


By Cleve Clinton and Bill Drabble
Gray Reed & McGraw LLP, Houston

Statute of Repose: Providing Peace of Mind for Texas Builders, Contractors, and Repairmen

After last call, Rebecca closes up the basement bar she manages and heads to her office for a cigarette and moment of solitude and reflection. Promising (again) that the cigarette would be her last, Rebecca finishes it, flicks the butt into a nearby wastebasket, and leaves. A butt ignites the wastebasket, and the fire quickly spreads through the manager's office. The fire-suppression system activates but fails to halt the blaze, which rapidly engulfs the rest of the bar and the high-end seafood restaurant upstairs. The fire eventually consumes—and destroys—the entire building. Not much later, the company that installed the fire-suppression system twelve years ago, Commercial Safety and Security, Inc., is served with a citation and petition. The bar is suing, alleging that Commercial negligently designed the system by using the wrong sprinkler discharge criteria and spacing. With twelve years having passed, Commercial no longer has any records of the installation; most of its employees have left; the few remaining employees have little memory of the installation. How does Commercial defend itself?

Fortunately, one of Texas's statutes of repose eliminates the threat of never-ending liability for those who construct improvements on real property. The statute, codified at Texas Civil Practice and Remedies Code §16.009, provides:

> A claimant must bring suit for damages . . . against a person who constructs or repairs an improvement to real property not later than 10 years after the substantial completion of the improvement in an action arising out of a defective or unsafe condition of the real property or a deficiency in the construction or repair of the improvement.[1]

For those individuals and corporations with control over substantially-completed real est improvements and no authority to access a inspect any unsafe conditions or to ensure improvements are being properly used or have been defectively altered,[2] the statute of rep provides a complete defense to a lawsuit alleg personal injury or property damage.[3]

This article addresses (i) the signific distinctions between statutes of repose (such §16.009) and statutes of limitations; (ii) §16.00 scope and application, including those who statute shields, (iii) calculation of the ten-y repose period, and (iv) the statute's exceptions

Difference Between Statutes of Repose a Statutes of Limitations

Although they both impose a deadline when claims must be filed, statutes of limitati and repose are different. Time limits establish by statutes of limitations are generally based up the date when the claim accrues.[4] For examp limitations begin to run upon a legal injury be suffered, even if the injury was not discove until later and damages had not yet occurre

[1] TEX. CIV. PRAC. & REM. CODE ANN. § 16.009(a).
[2] *S. Tex. Coll. of Law v. KBR, Inc.*, 433 S.W.3d 86, 91 (Tex. App.—Houston [1st Dist.] 2014, no pet.); *see also Reames v. Hawthorne-Seving, Inc.*, 949 S.W.2d 758, 761 (Tex. App.—Dallas 1997, pet. denied) ("The purpose of the statute is to protect someone who constructs and installs an improvement from facing never-ending potential liabi based on that work.").
[3] *See Reaves*, 949 S.W.2d at 761.
[4] *Statute of Limitations*, Black's Law Dictionary (10th 2014).
[5] *See S.V. v. R.V.*, 933 S.W.2d 1, 4 (Tex. 1996).

Statutes of limitations may also be extended by equitable doctrines, such as the discovery rule and fraudulent concealment, and tolling limitations, such as the plaintiff's disability or military service or the defendant's absence from the state.[6] For the defective fire suppression claim, Texas's statute of limitations is two years[7] and any lawsuit filed within two years of the fire would likely be timely.

"[W]hile statutes of limitations operate procedurally to bar the enforcement of a right, a statute of repose takes away the right altogether, creating a substantive right to be free of liability after a specified time."[8] Statutes of repose are absolute in nature.[9] They commence on a readily ascertainable date, which is typically when the defendant acted rather than when the plaintiff was injured. Statutes of repose can eliminate a plaintiff's cause of action before it ever accrued.[10] And, unlike statutes of limitation, there are no judicially-created rules of tolling or deferral for a statute of repose.[11] The "whole point" of a statute of repose is to "fix an outer limit beyond which no action can be maintained."[12]

Texas's Statute of Repose for Constructors and Repairmen

The statute of repose codified at section 16.009 of the Civil Practice and Remedies Code applies if: (1) the defendant constructed or repaired; (2) that which the defendant constructed or repaired was an improvement to real property; (3) the plaintiff's claim "aris[es] out of a defective or unsafe condition on real property or the deficiency in the construction or repair of the improvement"; and (4) the plaintiff did not file his or her claim within ten years after substantial completion of the improvement.[13]

Who Does the Statute of Repose Protect?

Section 16.009 protects those who construct or repair improvements to real property.[14] In other words, "the statute applies to those who start with personalty and transform the personalty into an improvement."[15] While those in the construction industry are clearly covered[16], section 16.009 protects any person who builds or repairs a structure for any reason. Special training or qualifications, participation in a specific trade or profession, or even being compensated for the work is not required. A dutiful amateur repairing his grandmother's fence receives the same protection as the professional who built it.

Section 16.009's protection also extends beyond the persons who "hammered the nails and turned the screws" to who are contractually responsible for the construction or repair work.[17] It applies to both the general contractor and the subcontractor who actually installed the improvement.[18] The statute also shields those that provide management and support services for construction projects.[19] For instance, the Eleventh Court of Appeals held section 16.009 applies to a machinery manufacturer hired by the property

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[6] *Id.*; TEX. CIV. PRAC. & REM. CODE ANN. §§ 16.001(b), 16.063.

[7] TEX. CIV. PRAC. & REM. CODE ANN. § 16.003(a).

[8] *Methodist Healthcare Sys. of San Antonio, Ltd. v. Ranking*, 307 S.W.3d 283, 287 (Tex. 2010) (quoting *Galbraith Eng'g Consultants, Inc. v. Pochucha*, 290 S.W.3d 863, 866 (Tex. 2009)); *see also Trinity River Auth. v. URS Consultants, Inc.–Tex.*, 889 S.W.2d 259, 261 (Tex. 1994) (stating that statutes of repose are "a substantive definition of, rather than a procedural limitation on, rights").

[9] *Methodist Healthcare Sys.*, 307 S.W.3d at 287.

[10] *See id.*; *Galbraith Eng'g*, 290 S.W.3d at 866.

[11] *Methodist Healthcare Sys.*, 307 S.W.3d at 287.

[12] *Id.* (quoting *Holubec v. Brandenberger*, 111 S.W.3d 32, 37 (Tex. 2002)).

[13] TEX. CIV. PRAC. & REM CODE ANN. § 16.009(a); *Jenkins v. Occidental Chem. Corp.*, 415 S.W.3d 14, 24 (Tex. App.—Houston [1st Dist.] 2013), *rev'd on other grounds*, 478 S.W.3d 640 (Tex. 2016); *Williams v. U.S. Nat. Resources, Inc.*, 865 S.W.2d 203, 206 (Tex. App.—Waco 1993, no writ).

[14] *Petro Shopping Ctrs., Inc. v. Ownes Corning Fiberglas Corp.*, 906 S.W.2d 618, 620 (Tex. App.—El Paso 1995, no writ).

[15] *Sonnier v. Chisholm-Ryder Co.*, 909 S.W.2d 475, 479 (Tex. 1995); *see also Reames v. Hawthorne-Seving*, 949 S.W.2d 758, 761 (Tex. App.—Dallas 1997, pet. denied) (stating that section 16.009 applies to "those who actually alter the realty by constructing additions or annexing personalty to it").

[16] *But see Galbraith Eng'g Consultant, Inc. v. Pochucha*, 290 S.W.3d 863, 867 (Tex. 2009) (incorrectly stating that section 16.008 "only precludes suits against person or entities in the construction industry that annex personalty to realty").

[17] *See S. Tex. Coll. of Law v. KBR, Inc.*, 433 S.W.3d 86, 91 (Tex. App.—Houston [1st Dist.] 2014, no pet.); *Jenkins*, 415 S.W.3d at 25; *Reames*, 949 S.W.2d at 763.

[18] *Reames*, 949 S.W.2d at 763; *Barnes v. J.W. Bateson Co.*, 755 S.W.2d 518, 519–20 (Tex. App.—Fort Worth 1988, no writ).

[19] *See S. Tex. Coll. of Law*, 433 S.W.3d at 92.

owner to "supervise and assist" in the machinery's installation, even though it did not provide any labor.[20] The property owner contracted with the manufacturer to bear the "ultimate responsibility" for the machinery's installation.[21] Due to the manufacturer's dual role, the court held that it "constructed" the improvement within the meaning of section 16.009.[22]

Nevertheless, a manufacturer acting solely as a manufacturer falls outside section 16.009's scope. In *Sonnier v. Chisholm-Ryder Co.*, the Texas Supreme Court held that the statute did not apply to materialmen or manufactures of the personalty that a third party subsequently affixes to the property.[23] In that case, a portion of a prison employee's arm was severed while inspecting a tomato chopper manufactured for use in the prison's commercial cannery.[24] When the employee sued, the manufacturer raised the statute of repose as a defense.[25] A closely divided supreme court held that section 16.009 did not apply. The five-justice majority reasoned an item does not transform from personalty to an improvement until it is affixed to the property.[26] Because section 16.009 applies only to those who construct and repair an "improvement," its applicability is limited to those that annex personalty to realty.[27] Four justices dissented, arguing that the statute should apply if "it was the objective intent of the parties at the time the object was constructed that it would become an improvement."[28]

What Are Improvements?

In addition to being directly involved, a person seeking repose under section 16.009 must have constructed or repaired an "improvement" to the real property. In *Sonnier*, the Texas Supreme Court defined "improvement" broadly, stating that it "includes all additions to the freehold except for trade fixtures which can be removed without injury to the property."[29] "An improvement can be anything that 'permanently enhances the value of the premises' and may even be something that is easily removable so long as it is attached to and intended to remain a part of the [real property]."[30] That expansive definition encompasses fixtures, which are personal property that have become so attached to realty that they become part of it while simultaneously retaining their separate identity.[31] All improvements are not necessarily fixtures, but all fixtures—except trade fixtures—are improvements.[32]

To qualify as an improvement, the item must be annexed to the real property.[33] When determining whether the item has been sufficiently annexed, the courts consider three factors: (1) the mode and sufficiency of the annexation, either actual or constructive; (2) the adaption of the item to the use or purpose of the realty; and (3) the intent of the person who annexed the item.[34]

The first factor, which addresses how securely the item is attached to the property, is ultimately a question of degree. While the item need not be permanently attached and rendered immobile, merely placing an item on property obviously does not make it an improvement.[35] Additionally, where the item is attached will affect the analysis. An item directly attached to the soil, as opposed to a structure, is more likely to be considered an improvement.[36]

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[20] *Fuentes v. Cont'l Conveyer & Equip. Co.*, 63 S.W.3d 518, 521 (Tex. App.—Eastland 2001, pet. denied).
[21] *Id.* at 521–22.
[22] *Id.* at 522.
[23] *Sonnier v. Chisholm-Ryder Co.*, 909 S.W.2d 475, 479–80 (Tex. 1995).
[24] *Id.* at 477.
[25] *Id.*
[26] *Id.* at 479 ("Only upon annexation does the personalty lose its characteristics as personal property and become viewed as an improvement").
[27] *Id.*
[28] *See id.* at 488 (Owen, J., dissenting).
[29] *Id.* at 479.
[30] *Dedmon v. Stewart-Warner Corp.*, 950 F.2d 244, 246–47 (5th Cir. 1992) (quoting *Dublin v. Carrier Corp.*, 731 S.W.2d 651, 653 (Tex. App.—Houston [1st Dist.] 1987, no writ)), *disapproved on other grounds by Sonnier*, 909 S.W.2d at 483.
[31] *Reames* , 949 S.W.2d at 761.
[32] *Id.*
[33] *Sonnier,* 909 S.W.3d at 479; *Reames*, 949 S.W.2d at 761.
[34] *Sonnier*, 909 S.W.3d at 479 (citing *Logan v. Mullis*, 686 S.W.2d 605, 607 (Tex. 1985)).
[35] *Reames*, 949 S.W.2d at 762 (holding that a movable conveyer belt was an improvement); *In re San Angelo Pro Hockey Club, Inc.*, 292 B.R. 118, 130 (Bankr. N.D. Tex. 2003).
[36] *In re San Angelo Pro Hockey Club*, 292 B.R. at 132 ("[W]hen an item is annexed to the soil, as opposed to a wall, floor, or ceiling, the appropriate legal analysis is not

The second factor—adaptation—addresses whether the item and the realty have a common purpose. An item that furthers the property's use and enhances its value will likely be considered an improvement.[37]

The third factor examines whether the person who annexed the item intended to make it a permanent addition to the property. Intent is the "preeminent" factor, and "the other two are evidence of intent."[38] Courts determine the parties' intent by looking to its external objective manifestations.[39] A bald assertion that the personalty was not meant to become an improvement cannot prevail over facts.[40]

Applying that three-factor test, Texas courts have held that a wide variety of items qualified as improvements, including a furnace,[41] a garage-door opener,[42] an air-conditioning unit,[43] industrial kilns,[44] underground gasoline storage tanks,[45] asbestos-containing fireproofing materials,[46] and a heat exchanger at a refinery.[47] In fact, the Texas Supreme Court suggested in *Sonnier* that a motel could bolt a painting to the wall of one of its rooms with the intent that it not be removed and thereby transform a painting into an improvement.[48]

As another example, in *Reames v. Hawthorne-Seving, Inc.*, the Fifth Court of Appeals held that a movable conveyer belt in a ceramic tile plant was an improvement under section 16.009.[49] The conveyer belt, which carried powder that was later pressed into tiles, was located under the plant's drying system.[50] The conveyer belt was placed on wheels to facilitate cleaning the dryer.[51] Workers would periodically move the conveyer belt four to five feet and then return it to its original position after they finished cleaning.[52] Even though the conveyer belt was readily moved, the court held that it was an improvement. The conveyer belt was constructively annexed to the property, because the property owner "never intended to move it more than few feet as necessary for [the plant's] operations and never moved it for any other purpose."[53] Additionally, the court stated that the conveyer belt was well adapted to the property "because a critical phase of the [tile-making] process, transporting dried power from the dryer to the storage silo, could not be performed unless [the conveyer belt] was in place."[54] Finding those facts evidenced the property owner's intent, the court held that the conveyer belt was an improvement as a matter of law.[55]

Though broad, the definition of improvement has its limits, and it expressly excludes trade fixtures. Trade fixtures have a "well-established and commonly understood meaning in Texas law."[56] They are items "annexed to the realty by the tenant to enable him to properly or efficiently carry on the trade, profession, or enterprise contemplated by the tenancy contract or in which he is engaged while occupying the premises, and which can be removed without material or permanent injury to

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to look at such items as a fixture or a trade fixture but as an improvement.").

[37] *See Dow Chem. Co. v. Abutahoun*, 395 S.W.3d 335, 345–46 (Tex. App.—Dallas 2013), *aff'd*, 463 S.W.3d 42 (Tex. 2015).

[38] *Sonnier*, 909 S.W.at 479.

[39] *See State v. Clear Channel Outdoor, Inc.*, 463 S.W.3d 488, 494 (Tex. 2015).

[40] *Id.*; *see also Logan*, 686 S.W.2d at 608 (stating that "even testimony of intention that the chattel was not meant to become a fixture will not prevail in the fact of undisputed evidence to the contrary").

[41] *Dedmon* , 950 F.2d at 250.

[42] *Ablin v. Morton Sw. Co.*, 802 S.W.2d 788, 791 (Tex. App.—San Antonio 1990, writ denied).

[43] *Rodarte v. Carrier Corp.*, 786 S.W.2d 94, 95 (Tex. App.—El Paso 1990, writ dism'd by agr.), *overruled by Petro Shopping Ctrs., Inc. v. Ownes Corning Fiberglas Corp.*, 906 S.W.2d 618 (Tex. App.—El Paso 1995, no writ).

[44] *Cofer v. Ferro Corp.*, No. 12-02-00151-CV, 2003 WL 21804821, at *4 (Tex. App.—Tyler Aug. 6, 2003, no pet.).

[45] *Big W. Oil Co. v. Willborn Bros. Co.*, 836 S.W.2d 800, 803 (Tex. App.—Amarillo 1992, no writ).

[46] *Brown & Root, Inc. v. Shelton*, 446 S.W.3d 386, 390–91 (Tex. App.—Tyler 2003, no pet.).

[47] *Karish v. Allied-Signal, Inc.*, 837 S.W.2d 679, 681 (Tex. App.—Corpus Christi 1992, no writ).

[48] *Sonnier*, 909 S.W.2d at 479–80.

[49] *Reames*, 949 S.W.2d at 762.

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.* at 762.

[54] *Id.*

[55] *Id.*

[56] *C.W. 100 Louis Henna, Ltd. v. El Chico Rests. of Tex., L.P.*, 295 S.W.3d 748, 755 (Tex. App.—Austin 2009, no pet.).

the freehold."[57] Courts have held that trade fixtures remain personal property "because the intent of [their] annexation is to further the purpose of the tenant's trade, not to improve the realty."[58] Given that purpose, trade fixtures are typically intended to be temporary additions and retained by tenant when the lease ends.[59] Thus, trade fixtures are a narrow exception to the broad definition of improvements.

What Claims Are Barred by the Statute of Repose?

Moreover, the types of claims covered by §16.009 are expansive. The statute applies to claims for: "(1) injury, damage, or loss to real or personal property; (2) personal injury; (3) wrongful death; (4) contribution; or (5) indemnification" if they arise out of "a defective or unsafe condition of the real property or a deficiency in the construction or repair of the improvement."[60] Notably, section 16.009 applies when the alleged injury results from any dangerous condition on the property, even if it is not the improvement that the defendant constructed or repaired.[61]

How Is the Repose Period Calculated?

Section 16.009's ten-year period to assert those claims begins to run upon "the substantial completion of the improvement."[62] "Substantial completion" is left undefined by the statute. While Texas courts have not interpreted term in the context of section 16.009, they have elsewhere defined "substantial completion" to mean "so completed that the [improvement] is capable of being utilized for its intended purposes . . . , even though there may be incompleted aspects of construction."[63] And, that interpretation is consistent with similar statutes of repose in other states.[64]

Determining when section 16.009's ten-year period begins is a party-specific inquiry. For example, in *Gordon v. Western Steel Co.*, the plaintiff sued its general contractor for alleged defects in the construction of condominiums.[65] The general contractor, in turn, filed claims against two of its subcontractors who had delivered and erected the structural steel.[66] Because they had completed their work more than ten years before they were sued, the subcontractors asserted the statute of repose as defense.[67] In response, the general contractor argued that the claims were timely because the condominiums, as a whole, were finished within nine years of the filing of the lawsuit.[68]

The Thirteenth Court of Appeals agreed with the subcontractors and has held that, when different persons are responsible for distinct parts of the construction or repair work, the statutory period begins upon the substantial completion of each person's portion of the work.[69] The court concluded that "[s]tarting the statute of repose when each [person] finishes its improvement conforms with the legislative intent of preventing indefinite liability for those who construct or repair improvements to real property."[70] And, the court stated that the practicalities did not militate in favor of an alternative construction. The substantial completion of the various improvements within a larger project is unlikely to "stretch beyond several years, and general contractors and beneficiaries ordinarily have

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[57] *Id.* (quoting *Boyett v. Boegner*, 746 S.W.2d 25, 27 (Tex. App.—Houston [1st Dist.] 1988, no writ); *see also Reames*, 949 S.W.2d at 761 (defining a "trade fixture" as "an item, which can be removed without material or permanent injury to the free hold, that a tenant annexes to the realty to enable the tenant to carry on its business").

[58] *Eun Bok Lee v. Ho Chang Lee*, 411 S.W.3d 95, 110 (Tex. App.—Houston [1st Dist.] 2013, no pet.).

[59] *C.W. 100 Louis Henna, Ltd.*, 295 S.W.3d at 755 (quoting *Jim Walter Window Components v. Turnpike Distr. Ctr.*, 642 S.W.2d 3, 5 Tex. Civ. App.—Dallas 1982, writ ref'd n.r.e.)).

[60] TEX. CIV. PRAC. & REM. CODE ANN. § 16.009(a)–(b).

[61] *Id.* § 16.009(a).

[62] *Id.*

[63] *See Uhlir v. Golden Triangle Dev. Corp.*, 763 S.W.2d 512, 514 (Tex. App.—Fort Worth 1988, writ denied).

[64] *See, e.g., Hill Cnty. High Sch. Dist. A v. Dick Anderson Constr., Inc.*, 390 P.3d 602, 605 (Mont. 2017); *Lamprey v. Britton Constr., Inc.*, 37 A.3d 359, 366 (N.H. 2012); *Weston v. McWilliams & Assocs., Inc.*, 716 N.W.2d 634, 636 (Minn. 2006); *Ocean Winds Corp. of Johns Island v. Lane*, 556 S.E.2d 337, 419 (S.C. 2001); *Gordon v. W. Steel Co.*, 950 S.W.2d 743, 747 (Tex. App.—Corpus Christi 1997, writ denied) (quoting *Patraka v. Armco Steel Co.*, 495 F. Supp. 1013, 107–20 (M.D. Pa. 1980)).

[65] *Gordon*, 950 S.W.2d at 744.

[66] *Id.*

[67] *Id.* at 745.

[68] *Id.*

[69] *Id.* at 748.

[70] *Id.*

opportunities to supervise or disapprove of the work along the way."[71] And, the court further remarked that "it is not overly burdensome to decipher when respective contractors substantially complete their improvements (*e.g.*, when they submit their final bills and/or walk away from the project)."[72] Thus, when applying section 16.009, the court must determine when the defendant substantially completed its work, not when the entire project was substantially complete.

What Are the Exceptions to the Statute of Repose?

If the defendant shows that section 16.009 applies and the plaintiff did not file his claim within the ten-year period, then the burden shifts to the plaintiff to show an exception or defense to the statute of repose.[73] Section 16.009 contains three exceptions.[74] It will not bar claims: "(1) on a written warranty, guaranty, or other contract that expressly provides for a longer period; (2) against a person in actual possession or control of the real property at the time that the damage, injury, or death occurs; [and] (3) based on willful misconduct or fraudulent concealment with the performance of the construction or repair."[75] The second exception is the most significant, as it preserves the property owner's continuing duty to warn or make safe dangerous conditions on the property.

In addition, section 16.009 allows potential plaintiffs to extend the repose period by providing a written claim for damages, contribution, and indemnification to the potential defendant within the ten-year period.[76] Providing a written claim will extend the period for two years from the date the claim is presented.[77]

Conclusion

Section 16.009 of the Civil Practice and Remedies Code is useful in defending negligence or personal-injury claims arising out of a dangerous condition on real property. With a few narrow exceptions, the statute applies broadly to any person who constructed or repaired any improvement on the property. And, the statute's protections are substantial. It provides a complete defense to any claim filed beyond the statute's inflexible and absolute ten-year deadline.

About the Authors

Cleve Clinton, Partner – Gray Reed & McGraw LLP, Houston
cclinton@grayreed.com

With a client list full of families navigating business and generational transitions, Fortune 500 companies and risk-taking mavericks who won't take "no" for an answer, Cleve Clinton knows what it takes to develop creative solutions when big ideas result in big problems. Whether he's serving as lead counsel in one of the growing number of fiduciary litigation claims within family businesses, advising a family in transition, or helping a developer sidestep a legal and public relations disaster in a new residential community, Cleve's focus is always the same – understand and achieve the client's goals, either in or out of the courtroom. His clients span nearly every industry, including beverage distribution, real estate, manufacturing, telecommunications and transportation.

Bill Drabble, Partner-Elect – Gray Reed & McGraw LLP, Houston - wdrabble@grayreed.com

Bill Drabble focuses his practice on representing property owners, landlords, tenants and developers in real estate litigation before courts throughout North Texas, including disputes over land sales, breaches of lease agreements, premises-liability claims and other disputes involving commercial and residential properties. He also handles a wide variety of intra-company disputes, such as prosecuting and defending claims for breaches of shareholder or company agreement, breach of fiduciary duty claims against directors and officers, and contests for control over the company. Bill's practice also includes appeals. He was the principal author of briefs filed in the Fifth Circuit, intermediate appellate courts and the Texas Supreme Court.

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[71] *Id.*
[72] *Id.*
[73] *See Nw. Austin Mun. Util. Dist. No. 1 v. City of Austin*, 274 S.W.3d 820, 836 (Tex. App.—Austin 2008, pet. denied); *see also Ryland Grp., Inc. v. Hood*, 924 S.W.2d 120, 121 (Tex. 1996) (per curiam) (rendering summary judgment for the defendant because the plaintiff failed to raise a fact issue on an exception to the statute of repose).
[74] TEX. CIV. PRAC. & REM. CODE ANN. § 16.009(e).
[75] *Id.*