

CASE NO. A04-2491

State of Minnesota
In Court of Appeals

DAVID ANDERSON,

Defendant-Appellant,

vs.

NORTHFIELD CARE CENTER, INC., A Minnesota Corporation,

Plaintiff-Respondent.

(Hennepin County Court File No.: AC 04-000171)

APPELLANTS' BRIEF AND APPENDIX

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ISSUES ON APPEAL

Whether the trial court erred in finding that Minn. Stat. § 144.6501, subd. 4(d) allows the defendants to include a personal guaranty in their standard Admissions Agreement or construe a personal guaranty from language in the standard Admissions Agreement?

Whether the trial court erred in finding that the terms of the Admissions Agreement included personal liability for the Responsible Party?

Whether the trial court erred in finding that there was no issue of material fact regarding the signing of the Admissions Agreement or Plaintiff's understanding of and intention to signing a personal guaranty as a part of the Defendant's Admissions Agreement?

Whether the trial court erred in finding that the fees claimed were reasonable?

STATEMENT OF THE CASE

I. STATEMENT OF FACTS AND ISSUES

Appellant seeks relief from an order of the District Court entered on November 18, 2004, granting summary judgment under Minn. R. Civ. P. 56.01. The order grants to the Respondent the alleged damages, allows attorney's fees and certifies that the stated fees are reasonable.

A. PARTIES

Respondent Northfield Care Center ("Northfield") is a Minnesota corporation engaged in operating a nursing home which provides health care, personal care, and related services.

David Anderson ("Anderson") is an individual residing in Minnesota. Anderson acted as the Responsible Party in signing Respondent's Admissions Agreement in connection with the admission of his mother, Frances Anderson ("Resident"), to Respondent's facility.

B. THE ACTION ON APPEAL BEFORE THIS COURT

Respondent commenced a collection action on January 7, 2004 in Hennepin County. The case was assigned to the Honorable Marilyn Brown Rosenbaum.

On July, 30, 2004, Respondents moved for summary judgment.

The Respondent's First Amended Complaint alleges that Anderson knowingly undertook upon himself a personal guaranty and that his failure to make payment on the balance owed to Respondent by Resident constitutes bad faith and unjust enrichment. (AA 00042).

C. GENERAL BACKGROUND AND CONTEXTUAL FACTS

In January of 2001, Anderson contacted Northfield to provide housing and health care for the Resident. (AA 00001, 00006, 00010). At the time of the Resident's admission, Northfield presented Anderson and the Resident with a contract labeled 'Admissions Agreement.' (AA 00001, 00009). After Anderson and the Resident reviewed the document, it was executed by all three parties. As the Resident's Attorney in Fact and the Responsible Party, Anderson agreed to manage the assets of the Resident, and to make payments to Respondent from the Resident's funds. (AA 00007, Minn. Stat. § 144.6501 subd. 1(d)).

The Resident lived until the care of Northfield under her death on March 30, 2003. (AA 00010, ¶4).

At all times, Resident was a recipient of medical assistance from Rice County. (AA 00010, ¶5). As such, Rice County periodically determined the amount of money Resident would be required to pay Respondent from her assets to continue on Medical Assistance.¹ (AA 00009, 00010, 00024). For a time, Appellant paid this balance. (AA00010, ¶9). The Order on appeal declined to make findings on questions of amount of Resident's assets remaining and the appropriateness of Appellant's application of assets to the spenddown. (AA 00020).

At the time of death, Resident had an outstanding balance allegedly due Respondent, the sum of which is in dispute. (AA00014). Appellant and Respondent agree, however, that the sum in dispute arises from the Resident's non-payment of spenddown. (AA 00031, 00010 ¶¶5-9).

¹ This payment is commonly referred to as a "spenddown" (AA 00009).

ARGUMENT

I. STANDARD OF REVIEW

“On an appeal from summary judgment, the role of the reviewing court is to review the record for the purpose of answering two questions: (1) whether there are any genuine issues of material fact to be determined, and (2) whether the trial court erred in its application of the law.” *Offerdahl v University of Minnesota Hospitals & Clinics*, 426 N.W.2d 425, 427 (Minn. 1988). “In making this determination, the evidence must be viewed in a light most favorable to...the party against whom summary judgment was granted. Any doubts as to whether an issue of material fact exists should also be resolved in favor of [the non-moving party].” *Wartnick v. Moss & Barnett*, 490 N.W.2d 108, 112 (Minn. 1992).

II. ANDERSON DID NOT BECOME PERSONALLY LIABLE FOR THE COSTS INCURRED BY THE RESIDENT UPON SIGNING THE ADMISSIONS AGREEMENT.

At the center of this case lies the question of Anderson’s intention to undertake personal responsibility for the costs of the care of his mother, Frances Anderson.

In general contract cases, the court may simply analyze the document and the performance of the parties to understand the nature of the agreement. In special cases such as this, however, a statute may limit or otherwise control the bargaining environment. Both parties agree that Minn. Stat. § 144.6501 applies to contract arrangements between nursing homes, residents, and those who act in charge of the care of the residents. Clearly, the Minnesota legislature (and, as § 144.6501 mirrors federal law, Congress) would not have wasted the time to pass a bill reiterating the general rights to freedom of contract.

An examination § 144.6501 reveals that it places upon nursing homes a special burden requiring them to prove that persons they allege signed personal guarantees intended to become

personally liable. Respondent did not meet this burden. They present no evidence that Anderson specifically agreed to a personal guaranty, and, in light of their special burden, certainly fail to make a showing worthy of a summary judgment in their favor.

A. STATE AND FEDERAL LAW REQUIRE THAT PERSONAL GUARANTEES BE SPECIFICALLY NEGOTIATED.

Minn. Stat. § 144.6501 limits the ability of nursing homes to force burdensome contract stipulations on consumers. The statute provides that consumers “must not be required by the facility to assume personal financial liability for the resident's care (*Ibid*, subd 4(d)).” In other words, contractual terms creating personal guarantees must be open to negotiation both technically and realistically. This is apparent from both the text and the purpose of the statute.

1. The Text of the State Statute Prohibits Requiring Personal Guarantees.

The text of §144.6501 limits the terms and methods available to nursing homes when presenting their admissions contracts to potential clients. The relevant section of the statute, subdivision 4(d), reads:

A person who desires to assume financial responsibility for the resident's care may contract with the facility to do so. A person other than the resident or a financially responsible spouse who signs an admission contract must not be required by the facility to assume personal financial liability for the resident's care. However, if the responsible party has signed the admission contract and fails to make timely payment of the facility obligation, or knowingly fails to spend down the resident's assets appropriately for the purpose of obtaining medical assistance, then the responsible party shall be liable to the facility for the resident's costs of care which are not paid for by medical assistance. A responsible party shall be personally liable only to the extent the resident's income or assets were misapplied.

Minn. Stat. § 144.6501 subd. 4(d).

Three portions of the statute stand out as indicators of the legislature's desire to rein in a nursing home's ability to extend financial responsibility beyond the Resident.

a. “A PERSON WHO DESIRES TO ASSUME FINANCIAL RESPONSIBILITY FOR THE RESIDENT’S CARE MAY DO SO.”

Two plausible relationships exist between this first statement and the rest of the subdivision. First, it may be read merely as an introduction to the section of the statute that suggests a type of agency agreement which allows nursing home residents to permit a third party to manage their assets. This reading is plausible, as the remainder of the subdivision details the rights and responsibilities of persons often known as ‘Responsible Parties.’ In this reading, the agreement with the person who assumes responsibility for the Resident is subject to the limitations listed in the rest of the section.

Alternatively, the statement may be read as preserving the right of third persons to personally guarantee payment to the Resident’s facility. This reading also supports the presumption that the statute creates an environment where personal guarantees to nursing homes are *not* the norm. If contracting in these contexts were meant to remain business as usual, this part of the statute would be rendered mere surplus; a specialized codification of a common law truism. The court must not assume the words of the legislature have no effect; it is an “elementary canon of construction that a statute should be interpreted so as not to render one part inoperative.” *Colautti v Franklin*, 439 U.S. 379, 392 (1979). See also, *S.C. v. Catawba Indian Tribe*, 476 U.S. 498, 510 (U.S., 1986), William Eskridge, Jr. & Phillip Frickey, *The Supreme Court, 1993 Term: Foreward Law as Equilibrium*, 108 Harv. L. Rev. 26, 108 (1994).

b. “A PERSON OTHER THAN THE RESIDENT ... WHO SIGNS AN ADMISSION CONTRACT MAY NOT BE REQUIRED BY THE FACILITY TO ASSUME PERSONAL FINANCIAL RESPONSIBILITY FOR THE RESIDENT’S CARE.”

The next statement of the statute clearly protects Responsible Parties from personal liability. To uphold the statute’s effect of creating a baseline environment which does not

include liability, we must recognize the presumption that the standard agreements used by nursing homes cannot contain guarantee clauses. A consumer's technical right to remove the offensive clause from the contract means little if nursing homes are allowed to include these provisions in standard agreements without explaining in detail their intent and effect. To pass this statute and still assume that consumers who sign standard agreements containing personal guaranty clauses have fairly bargained for them would render this subdivision meaningless.

- c. "A RESPONSIBLE PARTY SHALL BE PERSONALLY LIABLE ONLY TO THE EXTENT THE RESIDENT'S INCOME OR ASSETS WERE MISAPPLIED."

The final statement of the statute qualifies the ways in which Responsible Parties as defined in the subs. 1(d) and 4(d) can assume personal liability. By focusing on the effect the Responsible Party's actions has on the assets of the Resident, the statute reiterates that the baseline assumption in nursing home contracts is that the Resident pays her own way, the Responsible Party agency exists not to supply additional income, but for the convenience of the Resident.

Respondent recognizes this effect, the language is reflected even in their complaint. (AA 00041, ¶5).

- d. THE DEFINITION OF "RESPONSIBLE PARTY" AS DEFINED BY SUBD. 1(d).

The final piece of text directly supporting the assumption that the Responsible Party acts only as an agent of the Resident absent clear contractual terms and negotiations is the definition of "Responsible Party" in the statute. Subdivision 1(d) of §144.6501 provides:

"Responsible Party" means a person who has access to the resident's income and assets and who agrees to apply the resident's income and assets to pay for the resident's care or who agrees to make and complete an application for medical assistance on behalf of the resident.

This definition clearly defines the duties of the Responsible Party as 1) payment to the care facility from the Resident's assets, and 2) application for medical assistance on behalf of the Resident when those assets are depleted. Respondent's use of the 'Responsible Party' terminology in their contract sends the message both to consumers and the court that they meant to apply to Anderson the standards defined under the statute.

The text of Minn. Stat. §144.6501 subd. 4(d) clearly sets a default standard in nursing home negotiations. Personal guarantees are not on the table until the person signing as Responsible Party puts them there, and are not included in the contract absent evidence of true negotiation or intent on the part of the Responsible Party. The purpose of the law reflects the need to construe this statute as limiting the liability of persons who undertake responsibility for the care of elders.

2. The intent of the statute prohibits requiring personal guarantees.

If the text of the statute leaves any room for ambiguity, a brief analysis of the underlying purpose shows that the statute aims itself at limiting unfair practices used by nursing homes. The need for this court to endorse construing nursing home admissions contracts against the authors becomes clearer upon examination of the context in which the passage in question exists and the public policy debate surrounding nursing home admissions and personal liability.

a. THE WHOLE ACT

To gain understanding of ambiguous passages, the court will sometimes look to the effect and goals of the statute on a whole. *Occhino v Grover*, 640 N.W.2d 357, 359- 60 (Minn.App.2002), *review denied* (Minn. May 28, 2002) .

This legislation contains multiple passages only interpretable as a limitation on admissions contracts. These limitations include an absolute ban on liability waivers (Minn. Stat.

§ 144.6501 subd. 2), greater access to copies of the standard forms (*Ibid*, subd 3(a),(b),(c)), mandatory warnings to patients to disregard oral amendments offered by the facilities staff (*Ibid*, subd. 3(e) and subd. 4(e)), requirements to explain the effects of the contract, (*Ibid*, subd. 4(a)) and the patient's bill of rights (*Ibid*, subd. 8).

The court is already familiar with the text of subdivision 4(d) and the arguments which turn upon its language. The clear meaning of the statute explained above is supported by the other passages in the text. This section of Minnesota law unambiguously attempts to keep nursing home contracts in check. In light of this attempt and the specific provision regarding bargaining with Responsible Parties, it would be folly to allow the explanation of their bargaining process to begin with the presumption of a personal guaranty.

b. FEDERAL LAW AND IT'S EFFECTS

The basic premise for these contract provisions is that federal law, (which Minnesota law mirrors) prohibits any nursing facility from requiring "a third party guarantee of payment to the facility as a condition of admission ..." 42 U.S.C. §1396r(c)(5)(A)(ii); see also §19a550(b)(26). This limitation does not prevent "an individual, who has legal access to a resident's income or resources available to pay for care in the facility, to sign a contract (without incurring personal financial liability) to provide payment from the resident's income or resources for such care." 42 U.S.C. 1396r(c)(5)(B)(ii).

Federal law does not only inform the state statute at issue here, but serves also as an independent bar to Respondent's claim of personal financial liability on the part of Anderson.

Courts have interpreted this statute to limit the personal financial liability of Responsible Parties to payment of misapplied assets, rejecting agreements which purported to convey total

personal liability on to Responsible Parties. *Manor of Lake City, Inc. v. Hinners* 548 N.W.2d 573 (Iowa 1996), *Sunrise Healthcare Corp. v. Azarigan*, 821 A.2d 835 (Conn.App. 2003).

The latter case is exactly on point regarding the limits of responsibilities of Responsible Parties, stating:

As we stated previously, the act permits contracts concerning the payment of nursing care services by a legal representative in control of the resident's assets and income. 42 U.S.C. §1396r(c)(5)(A)(ii). Such a contract violates the Medicaid act, however, when that legal representative must personally guarantee such payments. 42 U.S.C. §1396r(c)(5)(A)(ii)

Ibid, at 839.

This interpretation of federal law should be persuasive to this court not only as an interpretation of a federal statute that binds Respondent, but also as evidence of the effect sought by Minnesota legislatures when they wrote § 144.6501 in a way that complimented it's federal brother.

c. PUBLIC POLICY

The majority of scholarly opinion regarding personal liability for persons in nursing homes squares with the above appraisal of the intent and effect of § 144.6501.

Public policy should and does clearly favor a society in which it is easier for our elders to undertake agency agreements that facilitate their care. These agency agreements allow nursing home residents to relieve themselves of the greatest and most confusing burdens while respecting them as individuals, with individual rights and assets. *Traps for the Unwary*, Katherine Pearson, 74 Penn. Bar. Assoc. Quar. 139.^{2 3} The presumption of third party signers as personal guarantors subverts this goal by making seniors legally reliant to Responsible Parties.

² "Congress sought to establish threshold standards for residents' safety, privacy, freedom from restraints and individual autonomy," at 140

Congress and the Minnesota legislature responded to the reality that elder care facilities have a history (and in some cases continue the practice) of engaging vulnerable elders or their caring relatives in unfair contracts:

87 percent of the agreements [of 45 Massachusetts nursing homes studied] improperly seek the signature of a 'voluntary responsible party,' *despite the fact such an agreement would provide no benefit to the resident, family member or friend.* [A]ll...agreements examined... contained certain provisions that the facilities *knew or should have known to be invalid or likely to confuse or deceive residents and their family members.*

Rebecca J. Benson, *Check Your Rights at the Door: Consumer Protection Violations in Massachusetts Nursing Home Admission Agreements* (1997). (emphasis supplied).

The evidence of these abuses and their subversion of laudable goals relating to the lives of seniors is an especially pressing concern as a greater portion of the population lives to the age where assisted living becomes necessary, and as shifting cultural norms reduce the number of seniors who live with their adult children. The policy needed as regards nursing home admissions agreements is easy to articulate and implement:

[a]t a minimum, federal law should be treated as establishing a presumption against a third-party assuming an obligation for payment, thus putting the burden on the nursing homes to show fair practices attendant to the admission process.

Katherine Pearson, *The Responsible Thing To Do About "Responsible Party" Provisions In Nursing Home Agreements*, 37 U. Mich. J. L. Ref. 757, 788.

The text of the statute in question, the context given the whole act, and the public policy align; accordingly, the court should adopt a standard that requires nursing homes to prove that contracting parties intended to sign personal guarantees.

B. ANDERSON'S SIGNATURE DID NOT CREATE PERSONAL LIABILITY.

³ [i]n many instances facilities are writing contracts that can mislead third parties about their liability. Courts should be willing to go beyond the contract language to examine the context in which third parties are signing as "Responsible Parties," at 144.

While the effect of the statute will affect the analysis greatly, the true meaning of the contract and desires of the parties are the ultimate test of enforcement of one party's view of the contract.

1. Should the Court accept the statute as presented:

Under the view of the statute explained above, the need to reverse the summary judgment in this case is clear.

Minn. Stat. § 144.6501 attempts to place a greater burden upon nursing facilities. This burden shifting includes the requirement that these facilities prove provisions purported to contain personal guarantees showing that such guarantees were bargained for by the Responsible Party.

Respondent presented no evidence to the Court of specific bargaining. Respondent never states clearly when agreement shifted from the standard text (presumably without the prohibited personal guaranty) to the version which holds Anderson personally liable. In spite of a clear statute constraining and burdening Respondent, it never makes an overt allegation of specific bargaining.

Given the lack of factual support of the bargain, allowing summary judgment under § 144.6501 is patently unreasonable.

2. Should the court not accept the statute as presented:

Regardless of the court's disposition on § 144.6501, significant factual questions remain as to the fairness of the contract and Respondent's interpretation thereof.

The court found Appellant liable for breach of contract, holding that the terms of the contract create in Appellant personal liability. The terms of the contract are in fact written to suggest that the "Responsible Party" acts merely as an agent of the Resident.

a. THE CONTRACT AS A WHOLE⁴

The "Status Sheet" of the agreement signed by Anderson is the most telling. It defines a Responsible Party as:

[a]ct[ing] for the Resident with respect to certain duties and obligations of the Resident as set forth in this Agreement. The Responsible Party...agrees to apply *the Resident's* income and assets to pay for the Resident's care. The Responsible Party will be personally liable to the facility *only to the extent that the Resident's income or assets are misapplied.*

(AA 00026)(emphasis supplied).⁵

The bold text enclosed in the boxed portion of the contract meant for the signature of the Responsible Party steps directly in line with the definition from the Status Page.

I, Responsible Party, agree to make payment of Resident's income and assets.

(AA 00007) (emphasis in original).

The text below the signature line does create liability in the Responsible Party, but again uses language that makes reference to spending the Resident's assets appropriately. These duties of the Responsible Party presumably exist to augment the sections of the contract⁶ which reference the Resident as responsible for payment. The consistent reference to the Resident's assets create in most readers the justified assumption that what is augmented is not whose money is used to pay, but whose hand pulls it out of the wallet. In fact, if the respondents were so keen to obtain personal guarantees, contract language referencing the Responsible Party's assets, or better, a separate Personal Guaranty could be inserted with ease. The real problem with doing so

⁴ Although, Respondent's complaint leaves unclear if the written contract is truly at issue, or if they base liability on subsequent oral agreement (AA 00041, ¶7)

⁵ Again, the language of Respondent's complaint mirrors this statement. (AA 00041).

⁶ 3.2.1: "The Resident will pay....
3.1.7: The Resident may continue private room service upon making appropriate financial arrangements..."
4.1 The Resident will pay all charges...
4.2 The Resident will pay the facility...
(AA 00003, 00004).

is that anyone who understood the facility's intent, his or her rights under Medicare law, and the potentially devastating financial consequence of a misunderstanding would refuse to sign a contract containing the provision. All this risk and liability comes with no added benefit to the Responsible party.

Despite this clear contractual language denying personal liability, the Respondent and the trial court saw it fair to pursue and grant summary judgment. The trial court states:

The court need not rule on whether Anderson knowingly failed to spenddown appropriately, because, whatever the reason for the gap in coverage, Anderson is liable as the Responsible Party.

(AA 00020).

This statement blatantly contradicts the definition of Responsible Party by ignoring the requirement on the part of Respondent to show or allege misappropriation and saddling Appellant with unlimited personal liability.

b. THE "JOINT AND SEVERAL LIABILITY" CLAUSE

Respondent's summary judgment brief makes mention of a passage in the contract that supposedly creates the joint and several liability. According to Respondent, Section 3.2 hooks Appellant (and presumably every other Responsible Party) into personal liability if the Resident receives Medicare. Section 3.2 reads:

3.2 Eligibility of Resident for Medical Assistance or Medicare. If the Resident is a recipient of Medical Assistance or Medicare at the time of admission, the Resident and the Responsible Party, if any, will be jointly and severally liable as follows:

(AA00003).

⁸ Despite this incongruous listing, Respondent claims in its summary judgment brief that "Resident and Legal Representative are used interchangeably, and their duties, obligations and responsibilities are owed to Northfield are the same." (AA00033). Then why split them up?

The key words of the clause are the last two: as follows. What follows is list of obligations.

“3.2.1... The Resident *and the Responsible Party* will promptly complete and file Medical Assistance and/or Medicare forms and/or claim forms when appropriate.

“The Resident will pay the daily room rate...

“3.2.2... The Resident will pay the facility any monthly income...

“3.2.3... The Resident *and the Responsible Party* will cause any co-insurance amounts required by Medicare...to be paid to the Facility...

“3.2.4... The Resident *and the Responsible Party* will inform the Facility whether the Resident will be on private pay basis or will be applying for Medical Assistance...”

(AA00003).

Additionally,

“4.1... The Resident will pay all charges for any services that are not included in the daily room rate...

“4.2... The Resident will pay the Facility for any collection costs...”

(AA00004)(Emphasis supplied).

Some of the obligations reference only the Resident while others include the Responsible Party. Respondent is perfectly capable of clearly conferring responsibility to the Responsible Party.⁸ It follows that the obligations of Responsible Parties in clauses where they are not specifically listed is somehow different.

The difference is revealed in examining the very basic pattern guiding where the contract lists both parties or merely the Resident. A fair reading of the contract will label the obligations in which the Responsible Party is specifically listed as administrative. According to the contract, Responsible Parties are directly responsible for filing Medicare and Medical Assistance applications, notifying the Facility of changes in status, and conferring payments sent to the

Resident to the Facility. Payment obligations reference the Resident only. (AA00001-00007, as listed above).

This pattern fits with the basic ideal of Responsible Party as agent-trustee of the Resident. *Restatement of the Law, Second, Agency* § 14B. An agent co-acting as trustee holds title to property for the benefit of the principal. *Ibid.* They are liable for failure to commit the property they hold to the purpose ascribed to it by the principal. The listing of obligations provides another example of an opportunity missed by Respondent to provide language giving true expression to their desire to hold Appellant personally liable.

In all applicable places, the contract states clearly that Resident will pay and that the Responsible Party takes on the burden of paying from the Resident's assets. The contract also clearly states that personal liability hinges on a misuse of the Resident's funds; again, the Responsible Party's duty boils down to agency, and the care facility can only expect payment in the amount of assets possessed by the Resident. The trial court failed to make this distinction in granting summary judgment without looking into facts relating to Francis Anderson's finances and David Anderson's application of them.

III. THE TRIAL COURT ERRED IN RULING THAT RESPONDENT'S REQUEST FOR ATTORNEY'S FEES WAS REASONABLE.

Respondent claims, and the trial court agrees, that approximately \$13,659 of legal fees is reasonable in a case decided on summary judgment in which cost of care totalled less than one-third the apparent cost of litigation.

In Minnesota, the starting point for determining the reasonableness of attorney's fees is the number of hours reasonably expended multiplied by a reasonable hourly rate. *Musicland Group v. Ceridian Corp.*, 508 N.W. 2d 524 (Minn. App. 1993). The number of hours and fee

charged relate directly to the novelty and difficulty of the question presented. *Matter of Voss*, 474 N.W. 2d 191 (Minn. App. 1991).

In suits seeking money damages only, it seems unlikely that a plaintiff would expose itself to liabilities greater than the potential recovery. For this reason, courts have balked at granting attorney's fees which outstrip the likely recovery. *Bloomington Electric Co. v. Freeman's, Inc.*, 394 N.W. 2d 605, *Liess v. Lindmyer*, 354 N.W. 2d 556 (Minn. App. 1984), *Asp v. O'Brien*, 277 N.W. 2d 382 (Minn. 1979). The *Asp* Court was offended by a fee award of 55% of the underlying judgment, the *Bloomington Electric* court by a fee award nearly identical to the recovery. Here, Respondent seeks an award nearly four times the underlying judgment.

While the fees are clearly unreasonable on their face, a close review of the bills submitted by Respondent's counsel confirms the excessive nature of the fees sought. Despite the fact the damages alleged amount to less than four thousand dollars, Respondent's billing shows some irregularities:

- 1) Four of the firm's five lawyers worked on the case, as did four legal assistants;
- 2) Even a secretary billed time on the case;
- 3) Counsel's redacted bills preclude meaningful review and any challenges to their substance;
- 4) Respondent's firm spent significant time in intra-office conference regarding this case. See, for example, Invoice # 6031, dated 5/31/2003, in which virtually every entry involves some sort of conference with multiple employees billing time. The record is replete with such billings.

5) Mr. Rodé's rate of \$165 per hour does not compare reasonably to others in this legal community. Further, it remains unexplained why Rodé's rate is so close to firm members in practice for twenty years; and

6) The firm's billing for the work of legal assistants shows much irregularity. For example, the rate of Amy Koehnen jumps \$25 per hour, from \$80 to \$105 after five hours billed. Ms. Koehnen's rate then surpasses the rate of Erin Becker (at \$90 per hour), an assistant with five years' more experience.

This limited review still provides an obvious conclusion ignored by the trial court. The Respondent overstaffed the case, elevated the hourly rates of those working on it, and spent ridiculous amounts of time in conference. The bills are entirely fluff, and the fees sought must be determined unreasonable and excessive.

CONCLUSION

The granting of summary judgment, damages and attorney's fees includes several errors of law and fact. The Minnesota Statute in question creates a presumption that Responsible Parties are not signing personal guarantees when they sign Admissions Agreements. The text of the statute is reinforced by both the public policy fueling its passage and the clearly deferential content of the contract. Since Appellant is not liable on the contract, the award of attorney's fees is unwarranted. Even without analysis of the underlying claim, the fees petitioned for are patently unreasonable; they ask the state of Minnesota to set a new standard in the way fees relate to claimed damages.

Appellant therefore respectfully requests that the Court reverse the order from the trial court and afford Appellant any relief it sees as just.

Dated: 3/31/05

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).