IN THE SUPREME COURT
STATE OF NORTH DAKOTA

2026 ND 159

Burleigh County, Morton County, and Burleigh Morton Detention Center, Plaintiffs and Appellants

v.

Comstock Construction, Inc.; The Sherwin-Williams Company; and Oxentenko, Inc., Defendants

and

Venture Architects, LLC, Defendant and Appellee

No. 20260004

Appeal from the District Court of Burleigh County, South Central Judicial District, the Honorable Lindsey R. Nieuwsma, Judge.

AFFIRMED.

Opinion of the Court by Tufte, Justice.

Lawrence E. King, Bismarck, N.D., for plaintiffs and appellants.

Mark R. Western, Fargo, N.D., for defendant and appellee.

Burleigh Cty. v. Comstock Construction
No. 20260004

Tufte, Justice.

[¶1] Burleigh County and Morton County (the Counties) appeal from a judgment dismissing their breach-of-contract claim against Venture Architects, LLC, the architect of record for construction of the Burleigh Morton Detention Center. We affirm, concluding the Counties commenced suit against Venture more than six years after discovering paint failure, the claim is barred by the statute of limitations, and the Counties cannot raise an equitable estoppel argument for the first time on appeal.

I

[¶2] The Burleigh Morton Detention Center (BMDC) is a detention facility in Bismarck jointly owned by the Counties under a Joint Powers Agreement executed on April 1, 2015. Burleigh County entered into a construction contract with Comstock Construction, Inc., on March 20, 2015. The Counties retained Venture as the architect of record. Venture was responsible for detailing the specifications of, and approving, all materials used in the project, including paint products. Comstock hired Oxentenko, Inc., as a subcontractor to perform painting, finishing, and epoxy coatings. Oxentenko performed work at BMDC from January 4, 2016 to June 4, 2017.

[¶3] On February 2, 2017, Major Steve Hall, BMDC's assistant jail administrator, and Rodney Matzke, Burleigh County's owner representative on the project, conducted a walk-through of BMDC. Hall observed that the paint on one metal bunk bed "looked odd." He testified that "you could grasp the edge of the paint and peel it off the metal, and it came off like it would have been cellophane. It was a rubbery . . . texture . . . and it wasn't adhering to the metal." Hall "removed a section of paint about the size of a fifty cent piece coin, exposing the raw metal" with "[n]o visible indication of primer." Hall acknowledged that the February 2, 2017 walk-through was "the first instance" he noticed any paint issue. Matzke confirmed that as of February 3, 2017, he "continued to be of the opinion that there was a problem with the paint applied to the metal furniture inside the jail."

[¶4] On February 3, 2017, Hall sent an email to Sheriff Pat Heinert, Matzke, and Cory Beyer of Venture, describing his observation and warning that "[i]f the paint continues to be able to be removed as easily, it will be an ongoing problem as these areas are occupied by inmates." Shortly afterward, Hall spoke with Shellae Backman, an owner of Oxentenko, about the paint failure. According to Hall, Backman told him the paint had not cured yet. Hall understood her to mean he should give the paint more time. Oxentenko's "daily labor report[s]" show that Oxentenko continued painting the facility and furniture into May 2017, including painting additional bunks through March 15, 2017. A certificate of substantial completion was issued on April 27, 2017, with owner possession effective April 19, 2017. The certificate of occupancy was issued in June 2017.

[¶5] The paint problems persisted in the months and years to follow. On September 13, 2017, Hall emailed Venture and Comstock, reporting that the paint quality on interior metal surfaces was "very poor" throughout the building and could be "removed with very little effort using only your fingernail." By July 17, 2018, Hall characterized the deterioration as reaching "a crisis point" and asked who would pay for repainting. In March 2019, Hall again emailed Venture and Comstock, noting that multiple explanations had been offered with no party taking responsibility, and that "[t]he issue of poor quality paint was identified in the first quarter of 2017, when the first inmate beds were being installed."

[¶6] The Counties eventually sued Comstock, Venture, Oxentenko, and the Sherwin-Williams Company (the paint supplier) for breach of contract. As to Venture, the Counties alleged Venture failed to ensure product specifications were suitable for the intended application. The summons and complaint are dated February 10, 2023. The Counties mailed the summons and complaint to Venture by certified mail on March 17, 2023. The parties did not enter into a tolling agreement. Venture answered and moved for summary judgment, arguing the claim was barred under the two-year professional negligence statute of limitations, N.D.C.C. § 28-01-18(3), and joined Comstock's summary judgment motion the same day, which included the six-year contract statute of limitations argument. All claims against Comstock, Oxentenko, and Sherwin-Williams were resolved by settlement and dismissed, leaving Venture as the sole remaining defendant. At the October 30, 2025 motion hearing, Venture confirmed it adopted the six-year statute of limitations argument.

[¶7] On November 6, 2025, the district court issued its order granting Venture's motion for summary judgment. The court applied the six-year statute of limitations, N.D.C.C. § 28-01-16(1), and the discovery rule, determining that the February 2, 2017 walk-through placed the Counties on objective notice of a potential claim. The court expressly declined to address whether the two-year professional negligence statute of limitations applied, concluding the claim was barred even under the longest limitations period. The court entered the judgment of dismissal. The Counties timely appealed.

II

[¶8] The Counties argue the district court erred in granting summary judgment. We review summary judgment decisions under the following standard:

> Summary judgment is a procedural device for the prompt resolution of a controversy on the merits without a trial if there are no genuine issues of material fact or inferences that can reasonably be drawn from undisputed facts, or if the only issues to be resolved are questions of law. A party moving for summary judgment has the burden of showing there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. In determining whether summary judgment was appropriately granted, we must view the evidence in the light most favorable to the party opposing the motion, and that party will be given the benefit of all favorable inferences which can reasonably be drawn from the record. On appeal, this Court decides whether the information available to the district court precluded the existence of a genuine issue of material fact and entitled the moving party to judgment as a matter of law. Whether the district court properly granted summary judgment is a question of law which we review de novo on the entire record.

McMahon v. Sanford, 2025 ND 184, ¶ 10, 27 N.W.3d 478.

A

[¶9] The Counties argue the district court erred in concluding their breach-of-contract claim against Venture was barred by the statute of limitations.

[¶10] An action for breach of contract must be commenced within six years after the claim for relief has accrued. N.D.C.C. § 28-01-16(1). Although the accrual date of a cause of action is "generally a question of fact," when the relevant facts are undisputed, the issue is one of law for the court. *Bullinger Enters., LLLP v. Dahl*, 2020 ND 63, ¶ 14, 940 N.W.2d 630. Under the discovery rule, the limitations period does not begin to run until the plaintiff knew, or with reasonable diligence should have known, of the wrongful act and the resulting injury. *Wells v. First Am. Bank W.*, 1999 ND 170, ¶ 10, 598 N.W.2d 834. We apply an objective standard for the knowledge requirement; "[t]he focus is upon whether the plaintiff is aware of facts that would place a reasonable person on notice a potential claim exists, without regard to the plaintiff's subjective beliefs." *Id.*

[¶11] The Counties argue the district court misapplied the discovery rule by improperly collapsing two elements—knowledge of the wrongful act and knowledge of the resulting injury—and treating the observation of peeling paint as simultaneously establishing both. The Counties contend that observing defective paint on a single bunk before occupancy, while receiving a plausible explanation of uncured paint, gave no notice of Venture's alleged wrongful act: improper paint specification. They analogize to *Ayling v. Sens*, 2019 ND 114, ¶ 13, 926 N.W.2d 147, where months of questioning an autopsy report did not start the clock; accrual required meeting an independent toxicologist who confirmed the claim. The Counties assert that at the time of the walk-through they could not have known the defect was caused by a specification error rather than improper application or some other wrongful act.

[¶12] Venture responds that the February 2, 2017 walk-through was sufficient to put the Counties on notice of a potential claim: Hall observed paint peeling off metal like cellophane with no visible primer, immediately memorialized the observation in writing to Venture's representative, and predicted an "ongoing problem." Venture further argues that Hall immediately identified potential responsible parties—he notified both Oxentenko and Venture the next day—demonstrating the objective sufficiency of his notice. Venture emphasizes that the Counties' own counsel acknowledged in pre-litigation correspondence the "failed paint and problems detected as early as February 2017." Venture asserts that a reasonable inquiry prompted by the February 2017 observation would have revealed the specification defects within the limitations period.

[¶13] The Counties settled and voluntarily dismissed their breach-of-contract claims against Comstock, Oxentenko, and Sherwin-Williams. The Counties alleged that Venture failed to ensure product specifications were suitable for the intended application. With the other defendants dismissed, this claim and its discovery control. Thus, the alleged wrongful act is the specification error, and the resulting injury is the paint failure, first observed on February 2, 2017.

[¶14] The discovery rule employs an objective standard and does not require full knowledge of the extent of the injury or identification of the specific responsible party—only awareness of facts that would put a reasonable person on notice of a potential claim. *Riemers v. Omdahl*, 2004 ND 188, ¶¶ 6-7, 687 N.W.2d 445; *Podrygula v. Bray*, 2014 ND 226, ¶ 15, 856 N.W.2d 791; *see also Bullinger Enters.*, 2020 ND 63, ¶ 14 ("[N]otice of facts, which would put a person of ordinary intelligence on inquiry, is equivalent to knowledge of all of the facts a reasonable diligent inquiry would disclose."). The district court's conclusion that accrual occurred as a matter of law on February 2, 2017, is well grounded in the record. The combination of Hall's physical observation (cellophane-like peeling, no primer, raw metal exposed), his immediate written notification to Venture's own representative, Matzke's confirmation of a perceived problem, and Hall's own March 2019 email attributing the issue to the "first quarter of 2017" supports the conclusion that what the Counties knew on February 2, 2017, was sufficient to trigger inquiry. In *Ayling*, the plaintiff had no physical observation of harm, only suspicion about a process—the coroner's performance of an autopsy. 2019 ND 114, ¶ 12. Here, the Counties had tangible physical evidence (cellophane-like peeling, no visible primer) that a reasonable person would recognize as a potential defect warranting inquiry. Moreover, discovery of a cause of action "cannot be reasonably delayed until the injured person consults an attorney or obtains professional confirmation of a defect." *Hanson v. Dabbert Custom Homes, LLC*, 2026 ND 139, ¶ 18; *Froysland v. Altenburg*, 439 N.W.2d 797, 799 (N.D. 1989).

[¶15] The objective test does not ask whether the Counties subjectively identified Venture's specific specification error at the moment the injury was discovered—it asks whether a reasonable person in their position would have commenced inquiry into a potential claim. *Wells*, 1999 ND 170, ¶ 10; *Podrygula*, 2014 ND 226, ¶ 15. A person who peels paint off metal like "cellophane," observes no primer, notifies both the paint applicator and the architect, and predicts an "ongoing problem" has clear, objective notice. The February 2017 walk-through gave the Counties sufficient notice of a potential claim, and the discovery rule does not require that they know the full extent of the injury to be put on notice that a wrongful act occurred that resulted in injury.

B

[¶16] The Counties contend that the district court resolved factual disputes at summary judgment that should have been presented to the trier of fact. They point to two categories of conflicting evidence. First, the "not cured" explanation: Hall's deposition testimony that Backman provided a plausible explanation for the one bunk's condition creates a factual dispute about what a reasonable person in Hall's position would have inferred from the February 2 observation. The district court rejected this argument by pointing to Hall's subsequent complaints in September 2017 as evidence he was "not satisfied" with Backman's explanation. The Counties assert that the court thereby relied on post-accrual conduct to determine the accrual date, which inverts the discovery rule's temporal analysis.

[¶17] The Backman explanation addressed the curing of the paint but not the absence of primer. The Backman "not cured" explanation was objectively plausible—the bunks may have been painted the day before and had not cured yet. The Counties' argument that this explanation negated inquiry notice, however, conflates two distinct inquiries. *See Hanson*, 2026 ND 139, ¶ 21. "The question of when the limitations period began to run is answered by reference to when [the Counties] first had facts sufficient to place a reasonable person on notice of a potential claim;" post-observation reassurance does not retroactively alter the accrual date. *Id.* Whether the Backman explanation caused the Counties to refrain from filing suit is the subject of equitable estoppel, not accrual. *Id.* Moreover, "[o]nce a party has acquired knowledge of facts sufficient to put a person of ordinary intelligence on inquiry, that party has a responsibility to promptly investigate, and failure to do so is construed against the party." *Id.* ¶ 18. The Counties conducted no such prompt investigation following the February 2017 walk-through, and inquiry notice does not depend on what such an investigation would have disclosed.

[¶18] Second, the Counties argue the district court improperly relied on the pre-litigation counsel letters as admissions of 2017 knowledge, when those letters were drafted two-and-a-half years after the alleged accrual date to rebut defendants' inmate-damage theory—not to describe the Counties' state of mind in February 2017.

[¶19] Venture argues the relevant facts are undisputed: Hall saw paint peeling, Hall notified Venture, and Hall's own March 2019 email stated the issue was "identified in the first quarter of 2017." When uncontroverted facts demonstrate the time when a reasonable person would have been placed on notice, the accrual question may be resolved as a matter of law. *Snortland v. State*, 2000 ND 162, ¶ 11, 615 N.W.2d 574. The pre-litigation counsel letter issue is less significant than either side suggests. The letters' references to "problems detected as early as February 2017" are corroborating evidence, but the district court's accrual analysis rests primarily on Hall's deposition, Hall's contemporaneous email, and Matzke's deposition—all of which independently support the conclusion. We conclude the undisputed facts show the accrual date was February 2, 2017, as a matter of law.

C

[¶20] The Counties argue that a cause of action cannot accrue for work not yet performed, and because substantial painting had not occurred as of February 2, 2017—bunks continued to be painted February 13–16, furniture was painted February 20–21, and additional painting ran through May 2017—the district court's February 2 accrual date was legally impossible for those later-painted surfaces. They cite *Western Energy Corp. v. Stauffer*, 2019 ND 26, ¶ 6, 921 N.W.2d 431, for the proposition that a cause of action "accrues when the right to commence the action comes into existence and can be brought in a court of law without being dismissed for failure to state a claim." They claim that for work not yet completed, no right of action existed. The district court rejected this argument, stating "it is not uncommon or unreasonable for issues to be discovered while a construction project is ongoing." The Counties argue this response is non-responsive: the issue is not whether discovery can occur during ongoing work, but whether a cause of action can exist for a breach not yet committed.

[¶21] Venture responds that the alleged wrongful act—the specification error approving the wrong paint—was complete by February 2, 2017, and arguably earlier, when the change order was approved in October 2015. Indeed, the painting from February through May 2017 did not generate new specification breaches; it extended the damages from the same underlying defect. Venture's alleged wrongful act (specifying the wrong paint) was complete before February 2, 2017. The Counties' observation on that date established their notice of the injury it caused. The continuing painting from February through May 2017 caused additional damage from the same specification error, but it did not constitute a new breach under that claim. A claim does not accrue upon the last of its damages. It accrues when the plaintiff, on notice of a breach, has suffered some appreciable harm resulting from the breach: "before the [plaintiff] sustains all, or even the greater part, of the damages." *Riemers*, 2004 ND 188, ¶ 7 (quoting *Wall v. Lewis*, 366 N.W.2d 471, 473 (N.D. 1985)). That the breach, if uncorrected, will produce greater damage later does not defer accrual. *Binstock v. Tschider*, 374 N.W.2d 81, 85 (N.D. 1985) ("The fact that greater damage was suffered when the option was exercised does not alter the fact that substantial damage was suffered when the option was created."). The Counties did not need to wait until the last surface was painted because damages for breach of contract include the detriment "which in the ordinary course of things *would be likely to result*" from the breach, N.D.C.C. § 32-03-09 (emphasis added), and a single claim may not be split across successive actions, *Lucas v. Porter*, 2008 ND 160, ¶ 10, 755 N.W.2d 88.

The continued painting from February through May enlarged the damages flowing from the specification error; it did not create a new claim or a new accrual date. The February 2, 2017 observation was sufficient notice of the specification error.

D

[¶22] At oral argument in this Court, the Counties asserted that they had alleged and argued Venture breached a duty to monitor the paint application and to review and correct defects. The only similar argument the Counties made in their appellate briefing was in the last paragraph of their reply brief in the context of arguing why the six-year statute of limitations applied, as opposed to the two-year statute of limitations: "While the paint applicator, Oxentenko, applied the paint, the architects still had a contractual obligation to review, monitor and approve that work to make sure it was done correctly. The claims against Venture Architects are clearly for breach of contract and, therefore, the two-year professional negligence statute is not applicable." At no point in their discussion of the discovery rule do the Counties mention Venture's duty to monitor or any new or different breaches arising from a failure to monitor. *See Alber v. Rodin*, 2026 ND 58, ¶ 31, 32 N.W.3d 337 ("We will not address issues raised for the first time in a reply brief, because the reply brief is limited to issues raised in the appellee's brief." (quoting *Koehly v. Levi*, 2016 ND 202, ¶ 9, 886 N.W.2d 689)); *Cavendish Farms, Inc. v. Mathiason Farms, Inc.*, 2010 ND 236, ¶ 5, 792 N.W.2d 500 ("We generally do not consider issues raised for the first time at oral argument on appeal.").

[¶23] Under N.D.R.App.P. 28(b)(7), the appellants' argument must contain their "contentions and the reasons for them, with citations to the authorities and parts of the record on which [they] rel[y]" and "citation to the record showing that the issue was preserved for review; or a statement of grounds for seeking review of an issue not preserved." We do not address inadequately briefed arguments. *Hoever v. Wilder*, 2024 ND 58, ¶ 5, 5 N.W.3d 544; *Petro-Hunt, L.L.C. v. Tank*, 2024 ND 46, ¶ 44, 4 N.W.3d 526. To the extent the Counties attempted to argue that the accrual date began after February 2017 based on an ongoing duty to monitor paint application, we conclude this argument was not adequately briefed, and we decline to consider it further.

III

[¶24] Venture argues, and the record confirms, that the Counties did not raise equitable estoppel in their written opposition to summary judgment. At the October 30, 2025 hearing, the Counties briefly raised a related argument ("I don't think they have clean hands") but conceded they had no supporting authority when directly questioned by the district court. At no point did the Counties present an equitable estoppel argument before the court. Because the Counties did not raise equitable estoppel below, the court did not address the issue in its order. "[I]ssues not raised in the district court may not be raised for the first time on appeal." *Paulson v. Paulson*, 2011 ND 159, ¶ 9, 801 N.W.2d 746. The Counties' reply brief is silent on equitable estoppel—it advances no response to Venture's preservation challenge and cites no record showing the argument was preserved below. The Counties did not preserve the issue for appeal.

IV

[¶25] Because the Counties' claim against Venture is barred by the six-year statute of limitations—the longest potentially applicable period—there is no need to decide whether a shorter period applied. Any remaining issues are either unnecessary to the decision or without merit. The judgment is affirmed.

[¶26] Lisa Fair McEvers, C.J.
Jerod E. Tufte
Jon J. Jensen
Douglas A. Bahr
William A. Herauf, D.J.

[¶27] The Honorable William A. Herauf, District Judge, sitting in place of Friese, J., disqualified.