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Property: A Missed Opportunity: Minnesota Supreme Court Shies Away from Clarifying the Discovery Rule to Toll the Statute of Limitations in Construction-Defect Litigation—328 Barry Avenue, LLC v. Nolan Property Group, LLC

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PROPERTY: A MISSED OPPORTUNITY: MINNESOTA SUPREME COURT SHIES AWAY FROM CLARIFYING THE DISCOVERY RULE TO TOLL THE STATUTE OF LIMITATIONS IN CONSTRUCTION-DEFECT LITIGATION—*328 BARRY AVENUE, LLC V. NOLAN PROPERTY GROUP, LLC*

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I. INTRODUCTION

In *328 Barry Avenue v. Nolan Properties Group*, the Minnesota Supreme Court held that the statute of limitations under section 541.051,[1] applying to claims of defective construction of an improvement to real property, does not require that construction be substantially complete before such claims accrue.[2] The court further held that there was a genuine issue of material fact as to when the owner discovered the actionable injury sufficient to trigger the statute of limitations, so it reversed and remanded the district court's grant of summary judgment on that issue.[3] The court's decision regarding the statute of limitations question accurately reflected legislative intent to protect construction companies from liability for stale claims.[4] However, the court should have taken a firm stance favoring a more lenient "discovery of injury" standard to protect owners from losing claims to the strict statute of limitations period. This approach would result in an increase in judicial efficiency and would ensure the most cost- and resource-efficient path to recourse for both parties.

This Note first gives an overview of the historical purpose of statutes of limitations and traces the modern trend of applying the discovery rule in construction litigation.[5] It then reviews the discovery rule's adoption and rejection in Minnesota common law.[6]

1. MINN. STAT. § 541.051(1)(a) (2015) ("[N]o action by any person . . . for any injury to property . . . arising out of the defective and unsafe condition of an improvement to real property, shall be brought . . . more than two years after discovery of the injury . . . .").
2. 871 N.W.2d 745, 751 (Minn. 2016).
3. *Id.* at 753.
4. *See id.* at 750.
5. *See infra* Part II.
6. *See infra* Part II.

This Note then discusses both parties' arguments and the rationale of the *328 Barry* decision.[7] After evaluating the relevant law and the rationale of this decision, this Note endorses the court's narrow interpretation of the statute of limitations;[8] but, it also discusses the implications of the court's failure to clarify the "discovery of injury" standard.[9] This Note agrees that the Minnesota Supreme Court made the correct decision that the statute of limitations on construction-defect claims may begin before substantial completion.[10] This Note concludes, however, that the court missed an opportunity to adopt a bright-line discovery of injury rule that would be reflective of public policy and facilitate future adjudication of complex construction-related litigation.[11]

II. HISTORY OF THE RELEVANT LAW

A. History of Statutes of Limitations in Construction-Defect Claims

Although the construction industry has experienced periods of stagnation, such as during the Great Recession, the construction industry remains a big industry in the United States.[12] The benefits of new construction to both construction companies and owners are significant: good business with high profits and long-term ownership of an increasingly valuable property. However, construction also poses equally significant risks to both parties. Constantly changing legislation over the past forty years has sought to balance and protect the parties' conflicting interests. For years, courts have tried to protect owners' legitimate claims while also shielding construction companies from unforeseeable and endless liability.[13] To do so, courts have had to balance construction companies' ability to insure and defend themselves from claims against owners' interests in living and working in safe and defect-

7. *See infra* Part III.
8. *See infra* Section IV.A.
9. *See infra* Sections IV.B, IV.C.
10. *See infra* Part V.
11. *See infra* Part V.
12. *See* Tim Henderson, *U.S. Construction Is on the Rebound After the Great Recession*, PBS NEWSHOUR: THE RUNDOWN (Aug. 30, 2016, 9:25 AM), http://www.pbs.org/newshour/rundown/u-s-construction-rebound-great-recession.
13. *See generally* Paul D. Rheingold, *Solving Statutes of Limitation Problems*, 4 AM. JUR. TRIALS 441 (1996).

free property.[14] Instead of requiring courts to singlehandedly determine the validity of a claim, states have passed statutes of limitations and statutes of repose in attempts to establish consistency and objectively settle expectations.[15]

Many statutes of limitations on claims arising from improvements to real property were enacted between the 1960s and 1980s as a response to pressure from construction professionals over concerns that never-ending exposure to liability was becoming too costly to insure against and that claims were too difficult to defend.[16] Specifically, this movement can be traced to the gradual shift away from the privity-of-contract requirement in construction-defect claims.[17] The privity requirement shielded construction and design professionals from third-party claims.[18] The gradual rejection of this doctrine from the early- to mid-1900s was the result of a distinct shift in attitude towards favoring consumer remedies.[19] Although construction companies were thought to be more capable of absorbing liability than individual consumers, their increased vulnerability to unexpected claims drove up insurance costs and drove some companies out of business.[20]

State legislatures passed statutes of limitations for construction-defect claims to address these issues in hopes of revitalizing the construction industry and supporting public policy objectives.[21]

14. *See* 2 PHILIP L. BRUNER & PATRICK J. O'CONNOR, JR., BRUNER & O'CONNOR ON CONSTRUCTION LAW § 7:174.50, Westlaw (database updated June 2016).

15. *Id.*

16. *See id.*; *see also* Katherine L. Johansen, *Property: Adventures in Boondoggle? The Unnecessary (and Inaccurate) Legislative Intent Analysis of* Lietz v. Northern States Power Co., 34 WM. MITCHELL L. REV. 1555, 1559 (2008) (discussing public policy arguments that capping liability would protect builders from timeless claims, lower building costs, and improve the construction market).

17. *See* Michael J. Vardaro & Jennifer E. Waggoner, *Statutes of Repose—the Design Professional's Defense to Perpetual Liability*, 10 ST. JOHN'S J. LEGAL COMMENT. 697, 701 (1995).

18. *Id.* Vardaro and Waggoner trace the first attack on the privity doctrine to a 1916 products liability case that held that privity was not required where a manufacturer's negligence resulted in a consumer's personal injury. *Id.* at 701 n.39 (citing MacPherson v. Buick Motor Co., 111 N.E. 1050, 1053 (N.Y. 1916)). For a list of cases from the mid-1900s abolishing the privity requirement, see *id.* at 702, n.40.

19. *See id.* at 701–02.

20. *See id.* at 702.

21. *See id.* at 703.

Most importantly, these statutes were passed to protect builders against false, fraudulent, and unjustifiably stale claims.[22] Construction and design professionals faced considerable obstacles in defending old claims due to "unavailability of witnesses, memory loss and a lack of adequate records."[23] These statutes lent some certainty as to when builders' liability ended and provided enough predictability to allow builders to safely dispose of old records and pursue new projects.[24]

In addition to statutes of limitations, almost all states have passed statutes of repose to protect builders and architects from long-term liability exposure.[25] The same policy objectives behind statutes of limitations apply to statutes of repose.[26] Importantly, statutes of repose cap a construction professional's liability on a distinct date, after which they can no longer be held liable for their actions.[27] However, unlike statutes of limitations, statutes of repose begin on a specific date, which is usually the date of substantial completion, and nullify both the remedy and the plaintiff's right of action against the defendant.[28] Statutes of repose have been controversial since their enactment because they impose a strict limitation on causes of action, irrespective of the circumstances of the case, and have been the subject of constitutional challenges in many states.[29] A majority of the due process and equal protection issues have been addressed, but statutes of repose are still under

22. *See id.*; *see also* 2 BRUNER & O'CONNOR, *supra* note 14, § 7:174.50.

23. Sartori v. Harnischfeger Corp., 432 N.W.2d 448, 454 (Minn. 1988) (finding that the policy objective behind Minnesota's statute of limitations on construction-defect claims was legitimate).

24. *See* Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 PAC. L.J. 453, 469–70 (1997).

25. *See* Vardaro & Waggoner, *supra* note 17, at 714–15.

26. *See* James Duffy O'Connor, *Suppose Repose Were Indisposed: A True Story Prediction of Collapse and Disaster for the Construction Industry*, 34 CONSTR. L. 5, 7–8 (2014) (discussing the policy objectives behind statutes of repose).

27. *See id.*

28. *See id.* at 6; *see also* Vardaro & Waggoner, *supra* note 17, at 715 (noting that statutes of repose do not extend statutes of limitation but function solely to preclude all claims after a specific time period).

29. *See* JAMES ACRET & ANNETTE DAVIS PERROCHET, CONSTR. LITIG. HANDBOOK § 22:4 (3d ed. 2016) (noting that statutes of repose create a special class of citizens (those listed in the statute) who are not liable for their wrongful acts after a certain date); 2 BRUNER & O'CONNOR, *supra* note 14, § 7:174.50. For a list of cases holding statutes of repose unconstitutional, see Vardaro & Waggoner, *supra* note 17, at 712 n.112.

constant revision to comport with state constitutions.[30] Despite the controversial nature of statutes of repose, state legislatures' dedication to amending and maintaining them indicates both the persistence of the underlying policy concerns and the value of the protections these statutes afford construction professionals.[31]

Unlike statutes of repose, statutes of limitations are generally triggered at the time of the injury or discovery of the injury.[32] They are not meant to allow defendants to escape liability; statutes of limitations "are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the avoidable and unavoidable delay."[33] As statutes of limitations merely limit the remedy available to a plaintiff and "[do] not extinguish the underlying obligation," they have been subject to far fewer constitutional attacks than statutes of repose.[34] However, state legislatures frequently amend substantive elements in these statutes, including time periods, definitions, subject parties, and subject causes of actions, in the interest of fairness and in light of other developments in the law.[35]

B. Modern Expansion of the Discovery Rule to Construction-Defect Claims

Since the enactment of statutes of limitations, the trigger for commencing the statutory period has been a source of unfortunate unpredictability.[36] Where legislation is silent on the specific date or action commencing the accrual of a cause of action, courts have

30. *See* Vardaro & Waggoner, *supra* note 17, at 712.

31. *Id.* at 716–17 (discussing the policy benefits of statutes of repose to design professionals and the design industry in general).

32. *See* 2 BRUNER & O'CONNOR, *supra* note 14, § 7:174.50.

33. O'Connor, *supra* note 26, at 6 (quoting Jewson v. Mayo Clinic, 691 F.2d 405, 411 (8th Cir. 1982)).

34. *See* 2 BRUNER & O'CONNOR, *supra* note 14, § 7:174.50 (quoting Ray & Sons Masonry Contractors, Inc. v. U.S. Fidelity & Guar. Co., 114 S.W.3d 189, 199 (Ark. 2003)); *see also id.* § 7:174.52 (noting constitutional challenges to both statutes of repose and statutes of limitation).

35. *See* Johansen, *supra* note 16, at Section II.C (discussing several amendments to Minnesota's construction-defect statute of limitations, including clarifying definitions and expanding applicability to certain causes of action). *See generally* Matthew T. Boyer, *Modern Legislation Creates Ambiguities in Determining Deadlines for Asserting Residential Construction Defect Claims*, 26 CONSTRUCTION LAW., Winter 2006, at 28 (analyzing the impact of modern construction-defect statutes with independent time limits on statutes of limitations time periods).

36. *See* ACRET & PERROCHET, *supra* note 29, § 22:5.

struggled to achieve unanimity in pinpointing a trigger that protects both construction companies' and owners' interests.[37] Courts have identified this trigger as (1) when the wrongful act occurred,[38] (2) the project's completion date,[39] (3) when the damage occurred,[40] or (4) when the owner knew or should have known of the damage.[41] Of these four interpretations, many states have recently adopted the fourth: when the owner knew or should have known of the damage, commonly known as the "discovery rule."

The discovery rule mandates that statutes of limitations are not triggered until the plaintiff has discovered, or reasonably should have discovered, that he or she has a cause of action.[42] The rule initially applied to medical malpractice and gradually expanded to other torts where the defects were likely to be unnoticed or misunderstood at the time the tort was committed.[43] Many states

37. *See id.*

38. *Id.* ("Many . . . states . . . apply the discovery rule.").

39. *See* State v. Lundin, 459 N.E.2d 486, 487 (N.Y. 1983) (holding that a cause of action against a contractor or architect for defective construction accrues upon the completion of the actual physical work of the construction); *see also* City Sch. Dist. of Newburgh v. Hugh Stubbins & Assocs., 650 N.E.2d 399, 401 (N.Y. 1995) (explaining that regardless of the type of claim, all claims arising out of defective construction accrue on the date of completion "since all liability has its genesis in the contractual relationship of the parties"). *See generally* Farash Constr. Corp. v. Stanndco Developers, Inc., 139 A.D.2d 899 (N.Y. App. Div. 1988); Brigham Young Univ. v. Paulsen Constr. Co., 744 P.2d 1370 (Utah 1987); Gateway Commc'ns, Inc. v. John R. Hess, Inc., 541 S.E.2d 595 (W. Va. 2000).

40. Hasemeier v. Metro Sales, Inc., 699 S.W.2d 439, 442 (Mo. Ct. App. 1985) (quoting MO. REV. STAT. § 516.100 (1978)) ("[T]he cause of action shall not be deemed to accrue when the wrong is done or the technical breach of contract or duty occurs, but when the damage resulting therefrom is sustained and is capable of ascertainment . . . ."); *see also* MBA Commercial Constr., Inc. v. Roy J. Hannaford Co., 818 P.2d 469, 474 (Okla. 1991) (holding that the cause of action against an architect for defective design accrued not at the time the negligent acts occurred or were discovered, but when the injury or damage was certain and not just speculative).

41. *See* Mistry Prabhudas Manji Eng'rs Pvt. Ltd. v. Raytheon Eng'rs & Constructors, Inc., 213 F. Supp. 2d 20, 24 (D. Mass. 2002) (holding that plaintiff's knowledge of its injury and cause triggered the limitation period, rather than plaintiff's discovery of the defendant's alleged fraud and misrepresentation).

42. Sonja Larsen, Annotation, *Modern Status of the Application of "Discovery Rule" to Postpone Running of Limitations Against Actions Relating to Breach of Building and Construction Contracts*, 33 A.L.R. 5th 1, 21 (1995); *see also* Leaf v. City of San Mateo, 163 Cal. Rptr. 711, 716 (Ct. App. 1980).

43. Larsen, *supra* note 42, at 1.

have recently adopted the discovery rule in cases involving defective construction, analogizing "the hidden defect in the house to the hidden nature of the tort in medical malpractice cases."[44]

While many courts have applied the discovery rule to construction-defect tort claims,[45] some courts have declined to extend the discovery rule to construction contract claims.[46] These courts reason that owners, unlike patients, have greater control over the risks they undertake because they have the ability to take a number of steps to mitigate such risks and should therefore be subject to a strict statute of limitations for the sake of predictability and settling expectations.[47] They further reason that applying the discovery rule to contract claims undermines statutes of limitations and creates apprehension and uncertainty for defendants as to how long they are subject to liability.[48]

44. *Id.* at 21.

45. *See* CLL Assocs. v. Arrowhead Pac. Corp., 497 N.W.2d 115, 118 (Wis. 1993) (noting that because tort claimants usually lack control over their risk of loss, "a consumer is typically unable to judge or investigate the design and manufacture quality of most products offered for purchase"); *see also* 2 BRUNER & O'CONNOR, *supra* note 14, § 7:174.59 (noting that in the discovery rule is frequently applied in cases involving latent defects). *See generally* Larsen, *supra* note 42.

46. *See* Steven C. Bennett, *Post-Construction Contract Claims: Statutes of Limitations and the "Discovery Rule,"* 29 CONSTRUCTION LITIG. REP., Sept. 2008, at 1 (discussing the policy considerations of rejecting the discovery rule in construction contract claims); *CLL*, 497 N.W.2d at 118 ("[In contract law,] unlike in tort law, the need to protect defendants from stale or fraudulent claims outweighs any injustice caused by barring rights of action prior to discovery.").

47. *See CLL*, 497 N.W.2d at 118 (declining to apply the discovery rule to a contract claim because, in theory, contract claimants have more control over their risks of loss through negotiation of the contract, choice of materials, and inspections). The *CLL* court also declined to extend the discovery rule to contract claims due to the lack of availability of liability insurance to protect defendants from singlehandedly bearing the costs of a stale claim. *Id.*; *cf.* Brisbane Lodging, L.P. v. Webcor Builders, Inc., 157 Cal. Rptr. 3d 467, 474 (Ct. App. 2013) (holding that parties that contract around the state's delayed discovery rule waive the right to be afforded its protections during litigation arising out of that contract). The *Brisbane* court noted that while California's public policy encourages application of the discovery rule, it also respects parties' rights to freely contract without judicial intervention. *Id.* at 475–76. As such, the court held that "sophisticated parties should be allowed to strike their own bargains and knowingly and voluntarily contract in a manner in which certain risks are eliminated and, concomitantly, rights are relinquished" without violating public policy. *Id* at 475.

48. *See, e.g.*, Samuel Roberts Noble Found., Inc. v. Vick, 840 P.2d 619, 623 (Okla. 1992) ("Were we to allow application of a discovery rule in contract cases,

Courts adopting the discovery rule have rationalized that the rule increases judicial efficiency and mitigates the consequences of strict interpretations of statutes of limitations as bars to legitimate and sympathetic claims.[49] However, courts generally tend to apply the rule in a limited manner to avoid negating the original purpose of statutes of limitation. The discovery rule functions to prevent defendants from escaping accountability for their mistakes at the expense of owners who may be reasonably ignorant of an injury or a cause of an injury; it does not operate to permit or encourage owners to assert claims well after their expiry date.[50] The discovery rule promotes judicial efficiency by encouraging injured parties to pursue remedies outside of the courtroom, such as repairs or thorough investigation into the source of the defect, before turning to the costly and time-consuming process of litigation.[51] While some courts have liberally extended the discovery rule to all causes of action in any professional malpractice suit,[52] a more common trend has been to apply the discovery rule on a case-by-case basis, particularly due to the context heavy and fact-specific nature of the rule.[53]

Although the widespread application of the discovery rule marks a long overdue attempt at national unanimity, in states that have applied the rule, courts have differed in their determinations of what owners must discover to trigger the limitations period.[54]

the legislatively-adopted public policy expressed by Section 109 of limiting a builder's liability after a certain time lapse would be defeated; a builder's liability for breach of contract could extend indefinitely.").

49. *See* 2 BRUNER & O'CONNOR, *supra* note 14, § 7:174.50; *see also* Ehrenhaft v. Malcolm Price, Inc., 483 A.2d 1192, 1202 (D.C. 1984) (holding that the discovery rule applied because the protection the discovery rule afforded the plaintiff outweighed any potential prejudice to the defendant). The *Ehrenhaft* court acknowledged the pragmatic necessity of statutes of limitations, but it ultimately concluded that the "added burden imposed upon a defendant to defend an 'old' claim due to application of the discovery rule is not unreasonable." *Id.* at 1202. In response to arguments that the discovery rule contradicts the underlying policy objectives of statutes of limitations, the court rationalized that "a plaintiff who will benefit by invocation of the discovery rule will not be one who has 'sat' on his rights to gain legal advantage." *Id.* at 1203.

50. *See* April Enters. v. KTTV, 195 Cal. Rptr. 421, 437–38 (Ct. App. 1983).

51. *Ehrenhaft*, 483 A.2d at 1203 (observing that the discovery rule promotes litigation as a "last resort").

52. *See, e.g.*, Poffenberger v. Risser, 431 A.2d 677, 680 (Md. 1981).

53. *See KTTV*, 195 Cal. Rptr. at 437.

54. *See* 2 BRUNER & O'CONNOR, *supra* note 14, § 7:174.50 (discussing different

Some courts require owners to have concrete evidence or information regarding the defect before a cause of action accrues. Specifically, these courts mandate that owners must discover the cause of the injury[55] or that damages must be ascertained to trigger the statute of limitations.[56] However, other courts require no evidence beyond the existence of some damage for a cause of action to accrue.[57]

C. The Statute of Limitations on Construction Defects in Minnesota

Although Minnesota's first statute of limitations with specific time limits for construction-defect litigation was not passed until 1965, Minnesota courts have long applied the concept of statutes of limitations in construction-defect cases as a way to limit stale claims and have acknowledged the important policy considerations behind such statutes.[58]

jurisdictions' interpretations and applications of the discovery rule to construction-related cases).

55. *See, e.g.*, Criswell v. M.J. Brock & Sons, Inc., 681 P.2d 495, 498–99 (Colo. 1984); Williams v. Kaerek Builders, Inc., 568 N.W.2d 313, 316 (Wis. Ct. App. 1997).

56. *See, e.g.*, Bus. Men's Assurance Co. of Am. v. Graham, 984 S.W.2d 501, 507 (Mo. 1999); Linn Reorganized Sch. Dist. No. 2 of Osage Cty. v. Butler Mfg. Co., 672 S.W.2d 340, 343 (Mo. 1984).

57. *See, e.g.*, Lumsden v. Design Tech Builders, Inc., 749 A.2d 796, 801 (Md. 2000) (holding that the cause of action accrued when plaintiffs first discovered the damage and not when the cause of that damage was actually determined); Bd. of Regents of Univ. of Neb. v. Lueder Constr. Co., 433 N.W.2d 485, 491–92 (Neb. 1988) (holding that the plaintiff's claim was time-barred because the defective condition of the building was such that the plaintiff should have conducted an investigation at that time to reveal all deficiencies and causes of actions, rather than allowing the deficiencies to deteriorate further); Russo Farms, Inc. v. Vineland Bd. of Educ., 675 A.2d 1077, 1092 (N.J. 1996) ("It is not necessary that the injured party have knowledge of the extent of the injury before the statute begins to run.").

58. *See* Bachertz v. Hayes-Lucas Lumber Co., 201 Minn. 171, 176–78, 275 N.W. 694, 697–98 (1937) (holding that plaintiff's construction-defect claims were time-barred because he complained about subpar materials and continually expressed his dissatisfaction with the faulty construction to the defendant more than six years before bringing a cause of action). The *Bachertz* court acknowledged the same public policy motivations that later drove construction-defect statutes of limitations legislation: "if one person has a claim against another . . . it would be inequitable for him to assert such claim after an unreasonable lapse of time, during which such other has been permitted to rest in the belief that no such claim existed." *Id.* at 176, 697 (citing 4 DUNNELL, MINN. DIG. § 5586 (2d ed. 1927 &

In 1965, the Minnesota legislature enacted a two-year statute of limitations for actions related to defects from construction improvements to real property.[59] The original statute provided, in relevant part:

> [N]o action to recover damages for any injury to property . . . 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, or observation of construction . . . more than two years after discovery thereof, nor, in any event more than ten years after the completion of such construction.[60]

There is no legislative history to indicate the exact purpose of the statute, but courts have acknowledged that the statute was enacted as part of a national trend towards minimizing potential liability for construction companies.[61] It is important to note that since its enactment, the statute has always provided a distinction between the two-year statute of limitations and the ten-year statute of repose,[62] which is now triggered upon a defined date of substantial completion.[63] While the statute of limitations has been substantively amended since its enactment, the limitation period has remained

Supp. 1932)).

59. Act of May 21, 1965, ch. 564, § 1, 1965 Minn. Laws 803, 803 (codified at MINN. STAT. § 541.051 (1965)).

60. *Id.*

61. *See* Pac. Indem. Co. v. Thompson-Yaeger, Inc., 260 N.W.2d 548, 554 (Minn. 1977) (discussing the history of courts' treatment of concerns about potential liability of builders and contractors and the resulting legislative response); Kittson Cty. v. Wells, Denbrook & Assocs., 308 Minn. 237, 241–42, 241 N.W.2d 799, 802 (1976) ("While we have no legislative history to enlighten us as to the exact purpose of the statute, we note that at least 30 jurisdictions have recently enacted similar statutes."). The *Kittson County* court noted that other jurisdictions enacted these statutes in response to the gradual disappearance of the privity-of-contract doctrine which had previously shielded builders from third-party liability. *Kittson Cty.*, 308 Minn. at 241–42, 241 N.W.2d at 802; *see also supra* Section II.A.

62. The original statute provided that no cause of action can be brought "more than two years after discovery thereof, nor, *in any event more than ten years after the completion of such construction.*" 1965 Minn. Laws at 803 (emphasis added).

63. MINN. STAT. § 541.051 subdiv. 1(a) (2016) (stating that date of substantial completion is determined by "the date when construction is sufficiently completed so that the owner or the owner's representative can occupy or use the improvement for the intended purpose").

stagnant, and the "completion" or "substantial completion" trigger has never been applied past the statute of repose.[64]

The legislature's first attempt to simultaneously protect builders' and owners' claims was immediately met with confusion in the courts. In 1976, the Minnesota Supreme Court first considered questions regarding the scope and application of the statute in *Kittson County v. Wells, Denbrook & Associates*.[65] Despite the all-encompassing language of the statute,[66] the *Kittson* court doubted that the state legislature intended the statute to apply to all causes of actions.[67] The court based this assumption on the fact that similar statutes in other jurisdictions contained specific language to encompass additional causes of action.[68] Resting on the assumption that the legislature did not intend that the statute be broadly applicable, the court evaluated the purpose and language of the statute and determined that the statute was only intended to apply to tort actions.[69]

64. *See* Act of Apr. 22, 2013, ch. 21, § 1, 2013 Minn. Laws 1, 1–2; Act of May 22, 2007, ch. 140, art. 8, § 29, 2007 Minn. Laws 1, 122–23; Act of May 18, 2007, ch. 105, § 4, 2007 Minn. Laws 1, 2–3; Act of May 13, 2004, ch. 196, § 1, 2004 Minn. Laws 356, 357; Act of Apr. 26, 1990, ch. 555, § 13, 1990 Minn. Laws 1557, 1562; Act of Apr. 24, 1988, ch. 607, § 1, 1988 Minn. Laws 680, 680–81; Act of Apr. 18, 1988, ch. 547, § 1, 1988 Minn. Laws 492, 492; Act of Mar. 25, 1986, ch. 455, § 92, 1986 Minn. Laws 840, 885–86; Act of Apr. 7, 1980, ch. 518, § 2, 1980 Minn. Laws 595, 596; Act of May 5, 1977, ch. 65, § 8, 1977 Minn. Laws 107, 110.

65. *Kittson Cty.*, 308 Minn. at 241, 241 N.W.2d at 799.

66. 1965 Minn. Laws at 803, *invalidated by* Pac. Indem. Co. v. Thompson-Yaeger, Inc. 260 N.W.2d 548 (Minn. 1977) (stating "no action" can be brought unless the type of action is specified). The *Kittson* court observed that "the statute does not clearly specify what kinds of actions and what types of parties fall within its limitation provisions" and held that the statute's construction should be interpreted narrowly based on similar statutes in other jurisdictions. *See Kittson Cty.*, 308 Minn. at 241, 241 N.W.2d at 799.

67. *See Kittson Cty.*, 308 Minn. at 240–41, 241 N.W.2d at 801–02 (holding that the statute did not clearly specify the applicable causes of action, so the reach of the statute should be narrowly construed to maintain its constitutionality).

68. *Id.* at 242–243, 241 N.W.2d at 802 (citing N.J. STAT. ANN. § 2A:14-1.1 (West 1952)) ("No action whether in contract, in tort, or otherwise . . .").

69. *Id.* at 242, 241 N.W.2d at 802 ("[W]e therefore confine its application to tort actions by persons not in privity with the party asserting the statute as a bar."). The court noted that the statute specifically mentioned "injury," which it interpreted as legislative intent to apply the statute to tort actions only. *Id.* at 241, 241 N.W.2d at 801.

While the *Kittson* court briefly cautioned that a constitutional issue regarding the statute of repose could arise in a future case,[70] it was not until *Pacific Indemnity Co. v. Thompson-Yaeger, Inc.* that the court fully examined the constitutional issue.[71] The *Pacific Indemnity* court once again evaluated cases from surrounding jurisdictions that involved attacks on the constitutionality of similar statutes.[72] The court held that the statute violated the Equal Protection Clause of the Fourteenth Amendment.[73] It reasoned that the statute singled out and granted immunity only to certain parties listed in the statute, and it left other parties who might be subject to similar lawsuits, such as owners and materials suppliers, completely open to liability.[74] Consequently, the court found that the statute's

70. *See id.* at 240, 241 N.W.2d at 801 ("[Application] of the 10-year nullification provision might create grave constitutional issues.").

71. 260 N.W.2d 548, 553–55 (Minn. 1977). Although *Pacific Indemnity* centered around the statute's constitutionality, it is worth noting that the court also forayed into the issue of what conduct constitutes "an improvement to real property," within the meaning of the statute. *See id.* at 553–54 (discussing and rejecting the lower court's application of the law of fixtures in ruling that the furnace was not an improvement because "it could be easily removed and . . . [was] not a part of the real property"). While the meaning of "an improvement to real property" is not relevant to the *Barry* decision, it is important to recognize the significant number of challenges that Minnesota courts have faced, and continue to face, in interpreting and applying this statute. For a discussion on the legislative history of Minnesota Statutes section 541.051 and the corresponding case law, see Johansen, *supra* note 16, at 1562–75. Johansen notes that Minnesota courts have struggled to achieve unanimity on a number of the statute's clauses, including the statute's causation clause, the trigger for the statute of limitations, the meaning of "improvement to real property," and the contribution and indemnity clause. *See id.* at 1573. This confusion is documented by the eighteen rulings on this statute issued by the Minnesota Court of Appeals and the Minnesota Supreme Court between 1986 and 1988. *See id.* at 1572.

72. *Pac. Indem. Co.*, 260 N.W.2d at 555. The court noted that of the fifteen courts that have ruled on the constitutionality of similar statutes, ten have upheld the statute and only five have found the statute unconstitutional. *Id.* Of the five cases that struck down the statute, the court found the following cases to be most persuasive: *Kallas Millwork Corp. v. Square D Corp.*, 225 N.W.2d 454 (Wis. 1975); *Fujioka v. Kam*, 514 P.2d 568 (Haw. 1973); *Skinner v. Anderson*, 231 N.E.2d 588 (Ill. 1967). *Id.*

73. *Id.*

74. *Id.*; *see also Fujioka*, 514 P.2d at 571. The *Fujioka* court explained that under such a statute, a plaintiff cannot recover from the engineer or contractor, even if their actions were the cause of the plaintiff's injuries. *Id.* Rather, the owners will be the sole parties required to pay the plaintiff damages, regardless of their degree of fault or participation in the injury. *Id.* Considering the facts

exclusion of owners and material suppliers from its protections lacked any semblance of rational basis and struck down the statute as unconstitutional.[75]

In 1980, the Minnesota legislature amended the statute to address the ambiguity of scope raised in *Kittson County*[76] and to remedy the constitutional concerns discussed in *Pacific Indemnity*.[77] The relevant part of the statute was amended to read:

> [N]o action *by any person in contract, tort, or otherwise* to recover damages for any injury to property . . . shall be brought against any person performing or furnishing the design, planning, supervision, *materials,* or observation of construction . . . *or against the owner of the real property* more than two years after discovery of the injury . . . .[78]

While this amendment cured all foreseeable constitutional issues, it barely scratched the surface in clarifying the statute's ambiguity.[79] Questions regarding applicability[80] and timing[81] remain widely contested in the courts.

presented to it, the court could not find any rational basis for treating these similarly situated parties differently; in the absence of any reasonable distinction between the classes or any driving public policy, the court found that the statute was arbitrary and capricious discrimination in violation of the Equal Protection Clause. *Id.* at 572.

75. *Pac. Indem. Co.*, 260 N.W.2d at 555 ("[T]he better reasoned position is embodied in the decisions which hold such statutes to be unconstitutional because they grant an immunity from suit to a certain class of defendants, without there being a reasonable basis for that classification.").

76. Kittson Cty. v. Wells, Denbrook & Assocs., 308 Minn. 237, 241–42, 241 N.W.2d 799, 802 (1976).

77. Johansen, *supra* note 16, at 1569 ("These legislative changes . . . show how the legislature rectified constitutional problems with the statute by expanding its scope to individuals, thereby avoiding equal protection problems."); *see also* Act of May 21, 1965, ch. 564, § 1, 1965 Minn. Laws 803, 803 (codified at MINN. STAT. § 541.051 (1965)).

78. Act of Apr. 7, 1980, ch. 518, § 2, 1980 Minn. Laws 596, 596 (amended language emphasized).

79. Calder v. City of Crystal, 318 N.W.2d 838, 843 (Minn. 1982) (affirming that the amended statute prevented future equal protection attacks).

80. *See* Sterling Heights, LLC v. Veit, Nos. A12-0889, A12-0890, 2012 WL 5990311, at *2–3 (Minn. Ct. App. Dec. 3, 2012) (holding that Minnesota Statutes section 541.051 applied because plaintiff's contract claim that defendant failed to disclose defective conditions on the property was an action "arising out of the defective and unsafe condition of an improvement"); Knoll v. MTS Trucking, Inc., No. A10-1736, 2011 WL 3557806, at *6 (Minn. Ct. App. Aug. 15, 2011) (holding that section 541.051 applied over section 541.05 because "[w]hen there is an

D. The Discovery Rule Applied to Construction Claims in Minnesota

1. The Original Statute: The Legislature's First Attempt to Adopt the Discovery Rule

In Minnesota's original statute of limitations, the phrase "discovery thereof" persisted as a source of considerable inconsistency in the Minnesota court system and, consequently, a source of confusion for owners, builders, and lawyers.[82] Three different interpretations by Minnesota courts emerged. First, Minnesota courts interpreted the statute to begin to run at the discovery of damages resulting from the defective condition.[83] The courts applied this interpretation specifically to actions of negligent design or construction; courts adhering to this interpretation emphasized that a negligence action would be subject to dismissal for failure to state a claim unless plaintiffs were able to demonstrate that damage had resulted from the negligent act.[84] Second, in 1987,

irreconcilable conflict between two statutory provisions, the more particular provision prevails over the general provision"); Nolan & Nolan v. City of Eagan, 673 N.W.2d 487, 496 (Minn. Ct. App. 2003) (holding that section 541.051, and not section 541.05, applied to nuisance and trespass claims arising out of a defective condition).

81. *See infra* Section II.D.2.

82. *See* Bulau v. Hector Plumbing & Heating Co., 387 N.W.2d 659, 661 (Minn. Ct. App. 1986), *rev'd*, 402 N.W.2d 528 (Minn. 1987) (concluding that the statute's reference to "discovery" was ambiguous because a number of events or conditions were previously mentioned in the statute and relying on legislative intent to ascertain the meaning of "discovery"). Further illustrating the confusion in this area, the Minnesota Supreme Court disagreed with the Court of Appeals' decision in *Bulau*. 402 N.W.2d at 530 ("This court, however, has not found this statute ambiguous."). *See also* Keith J. Halleland & Thomas F. Nelson, *The Statute of Limitations in Construction-Related Cases: The Return to Common Law and Common Sense*, HENNEPIN LAW., May–June 1987, at 8, 8 (discussing the inconsistency in Minnesota jurisprudence regarding the interpretation of "discovery thereof").

83. *See* Cont'l Grain Co. v. Fegles Constr. Co., 480 F.2d 793, 797 (8th Cir. 1973) (citing Dalton v. Dow Chemical Co., 280 Minn. 147, 158 N.W.2d 580 (1968)); Capitol Supply Co. v. City of St. Paul, 316 N.W.2d 554, 555 (Minn. 1982); *Dalton*, 280 Minn. at 153, 158 N.W.2d at 584.

84. *See Cont'l Grain Co.*, 480 F.2d at 797 (noting that although the statute of limitations usually begins at the time of the negligent act, Minnesota courts have acknowledged the severity of this rule and have interpreted the statute to begin once damage has resulted); *see also Capitol Supply Co.*, 316 N.W.2d at 555 ("The statutory time period begins to run from the date that the plaintiff first suffers damage and not from the date when the last known negligent act occurs."); *Dalton*, 280 Minn. at 153, 158 N.W.2d at 584 ("[T]he alleged negligence . . . coupled with

despite these holdings, the Minnesota Supreme Court issued a group of decisions stating that the statute began to run at the discovery of the defective condition.[85] Even though each of those decisions involved contribution and indemnity claims rather than negligence claims, the court never acknowledged its departure from precedent, nor did it address the reasoning behind the discrepancy between the "discovery of defective condition" interpretation and its prior "discovery of resulting damage" interpretation.[86] Third, that same year, the Minnesota Court of Appeals took an even more conservative approach. The court concluded that the statute began to run when an expert inspected the damage and discovered the injury, even though the expert had not yet informed the plaintiffs of his findings.[87]

As illustrated by the three different, but well-supported, interpretations, the seeming simplicity of "discovery thereof" created far too much ambiguity to foster unanimity among the courts. While the legislature addressed the concerns of the *Kittson* and *Pacific Indemnity* courts fairly quickly, it remained silent on the controversial issue of the commencement of the limitation period for over twenty years. The diversity in judicial interpretation of Minnesota Statutes section 541.051 from 1965 to 1987 finally prompted the legislature to action to clarify the discovery rule.

2. *The 1988 Amendment: The Legislature's Only Attempt to Clarify the Discovery Rule*

In the last case decided before a 1988 amendment to section 541.051, the Minnesota Supreme Court held that the plain reading of the statute and legislative intent indicated that discovery of the defective condition, and not the damage it caused, triggered the

the alleged resulting damage is the gravamen in deciding the date upon which the cause of action at law herein accrues.").

85. *See* Ocel v. City of Eagan, 402 N.W.2d 531, 532 (Minn. 1987); Frederickson v. Alton M. Johnson Co., 402 N.W.2d 794, 796–97 (Minn. 1987); *see also Bulau*, 402 N.W.2d at 531.

86. *See* Pac. Indem. Co. v. Thompson-Yaeger, Inc., 260 N.W.2d 548, 555 (Minn. 1977) (citing Fujioka v. Kam, 514 P.2d 568 (Haw. 1973); Skinner v. Anderson, 231 N.E.2d 588 (Ill. 1967); Kallas Millwork Corp. v. Square D Co., 225 N.W.2d 454 (Wis. 1975)).

86. *Pac. Indem. Co.*, 260 N.W.2d at 555.

87. State Farm Fire & Cas. Co. v. C & A Constr. Co., 412 N.W.2d 52, 55 (Minn. Ct. App. 1987).

limitations period.[88] Following that opinion, the legislature clarified its intent contrary to the Minnesota Supreme Court's interpretation: the statute of limitations is triggered upon discovery of *injury*, not upon discovery of the defective condition.[89] The current statute provides, in relevant part, that "no action by any person . . . to recover damages for any injury to property . . . arising out of the defective and unsafe condition of an improvement to real property, shall be brought . . . more than two years after discovery of the injury . . . ."[90] Despite this clarification, inconsistency in the application of the statute and interpretation of "injury" has persisted, and the legislature has avoided amending the statute to clarify the definition of what precisely constitutes such discovery.[91]

Minnesota courts have often found that discovery of injury is an issue of fact that is inappropriate for summary judgment;[92] however, there seems to be agreement that the extent of the injury is a major factor as to whether owners could reasonably believe that the problem was sufficiently solved to successfully toll the statute of limitations.[93] Courts often look at the frequency and severity of the injury to determine the extent of the injury.[94] Alternatively, or

88. Wittmer v. Ruegemer, 419 N.W.2d 493, 496 (Minn. 1988), *superseded by statute*, Act of Apr. 24, 1988, ch. 607, § 1, subdiv. 1(a), 1988 Minn. Laws 680, 680, *as recognized in* City of Willmar v. Short-Elliott-Hendrickson, Inc., 475 N.W.2d 73 (Minn. 1991).

89. § 1, subdiv. 1(a), 1988 Minn. Laws at 680. The legislature acknowledged the confusion caused by the ambiguous nature of the previous statute and entitled the amendment implementing the discovery rule "[a]n act relating to civil actions; *clarifying* the statute of limitations for damages based on services or construction to improve real property." *Id.* (emphasis added).

90. MINN. STAT. § 541.051, subdiv. (1)(a) (2016).

91. *See* § 1, subdiv. 1(a), 1988 Minn. Laws at 680. The statute only states that "a cause of action accrues upon discovery of the injury." MINN. STAT. § 541.051, subdiv. 1(c).

92. *See* Lake City Apartments v. Lund-Martin Co., 428 N.W.2d 110, 112 (Minn. Ct. App. 1988) (concluding that "reasonable minds may differ about the date of discovery of the injury under the amendments to Minn. Stat. § 541.051").

93. *See, e.g.*, Buscher v. Montag Dev., Inc., 770 N.W.2d 199 (Minn. Ct. App. 2009); Metro. Life Ins. Co. v. M.A. Mortenson Co., 545 N.W.2d 394, 398 (Minn. Ct. App. 1996).

94. *See* Nolan & Nolan v. City of Eagan, 673 N.W.2d 487, 497 (Minn. Ct. App. 2003) (holding that because plaintiff cited several incidents of frequent, regular, and permanent flooding over several years before filing suit, his claims were time-barred); *see also* Hyland Hill N. Condo. Ass'n v. Hyland Hill Co., 538 N.W.2d 479, 484 (Minn. Ct. App. 1995) (holding that discovery did not trigger the statute of

conjunctively, courts sometimes look at the owner's proactive steps, or lack thereof, to remedy the injury in order to establish if the owner had sufficient notice of the injury.[95] The owner's initial reaction to discovery of some defect or notice that a defect may exist seems to be a heavily weighed factor; owners that appear to immediately treat the injury as a serious problem but wait several years to commence a lawsuit generally receive unfavorable outcomes.[96] To avoid adopting a specific governing rule, Minnesota courts have generally substituted a strictly fact-based contextual analysis.[97]

III. THE *328 BARRY* DECISION

A. *Facts and Procedure*

328 Barry Avenue, LLC ("328 LLC") selected Nolan Properties Group, LLC ("NPG"), both solely owned by John Nolan, to serve as the general contractor for the construction of a building on its

limitations where leakage was initially sporadic and handled by minor repairs, but was found when the leak became extensive and irreparable), *aff'd in part, rev'd in part*, 549 N.W.2d 617 (Minn. 1996); *see also Lake City*, 428 N.W.2d at 112 (holding that the statute of limitations was triggered by discovery not when plumbing was altered after leaks occasionally occurred and no further leaks occurred for two years, but when leaking recommenced and it was discovered that the plumbing might be defective).

95. *Compare* Greenbrier Vill. Condo. Two Ass'n v. Keller Inv., Inc., 409 N.W.2d 519, 524–25 (Minn. Ct. App. 1987) (finding summary judgment appropriate when owner was on notice of defects from reports clearly indicating the presence of faulty construction, and owner took steps in attempt to remedy the problem), *and Metro. Life*, 545 N.W.2d at 398 (holding that owner's action was untimely because owner was aware of the source of the continual and frequent water damage, took steps to fix the damage through its own employees, and believed the damage to be significant), *with Hyland Hill Co.*, 538 N.W.2d at 484 (holding that owner took reasonable steps to remedy the roof leaks and brought timely action when an outside specialist informed owner that the leak had become extensive and irreparable).

96. *See* Minch Family LLLP v. Estate of Norby, 652 F.3d 851, 858 (8th Cir. 2011) (holding that plaintiffs' claims were time-barred because plaintiffs sought damages for injuries caused by a flooding from almost seven years prior); *see also* Indep. Sch. Dist. No. 775 v. Holm Bros. Plumbing & Heating, Inc., 660 N.W.2d 146, 151 (Minn. Ct. App. 2003) (holding that after being informed of multiple failed heat pumps, the superintendent's subsequent concern of a "major defect" constituted discovery of injury and commenced the limitations period).

97. *See Lake City*, 428 N.W.2d at 112.

building site.[98] In October 2009, during the "punch list"[99] phase of construction, NPG contacted Minuti-Ogle Co. ("MOC"), the stucco contractor, about a leak near an east elevation window.[100] A MOC representative visited the property, observed water coming out by the window, and told NPG that he thought it might be a window issue.[101] A few days later, after the leak persisted at the same location, NPG had the same MOC representative return and apply sealant to the window corners.[102] In early November 2009, the MOC representative and two NPG representatives performed a garden-hose spray test to determine the location of the leak, which revealed water seeping in on the right side of the same window.[103] Although the record showed no evidence that MOC or any subcontractor repaired the leak, Nolan testified that the subcontractors appeared to address the leak because all subcontractors were paid and 328 LLC observed no leaks between November 2009 and August 2010.[104]

A certificate of occupancy for the building was issued in January 2010, and 328 LLC began to occupy the building in May 2010.[105] In August 2010, 328 LLC noticed water on the floor of the building, and NPG contacted MOC to resolve the issue.[106] The MOC representative noticed the water was in the same spot as earlier and suggested that NPG "get [the] window tested."[107] In response, NPG and 328 LLC hired experts to determine the extent

98. 328 Barry Ave., LLC v. Nolan Props. Grp., LLC, 871 N.W.2d 745, 747 (Minn. 2015). NPG did not perform any of the construction work, but it was required to select, hire, and supervise subcontractors, and to ensure the subcontractors' work was completed according to the contracts. *Id.*

99. A "punch list" is a "document listing work that does not conform to contract specifications, usually attached to the certificate of substantial completion. The contractor must correct the punch list work before receiving payment." *Punch List*, BUSINESSDICTIONARY.COM, http://www.businessdictionary.com/definition/punch-list (last visited Dec. 2, 2016).

100. *328 Barry*, 871 N.W.2d at 747.

101. *Id.*

102. *Id.*

103. *Id.* The spray test was performed in response to an e-mail the MOC representative had received from NPG on October 30 informing him that the leaking had recommenced at the same window two weeks after his previous visit. *Id.*

104. *Id.*

105. *Id.* at 747–48.

106. *Id.* at 748.

107. *Id.*

and cause of the water damage.[108] A June 2011 report revealed multiple window leaks, water damage, and other problems.[109] A June 2012 report documented water damage and further window issues.[110] Based on these reports, 328 LLC sued NPG on June 14, 2012, for negligence.[111]

The district court granted NPG's motion for summary judgment, holding that the action was untimely under the two-year statute of limitations.[112] The court held there was no genuine issue of material fact that 328 LLC discovered an actionable injury in fall 2009, so its 2012 negligence action was untimely.[113] The court of appeals affirmed.[114]

B. The Rationale of the Minnesota Supreme Court Holding

In the appeal before the Minnesota Supreme Court, 328 LLC raised two primary issues: whether a cause of action could accrue under Minnesota Statutes section 541.051 prior to substantial completion, and whether summary judgment was appropriate regarding the timing of 328 LLC's discovery of an actionable injury.[115] 328 LLC argued that a project must be substantially complete before an owner can discover an actionable injury rather than a defective condition, while NPG emphasized that the reading of the plain language of the statute includes no such exemption.[116] NPG further argued for an expansive definition of "actionable injury," such that an actionable injury would occur as soon as a party is aware of some injury, to support affirming the court of appeals' decision that 328 LLC's action was untimely.[117] 328 LLC maintained that although it was aware of a water leak in November 2009, it did not discover an actionable injury sufficient to trigger the statute of limitations before August 2010.[118]

108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.* at 748–49.
116. *Id.* at 749–50.
117. *See id.* at 752.
118. *Id.* at 751.

Following its analysis of the plain language of the statute, the Minnesota Supreme Court affirmed the court of appeals' decision that construction does not need to be substantially complete before the two-year-limitation period begins.[119] The court relied on precedential interpretation of legislative intent in rejecting 328 LLC's primary argument that although "substantial completion" did not appear in the statute of limitations, construction must nevertheless be substantially complete before any actionable injury can be discovered.[120]

After holding that the statute of limitations may begin before substantial completion, the court then turned to the question of whether summary judgment was appropriate regarding the timing of 328 LLC's discovery of an actionable injury.[121] The court held that the timing of the discovery of the injury is a question of fact.[122] The court relied heavily on the standard for a motion for summary judgment—to construe the evidence in the light most favorable to the nonmoving party—in its evaluation of when 328 LLC knew, or should have known, of the injury.[123] The court then viewed the evidence in the light most favorable to 328 LLC and concluded that reasonable minds could differ as to 328 LLC's discovery of injury and held that the district court erred in granting summary judgment.[124]

IV. ANALYSIS

A. Statutory Interpretation of the Statute of Limitations

The Minnesota Supreme Court correctly interpreted the statute of limitations on construction-defect claims in *328 Barry* to

119. *Id.* at 749–51.

120. *See id.* at 749–50 ("[W]e cannot add words to an unambiguous statute under the guise of statutory interpretation."); *see also* Seagate Tech., LLC v. W. Dig. Corp., 854 N.W.2d 750, 759 (Minn. 2014) ("[A] condition expressly mentioned in one clause of a subdivision provides evidence that the Legislature did not intend for the condition to apply to other clauses in which the condition is not stated."); *see also* Cty. of Dakota v. Cameron, 839 N.W.2d 700, 709 (Minn. 2013); *In re* Stadsvold, 754 N.W.2d 323, 328–29 (Minn. 2008) ("[D]istinctions in language in the same context are presumed to be intentional.").

121. *328 Barry*, 871 N.W.2d at 751.

122. *Id.*

123. *Id.* at 753.

124. *Id.*

hold that the statute can begin to run prior to substantial completion of the construction. First, the court's holding closely follows precedent and is supported by strong policy considerations. Second, the court's decision correctly mirrors legislative intent to preserve the important distinction between the statutes of limitations and of repose.

The court's decision that the statute of limitations on defective construction claims does not require that construction be substantially complete[125] accurately reflects the plain language of the statute. Such a reading also comports with previous Minnesota decisions[126] that assumed the legislature's passing of the statute was part of a national trend that reflected the complex public policy behind a strict limitation period.[127] A contrary holding would allow owners to wait until substantial completion of a lengthy construction project to bring suit for an injury discovered years prior when the injury could have been remedied before wasting material, money, and labor. Such a determination would hold construction companies unjustifiably liable for unmitigated damages and would lead to economic waste of labor and resources.[128]

Further, contrary to 328 LLC's argument, holding that the two-year statute of limitations is triggered upon substantial completion would render the statute of repose superfluous[129] and would stand

125. *Id.* at 751.

126. *See* Fiveland v. Bollig & Sons, Inc., 436 N.W.2d 478, 481 (Minn. Ct. App. 1989). The *Fiveland* court noted that the legislature deliberately provided two separate limitations statutes: "one running for two years commencing upon discovery of the injury; and the other running for 10 years from the substantial completion of construction." *Id.* The court concluded that this was sufficient proof that the legislature "considered the importance of the time of substantial completion of construction as a measure for commencing a time period, and has chosen not to use this point as commencement for the two-year limitation period." *Id.* The court also acknowledged that there had been substantive amendments of the statute since its enactment, indicating that if the legislature intended that the two-year limitation period commence upon substantial completion, it would have expressly and unambiguously amended the statute to provide as such. *Id.*

127. Kittson Cty. v. Wells, Denbrook & Assocs., Inc., 308 Minn. 237, 241–42, 241 N.W.2d 799, 801 (1976).

128. *See* 2 BRUNER & O'CONNOR, *supra* note 14, § 7:174.50.

129. *328 Barry*, 871 N.W.2d at 750. 328 LLC argued that "if the statute of limitations can begin to run during construction, there would be no need for a statute of repose because all claims would be barred within two years of substantial completion of construction." *Id.*

in complete contrast to the original public policy objectives[130] of enacting two distinct statutes. Minnesota courts have consistently recognized the distinction between the statute of limitations and the statute of repose and have emphasized the precise policy objectives that the statute of repose furthers.[131] None of the concerns that the extended statute of repose was enacted to address exist here;[132] extending the "substantial completion" trigger in the statute of repose to the statute of limitations would be unnecessary, inconsistent with precedent[133] and national legislative intent,[134] and would undermine legitimate policy concerns.[135]

B. A Missed Opportunity to Adopt a Clearer "Discovery of Injury" Rule

As discussed in this Note, many jurisdictions have expanded the discovery rule to apply to construction-defect claims.[136] However, the jurisdictions that have adopted the discovery rule differ substantially in their interpretations of "discovery," which has

130. *See* O'Connor, *supra* note 26, at 7. Statutes of repose were enacted in response to court decisions exposing building professionals to endless liability, which ultimately increased the amount of construction lawsuits and created substantial volatility in prices and parties involved in the insurance market, resulting in an "insurance crisis." *Id.*; *see also* Michael John Byrne, *Let Truth Be Their Devise:* Hargett v. Holland *and the Professional Malpractice Statute of Repose*, 73 N.C. L. REV. 2209, 2220 (1995).

131. *See* Sartori v. Harnischfeger Corp., 432 N.W.2d 448, 454 (Minn. 1988) (acknowledging that the statute of repose was created to eliminate suits against building professionals that have completed their work and no longer have any interest or control in the improvement to owner's real property); *see also* Day Masonry v. Indep. Sch. Dist., 781 N.W.2d 321, 326 (Minn. 2010) (noting that section 541.051 provides both a statute of limitations and a separate statute of repose, and that different and distinct triggers commence each statute).

132. *See Sartori,* 432 N.W.2d at 454. Such policy objectives include (1) avoiding litigating stale claims and (2) remedying problems in litigation arising from a substantial lapse of time such as unavailability of witnesses, unavailability of adequate records, and memory loss. *Id.*

133. *See* Fiveland v. Bollig & Sons, Inc., 436 N.W.2d 478, 481 (Minn. Ct. App. 1989).

134. *See* O'Connor, *supra* note 26, at 7 (citing Tex. Gas Expl. Corp. v. Fluor Corp., 828 S.W.2d 28, 32 (Tex. App. 1991)) (explaining that statutes of repose "represent a response by the legislature to the inadequacy of traditional statutes of limitation").

135. *See Sartori*, 432 N.W.2d at 454; *see also supra* Section II.A.

136. See Larsen, *supra* note 42, for a collection and discussion of cases that have applied the discovery rule in construction-related statutes-of-limitations issues.

led to understandable confusion and frustrating inconsistency. Due to this inconsistency, the case law fails to provide reasonable expectations of legal rights to both owners and construction companies. States must amend their statutes of limitations to include specifics of the discovery rule for the sake of settling expectations of parties, ensuring continued growth and industrialization, and fostering goodwill between owners and construction companies. In the absence of such an amendment it is the responsibility of states' highest courts to adopt one controlling interpretation of discovery when an appropriate construction-defect case, such as *328 Barry*, presents itself.

Due to the inconsistency in their interpretations of "discovery of injury" in construction-related cases, it is imperative that Minnesota courts adopt specific rules governing such claims that are reflective of public policy, consistent with precedent, and adoptive of recent trends. Court holdings on these issues tend to follow one of two patterns to trigger the limitations period: (1) a "lower standard" of discovery that requires owners to bring suit when they are first put on notice of the defect or upon discovery of some injury; or (2) a "higher standard" of discovery that requires owners to bring suit only once they have proof of an injury sufficient to maintain a cause of action.[137] The discovery rule is a mechanism through which legislatures and courts have preserved the integrity of statutes of limitations and repose without ignoring the injustice of the unavailability of remedies to innocent homeowners.[138] Both standards emulate this policy to some extent, but the higher standard prioritizes a homeowner's access to an equitable remedy.

1. A Lower Discovery Standard: Costs and Benefits

Courts that adhere to the lower standard generally emphasize the policy justifications of statutes of limitations and favor a strict construction of statutory time bars.[139] Such courts expect owners to

137. *See supra* Sections II.C, II.D. *But see* State Farm Fire & Cas. Co. v. C & A Const. Co., Inc., 412 N.W.2d 52, 55 (Minn. Ct. App. 1987).

138. *See* 1000 Virginia Ltd. P'hip v. Vertecs Corp., 146 P.3d 423, 430 (Wash. 2006) (quoting Ruth v. Dight, 453 P.2d 631, 634 (Wash. 1969)) ("A court must consider the goal of the common law 'to provide a remedy for every genuine wrong' while recognizing, at the same time, that 'compelling one to answer stale claims in the courts is in itself a substantial wrong.'").

139. *See, e.g.*, Georgetowne P'ship v. Geotechnical Serv., Inc., 430 N.W.2d 34,

be vigilant in their supervision of the construction and immediate in their response to discovery of any defect or warning of the possibility of a defect.[140]

The support of the lower discovery standard rests heavily on general justifications for strict observance of statutes of limitations.[141] As discussed earlier in this Note, statutes of limitations and repose were initially passed in response to builder complaints of exposure to endless liability and spiking insurance costs.[142] Statutes of limitations and repose thus served as a means of revitalizing the construction industry and promoting growth.[143] Relying on the predictability and stability that these statutes provide, construction companies are now able to save money by disposing of old documents and spending less on insurance premiums.[144] In turn, this extra money allows builders to engage in more projects, without the fear of being hit with an unexpected lawsuit, and dedicate more resources and higher quality materials to completing these projects.[145] While this commerce theory is persuasive and particularly attractive to state legislatures, it will cease to be a legitimate justification if legislative inaction and judicial apathy to owners' concerns continue for much longer. The current dearth of legal protections may cause owners to refrain from investing in construction projects for fear of the unavailability of an adequate remedy.

39 (Neb. 1988) (analyzing the legislative intent, which favored a strict construction of statutory time bars).

140. *See, e.g.*, *id.* (holding that knowledge of the existence of an injury, not the existence of a "legal right to seek redress in court," constitutes discovery). Even stricter, the Supreme Court of Nebraska held that the statute of limitations begins to run merely when facts exist to lead a reasonable person to investigate, which would lead to discovery. Bd. of Regents of Univ. of Neb. v. Wilscam Mullins Birge, Inc., 433 N.W.2d 478, 484 (Neb. 1988).

141. *See Georgetowne*, 430 N.W.2d at 37; *see also Wilscam Mullins*, 433 N.W.2d at 483–84.

142. *See supra* Section II.A.

143. *See* Michael F. Lutz, *Restore Colorado's Repair Doctrine for Construction-Defect Claims*, 83 U. COLO. L. REV. 875, 890 (2012) (noting that the intent of the statutes of limitations and repose is to promote commerce).

144. Ochoa & Wistrich, *supra* note 24, at 469 (discussing the negative impact of uncertainty and old claims on insurance costs). Ochoa and Wistrich also note that statutes of limitations allow potential defendants to destroy burdensome records without the fear of being penalized. *Id.* at 470.

145. *Cf. id.* at 466–67 (noting that uncertainty inhibits a potential defendant's ability to pursue new ventures or economically allocate resources).

Proponents of a lower discovery standard also reason that a more liberal standard would incentivize owners to neglect their responsibility to exercise reasonable diligence in inspecting their properties in order to extend the limitation period.[146] This lower standard, proponents argue, holds owners to a higher degree of responsibility, requiring them to consistently and thoroughly inspect their properties. Supporting this idea, one court held that statutes of limitations simply "reflect[] a policy decision regarding what constitutes an adequate period of time for a person of ordinary diligence to pursue his claim."[147] However, this justification operates under the assumption that any construction defect can be discovered through reasonable diligence within the allotted time. This assumption ignores an important policy justification of the discovery rule, which is to protect diligent owners who are unable to discover the injury due to lack of expertise or the undetectable nature of the injury.[148] Additionally, this assumption begins to erode the distinction between the harshness of the traditional rule, where the statute of limitations is immediately triggered upon the occurrence of the wrongful act causing the injury, and the fairness of the discovery rule.[149] Critics

146. *See* Melrose Hous. Auth. v. N.H. Ins. Co., 520 N.E.2d 493, 498 (Mass. 1988) (quoting Fulcher v. United States, 696 F.2d 1073, 1077 (4th Cir. 1982)) ("A man should not be allowed to close his eyes to facts readily observable by ordinary attention, and maintain for his own advantage the position of ignorance. Such a principle would enable a careless man, and by reason of his carelessness, to extend his right to recover for an indefinite length of time, and thus defeat the very purpose the statute was designed and framed to accomplish." (citation omitted) (internal quotation marks omitted)).

147. Lumsden v. Design Tech Builders, Inc., 749 A.2d 796, 799 (Md. 2000) (quoting Goldstein v. Potomac Elec. Power Co., 404 A.2d 1064, 1069 (Md. 1979)); *see* Pierce v. Johns-Manville Sales Corp., 464 A.2d 1020, 1026 (Md. 1983) (discussing that the limitation period is a product of balancing fairness to potential defendants with preventing injustice to potential diligent plaintiffs).

148. *See* Ehrenhaft v. Malcolm Price, Inc., 483 A.2d 1192, 1203 (D.C. 1984). The court in *Ehrenhaft* emphasized the fact that owners must rely on the skills and advice of the professionals they hire and likely do not possess the expertise to immediately identify defective construction or design. *Id.* The court also noted that due to the latent nature of some defects, even the most diligent owner would not be able to detect such defects for a number of years. *Id.*

149. *See* Leaf v. City of San Mateo, 163 Cal. Rptr. 711, 715 (Ct. App. 1980) ("The traditional rule . . . is that the statute of limitations begins to run upon the occurrence of the last fact essential to the cause of action. Although sometimes harsh, the fact that plaintiff is neither aware of his cause of action nor of the identity of a wrongdoer will not toll the statute. . . . The harshness of this rule has

of this approach also caution that a lower standard of being aware of some injury would require owners to sue any party they believe could have contributed to the injury to prevent losing their claims under the statute of limitations.[150]

Overall, a lower discovery standard would inevitably lead to frivolous lawsuits, judicial inefficiency, and a substantial waste of money and resources on behalf of owners and construction companies.[151]

2. A Higher Discovery Standard: Costs and Benefits

As the demand for construction services has increased exponentially in the past two decades, so too have the number of construction-defect lawsuits.[152] While the lower standard directly responds to builders' concerns prior to the enactment of statutes of repose regarding exposure to endless liability, the higher standard importantly addresses more recent and prevalent issues from the past twenty years. The pressure to remain competitive and efficient in a booming industry has led construction companies to underestimate the time to complete a project, use cheaper and more defect-prone materials, and understaff projects that would typically warrant a quality control expert or supervisor.[153] The result

been ameliorated in some cases where it is manifestly unjust to deprive plaintiffs of a cause of action before they are aware that they have been injured.").

150. *Id.*

151. *Cf.* Hyland Hill N. Condo. Ass'n, Inc. v. Hyland Hill Co., 538 N.W.2d 479, 484 (Minn. Ct. App. 1995) (comparing a more lenient discovery standard to the doctrine of mutual mistake, which "promotes economic efficiency by allowing parties to enter freely into contracts without first going to the prohibitive expense of carefully investigating every fact assumption"), *aff'd in part, rev'd in part*, 549 N.W.2d 617 (Minn. 1996).

152. *See, e.g.*, Robert J. Aalberts, *"To Sue or Not to Sue": The Past, Present and Future of Construction Defect Litigation in Nevada*, 5 NEV. L.J. 684, 684–85 (2005). In Clark County, Nevada, nearly 170 construction-defect lawsuits were filed between 2000 and 2001. *Id.* (citing Robert Gavin, *Home Builders Face Insurance Woes*, WALL ST. J., Feb. 27, 2002, at B7).

153. *Cf.* Darin T. Allen, *Construction Defects Litigation and the "Right to Cure" Revolution*, CONSTRUCTION BRIEFINGS, Mar. 2006, ¶ 8 (2006) (In response to the frequency and normalcy of construction defect litigation, the number of lawyers specializing in this area of law has increased as well.); Mario Menanno, *New and Emerging Issues: Top Trends in Construction Cases*, DRI FOR DEF., Mar. 2016, at 78 ("The principal lesson to be learned from . . . recent construction law trends is that this area of the law is rapidly changing, and attorneys should not only be aware of these changes, but they also should be actively participating in molding

has inevitably been an increase in construction and design defects. However, as owners tend to not be construction experts, they often fail to identify defects and lose the right to remedy due to strict statutes of limitations.[154] As such, the rigidity of and the lack of specification in these statutes of limitations have unwittingly encouraged owners to immediately pursue litigation rather than attempt to remedy the problem in a less costly and hostile manner outside of the court system.[155]

In acknowledgement of the national emergence of increased construction litigation, states have enacted a variety of statutes to curb the number of lawsuits, encourage parties to work together again, and promote industry growth.[156] A higher discovery standard aligns with the purposes of these statutes. Requiring owners to have the basis of a cause of action for a construction-defect claim before commencing the limitation period necessitates a degree of certainty as to the legitimacy of the claim. Moreover, a higher discovery standard discourages owners from filing frivolous or impulsive lawsuits, which will ultimately increase judicial economy and decrease litigation costs for all parties.

Not only would a higher standard decrease litigation for builders, but it would also protect owners' legitimate claims. Courts that have embraced a higher standard generally take a more balanced approach: they acknowledge the importance of statutes of limitations but also consider individual circumstances and other relevant factors.[157] These courts have acknowledged that there are

the law."); Melissa C. Tronquet, Comment, *There's no Place Like Home . . . Until You Discover Defects: Do Prelitigation Statutes Relating to Construction Defect Cases Really Protect the Needs of Homeowners and Developers?,* 44 SANTA CLARA L. REV. 1249, 1262 (2004).

154. *See* Allen, *supra* note 153, ¶ 1.

155. *See* Aalberts, *supra* note 152, at 686 (noting that in many cases, only owners who have financial resources have the luxury of pursuing litigation). Aalberts notes that during the rise of construction litigation, despite litigation only being a viable option for some owners, the financial costs and the damage to construction companies' reputations created animosity towards all owners complaining about defects. *Id.* at 687. As a result, when owners tried to pursue amicable remedies outside of the court system, such as asking builders to fix the problem, builders were sometimes reluctant to cooperate. *Id.*

156. *See* Menanno, *supra* note 153; *see also* Tronquet, *supra* note 153, at 1263.

157. *See supra* Sections II.C–D. Minnesota courts have looked at a number of extraneous factors, including public policy, comparative jurisprudence, and recent history. *See* Ehrenhaft v. Malcolm Price, Inc., 483 A.2d 1192, 1203 (D.C. 1984) (holding that a liberal discovery rule applies after balancing the burden to the

limits to an owner's ability to be diligent.[158] An owner cannot be expected to shoulder the entire burden of supervision, particularly when the owner has entrusted paid construction professionals to perform defect-free work on personal property.[159] In cases where diligence is not the issue, owners should not worry about losing claims for defects that they could not have been aware of. Such situations can occur when a manifestation of a defect is not obvious to the owner[160] or when an injury is temporarily abated but recurring over a period of time.[161]

3. The 328 Barry Decision*'s Bearing on the Discovery of Injury Standard*

In *328 Barry*, the Minnesota Supreme Court correctly found that there was a genuine issue of material fact regarding the timing of 328 LLC's discovery of an actionable injury.[162] However, in its discussion on this matter, the court should have addressed the impact of its strict statute of limitations holding on Minnesota's standard for "discovery" of actionable injury. If the statute of limitations can begin before substantial completion, the standard for discovery of actionable injury must be higher. The court alluded to a higher standard by distinguishing the present case from a prior case where discovery of injury was found immediately after completion of construction,[163] but the court failed to explicitly

defendant of defending an older claim with the practical purposes of statutes of limitations).

158. *See supra* Sections II.C–D.

159. *See Ehrenhaft*, 483 A.2d at 1202 (noting that an owner should not be reasonably expected to hire additional experts to oversee the construction work).

160. *See* Performing Arts Ctr. Auth. v. Clark Constr. Grp., 789 So.2d 392, 394 (Fla. Dist. Ct. App. 2001) ("Where the manifestation is not obvious but could be due to causes other than an actionable defect, notice as a matter of law may not be inferred.").

161. Kulpinski v. City of Tarpon Springs, 473 So.2d 813, 814 (Fla. Dist. Ct. App. 1985) (holding that the owner was entitled to a cause of action for damages for each recurrence of the damage during the limitation period, even though suit was filed outside of the one-year limitation period after the owner first noticed the injury).

162. 328 Barry Ave., LLC v. Nolan Props. Grp., LLC, 871 N.W.2d 745, 753 (Minn. 2015).

163. *Id.* at 752 (citing Day Masonry v. Indep. Sch. Dist. 347, 781 N.W.2d 321, 334 (Minn. 2010) (holding that the school district's claims were time-barred because it discovered the problem as soon as the school opened but failed to bring suit until several years later)).

establish any definite rule defining Minnesota's discovery standard.[164]

As strict interpretations of statutes of limitations and the incorporation of statutes of repose exist to protect construction companies from unjustifiable liability exposure,[165] so too should lenient interpretations of "discovery of injury" exist to allow owners to hold construction companies accountable for legitimate claims of actual injury.[166] Thus, to equalize legal protections for both parties, Minnesota courts should adopt the higher standard for Minnesota's discovery rule.[167] While Minnesota courts have differed in their approaches in the past, taking a firm stance on this interpretation would be consistent with precedent, would be good public policy, and would provide invaluable guidance for inevitable future construction litigation in Minnesota.[168] The Minnesota Supreme Court missed an important opportunity to take a firm stance and adopt the higher standard as Minnesota's discovery rule.

C. *In Support of a Higher Discovery of Injury Standard: Through the Lens of a Minnesota Court*

The Minnesota Supreme Court could adopt the higher standard through an interpretation of Minnesota Statutes section 541.051. Applying the higher standard for the discovery rule in

164. *Id.*

165. Marianne M. Jennings, *Reposing: An Evolving Issue*, 34 REAL EST. L.J. 470, 471 (2006). Jennings also cites concern about the decline in services provided by construction companies as a result of high costs of insurance and litigation as an argument for enacting of statutes of limitations. *Id.* at 470.

166. Peggy Rose Revocable Tr. v. Eppich, 640 N.W.2d 601, 608 (Minn. 2002) (citing Schmucking v. Mayo, 183 Minn. 37, 40, 235 N.W. 633, 634 (1931)) (discussing the rationale of the discovery rule in preventing the preclusion of legitimate claims by aggrieved parties before they even know they have a valid claim).

167. *But cf.* Harvard Law Review Ass'n, *Developments in the Law Statutes of Limitations*, 63 HARV. L. REV. 1177, 1205 (1950) ("As between the duly diligent plaintiff and the wrongdoer, the courts have been unnecessarily sympathetic towards the latter, in shortening the period in which it is likely that the plaintiff will bring an action or in entirely depriving the plaintiff of a practical remedy.").

168. *See* Greenbrier Vill. Condo. Two Ass'n v. Keller Inv., Inc., 409 N.W.2d 519, 523 (Minn. Ct. App. 1987) (citing Bulau v. Hector Plumbing & Heating Co., 402 N.W.2d 528, 530 (Minn. 1987)) ("In Minnesota, the harshness of [the statute of limitations] has been recognized and . . . the statute begins to run when some damage occurs which would entitle the victim to maintain a cause of action.").

Minnesota would not be judicial legislation. This Section examines the higher standard as an issue of statutory interpretation as though it were before a Minnesota court. This analysis relies solely on factors that Minnesota courts have considered when interpreting section 541.051.

1. Legislative Intent

Significant literature exists explaining the intent behind the initial passage of statutes of limitations in construction-defect litigation.[169] Minnesota courts have duly accepted that the primary motivations behind the original enactment of Minnesota Statutes section 541.051 were (1) the erosion of the privity-of-contract doctrine and (2) the need to establish protections for builders against endless liability.[170] However, the changing climate of the construction industry in the 1980s spurred a change in policy considerations.[171] When clarifying the discovery rule in 1988, the legislature's primary goal was no longer protecting construction industry professionals but "to handle fairly and predictably the various circumstances that can arise in construction litigation."[172]

In amending the discovery rule, the legislature considered various hypothetical situations in which a construction-defect lawsuit might arise. The legislature discussed three likely situations: (1) a cause of action arising out of a personal injury caused by a sudden event; (2) a cause of action arising out of economic loss caused by a sudden event; and (3) a cause of action arising out of an economic loss not caused by a sudden event.[173] The evaluation of these diverse hypotheticals indicates an intent to account for many types of property owners and protect as many legitimate

169. *See supra* Sections II.A, II.C.

170. *See* Kittson Cty. v. Wells, Denbrook & Assocs., 308 Minn. 237, 241–42, 241 N.W.2d 799, 802 (1976).

171. *See* Johansen, *supra* note 16, at 1572–73 (discussing the sharp increase in construction-defect litigation following the construction boom of the 1980s).

172. *See* Halleland & Nelson, *supra* note 82, at 28. Halleland and Nelson note that the legislature's purpose was also to clarify that, contrary to judicial presumption, the statute was not intended to "abrogate" the common law. *Id.*

173. *Id.* The first two hypotheticals assume that the discovery of the injury will be obvious, coinciding with the occurrence of the sudden event. *Id.* In the third hypothetical, the limitations period is triggered upon discovery of an injury sufficient to maintain a cause of action. *Id.* Halleland and Nelson reason that the third hypothetical reaffirms a recent decision that "punch list" items should not form the basis for a cause of action. *Id.*

claims as possible. The particular consideration the legislature gave to owners who do not discover the injury for several years by no fault of their own but due to the latent nature of the defect demonstrates a deliberate commitment to furthering the policy objectives of the discovery rule.[174] The legislature's careful consideration of protecting claims arising from both obvious and subtle injuries signifies an inclusive trend and a rejection of a stringent construction of the statute to which Minnesota courts previously adhered.

2. Precedent

Although Minnesota case law has been somewhat inconsistent since the 1988 amendment, patterns have emerged, and underlying trends have become more apparent.[175] On the surface, case law from the past ten years appears to indicate a trend towards time-barring most claims.[176] However, an evaluation of the specific facts behind these holdings reveals underlying trends reflective of public policy. In a majority of the recent construction-defect cases, the courts based their decisions heavily on what the owner actually knew about the injury and how the owner responded to that knowledge.[177] If the owner was informed of either the existence of an extensive injury or the development of a potentially grave injury from a credible source, courts have generally agreed that this knowledge constitutes discovery.[178] Many courts have taken the

174. *See* Ehrenhaft v. Malcolm Price, Inc., 483 A.2d 1192, 1202 (D.C. Cir. 1984) (noting that the discovery rule aligns with notions of justice in that it recognizes the difficulty in discovering a latent construction deficiency).

175. *See supra* Section II.D.

176. *See generally* Minch Family LLLP v. Estate of Norby, 652 F.3d 851 (8th Cir. 2011); Day Masonry v. Indep. Sch. Dist. 347, 781 N.W.2d 321 (Minn. 2010); Glendalough Homeowners' Ass'n v. Nassar, No. A15-0230, 2015 WL 7357196 (Minn. Ct. App. Nov. 23, 2015); Sterling Heights, LLC v. Veit, No. A12-0889, 2012 WL 5990311 (Minn. Ct. App. Dec. 3, 2012).

177. *See infra* notes 180, 181, 183 and accompanying text.

178. *See Glendalough*, 2015 WL 7357196, at *2 (holding that plaintiff discovered the injury after an engineer he had hired to survey his damaged landscaping informed him of the sources of the damage and warned him that the defects would devalue his home and "potentially create an unsafe situation"); *see also Sterling Heights,* 2012 WL 5990311, at *4 (holding that plaintiff's claims were time-barred because plaintiff received reports of the defects from two separate sources in 2003 and was informed of these defects again in 2006 when he hired an expert to inspect the building but failed to bring suit until 2010).

inquiry one step further, finding that if the owner responds to a problem as though he or she believes it to be serious, discovery is found at the time of that response.[179]

Despite initial impressions, these holdings are not an indication that Minnesota courts are less sympathetic to the plight of homeowners faced with damaging and costly construction defects.[180] In fact, in *Fuhr v. D.A. Smith Builders, Inc.*, the Minnesota Court of Appeals explicitly rejected the idea that "the legislature intended to require homeowners to engage in an exhaustive investigation absent facts that would place a reasonable person on notice that such an investigation is prudent."[181] This plaintiff-centered approach goes no further than ensuring that owners do not sit on their rights.[182] The focus on the actions of the owner, as opposed to the extent or nature of the injury, corresponds with the proposed higher standard and mirrors the underlying policy

179. *See Minch*, 652 F.3d at 858 (holding that the date of discovery of injury was the date plaintiffs first complained to the Watershed District about the flooding); Smith v. Lindstrom Cleaning and Constr., Inc., No. A07-1122, 2008 WL 2020493, at *1 (Minn. Ct. App. May 12, 2008) (holding that discovery was found when plaintiff wrote a letter to her insurance agent stating that she firmly believed that the mold causing her health problems was a direct result of defendant's construction). *But see* Lake City Apartments v. Lund-Martin Co., 417 N.W.2d 704, 708 (Minn. Ct. App. 1988) (holding that plaintiff acted as a responsible property owner by installing a valve that appeared to fix the leak and therefore plaintiff's claims did not begin to accrue until the leaks occurred again two years later). The court in *Lake City Apartments* noted that plaintiff would not have been able to maintain a cause of action if it had brought suit after it reasonably believed it had repaired the problem and the defect appeared to be fixed. *Id.*

180. *Cf.* Ehrenhaft v. Malcolm Price, Inc., 483 A.2d 1192, 1202 (D.C. 1984) (noting that under the discovery rule, courts take into consideration the fact that owners are generally not construction experts and must rely on the expertise and advice of professionals in the field).

181. No. A04-2457, 2005 WL 3371035, at *4 (Minn. Ct. App. Dec. 13, 2005) (holding that a genuine issue of material fact as to date of discovery existed where owners promptly fixed what they understood to be the problem after noticing water damage, did not experience water damage for over four years, and then discovered extensive water damage and received reports identifying the cause of the damage).

182. The *Fuhr* court reasoned that "[a] contrary result would force Fuhrs to choose between taking what they claim was a prudent corrective action and then being barred by the statute of limitations from further claims, and undertaking an exhaustive, invasive inspection of their entire home, including tearing out sheetrock and insulation to determine whether systemic problems exist." *Id.*; *see also Ehrenhaft*, 483 A.2d at 1203 ("A plaintiff who will benefit by invocation of the discovery rule will not be one who has 'sat' on his rights to gain legal advantage.").

objectives behind the original purpose of these statutes: prompt investigation into construction defects to ensure low-cost and time-efficient litigation of these matters as amicably and fairly as possible.[183]

3. Common-Sense Approach

The Minnesota Supreme Court first adopted the common-sense approach in *Kloster-Madsen, Inc. v. Tafi's, Inc.* in 1975.[184] The court was tasked with determining whether work performed by an electrician constituted an "improvement" within the meaning of Minnesota Statutes section 514.05.[185] To make this determination, the court relied on the dictionary definition of "improvement" compounded with its implicit definition in the statute.[186] The court then revisited this common-sense approach in *Pacific Indemnity*, affirming the utility of this approach in evaluating the language of this statute.[187]

As Minnesota courts have repeatedly relied on this interpretive tool, the same common-sense approach can be applied here to lend clarity to the phrase "discovery of injury." By dictionary definition, "injury" is "hurt, damage, or loss sustained" or the "violation of another's rights for which the law allows an action to recover damages."[188] Applying that definition to the phrase "discovery of injury" as it is used in the statute, "injury" warrants the

183. Halleland & Nelson, *supra* note 82, at 8.

184. 303 Minn. 59, 63, 226 N.W.2d 603, 606 (1975).

185. *Id.*

186. *Id.* at 63–64, 226 N.W.2d at 607 (citing WEBSTER'S THIRD NEW INT'L DICTIONARY 1138 (1971)) (defining improvement as a mixed question of fact and law).

187. Pacific Indem. Co. v. Thompson-Yaeger, Inc., 260 N.W.2d 548, 554 (Minn. 1977) (quoting *Kloster-Madsen*, 303 Minn. at 63, 226 N.W.2d at 607) ("[A]n improvement is 'a permanent addition to or betterment of real property that enhances its capital value and that involves the expenditure of labor or money and is designed to make the property more useful or valuable as distinguished from ordinary repairs.'"), *superseded by statute*, MINN. STAT. § 541.051, *as recognized in* Siewert v. N. States Power Co., 793 N.W.2d 272, 286 (Minn. 2011). The *Pacific Indemnity* court noted that this "common usage" approach had also been recently adopted by the Wisconsin Supreme Court. 260 N.W.2d at 554 (citing Kallas Millwork Corp. v. Square D Co., 225 N.W.2d 454, 456 (Wis. 1975)). The Minnesota Supreme Court implemented Wisconsin's common-sense approach to determine that the installation of a furnace constituted an improvement to real property. *Id.*

188. *Injury*, MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/injury (last visited Oct. 11, 2016).

showing of some loss or damage that would allow the plaintiff to maintain a cause of action. Looking no further than the plain language of the statute, observation or notice of any defect is not enough to form the basis of an action to recover damages. Rather, this definition warrants the necessity of investigation by the owner to ascertain whether or not the defect actually caused some damage or loss to avoid dismissal for failure to state a cause of action. Thus, the common-sense interpretation of "discovery of injury" rejects the lower standard of requiring owners to bring suit upon awareness of some injury[189] and more closely aligns with the higher proof of injury standard.

4. Recent Developments in the Law

Prior to the Minnesota legislature passing the original statute of limitations, construction professionals had little to no legal protections to shield them from endless liability.[190] In light of the dire state of construction companies at that time, statutes that heavily favored builders were long past due. Balancing the legal protections of both construction companies and owners was not the focus or even a priority.[191] Rather, the sole objective of these statutes was drastically limiting builders' exposure to liability.[192]

However, today's climate is much different. The construction industry has been revitalized, and significant legal protections exist to insulate builders.[193] Although legislatures acted fairly quickly to

189. The defendants in *328 Barry* urged the court to adopt the reasoning that discovery begins as "long as [the party] is aware of some injury." 328 Barry Ave., LLC v. Nolan Properties Grp., LLC, 871 N.W.2d 745, 752 (Minn. 2015) (citing Day Masonry v. Indep. Sch. Dist. 347, 781 N.W.2d 321, 334 (Minn. 2010)). However, the *328 Barry* defendants misunderstood the *Day Masonry* court's holding, so their reliance on *Day Masonry* was misplaced. The court in *Day Masonry* held that discovery began when plaintiff was aware of *both* the problem and "the need to take action to repair the problem." 781 N.W.2d at 334.

190. *See supra* Section II.A.

191. *See* Ali v. City of Detroit, 554 N.W.2d 384, 387 (Mich. Ct. App. 1996) ("[T]he statute is not designed to protect owners of the property, building, or improvement.").

192. *Id.* (citing Witherspoon v. Guilford, 511 N.W.2d 720, 723–24 (Mich. Ct. App. 1994)) ("The purpose of the statute of repose is to shield architects, engineers, and contractors from stale claims and relieve them of open-ended liability for defects in workmanship.").

193. *See* Allen, *supra* note 153, ¶¶ 1–2 (discussing variations of "right to cure" laws designed to shield construction professionals from excessive legislation).

remedy builders' concerns in the 1960s, few statutes have been passed to address recent homeowner plights.[194] Most notably, many states have enacted home warranty statutes over the past twenty years in an attempt to protect purchasers of homes.[195] However, many of these laws conflict with time limits in statutes of limitations and repose and are therefore too ambiguous to provide owners with reasonable expectations.[196] In Minnesota, the home warranty statute has received criticism that it does not provide a complete, or even sufficient, remedy to homeowners.[197]

Embedded within these home warranty statutes, many states have also enacted "right to cure" or "notice and opportunity to repair" laws, which require owners to provide builders with written

194. *See* Boyer, *supra* note 35, at 28 n.4.

195. *See* Charles L. Armstrong, Comment, *Who Pays the Price for Defective Home Construction? A Note on* Buecher v. Centex Homes, 53 BAYLOR L. REV. 687, 701 (2001) (noting that statutory warranties intend to protect consumers and incentivize sellers and builders to provide defect-free products). *But see* Amy L. McDaniel, Note, *The New York Housing Merchant Warranty Statute: Analysis and Proposals*, 75 CORNELL L. REV. 754, 754 (1990) (cautioning that New York's home warranty statute failed to protect consumer rights and did not encourage builders to construct defect-free homes).

196. *See* Boyer, *supra* note 35, at 29 (noting that the overlap of construction-defect claims arising from home warranty statutes and statutes of limitation and repose has prompted many states to clarify when each statute applies). Boyer notes that some states have specified that breach of warranty claims resulting in defects supersede other statutes of limitations or repose. *Id.* (citing LA. STAT. ANN. § 9:3141 (1999); MISS. CODE ANN. § 83-58-1 (1997); N.Y. GEN. BUS. LAW § 777 (1988); VA. CODE ANN. § 55-70.1 (2011)). Boyer cautions that many states have been silent on the issue, resulting in ambiguity for homeowners and inconsistency in the case law. *See id.* at 30 (citing CONN. GEN. STAT. § 47-116 (1980); IND. CODE § 32-27-2-1 (2016); MD. CODE ANN., REAL PROP. § 10-601 (West 2002); MINN. STAT. § 327A.02 (2011); N.J. STAT. ANN. §§ 46:3B-1).

197. *See* Terri A. Tersteeg, *Minnesota's Moisty, Moldy Morass: A Comment on Construction Defect Claims in Minnesota*, 33 WM. MITCHELL L. REV. 1551, 1568–71 (2007) (discussing the complexities of home warranty cases in Minnesota and cautioning that even in best-case scenarios, homeowners do not recoup their financial losses). Under Minnesota's home warranty statute, owners lose their right to recovery if they do not provide written notice to the general contractor within six months after the owner discovers or should have discovered the damage. MINN. STAT. § 327A.03 (2016). Tersteeg notes that the courts' strict adherence to the written notice requirement has been the cause of injustice in a number of warranty suits. Tersteeg, *supra*, at 1568; *see also* Collins v. Buus, No. A05-1771, 2006 WL 1985431, at *1 (Minn. Ct. App. July 18, 2006) (holding that plaintiffs lost their claim for breach of statutory warranty because they notified their general contractor of the defect through oral conversation rather than written notice).

notice of a discovered defect prior to filing suit.[198] The builder then has a statutory period to respond with an inspection, offer to cure the defect, negotiate a settlement, or reject the proposal.[199] State legislatures passed these statutes in an attempt to curb the increasing amount of construction-defect litigation by encouraging parties to remedy construction defects through other avenues, such as mediation or fixing the defect, before resorting to litigation.[200] These laws were passed in response to builder complaints that homeowners prematurely file suit upon notice of any source of dissatisfaction, consequently racking up litigation costs and driving up builder insurance costs.[201] Although these "right to cure" laws sometimes interfere with the equitable application of statutes of limitations and repose,[202] they ultimately serve as another layer of protection for builders.[203] Despite the fact that the underlying policy motivations of decreasing excessive litigation are relevant, urgent, and in the best interest of both parties, these laws have raised legitimate concerns of inequitable treatment of homeowners.[204] Not only do these laws create additional obstacles for owners with genuine claims,[205] but owners also face steep

198. *See* Allen, *supra* note 153, ¶ 2.

199. In many states, builders have thirty days to respond. *Id.*

200. *See* Anders v. Superior Court, 121 Cal. Rptr. 3d 465, 472 (Ct. App. 2011) (noting that the legislative history of California's Right to Repair Act, Sen. Bill No. 800, emphasizes that "builders, insurers, and other business groups are hopeful that this right to repair will reduce litigation" and that one of the main purposes of the statute is to "avoid the costs of litigation and the resulting increased costs of construction"). It is important to note that many of these "right to cure" statutes are triggered upon an owner's discovery of a defect after the completion of the project. *See* Allen, *supra* note 153, ¶¶ 2–3.

201. *See* Boyer, *supra* note 35, at 31.

202. *Id.* at 28.

203. *Anders*, 121 Cal. Rptr. 3d at 472.

204. *See* Allen, *supra* note 153, ¶¶ 33–38 (citing concerns that these laws enacted to curb litigation seem to only benefit builders); *see also* Boyer, *supra* note 35, at 28 (discussing the inequitable result of mandatory notice and opportunity to repair laws when owners discover claims toward the end of a limitation period). Boyer cautions that notice and opportunity to repair statutes should include a mechanism that allows owners bringing a claim near the end of a limitations period to toll the statute of limitations or repose. *Id.* at 32. In the absence of such an exception, owners face the risk of losing legitimate claims and builders are incentivized to respond in an untimely fashion. *Id.*

205. *See* Allen, *supra* note 153, ¶¶ 4, 33 (noting concerns that these laws are costly and time-consuming for owners, but afford construction companies additional legal protections).

consequences for not complying with the statutory requirements of these laws.[206]

These new laws insinuate that current reform efforts are focused on decreasing the amount of construction litigation in a manner only favorable to builders.[207] As construction companies have been subject to less and less liability and accountability for their alleged wrongful acts, the disparity in bargaining power between builders and owners has continued to increase.[208] The tables have turned—owners are now the disparaged party in need of legal protections.[209] The higher discovery standard recognizes this recent shift in circumstances and seeks to equalize the legal footing of both parties. This approach does not aim to remove any legal protections for builders; rather, it provides an owner more leeway to investigate or solve a defect and protects the owner's right to redress upon discovery that the defect is grave enough to resort to litigation.[210]

5. Public Policy

Access to the court system is an important right and should not be undermined. It is essential to the preservation of our democracy and Constitution that every American citizen has the ability to exercise her right to be heard in a court of law.[211] However, the court system does not exist to discourage problem-solving or cooperation between parties;[212] if it did, litigation would be the

206. *See id.* ¶¶ 19, 22, 37 (discussing that if an owner does not follow each requirement, the owner will not be allowed to file suit until fully repeating the statutory process, and that strict adherence to this time-consuming process can cause owners to lose their claims to the statute of limitations).

207. *Boyer, supra* note 35, at 29–31 (discussing various legislations in multiple states and how a contractor is protected under them).

208. *See* Tersteeg, *supra* note 197, at 1585 (noting that homeowners' personal assets are at risk in construction-defect claims).

209. *Id.* at 1559 ("Many homeowners have been unhappy to discover that they have more consumer protections for a fickle $20 toaster than for a home that turns out to be flawed.").

210. Boyer, *supra* note 35, at 31 ("[Notice and opportunity to repair statutes] require[] an owner to give a builder notice of construction defects and provide an adequate opportunity for the builder to repair, or refuse to repair, those defects before the owner may initiate formal proceedings.").

211. *See* U.S. CONST. amend. XIV, § 1.

212. *See* Allen, *supra* note 153, ¶ 1 (noting that construction "defects create animosity between homeowner and builder, leading many homeowners to pursue

standard rather than a last resort, and no dispute resolution would take place outside of a courtroom.[213] The heightened pleading standards adopted by the Supreme Court reiterate this concern.[214]

During construction, particularly major construction projects, it is assumed by all parties involved that there will be minor, fixable defects throughout the process. Just because an owner is put on notice of these minor defects, it is not expected that they will bring suit at that time.[215] On the contrary, it is expected that the contractors will remedy those minor defects before the "punch list" phase—and certainly before a certificate of occupancy is issued.[216]

litigation without attempting to negotiate for repairs or other remedies").

213. *Id.* ¶ 2 (indicating that many states have enacted right to cure provisions to "prevent unnecessary litigation" and allow the contractor an opportunity to remedy the defect).

214. Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009) ("While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations."); *see* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555–56 (2007) (holding that the plausibility standard requires that the plaintiff pleads enough facts to raise the reasonable inference that the defendant is liable for the illegal conduct). The *Twombly* Court cited concerns of frivolous claims, judicial inefficiency, and increasing litigation costs as justifications for the heightened pleading standard. *Id.* at 562. While the Minnesota Supreme Court recently rejected the *Twombly* and *Iqbal* heightened pleading standard, the same underlying policy concerns are still present. *See* Walsh v. U.S. Bank, N.A., 851 N.W.2d 598, 606 (Minn. 2014). The court reasoned that the Minnesota Rules of Civil Procedure provided sufficient safeguards against lack of clarity and high discovery costs, including a recent amendment giving the district court more discretion to manage discovery. *Id.* at 605–06 (citing MINN. R. CIV. P. 12.05, 26). However, the *Twombly* court cautioned that judicial supervision as an attempt to curb discovery abuse has not been that successful. *Twombly*, 550 U.S. at 559 (quoting Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 638 (1989)) ("Judges can do little about impositional discovery when parties control the legal claims to be presented and conduct the discovery themselves.").

215. *See* Linn Reorganized Sch. Dist. No. 2 of Osage Cty. v. Butler Mfg. Co., 672 S.W.2d 340, 342 (Mo. 1984) (holding that evidence that the roof leaked from the first day of construction is not sufficient to trigger the statute of limitations). The court reasoned that requiring an owner to bring suit upon notice of any defect during the construction "would place upon an aggrieved party the task of piecemeal litigation. . . . [A] claimant would have to sue a roofer within five years of the first leakage, although the remainder of a project might well extend beyond a five-year period." *Id.*

216. 328 Barry Ave., LLC v. Nolan Props. Grp., LLC, 871 N.W.2d 745, 752 (Minn. 2015). Nolan testified on behalf of 328 LLC that several other minor defects, including weather seals on the doors, had been brought to the attention of the subcontractors prior to the "punch list" phase of construction. *Id.* Each of

These minor defects are rarely considered grave enough to resort to litigation. If this were the standard, builders would not be allowed any leeway to make minor mistakes along the way, which would substantially harm the construction business. Further, common-sense and regard for financial self-interest warrant the assumption that owners would not pay subcontractors or contractors if they felt that there was a serious pending defect that needed to be corrected. Final payment generally signals the end of a professional relationship, and the payment would not be extended if the paying party felt that the services rendered were not adequately performed.[217]

Due to the inherent uncertainty of the extent and source of an injury while there is still work to be performed, owners should have reasonable certainty about these facts before bringing a lawsuit against contractors.[218] While the term "injury" in Minnesota Statutes section 541.051 is somewhat open to interpretation, the policy motivations driving the statute of limitations and the history of the construction industry indicate that the legislature could not have intended "injury" to mean "minor defect."[219] While the statute is silent on the meaning of actionable injury, in the interests of internal consistency and public policy, this meaning cannot be adopted.

V. CONCLUSION

The Minnesota Supreme Court's holding in *328 Barry* that the statute of limitations on construction-defect claims may begin to run before construction is substantially complete is a consistent reflection of the historic rationale behind the enactment of statutes

these issues, including the water intrusion injury, had been remedied to NPG's satisfaction during the final phase of construction, prior to the issuance of the certificate of occupancy. *Id.*

217. *Id.* In explaining his reasonable belief that the initial water intrusion had been a minor defect that had been corrected in full, Nolan noted that NPG and all the subcontractors had been paid for their work. *Id.*

218. Hyland Hill N. Condo. Ass'n, Inc. v. Hyland Hill Co., 538 N.W.2d 479, 484 (Minn. Ct. App. 1995) ("It would be unsound public policy to impose a stricter rule, requiring a party to investigate all possibilities at the first sign of a problem."), *aff'd in part, rev'd in part*, 549 N.W.2d 617 (Minn. 1996).

219. In fact, the dictionary defines "injury" as a "violation of another's rights for which the law allows an action to recover damages." *Injury*, MERRIAM-WEBSTER.COM, *supra* note 188.

of limitations in construction litigation.[220] This strict interpretation reflects legislative intent to shield construction companies from exposure to unjustifiable liability.[221] However, while the court correctly held that reasonable minds could differ as to what constitutes discovery of injury,[222] the court missed an opportunity to clarify this standard. In the absence of statutory clarity, the court should adopt a clear rule governing the meaning of discovery of injury to trigger the statute of limitations. In the interests of preserving legitimate claims, promoting judicial efficiency, and minimizing wasteful expenditure of resources, the statute of limitations should begin upon discovery of an injury sufficient for a plaintiff to maintain a cause of action. This approach requires further investigation between the time a defect is first discovered and when the suit is filed to either verify the legitimacy of a claim or abate a minor problem. Ultimately, this higher standard, which requires plaintiffs to have proof of the injury sufficient to maintain a cause of action, lends some certainty to both owners and builders as to the limitation period and protects diligent owners against the harshness of the traditional discovery rule.

220. *Compare 328 Barry*, 871 N.W.2d at 751, *with infra* Part II.

221. Kittson Cty. v. Wells, Denbrook & Assocs., 308 Minn. 237, 241, 241 N.W.2d 799, 802 (1976).

222. *328 Barry*, 871 N.W.2d at 751.