

APPELLATE COURT CASE NUMBERS A05-0800 and 05-1533  
STATE OF MINNESOTA  
IN COURT OF APPEALS

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Lake Superior Center Authority, a public corporation,  
and Lake Superior Center, a non-profit corporation,  
d/b/a Great Lakes Aquarium,

Appellants,

vs.

Hammel, Green & Abrahamson, Inc.,  
defendant and third-party plaintiff,

Respondent,

and

Rutherford & Chekene, a California corporation,  
defendant and third-party plaintiff,

Respondent,

vs.

Melander, Melander & Schilling, Inc., Adolphson &  
Peterson, Inc./Johnson Wilson Construction Management,  
Inc., a joint venture, LLP, Kosmann Project  
Management Services, Inc., a Minnesota corporation,  
American Engineering Testing, Inc. and  
Krech/Ojard & Associates, P.A.,

Third-Party Defendants,

and

Rutherford & Chekene, a California corporation,

Defendant and Fourth-Party Plaintiff,

vs.

Concrete Restorers, Inc.,

Fourth-Party Defendant.

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REPLY BRIEF OF APPELLANTS LAKE SUPERIOR CENTER AUTHORITY  
AND LAKE SUPERIOR CENTER

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## STATEMENT OF THE CASE

Lake Superior Center Authority (“LSCA”) and Lake Superior Center (“LSC”) submit this reply brief in response to issues raised by HGA and R&C in their briefs.

On appeal, LSCA and LSC seek reversal of the trial court’s order denying their post-trial motions for judgment notwithstanding the verdict (JNOV) or a new trial based on collusive settlement agreements which distorted the adversary process and prejudiced LSCA and LSC as made evident by trial testimony of cooperating witnesses which was not disclosed prior to trial or was materially different than disclosures made prior to trial. LSCA and LSC seek reversal of the trial court’s order denying post-trial motions based on the collusive settlement agreements against which trial proceeded which, in combination with misconduct by the prevailing parties and errors of law occurring at trial, deprived LSCA and LSC of a fair trial. As outlined by LSCA and LSC in their principal brief, LSCA and LSC are entitled to JNOV or a new trial because the integrity of the adversary process was undermined by the collusive settlement agreements and the settlement agreements, coupled with defense misconduct and other errors of law, deprived LSCA and LSC of a fair trial.

LSCA and LSC also seek an order vacating the trial court’s costs and disbursements award. Taxation of costs and disbursements is governed by rules specific to taxation, including a rule specifically applicable to taxation of expert witness fees placing certain limitations on an award of expert witness fees. The trial court adopted a flawed taxation analysis and failed to follow the rules applicable to taxation. The costs and disbursements award represents a substantial departure from applicable law and practice on taxation which, if left alone, constitutes a substantial injustice to

LSCA and LSC and creates a precedent for future litigants which is at odds with rules applicable to taxation and general principles of the adversarial system.

On review, HGA and R&C challenge the trial court's order denying a defense motion based on the statute of limitations set forth in Minn. Stat. § 541.01. The trial court correctly concluded, as a matter of law, that LSCA and LSC did not discover an actionable injury on or before March 14, 2001 and, accordingly, their commencement of an action on May 3, 2002 was well within the two-year limitations period of Minn. Stat. § 541.051. The trial court also correctly concluded that a genuine issue of material fact exists as to whether promises of repair made by HGA and R&C suspend the running of the statute of limitations and preclude HGA and R&C, under the doctrine of estoppel, from asserting the statute of limitations as a defense. While the trial court concluded as a matter of law LSCA and LSC did not discover an injury more than two years prior to commencing an action and, thus, their claims were not time barred, the defense requested the issues of "discovery" and estoppel be submitted to the jury as special verdict questions and the trial court yielded to the defense. The jury ultimately answered the special verdict questions regarding estoppel in a manner favorable to LSCA and LSC. The trial court's order recognizing promises of repair create a genuine issue of material fact as to whether HGA and R&C may invoke the statute of limitations as a defense, and the subsequent jury findings supporting estoppel, are correct under Minnesota law recognizing that promises to repair and corrective action toll or suspend the statute of limitations and prevent a party from invoking the statute of limitations as a defense.

HGA also seeks review of the trial court's order denying its motion to dismiss based on Minn. Stat. § 544.42, a statute which imposes certain requirements on litigants asserting claims against "professionals." Minn. Stat. § 544.42 expressly authorizes a party may apply for a waiver

and/or extension of the time limits specified in Minn. Stat. § 544.42 for “good cause” shown, LSCA and LSC applied for such a waiver and/or extension and the trial court granted the application. The trial court correctly denied HGA’s motion to dismiss because LSCA and LSC complied with Minn. Stat. § 544.42.

HGA also seeks review of the trial court’s denial of its motion for a directed verdict. HGA sought a directed verdict because LSCA and LSC did not call an architect other than HGA’s architects to establish the standard of care. LSCA and LSC established the standard of care applicable to an architectural engineering firm responsible for design of aquatic containment structures by way of the testimony of representatives of HGA and R&C who were called as adverse witnesses and the trial court correctly denied the motion for a directed verdict. The trial court also recognized that certain aspects of the negligence claim against HGA could be established without the need for expert testimony.

The issues raised by HGA and R&C by way of notice of review do not support appellate relief. As outlined by LSCA and LSC in their initial brief, LSCA and LSC seek an order from the Court of Appeals reversing the trial court’s order denying post-trial motions and vacating the costs and disbursements award.

**LEGAL ISSUES<sup>1</sup>**

**I. WHETHER LAKE SUPERIOR CENTER AUTHORITY AND LAKE SUPERIOR CENTER ARE ENTITLED TO JUDGMENT NOTWITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE, A NEW TRIAL?**

**Trial Court Held:** The trial court held in the negative.

**A. Whether The Collusive Settlement Agreements Prejudiced the Rights of Non-Settling Parties, are Void as Against Public Policy Because They Distort the Trial Process and Constitute Irregularities in the Proceedings of the Court Warranting a New Trial.**

**Trial Court Held:** The trial court held in the negative.

**Apposite Cases:**

*Frey v. Snelgrove*, 269 N.W.2d 918 (Minn. 1978).

*Johnson v. Moberg*, 344 N.W.2d 411 (Minn. 1983).

*Pacific Indemnity Co. v. Thompson-Yaeger, Inc.*, 260 N.W.2d 548 (Minn. 1977).

*Peterson v. Little Giant – Glencoe Port Elevator Co.*, 366 N.W.2d 111 (Minn. App. 1985).

*Riewe v. Arnesen*, 381 N.W.2d 448 (Minn. App. 1986).

**B. Whether The Prevailing Parties Engaged in Numerous Instances of Misconduct, Prejudicing Lake Superior Center Authority's and Lake Superior Center's Right to a Fair Trial and Warranting a New Trial.**

**Trial Court Held:** The trial court held in the negative.

**Apposite Cases:**

*Ellwein v. Holmes*, 234 Minn. 397, 68 N.W.2d 220 (1955).

*Lamont v. Independent School District No. 395*, 278 Minn. 291, 154 N.W.2d 188 (1967).

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<sup>1</sup> LSCA and LSC outline all legal issues in this reply brief, including issues which are the subject of analysis in their opening brief.

*Larson v. Belzer Clinic*, 292 Minn. 301, 195 N.W.2d 416 (1972).

*Magistad v. Potter*, 227 Minn. 570, 36 N.W.2d 400 (1949)

*Nadeau v. Ramsey County*, 277 N.W.2d 520 (Minn. 1979).

*Reese v. Ross and Ross Auctioneers, Inc.*, 276 Minn. 67, 149 N.W.2d 16 (1967).

*Sievert v. First National Bank*, 358 N.W.2d 409 (Minn. App. 1984).

*State v. Boyce*, 157 Minn. 374, 196 N.W.2d 483 (1923).

*State v. Haney*, 219 Minn. 518, 18 N.W.2d 315 (1945).

*State v. Silvers*, 230 Minn. 12, 40 N.W.2d 630 (1950).

C. **Whether Numerous Errors of Law Occurred at Trial Which Were Prejudicial to Lake Superior Center Authority and Lake Superior Center and Warrant a New Trial.**

**Trial Court Held:** The trial court held in the negative.

**Apposite Cases:**

*Peterson v. Little Giant – Glencoe Port Elevator Co.*, 366 N.W.2d 111 (Minn. Ct. App. 1985).

*Zontelli & Sons v. City of Nashwauk*, 353 N.W.2d 600 (Minn. 1985).

II. **WHETHER THE TRIAL COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION BY AWARDING COSTS AND DISBURSEMENTS BASED ON A FLAWED TAXATION ANALYSIS?**

**Trial Court Held:** The trial court's costs and disbursements award is the subject of review on appeal.

A. **Whether the Trial Court Erred and Abused its Discretion by Awarding Expert Witness Fees Greater Than Authorized by Rule 127 of the General Rules of Practice for the District Courts?**

**ANSWER:** Yes.

**B. Whether the Trial Court Erred and Abused its Discretion by Awarding Fees of Non-Experts for Which There is No Legal Authority for Taxation?**

**ANSWER:** Yes.

**C. Whether the Trial Court Erred and Abused its Discretion by Taxing Costs and Disbursements Against Lake Superior Center Authority and Lake Superior Center Which Were Taxable By Third-Party Defendants Against Respondents?**

**ANSWER:** Yes.

**D. Whether the Trial Court Erred and Abused its Discretion by Adopting a More Liberal Standard of Taxation, Favorable to HGA and R&C, Based on Factors Not Relevant to Taxation, Including a Rule 68 Settlement Offer?**

**ANSWER:** Yes.

**III. WHETHER THE CLAIMS OF LAKE SUPERIOR CENTER AUTHORITY AND LAKE SUPERIOR CENTER ARE TIME BARRED UNDER THE TWO-YEAR STATUTE OF LIMITATIONS SET FORTH IN MINN. STAT. § 541.01 WHICH BEGINS TO RUN UPON DISCOVERY OF AN ACTIONABLE INJURY?**

**Trial Court Held:** The trial court held in the negative, concluding as a matter of law, that LSCA and LSC did not discover an actionable injury on or before March 14, 2001.

**Apposite Cases:**

*Greenbrier Village Condominium Two Ass'n v. Keller Investment, Inc.*, 409 N.W.2d 519 (Minn. App. 1987).

*Lake City Apartments v. Lund-Martin Co.*, 428 N.W.2d 110 (Minn. App. 1988).

*Metropolitan Life Ins. Co. v. M.A. Mortenson Co.*, 545 N.W.2d 394 (Minn. App. 1996), review denied (March 21, 1996).

*Rhee v. Golden Home Builders, Inc.*, 617 N.W.2d 618 (Minn. App. 2000).

- A. **Whether, As a Matter of Law, Lake Superior Center Authority and Lake Superior Center Did Not Discover an Actionable Injury on or Before March 14, 2001 as Recognized by the Trial Court?**

**ANSWER:** Yes. By virtue of the trial court's May 7, 2003 order denying HGA's summary judgment motion, LSCA and LSC did not discover an actionable injury on or before March 14, 2001.

- B. **Whether Lake Superior Center Authority and Lake Superior Center Did Not Discover an Actionable Injury or in the Exercise of Reasonable Diligence Should Not Have Discovered an Actionable Injury on or Before May 3, 2000 Such That Their Commencement of an Action Against HGA on May 2, 2002 Was Within the Two-Year Statute of Limitations Set Forth in Minn. Stat. § 541.051?**

**ANSWER:** Yes.

- C. **Whether a Genuine Issue of Material Fact Exists Regarding When Lake Superior Center Authority and Lake Superior Center Discovered an Actionable Injury or, in the Exercise of Reasonable Diligence, Should Have Discovered An Actionable Injury?**

**ANSWER:** Yes.

- D. **Whether HGA and R&C, the Architect and Engineer Responsible for Design of the Isle Royale Tank and Playing an Active and Integral Role in Repairs of the Isle Royale Tank and Making Assurances Regarding Such Repairs, Are Estopped from Asserting the Statute of Limitations as a Defense?**

**ANSWER:** Yes.

IV. **WHETHER THE TRIAL COURT PROPERLY DENIED HGA'S MOTION TO DISMISS BASED ON MINN. STAT. § 544.42?**

**Trial Court Held:** The trial court denied HGA's motion to dismiss.

**Apposite Cases:**

*Parker v. O'Phelan*, 414 N.W.2d 534 (Minn. App. 1987), affirmed, 428 N.W.2d 361 (Minn. 1988).

- A. **Whether Minn. Stat. § 544.42 Expressly Authorizes an Extension of the Time Limits Specified in Minn. Stat. § 544.42 and the Trial Court Granted Such an Extension for Good Cause Shown?**

**ANSWER:** Yes.

- B. **Whether The Application for Such an Extension May be Sought After the Time Period Has Expired by the Express Authority of Minn. Stat. § 544.42 Or, In the Alternative, Pursuant to Rule 6.02 of the Minnesota Rules of Civil Procedure?**

**ANSWER:** Yes.

- V. **WHETHER LAKE SUPERIOR CENTER AUTHORITY AND LAKE SUPERIOR CENTER ESTABLISHED A PRIMA FACIE NEGLIGENCE CLAIM AGAINST HGA AND THE TRIAL COURT PROPERLY DECLINED TO GRANT A DIRECTED VERDICT IN FAVOR OF HGA?**

**Trial Court Held:** The trial court denied HGA's motion for a directed verdict..

#### **STATEMENT OF FACTS**

LSCA and LSC incorporate by reference the statement of facts set forth in their initial brief. In addition, LSCA and LSC set forth the following additional facts as relevant to the issues which are the subject of this reply brief.

- A. **Lake Superior Center Authority and Lake Superior Center Complied with Minn. Stat. § 544.42.**

On May 3, 2002, LSCA and LSC commenced an action against HGA, alleging claims of breach of contract, negligence, vicarious liability (related to the services provided by HGA's consultant, R&C), breach of warranty and contribution and indemnity. LSCA sought, among other things, to recover on a contribution and indemnity basis a sum paid by it to settle a trade contractor's claim for additional compensation in connection with repairs and remedies of the Isle Royale tank.<sup>2</sup>

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<sup>2</sup>In March of 2001, Marcy commenced an arbitration proceeding against LSCA and asserted a claim for additional compensation for its work in performing substantial repairs and remedies to the Isle Royale tank. Marcy alleged it was entitled to additional compensation for

LSCA also sought to recover loss of revenue due to a delay in construction which caused a delay in opening of the aquarium. At the time of commencement of the action, LSCA and LSC provided an affidavit pursuant to Minn. Stat. § 544.42, Subd. 2(1) and Minn. Stat. § 544.42, Subd. 3(2). After commencing an action against HGA, LSCA began a search to locate a qualified expert at reasonable cost who would be available to evaluate HGA's conduct and provide opinions as to whether HGA's conduct deviated from the applicable standard of care. LSCA's search to find an available qualified expert at a reasonable cost was made difficult due to a number of factors, including a perceived conflict of interest on the part of potential qualified experts, a limited pool of experts available on a local, regional and national level who would be qualified to evaluate the issues involved in the action which includes design and construction of large tanks for an aquarium facility and because the 90-day time period for locating the expert corresponded with the peak season for construction and design work thus further limiting the availability of qualified experts. *Id.* LSCA and LSC subsequently applied for a waiver and/or extension of the time limits for service of certain affidavits required in an action against a professional as set forth in Minn. Stat. § 544.42 and in support of its application set forth facts constituting "good cause." LSC S1. LSCA and LSC filed a motion in connection with their application and submitted a memorandum of law in support of the motion. LSC S51. While the motion was under advisement, HGA served and filed a motion seeking dismissal of the action, claiming LSCA and LSC failed to comply with Minn. Stat. § 544.42. LSC S99. The trial court concluded LSCA and LSC established "good cause" for an extension of the time

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the repairs and remedies because the repairs resulted from defective specifications prepared by R&C for which HGA had vicarious liability. *Id.*, ¶ 5. On January 10, 2002, LSCA and Marcy entered into a settlement agreement relating to Marcy's arbitration claim whereby LSCA paid Marcy the sum of \$465,000 in exchange for Marcy executing a full and final release in favor of LSCA. *Id.*, ¶ 22.

limits specified in Minn. Stat. § 544.42 and, accordingly, extended the deadlines for service and filing of affidavits in accordance with the statute. HGA 360. The trial court denied HGA's motion to dismiss. HGA 393. HGA subsequently sought review by the Supreme Court which was denied. HGA 401.

**B. The Trial Court Denied Defense Motion for Summary Judgment Based on the Statute of Limitations and Concludes as a Matter of Law Lake Superior Center Authority and Lake Superior Center Did Not Discover an Actionable Injury Two Years Prior to the Date They Commenced An Action Against HGA.**

R&C moved for summary judgment based on the statute of limitations set forth in Minn. Stat. § 541.051. HGA and the third party defendants joined in the motion. The trial court denied the motion, concluding, as a matter of law, that LSCA and LSC did not sustain an "actionable injury" two years prior to the date they commenced an action against HGA. HGA 370. The trial court specifically concluded that LSCA and LSC did not discover an "actionable injury" on or before March 14, 2001, the date when HGA, in its role as an arbiter of disputes on the project, declined to rule on various claims and referred the parties to their available remedies. *Id.* at 5. The trial court also concluded that a genuine issue of material fact existed as to whether HGA and R&C, by virtue of their role in repairs and remedies to the tank, were estopped from asserting the statute of limitations as a defense. *Id.* at 8, 14. In its order, the trial court noted the following:

As plaintiffs point out, a course of repairs whereby it is represented that recognized defects will be remedied serves to "toll" the running of the statute. *Rhee v. Golden Home Builders, Inc.*, 617 N.W.2d 618 (Minn. Ct. App. 2000). That is precisely what occurred here. Plaintiffs were advised by HGA and RC that the tank could, and would, be rendered structurally sound by reason of the repairs. HGA, RC and the others engaged in the construction project were the experts and it was their expertise that led to their involvement in the project. The Court cannot conclude plaintiffs should be penalized for following the very course of conduct suggested to them as to the proper, and allegedly effective, manner to address the obvious defects that became known when the forms were stripped from the concrete.

Id. at 8. In March of 2000, the construction manager sent a letter suggesting that since the owners were “likely headed to court or arbitration” over the quality of the concrete that the owner, LSCA and LSC, should consider hiring an independent specialist to evaluate all aspects affecting the quality of the existing tanks. The March 20, 2000 letter is a letter authored by someone other than LSCA and LSC and the record fails to establish that as of March 20, 2000, LSCA and LSC considered the hiring of an independent expert. HGA and R&C placed much emphasis on this letter; however, the evidence at trial established that HGA, upon receipt of the letter suggesting the hiring of an expert, indicated the suggestion was inappropriate and there should be no further discussions regarding the hiring of an expert but, rather, HGA and others should keep Chuck Koosmann, the owner’s representative, and Great Lakes Aquarium “on board” and confident. Tr. Ex. 1010 (email from Hal Davis to Robert Lundgren suggesting best way to proceed is to keep Chuck and GLA on board and confident); Tr. at 441-444.

C. **HGA and R&C Played an Integral Role in Repairs and Remedies to the Isle Royale Tank.**

HGA and R&C played an active and integral role in repairs and remedies to the Isle Royale tank such that they are estopped from asserting the statute of limitations as a defense.<sup>3</sup>

HGA, an architectural engineering firm, served as the leader of the design team and, pursuant to a contract with LSCA, was directly responsible to LSCA for all aspects of design of the aquarium, including the large exhibit tanks. *Complaint*, ¶ 3. HGA elected to delegate an aspect of its design work to R&C and entered into a consulting agreement with R&C relating to design of the large

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<sup>3</sup>HGA and R&C both advocate in their briefs that the doctrine of estoppel does not apply to them because they were not responsible for repairs and remedies to the tanks. As outlined in this brief, the record establishes otherwise.

exhibit tanks. Under HGA's supervision, R&C designed the Isle Royale tank and, related to its design work, R&C prepared specifications governing the work of the concrete contractor who placed concrete in the tank. R&C prescribed requirements for the concrete mix design to be utilized in placement of the tank, including the shrinkage factor, aggregate size, level of slump for the concrete and provided for a prohibition on the use of an admixture (superplasticizer). Tr. 191, 719-729. The concrete properties prescribed by R&C made the concrete mix one which was "stiff."<sup>4</sup>

Prior to the concrete pour of the Isle Royale tank, two mockups were prepared by the concrete contractor. LSC S53. The mockups were intended to reflect the structural components of the tank, including the level of reinforcing. Tr. at 765-778. HGA rejected the first mockup but accepted the second mockup and because the mockup was accepted, the concrete pour of the tank proceeded on September 16, 1999. Consistent with the results of the second tank mockup, the concrete contractor encountered difficulties in placing the concrete and after the forms on the tank were removed, there were certain "defects" apparent in the concrete, including large voids, honeycombing, bug holes and lack of consolidation. LSC S262.

R&C was charged with responsibility for determining whether the voids and defects resulting from placement of concrete in the Isle Royale tank affected the structural performance of the tank. On October 19, 1999, a concrete construction meeting was held and the meeting minutes reflect the following:

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<sup>4</sup>As previously noted by LSCA and LSC, the concrete mix design prescribed by R&C adversely affected the flowability of the concrete which, coupled with the design of tank which included a superfluous level of reinforcing, failed to properly take into consideration the constructability of the tank which ultimately lead to difficulties in placement.

Isle Royale Repairs – Marcy will proceed with the sand blasting on the inside walls of the tank. R&C to determine if the voids affect the structural performance of the tank.

Marcy will proceed with the plan to repair the imperfections. This plan will be jointly arrived at with R&C, HGA, Marcy and the Construction Manager. Marcy will still be required to warranty their work.

LSC S262 (emphasis added). On October 26, 1999, Hal Davis, R&C, inspected the Isle Royale tank and A&P/J-W and K/O memorialized the plan of action agreed to at that inspection, including R&C's role in review and approval of any procedures for repair work:

Hal stated that the tank is structurally acceptable and repairable ...

\*\*\*

Hal stated and Marcy Construction agreed that before any repair work starts, Marcy would submit their procedures for repairing the various defects. It was generally agreed that there would be 3-4 procedures required to cover the variety of defects. Each repair work would be covered by one of more of the procedures developed. Before beginning the repair work, Hal would review and approve the proposed procedures.

LSC S263, 264 (emphasis added).

After engineer Davis inspected the Isle Royale tank on October 26, 1999 and determined the tank was structurally acceptable and repairable, all members of the project team and design team, including HGA, R&C, A&P/J-W, established a protocol for repair of the tank. Tr. 5056-57, 5077. All members of the project team, including the design professionals, worked together to identify repair procedures and to develop acceptable means to resolve any problem areas in the Isle Royale tank. LSC S180-258.

As the party responsible for design of the tank, including the concrete mix design, R&C not only played an active and integral role in the repair process, R&C and its principal, Hal Davis, held a leadership role with respect to repairs and declaring the tank was structurally acceptable and

repairable which is reflected in meeting minutes of the construction manager indicating that others involved in construction of the project were looking to R&C for guidance and direction. Tr. 797-812, 2801, Tr. Exhs. 1012-1021. After R&C represented the tank was structurally acceptable and repairable, substantial repairs and remedies were undertaken of the tank for nearly seven months. When the repairs were completed, the tank was tested and the testing indicated the repairs were effective. LSC S303.

**D. At Trial, HGA and R&C Introduced Hearsay Evidence Intended to Establish the Negligence of Marcy Construction Company.**

At trial, HGA and R&C, over objections by LSCA's counsel, introduced hearsay evidence for the purpose of establishing Marcy's negligence. Such evidence included introduction of evidence regarding Eclipse, a product which HGA and R&C claimed Marcy should have used on the project to improve the flowability of the concrete and which was one of the grounds asserted by HGA and R&C for claiming Marcy was negligent. No Eclipse representative ever testified at trial regarding the product. Rather, HGA and R&C introduced, over objections by LSCA and LSC, various communications to and from Eclipse which attested to the performance of Eclipse. Tr. at 2374, 2384-2397, 4075-4084. By permitting introduction of documents attesting to the performance of Eclipse, HGA and R&C were permitted to introduce substantive evidence as to the performance of Eclipse without calling an Eclipse representative for cross examination.

**G. Corrections to the Statement of Facts Set Forth by HGA and R&C in Their Briefs.**

R&C makes the following incorrect statements in its brief:

1. R&C represents in its brief that the trial court invited LSCA and LSC to assert claims against the third party defendants. To the contrary, the trial court recognized that LSCA and LSC were not obligated to then plead over but reserved the right to plead over and cautioned HGA, not

LSCA and LSC, that it was “in dangerous waters” by agreeing to dismiss certain parties. See Transcript of July 30, 2004 proceedings. On August 27, 2004, just prior to the start of the trial of this action, a hearing was held on motions in limine. At that hearing, HGA and R&C sought dismissal of certain third party defendants based on the representation that HGA had entered into standard *Pierringer* releases with such third party defendants. LSCA and LSC objected to dismissal and their objections were acknowledged by defense counsel and the trial court. LSC S307-329. The trial court stated at the hearing that he would dismiss the third party defendants but did so expressly reserving the right of LSCA and LSC to plead over at the conclusion of the trial. Id. The trial court dismissed the third-party defendants based on the predicate that they had entered into standard *Pierringer* releases, including full indemnity, obviating their need to appear at trial and LSCA and LSC would be entitled to plead over at the end of the case. Id. The trial court subsequently declined to permit LSCA and LSC to plead over at the end of the case and contrary to representations made at the August 27, 2004 hearing, HGA and R&C advanced a position that the settlement agreements were something other than a *Pierringer* release and that they contained partial, not full, indemnity provisions Tr. 1337-1342, 1692, 1726, 1771-1788.

2. R&C contends LSCA did not previously make a forfeiture argument and has waived its right to waive that issue on appeal. LSCA and LSC have previously raised the issue of forfeiture with respect to taxation of costs and disbursements. See *Plaintiffs’ Memorandum of Law in Opposition to (1) Hammel, Green and Abrahamson’s Application for Taxation of Costs and Disbursements; and (2) Rutherford & Chekene’s Application for Taxation of Costs and Disbursements* at p. 39-43.

3. Contrary to R&C's assertion in its brief, LSCA and LSC did request an opportunity to meet with Krech/Ojard engineers but was declined that request due to the anti-cooperation clause contained in the settlement agreement and K/O. Tr. at 1722-23.

4. While LSCA was permitted to cross examine based on the cooperation clause and the existence of the settlement agreement, the court required LSCA's counsel to refer to the agreements as "partial," minimizing the degree of impeachment associated with the settlement agreements and foreclosed LSCA from cross examining based on the indemnity provision of the agreement. Tr. 1337-1342; 1692-1726, 1771-1788.

### ARGUMENT

I. **THE SETTLEMENT AGREEMENTS CONTAINING NON-COOPERATION CLAUSES, COLLUSIVE AND SECRET IN NATURE, UNDERMINE THE INTEGRITY OF AND DISTORTED THE TRIAL PROCESS, CONSTITUTE IRREGULARITIES IN THE PROCEEDINGS OF THE COURT AND PREVAILING PARTIES AND PREJUDICED LAKE SUPERIOR CENTER AUTHORITY AND LAKE SUPERIOR CENTER.**

R&C contends that the settlement agreements between HGA and others did not unfairly prejudice the rights of LSCA and LSC to a fair trial. The record demonstrates that the adversary process was distorted at all stages, depriving LSCA and LSC of a fair trial. In addition to the examples recited in their principal brief, LSCA and LSC note the following additional examples of distortion of the trial process caused by the collusive settlement agreements:

1. By providing for dismissal of third party defendants based on the pretrial characterization of settlement agreements as standard *Pierringer* releases (which would include full indemnity clauses) and subsequently requiring LSCA and LSC to refer to such settlement agreements as partial in nature based upon defendants' subsequent characterization of the indemnity agreements as being partial and not full.

2. After adopting defense characterization of agreements as “partial,” by then failing to permit LSCA and LSC to impeach witnesses based on indemnity agreements. *Peterson v. Little Giant – Glencoe Port Elevator Co.*, 366 N.W.2d 111, 114 (Minn. Ct. App. 1985) (indemnity agreements are admissible to impeach witnesses).

3. Recanting of expert opinions by defense experts which were adverse to third party settling defendants (and which would create an indemnity obligation on the part of HGA). Tr. at 4061-64.

4. Disclosure and sharing of information among certain litigants and not others outside of the discovery process. Tr. 1816 (defense meets with David Krech four outside of discovery)

5. Helen Fehr offered deposition testimony critical of Krech/Ojard and once Krech/Ojard became a settling party and an indemnity obligation of HGA, she recanted that testimony at trial. Tr. at 772-778, 5027.

6. David Krech disclaimed field inspection reports clearly identifying pour ports as being utilized by Marcy and testified at trial that pour ports were not utilized. Tr. at 1763-65. This trial distortion was enhanced by virtue of the trial court’s inconsistent ruling on hearsay objections. When LSCA’s counsel attempted to impeach David Krech on the contents of his field inspection report the objection was sustained on hearsay grounds as calling for hearsay regarding Marcy. Subsequently, the trial court permitted hearsay evidence of Marcy over objection by counsel by LSCA. Compare Tr. 1761 to LSC S 258.

7. When LSCA’s counsel attempts to cross examine witness on commonality of claims counsel, the court precludes such cross examination. Tr. at 3264-74 (“I am really troubled by the box you are in here and I can’t quite think of an answer.”)

**II. THE CLAIMS OF LSCA AND LSC ARE NOT TIME BARRED BY THE STATUTE OF LIMITATIONS SET FORTH IN MINN. STAT. § 541.051.**

R&C and HGA sought summary judgment in their favor based on the statute of limitations set forth in Minn. Stat. § 541.051, the statute of limitations applicable to negligence claims against architects and engineers, among others, arising out of the defective and unsafe condition of an improvement to real property. The trial court denied the motion, concluding as a matter of law LSCA and LSC did not discover an actionable injury on or before March 14, 2001 and concluding in the alternative that a genuine issue of material fact as existed as to when LSCA and LSC discovered an injury, the operative event which triggers the running of the statute of limitations and a genuine issue of material fact existed as to whether HGA and R&C, by virtue of their role in repairs to the tank and assurances made in connection with those repairs, were estopped from assertion a statute of limitations defense. While the trial court concluded as a matter of law that LSCA and LSC did not discover an actionable injury on or before March 14, 2001 such that the statute of limitations was not a viable defense to their claim, the court ultimately submitted special verdict questions to the jury on the statute of limitations issues of discovery of injury and tolling. The jury answered the special verdict questions on tolling in a manner favorable to LSCA and LSC.

In notices of review filed in conjunction with this appeal, R&C and HGA challenge the trial court's May 7, 2003 order denying summary judgment based on the applicable statute of limitations. On appeal, from a summary judgment, the court's role is to determine whether there are any issues of material fact or whether the district court erred in its application of the law. *Offerdahl v. Univ. of Minn. Hosps. & Clinics*, 426, 427 (Minn. 1988). The trial court correctly denied the summary judgment motion.

**A. As a matter of law, LSCA and LSC did not discover an actionable injury more than two years prior to commencement of an action.**

As the trial court concluded in its May 7, 2003 order, LSCA and LSC did not discover an injury more than two years prior to commencement of an action and, accordingly, the only error which occurred was one which was fortuitous for HGA and R&C in that the court submitted special verdict questions on the statute of limitations issues of discovery and tolling which, according to the court's summary judgment order, should not have been submitted to the jury. The concept of what constitutes an "actionable injury" for purposes of triggering the statute of limitations may, in certain cases, not be amenable to determination by a lay jury and based on the record in this case the trial court correctly recognized the issue presented a question of law.

**B. Lake Superior Center Authority and Lake Superior Center Did Not Discover An Actionable Injury More Than Two Years Prior to Commencement of An Action.**

Under Minn. Stat. § 541.051, a negligence claim against an architect or engineer arising out of the defective and unsafe condition of an improvement to real property must be commenced within two years after the claimant discovers, or, with reasonable diligence, should have discovered an injury sufficient to entitle it to maintain an action. *Greenbrier Village Condominium Two Ass'n v. Keller Inv., Inc.*, 409 N.W.2d 519, 524 (Minn. App. 1987). When reasonable minds may differ as to the date of discovery of an injury, the issue is one for the trier of fact. *Metropolitan Life Ins. Companies, Inc. v. M.A. Mortenson Co.*, 545 N.W.2d 394, 399 (Minn. App. 1996), review denied (March 21, 1996) (citations omitted). While a lay jury may not be equipped in a particular case to determine when an actionable injury occurs such that it should be decided as a matter of law, the court ultimately decided to submit the "discovery of injury" issue to the jury. Because a genuine issue of material fact exists as to when LSCA and LSC discovered an injury, in light of the record

in this case and the role of HGA and R&C in repairs made to the tank as well as assurances made based on those repairs, the trial court correctly submitted the issues of discovery of injury and estoppel to the jury by way of special verdict questions.

**C. Lake Superior Center Authority's Indemnity Claim Was Commenced Within Five Months of Payment of a Settlement Arising Out of the Defective and Unsafe Condition of an Improvement to Real Property.**

Under Minn. Stat. § 541.051, Subd. 1(b), LSCA's indemnity claim did not accrue until "payment of a final judgment, arbitration award, or settlement arising out of the defective and unsafe condition [of an improvement to real property]." LSCA's indemnity claim was commenced within five months of payment of a settlement arising out of the defective and unsafe condition of an improvement to real property and is not time barred. LSCA settled the Marcy arbitration claim on January 10, 2002, and commenced an action within five months of the settlement, well within the two-year statute of limitations of Minn. Stat. § 541.051. LSC 102. As a matter of law, then, LSCA's indemnity claim is not time barred.

**D. Lake Superior Center Authority and Lake Superior Center Did Not Discover An Actionable Injury Two Years Prior to Commencement of an Action.**

"Discovery [of] an injury" requires discovery of an actionable injury, an injury sufficient to maintain a cause of action. *Rhee v. Golden Home Builders, Inc.*, 617 N.W.2d 618, 621 (Minn. App. 2000) (citing *Greenbrier Village Condominium Ass'n v. Keller Investment, Inc.*, 409 N.W.2d 519, 524 (Minn. App. 1987)). Under Minnesota law, an actionable injury requires a showing of injury and damages. In the absence of damages, an injury is not actionable. *Continental Grain Co. v. Fegles Const. Co.*, 480 F.2d 793, 797 (8<sup>th</sup> Cir. 1973). In October of 1999, when forms were stripped from the tank and the post-placement condition of the tank was discovered, LSCA and LSC discovered the defective, but repairable condition of tank, but did not discover an actionable injury.

LSCA and LSC did not discover an actionable injury related to the tank until at least June 1, 2000 when they determined the injury was actionable because it had caused damages in the form of a delay in opening. During the time period between October 19, 1999 and June of 2000, the construction manager undertook various steps to resequence and stack work of various trade contractors with the intent of overcoming any delay associated with repairs on the tank which if successful would have resulted in no delay on the project. Until the scheduled date for opening arrived, delay could have been overcome and, if so, LSCA and LSC would not have sustained any actionable injury.

**E. A Genuine Issue of Material Fact Exists as to Whether HGA and R&C, Due to Their Active and Integral Role in Repairs of the Isle Royale Tank and Assurances Made in Connection with Such Repairs, Are Estopped from Asserting a Statute of Limitations Defense.**

When a party allegedly responsible for remedying a defect in real property makes assurances that a defect will be repaired, that party is estopped from asserting a statute of limitations defense if the injured person detrimentally and reasonably relies on the assurances and representations. *Rhee v. Golden Home Builders, Inc.*, 435 N.W.2d 136 (Minn. App. 1989).

With regard to Minn. Stat. § 541.051, estoppel is pled where, after discovery of a cause of action, the injured has been induced to forego suit in reliance on the other party's assurances that corrective action would be taken. *Id.* Corrective action, such as repairs, destroy the significance of a party's knowledge of an injury. In a case involving corrective action, a party is deemed to have discovered an injury only if and when, notwithstanding repairs, a party discovers an actionable injury or the repairs and remedies fail. A genuine issue of material fact exists as to whether R&C and HGA, based on their active and integral role in the repair process, are estopped from asserting a statute of limitations defense. *Rhee v. Golden Home Builders, Inc.*, 617 N.W.2d 618 (Minn. App.

2000) (recognizing that repairs and corrective action, and a party's assurances made in connection with such repairs and corrective action, may constitute estoppel and suspend the running of the statute of limitations); *Lake City Apartments v. Lund- Martin Co.*, 428 N.W.2d 110, 112 (Minn. App. 1998), review denied (Minn. October 19, 1998) (leaks occurred occasionally over 10 months, the plumbing was altered and no further leaks appeared for two years, suggesting a temporary solution or cessation of an injury). Estoppel depends on the facts of each case and ordinarily presents a question for the jury. *Brenner v. Nordby*, 306 N.W.2d 126, 127 (Minn. 1981).

In light of their principal role in design of the tanks, both HGA and R&C played an integral role in repairs to the Isle Royale tank. R&C made the initial determination, based on its knowledge of the design of the tank, whether the tank could be repaired. Based on its inspection, R&C declared the tank was structurally acceptable and repairable and, accordingly, LSCA and LSC proceeded with repairs. R&C reviewed and approved repair procedures, evaluated areas in need of repair and made recommendations on repair procedures, consistent with its role as the engineer responsible for design of the tank and having prescribed, in the first instance, certain requirements for the concrete design mix.<sup>5</sup> R&C regularly communicated with the architect, contractor and construction manager regarding repairs, including emails and digital photographs depicting areas to be repaired. HGA likewise similarly participated in the repair process. All communications routed to R&C were initially routed through HGA and as the communications regarding repair procedures reflected, HGA was knowledgeable about and actively participated in determining the various repair procedures being made to the tank.

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<sup>5</sup>Contrary to the assertion made by HGA and R&C disclaiming any responsibility for repairs, both were involved in design of the aquatic containment structures and were responsible for remedying the defects in the tanks should the defects be a function of design.

Repairs were performed over a series of months with the tank ultimately passing hydro-static testing. LSCA and LSC obviously relied upon the repairs and representations made by HGA and R&C because they moved forward with repairs, the course of action recommended by R&C and HGA.

R&C and HGA are estopped from claiming LSCA and LSC should have discovered an actionable injury during the exact same period when R&C and HGA, the parties representing themselves as most knowledgeable about design of the Isle Royale tank, played an active and predominant role in repairs made to the Isle Royale tank by, among other things, determining in the first instance whether the tank could be repaired, recommending that the tank be repaired, establishing a protocol for the repairs, reviewing and approving the repairs that were made and representing the tank was “structurally acceptable and repairable.”

**III. LAKE SUPERIOR CENTER AUTHORITY AND LAKE SUPERIOR CENTER COMPLIED WITH MINN. STAT. § 544.42.**

HGA again challenges the trial court’s order denying its motion for dismissal based on Minn. Stat. § 544.42. LSCA and LSC complied with Minn. Stat. § 544.42 and the trial court properly denied the motion to dismiss.

**A. Lake Superior Center Authority and Lake Superior Center Obtained an Extension of the Time Limits Set Forth in Minn. Stat. § 544.42 For Good Cause Shown and Provided an Affidavit With The Deadline Established by The Court.**

Minn. Stat. § 544.42, effective to causes of action arising on or after August 1, 1997, sets forth certain requirements for the service and filing of different forms of affidavits for claims against certain professionals, including architects and engineers.

While LSCA and LSC substantively complied with requirements of Minn. Stat. § 544.42,<sup>6</sup> they applied for and obtained an extension of the time limits set forth in Minn. Stat. § 544.42 as expressly authorized by the statute. Minn. Stat. § 544.42, Subd. 4(b) expressly authorizes that the parties by agreement or the court for “good cause shown” may extend the time limits set forth in Minn. Stat. § 544.42.

The parties by agreement, or the court for a good cause shown, may provide for extensions of the time limits specified in subdivision 2, 3, or this subdivision.

Minn. Stat. § 544.42, Subd. 4(b). Minn. Stat. § 544.42 contains a non-exclusive definition of good cause:

Good cause includes, but is not limited to, a showing that the action requires discovery to provide a reasonable basis for the expert’s opinion or the unavailability, after a good faith effort, of a qualified expert at reasonable cost.

Minn. Stat. § 544.42, Subd. 3(c). LSCA and LSC submitted an application and affidavit in support of its application for a waiver or extension of the time limits set forth in Minn. Stat. § 544.42, in which they set forth facts demonstrating good cause. Immediately after commencing an action against HGA, LSCA and LSC engaged in a good faith effort to locate a qualified expert at reasonable cost but that task was made difficult due to a number of factors, including:

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<sup>6</sup>See LSC S1-S99.

- Many potential qualified experts declined to serve as an expert due to a perceived conflict of interest with either HGA or one of the other contractors or design professionals involved in design and construction of the aquarium project.
- The nature of the design and construction of the facility involved – an aquarium and aquatic containment structures – limited the pool of experts qualified to provide an analysis of the architect’s role in design and construction of the facility.
- The time period (late spring and summer) when LSCA and LSC were attempting to locate an expert coincided with the peak season for design and construction professionals in that design professionals were involved in the administration of ongoing construction projects and working on design for future projects.

LSC S1-50. LSCA and LSC chronicled for the court their attempts to locate and retain an expert, including their initial attempt to consult with a local expert (such experts would be available at a reasonable cost) and when LSCA and LSC determined such experts were unavailable, proceeded to expand its search to a regional and national level. The good faith effort of LSCA and LSC to locate a qualified expert at reasonable cost and its determination, after engaging in that effort, that qualified experts were unavailable or available only on a limited basis constitutes “good cause” within the express definition of Minn. Stat. § 544.42, Subd. 3(c). The showing of “good cause,” made by LSCA and LSC, including retaining a qualified expert at a reasonable cost, one of the express “causes” constituting good cause as defined in Minn. Stat. § 544.42, supports the trial court’s extension of the time limits set forth in Minn. Stat. § 544.42.

**B. Lake Superior Center is Entitled to an Enlargement of the Time Period Applicable to an Application for an Extension of Time Limits Specified in Minn. Stat. § 544.42.**

As outlined in Section A, Minn. Stat. § 544.42 expressly authorizes that an application for an extension of the time limits specified in Minn. Stat. § 544.42 may be made at any time and does not require that it be made before the expiration of the time period which is the subject of the application. Even assuming there is an unexpressed requirement that an application for an extension must be made by a certain time period, LSCA and LSC established they were entitled to an enlargement of the time period for bringing an application, pursuant to Rule 6.02 of the Minnesota Rules of Civil Procedure.

In order to determine whether a party is required to seek an enlargement pursuant to Rule 6.02, the relevant statute must be examined to determine whether the statute requires or allows an act to be done at or within a specified time period. Minn. Stat. § 544.42 does not prescribe that the act – the application – be required or allowed within a specified time and, accordingly, Rule 6.02 is inapplicable. Even assuming Rule 6.02 applies, LSCA and LSC established an extension was appropriate under Rule 6.02 based on a consideration of factors relevant to such relief. *See Parker v. O-Phelan*, 414 N.W.2d 534 (Minn. App. 1987), affirmed, 428 N.W.2d 361 (Minn. 1988). Lake Superior Center established (1) a reasonable explanation (or “good cause”) supporting an extension of time; (2) a reasonable excuse for failure to seek an application within 90 days; (3) due diligence in seeking an extension; and (4) no substantial prejudice to HGA. LSCA and LSC served an affidavit of expert review within 2 business days of HGA notifying LSCA and LSC that it would be

seeking dismissal and only 2 business days after expiration of the 90 days from the date of service of the summons and complaint.<sup>7</sup>

C. **Rule 6.02 of the Minnesota Rules of Civil Procedure May be Invoked by a Plaintiff Seeking to Extend the Time Limits Specified in Minn. Stat. § 544.42.**

HGA's motion for dismissal presumed that a plaintiff is foreclosed from invoking Rule 6.02 of the Minnesota Rules of Civil Procedure to seek an extension of the time limits specified in Minn. Stat. § 544.42. As outlined below, Rule 6.02 of the Minnesota Rules of Civil Procedure may be invoked by a plaintiff to obtain an extension of the time limits specified in Minn. Stat. § 544.42.

Rule 6.02 of the Minnesota Rules of Civil Procedure provides that a party may seek to enlarge the time period for taking certain action within a specified time if time limit is specified "by statute." Minn. R. Civ. P. 6.02. While Minn. Stat. § 544.42 does not contain a time limit requiring that an extension be sought by a certain date, even if the statute is construed such that an application is subject to an unexpressed time limitation, Rule 6.02 of the Minnesota Rules of Civil Procedure may be invoked by a plaintiff seeking to extend the time limits specified in Minn. Stat. § 544.42 and, as outlined below, where the court grants relief under Rule 6.02 to a plaintiff, the penalty for non-compliance provisions are inoperative. Where, as in the present case, a statutory scheme does not create a cause of action but merely prescribes a process for a service of affidavits intended to provide validity for a lawsuit, Rule 6.02 of the Minnesota Rules of Civil Procedure may be invoked by a

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<sup>7</sup>LSCA and LSC note that the affidavit in question relates to an affidavit of expert review by counsel as at the time HGA sought dismissal, the time period for the affidavit relating to identification of experts to be called at trial (requiring disclosure of the identity of the experts, the substance of their facts and opinions to which they are expected to testify and a summary of the grounds for each opinion) had not expired.

plaintiff to extend the time limits for service of affidavits. *Parker v. O'Phelan*, 414 N.W.2d 534 (Minn. App. 1987), aff'd 428 N.W.2d 361 (Minn. 1988)

In *Parker v. O'Phelan*, the court concluded that a plaintiff is entitled to seek an extension of the time limits specified in the statute after the expiration of the original time period according to Rule 6.02 of the Minnesota Rules of Civil Procedure.<sup>8</sup> Since *Parker*, many plaintiffs have sought relief under Rule 6.02 of the Minnesota Rules of Civil Procedure and depending upon the particular circumstances of the application and the showing made by the plaintiff in support of the motion, the courts have either granted or denied the request. *Stern v. Dill*, 442 N.W.2d 322, 324 (Minn. 1989) (Minn. Stat. § 145.682 must be read in conjunction with Minn. R. Civ. P. 6.02). In each of the cases, the courts have reaffirmed the *Parker* holding that Rule 6.02 of the Minnesota Rules of Civil Procedure applies to a statutory scheme providing for the service of affidavits.

Rule 6.02 of the Minnesota Rules of Civil Procedure permits trial courts, in their discretion, to extend time limits imposed by statute even if the motion is made after the time expires where the failure to act was a result of excusable neglect. Generally, the Rules of Civil Procedure are applicable unless they are inconsistent with the statutory practice and procedure. *Parker v. O'Phelan*, 414 N.W.2d 534 (Minn. App. 1987), aff'd 428 N.W.2d 361 (Minn. 1988) (citing Minn. R. Civ. P. 81.01; *Universal Const. Co. v. Peterson*, 280 Minn. 529, 530-31 160 N.W.2d 253, 255 (1968)). The courts will find inconsistency only if a provision of the statute directly conflicts with the rules. *Tischendorf v. Tischendorf*, 321 N.W.2d 405, 409 N.2 (Minn. 1982), cert. denied, 460 U.S. 1037 (1983). Technicalities that contribute nothing but rigidity to the judicial process deserve

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<sup>8</sup>LSCA and LSC note that in *Parker*, the court assumed that a plaintiff is required to make its application within a certain time period even though the statute does not exclude bringing the application after the expiration of the time period which is the subject of the application.

neither recognition nor preservation. *Gelin v. Hollister*, 222 Minn. 339, 24 N.W.2d 496 (1946). Minn. Stat. § 544.42, subd. 4 (b) demonstrates clear legislative intent to permit a time enlargement under appropriate circumstances, notwithstanding the penalty for noncompliance provisions of subdivision 6 of Minn. Stat. § 544.42. The statutory purpose of Minn. Stat. § 544.42 is the same statutory purpose underlying the enactment of Minn. Stat. § 145.682. As recognized by the *Parker* court, “[t]he statutory purpose of eliminating nuisance claims is not harmed since the plaintiff still is required to submit the affidavit of an expert willing to support and testify to the validity of the negligence claim[.]”

Allowing a plaintiff to invoke Rule 6.02 does not frustrate the purpose served by Minn. Stat. § 544.42. Rule 6.02 providing that a party may seek to extend a time period for taking certain action is entirely consistent with and fosters the same goal behind Minn. Stat. § 544.42. Minn. Stat. § 544.42 is intended to prevent frivolous lawsuits against professionals as defined with the statute, including architects. Rule 6.02 *also* fosters only meritorious claims by only allowing an extension to a party who demonstrates four factors, one of which is the merits of its underlying action. Accordingly, there is absolutely no inconsistency between Minn. Stat. § 544.42 and Rule 6.02 which results from a plaintiff invoking Rule 6.02 to seek an extension of the time limits specified in Minn. Stat. § 544.42.

The trial court properly denied HGA’s motion to dismiss. First, Minn. Stat. § 544.42 expressly provides that a plaintiff may seek an extension of time within which to file an affidavit of expert review and the court is vested with discretion, upon a showing of good cause, to either waive or extend the time limits specified in Minn. Stat. § 544.42. Second, in the alternative to the express statutory authority found in Minn. Stat. § 544.42 providing a trial court with authority to waive or

modify the time limits specified by statute, and even assuming Minn. Stat. § 544.42 is construed so as to include an unexpressed limitation on when an application must be made the trial court is vested with discretion, pursuant to Rule 6.02 of the Minnesota Rules of Civil Procedure, to grant an extension. Where, as in the present case, a party seeks an extension for good cause shown and establishes its right to relief under Rule 6.02 of the Minnesota Rules of Civil Procedure, the plaintiff is in compliance with Minn. Stat. § 544.42, the penalty for non-compliance provisions of Minn. Stat. § 544.42 are inoperative and dismissal is not warranted.

**IV. THE TRIAL COURT PROPERLY DENIED HGA'S MOTION FOR A DIRECTED VERDICT AT THE CLOSE OF LAKE SUPERIOR CENTER AUTHORITY'S AND LAKE SUPERIOR CENTER'S CASE IN CHIEF.**

At the close of LSCA and LSC's case, HGA made a motion for a directed verdict which was denied by the trial court. The trial court correctly denied HGA's directed verdict motion.

LSCA and LSC asserted claims against HGA based on HGA's direct negligence and its vicarious liability for the negligence of its consultant, R&C. HGA contended that because LSCA and LSC did not call an architect, other than HGA, to testify to the standard of care applicable to HGA, the negligence claim against HGA should be the subject of a directed verdict. The trial court correctly concluded LSCA and LSC established a prima facie claim against HGA.

Ordinarily, a negligence claim against a professional, including an architect, requires expert testimony to establish the prevailing standard of care and the professional's departure from the standard of care. *City of Eveleth v. Ruble*, 302 Minn. 249, 225 N.W.2d 521, 525 (Minn. 1974). If, however, the standard of care and deviation from the standard of care may be evaluated and measured by persons of ordinary learning and understanding, expert testimony is not necessary and a claim against a professional may be submitted to the jury without the aid of expert testimony. Id.

(concluding the trial court was justified in finding without the aid of expert testimony that an engineer's errors and omissions constituted negligence and resulted in an inadequate intake capacity).

The issue of HGA's negligence was properly submitted to the jury and should not have been the subject of a directed verdict. First, HGA, an architectural engineering firm, is the design professional who, in the first instance and vis-a-vis LSCA and LSC, agreed to undertake design of all aspects of the aquarium project, including design of the exhibit tanks, and it is vicariously liable for the negligence of its subconsultant, R&C. Second, LSCA and LSC relied on the expert testimony of an engineer who testified to the standard of care applicable to a design professional responsible for design of aquatic containment structures which established that the design professional deviated from the standard of care. Third, many of HGA's responsibilities, as the lead design professional, including alleged coordination of subconsultants, supervision of subconsultants, and review and approval of tank mockups, were services which could be evaluated by a lay jury without the need for definitive expert testimony. Finally, LSCA and LSC called HGA and R&C as adverse witnesses in their case-in-chief and their testimony established the standard of care and HGA's deviation from the standard of care. LSCA and LSC introduced evidence of the standard of care applicable to an architectural engineering firm like HGA and its deviation from the standard of care. The standard of care may be established through an outside expert or through the testimony of a professional whose conduct is in question. HGA held itself out as a "full-service" architectural and an engineering firm and, accordingly, the testimony of R&C as to the applicable standard of care is binding on HGA which held itself out as responsible for all aspects of the design of the aquarium, including architectural and engineering aspects of the design. While HGA chose to enter into an

agreement with a subconsultant relating to certain other services, that agreement does not discharge HGA from its primary obligation as a design professional – both architecturally and as a structural engineer – in relationship to LSCA and LSC.

One of the issues in this case concerning HGA's negligence is whether HGA deviated from the applicable standard of care by approving a second tank mockup. The tank mockup was a requirement of the specifications which, according to LSCA's and LSC's expert, was intended as one "check" on the constructability of the design of the tank. Tr. 765-772. HGA approved the second tank mockup. Immediately following HGA's approval of the second tank mockup, the owner's representative expressed concerns about the approval in an August 16, 1999 letter forecasting that the approval would result in a substandard product for the owner. At trial, LSCA and LSC called as an adverse witness, Helen Fehr, R&C's engineer primarily responsible for design of the large aquatic containment structures who testified to, among other things, her opinion that HGA should not have approved the second tank mockup because that review is one which should have been undertaken by the engineer, rather than the architect. Tr. 765-776. While both R&C and HGA tried to rehabilitate Helen Fehr regarding this testimony, her rehabilitated testimony did not overcome her opinion, elicited by way of impeachment, that HGA deviated from the standard of care by approving the second tank mockup.

Here, the jury was equipped to evaluate HGA's conduct without the aid of outside expert testimony and against the backdrop of testimony of representatives of R&C and HGA and from that factual background determine that HGA deviated from the applicable standard of care. For example, the jury may evaluate the testimony of HGA, R&C and Miklos Peller, an engineer who testified to the standard of care applicable to a design professional, to determine the importance of a test panel

or a mockup in design and construction of aquatic containment structures and may infer from the testimony of Helen Fehr and Hal Davis, who suggested a test panel and mockup be included within the specifications, to determine that the test panel and mockup represented a structural, not an architectural, check on the design of the structure and, necessarily, required that an engineer and not an architect review and approve the mockup. Accordingly, HGA's "approval" of the mockup, which should have been approved by the engineer, was a departure from the applicable standard of care.

The trial court correctly denied the directed verdict motion.

### CONCLUSION

LSCA and LSC request that the Court of Appeals grant the following relief:

1. Affirm the trial court's rulings on dispositive motions based on the statute of limitations and Minn. Stat. § 544.42.
2. Reverse the trial court's denial of post-trial motions, recognizing that the collusive settlement agreements distorted the adversarial process and, in combination with misconduct by the prevailing parties and errors of law on evidentiary rulings and jury instructions, deprived LSCA and LSC of a fair trial.
3. Vacate the costs and disbursements award, recognizing that the award provides for an award of expert witness fees which are not authorized by rules applicable to taxation

Dated this 24<sup>th</sup> day of October, 2005.

Respectfully submitted,



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