

NO. A06-2155

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**STATE OF MINNESOTA  
IN COURT OF APPEALS**

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Gail and Lupe Gomez,

Appellants,

vs.

David A. Williams Realty & Construction,  
Inc., defendant and third-party plaintiff,

Respondent,

vs.

David Freund, et al.,

Third-Party Defendants,

Scherer Bros. Lumber Co.,  
third-party defendant,

Respondent.

**APPELLANTS' BRIEF,  
APPENDIX AND  
STATUTORY ADDENDUM**

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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).

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## I. STATEMENT OF THE LEGAL ISSUES ON APPEAL

Whether the trial court erred in granting summary judgment dismissing Appellant homeowners' claims for breach of statutory and express written residential construction warranties on the ground first raised in Respondent David A. Williams Realty & Construction, Inc.'s ("Williams Construction's") reply memorandum, specifically:

- A. Whether the Trial Court Erred in Granting Summary Judgment Based on a Statute of Repose Defense that was not Raised by Williams Construction Until its Reply Memorandum?

Although Appellants requested an additional opportunity to respond to the statute of repose defense first raised by Williams Construction in its reply memorandum, the trial court granted summary judgment based on this defense without giving Appellants such an additional opportunity. The most apposite rule and cases are Gen. R. Prac. 115.03 (prohibiting a party from raising new issues in a reply brief); *Hebrink v. Farm Bureau Life Ins. Co.*, 664 N.W.2d 414 (Minn. Ct. App. 2003) (reversing grant of summary judgment where adverse party was not given a meaningful opportunity to oppose summary judgment) and *Bradley v. First National Bank of Walker, N.A.*, 711 N.W.2d 121 (Minn. Ct. App. 2006) (although novel legal arguments raised in a reply memorandum should generally not be considered, trial court did not err in considering statute of limitations defense raised for first time in reply brief because opposing party was given full opportunity to address it).

B. Whether the Trial Court Erred in Interpreting the Ten-Year Statute of Repose Contained in Minn. Stat. § 541.051, subd. 1 to Provide that Appellants' Causes of Action Accrued Upon "Discovery of the Breach" as Opposed to Upon "Discovery of the Injury?"

The trial court found that Appellants' causes of action accrued for purposes of the statute of repose contained in § 541.051, subd. 1 upon their "discovery of the breach", which, the trial court found, had not occurred until after the running of the ten-year repose period, and that Appellants' claims were therefore barred. However, the statute specifically defines accrual to occur upon "discovery of the injury", which it is undisputed occurred within the ten-year repose period. The most apposite statute and cases are Minn. Stat. § 541.051, subd. 1 (2006) and *Vlahos v. R&I Construction of Bloomington, Inc.*, 676 N.W.2d 672, 677 (Minn. 2004) ("discovery of the injury" means something different than "discovery of the breach" within the meaning of Minn. Stat. § 541.051) and *Weston v. McWilliams & Assoc. Inc.*, 716 N.W.2d 634, 638 (Minn. 2006) ("[t]he reference to 'accrues' in the repose provision must be read together with the definition that is given later in section 541.051: ' . . . a cause of action accrues upon discovery of the injury'").

C. Alternatively, Whether Even Under the Trial Court's Incorrect Interpretation, It Erred in Finding that the Statute of Repose Barred Appellants' Claims as a Matter of Law?

The trial court held that as a matter of law Appellants did not discover actual damage to load bearing portions of their home within the ten-year repose period and thus could not have "discovered the breach" until even later. The most apposite statute and case is Minn. Stat. § 327A.02, subd. 1 (1994) and *Vlahos v. R&I Construction of*

*Bloomington, Inc.*, 676 N.W.2d 672 (Minn. 2004) (issues of fact precluded summary judgment as to when homeowner “discovered the breach”).

## II. STATEMENT OF THE CASE

This is yet another residential construction water intrusion/mold property damage case involving the interpretation of Minn. Stat. § 541.051. This case arises out of the construction of Appellants’ (the “Gomezés”) stucco home by Williams Realty, which construction was substantially completed on October 19, 1994. The Gomezés commenced this action on or about November 15, 2005, asserting claims against Williams Realty for negligence, breach of contract, breach of implied warranty, breach of express warranty and breach of the statutory new home warranties of Minn. Stat. § 327A.02. (A copy of the Complaint is at page 1 of the attached Appellants’ Appendix [“A.A. 1”]).

Williams Construction served an Answer generally denying liability (A.A. 4) and subsequently served a third-party complaint seeking indemnity or contribution from David Freund, Richard Imdieke, d/b/a Imdieke Builders, R&R Construction, and Scherer Bros. Lumber Co. (“Scherer Bros.”), who allegedly were subcontractors of, or material suppliers to, Williams Construction.

After the close of discovery, Williams Construction moved for summary judgment (A.A. 11) seeking (1) dismissal of the Gomezés’ claims for negligence, breach of contract, breach of implied warranty and breach of express warranty on the basis of the two-year statute of limitations contained in § 541.051, subd. 1, claiming that the Gomezés “discovered the injury” more than two years before they commenced their

action (A.A. 18) and (2) dismissal of the Gomezes' statutory warranty claims on the basis of an alleged lack of written notice of damage under Minn. Stat. § 327A.03(a) (A.A. 23). Third-party defendant Scherer Bros. joined in that motion and also moved for dismissal of Williams Construction's third-party claims against it. (A.A. 27.)

In response, the Gomezes conceded that they had "discovered the injury" within the meaning of § 541.051, subd. 1 more than two years before the suit was commenced and that thus their claims for negligence, breach of contract and breach of implied warranty were barred by the two-year statute of limitations in § 541.051, subd. 1. (A.A. 43.) As to their statutory warranty and express written warranty claims, however, the Gomezes pointed out that those claims were not governed by the statute of limitations contained in subdivision 1 of § 541.051, but instead by subdivision 4, which allows such claims to be brought within two years of the "discovery of the breach," and that under that subdivision, the Gomezes' claims were timely. (A.A. 48.) The Gomezes also demonstrated that they had given timely notice of damage with respect to their statutory warranty claims. (A.A. 44.)

In Williams Construction's reply memorandum, received just three days before the hearing on its motion, Williams Construction changed course and for the first time argued that the Gomezes' claims were barred because they did not accrue within the ten-year repose period in § 541.051, subd. 1. (A.A. 51-65.) Although at the motion hearing the Gomezes repeatedly requested an additional opportunity to respond to Defendant's new arguments (Tr. at 8, 15, and 26), the trial court did not grant them that opportunity. Instead, by Order dated September 1, 2006, Hennepin County District Court Judge John

Q. McShane granted Williams Construction's motion for summary judgment and dismissed the case on the statute of repose grounds first raised by Williams Construction in its reply memorandum. (A.A. 66.) As a result, the trial court did not reach the issue of whether the Gomezes' statutory warranty claims were barred for allegedly failing to give timely notice of damage pursuant to § 327A.03(a) or third-party defendant Scherer Bros.' separate motion for dismissal of the third-party claims against it, stating that these issues were moot. (A.A. 73-74.)

By letter dated September 8, 2006, pursuant to Gen. R. Prac. 115.11, the Gomezes requested permission to move for reconsideration. (A.A. 75.) Williams Construction opposed that request by letter dated September 8, 2006. (A.A. 77.) On September 14, 2006, judgment was entered. (A.A. 67.) On September 26, 2006, the trial court denied the Gomezes' request for permission to move for reconsideration. (A.A. 80.) The Gomezes filed this appeal by mail on November 13, 2006. (A.A. 81.)

### **III. STATEMENT OF THE FACTS**

Appellants Lupe and Gail Gomez are husband and wife. Since 1978, they have owned and operated their own small residential sprinkler installation business out of their home, with Mr. Gomez primarily working in the field and Mrs. Gomez primarily doing the office work. (G. Gomez Depo. at 6-8; L. Gomez Depo. at 4-5.)<sup>1</sup> Mrs. Gomez has a high school diploma, while Mr. Gomez does not, having attended school in Mexico and, for a short while, in California before stopping after the eleventh grade. (G. Gomez

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<sup>1</sup> All deposition excerpts referred to herein were attached to the Affidavit of Mark Enslin filed by the Gomezes in opposition to the motion for summary judgment.

Depo. at 9-10; L. Gomez Depo. at 4.) Mrs. Gomez has brain cancer and, as a result, she has experienced problems with short-term memory loss since January 2005. (G. Gomez Depo. at 6-7).

In 1989, the Gomezes purchased the lot on which their home would ultimately be built from Williams Construction for whom they had previously installed sprinkler systems. (G. Gomez Depo. at 2; L. Gomez Depo. at 6.) Their property is located at 3790 Highland Road, St. Bonifacius, Minnesota. On or about June 30, 1994, the Gomezes entered into an agreement with Williams Construction for the construction of their home on that land for a base price of \$177,510. (Affidavit of Gail Gomez submitted in opposition to summary judgment motion (“G. Gomez Aff.”) at ¶ 1 and Ex. A.) It is a modest two-story stucco and brick home with a finished lower level walkout and attached garage. (*Id.*) The home was substantially completed on October 19, 1994. (A.A. 31.)

Among other things, in its contract with the Gomezes, Williams Construction made the following express warranties:

- “During the first 10 years of ownership, the home shall be free from major construction defects.”
- “All the work is to be executed in a workmanlike manner in accordance with the Plans and Specifications.”
- “The builder shall comply with all health and building ordinances that are applicable.”

(G. Gomez Aff. at Ex. A at GOM00100, GOM00101 and GOM00079.)

In addition, by virtue of Minn. Stat. § 327A.02, subd. 1(c) (1994), Williams Realty warranted that “during the ten-year period from and after the warranty date, the dwelling

shall be free from major construction defects.”<sup>2</sup> “Major construction defect” is defined as “actual damage to the load-bearing portion of the dwelling . . . which affects the load-bearing function and which vitally affects or is imminently likely to vitally affect use of the dwelling . . . for residential purposes.” Minn. Stat. § 327A.01, subd. 5.

Unfortunately for all concerned, the Gomezes’ home has leaked when it rains. Although Williams Construction initially responded to the Gomezes’ complaints about the leaks by sending someone out, it eventually stopped doing so. (A.A. 15-16.) In mid-2004 when Mrs. Gomez again contacted Williams Construction about leaks, Mr. Williams told her to contact Williams Construction’s insurer. (G. Gomez Aff. at ¶ 2.) On June 18, 2004, the Gomezes wrote about their leaks to Insurance Brokers of Minnesota (G. Gomez Aff. at ¶ 3 and Ex. B) and shortly thereafter they received a June 30, 2004 letter from American Family Insurance Company, Williams Construction’s insurer, acknowledging that it had been placed on notice of a moisture/water infiltration claim by them and requesting that the Gomezes provide it with additional information concerning their claim. (*Id.* at Ex. C.) The Gomezes provided the requested information to American Family by letter dated August 20, 2004. (Affidavit of James Hamilton submitted by Williams Construction in support of its motion at Depo. Ex. 10.)

In August 2004, the Gomezes engaged Private Eye, Inc. to perform a moisture analysis on their home which resulted in a Moisture Analysis Report dated October 4,

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<sup>2</sup> This is the statutory warranty as it existed in 1994 when the Gomezes’ house was built, and thus is the statutory warranty that applies. *See Vlahos v. R&I Construction of Bloomington, Inc.*, 676 N.W.2d 672, 680 n.6 (Minn. 2004) (applying statutory warranty language of 1990 to home built in 1990).

2004. (G. Gomez Aff. at ¶ 5 and Ex. D.) In addition to noting that its probes indicated high moisture readings at numerous locations within the wall cavities of the Gomezes' home, the report indicated that the wall sheathing "felt soft when probed" at more than 30 locations and that the sheathing couldn't even be detected by probes at some half-dozen locations. (*Id.*) The Gomezes promptly forwarded this report to Williams Construction's insurer by letter dated October 12, 2004 (*Id.* at ¶ 6), the receipt of which was acknowledged by Williams Construction's insurer by letter dated October 26, 2004. (*Id.* at ¶ 7 and Ex. E.)

#### IV. ARGUMENT

##### A. Standard of Review.

Whether the district court properly granted summary judgment is a question of law that the Court of Appeals reviews *de novo*. *Timeline, LLC v. Williams Holdings*, 698 N.W.2d 181, 184 (Minn. Ct. App. 2005). In doing so, the Court must determine "whether general issues of material fact exist and whether the district court erred in its application of the law." *Id.* In considering whether a genuine issue of material fact exists, the Court must view the evidence in the light most favorable to the party against whom summary judgment was granted. *Star Centers, Inc. v. Faegre & Benson*, 644 N.W.2d 72, 76-77 (Minn. 2002); *Laska v. Anoka County*, 696 N.W.2d 133, 137 (Minn. Ct. App. 2005). The interpretation of a statute is a question of law that the Court reviews *de novo*. *Weston v. McWilliams & Assoc., Inc.*, 716 N.W.2d 634, 638 (Minn. 2006).

B. The Trial Court Erred in Granting Summary Judgment Based on an Argument Raised by Williams Construction for the First Time in its Reply Memorandum.

Williams Construction originally moved for summary judgment (1) on the Gomezes' statutory warranty claims **solely** on the basis of lack of timely notice of damage and (2) on the balance of the Gomezes' claims **solely** on the basis of the two-year statute of limitations contained in Minn. Stat. § 541.051, subd. 1. (A.A. 13-26.) Indeed, in its opening memorandum, Williams Construction did not even mention the ten-year statute of repose defense. Similarly, in joining Williams Construction's motion, Scherer Bros. also did not even mention the ten-year statute of repose (although it did rely upon that statute in separately moving for summary judgment of Williams Construction's third-party claims against it). (A.A. 30-37.)

As a result, in their memorandum opposing summary judgment, the Gomezes quite appropriately only addressed the arguments raised by Williams Construction and Scherer Bros. in their moving papers—the statute of limitations contained in § 541.051, subd. 1 and the notice provision of § 327A.03(a). Specifically, with respect to the statute of limitations contained in § 541.051, subd. 1, the Gomezes agreed with Williams Construction and Scherer Bros. that under the broad interpretation given by the courts to the phrase “discovery of the injury” in Minn. Stat. § 541.051, subd. 1, the Gomezes had “discovered the injury” more than two years before they commenced their action, even though they did not know the full extent of the defects. As a result, the Gomezes conceded that their claims for negligence, breach of contract and breach of implied

warranty were barred by the two-year statute of limitations contained in § 541.051, subd. 1. (A.A. 43-44.)

As to their claim for breach of the express written warranties, however, the Gomezes noted that the two-year statute of limitations contained in subdivision 1 of § 541.051 did not even apply. Instead, that claim, like their claim for breach of the statutory warranties, is governed by subdivision 4, which allows claims for breach of the statutory warranties and for breach of express warranty to be brought “within two years of the discovery of the breach.” (A.A. 48-49.)

As to notice with respect to their statutory warranty claim, the Gomezes noted that in seeking summary judgment, Williams Construction and Scherer Bros. had simply ignored the Gomezes’ October 12, 2004 notice letter, which constituted timely notice under Minn. Stat. § 327A.03(a). (A.A. 44-47.)

Just three days before the motion hearing, the Gomezes received Williams Construction’s reply memorandum. In that memorandum, Williams Construction raised for the first time its argument that the Gomezes’ claims were barred by the ten-year statute of repose contained in Minn. Stat. § 541.051, subd. 1 because, it claimed, the October 4, 2004 Private Eye Report did not indicate there was structural damage and thus discovery of the breach must have occurred after the ten-year repose period had run. (A.A. 51-65.) At the oral argument, the Gomezes requested an additional opportunity to address this new argument, but the trial court did not grant them that opportunity. (Tr. at 8, 15 and 26.)

Instead, the trial court granted summary judgment on the Gomezes' remaining claims (breach of express warranty and breach of statutory warranty) on the basis of the newly-raised statute of repose contained in Minn. Stat. § 541.051, subd. 1. (A.A. 66-74.) Although in seeking permission to move for reconsideration the Gomezes again requested an additional opportunity to address this newly-raised ground (A.A. 75-76), the trial court also denied that request. (A.A. 80.)

The trial court erred in granting summary judgment on the basis of the statute of repose because it was not raised by Williams Construction until its reply memorandum, and the Gomezes were denied an adequate opportunity to respond to it and were prejudiced by that denial. Gen. R. Prac. 115.03 (c) explicitly limits reply memorandums to "new legal or factual matters raised by an opposing party's response to a motion." The Gomezes certainly did not raise the statute of repose defense and thus Williams Construction's belated raising of that issue should not have been considered, at least not without the Gomezes being afforded the opportunity they repeatedly requested to respond to it. *See Hebrink v. Farm Bureau Life Ins. Co.*, 664 N.W.2d 414 (Minn. Ct. App. 2003) (reversing grant of summary judgment where adverse party was not given a meaningful opportunity to oppose it) and *Bradley v. First National Bank of Walker, N.A.*, 711 N.W.2d 121 (Minn. Ct. App. 2006) (although "[u]nresponsive, novel legal arguments should not be considered if part of the moving party's reply memorandum," court did not abuse its discretion in considering statute of limitations defense raised for the first time in reply brief because opposing party was afforded "full opportunity to address this issue"). Here, the Gomezes were not afforded a full opportunity to address the statute of repose

issue, and if they had, they would have made the arguments discussed below.

Accordingly, the trial court erred in granting summary judgment on the basis of the newly-raised statute of repose without giving the Gomezes an adequate opportunity to respond, and the Gomezes were prejudiced by that error.

C. The Trial Court Erred in Interpreting the Ten-Year Statute of Repose Contained in Minn. Stat. § 541.051, subd. 1 to Provide that the Gomezes' Causes of Action Accrued Upon "Discovery of the Breach" as Opposed to Upon "Discovery of the Injury."

The trial court granted summary judgment dismissing the Gomezes' express written and statutory warranty claims on the basis of the ten-year statute of repose contained in Minn. Stat. § 541.051, subd. 1. That oft-litigated statute contains both a statute of limitations and a statute of repose and governs certain injury claims by owners as well as actions for indemnification.

As an initial matter, it is not at all clear, as Williams Construction and the trial court simply assumed, that subdivision 1 of § 541.051 even applies to express written and statutory warranty claims by owners. Prior to August 1, 2004, it certainly did not. Prior to then, subdivision 4 of § 541.051 explicitly provided that "this section shall not apply to actions based on breach of the statutory warranties set forth in section 327A.02, or to actions based on breach of an express written warranty, provided that such actions shall be brought within two years of the discovery of the breach." *See also Koes v. Advanced Design, Inc.*, 636 N.W.2d 352, 360 (Minn. Ct. App. 2001) (finding that whether intended or not, § 541.051 did not contain a statute of repose for statutory warranty claims and indicating that "[i]f 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”). In 2004, the legislature amended subdivision 4 to read as follows:

**Applicability.** For the purpose of actions based on breach of the statutory warranties set forth in section 327A.02, or to actions based on breach of an express written warranty, such actions shall be brought within two years of the discovery of the breach. In the case of an action under section 327A.05, which accrues during the ninth or tenth year after the warranty date, as defined in section 327A.01, subdivision 8, an action may be brought within two years of the discovery of the breach, but in no event may an action under section 327A.05 be brought more than 12 years after the effective warranty date.

In doing so, the legislature left in place that subdivision 1 did not apply to express written and statutory warranty claims, at least with respect to the statute of limitations on such claims, and added a statute of repose for statutory warranty claims, which this Court in *Koes* had noted was absent. Nothing in that amended subdivision 4, however, states that the statute of repose in subdivision 1 is to apply to express written and statutory warranty claims, as the trial court simply assumed. Under the statute of repose in subdivision 4, the Gomezes claims were clearly timely as they were brought well within 12 years of the effective warranty date.

But even if the statute of repose in subdivision 1 of § 541.051 is deemed to apply to the Gomezes’ statutory and express written warranty claims, the trial court still erred in granting summary judgment.

As to owners’ injury claims, § 541.051, subd. 1 provides in relevant part as follows:

(a) Except where fraud is involved, no action by any person in contract, tort or otherwise to recover damages for any injury to property . . . arising out of the defective and unsafe condition of an improvement to real property . . . shall be brought . . . more than two years after discovery of the injury . . . **nor, in any event, shall such a cause of action accrue more than ten years after substantial completion of the construction. . . .**

**(b) For purposes of paragraph (a), a cause of action accrues upon discovery of the injury. . . .**

(Bolding added.) As the Minnesota Supreme Court recently emphasized in *Weston v. McWilliams & Assoc., Inc.*, 716 N.W.2d 634, 639 (Minn. 2006), “[t]he reference to ‘accrues’ in the repose provision must be read together with the definition that is given later in section 541.051: ‘For purposes of paragraph (a), a cause of action accrues upon discovery of the injury. . . .’” Indeed, in *Weston*, the Supreme Court criticized this Court for disregarding the “plain meaning” of “accrual” within this statute. 716 N.W.2d at 639. Accordingly, the statute’s plain meaning controls and under § 541.051, subd. 1, if an owner does not “discover the injury” within the ten-year period from substantial completion, the action is barred.

As a result, if Williams Construction had timely raised the statute of repose contained in § 541.051, subd. 1 (and assuming that subdivision 1 even applies to express written and statutory warranty claims despite subdivision 4), the issue the trial court should have considered is whether the Gomezes “discovered the injury” on or before October 19, 2004, ten years after substantial completion of their home. Instead, at the urging of Williams Construction, the trial court misinterpreted § 541.051, subd. 1 and considered whether the Gomezes “discovered the breach” on or before October 19, 2004,

apparently looking at the language of § 541.051, subd. 4. (A.A. 73.) That subdivision, however, in no way changes the definition of “accrual” for purposes of the statute of repose contained in subdivision 1.

As the Minnesota Supreme Court has specifically held, the phrase “discovery of the injury” contained in subdivision 1 of § 541.051 is **not** synonymous with the phrase “discovery of the breach” contained in subdivision 4, reasoning that the legislature would not have employed different terms in different subdivisions of the same statute if it had intended those terms to have the same meaning. *Vlahos v. R&I Construction of Bloomington, Inc.*, 676 N.W.2d 672, 677 (Minn. 2004). Instead, “discovery of the breach” means something entirely different. Specifically, it is when the homeowner discovers or should have discovered the builders’ refusal or inability to maintain the home as warranted. *Id.*

Accordingly, the trial court erred in interpreting § 541.051, subd. 1 to provide that the accrual of the Gomezes’ causes of action occurred for purposes of the statute of repose contained therein upon “the realization that the builder was unable or unwilling to ensure that the home was free from this major construction defect.” (A.A. 73.) Instead, for purposes of the statute of repose contained in § 541.051, subd. 1(a), their causes of action accrued “upon discovery of the injury,” as explicitly provided by subd. 1(b).

As to when the Gomezes “discovered the injury” within the meaning of § 541.051, subd. 1, it is undisputed they did so well within the ten-year period. In its opening memorandum, Williams Realty readily acknowledged that the Gomezes “discovered the injury” “years before they commenced this litigation,” and thus well before the critical

October 19, 2004 date. (A.A. 19.) This is because, as Williams Realty noted, “discovery of the injury” occurs “when an actionable injury is discovered, or, with due diligence, should have been discovered, regardless of whether the precise nature of the defect causing the injury is known.” (A.A. 19, *quoting Dakota County v. BWBR Architects, Inc.*, 645 N.W.2d 487, 492 (Minn. Ct. App. 2002). Similarly, Scherer Bros. agreed that the Gomezes “discovered the injury” in “1996 or 1997,” noting that “discovery of the injury” occurs when “the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, an injury sufficient to entitle him to maintain a cause of action.” (A.A. 32, 34, *quoting Greenbrier Village Condo Two Ass’n v. Keller Inv., Inc.*, 409 N.W.2d 519, 524 (Minn. Ct. App. 1987.) Although Williams Realty and Scherer Bros. made these points in connection with arguing that the two-year statute of limitations contained in § 541.051, subd. 1 barred certain of the Gomezes’ claims (a point with which the Gomezes agreed, conceding that their claims for negligence, breach of contract and breach of implied warranty were therefore barred), the same “discovery of the injury” phrase is used with respect to the statute of repose in that same subdivision. Accordingly, it is undisputed that the Gomezes “discovered the injury” within the ten-year repose period. Therefore, their claims are not barred by the statute of repose contained in § 541.051, subd. 1, even assuming subd. 1 applies to their express written and statutory warranty claims. Accordingly, the trial court erred in finding that the Gomezes’ claims were barred by that ten-year statute of repose.

D. Alternatively, Even under the Trial Court's Incorrect Interpretation, it Erred in Finding that the Statute of Repose Barred the Gomezes' Claims as a Matter of Law.

Even if, as the trial court mistakenly found, the critical event for measuring accrual for purposes of the statute of repose in § 541.051, subd. 1 was “discovery of the breach” and not “discovery of the injury” as explicitly provided in subd. 1(b), and even assuming the statute of repose contained in subdivision 1 applies to express written and statutory warranty claims, summary judgment would still have been in error because there are issues of material fact as to when “discovery of the breaches” occurred.

As mentioned above, in *Vlahos*, the Supreme Court held that “discovery of the breach” occurs when the homeowner discovers, or should have discovered, the builder’s refusal or inability to maintain the home as warranted. Because a statute of repose is an affirmative defense, Williams Construction bears the burden of establishing every necessary element of that defense. *See Thiele v. Stitch*, 425 N.W.2d 580, 583 (Minn. 1988); *Golden v. Lerch*, 281 N.W.2d 249, 253 (Minn. 1938). Thus, the question (if the correct test were “discovery of the breach”) would be whether Williams Construction established as a matter of law that the Gomezes did not discover, and should not have discovered, the builder’s refusal or inability to maintain the house as warranted prior to October 19, 2004. This is a classic jury issue and the trial court erred in making its own decision on this issue on summary judgment. *See Vlahos*, 676 N.W.2d at 678-679 (“the question of when [the homeowners] discovered or should have discovered [the contractor’s] refusal or inability to ensure the home was free from major construction defects was a factual question, inappropriate for resolution on summary judgment”).

Here, in erroneously analyzing for purposes of the statute of repose when the Gomezes “discovered the breach,” the trial court also erred by only addressing the statutory and express written warranties against major construction defects, incorrectly stating that the Gomezes had conceded that all of their other statutory and express warranty claims were barred by the two-year statute of limitations contained in § 541.051, subd. 1. (A.A. 71.) The Gomezes did not so concede, and would not so concede, because **all** of their statutory and express warranty claims are governed by the statute of limitations contained in subd. 4, not the statute of limitations contained in subd. 1.

As to the warranties against major construction defects, the trial court found, as a matter of law, that the Gomezes did not discover Williams Construction’s refusal or inability to ensure the home was free from major construction defects until after the ten-year period had run. (A.A. 73.) **Williams Construction itself, however, argued that such discovery had occurred before the ten-year period had run (A.A. 57-60), and thus there was clearly an issue of fact precluding summary judgment on this issue.**

Moreover, in granting summary judgment, the trial court found that the October 4, 2004 Private Eye Report did not disclose a major construction defect, as a matter of law. This ignored, however, that Williams Construction in connection with its warranty specifically defined the load-bearing components to include “walls and partitions,” (G. Gomez Aff., Ex. A at GOM00079) and that the Private Eye Report noted literally dozens of places where the wall sheathing was either soft or undetectable when probed. (G.

Gomez Aff., Ex. D.)<sup>3</sup> Thus, there was ample evidence from which a jury could have concluded that as a result of the Private Eye Report, the Gomezes either knew or should have known that there was a major construction defect. Accordingly, even had this issue been the appropriate one, issues of material fact still precluded summary judgment.

## V. CONCLUSION

The trial court erred in granting summary judgment based on the statute of repose defense which was raised by Williams Construction for the first time in its reply memorandum without giving the Gomezes an adequate opportunity to respond to it as they repeatedly requested. Had they been given that opportunity, the Gomezes would have pointed out that the relevant test under the statute of repose contained in § 541.051, subd. 1, assuming that section even applied to their express written and statutory warranty claims, is when the Gomezes “discovered the injury,” as provided in § 541.051, subd. 1(b), not when they “discovered the breaches” as argued by Williams Construction and as found by the trial court. Because it is undisputed that the Gomezes “discovered the injury” well within the ten-year repose period, the trial court erred in granting summary judgment dismissing the Gomezes claims on the basis of the statute of repose contained in § 541.051, subd. 1. Alternatively, even if “discovery of the breach” were the appropriate event under the statute of repose, issues of material fact precluded summary

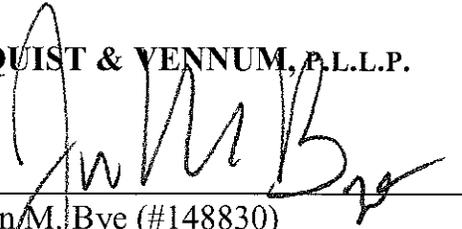
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<sup>3</sup> To the extent there is any doubt that the damage to the sheathing constituted a major construction defect, the Gomezes offered to submit additional affidavits on this newly-raised point, but they were improperly not given that opportunity. (Tr. at 8, 15 and 26; A.A. 75.) See *Hebrink v. Farm Bureau Life Ins. Co.*, 664 N.W.2d 414, 419 (Minn. Ct. App. 2003) (prejudice is unavoidable where trial court denies opportunity to marshal evidence in opposition to summary judgment motion).

judgment. Accordingly, the Gomezes request that the summary judgment dismissing their express written and statutory warranty claims be reversed and that the case be remanded for trial.

Dated: January 5, 2007.

**LINDQUIST & VENNUM, P.L.L.P.**



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