

NO. A08-0929

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State of Minnesota
In Supreme Court

DAY MASONRY,

Appellant,

vs.

INDEPENDENT SCHOOL DISTRICT NO. 347,

Respondent.

COMMERCIAL ROOFING, INC.,

Appellant,

GENFLEX ROOFING SYSTEMS, LLP,

Appellant,

LOVERING-JOHNSON CONSTRUCTION,

Appellant.

APPELLANT DAY MASONRY'S BRIEF, ADDENDUM AND APPENDIX

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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).

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STATEMENT OF THE ISSUES

- 1. Did the Court of Appeals err in failing to consider the Appellant contractors' arguments on the applicable version Minn. Stat. § 541.051 despite the Contractors' failure to file a separate notice of review, based on the Court of Appeals' incorrect conclusion that the District Court made a determination adverse to the Appellants on the issue?**

The Court of Appeals incorrectly held that the District Court made a determination that the 2004 amendments to Minn. Stat. § 541.051 did not apply to breach of warranty claims accruing after the effective date of the amendments, and incorrectly held that the issue was not preserved as a result of Appellants' failure to file a notice of review on the issue.

Apposite Authorities:

Minn. R. Civ. App. P. 106

Hoyt Inv. Co. v. Bloomington Commerce & Trade Ctr. Assocs., 418 N.W.2d 173 (Minn. 1988).

Sletto v. Wesley Construction, Inc., 733 N.W.2d 8 (Minn. Ct. App. 2007)

Minn. Stat. § 541.051(2004).

- 2. Do the District Court's findings of fact that multiple School District employees were aware of numerous and recurring problems with water leaks located in multiple places throughout the building prior to 2004 provide sufficient support for the District Court's conclusion of law that School District's non-warranty claims accrued prior to March 13, 2004?**

The Court of Appeals correctly held that the District Court's findings of fact were supported by the evidence as a whole, and the District Court's findings supported its conclusion that the statute of limitation began to run prior to March 13, 2004. .

Apposite Authorities:

Hanka v. Pogatchnik, 276 N.W.2d 633, 636 (Minn. 1979)

Hyland Hill North Condominium Ass'n, Inc. v. Hyland Hill Co., 549 N.W.2d 617 (Minn. 1996).

3. Did the Court of Appeals err in concluding that a breach of warranty claim may not accrue, as a matter of law, prior to the time the warrantee gives notice to the warrantor of the defect?

The Court of Appeals incorrectly held that the District Court's conclusion that the School District should have discovered that Lovering Johnson, Commercial Roofing, and GenFlex would not or could not honor their warranties prior to the date the School District requested performance of their respective warranties was incorrect as a matter of law.

Apposite Authorities:

Vlahos v. R&I Constr. of Bloomington, Inc., 676 N.W.2d 672 (Minn. 2004)

Gomez v David A. Williams Realty & Const., Inc.,
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815 F. Supp. 1266 (D. Minn. 1993)

Minn. Stat. § 541.051, Subd. 4 (2004)

STATEMENT OF THE CASE

On March 13, 2006, Respondent Independent School District No. 347, Willmar (“School District”) initiated arbitration proceedings against Appellants GenFlex Roofing Systems, LLP, (“GenFlex”), Lovering-Johnson Construction (“Lovering”), and Commercial Roofing, Inc. (“Commercial Roofing”) related to the construction of Willmar High School in 1994 (the “High School”). Lovering brought a third-party claim against Appellant Day Masonry (Day Masonry, Lovering, Commercial Roofing, and GenFlex are collectively referred to as “the Contractors”). Day Masonry subsequently brought a motion in the Eighth Judicial District, Kandiyohi County, before the Honorable Michael J. Thompson, to stay arbitration on the grounds that the arbitration agreement excluded claims barred by the limitations periods in Minn. Stat. § 541.051. Following a full evidentiary hearing, the District Court granted the motion to stay arbitration with respect to all claims arising out of contract, tort, or otherwise, on the grounds that such claims were beyond the scope of the arbitration agreement because they were barred by the two-year statute of limitations in Minn. Stat. § 541.051, Subd. 1. The District Court stayed arbitration of the breach of express warranty claims against Lovering and Commercial Roofing, and breach of the Full System Warranty provided by GenFlex because the claims were barred by the two year statute of limitations in Minn. Stat. § 541.051, Subd. 4 (pre-2004).

The School District appealed the District Court's decision. ADA p.1.¹ On appeal, the School District argued: 1) that the District Court erred in concluding that it had subject matter jurisdiction to determine the scope of the arbitration clause; 2) that the District Court's findings of fact numbers 18, 22(a), 22(e), 32, 35, 37, 50, and 53 were either not supported by the evidence or did not support the conclusions of law; 3) the findings of fact did not support the District Court's conclusion that an actionable injury existed prior to September 1, 2002, and March 13, 2004; 4) the findings of fact did not support the District Court's conclusion that the School District was aware of the injuries prior to September 1, 2002, and March 13, 2004; 5) the School District's breach of express warranty claims against Lovering and Commercial Roofing were not barred because the School District did not notify them of the injuries until December 13, 2004; 6) the School District's claim for breach of the Full System warranty was not barred by the statute of limitations because the School District did not notify GenFlex of its warranty claims until August 12, 2005 and December 30, 2005; and 7) the statute of repose did not apply to the warranty claims.

The Contractors argued in response that, if the Court of Appeals were to determine that the breach of warranty actions accrued in December of 2004 or later, as the School District argued, the inescapable result was that the amended version of Minn. Stat. § 541.051 would apply, and the statute of repose contained therein would bar the School District's warranty claims. In the alternative, the Contractors argued that the District

¹ Day Masonry's Appendix is abbreviated "ADA" and Addendum is abbreviated "ADD."

Court did not err in concluding that warranty causes of action were barred by the two year limitations period in Minn. Stat. § 541.051, Subd. 4.

The Court of Appeals held that the District Court properly exercised its subject matter jurisdiction to determine whether the School District's claims fell within the arbitration provision, and held that the School District's non-warranty claims were barred by the applicable statute of limitations. *Day Masonry v. Independent School Dist. 347*, 2009 WL 1182053 (Minn. Ct. App. 2009). However, the Court of Appeals reversed as to the warranty claims, concluding that the School District did not provide notice to GenFlex, Lovering, or Commercial Roofing of any problems until at least December of 2004. *Id. at *4-5*. The Court of Appeals declined to address the Contractors' argument that if the causes of action accrued after August 1, 2004, then the ten year statute of repose in the amended version of Minn. Stat. § 541.051 applied to bar the School District's breach of warranty claims, because the Contractors did not file a notice of review as to the applicable version of Minn. Stat. § 541.051. The Court of Appeals then ordered arbitration of the School District's breach of warranty claims against GenFlex, Commercial Roofing, and Lovering-Johnson.

The Contractors petitioned this Court for review on the grounds that the Court of Appeals incorrectly failed to address the issue of whether the post-2004 version of Minn. Stat. § 541.051 applied to the breach of warranty claims, and alternatively, that the Court of Appeals erred in holding that actual notice of a warranty claim was required. The School District requested conditional review of the Court of Appeals' decision that the

findings of fact supported the conclusion that the two year statute of limitations barred the School District's non-warranty claims.

STATEMENT OF THE FACTS

The School District requested conditional review of the Court of Appeals' decision that the District Court's determination that the School District was aware of an actionable injury was supported by sufficient evidence. As a result, a detailed recitation of the facts is necessary.

In late 1992, the School District began to plan the construction of a new Senior High School building. Lovering was the general contractor for the masonry work. Lovering subcontracted the masonry work to Day Masonry. Commercial Roofing installed the roofing systems and repaired some problems with the roof that arose during the construction phase. GenFlex manufactured the rubber membrane for the roof. The School District and its various contractors entered into a construction contract which included American Institute of Architects (AIA) Form A201/CM (1980). ADA p.4. Article 7.9.2 of Form A201 (hereinafter "Article 7.9.2") states in pertinent part:

Notice of demand for arbitration shall be filed in writing with the other party to the Owner-Contractor Agreement and with the American Arbitration Association, and a copy shall be filed with the Architect and the Construction Manager. The demand for arbitration shall be made within the time limits specified in Subparagraph 2.3.15 where applicable, and in all other cases within a reasonable time after the claim, dispute, or other matter in question has arise; and in no event shall it be made after the date when institution of legal or equitable proceedings based on such claim, dispute or other matter in question would be barred by the applicable statute of limitations.

Id. Construction was completed and the School District began to occupy the High School in August 1994.

In June of 2004, the School District hired Waters Edge Architectural Group, Inc. (nka Cities Edge) to conduct an assessment of the High School. ADA p.6. Waters Edge submitted a report on November 22, 2004. The School District also hired Inspec, an engineering firm, to conduct an investigation into the leaks at the High School, and issued a report dated November 2, 2004. ADA p.7. The School District sent the results of its investigations to Lovering and Commercial Roofing on December 13, 2004, and January 24, 2005. ADA p.8-11. The School District sent a notice to GenFlex of issues with the roof membrane on August 12, 2005. ADA p.12. The School District instituted arbitration proceedings on March 13, 2006, against Commercial Roofing, GenFlex, and Lovering-Johnson. Lovering then brought Day Masonry into the action.

While the District Court action was pending, and during the time that the arbitration was proceeding, the various contractors and roof manufacturer took the depositions of the witnesses they believed had knowledge of water problems. These depositions included the depositions of two of the head custodians at the High School, the former maintenance engineer and handyman, the present Health and Safety Director of Buildings and Grounds, the Inspec employee responsible for inspecting the walls and recommending repairs, and the architectural assistant from Cities Edge Architects who became the project manager for work done at the High School. The contractors and roof manufacturer also took the depositions of the roofing contractor who repaired the High School roof on repeated occasions since the High School opened.

A. Deposition of Richard Olson.

Richard Olson is the Health and Safety Director of Buildings and Grounds for the Willmar School District. As such, he is the head of the custodial staff for the entire district. ADA p.13. He has been in this position since approximately 2001, and for fifteen years before that he had been the school carpenter.

His current position was created for him in 2001 and was a combination of duties others had. ADA p. 14. He succeeded Dick Rutjes, the former head of building and grounds, when Mr. Rutjes retired. ADA p. 15. He also assumed duties from the business manager, Marv Cray. Mr. Cray retired around this same time, and Mr. Cray was the head of custodians prior to having Mr. Olson assume that role. Mr. Olson also assumed the Health and Safety Director position from the business manager. ADA p. 15.

Since taking over his current position, Mr. Olson has worked closely with Brad Schueller, the present head custodian at the High School. Brad Schueller has been the head custodian at the High School since the time it opened in 1994, except for a one and one-half year period beginning in 2001 when he was the head custodian at Willmar Junior High School. ADA pp.16-20.

As the supervisor of all the custodians, Mr. Olson is the supervisor for Brad Schueller. Mr. Olson's deposition conveys Mr. Olson's belief that Brad Schueller, as a head custodian, should know, and in fact did now, about problems in the High School. Mr. Olson testified that if something was wrong in a school building, the custodian is typically the first person to find out about it because someone reports it to him. ADA

p.21. He testified that he relied heavily on Brad Schueller as the High School custodian to report what the problems were in the High School. ADA p.22.

Mr. Olson stated that Brad Schueller, as the head custodian, is extremely knowledgeable in knowing about the problems that exist in his building. ADA p.23. Mr. Olson testified if Mr. Schueller reports a leak, he is typically right that there is a leak there. ADA p.24.

Brad Schueller was specifically questioned about areas where he noticed specific leaks in the High School and when it was that he noticed them. In his deposition, Mr. Schueller identified six specific areas of concern. He indicated unequivocally that all areas had been a problem at the High School from the time the High School opened in 1994.

Mr. Olson was questioned about each of the specific areas that Brad Schueller identified as areas that had leaked from the time the High School opened. When questioned about those six areas, Mr. Olson did not, and could not, disagree with Brad Schueller's observations.²

Mr. Olson also had specific personal knowledge of water problems at the High School. He stated that the leak problems at the High School predated 2004 when Inspec began work at the High School. ADA p.25. When Inspec did an inspection in April of 2004, he was not surprised by its finding of leak problems. He stated that he knew there

² With each area of leak, Mr. Olson was asked if he knew any facts which would suggest that Brad Schueller's statements that the leaks had existed from the time the High School opened. He stated in each instance that he knew of no facts to refute the statements of Brad Schueller. See ADA. pp. 26-31.

were leaks over the years, and Inspec came out to inspect the High School because of water and leak issues. ADA p.32.

B. Deposition Testimony of Brad Schueller.

Mr. Schueller confirmed the ongoing difficulty at the High School with leaks in the roof, windows, and walls. When he started to work as a custodian at the High School, his duties were to take care of the outside grounds. ADA pp. 33-34. However, he testified that Marlan Stegeman, the head custodian at that time, would have him do things inside the building because he was close to Mr. Stegeman. ADA pp. 35-36. During the time that Marlan Stegeman was the head custodian (1994-99), Schueller testified that he noticed moisture running through the walls at the High School pool, but he just did not think anything was wrong. ADA p.37-38. However, he admits that he discussed this water intrusion problem with Mr. Stegeman at the time he noticed it. ADA pp.35, 38.

Mr. Schueller testified that when he was working on the grounds, he observed white staining on the brick walls under windows and in various locations around the building. This was a problem he noticed from the time that the building opened up to the present. ADA p. 39-40. He assumed the condition was caused by moisture or water, and he reported that condition to either Mr. Stegeman or Dick Rutjes. ADA p. 41. From 1994 to 1999 when was working as the head custodian, Mr. Stegeman told Mr. Schueller about the leaks and told Mr. Schueller to keep an eye on them. ADA pp. 41-42.

At the time Mr. Schueller left his position to go to the Junior High School in 2001, ADA pp.43-44, he noticed leaks in six distinct areas in the High School. The first area was in the area between the commons and the main door to the gym, where he noticed

water coming down the walls. ADA pp.45-46. He was able to see the water on the walls in this area when the ceiling tiles got wet and caved in. *Id.* Mr. Schueller testified that this water problem was going on when he left to take his position at the Junior High School, and was still going on when he returned to the High School in 2003. ADA pp.47-48.

The second area where Mr. Schueller noticed a problem was the showcase area. He noticed what he referred to as a “waterfall” running down on the inside of the showcase. ADA pp. 48-49. He observed this on one occasion before he left the High School, but other custodians told him about it on several occasions. ADA pp. 49-50. He indicated that later, after his return to the High School, the problem still existed. ADA p. 48. To try to determine the cause of the leaks, he and Mr. Olson, the Health and Safety Director, went on the roof to see if they could determine the cause. They opened the parapet cap, and when they did, they observed frost under the cap. ADA pp. 51-52.

The third problem occurred in a large area referred to as the IMC/Library/ITV/conference room. Mr. Schueller investigated this area as a result of wet and damaged ceiling tiles. ADA p. 54. When he opened up the ceiling, he noticed water coming down the walls and soaking the carpet. ADA pp. 53-54. Mr. Schueller stated that this was a condition that he noticed repeatedly over the entire time that he was at the High School. ADA pp. 54-55.

The fourth and fifth areas where Mr. Schueller noticed problems were the shop hallway and the gym walls. Again, the first sign of problems in the shop hallway were wet ceiling tiles. ADA p.56. This occurred on more than one occasion. *Id.* When

Schueller examined the walls, he found water running down the walls. ADA pp. 56-57. He testified that this problem existed, just as with the other problems, from the time the building opened. ADA p. 57. The gymnasium had problems with water running down the walls, both inside the gymnasium and out. ADA p. 58. This was a condition that Mr. Schueller observed more than once. *Id.* Mr. Schueller indicated that all five of these conditions were such that anyone looking at the walls would be able to see them. ADA p. 60. They were not at all hidden, and it was his assumption that the principals always became aware of these problems, though the only principal he could say for certain had knowledge was the present principal, Mr. Anderson. *See* ADA pp. 60-63.

Mr. Schueller also testified to the existence of water problems in a sixth area - three different "115" rooms. He noticed water coming through the blocks of the walls in these rooms which left visible efflorescence on the walls. He described efflorescence as white residue staining left from the water. ADA p. 63. He saw the staining on both the interior and exterior block walls. Again, this was a condition that he noticed essentially since the school had opened. ADA pp. 63-64. It was his understanding that this staining was caused by water getting through the walls, ADA pp. 64-65, and he assumed that this problem had something to do with either the design or construction of the building. ADA pp. 65-66. He noticed the efflorescence on the interior walls for years, and he told Mr. Olson, his supervisor, about it. ADA p. 67.

Mr. Olson, his supervisor, testified that he, too, was aware of the efflorescence inside and outside of the 115 rooms. ADA p. 68. In fact, Mr. Olson had the efflorescence tested by another company. *Id.* Although he is not sure when he saw this

efflorescence, he believes it would have been before 2004. ADA pp. 68-69. Olson did state that if Brad Schueller stated that the efflorescence existed from the time the High School opened, as he did, ADA pp. 63-64, he would agree with Mr. Schueller. ADA pp. 70-71.

C. Deposition of Marlan Stegeman.

Marlan Stegeman was the first head custodian at the High School. He worked in that position from the time the High School opened until he retired in 1999. ADA p. 72. He testified to knowing that the High School had regular leaks. When he called somebody to get them fixed, he claims he would be told that the leaks got fixed; however, his experience was that the leaks did not get fixed. ADA p. 73. The leaks that existed at the High School were there throughout the entire time he worked at the High School. ADA pp. 74-75. There were leaks in the hallways where the ceiling tiles had to be replaced because of water damage. ADA p. 75. There were also leaks in the windows. ADA p. 75-76. He testified that he knew there were always leaks in the windows. ADA p. 76. Mr. Stegeman testified that for the whole five years that he was at the High School, the roof leaked and the windows leaked. ADA pp. 77-78. He has distinct recollections of the leaks occurring because he stated it was very frustrating for him to have to deal with the leaks over that entire period of time. ADA p. 78. What was particularly frustrating to him was the fact that this was a new building and it continually had leaks. *Id.*

When these leaks would occur, Mr. Stegeman would complain about the leaks to Dick Rutjes, his maintenance supervisor. ADA pp.79-80. Mr. Stegeman testified that

every year for the five years he was there, he called Dick Rutjes about the leaks in the windows and roof. ADA p.81. However, nothing stopped the leaks. As Mr. Stegeman so succinctly put it, "When it would rain, I would expect to have problems someplace." ADA p. 79.

D. Deposition of Richard Rutjes.

Richard Rutjes worked with the Willmar School District from 1976 to 2001 as a handyman and maintenance engineer for all of the schools. ADA p. 82. He was the one person going back and forth to all of the schools. ADA p. 83. From 1994 until the time he retired in 2001, he was aware of ongoing leak problems at the High School. ADA pp. 84-87. He never recalled those leaks being resolved. ADA p. 84.

Like Richard Olson, Richard Rutjes felt that Marlan Stegeman and Brad Schueller were more aware of the problems that existed at the High School than he was. ADA p. 88 He testified that when both reported problems to him, those problems always existed. *Id.* Consequently, when either Stegeman or Schueller were aware of a problem, he never found a reason to disagree with them. *Id.*

E. Depositions of Paul Reeb and Kevin Charter.

Kevin Charter and Paul Reeb are two experts involved in this matter who did work for the School District analyzing the problems that caused the leaks and also determining what problems should be fixed. Paul Reeb is an employee of Cities Edge Architects. ADA p. 89. Mr. Reeb was the project manager for the work that was done to correct leaks at the High School, and his responsibilities were to see that the repair project was done correctly and timely and within budget. ADA p. 90-92.

Prior to managing the repair work done at the High School in 2006, Cities Edge had done a facilities assessment of all Willmar School buildings in 2004 (at that time, Cities Edge was doing business under the name of Waters Edge). ADA pp. 93-94. The purpose of the facilities assessment conducted in 2004 was to generate a database of the condition of the buildings for planning purposes. ADA p. 95. The database was to include fixes that needed to be made on the buildings. ADA p. 96. When Cities Edge did the facilities assessment, Mr. Reeb testified that the custodians and maintenance people were the first people with whom they talked. ADA p. 97. According to Mr. Reeb, if the facilities assessment project started in April of 2004, he would “bet” the custodians knew what a lot of the problems were before April of 2004 - especially water issues. *Id.*

Kevin Charter is the Inspec employee who did an investigation of the problems at the High School and signed the investigation report summarizing the problems. Mr. Charter explained that talking to school personnel is a “big part” of getting started on the investigation. ADA p. 98. He explained that the custodians are usually extremely knowledgeable about the problems that exist and when they started because they have to live with the building every day. *Id.* In this case, Mr. Charter testified that he talked to Brad Schueller for about three hours just discussing leaks. ADA p. 98-99. In that time, Schueller told him where the problems were and when they started, and Mr. Charter states that he accepted what Schueller told him as being accurate. ADA p.99.

F. Deposition of Cal Torkelson.

Cal Torkelson is presently the manager of West Central Roofing. He explained that his company had done “a lot” of troubleshooting and repair projects for the School District. He believes that this started in about the year 2000. ADA p. 100. Mr. Torkelson brought to his deposition two separate West Central Roofing invoices for work done at the High School dealing with leaks in 2002. On May 23, 2002, the invoice indicated: “Senior High Shop Office Leak. Looked for leak. Leak may be coming from windows. They need to be re-caulked.” ADA p. 101. An October 30, 2002 invoice stated: “Roof leaks, Senior High School, Show Case and By Gym Hallway. Looked at roof leaks. Leaks appear to be coming through the wall. Walls should be re-caulked and sealed.” ADA p. 101-102. In discussing this leak apparent at the showcase, Mr. Torkelson said that he saw water coming in the showcase “pretty good. It was filling the 55 gallon drums, pretty fast.” ADA p. 102. He testified that during this period when he did repair work, he talked to Brad Schueller. ADA p. 103. He confirmed that conversations he had with Brad Schueller and others confirmed that these leaks were persistent occurrences and that they were a longstanding, continual problem. *Id.*

ARGUMENT

I. THE CONTRACTORS WERE NOT REQUIRED TO FILE A NOTICE OF REVIEW TO PRESERVE THE ISSUE OF THE VERSION OF MINN. STAT. § 541.051 APPLICABLE TO BREACH OF WARRANTY CLAIMS ACCRUING AFTER AUGUST 1, 2004.

Appellant Day Masonry adopts and incorporates herein by reference the arguments on this issue contained in the briefs of GenFlex, Lovering, and Commercial Roofing. Day Masonry offers the following argument in addition to the arguments of the other parties.

The Court of Appeals held that the District Court decided that the pre-2004 version of Minn. Stat. § 541.051 applied to the School District's breach of warranty claims. The Court of Appeals then declined to address the Contractors' arguments that the amended version of Section 541.051 (effective Aug. 1, 2004) applied to the School District's breach of warranty claims (and therefore the statute of repose barred the School District's claims), because the Contractors failed to file a notice of review on the issue of the applicable version of the statute. *Day Masonry*, 2009 WL 1182053 at *5. This Court should reverse the Court of Appeals because the District Court did not conclude that the pre-2004 version of the statute applied to breach of warranty claims accruing after August 1, 2004, and because a notice of review is not necessary to preserve an issue where the issue was not decided adversely to a respondent.

A. Standard of Review.

The Supreme Court reviews de novo review the court of appeals' interpretations of the rules of civil appellate procedure. *In re GlaxoSmithKline PLC*, 699 N.W.2d 749, 753 (Minn. 2005); *Kastner v. Star Trails Ass'n*, 646 N.W.2d 235, 238 (Minn. 2002) (construction of a procedural rule is a question of law). The retroactivity of a statute presents a question of law reviewed de novo. *Gomon v. Northland Family Physicians, Ltd.*, 645 N.W.2d 413, 415-16 (Minn. 2002).

B. The District Court did not Determine that the Pre-2004 Version of Minn. Stat. § 541.051 Applied to Warranty Claims with an Accrual Date after August 1, 2004.

In front of the District Court level, the School District had an irreconcilable dilemma. The Contractors argued that the breach of warranty claims were barred by the two year statute of limitations found in Minn. Stat. § 541.051, on the grounds that the breach of warranty claims accrued prior to March 13, 2004. The School District based its argument that the breach of warranty claims had not accrued on the grounds that no notice had been given the Contractors until December of 2004, at the earliest, and therefore no breach could have occurred until after that time.

As a response, the Contractors argued that if the December 2004 accrual date was correct, then the ten-year statute of repose in the amended version of Section 541.051 applied. *See* Transcript, p.44-47 ADA p. 104-107. In 2004, the legislature amended Section 541.051, effective August 1, 2004, removing the language exempting warranty claims from the statute of repose. Laws 2004, Ch.196, Sec. 1. The amendment made the ten-year statute of repose in Minn. Stat. § 541.051, Subd. 1(a) applicable to breach

warranty claims accruing after August 1, 2004. *Gomez v. David A. Williams Realty & Const., Inc.*, 740 N.W.2d 775, 781 (Minn. Ct. App. 2007) (citing *Sletto v. Wesley Constr., Inc.*, 733 N.W.2d 838, 843 (Minn. Ct. App. 2007)).

The Court of Appeals oversimplified the District Court's detailed analysis of the applicable version of the statute, and summarily stated that "the district court determined that the school district's warranty claims are governed by the version of the statute in effect before 2004 that did not include a repose period." *Day Masonry*, 2009 WL 1182053 at *5. The District Court did not simply make a blanket conclusion that the pre-2004 version of Minn. Stat. § 541.051 applied. Rather, the District Court explicitly concluded that if the claims accrued after August 1, 2004 (as the Court of Appeals found), the amended version of Section 541.051 would apply.

In its memorandum, the District Court explicitly analyzed whether the 2004 amendments to Minn. Stat. § 541.051 would apply to the School District's claims. The District Court reasoned, based on the decision in *Sletto*, 733 N.W.2d at 38, that unless both the accrual of the claim and the commencement of the suit occurred after the August 1, 2004 effective date of the amendment to Minn. Stat. § 541.051, the statute of repose amended version did not apply. ADD-10. After making the straightforward conclusion that the School District commenced its claim for breach of warranty on March 13, 2006, when it initiated arbitration, ADD-12, the District Court concluded that all of the School District's claims, including the breach of warranty claims, accrued *prior to* Aug. 1, 2004, noting:

[T]he Court finds that the accrual of the School District's claim occurred prior to the passage of the 2004 amendment to 541.051, Subd. 4. As a result of the holding in *Sletto v. Wesley Construction, Inc.*, the language of Subd. 4 as it existed prior to the 2004 amendment is the language to be used in this analysis.

ADD-12.

In its Conclusions of Law, the District Court concluded that "Minn. Stat. § 541.051, Subd. 4 (prior to Aug. 1, 2004) bars the action of the School District for any claim against the express warranty provided by" Lovering, Commercial Roofing, and GenFlex (Full System Warranty). ADD-7 (Concl. of Law 3-5). Subdivision 4 of Section 541.051 includes the two-year statute of limitations for express warranty claims. In order to make these conclusions, the District Court necessarily concluded that the breach of warranty claims accrued prior to March 13, 2004. It would not be possible for the claims to accrue after August 1, 2004, and still be barred by the statute of limitations..

1. The finding that the School District did not notify the Contractors of the alleged injuries until March of 2006 did not affect the District Court's determination of a pre-March 2004 accrual date.

The District Court concluded that the School District did not give notice to any of the Contractors of any problems until it filed for arbitration in 2006. ADD-6-7, FF 53.³ This finding did not prevent the District Court from concluding that the breach of warranty claims accrued prior to the date of notice to the Contractors. At the outset, it is important to note that the District Court applied the correct standard for accrual of a breach of warranty claim. The District Court quoted *Vlahos v R&I Constr. of*

³ Finding of Fact is abbreviate "FF." Day Masonry recognizes that the School District did in fact send letters to Lovering and Commercial in December of 2004, and letters to GenFlex beginning in August of 2005.

Bloomington, Inc., 676 N.W.2d 672, 678 (Minn. 2004) for the holding that the “statute of limitations ... begins to run when the homeowner discovers, or should have discovered, the builder’s refusal or inability to ensure the home is free from defects.” The District Court even explained the standard in its own words in a two part test: “[f]irst comes the question whether the building owner discovered the injury and second, when did the building owner discover, or should have discovered, the refusal of the grantor of the warranty to perform.” ADD-13. Thus, when the District Court concluded that the two year statute of limitations had run, it knew full well that it was concluding that the School District should have discovered the refusal of Contractors to perform on their respective warranties prior to March of 2004. *See generally, infra*, Section III.

Although the Court of Appeals interpreted *Vlahos* to mean that notice is required in order for a warranty statute of limitations to accrue, the District Court considered notice unnecessary. Again, the District Court focused on the “should have known” language, and explicitly stated that the “School District had every opportunity to contact [the Contractors] about the problem prior to September 1, 2004 ... and thus *would have known* whether they were intending on performing or breaching their respective warranties.” ADD-13 (emphasis added). It is clear from the District Court’s reasoning that it did not conclude that that notice was a necessary prerequisite to a breach of contract claim, and there was nothing about the District Court’s analysis that was adverse to the Contractors and required a notice of review.

2. The “prior to September 1, 2004” language cannot be interpreted to mean the District Court concluded the breach of warranty claims accrued “prior to September 1, 2004, but after August 1, 2004”.

The important date for determining the applicable version of Section 541.051 is August 1, 2004. It is not entirely clear why the court used the “prior to September 1, 2004” language in analyzing when the School District should have known of the breach of warranty. While it is not clear exactly what the District Court intended, it is very clear from the remainder of the District Court’s Order that it did not conclude that the breach of warranty claims accrued in the window between August 1, 2004, and September 1, 2004. If that had been the case, the District Court would not have applied the pre-2004 version of Minn. Stat. § 541.051, would not have concluded that the breach of warranty claims commenced on March 13, 2004 were barred by the two-year statute of limitations, and would not have explicitly concluded that School District’s causes of action accrued prior to Aug. 1, 2004. Any attempt to interpret the phrase to mean the breach of warranty claims accrued in the window between August 1, 2004, and September 1, 2004, is simply inconsistent with the District Court’s Conclusions of Law. To the extent there is an inconsistency between a conclusion of law and a finding of fact in an order, the conclusion of law prevails. *See Dailey v. Chermak*, 709 N.W.2d 626, 631-632 (Minn. Ct. App. 2006) review denied, May 16, 2006 (when a conflict exists between finding of fact and conclusion of law, the conclusion of law prevails).

C. The Contractors did not Fail to Preserve the Issue of the Applicable Version of Minn. Stat. § 541.051 by Failing to File a Notice of Review.

The Court of Appeals held that the Contractors had not preserved their statute of repose defenses because they failed to file a notice of review under Minn. R. Civ. App. P. 106 of the applicable version of Minn. Stat. § 541.051. Minn. R. Civ. App. P. 106 provides that:

A respondent may obtain review of a judgment or order entered in the same action which may adversely affect respondent by filing notice of review with the clerk of the appellate courts. The notice of review shall specify the judgment or order to be reviewed, shall be served and filed within 15 days after service of the notice of appeal, and shall contain proof of service. A filing fee of \$100 shall accompany the notice of review.

Minn. R. Civ. App. P. 106 requires a Respondent to file notice of review of issues which were determined below that were adverse to the Respondent. *See City of Duluth v. Duluth Police Local*, 690 N.W.2d 357, 359 (Minn. Ct. App. 1996). Rule 106 does not require a notice of review of issues which were not adverse to the Respondent. *Hoyt Inv. Co. v. Bloomington Commerce & Trade Ctr. Assocs.*, 418 N.W.2d 173, 175 (Minn. 1988). In *Hoyt*, the court explained that:

Failure of a respondent to file a notice of review to challenge those issues determined adversely to it has resulted in this court's declination to review those questions. This court has not, however, imposed the requirement of a notice of review where the trial court has failed to rule on a question litigated and practical reasons continue to render such a notice unnecessary. While a notice of review might serve to call attention to the unresolved issue, an undecided question is not usually amenable to appellate review.

Id. at 175.

There was nothing adverse to the Contractors in the District Court's Order from which the Contracts should have appealed. (With the exception of one of two warranty

claims against GenFlex). The District Court held that all claims accrued prior to March 13, 2004. It explained that, had the School District's claims accrued after August 1, 2004, the amended version of Section 541.051, which included a statute of repose, would apply. The illogical nature of requiring a notice of review in such a situation is easily demonstrated by considering the notice of review the Court of Appeals must have thought necessary:

Respondent requests review of the District Court's failure to make an explicit alternative Conclusion of Law that, if the breach of warranty claims did not accrue when the District Court concluded they accrued, but instead much later, a different version of the statute applies.

Courts justifiably do not make explicit findings on every alternative theory which would lead to dismissal. If a failure to make such explicit findings was "adverse" to a successful litigant, successful litigants would need to file a notice of review in nearly every case. Diligent counsel would also need to take extra steps at the trial court level to request a determination on alternative theories which do not control the outcome. These additional burdens on litigants and the courts serve no purpose. Because there was nothing in the District Court's Order concerning the applicable version of Section 541.051 adverse to the Contractors, the Contractors were not required to file a notice of review to preserve the issue.

D. The Supreme Court Should Determine that the 2004 Amended Version of Minn. Stat. § 541.051 Applies to the School District's Breach of Warranty Claims, and that the Statute of Repose Bars Such Claims.

The Supreme Court has authority to address issues not decided by the Court of Appeals. Minn. R. Civ. App. P. 103.04 ("appellate courts may ...take any other action as

the interests of justice require”); *Weston v. McWilliams & Associates, Inc.*, 716 N.W.2d 634, 641 (Minn. 2006). By exercising this authority, this Court would further the purposes of Minn. R. Civ. App. P. 106, which is “to avoid piecemeal decisions and allow an appellate court to resolve all issues in one proceeding[.]” *City of Duluth v. Duluth Police Local*, 690 N.W.2d 357, 359 (Minn. Ct. App. 2004) (quoting *Arndt v. Am. Family Ins. Co.*, 394 N.W.2d 791, 793 (Minn. 1986)).

Despite the *Hoyt* court’s warning that an undecided question is not “usually amenable to appellate review,” it would be difficult to imagine a claim that is more amenable to appellate review – the 2004 amendments to Section 541.051 apply, as a matter of law, by virtue of the Court of Appeals’ conclusion that the warranty causes of action accrued no earlier than December of 2004.

As the District Court correctly noted, the statute of repose in the amended version of the statute only applies if both the commencement and the accrual occur after the effective date of the statute.” *Sletto*, 733 N.W.2d at 844. The School District commenced its claim on March 13, 2006. The Court of Appeals determined that the warranty claims against Lovering and Commercial roofing accrued in December of 2004 at the earliest. *Day Masonry*, 2009 WL 1182053 at *5. Because the breach of warranty claims accrued after August 1, 2004, the amendments to Minn. Stat. § 541.051, and its ten year statute of repose applies.

The application of the ten-year statute of repose is equally straightforward, and may be determined without remand. The statute of repose began to run on the date of “substantial completion of the construction.” Minn. Stat. § 541.051, subd. 1(a) (2005).

The District Court concluded that the High School was substantially completed by September 1, 1994. ADD-3, FF. 11. The School District's breach of warranty claims accrued more than ten years later, and were brought more than eleven and a half years later. As a result they are barred by the statute of repose.

If this Court determines that the Court of Appeals properly declined to review the issue of the applicable version of Minn. Stat. § 541.051 due to the Contractors' failure to file a notice of review, the Court of Appeals nonetheless erred by failing to remand the issue of the applicable version of the statute to the District Court. *See In re C.M.A.*, 557 N.W.2d 353, 359 (Minn. Ct. App. 1996) (the failure to file a notice of review does not preclude remand for the district court to decide issues that it had previously declined to address); *see also, Villarreal v. Independent School Dist. No. 659, Northfield*, 505 N.W.2d 72, 76 Fn.1 (Minn. Ct. App. 1993) rev'd on other grounds, 520 N.W.2d 735 (Minn. 1994) (A respondent is not required to file a conditional notice of review to preserve an alternative theory). If this Court does not decide the issues, it is the duty of the District Court to determine on remand the applicable version of Section 541.05, and whether the statute of repose bars the breach of warranty claims and removes the claim from the scope of the arbitration clause.

If the Court of Appeals decision is affirmed without modification, the Contractors will have been deprived of their opportunity to have their arguments related to the statute of repose considered by the court in violation of the due process clauses of the 14th Amendment of the United States Constitution and the Minnesota Constitution (Minn.

Const. Art. 1, § 7). Despite raising their argument in every possible forum, the Contractors will not be permitted a decision by the Courts.

II. THE DISTRICT COURT DID NOT ERR IN DETERMINING THAT THE SCHOOL DISTRICT'S NON-WARRANTY CLAIMS ACCRUED, AND THE STATUTE OF LIMITATIONS BEGAN TO RUN, PRIOR TO MARCH 13, 2004.

In its argument in front of the Court of Appeals, the School District sifted through the minor details of the District Court's extensive factual findings and identified a small number of factual findings as abuses of discretion, which it argued should result in reversal. The District Court made 31 findings of fact that supported its conclusion that the School District was aware of an actionable injury prior to March 13, 2004. The School District challenged only eight of the District Court's Findings of Fact (numbers 18, 22(a), 22(e), 32, 35, 37, 50, and 53) in the Court of Appeals, of which only seven were from the findings supporting knowledge of the injury. (Finding 53 related to the date of notice to the Contractors).

The alleged errors raised by the School District are inconsequential. Even if the minor factual details were not correct, it would not change the ultimate conclusion that the School District was aware of the numerous and continual leaks in the High School, and the statute of limitations on its breach of contract began to run long before March of 2004.

A. Standard of Review.

The question of when a claimant discovered or should have discovered an injury is one of fact. *200 Levee Dr. Assoc., LTD, v. Bor-Son Building Corp.*, 441 N.W.2d 560,

564-65 (Minn. Ct. App. 1989). A district court's findings of fact shall not be set aside unless clearly erroneous. Minn. R. Civ. P. 52.01. In applying Minn. R. Civ. P. 52.01, a reviewing court will "view the record in the light most favorable to the judgment of the district court[.]" *Rogers v. Moore*, 603 N.W.2d 650, 656 (Minn. 1999), and will not reverse the district court's judgment merely because the reviewing court views the evidence differently. *Id*; *see also Vangsness v. Vangsness*, 607 N.W.2d 468, 474 (Minn. Ct. App. 2000) ("[t]hat the record might support findings other than those made by the trial court does not show that the court's findings are defective"). Rather, the district court's factual findings must be clearly erroneous or "manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole" to warrant reversal. *Rogers*, 603 N.W.2d at 656 (quotation omitted). "Findings of fact are clearly erroneous only if the reviewing court is left with the definite and firm conviction that a mistake has been made." *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999) (quotation omitted). If there is reasonable evidence to support the district court's findings, the appellate court will not disturb them. *Rogers*, 603 N.W.2d at 656.

B. The District Court's Findings of Fact Adequately Sustain the District Court's Conclusion of Law that the School District was Aware of its Injuries Prior to March 13, 2004.

The Court of Appeals correctly noted that "the inclusion of erroneous findings does not warrant reversal if other findings are supported by sufficient evidence and adequately sustain the district court's conclusion." *Day Masonry*, 2009 WL 1182053, *3 (Minn. Ct. App. 2009) (citing *Hanka v. Pogatchnik*, 276 N.W.2d 633, 636 (Minn. 1979); Minn. R. Civ. P. 61). In *Hanka*, the appellant attacked numerous findings of fact, but the

court refused to overturn the decision, noting that “[w]here a decisive finding of fact is supported by sufficient evidence and is adequate to sustain the conclusions of law, it is immaterial whether some other findings are not so sustained.” *Hanka*, 276 N.W.2d at 636.

The School District challenged only eight specific findings of fact in the Court of Appeals. By failing to challenge any other findings of fact, any challenges of other facts have not been preserved on appeal. See *City of Morris v. Sax Investments, Inc.*, 749 N.W.2d 1, 14 (Minn. 2008) (argument not raised in court of appeals not properly before Supreme Court) (citing *Thiele v. Stich*, 425 N.W.2d 580, 582-83 (Minn.1988)). The School District left unchallenged several decisive findings of fact which adequately sustain the District Court’s ultimate conclusion that the statute of limitations had run.

Minn. Stat. § 541.051 (2002)⁴ requires a claimant to pursue an action to recover for damages arising out of a defective or unsafe condition of an improvement to real property within two years after discovery of the injury. For purposes of Section 541.051, a contract cause of action accrues, and the statute of limitations begins to run, on the date the claimant discovered, or with due diligence should have discovered an actionable injury, regardless of whether the precise nature of the defect is known. *Dakota County v. BWBR Architects, Inc.*, 645 N.W.2d 487, 492 (Minn. Ct. App. 2002).

The District Court made extensive findings of fact demonstrating that multiple people were aware of the leaks in the building more than two years before the School

⁴ The two-year statute of limitations for non-warranty claims in Minn. Stat. § 541.051 did not change in any relevant respect as part of the 2004 amendments to the statute.

District brought its cause of action. The findings of fact concerning the knowledge of any of the following individuals would be adequate to sustain the District Court's conclusion that the School District was aware of the injury prior to March 13, 2004:

1. Marlon Stegeman.

Marlon Stegeman was the head custodian of the school from the date the school opened on September 1, 1994, until June 18, 1999. ADD-4, FF. 20. The District Court found that Stegeman observed signs of water leaking in the High School in six different fashions. ADD-4, FF. 22(a)-(f). The School District did not challenge on appeal the Findings of Fact that Mr. Stegeman observed the following conditions: water stains on the ceiling tile in the hallway area by the theatre, and what appeared to be water running down the walls above the tile, ADD-4, FF 22(b); the windows leaked in the foreign language rooms, with water visible and tangible on the sills and wet window hangings, ADD-4, FF 22(c); the center of the gymnasium above the basketball jump circle leaked water onto the gym floor when it rained, ADD-4, Finding 22(d); and lastly, that when it rained and was windy, Mr. Stegeman would expect to have water problems. ADD-5, FF 22(f). Without respect to the challenged findings, these Findings of Fact are sufficient to uphold the District Court's conclusion.

In the Court of Appeals, the School District argued that Finding 22(a) was erroneous. ADA. pp. 11-112. Finding 22(a) is that "On November 18, 1996, [Stegeman] reported to Gen-Flex by letter that on the previous two days, after a rain, several water leaks had appeared on the first floor, or in rooms 208 and 209." ADD-3. Mr. Stegeman's letter states:

Dear Sirs:

We had a couple inches of rain this weekend, Nov. 16 and 17 and a couple of roof leaks showed up. These are the same leaks we had on previous report. I thought we had them fixed but apparently we don't. I am enclosing a map to show where leaks are.

ADA p.114. The School District quibbles with Finding 22(a)'s description of the leaks as "several" instead of "a couple." The distinction is immaterial. The letter provides sufficient support for the District Court's conclusion that the School District was aware of multiple leaks in the building over an extended period of time prior to March 13, 2004.

The School District argued in the Court of Appeals that Finding 22(e), although correct, did not imply that the bubbling in the roof was associated with leaks. Even if the bubbling does not support a conclusion of knowledge of an actionable injury related to leaks, the School District presented no argument that the District Court relied on this finding in such a manner that reversal is required merely because the finding was included.

2. Richard Rutjes.

Richard Rutjes was the School District's maintenance engineer and handyman from the time the High School was completed until 2001. ADD-5, FF 23. Mr. Rutjes was informed of leaks by Mr. Stegeman, and reported knowledge of specific water leaks in the area of the shop hallway. ADD-5, FF 24-25. He observed water leaking into the High School on an "ongoing" basis during the time he was employed at the High School. ADD-5, FF 27. The School District did not challenge on appeal any of the findings related to Mr. Rutjes' knowledge of ongoing leaks. The District Court's findings related

to Mr. Rutjes knowledge are, in themselves, sufficient to support its conclusion that the School District was aware of an actionable injury prior to March 13, 2004.

3. Richard Olson.

Richard Olson was employed as the School District's Health and Safety Director of building and grounds beginning in 2001. ADD-5, FF 28. The District Court made several findings detailing ten discrete facts that demonstrated that Mr. Olson was aware of water leaks prior to March 13, 2004. The School District challenged four of the ten facts. The School District did not challenge the District Court's findings that Mr. Olson:

- 1) recalled having discussions with Brad Schueller about water leaks through the roof of the High School (ADD-5, FF 30);
- 2) received reports of water leaks around the glass cases in the entryway of the High School in 2001 (ADD-5, FF 31);
- 3) received reports of water leaks in the hallway area of the shop classrooms in 2001 (ADD-5, FF 31);
- 4) could observe wet ceiling tiles (ADD-5, FF 31);
- 5) observed water stains on wallpaper in the library conference room areas around 2002 (ADD-5, FF 33);
- 6) observed efflorescence in rooms 115 A,B,C, and D prior to 2004 (ADD-5, FF 34).

The School District argued in the Court of Appeals that the District Court's Findings of Fact were not supported by substantial evidence that Mr. Olson:

- 7) received reports of a "water fall" of water flowing into the trophy case area (ADD-5, FF 32);
- 8) observed staining on the gymnasium walls (PFRA 38, FF 35); and

- 9) estimated that he knew of about 12 leaks since 2001 that needed work to fix them, including six related to standing water on the roof and leaks. (ADD-5, FF 37).

With respect to Finding 32, the School District again quibbles with immaterial details, and focuses on whether or not the water leak which was observed by Mr. Olson was properly characterized as a “waterfall.” The characterization of the leak is not as significant as the fact that Mr. Olson *was aware of the water leak*. ADA p. 115 (“when I came in my new position, [Brad Schueller and I] would visit from time to time and it would come up occasionally that we had leaks of the glass cases in the front entryway”).

The School District also argued that Finding 36, that Mr. Olson arranged to install a roof drain on the High School Building in 2003, ADD-5, FF36, did not support the conclusion that the School District had knowledge of leaks.

Again, the “inclusion of erroneous findings does not warrant reversal if other findings are supported by sufficient evidence and adequately sustain the District Court’s conclusion.” *Hanka*, 276 N.W.2d at 636. The Court of Appeals agreed with the School District with respect to Findings 35 and 37. *Day Masonry*, at 2009 WL 1182053, at *3. The Court of Appeals went on to conclude, however, after a careful review of the evidence, that the other findings adequately sustained the District Court’s conclusion. *Id.*

4. Brad Schueller.

Brad Schueller was a custodian at the High School from 1994 to 2000. ADD-5, FF 38. The District Court found that “[d]uring his time at the High School, Schueller observed water running down the walls of the pool area and discoloration in that area. ADD-6, FF 39. Mr. Schueller observed efflorescence on the outside windows and in

various locations throughout the building, ADD-6, FF 40, and water coming down walls and staining, and collapsing tiles in the area of the conjunction of the commons hallway, gym hallway, and music hallway. ADD-6, FF 41. Mr. Schueller repaired wet ceiling tile five to six times between 1994 and 1999. *Id.* He observed a waterfall running into the showcase. ADD-6, FF 42. Schueller observed water coming down walls in the library area and conference room and noticed that it stained tile. ADD-6, FF 44. Schueller observed efflorescence on the walls in rooms 115 G, H, and J. ADD-6, FF46. The School District did not assert that any of the factual findings related to Mr. Schueller were inaccurate. As with Mr. Rutjes, Mr. Schueller's knowledge of water leaks alone is sufficient to support the conclusion that the School District was aware of an actionable injury prior to March 13, 2004.

5. West Central Roofing Invoices.

The School District asserted that Finding 50, concerning the West Central Roofing repair work, was somehow misleading. The School District admitted that the findings were accurate ADA p.113, but argued that invoices other than the two specifically enumerated repair dates did not support the District Court's conclusion. *Id.* The School District failed to address how the May 23, 2002 and October 30, 2002 repairs performed by West Central Roofing did not put the School District on notice of an actionable injury. On the contrary, it should be clear that the two separate invoices demonstrate that the School District was aware of its actionable injuries more than two years before it initiated arbitration in 2006.

The unchallenged findings in this case support the District Court's conclusions that the school district was aware of an actionable injury prior to September 1, 2002, and prior to the dispositive date of March 13, 2004. Discovery of any injury sufficient to maintain a cause of action triggers the limitations period. *See Greenbrier Village Condo. Ass'n v. Keller Inv., Inc.*, 409 N.W.2d 519, 523-524 (Minn. Ct. App. 1987) (adopting reasoning in *Dalton v. Dow Chemical Co.*, 158 N.W.2d 580, 583 (Minn. 1968) that the alleged wrong coupled with the resulting damage is the gravamen in deciding the date upon which the cause of action at law herein accrues). A claim is actionable if it can survive a motion to dismiss for failure to state a claim. *Dalton*, 158 N.W.2d at 584; *see also, Herrmann v. McMenemy & Severson*, 590 N.W.2d 641, 643 (Minn. 1999) (professional malpractice); *Molloy v. Meier*, 679 N.W.2d 711, 721 (Minn. 2004) (the limitations period begins to run when the plaintiff can allege each of the essential elements of a claim).

Similarly, the limitations period is commenced when the claimant, by exercising due diligence, *should have* discovered the actionable injury, regardless of whether the precise nature of the defect causing the injury is known. *BWBR Architects*, 645 N.W.2d at 492 (emphasis added). The date of accrual does not await a "leisurely discovery of the full details of the injury." *Appletree Square 1 Ltd. Partnership CHRC v. W R. Grace & Co.*, 815 F. Supp. 1266, 1279 (D. Minn. 1993) (quotation omitted), *aff'd* 29 F.3d. 1283 (8th Cir. 1994). Where sufficient facts are known to indicate that an injury may exist and a cause of action thus may lie, a claimant may not sit on its hands and wait for the full

details to become available. The claimant must act on what is known and conduct a reasonable investigation to discover its injury. *Appletree Square I*, 815 F. Supp. at 1279.

The School District was aware of the numerous leaks by virtue of the knowledge of multiple of its employees who were responsible for fixing the leaks. The fact that the school waited several years before hiring Inspec to conduct an investigation into the cause of the known leaks does not toll the running of the statute of limitations. If otherwise, the statutory directive that the statute of limitations begins to accrue upon discovery of the injury, as opposed to the discovery of the defect, would be turned on its head.

The Court faced a similar issue in *Hyland Hill North Condominium Ass'n, Inc v. Hyland Hill Co.*, 549 N.W.2d 617 (Minn. 1996), overruled on other grounds by *Vlahos v. R&I Const. of Bloomington, Inc.*, 676 N.W.2d 672 (Minn. 2004). In *Hyland Hill*, a condominium association sued the builders for various leaks in the building. The first tenants of the condominium were aware of leaks since the time they occupied the building, and minutes of a special meeting on October 6, 1987, reflected knowledge on the part of the condominium association of leaks in two parts of the building. *Id.* at 619. The association argued that they were not aware of an actionable injury until at least 1989, when they became aware of what they considered “serious” leaks in the roof. *Id.* The Court of Appeals in *Hyland Hill* had determined that the first signs of leaks did not mean the limitations period had begun to run. *Hyland Hill North Condominium Ass'n, Inc v. Hyland Hill Co.*, 538 N.W.2d 479, 484 (Minn. Ct. App. 1995). This Court rejected that conclusion, instead holding that the plaintiff discovered the injury at the

latest when the condominium association's meeting minutes reflected that its members were "aware of leaks in the party room and garage." *Hyland Hill*, 549 N.W.2d at 621.

As in *Hyland Hill*, the School District suffered a tangible injury when it incurred damages that it could allege were caused by a construction defect. The unchallenged findings of fact that head custodian Marlon Stegeman, health and safety director of building and grounds Richard Olson, maintenance engineer and handyman Richard Rutjes, and custodian Brad Schueller were aware of the numerous leaks in the roof, walls, and windows of the High School more than two years before the School District initiated its arbitration action can only lead to the conclusion that the statute of limitations began to run well before March 13, 2004.

In addition, the evidence that the School District hired West Central Roofing to repair of leaks on the roof on May 23, 2002 and October 30, 2002 is itself sufficient to establish the School District's knowledge of an actionable injury prior to March 13, 2004. *See Hyland Hill*, 549 N.W.2d at 621 (meeting minutes indicating knowledge of leaks sufficient); *see also, Dakota v. BWBR Architects*, 645 N.W.2d 487 (Minn. Ct. App. 2002) (letter recognizing leaks and threatening litigation sufficient to show actionable injury); *Ind. School Dist. No. 775 v. Holm Bros. Plumbing and Heating, Inc.*, 660 N.W.2d 146 (Minn. Ct. App. 2003) (School's superintendent recognized that a defect was occurring). The District Court's conclusion that the School District knew or should have known of the existence of an actionable injury prior to March 13, 2004, is supported by sufficient findings, and should be affirmed.

III. THE STATUTE OF LIMITATIONS FOR A BREACH OF WARRANTY ACTION MAY ACCRUE PRIOR TO THE TIME THE WARRANTEE GIVES NOTICE TO THE WARRANTOR OF THE ALLEGED DEFECT.

Minn. Stat. § 541.051 Subd. 4 (2002) requires express warranty claims be brought “within two years of the discovery of the breach.” In *Vlahos*, this Court held that the two year statute of limitations in Minn. Stat. § 541.051, Subd. 4 “begins to run when the homeowner discovers, or should have discovered, the builder’s refusal or inability to ensure the home is free from major construction defects.” *Vlahos*, 676 N.W.2d at 678 (relying on *Church of the Nativity of Our Lord v. Watpro, Inc.*, 491 N.W.2d 1, 6 (Minn. 1992)). The Court of Appeals misinterpreted *Vlahos* and held that the District Court applied the wrong legal standard by concluding that the School District should have discovered the breach of warranty prior to the letters notifying the Contractors of the alleged defects.

A. Standard of Review.

Whether a warrantee discovered or should have discovered a warrantor’s refusal or inability to perform its warranty is a factual question. *Vlahos*, 676 N.W.2d at 679. A district court’s findings of fact shall not be set aside unless clearly erroneous. Minn. R. Civ. P. 52.01; *see also, supra*, section II.A). The construction and application of a statute of limitations, including the law governing the accrual of a cause of action, is a question of law and is reviewed de novo. *MacRae v. Group Health Plan, Inc.*, 753 N.W.2d 711, 716 (Minn. 2008).

B. The Court in *Vlahos* Specifically Rejected the Argument that a Lack of Notice Precluded a Finding that the Warrantee “Should Have Discovered” the Breach.

After correctly setting forth the general standard for accrual of a breach of an express warranty claim, the Court of Appeals then quoted *Vlahos* for the proposition that “the failure to pursue legal action does not trigger the running of the statute of limitations.” *Day Masonry*, 2009 WL 1182053 at *4. The Court of Appeals then built on this quote to conclude:

The district court's finding that the school district's warranty claims are untimely because if the school district had notified the warrantors sooner it would have learned of their breach earlier, imposes a burden the law does not require and runs afoul of the rule that failure to take legal action with respect to a known injury, standing alone, does not trigger the statute of limitations on a warranty claim.

Id. at *5 (citing *Vlahos*, 676 N.W.2d at 679).

The *Vlahos* Court specifically rejected an argument that a breach of warranty could not occur prior to notice of the defect to the warrantor. In *Vlahos*, the plaintiff homeowner had purchased a home from its previous owners in 1999, approximately eight years after its completion. *Vlahos*, 676 N.W.2d at 675. The previous owners were aware of at least some water problems (the extent of their knowledge was disputed), but never requested that the builder perform under its warranty. The plaintiffs notified the builder of the defects and made a demand for repairs in May of 2000. *Id.* at 678. The plaintiffs argued that the breach of warranty claims could not accrue until the builder received notice of the defects in May of 2000. *Id.*

In response, the builder argued that the previous owners experienced consistent water intrusion and had to repair various water-damaged areas of the home from 1992 until 2000, yet did not pursue any legal action against the builder, and as a result the statute of limitations had run as a matter of law. *Id.* at 678-9. Notably, because *Vlahos* was an appeal from a summary judgment order, the builder was arguing that the failure to bring a legal action caused the statute of limitations to accrue as a matter of law. The Court rejected the builder's argument, and pointed out that the "failure to pursue legal action does not trigger the running of the statute of limitations." *Id.* at 679.

The Court then rejected the plaintiff's argument that the cause of action could not accrue prior to the notice to the builder by concluding that "the question of when either the [previous homeowners] or the [plaintiffs] discovered or should have discovered [the builder's] refusal or inability" to perform "was a factual question, inappropriate for summary judgment." *Id.* (citing *Leamington Co. v. Nonprofits' Ins. Ass'n*, 615 N.W.2d 349, 355 n.4 (Minn. 2000)). The Supreme Court then remanded to the district court for a factual determination of when the plaintiff or the previous homeowner discovered, or should have discovered, the breach. *Id.* at 681. If the Court of Appeals' interpretation of *Vlahos* was correct, and a notice to the warrantor is required for accrual of a breach of warranty claim, the Court in *Vlahos* would not have remanded for a factual determination.

Subsequently, in *Gomez*, the Court of Appeals addressed the "discovered or should have discovered" standard, and concluded:

[A] cause of action for breach of express written warranties covering future performance accrues on discovery of the breach, which occurs when the homeowner discovers, or should have discovered, the builder's refusal or inability to ensure the home is free from major construction defects known to, or that should have been known to, the homeowner.

Gomez, 740 N.W.2d at 782-83 (citing *Vlahos*, 676 N.W.2d at 678). The standard in *Gomez* permits the cause of action to accrue when the owner should have known of the defect, but did not. It would be illogical to conclude that a cause of action for breach of warranty could accrue when the owner should have known of the injury but did not, but only if the owner sent a notice to the builder of the defect of which the owner was not aware.

A “should have discovered” standard that permits accrual of a breach of warranty claim does not run afoul of any legal principle in Minnesota. The purpose of a “should have discovered” standard is to require a party to act with due diligence. *See Appletree Square I*, 815 F. Supp. at 1279 (a claimant must act on what is known and conduct a reasonable investigation to discover its injury). Minnesota’s legislature has recognized the importance of acting with diligence in the construction context. Minn. Stat. § 327A.03 (a) provides no coverage under the statutory construction warranties for “loss or damage not reported by the ... owner to the vendor or the home improvement contractor in writing within six months after the vendee or the owner discovers *or should have discovered the loss or damage.*” Minn. Stat. § 327A.03 (a) (emphasis added). Under the statutory construction warranties, the liability of the warrantor can be cut off six months after the time the owner did not actually discover the loss or damage, but should have discovered the loss or damage. In other words, the owner’s failure to act diligently to

discover whether the builder will perform under the warranty bars the warranty claim.

The same result should apply here.

The District Court made a legally permissible factual conclusion that the School District should have discovered GenFlex, Commercial Roofing, and Lovering's breach of warranty prior to March 13, 2004.⁵

C. The Evidence as a Whole Reasonably Supported the District Court's Conclusion that the School District Should Have Discovered Lovering, Commercial Roofing, and GenFlex's Breaches of Warranty Prior to March 13, 2004.

Day Masonry has set forth substantial facts detailing of the School District's ongoing knowledge of recurring leaks. *See generally, supra*, Statement of Facts, Section II. The evidence as a whole demonstrating that the School District knew of its injuries prior to September 1, 2002, but did not notify the Contractors of the defects for over 18 months prior to March 13, 2004, supports the District Court's conclusion that the School District should have discovered the Contractors' breach of their respective warranties prior to March 13, 2004.

The District Court specifically found that the School District wrote a letter to GenFlex alerting them of leaks as early as 1996. ADD-4, FF 22(a). Marlan Stegeman sent a letter to the general construction manager for the High School in August of 1995 stating that he had called Commercial Roofing to inform them of the leaks, but that Commercial Roofing would not do any repairs at the time due to a pending legal dispute.

⁵ As discussed in more detail in Section I.B, *supra*, although the District Court used "prior to September 1, 2004" language in its memo, it concluded as a matter of law that the claim accrued prior to March 13, 2004.

See Ex. 46 to Stegeman Deposition. Mr. Stegeman was aware of the need to inform the company performing the work of the injury, because he had done so repeatedly in the past. He was aware of the leaks throughout the time he worked at the High School, up until 1999, and testified that he did not expect a new building to have so many leaks. Further, the School District hired and paid West Central Roofing to repair the roof twice in 2002, yet never notified the warrantors or demanded reimbursement. These particular facts, in addition to the record as a whole, support the District Court's factual conclusions.

CONCLUSION

Day Masonry respectfully requests that the Supreme Court affirm the Court of Appeals' affirmance of the District Court's determination that the School District's non-warranty claims are barred by the statute of limitations and that all non-warranty claims are therefore not within the scope of the arbitration agreement.

Day Masonry also respectfully requests that the Supreme Court determine that the issue of the applicable version of Minn. Stat. § 541.051 was properly before the Court of Appeals, and requests a determination that the post-2004 version applies and either (1) determine that the applicable statute of repose barred the School District's warranty claims and removed them from the scope of the arbitration clause, or (2) remand to the District Court for a determination of whether the statute of repose removed the School District's warranty claims from the scope of the arbitration agreement. In the alternative, if the Supreme Court determines that the Court of Appeals properly declined to address the applicable version of Minn. Stat. § 541.051, Day Masonry respectfully requests that

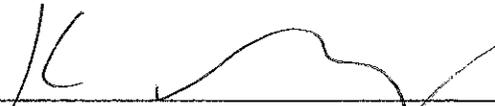
the Supreme Court remand to the District Court for a determination of the applicable version of Minn. Stat. § 541.051 to the School District's breach of warranty claims.

In the alternative, Day Masonry requests that the Supreme Court reverse the Court of Appeals' holding that the District Court erred as a matter of law by finding the School District should have discovered Lovering, Commercial Roofing, and GenFlex's failure to honor their warranties prior to written notice of the defects, and affirm the District Court's dismissal of all warranty claims asserted by the School District against Commercial Roofing and Lovering, and the Full System Warranty provided by GenFlex, on the grounds that such claims are barred by the two-year statute of limitations in Minn. Stat. § 541.051, Subd. (4) (2002) and therefore outside the scope of the arbitration agreement.

Respectfully Submitted,

Dated: August 19, 2009

BLETHEN GAGE & KRAUSE, PLLP

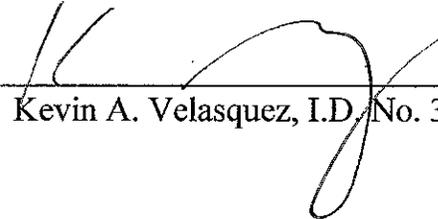
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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to Minn. R. Civ. App. P. 132.01, subd. 3, for a brief produced using the following font:

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