

State of Minnesota  
In Court of Appeals

LAKE SUPERIOR CENTER AUTHORITY, a Public Corporation and  
LAKE SUPERIOR CENTER, A Non-Profit Corporation, d/b/a GREAT LAKES AQUARIUM,  
*Plaintiffs,*

vs.

HAMMEL GREEN & ABRAHAMSON, INC., A Minnesota Corporation,  
and RUTHERFORD & CHEKENE, A California Corporation,  
*Defendants and  
Third Party Plaintiffs,*

vs.

MELANDER, MELANDER & SCHILLING ARCHITECTS, INC., ADOLPHSON & PETERSON,  
INC./JOHNSON WILSON CONSTRUCTION MANAGEMENT, a joint venture, LLP, KOOSMAN  
PROJECT MANAGEMENT SERVICES, INC., AMERICAN ENGINEERING TESTING, INC., &  
KRECH/OJARD & ASSOCIATES, P.A., MARCY CONSTRUCTION CO., DULUTH READY MIX  
CONCRETE, INC., & CONCRETE RESTORERS, INC.,  
*Third Party Defendants,*

and

MARCY CONSTRUCTION COMPANY,  
*Third Party Defendant and  
Fourth Party Plaintiff,*

vs.

RUTHERFORD & CHEKENE, a California Corporation,  
*Defendant,*

vs.

DULUTH READY MIX CONCRETE, INC., & CONCRETE RESTORERS, INC.,  
*Fourth Party Defendants*

RESPONDENT HAMMEL, GREEN & ABRAHAMSON, INC.'S (HGA) BRIEF

CLAPP & ERICKSON  
Donald G. Clapp, Esq. (#17000)  
386 North Wabasha Street  
Suite 1450  
Saint Paul, Minnesota 55102  
(651) 223-8100

FRYBERGER, BUCHANAN, SMITH, et al.  
Stephanie A. Ball, Esq. (#191991)  
700 Lonsdale Building  
302 West Superior Street  
Duluth, Minnesota 55802  
(218) 722-0861

*Attorneys for Respondent HGA*

*Attorneys for Appellants*

(Additional Counsel Listed on Following Page)

ADDITIONAL COUNSEL:

COLEMAN HULL & VAN VLIET  
Jeffrey W. Coleman, Esq.  
8500 Normandale Lake Boulevard  
Suite 2110  
Minneapolis, MN 55437

DOWNS LAW FIRM  
Timothy J. Downs, Esq.  
306 West Superior Street  
Suite 200  
Duluth, MN 55802-1973

ARTHUR CHAPMAN, ET AL.  
Robert W. Kettering, Jr., Esq.  
81 South Ninth Street  
Suite 500  
Minneapolis, MN 55402

COUSINEAU MCGUIRE  
& ANDERSON  
James Haigh, Esq.  
1550 Utica Avenue South  
Suite 600  
Minneapolis, MN 55416

FRYBERGER, BUCHANAN,  
SMITH, ET AL.  
Stephanie A. Ball, Esq.  
700 Lonsdale Building  
302 West Superior Street  
Duluth, MN 55802

CONCRETE RESTORERS, INC.  
Anthony Coda  
2120 East Third Street  
Duluth, MN 55812

MOORE COSTELLO & HART  
Larry Hanson, Esq.  
1400 Norwest Center  
55 East Fifth Street  
St. Paul, MN 55101-1792

STATE OF MINNESOTA  
IN COURT OF APPEALS  
Appellate Court Case Numbers A05-0800 and 05-1533

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AUTHORITY, a public corporation and  
LAKE SUPERIOR CENTER, a  
Non-profit corporation, d/b/a/  
GREAT LAKES AQUARIUM,

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Defendants and  
Third-Party Plaintiffs

**RESPONDENT HAMMEL, GREEN  
AND ABRAHAMSON, INC.'S (HGA)  
BRIEF**

v.

MELANDER, MELANDER &  
SCHILLING ARCHITECTS, INC.,  
ADOLPHSON & PETERSON, INC./JOHNSON  
WILSON CONSTRUCTION MANAGEMENT,  
a joint venture, LLP, KOOSMAN PROJECT  
MANAGEMENT SERVICES, INC.,  
AMERICAN ENGINEERING TESTING, INC.,  
and KRECH/OJARD & ASSOCIATES, P.A., MARCY  
CONSTRUCTION COMPANY, DULUTH  
READY MIX CONCRETE, INC., and CONCRETE  
RESTORERS, INC.,

Third Party Defendants,

and

MARCY CONSTRUCTION COMPANY,

Third Party Defendant and  
Fourth Party Plaintiff,

and

RUTHERFORD & CHEKENE, a  
California corporation,

Defendant,

vs.

DULUTH READY MIX CONCRETE, INC.,  
and CONCRETE RESTORERS, INC.,

Fourth Party Defendants.

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**RESPONDENT HAMMEL, GREEN AND ABRAHAMSON, INC.'S (HGA) BRIEF**

Donald G. Clapp (# 17000)  
Clapp & Erickson  
386 North Wabasha St.  
Suite 1450  
St. Paul, MN 55102  
651-223-8100  
*Attorneys for Respondent HGA*

Stephanie A. Ball (# 191991)  
Fryberger, Buchanan, Smith, et al  
700 Lonsdale Building  
302 West Superior Street  
Duluth, MN 55802  
218-722-0861  
*Attorneys for Appellants*

Jeffrey W. Coleman.(# 157922)  
Coleman, Hull & Van Vliet  
8500 Normandale Lake Boulevard  
Suite 2110  
Minneapolis, MN 55437  
952-841-0001  
*Attorneys for Respondent Rutherford & Chekene (R&C)*

Robert W. Kettering, Jr. (# 55499)  
Arthur, Chapman, Kettering, et al  
81 South 9<sup>th</sup> St.  
Suite 500  
Minneapolis, MN 55402  
612-339-3500  
*Attorneys for Respondent Melander, Melander & Schiling, Architects, Inc. (MMS)*

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## STATEMENT OF LEGAL ISSUES

### I. DOES MINN. STAT § 544.42(6)(b) REQUIRE THAT PLAINTIFFS' COMPLAINT BE DISMISSED.

The district court held in the negative and ruled that the Appellants were entitled to an extension of time to certify expert review and file their Affidavit.

### II. ARE PLAINTIFFS CLAIMS BARRED BY THE STATUTE OF LIMITATIONS IN MINN. STAT. § 541.051 BECAUSE THEY FAILED TO BRING THEIR ACTION WITHIN TWO YEARS OF DISCOVERY OF THE UNSAFE AND DEFECTIVE CONDITION?

The district court held in the negative.

### III. WAS HGA ENTITLED TO A DIRECTED VERDICT AT THE CONCLUSION OF THE APPELLANTS CASE IN CHIEF?

The district court held in the negative.

### IV. WAS THE COURT'S TAXATION OF COSTS PURSUANT TO RULE 68 APPROPRIATE? SHOULD HGA BE ABLE TO TAX THE COST OF THE DAILY TRANSCRIPT?

The district court held that HGA was entitled to tax costs and disbursements pursuant to Rule 68. The district court denied the request to tax the daily transcript although the district court said if case law were different the court would have granted the request.

### V. WAS THE LSCA ENTITLED TO A STAY OF ENFORCEMENT OF THE JUDGMENT FOR COSTS AND DISBURSEMENTS?

The district court held in the in the affirmative.

### VI. WERE APPELLANTS ENTITLED TO A JUDGMENT NOTWITHSTANDING THE VERDICT?

The district court held in the negative and ruled that the Appellants had not met the requisite standard(s) for a judgment notwithstanding the verdict (JNOV).

**VII. WERE APPELLANTS ENTITLED TO A NEW TRIAL?**

The district court held in the negative and ruled that the Appellants had not met the requisite standard(s) for a new trial.

**XI. WERE THE APPELLANTS ENTITLED TO AMEND THEIR CLAIMS AND ADD PARTIES AFTER THE VERDICT PURSUANT TO RULES 14 AND 15?**

The district court held in the negative.

**XII. IS THERE A LEGAL OR FACTUAL BASIS TO OVERTURN THE TRIAL COURTS FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING THE PROFESSIONAL FEES DUE TO HGA (THAT INCLUDES FEES DUE TO MMS)?**

The district court held in the negative.

**XIII. WAS THE DISTRICT COURT'S TAXATION OF COSTS PURSUANT TO RULE 68 APPROPRIATE AND SUPPORTED BY FACT AND THE LAW?**

The district court held in the affirmative.

**STATEMENT OF CASE--PROCEDURAL HISTORY--STATEMENT OF FACTS**

This litigation arises out of the design and construction of the Great Lakes Aquarium located in Duluth, Minnesota ("Project").

**1. *The Parties***

Appellant Lake Superior Center Authority ("LSCA") is a public corporation that the legislature created in 1990 to, among other things, obtain financing, purchase the land, and enter into contracts for the construction of the Project. MSA § 85; (T. 138; Appellants Lake Superior Center Authority and Lake Superior Center's Appendix (hereinafter LSC) LSC 556) Appellant Lake Superior Center ("LSC") is a nonprofit corporation formed in 1989 that originally managed the daily operation of the Aquarium. (T. 139) The LSC was formed before the LSCA. The LSCA and LSC are separate entities.

In June 1997, the LSCA contracted with respondent Hammel, Green and Abrahamson, Inc. ("HGA") to serve as project architect. (T. 54-56; Tr. Ex. 358) HGA then contracted with Rutherford & Chekene, Inc ("R&C"), a specialty structural engineering firm located in Oakland, California, with experience in designing large aquarium tanks, to provide the structural design services for the Project's exhibit tanks. R&C is an experienced aquarium tank designer having designed tanks for the Monterey Bay Aquarium and Longbeach Aquariums in California and the Shedd Aquarium in Chicago, Illinois, among with several others. (T. 93-94; Tr. Ex. 370) The R&C/HGA contract incorporates the terms and conditions of the HGA/LSCA contract. (T. 94; Tr. Ex. 370) HGA also contracted with Melander, Melander & Schilling Architects, Inc. ("MMS"), a Duluth architectural firm, to provide on-site architectural site observations. (T. 2268, 2279; Tr. Ex. 288, 363)

The LSC entered a contract with American Engineering Testing (AET) to provide special inspections. (Tr. Ex. 363) The AET contract was the only construction-related contract that the LSC entered into for the Project. (T. 2220-21) Under this contract, the LSC agreed to limit AET's liability arising out of the Project to \$50,000. (T. 4137; Ex. 288) The LSCA entered into all other design and construction-related contracts necessary for the Project. (Tr. Ex. 217, 356, 358, 359, 360, 361, 362) In addition, Marcy Construction Company ("Marcy") contracted with Duluth Ready Mix ("DRM") and eventually AET (either direct or as a sub contractor to DRM) to design the concrete mix for the Project, which was Marcy's contractual obligation in accordance with the Project's plans and specifications. (T. 2395-96; Tr. Ex. 2 page 03301-6, "2.4 proportioning"; see also Tr. Ex. 374 page 03301-6) The LSCA selected Krech/Ojard

Associates ("K/O") to provide special inspection services as required by the Minnesota Building Code. (T. 4552-53; Tr. Ex. 3595 and 1003) These services included inspecting the reinforcing steel and concrete forms before Marcy placed the concrete. (Tr. Ex. 3595 and 373, page 01410-3, 4 (G.2), page 01410-10, 11 (items C., D.)) Based on this selection, AP/JW contracted with K/O to provide those services. (T. 1832-33; Tr. Ex. 3595)

The LSCA also contracted with Marcy to serve as the Project's concrete contractor. (T. 2726-27; Tr. Ex.360) Among other things, Marcy was responsible for constructing the Project's exhibit tanks and agreed to provide the necessary labor and materials for the Project's concrete work. (T. 2729; Tr. Ex. 360) While HGA and R&C provided the Project plans and specifications, including those for the Isle Royale tank, Marcy was contractually responsible for the means and methods used to construct the Project. (T. 100, 108-109, 5144; Tr. Ex. 360) The LSCA contracted with Listul Industries, Inc., ("Listul") to construct the Project's structural steel, which included the building structural frame and roofing. (Tr. Ex. 359)

## **2. *The Project Schedule***

The Project was originally set to commence on August 20, 1998. (T. 222; Tr. Ex. 364) The LSCA's contracts with Marcy and Listul both contained a substantial completion date of November 26, 1999, "subject to adjustments of this Contract Time as provided in the Contract Documents." There were no "adjustments" but instead the completion date was eventually constructively abandoned. (T. 4703-05; Tr. Ex. 359 and 360) AP/JW was contractually responsible for coordinating the activities of the various contractors and creating and revising construction schedules as necessary. (Tr. Ex.

217 ¶ 2.3.5) Under its contract, Marcy agreed to "conform to the most recent schedules" that AP/JW issued. (Tr. Ex. 360, ¶ 3.10.4) Unlike the Marcy and Listul contracts, the LSCA's contract with HGA, and HGA's contract with R&C, contain no completion date or "time is of the essence" clauses. (T. 1391; Tr. Ex. 358 and 370) The HGA contract did, however, call for an active construction period of no more than 18 months for purposes of defining the time limit within which HGA was required to provide construction phase services. (Tr. Ex. 358 § V, ¶ 3)

Because of a citizen lawsuit challenging the financing for the Project and the decision of the LSCA and LSC to rebid the Project, construction did not commence until January 15, 1999. (T. 1435-36, 4641-43) The date for substantial completion stated in the Marcy and Listul contracts was never changed and the November 26, 1999 completion date was abandoned. (T. 193-94, 1435-36, 4703-05; Tr. Ex. 359 and 360) In April 1999, the owners' representative, Charles Koosman, reported to the Lake Superior Center Building Committee's executive director, David Lonsdale, that the estimated completion date of the Project had been changed to August 7, 2000. (T. 1235-36; Tr. Ex. 381-Mtg. No. 8, ¶ 8.02) And on July 22, 1999 (15 days before Marcy began to pour any concrete on the Isle Royale tank) and again on September 23, 1999, AP/JW pushed the scheduled completion date back to August 21, 2000. (T. 1236-47; Tr. Ex. 381, meetings No. 10 and No. 11 ¶¶ 10.02 and 11.02 respectively) Indeed, the various construction schedules that AP/JW issued between May 1999 and June 2000 and reported to the LSC Building Committee by Mr. Koosman showed project completion dates that ranged from June 1, 1999 to October 16, 2000. (T. 4703-04; Tr. Ex. 381) The aquarium opened to the public on July 29, 2000.

### **3. Construction of the Exhibit Tanks**

During the project, there were conversations between several Project participants regarding the complexity of the concrete pour of the Isle Royale tank, given the amount of reinforcing steel contained in the structure and Marcy's ability to perform this work satisfactorily. (T. 4303-04, 5137-39; Tr. Ex. 108 and 171) Prior to the concrete placement on the Isle Royale tank, Craig Kronholm of AP/JW wrote to Chris Rowe, Marcy's foreman, to warn Rowe that he was concerned about Marcy's apparent plan for the placement of concrete and to suggest alternate means and methods for placing the Isle Royale tank concrete, advice that Marcy ultimately ignored. (T. 5137-50; Tr. Ex. 108) The project specifications prepared by R&C allowed the use of pour ports to aid in placement of the concrete and such ports were to be used at the discretion of the contractor, something Marcy chose not to do. (T. 5256-63; Tr. Ex. 374, p 03301-9, § 3.3 (F))

HGA required that Marcy pour a mock-up of one panel to establish a benchmark for surface finish in the final result. (T. 4655). The first mock up was rejected by HGA's employee Robert Lundgren in a letter of July 26, 1999. (Exhibit 23). Marcy then revised the concrete mix from T-1 to T-1R and poured a second mock-up. HGA through Robert Lundgren gave "conditional" approval to the second mock-up in a letter to Koosman dated August 11, 1999. (See Exhibit 8). On August 16, 1999 Koosman wrote a letter (Exhibit 9) expressing concern over the conditional acceptance because of potential repair costs in excess of the amount budgeted for repairs. (T. 4652) On August 17, 1999 Koosman, HGA and Marcy attended a contractors meeting (See Exhibit 380 tab 4)(HGA Appendix p. 495). The possibility of requiring Marcy to do a

third mock-up was discussed and then rejected, all in the presence of Koosman, the owners representative. (Tr. Exhibit 380 tab 4) (HGA Appendix p. 495) There is no evidence HGA objected to a third mock-up. In fact, Harold Davis of R&C visited the site on September 8, 1999 (Tr. Exhibit 435-3) (HGA Appendix p. 499-500) and Mr. Schilling of MMS noted in the Exhibit 435-3 at paragraph 3.10 "The sample wall was reviewed. Hal stated that he felt the condition of the sample was a good example and felt that if we could achieve the result of the sample wall that would be acceptable." The sample wall was in fact the second mock-up panel.

When Marcy started pouring concrete for the Isle Royal tank on September 16, 1999, problems became immediately evident. (T. 1626-27, 1769-71; Tr. Ex. 430, nos. 85-1 and 86) According to an affidavit from the owner of Duluth Remedy Mix Concrete ("DRM"), on the morning of the pour, Marcy called and ordered the concrete mix designated as "T1". (Respondent R&C's Appendix (hereinafter R&C), page 295-297) AET, in its role as special inspector for the LSC, did not discover the delivery and use of the T1 concrete mix until after it had been poured into the bottom of the tank forms. (T. 2408-2416; Tr. Ex. 285) AET's practice was to collect the load tickets for the trucks only at the completion of the emptying of the truck to ensure that anything added to the concrete mix at the site, such as water, admixtures, etc., would be noted. (T. 2415-17; 2448 Tr.) No testimony was offered or admitted alleging AET's practices breached any standard of care for special inspections and no expert testimony was offered making a causal link to any damage.

Marcy failed to use pour ports, which are openings in the sides of the forms through which concrete can be poured and were authorized under the specifications for

the tank that R&C prepared, or leave out the window sill forms to facilitate the placement of concrete around the tank viewing windows. (T. 5256-75; Tr. Ex. 415, photo P9140036.jpg, and 422, photo PA250014.jpg) Both Matthys Levy and James Metzler, experts for HGA and R&C, testified that these were the proper methods to use in such a construction project, and Metzler testified that he used these methods in constructing the aquatic tanks and viewing windows for the Minnesota Zoo's aquarium. (T. 5248-56, 3988-92; Tr. Ex. 3603 (DVD animation used for illustrative purposes)) Based on the events during the pour, K/O immediately informed the LSCA that "the quality of the product appears likely to have some defects, the extent of which cannot be evaluated till forms are stripped." (Tr. Ex. 430 no. 85-1)

Marcy stripped the forms for the Isle Royale tank in late September through early October 1999, and discovered significant problems. (T. 2796; Tr. Ex. 21) These problems included numerous areas of "honeycombing"; several large voids where there was no concrete; and various other defects. (Tr. Ex. 420 and 421 (multiple photographs of tank concrete)) The LSCA became aware at that time that Marcy would have to provide significant repair and remediation to the Isle Royale tank. A meeting was held at the Project site on October 26, 1999, and a repair plan was discussed between representatives of Marcy, HGA, R&C, A&P, Koosman, MMS, and K/O. (T. 957; Tr. Ex. 21) On March 20, 2002, John Carlson, one of AP/JW's construction managers, wrote to Koosman, advising that "we are most likely heading to court or arbitration" and that the LSCA and LSC should hire an "independent specialist to evaluate all aspects of affecting (sic) the quality of the existing tanks." (T. 2821; Tr. Ex. 38) (HGA Appendix p. 494) According to Koosman and David Lonsdale of the LSCA the result of the pour of

the Isle Royale tank was much worse than the second mock-up conditionally approved by HGA. (T. 2744, 4671) In fact it was thought to have been worse than the appearance of the first mock-up rejected by HGA in July 1999. (T.4671, 4672)

The Isle Royale tank was ultimately repaired, the aquarium opened to the public on July 29, 2000. (T. 5457; Tr. Ex. 381-No. 19 ¶ 19.02) Robert Davenport, the construction-scheduling expert for R&C, testified that there was no delay in the opening of the aquarium and that the facility took until July 29, 2000 to open due to the actions of Listul, the LSCA and the LSC which were unrelated to concrete tank construction. (T. 5541-42, 5458-72; Tr. Ex. 3618) The opening date also approximated the 18-month active construction period anticipated in the HGA contract (Tr. Exhibit 358).

#### **4. Procedural Posture**

In March 2001, Marcy brought an arbitration action against the LSCA for various claims, including its claim to recover the additional expenses it allegedly incurred as a result of the repair work on the Isle Royale tank. (T. 3119-3120; Tr. Ex. 1041 and 1044) The LSCA counterclaimed against Marcy, alleging delay damages in excess of one million dollars as a result of Marcy's defective work. (Tr. Ex. 1043) On or about January 10, 2002, Marcy and the LSCA settled their claims against one another by means of a *Pierringer* agreement. (LSC 97-104) Under the agreement, the parties agreed to drop their claims against one another and the LSCA agreed to pay Marcy \$465,000 to settle its claims against the LSCA. (T. 3127; Tr. Ex. 1048) In addition, the LSCA agreed to indemnify and hold Marcy harmless against any claims arising out of Marcy's work on the Project.

On May 3, 2002, the LSCA and LSC commenced suit against HGA, alleging breach of contract, negligent design, vicarious liability, breach of warranty, and claims for contribution and indemnity. (LSC 1-32) The LSCA and LSC sought damages for the cost to repair the Isle Royale tank and the lost net operating revenues that it alleged were the result of the delay in the opening of the Project. (LSC 10-11) They claimed that the problems with the Isle Royale tank concrete were due to design defects and that these problems caused the Project opening to be delayed, resulting in lost net operating revenues to the LSC. At the time they served their summons and complaint, the LSCA and LSC submitted an affidavit from their counsel that due to the running of the statute of limitations they could not reasonably obtain the affidavit of expert review required pursuant to Minnesota's Expert Affidavit Statute, Minn. Stat. § 544.42, before commencing the action. (Respondent HGA's Appendix (hereinafter HGA Appendix), page 13)

HGA denied the claims of the LSCA and LSC, and asserted counterclaims for breach of contract and a violation of Minnesota's Prompt Payment Statute based on the failure of the LSCA and LSC to pay its professional fees under its contract. (LSC 58-71) In late July 2002, within 90 days of suit being commenced, HGA commenced third-party claims for contribution and indemnity against R&C, MMS, AP/JW, K/O, Koosman, and AET. (LSC 49-57)

On August 6, 2002, HGA's counsel requested that the LSCA and LSC voluntarily dismiss their complaint because they had not submitted the affidavit of expert review within 90 days of when they served their summons and complaint as required under Minn. Stat. § 544.42. (HGA Appendix p. 107, ¶ 5) Three days later, the LSCA and LSC

filed an Application for Extension of Time Limits because, as the district court noted, "plaintiffs' counsel recognized that more than 90 days had elapsed subsequent to the summons and complaint being served before the affidavit of expert review required by Minn. Stat. § 544.42, subdivision 3(a)(1) had been provided." (HGA Appendix p. 362) During this 90-day period, neither the LSCA nor the LSC had moved for an extension of time to provide the required affidavit of expert certification.

By Order filed September 23, 2002, the district court granted motion of the LSCA and LSC to extend the time limits under Minn. Stat. § 544.42. (HGA Appendix p. 360) Despite recognizing that the LSCA and LSC had failed to submit the required affidavit of expert certification within the time required under the statute, the district court concluded that good cause existed for their failure to provide the required affidavit(s) within the time prescribed by the statute due to their "excusable neglect" in submitting the affidavit(s). (HGA Appendix p. 360-366)

Less than two weeks later, the district court denied the summary judgment motions of HGA and R&C based on the failure of the LSCA and LSC to provide the required affidavit of expert certification within the strict time periods set forth in Minn. Stat. § 544.42. (HGA Appendix p. 367) In denying the motions, the district court relied on its previous order and memorandum granting the LSCA and LSC an extension of time to provide such an affidavit. (HGA Appendix p. 360) HGA appealed the decision to this Court, which denied an interlocutory review of the district court's Order. (HGA Appendix p. 385-395) The Minnesota Supreme Court denied further review. (HGA Appendix p. 401)

The following spring, HGA and R&C moved the district court for summary judgment on the ground that the two-year statute of limitations governing improvements to real property set forth in Minn. Stat. § 541.051, barred the claims of the LSCA and LSC. (R&C 32-48) By Order filed May 7, 2003, the district court denied the motions after ruling that no "actionable injury" arose when the defective concrete work was discovered in October 1999. (HGA Appendix p. 370) The court concluded that the dispute resolution process and claims administration process set forth in the parties' contracts worked to toll the statute of limitations. (HGA Appendix p. 370-384) The court further ruled that genuine issues of material fact existed with regard to the claims of the LSCA and LSC that HGA was estopped from raising a statute of limitations defense because HGA allegedly made certain representations that the cause of the tank problems were not design issues. (HGA Appendix p. 370-384)

Koosman had been joined in this litigation by HGA's third party complaint. (HGA Appendix p. 23) Koosman was dismissed by Stipulation of the parties---after the district court ruled that there was "attorney-client privilege" as to communications between Appellants and Koosman and their counsel.

In August of 2003 HGA sought, and the district court granted, the court's permission to join Marcy to the litigation. HGA sought such permission after the LSC alleged it was not a "party to the *Pierringer* agreement with Marcy" and therefore were not bound by it. Marcy subsequently brought a motion for summary judgment and the district court granted the motion finding the LSC was bound by the terms of the *Pierringer* agreement with Marcy.

In October 2003, nearly 18 months after its original summons and complaint against HGA, the LSC asserted direct claims against R&C for negligence and contribution and indemnity. (LSC 33-48) The LSC sought to recover the money that it had paid as part of its settlement with Marcy and the lost net operating revenues it claimed were the result of the alleged delay in the opening of the aquarium that it attributed to the problems with the Isle Royale tank. (LSC 44-47) R&C denied the LSC's claims, and at the same time, brought crossclaims for contribution or indemnity against HGA, Marcy, AP/JW, Melander, K/O, and AET and alternative third-party claims against Concrete Restorers (CR), DRM, Marcy, AP/JW, Melander, K/O, and AET. (R&C 98-108)

In April 2004, HGA and R&C entered into a settlement agreement and executed a *Pierringer* release. (LSC 436) Under the settlement agreement and release, HGA agreed to release its claims against R&C and to indemnify and hold R&C harmless to the extent of the insurance available to HGA. (LSC 436) In return, R&C tendered its remaining available insurance to HGA and assigned all of its rights, claims, and defenses in the action to HGA. (LSC 436) A copy of the settlement agreement was provided to both the district court and the LSCA and LSC. (LSC 436)

In May 2004, R&C and HGA jointly made a Rule 68 Offer of Settlement to the LSCA and LSC in the amount of \$1,000,000.00. (HGA Appendix p. 403) The LSCA and LSC did not accept the offer.

In late July 2004, approximately a month before trial was set to commence, HGA settled its claims against K/O pursuant to a settlement agreement. (LSC 447) Under this agreement, K/O agreed to pay \$100,000 to HGA in return for a release of all claims against it by HGA. In turn, HGA agreed to defend, indemnify, and hold K/O harmless up

to the extent of its available insurance coverage, which was five million dollars. (LSC 447) HGA provided the district court and the LSCA and LSC with copies of this settlement agreement. (Transcript of August 27, 2004)

Approximately a week later, on August 4, 2004, HGA entered into a settlement agreement with AET. (LSC 457) The agreement was substantially similar to HGA's settlement agreement with K/O. (LSC 457, LSC 447) On August 27, 2004, HGA entered into a settlement agreement with AP/JW that was substantively similar to HGA's settlement agreements with K/O and AET. (LSC 466) As it did with the other settlement agreement, HGA provided copies of these settlement agreements to the district court and the LSCA and LSC before trial. (See transcript of August 27, 2004 proceedings)

HGA moved to dismiss AP/JW, K/O and AET because the LSCA and LSC had made no direct claims against them. (transcript of August 27, 2004) The district court dismissed the settling parties, and in its order, granted the LSCA and LSC leave to assert direct claims against them to the extent the law and procedure allowed. (LSC 144-145) R&C remained in the case as a direct defendant. **The LSCA and LSC did not bring direct claims against AP/JW, K/O, AET, in either of its roles on the Project or any other party at any other time in this litigation.** The LSCA and LSC did, however, move the district court to amend its complaint to include a claim for punitive damages against R&C and HGA. (R&C 141-148) The court denied the motion at that time, but reserved the issue for a later consideration. (R&C 149-150)

After the parties selected the jury, but before opening statements, R&C dismissed its claim against DRM.

## 5. Trial

The trial began with the LSCA and LSC as Plaintiffs, HGA and R&C as Defendants, MMS, DRM and CR as Third-Party Defendants. CR did not appear in the proceeding. DRM (technically a Fourth-Party Defendant) was dismissed before testimony began in the case.

The case began with *voir dire* on August 31, 2004, and continued through October 23, 2004. On October 8, 2004 Appellants rested and HGA, MMS and R&C brought motions for directed verdict. The district court granted the MMS motion and denied those of HGA and R&C. (T. 3719-3796).

After nearly eight weeks of trial, the jury returned a special verdict on October 23, 2004. (LSC 195) The jury awarded the LSCA and LSC damages for the defects in the Isle Royale tank in the amount of \$270,000, which is \$1,000 more than what counsel for the LSCA and LSC requested during her closing argument. (T. 6012) The jury found that Marcy and AET, in its capacity as special inspector for the LSCA and LSC, were negligent and that this negligence was the direct and proximate cause of the damage to the Isle Royale tank. (LSC 205) The jury apportioned 75% of the fault to Marcy, and the remaining 25% to AET, in its capacity as special inspector for the LSC. (LSC 205) Although the jury found the LSCA, LSC, and Koosman negligent, it found that this negligence was not a direct cause of the damages to the tank. (LSC 204, 201) The jury specifically found that neither HGA nor R&C were negligent in their respective designs and specifications for the Isle Royale tank. (LSC 197-198) It further found there was no negligence on the part of AP/JW; K/O; CR; or AET, in its role as designer of the concrete mix, for the damage to the tank. (LSC 199-204) The jury found that

there was no delay in the completion of the Project as a result of the design or construction of the Isle Royale tank. (LSC 197) The jury also found that that the LSCA and LSC knew, and were aware, of their injury before May 1, 2000. (LSC 208)

## **6. *Post-trial Motions***

Based on the jury's special verdict, the district court filed an Order for Judgment on November 4, 2004, dismissing DRM and the claims of the LSCA and LSC against HGA and R&C. (LSC 236) The LSCA and LSC moved to amend the pleadings under Rules 14 and 15 of the Minnesota Rules of Civil Procedure, and for an order determining certain parties liable in indemnity as a matter of law. They sought the right to assert direct claims against Koosman, AP/JW, K/O, and AET all who had previously been dismissed and against whom they had not asserted direct claims at trial. (LSC 349)

On December 10, 2004, the LSCA and LSC moved the district court for judgment notwithstanding the verdict (JNOV) or, in the alternative, a new trial. (LSC 374) They also renewed their motion to amend the pleadings and for an order determining certain parties liable in indemnity as a matter of law. (LSC 374) In addition, they sought an order from the district court ruling that they were prevailing parties under Minn. Stat. § 549.04. (LSC 374) Three days later, the LSCA and LSC amended their motion for JNOV, or, in the alternative, a new trial. (LSC 378)

On February 22, 2005, the district court entered judgment on its November 4, 2004 Order for Judgment, reducing the jury's special verdict to judgment. Also by two separate orders, the district court denied the post-trial motions of the LSCA and LSC in their entirety. (LSC 240-275) In denying the motion of the LSCA and the LSC for JNOV, the district court concluded that "[n]o aspect of the jury findings is manifestly against the

evidence adduced at trial. (LSC 256) It cannot be said that reasonable minds could not differ and that only one result could be reasonably be reached upon the record at trial." (LSC 256) The court noted that the jury "was as thoughtful and attentive as any the Court has had the pleasure of presiding over [and i]t was obvious throughout that the members of the jury were paying attention, perceptive, and dedicated to their term of service." (LSC 256) The court ruled that the jury's verdict had reasonable, "indeed ample, support in the record." (LSC 256)

The district court also rejected the motion for a new trial by the LSCA and LSC. (LSC 254) The court first noted that counsel for the LSCA and LSC failed to object at trial to many of the numerous errors of law and procedure on which they based their new trial motion. (LSC 257) The court further observed that the other errors "are not accompanied by specific reference to the trial record . . . [and] The Court is thus left at sea in certain instances as to what specific comments or rulings are proffered as the basis for relief." (LSC 257-258)

The court, however, did carefully consider the alleged errors for which the LSCA and LSC had provided sufficient detail, and concluded: (1) the settlement agreements between HGA and the dismissed parties did not result in any prejudice to the LSCA or LSC because the testimony of the released parties was tested by cross-examination and there was no evidence presented of any conspiracy or untruthful testimony; (2) defense counsel did not engage in misconduct and that during the long and complicated trial, "[a]ll counsel were professional in their manner and presentations"; and (3) the use of the word "soiree" was not misconduct and merely reflected a word that defense counsel used to refer to a "meeting." . (LSC 257-275)

The court similarly rejected the motion for new trial based on the claim of the LSCA and LSC that numerous errors of law occurred at trial. With respect to the fact that some of the dismissed parties and HGA were insured by the same carrier and shared common claims counsel, the court clarified that its previous concern related to the issue of whether the insureds' interest might be compromised, "not the rights of plaintiffs who had no contractual relationship with the insurance carrier." (LSC 266-267) It also rejected the claim that the LSCA and LSC were entitled to a specific jury instruction based on the holding in Zontelli v. City of Nashwak, 353 N.W.2d 600 (Minn. 1985) because this case was factually distinguishable. (LSC 269) Finally, the court rejected the claims of the LSCA and LSC that it improperly allowed the admission of evidence relating to Marcy's reputation and Marcy's failure to use the concrete additive "Eclipse," noting that these claims misperceived what occurred at trial and the bases on which the evidence was presented. (LSC 270-271)

By a separate order, the district court rejected the motion of the LSCA and LSC to amend the pleadings and join AET, AP/JW, K/O, DRM, and CR as direct defendants under Rule 14.01. (LSC 240-252) The court rejected the motion noting, among other things, that there was nothing to be gained by the joinder because the jury found that none of the parties, except AET in its capacity as a special inspector, were a direct cause of any of the damages that the LSCA and LSC claimed. It therefore questioned the utility of joining these parties under Rule 15 in order to conform with the evidence presented at trial. The court further noted that the utility of joining of K/O; AET, as concrete mix designer; DRM; and CR as direct defendants was questionable because neither the LSCA nor the LSC requested any relief against them if joined. The district

court also refused to join AET, in its role as special inspector, after concluding that they had been dismissed, neither the LSCA or LSC had asserted direct claims against AET before dismissal, and the two-year statute of limitations under Minn. Stat. § 541.051 had run. The court similarly denied the request of the LSCA and LSC to enter an order finding that AP/JW had a duty to indemnify Marcy to the extent of damages that the jury attributed to Marcy. The court recognized that the LSCA and LSC were attempting to convert HGA's indemnity obligation to AP/JW into a direct claim on their behalf. Finally, the court concluded the LSCA and LSC were subject to the taxation of costs and disbursements after determining that neither were acting in a sovereign capacity in their respective roles related to the Project.

Also on February 22, 2005, the district court issued its findings of fact, conclusions of law, and order for judgment and judgment on the counterclaims asserted by HGA and MMS. (LSC 276-285) Previously, on January 11 and 12, 2005, the district court conducted a bench trial, by agreement of the parties, on the counterclaims by HGA against the LSCA for breach of contract and violation of Minnesota's Prompt Payment statute, and the counterclaim by MMS against HGA for sums allegedly due for services in connection with the design and construction of the project. (LSC 277) The district court awarded HGA its professional fees against the LSCA, and dismissed the claim of MMS for professional fees that HGA owed to it for its work on the Project because they were a part of the fees granted HGA against the Appellants with the condition that HGA did not have to pay MMS unless HGA got paid. (LSC 284)

On February 25, 2005, HGA, and on March 3, 2005, R&C served the LSCA and LSC by mail with a notice of filing of the district courts orders entering judgment on the

jury's special verdict and denying all post-trial motions. On April 22, 2005, the LSC and LSCA served and filed their Notice of Appeal challenging the district court's February 22, 2005 judgment. (LSC 426) On May 6, 2005 HGA filed a Notice of Review asserting that the trial court erred when it refused to dismiss the claims against it under Minn. Stat. § 544.42; that the statute of limitations Minn. Stat. § 541.051 barred the claim against HGA and that HGA had been entitled to a directed verdict on all counts plead against HGA at the close of Appellants case in chief, except for the vicarious liability claim. (HGA Appendix 354)

In late March 2005, HGA and R&C moved the district court for an award of their costs and disbursements. (HGA Appendix p. 453) By order dated June 7, 2005, the district court awarded R&C, and HGA their respective costs and disbursements against LSCA and LSC. (LSC 286-347) The Court also awarded MMS its costs against HGA and created a pass through allowing HGA to recover those costs from Appellants. (LSC 286-347) The award of costs to MMS has not been appealed and is final. The court, however, concluded that the LSCA was a governmental subdivision, and therefore, entitled to a stay of enforcement on the costs and disbursements award, but not on the award on HGA's counterclaim, pending the appeal of LSCA and LSC without the need to post a supersedeas bond pursuant to Minn. R. Civ. App. P. 108. (LSC 286-347) The district court denied the LSC's motion for a stay after concluding that significant prejudice would accrue to R&C and HGA if it granted a stay without requiring the LSC to post a supersedeas bond or other security in accordance with Minn. R. Civ. App. P. 108. (LSC 286-347)

By Notice of Appeal dated June 21, 2005, the LSCA and LSC attempted to appeal the district court's June 7, 2005 order, awarding costs and disbursements to R&C and HGA. (LSC 430) This Court dismissed that appeal because it was taken from a non-appealable order. The LSCA and LSC petitioned this Court for a Writ of Prohibition, seeking to prevent entry of judgment on the June 7 order and to stay enforcement pending appeal. By Ordered dated June 20, 2005, this Court denied the petition and motion of the LSCA and LSC, concluding that the petition was "an improper attempt to obtain review of the award of costs and disbursements by means of an extraordinary writ." The Court further denied the LSC's request to stay enforcement of the district court's award of costs and disbursement without the need to post a supersedeas bond after determining that the LSC was not a governmental subdivision and the bond was necessary to protect HGA and R&C. It also denied the LSCA's request to stay enforcement of the judgment without the posting of a supersedeas bond on the district court's judgment on the fees awarded to HGA following the trial on HGA's counterclaims.

By Notice of Appeal dated on August 3, 2005, the LSC and LSCA appealed the district court's June 29 judgment awarding costs and disbursements to HGA and R&C. This Court consolidated these two appeals by Order dated August 10, 2005. (LSC 433) On August 17, 2005 HGA filed its Notice of Review in respect of the June 29<sup>th</sup> judgment. HGA challenged the failure to award costs for the daily transcript and the grant of the stay of the enforcement of the costs and disbursements award as to LSCA. (HGA Appendix 356-359)

Appellants have not raised any challenge to the jury's answers to the special verdict questions---including the fact finding that HGA & R&C were not negligent---and the construction of the Isle Royale tank did not cause any delay in opening of the aquarium.

## ARGUMENT

### **I. DOES MINN. STAT § 544.42(6)(b) REQUIRE THAT PLAINTIFFS' COMPLAINT BE DISMISSED.**

The language of Minn. Stat. § 544.42(6)(b) requires mandatory dismissal of Plaintiff's Complaint because Appellants failed to serve on Defendant the subd.(3)(a)1 expert review affidavit within 90 days of commencement of the action. It is undisputed that HGA was served on May 3, 2002. (HGA Appendix p. 41) It is undisputed that Appellants did not seek an extension of time or attempt to meet the certification requirement until late in the afternoon on August 6, 2002 after a call to Appellants counsel by counsel for HGA. (HGA Appendix p. 34) Appellants served no expert review affidavit until after the expiration of the 90-day period. Thus, under the unambiguous language of the statute, the district court should have dismissed Plaintiffs' Complaint. HGA requests that this Court reverse the district court's orders granting the LSCA and LSC a time extension to file the affidavit and denying HGA and R&C's summary judgment motion based on the failure to comply with Minn. Stat. § 544.42. A ruling in favor of HGA and R&C on this issue moots the remainder of matters raised by all parties except for the costs and disbursements award and stay granted to LSCA.

### **A. AN ANALYSIS OF THE LEGISLATIVE HISTORY OF § 544.42 LEADS TO THE CONCLUSION THAT PLAINTIFFS' COMPLAINT SHOULD HAVE BEEN DISMISSED.**

HGA submitted an extensive amount of materials at the district court that outlined the legislative history of the tort reform embodied in Minn. Stat. § 544.42 and the differences that existed between the medical malpractice statute Minn. Stat. § 145.682 and Minn. Stat. § 544.42. HGA asserted at the district court that a “bright line” rule should be applied to the 90-day period. Appellants moved for an expansion of time to certify alleging good cause shown within the meaning of Minn. Stat. § 544.42 (3). HGA asserted that one could not obtain an extension for a period that has already expired--- but conceded to the trial court such a fact situation, as of September 2002, had not been before the appellate courts of this state.

A plaintiff, pursuant to Minn. Stat. § 544.42, subd. 3(c) can gain extensions of time by showing good cause and that a reasonable and good faith effort had been undertaken to obtain the expert’s opinion. The essence of the statute is that for excusable neglect, the court can grant exceptions. As of September 2002 it had not been decided under Minn. Stat. § 544.42 whether a request for an extension of time will be entertained after the time period to provide the Affidavit has **expired**. That set of facts---undisputed facts---existed in the instant case.

Undoubtedly, Appellants will again rely upon cases decided under Minn. Stat. § 145.682, which have allowed this practice in medical malpractice cases. Appellants were acutely aware of Minn. Stat. § 544.42, as they invoked it at the commencement of this litigation. They cannot be said to have been unwitting or unknowing parties – they were aware that by invoking Minn. Stat. § 544.42(3)(a)(2), they would be required to provide the Affidavit of Expert Review within 90 days of starting the lawsuit. A review of

the statute indicates such an invocation gives a litigant 30 days beyond the normal "safe harbor" provisions of 60 days supplied in the statute.

**B. IT IS UNDISPUTED THAT PLAINTIFFS FAILED TO COMPLY WITH MINN. STAT. §544.42, SUBD. 3(b).**

On May 3, 2002, Plaintiffs' commenced this action against HGA by service of a Summons and Complaint and an Affidavit of attorney Ball, invoking Minn. Stat. §544.42 subd. 3(a)(2). (HGA Appendix p.13) At the time they commenced this action, the Affidavit asserted they could not obtain expert review because of the potential expiration of the applicable statute of limitations prior to service of the action. By invoking that statute, Plaintiffs were allowed 90 days to obtain review by an expert and file the Attorney's Affidavit of Expert Review. See Minn. Stat. §544.42, subd. 3(b). Ninety days from the date of the service of the Summons and Complaint would have been no later than August 2, 2002. On August 6, 2002, at approximately 1:30 p.m., counsel for Defendant and Third Party Plaintiff HGA telephoned attorney for Plaintiffs and advised her that Plaintiffs had failed to provide the appropriate Affidavit of Expert Review, and HGA demanded a dismissal with prejudice pursuant to Minn. Stat. §544.42, subd. 6(b) or HGA would bring a motion, pursuant to that statute for relief. (See Clapp Aff. ¶ 6, 7)(HGA Appendix p. 107)

At approximately 4:15 p.m. on August 6, 2002, counsel for HGA received via facsimile an Affidavit of Expert Review executed by counsel for Plaintiffs. (Clapp Aff. ¶ 6) (HGA Appendix p. 107)

On August 7, 2002, counsel for HGA wrote to attorney for Plaintiffs and advised he had not agreed to extend, modify or waive the provisions of Minn. Stat. §544.42 and that Defendant and Third Party Plaintiff would bring a Motion to Dismiss if Plaintiffs did

not agree by August 9, 2002, to voluntarily dismiss with prejudice. (Clapp Aff. ¶ 7) (HGA Appendix p. 107)

On August 9, 2002, Plaintiffs filed an Application for Extension of Time to provide the Affidavit of Expert Review. (HGA Appendix p. 37) Counsel for HGA received the Application for Extension of Time for providing the Affidavit of Expert Review by mail on August 12, 2002. Counsel for HGA immediately wrote to the Court advising he wanted to be heard since he intended to bring a Motion to Dismiss, pursuant to Minn. Stat. §544.42, subd. 6(b). (See Clapp Aff p 8) (HGA Appendix p. 108) On August 13, 2002, counsel for HGA obtained the date of September 23, 2002, for the time to hear its Motion to Dismiss and sent attorney Ball a letter via facsimile and U.S. Mail advising of the date. (See Clapp Aff. ¶ 9). (HGA Appendix p. 108)

Minn. Stat. §544.42 states that if a plaintiff elects to invoke Minn. Stat. §544.42, subd. 3(a)(2), one must serve the Affidavit of Expert Review within 90 days of the commencement of the action. See Minn. Stat. §544.42 subd. 3(b). Further, Minn. Stat. §544.42, subd. 6(b) reads as follows:

(b) Failure to comply with subd. 3, paragraph (b) or (c), results, upon motion, in mandatory dismissal of each cause of action with prejudice as to which expert testimony is necessary to establish a *prima facie* case.

It is undisputed that Plaintiffs did not supply the Affidavit of Expert Review required by Minn. Stat. §544.42, subd. 3(b) within the 90 days provided. Therefore the provisions of Minn. Stat. §544.42, subd. 6(b) are applicable. Plaintiffs were not entitled to an extension of time and HGA was entitled to a mandatory dismissal with prejudice of all Counts pled against HGA, as all Counts would require expert testimony.

**C. RECENT CASE LAW SUPPORTED BY EARLIER DECISIONS HAS CONFIRMED THAT THE STATUTE MUST BE STRICTLY CONSTRUED**

**AND ENFORCED TO PREVENT SUBVERSION OF THE LEGISLATIVE INTENT.**

At the time HGA brought its motion to dismiss in September 2002, there were no cases directly on point dealing with the subdivision at issue 544.42(6)(b),

Since the September 2002 argument in the instant case this Court has had an opportunity to pass upon a similar claim in Middle River-Snake River Watershed District v. Dennis Drewes, Inc., 692 N.W.2d 87 (Minn. App. 2005). In the Middle River-Snake River Watershed District a flood impoundment project was the subject of the dispute. Drewes, a contractor, contracted to perform work on the project. Specifications for the project were drawn by J.O.R. Engineering, Inc. which included soil reports conducted by Midwest Testing Laboratory. The soil information reported the soil was moist. The specifications had clear requirements regarding compaction and limiting lifts to no greater than 12 inches. Drewes had problems on the site because the soil was wetter than anticipated and a farmer had disked the area making it harder to compact. Drewes did not comply with the specifications regarding compaction or lift heights----and did not notify the watershed district or the engineer. When it was discovered Drewes had not performed the work consistent with the specifications the watershed filed suit asking that rights and responsibilities under the contract be determined. Drewes responded and also impleaded J.O.R. Engineering as an additional party and alleged negligence, estoppel, and tortious interference with contract. J.O.R. moved for summary judgment because Drewes failed to serve an expert-identification affidavit. The Court ultimately granted J.O.R.'s motion.

Even though the Middle River-Snake River Watershed District case dealt with the 180-day affidavit (the second affidavit) its reasoning is applicable in the instant case.

Here as in that case Plaintiffs took no action before the expiration of the time in question (in our case 90 days). The Middle River-Snake River Watershed District court utilized the same analysis used in the House v. Kelbel, 105 F. Supp 2d 1045 (D. Minn. 2000) and Meyer v. Dygart, 156 F.Supp.2d 1081 (D. Minn.2001) cases. In our case before this Court an evisceration of the statutory intent has occurred by not giving full effect to the statute. In Middle River-Snake River Watershed District the Court stated:

The interpretation of a statute is a question of law that we review de novo. Lolling v. Midwest Patrol, 545 N.W.2d 372, 375 (Minn.1996). When applying a statute, courts must give effect to its plain meaning, which takes into account the structure of the statute and the language of the specific statutory provision in the context of the statute as a whole. Glen Paul Court Neighborhood Ass'n v. Paster, 437 N.W.2d 52, 56 (Minn.1989) (reasoning that sections of statute must be read together to give words their plain meaning); see also United States v. Jennings, 323 F.3d 263, 274-75 (4th Cir.2003) (determining meaning by reference to language itself, specific context in which language is used, and broader context of statute as whole). We presume that plain and unambiguous statutory language manifests legislative intent. Lenz v. Coon Creek Watershed Dist., 278 Minn. 1, 9, 153 N.W.2d 209, 216 (1967). Courts refrain from construing statutory provisions that convey a plain meaning "in order to preserve language as an effective medium of communication from legislatures to courts." Krzalic v. Republic Title Co., 314 F.3d 875, 879 (7th Cir.2002). 692 N.W.2d at 89, 90

HGA is requesting that the direct and plain meaning of the statute be given effect.

In Middle River-Snake River Watershed District the Court further stated:

First, the exception to mandatory dismissal that Drewes claims as a safe harbor allows 60 days to satisfy the disclosure requirement but only in response to a motion "based upon claimed deficiencies of the affidavit." When no expert-identification affidavit has been filed, the motion is simply to dismiss, not to compel the errant party to cure claimed deficiencies in the affidavit's contents. See Minn.Stat. § 645.19 (2004) (supplying statutory construction canon that states, "[p]rovisos shall be construed to limit rather than to extend the operation of the clauses to which they refer").

Second, courts must presume that the legislature intends to give effect to

all provisions of a statute, Minn.Stat. § 645.17(2) (2004), and must construe every law, if possible, to give effect to all of its provisions. Minn.Stat. § 645.16 (2004). To apply a general 60-day extension whether or not an affidavit is filed would invalidate part of subdivision 6(c)'s operative language and eviscerate the effect of the mandatory-dismissal provision.

Third, a general 60-day extension, whether or not an expert-identification affidavit was initially filed, could not be reconciled with the last sentence of subdivision 6(c) that requires the court to issue specific findings on "the deficiencies of the affidavit." When an initial expert-identification affidavit has not been filed, a court would be unable to make specific findings on the deficiencies. 692 N.W.2d 90, 91.

The Court in Middle River-Snake River Watershed District concluded that when one had not filed any affidavit it was not possible to find language in the statute that would allow one to avoid the intended consequences set forth by the legislature. The facts are the same in the instant case. Nothing was filed---there is nothing to expand or enlarge.

Defendant HGA's motion for dismissal with prejudice was consistent with the U. S. District Court's opinion in House v. Kelbel, 105 F. Supp 2d 1045 (D. Minn. 2000).

Unlike the case at hand, the *House* case deals with the expert identification affidavit of § 544.42(4). The two cases are nonetheless very similar in nature. This case and the *House* case deal with situations where plaintiff failed to meet well-defined and straightforward procedural deadlines, which fell under the mandatory dismissal provisions of § 544.42(6).

In *House*, plaintiffs brought a malpractice action against accountant Kelbel, *et. al* on June 11, 1999. The plaintiffs did not serve the § 544.42(4) affidavit of expert identification until January 15, 2000. Thus, under the 180-day requirement of § 544.42(4), the affidavit was slightly more than one month late.

In affirming the magistrate's decision that § 544.42(6)(c) required mandatory dismissal of plaintiff's action with prejudice, the Court noted that the 180-day deadline requirement of § 544.42 (4) was straightforward, and that therefore there was no question that failure to satisfy the deadline required mandatory dismissal with prejudice. (See 105 F. Supp. 2d at p. 1051 and 1055).

After an exhaustive examination of Minnesota law as it relates to Minn. Stat. 145.682 (the statute governing medical malpractice cases), the *House* court concluded that prior Minnesota case law supported mandatory dismissal of Plaintiff House's case. The *House* court made the following comment :

It appears that the Minnesota Supreme Court has attempted to interpret the statute (145.682) in a manner in which clear procedural violations of the statute require mandatory dismissal, as do violations in which the substantive requirements are completely disregarded. However, in situations in which an affidavit is submitted in good faith, but is not deemed substantively sufficient, the court is left an opening in which the court can take an alternative action to mandatory dismissal and allow a case to proceed on the merits. 105 F.2d at p. 1053.

This Court in our case should apply the well-reasoned *House* rationale and rule that Plaintiffs' failure to follow the straightforward requirements of § 544.42(6)(b) should result in dismissal with prejudice of Plaintiffs' case.

Finally, it should be noted that the *House* decision, and the rationale underpinning that decision, is consistent with the legislature's intention in enacting Minn. Stat. § 544.42 in 1997 as a part of tort reform. As stated above, by enacting Minn. Stat. § 544.42(6)(b), the legislature intended to make it known that missing the 90-day deadline § 544.42(3)(b) – a clear and straightforward procedural deadline—would result

in mandatory dismissal with prejudice. It was intended to be and should be construed as a “bright line” rule.

Even though the *House* case dealt with the affidavit of expert identification rather than the affidavit of expert review, nonetheless the *House* Court did conclude in *dicta* that under Minnesota law, the failure to file the expert review affidavit of § 544.42 (3) would also require mandatory dismissal of plaintiff's action with prejudice. (105 F. Supp.2d at p 1051).

Another case which supports HGA's position for a dismissal is *Meyer v. Dygart*. 156 F.Supp.2d 1081 (D. Minn. 2001). In that case, Plaintiffs served neither the affidavit of expert review nor the affidavit of expert identification required by Minn. Stat. § 544.42.

In *Dygart*, plaintiffs attempted to escape the mandatory dismissal provisions of Minn. Stat. § 544.42(6) by moving for a “good cause extension” under Minn. Stat. § 544.42(4)(b). However, the U.S. District Court denied the request for extension, reasoning that plaintiffs' failure to submit the extension request with the Complaint pursuant to Minn. Stat. § 544.42(3)(a)(3) was a substantial factor in denying the extension.

Our case is similar to *Dygart*. Like the plaintiff in *Dygart*, Plaintiffs failed to comply with the expert affidavit requirements by filing their affidavit until after the 90-day period had expired. Furthermore, the plaintiffs in both cases moved for an extension for good cause as allowed under Minn. Stat. § 544.42. Finally, the plaintiffs in both cases submitted their good cause extension requests **after** the expiration of the expert affidavit filing deadlines. Thus, under the *Dygart* rationale, the Court should reverse the district court and dismiss Appellants action with prejudice.

The 60-day grace provision in the statute applies only in situations where the plaintiff files with the Complaint **neither** the expert review affidavit of subd. (3)(a) **nor** the subd. (3)(a) 2 affidavit stating the statute of limitations makes it impossible to immediately file the expert review affidavit.

With respect to this issue, the *House* case again provides guidance. The *House* case stands for the proposition that the 60 day safe harbor demand provision applies only where plaintiff files a substantively deficient affidavit expert identification affidavit, or where plaintiff files with his Complaint neither an affidavit of expert review nor an affidavit of delay pursuant to Minn. Stat. § 544.42 (3)(a) 2.

Minn. Stat. § 544.42, subd. 3(a)(2) reads as follows:

(2) A review required by clause (1) could not reasonably be obtained before the action is commenced because of the applicable statute of limitations; or . . .

Minn. Stat. § 544.42, subd. 3(b) reads as follows:

(b) If an affidavit is executed under paragraph (a) clause (2) the affidavit in paragraph (a), clause (1), must be served on the defendant or the defendant's counsel within 90 days after service of the summons and complaint.

Minn. Stat. § 544.42, subd. 6(b) reads as follows:

(b) Failure to comply with subd. 3, paragraph (b) or (c) results, upon motion, in mandatory dismissal of each cause of action with prejudice as to which expert testimony is necessary to establish a *prima facie* case.

Under the facts of the instant case, the causes of action pled against HGA could not be proved, nor a *prima facie* case be made, absent expert testimony and HGA was entitled to a dismissal with prejudice as contemplated in Minn. Stat. § 544.42 (6).

**D. ARE PLAINTIFFS ENTITLED TO AN EXTENSION OF TIME, PURSUANT TO MINN. STAT. § 544.42, BEYOND THE 90 DAYS PROVIDED FOR IT TO SUPPLY ITS AFFIDAVIT OF EXPERT REVIEW?**

For all the reasons articulated above it is not possible for the Appellants to gain an extension of a date---after the date has expired. See *Middle River-Snake River Watershed District v. Dennis Drewes, Inc.*, 692 N.W.2d 87 (Minn. App. 2005), *Meyer v. Dygart*, 156 F.Supp.2d 1081 (D. Minn. 2001) and *House v. Kelbel*, 105 F. Supp 2d 1045 (D. Minn. 2000).

**E. ARE PLAINTIFFS ENTITLED TO A “SAFE HARBOR” UNDER MINN. STAT. §544.42?**

There is no “safe harbor” provision when Minn. Stat. §544.42, subd. 3(a)(2) is invoked. Appellants asserted below they were relying upon Minn. Stat. §544.42, subd. 6(a) to the exclusion of reading or referring to Minn. Stat. §544.42, subd. 6(b).

This statute does not exist in a vacuum. The purpose of Minn. Stat. §544.42, subd. 6(b) is **substantive** and not a mere recitation of procedural rules. When one invokes Minn. Stat. §544.42, subd. 3(a)(2), there is no requirement that any demand be made upon Plaintiffs, since they are deemed to be aware of the entire contents of Minn. Stat. §544.42 by having invoked its terms at the initiation of the action. See *House v. Kelbel*.

Minn. Stat. §544.42, subd. 3(c) is inapplicable because it is undisputed that Plaintiffs did not serve the application for the modification, extension or waiver of time for expert review at the time they commenced their action with the Summons and Complaint. This would have been an alternative to the invocation of §544.42, subd. 3(a)(2). However, because Plaintiffs chose to invoke Minn. Stat. §544.42, subd. 3(a)(2), they were compelled to comply with the statutory requirements and demands of §544.42, subd. 3(b). Simply stated, Plaintiffs could have elected to seek the waiver,

extension or modification as anticipated in §544.42, subd. 3(c) which, had it been denied, would have still provided a 60-day "safe harbor" window.

**F. ARE PLAINTIFFS ENTITLED TO RELIEF PURSUANT TO MINN. STAT. §544.42 SUBD. 4(b)?**

Appellants moved for an extension of time and modification of the requirements of Minn. Stat. § 544.42 pursuant to Minn. Stat. §544.42, subd. 4(b). Subdivision 4(b) is not applicable since it deals with the identity of the experts and the substance of the opinions of the experts regarding the second affidavit that is due within 180 days of commencement of the action. This is not the affidavit that is in dispute in this case.

**G. ARE APPELLANTS ENTITLED TO RELIEF PURSUANT TO RULE 6.02 BY SHOWING EXCUSABLE NEGLIGENCE?**

Appellants will no doubt seek to utilize Minn. Stat. §544.42, subd. 4(b), but that provision should not allow for the relief they are seeking. Therefore, they are limited to pursuit of a request that Rule 6.02 of the Minnesota Rules of Civil Procedure be utilized to assist them. Juxtaposing the language of the statute with the Rule makes it clear the legislature intended to supersede the Rule with the language in the statute.

Similar efforts have been made to utilize Rule 6.02 when dealing with the application of the medical malpractice statute, Minn. Stat. §145.682. In one case decided that applied the 90-day time limit set forth in 145.682, subd. 3(b) no relief was granted. See *Paulos v. Johnson*, 502 N.W.2d 397 (Minn. App. 1993). Review denied September 10, 1993.

In *Paulos* there is dicta which seems to suggest one might be able to show excusable neglect for having failed to provide the original 90-day Affidavit of Review. However, before one undertakes the "excusable neglect analysis" which would then be required, one must consider that Minn. Stat. §544.42, subd. 6(b) reads as follows:

(b) failure to comply with Subd. 3, (b) or (c), results, upon motion, in mandatory dismissal of each cause of action with prejudice as to which expert testimony is necessary to establish a *prima facie* case.

No counterpart existed within Minn. Stat. §145.682 (2002). Because of the non-existence of such a provision in 145.682, the analysis undertaken regarding “good cause” or “excusable neglect” by Plaintiffs is inapplicable. It is clear from the enactment of §544.42 subd. 6(b) in 1997, the legislature intended a failure to supply the affidavit required by Minn. Stat. §544.42, subd. 3(b) would result in mandatory dismissal with prejudice.

Additionally, in *Parker v. O’Phelan*, 414 N.W.2d 534 (Minn. App. 1987) affirmed 428 N.W.2d 361, the court stated as follows:

As in *Guillaume*, Minn. Stat. §145.682 does not state whether excusable neglect may constitute a sufficient reason to allow an untimely affidavit to be served. We subsequently must determine whether the statutory purpose is so frustrated by Rule 6.02 that the two must be deemed inconsistent. . . . 414 N.W. 2d at 537

The Rule 6.02 referred to in the quote set forth above is Rule 6.02 of the Minnesota Rules of Civil Procedure. In the instant case, Rule 6.02 is inconsistent with the clear purpose of Minn. Stat. § 544.42. The legislature has created and intended a statute in which no excuse can be shown for not having provided the Attorney’s Affidavit of Expert Review within the 90 days. The alternative, a choice the Plaintiffs elected not to pursue, was to invoke Minn. Stat. §544.42, subd. 3(c) which would have given them the opportunity to persuade this Court that they were entitled to an extension, modification, or waiver of the provisions of Minn. Stat. §544.42 by showing good cause.

**H. ALTERNATIVELY, APPELLANTS CAN NOT SHOW "EXCUSABLE NEGLIGENCE" WITHIN THE MEANING OF RULE 6.02 OF THE MINNESOTA RULES OF CIVIL PROCEDURE.**

HGA asserts that Minn. Stat. §544.42 subd. 6(b) is in direct conflict with Rule 6.02 of the Minnesota Rules of Civil Procedure. Because of the conflict under the facts of this case Rule 6.02 is not an appropriate vehicle to alter the legislatively intended deadlines that are substantive and jurisdictional. Minnesota Practice Series Civil Rules Annotated, 4th Edition states:

The difference between the motions sought before the end of the time period involved and that sought after is significant. If an extension is sought before the original time period has expired, it is not necessary to file a notice of motion or a motion, and no hearing is necessary. The order may be obtained under Rule 6.02(1) merely upon application to the court and the establishment of just cause. That just cause will not normally be difficult to establish. The extension sought after the lapse of the initial period, however, requires a formal motion, notice to all parties, and the showing of excusable neglect. . . MN PR V.1 at page 157.

Since the Plaintiffs did not seek relief within the 90 days provided in Minn. Stat. §544.42 subd. 3(b), they are held to a higher standard than that of good cause- if Rule 6.02 is determined not to be in conflict with the substantive requirements of 544.42 subd. 6(b).

The Court has dealt with the difficulty of "excusable neglect" in the case of Moen v. Mikhail, 447 N.W.2d 462 (Minn. App. 1989), reversed on other grounds, 454 N.W. 2d 422, (1990). The Court held that because Moen filed their second affidavit eleven days late in the suit against Mikhail and twenty-four days late in a suit against Reisdorf that was not a sufficient reason to deny relief. However, the Supreme Court found there had

not been a sufficient reason given for the claimed excusable neglect, even though the time was short.

In Bellecourt v. US, 784 F.Supp. 623 (D. Minn. 1992), the United States District Court found that the claim of plaintiff that they had a reasonable excuse and had used due diligence for a late affidavit was unfounded. In that case, the plaintiff made a submission, but did not include the names of the experts contacted, the date they were contacted, what their credentials were, and after finding a declination from those persons, what sources plaintiff used for his research.

In Bellecourt the court also found that there was not a "reasonable excuse" on the merits (at this time that's impossible to ascertain in this case) and they found that there would be prejudice to the physician. However, the important point in Bellecourt was the finding that no reasonable excuse was given. In this case insufficient information was given for a conclusion on the "reasonable excuse" to be determined.

In the instant case there is no "reasonable excuse". What reasonable explanation have Appellants given which is plausible to have allowed the 90 days to run and then ask that it the period be revived and extended? This is a particularly perplexing question in light of the fact that counsel for HGA called attorney Ball at 1:30 p.m. on August 6, 2002, and at 4:15 p.m. she faxed to his office the attorneys' Affidavit of Expert Review. The reasonable inference to be drawn from this event alone is that there was neglect but none of it was excusable.

In Parker v. O'Phelan, the Court stated:

Excusable neglect is found when there is a reasonable defense on the merits, a reasonable excuse for the failure to answer, the party acted with due diligence after notice of the

entry of judgment, and no substantial prejudice results to other parties.

Appellants offered no proof in September 2002 that they had a reasonable malpractice case against HGA. At trial, Cynthia Hayden, the chair of Plaintiffs, testified that in January of 2002 when they settled the "Marcy claim"; and in May of 2002 when they brought the claim against HGA they had no information that HGA had breached its standard of care. (T. 3251-3252) Appellants' purported excuse is not a reasonable one for their failing to supply the Affidavit within 90 days. There is no evidence that the Appellants' acted with due diligence during the 90 days subsequent to commencement of the suit, nor has it been outlined sufficiently to the Court, as suggested should be required in the *Bellecourt* case.

This case is the **poster child** why the statute should have been strictly enforced. When Appellants sued HGA they had no information HGA had breached its standard of care; they did not seek an extension of the time frames set forth in Minn. Stat. § 544.42 before the time period expired; they knew of the time period since they invoked it when they commenced their action; and they never produced an architectural expert at trial. All of the above was to HGA's direct prejudice and resulted in taxable cost claims (HGA, R&C and MMS) in excess of \$500,000.00----exclusive of the non-taxable costs and attorneys fees incurred. It is the **poster child case** for the enforcement of the statute.

For all of the reasons outlined in the preceding pages this Court should reverse the district orders of September 23 and October 1, 2002 and order entry of a judgment with prejudice in favor of the Defendants pursuant to Minn. Stat. § 544.42(6)(b).

- I. **ALTERNATIVELY, IF THIS COURT IS NOT PERSUADED TO DISMISS APPELLANTS CLAIMS—IT SHOULD CREATE A RULE OF LAW THAT ALLOWS FOR AN IMMEDIATE APPEAL OF A DENIAL OF A MOTION TO**

**DISMISS UNDER MINN. STAT. § 544.42(6)(b)—TO PREVENT THE REMEDY FROM BECOMING ILLUSORY.**

HGA asked the trial court to certify as important and doubtful its motion to dismiss with prejudice pursuant to Minn. Stat. § 544.42(6)(b). (HGA Appendix p. 92) The trial court ruled against HGA and declined to certify the question so it would become immediately appealable under the Rules of Civil Appellate Procedure. (HGA Appendix p. 92) HGA sought interlocutory review from the Court of Appeals and Supreme Court and it was declined. In cases involving other limitation of actions matters, such as exclusivity of remedy or immunity (Minn. Stat. § 176.031, 466.03) it has been determined that denial of a motion to dismiss is immediately appealable. It is apparent that the remedy intended by the legislature to be available “dismissal with prejudice” is illusory if one can only raise the matter after discovery and trial with their attendant costs and fees. This Court should decide that as a matter of law a denial of motion to dismiss under Minn. Stat. § 544.42(6)(b) that involves the first affidavit (certification of expert review) is immediately appealable.

**II. ARE PLAINTIFFS CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS IN MINN. STAT. § 541.051 BECAUSE THEY FAILED TO BRING THEIR ACTION WITHIN TWO YEARS OF DISCOVERY OF THE UNSAFE AND DEFECTIVE CONDITION?**

The jury was asked a specific question, number 41, relating to when Plaintiffs knew of the injury. The question put to the jury read:

41. Did plaintiffs discover, or should they reasonably have discovered, an injury to the Great Lakes Aquarium due to the defective and unsafe condition of the Isle Royale Tank on or before May 1, 2000?

ANSWER: YES

The answer by the jury was unambiguous and clear. Further, the finding was supported by an overwhelming amount of evidence in the record including but not limited to the following; the appearance of the tank was known in October 1999 when the forms were stripped from the tank; that on March 20, 2000 the construction manager John Carlson wrote to Koosmann and told him---get an independent expert to evaluate the concrete issues on the aquatic tanks because this issue is headed to arbitration or court. Numerous other pieces of evidence also indicated the answer to the question was yes.

The LSCA is barred from making any claims for damages, other than for contribution and indemnity, against the defendants, including R&C, because it failed to bring its claims within two years of the discovery of its injury. Minnesota strictly interprets the limitation statute governing actions based on improvements to real property. Brandt v. Hallwood Management Co., 560 N.W.2d 396, 399 (Minn. Ct. App. 1997). The Duluth Aquarium project was an improvement to real property. Therefore, the applicable statute of limitations in this case is Minnesota Statutes § 541.051, subd. 1, which provides in relevant part:

- a. Except where fraud is involved, no action by any person in contract, tort, or otherwise to recover damages for any injury to property, . . . arising out of the defective and unsafe condition of an improvement to real property . . . shall be brought against any person performing or furnishing the design, planning, supervision, materials, or construction of the improvement to real property . . . more than two years after discovery of the injury.
- b. For the purposes of paragraph (a), a cause of action accrues upon discovery of the injury. . .

(Minn. Stat. § 541.051, subd. 1). It is undisputed Plaintiffs Complaint was served on HGA on May 3, 2002.

Minnesota law is quite clear that the statute of limitations on an improvement to real property “begins to run when an actionable injury is discovered, or, with due diligence, should have been discovered regardless of whether the precise nature of the defect causing the injury is known.” Dakota County v. BWBR Architects, Inc., 645 N.W.2d 487, 492 (Minn. App. 2002)(citing The Rivers v. Richard Schwartz/Neil Weber, Inc., 459 N.W.2d 166, 168 n. 2 (Minn. App. 1990), *review denied* (Minn. Oct. 25, 1990)). This places the burden of discovery of the injury upon the plaintiff. *The Rivers*, at 169.

In this situation, the burden for discovering the injury was easy for Appellants. The discovery of the injury occurred upon removal of the forms from the Isle Royale tank by Marcy. The “defective” condition of the Isle Royale tank was readily apparent to any person who looked at the tank. The documentation of the severe defects in the concrete placement is voluminous and graphically depicted in the photographs.

According to the Minnesota Supreme Court, the term “unsafe” as used in §541.051, also means “insecure”. Griebel v. Andersen Corp., 489 N.W.2d 521, 523 (Minn. 1992)(holding that window screens that did not keep out flies were defective and unsafe). The Isle Royale tank was unsafe in its unrepaired condition. The Isle Royale tank was designed to hold 80,000 gallons of water. If the tank were filled before being repaired, that water would pour out of the tank and into the building. This certainly constituted an insecure condition, not to mention an unsafe condition for any person in the path of the deluge of water. It cannot be disputed that the LSCA had an actionable injury, an injury that was both “defective” and “unsafe”, when the forms were pulled off the Isle Royale tank.

Certainly the March 20, 2000 letter is the “actionable injury” that Judge Hallenbeck was concerned about in his May 2003 Order. Not only do they know of damage from October 1999 stripping of the forms---the Plaintiffs construction manager tells them to hire an independent expert because “they are headed to Court or arbitration” over the concrete issue.

Judge Hallenbeck held in his May 2003 ruling the claims process set forth in the contract between the parties “tolled” the running of the statute and he concluded as “a matter of law” the statute would not have commenced running until March 2001 when Marcy filed its demand for arbitration and HGA declined to rule on the claims between Marcy and Plaintiffs.

HGA contends the May 2003 ruling of the district court was in error---when juxtaposed with the facts found by the jury. An “actionable injury” certainly was known as of March 20, 2000 when John Carlson wrote to Koosman regarding the need for an independent expert. The tolling of the statute of limitations referred to by the court is only if HGA and R&C were the parties actually performing the repairs. In fact, the Minnesota Court of Appeals states:

When a party allegedly responsible for remedying a defect in real property makes assurances or representations that the defect will be repaired that party may be estopped from asserting a statute of limitations defense if the injured party reasonably and detrimentally relied on those assurances and representations.

Rhee v. Golden Home Builders, Inc., 617 N.W.2d 618, 622 (Minn. Ct. App. 2000). The estoppel or tolling argument is not applicable. This Court should reverse the Order of district court entered in May 2003 and order dismissal with prejudice of the Appellants claims based upon Minn. Stat. § 541.051 subd. 1 and the finding of fact by the jury.

**III. WAS HGA ENTITLED TO A DIRECTED VERDICT AT THE CONCLUSION OF THE APPELLANTS CASE IN CHIEF?**

On October 8, 2005 Plaintiffs rested their case without calling any architectural expert to the witness stand-----or any other qualified witness to opine that HGA had breached its "standard of care" as an architect. Plaintiffs/Appellants failure to call an expert qualified to opine about HGA's performance left the Court with "a question of law". See Wall v. Fairview Hosp. & Healthcare Services, 584 N.W.2d 395 (Minn.1998). Ordinarily an essential element of proof of a breach of the standard of care and the damaged caused requires an expert opinion be admitted to that effect. See, City of Eveleth v. Ruble, 302 Minn. 249, 225 N.W.2d 251 (1974). This was a complex case and the only way one could have proved the alleged breach and harm is by use of an expert. It is not a case that falls within the exception to the general rule. HGA does not contend they should have been granted a directed verdict on the vicarious liability claim plead against it.

MMS was granted a directed verdict at that time for essentially the same argument. The expert Appellants identified who would opine about the field observations (MMS scope of work) and HGA's conduct, Mr. Charvat, was never called. HGA was entitled to a directed verdict and this Court should enter an Order granting a directed verdict to HGA on all counts, except the vicarious liability claim.

**IV. WAS THE COURT'S TAXATION OF COSTS PURSUANT TO RULE 68 APPROPRIATE? SHOULD HGA BE ABLE TO TAX THE COST OF THE DAILY TRANSCRIPT?**

This matter was recently argued and briefed to the district court. HGA refers this

Court to HGA's Application to Tax Costs and Disbursements. The Court articulated its rationale for the award and had the opportunity to see the effort necessary by the experts and understood the necessary out of Court preparation they had to undertake to have sufficient foundation to testify.

The Appellants refuse to acknowledge that a Rule 68 offer of \$1,000,000.00 three and one half months prior to trial is a basis for the Court to consider. (HGA Appendix p. 403)

Rule 68 of the Minnesota Rules of Civil Procedure provides a mechanism to assist litigants with efforts to resolve or settle their disputes. In Collins v. Minnesota School of Business, Inc. 655 N.W.2d 320 (Minn. 2003) the court stated:

Rule 68 provides that any party may serve upon an adverse party an offer to allow judgment to be entered to the effect specified in the offer or to pay or accept a specified sum of money, with costs and disbursements then accrued, either as to the claim of the offering party against the adverse party or as to the claim of the adverse party against the offering party. Minn. R. Civ. P. 68. If the offer is accepted, either party may file the offer with the district court and the court administrator shall enter judgment. If the offer is rejected and the final judgment entered is not more favorable to the offeree than the offer, the offeree **must** pay the offeror's costs and disbursements. This cost-shifting mechanism was designed to encourage settlement and decrease litigation. Swisher, 631 N.W.2d at 799; 2A David F. Herr & Roger S. Haydock *Minnesota Practice* § 68.3 (3d ed.1998). **(emphasis supplied)** 655 N.W.2d at 324.

In Imperial Developers v. Seaboard Surety, 518 N.W.2d 623 (Minn. App. 1994) (pet. for rev. denied August 24, 1994) the appellate court spoke about the discretion available to a trial court when an offer under Rule 68 has been made, rejected, and the resulting verdict is less than the offer. In Imperial the court stated:

Finally, L & D asserts that it is entitled to costs and disbursements under rule 68. We agree. Rule 68 addresses the procedure to be followed in making an offer of judgment or settlement and states in relevant part:

If the judgment finally entered is not more favorable to the offeree than the offer, the offeree *must* pay the offeror's costs and disbursements. Minn.R.Civ.P. 68 (emphasis added). Hence, we conclude that an award of costs and disbursements under the rule is not discretionary. 518 N.W.2d at 628.

Recently the Minnesota Supreme Court addressed this issue in Vandenheuvel v. Wagner, 690 N.W.2d 753 (Minn. 2005) and held:

We conclude that the plain language of Rule 68 that "the offeree must pay the offeror's costs and disbursements" does not limit recoverable costs and disbursements under the rule to those incurred after the making of the offer. Accordingly, we hold that appellants must pay respondent's total costs and disbursements incurred from the beginning of the lawsuit. 690 N.W. 2d at 757.

The Supreme Court reaffirmed its position that this is the "just" result and will further the resolution of lawsuits.

The Appellants argument that a "chilling effect" will take place as a result of the award is directly contrary to the stated purpose for a Rule 68 offer--which is to avoid the cost and expense of the trial to the Court and the litigants. It also ignores the reaffirmation given to Rule 68 offers from the Supreme Court as stated in the Vandenheuvel v. Wagner case.

HGA has also requested that they be granted the costs of the daily transcript as taxable costs. In Brede v. Minnesota Crushed Stone Co., 146 Minn. 406, 178 N.W. 820 (1920) the Supreme Court disallowed the request for costs of a transcript. In Brede, the Court stated:

Plaintiffs attempted to tax the cost of the court reporter's transcript of the evidence taken at the second hearing, and assigns as error the trial court's affirmance of the clerk's disallowance of the item. The transcript was procured after the findings were filed, and was used in connection with plaintiffs' motion for amendments thereof, which was denied. It was not used in procuring the decision which made plaintiffs the prevailing parties. The item was properly disallowed. Salo v. Duluth Rd. Co., 124 Minn. 361, 145 N. W. 114 (1914) 178 N.W. at 822

The district court in finding number 44 on pages 27-28 agrees the daily transcript should be taxable as a cost in this case in his opinion. On page 44 in his Memorandum the Court indicates he would be inclined to grant the application except for the existence of the Salo v. Duluth Rd. Co. case. HGA asks this Court to reconsider or recommend reconsideration of this holding especially since that case was decided in 1914.

The additional reason HGA asks for further consideration regarding the request is the "windfall benefit" Appellants have obtained from the existence of the transcript. As noted HGA paid over \$37,000.00 for the daily transcripts. Because the transcript existed, the Appellants were able to appeal this case and save over \$30,000.00 up front money for the transcript. Yet HGA could not tax the cost. It would appear the transcript would not be taxable at the appellate level because it was not "procured for the purpose of an appeal". This is an additional reason HGA requests this rule of law be modified extended or clarified.

The district court went to great lengths to find what he believed to be the "reasonable amounts" and repeatedly noted he was balancing his findings against his concern about access to the Courts and the "chilling affect" alleged by Appellants. His findings are well supported and his reasoning is clearly articulated. There is no basis to disturb any part of the findings, order or reasoning. The district court understood clearly the purpose behind defendants obtaining the daily transcript was to keep experts and witnesses informed of the progress of the trial some of whom were great distances away---even out of the country for extended periods. HGA is not urging a rule that would allow the taxing of the cost of a daily transcript in every case. However, in complex cases involving multiple fields of expertise it is essential to assist in limiting

cost. The alternative is to have the expert remain throughout the trial----and the billing information we have provided and is a part of HGA's Application for Costs and Disbursements demonstrates that would have been a far less cost efficient way to handle the circumstances. (See HGA Application for Costs and Disbursements) This court should grant HGA's request to tax the cost of the daily transcript and affirm the other costs awarded by the district court.

**V. WAS THE LSCA ENTITLED TO A STAY OF ENFORCEMENT OF THE JUDGMENT FOR COSTS AND DISBURSEMENTS?**

- A. The LSCA (Authority) is not a "governmental subdivision" contemplated to be covered by Rule 62 of the Rules of Civil Procedure or Rule 108 of the Rules of Appellate Procedure when promulgated by the Supreme Court.**

Plaintiffs Lake Superior Center Authority (LSCA) and Lake Superior Center (LSC) sought a stay of the enforcement of the judgment(s) in existence against them. Appellants relied upon Rules 107 and 108 of the Rules of Appellate Procedure. The district court granted the stay to the LSCA on the Court's award of costs and disbursements but denied the request as to the remainder of the amounts due and as to the LSC.

Appellants argued that Rule 62.04 of the Rules of Civil Procedure required the Court to stay the enforcement as to the Authority. Their argument is they are a "governmental subdivision" and therefore are within the ambit of the Rule. However, it is difficult to believe the Supreme Court contemplated an entity that has no power to levy taxes or issue debt to raise revenue (and could not service its own debt except by gratuities and from local government) was a "governmental subdivision" entitled to such protection. See M.S.A. § 85B.03 and § 302A.161. The legislature expressly removed

certain powers that corporations organized under M.S.A. § 302A.161 are inherently deemed to have. For all intents and purposes the Authority is nothing more than a shell. The Legislature expressly denies that the State has any obligation for the debts of the Authority and is not allowed to receive any state general appropriations to support its operation. Minn. Stat. § 85.B.03, subd. 1 (b); subd. 3. Plaintiffs argued in response to HGA's request for costs and disbursements the Authority and Center are destitute. It would seem clear that the Supreme Court did not intend for an entity without the full faith, credit and backing of the taxpayer to be one of the "governmental subdivisions" they had in mind when granting such protection.

Judge Hallenbeck noted some unusual traits (see page 4 paragraphs 7 and 8 of Findings of Fact) not typically associated with "governmental subdivisions". The enabling legislation refers to the Authority as a "**public corporation**". Does it necessarily follow that all public corporations would be considered "governmental subdivisions" for purposes of entitlement to a stay of enforcement of a judgment? It would seem odd if such were the case---especially since the enabling legislation includes an affirmative negative asserting the State will not be liable for the debts of the Authority.

This Court should reverse that part of the district court's Order that stays the enforcement of the costs and disbursements judgment against the LSCA.

#### **VI. WERE APPELLANTS ENTITLED TO A JUDGMENT NOTWITHSTANDING THE VERDICT?**

The standard to be employed in determining whether judgment notwithstanding the verdict should be granted is nearly the same as the standard for a directed verdict. The Supreme Court has described this as "reasonable minds can

reach but one conclusion". See Kleven v. Geigy Agric. Chemicals, 303 Minn. 320, 227 N.W.2d 566 (1975). If it is clear that the unequivocal evidence would result in a contrary verdict against the entire evidence or applicable law a JNOV may be granted. Coenen v. Buckman Bldg. Corp., 278 Minn. 193, 153 N.W.2d 329 (1967). Finally, if no competent evidence reasonably tends to support the verdict JNOV may be proper. See Blue Water Corp. v. O'Toole, 336 N.W.2d 279 (Minn. 1983).

In the instant case a huge volume of evidence supports the jury's verdict and is "overwhelming" when viewed in the entire context of the trial and the verdict reached and is supportable by competent evidence.

That evidence includes but is not limited to the following:

A. The Jury's finding that there was no delay is supported in the record by:

The testimony of Robert Davenport;  
The testimony of Ann Glumac, especially Exhibit 2049 (HGA Appendix 501);  
and Building Committee Meeting Minutes No. 19, Exhibit 31.

B. The Jury's finding that HGA and R&C were not negligent is supported in the record by:

Plaintiffs' failure to produce an expert, or otherwise qualified witnesses, who could articulate any negligent act on the part of HGA;

The testimony of Robert DeBruin conclusively established that HGA was not negligent in providing its services on the project; and

The testimony of Matthys Levy established that R&C was not negligent in providing its design services on the project.

C. The Jury's finding on the negligence of Marcy is supported in the record by:

The testimony of James Metzler;

The testimony of Craig Kronholm;  
The testimony of David Lonsdale; and  
The testimony of John Carlson.

- D. The Jury's findings of negligence on the part of the Plaintiff's and their representative Koosmann Project Management Services, Inc.

("Koosman") is supported in the record by:

The testimony of John Carlson established that Plaintiffs introduction of acid into the Isle Royale tank caused the project participants to believe the Vandex coating had been compromised and required the tank to be drained and re-vandexing; and

The testimony of John Carlson and Charles Koosman establish that Mr. Koosman, as the owner's representative on the project, asked that the project schedules not be distributed to the project participants as contemplated under the general conditions of the contract.

It is well settled in this jurisdiction that in examining a verdict on appeal, the evidence must be considered in a light most favorable to the prevailing party and the verdict must be sustained if it is possible to do so on any reasonable theory of evidence. The verdict should not be disturbed unless it is manifestly and palpably contrary to the evidence. Hestad v. Pennsylvania Life Ins. Co., 295 Minn. 306, 204 N.W.2d 433 (1973). See, also, Stapleman v. St. Joseph the Worker, 295 Minn. 406, 205 N.W.2d 677 (1973); Krengel v. Midwest Automatic Photo, Inc., 295 Minn. 200, 203 N.W.2d 841 (1973); Thill v. Modern Erecting Co., 292 Minn. 80, 193 N.W.2d 298 (1971). The motion for JNOV was properly denied and no further inquiry is necessary on this point.

#### **VII. WERE APPELLANTS ENTITLED TO A NEW TRIAL?**

Appellants' claimed basis for a new trial are too numerous and lacking in specificity to set them forth in any succinct fashion. The essence of a motion for a new trial is to bring to the Court's attention the assertions that are the basis of the new trial

request and is intended to give the trial court a chance to correct an error than might eliminate an appeal and may have prejudiced a party to the extent a new trial should be granted. See Sauter v. Wasemiller, 389 N.W.2d 200 (Minn. 1986).

There are seven separate grounds upon which one may rely to seek a new trial enumerated in Rule 59 of the Minnesota Rules of Civil Procedure. The decision whether to grant a new trial is substantially in the trial Court's discretion as the Court had the opportunity to see and feel the trial. See Lamb v. Jordan, 333 N.W.2d 852 (Minn. 1983); *appeal after remand* 363 N.W.2d 351 (Minn. App. 1985). A motion for a new trial should be granted cautiously and sparingly and to further substantial justice in the application of trial procedure. See Boland v. Morrill, 270 Minn. 86, 132 N.W.2d 711 (1965).

None of the numerous issues Appellants raise as a basis for the new trial rise to the level of a matter that prejudiced them and therefore did not warrant the extraordinary exercise of the Court's discretion and resultant invasion of the province of the jurors who spent eight weeks hearing this matter. Simply stated there is no basis to grant a new trial and the district court articulated this conclusion in its memorandum of law.

#### **A. SETTLEMENT AGREEMENTS**

Plaintiffs allege they should have been able to introduce into evidence the settlement agreements and that the agreements skewed the adversarial process. However, as noted by the Judge in his post trial memorandum, the agreements were disclosed. Appellants were allowed to cross-examine witnesses about the agreements.

The Appellants failed to disclose how the case was substantively affected or what other substantive evidence they have would have made a difference in the finding of no negligence against HGA and R&C. Appellants summation was replete with arguments about "settlement agreements" and indemnity.

The Plaintiffs could have made the same agreement(s) with the settling parties. In fact, there is **no evidence** Appellants ever attempted to consult with the other parties and Appellants have never identified what new information was discovered by the defendants in the purported "secret" meetings that was not available in discovery.

The district court concluded that the settlement agreements between HGA and R&C, amongst themselves and with the other third-party defendants "were not impermissibly collusive or such as to render the process unfair." (LSC 258) It specifically stated that the cooperation provisions in the various settlement agreements "do not trouble the Court." (LSC 258) The court rejected the LSCA and LSC's "collusion" argument, noting that the LSCA and LSC had no right to access the agents and employees of the released parties beyond the extent the released parties might voluntarily provide such access. (LSC 259) It further noted that the released parties were under no obligation to provide access to their agents and employees, except to the extent of discovery proceedings that had been available to the LSCA and LSC throughout the trial. (LSC 259) More importantly, the court observed that the LSCA and LSC had every reasonable opportunity to cross-examine the representatives of the released parties that offered testimony at trial. (LSC 260) The Court commented that where a witnesses' testimony at trial differed from earlier testimony, it could have been, and in some instances was, challenged during cross-examination by counsel for the LSCA and LSC. (LSC 260)

Counsel for the Plaintiffs was permitted to inquire whether a witness was aware of the settlement releases, and if aware, to inquire into the witnesses' knowledge of the terms related to indemnity and cooperation and what impact, if any, it might have on the witnesses' testimony or if it led to bias. (LSC 260) The court concluded that the testimony of the witnesses of the released parties was tested by cross-examination and that there was no evidence of any conspiracy between HGA and R&C and the released parties to present untruthful testimony. (LSC 260) The court was left with the firm conviction that the settlement agreements did not result in prejudice to the Plaintiffs or so skew the trial process to deny any party of a fair trial. (LSC 260)

The district court also ruled that the settlement agreements should not have been allowed into evidence because the amounts of payments under the releases might have allowed the jury to draw improper inferences. (LSC 261)

If such agreements had not been disclosed (*Mary Carter Agreements*) an argument could be made that they created a distortion of the process. Not only were they disclosed but, in addition, motions were brought to accomplish the dismissals of the settling parties. Plaintiffs assert that the settlement agreements should be allowed into evidence. The case law is clear that the question of making the jury aware of the settlement is within the discretion of the trial court and should be done on a case by case basis. See, *Frey v. Snelgrove*, 269 N.W.2d 918 (1978). In the instant case the Court allowed the evidence of the settlement agreements but did not admit the documents or the amount. That decision was well within the bounds of the Court's discretion. A review of the transcript at closing demonstrates the record is permeated

with comments by Appellants counsel to the jury about settlement agreements, indemnity and credibility. (T. 6037-6041)

What insurer would agree to indemnify and hold harmless a party who was not required to cooperate and only consult with its insurer? The simple fact is none would ever agree to such an arrangement. The public policy of encouraging settlements would be severely limited and would discourage parties from settling their disputes. The Court's have noted in varying kinds of case and statutes the state's interest in encouraging settlements. See Mankato Aglime & Rock Company, Inc., v. City of Mankato, 434 N.W.2d 490 (Minn.App.1989); Cincinnati Insurance Company v. Franck, 644 N.W.2d 471 (Minn.App.2002) and Zaretsky v. Molecular Biosystems, Inc., 464 N.W.2d 546 (Minn.App.1990).

Appellants argue that because the settlement agreements with AET, K/O and AP/JW were partial they should have been required to remain as parties and should not have been dismissed. Why? Logic would dictate because the settlements were to the extent of insurance available to HGA through CNA it would logically follow the testimony would be more accurate and more likely to be truthful. Plaintiffs did not assert any direct claim against these parties. One might observe that even had Plaintiffs done so that would not dictate that they "participate" in the trial as Plaintiffs contemplate but they would have had the opportunity to do so.

The district court was well within the use of its discretion outlined in *Frey* and the process was not affected by the settlement agreements. The Court should affirm this part of the district court's Order.

## **B. REQUISITES TO PRESERVE ISSUES FOR NEW TRIAL MOTION**

Appellants' appeal covers nearly every possible basis set forth in Rule 59. The general rule is that for a party to preserve for appeal trial procedures, evidentiary rulings, jury instructions and other issues, a party must first make a timely objection and then move for a new trial. See, Sauter v. Wasemiller, 389 N.W.2d 200 (Minn. 1986). Appellants did not adequately identify how they perfected these issues for review or refer to the record of how they made a timely objection and/or requested a new trial. These same observations were made by Judge Hallenbeck when he observed in his Memorandum of Law that the Court was not provided any record by Appellants to review to determine if the specific event alleged had been objected to. (LSC 257)

A party who neither objects to prejudicial or objectionable remarks nor requests a curative instruction does not preserve grounds to seek a new trial. See, Hake v. Soo Line Ry. Co., 258 N.W.2d 576 (1977). It is also axiomatic one must be in position to demonstrate to the trial court the specifics of one's basis for a new trial request or the exercise is one in futility for the court. On page 20 of the Appellants brief they give a series of cites to transcript pages. One pairing of pages T. 3184 and 3203 relates to the mention of Andrew Slade. This inquiry was made by counsel for HGA. What is most informative in this respect is the discussion with the Court regarding the reason for the question set out in T. 3203-3210. The district court ruled the matter not relevant. The only query that got out was Andrew Slade's name. The fact is he was the director of education---as Ms. Hayden identified him.<sup>1</sup> Simply and bluntly stated the assertions by

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<sup>1</sup> HGA inquired about Slade because he was fired in September or October 2000 (approximatley 6-8 weeks after the aquarium opened) for having written an article in the local paper regarding his disagreement with the building of a power line by Allete

Appellants are not substantiated by the transcript citations provided in their brief. The other assertions of counsel including referring to the fact of "retainage" (T. 3251), loan guarantors etc. are equally meritless. The Court should affirm the district court's holding in this part of the Order.

### **C. ALLEGATIONS OF "MISCONDUCT"**

The Supreme Court has noted that the trial court is in a better position to determine the propriety of granting a new trial when assertions of "misconduct" are made because the Court has seen the "misconduct alleged" and its prejudicial affect. See, *Fisher v. Mart*, 308 Minn. 218, 241 N.W.2d 320 (1976).

The assertions by Plaintiffs about alleged instances of misconduct are not matters alone or cumulatively that gives rise to prejudice and the need for a new trial.

The district court addressed the issue of misconduct by defense counsel. In rejecting the arguments of the LSCA and LSC, the court stated that it "did not observe, in argument or during the presentation of evidence, anything approaching that qualify of conduct that would merit, let alone require, new trial relief." (LSC 261) Again, the court noted that in many instances the LSCA and LSC failed to present specific situational references in the record that left the court uncertain what particular matter to address. (LSC 257) The court further recalled that a significant number of the alleged instances were not raised during trial, "leaving the Court with no opportunity to correct any alleged

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(formerly Minnesota Power and Light). That resulted in a boycott and placarding of the aquarium that HGA believed could have adversely affected its finances.

impropriety." (LSC 262) The court concluded that the LSCA and LSC therefore waived any claim of error in those instances were they failed to object to the alleged impropriety at trial. (LSC 265)

As to the comments by counsel for R&C during closing argument referring to the tearful reaction of Helen Fehr, the engineer from R&C who prepared and signed the Isle Royale tank design plans and specifications, when she entered the courtroom, the court acknowledged that this comment was based, in part, on what occurred at trial, but also included information outside the record. (LSC 262) The court determined, however, that the reference was made in passing, and under the circumstances of the entire trial, was not "so out of bounds as to taint the fair trial process." (LSC 262-263)

The court also rejected the challenge to the comments of R&C's counsel during closing argument that certain testimony of Craig Kronholm was a "curveball" to the parties. (LSC 263) This testimony related to a letter Kronholm alleges he sent expressing a negative opinion of Marcy's work and his recommendation that Marcy not be allowed to serve as the prime concrete contractor on the Project. (LSC 263) The court was satisfied that counsel for none of the parties knew of this letter, but more importantly, noted that the jury found that A&P/JW was not negligent in allowing Marcy to serve as the prime concrete contractor on the Project. (Special Verdict LSC 200). It is worthy of note that no evidence was offered by any party that Marcy was not "competent to bid" for this work.

In terms of the alleged misconduct by counsel, the court noted that this was a long and complicated case and that "[a]ll counsel were professional in their manner and presentations." (LSC 266) The court noted that at times, particular words became a part

of the trial, including the word "soiree." (LSC 266) The use of this word by defense counsel, however, was not misconduct. (LSC 266)

**D. Alleged errors of law.**

The court addressed and rejected numerous "errors of law" that the LSCA and LSC claimed warranted a new trial. (LSC 266-275) The court clarified that its concern regarding the fact the same carrier insures three of the companies involved in the litigation related to the issue of whether the interests of the insured parties might be compromised, "not the rights of plaintiffs who had no contractual relationship with the insurance carrier." (LSC 266-267) The court rejected the claim that the LSCA and LSC were entitled to a jury instruction based on the decision in Zontelli v. City of Nashwak, 353 N.W.2d 600 (Minn. 1985), because it concluded the holding in that case did not apply to the facts of this case. (LSC 269) As for the admission of evidence regarding Marcy's "reputation" and its failure to use the concrete additive "Eclipse," the court noted that the LSCA and LSC misperceived what occurred at trial and the bases on which the evidence was presented. (LSC 269) It noted that curiously, the LSCA and LSC sought to use the same information in support of its motion that they be permitted to recover against HGA, as the indemnitor of AP/JW, based on the alleged negligence of AP/JW relating to this information. (LSC 269) As to the evidence relating to Eclipse, the court noted that the LSCA and LSC had in fact spent considerable time developing this evidence in support of their claim that Marcy was "hamstrung" by the original design specifications put forth by HGA and R&C that did not allow the use of concrete additives. (LSC 270) David Lonsdale the executive director of the Great Lakes Aquarium during the time of its construction opined about the poor

quality of Marcy's work (T-2743-2745). When Appellants own director is critical of the Marcy work it is difficult to see how anyone else's critique could do any harm.

- E. No "surprise" exists regarding the testimony of David Kreck or Craig Kronholm that would warrant a new trial.**

Appellants assert that Kreck and Kronholm's testimony was so "surprising" that it warrants the grant of a new trial. Appellants never deposed David Kreck so their claim to be surprised at what he had to say is a product of their own failure to pursue discovery. (LSC 273) Kreck's testimony was consistent with his reports---and more important the legion of photos introduced that demonstrated the truth of his testimony. Clearly the openings placed in the forms by Marcy were for observation----not placement of concrete---which Marcy attempted to do with five gallon buckets---when it was clear their methods and means would not allow proper placement of the concrete. It is presumed this is the testimony Appellants objected to.

Craig Kronholm was deposed three (3) times regarding this project. (LSC 263) Appellants were present with counsel all three times. Defendants in this case deposed him once and were present once for his deposition. The complaint of Appellants regarding the Kronholm testimony----his opinion about Marcy and their work----was never asked of Kronholm in any of the three depositions. (LSC 263, 273) It seems to be an immutable fact that in every trial one will hear something one did not previously know----usually because no one asked before.

- F. The district court correctly determined that Duluth Ready Mix (DRM) should not be on the verdict form.**

As a preliminary matter HGA never brought an action against DRM. R&C had

joined them under the theory they may have delivered the wrong mix to the site. When it was apparent that no such evidence existed---and DRM proffered an Affidavit stating that their testimony would be they got a call and the exact mix Marcy ordered from them is what they delivered, R&C dismissed them. Further Rule 11 required R&C to dismiss at that point or risk sanctions for bad faith. There was never any evidence in the record that would have allowed any reasonable person to conclude DRM did anything wrong.

**G. Helen Fehr's testimony about the lack of knowledge about a budget for repairs was particularly pertinent to HGA---because it was the reason for the concern R&C expressed regarding the appearance of the mock-ups.**

Appellants attempted to make an issue over the fact R&C had not been overly enthused by the appearance of the second mock-up conditionally accepted by HGA. What was apparent later---and at trial---was R&C did not know a budget had been created before the project was bid---for repairs to the tanks---as HGA always anticipated imperfections. It was apparent R&C would not have been concerned about the second mock-up appearance had they known about the repair budget. Appellants interjected the issue and now complain because it was met. There was nothing improper---Appellants opened the door by their assertions. Her testimony about the budget was related to documents already in the record.

**H. Marcy's reputation became relevant based upon the positions taken at trial---that HGA had not apprised the owner of ongoing concerns over Marcy's work.**

Appellants repeatedly suggested to the Court and jury that HGA failed to "supervise" the project adequately---including but not limited to the assertion(s) or implication(s) the owner was not adequately apprised of issues arising regarding Marcy's performance. (LSC 270) In fact, they also implied in their case in chief that

MMS had failed to point out issues to the owner. As a result it was necessary to point out **everyone** from the construction manager, owners representative and other trade contractors were concerned about the Marcy performance. (LSC 270) In fact--- Appellants essentially asserted HGA should have fired Marcy. That assertion was made by Appellants even though they knew the only party who could terminate Marcy were themselves-----and they as owner were fully aware of all parties concerns.

Appellants suggest Dave Schilling, Craig Kronholm and John Carlson should have been prevented from testifying about their own observations. (LSC 270) Finally--- -it would have been perfectly appropriate for the jury to conclude---and perhaps they did----that one reason the owner did not act to remove Marcy was cost and delay---both major issues on this project.

The documents Robert Christian testified about were business records admitted as such as an exception to the hearsay rule. (LSC 270) It was AET who did the experimenting with the Eclipse----and got good results but was told by Marcy not to report that to R&C and HGA. (LSC 270, 271) Christian and AET are rightly stating this---in their own defense. Appellants' argument suggests AET should not be allowed to explain what they did----even though Appellants now attempt to make a claim against AET.

**I. The trial court properly allowed the animation offered by R&C.**

See the trial courts Memorandum. (LSC 271) There is no issue regarding the admissibility or the propriety of the exhibit. The trial court took extraordinary steps to ensure the exhibit met the legal requirements.

**VIII. DID THE DISTRICT COURT CORRECTLY HOLD THAT APPELLANTS**

**COULD NOT AMEND AND ADD PARTIES AFTER THE VERDICT PURSUANT TO RULES 14 AND 15?**

Appellants allege they should have been able to amend their claims after verdict to Assert claims against entities that were not parties to the case when the trial commenced. The trial court Memorandum on this issue says all that is necessary to deal with this assertion. The “newly joined parties” would have had available to them all defenses as any newly minted defendant would----and the statute of limitations would bar such claims in this case brought at this date.

**A. The finding by the jury to the Special Verdict Interrogatory number 41 presents a bar to “any and all claims” pursuant to Minn. Stat. § 541.051.**

The jury was asked to answer the following question:

41. Did plaintiffs discover, or should they reasonably have discovered, an injury to the Great Lakes Aquarium due to the defective and unsafe condition of the Isle Royale Tank on or before May 1, 2000?

The jury answered the question YES. The facts as found demonstrate that Plaintiffs knew of the injury from the defective and unsafe condition more than two years prior to commencing suit against HGA. (Suit against HGA was commenced by service on them on May 3, 2002.) Plaintiffs can maintain no claims against any of the original parties to this litigation over the Isle Royale tank. See Minn. Stat. § 541.051.

In the instant case the jury has found that the injury alleged by Plaintiffs was known to them on or before May 1, 2000 more than two years before the commencement of suit against HGA. Plaintiffs alleged they were misled by R&C and HGA and therefore their reliance on the “advice” they were given tolled the statute of limitations. However, no reasonable interpretation of the jury’s verdict allows such a conclusion. According to the trier of fact, the advice of HGA and R&C was correct. See

Special Verdict question no. 44. (LSC 209) Therefore, the clear language of Minn. Stat. § 541.051 subd. 1 precludes the claim(s) of Plaintiffs.

**B. Plaintiffs can not “claim over” pursuant to Rule 14.01 against parties dismissed from the case as they are no longer “parties” within the meaning of the Rule.**

Plaintiffs assert they are entitled to bring a “direct claim” pursuant to Rule 14.01 of the Minnesota Rules of Civil Procedure. The Rule states in pertinent part:

...The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert any defenses as provided in Rule 12 and any counterclaims and cross-claims as provided in Rule 13. ..

The provision above contemplates the continued presence of a third-party defendant---not a claim to be brought after their dismissal. To allow the Rule to be used otherwise invites chaos and such uncertainty to the “system” that no settlements would be undertaken in multiple party cases. The Rule is inapplicable by its language.

**C. HGA’s claim(s) against AET, A&P/JW and K/O was solely for contribution and indemnity, in the event HGA was held to be liable to Plaintiffs for damages alleged by Plaintiffs.**

Plaintiffs attempt to amend to join new parties as Defendants can not directly arise from the Third Party Complaint of HGA. HGA’s claim(s) was solely for contribution and/or indemnity from any damages that might be assessed by the trier of fact for the conduct of HGA. (See Amended Third Party Complaint of HGA.) Ample evidence of this distinction is demonstrated by Plaintiffs bringing a “new” pleading when they elected to join R&C and pleading a direct claim of negligence against them. When instituting a “new” claim, the now new defendants have the right to assert all of their

defenses, including statute of limitations, limitation of liability and lack of a professional witness' opinion that the standard of care has been breached.

**D. Rule 15.02 can not "save Plaintiffs claim" from the application of the applicable limitations period.**

Rule 15.02 of the Minnesota Rules of Civil Procedure states in part:

...and the objecting party fails to satisfy the court that admission of such evidence would prejudice maintenance of the action or defense upon the merits...

HGA asserts that the allowance at this stage (after jury verdict) has prejudiced its ability to defend the case on its merits. The time for making the motion to allow a direct claim was when the motion was brought to dismiss the third party defendants with prejudice. Defendants' counsel stated this at that time. Apparently Plaintiffs' made a decision not to make their claim at that time, because they would risk dismissal of these parties at the close of their case in chief, just like what happened with MMS. In addition, as set forth in the transcript of the proceedings that took place on October 22, 2004 Plaintiffs withdrawal of their motion to amend to add parties precluded HGA from commenting on the "actual claims in the case" in its closing argument to the jury. In a jury trial it is next to impossible to demonstrate the affect of such an issue---- other than to state this concern was completely aired as untimely and prejudicial **prior to the closing argument.** If Plaintiffs are allowed to amend now it is essentially rewarding them for making the choice in their closing to mislead the jury as to the real status of claims. In Appellants closing argument they asserted the jury should apportion fault 60% to R&C and 40% to HGA. ( T. 6044) Had appellants plead claims against the third party defendants it would have been a much different

case for the “design team”—HGA, R&C and MMS----to defend.

If the Court allows the amendment under Rule 15.02 any entity made a “defendant” at this point would be as if they were just sued and would have all defenses available to them including the statute of limitations. The statute of limitations is not tolled by the previous dismissals. See Bebo v. Delander, 632 N.W.2d 732 (Minn. App. 2001). The futility of a motion to amend due to the running of the applicable statute of limitations is proper grounds for denying the proposed amendment. See Fabio v. Bellemo, 504 N.W.2d 758 (Minn. 1993). Plaintiffs entered into an agreement and paid Marcy pursuant to a Pierringer Agreement in January of 2002. The statute of limitations is not tolled by the prior dismissal; therefore, any action commenced now is barred by the language in Minn. Stat. § 541.051 subd. 1b that states:

(b) For purposes of paragraph (a), a cause of action accrues upon discovery of the injury or, in the case of an action for contribution or indemnity, upon payment of a final judgment, arbitration award, or settlement arising out of the defective and unsafe condition.

It is anticipated Plaintiffs will attempt to defeat the affect of the jury’s verdict outlined above by alleging no injury until they paid Marcy the settlement in January of 2002. Should the Court find that argument persuasive it then must look at the interaction of the “relation back” provisions of Rule 15 and how that is interpreted in light of Minn. Stat. § 541.051. The newly minted Defendant(s) are not subject to relation back principles and as a result it is clear that more than two years have passed since the time of the payment to Marcy.

A dismissal with prejudice based on a stipulation is a final adjudication on the merits. State Bank of New London v. Western Casualty and Surety Co., 178

N.W.2d 614, 617 (Minn. 1970). Plaintiffs want to take advantage of Rule 15.02 and amend after dismissal of parties and after a jury verdict. However, while it is true Rule 41.01 (b) allows a court to attach conditions to the dismissal as it deems proper, the court cannot toll the statute of limitations as one of those conditions. See Werlein v. Federal Cartridge Corp., 401 N.W.2d 398,

**D. Plaintiffs can not assert a right to make a claim against AET in excess of the limitation of liability expressly stated in the contract with Plaintiffs.**

Plaintiffs brought a motion that sought to add AET as a party Defendant and then make HGA and R&C liable. That is not what the agreement between the parties' states. It requires HGA to indemnify AET up to the limits available to it under its contract of insurance with CNA. That does not give rise to a cause of action in favor of Plaintiffs---in any respect---against HGA and/or R&C. As a result, the motion was ill formed and not viable. If HGA owes a duty of indemnity to AET under this verdict any claim against HGA would only lie in favor of AET---alleging some breach of agreement with HGA. Nothing else could or would pend against HGA and/or R&C.

AET has an express limitation of liability in its contract---for special inspection services---the item the jury found they performed negligently---that limits its liability to the sum of \$50,000.00 for such failure. At the time of the entry into the contract with AET Plaintiffs had counsel and there is no evidence that such a limitation would be unconscionable or that it should be unenforceable. Minnesota recognizes the validity of exculpatory clauses. Schlobohm v. Spa Petite, Inc., 326 N.W.2d 920, 923. (Minn. 1982).

The exculpatory clause contained within the AET Service Agreement is not ambiguous. An exculpatory clause is ambiguous when it is susceptible to more than one reasonable construction. See Collins Truck Lines, Inc. v. Metro. Waste Control Comm'n. 274 N.W.2d 123, 126 (Minn. 1979). Simply stated, if this Court is inclined to allow such an amendment the result must be limited by the terms of the contract Plaintiffs negotiated with AET---\$50,000.00.

Further, no expert testimony or opinion was offered that AET breached the standard of care for an entity providing its services. The district court had previously ruled an expert pursuant to Minn. Stat. § 544.42 was necessary to be able to maintain an action against AET. No opinion testimony was offered that AET breached the standard of care and therefore any attempt at amendment would be ineffectual because no cause could survive directed verdict motions brought by this potential defendant.

**J. Plaintiffs are not entitled to look to AET for any part of the sums paid to Marcy as a settlement.**

The Appellants willful failure to pursue amendment at an earlier time (prior to trial) precludes this recovery. As a result of their untimely request the verdict form is substantially different than it would have been had other third-party defendants been parties to the proceeding. The answer to the Special Verdict interrogatories does no more than tell us the jury believed Plaintiffs "business decision" to settle the Marcy claim seemed to be a reasonable "business decision" when they made it. It tells us nothing else in light of the verdict. The question was premised upon the belief that if the jury found the Defendants (HGA and R&C) negligent Plaintiffs would possibly seek indemnity by way of motion against the Defendants. Because the jury decided the Defendants were not negligent the asking of the questions is not helpful in trying to

determine what the answers mean. That is, perhaps the jury believed that as a result of its answers that Plaintiffs and Koosman were negligent might make them responsible for the amounts. Again, simply stated, the manner in which the Special Verdict Form was crafted was dictated by the choices Plaintiffs made before the commencement of the trial. Their decision(s) not to claim over before dismissal of the third party defendants has consequences----and as all strategic decisions---upsides and downsides.

In this case Special Verdict questions were addressed at some length on the record on October 22, 2004. (See transcript of same date) The issue is now squarely presented on how the sum paid to Marcy can be allocated in any way when the jury found no liability on the Defendants. The fact of the payment made to Marcy for whatever reason does not equate to a conclusion there has been any damage, save and except for the decision by Plaintiffs to pay Marcy.

**K. Plaintiffs can not avoid the fact finding of the jury and now allege that A&P/JW and HGA are liable for indemnity for the \$465,000.00 to Plaintiffs for an alleged failure to disqualify Marcy as a contractor. Further, if the Court were to require A&P/JW and HGA to pay Marcy's share (75%) A&P/JW and HGA would be entitled to pursue a right of contribution from Marcy, who is indemnified by Plaintiffs.**

As a preliminary matter Plaintiffs ignore the fact that Special Verdict Interrogatory 16 was asked of the jury and answered NO. Question 16 read as follows:

16. Was AP/JW negligent in failing to pre-qualify Marcy as a contractor competent to perform the concrete work on the Isle Royale Tank?

As set forth above the jury answered this question no. (LSC 200) The answer is res judicata (factually) since it was explicitly asked and answered by the trier of fact.

Given the jury's verdict relating to AP/JW, AET, K/O and CR, Plaintiffs are

barred from bringing additional claims against these parties by the doctrine of *res judicata*, or claim preclusion. The Minnesota Supreme Court explained the concept of *res judicata* in its decision of *Hauser v. Mealey*, 263 N.W.2d 803 (Minn. 1978).

Further, there was not one scintilla of evidence offered by any party that Marcy was not qualified to bid for and contract to do this work. Even further removed is the question of causation, as it would theoretically relate to HGA & AP/JW. It would make far more sense that Plaintiffs and Koosmann were negligent in hiring Marcy and failing to remove them from the project (especially since the jury found Plaintiffs and Koosmann negligent) but that still does not supply the cause and effect relationship. These requests are premised on flawed logic and would require this Court to supply by way of speculation and/or surmise that Marcy was not qualified to bid and contract for the work.

Plaintiffs assert that they were entitled to indemnity because of a breach of a duty owed to them and cite the decisions of *Tolbert v. Gerber Industries, Inc.*, 255 N.W.2d 362 (Minn. 1977) and *Hendrickson v. Minnesota Power & Light Co.*, 104 N.W.2d 843 (Minn. 1960) claiming they represent the law in that respect. However, the damage suffered by Plaintiffs was a “business decision” to pay money to Marcy (Plaintiffs witnesses did not dispute Marcy was owed money on their contract---for retainage) not the breach of any duty owed to them by a third party. The distinction is important because Plaintiffs have attempted to “blur” the line between breach of a duty and a “business decision”.

**IX. IS THERE A LEGAL OR FACTUAL BASIS TO OVERTURN THE TRIAL COURTS FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING THE PROFESSIONAL FEES DUE TO HGA (THAT INCLUDES FEES DUE TO MMS)?**

Appellants have challenged the trial court's award of professional fees due to HGA but have not cited one factual finding or conclusion of law as being errant. "[A]ssignment of error based on mere assertion and not supported by any argument or authorities in appellant's brief is waived and will not be considered on appeal unless prejudicial error is obvious on mere inspection." Schoepke v. Alexander Smith & Sons Carpet Co., 290 Minn. 518, 519-20, 187 N.W.2d 133, 135 (1971); Joelson v. O'Keefe, 594 N.W.2d 905, 909 (Minn. App. 1999).

No errors exist in the detailed findings of the trial court and its resultant Order. Appellants' failure to identify how they are aggrieved constitutes a waiver of this assertion and this Court should affirm the district court in all respects.

**X. WAS THE DISTRICT COURT'S TAXATION OF COSTS PURSUANT TO RULE 68 APPROPRIATE AND SUPPORTED BY FACT AND THE LAW?**

This matter was relatively recently argued and briefed to the district court. It is rare for an attorney not to have too much to say. However, the Findings and Memorandum prepared by Judge Hallenbeck are so extraordinarily detailed little need be added. There is no doubt the award of costs and disbursements should be sustained.

Minnesota Statute Chapter 549.04 provides that "[i]n every action in a district court, the prevailing party . . . shall be allowed reasonable disbursements paid or incurred, including fees and mileage paid for service of process by the sheriff or by a private person." The trial judge is generally given broad discretion in determining the reasonableness of costs and disbursements. See Romain v. Pebble Creek Partners, 310 N.W.2d 118, 123-24 (Minn. 1981); Solon v. Solon, 255 N.W.2d 395, 397 (Minn. 1977).

However, absent a specific finding that a particular cost was unreasonable, the court "shall" approve recovery of all disbursements sought. Minn. Stat. § 549.04; Jonsson v. Ames Construction, Inc., 409 N.W.2d 560, 563 (Minn. Ct. App. 1987). "The trial court does not have discretion to deny costs and disbursements to a prevailing party." Quade & Sons Refrigeration, Inc. v. Minnesota Mining & Manufacturing, 510 N.W.2d 256 (Minn. Ct. App. 1994), *pet. for rev. denied*, (Minn. Mar. 15, 1994) (citations omitted). "When reviewing a request for costs and disbursements, the district court must make sufficient findings of reasonable and necessary costs and disbursements." Beniek v. Textron, Inc., 479 N.W.2d 719, 724 (Minn. Ct. App. 1992), *pets. for rev. denied*, (Minn. Feb. 19, 27, 1992).

### **Deposition Costs**

The trial court has the discretion to award deposition costs to the prevailing party. Green-Glo Turf Farms, Inc. v. State, 347 N.W.2d 491, 495 (Minn. 1984). The costs of procuring depositions, including the cost of depositions not used at trial, are recoverable costs as long as they are not cumulative or duplicative. Stinson, 473 N.W.2d 333, 337-38 (citing Green-Glo Turf Farms, Inc. at 495.) Travel expenses incurred by a party in procuring deposition testimony are also a recoverable cost. Benson v. Northwest Airlines, Inc., 561 N.W.2d 530, 541 (Minn. Ct. App. 1997) *review denied*, (Minn. June 11, 1997).

### **EXPERT WITNESS FEES**

Minnesota statutes provide that an expert shall be given reasonable and just fees. M.S.A. § 357.25 states as follows:

#### **357.25. Expert witnesses**

The judge of any court of record, before whom any witness is summoned or

sworn and examined as an expert in any profession or calling, may allow such fees or compensation as may be just and reasonable.

As stated, expert witness fees are allowable within the district court's discretion, and should be allowed when just and reasonable. See *Johnson*, 460 N.W.2d 68; Minn. Stat. § 357.25. Although the administrator may tax, and the rule expressly provides that the limitation is 'subject to increase or decrease by a judge.'" *Quade & Sons Refrigeration*, 510 N.W.2d at 260. The courts have repeatedly held that compensation for an expert's preparation for trial should be allowed where the complexity of the case so demands. See *id.*; *Stinson*, 473 N.W.2d at 337; *Johnson*, 460 N.W.2d at 73; *Mohwinkel v. City of North St. Paul*, 357 N.W.2d 174, 177 (Minn. Ct. App. 1984) *pet. for rev. denied*, (Minn. Feb. 19, 1985) (holding that "Rule 11 may disallow fees for outside preparations which are merely convenient, but it does not disallow those necessary for testimony") (Rule 11 is the predecessor to Rule 127).

This was a complex case that led to the need for substantial out of court preparation time for any expert witness to be qualified and competent to testify. HGA adopts and incorporates by reference the arguments submitted by R&C regarding the experts they covered including A.W. Hutchinson (Robert Davenport); James Metzler; and Weidlinger Associates (Matthys Levy). In addition, the size of the claim asserted by Plaintiffs dictated that Defendants had to take all reasonable steps to assure they were in a position to defend against that claim. The district court fully reviewed the fees and noted that nearly half of the fees incurred were **after the Rule 68 offer** that was made in May 2004 about 3 and one-half months prior to trial. (HGA Appendix p. 453)

The district court's detailed findings and conclusions along with its memorandum should be affirmed, except as to the stay of the enforcement of the judgment and the daily transcript matter.

### **CONCLUSION**

HGA requests that this Court reverse the trial court's Orders of September 23, 2002 and October 1, 2002 and enter a dismissal with prejudice in defendants favor pursuant to Minn. Stat. § 544.42(6)(b). Alternatively, this Court should reverse the trial court's denial of HGA & R&C's motion for a summary judgment in its Order of May 7, 2003 and Order entry of judgment in favor of the defendants based upon the finding of the jury in the special verdict. This Court should reverse the district court's denial of HGA's motion for a directed verdict on October 8, 2004 and order entry of judgment with prejudice in favor of HGA except as to the vicarious liability claim.

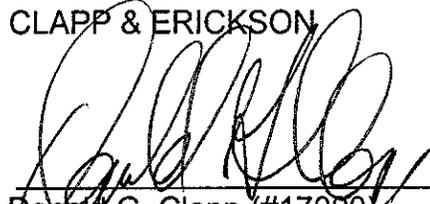
This Court should sustain the jury's verdict in this matter. Nothing unusual occurred warranting interference with the findings of this 10 person jury who listened to the evidence for approximately 8 weeks and unanimously concurred on their verdict.

This Court should sustain the Order allowing costs and disbursements and amend it and include the cost of the daily transcript for reasons outlined above. The Court should vacate the stay that was entered in favor of the LSCA on the costs and disbursements award.

Dated: 10-10-2005

Respectfully submitted,

CLAPP & ERICKSON

A handwritten signature in black ink, appearing to read "Donald G. Clapp", written over a horizontal line.

Donald G. Clapp (#17000)  
386 North Wabasha St., #1450  
St. Paul, MN 55102  
651-223-8100  
*Attorneys for Hammel, Green &  
Abrahamson, Inc.*