

23-CV-0122

CAUSE NO. _____

**BRANDON OLIVE AND
ASHLEY OLIVE** § **IN THE DISTRICT COURT**
§ **Galveston County - 212th District Court**
V. § **JUDICIAL DISTRICT**
§
**ASHTON HOUSTON RESIDENTIAL,
LLC d/b/a ASHTON WOODS HOMES** § **OF GALVESTON COUNTY, TEXAS**

PLAINTIFFS' ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, BRANDON OLIVE and ASHLEY OLIVE (the “Olives” or “Plaintiffs”), complaining of ASHTON HOUSTON RESIDENTIAL, LLC d/b/a ASHTON WOODS HOMES (“Ashton” or “Defendant”) and respectfully show the Court and jury as follows:

PARTIES

1. Plaintiffs BRANDON OLIVE and ASHLEY OLIVE are residents of League City, Galveston County, Texas.

2. Defendant ASHTON HOUSTON RESIDENTIAL, LLC d/b/a ASHTON WOODS HOMES (“Ashton”), is a Texas limited liability company which may be served by serving its registered agent, Corporation Service Company d/b/a CSC – Lawyers, 211 East 7th Street, Suite 620, Austin Texas 78701, or wherever else it may be found. Plaintiffs request issuance of citation at this time.

VENUE AND JURISDICTION

3. Venue is proper in Galveston County, Texas because this is the county in which all or a substantial part of the events and omissions giving rise to the claims occurred. TEX. CIV. PRAC. & REM. CODE §15.002 (a)(1).

4. All conditions precedent necessary to the filing of this suit have been performed or

have occurred. This suit is filed out of necessity to prevent expiration of the statute of limitations period. To the extent that prior written notices are required under the Texas Deceptive Trade Practices & Consumer Protection Act (“DTPA”) and the Texas Residential Construction Liability Act (“RCLA”), this action is brought under the provision of Texas Business and Commerce Code §17.505(b) (DTPA) and Texas Property Code §27.004(c) (RLCA), which allow a direct filing of a civil action when required to preserve the statute of limitations.

5. Jurisdiction is proper in this Court in that the Plaintiffs’ damages exceed the minimum jurisdictional limits of this Court.

6. In accordance with Rule 47 of the Texas Rules of Civil Procedure, Plaintiffs seek monetary relief over \$250,000.00 but no more than \$1,000,000.00, excluding interest, statutory or punitive damages and penalties, and attorneys’ fees and costs in this Court.

7. Plaintiffs intend to conduct discovery under Level 2 as set forth in 190.3 of the Texas Rules of Civil Procedure.

FACTUAL BACKGROUND

8. Ashton is and was a home builder that acquired title to the lot and constructed a new residential home located at 1620 Kaleta Pass Lane, League City, Texas 77573 (the “Home”). Ashton warranted the Home to be free from defects in workmanship when it sold the Home to Plaintiffs. Further, Ashton warranted the Home to be habitable for all owners and occupants of the Home. Additionally, Defendant issued a “StrucSure Express Limited Warranty” (the “Warranty”) applicable to the new Home to be administered by StrucSure Home Warranty.

9. As memorialized in the parties’ Earnest Money Contract dated October 3, 2016 (the “Contract”), Plaintiffs purchased the Home directly from Ashton for a purchase price of \$531,308.00.

10. At all relevant times, Ashton was a new home builder and built the Home. Accordingly, Ashton is at all times mentioned herein as a “Contractor” within the meaning of the RCLA. TEX. PROP. CODE §27.001(5).

11. At some point after purchasing and moving into the Home, Plaintiffs eventually discovered a number of problems within the Home including but not limited to the following: water intrusion, mold, water damage around HVAC returns, leaking windows, a lack of attic ventilation, and chronic high humidity. Plaintiffs repeatedly requested Defendant to make repairs throughout the Home, but Defendant’s attempts at repairs, to the extent any were made, were significantly ineffective while some repair requests were ignored completely.

12. **Mold.** In connection with the recurring and extensive mold infestation discovered within the residence, Plaintiffs learned that the air within the residence has extremely high mold counts. With conditions in the Home deteriorating, Plaintiffs incurred the costs of a professional mold inspection on June 6, June 8, and June 9, 2022. The inspections and subsequent lab testing confirmed dangerously-high levels of Cladosporium, Trichoderma, and Penicillium/Aspergillus mold growth in various areas in the Home. For instance, it was determined that there were elevated mold counts in the Home as high as 1,370,000 spores/m³ of Penicillium/Aspergillus in a second-floor bedroom.

13. **Habitability Letter.** Because on the significantly elevated levels of mold identified as being present in numerous air samples collected inside Plaintiffs’ Home, a licensed Mold Assessment Consultant issued a letter on June 16, 2022 stating that, in her professional opinion, the Home was unfit for human habitation.

14. On September 7, 2022, AQ Testing Services, LLC delivered its Mold Remediation Protocol to Plaintiffs. The Mold Assessment Consultant who authored the Protocol opined that

“the moisture source(s) that caused mold growth were high humidity and condensation associated with building science defects including, but not limited to uninsulated AC drain lines, inadequate attic ventilation, HVAC issues, and unsealed top plates.”

15. Suspected Building Science and HVAC Defects. Plaintiffs have now hired building science consultants to investigate the suspected deficiencies and/or defects related to the Home’s building science functionality, and an HVAC consultant to investigate suspected defects related to the Home’s HVAC system.

16. Under Texas common law, Ashton represented and warranted to Plaintiffs that the Home would be free of defects, built in a good and workmanlike manner, and habitable. It is apparent that mold-conducive conditions are present in Plaintiffs’ Home, and due to the defective design and construction of the Home, mold contamination will continue to spread if the causes of the mold are not remediated. With such a large and complicated framing and architectural design, it is evident that all due care and customary construction and design practices were not followed or otherwise ignored by Ashton during original construction of the Home. Ashton’s actions and/or omissions have led to the defects found and mold growth throughout the Home.

17. Limitations Accrual Date Deferred by Discovery Rule. Plaintiffs requested that Ashton repair the defects on numerous occasions. While Ashton performed a few superficial repairs, it failed and/or refused to address the underlying source of the problems. As applicable, Plaintiffs rely upon the discovery rule for each of their causes of action as the defects in their Home were latent and inherently undiscoverable, and Ashton gave misleading and untrue assurances that sources of the damage had been addressed.

18. Because of Ashton’s subterfuge in dealing with Plaintiffs’ warranty and repair requests, Plaintiffs may have been delayed in asserting their rights and remedies requiring the

equitable tolling of the applicable limitations periods for Plaintiffs' claims due to Ashton's assurances that the problems had been, or would be, sufficiently repaired or otherwise remedied. Ashton's defective repairs and assurances to Plaintiffs constituted a continuing tort involving a repeated injury proximately caused by repetitive wrongful acts. Therefore, Plaintiffs' claims only accrued when Ashton finally ceased its tortious conduct.

19. Limitations Accrual Date Deferred by Ashton's Fraudulent Inducement.

Ashton's conduct also constituted fraudulent concealment, as Ashton had actual knowledge of its wrongdoing, concealed its wrongdoing by representing to Plaintiffs that it had competently fixed the defects in the Home, or by remaining silent when it had a duty to speak, and had a fixed purpose to conceal the wrongdoing from Plaintiffs. Plaintiffs reasonably relied on Ashton's misrepresentations and/or silence. Plaintiffs were unable to discover Ashton's deceitful conduct or the facts giving rise to their various causes of action until they hired outside construction defect experts to inspect the Home, diagnose the defects, and communicate their findings to Plaintiffs. Finally, the construction defects in the Home were inherently undiscoverable injuries as the defects were not apparent to Plaintiffs as laypersons. It would have been extremely difficult, if not impossible, for Plaintiffs to discover the latent defects in the Home absent information provided to them by the construction defect experts hired by Plaintiffs.

20. Ashton has failed to take responsibility for the defects or offer Plaintiffs any reasonable repairs or compensation per the RCLA.

21. Because of these matters, Plaintiffs retained the Freeman Law Firm, P.C. to represent them and seek recovery of the damages from Ashton and agreed to pay them their reasonable attorneys' fees and expenses to prosecute this matter.

CAUSES OF ACTION

A. NEGLIGENCE, NEGLIGENT MISREPRESENTATION, AND GROSS NEGLIGENCE

22. Plaintiffs incorporate by reference the factual allegations contained in ¶¶11-15 above. Ashton's negligent acts or omissions proximately caused Plaintiffs to incur damages.

23. **Duty.** Ashton owed legal duties to Plaintiffs, including but not limited to: (1) the duty to exercise reasonable care to avoid a foreseeable risk of injury to others; (2) the duty to construct the Home in a good and workmanlike manner; and (3) the duty to construct the Home so that it is habitable.

24. **Breach.** Ashton breached the duties when it failed to construct the Home in a good and workmanlike manner and failed to construct a habitable Home. Ashton negligently made representations to Plaintiffs that were false, or which in the exercise of ordinary care, Ashton should have known to be false. Plaintiffs justifiably relied upon these statements which proximately caused their injuries and damages.

25. **Causation and Damages.** Ashton's negligence was the direct, proximate, producing and contributing cause of injury to the Plaintiffs, which resulted in following damages: actual damages including damages for injury to personal property, damages for injury to real property (including costs of repair, relocation expenses, remediation costs, loss of the benefit of the bargain, market resistance and stigma damages for loss of value to the Home once repaired, reasonable expenses of temporary housing reasonably necessary during the repair period, and reasonable fees incurred with consultants and experts), and damages for economic injury; exemplary damages; interest; court costs; and attorney's fees under equity.

B. BREACH OF CONTRACT

26. Plaintiffs incorporate by reference the factual allegations contained in ¶¶11-15

above. Pleading in the alternative and without waiving the foregoing, Plaintiffs allege Ashton breached the Contract and the Warranty.

27. Ashton breach of contract was the direct, proximate, producing and contributing cause of the Plaintiffs' damages

C. COMMON LAW FRAUD, FRAUD BY NONDISCLOSURE, AND STATUTORY FRAUD

28. Plaintiffs incorporate by reference the factual allegations contained in ¶¶11-15 above. Pleading in the alternative and without waiving the foregoing, Plaintiffs assert that Ashton committed common law fraud, fraud by nondisclosure, and statutory fraud in a real estate transaction against Plaintiffs.

29. Ashton made material and false presentations to Plaintiffs regarding the construction, care, condition, and quality of the Home by claiming to adhere to residential building codes, customs, and standards, and did so knowingly or recklessly without knowledge of the truthfulness or falsity of such representations. Ashton misrepresented the nature and extent of the warranties, improvements, damages, defects, and repairs concerning the Home.

30. Further, Ashton concealed from or failed to disclose to Plaintiffs certain material facts that Ashton had a duty to disclose. Ashton knew that Plaintiffs were ignorant of the facts and did not have equal opportunity to discover such facts.

31. Ashton's misrepresentations and failure to disclose existing material facts violated the provisions of Texas Business & Commerce Code §27.01 and constituted Fraud in the Sale of Real Estate.

32. Ashton received value for their fraudulent misrepresentations to Plaintiffs, and as such, Ashton is liable for exemplary damages, in addition to actual damages.

D. VIOLATIONS OF THE TEXAS DECEPTIVE TRADE PRACTICES ACT

33. Plaintiffs incorporate by reference the factual allegations contained in ¶¶11-15 above. Pleading in the alternative and without waiving the foregoing, Plaintiffs assert Ashton violated the DTPA.

34. Plaintiffs are consumers pursuant to Section 17.45(4) of the DTPA, in that Plaintiffs sought to acquire goods and services by purchase, being the Home.

35. Ashton engaged in false and deceptive conduct that violated, among other provisions, §§17.46(b) (1, 2, 3, 5, 6, 7, 12, 20, 24 and 25) and 17.50 (a)(1)(2) of the DTPA. Ashton engaged in false, misleading, or deceptive acts or practices that Plaintiffs relied on to their detriment by:

- a. representing goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which the person does not;
- b. causing confusion or misunderstanding as to affiliation, connection, or association with, or certification by, another;
- c. representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;
- d. representing an agreement confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law;
- e. knowingly making false or misleading statements of fact concerning the need for parts, replacement, or repair service;
- f. representing work or services have been performed on, or parts replaced in, goods when the work or services were not performed or the parts replaced; and
- g. failing to disclose information concerning goods or services which was known at the time of the transaction if such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed.

36. The enumerated violations were a producing cause of the occurrence in question and of Plaintiffs' resulting damages. Ashton is liable to Plaintiffs for actual damages, court costs, and reasonable attorneys' fees.

37. Ashton engaged in an unconscionable action or an unconscionable course of action as defined in Section 17.45(5), in that Ashton took advantage of the lack of knowledge, ability or experience, of Plaintiffs to a grossly and unfair degree. Ashton's conduct resulted in a gross disparity between the value received and the consideration paid by Plaintiffs for the Home.

38. Ashton's conduct was committed knowingly or intentionally; that is, Ashton was actually aware of the falsity, deception, and unfairness of the conduct about which Plaintiffs complain. At all relevant times, Ashton knew the Home was damaged, repaired and needing more repairs. Ashton failed live up to its legal duties and contractual obligations. Accordingly, Ashton is liable to Plaintiffs for mental anguish damages as well as additional damages of up to three times the amount of economic and mental anguish damages as provided for by Section 17.50(b)(1) of the DTPA.

39. Ashton's conduct was also committed intentionally; that is, Ashton intended to deceive and commit unfair acts in connection with the transaction with the Plaintiffs, and which Plaintiffs complains of herein. Accordingly, Ashton is liable to the Plaintiffs for additional damages as provided for under the DTPA for committing an intentional act.

40. **Ashton's Breach of Implied Warranties.** Ashton further violated the DTPA when it breached the implied warranties of good workmanship and habitability as defined by common law.

E. BREACH OF IMPLIED WARRANTIES

41. Plaintiffs incorporate by reference the factual allegations contained in ¶¶11-15 above. Pleading in the alternative and without waiving the foregoing, Plaintiffs assert Ashton has breached (1) the implied warranty of good workmanship, and (2) the implied warranty of habitability with respect to the Home.

42. Ashton's Breach of Implied Warranty of Good and Workmanlike Services.

The Home constructed by Ashton was not constructed in a good and workmanlike manner, which was a breach of the implied warranty of good and workmanlike services for home construction. Ashton constructed the Home with building science defects, which caused the Home to suffer from musty odors, high humidity, and elevated spore counts of toxic mold.

43. Ashton's Breach of Implied Warranty of Habitability. Plaintiffs discovered latent defects in the Home on or about June 2022. Ashton created the latent defects in the Home, and subsequently engaged in a systematic effort to obfuscate the defective construction of the Home. The defects (building science defects and deficiencies) made the Home uninhabitable.

44. The actions and omissions of Ashton set forth herein were the direct, proximate, producing and contributing cause of property damage to the Home.

ATTORNEYS' FEES AND COSTS

45. Plaintiffs incorporate by reference the factual allegations contained in ¶¶11-15 above. Pursuant to the terms of the contract between the parties, case law, and Texas statutes, including but not limited to, §38.001 et seq of the Texas Civil Practice & Remedies Code, §27.004 of the Texas Property Code, Texas Business & Commerce Code §27.01, and §17.41 et seq of the Texas Business and Commerce Code (“DTPA”), Plaintiffs are entitled to recover their attorneys’ fees in connection with this litigation, together with court costs and reasonable expert fees. Plaintiffs seek their reasonable and necessary attorneys’ fees for the preparation of this suit, prosecution of this suit, trial, and all appeals.

DAMAGES

46. Plaintiffs seek to recover from Defendant their actual and economic damages, including costs of repair, relocation expenses, remediation costs, repair costs, court costs,

Plaintiffs' loss of the benefit-of-the-bargain, and damages related to decline in value due to the stigma for resale.

47. Plaintiffs also seek statutory damages from Defendant for its knowing, unconscionable, malicious, intentional, and fraudulent conduct.

48. Plaintiffs are additionally entitled to recover punitive damages from the Defendant in an amount sufficient to punish their misconduct and to deter similar acts of misconduct in the future.

JURY DEMAND

49. Plaintiffs hereby demand a trial by jury on all issues and have tendered the appropriate fee.

NOTICE OF INTENT TO USE DISCOVERY AT TRIAL

50. Pursuant to TRCP Rule 193.7, Plaintiffs gives notice to Defendant of Plaintiffs' intent to use at trial and any pretrial hearing, matter, including all depositions and all discovery produced by each party including, without limitation, documents, deposition transcripts, reports, affidavits, audio and visual recordings, photographs, video images, electronic images, electronic recordings, and visual/digital/electronic images.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiffs prays that on final trial, Plaintiffs have judgment against Defendant Ashton as follows:

1. Actual, consequential, pecuniary, special, and economic damages;
2. Additional damages for all knowing and/or intentional DTPA violations;
3. Exemplary damages;
4. Reasonable and necessary attorneys' fees for the preparation and prosecution of this lawsuit through trial and all appeals;
5. Reasonable costs of experts hired to evaluate damages and recommend repair protocols;
6. Pre-judgment and post-judgment interest at the highest rate allowed by law;

7. Temporary housing expenses during repairs;
8. Temporary housing expenses while the Home is uninhabitable;
9. Taxable court costs; and
10. Such other and further relief, at law or in equity, to which Plaintiffs may be justly entitled.

Respectfully submitted,

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