

NO. A08-0929

State of Minnesota
In Supreme Court

DAY MASONRY,

Appellant,

vs.

INDEPENDENT SCHOOL DISTRICT NO. 347,

Respondent.

COMMERCIAL ROOFING, INC.,

Appellant,

GENFLEX ROOFING SYSTEMS, LLP,

Appellant,

LOVERING-JOHNSON CONSTRUCTION,

Appellant.

RESPONDENT INDEPENDENT SCHOOL DISTRICT NO. 347'S
RESPONSE BRIEF TO LOVERING-JOHNSON CONSTRUCTION AND
COMMERCIAL ROOFING, INC.'S BRIEF

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STATEMENT OF THE LEGAL ISSUES

I. Is a Successful Party Required to File a Notice of Review to Preserve Adverse Issues?

The Court of Appeals correctly applied Rule 106 of the Minnesota Rules of Civil Appellate Procedure and declined to consider an issue adverse to Respondents for which they did not file a notice of review.

Arndt v. American Family Ins. Co. 394 N.W.2d 791 (Minn. 1986)

City of Duluth v. Duluth Police Local, 690 N.W.2d 357 (Minn. App. 2004)

Thiele v. Stich, 425 N.W.2d 580 (Minn. 1988)

II. Did the Court of Appeals Apply the Correct Legal Standard in Regard to the Accrual of the District's Breach of Warranty Claim?

The Court applied the correct legal standard to the breach of warranty claims as set forth in *Vlahos v. R & I Constr.*, 676 N.W.2d 672 (Minn. 2004).

III. Whether the Court of Appeals erred in concluding that the District's breach of contract claims were barred?

Relying on erroneous findings of fact, the Court of Appeals held that the District's breach of contract claims were barred by Section 541.051, subd. 1.

STATEMENT OF THE CASE AND OF THE FACTS

The District incorporates by reference its Statement of the Case and description of the facts in its Response to Day Masonry's Brief.

ARGUMENT

I. The Contractors Were Required to File a Notice of Review to Preserve the Issue of Which Version of Section 541.051 Applies in this Lawsuit.

The Court of Appeals correctly held that the Contractors were required to preserve their arguments as to the applicable version of Section 541.051 by filing a notice of review. The District Court's determination that the pre-2004 version¹ of Section 541.051 applied to the District's claims was adverse to the Contractors' position. By failing to file a notice of review on this issue, the Contractors waived their arguments thereon. Because they waived their arguments as to the applicable version of Section 541.051, the Contractors were unable to assert that the statute of repose contained in Section 541.051 barred the District's warranty claims.

A. Standard of Review

The Court of Appeals' interpretation of procedural rules is a question of law. *Kastner v. Star Trails Ass'n*, 646 N.W.2d 235, 238 (Minn. 2002). This Court reviews all questions of law, including those of statutory interpretation and applicability, *de novo*. *Goldman v. Greenwood*, 748 N.W.2d 279, 282 (Minn. 2008).

¹ The phrase "pre-2004 version" refers to the version of Section 541.051 before the August 1, 2004 amendment. The phrase "post-2004 version" refers to the version of Section 541.051 after the August 1, 2004 amendment.

B. Rule 106 Filing Requirement

Minnesota Rule of Appellate Procedure 106 allows respondents to “obtain review of a judgment or order entered in the same action which may adversely affect respondent by filing a notice of review with the clerk of appellate courts.” Minn. R. Civ. App. P. 106. A respondent is required to file a notice of review to preserve any issue that the District Court found adversely to the respondent’s position, even though the respondent ultimately prevailed in the District Court. *Arndt v. American Family Ins. Co.*, 394 N.W.2d 791, 793 (Minn. 1986); *see also City of Duluth v. Duluth Police Local*, 690 N.W.2d 357, 359 (Minn. App. 2004) (internal citation omitted).²

C. The Court of Appeals Correctly Ruled that the District Court Ruled on the Issue of the Applicable Version of Section 541.051.

Lovering-Johnson and Commercial Roofing (collectively referred to herein as “Appellants”) assert that the Court of Appeals declined to review the Contractors’ argument that the statute of repose found in Section 541.051, subd. 1, barred the District’s warranty claims “on the grounds that the trial court ruled adversely to them on that issue but they failed to file a notice of review.” Appellants’ Br. 12. This argument mischaracterizes the Court of Appeals’ ruling.

1. The Court of Appeals correctly identified the District Court’s ruling on the preliminary issue of the existence of an applicable statute of repose.

The Court of Appeals held that “the district court determined that the school district’s warranty claims are governed by the version of the statute [Section 541.051] in

effect before 2004 that did not include a repose period.” Respondent’s Appendix 196.³ The conclusion that the pre-2004 version of Section 541.051 applied in this case, not the effect of the statute of repose on the District’s warranty claims, was the issue that the Court of Appeals decided that Appellants had waived.

The District Court clearly ruled on the applicable version of Section 541.051 that applied in this case. Specifically, the court found that “the language of [Section 541.051] Subd. 4 as it existed prior to the 2004 amendment is the language to be used in this analysis” of the District’s claims. *Day Masonry v. Independent Sch. Dist. 347, et al*, Court File No. 34 CV 07 1999 (Dist. Court 2008), Resp’t. App. 209 (emphasis added).

Appellants’ presentation of the Court of Appeals’ decision glosses over the distinction between the question which they failed to preserve by filing a notice of review, namely, the question of the applicable version of Section 541.051, and the ultimate question, whether the District’s warranty claims are barred by the statute of repose in the post-2004 version of Section 541.051. Despite Appellants’ re-phrasing of the Court of Appeals’ decision, the Court of Appeals made the distinction between the threshold issue, the applicable version of Section 541.051, and the ultimate issue, whether the District’s warranty claims were barred by the statute of repose. The Court of Appeals

² Appellants concede that they were not excused from filing a notice of review by virtue of their status as prevailing parties in the District Court proceeding. Appellants’ Br. 13.

³ Unless otherwise noted, all references to Respondent’s Appendix (“Resp’t. App.”) refer to the Appendix submitted by the District with its Response to Day Masonry’s Brief.

did not, as asserted by Appellants, hold that the District Court ruled on the effect of the statute of repose.⁴

2. Appellants' argument that the District Court did not rule on the application of Section 541.051 to the District's warranty claims is without merit.

Appellants contend that they were not required to file a notice of review to preserve their statute of repose arguments because the District Court never ruled on the issue of whether the District's warranty claims were barred by the statute of repose. Appellants' Br. 19. Appellants' argument, once again, misses the distinction between the District Court's ruling and its effect on their statute of repose arguments.

Appellants opine that the "trial court did not reach the Contractors' repose argument." Appellants' Br. 21. As discussed above, the Court of Appeals did not hold that the District Court ruled on their statute of repose argument. Rather, the Court of Appeals properly held that the District Court ruled on the preliminary issue of which version of Section 541.051, pre-2004 amendments, or post-2004 amendments, applies to the District's claims. Resp't. App. 196.

In its *City of Duluth* decision, the Court of Appeals held that Rule 106 precluded review of a threshold question for which no notice of review had been filed. 690 N.W.2d 357. While not binding on this Court, the *City of Duluth* opinion is instructive.

The *City of Duluth* case involved a claim under the Minnesota Government Data Practices Act. The District Court denied a motion to compel the release of governmental

⁴ The other Contractors make similar arguments based on the same mischaracterization of the District Court's ruling. See Day Masonry Br. 18, GenFlex Br. 28.

data brought by the Duluth News Tribune newspaper. One issue in front of the District Court was whether the data in question contained “the final disposition of any disciplinary action together with specific reasons for the action, and data documenting the basis of the action.” 690 N.W.2d at 359 (citing Minn. Stat. § 13.43, subd. 2(a)(5)).

The District Court held that a disciplinary action had occurred, but that the data in question were not public and that the newspaper was not entitled to their production. *Id.* Even though they were ultimately successful at the District Court level, neither respondent filed a notice of review challenging the District Court’s determination that a disciplinary action had occurred.

In relevant part, the issue before the Court of Appeals in the *City of Duluth* case was whether Rule 106 required the respondents to file a notice of review to preserve their arguments as to whether a disciplinary action had occurred. *Id.* at 359-60. As the Court of Appeals explained, the District Court’s “decision that a disciplinary action occurred will adversely affect respondents once a final disposition has occurred [] because that is when the data are deemed to be public.” *Id.* Thus, even though the district court’s ruling was ultimately in favor of the respondents, they were required to file a notice of review to preserve their arguments on an adversely decided preliminary issue which potentially affected their arguments on appeal, and their future obligations towards the newspaper. *See id.*

As in the *City of Duluth* case, Appellants failed to file a notice of review on a threshold issue, namely whether the pre-2004 version of Section 541.051 applied to the claims in this lawsuit. As in the *City of Duluth* case, this Court should rule that Rule 106

applies to all issues decided by the District Court, not merely the ultimate conclusion reached by the District Court.⁵

Appellants rely heavily on this Court's decision in *Hoyt Investment Co. v. Bloomington Commerce and Trade Center Assocs.*, 418 N.W.2d 173 (Minn. 1988), for the proposition that "where the trial court failed to rule on a question litigated," Rule 106 does not require respondents to file a notice of review. Appellants' Br. 19.⁶ Appellants' reliance on the *Hoyt* decision is misplaced.

There is no doubt that the applicable version of Section 541.051 was a "question litigated" before the District Court. Both the Contractors and the District submitted briefs on this question. Resp't. App. 215-218. Thus, the first element of the *Hoyt* analysis is satisfied. The *Hoyt* decision, however, does not apply to this situation because, unlike in the *Hoyt* case, the District Court did rule on the question. It specifically found that the pre-2004 version of Section 541.051 governed the District's claims. Resp't. App. 209. Thus, the District Court clearly decided the question of which version of Section 541.051 applied to the District's claims. This was the only question for which the Court of Appeals found that the Contractors had waived their arguments by failing to file a notice of review. Resp't. App. 196. The District Court ruled on which version of Section

⁵ As discussed below, the District Court's finding that the pre-2004 version of Section 541.051 governed the District's warranty claims was, in addition to being adverse to the Contractors on its own, dispositive of the statute of repose issue.

⁶ Appellants also cite to the Court of Appeals' decision in *Villarreal v. Independent Sch. Dist. No. 659, Northfield*, 505 N.W.2d 72, 76 n. 1 (Minn. App. 1993) *rev'd on other grounds*, 520 N.W.2d 735 (Minn. 1994) for the same proposition. The section of the *Villarreal* case cited by Appellants references the language in the *Hoyt* case already cited by Appellants.

541.051 applied to the District's claims. Resp't. App. 204. This was an issue actually litigated before the District Court. *See* Resp't. App. 217. Thus, the *Hoyt* case is inapposite.

3. Appellants' argument that the District, by filing a notice of review, obviated Appellants' duty to file a notice of review is without merit.

Appellants argue that the District's appeal from the District Court's decision addressed all of the issues in this case, and thus, there "were no other issues to appeal." Appellants' Br. 17; *see also* Appellants' Br. 18, 19 n. 6. Based on this argument, Appellants assert that the purpose of Rule 106 – avoiding piecemeal decisions on appeal – was satisfied. *See Id.* Appellants' contentions are both factually and legally flawed.

i. The District did not appeal the District Court's application of the pre-2004 version of Section 541.051.

As a factual matter, the District's Statement of the Case that was filed with the Court of Appeals did not include an appeal of the District Court's legal determination that the pre-2004 version of Section 541.051 governed the District's claims. GenFlex Appendix 57-63. Indeed including such an issue in the notice of appeal would have been nonsensical. As discussed below, the District Court's determination that the pre-2004 version of Section 541.051 applies to the District's claims was in the District's favor. *See, generally*, Section I(D) *infra*.

The District appealed very specific portions of the District Court's conclusions. *See* GenFlex 58-63. While one of the ultimate questions on appeal certainly was whether the District Court erred in holding that the District's warranty claims were barred by

Section 541.051, the District did not broadly appeal every facet of the District Court's decision. Thus, there is no basis for an argument that, by virtue of the District's appeal of the overall decision, the question as to the applicable version of Section 541.051 was properly before the Court of Appeals. The District's notice of review was not, as depicted by Appellants, "all-encompassing."

ii. Appellants, not the District, had the burden to appeal the District Court's ruling with respect to the applicable version of Section 541.051.

Rule 106 provides that a "*respondent* may obtain review" over an adversely decided issue by filing a notice of review. Minn. R. Civ. App. P. 106 (emphasis added). This Court, as well as the Court of Appeals, has consistently placed the obligation to obtain review of an adverse decision by the District Court on the respondent, irrespective of any appeal brought by another party to the litigation. *See, e.g., In re Estate of Barg*, 752 N.W.2d 52, 73 (Minn. 2008) (holding that a "respondent who does not file a notice of review to challenge an adverse ruling of the district court waives that issue in the court of appeals"); *see also Andren v. White-Rodgers Co.*, 462 N.W.2d 860 (Minn. App. 1990) (holding that a notice of review is proper for raising issues that are adverse to the party filing the notice, not other parties to the litigation) (internal citation omitted).

A holding to the contrary would vitiate Rule 106 and allow respondents to rely on the appeal itself to preserve their issues. Such a holding would also place additional burdens on appellants, causing them to take extra care when crafting appeals, so as to not "open the door" to respondents' issues. Moreover, as discussed in Section III, *infra*, such a ruling would not further the policies behind Rule 106.

D. The District Court's Ruling was Adverse to Appellants.

An issue is decided adversely to a party when it is decided contrary to the position taken by that party, or in opposition to a party's position or interests. *See* Black's Law Dictionary 58 (8th ed. 1999) (defining "adverse" as "[c]ontrary (to) or in opposition (to)"); *see also* *City of Duluth*, 690 N.W.2d at 359 (holding that the District Court's initial determination was adverse to a party when it would negatively affect that party).

Appellants assert that the "trial court did not expressly (or even implicitly) rule against the Contractors in any respect." Appellants' Br. 15. Appellants are wrong. The District Court both explicitly and implicitly ruled against the Contractors with its determination that the pre-2004 version of Section 541.051 governed the District's claims.

1. The District Court's application of the pre-2004 version of Section 541.051 was adverse to the Contractors.

The Contractors submitted briefs to the District Court urging the court to rule that the District's warranty claims were barred by the statute of repose in Section 541.051. Resp't. App. 215-8; *see also* Appellants' Br. 4. As part of their argument, the Contractors argued that the District's warranty claims were governed by post-2004 version of Section 541.051. Resp't. App. 217. In response, the District asserted its claims were governed by the pre-2004 version of Section 541.051. The District Court concluded that the pre-2004 version of Section 541.051 applied to the District's claims. Resp't. App. 209.

The District Court's ruling as to the applicability of the pre-2004 version of Section 541.051 was contrary to the Contractors' position. *See, e.g.,* Resp't. App.217. Therefore, its ruling on this issue was, by definition, adverse to the Contractors. Despite the fact that the District Court's "order for judgment is entirely in [Appellants'] favor,"⁷ Appellants were required to file a notice of review to preserve their arguments on this one adverse ruling. *See, e.g., City of Ramsey v. Holmberg*, 548 N.W.2d 302, 305 (Minn. App. 1996), *pet. for rev. denied* (Minn. Aug. 6, 1996) (holding that, "[e]ven if the judgment below is ultimately in its favor, a party must file a notice of review to challenge the District Court's ruling on a particular issue") (citing *Arndt*, 394 N.W.2d at 793).

2. The District Court's application of the pre-2004 version of Section 541.051 was implicitly adverse to the Contractors' statute of repose arguments.

The District Court did not explicitly reach the Contractors' overall statute of repose arguments with respect to the District's warranty claims. *See* Resp't. App. 210. Any such argument by the Contractors, however, was necessarily predicated on the existence of an applicable statute of repose.

The District Court ruled that the pre-2004 version of Section 541.051 applied to all of the claims asserted by the District. Resp't. App. 209. As discussed above, the pre-2004 version of Section 541.051 did not contain a statute of repose applicable to claims for breach of express warranty. *See* Day Masonry Addendum 15-19; *see also Gomez v. David A. Williams Realty & Construction*, 740 N.W.2d 775, 781 (Minn. App. 2007)

⁷ Appellants' Br. 17.

(holding that, prior to its 2004 amendment, Section 541.051 did not contain a statute of repose applicable to claims for breach of express warranty).

Because it ruled that the pre-2004 version of Section 541.051 governed the District's claims, the District Court implicitly ruled that there was no statute of repose applicable to the District's warranty claims. Such a conclusion is the only possible interpretation of the District Court's ruling that gives effect to the version of Section 541.051 that the District Court found applicable to this case. *See also* Minn. Stat. § 645.17(2).

The Court of Appeals' decision in the *City of Duluth* case is once again instructive. That decision illustrates how an adverse ruling on a threshold issue is implicitly adverse to the respondent's overall position, requiring the respondent to file a notice of review to preserve the question.

Minnesota Statutes, Section 13.43, subd. 2(a)(5), the statute at issue in the *City of Duluth* case involved a two part inquiry. Pursuant to Section 13.43, public data includes "the final disposition of any disciplinary action." *See also City of Duluth*, 690 N.W.2d at 359. Thus, the court concluded that the data in question was only public if: 1) it contained the final disposition; of 2) a disciplinary action. *Id.*

As discussed above, the *City of Duluth* court held that the district court's determination that a disciplinary action had occurred was adverse to the respondents' arguments that the data in question were not public. *Id.*; *see also* Section I(C)(2), *supra*. The Court of Appeals ruled that the district court's decision was adverse to the

respondents even though it only ruled against them on one prong of the relevant two prong analysis. *Id.*

Similarly, the Court of Appeals in this case found that the District Court ruled against Appellants on one sub-issue, which version of Section 541.051 applied to the District's claims. As in the *City of Duluth* case, the District Court's ruling on this issue was adverse to Appellants even though it only pertained to one part of Appellants' overall argument.

If anything, the District Court's ruling in the case at bar was more adverse than the district court's adverse ruling in the *City of Duluth* case. Respondents, in the *City of Duluth* case, were still able to potentially succeed on their arguments under the second prong in the applicable analysis. *See* 690 N.W.2d at 360. Unlike the question of whether a disciplinary action had occurred, the question of whether an applicable statute of repose exists is a fundamental preliminary question to any application of that statute.

Appellants argued that post-2004 version of Section 541.051 applied to the District's claims. *Resp't. App. 217.* Appellants' statute of repose argument cannot succeed without the existence of an applicable statute of repose. The District Court determined that the pre-2004 version of Section 541.051 governed the District's claims. Thus, it concluded that there was no statute of repose applicable to the District's warranty claims. The District Court's ruling was adverse to Appellants' position in the District Court⁸ and fatally adverse to their ultimate statute of repose arguments.

⁸ *See Resp't. App. 217.*

E. Based on the Contractors' Wavier of their Arguments as to the Application of the Post-2004 Version of Section 541.051, the Court of Appeals Correctly Ruled that the Contractors could not Prevail on their Statute of Repose Argument.

It is elementary that, in order to successfully argue that a statute of repose applies to the District's warranty claims, the Contractors first must be able to point to an applicable statute of repose. It is also undisputed that prior to 2004, Section 541.051 did not contain a statute of repose applicable to claims, such as the District's claims in this matter, for breach of express warranty. Day Masonry Addendum 15-19.

By failing to file a notice of review, Appellants failed to preserve their arguments on the applicable version of Section 541.051. *See Arndt*, 394 N.W.2d at 793; *see also Pine River State Bank v. Mettille*, 333 N.W.2d 622, 532 (Minn. 1983), *City of Duluth*, 690 N.W.2d at 359-360, *Holmberg*, 548 N.W.2d at 305, *Potter v. LaSalle Sports & Health Club*, 368 N.W.2d 413, 418 (Minn. App. 1985) *aff'd* 384 N.W.2d 873 (Minn. 1986). Appellants assert that this case is factually unlike the *Arndt* decision because the trial court in this case did not expressly or implicitly rule against the Contractors in any respect. Thus, the Appellants claim that the *Arndt* case is inapplicable. Appellants' Br. 15. Appellants are mistaken.

Appellants accurately summarize the facts of the *Arndt* decision. Appellants' Br. 14-15. The District does not herein repeat those facts. The respondent in the *Arndt* decision was a prevailing party, despite an adverse ruling by the district court. *Arndt*, 394 N.W.2d at 793; *see also* Appellants' Br. 15. In this case, Appellants were a prevailing

party, despite the District Court's adverse ruling that the pre-2004 version of Section 541.051 governed the District's warranty claims.

The respondent, in the *Arndt* case, "unsuccessfully argued against" the district court's adverse determination. *Id.*; see also Appellants' Br. 15. Appellants, in this case, unsuccessfully argued for the application of the post-2004 version of Section 541.051 to the District's claims. Resp't. App. 217. The District Court ruled adversely to the Contractors on this issue.⁹

The similarities between the respondent in the *Arndt* case and the Contractors in this case are striking. Thus, that decision is applicable to the case at bar. An application of the *Arndt* decision reveals that the Court of Appeals correctly ruled that the Contractors failed to preserve their arguments as to the applicable version of Section 541.051 when they failed to file a notice of review on the District Court's ruling that the pre-2004 version of Section 541.051 applies in this case.

Having waived their arguments as to the applicability of the post-2004 version of Section 541.051, the Contractors were unable to establish that there was a statute of repose applicable to the District's warranty claims. Without establishing the existence of an applicable statute of repose, the Contractors' arguments that the District's warranty claims are barred by a statute of repose are, to quote the Court of Appeals, "unavailing."

⁹ Appellants imply that the "adverse" ruling was unclear. Appellants' Br. at 27. Contrary to the Appellant's assertion, the District Court's decision that the pre-2004 version of Section 541.051 applied to this matter was very clear. See Resp't. App. 204 (Dist. Ct. Conclusions of Law 3, 5), and 209 (Dist. Ct. Memorandum).

II. Reversal of the Court of Appeals' Determination with Respect to the District's Warranty Claims Would Frustrate The Purpose of Rule 106 and Judicial Economy while Prejudicing Litigants Across the State.

Appellants assert that the Court of Appeals' decision in this case frustrates the purpose of Rule 106, "to allow a matter that the appellate court will be hearing anyway to be heard in its entirety." Appellants' Br. 21 (citing *Kostelnik v. Kostelnik*, 367 N.W.2d 665 (Minn. App. 1985)). Appellants' argument fails to apprehend that, without the Contractors' filing of a notice of review, no party to this litigation challenged the validity of the District Court's application of the pre-2004 version of Section 541.051 to the District's claims.

Appellants opine that this case provides the Court with "an opportunity to clarify the scope and rigidity of Rule 106 for the Court of Appeals and litigants." Appellants' Br. 26. Appellants' assertion disregards the fact that this Court and the Court of Appeals already apply Rule 106 in a consistent, clear, fashion. *See, e.g., Arndt, supra., City of Duluth, supra.* Clarification of Rule 106 is not needed. Instead, Appellants essentially ask the Court to overturn years of prior rulings to forgive them for their failure to follow clear procedural rules.

Appellants next assert that a broad interpretation of Rule 106 will create unnecessary reversals and bad law. Appellants' Br. 26. Appellants continue to characterize their repose argument as an alternative argument. To support their position, they suppose that the District Court's decision as to the District's warranty claims would

have been upheld, if only the Court of Appeals had considered their repose argument on appeal. *Id.*¹⁰ Appellants, once again, misinterpret the Court of Appeals' decision.

The Court of Appeals did consider the Contractors' repose arguments. It found them to be "unavailing" because the Contractors could not establish the existence of a statute of repose applicable to the District's warranty claims. Resp't. App. 196. That the narrow issue on which the Contractors waived their arguments created a major legal flaw in their ultimate repose argument is, from their perspective, unfortunate. It does not, however, support their argument that the Court of Appeals has expanded the scope of Rule 106 to include undecided alternative arguments. Instead, the Court of Appeals followed this Court's guidance, as articulated in the *Arndt* and *Hoyt* decisions, as well as its prior interpretation of Rule 106, as found in the *City of Duluth* opinion.

Appellants contend that the Court should review the Court of Appeals' application of Rule 106 *de novo*. Appellants' Br. 27. The District does not disagree. As discussed above, this Court exercises *de novo* review of the Court of Appeals' interpretation of procedural rules. Also, as discussed above, the Court of Appeals' application of Rule 106 is consistent with this Court's past decisions on Rule 106, as well as its own past interpretations of Rule 106. Appellants have failed to catch the distinction (or conveniently choose to ignore it) between what the Court of Appeals actually ruled – that the Contractors waived their arguments as to the application of the post-2004 version of

¹⁰ The District notes that the Court of Appeals may well have reversed the District Court's conclusion regarding its warranty claims on the grounds discussed in Section III, *infra*.

Section 541.051 to the District's warranty claims – and what they believe the court ruled – that the Contractors waived their arguments as to the overall repose argument. While this distinction may be subtle, the Court of Appeals' ruling was nevertheless correct.

Finally, Appellants invoke Minnesota Rule of Appellate Procedure 103.04 for the proposition that the Court of Appeals was required to consider their statute of repose arguments despite their failure to preserve the issue of whether the applicable version of Section 541.051 contained an enforceable statute of repose. Appellants' Br. 28. Appellants, however, overlook the fact that an appellate court's authority to deviate from procedural rules is entirely discretionary.

This Court has held that “the decision whether to exercise that power [authority under Rule 103.04] was within the sound discretion of the Court of Appeals.” *Arndt*, 394 N.W.2d at 794. The *Arndt* court also rejected an invitation to invoke its own power under Rule 103.04, believing that “the enforcement of Rule 106 will encourage future respondents to file notices of review, thus providing the court and all parties with notice of all issues to be addressed on appeal.” *Id.* Indeed, the Court has routinely declined to exercise its discretion to hear arguments which were waived by a respondent's failure to file a notice of review. *See, e.g., Ford v. Chicago, M., St. P. and P.R. Co.*, 294 N.W.2d 844, 845 (Minn. 1980). Relying on these decisions, the Court of Appeals has routinely declined to consider arguments on issues when respondents have failed to properly

preserve those issues by filing a notice of review. *See, e.g., Potter*, 368 N.W.2d at 418; *Holmberg*, 548 N.W.2d at 305.¹¹

Despite Appellants' vigorous assertion to the contrary, this case is little different from the *Arndt* case and those cases relying thereon. All of these cases involve an ultimately successful district court litigant who failed to file a notice of review to preserve an issue decided adversely to its position by the district court. In each of these cases, the Court of Appeals declined to deviate from the requirements of Rule 106. Just as the *Arndt* court declined to exercise its own discretion to forgive the procedural defects, so too should this Court decline to forgive Appellants' failure to follow Rule 106.

III. The Statute of Repose Made Applicable to Warranty Claims by the Post-2004 Version of Section 541.051 Cannot be Applied to the District's Warranty Claim.

At the outset, the District notes that if the Court determines that the Contractors waived their argument as to whether the post-2004 version of Section 541.051 governs the District's claims in this action, the Contractors cannot succeed on their statute of repose arguments before this Court. An issue waived at the Court of Appeals level cannot be revived in this Court. *See, e.g., Matter of Welfare of M.D.O.*, 462 N.W.2d 370, 378 (Minn. 1990) (holding that the failure to preserve an issue in the Court of Appeals constitutes a waiver of that issue before this Court) (citing *L & H Transport, Inc. v. Drew Agency*, 403 N.W.2d 223, 226 (Minn. 1987)). That being said, and without waiving any

¹¹ In fact, according to the Court of Appeals in its *Potter* and *Holmberg* decisions, that Court *cannot* address any issue for which a notice of review was required, but not filed. *Holmberg*, 548 N.W.2d at 305 (citing *Potter*, 368 N.W.2d at 413).

argument that Appellants have waived their repose arguments, the District responds to Appellants' claim that the Court of Appeals could have applied the statute of repose to the District's warranty claims.

Appellants opine that the Court of Appeals was obligated to conduct a *de novo* review of the District Court's determination of the correct date on which the District's warranty claims accrued. Appellants' Br. 22. This argument illustrates precisely why the Contractors were required to file a Rule 106 notice of review to preserve the question of the applicable version of Section 541.051 in front of the Court of Appeals. They seek review of a trial court decision which, they now implicitly admit, was adverse to their repose argument.

Appellants assert that the Court of Appeals erred by not affirming the District Court's ruling on the District's warranty claims on the alternative grounds that those claims were barred by the statute of repose found in Section 541.051. Appellants' Br. 21. Appellants ignore that the District Court ruled that the pre-2004 version of Section 541.051, which did not contain a statute of repose applicable to claims for breach of express warranty, applied to the District's warranty claims. Resp't. App. 209. No appeal was taken from this legal conclusion, and the Court of Appeals did not disturb it. Resp't. App. 196.

Appellants assert that the earliest the District's warranty claims could have accrued was December 13, 2004, when the District first notified the Contractors of the leaks. Appellants' Br. 24. Thus, Appellants contend the post-2004 version of Section 541.051 applies to the District's warranty claims and bars those claims.

The application of the statute of repose in the post-2004 version of Section 541.051 would amount to an impermissible retroactive application of the amendments to Section 541.051. In addition, such an application would divest the District of vested contract rights and constitute a judicial rewrite of the District's agreement with the Contractors. The District's arguments as to why the post-2004 version of 541.051 cannot be applied to its breach of warranty claims were fully briefed in its Response Brief to Day Masonry's Brief, and thus, the District will not repeat those arguments here. *See* District's Response to Day Masonry Br. at 27-39. The District incorporates by reference its arguments as to why the statute of repose in the post-2004 version of 541.051 cannot be applied retroactively to the District's warranty claims.

IV. The Court of Appeals Erred by Failing to Reverse the District Court with Respect to the District's Breach of Contract Claims.

In the District's Response Brief to Day Masonry's Brief, the District explained why the Court of Appeals' decision on the District's contract claims should be reversed. The District incorporates by reference its arguments as to why the Court of Appeals erred in failing to reverse the District Court with respect to the District's breach of contract claims. *See* District's Response to Day Masonry Br. at 39-48; *see also* District's Court of Appeals Br. 19-34.

CONCLUSION

The Court of Appeals correctly ruled that Appellants and the other Contractors waived their arguments as to the application of the post-2004 version of Section 541.051 to the District's warranty claims. Based on the Contractors' waiver of this threshold

issue, the Court of Appeals correctly ruled that the Contractors could not establish that the District's warranty claims were barred by an applicable statute of repose. Even assuming that the Contractors' arguments as to the application of the post-2004 version of Section 541.051 had not been waived, any application of those statutory amendments to the District's warranty claims would constitute an impermissible retroactive application of those amendments to the parties' contracts and would deprive the District of the benefit of its agreement. Therefore, the Court of Appeals properly allowed the District's warranty claims to proceed to arbitration.

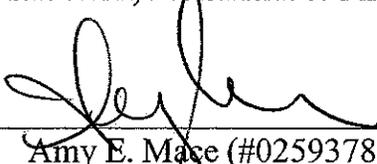
The Court of Appeals based its decision with regards to the District's non-warranty claims on clearly erroneous Findings by the District Court and additional erroneous findings by the Court of Appeals. Therefore, the Court of Appeals' decision on the District's breach of contract claims was itself erroneous. The District's breach of contract claims should be allowed to proceed to arbitration.

Dated: _____

9/23/09

By: _____

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