

NORTH CAROLINA COURT OF APPEALS

GEORGE CHRISTIE and)
DEBORAH CHRISTIE,)

Plaintiffs,)

v.)

From Orange County

HARTLEY CONSTRUCTION,)
INC.; GRAILCOAT)
WORLDWIDE, LLC; and)
GRAILCO, INC.,)

Defendants.)

BRIEF OF AMICUS CURIAE
NORTH CAROLINA ADVOCATES FOR JUSTICE

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ISSUE PRESENTED

DOES A SIX-YEAR STATUTE OF REPOSE FOR DEFECTIVE IMPROVEMENTS TO REAL PROPERTY (N.C. GEN. STAT. § 1-50(a)(5)) BAR A CLAIM BASED UPON BREACH OF AN EXPRESS TWENTY-YEAR PRODUCT WARRANTY?

STATEMENT OF THE CASE AND FACTS

Amicus curiae North Carolina Advocates for Justice adopts the statement of the case and facts provided in the Brief of Plaintiffs-Appellants George Christie and Deborah Christie (hereinafter also “the Christies”).

ARGUMENT

This Court should not permit GrailCoat Worldwide, LLC, and Grailco, Inc., (hereinafter also “GrailCoat”) to sell a product supported by a twenty-year warranty and later invoke the six-year statute of repose to avoid that warranty. In *Roemer v. Preferred Roofing, Inc.*, 190 N.C. App. 813, 660 S.E.2d 920 (2008), this Court indicated that claims for breach of warranty survived a statute of repose defense if the specified warranty term had not expired. Other cases support that principle, in North Carolina and other jurisdictions.

Barring this lawsuit does not further the goals behind the statute of repose and frustrates the reasonable expectations of the consumer who has purchased a product in reliance upon the express warranty. The inequity is especially acute where, as here, the consumer selected the product specifically for its long-term warranty. Allowing a statute of repose to defeat a long-term warranty encourages sellers to perform a bait-and-switch on buyers. Affirming the trial court’s judgment poses a danger that sellers—presumably more aware of the commercial law of our State—would adopt a business model under which long-term warranties

are promoted but never performed, thanks to the six-year statute of repose. Such conduct should not be condoned.

Amicus curiae contends that a twenty-year warranty means exactly that: a *twenty-year* warranty. Sellers, including GrailCoat, should not be permitted to make express promises that are voided by the statute of repose, something about which most buyers are surely not aware.

I. A six-year statute of repose does not invalidate an express twenty-year warranty.

Construing N.C. Gen. Stat. § 1-50(a)(5), this Court has already decided in principle that the statute of repose does not trump long-term warranties that exceed the repose period. In *Roemer*, a homeowner hired a contractor to install a roof. *Id.* at 814, 660 S.E.2d at 922. As part of the construction contract, there was a “lifetime” warranty. *Id.* at 817, 660 S.E.2d at 923. When damage from defects in the roof arose, the homeowner asserted a claim *inter alia* for breach of warranty. The contractor in *Roemer* asserted the six-year statute of repose, and the homeowner argued that the statute of repose must yield to the lifetime warranty. *Id.* The Court concluded that, notwithstanding the statute of repose, the homeowner was entitled to specific performance of the warranty:

Plaintiff’s remedy for breach of an alleged lifetime warranty claim that is brought more than six years from the later of the specific last act or omission of the defendant giving rise to the cause of action or substantial completion of the improvement[,] lies in specific performance[.]

Id. (internal quotation marks omitted).

Defendants in the instant case may argue that language in *Roemer* should be construed as limiting plaintiff-buyers to the remedy of specific performance when the statute of repose expires before the warranty term. That interpretation is mistaken, since the *Roemer* Court was evidently analyzing a “repair or replace” warranty. Consider the assessment of a North Carolina contract law treatise:

The terms of the *Roemer* warranty were not set forth in the opinion. Presumably, the remedies under the warranty were limited to repair or replacement of the defective portions of the roof. The authors note that in a case involving an express warranty that exceeds the statute of repose and in which the buyer’s remedies are limited to repair or replacement of defective parts, the buyer should still be entitled to recover monetary damages[.]

John N. Hutson & Scott A. Miskimon, *North Carolina Contract Law* § 16-7 (2009 Cum. Supp.). This interpretation of *Roemer*, and therefore North Carolina law, was recently adopted by United States District Court Judge Terrence W. Boyle. *Hart v. Louisiana-Pacific Corp.*, No. 2:08-CV-00047-BO (E.D.N.C.) (Order, Nov. 11, 2009) (remedy not limited to specific performance unless warranty so provides); *see* Exhibits pp 76, 78-79.

Other North Carolina cases are consistent with *Roemer*. In *Haywood St. Redev. Corp. v. Harry S. Peterson, Co.*, 120 N.C. App. 832, 463 S.E.2d 564 (1995), *disc. review denied*, 342 N.C. 655, 467 S.E.2d 712 (1996), this Court held that the five-year warranty was in the nature of a prospective warranty, in that it

guaranteed the future performance of the product for a stated period of time. As such, the warranty was a guarantee that the product would continue to be free of the specified defects, and on each day the product was not free of those defects, there was a new breach of the agreement. “With the occurrence of each breach, a new cause of action accrued.” Thus, the running of the statute of limitations was effectively tolled during the warranty period. Because the warranty period had therefore not expired when the plaintiff filed suit, this Court held that the trial court had erred in dismissing the action. *Id.* at 836-37, 463 S.E.2d at 566-67. While *Haywood* dealt with a statute of limitations, this Court has applied *Haywood* in at least one statute of repose case. *See Whittaker v. Todd*, 176 N.C. App. 185, 187, 625 S.E.2d 860, 861-62, *disc. review denied*, 360 N.C. 545, 635 S.E.2d 62 (2006).

The lesson from these cases is that when an express warranty extends beyond the repose period, the warranty should be enforced notwithstanding the lapse of the repose period. And as noted above, the academic writings on North Carolina law concur that the written warranty should take precedence: “If the six year statute of repose were applied to twenty-year warranties, it would extinguish claims under such warranties long before the warranty had expired. . . . [T]he buyer should still be entitled to recover monetary damages[.]” Hutson & Miskimon, *supra* page 4, § 16-7.

Other jurisdictions confronting a similar problem have ruled that the express warranty term should not be curtailed by a statute of limitation. In a New York case, the seller-defendant warranted a hot-water heater for ten years. *Shapiro v. Long Is. Light Co.*, 71 A.D.2d 671, 671 (N.Y. 1979). That warranty was limited to replacement. *Id.* After the limitations period expired, but before the warranty expired, the hot-water heater failed. *Id.* Purchaser-plaintiff sued for damages caused by the hot-water heater's failure. The court held that, although damages were not available, the warranty could be enforced despite the expired statute of limitations, and the hot-water heater replaced. *Id.* at 671-72. Other jurisdictions follow a similar rule. Compare, e.g., *Thompson Pow. Corp. v. Millennium Tiles LLC*, 2010 WL 4867891 (M.D. Tenn. 2010) (fifty-year warranty, one-year statute of limitation); *Hersh Cos. Inc. v. Highline Vill. Assocs.*, 30 P.3d 221 (Colo. 2001) (five-year warranty, two-year statute of limitation; claim for breach of express "repair and replace" warranty not subject to statute of limitation protecting contractors); *Hillcrest Cnty. Club v. N.D. Judds Co.*, 461 N.W.2d 55 (1990) (twenty-year warranty, four-year statute of limitation).

II. When parties offer and rely upon a warranty that exceeds the repose period, the parties' reasonable expectations are thwarted if the lawsuit is barred by the statute of repose, yet the goal behind the statute of repose is not furthered by barring the lawsuit.

In this case, the construction contract was between Hartley and the Christies, and Hartley, on behalf of the Christies, purchased the product from GrailCoat, for

use on the Christies' home. The Christies were persuaded to authorize the purchase and installation of GrailCoat's product based in significant part upon the express warranty appearing on GrailCoat's website. (R pp 75-77) "[A] manufacturer can extend a warranty beyond the bounds of privity if he makes representations designed to induce a purchase and directed to the ultimate purchaser[.]" *Kinlaw v. Long Mfg. N.C., Inc.*, 298 N.C. 494, 499, 259 S.E.2d 552, 556 (1979). In the present dispute, the express promise was that the cladding/coating be "fully warranted for twenty years." (R p 76) It is unreasonable to conclude that the Christies should have understood GrailCoat's promise that the cladding/coating was "fully warranted" for twenty years to mean that the warranty lasted merely until the statute of repose expired. To bar the Christies' claim under the statute of repose vitiates the express warranty made by GrailCoat.

In this case, GrailCoat enjoyed a significant marketing advantage by promoting its product as being "fully warranted for twenty years." *Id.* GrailCoat proudly placed this long-term warranty on its website. The Christies accessed the GrailCoat website and, because of the twenty-year warranty, selected the GrailCoat product. (R pp 76-77) GrailCoat directly benefited from the twenty-year warranty, since the sale of the product was induced by the warranty. To hold that the twenty-year warranty is actually a mere six-year warranty (by operation of the

statute of repose) is to ignore the parties' intent, conferring an additional benefit on GrailCoat, and depriving the Christies of the benefit of their bargain. Having enjoyed a marketing advantage over its competitors by promoting its twenty-year warranty, GrailCoat should not be permitted to escape that commitment.

Dismissal of this action does not promote the goals of the statute of repose. The six-year statute of repose at issue here, N.C. Gen. Stat. § 1-50(a)(5), was enacted in response to concerns in the construction industry about indefinite liability stemming from new "discovery" provisions within the then-existing statutes of limitation. *Lamb v. Wedgewood S. Corp.*, 308 N.C. 419, 427-28, 302 S.E.2d 868, 873 (1983). This concern prompted the legislature to set a definite cut-off time—six years—for the liability of contractors and sellers. *Id.* The goal was to protect them from stale claims against which they cannot defend due to lost or destroyed evidence. *Boudreau v. Baughman*, 86 N.C. App. 165, 172, 356 S.E.2d 907, 911 (1987), *rev'd on other grounds*, 322 N.C. 331, 368 S.E.2d 849 (1988).

In light of this statutory purpose, there is no reason for the statute of repose to bar a warranty claim where the parties negotiated a definite warranty period. GrailCoat offered (and the Christies accepted and paid for) a warranty of twenty years. Thus, GrailCoat should have been well aware that it faced twenty years' worth of liability exposure, that it must keep records of this transaction for twenty

years, and that it must otherwise preserve evidence relevant to the warranty for twenty years. Because the warranty period is specific in duration, GrailCoat had the opportunity to make financial arrangements to protect against claims from the Christies for the next twenty years. For example, GrailCoat's insurance and investment decisions should have been informed by the fact that it had agreed to twenty years of potential liability. There is nothing indefinite about GrailCoat's liability exposure in this case, and the Christies' warranty claim is by no means "stale." Hence, the purpose behind the statute of repose is not promoted if the statute of repose is applied under these circumstances.

For these reasons, thoughtful commentators encourage courts to enforce warranties that exceed a repose period. *See e.g.*, Chris Williams, *The Statute of Limitations, Prospective Warranties, and Problems of Interpretation in Article Two of the UCC*, 52 *Geo. Wash. L. Rev.* 67, 104-10 (1983). GrailCoat should not be allowed expressly to promise its customers twenty years' worth of protection and then renege on its promises once the shorter repose period expires.

III. If the statute of repose defeats an express warranty term, it will encourage deceptive behavior by sellers.

If GrailCoat is allowed to escape its expressly undertaken obligations via the statute of repose, then the construction industry will receive a blueprint for duping customers. A ruling in GrailCoat's favor would signal that a "twenty-year" warranty is, in reality, merely a "six-year" warranty. Sellers would certainly learn

that they may advertise and charge a premium for apparent long-term warranties that are actually ineffective. When the six-year repose period expires, the sellers will be able to decline to uphold their promises and instead assert a statute of repose defense.

This tendency is on full display in the present case. During his deposition, the President of GrailCoat said that the Christies should have known that a “full[]” warranty actually meant only a “limited” warranty. (Kevin Grail Dep. p 143) Later, GrailCoat declined to abide by its twenty-year warranty because, according to GrailCoat, the statute of repose relieved them of any obligation upon expiration of the repose period. (R p 54)

It is an unfair and deceptive trade practice for a builder to misrepresent the existence of warranty coverage. *Love v. Keith*, 95 N.C. App. 549, 554, 383 S.E.2d 674, 677-678 (1989), *disapproved on other grounds by Custom Molders, Inc. v. American Yard Products, Inc.*, 342 N.C. 133, 463 S.E.2d 199 (1995). A ruling in GrailCoat’s favor is tantamount to judicial approval of false advertising.

A ruling in GrailCoat’s favor could also encourage the sale of subpar products that purchasers buy because of illusory “long-term” warranty protection. The present case is a perfect example. GrailCoat apparently did not undertake appropriate testing of its product until 2005, the year after the Christies purchased the product (Kevin Grail Dep. p 155), and GrailCoat had reason to suspect that its

product was “inherently defective” by 2007 at the latest. (R pp 76, 93) Thus, the evidence suggests that at some point, GrailCoat’s twenty-year warranty could have inveigled consumers into purchasing a product that GrailCoat should have known to be defective. In any event, the Christies were “sold” on the warranty, and the product failed them.

Enforcement of the statute of repose over an express warranty pardons and promotes the unsavory business practice of defrauding unwitting consumers. If the statute of repose is allowed to overrule an express warranty agreement between contracting parties, then a seller may hereafter offer a twenty-year warranty—or even a lifetime warranty—as a means to increase sales, all the while knowing that it can disclaim all responsibility when the six-year repose period expires. Such conduct should not be permitted.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the trial court and hold that the statute of repose cannot bar claims to enforce an express warranty that extends beyond the repose period.

CERTIFICATE OF WORD COUNT

Pursuant to N.C. R. App. P. 28(j)(2)(B), I hereby certify that the word count of the brief of *Amicus Curiae* in COA12-1385 is less than 3,750 words, including footnotes and citations.

By: /s/Jonathan McGirt
Jonathan McGirt

