

NO. A05-0222

State of Minnesota
In Court of Appeals

Terry L. Ittel and Gina L. Ittel,

Appellants,

vs.

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.

BRIEF OF RESPONDENT BERGSTROM STUCCO, INC.

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TABLE OF CONTENTS

I. TABLE OF AUTHORITIES 1

I. LEGAL ISSUE 2

 WHETHER A MUTUALLY NEGOTIATED "MUTUAL RELEASE AND SETTLEMENT OF ALL CLAIMS" AGREEMENT, EXECUTED BY PARTIES REPRESENTED BY COUNSEL, IS VALID AND ENFORCEABLE UNDER MINNESOTA LAW WHEN IT BARS ALL FUTURE CLAIMS... 2

TRIAL COURT HELD: THE RELEASE IS VALID AND ENFORCEABLE AS TO ALL PRIOR, CURRENT AND SUBSEQUENT CLAIMS. AA 17-27..... 2

II. STATEMENT OF THE CASE 2

III. STATEMENT OF THE FACTS 4

V. ARGUMENT 8

VI. CONCLUSION 13

I. TABLE OF AUTHORITIES

| | <u>Pages</u> |
|---|-----------------|
| Statutes | |
| Minn. Stat. § 327A.04 | 6, 9 |
| Cases | |
| <i>Beach v. Anderson</i> , 417 N.W.2d 709 (Minn. Ct. App. 1988) | 10 |
| <i>Carlock v. Pillsbury Co.</i> , 719 F.Supp. 791 (D. Minn. 1989) | 10 |
| <i>Clark v. Allstate Ins. Co.</i> , 405 N.W.2d 463 (Minn. Ct. App. 1987) | 10 |
| <i>Lefto v. Hoggsbreath Enters., Inc.</i> , 581 N.W.2d 855 (Minn. 1998) | 8 |
| <i>Metropolitian Prop. V. Metropolitan Transit</i> , 538 N.W.2d 692 (Minn. 1995) | 8 |
| <i>Simons v. Schiek's, Inc.</i> , 275 Minn. 132, 145 N.W.2d 548 (1966) | 10 |
| <i>Sorenson v. Coast-to-Coast (Cent. Org.), Inc.</i> , 252 N.W.2d 666 (Minn. Ct. App. 1984) | 9, 11, 12 |

I. LEGAL ISSUE

Whether a mutually negotiated "Mutual Release and Settlement of All Claims" agreement, executed by parties represented by counsel, is valid and enforceable under Minnesota law when it bars all future claims.

TRIAL COURT HELD: The Release is valid and enforceable as to all prior, current and subsequent claims. AA 17-27.

II. STATEMENT OF THE CASE

In previous litigation, Appellants sued Respondents Jerome Pietig and Pietig Bros., Inc. (hereinafter "Pietig"), claiming construction defects and water-intrusion-related damages to their home. AA 15-16 and AA 19. In this earlier suit, Appellants claimed that the interior and exterior drain tile systems were defective. AA 20. After lengthy and protracted settlement negotiations, both parties, represented by counsel, signed and fully executed a "Mutual Release and Settlement of all Claims" (hereinafter "Release"). AA 15-16. That case was ultimately dismissed with prejudice.

Despite the express language of the Release, on February 11, 2004, Appellants Terry L. and Gina L. Ittel (hereinafter, "Appellants") brought this suit against

Appellant Jerome Pietig and Pietig Bros., Inc.

(hereinafter, "Pietig"). AA 21. Again, Appellants claimed construction defects and water intrusion-related damages to their home. AA 21. Specifically, Appellants alleged that the building code requirements were not met by Pietig and that Pietig's failure to install kick-out flashing contributed to moisture intrusion issues. AA 21. Pietig was the general contractor for the Appellants' house. Appellants' claim included (1) breach of contract; (2) breach of warranty; and (3) breach of consumer fraud. AA 6-9.

Pietig denied liability for the claims and affirmatively alleged that the Release precluded Appellants from bringing their claims. AA 10-14. Appellants argued that the Release was void because it did not comport with the Minnesota Statutes Section 327A.04 requirements for exclusion and modification of a statutory new home warranty. The trial court disagreed with Appellants, stating:

The Ittels knew of their statutory warranty rights, the Release was clear in releasing Pietig from all statutory liability, the Ittels consented, and both parties signed the Release...The parties entered into the Release with knowledge of its ramifications and the intent to

release one another from prior, current, and subsequent claims...This Court will not interpret Minnesota Statutes Section 327A.04 to effectively prevent parties from settling breaches of statutory warranties, as that is clearly not what the legislature intended...[T]his Release does not fall under the section 327A.04 requirements for modification or exclusion.

AA 27.

III. STATEMENT OF THE FACTS

Appellants Terry L. and Gina L. Ittel (hereinafter, "Appellants") sued Appellant Jerome Pietig and Pietig Bros., Inc. (hereinafter, "Pietig"), alleging construction defects and water intrusion-related damages to their home. AA 6-9. Pietig was the general contractor for the Appellants' house. Pietig brought a third-party action against Respondent Bergstrom Stucco, Inc., Scherer Bros. Lumber Company and James Noreen d/b/a Noreen Construction for contribution and/or indemnification. Bergstrom Stucco, Inc. also brought a fourth-party action seeking contribution and/or indemnification against David Moore, d/b/a Moore Lathing and d/b/a David Moore Stucco.

On November 30, 1999 Appellants entered into a purchase agreement with Pietig Bros., Inc. to purchase a home being constructed by Pietig at 925 Bayside Lane in Minnetrista, Minnesota. AA 2. On February 11, 2000, Appellants paid

Pietig the full purchase price for the property and took possession. AA 2.

On August 27, 2001, Appellants sued Pietig for the first of three times. AA 3. In the first suit, Appellants alleged that the surface drainage on the property was impeded due to improper grading and landscaping causing water to collect close to the house and saturate the soil. AA 2-3. On December 13, 2001, the parties agreed to arbitrate their dispute and submitted the case to the American Arbitration Association. AA 3. As a result of the arbitration, Pietig paid Appellants the sum of \$14,127.76 on March 18, 2002 with the specific notation by Appellants' attorney that there may be additional claims for damages that were outlined and carved out from the arbitration claim. AA 3.

On June 28, 2002, Appellants sued Pietig for a second time. AA 3. This time, Appellants brought their claim in Conciliation Court claiming (1) breach of contract; (2) consumer; (3) breach of statutory warranty; (4) breach of express warranty; (5) breach of implied warranty; (6) negligence; (7) intentional and negligent misrepresentation; and (8) rescission alleging defects in

the interior and exterior drain tile system. Pietig hired legal counsel and removed the case to District Court. AA 3 and AA 15.

Upon removal of the case to District Court, Appellants hired legal counsel to represent their interests. AA 3. After lengthy and protracted settlement negotiations, both parties signed and fully executed a "Mutual Release and Settlement of all Claims". AA 25. Pietig executed the Release on November 1, 2002; Appellants executed the Release on November 4, 2002. AA 16.

The Release states that upon payment by Pietig, Appellants will release and forever discharge Pietig 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 Appellants now have or may have against Pietig." AA 15-16. The Release further references the existing lawsuit at the time, the previous lawsuit that went into arbitration, and any and all future claims or lawsuits, or any other claim that may arise or be asserted by Appellants against Pietig. AA 15-16. To avoid confusion, the Release sets forth examples of the types of claims that Appellants were

releasing. Those claims include, but are not limited to, all claims relating to breach of contract, consumer fraud, breach of statutory warranty, breach of express warranty, breach of implied warranty, negligence, intentional and negligent misrepresentation, rescission and each and every claim now existing or hereinafter arising which has been made or could have been made by Appellants against Pietig in relation to the claims in the lawsuit existing at that time and any and all claims relating to the property. AA 15. Finally, the Release specifically states that the payment by Pietig is in full accord and satisfaction of all claims referenced in the Release. AA 16.

On or about February 11, 2002, Appellants sued Pietig a third time, again claiming (1) breach of contract; (2) breach of warranty; and (3) breach of consumer fraud act alleging this time that the building code requirements were not met by Pietig in that it failed to install kickout flashing. AA 6-9.

Pietig brought a motion for summary judgment, successfully arguing that Appellants' claims were barred by the Release. Appellants appealed.

IV. STANDARD OF REVIEW

In reviewing an order for summary judgment based on 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); *Metropolitian Prop. V. Metropolitan Transit*, 538 N.W.2d 692, 695 (Minn. 1995).

V. ARGUMENT

MINNESOTA STATUTE SECTION 327A.04 DOES NOT APPLY TO POST-SALE SETTLEMENT OF CLAIMS.

In an attempt to do an end-run around their negotiated settlement agreement, Appellants now claim that the Release is void because it does not comport with the requirements for exclusion or modification of the statutory new-home warranty as set out in Minn. Stat. § 327A.04.

Specifically, Appellants claim that the Release does not comply with subdivision 2:

At any time after a contract for the sale of a dwelling is entered into...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 the 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...

Minn. Stat. § 327A.04, subd. 2.

As the trial court correctly held, the public policy encouraging settlement of claims is stronger than the policy behind the new home statutory warranty. Without the ability to settle claims, no incentive would exist to encourage settlements. In fact, if settlement and release of statutory warranty claims was not allowed, it would disrupt the judicial process by allowing subsequent claims to be brought by parties who have previously settled their suits.

Therefore, unless Appellants can show that the Release is somehow invalid or unenforceable, the Release, executed by Appellant and Pietig, bars to all claims asserted in this lawsuit. Appellants have provided no evidence that the Release is invalid or unenforceable.

Minnesota courts clearly favor and encourage the settlement of lawsuits. Accordingly, an agreement settling a dispute is presumed to be valid. *Sorenson v. Coast-to-Coast (Cent. Org.), Inc.*, 252 N.W.2d 666, 669 (Minn. Ct. App. 1984); see also *Carlock v. Pillsbury Co.*, 719 F.Supp.

791, 857 (D. Minn. 1989) citing *Schmitt-Norton Ford, Inc. v. Ford Motor Co.*, 524 F.Supp. 1099, 1102 (D. Minn. 1981). Settlement agreements will not be set aside readily. *Beach v. Anderson*, 417 N.W.2d 709, 712-13 (Minn. Ct. App. 1988) (citation omitted). This concept was vividly illustrated in Justice Otis' in *Simons v. Schiek's, Inc.*, 275 Minn. 132, 145 N.W.2d 548 (1966):

To permit releases to be vacated except for the most compelling reasons creates 'uncertainty, chaos, and confusion' with respect to future dispositions, and is a disservice to other litigants whose matters are thereby delayed.

Id. at 139, 145 N.W.2d at 553 (Otis, J., dissenting) (footnotes omitted). See also *Clark v. Allstate Ins. Co.*, 405 N.W.2d 463 (Minn. Ct. App. 1987).

In *Sorenson*, the plaintiff signed a release agreement discharging any and all "claims, demands, or causes of action to the date thereof." *Sorenson v. Coast-to-Coast (Cent. Org.), Inc.*, 252 N.W.2d 666, 669 (Minn. Ct. App. 1984). The plaintiff contended that he did not know about his causes of action against the defendant when he executed the release and, therefore, summary judgment was inappropriate. *Id.* The district court granted summary judgment in favor of the defendant, and the Court of

Appeals affirmed. *Id.* at 671. In doing so, the court used six factors to decide a claimant's intent to release claims (1) the language of the release; (2) presence of legal counsel; (3) existence of fraud or misrepresentation; (4) wrongful concealment of fact or other inequitable conduct which contributes to plaintiff's mistake; (5) duress; and (6) consideration. *Id.* at 670.

The appellate court affirmed the district court because the release was comprised of basis language, plaintiff was an experience businessman, there was no mutual mistake of fact, there was no wrongful concealment of fact, no duress, ad adequate consideration.

Here, the trial court analyzed these six factors and determined plaintiffs' intent supported dismissal of Appellant's claims. First, Appellants were represented by counsel and their counsel drafted the Release. The Release specifically addresses breach of contract, consumer fraud, breach of statutory warranty, breach of express warranty, and breach of implied warranty. Moreover, the Release states:

The parties desire to forever end and terminate each and every claim now existing or hereinafter arising which has been made or could have been made, by Ittels against Pietig in relation to the

claims in the lawsuit and *any and all claims relating to the property.*

AA 15 (*italics added*). Appellants released Pietig 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 15-16 (*italics added*). In consideration of the Release, Pietig paid \$5,375 and released Appellants from any and all claims of action. AA15. Moreover, the Release specifically states that the payment by Pietig is a full accord and satisfaction of all claims as referenced above. AA 16. Therefore, it is clear from the face of the Release that Appellants released Pietig from the claims now before this Court.

Appellants did not allege the existence of fraud, misrepresentation, wrongful concealment of fact, or other inequitable conduct to support the third and fourth factors. Moreover, Appellants did not allege duress caused by economic coercion, or that there was inadequate consideration to support the Release. Therefore, the third, fourth, fifth and sixth factors supported dismissal by the trial court.

After considering the *Sorenson* factors, the trial court found that the parties' intent to settle their claims and release Pietig was clear. Appellants were fully aware that they were releasing Pietig from all present and future liability. Therefore, the trial court's holding should be affirmed.

VI. CONCLUSION

Respondents Bergstrom Stucco, Inc. respectfully requests that the Court affirm the district court's order holding that the Release is valid and enforceable and enter judgment for Respondents.

Respectfully Submitted,

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Dated: _____

4/5/05



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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.vCiv.App. 132.01. The number of words in the Brief is 1,726. The word processing software used to prepare the Brief was MicroSoft Word.

Dated:

4/5/05


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