

NO. A05-2541

State of Minnesota
In Court of Appeals

Gregory A. Jablonske, et al.,

Appellants,

v.

Metropolitan Property and Casualty
Insurance Company,

Respondent.

RESPONDENT'S BRIEF AND APPENDIX

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STATEMENT OF THE ISSUES

- I. Whether the District Court properly held that Respondent Metropolitan Property and Casualty Insurance Company owed no duty to defend or indemnify the Jablonskes because the business activities exclusion barred coverage for the Jablonskes' long-term development efforts of South Oaks and long-term farm rental of South Oaks.**

The District Court held that Metropolitan had no duty to defend or indemnify the Jablonskes because they had been engaged in business activities in their extensive and long-term efforts to develop South Oaks as well as receiving income for years from their rental of the land for farming.

Apposite Authority:

Allied Mut. Cas. Co. v. Askerud, 254 Minn. 156, 94 N.W.2d 534 (1959)

Buirkle v. The Hanover Ins. Co., 832 F. Supp. 469 (D. Mass. 1993)

Smith v. State Farm Fire and Cas. Co., 656 N.W.2d 432 (Minn. Ct. App. 2003)

Erickson v. Christy, 622 N.W.2d 138 (Minn. Ct. App. 2001)

- II. Whether the District Court properly held that Respondent Metropolitan Property and Casualty Insurance Company owed no duty to defend or indemnify the Jablonskes because the land was not vacant land as it had been farmed for profit for years, including the planting and harvest season just before the accident at issue.**

The District Court held that Metropolitan had no duty to defend or indemnify the Jablonskes because the land where the accident occurred, was not vacant land covered under the Policy. given the continuous farming, from which the Jablonskes profited, that occurred for all the years of their ownership prior to the accident.

Apposite Authority:

George J. Couch, *Couch on Insurance*, § 94:132 and § 94:13, § 126:11, 3rd Ed. (Nov. 2004)

Saha v. Aetna Cas. and Surety Co., 427 So.2d 316 (Fla. 5th DCA 1983)

STATEMENT OF THE CASE

This appeal involves a declaratory judgment action and dispute over whether a homeowner's policy provides coverage for claims arising out of a snowmobile accident occurring on land (hereinafter "South Oaks") owned by Gregory and Susan Jablonske (hereinafter "the Jablonskes"). A.1-A.10. South Oaks was a large piece of property the Jablonskes purchased several years before for investment purposes and which had been farmed up through the 2001 planting and harvesting season just before January 14, 2002. R.A.1-R.A.15. Gregory A. Jablonske ("Jablonske") is a well-known land developer and owns Greg J. Homes, Inc. ("Greg J. Homes"). R.A.16-R.A.21.

The underlying negligence action was brought by Appellants Joseph and Jeanne Senko (hereinafter "the Senkos") and alleged that Joseph Senko ("Senko") was injured while riding his snowmobile in January 14, 2002. A.89-A.98. The Senkos allege that this accident occurred as a result of the negligence of the underlying defendants in the construction and/or presence of a storm sewer outlet on South Oaks. *Id.*

Jablonske tendered the matter first to Greg J. Homes' insurance carrier, State Farm Insurance Company, which accepted the tender of defense. The Jablonskes also tendered the matter to their homeowner's insurer, Respondent Metropolitan Property and Casualty Company ("Metropolitan"). Metropolitan provided a defense to the Jablonskes under a reservation of rights. Metropolitan separately commenced a declaratory judgment action to determine its coverage obligations concerning the underlying case. A.1-A.10.

Metropolitan moved for summary judgment, arguing that it had no obligation to defend or indemnify the Jablonskes for any of the underlying claims because the accident arose out of the business activities of the Jablonskes' land development of South Oaks. Further, Metropolitan argued there was no coverage for the Senkos' claims because the accident did not occur on vacant land given the long-term farming of South Oaks for which the Jablonskes received rental monies. A.153.

Before the summary judgment motion hearing, all the defendants in the underlying action settled with the Senkos. A.3-A.4. The Jablonskes entered into a *Miller Shugart* agreement with the Senkos who then argued against the summary judgment motion in the District Court. *Id.* The Dakota County District Court, the Honorable Rex D. Stacey, granted summary judgment to Metropolitan, concluding there was no coverage because the business activities exclusion applied and because the accident did not occur on vacant land. A.100-A.111. The Senkos, who stand in the Jablonskes' shoes pursuant to the *Miller Shugart* agreement, appealed. A.100-A.111.

STATEMENT OF THE FACTS

Metropolitan issued a PAK II insurance policy to the Jablonskes. A.32 - A.149. The PAK II Policy ("Policy") provides coverage for the Jablonske's vehicles, boat, and home and also provides personal liability coverage. *Id.* The Policy also contains a Minnesota Personal Umbrella Liability Endorsement that supplements the liability coverage. *Id.*

Jablonske, along with various construction, development, and design companies, was named as a defendant in a negligence action. A.89-A.98. In the underlying action,

the Senkos alleged that Jablonske and various defendants were negligent in the design, construction, installation, and presence of a storm sewer outlet on South Oaks. The Senkos further alleged that this negligence was the proximate cause of Senko's January 14, 2002 snowmobile accident on South Oaks.

Metropolitan moved for summary judgment, which the District Court granted. A.100-A.111. The District Court found that Metropolitan had no duty to defend or indemnify because coverage was excluded by the business activities exclusion. *Id.* The District Court held that Jablonske was in the business of property and land development and that he had "begun moving toward the South Oaks development at least as early as January 2001 if not earlier." A.108. Further, the District Court stated that Jablonske admitted that it was difficult to separate Jablonske from Greg J. Homes. A.109. Jablonske testified:

Well, it's always kind of involved. I mean, you know, the two are sometimes hard to separate as far as what I do and where Greg J. Homes starts and where I stop, you know. So to say that Greg J. Homes was involved at this point, you know, we weren't building any houses or doing anything. I was looking at what I could do with my land and so a lot of things I do just naturally go through my company.

R.A.10-R.A.11.

The District Court also noted that Jablonske and Greg J. Homes' agents all worked on facilitating the development of South Oaks during the year before Senko's accident. A.109. The actions taken by Jablonske and Greg J. Homes toward his business venture in developing South Oaks prior to the January 14, 2002 accident and

some of the factors upon which the District Court relied to find that coverage was excluded under the business activities exclusion included the following:

- On January 3, 2001, Jablonske procured the services of Probe to prepare a development plan and plat maps for the Land referenced later as South Oaks. R.A.22 and A108.
- Several communications between Probe and Jablonske regarding South Oaks consistently referenced Greg J. Homes as the organization upon which Jablonske acted. R.A.23-R.A.26. In addition, these were all sent to Greg J. Homes' address and fax numbers. *Id.*
- Roger Schlader ("Schlader"), a then employee of Greg J. Homes, performed many tasks in the fall and winter of 2001 in furtherance of the South Oaks development project. R.A.9. Greg J. Homes, not Jablonske personally, paid for Schlader's services during 2001 for his work on the development of South Oaks. R.A.9-R.A.11 and A108.
- Schlader corresponded with Probe and the City on Greg J. Homes letterhead regarding the South Oaks development. *See e.g.*, R.A.27-R.A.38 and A108-A109.
- The City of Hastings in its meeting notes referenced Jablonske as the "Developer" and equated communications from him, his representatives, or on behalf of Greg J. Homes as all coming from the same developer. *See e.g.*, R.A.39, R.A.40-R.A.43 and A108-A109.
- As early as October 31, 2000, the City of Hastings was aware it would need an easement from Jablonske for a planned sanitary sewer and watermain being built to feed the Century South development under construction, immediately south of South Oaks. This planned sewer and watermain project would also provide sewer and water to South Oaks. R.A.44-R.A.45 and A108-A109.
- During the fall of 2001, the City of Hastings entered into a massive construction project through the western edge of South Oaks in order to provide a sanitary sewer and water connection to the Century South Development. R.A.17-R.A.20; *see also* R.A.52-R.A.53 and A108-A109.
- There was a dispute over the amount Jablonske was to be compensated for the easement, but the City of Hastings stepped in and proposed an Agreement for the easement under threat of condemnation with promises to work out the financial compensation at a later date. R.A.58-R.A.61. Jablonske admitted

that he saw the city construction project in process in 2001 and pictures show the extent of the construction on South Oaks itself. R.A.48-R.A.50 and R.A.54-R.A.57. Jablonske admits that as part of this 2001 construction, sewer connections or “curb boxes” were also constructed for the future hook up to his South Oaks Development. *Id.*; *see also* A108-A109.

- Lyman Construction (“Lyman”), the developer of Century South (where Jablonske through Greg J. Homes also built homes), contacted Jablonske about a proposed license agreement and right of entry permit for the purpose of installing a storm sewer outlet, rip rap, geo-textile fabric and grading scale on South Oaks (hereafter “storm sewer outlet”). R.A.62-R.A.71 and A108.
- In the September 5, 2001 proposed agreement, Lyman memorialized the fact that **“Jablonske acknowledges that Jablonske’s real property will develop in the foreseeable future and,** in connection therewith, it is anticipated that dedicated right-of-way contained on Lyman’s plat of Century South or “Century Drive” will, in the future, be extended north over and upon the Jablonske real property, and that **the Jablonske property will be improved with storm sewer facilities.”** R.A.63 (emphasis added); *see also* A108. According to James W. Johnston, Vice-President of Lyman, the installation of the storm sewer outlet on the Land in the fall and winter of 2001 saved Jablonske the expense of having to construct that portion of the storm sewer outlet on his own as part of his South Oaks development project. R.A.72-R.A.73.
- Jablonske also executed a Temporary Construction Easement for the purpose of building the drainage and utility system. R.A.74-R.A.76. The system was completed prior to January 14, 2002. R.A.77-R.A.78.
- Jablonske was eventually compensated in the amount of \$18,800.00 for his grant of the entire easement by the City of Hastings (Fleming Aff., Ex. 44 Copy of Check). R.A.79 and A108.
- The storm sewer outlet no longer exists in its original form as it has been fully buried after being connected with the sewer line running through South Oaks. R.A.72-R.A.73. Notably, Senko alleged that it was the storm sewer outlet that caused his snowmobile accident. A.89-A.90. The construction of the sewer and water lines and the storm sewer outlet that occurred on South Oaks in 2001 were both projects that benefited Jablonske’s business as it related to developing South Oaks. R.A.72-R.A.73 and A108.
- Jablonske first sought having the City rezone South Oaks from agricultural use to multi-dwelling use on October 22 2001 – a necessary precursor to any developing of South Oaks. R.A.80-R.A.82 and A108.

- The Hastings Planning Commission publicly considered Jablonske's South Oaks development plan on November 26, 2001. R.A.85. The Commission recommended approval. *Id.*
- The local Hastings Star Gazette reported that the South Oaks development would consist of town homes and single family homes totaling about 197 units on 48 acres of land. R.A.86-R.A.87 and A107-A108.
- Jablonske presented the project to the city on or before October 15, 2001. R.A.88-R.A.91 and A108.
- The City corresponded with Jablonske regarding "his South Oaks Development" prior to January 14, 2002. R.A.92 and A108.
- The matter was discussed in several Hastings Planning Committee meetings and City Council meetings prior to January 14, 2002. R.A.83- R.A.85, R.A.93-R.A.94, R.A.95-R.A.97 and A108.
- The Hastings Gazette reported on December 6, 2001 that the Hastings City Council approved the South Oaks development. R.A.98.
- Prior to January 14, 2002, there were several meetings between Jablonske, his representatives, Probe, Lyman or Hastings' employees regarding the development including an October 19, 2001 meeting to discuss that the plat maps for South Oaks did not show Century Drive lining up properly with the Century South development's Century Drive. R.A.88-R.A.91 and A108.
- After several meetings prior to and following January 14, 2002, the plats for the project were approved on February 6, 2002. R.A.99-R.A.102.
- The plats were later amended and then finally approved on June 9, 2002 (Fleming Aff., Ex. 31 Amended Resolution of South Oaks Final Plat). R.A.103-R.A.106. On July 12, 2002, the plats were officially filed (Fleming Aff., Ex. 32). R.A.107-R.A.110.
- On February 14, 2002, M.W. Johnson Construction, Inc. entered into an Agreement with Greg J. Homes to develop the lots in South Oaks for \$1,750,000.00. R.A.111-R.A.113.
- On March 20, 2002, an attachment to that Agreement provided for distribution of \$1.2 million to Jablonske and \$550,000 to Greg J. Homes of that original \$1,750,000 all designated to Greg J. Homes. R.A.113. Notably, Jablonske signed this attachment on behalf of Greg J. Homes. R.A.112. The Purchase Agreements between the parties broke the sale of the land into four

parcels. R.A.114-R.A.125. A portion of the first phase of South Oaks was completed fall of 2002. South Oaks Second Addition began in 2003 and 2004. R.A.126-R.A.129. There is nothing in the title records to suggest M.W. Johnson Construction, Inc.'s involvement with this phase. *Id.* There is also nothing on the certificate of title for the property that shows the actual transfer from Jablonske to M.W. Johnson Construction, Inc. in the first phase of South Oaks beyond the Land Development Agreement and the Purchase Agreements. R.A.130-R.A.131. According to the County, the last owner of the South Oaks Properties before subdivision and sale was Jablonske. *Id.*

- Jablonske commented in the press about South Oaks noting that it and the development in that area had been in the works for years. R.A.132-R.A.133.
- In an October 11, 2001 letter from Lyman's James W. Johnson to the City Planner of Hastings, he noted that he and Jablonske had been discussing Jablonske's development since the spring of 2001. R.A.134.

Besides all of these ongoing and continuous business activities in 2001 regarding South Oaks, the District Court also found that Jablonske had rented out South Oaks for farming for several years before the accident. A.110. Jablonske had received regular payments for renting the land for farming, which he declared as income on his taxes and from which he deducted expenses. A.110. The District Court found this farm rental was also a business activity. A.110. Because of all of these activities, the District Court found that coverage for the Senkos' claims was excluded by the Policy's business activities exclusion. A.110.

The District Court also found that the land was not vacant land within the meaning of the Policy but excluded farmland because South Oaks had been farmed for many years including the last harvest before the accident. A.111. Despite Jablonske's claim that 2001 was the last year he intended to rent South Oaks for farming, the District Court found that the Jablonskes could not transform established farmland into

“vacant land” by simply claiming cessation of the long-established farming activity.

A.111.

Metropolitan’s PAK II Insurance Policy

The insurance policy issued to the Jablonskes is PAK II insurance policy number PK02219381. A.11 – A.88. The Policy contains the following relevant language to this coverage dispute:

Legal Liability Protection. Under the liability section of this policy you’re covered when somebody makes a claim against you. We’ll cover your legal liability resulting from an occurrence in which there is actual accidental property damage, personal injury or death, anywhere in the world, subject to the limitations and exclusions in PAK II. By occurrence, we mean an event, including continuous or repeated exposure to the same conditions, resulting in personal injury or property damage neither expected nor intended by anyone insured by PAK II.

* * *

personal injury is bodily injury such as broken bones. It also includes nonphysical injuries to a person’s feelings or reputation, including mental injury, mental anguish, wrongful eviction, libel, slander, defamation of character, invasion of privacy and false arrest. Remember: you are not covered for liability for physical bodily injury if it results from an intentional act. Other nonphysical personal injury is not covered if you could’ve expected the injury that resulted.

A.43.

* * *

The Homeowners Liability Protection provides in relevant part:

We cover your liability for an accident or incident that happens in your home that is listed in the Coverage Summary. You and your family are protected against claims up to the limit of liability per occurrence shown on the Coverage Summary.

* * *

We also cover the liability of you and your family (but not others) in connection with:

1. Any premises not owned by you such as a hotel, motel or vacation retreat where you and your family are temporarily residing.
2. **Vacant land owned by you or rented to you as long as it is not used for farming or ranching.**
3. Land owned by you or rented to you on which a home is being built that you intend to use as your residence.
4. Cemetery plots or burial vaults owned by you or your family.
5. Premises occasionally rented to you or your family as long as it is not for business purposes.

A.46. (emphasis added). The notable exclusion relevant to the Policy is the following:

PAK II doesn't cover accidents happening on your business premises. And we do not cover any liability or claims connected with any business, profession or occupation.

A.60.

ARGUMENT AND AUTHORITIES

I. STANDARD OF REVIEW AND SUMMARY OF ARGUMENT.

On appeal from summary judgment, the court reviews 1) whether there are any genuine issues of material fact and 2) whether the district court erred in its application of the law. *Grinnell Mut. Reinsurance Company v. Ehmke*, 664 N.W.2d 409, 412 (Minn. Ct. App. 2003) (citing *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn.1990)). “The district court can properly determine the construction and interpretation of insurance policies on a motion for summary judgment and appellate courts will review the district court's decision de novo.” *Reinsurance Ass'n of Minnesota v. Timmer*, 641 N.W.2d 302, 207 (Minn. Ct. App. 2002); see also *Dohney v. Allstate Ins. Co.*, 632 N.W.2d 598, 600 (Minn. 2001).

An insurer's duty to defend arises when any part of the claim against the insured is arguably within the scope of protection afforded by the policy. *Franklin v. Western National Mut. Ins. Co.*, 574 N.W.2d 405, 406-407 (Minn. 1998). An insurer may ordinarily determine whether a cause of action includes an "arguably covered" claim by comparing the wording of the policy to the allegations of the underlying complaint. *Id.* at 407 (where pleadings clearly manifested that the dispute concerned the terms of a contract rather than a "wrongful entry" court determined there was no duty to defend). If the underlying pleadings do not raise a claim arguably within the scope of coverage, the insurer has no duty to defend or investigate further. *Garvis v. Employers Mut. Cas. Co.*, 497 N.W.2d 254, 258 (Minn. 1993).

Metropolitan defended this matter under a reservation of rights while it investigated whether there was coverage for the underlying claims. Jablonske was a well-known Hastings developer and the accident occurred on what is now a large residential development of Jablonske's called South Oaks. Moreover, the pictures from the accident evidenced several rows of corn stalks in the snow showing that farming activity had occurred that season. The Policy clearly excluded coverage for any liability arising out of the business activities of the Jablonskes. The Policy also excluded coverage for all liability arising out of land used for farmland.

II. THERE IS NO COVERAGE FOR THE SENKOS' CLAIMS AGAINST THE JABLONSKES BECAUSE THEY ARISE OUT OF JABLONSKES' BUSINESS ACTIVITIES AS A DEVELOPER AND OWNER OF GREG J. HOMES.

The District Court correctly found that the Jablonskes' ongoing and continuous efforts to develop South Oaks, the first phase of which garnered the Jablonskes and Greg J. Homes the combined amount of \$1.75 million, constituted business activities excluded from coverage under the Policy. The District Court also correctly found that the longstanding rental monies received each farming season by the Jablonskes for the rental of South Oaks constituted uncovered business activities. This District Court properly rejected Appellants' argument that because the Senkos did not sue Greg J. Homes and only alleged negligence against Jablonske for his ownership of South Oaks, the business activities exclusion did not apply. The District Court refused to confuse the exclusion for liability occurring on a business premises versus liability connected with the business activities of the Jablonskes. The District Court correctly recognized that the ownership of South Oaks itself was connected with the business activities of the Jablonskes given all of their ongoing and continuous farm rentals and subsequent extensive efforts to develop the property in 2001 – well before Senko's accident. South Oaks was simply never "vacant land" covered under the Policy during the entire time the Jablonskes owned it.

Appellants ignore the overwhelming undisputed evidence showing that the Jablonskes and Greg J. Homes, Jablonske's business, were actively and extensively working on the development of South Oaks prior to the January 14, 2002 accident. In

seeking remand, Appellants rely upon the following points: 1) that South Oaks was purchased by the Jablonskes in their individual names not in the name of Jablonskes's business Greg J. Homes; 2) that none of the Jablonskes' business activities regarding South Oaks are connected to the injuries alleged by the Senkos; 3) that groundbreaking did not begin until after the accident; 4) business pursuits are somehow different from business activities; and 5) the ongoing use of South Oaks for farming for which the Jablonskes were paid was not a business activity on January 14, 2002 since no farming was occurring on that date. Appellants' arguments fail.

A. THE DISTRICT COURT PROPERLY FOUND THAT THE JABLONSKES' EFFORTS IN DEVELOPING SOUTH OAKS CONSTITUTED A BUSINESS ACTIVITY BARRING COVERAGE UNDER THE POLICY.

There is no ambiguity. The Policy unambiguously and expressly excludes coverage for claims connected with an insured's business activities. The Major Exclusions (Claims Not Covered) section of the Policy states:

1. PAK II doesn't cover accidents happening on your business premises. And we do not cover any liability or claims connected with any business, profession or occupation. ...

A.60.

The Senkos' contend that the Policy's exclusion for "claims connected with any business, profession or occupation" is a broader exclusion than the standard exclusion in homeowners policies for claims "arising out of" an insured's "business pursuits" and therefore the District Court erred. This argument lacks merit. Even if there was such a distinction between the exclusions, the Senkos' claims that Senko was injured as a result

of the installation of the storm sewer outlet on South Oaks, would still mandate a finding of no coverage under the Policy.

Courts often define the term “arising out of” utilizing the phrase “in connection with.” See *Board of Education v. St. Paul Fire & Marine Ins. Co.*, 261 Conn. 37, 48, 801 A.2d 752 (2002). The Minnesota Supreme Court has defined the phrase “arising out of” with “originating from, having its origin in, growing out of, or flowing from.” *Waseca Mut. Ins. Co. v. Nosak*, 331 N.W.2d 917, 920 (Minn. 1983). Moreover, a Minnesota court has previously equated the phrases “arising out of” and “in connection with.” See *Anstine v. Lake Darling Ranch*, 305 Minn. 243, 249, 233 N.W.2d 723, 72-28 (Minn. 1975).

There simply is no distinguishable difference between “arising out of” and “connected with” an insured’s business that would justify not applying well settled case law regarding the business pursuits exclusion present in the Policy. Yet even if these cases did not apply, there is no question that Senko’s injuries that occurred on South Oaks were connected with the Jablonskes’ business given the fact they allegedly occurred because of the presence of a storm sewer outlet installed in part for the benefit of developing South Oaks. Even more conclusive is the fact that Jablonske’s business, Greg J. Homes, was inextricably intertwined with all of the South Oaks development efforts. This was not just a business pursuit; the development of South Oaks was connected with Jablonske’s business and therefore excluded from coverage under the Policy. The District Court properly applied the law in determining the Jablonskes’ activities were connected to his business and thus excluded from coverage.

In making the determination of whether an insured's activities are excluded as uncovered business activities, Minnesota has a two-prong test to define business pursuits that considers whether the alleged business activity: 1) is regularly engaged in; and 2) with the intent to generate profits or financial gain. *Allied Mut. Cas. Co. v. Askerud*, 254 Minn. 156, 163, 94 N.W.2d 534, 539-40 (1959). "The function of a business pursuits exclusion is to confine the homeowner's policy coverage to non-business risks and to relegate business coverage to a commercial policy." *Erickson v. Christie*, 622 N.W.2d 138, 140 (Minn. Ct. App. 2001).

Minnesota's appellate courts have repeatedly found that a wide variety of claims arising from an insured's business activities are excluded from coverage under a homeowner's policy. *See, e.g., Bob Useldinger & Sons, Inc. v. Hangsleben*, 505 N.W.2d 323, 328 (Minn. 1993) (breach of warranty claims brought by potato purchasers against insured, an investor in potato farming partnership); *Grossman v. American Family Mut. Ins. Co.*, 461 N.W.2d 489, 496 (Minn. Ct. App. 1990) (various claims for damages brought by general partner in real estate partnership against limited partners).

Appellants try to claim that because South Oaks was technically owned by the Jablonskes instead of Greg J. Homes at the time of the accident, that any injuries that occurred on South Oaks did not arise out of, or were unconnected to, Jablonske's business activities. The fact that an insured in his or her individual capacity has entered into an agreement regarding his or her land does not insulate the insured from application of the business pursuits exclusion. *See e.g., Allstate Ins. Co. v. Hallman*, 159 S.W.3d 640, 645 (Tex. 2005) (liability arising out of an individual homeowner's

lease of her home property for the purpose of another's commercial enterprise constitutes a business activity not covered by a homeowners policy).

Although the Jablonskes concede they purchased the land for investment purposes, Appellants seemingly argue that passive investment activities do not trigger the business activities exclusion. This argument fails because Jablonskes' activities were not passive and even if they were, "passive" activities are still excluded business activities. In addition, there is no requirement that the business activities exclusion may only be applied to injuries occurring on land held under the name of an insured's business rather than the insured's individually.

In *Buirkle v. The Hanover Ins. Co.*, 832 F. Supp. 469, 484-86 (D. Mass. 1993), the court extensively analyzed whether an insured's activities constitute business pursuits within the meaning of a homeowners insurance policy when such activity might not involve the primary business of an insured. *Buirkle* involved alleged defamatory statements the insured made as it related to an alleged scheme to advance his business interests. *Id.* at 481. Buirkle was managing director of a company and the complaint alleged he was very close to a third individual named Wells, who had an ownership interest in another company, AeroChem. *Id.* The allegation was that Wells wanted to expand his ownership in AeroChem and push out an individual named Harris. *Id.* It was alleged that Buirkle agreed to aid the scheme in agreeing to loan money to Wells, presumably after Wells acquired the larger ownership interest in AeroChem. *Id.* It was also alleged that Buirkle provided business advice to Wells and participated in

defamatory statements about Harris. *Id.* The *Buirkle* court found this to be a business pursuit excluded from coverage under the homeowner's policy. *Id.* at 489.

The factors considered were whether: 1) the activity at issue was profit motivated; 2) it was a single act or a series of ongoing acts toward a common goal, that is, the continuity of the activity; 3) the matter was a part-time business pursuit or just a hobby of the insured; and 4) it involved investment activity. *Id.* at 484-86. The *Buirkle* court next considered the fact patterns involved when courts found coverage or excluded coverage under a business pursuits exclusion. *Id.* at 486. Coverage has been allowed for a business pursuit if the activities alleged only involved a single or small number of instances and a very small part of the insured's total time committed to making those earnings or profits. Coverage has been denied when the activities alleged are part of a business pursuit that went on continuously without break over a long period and occupied a significant amount of the insured's time and/or effort towards making earnings and profits. *Id.*; see also *Stern v. Ins. Co. of North America*, 62 N.J. 582, 383 A.2d 883, 883 (1973) (coverage for insured whose main occupation was trucking and warehousing was excluded for continuous work across a prolonged period of time as a member of the board of a bank).

The *Buirkle* court supported its findings of no coverage under the business pursuits exclusion for *Buirkle's* actions by noting that the general purpose of homeowners' insurance policies was designed to supplement, and not supplant other policies available on the market like motor vehicle policies, professional liability insurance policies, and specialized policies like farming policies. 832 F. Supp. at 487

(citations omitted). Importantly, *Buirkle* relied upon this Court's decision in *Grossman v. American Family Mut. Ins. Co.*, 461 N.W.2d 489 (Minn. Ct. App. 1990) for the proposition that the economics of excluding coverage for business pursuits is incompatible to fairness and efficiency in the marketing of homeowners' policies. *Id.* (citing *Grossman*, 461 N.W.2d at 495 ("the purpose of business pursuits exclusions in homeowner's policies is to delete coverage which is not essential to the purchasers of the policy and which would normally require specialized underwriting and rating, and thus keeps premium rates at a reasonable level")). *Buirkle* concluded that the five percent or so of homeowners who are involved in business pursuits would negatively impact the amount that would be charged to the 80 percent or so who are not involved in such high-risk activities. *Buirkle*, 832 F. Supp. at 487.

Using these considerations, the District Court properly found that the Policy does not provide coverage for any damages Senko allegedly sustained on South Oaks. First, there is no question that the Jablonskes' activities in developing South Oaks, including all the administrative and planning aspects of 2001, were profit motivated. This was ultimately an almost \$1.8 million dollar deal for the Jablonskes and Greg J. Homes and that was only for the first phase of South Oaks. Notably, payment for the land and various contractual rights related to the transaction went in part to Greg J. Homes evidencing that South Oaks was connected with Jablonske's business, Greg J. Homes. The sale and agreement involved a series of prior and ongoing acts toward the common goal of developing South Oaks. There was no break in the Jablonskes' South Oaks

development activity beginning as early as January, 2001 up to the accident of January 14, 2002, and afterwards.

The actions of the Jablonskes, Jablonske's agents Probe Engineering, and Greg J. Homes' employees were extensive toward this endeavor. Considering all of the people involved acting on behalf of the Jablonskes and Greg J. Homes, these actions cannot be said to be merely a hobby. It is far more than a part-time business activity. The District Court noted that many actions were even done under Greg J. Homes letterhead, at the direction of Greg J. Homes' employees and agents compensated by Greg J. Homes, and that Jablonske himself conceded it was difficult to say where Jablonske stopped and Greg J. Homes began. Sometime in 2001, then, South Oaks became an endeavor associated with Jablonske's primary occupation – Greg J. Homes. Finally Jablonske's own testimony established that although he purchased the land as an investment interest, by 2001 that "interest" became far more active.

Buirkle supports the district court finding that the pursuit of the South Oaks development constituted a business activity. Other cases provide even more support for this determination. In *Saha v. Aetna Cas. and Surety Co.*, 427 So.2d 316 (Fla. 5th DCA 1983), a case very similar to this one, plaintiff owned land upon which he had moved a herd of cattle he kept as an admitted tax shelter. The plaintiff had moved the cattle to that land after becoming unhappy with the way they were cared for at another facility. *Id.* at 317. The land contained a pond upon which he had installed an irrigation pump. *Id.* He also constructed a cattle shoot. *Id.* A young child drowned in the pond and the matter resulted in litigation. *Id.* The court held that this constituted a business pursuit

given the presence of the investment cattle even for a short period.¹ *Id.* at 317-18. The court noted that although the insured made no practical income, he did deduct expenses for the operation that resulted in a reduction of his taxes positively affecting his income. *Id.* at 318. This was sufficient to find a business activity and exclude coverage. *Id.* Notably in *Saha*, the main occupation of the insured was that of a physician, not farmer or cattle rancher.

In *Vallas v. Cincinnati Ins. Co.*, 624 So.2d 568, 571-72 (Ala. 1993), the court found that an insured's involvement in the limited partnership, which was formed for the purposes of purchasing and later subdividing and selling for profit a 220-acre tract of land, constituted a business pursuit even though the development had not yet begun. The *Vallas* court looked at the meaning of business pursuit and found that it included within its purview an activity that was "essentially a passive, real estate investment." *Id.* The court reasoned that the term business involved "a continued, extended, or prolonged course of business," and it included this kind of passive real estate investment. *Id.* (citing *Stanley v. American Fire and Cas. Co.*, 361 So.2d 1030, 1032-33 (Ala. 1978)). The Jablonskes' development activities were much further along than in *Vallas*.

O'Conner v. Safeco Ins. Co. of North America, 352 So.2d 1244 (Fla. 1st DCA 1977) is also similar to this case. In *O'Conner*, the court found that installing and

¹ The Court also held that the presence of the cattle rendered the land farmland within the meaning of the exclusion for coverage on vacant land that is farmed. *See infra* pp. 28-29.

maintaining a clay road on land for a *future* planned real estate development constituted a business pursuit. *Id.* at 1246. The insureds tried to argue that this was only vacant land within the meaning of the policy such that a minor child who was injured on the road would be covered under the insured's homeowners' policy. *Id.* The court rejected this idea because the insured was in the process of subdividing the property into one hundred lots with the intent to sell such lots for profit. *Id.* 1245-46. Notably, no groundbreaking had yet begun. *Id.* at 1246. The court held that even though the move towards this development was somewhat casual, it was continuous and comprehensive and ultimately an activity for financial gain. *Id.*

Also persuasive is *In re San Juan Dupont Plaza Hotel Fire Litigation*, 789 F. Supp. 1212 (D. Puerto Rico 1992), where the court found that passive investment activities constitute business pursuits as they "do not represent spare time interests of the insureds regardless whether they are gainfully employed in another trade, business or occupation." *Id.* at 1220. The *San Juan* court noted that the investments were clearly motivated by profit and "are easily distinguishable from spare time pursuits such as hobbies or leisure activities" that courts typically find are not business pursuits. *Id.* (citing *Southern Guarantee Ins. Co. v. Duncan*, 131 GA. App. 761, 206 S.E.2d 672 (1974)).

Saha, Valas, O'Conner, and *In re San Juan* are on all fours with the case at bar. In fact, using the reasoning of these cases, Jablonske's activities are even more involved and active than the insureds were in those cases. While these are in outside jurisdictions, they are very instructive. Moreover, Minnesota courts have specifically

looked at the application of business pursuits exclusions involving part-time business activities and *still* applied the exclusion. *See Smith v. State Farm Fire and Cas. Co.*, 656 N.W.2d 432 (Minn. Ct. App. 2003). In *Smith* the insured rented out her barn to a commercial marina to use for boat storage in the winter. This storage activity was engaged for profit on a regular basis by the insured. Although the rental was mostly a seasonal endeavor performed by an insured whose primary business was that of a financial analyst, this Court found that the rental constituted a business purpose under the meaning of the homeowner's policy and excluded coverage. *Id.* at 436.

Finally, and most persuasively, in *Grossman*, this Court considered whether an insured's involvement in a real estate investment partnership constituted a business pursuit. 461 N.W. 2d at 495. *Grossman* found that a real estate investment involved a business pursuit excluded from coverage under the insured's homeowners' policy because the real estate investment was an extensive one. *Id.*

The argument is even stronger in this case. Jablonske was in the business of property and land development operating a business called Greg J. Homes. His pattern and practice was to acquire land and eventually develop and build housing developments on that land. Jablonske had begun developing South Oaks at least as early as January 2001, if not earlier. R.A.15. Jablonske stated in a newspaper article that the South Oaks development was in the works for a number of years prior to its actual build. R.A.133. For purposes of development in 2001, Jablonske hired Probe Engineering to create plat maps and design the layout of the development a year before the accident of January, 2002. Probe's communications during 2001, including its

initial retention in January, 2001, were all fielded to the Greg J. Homes' office demonstrating that even as of this early date, South Oaks was connected with Jablonske's business. R.A.15. In fact, many of Probe's communications regarding the work it was doing in 2001 as part of the development of South Oaks were directed to Greg J. Homes employees, not Jablonske himself. South Oaks and its development was inextricably entwined with Jablonske's regular occupation and business Greg J. Homes.

The Jablonskes took active steps on this development in 2001 and applied to the city to change the zoning for the land from one of agricultural to multi-dwelling units. R.A.80-R.A.82. The Jablonskes, Jablonske's agents, or employees of Greg J. Homes negotiated with the city and other construction companies regarding the utilities necessary for the development and attended several city planning commission meetings and city council meetings advocating for his development. *See e.g.*, R.A.37-R.A.43, R.A.83-R.A.85, R.A.88-R.A.91, and R.A.93- R.A.97.

More importantly, the City of Hastings constructed sewer and water lines through South Oaks and provided hook-ups for the future sewer connections for South Oaks. R.A.46-R.A.57. The construction of a storm sewer outlet on South Oaks not only provided an outlet for the nearby Century South development for which the Jablonskes received a large amount of compensation, but was meant to, and expressly stated in the agreement would, benefit his South Oaks development. R.A.63. This negotiation and construction all occurred in the fall of 2001. There is correspondence between Greg J. Homes from its agents to the city regarding the South Oaks development on Greg J. Homes stationary throughout the fall of 2001 again

demonstrating the connection of South Oaks to the business of Jablonske. Jablonske was even sent a letter by the city referencing the South Oaks development in early January 2002, just before Senko's accident. Notably Senko's accident allegedly took place as a result of the installation of that storm sewer outlet. There is no ambiguity in application of these facts to the business activities exclusion of the Policy. Simply put, South Oaks could never have been built until all of these preparations as to city approvals and plans had taken place as well as installation of the water and sewer lines and the storm sewer outlet. The planning and preparation for the South Oaks development that took place throughout 2001 unambiguously involved extensive activities connected with the business of Jablonske within the meaning of the policy.

B. THE DISTRICT COURT PROPERLY FOUND THAT THE SENKOS' CLAIMS AROSE OUT OF THE INSTALLATION OF THE STORM SEWER OUTLET WHICH WAS TO BENEFIT SOUTH OAKS.

Appellants are correct that the focus of a business pursuits exclusion is on the liability-causing conduct. Appellants, however, cannot rely upon a blanket statement that because groundbreaking at South Oaks had not yet begun, Senko's injuries did not arise out of the Jablonskes' business activities. This is because the Senkos' Complaint alleges that Senko was injured as the result of the negligent installation and presence of the storm sewer outlet. Given this Complaint, Appellants' contention in their appeal that Senko's injuries did not relate to any liability-causing conduct of the Jablonskes that was connected with a business activity, fails. The undisputed evidence shows, and

the District Court held, that the storm sewer outlet was installed to benefit the developments of Century South *and* South Oaks.

If the liability-causing conduct, by whomever performed, is within a business activity of anyone insured under the policy, coverage is excluded. *Zimmerman v. Safeco Ins. Co.*, 605 N.W.2d 727, 731 (Minn. 2000). Whether conduct constitutes a business pursuit depends on the relationship between the conduct in question and the business of the insured. *Milwaukee Mut. Ins. Co. v. City of Minneapolis*, 307 Minn. 301, 309, 239 N.W.2d 472, 476 (1976).

Erickson v. Christy, 622 N.W.2d 138 (Minn. Ct. App. 2001) discussed the application of a business pursuits exclusion and focused on the liability causing conduct rather than the status of the individual concern. In *Erickson*, the insured's son was conducting farm business activities in pursuit of his father's farming business when a motorcyclist was injured in a collision with a tractor the son operated. *Id.* at 139. This Court applied the business pursuits exclusion to find that at the time of the accident the son was on the tractor doing the farming work of his father. *Id.* at 140-41. The Court reasoned that the function of the business pursuits exclusion was to limit homeowners' policy coverage to non-business risks while relegating business pursuits to a commercial policy; to hold otherwise would result in inflation of premiums for homeowners' insurance policies in an unreasonable manner. *Id.* at 140 (*citing Grossman*, 461 N.W. 2d at 495). In *Erickson*, the appropriate policy was the insured's farm policy rather than his homeowners' policy. *Id.* at 141.

The *Grossman* court also discussed the necessity to look at the liability creating conduct or property and its relationship to the business in question. *Grossman* noted the following:

It is the nature of the particular act involved and its relationship, or lack of relationship, to the business that controls. Personal acts, such as pranks, do not become part of a business suit, so as to be outside of the coverage, merely because performed during business hours and on business property. In order for an act to be considered part of a business pursuit it must be considered an act that contributes to, or furthers the interest of, the business and one that is peculiar to it. It must be an act that he insured would not normally perform but for the business, it must be solely referable to the conduct of the business.

461 N.W.2d at 495 (*citing Milwaukee Mut. Ins. Co.*, 307 Minn. at 309, 239 N.W. 2d at 476).

The underlying Complaint alleged that Senko was injured due to the negligent installation of the storm sewer outlet on South Oaks. This storm sewer outlet was installed upon the agreement Jablonske entered into with Lyman Development Company. R.A.62-R.A.71. As previously discussed, the agreement between Lyman Development Company and Jablonske stated that the installation of the storm sewer outlet was to benefit Jablonske's South Oaks development. *Id.* Jablonske's self-serving deposition testimony that the storm sewer outlet did not benefit South Oaks directly contradicted the terms of the agreement he entered into with Lyman Development Company. Jablonske is a sophisticated businessman and well-known Hastings developer and the agreement he executed stating that the installation of the storm sewer would benefit South Oaks speaks for itself. R.A.63. The District Court properly found

that the liability-causing conduct allegedly leading to Senko's injuries arose out of and was connected with Jablonske's business activities.

C. THE DISTRICT COURT PROPERLY FOUND THAT THE JABLONSKES' REGULAR RENTAL OF SOUTH OAKS FOR FARMING WAS A BUSINESS ACTIVITY.

Moreover, the fact that the Jablonskes rented the land out to a local farmer prior to and during the planning of this development, is also strongly supportive of a business pursuit. Besides the income from the rental, the Jablonskes deducted on their taxes for 2001 expenses associated with the farm including taxes paid on it and the interest paid on the contract for deed. The Jablonskes took the benefit of the tax situation as to the farming just as the insured in *Saha* did. *See Saha*, 427 So.2d at 318. Although the corn was harvested in the fall of 2001 and the usual one seasonal payment was made, business activities did not cease. This was the pattern every year. A farm does not stop being a business enterprise after the harvest is over.

But even if the end of the harvest could be said to end the Jablonskes' business interests in the farm rental, the South Oaks development activities continued before, during, and after the farming. For all of these reasons this Court should affirm the District Court's determination that the Senkos' claims against the Jablonskes arose out of, and are connected with, the business activities as they relate to the South Oaks development and the farming from which the Jablonskes profited. Further this Court should affirm the District Court because the accident causing instrumentality alleged by the Senkos was directly connected with the Jablonskes' business activities as the storm sewer outlet was installed to benefit South Oaks.

III. THE DISTRICT COURT PROPERLY FOUND THAT SOUTH OAKS HAD BEEN FARMED FOR YEARS AND THAT THE JABLONSKES COULD NOT CONVERT THAT FARMLAND TO VACANT LAND SIMPLY BY DECLARING THE INTENT NOT TO RENT OUT THE LAND FOR FARMING FOR THE 2002 SEASON.

The District Court properly found that South Oaks was not vacant land within the meaning of the policy considering it had been farmed for all of the years that the Jablonskes owned it up to the 2001 harvest, and before they bought it. Appellants argue that because no farming was occurring on January 14, 2002, and Jablonske testified he had no intent to rent it for farming again, South Oaks somehow converted to vacant land – something it had never been during the entire tenure of the Jablonskes’ ownership of South Oaks and during the Policy. The District Court rejected this argument and so should this Court.

Homeowners’ policies typically provide coverage for the “vacant land” of an insured, just as the Policy does in this case, as long as the land is not farmed or ranched.

The Policy provides coverage for vacant land as follows:

We also cover the liability of you and your family (but not others) in connection with:

2. Vacant land owned by you or rented to you as long as it is not used for farming or ranching.

Although the Policy does not define “vacant land,” Courts have held that the term should be given its plain and ordinary meaning. *See Dawson v. Dawson*, 841 P.2d 749, 751 (Utah Ct. App. 1992). *Dawson* relied on the dictionary to determine that “vacant” meant, “containing nothing; empty.” *Id.* It also relied upon the definition provided by *Couch on Insurance*. *Id.* *Couch on Insurance* defines “vacant land” as meaning: “lands

which were unoccupied and unused; the use of land implies its employment in a manner that will materially benefit the owner.” George J. Couch, *Couch on Insurance*, § 94:132, 3rd Ed. (Nov. 2004). *Couch* goes on to state that “‘vacant land’ refers to land unoccupied, unused, and in its natural state” and that homeowners’ coverage for vacant land “does not extend to land containing buildings, or to other structures, or *improvements*.” *Id.* at § 126:11 (emphasis added). Moreover *Couch* discusses that land cannot be transformed into vacant land simply by “cessation of the customary use.” *Id.* at § 94:133.

In *State Farm Fire & Cas. Co. v. Comer*, 1996 WL 33370669 (N.D. Miss. Jan. 10, 1996), the court considered what constituted farmland within the meaning of the exclusion for “vacant land” in a homeowner’s policy. The *Comer* court found that a pasture regularly used by the insured to feed cattle even though the cows were not always present on the land still constituted farmland excluded from coverage within the meaning of the policy’s vacant land provision. *Id.* The court rejected the insureds’ claim that this was only a hobby and that cows merely grazing on land did not change the land to farmland. *Id.* The court also found the operation to implicate the business pursuits exclusion under the policy. *Id.*

In *Tolbert v. Ryder*, 345 So.2nd 548 (La. App. 3rd Cir. 1977), the court also held that the presence of a cattle operation on land negated a finding that it was “vacant land” within the meaning of a homeowners policy. *Id.* at 553. Finally, in *Saha*, besides finding a cattle operation used for investment purposes to be a business activity, the court held that having that cattle on the land, installing a cattle chute and an irrigation

pump, rendered the land non-vacant farmland and thus excluded coverage under a homeowners' "vacant land" provision for a child who drowned in a pond on the property. 427 So.2d at 317. *Saha* did not even require the improvements or the cattle operation to be the accident causing instrumentality when the court found no coverage under the vacant land provision. *Id.*

In this case there is no dispute that through the agricultural season of 2001 the land was not "vacant land" within the meaning of the policy because the land was farmed. It was farmed not only that season but for countless seasons before. Aerial photos show this farming, as do the pictures taken just after the accident evidencing cornhusks in neat rows coming up through the snow. *See Fleming Aff., Ex. 10.* The Jablonskes' tax returns show that this land was farmed and deductions were made and income declared pursuant to the Jablonskes' renting the land to a local farmer who paid them rent. Not only does this show a business pursuit as it was an ongoing income producer for the Jablonskes and provided tax deductions, it is clear evidence that this land was used for farming and thus excluded from coverage under the Policy's "vacant land" exclusion for land that is farmed or ranched.

The customary use in this case was farming -- it had been used that way for all the years that the Jablonskes owned the property and even prior to their ownership. Relying upon *Couch on Insurance*, the District Court properly found that South Oaks could not be transformed from its customary use as farmland into vacant land just by a stated claim to cease the farming. This is especially true when South Oaks had never been vacant land from the first day the Jablonskes purchased South Oaks and the first

day Metropolitan insured the Jablonskes. The District Court was correct in determining that this land “was not unused and in its natural state” given the ongoing farming enterprise along with the installation of the sewer, water, curb boxes, and the storm sewer outlet. It is unreasonable for Appellants to suggest that the land was used for farming through harvesting of 2001 and not covered under the Policy for all those years, but then magically transformed into “vacant land” covered under the Policy for the relatively few months before groundbreaking occurred on the development or until the Jablonskes sold the land.

Not only was South Oaks uncovered farmland under the Policy, it was also not “vacant” within the meaning of the Policy. Courts that have looked at when land is no longer considered vacant within the meaning of a homeowners’ policy are instructive. A California court held that construction of a large earthen dam changed the nature of the land from vacant to occupied under the terms of a homeowners’ liability insurance policy. *See Bianchi v. Westfield Ins. Co.*, 191 Cal. App. 3rd 287, 236 Cal. Rptr. 343 (4th Dist. 1987). In that case the insured had built the dam on his property with the intent of providing future irrigation for an orchard he was contemplating. *Id.* at 290. Notably the cause of the damage in question was the bursting of the dam upon heavy rains and the corresponding water flooding adjacent properties. *Id.* at 293. “Beneficial use or improvement of untenanted land renders it nonvacant, particularly if the use has accompanied the introduction of artificial structures.” *Id.*

One of the factors in determining the vacancy at issue in “vacant land” is the absence of inanimate objects. *See O’Conner*, 352 So.2d at 1246. This can be

distinguished from the issue of occupancy and what constitutes unoccupied within the meaning of an insurance policy -- the absence of animate objects. *Id.* In *O'Conner*, the court rejected the idea that the road on the insured's premises was vacant for purposes of liability given that it was intended to provide access to many substantially improved lots that were being constructed. *Id.* *O'Conner* went further and said it was necessary to interpret the phrase "vacant land" in the context of the case with a view toward the character of the risks assumed by the insurer. *Id.* The court noted that the road was serving a number of improved lots that had been subdivided and sold by the insured. *Id.* Such land was not vacant. *See also Foret v. Louisiana Farm Bureau Cas. Ins. Co.*, 582 So.2d 989, 990-91 (La. Ct. App. 1st Cir. 1991) (land was no longer vacant because insured was in the process of affixing a mobile home on the property).

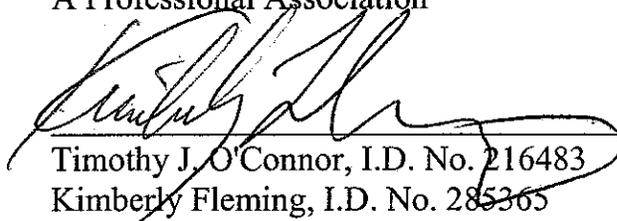
It is undisputed that South Oaks was an active farming enterprise for all the years before the Senko accident. As well, there is no question that the Jablonskes were also in the process of developing the land. In addition to all the administrative action this involved in terms of working with the city, engineers, other construction companies, and publicity for the development, the Jablonskes also made improvements on South Oaks including installation of sewer and water lines and curb boxes for future hook-ups, as well as the storm sewer outlet and the leveling of the area. These activities along with the farming rendered this land "not vacant" for purposes of coverage for Senko's injuries under the Jablonskes' Policy. The District Court properly found that the Senko's claims against the Jablonskes occurred on land that was not vacant and therefore not covered by the Policy and this Court should affirm.

CONCLUSION

For the foregoing reasons, Metropolitan respectfully asks this Court to affirm the District Court and determine that Metropolitan owed no duty to defend or indemnify the Jablonskes.

Dated: March 14, 2006

Lind, Jensen, Sullivan & Peterson
A Professional Association

A handwritten signature in black ink, appearing to read "Timothy J. O'Connor", is written over a horizontal line. The signature is fluid and cursive.

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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).