

NO. A09-1086

State of Minnesota
In Court of Appeals

Mountain Peaks Financial Services, Inc.,

Respondent,

v.

Catherine A. Roth-Steffen,

Appellant.

RESPONDENT'S BRIEF

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I. STATEMENT OF THE CASE AND FACTS

Appellant obtained two student loans from the Missouri Higher Education Loan Authority (“MOHELA”) and failed to pay the amount owed. AA77-AA79. The loans were assigned from MOHELA to Guaranty National Insurance Company. AA80. Guaranty National Insurance Company assigned the accounts to Mountain Peaks Financial Services, Inc., who is the Respondent in this collection action. AA81-AA82.

The Appellant obtained the first law school student loan from MOHELA in 1995. AA83-AA86. The 1995 law school student loan was assigned account number _

AA87. The loan proceeds were disbursed on September 6, 1995 in the amount of \$3,179.00 and on December 18, 1995 in the amount of \$3,179.00. AA87.

The Appellant obtained a second law school student loan from MOHELA in 1997. AA88-AA91. The 1997 law school student loan was assigned account number _

AA92. The loan proceeds were disbursed on August 7, 1997 in the amount of \$7,000.00 and on October 15, 1997 in the amount of \$7,000.00. AA92.

The assignment between MOHELA and Guaranty National Insurance Company references the two loan numbers at issue, along with the Appellant’s social security number and the amount owed. AA81. Referenced on that assignment are claim numbers on the top right corner. In the assignment between Guaranty National Insurance Company and Respondent, the assignment includes a cover letter that links the loan numbers to the claim numbers. AA81. The claim numbers are listed on the top right corner of the assignment. AA82. Contrary to the Appellant’s claims, the assignments

expressly identify the loans at issue and conclusively establish Respondent's ownership of the debt.

Appellant has repeatedly falsely alleged she never had these student loans and also falsely alleged she consolidated the loans. On September 30, 2008, Appellant's attorney emailed Respondent's counsel a series of documents. AA143. Included in these documents was the Appellant's student loan consolidation application from 1998 that listed the debts at issue in this litigation. AA144-AA148. In addition, the documents included a statement of account that was mailed to Appellant by MOHELA that itemized the unpaid law school student loans at issue in this litigation. AA154. At the summary judgment hearing, Judge Cleary admonished Appellant because she is an attorney and has made numerous apparent false statements to the court. Appellant has continued with her dishonest course of conduct before this court.

Appellant's application to consolidate her loans with the William D. Ford Federal Direct Loan Program from 1998 was attached as AA144-AA148. The law school loans at issue are listed on the bottom of AA147 as MOHELA. Note that in the second column, she identified the loans as "Law Cash," which is how the loans were referenced on the applications. AA83-AA86 & AA88-AA91. In the far right hand column, the Appellant specifically asked for the MOHELA loans to **NOT** be included in the consolidation. This document proves that the Appellant did not consolidate the loans in 1998 with the Federal Direct Loan Program. It also proves that in 1998, the Appellant knew these loans were outstanding and she knew a current balance of \$23,401.28 was owed on the loans.

AA154 is a document produced by the Appellant titled "Cash Loan Repayment Schedule." It lists an amount financed of \$23,401.28, which is the same amount Appellant listed in AA147 as the MOHELA loan. On the bottom of the Cash Loan Repayment Schedule, there is an itemization of the amount financed. The amount copayable to the school and to the Appellant was \$20,358.00. AA87 & AA92 are documents produced by Respondent that show the disbursement dates and amounts provided to Appellant which confirm the total disbursements of \$20,358.00. The first loan had a total disbursement amount of \$6,358.00, and the second loan had a total disbursement amount of \$14,000.00, which equals \$20,358.00. When the accrued interest of \$3,043.28 as shown on the "Cash Loan Repayment Schedule" (AA154) itemization is added to the disbursement amounts, it equals \$23,401.28, which is the exact amount of the MOHELA loans the Appellant asked to be excluded from her consolidation. The loans the Appellant knew of and listed in her 1998 consolidation are the same loans she is now denying any knowledge of.

In 2002, the Appellant requested forbearance from paying her MOHELA law school student loans. AA93 & AA94. Note that the fax sender information at the top of each page lists "Catherine Steffen, Esq" as its sender and each document is signed by the Appellant. Appellant's request for a deferment of her MOHELA law school student loans was four years after her alleged consolidation. In light of the fact the Appellant requested deferment of her MOHELA law school student loans four years after the alleged consolidation, it shows she knew of these loans, she did not consolidate these loans in 1998 and it shows a reaffirmation of her debts in 2002.

Appellant accepted and obtained the benefit of the law school student loans and failed to pay the amount owed. As shown by the documentation disclosed by the Appellant, she knew of these loans and repeatedly acknowledged that they were due and owing. Her statements to the District Court and in her appellate brief that she had no knowledge of these loans are directly contradicted by her own documentation. Judge Cleary wisely admonished her for being a lawyer who is making apparent false statements to a court.

II. STANDARD OF REVIEW

"A motion for summary judgment shall be granted when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to a judgment as a matter of law." Fabio v. Bellomo, 504 N.W.2d 758, 761 (Minn. 1993). On appeal from summary judgment, this court makes two determinations: (1) whether there are any genuine issues of material fact; and (2) whether the district court erred in its application of the law. N. States Power Co. v. Minn. Metro. Council, 684 N.W.2d 485, 491 (Minn. 2004). "[T]he reviewing court must view the evidence in the light most favorable to the party against whom judgment was granted." Fabio, 504 N.W.2d at 761. But "[t]he party opposing summary judgment may not establish genuine issues of material fact by relying upon unverified and conclusory allegations, or postulated evidence that might be developed at trial, or metaphysical doubt about the facts." Dyrdal v. Golden Nuggets, Inc., 689 N.W.2d 779, 783 (Minn. 2004). "A party need not show *substantial evidence* to withstand summary judgment. Instead, summary

judgment is inappropriate if the nonmoving party has the burden of proof on an issue and presents *sufficient evidence* to permit reasonable persons to draw different conclusions." Schroeder v. St. Louis County, 708 N.W.2d 497, 507 (Minn. 2006) (emphasis in original).

III. ARGUMENT

A. **THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT BASED UPON THE EVIDENCE SHOWING THE APPELLANT RECEIVED THE LOANS AT ISSUE.**

The district court's opinion was based on overwhelming evidence that the Appellant's student loans remain due and owing. Respondent was granted summary judgment based upon the account stated theory and unjust enrichment. As stated in the district court opinion, the CASH Loan Repayment Schedule produced by Appellant constitutes a statement of account. In light of the fact that Appellant produced the document, and failed to produce any proof she disputed it within a timely manner, Respondent established the creation of an account stated.

Based upon the equities involved in this litigation, the district court also properly granted summary judgment on the theory of unjust enrichment. Appellant has repeatedly made apparent false statements in this litigation by denying she ever received these law school student loans. In her affidavit, she states in bolded underlined text, "My law school loans do not include the debt alleged in this lawsuit." AA127. The Appellant has continued to make blatantly false statements to this court. On page 14 of her appellate brief, she states, "There is no evidence in the record of statements provided to Appellant except for the CASH Loan Repayment schedule attached to the Michael Johnson

affidavit.” This statement is directly contradicted by the fact the Appellant produced the MOHELA document in discovery. In addition, her claim that the MOHELA statement does not reference the loans at issue is half-hearted considering the document referenced the amount owed of \$23,401.28, to the penny. Based upon the fact that these loans enabled Appellant to attend law school and she is now denying ever receiving them, summary judgment was properly granted based upon the theory of unjust enrichment.

A further example of Appellant’s false statements to this court is found on page six of her brief, wherein she states, “She has never received any letters, statements of accounts, notices, bills, or invoices of any kind from Respondent or Respondent’s predecessors-in-interest asserting any amount Appellant owes for these alleged loans.” This statement is directly contradicted by the CASH Loan Repayment schedule she produced, the fact she listed these debts as due and owing on her consolidation application (AA144-AA149), and her request for forbearance of these loans. AA93 & AA94. As previously noted, it was the Appellant herself who produced her 1998 loan consolidation application that listed the debts at issue as due and owing. The Appellant is simply making misstatements of fact to this court.

The loans at issue in this litigation were issued in 1995 and 1997. In 1998, the Appellant applied for a consolidation of her law school loans and she listed these loans. In Section E(1) of that application, the Appellant swore to the accuracy of the information and she listed a current balance of \$23,401.28. She also requested that these loans not be included in her consolidation. It is inconceivable that a person would testify in a consolidation application that she owes \$23,401.28 on loans she never received, or

seek forbearance of loans she never had. In light of the Appellant's inability to overcome the Respondent's evidence, summary judgment was properly awarded to Respondent.

B. THE STATUTE OF LIMITATIONS HAS NOT EXPIRED FOR THE APPELLANT'S UNPAID LAW SCHOOL STUDENT LOANS.

Appellant alleges the statute of limitations has expired for her unpaid student loan debts and that Plaintiff is not entitled to the statute of limitations exemption provided under the Federal Higher Education Act (HEA), 20 U.S.C. § 1091a. HEA retroactively abrogated time-bars on the collection of eligible student loans. Millard v. United Student Aid Funds, Inc. 66 F.3d 252 (9th Cir. 1995); United States v. Phillips, 20 F.3d 1005, 1007 (9th Cir.1994) (Congress "eliminated all statutes of limitation on actions to recover on defaulted student loans"); United States v. Glockson, 998 F.2d 896, 897 (11th Cir.1993) ("Congress intended to revive all time-barred actions to recover defaulted student loans"). Nowhere in the HEA does it limit the statute of limitations exemption to the original lender. Therefore, Respondent is entitled to the same rights as the original lender and these debts are not covered under the Minnesota statute of limitations.

In support of its argument, the Appellant cites to the case of Casa Investment Company v. Nestor, 2008 WL 3896012 (Aug. 12, 2008, Fla. Cir. Ct). Casa Investment Company cannot be used as even persuasive authority. It is an unpublished opinion issued by a Florida trial court, hearing an appeal from the lower county court, which was thereafter overturned by a Florida appellate court. Casa Investment Co., Inc. v. Nestor, 8 So. 3d 1219 (Fla. 3d Dist. Ct. App. 2009). In addition, the overruled trial court case is based upon a summary judgment motion that was made "ore tenus," or an oral motion.

Essentially the creditor in that case was ambushed with an oral motion for summary judgment. As noted in the trial court's dissent, and the appellate opinion overturning the decision, the parties were not given the opportunity to properly litigate the effect of the HEA upon the statute of limitations question. In the reversal, the court noted that the creditor was deprived of the ability to both adequately respond and prepare for the summary judgment hearing because the motion was neither written nor properly noticed. (Attached to the Respondent's Appendix at RA1). To put it mildly, the Casa Investment Company trial court opinion is not a binding or persuasive precedent upon this court.

Contrary to Casa Investment Company, other courts have found that the exemption from the statute of limitations is conveyed to an assignee of a student loan debt. In the case of Affiliated Computer Services v. Ramsey Sealy, (December 28, 2005, Ak Cir. Ct., CV-2005-1275-2) (attached to the Respondent's Appendix at RA7), the court found that there was no provision in the HEA which required a student loan to remain a federally guaranteed loan and there was no authority to support such a position.

20 U.S.C. § 1091a lays out the situations under which statutes of limitations do not apply to student loans. As admitted by Appellant, the original lender of the loans was a qualified party under HEA and therefore no statute of limitations governed the contract between the parties. Nowhere in the HEA is that exemption qualified as not applicable to an assignee of the debt. It is well established law in Minnesota that an assignee of a debt steps into the shoes of the assignor. Ill. Farmers Ins. Co. v. Glass Serv. Co., 669 N.W.2d 420, 424 (Minn. App. 2003) ("[a] valid assignment generally operates to vest in the assignee the same right, title, or interest that the assignor had in the thing assigned")

(rev'd on other grounds, 683 N.W.2d 792 (Minn. 2004). The District Court properly concluded that Respondent stepped into the shoes of the original qualified lender and assumed all of its rights under the contract, including an exemption from the statute of limitations.

An analogous situation to the issue before this Court was whether the extended statute of limitations granted to the Federal Deposit Insurance Corporation under 12 U.S.C. § 1821(d)(14) inures to the benefit of a subsequent holder. Cadle Co. II, Inc. v. Stamm, 633 So.2d 45 (Fla. App. 1 Dist., 1994). The Court noted in Cadle that every federal court, and the overwhelming majority of state courts that reviewed the issue, found that the extended statute of limitations should apply to the assignee of the debt. The court found that “the important public policy served by giving the FDIC an extended statute of limitations requires the availability of that limitations period in actions brought by assignees of the FDIC.” *Id* at 47. If this statute of limitations exemption were not extended to assignees of the FDIC, the agency would be forced to hold all such claims and prosecute them itself, since they would be worthless to all others. Such a result would be contrary to the policy purposes of the appointment of the FDIC as receiver of the assets of a failed banking institution.

Similar to how courts have found the FDIC’s exemption from statutes of limitation to be assignable, the exemption from statutes of limitation under the HEA should inure to the benefit of assignees. Otherwise the original lenders would be forced to hold the expired student loans. Such an outcome would not accomplish the goal of the statute. In addition, nothing in the statute limits its applicability to only the original lender.

1. APPELLANT RENEWED THE STATUTE OF LIMITATIONS DATE BY REQUESTING FORBEARANCE OF THE LOANS.

Even if the Court were to rule that Respondent is not entitled to the statute of limitations exemption provided under the HEA, Appellant reaffirmed the debts in 2002 when she requested forbearance of the loans. As noted in AA93-AA94, Respondent requested forbearance of these loans on February 28, 2002. Respondent was served with the lawsuit on October 9, 2007. The forbearance agreement put the debts within either the six year Minnesota statute of limitations for contracts, Minn. Stat. § 541.05, or the 10-year Missouri statute of limitations, Mo. Stat. § 516.110, that is provided for under the terms of the contract.

A valid acknowledgement of an existing debt tolls and restarts the limitations period. Windschitl v. Windschitl, 579 N.W.2d 499, 501 (Minn. App. 1998). When a defendant acknowledges an existing past-due debt and promises to pay it in the future, the new promise effectively renews the broken one. Reconstruction Fin. Corp. v. Osven, 207 Minn. 146, 148-49, 290 N.W. 230, 231 (Minn. 1940) (stating that acknowledgement of debt places old debt "on the footing of one contracted at the time of such acknowledgment").

In order to toll the limitations period, an acknowledgment and promise to repay must generally be embodied in a signed writing. Minn. Stat. § 541.17. Minn. Stat. § 541.17 states:

No acknowledgment or promise shall be evidence of a new or continuing contract sufficient to take the case out of the operation of this chapter unless the same is contained in some writing signed by the party to be charged thereby; but this section shall not alter the effect of a payment of principal or interest.

By seeking a forbearance of her MOHELA law school student loans in writing, the Appellant acknowledged the existing debt and explicitly promised to pay the debt in the future. Even if this Court were to find this debt is not entitled to the exemption under the HEA, the Appellant's written acknowledgment of the debt places it within either Minnesota's or Missouri's statute of limitations for a contract.

C. AN INNOCENT CLERICAL ERROR, THAT WAS CORRECTED, DOES NOT CREATE A FACT QUESTION.

Appellant alleges that Respondent submitted contradictory affidavits to the District Court, thus creating a fact question. In reality, Respondent committed a clerical error in its complaint and initial summary judgment motion, by stating that it was the original creditor of the Appellant's loans. This error does not change the actual relationship between the parties and was simply an innocent clerical error. Respondent brought a motion to amend its complaint to clarify that it purchased the Appellant's unpaid student loans and that it was not the original lender of the loans. AA32-AA41. Respondent's motion was granted and it properly amended its paperwork to reflect that it purchased the Appellant's unpaid law school student loan debt.

Pursuant to Rule 15.01 of the Minnesota Rules of Civil Procedure, a party to a legal action must obtain leave of court to amend a pleading if a response has been received. Appellant filed a response, thus, leave of court was required to amend Respondent's complaint. As opposed to stipulating to the motion, Appellant's counsel took the unusual step of threatening Respondent's counsel with Rule 11 sanctions.

AA34. As stated in Rule 15.01, leave of court shall be freely given when justice so requires, which was granted by the lower court

Appellant's position appears to be that Respondent is bound to its clerical errors, even though it brought a motion to amend its admitted mistake. If Appellant were correct in her position, then if a party incorrectly stated the sun rose in the west, that party would be unable to correct its mistake. It would be forced to litigate in a bizarre parallel universe in which the sun rises in the west. Public policy and basic legal fairness should not require a party to litigate upon admitted innocent clerical errors. Rule 15.01 was enacted to allow parties to correct mistakes. Respondent properly went through the steps to correct its mistake and the errors do not create a question of fact.

D. RESPONDENT PRODUCED COMPETENT EVIDENCE AND WITNESS TESTIMONY PURSUANT TO THE BUSINESS RECORDS EXCEPTION TO THE HEARSAY RULE.

The Appellant wrongly alleges that the documentation attached to Respondent's affidavit was inadmissible. Respondent's affidavit properly lays a foundational basis for admitting the documents according to the business records exception. AA77-AA79. In addition, it is highly noteworthy that a significant portion of the documents that Respondent relied upon to establish its case were provided by Appellant through the discovery process. AA 143-AA160. For example, the Appellant herself disclosed the documents showing she listed the loans at issue in her loan consolidation application in 1998 (AA144-AA148) and that she received a statement of account from MOHELA in 1998 stating the amount payable. AA154.

Business records are presumed to be reliable because (1) the regularity of the records produces habits of precision in the record keeper, (2) the records are regularly checked, (3) employees are motivated to make accurate records because the businesses that employ them function in reliance on these records, and (4) employees are required to be accurate and risk embarrassment or dismissal if they fail. In re Simon, 662, N.W.2d 155, 160 (Minn. Ct. App. 2003). The purpose of the rule is to make it unnecessary to call as witnesses the parties who made the entries. Brown v. St. Paul City Ry. Co., 62 N.W.2d 688, 696 (Minn. 1954).

Minn. R. Evid. Rule 803(6), the business records exception to the general hearsay rule, has three requirements: (1) that the evidence was kept in the course of regularly conducted business activity; (2) that it was regular practice of that business to make memorandum, report, record, or data compilation; and (3) that foundation for the evidence is shown by a custodian or other qualified witness. Nat'l Tea Co., Inc. v. Tyler Refrigeration Co., Inc., 339 N.W.2d 59, 61 (Minn. 1983); Minn. R. Evid. 803(6).

1. The Evidence Presented by Respondent Meets the First and Second Prongs: It Was Kept in the Course of Regularly Conducted Business Activity and was Respondent's Regular Practice to Keep Such Records.

Rule 803(6) defines the term business in an expansive fashion. It includes businesses, institutions, associations, professions, occupations, and callings of every kind, whether or not conducted for profit. Minn. R. Evid. 803(6).

""[R]egular course of business' must find its meaning in the inherent nature of the business in question and in the methods systematically employed for the conduct of the

business as a business." Palmer v. Hoffman, 318 U.S. 109, 115 (1943). The entry must be typical of those made systematically or as a matter of routine to record events or occurrences, to reflect transactions with others, or to provide internal controls. *Id.* at 113.

Respondent's principal business is the buying of delinquent debts. In the course of its business practices, it is routine to obtain and store documents from the original creditors of debts. When those documents become necessary, Respondent produces the documents and executes affidavits as to their authenticity. As noted in Respondent's affidavit, AA77-AA79, paragraph 12, the documents relied upon by Respondent in its summary judgment motion were kept in the ordinary course of business.

2. Respondent's Affidavit Meets the Third Prong: Foundation Was Shown by a Custodian or Other Qualified Witness.

"The phrase 'other qualified witness' should be given the broadest possible interpretation; he need not be an employee of the entity so long as he understands the system." Nat'l Tea, 339 N.W.2d at 61 (emphasis in original). "A foundation for admissibility may at times be predicated on judicial notice of the nature of the business and the nature of the records as observed by the court, particularly in the case of bank and similar statements...." *Id.* "The custodian need not have 'personal knowledge of the creation of the document.'" *Id.*

Minnesota courts approvingly cite the Eighth Circuit determination that "it is not necessary under the new rules that the declarant be present if the knowledge of the custodian of the record demonstrates that a document has been prepared and kept in the course of a regularly conducted business activity. *Id.* (citing United States v. Pfeiffer,

539 F.2d 668, 671 (8th Cir. 1976)). The Minnesota Supreme Court has also held that one business entity may submit the records of another business entity to establish a proposition at trial. *Id.* (citing Swedish-American Nat'l Bank v. Chicago, B & Q Ry. Co., 105 N.W. 69 (1905)). Other courts interpreting the rule hold that "if records prepared by another source are adopted and integrated in the regular course of established business procedures into the records sought to be introduced, such records are admissible." Teac Corp. of America v. Bauer, 678 P.2d 3, 4 (Colo. App. 1984). "Further, even if the identity of the person whose first hand [sic] knowledge was the basis of a particular entry is not established, such records are admissible. *Id.* (citing United States v. Ullrich, 580 F.2d 765 (5th Cir. 1978)).

Courts outside of Minnesota have recognized the increasing number of claims on assigned debts and have allowed assignees to introduce records inherited from an assignor in establishing a prima facie case on the assigned debt. In New England Savings Bank v Bedford Realty Corp., 246 Conn 594, 603, 717 A2d 713 (1998), the Court established that business records received from an assignor could be introduced by the assignee under the business records exception without bringing in a witness from the assignor entity. In Beal Bank, SSB v Eurich, 444 Mass 813, 831 NE2d 909 (2005), Massachusetts' highest Court recognized that the buying and selling of loans is a common business practice and that assignees routinely rely on the data previously kept by the assignor in keeping a business record as to the amount of the debt owed. The Court held that computer records received from an assignor qualified as business records of the

assignee and allowed the assignee to use the balance shown on the received record in establishing its claim against the debtor.

In NCNB Tex Nat'l Bank v Johnson, 11 F3d 1260, 1265 (5th Cir 1994), the defendant challenged the plaintiff's ownership of a promissory note it purchased from the assignee of the original creditor. The plaintiff could not produce an assignment document specifically listing the defendant's promissory note as an asset of the sale. The Court accepted an Affidavit of a records custodian for a prior owner to establish the transfer of the note and plaintiff's right to summary judgment on the ownership issue.

In Miller v MIF Realty LP (In re Perrysburg Marketplace Co), 208 BR 148, 159 (Bankr. N.D. Ohio 1997), an affidavit regarding the transfer of a lost promissory note sufficed to permit the claimant to enforce a loan debt against the maker of the note.

Through documents it obtained from the original lender and from the Appellant, Respondent presented overwhelming evidence supporting its case. Respondent produced extensive documentation showing that the Appellant's law school student loans remain due and owing and that it now owns her debt. The Respondent is entitled to rely upon documentation provided by the original creditor and the Appellant pursuant to the business records exception. Respondent laid the proper foundation for the admission of those documents and summary judgment was properly granted.

IV. CONCLUSION

Appellant obtained law school student loans and failed to repay the amount owed. Even after being presented with evidence that she listed the loans in a consolidation application and requested a deferral in 2002, she continues to deny receiving the loans.

The Appellant even denies knowledge of documentation that she disclosed in discovery. Throughout this litigation, Appellant has repeatedly made false statements regarding these loans.

Respondent timely brought its lawsuit because these debts are exempt from any state's statute of limitation under the HEA. Even if this court were to find the statute of limitations exemption to not apply, the Appellant reaffirmed the debts, within the statutory time frame, by seeking a forbearance of the loans. In addition, the lower court properly admitted the Respondent's evidence under business records exception to the hearsay rule. As such, this Court should rule in Respondent's favor and uphold the lower court's summary judgment. In addition, Respondent requests that this Court grant its attorneys' fees and costs for appeal.

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CERTIFICATE OF COMPLIANCE

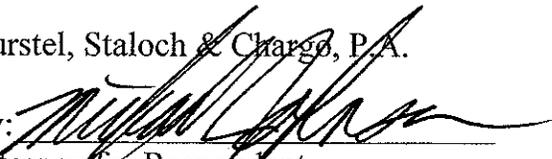
The undersigned hereby certifies that this brief complies with the requirements of Rule 132.01 of the Minnesota Rules of Civil Appellate Procedure. Specifically, the brief contains 4,618 words in compliance with the word count limitation contained in Rule 132.01 and conforms with all typeface requirements of Rule 132.01, subd. 1. The brief was prepared using Microsoft Word 2003.

Date:

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