
No. A08-929

State of Minnesota
In Supreme Court

Day Masonry,

Appellant,

vs.

Independent School District 347,

Respondent,

Commercial Roofing, Inc.,

Appellant,

GenFlex Roofing Systems, L.L.P.,

Appellant,

Lovering-Johnson Construction,

Appellant.

**REPLY BRIEF OF
APPELLANT GENFLEX
ROOFING SYSTEMS, L.L.P.**

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I. LEGAL ANALYSIS

A. **The Court of Appeals erred in concluding that the Contractors were required to file a Rule 106 Notice of Review in order to secure appellate consideration of the alternative statute of repose argument raised before, but not decided by, the trial court**

In its briefs on the present appeal, Independent School District 347 (“the District”) asserts that the trial court’s finding as to the applicability of the pre-2004 amendment to Minn. Stat. § 541.051, subdiv. 4 (“the subdivision 4 question”) contained sufficient adversity necessary to require the Contractors¹ to file a notice of review under Minn. R. Civ. App. P. 106. It also argues that the trial court’s “adverse” decision on the question amounted to a threshold determination that prevents appellate consideration of the alternative argument the contractors raised with regard to the operation of the statute of repose as a bar to the District’s express warranty claims.

Consequently, the District asks this court to affirm the Court of Appeals’ finding that the Contractors’ failure to file a Rule 106 notice of review prevents appellate consideration of the repose issue. Moreover, the District also argues (for the first time) that the Contractors’ collective failure to file a notice of review on “the subdivision 4 question” operates as a *waiver* of their right to argue that the District’s express warranty claims are barred by the statute of repose, presumably preventing remand to the trial court on this issue as well.

¹ The term “the Contractors” is occasionally referred to herein to collectively refer to Appellant GenFlex Roofing Systems, L.L.P., along with Appellants Lovering Johnson Construction, Commercial Roofing, Inc. and Day Masonry.

The District's current stance on the meaning and import of the trial court's underlying decision on the "subdivision 4 question"—along with the District's adamant position on the necessity of a Rule 106 notice of review—stands in contrast to the positions it took in its briefs to the Court of Appeals. As an appellant there, the District repeatedly acknowledged that the trial court never addressed the Contractors' alternative repose argument. *See GA. 75-76.*² It therefore (correctly) anticipated that the Contractors would stress it as an alternative means by which the court could affirm the trial court's conclusion that the District's claims were time-barred, and went on to address the repose issue both in its principal brief and in its reply brief. *See GA 75-80, 107-10.*

The fact that the District now finds adversity in the trial court's order as to the "subdivision 4 question" when it found no adversity below demonstrates why the Court of Appeals erred in finding that the Contractors' failure to file a Rule 106 notice of review prevented consideration of the alternative repose issue. In its briefs below even the District agreed that when the trial court decided "which version of 541.051, subdiv. 4 applies," it *accepted the Contractor's theory of accrual* when it came to the timeliness of the District's express warranty claims under a statute of limitations analysis. *GA. 75-76.* The District below also recognized that in so doing the trial court necessarily *rejected the District's theory of accrual*, which was that, under *Vlahos v. R & I Constr.*, 676 N.W. 2d 672 (Minn. 2004), its express warranty claims could not have accrued until December,

² Reference to "GA" herein is to the Appendix that accompanied GenFlex's principal brief.

2004, because that was the earliest date on which it could have realized that the Contractors would not honor their warranties. Therefore the District asked the Court of Appeals to find that its express warranty claims did not accrue until the end of 2004.³ GA. 74-75. The District thus admitted that the trial court never addressed (much less rejected) the Contractors' alternative argument that *if* the District's warranty claims accrued in December, 2004, the statute of repose applicable to express warranty claims as of August, 2004 applied to bar the District's warranty claims. GA. 75, 107-08.

Against this backdrop it becomes clear that the District's newfound point of view concerning the "adversity" within the trial court's decision on "the subdivision 4 question" requires not only a complete out-of-context assessment of *how* the trial court reached its decision on subdivision 4, but blind ignorance of the fact that when it answered the question, the trial court ultimately ruled *in the Contractor's favor* that the District's express warranty claims were time-barred by the statute of limitations. Therefore, because the trial court's decision on the "subdivision 4 question" resulted in a *judgment* entirely favorable to the Contractors, under the clear terms of the Rule 106 there was no adverse "judgment or order" which necessitated the filing of a notice of review.

This court has never required parties to perform mental gymnastics to find "adversity" lurking within favorable underlying judgments and orders, as a precursor to obtaining appellate review of alternative issues and arguments presented to, but not ruled

³ The Court of Appeals did, in fact, so find. *See* GenFlex' Addendum ("G.ADD.") at 11.

upon by, the lower courts. Indeed, this court's decision in *Hoyt* confirms that Rule 106 was never meant to be construed or applied to prevent appellate review "where the trial court has failed to rule on a question litigated and practical reasons continue to render such a notice unnecessary." *Hoyt Inv. Co. v. Bloomington Commerce and Trade Center Assoc.*, 418 N.W. 2d 173 (Minn. 1988).

The *Hoyt* court's assessment of the limitations of Rule 106 are in complete accord with *Penn Anthracite Mining Co. v. Clarkson Securities Co.*, where this court found that appellate review may encompass any argument a respondent asserts "in support of a decree," even if that argument "may involve an attack upon the reasoning of the lower court or an insistence upon matters overlooked or ignored by it." 205 Minn. 517, 520, 287 N.W. 15, 17 (1939). The District suggests that because Rule 106 was adopted after *Penn Anthracite* was decided, the principles articulated therein were abrogated by the rule. But, as GenFlex asserted in its principal brief, this court has expressly stressed the vitality of *Penn Anthracite* even after the adoption of Rule 106. See *Hunt by Hunt v. Sherman*, 345 N.W. 2d 750, 753 n. 3 (Minn. 1984) (citations omitted).

In the present case, when the Court of Appeals found that a Rule 106 notice of review was necessary with respect to the out-of-context adversity it found in the trial court's interstitial determination of "the subdivision 4 question," it strayed not only from the clear terms of the rule, but turned its back on the *Hoyt* court's careful interpretation of the limitations of Rule 106 and effectively abrogated *Penn Anthracite*. In fact, the District's reliance on the Court of Appeals' decision in *City of Duluth v. Duluth Police Local*, 690 N.W. 2d 357 (Minn. Ct. App. 2004) demonstrates that the Court of Appeals

has often gone too far in requiring notices of review with respect to purportedly adverse intermediate trial court findings that ultimately result in judgments favorable to the respondent. *See, e.g. Olson v. Lyrek*, 582 N.W. 2d 582, 584 n. 1 (Minn. Ct. App. 1998)(refusing to address respondent’s argument that trial court incorrectly decided one factor in three-factor test ultimately decided in respondent’s favor); *City of Duluth*, 690 N.W 2d at 359-60 (respondent’s failure to file notice of review regarding trial court determination that disciplinary action occurred precludes review, even though trial court ultimately found in favor of respondent on second part of question, which was whether such action was a final disposition).

The Court of Appeals has, however, correctly decided that an “adverse” finding as to an interstitial component does not, however, necessitate a notice of review. *See Johnson v. American Economy*, 419 N.W.2d 126, 128 n. 1 (Minn. Ct. App. 1988)(adverse finding as to one of three elements of test for coverage does not trigger need for notice of review; respondent’s position as to the propriety of trial court’s decision on coverage question may simply be argued in respondent’s brief). That is because Rule 106 expressly refers only to adverse *judgments or orders*. To effectively penalize a respondent for failing to file a notice of review with regard to an allegedly adverse interstitial *finding* that ultimately results in a favorable judgment expands the rule far beyond its terms.

Ironically, in urging affirmance of the Court of Appeals on this issue (while now claiming, for the first time, that Contractors have “*waived*” the repose question) the District cites this court’s decision in *Arndt* for the purposes behind the adoption of Rule

106. There, this court found that the rule was adopted to provide “the court and all parties with notice of all issues to be addressed on appeal,” thus avoiding “piecemeal decisions,” and allowing appellate courts to “resolve all issues in one proceeding.” *Arndt v. American Family Ins. Co.*, 394 N.W. 2d 791, 793-94 (Minn. 1986)(citations omitted). In this case, the record shows that *all* parties—including the District—agreed that the trial court never ruled on, and thus never entered any judgment or order adverse to the Contractors with respect to, the Contractors’ alternative repose argument. As such this issue was fully briefed by all parties before the Court of Appeals. The District did not need a notice of review from the contractors to realize that the repose issue was still in play, and the Court of Appeals had full briefs—and a full record—on an issue which it could have—and should have—decided. The Court of Appeals effectively turned its back on the purpose of Rule 106, and gave it a gatekeeper character that put form over function.

For the reasons set forth above, as well as for the reasons contained within its principal brief and within the briefs of the other Contractors, GenFlex respectfully requests that this court reverse the Court of Appeals’ finding that a Rule 106 notice of review was necessary to secure appellate review of the alternative repose argument.

B. The Court of Appeals erred in failing to consider the Contractor’s alternative argument that the District’s express warranty claims are time-barred by the statute of repose

GenFlex adopts, and incorporates herein by reference the arguments made by the other Contractors with respect to application of the statute of repose.

1. *The District had no “vested” right to assert an express warranty claim until the claim accrued, which it repeatedly claims did not occur until December, 2004 at the earliest*

The District now argues, as it did before the trial court and the Court of Appeals, that the ten-year statute of repose made applicable to the legislature’s 2004 amendments to Minn. Stat. § 541.051, subdiv. 4 cannot be applied to bar its statutory warranty claims because its *contracts* were executed in the early 1990’s. It seems to assert that as of the date of their execution, it had *vested* contractual rights to commence arbitration with respect to its express warranty claims. Therefore because the contracts were executed before the 2004 amendment, the District asserts that the amendment cannot be construed in such a way as to obviate its vested contractual rights.

To be sure, in *Sletto v. Wesley Construction, Inc.*, 733 N.W. 2d 838 (Minn. Ct. App. 2007) the Court of Appeals recognized that under the “vested rights theory,” a statute cannot be retroactively applied to impairs rights that “vested before the effective date of the statute.” 733 N.W. 2d at 845 (citation omitted). This court has found that [r]etrospective legislation in general . . . will not be allowed to impair rights which are vested and which constitute property rights.” See *Wichelman v. Messner*, 250 Minn. 88, 107, 83 N.W. 2d 800, 816 (1957)(as cited in *Olsen v. Special School Dist. # 1*, 427 N.W. 2d 707, 711 (Minn. Ct. App. 1988)).

But the “accrued right” claimed must, in fact, be vested. *Id.* “A right is not ‘vested’ unless it is something more than a mere expectation, based on an anticipated continuance of present laws. It must be some right or interest in property that has

become fixed or established, and is not open to doubt or controversy.” *Olsen*, 427 N.W. 2d at 711 (citations omitted). As this court recently noted in *Weston v. McWilliams & Assoc., Inc.*, 716 N.W. 2d 634 (Minn. 2006), a party does not have a “vested” right in a cause of action *before it accrues*. *Id.* at 643.

Under *Vlahos*, the District’s express warranty claims did not accrue until the district realized, or should have realized, that the warranting parties were in breach. The Court of Appeals below agreed with the District that such realization could not have occurred, at the earliest, until December, 2004. Therefore the District had no vested warranty causes of action upon the date the contracts were executed and, instead, its right to the claim did not “accrue” until late 2004—after the subdivision 4 was amended. The statute of repose therefore can and should be applied to bar the District’s express warranty claims.

2. *Under Minnesota law concerning interpretation of unambiguous contractual language, reference to the term “statutes of limitations” does not prevent application of the statute of repose*

The District finally argues that its express warranty claims cannot be subject to the repose period within Minn. Stat. § 541.051, subdiv. 1 (made applicable via the 2004 amendments to subdivision 4), because in its contracts it only agreed to be bound by applicable statutes of limitation, and did not agree to be bound by statutes of repose. The specific contractual language is as follows:

. . . The demand for arbitration shall be made within the time limits specified in Subparagraph 2.3.15 where applicable, and in all other cases within a reasonable time after the claim, dispute or other matter in question has arisen; and in no event shall it be made after the date when institution

of legal or equitable proceedings based on such claim, dispute or other matter in question would be barred by the applicable statute of limitations.

See Respondent's Appendix, 25 (Paragraph 7.9.2).

When interpreting a contract, the primary goal is to “determine and enforce the intent of the parties.” *Motorsports Racing Plus, Inc., v. Arctic Cat Sales, Inc.*, 666 N.W.2d 320, 323 (Minn.2003). The parties' intent must be based on the plain language of the document. *Metro. Sports Facilities Comm'n v. Gen. Mills, Inc.*, 470 N.W.2d 118, 123 (Minn.1991). If a contractual provision is clear and unambiguous, “courts should not rewrite, modify, or limit its effect by a strained construction.” *Travertine Corp. v. Lexington-Silverwood*, 683 N.W.2d 267, 271 (Minn.2004).

Here, the District argues that because the term “repose” appears nowhere within paragraph 7.9.2, application of the repose provisions within section 541.051 would impermissibly re-write its contractual obligations. It asserts that because the contracting parties agreed to be bound by applicable statutes of *limitation*, they “implicitly” agreed that they would *not* be barred by any statute of *repose*.

To be sure, this court has found that a statute of limitations differs from a statute of repose because the former places a procedural limit on the time within which a party can pursue a remedy after a claim accrues, whereas the latter presents a substantive limit on the time within which a party can acquire a cause of action. See *Weston*, 716 N.W. 2d at 641 (citation omitted). Despite these differences, however, the Minnesota legislature placed both such limitations on the time within which parties can assert claims within a single statute entitled: “Limitation of action for damages based on services or

construction to improve real property.” *See generally* Minn. Stat. § 541.051. In fact, the term “repose” appears nowhere within the statute.

Consequently, the clear intent of the cited contractual language is to bind the contracting parties to applicable statutes providing time limitations within which claims may be commenced. The District’s assertion that the language represents an “implicit” intent to *not* be barred by statutory repose provisions represents a strained construction of a clear and unambiguous contractual term. This court has found that “[a] party cannot alter unequivocal language of a contract with speculation of an unexpressed intent of the parties.” *See Metro. Sports*, 470 N.W.2d at 123 (citation omitted). If the District intended to carve out an exception whereby it would only agree to be bound by a statute placing a procedural limit on the time within it may pursue a remedy, but *not* be bound by the *same* statute which places a substantive limit on the time within which it could acquire a cause of action, that specific intention should have been spelled out in the contract. Because such limitation is not found within the terms of the contract, the court cannot read it into the contract for the purpose of preventing the proper application of the statute of repose.

Accordingly, this court should find that the language appearing in the subject contract presents no impediment to proper application of the repose provisions within Minn. Stat. § 541.051.

C. The Court of Appeals erred in refusing to address GenFlex's unique arguments concerning the expiration of the two-year statute of limitations on the District's express warranty claims

1. Thiele v. Stich does not prevent appellate consideration of issues and arguments fully raised and briefed before the trial court

The District acknowledges that GenFlex *presented* the trial court below with both argument and factual support for its unique assertions concerning the timeliness of the District's express warranty claims under the statute of limitations within Minn. Stat. § 541.051, subdiv. 4. Nevertheless, the District asserts that, under *Thiele v. Stich*, 425 N.W. 2d 580 (Minn. 1988), because the trial court does not appear to have *considered* the matter, the Court of Appeals correctly found that this argument could not be addressed on appeal.

This assertion really asks this court to interpret *Thiele* in a new and disjunctive way, by barring appellate consideration of *either* issues that were not raised and briefed before the trial court, *or* issues that may have been raised but which were not expressly *considered*. That is not the way in which this court has construed *Thiele* in the past. *See, e.g. Toth v. Arason* 722 N.W.2d 437, 443 (Minn.2006) (we have said that "a reviewing court generally may consider only those issues that the record shows were presented to *and* considered by the trial court; thus Arason may not seek review of argument not pressed below); *Broehm v. Mayo Clinic Rochester*, 690 N.W.2d 721, 728 (Minn. 2005)(court declines to address Broehm's argument on res ipsa loquitur; issue was neither timely presented before the district court nor adequately briefed on appeal).

The rule in *Thiele* is that parties may not raise “the same *general issue* litigated below but under a *different theory*.” 425 N.W.2d at 582 (emphasis added). As GenFlex demonstrated in its principal brief, throughout the proceedings before the trial court below, it repeatedly articulated its argument that the District’s express warranty claims accrued as early as November, 1996, when the District’s head custodian wrote to GenFlex about roof leak concerns, but GenFlex never responded. It therefore repeatedly argued that because the District knew or should have known by then that GenFlex was refusing or unable to honor its Full Roofing System warranty, the District’s claims were barred by the statute of limitations in section 541.051, subdiv. 4. GenFlex also repeatedly argued before the trial court that the claim was barred simply because the warranty itself expired before the District commenced arbitration.

The trial court neither expressly accepted nor rejected these arguments when it found that the District’s express warranty claims were time-barred. Accordingly, this court’s pronouncements in *Thiele* should not have presented any impediment to GenFlex’s arguments fully presented to and briefed before the trial court, as well as to the Court of Appeals.

2. *The unique evidence and arguments GenFlex raised and briefed before the trial court and the Court of Appeals warranted affirmance of the trial court’s conclusion that the District’s express warranty claims were time-barred by the two-year statute of limitations for express warranty claims*

With respect to warranty claims falling within the purview of Minn. Stat. § 541.051, subdiv. 4, it is well established that the statute of limitations for claims of breach begins to run when the building owner discovers, *or should have discovered*, the

warranting party's alleged breach. See *Vlahos*, 676 N.W.2d at 678; see also *Metropolitan Life Ins. Co. v. M.A. Mortenson Companies, Inc.*, 545 N.W. 2d 394, 401 (Minn. Ct. App. 1996), *rev. denied* (Minn. May 21, 1996); *Oreck v. Harvey Homes, Inc.* 602 N.W. 2d 424, 430 (Minn. Ct. App. 1999), *rev. denied* (Minn. Jan. 25, 2000). Citing this authority—as well as several unpublished Court of Appeals decisions—GenFlex repeatedly argued both before the trial court and the Court of Appeals that the District knew *or should have known* well more than two years before it commenced arbitration in March, 2006, that GenFlex was unwilling or unable to honor the full-roofing system warranty on its EPDM membrane. This argument was primarily based on a November, 1996 letter in which its head custodian advised of continuing roof leaks even after extensive repairs had been completed earlier that year. There was no evidence showing that GenFlex ever responded to the letter. But there was evidence that the District continued to experience roof leaks.

In its latest opposition to this argument made by GenFlex so many times before, the best the District can do is assert that the facts in this case are not *exactly* like the facts in *Metropolitan Life* (where a consultant advised the building owner that spandrel glass was defective) or *Oreck* (where homeowners advised their builder of continuing problems with their home). The District also contends that the problems complained of in the 1996 letter were simply that the roof leaked—and did not specifically identify the problem for which it now seeks compensation (that the parapet cap flashing did not extend down far enough on the exterior brick walls).

But the law makes it clear that the two-year time clock begins to run when the claimant discovered, *or should have discovered*, that the warranting party was not going to honor the warranty. Neither *Metropolitan Life* nor *Oreck* stands for the proposition that the building owner needs to know of a specific defect, or be given advice about the defect by an engineer or third party. Here, the evidence established that when the District notified GenFlex in November, 1996 of continued roof leaks even after earlier extensive repairs had been completed, and thereafter GenFlex did not respond, the District knew or should have known that GenFlex was not going to honor its full roofing system warranty. The two-year time clock began to tick regardless of whether the problem first noticed in 1996 was in any way related to the parapet cap flashing. And the clock stopped long before the District commenced arbitration against GenFlex in March, 2006.

The record in this matter establishes that GenFlex's unique statute of limitations argument was fully presented to and argued before the trial court and the Court of Appeals. The fact that the trial court appears to have ignored it presented no impediment to the Court of Appeals' substantive consideration. Under GenFlex's unique argument, the Court of Appeals should have affirmed the trial court's dismissal of the District's express warranty claim. Consequently, this court should reverse the Court of Appeals on this issue, and reinstate the trial court's judgment in favor of GenFlex with regard to the full roofing system warranty.

3. *The expiration of the GenFlex ten-year warranty represented an alternative reason why GenFlex was entitled to dismissal of the District's breach of warranty claims*

Finally, the District claims GenFlex was not entitled to dismissal of its express warranty claims based on the simple fact that the ten-year Full System Warranty expired on May 1, 2004, before the District commenced its breach of warranty claim on March 13, 2006. Again, this issue was presented to the trial court, which did not rule on it. The Court of Appeals did not mention it.

The District cites two cases in support of the proposition that its warranty claim is viable even though it was brought outside the ten-year warranty period: *Koes v. Advanced Design, Inc.*, 636 N.W. 2d 352 (Minn. Ct. App. 2001), *rev. denied* (Minn. Feb. 19, 2002), and *Anderson v. Crestliner, Inc.*, 564 N.W. 2d 218 (Minn. Ct. App. 1997). But *Koes* construed the complex interplay between the language chosen by the legislature within the statutorily-created new home warranties found in Minn. Stat. § 327A.02, *et. seq.*, and the limitations period for such claims provided in Minn. Stat. §541.051, subdiv. 4, and did so before the legislature revised subdivision 4 in 2004. Against this complex backdrop—and in an analysis that the court admitted was “not without its problems—the court concluded that because both statutes were silent as to whether the breach must be discovered within the warranty period, claims could be asserted outside of the period as long as they were brought within two years of discovery of the breach. 636 N.W. 2d at 359-60.

In the present case, the issue presented by GenFlex has nothing to do with that statutory interplay and instead concerns an express warranty that simply expired in May

of 2004. *Koes* therefore does not prevent GenFlex from arguing that the expiration of its warranty simply makes the District's claims too late.

Finally, no party in *Crestliner* ever argued that the simple expiration of the five-year warranty term barred the plaintiff's claim. Consequently, that case does not invalidate GenFlex's argument, either.

Thus, because the Full Roofing System Warranty expired in May, 2004, before the District commenced its claims in this matter in March, 2006, the District's warranty claim was untimely for this reason as well. Based on this alternative theory, the trial court was still correct in deciding that the District's express warranty claim was time-barred against GenFlex under the Full System Warranty. The Court of Appeals erred in reversing the trial court on this issue, and its conclusions in this regard must be reversed.

II. CONCLUSION

For the reasons set forth above, as well as for the reasons contained within its principal brief (and the briefs of Appellants Day Masonry, Lovering-Johnson and Commercial Roofing), Appellant GenFlex Roofing Systems, LLP, respectfully asks that this court reverse the Court of Appeals' conclusion that a respondent must file a notice of review under Minn. R. Civ. P. 106 in order to trigger appellate consideration of purportedly "adverse" interstitial trial court findings that ultimately lead to judgments or orders that are entirely favorable to the respondent. Because GenFlex and the other Appellant Contractors properly raised and preserved an alternative argument before the trial court and the Court of Appeals concerning the statute of repose, contained within

Minn. Stat. § 541.051, subdiv. 1(a), made applicable to warranty claims by the legislature's 2004 amendments to section 541.051, subdiv. 4, GenFlex respectfully requests that this court substantively address the issue and conclude that the District's warranty claims were time-barred under this alternative argument. GenFlex therefore respectfully requests that this court reverse the Court of Appeals' conclusion that the District may proceed to arbitration against GenFlex on its claim of breach of the Full System Warranty.

GenFlex additionally asserts that because it fully raised and briefed its alternative arguments regarding the timeliness of the District's warranty claims before the trial court, the Court of Appeals erred in finding that *Thiele v. Stich* barred appellate consideration. This court's proper consideration of these arguments should result in a conclusion that the District's warranty claim against GenFlex was untimely under the two-year statute of limitations for express warranty claims found in Minn. Stat. § 541.051, subdiv. 4. Therefore for this alternative reason GenFlex respectfully requests that this court reverse the Court of Appeals' conclusion that the District may proceed to arbitration against GenFlex on its claim of breach of the Full System Warranty.

Dated this 5th day of October, 2009.

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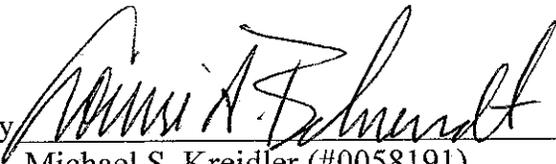
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CERTIFICATE OF COMPLIANCE

This brief complies with the word/line limitations of Minn. R. Civ. App. P. 132.01, subdiv. 3(a). This brief was prepared using Microsoft Word Version 12.0 in 13-pt. font, which reports that the brief contains 4,592 words.

Dated this 5th day of October, 2009.

***STICH, ANGELL, KREIDLER & DODGE,
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