

NO. A08-1764

State of Minnesota
In Supreme Court

Loren J. Zutz and Elden J. Elseth,

Appellants,

vs.

John Nelson and Arlyn Stroble,

Respondents.

RESPONDENTS' REPLY BRIEF

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ZUTZ AND ELSETH V. NELSON AND STROBLE
CASE NO. A08-1764

BRIEF OF RESPONDENTS

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STATEMENT OF THE ISSUES

1. Was the District Court and Court of Appeals correct in holding that Respondents Nelson and Stroble, as Watershed District Board Members, have an absolute privilege to question the official conduct of other Board Members at a public meeting, in their roles as Board Members, even if the statements could be defamatory.

RULING BELOW:

The District Court and Court of Appeals held that the absolute privilege accorded to government officials applied to the Respondents.

APPOSITE CASES:

Carradine v. State, 511 N.W.2d 733 (Minn. 1992)
Johnson v. Dirkswager, 315 N.W.2d 215 (Minn. 1982)

2. If the District Court and Court of Appeals did err when finding that Respondents have an absolute privilege, can this Court uphold dismissal on the other grounds argued at the District Court and Court of Appeals?

RULING BELOW:

The District Court and Court of Appeals did not make a ruling.

APPOSITE CASES:

Katz v. Katz, 408 N.W.2d 835, 840 (Minn. 1987)

STATEMENT OF THE CASE

On August 17, 2007, Appellants Loren J. Zutz and Elden J. Elseth sued Respondents John Nelson and Arlyn Stroble alleging defamation, slander, negligent defamation per se, and seeking declaratory judgment in Marshall County, Minnesota. The claims were based on statements made by Respondents at a public meeting of the Middle Snake Tamarac Rivers Watershed District on June 18, 2007.

Respondents moved to dismiss under Minn. R. Civ. P. 12.03 based on six affirmative defenses: (1) absolute legislative privilege; (2) qualified privilege of fair comment; (3) official immunity; (4) participation-in-government immunity under Minn. Stat. § 544 (2008); (5) the *Noerr-Pennington* doctrine; and (6) because defamation by implication is not a recognized cause of action in Minnesota.

The District Court granted Respondents' motion to dismiss, holding that Respondents had an absolute privilege from suit. (Appellants' App.¹ 170-78.) Zutz and Elseth appealed the District Court's holding, and the Court of Appeals affirmed. *See Zutz v. Nelson*, No. A08-1764, 2009 LEXIS 671 (Minn. App. June 23, 2009) (App. 183.)

STATEMENT OF THE FACTS

Appellants' claims were dismissed on the pleadings under Minn. R. Civ. P. 12.03; therefore, the facts as alleged in Appellants' Complaint are presumed to be true. Appellants and Respondents are four members of the seven-member Board of Managers ("Board") for the Middle Snake Tamarac Rivers Watershed District ("Watershed

¹ Herein, references to "App." shall refer to Appellants' Appendix submitted with Appellants' Brief to this Court.

District”). (App. 3.) On June 18, 2007, the Board met for a public Watershed District meeting. (App. 4.)

During the course of this meeting, Respondents Nelson and Stroble made three statements that Appellants claim were defamatory. (App. 4-5.) First, Respondent Nelson stated: “I don’t think there is much question that he [referring to Zutz and Elseth] did [violate the Minnesota Data Practices Act].” (App. 4.) Second, Respondent Nelson further stated: “Laws are being broken by Board Members-enough is enough!” (App. 4.) Third, Respondent Stroble stated: “Why should we provide legal counsel for actions that are against the law?” (App. 5.) Appellants claim the statements question the legality of their gathering payroll information about Watershed District employees from the local bank. (App. 4-5.)

Based on these three comments, Appellants brought claims alleging defamation per se, slander, and negligent defamation, and they sought a declaratory judgment that Appellants’ conduct in reviewing banking and payroll records was not in violation of Minnesota law.² (App. 6-8.) In their Amended Answer, Respondents alleged affirmative defenses, including: (1) absolute legislative privilege; (2) qualified privilege of fair comment; (3) official immunity; (4) participation-in-government immunity under

² After Respondents filed their motion to dismiss in state court, but before the motion had been heard, Appellants also filed a complaint in the Federal District Court of Minnesota. The federal complaint names Respondents, two Watershed District employees, and an outside investigative firm. (App. 107-24.) The claims against Respondents in the federal case are factually the same as the claims made in the state court matter. (*Id.*) The Federal District Court dismissed Appellants’ case, and it is now on appeal to the Eighth Circuit.

Minn. Stat. § 544 (2008); (5) the *Noerr-Pennington* doctrine; and (6) that defamation by implication is not a recognized cause of action in Minnesota. (App. 12-14.)

Respondents moved for judgment on the pleadings under Minn. R. Civ. P. 12.03, based on these six affirmative defenses. (App. 15.) The District Court dismissed Appellants' claims with prejudice, concluding that Respondents hold an absolute privilege and thus have immunity from suit for defamation. (App. 176.)

On appeal, the Court of Appeals upheld the District Court's grant of judgment on the pleadings, holding that Respondents were protected from suit by absolute privilege. *Zutz*, 2009 LEXIS at *2-6. This Court granted Appellants' petition for review on the question of whether the absolute privilege accorded to government officials applied to Respondents.

ARGUMENT

I. Standard of Review.

When reviewing cases dismissed for failure to state a claim upon which relief can be granted, this Court reviews de novo whether "the complaint sets forth a legally sufficient claim for relief." *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003) (reviewing a Rule 12.02(e) motion for dismissal). The facts alleged in the complaint must be taken as true and all reasonable inferences are drawn in favor of the nonmoving party. *Id.*

II. Respondents are protected by absolute privilege and are immune from suit.

Under a defamation claim, "one is liable for an unprivileged communication or publication of false and defamatory matter which injures the reputation of another."

Matthis v. Kennedy, 243 Minn. 219, 222-23, 67 N.W.2d 413, 416 (1954). The doctrine of absolute privilege against defamation claims provides that government officials are absolutely immune from suit for defamation, regardless of the nature or intent of the speaker. *Id.* at 223, 67 N.W.2d at 416. Application of absolute privilege is a question of law, which the Court reviews de novo. See *Lewis v. Equitable Life Assurance Soc.*, 389 N.W.2d 876, 889 (Minn. 1986).

This Court should conclude that Respondents are protected by absolute privilege. Public policy supports allowing Respondents to speak freely when fulfilling their official functions. Respondents' statements were made in the course of fulfilling their official function.

A. Public policy supports allowing Respondents to speak freely when fulfilling their official functions.

The doctrine of absolute immunity rests in public policy and is confined within narrow limits to "situations in which the public service or the administration of justice requires complete immunity from being called to account for language used." *Matthis*, 243 Minn. at 223, 67 N.W.2d at 417. The doctrine "is not intended so much for the protection of those engaged in the service as it is for the promotion of the public welfare." *Id.* "[T]he rationale is that unless the officer in question is absolutely immune from suit, the officer will timorously, instead of fearlessly, perform the function in question and, as a result, government—that is, the public—will be the ultimate loser." *Carradine v. State*, 511 N.W.2d 733, 735 (Minn. 1994). "[T]o submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its

outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.” *Id.* at 735-36. In extending absolute privilege, the Court balances “the public’s right to know with a defamed individual’s right to redress.” *Johnson v. Dirkswager*, 315 N.W.2d 215, 221 (Minn. 1982).

In *Jones v. Monico*, this Court concluded that “proceedings of subordinate bodies, including municipal councils or town meetings” are not protected by absolute privilege because they are “sufficiently protected by exemption from liability in the exercise of good faith.” 276 Minn. 371, 375, 150 N.W.2d 213, 216 (1967)³; *see also Johnson v. Northside Residents Redevelopment Council*, 467 N.W.2d 826 (Minn. App. 1991).

After *Monico* and *Johnson* were decided, this Court has extended absolute privilege to lower-level officials, concluding that “[t]he complexities and magnitude of governmental activity have become so great that there must of necessity be a delegation and redelegation of authority as to many functions, and [the Court] cannot say that these functions become less important simply because they are exercised by officers of lower rank in the executive hierarchy.” *Carradine*, 511 N.W.2d at 735 (quoting *Barr v. Matteo*, 30 U.S. 564, 572 (1959)). “Immunity ‘is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective function of government.’ ” *Id.* (quoting *Barr v. Matteo*, 30 U.S. at 572).

Appellants argue that public policy does not support extending absolute privilege to members of a Watershed District. (Appellants’ Br. 13-15.) But this lawsuit

³ This conclusion in *Monico* is arguably dicta because the Court had already concluded that the commissioner’s statements were not defamatory. 276 Minn. at 374, 150 N.W.2d at 215.

demonstrates the very reason why absolute privilege should be extended to members of the Watershed District. As held by the Court of Appeals, such board members must be free “to speak out in the performance of their required duties without fear of liability.” *Zutz v. Nelson*, No. A08-1764, 2009 LEXIS 671, at *5 (Minn. App. June 23, 2009). There is nothing more necessary to the public good than a public official who is free to discuss and debate potential wrongdoing without fear of litigation – particularly when the potential wrongdoing is performed by a fellow board member in his or her role as a board member. The public’s interest in having qualified board members who pursue their function without fear of liability far outweighs any interest that Appellants might have to redress.

Members of the Watershed District Board provide an important function in the community. Extending absolute privilege to them will ensure the continued participation of qualified individuals on the Board. Otherwise, as noted in *Carradine*, 511 N.W.2d at 735-36, only “the most resolute, or the most irresponsible” would continue to serve this role in the community. Qualified immunity does not sufficiently protect board members, as it subjects members to the potential burden of a trial defending against such claims as the ones brought before this Court.

Extending absolute privilege to members of the Watershed District Board does not protect members who engage in unchecked pursuit of their personal agendas. Even if absolute privilege is extended, officials are not protected for defamatory statements that are outside the scope of their official function. *Carradine*, 511 N.W.2d at 736.

Based on public policy, this Court should conclude Respondents are protected from suit by absolute privilege when fulfilling their official functions.

B. Respondents' statements were made in the course of fulfilling their official function.

This Court has long held that absolute privilege extends to proceedings of "all legislative bodies, state or municipal." *Peterson v. Steenerson*, 113 Minn. 87, 89, 129 N.W. 147, 148 (1910). It has distinguished such proceedings from other cases involving publication of libelous or slanderous matter, which may only be entitled to a qualified privilege. *Id.*

Absolute immunity extends beyond high-level offices, as it is not the level of office that entitles one to immunity, but rather the function performed. *Carradine*, 511 N.W.2d at 735. Based on this policy, Minnesota courts have extended absolute privilege beyond participants in legislative and judicial proceedings, as originally provided for in Minn. Const., art. 4, § 10, to protect a broad array of government officials fulfilling public functions. *Dirkswager*, 315 N.W.2d 215 (high-level executive officers); *Carradine*, 511 N.W.2d at 735 (inferior government officers); *Buchanan v. Minn. State Dep't of Health*, 573 N.W.2d 733 (Minn. App. 1998) (Program Manager for MDH's Licensing and Certification Section); *Redwood County Tel. Co. v. Luttman*, 567 N.W.2d 717 (Minn. App. 1997) (elected county sheriff); *Bd. of Regents of the Univ. of Minn. v. Reid*, 522 N.W.2d 344 (Minn. App. 1994), review denied (Minn. Oct. 27, 1997) (Board of Regents of the University of Minnesota).

When deciding whether to extend absolute immunity, this Court considers several factors, including: (1) “the nature of the functions assigned to the officer;” and (2) “the relationship of the statements to the performance of that function.” *Carradine*, 511 N.W.2d at 736.

In *Carradine*, the Court concluded that an arresting officer was protected by absolute privilege for statements made in his written arrest report. *Id.* First, it emphasized that this report was a key part of the arresting officer’s job and that it was relied on by the officer’s departmental superiors and by the judicial system. *Id.* In contrast, in *Bauer v. State*, this court did not extend absolute privilege to employees of Faribault Regional Treatment Center for statements made in an administrative personnel matter because these types of matters are “not unlike those that occur in the private sector” and do “not raise public policy concerns of the same urgency as *Carradine*.” 511 N.W.2d 447, 450 (Minn. 1994).

Second, in analyzing the relationship of the statements to the performance of the officer’s function, the *Carradine* court concluded that in order to fulfill the role for which the police officer’s report was designed, it was important that the report be accurate. 511 N.W.2d at 736. In contrast, the Court found that making statements to the press was not essential to the performance of the officer’s duties, and therefore, the statements were not protected by absolute privilege. *Id.* at 737.⁴

⁴ See also *Burch v. Bernard*, 107 Minn. 210, 102 N.W. 33 (1909) (member of city council was “protected from responsibility for statements made on a proper occasion which were pertinent to any inquiry or investigation pending before the council, but he had no privilege to wander from the subject and wantonly assail the respondent”); *Trebbly*

Here, Respondents made their alleged defamatory statements during a public proceeding in the course of fulfilling their obligation to the public as board members. The issue of whether or not board members are breaking the law by requesting and receiving employee information from a bank is a legitimate issue of public concern. Both the public and members of the board have an interest in ensuring that the Watershed District complies with Minnesota statutes, such as the Data Practices Act. Further, as watershed districts have the power to sue and be sued, Minn. Stat. § 103D.335, subd. 1 (2008), part of the Board's role is to protect the district from lawsuits based on the conduct of individual board members. *Zutz v. Nelson*, 2009 LEXIS at *5.

Respondents attempt to distinguish *Carradine* by arguing that the officer was "required" to make a record of his arrest and that Respondents were not "required" to question Appellants' actions. (Appellants' Br. 16, 18.) But just as the content of the officer's report was not required, the statements of board members are not required. Just as the Court concluded that the officer in *Carradine* should be free to provide an accurate report without fear of litigation, board member should be free to fulfill their role as members without fear of litigation. This case is not like *Bauer*, which involved an administrative personnel matter. This case involves the proceedings and obligations of a public body, and the actions of Board members acting in their official role which could

v. Transcript Publ'g Co., 74 Minn. 84, 76 N.W. 961 (1898) (resolution passed by city council was not protected by absolute privilege because it was "wholly outside" the scope of official authority); *Wilcox v Moore*, 69 Minn. 49, 71 N.W. 917 (1897) (members of city council were not entitled to absolute privilege "because they went outside of the line of their official duty in publishing the article . . . if, indeed, the resolution was within the scope of their duty as a city council at all).

subject the entire Board to suit. This kind of discussion would not occur in the private sector.

Respondents' statements were made in the course of performing their public function. Their questioning was not a matter of preference. It was integral to ensuring that the Board and its members complied with Minnesota statutes and were not subjecting the District to unnecessary lawsuits. Therefore, this Court should conclude that Respondents are protected by absolute privilege.

III. Respondents are entitled to dismissal on other grounds which they argued below.

Appellate courts "will not reverse a correct decision simply because it is based on incorrect reasons." *Katz v. Katz*, 408 N.W.2d 835, 840 (Minn. 1987). Thus, even if this Court concludes that Respondents do not have an absolute privilege, the Court should dismiss this case on the other grounds argued below: (1) qualified privilege of fair comment; (2) official immunity; (3) participation-in-government immunity under Minn. Stat. § 544 (2008); (4) the *Noerr-Pennington* doctrine; and (5) that defamation by implication is not a recognized cause of action in Minnesota.

A. Respondents' statements are protected under the qualified privilege of fair comment.

Respondents' statements are protected by the qualified privilege of "fair comment" about a public matter and public official. When a plaintiff is a public figure, statements against him or her are conditionally privileged and not defamatory unless the plaintiff proves with "convincing clarity" that the statements were made with actual malice. *Beatty v. Ellings*, 285 Minn. 293, 301-02, 173 N.W.2d 12, 17-18 (1969); *Britton*

v. Koep, 470 N.W.2d 518, 524 (Minn. 1991). This furthers the public policy which “supports a ‘profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.’ ” *Britton*, 470 N.W.2d at 520 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

“ ‘Actual malice’ means with knowledge that the statements were false or with reckless disregard of whether they were true or false.” *Id.* at 524 (citing *New York Times Co.*, 376 U.S. at 279-80). The standard of “reckless disregard” is subjective and requires “sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.” *Id.* “[F]ailure to investigate does not establish bad faith.” *Id.* The question of whether there is sufficient evidence in the record to support a finding of actual malice is a question of law. *Id.*

In *Britton*, a county commissioner was sued for remarks made at a county commission meeting that criticized the behavior of another public official. *Id.* The Court found no evidence of malice, noting that the commissioner was fulfilling her duty to citizens as an elected official. *Id.*

Here, Respondents’ alleged defamatory statements are protected by the qualified privilege of fair comment about Appellants, who are public officials, and who alleged to be seeking payroll information in their official role as members of the Watershed District. (App. 5.) Appellants have not proved actual malice with “convincing clarity.” Appellants’ Complaint contains no allegations that Respondents’ statements were made

with actual malice. Further, there is no claim that Respondents had serious doubts as to the truth of their statements.

Essentially, Appellants ask this court to adopt a rule that would require those criticizing public officials to wait until those officials are actually convicted before they could raise a non-defamatory question or concern about the official's action. Such rule would undercut the entire reason for qualified immunity of fair comment.

As in *Britton*, Respondents' questioning of Appellants' behavior was well within their role as public officials fulfilling their duties to the public. Thus, this Court should conclude that Respondents' comments are protected by the qualified privilege of "fair comment" about a public matter and public official.

B. Respondents' statements are protected by official immunity.

Public officials who speak on a discretionary basis are entitled to official immunity if their words are not spoken maliciously. *Anderson v. Anoka Hennepin Indep. Sch. Dist.*, 678 N.W.2d 651, 655 (Minn. 2004). Official immunity is designed to "protect[] public officials from the fear of personal liability that might deter independent action and impair effective performance of their duties." *Elwood v. Rice County*, 423 N.W.2d 671, 678 (Minn. 1988). The application of official immunity is a question of law, which this Court reviews de novo. *Sletten v. Ramsey County*, 675 N.W.2d 291, 299 (Minn. 2004).

Official immunity does not protect officials charged with executing ministerial rather than discretionary functions. *Id.* A ministerial duty is one that is "absolute, certain, and imperative, involving merely the execution of a specific duty arising from

fixed and designated facts.” *Wiederholt v. City of Minneapolis*, 581 N.W.2d 312, 315 (Minn. 1998). To determine whether an act is discretionary or ministerial, the focus is on the act at issue. *Elwood*, 423 N.W.2d at 677. Members of a Watershed District board exercise discretionary functions. *See* Minn. Stat. § 103D.335 (2008). While members have an obligation to comply with the law, their acts to ensure compliance are discretionary, not ministerial. Here, Respondents’ comments at the Watershed District meeting were based on their independent judgment as to whether there was a need to question the legality of Appellants’ conduct.

“In the context of official immunity, wil[l]ful and malicious are synonymous” and “ ‘mean[] nothing more than the intentional doing of a wrongful act without legal justification or excuse, or, otherwise stated, the willful violation of a known right.’ ” *Rico v. State*, 472 N.W.2d 100, 107 (Minn. 1991) (quoting *Carnes v. St. Paul Union Stockyards Co.*, 164 Minn. 457, 462, 205 N.W. 630, 631 (1925)). Here, there is no evidence that Respondents’ statements were made with the intent to defame Appellants. Rather, Respondents were intending to prevent a wrongful act and to protect the Watershed District from suit.

Concluding that Respondents are protected by official immunity supports the policy for official immunity as it protects officials from fear of personal liability as a result of performing their duties. Thus, as the statements were made on a discretionary level, and were not spoken maliciously, this Court should conclude that Respondents are protected by official immunity.

C. Minn. Stat. § 554.01-.05 (2008) requires dismissal of Appellants' claims.

Under Minn. Stat. § 554.01-.05 (2008), Minnesota's Strategic Lawsuits Against Public Participation (anti-SLAPP) statutes, this Court should dismiss Appellants' claims. Appellants' claims are based on Respondents' acts of public participation, and Appellants have not demonstrated by clear and convincing evidence that their claims have merit. See Minn. Stat. § 554.02, subd. 2(3). The anti-SLAPP statutes were designed "[t]o protect citizens and organizations from lawsuits that would chill their right to publicly participate in government." *Marchant Inv. & Mgmt. Co. v. St. Anthony W. Neighborhood Org.*, 694 N.W.2d 92, 95 (Minn. App. 2005) (citing 1994 Minn. Laws ch. 566 (describing act as "protecting citizens and organizations from civil lawsuit for exercising their rights of public participation in government"))).

Here, Respondents were involved in public participation by speaking at a public meeting of the Watershed District. The only basis for Appellants' claims against Respondents is based in defamation. Because Respondents' statements were privileged, and because Appellants have not demonstrated by clear and convincing evidence that the statements were defamatory, Respondents are entitled to dismissal under Minn. Stat. § 544.01-.05.

D. Respondents are entitled to immunity under the Noerr-Pennington Doctrine.

The *Noerr-Pennington* doctrine provides immunity from suit "for injuries allegedly caused by activities and participation in public processes with the intent of influencing public policy decisions." *Fischer Sand & Aggregate Co. v. City of Lakeville*,

874 F. Supp. 957, 958 (D. Minn. 1994). The doctrine applies to protect public officials from statements made while acting in their official capacity. *Id.* at 959 (city council members shielded from liability for comments made during a zoning proceeding). In fact, it likely has greater application to government officials because they are more likely to “act with the intent of advancing the public interest in exercising their First Amendment rights than private petitioners.” *Id.*

Here, Respondents were exercising their First Amendment rights and advancing the public interest by publically questioning whether the actions of Board members were violating the law. Thus, Respondents are entitled to dismissal under the *Noerr-Pennington* doctrine.

E. Respondents are entitled to dismissal because Appellants’ claims only rise to the level of defamation by innuendo or implication about public officials.

“[D]efamation by implication occurs when a defendant ‘juxtaposes a series of facts so as to imply a defamatory connection between them, or creates a defamatory implication by omitting facts, [such that] he may be held responsible for the defamatory implication, unless it qualifies as an opinion, even though the particular facts are correct.’” *Toney v. WCCO TV*, 85 F.3d 383, 387 (8th Cir. 1996) (quoting *Diesen v. Hessburg*, 455 N.W.2d 446, 450 (Minn. 1990)). The question of whether defamation by implication occurs is a question of law for the Court to decide. *Utecht v. Shopko Dep’t Store*, 324 N.W.2d 652, 654 (Minn. 1982).

Comments about public officials are excluded from the scope of actionable defamation by implication claims. *Toney*, 85 F.3d at 391 (citing *Diesen*, 455 N.W.2d at

450). “[A] public official may suffer injury to his or her professional reputation without recovery under defamation law because of the paramount free speech and free press rights at stake,” and because they generally have access to a public medium to respond to the falsehoods. *Diesen*, 455 N.W.2d at 450.

Appellants’ Complaint alleges that three statements by Respondents were defamatory. These three alleged defamatory statements are: (1) “I don’t think there is much question that he did;” (2) “Laws are being broken by Board Members – enough is enough;” and (3) “Why should we provide legal counsel for actions that are against the law.”

Appellants allege that these statements implied that Appellants were violating the Minnesota Government Data Practices Act despite the non-specific nature of the comments. But these statements fall well within the public official exception to defamation by implication claims, and are thus barred from suit in Minnesota

CONCLUSION

This Court should affirm the District Court’s holding that Respondents are protected from suit by absolute privilege. As a result, Appellants’ Complaint was properly dismissed with prejudice and the District Court’s Order Dismissing the Complaint with Prejudice must be upheld. Alternatively, this Court should conclude that Respondents are protected from suit under the doctrine of qualified privilege of fair comment, official immunity, participation-in-government immunity, the *Noerr-Pennington* doctrine, or because defamation by implication is not a recognized cause of action in Minnesota.

ARTHUR, CHAPMAN, KETTERING,
SMETAK & PIKALA, P.A.

Dated: 11/11/09


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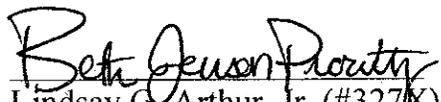
CERTIFICATION OF BRIEF LENGTH

I hereby certify that the foregoing Brief of John Nelson and Arlyn Stroble conforms to Minn. R. Civ. App. P. 132.01, subd. 3(c)(1), for a brief produced with proportionally spaced font.

There are 4,122 words in this Brief, not including the Table of Contents and the Table of Authorities. The word processing software used to prepare this Brief was Microsoft® Office Word 2003.

ARTHUR, CHAPMAN, KETTERING,
SMETAK & PIKALA, P.A.

Dated: 11/11/09


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