

Case 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 Starr, d/b/a Starr Marketing, Automated Building Components, Inc. and SNE Enterprises, Inc., d/b/a Crestline Windows and Doors,

Respondents/Third-Party Defendants.

**BRIEF AND APPENDIX OF RESPONDENT, SNE ENTERPRISES, INC.,
D/B/A CRESTLINE WINDOWS AND DOORS**

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STATEMENT OF THE ISSUE

Whether the contribution and indemnity claims asserted by Wesley Construction, Inc. against SNE Enterprises, Inc., d/b/a Crestline Windows and Doors are barred by the ten year statute of repose set forth in Minn. Stat. §541.051, subd. 1(a).

STATEMENT OF THE CASE

Appellants, Mark and Laura Sletto, commenced the present action against Wesley on or about November 16, 2004. Appellants' Complaint against Wesley includes claims for negligence, breach of statutory warranty, breach of duty of good faith and fair dealing, intentional and/or negligent misrepresentation and third-party beneficiary breach of contract.

Wesley subsequently caused a Third-Party Summons and Third-Party Complaint to be served upon various Third-Party Defendants, including SNE Enterprises, Inc., d/b/a Crestline Windows and Doors ("Crestline") during February 2005. In its Third-Party Complaint against Crestline, Wesley alleges that it is entitled to contribution or indemnity from Crestline based on theories of negligence, breach of contract and "other fault."

Crestline subsequently moved for summary judgment based on the argument that the contribution claims asserted against it by Wesley were barred by the ten year statute of repose set forth in Minn. Stat. §541.051, subd. 1(a). Wesley also moved for summary judgment with respect to the claims asserted against it by the appellants on similar grounds.

All motions for summary judgment were heard by the Court on July 14, 2005. On August 11, 2005, the Court issued Findings of Fact, Conclusions of Law and Order for Judgment in which it denied all motions for summary judgment but permitted additional discovery limited to the “issue of whether fraud [was] involved” under Minn. Stat. §541.051, subd. 1(a). (Resp. App., 1-6).

Additional discovery was completed on this case and the motions for summary judgment were renewed. In an Order dated May 25, 2006, the Court found that the Appellants had failed to establish that Wesley fraudulently concealed Appellants’ potential causes of action and that the ten year statute of repose therefore applied, thereby barring the Appellants’ claims pursuant to Minn. Stat. §541.051, subd. 1. The Court further dismissed as moot the contribution and indemnity claims asserted by Wesley against the Third-Party Defendants, including Crestline. (Id., 7-10).

Subsequent to the Court’s Order granting summary judgment, the Minnesota Supreme Court decided the case of *Weston v. McWilliams & Associates, Inc.*, 716 N.W.2d 634 (Minn. 2006), in which it held that the ten-year period of repose provision in Minn. Stat. §541.051, subd. 1(a) bars claims for contribution and indemnity that have not accrued (i.e., where the principal claim has not been paid) and has not been brought within 10 years of the completion of the construction. 716 N.W.2d at 640

Crestline contends that based on the *Weston* case, the judgment of dismissal of the contribution and indemnity claims asserted by Wesley against Crestline should be

affirmed, regardless of whether the Court of Appeals finds that Appellants' claims against Wesley are viable. Crestline therefore requests that the Court of Appeals affirm the judgment entered by the District Court in favor of Crestline.

STATEMENT OF FACTS

The home at issue in this litigation, which is located at 3959 -- 144th Street West, Rosemount, Minnesota (hereinafter referred to as the "Home"), was constructed by Wesley Construction, Inc, d/b/a Wesley Homes (hereinafter "Wesley"). (Resp. App., 12). Construction of the Home was substantially completed in 1990. (Id., 12, 23).

Appellants claim that they first discovered water infiltration in their home in February 2003. (Id., 13-14). Appellants generally allege that water infiltration into the Home occurred as a result of various construction defects and that there has been damage to certain components of the home. (Id., 13). The Appellants served their Complaint against Wesley on or after November 16, 2004. (Id., 11-20). The Appellants have not made any direct claims against Crestline.

Wesley served its Third-Party Complaint upon Crestline and others on or about February 9, 2005. Wesley asserts claims for contribution and indemnity against Crestline and others. (Id., 29-30). Crestline alleged in its Answer to the Third-Party Complaint that the claims asserted against it are barred by the statute of repose. (Id., 32).

LEGAL ANALYSIS

a. Standard of Review

In reviewing an order granting summary judgment, this Court makes two determinations: (1) whether there are any genuine issues of material fact; and (2) whether the trial court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). The construction and applicability of a statute of limitation or repose is a question of law subject to *de novo* review by the appellate court. *Weston v. McWilliams & Associates*, 716 N.W.2d 634, 638 (Minn. 1998).

In the present case, the District Court did not specifically address whether the contribution and indemnity claims asserted by the general contractor against Crestline and others were barred by the 10-year statute of repose. The District Court concluded that dismissal of the Appellants' claims against the general contractor was dispositive of the third-party claims as well. The District Court therefore dismissed as moot the contribution and indemnity claims asserted by Wesley against the Third-Party Defendants, including Crestline.

If the Court of Appeals concludes that the District Court erroneously granted summary judgment to the general contractor, this court should still affirm the judgment of dismissal of the third-party claims against Crestline. *See gen., Sinn v. City of St. Cloud*, 203 N.W.2d 365 (Minn. 1972)(although a reviewing court may find that the trial court erred, appellant will not be granted relief upon appeal where the effect of the result in the

trial court below was nonetheless correct); *Bains v. Piper, Jaffray & Hopwood, Inc.*, 497 N.W.2d 263, 270 (Minn. App. 1993)("[a]n appellate court will not reverse a correct decision of the trial court simply because the trial court based its conclusion on incorrect reasons. *Schweich v. Ziegler, Inc.*, 463 N.W.2d 722, 728 (Minn. 1990)"). Crestline contends that it is entitled to summary judgment with respect to the claims asserted against it by the general contractor even if the Court of Appeals concludes that the claims asserted by the appellants against the general contractor are not barred by the statute of repose.

- b. **The contribution and indemnity claims asserted against Crestline must be dismissed pursuant to the ten year Statute of Repose set forth in Minn. Stat. § 541.051, subd. 1(a).**

Minn. Stat. Sec. 541.051, subdivision 1, states, in pertinent part, as follows:

Subdivision 1. Limitation; service or construction of real property; improvements. (a) Except where fraud is involved, ***no action by any person in contract, tort, or otherwise to recover damages for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained on account of the injury, shall be brought against any person performing or furnishing the design, planning, supervision, materials, or observation of construction or construction of the improvement to real property or against the owner of the real property more than two years after discovery of the injury or, in the case of an action for contribution or indemnity, accrual of the cause of action, nor, in any event shall such a cause of action accrue more than ten years after substantial completion of the construction.*** Date of substantial completion shall be determined by the date when construction is sufficiently completed so that the owner or the owner's representative can occupy or use the improvement for the intended purpose.

(b) For purposes of paragraph (a), ***a cause of action accrues*** upon discovery of the injury or, ***in the case of an action for contribution or indemnity,***

upon payment of a final judgment, arbitration award, or settlement arising out of the defective and unsafe condition.

(Emphasis added).

Construction of the appellants' home constitutes an improvement to real property within the meaning of Minn. Stat. §541.051, subd. 1(a). The Minnesota Supreme Court adopted a common-sense interpretation of the phrase "improvement to real property" as stated in Minn. Stat. §541.051 by holding that:

an improvement [to real property] is a "permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor or money and is designed to make the property more useful or valuable as distinguished from ordinary repairs."

Pacific Indemnity Co. v. Thompson-Yaeger, Inc., 260 N.W.2d 548, 554 (Minn. 1977) (citing *Kloster v. Madson, Inc. v. Tafi's, Inc.*, 303 Minn. 59, 226 N.W.2d 607 (1965)).

The appellants allege that defects in the construction of their home have resulted in damage due to water intrusion. Minnesota Appellate Courts have held that water infiltration constitutes a defective and unsafe condition within the meaning of Minn. Stat. §541.051. *See gen., Oreck v. Harvey Homes, Inc.*, 602 N.W.2d 424 (Minn. App. 1999); *Hyland Hill North Condominium Association, Inc. v. Hyland Hill Co.*, 549 N.W.2d 617 (Minn. 1996), *reversed in part on other grounds, Vlahos vs. R&I Construction of Bloomington*, 676 N.W.2d 672 (Minn. 2004).

The operative fact that triggers the running of the ten year period of repose is the date on which the home was "substantially completed." A cause of action that does not

accrue within ten years of “substantial completion” may never accrue thereafter, and accordingly, it is substantively, and not merely procedurally barred by Minn. Stat. § 541.051, subd. 1(a).

A statute of repose is substantive in nature in that it operates to abrogate or preclude the existence of a right or cause of action in the first instance. In contrast, a statute of limitation does not abrogate a right, but rather is a procedural mechanism that limits the time within which a party can pursue a remedy. *Weston v. McWilliams & Associates, Inc.*, 716 N.W.2d 634, 641 (Minn. 2006); and *See gen., Goad v. Celotex Corp.*, 831 F.2d 508, 511 (4th Cir. 1987) (“[t]he distinction between statute of limitations and statutes of repose corresponds to the distinction between procedural and substantive laws. Statutes of repose are meant to be a ‘substantive definition of rights as distinguished from a *procedural limitation on the remedy used to enforce rights.*’”(emphasis added); *see also, Harding v. K.C. Wall Products, Inc.*, 831 P.2d 958, 963 - 968 (Kan. 1992) (a statute of repose “abolishes the cause of action after the passage of time even though the cause of action may not have yet accrued. It is substantive.”); *Koes v. Advanced Design, Inc.*, 636 N.W.2d 352, 357 (Minn. App. 2001)(citing *Black’s Law Dictionary* 927 (6th Ed. 1990) (“[a] ‘statute of repose’ terminates any right of action after a specific time has elapsed, regardless of whether there has as yet been an injury.”); and *See gen., Larson, et al., v. Babcock & Wilcox, et al.*, 525 N.W.2d 589, 591 (Minn. App. 1994) (“[t]he time limitation in [a statute of repose] begins to run from the occurrence of an event unrelated to the

accrual of a cause of action, and the expiration of the time extinguishes not only the legal remedy but also all causes of action, including those which may later accrue as well as those already accrued.” (citation omitted)) (emphasis added).

In *Weston*, the Supreme Court stated that: “A statute of repose *** is intended to eliminate the cause of action. In at least the majority of jurisdictions, it has been held that such statutes may constitutionally eliminate causes of action even before they accrue.” *Weston*, 716 N.W.2d at 641 (citations omitted).

A cause of action for contribution or indemnity does not “accrue” within the context of the improvement to real property statute until payment of a final judgment, arbitration award, or settlement has been made by the party seeking to recover contribution or indemnity. *See*, Minn. Stat. §541.051, subd. 1(b).

Construction of the Home was substantially completed in 1990. Appellants claim to have first discovered water infiltration in the Home in February 2003.¹ Wesley’s contribution and indemnity claims had not accrued as of the time that the 10 year statute of repose lapsed in 2000. Given the plain language of Minn. Stat. § 541.051, subd. 1(b), and the holding in *Weston*, any purported contribution or indemnity claim against Crestline would have been effectively extinguished by the statute of repose by the time that Appellants first discovered water infiltration in their Home.

¹ Since the appellants did not initially discover water infiltration in their home until more than 12 years after substantial completion of the construction of Home, there is no viable argument that the grace period for claims that accrue in the ninth and tenth years after substantial completion set forth in Minn. Stat. § 541.051, subd. 1(a) would apply to this case.

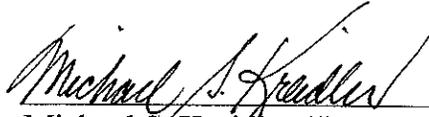
As noted in *Weston*, “[A] statute [of repose] is intended to terminate the possibility of liability after a defined period of time, regardless of the potential plaintiff’s lack of knowledge of his or her cause of action. Such statutes reflect the legislative conclusion that a point in time arrives beyond which a potential defendant should be immune from liability for past conduct.” *Weston*, 714 N.W.2d at 641. In this case, the “point in time” for the assertion of a claim for contribution or indemnity against Crestline came and went well before the Appellants first discovered any damage to their home. Wesley therefore is left with no remedy against Crestline regardless of whether this Court determines that the Appellants have a viable claim against Wesley.

CONCLUSION

The Third-Party Complaint alleges claims for contribution and indemnity arising out of defects in an improvement to real property. The Appellants’ home was substantially completed in 1990 and Appellants did not discover any damage to their home until 2003. The purported contribution and/or indemnity claims of Wesley against Crestline did not “accrue” within the ten year period of repose set forth in Minn. Stat. § 541.051, subd. 1(a). Therefore, the judgment of the District Court dismissing the claims for contribution or indemnity asserted against Crestline should be affirmed regardless of whether this Court determines that the Appellants have a viable claim against Wesley.

Dated: August 29, 2006

Stich, Angell, Kreidler & Dodge, P.A.

A handwritten signature in cursive script, reading "Michael S. Kreidler". The signature is written in black ink and is positioned above a horizontal line.

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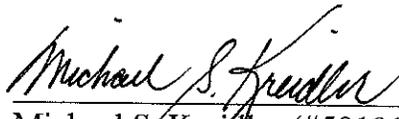
CERTIFICATE OF COMPLIANCE

I hereby certify that the Brief of SNE Enterprises, Inc. conforms to the requirements set forth in Rule 132 of the Minnesota Rules of Civil Appellate Procedure.

This Brief is produced using a proportional font with Wordperfect Version 12. The length of the brief is 2419 words.

Dated: August 28, 2006

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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).