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State of Minnesota
In Court of Appeals

RAM MUTUAL INSURANCE COMPANY,

Appellant,

vs.

RUSTY ROHDE d/b/a STUDIO 71 SALON,

Respondent.

APPELLANT'S BRIEF AND ADDENDUM

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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Statement of the Issues

- (1) **Does *United Fire & Casualty v. Bruggeman*, 505 N.W.2d 87 (Minn. Ct. App. 1993), and its progeny apply to subrogation claims not involving fire-related loss?**

Trial Court Ruling: In effect, the trial court determined that *Bruggeman* and its progeny apply to non-fire related insurance losses, such as water damage, thereby barring Appellant's subrogation claim.

Cases: E.g., *United Fire & Casualty v. Bruggeman*, 505 N.W.2d 87 (Minn. Ct. App. 1993) (fire); *Nuessmeier Elec., Inc. v. Wweiss Mfg. Co.*, 632 N.W.2d 248 (Minn. Ct. App. 2001) (fire); *Osborne v. Chapman*, 574 N.W.2d 64 (Minn. 1998) (fire); *Blohm v. Johnson*, 523 N.W.2d 14 (Minn. Ct. App. 1994) (fire).

- (2) **Appellant alleges that Respondent (tenant) negligently caused water damage to the leased premises. The lease requires Respondent to keep the premise in good order and in a tenant-like manner and not to commit waste. Does *Bruggeman* and its progeny bar Appellant's subrogation claim where Appellant's insured (landlord) agreed to, and did, provide insurance (including fire insurance) for a number of perils, none of which perils required to be carried by the landlord under the lease included the peril of water damage?**

Trial Court Ruling: *Bruggeman* and its progeny preclude Appellant's subrogation claim where there is no agreement regarding fire insurance.

Cases: *United Fire & Casualty v. Bruggeman*, 505 N.W.2d 87 (Minn. Ct. App. 1993); *Blohm v. Johnson*, 523 N.W.2d 14 (Minn. Ct. App. 1994).

Statement of the Case

The trial court disposed of this case by way of summary judgment in Respondent's favor. The trial judge was the Honorable Thomas P. Knapp of the Seventh Judicial District, Stearns County.

Appellant (RAM) insured commercial property in Sauk Centre, Minnesota. Respondent (Rohde) rented and operated a beauty salon out of one of the units. During his occupancy, Rohde installed new water lines to a pedicure machine. He did so without first obtaining his landlord's permission as required under the lease. The negligently installed water lines burst, causing water damage to the unit. RAM paid the landlord's insurance claim and brought subrogation claims against Rohde for breach of contract, negligence, and promissory estoppel.

The parties' lease agreement set forth the various perils the landlord was to insure. These perils included fire insurance, which the landlord obtained. The lease, however, did not require the landlord to insure against water damage caused by Rohde's negligence. Rather, it required Rohde to maintain the premises in a tenant-like manner and not commit waste, among other things.

Rhode sought summary judgment, claiming that RAM's subrogation action was barred by *United Fire & Casualty v. Bruggeman*, 505 N.W.2d 87 (Minn. Ct. App. 1993), and its progeny. The trial court agreed and dismissed RAM's Complaint.

Statement of Facts

Rohde operates a beauty salon in a rental suite owned by RAM's insured, JD Properties. (App. 53). On February 4, 2008, a water line to a manicure chair burst within Rohde's salon, causing \$17,509.38 in damage. (App. 60; 75). RAM insures the commercial property where Rohde's salon is located. (App. 228). RAM paid its insured, JD Properties, for the loss. (App. 60). In turn, RAM initiated this suit to recover its subrogation interest. (App. 1-7).

The commercial property at issue contains three different suites, all of which are connected. (App. 72). Aflac Insurance occupies Suite 1. (App. 72). Rohde occupies Suite 2. (App. 72). And, Soak Centre, a launder mat, occupies the final suite. (App. 72). While most of the damage occurred to Rohde's unit (Suite 2), water also seeped into Suite 1, disrupting Aflac's business. (App. 72-73)

Upon investigation, RAM learned that "Rhode installed the pedicure chairs and [] additional plumbing lines in this rental property without [JD Properties'] knowledge or consent." (App. 73) (alterations added). RAM also learned that Rohde incorrectly installed the lines or used an inappropriate application in the process. (App. 75).

Rohde's five-year lease extends from January 1, 2005 to December 31, 2010. (App. 53, ¶ 2). The Lease Agreement provides, in pertinent part, that:

The Tenant will not make or have others make alterations, additions or improvements or erect or have others erect . . . *plumbing fixtures* . . . or

make any changes to the Premises or otherwise without first obtaining the Landlord's written approval thereto.

(App. 56, ¶ 37). The lease also provides a number of other relevant clauses, including:

Additional Right Reentry

19. If the Landlord reenters the Premises or terminates the Lease, then:
 - h. the Tenant will pay to the Landlord on demand:
 - ii. reasonable expenses as the Landlord incurs or has incurred in connection with . . . expenses of keeping the Premises in good order, repairing the same.

(App. 55, ¶ 19(h)(ii))

Tenant's Repairs and Alterations

35. The Tenant covenants with the Landlord to occupy the Premises in a tenant-like manner and not to permit waste. . . . [T]he Tenant will keep, repair, replace and maintain all glass, wiring, *pipes* and mechanical apparatus in, upon or serving the Premises in good and tenantable repair at its sole expense.

(App. 56, ¶ 35)

Care and Use of Premises

47. At the expiration of the lease term, the Tenant will quit and surrender the Premises in as good a state and condition as they were at the commencement of this Lease, reasonable wear and damages by the elements excepted.

(App. 57, ¶ 47)

Insurance

25. The tenant is advised that, if insurance coverage is desired by the Tenant, the Tenant should inquire of Tenant's insurance agent regarding a Tenant's Policy of Insurance.

26. The Tenant is responsible for insuring the Premises for liability insurance for the benefit of the Tenant and the Landlord.

(App. 55, ¶¶ 25 & 26). As to insurance, Rohde ultimately obtained a business owner's policy, providing coverage to the landlord for the tenant's own negligence. (App. 41).

Rohde acknowledges that he installed the new waterlines without prior written consent. (App. 51). And, he admits that one of the lines he installed burst, causing damage to the rental premises. (App. 51). Finally, Rohde admits that he failed to notify JD Properties that he was installing new water lines in Suite 2. (App. 51). Accordingly Rohde's actions were contrary to his obligations under the lease.

As to the landlord's obligations under the lease, it was obligated, among other things, to obtain fire insurance. (App. 56, ¶ 35). In this regard, the lease provided:

Tenant's Repairs and Alterations

35. The Tenant will at all times and at its sole expense, subject to the Landlord's repair, maintain and keep the Premises, reasonable wear and tear, damage by *fire*, lightning, tempest, structural repairs, and repairs necessitated from hazards and perils against which the Landlord is required to insure excepted.

(App. 56, ¶ 35). The landlord did obtain a commercial package insurance policy with RAM, which was in place on the date of the incident. (App. 228).

Argument

RAM appeals the trial court's order and entry of judgment, granting Rohde's

motion for summary judgment and dismissing RAM's Complaint with prejudice. (Add. 1–2). The standard of review, therefore, is de novo. *See Losen v. Allina Health System*, 767 N.W.2d 703, 707–09 (Minn. Ct. App. 2009) (“On appeal from summary judgment, we review de novo whether there are any genuine issues of material fact and whether the district court erred in its application of the law.”).

The trial court erred in concluding that *United Fire & Casualty v. Bruggeman*, 505 N.W.2d 87 (Minn. Ct. App. 1993), and its progeny apply to a subrogation action not involving a fire-related insurance loss. The trial court also erred in applying *Bruggeman* where, pursuant to the parties' lease agreement, RAM's insured (landlord) agreed to, and did, provide fire insurance. The landlord was not required, however, to provide coverage for the peril of water damage. In turn, Rohde (tenant) agreed to keep the premises in good order and in a tenant-like manner and not to commit waste, among other things.

1. COURTS HAVE NOT APPLIED *BRUGGEMAN* AND ITS PROGENY TO A NON-FIRE RELATED LOSS

In this water-damage case, the trial court relied exclusively on *Bruggeman*, 505 N.W.2d 87, and its progeny in dismissing RAM's subrogation action. *Bruggeman* stands for the proposition that absent an agreement to procure fire insurance, a tenant is a co-insured on the landlord's insurance policy. *Id.* at 89–90. As a co-insured, the landlord's insurer cannot subrogate against the negligent tenant that causes fire damage to the premises. *Id.*

Minnesota cases construing *Bruggeman* have all dealt with a fire-related loss. *Nuessmeier Elec., Inc. v. Weiss Mfg. Co.*, 632 N.W.2d 248 (Minn. Ct. App. 2001) (fire by heater); *Osborne v. Chapman*, 574 N.W.2d 64 (Minn. 1998) (fire); *Blohm v. Johnson*, 523 N.W.2d 14 (Minn. Ct. App. 1994) (fire); *TIG Ins. Co. v. Anderson*, 663 N.W.2d 1 (Minn. Ct. App. 2003) (fire); *State Auto Ins. Co. v. Knuttila*, 645 N.W.2d 475 (Minn. Ct. App. 2002) (fire); *St. Paul Companies v. Van Beek*, 609 N.W.2d 256 (Minn. Ct. App. 2000) (fire by employee); *Bigos v. Kluender*, 611 N.W.2d 816 (Minn. Ct. App. 2000) (fire by grill). Here, however, the trial court applied *Bruggeman* to a non-fire related claim.

Furthermore, cases following *Bruggeman*, including *Bruggeman* itself, all dealt with complete destruction and loss of use of the rental premises. *See e.g., Bruggeman*, 505 N.W.2d at 88 (“a fire destroyed the property”); *Osborne*, 574 N.W.2d at 65 (“heavily damaged by fire”). This makes sense because *Bruggeman*’s roots are based on the fiction that “the landlord and the tenant [are] co-insureds [as] each ha[s] an insurable interest in the property—the landlord a fee interest and the tenant a possessory interest.” *Bruggeman*, 505 N.W.2d at 89 (citing *Sutton v. Johnahl*, 532 P.2d 478 (Okla. Ct. App. 1975)) (alterations added). Thus, when fire destroys the property, the tenant loses its possessory interest.

The subrogation action at issue here, however, concerns water damage—damage that did not destroy the property. In fact, it caused approximately \$18,500 in damage; this compared to the \$259,600 insurance coverage on the building. (App. 60, 72 & 231). In turn, the damage did not result in Rohde losing his possessory interest. (App. 110, ¶ 17; 111, ¶ 21). Approximately three days after the loss occurred, the property was cleaned and dried. (App. 73). For these reasons, *Bruggeman* and its progeny are inapplicable. The trial court’s decision was in error.

2. EVEN IF *BRUGGEMAN* AND ITS PROGENY APPLY TO A NON-FIRE RELATED LOSS, THE LANDLORD HERE AGREED TO AND DID PROVIDE FIRE INSURANCE AND THE TENANT WAS OBLIGATED TO KEEP THE PREMISES IN GOOD ORDER IN A TENANT-LIKE MANNER AND NOT COMMIT WASTE

Generally, insurance coverage does not relieve a tortfeasor for its wrongdoing. Our Supreme Court has stated: “[I]nsurance coverage of the plaintiff has no effect on the liability of a defendant for a tort. This is on the theory that defendant cannot escape liability for his wrong because of insurance bought and paid for by plaintiff.” *Donohue v. Acme Heating Sheet Metal & Roofing Co.*, 8 N.W.2d 618, 619 (Minn. 1943).

When an insurer pays an insurance loss it usually can pursue an action against the tortfeasor through subrogation. In that instance, the insurer stands in the shoes of the insured and inherits the rights the insured would otherwise have against the tortfeasor. *Weber v. Sentry Ins.*, 442 N.W.2d 164, 167 (Minn. Ct. App. 1989) (“With subrogation,

unlike reimbursement, the insurer stands in the shoes of the insured.”). This inheritance typically would include the principle that the tortfeasor cannot escape its wrong because the insured had insurance coverage. *Bruggeman*, 505 N.W.2d at 89–90, however, limits this principle.

In *Bruggeman*, the Court held that an implied waiver of subrogation exists between a landlord and tenant where there is “*no express agreement as to which party shall be responsible for obtaining fire-insurance coverage for the rental property.*” *Bruggeman*, 505 N.W.2d at 89–90 (emphasis added); *see also Blohm v. Johnson*, 523 N.W.2d 14, 16 (Minn. Ct. App. 1994) (“*Bruggeman* applies to any landlord/tenant situation *where there is no express agreement covering the provision of fire insurance* for the building.”) (emphasis added). In that circumstance, the tortfeasor escapes its wrong.

Given this inequity, our Supreme Court has recognized that:

[I]n view of the principle that one is ordinarily held liable for his or her negligent acts, many courts adopting the *Sutton*¹ approach have required some evidence that the parties to the lease intended that the landlord would seek recovery from its insurer, rather than the tenant, in the event of a loss occasioned by the tenant’s negligence.

¹ *Sutton* refers to *Sutton v. Johnahl*, 532 P.2d 478 (Okla. Ct. App. 1975)—the case relied upon by the *Bruggeman* Court in reaching its decision. *See Bruggeman*, 505 N.W.2d at 89 (citing *Sutton*).

Osborne, 574 N.W.2d at 67 n.5 (citing cases in other jurisdictions). This rationale makes sense and RAM urges the Court to adopt it here. For the reasons that follow *Bruggeman* should be inapplicable and the terms of the parties' lease should control.

Fire insurance is defined as “[a]n agreement to indemnify against property damage caused by fire, wind, rain, or other similar disaster.” BLACK’S LAW DICTIONARY, p. 817 (8th ed. 2004) (alteration added). The parties’ lease here required the landlord to provide fire insurance:

Tenant’s Repairs and Alterations

35. The Tenant will at all times and at its sole expense, subject to the Landlord’s repair, maintain and keep the Premises, reasonable wear and tear, *damage by fire*, lightning, tempest, structural repairs, and repairs necessitated from hazards and perils against which the Landlord is required to insure excepted.

(App. 56, ¶ 35) (emphasis added). It is undisputed that the landlord did obtain such coverage. (App. 228). And, it is undisputed that the damage at issue was not fire related. Nor was the damage caused by “wind, rain, or other similar disaster,” as defined by the term fire insurance.

Rather, we are dealing with water damage caused by Rohde’s negligent installation of a water line—a risk that the landlord was not required to cover. Thus, since an express agreement exists as to fire insurance coverage, and since the loss at issue is unrelated to the perils associated with fire insurance, *Bruggeman* is inapplicable. *See*

Blohm v. Johnson, 523 N.W.2d 14, 16 (Minn. Ct. App. 1994), (“*Bruggeman* applies to any landlord/tenant situation *where there is no express agreement covering the provision of fire insurance for the building.*”) (emphasis added).

In that instance, there is no implied waiver of subrogation. Instead, the terms of the parties’ lease must control.

The lease here indicates that responsibility for water damage would fall on the tenant in the event he negligently caused such damage to the premises. In this regard, the relevant provisions of the lease state:

Additional Right Reentry

19. If the Landlord reenters the Premises or terminates the Lease, then:
 - h. the Tenant will pay to the Landlord on demand:
 - ii. reasonable expenses as the Landlord incurs or has incurred in connection with . . . expenses of keeping the Premises in good order, repairing the same.

Tenant’s Repairs and Alterations

35. The Tenant covenants with the Landlord to occupy the Premises in a tenant-like manner and not to permit waste. . . . [T]he Tenant will keep, repair, replace and maintain all glass, wiring, *pipes* and mechanical apparatus in, upon or serving the Premises in good and tenantable repair at its sole expense.
37. The Tenant will not make or have others make alterations, additions or improvements or erect or have others erect . . . *plumbing fixtures* . . . or *make any changes* to the Premises or otherwise *without first obtaining the Landlord’s written approval thereto.*

Care and Use of Premises

47. At the expiration of the lease term, the Tenant will quit and surrender the Premises in as good a state and condition as they were at the commencement of this Lease, reasonable wear and damages by the elements excepted.

(App. 55, ¶ 19(h)(ii); App. 56, ¶¶ 35 & 37; App. 57, ¶ 47, respectively) (emphasis added).

Similar lease provisions were at issue in *Koch v. Spann*, 92 P.3d 146, 149 (Or. Ct. App. 2004). There, the court determined that an insurer's subrogation claim was not barred by *Sutton* where the lease stated that the tenant was responsible for damage caused by his negligence and the tenant was responsible for insuring his personal property. *Id.* The Court made this ruling despite the fact that the lease was silent with respect to fire insurance. The same situation should apply here, given the non-application of *Bruggeman*, as argued above.

Similarly, in *Osborne v. Chapman*, 574 N.W.2d 64, 68 (Minn. 1998), our Supreme Court recognized that “a landlord and tenant may expressly or *implicitly* agree to allocate the responsibility for maintaining insurance coverage.” (emphasis added) (citing *Dolphine Mfg., Inc. v. Tehaar*, 404 N.W.2d 295, 297 (Minn. Ct. App. 1987)). There, the Court determined that provisions in the parties' lease may have shifted the risk of loss to the tenant. Those provisions:

- obligated Osborne to repair the premises if “any part thereof[] shall be partially damaged by fire not due to [Chapman's] negligence”;
- required Chapman to surrender the premises at the end of the lease term

“in as good state and condition as they were at the commencement of this lease, damages by the elements excepted”;

- obligated Chapman to keep the premises “in good repair” and to “make all required repairs to the plumbing, range, heating, apparatus, and electric and gas fixtures whenever damage thereto shall have resulted from [his] misuse, waste, or neglect”; and

- required Osborne to undertake all “[m]ajor maintenance and repair not due to [Chapman's] misuse, waste, or neglect.”

See Osborne v. Chapman, 574 N.W.2d 64, 68 n.7, 65, n.2 (Minn. 1998) (alterations in original) (“[T]he lease [] provisions [] arguably shift the risk of loss to Chapman for losses caused by his negligence—at least for damage to the property.”) (alterations added).

Here, the parties’ lease agreement is on the same footing. The following provisions are similar to those present in the Osborne-Chapman lease:

- The Tenant covenants with the Landlord to occupy the Premises in a tenant-like manner and not to permit waste. . . . [T]he Tenant will keep, repair, replace and maintain all glass, wiring, pipes and mechanical apparatus in, upon or serving the Premises in good and tenantable repair at its sole expense.

- The Tenant will pay to the Landlord on demand . . . reasonable expenses as the Landlord incurs or has incurred in connection with . . . expenses of keeping the Premises in good order, repairing the same.

- The Tenant will not make or have others make alterations, additions or improvements or erect or have others erect . . . plumbing fixtures . . . or make any changes to the Premises or otherwise without first obtaining the Landlord’s written approval thereto.

- At the expiration of the lease term, the Tenant will quit and surrender the Premises in as good a state and condition as they were at the commencement of this Lease, reasonable wear and damages by the elements excepted.

(App. 55, ¶ 19; App. 56, ¶¶ 35 & 37; App. 57, ¶ 47, respectively).

In sum, the parties' lease here indicates that Rohde would be responsible for repairing the premises in the event he negligently caused water damage. Furthermore, like the lease in *Koch*, 92 P.3d at 149, the lease here advises Rohde to obtain his own tenant's insurance. Specifically, the lease states: "tenant is advised that, if insurance coverage is desired by the Tenant, the Tenant should inquire of Tenant's insurance agent regarding a Tenant's Policy of Insurance." (App. 55, ¶ 25). Given all this, in the absence of an express agreement here requiring the landlord to provide insurance coverage for the peril of water damage, these contractual provisions shifted the risk to Rohde, the tenant.

At the trial level, Rohde argued and the trial court determined that *Osborne* has no application to a subrogation claim since the issue there involved a direct suit by the landlord against the tenant. (Add. 9–10). While true, *Osborne* was not a subrogation suit, it is relevant for the purpose of establishing what type of lease provisions can shift the risk of loss to a tenant, especially if *Bruggeman* is inapplicable.

Furthermore, the parties' lease required Rhode to obtain liability insurance for the benefit of the landlord. (App. 55, ¶ 25). Rhode did obtain a business owner's policy providing coverage for his own negligent acts, which damage the rental premises. (App.

41).² As one authority has noted, “A requirement that parties purchase insurance is a significant indication that [parties] intended to shift the risk of loss.” Lee R. Russ, 16 COUCH ON INSURANCE § 224:88 (3d ed. 2007) (alteration added). Again, the insurance clause in the parties’ lease, as in *Koch*, indicates that Rohde would be responsible for his negligence.

In *Bruggeman*, the legal fiction of an implied waiver of subrogation existed because the landlord and tenant had no express agreement regarding insurance or what type. *Id.* at 89. Here, an *implied* waiver cannot exist where there is an *express* agreement regarding the applicable insurance coverage that causes the damage—that being water damage caused by Respondent’s negligence.

Finally, it is worthwhile to discuss *Blohm v. Johnson*, 523 N.W.2d 14 (Minn. Ct. App. 1994)—a case relied upon by Rohde and the trial court. (Add. 8–9). In *Blohm*, a tenant negligently caused fire damage to a rental unit. *Id.* at 15. The court dismissed the insurer’s subrogation claim, finding that *Bruggeman* applied because the lease did not specifically state that the landlord was responsible for carrying fire insurance. *Id.* at 16.

² Given the fact Rohde obtained insurance, he certainly did not rely on the landlord’s insurer to provide coverage for his negligence. See *Osborne*, 574 N.W.2d at 67 n.6 (“We express no opinion as to whether tenants reasonably rely upon landlords to insure the leased structure against damage by fire, as suggested in *Sutton* and *Bruggeman*.”).

The lease did, however, provide that the tenant was responsible for obtaining insurance for his business. *Id.* It did not address fire insurance, though.

Here, unlike in *Blohm*, the risk-causing loss, *i.e.*, Rohde's negligence, was specifically delegated to Rohde by the lease provisions addressed above. Furthermore, Rohde agreed to provide liability coverage for the benefit of the landlord, and he did in fact obtain a policy that provided coverage for loss sustained to the rental premises due to his own negligence. (App. 55, ¶ 26; App. 41). Indeed, if the loss at issue in *Blohm* was caused by the tenant's business activities—a risk specifically delegated to the tenant in the lease agreement—then the insurance company's subrogation claim arguably would have been viable. Here, the lease provision requiring Rohde to obtain "liability insurance" should, in addition to the other lease provisions, make RAM's claim viable.

On this point, the trial court determined that the term "liability insurance" was ambiguous at best. (Add. 11). Yet, to the extent the term "liability insurance" is ambiguous, Rohde's subsequent actions in obtaining that form of insurance, which specifically apply to the loss here, cures any claimed ambiguity. *See Flakne v. Minnesota Farmers' Mut. Ins. Co.*, 117 N.W. 785, 787 (Minn. 1908) ("In causing the by-laws to conform to the policy, it resolved an ambiguity in the contract and made definite an uncertain provision."). Moreover, summary judgment is not proper if the court determines that a contract is ambiguous. *Donnay v. Boulware*, 144 N.W.2d 711, 716

(Minn. 1966). This is especially true where disputed material facts are to be resolved in favor of the non-moving party on summary judgment. *Id.* “Under such circumstances, the trial court should allow the parties a full opportunity to present evidence of facts and circumstances and conditions surrounding its execution and conduct of the parties relevant thereto.” *Abdallah, Inc. v. Martin*, 65 N.W.2d 641, 643 (Minn. 1997).

In conclusion, *Bruggeman* presented a situation where there was no lease between the parties. *Bruggeman*, 505 N.W.2d at 88. While there was an absence of insurance coverage, likewise there was no allocation of responsibility for damages. Here, the lease required the landlord to obtain fire insurance, which he did; and, it required, among other provisions, Rohde to obtain liability insurance, which he did. The loss at issue, however, does not fall within the context of a fire-related loss; rather, it falls within Rohde’s liability for negligence and his obligations under the lease. *Bruggeman* is therefore inapplicable and accordingly the other provisions of the parties’ lease apply. Under those provisions, Rohde expressly agreed to pay for his damages to the property.

Conclusion

RAM respectfully asks that the Court reverse the judgment of the trial court with directions to reinstate RAM’s Complaint and reconsider RAM’s motion for partial summary judgment with respect to its contract claim.

Dated: January 4th, 2011.

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Certificate of Compliance

This brief complies with the word/line limitations of Minn. R. Civ. App. P. 132.01, subd. 3(a). The brief was prepared using Microsoft Word version 2010, which reports that the brief contains 580 lines and 4,671 words.

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