

RECENT LEGAL WRANGLINGS

FRANK AND BETH STABILE vs. LIBERTY MUTUAL INSURANCE

Case No. GN303308

DATE OF SETTLEMENT: April 22, 2004

Publication Date: July 15-31, 2004

TOPIC: BREACH OF CONTRACT - BREACH OF THE DUTY OF GOOD FAITH AND FAIR DEALING - FRAUD - PERSONAL INJURY - VIOLATIONS OF THE DTPA AND INSURANCE CODE

RESULT: \$ 2,971,885.28; **RESULT:** Liberty Mutual agreed to pay \$ 2,971,885.28 in full and final settlement of the Stabiles' claims.

INJURY: The Stable family claimed breach of contract, breach of the duty of good faith and fair dealing, fraud, personal injuries related to exposure to mold, and violations of the DTPA and insurance code.

COURT: 200TH JUDICIAL DISTRICT, TRAVIS COUNTY, AUSTIN, TEXAS

JUDGE: HONORABLE PAUL R. DAVIS, JR.

PLAINTIFF COUNSEL: HAGANS, BOBB & BURDINE, P.C. from Houston, TX, By: Mr. W. Fred Hagans; HAGANS, BOBB & BURDINE, P.C. from Houston, TX, By: Ms. Jennifer B. Rustay; HANCE SCARBOROUGH WRIGHT WOODWARD & WEISBART, L.L.P. from Austin, TX, By: Mr. Terry L. Scarborough

DEFENDANT COUNSEL: HANNA & PLAUT, L.L.P. from Austin, TX, By: Ms. Catherine L. Hanna

SUMMARY: Frank and Beth Stabile made a claim for coverage under their homeowner's insurance policy with Liberty Mutual Insurance for the water and resultant mold in their beautiful home overlooking the Austin Hill Coun-

try. Initially, Liberty Mutual provided coverage for the water and mold damage in their home. However, when it became clear that the damage was far more extensive than Liberty Mutual had initially contemplated, Liberty Mutual delayed and ultimately refused to provide coverage for the additional loss, despite the fact that coverage had been initially provided without reference to exclusions or any other conditions.

Over the course of the litigation, Liberty Mutual alleged various exclusions and other reasons for its failure to pay the Stabiles' claim. Evidence was also developed demonstrating that Liberty Mutual's delay caused the damage in the home to grow worse over time.

The case was settled before trial after the numerous motions were heard, paper discovery was exchanged and the depositions of the individuals involved in the claims handling process were completed.

MARY ALLEN V. CINCINNATI INSURANCE COMPANY

Case No. 03A-01693-8

Verdict Date: November 14, 2005

TOPIC: Contract Insurance - Real Estate - Mold Infestation Insurance property Damage real Estate

RESULT: \$ 100,000 (verdict)

INJURY: Breach of contract for refusal to pay for mold remediation. Plaintiff sought \$ 1,200,000 to \$ 1,400,000 for lost homeowner equity, bad faith, penalty interest and attorney fees after losing her home in foreclosure.

STATE: Georgia

COUNTY: Gwinnett County, GA

COURT: Superior Court

JUDGE: R. Timothy Hamil

PLAINTIFF PROFILE: Age: 45

Sex: Female

Marital Status: Divorced

PLAINTIFF ATTORNEY: Steven Paul Smith, Atlanta;

DEFENDANT ATTORNEY: John D. Richardson, Mobile, AL; James T. Perry, Atlanta; Daniel R. Schuler, Mobile, AL;

FACTS: Mold remediation efforts allegedly caused plaintiff to lose her home in foreclosure and she sought reimbursement for her losses from defendant insurance carrier. The jury awarded plaintiff \$ 100,000 after deliberating 1 day.

Plaintiff Mary Allen owned a house with an approximate value of \$ 800,000. In February 2001, a toilet overflowed and caused water intrusion that was remediated by her homeowner's insurance carrier, Defendant Cincinnati Insurance Company. Plaintiff and her family were temporarily relocated while the house was remediated at defendant's cost. In January 2002, there was another water intrusion followed by discovery of mold infestation. Plaintiff alleged the mold oc-

curred because the company defendant hired after the first flood improperly cleaned personal effects. As a result, plaintiff argued that mold began to grow and infiltrated other areas of the house over the course of one year. Defendant investigated plaintiff's second claim and remediated the water damage. However, defendant concluded that the second water infiltration was caused by plaintiff's failure to maintain the house and her lack of maintenance caused the mold to develop. It refused to further remediate the property because it had already spent \$ 184,000 for both water intrusion events.

Plaintiff alleged defendant breached the homeowners' insurance policy by refusing to remediate the mold problem. Plaintiff claimed she was forced to abandon the house and lost her home to foreclosure. She sought the lost equity in her home, bad faith damages, penalty interest and attorney fees.

Defendant contended it provided remediation under the terms of the contract. Defendant asserted that plaintiff's claim of mold damage was the result of neglect, which was excluded under the terms of the insurance contract. Defendant also disputed the extent of damages sought by plaintiff.

DEFENDANT EXPERTS: Morris L.V. French, Ph.D. - Microbiologist Indianapolis, IN
John H. Stewart, P.E. - Engineer Atlanta, GA

INSURANCE: Self-insured

JURY DELIBERATIONS: 1 day

EDITOR'S NOTE: Per defendant's counsel, this was a compromised verdict with no finding of bad faith.

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WRANGLINGS...

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DANIEL W. AND ANNE K. PARKER PARKER vs. JAMES F. COTTER, COTTER & SONS, INC., JAMES VAL COTTER, RIVER CITY ROOFING & REMODELING, INC. AND KENYON CONSTRUCTION, INC. vs. FORTUNA ASSOCIATES, INC. AND BETTY KIRKPATRICK vs. STATE FARM LLOYDS, INTERVENOR

Case No> 2002-CI-00102

Verdict Date: DATE OF SETTLEMENT: January 6, 2004**Publication Date:** December 15-31, 2003**TOPIC:** MOLD - WATER DAMAGE

RESULT: Case settled the second day of trial during jury selection. Defendants Cotter agreed to buy the home back from Plaintiffs for \$ 475,000.00. State Farm paid \$ 130,000.00 and dropped its claim of subrogation. Phyllis Browning paid \$ 30,000.00. Kenyon Construction paid \$ 35,000.00, River City Roofing paid \$ 16,000.00 and Fortuna/Kirkpatrick paid \$ 5,000.00.

COURT: 407TH, BEXAR COUNTY, SAN ANTONIO, TEXAS**JUDGE:** HONORABLE REBECCA SIMMONS

PLAINTIFF COUNSEL: BRYAN A. WOODS, ATTORNEY AT LAW from San Antonio, TX, By: Mr. Bryan A. Woods

DEFENDANT COUNSEL: LAW OFFICE OF JAMES E. MONTGOMERY, JR. from San Antonio, TX, By: Mr. James E. Montgomery, Jr. - Counsel representing Cotter; REGINA B. CRISWELL, ATTORNEY AT LAW from Helotes, TX, By: Ms. Regina Bacon Criswell - Counsel representing River City Roofing & Remodeling Inc.; HARRISON, BETTIS & STAFF, L.L.P. from Houston, TX, By: Mr. James M. Bettis, Jr. - Counsel representing

Kenyon; HARRISON, BETTIS & STAFF, L.L.P. from Houston, TX, By: Mr. Paul D. Scully - Counsel representing Kenyon; Pro Se representing Fortuna Associates, Inc.; LAW OFFICE OF TIM TYNAN from San Antonio, TX, By: Mr. Tim Tynan - Counsel representing Betty Kirkpatrick

OTHER COUNSEL: INTERVENOR COUNSEL: LAW OFFICE OF KEVIN J. SCHUBLE from San Antonio, TX, By: Mr. Kevin J. Schuble - Counsel representing State Farm Lloyds

SUMMARY: Plaintiffs purchased a home in the Dominion in May of 2001 for \$ 445,000.00. After their purchase they discovered that significant water penetration was occurring through the roof, windows, stucco and via surface water. The home was also infested with mold. Plaintiffs sued the owner/builder of the home (Defendants Cotter), two of Defendants Cotter's subcontractors (River City Roofing & Remodeling and Kenyon Construction), their real estate agent Phyllis Browning, the listing agent, Fortuna Associates/Betty J. Kirkpatrick and filed a homeowners' insurance claim.

PLAINTIFF EXPERT: James Jones, P.E., source and cause of water penetration, San Antonio, TX; David Joyner, P.E., source and cause of water penetration, New Braunfels, TX; Robert Lampkin, cost or repair/remediation, San Antonio, TX; David Willis, P.E., existence and extent of mold, San Antonio, TX; Rafael Luebert, MAI, reduction in value, San Antonio, TX

DEFENDANT EXPERT: Scott Franklin, River City Roofing & Remodeling, roofing issues; David Bucholtz, P.E., Kenyon Construction; Robert Garrison, Defendants Cotter

PAUL AND RENEE HAYNES; PAMELA HOPKINS AS GUARDIAN AD LITEM FOR MICHAEL AND LIAM HAYNES, MINOR CHILDREN V. ADAIR HOMES, INC.

Case No. CCV0211573

Jury Trial Date: February 15, 2005

Date of Publication: April, 2005

TOPIC: NEGLIGENCE; TOXIC EXPOSURE; EAR, INTESTINAL & RESPIRATORY INJURIES; EMOTIONAL DISTRESS; SENSORY INTEGRATION & NEUROLOGICAL DISORDERS; COGNITIVE & DEVELOPMENTAL LOSS.

RESULT: PLAINTIFF VERDICT for \$ 498,417. (Pliffs were found 33% contributory negligent.)

INJURY: Pliff Renee: diarrhea; nausea and upset stomach; fatigue. Respiratory problems including shortness of breath and congestion. Muscular aches, sweating and elevated blood pressure. Hearing loss in left ear; dizziness and neurological deficits such as facial numbness and tachycardia. Emotional distress. Pliff Michael: diarrhea, vomiting, nausea and upset stomach; weight loss. Candida; runny nose and coughing. Muscle and joint pain; loss of energy. Respiratory problems including shortness of breath and congestion. Sensory Integration Disorder; emotional distress. Fear and anxiety; impaired social, emotional and physical development. Pliff Liam: diarrhea, vomiting, upset stomach and nausea; weight loss. Runny nose and coughing. Muscle and joint pain; loss of energy. Inability to focus; hyperactivity and hypersensitivity. Impairment of self esteem and social and neurological development. Emotional distress; fear and anxiety. Pliffs still treating on date of trial.

SPECIALS: Med. \$ 72,000.**STATE:** Oregon**COUNTY:** Clackamas**TRIAL JUDGE:** Hon. Douglas Van Dyk**PLAINTIFF ATTORNEY(S):** Calvin P. "Kelly" Vance, Vance Law Office (Spokane WA).**DEFENDANT ATTORNEY(S):** Erik Kekel of Dunn Carney (Portland).

SUMMARY: 7/14/02 - Pliffs contended that as a result of the Def.'s defective workmanship, the interior walls, floors, crawl space and other areas of their house became saturated with water before and during construction, causing high humidity within the crawl space and walls, which resulted in the growth of toxigenic mold. Pliffs discovered that their home was water damaged and/or contaminated by toxigenic mold, including Stachybotrys Chartarum, Chaetomium, Curvularia, Cladosporium, Alternaria, Aspergillus Niger and various other forms of Penicilium and toxigenic fungi.

PLAINTIFF MEDICAL EXPERT(S): Vincent Marinkovich MD (Allergist) Redwood City CA; Jennifer Reid MD (Pediatrician) Seattle WA.

PLAINTIFF EXPERT(S): James Johnson Ph.D. (Neuropsychologist) Portland.

DEFENDANT MEDICAL EXPERT(S): Emil Bardana MD (Allergist); Michael Noonan MD (Allergist) both Portland.

TRIAL-TIME: 3-week trial

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WRANGLINGS...**NICOLE WERTHER V. FIRE-MAN'S FUND INSURANCE COMPANY, THE AMERICAN INSURANCE COMPANY**

Case No. 032-09911
December 29, 2004

TOPIC: Contract

RESULT: Settlement: Reached December 29, 2004 during mediation, for plaintiff \$190,000.

DAMAGES: About \$350,000 for diminution of fair market value of home and loss of personal contents.

STATE: Missouri

COURT: St. Louis City - Division 23

JUDGE: Hon. Timothy J. Wilson

PLAINTIFF ATTORNEY(S): Matthew O'Grady, Teasdale, Murphy & O'Grady, LLP, 1001 Washington Ave., Suite 360, St. Louis, MO 63101, phone #(314) 725-5353, fax #314-621-1906.

DEFENDANT ATTORNEY(S): Anthony Martin, Sandberg, Phoenix & von Gontard, PC, 515 North Sixth Street, One City Centre, 15th Floor, St. Louis, MO 63101-1804, phone #(314) 231-3332, fax #314-241-7604.

SUMMARY: The following information is from plaintiff's attorney; defendant's attorney was unavailable for comment.

Water damage to property, mold growth; Plaintiff claimed that a moving company went into plaintiff's home to move a refrigerator out of the premises and the movers left the water feed lines on. Plaintiff was in California for a week and during the week, the water feed lines caused flooding that damaged the entire first floor and basement of the home. Since the flooding occurred during the month of July, heat and humidity combined with the excessive water caused mold to grow. Upon returning home from her trip, plaintiff notified her homeowner's

insurer, The American Insurance Co., but coverage was denied. Plaintiff claimed defendants vexatiously refused to cover the water and mold damages under the policy.

Defendants are affiliates of the same company. Defendants contended that the damages were properly denied because plaintiff failed to timely notify them of the damages and there had been a prior claim for water damage to the property.

Defendants claimed that about three years before the incident in this case, plaintiff had made a claim for water damage in the basement from a sewer back-up. Defendant paid about \$3,000 - \$4,000 for that claim.

OFFER: \$60,000 before trial

DEMAND: \$325,000 before trial

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EDITOR'S NOTE: The parties settled during mediation with neutral George Fitzsimmons.

RICHARD BENEFIELD, SUE BENEFIELD, AS PLAINTIFF & AS NEXT FRIEND, & BRANDON BENEFIELD V. SAFECO SURPLUS LINES INSURANCE CO., STEAMATIC OF ST. LOUIS & SERVICE MASTERS, A/K/A SERVICE MASTER RESIDENTIAL COMMERCIAL SERVICES, LP

Case No. 022-09801A

December 17, 2004

TOPIC: Contract

RESULT: Verdict: Returned December 17, 2004 for plaintiffs \$145,000 against defendant Safeco.

DAMAGES: About \$150,000 for damages to personal property and diminution of value of real property; \$100,000 for consequential damages.

STATE: Missouri

COURT: St. Louis City - Division 10

JUDGE: Hon. Philip D. Heagney

PLAINTIFF ATTORNEY(S): Louis Basso, Basso & Myers, 133 Chesterfield Business Parkway, Chesterfield, MO 63005-1233, phone # (636) 733-3383, fax # 636-733-3384.

DEFENDANT ATTORNEY(S): Robert Cockerham, Brown & James, 1010 Market Street, 20th Floor, St. Louis, MO 63101-2000, phone # (314) 421-3400, fax # 314-421-3128 Safeco

Victor Avellino & Beth Boggs, Boggs, Boggs & Bates, LLC, 7912 Bonhomme, Suite 400, Clayton, MO 63105-1912, phone # (314) 726-2310, fax # 314-726-2360 Steamatic

John Cooney, Evans & Dixon, 515 Olive St., Suite 1100, St. Louis, MO 63101-1836, phone # (314) 621-7755, fax # 314-621-3136 Service Masters .

SUMMARY: The following information is from Basso and Avellino; the other attorneys were unavailable for comment.

Breach of insurance contract, failure to pay damage claim for residential property, water and mold damages; Plaintiffs owned a house that was insured by defendant Safeco and on October 25, 2000 they experienced a water damage loss due to a burst water service line underneath a vanity on the first floor of their home, which caused significant property damage, including but not limited to the main hall bath, the hallway, the perimeter bath walls, sub flooring, drywall, carpet, lower level finished living space, furnace, water heater, household items and other personal property. Plaintiffs claimed that the loss was covered under their insurance policy and that the loss was reported in a timely manner to Safeco. Plaintiffs alleged that upon specific approval, authorization and selection by Safeco agents and representatives, defendants Steamatic and Service Master were permitted to perform certain clean up and repair work to the plaintiff's home. Plaintiffs contended that these companies failed to fully, timely and adequately address the water problem, causing the development of various molds (Trichodermatypes) in the water damaged areas that included, but were not limited to, Stachybotrys, Aspergillus, Penicillium and Fusarium, all of which contain various mycotoxins, some of which are carcinogenic and can cause allergic reactions and a variety of illnesses. Plaintiff claimed that Safeco at first refused to allow plaintiffs to choose the contractors after the faulty repairs were made and subsequently promised to allow plaintiffs to choose their own contractors, but refused to authorize any bids from other contractors. Plaintiffs contended that they were forced to move out of their house as the conditions worsened and they remained in alternate temporary living arrangements from February 2001 to February 2005, a period of four years. Plaintiffs alleged that defendant Safeco vexatiously refused to remediate the water damage, intentionally caused delays, wrongfully refused to renew their insurance policy, fraudulently blamed plaintiffs for the conditions and retained incompetent contractors that caused additional damages.

Defendants denied plaintiffs' allegations and contended that their home was adequately remediated by the contractors and any subsequent mold development was not due to the work done by the contractors. Defendants Steamatic and Service Masters settled with plaintiffs before trial for confidential amounts.

PLAINTIFF EXPERTS:

John Jurgiel, Industrial Hygienist, expert, (location unavailable).

Lee Safety, Industrial Hygienist, expert (location unavailable)

OFFER: \$27,000

DEMAND: \$100,000

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