

NO. A04-599

State of Minnesota
In Supreme Court

Arturo Camacho and Kristi Camacho,
Appellants,

v.

Todd and Leiser Homes,
Respondent.

REPLY BRIEF

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ARGUMENT

I. CORPORATE CONTRACTOR'S DISSOLUTION DID NOT ABSOLVE IT OF ITS STATUTORY DUTY TO WARRANT THAT THE CAMACHOS' HOME WOULD BE FREE FROM DEFECTS FOR TEN YEARS FOLLOWING CONSTRUCTION.

A. The corporate-dissolution statute and the statutory warranties are in conflict.

In its responsive brief, Respondent Todd and Leiser Homes ("Contractor") consistently ignores the tension between the corporate-dissolution statute, Minn. Stat. § 302A.7291, and the statutory new-home warranties, Minn. Stat. § 327A.02.¹ Admittedly, the language of the dissolution statute is clear. Read in isolation, as Contractor implores this Court to do, the statute appears to allow a corporate builder to escape liability for any legal obligations two years after it dissolves. However, the language of the statutory warranties is equally clear, in that it provides a non-waivable mandate that all builders (whether incorporated or not) warrant their work against defects

¹ Two of Contractor's procedural arguments on appeal do not merit extended response:

First, Contractor argues that Appellants' claim is barred because they did not commence suit during the two years after dissolution, citing Minn. Stat. § 302A.7291. The simple answer to that assertion is that the Camachos had no claim to assert at that time. The Camachos claim for breach of statutory warranties did not accrue until after they discovered damage to their home, in August 2003. *Vlahos v. R&I Constr. of Bloomington, Inc.*, 676 N.W.2d 672, 678 (Minn. 2004).

Contractor's inadequate service of process argument was not raised below. Service of process related defenses are waived if not raised in a Rule 12 motion, Minn. R. Civ. P. 12.08(a). Moreover, as this argument was not raised in the trial court, it cannot be raised on appeal. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

for ten years. Under these circumstances, the plain meaning of either statute in isolation is not at issue; rather, the issue for the Court to determine is how best to resolve the inherent conflict between these two statutes. A thorough analysis of the conflict reveals that the specific, consumer protection warranties must prevail. To hold otherwise would allow a corporate builder to unilaterally and unjustly revoke its statutorily created affirmative duty to warrant that its homes are free of construction defects for ten years.

B. The statutory warranties give rise to an affirmative duty which a corporate builder should not be allowed to evade by dissolving.

The Camachos do not contend that the dissolution statute must yield to all statutory causes of action. However, it must yield in limited situations, like this, where its application would effectively repeal a legislatively created affirmative duty on the part of a specific industry (residential builders) to assure a specific class of consumers (homeowners) that their home will be free of defects for a specified period of time following construction. The statutory warranties create such an affirmative duty. This Court in *Vlahos* noted the similarity between the statutory new-home warranties and warranties of future performance, which provide “a guarantee that the product will perform in the future as promised.” *Vlahos*, 676 N.W.2d at 678 (citing *Church of the Nativity of Our Lord v. WatPro, Inc.*, 491 N.W.2d 1, 6 (Minn. 1992), *overruled on other grounds by Ly v. Nystrom*, 615 N.W.2d 302 (Minn. 2000)). Other courts have observed that warranties create an affirmative duty on the part of the warrantor. *See, e.g., Jillson v. Vt. Log Bldgs., Inc.*, 857 F. Supp. 985, 991 (D. Mass. 1994) (“implied warranties are affirmative duties imposed by state law”); *Kingston Square Tenants Ass’n v. Tuskegee*

Gardens, Ltd., 792 F. Supp. 1566, 1574 (S.D. Fla. 1992) (“implied warranty of habitability . . . places an affirmative duty of repair on the landlord”). Moreover, in creating the statutory warranties, the Legislature expressly authorized specific performance as a remedy for any breach. Minn. Stat. § 327A.05, subd. 1. If the Legislature did not intend the statutory warranties to create an affirmative duty on the part of builders, it would not have included such an extraordinary remedy.

For this reason, Contractor’s reliance on decisions such as *Abad v. ISCO, Inc.*, 537 N.W.2d 620 (Minn. 1995), *Ortiz v. Gavenda*, 590 N.W.2d 119 (Minn. 1999), *Podvin v. The Jamar Co.*, 655 N.W.2d 645 (Minn. Ct. App. 2003), and *Onan Corp. v. Industrial Steel Corp.*, 770 F. Supp. 490 (D. Minn. 1989), is misplaced. (Respondent’s Br. at 13-15.) *Abad*, *Ortiz*, and *Podvin* are personal-injury or wrongful-death actions, and *Onan* concerns a contribution claim. None of these cases raised a conflict between the corporate-dissolution statute and a consumer protection statute that created an affirmative, future duty owed by a specific class of corporations (builders of residential homes) toward a consumer for a specific period of time.

Contractor did not go bankrupt. It was not a large, publicly traded corporation which, for a variety of internal or external factors, could not continue as a going concern. Instead, its two principals simply decided to close up shop, in spite of the clear statutory obligation to warrant that the homes they had built were free of various construction defects for ten years. If a builder-corporation can simply dissolve and thus avoid its affirmative duty to guarantee the condition of the home it built, the statutory warranties

are rendered meaningless. This would be an absurd triumph of form over substance, which the Legislature certainly did not intend. *See* Minn. Stat. § 645.17(1).

C. Contractor’s brief ignores the practical and public-policy implications of the Court of Appeals’ decision.

In its brief, Contractor refuses to address the policy implications of the issue at hand. Minnesota courts routinely consider the practical effect of the interpretation of a particular statute. *See* Minn. Stat. § 645.16(6) (stating court may consider consequences of interpretation); *Weston v. McWilliams & Assocs., Inc.*, 694 N.W.2d 558, 563-64 (Minn. Ct. App. 2005) (noting while interpreting Minn. Stat. § 541.051 that an “interpretation barring a contribution or indemnity action after the tenth year prospectively destroys the right to assert such a claim before the contribution claimant has any opportunity to learn that a meritorious claim of an injured party has arisen” and commenting that such a result would be absurd), *pet. for review filed* (Minn. May 16, 2005).

The Court of Appeals’ decision permits residential builders to incorporate, build a home and immediately dissolve the corporation in order to reduce its warranty obligations to two years. It could then repeat the same cycle after each development, or even each house that it builds. And while Contractor cries that there is no evidence that it dissolved to avoid its obligations under the statutory warranties, that is exactly the result Contractor is trying to achieve here by asserting that it cannot be sued for breach of

warranties because of its dissolution (even though it is undisputed that the Camachos brought their claims within ten years).²

The Camachos are not asking this Court to speculate as to the motives of the principals who dissolved the corporation. Indeed, it should not matter why a particular builder decides to shut down its company. Whether a builder seeks to dissolve because it fears warranty claims or simply because the principals want to try a different career, a homeowner's statutory warranties should remain in effect until the termination of the legislatively specified warranty period. This would hardly be a burden or a surprise to builders, who are informed from the moment they are licensed that they are required to provide homeowners with specific warranties that run up to ten years. Thus, Contractor's arguments that the Camachos are asserting a claim of fraud in the dissolution or that the Camachos are seeking an advisory opinion simply miss the point and confuse the true issues in this matter.

Allowing the Camachos' suit to proceed will not extend corporate liability in perpetuity. To be sure, corporations should be allowed to die a natural death, and corporate liability should not go on forever. But where builder-corporations have an affirmative duty to warrant that a home is free from various construction defects for ten years, a builder-corporation must remain answerable for breach of that warranty for the applicable limitations and repose period, after which time liability will be appropriately cut off. The Camachos are not asking this Court to resurrect a dead corporation for the

² It should be noted that the Camachos have had no opportunity to conduct discovery as to the truth of Contractor's claim that there was no fraud in the dissolution.

limited purpose of being sued; they seek only recognition of their right to pursue a claim against Contractor, regardless of its status as an active or a dissolved corporation, for breach of the warranties that chapter 327A requires Contractor to provide.

D. The Camachos' lawsuit is not a direct action against an insurance company.

Allowing the Camachos to pursue their claims to the extent that Contractor has insurance coverage is not akin to a direct action, as Contractor suggests. The case remains one against Contractor. The insurer does not become a named party. Rather, it is the only way to give effect to the intent of the warranty and dissolution statutes at the same time. The statutory warranties are designed to protect owners of new homes from having to bear the costs of correcting a builder's faulty workmanship or repairing major construction defects. The corporate-dissolution statute is intended to permit a corporation and its shareholders to cease doing business and avoid having to pay for the liabilities of the corporation in perpetuity. By allowing a homeowner to proceed with a statutory warranties claim only to the extent that the builder had secured its warranty obligations with insurance coverage, the purposes of both statutes are met. The homeowners have the opportunity to recover the costs of correcting defects that would be covered by the warranties, while the dissolved builders would not have "personal" responsibility to pay any judgment that may be obtained.

CONCLUSION

For the foregoing reasons, the Camachos respectfully request that this Court reverse the decision of the Court of Appeals and remand this matter to the district court for further proceedings.

Respectfully submitted,

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