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ESCH and HAMLET, et. al v. TURNER & COMPANY, INC., et. al

2026 OK 69

Case Number: 123142

Decided: 09/29/2026

THE SUPREME COURT OF THE STATE OF OKLAHOMA

Cite as: 2026 OK 69, __ P.3d __

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GEORGE A. ESCH, JR. and LYNDA A. HAMLET, Husband and Wife, Individually and as Trustees of the ESCH and HAMLET FAMILY TRUST, dated March 10, 2016, Plaintiffs/Appellants,

v.

TURNER & COMPANY, INC., an Oklahoma Corporation, and CHITWOOD FARMS, LLC, an Oklahoma Limited Liability Company, Defendants/Appellees.

OPINION

¶0 Appellants George A. Esch, Jr. and Lynda A. Hamlet sued the developer of their residential subdivision and the entity that sold them their lot, alleging that defective grading and drainage caused water and erosion damage to their property. After Appellants rested at a bench trial, the District Court of Oklahoma County, the Honorable Richard Ogden, sustained Appellees' demurrer to the evidence and motion for directed verdict and entered judgment for Appellees, holding the tort and warranty claims barred by the ten-year statute of repose, 12 O.S. § 109, and the contract claim barred by the statute of limitations, 12 O.S. § 95. We retained the appeal. We hold that the tort claims were barred by the statute of repose and the contract and warranty claims were barred by the statute of limitations. Because the only evidence bearing on substantial completion was uncontroverted, the judgment is correct as a matter of law. The judgment is affirmed.

JUDGMENT OF THE DISTRICT COURT AFFIRMED

Robert Todd Goolsby, Megan C. Lee, and Rebecca Hargrove-Santos, GOOLSBY, PROCTOR, NELSON & LEE, Oklahoma City, Oklahoma, for Plaintiffs/Appellants.

Linda G. Kaufmann and J. Derrick Teague, JENNINGS TEAGUE, P.C., Oklahoma City, Oklahoma, for Defendants/Appellees.

KUEHN, V.C.J.:

¶1 This appeal asks when the ten-year statute of repose for improvements to real property begins to run and whether the statute of limitations bars claims for breach of a contract for the sale of a residential lot. Appellants contend (a) that the repose period does not begin to run until the development as a whole was substantially complete, which they say occurred no earlier than the recording of the final plat, and (b) that their contract claims did not accrue until the developer conveyed a related interest nearly three years after the lot was deeded to them. We reject both contentions. The repose period runs from substantial completion of the improvement alleged to

have caused the harm. A contract claim accrues on breach, and the later conveyance of a collateral interest did not create a new one. The evidence bearing on each question was uncontroverted, and the trial court correctly resolved both as a matter of law.

Background

¶2 Turner & Company, Inc. and a Chitwood family entity formed Chitwood Farms, LLC (Chitwood Farms) to develop a residential subdivision, the Lake at Chitwood Farms, in Edmond. The two members each held a fifty-percent interest and shared profits. Turner & Company performed the development work, and Chitwood Farms owned and sold the lots.

¶3 The subdivision's final plat, which included a private drive and drainage feature designated C1, was accepted by the City of Edmond on April 13, 2009, and was recorded in Oklahoma County in September 2009. Chitwood Farms then began selling lots. After Appellants contracted with Chitwood Farms to purchase Lot 8 in September 2012, Chitwood Farms conveyed Lot 8 to Appellants by warranty deed on March 15, 2013. Appellants later received a one-third interest in C1 by correction deed on January 7, 2016.

¶4 Appellants filed suit on May 17, 2019, asserting claims for negligence, breach of contract, and breach of the implied warranty of workmanlike construction related to water and erosion on their property. Only Turner & Company and Chitwood Farms (collectively, Appellees) remain. Appellants alleged that Appellees' design and construction of C1 caused their water problems: that Appellees deviated from the city-approved drainage plan and relocated the drainage high point during construction of C1, redirecting stormwater onto Lot 8 and causing progressive water and erosion damage. Appellants alleged they discovered the source of the problem in 2017, after a heavy rainstorm prompted them to retain a surveyor.

¶5 The case was tried by the court. Appellants called Derek Turner, president of Turner & Company; Appellant Lynda A. Hamlet; and three experts. At the close of Appellants' evidence, Appellees demurred and moved for a directed verdict on all claims. The trial court granted the motion for a directed verdict, ruling that the statute of repose barred the tort claims because the improvement was substantially completed more than ten years before suit; that the warranty claim was likewise barred by the statute of repose; and that the contract claims failed because Turner & Company was not a party to the contract and because the claim against Chitwood Farms, LLC was time-barred, with no evidence of fraud sufficient to toll the limitations period. Appellants appealed.

Standard of Review

¶6 To begin, the parties dispute the standard that governs a directed verdict or demurrer to the evidence in a non-jury trial. Appellants contend that in an action at law the court must take the plaintiff's evidence as true and may not weigh it, even where a jury is waived. Appellees respond that a court sitting as factfinder may weigh the evidence at the demurrer stage. Appellants have the better of this dispute. A demurrer to the evidence is ordinarily sustained only where there is "an entire absence of proof" to support the nonmoving party; a different, weighing standard applies "when the trial court sits as ultimate factfinder, as in matters of equity." *Matter of Est. of Rivenburg*, **2023 OK 109**, ¶ 7, **539 P.3d 1262**, 1266. This is an action at law for damages, not a matter of equitable cognizance. The governing rule is that a trial court considers as true all evidence favorable to the plaintiff, together with all reasonable inferences, and disregards conflicting testimony favorable to the defendants. *Bird v. Pruett's Food, Inc.*, **2023 OK 92**, ¶ 6, 536 P.3d 578, 581. Orders sustaining a demurrer are reviewed *de novo*. *Id.* A demurrer should be overruled if the plaintiff has made a *prima facie* case but should be affirmed if the record is devoid of competent evidence to support each material element of the plaintiff's cause of action. *Id.*

¶7 As explained below, the trial court found that the only evidence bearing on substantial completion of the improvement was the Edmond City Council's acceptance of the final plat in April 2009. Because that evidence was uncontroverted, the demurrer standard Appellants invoke does not aid them; it requires the court to accept that evidence as true.

Analysis

I. The statute of repose bars the tort claims because the improvement was substantially completed more than ten years before suit.

¶8 Oklahoma's ten-year statute of repose bars untimely claims based on design and/or construction defects. ¹ Section 109 is a statute of repose, not a statute of limitations. A statute of repose sets "a firm outer boundary on when a claim can accrue" without tolling or exceptions. *Scott v. Foster*, **2023 OK 112**, ¶ 14, **538 P.3d 1180**, 1194 (Kuehn, J., dissenting); *St. Paul Fire & Marine Ins. Co. v. Getty Oil Co.*, **1989 OK 139**, ¶ 17, **782 P.2d 915**, 919. The period "may or may not allow for the plaintiff's discovery of the injuries caused by the negligent act and accrual of the action." *Consol. Grain & Barge Co. v. Structural Sys., Inc.*, **2009 OK 14**, ¶ 10, **212 P.3d 1168**, 1172 (citing *Samuel Roberts Noble Found. v. Vick*, **1992 OK 140**, ¶¶ 19--20, **840 P.2d 619**, 624).

¶9 Section 109 applies to "(1) an action in tort; (2) for injury to property which arises from a described deficiency; (3) the described deficiency involves an improvement to real property; (4) the defendant is a member of a described class; and (5) more than ten years have passed since substantial completion." *Lay v. ConocoPhillips Co.*, **2019 OK CIV APP 73**, ¶ 13, **453 P.3d 1267**, 1272. The parties do not dispute the first four elements; they disagree only when substantial completion occurred.

¶10 The statute does not define "substantial completion," and no decision of this Court supplies a precise definition of the phrase. We have, however, identified the event to which the ten-year period is keyed. In *Gorton v. Mashburn*, we held that claims for design or construction defects "can only be prosecuted during the ten-year period which follows substantial completion of the improvement allegedly causing the harm." **1999 OK 100**, ¶ 6, **995 P.2d 1114**, 1116. The inquiry thus centers on the improvement to have caused the injury and asks when that improvement was substantially complete.

¶11 To give content to "substantial completion," we look to the purpose Section 109 serves. In *Jaworsky v. Frolich*, we explained that the limits Section 109 places on liability "represent a reasonable counterbalance to the greatly increased potential tort liability faced by builders and others," and that nothing is unreasonable in the Legislature's decision "to limit to ten years the time within which one must file a suit in tort arising out of an improvement to real property, *regardless of when the plaintiff discovers a defect*." **1992 OK 157**, ¶ 16, **850 P.2d 1052**, 1056 (emphasis in original). Consistent with that purpose and with *Gorton*, we hold that an improvement is substantially complete when construction is sufficiently complete so that the owner or the owner's representative can occupy or use the improvement for its intended purpose, even if minor defects remain. This functional standard accords with the approach taken in other jurisdictions that have construed comparable statutes. ²

¶12 In their petition³ and the joint pretrial conference order, Appellants alleged that Appellees altered the highpoint of C1 during construction, diverting stormwater from the intended path to Appellants' lot. Derek Turner testified that all work on C1 was completed and C1 was useable by the April 2009 acceptance by the City Council. Relying on two out-of-state decisions, Appellants argued below that when one entity is responsible for an entire project, such as a developer, the court should measure substantial completion by when the project as a whole is completed; because Turner & Company was responsible for the development, Appellants argued that the trial court should apply that measure to the development as a whole, and find that the intended purpose of the development was to sell lots. Under this reasoning, the substantial completion date was when the plat was recorded with the county in September 2009, or later. Appellees countered that because Appellants complained the injury was caused by the design and construction of C1, the completion of C1 fixed the date of substantial completion. The trial court agreed the C1 was the only improvement alleged to have caused the injury and found that the only evidence presented showed that C1 was complete on or before the City Council's acceptance of the plat, and it sustained the motion for directed verdict. ⁴

¶13 On appeal, Appellants reargue that, because their suit is against the developer, the date of substantial completion is keyed to the date the development as a whole was complete, and the development as a whole was completed when the developer could sell lots.

¶14 The inquiry, however, is improvement-specific, not defendant-specific. *Gorton v. Mashburn* keys repose to "the improvement allegedly causing the harm," not to the identity or role of the defendant. 1999 OK 100, 995 P.2d 1114. *Lay v. ConocoPhillips Company* illustrates the point. 2019 OK CIV APP 73, 453 P.3d 1267, cert. denied (Okla. Oct. 28, 2019). Property owners there sued an oil company for contaminating their well; the oil company brought third-party contribution claims against the developer. The Court of Civil Appeals did not measure repose from a single, project-wide date. It analyzed the improvements separately, treating "the drilling and/or plugging of residential water wells" as "separate improvements to real property" with completion dates of their own, and held Section 109 barred the well-related claims because they were brought more than ten years after those wells were substantially completed. COCA held that Section 109 also barred claims alleging the development as a whole caused the injury but found that the wells and the development were completed on different dates. *Lay* thus measures repose improvement-by-improvement. It does not hold that repose runs from completion of a development as a whole merely because an improvement is part of a larger project or because a developer is the defendant. Here, Appellants' pleaded theory is that C1 caused their injury; the operative improvement is therefore C1, and the repose period runs from C1's substantial completion. ⁵

¶15 On this record, the trial court was correct. Because Appellants alleged that the design and construction of C1 caused their injury, the operative date is the date C1 could be used for its intended purpose, "to allow vehicular traffic to access lots in" the development. *Glens of Ironduff Prop. Owners Ass'n, Inc. v. Daly*, 224 N.C. App. 217, 220, 735 S.E.2d 445, 447--48 (2012). That is the date "the road was adequate for and was used by vehicles traveling to construct houses on lots." *Id.* The only evidence bearing on that question was the City Council's acceptance of the final plat, and that evidence establishes substantial completion on or before April 13, 2009. Appellants filed suit on May 17, 2019, more than ten years later. The statute of repose bars their tort claims.

¶16 On appeal, Appellants attempt to recast their petition as having alleged that the development as a whole caused the harm, rather than C1 only, an argument not presented to the trial court. Appellants cite the trial transcript to contend that because Appellees conceded that as developers, they were responsible for developing the flood plan for the whole development, Appellants' allegations included the design of the flood plan. The petition and the joint pretrial conference order located the injury in one improvement, C1, also identified as the Drainage Easement Structure, and alleged that its defective design and construction diverted stormwater onto Appellants' lot. Even in their Brief in Chief, Appellants maintain that the flooding "was indisputably caused by the field change made to C1." Br. in Chief, at 5. Surprisingly, Appellees adopt Appellants' newly framed argument in their answer brief instead of continuing the better argument made to the trial court. Appellees ask this Court to decline to adopt the proposed definition of substantial completion and argue that the trial court found both the development and C1 were substantially complete on or before the date the Edmond City Council accepted the plat. A trial court is limited to the issues framed by the petition and the pretrial order. See *Gen. Motors Corp. v. Okla. Cnty. Bd. of Equalization*, 1983 OK 59, ¶ 14, 678 P.2d 233, 239; *McGinnity v. Kirk*, 2015 OK 73, n.25, 362 P.3d 186, 193. Appellants' "development as a whole" timing argument for measuring substantial completion was preserved and is addressed above; but the new theory that the development as a whole was the injury-causing improvement was not advanced at trial and was not preserved for review. *Hall v. Galmor*, 2018 OK 59, ¶ 31, 427 P.3d 1052, 1066.

II. The statute of repose does not reach the implied-warranty claim, but that claim is barred by the statute of limitations.

¶17 Appellants correctly observe that Section 109 applies only to tort actions and cannot bar a claim for breach of the implied warranty of workmanlike construction. That claim sounds in contract, not tort, and is governed by the five-year statute of limitations rather than by Section 109. *Jaworsky v. Frolich*, 1992 OK 157, ¶ 8, 850 P.2d 1052, 1054. To the extent the trial court rested its disposition of the warranty claim on the statute of repose, that reasoning was incorrect.

¶18 Appellees note that they moved for a directed verdict on the breach of implied warranty claim because it was barred by the statute of limitations, and they argue that the trial court's application of the statute of repose did not require reversal. Appellees are correct that a judgment is not subject to reversal if the trial court reached the

correct result for the wrong reason. *Hall v. GEO Grp., Inc.*, **2014 OK 22**, ¶ 17, **324 P.3d 399**, 406. A breach of the implied warranty of workmanlike construction sounds in contract, and the limitations period "begins to run when the contract is completed." *Jaworsky*, **1992 OK 157**, ¶ 9, 850 P.2d at 1054; see also *Samuel Roberts Noble Found., Inc. v. Vick*, **1992 OK 140**, ¶ 14, **840 P.2d 619**, 623. Oklahoma provides a five-year statute of limitations for a written contract action. **12 O.S. § 95(A)(1)**. The work was completed by April 13, 2009, and the sale of Lot 8 closed on March 15, 2013. Measured from either date, the five-year period expired well before Appellants sued on May 17, 2019. The same uncontroverted completion evidence that establishes the repose bar sustains the judgment on the limitations ground. The warranty claim is time-barred.

III. The contract claims were properly dismissed.

¶19 To recover against Turner & Company for breach of contract, Appellants were required to show that Turner & Company was a party to a contract with them. It was not. Chitwood Farms, LLC owned and sold the lots and was the sole seller under the contract for Lot 8. Appellants seek to reach Turner & Company on a joint-venture theory, relying on evidence that the two entities shared profits. But the development was conducted through a limited liability company, and membership in an LLC does not by itself impose personal liability for the entity's obligations. **18 O.S. § 2022**.⁶ In any event, even if the joint-venture theory could fix liability on Turner & Company, the contract claim would remain barred by the statute of limitations for the same reasons that defeat the claim against Chitwood Farms, LLC.

¶20 A claim for breach of a written contract must be brought within five years after the cause of action accrued. **12 O.S. § 95(A)(1)**. An action for breach of contract "accrues when the contract is breached, not when damages result." *Morgan v. State Farm Mut. Auto. Ins. Co.*, **2021 OK 27**, ¶ 3, **488 P.3d 743**, 745. Appellants' theory is that they did not receive a properly developed lot; any such breach occurred when Chitwood Farms conveyed Lot 8 on March 15, 2013. The five-year period thus expired on March 15, 2018, more than a year before Appellants filed their suit. Appellants' contention that the contract was not "performed" until the one-third interest in C1 was conveyed in January 2016 does not save the claim; the written contract for the sale of Lot 8 does not mention C1, and a contract claim accrues at the time of breach regardless of later performance of collateral matters.

¶21 Although the discovery rule does not apply to a contract claim, the limitations period may be tolled where the defendant fraudulently concealed material facts and prevented a plaintiff from discovering the wrong. *Id.* at ¶¶ 31-32, 488 P.3d at 753. Fraud, however, is never presumed and *each element* must be proved by clear and convincing evidence. *Bowman v. Presley*, **2009 OK 48**, ¶ 13, **212 P.3d 1210**, 1218. The trial court found that Appellants presented no evidence of fraudulent concealment by Chitwood Farms. The developer testified that C1 was a private drive not regulated by the City, and that no change requiring City approval was made. Appellants identified no contrary evidence of an affirmative act of concealment. The record therefore does not support tolling, and the contract claim against Chitwood Farms is time-barred.

¶22 Finally, we note that Appellants' authorities on progressive property damage do not aid them. For a continuing or abatable injury to realty, a tort cause of action may accrue with each successive injury, or, for permanent damage, when the injury becomes apparent as permanent. *Moneypenney v. Dawson*, **2006 OK 53**, ¶¶ 10--11, **141 P.3d 549**, 554. This Court has also applied a discovery rule to latent, hidden construction defects. *McVay v. Rollings Const., Inc.*, **1991 OK 102**, ¶ 9, **820 P.2d 1331**, 1333. These doctrines govern the accrual of tort limitations; they do not displace the statute of repose, which bars the tort claims here before any question of accrual is reached. *St. Paul Fire & Marine Ins. Co. v. Getty Oil Co.*, **1989 OK 139**, ¶ 22, **782 P.2d 915**, 920.

Conclusion

¶23 Section 109 ties the ten-year repose period to the substantial completion of the improvement, measured by the substantial completion of the improvement allegedly causing the harm. The only evidence bearing on that question, that the Edmond City Council accepted the final plat in April 2009, established that C1 was substantially complete more than ten years before Appellants sued, and that evidence stood uncontradicted. The statute of repose therefore bars the tort claims. The implied-warranty and contract claims are barred by the five-year statute of limitations, which runs from completion of construction and from breach of contract, and the record contains no

evidence of fraudulent concealment to toll it. Turner & Company was not a party to the contract, and its membership in the developing limited liability company does not make it one. Although the trial court erred in citing the statute of repose as to the warranty claim and, to the extent it weighed evidence, in departing from the demurrer standard governing an action at law, those errors were harmless. Because the only evidence of substantial completion was uncontradicted, the demurrer standard itself compelled acceptance of that evidence, and the judgment is correct as a matter of law.

JUDGMENT OF THE DISTRICT COURT AFFIRMED.

ALL JUSTICES CONCUR.

FOOTNOTES

KUEHN, V.C.J.:

¹ Specifically, the statute of repose provides:

No action in tort to recover damages

(i) for any deficiency in the design, planning, supervision or observation of construction or construction of an improvement to real property,

....

shall be brought against any person owning, leasing, or in possession of such an improvement or performing or furnishing the design, planning, supervision or observation of construction or construction of such an improvement more than ten (10) years after substantial completion of such an improvement.

12 O.S. § 109.

² See, e.g., *Monson v. Suck*, 855 N.W.2d 323, 326 (Minn. Ct. App. 2014) (quoting Minn. Stat. Ann. § 541.051); *Glens of Ironduff Prop. Owners Ass'n, Inc. v. Daly*, 224 N.C. App. 217, 220, 735 S.E.2d 445, 447 (2012) (quoting N.C. Gen. Stat. § 1--50(a)(5)(c)); *Jenkins v. Southland Cap. Corp.*, 301 S.W.3d 268, 273--74 (Tenn. Ct. App. 2008) (quoting Tenn. Code Ann. § 28--3--201).

³ The petition brought claims against other parties, but the claims against Appellees arose from design and construction of a drainage assemblage, also known as C1.

⁴ Appellants also argued that the trial court erred in finding Derek Turner's testimony credible.

⁵ The petition and the joint pretrial conference order alleged improper construction of C1 and resulting stormwater diversion on Appellants' lot. While the parties disagreed below about whether the development as a whole or C1 was the operative improvement, whether C1 was an improvement to real property is not an issue. For Section 109 purposes, the definition of "improvement to real property" is drawn from the ad valorem taxing code amounting to "more than normal repairs, replacement, maintenance or upkeep," that as taxed is realty, *Kirby v. Jean's Plumbing Heat & Air*, **2009 OK 65**, ¶ 6, **222 P.3d 21**, 24. C1, a permanent drainage/utility/roadway installation integral to the subdivision, fits that definition, and according to Appellants, Appellees had paid taxes on C1. Appellants' Br. at 5.

⁶ "A person who is a member or manager, or both, of a limited liability company is not liable for the obligations of a limited liability company solely by reason of being such member or manager or both."

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