

NO. A05-0222

State of Minnesota  
 In Court of Appeals

TERRY L. ITTEL AND GINA L. ITTEL,  
*Appellants,*

v.

JEROME PIETIG AND PIETIG BROS, INC.,  
*Respondents,*

vs.

BERGSTROM STUCCO, INC.; SCHERER BROS.  
 LUMBER COMPANY; JAMES NOREEN, d/b/a NOREEN  
 CONSTRUCTION; AND DAVID MOORE, d/b/a  
 MOORE LATHING AND d/b/a MOORE STUCCO,  
*Respondents.*

**APPELLANTS' BRIEF AND APPENDIX**

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## STATEMENT OF LEGAL ISSUE

**Despite the express language of Minn. Stat. §327A.04, subd. 2, which states that a statutory new home warranty cannot be waived or modified by any agreement unless a substitute warranty is provided, does a public policy favoring settlement of cases override the express language of the statute?**

The Trial Court held that a “strong public policy” supported the home warranty waiver limitations found in Minn. Stat. §327A.04, and, “on its face,” this statute applied to the parties’ agreement that settled a previous claim. Nonetheless, the Trial Court determined that a “strong public policy” in favor of settling cases was in direct conflict with Minn. Stat. §327A.04 and that this latter public policy overrode Minn. Stat. §327A.04.

## APPOSITE CASES, STATUTES, AND CONSTITUTIONAL PROVISIONS

Minn. Stat. §327A.02

Minn. Stat. §327A.04

*Koes v. Advanced Design, Inc.*, 636 N.W.2d 352, 356 (Minn. App. 2001), *rev. den.* (Minn. Feb. 19, 2002)

## STATEMENT OF THE CASE

On February 11, 2004, Appellants commenced this litigation in Hennepin County District Court, the Honorable Gary Larson presiding. Appellants brought claims based upon breach of contract, consumer fraud, and breach of the statutory warranties against home construction defects found in Minn. Stat. §327A.02. Appellants sought \$66,293.94 for the costs of repairing major structural defects.

Respondent Pietig, who sold the home to the Ittels, brought a motion for summary judgment. The motion was based upon the parties' agreement that settled a previous, unrelated claim, which was executed by Appellants and Respondent Pietig on November 1, 2002, before discovery of the major structural defects at issue in this lawsuit. This settlement agreement was executed when Appellants were paid \$5,375.00 for some drain tile problems in their home. Respondents argued that, despite the fact that over seven years remained on Appellants' 10-year statutory new home warranty under Minn. Stat. §327A.02, Appellants had waived any further statutory warranty claims because the drain tile settlement agreement included a general release.

Appellants responded by pointing to Minn. Stat. §327A.04, which plainly states that the statutory home warranties cannot be waived by any agreement, even one entered into well after the sale of the home, unless the statutory warranty is replaced by a substitute warranty. Respondents conceded that a substitute warranty was not included as part of the previous drain tile settlement agreement.

The Trial Court issued its Order and Memorandum, dated December 7, 2004, granting Respondent Pietig's motion for summary judgment. The Trial Court held that Minn. Stat. §327A.04, "on its face," applied and that Minn. Stat. §327A.04 expressed a "strong public policy of protecting new home buyers." In addition to the strong public policy found in the statute, however, the Trial Court found that there exists a strong public policy in favor of settlement of cases, and that "these two public policies collide head-on in this case." The Trial Court then concluded: "absent any case law, it is this Court's position that the parties' ability to settle cases is the stronger public policy."

Judgment was entered on the Court's Order on December 7, 2004. By a subsequent order for judgment, entered February 2, 2005, the Court dismissed all claims against all parties.

Appellants filed their Notice of Appeal on February 4, 2005.

## STATEMENT OF FACTS

On February 11, 2000, Appellants purchased a new home in Minnetrista from Respondent Jerome Pietig for a purchase price of \$340,000.00. The home had been constructed by Respondent Pietig Bros., Inc. *Appellants' Appendix ("AA") 2*. In the Fall of 2003, Appellants discovered water problems within the house, and the City of Minnetrista's Building Inspector determined that the home suffered from construction defects that constitute building code violations. *AA 3 and 4*. After further investigation of the problems in the house, Appellants repaired these construction defects at a cost of \$66,293.94. *AA 4*.

Appellants commenced suit on February 11, 2004, alleging that major structural defects existed in the house, and that these defects were a violation of the statutory warranties required of all new home construction in Minnesota pursuant to Minn. Stat. §327A.02. *AA 6-9*. Respondent Pietig, filed third-party complaints against various subcontractors, alleging that these subcontractors performed the defective work.

After discovery, Respondent Pietig brought a motion for summary judgment based upon a settlement agreement entered into between Respondent Pietig and Appellants in a previous dispute. This prior dispute concerned unrelated drain tile problems. *AA 3*. The parties' resolution of the drain tile dispute included execution of a settlement agreement dated November 1, 2002 (the "Drain Tile Agreement") that included the following release language:

2. In consideration of the above-referenced amounts paid by Pietig, Ittels, together with their agents, servants, employees,

officers, directors, shareholders and related or associated companies or enterprises, as well as their respective successors and assigns, heirs, executors and administrators, does hereby release and forever discharge Pietig, together with their agents, servants, employees, officers, directors, shareholders and related or associated companies or enterprises, as well as their respective successors and assigns, heirs, executors and administrators, and all other persons, firms, associations, partnerships, proprietorships, or corporations who are or might be liable, from any and all actions, causes of actions, claims, demands, damages, costs, or expenses of whatever kind and nature, whether known or unknown, suspected or unsuspected, which Ittels now have or may have against Pietig.

*AA 15 and 16.* The Drain Tile Agreement did not include any substitute home warranty of any kind. The parties agreed that the Drain Tile Agreement was to be construed and interpreted in accordance with Minnesota law. *AA 16.*

It is undisputed that Appellants did not discover the major structural defects until the fall of 2003, well-after the parties entered into the Drain Tile Agreement. *AA 3 and 4.* Respondents have never alleged that Appellants knew or should have known, of the existence of these major structural defects at the time the Drain Tile Agreement was executed.

## ARGUMENT

**Standard of Review.** In reviewing an order for summary judgment based upon the application of a statute to undisputed facts, the lower court's legal conclusion is reviewed de novo. *Lefto v. Hoggsbreath Enters., Inc.*, 581 N.W.2d 855, 856 (Minn. 1998); *Metropolitan Prop. v. Metropolitan Transit*, 538 N.W.2d 692, 695 (Minn. 1995).

- A. Although parties are free to settle claims involving defective home construction, the plain language of Minn. Stat. §327A.04 states that the statutory new home warranties cannot be waived, even well after the sale of the home, unless substitute warranties are provided.**

Because of complaints surrounding new-home construction, Minnesota has adopted a comprehensive consumer-protection law focused on home warranties. These legislative actions are codified in Chapter 327A. *Koes v. Advanced Design, Inc.*, 636 N.W.2d 352, 356 (Minn. App. 2001), *rev. den.* (Minn. Feb. 19, 2002). Minn. Stat. §327A.02, subd. 1 requires three warranties on all new homes built in Minnesota:

**Subdivision 1. Warranties by vendors.** In every sale of a completed dwelling, and in every contract for the sale of a dwelling to be completed, the vendor shall warrant to the vendee that:

- (a) during the one-year period from and after the warranty date the dwelling shall be free from defects caused by faulty workmanship and defective materials due to noncompliance with building standards;
- (b) during the two-year period from and after the warranty date, the dwelling shall be free from defects caused by faulty installation of plumbing, electrical, heating, and cooling systems due to noncompliance with building standards; and
- (c) during the ten-year period from and after the warranty date, the dwelling shall be free from major

construction defects due to noncompliance with building standards.

The beneficiary of these warranties is the “vendee” of the home, who is defined as “any purchaser of a dwelling, and includes the initial vendee and any subsequent purchasers.” *Minn. Stat. §327A.01, subd. 6*. These statutory warranties begin to run on the earlier of the date of closing on the home sale or occupancy of the home. *Minn. Stat. §327A.01, subd. 8*. The warranties survive passage of title. *Minn. Stat. §327A.02, subd. 2*.

*Minn. Stat. §327A.04* provides that these statutory warranties cannot be waived except under limited circumstances:

**Subdivision 1. Waiver.** Except as provided in subdivisions 2 and 3, the provisions of sections 327A.01 to 327A.07 cannot be waived or modified by contract or otherwise. Any agreement which purports to waive or modify the provisions of sections 327A.01 to 327A.07, except as provided in subdivisions 2 and 3 of this section, shall be void.

*Minn. Stat. §327A.04, subd. 3* addresses the manner in which, under limited circumstances, the statutory warranties may be waived prior to the sale of the dwelling. *Minn. Stat. §327A.04, subd. 2* also makes clear that the waiver of statutory home warranties is restricted at any time after the sale of the home. Specifically, if such a post-sale waiver of statutory warranties is to be valid, it must be accompanied by new, similar warranties from the vendor, so that the vendee has a remedy for future, as yet unknown, home construction defects:

**Subd. 2. Modification.** *At any time after a contract for the sale of a dwelling is entered into by and between a vendor and a vendee or contract for home improvement work is entered into by and between a home improvement contractor and an owner, any of the statutory warranties provided for in section 327A.02 may be excluded or modified only by a written instrument, printed in boldface type of a minimum size of ten points, which is signed by the vendee or the owner and which sets forth in detail the warranty involved, the consent of the vendee or the owner, and the terms of the new agreement contained in writing. No exclusion or modification shall be effective unless the vendor or the home improvement contractor provides substitute express warranties offering substantially the same protections to the vendee or the owner as the statutory warranties set forth in section 327A.02.*

Minn. Stat. §327A.04, subd. 2 (emphasis supplied).

A post-sale settlement agreement, such as this Drain Tile Agreement, is clearly subject to the waiver-restrictions in Minn. Stat. §327A.04. Minn. Stat. §327A.04, subd. 1, makes clear that statutory warranties “cannot be waived or modified by *contract or otherwise*” (emphasis supplied), and that the anti-waiver provisions apply to “*any agreement which purports to waive*” the statutory warranties. Clearly, the expansive language referring to any “contract” and “any agreement” encompasses a settlement agreement. The legislature was careful to specifically identify, in Minn. Stat. §327A.04, subd. 2 and 3, specific types of procedures that — if followed — would result in a valid waiver of the statutory home warranties. There is no exception anywhere in Minn. Stat. §327A.04 for waivers contained within post-sale settlement agreements. If the legislature meant to except out a post-sale settlement agreement, it would have done so, especially given its expansive application of the anti-waiver restrictions to “any agreement” and the

specific statement in subdivision 2 that the waiver restrictions apply “at any time after” the house is sold.

In addition to Minn. Stat. §327A.04’s plain language, applying the anti-waiver provisions to post-closing settlement agreements furthers the interests of the statute and prevents the evisceration of the statute’s protections. Shortly after a house is completed, it is quite common to experience minor difficulties that require some vendor/vendee dispute resolution. Adopting Respondents’ interpretation of Minn. Stat. §327A.04, a vendor could resolve such a claim by correcting or paying for a relatively minor defect and, through a general release, cancel all protections of the remaining years of the 10-year major structural defect warranty. The vendee would thereafter be without remedy for major structural defects, despite the fact that a particular major structural defect was completely unforeseen at the time of the settlement of the minor problem. This is precisely what the waiver restrictions in Minn. Stat. §327A.04 were designed to prevent, and precisely the situation in the case before us.

Appellants’ received \$5,375.00 for a relatively minor drain tile issue and signed a general release, not anticipating that, a year later, major structural defects would be discovered. When these major structural defects were discovered, the repairs cost over ten times the cost of the drain tile settlement amount. There is no party to this lawsuit who has alleged that, when they signed the Drain Tile Agreement, Appellant’s could have or should have foreseen the later discovery of these major structural defects. For precisely this reason, Minn. Stat. §327A.04 directs that the remaining years of Appellants’ statutory

warranties were not waived by the Drain Tile Agreement, because no substitute warranty covering major structural defects was included.

This is not to say that parties are prevented from settling cases involving defective home construction. First, Minn. Stat. §327A.04 does not restrict parties from settling all claims presently before the parties in a lawsuit. A settlement of this kind does not run afoul of Minn. Stat. §327A.04 because it does not purport to waive any of the vendee's statutory warranty that remains. Second, there is nothing in the statute that restricts parties from resolving later discovered claims, with the exception of the statutory warranty claim. But parties are even free to settle future claims based upon the statutory warranty, so long as a similar, substitute warranty is put in place. In short, Minn. Stat. §327A.04 places a minimal burden on the settlement process.

The case before us is a perfect example. There were seven causes of action brought in the drain tile lawsuit, and, because the waiver of these claims in no respect ran afoul of the provisions of Minn. Stat. §327A.04, all seven claims were effectively settled. Of the three claims brought in the present lawsuit, the Drain Tile Agreement barred two of them, and could even have barred the statutory warranty claim, had the Drain Tile Agreement included an adequate substitute warranty.

Such cases can clearly be settled. What is required, however, is more than a general release. The legislature has decided that home construction defects may lie dormant and unnoticed for a number of years, and, accordingly, the statutory warranty cannot be cancelled by "any agreement" until the warranty has run its course, or until the

statutory safeguards for a substitute warranty have been put in place. Here, it is undisputed that no substitute warranty was provided, and so the protection of Appellants' Minn. Stat. §327A.02 warranties, remain in force.

**B. The Trial Court erred when it concluded that this case involves a “head-on collision” of two strong public policies. The public policy in favor of settlements and the public policy expressed in the new home warranty statute are consistent and complimentary.**

The Trial Court did not find that the language of Minn. Stat. §327A.04 was ambiguous, that this statute contradicted another statute, or that the Drain Tile Agreement was not an “agreement” subject to the statutory protection. To the contrary, the Trial Court candidly acknowledged that the statute restricting waivers of new home warranties expresses a “strong public policy,” which “on its face” applies. *AA 24*.

The Trial Court, however, did not end its analysis by finding that the strong public policy expressed in Minn. Stat. §327A.04 had been implicated. The Court further decided that this case raised serious concerns regarding the public policy in favor of settling lawsuits. It correctly derived this public policy from the common law. Finality and certainty in the resolution of claims is clearly a benefit to parties and the judicial system. The Trial Court erred, however, when it determined that these two “strong public policies” were on a collision course in this case:

On its face, section 327A.04, subd. 2 purports to apply “any time after a contract for sale of a dwelling is entered into.” Minnesota has a strong public policy in favor of settlement and also has a strong public policy of protecting new home buyers. These two public policies collide head on in this case. Absent any case law, it is this Court’s position that the parties’ ability to settle cases is the stronger public policy.

*AA 24.*<sup>1</sup> The Trial Court's view of colliding public policies appears grounded in a mistaken assumption that the application of Minn. Stat. §327A.04, subd. 2 acts as a complete bar to the settlement of disputes arising out of new home construction. *See, e.g., AA 27* ("this Court will not interpret Minn. Stat. §327A.04 to effectively prevent parties from settling breaches of statutory warranties, as that is clearly not what the legislature intended"). This is not so. As stated above, Respondents were able to settle seven out of the seven claims at issue in the drain tile lawsuit, and, even with respect to future claims, were able to settle all claims, known or unknown, with the one exception of the statutory warranty claim. Even the statutory warranty claim could have been settled if a valid alternative warranty had been put in place.

This is not a head-on collision between a policy in favor of settlement and the policies articulated in Minn. Stat. §327A.04. The parties are free to settle claims arising out of house construction disputes, including statutory home warranty claims. The only limitation is that, with respect to future abridgments of the statutory home warranty, a substitute warranty must be provided. This is a slight accommodation, and allows the two "strong public policies" to co-exist without an unreasonable conflict or burden on the Courts or parties.

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<sup>1</sup> The Court's determination that the two policies collide "head-on in this case" again emphasizes that the Court correctly believed the plain language of Minn. Stat. §327A.04 applied to the Drain Tile Agreement. If it had not, the Trial Court would have written a routine statutory construction opinion, explaining why the statutory language excepts out or excludes a settlement agreement. In other words, the Trial Court would have explained why these two policies pass cleanly by one another, rather than describing, as it did, a head-on collision.

Modest, statutorily prescribed restrictions on parties' ability to waive future rights and claims have existed in certain areas of the law for many years and have not caused the kind of grave disruption or head-on collision of policy suggested by the Trial Court. For example, the 1967 Age Discrimination in Employment Act contains a number of restrictions on the waiver of claims, including an outright prohibition against waiving rights that arise after the date of the waiver. *See, 29 U.S.C. §626 (f)(1)(C)*. This prohibition against waiving future claims exists even if the waiver is included in a lawsuit settlement agreement and even if the individual is represented by an attorney when the waiver is drafted. Likewise, resolution of claims under the Minnesota Human Rights Act, cannot contain prospective waivers. *Minn. Stat. §363A.01*. These two statutes have generated a great deal of litigation for many years, and the statutory prohibitions against waiving future rights have not resulted in major roadblocks to case settlement.

Enforcing Minn. Stat. §327A.04, as written, will not infringe on the ability to resolve home construction lawsuits. To the extent a waiver of the statutory home warranty is limited, it is a reasonable and modest accommodation to what the Trial Court acknowledges is a strong public policy of protecting new home buyers.

**C. Even assuming the public policy in favor of settlements conflicts in some respects with the policy expressed in the plain language of Minn. Stat. §327A.04, the plain language of the statute must prevail.**

The Trial Court accurately determined that there is a strong public policy in favor of settlements. Such a public policy, however, whether strong or otherwise, is

insufficient to trump what the Trial Court acknowledged is the plain language of the statute.

“Public policy, where the legislature has spoken, is what the legislature has declared that policy to be. So far as the question of policy is concerned, our statute settles the matter.” *Behr v. American Family Mut. Ins. Co.*, 638 N.W.2d 469, 479 (Minn. App. 2002), *rev. den.* (Minn. April 23, 2002), quoting *Thompson v. Allstate Ins. Co.*, 412 N.W.2d 386, 388-89 (Minn. App. 1987); *Brula v. St. Louis County*, 587 N.W.2d 859, 862 (Minn. App. 1999)(“moreover, even if we were persuaded by relator’s arguments that federal case law and public policy support extending the application of V.P.A. benefits, ‘the task of extending existing law falls to the Supreme Court or the legislature, but it does not fall to this Court.’ ”); *LaChapelle v. Mitten*, 607 N.W.2d 151, 159 (Minn. App. 2000), *rev. den.* (Minn. May 16, 2000) (“where the intention of the legislature is clearly manifested by plain unambiguous language . . . no construction of the statute is necessary or permitted. Because this Court is limited in its function to correcting errors, it cannot create public policy. Thus, in the face of clear statutory language, Mitten’s policy arguments must fail”). In the course of resolving a particularly difficult issue involving an apparent contradiction between interpretation of the home warranty statute and the general statute of limitations, the Court made clear that such difficulties should be brought to the legislature’s attention and not to the courts:

Perhaps the legislature intended to cut off such claims, and the absence of a statute of repose (or a clear, non-discovery-based statute of limitations) applicable to the specific new-home warranty at issue here was an oversight. But whether the decision was intended or inadvertent, the public

policy issues associated with statutes of limitation and repose are for the legislature to determine. If a statute needs to be changed, the change must come from the legislature, regardless of whether the need for the change arose from an inadvertent mistake by the legislature or a purposeful omission.

*Koes v. Advanced Design, Inc.*, 636 N.W.2d 352, 360 (Minn. App. 2001), *rev. den.* (Minn. Feb. 19, 2002).

The Trial Court erred, therefore, when it viewed the requirements of Minn. Stat. §327A.04, subd. 2, and a policy favoring settlements as presenting two public policies from which the Court was entitled to weigh and, in its own discretion, select the stronger. Having found no ambiguity, vagueness, unconstitutionality, conflicting statute, or other statutory defect, the Trial Court was bound to end its discussion once it had determined that, “on its face,” Section 327A.04, subd. 2 applies “any time after a contract for sale of a dwelling is entered into.” *AA 24*.

Of course, if Respondents believe there is a public policy stronger, and at odds with, that reflected in Minn. Stat. §327A.04, they are free to encourage the legislature to revise the statute. Short of that occurring, however, the plain language of Minn. Stat. §327A.04 must prevail and must be enforced according to its terms. The law in Minnesota is clear that, if one of the two public policies emanates from the plain language of an applicable statute, the statute must always prevail.

**D. There is no basis in the language of Minn. Stat. §327A.04 for the Trial Court’s conclusion that pre-sale and post-sale attempts to waive the statutory home warranty should be treated differently.**

In addition to analyzing this case as a head-on collision of strong public policies, the Trial Court suggests that attempts to waive or modify the statutory home warranties at

the time a house is sold should be treated differently than attempts to waive the warranties after the sale. The Trial Court's rationale for this distinction appears based upon the assumption that, in waiving such warranties at a sale closing, the vendees will be making a less informed decision than when later considering such a waiver at the time of resolving a lawsuit:

At the time of settlement parties are aware of their legal remedies – as, in this case, the Ittels had already brought legal claims for relief – and are not in the same vulnerable position as prospective buyers presented with multiple documents at a closing.

*AA 27.* The Trial Court's assessment of the relative risks of pre- and post-closing waivers seems open to some debate. In this case, Appellants invested \$340,000.00 in a new house. When they did so, were they less vigilant with respect to their legal rights than when they resolved the drain tile claim that resulted in a much smaller \$5,375.00 payment? That question need not be resolved, however, because the only relevant point is that no pre- and post-closing distinction is found in the wording of Minn. Stat. §327A.04. Precisely, the opposite is true. While Minn. Stat. §327A.04, subd. 3 applies to waivers of the warranty at the time of sale, subd. 2 expressly applies to waiver attempts "after a contract for the sale of a dwelling," and permits no analysis of the relative legal sophistication of the parties' circumstances at one or the other point in time.

The statute does not make the pre- and post-sale distinction suggested by the Trial Court because the risks targeted for protection by the statute are different from those suggested by the Trial Court. The legislature was concerned not with the relative legal sophistication of the parties at one point in time versus the other but, instead, that a

waiver agreement entered into in conjunction with the resolution of a relatively minor defect (or in conjunction with no defect at all) should not impair the statutory remedy for a major structural defect of which the parties have no clue at the time of the waiver – precisely the scenario in the case before us.

At times the Trial Court seems to want to bolster its argument for a pre- and post-closing distinction by implying that the Ittels should have been aware of the major construction defects that were not discovered until after execution of the Drain Tile Agreement:

The Ittels had already sustained damage at the time of the Release, which indicates that they entered into the Release with knowledge of the defects, whereas a person entering into a contract modifying their statutory warranties at closing has no knowledge of possible defects.

AA 26. While Appellants certainly had “knowledge of the defects,” involving the drain tile, no one has suggested that Appellants were aware, or should have been aware, of the later discovered major structural defects when they entered into the Drain Tile Agreement.

Similar confusion seems present when the Trial Court mistakenly concludes that “the legislature must have meant to protect the new-home buyer *before* the breach of the warranty and not during a settlement of a breach of the warranty.” AA 27 (*emphasis in original*). Whether an attempt to waive the statutory home warranty occurs at the closing on the sale of the house or at some later date, it will always be *after* the breach of the warranty – that is, after the defective home construction took place. The legislature’s concern is not the timing of the breach (“during the 10-year period from and after the

warranty date, the dwelling shall be free from major construction defects due to noncompliance with building standards”) and the legislature made no pre-and post-closing distinctions in its restrictions on waivers of the new home warranty. Instead, it specifically stated that “any agreement” purporting to waive the warranty “by contract or otherwise” (*Minn. Stat. § 327A.04, subd. 1*) entered into “at any time after a contract for the sale of a dwelling” (Subd. 2) must include a substitute warranty. Here there was none.

### CONCLUSION

The plain language of Minn. Stat. §327A.04, subd. 1, states that the statutory home warranties “cannot be waived” by “contract or otherwise” and that “any agreement which purports to waive” the statutory warranties is void. Minn. Stat. §327A.04, subd. 2, makes clear that the anti-waiver provisions apply, not solely at the time of sale of the home, but “at any time after a contract for the sale of a dwelling.” Subd. 2, provides that the statutory warranty can be waived so long as a substitute warranty replaces it. Here, there was clearly no substitute warranty provided, and the statutory warranties therefore survived the Drain Tile Agreement.

By restricting waivers in settlement agreements, there is no “head-on collision” between the interest in settling cases and the statute. All claims brought by all parties in any lawsuit can be settled, and all future claims can even be settled, provided that a future statutory warranty claim could only be waived if the settlement includes a substitute warranty. In any event, even if a conflict in some respects is perceived between

settlement of cases and the statutory warranty, the plain language of the legislative act must prevail.

Finally, the Trial Court's opinion that warranty waivers pre-sale and warranty waivers post-sale should be treated differently is in conflict with the plain wording of the statute. Minn. Stat. §327A.04, subd. 2, specifically makes the anti-waiver provisions applicable to any waiver attempt "at any time after a contract for the sale of a dwelling."

**GREGERSON, ROSOW, JOHNSON & NILAN, LTD.**

Dated 3-7-2005

By



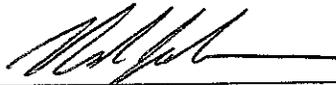
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**CERTIFICATION OF BRIEF LENGTH**

I hereby certify that this Brief complies with the word count and type face requirements of Minn. R. Civ. App. 132.01. The number of words in the words in the Brief is 5,418. The word processing software used to prepare the Brief was Microsoft Word.

Dated: 3-7-2005

  
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Mark J. Johnson

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).