

NO. A05-0222

State of Minnesota
In Court of Appeals

TERRY L. ITTEL AND GINA L. ITTEL,
Appellants,

v.

JEROME PIETIG AND PIETIG BROS, INC.,
Respondents,

vs.

BERGSTROM STUCCO, INC.; SCHERER BROS.
LUMBER COMPANY; JAMES NOREEN, d/b/a NOREEN
CONSTRUCTION; AND DAVID MOORE, d/b/a
MOORE LATHING AND d/b/a MOORE STUCCO,
Respondents.

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The plain language of Minn. Stat. § 327A.04 restricts the prospective waiver of statutory home warranties. As a result, a home warranty breach that is undiscovered and does not yet exist at the time of a settlement agreement cannot be waived in that agreement, unless the agreement contains a substitute warranty.

Respondents continue to mischaracterize Appellants' position as an attempt to invalidate home construction settlement agreements. Parties are free to settle all claims that were or could have been brought in a lawsuit, including statutory home warranty claims. The sole impact of Minn. Stat. § 327A.04 is to restrict a waiver of a claim for a home warranty breach that is undiscovered and does not yet exist at the time of the settlement agreement. This is no "head on collision" between settling cases and the clear statutory language.

Respondents' briefs are notable for what they do not say. None attempt to distinguish, through statutory construction or otherwise, the plain language of Minn. Stat. § 327A.04, which restricts a waiver of a statutory home warranty contained in "any agreement" and any "contract or otherwise." There is no ambiguity or uncertainty in the broad coverage of the statute, and Respondents have not attempted to find any.

Respondent Noreen's *res judicata* argument, raised for the first time on appeal, does not bar Appellants' claim. As the cases cited by Noreen make clear, *res judicata* only applies where a claim could have been joined in a first action, but was not. Here, Appellants were incapable of bringing the presently asserted major construction defect

claims in the prior case because the major construction defect claims were undiscovered and did not yet exist at the time of the prior action.

I. Because of the plain language of Minn. Stat. § 327A.04, a settlement agreement cannot be construed to waive Appellants' remaining statutory home warranty with respect to a breach of the warranty that remains undiscovered, and, in light of the Minnesota Supreme Court's *Vlahos* decision, does not yet exist as of the date of the settlement agreement.

Respondents continue to mischaracterize Appellants' position as an attempt to invalidate the previous settlement agreement and prevent settlement of home construction cases. *See Resp't. Pietig Br. at 4* ("In a desperate attempt to invalidate the Mutual Release . . ."); *Id. at 7* (No facts alleged "that would justify setting aside the Release."); *Resp't. Bergstrom Br. at 9* ("Without the ability to settle claims, no incentive would exist to encourage settlements."). Minn. Stat. § 327A.04 does not prevent parties from settling all claims asserted or that could have been asserted in a dispute, including any statutory home warranty claims that were asserted or could have been asserted. Because of Minn. Stat. § 327A.04, however, a settlement agreement cannot be interpreted to waive the statutory new home warranty with respect to major construction defects that are then undiscovered and do not yet exist. The public policy favoring case settlement and the waiver-limiting provisions of Minn. Stat. § 327A.04 are not at odds with one another. "Invalidating" or "setting aside" the settlement agreement is not an issue in this case.¹

¹ Respondents' briefs argue that appropriate bases for setting aside settlement agreements (mistake, fraud, wrongful concealment, etc.) are not present in this case. These arguments are irrelevant since Appellants do not seek to set aside the settlement agreement. Respondent Noreen at least correctly understands Appellants' position:

This case is a perfect example of the appropriate balance between case settlements and recognition of the plain language of Minn. Stat. § 327A.04. Appellants closed on the purchase of their property on February 11, 2000. Accordingly, they have a statutory warranty against major defects that lasts until February 11, 2010. *See Minn. Stat. § 327A.02, subd. 1(2)*. Shortly after moving into the home they noticed drain tile problems in their yard and brought a lawsuit for these problems based upon breach of contract and breach of the Consumer Fraud Act. *RA 15-18*. That drain tile lawsuit was settled on November 1, 2002. As part of the settlement agreement, Appellants released all claims “of whatever kind and nature, whether known or unknown, suspected or unsuspected, which Ittels now have or may have against Pietig.” *AA 16*. The case was dismissed with prejudice as a result of the settlement agreement. It is undisputed that this settlement agreement was effective to settle and dismiss both claims asserted in the drain tile lawsuit, as well as any other claims that Appellants could have brought, but chose not to. Although Appellants chose not to bring a statutory home warranty claim based upon the drain tile problems, both the broad language of the settlement agreement and principles of *res judicata* effectively barred such a claim from later being asserted. *See, e.g., Amalgamated Meat Cutters & Butcher Workmen of N. Amer. v. Club 167, Inc.*, 295 Minn. 573, 204 N.W.2d 820 (1973) (*Res judicata* will bar a second claim if “the same evidence will support both judgments.”). The only restriction imposed by Minn. Stat. § 327A.04, was to prevent interpretation of the drain tile agreement as a waiver of the

“Ittels do not contend that their voluntary settlement or the release they provided is invalid.” *Resp’t. Noreen Br. at 4*.

seven years remaining on Appellants' statutory home warranty; that is, as a waiver of a major construction defect that had not been discovered and did not exist as of the date of the drain tile agreement.

Respondents' position in this case reflects a basic misunderstanding of the nature of the statutory home warranty: a belief that the statutory home warranty is concerned solely with defective conditions that exist at the time the house is built. If all defective conditions are present when the home construction is completed, Respondents argue, a complete settlement agreement must be construed so as to release any such pre-existing defects. For example, in discussing why the anti-waiver provisions in the Age Discrimination & Employment Act do not parallel similar provisions in Minn. Stat. § 327A.04, Respondent Pietig argues as follows:

The reasoning which applies to preclude a waiver of future claims under the Age Discrimination & Employment Act simply does not apply in the residential home construction context. The claims relating to construction defects and/or moisture intrusion arise out of the construction of the home, a past event, and can therefore can [sic] be resolved in their entirety.

Resp't. Pietig's Br. at 14. The Minnesota Supreme Court, however, has made it clear that the statutory home warranties apply to more than those claims that arise at the time the home is built. Instead, the statutory warranty stands as a guaranty of future performance, the breach of which does not even exist until actual damage occurs and is discovered.

In *Vlahos v. R&I Construction of Bloomington, Inc.*, 676 N.W.2d 672 (Minn. 2004), the housing contractor argued— as do Respondents in the case before us — that all construction defects were created and present upon completion of construction: “R&I

contends that the plain language of Minn. Stat. § 327A.02, subd. 1(c), provides that the alleged construction defect must be created during and be present upon completion of construction.” *Id.* at 679. The Minnesota Supreme Court rejected this argument, noting that “the definition of ‘major construction defect’ in the statutory new home warranty extends to actual damage to load-bearing portions of the dwelling occurring after the completion of construction.” *Id.* at 681. The Minnesota Supreme Court reasoned as follows:

A warranty of future performance provides a guarantee that the product will perform in the future as promised. *Church of the Nativity of Our Lord v. WatPro, Inc.*, 491 N.W.2d 1, 6 (Minn. 1992), *overruled on other grounds by Ly v. Nystrom*, 615 N.W.2d 302, 314 n. 25 (Minn. 2000). The statutory new home warranty at issue in this case functions much like the express warranty of future performance we addressed in *WatPro*. In that case, we addressed the question of whether a warranty promising to maintain a roof in a watertight condition for a period of 10 years was a warranty that explicitly extended to future performance under Minn. Stat. § 336.2-725 (1990). *WatPro*, 491 N.W.2d at 6. We held that the guarantees “extended to the future performance of the goods, expressly warranting that the roofs would remain watertight for ten years.” *Id.* Here, the statutory home warranty guarantees that “during the ten-year period from and after the warranty date, the dwelling shall be free from major construction defects. Minn. Stat. § 327A.02, subd. 1(c). Like the warranty in *WatPro*, the statutory new home warranty explicitly extends to future performance.

Id. at 678.

Accordingly, statutory home warranty breaches are not considered by the Minnesota Supreme Court to be a collection of hidden, unknown causes of action that reveal themselves at some later date. Instead, such a breach does not even exist until the home damage occurs and is discovered. In light of *Vlahos*, therefore, Respondents are

arguing that the drain tile agreement must be viewed as waiving not only claims that were or could have been asserted, but also claims that did not even exist as of the date of the drain tile settlement agreement. If Minn. Stat. § 327A.04 means anything at all, it must be understood to restrict the waiver of Appellants' remaining seven years of their statutory home warranty with respect to breaches that were undiscovered and did not even exist at the time of the waiver.

II. Appellants are not, as Respondents suggest, arguing that a party has the right to sue twice for the same defect.

Respondent Pietig also overstates Appellants' position by claiming that, under Appellants' interpretation of Minn. Stat. § 327A.04, a home owner would have the right to sue for the same defect again and again. *See Resp't. Pietig Br. at 12* ("A settlement agreement that would require the settling builder or contractor to provide a substitute warranty offering substantially the same protection for future claims and damages would effectively allow a home owner to sue a builder, recover settlement monies, execute a release, and then immediately sue the builder again for the same alleged defects.")

Appellants' position is that Minn. Stat. § 327A.04 only restricts waiver of the statutory warranty with respect to claims that do not yet exist at the time of the waiver. This creates no risk that parties will be permitted to sue twice for the "same alleged defects." If Appellants were to bring a second set of claims relating to the drain tile problem, it would run afoul of the drain tile settlement agreement. Minn. Stat. § 327A.04, however, would have no impact because the drain tile problem was a breach that occurred and was discovered during a portion of the ten year warranty that had

expired as of the time of the drain tile agreement. (That is, the drain tile defect was discovered and caused damage during the two years of the statutory home warranty that preceded the drain tile agreement.) Moreover, bringing a second claim for the same defect is barred by *res judicata*, which prevents a party from bringing a second claim based upon the same evidence that supported a prior claim. *See Resp't. Noreen Br. at 10* (*Res judicata* bars “any and all claims that were brought or could have been brought”).

III. Respondents have not attempted to distinguish the plain language of Minn. Stat. § 327A.04.

Minn. Stat. § 327A.04 clearly provides that the remaining portions of a statutory home warranty “cannot be waived or modified by contract or otherwise” and that these restrictions apply to “any agreement which purports to waive” the statutory warranties. Respondents do not argue that this statute is unconstitutional or otherwise defective. Likewise, Respondents do not suggest any statutory construction, or identify any language that would exclude settlement agreements from the statute’s broad coverage of “any agreement.”

For the first time on appeal, however, Respondents appear to argue that Minn. Stat. § 327A.04 is not plain and unambiguous. *See Resp't. Pietig's Br. at 14* (“Appellants’ reasoning would apply if the Trial Court had been called on to construe a plain and unambiguous statute.”). Pietig argues that ambiguity arises from the fact that Minn. Stat. § 327A.04 “is silent on the issue of settlement of breach of warranty claims.” *Id.* Because of this “silence,” Pietig argues, it is necessary to consider “legislative intent,

the purpose of the statute, and the consequences of Appellants' statutory interpretation."
Id.

Is Minn. Stat. § 327A.04 "silent" with respect to a statutory warranty waiver contained in a settlement agreement? The anti-waiver provisions in the statute apply to "any agreement which purports to waive" the statutory warranty whether contained in a "contract or otherwise." No more expansive description can be imagined. Clearly the drain tile settlement agreement is an "agreement" and, Respondents' position in this case surely relies on establishing that the settlement agreement waived the remaining years of Appellants' statutory warranties. The statute is "silent" on settlement agreements only in the sense that it is silent on all types of agreements. A specific reference in the statute to settlement agreements or any other type of agreement is not necessary because the statute applies to "any agreement." Moreover, Minn. Stat. § 327A.03 provides an extensive list of exceptions to the application of the statutory home warranty. If the legislature had chosen to exempt settlement agreements from its expansive definition of "any agreement," we must assume that it would have included such agreements in this long list of exceptions.

Even if there is statutory "silence" that creates an "ambiguity," which in turn requires considering "legislative intent, the purpose of the statute, and the consequences of Appellants' statutory interpretation," Appellants have suggested nothing on these topics that advances their case. Respondents have supplied no evidence of "legislative intent," in the form of legislative history or otherwise. As to the "purpose of the statute,"

Respondents are clearly mistaken in drawing a distinction between agreements to waive the statutory warranty at closing of the house purchase and later waiver agreements *See Resp't. Pietig Br. at 15*. Minn. Stat. § 327A.04, subd. 2 makes clear that the waiver of statutory home warranties is restricted not only in any agreement executed at the time of purchase, but also “at any time after a contract for the sale of a dwelling is entered into.” As to the “consequences of Appellants’ statutory interpretation,” Respondents have misstated Appellants’ interpretation, claiming that Appellants are requiring courts to make a stark choice between settlements and statutory home warranties. That is not Appellants’ position. All claims existing at the time of a settlement, whether known or unknown, can be settled by settlement agreement. The sole impact of Minn. Stat. § 327A.04 is to restrict waivers of statutory warranties with respect to breaches that are undiscovered and do not yet exist at the time of the waiver.

Respondent Noreen similarly adopts Respondent Pietig’s mistaken “silence-of-the-statute” analysis, but goes one step further. Noreen argues that Appellants have waived their ability *to sue* on the statutory home warranty. Simultaneously, however, Noreen takes the position that, in the drain tile agreement, “there was no waiver, modification, or exclusion of the statutory new home warranties, and thus the requirements of Chapter 327A for waiver, modification or exclusion are inapplicable.” *Resp't. Noreen Br. at 6-7*. This is a truly remarkable position. Under Noreen’s interpretation, Appellants’ remaining statutory warranty is intact, but after the drain tile agreement Appellants are prohibited from bringing any claims on this warranty. This is,

of course, saying there is no warranty at all. Disagreeing with Noreen on this point are Respondent Pietig and the Trial Court, who at least both argue that there was a “head on collision” between the settlement agreement and Minn. Stat. § 327A.04 that needed to be resolved. If, as Noreen believes, the drain tile agreement did not act to waive future warranty claims, then such warranty claims surely must survive.

IV. Appellants’ right to sue for a breach of warranty is not barred by *res judicata* where the breach did not yet exist at the time the prior case was dismissed.

For the first time on appeal, Noreen argues that the principles of *res judicata* prevent Appellants from making claims for future breaches of the statutory home warranty. This issue was not raised in or considered by the Trial Court, and therefore, cannot be raised for the first time on appeal. 2 Dunnell Minn. Digest Appeal and Error §5.00 (5th Ed. 2002). In any event, *res judicata* does not bar Appellants’ statutory home warranty claim in this case. One need go no further in this analysis than to quote from the precise cases cited by Respondent Noreen. In *Amalgamated Meat Cutters & Butcher Workmen of N. Amer. v. Club 167, Inc.* 295 Minn. 573, 204 N.W.2d 820, 821 (1973), the Minnesota Supreme Court held that a stipulated dismissal with prejudice bars a second claim if “the same evidence will support both judgments.” In *Gulbranson v. Gulbranson*, 408 N.W.2d 216 (Minn. App. 1987) the Court of Appeals stated: “*Res judicata* as merger or bar forbids a party from withholding a claim from the initial action, where it could be joined and easily adjudicated, in order to retain a cause of action.” *Id.* at 218. Not only could the major construction defects at issue in this case not have been “joined

and easily adjudicated” in the prior lawsuit, they were undiscovered and did not even exist until well after the drain tile lawsuit was settled.

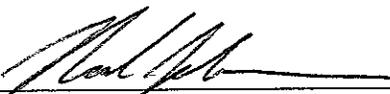
Respondent Noreen’s discussion of *res judicata* is helpful, however, in putting to rest the overstated concerns raised about the inability to settle claims and Respondent Pietig’s argument that home owners could sue several times for the “same alleged defects.” *Resp’t. Pietig Br. at 12. Res judicata* would bar any such “same defect” claims.

CONCLUSION

We respectfully request that the Court of Appeals reverse the Trial Court. The plain language of Minn. Stat. § 327A.04 restricts a home warranty waiver contained in “any agreement.” This restriction clearly applies to a settlement agreement that – Respondents argue – waives the remaining years of Appellants’ statutory home warranty with respect to a breach that had not been discovered and did not yet exist at the time of the settlement agreement.

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