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**Trial Court:**

Adams County District Court  
Consolidated Case Numbers 2003 CV 3836  
and 2004CV3625  
Hon. Donald Marshall,  
Hon. John E. Popovich, Jr., District Judges

**Plaintiff-Appellant:**

WESTERN INNOVATIONS, INC.

Case Number: **06 CA**

**Defendant-Appellee:**

SONITROL CORPORATION, formerly  
known as Sonitrol Management Corporation

**06CA2275**

Gregory J. Fasing, No. 7631  
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**NOTICE OF APPEAL**

Western Innovations, Inc., one of several consolidated plaintiffs below, respectfully initiates this appeal by its attorneys Fasing Law Firm P.C. pursuant to C.A.R. 3(a):

Western Innovations, Inc. is a packaging company that leased space in a warehouse in Aurora, Colorado. A company named Core-Mark also leased space for its convenience store supply operations. On April 10, 2000, Western Innovations entered into a contract with Sonitrol for burglar alarm services. The Sonitrol system was designed to transmit an alarm to an off-site monitoring station in Texas at the first sign of an unauthorized break-in. The alarm was monitored by Sonitrol.

On December 21, 2002, a burglar smashed a hole into an overhead door in the

Core-Mark space on the west side of the warehouse. At 7:00 a.m. that day, a Sonitrol operator in Texas detected a noise in the warehouse. Protocol required the operator to replay an audio recording of the noise to determine whether it warranted police or fire department 911 call. Instead, the operator ignored the noise and reset the system. At 7:30 a.m., a similar noise was detected by the alarm system. Again, the operator ignored the noise and reset the system without listening to the audio recording of the noise. The system was tripped a third and fourth time, at 8:00 a.m. and again at 8:30 a.m.

The operator negligently reset the system until finally, at 8:42 a.m., the operator listened to the audio recordings of the suspicious noises. By that time, the warehouse was already burning after the burglars set fire to the warehouse causing the alarm fire sensor to trigger. The Sonitrol operator finally called the Aurora Fire Department, which had already been called to the scene by a neighbor.

The Western Innovations-Sonitrol and Core-Mark-Sonitrol contracts provided for the installation and monthly monitoring of the burglar alarm system. The required duties of Sonitrol upon receipt of an alarm are clearly expressed in the contract. Sonitrol failed to notify the authorities, resulting in millions of dollars of losses to the tenants.

Eight lawsuits were filed against several defendants in Adams County District Court alleging various claims for relief. The trial court consolidated cases 03 CV 3836, 03CV3873, 03CV3875, 03CV3876, 04CV3625, 04CV3637, 04CV3644 and 04CV1978 for trial. Western Innovations sued Sonitrol and the local franchisee, Cornerstone Security, Inc. in cases 03CV3836 and 04CV3625 for negligence, gross negligence, false misrepresentation, breach of contract and implied warranties. Cornerstone settled. Western also sued the adjacent tenant, Core-Mark, for negligence. Sonitrol filed motions to dismiss the complaint and for summary judgment. The motions were partially granted on April 18, 2005 and all remaining issues determined in Sonitrol's favor on September 8, 2006. Although the ruling determined all issues between Western Innovations and Sonitrol, the claims against Core-Mark remained for trial. On September 22, 2006, the trial court stayed the pending trial against Core-Mark and entered a C.R.C.P. 54(b) ruling allowing an immediate appeal.

1. Significant dates of filing and rulings:

- a. Dates of partial summary judgments (*Copies attached*):
    - i. 2004CV3625: April 18, 2005.
    - ii. 2003CV3836: September 8, 2006.
  - b. Date judgment was mailed to counsel: Never; they were sent by Justice Link as shown on the certificates.
  - c. Date judgments were received by plaintiff's counsel: April 18, 2005 and September 8, 2006, respectively.
  - d. The C.R.C.P. 54(b) ruling was received via Justice Link on September 22, 2006.
2. Neither of the partial summary judgments were final orders that resolved all issues among all parties pending before the trial court.
  3. The trial court's judgment was made final for purposes of appeal under C.R.C.P. 54(b). On September 22, 2006, the trial court, pursuant to motion, entered a C.R.C.P. 54(b) finding and order, *copy attached*, finding that there is no just reason for delay and directed entry of judgment to allow for appellate review of questions of law determined by the court. The trial court also stayed the trial against Core-Mark Corporation in 2004CV3625 scheduled to start on October 2, 2006, pending final mandate in this appeal.
  4. The partial summary judgments were entered on April 18, 2005 and September 8, 2006, respectively and never mailed to the parties, but rather were transmitted by Justice Link on April 18, 2005 and September 8, 2006, respectively. No extensions of time were requested to file any pleadings that would affect the deadline to file a notice of appeal. There were no extensions of time requested or granted to file any notice of appeal.
  5. Advisory listing of issues to be raised on appeal include, without limitation:

- a. Did the trial court err in granting summary judgment in favor of Sonitrol on the negligence claims, on the grounds that Sonitrol owed no tort duty to Western Innovations, Inc.?
6. No transcript is necessary. There was no trial and there were no pretrial evidentiary hearings.
7. A pre-argument conference is requested.
8. The names of counsel for the parties, their addresses, telephone numbers and registration numbers are:

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**An advisory list of other plaintiffs'  
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Respectfully submitted,

FASING LAW FIRM P.C.

  
\_\_\_\_\_

**CERTIFICATE OF SERVICE**

I CERTIFY that an accurate copy of this document was placed in the United States mail, postage pre-paid, or telefaxed, e-mailed, e-filed or hand delivered as shown, on Friday, November 3, 2006 14:28:2 hours addressed to:

Adams County District Court  
1000 Judicial Center Dr.  
Brighton, CO 80601-8800  
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\_\_\_\_\_

DISTRICT COURT, ADAMS COUNTY, COLORADO  
Court Address: 1100 Judicial Center Drive, Brighton,  
CO 80601  
Phone Number: (303) 654-3260

**CORE-MARK MIDCONTINENT, INC., and CORE-  
MARK INTERNATIONAL, INC., et al.,  
Plaintiffs,**

**SONITROL MANAGEMENT CORP.,  
CORNERSTONE SECURITY, INC., d/b/a  
SONITROL OF DENVER and SONITROL  
CORPORATION, et al.,  
Defendants.**

Case Nos. 03-CV3836  
03-CV-3873  
03-CV-3875  
04-CV-1978  
04-CV-3625  
04-CV-3637  
04-CV-3644

Div. C. Ctrm.: 504

**ORDER  
CERTIFICATION C.R.C.P. 54(b)**

**ORDER  
STATUS OF 04 CV 3625**

The Court having reviewed all pleading to issue and being advised enters the following Findings and Orders.

**CERTIFICATION C.R.C.P. 54(b)**

The Court having considered all submitted pleadings and statements of counsel and being advised enters the following Findings and Orders.

The Court Finds and Concludes that the omnibus Order entered on September 8, 2006 was dispositive of all legal issues and substantially dispositive of all but minor factual issues.<sup>1</sup> The Court in its September 8, 2006 Order limited substantial claims and rights of certain parties, and therefore those determinations are questions of law now ripe for appellate review. The Court specifically Finds that there is no just reason for delay and directs entry of judgment to allow for appellate review of questions of law determined by the Court in the September 8, 2006 Order.<sup>2</sup>

The Court hereby Grants the parties fifteen (15) days to submit a stipulated and agreed upon Order as to certification under C.R.C.P. 54(b). Further and upon execution of the above Order, the Court will certify all issues as Final and subject to Appeal under C.R.C.P. 54(b).

#### **STATUS OF 04 CV 3625**

The Court notes that case 04 CV 3625 was consolidated for trial with all related and captioned and cited cases. The Court's omnibus September 8, 2006 Order determined substantial legal issues in all cases, including case 04 CV 3625. The Court Finds that the issues and claims of the parties are substantially intertwined and dependent upon the claims of other parties in other related cases.

The Court therefore Finds and Concludes under the general rationale of *Trans Central Airlines v. McBreen & Associates*, 497 P. 2d 1033 (1972) and *Ireland v. Wynkoop*, 539 P.2d 1349 (1975) to establish consistency of rulings, judicial and litigant economy, and overall resolution of both factual and legal issues common in all of the interrelated cases that a continuance and stay of case 04 CV 3625 is warranted pending appellate review.

The Court hereby Orders that trial in 04 CV 3625 be vacated and all proceeding be stayed pending appellate review of all matters herein. Further, all interest is tolled as between the parties as of October 2, 2006.<sup>3</sup>

DONE AND SIGNED, this 22<sup>nd</sup> day of September, 2006.

BY THE COURT:

*Original in Court's file signed by*

\_\_\_\_\_  
John E. Popovich, District Court Judge

<sup>1</sup> Minor factual issues as to determination of damages as to breach of contract remain.

<sup>2</sup> Court's determination of contract and not tort liability of Sonitrol, et al.

<sup>3</sup> The Court accepted the judicial admission of counsel for plaintiffs that interest would be tolled in the event the court continued the subject proceedings herein.

CERTIFICATE OF SERVICE

A copy of the within Order was e-filed to counsel of record on this 22<sup>nd</sup> day of September, 2006.

*Original in court's file signed by*

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District Court Judicial Assistant

DISTRICT COURT, ADAMS COUNTY, COLORADO  
Court Address: 1100 Judicial Center Drive, Brighton,  
CO 80601  
Phone Number: (303) 654-3260

**LEXINGTON INSURANCE COMPANY, et al.,  
Consolidated Plaintiffs,**

**CORNERSTONE SECURITY, a Colorado  
corporation d/b/a SONTIROL OF DENVER; and  
SONITORL CORPORATION, a Delaware  
corporation, et al, UNITED FIRE & CASUALTY,  
TARTAN PRODUCTS COMPANY, UNITED  
INSURANCE COMPANY and WESTERN  
INNOVATIONS, INC.,  
Consolidated Defendants.**

FILED IN ADAMS COUNTY  
COMBINED COURT  
SEP - 8 2006

**E-FILE**

Case No. 03 CV 3836  
Div. C. Ctrm.: 504

**ORDER**

**DEFENDANT SONITROL'S MOTION FOR SUMMARY JUDGMENT AGAINST  
UNITED FIRE & CASUALTY, TARTAN PRODUCTS COMPANY, UNITED  
INSURANCE COMPANY AND WESTERN INNOVATIONS, INC.**

The Court has received and reviewed Sonitrol's Motion for Summary Judgment Against United Fire & Casualty, Tartan Products Company, United Insurance Company and Western Innovations, Inc. The Court has also received and reviewed United Insurance Company, United Fire & Casualty and Tartan's (hereinafter United and Tartan) Response and Sonitrol's Reply. The Court has also received and reviewed Western Innovations' (hereinafter Western) Brief Opposing Sonitrol's Motion for Partial Summary Judgment and Sonitrol's Response. The Court now dispenses with oral arguments and enters its order on the motion as stated herein.

Summary judgment is a drastic remedy and is never warranted except on a clear showing that there is no genuine issue as to any material fact. *Urban v. Beloit Corp.*, 711 P.2d 685 (Colo. 1985). The moving party has the burden of establishing the lack of a triable factual issue, and all doubts as to the existence of such an issue must be resolved against the moving party. The party against whom summary judgment might otherwise be entered is entitled to the benefit of all favorable inferences that may be drawn from the facts. Summary judgment is proper only when the pleadings, affidavits, depositions, or admissions establish that there

is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Huydts v. Dixon*, 606 P.2d 1303 (Colo. 1980).

As a general rule, issues of fact should not be determined on a motion for summary judgment. However, once the moving party affirmatively shows specific facts probative of the rights to judgment, it becomes necessary for the nonmoving party to set forth facts showing that there exists a genuine issue for trial. C.R.C.P. 56(e) provides that a party against whom summary judgment is moved may not rely upon the allegations and denials of the pleadings, but must set forth by affidavits or otherwise, specific facts which demonstrate the existence of a triable issue. *Heller v. First Nat'l Bank of Denver*, 657 P.2d 992 (Colo. App. 1982). The arguments of counsel alone cannot create a factual issue. *Ginter v. Palmer and Co.*, 585 P.2d 583 (Colo. 1978).

Once the moving party has met its initial burden of production, the burden shifts to the nonmoving party to establish that there is a triable issue of fact. See *Ginter v. Palmer & Co.*, supra. The nonmoving party must receive the benefit of all favorable inferences that may be reasonably drawn from the undisputed facts. *Tapley v. Golden Big O Tires*, 676 P.2d 676 (Colo. 1983). All doubts as to whether an issue of fact exists must be resolved against the moving party. See *Dominguez v. Babcock*, 727 P.2d 362 (Colo. 1986).

Summary Judgment Against United (Union Insurance) Company,  
United Fire & Casualty, Tartan Products

Sonitrol requests summary relief on the following claims:

1. Counts 1 and 2 (negligence and gross negligence) because, as a matter of law, Sonitrol owed no duty to the third Parties.
2. Count 5 (breach of contract) because the Third Parties were not third-party beneficiaries of the burglar alarm contract as a matter of law.
3. Counts 7 and 8 (breach of warranties) because Sonitrol disclaimed any such warranties in the burglar alarm contract and those disclaimers are enforceable and equally operative against the Third Parties.

The record provided establishes that Plaintiffs United Fire & Casualty Company ("U.F. & C.") insured Tartan Products ("Tartan") which had product on Western Innovations floor and that the product was destroyed in the fire. Plaintiffs ("U.F. & C.") have asserted claims against Sonitrol which are subject to Sonitrol's Motion for Summary Judgment.

Counts 1 and 2 (negligence and gross negligence) because, as a matter of law, Sonitrol owed no duty to the third Parties

Sonitrol asserts that as between the United Plaintiffs as Third Parties and Sonitrol there is no special relationship between Sonitrol and the United Plaintiffs and no showing of any purported misfeasance on behalf of Sonitrol and therefore as a matter of law those claims must be dismissed. *Lewis v. Emil Clayton Plumbing Co.*, 25 P. 3d 1254 (Colo. App. 2000).

The United Plaintiffs assert under the contract between Sonitrol and Core-Mark that Sonitrol agreed, "Upon receipt of an audio signal indicating an unauthorized entry into Client's premises, Dealer's operator will use reasonable efforts to identify the sound and when warranted transmit notice of said signal to the public police department." Plaintiffs assert that Sonitrol's negligence was active misfeasance in that Sonitrol under the Core-Mark contract affirmatively agreed to monitor all incoming communications and that Sonitrol's employees actively re-armed or reset their control panels at the time of the alleged burglary and fire.

The Court in an Order entered November 7, 2005 in Case 04 CV 3637, *Union Insurance as Subrogee of Randy Overly, v. Sonitrol et al.* found in pertinent part, "there is no allegation that any Sonitrol employee caused the fire or took any other affirmative action which injured Plaintiff. The allegation is that defendant's employees were passive and failed to intercede in the situation."

The Court Finds under the law of the case doctrine that under prior Orders<sup>1</sup> this Court determined that the actions of Sonitrol's employees constituted nonfeasance, "i.e. the failure to take positive steps to protect other from harm...that employees of Sonitrol received audio activation signals from Core-mark warehouse burglar alarm system but failed to act on those signals." The Court Finds and Concludes under the rationale of *People ex rel. Gallagher v. District Court*, 666 P.2d 550, 553 (Colo.1983) that the actions of Sonitrol were passive nonfeasance and not active misfeasance and therefore Summary relief is appropriate.

The Court Grants Sonitrol's Motion for Summary Judgment on the Plaintiffs' First and Second Claims for Relief and the same are hereby dismissed.

Count 5 (breach of contract) because the Third Parties were not third-party beneficiaries of the burglar alarm contract as a matter of law.

In their Response the United Plaintiffs confess dismissal of claims of breach of contract.

The Court Grants Sonitrol's Motion for Summary Judgment on Count 5 and the same is hereby Dismissed.

Counts 7 and 8 (breach of warranties) because Sonitrol disclaimed any such warranties in the burglar alarm contract and those disclaimers are enforceable and equally operative against the Third Parties

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<sup>1</sup> Order entered October 17, 2005 in *Product Development Corporation v. Sonitrol et al.*, 03 CV 3837.

The Court finds in the November 7, 2005 Order Judge Marshall found, "Therefore, there is no question that this contract is primarily for services even though it allows the use of the Sonitrol equipment by Core-mark during the contract period. As such, the court rules as a matter of law that implied warranties of merchantability and fitness for particular purpose do not apply under this contract." Therefore under the rationale of *Gallagher, supra*. Judge Marshall's Order of November 7, 2006 established the law of the case as to the applicability of implied warranties.

The Court Grants Sonitrol's Motion for Summary Judgment on Counts 7 and 8 and the same are hereby Dismissed.

Summary Judgment Against United Insurance Company (United) and Western  
Innovation, Inc. (Western)

Western Innovations generally asserts under its contract with Sontitrol the following:

1. There is Insufficient Discovery to Determine Whether the Limitation of Damages Provision is Enforceable.
2. Neither Limitation of Liability Nor Exculpatory Provisions Apply to Gross or Willful and Wanton Negligence.
3. Colorado Public Policy Negates the "Limitation of Damages" Provision at Issue.
4. A Contracting Party Cannot Limit Damages Arising from Its Goss Negligence or Willful and Wanton Misconduct.
5. Colorado Law Recognizes Distinct Standards for Gross Negligence and Willful And Wanton Misconduct.
6. In Addition to a Contractual duty, Sonitrol had a Clear tort Duty to Western Innovations.

The Court Finds that several of Western's assertions in its Response were not initially raised by Sonitrol in its Motion for Summary Judgment, however for clarity of the record the Court enters the following Findings and Order.

The Court finds these assertions were considered in Rulings entered in this Order and related Orders on Summary Judgment and therefore incorporates those Findings and Orders and therefore under *People ex rel. Gallagher v. District Court, supra*. constitute the law of the case and are controlling as to all issued raised.

<p>District Court, Adams County, State of Colorado</p> <p>Court Address: Adams County Justice Center  1100 Judicial Center Drive  Brighton, Colorado 80601  Phone Number (303) 659-1161</p> <hr/> <p>WESTERN INNOVATIONS, INC., UNION INSURANCE COMPANY, UNITED FIRE &amp; CASUALTY, TARTAN PRODUCTS COMPANY and RANDY OVERLY dba C.P. &amp; D. COMPANIES,</p> <p>Plaintiffs,</p> <p>v.</p> <p>SONITROL CORPORATION, CORE-MARK INTERNATIONAL, INC., FLEMING COMPANIES, INC., and ROCKY MOUNTAIN FIRE AND SAFETY, INC.,</p> <p>Defendants.</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p> <hr/> <p>Case Number:  O4CV3625</p> <p>Div.C            Ctrm: 504</p>
<p><b>ORDER</b></p>	

The court has received and reviewed Sonitrol Corporation's Motion to Dismiss. The court has also received plaintiffs' response and Sonitrol's reply. The court now dispenses with oral arguments and enters its ruling on the motion as stated herein.

Plaintiffs sue for property losses resulting from fire. The core facts alleged in the Amended Complaint are summarized as follows. Core-Mark leased a portion of a warehouse in which it stored personal property. Core-Mark contracted for burglar alarm services from Sonitrol of Denver, now Sonitrol, for Core-Mark's portion of the warehouse. The contract to provide the burglar alarm services was subsequently assigned to and assumed by Sonitrol. On the date of the fire Sonitrol was responsible to Core-Mark to perform the obligations of the contract. Western Innovations, Inc., Tartan Products and Randy Overly stored goods in a separate section of the warehouse separated from Core-Mark by a common fire wall. On December 21, 2002, burglars entered the Core-Mark area of the warehouse. While the burglars were present,

the Sonitrol system detected noise in the warehouse on several occasions. However, the Sonitrol employees monitoring the system disregarded the system alarm and took no action to call police or otherwise act to protect the Core-Mark property. Before leaving the premises, the burglars set a fire in the Core-Mark section of the warehouse. The fire ultimately spread past a common fire wall into the Western Innovations area where property owned by Western Innovations, Tartan Products and Overly was destroyed. Union Insurance Company sues as subrogee of Western Innovations. United Fire & Casualty sues as subrogee of Tartan Products. In their Amended Complaint, plaintiffs sue each defendant for negligence.

Sonitrol now moves pursuant to C.R.C.P. 12(b)(5) to dismiss the negligence claims asserted against it. In its motion Sonitrol separately discusses the negligence claims based on failure to use reasonable care, claims for negligent hiring, training and supervision, and those based on defective product. Plaintiffs oppose the motion.

In ruling on a motion submitted pursuant to C.R.C.P. 12(b)(5) to dismiss an action for failure to state a claim for which relief may be granted, the court must apply well established legal standards. Such motions are viewed with disfavor and are rarely granted. *Davidson v. Dill*, 503 P.2d 157 (Colo. 1972); *Dunlap v. Colorado Springs Cablevision, Inc.*, 829 P.2d 1286 (Colo. 1992). The court may only consider matters stated in the Complaint and cannot go beyond the confines of the pleading. *Troxel v. Town of Basalt*, 682 P.2d 501 (Colo.App. 1984). All material allegations of the Complaint are assumed to be true. *Schmaltz v. St. Luke's Hospital*, 521 P.2d 787, modified 534 P.2d 781 (Colo. 1975). In the Complaint the plaintiff need not set forth the underlying facts giving rise to the claim with precise particularity. *Schockley v. Georgetown Valley Water and Sanitation District*, 548 P.2d 928 (Colo.App. 1976). A Complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Davidson v. Dill*, supra.

I.

The Negligence Claim for Failure to Act.

In their Amended Complaint plaintiffs assert a multitude of factual circumstances to support their negligence claim against Sonitrol. These include failure to monitor and maintain the audio alarm system, failing to properly test and inspect the system, failure to report received alarms to authorities, failure to take reasonable precautions to protect against potential damage to property, and "any other acts and/or omissions constituting negligence, willful and wanton conduct and/or negligence per se."<sup>1</sup> Sonitrol moves to dismiss plaintiffs' negligence claim contending it owed no duty to plaintiffs. Sonitrol argues that its conduct amounted only to nonfeasance which is not actionable absent limited special relationships.

The initial determination of whether a defendant owes a duty to the plaintiff, as well as the scope of that duty, is a question of law for the court. *Bath Excavating & Construction Co. v. Wills*, 847 P.2d 1141 (Colo. 1993). In determining whether a defendant owes a duty to a particular plaintiff, the law distinguishes between acting and failure to act, *i.e.* misfeasance, on one hand, which is active misconduct that injures others, and nonfeasance, on the other hand, which is the failure to take positive steps to protect others from harm. *University of Denver v. Whitlock*, 744 P.2d 54 (Colo. 1987); *Smit v. Anderson*, 72 P.3d 369 (Colo.App. 2002). In nonfeasance cases, the existence of a duty has been recognized only in a limited number of special relationships parties including common carrier/passenger, innkeeper/guest, employer/employee, possessor of land/invited entrant, parent/child and hospital/patient. *Lewis v. Emil Clayton Plumbing Co.*, 25 P.3d 1254 (Colo.App. 2000).

The negligence claims in this case are based on nonfeasance, *i.e.* the failure to take positive steps to protect others from harm. The Amended Complaint specifically alleges that employees of Sonitrol received audio activation signals from the Core-Mark warehouse burglar alarm system but failed to act on those signals. The complaint does not allege any affirmative action on the part of Sonitrol. This case does not fall within the limited area where a duty exists for inaction or nonfeasance. None of the special relationships where liability for nonfeasance might be imposed are alleged in the plaintiffs' Complaint. Therefore, the

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<sup>1</sup> See Amended Complaint paragraph 52.

court rules, as a matter of law, that no duty existed such as to support plaintiff's common law negligence claim against Sonitrol for any of its failures to act to protect plaintiffs' property. The motion to dismiss these claims is granted.

## II.

### The Negligent Hiring, Supervision and Training Claims.

Plaintiffs allege in their Amended Complaint that Sonitrol failed to hire, train, supervise and control competent, qualified, careful and prudent employees to perform their responsibilities in a safe and workmanlike manner and/or adequately train such employees in the safe and proper design, manufacture, testing, monitoring and/or inspection of the product. They also allege Sonitrol failed to hire, train, supervise and control competent, qualified, careful and prudent employees to perform their responsibilities while monitoring the facility a 3650 Fraser Street in a reasonable and prudent manner so as to protect plaintiffs' property.<sup>2</sup> Sonitrol separately moves to dismiss this portion of the negligence claim asserted against it.

Liability for negligent hiring, training and supervision is based on section 213 of the Restatement (Second) of Agency §213 which is clearly now adopted in Colorado. The principles of liability, however, are not based on rules of agency but rather on the law of torts. *Connes v. Molalla Transport Systems, Inc.*, 831 P.2d 1316 (Colo. 1992). Like other forms of negligence, negligent hiring, supervision and training require the existence of a legal duty by the defendant to the plaintiff, breach of that duty by the defendant, injury to plaintiff, and a sufficient causal relationship between defendant's breach and plaintiff's injuries. A negligence claim will fail if it is predicated on circumstances for which the law imposes not duty of care upon the defendant. *Connes*, supra at 1320.

This court sees no reason to address the claims for negligent hiring, supervision or training differently from the other negligence claims discussed above. These claims are also based entirely on the failure of Sonitrol employees to act to protect plaintiffs from injury. There is no allegation that any Sonitrol employee caused the fire or took any other affirmative action which injured plaintiffs. The allegation is that Sonitrol employees were passive and failed to intercede in the situation.

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<sup>2</sup> See paragraph 52 (e) and (f) of Amended Complaint.

Therefore, it is this court's ruling that the same distinction between malfeasance and nonfeasance applies to these claims and that they must be dismissed for the same reasons as stated in Section I of this order.<sup>3</sup>

### III. The Negligence Claims Based on Product Defects.

Plaintiffs' negligence claim also includes the conclusory allegation that Sonitrol failed to properly design and manufacture the Sonitrol audio alarm system in a manner that it would not fail.<sup>4</sup> Sonitrol separately moves to dismiss these aspects of the negligence claim.

Whether a defective product claim is based on strict liability or negligence, the plaintiff must plead and prove the product is defective. *Mile High Concrete, Inc. v. Matz*, 842 P.2d 148 (Colo. 1992). While plaintiffs make the conclusory allegation that Sonitrol negligently designed and manufactured the alarm system, the Amended Complaint nowhere alleges the product itself was defective. To the contrary, plaintiffs only allegation of alarm system failure is that one microphone in the system never produced an audio activation because its sensitivity was set at its lowest level by defendants, effectively disabling the microphone.<sup>5</sup> In fact, the substantial essence of plaintiffs complain it that the alarm system performed properly sending audio alarms to the Sonitrol monitoring facilities where they were neglected by the monitoring employee. These allegations do not support a claim based on a defective product. Therefore, the court dismisses the negligence claims based on negligent design or manufacture.

### IV. Summary.

In summary, the court dismisses the negligence claim asserted against Sonitrol in its entirety.

<sup>3</sup> Also see *Arnold v. Colorado State Hospital*, 910 P.2d 104 (Colo.App. 1995) holding a claim for negligent supervision can only be sustained where damage results from the wrongful actions of the person supervised. The court sees no reason why the same principle would not apply to claims for negligent hiring or training.

<sup>4</sup> See Amended Complaint, paragraphs 52(a) and (b).

<sup>5</sup> See Amended Complaint, paragraph 18.

Dated at Brighton, Colorado this 18th day of April, 2005.

By the court:

**Duly signed original  
in court file**

---

Donald W. Marshall, Jr.  
District Court Judge

**CERTIFICATE OF MAILING**

I hereby certify that the foregoing document was sent via JusticeLink (e-file) to all counsel of record and all pro se parties this 18th day of April, 2005.

**Duly signed original  
in court file**

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Division Clerk