

NO. A04-1251

State of Minnesota  
**In Supreme Court**

McWilliams & Associates, Inc., a Minnesota Corporation,  
d/b/a Top Value Homes,

*Respondent,*

vs.

Tappe Construction; Panelcraft of Minnesota, Inc. and  
Jeffrey Johnson, Individually and in his Capacity as Corporate Officer  
of Panelcraft of Minnesota, Inc.; and Windsor Window Company,

*Appellants.*

**BRIEF OF RESPONDENT MCWILLIAMS & ASSOCIATES, INC.,  
d/b/a TOP VALUE HOMES**

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## STATEMENT OF LEGAL ISSUE

Does Minn. Stat. § 541.051 prohibit a defendant from joining additional parties into a timely-commenced action by asserting unaccrued claims of contribution or indemnity if that joinder occurs more than ten years after completion of construction?

The district court held that a ten-year statute of repose applies to contribution and indemnity actions even before they accrue, regardless of the timeliness of the claims from which they derive, and therefore, granted Appellants' motions for summary judgment.

The Minnesota Court of Appeals held that the concept of accrual was distinct from the right to sue, and therefore, the statute deems otherwise unaccrued contribution or indemnity claims to accrue on the tenth anniversary of construction, thus permitting such claims to be brought up until the twelfth anniversary of construction. The Minnesota Court of Appeals reversed the decision of the district court dismissing the contribution and indemnity claims and remanded the proceedings to the district court.

### **Apposite Cases:**

Calder v. City of Crystal, 318 N.W.2d 838 (Minn. 1982);

City of Willmar v. Short-Elliott-Hendrickson, 512 N.W.2d 872 (Minn. 1994);

Blomgren v. Marshall Mgmt. Services, 483 N.W.2d 504, 507 (Minn. Ct. App. 1992); and

Minnesota Landmarks v. M.A. Mortenson Co., 466 N.W.2d 413, 415 (Minn. Ct. App. 1991) rev. denied (Minn. May 10, 1991).

### **Apposite Statute:**

Minn. Stat. § 541.051.

## STATEMENT OF THE CASE

This matter arises from a homeowner's action originally brought against Respondent McWilliams & Associates, Inc., d/b/a Top Value Homes ("Top Value Homes"), a general contractor. The suit alleged water intrusion-related damages to a home built by Top Value Homes in July 1993. The homeowners, William Weston and Debra Schwalbe commenced the action in May 2003, shortly before the tenth anniversary of the construction. In March and April 2004, Top Value Homes served Third-Party Complaints seeking contribution and indemnity from the parties responsible for the defects alleged by Weston and Schwalbe: Appellants Tappe Construction; Panelcraft of Minnesota, Inc. ("Panelcraft") and Jeffrey Johnson; and Windsor Window Company ("Windsor Window").

Tappe Construction, Windsor Window and Panelcraft sought dismissal of the claims for contribution and indemnity based on the ten-year statute of repose in Minn. Stat. § 541.051. In the Findings of Fact, Conclusions of Law and Order for Judgment and Partial Judgment, filed on June 9, 2004, the Dakota County District Court granted Appellants' motions for summary judgment, concluding that the third-party claims were barred by the statute of repose. Top Value Homes petitioned the Minnesota Court of Appeals for discretionary review. Discretionary review was accepted, and in a published opinion dated April 12, 2005, the Minnesota Court of Appeals reversed the decision of the district court, holding that for contribution and indemnity actions "accrual" of the claim signified the beginning of a period of limitations, not the end. In order to avoid an absurd result, the court held Minn. Stat. § 541.051, subd. 1, must be interpreted to

conclude that an otherwise unaccrued action for contribution or indemnity is deemed accrued on the tenth anniversary of construction, and suit can be brought at any time before the twelfth anniversary of construction.

The reasoning adopted by the Minnesota Court of Appeals was not the reasoning advocated by either Appellants or Respondent in their respective briefs and oral arguments. Although reaching a proper outcome under the facts of the present case, the reasoning of the Court of Appeals could create for others the same problem faced by Top Value Homes here – *e.g.*, a plaintiff homeowner could bring a timely action at the end of the twelfth year, and the general contractor could be unreasonably barred by the statute of repose from joining other responsible parties into that same action. Thus, while the Minnesota Court of Appeals reached the correct outcome, in order to avoid an absurd and unreasonable result in future cases, Respondent respectfully submits a better interpretation is that the statute of repose in Minn. Stat. § 541.051 applies to an initial action only, not derivative actions of contribution and indemnity.

### **STATEMENT OF FACTS**

In approximately July of 1994, William Weston purchased from Top Value Homes a newly-constructed house located on Red Oak Drive in Eagan, Minnesota. Appellants' Appendix (hereinafter "App."), p. 17. Top Value Homes had hired Tappe Construction to frame the house. Windsor Window Company manufactured the windows that Tappe Construction installed. Panelcraft of Minnesota installed the siding on the house. App., p. 12. A Certificate of Occupancy was issued on July 20, 1993. App., p. 32.

After discovering a potential construction defect problem and related alleged damages, Plaintiffs Weston and Schwalbe sued Top Value Homes on or about May 15, 2003, two months before the tenth anniversary of the completed construction. App., p. 16. After receiving an extension to answer, in order to investigate the allegations further, Top Value Homes served its Answer on January 30, 2004. App., p. 26. After identifying and locating the parties responsible for the construction defects alleged by Plaintiffs, Top Value Homes served third-party complaints on Tappe Construction, Windsor Window, and Panelcraft on March 22, 2004, March 29, 2004, and April 8, 2004, respectively. See App., p. 54.

#### **STANDARD OF REVIEW**

In reviewing a motion for summary judgment, the appellate court must determine whether there are any genuine issues of material fact, and whether the district court erred in its application of the law. See Royal-Milbank Ins. Co. v. Busse, 474 N.W.2d 441, 442 (Minn. Ct. App. 1991) (citing Offerdahl v. Univ. of Minn. Hosps. & Clinics, 426 N.W.2d 425, 427 (Minn. 1988)). Here, the decisions of the district court and the court of appeals were based on undisputed facts. The sole legal issue is the application of Minnesota Statute § 541.051. Statutory construction is a question of law that this Court reviews de novo. See Brookfield Trade Center, Inc. v. County of Ramsey, 584 N.W.2d 390, 393 (Minn. 1998).

## ARGUMENT

### **I. THE STATUTE OF REPOSE IN MINN. STAT. § 541.051 DOES NOT BAR TOP VALUE HOMES' CONTRIBUTION AND INDEMNITY ACTIONS.**

#### **A. Claims for Contribution or Indemnity are Contingent Actions That Derive Entirely From an "Initial Claim" Presented by Another Party.**

Before engaging in any analysis of the statute of repose and the issues presented by the facts of the present case, it is important to clarify the nature of a claim for contribution or indemnity. Contribution and Indemnity are "venerable equitable claims" that pre-date Minn. Stat. § 541.051 and any statute of repose in Minnesota. City of Willmar v. Short-Elliott-Hendrickson, Inc., 512 N.W.2d 872, 874 (Minn. 1994) (citations omitted). Contribution arises when two parties share "common liability" to another and one is being called upon to pay "more than its fair share" to the initial claimant. See, e.g., id. Indemnity is similar, except that it is essentially contractual in nature and arises not from "common liability" but from a circumstance where one party has been called upon to pay an obligation that more appropriately lies with another. See id. While the actions themselves can be brought "independently" (see id. at 874) they are not themselves "independent" – instead, they are "contingent on the outcome of an original action." Grothe v. Shaffer, 232 N.W.2d 227 (Minn. 1975) (citations omitted), cited by Calder v. City of Crystal, 318 N.W.2d 838, 841 (Minn. 1982). In other words, a party must necessarily be the subject of an initial claim before it can seek contribution or indemnity from another.

Claims for contribution or indemnity do not typically ripen or accrue until the party entitled to contribution or indemnity has paid more than its fair share of a joint obligation (contribution) or incurred the liability of another (indemnity). See Calder, 318 N.W.2d at 841. In Calder, however, this Court pointed out that “defendants customarily have joined third parties at the time they were initially sued” instead of waiting for actions to ripen or accrue; and that Minnesota’s “Rules of Civil Procedure anticipate and encourage the joining of third parties at an early stage in the proceedings.” Id., at 844 (citing Minn. R. Civ. P. 14.01). Indeed, in cases involving construction defects, “[t]he business world and construction bar recognize that general contractors must often sue subcontractors by means of third-party actions. Minnesota Landmarks v. M.A. Mortenson Co., 466 N.W.2d 413, 415 (Minn. Ct. App. 1991) rev. denied (Minn. May 10, 1991).

With respect to Minn. Stat. § 541.051 and analysis of the statute of repose, the derivative nature of claims for contribution or indemnity are vitally important. In the context of a construction defect claim, no party – be it Top Value Homes, or anyone else – can present a claim for contribution or indemnity, without having first been the subject of a claim by the owner or occupant of the building with the alleged defect. Specifically, the party seeking contribution or indemnity does not have the ability to control when the initial lawsuit is commenced. The earliest time at which a claim for contribution or indemnity can be brought is after a party has itself been sued. For purposes of the statute of repose, this becomes vitally important, since an initial action could be commenced on

the eve of (or in some instances after) expiration of the statute of repose, leaving a party with little (or no) time to join the responsible third parties.

**B. Minn. Stat. § 541.051's Unclear Limitations On Claims For Contribution and Indemnity Must Be Interpreted to Avoid Absurd Results.**

Where terms in a statute do not have a plain meaning, and they can be subject to more than one reasonable interpretation, the terms are ambiguous. Info Tel Communications v. U.S. West, 592 N.W.2d 880, 884 (Minn. Ct. App. 1999); See also Smith v. Hollingsworth, 2005 WL 1323908, \* 4 (D. Minn. 2005) (terms as used in a statute can be ambiguous). In such cases, courts should interpret ambiguous terms in a manner that promotes the legislature's intent. Mankato Citizens Tel. Co. v. Comm'r of Taxation, 145 N.W.2d 313, 112 (Minn. 1966). Moreover, Minnesota statutes further require that statutes be interpreted to avoid absurd or unreasonable results. See Minn. Stat. § 645.16(6) (2002) (requiring attention to the consequences of interpretation); see also Minn. Stat. § 645.17(1) (2002) (declaring legislative intent against the absurd or unreasonable), cited by Weston v. McWilliams & Associates, Inc., 694 N.W.2d 558, 564 (Minn. Ct. App. 2005); App., p. 6.

The proper application of Minnesota's statute of repose is not nearly as clear as Appellants contend. One need only read the text of Minn. Stat. § 541.051, its various historical amendments,<sup>1</sup> and the case law interpreting it to recognize that neither the

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<sup>1</sup> Pursuant to Minn. R. Civ. App. P. 128.04, the complete text of Minn. Stat. § 541.051 (2002) is included herewith as an Addendum, along with "blacklined" versions of the statute and amendments from its enactment in 1965 to the present.

legislature nor the courts anticipated the various permutations under which Section 541.051 can arise in a homeowner's claim for construction defects. Indeed, the Minnesota Court of Appeals, while grappling with the present issue acknowledged the problem, stating "the repose clause begs for clarity." App., p. 5 (Weston, 694 N.W.2d at 562).

At the time the present case commenced, claims arising from an improvement to real property were subject to a general 10-year statute of repose (under Minn. Stat. § 541.051, subs. 1(a) & 1(b) (2002)); *except* in certain circumstances when they were subject to a 12-year statute of repose (under Minn. Stat. § 541.051, subd. 2 (2002));<sup>2</sup> *unless* it was a claim for breach of warranty, in which case it was subject to no statute of repose at all. See Koes v. Advanced Design, Inc., 636 N.W.2d 352, 359 (Minn. Ct. App. 2001) (citing Minn. Stat. § 541.051, subd. 4, and stating "there is no other reference to any statute of repose that limits the time in which a cause of action must be brought for breach of warranty under § 327A.02"), rev. denied (Minn., Feb. 19, 2002).<sup>3</sup> Notably, Plaintiffs' claims against Top Value include a claim for breach of warranty under Minn. Stat. § 327A.02.

With this backdrop, Appellants argue that the legislature clearly intended to enact only a 10-year statute of repose with respect to claims for contribution and indemnity.

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<sup>2</sup> Minn. Stat. § 541.051, subd. 2, provides a 12-year statute of repose if the injury is discovered in the ninth or tenth year following substantial completion of the construction.

<sup>3</sup> Since the Koes decision, the legislature has revised Minn. Stat. § 541.051, to apply the same twelve-year repose period found in Minn. Stat. § 541.051, subd. 2., to warranty claims made pursuant to Minn. Stat. § 327A. See Minn. Stat. § 541.051, subd. 4 (2004), Addendum p. 8.

They argue this even though Minn. Stat. § 541.051 makes no specific statement about limiting claims for contribution or indemnity, other than providing that they must be brought within two years of the date on which a party has paid a “final judgment, arbitration award, or settlement.” Minn. Stat. § 541.051, subds. 1(a) & 1(b).<sup>4</sup> Appellants argue this even though at the time this action was brought, homeowners, like Plaintiffs, had statutes of repose ranging from ten to twelve years, or, if alleging breach of warranty, no statute of repose at all.

Despite these shifting statutes of repose and a lack of any detailed language applying them to contribution or indemnity actions, Appellants contend that there is a clear, express intention to create a ten-year statute of repose for such actions. Significantly, this contention ignores the circumstance where a Plaintiff can “run out the clock” by commencing an action on the brink of the expiration of a statute of repose or even commence it twelve or more years after completion of construction. In these circumstances, Appellants interpret the statute to mean that builders like Top Value Homes are left with no recourse because the “ten-year repose clock” has run.

Again, the Court of Appeals recognized the flaw in this argument pointing out that a court interpreting a statute is “compelled to avoid an absurd interpretation.” App., p. 6 (Weston, 694 N.W.2d at 563-64 (citations omitted)). It defies logic to conclude that the legislature intended to permit a homeowner to commence an action twelve years from the date of construction, but prevent a builder from impleading the parties responsible for the

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<sup>4</sup> Limitation of two years from accrual (subd. 1(a)), with accrual defined as “payment of final judgment, arbitration award or settlement” (subd. 1(b)).

homeowner's claims because ten years have passed from the date of original construction. See Minnesota Landmarks, 466 N.W.2d at 415 (reversing summary judgment for third-party defendant subcontractors under Minn. Stat. § 541.051's statute of limitations stating "[t]he legislative purpose of this section would commonly be frustrated if third-party defendants could then bar the contribution and indemnity claim by raising a statute of limitations defense against plaintiff which was unavailable to third-party plaintiff).<sup>5</sup>

Appellants' interpretation begs the question:

*"Why would a party seeking contribution or indemnity by impleading parties into an underlying action be subject to shorter, harsher statute of repose than the one applicable to the underlying action?"*

The answer is:

*"it would not and is not."*

The legislature did not intend such an absurd or unreasonable result; and thus, did not impose a ten-year repose period on contribution or indemnity actions. With these considerations in mind, the Court of Appeals correctly determined the statute of repose in Minn. Stat. § 541.051, subd.1 does not bar Top Value Homes' claims of contribution and indemnity against Appellants.

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<sup>5</sup> Although not an issue before the Minnesota Landmarks court, this Court should take note that in that case, M.A. Mortenson sued the subcontractors almost 11 years after completion of construction. See Minnesota Landmarks, 466 N.W.2d at 414 (work completed in summer of 1978, Minnesota Landmarks sued Mortenson May 12, 1989, with third-party complaint following thereafter).

**C. Interpreted to Further Legislative Intent, Minn. Stat. § 541.051 Does Not Bar Top Value Homes' Claims of Contribution and Indemnity.**

As stated above, courts must interpret ambiguous statutes in a manner to promote legislative intent. See Mankato Citizens Tel. Co., 145 N.W.2d at 112. Respondent, as well as the court of appeals, undertook a search for legislative history regarding the terms of the statute at issue. Neither senate committee tapes nor any other form of documented legislative intent is available to provide aid in statutory interpretation. What is available is the context of the language of the statute, the historical amendments, the nature of contribution and indemnity claims, and common sense. Using the admittedly limited tools available to ascertain the legislative intent for Minn. Stat. § 541.051, the only reasonable conclusion is that the legislature did not intend to bar Respondent's claims for contribution and indemnity in this case.

Minn. Stat. § 541.051, subd. 1, provides both a statute of limitations and a statute of repose. An analysis of the statutory language and the historical amendments reveals a clear intent to limit initial actions – whether by statute of limitation or statute of repose. That same analysis, however, shows only limited treatment of derivative claims for contribution and indemnity; and then, only to provide a statute of limitations.

**1. Statute of Limitations**

Section 541.051's statute of limitations provides that no action to recover damages for injury to property arising out of the defective and unsafe condition of improvement to real property shall be brought more than two years after the discovery of the injury, or in

the case of an action for contribution or indemnity, more than two years from payment of final judgment, arbitration award or settlement.” See Minn. Stat. § 541.051, subs. 1(a) & 1(b) (2002). Beginning with the 1980 amendment, the statute exhibits a clear intent to give a claimant two years to commence an action. See Addendum p. 4 (Minn. Stat. § 541.051 (1980)). Along with lengthening the “repose period” from 10 to 15 years, the legislature amended subdivision two, to lengthened from one year to two years, the time allowed for commencing an action when an injury is discovered near the running of the “repose period.” Id. In addition, the legislature amended subdivision four to provide a two-year statute of limitations on claims for breach of warranty, even though Section 541.051 did not otherwise apply to such claims. Id.

Later, in 1988, the legislature again amended Section 541.051 to express its intent that any party be given two years to commence an action. This time, the legislature focused on contribution and indemnity actions, amending the statute to provide that an action for contribution or indemnity must be commenced within two years of its accrual. Addendum p. 6 (Minn. Stat. § 541.051 (1988)). The legislature then defined accrual for contribution or indemnity actions as “payment of final judgment, arbitration award, or settlement.” Id. This amendment was a direct response to a decision of this Court in Bulau v. Hector Plumbing and Heating Co., 402 N.W.2d 528 (Minn. 1987), which held that under the plain language of the 1980 version of the statute, the statute of limitations for a contribution or indemnity action began to run with the initial discovery of the injury by the underlying plaintiff. See Blomgren v. Marshall Mgmt. Serv., 483 N.W.2d 504, 507 (Minn. Ct. App. 1992) (stating the 1988 amendment effectively overruled Bulau and

codified the general common law rule regarding the statute of limitations for contribution or indemnity actions).

Whatever one may argue regarding the legislature's intent with respect to statutes of repose, there can be no doubt that the legislature has shown a clear intent to give any party two full years to commence an action, once it realizes it may have a cause of action.

## 2. Statute of Repose

Minn. Stat. § 541.051's only language providing a statute of repose states "nor in any event shall such a cause of action accrue more than ten years after substantial completion of the construction." Minn. Stat. § 541.051, subd. 1(a) (2002). While the original version of the statute appeared to have a general 10-year time bar on an action, the term "accrue" first appeared in the statute with the 1980 amendment, which added the language "such a cause of action." Addendum p. 4 (Minn. Stat. § 541.051 (1980)). This change, with its use of the singular phrasing, indicates that it is referring to the beginning of the subdivision, which discusses an "action by any person in contract, tort, or otherwise to recover damages for any injury." *Id.* Since a claim for contribution or indemnity is distinctly referenced and separated from the initial discussion of an action to "recover damages for any injury," a legislative intent to include claims for contribution or indemnity within the statute of repose would need to use a plural phrasing: "such causes of action." That phrasing was not used, which exhibits an intent by the legislature to apply the statute of repose to initial actions only – without which an action for contribution or indemnity could not exist.

Notably, when the 1980 amendment lengthened the repose period from ten to fifteen years, it further acknowledged the potential unfairness if a plaintiff were to discover its injury with less than two years remaining on the statute of repose. Under those circumstances, the legislature changed subdivision 2 and expressed its preference for a two-year period to commence an action over any repose period, by permitting a repose period to extend as much as an additional two years. Id. In expressing this preference, the legislature specifically referred to “the case of such an injury to property or the person.” Id. Throughout the present case, this is what Respondent has consistently referred to as an “initial action” from which a claim for contribution or indemnity derives.

The 1988 amendment for the first time used the term “accrual” with respect to an action for contribution or indemnity. Addendum p. 6 (Minn. Stat. § 541.051 (1988)). It was inserted into the portion of subdivision 1(a) that provided the two-year statute of limitations – not the ten-year statute of repose. Id. Moreover, it was defined as “payment of a final judgment, arbitration award, or settlement.” Id. (subd. 1(b)). With that definition, and in the context of the Bulau decision, the interpretation of the insertion of accrual in 1988 must be that it was only used to clarify the statute of limitations, not the statute of repose. Indeed, the legislature acted to further define the statute of repose, but again, only for initial actions for injury to property or the person, by defining accrual for purposes of subdivision 1(a) as “discovery of the injury.” Id. (subd. 1(b)).

Finally, the most recent amendment to the statute – in 2004 – is also instructive on the legislature’s intent to apply the statute of repose to a homeowner’s claim only. In

response to the court of appeals decision in Koes v. Advanced Design, supra, 636 N.W.2d 352, the legislature again amended subdivision 4, this time to create a specific statute of repose for warranty claims under Minn. Stat. § 327A. Addendum p. 8 (Minn. Stat. § 541.051 (2004)). The amended repose period for warranty claims is consistent with the expression earlier in section 541.051: ten years from substantial completion of the construction with an additional two years for a total repose of up to twelve years, in event of the breach of warranty is discovered in years nine or ten. Id. By definition, claims for breach of warranties under Minn. Stat. § 327A can only be brought by a homeowner against a builder. See Minn. Stat. § 327A.02 (warranty is between “vendor” and “vendee”); Minn. Stat. § 327A.01, subd. 6 & 7 (“vendee” means any purchaser of a dwelling; “vendor” means any person, firm or corporation which constructs dwellings for the purpose of sale). Thus, the legislature again exhibited its intent to only place a statute of repose on initial homeowner actions, not actions for contribution or indemnity.

### **3. Legislative Intent**

With each of its amendments to Section 541.051 – in 1980, 1988, and 2004 – the legislature revised the statute to clarify the statute of repose. In each instance, it made no amendment to indicate it intended to apply a statute of repose to claims for contribution or indemnity. To the contrary, each of the “repose” amendments focused on initial actions. The only amendment applying to contribution or indemnity claims liberalized their use by clarifying the applicable statute of limitations. With all of the various amendments, the legislature has established a variable statute of repose of 10 to 12 years. With no regard for this variable statute of repose for initial actions, however, Appellants

contend that the legislature clearly intended to enact only a 10-year statute of repose for contribution and indemnity actions.

In the absence of any specific supporting statutory language, Appellants argue for a strict 10-year repose on contribution or indemnity actions. They argue this even though the initial action upon which a claim for contribution or indemnity is contingent may not have been commenced. In short, they contend the legislature intended to create a window of time in which a builder alone can be liable for claims arising from the construction of a house. In fact, under the circumstances of the present case (a statutory warranty claim that pre-dates the 2004 amendment), Appellants are interpreting the statute in such a way that would permit Plaintiffs in this case to have initiated this action more than twelve years after completion of the construction while leaving Respondent with no recourse against the responsible parties. This is not the language of the statute, nor could it have been the intent of the legislature when enacting the statute.

While the Minnesota Court of Appeals took a different approach, Respondent maintains the crux of the statute that must be examined here is the term “such a cause of action.” An examination of the statute leads to the conclusion that “such a cause of action” as it relates to the statute of repose in the present context, refers to a plaintiff homeowner’s initial action – not a contingent action for contribution and/or indemnity.

This interpretation of “such a cause of action” is not unique to Respondent. Indeed, the same interpretation was made by the Washington County District Court in

Reiter v. W.F. Bauer Construction, File No. C1-03-2385 (April 26, 2004).<sup>6</sup> There, the court found that the identical argument for a ten-year repose on contribution or indemnity claims misapplied the “nor” clause of Minn. Stat. § 541.051, subd. 1(a). Id. It held that the “nor” clause contained in the ten-year repose clause applied to an “initial action” - not an action for contribution or indemnity that arises from it. See id. at 10. The reference to “such an action” – note the singular – relates back to the beginning of the subdivision; an initial action, not an action for contribution or indemnity.

Borrowing from the court order, a focused reading of Minn. Stat. § 541.051 shows the following:

**Subdivision 1. (a)** Except where fraud is involved, **no action by any person** in contract, tort, or otherwise **to recover damages for any injury to property**, real or personal, 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 the injury shall be brought** against any person performing or furnishing the design, planning, supervision, materials, or observation of construction or construction of the improvement to real property or against the owner of the real property **more than two years after the discovery of the injury or, in the case of an action for contribution or indemnity, accrual of the cause of action**, nor, in any event shall such a cause of action accrue more than ten years after substantial completion of the construction. Date of substantial completion shall be determined by the date when the construction is sufficiently completed so that the owner or owner’s representative can occupy or use the improvement for the intended purpose.

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<sup>6</sup> The citation and references to the Reiter decision obviously are not intended to assert any sort of precedent for this Court. Instead, they are offered for two reasons: first, they were made in all phases of the proceedings below; second, they are evidence that Respondent is not alone in its interpretation of Minn. Stat. § 541.051. A copy of this decision is provided at page 9 of the Addendum.

(b) For purposes of paragraph (a), a cause of action accrues upon discovery of the injury or, in the case of an action for contribution or indemnity, upon payment of a final judgment, arbitration award, or settlement arising out of the defective and unsafe condition.

Id. at 9 (emphasis in original).

The bold portions quoted above define the time limit for a contribution action as two years after accrual of the cause of action. Id. at 9-10. The underlined portions define accrual of the cause of action, with paragraph (a) containing the “nor” clause that separately limits accrual of “such an action” (*i.e.*, an initial action, not an action for contribution or indemnity) to ten years from substantial completion. Id. at 10. Paragraph (b) sets accrual for a contribution action to be the date on which a settlement is paid. Id.<sup>7</sup> Thus, a focused reading of the statute shows that an initial action by the plaintiff homeowners must be commenced within ten to twelve years of substantial completion of the home, but that Top Value Homes’ action for contribution and indemnity only must be brought within two years of paying a final judgment or settlement to the plaintiffs.

Appellants argue that this reading of the statute does not comport with legislative intent, because the true legislative intent behind a statute of repose is to prevent the litigation of “stale claims.” See App. Brief, p. 6. Top Value Homes agrees that this is the purpose behind a statute of repose – to provide an absolute cut off to claims. However, allowing a homeowner to bring a timely action, but not allowing the builder to join other

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<sup>7</sup> Reiter only dealt with a contribution claim for amounts paid in settlement. For purposes of the present case, Top Value Homes’ claims for contribution or indemnity will not accrue until it has paid a final judgment, arbitration award, or settlement.

responsible parties in that same action is not an absolute cut off. It is two different cut-offs for claims that arise from the same operative injury but happen to be brought by different parties. It defies logic to contend that the legislature considered a homeowners' claim to become stale at 12 years, but that a contribution or indemnity action deriving from that claim would become stale 2 years earlier. As stated by the Washington County District Court in Reiter:

. . . in reading [the Third-Party's] argument and footnotes, he seems to argue that if Plaintiff has a ten-year warranty to file a claim and properly files within that time, there must also be a settlement within this ten year time frame between Plaintiff/Defendant and all other parties brought into the case, or there can be no contribution claims. This seems ridiculous and the statute never mentions a settlement time limit or time frame.

Reiter, File No. C1-03-2385 at 10. The existence of a statute of repose that applies to initial actions will prevent stale actions. Once a homeowner's rights are cut off by a statute of repose, it logically follows that the contribution and indemnity actions on that same claim are barred.

#### **4. Extra-jurisdictional Statutes**

Appellants point to Iowa and Wisconsin case law interpreting those states' statutes of repose in support of their arguments that the Minn. Stat. § 541.051 statute of repose bars claims of contribution and indemnity brought after 10 years, even where the main action is timely filed. See App. Brief, pp. 6, 12. These cases are distinguishable, however, because the statutes of repose at issue are distinguishable. Wisconsin Stat. § 893.89 contains the language "no cause of action may accrue and no action may be commenced, including an action for contribution or indemnity." The statute specifically

addresses how actions for contribution and indemnity are to be handled. In addition, it covers both the accrual and commencement of actions. Iowa Stat. § 614.1(11) is a more typical statute of repose, using the language, “an action . . . shall not be brought . . .”.

The statute of repose at issue here is distinguishable. As stated by the Minnesota Court of Appeals, this not a typical statute of repose:

Although the “nor” clause might be expected to state a date of repose for the time when an action “shall be brought” . . . the repose clause says instead that the cause of action must “accrue” no later than ten years after construction is completed. In the limitations portion of the statute, the date of accrual is the date the limitations period begins. For an injury claim, the date of this significant accruing is designated as the date of discovery. For a contribution/indemnity claim, the beginning of the date of the limitations period is designated only as the date of “accrual,” and this is defined in the next subparagraph as the payment event that gives rise to a contribution claim.

App., p. 4 (Weston 694 N.W.2d at 561-62) (internal citations omitted). The concept of “accrual” as the basis for a period of limitation is distinct. Based on the manner in which the Minnesota legislature drafted the statute, separating out claims for indemnity and contribution, it is clear that they are distinguished from initial actions brought by homeowners. The statute of repose applies only to initial homeowner actions – not derivative actions of contribution and indemnity.

**D. Interpreted to Avoid Constitutional Violations and to Avoid Absurd and Unjust Results, Minn. Stat. § 541.051 Cannot Bar Top Value Homes Claims of Contribution and Indemnity.**

Appellants also argue that applying the statute of repose to initial actions, but not derivative actions for contribution and indemnity creates practical problems. See App. Brief, p. 6. To the contrary, reading the statute as advocated by Appellants leads to

practical problems. Appellants' reading leads not only to an absurd result, but it violates constitutional principals of due process. As this Court stated in Calder:

We do not believe the legislature can pass a statute allowing a substantive remedy and yet, by adopting a procedural statute of limitations, make the remedy impossible to achieve and meaningless by barring the suit from being brought before it has matured.

Calder, 318 N.W.2d at 844. In Minnesota Landmarks, when specifically addressing an attempt to use Minn. Stat. § 541.051 to bar a general contractor's third-party joinder of subcontractors with claims of contribution and indemnity, the Minnesota Court of Appeals reversed summary judgment and relied on the language in Calder to hold that constitutional due process requires a reasonable time for a general contractor to join subcontractors as third-parties. Minnesota Landmarks, 466 N.W.2d at 416 (citation omitted).

Statutes must be construed to avoid absurd or unjust consequences. See Hince v. O'Keefe, 632 N.W.2d 577, 582 (Minn. 2001) (citing Erickson v. Sunset Mem'l Park Ass'n, 108 N.W.2d 434, 441 (Minn. 1961)). Courts must also construe statutes to avoid constitutional violations. Id. Indeed, the statutory construct being advocated by Appellants violates constitutional principals of due process. Their interpretation creates a statute of repose for a homeowner that is longer than a statute of repose for a builder seeking contribution for the same claims as the homeowner. In this case, their interpretation would have required Top Value Homes to settle Plaintiffs' case within two months of being served with the Complaint in order for the contribution and indemnity actions to accrue within the ten-year statute of repose they argue applies to Top Value

Homes. This interpretation does not provide a reasonable period to join third-parties and therefore, would violate constitutional principals of due process as stated in Calder and Minnesota Landmarks.

Appellants argue that Top Value Homes could have saved itself by commencing its action against them within two months of having been sued. They contend that two months is a reasonable period of time for a defendant to commence a third-party action. This argument not only ignores the realities of claims investigation and litigation, but also ignores the decision in Calder, which found that, while 18 months was an unreasonable delay in commencing a third-party action, 14 months was a constitutionally reasonable period in which to commence it. See Calder, 318 N.W.2d at 842, 844.

Moreover, the position advocated by Appellants creates potential ethical problems under Minn. R. Civ. P. 11 and Minn. Stat. § 549.211. Top Value Homes had a duty under the Minnesota Rules of Civil Procedure and Minnesota Statutes to have a good faith basis for bringing its claims. The position advocated by Appellants would require general contractors to serve third-party complaints *en masse* to all entities that could be associated with a project without having a good faith basis to do so. This is a bad policy to promote.

To be clear, Top Value Homes is not contending that Minn. Stat. § 541.051 is unconstitutional.<sup>8</sup> To the contrary, Top Value Homes' interpretation of the statute raises no constitutional issue. As argued throughout this matter, the statute on its face does not

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<sup>8</sup> Top Value Homes points this out to remove any argument or question that it has failed to notify the Attorney General's Office of a Constitutional Challenge as required by Minn. R. Civ. App. P. 144.

create a statute of repose for contribution or indemnity actions. Instead, the statute of repose indirectly applies to claims for contribution or indemnity; the protections it affords to builders and subcontractors apply equally to all of them and depend entirely on when plaintiffs commence an action. Now, plaintiffs have, at most, twelve years to commence an action. If that twelve years passes with no lawsuit, all parties (builders, subcontractors and suppliers, alike) can be secure in the knowledge that they will not be hailed into court to litigate stale claims. The statute is not unconstitutional - the interpretation of it espoused by Appellants is.

**II. THE MINNESOTA COURT OF APPEALS CONSTRUED MINN. STAT. § 541.051 IN A MANNER THAT COMPORTS WITH EQUITY AND JUSTICE.**

In analyzing Minn. Stat. 541.051, the Minnesota Court of Appeals focused on the use of the term “accrual,” rather than the typical statute of repose terminology “shall be brought,” which was a change made by the 1980 amendment. App., p. 5. Under the statute, a cause of action for contribution and indemnity “accrues” “upon payment of a final judgment, arbitration award, or settlement arising out of the defective and unsafe condition.” Minn. Stat. § 541.051, subd. 1(b). The court of appeals determined the use of the distinct term “accrual,” was a reference by the legislature to the beginning of the time period, not the end. The court of appeals recognized that damages could be discovered in the ninth and tenth years after construction, which would “destroy[] the right to assert such a claim before the contribution claimant has any opportunity to learn that a meritorious claim of an injured party has arisen.” App., p. 6 (Weston, 694 N.W.2d at 563). Therefore, in order to avoid constitutional violations and avoid and absurd

result, the court of appeals inferred from the language that contribution and indemnity claims are deemed to be accrued at the tenth anniversary, if they have not already.

While the court of appeals recognized the ambiguity in the “distinctly different concept of accrual,” App., p. 5 (Id.), the inference that contribution and indemnity claims are deemed accrued if they already have not done so at the tenth anniversary of completion of construction could potentially lead to the same result the court found the legislature was trying to avoid. If a homeowner plaintiff discovers damages in the tenth year, then has an additional two years to bring an action, the same situation as the one before this court could be presented - a homeowner plaintiff could bring a timely action against a general contractor builder, but the builder’s recourse against responsible parties is expired.

While the court of appeals’ interpretation may leave certain possible claims unprotected, this Court can still adopt the court of appeals’ reasoning and leave those possible claims to be remedied by the doctrine of equity. “[E]quity deems it more important that a defendant not evade its liability at the literal expense of a codefendant.” City of Willmar, 512 N.W.2d at 875. Appellants argue that equity has no place in the consideration as to whether Top Value Homes can implead them into the plaintiffs’ initial action; indeed the court of appeals, without explanation, rejected this argument as without merit. App., p. 7 (Weston, 694 N.W.2d at 564). However, the decision in City of Willmar refutes both Appellants’ contention and the court’s summary rejection.

In City of Willmar, this Court was specifically called upon to rule on the interplay between Minn. Stat. § 541.051, and equitable claims for contribution and indemnity. In

that case, defendant Clow Construction was attempting to avoid responsibility in the litigation by contending that if the statute of limitations barred the City of Willmar's claim against it, then Short-Elliott-Hendrickson's claims against it for contribution and indemnity should be similarly barred. Id. at 874. The Court disagreed, ruling that the "venerable equity actions" of contribution and indemnity overrode the statute of limitations. Id. The Court specifically stated:

As a practical matter, a party may lose the protection afforded by the statute of limitations against a plaintiff's claim when there are other defendants who do not have a statute of limitations defense to plaintiff's claims; but equity deems it more important that a defendant not evade its liability at the literal expense of a codefendant.

Id. at 875 (emphasis added). Although it dealt with the statute of limitations rather than repose, the underlying rationale and principals of City of Willmar apply here. Appellants are attempting to apply Section 541.051 to contribution and indemnity claims in a manner to evade liability at the literal expense of Top Value Homes.

A focused reading of the statute as explained above conforms to the purpose and intent behind the equitable principles underlying contribution and indemnity claims. A third-party claim is derivative of an initial action and contingent on the outcome of that action. Moreover, a defendant/third-party plaintiff has no control over when a plaintiff files suit and thus, when it will have paid more than its fair share of the damages. See City of Willmar, 512 N.W.2d at 875 (running of a plaintiff's claim against another party does not prohibit a claim for contribution against him by a codefendant). Claims of contribution and indemnity do not accrue until one party pays a disproportionate share of

the damages. Blomgren, 483 N.W.2d at 507. Minn. Stat. § 541.051 would be meaningless if a suit for contribution or indemnity (which it plainly envisions) was barred before it has had a chance to arise. See Calder, 318 N.W.2d at 844; see also Minnesota Landmarks, 466 N.W.2d at 415, 416.

### CONCLUSION

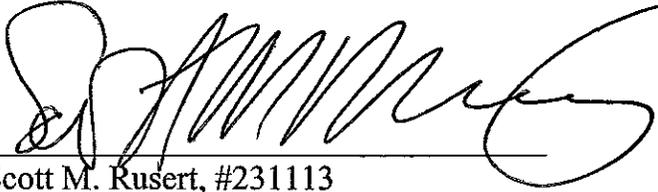
The roles of Appellants Tappe Construction, Windsor Window and Panelcraft in creating the construction defects in Plaintiffs' cannot be ignored, nor should they be summarily dismissed. To do so in the manner argued by Appellants would render Minn. Stat. § 541.051 absurd, unreasonable, and possibly unconstitutional. Moreover, equity dictates that Appellants be held responsible for their proportionate share of any damages alleged by Plaintiffs.

Only two readings of the Minn. Stat. § 541.051, subd. 1 comport with the principles of equity, further legislative intent, and avoid constitutional due process problems – the reading by Respondent and the reading by the Minnesota Court of Appeals. Therefore, Respondent respectfully requests this Court affirm the decision of the Minnesota Court of Appeals by ruling that Top Value Homes' claims for contribution and indemnity are not barred by the statute of repose of Min. Stat. § 541.051.

Dated this 24<sup>th</sup> day of August, 2005.

Respectfully submitted,

FLYNN, GASKINS & BENNETT, L.L.P.

A handwritten signature in black ink, appearing to read "Scott M. Rusert", written over a horizontal line.

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