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1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 **GREGORY L. BAKER and**
3 **LAURIE D. BAKER,**

4 Plaintiffs-Appellants,

5 v.

NO. 34,664

6 **WOOD METAL CONCRETE, LLC,**

7 Defendant-Appellee.

8 **APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY**

9 **Francis J. Mathew, District Judge**

10 John B. Pound, LLC

11 John B. Pound

12 Santa Fe, NM

13 for Appellants

14 Montgomery & Andrews, P.A.

15 Kevin M. Sexton

16 Miguel P. Archuleta

17 Carolyn A. Wolf

18 Santa Fe, NM

19 for Appellee

20 **MEMORANDUM OPINION**

21 **VANZI, Judge.**

1 {1} Summary judgment was granted to Defendant Wood Metal Concrete, LLC, on
2 the ground that the statute of repose limiting liability for construction projects to ten
3 years after their substantial completion bars the present suit. Gregory and Laurie
4 Baker (Plaintiffs) appeal, contending that their claims are not time-barred under the
5 due process rule announced in *Terry v. New Mexico State Highway Commission*,
6 1982-NMSC-047, 98 N.M. 119, 645 P.2d 1375. We affirm.

7 **BACKGROUND**

8 {2} The following facts are not in dispute. In July 2010, Plaintiffs purchased a home
9 in the Sierra Del Norte Subdivision in Santa Fe, New Mexico. The home was designed
10 by Defendant a decade earlier and first occupied by the sellers on November 21, 2001.

11 {3} Plaintiffs had the structure of the home inspected prior to closing. The
12 inspector's report noted "heaving in the garage area" with "related cracking in some
13 adjacent walls." Plaintiffs discussed the issue with the builder of the home, who
14 explained that melting snow in the gravel driveway had been causing the soil under
15 the building to expand, resulting in damage to the slab. The builder represented to
16 Plaintiffs that he had returned to the site to remedy the drainage issue in 2008,
17 installing new french drains and gutters and paving the driveway and surrounding
18 area.

19 {4} Not convinced that the problem had been fully resolved by those efforts,
20 Plaintiffs hired a structural engineering firm to inspect the garage in July 2010. The

1 resulting report observed that “[t]he garage slab has heaved and separated specifically
2 at the joint which is nearest to the main portion of the house” and that there were
3 “minor shrinkage cracks in the garage floor slab[,]” but that there was no evidence of
4 structural distress in the house itself. The engineer’s report also stated:

5 It is common knowledge that several residences in the Sierra Del Norte
6 area have incurred significant damage due to subsurface instability. We
7 have had great success in preventing structural distress with careful and
8 good management of the grading and drainage around the houses. It is
9 my professional opinion that this house is in good structural condition,
10 the grading and drainage and waterproofing have been correctly installed
11 and that future potential for damage is next to none.

12 Presumably encouraged by these representations, Plaintiffs purchased the home.

13 (5) According to Plaintiffs, cracks began to appear in the interior and exterior of
14 the house in mid-2011. They hired a different structural engineer and a soil consultant
15 who ultimately concluded that the home “had been built over clay/shale materials,
16 which possessed the ability to swell and heave vertically when wetted.” The soil
17 consultant also noted that the slab had probably been heaving since it was first
18 constructed. Plaintiffs sued the builder, the sellers, the first engineer, and Defendant
19 on April 10, 2014.

20 (6) With respect to Defendant, Plaintiffs alleged that a topographic survey showed
21 on its face that the site was one of greatly varied elevations, with approximate eleven-
22 foot variations within the footprint of the home. Despite this, Defendant’s
23 specifications provided that all footings were to bear on undisturbed soil, causing the

1 home to be constructed with inadequate foundations on inadequately prepared subsoil.
2 According to the complaint, this design ultimately caused the slab to heave. The
3 district court applied the relevant statute of repose and granted summary judgment to
4 Defendant, resulting in this appeal. The district court’s ruling is only appropriate if
5 there are no genuine issues of material fact and Defendant is entitled to judgment as
6 a matter of law. *See Jacobo v. City of Albuquerque*, 2005-NMCA-105, ¶ 4, 138 N.M.
7 184, 118 P.3d 189. “We review these legal questions de novo.” *Id.* (internal quotation
8 marks and citation omitted).

9 **DISCUSSION**

10 {7} By statute, liability arising from defective or unsafe conditions created during
11 the improvement of real property is limited to ten years from substantial completion
12 of the improvement. NMSA 1978, § 37-1-27 (1967). Section 37-1-27 is a statute of
13 repose, meaning that it is intended “to put an end to prospective liability for wrongful
14 acts that, after the passage of a period of time, have yet to give rise to a justiciable
15 claim.” *Garcia ex rel. Garcia v. La Farge*, 1995-NMSC-019, ¶ 14, 119 N.M. 532, 893
16 P.2d 428. Unlike a statute of limitations, Section 37-1-27 begins to run from the date
17 of substantial completion of a project “without regard to when the underlying cause
18 of action accrues and without regard to the discovery of injury or damages.” *Garcia*,
19 1995-NMSC-019, ¶ 14. Thus, our Supreme Court has recognized that the purpose of
20 the statute, as evidenced by its history and text, is to shift liability from protected

1 parties to property owners and other tortfeasors ten years after completion of a project.
2 *See Saiz v. Belen Sch. Dist.*, 1992-NMSC-018, ¶ 41, 113 N.M. 387, 827 P.2d 102.

3 {8} However, when application of Section 37-1-27 would create an “unreasonably
4 short” period of time to pursue a remedy against a protected party, due process
5 requires the courts to intervene. *Terry*, 1982-NMSC-047, ¶¶ 14-17. In short, the
6 statute cannot be constitutionally applied to bar any cause of action accruing within
7 but close to the end of the ten-year period. *Id.* ¶ 13. This is a narrow doctrine that we
8 have previously applied only in “ ‘unusual cases involving exceptional circumstances’
9 resulting in an unusually short period of time within which to file suit[.]” *Cahn v.*
10 *Berryman*, 2015-NMCA-078, ¶ 22, 355 P.3d 58, *cert. granted*, 2015-NMCERT-007,
11 355 P.3d 58. When the *Terry* rule is implicated, Section 37-1-27 does not apply, and
12 the period for liability is only limited by the generally applicable accrual-based statute
13 of limitations that would ordinarily apply to the claim alleged. *See Terry*, 1982-
14 NMSC-047, ¶ 17; *see also Garcia*, 1995-NMSC-019, ¶ 37 (applying *Terry* to the
15 statute of repose for medical malpractice claims). In *Terry*, for instance, the Court held
16 that Section 37-1-27 was unconstitutional as applied to a cause of action for bodily
17 injuries arising from unsafe conditions on a state highway that accrued approximately
18 three months before the end of the ten-year statutory period. *Terry*, 1982-NMSC-047,
19 ¶¶ 2, 10, 16. Under those circumstances, the Court declined to enforce the statute and

1 instead applied the three-year statutes of limitations for personal injury and wrongful
2 death claims. *Id.* ¶ 17.

3 {9} It is uncontested that Section 37-1-27's ten-year period began when the
4 certificate of occupancy was issued on November 21, 2001. That period would have
5 expired in November 2011, long before Plaintiffs filed their complaint. But Plaintiffs
6 argue that *Terry*'s due process exception controls this case and that their claims are
7 thus limited only by the generally applicable accrual-based statutes of limitations for
8 negligence and breach of contract. *See Terry*, 1982-NMSC-047, ¶ 17. Resolving
9 Plaintiffs' contention necessarily involves two determinations: first, we must identify
10 the date the cause of action accrued, and second, we apply the *Terry* analysis to
11 determine whether the time remaining between the accrual date and the expiration of
12 the statutory period was unreasonably short.

13 {10} The parties seem to agree that the cause of action in this case accrued when
14 Plaintiffs discovered the injury to the property. *See* NMSA 1978, § 37-1-7 (1880)
15 (“[I]n actions for injuries to . . . property, the cause of action shall not be deemed to
16 have accrued until the . . . injury . . . complained of[] shall have been discovered by
17 the party aggrieved.”). “The key consideration under the discovery rule is the factual,
18 not the legal, basis for the cause of action.” *Christus St. Vincent Reg'l Med. Ctr. v.*
19 *Duarte-Afara*, 2011-NMCA-112, ¶ 29, 267 P.3d 70 (internal quotation marks and
20 citation omitted). Thus, discovery occurs—and the cause of action accrues—“when

1 the plaintiff knows or should know the relevant facts, whether or not the plaintiff also
2 knows that these facts are enough to establish a legal cause of action.” *Id.* (internal
3 quotation marks and citation omitted). When conflicting inferences can be drawn, the
4 application of the discovery rule is a jury question. *Williams v. Stewart*, 2005-NMCA-
5 061, ¶ 16, 137 N.M. 420, 112 P.3d 281.

6 {11} The basis for the complaint is that Defendant improperly specified that the
7 footings of the home were to bear on undisturbed soil, causing and contributing to
8 heaving. It is undisputed that Plaintiffs had actual knowledge of the damage to the slab
9 as well as its potential cause—unstable soils—by the end of July 2010. As early as
10 June 22, 2010, Plaintiffs indicated in documents related to the purchase of the
11 property that they were aware of “cracking and heaving in the garage area[.]” Shortly
12 thereafter they disclosed to the structural engineer that the home inspection uncovered
13 heaving in the garage slab and cracking in some adjacent walls. The engineer’s
14 subsequent report to Plaintiffs, dated July 8, 2010, confirmed that “[t]he garage slab
15 ha[d] heaved and separated specifically at the joint which is nearest to the main
16 portion of the house” and that it was “common knowledge that several residences in
17 the Sierra Del Norte area have incurred significant damage due to subsurface
18 instability.” Plaintiffs’ conversation with the builder of the home was to the same
19 effect. Thus, by the end of July 2010, Plaintiffs knew, or through reasonable diligence
20 should have known, the facts relevant to their suit against Defendant.

1 {12} Plaintiffs point to facts in the record that indicate that they had reason to believe
2 that the problem had been resolved by the builder’s efforts in 2008. Representations
3 from the builder, together with the engineer’s report, which ultimately concluded that
4 the 2008 repairs were functioning to maintain good subsurface stability and that there
5 was “no reason to believe that the house [would] not continue to remain stable[,]”
6 certainly support that inference. And that inference, if accepted by the fact finder,
7 might affect the discovery date for a cause of action against the builder or the
8 engineer. *See id.* But it has no effect on the undisputed fact that in July 2010 Plaintiffs
9 knew or should have known that slab damage in their home resulted from the
10 building’s construction on unstable soils, which is the precise basis for the suit against
11 Defendant. In cases involving undisputed facts that show that a plaintiff “knew, or
12 should have been aware of the negligent conduct on or before a specific date, the issue
13 [of discovery] may be decided as a matter of law.” *Id.* ¶ 21 (internal quotation marks
14 and citation omitted).

15 {13} Plaintiffs call our attention to *Yurcic v. City of Gallup*, 2013-NMCA-039, 298
16 P.3d 500, which they describe as “directly on point.” In *Yurcic*, the plaintiff sued the
17 City of Gallup and various other defendants, alleging that seepage from a neighboring
18 retaining pond was eroding the foundation of her building. *Id.* ¶¶ 2-3. The suit was
19 filed in 2008. *Id.* ¶ 3. This Court applied two separate statutes of limitations—two
20 years for claims against the city and four years for claims against the nongovernmental

1 defendants. *Id.* ¶¶ 7-8. Although it was undisputed that the plaintiff’s tenant informed
2 her of cracks in the foundation and told her that he believed the pond to be their cause,
3 the testimony conflicted about *when* that conversation took place. *Id.* ¶¶ 15, 17. At the
4 earliest, it occurred in 2002, meaning that claims against all defendants would have
5 been time-barred. *Id.* ¶ 15. At the latest, it occurred in 2004, meaning that claims
6 against the nongovernmental defendants could go forward. *Id.* ¶ 16. This Court
7 therefore refused to decide issues related to the accrual of the cause of action against
8 the nongovernmental defendants as a matter of law because the date of the critical
9 conversation between the plaintiff and her tenant was materially disputed, precluding
10 summary judgment. *Id.* ¶ 18.

11 {14} On the other hand, we recognized in *Yurcic* that claims against the city would
12 have been time-barred as a matter of law.¹ *Id.* ¶¶ 19, 22. We viewed the conversation
13 between the plaintiff and her tenant as undisputably establishing that the plaintiff was
14 or should have been aware of “(1) serious structural damage requiring further
15 investigation, and (2) a causal link between the pond and the injury to [her] property.”
16 *Id.* ¶ 20. Because the lawsuit was filed in 2008 and because the statute of limitations
17 for claims against the city was only two years, and not four, it was immaterial whether
18 the conversation occurred in 2002, 2004, or any time between. *Id.* ¶ 19.

19 ¹We ultimately reversed the grant of summary judgment to the city on grounds
20 that are not applicable in this case. *Id.* ¶¶ 23, 37.

1 {15} If, as Plaintiffs suggest, we are going to analogize to *Yurcic* in order to
2 determine when the cause of action accrued, we find the case against the city to be the
3 appropriate analog. It is undisputed that Plaintiffs were aware of (1) structural damage
4 (heaving) to their slab; and (2) a causal link between the damaged slab and the
5 unstable soil beneath it. It is also undisputed that Plaintiffs had that relevant
6 knowledge before the end of July 2010. Therefore, notice was established at that time
7 and “the issue of [discovery] may be decided as a matter of law.” *Williams*, 2005-
8 NMCA-061, ¶ 21 (internal quotation marks and citation omitted); *see Yurcic*, 2013-
9 NMCA-039, ¶ 20.

10 {16} The statute of repose would have run in late November 2011. That left
11 approximately sixteen months to file suit after the cause of action accrued against
12 Defendant. The question under *Terry* is whether this is an unreasonably short period
13 of time to pursue a remedy, thereby implicating due process concerns. 1982-NMSC-
14 047, ¶¶ 14-15. Stated otherwise, the inquiry is whether this case is one of those “
15 ‘unusual cases involving exceptional circumstances’ resulting in an unusually short
16 period of time within in which to file suit[.]” *Cahn*, 2015-NMCA-078, ¶ 22. It is not.
17 *See id.* (“The period of time must be so short that the plaintiff is in effect prevented
18 from being able to file suit.”). There is nothing in the record indicating that Plaintiffs
19 had insufficient information concerning the identity of Defendant or the nature of the
20 work performed. And we can locate no prior case that has ever applied the due process

1 exception to a period of time longer than one year. *See Tomlinson v. George*, 2005-
2 NMSC-020, ¶ 24, 138 N.M. 34, 116 P.3d 105; *Cummings v. X-Ray Assocs. of N.M.*,
3 *P.C.*, 1996-NMSC-035, ¶ 57, 121 N.M. 821, 918 P.2d 1321; *Garcia*, 1995-NMSC-
4 019, ¶ 37; *Cahn*, 2015-NMCA-078, ¶ 24.

5 {17} Plaintiffs, in fact, do not argue on appeal that sixteen months is insufficient
6 under *Terry*. Their argument under *Terry* relies entirely on the premise that the cause
7 of action may have accrued three to four and one-half months prior to the expiration
8 of the statutory period because third parties encouraged them to buy the home,
9 notwithstanding known damage to the slab. Having already rejected that view, we
10 affirm the district court's grant of summary judgment to Defendant. We note that
11 nothing in this Opinion is intended to prevent Plaintiffs from seeking relief against
12 other allegedly culpable parties. *Saiz*, 1992-NMSC-018, ¶ 41 (stating that the purpose
13 of Section 37-1-27 is to shift liability from protected parties to other tortfeasors ten
14 years after completion of a project).

15 **CONCLUSION**

16 {18} For the reasons stated, the district court's order granting summary judgment in
17 favor of Defendant is affirmed.

18 {19} **IT IS SO ORDERED.**

19
20

LINDA M. VANZI, Judge

1 **WE CONCUR:**

2

3 _____
3 **JONATHAN B. SUTIN, Judge**

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5 _____
5 **RODERICK T. KENNEDY, Judge**