

## APPELLATE COURT CASE NUMBER A09-1854

STATE OF MINNESOTA  
IN COURT OF APPEALS

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Susan L. Nordin, the Personal	)
Representative of the Estate of	)
Lester L. Nordin	)
	)
Respondent,	)
	)
vs.	)
	)
Roland Retzlaff	)
	)
Appellant.	)

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## APPELLANT'S REPLY BRIEF

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**FLUEGEL, ANDERSON,  
 MCLAUGHLIN  
 & BRUTLAG, CHTD.**  
 Michael M. Fluegel, #30417  
 Jason G. Lina, #347541  
 215 Atlantic Avenue  
 P.O. Box 527  
 Morris, MN 56267  
 Telephone: 320-589-4151  
**ATTORNEYS FOR APPELLANT  
 ROLAND RETZLAFF**

**THORNTON, REIF, DOLAN  
 BOWEN & KLECKER, P.A.**  
 Thomas P. Klecker, #295206  
 1017 Broadway  
 P.O. Box 819  
 Alexandria, MN 56308  
 Telephone: 320-762-2361  
**ATTORNEYS FOR RESPONDENT  
 SUSAN L. NORDIN, THE  
 PERSONAL REPRESENTATIVE OF  
 THE ESTATE OF LESTER L.  
 NORDIN**

## TABLE OF CONTENTS

TABLE OF CONTENTS .....	i
TABLE OF AUTHORITIES .....	ii
ARGUMENT .....	1
CONCLUSION .....	4

**TABLE OF AUTHORITIES**

<b><u>STATUTES:</u></b>	<b><u>PAGES</u></b>
Minn. Stat. § 336.3-108.....	3
Minn. Stat. § 336.3-118.....	1, 2
 <b><u>CASES:</u></b>	
<i>Pfenninger v. Kokesch</i> , 68 Minn. 81, 70 N.W. 867 (Minn. 1897).....	1
<i>Currie State Bank v. Schmitz</i> 628 N.W.2d 205 (Minn. App. 2001) .....	4

## ARGUMENT

The facts before the Court are simple. No demand for payment on a demand note was made by the creditor within ten years of the debtor's making of the note. Under Minn. Stat. § 336.3-118(b), an attempt to collect on the note is time-barred unless a "payment" was made on the note which restarted the running of the ten-year limitation period. The question before the Court is whether a payment by a creditor's wife to the creditor is a "payment" sufficient to prevent the Minn. Stat. § 336.3-118(b) statute of limitation from running. Case law is clear that a payment is not a "payment" unless it was done by the debtor, at the direction of the debtor, or the payment was subsequently ratified by the debtor. *E.g. Pfenninger v. Kokesch*, 68 Minn. 81, 70 N.W. 867 (Minn. 1897). Since none of these things occurred, the debt is time-barred and the lower court's decision must be reversed.

In arguing against this clear application of the statute and applicable case law Respondent argues: 1) that debts between family members are to be treated differently from the normal debtor creditor relationship; and, 2) that the application of Minn. Stat. § 336.3-118(b) requires the court to undertake mind-reading to divine a creditor's intent. Neither of the novel approaches suggested by Respondent should supplant the common law principals regarding "payment" and a plain-reading of the statute in question.

The comments to Minn. Stat. § 336.3-118(b) cited by Respondent do not support either of Respondent's propositions. Rather, the cited comment discusses the fact that, in determining a limitation period, the drafters considered that they needed to draft language

which would cover not only typical debtor-creditor relationships but also “family and noncommercial transactions.” *See* Minn Stat. §336.3-118, comment 2. The drafters also considered that they needed to address situations where “it may be difficult to determine whether the note presents a real or forgiven debt.” *See id.* The comments do not suggest that a court inquire as to whether the transaction was one between family members or to what the creditor’s intentions were regarding the debt when applying the statute. Rather, the comments tell the reader no more than what was in the drafter’s minds when the provision was drafted.

Keeping this universe of potential transactions in mind, the drafters determined that giving a creditor ten years to enforce a note where no demand had been made and six years to enforce a note where demand had been made was “appropriate.” *See id.* In a situation where a payment of principal or interest was made by the debtor, the ten year period would run from the date of the payment since the debtor had clearly acknowledged the debt. *See* Minn Stat. § 336.3-118 (b). In a situation where the debtor had not acknowledged the debt, common law principals were to continue to apply. Minn. Stat. § 336.3-118, comment 1 (stating “the circumstances under which the running of a limitations period may be tolled is left to other law pursuant to Section 1-103”). That the transaction is between family members does not affect the application of the statute. That the debtor always intended to enforce the debt but did not do so within the limitation period does not affect the application of the statute.

In reply, Appellant must also address Respondent’s statement that “Although

Retzlaff *claims* that he did not authorize the payment by his mother made on his behalf, he did ‘consent that the time of payment may be extended without notice.’” See Respondent’s Brief at page 10 (emphasis added).

First, Respondent is attempting to raise an issue of fact as to whether or not Mr. Retzlaff authorized the payment or not. This case was decided on summary judgment because the parties agreed that there were no issues of material fact in question. Mr. Retzlaff, in his affidavit stated that he did not authorize Mrs. Nordin to make the payment to her husband. Appellant’s Appendix at A-50. Respondent never contested this below. Indeed Mr. Retzlaff most certainly *did not* authorize the payment, nor did he even have knowledge of the payment until well after the fact. It is this danger—that a third-party will make a payment unbeknownst to, unauthorized by, and never ratified by the debtor and thereby extend a neglectful creditor’s limitation period—that this Court should be on guard against.

Second, Respondent is trying to use language in the note to somehow argue that a payment by Edna Nordin was authorized by the debtor and extended the limitation period. The language referred to is present on the note because the form used was for a term note. Appellant’s Appendix at A-20. Because the parties did not include a date for payment, the note becomes a demand note. See Minn. Stat. § 336.3-108 (a). Without language stating the date for repayment, the language that the maker consents “that the time of payment may be extended without notice” is inoperative since there is no time of payment. The cited language is not, as Respondent argues, a consent that a third-party

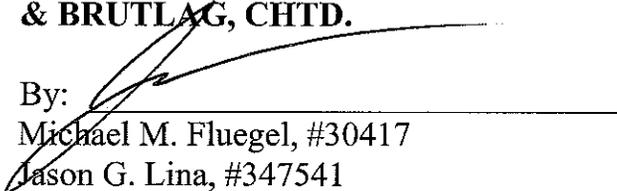
may make a payment that extends the limitation period. Respondent then cites an inapposite case, Currie State Bank v. Schmitz in support of its incorrect interpretation of the note language. Currie relies upon guaranty law. 628 N.W.2d 205 (Minn. App. 2001). The case does not involve a note or guaranty, the enforcement of which is barred by a statute of limitation. Rather, the case involves a guarantor attempting to escape liability on his guaranty solely because the bank extended the time for payment on the underlying note. Currie is inapplicable.

### **Conclusion**

Here, enforcement of the debt is clearly barred unless Respondent can show a “payment” that qualifies under the common law understanding of a “payment” sufficient to toll the statute of limitations. Respondent cannot do so. Appellant did not know about the payment from wife to husband at the time it was made, did not learn about it until well after the fact, and never ratified it. The limitation period ran on December 31, 2007. Respondent’s subsequent attempt to enforce the debt is time-barred.

Respectfully submitted this 29th day of January, 2010.

**FLUEGEL, ANDERSON, MCLAUGHLIN  
& BRUTLAG, CHTD.**

By: 

Michael M. Fluegel, #30417

Jason G. Lina, #347541

215 Atlantic Avenue, P.O. Box 527

Morris, MN 56267

320-589-4151

**ATTORNEYS FOR APPELLANT**

**ROLAND RETZLAFF**