STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1663

Jaime Fernandez, et al.,
Appellants,

vs.

Hilario Ortiz Vargas d/b/a Hills Construction,
Respondent.

Filed October 21, 2008
Affirmed in part, reversed in part, and remanded
Minge, Judge
Concurring in part, dissenting in part, Schellhas, Judge

Kandiyohi County District Court
File No. 34-CV-06-83

John E. Mack, Mack & Daby, P.A., P.O. Box 302, 26 Main Street, New London, MN 56273 (for appellant)

Hilario Vargas, 16167 Golf View Road Northeast, New London, MN 56273 (pro se respondent)

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

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

MINGE, Judge

Appellants challenge the dismissal of their statutory breach of warranty (Minn. Stat. § 327A.02 (2006)) and contract claims arising out of the construction of a house by respondent. The district court determined that service of the complaint initiating this

action did not constitute the required notice of a statutory claim and that regardless of any deficiency in notice, appellants were not entitled to recover because: (1) they did not overcome respondent's defense that appellants' substantial work in building the house caused many complained-of defects; (2) there was no proof of damages of certain defects; and (3) appellants did not afford respondent an opportunity to repair the defects. We conclude that the district court did not abuse its discretion in determining that appellants failed to establish that most alleged defects were attributable to respondent's faulty workmanship or that damages were not established. Accordingly, we affirm dismissal of most of the claims. However, we conclude that (1) the statutory complaint was adequate notice; (2) the record or district court findings establish that certain construction defects were caused by respondent and that damages were proven for those defects; and (3) there is not adequate record support for the finding that respondent was denied an opportunity to repair those defects. Accordingly, we reverse and remand for modification of the judgment to award damages for those defects.

FACTS

Appellants Jaime and Sarah Fernandez (Fernandez) contracted with respondent Hilario Vargas to build their home in rural Willmar. Vargas, a licensed homebuilder, does business as Hill Construction. The parties' one-page contract was signed on March 9, 2005. The original quoted price of $124,000 was reduced to a contract price of $116,000 because Fernandez agreed to furnish various building materials and contribute labor. As agreed, Jaime Fernandez took an active role in the construction. After moving into their new home, Fernandez became aware of numerous problems.

Fernandez served a summons and complaint upon Vargas on December 20, 2005. Fernandez had not provided prior written claims or notice of the defects. In addition to the construction problems, the complaint included claims for living expenses due to late completion of the home and an adjustment of the contract price for materials and labor furnished by Fernandez. Vargas answered, denying the problems, asserting various defenses, and counterclaiming for extra labor and material costs. On April 25, 2006, Fernandez served an amended complaint that included more extensive claims for losses due to late completion. The parties filed cross-motions for summary judgment on numerous grounds. The district court struck the amended complaint because it was filed outside of the time provided for in Minn. R. Civ. P. 15.01 without leave of court or written consent of respondents and dismissed Fernandez's claims for living expenses and additional claims in the amended complaint. Fernandez's claims for materials, labor, and breach of warranty as set forth in the original complaint and Vargas's counterclaim were allowed to go to trial.

A trial was held on Fernandez's claims for breach of contract and breach of statutory warranty. The district court made 127 detailed findings and provided an extensive memorandum of law. The scope of the district court's findings indicates a thorough understanding of both parties' claims and, together with its earlier ruling on cross-motions for summary judgment, provides a comprehensive analysis of the litigation. The district court's order addressed the merits of many of the claims that had been raised in Fernandez's previously dismissed, amended complaint. The district court determined that Fernandez failed to give Vargas the required statutory notice for the

warranty claims, that Fernandez was actively involved in constructing his home, and that Fernandez failed to show that most of the defects were caused by Vargas's faulty workmanship. The district court also concluded that although some of the problems were due to Vargas's work, Fernandez had not given Vargas an adequate opportunity to repair them and for certain problems did not establish the amount of damages. The district court denied Fernandez's claims based on late completion of the project, their personal labor, and the materials they furnished. The district court also denied Vargas's counterclaim for extra work and materials he provided at Fernandez's request. As a result, neither party recovered anything from the other. Fernandez moved for a new trial on a wide range of bases, including newly discovered evidence. The motion was denied in an order that addressed certain matters in detail.

This appeal follows. Because Vargas did not make an appearance in this appeal, we only consider issues raised by Fernandez.

D E C I S I O N

At the outset, we note that this litigation presents numerous issues and involves an extensive record. However, we limit our review to the matters briefed on appeal. *See Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982). The two issues briefed are as follows: (1) Did the district court err in not granting relief for Fernandez's claims based on the statutory warranty in Minn. Stat. § 327A.02 (2006);[1] and (2) based on the

[1] After this controversy occurred, the legislature amended the statutory-warranty law. *See* 2006 Minn. Laws ch. 2002, §§ 3-6. Because with one exception, there has been no substantive change to the statutes cited in this opinion, we cite the 2006 version of those

circumstantial evidence and the doctrine of res ipsa loquitor, was the evidence of errors in constructing the Fernandez home so obvious that the district court abused its discretion in rejecting Fernandez's claims?

I. STATUTORY WARRANTY

The first issue is the applicability of the statutory warranties. Minn. Stat. § 327A.02, subd. 1(a) (2006) provides that a new home "shall be free from defects caused by faulty workmanship and defective materials due to noncompliance with building standards" for the one-year period after the warranty date. The warranty statute states that a homebuilder is not liable for, among other things, "[l]oss or damage [to the home] not reported by the vendee or owner . . . in writing within six months after the vendee or owner discovers or should have discovered the loss or damage." Minn. Stat. § 327A.03(a) (2006). The statute does not specify the form or degree of detail required in any notification to the vendor or homebuilder. It merely requires a writing that notifies the contractor of the "loss or damage." *Id.*

A. Notification

The initial question related to statutory warranties is whether Fernandez gave the written notification required by Minn. Stat. § 327A.03(a). Because the only written notices were the original and amended complaints with attachments, there is no factual dispute as to the contents of the notices, and this court reviews de novo whether the complaint satisfies the notice requirement in section 327A.03(a). *See Peterson v.*

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sections. The exception is the inspection/cure provision addressed subsequently in this opinion.

Johnson, 733 N.W.2d 502, 504 (Minn. App. 2007) (applying de novo review). Here, the district court ruled that Fernandez had failed to give Vargas adequate notice both because the only notice given was the complaint and the amended complaint, and because the complaint and amended complaint were too vague to constitute adequate notice.

Our *Peterson* decision was released after the trial and the district court's judgment in this proceeding. *Peterson* held that the service of a written complaint within the time allotted constituted notice under the statute and that the use of a complaint rather than some other writing does not preclude a vendor or contractor from investigating or remedying any loss or damage before becoming irretrievably entrenched in litigation. *Peterson*, 733 N.W.2d at 504-05. "Generally, case law applies retroactively." *Clark v. Clark*, 642 N.W.2d 459, 467 n.5 (Minn. App. 2002) (quoting *Hoff v. Kempton*, 317 N.W.2d 361, 363 (Minn. 1982)). Thus, because *Peterson* is caselaw clarifying that a compliant can satisfy the notice requirement of Minn. Stat. § 327A.03(a) and because *Peterson* can be applied retroactively, it is applied here.

Moreover, Fernandez also served an amended complaint, with an attached exhibit which contained a more extensive list of alleged defects in the home and a second attachment that is a detailed estimate of repair expenses prepared by another building contractor. Although the district court struck the amended complaint from the court proceeding because it was filed in violation of the Minnesota Rules of Civil Procedure, there is no dispute that it was actually served on Vargas. Under the circumstances, and especially in light of the *Peterson* holding that a complaint can satisfy the statutory notice

requirement, we reverse the district court's holding that the complaint and amended complaint could not provide the statutory notice.

Second, while neither Minn. Stat. § 327A.03 nor *Peterson* elaborate upon the degree of detail required in order to provide adequate notice to the vendor of loss or damage, we cannot say that the complaint and amended complaint are insufficiently specific to satisfy the notice requirement. *Peterson*, 733 N.W.2d at 505. Much like *Peterson*, the complaint here contains substantial detail regarding alleged defects. The complaint states that there are multiple items in the home that were "not finished" or that "need[ed] to be redone" because of poor construction, and that:

> They include, but are not limited to, studding the walls in the basement according to the floor plan, securing the kitchen counter top, installation of garage door lights, insulation in the laundry room, carpeting on the stairs, [plumbing problems], repainting of the interior walls . . . retaping [of sheetrock on the second level], replacing master bedroom door . . . and the concrete block wall in the basement needs to be redone because it moved when [Vargas] backfilled the wall.

These problems are listed in an exhibit attached to the complaint with estimated repair costs and itemized claims for consequential damages. The complaint also specifically alleges mold in the home.

As previously noted, the amended complaint included attachments with a more detailed list of alleged defects and estimates of the cost of repairs. At trial, both parties addressed many of the defects only identified in the amended complaint. Further, despite the fact that the amended complaint was stricken because it was served without Vargas's consent or court approval, the district court addressed in detail in its findings and order

the merits of many of the defects identified in the attachments to the amended complaint. On this record, we conclude that Fernandez's complaints were sufficiently specific to provide Vargas with adequate notice of the alleged construction defects.

B. Timeliness

The district court stated that it was "inclined" to rule that Fernandez did not provide timely notice of the additional problems listed in the amended complaint. A party's failure to provide notice within six months of discovering defects is a defense to a claim for violation of statutory warranties. Minn. Stat. § 327A.03(a). Generally, the party seeking to establish the application of a statute has the burden to show that the facts of a particular case fall within the scope of that statute. *State v. City of White Bear Lake (In re Application of White Bear Lake for Permit to Encroach)*, 311 Minn. 146, 150, 247 N.W.2d 901, 904 (1976). The burden of proving an exception to a statute lies with the party seeking to benefit from that exception. *See State Farm Fire & Cas. v. Aquila, Inc.*, 718 N.W.2d 879, 886 (Minn. 2006) (finding that the burden of establishing an exception to a statute of repose fell on the party seeking to benefit from that exception); *see also* Minn. R. Civ. P. 8.03 (requiring a party to affirmatively plead affirmative defenses such as the statute of limitations or other matters "constituting an avoidance").

Vargas never raised the question of when Fernandez discovered or should have discovered their injuries and neither party presented evidence or otherwise addressed that issue at trial. When Fernandez discovered or should have discovered all of the alleged defects recited in the amended complaint is neither clear nor is it addressed by the district

court. For this reason, we conclude the question of timing of the notice was not properly before the district court and is not an issue on appeal.

C. Warranty Defenses Based on Fernandez Activity

The next question related to the warranty claims is whether the buyer's (home owner's) activity precludes recovery. A reviewing court need not defer to a district court's decision on a purely legal issue. *Modrow v. JP Foodservice, Inc.*, 656 N.W.2d 389, 393 (Minn. 2003). However, "[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Minn. R. Civ. P. 52.01. Because the question involves the adequacy of the evidence, we carefully review the entire record.

Vendors of new homes are required to provide certain warranties under Minn. Stat. § 327A.02, which reads:

> In every sale of a completed dwelling, and in every contract for the sale of a dwelling to be completed, the vendor shall warrant to the vendee that:
>
> (a) during the one-year period from and after the warranty date the dwelling shall be free from defects *caused by* faulty workmanship and defective materials due to noncompliance with building standards; . . . .

Minn. Stat. § 327A.02, subd. 1 (2006) (emphasis added). Notably, the statute only provides for a warranty "from defects caused by" faulty workmanship or installations for which the vendor is responsible. *Id.* There are a number of exclusions from the general requirement that a vendor does not warrant, including:

> (b) loss or damage caused by defects in design, installation, or materials which the vendee or the owner supplied, installed, or directed to be installed;
>
> . . . .
>
> (f) loss or damage from dampness and condensation due to insufficient ventilation after occupancy;
>
> (g) loss or damage from negligence, improper maintenance or alteration of the dwelling or the home improvement by parties other than the vendor or the home improvement contractor;
>
> (h) loss or damage from changes in grading of the ground around the dwelling or the home improvement by parties other than the vendor or the home improvement contractor; . . . .

Minn. Stat. § 327A.03 (2006).

Here, the district court found that Fernandez was extensively involved in personally working on the construction of his own home and directing numerous details of the construction activity. Although Fernandez alleged faulty workmanship that resulted in the numerous defects, the district court found that Fernandez

> failed to prove causation [for most of the claimed defects and problems], ie. that it was [Vargas's] work product that failed. Mr. Ahman[, who provided an estimate for repairing the defects in the Fernandez home,] did not do a causation inspection. The building inspector, [], did not determine causation. . . . Again, it [was Fernandez's] duty to prove defects existed and that [Vargas's faulty workmanship] caused the defects. They did not do so.

In reviewing the record, we note that Vargas testified as to the extensive work done by Fernandez, much of it when none of Vargas's crew was on site, and how this work caused or contributed to claimed problems. We further note that rarely is there testimony, evidence, or a finding that any of the more than 30 alleged construction

defects were actually caused by Vargas. The district court found that many of the problems were caused by moisture. These include mold problems and possibly the humps in the floor. The district court tied this finding into separate findings that Fernandez took responsibility for landscaping and siding the house, that he banked dirt above the foundation and up against the siding, and that such banking of dirt and any improper installation of vapor barriers as a part of siding can result in moisture problems. The district court also found that any problems resulting from a foundation wall that had been damaged during construction could not be attributed to Vargas, both because Fernandez had access to and often had been using Vargas's skid loader at the site in the timeframe during which the damage may have occurred and because regardless of cause, Vargas had used generally accepted techniques to repair it. Thus, the moisture, grading, and dwelling-alteration exceptions to the warranty apply to most of the alleged defects.

Fernandez contends that they are owed damages related to the improper installation of a kitchen island, extra labor costs for carpeting a stairway, and the cost of a missing code-required concrete pad for a garage door. The district court determined that the extra carpeting cost occurred because the carpet layer had to come back to do extra work on the stairway. The record indicates that Fernandez undertook to install the handrail on the stairway and that because he delayed completing that task, the stairway carpeting was delayed. Vargas admitted at trial that he installed the kitchen island but pointed out that he was not responsible for fastening it.

The district court further found that, even in several areas where Vargas had responsibility, Fernandez did not separate out the individual costs or damages and that the district court could not determine damages.

There were sheetrock-taping problems which the district court stated were probably contractor error. However, moisture and humps in the floor could damage the sheetrocking. The likelihood of multiple causes complicates determination of Vargas's portion of responsibility for overall sheetrocking defects. Furthermore, because the cost of retaping sheetrock was lumped in with other costs of correcting unrelated problems in various rooms of the house, the district court concluded that the record did not enable it to determine the cost of retaping the sheetrock that may have been Vargas's responsibility.

Fernandez did show at trial that a concrete pad was missing for one of the garage doors. However, the contract specified that two garage doors were included in the contract price. Vargas testified at trial that he added a third garage door without charge after the contract was signed. However, there is no testimony or other indication that Vargas agreed to pour an extra concrete slab free of charge. Under the circumstances, the district court did not err by determining that Vargas did not have warranty responsibility for a concrete pad at the third door.

The foregoing is but a brief account of a handful of the more than 30 alleged defects mentioned in scattered testimony at trial. Appellant's brief does not address each defect in detail, and we will not attempt to do so in this opinion. However, we have determined that there is support in the record for the court findings that: (1) many of these

problems were likely due to moisture; (2) Fernandez's participation in construction may have led to moisture and other problems; (3) Fernandez failed to establish damages for certain claimed defects; and (4) Vargas could not be held responsible under the statutory warranty for most of the problems. The question on appeal is not whether we, as appellate judges, would make the same factual findings as the district court, but whether there is record support for the district court's findings. If so, we defer to those findings. The district court heard the witnesses and made extensive, careful findings. Having reviewed the record, we conclude that with three exceptions, there is adequate support for the district court's rejection of Fernandez's claims.

The three exceptions where we do not find record support for the district court's rejection of any damages for warranty claims are (1) a crooked bedroom door; (2) 28 feet of missing aluminum soffit; and (3) an improperly installed sidewalk. The district court specifically found that Vargas failed to properly install the sidewalk. There is unchallenged testimony that as a contractor, Vargas was responsible for improper installation of the door. The record is unequivocal that 28 feet of soffit are simply missing from the second floor overhang. A photograph in the record shows the missing item. No claim is made that Fernandez was in any way responsible for these three items or that they are attributable to moisture or delay. Because these are defects caused by the faulty workmanship of Vargas, the exclusions to the statutory warranty do not apply to these items.

The record establishes the cost of remedying these three items: $255 for the defective bedroom door; $245 for the missing aluminum soffit; and $1,350 to repair the concrete sidewalk. The total repair cost for these items is $1,850.

D. Opportunity to Repair

With respect to the numerous claimed problems with construction of the Fernandez home, the district court found that Vargas had not been afforded an opportunity to inspect and repair the problems and that therefore Fernandez was estopped from recovering damages. This presents the question of whether the district court improperly denied recovery on this opportunity-to-repair ground. "Cure is a fundamental common-law right implied in every contract as a matter of law." 5 *Bruner & O'Connor on Construction Law*, § 18.41 at 1001 (2002). Although the 2004 statute[2] establishing housing warranties does not explicitly refer to or outline the scope of any right to repair or cure defects in a completed dwelling, Minnesota courts have recognized that such a

[2] After this controversy occurred, the legislature amended the statutory-warranty law to specifically address the contractor's right to inspect and repair. Minn. Stat. § 327A.02, subd. 4 (2006). Generally, unless specified otherwise by the act, a statutory amendment is effective on August 1 following its enactment. Minn. Stat. § 645.02 (2006). The act amending Minn. Stat. § 327A.02, subd. 4 did not specify an effective date. *See* 2006 Minn. Laws ch. 202, § 6, 7 at 110 (amending Minn. Stat. § 327A.02, subd. 4 (2004) and specifying an effective date for sections of the act other than section 6, respectively). Therefore, the amended version of Minn. Stat. § 327A.02, subd. 4 became effective on August 1, 2006. Generally, courts apply the law in effect at the time they make their decision unless doing so will alter vested rights or result in manifest injustice. *Interstate Power Co. v. Nobles County Bd. Of Commr's*, 617 N.W.2d 566, 575 (Minn. 2000); *McClelland v. McClelland*, 393 N.W.2d 224, 226-27 (Minn. App. 1986), *review denied* (Minn. Nov. 17, 1986). Here, because the statutory amendment was not in effect at the time of the incidents at issue nor when the original and amended complaints were served, and because the amended statute imposes an unanticipated obligation upon homebuilder, we apply the pre-2006 version of Minn. Stat. § 327A.02, subd. 4 and related caselaw.

right is implicit in the statutory scheme. In *Vlahos v. R & I Constr. Of Bloomington, Inc.*, 676 N.W.2d 672, 678 (Minn. 2004), the Minnesota Supreme Court acknowledged that the Minn. Stat. § 327A.02 warranty was for future performance and discusses the builder's refusal or inability to repair the home. *Id.* The language of *Vlahos* and the common-law rule both provide for a "right to repair" under the 2004 statutory warranty for completed homes despite the lack of explicit statutory language in reference to it.

To exercise that right, the homebuilder must be aware of problems. That is presumably an important reason for requiring a written notice of defects. *See* Minn. Stat. § 327A.03(a) (2004); *cf.* 3 *Bruner & O'Connor on Construction Law*, § 9.28 at 503 (stating that under the UCC, "[a] buyer's failure to notify the seller of a defect, within a reasonable time of breach of the contract, will result in the buyer being barred from all remedies"). The vendor/homebuilder must then respond to the notice in a manner that honors the warranty by so correcting the problem as to meet the standard of quality. *See Church of the Nativity of Our Lord v. Watpro, Inc.*, 491 N.W.2d 1 (Minn. 1992) (holding that breach of warranty occurs when the warrantor refuses or is unable to maintain the goods as warranted) *overruled on other grounds by Ly v. Nystrom*, 615 N.W.2d 302, 314 n.25 (Minn. 2000); *Anderson v. Crestliner, Inc.*, 564 N.W.2d 218 (Minn. App. 1997) (determining that a warranty for future performance guarantees the performance of the product and that a retailer breaches the warranty when it fails to keep the product free from defects or refuses to make repairs).

Here, the district court concluded that Fernandez "did not give [Vargas] notice of any problems until they filed a lawsuit. They thus prevented [Vargas] from inspecting

the problems and having an opportunity to correct them." However, the record indicates that Fernandez testified that they made oral requests for repairs to their home. Sarah Fernandez testified that she and her husband

> had a verbal meeting with [Vargas in September 2005], and he made it very clear that he was not going to do the items. He basically sent Alex and Eddie, he said he would send the[m] over to finish some of the repairs. But then he was not going to have anything to do with some of the other issues that we . . . mentioned at that time.

In addition, Jaime Fernandez testified that:

> I told him about all the things that were happening with the house. He was not very interested in that. He said he was going to send his employees to fix it. But I have many – well, not good communication with Mr. Hilario. He was very frustrated with me, because I had been calling his cell phone many times. I was calling him only to inform him that many things were not according to the plan, the measurements were off, or things that were not according to it. And one day he got upset. He told me, like threatening me that if I call him after 5:00 at night, he was going to charge me $50 dollars per phone call, and many other things

By contrast, Vargas testified that he felt Fernandez "just wanted [him] out of there" and that *prior to this lawsuit* he was not given notice of problems and an opportunity to repair them. However, Vargas did not assert in his pleadings, testimony, or argument of counsel that he had been denied access to the home in order to inspect or make repairs or that the homeowners had rejected any written or oral offer to repair. After a careful and exhaustive review of the record, this appellate court cannot identify evidentiary support for a finding that Fernandez denied Vargas an opportunity to repair the defects in their home. It appears the district court concluded that there was not an

opportunity to cure because the complaint did not constitute notice and because once the litigation commenced, the parties' positions were polarized and Vargas could not reasonably be expected to attempt to cure. However, we rejected that conclusion in *Peterson*. 733 N.W.2d at 505.

Here, we recognize that although each party believed strongly in his/her good faith and reasonableness, their relationship was strained, and the mutual good will necessary to work through differences was lacking. However, this awkward situation does not relieve either party of the duty to allow or offer to make repairs. We conclude the record does not support the determination that Fernandez denied Vargas the right to repair the three items previously determined to be caused by Vargas or that Vargas attempted to repair them. Rather, Vargas failed to vindicate that right by asking to inspect or offering to repair those items.

II. RES IPSA LOQUITUR

The second issue is whether the district court abused its discretion in not awarding Fernandez damages on the general principle of *res ipsa loquitur* or because of overwhelming circumstantial evidence. There are three elements of *res ipsa loquitur*:

> (1) The event must be of a kind which ordinarily does not occur in the absence of someone's negligence; [2] it must be caused by an agency or instrumentality within the exclusive control of the defendant; and [3] it must not have been due to any voluntary action or contribution on the part of the plaintiff.

Stelter v. Chiquita Processed Foods, L.L.C., 658 N.W.2d 242, 247 (Minn. App. 2003) (citations and quotations omitted). The *res ipsa loquitur* doctrine does not apply if causes

beyond the exclusive control of the defendant are equally likely to have produced the injury. *See Spannaus v. Otolaryngology Clinic*, 308 Minn. 334, 337, 242 N.W.2d 594, 596 (1976).

Here, there is a basic problem with applying *res ipsa loquitur*. Fernandez extensively participated in the construction of his home, was often present at the site when Vargas's crew was not there, and used Vargas's bobcat and other construction equipment. He was solely responsible for the landscaping, installation of siding, and certain other details such as the stairway railings. Accordingly, the record does not indicate that the many problems arose in a setting where the job site was within the exclusive control of Vargas. Additionally, with the exception of the three items already allowed (sidewalk, door and soffit) and possibly other items for which damages were not established, Fernandez cannot show that they meet the third factor of the test because there is testimony in the record and the district court found that Fernandez engaged in "contributions" toward the ultimate defects. Therefore, the doctrine of *res ipsa loquitor* does not apply.

In sum, we reverse in part and remand for modification of the judgment to award Hernandez damages of $1,850 for correction of the sidewalk, repairing the defective bedroom door, and installing missing soffit. We affirm the district court's judgment with regard to all other items and in all other respects.

Affirmed in part, reversed in part, and remanded.

Dated:

SCHELLHAS, Judge (concurring in part and dissenting in part)

I concur with the majority's opinion insofar as it affirms the district court's decision. But I must respectfully dissent as to the majority's conclusion that certain findings by the district court are not supported by the record, and as to the majority's decision to reverse in part as to those findings and to modify the judgment to award appellants damages for breach of warranty.

When reviewing a decision after a court trial, "[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Minn. R. Civ. P. 52.01. I recognize that "even though there is evidence to support a finding, the finding can be held to be clearly erroneous if 'the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *In re Estate of Balafas*, 293 Minn. 94, 96-97, 198 N.W.2d 260, 261 (1972) (quoting *United States v. Ore. State Med. Soc'y*, 343 U.S. 326, 339, 72 S. Ct. 690, 698 (1952) (quoting *United States v. U.S. Gypsum Co*. 333 U.S. 364, 395, 68 S. Ct. 525, 542 (1948))). But, "[t]he decision of a district court should not be reversed merely because the appellate court views the evidence differently." *Rogers v. Moore*, 603 N.W.2d 650, 656 (Minn. 1999).

In this case, the parties waived their right to a jury trial and the case was tried to the district court over three days. As in *Balafas*, "[t]he primary and dispositive issue presented is whether the evidence supports the extensive and detailed findings of the trial court." *Balafas*, 293 Minn. at 95, 198 N.W.2d at 261. Here, the district court heard

voluminous testimony from 12 witnesses, both fact and expert, issued a decision with 127 findings of fact and 9 conclusions of law, dismissed appellants' and respondent's claims in their entirety, and denied appellants' motion for a new trial. While it is true that the district court erroneously ruled that the complaint did not constitute proper notice of a statutory claim, the court issued its decision before this court ruled to the contrary in *Peterson v. Johnson*, 733 N.W.2d 502, 505 (Minn. App. 2007). But the district court's erroneous ruling was of no consequence to the outcome of the trial, because, as the record clearly reflects, appellants were allowed to fully litigate their breach-of-warranty claims at trial.

In its findings, the district court specifically found that appellants failed to prove respondent's work caused most of the defects, and that, in any event, as to several that were respondent's fault, appellants never gave respondent the opportunity to repair them. As stated by the supreme court in *Balafas*: "Affording the witnesses' testimony the full weight and persuasive quality the trial court found it had, there is no justification for our interference either on the basis of lack of evidentiary support or because of a conviction that a mistake has been committed." 293 Minn. at 98, 198 N.W.2d at 262. I would affirm.