

NO. A06-2155

State of Minnesota
In Court of Appeals

Gail Gomez, et al.,

Appellants,

vs.

David A. Williams Realty & Construction, Inc.,

Respondent,

vs.

David Freund, et al.,

Third-Party Defendants,

Scherer Bros. Lumber Co.,

Respondent.

**RESPONDENT DAVID A. WILLIAMS REALTY &
CONSTRUCTION, INC.'S BRIEF**

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STATEMENT OF THE LEGAL ISSUES ON APPEAL

I. Whether Respondent DAW's Reply Memorandum Properly Responded to New Legal and Factual Arguments Raised by Appellants?

Trial Court Held: Yes.

Authorities:

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City of Duluth v. P.F.L., Inc., 431 N.W.2d 138 (Minn. App. 1988)

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Lewis v. St. Cloud State University, 693 N.W.2d 466 (Minn. App. 2005), *review denied* (June 24, 2005).

II. Whether The Issue of the Application of 541.051, Subd. 4 (1994) is Properly Before This Court?

Trial Court Held: The issue was not presented to the trial court

Authorities:

Thayer v. American Fin. Advisors, Inc., 322 N.W.2d 599 (Minn. 1982)

Soukop v. Molitor, 409 N.W.2d 253 (Minn. App. 1987)

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III. Whether Warranties Other Than the Statutory Warranty Against Major Construction Defects Are Barred by the Statute of Limitations?

Trial Court Held: Yes.

Authorities:

Vlahos v. R&I Construction of Bloomington, Inc., 676 N.W.2d 672

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IV. Whether, On the Record Before the Trial Court, Appellants' Claims of Breach of Statutory and Express Warranties Were Barred By the Statute of Repose Contained in Minn. Stat. § 541.051, Subd. 1 (2004)?

A. Whether Minn. Stat. § 541.051, Subd. 1 (2004) Applies to
Claims of Breach of Warranties Created by Minn. Stat.
§327A.02?

Trial Court Held: Yes.

Authorities:

Minn. Stat. § 541.051, Subd. 1 and 4 (2004)

Laws 2004, c. 96, § 1

Weston v. McWilliams & Assoc., 716 N.W.2d 643 (Minn.
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B. Whether There is Any Genuine Issue of Material Fact as to
When Appellants Discovered The Alleged Breach of the
Statutory Warranty Against Major Construction Defects?

Trial Court Held: No.

Authorities:

Hunt v. Mid America Employees Federal Credit Union, 384
N.W.2d 853 (Minn. 1986)

STATEMENT OF THE FACTS¹

Respondent David A. Williams Realty & Construction, Inc.,
(hereinafter “DAW”) adopts by reference the statement of facts set forth in

¹ The undersigned hereby certifies that counsel for David A. Williams Realty & Construction, Inc., authored this brief in whole.

the brief of Respondent Scherer Bros. Lumber Co. and submits the following additional statement of the case.

DAW's initial motion for summary judgment and memorandum of law raised three issues:

1. Whether certain claims made by Appellants were barred by the running of a two year statute of limitations;
2. Whether Appellants could make a prima facie case for estoppel;
and
3. Whether Appellants' claim for breach of statutory warranties was barred by their failure to provide written notice of their claims, as required by Minn. Stat. §327A.03(a). See, A.A. 17.

With respect to the issue of written notice, DAW argued that Appellants had not given written notice to DAW until May, 2005, almost ten years after Appellants first discovered conditions causing damage to their home and nine months after Appellants began the process of obtaining professional inspections of those conditions. A.A. 23-24. DAW argued that, as a matter of law, the May, 2005, notice came too late to preserve Appellants' claims of breach of statutory warranties. *Id.*

Appellants responded to this motion by conceding that certain claims were barred by the statute of limitations and by ignoring the estoppel

argument. As to the issue of notice, Appellants responded by offering the affidavit of Appellant Gail Gomez, in which she alleged that she had spoken with David A. Williams in June, 2004, and that he had told her “to contact Williams Construction’s insurance company.” A.A. 41; Affidavit of G. Gomez, ¶ 2. On the basis of this affidavit, an October 4, 2004, report prepared by the first of two companies to inspect Appellants’ home (Private Eye), and a letter from the insurer for Respondent DAW’s insurer, Appellants made three arguments:

1. That they had not discovered the existence of any alleged structural damage until receipt of the October 4, 2004, Private Eye report;

2. That they gave notice to DAW’s insurer of the contents of that report; and

3. That notice to DAW’s insurer was notice to DAW. A.A. 44-48.

The only evidence Appellants offered in support of their claim that they had discovered structural damage in October, 2004, was the Private Eye report. A.A. 42, 44-48. The report itself advised Appellants that areas “showing signs of excessive moisture intrusion and/or soft or damaged sheathing * * * **should be opened up and explored further to determine if any structural damage is present.**” R.S.A. 3. (Emphasis added.)

Appellants offered no expert opinion interpreting the Private Eye report or

stating that the conditions reported by Private Eye constituted structural damage. See, A.A. 38-50.

Appellants also submitted a second report, dated February 2, 2005, based on a January 4, 2005, inspection by Air Tamarack. R.S.A. 25 et seq. Air Tamarack had concluded that “this house has serious structural * * * problems related to the above grade exterior wall construction and rim joist construction.” R.S.A. 25.

Appellants further argued that their express written warranty were not barred by the statute of limitations because the two-year statute of limitations applicable to such claims did not begin to run until discovery of the breach, which they contended occurred upon the builder’s refusal to remedy them. A.A. 48-49.

DAW’s reply made the following points:

- The self-impeaching affidavit of Gail Gomez was not admissible.

There was, therefore, no evidentiary basis for the claim that DAW had appointed its insurer as its agent for purposes of accepting the written notice required to preserve Appellants’ statutory warranty claims.

- If the court were to accept Appellants’ claim that they had no knowledge of potential structural defects in their home until after the home had been inspected by professionals, then [Appellants] must

acknowledge that the first mention of structural defects by these professionals was made by Air Tamarack, more than 10 years after the date of substantial completion of the home. Therefore, the claim is barred by the statute of repose.

A.A. 52.

The trial court identified the two critical issues at the beginning of the hearing:

- Whether the Air Tamarack report was the first determination that there were major construction defects, actual damage to the load-bearing portions of the home. T. 5.
- If not, whether Appellants had met the six-month written notice requirement. T. 5.

Appellants specifically addressed the issue of the statute of repose at the hearing on DAW's motion for summary judgment, specifically stating that they believed there was an argument to be made to the effect that the statute of repose did not apply. That argument was, in total, that Minn. Stat. § 541.051, Subd. 4 contained no statute of repose, that it only contained a 12 year statute. T. 13. Appellants explicitly told the trial court they were "hanging [their] hat" on the argument that "this cause of action accrued within 10 years and that extension is there." T. 23.

Appellants' only other argument with respect to the application of the statute of repose consisted of the claim that it was DAW's burden to demonstrate that the Private Eye report was not evidence of the existence of structural defects. T. 26. Appellants last words on the subject were: "if that is going to be an issue then we should have additional time." T. 26.

Appellants objected to the timing of that portion of DAW's reply memorandum which suggested Appellants had not offered any admissible evidence of the existence of any structural damage and that, therefore, their entire claim should be dismissed on the merits. T. 8; T. 15. Appellants requested additional time to respond on that issue. *Id.* The trial court, however, did not rule on the issue. See, A.A. 66-74.

After the trial court issued its order granting DAW's motion, Appellants requested reconsideration. A.A. 75-76. This request contained Appellants' first specific objection to the timeliness of DAW's assertion of the statute of repose as it related to Appellants' statutory warranty claims. See, T. 1-28; A.A. 75-76. Appellants asserted that, had they been given an "adequate opportunity to respond to this notice", they would have made additional arguments and would have submitted additional evidence. A.A. 75-76. They did not offer that evidence at the time of the request for reconsideration but asserted that, if their request for reconsideration was

granted, they would offer expert opinion interpreting the results of the Private Eye report. A.A. 76.

DAW responded, asking that the trial court deny the request for reconsideration on the grounds that Appellants had not demonstrated compelling circumstances justifying reconsideration and were in fact asking for an opportunity to offer new arguments and evidence, neither of which was appropriate on reconsideration. A.A. 77-78. The trial court denied Appellants' request for reconsideration. A.A. 80.

Appellants filed their Notice of Appeal and Statement of the Case, identifying a single issue:

Whether the trial court erred in granting summary judgment dismissing Plaintiffs' claims for breach of statutory and express warranties on the grounds first raised in Defendant's reply brief?

Appellants' Brief, however, raises two additional issues: Whether the trial court erred in its interpretation and application of Minn. Stat. §541.051, Subd. 1, in determining that Appellants' statutory warranty cause of action accrued upon discovery of the breach, as opposed to their discovery of the injury; and Whether the trial court erred in finding that the statute of repose contained in Minn. Stat. §541.051, Subd. 1. Barred Appellants' claims as a matter of law. App. Br. 1-3.

STANDARD OF REVIEW

Respondent DAW agrees with the standards of review applicable to an appeal from the grant of summary judgment, as set forth in the brief of Respondent Scherer Bros. Lumber Co. (hereinafter “Scherer Bros.”) See, Scherer Bros. Brief at 4-5.

A trial court’s denial of a request to permit the filing of supplemental affidavits is reviewed under an abuse of discretion standard. See, Lewis v. St. Cloud State University, 693 N.W.2d 466 (Minn. App. 2005), *review denied* (June 14, 2005) (Applying abuse of discretion standard to denial of motion for continuance to conduct discovery before summary judgment.)

ARGUMENT

I. DAW Properly Raised the Issue of the Application of the Statute of Repose in Reply to Appellants’ Claim That They Had Discovered Structural Damage Days Before the Running of The Statute of Repose.

Minn. R. Prac. 115.04 (c) provides that the “moving party may submit a reply memorandum, limited to new legal or factual matters raised by an opposing party’s response[.]”

DAW asserted the application of the statute of repose in direct response to the legal and factual arguments made by Appellants in their response to DAW’s motion for summary judgment. DAW had argued, with respect to Appellants’ failure to provide written notice of damage pursuant

to Minn. Stat. § 327A.03 (a), that Appellants had not given notice of any loss or damage within “six months after the vendee or owner discovers or should have discovered the loss or damage.” A.A. 23-26. DAW asserted that the only written notice given to DAW came in May, 2005, 10 years after Appellants had discovered water intrusion and 9 months after Appellants began the process of obtaining professional inspections of their home in connection with that intrusion. A.A. 23-24. DAW noted that Appellants had sought the advice of counsel in connection with these problems as early as 1997, that they had consulted a local building inspector in 1997 or 1998, and that they had consulted at least two builders in connection with the problems in 1999 or earlier. A.A. 20; Deposition of L. Gomez. DAW argued, on the basis of these undisputed facts, that Appellants knew or should have known of the damage to their home long before they gave written notice to DAW in May, 2005, 9 full years after they discovered damage. A.A. 24.

Appellants chose to counter that argument by claiming that they had not discovered any structural damage until after they received the October 4, 2004, Private Eye report. A.A. 42. Specifically, Appellants argued that the Private Eye report was evidence of structural damage to their home. *Id.*

DAW replied directly to that factual allegation in 3 ways: by noting that the Private Eye report did not contain an opinion that there was structural damage to the home; by pointing out that the first specific claim of structural damage was contained in the Air Tamarack report placed in the record by Appellants; and by addressing the legal effect of Appellants' attempt to circumvent the notice issue by alleging discovery at such a late date. A.A. 52.

Appellants' attempt to place discovery of structural defects in October, 2004, was not an accident. It was a carefully planned attempt to navigate between the rock of the notice requirement and the hard place of the statute of repose. Unfortunately for Appellants, the evidence on which they chose to rely undercut their own argument. The Private Eye report did not say that there had been structural damage. Private Eye told Appellants to hire someone else to make that determination. R.S.A. 3 (Advising Appellants that certain "areas should be opened up and explored further to determine if any structural damage is present.") DAW's insurer also told Appellants that the Private Eye report did not state that there was any structural damage to their home and also advised them to conduct additional investigation. A.A. 42; G. Gomez Affidavit, ¶ 8 and Exhibit F thereto.

Faced with Appellants' factual and legal arguments in response to its motion for summary judgment, DAW had to reply to these arguments. It did so quite logically and naturally, showing that the only evidence specifically opining that structural damage existed was the February 2, 2005, Air Tamarack report and then addressing the legal significance of that fact.

Appellants ignore this sequence of events and the logical progression of the arguments they instigated. They must, because they failed to present any evidence from which the trial court, or a jury, reasonably could infer that they might have discovered structural damage before October 19, 2004, the end of the 10 year period of repose. All that was presented was the argument of counsel as to the significance of certain aspects of the Private Eye report. See, T. 8-9.² The argument of counsel is not an adequate basis for opposing or denying a motion for summary judgment. City of Duluth v. P.F.L., Inc., 431 N.W.2d 138 (Minn. App. 1988). Once Appellants opted to argue that they did not have notice of a structural defect in October, 2004, it was their burden to offer admissible evidence in support of the claim. See, Minn. R. Civ. P. 56.03, 56.05; Hunt v. IBM Mid America Employees

² Argument reported beginning at page 9 and continuing to page 10 of the transcript is noted as that of Mr. Hamilton, counsel for DAW. It is in fact that argument of Mr. Bye, counsel for Appellants, as a reading of the surrounding material will confirm.

Federal Credit Union, 384 N.W.2d 853, 855 (Minn. 1986). They cannot now lay the blame for that failure on Respondents.

Appellants knew when they filed their memorandum and supporting materials in opposition to DAW's summary judgment motion that their argument took them perilously close to the end of the period of repose. It was necessary to avoid the consequences of their own failure to take action over a period of many years before they took any steps to address conditions at their home themselves. If in fact they had or could have obtained an expert affidavit supporting the claim that they discovered structural damage in October, 2004, then it was incumbent upon them to offer that evidence as part of their response to the motion. They were not entitled to wait until after the hearing to correct their mistake.

Minn. R. Civ. P. 56.05 and 56.06 provide specific mechanisms for supplementation of argument and the record. Rule 56.05 specifically authorizes the court to permit affidavits to be supplemented or opposed by depositions or by further affidavits." 56.06 states that:

should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present, by affidavit, facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Appellants cast the situation before the trial court as one in which they were unfairly disadvantaged by an unanticipated reply to their own evidence and arguments. This just doesn't wash. Appellants opened this door and then failed to follow the procedures needed to close it, by way of leave to file a supplemental brief or evidence in opposition to DAW's motion. Having done so, they cannot now argue that the trial court abused its discretion.

Appellants chose not to avail themselves of the process provided by the rules. No affidavit was submitted explaining why they had not submitted evidence supporting their argument or why they could not have done so in the time provided for them to respond to DAW's initial memorandum. No explanation for that failure was offered at the hearing other than the claim that Appellants were taken unawares by DAW's reply.

Because the application of the statute of repose was raised in direct response to the evidence and legal arguments made by Appellants, Appellants must demonstrate that the trial court abused its discretion when it did not grant them an opportunity to file additional arguments and affidavits on this issue. See, Lewis v. St. Cloud State University, 693 N.W.2d 466 (Minn. App. 2005), *review denied* (June 14, 2005) (Applying abuse of discretion standard to denial of motion for continuance to conduct discovery

before summary judgment.) In light of Appellants' failure to file the affidavit required by Minn. R. Civ. P. 56.06, or to state on the record why they had not submitted the evidence necessary to support their own argument, the trial court cannot be found to have abused its discretion.

The trial court's decision to rule on the issue of the statute of repose was in accordance with the rules and precedent. It should be affirmed.

II. Application of a Prior Version of Minn. Stat. § 541.051, Subd. 4, Was Not Presented to the Trial Court and Is Not Properly Before the Court on Appeal.

Issues not raised before the trial court may not be considered for the first time on appeal. See, e.g., Thayer v. American Fin. Advisors, Inc., 322 N.W.2d 599 (Minn. 1982). Thus, an appellate court generally will consider only those issues which the record reflects were presented to and considered by the trial court. Soukop v. Molitor, 409 N.W.2d 253 (Minn. App. 1987). An exception may be made where the question raised for the first time on appeal is plainly decisive of the entire controversy, on its merits, where facts are undisputed, and where there is no possibility of an unfair advantage or disadvantage to any party in not having had a prior ruling on the issue. See, e.g., Byrd v. O'Neill, 309 Minn. 415, 244 N.W.2d 657 (1976); Holen v. Minneapolis-St. Paul Metro Airports Commission, 250 Minn. 130, 84

N.W.2d 282 (1957); Christianson v. Hager, 242 Minn. 41, 64 N.W.2d 35 (1954); In re Peavey's Estate, 144 Minn. 208, 175 N.W. 105 (1911).

A corollary principle is that litigants are bound by the theories on which they presented their case to the trial court. W.H. Barber Co. v. McNamara-Vivant Contracting Co., 293 N.W.2d 91 (Minn. 1979). Stated another way, where parties present their case on a particular interpretation of the law, that interpretation will bind them on appeal. See, Wooddale Builders, Inc., v. Maryland Cas. Co., 722 N.W.2d 283, 291, fn. 6 (Minn. 2006) (Stating that where parties had agreed to application of a rule of law, it was the law of the case.); Stabs v. City of Tower, 229 Minn. 552, 556, 40 N.W.2d 362, 366 (1949) (Stating that “where parties consent to try their case on a particular theory of what the law of the case is, such rule will be applied on appeal.”)

Appellants' appeal is based not on what was argued below, but what Appellants claim they **would have** argued below, given an opportunity to reconsider their positions on the issues as they themselves framed them. See, App. Br. at 12.

The most notable of the arguments made for the first time on appeal relates to the application of 2004 amendments to Minn. Stat. § 541.051, Subd. 4. See, App. Br. at 12-13, contending for the application of Minn.

Stat. § 541.051, Subd. 4, as in effect prior to August 1, 2004. **The application of the 2004 amendments to the statute was never questioned by Appellants before the trial court.** See, A.A. 38-50. To the contrary, Appellants themselves cited the amendment of the statute, pointing out that the phrase “discovery of the breach” had been retained. A.A. 47, fn. 3. Appellants in fact that relied on Koes v. Advanced Design, Inc., 636 N.W.2d 352 (Minn. App. 2002) in their argument on the application of the statutory warranties. A.A. 45. They rely on the same decision in connection with their newly raised claim that the controlling statute is that which was in effect prior to August 1, 2004. App. Br. 12. Having cited Koes in their response, Appellants had to have been aware of the availability of this argument at the time of the hearing. Appellants chose not to make the argument or to ask the court to permit them to make this argument, at any time. Even when Appellants tried to offer new arguments to the trial court, in their request for reconsideration, they did not challenge the application of the statute as amended in 2004. A.A. 75-76.

The new issue presented by Appellants is nowhere near as straightforward as their argument implies. (See App. Br. 12, alleging that “Prior to August 1, 2004, it certainly did not.”) Laws 2004, c. 96, § 1, rewrote subd. 4. The law did not specify which actions it was intended to

govern. See, *id.* The amendments were presented to the Governor on May 13, 2004, and signed by him two days later, on May 15, 2004. They were a direct legislative response to the Minnesota Supreme Court's decision in Vlahos v. v. R& I Construction if Bloomington, Inc., 676 N.W.2d 672 (Minn. 2004), announced April 1, 2004, and obviously were intended to correct the Supreme Court's determination that "warranty claims under Minn. Stat. § 327A.02 are specifically exempt from the statutes of limitation and repose set forth in Minn. Stat. § 541.051, Subd. 1(a)[.]" 676 N.W.2d at 677.

The issue Appellants seek to raise for the first time on appeal would require this court to determine, at a minimum, whether the 2004 amendments apply to all causes of action arising after their effective date or only to homes constructed after their effective date. A responsive appellate brief is not the place to address so complex an issue.

The prejudice to Respondents DAW and Scherer Bros. is obvious. Neither time nor procedural limitations permit DAW to fully address the question implicit in Appellants' new position or to research and offer evidence of the legislative history behind Laws 2004, c. 96, § 1.

If Appellants wished to challenge the application of the 2004 amendments to their claims, the time to do so was when the parties were

before the trial court. They had the opportunity to do so. They should have done so directly, both before the trial court and before this court, not merely as an aside. They cannot now contest the application of a statute to which they made no objection before summary judgment was granted. To the extent that Appellants challenge the entry of summary judgment on this ground, their appeal should be denied.

III. Claims of Breach of Warranties Other Than the Warranty Against Major Construction Defects Are Barred By the Statute of Limitations.

An underlying issue in this appeal is the nature or the warranties Appellants claim were breached, be they express or statutory, present or future warranties. The statutory warranties relied on by Appellants are identical to the express warranties found in the contract documents. Compare, A.A. 57-58; Plaintiffs' Ex. A in Opposition to Motion for Summary Judgment, page 2; *Id.*, "Minimum Performance Standards", with Minn. Stat. § 327A.02 (1994). These warranties are one and the same and each is governed by the terms of Minn. Stat. § 327A.03. Each is also governed by Minnesota appellate decisions distinguishing between present and future warranties and defining when breaches of those warranties occur.

A cause of action for breach of a statutory warranty accrues on discovery of the

breach. Minn. Stat. § 541.051, Subd. 4 (1994) and (2004); Vlahos v. R&I Construction of Bloomington, Inc., 676 N.W.2d 672, 677 (Minn. 2004).

Warranties fall into two general categories: “present warranties”, which address the condition of an object at the time of delivery and which are breached upon delivery of a nonconforming item, and future warranties, which provide a guarantee that a product will perform in the future as promised. See, Marvin Lumber and Cedar Co. v. PPG Industries, Inc., 223 F.3d 873, 879 (8th Cir. 2000); Vlahos, 676 N.W.2d at 678 and cases cited therein.

Of the various warranties Appellants claim were breached, two arguably extend to the future performance of the home: the one-year warranty against defects caused by faulty workmanship and defective materials due to noncompliance with building standards”³ and the 10 years warranty against “major construction defects.”⁴ The remaining warranties relied upon by Appellants are the warranty that “all the work is to be executed in a workmanlike manner in accordance with the plans and

³ Defined when this home was built as “the structural, mechanical, electrical, and quality standards of the home building industry for the geographic area in which the dwelling is situated.” Minn. Stat. § 327A.01, Subd. 2 (1994).

⁴ “Actual damage to the load-bearing function * * * which vitally affects or is imminently likely to affect use of the dwelling for residential purposes to the extent the home becomes unsafe, unsanitary or otherwise unlivable.” Minn. Stat. § 327A.01, Subd. 5 (1994).

specifications” and that “the builder shall comply with all health and building ordinances that are applicable.” See, Plaintiffs’ Ex. A in Opposition to DAW’s Motion for Summary Judgment, pages 2 and 3. Both of these warranties parallel the one-year “faulty workmanship and defective material” statutory warranty, but neither warranty contains any language promising future performance.

If DAW breached these present warranties, the breach occurred when the home was sold to Appellants. The undisputed evidence is that Appellants learned of these breaches within the first year, the same evidence that compelled Appellants to concede that their common law claims were barred by the running of the two year statute of limitations. These claims, too, are barred by the statute of limitations.

The warranty created by Minn. Stat. § 327A.02, Subd. 1 (a), on the other hand, contains virtually identical prefatory language (“during the one-year period from and after the warranty date”) to that which the Vlahos court relied upon in holding that the statutory warranty against major construction defects is a future warranty. See, Vlahos, 676 N.W.2d at 678. (“during the ten-year period from and after the warranty date.”) Consequently, it must be considered a future warranty as well. Under Vlahos, the breach of such a warranty occurs when the owner discovers or should have discovered that

the builder is unable or unwilling to ensure the home is free from the covered defects. Id.

Again, the undisputed evidence is that Appellants were aware of defects allegedly caused by faulty workmanship and defective materials within the first year of occupancy. The undisputed evidence is that they requested action by the builder for the next 4 years and that, when the builder acted, the defects were not repaired.

On these facts, Appellants' claim for breach of the warranty contained in Minn. Stat. § 327A.02, Subd. 1 (a) is barred by reason of their failure to commence an action for that breach within two years of its discovery. The trial court's entry of summary judgment on this claim, therefore, must be affirmed.

IV. Appellants' Claim for Breach of the Statutory Warranty Against Major Construction Defects is Barred by the Running of the Statute of Repose.

The court must determine two things in connection with this issue: A. Does the statute of repose contained in Minn. Stat. § 541.051, Subd. 1 (2004) apply to claims of breach of statutory warranties created by Minn. Stat. § 327A.02? B. If so, did the trial court err in granting summary judgment on that basis?

A. Minn. Stat. § 541.051, Subd. 1 (2004) apply to claims of breach of statutory warranties created by Minn. Stat. § 327A.02.

We are required to apply the plain language of the statute. See, Weston v. McWilliams & Assoc., 716 N.W.2d 634, 639 (Minn. 2006).

Minn. Stat. § 541.051, Subd. 1 (a) (2004) states that:

Except where fraud is involved no action by any person in contract, tort or otherwise to recover for any injury to property * * * arising out of the defective and unsafe condition of an improvement to real property * * * shall * * * accrue more than ten years after substantial completion of the construction.

The statute defines accrual of a cause of action in three separate ways. With respect to claims for direct injury other than those based on breach of an express or statutory warranty, a cause of action accrues “upon discovery of the injury.” Minn. Stat. § 541.051, Subd. 1 (b) (2004). Claims for contribution or indemnity accrue upon payment of a final judgment, award, or settlement. *Id.* Claims for breach of express or statutory warranty accrue upon discovery of the breach. See, *id.*, Subd. 4, providing that such claims shall be brought within two years of discovery of the breach and that claims accruing during the ninth or tenth year after the warranty date may be brought within two years of the discovery of the breach but in no case more than 12 years after the effective warranty date.

The statute does not state that express and statutory warranty claims are not subject to the period of repose established by subdivision 1 (a). The statute does not say that express and statutory warranty claims are subject to a 12 year statute of repose. The statute says is that **no claim**, other than one based on fraud, **may accrue more than ten years after the date of substantial completion** of the construction. This language is explicit, unambiguous, and beyond debate.

Appellants, however, ask this court to read into subdivision 4 precisely the language deleted by Laws 2004, c. 96, § 1: “This section shall not apply to * * * actions based on breach of statutory warranties * * * or to actions based on breach of an express written warranty[.]” Appellants argue, in effect, that the Legislature did not intend to bring such claims within the reach of the statute of repose when it eliminated this language from the statute. App. Br. at 13-14. The argument defies both common sense and the dictate that the courts limit themselves to the plain language of this statute. See, e.g., Weston, 16 N.W. 2d at 639.

The trial court correctly held that the statute of repose applies to claims of breach of both express written warranties and statutory warranties. This holding should be affirmed.

B. There Is No Genuine Issue of Material Fact As to the Discovery of the Breach of the Statutory Warranty Against Major Construction Defects.

Appellants had the burden of producing specific evidence that they knew of a major construction defect and that DAW was unable or unwilling to repair any such defects before October 19, 2004, the date on which the ten year period of repose ran and extinguished all claims they may have had against DAW. See, Hunt v. IBM, supra. Appellants themselves chose to assert that discovery occurred in early October, 2004. They never presented any evidence in support of the claim. The only evidence submitted by Appellants stating that any structural damage had occurred was the February 2, 2005, Air Tamarack report, based on a January 4, 2005, inspection. If Appellants did not know that structural damage existed before Air Tamarack inspected, they cannot have advised DAW of the existence of structural damage or known that DAW would refuse or be unable to repair any such damage.

The evidence relied upon by Appellants, the Private Eye report of October 4, 2004, effectively states that **the author of the report does not know whether structural damage exists**. R.S.A. 3. He told Appellants to hire someone else to make that determination. Id. Appellants took that advice and hired Air Tamarack, which did exactly what Private Eye had

recommended. Air Tamarack opened up the walls of the house and inspected the structure for damage. R.S.A. 3 (recommendation); R.S.A. 57 (photos showing openings in walls made during Air Tamarack inspection).

Appellants themselves have argued that they did not know of the existence of structural damage until told by a professional that it existed. A.A. 46. DAW accepted the essence of that argument, for the purposes of the summary judgment motion, but demonstrated to the trial court that **the evidence upon which Appellants relied in support of the claimed discovery date was silent on the existence of structural damage.** Relying on Appellants' own evidence, DAW argued (and the trial court properly found) that the existence of structural damage was first identified by Air Tamarack in its January 4, 2005, inspection.

There was no genuine issue of material fact, because the only evidence of structural damage was the Air Tamarack report, prepared on the basis of an inspection conducted more than two months after the ten year period of repose had run. It is irrelevant whether the cause of action would have accrued on the date of the inspection or after Appellants gave written notice of the damage to DAW in May, 2005, and DAW took no action in response. Both occurred well after October 19, 2004. As a result, no cause of action based on structural damage to the home could accrue at all,

because Minn. Stat. § 541.051, Subd. 1 (a) precluded the accrual of **any** cause of action, other than one based on fraud, after that date.

The trial court properly held that Appellants' claim for breach of the statutory warranty against major construction defects was barred by the statute of repose. There was no evidence before the trial court giving rise to a genuine issue of material fact as to when Appellants first learned that structural damage had occurred. The trial court's grant of summary judgment on this ground, therefore, should be affirmed.

CONCLUSION

The application of the statute of repose to Appellants' claims was raised in direct reply to factual and legal arguments made by Appellants in their responsive pleading.

Appellants did not question the application of Minn. Stat. § 541.051, Subd. 1 and 4 (2004) to their claims before the trial court, before or after summary judgment was rendered. Appellants are bound by the arguments they made below. The issue, therefore, is not properly before this court.

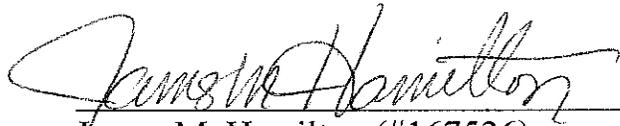
All claims of breach of warranties other than the statutory warranty against major construction defects are barred by the applicable statutes of limitation.

The trial court properly ruled that Appellants' claim for breach of the statutory warranty against major construction defects was barred by application of the statute of repose, as a matter of law.

In light of the above, Respondent DAW requests that the judgment dismissing Appellants' claims be affirmed.

Dated: February 7, 2007.

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