

NO. A06-1413

State of Minnesota
In Court of Appeals

Mark and Laura Sletto, individually and as parents and natural guardians of Travis Sletto, and Katrina Sletto, individually,
Plaintiffs/Appellants,

vs.

Wesley Construction, Inc., d/b/a Wesley Homes, a Minnesota Corporation, Dale Kleven, individually, ABC Corporation, John Doe and Mary Roe,
Defendants/Respondents,

and

Wesley Construction, Inc., d/b/a Wesley Homes, a Minnesota Corporation,
Defendant and Third-Party Plaintiff,

vs.

Steve Johnson, d/b/a Quality Construction, Larry Start, d/b/a Starr Marketing, Automated Building Components, Inc., and SNE Enterprises, Inc., d/b/a Crestline Windows and Doors,
Third-Party Defendants.

**REPLY BRIEF OF APPELLANTS
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TABLE OF AUTHORITIES

Cases

Baune v. Farmers Ins. Exch., 166 N.W.2d 335 (Minn. 1969).....3

Cooper v. Watson, 187 N.W.2d 689 (Minn. 1971)2, 3, 4, 5

K.E. v. Hoffman, 452 N.W.2d 509 (Minn. App. 1990).....3

Larson v. Babcock & Wilcox, 525 N.W.2d 589 (Minn. 1994).6, 7

Lee v. Industrial Elec. Co., 375 N.W.2d 572 (Minn. App. 1985)2, 4

Midwest Family Mut. Ins. Co. v. Bleick, 486 N.W.2d 435 (Minn. App. 1992)2, 3

Muckler v. Buchl, 150 N.W.2d 689 (Minn. 1967)3

Vlahos v. R&I Const. of Bloomington, 676 N.W.2d 672 (Minn. 2004).....5

Statutes

Minn. Stat. §541.051 (2002).....4, 5

Minn. Stat. §541.051 (2004).....5

Minn. Stat. 645.21.....2

Treatises

50 Am. Jur., Statutes, § 476.....5

Black’s Law Dictionary (7th ed.).....6

STATEMENT OF THE ISSUES

- I. The Date of The Accrual Of A Cause of Action Is Relevant And Determinative For Purpose of Application of A Statute of Repose or Any Legislative Changes.
- II. The Trial Court Retroactively Applied the Legislative Changes to Minn. Stat. §541.051 To A Pre-Existing Cause of Action.

ARGUMENT

I. The Date of The Accrual Of A Cause of Action Is Relevant And Determinative For Purpose of Application of A Statute of Repose or Any Legislative Changes.

At issue on appeal is the District Court's error in applying the newly-enacted 2004 statute of repose to a cause of action that accrued well before the effective date of the new statute. Respondent incorrectly argues that the date of an accrual of a cause of action is relevant only to interpretation and application of statutes of limitation, not statutes of repose. See Resp. Memo. at p. 10. Further, Respondent argues that the Trial Court did not and did not have to retroactively apply the statute of repose in Minn. Stat. §541.051 because the Appellants did not commence their action until after the changes to the statute became effective. Finally, Respondent attempts to redefine the term "cause of action" to mean existing actions, commenced and served upon the defendants. See Resp. Memo. at p. 12.

Minnesota Courts have routinely noted the importance of the accrual of a cause of action or date of injury when applying recently enacted changes to a statute, including when interpreting the application of Minn. Stat. §541.051. Midwest Family Mut. Ins. Co. v. Bleick, 486 N.W.2d 435, 438 (Minn. App. 1992); Lee v. Industrial Elec. Co., 375 N.W.2d 572 (Minn. App. 1985); Cooper v. Watson, 187 N.W.2d 689 (Minn. 1971). Minn. Stat. §645.21 provides:

No law shall be construed to be retroactive unless clearly and manifestly so intended by the legislature.

(emphasis added).

The Respondent attempts to distinguish from the proposition set forth Bleick, namely that “when a statute is enacted that applies to existing causes of action, application of that statute is retroactive,” by noting that one of the cases relied upon by the Court in Bleick involved an action that had already been commenced at the time changes to the applicable statute were enacted. Bleick, 486 N.W.2d at 438; Resp. Memo. at p. 12. *citing* K.E. v. Hoffman, 452 N.W.2d 509, 512 (Minn. App. 1990). However, the cases cited by the Court in Bleick in this discussion clearly place the emphasis and importance on when the injury occurred, not when the lawsuit was commenced. See Cooper v. Watson, 187 N.W.2d 689, 692-93 (Minn. 1971) (injury before statute’s effective date); Baune v. Farmers Ins. Exch., 166 N.W.2d 335, 336-37 (Minn. 1969); Muckler v. Buchl, 150 N.W.2d 689, 697 (Minn. 1967).

In Cooper for example, the Court refused to retroactively apply statutory changes to an existing cause of action where the injury providing the basis for the suit occurred before the changes to the statute were enacted. Cooper, 187 N.W.2d at 692-93. The pertinent facts in Cooper are similar to the present case in that both cases were commenced after the enactment of changes to an applicable statute, yet in both cases the injury suffered (car accident in Cooper; breach of statutory warranty in this matter) occurred before the changes became effective. See Id.

In Cooper, the accident at issue occurred on December 12, 1968. Id. Amendments to a pertinent statute became effective on September 1, 1969. Id. Plaintiff served his complaint on November 26, 1969 and third-party claims (those at issue on appeal) were

commenced and served on December 16, 1969. *Id.* The Court refused to apply the changed statute retroactively and noted that the statute must be construed to affect “only claims for indemnity arising from injuries occurring on or after the effective date.” (emphasis added) *Id.* at 694.

Further, the Court of Appeals refused to apply a re-enacted version of Minn. Stat. §541.051 which became effective August 1, 1980 to a cause of action which resulted from an injury on June 10, 1980. *Lee v. Industrial Elec. Co.*, 375 N.W.2d 572 (Minn. App. 1985) *aff'd without opinion* 389 N.W.205 (Minn. 1986). The plaintiffs in *Lee* did not commence their action until June 1981, over a year after the injury and ten months after the changes to §541.051 became effective. *Id.* at 573. Relying on Minn. Stat. §645.21, the Court held there was no “clear legislative intent” to apply a statute retroactively. *Id.* at 575.

Likewise in this matter the Respondent cannot point to, and the Appellants are not aware of, any legislative intent whatsoever to apply the current statute of repose to causes of action that accrued at a time when there was no statute of repose for warranty claims made pursuant to Minn. Stat. Ch 327A. To apply the new law to an existing cause of action would improperly divest the Appellants and all other similarly situated homeowners of an already vested right.

II. The Trial Court Retroactively Applied the Legislative Changes to Minn. Stat. §541.051 To A Pre-Existing Cause of Action

The version of Minn. Stat. §541.051 in effect at the time the Appellants' cause of action accrued stated as follows:

This section shall not apply to actions based on breach of the statutory warranties set forth in section 327A.02, or to actions based on breach of an express written warranty, provided such actions shall be brought within two years of the discovery of the breach.

(emphasis added). As a result, there was no statute of repose for claims made under Chapter 327A in 2003 when the Slettos' discovered Wesley's breach of its statutory warranty obligations. Minn. Stat. §541.051, Subd. 4 (2002); Vlahos v. R&I Const. of Bloomington, 676 N.W.2d 672, 677 (Minn. 2004). This section was amended, effective August 1, 2004 to implement for the first time a statute of repose applicable to claims like those asserted by the Appellants. See (A.165).

50 Am. Jur., Statutes, § 476, a defines a "retrospective law" as follows:

A retrospective law, in the legal sense, is one which takes away or impairs vested rights acquired under existing laws, or creates a new obligation and imposes a new duty, or attaches a new disability, In respect of transactions or considerations already past. It may also be defined as one which changes or injuriously affects a present right by going behind it and giving efficacy to anterior circumstances to defeat it, which they had not when the right accrued, or which relates back to and gives to a previous transaction some different legal effect from that which it had under the law when it occurred.

Another definition of a retrospective law is one intended to affect transactions which occurred, or rights which accrued, before it became operative, and which ascribes to them effects not inherent in their nature, in view of the law in force at the time of their occurrence.

(emphasis added). See Cooper v. Watson, 187 N.W.2d 689, 692-93 (Minn. 1971).

While the Respondent attempts to argue that the Appellants did not have an "existing cause of action" at the time the changes to §541.051 became effective, such an argument is contrary to the very definition of the term. "Cause of action" is defined as:

1. A group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in court from another person.
2. A legal theory of a lawsuit.

(emphasis added). Black's Law Dictionary (7th ed. 2000). It is uncontested that the facts which gave rise to the Appellants' lawsuit and which entitled them to bring an action against the Respondent occurred in the Spring or Summer of 2003 when the Appellants: (1) discovered building code violations, construction defects and damage to their Home, (2) placed the Respondent on notice, and (3) the Respondent failed to fulfill its statutory warranty obligations. See (A.180-183).

Despite Respondent's assertions, it is irrelevant when the lawsuit is commenced for purposes of deciding (absent a clear legislative intent to the contrary) which statute of repose to apply to a cause of action. The Respondent discusses the decision in Larson v. Babcock & Wilcox, determining it to be inapposite to the arguments asserted in the Appellants original brief. See Respondent's Memo., p.13-14, fn 5; Larson v. Babcock & Wilcox, 525 N.W.2d 589, 591-92 (Minn. 1994).

The Respondent notes that in Larson, a previously enacted repose period, which had already run, provided the defendant with a "vested right not to be sued under the statute of repose." 525 N.W.2d at 591. In Larson, a subsequent amendment to the statute of repose, which would have provided the plaintiffs with the ability to assert a claim against the defendant was held to be inapplicable as it would be a retroactive application of changes made to Minn. Stat. §541.051. Id. Respondent is apparently (and inconsistently) arguing that while a vested right not to be sued is protected against the

retroactive application of a statutory amendment, a vested right to sue is not afforded the same protection against the retroactive application of later-enacted changes. The Respondent cannot have it both ways. Further, to conclude, as Respondent does, that the Appellants had no right vest in 2003 would require the Court to make the untenable conclusion that the 2004 changes were already in effect at the time the Appellants cause of action accrued in 2003. Such a result defies all logic.

Despite Respondent's assertions, the Appellants clearly had a right to sue which vested in 2003. There was no statute of repose in effect at that time which governed or precluded their claims and, therefore, they had a viable cause of action to assert against the Respondent. Like the defendant in Larson, the Appellants had a vested right in 2003 and the District Court erred in applying the current statute of repose to divest them of that right.

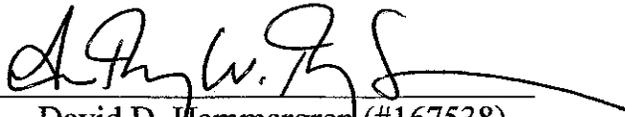
CONCLUSION

For the above stated reasons, Appellants respectfully request that this Court reverse the order of the District Court granting the Respondent's motion for summary judgment dismissing Appellant's claims, and remand this case to the District Court for trial. Specifically, Appellants ask that this Court find that: (a) the applicable Statute of Repose is that which was in effect at the time the Slettos' causes of action accrued; and (b) a genuine issue of material fact exists as to whether Wesley Construction fraudulently concealed the Slettos' causes of action.

Respectfully Submitted,

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Dated: 9/28/06

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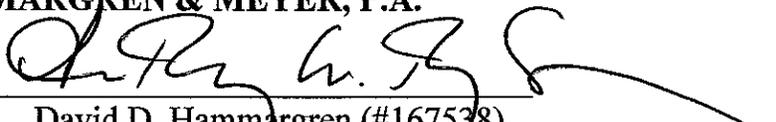
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Certificate of Compliance

I hereby certify that the Appellant's Reply Brief conforms to the requirements as provided in Rule 132 of the Minnesota Rules of Civil Appellate Procedure. This Brief is produced using a proportional font with Microsoft Word 2003. The length of the brief is 2,057 words.

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