STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0604

HongShi Li, et al.,
Appellants,

vs.

Steven J. Zawadski d/b/a
W. F. Bauer Homes, et al.,
defendants and third party plaintiffs,
Respondents,

vs.

Jody Kainz d/b/a Kainz Construction,
third party defendant,
Respondent,

Lincoln Wood Products,
third party defendant,
Respondent,

Harley Rohlf d/b/a Butch Rohlf Stucco,
third party defendant,
Respondent,

Westurn Cedar and Supply Company d/b/a
Westurn Roofing and d/b/a Westurn Roofing
and Siding and Westurn Cedar Supply, Inc.,
third party defendant,
Respondent,

Hart Masonry, Inc.,
third party defendant,
Respondent.

Filed April 8, 2008
Reversed and remanded
Halbrooks, Judge

Ramsey County District Court
File No. C0-05-12099

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Considered and decided by Klaphake, Presiding Judge; Halbrooks, Judge; and Schellhas, Judge.

U N P U B L I S H E D O P I N I O N

HALBROOKS, Judge

Appellants HongShi Li and Danli Wang challenge the district court's grant of summary judgment to respondents Steven J. Zawadski, d/b/a W.F. Bauer Homes; W.F.B., Inc. d/b/a W.F. Bauer Homes, Inc. also d/b/a W.F. Bauer Homes; and Zawadski Homes, Inc. (Bauer). Appellants argue that the district court erred in its application of the statute of limitations on their statutory new-home warranty claims and that material fact issues exist that preclude summary judgment on their claims of negligence and breach of contract. Because we agree that the district court erred in its application of the statute of limitations and because genuine issues of material fact exist that preclude summary judgment, we reverse and remand.

FACTS

Bauer, the general contractor, constructed a home at 710 Valley View Court in Shoreview in 1996. Bauer subcontracted with respondents Jody Kainz, d/b/a Kainz Construction; Lincoln Wood Products; Harley Rohlf, d/b/a Butch Rohlf Stucco; Westurn Cedar and Supply Co., d/b/a Westurn Roofing, and d/b/a Westurn Roofing and Siding and Westurn Cedar Supply, Inc.; and Hart Masonry, Inc. to construct the home. On April 8, 2000, appellants entered into a purchase agreement with the original homeowners. The purchase agreement stated that the home "has had a wet basement" and "has had roof, wall or ceiling damage caused by water." An addendum to the purchase agreement stated that "[appellants] are aware the basement has a leak in the back room by the furnace

outside wall." A complete home inspection was also required by the agreement prior to purchase.

Appellants hired Donald Fogelberg, Ph.D., of Homebuyer's Inspection Service to inspect the home. Dr. Fogelberg inspected the home on April 22, 2000. His evaluation of the home concluded that it was "[o]verall a very good place, but no place is perfect. Some upgrades and deferred maintenance to do." Dr. Fogelberg's report indicated the following specific areas as either "non-functional" and/or of "special concern":

1. Missing shingles on front roof area.
2. Grade/Drainage at foundation is improper and inadequate.
3. Caulk at patio joint with house.
4. Stucco lacks damp proofing.
5. Cracks and unfinished stucco area.
6. Caulk all open joints of stucco.
7. Block at foundation lacks damp proofing.
8. Exterior walls need caulk at open joints.
9. Foundation leak reported by client.
10. Indications of stains and dampness attributable to the above defects.

Appellants received this report before they purchased the home. After buying the home, appellants replaced shingles and repaired a leak near a basement door.

After a neighbor suggested that appellants have their home inspected, appellants hired Certified Moisture Testing, LLC (CMT) to inspect their home in July 2005. The CMT inspection determined that appellants' home had elevated moisture ratings and defects including: (1) failure to caulk window joints and other exterior breaches; (2) inadequate roof flashing; and (3) stucco terminating at or below grade. CMT also found stucco deterioration, stains, and cracking.

After receiving the CMT report, appellants sent a letter to Bauer. In response, Zawadski telephoned appellants and left a message requesting an opportunity to inspect the home. Other than the call from Zawadski, appellants had no other pre-suit contact with Bauer. It is not disputed that Bauer was not given an opportunity to inspect and/or address the conditions noted in the CMT report. Instead, appellants hired Advanced Consulting and Inspection, Inc. (ACI) to provide further moisture inspection of the home.

ACI inspected the home on September 23, 2005, and provided the following written summary of the inspection:

> This home exhibits evidence of moisture intrusion and structural damage at both the interior and exterior. At the interior, there is evidence of leakage at the windows that caused deterioration of the sashes on several windows. There is also evidence of damage to the carpet tack strip, under a window, due to moisture intrusion. At the exterior, there are several deficiencies. There is no exposed flashing at the base of the roof/wall intersection for the purpose of diverting water away from the wall and end of the fascia, at several locations on the home. Perimeter surface caulk was not visible at most of the windows observed. No perimeter caulk joint was visible at any of the windows or doors observed. No surface caulk was observed on the edge of the stucco/soffit or brick/soffit interface on the home. . . . There are numerous cracks in the stucco evident on all four elevations of the home.
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> . . . .
>
> The moisture intrusion, leakage, and structural damage are a result of failure to properly install two layers of Grade D paper per UBC Sec. 2506.4, failure to flash exterior openings in a weatherproof manner per UBC Sec. 1402.2, failure to meet the minimum requirements for stucco thickness per UBC Sec. 2508.1, failure to install a weep screed per UBC Sec. 2506.5, and failure to install exposed flashing at the base of the roof/wall intersections for the purpose of diverting

> water away from the wall and end of the fascia. . . . The deficiencies and code violations cited above have existed since the home was constructed and the damage observed has occurred progressively over the years.

Appellants filed their lawsuit on October 28, 2005, asserting claims of breach of contract, breach of statutory new-home warranty, and negligence. Bauer filed an answer and joined Kainz, Lincoln Wood Products, Rohlf, Westurn Cedar and Supply Co., and Hart Masonry in a third-party complaint, asserting claims of contribution and indemnification against all five subcontractors.

Respondents moved the district court for summary judgment on appellants' claims. Respondents argued that summary judgment was appropriate because: (1) the breach of contract and negligence claims were barred by the two-year statute of limitations in Minn. Stat. § 541.051, subd. 1(a) (2006), and (2) appellants' statutory new-home warranty claim did not comply with the written notice requirements of Minn. Stat. § 327A.03 (2006). Appellants argued that their claims were not time-barred because they did not discover the "injury" or "defective and unsafe condition" required by Minn. Stat. § 541.051, subd. 1(a), until the 2005 inspections. The district court granted respondents' motion for summary judgment. Appellants asked the district court to reconsider its order, but the district court denied appellants' request. This appeal follows.

D E C I S I O N

On appeal from an order granting summary judgment, this court asks two questions: (1) whether the district court erred in its application of relevant law and (2) whether there are any genuine issues of material fact. *State by Cooper v. French*¸ 460

N.W.2d 2, 4 (Minn. 1990). This court must view the evidence in the light most favorable to the party against whom summary judgment was granted. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

I. Appellants' Statutory New-Home Warranty Claim

Appellants argue that the district court erred in granting summary judgment in favor of respondents on their statutory new-home warranty claim. Appellants contend that the district court erred in its application of the relevant statute of limitations and that their claim is not barred by Minn. Stat. § 541.051 (2006).

Appellants' claim is based on the statutory new-home warranties found in Minn. Stat. §§ 327A.01-.08 (2006). Minn. Stat. § 327A.02 describes the warranties that appellants allege Bauer has breached:

> Subdivision 1. Warranties by vendors. In every sale of a completed dwelling, and in every contract for the sale of a dwelling to be completed, the vendor shall warrant to the vendee that:
>
> (a) during the one-year period from and after the warranty date the dwelling shall be free from defects caused by faulty workmanship and defective materials due to noncompliance with building standards;
>
> (b) during the two-year period from and after the warranty date, the dwelling shall be free from defects caused by faulty installation of plumbing, electrical, heating, and cooling systems due to noncompliance with building standards; and
>
> (c) during the ten-year period from and after the warranty date, the dwelling shall be free from major construction defects due to noncompliance with building standards.

Minn. Stat. § 327A.02, subd. 1.[1] Appellants' statutory new-home warranty claim is based on an alleged violation of Minn. Stat. § 327A.02, subd. 1(c), which requires that a new home be free from major construction defects for ten years after its substantial completion. *Id.* Appellants allege that the water damage to their home and stucco problems are a result of Bauer's noncompliance with building standards.

Minn. Stat. § 541.051, subd. 4, establishes a statutory time requirement for any claims brought under sections 327A.01-.08:

> 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 district court applied Minn. Stat. § 541.051, subd. 1, to all of appellants' causes of action, including appellants' statutory new-home warranty claim. Minn. Stat. § 541.051, subd. 1, states:

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[1] Minn. Stat. § 327A.01 defines vendor and vendee as:

> Subd. 6. Vendee. "Vendee" means any purchaser of a dwelling and includes the initial vendee and any subsequent purchasers.
>
> Subd. 7. Vendor. "Vendor" means any person, firm or corporation which constructs dwellings for the purpose of sale, including the construction of dwellings on land owned by vendees.

Here, appellants are vendees as subsequent purchasers of the home, and respondents are vendors under the statutory language. *See* Minn. Stat. § 327A.01, subds. 6, 7.

> 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, . . . 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 . . ., nor, in any event shall such a cause of action accrue more than ten years after substantial completion of the construction.

In so doing, the district court concluded that the limitations period under subdivision 1 "begins to run when an actionable injury is discovered, or with due diligence, should have been discovered, regardless of whether the precise nature of the defect causing the injury is known." *See Indep. Sch. Dist. No. 775 v. Holm Bros. Plumbing & Heating*, 660 N.W.2d 146, 150 (Minn. App. 2003). The district court cited *Dakota County v. BWBR Architects, Inc.*, in support of its conclusion that "[i]t is knowledge of the injury, not the defect, which triggers the statute." *See* 645 N.W.2d 487, 492 (Minn. App. 2002), *review denied* (Minn. Aug. 20, 2002). In its analysis, the district court focused on the purchase agreement. The district court found that the purchase agreement in 2000 made appellants

> aware that the basement of the home was experiencing a leak. In addition to this, [Dr.] Fogelberg's report establishes that on April 22nd, 2000 [appellants] were not only aware that there were numerous construction defects . . . but also that the observable indications of stains and dampness were attributable to these defects.

In light of these findings, the district court concluded that, "[w]hile [appellants] may not have been aware in April of 2000 of the precise nature of the construction

defects afflicting their home, they were made aware, or should have been aware of the injuries actionable at that time."

But subdivision 1 is not the applicable limitations period for a statutory new-home warranty claim based on 327A.02. "[W]arranty claims under Minn. Stat. § 327A.02 are specifically exempted from the statute[] of limitation . . . set forth in Minn. Stat. § 541.051, subd. 1(a), [therefore] the only statutory limitation applying, by its terms, to a § 327A.02 claim is found in § 541.051, subd. 4." *Vlahos v. R&I Constr. of Bloomington, Inc.*, 676 N.W.2d 672, 677 (Minn. 2004) (quotation omitted). Under subdivision 4, the limitations period starts to run only when appellants knew or should have known that Bauer was unable to or refused to meet the statutory new-home warranty obligations. *See* Minn. Stat. § 327A.02, subd. 4; *Vlahos*, 676 N.W.2d at 678. "[T]he statute of limitations . . . applicable to the statutory new home warranty provided by Minn. Stat. § 327A.02 . . ., begins to run when [a] homeowner discovers, or should have discovered, the builder's refusal or inability to ensure the home is free from major construction defects."[2] *Vlahos*, 676 N.W.2d at 678.

The district court made no findings regarding Bauer's failure or refusal to ensure that the home was free from major construction defects. Appellants sent a letter notifying Bauer about the CMT report and the "moisture problem." According to appellants,

[2] Appellants assert that even if they had knowledge of the injury as a result of the Fogelberg report, it did not notify them of "major construction defects," which appellants assert is necessary to trigger accrual of their claims. Respondents assert that this argument was never raised before the district court and is improperly made before this court. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Because we decide the matter on other grounds, we have no need to determine whether this issue is properly before us.

Zawadski left a voice message in response to appellants' letter that asked appellants to contact him to "look at the house or look at the problems." But appellants had no contact with Zawadski or anyone else at Bauer regarding the condition of the home after Zawadski left the voice message. As a result, this record does not support a factual conclusion appropriate for summary judgment that appellants were aware or should have been aware that Bauer had refused or was unable to meet the statutory new-home warranty obligations. As in *Vlahos*, "the question of when . . . the [appellants] . . . discovered or should have discovered [respondent's] refusal or inability to ensure the home was free from major construction defects was a factual question, inappropriate for resolution on summary judgment." *Id.* at 679.

We conclude that there are material issues of fact regarding the timing of appellants' knowledge that Bauer had breached the statutory new-home warranty. *See Fabio*, 504 N.W.2d at 761; *Gomez v. David A. Williams Realty & Constr., Inc.*, 740 N.W.2d 775, 782 (Minn. App. 2007). Because the district court applied the incorrect subdivision of Minn. Stat. § 541.051 to the statutory new-home warranty claim and because there appears to be a genuine issue of material fact, this issue is "inappropriate for resolution on summary judgment." *Gomez*, 740 N.W.2d at 782.

Respondents assert that even if the district court erred in its grant of summary judgment on appellants' statutory new-home warranty claim, appellants have not met the written notice requirements included in section 327A. Minn. Stat. § 327A.03(a) excludes any vendor liability for loss or damage that is not reported in writing to the vendor within six months of when the vendee or owner discovers it or should have discovered it. But

the district court made no finding regarding the timing or sufficiency of written notice provided by appellants to Bauer. While appellants sent Bauer a letter after the CMT report, the record is insufficient to grant summary judgment on that point, and it is a question best left for the finder of fact. *See Gomez*, 740 N.W.2d at 782.

II. Appellants' Breach of Contract and Negligence Claims

Appellants argue that the district court erred in granting summary judgment to respondents on their claims of breach of contract and negligence because material issues of fact remain and because the district court mistakenly made conclusions of fact that are inappropriate for summary judgment.

Minn. Stat. § 541.051, subd. 1, is the applicable limitations period for appellants' claims that are not based on the statutory warranties in section 327A. For non-statutory claims, it is the knowledge of the injury, and not the defect, that triggers the limitations period. *See Hyland Hill N. Condo. Ass'n v. Hyland Hill Co.*, 549 N.W.2d 617, 621 (Minn. 1996) (basing discovery of injury on the observations of water leakage by homeowners), *overruled on other grounds by Vlahos*, 676 N.W.2d at 677; *Sletto v. Wesley Constr., Inc.*, 733 N.W.2d 838, 844 (Minn. App. 2007) (discovery of the injury began accruing when homeowners discovered water damage). But when reasonable minds can differ about the discovery of the injury, summary judgment is inappropriate. *Lake Superior Ctr. Auth. v. Hammel, Green & Abrahamson, Inc.*, 715 N.W.2d 458, 472-73 (Minn. App. 2006), *review denied* (Minn. Aug. 23, 2006); *compare Lake City Apartments v. Lund-Martin Co.*, 428 N.W.2d 110, 112 (Minn. App. 1988) (finding that reasonable minds could differ regarding discovery of the injury where water pipe leaks

were occasional and repairs caused the water leaks to stop for two years), *review denied* (Minn. Oct. 19, 1988), *with Nolan & Nolan v. City of Eagan*, 673 N.W.2d 487, 497 (Minn. App. 2003) (stating "numerous incidents of frequent, regular and permanent flooding 'over the years'" is sufficient to determine when discovery of the injury occurred and grant summary judgment), *review denied* (Minn. Mar. 16, 2004). Where reasonable minds can differ, the question of when the injury was discovered is best left to the trier of fact. *Lake City Apartments*, 428 N.W.2d at 112.

Respondents argue that summary judgment is appropriate because appellants knew or should have known of the injury when they received Dr. Fogelberg's report. The district court agreed and stated that "in April of 2000 . . . [appellants] were made aware, or should have been aware of the injuries actionable at that time." The district court stated that the Fogelberg report "establishes that on April 22nd, 2000 [appellants] were not only aware that there were numerous construction defects (missing shingles, improper grade/drainage, missing caulk, inadequate damp proofing, unfinished stucco) but also that the observable indications of stains and dampness were attributable to these defects."

Based on this finding, the district court stated that appellants "were aware, or should have been aware of the injuries actionable at that time." As a result, the district court concluded that the limitations period under Minn. Stat. § 541.051 began to run in April 2000 and that appellants' action was barred by the two-year limitations period. But the record does not support such a clear conclusion. *Cf. Greenbrier Vill. Condo. Two Ass'n v. Keller Inv., Inc.*, 409 N.W.2d 519, 524-25 (Minn. App. 1987) (summary judgment is appropriate when plaintiffs had documents which clearly described structural

deficiencies or faulty engineering); *Dakota County*, 645 N.W.2d at 492-93 (holding that summary judgment is appropriate when plaintiffs knew of 25 work orders for leaks and threats to take legal action were made regarding those leaks). Here, we conclude that the question of when appellants were aware or should have been aware of the injury is a question of genuine issue of material fact that is best left to a finder of fact. *Lake Superior*, 715 N.W.2d at 472-73.

Reversed and remanded.