

CASE NO. A06-1830

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**State of Minnesota  
In Court of Appeals**

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LISA PETERSON,

*Plaintiff/Respondent,*

vs.

PHILIP JOHNSON,

*Defendant/Appellant.*

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**APPELLANT'S BRIEF AND APPENDIX**

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## LEGAL ISSUES

1. Whether service of a Summons and Complaint commencing a lawsuit alleging claims under the Minnesota Home Warranty Statute (Chapter 327A), without any other written notice, satisfies the notice requirement of M.S.A. § 327A.03(a).

**Held: Service of a Complaint satisfies the notice requirements of M.S.A. § 327A.03(a).**

**Apposite Authority:**

M.S.A. § 327A.03(a)

2. Whether Respondent lacks standing to claim remedies under the Minnesota Home Warranty Statute (Chapter 327A) because her interest as a vendee expired following a sheriff's sale of her home.

**Held: Respondent is a vendee as defined under chapter 327A. Therefore, Respondent has standing to pursue available remedies under chapter 327A.**

**Apposite Authority:**

*Woodman of World Life Soc. Ins. v. Sears, Roebuck, & Co.*, 200 , N.W.2d 181, 184 (Minn. 1972)

M.S.A. § 327A.02, subd. 2, Warranties to Survive Passage of Title

## **STATEMENT OF THE CASE AND FACTS<sup>1</sup>**

This matter originates from a lawsuit commenced in Cottonwood County, the Honorable Terry M. Dempsey, presiding. Respondent alleged in her complaint three separate claims: Breach of Warranty under Chapter 327A, Breach of Contract, and Negligence. Appellant moved for summary judgment on August 8<sup>th</sup>, 2006. Among the various arguments in support of summary judgment, Appellant argued that Plaintiff failed to provide adequate statutory notice of defects and that Plaintiff lacked standing to claim warranty protection. The court denied Appellant's motion, but certified the issues of this appeal as important and doubtful. (See Orders dated 8/22/2006 and 8/23/2006) This appeal followed that certification.

### **FACTS**

In 1997, Appellant was a building contractor specializing in new home construction. Among the various homes he constructed, Appellant built a split-level home situated at 523 Riverbluff, in Windom. (Appendix 4) The initial homeowner lived there until he sold it to Respondent in May 2000. (Appendix p. 1) Some three years after moving into the home, Respondent employed an inspector on March 7<sup>th</sup>, 2003 to review it for various defects. (Appendix p. 4) After the inspection, Respondent did not contact Appellant to notify him of defects or make any warranty claims. Instead, Respondent simply commenced suit by service of a summons and complaint on August 25<sup>th</sup>, 2003. (Appendix p. 53) Respondent attached as an exhibit a copy of the inspection report to the complaint. She intended that the document as a whole, the complaint and its

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<sup>1</sup> Rule 129.03 Certification: Gregory R. Anderson, Appellant's attorney, authored the entire brief in its entirety. Appellant's insurer, Grinnell Mutual Reinsurance Company, paid for preparation and submission of the brief.

attachment, would satisfy the requirement of written notice under M.S.A. § 327A.03(a).

Respondent lived in the home for another three years or so before moving out January 2006. (Appendix p. 17) She made no further payments on the mortgage, and ultimately lost the home to foreclosure. A Sheriff's sale took place on June 2<sup>nd</sup>, 2006, and the redemption period will expire after 180 days (approximately December 1<sup>st</sup>, 2006). (Appendix 56) Respondent has no plans to redeem the mortgage. At his motion for summary judgment, Appellant urged, among other things, to dismiss Respondent's complaint because 1) the service of a complaint does not satisfy the requirement of written notice under M.S.A. § 327A.03(a) and 2) Respondent lacks standing to claim any remedies under Chapter 327A because she no longer owns the property.

## **ARGUMENT**

- I. Whether service of a Summons and Complaint commencing a lawsuit alleging claims under the Minnesota Home Warranty Statute (Chapter 327A), without any other written notice, satisfies the notice requirement of M.S.A. § 327A.03(a)

The home warranty statute does not extend warranty protection unless the loss or damage is reported "... to the home improvement contractor in writing within six months after the vendee or the owner discovers or should have discovered the loss or damage." Minn. Stat. § 327A.03 (emphasis added) (2004). Plaintiff argues that she complied with this requirement by service of the complaint with its attachment. The question for the court is whether a homeowner can satisfy the written notice requirement of § 327A.03 by serving a complaint commencing litigation, or is a separate written notice required before commencing litigation. If the statute requires a separate written notice of loss or damage, then Respondent's warranty claim specified in Count I of the complaint fails.

This is an issue of first impression, there being no cases directly on point. The "sixth month notice rule" is among the several enumerated home warranty exclusions specified in M.S.A. § 327A.03. The logic of a notice requirement as a prelude to warranty protection is easy to see. Requiring a six month notice to the contractor allows for remediation of the problem before a resolution degenerates to litigation. Public policy would bless the opportunity to remedy defects and cure damage before going to court. In fact, there would be no purpose for a statutory requirement of written notice if a homeowner could simply abandon any obligation to provide separate notice and simply start litigating. Once the

war begins, the contractor loses any opportunity to cure defects and satisfy the homeowner.

In *Collins v. Buus*, (not reported in N.W.2d), 2006 WL 1985431, (Minn.App. 2006) the court sustained a trial court ruling that a homeowner's lawsuit was unsustainable because the homeowner did not provide six months written notice. In *Collins*, the homeowner argued that a transcript of his oral statement to the insurance company satisfied the notice requirement, or in the alternative, that the builder's visual inspection of the home constituted actual notice. Although the case is unpublished and cannot be precedential, the holding is instructive:

Because the plain language of Minn.Stat. § 327A.03(a) provides that liability under the statutory warranty does not extend to damage that is not reported by the vendee in writing, the district court did not err in concluding that when there is no written report, actual notice is insufficient to satisfy Minn.Stat. § 327A.03(a).

*Collins* at p. 2.

The statutory requirement for written notice is plain, and more importantly, it amounts to a condition precedent to commencement and maintenance of a lawsuit under Chapter 327A. While the homeowner in *Collins* apparently did not argue that his complaint satisfied the written requirement as Respondent does here, it is clear that his claim was unsustainable without a separate written notice of damage timely sent to the contractor. This is the plain meaning of the statute.<sup>2</sup>

The sixth month notice rule may not rise to the level of a *jurisdictional* prerequisite to suit, but it otherwise has no purpose unless viewed as a condition precedent to litigation.

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<sup>2</sup> Plain meaning is the governing principle in applying all statutory language. *Hans Hagen Homes, Inc. v. City of Minnetrista*, 713 N.W.2d 916, 922 (Minn.App., 2006)

The law is not without other examples of a notice requirement predicated suit. Before an individual can recover against a railroad for damages caused by fire, the claimant must serve a notice and claim for reimbursement (M.S.A. § 219.761). A gasoline retailer must notify an automobile owner that his vehicle received fuel without payment before he can make a claim for the price. (M.S.A. § 604.15) A person who claims damages from a licensed retailer of alcoholic beverages or municipal liquor store for injuries within the scope of M.S.A. § 340A.801 must give written notice to the licensee or municipality. (M.S.A. § 340A.802) The common thread germane to all statutes requiring notice is the effort to resolve an issue before marching off to court. The party causing some kind of offense, must be given an opportunity to make redress. It is hard to argue with the common sense of a notice requirement. On the other hand, if a complaint commencing litigation can satisfy the requirement of written notice, then every other statute in Minnesota with similar provisions is similarly affected and the legislature has some real work to do to protect the policy of pre-claim notice.

II. Whether Respondent lacks standing to claim remedies under the Minnesota Home Warranty Statute (Chapter 327A) because her interest as a vendee expired following a sheriff's sale of her home.

Minnesota's home warranty statute provides warranty protection to vendees. M.S.A. § 327.02, subd. 1. A "vendee" is "any purchaser of a dwelling and includes the initial vendee and *any subsequent purchasers.*" Minn. Stat. § 327A.01 Subd. 6. Respondent purchased the Riverbluff property and it appears *a priori* that she fits the definition of a "vendee" under the statute. She is a subsequent purchaser and seemingly should be able to claim warranty protection under the statute. However, the subsequent mortgage foreclosure changes things. With the Sheriff's sale, Plaintiff no longer owns the home. The mortgagor, who is not a party to this suit, now owns the property. The mortgagor is also a vendee as the statute defines the term. Here lies the paradox. The mortgagor and the Respondent are both vendees, but one owns the home and the other does not. Warranty protection cannot extend to both of them because the statutory remedies relate to diminished value or repair/replacement measures involving the home. (See M.S.A. § 327A.05) How can Respondent recover damages for repair, replacement, or diminished value for a home she no longer owns?

The Minnesota Supreme Court stated that "[i]t is a cardinal rule of statutory construction that a particular provision of a statute cannot be read out of context but must be taken together with other related provision to determine its meaning." *Kollodge v. F. and L. Appliances*, 80 N.W.2d 62, 64-65 (Minn. S. Ct. 1956). "Words and sentences are to be

understood in no abstract sense, but in the light of their context, which communicates meaning and color to every part." Id.

If the statute's literal meaning leads to an absurd result that utterly departs from the legislature's purpose, we may look beyond the language and examine other indicia of legislative intent. *Wegener v. Commissioner of Revenue*, 505 N.W.2d 612, 617 (Minn.1993); *Kay v. Fairview Riverside Hosp.*, 531 N.W.2d 517, 521 (Minn.App.1995),

*Anker v. Little*, 541 N.W.2d 333, 336 (Minn.App.,1995)

If a vendee under the statute is not also an owner of the property, then the efficacy of the home warranty statute is severely undermined. The legislature plainly never intended to obligate a vendor to provide warranty protection to more than one party at the same time. Yet, that is plainly possible as this case indicates if a vendee is something different from an owner. If the court rules that Appellant is liable to Respondent under the home warranty statute, then what are the rights of the mortgagor that just acquired title? The remedy is limited to 1) the amount necessary to remedy the defect or the breach, or 2) the difference between the value of the dwelling with the defect and the value of the dwelling without the defect. M.S.A. § 327A.05, subd. 1. Any award to Respondent is a windfall, and because Appellant cannot be made to pay twice for the same claim, a windfall made at the expense of the mortgagor. The court cannot apply the available remedies because Plaintiff's claims are moot by the foreclosure, and she lacks standing to proceed on the mortgagor's warranty claim.

Mootness is "a flexible discretionary doctrine, not a mechanical rule that is invoked automatically." *Jasper v. Comm'r of Pub. Safety*, 642 N.W.2d 435, 439 (Minn.2002) (citing *State v. Rud*, 359 N.W.2d 573, 576 (Minn.1984)). Generally, we will dismiss a case as moot if we are unable to

grant effectual relief. *In re Schmidt*, 443 N.W.2d 824, 826 (Minn.1989).

*Kahn v. Griffin* 701 N.W.2d 815, 821 (Minn., 2005)

Here, any remedy that favors both Respondent and the mortgagor is punitive. The legislature could not have intended to protect those who do not own property with the same warranty protection available to those that do. A sensible reading of the entire chapter compels the conclusion that the legislature intended the Home Warranty Statute to protect owners, but not past owners. Current owners are the ones for whom the available remedies are designed to protect. Thus, when Plaintiff lost her home to foreclosure, she also lost her right to proceed in this action under the home warranty statute. Whatever rights the statute creates, if any, now inure to the mortgagor, and are lost to Respondent.

Of course, this argument presumes that Respondent has in fact lost title to her home through foreclosure. Respondent may argue that she still owns a property interest notwithstanding the sheriff's sale on June 2<sup>nd</sup>, 2006. Since Respondent still owns a property interest, she would argue, her rights under Chapter 327A remain viable. This argument is without merit.

A sheriff's sale in a mortgage foreclosure is an auction for real estate open to the public.<sup>3</sup> The mortgagee may pledge the unpaid balance of the outstanding promissory note, but the proceeding is open to any person choosing to bid on the property. Title transfers to the winning bidder, which is often the mortgagee, subject only to the right of redemption.

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<sup>3</sup> The sale shall be made by the sheriff or the sheriff's deputy at public venue to the highest bidder, in the county in which the premises to be sold, or some part thereof, are situated, between 9:00 a.m. and the setting of the sun. M.S.A. § 580.06

Every sheriff's certificate of sale made under a power to sell contained in a mortgage shall be prima facie evidence that all the requirements of law in that behalf have been complied with, and **prima facie evidence of title in fee thereunder in the purchaser at such sale**, the purchaser's heirs or assigns, after the time for redemption therefrom has expired.

M.S.A. § 580.19 (emphasis added)

Thus, while Respondent plainly keeps her right to redeem until that right expires on December 2<sup>nd</sup>, 2006, the right is not a fee interest in the land.<sup>4</sup> In *Bradley v. Bradley*, 554 N.W.2d (Minn.App. 1996), the Court held that "a purchaser of property at a foreclosure sale takes title subject to an *equitable right of redemption* in the previous owners of the property." *Id.*, at 764 (emphasis added). Redemption therefore, is an equitable right created by statute, subject to extinction, but in no way a property interest. When the Sheriff sold Respondent's home to the mortgagee, title conveyed subject only to Plaintiff's equitable right to buy it back.<sup>5</sup> Indeed, even a creditor with a lien on the property has a

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<sup>4</sup> In *Browning v. Browning*, 76 N.W.2d 100 (Minn. 1956), the Minnesota Supreme Court discussed redemption by stating "the policy of the law is to provide free alienability; thus rights such as equity of redemption must be exercised within a limited time or those rights will be extinguished." *Id.*, at 104.

<sup>5</sup> **580.25. Redemption, how made.**

Redemption shall be made as provided in this section.

The person desiring to redeem shall pay the amount required by law for the redemption, and shall produce to the person or officer receiving the redemption payment:

(1) a copy of the docket of the judgment, or of the deed or mortgage, or of the record or files evidencing any other lien under which the person claims a right to redeem, certified by the officer with custody of the docket, record, or files, or the original deed or mortgage with the certificate of record endorsed on it;

(2) a copy of any assignment necessary to evidence the person's ownership of the lien, certified by the officer with custody of the assignment, or the original of each instrument of assignment with the certificate of record endorsed on it. If the redemption is under an assignment of a judgment, the assignment shall be filed in the court entering the judgment, as provided by law, and the person so redeeming shall produce a certified copy of it and of the record of its filing, and the copy of the docket shall show that the proper entry was made upon the docket. No

redemption right under M.S.A. § 580.24<sup>6</sup> Should Respondent fail or refuse to redeem the mortgage, an interested creditor can redeem within seven days after Respondent's redemption period expires. This point is important. If Respondent's argument were true; that her redemption right constituted an actual property interest, then the same is true for some of her creditors. Since they can redeem, it follows that they must also have tangible real property interests as well. Indeed, the only difference between Respondent's property interest and those of a creditor with a lien is that she gets the first opportunity to redeem. Of course, the idea that foreclosure elevates a creditor's lien to an interest in fee is absurd. The foreclosure laws do nothing of the sort. The sheriff's sale is

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further evidence of the assignment of the judgment is required unless the mortgaged premises or part of it is registered property, in which case the judgment and all assignments of the judgment must be entered as a memorial upon the certificate of title to the mortgaged premises and the original judgment and each assignment with the certificate of record endorsed on it, or a copy certified by the registrar of titles, must be produced; and

(3) an affidavit of the person or the person's agent, showing the amount then actually claimed due on the person's lien and required to be paid on the lien in order to redeem from the person.

If redemption is made to the sheriff, the sheriff may charge a fee of \$250 for issuing the certificate of redemption and any related service. No other fee may be charged by the sheriff for a redemption.

Within 24 hours after a redemption is made, the person redeeming shall cause the documents so required to be produced to be filed with the county recorder, or registrar of titles, who may receive fees as prescribed in section 357.18 or 508.82. If the redemption is made at any place other than the county seat, it is sufficient forthwith to deposit the documents in the nearest post office, addressed to the recorder or registrar of titles, with the postage prepaid. A person recording documents produced for redemption shall, on the same day, deliver copies of the documents to the sheriff for public inspection. The sheriff may receive a fee of \$20 for the documents delivered following a redemption. The sheriff shall note the date of delivery on the documents and shall maintain for public inspection all documents delivered to the sheriff for a period of six months after the end of the mortgagor's redemption period.

**<sup>6</sup> 580.24. Redemption by creditor**

(a) If no redemption is made by the mortgagor, the mortgagor's personal representatives or assigns, the most senior creditor having a legal or equitable lien upon the mortgaged premises, or some part of it, subsequent to the foreclosed mortgage, may redeem within seven days after the expiration of the redemption period determined under section 580.23 or 582.032, whichever is applicable; and each subsequent creditor having a lien may redeem, in the order of priority of their respective liens, within seven days after the time allowed the prior lienholder by paying the amount required under this section.

a transaction that vests title only with the purchaser. Here, that was the mortgagee. While the mortgagee can lose title if Plaintiff redeems before December 2<sup>nd</sup>, 2006, her right is simply an equitable one that allows her the opportunity to buy the property back from the mortgagee.

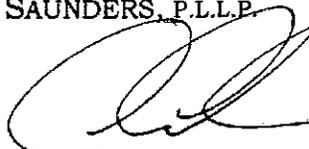
This analysis makes sense in light of the Minnesota Home Warranty Statute. Since the warranties under this chapter extend to vendees', then it makes sense that Respondent's mortgagee benefits from the warranty protection of Chapter 327A. It is a purchaser (vendee) in possession of the property. Any remedy due should benefit the party in possession, and that is the mortgagee, not Respondent. The Home Warranty statute is without a remedy for Respondent. Her claim is moot and she is without standing to proceed further.

### CONCLUSION

In denying summary judgment, the trial court erred by holding that 1) a complaint commencing litigation satisfies the written notice requirement of M.S.A. § 327A.03(a); and 2) Respondent can proceed with claims under Chapter 327A even though she no longer has title to the affected real property. On appeal, the court should reverse and remand for judgment dismissing Respondent's claims.

Date: October 27, 2006.

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**CERTIFICATION - RULE 132.01**

I certify that Appellant's brief complies with the word count or line count limitation. The brief was prepared using Microsoft Word 2003. The total number of words in the brief is 2974.

Date: October 27, 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).