

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 20, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 98-2051-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

VICTOR SALBASHIAN,

PLAINTIFF-APPELLANT,

v.

DAVID C. MATZKE AND CAROL MATZKE,

DEFENDANTS,

OPPORTUNITY HOMES, INC. AND WAUSAU HOMES, INC.,

DEFENDANTS-RESPONDENTS.

APPEAL from judgments of the circuit court for Milwaukee County:
VICTOR MANIAN, Judge. *Reversed and cause remanded with directions.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

PER CURIAM. Victor S. Salbashian appeals from two judgments dismissing his claims against Opportunity Homes, Inc., and Wausau Homes, Inc.,

(the builders). Salbashian's claims alleged that the builders were negligent in constructing his residence.¹ The trial court granted summary judgment to the builders, concluding that Salbashian's claims were barred by § 893.89, STATS., Wisconsin's statute of repose for injuries resulting from improvements to real property. Because we conclude as a matter of law that Salbashian sustained actionable damages with respect to his residence on April 20, 1994, we hold that Salbashian's claims against these builders are not barred. *See* § 893.89(4)(d), STATS. Accordingly, we reverse the trial court's judgments and remand the cause with directions.

BACKGROUND

On April 13, 1994, Salbashian entered into a residential offer to purchase contract with David C. Matzke and Carol J. Matzke regarding a single family residence at 7929 West Coventry Drive in the City of Franklin. On April 20, 1994, Salbashian waived the single condition to the contract, an inspection contingency. On May 12, 1994, Salbashian closed on the property and took title to it.

On August 11, 1997, Salbashian filed an amended complaint, alleging that the builders of the residence were negligent in their construction because the residence lacked an adequate vapor barrier, thereby allowing moisture to penetrate the residence and destroy certain structural components. The builders moved the trial court for summary judgment. Because the residence was substantially completed in 1981 and Salbashian initiated the instant lawsuit more than ten years after its completion date, the builders argued that Salbashian's

¹ This appeal was expedited pursuant to RULE 809.17, STATS.

claims were barred by § 893.89, STATS. The trial court granted the builders summary judgment and this appeal followed.

DISCUSSION

This case involves the review of summary judgment. The methodology for reviewing summary judgment is well-known and need not be repeated here. See *Smith v. Dodgeville Mut. Ins. Co.*, 212 Wis.2d 226, 232, 568 N.W.2d 31, 34 (Ct. App. 1997). Review is *de novo*. See *id.*

The interpretation and application of a statute to undisputed facts presents a question of law. See *Tobler v. Door County*, 158 Wis.2d 19, 21, 461 N.W.2d 775, 775-76 (1990). Where the statutory language is clear, no judicial rule of construction is permitted, and the court must arrive at the intent of the legislature by giving the language its ordinary and accepted meaning. See *Guyette v. West Bend Mut. Ins. Co.*, 102 Wis.2d 496, 500-01, 307 N.W.2d 311, 313 (Ct. App. 1981).

Section 893.89(2), STATS., provides that “no cause of action may accrue” against “any person involved in the improvement to real property after the end of the exposure period.” “[E]xposure period” is defined in § 893.89(1), STATS., as “the 10 years immediately following the date of substantial completion of the improvement to real property.” The statute contains a number of exceptions to its application, including § 893.89(4)(d) which provides that this section does not apply to “[d]amages that were sustained before April 29, 1994.”

Salbashian contends on appeal that the residential offer to purchase contract created an ownership interest sufficient for him to sustain damages prior to April 29, 1994. The trial court rejected Salbashian’s contention, concluding

that only a party with an equitable interest may sustain damages within the meaning of § 893.89(4)(d), STATS.

We disagree with the trial court's conclusion of law. We conclude instead that Salbashian acquired a contractual interest in the property on April 20, 1994, when he removed the inspection contingency. We conclude further that when he acquired a contractual interest in the property, he became fully capable of enforcing this interest in the real estate, including recovering damages for any loss to his property's value on or after April 20, 1994.

The common law has long recognized that “[t]he acceptance of an offer to purchase results in a binding contract.” *Gregory v. Selle*, 58 Wis.2d 367, 374, 206 N.W.2d 147, 151 (1973) (footnote omitted). As a result of this binding contract, the seller of real estate may compel his or her buyer to purchase property pursuant to the terms of an accepted offer to purchase. *See Moritz v. Broadfoot*, 35 Wis.2d 343, 347-48, 151 N.W.2d 142, 144-45 (1967).

These common law principles governing contractual property rights are in accord with ch. 840, STATS., the body of statutory law governing real property actions. Section 840.01, STATS., defines an “‘interest in real property’” as including “all present and future rights to, title to, or interests in real property” Any person with an interest in real property under § 840.01 is authorized by § 840.03(1), STATS., to “bring an action relating to that interest, in which the person may demand the following remedies singly, or in any combination” The remedies include the specific enforcement of a contract or damages. *See* § 840.03(1)(f) and (o), STATS.

Applying this principle to the case at bar, we conclude that Salbashian became obligated to buy the property irrespective of its condition when

he removed the inspection contingency on April 20, 1994. We further conclude that at the moment Salbashian became obligated to purchase the property under the terms of the offer to purchase contract, he acquired an enforceable legal interest in the property.

Defective property is worth less than property that is not defective. It follows that on April 20, 1994, Salbashian became obligated to purchase property that was worth less than the price that he had agreed to pay for it because of the alleged negligence of the builders. Accordingly, Salbashian suffered damages and could have filed a claim for damages against the builders on or after April 20, 1994, pursuant to § 840.03(1)(o), STATS. *See also Hennekens v. Hoerl*, 160 Wis.2d 144, 152-53, 465 N.W.2d 812, 815-16 (1991) (a tort claim “capable of present enforcement” is one predicated on actual harm that has already occurred or is reasonably certain to occur in the future).

In light of the foregoing analysis, we conclude that Salbashian had an enforceable contractual interest in the property that suffered actual harm prior to April 29, 1994. We hold, therefore, that the trial court erred when it granted to the builders summary judgment upon the faulty legal conclusion that the damages provision set forth in § 893.89(4)(d), STATS., was limited to those having an equity interest in the subject real estate. Accordingly, we reverse the trial court’s order and remand this cause for further proceedings.

By the Court.—Judgments reversed and cause remanded with directions.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

