

NO. A08-0929

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.

RESPONDENT INDEPENDENT SCHOOL DISTRICT NO. 347'S
RESPONSE BRIEF TO GENFLEX ROOFING SYSTEMS, LLP'S BRIEF

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STATEMENT OF THE LEGAL ISSUES

I. Is a Successful Party Required to File a Notice of Review to Preserve Adverse Issues?

The Court of Appeals correctly applied Rule 106 of the Minnesota Rules of Civil Appellate Procedure and declined to consider an issue adverse to Respondents for which they did not file a notice of review.

Arndt v. American Family Ins. Co., 394 N.W.2d 791 (Minn. 1986)

City of Duluth v. Duluth Police Local, 690 N.W.2d 357 (Minn. App. 2004)

Thiele v. Stich, 425 N.W.2d 580 (Minn. 1988)

II. Assuming, *Arguendo*, that the Contractors had not Waived their Arguments as to the Application of the post-2004 Version of Section 541.051 to the District's Claims, did the Court of Appeals Correctly Determine that the District's Warranty Claims were not Barred by the Statute of Repose?

The Court of Appeals found the Contractors' argument that the District's warranty claims were barred by the statute of repose "unavailing." The Court of Appeals could not apply the statute of repose in the post-2004 version of Section 541.051 to the District's warranty claims because such an application would be impermissibly retroactive.

Cooper v. Watson, 187 N.W.2d 689, 693 (Minn. 1971)

III. Must the Court of Appeals Consider Arguments that were presented, but not Decided, by the District Court?

The Court of Appeals properly found that GenFlex's arguments regarding the expiration of its Full Systems Warranty and a letter sent by District a employee prior to 2002 were not properly before it, as the District Court had not ruled on those issues.

Thiele v. Stich, 425 N.W.2d 580, 582 (Minn. 1988)

STATEMENT OF THE CASE AND OF THE FACTS

The District incorporates by reference its Statement of the Case and description of the facts in its Response to Day Masonry's Brief. The District does not herein recite the facts, except to respond to factual misstatements made in GenFlex's statement of the facts.

GenFlex asserts that the District retained West Central Roofing to make multiple repairs to the roof between 2000 and 2004. GenFlex Br. 5. GenFlex neglects to mention that the one invoice prior to 2002 does not refer to a leak or any other construction defect. Respondent's Appendix 68.¹ The first invoice that refers to a leak is from May, 2002. Resp't. App. 69. In addition, there were not multiple invoices related to leaks between 2000 and 2004. There were three total; one from May 2002, one in October, 2002, and one in June, 2004. Resp't. App. 70, 71, 74. Notably, there was only *one* invoice related to a leak prior to September 1, 2002, which was the date that the District Court found the District had knowledge of the injury. Finally, the description that the District retained West Central Roofing to make "multiple *repairs* to the roof between 2000 and 2004" is not accurate. The two invoices that describe a leak in 2002 do not note that West Central Roofing made any roof repairs. To the contrary, the May, 2002 invoice states that the leak may be coming from the windows and states that they need to be recaulked. Resp't. App. 70. The October, 2002 invoices states that the leaks appear to be coming through the walls and notes that the walls should be recaulked and sealed. Resp't. App. 71.

¹ Unless otherwise noted, all references to Respondent's Appendix ("Resp't. App.") refer to the Appendix submitted by the District with its Response to Day Masonry's Brief.

ARGUMENT

I. Standard of Review

The Court of Appeals' interpretation of procedural rules is a question of law. *Kastner v. Star Trails Ass'n*, 646 N.W.2d 235, 238 (Minn. 2002). This Court reviews all questions of law, including those of statutory interpretation and applicability, *de novo*. *Goldman v. Greenwood*, 748 N.W.2d 279, 282 (Minn. 2008).

II. The Court of Appeals Correctly Applied Rule 106.

GenFlex asserts that the Court of Appeals incorrectly applied Rule 106 to its statute of repose arguments. GenFlex Br. 18-35. This argument is made by the other Contractors as well. Day Masonry Br. 18-25; Lovering-Johnson and Commercial Roofing Br. 12-22. GenFlex, as well as the other Contractors, misinterprets the Court of Appeals' decision, as well as the underlying decision by the District Court.

The Court of Appeals properly applied Rule 106 to the issues presented to and decided by the District Court. GenFlex, and the other Contractors, simply failed to preserve essential portions of their arguments on appeal. Because they failed to preserve these arguments, they could not succeed on their statute of repose arguments.

A. Rule 106 and the Necessity of Filing a Notice of Review.

GenFlex devotes considerable effort to describing the history of Rule 106 and its past application by this Court and the Court of Appeals. GenFlex Br. 28. Nestled within GenFlex's historical exposition are the salient points of Rule 106.

Rule 106 states that "a *respondent* may obtain review of a judgment or order entered in the same action which *may adversely affect respondent* by filing a notice of

review with the clerk of appellate courts.” Minn. R. Civ. App. P. 106 (emphasis added). A respondent is required to file a notice of review to preserve any issue that the District Court found adversely to the respondent’s position, even though the respondent ultimately prevailed in the District Court. *Arndt v. American Family Ins. Co.*, 394 N.W.2d 791, 793 (Minn. 1986); *see also City of Duluth v. Duluth Police Local*, 690 N.W.2d 357, 359 (Minn. App. 2004) (internal citation omitted).

GenFlex’s analysis of Rule 106 begins with this Court’s decision in *Penn Anthracite Min. Co. v. Clarkson Securities Co.*, 287 N.W. 15 (Minn. 1939). GenFlex Br. 19. The *Penn Anthracite* decision, as asserted by GenFlex, stands for the proposition that, prior to the adoption of Rule 106, respondents were free to raise alternative legal theories on appeal. As GenFlex candidly admits, Rule 106 was enacted more than twenty-five years after the *Penn Anthracite* decision. GenFlex Br. 18. Thus, that earlier decision can have no bearing on the application of Rule 106. Moreover, the *Penn Anthracite* decision does not discuss waiver of those alternative arguments.

Similarly, GenFlex’s inclusion of the *Dandridge v. Williams* decision, 397 U.S. 471(1970) decision is unresponsive to an analysis of Rule 106. The Court in *Dandridge* simply reiterated the proposition that appellants may assert alternative legal theories. 397 U.S. 471 at 475-76 n. 6. The *Dandridge* case does not address Rule 106 or waiver in any capacity.

GenFlex’s discussion of this Court’s decision in *Hoyt Inv. Co. v. Bloomington Commerce and Trade Ctr. Assoc.*, 418 N.W.2d 173 (Minn. 1988) warrants additional discussion. From GenFlex’s description of the *Hoyt* decision, it appears that it is

intimating that the Court of Appeals should have recognized that the Contractors were seeking review of the District Court's decision regarding the application of the pre-2004² version of Section 541.051 to the District's claims. Such an interpretation confuses the Court's ruling in *Hoyt*.

The *Hoyt* case involved the interaction of several different procedural rules, including Rule 106. *Hoyt*, 418 N.W.2d at 175-76. This Court held that counsel for respondent had not properly requested a remand under Minn. R. Civ. App. P. 128.02, subd. 1(e). *Id.* Nevertheless, the Court noted that the Court of Appeals should have, from the record before it, recognized that respondent was requesting a remand on that issue. *Id.* Entirely separate from its ruling on Rule 128.02, the Court held that respondent was not required to file a Rule 106 notice of review to preserve an alternative argument which the District Court had not reached. *Id.* In all other cases, the *Hoyt* Court reiterated that the “[f]ailure 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.” *Id.* at 175. Rule 128.02 is not at issue here. Instead, the Court of Appeals only found that the Contractors had waived their arguments with regards to the application of the pre-2004 version of Section 541.051 to the District's claims. Resp't. App. 196.

² The phrase “pre-2004 version” refers to the version of Section 541.051 before the August 1, 2004 amendment. The phrase “post-2004 version” refers to the version of Section 541.051 after the August 1, 2004 amendment.

As discussed below, the Court of Appeals interpreted Rule 106 consistently with this Court's prior decisions. The Court of Appeals correctly determined that the Contractors had waived their arguments with regards to the application of the pre-2004 version of Section 541.051 to the District's warranty claims.

B. GenFlex Mischaracterizes the Court of Appeals' Holding.

At the outset, it is important to clarify exactly what the Court of Appeals held with respect to the District's warranty claims and the statute of repose. The Court of Appeals held that "the district court determined that the school district's warranty claims are governed by the version of the statute [Section 541.051] in effect before 2004 that did not include a repose period." Resp't. App. 196. That is the sole issue for which the Court of Appeals held that GenFlex was required to file a Rule 106 notice of review. *Id.*³

GenFlex asserts that the Court of Appeals incorrectly interpreted Rule 106 when it found that Rule 106 precluded review of the Contractors' statute of repose arguments because this was not an issue decided upon by the District Court. GenFlex Br. 28. Yet, as discussed above, this is not what the Court of Appeals found.

Similarly, GenFlex contends that the Court of Appeals "intimated" that the District Court rejected the Contractors' repose arguments. GenFlex Br. 29. This assertion overlooks the Court of Appeals' analysis of the District Court's decision and ignores the Court of Appeals' actual decision.

³ GenFlex correctly notes that this is the issue for which the Court of Appeals required a notice of review. GenFlex Br. 17-18. In light of this acknowledgement, GenFlex's subsequent mischaracterization of the court's decision is confusing.

The Court of Appeals held that the post-2004 version of Section 541.051 was the only potentially applicable version of that statute which contained a statute of repose enforceable against express warranty claims. Resp't. App. 196. The court then found that the Contractors did not file a notice of review to preserve their arguments as to the application of the post-2004 version of Section 541.051 to the District's warranty claims. *Id.* Finally, the Court of Appeals found that without being able to establish the existence of an applicable statute of repose, the Contractors statute of repose claims were untenable. *Id.*

The Court of Appeals did not discuss the District Court's consideration (or lack thereof) of any arguments as to the application of the statute of repose. Instead, these three distinct steps taken by the court illustrate that the Court of Appeals narrowly confined its application of Rule 106 to the threshold question of the applicable version of Section 541.051. That the District Court's answer to that question precluded the Contractors from successfully asserting their statute of repose arguments does not enlarge the scope of the Court of Appeals' ruling. Instead, as discussed below, it is clear evidence that the District Court's ruling was adverse to GenFlex, such that it was required by Rule 106 to file a notice of review.

C. The District Court Clearly Ruled on the Applicability of the Pre-2004 Version of Section 541.051 to the District's Claims.

GenFlex argues that the District Court did not reach the Contractors' statute of repose arguments with respect to the District's warranty claims. GenFlex Br. 29-31. Although the District Court did not explicitly rule on the Contractor's repose arguments, the District Court's decision as to which version of Section 541.051 applied to this case was fatal to the Contractor's repose arguments in regard to the breach of warranty claims. The District Court clearly ruled that the pre-2004 version of Section 541.051 applied to the District's warranty claims. *Day Masonry v. Independent Sch. Dist. 347, et al*, Court File No. 34 CV 07 1999 (Dist. Court 2008) Resp't. App. 209 (emphasis added). This ruling was fatal to the Contractors' statute of repose arguments in regard to the warranty claims because it meant that no statute of repose existed in regard to those claims.

The Court of Appeals, relying on this Court's *Arndt* decision, has ruled that Rule 106 requires respondents who unsuccessfully argue a threshold question, such as whether the post-2004 version of Section 541.051 applies to the District's claims, in the District Court to file a notice of review to preserve those issues on appeal. *See, e.g., City of Duluth*, 690 N.W.2d at 359; *Olson v. Lyrek*, 582 N.W.2d 584 n. 1 (Minn. Ct App. 1998).⁴ The *City of Duluth* opinion is fully described in the District's Response to Day Masonry's

⁴ GenFlex argues that these decisions are inconsistent with the earlier decision in *Johnson v. American Economy Ins. Co.*, 419 N.W.2d 126, 218 n. 1 (Minn. App. 1988). The *Johnson* court interpreted Rule 106 to only require a notice of review if an order or judgment was found to be adverse to a respondent, and did not cite to the *Arndt* decision. As discussed above, this conflicts directly with this Court's *Arndt* decision. The two later cases, *City of Duluth* and *Olson*, correctly interpret Rule 106 consistent with the *Arndt* decision.

Brief. *See* District Response to Day Masonry’s Br. Section II(D)(2). The District does not herein reiterate the facts of that decision.

GenFlex glosses over the District Court’s ruling that the pre-2004 version of Section 541.051 applied to the District’s claims. That ruling was fatal to GenFlex’s argument that the District’s breach of warranty claims were barred by the statute of repose.

D. The District Court’s Ruling on the Applicability of the Pre-2004 Version of Section 541.051 to the District’s Claims was Adverse to Appellant.

GenFlex asks this Court to clarify that it is the adversity of a District Court’s ruling that triggers the Rule 106 requirement of filing a notice of review. GenFlex Br. 27. GenFlex fails to realize that the District Court’s ruling on the application of the pre-2004 version of Section 541.051 was adverse to its position.⁵

An issue is decided adversely to a party when it is decided contrary to the position taken by that party, or in opposition to a party’s position or interests. *See* Black’s Law Dictionary 58 (8th ed. 1999) (defining “adverse” as “[c]ontrary (to) or in opposition (to)”; *see also* *City of Duluth*, 690 N.W.2d at 359 (holding that the District Court’s initial determination was adverse to a party when it would negatively affect that party). The District Court’s application of the pre-2004 version of Section 541.051 to the District’s claims was contrary to GenFlex’s position and in opposition to its interests.

⁵ GenFlex concedes that Rule 106 requires respondents to file a notice of review on issues decided adversely by the District Court.

As discussed in the District's Response to Day Masonry's Brief, all the Contractors urged the District Court to apply the post-2004 version of Section 541.051 to the District's claims. Resp't. App. 215, 217; *see also* GenFlex Br. 31.⁶ In spite of the Contractors' arguments, the District Court concluded that the pre-2004 version of Section 541.051 applied to the District's claims. Resp't. App. 209. Thus, the District Court decided this issue contrary to the Contractors' position. By definition, the District Court's decision was adverse to GenFlex. Despite its overall victory before the District Court, GenFlex was required to file a notice of review to preserve its arguments on this one adverse ruling. *See, e.g., City of Ramsey v. Holmberg*, 548 N.W.2d 302, 305 (Minn. Ct. App. 1996), *pet. for rev. denied* (Minn. Aug. 6, 1996) (holding that, "[e]ven if the judgment below is ultimately in its favor, a party must file a notice of review to challenge the District Court's ruling on a particular issue") (citing *Arndt*, 394 N.W.2d at 793).

In addition to being directly adverse to GenFlex's argument before it, the District Court's ruling that the pre-2004 version of Section 541.051 applies to the District's claims⁷ was ultimately fatal to GenFlex's statute of repose argument. Any argument by the Contractors that the District's warranty claims are barred by the statute of repose must be predicated on a finding that there is an existing statute of repose that applies to the

⁶ GenFlex now argues that even this question was phrased as an alternative argument. GenFlex's argument mischaracterizes the argument actually submitted to the District Court. *See* Resp't. App. 217 (broadly asserting that the District's claims were governed by the post-2004 version of Section 541.051).

⁷ GenFlex attempts to distinguish this Ruling as part of the memorandum, not the actual Order. GenFlex Br. 30. GenFlex misses the fact that the trial court's memorandum is incorporated by reference into the Order and constitutes a part of the Order. *See* Resp't. App. 214.

District's claims. Without such a statute, any statute of repose argument fails as a matter of law.

Prior to the 2004 amendment, Section 541.051 did not contain a statute of repose applicable to warranty claims such as the District's. *See Day Masonry Addendum*, 15-19; *see also Gomez v. David A. Williams Realty & Constr.*, 740 N.W.2d 775, 781 (Minn. Ct. App. 2007) (holding that, prior to its 2004 amendment, Section 541.051 did not contain a statute of repose applicable to claims for breach of express warranty).⁸ The application of the pre-2004 version of Section 541.051 to the District's breach of warranty claims can only, therefore, lead to the conclusion that such claims were not subject to any statute of repose. As the Court of Appeals held, any argument that the District's warranty claims were subject to a non-existent statute of repose are "unavailing."

Because it negatively impacted GenFlex's ability to present its ultimate statute of repose argument on appeal, the District Court's ruling that the District's warranty claims were subject to the pre-2004 version of Section 541.051 was "in opposition to" GenFlex's interests in this lawsuit. Once again, by definition, the District Court's decision was adverse to GenFlex.

GenFlex's characterization of its statute of repose argument as an alternative argument does not negate the fact that the District Court clearly ruled that the pre-2004 version of Section 541.051 applies to the District's claims. That ruling was directly contrary to the Contractors' argument to the court, as well as detrimental to the

⁸ Indeed, GenFlex admits as much. GenFlex Br. 29.

Contractors' position in the litigation. Very simply, that ruling was adverse to the Contractors.

E. The District Did Not Raise the Issue of Whether the Post-2004 Version of Section 541.051 Applies to its Warranty Claims on Appeal.

GenFlex opines that the District "raised anew the issue of which version of [Section 541.051] subdivision 4 applies" to the District's claims. GenFlex Br. 32. This argument is without merit.

A review of the District's Statement of the Case that was submitted to the Court of Appeals and which identifies the issues for appeal clearly shows that the District did not ask the Court of Appeals to review which version of Section 541.051 applied to this case. The District had no interest in doing so. The District Court's ruling on the applicable version of Section 541.051 was the one favorable ruling for the District.

Moreover, Rule 106 specifically authorizes a "respondent" to obtain review of adversely decided issues. Minn. R. Civ. App. P. 106. This Court has strictly interpreted Rule 106 and placed the burden on respondents to file a notice of review, irrespective of the appeal filed by the appellant. *See, e.g., In re Estate of Barg*, 752 N.W.2d 52, 73 (Minn. 2008) (holding that a "respondent who does not file a notice of review to challenge an adverse ruling of the district court waives that issue in the court of appeals"); *see also Andren v. White-Rodgers Co.*, 462 N.W.2d 860 (Minn. Ct. App. 1990) (holding that a notice of review is proper for raising issues that are adverse to the party filing the notice, not other parties to the litigation) (internal citation omitted).

Were the Court to Rule that Rule 106 does not require respondents to file notices of review to preserve issues when appellants challenge the court's overall decision, it would render Rule 106 meaningless.

III. The Court of Appeals Could Not Have Retroactively Applied the Post-2004 Version of Section 541.051 to the District's Claims.

At the outset, if the Court determines that GenFlex waived its arguments as to the application of the post-2004 version of Section 541.051 to the District's warranty claims, GenFlex's arguments on the merits are not properly before this Court. *See, e.g., Matter of Welfare of M.D.O.*, 462 N.W.2d 370, 378 (Minn. 1990) (holding that the failure to preserve an issue in the Court of Appeals constitutes a waiver of that issue before this Court) (citing *L & H Transport, Inc. v. Drew Agency*, 403 N.W.2d 223, 226 (Minn. 1987)). That being said, and without waiving any argument that the Contractors have waived their repose arguments, the District responds to GenFlex's claim that the Court of Appeals could have applied the statute of repose to the District's warranty claims.⁹

GenFlex contends that the accrual of the District's warranty claims is the determinative factor in the question of which version of Section 541.051 applies to those claims. GenFlex Br. 33 (citing *Sletto v. Wesley Constr.*, 733 N.W.2d 838 (Minn. Ct App. 2007)). GenFlex's argument overlooks aspects of the holding in *Sletto* and the doctrine of vested rights, which precludes the retroactive application of the 2004 amendment to Section 541.051 to the District's warranty claims.

⁹ The District incorporates all of the arguments made in its Responses to the other Contractors' Briefs.

GenFlex opines that the District's argument that the date of contractual execution governs the applicability of the pre-2004 version of Section 541.051 to the District's warranty claims is "just plain wrong." GenFlex Br. 34. GenFlex then cites the *Gomez* decision for the proposition that a warranty claim accrues on discovery of the breach of the warranty. *Id.* This is something of a legal non sequitur.

The District does not challenge the standard for determining when a breach of warranty claim accrues. Rather, the District challenges the application of the 2004 amendment to Section 541.051 to its warranty claims because such an application would divest the District of vested contractual rights. As discussed in the District's Response to Day Masonry's Brief, the *Sletto* court acknowledged that its decision was consistent with the vested rights doctrine. 733 N.W.2d at 845.

The District's arguments as to why the post-2004 version of Section 541.051 cannot be applied to its breach of warranty claims were fully briefed in its Response to Day Masonry's Brief, and thus, the District will not repeat those arguments here. *See, generally* District Response to Day Masonry Br. Section III. The District incorporates by reference its arguments as to why the statute of repose in the post-2004 version of Section 541.051 cannot be applied retroactively to the District's warranty claims.

IV. The Court of Appeals Properly Held that GenFlex's Individual Arguments Were Not Properly Before it.

In addition to the arguments common to all the Contractors, GenFlex asserted that the District's claims against it were time-barred because of earlier letters from District employees. GenFlex Br. 35-41. GenFlex also argued that the District was barred from

bringing warranty claims against it because the express warranty had expired prior to the date on which the District commenced arbitration. GenFlex Br. 41-43. The Court of Appeals concluded that these issues were not properly before it. Resp't. App. 196. The Court of Appeals was correct.

This Court has held that an appellate court must consider “only those issues that the record shows were presented into evidence *and considered* by the trial court in deciding the matter before it.” *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). The *Thiele* decision specifically dealt with questions regarding statutes of limitations. In the *Thiele* decision, this Court held that it “will not consider the applicability of the statute of limitations on appeal, even though the question was raised below, *if it was not passed on* by the trial court.” *Id.* The *Thiele* Court did not hold, as asserted by GenFlex that only matters “not presented before” the District Court are not properly before the Court of Appeals. Such an interpretation ignores the second element of the *Thiele* inquiry, whether the District Court actually “passed on” the question litigated.

As indicated by the language in *Thiele*, the question of whether an issue is properly before the Court of Appeals is twofold. First, was the issue “presented into evidence” by the trial court? If so, did the trial court “consider” the issue? Both questions must be answered in the affirmative before an appellate court can properly review the issue. *Id.*

GenFlex concedes that the District Court “did not address” the arguments unique to its position. GenFlex Br. 35, 41. Thus, GenFlex’s assertion that the Court of Appeals could have considered its unique arguments fails the second prong of the *Thiele* analysis.

Therefore, the Court of Appeals correctly determined that GenFlex's unique arguments as to the application of the statutes of limitations and repose to the District's warranty claims against it, as well as the expiration of its express warranty were not properly before it. Nor are they properly before this Court. *See, e.g., Matter of Welfare of M.D.O.*, 462 N.W.2d at 378.

V. The District's Warranty Claims Against GenFlex Were Timely Under the Two-Year Statute of Limitations.

Without waiving its argument that GenFlex's unique challenges to the District's warranty claims are not properly before this Court, the District responds to GenFlex's argument that, because of the letters sent by District employees prior to March 13, 2002, it should have been aware of GenFlex's breach of warranty. The District also responds, without waiving any argument, to the assertion that its claim against GenFlex is untimely because of the expiration of GenFlex's express warranty.

A. The Letters Sent by District Employees Prior to March 13, 2002 Do Not Provide the District with Constructive Knowledge of Appellant's Breach of Warranty.

The accrual for a breach of warranty claim is discussed in detail in the District's Response to Day Masonry's Brief. *See* District's Response to Day Masonry Br. Section III. Accrual of such claims occurs when a property owner discovers or should have discovered the warrantor's refusal or inability to honor its warranty. *Vlahos v. R&I Constr. of Bloomington*, 676 N.W.2d 672, 678 (Minn. 2004) (internal citation omitted). GenFlex relies on the Court of Appeals' decisions in *Metropolitan Life Ins. Co. v. M.A. Mortenson Cos.*, 545 N.W.2d 394 (Minn. Ct. App. 1996), *pet. for rev. denied* (Minn. May

21, 1996) and *Oreck v. Harvey Homes*, 602 N.W.2d 424 (Minn. Ct App. 1999) as support for its arguments that the breach of warranty claim against it is barred by the applicable statute of limitations. A review of those cases, however, demonstrates the difference between the facts in those cases and the facts in this case.

In the *Metropolitan Life* case, the building owner was advised in 1991 that the sprandrel glass was defective, and by March, 1992, a consultant recommended that all of the sprandrel units be replaced. 545 N.W.2d at 397. Despite receiving notice in 1991 that the glass was defective, the owner did not inform the manufacturer and supplier of the windows of a problem until late March or early April 1992, and the manufacturer took no action in response. *Id.* at 397-98. The owner did not commence a lawsuit until April 19, 1994. *Id.*

Unlike the *Metropolitan Life* case, after the warranties were issued, no one advised the District that the roof was defective or that it needed to be replaced prior to the summer of 2004. As explained below, Stegeman's November 18, 1996 letter which refers to a couple of leaks cannot be the basis for arguing that the District knew of a breach of warranty claim.

GenFlex's reliance on the *Oreck* case is also misplaced. In that case, the homeowners wrote a letter to the contractors on October 26, 1995, outlining their continuing problems with their home. 602 N.W.2d at 426. Despite given written notice to the contractors in October of 1995, the homeowners did not sue until November 14, 1997. *Id.* Thus, the court found that the homeowners' breach of warranty claims were barred.

Contrary to the *Oreck* case, the District brought its claims against GenFlex on March 13, 2006, which was less than two years from the date that the District had notice that GenFlex would not honor its warranties.

GenFlex relies on a letter written by Mr. Stegeman on November 18, 1996 to assert that the District's breach of warranty claim is time-barred. Stegeman did not recall writing the letter. Resp't. App. 105, Stegeman Dep. at 24-5. There is no indication in the letter that the issue which is the subject of the current claims was involved. The current claims are based on the failure of the parapet cap flashing to extend far enough down on the exterior brick walls. The Affidavits submitted by the District demonstrate that the District did not have any knowledge of this issue before June of 2004. Resp't. App. 56, Kray Aff. ¶ 3; Resp't. App. 67, Williams Aff. ¶ 3; Resp't. App. 52, Leedom Aff. ¶ 12.

GenFlex's arguments amount to a claim that the District knew of its warranty claims much earlier and that it should have asserted its warranty claims prior to 2004. Such an argument is an attempt by GenFlex to apply the "discovery of the injury" standard to a breach of warranty claim. This is error as explained in the *Vlahos* case and contrary to Minn. Stat. § 541.051, subd. 4.

B. The District's Claims Against GenFlex are not Barred Because of the Expiration of GenFlex's Warranty.

GenFlex argues, in the alternative, that the District's breach of warranty claim is untimely because the claim was not made until March of 2006, whereas the full roofing

system warranty expired on May 1, 2004. GenFlex Br. 41. Assuming that the warranty expired in 2004,¹⁰ the action was brought within two years of the discovery of the breach of the warranty as required by Minn. Stat. § 541.051, subd. 4, and thus, the action is not time barred.

In the case of *Koes v. Advanced Design*, 636 N.W.2d 352 (Minn. Ct. App. 2001) *pet. for rev. denied* (Minn. Feb. 19, 2001), the court examined whether a breach of warranty claim must be brought before the warranty expires in the context of new-home warranties. 636 N.W.2d at 358-60. The court explained that Minn. Stat. § 541.051, subd. 4, does not state that the breach must be discovered within the warranty period. *Id.* at 359. Section 541.051 only requires that the action be brought within two years of the discovery of the breach. *Id.* Because the District complied with this requirement, there is no basis for dismissing the District's warranty claim simply because it was not brought before May 1, 2004. *See Anderson v. Crestliner, Inc.*, 564 N.W.2d 218 (Minn. Ct. App. 1997) (breach of warranty claim brought after warranty period expired was timely because it was brought before statute of limitations expired).

CONCLUSION

GenFlex and the other Contractors were required by Rule 106 to file a notice of review to preserve their arguments regarding the application of the post-2004 version of Section 541.051 to the District's warranty claims. The Contractors failed to file such a

¹⁰ As mentioned in the Facts section of the District's Response to Day Masonry's Brief, in accordance with the contract documents, the warranty should have been provided from July of 1996 through July of 2006. *See District's Response to Day Masonry* at 4.

notice. Therefore, the Court of Appeals correctly found that the Contractors had waived their arguments as to the application of the post-2004 version of Section 541.051.

In any event, the 2004 amendment to Section 541.051 cannot be applied retroactively to the District's warranty claims. Such an application would impermissibly rewrite the parties' bargained for agreement and divest the District of vested contractual rights.

The District Court did not rule on GenFlex's argument that the letters sent by District employees prior to March 13, 2002 gave the District notice of its impending breach of warranty. Nor did the District Court rule on GenFlex's argument that the District's warranty claim against it was untimely due to the expiration of its express warranty. Thus, the Court of Appeals correctly determined that these arguments were not properly before it on appeal.

Even if the Court of Appeals had expanded its review to consider these two unique arguments which the District Court had not passed upon, they are untenable given past precedent and the proper standard for determining when a breach of warranty claim accrues. Thus, these arguments do not impact the Court of Appeals' decision.

For the above reasons, as well as those contained in the District's Responses to the other Contractors' Briefs, the District must be allowed to proceed to arbitration with the Contractors on both its warranty claims and its contract claims.

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