

NEBRASKA SUPREME COURT

de Vries v. L & L Custom Builders, Inc.

310 Neb. 543 (2021) · No. No. S-20-577 · Decided December 17, 2021

SUMMARY

The Nebraska Supreme Court affirmed a judgment after a jury found in favor of homeowners in their claims against a custom home builder involving construction defects and lot preparation near a riverbank bluff. The court addressed the statute of limitations for defective construction claims, equitable estoppel, preservation of appellate issues, jury instructions, settlement allocation, and the proper measure and sufficiency of damages. The court held that the limitations period under Neb. Rev. Stat. § 25-223 runs from substantial completion and upheld the judgment.

CASE DETAILS

COURT	Nebraska Supreme Court
WRITING FOR THE COURT	Per Curiam; Heavican, C.J.; Cassel, J.; Stacy, J.; Funke, J.; Papik, J.; Freudenberg, J.; Weimer, District Judge
JURISDICTION	Nebraska
DECIDED	December 17, 2021
DOCKET	No. S-20-577
DISPOSITION	affirmed
PROCEDURAL POSTURE	Homeowners obtained a general jury verdict for \$418,175 against their builder on breach-of-contract or breach-of-express-warranty claims. The builder appealed issues concerning the statute of limitations, jury instructions, settlement setoff, and damages; the homeowners cross-appealed the exclusion of stigma-damages evidence.
STANDARD OF REVIEW	A jury verdict is reviewed by resolving evidentiary conflicts in favor of the successful party and will not be set aside unless clearly wrong. Denial of a motion for judgment notwithstanding the verdict is reviewed de novo on the record. Jury-instruction correctness is a question of law reviewed independently, while instructional error is subject to harmless-error principles and, when unpreserved, plain-error review. Denial of a motion to alter or amend, a motion for reconsideration, a motion to compel, and allocation of a settlement are reviewed for abuse of discretion. The amount of damages receives great deference.

PRECEDENTIAL VALUE	precedential
PARTIES	L & L Custom Builders, Inc. v. Tabe de Vries, Bonnie J. de Vries

TOPICS

construction defects construction law statute of limitations damages appellate procedure

PRACTICE AREAS

construction law contracts real estate damages appellate procedure

QUESTIONS PRESENTED

1. Whether the homeowners' construction-defect claims were barred by Neb. Rev. Stat. § 25-223.
2. Whether equitable estoppel could be used to avoid L & L's statute-of-limitations defense without being formally pleaded by the homeowners.
3. Whether the statute-of-limitations jury instruction was erroneous or prejudicial.
4. Whether L & L was entitled to a setoff for the homeowners' settlement with TD2.
5. Whether the damages award was excessive or included unrecoverable investigation or litigation costs.
6. Whether the district court abused its discretion by denying L & L's motion to compel production of the settlement agreement and motion to reconsider.
7. Whether the district court properly excluded evidence and argument concerning stigma damages.

HOLDINGS

1. For claims based on improper workmanship resulting in defective construction, the four-year limitations period in Neb. Rev. Stat. § 25-223 runs from substantial completion of the project, rather than from the date of a specific act that caused the defect.
2. When a plaintiff raises estoppel to avoid or rebut a statute-of-limitations defense pleaded by the defendant, evidence of estoppel is generally admissible without the plaintiff formally pleading estoppel.
3. The statute-of-limitations instruction did not warrant reversal because it correctly stated the law, adequately presented the issues, and any challenge to one limitations theory was subject to the general-verdict rule when the jury also considered an independent, nonerroneous theory.
4. The district court properly denied L & L's request for a settlement setoff because L & L failed to introduce or obtain the settlement agreement and therefore failed to establish what portion, if any, compensated the same injury for which L & L was liable.
5. Investigation expenses incurred to determine the extent and source of construction defects and the proper course of remediation are recoverable damages rather than litigation costs, and the \$418,175 verdict did not warrant remittitur.
6. Public perceptions of a defect, when the evidence shows no remaining physical defect, are an improper and inherently speculative basis for recovery; the district court properly excluded the proffered stigma-

damages evidence.

KEY QUOTATIONS

“Where the basis of the claim is improper workmanship resulting in defective construction, under either negligence or breach of the implied warranty to perform in a workmanlike manner, the statute of limitations of § 25-223 runs from the date of substantial completion of the project, not the date of any specific act which resulted in the defect.” (573-574)

“But when a plaintiff raises estoppel to avoid or rebut an affirmative defense that has been alleged in a responsive pleading, evidence of estoppel is generally admissible without being formally pled.” (576)

“Amounts expended to investigate the extent of a defect and determine the proper course of remediation are recoverable damages, not litigation costs.” (583)

“We agree that public perceptions of a defect when the evidence demonstrates there is none is an improper basis for recovery.” (587)

FACTUAL BACKGROUND

The homeowners contracted with L & L to build a custom home on property adjoining an approximately 80-foot river bluff. The house was substantially completed in November 2012, and cracking and other distress appeared in 2014 and progressively worsened. L & L and its consultants investigated the problems for several years, repeatedly characterizing them as minor or continuing to investigate their cause, while the homeowners later discovered alleged construction and drainage deficiencies, including failure to install a French drain. A jury found for the homeowners and awarded \$418,175 in damages.

PROCEDURAL HISTORY

The homeowners sued L & L and TD2 in the Douglas County District Court for construction defects involving their home, lot preparation, drainage, and a riverbank bluff. The district court denied summary judgment and directed-verdict motions, submitted the case to the jury, and entered judgment on the jury's verdict. TD2 was dismissed with prejudice after settling with the homeowners. The district court denied L & L's posttrial motions, including requests for judgment notwithstanding the verdict, remittitur, settlement setoff, and reconsideration. The Nebraska Supreme Court affirmed.

DISPOSITION

affirmed

CASES CITED

- Jacobs Engr. Group v. ConAgra Foods, 301 Neb. 38, 917 N.W.2d 435 (2018)
- ACI Worldwide Corp. v. Baldwin Hackett & Meeks, 296 Neb. 818, 896 N.W.2d 156 (2017)
- Golnick v. Callender, 290 Neb. 395, 860 N.W.2d 180 (2015)
- Manker v. Manker, 263 Neb. 944, 644 N.W.2d 522 (2002)

- Maxwell v. Montey, 262 Neb. 160, 631 N.W.2d 455 (2001)
- McCaulley v. C L Enters., 309 Neb. 141, 959 N.W.2d 225 (2021)
- Adams v. Manchester Park, 291 Neb. 978, 871 N.W.2d 215 (2015)
- Rauscher v. City of Lincoln, 269 Neb. 267, 691 N.W.2d 844 (2005)
- Greer v. Chelewski, 162 Neb. 450, 76 N.W.2d 438 (1956)
- Gard v. City of Omaha, 18 Neb. App. 504, 786 N.W.2d 688 (2010)
- VKGS v. Planet Bingo, 309 Neb. 950, 962 N.W.2d 909 (2021)
- Davis Erection Co. v. Jorgensen, 248 Neb. 297, 534 N.W.2d 746 (1995)
- Strasburg v. Union Pacific RR. Co., 286 Neb. 743, 839 N.W.2d 273 (2013)
- "L" Investments, Ltd. v. Lynch, 212 Neb. 319, 322 N.W.2d 651 (1982)
- Jones v. Elliott, 172 Neb. 96, 108 N.W.2d 742 (1961)
- Stearman v. Centex Homes, 78 Cal. App. 4th 611, 92 Cal. Rptr. 2d 761 (2000)
- Ramirez v. Akzo Nobel Coatings, Inc., 153 Ohio App. 3d 115, 791 N.E.2d 1031 (2003)