

NORTH DAKOTA SUPREME COURT

Neal A. Leno and Susan A. Leno v. K & L Homes, Inc.

Leno, 2011 ND 171 (N.D. 2011) · No. No. 20100347 · Decided September 2, 2011

SUMMARY

The North Dakota Supreme Court affirmed a judgment entered on a jury verdict for homeowners against a home builder for breach of contract and implied warranties. The court held that comparative fault did not apply to the homeowners’ contract-based implied warranty claims involving economic loss to the house, upheld the ruling that the builder had not effectively disclaimed implied warranties, and found no abuse of discretion in denying a late inspection request or excluding testimony concerning observations during the jury’s viewing.

CASE DETAILS

|                       |                                                                                                                                                                                                                                                                                    |
|-----------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| COURT                 | North Dakota Supreme Court                                                                                                                                                                                                                                                         |
| WRITING FOR THE COURT | Carol Ronning Kapsner, Justice; Carol Ronning Kapsner; Mary Muehlen Maring; Daniel J. Crothers; Benny A. Graff, S.J.; John C. McClintock, Jr., D.J.                                                                                                                                |
| JURISDICTION          | North Dakota                                                                                                                                                                                                                                                                       |
| DECIDED               | September 2, 2011                                                                                                                                                                                                                                                                  |
| DOCKET                | No. 20100347                                                                                                                                                                                                                                                                       |
| DISPOSITION           | affirmed                                                                                                                                                                                                                                                                           |
| PROCEDURAL POSTURE    | K & L Homes appealed a district court judgment entered on a jury verdict awarding the Lenos damages for breach of contract or implied warranty arising from construction of their home.                                                                                            |
| STANDARD OF REVIEW    | Statutory interpretation is reviewed de novo. Discovery decisions are reviewed for abuse of discretion, with the party seeking relief bearing a heavy burden. Evidentiary rulings are not reversible unless properly objected to and the party's substantial rights were affected. |
| PRECEDENTIAL VALUE    | Published North Dakota Supreme Court opinion; precedential.                                                                                                                                                                                                                        |
| PARTIES               | K & L Homes, Inc. v. Neal A. Leno, Susan A. Leno                                                                                                                                                                                                                                   |

TOPICS

- construction law
- breach of contract
- comparative fault
- statutory interpretation
- discovery dispute

## PRACTICE AREAS

construction law

contracts

torts

civil procedure

evidence

statutory interpretation

## QUESTIONS PRESENTED

1. Whether fault and modified comparative fault under N.D.C.C. chapter 32-03.2 applied to the Lenos' contract-based implied-warranty claims for economic loss from a defective house.
2. Whether K & L Homes effectively disclaimed implied warranties through a Homeowners' Guide delivered to the Lenos at closing.
3. Whether the district court abused its discretion by denying K & L Homes' late request to inspect the house.
4. Whether the district court committed reversible error by excluding K & L Homes' witness from testifying about observations made during the jury's viewing of the house.

## HOLDINGS

1. Fault and modified comparative fault under N.D.C.C. chapter 32-03.2 do not apply when the cause of action arises solely from the parties' contract and the damages sought are only the loss of the expected bargain.
2. The Homeowners' Guide delivered at closing did not effectively disclaim the implied warranties because the purported exclusion was not part of the parties' bargain.
3. The district court did not abuse its discretion by denying K & L Homes' request to inspect the house after the discovery deadline and shortly before trial.
4. The exclusion of the witness's testimony was not reversible error because K & L Homes did not object when the ruling was made and did not show that its substantial rights were affected.

## KEY QUOTATIONS

*“Fault and modified comparative fault do not apply where the cause of action arises solely out of the contract between the parties, and the damages sought are for the loss of the expected bargain only.” (¶ 19)*

*“All warranties may properly be excluded, but that exclusion must be part of the bargain between the parties.” (¶ 20)*

*“The district court did not abuse its discretion in denying K & L Homes’ request to inspect the Lenos’ house.” (¶ 24)*

## FACTUAL BACKGROUND

The Lenos purchased a newly constructed house from K & L Homes and soon noticed cracks, unevenness, and shifting that they attributed to improper construction. They alleged that the contract included express and implied warranties that the house would comply with applicable codes, be fit for residential use, and be constructed in a workmanlike manner. The claimed damage was limited to the house itself and consisted of the economic loss associated with receiving a defective home. K & L Homes attempted to attribute fault to the

Lenos, relied on a purported warranty disclaimer in a Homeowners' Guide delivered at closing, and sought a late inspection of the property.

## PROCEDURAL HISTORY

The Lenos sued K & L Homes for negligence, breach of contract, and breach of implied warranties concerning defects in a newly constructed house. They later dismissed the negligence claim and proceeded on contract and implied-warranty theories. The district court refused to submit comparative fault to the jury, ruled that K & L Homes had not effectively disclaimed implied warranties, denied a late request to inspect the property, and excluded testimony concerning observations during the jury viewing. The jury found for the Lenos and awarded damages, and the North Dakota Supreme Court affirmed.

## DISPOSITION

affirmed

## CASES CITED

- Dobler v. Malloy, 214 N.W.2d 510 (N.D. 1973)
- Robertson Lumber Co. v. Stephen Farmers Coop. Elevator Co., 143 N.W.2d 622 (Minn. 1966)
- Air Heaters, Inc. v. Johnson Electric, Inc., 258 N.W.2d 649 (N.D. 1977)
- Locken v. Locken, 2011 ND 90, ¶ 9, 797 N.W.2d 301
- Sauby v. City of Fargo, 2008 ND 60, ¶ 8, 747 N.W.2d 65
- Stutsman County v. State Historical Society, 371 N.W.2d 321, 325 (N.D. 1985)
- Boumont v. Boumont, 2005 ND 20, ¶ 15, 691 N.W.2d 278
- Stewart v. Ryan, 520 N.W.2d 39, 45 (N.D. 1994)
- Champagne v. United States, 513 N.W.2d 75, 79 (N.D. 1994)
- Erickson v. Schwan, 453 N.W.2d 765, 768 (N.D. 1990)
- Peterson v. Bendix Home Systems, Inc., 318 N.W.2d 50, 54 (Minn. 1982)
- Mauch v. Manufacturers Sales & Service, Inc., 345 N.W.2d 338, 348 (N.D. 1984)
- Day v. General Motors Corp., 345 N.W.2d 349, 357 (N.D. 1984)
- Prosser, The Assault Upon the Citadel (Strict Liability to the Consumer), 69 Yale L.J. 1099 (1960)
- Steiner v. Ford Motor Co., 2000 ND 31, ¶ 7, 606 N.W.2d 881
- Hagert v. Hatton Commodities, Inc., 350 N.W.2d 591, 595 (N.D. 1984)
- Clarys v. Ford Motor Co., 1999 ND 72, ¶ 18, 592 N.W.2d 573
- Dakota Grain Co., Inc. v. Ehrmantrout, 502 N.W.2d 234, 238 (N.D. 1993)
- Bonebrake v. Cox, 499 F.2d 951, 960 (8th Cir. 1974)
- Darby v. Swenson Inc., 2009 ND 103, ¶ 17, 767 N.W.2d 147
- Fleck v. Jacques Seed Co., 445 N.W.2d 649, 654 (N.D. 1989)
- Investors Title Insurance Co. v. Herzog, 2010 ND 169, ¶ 38, 788 N.W.2d 312

- Martin v. Trinity Hospital, 2008 ND 176, ¶ 17, 755 N.W.2d 900
- Westby v. Schmidt, 2010 ND 44, ¶ 12, 779 N.W.2d 681

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