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State of Minnesota

In Supreme Court

MidCountry Bank, f/k/a First Federal fsb,

Respondent,

v.

Case No.: A08-0534

Frederick C. Krueger and Nancy Krueger, Cherolyn A. Hinshaw, PHH Home Loans, LLC, d/b/a Burnet Home Loans, John Doe, Mary Rowe, and ABC Corporation,

Appellants

REPLY BRIEF OF APPELLANTS CHEROLYN A. HINSHAW AND PHH HOME LOANS, LLC

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INTRODUCTION

Minnesota's Recording Act defines when recorded instruments provide constructive notice to subsequent purchasers, stating: "[t]he record . . . of any instrument ***properly recorded*** shall be taken and deemed notice to parties." Minn. Stat. § 507.32 (emphasis added). Respondent MidCountry Bank ("MidCountry") argues that its mortgage provided constructive notice because it received a date-and-time stamp and because the document number assigned to the mortgage appeared in a grantor/grantee name search of the county's TriMin unified indexing system. But MidCountry's argument fails under well established Minnesota law. "The [grantor's and grantee's] reception books are intended to be a tolerably complete index to the records, rendering the investigation of titles comparatively easy." *Mapes v. Bd. of Comm'rs of Olmsted County*, 11 Minn. 367 (1866). Accordingly, a grantor's and grantee's reception index is required to identify "the particular tract of land" encumbered by an instrument. *Id.* Scott County's TriMin indexing system did not comply with the "where situated" requirement of Minn. Stat. §§ 386.03, 386.04 and 386.05 because—as a result of a recording error—it failed to identify the Hinshaw Property as a "particular tract of land" encumbered by the MidCountry Mortgage. This was true regardless of whether one examined the TriMin indexing system by grantor or grantee name, by legal description, or by Document Number Inquiry. Because the MidCountry Mortgage was not "properly recorded," Hinshaw and her mortgagee PHH Home Loans ("PHH") took the Hinshaw Property with no constructive notice of—and thus not subject to—the MidCountry Mortgage.

ARGUMENT

I. A subsequent purchaser may be charged with constructive notice of an instrument only when the index makes the requisite reference to the legal description of the property affected by the instrument.

Subsequent purchasers acquire property with constructive notice of any "properly recorded" instrument. Minn. Stat. § 507.32. As this Court plainly held in *Latourell v. Hobart*, "a party . . . is, ***where the index makes the requisite reference***, affected with notice of any facts which either [the record book or the index book] contains with respect to the title of his grantor." 160 N.W. 259, 261 (Minn. 1916) (emphasis added). In *Mapes*, this Court specified the "requisite reference" necessary to satisfy the "where situated" requirement of Minn. Stat. §§ 386.03, 386.04, and 386.05:

> We think the column headed "where situated" was designed to contain a description of the land, so that any person making a search, could ascertain from the [grantor's and grantee's] reception books whether a grantor had made any conveyance of the particular tract of land, the title to which the searcher was interested in examining. The [grantor's and grantee's] reception books are intended to be a tolerably complete index to the records, rendering the investigation of titles comparatively easy.

11 Minn. 367 (1866). MidCountry, however, ignores the critical language from both *Latourell* and *Mapes*.[1] Instead, it points to *Latourell* to argue that a subsequent purchaser has constructive notice of the "entire record," which in MidCountry's view[2] includes *every fact* appearing in the complete text of *every recorded instrument*, as long as *any index* makes *any reference*—accurate or not—to an instrument. (Resp. Br. 23–25.) In

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[1] Notably, *Mapes* is prominently cited in *Gaston v. Merriam*, 22 N.W. 614 (Minn. 1885), a case relied on by MidCountry.

[2] The Court of Appeals also adopted MidCountry's erroneous reading of *Latourell*. 762 N.W.2d 284 (Minn. Ct. App. 2009).

addition to the fact that this is not the law, the adoption of MidCountry's position would defeat the primary purpose of the recording system: to provide notice of interests affecting real estate, thus "protect[ing] persons who buy real estate in reliance upon the record." *Miller v. Hennen*, 438 N.W.2d 366, 369 (Minn. 1989).

As Hinshaw and PHH have previously shown, the burden on "persons who buy real estate in reliance upon the record" would increase dramatically under the outcome MidCountry urges. (App. Br. 32.) Specifically, it would force subsequent purchasers to read the full text of every instrument appearing under the name of their grantor—or under the name of anyone in their chain of title—even if the grantor is a large bank or home builder with many thousands of instruments attributed to its name in county records. (App. Br. 32.) Avoiding the reality that its argument would create, MidCountry claims that the Court cannot consider these facts because it may not take judicial notice of property records. (Resp. Br. 31 n.10.)

The case MidCountry cites for this notion, *Williams v. Langevin*, 41 N.W. 936 (Minn. 1889), however, predates the Minnesota Rules of Evidence by nearly 100 years and does not curtail the Court's ability under Rule 201 to take judicial notice of: (a) generally known facts—such as the fact that large banks and home builders own and sell myriad single-family homes; or (b) facts capable of accurate and ready determination, such as the fact that Hennepin and Washington Counties' grantor indexes reference more than 10,000 recorded instruments each for Centex Homes, Pulte Homes, and Wells Fargo Bank. Moreover, unlike in *Williams*, the Court here is not called upon to take judicial notice of a specific instrument or record, but merely of commonly known current affairs

and the large volume of resulting index records. Accordingly, *Williams* is inapposite, and the Court can and should consider the broad effect that a decision in this case will have on the many people who purchase real property from banks, home builders, or other grantors with common names.

II. The district court correctly recognized that the Scott County Recorder's error in recording the MidCountry Mortgage affected the entire TriMin indexing system.

MidCountry acknowledges with its brief that Scott County's TriMin electronic recording system operates from a single, unified database that can be searched by document number, grantor or grantee, or legal description.[3] (Resp. Br. 7.) MidCountry also admits the county recorder's failure to record the Hinshaw Property as encumbered by the MidCountry Mortgage in what MidCountry calls the "tract index information." (*Id.* at 8.) At the same time, however, MidCountry ignores the fact that because the TriMin is a unified indexing system, all searches—by grantor, grantee, or tract—draw from one database, and that mis-indexed information therefore infects all search results. Similarly, MidCountry tries to hide the fact that, due to the recorder's error, the Hinshaw Property did not appear to be encumbered by the mortgage *regardless* of the method used to try to locate the information in the TriMin indexing system. (*Id* at 8–9.)

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[3] MidCountry also asserts, however, that a Document Number Inquiry—the TriMin screen that displays details related to a document number—does not contain legal descriptions. (Resp. Br. 9.) This is not accurate: the TriMin indexing system's Document Number Inquiry includes the legal descriptions on its F8 screen, which plainly displays "Document Number Inquiry **** Legal Descriptions ****." (A32–33.)

MidCountry persists in using terminology throughout its brief that obscures the unified nature of the TriMin indexing system, referring to "the tract index" and "the grantor-grantee index" as if they were distinct indexes with distinct information. (*Id.* at 1, 3, 8, 11, 17, 18, 19, 20, 23, 24, 25, 26, 26, 27, 29, 32.) MidCountry uses these terms to distort the holding of the district court, claiming that it granted summary judgment to Hinshaw and PHH because it concluded that the MidCountry Mortgage "was not properly indexed *in the tract index* against [the Hinshaw Property]." (*Id.* at 3, emphasis added.) The district court, however, rejected MidCountry's argument that the tract index was incomplete but the grantor's and grantee's reception index was complete. Specifically, the court noted: "Ms. Javens and Ms. Jennrich both testified a search of the document number record for the MidCountry Bank Mortgage *appearing in the Krueger Grantor/Grantee Index* showed that the mortgage only encumbered Parcels 1 and 2, not the Hinshaw property."[4] (Add. 5, emphasis added.) Thus, the court simply held that "[t]here was no actual, implied or constructive notice of the MidCountry Bank mortgage because it was not recorded against the Hinshaw property." (Add. 6.)

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[4] In so holding, the district court correctly recognized what MidCountry refuses to acknowledge: if searching the TriMin system by grantor or grantee, the *only* way to view the indexed legal descriptions affected by an instrument appearing in the search results is to mark an "X" next to a document in order to view the Document Number Inquiry. (*See* A30.) In the case of the MidCountry Mortgage, it is not disputed that the Document Number Inquiry referenced only the Krueger Properties and *not* the Hinshaw Property. (A32–33.)

III. The "where situated" provisions of the recording statutes require the county recorder to include in the county indexes the legal descriptions of the property affected by an instrument.

A. Hinshaw's and PHH's argument was raised below and is not waived.

Hinshaw and PHH have consistently argued throughout this litigation that Scott County's unified indexing system did not meet the "where situated" requirement for the recording of the MidCountry Mortgage. With their summary judgment memorandum to the district court, for example, Hinshaw and PHH stated:

> Chapter 386 of the Minnesota Statute establishes the requirements placed on county recorders to ensure proper recording. Pursuant to Minn. Stat. § 386.04, Scott County's maintenance of a combined electronic numerical register and reception index (grantor/grantee index) requires it to include in its record "where the land is situated," that is, the legal description of the encumbered land. . . .
>
> In May 2006 when Hinshaw and PHH acquired their interests in the Property, the MidCountry Mortgage was not properly recorded, and Scott County official property records did not provide Hinshaw and PHH with constructive notice of the Mortgage. Pursuant to Minnesota Statutes Chapter 386, a proper record of a mortgage must identify the land which it encumbers. This must be apparent both from the numerical register/ reception index and from the tract index. M.S.A. §§ 386.04, 386.05.

(Hinshaw/PHH S.J. Br. 17.) Similarly, in their Court of Appeals brief, Hinshaw and PHH discussed how the MidCountry Mortgage failed to appear in any of the TriMin indexes against the Hinshaw Property (Hinshaw/PHH Ct. App. Br. 6–8), and argued that "a county recorder must ensure that recording indexes correctly identify 'where the [encumbered] land is situated." (*Id.* at 10, citing Minn. Stat. §§ 386.03, 386.04, 386.05.)

Hinshaw and PHH have thus consistently argued that, although a reference to where the land is situated is statutorily required, none of the search methods used to

access the TriMin indexing system—grantor/grantee name, legal description, or document number—revealed the MidCountry Mortgage as an encumbrance against the Hinshaw Property. As a result, MidCountry's waiver argument fails.[5] (Resp. Br. 18–20.)

B. Merely identifying "Belle Plaine" is insufficient to satisfy the "where situated" requirement of Minn. Stat. §§ 386.03, 386.04, and 386.05.

MidCountry is incorrect in asserting that the notation merely of "Belle Plaine" in the grantor's and grantee's reception index is sufficient to satisfy the "where situated" requirement of the recording statutes. This Court plainly held in *Mapes v. Bd of Comm'rs of Olmsted County* that "the column headed 'where situated' ***was designed to contain a description of the land***, so that any person making a search, could ascertain from the reception books whether a grantor had made any conveyance . . . of the ***particular tract of land*** [he] was interested in examining." 11 Minn. 367 (1866) (emphasis added). MidCountry's argument therefore fails: the grantor's and grantee's reception index was required to state the actual legal description of a tract of land—the Hinshaw Property—not just the general name of the municipality "Belle Plaine."

MidCountry cites *Gaston* for the notion that a legal description recorded in a property-records index might be "abbreviated." (Resp. Br. 20, citing *Gaston v. Merriam*, 22 N.W. 614, 617 (Minn. 1885).) In *Gaston*, a deed from decades earlier apparently

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[5] Moreover, it is MidCountry that now attempts to raise a new argument by asserting that the "where situated" requirement of §§ 386.03 and 386.04 is satisfied by a reference to "Belle Plaine." (Resp. Br. 20–23.) Because "parties are bound . . . by the arguments they make to the district court," MidCountry—which bears the burden of proof and *should have* raised the issue below—is precluded from now making this argument. *No. States Power Co. v. Gas Servs., Inc.*, 690 N.W.2d 362, 367 (Minn. Ct. App. 2004).

conveyed "the west half of the south-east quarter of section twenty-five, township twenty-nine (29) north, of range twenty-three (23) west." *Id.* at 615. The index entry under "Description," however, stated only "West half of South-east one-fourth of South-west one-fourth Section 25, Township 29, Range 23." *Id.* at 616. The Court cited generally the "duty to enter a description of the land conveyed" and stated that it was unnecessary to consider "[w]hether this description should be in full, in the exact words of the deed, or whether it might be abbreviated." *Id.* at 617. But contrary to MidCountry's claims, *Gaston* addressed neither the "where situated" recording requirement nor constructive notice. Because the deed itself had since been lost, the only issue was whether the allegedly abbreviated index entry "was proper evidence to be considered in determining what were the contents of the instrument." 22 N.W. at 617. Consequently, MidCountry may not rely on *Gaston* to assert that constructive notice was achieved with the notation of only "Belle Plaine" in the grantor's and grantee's reception index. (*See* A30–31.)

Similarly, the *Whitaker* case that MidCountry cites is inapposite. There, the statute in effect at the time specified the seven columns to be kept in the grantor's and grantee's reception book, one of which was headed "Where Situated." Gen. St. 1878, c. 8, § 177. Plaintiff argued that the words "see record" in an additional column headed "Description of Property" did not comply with the statute. Rejecting this argument, the Court stated, "in the form prescribed . . ., there is no provision for a column to be headed 'Description of Property' . . . . It was therefore of no consequence that under such a heading nothing appeared but the words 'See record.'" *Whitacre v. Martin*, 53 N.W. 806,

807 (Minn. 1892). MidCountry's discussion of this case is therefore misleading where it asserts that the "See record" entry was held to be "sufficient." (Resp. Br. 20.) *Whitaker* did not address the information required to be kept in the "Where Situated" column; instead, it merely found that an additional, non-required column did not affect the index's validity.

Finally, the vagueness of the "Belle Plaine" notation in Scott County's grantor's and grantee's reception index rendered the accuracy of the Document Number Inquiry and the tract search even more essential.[6] Because these indexes "furnish valuable assistance in making searches, [there could] be no entry more valuable or more important than that which was intended to describe the situation of the land conveyed." *Mapes*, 11 Minn. 367. Here, there is no dispute that the TriMin system's record of the MidCountry Mortgage—regardless of how accessed—failed to "describe the situation of the land conveyed" and showed it as encumbering only the Krueger Properties, not the Hinshaw Property. (A32–33.) And because the Krueger Properties, like the Hinshaw Property, are located in Belle Plaine, the reference to "Belle Plaine" alone on the face of the grantor's and grantee's reception index search did not remotely suggest that an additional parcel was missing from the results generated by other index searches. MidCountry is therefore incorrect that the notation of "Belle Plaine" alone in the grantor/grantee search results satisfied Minn. Stat. §§ 386.03 and 386.04.

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[6] Furthermore, Scott County contains both a city and a township of Belle Plaine, between which the index notation does not distinguish.

IV. A county recorder's endorsement does not establish proper recording.

A. Scott County Recorder Patricia Boeckman did not testify that her office's endorsement meant the MidCountry Mortgage was "properly recorded."

MidCountry misleadingly attempts to assert as fact that "Patricia Boeckman—the Scott County Recorder—testified during her deposition that [the county recorder's] stamps indicate that the Warranty Deed and MidCountry Mortgage were recorded as of May 19, 2004." (Resp. Br. 6, citing A27 at 107:19–108:23.) Again misleadingly, MidCountry claims that this deposition testimony "unequivocally states Ms. Boeckman's conclusion that the MidCountry Mortgage was recorded on May 19, 2004, when the recorder's endorsement was affixed to the document." (*Id.*) Boeckman's testimony does not contain such conclusions, however. In response to leading questions from MidCountry's counsel, Boeckman merely recites the types of information shown on a recorder's stamp: "the document number, whether it's abstract or torrens, . . . the date that it was brought in for recording and the time, the receipt number, and the filing fee for that document." (*Id.* at 107:23–108:1.) Ultimately, MidCountry's counsel asks Boeckman whether she can see from the face of the MidCountry Mortgage that it was recorded, to which she responds "Yes . . . [b]ecause it has my stamp in the upper right-hand corner with my name on there."[7] (A27 at 108:20–108:23.)

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[7] Significantly, in response to each question that attempted to prompt Boeckman to conclude that the MidCountry Mortgage was "recorded" or "properly recorded," counsel for Hinshaw and PHH objected that the question "calls for a legal conclusion." (A27 at 108:5–108:19.)

MidCountry also tellingly ignores Boeckman's plain testimony that, while the MidCountry Mortgage did receive a stamp, it was not properly recorded and indexed when Hinshaw bought her property. Boeckman testified about the "cloning" process that her office used to copy the legal descriptions from the deed to the Krueger Properties into the record for the MidCountry Mortgage. (A15 at 60:22 – A16 at 64:24.) Because that deed did not convey the Hinshaw Property, Boeckman testified, the MidCountry Mortgage was not indexed or recorded as an encumbrance against that property. (A16 at 64:14 – A18 at 69:25.) Boeckman stated that this recording error was not corrected until sometime after October 18, 2006—months after Hinshaw bought her property. (A18 at 69:1–69:25.) And as the district court notably points out:

> MidCountry Bank does not challenge the testimony by Ms. Boeckman, Ms. Javen [sic] and Ms. Jennrich that the MidCountry Bank Mortgage did not appear of record in the Scott County Recorder's Office as an encumbrance against the Hinshaw Property at the time Hinshaw and PHH took their interests in the property.

(Add. 6.)

B. Because indexing is part of the recording process, an instrument is not "properly recorded" until all recording and indexing statutes have been complied with.

"Recording" and "indexing" are not separate and distinct processes, as MidCountry asserts. (Resp. Br. 14.) Rather, the indexing of instruments affecting real estate is the chief element of the recording process. Notably, MidCountry fails to define what "recording" alone constitutes or to explain how it concludes that "recording" is different from "indexing." It first asserts that *recording* is complete the moment an instrument is stamped. (*Id.* at 13.) But then it goes on to assert that *recording* requires

the creation of a "suitable word for word record" of an instrument. (*Id.* at 14.) As MidCountry itself ultimately acknowledges, the stamping, indexing, and scanning of instruments are all part of a single recording process that occurs sometime after an instrument is delivered for recording. (*Id.* at 7–8.) In the case of Scott County, for example, the statutorily required information regarding grantors, grantees, document date, and legal description is indexed in the TriMin indexing system *after* a certification label is printed and affixed and *before* a scan of the instrument (the "word for word record") is made. (*Id.*) Accordingly, MidCountry may not claim that proper indexing under Chapter 386 is something different from proper recording.

Furthermore, MidCountry's argument that proper recording is accomplished merely by stamping an instrument undermines the fundamental purpose of recording acts: "to give notice to subsequent purchasers of the inconsistent outstanding rights of others." *Minn. Cent. R.R. Co. v MCI Telecomm. Corp.*, 595 N.W.2d 533, 538 (Minn. Ct. App. 1999) (citing *Telford v. Henrickson*, 139 N.W. 941, 943 (Minn. 1913)). No one but the holder of an instrument has notice that the instrument bears a recording stamp. Rather, it is the indexes that provide prospective purchasers with notice of the rights of others. This is precisely why an instrument is not "properly recorded" until the indexing requirements of Minn. Stat. §§ 386.03, 386.04, and 386.05 are met.

C. *Thomas v. Hanson* does not address proper recording.

MidCountry again cites *Thomas v. Hanson* for the proposition that a county recorder's endorsement conclusively establishes proper recording. (Resp. Br. 15–16.) The *Thomas* case, however, says nothing about proper recording and is simply not

instructive on the issues before the Court. In that case, the grantor had conveyed land in Toombs County to grantee Mendenhall in 1860, and then attempted to convey the same land to grantee Thomas in 1877. 61 N.W. 135 (Minn. 1894). In the interim, Toombs County became Andy Johnson County, was attached at times to Stearns County and to Douglas County for some purposes, and later became Wilkin County. *Id.* at 136–37. Additionally, the parties disputed whether Toombs County was ever legitimately formed, whether it had an official county recorder, and whether the records he maintained outside the county seat were valid. *Id.* Further, the records that did belong to Toombs County "were wholly destroyed by fire . . . some time in the year 1862." *Id.* at 136. The question before the Court was whether the earlier deed to Mendenhall prevailed over the later deed to Thomas, despite the many intervening circumstances.

The Court held in favor of the Mendenhall deed for various reasons that are irrelevant to this case. First, the Court held that the service and actions of the purported county recorder were valid. *Id.* This was because at the time, there were no officially appointed public officials of Toombs County. Second, the Court held that the "fact that the records of Toombs county may have been burned does not destroy their effect as constructive notice." *Id.* This holding makes sense in the unique context of the fire: had the recorded but later burned instruments not constituted constructive notice, every property owner in Toombs County would have lost the foundation for his or her title well after the fact, causing widespread injustice and chaos. In short, *Thomas* is inapposite.

V. Constructive notice hinges on proper recording, not on a "proper title examination."

A. The nature of the pre-purchase title search performed is irrelevant to whether an instrument provides constructive notice.

MidCountry repeatedly attacks the pre-purchase title examinations performed on behalf of Hinshaw and PHH as somehow falling short of an undefined "proper" or "reasonable" standard. (Resp. Br. 24, 26, 27, 30, 32.) But constructive notice exists only when an instrument has been "properly recorded." Minn. Stat. § 507.32. The determination of whether an instrument was "properly recorded," therefore, has nothing to do with the steps taken by a purchaser to verify title, or whether any such steps are taken at all. *Bailey v. Galpin*, 41 N.W. 1054, 1056 (Minn. 1889). Furthermore, even if a "proper" or "reasonable" title examination were the correct standard, MidCountry has presented no expert-opinion or other evidence as to what such an examination would entail. The Court should therefore reject MidCountry's attempt to shift the focus of the inquiry away from the errors admittedly made by the Scott County Recorder.

B. Title Standard 37 undermines MidCountry's claim that the record of its mortgage provided constructive notice to Hinshaw and PHH.

As MidCountry cites, Minnesota Title Standard No. 37 provides that when one instrument is recorded prior in time to another, earlier instrument that creates its source of title, the former does not constitute constructive notice of its contents. (Resp. Br. 30.) Title Standard No. 37 therefore establishes that, when an instrument does not appear in property-records indexes in the location where it should appear—though it does appear *somewhere*—it does not constitute constructive notice to the world. Thus, the plain

language of this title standard relied upon by MidCountry lends yet further support to the position of Hinshaw and PHH, that the MidCountry Mortgage was not "properly recorded" because it did not appear in any of the statutorily required indexes as an encumbrance against the Hinshaw Property.

VI. Minnesota law and sound public policy dictate that those seeking to record an instrument bear the risk of loss resulting from recording errors.

The risk of loss resulting from a mis-recorded instrument must ultimately be borne either by unknowing subsequent purchasers such as Hinshaw and PHH or by knowing recording parties such as MidCountry. While MidCountry complains that grantees would incur additional costs if that risk were placed on them, it ignores the undeniable fact that those costs are vastly lower if borne by recording parties than if borne by subsequent purchasers. In other words, MidCountry is simply the cheapest cost-avoider because it was the only party with the knowledge and ability to correct the problem. *See Weckerly v. Abear*, 256 N.W.2d 79, 81–82 (Minn. 1977) (citing, *inter alia*, Guido Calabresi, The Cost of Accidents (1970)) (noting that "a sound social policy" must underlie doctrines applied by the Court and discussing most efficient allocation of risks); *see also* 1 *Patton & Palomar on Land Titles* § 64 (2003). Consistent with this policy, Minnesota law has long held that "one who seeks a benefit from the recording laws must incur all the risks of the failure to have his papers spread upon the record in proper form." *Bailey v. Galpin*, 41 N.W. 1054, 1056 (Minn. 1889). As a result, this Court should hold that MidCountry and other recording parties are best situated to prevent losses resulting from recording errors by taking simple steps to verify the proper recording of their instruments.

CONCLUSION

For the reasons stated above and in their principal brief, Appellants Hinshaw and PHH respectfully request that the Court reverse the decision of the Court of Appeals and reinstate the summary-judgment rulings of the district court.

DATED: August 10, 2009

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CERTIFICATE OF WORD COUNT COMPLIANCE

I, Christopher R. Grote, hereby certify that this brief complies with the requirements of Minn. R. Civ. App. P. 132.01. This brief was prepared using Microsoft Word 2003 and contains 4,326 words, according to the software's word-count function.

_____

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