

NO. A06-2155

STATE OF MINNESOTA
IN COURT OF APPEALS

Gail and Lupe Gomez,
.....

vs.

David A. Williams Realty & Construction,
Inc., defendant and third-party plaintiff,
.....

**APPELLANTS' REPLY
BRIEF**

vs.

David Freund, et al.,
.....

Scherer Bros. Lumber Co.,
third-party defendant,
.....

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I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT BASED ON THE STATUTE OF REPOSE RAISED BY WILLIAMS CONSTRUCTION FOR THE FIRST TIME IN ITS REPLY MEMORANDUM WITHOUT GIVING THE GOMEZES A MEANINGFUL OPPORTUNITY TO RESPOND.

All agree that the trial court granted summary judgment on the basis of the statute of repose, even though it was not raised as a grounds for summary judgment until Williams Construction's reply brief and even though the Gomezes were denied the additional opportunity they requested to address that new grounds. Where the Gomezes and Respondents differ is whether this was error.

Scherer Bros. claims that it was not error, arguing that the Gomezes received adequate notice of the statute of repose issue because it was included in the laundry list of affirmative defenses it pled in its answer.¹ While this may have put the Gomezes on notice that a statute of repose might be an issue in the case, it did not put them on notice that Respondents were seeking summary judgment on that grounds. If Scherer Bros.' argument were accepted, in responding to a summary judgment motion, plaintiffs would have to address every affirmative defense pled in an answer. Here, for example, that would have included every possible affirmative defense because David Freund asserted as affirmative defenses "any or all of the affirmative defenses set forth under Minn. R Civ. P. 8.03" and Scherer Bros. incorporated all of Freund's affirmative defenses by

¹Neither Respondent specifically pled the statute of repose as an affirmative defense. Scherer Bros. did incorporate by reference any affirmative defense pled by any other third-party defendant and third-party defendant David Freund in its Answer alleged "on information and belief, that the claims of plaintiffs are barred in whole or in part by the applicable statutes of limitation and/or repose." Even this, however, did not provide any notice of which statute was being referred to. (*See* A.A. 5-6, R.S.A. 79, 84-85.)

reference. (See R.S.A. 79, 85.) Understandably, the rules do not impose any such wasteful burden and there is no requirement that plaintiffs rebut in their opposition papers arguments for summary judgment that were never raised in the motion papers.

Similarly, Williams Construction claims that it was not error for the trial court to grant summary judgment on the basis of the newly-raised statute of repose, arguing that the statute of repose was the “logical progression” from the Gomezes’ responsive brief. (Williams Construction’s Brief at 13.) In essence, Williams Construction is arguing that because the Gomezes did such an effective job of pointing out the flaws in the original grounds for summary judgment, they should have logically anticipated that Respondents would raise new ones and have addressed those as well. Again, there is no requirement that plaintiffs rebut in their opposition papers arguments for summary judgment that were never raised in the motion papers. To the contrary, Minnesota General Rule of Practice 115.03(c) protects plaintiffs from having to do so by explicitly limiting a moving party’s reply brief to those issues “raised” by the non-moving party.

Attempting to divert attention from its own failure to timely raise the statute of repose in its motion papers, Williams Construction faults the Gomezes for not having submitted an affidavit under Rule 56.06 as to why facts opposing summary judgment on the basis of the statute of repose were not available. This ignores, however, that the Gomezes were required to submit any such affidavit at least nine days prior to the hearing. Minn. Gen. R. Prac. 115.03(b). At that time, of course, the Gomezes did not

know the statute of repose was an issue with respect to the pending motion because Respondents had not yet raised it.²

At the hearing, the Gomezes did request additional time to respond to Respondents' newly-raised arguments, including the opportunity to submit additional affidavits as to the issue of structural damage. (Tr. at 8, 15 and 26.) The trial court erred in granting summary judgment on the basis of the newly-raised statute of repose without giving them that opportunity. Hebrink v. Farm Bureau Life Ins. Co., 664 N.W.2d 414 (Minn. Ct. App. 2003) (reversing grant of summary judgment where adverse party was not given a meaningful opportunity to oppose it).

II. THE TRIAL COURT ERRED IN ITS INTERPRETATION OF THE STATUTE OF REPOSE.

A. The Gomezes are Not Claiming that the Pre-August 1, 2004 Version of § 541.051 Applies.

For some reason, Williams Construction spends some four pages of its brief arguing that the Gomezes should not be allowed to argue that the pre-August 1, 2004, version of Minn. Stat. § 541.051 applies. (Williams Construction's Brief at 16-20.) The Gomezes have not made and are not now making this argument. For purposes of the

² Scherer Bros. also argues that the trial court had a duty to review the statute of repose issue *sua sponte* as a matter of the court's subject matter jurisdiction. It cites no authority for this surprising proposition and there is none. The statute of repose is an affirmative defense which is waived if not pled, not an issue of subject matter jurisdiction. See Minn. R. Civ. P. 8.03. Even if the trial court had raised this issue *sua sponte*, it would still have to have afforded the Gomezes a meaningful opportunity to address it. Hebrink v. Farm Bureau Life Ins. Co., 664 N.W.2d 414, 419 (Minn. Ct. App. 2003).

underlying motion and this appeal, the Gomezes agree that it is the post-August 1, 2004 version of § 541.051 that applies to this action commenced in November 2005.

B. Subdivision 1 of § 541.051 Does Not Apply to Express Written and Statutory Warranty Claims by Homeowners.

As Williams Construction correctly notes in its brief (at 23), in considering the statute of repose issue, the Court must first determine if the statute of repose contained in subdivision 1 of § 541.051 even applies to express written and statutory warranty claims. Below, Respondents and the trial court simply assumed that it did.

It is undisputed that prior to the amendments to § 541.051 effective August 1, 2004, the statute of repose in subdivision 1 did not apply to such claims and there was no statute of repose for such claims. See Koes v. Advanced Design, Inc., 636 N.W.2d 352 (Minn. Ct. App. 2001) and Vlahos v. R&I Construction of Bloomington, Inc., 676 N.W.2d 672, 677 (Minn. 2004). Similarly, it is undisputed that in response to *Koes* and *Vlahos*, the legislature acted in 2004 to adopt a statute of repose for statutory warranty claims. To do so, however, the legislature did not amend subdivision 1, but instead amended subdivision 4 by, among other things, adding a twelve-year statute of repose to it.

In arguing that this amendment to subdivision 4 somehow made the statute of repose contained in subdivision 1 apply to express written and statutory warranty claims, Respondents never explain the purpose of the twelve-year statute of repose added to subdivision 4. Instead, they simply state that subdivision 1 by its terms applies to all claims. *Koes* and *Vlahos*, however, held that it did not and subdivision 1 has not been subsequently amended. Moreover, the same language in subdivision 1 that Respondents

rely upon also applies to the statute of limitation in subdivision 1 and even Respondents agree that the statute of limitations contained in subdivision 1 does not apply to express written and statutory warranty claims. Accordingly, just as it is subdivision 4, and not subdivision 1, which sets forth the statute of limitations for express written and statutory warranty claims, it is subdivision 4, and not subdivision 1, which sets forth the statute of repose for such claims. And, all agree that the Gomezes' claims were not untimely under the 12-year statute of repose contained in subdivision 4.

C. Even if the Statute of Repose Contained in Subdivision 1 of § 541.051 Did Apply to Express Written and Statutory Warranty Claims, the Trial Court Erred in its Interpretation of It.

As indicated above, Respondents maintain that the statute of repose contained in subdivision 1 of § 541.051 applies to all construction defect claims (except where fraud is involved), including express written and statutory warranty claims. Specifically, the “statute of repose” they refer to is the following phrase in subdivision 1(a): “nor, in any event, shall such a cause of action accrue more than ten years after substantial completion of the construction”

In light of their reliance on this phrase in subdivision 1(a), it is puzzling, to say the least, why Respondents then ignore the following language in subdivision 1(b):

“For purposes of paragraph (a), a cause of action accrues upon discovery of the injury”

And yet, ignore it they do. Despite this explicit language in the very subdivision Respondents claim supplies the relevant statute of repose, Respondents instead refer to subdivision 4, which they have just finished saying has nothing to do with the statute of

repose. Respondents cannot have their cake and eat it, too. It is either subdivision 1 or subdivision 4 that provides the statute of repose applicable to express written and statutory warranty claims. And if it is subdivision 1, then it is all of subdivision 1 that applies, including its explicit definition of when a cause of action accrues for purposes of determining that statute of repose.

In ignoring the explicit definition in subdivision 1(b) for when a cause of action accrues within the meaning of subdivision 1(a), Respondents argue that subdivision 4 provides, for purposes of the statute of repose in subdivision 1, that claims for breach of express or statutory warranty accrue upon discovery of the breach. Williams Construction spends exactly one sentence on this critical issue. (Williams Construction's Brief at 24.) Although Scherer Bros. spends six pages (at 9-16), no matter how many times Scherer Bros. repeats it, subdivision 4 does not "set forth a specific definition of accrual for breach of express and § 327A warranty claims." To the contrary, subdivision 4 does not contain any definition of accrual. It merely provides that any express written warranty or statutory warranty claim must be "brought within two years of discovery of the breach." Contrary to what Scherer Bros. argues (at 14), applying the plain language of subdivision 1(b) to the statute of repose in subdivision 1(a) in no way disregards this language in subdivision 4 concerning the statute of limitations applicable to such claims.

In essence, Respondents are arguing that in light of the language in subdivision 4, it makes little sense to apply the explicit definition of accrual in subdivision 1(b) to express written and statutory warranty claims. To the extent this is true, it is just another reason the statute of repose in subdivision 1 should not be so applied to such claims in the

first place. If, as Respondents desire, the statute of repose in subdivision 1 is applied to such claims, the entirety of its plain language must be applied. As the Minnesota Supreme Court stated in Weston v. McWilliams & Assoc., Inc., 716 N.W.2d 634, 639 (Minn. 2006), “[t]he reference to ‘accrues’ in the repose provision must be read together with the definition that is given later in section 541.051: ‘For purposes of paragraph (a), a cause of action accrues upon discovery of the injury. . . .’” And all agree that the Gomezes “discovered the injury” well within the ten-year period.

III. ALTERNATIVELY, EVEN UNDER THE TRIAL COURT’S INCORRECT INTERPRETATION, IT ERRED IN FINDING THAT THE STATUTE OF REPOSE BARRED THE GOMEZES’ MAJOR CONSTRUCTION DEFECT CLAIMS AS A MATTER OF LAW.

If the statute of repose in subdivision 1 of § 541.051 does not apply to the Gomezes’ express written and statutory warranty claims, the parties are in agreement that the Gomezes’ major construction defect claims are not barred. Similarly, if the statute of repose in subdivision 1 does apply to such claims, including the definition of accrual contained in subdivision 1(b), the parties are in agreement that the Gomezes’ major construction defect claims are not barred. If, however, as Respondents maintain, the statute of repose contained in subdivision 1 applies without reference to subdivision 1(b) and that such causes of action accrue upon discovery of the breach instead of upon discovery of the injury, then the parties disagree as to the status of the Gomezes claims and this Court must consider whether as a matter of law the Gomezes did not “discover the breach” on or before October 19, 2004.

If the appropriate event under the statute of repose were “discovery of the breach,” then the issue is whether, as a matter of law, on or before October 19, 2004, the Gomezes did not discover and should not have discovered, Williams Construction’s refusal or inability to maintain the home as warranted. Given the fact-intensive nature of this standard, the Gomezes maintain that the record already demonstrated sufficient issues of fact to preclude summary judgment, even though they were denied the opportunity to present additional material after this issue was belatedly raised. First and foremost, of course, is the fact that Williams Construction itself maintained that such discovery occurred before the ten-year period had run. (A.A. 57-60.) In addition, the Private Eye Report noted literally dozens of places where the wall sheathing was either soft or undetectable when probed. (G. Gomez Aff., Ex. D.) This was ample evidence from which a jury could conclude that the Gomezes should have known there was a major construction defect.

In arguing that the trial court did not err in granting summary judgment on this fact-intensive issue, Respondents argue that there is no evidence that the Gomezes, or anyone else, actually knew of structural damage before October 19, 2004. Actual knowledge, however, is not the test – it is discovered or should have discovered. Thus, the fact that Williams Construction’s insurer (a biased witness if there ever was one) claimed that the Private Eye report did not demonstrate structural damage is irrelevant. The fact that based on the Private Eye Reports of excessive moisture intrusion and damaged sheathing, both Private Eye and Williams Construction’s insurer recommended further investigation to confirm the existence of structural damage is sufficient for a jury

to conclude that the Gomezes “should have known” at that point there was a major construction defect. As Scherer Bros. argued in connection with the similar discovery test under the statute of limitations contained in § 541.51, subd. 1, “discovery” occurs when “1) Initial defects are discovered; and 2) Underlying deficiencies are *suspected*.” (A.A. 33, citing Greenbrier Village Condo Two Ass’n v. Keller Inv., Inc., 409 N.W.2d 519, 524 (Minn. Ct. App. 1987) (emphasis by Scherer Bros.)). Here, at a minimum, the Private Eye report led everyone to suspect there was structural damage, which was sufficient to constitute “discovery”.

To the extent these facts already in the record did not demonstrate sufficient issues of fact to preclude summary judgment, the Gomezes should have been allowed the additional opportunity they requested to present additional facts. Williams Construction argues (at 14) that it was “incumbent upon” the Gomezes to have presented such evidence in response to its motion for summary judgment because they were “perilously close” to the end of the period of repose. However, the fact remains that Respondents did not raise the statute of repose as a possible grounds for summary judgment until after the Gomezes responded to their motion and thus the Gomezes had no obligation to respond to that grounds.³ Accordingly, as discussed in Section I above, the trial court should not

³ Williams Construction also seems to imply that the Gomezes should have submitted additional evidence in connection with their request for permission to move for reconsideration. (Williams Construction’s Brief at 8.) Gen. R. Prac. 115.11 does not allow the submission of additional evidence until permission to move for reconsideration is granted. At Williams Construction’s urging, the Gomezes’ request was denied, and thus they were denied the opportunity to submit such evidence.

have granted summary judgment on this grounds without giving the Gomezes an adequate opportunity to respond.

IV. THE TRIAL COURT ERRED IN FINDING THAT THE GOMEZES HAD CONCEDED THAT THEIR NON-MAJOR CONSTRUCTION DEFECT EXPRESS WRITTEN AND STATUTORY WARRANTY CLAIMS WERE BARRED BY THE STATUTE OF LIMITATIONS CONTAINED IN § 541.051, SUBD. 1.

The trial court dismissed the Gomezes' non-major construction defect express written and statutory warranty claims simply by stating that "Plaintiffs conceded that [these claims] are barred by the two-year statute of limitation. Minn. Stat. § 541.051, subd. 1." (AA.71.) As the Gomezes indicated in their opening brief, they did not and would not so concede because the statute of limitations in subdivision 1 does not even apply to such claims. Williams Construction does not dispute this, but instead now argues that these claims are barred by the statute of limitations contained in subdivision 4 of § 541.051. (Williams Construction Brief at 20-23.) This issue, however, was never presented to the trial court and thus may not be considered for the first time on appeal. *See, e.g., Thayer v. American Fin. Advisors, Inc., 322 N.W.2d 599 (Minn. 1982).*

For its part, Scherer Bros. argues that because the express written warranties were contained in the Gomezes' contract with David Williams, they are not governed by the statute of limitations for express written warranty claims in subdivision 4 of § 541.051. In addition to the fact that this argument ignores the plain wording of subdivision 4 and contradicts Scherer Bros. argument that subdivision 4 "defines" accrual for such claims, it also was not raised below and thus may not be considered on appeal.

V. CONCLUSION

In considering this appeal, this Court must first determine whether the trial court erred in applying the statute of repose contained in subdivision 1 of § 541.051 to express written and statutory warranty claims. If this Court finds the trial court did so err, then dismissal of the Gomezes' major construction defect claims must be reversed.

If this Court instead finds that the statute of repose in subdivision 1 of § 541.051 does apply to express written and statutory warranty claims, then this Court must determine whether the trial court erred in ignoring the explicit definition in subdivision 1(b) of § 541.051 that for purposes of subdivision 1(a) "a cause of action accrues upon discovery of the injury." If this Court finds that the trial court did so err, then the dismissal of the Gomezes' major construction defect claims must be reversed.

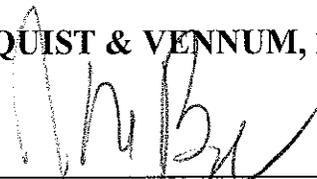
If this Court instead finds that the explicit definition in subdivision 1(b) does not for some reason apply, and that the issue is instead whether the Gomezes "discovered the breach" before October 19, 2004, then this Court must determine whether the trial court erred in finding that as a matter of law (and without allowing the Gomezes an additional opportunity to respond to this newly-raised issue) that the Gomezes did not discover and should not have discovered the breach with respect to the major construction defects before October 19, 2004. If this Court finds that the trial court did so err, then the dismissal of the Gomezes' claims must be reversed.

For the reasons set forth above, the trial court erred with respect to all three of these issues, any one of which requires reversal. Accordingly, the trial court's summary judgment dismissing the Gomezes' major construction defect express written and

statutory warranty claims must be reversed. In addition, for the reasons set forth above, the trial court erred in dismissing the Gomezes' other express written and statutory warranty claims and thus the summary judgment as to those claims must also be reversed.

Dated: February 15, 2007.

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