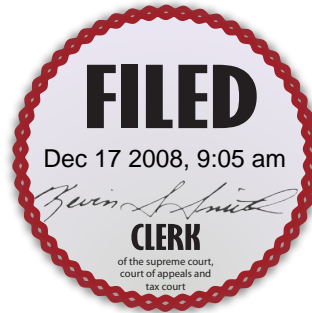


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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D & D SIGNATURE HOMES, INC., )  
 )  
Appellant-Petitioner, )  
 )  
vs. )  
 )  
MARY L. EICHER d/b/a EICHER )  
CONSTRUCTION and MATT FULTZ )  
d/b/a MATT FULTZ MASONRY )  
 )  
Appellee-Respondent. )

No. 02A03-0806-CV-288

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APPEAL FROM THE ALLEN CIRCUIT COURT  
The Honorable Thomas J. Felts, Judge  
Cause No. 02C01-0603-PL-33

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**December 17, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**FRIEDLANDER, Judge**

D&D Signature Homes, Inc. (D&D) appeals the trial court's grant of summary judgment in favor of David A. and Mary L. Eicher d/b/a Eicher Construction (Eicher)<sup>1</sup> on Eicher's motion for summary judgment. D&D presents six issues for our review, one of which we find dispositive: Are D&D's claims against Eicher barred by the two-year statute of limitation?

We affirm.

The facts construed most favorably to D&D, as the non-moving party, follow. D&D is a corporation in the business of acting as a general contractor for the design and construction of custom homes. D&D also performs much of the finish carpentry work in each home it builds. Doug Knake is the principal owner and decision maker with regard to D&D operations. He has extensive experience in most aspects of the home building process, including concrete work. Indeed, prior to serving as a general contractor, Knake worked for a business that performed concrete work. Knake is familiar with the process for excavating and pouring a concrete basement. Knake also holds a license to do concrete work. Notwithstanding his expertise, for the sake of efficiency, Knake utilized the services of multiple subcontractors when constructing a new home. For concrete basements and slab foundations, Knake had utilized the services of Eicher on numerous D&D construction projects. As general contractor and owner of D&D, Knake supervised the subcontractors and the entire homebuilding process of each home built by D&D.

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<sup>1</sup> David Eicher was named as a defendant in this matter. The record reveals, however, that Mary Eicher was the sole owner of Eicher Construction and that David has no ownership interest in Eicher. Further, David was neither a party to the contract with D&D with respect to the Butz Residence, nor did he perform, supervise, or have any involvement in the construction of the Butz Residence.

On or about May 3, 2003, James and Patty Butz contracted with D&D for the construction of their custom home to be located in the Forest Canyon Estates housing addition in Fort Wayne, Indiana (the Butz Residence). D&D contracted with Eicher to perform all of the concrete work on the Butz Residence, including pouring and forming the walk-out basement. Eicher poured the basement for the Butz Residence in May and June 2003. At that time, Knake observed that Eicher had formed the rough opening for a basement window such that the window was below grade and that Eicher had failed to install drainage tile along the foundation below two other basement windows. In his “extensive experience in the homebuilding business”, Knake knew that drainage tile was always placed below the base of a basement window to ensure that water flows away from the foundation of the basement into the surrounding landscaping or into a sump pit. *Appellant’s Brief* at 8. Knake was concerned that these “oversights” or what he perceived as “problems” could result in flooding of the basement of the Butz Residence, so he brought such to Eicher’s attention. *Appellant’s Brief* at 9, *Appellant’s Appendix Vol. 2* at 8. Eicher assured him that the exterior brick, once installed, would keep water from coming in the window that was formed below grade and that there was no need for drainage tile under the two basement windows where no drainage tile had been installed. Neither Eicher nor Knake made any change to the rough opening for the basement window that was below grade or installed drainage tile where it was lacking.

The Butzes moved into their new home in March 2004. At the time they moved into their home, the Butzes owed D&D an outstanding bill in the amount of \$57,165.33. This

amount represented the final payment on the initial home construction. The Butzes owed this amount “[a]s a result of their being over budget and exceeding their allowances”. *Appellee’s Appendix* at 4. When they moved into the residence, the Butzes gave no indication that they would not make the final payment to D&D on the home construction project.

On or about May 3, 2004, a heavy rainstorm occurred. On or about that same date, Knake received a call from the Butzes, notifying him that their basement had flooded. Knake went to the Butz Residence and verified the extent of the water damage to the basement, specifically noting that the basement was still taking on water, that in some places there was water an inch deep, and that water was running across other places in the basement. Knake returned to the Butz Residence and attempted to fix the problem by applying tar to the exterior brick of the Butz Residence near the area from where the water appeared to originate. Specifically, Knake noted that the water was pouring in from behind the drywall around the window that, during construction of the home, he noted had been formed below grade.

On May 18, 2004, the Butzes sent a five-page letter to Knake listing the items about the residence that were not completed or that were completed improperly. Shortly thereafter, the Butzes refused to let Knake enter upon their property to attempt to correct problems with the home. Ultimately, with respect to the water issue, the Butzes hired a restoration company to rehabilitate the interior areas of the residence that suffered water damage and contracted with an excavating company to install drainage tile around the exterior of the foundation. The Butzes refused to make the final payment to D&D.

In August 2004, D&D filed a complaint against the Butzes in the Allen Circuit Court alleging that the Butzes had failed to pay their final bill for the construction of the residence.

On October 20, 2004, the Butzes filed their answer, affirmative defenses, counterclaim, and third-party complaint, naming as third-party defendants D&D, Knake, Diane Knake, and Cincinnati Insurance Company. The case ultimately settled with Cincinnati Insurance Company making payment in the amount of \$28,500 to the Butzes as compensation for water damage to the interior of the Residence.<sup>2</sup>

On March 13, 2006, D&D filed its complaint against Eicher and Matt Fultz d/b/a Matt Fultz Masonry, setting forth three claims: breach of implied warranty of workmanship, breach of express warranties, and negligence.<sup>3</sup> Specifically with respect to Eicher, D&D alleged that defects in the concrete construction of the basement of the Butz Residence caused flooding and severe water damage to the residence, which in turn caused damage to D&D in terms of monies paid by D&D to cure or remedy the defects, monies lost on other potential residential construction, and other monetary damages resulting from higher insurance premiums after the settlement with the Butzes. Eicher filed its answer to the complaint on April 26, 2006. On November 28, 2007, Eicher filed a motion for summary judgment. D&D filed a brief in opposition to Eicher's motion for summary judgment on January 22, 2008. The trial court held a hearing on the pending motion on February 5, 2008. In an order dated February 25, 2008, the trial court granted Eicher's motion for summary

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<sup>2</sup> It is unclear whether the Butzes paid anything to D&D.

<sup>3</sup> Fultz is not involved with the matter on appeal.

judgment.<sup>4</sup> D&D filed a motion to correct error, which the trial court denied on April 25, 2008. D&D now appeals.

The purpose of summary judgment is to terminate litigation about which there can be no factual dispute and which can be determined as a matter of law. *Bamberger & Feibleman v. Indianapolis Power & Light Co.*, 665 N.E.2d 933 (Ind. Ct. App. 1996). On appeal, our standard of review is the same as that of the trial court. Summary judgment is appropriate only where the evidence shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(c); *Liberty Mut. Ins. Co. v. Michigan Mut. Ins. Co.*, 891 N.E.2d 99 (Ind. Ct. App. 2008). “The trial court’s grant of summary judgment is clothed with a presumption of validity and the appellant bears the burden of proving that the trial court erred.” *Bamberger & Feibleman v. Indianapolis Power & Light Co.*, 665 N.E.2d at 936.

The dispositive issue in this case is answered by application of the applicable statute of limitation. D&D and Eicher agree that pursuant to Ind. Code Ann. § 34-11-2-4 (West, Premise through 2008 2nd Regular Sess.), an action for injury to personal property must be commenced within two years after the cause of action accrues. A cause of action accrues,

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<sup>4</sup>In its order the trial court stated that Eicher’s motion, “although filed and presented as a motion for summary judgment pursuant to Trial Rule 56, is more properly considered by the Court as a Motion to Dismiss for Failure to State a Claim upon which relief can be granted (pursuant to Trial Rule 12(B)(6)) and/or a Motion for Judgment on the Pleadings pursuant to Trial Rule 12(C).” *Appellant’s Appendix* at 13. The trial court further acknowledged, however, that “upon presentation of additional evidence (as is the case here), each of these motions [i.e., a motion to dismiss under T.R. 12(B)(6) or 12(C)] may be considered by the Court as filed pursuant to Trial Rule 56.” *Id.* The court then granted “the Motion of Defendants Eicher”. *Id.* Although not a model of clarity, it appears the trial court did not, as asserted by D&D, consider Eicher’s motion as a motion to dismiss, but ultimately, the court applied the summary judgment standard in entering judgment in favor of Eicher.

and the statute of limitation begins to run, “when the plaintiff knew or, in the exercise of ordinary diligence, could have discovered that an injury had been sustained as a result of the tortuous act of another.” *Filip v. Block*, 879 N.E.2d 1076, 1082 (Ind. 2008) (quoting *Wehling v. Citizens Nat’l Bank*, 586 N.E.2d 840, 843 (Ind. 1992)). For a cause of action to accrue, it is unnecessary that the full extent of damages be known or even ascertainable. *Filip v. Block*, 879 N.E.2d 1076; *Del Vecchio v. Conseco, Inc.*, 788 N.E.2d 446 (Ind. Ct. App. 2003), *trans. denied*. It is only necessary that some ascertainable damage has occurred. *Del Vecchio v. Conseco, Inc.*, 788 N.E.2d 446.

The basis of D&D’s claims against Eicher is that the basement of the Butz Residence flooded because of the window that Eicher improperly formed below grade and because of Eicher’s failure to install drainage tile along the foundation under two other basement windows. D&D readily admits that Knake noticed these “oversights” or “problems” in the construction of the basement of the Butz Residence in the summer of 2003 when the Butz Residence was being constructed. *Appellant’s Brief* at 9, *Appellant’s Appendix Vol. 2* at 8. Indeed, given Knake’s “extensive experience in the homebuilding business” and his knowledge about concrete construction and basements, Knake was concerned that these problems might result in flooding of the basement, so he brought the problems to Eicher’s attention. *Id.* at 8. Notwithstanding Knake’s own expertise, D&D asserts that it relied on assurances made by Eicher that exterior brick would keep water from coming through the basement window that was formed below grade and that drainage tile, which Knake had always known to be installed in such locations, was unnecessary in those areas where it had

not been installed because of the presence of gravel. It is these assurances that D&D maintains forestalled the running of the statute of limitation until the basement of the Butz Residence flooded in May 2004.

We reject D&D's claim that the statute of limitation did not begin to run until May of 2004, when the basement of the Butz Residence flooded. Under the discovery rule, a cause of action accrues and the statute of limitation begins to run when the plaintiff knows that an injury has been sustained as a result of the tortious act of another. Here, the record reveals that D&D knew of defects in Eicher's concrete work in the summer of 2003 and that D&D knew that such defects could result in flooding of the basement of the Butz Residence. Knowledge of these defects was based on Knake's "extensive experience in the homebuilding business" and his knowledge about the proper construction of concrete basements. *Id.* at 8. It was D&D's knowledge of the problems with Eicher's concrete work and the potential for more extensive damage that triggered the running of the statute of limitation, for it was at this point that some ascertainable damage had certainly already occurred. To be sure, D&D was damaged to the extent it would have expended time and money to correct the problem itself or to hire someone else to repair the problems identified.

In summary, we conclude the designated evidence reveals that D&D knew of the defects in Eicher's concrete work in the summer of 2003, thereby triggering the statute of limitation. D&D did not file its complaint against Eicher until March of 2006, nearly three years after the defects were discovered. Therefore, D&D's complaint against Eicher asserting claims arising from Eicher's defective work is time-barred by the applicable two-



year statute of limitation. The trial court did not err in granting Eicher's motion for summary judgment.

Judgment affirmed.

MAY, J., and BRADFORD, J., concur