

1 CASE NO. CV89-4841

2 DEPT. NO. 2

FILED

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5 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
6 IN AND FOR THE COUNTY OF WASHOE V. Stewart ...

7 \* \* \* \* \*

8 BYRON C. RADAKER and  
9 SHIRLEY A. RADAKER,

Plaintiffs,

10 v.

SECOND AMENDED FINDINGS OF  
FACT, CONCLUSIONS OF LAW  
AND JUDGMENT

11  
12 DAN TONNEMACHER dba  
13 METAMORPHOSIS, LEWIS E. SCOTT  
and PHYLLIS SCOTT, et al.

14 Defendants.

15  
16 This matter having come before the Court for trial commencing  
17 May 28, 1991 before the bench lasting six and one-half (6-1/2)  
18 days. The Plaintiffs, BYRON C. RADAKER and SHIRLEY A. RADAKER  
19 (Radaker), being present in Court and represented by Mark H.  
20 Gunderson, Esq., and Defendant DAN TONNEMACHER (Tonnemacher) being  
21 present in Court and representing himself in proper person; and  
22 Defendants, LEWIS E. SCOTT and PHYLLIS SCOTT (Scott), being present  
23 in Court and represented by Richard Horton, Esq., the Court having  
24 carefully weighed the documentary evidence, the oral testimony  
25 given and argument of counsel, this Court originally entered its  
26 Findings of Fact, Conclusions of Law and Judgment on December 5,  
27 1991 and subsequently amended on February 24, 1992 pursuant to a  
28

1 Motion to Amend Judgment having been filed. This matter was  
2 appealed to the Nevada Supreme Court. The Nevada Supreme Court  
3 issued its opinion which is binding in this action, on July 8,  
4 1993. This Court being fully advised makes the following Second  
5 Amended Findings of Fact, Conclusions of Law and Judgment, as  
6 follows:

7 FINDINGS OF FACT

8 1. That Radaker is, and at all times mentioned was, a  
9 resident of Washoe County, Nevada.

10 2. That Tonnemacher is, and at all times mentioned was, a  
11 resident of Washoe County, Nevada.

12 3. That Scott is, and at all times mentioned was, a resident  
13 of the State of Washington and former owners of real property in  
14 Washoe County, Nevada, which was the subject of this action.

15 4. That on September 15, 1986 Scott and Tonnemacher entered  
16 into a written contract for the construction of a residence located  
17 in Washoe County, Nevada commonly known at 571 Putter Court,  
18 Incline Village, Nevada.

19 5. That Scott and Tonnemacher jointly built and presented  
20 the residence for sale located at 571 Putter Court to make a profit  
21 from their investment of time and money.

22 6. That Scott, as the owner-builder, procured all necessary  
23 building permits from Washoe County and all other necessary  
24 approvals from regulatory agencies, including the Tahoe Regional  
25 Planning Agency (TRPA), for the construction of the residence.

26 7. That on June 24, 1987 Radaker and Scott entered into a  
27 residential Purchase Agreement and Deposit Receipt for the purchase  
28 of the property at 571 Putter Court, Incline Village, Nevada. The

1 Agreement provided for the purchase and sale by Scott to Radaker  
2 for the sales price of Seven Hundred Twenty-Five Thousand Dollars  
3 (\$725,000.00). In connection with the Purchase Agreement, a  
4 Sellers Property Disclosure Statement which was executed by Scott's  
5 son in the capacity of attorney-in-fact. The Disclosure Statement  
6 authorized Tonnemacher as "the agent in this transaction" to  
7 publish the information contained in the Disclosure Statement.

8 8. That at the time of the disclosure statement, Exhibit A  
9 given by Scott to Plaintiffs, Scott did not know of the existence  
10 of any serious defects in the home.

11 9. That Tonnemacher and Scott failed to construct the  
12 residence in a good and workmanlike manner, including but not  
13 limited to, the following:

14 A. The roof of the residence was not built in  
15 accordance with the applicable building codes and customary  
16 building practices for a residence of the type and nature  
17 represented to Radaker.

18 B. The concrete foundation of the residence was  
19 defective and not in accordance with the applicable building  
20 codes and customary building practices for a residence of the  
21 type and nature represented to Radaker.

22 C. The structure contained deficient framing  
23 connections and sheer wall inadequacies.

24 D. The residence was not built in accordance with the  
25 plans and specifications.

26 E. The residence was under built for the customary  
27 building practices in the area in that the residence was to  
28 be a premiere quality residence.

1 F. The residence was under engineered for the customary  
2 building practices in the area.

3 10. That at the time of the Disclosure Statement which was  
4 a part of the June 24, 1987 Purchase Agreement; Scott did not  
5 actually know of the existence of any serious defects in the home.

6 11. That Scott did not make any fraudulent representation to  
7 the Plaintiffs regarding the condition of the home.

8 12. That throughout the construction of the residence Scott  
9 relied on the building expertise of Tonnemacher and Scott paid all  
10 funds necessary for the construction.

11 13. That Scott did not have the skill or knowledge to perform  
12 the tasks of managing or supervising the construction of the home.

13 14. That throughout the construction of the home, Scott  
14 relied upon the expertise of Defendants Tonnemacher and  
15 Metamorphosis.

16 15. That Scott had the right to exercise management or  
17 supervision pursuant to their agreement with Tonnemacher.

18 16. That Scott did not actively manage or supervise the  
19 construction of the home.

20 17. That Tonnemacher deviated from the approved plans as  
21 engineered during the construction of the residence and failed to  
22 construct the residence in accordance with the approved plans and  
23 in accordance with the provisions of the Uniform Building Code as  
24 adopted in Washoe County, Nevada.

25 18. That Scott did not know that Tonnemacher and  
26 Metamorphosis had deviated from the plans in any fashion or had  
27 violated any provisions of the Uniform Building Code in  
28 constructing the home.

1 19. That the residence contained numerous, various and  
2 substantial violations of the Uniform Building Code as adopted in  
3 Washoe County, Nevada.

4 20. That upon completion of the construction of the residence  
5 located at 571 Putter Court Tonnemacher affirmed and promised that  
6 the residence was of a superior construction quality and that the  
7 construction of the residence was in conformity with the approved  
8 plans and specifications and such affirmations and promises became  
9 part of the basis of the purchase of the residence by Radaker.

10 21. That Scott and Tonnemacher impliedly warranted that the  
11 construction of the residence located at 571 Putter Court was  
12 suitable for the purpose for which Radaker purchased it, namely,  
13 a premiere single family residence which became the basis of the  
14 bargain between Scott and Radaker.

15 22. That Scott impliedly warranted that the home be habitable  
16 and assumed the identity of owner/builder.

17 23. That Radaker encountered water penetration problems in  
18 several areas and there were distressed cracking sheet rock in  
19 other areas of the home. Consequently, Radakers' authorized their  
20 experts Sam Viviano and Robert Leonard to proceed to limited  
21 evasive testing of the residence. That investigation, in turn,  
22 showed furthermore serious areas of concern. This conduct was  
23 prudent under the circumstances.

24 24. That based upon the experts' further investigation,  
25 significant structural problems were identified. The residence was  
26 literally torn apart and put back together by Messrs. Leonard and  
27 Fazzari to meet the standards of the Uniform Building Code, as  
28 adopted in Washoe County, Nevada.

1 25. That the problems and deficiencies which Radaker  
2 encountered as they methodically investigated and repaired the  
3 residence can be divided into two categories:

4 A. Those defects which represent planned variations,  
5 but which do not necessarily impair the residences  
6 habitability, and

7 B. Those repairs which were necessitated because of  
8 major construction problems.

9 26. That among the 128 structural defects, several of them  
10 are problems so obvious and ominous that they threatened the  
11 integrity of the building to the point that the safety of the  
12 residences' occupants was in jeopardy.

13 27. That the areas representing breach of the implied  
14 warranty of habitability are as follows: the roof, the offset  
15 column; structural ties, rafters and ledgers; cost of replacing  
16 missing sheer walls; cost of footings and some vertical load  
17 problems.

18 28. That Tonnemacher deceived Radaker by creating a scheme  
19 which amounts to an intentional misrepresentation that the home was  
20 in fact constructed in accordance with the engineered plans and  
21 specifications when it was not so constructed. Radaker reasonably  
22 relied on Tonnemacher's representations to their substantial  
23 financial detriment.

24 CONCLUSIONS OF LAW

25 1. That the Court has jurisdiction over Radaker, Scott and  
26 Tonnemacher and the subject matter of these proceedings.

27 2. That the agreement entitled Contract for Construction  
28 dated September 15, 1986 creates a joint venture relationship

1 between Scott and Tonnemacher.

2 3. That Scott acted as the owner/builder (contractor) of the  
3 residence pursuant to the Nevada Revised Statutes.

4 4. That the residence was not constructed in a skillful,  
5 careful, diligent and workmanlike manner in direct violation of  
6 Chapter 624 of the Nevada Revised Statutes constituting negligence.

7 5. That the joint venture was in privity of contract with  
8 Radaker and owes an independent contractual duty to them. A part  
9 of the negligence in construction leading to the latent structural  
10 defects may be imputed to the venture and its venture partners,  
11 including the Scotts, because Scott assumed all of the rights and  
12 liabilities of owner/builders when they followed their joint  
13 venturers' advice to build the home under an owner/builder permit.

14 6. That the Court recognizes an owner/builder exception to  
15 the general doctrine of caveat emptor and enforces an implied  
16 warranty of habitability against the joint venture of Scott and  
17 Tonnemacher.

18 7. That the Scotts and Tonnemachers are liable to the  
19 Radakers on the claims for breach of contract, for  
20 misrepresentation, for breach of express and implied warranty and  
21 for negligence.

22 8. That the joint venture is in privity with the Radakers  
23 on the construction contract.

24 9. That the September 15, 1986 agreement between Scott and  
25 Tonnemacher created a joint community of mutual interest in that  
26 Scott and Tonnemacher were jointly building and preparing a home  
27 for sale to make a profit from their mutual investment of time and  
28 money as a joint venture.

1 10. That the management decisions concerning the construction  
2 of the residence are imputed to the Scotts under Nevada law  
3 pursuant to constructive notice afforded to a permit holder under  
4 NRS 624.020.

5 11. That the Scotts, as well as Tonnemacher, are held jointly  
6 and severally liable for all of Radakers' damages.

7 12. That Tonnemacher and Metamorphosis are liable to Scott  
8 for the full amount for which Scott is liable to Plaintiffs and  
9 that Scott is entitled to full indemnity from Tonnemacher and  
10 Metamorphosis.

11 JUDGMENT

12 Based upon the foregoing Findings of Fact and Conclusions of  
13 Law, Judgment is entered in favor of Byron C. Radaker and Shirley  
14 A. Radaker against Lewis E. Scott, Phyllis Scott and Dan  
15 Tonnemacher, jointly and severally as follows:

16 1. For the sum of Two Hundred Twenty Three Thousand, Six  
17 Hundred Sixty Three Dollars and 05/100 (\$223,663.05).

18 2. For interest pursuant to NRS 99.040 from the date of the  
19 service of the Summons and Complaint until satisfied.

20 3. For Radakers' costs of suit of \$6,048.02 and attorney's  
21 fees of:

22 a. \$50,000.00 against Defendants Scott;

23 b. \$92,750.00 against Defendant Tonnemacher.

24 Also, based upon the foregoing Findings of Fact and Conclusions of  
25 Law, Judgment is entered in favor of Lewis E. Scott and Phyllis E.  
26 Scott and against Dan Tonnemacher and Metamorphosis jointly and  
27 severally as follows:

28 1. For the sum of \$223,663.05.

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2. For interest pursuant to NRS 99.040 from the date of the service of the summons and complaint until satisfied.

3. For the Plaintiff's cost of suit of \$6,048.02 and attorney's fees of \$50,000.00.

4. For Defendant Scott cost of suit of \$27,212.27 and reasonable attorney's fees of \$80,446.25.

5. And this Judgment in favor of Defendants Scott may be enforced only against Metamorphosis joint partnership property or the separate property of the individual Defendant Dan Tonnemacher or both.

Dated this 24<sup>th</sup> day of November, 1993.

Charles M. McGee  
DISTRICT JUDGE

APPROVED AS TO FORM:

Richard W. Horton  
Richard W. Horton, Attorney  
for Defendants Scott

Mark H. Gunderson  
Mark Gunderson, Attorney for  
Plaintiffs

COPY

REQUESTED BY  
Lionel Sawyer Collins  
IN OFFICIAL RECORDS OF  
DOUGLAS CO., NEVADA

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SUZANNE BEAUBREAU  
RECORDER

\$/6 PAID ko DEPUTY

CERTIFIED COPY

The document to which this certificate is attached is a true and correct copy of the original on file in my office.

DEC 1 1993

By \_\_\_\_\_  
Deputy

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