

NO. A04-1251

State of Minnesota  
**In Supreme Court**

McWilliams & Associates, Inc., a Minnesota Corporation,  
d/b/a Top Value Homes,

*Respondent,*

vs.

Tappe Construction; Panelcraft of Minnesota, Inc. and  
Jeffrey Johnson, Individually and in his Capacity as Corporate Officer  
of Panelcraft of Minnesota, Inc.; and Windsor Window Company,

*Appellants.*

**JOINT BRIEF AND APPENDIX OF APPELLANTS  
TAPPE CONSTRUCTION, WINDSOR WINDOW COMPANY,  
JEFFREY JOHNSON AND PANELCRAFT OF MINNESOTA, INC.**

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## STATEMENT OF LEGAL ISSUE

**Does the 10-Year Statute of Repose in Minnesota Statutes Section 541.051, Subdivision 1(a) Apply to Prevent the Accrual of a Contribution Claim More Than Ten Years After Substantial Completion of the Real Property Improvement When the Party Seeking Contribution Has Been Sued, But Has Failed to Seek Contribution, Within the Repose Period?**

The trial court held: In the affirmative and dismissed Top Value's contribution action as untimely.

The Court of Appeals, reversing the trial court, held that when a contribution claim accrues in fact after the 10-year repose period has ended, accrual will be deemed to have occurred at the tenth anniversary such that the claim can be brought within two years thereafter.

Apposite Cases:

Minn. Stat. § 541.051

*Calder v. City of Crystal*, 318 N.W.2d 838 (Minn. 1982)

*Hodder v. Goodyear Tire & Rubber Co.*, 426 N.W.2d 826 (Minn. 1988)

*Sartori v. Harnischfeger Corp.*, 432 N.W.2d 448 (Minn. 1988).

## STATEMENT OF THE CASE

This is an appeal from a Minnesota Court of Appeals' decision, filed April 12, 2005, reinstating Respondent McWilliams & Associates, Inc., d/b/a Top Value Homes' ("Top Value") contribution claims against Appellants Tappe Construction, Windsor Window Company, Jeffrey Johnson and Panelcraft of Minnesota, Inc. The underlying litigation and corresponding contribution claim arise out of alleged defects in a home the construction of

which was substantially completed on July 20, 1993. Top Value sued each of the Appellants, seeking contribution and/or indemnity, more than ten years later in March and April 2004.

On May 27, 2004, Appellants moved the Dakota County District Court, the Honorable Joseph T. Carter, Judge of District Court, First Judicial District presiding, for summary judgment on the grounds that Top Value's contribution action neither accrued, nor was commenced, within the ten-year period of repose contained in Minnesota Statutes section 541.051, subdivision 1(a). In an Order filed June 8, 2004, Judge Carter granted the Appellants' motions and ordered the dismissal of Top Value's contribution claims. The Court of Appeals accepted discretionary review of the trial court's decision and, in a published opinion released April 12, 2005, reversed based on its interpretation of section 541.051 as providing that when a contribution claim accrues in fact after the ten-year repose period has ended, accrual will be deemed to have occurred at the tenth anniversary, making claims brought within two years thereafter timely. *See Weston v. McWilliams & Associates, Inc.*, 694 N.W.2d 558 (Minn. App. 2005). This Court granted Appellants' Joint Petition for Review on June 28, 2005.

### **STATEMENT OF FACTS**

Top Value contracted to build a home in Eagan, Minnesota for William Weston and Deborah Schwalbe. App. 17, 22. Appellants contributed to the project as subcontractors and suppliers.<sup>1</sup> A Certificate of Occupancy was issued for the home on July 20, 1993. App. 32.

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<sup>1</sup> Tappe was the framing subcontractor, Panelcraft installed the siding, and Windsor  
(continued...)

On May 15, 2003, Weston and his family commenced a lawsuit against Top Value in which they alleged water intrusion-related damages and personal injuries resulting from defects in construction. App. 17. As early as summer 2002, however, Top Value was given notice of water intrusion and moisture-related problems in the home and retained experts to investigate potential sources for the moisture problems. App. 48.<sup>2</sup> Ten months after it was originally sued, in March and April of 2004, Top Value commenced a third-party action seeking contribution and indemnity from Appellants. App. 28-31.

### STANDARD OF REVIEW

On appeal from a grant of summary judgment, the reviewing court must determine whether there are genuine issues of material fact presented by the parties and whether the trial court erred in its application of the law. *Offerdahl v. University of Minnesota Hospitals and Clinics*, 426 N.W.2d 425, 427 (Minn. 1988). This case, however, was submitted to the lower courts upon undisputed facts, with the issue being the proper interpretation of

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<sup>1</sup> (...continued)

Window manufactured and sold the windows installed at the residence. Third-Party Complaint at App. 12.

<sup>2</sup> Top Value's insurer, State Farm, contracted with Architectural Testing, Inc. to conduct water testing of "Windsor aluminum clad windows" on July 29, 2002. App. 48. State Farm also retained Wiss, Janey, Elstner Associates ("WJE") to investigate the water leakage problems experienced at the Weston residence. App. 36, 52. WJE's findings, set out in the November 7, 2002 report, were quoted extensively by Top Value in its opposition to the Appellants' summary judgment motions.

Minnesota Statutes section 541.051. Statutory interpretation presents a question of law subject to *de novo* review. *Ryan v. ITT Life Ins. Corp.*, 450 N.W.2d 126, 128 (Minn. 1990).

### ARGUMENT

**I. Top Value's Contribution Action Against Appellants is Barred by the Statute of Repose in Minnesota Statutes Section 541.051 Because It Neither Accrued Nor Was Commenced Within Ten Years After Substantial Completion of the Weston Home.**

**A. The Trial Court Gave Effect to the Clear and Unambiguous Language of Minnesota Statutes Section 541.051 When It Properly Dismissed Appellants on the Basis That Top Value's Contribution Claims, Asserted Eight Months after the Repose Period Had Ended, Were Untimely.**

This appeal concerns the proper interpretation of Minnesota Statutes section 541.051, which addresses limitations on actions arising out of construction defects. The statute provides, in subdivision 1(b), that a contribution claim accrues upon payment of a final judgment, arbitration award or settlement arising out of the defective and unsafe condition, but also states, in subdivision 1(a), that a cause of action cannot accrue more than ten years after substantial completion of construction:

**Subdivision 1. Limitations; service or construction of real property; improvements.** (a) Except where fraud is involved, no action by any person in contract, tort, or otherwise to recover damages for any injury to property, . . . , or bodily injury . . . arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained on account of the injury, shall be brought against any person performing or furnishing the design, planning, supervision, materials, or observation of construction or construction of the improvement to real property . . . more than two years after discovery of the injury or, in the case of an action for contribution or indemnity, accrual of the cause of action, nor, in any event shall such a cause of action accrue more than ten years after substantial completion of the construction. . . .

(b) For purposes of paragraph (a), a cause of action accrues upon discovery of the injury or, in the case of an action for contribution or indemnity, upon payment of a final judgment, arbitration award, or settlement arising out of the defective and unsafe condition.

Minn. Stat. § 541.051 (2002). As written, Minnesota Statutes section 541.051 contains both a statute of limitations, barring a right of action unless initiated within two years after the cause of action accrues, and a statute of repose, preventing the accrual of any cause of action more than ten years after substantial completion of the construction. This case concerns application of the statute of repose only.

The trial court dismissed Top Value's contribution action because it was commenced more than ten years after the Weston home was substantially completed. Its decision properly applied the unambiguous language of section 541.051, subd. 1(a) and (b) to the undisputed facts of this case. First, with respect to the accrual provisions, Top Value conceded in the lower courts that its claim for contribution did not accrue within the 10-year repose period. And although Minnesota law both recognizes and even encourages the joining of third parties before the cause of action for contribution actually accrues<sup>3</sup>, Top Value did not assert its claims against Appellants within the two months remaining in the repose period, but instead waited nearly eight months after the repose period deadline. Because Top Value did not join Appellants within the repose period, and section 541.051 plainly and unambiguously prohibited the accrual of its cause of action thereafter, Appellants appropriately were dismissed.

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<sup>3</sup> See *Calder v. City of Crystal*, 318 N.W.2d 838, 844 (Minn. 1982).

Faced with the reality that its contribution claim had not yet accrued, Top Value's argument before the trial court, and the Court of Appeals as well, was limited to a claim that the repose period was meant to apply to direct injury claims only, not claims for contribution, and that it would be unfair to bar a contribution claim before it has accrued. This argument was rejected by the trial court, and properly so. Statutes of repose, like that in section 541.051, are designed to eliminate stale claims and the practical problems such claims present. *Sartori v. Harnischfeger Corp.*, 432 N.W.2d 448, 454 (Minn. 1988). They accomplish this objective by limiting the time during which a cause of action can arise and by terminating any right of action after the specified period regardless of whether there has yet been any injury. *See Koes v. Advanced Design, Inc.*, 636 N.W.2d 352, 357 (Minn. App. 2002) (citing *Black's Law Dictionary* 927 (6<sup>th</sup> Ed. 1990) and William L. Prosser & W. Page Keeton, *Prosser and Keeton on the Law of Torts* § 30, at 168 (W. Page Keeton et al. Eds., 5<sup>th</sup> Ed. 1984)). *See also Hodder v. Goodyear Tire & Rubber Co.*, 426 N.W.2d 826, 830 (Minn. 1988) ("A typical statute of repose will specify a presumptive number of years after which an action cannot be brought."). While this may seem harsh or unfair, this Court already has found the legislative objective to be a reasonable one, and one not to be lightly disregarded. *Sartori*, 432 N.W.2d at 454.<sup>4</sup>

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<sup>4</sup> The highest courts of our neighboring jurisdictions likewise acknowledge and give deference to the legislative policy underpinning statutes of repose. *See, e.g., Kohn v. Darlington Community Schools*, 698 N.W.2d 794, 807 ¶¶ 41-43 (Wis. 2005); *Krull v. Thermogas Co.*, 522 N.W.2d 607, 614-15 (Iowa 1994).

**B. The Court of Appeals' Conclusion that Contribution Actions Accruing in Fact After the Specified 10-Year Repose Period Are Statutorily Deemed to Accrue at the Tenth Anniversary Following Construction is Neither Supported By, Nor Even Fairly Inferred From Minn. Stat. § 541.051's Plain and Unambiguous Language.**

Like the trial court, the Court of Appeals rejected “as without merit” the sole issue presented by Top Value, the assertion that the statute of repose applies only to injury claims and not claims for contribution and indemnity. *See* 694 N.W.2d at 564. Nevertheless, the Court of Appeals, reformulating the issue and attributing an argument on that issue to Top Value, reversed based on the following language found in subdivision 2 of the statute:

**Subd. 2. Action allowed; limitation.** Notwithstanding the provisions of subdivision 1, in the case of an action which accrues during the ninth or tenth year after substantial completion of the construction, an action to recover damages may be brought within two years after the date on which the action accrued, but in no event may an action be brought more than twelve years after substantial completion of the construction.

Minn. Stat. § 541.051, subd. 2 (2002). The Court of Appeals reasoned that because the statute permits causes of actions accruing during the ninth or tenth year following construction to be brought up to two years thereafter, a cause of action for contribution accruing after the tenth year should relate back and be “deemed to accrue” at the tenth anniversary. 694 N.W.2d at 558 and 564. This conclusion on the part of the Court of Appeals is contrary to the plain language of the statute and could only be reached by overlooking well-established canons of statutory construction.

The fundamental object of statutory interpretation is to ascertain and give effect to the intention of the Legislature as expressed in the language used. Minn. Stat. § 645.16; *City of*

*St. Louis Park v. King*, 246 Minn. 422, 429, 75 N.W.2d 487, 492-3 (1956). When the words of a statute are clear and unambiguous, the courts are not permitted to engage in further construction but must instead apply their plain meaning. *U.S. Speciality Ins. Co. v. James Courtney Law Office, P.A.*, 662 N.W.2d 907, 910 (Minn. 2003). See also *Tuma v. Comm'r of Econ. Security*, 386 N.W.2d 702, 706 (Minn. 1986). And although canons of statutory construction may be used to solve ambiguities that may exist, they cannot be used to create ambiguity. *Feick v. State Farm Mut. Auto. Ins. Co.*, 307 N.W.2d 772, 775 (Minn. 1981).

Courts may not create ambiguity in an otherwise clear statute under the guise of statutory construction. See *Zurich American Ins. Co. v. Bjelland*, 690 N.W.2d 352, 356 (Minn. App. 2004), *pet. for rev. granted* (Minn. Mar. 4, 2005). Yet in this case, the Court of Appeals, in its effort to resuscitate Top Value's cause of action, went out of its way to find some ambiguity in section 541.051 when, in fact, no uncertainty exists. For instance, the court describes the repose clause as "begging" "for clarity as to an ultimate time limit that the statute addresses in terms of the event when a claim 'accrue[s]'." See 694 N.W.2d at 562. But the statute could not be clearer – a cause of action for contribution will accrue upon payment of a judgment or settlement but can never accrue more than ten years after the construction is completed. Minn. Stat. § 541.051, subd. 1(a) and (b).

A statute is considered ambiguous only if its language is susceptible to more than one reasonable interpretation. *Amaral v. St. Cloud Hosp.*, 598 N.W.2d 379, 384 (Minn. 1999). Thus, in its effort to find ambiguity where none exists, the Court of Appeals suggested that at least two inferences can be made from the statutory language: 1) "That the claim never

accrues, and no suit can ever be brought if the claim accrues in fact in year eleven or twelve;” or 2) “that ripening of the cause is deemed by law to occur at the end of the tenth year and that no action can be brought after the end of year twelve.” 694 N.W.2d at 562. Even if this were true, however, only one of these inferences is reasonable. The first “inference” – that no suit can ever be brought if the claim accrues in fact in year eleven or twelve – really is no inference at all, but instead reflects what the statute in fact says: “[n]or, in any event shall such a cause of action accrue more than ten years after substantial completion.” Minn. Stat. § 541.051, subd. 1(a). This first “inference” is, therefore, reasonable.

The second “inference” suggested by the Court, however, is not reasonable. An inference that “ripening” or accrual is deemed to occur at the end of the tenth year is not, as the Court of Appeals conceded, expressed anywhere in section 541.051. To the contrary, the section is explicit in its pronouncement that the cause of action accrues upon the payment of a judgment, arbitration award or settlement. Minn. Stat. § 541.051, subd. 2. In short, Minnesota Statutes section 541.051 in no way lacks clarity. The plain language of the statute should have been applied by the Court of Appeals, and its attempt to engage in statutory construction was neither necessary nor even permitted. *State by Beaulieu v. R.S.J., Inc.*, 552 N.W.2d 695, 701 (Minn. 1996).

**C. The Various “Considerations” Articulated by the Court of Appeals Do Not Support a Conclusion that Unasserted Contribution Claims Which Accrue More Than Ten Years After Substantial Completion Should Relate Back to the Ten Year Anniversary.**

The Court of Appeals justified its decision through a discussion of three considerations: “accrual,” “bringing suit” and “narrow construction.” Although it was inappropriate for the court to engage in any construction or interpretation whatsoever given the absence of an ambiguity, none of the three considerations, individually or even collectively, support a conclusion that an unasserted cause of action which has not accrued within the ten-year repose period is deemed to accrue on the last day of that period.

With respect to the “accrual” consideration, the Court of Appeals’ decision attempts to draw significance from the fact that the Legislature chose in subdivision 1 to define the repose period in terms of when a cause of action can accrue, as opposed to when the right to sue is terminated. That the Legislature should do so, however, is not surprising because Minnesota Statutes section 541.051, in fact, does permit an action to be brought more than ten years after substantial completion of the construction, provided, however, that the cause of action has accrued within that initial ten years. *See* Minn. Stat. § 541.051, subd. 2. The Court of Appeals’ discussion of the “accrual” and “bringing suit” considerations is not only confusing, but suggests a misunderstanding regarding the interplay between subdivision 1 of the statute, which establishes the limitations and repose periods, and subdivision 2, which does nothing more than clarify that the ten-year statute of repose will not prevent suits in

years eleven or twelve for causes of action that have accrued in years nine and ten – within the repose period.

Despite the Court of Appeals' efforts to draw some broader meaning from Minnesota Statutes section 541.051, subdivision 2, there is nothing in the subdivision that suggests an intent on the part of the Legislature to "deem" after-the-fact accruals to occur at the tenth anniversary of substantial completion. And the Court of Appeals, itself, conceded in a footnote that although subdivision 2 permits suits in years eleven and twelve, "it does not expressly determine that this affects actions accrued either before year ten, at the end of year ten, or later." 694 N.W.2d at 563, n. 11. But subdivision 2 does expressly describe the particular causes of action it is intended to affect, referring to actions that accrue before the tenth anniversary only: ". . . in the case of an action that accrues during the ninth or tenth year after substantial completion of construction . . ." Minn. Stat. § 541.051, subd. 2.

Contrary to the Court of Appeals' interpretation, Minn. Stat. § 541.051, subd. 2, by its plain language, is intended to allow additional time to sue only with respect to causes of action that have accrued during the ten-year repose period. Had the Legislature intended to extend the period to sue on contingent or inchoate contribution claims that do not accrue in fact within the ten years following substantial completion, it easily could have expressed that intent in the statute. For instance, Wisconsin has a similar statute of repose. *See* Wis. Stat. § 893.89. Like Minnesota's statute, Wisconsin Statutes section 893.89 describes a ten-year "exposure period" following substantial completion of an improvement to real property and provides that "no cause of action may accrue and no action may be commenced, including

an action for contribution or indemnity,” against any person involved in the construction of the improvement to real property after the end of this exposure period. Wis. Stat. § 893.89(2). And similar to Minn. Stat. § 541.051, subd. 2, the Wisconsin statute addresses causes of action accruing late in the exposure period by extending the period to sue by three years if a person sustains damages during the period beginning on the first day of the eighth year and ending on the last day of the tenth year after substantial completion. Wis. Stat. § 893.89(3)(b). But unlike section 541.051, Wisconsin’s statute specifically addresses contribution claims accruing beyond the repose period:

(c) An action for contribution is not barred due to the accrual of the cause of action for contribution beyond the end of the exposure period if the underlying action that the contribution action is based on is extended under par. (b).

Wis. Stat. § 893.89(3)(c). In summary, the Minnesota Legislature could very well anticipate that in cases falling within Minn. Stat. § 541.051, subd. 2, a defendant’s cause of action for contribution might not accrue before the end of the repose period. Nevertheless, unlike the Wisconsin Legislature, it failed to, or chose not to, provide additional time for the commencement of a contribution claim. The Court of Appeals’ attempt to read such a provision into the statute was simply wrong.

The Court of Appeals, in its discussion of the “bringing suit” consideration, further comments that an interpretation barring a contribution action after the tenth year “prospectively destroys the right to assert such a claim before the contribution claimant has had any opportunity to learn that a meritorious claim of an injured party has arisen” and produces an absurd or unreasonable result. 694 N.W.2d at 563-64. Although potentially

unfair, such an interpretation is not absurd. By their nature, statutes of repose terminate any right of action after a specific time has elapsed, regardless of whether there has yet been an injury, discovery or accrual. *See, e.g., Koes*, 636 N.W.2d at 357 and authorities cited therein; *Taney v. Independent School Dist. No. 624*, 673 N.W.2d 497, 500 n. 1 (Minn. App. 2004). *See also Hodder*, 426 N.W.2d at 830, n.3. And, again, while the effect of a statute of repose may be harsh, this Court already has concluded that section 541.051 furthers a reasonable legislative objective. *Sartori*, 432 N.W.2d at 454.<sup>5</sup>

The final consideration cited by the Court of Appeals to justify its decision that claims accruing outside the repose period should relate back to the tenth anniversary is this Court's prior pronouncement that section 541.051 must be narrowly construed. *See* 694 N.W.2d at 564 (citing *Kittson County v. Wells, Denbrook & Assocs.*, 308 Minn. 237, 240-41, 241 N.W.2d 799, 801 (1976)). None of the Appellants dispute this rule of strict construction. But although the statute is to be narrowly construed, other rules of statutory construction still apply. *See Pacific Indem. Co. v. Thompson-Yaeger, Inc.*, 260 N.W.2d 548, 554 (Minn. 1977). Thus, courts construe section 541.051 narrowly, but still give effect to the plain language of the statute without resorting to technical legal construction of its terms. *Id.* And

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<sup>5</sup> Moreover, as in *Calder, supra*, Top Value's fairness claim rings "hollow" because it was aware of and had investigated the Westons' claims before it was sued, and because Top Value had time after it was sued to assert its inchoate contribution claim but waited nearly ten months (eight months past the end of the repose period) to do so. *See Calder*, 318 N.W.2d at 844.

again, the plain language of Minnesota Statutes section 541.051 simply does not support the Court of Appeals' conclusion in this case.

**CONCLUSION**

The Court of Appeals' decision in this case materially alters Minn. Stat. § 541.051's clear and unambiguous accrual provisions. Under the statute's plain language, a cause of action for contribution and indemnity cannot accrue more than ten years after construction is complete. There is nothing in the statute that expressly allows a claim for contribution accruing after year ten to relate back; and such a conclusion cannot be fairly or reasonably inferred from the language of the statute. For all of the reasons discussed above, Appellants respectfully request that the decision of the Court of Appeals be reversed, and the trial court's judgment reinstated.

Respectfully submitted,

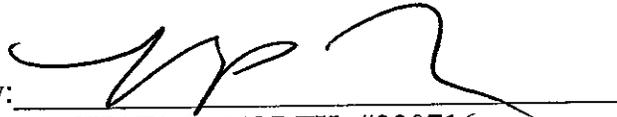
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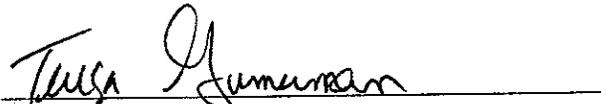
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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).