

A12-0453

State of Minnesota
In Court of Appeals

Jonathan Schupp and Northern Pine Lodge, Inc.,

Respondents,

v.

United Fire & Casualty Company,

Appellant,

and

Ross Nesbit Agencies, Inc., and

Itasca Region Insurance Agency, Inc.,

Defendants.

REPLY BRIEF OF APPELLANT
UNITED FIRE & CASUALTY COMPANY

Kay Nord Hunt (I.D. No. 138289)
LOMMEN, ABDO, COLE,
KING & STAGEBERG, P.A.
2000 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 339-8131

Lawrence M. Rocheford (I.D. No. 1534212)
Michael P. Goodwin (I.D. No. 0390244)
Jardine, Logan & O'Brien, P.L.L.P.
8519 Eagle Point Boulevard, Suite 100
Lake Elmo, MN 55042
(651) 290-6500

*Attorneys for Appellant
United Fire & Casualty Company*

Timothy R. Schupp (I.D. No. 130837)
GASKINS, BENNETT,
BIRRELL, SCHUPP, LLP
333 South Seventh Street, Suite 2900
Minneapolis, MN 55402
(612) 333-9500

Kevin S. Carpenter (I.D. No. 15258)
KEVIN S. CARPENTER, P.A.
2919 Veterans Drive
P.O. Box 984
St. Cloud, MN 56302-0984
(320) 251-3434

*Attorneys for Respondents
Jonathan Schupp and
Northern Pine Lodge, Inc.*

Michael D. Hutchens
MEAGHER & GEER, P.L.L.P.
33 South Sixth Street, Suite 4400
Minneapolis, MN 55402
(612) 338-0661

*Attorneys for Defendant
Ross Nesbit Agencies, Inc.*

Rolf E. Sonnesyn
TOMSCHE, SONNESYN
AND TOMSCHE, P.A.
610 Ottawa Avenue North
Minneapolis, MN 55422
(763) 521-4499

*Attorneys for Defendant
Itasca Region Insurance Agency, Inc.*

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I. THE STATEMENT OF FACTS OFFERED BY APPELLANT UNITED FIRE & CASUALTY COMPANY IS ACCURATE AND IN ACCORD WITH THE STANDARD OF REVIEW. BASED ON THE FACTS OF RECORD AS APPLIED TO MINNESOTA LAW, THE TRIAL COURT MUST BE REVERSED.

A. This Court Has De Novo Review.

This case came before the trial court on cross-motions for summary judgment. The parties did not stipulate to the facts, but each presented evidence under the Minn. R. Civ. P. 56.03 standard and on which they assert their position prevails. As with any grant of summary judgment, the trial court does not make factual findings. Geist-Miller v. Mitchell, 783 N.W.2d 197, 201 (Minn. Ct. App. 2010). And this Court reviews de novo the two questions relevant to this appeal from the grant of summary judgment: whether there are genuine issues of material fact and whether the district court erred in applying the law. STAR Ctrs., Inc. v. Faegre & Benson, LLP, 644 N.W.2d 72, 77 (Minn. 2002).

B. The Material Facts Are Not in Dispute and United Fire Is Entitled to Judgment as a Matter of Law.

The statement of facts offered by Appellant United Fire & Casualty Company (United Fire) in its Appellant's Brief is both accurate and in accord with the standard of review. The material facts of record are not in dispute, but are not as limited as Respondents/Plaintiffs assert. The trial court, based on the undisputed material facts of record, erred in its conclusion that Respondents/Plaintiffs Jonathan Schupp (Schupp) and Northern Pine Lodge, Inc. (NPL) (collectively Plaintiffs) were entitled to judgment as a matter of law. It is United Fire that is entitled to judgment of dismissal of this lawsuit against it.

C. No Auto Coverage Was Provided Under the CGL Policies Issued by United Fire to NPL from 2003 Through 2010.

The record stands undisputed that since 2003 United Fire has been writing commercial general liability coverage (CGL) for NPL. (A. 3, 80-81). NPL's auto accident for which it seeks insurance coverage occurred in August 2009. (A. 53-55). The undisputed fact is that no liability coverage for NPL's automobiles was ever provided as part of any contract between United Fire and NPL. All policies issued by United Fire to NPL contained auto exclusion 2.g.¹ (A. 80-81).

Schupp testified that when he in 2003 received the initial CGL policy issued by United Fire for NPL, he looked through the policy. It contained the coverage he thought he was buying for NPL. (Schupp Depo., p. 89; A. 219). It stands undisputed the policy Schupp procured in 2003 for NPL contained no coverage for NPL's business autos and contained exclusion 2.g. (A. 3, 4, 8). NPL continued to renew the policy year after year, never requesting auto coverage. (Schupp Depo., pp. 89-91; A. 219-221).

It should be noted that under Minnesota law, an insurance agent is generally not under an affirmative duty to update an insurance policy at the time it is renewed nor to inquire as to changes which would affect coverage. Gabrielson v. Warnemunde, 443 N.W.2d 540, 544 (Minn. 1989). It is the insured who bears the responsibility to inform the agent of changed circumstances. Id. So if NPL wished to subsequently add auto coverage either on a primary or excess basis to its policy with an insurer, it had the

¹ This was also true as to CGL policies previously procured for NPL through a different CGL insurer. (Engst Depo., pp. 156-157; A. 171-172).

obligation to so request and for which coverage a premium would then be charged.

(A. 79). As the record reflects, NPL never so requested from United Fire. Plaintiffs are now trying to obtain coverage NPL never had and for which it never paid a premium based on a construction of Minnesota law for which there is no support.

D. NPL Never Requested Auto Liability Insurance Coverage From United Fire.

Plaintiffs' assertion in Respondents' brief that NPL requested auto liability insurance coverage from United Fire has no record support. At no time did NPL apply for auto liability coverage from United Fire or pay the requisite extra premium for such coverage. (A. 79-80).

To successfully oppose a summary judgment motion, Plaintiffs needed to present affirmative evidence sufficient to raise a genuine issue of material fact; mere denials, general assertions and speculation are not enough. Gutbrod v. County of Hennepin, 529 N.W.2d 720, 723 (Minn. Ct. App. 1995). An inability to recall does not create such an issue of fact. St. Paul Fire & Marine Ins. Co. v. Metropolitan Urology Clinic, P.A., 537 N.W.2d 297, 299-300 (Minn. Ct. App. 1995). So when Schupp was specifically asked at his deposition whether he recalled telling NPL's insurance agent Mr. Rykken that NPL did not want auto coverage, his statement of "do not recall" does not create an issue of fact in light of the unequivocal evidence of record that Plaintiffs did not request auto coverage. (Schupp Depo., p. 67; A. 209; A. 154; Nesbit Agency Answer to Interrogatory No. 2 at A. 157-158; Rykken Depo., p. 108; A. 192).

The mere fact that NPL used motor vehicles in its business does not create a material issue of fact that NPL somehow sought auto coverage from United Fire. Plaintiffs' assertion is legally and factually unsupportable. St. Paul Mercury Indem. Co. v. Standard Accident Ins. Co., 216 Minn. 103, 11 N.W.2d 794, 797 (1943) (acknowledging autos are not a risk that is generally covered under a business policy).

E. A CGL Policy Can Be Renewed With Different Terms.

Beginning in 2003, United Fire issued a CGL policy to NPL under Policy No. 85304136. (A. 3, 24, 165). The 2009/2010 policy at issue is identified as a renewal. (Add. 28; A. 80-81). A renewal policy is not the first issuance of a policy by the insurer to the insured. A renewal of an insurance policy is in effect a new and separate insurance contract for the period of time covered by such renewal, in the sense that it is subject to the laws in force at the time it is in effect. Safeco Ins. Co. v. Lindberg, 394 N.W.2d 146, 147 (Minn. 1986). But contrary to the premise of Plaintiffs' argument, which is premised on their citation to Minn. Stat. § 60A.08, subd. 3, the Minnesota Legislature in Minn. Stat. § 60A.351 recognizes that a commercial liability policy may be renewed, and be offered for renewal with different terms.² See also Minn. Stat. §§ 60A.36, subd. 3 (describing new policies) and 60A.37 (addressing nonrenewals).

If renewal on different terms is offered, the insurance company must provide the insured conspicuous notice of those changes. Duane Wolff Agency, Inc. v. Northshore

² Notably, while the Legislature provides for a penalty for violation of Minn. Stat. §§ 60A.35 to 60A.38, none is provided for as to § 60A.08. Minn. Stat. § 60A.38, subd. 2.

Marine, Inc., 463 N.W.2d 562, 564 (Minn. Ct. App. 1990). As this Court stated in Eiynek v. Sabrowsky, 524 N.W.2d 297, 298 (Minn. Ct. App. 1994), “[i]f an insurer substantially reduces the prior insurance coverage provided to the insured, either through a policy renewal or an endorsement, it must notify the insured of the change in writing,” citing Canadian Universal Ins. Co. v. Fire Watch, Inc., 258 N.W.2d 570, 575 (Minn. 1977) (when an insurer by renewal of a policy substantially reduces the prior insurance coverage, the insurer has the affirmative duty to notify the insured in writing of the change in coverage). St. Paul Fire & Marine Ins. Co. v. Federal Deposit Ins. Corp., 968 F.2d 695, 700 (8th Cir. 1992), *reh’g denied* (applying Minnesota law and holding under the facts of that case the renewal letter and renewal policy constituted conspicuous notice in writing of exclusions added to the policy on renewal, as required by Minnesota law).

F. The CGL Coverage at Issue in 2009/2010 Was the Same as for the Previous Policy Period and Contains Exclusion 2.g.

What was provided to NPL in July 2009 was the 2009/2010 policy listing all applicable coverage forms that constituted NPL’s 2009-2010 policy. (Add. 29; A. 79). To that there is no dispute. (Id.) As NPL’s insurance agent Rykken admits, all listed forms which are identified by number are part of Policy No. 85304136. (Rykken Depo., pp. 18, 135; A. 181, 201; see Add. 29). Rykken acknowledged that when United Fire sent the renewal of Policy 85304136 to Rykken for Rykken’s delivery to NPL (per Rykken’s request), the policy renewal would not physically include all its forms. (A. 159; Rykken Depo., pp. 18-19; A. 181-182; see also A. 79). When Rykken reviews the policy on renewal and before sending it on to his client, the insured, he looks at the “dec pages,

limits, endorsements,” “but did not read or even look at every form.” (Rykken Depo., p. 19; A. 182).

Form CG001 (12-07) is listed on the Forms Supplemental Declarations as part of the 2009/2010 NPL renewal policy. (Add. 29, 81; A. 127). It was also so listed as part of NPL’s policy on the 2008/2009 renewal. (A. 85; A. 127). So while it is true that a copy of CG0001 (12-07) Commercial General Liability Coverage Form (CGL Coverage Form) was not sent to NPL with the 2009/2010 renewal, it is also true that 17-page CGL Coverage Form was provided to NPL in 2008 as part of the 2008/2009 NPL/United Fire CGL policy because there was a change in that coverage form from the previous renewal. (Add. 29; A. 81, 85, 127). But as was true in all previous policy periods, that CGL Coverage Form contains auto exclusion 2.g. (A. 80, 85, 127). And no changes were made in that coverage form from 2008/2009 to 2009/2010 so as to trigger the need for United Fire to so notify the insured. (Add. 29; A. 85, 127).

If there had been a change in that coverage from the 2008/2009 policy period to the 2009/2010 policy period, and United Fire had failed to notify NPL, this Court would apply the coverage as provided in the 2008/2009 policy period. Eisenschenk v. Millers’ Mut. Ins. Ass’n of Illinois, 353 N.W.2d 662, 664 (Minn. Ct. App. 1985), *rev. denied*. That would still mean that at all times, the coverage provided by United Fire to NPL contained auto exclusion 2.g. (A. 80).

G. Plaintiffs' Claim for Coverage Is Premised on the CGL Coverage Form, Which Form Excludes Auto Liability Coverage Under Exclusion 2.g.

What Plaintiffs would have this Court ignore is not only did the 17-page CGL Coverage Form contain the policy's insuring agreement by which NPL is seeking liability coverage for the August 2009 auto accident (Add. 29; A. 127), it also contains exclusion 2.g. (Add. 29; A. 130). Plaintiffs' entire claim for coverage is premised on their contention NPL's policy contained this 17-page CGL Coverage Form. The Court can review CGL Coverage Form under which NPL seeks coverage for its August 2009 accident and contained therein is exclusion 2.g. (A. 127, 130). Plaintiffs' assertions such as "United Fire admits that its agent didn't provide Exclusion [2.g.] as part of the 2009-2010 policy," citing A. 79, is a gross misstatement of the record. If CGL Coverage Form is part of the 2009/2010 policy, which Plaintiffs admit because it is under that form that NPL claims coverage, so, too, is exclusion 2.g.

The fundamental law of contracts, as is true with insurance contracts, is there can be no binding contract without mutual assent of the parties. Royal Ins. Co. v. Western Cas. Ins. Co., 444 N.W.2d 846, 848 (Minn. Ct. App. 1989), citing St. Paul Fire & Marine Ins. v. Bierwerth, 285 Minn. 310, 317-18, 175 N.W.2d 136, 141 (1969). Here, United Fire assented to provide coverage to NPL under the CGL Coverage Form, but it did not assent to provide such coverage without the exclusions contained therein. As the New York Court of Appeals held in Galaska v. State Farm Mut. Auto. Ins. Co., 577 N.Y.S.2d 988, 989 (App. Div. 1991), an argument that one has insurance coverage under the policy

but is not subject to one of the terms of that policy of insurance because the policy was not delivered to it “is devoid of merit.”

Fundamentally, there is no question in this case as to the terms of coverage provided to NPL upon its 2009/2010 renewal. (Add. 28-29). NPL was informed of the provisions. (Id.) It had access to them at all times via United Fire’s website. (Add. 41). And NPL is, in fact, seeking coverage under the specific coverage form listed on the 2009/2010 renewal but for which a written copy was not provided with the renewal. (Add. 29; A. 127). The basic purpose of Minn. Stat. § 60A.08, subd. 1, is to ensure that the insured is informed of the insurance policy provisions. NPL was so informed.

H. Nullification of the Auto Exclusion Is Estoppel by Another Name and Such Is Not Allowed Under Minnesota Law.

Estoppel is an equitable doctrine “intended to prevent a party from taking unconscionable advantage of his own wrong by asserting his strict legal rights.” Northern Petrochemical Co. v. United States Fire Ins. Co., 277 N.W.2d 408, 410 (Minn. 1979). Despite Plaintiffs’ protest to the contrary, Plaintiffs are, in effect, utilizing the doctrine of estoppel to expand the scope of the United Fire policy. That is what they asserted in their Complaint. (A. 55-56). And the trial court’s “nullification” of auto exclusion 2.g. is really estoppel by another name. (Add. 12). But such is not allowed under Minnesota law. Malakowsky v. Johannsen, 374 N.W.2d 816, 819 (Minn. Ct. App. 1985).

The general principle that estoppel cannot be used to expand or create insurance coverage where it does not exist has been applied consistently by the Minnesota courts and those applying Minnesota law. To nullify auto exclusion 2.g. is to expand the

insurance contract by estoppel. See Continental Cas. Co. v. Advance Terrazzo & Tile Co. Inc., 462 F.3d 1002, 1010 (8th Cir. 2006) (applying Minnesota law and holding estoppel could not be used to expand insurance coverage by reading out of the policy its absolute pollution exclusion); Winthrop & Weinstine, P.A. v. Travelers Cas. & Sur. Co., 187 F.3d 871, 877 (8th Cir. 1999) (citing Minnesota Supreme Court's decision in Shannon v. Great American Ins. Co., 276 N.W.2d 77 (Minn. 1979) in finding an equitable estoppel claim to be without merit); Northwestern Airlines, Inc. v. Federal Ins. Co., 32 F.3d 349, 356 (8th Cir. 1994) (“waiver cannot be used to bring within the coverage of an insurance policy risks not covered by its terms”); Redeemer Covenant Church of Brooklyn Park v. Church Mut. Ins. Co., 567 N.W.2d 71, 76 (Minn. Ct. App. 1997) (holding that the insurer did not waive its right to invoke policy exclusions by failing to respond to insured's notice of claim within the 60-day statutory period and instead taking over two years); Continental Ins. Co. v. Bergquist, 400 N.W.2d 199, 201 (Minn. Ct. App. 1987) (holding that an insurer was not estopped from raising affirmative defense that insured's loss occurred prior to policy period).

There is no basis under Minnesota law under which the court can disregard auto exclusion 2.g. under the facts of this case, and to do so is to grant coverage by estoppel, which this Court cannot do.

I. Case Law Cited by Plaintiffs Is Not Relevant and/or Does Not Support Reversal Here.

Plaintiffs have admitted that the loss for which NPL seeks liability insurance coverage arises from the use or ownership of an NPL auto. (Plaintiffs' Response to

United Fire's Statement of Undisputed Facts, p. 9, dated August 5, 2011). Exclusion 2.g. states NPL's liability insurance does not apply to "[b]odily injury' or 'property damage' arising out of the ownership, maintenance, use . . . of any . . . auto." (A. 130). Plaintiffs cite to Henning Nelson Constr. Co. v. Fireman's Fund American Life Ins. Co., 383 N.W.2d 645, 652 (Minn. 1986).

In Henning, the question was whether the insurance policy exclusions involving underground water, earth movement and design defect applied to the facts in that case. Id. Here, by contrast, Plaintiffs do not dispute that the loss for which they seek liability coverage is within the scope of the exclusion. Rather, Plaintiffs argue that there is no exclusion to apply because the court is somehow entitled to ignore or nullify the policy's exclusions as a sanction for purported failure to follow the dictates of Minn. Stat. § 60A.08. There is, however, no question that the auto exclusion is in fact part of the CGL Coverage Form and, by its unambiguous terms, NPL has no coverage for its August 2009 auto accident. Henning, therefore, does not apply.

In support of their argument, Plaintiffs also cite to In re Thomas Casey, Sr., P.A., 540 N.W.2d 854 (Minn. Ct. App. 1995), *rev'd in part* 543 N.W.2d 96 (Minn. 1996) (ordering the reinstatement of a \$500 civil penalty against an agent for rule violation on the basis that the record, contrary to this Court's holding, did not support a conclusion that the Commissioner clearly abused its discretion). That case is not on point, nor is it at odds with United Fire's argument here.

There, the Commissioner of Commerce had sanctioned Casey, an insurance agent, for failure to deliver a policy or “other evidence of insurance” to the insured according to the requirements of Minn. Rule 2795.0400. 540 N.W.2d at 857. This rule was promulgated by the Commissioner of Commerce under Minn. Stat. § 60A.17, a statute which has since been repealed.

Casey, as the insurance agent for Attracta Sign, had sought to place a complete package of business insurance for it through Ohio Casualty. Id. at 855. After binding coverage, Casey “delivered to [Attracta Sign] the insured’s copies of documents identified as exhibit 6.” Id. at 856. Casey had received the documents from Ohio Casualty on January 22, but did not deliver them to Attracta Sign until April 13. Id. Attracta Sign was shocked at the premium, which was far in excess of what it expected, and then secured coverage elsewhere. Id.

After canceling coverage with Ohio Casualty, Ohio Casualty and Casey sought to assess costs against Attracta Sign for the less than full term insurance. Attracta Sign then complained to the Department of Commerce about Casey’s conduct, and the Department of Commerce brought a disciplinary action against Casey, which was the case before this Court on appeal. Id. at 856-57.

The Commissioner explained that because of Casey’s failure to timely deliver the documents, which included the amount of the premium, Attracta Sign faced liability for several months’ premium under a far more expensive policy than it had expected. Id. at 859. The challenge on appeal was the imposition of a \$500 sanction against Casey for

violating the rule requiring delivery of a policy or other evidence of insurance to the insured within 30 days. Id.

In response to the Commissioner's disciplinary action against him, Casey asserted he did not receive an insurance policy for Attracta Sign. Casey stated the documents in Exhibit 6 were only a proposal, because the parties had not yet agreed on a premium. Id. at 858.

It is unclear from this Court's opinion exactly what was contained in Exhibit 6 other than the Court describes it as containing "insured coverage summary and the declarations sheets with schedules and premiums." Id. at 857. Casey had not, until the delivery of Exhibit 6, made Attracta Sign aware of the total premium cost. Id. at 856. It was in that context that this Court, in passing, mentions Minn. Stat. § 60A.08, subd. 1, and states Exhibit 6 "is not a policy." Id. at 857.

The case and its resolution revolves around Minnesota Rule 2795.0400. 540 N.W.2d at 858. Ultimately, this Court concluded Casey had technically violated Minn. Rule 2795.0400, but reversed the sanction. Id. at 860. The Supreme Court then reversed this Court's reversal of the sanction. 543 N.W.2d 96.

The case before this Court does not concern Minn. Rule 2795.0400. In this case, unlike Casey, the Court is dealing with a renewal, not the issuance of the first policy. The insurance procured for United Fire by NPL, from its inception in 2003, never contained auto liability coverage. There is no confusion here. Casey simply is not applicable.

J. Plaintiffs Cannot Support the Trial Court's Interpretation of Minn. Stat. § 60A.08.

There is no authority that allows Plaintiffs to self-select that portion of the CGL Coverage Form they choose to rely on but ignore the policy provisions as a whole. The Minnesota Supreme Court held such is not Minnesota law in Aaberg v. Minnesota Commercial Men's Ass'n, 143 Minn. 354, 173 N.W. 708, 711 (1919). There is no authority that allowed the trial court to selectively enforce part of the 17-page CGL Coverage Form and ignore other provisions contained therein. Id. If the CGL Coverage Form insuring agreement is part of Policy No. 85304136, which Plaintiffs assert it is, then so, too, is exclusion 2.g., which is part of that form and must be enforced as written.

Plaintiffs provide this Court with no support for the trial court's analysis. The trial court's reading of the term "incorporated in" has been rejected by New York, as discussed in Appellant's Brief. It is true the New York cases cited in United Fire's brief do not specifically mention the New York statute which is similar to that of Minnesota – McKinsey's Insurance Law § 3204(a)(1). But obviously, the New York courts could not reach the result they did in the cases cited if they interpreted "incorporated therein" under New York law as Plaintiffs argue here.

None of the other cases cited by United Fire from other jurisdictions state in their respective court opinions that their law is "unlike Minnesota," as Plaintiffs incorrectly suggest in their Respondents' brief at pages 25-26.

And it is true that each state has its own statutory scheme, but jurisdictions uniformly have not precluded an insurer from relying on an exclusion contained in its

policy. For example, in Georgia, the Georgia statute – Ga. Code Ann. § 33-24-14 – requires every policy to be mailed or delivered to the insured within a reasonable period of time after its issuance. In Williams v. Fallaize Ins. Agency, Inc., 469 S.E.2d 752, 755-56 (Ga. App. 1996), the Georgia Court of Appeals held even if an insurance company failed to mail or deliver the insurance policy to the insured within a reasonable period of time after its issuance, the insurance company may still rely on exclusions contained in the policy of which the insured otherwise had notice. In that case, since the policy at issue was a renewal policy, the insured had notice of the exclusion. Id.

II. THE GRANT OF ATTORNEY’S FEES AND COSTS AWARDED TO PLAINTIFFS MUST BE REVERSED.

As stated in United Fire’s initial brief to this Court, the trial court’s ruling granting Plaintiffs their attorney’s fees rests solely on its erroneous decision to read out of or “nullify” United Fire’s policy auto exclusion 2.g. Since the trial court was wrong in nullifying United Fire’s policy auto exclusion 2.g., the trial court must be reversed with regard to its grant of attorney’s fees, costs and disbursements to Plaintiffs.

If the Court should conclude that auto exclusion 2.g. can somehow be nullified, the trial court nonetheless improperly extended the Supreme Court’s decision in Morrison v. Swenson, 274 Minn. 127, 142 N.W.2d 640 (1966), in granting Plaintiffs attorney’s fees. The Morrison rule holds that attorney’s fees are recoverable when an insurer breaches its duty to defend. Id.

Contrary to Plaintiffs’ assertion, United Fire did specifically raise this argument in opposition to Plaintiffs’ motion for attorney’s fees at pages 3-4 in its December 5, 2011

memorandum. (Respondents' Appendix [R.A.] 98). Specifically, United Fire brought to the trial court's attention American Standard Ins. Co. v. Le, 551 N.W.2d 923 (Minn. 1996), which discusses the "seminal case" of Morrison. Id. at 926. The Supreme Court in Le reiterated "this court has consistently resisted efforts to expand the Morrison holding." Id. at 927. United Fire argued to the trial court that it had made "no finding that United Fire has breached its contract with Plaintiffs. Accordingly, Plaintiffs have not established a contractual basis that would support an award of attorney's fees." (R.A. 98).

CONCLUSION

Appellant United Fire respectfully requests the trial court judgment, and as amended, as to United Fire be reversed and this action against United Fire be ordered dismissed as a matter of law.

LOMMEN, ABDO, COLE, KING & STAGEBERG, P.A.

Dated: May 29, 2012

BY 

Kay Nord Hunt (I.D. No. 138289)
2000 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 339-8131

JARDINE, LOGAN & O'BRIEN, P.L.L.P.
Lawrence M. Rocheford (I.D. No. 1534212)
Michael P. Goodwin (I.D. No. 0390244)
8519 Eagle Point Boulevard, Suite 100
Lake Elmo, MN 55042
(651) 290-6500

**Attorneys for Appellant
United Fire & Casualty Company**

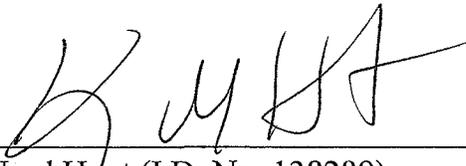
CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 4,003 words. This brief was prepared using Word Perfect 10.

LOMMEN, ABDO, COLE, KING & STAGEBERG, P.A.

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Kay Nord Hunt (I.D. No. 138289)
2000 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
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JARDINE, LOGAN & O'BRIEN, P.L.L.P.

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Michael P. Goodwin (I.D. No. 0390244)
8519 Eagle Point Boulevard, Suite 100
Lake Elmo, MN 55042
(651) 290-6500

**Attorneys for Appellant
United Fire & Casualty Company**