

NO. A07-0110

---

---

State of Minnesota  
**In Court of Appeals**

---

In the Marriage of:

Elaine Irene Lee,  
*Petitioner-Respondent,*

vs.

Raymond Michael Lee,  
*Appellant.*

---

**APPELLANT'S REPLY BRIEF**

---

Timothy W.J. Dunn (#24910)  
1150 US Bank Center  
101 East Fifth Street  
St. Paul, MN 55101-1808  
(651) 297-8484

*Attorneys for Appellant*

ROBERT L. WEINER & ASSOCIATES  
Robert L. Weiner (#128430)  
701 Fourth Avenue South, Suite 500  
Minneapolis, MN 55415  
(612) 337-9585

*Attorney for Respondent*

TABLE OF CONTENTS

TABLE OF CONTENTS .....	i,ii
TABLE OF AUTHORITIES .....	iii
ARGUMENT .....	
<b>I. THE CLAIM OF THE APPELLANT THAT NO AFFIDAVIT WAS SERVED AND FILED WITH RESPONDENT’S AUGUST 8, 2006 MOTION IS FACTUALLY ACCURATE AND SUPPORT BY THE WASHINGTON COUNTY DISTRICT COURT ACTIVITY RECORD. ....</b>	<b>1-2</b>
<b>II. THE RESPONDENT IS FACTUALLY IN ERROR WHEN SHE ARGUES IN HER BRIEF THAT THE COURT CAN DETERMINE THE APPELLANT’S NON-MARITAL INCOME FROM HIS PENSIONS BY MERELY SUBTRACTING FROM HIS TOTAL AMOUNT OF PENSION RECEIPTS THE AMOUNTS RESPONDENT RECEIVES .....</b>	<b>2-6</b>
<b>III. THE DISTRICT COURT ERRED NOT ONLY IN THE DETERMINATION OF INCOME BUT IN DETERMINING EXPENSES AND NEEDS OF THE PARTIES .....</b>	<b>6-8</b>
<b>IV. SPLITTING THE DETERMINED APPELLANT’S BUDGET “EXCESS” TO MORE THAN MEET THE RESPONDENT’S DETERMINED BUDGET “SHORTFALL” IS NOT A LEGAL NOR ACCEPTABLE COURT PRACTICE IN DETERMINING THE AMOUNT OF SPOUSAL MAINTENANCE .....</b>	<b>8-10</b>
<b>V. THE COURT ERRED OR ABUSED ITS DISCRETION IN DETERMINING THAT THE RESPONDENT WAS IN NEED OF THE SECURITY OF A LIFE INSURANCE POLICY TO SECURE THE PAYMENT OF THE ORDERED SPOUSAL MAINTENANCE. ....</b>	<b>11-12</b>
<b>VI. THE COURT ERRED IN ITS DETERMINATION OF THE DATE OF THE RETROACTIVE REDUCTION IN SPOUSAL MAINTENANCE SETTING THAT DATE AS MAY 1, 2006. ....</b>	<b>12-13</b>

**VII. THE COURT RIGHTFULLY REJECTED THE RESPONDENT'S CLAIM FOR EITHER NEED BASED OR CONDUCT BASED ATTORNEY'S FEES INCURRED IN CONNECTION WITH APPELLANT'S SUCCESSFUL MOTION TO REDUCE SPOUSAL MAINTENANCE** .....13-14

**CONCLUSION** ..... 14-16

**APPENDIX**

Washington County Activity Record	Reply Brief Appendix p. 1
Affidavit of Robert Weiner	Reply Brief Appendix pp. 2-3
Exhibit 7 from Robert Weiner's Affidavit	Reply Brief Appendix pp.4-11
Original Judgment and Decree	Reply Brief Appendix pp12-22

TABLE OF AUTHORITIES

CASES:

Minnesota State Court

	Page
<i>Bollenbach v. Bollenbach</i> , 175 N.W. 2 <sup>nd</sup> 155 (Minn. 1970).....	6
<i>Galles v. Gales</i> , 553 N.W. 2d 416 (Minn. 1996).....	13
<i>Kemp v. Kemp</i> 608 N.W. 2d 916 (Minn. Ct. App. 2000).....	6
<i>Kitchar v. Kitchar</i> , 553 N.W. 2d 97 (Minn. App. 1996).....	14
<i>Kruschel v. Kruschel</i> 419 N.W.2d 119 (Minn.App. 1988).....	3,5
<i>Lyon vs. Lyon</i> , 439 N.W. 2d 18 (Minn. 1989).....	10
<i>Redmond v. Redmond</i> , 594 N.W. 2d 272 (Minn App. 1999).....	14
<i>Richards v. Richards</i> 472 N.W. 2d 162,165,166 (Minn. App. 1991).....	5
<i>Walker v. Walker</i> 553 N.W. 2d 90 (Minn. Ct. App. 1996).....	3

Statutes:

Minn. Stat. § 518.552 (2006).....	6, 8, 9
-----------------------------------	---------

I. THE CLAIM OF THE APPELLANT THAT NO AFFIDAVIT WAS SERVED AND FILED WITH RESPONDENT'S AUGUST 8, 2006 MOTION IS FACTUALLY ACCURATE AND SUPPORT BY THE WASHINGTON COUNTY DISTRICT COURT ACTIVITY RECORD.

The Respondent states in her brief that the Appellant is factually inaccurate when he states in his brief that there was no affidavit served and filed with her August 8, 2006 Responsive Motion. The Respondent attaches in her appendix the affidavit that was supposedly served and filed (Respondent's Appendix pages 10 to 15). The fact of the matter is that this affidavit of Elaine Lee was *never* served and was for the first time seen when the Respondent's brief was reviewed. This is *verified* because this affidavit was *never* filed with the Washington County District Court Administrator's office either. Appellant is attaching as Reply Brief Appendix p. 1 a copy of a page of the Washington County District Court's filing activity page, a Court Record. The Court's attention is directed to the enter on 08-08-06 that indicated the fax filing of the Notice of Responsive Motion and Motion of Petitioner Elaine I. Lee. There is a clerk's parenthetical notation that states "DID NOT RECEIVE AFFIDAVIT OF ELAINE I. LEE". In the entries following this entry up until the time that this matter was taken under advisement the affidavit of Elaine I Lee as referred to in Respondent's brief was *never* filed! If the Court reviews the District Court's file when the file is transmitted to the Court it will not find that

affidavit in the file because it was *never* filed.

Again, the late filings and the non-filing are factual in nature in all respect. What is very egregious and unfair is the fact that the District Court failed to allow any time whatsoever after the hearing for Appellant to at least respond to the late filings of the Attorney's Affidavit for fees and the Sealed Financial Documents even through counsel requested to do so.

II. THE RESPONDENT IS FACTUALLY IN ERROR WHEN SHE ARGUES IN HER BRIEF THAT THE COURT CAN DETERMINE THE APPELLANT'S NON-MARITAL INCOME FROM HIS PENSIONS BY MERELY SUBTRACTING FROM HIS TOTAL AMOUNT OF PENSION RECEIPTS THE AMOUNTS RESPONDENT RECEIVES.

The Respondent states in her brief that "...Appellant's marital share at the time of the divorce is known simply by looking at what Respondent receives. Subtracting that amount from his total pension receipts, yields his non-marital share."(Respondent's brief page 10). That statement is factually incorrect. The reason that it is in error is because the Appellant had 9 years and 2 months of *pre-marital* earned pension time as an electrician from June 13, 1960 (his start in the trade) to September 4, 1968, the date of the parties' marriage. The fact that the Appellant had pre-marital earned pension time in all of his pensions was *very known* to Respondent and Respondent's counsel. The Respondent's counsel in his own affidavit in this matter, on two separate occasions, stated to the court that the

Appellant started earning his pension as a union electrician in the early 1960's (Reply Brief Appendix pp. 2-3) and in his affidavit of January 23, 2004 the Respondent's counsel attaches as exhibits 7 and 8 Appellant's itemized work history, which shows that the Appellant started his pension time on June 13, 1960. (Exhibit 7 is attached as Reply Brief Appendix pp. 4-11).

The Appellant was awarded these 9 years and 2 months of his pre-marital pension time in the original Judgement and Decree *as a property award* ( See Reply Brief Appendix p. 12-26; Judgment and Decree Finding No. 21 divided only the pension accumulated during the marriage, from September 14, 1968 through the date of the Judgment and Decree; and, in her brief Respondent's Appendix on page 6 the Court divides only the "marital portion" of the omitted pensions). The 9 yrs and 2 months of the Appellant's pension after the divorce is the Appellant's personal property and not income (See: *Kruschel v. Kruschel* 419 N.W.2d 119 (Minn.App. 1988) and *Walker v. Walker* 553 N.W. 2d 90 (Minn. Ct. App. 1996)) and can not be treated as income as the Respondent suggests in her brief. When the Court subtracted the amount Respondent receives in pension from the total amount of the pension received by the Appellant it is treating the 9 years and 2 months of property awarded to the Appellant as income. The Court must separate the 9 years and 2 months of premarital interest as it did the ½ of the pensions awarded to the

Appellant in the Judgment and Decree that was earned during the marriage. There is no value ever assigned to the pre-marital part of the pensions in this matter but the Court can not forget that it is not income and redivide it as it did in the November 16, 2006 and as the Respondent does it her brief. The simple subtraction of the Respondent's pension amounts she receives *does not* yield just the Appellant's non-marital *increase* amount as suggested by Respondent in her brief.

The Respondent also claims in her brief that "Appellant claims that all of his pension income is excluded from consideration for spousal maintenance purposes because it was divided as personal property at the time of the divorce."

(Respondent's brief page 9). This is a misstatement of, or a misreading of, the Appellant's position as contained in Appellant's brief.

The Appellant's position on including *any* part or portion of the pensions received by the Appellant in the determination of spousal maintenance is that the District Court erred in including any part or portion of Appellant's *present monthly* pension amounts because the Appellant had not yet received *all* of his pensions *marital and pre-marital* that were determined to be personal property and were split at the time of the Judgment and Decree by the date of the Court Order now being appealed. The case law is clear that "*until* [Appellant] has received from the pension[s] an amount equivalent to [their] value[s] as determined in the original

property distribution” the pensions can not be included as income. (Emphasis added, *Kruschel v. Kruschel* 419 N.W.2d 119, 123 (Minn.App. 1988)). The District Court, in subtracting the monthly amounts received by the parties on a monthly basis to determine the non-marital portion of the monthly “pensions”, not only is error because it includes the *pre-marital* portion of the Appellant’s pension as income that already was awarded to him as personal property but it makes the monthly portions of the pensions it determined to be property and already divided in the Judgment and Decree *immediately available* before the entire value of the personal property portions of the Appellant’s pensions is distributed to him. The case law is clear that: “The purpose of *Kruschel* was to avoid a redistribution of property after the divorce became final. The court held that a pension awarded as property could not be invaded for maintenance until the owner received pension payments equal to the value of the asset at the time of the divorce. The court did not hold that income representing the appreciation of the pension after the divorce was *immediately available for maintenance*.” (Emphasis added *Richards v. Richards* 472 N.W. 2d 162,165,166 (Minn. App. 1991)).

The District Court erred in redividing the portions, marital and pre-marital, of the Appellant’s pensions awarded to him as personal property award in the Judgment and Decree and making this portion of his pension immediately available

on a monthly basis before he has obtained his full personal property award.

### III. THE DISTRICT COURT ERRED NOT ONLY IN THE DETERMINATION OF INCOME BUT IN DETERMINING EXPENSES AND NEEDS OF THE PARTIES.

The Respondent in her brief argues suppositions as to what the District Court “may” have done or thought in determining the parties’ expenses and adopting the 2004 expenses but that begs the question. What the District court is to do when, as in this case, it finds that there has been a substantial change in circumstances that makes the prior Order unreasonable and unfair, the trial court *must* make findings on the recipient spouse’s *present* needs and income so that her present needs, available present resources, and present income may be balanced against the obligor’s ability to pay from his earned income. ( See: *Kemp v. Kemp* 608 N.W. 2d 916 (Minn. Ct. App. 2000)). The key factor as is pointed out by the Minnesota Supreme Court is a showing of *need* and that even if one of the two statutory factors contained in Minn. Stat. § 518.552, subd. 1 (2006) is met, an award is *improper* if there is no showing of need for the award of spousal maintenance (See: *Lyon vs. Lyon*, 439 N.W. 2d 18 (Minn. 1989)). The Respondent never address her needs in her brief but relies on the *Bollenbach* decision (*Bollenbach v. Bollenbach* 175 N.W. 2d 155 (Minn. 1970) in saying that she is not just relegated to her bare necessities. However, as pointed out in *Bollenbach* the “...station in life of the parties prior to

the divorce...” is the measurement of the “life style”. The Appellant submits that the life style prior to the divorce is reflective in the original Judgment and Decree (Reply Brief Appendix pp. 12-26). The Respondent’s expenses and needs were found to be \$1,500.00 per month until July 31, 1993 and thereafter reduced to \$1,200.00 per month (See finding No. 28). The parties investments and equities were very minimal and each party basically was awarded 50% of the investments and equities. The life style was minimal at best.

It is also interesting to note that the Respondent did not mention the glaring error in the court’s order that alludes to the Appellant’s expenses not being his but he, his new wife’s and her children’s expenses. There are absolutely no documents, affidavits, nor argument presented to the Court in this matter that have *ever* referred to Appellant’s new wife’s “*children*” living with him or he paying expenses for his new wife or her “*children*” because the fact is he does not. Again, the fact is no other person resides with the Appellant and his new wife. Where the trial Court got the “fact” that the Appellant “makes no allowance for the presence of his new wife *and her children*”(Emphasis added) is a mystery and that conclusion and “fact” is against logic and the facts of the record and is in error and to base reject of the Appellant’s undisputed affidavits as to his expenses on this false basis is unjustifiable error. Secondly, it is interesting to note that Respondent makes no

attempt to legitimize or show this Court any support for her claimed expenses, be those 2004 or current claimed expenses.

IV. SPLITTING THE DETERMINED APPELLANT'S BUDGET "EXCESS" TO MORE THAN MEET THE RESPONDENT'S DETERMINED BUDGET "SHORTFALL" IS NOT A LEGAL NOR ACCEPTABLE COURT PRACTICE IN DETERMINING THE AMOUNT OF SPOUSAL MAINTENANCE.

The Respondent in her brief acknowledges that the District Court in this matter split the Appellant's determined budget "excess" to more than meet the Respondent's budget "shortfall" to determine the amount of spousal maintenance it awarded. I say more than meet the Respondent's budget "shortfall" because the awarded amount is in an amount that exceeds the Respondent's budget "shortfall". The Respondent acknowledges that there is statutory guidance as to "factors" that the Court should examine in determining an amount of spousal maintenance. Splitting the obligor's budget "excess" is not one of those factors contained in Minn. Stat. §518.552 Subd. 2.

Respondent indicates in her brief that the District Court need not make specific findings as to the statutory factors it used to determine spousal maintenance but then launches into speculation as to what factors or consideration that the Court "ostensibly" used to determine the amount of spousal maintenance. Such speculation would be avoided had the Court made specific findings as to the

statutory factors it used to determine that it would split the perceived budget “excess”.

The Respondent makes mention of three “factors” in her brief that she speculates the District Court “ostensibly” examined: 1. The parties life style prior to the dissolution; 2. The impact of the Appellant stopping to pay spousal maintenance; and, 3. The tax effect of spousal maintenance. First of all, as indicated above, the parties life style prior to the divorce is reflective in the original Judgment and Decree (Reply Brief Appendix pp. 8-22). The Respondent’s expenses and needs at that time were found to be \$1,500.00 per month until July 31, 1993 and thereafter reduced to \$1,200 00 per month (See finding No. 28). The parties’ investments and equities were very minimal and each party basically was awarded 50% of the investments and equities. The Appellant’s net monthly income at the time of the divorce was \$1,967.20 (See finding No. 19) and the Respondent’s net monthly income was \$98.31 per week (See Finding No. 26). It is submitted that the parties’ life style was minimally at best. These people are not the Rockefeller. The second factor listed was the “impact” of the Appellant stopping paying spousal maintenance. It is submitted that this is not a statutory factor contained in Minn. Stat. §518.552 Subd. 2. and it is further submitted that there is no reliable evidence that the stopping of paying spousal maintenance had any impact other than financial

on the Respondent. The financial impact was thereafter negated when all the spousal maintenance was paid and there exists no arrears today. Thirdly, the “tax impact” of spousal maintenance is not a statutory factor. It is submitted that here is no reliable evidence submitted in this matter as to any tax impact that spousal maintenance has upon the Respondent let alone considered by the Court. It is submitted that it would be surprising if the Respondent has any tax liability on the receipt of spousal maintenance at her income level in retirement, however, such could be explored upon remand.

The glaring missing main factor, at least to the Court in *Lyon vs. Lyon*, 439 N.W. 2d 18 (Minn. 1989), that is not even argued by Respondent or even touched upon by Respondent in her brief is her “*needs*”. The case law is very clear that an award of spousal maintenance is given in principle to have the “*needs*” of the spouse in need of the award met. If there is no need shown there should be no award of spousal maintenance despite any “surplus” of income that the other spouse’s may have. (See: *Lyon vs. Lyon*, 439 N.W. 2d 18 (Minn. 1989)). Appellant submits that the Respondent failure to mention her needs in her brief is because the needs were not shown at the District Court level, were never substantiated, and have been avoided through this matter.

V. THE COURT ERRED OR ABUSED ITS DISCRETION IN DETERMINING THAT THE RESPONDENT WAS IN NEED OF THE SECURITY OF A LIFE INSURANCE POLICY TO SECURE THE PAYMENT OF THE ORDERED SPOUSAL MAINTENANCE.

The Respondent in her brief did not dispute the fact that the Respondent has the benefit of and the security of federal law, eg. Social Security that will insure her payment of an amount equal to, if not more, than the amount of the presently ordered spousal maintenance. Upon the death of the Appellant, and because the parties were married for more than 10 years and the Appellant is 60 years of age or older, and the Respondent is over 62 years of age Respondent can *immediately* start drawing Appellant's amount of Social Security instead of her amount which amounts to a difference of \$815.00 per month (\$1,555.00 - \$740.00; See the Appellant's original brief's Appendix p.88) This is \$115.00 *more* a month than the amount of the monthly spousal maintenance awarded in the November 16, 2006 Order. The only argument that is given by Respondent is that the law may change and therefore the Court should not consider the present law. It is submitted that the law is not now speculative and if changed the Respondent can go back to Court to revive her request for security.

The Respondent argues in her brief that the Appellant could have asked to have this matter reconsidered and did not. It is submitted that the Appellant asked

for time to submit responses to the late filed motion and papers and was denied that opportunity how does one expect the reconsideration process would be any different when initially not afforded the opportunity to respond.

The issue of the costs of such insurance was never addressed by the Court in either ordering the same or the impact on the monthly cost of insurance on the determined budget “excess” it found that the Appellant had based upon his 2004 expenses nor was the same addressed by the Respondent in her brief. Not to take the cost of this insurance, let alone its availability to a 65 year old man in poor health, into consideration is inequitable and unfair.

VI. THE COURT ERRED IN ITS DETERMINATION OF THE DATE OF THE RETROACTIVE REDUCTION IN SPOUSAL MAINTENANCE SETTING THAT DATE AS MAY 1, 2006.

Again, the date chosen by the Court of May 1, 2006 for the retroactive application of the ordered reduction in spousal maintenance has no significance to any event or procedures in the pending case and was arbitrarily and capriciously set by the Court. The Respondent argues that date was probably chosen by the court to “...mitigate the financial burden than can result from retroactive modification” (See Respondent’s Brief p. 17). The Respondent’s choice of words is enlightening. The choice of the words “can result” shows that there is and was no *actual* financial impact suffered by the Respondent or else it would have been argued that there was

actual impact.

The Appellant submit that the date of the retroactivity of the reduction should be July 11, 2005 the date that the appellant's Motion was served and filed. The circumstances warranting the reduction existed back on July 11, 2005 and this is the date that should have been used by the Court for the date of the commencement of the new amount of spousal maintenance and not May 1, 2006. The Respondent did not in her brief dispute the fact that the circumstances that warranted the reduction order were present back at the time of the service and filing of the motion. The facts are clear that the Appellant retired and served his Motion back on July 11, 2005 and Appellant submits that any order in this matter for reduction or termination should be retroactive to July 11, 2005 and there is no argument presented by the Respondent that bears any weight to the contrary.

VII. THE COURT RIGHTFULLY REJECTED THE RESPONDENT'S CLAIM FOR EITHER NEED BASED OR CONDUCT BASED ATTORNEY'S FEES INCURRED IN CONNECTION WITH APPELLANT'S SUCCESSFUL MOTION TO REDUCE SPOUSAL MAINTENANCE.

Conduct based fees are not appropriate when the party's conduct in the litigation is not unreasonable. Conduct based fees were denied in *Gales v. Gales*, 553 N.W.2d 416, (Minn. 1996) because the arguments of Appellant were neither frivolous nor asserted in bad faith. It is submitted that the Appellant's actions in

bringing his motion to reduce his spousal maintenance was neither frivolous nor in bad faith. In *Redmond v. Redmond*, 594 N.W.2d 272 (Minn.App.1999) conduct based fees were appropriate because Mr. Redmond's actions were duplicitous and disingenuous and delayed the property division, which lengthened the proceeding. This is not the facts of this case.

In *Kitchar v. Kitchar*, 553 N.W.2d 97 (Minn.App. 1996), conduct based fees were denied by the trial court and the Appellate Court affirmed the District Court's denial of conduct-based attorney's fees saying that the denial was not an abuse of discretion. This case is very similar. It is submitted that conduct-based attorney's fees are best determined by the judicial officer that was involved in the case. The District Court found no conduct that warranted the award of fees.

### CONCLUSION

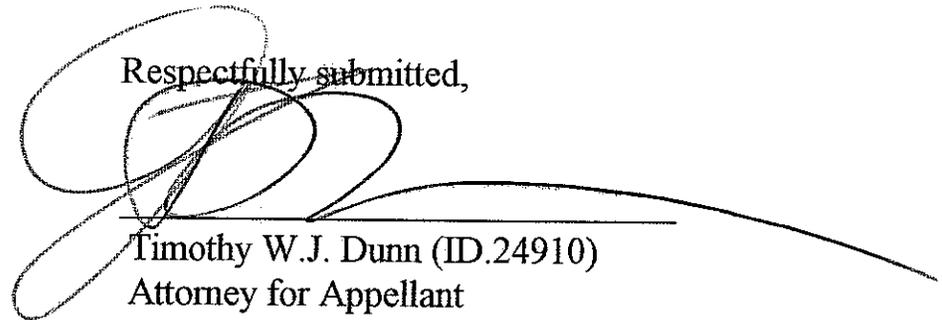
The conclusion in this Reply Brief is the same as which was originally filed. It is submitted that: the district court abused its discretion in allowing the Respondent's August 11, 2006 dilatory and late filing in violation of the requirements of the Rules of General Practice for Family Court and erred in its discretion not to allow Appellant time for a written response; the district court erred as a matter of fact and law in the determination of the Appellant's earned income in including the Appellant's pensions as income before the Appellant has received all

of the pension that was awarded to him as property in the dissolution; the Court erred as a matter of fact and law in disregarding the Appellant's unrebutted affidavits and documentation to establish the parties' 2006 ("present") expenses and erred by adopting the parties' 2004 finding as to the parties' expenses as the parties' 2006 ("present") expenses; the Court erred as a matter of fact and law and was arbitrary, in "balancing" the parties surpluses and shortages in determining the "reduced" amount of spousal maintenance; the Court erred as a matter of fact and law (or abused discretion) in determining that the Respondent was in need of security for the payment of the reduced amount of spousal maintenance by requiring a new requirement on Appellant to obtain a life insurance policy; the Court erred, and abused its discretion, in not obtaining information on cost of insurance and insurability of Appellant's life before requiring the Appellant to obtain \$75,000.00 of coverage; The Court erred as a matter of fact and law in not taking into consideration the cost of the ordered insurance into Appellant's living expenses; the Court erred as a matter of law in its determination of the date for the retroactive reduction of the Appellant's spousal maintenance and not using the date of the original Motion to reduced; The Court erred as a matter of law and fact and abused its discretion in awarding conduct based attorney's fees to Respondent for collect of the three judgements already awarded in this matter.

The Appellant requests that this Court determine, that as a matter of law, all of Appellant's pensions currently received by Appellant are previously awarded property settlement and not income, and, as such, the Appellant's spousal maintenance obligation should have been terminated. The Appellant also requests that this Court reverse the district court's order that orders the Appellant to obtain a \$75,000.00 life insurance policy and to reverse the district court's award of the conduct based attorney's fees.

Alternatively, the Appellant requests this Court to remand to the district court with instructions to determine of the parties' actual 2006 expenses and 2006 incomes without the inclusion of the Appellant's previously awarded personal property.

Respectfully submitted,

A large, stylized handwritten signature in black ink, consisting of several overlapping loops and a long horizontal flourish extending to the right.

Timothy W.J. Dunn (ID.24910)  
Attorney for Appellant  
1150 US Bank Center  
101 East 5<sup>th</sup> Street  
St. Paul, MN. 55101-1808  
(651) 297-8484