MICHAEL CAPRIOTI, et al., Plaintiffs, v. BEAZER HOMES CORP. d/b/a BEAZER HOMES GROUP, et al., Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION – CIVIL PART GLOUCESTER COUNTY DOCKET NO. GLO-L-45-16 CIVIL ACTION **OPINION**

RANDAL ALLEN, et al., Plaintiffs, v. BEAZER HOMES CORP. d/b/a BEAZER HOMES GROUP, et al., Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION – CIVIL PART GLOUCESTER COUNTY DOCKET NO. GLO-L-57-16 CIVIL ACTION **OPINION**

Before the court are defendant, Beazer Homes Corp. d/b/a Beazer Homes Group's ("Beazer Homes" or defendant) motions for summary judgment in these two companion cases (referred to herein as the "Caprioti action" and the "Allen action")which were consolidated for discovery purposes. The motions, which raise issues of first impression, seek to dismiss the claims of certain of the plaintiffs as being time-barred. The motions affect 34 plaintiffs in the *Caprioti* action and 13 plaintiffs in the *Allen* action. Plaintiffs oppose the motion. The court heard oral argument on

August 19, 2016, took the motions under advisement, and after carefully reviewing the motion record, now issues this Opinion pursuant to *Rule* 1:6-2(f).[1]

RELIEF REQUESTED

This matter arises out of alleged unlawful sales practices in connection with the selling of homes. Plaintiffs contend that Beazer Homes violated the Consumer Fraud Act ("CFA"), *N.J.S.A.* 56:8-1 to -20, by selling homes to more than 100 plaintiffs without including allegedly pertinent information regarding the type of septic tank used on the properties. Beazer Homes now moves for summary judgment against 47 plaintiffs, contending that they filed their Complaint more than 10 years after the purchase of their homes, and are thereby beyond the applicable 10-year Statute of Repose.[2]

PROCEDURAL HISTORY

Plaintiffs filed their Complaints on December 24, 2014. Each Complaint contains a single count alleging violation of the CFA. Beazer Homes filed their Answers on March 31, 2016. In its Answers, Beazer Homes asserted an affirmative defense that plaintiffs' claims were barred by the applicable statute of limitation and/or statute of repose. By Order dated June 24, 2016, these two matters were consolidated for discovery only with a third case captioned *Michael Cocozza, et al.*

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[1] Because the cases involve the same factual patterns, claims and defenses, and the two motions raise the same legal issues, the court is issuing a single Opinion deciding both motions.

[2] The motion seeks dismissal of the claims of the following 34 plaintiffs in the *Caprioti* action: Michael Caprioti, Amy Caprioti, Mark Connolly, Tracy Connolly, Jeffrey Hayes, Elliot Hudak, Arlene Hudak, Mary Kelley, Robert Kelley, Kim McNally, Ryan McNally, Michael Pecorilli, Gina, Mary Kate Racobaldo, Salvatore Racobaldo, Chris Reuter, Bridget Reuter, Lesley Rhoades, Bill Tringer, Cheryl Stringer, Robert Sullivan, Jodi Sullivan, Leila Stennie, Paul Stennie, James Vaites, Theresa Vaites, Cindy Volkmann, Ron Volkmann, George Wang, Kathy Wu, Nora Zacierka, Michael Zacierka, Robert Thompson and Mary Chris Thompson.
The motion seeks dismissal of the claims of the following 13 plaintiffs in the *Allen* action: Robert Anicic, Gretchen Anicic, Meredith Barnes, Nathan Barnes, William Craig, Stacey Craig, Brian Dougherty, Josie Dougherty, Katie Homola, Jason Homola, Joseph Loftis, Richard Young and Cherie Young.
For purposes of this Opinion, the aforementioned plaintiffs shall be referred to as the "47 plaintiffs."

v. Beazer Homes, etc., Docket No. GLO-12-16. The Discovery End Date is June 24, 2017. Plaintiffs do not contend that additional discovery is necessary before these motion are decided.

FACTUAL BACKGROUND

For purposes of analyzing these motions, plaintiffs' factual allegation will be considered to be true. Plaintiff makes the following allegations against Beazer Homes:

1. Beazer Homes constructed and sold homes in the developments known as Greenwich Meadows (the *Caprioti* action), The Reserve at Mullica Station (the *Allen* action), and Harrison Run (the *Allen* action).
2. Beazer Homes "misrepresented and concealed material facts regarding the homes' septic tank systems, engaged in unconscionable practices, and otherwise violated New Jersey's Consumer Fraud Act in connection with the sale of these homes, causing Plaintiffs to suffer ascertainable harm and obligating Beazer to pay all damages recoverable under the CFA." Complaints, ¶ 1.
3. The homes Beazer Homes sold to plaintiffs included an individual sewage disposal system, or septic tank system ("STS").
4. In New Jersey, a conventional stone and pipe septic tank system ("CSTS") has an expected minimum life expectancy of approximately 25 years, and it is not uncommon for a CSTS to perform properly well beyond 25 years.
5. The homes that Beazer Homes sold to plaintiffs did not include a CSTS. Instead, the homes included an infiltrator or chamber septic tank system (ISTS"). An ISTS will more often fail prematurely and at a higher rate than a CSTS using stone and perforated pipes.
6. The ISTS typically have a 34" width and 12" height and store approximately 12 gallons per lineal foot. This type of storage does initially limit the effluent distribution to a small

area and keeps the area closest to the infiltrator inlet wet at all times. Disbursement to the entire disposal bed area does not occur until the first area becomes too saturated to allow the water to drain. Saturated conditions cause premature biomat development and soil clogging. The CSTS uses a 3" or 4" pipe over a bed of stone which permits a much more even disbursement and slower and more even biomat development resulting in longer life.

7. The fact that a new home is equipped with an ISTS rather than a CSTS is a material fact which a reasonable person would want to know before purchasing a new home, as is the useful life of a new home's STS. Accordingly, the differences between a CSTS and an ISTS are material facts which a reasonable person would want to know before purchasing a new home.

8. In connection with Defendant Beazer's sales of the homes to Plaintiffs, Defendant Beazer suppressed, concealed, or omitted at least the following material facts with intent that Plaintiffs rely upon such concealment, suppression or omission: (1) the fact that each new home was equipped with an ISTS rather than a CSTS, (2) the useful life of the ISTS Beazer included with the homes they sold to Plaintiffs, (2) (sic) that Beazer did not know the useful life of the ISTS included with the homes Beazer sold to Plaintiffs and/or (3) the differences between a CSTS and an ISTS.

9. In connection with Defendant Beazer's sales of the homes to Plaintiffs, Defendant Beazer engaged in unconscionable, deceptive, and/or fraudulent conduct and/or engaged in false pretenses, false promises, and/or misrepresentations, including but not limited to falsely stating in writing that each "Septic system is to be capable of properly handling normal flow of household effluent."

10. Beginning no earlier than 2010 some Plaintiffs' Beazer ISTSs began to experience problems, including but not limited to: septic system failure, the need to pump the septic systems more frequently, sewage back up into the home, septic water visible in the field, the septic field exhibiting signs of poor drainage, and objectionable sewage odor coming from the septic field.
11. Plaintiffs have attempted various repairs to no avail.
12. The replacement cost for each CSTS Defendant Beazer sold to Plaintiffs would cost between approximately $15,000 to $25,000, not including the cost of landscaping or other costs associated with removing the STS and replacing it with a properly functioning, adequate, appropriate STS.

Plaintiffs do not claim that the design, construction or installation of the septic systems violated any statute, regulation or rule, or that the septic systems were installed without required inspections, permits or approvals. Nor do plaintiffs claim that the written contract they entered into with Beazer Homes violated any technical statutory or regulatory requirements. The court further notes that Beazer Homes did not warranty the septic system for a defined period of time.

PARTIES' POSITIONS

Beazer Homes moves to dismiss the claims of 47 plaintiffs in these matters because their claims are barred by the 10-year Statute of Repose, *N.J.S.A.* 2A:14-1.1(a). The statute of repose bars all claims relating to home-design or construction if filed more than ten years from the date the design or construction was rendered. Each of the aforementioned plaintiffs allege that Beazer Homes violated the CFA by furnishing inadequate or inferior septic systems on plaintiffs' properties contrary to the representation that each "septic system is to be capable of properly handling normal flow of household effluent." These 47 plaintiffs acknowledged that Beazer

Homes completed construction of their homes no later than December 13, 2005, and that they filed their Complaints against Beazer Homes more than 10 years later on December 24, 2015. Accordingly, Beazer Homes contends that the claims of these 47 plaintiffs are time barred and must be dismissed.

Plaintiffs oppose the motion, arguing that the statute of repose does not apply to plaintiffs' CFA claim, as it arises out of defendant's unlawful sales practices, not negligent design, planning or construction of their homes. More specifically, plaintiffs contend that their CFA claims are not premised upon any "deficiency in the design, planning, surveying, supervision or construction" of the home, but are instead based on Beazer Homes misrepresenting that each "septic system is to be capable of properly handling normal flow of household effluent." Plaintiffs assert that the alleged inadequacy of the septic systems was not discovered until long after the date of sale, but within two years of the filing of their Complaint.

SUMMARY JUDGMENT STANDARD

"*Rule* 4:46-2(c) provides that a court should grant summary judgment when 'the pleadings, depositions, answers to interrogatories, admissions on file, together with affidavits, if any, show that there is no genuine issue of any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law.'" *Brill v. Guardian Life Insurance,* 142 *N.J.* 520, 528-29 (1995) (quoting *Rule* 4:46-2(c)).

The summary judgment rule set forth in *Rule* 4:46-2 "serves[s] two competing jurisprudential philosophies": first, "the desire to afford every litigant who has a bona fide cause of action or defense the opportunity to fully expose his case," and second, to guard "against groundless claims and frivolous defenses," thus saving the resources of the parties and the court. *Id.* at 541-42 (quoting *Robbins v. Jersey City*, 23 *N.J.* 229, 240-41 (1957)).

> "An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." *R.* 4:46-2(c).
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> [A] determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in a light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.
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> [*Brill*, *supra*, 142 *N.J.* at 540.]

Rule 4:46-2(c)'s genuine issue of material fact standard mandates that the opposing party do more than point to *any* fact in dispute in order to defeat summary judgment. *Brill*, *supra*, 142 *N.J.* at 529. Under that standard, once the moving party presents sufficient evidence in support of the motion, the opposing party must "demonstrate by competent evidential material that a genuine issue of fact exists[.]" *Robbins*, *supra*, 23 *N.J.* at 241; *see also Brill*, *supra*, 142 *N.J.* at 529 (noting opposing party should "come forward with evidence that creates a 'genuine issue as to any material fact challenged'" (quoting *R.* 4:46-2)). As Justice Coleman noted in *Brill*, *supra*, if the party opposing the summary judgment motion "offers . . . only facts which are immaterial or of an insubstantial nature, a mere scintilla, "fanciful, frivolous, gauzy or merely suspicious," he will not be heard to complain if the court grants summary judgment." *Id*. at 529.

"A court deciding a summary judgment motion does not draw inferences from the factual record as does the factfinder in a trial, who 'may pick and choose inferences from the evidence to the extent that 'a miscarriage of justice under the law' is not created.'" *Globe Motor Co. v. Igdalev*, 225 *N.J.* 469, 480 (2016) (quoting *Brill*, *supra*, 142 *N.J.* at 529 (quoting *R.* 4:49-1(a)). "Instead, the motion court draws all legitimate inferences from the facts in favor of the non-moving party." *Ibid*. (citing *R.* 4:46-2(c)).

The court cannot resolve contested factual issues, but instead must determine whether any genuine factual disputes exist. *Agurto v. Guhr*, 381 *N.J. Super.* 519, 525 (App. Div. 2005). If there are materially disputed facts, the motion for summary judgment should be denied. *Parks v. Rogers*, 176 *N.J.* 491, 502 (2003); *Brill*, *supra*, 142 *N.J.* at 540.

"The motion court must analyze the record in light of the substantive standard and burden of proof that a factfinder would apply in the event that the case were tried." *Globe Motor Co., supra*, 225 *N.J.* at 480. As our Supreme Court most recently indicated, the task of a court reviewing a motion for summary judgment "is not to weigh the evidence, not to decide who has the better case or who is more likely to succeed before the jury." *Steinberg v. Sahara Sam's Oasis*, ___ *N.J.* ___ (2016) (slip op. at 29). At this stage, the strength of the plaintiff's case "is not at issue." *Ibid*. Instead, to grant the motion, the court must find that "the evidence is so one-sided that one party must prevail as a matter of law …." *Brill*, *supra*, 142 *N.J.* at 540 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 *U.S.* 242, 252, 106 *S.Ct.* 2505, 2512, 91 *L. Ed.* 2d 202, 214 (1986)). Thus, to prevail on a summary judgment motion, defendants must show that plaintiffs' claims are so deficient as to warrant dismissal of her action. *See Butkera v. Hudson River Sloop "Clearwater", Inc.*, 300 *N.J. Super.* 550, 557 (App. Div. 1997).

Where discovery on material issues is not complete the non-moving party must be given the opportunity to take discovery before disposition of the motion. Pressler & Verniero, *Current N.J. Court Rules*, comment 2.3.3 on *R.* 4:46-2 (2012). Moreover, where a claim for relief is based on allegation of the adverse party's bad faith, discovery that would adduce facts giving rise to an inference of bad faith must be permitted before the summary judgment motion is heard. *Wilson v. Amerada Hess Corp.*, 168 *N.J.* 236, 253-54 (2001). "However, a respondent on a summary judgment motion who resists the motion on the ground of incomplete discovery is obliged to

specify the discovery still required." Pressler & Verniero, *Current N.J. Court Rules*, *supra,* comment 2.3.3 on *R.* 4:46-2 (citing *Trinity Church v. Lawsen-Bell*, 394 *N.J. Super.* 159, 166 (App. Div. 2007); *Alpert, Goldberg v. Quinn*, 410 *N.J. Super.* 510, 538 (App. Div. 2009)).

"The cases are legion that caution against the use of summary judgment to decide a case that turns on the intent and credibility of the parties." *McBarron v. Kipling Woods*, 365 *N.J. Super.* 114, 117 (App. Div. 2004). Summary judgment motions should ordinarily be denied where an action requires determination of a state of mind or intent, such as claims of bad faith or fraud. *Auto Lenders v. Gentilini Ford*, 181 *N.J.* 245, 271-72 (2004); *Liebling v. Garden State Indem.*, 337 *N.J. Super.* 447, 463 (App. Div.), *certif. denied*, 169 *N.J.* 606 (2001) ("When subjective elements such as state of mind or good faith are at issue, a conclusion from papers alone that palpably there exists no genuine issues of material fact will ordinarily be very difficult to sustain.").

ANALYSIS

By assuming that the facts alleged by plaintiffs are true, there are no material facts at issue with respect to the issues raised by these summary judgment motions. The parties agree that the dates of completion of construction and purchase of the homes in question are not in dispute. They have been stipulated by the parties.

Plaintiff	**Purchase Date**
Michael and Amy Capriotti	12/1/2004
Mark and Tracey Connolly	9/14/2004
Jeffrey Hayes	11/12/2004
Elliott and Arlene Hudak	3/29/2005
Mary and Robert Kelley	9/15/2005
Kim and Ryan McNally	9/10/2004
Michael and Gina Pecorilli	9/29/2004
Mary Kate and Salvatore Racobaldo	3/29/2005
Chris and Bridget Reuter	10/15/2004
Lesley Rhoades	10/4/2004
Bill and Cheryl Stringer	11/11/2004
Robert and Jodi Sullivan	2/11/2005
Leila and Paul Stennie	11/22/2004

James and Theresa Vaites	10/28/2004
Cindy and Ron Volkmann	10/28/2004
George Wang and Kathy Wu	1/18/2005
Nora and Michael Zacierka	4/29/2005
Robert and Mary Chris Thompson	8/27/2004
Robert and Gretchen Anicic	10/25/2005
Meredith and Nathan Barnes	11/22/2005
William and Stacey Craig	11/28/2005
Brian and Josie Dougherty	10/21/2005
Katie and Jason Homola	12/13/2005
Joseph Loftis	10/28/2005
Richard and Cherie Young	8/17/2005

See Morgan Cert. *at ¶* 4, Exh. C (Stipulation Relating to the Capriotti and Allen Cases). As indicated above, of these 47 plaintiffs, the most recent home purchase occurred on December 13, 2005. *Ibid*. The parties also agree that the construction was completed before the respective purchase dates. Substantial completion occurred even earlier. Moreover, the motions do not implicate the intent and credibility of the parties or witnesses. Instead, these motions raise a purely legal issue. Consequently, adjudication of that issue by way of motion for summary judgment is appropriate. Accordingly, these issues raised by these summary judgment motions are ripe for consideration.

Distilled to its essence, the court is asked to determine whether the 47 plaintiffs' claims are time-barred by *N.J.S.A.* 2A:14-1.1(a), "which is a statute of repose governing recovery of damages for any deficiency in the design, planning, surveying, supervision or construction of an improvement to real property." *Cumberland Cty. Bd. v. Vitetta*, 431 *N.J. Super.* 596, 603 (App. Div.), *certif. denied*, 216 *N.J.* 430 (2013). The question is a legal one to be decided by the court. *Ibid*.

Beazer Homes' motions rely upon the ten-year statute of repose imposed by *N.J.S.A.* 2A:14-1.1(a), which states:

> No action, whether in contract, in tort, or otherwise, to recover damages for any deficiency in the design, planning, surveying, supervision or construction of an improvement to real property, or for any injury to property, real or personal, or for an injury to the person, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained on account of such injury, shall be brought against any person performing or furnishing the design, planning, surveying, supervision of construction or construction of such improvement to real property, more than 10 years after the performance or furnishing of such services and construction. This limitation shall serve as a bar to all such actions, both governmental and private, but shall not apply to actions against any person in actual possession and control as owner, tenant, or otherwise, of the improvement at the time the defective and unsafe condition of such improvement constitutes the proximate cause of the injury or damage for which the action is brought.
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> [*N.J.S.A.* 2A:14-1.1.]

Plaintiffs oppose the motion, arguing that the statute of repose does not apply to plaintiffs' CFA claim, because it arises out of Beazer Homes' unlawful sales practices when it misrepresented that each "septic system is to be capable of properly handling normal flow of household effluent," rather than any "deficiency in the design, planning, surveying, supervision or construction" of the homes. Plaintiffs assert that the inadequacy of the septic systems was not discovered until long after the date of sale, but within two years of the filing of their Complaint, and were thus filed within the statute of limitations applicable to CFA claims.[3] For purposes of these motions, the court will assume that the plaintiffs' claims are not time-barred by the applicable statute of limitations.

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[3] "Private consumer-fraud claims are subject to the six-year statute of limitations, *N.J.S.* 2A:14-1, governing actions to recover for injury to real or personal property." Sullivan, *New Jersey Consumer Fraud*, § 9:2-4(a) at 153 (2016); *see also* Depetris, *New Jersey Consumer Fraud Act & Forms*, § 6-2:1-3 at 184 (2014). CFA claimants must bring their CFA claims within six years of when they accrue. *Catena v. Raytheon Co.*, ___ *N.J. Super*. ___ (App. Div. 2106) (slip op. at 11). Here, plaintiffs' Complaints were filed within six years of the accrual of their CFA claims, which occurred when plaintiffs "knew or should have known information that would have led a reasonable person to question the alleged affirmative act" in the form of misrepresentations. *New Jersey Consumer Fraud Act & Forms*, *supra*, `§ 6-2:1-3 at 185. Moreover, a CFA claim does not accrue until a person has suffered an ascertainable loss as a result of an unlawful practice. *New Jersey Consumer Fraud*, *supra*, § 9:2-4(a) at 153 (citing *Belmont Condominium v. Geibel*, 432 *N.J. Super*. 52, 82-83 (App. Div.), *certif. denied*, 216 *N.J.* 366 (2013).

In *Vitetta*, Judge Marie E. Lihotz engaged in a comprehensive overview of statutes of repose and their interplay with applicable statutes of limitations.

> Although some jurisprudence uses the terms statute of limitations and statute of repose interchangeably, they are different. "The basic feature of a statute of repose is the fixed beginning and end to the time period a party has to file a complaint." *R.A.C. v. P.J.S., Jr.*, 192 *N.J.* 81, 96 (2007) (citing *Lieberman v. Cambridge Partners, L.L.C.,* 432 *F.*3d 482, 490 (3d Cir.2005)). "Unlike a conventional statute of limitations, the statute of repose does not bar a remedy but rather prevents the cause of action from ever arising." *Port Imperial Condo. Ass'n v. K. Hovnanian Port Imperial Urban Renewal, Inc.,* 419 *N.J. Super.* 459, 469 (App.Div.2011) (citing *Rosenberg*, *supra*, 61 *N.J.* at 199). *See also Daidone v. Buterick Bulkheading*, 191 *N.J.* 557, 565 (2007) (same).
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> The time within which an action may be brought under *N.J.S.A.* 2A:14-1.1 "'is entirely unrelated to the accrual of any cause of action[,]'" *Daidone*, *supra*, 191 *N.J.* at 564 (quoting *Rosenberg*, *supra*, 61 *N.J.* at 199), and the cause of action specifically "ceases to exist" after ten years, *id*. at 566." The statute cuts off all claims after ten years. . . , irrespective of the date of injury." *Ramirez v. Amsted Indus., Inc.*, 86 *N.J.* 332, 355 (1981) (citation omitted). "Thus injury occurring more than ten years after the negligent act allegedly responsible for the harm, forms no basis for recovery. The injured party literally has no cause of action." *Rosenberg*, *supra*, 61 *N.J.* at 199.
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> The Supreme Court has considered the legislative purpose in adopting the statute of repose. "The Court perceived the statute as a legitimate legislative reaction to judicial decisions expanding the period of liability under certain statutes of limitations." *Ebert v. S. Jersey Gas Co.,* 157 *N.J.* 135, 138 (1999) (citing *Rosenberg*, *supra*, 61 *N.J.* 190). Earlier court decisions had extended a contractor's liability exposure for defective materials, equipment, and workmanship. *Rosenberg*, *supra*, 61 *N.J.* at 194-98 (determining the statute of repose was likely adopted as "a legislative response seeking to delimit th[e] greatly increased exposure" facing construction professionals as a result of the judicial expansion of the period of liability under certain statutes of limitations).
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> This defined purpose, as first expressed in *Rosenberg*, has thereafter been reinforced by the Court. Most recently, the Court has noted,
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> > the Legislature enacted the statute [of repose] in response to the expanding application of the discovery rule to new types of tort litigation, the abandonment of the 'completed and accepted rule' . . . and the expansion of strict liability in tort for personal injuries caused by defects in new homes to builder/sellers of those homes[.]
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> > [*Town of Kearny v. Brandt*, 214 *N.J.* 76, 92, (2013) (internal quotation marks and citations omitted).]

Also, in *Russo Farms, Inc. v. Vineland Bd. of Educ.*, the Court stated:

> Before the statute was enacted, the development of several trends in the common law created the possibility that architects and contractors could be sued for injuries long after a project was completed, and the statute meant to cut back on the potential of this group to be subject to liability for life.
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> [144 *N.J.* 84, 116 (1996) (internal quotation marks and citations omitted).]

Consequently, it is now well-accepted that *N.J.S.A.* 2A:14-1.1 was specifically "intended to limit the time within which a cause of action may arise against an architect or builder to ten years from the date construction is substantially completed[,]" such that "injuries sustained or suits filed after the ten-year period are barred." *Greczyn v. Colgate-Palmolive*, 183 *N.J.* 5, 18 (2005). *See also E.A. Williams*, *supra*, 82 *N.J.* at 167.

Courts have consistently construed the statute broadly to "achieve the legislative goal of providing a reasonable measure of protection against expanding liability for design and construction professionals[.]" *Newark Beth Israel Med. Ctr. v. Gruzen & Partners*, 124 *N.J.* 357, 363 (1991). *See also Brandt*, *supra*, 214 *N.J.* at 86 (same); *Daidone*, *supra*, 191 *N.J.* at 567 (same); *Russo Farms*, *supra*, 144 *N.J.* at 116 (same). "The primary consideration underlying a statute of repose is fairness to a defendant, the belief that there comes a time when the defendant ought to be secure in his reasonable expectation that the slate has been wiped clean of ancient obligations[.]" *R.A.C.*, *supra*, 192 *N.J.* at 96-97 (internal quotation marks and citations omitted).

"Because of the deference owed to a legislative enactment, courts generally do not expand the limitations period defined by a statute of repose unless the Legislature carved out exceptions that permit for tolling." *Id.* at 97 (citing *Lieberman*, *supra*, 432 *F.*3d at 490).

* * *

The exemption meshes with the general purpose of the statute of repose to allow a construction professional "'to be secure in his reasonable expectation that the slate has been wiped clean of ancient obligations, and he ought not to be called on to resist a claim when evidence has been lost, memories have faded, and witnesses have disappeared,'" *Cyktor v. Aspen Manor Condo. Ass'n*, 359 *N.J. Super.* 459, 470 (App.Div.2003) (*quoting Rosenberg*, *supra*, 61 *N.J.* at 201), unless a defendant engaged in untoward conduct.

* * *

That said, plaintiff cannot proceed with its complaint by ignoring its obligation to timely file claims pursuant to the applicable statute of limitations. The statute of repose, *N.J.S.A.* 2A:14-1.1, may sometimes preclude an action that otherwise would be timely under the statute of limitations, *N.J.S.A.* 2A:14-1.2. For example, the ten-year statute of repose would preclude suit even if the statute of limitations had not run on a claim in which the discovery rule was applied. However, the statute of repose, *N.J.S.A.* 2A:14-1.1, will not save a claim otherwise barred by the applicable statute of limitations, *N.J.S.A.* 2A:14-1.2. *See O'Connor v. Altus*, 67 *N.J.* 106, 122-23 (1975).

* * *

Limitations statutes are separate and distinct from the statute of repose. In fact, the statute of repose "impliedly incorporates" the applicable statute of limitations for particular actions. *O'Connor*, *supra*, 67 *N.J.* at 122. Consequently, a plaintiff's claim is subject to the ten-year statute of absolute repose, *as well as* the separate and distinct statute of limitations. *See*, *e.g.*, *Russo Farms*, *supra*, 144 *N.J.* 115-19 (noting the defendants could defeat the plaintiff's claim on either basis under the facts of the case); *E.A. Williams*, *supra*, 82 *N.J.* at 164, 172 (same).

In *O'Connor*, *supra*, the Court explained the interaction of the statute of limitations for tort actions, applicable in that case, *N.J.S.A.* 2A:14-2, and the statute of repose, *N.J.S.A.* 2A:14-1.1, noting both statutes were

> at work in that situation. The latter [statute of repose] does not expand the two-year period of the personal injury statute. It simply provides that in any event the suit must be started within ten years of the construction, regardless of when the cause of action accrues. The two-year period of *N.J.S.A.* 2A:14-2 controls to the extent that it "fits" within the ten years.
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> [67 *N.J.* at 122.]

Accordingly, if an action is barred by the statute of limitations, it cannot be saved by the statute of repose. Once a plaintiff is aware of the facts giving rise to the cause of action, the statute of repose does not relieve the plaintiff of the obligation to file the cause within the period defined by the applicable statute of limitations. The timeliness of the plaintiff's claim remains dependent on applicable statute of limitations.

[*Vitetta*, *supra*, 431 *N.J. Super.* at 606-611 (footnote omitted).]

The law is also well-settled that there is no equitable tolling of the statute of repose. *Cnty. of Hudson v. Terminal Constr. Corp.*, 154 *N.J. Super.* 264, 268-69 (App. Div. 1977), *certif. denied*,

75 *N.J.* 6605 (1978). The discovery rule does not apply to the statute, because "[s]uch an exception would quickly engulf the stature … and render it worthless." *Id.* at 269.

The court finds that the ten-year statute of repose applies in these matters. "The purpose of the statute of repose was to limit the expanding liability of contractors, builders, planners, and designers[.]" *Horsz v. Alps Estates*, 136 *N.J.* 124, 128 (1994). "[T]he Legislature enacted the statute of repose in response to the expanding application of the 'discovery rule" … and the expansion of strict liability in tort for personal injuries caused by defects in new homes to builders/sellers of those homes." *Newark Beth Israel Hosp.*, *supra*, 124 *N.J.* at 362. Based on that legislative purpose, statutes of repose are read broadly, not narrowly. *See*, *e.g.*, *State v. Perini Corp.,* 221 *N.J.* 412, 426 (2015); *Horsz, supra*, 136 *N.J.* at 129; *Town of Kearney v. Brandt*, 214 *N.J.* 76, 93 (2013); *Newark Beth Israel Hosp.*, *supra*, 124 *N.J.* at 363; *Rosenberg*, *supra*, 61 *N.J.* at 198.

"The statute of repose applies only to work that constitutes an 'improvement to real property.'" *Perini Corp.*, *supra*, 221 *N.J.* at 426 (quoting *N.J.S.A*. 2A:14-1.1(a)). The parties do not dispute that the design, construction and installation of the ISTS for plaintiffs' homes constituted "improvements to real property" within the meaning of *N.J.S.A.* 2A:14-1.1. New Jersey's Supreme Court has broadly construed the meaning of "improvement to real property," to include "an alteration, modification or addition that (1) enhances the use of the property; (2) expends labor or money; (3) is more than a mere repair; (4) adds value to the property; and (5) is permanent in nature." *Port Imperial Condo. Ass'n v. K. Hovnanian Port Imperial Urban Renewal, Inc.*, 419 *N.J. Super.* 459, 469 (App. Div. 2011). Such improvements to real property include service lines carrying natural gas onto a residential property. *Ebert v. South Jersey Gas Co.*, 157 *N.J.* 135, 139 (1999).

Any liability related to defects in the design, construction and installation of the ISTS is within the ambit of the ten-year statute of repose. Even less significant aspects of home design and construction are considered "improvements to real property." *See Perini Corp.*, *supra*, 221 *N.J.* at 430 (high pressure water system); *Dziewiecki v. Bakula*, 180 *N.J.* 528, 533 (2004) (in-ground swimming pool installed at a home); *Ebert v. S. Jersey Gas Co.*, 157 *N.J.* 135, 139-40 (1999) (natural gas service line from a central main onto residential property); *Brown v. Jersey Central Power & Light Co.*, 163 *N.J. Super.* 179, 196 (App. Div. 1978), *certif. denied*, 79 *N.J.* 489 (1979) (installation of free-standing electrical transfer switch which constituted permanent part of one of the mechanical systems necessary to the normal function of the particular improvement to the real estate); *Rosenberg*, *supra*, 61 *N.J.* at 198 (repaving road); *Wayne Township Bd. of Educ. V. Strand Century, Inc.*, 172 *N.J. Super.* 296, 300 (App. Div. 1980) (installation of dimmer switch in auditorium); *Hall v. Luby Corp.*, 232 *N.J. Super.* 337, 339 (Law Div. 1989) (installation of elevator); *see also Stix v. Greenway Dev. Co.*, 185 *N.J. Super.* 86, 89 (App. Div. 1982) (applying statute to negligent workmanship which caused collapse of basement foundation wall).

"Only construction and designs of improvements to real property 'that result in unsafe and defective conditions implicate the statute.'" *Horsz, supra*, 136 *N.J.* at 130 (quoting *Newark Beth Israel Hosp.*, *supra*, 124 *N.J.* at 364). Absent functioning septic systems, the homes could not safely be used for their intended purposes. The septic systems constituted "measures necessary and proper to ensure safety." *See Newark Beth Israel Hosp.*, *supra*, 124 *N.J.* at 365. A septic system is integral to a home. Without it, the house could not function as intended or be legally occupied. The defective septic systems functionally impaired the homes.

The defective septic systems also created an alleged unsafe and hazardous condition within the ambit of the statute. Indeed, plaintiffs allege that the ISTSs were "insufficient, inadequate, and

not functioning properly." (Capriotti Complaint at ¶ 42; Allen Complaint at ¶ 48). Plaintiffs further allege that beginning no earlier than 2010, some plaintiffs' ISTSs "began to experience problems, including but not limited to: septic system failure, the need to pump the septic system more frequently, sewage back up into the home, septic water visible in the field, the septic field exhibiting poor drainage, and objectionable odors coming from the septic field." (Capriotti Complaint at ¶ 35; Allen Complaint at ¶ 41). "A malfunctioning system can contaminate groundwater which might be a source of drinking water." *See A Homeowners Guide to Septic Systems* published by the New Jersey Department of Environmental Protection ("NJDEP"), pg. 1 at *http://www.state.nj.us/dep/dwq/pdf/septicmn.pdf.* "Safe treatment of sewage is important because it prevents the spread of infection and disease, protecting water resources." *Id*. at 7. As explained by the NJDEP:

> Inadequately treated wastewater from septic systems can be a cause of groundwater contamination, which poses a significant threat to drinking water and human health. It can contaminate drinking water wells and cause diseases and infections in people and animals. Improperly treated wastewater that contaminates nearby surface waters also increases the chance of swimmers contracting a variety of infectious diseases. These range from eye and ear infections to acute gastrointestinal illness and diseases such as hepatitis.
>
> [*Id*. at 7-8.]

As further explained by the NJDEP: "If the amount of wastewater entering the system is more than the system can handle, called hydraulic overload, the wastewater backs up into the house or yard and creates a health hazard." *Id*. at 12. "You can suspect a system failure not only when a foul odor is emitted, but also when partially treated wastewater flows up to the ground surface." *Ibid*.

Because of the impact of septic systems and wastewater on public health and safety, the design, construction and operation of septic systems in New Jersey is comprehensively governed by the Standards for Individual Subsurface Sewage Disposal Systems, *N.J.A.C.* 7:9A, also known

as Chapter 199. *Id*. at 3. County health departments are responsible for enforcement of Chapter 199 throughout the state. *Ibid*.

Septic systems that do not perform as approved, or that malfunction, are deemed non-compliant. *N.J.A.C.* 7:9A-3.4(a). Indications that an individual subsurface sewage disposal system is malfunctioning include "ponding or breakout of sewage or effluent onto the surface of the ground," *N.J.A.C.* 7:9A-3.4(b)(2), or "seepage of sanitary sewage into the building served which is not caused by blockage of the internal plumbing," *N.J.A.C.* 7:9A-3.4(b)(4). The owner of a non-compliant system "shall immediately notify the administrative authority upon detection of a potential non-compliant system." *N.J.A.C.* 7:9A-3.4(c). "When a system has been determined to be non-compliant, the owner shall take immediate steps to correct the non-compliance." *N.J.A.C.* 7:9A-3.4(e). "When it becomes necessary to repair or replace one or more of the system components or to make alterations to the system," various requirements must be met, including obtaining prior approval from the administrative authority. *Ibid*.

A malfunctioning or non-compliant septic system, particularly one exhibiting the symptoms alleged by plaintiffs, creates an unsafe and hazardous condition within the ambit of the statute of repose.

In summary, the design, construction and installation of the ISTSs constituted "improvements to real property." Plaintiffs allege that the ISTS installed by Beazer Homes were not "capable of properly handling normal flow of household effluent," resulting in "septic system failure" exhibited by "the need to pump the septic system more frequently, sewage back up into the home, septic water visible in the field, the septic field exhibiting poor drainage, and objectionable odors coming from the septic field." The septic system failures created an unsafe and hazardous condition within the ambit of the statute of repose. Plaintiffs' Complaints were

filed more than ten years after the 47 plaintiffs' homes were completed, let alone after they were substantially completed, as well as more than ten years after the 47 plaintiffs purchased their homes. Consequently, their claims against Beazer Homes are time-barred by the ten-year statute of repose, *N.J.S.A.* 2A:14-1.1, and must be dismissed. *Greczyn v. Colgate-Palmolive*, 183 *N.J.* 5, 18 (2005) ("injuries sustained or suits filed after the ten-year period are barred"). As explained by the Court in *E. A. Williams, Inc. v. Russo Dev. Corp.*, "the statute prevents what might otherwise be a cause of action from ever arising. *** The injured party literally has no cause of action." 82 *N.J.* 160, 167 (1980). Consequently, summary judgment must be granted to Beazer Homes dismissing the claims of the 47 plaintiffs in these cases.

To be sure, plaintiffs do not claim that the design, construction or installation of the septic systems violated any statute, regulation or rule, or that the septic systems were installed without required inspections, permits or approvals. Nor do plaintiffs claim that the written contract they entered into with Beazer Homes violated any technical statutory or regulatory requirements. Instead, plaintiffs complain only of the failure of the septic system to handle the effluent flow of their homes after several years of use.

While plaintiffs couch their complaint in terms of a violation of the CFA based on an alleged misrepresentation in the contract, but for the alleged septic system failures, there would be no cause of action. Plaintiffs' attempt, through creative labeling and pleading, to exclude or "read out" any claim "to recover damages for any deficiency in the design, planning, surveying, supervision or construction of an improvement to real property" does not alter the fundaments of their cause of action against Beazer Homes. Plaintiffs cannot avoid the impact of the statute of repose by limiting their allegations to a violation of the CFA. As noted by one commentator, the stature of repose "may also come into play if a CFA claim is based on an unlawful practice

occurring in connection with the construction of an improvement to real property." *New Jersey Consumer Fraud,* § 9:2-4(b) at 154-55. The statute of repose may bar a CFA action if the alleged unlawful practice occurred as part of the construction or design of an improvement to real property and resulted in a condition that presents a safety hazard. *Id.* at 155; *see also New Jersey Consumer Fraud Act & Forms*, § 6-2:2 at 194 ("In appropriate CFA cases, such as those involving construction, the [statute of repose] may apply so as to bar a CFA complaint or counterclaim").

Here, plaintiffs' alleged damages arise "out of the [allegedly] defective and unsafe condition of an improvement to real property" that was designed and/or constructed by Beazer Homes. *See N.J.S.A.* 2A:14-1.1. Consequently, their claims are subject to and barred by the time limitations imposed by the statute of repose. The 47 plaintiffs literally have no cause of action. *See E. A. Williams, supra,* 82 *N.J.* at 167. Accordingly, summary judgment must be granted to Beazer Homes dismissing their claims.

CONCLUSION

For the foregoing reasons, Beazer Homes' motions for summary judgment is granted. The claims of the 47 plaintiffs affected by these motions are dismissed with prejudice as time-barred by the 10-year statute of repose. More specifically, the claims of the following 34 plaintiffs in the *Capriotti* matter are dismissed with prejudice: Michael Capriotti, Amy Capriotti, Mark Connolly, Tracy Connolly, Jeffrey Hayes, Elliot Hudak, Arlene Hudak, Mary Kelley, Robert Kelley, Kim McNally, Ryan McNally, Michael Pecorilli, Gina, Mary Kate Racobaldo, Salvatore Racobaldo, Chris Reuter, Bridget Reuter, Lesley Rhoades, Bill Tringer, Cheryl Stringer, Robert Sullivan, Jodi Sullivan, Leila Stennie, Paul Stennie, James Vaites, Theresa Vaites, Cindy Volkmann, Ron Volkmann, George Wang, Kathy Wu, Nora Zacierka, Michael Zacierka, Robert Thompson and Mary Chris Thompson. In addition, the claims of the following 13 plaintiffs in the *Allen* matter

are dismissed with prejudice: Robert Anicic, Gretchen Anicic, Meredith Barnes, Nathan Barnes, William Craig, Stacey Craig, Brian Dougherty, Josie Dougherty, Katie Homola, Jason Homola, Joseph Loftis, Richard Young and Cherie Young.

The court has entered orders reflecting its ruling.

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RICHARD J. GEIGER, J.S.C.

Dated: August 30, 2016