

NO. A04-1251

State of Minnesota
In Supreme Court

McWilliams & Associates, Inc., a Minnesota Corporation,
d/b/a Top Value Homes,
Respondent,

vs.

Tappe Construction; Panelcraft of Minnesota, Inc. and
Jeffrey Johnson, Individually and in his Capacity as Corporate Officer
of Panelcraft of Minnesota, Inc.; and Windsor Window Company,
Appellants.

**JOINT REPLY BRIEF AND APPENDIX OF APPELLANTS
TAPPE CONSTRUCTION, WINDSOR WINDOW COMPANY,
JEFFREY JOHNSON AND PANELCRAFT OF MINNESOTA, INC.**

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ARGUMENT

The Brief submitted by Respondent McWilliams & Associates, Inc. d/b/a Top Value Homes begins by acknowledging that the Court of Appeals' decision is based on reasoning that is problematic and not advocated by any party, much less Top Value. Top Value, therefore, makes little effort to support the Court of Appeals' reasoning. Instead, it defends the result with three primary arguments. First, Top Value maintains that the repose language in Minn. Stat. § 541.051, subd. 1(a) is ambiguous, making resort to statutory construction proper, and that the legislative history to be gleaned solely from the language of the various amendments to section 541.051 demonstrates a legislative intent to exclude contribution claims from the 10-year statute of repose. Second, Top Value suggests that the statute of repose somehow becomes unconstitutional when applied to claims for contribution. Finally, Top Value falls back on the "doctrine of equity," claiming that applying the statute of repose to its contribution claims against Appellants is unfair.

Top Value's brief is particularly notable for what it omits. For instance, Top Value relies heavily on dicta from the Court's decision in *Calder v. City of Crystal*, 318 N.W.2d 838 (Minn. 1982). Yet, no mention is made of the actual holding or result in that case – the application of section 541.051's statute of repose to a claim for contribution and indemnity in the face of, among others, a constitutional challenge. Even more surprising, although Top Value raises constitutional issues, there is not a single reference in its brief to *Sartori v. Harnischfeger*, 432 N.W.2d 448 (Minn. 1988), in which the statute of repose withstood challenges under both the due process and remedies clauses of the Minnesota Constitution.

And despite its various fairness arguments, Top Value makes no mention of the extensive investigation that took place for months before Top Value was sued, leaving the Court to believe that Top Value was blind-sided by the Weston's claims when, in fact, it was not. These omissions highlight the weaknesses in Top Value's case and demonstrate why the Court of Appeals' decision must be reversed.

I. Minnesota Statutes Section 541.051 is not Ambiguous, and Nothing in the "Historical Amendments" Suggests an Intent on the Part of the Legislature to Limit the Statute of Repose to "Initial Claims." To the Contrary, the Statute of Repose Already has been Applied to Contribution Claims, yet the Legislature has not Changed the Language upon which Top Value Relies.

The Court of Appeals, although reaching the wrong result, nevertheless rejected as "without merit" the argument Top Value now makes to this Court, that the statute of repose was intended to apply only to injury claims and not to claims for contribution and indemnity. And properly so. The plain language of Minn. Stat. § 541.051 states that although Top Value would have to bring its contribution claims within two years after they accrued, those claims could not accrue more than ten years after substantial completion:

[N]o action . . . arising out of the defective and unsafe condition of an improvement to real property . . . shall be brought against any person performing . . . construction of such improvement . . . more than two years after discovery of the injury, or, in the case of an action for contribution or indemnity, accrual of the cause of action, nor, in any event, shall such a cause of action accrue more than ten years after substantial completion. . . .

Minn. Stat. § 541.051, subd. 1(a) (2002). The statute's meaning was patently clear over 20 years ago when, in *Calder*, the Minnesota Supreme Court applied the statute of repose to bar

contribution and indemnification claims that accrued and were initiated after the repose period had run. *See Calder*, 318 N.W.2s at 840-43.

Top Value chooses to overlook supreme court precedent, refusing to acknowledge the actual holding in *Calder* in favor of a Washington County District Court decision, *Reiter v. W.F. Bauer Const., et. al.*, File No. C1-03-2385. The trial judge in *Reiter* focused on the words “such a cause of action” and concluded that they must refer to an “initial action” even though the only reference in the statute to a “cause of action” relates to causes of action for contribution and indemnification. *See* Minn. Stat. § 541.051, subd. 1(a). Top Value’s reliance on *Reiter* is not only improper, but is misguided because *Reiter*, too, is at odds with *Calder*. Notably, the statute at issue in *Calder* was identical with respect to the repose language upon which Top Value chooses to focus, i.e. “such a cause of action.” *Compare Calder*, at 840 with Minn. Stat. § 541.051, subd. 1(a) (2002). The only difference between that version and the one at issue in this case is that the repose period used to be 15 years but has since been shortened by the legislature to ten.. *Id.* Thus, a “focused reading” of section 541.051 is of no help to Top Value’s case.

Although it is neither necessary nor proper to engage in statutory construction absent an ambiguity in a statute (*Tuma v. Comm’r of Econ Security*, 386 N.W.2d 702, 706 (Minn. 1986)), canons of statutory construction further undercut Top Value’s argument that the legislature never intended to apply the statute of repose to contribution claims. First, with respect to the “historical amendments” to section 541.051, every amendment to the statute

since 1980 has, with one irrelevant exception,¹ reinforced the legislatures's clear intent to place reasonable time limits on all construction-related claims, including claims for contribution and indemnification. Indeed, the 2004 amendment furthered this legislative intent by adding a new 12-year repose period for statutory warranty claims. *See* Minn. Stat. § 541.051, subd. 4 (2004).

Top Value attempts to find meaning in the fact that despite amending the statute in 1980, 1988 and 2004, the legislature "made no amendment to indicate that it intended to apply a statute of repose to claims for contribution or indemnity." Resp. Brief. p. 15. But it doesn't explain why the legislature would have to make such an amendment given the clear language of the statute and a supreme court decision (*Calder*) applying the statute of repose to contribution claims. In fact, no amendment has been necessary; the legislature, through its silence, has incorporated *Calder* into the statute. *See* Minn. Stat. § 645.17(4) ("When a court of last resort has construed the language of a law, the legislature in subsequent laws on the same subject matter intends the same construction to be placed upon such language."). *See also Wynkoop v. Carpenter*, 574 N.W.2d 422, 425 (Minn. 1988) ("Once this court has construed a statute, that interpretation is as much a part of the statutory text as if it had been written into the statute originally."). Other than to shorten its duration by 5 years, the Minnesota Legislature has not altered the statute of repose in the 23 years since *Calder*, and

¹ In 1990, the legislature carved out an exception for manufacturers or suppliers of equipment or machinery installed upon real property.

thus, Top Value's argument that the "historical amendments" alone demonstrate a legislative intent to limit the statute of repose to initial injury claims only is untenable.

Finally, with respect to legislative intent, Top Value has represented to the Court that no legislative history, including senate committee tapes or other form of documented legislative intent is available to aid in statutory interpretation. *See* Resp. Brief, p. 11. This is not true. Clearly, there would be history available for the 2004 amendments. After all, those amendments are only a year old. But, more significantly, legislative history is **available** for the 1988 amendments that clarified when a cause of action for contribution would accrue for purposes of both the statute of limitations and the statute of repose. *See* Reply App. at 1-6.² With respect to the amendments' effect on the statute of repose, the

² Appellants acknowledge that the legislative materials contained in the Appendix to this Brief were not presented to, and thus not considered by, the lower courts. Such materials, however, are important to the case, documentary and a matter of public record. Despite the reluctance to consider new materials on appeal, appellate courts can and will consider legislative history and uncontroverted reports when engaging in statutory analysis. *See, e.g., Fairview Hosp. & Healthcare Services v. St. Paul Fire & Marine Ins. Co.*, 535 N.W.2d 337, 340 n. 3 (Minn. 1995) ("just as a reviewing court may consider cases and statutes that were not presented to the district court, this court may consider rules and proposed rules set out in the Federal Register as well as publically available articles that were not previously presented to the district court."); *Estate of Turner*, 391 N.W.2d 767, 771 (Minn. 1986) ("on an issue of such magnitude, we see no reason why a party may not submit such a report [required by the Department of Health and Human Services] to us as part of its brief when we could refer to such a report in the course of our own research, if we were so inclined."). *See also Holbrook v. State of Minnesota Gambling Control Board*, 532 N.W.2d 578, 582 n. 2 (Minn. App. 1995) (declining to strike relevant administrative and legislative history from appendix to reply brief). Moreover, legislative history has been provided to advise the Court that, contrary to the representations in Respondent's Brief, legislative history is available, and to inform the Court as to where the historical materials can be found in the event it chooses to conduct its own research.

Statement of Purpose submitted to the Minnesota House and Senate expressly states that the statute of repose applies to claims for contribution and indemnity:

The amendment provides for the commencement of third-party claims for contribution and indemnity within two years of accrual of the cause of action . . . The amended statute would also allow for the timely commencement of well-evaluated and more deserving third-party actions. **Commencement of such actions would still be controlled by the 10-year “statute of repose.”**

See Reply App. 5 (Statement of Purpose and Background Analysis (emphasis added)). Thus, the legislature unquestionably was aware of, and left standing, an interpretation of section 541.051 that applied the statute of repose to contribution claims. Top Value’s claim that the legislature never intended the statute of repose to apply to contribution claims is, therefore, simply incorrect.

II. Application of the Statute of Repose to Contribution Claims Raises no Constitutional Infirmities.

Although downplayed somewhat in an effort to avoid 1) the fact that no notice was given to the Minnesota Attorney General, and 2) the possibility that its arguments could also be applied to initial claims, Top Value argues that application of the statute of repose to contribution claims violates constitutional principles of due process. See Resp. Brief, pp. 20-23.³ Top Value’s constitutional claims should be rejected because the Minnesota

³ Top Value maintains that notice to the Attorney General is unnecessary because it is not claiming the statute of repose is unconstitutional, just its application to contribution claims since the effect would be to bar a claim before it could accrue or otherwise deny Top Value a reasonable amount of time to commence its contribution action. But the same arguments could be made with respect to the initial injury claim. Thus, Top Value is, in effect, claiming the statute is unconstitutional and it is for this reason that the Attorney
(continued...)

Supreme Court, in a case involving a direct challenge to the statute of repose – *Sartori v. Harnischfeger* – already has found no constitutional infirmity, holding that the statute of repose violates neither due process, nor the Minnesota Constitution’s Remedies Clause.

The *Sartori* plaintiffs were workers who were seriously injured when a “load block” fell from a crane into the area in which they were working. *Sartori*, 432 N.W.2d at 450. This Court considered and rejected the workers’ arguments that the statute of repose violated due process and the state constitution’s remedies clause because: one, they had a reasonable alternative (*i.e.*, suing other parties and workers’ compensation); and two, in any event, the statute of repose furthered a legitimate legislative objective. *Id.* at 454; *see also Lourdes High Sch. v. Sheffield Brick & Tile Co.*, 870 F.2d 443, 445-46 (8th Cir. 1989) (*citing Sartori* and rejecting plaintiff’s remedies and due process clause arguments, stating “the Minnesota Supreme Court has decisively held that section 541.051 does not violate the Minnesota Constitution”). And as a result, the court barred the two workers from suing the company that manufactured the allegedly defective crane. *Sartori*, 432 N.W.2d at 454. The court so held, despite the fact that the workers’ claims could not possibly have “accrued” until long after the statute of repose had expired. *Id.* at 449-51 (showing crane was substantially completed in 1965, and accident causing injury occurred in 1984).

³ (...continued)

General should have been notified. Because the constitutional argument has now been raised, and because of the magnitude of that issue, Appellants are now compelled to extensively discuss the statute’s constitutionality in response to Top Value’s three page argument.

The court held that the “legitimate objectives” behind the statute of repose included the fact that the architects, designers and contractors no longer had any interest in or control over the property. *Id.* at 454. The statute of repose helped to “avoid litigation and stale claims which could occur many years after an improvement to real property has been designed, manufactured and installed.” *Id.* It thereby prevented the “lapse of time” between completion and suit, which often resulted in witnesses becoming unavailable, as well as “memory loss and a lack of adequate records.” *Id.* And finally, the court observed, the statute avoided a “particularly crucial” issue, which was the “potential application of current improved state-of-the-art standards to cases where the installation and design of an improvement took place many years ago.” *Id.*

Sartori is consistent with the analyses and conclusions reached by courts all over the country. For instance, at least 26 in addition to Minnesota have held that statutes of repose like that found in Minn. Stat. § 541.051 do not violate their state constitutions’ remedies clauses, even though they may cut off claims before they can accrue. Martha Ratnoff Fleisher, Annotation, *Validity, As to Claim Alleging Design or Building Defects, of Statute Imposing Time Limitations Upon Action Against Architect, Engineer, or Builder for Injury or Death Arising Out of Defective or Unsafe Condition of Improvement to Real Property*, 2002 A.L.R.5th 21, § 3 [a] (citing cases). By 2002, only three jurisdictions still rejected their statutes of repose based on their states’ remedies clauses. *See id.* at § 3 [b] (citing cases in 8 states, 5 of which had been overruled by cases cited in § 3 [a]). Without question, statutes of repose serve a legitimate, constitutionally allowable purpose. *See, e.g., Kohn v.*

Darlington Community Schools, 698 N.W.2d 794 (Wis. 2005) (upholding statute against challenges based on remedies clause and equal protection); *Cleveland v. City of Lead*, 663 N.W.2d 212, 222-25 (S.D. 2003) (statute of repose did not violate remedies clause, even though it abrogated claims for contribution before they accrued, because statute served legitimate purpose); *Evans v. State of Alaska*, 56 P.3d 1046, 1067-69 (Alaska 2002) (no due process violation); *Craftsman Builder's Supply, Inc. v. Butler Mfg. Co.*, 974 P.2d 1194, 1197-1201 (Utah 1999) (upholding statute of repose that barred claims before they had accrued because statute was not "an arbitrary or unreasonable means to eliminate the stated evils," including "costs to construction industry" such as liability insurance and records storage costs); *Trinity River Auth. v. U.R.S. Consultants, Inc.*, 889 S.W.2d 259, 261-65 (Tex. 1994) (upholding statute of repose as against "open courts," "due process," "equal protection," and "special law" challenges); *Commonwealth of Va. v. Owens-Corning Fiberglass Corp.*, 385 S.E.2d 865, 866-69 (Va. 1989) (statute of repose did not violate Virginia remedies clause, even though claims "had accrued and were fully vested" before statute enacted); *Sartori*, 432 N.W.2d at 452.

Minnesota's analysis in *Sartori* articulated all the same four factors that courts consider in more modern constitutional cases, namely, whether the statute: 1) "abrogates;" 2) a "common law right;" 3) without providing a "reasonable substitute;" and without 4) a "permissible, legitimate legislative objective." Compare *Sartori*, 432 N.W.2d at 453 (citing *Calder*) with *Smothers v. Gresham Transfer, Inc.*, 23 P.3d 333, 356-57 (Or. 2001) (providing

detailed historical analysis of remedies clause and articulating factors). Because none of these factors can be established, any remedies clause argument necessarily must fail.

To begin, the statute of repose does not “abrogate” Top Value’s claims. It places time limitations on them. But, as several courts have held, such time limits do not “abrogate” a right, even if they effectively prevent the party from asserting its cause of action in certain circumstances. *E.g., Cleveland*, 663 N.W.2d at 223. The claims are not abolished if they are “legally cognizable,” for some, though admittedly not for the plaintiff. *Id.*

Moreover, *Lambertson v. Cincinnati Corp.*⁴ and *Calder v. City of Crystal*⁵ notwithstanding, Top Value’s contribution and indemnification claims were not “common law rights,” in existence when the Minnesota Constitution was ratified. Rather, as this Court has recognized more recently, such claims are merely remedies based on equitable principles. *See, e.g., Home Ins. Co. v. Nat’l Union Fire Ins. of Pittsburgh*, 658 N.W.2d 522, 535 (Minn. 2003) (indemnification rights governed by equitable principles); *see also Hermeling v. Minnesota Fire & Cas. Co.*, 548 N.W.2d 270, 273 n. 1 (Minn. 1996) (noting indemnity and contribution are both remedies based on equitable principles), *overruled on other grounds by Oanes v. Allstate Ins. Co.*, 617 N.W.2d 401 (Minn. 2000).

⁴ *Lambertson v. Cincinnati Corp.*, 257 N.W.2d 679, 685 (Minn. 1979) (stating contribution and indemnification were “variant common-law remedies”).

⁵ 318 N.W.2d at 843-44 (treating contribution and indemnification as common-law rights without discussion).

And even assuming, *arguendo*, that the statute of repose “abrogated” a “common law right” to contribution or indemnity existing when the Minnesota Constitution was ratified, the statute still would not violate the remedies clause because the statute provides – and had provided for at least 14 years at the time that Top Value contracted with Appellants – a readily-available “reasonable substitute,” namely an express written warranty. *See* Minn. Stat. § 541.051, subd. 4 (1980) (stating exception to statute of repose for claims based on express written warranty). Unlike Mr. Sartori, Top Value had every opportunity to negotiate for some sort of contractual protection in case this scenario occurred. It could have, for example, obtained express written warranties from Appellants. And had it done so, Top Value would not now need to assert its equitable claims: a cause of action based on an express written warranty would have had the same statute of limitations as the claim for breach of the statutory warranty. *See* Minn. Stat. § 541.051, subd. 4 (2002) (stating claim based on express written warranty may be brought within two years of discovery of breach). Top Value also could have negotiated for a provision that extended the statute of repose with respect to claims between it and Appellants. *Peggy Rose Revocable Trust v. Eppich*, 640 N.W.2d 601, 606 (Minn. 2002). Such a provision would have been enforceable under Minnesota law. *Id.* at 608.

Finally, even if this Court were somehow convinced that the statute of repose does “abrogate” a contribution claimant’s “common law right” without a “reasonable substitute,” any remedies clause argument would still fail because the Court already has explicitly held that the statute of repose furthers a “permissible, legitimate legislative objective.” *Sartori*,

432 N.W.2d at 453-54. As discussed above, *Sartori* recognized that the statute of repose was supported by at least two such objectives, namely avoiding stale claims and the application of state-of-the-art standards of care to work completed long ago. *See id.* These concerns are consistent with those articulated more recently by other state supreme courts. *E.g.*, *Cleveland*, 663 N.W.2d at 222-25 (finding designers and contractors “have no control over how property is used once construction is complete”); *Craftsman Builder’s Supply, Inc.*, 974 P.3d at 1199 (“social and economic evils” to be remedied include “records storage costs”, cost of liability insurance, and “difficulties in defending against claims asserted many years after completion”). Given the holding in *Sartori* that the “social and economic evils” caused by late-asserted claims justified barring an injured worker’s claim – which was based on actual common law rights – is there any principled basis for holding that the same statute cannot act to bar the tortfeasor’s supposed “common law right” to minimize its own liability by seeking contribution or indemnity from parties with which it had full opportunity to negotiate some sort of alternative protection? Of course not.

Top Value’s “due process” argument, while slightly more developed than any remedies clause argument, merits only a very brief response. Minnesota courts consistently hold that the Minnesota Constitution’s due process protections are identical to those provided by the U.S. Constitution. *E.g.*, *Sartori*, 432 N.W.2d at 453. And *Sartori* held that Minn. Stat. § 541.051 comports with due process. *Id.*

In addition, most states that have examined due process clauses closely distinguish them from remedies clauses. *E.g.*, *Smothers*, 23 P.3d at 355. A “due process” clause merely

protects against the adequacy of process. *Id.* And consistent with 100 year-old case law from the U.S. Supreme Court, the Due Process Clause does not guarantee against legislative interference with any particular common law rule:

A person has no property, no vested interest, in any rule of common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the legislature, unless prevented by constitutional limitations. Indeed the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to changes of time and circumstances.

Munn v. Illinois, 94 U.S. 113, 134 (1896).

Top Value has cited no Minnesota authority holding that Minn. Stat. § 541.051 violates the due process clauses of either the state or federal constitutions. Rather, ignoring *Sartori's* clear and unambiguous holding – in fact ignoring *Sartori* altogether – Top Value relies on two cases as alleged support for the proposition that Minn. Stat. § 541.051's statute of repose is unconstitutional, but only as applied to its third-party contribution and indemnification claims. *See* Resp. Brief, pp. 20-22 (*citing Calder v. City of Crystal*, 318 N.W.2d 838 (Minn. 1982); and *Minnesota Landmarks v. M.A. Mortenson*, 466 N.W.2d 413 (Minn. App. 1991)). Neither of those cases hold that Minn. Stat. § 541.051 is unconstitutional. Rather, *Calder* specifically **rejected** due process and remedies clause challenges, thereby upholding Minn. Stat. § 541.051. *See Calder*, 318 N.W.2d at 843-44. To be sure, *Calder* contained dicta (discussed below) that was favorable to Top Value's position. But that decision pre-dates the one and only Minnesota Supreme Court decision

directly on point, namely *Sartori*, which involved facts that were, if anything, significantly **more** compelling than are Top Value's facts in this case.

Top Value claims that the following language from *Calder* demonstrates that the statute of repose would be unconstitutional if it cut off contribution and indemnification claims before they could accrue:

We do not believe the legislature can pass a statute allowing a substantive remedy and yet, by adopting a procedural statute of limitations, make the remedy impossible to achieve and meaningless by barring suit from being brought before it has matured.

Resp. Brief, p. 21. (*citing Calder*, 318 N.W.2d at 844).⁶ Notwithstanding this language, however, *Calder* did not strike the then-effective version of Minn. Stat. § 541.051 on constitutional grounds. Just the opposite. The court upheld the 1980 version of the statute, stating that it had cured certain defects that caused the court to strike the statute in 1977. *See Calder*, 318 N.W.2d at 842-43 (“We believe that our legislature did close the door to objection to the statute on equal protection grounds”).

The court then had to decide whether “retroactive” application of the 1980 amendments (*i.e.*, to a right of contribution that remained “inchoate” before the statute became effective) would violate “due process.” *Id.* at 842-44. The court analyzed the “due process” question with reference to the Minnesota Constitution’s Remedies Clause, in

⁶ This particular language chosen by Top Value more appropriately suggests a “remedies clause” issue than it does a “due process” issue, and hence, the foregoing discussion regarding application of the remedies clause is provided. Top Value’s discussion of the need for adequate time to join parties, however, appears to invoke due process.

conjunction with the Fifth and Fourteenth Amendments of the U.S. Constitution. *Id.* at 844. It articulated a version of the remedies clause analysis that would come up in more modern decisions, and reiterated the by-now familiar rule that the legislature “could constitutionally abrogate a common law right without providing a reasonable substitute if it is pursuing a permissible, legitimate legislative objective.” *Id.* at 844. The court then went on to hold that retroactive application did not violate the constitution, only in part because the third-party plaintiff had sufficient time – before the 1980 amendments took effect – to join the third-party defendants, yet failed to do so. *Id.*

Dicta – even Minnesota Supreme Court dicta – is not binding; and for good reason. See *Pecinovsky v. AMCO Ins. Co.*, 613 N.W.2d 804, 808 (Minn. App. 2000) *rev. denied* (Minn. Sept. 26, 2000). Because dicta addresses facts not presented in the case before the court, the court’s analysis is not assisted by full adversarial briefing and argument focused on the issue. *Id.* It is merely an advisory opinion by the one judge who authored the decision. *Id.* And the comments in *Calder* regarding the possible unconstitutionality of a statute that would not allow any time to join third parties is an example of why dicta should not be binding on subsequent courts. It is wholly unclear how the author squared his comments regarding constitutionality with the court’s observation (just a year earlier) that “the legislature could constitutionally abrogate a common-law right without providing a reasonable substitute if it is pursuing a permissible, legitimate legislative objective.” See *Calder*, 318 N.W.2d at 844 (*quoting Tri-State Insurance Co. of Minn. v. Bouma*, 306 N.W.2d 564, 566 (Minn. 1981)). In light of *Sartori* – which, it can’t be overstated, **post-dated**

Calder – this court would not be justified in relying on dicta in *Calder* to strike the 10-year statute of repose – not even for contribution claims.

Finally, *Minnesota Landmarks v. M.A. Mortenson*, 466 N.W.2d 413 (Minn. App. 1997) does nothing to help Top Value. The only relevant holding in *Minnesota Landmarks* was that the 1988 statutory amendment revived the third-party plaintiff's contribution and indemnification claims. *See id.* at 415-16. In *Minnesota Landmarks*, the third-party defendants attempted to assert defenses to the plaintiff's claims against Mortenson, claiming that because the plaintiff's claims against Mortenson were barred by the statute of limitations, Mortenson's third-party contribution claim was barred as well. *See id.* at 415. The court naturally rejected this attempt at asserting such "derivative" defenses because of Minn. R. Civ. P. 14. *Id.* The court of appeals, however, then went on to hold that the 1988 amendment applied, and thus the contribution and indemnification claims were not barred because they did not accrue until there was a payment. *Id.* at 416. In other words, the court refused to apply the pre-1988 statute under which the statute of limitations for contribution and indemnity ran from discovery of the injury. That is all *Minnesota Landmarks* stands for, and it does nothing to assist Top Value.

There is simply no constitutional basis upon which to affirm the Court of Appeals decision.

III. Equity and Justice are not a Valid Basis for Ignoring a Statute of Repose.

Finally, Top Value concludes its brief by invoking equity and justice and this Court's decision in *City of Willmar v. Short-Elliott-Hendrickson, Inc.*, 512 N.W.2d 872 (Minn. 1994).

Neither “equity” nor *City of Willmar*, however, support Top Value’s claim that the statute of repose is inapplicable to contribution claims.

City of Willmar simply is inapplicable. That case concerned the interplay between two statutes of limitations – Minn. Stat. § 541.051 and the four-year U.C.C. statute of limitations in Minn. Stat. § 336.2-725 – and their application to various claims arising out of a malfunctioning waste water treatment plant. The City of Willmar sued, among others, the consulting engineers (Short-Elliott) and the manufacturer of a critical component (Clow Corporation). In an earlier decision, the Court held that the City’s claim against Clow was a breach of warranty action for the sale of goods and was barred by the U.C.C. statute of limitations. See *City of Willmar*, 512 N.W.2d at 873 (summarizing *City of Willmar v. Short-Elliott-Hendrickson, Inc.*, 475 N.W.2d 73 (Minn. 1991)). The City’s claims against Short-Elliott, however, were governed by Minn. Stat. § 541.051. Despite these conclusions, Clow remained in the lawsuit because of Short-Elliott’s crossclaim for contribution or indemnity. *Id.* Thus, the issue in *City of Willmar* was whether Short-Elliott’s crossclaim for indemnity and contribution against Clow could be maintained even though the City’s claims against Clow were barred by the statute of limitations. The Court concluded that because the plaintiff was not bringing the contribution claim, and because the U.C.C. statute of limitations did not apply to the contribution claim, Clow could not be dismissed. *City of Willmar*, 512 N.W.2d at 877.

Top Value’s reliance on *City of Willmar* is misplaced because, notwithstanding the Court’s comments regarding equity and fairness, that case did not concern a statute of repose,

as even Top Value reluctantly admits. In the end, equity and fairness arguments really have no place and cannot be determinative when considering statutes of repose. Such statutes are, by their very nature, inherently harsh: “Statutes of repose by their nature reimpose on some plaintiffs the hardship of having a claim extinguished before it is discovered, or perhaps before it even exists. . . .” William L. Prosser & W. Page Keeton, *Prosser and Keeton on the Law of Torts*, § 30, at 168 (W. Page Keeton *et al.*, Eds., 5th Ed. 1984). But harshness should not be confused with equity, and the courts must presume that the legislature, in enacting statutes of repose, already has balanced the equities and made a determination that the avoidance of litigation of stale claims outweighs any unfairness in terminating rights of action after a specified period has elapsed.

Finally, equity is not a valid concern under the particular facts of this case. As in *Calder*, Top Value’s fairness and equity claims ring “hollow” because it was aware of and had investigated the Westons’ claims months before it was sued, identifying one of the Appellants (Windsor Window) as early as a year before the statute of repose had run (*See* App. 48), and because Top Value had a full two months after it was sued to assert its inchoate contribution claim. For whatever reason, Top Value created its present predicament by failing to initiate its third-party claim within those two months, instead waiting an additional eight months before asserting its contribution claim.⁷

⁷ The fact that Top Value was not left without a remedy (the supposed unfairness in this case) further undercuts its *Calder*-based due process argument.

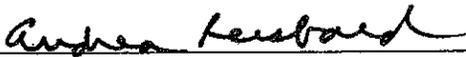
CONCLUSION

The trial court properly concluded that Top Value's third-party contribution action was time-barred under the ten-year statute of repose set forth in Minn. Stat. § 541.051. For all of the reasons discussed above, and in Appellants' opening brief, Appellants respectfully request that the decision of the Court of Appeals be reversed, and the trial court's judgment reinstated.

Respectfully submitted,

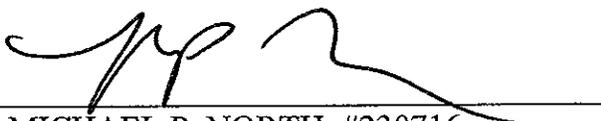
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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).