

NO. A08-0929

State of Minnesota
In Supreme Court

Day Masonry, Commercial Roofing, Inc.,
 Genflex Roofing Systems, L.L.P., and
 Lovering-Johnson Construction,

Appellants,

vs.

Independent School District No. 347,

Respondent.

**JOINT REPLY BRIEF OF APPELLANTS
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INTRODUCTION

This Court granted review to Appellants Lovering-Johnson Construction, Commercial Roofing, Inc., Day Masonry, and Gen-Flex (referred to collectively as “Contractors”) of the question whether the court of appeals erred when it refused to consider if the 10-year repose period under Minn. Stat. § 541.051, subd. 1 (2004) bars Respondent ISD No. 347 (“the District”) from enforcing the express written warranty claims included in Lovering-Johnson and Commercial Roofing’s general contracts. The court of appeals did not consider the repose period because it concluded that the Contractors should have filed a notice of review after the District appealed the trial court’s dismissal of its claims.

This joint Reply Brief of Lovering-Johnson Construction and Commercial Roofing, Inc., responds to the District’s contention that the Contractors waived the right to assert their repose argument by not filing a notice of review under Minn. R. Civ. App. P. 106, and further, that enforcing the repose provision in Minn. Stat. § 541.051, subd. 1 (2004) would be an impermissible retroactive application of the statute. This Court should conclude that the Contractors were not required to file a notice of review to preserve their repose defense, and that the 10-year repose period in Minn. Stat. § 541.051, subd. 1 (2004) applies to bar the express written warranty claims under Lovering-Johnson’s and Commercial Roofing’s contracts as a matter of law. The court of appeals partial reversal should be reversed and the trial court’s judgment affirmed. Lovering-Johnson Construction and Commercial Roofing, Inc., also join the arguments made by Day Masonry and GenFlex in their separate reply briefs.

Lovering-Johnson Construction and Commercial Roofing, Inc., rely on Day Masonry's Reply Brief to respond to the District's arguments that the trial court and court of appeals erroneously concluded that the District's breach of contract claims were barred.

ARGUMENT

I. THERE IS NO ADVERSE JUDGMENT OR ORDER FOR THE CONTRACTORS TO APPEAL.

The trial court did not make a ruling or determination adverse to the Contractors. The trial court did not rule on the applicability of the 10-year repose period to the written warranty claims. The case law that the District cites does not support its claims of an adverse ruling. The court of appeals opinion improperly expands the scope of Minn. R. Civ. App. P. 106 to alternative theories that were litigated below but not decided.

A. No trial court ruling was adverse to the Contractors.

The District contends that the trial court ruled adversely to the Contractors when it concluded that the District's claims accrued before March 2004 and applied the pre-2004 version of Minn. Stat. § 541.051. (Resp't Br. to Lovering-Johnson and Commercial Roofing (RB) 4-5.) This is because the statute's repose period did not apply to express written warranty claims until it was amended effective August 1, 2004. The District is mistaken. Even if the trial court applied the wrong accrual test when it ruled in the Contactor's favor, applying the correct test such that the claims were deemed to accrue after December 2004, when the District insisted they did, and the court of appeals so found, would favor the Contractors too. That date was after the statute was amended to

remove the exemption for warranty claims from the repose period. Either way the Contractors win, and thus the court's order could not be adverse to them.

Even if the trial court implicitly or expressly ruled on the Contractors' repose defense by applying the pre-2004 statute, its ruling was not potentially adverse to the Contractors.¹ The trial court's ruling that the District's claim accrued before September 1, 2002, was not adverse because it meant that the District's warranty claims were barred by the 2-year limitation period in subdivision 4 of the statute, which was unchanged by the 2004 amendment. (App. in Resp't Br. to Day Masonry 210.)

Alternatively, if the trial court would have concluded that the District's warranty claims did not accrue in 2002, it would have concluded, as was argued by both parties at trial, that the District's claims did not accrue until after December 2004 when the District sent notice letters to the Contractors. This ruling would not have been adverse to the Contractors because the trial court would have applied the 2004 amendments to Minn. Stat. § 541.051 and would have concluded that the District's warranty claims were barred by the repose period because they accrued more than 10 years after construction was substantially completed.

On review of the trial court's decision, the court of appeals should have applied de novo review and considered the same legal alternatives that the trial court considered. *See Roderick v. Group Health Plan*, 753 N.W.2d 711, 716 (Minn. 2008). If the court of appeals had applied de novo review of the repose period's applicability to the District's

¹ Minn. R. Civ. App. P. 106 provides that "[a] respondent may obtain review of a judgment or order entered in the same action which may adversely affect respondent by filing a notice of review."

warranty claims, it would have affirmed the trial court, albeit on different grounds (see following sections). Whether the court of appeals had determined the District's warranty claims accrued in September 2002, as the trial court did, or after December 2004, the alternative argued at trial by both the District and the Contractors, its ruling would have favored the Contractors. The warranty claims should have been barred either by the statute of limitations or by the statute of repose.

The court of appeals conducted de novo review to conclude that the District's warranty claims were not barred by the statute of limitations because they did not accrue until after December 2004. *Day Masonry v. Indep. Sch. Dist.*, No. A08-0929, 2009 LEXIS 464, at *13-17 (Minn. App. May 5, 2009). But the court of appeals stopped short on its review and did not conduct de novo review of the repose period. Had it done so, the court of appeals would have concluded that the District's claims were barred by the repose period. Further, in a case like this, when the appellate court is asked to review a purely legal issue that has been fully briefed and argued below, and that is based on undisputed facts, the proper remedy is to affirm the trial court's correct decision using the correct reasoning. *See Katz v. Katz*, 408 N.W.2d 835, 840 (Minn. 1987).

Had the court of appeals conducted de novo review, it would have reached a conclusion that was favorable to the Contractors. Thus, there was no reason for the Contractors to file a notice of review of the trial court's conclusion.

B. The trial court did not rule on the repose period.

This Court could also conclude that the trial court did not even rule on the repose period. The District contends that the trial court did rule on this when it concluded that

the District's claims accrued before March 2004 and applied the pre-2004 version of Minn. Stat. § 541.051. (RB 4-5.) The District's position is inconsistent with both the trial court's order and memorandum and with the District's arguments to the court of appeals. The District's brief to the court of appeals stated that "[t]he Court did not specifically address the statute of repose contained in Minn. Stat. § 541.051 because the Court concluded that the statute of limitations barred the District's warranty claim" (Resp't Court of Appeals Br. (RAB) 40-41.)

The District now argues, for the first time,² that the trial court did rule on the repose period and that the ruling was adverse to the Contractors. As evidence of the adverse ruling, the District notes that the trial court applied the pre-2004 amended version of Minn. Stat. § 541.051 to analyze whether the District's warranty claims were barred by the statute of limitations. This is because the court concluded that the warranty claims accrued before the 2004 amendments took effect. The District argues that the trial court would have applied the same pre-2004-amendment statute to determine whether the District's warranty claims were barred by the repose period. (RB 4-5.)

In making its argument that the trial court ruled on the statute of repose, and that the ruling was adverse, the District takes a leap of logic. It asks the Court to extend the trial court's reasoning that it applied in its statute of limitations ruling to an issue that the trial court did not decide. While Minn. R. Civ. App. P. 106 provides that "[a] respondent may obtain review of a judgment or order entered in the same action which may

² On appeal to the court of appeals, the District did not argue that the trial court's ruling was adverse to the Contractors or that they should have filed a notice of review. Rather the court of appeals reached this conclusion sua sponte.

adversely affect respondent by filing a notice of review,” here, there was no adverse ruling or judgment for the Contractors to appeal. The trial court concluded that the District’s warranty claims were barred by the statute of limitations. This ruling was not adverse to the Contractors. The trial court’s failure to reach a determination on the statute of repose was not adverse to the Contractors. Respondents are not required to appeal an issue that the trial court never decided.

C. Case law does not support the District’s arguments.

The District cites case law purporting to support its argument that the trial court ruled adversely to Contractors on the repose period and that appellate courts cannot review the applicability of the repose period because the Contractors did not file a notice of review. (RB 5-8.) But the cited cases actually support the Contractors’ position that no notice was required. Cases have only required a notice of review to preserve an issue on appeal when the trial court has made an express ruling that is adverse to the non-appealing party. Here, as explained above, the trial court’s ruling was not adverse to the Contractors.

In *City of Duluth v. Duluth Police Local*, upon which the District heavily relies, there was an adverse ruling on the merits of the City’s claim. 690 N.W.2d 357, 359-61 (Minn. App. 2004). In that case, the City petitioned the trial court to vacate an arbitration award, as permitted under Minn. Stat. § 572.19 (2002). *Id.* at 358. At the trial court proceeding, the City argued that the arbitration award was not a public record because it was not the result of a “disciplinary action.” *Id.* at 359. The trial court concluded that there had been a “disciplinary action” and that the award should be a public record. *Id.* at

359-60. The trial court delayed the public release date until after the parties had exhausted their appellate remedies. *Id.* at 360. Thus, unless the trial court was reversed on appeal the award would become public. Here, unlike *City of Duluth*, the respondent Contractors were the prevailing party, and there was no ruling that was adverse to them.

The District also cites to *In re Barg*, 752 N.W.2d 52 (Minn. 2008), and *Arndt v. Am. Family Ins.*, 394 N.W.2d 791 (Minn. 1986). (RB 9, 14-15.) In *Barg*, this Court concluded that a party could not contest on appeal an issue that it had expressly conceded at trial. *Barg*, 752 N.W.2d at 53-55. Here, the Contractors never conceded that the repose period would not apply. In *Arndt*, the trial court allowed the plaintiff to orally amend his action and subsequently issued an opinion denying the plaintiff's claims. *Id.* at 793. When the plaintiff appealed, the defendant argued that the trial court should not have allowed the plaintiff to amend his claim. *Id.* The court of appeals concluded that the defendant should have filed a notice of review and did not consider the argument. *Id.* In *Arndt*, the trial court ruled adversely to defendants on a dispositive issue. If the plaintiff had not been permitted to amend his complaint, the case would have been over. Instead, the court considered the merits of the case. Here, there was no dispositive ruling that was adverse to the Contractors. If the trial court had concluded that the District's claims did not accrue until December 2004, the District's claims would still have been barred.

D. The court of appeals improperly expanded the scope of Minn. R. Civ. App. P. 106 to undecided alternative theories that were litigated below.

The District contends that the court of appeals did not expand the scope of Minn. R. Civ. App. P. 106 to undecided alternative theories. (RB 5-8, 17.) But that is exactly what the court of appeals did. The court's ruling ignores established precedent that undecided alternative theories can be reviewed on appeal even if a notice of review is not filed.

In *Hoyt Inv. Co. v. Bloomington Commerce & Trade Ctr. Assoc.*, plaintiff alleged that defendant breached its contract. 418 N.W.2d 173, 174 (Minn. 1988). Defendant's defense was that no "closing" occurred. *Id.* Both issues were litigated, but after the trial court concluded that there was "no closing," it did not rule on breach. *Id.* This Court stated that the defendant should have raised the question of breach in his first petition for review. *Id.* at 176. It declined to review the issue because the defendant waited until his second petition for review to raise the issue. *Id.*

In reaching its conclusion in *Hoyt*, this Court noted that it has never "imposed the requirement of a notice of review where the trial court has failed to rule on a question litigated and practical reasons continue to render such a notice unnecessary." 418 N.W.2d at 175. Further, "[w]hile a notice of review might serve to call attention to the unresolved issue, an undecided question is not usually amenable to appellate review." *Id.* As to the defendant, this Court stated that because the defendant prevailed "on what the trial court viewed as the dispositive issue, [defendant] had no occasion to seek from the trial court the finding required by the court of appeals." *Id.* See also *Hunt v. Sherman*,

345 N.W.2d 750, 753 n.3 (Minn. 1984) (stating that “[i]t is well settled, however, that a respondent may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, even though the argument may involve an attack upon the reasoning of the lower court or an insistence upon matters overlooked or ignored by it”).

The facts of this case parallel *Hoyt*. The trial court did not rule on the repose period because it decided that the District’s warranty claims were barred by the statute of limitations. Because the Contractors prevailed on the dispositive issues, they did not have the occasion to request that the trial court rule on the repose period to preserve an appealable judgment or order. Similar to *Hunt*, the statute of repose theory is a matter that the trial court overlooked. The Contractors may, without taking a cross-appeal argue that the trial court’s ruling should be upheld because the District’s claims are barred by the repose period.

The court of appeals erred by concluding that the Contractors could not raise the repose period as a defense and that it could not review the repose period de novo. Essentially, the court required the Contractors to file a notice of review of an alternative theory that was fully litigated below but not decided. This conclusion ignores precedent and impermissibly expands the scope of Minn. R. Civ. App. P. 106.

II. IF THE TRIAL COURT RULED ON THE STATUTE OF REPOSE, THEN THE DISTRICT SOUGHT REVIEW OF THAT RULING.

Even if this court construes the trial court’s Findings of Fact, Conclusions of Law, and Order for Judgment and Judgment to include an adverse ruling on the statute of

repose, it should conclude that the District appealed this ruling. The District appealed the trial court's entire order, including the applicability of the 2004 statutory amendments.

A. The District appealed the trial court's entire order.

The District alleges that it did not appeal the trial court's decision as a whole, and that it did not appeal the trial court's ruling on the repose period. (RB 8.) But the District's argument is internally inconsistent.

The District argues that the Court's Findings of Fact, Conclusions of Law, and Order for Judgment and Judgment contains a ruling on the repose period that was adverse to the Contractors. But then the District argues that even though it appealed all of the trial court's conclusions of law,³ it did not appeal the statute of repose ruling.

The District cannot have it both ways. Either the trial court did not rule on the statute of repose, or, if it did, the District appealed that ruling when it appealed all of the trial court's conclusions of law. Either way Contractors were not required to file a notice of review.

³ In its "Statement of the Case" filed with the court of appeals, the District sought review of each of the trial court's conclusions of law, and its stated issues mirror the trial court's conclusions of law almost word for word. For example, the trial court's third conclusion of law was that:

Minn. Stat. 541.051 Subd. 4 (prior to August 1, 2004) bars the action of the School District for any claims against the express warranty provided by Lovering-Johnson.

(CAP RA 204.) The issue in the District's "Statement of the Case" is:

Whether the District Court erred in concluding that Minn. Stat. 541.051, subd. 4 bars the School District's claim against the express warranty provided by Lovering-Johnson?

B. The District appealed the trial court's conclusion that its warranty claim accrued before September 1, 2002.

The District contends that it would not have appealed the trial court's decision that the 2004 amendments to Minn. Stat. § 541.051 did not apply because that ruling favored the District. (RB 8.) But at trial, the District argued that its warranty claims accrued in late 2004 or early 2005, so that its claims would not be barred by the statute of limitations. (App. in Resp't Br. to Day Masonry 207.) Thus, the trial court's ruling that the District's warranty claim accrued before September 1, 2002, was adverse to the District.

The District also argues that the trial court's "threshold" conclusion that the District's warranty claim accrued in 2002 necessarily meant that the 2004 amendments to Minn. Stat. § 541.051 would not be used to analyze either the Contractors' statute of limitations defense *or* the Contractors' statute of repose defense. (RB 4.) This is because, the District argues, the warranty accrual date for both the statute of limitations and the statute of repose defenses is the same. (RB 4.) But then the District argues that it can challenge the trial court's determination of the warranty accrual date for purposes of the statute of limitations defense without affecting the accrual date for the statute of repose defense. If, as the District argues, both the statute of limitations and the statute of repose defenses hinge on the same accrual date, then the District cannot appeal one without appealing the other. Again, Contractors were not required to file a notice of review.

III. THE COURT OF APPEALS IMPOSED THE WRONG REMEDY.

The court of appeals correctly concluded that the trial court applied the wrong accrual analysis when it concluded that the District's warranty claims were barred by the statute of limitations under Minn. Stat. § 541.051, subd. 4.⁴ But the court of appeals should also have applied de novo review to the alternative theory that the District's claims were barred by the 10-year repose period in the amended version of Minn. Stat. § 541.051, subd. 1 (2004).

Appellate courts apply de novo review to determine when a cause of action accrues. *Roderick v. Group Health Plan*, 753 N.W.2d 711, 716 (Minn. 2008). This means that the appellate courts conduct an independent review of the legal issues, giving no deference to the trial court's decision. *Kornberg v. Kornberg*, 542 N.W.2d 379, 384 (Minn. 1996). Appellate courts "will not reverse a correct decision simply because it is based on incorrect reasons." *Katz v. Katz*, 408 N.W.2d 835, 840 (Minn. 1987). "The function of the court of appeals is limited to identifying errors and then correcting them." *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988).

Here, the court of appeals applied de novo review to conclude that the trial court applied the wrong legal standard when it held that the District's claims were barred by the statute of limitations. *Day Masonry v. Indep. Sch. Dist.*, No. A08-0929, 2009 LEXIS 464, at *12 (Minn. App. May 5, 2009). But upon finding that the trial court erred, the

⁴ At trial, the parties argued that the repose period should or should not apply. Neither party argued that the claims were barred by the statute of limitations. But the trial court reached this conclusion on its own.

court of appeals did not consider whether the statute of repose, an alternative theory litigated below but not decided, provided a basis to uphold the trial court's decision.

While the Contractors could have notified the court of appeals of the proper remedies to be applied if it concluded that the statute of limitations did not bar the District's warranty claims, the court should have recognized from its own de novo review of the record that granting a favorable ruling to the District was not the proper relief on reversing the trial court's statute of limitation's holding. *See Hoyt*, 418 N.W.2d at 175-76 (stating that while respondent should have explicitly informed that court of appeals that remand to consider the litigated but undecided alternative theory was warranted if the court reversed the trial court, the court of appeals should have recognized, during its own de novo review of the case, that remand should precede any award to appellant). In *Hoyt*, this Court did not review the respondent's claim because he did not seek to correct the court of appeal's error in his first petition to this Court. *Id.* at 176. Here, the Contractors have raised the issue in their first petition for review. Therefore, this Court should review the issue.

Further, in a case like this, when the appellate court is asked to review a purely legal issue that has been briefed and argued below, and that is based on undisputed facts, the property remedy is to affirm the trial court's correct decision using the correct reasoning. Here, in contravention of precedent, the court of appeals reversed a trial court decision because it was based on improper reasons even though it was the correct decision. In doing so, the court of appeals substituted one erroneous ruling for another. The court of appeals did not fulfill its role as an error-correcting body.

IV. PROCEDURAL RULES CAN BE SET ASIDE IN THE INTEREST OF JUSTICE.

This Court should consider whether the statute of repose bars the District's warranty claims because it is in the interest of justice and because it furthers the purpose of Minn. R. Civ. App. P. 106.

A. This Court should review the Contractors' repose defense in the interest of justice.

The construction and application of procedural rules are reviewed de novo. *St. Croix Dev., LLC v. Grossman*, 735 N.W.2d 320, 325 (Minn. 2007). While Minn. R. Civ. App. P. 106 provides that a respondent may obtain review of an adverse judgment or order by filing a notice of review, Rule 103.04 provides the Court latitude to address any matter "as the interest of justice may require." Concluding that it was in the interest of justice, this Court, in *Weston v. McWilliams & Associates, Inc.*, reviewed the constitutionality of Minn. Stat. § 541.051, the same statute at issue here, even though the issue had not been considered by the trial court or adequately briefed on appeal. 716 N.W.2d 634, 641 (Minn. 2006).

Here, the statute of repose defense was briefed and considered below. It is also in the interest of justice for the Court to review the statute of repose defense. The statute of repose period reflects the legislature's conclusion that " 'a point in time arrives beyond which a potential defendant should be immune from liability for past conduct.' " *Weston*, 716 N.W.2d at 641 (quoting 51 Am. Jur. 2d *Limitation of Actions* § 18 (2000)). A procedural rule that may be waived in the interest of justice should not be used to usurp

the legislature's clear intent. Therefore, this Court should consider the Contractors' statute of repose defense.

B. Review of the Contractors' statute of repose defense would further the purpose of Minn. R. Civ. App. P. 106.

The District argues that reviewing the statute of repose defense would frustrate the purpose of Minn. R. Civ. App. P. 106 and prejudice litigants. (RB 16.) But the purpose of Rule 106 is "to avoid piecemeal decisions and allow an appellate court to resolve all issues in one proceeding." *Arndt*, 394 N.W.2d at 793. Here, the District fully briefed the statute of repose argument in its appellate brief to the court of appeals. (RAB 40-45.) Thus, the purpose of Rule 106 is met.

Further, Minn. R. Civ. App. P. 106 was not intended to be a trap. It should not preclude review of an issue when it is not clear to either party that the trial court ruled on the issue. Here, the trial court's ruling is at most unclear. Even the District argues that it is. Before the court of appeals, the District stated that the Court's warranty ruling was "not entirely clear." (RAB 37.) It also stated that "[t]he Court did not specifically address the statute of repose" (RAB 40-41.) Before this Court, the District does not argue the trial court ruled that the District's claims were barred by the statute of repose. (RB 4-5.) Therefore, as Rule 106 was not intended to be a trap, this Court should review the Contractors' statute of repose defense.

V. THE STATUTE OF REPOSE BARS THE DISTRICT'S WARRANTY CLAIMS.

The District argues that even if the Court reviews the Contractors statute of repose defense, the statute of repose contained in Minn. Stat. 541.051, subd. 1 (2004) should not

apply to the District's claims against the Contractors. It contends that because the repose period did not apply to warranty claims at the time the contract was signed, enforcing the 2004 statutory amendments would (1) be an impermissible retroactive application of the statute that would (2) divest the District of a vested contractual right, and (3) result in a judicial re-write of the parties' contract. (RB 21; *see also* App. in Resp't Br. to Day Masonry 36-40.)

A. The 2004 amendments to Minn. Stat. § 541.051 are not being applied retroactively.

The School District argues that applying the statute of repose would be a retroactive application of the 2004 amendment to Minn. Stat. 541.051. (RB 21; *see also* App. in Resp't Br. to Day Masonry 36-38.) But the court of appeals has clearly ruled that a retroactive application of the statute of repose to breach of warranty claims does not occur if those claims accrue after the statute takes effect. *Sletto v. Wesley Constr., Inc.*, 733 N.W.2d 838, 845 (Minn. App. 2007). At the earliest, the District's breach of warranty claims accrued in December of 2004, when they notified the Contractors of the moisture problems at the school. Thus, the claims did not accrue until after the August 1, 2004, the date that the amendments to Minn. Stat. 541.051 took effect. Thus, Minn. Stat. 541.051 is not being applied retroactively.

B. The statute of repose does not interfere with vested rights.

The District contends that applying statute of repose would interfere with the District's vested rights. But this Court has already rejected the District's argument. It has concluded that because the statute of repose prevents a party from acquiring a cause

of action, rights to that action never vest. *Weston*, 716 N.W.2d at 643-44. Thus, the statute of repose does not interfere with the District's vested rights.

C. The parties' contract provides that Minnesota law governs.

The District argues that applying the statute of repose would be a retroactive judicial rewrite of the parties' contract because the contract only stated that the "applicable statute of limitations" would apply and did not mention the statute of repose. (Resp't Br. to Day Masonry 36-40.) The District contends that the inclusion of one term in a contract is the exclusion of all other terms. (R Resp't Br. to Day Masonry 39.) As the only support for its argument, the District cites a footnote in an unpublished court of appeals decision, *Sundberg v. Brentonwood Four Estates Partnership*, No. C2-94-351, 1994 LEXIS 752, at *3 n.1 (Minn. App. Aug. 9, 1994). Generally, unpublished court of appeals decisions are not precedential and should not be cited. *Vlahos v. R&I Constr. of Bloomington, Inc.*, 676 N.W.2d 672, 676 n. 3 (Minn. 2004).

Even if *Sundberg* was authoritative, it does not apply. In *Sundberg*, the court of appeals analyzed an exclusive remedy provision contained in a contract for deed. *Id.* The footnote observes that an exclusive remedy provision excludes all remedies that are not enumerated. *Id.* In contrast, the provision relied upon by the District, section 7.9.2, is not an exclusive remedy provision. (See Resp't Br. to Day Masonry 39; Resp't App. to Day Masonry 25.)

More importantly, the District's contracts with Lovering-Johnson and Commercial Roofing include, rather than exclude, the repose period at issue here. First, section 7.9.2 states that arbitration claims must be made within the applicable statute of limitations

period. In *Koes v. Advanced Design, Inc.*, the court of appeals aptly described Minn. Stat. § 541.051, subd. 1(a), as a “general statute of limitations” which “contains both a two-year statute of limitations and a ten-year statute of repose” 636 N.W.2d 352, 357 (Minn. App. 2001). Section 7.9.2 therefore includes the statute of repose. Second, section 7.1.1 of each contract provides that “[t]he Contract shall be governed by the law of the place where the Project is located,” which means Minnesota law and its statutes of should be applied. (Resp’t App. to Day Masonry 24.) Third, section 7.6.1 provides that the duties, obligations, rights and remedies under the contract “shall be in addition to, and not a limitation of, any duties, obligations, rights and remedies otherwise imposed or available by law.” (Resp’t App. to Day Masonry 24.) Section 7.6.1 incorporates the statute of repose as a contract term because it is an “obligation” that is “imposed by law” upon the District and the statute also creates defensive rights available to the Contractors. Thus, the District’s argument that applying Minnesota law would rewrite the contract fails.

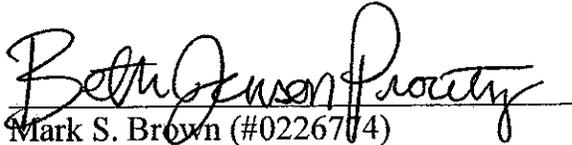
CONCLUSION

Appellants Lovering-Johnson Construction and Commercial Roofing, Inc., respectfully request that this Court reverse that portion of the court of appeals’ opinion that declined to review of the Contractors’ statute of repose defense. The Court should affirm the trial court’s judgment on alternative grounds.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief of Lovering-Johnson Construction and Commercial Roofing, Inc., conforms to Minn. R. Civ. App. P. 132.01, subd. 3(c)(1), for a brief produced with proportionally spaced font.

There are 4,915 words in this Brief, not including the Table of Contents and the Table of Authorities. The word processing software used to prepare this Brief was Microsoft® Office Word 2003.

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