

NO. A06-2155

State of Minnesota
In Court of Appeals

Gail Gomez, et al.,

Appellants,

vs.

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

Respondent,

vs.

David Freund, et al.,

Third-Party Defendants,

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

Respondent.

**RESPONDENT SCHERER BROS. LUMBER CO.'S
BRIEF 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) (with amendments effective July 1, 2007).

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STATEMENT OF THE LEGAL ISSUES ON APPEAL

- I. Did The Trial Court Properly Grant Summary Judgment Based on Arguments Raised in Williams' Reply Brief in Response to New Factual Admissions Set Forth in Appellants' Memorandum of Law in Opposition to Summary Judgment?

Trial Court Held: Yes. The statute of repose argument was properly considered.

Authorities:

Bradley v. First Nat. Bank of Walker, 711 N.W.2d 121 (Minn. Ct. App. 2006).
Federal Land Bank of Saint Paul v. Obermueller, 429 N.W.2d 251 (Minn. 1988).
Hebrink v. State Farm Bureau Life Ins. Co., 664 N.W.2d 414 (Minn. Ct. App. 2003).

- II. Did The Trial Court Properly Decide That Appellant's Breach of Statutory Warranty and Breach of Express Warranty Claims Accrued upon "Discovery of The Breach"?

Trial Court Held: Yes. The breach of warranty claims accrued upon discovery of the breach.

Authorities:

Minn. Stat. §541.051, subd. 4.
Koes v. Advanced Design, Inc., 636 N.W.2d 352 (Minn.Ct. App. 2001).
Vlahos v. R & I Constr. of Bloomington, Inc., 676 N.W.2d 672 (Minn. 2004).

- III. Did The Trial Court Properly Decide That Appellants' Claims for Breach of Statutory Warranties and Breach of Express Warranty Were Barred by The Ten-Year Statute of Repose in Minn. Stat. 541.051, Subd. 1?

Trial Court Held: Yes. The statute of repose bars Appellants' claims for breach of express warranty and for breach of statutory warranty, arising under Minn. Stat. Ch. 327A.

Authorities:

Minn. Stat. § 541.051, subd. 1(a).
Koes v. Advanced Design, Inc., 636 N.W.2d 352 (Minn.Ct. App. 2001).
Metropolitan Life Ins. Co. v. M.A. Mortenson Cos., Inc., 545 N.W.2d 394 (Minn. Ct. App. 1996).
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Weston v. McWilliams & Assoc., 716 N.W.2d 634 (Minn. 2006).

STATEMENT OF FACTS

Respondent Scherer Bros. Lumber Co. (hereinafter “Respondent Scherer”)¹ submits the following additional relevant facts. On June 30, 1994, Appellants entered into the contract with Respondent David A. Williams Realty & Construction, Inc. (hereinafter “Williams”) for the construction of the home at issue. (A.A. 40, 69). On October 19, 1994, construction was substantially complete and the Certificate of Occupancy was issued. (A.A. 31).

In August of 2004, Appellants contacted Private Eye, Inc. to test the home for moisture. (A.A. 42). Private Eye conducted a moisture analysis and issued a report dated October 4, 2004. (R.S.A. 1-2). That report indicates the home had one or more areas of “excessive moisture and/or soft damaged sheathing.” (*Id.* at 3). The report recommends Appellants open up these areas for further exploration “**to determine if any structural damage is present.**” (*Id.*) (emphasis added).

Appellants sent a copy of the Private Eye report to Williams’ insurer, American Family. (R.S.A. 24). Mr. Paul Morrison from American Family replied by letter that he needed some evidence of structural damage to the home: “While these readings may indicate high moisture readings, the report does not indicate structural damage to the home... A qualified structural engineer would have to provide a report to substantiate and support structural damage to your home.” (*Id.*).

¹ Pursuant to Minn. R. Civ. App. P. 129.03, the undersigned hereby certifies that counsel for Scherer Bros. Lumber Co. authored this reply brief in whole.

Appellants then hired Air Tamarack to conduct a structural analysis of the home. (A.A. 42). The Air Tamarack report dated February 2, 2005 concludes: “(T)his house has serious structural and fungal infestation problems related to the above grade exterior wall construction and rim joist construction.” (R.S.A. 25). This report further concludes: “The visual inspection revealed several state building code violations and poor building practices, which are related to the moisture penetration concerns in this house.” (*Id.*).

Appellants subsequently brought suit against Williams on or about November 8, 2005. (A.A. 43). Williams brought a third-party action for contribution and indemnity against Scherer, as the window manufacturer, and against subcontractors that worked on the original construction of the home: David Freund Stucco, Imdieke Builders, and R & R Construction. (A.A. 32). David Freund Stucco answered, affirmatively alleging statute of limitations and statute of repose defenses. (R.S.A. 78-9). Scherer also answered, affirmatively alleging statute of limitations as a defense, as well as all other defenses interposed by any other third-party defendant. (R.S.A. 81, 85).

After Appellants’ depositions, Respondents Williams and Scherer moved for summary judgment, asserting, *inter alia*, that Appellants’ claims were barred by the applicable statutes of limitation. (A.A. 13-26, 27-34).

In their memorandum in opposition, Appellants conceded the statute of limitations in §541.051, subd. 1(a) barred their contract, tort, and implied warranty claims. (A.A. 43-4). However, Appellants argued they had brought their claims for breach of express and Minn. Stat. Ch. §327A warranties within the statute of limitations period, because they only discovered structural damage to the home upon receipt of the Private Eye report.

(A.A. 46-7). Appellants further affirmed that the Air Tamarack report documented structural damage, building code violations, and poor building practices. (A.A. 42).

Williams then submitted a reply brief, arguing that if Appellants first learned of structural damage to the home upon receiving their experts' reports, then the statute of repose barred their breach of express and §327A warranty claims. (A.A. 52, 57, 60-1). The Air Tamarack report is the first report that confirms structural damage to the home. (*Id.*).

The trial court agreed with the arguments made by Williams in its reply and granted summary judgment on Appellants' claims for breach of §327A warranties and for breach of the express warranty that the home would be free of major construction defects for ten years (hereinafter collectively referred to as "breach of express and §327A warranties"). (A.A. 72-3).

ARGUMENT

I. STANDARD OF REVIEW

An appeal from summary judgment is reviewed *de novo* where the trial court applied statutory language to undisputed facts. *Koes v. Advanced Design, Inc.*, 636 N.W.2d 352 (Minn.Ct. App. 2001).

Also, the appellate court asks two questions when reviewing summary judgment:

1) Whether there are any genuine issues of material fact; and 2) Whether the district court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). A trial court properly grants summary judgment where the evidence of record

shows there is no genuine issue of material fact, entitling either party to judgment as a matter of law. Minn. R. of Civ. P. 56.03 (2006); *DLH Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997).

At the time a motion for summary judgment is made, the non-moving party must identify specific facts that establish the existence of a material issue and not merely rely on general statements of fact, in order to successfully oppose the motion. Minn. R. Civ. P. 56.03, 56.05; *Hunt v. IBM Mid America Employees Federal Credit Union*, 384 N.W.2d 853, 855 (Minn. 1986).

II. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT BECAUSE THE ARGUMENTS SET FORTH IN WILLIAMS' REPLY BRIEF RESPONDED TO NEW FACTS.

The trial court's decision to grant summary judgment must be upheld. The trial court properly considered the arguments set forth in Williams' reply brief in deciding that Appellant's breach of express and §327A warranty claims were barred by the statute of repose.

Minnesota General Rule of Practice 115.03(c) provides: "The moving party may submit a reply memorandum, limited to new legal *or factual* matters raised by an opposing party's response to a motion, by serving a copy on opposing counsel....at least 3 days before the hearing."

The Task Force that decided the time limits under Rule 115.03 balanced "the needs of the courts to obtain information on motions sufficiently in advance of the hearing to permit judicial preparation and the needs of the counsel and litigants to have

prompt hearings after the submissions of motions.” Advisory Comm. Cmt.- 1997 Amendments.

In light of Rule 115, the court’s judicious exercise of its inherent power to grant summary judgment in appropriate cases should not be disturbed unless the objecting party can show: 1) Prejudice from lack of notice; 2) Other procedural irregularities; or 3) He was not afforded a meaningful opportunity to oppose summary judgment. *Federal Land Bank of St. Paul v. Obermueller*, 429 N.W.2d 251, 255 (Minn. 1988); *Zimprich v. Stratford Homes, Inc.* 453 N.W.2d 557, 567 (Minn. Ct. App. 1990).

For example, in *Federal Land Bank of St. Paul v. Obermueller*, the Minnesota Supreme Court upheld the trial court’s grant of summary judgment. 429 N.W.2d 251. The Court found no prejudice where the adverse party had received notice of the summary judgment motion and had opposed the motion at a hearing. *Id.* at 255.

Similarly, in *Bradley v. First Nat. Bank of Walker*, this Court held that the non-moving party was afforded a full opportunity to oppose summary judgment, despite the moving party raising the statute of limitations as a novel, unresponsive argument in its reply brief. 711 N.W.2d 121, 128 (Minn. Ct. App. 2006). Prior to the hearing, the non-moving party was placed on notice of a potential statute of limitations defense in the moving party’s answer to the complaint, where “statutory limitations” was alleged as an affirmative defense. *Id.*

In contrast, in *Hebrink v. State Farm Bureau Life Ins. Co.*, this Court held that the non-moving party was not afforded an adequate opportunity to oppose summary judgment where he, literally, had no notice of the motion. 664 N.W.2d 414 (Minn. Ct.

App. 2003). In *Hebrink*, the moving party disguised the summary judgment motion as a motion *in limine*. *Id.* As such, the court essentially granted summary judgment *sua sponte*, and the non-moving party never had any opportunity to respond to the motion. *Id.* at 418-20.

In the instant case, the trial court properly exercised its inherent power to grant summary judgment based on the statute of repose arguments set forth in Williams' reply. The statute of repose argument replied to new facts set forth in Appellants' memorandum opposing summary judgment. Specifically, Appellants set forth that the first time they learned of structural damage to the home was upon receipt of their experts' reports. Due to these new facts, 115.03(c) provided Williams with the opportunity to fully respond to the facts on summary judgment as they developed.

Appellants cannot show any prejudice from: 1) Lack of notice; 2) Procedural irregularity; or 3) Lack of opportunity to meaningfully oppose summary judgment.

First, Appellants received proper notice of the statute of repose defense. Like *Bradley*, the answers interposed by David Freund Stucco and Scherer placed Appellants on notice of a potential statute of repose issue. Like *Obermueller* and unlike *Hebrink*, both Williams and Scherer provided proper notice of the summary judgment motion. In addition, Appellants were again notified of the statute of repose issue when Williams argued the same in its reply memorandum. At numerous times throughout this lawsuit, Appellants received notice of the statute of repose defense.

Second, no procedural irregularities caused Appellants any prejudice. The answers of David Freund Stucco and of Scherer were timely served on all parties.

Williams and Scherer properly served their motions for summary judgment, to which Appellants responded. Williams served its reply within the required timeframe under Rule 115.03: three days. The trial court heard arguments from all parties at the summary judgment hearing prior to making its decision. Appellants even utilized their opportunity to request reconsideration. No procedural irregularities exist in this case.

Third, like in *Bradley* and *Obermueller*, Appellants were afforded a meaningful opportunity to oppose summary judgment. They had prior notice of the statute of repose issue as well as the summary judgment motion. In response, they opposed the motion in writing and orally at the motion hearing.

Furthermore, under *Bradley*, the trial court would have properly considered the statute of repose defense in granting summary judgment, even if Williams' arguments had not been asserted in reply to Appellants' factual admissions. 711 N.W.2d at 128. Not only did the court have the inherent power to review the statute of repose issue *sua sponte*, but it had a duty to do so, because the statute of repose potentially compromised the trial court's subject matter jurisdiction. *See* Minn. R. Civ. P. 12.08(c); *See Hebrink*, 664 N.W.2d 414.

The trial court properly considered the statute of repose arguments set forth in Williams' reply brief. Appellants have not shown and cannot show any prejudice, because they were afforded a meaningful opportunity to oppose summary judgment. Procedurally and substantively, Appellants were afforded every opportunity to present their arguments to the trial court.

III. THE TRIAL COURT PROPERLY DECIDED THAT APPELLANTS' BREACH OF EXPRESS AND §327A WARRANTY CLAIMS ACCRUED UPON "DISCOVERY OF THE BREACH".

The trial court applied the proper accrual date, "discovery of the breach", in determining that the statute of repose bars Appellants' breach of express and §327A warranty claims.

Breach of express warranty claims and breach of §327A warranty claims accrue upon "discovery of the breach" not upon "discovery of the injury." Appellants erroneously assert that all claims "accrue" upon "discovery of the injury" for purposes of the statute of repose. Construing §541.051 as Appellants propose fails to recognize that, under the statute, different types of claims accrue at different times. *See* §541.051, subs. 1(a) & (b) and subd. 4.

A. The Rules of Statutory Construction Require That Breach of Express and §327A Warranties Accrue Upon "Discovery of the Breach."

Under the plain language of §541.051, actions for breach of express or §327A warranties accrue upon "discovery of the breach." Subd. 4. Appellants even acknowledged this rule in their memorandum opposing summary judgment. (A.A. 44, 49).

Statutory construction begins with the plain language rule. "To ascertain and effectuate the intention of the legislature, the appellate court's analysis begins with a careful and close examination of the statutory language in order to apply the plain-meaning of the statute." *State v. Iverson*, 664 N.W.2d 346, 350 (Minn. 2003); Minn. Stat. § 645.16 (2006).

Statutory language must be harmonized, rather than isolated and construed piecemeal. In reviewing a statute *de novo*, "(e)very law shall be construed, if possible, to give effect to all its provisions." Minn. Stat. § 645.16; *Koes*, 636 N.W.2d at 358.

"Whenever possible, no word, phrase or sentence should be deemed superfluous, void, or insignificant." *Vlahos v. R & I Constr. of Bloomington, Inc.*, 676 N.W.2d 672, 679 (Minn. 2004) citing *Amaral v. St. Cloud Hosp.*, 598 N.W.2d 379, 384 (Minn. 1999).

Even if two statutory provisions conflict and cannot otherwise be reconciled, the court must attempt to harmonize them with the specific provision controlling over the general provision. Minn. Stat. §645.26, subd. 1; *Hyland Hill North Condo. Ass'n, Inc. v. Hyland Hill Co.*, 549 N.W.2d 617 (Minn. 1996) *reversed on other grounds.*; *200 Levee Drive Assoc., Ltd. v. Bor-Son Bldg. Corp.*, 441 N.W.2d 560, 563 (Minn. Ct. App. 1989).

Under these rules of statutory construction, the plain language of §541.051 must be harmonized to effectuate the statute's purpose: To eliminate suits against contractors that had completed an improvement to real property and then abandoned all interest and control in the work when it was turned over to the owners. *Ritter v. Abbey-Etna Mach. Co.*, 483 N.W.2d 91, 93 (Minn. Ct. App. 1992).

To that purpose, subd. 4 of §541.051 sets forth a specific definition of accrual for breach of express and §327A warranty claims: upon "discovery of the breach." This definition effectuates the statute's purpose of eliminating suits, because it provides notice for when the timeframe for the statute of limitations begins to run and provides a clear definition for determining whether these warranty claims have accrued within the statute of repose. *See Id.*; *Weston v. McWilliams & Assoc.*, 694 N.W.2d 558, 562 (Minn. Ct.

App. 2005) *reversed on other grounds*; *Weston v. McWilliams & Assoc.*, 716 N.W.2d 634, 640-1 (Minn. 2006).

Under the plain language of the statute, breach of express and §327A warranty claims accrue “upon discovery of the breach”.

B. The Statute of Limitations Language Contains The One And Only Accrual Definition.

§541.051, subd. 4 provides the one and only definition of accrual for breach of express and §327A warranty claims. §541.051 subd. 1(b) does not provide a separate accrual date for these claims for purposes of determining whether they were brought within the statute of repose.

“(T)he date of accrual is the date the limitations period begins.” *Weston*, 694 N.W.2d at 562. However, §541.051 provides different accrual dates for different causes of action. *See* subds. 1(a) & (b) and subd. 4. The date upon which a common law claim accrues differs from the date upon which a breach of express or §327A warranty claim accrues. *Id.*

§541.051, subd. 1(a) contains the statute of limitations applicable to all common law claims arising from a defective or unsafe improvement to real property: “(N)o action...arising in contract, tort, or otherwise to recover for damages for any injury to [real] property... shall be brought...more than two years after discovery of the injury.” §541.051; *Dakota v. BWBR Architects*, 645 N.W.2d 487, 492 (Minn. Ct. App. 2002).

Subd. 1(b) provides the accrual date for common law claims, triggering the two-year statute of limitations: “(F)or purposes of paragraph (a), a cause of action accrues

upon discovery of the injury." *Id.*; See *The Rivers v. Richard Schwartz/Neil Weber*, 459 N.W.2d 166, 169 (Minn. Ct. App. 1990); *Dakota*, 645 N.W.2d at 492; *Koes*, 636 N.W.2d 352; *Hyland Hill North Condo. Ass'n, Inc.*, 549 N.W.2d 617, 621 (Minn. 1996); *200 Levee Drive Assoc., Ltd.*, 441 N.W.2d at 563; *Vlahos*, 676 N.W.2d at 677; *Brink v. Smith Cos. Constr. Inc.*, 703 N.W.2d 871, 878-9 (Minn. Ct. App. 2005).

In contrast, actions for breach of express warranty and breach of §327A warranties accrue upon "discovery of the breach" not upon "discovery of the injury." *Vlahos*, 676 N.W.2d at 677. "For...actions based on breach of the statutory warranties set forth in section 327A.02, or to actions based on breach of an express warranty, such actions shall be brought within two years of the discovery of the breach." *Id.* §541.051, subd. 4.

§541.051, subd. 4 contains the one and only accrual definition for breach of express and §327A warranty claims. The plain language of the statute and well-established Minnesota caselaw all confirm this. Subd. 1(b) does not control.

C. The General Reference to "Accrue" in The Statute of Repose Reflects That Different Claims Have Different Dates of Accrual.

The word "accrue" in the statute of repose language acknowledges and reflects that different claims falling within the governance of §541.051 accrue at different times. Contrary to Appellants' proposed reading of the statute, not all claims "accrue" for purposes of the statute of repose upon "discovery of the injury".

§ 541.051, subd. 1(a) contains the general ten-year statute of repose: "(N)or in any event shall a cause of action accrue more than ten years after substantial completion of the construction." §541.051; *Koes*, 636 N.W.2d at 358; *Brink*, 703 N.W.2d at 875.

The Minnesota Supreme Court in *Weston v. McWilliams & Assoc. Inc.* reviewed §541.051, subd. 1(a) to decide whether the repose period barred a claim for contribution and indemnity. 716 N.W.2d at 638. In doing so, the Court read the reference to “accrues” in the repose provision together with the accrual definitions in other provisions of the statute. *Id.*

In *Weston*, the Court decided that “accrues” in the repose provision needed to be read in conjunction with subd. 1(b), because this particular subdivision contained the definition of accrual for contribution and indemnity claims: “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.” *Id.* “This definition determines when a contribution or indemnity claim will accrue.” *Id.* at 639.

The instant case significantly differs from *Weston* where the Court had to go no further than the plain language of subds. 1(a) and 1(b) to find the accrual definition and repose period for contribution and indemnity claims. Unlike *Weston*, contribution and indemnity claims are not at issue in this case. In this case, breach of express and §327A warranty claims are at issue. Moreover, subd. 1(b) fails to contain the particular accrual definition for an express or §327A warranty claim. As already discussed at length, *supra*, subd. 4 specifically provides this definition of accrual.

However, the overarching rule used by the *Weston* Court still applies to this case: “Accrues” in the repose provision must be read together with the definitions of accrual in other provisions of the statute. 716 N.W.2d at 638. Specifically, “accrues” in the repose

language must be read in conjunction with the accrual language in subd. 4., governing breach of express and §327A warranty claims.

Reading “upon discovery of the breach” in subd. 4 in harmony with the accrual language in subd. 1(a), “shall a cause of action accrue” effectuates each provision of the statute, as well as upholds the purpose of the statute as a whole. If subd. 1(b) were applied across the board to all causes of action, then the definition of accrual in subd. 4 would be completely disregarded.

Even the plain-meaning rule of statutory construction, does not require that statutory language be read outside of its context. Minn. Stat. § 645.16. Even if the two provisions at issue in §541.051 appear to conflict, the provisions must be read together with the more specific provision controlling over the more general one. Minn. Stat. §645.26, subd. 1; *Hyland Hill North Condo. Ass'n, Inc.*, 549 N.W.2d 617; *200 Levee Drive Assoc., Ltd.*, 441 N.W.2d at 563. Subd. 4 contains the accrual definition specifically applicable to the claims at issue and must, therefore, control.

The trial court correctly interpreted §541.051 and properly construed all provisions of the statute in applying “discovery of the breach”. Subd. 4 must be read in conjunction with subd. 1(b), with the more specific “accrual” language in subd. 4 controlling.

IV. THE TRIAL COURT PROPERLY DECIDED THAT THE TEN-YEAR STATUTE OF REPOSE BARS APPELLANTS’ BREACH OF WARRANTY CLAIMS.

The trial court properly granted summary judgment. The ten-year statute of repose bars Appellants’ breach of express and §327A warranty claims.

A. Minn. Stat. §541.051, subd. 1(a) Contains the Statute of Repose for Appellants' Breach of Express and Statutory Warranty Claims

Minn. Stat. §541.051, subd. 1(a) contains the statute of repose for claims arising from services or construction to improve real property, including those based on breach of express and statutory warranty. *Koes*, 636 N.W.2d at 358. Contrary to Appellants' arguments, this broad language encompasses all claims, including those for breach of express or §327A warranties.

In *Koes v. Advanced Design, Inc.*, this Court stated that Minn. Stat. §541.051, subd. 1(a) contains the ten year statute of repose for claims based on services or construction to improve real property: "(A) cause of action [shall not] accrue more than ten years after substantial completion of the construction." 636 N.W.2d at 358. *Koes* interpreted a prior version of §541.051, wherein this Court stated:

Like all statutes of repose, this provision bars **any litigation**, regardless of discovery or non-discovery of the defect. But, as noted earlier, because warranty claims under Minn. Stat. §327A.02 are specifically exempted from the statutes of limitation and repose set forth in Minn. Stat. §541.051, subd. 1(a), the only statutory limitation applying, by its terms, to a §327A.02 claim is found in §541.051, subd. 4...[which] requires home-warranty actions based on Minn. Stat. §327A.02 to be 'brought within two years of the discovery of the breach' of warranty.

This Court then went on to recognize that the legislature amended the statute in 2004, imposing the "10 and 12 year statutes of repose," which curtails the ability of homeowners to bring claims for breach of §327A.02, subd. 1(b) statutory home warranties after the ten-year warranty period expires. *Id.*

However, this amendment did not negate the implications of the core ten-year statute of repose, which cuts off "**any right of action** ten years from substantial

completion of the construction." *See Appletree Square I, Ltd. Partnership v. W.R. Grace & Co.*, 29 F.3d 1283 (C.A.8 Minn. 1994)(construing ten-year repose language prior to 2-year extensions in subds. 2 and 4)(emphasis added). The amended statute simply provides a two-year extension to the repose period for claims discovered in the ninth or tenth year following substantial completion. *See* Minn. Stat. § 541.051, subd. 4; *Weston*, 716 N.W.2d at 638-9.

In this case, the trial court properly applied the ten-year statute of repose in §541.051, subd. 1(a) to bar Appellants' express and §327A warranty claims. The broad language of subd. 1(a) applies to all causes of action.

B. § 541.051, Subd. 4 Provides A Two-Year Extension, Not A Twelve-Year Statute of Repose.

§541.051, subd, 1(a) contains a ten-year statute of repose applicable to all actions arising from a defective or unsafe improvement to real property, not a twelve-year statute of repose as Appellants contend.

§541.051, subd. 4 provides a two-year extension to the ten-year repose period, triggered by a specific condition precedent: "In the case of an action under section 327A.05, *which accrues during the ninth or tenth year after the warranty date*...an action may be brought within two years of the discovery of the breach, but in no event may an action under section 327A.05 be brought more than 12 years after the effective warranty date." (emphasis added).

This extension provides a homeowner with the entire ten year warranty period for major construction defects contained in §327A.02 and overrides the general rule that a

statute of limitations will foreclose an action, despite the warranty period running for a longer period of time. *See Koes*, 636 N.W.2d at 358; *Metropolitan Life Ins. Co. v. M.A. Mortenson Cos., Inc.*, 545 N.W.2d 394 (Minn. Ct. App. 1996); *Oreck v. Harvey Homes, Inc.*, 602 N.W.2d 424 (Minn. Ct. App. 1999).

§541.051 must not be read to provide a blanket twelve-year statute of repose for a cause of action arising under §327A. *See Weston*, 716 N.W.2d at 638-9. If the legislature had intended to impose a twelve-year statute of repose, it would have simply enacted a twelve-year statute of repose. *Id.* Instead, the legislature enacted a two-year extension, which provides a *potential* twelve year repose period, subject to the specific “discovery” requirements. *See Id.*

Based on the facts of this case, the ten-year repose period applied. Contrary to Appellants’ arguments, they did not have a twelve-year repose period in which to bring their claims. As next discussed, the two-year extension was never triggered, because Appellants’ claims for breach of express and §327A warranties only accrued in year twelve, not in year nine or ten.

C. The Trial Court Properly Concluded as A Matter of Law When Appellants “Discovered” Structural Damage to The Home.

The trial court properly found, as a matter of law that the express and §327A warranty claims accrued outside the ten-year repose period and, therefore, are barred.

An action for breach of statutory warranties arising under §327A accrues “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.

The accrual rule for 327A claims actually derives from the general rule for determining when a cause of action accrues for breach of express warranty of future performance: “(W)hen the plaintiffs discovers or should have discovered the defendant’s refusal or inability to maintain the goods as warranted in the contract.” *Id.*; *M.A. Mortenson Cos., Inc.*; 545 N.W.2d 394.

“Discovery of the breach” occurs as a matter of law when no reasonable mind could differ as to the date of discovery, such as when a plaintiff admits to such discovery or where the evidence clearly establishes the time of discovery. *M.A. Mortenson Cos., Inc.*; 545 N.W.2d 394; *Vlahos*, 676 N.W.2d at 678; *See also Greenbrier Village Condo. Two Ass’n v. Keller Inv., Inc.*, 409 N.W.2d 519, 524 (Minn. Ct. App. 1987) (“discovery” of an injury).

For example, in *Metropolitan Life Ins. Co. v. M.A. Mortenson Companies, Inc.*, this Court found that MetLife had “discovered the breach” as a matter of law where:

- 1) Expert reports indicated that a glass product contained defects covered by warranty;
- 2) The manufacturer was informed of the warranted defects; and 3) After being informed, the manufacturer made no promise of repair or replacement. *Id.* at 401.

The evidence presented on a motion for summary judgment plays a crucial role in determining whether the date of discovery bars a warranty claim. For example, in *Vlahos v. R & I Construction of Bloomington*, the Minnesota Supreme Court held: “**Based on the information presented to the district court**, the question of when [the homeowners] discovered or should have discovered [the builder’s] refusal or inability to ensure the home was free from major construction defects was a factual question, inappropriate for

resolution on summary judgment.” 676 N.W.2d at 679. While “discovery of the breach” is a question of fact in some cases, *Vlahos* and *M.A. Mortenson* illustrate that each summary judgment determination must be decided on a case-by-case basis. *Id.*; 545 N.W.2d 394.

In this case, the trial court had a clear basis on which it determined that Appellants first discovered major construction defects at a time that was beyond the statute of repose period. Like *M.A. Mortenson* and *Vlahos*, the trial court determined when “discovery” occurred based on the evidence presented at the time of summary judgment. The reports submitted by Appellants contained the exact date: February 2, 2005, the date of the Air Tamarack report. (A.A. 73; R.S.A. 2, 25). Like *M.A. Mortenson*, “discovery of the breach” could only then have occurred sometime thereafter, once Williams was: 1) Placed on notice of the structural defects in violation of the statutory and express warranties; and 2) Refused to remedy or repair the home. 545 N.W.2d at 401; (A.A. 73).

Mere arguments by Appellants that they discovered the structural damage when they received the Private Eye report failed to present a genuine issue of material fact for trial. *Hunt*, 384 N.W.2d at 855. A material fact issue must be supported by the evidence. *Id.* As confirmed by the correspondence from American Family to Appellants, the Private Eye report merely recommends further investigation to determine if any structural damage exists. (A.A.72-3; R.S.A. 3, 24).

The trial court correctly concluded that no reasonable mind could differ on the date that Appellants “discovered” that their home had structural damage: upon receipt of the Air Tamarack report on February 2, 2005.

D. “Discovery” Beyond the Statute of Repose Period Bars Appellants’ Warranty Claims.

The trial court correctly determined that accrual of the warranty claims beyond the repose period bars the claims as a matter of law.

The statute of repose provision in §541.051 requires that a cause of action accrue within the repose period. *Weston*, 716 N.W.2d at 640-1. Statutes of repose by their nature reimpose on some plaintiffs the hardship of having a claim extinguished before it is discovered, or perhaps before it even exists. *Koes*, 636 N.W.2d at 357.

The repose period in §541.051 acts as a complete bar to all litigation. *See Id.*; *Appletree Square I, Ltd. Partnership*, 29 F.3d 1289; *Henry v. Raynor Mfg. Co.*, 753 F.Supp. 278 (D.Minn. 1990). “While statutes of limitation are sometimes called ‘statutes of repose,’ the former bars right of action unless it is filed within a specified period of time after injury occurs, while “statute of repose” terminates any right of action after a specific time has elapsed, regardless of whether there has as yet been an injury. *Koes*, 636 N.W.2d at 357 *citation omitted*.

In this case, the ten-year statute of repose bars Appellants’ express and §327A warranty claims because they accrued beyond the ten-year repose period. On October 19, 1994, substantial completion of the home started the time frame running for the statute of repose. The repose period ended on October 19, 2004. As discussed *supra*, the

express and §327A warranties could only have accrued sometime after February 2, 2005, the date of the Air Tamarack report, which first revealed any structural damage.

The evidence presented by Appellants on summary judgment compels that summary judgment be upheld.

E. All Express Warranties Arising from The Construction Contract Are Barred.

All claims for breach of any of the express warranties arising from Appellants' construction contract with Williams are barred by the statute of limitations or, alternately, by the statute of repose.

Challenging the trial court's summary judgment memorandum, Appellants argue that they did not concede two of the express warranties arising from their construction contract with Williams. (A.A. 71). These remaining two express "warranties" provided: 1) All work on the home was to be executed in a workmanlike manner; and 2) Williams would comply with all applicable ordinances. (Appellant's Brief pp. 6 & 18) (hereinafter referred to as "warranty of workmanship" and "warranty of ordinance compliance," respectively).

At the time of summary judgment, Appellants conceded that the statute of limitations in §541.051, subd. 1(a) bars their contract claims. (A.A. 43-4). In doing so, Appellants also conceded that these two contractual provisions warranting workmanship and ordinance compliance are time-barred. These "warranties" do not extend to future performance, unlike the ten-year express warranty claim and the claim for breach of §327A warranties. *See* Section IV, C *supra*; *M.A. Mortenson Cos., Inc.*, 545 N.W.2d 394.

Instead, these “warranties” are merely contractual promises that were to have been performed by Williams at the time the construction contract was executed. The trial court correctly determined that Appellants conceded that these two contractual provisions warranting Williams’ work are barred by the statute of limitations.

Even if Appellants’ did not concede that the warranties of workmanship and of ordinances compliance are time-barred under the statute of limitations, the evidence presented at the time of summary judgment shows that these two warranties are barred by the statute of repose in §541.051, subd. 1(a). Assuming *arguendo* that these two contractual provisions are “express warranties” rather than contractual promises, their accrual is governed by §541.051, subd. 4, and they are also governed by the ten-year statute of repose in §541.051, subd. 1(a). (*See* Sections IV, A-D *supra*).

In their memoranda opposing summary judgment, Appellants state that they learned of “numerous building code violations and poor building practices” upon receipt of the February 2, 2005 Air Tamarack report. (A.A. 42). Appellants failed to present any other evidence regarding these two specific warranties. Like the ten-year express and §327A warranty claims, Appellants’ claims for breach of the express warranties of workmanship or compliance with ordinances accrued beyond the ten-year repose period.

All of Appellants’ express warranty claims are barred, by either the statute of limitation or the statute of repose, regardless of whether Appellants conceded the same at the time of summary judgment or not.

No issue of material fact remains for the trier of fact in this case. The trial court properly granted summary judgment.

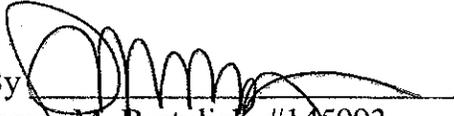
CONCLUSION

Based on the foregoing, Respondent Scherer respectfully requests that this Court affirm and uphold the trial court's grant of summary judgment, dismissing with prejudice Appellants' Complaint.

Dated: 02/02/2007.

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STATE OF MINNESOTA
IN COURT OF APPEALS

Gail Gomez, et. al.,

Appellants,

vs.

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

**RESEPPONENT SCHERER BROS.
LUMBER CO.'S CERTIFICATE
OF BRIEF LENGTH**

Respondent

vs.

David Freund, et al.

Third-Party Defendants,

Appellate Court Case No.: A06-2155

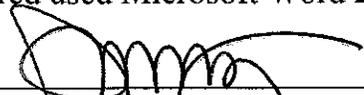
Scherer Bros. Lumber Co.,
third-party defendant,

Respondent.

I hereby certify that this brief confirms to the requirements of Minn. R. of Civ.
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