

NO. A11-0581

State of Minnesota
In Supreme Court

Marie Delores Green,

Respondent,

vs.

BMW of North America, LLC,
a foreign limited liability company
qualified to do business in the State of Minnesota,

Appellant.

**REPLY BRIEF OF
APPELLANT BMW OF NORTH AMERICA, LLC**

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ARGUMENT

I. Appellant Did Not Argue For Application of a Strict “Dollar-Value Proportionality” Rule.

Respondent Marie Green primary focus is to rail against a position that appellant never assumed. Green’s straw-man argument is that appellant seeks to have this Court “judicially enact new law” that would impose what Green characterizes as a strict “dollar-value proportionality” rule in attorney fee-shifting cases. [Resp’s Br. at 9-10]. Green then spends the remainder of her brief knocking that position down without precisely addressing why her attorneys were justified in recovering more than \$221,000 in fees and costs in a case that they knew from the outset had an upward value of \$25,000.¹

It is that imbalance that appellant addressed in its opening brief and that the dissent below took up in its separate opinion. At no time did appellant ever advance an argument that lemon-law litigants must be limited to recovering a percentage of their compensatory damages or that courts should apply a specific multiplier as a cap on recoverable fees. Instead, appellant contended, as it does now, that the district court was mistaken when it determined that it is “improper” to consider whether the amount of fees sought were unreasonably disproportionate to the amount at issue when awarding damages under Minnesota’s Lemon Law, Minn. Stat. § 325F.665, subd. 9 and that the court of appeals erred when it affirmed that decision. (Add. 28; Add. 17). That view, though, is not supported by this Court’s precedent, which holds that the amount involved

¹ If the Minnesota Court of Appeals grants Green’s pending motion for an additional \$45,000 in attorney fees, the total would come to more than \$266,000.

is one of the relevant factors in determining reasonable attorney fees. Appellant, thus, seeks to have this Court use this case as an opportunity to reaffirm that position.

II. The Reasonableness Requirement in Both Minnesota’s Lemon Law and The Magnuson-Moss Warranty Act Imparts a Sense of Proportionality.

A. This Court Has Long Held That “The Amount At Issue” is a Relevant Factor in Determining Reasonable Attorney Fees.

Appellant recognizes that the aim of fee-shifting statutes, like Minnesota’s Lemon Law and the Magnuson-Moss Warranty Act, is to ensure that people of all economic backgrounds have the ability to access and utilize the judicial system to enforce specific substantive rights that legislative bodies have deemed worthy of special protection. *See, e.g., City of Burlington v. Dague*, 505 U.S. 557, 568 (1992) (Blackmun, J. dissenting) (stating that the rationale for fee-shifting provisions is “to strengthen the enforcement of selected federal laws by ensuring that private persons seeking to enforce those laws could retain competent counsel” even though lacking financial means to pay for those services). Nothing about this appeal seeks to undo or even undermine that goal.

“[I]f plaintiffs * * * find it possible to engage a lawyer based on the statutory assurance that he will be paid a ‘reasonable fee,’ the purpose behind the fee-shifting statute has been satisfied.” *Pennsylvania v. Delaware Valley Citizens’ Council for Clean Air*, 478 U.S. 546, 565 (1986) (*Delaware Valley I*). “A reasonable attorney’s fee is one that is adequate to attract competent counsel, but that does not produce windfalls to attorneys.” *Blum v. Stenson*, 465 U.S. 886, 897 (1984) (ellipsis, brackets, and internal quotation marks omitted); *see also Coulter v. State of Tennessee*, 805 F. 2d 146, 149 (6th Cir. 1986) (citing and quoting S.Rep. No. 94-1011, p. 6 (1976), U.S.Code Cong. &

Admin. News 1976, pp. 5908, 5913 (promoting “fees which are adequate to attract competent counsel, but which do not produce windfalls”); 122 Cong.Rec. 33314 (1976) (cautioning against allowing the statute to be used as a “relief fund for lawyers”) (remarks of Sen. Kennedy)). Indeed, the aim of fee-shifting statutes is *not* to provide “a form of economic relief to improve the financial lot of attorneys.” *Delaware Valley I*, 478 U.S. at 565. Nor is it the intent of fee-shifting statutes that “lawyers, already a relatively well-off professional class, receive excess compensation or incentives beyond the amount necessary to cause competent legal work to be performed in these fields.” *Coulter*, 805 F.2d at 148.

Green’s argument that consumer-protection statutes will be “eviscerated,” and that the state’s consumers will be without a remedy if courts must consider the amount-involved factor when evaluating the reasonableness of a fee petition, presents a false choice. Green fails to explain why consideration of this factor would leave lemon-law litigants without competent counsel. Will this state’s attorneys refuse to handle consumer cases if fee awards are more proportional to the amount at issue?² Plainly, the answer is “no.” Moreover, it ignores that the amount-involved factor is one of the “relevant circumstances” that this Court has previously instructed lower courts to consider when “determining the reasonableness of the hours and the reasonableness of the hourly rates” in awarding attorney’s fees pursuant to a statute. *Milner v. Farmers Ins. Exchange*, 748

² The fact that Green’s counsel continues to accept lemon-law litigants as clients despite the fact that some district courts have substantially reduced their fees would suggest that these types of cases are still financially viable even when counsel has their fees cut by 30 and 50 percent. (App. 31-64).

N.W.2d 608, 621 (Minn. 2008) (citing *State v. Paulson*, 290 Minn. 371, 373, 188 N.W.2d 424, 426 (1971); *Hensley v. Eckerhart*, 461 U.S. 424, 430 (1983)).

Green’s narrow focus on just two of those factors — whether the prevailing party was successful on all asserted claims and whether that party realized the full remedy available under the statute — not only ignores the other factors, but also disregards this Court’s directive to consider “‘*all* relevant circumstances.’” *Milner*, 748 N.W.2d at 621 (quoting *Paulson*, 290 Minn. at 373, 188 N.W.2d at 426) (emphasis added). While those two factors are indeed significant in determining reasonableness, they do not alone assist courts in deciding whether counsel exercised “‘billing judgment.’” *Anderson v. Hunter, Keith, Marshall & Co.*, 417 N.W.2d 619 n. 10 (Minn. 1988) (quoting *Hensley*, 461 U.S. at 434) (“In the private sector, ‘billing judgment’ is an important component in fee setting. It is no less important here.”) (Internal quotation and citation omitted)).³

Green’s argument that *Hensley* precludes consideration of the amount involved overstates the precise issue that was before the Court and the narrow holding that it reached. In *Hensley*, the Court stated it accepted review “to clarify the proper relationship of the results obtained to an award of attorney’s fees.” *Id.* at 432, 103 S.Ct. 1939. The Court ultimately held that “[t]he District Court did not properly consider the relationship between the extent of success and the amount of the attorney’s fee award.”

³ In any event, Green’s complaint states that she is seeking “damages including but not limited to in the amount of Fifty Thousand Dollars (\$50,000).” Her recovery of \$25,000 in compensatory damages means that she was at best only 50% successful. Thus, using Green’s own argument, she was only 50% successful, and the district court should have reduced her fee request accordingly.

Id. at 424, 103 S.Ct. at 1935. In reaching that holding, the Court instructed that attorneys paid by an adversary pursuant to a statute must exercise the same kind of billing judgment they would if they had a paying client. Importantly, the Court also noted that “[t]he product of reasonable hours times a reasonable rate does not end the inquiry.” *Id.* at 434, 103 S.Ct. at 1940. The Court went on to advise that “[t]here remain *other considerations* that may lead the district court to adjust the fee upward or downward, *including* the important factor of the ‘results obtained.’” *Id.* (citing *Copeland v. Marshall*, 205 U.S.App.D.C. 390, 400, 641 F.2d 880, 890 (1980) (en banc)) (emphasis added). In short, while the Court in *Hensley* addressed one particular factor, it acknowledged that in other cases, other circumstances might predominate.

Like the appellant in *Hensley*, the appellant here has asked this Court “to clarify” that the amount involved is indeed also one of the relevant factors that courts must consider when determining reasonable attorney fees.⁴ Perhaps more than any of the other factors, the amount-involved factor will assist courts in resolving whether counsel exercised billing judgment. Without regard to the amount at issue, counsel cannot adequately evaluate the time and labor involved and, thus, cannot adequately attest that his or her submitted fees are reasonable in the context of the matter for which the fees are sought. As the dissent below aptly noted, the more than 600 billed hours in this case are “unreasonable in light of the nature and limited value of the case.” (Add. 19).

⁴ The district court decisions in appellant’s appendix suggest strongly that this Court’s guidance is required. Those decisions reflect disparate approaches to fee petitions.

Although Minnesota's Lemon Law allows attorneys to recover more than the value of the vehicle at issue, that recovery must have some bearing on the amount of fees assessed to the unsuccessful defendant. "[T]he term 'reasonable' does impart a sense of proportionality between an award of damages and an award of attorney's fees." *McCauslin v. Reliance Finance Co.*, 751 A.2d 683, 686 (Pa. Super. 2000) (holding that the \$12,000 in attorney fees award to an automobile purchaser under Pennsylvania's consumer-protection law on a \$5,000 claim was unreasonable); accord *Samuel-Bassett v. Kia Motors America, Inc.*, 357 F.3d 392, 401 (3rd Cir. 2004). Recently, a Minnesota federal district court held just that. *Nelson v. American Home Assurance Co.*, 2012 WL 694641 (D. Minn. Mar. 1, 2012). There, the court, in an alleged breach of the duty to defend case, reduced the nearly \$160,000 in requested fees and costs to approximately \$32,000 on the grounds that "the amount Plaintiffs could recover (and did recover) for breach of that duty was relatively small, just under \$5,000." *Id.* at *2. The court then noted that "[w]hile it is not necessarily improper to award fees and costs exceeding the amount recovered on a claim, '[t]he amount of damages a plaintiff recovers is certainly relevant to the amount of attorney's fees to be awarded.'" *Id.* (quoting *City of Riverside v. Rivera*, 477 U.S. 561, 574 (1986)). That court likewise relied on *Milner*, stating that it was applying "all of the factors relevant to an award of reasonable fees and costs" and that its reduced award was "'reasonable in relation to the results obtained.'" *Nelson* at *2 (quoting *Milner*, 748 N.W.2d at 624) (internal citation to *Hensley* omitted).

Here, too, the exercise of billing judgment demands consideration of the amount involved. "Hours that are not properly billed to one's *client* are also not properly billed

to one's *adversary* pursuant to statutory authority.'" *Anderson*, 417 N.W.2d at 629 n.10 (quoting *Hensley*, 461 U.S. at 434) (internal quotation and citation omitted) (emphasis in original)). Thus, the dissent's comment that "no reasonable attorney with a contingent-fee would have invested more than 600 hours into a case that was so limited in value" comports with this Court's adoption of the *Hensley* billing-judgment analysis. (Add. 19).

Green's attorney fees did not become so disproportionate to the amount involved solely because her attorneys spent more 600 hours on this \$25,000 case. The rate at which her attorneys billed — \$375 and \$350 — likewise contributed to fees that were nearly nine times the outside value of this case. But rather than rely on what the market rate would bear in a simple, low-value lemon-law case, Green justified her attorneys' high rates by pointing both to the rates charged by other local consumer-law attorneys whose fees are paid by defendants, not clients, and to a national survey of other consumer-law attorneys, who are also paid pursuant to fee-shifting statutes. In other words, the rates that Green's attorneys charged the appellant were based on rates that other consumer-law attorneys charged to other deep-pocket defendants, instead of that charged to paying clients. *Hensley*, though, instructs that "market standards should prevail" when awarding statutory-based fees, which "means that judges awarding fees must make certain that attorneys are paid the full value that their efforts would receive on the open market" in non-fee-shifting cases. *Hensley*, 461 U.S. at 447. That of course makes sense. Relying on the rates charged by attorneys who are paid by their client's adversary says nothing about what these attorneys could command on the open market. Using a survey based on self-serving data is hardly proof of what the market will bear.

Put another way, if the attorneys in this action were to advise future survey takers that they charge \$375 and \$350 an hour to handle lemon-law cases, those stated rates would not be an accurate reflection of the market rate simply because they became data in a survey of consumer-law attorneys.

As this Court has suggested, determining reasonable attorney fees requires more than a mechanical application of rates multiplied by hours. *Milner*, 748 N.W.2d at 621. Rather, it requires consideration of all relevant factors to arrive at the reasonable number of hours expended on the litigation and in setting the reasonable hourly rates. *Id.* One of those factors is the amount involved. This factor, more than any other, provides the court with the context necessary to determine what is reasonable in each case. That is exactly what the Eighth Circuit held in *Gumbhir v. Curators of the Univ. of Mo.*, 157 F.3d 1141, 1146-47 (8th Cir. 1998). While it is true, as Green contends, that plaintiff there had limited success on his claims, the court's focus in affirming the district court's drastic fee reduction (from more than \$458,000 to \$110,000) was based on the fact that "counsel knew from the outset that this case involved only a relatively modest claim for compensatory damages, perhaps \$50,000 to \$75,000 at most." *Id.* at 1146. Importantly, the court noted that attorneys "should not be permitted to run up bills that are greatly disproportionate to the ultimate benefits that *may be* reasonably attainable." *Copeland v. Marshall*, 641 F.2d 880, 908 (D.C.Cir.1980) (en banc) (MacKinnon, J., concurring) (emphasis added). In short, an attorney exercising billing judgment must at the outset of the case evaluate the amount that "may be reasonably attainable" to determine the

amount of time reasonably invested. Green's counsel did not do this when they incurred fees that were nearly nine times the amount that could ever be attainable in this case.

Without such a consideration, the fees awarded can become more punitive than compensatory. As the Eighth Circuit warned, the threat of paying for unconscionably high attorney fees can unreasonably "chill the assertion or defense of seemingly meritorious * * * claims." *Planned Parenthood of Minn., Inc. v. Citizens for Community Action*, 558 F.2d 861, 871 (8th Cir. 1977). While Green talks about leveling the playing field for consumers, fees like those at issue here that are so disproportionate to the amount at issue, tips the playing field toward plaintiff's counsel rather than any of the litigants. As the amicus party aptly points out, defendants in lemon-law actions are left with the unpalatable choice of either settling meritorious (and sometimes unmeritorious) cases early on when substantial and unreasonable fees have already been incurred or gambling that a district court will later rein in counsel's fee request should it get an adverse verdict.⁵

In sum, the lower courts erred in finding that it was improper to consider the amount involved when setting reasonable attorney fees.

B. The MMWA's Reasonableness Requirement Demands Application of the Hensley Factors.

Green "objects" to the fact that appellant focused on the district court's award of attorney fees under Minnesota's Lemon Law, suggesting both that there was something

⁵ The district court's conclusion that the requested fees were reasonable, "especially" in light of the fact that the case was "vigorously defended," suggests a somewhat punitive nature to the fee award and, thus, is a good example of the Catch-22 in which lemon-law defendants find themselves.

untoward about that argument and that appellant's analysis of attorney fees under the state statute is unnecessary because she would in any event have been entitled to all her requested fees under the Magnuson Moss Warranty Act, 15 U.S.C. § 2310(d)(2). True, Green did prevail on her MMWA claims and, true, that statute does permit the award of attorney fees, like Minnesota's Lemon Law. The district court, though, specifically stated that it was not awarding Green attorney fees under the MMWA because she had already recovered fees under the state statute, noting that "the court does not allow double recovery." (Add. 29). The court of appeals likewise only addressed fee awards under Minnesota's Lemon Law since that was the provision under which fees were awarded in this case. (Add. 14-17). Appellant, thus, properly sought review and reversal of those decisions.

In one sense, though, Green is correct that the analysis under both statutes is the same. Like Minnesota's Lemon Law, the MMWA specifically provides that the court is to award only those fees that have been *reasonably incurred*:

If a consumer finally prevails in any action brought under paragraph (1) of this subsection, he may be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of cost and expenses (including attorneys' fees based on actual time expended) determined by the court to have been *reasonably incurred* by the plaintiff for or in connection with the commencement and prosecution of such action, *unless the court in its discretion shall determine that such an award of attorneys' fees would be inappropriate.*

15. U.S.C. § 2310(d)(2) (emphasis added). While Green includes the above quote in her brief, she proceeds to ignore the highlighted provisions later in her argument, arguing only that the statute provides that fees are to be awarded "based on actual time

expended.” (Resp’s br. at 15). But the statute requires a reasonableness determination, just like that required for fees awarded under Minnesota’s Lemon Law. Thus, had the district court awarded fees under MMWA, it would have likewise been required to scrutinize counsel’s billings to determine if the hours and rate were reasonable and whether counsel demonstrated billing judgment.

Although the MMWA, like Minnesota’s Lemon Law, does not require strict dollar proportionality (and, again, appellant is not asking this Court for that rule of law), the vast majority of the jurisdictions interpreting the MMWA’s attorney-fee provision apply the *Hensley* factors and demand that the fees sought under this federal provision be both reasonable and demonstrate billing judgment.⁶ See, e.g., *Samuels v. Am. Motors Sales Corp.*, 969 F.2d 573, 575, 578 (7th Cir.1992) (awarding \$11,137 rather than requested \$38,149.75 and finding that court awarding attorney fees pursuant to MMWA has discretion in amount awarded); *Hanks v. Pandolfo*, 38 Conn.Supp. 447, 450 A.2d 1167, 1169 (1982) (award of \$450 when \$2825 requested); *Burns v. Chevrolet Motor Div.*, 1997 WL 126731 (E.D. Pa. Mar. 13, 1997) (applying *Hensley* analysis to reduce requested fees on grounds that plaintiff’s experienced counsel should have streamlined their handling of routine case); *Mike v. Chrysler Corp.*, 1995 WL 322500 (E.D. Pa. May 23, 1995) (applying *Hensley* analysis and reducing requested hours by 50 percent because of a lack of billing judgment); *Winrod v. Ford Motor Co.*, 557 N.E.2d 1250, 1253 (Ohio App. 3d 1988) (affirming district court’s reduction of fees); *Milicevic v. Fletcher Jones*

⁶ Thus, Green’s quotation from the congressional record that attorney fees awarded under the MMWA should not be tied to any specific percentage of the recovery is not inconsistent with what appellant contends here.

Imports, Ltd., 402 F.3d 912, 919 (9th Cir. 2005) (district court did not abuse its discretion in reducing hourly rate and eliminating unnecessarily duplicative hours).

And while Green has cited cases in which courts have rejected any consideration of the amount at issue as part of the reasonableness analysis, other courts have given that factor due consideration. *See, e.g., Iuorno v. Ford Motor Co.*, 1996 WL 1065620 (Va. Cir. Ct. Oct. 10, 1996) (reducing the sought-after fee because counsel “did not limit his research and preparation in proportion to the magnitude of the results sought”); *Winrod*, 557 N.E.2d at 1253 (holding that “the fee requested should relate to the amount recovered in the principal action”); *Hinman v. Jay’s Village Chevrolet, Inc.*, 657 N.Y.S.2d 814, 815-16, 239 A.2d 748, 749 (1997) (affirming trial court’s reduction of fees sought and noting small value of the case in relationship to the fee request); *Gibbs v. Hyundai Motor America*, 1997 WL 325788 (E.D. Pa. June 4, 1997) (awarding only \$1,200 of the requested \$4,950 fees and noting no reasonable person would have spent over \$5,000 to vindicate an economic loss of only \$1,200”).

In short, the MMWA, like Minnesota’s Lemon Law, requires courts to make a reasonableness determination when awarding fees. Both this Court and the U.S. Supreme Court have held that reasonableness necessarily involves consideration of the amount at issue. While Green argues that doing so will somehow contravene the goal of consumer-protection statutes, she has failed to establish why it is that this Court must tolerate vastly disproportionate fee awards to foster the statutory objective.

III. The District Court's Failure to Consider The Amount At Issue Led to Its Disproportionate Award.

The district court's starting point in awarding Green all of the requested \$221,000 in fees was that it did not have to consider the amount at issue as one of the factors in determining whether the sought-after fees was reasonable. This faulty foundation precipitated everything that followed and led to what was essentially a rubber stamp of all requested fees. At the heart of the district court's decision is the assumption that it is per se reasonable to incur fees that are almost nine times the amount at issue as long as counsel submits a detailed bill and affidavits from other consumer-law attorneys attesting that their rate in fee-shifting cases is also well beyond what any paying, cost-conscious client would accept. The self-serving nature of the affidavits is evident. This explains why the district court determined that not a single one of the 600 hours billed was "unreasonable." (Add. 25). But in the fee-shifting context, "[i]t does not follow that the amount of time actually expended is the amount of time reasonably expended." *Copeland*, 641 F.2d at 991-92. *See also Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 776 F.2d 646, 651 (7th Cir. 1985) (noting that "the number of hours actually worked rarely equals the number of hours reasonably expended, so the court must disallow hours devoted to unrelated, unsuccessful claims and hours which the attorneys would not bill to their clients").

The extent of the district court's analysis is that Green's attorneys "detailed" each of their 616 hours and billed in small increments of time, but that is likely not the kind of scrutiny that this Court instructed courts to engage in when evaluating whether the sought-after fees demonstrated billing judgment. *Anderson*, 417 N.W.2d at 629; *Milner*,

748 N.W.2d at 622. *Anderson* requires that the court “either make findings or otherwise concisely explain why it felt the hours claimed are reasonable or unreasonable.” 417 N.W.2d at 630.⁷ The fact that counsel detailed each of their 616 hours has nothing to do with reasonableness. The district court’s lack of scrutiny is especially evident here when it on the one hand notes that Green’s attorneys are seasoned lemon-law attorneys and, thus, entitled to their stated rates, but on the other hand does not question why attorneys with that level of experience would need to bill the amount of hours that they did to prepare boilerplate documents such as the summons, complaint, and form discovery requests or why attorneys of that caliber did not delegate routine tasks to paralegals.

Nor did the district court scrutinize Green’s evidence regarding those hourly rates. The district court accepted the stated rates based on the affidavits of other consumer-law attorneys and the previously discussed market survey without ever questioning whether these figures reflect the market rate — and thus the proper basis for an award — or whether these comparative rates are merely what other consumer-law attorneys seek from their client’s adversaries. Acknowledging that although the lodestar method of determining reasonable attorney fees is “not perfect,” the U.S. Supreme Court noted that one of its “virtues” is that it “looks to ‘the prevailing market rates in the relevant community.’” *Perdue v. Kenny A. ex rel. Winn*, 130 S.Ct. 1662, 1672 (2010) (quoting *Blum v. Stenson*, 465 U.S. 886, 895 (1984)). As such, using the market rate “produces an

⁷ The findings in *Chauvin v. BMW of N. America*, 27-CV-10-24020 (Minn. Dist. Ct. June 24, 2011) offer a stark comparison. (App. 31-42). There, the district court engaged in the kind of scrutiny required of fee petitions. Moreover, Green’s citation to this decision [Resp’s Br. at 27 n. 19] waives any prior objection she had to its inclusion in appellant’s appendix.

award that roughly approximates the fee that the prevailing attorney would have received if he or she had been representing a paying client who was billed by the hour in a comparable case.” *Id.* Here, though, Green did not produce any such evidence, relying instead on the rates submitted by other attorneys in fee-shifting cases. There was no evidence before the district court that any paying client would agree to rates of \$375 and \$350 on a case worth \$25,000. In fact, the only evidence of what an attorney could actually charge a cost-conscious paying client was disregarded by the court and determined to be “unreliable” for unstated reasons. (Add. 26).

At no point does the district court ever explain how it could arrive at a reasonableness determination without consideration of the amount at issue. How can any court determine what is a reasonable expenditure of time and a reasonable rate while turning a blind eye to the amount at stake? The amount at issue provides the context necessary to reach the reasonableness decision. Otherwise, the lodestar formula is nothing more than a multiplication exercise. The district court erred by failing to properly scrutinize Green’s fee petition.

CONCLUSION

In summary, appellant seeks a remand with direction from this Court to the district court to apply all of the relevant factors set out in *Milner*, to apply the prevailing market rate, rather than rates used in other fee-petition cases, and to scrutinize the bill, allowing only those hours reasonably expended given the nature of the case. Doing so is consistent with this Court's precedent that requires lower courts to consider "all relevant circumstances," including "the amount involved" in the underlying litigation, when determining a "reasonable" fee award. The district court abused its discretion in failing to consider this factor and by failing to properly apply any of the other relevant factors when it awarded fees that were nearly nine times the amount at issue.

Respectfully submitted,

Dated: May 14, 2012

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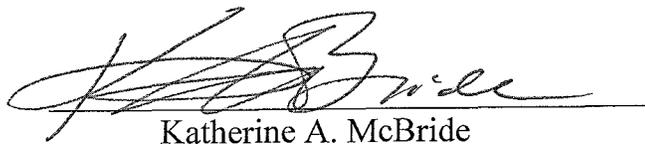
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FORM AND LENGTH CERTIFICATION

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