STATE OF MICHIGAN

COURT OF APPEALS

PLYMOUTH POINTE CONDOMINIUM ASSOCIATION,

Plaintiff/Counter-Defendant-Appellee/Cross-Appellant/Cross-Appellee,

v

DELCOR HOMES-PLYMOUTH POINTE, LTD., f/k/a DELCOR HOMES, INC.,

Defendant-Appellant/Cross-Appellee,

and

DELCOR ASSOCIATES, INC.,

Defendant-Cross-Appellee,

and

DELCOR CONSTRUCTION, INC.,

Defendant-Cross-Appellant/Cross-Appellee.

UNPUBLISHED
October 28, 2003

No. 233847
Wayne Circuit Court
LC No. 99-929761-CZ

ON RECONSIDERATION

Before: Smolenski, P.J., and White and Wilder, JJ.

PER CURIAM.

In this action, plaintiff Plymouth Pointe Condominium Association sued Delcor Homes-Plymouth Pointe, Ltd. ["Delcor Homes"], Delcor Associates, Inc., and Delcor Construction, Inc. for alleged defects in the building of its condominium complex, Plymouth Pointe Condominiums. The jury found in favor of plaintiff and awarded substantial damages. Delcor Homes appeals as of right. Plaintiff cross-appeals against Delcor Homes, Delcor Associates, and Delcor Construction. Delcor Construction cross-appeals against plaintiff. We affirm in part,

reverse in part, and remand for a new trial as to plaintiff's breach of warranty claim against defendant Delcor Homes only.

I

In 1992, Delcor Homes began development of a piece of property it owned on which a condominium complex was to be built. Delcor Homes hired Delcor Construction as the general contractor to oversee the construction of the project. Delcor Associates is the parent company of Delcor Homes. Plaintiff is the condominium owners' association.

The first condominium unit was sold in October 1993 and the last unit was sold in February 1996. At each closing, the condominium owner was required to sign a purchase agreement and a limited warranty document, which, among other things, limited claims under express warranty to one year and disclaimed all other warranties. The limited warranty further restricted an owner's warranty rights in that only the "first purchaser" of a condominium unit could exercise the warranty rights. If a subsequent owner purchased the condominium within a year from the first purchaser's closing date, the subsequent owner would have no warranty rights.

In September 1999, plaintiff filed suit against defendants[1] complaining of defects in the condominiums' construction. In its second amended complaint, plaintiff alleged negligence, negligence per se, breach of express and implied warranty, violation of the Michigan Consumer Protection Act ["MCPA"], MCL 445.901 *et seq.*, and fraud and misrepresentation. Plaintiff claimed there were defects in certain common elements,[2] such as the roofs, chimneys, heating-cooling systems, porches, driveways, roadways and the underground sprinkler system, as well as defects in the painting of doors and wood fences.

Before trial, Delcor Associates was granted summary disposition as to all claims and dismissed from the case. Delcor Homes and Delcor Construction also moved for summary disposition. The court granted partial summary disposition in favor of Delcor Construction with regard to the negligence per se, breach of express and implied warranty, violation of the MCPA, and fraud and misrepresentation claims. Plaintiff's negligence, negligence per se, breach of implied warranty, and fraud and misrepresentation claims against Delcor Homes were also dismissed. Therefore, only plaintiff's negligence claim against Delcor Construction and plaintiff's breach of express warranty and MCPA claims against Delcor Homes survived.

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[1] PM Diversified, Inc., and PM One, Ltd., former management companies for Plymouth Pointe Condominiums, were also named as defendants. The court granted their motions for summary disposition and all claims against them were dismissed. Neither entity is a party to this appeal.

[2] "Common elements" are those portions of the condominium project other than the condominium unit. MCL 559.103(6). A "condominium unit" is the portion of a condominium complex designed and intended for separate ownership and use as defined in the master deed. MCL 559.104(3). The disclosure statement provided by Delcor Homes to purchasers further defined the common elements as the structural components of the building and the land on which the building was located, and specifically listed the project's roadways, underground sprinkler system, driveways, porches, walkways, air compressors, garages, and landscape.

The trial commenced on February 5, 2001. At the close of proofs, Delcor Homes moved for a directed verdict, which was denied. The court held that the one-year warranty period in the limited warranty was unconscionable because many latent defects could not be discovered within that time period, and the exclusive remedy provision, paragraph 8, failed in its essential purpose. Delcor Construction also moved for a directed verdict on plaintiff's negligence claim, which was granted. The court concluded that Delcor Construction was only the general contractor and that all of the actual work was performed by subcontractors hired by Delcor Construction. The court also granted a partial directed verdict in favor of plaintiff ruling that, as a matter of law, the roofs, fence posts, piers, and heating and cooling system were defective.

Therefore, Delcor Homes was the only remaining defendant when the case went to the jury on plaintiff's claims of breach of express warranty and violation of the MCPA. The jury found in favor of plaintiff and awarded it $2,156,282.56 for its breach of express warranty claim and $280,000 for Delcor Homes' violation of the MCPA. This appeal followed.

II

Delcor Homes first argues that the court erred in striking the limitations period and other limiting provisions contained in the limited warranty. The express warranty provisions addressing the common elements in paragraph 3 of the limited warranty state that Delcor Homes' warranted:

> (b) For a period of one (1) year after Closing, the Common Elements which are not covered by other portions of this Limited Warranty and which are attached to or contained in the building in which your Condominium Unit is located, will be free from defects in materials and workmanship.
>
> (c) For a period of one (1) year after initial construction, the Common Elements which are not covered by other portions of this Limited Warranty will be free from defects in materials and workmanship.

Plaintiff recognizes that the contract at issue in this case is not governed by the UCC,[3] but nevertheless encourages this Court to apply the UCC concept of "failure of essential purpose." However, there is no need to adopt by analogy a UCC concept in analyzing the limited warranty because a common law mechanism exists for invalidating the contract either in its entirety or specific provisions. Unconscionability has its roots in the common law of contract law, and is still a viable mechanism for determining the enforceability of a contract in non-UCC cases. *Stenke v Masland Dev Co, Inc*, 152 Mich App 562, 572; 394 NW2d 418 (1986), citing *Reed v Kaydon Engineering Corp*, 38 Mich App 353, 356; 196 NW2d 487 (1972). Additionally, we note that at least one other state has also declined to apply UCC concepts to a non-UCC breach of warranty claim. *Southcenter View Condo Owners' Ass'n v Condo Builders, Inc*, 736 P2d 1075, 1077 (Wash App, 1986).

Whether the defense of unconscionability is viable, i.e., the enforceability of a contract's terms, is a question of law which this Court reviews de novo. *Ehresman v Bultynck & Co, PC,*

[3] See MCL 400.2102; MCL 400.2105.

203 Mich App 350, 354; 511 NW2d 724 (1994). However, whether a contract is unconscionable must be determined by reviewing the circumstances at the time the contract was formed. *Northwest Acceptance Corp v Almont Gravel, Inc*, 162 Mich App 294, 303; 412 NW2d 719 (1987). Thus, the trial court's findings of fact are reviewed for clear error. *Id*. at 304. A court's finding of fact is clearly erroneous when the appellate court, after reviewing the entire record, is left with a definite and firm conviction that a mistake has been made. *Id*.

Parties to a contract are free to establish a contractual limitations period which is shorter than the applicable statutory limitations period. *Herweyer v Clark Highway Services, Inc*, 455 Mich 14, 20; 564 NW2d 857 (1997). Hence, there is nothing inherently unenforceable about the one-year limitations period. In determining whether a provision is unconscionable, this Court has stated,

> The examination of a contract for unconscionability involves inquiries for both procedural and substantive unconscionability. Accordingly, there is a two-pronged test for determining whether a contract is unenforceable as unconscionable, which is stated as follows: (1) What is the relative bargaining power of the parties, their relative economic strength, the alternative sources of supply, in a word, what are their options?; (2) Is the challenged term substantively reasonable? Reasonableness is the primary consideration. [*Hubscher & Son, Inc v Storey*, 228 Mich App 478, 481; 578 NW2d 701 (1998); citations omitted.]

In *Northwest Acceptance, supra* at 302-303, this Court further explained,

> "'Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.' *Williams v Walker-Thomas Furniture Co*, 350 F2d 445, 449 (US App DC, 1965).
>
> Thus, merely because the parties have different options or bargaining power, unequal or wholly out of proportion to each other, does not mean that the agreement of one of the parties to a term of a contract will not be enforced against him; if the term is substantively reasonable it will be enforced. By like token, if the provision is substantively unreasonable, it may not be enforced without regard to the relative bargaining power of the contracting parties." [quoting *Allen v Michigan Bell Tel Co*, 18 Mich App 632, 637-638; 171 NW2d 689 (1969).]

In this case, the express warranty provision in the limited warranty provided that, subject to specific exclusions listed in the warranty, Delcor Homes warranted the common elements to be "free of defects in materials or workmanship" for a period of one year from the closing date or completion of construction, dependent on the common element at issue. The other parties to the contracts were the condominium purchasers. It is clear that the condominium purchasers were in the "weaker" position in terms of bargaining power. The limited warranty Delcor Homes presented was non-negotiable. This meant that a purchaser had to accept the terms if he wanted to buy a Plymouth Pointe condominium. However, a potential buyer could have decided not to purchase the condominium and looked elsewhere. We presume that Delcor Homes did not have a monopoly on condominium construction in Plymouth. Thus, the buyer still had a purchasing choice.

Even if this choice was not meaningful, the provision should be enforced unless it is unreasonable. *Hubscher, supra*. We agree with the trial court in that some defects may not manifest themselves until after the expiration of the express warranty period, potentially leaving some owners without a legal remedy. However, the question is whether the limitations period is reasonable, not whether it is equitable or fair. We find that the one-year warranty period is reasonable. Michigan has not addressed this specific issue where one party is a private consumer,[4] but other state jurisdictions have addressed it and have upheld a one-year warranty period.

For instance, in *Southcenter View, supra*, the plaintiff alleged that there were defects in the common elements of the condo complex. The sales agreement provided for a one-year warranty period from the date of issuance of a certificate of occupancy or closing, whichever occurred first, and also disclaimed all other express and implied warranties. *Id*. at 1077. The Washington Court of Appeals held that the contract was enforceable as written because it was not a "fine print" case, the contract did not exclude all warranties, nor were the provisions "deceptively foisted upon naïve and unsuspecting home buyers," as the plaintiff claimed. *Id*. at 1078. Following the decision in *Southcenter View*, the Washington Court of Appeals upheld a one-year warranty period for defects in cedar siding installed on the plaintiff's home. *Griffith v Centex Real Estate Corp*, 969 P2d 486, 490 (Wash App, 1998).

In this case, the limited warranty was recited not only in the buyer's purchase agreement, but was also set forth in the Limited Warranty and the warranty manual, which were separate documents. The warranty was explained to each buyer and, of the condominium owners who testified, each correctly understood the terms of the warranty. Therefore, we hold that the one-year warranty period is not unconscionable and the court erred in determining otherwise. Accordingly, we reverse the judgment against Delcor Homes and remand this case for a new trial.

Because related issues raised on appeal are likely to be raised at the new trial, we address them now. First, of primary concern to the trial court was the issue of latent defects and the operation of the one-year warranty period. In essence, what the trial court concluded was that the discovery rule applied to latent defects covered under an express warranty.

In *Terren v Butler*, 597 A2d 69 (NH, 1991), the condominium association and individual condominium owners brought suit against the developers, who had expressly warranted the common areas for one year as required by the state's law. The New Hampshire Supreme Court stated,

> We do not construe the one-year life of the statutory warranty to be a statute of limitations or even a time limit on the delivery of effective notice. The one-year period describes the life of the duty, that is, the period during which breach may occur. Effective notice of breach must be afforded within a

[4] In *Cree Coaches, Inc v Panel Suppliers, Inc*, 384 Mich 646, 649; 186 NW2d 335 (1971), where both parties were commercial entities, this Court upheld a one-year warranty period covering defects in workmanship for the construction of a building. The court concluded that the contract with its limiting provision was not an adhesion contract.

> reasonable time after discovery, and suit must be commenced within the time afforded by the appropriate statute of limitations. [*Id*. at 71, citing *Austin Co v Vaughn Bldg Corp*, 643 SW2d 113 (Tx, 1983).]

The Court concluded that the defect accrued, notice was given to the defendants during the warranty period, the defendants' failure to act constituted breach, and the suit was brought within the applicable six-year statute of limitations period; thus, the plaintiffs' claims of breach of express and statutory warranties were not barred. *Id*. at 71-72.

In *Austin, supra* at 115, the construction contract contained the following warranty:

> Austin guarantees the work against defective workmanship and material for one year from the date of completion of the work as follows: Upon written notice of any such defects, Austin will either make necessary repairs or at its option request Owner to make such repairs, all at Austin's expense.

The Court found that, when strictly construed against the drafter, the warranty provision did not specify a time by which the owner had to give written notice of a defect. *Id*. Therefore, the Court implied a reasonable time limit and found that written notice given fourteen days after the expiration of the one-year warranty period was reasonable and did not prejudice the defendant.

From *Terren*, *Austin*, and other similar cases, we construct the following rule of law: Where there is an express limited warranty, the warrantor has a duty to correct a defect which accrues within the warranty period. Notice of the defect must be given within a reasonable time of discovery of the defect, but not necessarily within the warranty period, *unless* the contract provides otherwise, in which case the terms of the contract govern. If the contract does not provide a time in which the notice is to be given and notice is not given to the warrantor within the warranty period, the burden is on the buyer to prove that the defect accrued within the warranty period and that notice of the defect was given to the warrantor within a reasonable time after the expiration of the express warranty period.[5]

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[5] We realize that by not applying the discovery rule to an express limited warranty period, a buyer who discovers a latent defect after the warranty period expires cannot recover under the express warranty. However, the buyer is not without a remedy. There exists an implied warranty of habitability on new home construction that applies the discovery rule which specifically addresses latent structural defects, and, dependent on the existence of a disclaimer, may provide an avenue for recovery. *Weeks v Slavik Builders, Inc*, 24 Mich App 621, 627-628; 180 NW2d 503 (1970).

Although *Weeks* dealt with new home construction, there is no reason not to extend the implied warranty of habitability to the new construction of condominiums. Other jurisdictions have addressed this issue and concluded similarly. *Berish v Bornstein*, 770 NE2d 961 (Mass, 2002) (implied warranty of habitability applied to new condominium construction, including construction of the common elements, reasoning that latent structural defects occur in condominium construction just as they do in new home construction); *Gable v Silver*, 258 So2d 11 (Fla Ct App, 1972) (implied warranties of fitness and merchantability extend to the purchase of new condominiums in Florida from builders); *Pontiere v James Dinert, Inc*, 627 A2d 1204 (Pa, 1993) (original purchasers of condominium units may bring suit for breach of implied

(continued…)

In this case, paragraph 7 of the limited warranty addressed written notice and provided in pertinent part:

> Except for emergencies, you may submit warranty claims in writing to the Warrantor at the following time: (1) within thirty (30) days after the Closing of your Unit, or (2) within the fifteen (15) day period immediately preceding twelve (12) months after the Closing of your Unit. If a defect appears which you think is covered by this Limited Warranty, you must write a letter describing it to our office at the address appearing in Paragraph 1 of this Limited Warranty. We will not assume responsibility for responding to any written letter delivered to us more than fourteen (14) days after the expiration of the one-year warranty period, even if the defects that are claimed in the letter may have arisen within the one-year warranty period.

The language of this provision is clear. Claims for defects must be submitted in writing, unless the situation is an emergency, not more than fourteen days after the expiration of the one-year warranty period. Thus, on remand, this notice of defect provision will govern and potentially limit plaintiff's breach of express warranty claim.

To be viable, a claim for breach of warranty must be brought within the statute of limitations period. A breach of warranty is essentially a breach of contract. The statute of limitations for a breach of contract in this context is six years.[6] MCL 600.5807(8). The limitations period begins to run on the date the contract is breached. *American Federation of State, Co, & Muni Employees, AFL-CIO, Michigan Council 25 & Local 1416 v Highland Park School Dist Bd of Ed*, 457 Mich 74, 85; 577 NW2d 79 (1998). The breach in a breach of warranty action occurs when it is finally determined that the warrantor will not satisfy the terms of the warranty. *Weeks v Slavik Builders, Inc*, 24 Mich App 621, 629; 180 NW2d 503 (1970); *Austin, supra* at 116.

This case was filed in September 1999. Therefore, to be within the applicable statute of limitations the earliest a breach could have occurred was during or after September 1993. The record indicates that the first unit was occupied in October 1993 and the defects were discovered

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(…continued)

warranty of habitability and workmanlike construction). However, this warranty only runs to the original purchaser. *McCann v Brody-Built Constr Co*, 197 Mich App 512, 516; 496 NW2d 349 (1992). Furthermore, the purpose of an express limited warranty is to allow the warrantor protection from fraudulent or unsubstantiated claims. *Independent Consolidated School Dist No. 24, Blue Earth Co v Carlstrom*, 151 NW2d 784 (Minn, 1967).

[6] Worthy of note is the fact that many states have prescribed a limitations period specifically regarding defects in materials and workmanship of new condominium construction. Michigan has recently followed suit, amending its condominium act, MCL 559.103 *et seq.*, to include a statute of limitations for claims involving allegations of defective materials or workmanship in the construction of new condominiums. 2000 PA 379 (adding MCL 559.276), amended by 2002 PA 283. Additionally, we note that there have been several other amendments to the condominium act since plaintiff filed suit that may supersede some of our conclusions, mandating a different result in later filed cases.

thereafter. Thus, even if the very first owner discovered a defect in the common elements, reported it, and Delcor Homes refused to correct the defect, the breach would have occurred within the six-year statute of limitations. Further, the statute of limitations is tolled by Delcor Homes' efforts to repair the defects and for a time thereafter until plaintiff had a reasonable opportunity to determine that the repairs were not sufficient. *Weeks, supra* at 629.

Second, the trial court also struck paragraph 8, which it called the exclusive remedy provision, because it determined that the provision "failed its essential purpose." Paragraph 8 of the limited warranty provided that upon receiving written notice of a defect covered by the limited warranty, Delcor Homes would repair or replace it. The choice between the two would be Delcor Homes'. We conclude that the court mischaracterized the provision. Paragraph 8 simply states what Delcor Homes' obligation is pursuant to its duty regarding defects in material and workmanship. If Delcor Homes' refused to repair or replace a warranted defect, notice of which it received during the warranty period, this would constitute breach.

An exclusive remedy provision, on the other hand, provides what an aggrieved party's remedy is in the event of a breach, such as mediation or arbitration. *Independent Consolidated School Dist No. 24, Blue Earth Co v Carlstrom*, 151 NW2d 784, 786-787 (Minn, 1967). The limited warranty in this case did not supply an exclusive remedy provision, and thus, plaintiff was free to initiate suit to recover for damages. We conclude that, on remand, there is no reason for paragraph 8 to be struck from the limited warranty.[7]

Third, the court also struck paragraph 9 of the limited warranty which provided that the warranty could not be transferred to a subsequent owner. The court stated that it struck this provision "for the same reasons" as it struck the one-year warranty period, but added,

> The Association [plaintiff] is responsible for maintaining the common elements, and they brought suit on behalf of the individual unit owners to try to divide up liability where the condo association is suing on behalf of the unit owners and where many of the damages or problems or defects or whatever are indivisible.
>
> For instance, the roof, you have got six roofs that cover the 144 units, would be to engaging in some kind of useless exercise. I can't think of a better phrase. In other words, if the jury determines that the roofs have to either be repaired, and they assess some kind of damages, determine some kind of for repair or determine, and this may not be a separate question on the verdict form, but determine that all the roofs have to be replaced and come back with a dollar figure, how is that going to be decided among the unit owners?

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[7] Delcor Homes also contends that the court erred in striking paragraph 6 from the limited warranty which disclaims all other warranties not mentioned, including implied warranties. However, the record is unclear as to whether the court did in fact strike this provision at trial, having dismissed plaintiff's breach of implied warranty claim before trial. Regardless, we conclude that it is unnecessary for the court to address this provision on remand unless the validity of the disclaimer provision is implicated in the new trial.

> It would still cost the same amount, for instance, to replace the roofs whether one unit owner in that property was the original purchasers or all, whatever, say there are 40 or 50 in one building, if all of them were original purchasers. Denied.

From the evidence at trial, the only potentially indivisible defects are the roofs. We do not see the quandary that the trial court was apparently in. Parties are free to contract as they wish, including restricting the transferability of an express warranty. See *Terrien v Zwit*, 467 Mich 56, 71; 648 NW2d 602 (2002).

Furthermore, MCL 559.137 provides that each owner of a condominium unit has an undivided interest in the common elements which may not be separated from the owner's interest in the condominium unit. Consequently, each condominium owner has an undivided ownership in the common elements and has a right to fully functional common elements. Therefore, if at least one owner on whose behalf plaintiff brought suit is an original owner, then he is entitled to full recovery. The record reflects that at least three condominium owners with roof leak complaints were original owners. Accordingly, it was not necessary for the court to strike paragraph 9.

III

Next, Delcor Homes argues that the cost of repair is not the proper measure of damages in this case; rather, diminution of the condominium's value is the proper measure. We disagree.

On the issue of damages regarding plaintiff's breach of warranty and MCPA claims, the court instructed the jury that if it found in favor of plaintiff, damages were equal to plaintiff's actual damages which were established with reasonable certainty. This Court reviews jury instructions as a whole to determine whether there is error requiring reversal. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). As long as the instructions fairly and accurately present the issues to the jury and sufficiently protect the defendant's rights, slight imperfections do not constitute error requiring reversal. *People v Bartlett*, 231 Mich App 139, 143-144; 585 NW2d 341 (1998).

As mentioned above, a claim for breach of warranty is essentially a breach of contract claim. Thus, for a breach of warranty claim, "the general rule is that damages recoverable for breach of contract are those that arise naturally from the breach or those that were in the contemplation of the parties at the time the contract was made." *Groh v Broadland Builders, Inc*, 120 Mich App 214, 217; 327 NW2d 443 (1982). In a commercial setting, damages are generally limited to the monetary value of the contract had the breaching party fully performed under it. *Id*.

More specifically,

> 'The rule is that where the contract is substantially complied with, and the building is such a one as is adapted for the purpose for which it was constructed, and only slight additions or alterations are required to finish the work according to the contract, the defects being remediable at a reasonable expense; and without interfering with the rest of the structure, the measure of damages is such a sum as

> is necessary to make the building conform to the plans and specifications. But, where the defects are such that they cannot be remedied without the entire demolition of the building, and the building is worth less than it would have been if constructed according to the contract, the measure of damages is the difference between the value of the building actually tendered, and the reasonable value of that which was to be built.' [*Kokkonen v Wausau Homes, Inc*, 94 Mich App 603, 615; 289 NW2d 382 (1980), quoting *Gutov v Clark*, 190 Mich 381, 387; 157 NW 49 (1916); see also *Forton v Laszar*, 239 Mich App 711, 716-717; 609 NW2d 850 (2000) (cost of repair for breach of contract regarding new home construction is proper measure of damages).]

Thus, the proper measure of damages depends on whether the defects are repairable.

Because there was no dispute that the defects were repairable, the measure of damages for plaintiff's breach of warranty claim is the cost of conforming the common elements to the plans and specifications, i.e., repair costs. Hence, evidence of the defects' effect on the condominiums' fair market value was not necessary to determine damages for plaintiff's breach of warranty claim.

Plaintiff also sought damages under § 11 of the MCPA, MCL 445.911, asserting that Delcor Homes misrepresented the quality of the condominiums because certain common elements were not constructed in accordance with the building code. MCL 445.911(2) provides that a plaintiff may recover his actual damages and reasonable attorney fees for a defendant's violation of the MCPA. "Actual damages" is not defined in the MCPA, nor is the method for calculating damages.

However, case law instructs that a claim for violation of § 11 of the MCPA is to be construed with reference to the common-law tort of fraud. *Zine v Chrysler Corp*, 236 Mich App 261, 283; 600 NW2d 384 (1999); *Mayhall v AH Pond Co, Inc*, 129 Mich App 178, 182-183; 341 NW2d 268 (1983). Regarding measurement of damages under the MCPA, applying common-law fraud principles, *Mayhall* stated, "In general, the plaintiff may recover the difference between the actual value of the property when the contract was made and the value that it would have possessed if the representations had been true." *Mayhall, supra* at 185. Delcor Homes contends that, therefore, evidence of the condominiums' value was necessary.

We do not read *Mayhall* to stand for the proposition that diminution of value is the only method of measuring economic actual damages in MCPA cases. *Mayhall* stated that "in general" the measure of damages is diminution in value, utilizing the standard measurement of damages in a common-law fraud case. *Mayhall* also went on to state that the nature of the remedy was fulfillment of the plaintiff's expectations, and recognized that the scope of the MCPA was broader than common-law fraud. *Id*. at 182, 185. Additionally, the remedial provisions of the MCPA are to be liberally construed to broaden the consumer's remedy. *Dix v American Bankers Life Assurance Co of Florida*, 429 Mich 410, 417; 415 NW2d 206 (1987). In cases such as *Mayhall, supra*, where the plaintiff expected a "perfect" diamond, cost of repair would not be a viable measure of damages because no amount of repair could conform the item to the buyer's expectation. Consequently, in this instance, the cost of repairing the common elements is a reasonable measure of damages because it is fulfilling the buyer's expectation.

In this case, while the jury instructions could have been more detailed, we find that the jury instruction regarding damages was not error requiring reversal because cost of repair was an appropriate method of calculating damages under both the breach of warranty and MCPA claims. Therefore, we hold that Delcor Homes was not entitled to a directed verdict or a new trial on this basis.

IV

On cross-appeal, plaintiff argues that the trial court erred in granting Delcor Construction a directed verdict in regards to its negligence claim. We disagree. The trial court's decision on a motion for a directed verdict is reviewed de novo. *Derbabian v S & C Snowplowing, Inc*, 249 Mich App 695, 701; 644 NW2d 779 (2002). The appellate court reviews all the evidence presented up to the time of the motion to determine whether a question of fact existed. In doing so, the appellate court views the evidence in the light most favorable to the nonmoving party and grants him every reasonable inference and resolves any conflict in the evidence in his favor. *Kubczak v Chemical Bank & Trust Co*, 456 Mich 653, 663; 575 NW2d 745 (1998). Directed verdicts are viewed with disfavor, particularly in negligence cases. *Berryman v K Mart Corp*, 193 Mich App 88, 91; 483 NW2d 642 (1992).

In order to sustain a negligence action, plaintiff must prove duty, breach of duty, proximate cause, and damages. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). The gravamen of plaintiff's negligence claim is that Delcor Construction's duty arose from "the contract [] which Delcor Construction undertook." Presumably plaintiff is referring to the contract between Delcor Homes and Delcor Construction, under which Delcor Construction agreed to act as the general contractor. However, as a general rule,

> when an owner or general contractor hires an independent contractor to perform a job, the owner or general contractor may not be held liable in negligence to third parties or employees of the independent contractor.[8] [*Candelaria v B C Gen Contr, Inc*, 236 Mich App 67, 72; 600 NW2d 348 (1999).]

Plaintiff argues that *Candelaria* is not controlling because that case, and the cases it cites, all involve negligence resulting in injury to a person. However, we believe that the general rule is not so limiting. It states that general contractors are not liable for the *negligence* of its subcontractors. It does not specify the type of injury that must occur. Negligence can result in injury to a person or his property. Therefore, we conclude that the general rule as stated in *Candelaria* is applicable in this case and precludes plaintiff from sustaining a negligence action against Delcor Construction. Accordingly, the trial court did not err in granting Delcor Construction a directed verdict on this claim.[9]

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[8] There are three recognized exceptions to this rule: (1) retained control doctrine, (2) hazardous activity, and (3) common area doctrine, none of which are applicable to this case; a point which plaintiff appears to concede.

[9] Because plaintiff's negligence claim was the only remaining claim against Delcor Construction at trial, our affirmance of the trial court's directed verdict effectively affirms Delcor Construction's dismissal from this case.

Plaintiff also asserts that Delcor Construction's duty arose from the Michigan Residential Builders and Contractors Act, MCL 339.2401 *et seq*. A duty can arise from a statute. *Phillips v Deihm*, 213 Mich App 389, 397; 541 NW2d 566 (1995). However, only the attorney general can bring an action under this statutory section. MCL 339.508. Moreover, even supposing that plaintiff could engraft the act's duty and standard of care into its negligence claim, plaintiff failed to show breach of the standard of care. MCL 339.2411(2) provides many instances which constitute violations of the act, but only two are remotely applicable in this case, subsections (2)(d), willful departure from or disregard of plans or specifications, and (2)(m), poor workmanship or workmanship not meeting the standards of the industry verified by a building code enforcement official. In this case, there was no evidence that Delcor Construction willfully departed from the building plans or specifications and there was no dispute that Delcor Construction did not perform any construction work. Thus, the statute is inapplicable.

V

Delcor Construction argues on cross-appeal that the trial court abused its discretion in granting plaintiff discovery in regards to plaintiff's piercing the corporate veil theory after it already had dismissed Delcor Construction from the proceedings. We agree.

There is no dispute that plaintiff was properly foreclosed from introducing proofs of an alter ego theory at trial, as it did not raise the theory at any point before trial. The only issue is whether the court erred by allowing discovery on this issue post-judgment. MCL 600.6104(1). A trial court's decision whether to grant or deny discovery will not be overturned absent an abuse of discretion. *Lantz v Southfield City Clerk*, 245 Mich App 621, 629; 628 NW2d 583 (2001).

The general principle in Michigan is that separate entities will be respected. *Seasword v Hilti, Inc (After Remand)*, 449 Mich 542, 547; 537 NW2d 221 (1995). The corporate veil may be pierced only when a separate corporate existence has been used to subvert justice or cause a result which is contrary to some other clearly overriding public policy. *Id.* at 548. A court will pierce the corporate veil only when: (1) the corporate entity was a mere instrumentality of another entity or individual; (2) the corporate entity was used to commit a fraud or wrong; and (3) there was an unjust loss or injury to the plaintiff. *LaRose Market, Inc v Sylvan Center, Inc*, 209 Mich App 201, 209; 530 NW2d 505 (1995).

We find there is insufficient evidence to justify the trial court's order granting plaintiff additional discovery. The fact that Delcor Homes was created specifically to develop Plymouth Pointe Condominiums is not dispositive, as this is a growing trend in the construction industry, and such companies have generally been upheld as separate corporations so long as the single project entity has sufficient working capital and follow corporate formalities. See *Minimizing Developer Liability to Community Ass'ns*, 9 APR Prob & Prop 16 (1995).

In regards to one corporation being a "mere instrumentality" of the other, plaintiff submits that Delcor Homes and Delcor Construction had a common employee, the same attorney represented both corporations in pre-trial matters, Delcor Homes did not exercise its indemnity rights, and Delcor Construction was content to orally extend its contract with Delcor Homes for construction worth $14,000,000. We disagree.

First, even if Delcor Homes wanted to use the indemnification clause in its contract with Delcor Construction, it could not because the clause did not cover damages relating to the breach of warranty or MCPA claims. Second, one common director is not an indication that the corporations are alter egos. See *Seasword, supra* at 548. Before trial plaintiff engaged in extensive discovery and deposed both corporation's presidents, yet did not allege any other commonalities than those mentioned above. For all of these reasons, we conclude that the court abused its discretion in granting post-judgment discovery.

VI

The parties also raise several issues that, for various reasons, we decline to substantively address. First, Delcor Homes argues that the court erred in denying its motions for summary disposition and directed verdict regarding plaintiff's MCPA claim. However, because Delcor Homes offers no authority to support its argument and legal conclusions, it has forfeited review of this issue. *Mudge v Macomb Co*, 458 Mich 98, 105; 580 NW2d 845 (1998).

Second, Delcor Homes also argues that the trial court erred in directing a verdict in favor of plaintiff on its breach of warranty claim. However, the court did not rule that Delcor Homes breached its warranty. In fact, while reviewing the proposed jury instructions with the parties, the court stated it believed whether or not the defects were repaired or replaced was a question of fact for the jury, and the jury was so instructed. The court acknowledged that there was conflicting evidence at trial as to whether Delcor Homes refused to complete any more repairs after a certain date. Thus, despite alluding to the contrary, the issue of breach did go to the jury. To the extent that Delcor Homes is arguing that the court erred in concluding, sua sponte, that plaintiff proved certain common elements were defective as a matter of law, this issue is moot in light of our decision to remand this case for a new trial.

Third, plaintiff argues that the trial court erred in granting Delcor Construction's summary disposition motion in regards to plaintiff's breach of warranty claim against it. Yet, at a hearing before trial on December 15, 2000, plaintiff admitted, "It's not disputed that the only warranty given to the co-owners was a limited warranty which specifically identifies the warrantor as Delcor Homes." Thus, because of plaintiff's tactical decision to concede that a breach of warranty action was not viable against Delcor Construction, plaintiff cannot now be heard to complain that the court erred in granting Delcor Construction summary disposition as to this claim; to do so would allow plaintiff to impermissibly "harbor error as an appellate parachute." *Hilgendorf v St John Hosp & Medical Center Corp*, 245 Mich App 670, 683; 630 NW2d 356 (2001). Consequently, we do not address the merits of this issue.

Lastly, we decline to address the remainder of the parties' appeal issues because they are moot as a result of our decision to remand this case for a new trial.

VII

In conclusion, regarding the issues we substantively addressed, we hold the following: (1) the trial court erred in concluding that the one-year warranty period in the limited warranty was unconscionable and in striking other provisions in the limited warranty; (2) for plaintiff's breach of warranty and MCPA claims, cost of repairing the common elements is a proper measure of damages where the defect is repairable; (3) the trial court did not err in directing a

verdict in favor of Delcor Construction regarding plaintiff's negligence claim; and (4) the trial court abused its discretion in granting plaintiff's motion for post-judgment discovery.

Accordingly, we affirm the trial court's dismissal of the remaining claim against Delcor Construction, we reverse and vacate the judgment against Delcor Homes, and remand this case for a new trial as to plaintiff's breach of warranty claim against defendant Delcor Homes only. Additionally, we vacate the trial court's order granting plaintiff post-judgment discovery.

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael R. Smolenski
/s/ Helene N. White
/s/ Kurtis T. Wilder