

NO. A05-0874

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State of Minnesota  
**In Court of Appeals**

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ILLINOIS FARMERS INSURANCE COMPANY,  
*Plaintiff/Appellant,*

v.

MARIESE MARVIN AND JEFFREY MARVIN,  
*Defendants/Respondents.*

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**RESPONDENTS' BRIEF AND APPENDIX**

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**LEGAL ISSUES**

**I. Whether the trial court erred in denying Appellant's motion for summary judgment.**

**A. Whether Respondent Marvin is an "insured" for purposes of underinsured motorist coverage.**

The trial court ruled that Respondent Marvin was occupying the vehicle and therefore was entitled to underinsured motorist coverage.

**B. Whether the injury occurred as a result of use of the vehicle as a motor vehicle.**

The trial court ruled that Respondent Marvin's injury occurred as a result of use of the motor vehicle as a motor vehicle.

## STATEMENT OF THE FACTS

This matter arises out of an injury that Respondent Mariese Marvin sustained on May 2, 2001. (Respondent's Appendix at pg. 1) (hereinafter, "RA-\_\_\_.") At the time of her injury, Respondent Marvin cared for a child of Tonya Weigel in the course of her daycare operations. (RA-1 [5 page Affidavit of Mariese Marvin]) Ms. Weigel informed Respondent Marvin that she had some toys that could be used at her daycare center and it was agreed that the toys would be obtained from Ms. Weigel's father's residence located at 1695 - 118<sup>th</sup> Avenue Northeast in Blaine, Minnesota. The residence was owned by Joseph Betz, Tonya Weigel's father. (RA-2)

In the early evening of May 2, 2001, Respondent Marvin rode as a passenger in Tonya Weigel's vehicle to said residence in a 1994 Ford Explorer. (RA-2) When they arrived at the home of Joseph Betz, they parked the Ford Explorer in the driveway which led to a garage in the back portion of the home. The Ford Explorer was parked by a back porch where the toys were located. The play house in question had to be disassembled and Ms. Weigel and Ms. Marvin began placing the component parts of the play house into the rear cargo area of the Ford Explorer. (RA-2) The Ford Explorer was open with a single hatch type of opening which opened vertically. Ms. Weigel and Ms. Marvin alternately placed the component parts of the playhouse into the rear cargo area of the Ford Explorer. (RA-2)

As Ms. Weigel was going to bring one more part of the playhouse to the Ford Explorer, Respondent Marvin leaned forward into the rear of the vehicle on her stomach and pushed the parts of the playhouse forward to make room for the last component. After Respondent Marvin straightened said items, while on her stomach she slid backward out of the cargo floor pushing off with her hands. It was her intention to walk around the passenger side and get into the passenger seat and drive home with Ms. Weigel afterward. While getting out of the Ford Explorer Respondent Marvin placed her right foot down on the ground and as she straightened up and was about to plant her left foot down to the pavement, she was struck by a vehicle owned and operated by Joseph Betz. Apparently that vehicle backed into her. (RA-3)

At the point of impact, Respondent Marvin raised her hands and touched the sides of the Ford Explorer and both legs were crushed just below the knees between the Ford Explorer and the vehicle owned and operated by Mr. Betz. (RA-3)

At the time of the impact the right leg was crushed below the knee and sustained a compound fracture and also a compound fracture of the right ankle. The skin was ripped off the back of the knee and a shin graft was performed in that area. The left leg was fractured as well and that fracture has not healed. Ms. Marvin was pinned between the vehicles for several seconds. Mr. Betz got out of his vehicle, observed the situation and went back into his vehicle and pulled his vehicle forward releasing Ms. Marvin. (RA-4) Respondent Marvin was eased to the pavement by Ms. Tonya Weigel and has sustained

permanent and severe injuries to her legs as a result. (RA-4)

Respondent Marvin, during the early discovery phase of the liability case against Tonya Weigel, submitted unexecuted Answers to Interrogatories. They were submitted by her counsel and these unexecuted Interrogatories are attached for reference. (RA-6)

Subsequently, Respondent settled a third party claim against the owner-operator of the Betz vehicle. Thereafter, Respondent requested arbitration in this matter claiming underinsured coverage with Illinois Farmers, the insurer for the Ford Explorer. Thereafter a Declaratory Judgment action was brought by Appellant, Illinois Farmers Insurance Company in this matter.

As far as the procedural background is concerned, this matter was heard on a Summary Judgment Motion brought by Appellant and a Summary Judgment Cross Motion brought by Respondents. See Transcript of Proceedings attached hereto and marked (RA-19). Both parties agreed at the time of the Summary Judgment Motion held on November 12, 2004, that there were no genuine issues of material fact and that Summary Judgment was appropriate regarding the issue of whether Ms. Marvin occupied the vehicle for purposes of coverage in this particular case. Appellant was represented by counsel, Ms. Loucks. Both parties were specifically told by the court:

**“I will tell you that the position I take on that is you both stipulate and agree that there are no fact issues. And if you’re not taking that position you better be sure that you’re telling me that because I don’t know how you can have it without facts.”**

(RA-22 & RA-23)

Ms. Loucks responded:.

**“You can see now it’s not a huge difference in facts, but it is obviously different than what we understood as to how the accident happened before. (RA-24)...But even if the Court were to consider her affidavit as true, and even if we would concede for purposes of today’s argument only that there is no fact issue, it simply doesn’t matter, Your Honor. (RA-25)**

The court concluded after hearing the arguments of counsel that Summary Judgment was appropriate and granted Summary Judgment in favor of the Respondent, concluding that Respondent was covered for purposes of the No-Fault Act when she was injured. See Court Order and Memorandum Granting Defendant’s Motion for Summary Judgment attached hereto (RA-47). The court essentially found that Defendant Marvin was occupying the Ford Explorer at the time of her injury. The court found that:

**“In this case, viewing the facts most favorable to Plaintiff, the Court finds that Defendant was in, on, getting into or out of Ms. Weigel’s vehicle and was thus an occupant of her vehicle for purposes of underinsured motorist coverage under Ms. Weigel’s policy.” (RA-53)**

The court stated in part that Dougherty v. State Farm Mutual Insurance Company, 683 N.W. 2d, 855, 859 (Minn.App. 2004), controls the facts of this case. (RA-54) The court held:

**“Here, the car was more than just the situs of the injury, the vehicle itself contributed to the physical injuries. While there is no dispute that Ms. Weigel’s vehicle was not moving at the time of the accident, it played an active part in the injuries. A causal connection can be established by showing “the injury is a natural and reasonable incident or consequence” of the vehicle’s use. Id. The injury is a natural and reasonable consequence of two vehicles colliding. It is not necessary for both cars to be moving at the time of the accident.” (RA-54 & RA-55)**

The court further held:

**“The second step is to determine whether an act of independent significance occurred, breaking the causal link between use of the vehicle and the injuries inflicted. Id. The injuries were inflicted due to the collision of the two vehicles. It was not due to something like a gunshot from a bystander or playing with matches.” (RA-54 & RA-55)**

Finally, the court held that:

**“There is no material fact at issue. Ms. Marvin was occupying Ms. Weigel’s vehicle at the time of the accident and was injured while using the vehicle as a vehicle. Defendant is therefore entitled to summary judgment.” (RA-55)**

## LEGAL ARGUMENT

### I. THE TRIAL COURT WAS CORRECT IN DENYING APPELLANT'S MOTION FOR SUMMARY JUDGMENT AND GRANTING RESPONDENT'S CROSS MOTION.

#### A. **Ms. Marvin is an Insured For Purposes of Underinsured Motorist Coverage.**

The concept of Summary Judgment is controlled by Rules of Civil Procedure

56.03. That rule specifically states:

**“Judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law.” Id.**

The moving party must meet the burden of proving that there is an absence of any genuine issue of material fact. See Sauter v. Sauter, 70 N.W. 2d, 351, (Minn. 1955).

Whenever a moving party shows that the non-moving party has failed to present specific facts showing a genuine issue for a trial, the motion for summary judgment must be granted. See Ahlm v. Rooney, 143 N.W. 2d, 65, (Minn. 1966).

In order for Respondent's to prevail in its Motion For Summary Judgment the standard for Summary Judgment must now not only be addressed, but the applicable statute and case law must also be applied. Specifically, Minn. Stat. § 65B of the No-Fault Act must be analyzed.

The priority for any claim for underinsured motorist coverage is controlled by Minn. Stat. §65B.49, Subd. 3a.(5):

**“If at the time of the accident the injured person is occupying a motor vehicle, the limit of liability for uninsured and underinsured coverages available to the injured person is a limit specified for that motor vehicle.” Id.**

In determining said priorities we must address whether or not the injured person was occupying the motor vehicle at the time of the accident. The No-Fault Act specifically addresses the concept of “maintenance or use” of a motor vehicle as it pertains to injuries arising thereof. The applicable statute is Minn. Stat. §65B.43 of the No-Fault Act, under Definitions, Subd. 3. That section specifically states:

**“Maintenance or use of a motor vehicle” means maintenance or use of a motor vehicle as a vehicle, including, incident to its maintenance or use as a vehicle, occupying, entering into, and alighting from it. Maintenance or use of a motor vehicle does not include (1) conduct within the course of a business of repairing, servicing, or otherwise maintaining motor vehicles unless the conduct occurs off the business premises, or (2) conduct in the course of loading and unloading the vehicle unless the conduct occurs while occupying, entering into or alighting from it.” Id.**

Although the No-Fault Act does not specifically define the term “occupying”, several court cases have interpreted this particular phrase. The leading case which addresses the issue at hand is Continental Western Insurance Company v. Klug, 415 N.W. 2d, 876, (Minn. 1987). In the Klug case, the injured plaintiff brought a claim against his no-fault carrier arising out of the high speed confrontation with another vehicle as the other vehicle was attempting to keep up with the plaintiff’s vehicle. Plaintiff was then shot with a gun during the high speed chase. The shot came from the speeding vehicle which was attempting to keep pace with Plaintiff.

In that case the court concluded that Klug’s injuries did, in fact, arise out of the use

of an uninsured motor vehicle. The Klug court applied a three point test in evaluating coverage. In its first test the court stated:

**“...we stated that the vehicle must be an “active accessory” in causing the injury. This causation standard was clarified to be “something less than proximate cause in the tort sense and something more than the vehicle being the mere situs of the injury.” See Tlougan v. Auto-Owners Ins. Co., 310 N.W. 2d, 116, 117 (Minn. 1981) Id. at 878**

The court referred to the next test in the following manner:

**“If a court finds the requisite degree of causation, it should next determine whether an act of independent significance occurred, breaking the causal link between the “use” of the vehicle and the injuries inflicted.” Id.**

The court applied the final test which was the transportation use test. The court stated:

**“Finally, we conclude that Bahe was using his car for motoring purposes.” Id.**

A number of cases have applied the Klug three point test in determining whether a plaintiff was operating a motor vehicle. One significant case is an unpublished decision, Minkel vs. Progressive Insurance Company, decided by the Minnesota Court of Appeals, number C5-98-1177, a copy of which is attached hereto and marked as (RA-56) as required by Minn. Stat. §480A.08(3). Under the Minkel case, plaintiff injured his back in a fall from the bed of his pickup truck. He was assisting his mother with a china hutch and loading it onto the tailgate. His mother lost her balance, falling into Minkel, causing him to fall off the bed and gate of the truck. (RA-56)

The court held that Minkel was covered within the No-Fault Act. The court

specifically cited Minn. Stat. §65B.43, Subd. 3. The court cited the Klug factors and limited its review to the extent of causation and existence of an act of independent significance. The parties stipulated that the vehicle was being used for transportation purposes at the time of the injury as apparently they were going to transport the china hutch from one location to another. The court cited Minn. Stat. §65B.43, Subd. 3. in its reasoning. The court stated:

**“Conduct in the course of loading a vehicle is included if it occurs while the person injured is occupying, entering into or alighting from the vehicle.” Id. (RA-57)**

The court further held:

**“The back injury Minkel sustained in his fall was a natural and reasonable consequence of the way the vehicle was being used.” See Kern v. Auto-Owners Insurance Company, 526 N.W. 2d, 409, 410 (Minn. App. 1995) Id. at page 2. (RA-57)**

The court distinguished this case from mere situs cases and concluded by stating the following:

**“Under Klug, however, our analysis must focus on the link between Minkel’s use of the pickup and his injury. The submitted facts provide a continuing link. Minkel fell while loading the pickup, after he entered the pickup’s bed and then unexpectedly alighted from it. His back injury is directly connected to the elevation and placement of the pickup. Although his mother set the accident in motion when she lost her balance, that does not diminish the role of the pickup’s features in the injury.” Id. at page 3. (RA-58)**

Under the facts of the instant case, it is clear that Respondent, Mariese Marvin, had been transported to the Betz home, the site of her injury, in Tonya Weigel’s vehicle. Some loading had apparently occurred and final placement of the playhouse had been

accomplished by Respondent Marvin.

As Respondent Marvin pushed herself out of the vehicle, on her stomach, by using her hands, she then alighted from the vehicle. She was then struck as her foot came down to the pavement. It is important to note that Respondent Marvin had no chance to even turn around or otherwise escape from the backing vehicle owned and operated by Joseph Betz. She was clearly in the final stage of alightment pursuant to her affidavit. Furthermore, in her affidavit she stated that it was her intent to take her seat in the passenger side of the vehicle and leave the area, being transported again by the Weigel vehicle to bring the playhouse to Respondent Marvin's home destination. Clearly the Weigel vehicle insured by Illinois Farmers Insurance Company, the Appellant in this matter, was used to transport and the purpose of that vehicle was not only to transport Respondent, but to transport the play house in question.

Respondent Marvin fits squarely within the three prong test enumerated under Klug. The Ford Explorer caused Respondent's injuries as she was crushed against it. It was an active accessory thereby causing the injuries. In addition there was no independent event of significance to break this causal chain and finally the vehicle was being used for transportation purposes. Respondent was getting off of the Ford Explorer at the time of her injuries. Furthermore, the Respondent was occupying within the policy definition of "in, on, getting into or out of."

Respondent Marvin falls as well under Minn. Stat. §65B.43, Subd. 3. which

provides coverage if an individual is alighting while loading. Furthermore, Respondent fits within the facts of the Minkel case. The critical point here is that there is a continuing link between the Ford Explorer and Respondent Marvin's injuries. Her injuries were directly connected to the fact that she was crushed against the bumpers of the vehicles at the unique elevation which crushed her legs. Even though the Betz vehicle initially set into motion said events, that should not diminish the role of the Ford Explorer's features in causing her injuries as well. It is Respondent's position that these two vehicles are concurrent active accessories in causing her injuries. Namely, the Betz vehicle and the Ford Explorer, insured by Appellant Illinois Farmers.

Given this continuing relationship with the Ford Explorer the next issue is whether or not Respondent ended her relationship with the Ford Explorer at the point she was injured. Hypothetically, had she turned around and faced the Betz vehicle an argument could be made that she ended said relationship with the Ford Explorer. However, given the undisputed facts contained in Respondent's affidavit, she was still getting out of the vehicle at the time she was crushed. The fact that she her back faced the Betz vehicle, as well as the types of injuries sustained, supports her version of the events contained in the affidavit.

**B. Whether the injury occurred as a result of use of the vehicle as a motor vehicle.**

All of Respondent's actions taken immediately before and at the time of her injuries are consistent with using a motor vehicle as a motor vehicle namely for

transportation purposes and alighting from said vehicle while loading.

Respondent's crushing injuries to her legs are unique and that it is a combination of the two vehicles colliding thereby pinning her in between both of them. Had the Ford Explorer not been there she would not have received the crushing injuries in question. Had she not been loading and alighting from the Ford Explorer her injuries would never have occurred. If Respondent had hypothetically been struck by just the Betz vehicle without the Ford Explorer present, she would have sustained entirely different injuries as a result of the impact. The No-Fault Automobile Act is designed and anticipates compensating injured victims arising out of the collision of motor vehicles. The No-Fault Automobile Act anticipates individual's who may be alighting while loading from a vehicle as well as moving vehicles which can collide. All of Respondent's actions fall within the statutory language.

Appellant has argued that Respondent's injuries did not occur as a result of use of a motor vehicle as a motor vehicle. Appellant has argued that the facts of Allied Mutual vs. Western National Mutual, 552 N.W. 2d, 561 (Minn. 1996) apply to defeat coverage in this case. It is Respondent's position that the facts under the Allied case are completely distinguishable from the facts of the instant case. The facts have no similarity whatsoever to the facts of the instant case. Under Allied the injured Plaintiff, Decker, was struck as she was simply standing in the vicinity of the vehicle. There was no indication that there was any collision between the two vehicles. The vehicle that she was

standing by was locked and she had no immediate expectation of occupying the vehicle. She was not loading or getting on or off or in to the vehicle at the time of her injuries. In contrast Respondent Marvin had the immediate expectation of occupying the vehicle so that she could go home. The vehicle was not locked. In fact the gate was open and she was exiting the vehicle at the time she was injured as she had just loaded the play house. The court in Allied states:

**“Furthermore, there was no conceivable causal connection between the McMillan automobile and Decker’s injuries” Id. at 564.**

Under the facts of the instant case the connection between Respondent Marvin and the Ford Explorer is clear. Had Respondent not been loading and alighting her injuries would never have been sustained in the unique way that they were.

An additional case cited by Appellant is a recent court decision by the Court of Appeals, Auto-Owners Insurance Company vs. Great West Casualty, A04-1591 (Minn. Ct. App., May 10, 2005). This case addressed whether or not a trailer that plaintiff was standing on was the mere situs of the injury and whether a stalled vehicle on said trailer was the active accessory in causing the injury. The Court found that the active accessory was, in fact, the stalled vehicle which set into motion the events causing plaintiff’s injuries.

The facts of the Auto-Owners case are entirely different from the present case. Under the facts of the instant case, occupancy is the major issue. Occupancy was a mere footnote in the Auto-Owners case in terms of analysis. The court analyzed the Auto-

Owners case in terms of maintenance or use.

Furthermore, under Auto-Owners the court analysis references that plaintiff Gessell's injury arose out of the maintenance or use of "the stalled vehicle". Similarly, under the facts of the instant case, Respondent Marvin's injuries arose by reason of the maintenance or use of the Ford Explorer. (i.e. loading the vehicle while alighting from it.) The alighting was certainly part and parcel of the loading activity as she was unable to properly load the vehicle unless she entered into it and got on to it.

The Court in Auto-Owner's analyzed the reason for Gessell's injury:

**"The injury occurred as a reasonable consequence" of the plan to pull a stalled vehicle off the trailer.....here the possibility of the vehicle stalling was clearly a risk associated with motoring." Id. at 824.**

Under the facts of the instant case maintenance or use clearly anticipates conduct while loading and alighting. This is exactly what Respondent Marvin was doing at the time of her injury. Loading and alighting were the two reasons that she was near the Ford Explorer in the first place. The No-Fault Act clearly through its statutory language anticipates injuries as a result of those particular activities. Furthermore, the No-Fault Act anticipates vehicles colliding with one another. Other distinguishing factors from the present case and the facts of the Allied case is that there was no collision between vehicles. Respondent Marvin was actively relating to the Ford Explorer, actively touching the vehicle and actively loading the vehicle. Respondent Marvin was actively getting out of the vehicle and alighting from said vehicle at the time she was injured.

Respondent Marvin is active at all points in her relationship with the Ford Explorer.

The Appellant has also argued that the Ford Explorer insured by Illinois Farmers was not an active accessory in Respondent's injury. There apparently has been an attempt to create some new rule of law describing the Ford Explorer as "passive." The definition of passive, under the Webster's New World Dictionary, Third College Edition, states:

**"Passive is offering no opposition or resistance; submissive; yielding; patient;"**

The Ford Explorer was hardly passive under the facts of this case. It is a motor vehicle. It is fixed, it is unyielding, unmoving and because of those characteristics and properties, Respondent Marvin was injured as a result. One can hardly call the Ford Explorer passive under these facts. The unique facts of the instant case demonstrate that there are two concurrent active accessories causing Respondent's injuries. Respondent Marvin simply could not have had the injuries she sustained without the active accessory of the Ford Explorer. The Ford Explorer caused her injuries in part by refusing to be truly passive. Furthermore, it is Respondent Marvin's position that the Ford Explorer need not be running or moving or defective in some way causing her injuries by itself. By its nature it is a motor vehicle and being pinned between two vehicles is a natural and reasonable consequence of loading and alighting from said vehicle. The gate of the Ford Explorer was up and she was leaning into it and she is crushed by another vehicle as she is exiting it. Respondent Marvin is not injured because she is merely, by happenstance, alighting from the Ford Explorer. Loading and alighting do not occur by chance, they

occur by a direct choice to interact with said vehicle.

Appellant has also raised fact questions in it's Brief. Respondent submits that there are no factual disputes and the parties agreed at the Summary Judgment Motion that there were, in fact, no factual disputes. Any objections that Appellant has to the Respondent's affidavit could have been raised and dealt with by way of continuance or additional discovery. No discovery was conducted by Appellant in regard to this case. Appellant can not now object to Respondent's Affidavit when it had every opportunity to postpone said motion for any further discovery that she felt necessary. It should be noted that Respondent's affidavit is entirely consistent with her injuries. There are no inconsistencies whatsoever. Appellant has made reference to unsigned interrogatories as they address Respondent's status at the time of her injury. Appellant's contend that Respondent was a "pedestrian" at the time of her injury. Unexecuted interrogatories are not evidence as they have not been adopted by the Respondent.

Even if the Court accepts unsigned interrogatory answers as they address the term "pedestrian" this would not change the outcome of this particular case. The phrase "pedestrian" was certainly the best descriptive phrase at the time on a third party liability case given the fact that Respondent was not a driver of the vehicle at the time of her injury and that she was technically "on foot" as she alighted from the vehicle.

A final point for the Court to consider would be the Memorandum of Law authored by Judge Elizabeth Martin at the District Court level. The Court gives an

excellent analysis as to why and how the Klug factors apply.

Judge Martin's most instructive quote from her memorandum is as follows:

**“Here, the car was more than just the mere situs of the injury, the vehicle itself contributed to the physical injuries. While there is no dispute that Ms. Weigel’s vehicle was not moving at the time of the accident, it played an active part in the injuries. A causal connection can be established by showing “the injury is a natural and reasonable incident or consequence” of the vehicle’s use. Id. (RA-54)...The injury is a natural and reasonable consequence of two vehicles colliding. It is not necessary for both cars to be moving at the time of the accident...Ms. Marvin was injured in a collision between two vehicles while using the vehicle for transportation.” (RA-55)**

### CONCLUSION

Under the facts of the instant case, Respondent Marvin had a unique ongoing relationship with the Ford Explorer in question. Respondent’s actions at all times arose out of the maintenance or use of a motor vehicle as a motor vehicle. This conclusion is accomplished via occupancy as she was “in, on, getting into or out of” the Ford Explorer within the meaning of the policy language. Based upon the affidavits of Respondent, as well as the undisputed facts in this case, Respondent Marvin clearly had a continuing relationship to the Ford Explorer. Respondent’s entire reason for being in the exact place at the exact time of the accident was for purposes of loading and alighting from said vehicle. Given the continuing and close relationship between Respondent and that vehicle, the District Court appropriately and properly recognized this relationship in granting Summary Judgment in favor of Respondent. The District Court was correct in its interpretation of the law as it applied to the undisputed facts.

Based upon the foregoing, Respondent respectfully requests that the District Court's Decision granting Summary Judgment be affirmed in all respects.

Respectfully submitted,

Dated this 30<sup>th</sup> day of June, 2005.



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STATE OF MINNESOTA  
IN COURT OF APPEALS

ILLINOIS FARMERS INSURANCE COMPANY,

Plaintiff/Appellant

vs.

Trial Court File No. 82-C4-04-004433  
Appellate Case No. A05-0874  
Date Judgment Entered: April 5, 2005

MARIESE MARVIN AND JEFFREY MARVIN,

Defendants/Respondents.

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**CERTIFICATION OF BRIEF LENGTH**

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Pursuant to Rule 132.01, subs. 1 and 3 of the Minnesota Rules of Civil Appellate Procedure, the undersigned hereby certifies that:

1. Respondent's Brief contains 4,693 words;
2. The software used is WordPerfect Office 2000; and
3. The Brief complies with the typeface requirements.

Dated: June 30, 2005



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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).