

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,

v.

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

Third Party Defendants/Respondents.

**BRIEF AND APPENDIX OF RESPONDENTS
 WESLEY CONSTRUCTION, INC. AND DALE KLEVEN**

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LEGAL ISSUES

1. Did the trial court correctly grant summary judgment and dismiss Appellants' breach of statutory warranty claims as untimely by applying the 12-year statute of repose in Minn. Stat. § 541.051, subd. 4?

Yes; the trial court correctly determined that Appellants' claims, brought in November, 2004, more than 14 years after construction of their residence, were time-barred by the 12-year repose period in section 541.051, subd. 4. Application of the repose provision, which became effective August 1, 2004, was proper and not retroactive as applied to Appellants' subsequently commenced claims.

2. Did the trial court correctly grant summary judgment and dismiss Appellants' remaining claims as untimely by finding a lack of any genuine issue as to whether Respondents committed fraud sufficient to toll the applicable statutes of limitation and repose in Minn. Stat. § 541.051, subd. 1?

Yes; the trial court correctly held that there are no genuine issues of material fact because there is no evidence that Respondents committed any fraud to toll the applicable limitation periods.

3. Did the trial court correctly dismiss the third-party motions for summary judgment as moot?

Yes; the trial court correctly dismissed the third-party motions as moot because the trial court's grant of summary judgment against Appellants and in favor of Respondents left no remaining controversy.

STATEMENT OF THE CASE

This property damage/personal injury action was brought in Dakota County District Court, First Judicial District, Court File No. 19-CX-05-006498, with The Honorable Mary E. Pawlenty presiding.

In November, 2004, Appellants commenced an action against Wesley Construction, Inc., d/b/a Wesley Homes, Dale Kleven (Wesley Construction, Inc.'s owner and principal officer) (collectively "Respondents"), and ABC Corporation, John Doe, and Mary Roe (unidentified entities which may have been involved in the construction of the residence at issue) to recover for alleged construction deficiencies in their residence. (Compl.) Respondent Wesley Construction, Inc. thereafter brought third-party contribution and indemnity claims against four entities involved in the construction of Appellants' residence, including Steve Johnson, d/b/a Quality Construction (the roofer), Larry Stark, d/b/a Starr Marketing (the framer), Automated Building Components, Inc. (the window supplier), and SNE Enterprises, Inc., d/b/a Crestline Windows and Doors (the window manufacturer). (Third Party Compl.)

In May and June, 2005, Respondents and Third-Party Defendants SNE Enterprises, Inc. and Automated Building Components, Inc. brought motions for summary judgment based on the statutes of repose in Minn. Stat. § 541.051, subs. 1, 4. (Mem. Law SNE Enterprises, Inc. Supp. Mot. Summ. J. (dated May 4, 2005), Automated Building Components, Inc.'s Mem. Law Supp. Mot. Summ. J. (dated May 5, 2005),

Wesley Construction Mem. Supp. Mot. Summ. J. (dated June 16, 2005).¹ In their separate motion, Respondents argued that the 10-year statute of repose in subdivision 1 of section 541.051 barred all Appellants' claims except the breach of statutory warranty claim, and that the 12-year statute of repose in subdivision 4 of section 541.051 barred Appellants' remaining breach of statutory warranty claim. (Wesley Construction Mem. Supp. Mot. Summ. J. 7-12, 12-13.)

Appellants opposed the motions, arguing that the statute of repose applicable to the majority of their claims (section 541.051, subd. 1) was tolled due to alleged fraud by Respondents. (Pls.' Combined Mem. Law Opp'n Summ. J. 7-11 (dated July 5, 2005).) Appellants also argued that the statute of repose applicable to their remaining breach of statutory warranty claim did not exist at the time their action accrued (though it did exist prior to the time their action was commenced), and thus could not be applied to bar their warranty claims. (Id. at 11-14.)

On July 14, 2005, the parties argued the summary judgment motions before The Honorable Mary E. Pawlenty of the Dakota County District Court. (A.162, 8-11-05 Find. Fact, Concl. Law, Order 1, 6.) By Order dated August 11, 2005, Judge Pawlenty ruled that the statutes of repose in Minn. Stat. § 541.051 barred Appellants' claims as untimely. (Id. Concl. Law at 4 ¶¶ 4, 5.) However, Judge Pawlenty denied Respondents' motion for

¹ Third-Party Defendant Quality Construction did not appear in this action until May, 2006. (Third-Party Def. Steve Johnson D/B/A Quality Construction's Answer Cross-Claims (dated May 11, 2006).) Neither Quality Construction nor Third-Party Defendant Starr Marketing brought separate motions for summary judgment, but did join in Wesley's motion at oral argument.

summary judgment pending a period of discovery during which Appellants could search for evidence of fraud sufficient to toll the statute of repose. (Id. Concl. Law at 5 ¶¶ 7-8, Order at 5 ¶¶1-3.) The Judge ruled that, in the event Appellants could not establish fraud at the end of the ordered discovery period, the entire case would be dismissed as time-barred pursuant to the statute of repose. (Id. Order at 6 ¶ 6.)

Pursuant to the trial court's August 11, 2005 Order, the parties conducted discovery relating to the alleged fraud committed by Respondents. (Wesley Construction, Inc.'s Suppl. Mem. Supp. Mot. Summ. J. 2 (dated May 22, 2006) (referencing the depositions of Appellants Mark and Laura Sletto and Respondent Dale Kleven and the affidavit of a former Rosemount building inspector); Pls.' Offer Proof Suppl. Br. Issue Fraud 2-3 (dated May 22, 2006) (listing exhibits reflecting the additional discovery).)

By Order dated May 17, 2006, the trial court scheduled a hearing for May 23, 2006 for the sole issue of "whether sufficient evidence exists to establish that defendant(s) fraudulently concealed a defective and unsafe condition of the home, thereby preventing plaintiffs from discovering damages for which plaintiffs had a right to sue." (A.168, 5-17-06 Order 2 ¶ 4.) The trial court ordered that Appellants' offer of proof on the issue of fraud "shall be presented by/through sworn affidavit(s)." (Id. at ¶ 5.)

Appellants and Respondents thereafter submitted written materials to the trial court on the issue of fraud. (Wesley Construction, Inc.'s Suppl. Mem. Supp. Mot. Summ. J.; Pls.' Offer Proof Suppl. Br. Issue Fraud.) The parties then appeared at the second

summary judgment hearing on the issue of fraud on May 23, 2006. (A.172, 5-25-06 Order Summ. J. 1.)

By Order dated May 25, 2006, the trial court granted Respondents' motion for summary judgment. (Id. at 4 ¶¶ 8-9.) The trial court reiterated in its final Order that the sole issue presented at the May 23, 2006 hearing was "whether Plaintiffs have produced sufficient evidence to create a genuine issue of material fact regarding their allegation that Defendant Wesley Construction * * * fraudulently concealed Plaintiffs' potential causes of action, such that the statute of repose does not apply." (Id. at 2 ¶ 2.) In her Order, the Honorable Mary E. Pawlenty ruled that none of Appellants' evidence "rise[s] to the level of fraudulent concealment as a matter of law." (Id. at 3 ¶ 5.) The trial court therefore held that the statute of repose applies and that Appellants' claims are time-barred and must be dismissed under section 541.051. (Id. at 4 ¶ 8.) Respondents' third-party contribution and indemnity claims were then dismissed as moot. (Id. ¶ 10.)

By Notice of Appeal dated July 26, 2006, Appellants appealed the trial court's August 11, 2005 decision that the statute of repose in section 541.051, subd. 4 applies to bar their breach of statutory warranty claim, and the trial court's May 25, 2006 decision that Appellants produced insufficient evidence of fraud to toll the statute of repose in section 541.051, subd. 1 that bars their remaining claims. (Notice of Appeal.)

By Notice of Review dated August 7, 2006, Respondent Automated Building Components, Inc. appealed the trial court's May 25, 2006 decision that dismissed the motions for summary judgment relating to the third-party contribution claims as moot,

seeking a substantive decision of dismissal on the merits. (Notice of Review Resp't Automated Building Components, Inc.)

STATEMENT OF FACTS

Respondent Wesley Construction, Inc. applied for a residential building permit on February 9, 1990, and thereafter constructed Appellants' residence as a model home. (A.1, Application for Building Permit; A.20-22, A.24, Kleven dep. at 44-45, 49, 58; A.127, Stark Aff. ¶ 3.) In June, 1990, Wesley Construction sold the model home to John and Linda Stark. (A.130, Purchase Agreement dated June 2, 1990; A.127, Stark Aff. ¶ 2.) After living in the home for nearly three years, the Starks sold the home to Appellants Mark and Laura Sletto on May 29, 1993. (A.144, Purchase Agreement dated May 29, 1993; A.128, Stark Aff. ¶ 10.) Appellants owned the home until June, 2004, when they sold the home to the current owners. (A.178, Mark Sletto Aff. ¶ 8.)

In February, 2003, while they still owned the home at issue, Appellants discovered damage to their home allegedly caused by defective construction methods and/or materials. (A.177, Mark Sletto Aff. ¶ 3; A.181, Laura Sletto Aff. ¶ 3.) In March, 2003, Appellants sent a letter to Respondents advising of their discovery. (7-5-05 Mark Sletto Aff. Ex. B, Letter dated March 25, 2003.) During that Spring and Summer of 2003, Appellants retained the services of another contractor to make repairs to their home. (A.178, Mark Sletto Aff. ¶ 7.)

Over 14 years after the home was constructed, over one and one-half years after discovering their damage, and over three months after the effective date of a 12-year statute of repose for warranty claims, Appellants commenced this action in November,

2004 to recover for the cost of the remediation and for alleged personal injuries caused by mold. (Compl.) As indicated earlier, Respondents then moved for summary judgment on the basis of the repose provisions in Minn. Stat. § 541.051, subds. 1, 4.

In an effort to avoid the application of the 10-year statute of repose in Minn. Stat. § 541.051, subd. 1, which applies to the majority of their claims, Appellants argue that Respondents committed fraud sufficient to toll the repose period. (Pls.' Combined Mem. Law Opp'n Summ. J. 7-11.) Their "evidence" of fraud is described in their Offer of Proof to the trial court and in their Brief to this Court. (Pls.' Offer Proof Suppl. Br. Issue Fraud 5-10, Appellants' Br. 14-22.) In an effort to avoid the application of the 12-year statute of repose in Minn. Stat. § 541.051, subd. 4, which applies to their remaining statutory warranty claim, Appellants argue that application of the repose provision, first enacted and effective in 2004, would be improperly retroactive. (Appellants' Br. 10-14.)

Respondents argue instead that there is no evidence to support a finding of fraudulent concealment to toll any limitation period, and further that application of the repose period to warranty claims was proper and not retroactive. Thus, Respondents request that the trial court be affirmed.

ARGUMENT

I. Standard of Review.

Summary judgment is appropriate when the evidence shows that there is no genuine issue as to any material fact and a party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03; Anderson v. State Dep't of Natural Res., 693 N.W.2d 181, 186 (Minn. 2005). "When reviewing a grant of summary judgment, an appellate court

must consider (1) whether there are any genuine issues of material fact, and (2) whether the lower court erred in its application of the law.” Leamington Co. v. Nonprofits’ Ins. Ass’n, 615 N.W.2d 349, 353 (Minn. 2000).

One of the two issues presented in this appeal is whether there are any genuine issues of material fact as to whether Respondents committed fraud sufficient to toll the relevant limitation periods. The appellate court reviews the record to determine whether there are any genuine issues of material fact. Art Goebel, Inc. v. N. Suburban Agencies, Inc., 567 N.W.2d 511, 515 (Minn. 1997). A genuine issue of fact is one which, depending upon its resolution, will affect the result or outcome of the case. Nw. Nat’l Cas. Co. v. Khosa, Inc., 520 N.W.2d 771, 773 (Minn. Ct. App. 1994). In the present case, the trial court correctly concluded that there were no genuine issues of material fact and that there was no evidence that Respondents committed any fraud sufficient to toll the applicable statutes of limitation and repose.

The other issue presented in this appeal is the interpretation and application of the more recent statute of repose in section 541.051, subd. 4. The application of a statutory limitation period to the facts of a case is a question of law which a reviewing court reviews de novo. Camacho v. Todd and Leiser Homes, 706 N.W.2d 49, 53 (Minn. 2005) (stating that “[s]tatutory construction is a question of law” and “[q]uestions of law are reviewed de novo”); Gomon v. Northland Family Physicians, Ltd., 645 N.W.2d 413, 415-16 (Minn. 2002) (stating that “[c]onstruction of a statute of limitations is a question of law that this court reviews de novo”). The trial court correctly applied section 541.051 and concluded that Appellants’ claims were time-barred by the 12-year statute of repose.

II. The Trial Court Properly Applied the Statute of Repose in Minn. Stat. § 541.051, Subd. 4 to Dismiss Appellants' Breach of Statutory Warranty Claims as Untimely.

Appellants make three arguments in support of their position that the 12-year statute of repose in section 541.051, subd. 4, enacted and first effective in 2004, cannot be applied to bar their breach of statutory warranty claims. (Appellants' Br. 10-14.) As explained below, none of these arguments has merit.

A. Accrual is Irrelevant for Application of a Statute of Repose.

Appellants first argue that their statutory warranty claims had already accrued in February, 2003, prior to the 2004 enactment of the amendment to section 541.051, subd. 4 that added a statute of repose to warranty claims.² (Appellants' Br. 10-11.) While true, the date of accrual of their statutory warranty claims is irrelevant to a determination of whether the statute of repose applies to the claims.

² Minn. Stat. § 541.051, subd. 4 (2004) states as follows:

For the purposes of 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, such actions shall be brought within two years of the discovery of the breach. In the case of an action under section 327A.05, which accrues during the ninth or tenth year after the warranty date, as defined in section 327A.01, subdivision 8, 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.

The May 15, 2004 amendment to section 541.051, subd. 4, which added the 12-year repose period to statutory warranty claims, did not contain an effective date. 2004 Minn. Sess. Law Serv. Ch. 196 (H.F. 730). Under Minn. Stat. § 645.02, every act passed without a specified effective date takes effect "on August 1 next following its final enactment." Thus, the statutory warranty repose period became effective on August 1, 2004.

The concept of accrual of a cause of action is relevant only to determine whether an action is timely under a statute of limitation, not a statute of repose. See Koes v. Advanced Design, Inc., 636 N.W.2d 352, 357 (Minn. Ct. App. 2001) (explaining the fundamental differences between statutes of limitation and repose, and noting that the former bars actions not brought within a set period of time after *accrual*, whereas the latter is unaffected by accrual and bars a suit after a specified time “regardless of time of accrual”). Accord School Board of Norfolk v. U.S. Gypsum Co., 360 S.E.2d 325, 327-28 (Va. 1987) (noting that a statute of repose, which is “different in concept, definition, and function” from a statute of limitation, “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”) (cited with approval by Larson v. Babcock & Wilcox, 525 N.W.2d 589, 591 (Minn. 1994)).

While a homeowner with otherwise valid claims may thus be unable to sue because of application of a limitation period, “[i]t is the province of the legislature, not th[e] court, to provide a remedy to those homeowners who may be foreclosed from bringing an action.” Camacho v. Todd and Leiser Homes, 706 N.W.2d 49, 55 (Minn. 2005). Appellants’ accrual argument therefore does nothing to further their position for non-application of the repose provision in section 541.051, subd. 4.

B. Application of the 12-Year Statute of Repose, Effective Prior to Commencement, Is Not Retroactive.

Appellants next argue that application of the 12-year statute of repose, effective on August 1, 2004, to Appellants' breach of statutory warranty action, commenced in November, 2004, is "retroactive" and improper. (Appellants' Br. 11-12.)³ Appellants fail to explain how application of the 2004 amendment, which was enacted and effective months prior to the commencement of this action, can be considered retroactive. Instead, Appellants merely note that application of a new statute to existing causes of action is retroactive. (Appellants' Br. 11 (emphasis in original) (citing Midwest Family Mut. Ins. Co. v. Bleick, 486 N.W.2d 435, 438 (Minn. Ct. App. 1992)).) Appellants are apparently arguing that an accrued but not yet commenced action is an "existing action," meaning that application of a statute enacted after accrual but prior to commencement would be retroactive.⁴

³ Under Minn. Stat. § 645.21, "No law shall be construed to be retroactive unless clearly and manifestly so intended by the legislature." As explained *infra*, this statute has no application to the present case because the trial court did not, and did not need to, retroactively apply the amendment to section 541.051 to Appellants' claims.

⁴ Retroactive application of a statute could occur in three separate circumstances: (1) when the legislature *revives* a cause of action that had been barred by a previous version of the statute (raising constitutional concerns not presented here) (Gomon v. Northland Family Physicians, Ltd., 645 N.W.2d 413, 418 n.1 (Minn. 2002) (noting that revival of a previously barred cause of action is a retroactive application subject to Minn. Stat. §645.21, which prohibits retroactive application in such circumstances absent legislative intent)); (2) when the legislature *extends* a limitation period to claims that have accrued but not yet been brought (*id.* (noting retroactive application is applicable to extension provisions); and (3) when the legislature *bars* an action currently pending, i.e., existing, in the court system. Lovgren v. Peoples Elec. Co., Inc., 380 N.W.2d 791, 795 (Minn. 1986) (holding that the version of the limitation period in effect at the time of the

However, the Bleick case cited by Appellants simply states that “[w]hen a statute is enacted that applies to existing causes of action, application of that statute is retroactive.” 486 N.W.2d at 438. The Bleick case did not define what it meant by “existing causes of action,” but the case it relied upon discusses an action that had already been commenced at the time of enactment of the new legislation. Id. (citing K.E. v. Hoffman, 452 N.W.2d 509, 512 (Minn. Ct. App. 1990)).

Here, by contrast, Appellants’ action had not yet been commenced at the time of enactment of the 12-year repose provision in section 541.051, subd. 4. Thus, Appellants had no “existing cause of action” to which any statute could be retroactively applied because they did not commence their action until after the effective date of the new repose provision. Therefore, application of the repose period was not retroactive.

C. The 12-Year Repose Period Enacted in 2004 Applies.

Finally, Appellants again argue that the trial court erred in determining when their cause of action accrued and which time limitation(s) applied. (Appellants’ Br. 12-14.) As already indicated, however, accrual of their cause of action is irrelevant for purposes of application of a statute of repose.

In addition, the trial court’s application of the 2004 enactment of a statute of repose to Appellants’ claims, which claims were not brought until *after* the effective date of the enactment, was not retroactive. Had Appellants brought their action *prior* to enactment of the 12-year repose period, then any application of that enactment would, of

suit governs over a shorter period enacted while the claim is pending). None of these three circumstances is presented here.

course, be retroactive. However, Appellants did not bring their action prior to it being barred, despite knowing of their damages and the ability to bring their claims for nearly 18 months prior to the enactment of the repose period.

If Appellants' argument is accepted, the legislature would not be able to enact a statute of repose without specifically stating that the legislation was meant to apply to all future claims, including accrued claims not yet commenced and pending. But future application is necessarily expected and intended of all legislation unless otherwise expressly stated. See Minn. Stat. § 645.21 (indicating that it is retroactive rather than prospective application that must be clearly and manifestly expressed). This is particularly true for statutes of repose, since such statutes have the known and intended effect of barring actions whether or not they have accrued within the specified time period. As explained earlier, accrual has no relevance to a statute of repose.

Appellants also argue that application of the 2004 enactment of the 12-year statute of repose "improperly divested the Slettos of an already acquired right and claim." (Appellants' Br. 13.) However, Appellants had no vested right to bring their action. See Hoffman, 452 N.W.2d at 512 (noting that even a trial court judgment in one party's favor is not sufficiently fixed "to be a vested right").⁵ Further, a divestment argument only

⁵ Appellants cite to Larson v. Babcock & Wilcox, 525 N.W.2d 589, 591-92 (Minn. 1994) as support for their position that they had an already acquired right and claim when section 541.051, subd. 4 was amended. (Appellants' Br. 13.) Contrary to this position, the Larson court found that a previously enacted repose period, which had already run prior to a subsequent amendment, had provided a defendant with "a vested right not to be sued under the statute of repose." 525 N.W.2d at 591. Courts in Minnesota have consistently held that statutes of repose create substantive rights, so when a defendant has not been sued within a repose period, that defendant does have a substantive right to be

applies if there is an impermissible attempt to retroactively apply a new statute. Id. (stating that the 14th amendment prohibits retroactive legislation when it divests any private vested interest). As explained above, application of the 12-year statute of repose to Appellants' subsequently commenced claims was not retroactive. Therefore, the trial court did not improperly divest Appellants of any vested right.⁶

D. The Statute in Effect at Commencement Governs.

Contrary to Appellants' position, Minnesota case law establishes that the 12-year statute of repose in section 541.051, subd. 4 applies to bar Appellants' subsequently brought cause of action. Since 1921, the law has been that "the statute in force at the time the action is brought controls, unless the time limited by the old statute for commencing an action has elapsed, while the old statute was in force, and before suit is brought. . . ." Donovan v. Duluth St. Ry. Co., 185 N.W. 388, 389 (Minn. 1921). The Minnesota Court of Appeals reaffirmed this principle over 80 years later, stating: "The

free from suit, even if the repose period is later modified. The right to be free from suit would already have vested, preventing retroactive application. Here, by contrast, Appellants had not brought any action prior to enactment of the repose period. They had no right that had vested, as no legislation gave them both the right to sue and a guaranteed remedy if they did. Thus, the Larson case is inapposite.

⁶ Appellants cite to Lovgren v. Peoples Elec. Co., Inc., 380 N.W.2d 791, 795 (Minn. 1986) as further support for their position that the trial court's application of the 2004 legislation was applied retroactively. However, in Lovgren, plaintiff's injury occurred in 1975 and he commenced suit in 1978. 380 N.W.2d at 793. At the time plaintiff commenced his suit, there was no statute of limitation because section 541.051 had been declared unconstitutional in 1977. Id. The legislature did not reenact section 541.051 until 1980, nearly two years after plaintiff commenced his action. Id. The court properly indicated that the 1980 legislation could not be retroactively applied to bar plaintiff's claims, which were timely when commenced. Id. at 795.

statute of limitations in effect when the action is brought controls, unless the time limit for the action set by the former statute of limitations has elapsed while the old statute of limitations was in effect and before the claim was brought.” Murphy v. Allina Health Sys., 668 N.W.2d 17, 22 (Minn. Ct. App. 2003).

The amendment to section 541.051, subd. 4 was already enacted and effective months before Appellants commenced the present action. Under longstanding case law, the already effective statute of repose controls and applies to bar Appellants’ claims as untimely.

Thus, in Brink v. Smith Cos. Constr., Inc., 703 N.W.2d 871 (Minn. Ct. App. 2005), the court of appeals applied the pre-2004 version of section 541.051, subd. 4 when plaintiffs brought their claims *prior* to the 2004 amendment adding the statute of repose provision. In Brink, the home at issue was substantially completed in 1989. 703 N.W.2d at 873. The homeowners commenced a suit for breach of statutory warranties in December, 2002, 13 years later. Id. at 873, 875. The 12-year repose period applicable to statutory warranty claims was not enacted until 2004, one and one-half years *after* the action had been commenced. Id. at 875, 879. The court of appeals noted that “although plaintiff sued Smith under section 327A.02 more than 13 years after the certificate of occupancy was issued, plaintiff’s cause of action was not barred by the statute of repose” because *at the time of the lawsuit*, there was no applicable repose period. Id. at 875.

Interestingly, the Brink court foreshadowed the very issue presented in the instant case by further noting that “[a]s a result of the 2004 amendment [enacting a 12-year statute of repose for statutory warranty claims] * * * [any future] lawsuit, if brought more

than 12 years after substantial completion of the construction, *will be barred by the statute of repose.*” Id. at 879 (emphasis added).

Under Brink, Appellants’ lawsuit, which was brought more than 12 years after the substantial completion of the construction of their home, and after the enactment of the 12-year statute of repose, is time-barred. The trial court correctly applied the 12-year statute of repose to bar Appellants’ claims and properly dismissed those claims as untimely. Respondents respectfully request that the trial court’s dismissal of Appellants’ statutory warranty claims as untimely be affirmed.

III. The Trial Court Properly Found No Genuine Issues of Material Fact as to Whether Respondents Committed Fraud Sufficient to Toll the Time Limitation for Appellants’ Causes of Action.

Appellants alternatively argue that the doctrine of fraudulent concealment tolls the repose period in section 541.051, subd. 1, making their non-breach of warranty claims timely. (Appellants’ Br. 14-22.) As explained below, this alternative argument also lacks merit.

A. Background of Fraudulent Concealment as Tolling Limitation Period.

The Minnesota Supreme Court first adopted the fraudulent concealment doctrine to toll a limitation period in 1931. Cohen v. Appert, 463 N.W.2d 787, 790 (Minn. Ct. App. 1990) (citing Schmucking v. Mayo, 235 N.W. 633 (1931)). In Schmucking, the rule governing fraudulent concealment was stated as follows:

when a party against whom a cause of action exists in favor of another, by fraudulent concealment prevents such other from obtaining knowledge thereof, the statute of limitations will commence to run only from the time the cause of action is discovered or might have been discovered by the exercise of diligence.

235 N.W. at 633. In the absence of fraud, “ignorance of the existence of a cause of action does not toll the statute of limitations.” Mut. Serv. Life Ins. Co. v. Galaxy Builders, Inc., 435 N.W.2d 136, 139 (Minn. Ct. App. 1989).

In order to establish a valid claim of fraudulent concealment, a party must establish: (1) the defendant made a statement(s) that concealed plaintiff’s potential cause of action; (2) the statement(s) were intentionally false; and (3) the concealment could not have been discovered by reasonable diligence. Williamson v. Prasciunas, 661 N.W.2d 645, 650 (Minn. Ct. App. 2003) (citing Haberle v. Buchwald, 480 N.W.2d 351, 357 (Minn. Ct. App. 1992)).

To satisfy the first element, a plaintiff must prove that “it is the very existence of the facts which establish the cause of action which are fraudulently concealed.” Hydra-Mac, Inc. v. Onan Corp., 450 N.W.2d 913, 918-19 (Minn. 1990).

To establish the second element, a plaintiff must prove that the concealment by the defendant was fraudulent or intentional (Collins v. Johnson, 374 N.W.2d 536, 541 (Minn. Ct. App. 1985)), i.e., that it “knows its representations are false or makes representations with reckless disregard for the truth.” Holstad v. Sw. Porcelain, Inc., 421 N.W.2d 371, 374 (Minn. Ct. App. 1988) (citing Collins, 374 N.W.2d at 541-42). “Central to the concept of fraud is a knowing and intentional statement, act, or refusal to act where a duty to act lies.” Haberle, 480 N.W.2d at 357 (affirming summary judgment against plaintiffs because their claims were time-barred where there was no evidence that defendants made any knowingly false statements).

As explained below, Appellants cannot establish either the first or second element of fraudulent concealment.

B. Application of Fraudulent Concealment Factors to Appellants' Alleged Evidence.

Appellants argue that three separate pieces of "evidence" support their claim of fraudulent concealment to toll the limitation period applicable to their remaining claims. The first piece of alleged evidence is a "Correction List" sent by the City to Respondents shortly after Respondents filed an application for a building permit. (Appellants' Br. 19.) Appellants argue that this Correction List "specifically informed [Respondents] of * * * referenced deficiencies in its building plan," implying that Respondents proceeded to build the home in knowing and intentional violation of these deficiencies. (Id.)

Contrary to Appellants' argument, a former City building inspector testified by affidavit that the Correction List "was generic" and that a "check by individual numbered items in the list was *not* a mandate for correction, * * * [n]or was a check an indication that the plan included a violation of that corollary item." (RA.2, May 22, 2006 Heimkes Aff. ¶ 2.) Thus, the Correction List, as a generic form provided to all builders that applied for a building permit, provides no evidence that Respondents fraudulently concealed any cause of action from a future home owner.

Appellants' next piece of "evidence" allegedly supporting fraudulent concealment is the Purchase Agreement between Respondents and the original purchasers of the home. (Appellants' Br. 20.) Specifically, Appellants argue that two statements in the Purchase Agreement, indicating that Respondents had not received notice from any governmental

entity as to a violation of any law and that Respondents were conveying title subject to the law (including the building codes), were “incomplete, misleading and prevented * * * all future owners of the Home from discovering any potential causes of action.” (Id.)

Noticeably absent from Appellants’ offer of proof is any evidence that Respondents knew about any code violations in the construction of the home at issue. As already indicated, the City did not inform Respondents of any code violations. Further, there no evidence that any other governmental entity had *any* communications with Respondents relating to the home, let alone communications advising of some code violation.

Instead, the undisputed evidence indicates that Respondents were unaware of any code violations. (A.25, A.37-38, Kleven dep. at 63, 110-11, 112-15 (testifying that it was his expectation and understanding that the home had been constructed in compliance with the building codes, and denying any knowledge of code violations or construction deficiencies).)

Also noticeably absent from Appellants’ offer of proof is any evidence that Respondents were selling the home, knowing of alleged building code violations, in an attempt to conceal a cause of action. Even if Respondents had known of some code violation (which is denied), concealing a code violation is not the same thing as concealing Appellants’ cause of action for property damage and personal injury. There is no evidence, and indeed there is no allegation, that the violation of a code provision by itself resulted in property damage or personal injury. Instead, Appellants claim that code violations and/or construction deficiencies eventually caused the property damage and

personal injury. But at the time the home was sold by Respondents in 1990, there was no evidence that any damage had yet occurred. Thus, "the very existence of the facts which establish the cause of action" could not have been fraudulently concealed because they did not even exist when Respondents completed and sold the home.

Finally, Appellants argue that Respondents' failure to request a final building inspection and the lack of a certificate of occupancy is evidence of fraudulent concealment. (Appellants' Br. 20.) Appellants acknowledge that Respondents did not receive a notice from the City about the lack of a final inspection and certificate of occupancy. Appellants attempt to argue, however, that Respondents' receipt of such a notice about another, unrelated home somehow suggests that Respondents were aware of building code violations that they were attempting to conceal on the home at issue. (Appellants' Br. 21.)

Contrary to Appellants' assumptions and implications, the lack of a final inspection and issuance of a certificate of occupancy were not the result of Respondents' intentional acts, but were rather the result of the City's overwhelming growth. As indicated by Mr. Heimkes, the City saw a significant amount of residential development during the 1990's. (RA.2, Heimkes Aff. ¶ 3.) "As a result, the Building Official's Department lost track of a number of homes that were subsequently finished without final inspections and issuance of Certificates of Occupancy." (Id.) More importantly, "[t]he fact that a final inspection and Certificate of Occupancy do not exist for a given home built before the [City] policy and procedure changes * * * is not an indication that the

home is in violation of provisions of the Building Code nor that it is notice from any governmental authority as to violation of any law, ordinance, or regulation.” (Id. ¶ 4.)

Indeed, the undisputed evidence shows that Respondents were not even aware that the final inspection had not been conducted or that a certificate of occupancy had not been issued, and that it was the regular practice of Respondents to request such inspections and obtain such certificates. (A.24, Kleven dep. at 59-61.)

Therefore, regardless of whether a final inspection was made or a certificate of occupancy issued for Appellants’ home, there is still no evidence that Respondents had any reason to suspect any code violations and there is still no evidence that Respondents intentionally failed to obtain the inspection or certificate to prevent Appellants from discovering their cause of action. An unintentional glitch in the City’s building inspections department is not sufficient evidence of an overt act of fraud necessary to toll a limitation period.

Due to their failure to produce any evidence proving the necessary elements of fraudulent concealment, Appellants’ claims were properly held by the trial court to be untimely and therefore properly dismissed. Respondents respectfully request that the trial court’s decisions to dismiss Appellants’ claims as untimely be affirmed.

C. Case Law Supports the Lack of any Fraudulent Concealment Here.

Respondents found no case analogous to the present situation that analyzed a fraudulent concealment issue. The closest cases appear to be those involving construction where asbestos was used. In one such case where plaintiff argued for application of fraudulent concealment to extend the limitation period, the Eighth Circuit

refused to toll the limitation period when: (1) there was no communication between plaintiff and defendant; (2) there was no fiduciary relationship between the parties; and (3) the defendant had no “special knowledge” that it failed to disclose. Metro. Fed. Bank of Iowa, F.S.B. v. W.R. Grace & Co., 999 F.2d 1257, 1261 (8th Cir. 1993).

Likewise here, there was no communication between Appellants and Respondents (until 2003 after discovery of the damage), there was no fiduciary relationship between Appellants and Respondents, and there is no evidence of any “special knowledge” possessed by Respondents that they failed to disclose. Under Metropolitan, fraudulent concealment has no application to this case.

Similarly, in another case where a plaintiff argued for application of the fraudulent concealment doctrine, the court confirmed that the plaintiff must prove that the defendant “has engaged in some behavior that has had the purpose and effect of concealing the presence of a cause of action from the plaintiff.” Appletree Square 1 Ltd. P’ship v. W.R. Grace & Co., 815 F. Supp. 1266, 1275 (D. Minn. 1993). Because plaintiff failed to present “any evidence of Grace’s behavior toward the Appletree Project during the 10 years following its substantial completion,” no one could conclude Grace fraudulently concealed the existence of a cause of action. Id. at 1276.

Likewise here, Respondents had no communication with Appellants at any time, including the 10 years following the substantial completion of Appellants’ home. According to the undisputed evidence, Respondents did not even know that Appellants owned the home at issue until Appellants provided their written notice in the Spring of 2003. (A.36, Kleven dep. at 105, 107 (noting that such written notice was the very first

communication between the parties).) Under Appletree and the comparable situation here, Appellants have no evidence of fraudulent concealment.

The present case actually presents a weaker case for application of the fraudulent concealment doctrine than in the cited asbestos cases. In those cases, the manufacturer/supplier of the asbestos products knew (and had long known) about the inherent dangers of asbestos. The issue was whether it fraudulently concealed that knowledge. As indicated above, the courts rejected such a conclusion and refused to find that there was sufficient evidence of fraudulent concealment.

Here, Appellants do not even have any evidence showing that Respondents knew of any building code violations. To the contrary, Respondents' actions of building the home at issue as a model in order to sell more homes (which would result in more people examining the details of the home) more easily supports a conclusion that it was unaware of any building deficiencies. Further, even if Respondents had known of any building code violation, there is no evidence that they knew any such violation would lead to damage of the home, and there is no evidence that Respondents tried to conceal any such violations to prevent discovery of an as-of-yet unexisting cause of action. Since Respondents did not even know Appellants or have any communications with them in the 13 years after construction of the home, Respondents could not have fraudulently and intentionally concealed any cause of action from Appellants.

Therefore, the trial court's grant of summary judgment dismissing Appellants' claims as time barred by the applicable statutes of repose should be affirmed.

IV. The Trial Court Properly Dismissed the Third-Party Motions as Moot.

In its separate Notice of Review, Respondent Automated Building Components, Inc. appealed the trial court's dismissal as moot of the motions for summary judgment relating to the third-party claims. Respondent Automated Building Components is requesting this Court to issue a substantive decision on the merits that the third-party claims must be dismissed as time-barred. (Statement Case Resp't Automated Building Components, Inc. 4 (stating that it "should be dismissed regardless of the outcome of the plaintiffs' claims against Wesley"); see also Resp't SNE Br. 4 (similarly seeking a dismissal of the third-party claims against it even if the judgment against Wesley is reversed).)

The trial court properly dismissed all of Appellants' claims against Respondents as untimely based on the statutes of repose in Minn. Stat. § 541.051, subs. 1, 4. Having done so, there was no remaining controversy to rule upon. "Courts are designed to decide actual controversies." In re Minnegasco, 565 N.W.2d 706, 710 (Minn. 1997). Thus, there was no reason for the trial court to address the merits of the third-party motions.

If this Court decides to reverse the trial court's grant of summary judgment to Respondents Wesley and Kleven, then Respondents respectfully request that this Court remand the third-party motions so that all parties can properly address the issues involved in that separate motion. Specifically, Respondents Wesley and Kleven will argue that application of a repose period to bar third-party claims, while at the same time allowing underlying direct claims to proceed, is unconstitutional under the equal protection clause

of the Minnesota Constitution. Contrary to third-parties' arguments, the Weston court never ruled on an equal protection challenge. See Weston v. McWilliams & Assocs., Inc., 716 N.W.2d 634, 644 (Minn. 2006) (stating that "Top Value did not present an equal protection challenge to the statute."). Because the trial court never had an opportunity to address such issues, this Court should not issue a decision on the third-party motions and instead should affirm the trial court's decision that such motions became moot upon dismissal of Appellants' direct claims.

CONCLUSION

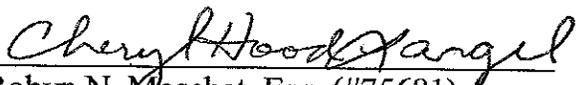
For the foregoing reasons, Respondents respectfully request that the trial court's decisions be affirmed. The trial court properly determined that the majority of Appellants' claims were barred by the 10-year statute of repose in Minn. Stat. § 541.051, subd.1, and that Appellants produced no evidence to toll the repose period under the doctrine of fraudulent concealment. Further, the trial court properly determined that Appellants' remaining statutory warranty claim was also barred by the 12-year statute of repose in Minn. Stat. § 541.051, subd. 4. Application of this 12-year repose period, which was enacted and became effective prior to Appellants' commencement of this action, was not retroactive. Therefore, the trial court properly dismissed all of

Appellants' claims against Respondents as untimely. The third-party motions were thus rendered moot and the trial court properly dismissed them as such.

Respectfully submitted,

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Dated: September 13, 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).