STIGMA DAMAGES IN CONSTRUCTION DEFECT LITIGATION: FEARED BY DEFENDANTS, CHAMPIONED BY PLAINTIFFS, AWARDED BY (ALMOST) NO COURTS—WHAT GIVES?

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I. INTRODUCTION

Construction defect claims may be “as common as crabgrass,”1 but this by no means makes them either predictable or stable. With the pace of construction quickening and the volume of construction defect litigation rising, many commentators have cast a concerned glance to the commensurately increasing scope of liability suffered by contractors and others in the construction industry.2 Some theories of liability remain comparatively settled by evolved case law or statute, yielding somewhat predictable results for parties on either side of the dispute.3 Other theories, however, submit less readily to the comfort of applied logic and predictability; changing, unsettled, or newly developing, these doctrines are either applied or interpreted inconsistently by the courts, at the extreme end of the spectrum even opening up entirely new landscapes of liability.4 Such is the case, many warn, with “stigma damages.”5

This Note seeks to broadly trace the evolution of the measure of “stigma damages” as it has (or has not) developed over various bodies of law through the last few decades. Specifically, this Note’s purpose is to explore the potential for the applicability of such damages to the contemporary context of construction defect litigation. The trajectory of this Note can be traced as follows: Part II sets forth the general purposes of damages, as pursued under contract theory compared to those pursued under tort theory. Incident to this discussion is a brief sketch of the traditional measure of contract damages of diminution in value versus the

3. See infra Part II.A.
4. See infra Part V.B.
cost of repair, as set forth in the first Restatement. Additionally, Part II
explores tort foundations for damages including, most importantly, the
economic loss rule, which is perhaps the most formidable barrier to the
recovery of construction defect damages pursued under the mantle of tort
law. Part III briefly sketches the function of stigma damages in
construction defect litigation to determine just what purpose, if any, this
concept may serve if brought in a construction defect case. Part IV
evaluates the various contexts in which, historically, stigma damages have
been considered by the courts. Part IV considers stigma damage claims
under common law nuisance and trespass theories, the tort theory of
negligence, and contract. Part V attempts to synthesize relevant doctrines
applied across these various fields of law and apply these doctrines in a way
that may shed some light on if and how stigma damages might be pled or
defended against in the context of construction defect litigation as pursued
under contract or tort theories. Finally, Part VI provides the conclusion for
this analysis, inquiring into what future (if any) there may be for stigma
damages in construction defect litigation and attempts to blaze a trail
through the knotted doctrinal undergrowth.

The approach this Note takes, however, requires some brief
definitional remarks. One persistent problem with stigma damages is the
unclear way in which they are defined—because of this, the varying paths
taken by courts are difficult to trace to a cohesive line of precedent.
Accordingly, this Note starts from the basic position that there are two core
definitions of stigma damages, as the term is applied by the courts.

The first is more or less improper, or, at the very least, confusing, and
it lends to the confusion associated with the second definition. The first
definition of stigma is closely linked to the traditional “diminution in
value” concept, a basic underpinning of contractual damages and, in fact, is
in practice virtually indistinguishable from it. It is this very definitional
shift that most threatens a plaintiff pursuing claims of stigma damage under
the second definition.

The second definition, the one advocated by commentators and
feared by wary defense counsel, are those damages from a “stigma” that
allegedly provides a persisting, residual loss in the market value of a
property that has been damaged and subsequently repaired.6 One

6. Charles L. Stott, Comment, Stigma Damages: The Case for Recovery in
Certainly, critics of “stigma damages” may argue that some damages don’t persist at all
and, instead, eventually “clear up.” The definition set forth above, however, assumes
that such diminution-in-value-as-a-result-of-stigma has some coefficient of duration.
commentator describes such damages as analogous to a new car’s depreciation when driven off a showroom floor: even though the car with negligible miles on the odometer and the building with “stigma damage” that has been repaired and/or remediated are purportedly “good as new,” the psychological stigma on the property causes it to have a reduced market value.7 The classic contract notion of diminution in value, by contrast, denotes “the total loss in market value of [property that has been damaged], or the loss in value prior to repair.”8 A real estate appraisal group has defined stigmatized property as “property psychologically impacted by an event which occurred or was suspected to have occurred on the property, such event being one that has no physical impact of any kind.”9 A more broadly applicable definition would cover property psychologically impacted by either an event that had (a) no physical impact or (b) a physical impact that has since been “repaired” or “remediated.” Plaintiffs in nuisance cases, for example, who successfully pled and proved stigma damages, pursued them under the theory that their property had suffered a permanent diminution in value because of a potential buyer’s concern about the plaintiffs’ formerly contaminated property.10

The archetypal example of this second kind of stigma would be the stigma associated with a residential mold infestation, when such infestation
manifests itself after a homeowner has purchased a house from a builder whose own negligent work or whose negligent subcontractors’ work, created the mold problem. Consider, for example, an inadequate roofing job that results in leaks, the retention of moisture, and a subsequent mold infestation.\(^{11}\) In some respects, this would seem to logically parallel the facts yielded by contamination nuisance cases.\(^{12}\) The law is far less developed in the construction defect context which is dominated by tort (primarily through negligence) and contract remedies. This Note’s purpose, in part, is to probe the links among these contexts to discern whether doctrines developed in the contamination cases transfer well to the context of construction defect litigation.

While the case law is inconsistent and fragmented, a handful of broad and somewhat coherent statements can be made about the current state of law and what that may show about the accessibility of stigma damages. Generally, such damages sought under tort theories have as their most significant hurdle the economic loss rule coupled with what appears to be many courts’ reluctance to permit tort damages pursued under the mantle of a contractual relationship.\(^{13}\) As such, the tort avenue is, at best, an uncertain path for the pursuit of full compensation.\(^{14}\)

Alternatively, stigma damages pursued under theories emanating from contract get swept into the “diminution in value” measure of damages, as set forth in the Restatement of Contracts.\(^{15}\) By such sleight-of-hand, stigma damages, instead of receiving separate consideration, are balanced against the cost to repair.\(^{16}\) Instead of compensating the parties for the damages suffered—that is, the separate breach of contract or

\(^{11}\) It is not difficult to see the parallels this scenario bears to the traditional nuisance contamination cases. See, e.g., Bonnette v. Conoco, Inc., 837 So. 2d 1219, 1239-40 (La. 2003) (affirming the trial court’s finding that plaintiff property owners of contaminated property suffered a diminution in the market value of their homes); discussion infra Part IV.A (evaluating a long line of cases with plaintiffs alleging stigma damages under nuisance or trespass and recovering).

\(^{12}\) See discussion infra Part IV.A.

\(^{13}\) See discussion infra Part II.B.

\(^{14}\) See discussion infra Part II.B (discussing limitations on the utilization of tort theories for damages suffered under contract).

\(^{15}\) See RESTATEMENT OF CONTRACTS § 346 (1932) (limiting damages for breaches of construction contracts to reasonable construction and completion costs or the diminution of the product’s value); see also Jacob & Youngs, Inc. v. Kent, 129 N.E. 889, 891 (N.Y. 1921) (awarding plaintiff Kent the diminution in value of his property when contractor installed a pipe other than pipe plaintiff had requested in the contract, and removal of the pipe would have amounted to wasteful deconstruction).

\(^{16}\) See RESTATEMENT OF CONTRACTS § 346.
negligence damages—the measure under such an approach balances the plaintiff’s interest in receiving compensation for the stigma against the cost of repair. 17 Such treatment misses the core purpose of the stigma damages measure and deflates damages actually suffered by the plaintiff in order to arbitrarily meet the confines of the classical formula.

Where does this leave the future of stigma damages? Placing recent cases within an intelligible framework, the aim of this Note is to shed some light on how stigma damages may be successfully pled or proven and, alternately, defended against. While developing case law certainly cautions against any manifest sense of certainty in the face of such complex damages issues, broad-based inquiries into the development and uses of stigma damages may indicate one or more of the various paths a court may choose in considering the merits of these damages.

II. PURPOSES OF DAMAGES IN CONTRACT V. PURPOSES OF DAMAGES IN TORT IN CONSTRUCTION DEFECT LITIGATION

Historically, contract breach damages have been subject to a host of limitations. They are generally limited to those damages that are within contemplation of the parties at the time the contract is formed, or reasonably foreseeable by the parties at that time. 18 Generally forming a

17. Id.

(1) Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made.

(2) Loss may be foreseeable as a probable result of a breach because it follows from the breach

(a) in the ordinary course of events, or

(b) as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know.

(3) A court may limit damages for foreseeable loss by excluding recovery for loss of profits, by allowing recovery only for loss incurred in reliance, or otherwise if it concludes that in the circumstances justice so requires in order to avoid disproportionate compensation.

part of foreseeability, but also considered separately by some courts, causation supplies the second limitation on damages in actions for breach of contract. Finally, contract damages must be established with reasonable certainty. As each of the following sections illustrates, the rules governing damages awarded in a breach of contract action are carefully circumscribed and guarded by the principles set forth above.

A. Classic Contract Scenario—Diminution in Value v. Cost of Repair

Damages with respect to a building contract—for defective construction, unworkmanlike performance, or deviation from drawings or specifications—are subject to the classical balance between two measures: (1) diminution in value of the structure or (2) the cost to repair it. Under the First Restatement of Contracts, the cost of repair was adopted as the preferred measure of damages for a contract breach. Additionally, the Restatement incorporated a balance against the cost of repair measure: the economic waste doctrine. The doctrine provides that in one of two scenarios—either (1) the cost to repair was much higher than the value of the project, or (2) the defects could not be remedied without wasteful deconstruction—the preferred measure would be the “diminution in value” of the structure. Diminution in value provides for the damaged party to recover the difference between two figures: the value of the structure if built as the purchaser specified in the contract minus the value of the structure as completed.

A few brief examples will illustrate the dynamics of this balance. In

19. See id. § 351(1), (2)(a) (providing that permissible damages must be a “probable result of the breach” or “follow[] from the breach . . . in the ordinary course of events”).
20. Id. § 352.
22. Id. at 30 (citing RESTATEMENT OF CONTRACTS § 346 (1932)).
23. RESTATEMENT OF CONTRACTS § 346(1)(a).
24. See Robinson, supra note 21, at 29-30 (discussing the development of the Restatement of Contracts factors determining when the cost of repair or diminution in value measures should be applied, and that “courts have often used a diminution in value measure of damages, rather than cost of repairs”). These concepts are highly condensed for the purposes of this Note. For more background on this measure, see id.
25. Id. at 31.
Mattegat v. Klopfenstein, the Appellate Court of Connecticut considered a case yielding evidence showing that diminution in value of the property was $36,179 and cost of repairs was somewhere between $15,000 and $17,000. Because the cost of repair was not more than the diminution in value and no submitted evidence indicated repairs could enhance the value of the property beyond what it was before the damage, the trial court properly could have awarded the cost of repair. Because cost of repair is the traditionally preferred measure, the cost of repair measure was not higher than the value of the project, and the defects were capable of remedy without wasteful deconstruction, this court’s ruling was consistent with both the Restatement and the majority rule.

To illustrate the other side of this balance, in Mayfield v. Swafford, the Appellate Court of Illinois considered the damages awarded a plaintiff who submitted contract claims against a contractor who constructed a defective swimming pool. The contract price of the pool was $7,000, and evidence showed that correction of the defects would cost $10,355 and an additional $1,026 for engineer’s fees. The court concluded that the appropriate measure of damages was the lesser of the cost to repair or the diminution in value of the affected property. While the preferred rule provides for an award of the cost of repair, the court noted that where this measure requires unreasonable destruction of the contractor’s work or costs disproportionate to the obtained results, the proper award of damages is the diminution in value attributed to the construction defects. In other words, the disproportion in the “cost-benefit ratio” of the case demonstrated, according to the court, the “economic waste” doctrine, as contemplated by the Restatement of Contracts. The total award of $11,381 to remedy an owner with a $7,000 damaged pool was unreasonably disproportionate; thus the appellate court remanded the case to the trial court for a hearing on the proper measure of damages, which should have been the “diminution in value to plaintiffs’ property” that resulted from the defective construction.

27. Id. at 282.
28. Id.
30. Id. at 954.
31. Id.
32. Id. at 957-58.
33. Id. at 956 (citation omitted).
34. Id.
35. Id. at 957.
1. **Emotional Damages Under Breach of Contract**

An additional limitation on damages pursued under breach of contract is the general rule against recovery of emotional damages. The Restatement (Second) of Contracts permits emotional damages when “the breach also caused bodily harm or the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result.” In ways that overlap with the Restatement, courts have generally carved out exceptions for awarding emotional distress damages when emotional distress is a natural and probable result of the breach, and when the breach also amounts to an independent tort.

Transporting this discussion to the construction defect context, it appears the general rule, which is comparatively well established, is that liability for emotional damages will not be predicated on a party's negligence when the resulting damage is a mere emotional or mental disturbance and is not partnered with or followed by injury to the plaintiff's person. Applying these basic principles, some courts have held in limited

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38. See Hirst v. Elgin Metal Casket Co., 438 F. Supp. 906, 907-08 (D. Mont. 1977) (holding that emotional distress damages are available when a casket guaranteed not to leak leaked, leading to mold appearing on a disinterred corpse); see also RESTATEMENT (SECOND) OF CONTRACTS § 353 cmt. a (providing examples of such contracts including “contracts of carriers and innkeepers with passengers and guests, contracts for the carriage or proper disposition of dead bodies, and contracts for the delivery of messages concerning death”).

39. Trimble v. City and County of Denver, 645 P.2d 279, 282 (Colo. Ct. App. 1981), aff’d in part, rev’d in part, 697 P.2d 716 (Colo. 1985); Graves v. Iowa Lakes Cmty. Coll., 639 N.W.2d 22, 28 (Iowa 2002), overruled on other grounds by Kiesau v. Bantz, 686 N.W.2d 164 (Iowa 2004); see also RESTATEMENT OF CONTRACTS § 341 (1932) (providing for emotional damages when either the breach is wanton or reckless and causes bodily harm, or when the wanton or reckless breach of a contract to render performance was of a character that the defendant had reason to know at the time of the contract’s making that the breach would likely cause mental suffering for reasons other than financial loss).

40. Michael G. Walsh, Annotation, Recovery for Mental Anguish or Emotional Distress, Absent Independent Physical Injury, Consequent Upon Breach of
circumstances that damages for emotional distress or mental anguish could be recovered in the absence of physical injury, relying on a contract or warranty breach in conjunction with a contract to build a home or building.\textsuperscript{41} At best, one court has concluded that a contract to build a distinctively planned residence qualifies as the type of contract where emotional damages are likely to result in certain circumstances.\textsuperscript{42} Another court has recognized that emotional damages may be recovered in the event of a particularly heightened severity of breach,\textsuperscript{43} but a distinct majority has held that a contract to construct a home is not among the kinds of contracts in which emotional distress is likely to result from a breach\textsuperscript{44} and seem to have accordingly held that such damages are not available.

2. \textit{Punitive Damages Under Breach of Contract}

As a general rule, punitive damages are not available in a breach of contract action.\textsuperscript{45} While the occasional award of punitive damages in this context is handed down,\textsuperscript{46} traditional contract law provides barren ground for these awards. However, a majority of jurisdictions follows a handful of deeply notched but narrow exceptions to this general principle. Those exceptions relevant to construction contracts include the independent tort exception, bad faith, and malicious or oppressive breach.\textsuperscript{47}

B. \textit{Limits on Tort Theories for Recovery Against Damages Suffered Under Contract or Warranty in Connection With Construction of Home or Other Building}, 7 A.L.R.4th 1178, 1179-80 (1981 & Supp. 2004); \textit{see also} \textit{Restatement (Second) of Contracts} § 353 (limiting recovery of emotional damages to cases involving bodily injury and when “serious emotional disturbance was a particularly likely result” of a breach).

\textsuperscript{41} \textit{See} Walsh, \textit{supra} note 40, at 1179-84 (collecting cases).

\textsuperscript{42} \textit{See} Whitener v. Clark, 356 So. 2d 1094, 1098 (La. Ct. App. 1978) (where statute provided that emotional damages were permitted if shown that principle purpose of contract was intellectual enjoyment).

\textsuperscript{43} \textit{Kishmarton v. William Bailey Constr., Inc.}, 754 N.E.2d 785, 788 (Ohio 2001).

\textsuperscript{44} \textit{E.g., Hancock v. Northcutt}, 808 P.2d 251, 258 (1991 Alaska) (collecting cases).


\textsuperscript{46} \textit{See} Gary W. Jackson & Fred W. DeVore III, \textit{When Bad Houses Make Good Cases}, TRIAL 65, 68 (Nov. 2002) (“At least four significant punitive awards were recently rendered in bad-house cases, one of which was upheld on appeal.”).

\textsuperscript{47} \textit{See generally} Cavico, \textit{supra} note 45, at 381-424 (discussing and analyzing these exceptions).
Contract

In large part, most courts put some measure of limitation on tort damages with respect to construction contracts. Some courts dismiss tort theories of recovery outright, concluding that contract provides the proper remedy. For courts that consider such claims, however, the major limitation is the classic tort requirement of proximate causation.48

In a relationship governed by contract, a plaintiff pursuing tort remedies is entitled to recover “‘all damages proximately caused by the [defendant’s] negligent performance of the contract whether or not the results were reasonably to be anticipated.’”49 The question guiding the proximate causation inquiry is whether the harm occasioned by the tort (and the damages, hence, flowing therefrom) “was of the same general nature as the foreseeable risk created by the defendant’s negligence.”50

An additional limitation on tort damages, applicable to the construction defect context, is the economic loss rule. While what follows is not a thorough discussion of the economic loss rule in all scenarios, this confined discussion should cast light on the economic loss rule as it bears on the boundary between tort and contract in the construction defect litigation context.

1. The Economic Loss Rule

One court has defined the economic loss rule as “‘the majority position that one may not recover “economic” loss under a theory of non-intentional tort.”’51 Courts following the rule52 almost uniformly seem to credit as its impetus the California Supreme Court’s decision in Seely v. White Motor Co.53 In Seely, the court posited that contract and warranty laws should control the economic relations between parties engaged in a contract, thus permitting recovery under tort theories of liability in a

49. Id. (quoting Johnson v. Flamia, 363 A.2d 1048, 1053 (Conn. 1975)) (emphasis added) (alteration in original).
50. Id.
situation governed by a contract would erode the contract’s allocation of risk.54 Plainly put, the court stated that purely economic losses were not ordinarily recoverable under tort law.55 Many courts have concluded that this perspective supports the traditional view of the law—that, historically, the only tort action available for a disappointed purchaser who had suffered an intangible commercial loss was an action for fraud.56

Most commentators agree that, after Seely, this rule was most closely tied to the products liability context, where courts considered whether plaintiffs could recover intangible economic losses under strict liability or negligence.57 A number of jurisdictions limited a buyer’s right to recovery to the rights enumerated in the Uniform Commercial Code (UCC) when the action was between a buyer and seller and the alleged loss was damage to the goods themselves.58 In this context, the distinction created by the law between recovery in tort for physical injury and recovery in warranty for economic losses was rooted in the unique responsibility undertaken by a manufacturer who distributes its products.59 The manufacturer’s scope of liability for physical injuries caused by its products’ defects can be countered by a standard of safety outlined “in terms of conditions that create unreasonable risks of harm or [that may] arise from lack of due care.”60 Because the risk and cost of injury could be overwhelming to the person injured, it is reasonable to place such a risk on a manufacturer who can simply insure against the risk and distribute the cost to its customers as a standard cost of doing business.61 Further, because several UCC provisions provide for assignments of risk through the use of warranties and disclaimers, it would seem counterintuitive to render such assignments meaningless by imposing tort liability to these scenarios.62

One may ask, however, how these questions with respect to the UCC and the “goods” over which it holds dominion come to bear on the

54. Id. at 151-52.
55. Id. at 151.
56. E.g., 2000 Watermark Ass’n, Inc. v. Celotex Corp., 784 F.2d at 1185.
57. Id. But see Michael D. Lieder, Constructing a New Action for Negligent Infliction of Economic Loss: Building on Cardozo and Coase, 66 WASH. L. REV. 937, 946 (1991) (arguing that the economic loss rule “may not have as clear a heritage as its advocates believe”).
59. See 2000 Watermark Ass’n, Inc. v. Celotex Corp., 784 F.2d at 1186.
60. Id.
61. Id.
62. Id.
construction defect context, notwithstanding certain pre-manufactured home components and mobile homes, which clearly fall under the UCC. The economic loss doctrine has expanded to other tort contexts, and is now broadly considered to be the primary means for distinguishing between tort, where liability arises from the concept of duty, and contract, where liability arises by virtue of promise.

The Seely analysis appears to have taken root, as evidenced by the majority position on economic loss. Contract law, these courts posit, permits parties to negotiate how risk will be allocated. Implied warranties, supposedly operational regardless of contractual language, can be modified by the use of contractual disclaimers. Tort law, by contrast, assigns risk broadly as a matter of various legal duties, and such duties, along with the risks they entail, cannot be disposed of easily. This broad, indiscriminating duty is anathema to the landscape of commercial transactions, and a majority of courts require injury to either person or property before tort liability will be imposed.

How does this rule get transported to the construction defect litigation context? Broadly conceived, the rule could preclude negligence and strict liability claims for damages to the structure and the existence of defects that have not yet resulted in damages. Strictly conceived, the rule would preclude recovery when only a product itself is damaged but permit

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63. See Joswick v. Chesapeake Mobile Homes, Inc., 765 A.2d 90, 92-93 (Md. 2001) (holding that mobile homes fall under the auspices of the UCC); State v. Bohne, 63 P.3d 63, 65 (Utah 2002) (holding same for modular homes).
65. See, e.g., 2000 Watermark Ass’n, Inc. v. Celotex Corp., 784 F.2d at 1185 (“The majority of courts which have considered this question have followed the decision of the California Supreme Court in Seely...”); see also RESTATEMENT (SECOND) OF TORTS § 766C (1974) (providing that an actor is not liable for purely pecuniary harm caused by the actor’s negligent interference with a third party’s entry into or performance of a contract with the plaintiff or with plaintiff’s performance of his own contract by making the performance more expensive or burdensome).
66. 2000 Watermark Ass’n, Inc. v. Celotex Corp., 784 F.2d at 1185-86.
67. Id.
68. Id. at 1186.
69. Id.
70. See Timothy S. Menter & Matthew W. Argue, The Economic Loss Rule & Construction Defect Litigation, 8 NEV. LAW. 18, 20 (Sept. 2000) (discussing the implications of the rule as applied by the Nevada Supreme Court, which held that a house failing to meet a purchaser’s expectations gives rise to a contract action, not a tort action).
recovery when component parts were damaged. Either way, a textbook case of economic loss in a construction case is “a technical building code violation that has not resulted in any damage to a building structure.” Further examples would include things like shear walls that were inadequately constructed; substandard fire protection safeguards in common walls; and electrical, mechanical, and plumbing installations “that do not meet building, mechanical, or electrical codes.” This statement seems consistent with the way most courts have applied this doctrine to the construction defect context.

The Indiana Court of Appeals, for example, considered plaintiff homeowners’ action against developers alleging the latter’s negligence and breach of the implied warranty of habitability. To recover in negligence, the court insisted that a plaintiff buyer must show a harm surpassing his mere disappointed expectations. The buyer’s interest in enjoying the benefit of the contract bargain, held the court, was not an interest traditionally protected by the law of torts. The bottom line is that “economic loss” could not be recovered under traditional tort doctrine.

The Nevada Supreme Court has unequivocally held that economic losses could not be recovered under a theory of tort. While the court has not held that the rule applies outside of the products liability context, it

71. See id. at 19.
72. Id.
73. Id.
74. ACRET, supra note 58, § 13.11 (citing Jordon v. Talaga, 532 N.E.2d 1174 (Ind. Ct. App. 1989)).
75. Jordon v. Talaga, 532 N.E.2d at 1181.
76. Id.
77. Id. at 1181-82; see also Casa Clara Condominium Ass’n, Inc. v. Charley Toppino & Sons, Inc., 620 So. 2d 1244, 1247 (Fla. 1993) (holding that contract and not tort principles were more appropriate for recovering “economic loss” in the absence of physical injury or property damage); Chambo v. Urban Masonry Corp., 647 A.2d 1284, 1285-86, 1292 (Md. Ct. Spec. App. 1994), vacated on other grounds, 659 A.2d 297 (Md. 1995) (holding that subcontractor A could not sue subcontractor B who damaged A’s work because B’s obligation not to damage A’s work arose under contract; A’s damages were economic loss because the damaged property belonged to the owner); Am. Towers Owners Ass’n, Inc. v. CCI Mech., Inc., 930 P.2d 1182, 1185, 1192 (Utah 1996) (condominium association’s damages based on theory of negligence failed because alleged damages were for economic loss and not for either property or personal injury).
78. Menter & Argue, supra note 70, at 20 (discussing Calloway v. City of Reno, 993 P.2d 1259 (Nev. 2000), overruled on other grounds by Olson v. Richard, 89 P.3d 31 (Nev. 2004)).
concluded “economic losses from a defective building are just as offensive to tort law as damages sought for economic losses stemming from a defective product.”79 By so holding, the court aligned its reasoning with the Florida Supreme Court, which held that, in the context of a contract to build a home, the house’s failure to meet the buyer’s economic expectations is properly a matter of contract and not tort.80 The Nevada Supreme Court ultimately left open a narrow basis under which plaintiffs could make a strict liability claim by noting that certain products could be installed in buildings and maintain separate identities as products, thus not becoming integrated within the structure; this separate identity would bar application of the economic loss rule and permit an action founded upon damage to this product.81

However, while this should not diminish its importance or impact, the economic loss rule remains inconsistently applied.82 Some general principles have emerged: the rule requires that consequential damages (other than personal injury) and potential property losses by parties whose relationship is governed by a contract are not recoverable in tort.83 In some jurisdictions, the doctrine is applied to limit actions against manufacturers of building components and subcontractors.84 Other courts have taken this limit further, ruling that homeowners cannot sue building component manufacturers because the contract between the homeowner and builder was for a finished product: a house.85 The majority rule, however, can be encapsulated by a ruling of the Fourth Circuit, where the court concluded that the economic loss rule would not preclude recovery for homeowners claiming losses against the manufacturers of building components that caused damages to the other parts of the home.86

III. PURPOSES OF STIGMA DAMAGES IN CONSTRUCTION DEFECT LITIGATION

Why preclude or award stigma damages? Before addressing this
question, the stigma measure of damages must be defined, and the stigma measure has not readily submitted itself as a clearly defined concept. One commentator has noted that the “ad hoc basis” of decisions handed down with respect to environmental stigma cases has resulted in “confused” precedent.87 This confusion stems from the myriad theories underlying claims requesting stigma recovery and the varied treatment the diverging claims receive.88 Take, for instance, the sphere of nuisance-based recovery, which “[s]ince its initial acceptance . . . has developed differently in different states.”89 Exacerbating this doctrinal fuzziness is the fact that stigma damages are themselves difficult to theoretically circumscribe.

IV. HISTORICAL USAGE OF STIGMA DAMAGES

A. Nuisance, Trespass

The concept of “stigma damages” appears to be most closely associated with its application in environmental contamination cases. In these scenarios, stigma damages manifest when the value of certain real property diminishes as a result of the public’s perception that property is contaminated; threatened by contamination; or fear, however rational, of contamination from a nearby property.90 A plaintiff alleging stigma damages attempts to recover some loss in a property's market value caused by public perception of a risk linked to that property.91 Stigma damages are usually alleged, paired up with restoration or loss in value damages, in one of two factual scenarios.92 In the first scenario, plaintiffs claim a diminution of property value because of their “property's proximity to a defendant's contamination,” even when the plaintiffs’ property has not been physically contaminated.93 In the second scenario, those plaintiffs with even slightly contaminated property maintain that the property's

88. Id.
89. Id. at 456.
90. Jynda J. Oswald, Stigma Damages in Environmental Contamination Cases, 28 Real Est. L.J. 177, 177 (Fall 1999).
92. Id.
93. Id. Additionally, a minority of courts seem to indicate a reduction in market value will be recoverable even absent permanent physical damage to the plaintiffs’ property. See, e.g., Wade v. S.J. Groves & Sons Co., 424 A.2d 902, 912 (Pa. Super. Ct. 1981).
value remains depressed—even after the contamination has been remediated.94 While states have not yet reached consensus on the treatment of stigma damages in this context, it appears that courts are generally unwilling to permit stigma damages to plaintiffs with property showing “background levels” of contamination—that is, contamination that does not rise to levels dangerous to humans.95

Some recent cases help define the scope of these damages and how courts circumscribe their availability. Mehlenbacher v. Akzo Nobel Salt, Inc.96 was a consolidated case involving two groups of plaintiffs seeking recovery for physical surface damage, structural damage, and loss of market value against a salt mine operator whose mine collapsed in 1994.97 Ultimately, the district court granted summary judgment against the plaintiffs, holding that they could not recover stigma damages98 without actual physical damage to their property.99 Based on the paucity of New York case law on the subject, the court looked to other jurisdictions and found that a majority had indicated stigma damages were not recoverable.100 After its survey, the district court summarized and articulated its findings, noting “that the widely accepted if not universal view among the courts in this country is that causing the value of another’s property to diminish is not in and of itself a basis for tort liability.”101 The court instead asserted that something like physical invasion, damage to, or unreasonable interference with a person’s enjoyment and use of the property would be required for a court to impose liability on a nuisance theory.102 In order to recover diminution in value, the court posited,
plaintiff property owners would need to show two things:

(1) that their property has been physically damaged, or that their use and enjoyment of their property has been unreasonably interfered with, by the defendant’s actions, and (2) either that the trespass or nuisance thus created cannot be fully remediated, or that the cost of remediation would exceed the amount by which the value of the property has been diminished.\(^{103}\)

The Second Circuit remanded the case on jurisdictional grounds, passing on the substantive issues of the case,\(^{104}\) and the District Court for the Western District of New York remanded the case to a New York State Supreme Court.\(^{105}\) While the New York federal district court case does not supply a tried and tested rule of law, the test it applies to the facts is very similar to at least two other different appellate courts struggling with the issue of stigma damages,\(^{106}\) which may cast some light on the hope for uniformity of the courts’ treatment of this problem.

Some courts have permitted recovery for reduced property values to owners whose property value was reduced by stigma from contamination, even without the property being harmed.\(^{107}\) Most courts, however, deny recovery if there is no physical damage to the property.\(^{108}\) One

\(^{103}\) Id. (emphasis added). It is perhaps worthy of note that the district court’s test is not far from that used in \textit{In re Paoli Railroad Yard PCB Litigation}, 35 F.3d at 717 (3d Cir. 1994), a case it cited in support of its decision. Mehlenbacher v. Akzo Nobel Salt, Inc., 71 F. Supp. 2d at 185. In \textit{Paoli}, the Third Circuit reversed the district court’s determination that repair cost, not the diminution in value, was the proper measure of damages, by applying a three-part test, cited and discussed \textit{infra}, note 106 and accompanying text.


\(^{106}\) See \textit{In re Paoli R.R. Yard PCB Litig.}, 35 F.3d at 798 (holding that a claim for diminution in value can be made out without showing permanent physical damage to the land “where (1) defendants have caused some (temporary) physical damage to plaintiffs’ property; (2) plaintiffs demonstrate that repair of this damage will not restore the value of the property to its prior level; and (3) plaintiffs show that there is some ongoing risk to their land”). The Supreme Court of Utah applied a similar test for a claim of stigma damages, in reversing a trial court’s denial of such damages. See \textit{Walker Drug Co. v. La Sal Oil Co.}, 972 P.2d 1238, 1248 (Utah 1998).


\(^{108}\) Id. (citing Stewman v. Mid-South Wood Prods. of Mena, Inc., 993 F.2d 646 (8th Cir. 1993); Berry v. Armstrong Rubber Co., 780 F. Supp. 1097 (S.D. Miss.
commentator has in fact argued that the test for stigma recovery in a Third Circuit case, similar to the one set forth by the Second Circuit above, supplied an appropriate balance against the competing interests and arguments of courts and commentators on both sides of the debate.  

B. Tort

Pursuing stigma damages under theories of tort has yielded some plaintiffs virtually no success, and this is due largely to the barrier set forth by the economic loss rule.  

C. Contract

The Florida Court of Appeal considered a claim of stigma damages in a breach of contract action involving termite infestation in *Orkin Exterminating Co. v. DelGuidice*. Plaintiff DelGuidice had built a $1.3 million home and subsequently purchased a termite protection plan from Orkin which provided “‘at no extra cost’” that Orkin would “‘re-treat when required to prevent or control a re-infestation of . . . termites and repair new damage to the structure and contents’” if the damage was after the initial date of Orkin treatment. The breach of this guarantee and a jury’s award of $300,000 for stigma damages was the subject of appeal before the court. The appellate court reversed on the issue of stigma damages. The defendant’s argument essentially posited that the exclusive remedy provided under the contract was retreatment and repair, a remedy that the defendant had been faithful in upholding. In a manner that perhaps foreshadowed its ruling, the Florida court defined stigma damages as synonymous with diminution in value damages.
The court’s ruling against the plaintiff’s recovery of stigma damages appeared to be based on two basic premises: (1) stigma damages were “not contemplated by the terms of the parties’ contract” and (2) damages for the diminution in value (as the court viewed stigma damages) are appropriate only “when the remedy of repair or replacement is impracticable.”117 As this court viewed the issue, in order to get the issue of stigma damages/diminution in value submitted to the jury, the plaintiff would have to show either that cost to repair was significantly higher than diminution value or “it would constitute economic waste to have existing termite damage . . . repaired” and, as the contract provided, “‘retreat when required to prevent or control a re-infestation.’”118

This case highlights the difficulty with actions brought under theory of contract. The traditional diad between diminution in value and cost to repair places a wedge between plaintiffs and compensation for their losses.119

V. WHERE DO STIGMA DAMAGES FIT IN THE DAMAGES FRAMEWORK OF CONSTRUCTION DEFECT LITIGATION?

Given the trajectory of case law on the issue, it seems there are three primary methods by which courts and defendants assail the veracity of stigma damages. First, some courts appear to posit that stigma damage, as an additional diminution in value after cost to repair is awarded, does not square with the traditional model that awards either diminution in value or cost to repair.120 Second, some courts denying stigma damages hold that these types of damages either simply do not exist or are too speculative to hold a defendant responsible.121 Finally, some courts note that such a measure of damages presents an improper allocation of the risk on the defendant.122

Synthesizing these defenses and criticisms, it appears that two primary observations are in order. First, returning to the two different

117. Orkin Exterminating Co. v. DelGuidice, 790 So. 2d at 1159.
118. Id. at 1160-61.
119. See discussion supra Part II.A.
120. See, e.g., Orkin Exterminating Co. v. DelGuidice, 790 So. 2d at 1159 (conflating stigma damages with the concept of “diminution in value,” and, in part, ruling that such diminution in value damages were recoverable only if disproportionate to cost to repair).
121. See infra Part V.B.2.
122. See infra Part V.B.3.
definitions of stigma damages set forth earlier in this Note,123 it would appear that the first kind of stigma is properly recoverable under contract.124 This is important because, with limited exceptions, in most jurisdictions a breach of contract case for a construction defect will generally not be permitted to proceed under a tort theory of recovery.125 Additionally, given the analysis in DelGuidice, it appears that courts are still unlikely to award stigma damages conceptualized under the second definition introduced in this Note. The primary barrier to this, articulated below,126 appears to be the analytical traditions supporting damages analysis in the law of contracts. Accordingly, these limitations are analyzed below from a pragmatic perspective.

A. Tensions Between Contract and Tort

It would appear that, given the trajectory of availability of contract damages compared to the availability of tort damages in the construction litigation context, a plaintiff has a better chance of getting the issue of stigma damages to the factfinder in a tort action. However, a plaintiff has little likelihood at all of getting a breach of contract action to a jury under theory of tort.127 The DelGuidice case and other decisions underscore the

123. See supra Part I. As a brief refresher, the first definition was nearly synonymous with, and appeared to be, the concept of stigma damages adopted by the DelGuidice decision—where the stigma is simply a diminution in value under the Restatement of Contracts—and is, for all intents and purposes, virtually indistinguishable from the traditional diminution in value measure of contract damages. The second, however, was a stigma that allegedly provided a persisting, residual loss in the market value of a property, as most easily recognized in the nuisance and trespass cases, where damages were awarded for a diminution in value of a property after remediation.

124. This should not, however, be altogether surprising. See Restatement (Second) of Contracts § 348(2) (1981) (providing for either the cost of repair or diminution in value of the property in a breach of contract scenario like a construction defect case).

125. See discussion supra Part II.B.1 (detailing how the economic loss rule analytically precludes such actions under theory of tort and permits plaintiffs to pursue claims by way of contract claims only).

126. See discussion infra Part V.B.1 (explaining how some courts seem reluctant to permit this strain of stigma damages under the reasoning that such damages do not fit into the binary measure set forth under § 346 of the Restatement of Contracts); see also Restatement of Contracts § 346(1)(a) (1932) (allowing damages to take form as either the reasonable cost of construction and completion or the difference between the value that the product contracted for).

127. See supra Part II.B.1, which articulates these limitations, as set forth by the economic loss rule.
way in which contract theory repels the possibility of recovering such a measure of damages.128

Finally, at least one commentator has suggested that stigma damages bear “many of the hallmarks of emotional harm claims,” which may be why they are so inimical to some courts considering breach of contract claims.129

B. Overcoming Barriers to a Plaintiff Seeking Stigma Damages

1. Custom and Tradition—Overcoming the Entrenchment of the Traditional Measure of Diminution in Value Versus Cost of Repair

Some courts appear to disallow stigma damages because of analysis rooted in the basic premise that such damages are accounted for in the already-existing, traditional measures of recovery. In DelGuidice, remember, the court held that stigma damages not provided for in the contract can be awarded on a breach of contract action in few circumstances.130 One such circumstance is when the remedy of replacement, as provided for in the contract, is impracticable, e.g., when such repair or replacement would constitute “substantial economic waste.”131 A Florida District Court of Appeals in DelGuidice stated that the diminution in value standard would have made it to the jury if the plaintiff had come forth with “competent substantial evidence” demonstrating that the cost to repair the termite infestation (which included not only repairing the existing damage but also eradicating the termites) “was substantially greater than the diminution in value” of the house.132 DelGuidice, however, had not shown that attempting to effectively fix the problem would result in economic waste.133 Accordingly, the court held that the plaintiff was limited to his remedies within the contract—repair of any damage and retreatment.134

Such a reading might suggest that the barrier to the plaintiff’s potential recovery of stigma damages is in the arena of contract law more

128. See supra Part IV.C.
129. Geisinger, supra note 87, at 496.
131. Id.
132. Id. at 1160.
133. Id. at 1161.
134. Id.
generally.  

Under the DelGuidice analysis, either diminution in value or cost to repair is awarded, and the complex panoply of rules discussed earlier indicate precisely which the court will choose. It is this rigidity and adherence to the either/or form of this traditional measure that appears to foreclose the recovery of stigma damages in some courts.

It must be remembered, however, that the duality created by the provision in the Restatement of Contracts and applied by the courts for so many years is merely a measure, a proxy for what damage the plaintiff has suffered. Some courts breaking this traditional mold have recognized that out-of-pocket and benefit-of-the-bargain measures of damages are not exclusive if neither, standing alone, will make the plaintiff whole. Furthermore, many courts recognize that the function of damages is not to submit to a rigid formula, but rather to fully compensate the plaintiff. Indeed, a rigid approach to damages justified by efficiency, ease of calculation, or custom threatens to deprive plaintiffs of compensation for losses they have suffered that extend beyond the confines of traditional formulas.

Furthermore, it is questionable that, in a stigma-type injury scenario, the either/or measure would be consistent with principles forming the basis of contract damages generally. The object and measure of damages under theory of contract is to “put the injured party in as good a position as if performance had been rendered.” Contract damages are limited to two broad categories of permissible damages: “direct (or general) damages and consequential (or special) damages.” General damages “naturally flow from the breach” and are consistent with the Restatement provisions concerning certainty, causation, and foreseeability. Special damages, by

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135. See supra Part II.A.
136. See supra Part II.A.
137. See, e.g., Orkin Exterminating Co. v. DelGuidice, 790 So. 2d at 1160 (stating that if repair damages will make the plaintiff whole, additional damages for diminution in value are unavailable, and if diminution in value damages are smaller, repair damages are unavailable).
139. E.g., In re Paoli R.R. Yard PCB Litig., 35 F.3d 717, 797-98 (3d Cir. 1994).
140. See Wade v. S.J. Groves & Sons Co., 424 A.2d 902, 912 (Pa. Super. Ct. 1981) (stating that fixed formulas and rules “must give way when it is determined that they are not setting a compensatory standard”) (internal quotations omitted).
143. Id.
way of contrast, are recoverable “only if the special circumstances were within the contemplation of both parties” at the time of the contract’s formation.145 Accordingly, because stigma-type damages will almost never be provided for in the typical contractual agreement, the most successful way to get the issue of stigma damages to the jury would be to convince the court that such damages are within the scope of general damages.

The most direct course of achieving this objective would be to reify stigma damages as a type of damage akin to a manifest physical damage to other property. Such physical damages that are foreseeable to the parties, incident to a breach of contract, are generally recoverable.146 In this vein, then, it would appear likely that stigma damages as contemplated by the first definition set forth above would be properly recoverable under the DelGuidice analysis, which sweeps the concept of “stigma damages” into the diminution in value measure.147 Such a position does not appear to offer any guidance with respect to the mold scenario contemplated by this Note,148 because, while the termite situation could theoretically be remedied to the point where the insects were eradicated, mold could potentially come back at any time, and such potential stigmatizes the building.

Customs regarding the measurement of damages are in place because they work, but they should not be so rigid that they squelch out the guiding inquiry to any damages question—namely: In what way can the plaintiff be made whole or accurately compensated for any loss caused by the defendant’s failure to exercise due care?149 It would appear that the argument advanced by the Florida Supreme Court in DelGuidice could be most readily set aside; indeed, the court’s characterization of the damages as diminution in value and subsequent treatment does not appear to square

146. See, e.g., Filiberto v. Conditioned Air Co., 112 So. 2d 748, 748-49 (La. Ct. App. 1959) (permitting a homeowner to recover costs for “ceiling damage resulting from water which seeped into the ceiling as a result of” defects in the cooling system installed by the contractor).
147. See Orkin Exterminating Co. v. DelGuidice, 790 So. 2d 1158, 1159 (Fla. Dist. Ct. App. 2001) (stating that plaintiff may have been able to recover stigma damages if he would have been able to show that repair was impracticable because it would have resulted in economic waste).
148. See supra Part I.
149. See, e.g., Anderson v. Bauer, 681 P.2d 1316, 1324 (Wyo. 1984) (noting that neither the cost to repair nor the diminution in value measure should be preferred, but that the “primary objective” should be “to determine the amount of loss, applying whatever rule is best suited for that purpose”) (quoting Douglas Reservoirs Water Users Ass’n v. Cross, 569 P.2d 1280, 1284 (Wyo. 1977)).
2. **Stigma Damages As “Too Speculative”**

A logically stronger argument against stigma damages is that such damages either do not objectively exist or are too speculative to warrant holding the defendant liable. Indeed, in the construction context, an owner seeking to recover from a contractor must prove both of the following: (1) the existence and nature of the defects—that they were due to either faulty materials or workmanship; and (2) the cost of repairing the defects. If the plaintiff fails to meet this standard—to either prove damages with requisite specificity or that the defect was from poor workmanship and not materials, or vice versa—most courts will not allow damages. The biggest crux for a plaintiff seeking stigma damages is this burden of proving them.

Following suit, some courts have disallowed a plaintiff’s claim for stigma damages on the basis that “[s]tigma to realty, in and of itself, is too remote and speculative to be a damage.” This position, however, is hardly unassailable. Several federal courts have considered this argument when advanced by defendants and summarily disposed of it. These defendants have, in federal courts, argued that the testimony of a witness—e.g., an appraiser or real estate broker—testifying as to potential fluctuations in the market, given certain defective features of a property

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150. Compare supra notes 102-09, 117-22 and accompanying text (explaining the holding in *DelGuidice*), with cases cited supra Part IV.A.-B. (discussing the historical use of stigma damages in nuisance, trespass, and tort cases).


152. See id. (holding that because there was no evidence of poor workmanship damages awarded by the lower courts must be disallowed).

153. Hammond v. City of Warner Robins, 482 S.E.2d 422, 428 (Ga. Ct. App. 1997). Note, however, that the *Hammond* court characterizes stigma as a situation that could arise when a “minimal physical invasion” exists which “would not rise to the level of actual hazard to health or safety.” Id. The court also perhaps leaves the door open by stating that “[s]pecial damages proximately flowing from such nuisance must be shown.” Id.

154. See, e.g., United States v. 14.38 Acres of Land, 80 F.3d 1074, 1078-79 (5th Cir. 1996) (rejecting the government’s claim that evidence of diminution in value was “speculation and conjecture” and therefore inadmissible); *Vector Pipeline, L.P.* v. 68.55 Acres of Land, 157 F. Supp. 2d 949, 957 (N.D. Ill. 2001) (accepting the testimony of two appraisers as cogent evidence supporting stigma damages).
should be excluded under Rule 702. In the federal context, Rule 702 plainly provides that an expert may be qualified “by knowledge, skill, experience, training, or education,” which would include either the skill, training and education-intensive basis of an appraiser’s knowledge or the experiential basis of a broker’s knowledge. On such a basis, the testimony of an appraiser and a broker with respect to a property's stigma has been held to be credible as well as admissible. This rule would appear to be the most sound, especially given the purpose of experts in any court system. One remedy for the defendant would be to simply put on his own expert who could testify that the plaintiff’s expert’s methodology was flawed, there were alternative ways of assessing damages, or that damages are, in fact, too speculative.

Two recent state court decisions detail such dynamics with respect to experts: a Louisiana Supreme Court case in which the plaintiff submitted the testimony of a real estate appraiser and a Utah Supreme Court case in which the plaintiff submitted the testimony of a real estate agent and an appraiser.

The Louisiana case involved asbestos contamination of several homeowners’ land. The plaintiffs’ expert testified that the plaintiffs’ property values would be depressed even after remediation because of “the ‘stigma effect’ the presence of the asbestos would have on the properties.” The plaintiffs would be required to disclose “that the property had once been contaminated with asbestos-containing soil” when they tried to sell the property. This expert stated that most of the buying public would be resistant to buying once disclosure was made and that “prudent buyers would be more likely to buy a house that ha[d] never been contaminated with a hazardous substance than one that ha[d] been contaminated and remediated.” Most people were frightened by the word “asbestos,” understood it was a carcinogen, and would be concerned even after it was cleaned up, according to the expert. The expert

156. FED. R. EVID. 702.
161. Id. at 1239.
162. Id.
163. Id.
164. Id.
conceded that the defendant’s remedial improvements, including certain landscaping, had enhanced the outward appeal of the plaintiffs’ houses and possibly made the homes “more sellable.” The expert stressed, however, that more sellable did not mean more valuable—“improving the looks of a home does not necessarily change its value.”

The defense expert, also a real estate appraiser, testified with respect to his appraisal and evaluation of property that had been impacted environmentally. He testified that the effect of stigma quickly diminishes after remediation is completed. His testimony regarding the postremediation value of the properties took into consideration both the potential stigma effect on the properties and the defendant’s remediation efforts, including the landscaping, which added value to each plaintiffs’ property. The expert concluded that the stigma of former contamination of asbestos-containing materials on plaintiffs’ lawns had not adversely affected the properties’ value. Furthermore, he argued that potential buyers preferred properties that had been contaminated and remediated over those that had never underwent remediation. According to this expert, remediated property had been officially declared “safe” while property which had not ever been remediated was unknown as to its safety.

The Bonnette proceedings underscore the manner in which a jury is capable of hearing and considering both arguments to conclude whether such expert testimony is credible without recourse to the exclusion of such evidence. This approach has been favored by several courts.

165. *Id.* (quotation marks omitted).
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.* (quotation marks omitted).
173. *See id.* at 1240 (stating that “questions of [expert testimony] credibility are for the trier of fact” and holding that the damages awarded by the trial court were not manifestly erroneous because there were “two permissible views of the evidence”).
174. *See, e.g.*, United States v. 14.38 Acres of Land, 80 F.3d 1074, 1078-79 (5th Cir. 1996) (stating that any flaws in expert testimony “are matters properly to be tested in the crucible of adversarial proceedings” rather than being subject to exclusion by a trial court); Vector Pipeline, L.P. v. 68.55 Acres of Land, 157 F. Supp. 2d 949, 957 (N.D. Ill. 2001) (holding that evidence of “stigma” damages based on expert testimony is admissible and objections to the methodological basis for the testimony should go to weight, and not the admissibility, of the evidence); *see also* Walker Drug Co. v. La Sal
Defendants would be permitted to argue before the jury that such damages, the measures thereof, or testimony concerning them were too remote and speculative or otherwise improper.\textsuperscript{175} It would appear that this prospect would more closely conform to the spirit of our system without compromising its integrity and permitting plaintiffs windfall damages. Furthermore, as a theoretical sampling of the greater population, a jury is potentially similar to the members of the “market” who determine the diminished value of such property. If these members of the market conclude that such testimony is credible and plaintiffs deserve certain damages, this would provide a more common sense method of determining what damages are due.

A Utah Supreme Court case considered a defendant’s argument about the admissibility of a real estate broker’s expert testimony with respect to certain stigma damages for a plaintiff’s property that had been contaminated by gasoline.\textsuperscript{176} The broker’s testimony centered partly on her own experiential knowledge with respect to the specific property owned by the plaintiffs.\textsuperscript{177} The witness testified that she personally knew about the property’s contamination and conceded that well-informed buyers would also likely have known the property was contaminated during the 1980s.\textsuperscript{178} However, she testified that the public’s perception with respect to environmental contamination’s effects on property values in the plaintiff’s town shifted considerably after March 1, 1990, which was the beginning of the limitations period for the case.\textsuperscript{179} Based on this witness’s experience as a real estate agent and appraiser in the area, she testified that buyers became more sophisticated about environmental contamination after 1990.\textsuperscript{180} These buyers asked detailed questions about potential contamination and gave more consideration to contamination when assessing value, in contrast to the 1980s, when contamination was not

Oil Co., 972 P.2d 1238, 1247-48 (Utah 1998) (holding that the trial court erred in refusing to admit testimony about stigma damages despite the fact that the witness “could not precisely detail the amount by which stigma to the . . . [p]roperty allegedly arose or increased”).

\textsuperscript{175} See United States v. 14.38 Acres of Land, 80 F.3d at 1078 (“Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.”) (quoting Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 596 (1993)).

\textsuperscript{176} Walker Drug Co. v. La Sal Oil Co., 972 P.2d at 1247.

\textsuperscript{177} Id.

\textsuperscript{178} Id.

\textsuperscript{179} Id.

\textsuperscript{180} Id.
considered very important. The witness tied such perception to regulatory changes taking place in 1990, which increased the effect of environmental contamination on the value of property. Additionally, she testified that in 1993, real estate agents became obligated to disclose any land conditions bearing on a property’s environmental purity.

The defendant argued against the relevance of the plaintiffs’ expert’s testimony, charging in part that the testimony did not address changes in the public perception regarding the plaintiffs’ property after 1990. However, the court found that the expert’s testimony permitted an inference that a prospective buyer after March 1, 1990, would likely have approached the plaintiffs’ contaminated property more carefully than a buyer before that date would.

Additionally, the methods of determining stigma loss for real property should be bolstered in part by the role of appraisers and the means by which appraisers arrive at an assessed value: “An appraisal is an unbiased estimate of the value of property based on pertinent data, application of appropriate analytical techniques to the data, and the knowledge, experience, and professional judgment of the appraiser.” Because “[a]n appraisal requires consideration of all market value influences,” the appraiser must evaluate not only all the characteristics of the property, “but also the social, economic, governmental, and environmental circumstances affecting the property.” Once relevant data has been collected, “the appraiser estimates the market value of the subject property by comparison to similar properties.”

181. Id.
182. Id.
183. Id.
184. Id.
185. Id.
186. Stott, supra note 6, at 372-73.
187. Id. at 373.
188. Id. (citing W.  Ventolo, Fundamentals of Real Estate Appraisal (4th ed. 1987); R. Dombal, Residential Condominiums: A Guide to Analysis and Appraisal 70 (1976)). This method is referred to as the “‘direct market comparison approach,’ and is the most appropriate method of appraising residential real estate.” Id. n.36 (citations omitted). See also Richard O. Faulk, Damages Without Injury? Speculating in “Stigma” Damages, ALI-ABA Course of Study: Envtl. Litig., June 22, 1998, at 903 (quoting The Dictionary of Real Estate Appraisal (Appraisal Inst. 3d ed. 1993)) (noting that “the market value of real estate is . . . ‘[t]he most probable price . . . for which the property should sell after reasonable exposure in a competitive market under all conditions requisite to a fair sale, with the buyer and seller each acting prudently, knowledgeable, and for self-interest, and assuming that
Given the appraisal process, it would appear as well that the argument for rejection of stigma damages as too speculative is nearly mooted by the real estate appraisal process. The value of real property, as ascertained therein, is rooted in the subjective judgment of the persons forming the composition of the marketplace.\textsuperscript{189} The appraisal process itself should as well be suspect—as an objective process, its definitions and methods may “provide guidelines for predicting human behavior, not hard rules for calculating with mathematical precision.”\textsuperscript{190} Such is the concept of value, however—it is not a matter of mathematical precision, but rather a value-laden, human-created concept, subject to human fancy, desires, and fears.

Also weighing against the position that stigma damages are too speculative is that courts have permitted stigma damages in all manner of relevant scenarios. Stigma damages, or damages based on the same measure, have been awarded in construction defect cases\textsuperscript{191} and nuisance cases, which merit consideration because they, too, deal with injuries to real property.\textsuperscript{192} Furthermore, removed from the construction defect litigation and real property context, stigma-type damages (as conceptualized under this Note’s second definition) have been permitted in certain damage to personal property cases including “injuries to a surveyor’s transit, canned goods, a bridge, transformers, a porcelain portrayal of the Last Supper, aluminum panels, . . . railroad cars,”\textsuperscript{193} and automobiles.\textsuperscript{194}

What these cases demonstrate is the dialectic between compensation for all of the plaintiff’s losses on one end and the reasonable certainty of damages on the other.\textsuperscript{195} The problem with these cases, however, is that neither is under undue duress”\textsuperscript{195} (second omission in original).

\textsuperscript{189} Faulk, supra note 188, at 912-13.
\textsuperscript{190} Id. (citing Eric S. Schlichter, Comment, Stigma Damages in Environmental Contamination Cases: A Possible Windfall for Plaintiffs?, 34 Hous. L. Rev. 1125, 1130 (1997)).
\textsuperscript{192} See supra Part IV.A.
\textsuperscript{193} Stott, supra note 6, at 384-85 (footnotes omitted).
\textsuperscript{195} See Young, supra note 5, at 425 (arguing that Paoli provides a rule that “is broad enough to cover the different types of litigation under which stigma damages arise[, y]et . . . refined enough to manage the opposing goals of full compensation and
they were all pursued under theory of tort. One commentator has gone so far as to advocate the three-part test, adopted by a Third Circuit panel in assessing stigma damages, to be applied in the context of property damage. 196 This commentator proposed this test for myriad claims for damages to property—from the torts of nuisance and negligence to breach of contract. 197 While this approach is appealing from a plaintiff's perspective, whereby homeowners and their attorneys would hope that courts will one day recognize all damages actually suffered by the homeowner, it fails almost completely from a pragmatic perspective, primarily because it ignores the strong fences courts have erected between tort and contract. 198 While part of the appeal of this test could potentially be rooted in the similarity between certain kinds of stigma and the contamination cases, 199 in the final analysis, it appears unlikely to take hold as the dominant force in contract law.

3. **Improper Allocation of Risk on Defendant Builders**

A plaintiff would pursue stigma damages (under the second definition contemplated by this Note) when repair would fail to restore the property to its value before the damage. 200 Many courts have used the economic rule as a guard against these types of damages. In a nuisance action, one court used the economic loss rule to preclude the recovery of stigma damages. 201

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196. See id. (arguing that the primary barrier for plaintiffs pursuing stigma damages in any action for damages to property is finding the balance between their own compensation and "reasonable certainty"). The test Young advocates is as follows:

"where (1) defendants have caused some (temporary) physical damage to plaintiffs' property; (2) plaintiffs demonstrate that repair of this damage will not restore the value of the property to its prior level; and (3) plaintiffs show that there is some ongoing risk to their land[, plaintiffs can make out a claim for diminution in value of their property without showing permanent physical damage to the land]."

Id. at 416 (quoting *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d at 717, 798 (3d Cir. 1994)).

197. Id. at 425.

198. See supra Part II.B.1, which discusses the economic loss rule and just why it would likely defeat this test proposed by Young.


200. See Stott, *supra* note 6, at 370, 380-93 (discussing the definition of stigma damages and the reasons such damages would be pursued by a plaintiff).

The plaintiff’s claim involved a contractual dispute, and the court saw the plaintiff’s allegation, in part as a way in which the plaintiff was attempting to “transpose [his] contractual dispute into a tort action.”\textsuperscript{202} Other courts have used the economic loss rule to preclude recovery in tort for “economic losses” (including stigma damages) because such losses, according to these courts, were more appropriately pursued under theory of contract or warranty.\textsuperscript{203} One court used the economic loss rule to preclude a tort cause of action for construction defects that had not yet resulted in injury.\textsuperscript{204} Another decision used the economic loss rule to preclude plaintiff’s cause of action for a stigma-type damage where plaintiff claimed that defendant’s negligence caused flooding on the plaintiff’s property, and that the heightened propensity of the property to flood lowered the market value of the home.\textsuperscript{205} The court there said that such “damages reflect[ed] prolonged deterioration and disappointed expectations” and, as such, were “economic in nature and therefore . . . not recoverable under a negligence theory.”\textsuperscript{206}

Why do these courts deny recovery? Partially, the reasoning is rooted in the same philosophy behind the courts’ adoption of the economic loss rule.\textsuperscript{207} Inherent in this argument, and probably its most logically persuasive component, is that because the relationship is governed by contract, contract should form the basis for recovery.\textsuperscript{208} Further extending this logic, any other outcome would upset the allocation of risk contemplated by the contract and, furthermore, unfairly shifts the burden of loss on the defendant.

Some commentators question these arguments.\textsuperscript{209} One has stated that scholars who advocate the economic loss rule, who also cite tradition as its principal logical basis, neglect the historical fact that very few decisions before 1950 held that injured parties could not recover damages under

\begin{itemize}
\item \textsuperscript{202} Id.
\item \textsuperscript{204} Aas v. Super. Ct., 12 P.3d 1125, 1138 (Cal. 2000) (superseded by statute).
\item \textsuperscript{205} Jordan v. Talaga, 532 N.E.2d at 1182.
\item \textsuperscript{206} Id.
\item \textsuperscript{207} \textit{See supra} Part II.B.1.
\item \textsuperscript{208} \textit{See supra} Part II.B.1 (discussing the reasoning supporting the economic loss rule).
\item \textsuperscript{209} \textit{See, e.g.}, Lieder, \textit{supra} note 57, at 945-46 (disputing the historical justifications for the economic loss rule).
\end{itemize}
negligence for purely economic losses. Additionally, some courts historically would impose a tort duty on a defendant who performed duties under a contract poorly that resulted in economic losses, stating that such duty arose at least partially independent of the contract. Finally, contractual claims against the builders were often based in the builder’s implied duty “to use the skill and care of ordinarily skilled persons in the business,” a duty courts would read into the contract. This analysis survives through the action in negligence, permitted in many jurisdictions, for the tort of negligent construction.

Furthermore, some argue that homebuyers are in a different position than the average commercial consumer contemplated by those who advocate the economic loss rule. The home is the biggest investment most consumers ever make and when damages to a structure include such problems as a structural defect, soil subsidence or compaction, drainage, or a latent defect, buyers are often incapable of evaluating the problem themselves. Because buyers do not understand the defect, the chances of recurring problems, or whether the nature and full extent of repair are impossible or impracticable, the market may demand a diminished price because such buyers evaluate the situation, which, in turn, determines the market value.

VI. CONCLUSION

In an attempt to search for some coherence within the uneven and diverging landscape of stigma damages, this Note sought to determine under what circumstances plaintiffs have pled, had courts consider, and prevailed on awards of stigma damages. The principal aim of this Note was to examine various barriers plaintiffs must overcome in the context of construction defect litigation and to attempt to find whether arguments

210. Id. at 945.
211. Id.
212. Id. at 946.
213. See, e.g., Cosmopolitan Homes, Inc. v. Weller, 663 P.2d 1041, 1042 (Colo. 1983) (en banc) (stating that the tort of negligent construction is independent from contractual remedies for latent defects); Nat’l Chain Co. v. Campbell, 487 A.2d 132, 136 (R.I. 1985) (stating the plaintiff could sue for breach of contract as well as negligent construction).
215. Id.
216. Stott, supra note 6, at 369-70.
217. Id.
may be successfully deployed around them. It is arguable that stigma damages should at least be permitted to get around the various obstacles and to the factfinder, whose judgment will determine whether or not such damages should be permitted, rather than excluded because of a technical rule drawn on sharply contested principles. However, the structure of the case law appears to be against recovery of stigma damages apart from those contemplated by the first definition considered by this Note—i.e., those that are virtually indistinguishable from the diminution in value measure set forth in the Restatement of Contracts. Perhaps part of the future, however, depends on the future reaction of various courts to the Florida Court of Appeals decision in DelGuidice. While the Florida Supreme Court denied review of DelGuidice,218 the fragmented case law still indicates a stubborn ambiguity in this area of the law.

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