

A04-769

STATE OF MINNESOTA  
IN SUPREME COURT

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David H. Toth,

Appellant,

v.

Gerald Arason, Individually,  
and d/b/a Arason's Body Shop,

Respondent.

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BRIEF AND APPENDIX OF APPELLANT  
DAVID H. TOTH

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**d/b/a Arason's Body Shop**

TABLE OF CONTENTS

STATEMENT OF THE ISSUES ..... 1

STATEMENT OF THE FACTS ..... 2

    A.    Damage to Toth’s New Truck ..... 2

    B.    Arason Prepares Visible Damage Quotation ..... 2

    C.    Insurance Company Authorizes Use of Original Equipment  
          Manufactured Parts ..... 4

    D.    Arason’s Use of Non-OEM Parts ..... 5

    E.    Radiator Fails and Truck Manufacturer Refuses to Replace  
          Because Warranty Was Voided ..... 8

    F.    Toth’s Efforts to Obtain a Remedy ..... 10

STATEMENT OF THE CASE ..... 13

    A.    Toth’s Amended Complaint ..... 13

    B.    Trial Court’s Findings and Conclusions of Law ..... 14

    C.    Toth’s Post-Trial Motion and Resulting Order ..... 17

    D.    Court of Appeals Decision ..... 21

ARGUMENT ..... 24

I.    TOTH IS ENTITLED TO RECOVER MORE THAN \$803.44 DUE  
      TO ARASON’S VIOLATION OF MINNESOTA’S TRUTH IN  
      REPAIRS ACT ..... 24

    A.    Standard of Review De Novo ..... 24

    B.    Statutes at Issue Are To Be Liberally Construed in Favor of  
          Consumers Such as Toth ..... 25

C.	Court of Appeals Failed to Construe Statutes in Accord with Basic Rules of Statutory Construction . . . . .	27
1.	Court of Appeals' Construction of the Statutes . . . . .	27
2.	Based on Rules of Statutory Construction, Toth is Entitled to a Remedy . . . . .	29
3.	Toth is Entitled to Damages for the Radiator and A/C Condenser . . . . .	33
4.	The Public Benefit Analysis Has Been Applied Only to a Determination of Attorneys' Fees . . . . .	35
5.	Toth is Entitled to Attorneys' Fees . . . . .	38
a.	Public Benefit Analysis Needs to be Clarified . . . . .	38
b.	There Are Two General Sets of Statutes That Fall Within the Private Attorney General Statute . . . . .	40
i.	First Set - Nonexclusive List Contained in § 8.31, subd. 1, Was the Statute at Issue in <u>Ly and Collins</u> . . . . .	40
ii.	Second Set is Statutes Which the Legislature Specifically Directs § 8.31 Applies But Are Not Listed in § 8.31, subd. 1, and Per Se the Party Should Be Entitled to Attorneys' Fees . . . . .	41
D.	Attorneys' Fees Payable in This Instance Even if the <u>Ly and Collins</u> Public Interest Test is Applied . . . . .	44
II.	TOTH IS ENTITLED TO ALSO RECOVER UNDER MINN. STAT. § 325F.69, SUBD. 1 . . . . .	46
	CONCLUSION . . . . .	51
	CERTIFICATION OF BRIEF LENGTH . . . . .	52

**TABLE OF AUTHORITIES**

**Statutes:**

Minn. Stat. § 8.31	passim
Minn. Stat. § 72B.091, subd. 2	11, 47
Minn. Stat. § 325F.18	42
Minn. Stat. § 325F.29	42
Minn. Stat. § 325F.56	passim
Minn. Stat. § 325F.60	passim
Minn. Stat. § 325F.63	passim
Minn. Stat. § 325F.64	passim
Minn. Stat. § 325F.65	25
Minn. Stat. § 325F.66	passim
Minn. Stat. § 325F.69	passim
Minn. Stat. § 325F.70	26
Minn. Stat. § 327B.12	42
Minn. Stat. § 332.59	42
Minn. Stat. § 333.065	42
Minn. Stat. § 645.16	29, 30
Minn. Stat. § 645.17(1)	30
Minn. Stat. § 645.44, subd. 16	34

**Rules:**

Minn. R. Civ. P. 36	5
Minn. R. Civ. P. 68	24
Minn. R. Civ. P. 106	28
Minn. R. Civ. App. P. 139.06	51

**Cases:**

<u>American Tower, L.P. v. City of Grant</u> 636 N.W.2d 309 (Minn. 2001)	29
<u>Bliss v. Bliss</u> 493 N.W.2d 583 (Minn. Ct. App. 1992)	21

<u>Boubelik v. Liberty State Bank</u> .....	25
553 N.W.2d 393 (Minn. 1996), <u>reh'g denied</u>	
<u>Bright v. Westmoreland County</u> .....	21
380 F.3D 729 (3d Cir. 2004)	
<u>Cashman v. Allied Products Corp.</u> .....	48
761 F.2d 1250 (8th Cir. 1985)	
<u>Chudasama v. Mazda Motor Corp.</u> .....	21
123 F.3d 1353 (11th Cir. 1997)	
<u>Collins v. Minnesota School of Business, Inc.</u> .....	passim
655 N.W.2d 320 (Minn. 2003)	
<u>Commercial Property Investments, Inc. v. Quality Inns Int'l, Inc.</u> .....	34
61 F.3d 639 (8th Cir. 1995)	
<u>Fressell v. AT&amp;T Technologies, Inc.</u> .....	40
103 F.R.D. 111 (N.D. Ga. 1984)	
<u>Ganguli v. Univ. of Minnesota</u> .....	23
512 N.W.2d 918 (Minn. Ct. App. 1994)	
<u>Glen Paul Court Neighborhood Ass'n v. Paster</u> .....	29
437 N.W.2d 52 (Minn. 1989)	
<u>Group Health Plan, Inc. v. Philip Morris Inc.</u> .....	34
621 N.W.2d 12 (Minn. 2001)	
<u>Hart v. North Side Firestone Dealer, Inc.</u> .....	35
235 Minn. 96, 49 N.W.2d 587 (1951)	
<u>Hibbing Educ. Ass'n v. Public Employment Relations Bd.</u> .....	1, 25
369 N.W.2d 527 (Minn. 1985)	
<u>Jensen v. Peterson</u> .....	34
264 N.W.2d 139 (Minn. 1978)	

<u>Jenson v. Touche Ross &amp; Co.</u> .....	25
335 N.W.2d 720 (Minn. 1983)	
<u>Johnson v. Ford Motor Co.</u> .....	31
289 Minn. 388, 184 N.W.2d 786 (1971)	
<u>Lewis v. Citizens Agency of Madelia, Inc.</u> .....	34
306 Minn. 194, 235 N.W.2d 831 (1975)	
<u>Liess v. Lindemyer</u> .....	39
354 N.W.2d 556 (Minn. Ct. App. 1984)	
<u>Ly v. Nystrom</u> .....	passim
615 N.W.2d 302 (Minn. 2000)	
<u>Nordling v. Ford Motor Co.</u> .....	31
231 Minn. 68, 42 N.W.2d 576 (1950)	
<u>Northern States Power Co. v. Comm’r of Revenue</u> .....	31
571 N.W.2d 573 (Minn. 1997)	
<u>Olson v. Ford Motor Co.</u> .....	30
558 N.W.2d 491 (Minn. 1997)	
<u>Patterson v. Beall</u> .....	38
19 P.3d 839 (Okla. 2000)	
<u>Sellinger v. Freeway Mobile Home Sales, Inc.</u> .....	40
521 P.2d 1119 (Ariz. 1974)	
<u>Sandy v. Walter Butler Shipbuilders</u> .....	30
221 Minn. 215, 21 N.W.2d 612 (1946)	
<u>Shands v. Castrovinci</u> .....	40
340 N.W.2d 506 (Wis. 1983)	
<u>State by Humphrey v. Alpine Air Products, Inc.</u> .....	25
490 N.W.2d 888 (Minn. Ct. App. 1992), <u>aff’d</u> , 500 N.W.2d 788 (Minn. 1993)	

Wegener v. Comm’r of Revenue ..... 30  
505 N.W.2d 612 (Minn. 1993)

Wiegand v. Walser Auto. Groups, Inc. ..... 1, 25  
683 N.W.2d 807 (Minn. 2004)

**Other Authorities:**

3A Sutherland Statutory Construction § 74:6 (6th ed. 2004) ..... 31

Ad Hoc Deceptions in Private Disputes: When Does a Private Plaintiff  
Confer a Public Benefit Under Minnesota’s Private Attorney General Statute?  
29 Wm. Mitchell L. Rev. 321 (2002) ..... 38

## STATEMENT OF THE ISSUES

- I. AN AUTO BODY SHOP PAID TO REPAIR A VEHICLE BY INSTALLING ORIGINAL EQUIPMENT MANUFACTURER (OEM) PARTS VIOLATED MINNESOTA'S TRUTH IN REPAIRS ACT, MINN. STAT. § 325F.60, BY USING CHEAPER AFTERMARKET PARTS (ALSO KNOWN AS NON-OEM PARTS) AND NOT INFORMING THE CONSUMER OF THEIR USE IN WRITING. IS THE CONSUMER ENTITLED TO, AS DAMAGES, THE COST OF REPLACING THE NON-OEM PARTS WITH THE OEM PARTS WHICH THE AUTO BODY SHOP HAD BEEN PAID TO INSTALL AND IS THE CONSUMER ENTITLED TO HAVE HIS ATTORNEYS' FEES PAID BY THE AUTO BODY SHOP?

Minn. Stat. § 325F.60

Minn. Stat. § 325F.63

Wiegand v. Walser Auto. Groups, Inc., 638 N.W.2d 807 (Minn. 2004)

Hibbing Educ. Ass'n v. Public Employment Relations Bd., 369 N.W.2d 527 (Minn. 1985)

- II. DOES AN AUTO BODY SHOP'S FAILURE TO INFORM THE CONSUMER THAT THE USE OF NON-OEM PARTS WILL VOID THE VEHICLE'S MANUFACTURER'S WARRANTY AND ORAL DECLARATION TO A CONSUMER THAT THE USE OF A NON-OEM PART CARRIES THE SAME GUARANTEE AS AN OEM PART VIOLATE MINN. STAT. § 325F.69?

Minn. Stat. § 325F.69, subd. 1

Ly v. Nystrom, 615 N.W.2d 302 (Minn. 2000)

## STATEMENT OF THE FACTS

Respondent/Defendant Gerald Arason, individually and d/b/a Arason's Body Shop (Arason), has been held to have violated Minnesota's Truth in Repairs Act, Minn. Stat. § 325F.60. The focus of this appeal is on what Appellant/Plaintiff David Toth (Toth) is entitled to recover as a remedy due to Arason's violation. Toth also contends that regardless of Arason's violation of the Truth in Repairs Act, Arason has violated Minnesota's consumer fraud statute, Minn. Stat. § 325F.69, subd. 1. The material facts are as follows.

### **A. Damage to Toth's New Truck.**

Toth, a resident of International Falls, Minnesota, was employed by Service Master as a custodian. (T. 198.) Toth describes himself as a slow learner who graduated from high school by taking special education classes. (T. 197.) In February 1997, Toth bought a new Chevrolet pickup truck. (T. 198.) In August 1997, the truck, which had been driven 4,792 miles, was damaged in an accident. (T. 199.)

Toth immediately notified his insurance carrier -- Western National Insurance Company (Western National) -- of the accident. Western National told Toth to obtain a couple of repair cost estimates. (T. 200.)

### **B. Arason Prepares Visible Damage Quotation.**

Toth contacted Arason's Body Shop, also located in International Falls. (T. 7-8, 200.) Arason's Body Shop is owned and operated by Gerald Arason. (T. 8.) Arason

personally has been doing vehicle repair work full time since 1951 and his advertisement states that Arason has provided "Quality Service Since 1932." (T. 17; Trial Ex. 1; A. 80.) Ninety to ninety-five percent of Arason's work for customers is paid for by their insurance companies. He also does some work where the customer alone pays for the repairs. (T. 36.)

On August 15, 1997, Arason towed Toth's vehicle to his place of business. (T. 11, 200.) Arason showed Toth a sign on his counter and told Toth he only needed one estimate. (T. 200.) Arason then prepared a visible-damage quotation. (T. 11-12; Trial Ex. 1; A. 80.)

The visible-damage quotation form used by Arason contains index codes for designating how a repair will be performed and, if a part is to be replaced, whether it will be replaced with a new part, a used part, an aftermarket part, or a rebuilt part. (Trial Ex. 1; A. 80.) Arason used check marks to designate whether each part would be repaired or replaced, but he did not use the parts index code to show what type of part would be used in replacement. Arason's estimated part cost for the radiator was \$313.00 and for the air conditioning (A/C) condenser was \$443.25.<sup>1</sup> The total visible-damage quote was \$8,259.58. (Trial Ex. 1; A. 78.)

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<sup>1</sup> The labor hours are separately estimated. The cost referenced is for the parts alone. (Trial Ex. 1; A. 80.)

Arason did not provide a copy of this estimate to Toth or mail it to him even though it contains his name and address. (T. 200-01; Trial Ex. 1; A. 80.) Arason testified he did not provide Toth a copy because “[h]e wasn’t interested” and had instructed Arason to “deal with my insurance people.” (T. 14.) Arason admitted that Toth specified that he wanted new parts to be used. (T. 15.)

**C. Insurance Company Authorizes Use of Original Equipment Manufacturer Parts.**

OEM, non-OEM and aftermarket parts are terms common in the auto industry, (T. 146, 170.) OEM means original equipment manufacturer parts. (T. 146, 170.) An OEM replacement part is a part supplied by the manufacturer that is to the original equipment standards. (Id.) An aftermarket part is a part supplied by someone other than the manufacturer of the vehicle. It is also known as a non-OEM part. (T. 146, 170-71.)

Darris Winter, an independent insurance appraiser, came to Arason’s shop to inspect the vehicle on behalf of Toth’s insurer, Western National. (T. 16.) Winter also contacted Toth who told him the truck was new and was under warranty. Winter told Toth “there wouldn’t be any question as to what kind of parts would be put in. He said it would be GM, otherwise known as OEM.” (T. 201-02.)

In his written estimate, Winter estimated the total cost of repairs at \$10,042.52, which included a \$250.00 deductible to be paid by Toth. (T. 22, 66; Trial Ex. 2; A. 81.) The cost estimate was based on Arason’s installation of OEM parts. (T. 134-35.) Arason agreed that he would complete and guarantee the necessary repairs as estimated by the

insurer. The estimated part cost was \$356.00 for the radiator and \$443.25 for the A/C condenser. (T. 17; Trial Ex. 2; A. 83.)

**D. Arason's Use of Non-OEM Parts.**

Prior to trial, and in response to Toth's Minn. R. Civ. P. 36 requests for admissions, Arason denied he had installed a non-OEM radiator. (T. 85.) At trial Arason admitted he had installed a non-OEM radiator. Arason testified:

Q. Just so I'm clear on this. You knew or did not know that that was an OEM radiator?

A. I knew that I didn't buy it from the dealer. I knew that it was not the same one that was -- that went in there. Correct.

Q. Okay. You knew it was a non-OEM radiator then?

A. You could say that.

(T. 83.)

At trial Arason offered the explanation that an OEM radiator and an OEM A/C condenser were on a six-week backorder. (T. 41, 55.) The list price that Arason was quoted for an OEM radiator was over \$600.00. (T. 54.) Arason's cost would be 25% to 30% less than the list price. (T. 54-55.) Arason instead ordered a non-OEM radiator and A/C condenser unit from Northern Factory Sales. (T. 43.) Arason paid \$197.26 for the non-OEM radiator and \$151.66 for the non-OEM A/C condenser. (T. 86; Trial Ex. 6; A. 87.)

Even though Arason had denied in his answers to requests for admissions that he had used non-OEM parts, at trial Arason now contended that he orally told Toth that the radiator and A/C condenser were non-OEM. (T. 85.) According to Arason, he orally told Toth "I had to get the radiators from my radiator people, that I could not get it from the GM dealer."<sup>2</sup> (T. 55.) Arason claims he never said he bought the radiator from a General Motors dealer nor did he say it was an "OEM manufactured radiator, manufactured by the General Motors people" but claims he did tell Toth that "they make radiators for General Motors." (T. 84-85.)

Arason testified that he did not discuss with Toth the possibility of waiting for the OEM parts. (T. 56.) Instead he told Toth that regardless of whether the radiator was from a GM dealer or Arason's radiator supplier, it would have a one-year guarantee. (T. 55-56, 93.) According to Arason, it is "the same as if we got it from the dealer." (T. 93.) Arason admitted he was familiar with the General Motors warranty pertaining to this particular truck. (T. 69.) Arason also acknowledged that a manufacturer's warranty is important to a vehicle owner and that he never told Toth that installing a non-OEM part would void the truck's manufacturer's warranty. (T. 24-25.)

Arason also claims he orally told Mr. Winter that he was installing an "OEM replacement radiator" from his regular supplier and he thought that Winter understood

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<sup>2</sup> Near the end of the trial, Arason testified that he orally told Toth at the time Toth signed the car rental agreement on August 25, 1997 that he had lined up a condenser and radiator from his supplier. (T. 290, 292-93; Trial Ex. 30.)

what he meant. (T. 57.) Arason admitted that any agreement with an insurance company “always has to be in writing” and an insurance company will not pay on an oral agreement. (T. 67.)

Arason admits he did not inform Toth or Western National in writing of his use of non-OEM parts even though he claimed to be aware of Minnesota’s statutory regulations. (T. 26, 92, 297.) Arason testified:

Q. Are you aware of any statutes requiring you to inform a customer if you put in a non-OEM part?

A. Yes.

(T. 92.) Arason further testified:

Q. Mr. Arason, it’s true, is it not, if they’re not identified that the customer can assume that they’re OEM parts? Is that not the law?

A. Um-mm, --

Q. If you don’t know that’s fine.

A. Yeah, I guess you’re supposed to inform the customer. Yeah. And in this day and age you have to write it all out, they say, so . . .

(T. 103.)

Toth testified that it was always his understanding that Arason “was going to put in the parts exactly as Darris Winters [Western National’s insurance appraiser] was going to allow him to put it in.” (T. 202.) Toth denies Arason orally informed him that he had installed non-OEM parts in his vehicle. (T. 211.) No information was provided by

Arason that Arason's repairs would have any effect on his vehicle's warranty. (T. 211-12.)

The repairs were completed on September 19, 1997. (T. 22; Trial Ex. 3; A. 85.) Arason was then paid \$10,042.52 per the estimate for an OEM radiator and an OEM A/C condenser and for the other repair work as specified in the estimate. (T. 22; Trial Ex. 3; A. 85.) Arason did not provide Toth with a final bill or dated invoice for the repairs performed as required by Minnesota law. (T. 24-25, 136, 204.) All Toth was provided was the final bill which stated "[p]arts labor painting material to repair front of truck \$10042.52 -- deductible 250.00 -- to be paid next week." Toth also received a receipt for his payment of \$250.00. (T. 21-22; Trial Ex. 3, 4; A. 85, 86.)

**E. Radiator Fails and Truck Manufacturer Refuses to Replace Because Warranty Was Voided.**

Approximately five months after his vehicle was repaired, antifreeze began leaking from Toth's vehicle. Toth went back to Arason but Arason sent him to Sheridan Motors, a General Motors dealer. (T. 205.)

Sheridan Motors attempted a few minor repairs to the radiator (tightening hose clamps and adding antifreeze). The leaking problem continued and Toth returned to Sheridan several times to put antifreeze in the truck.<sup>3</sup> (T. 205-06.) Because the warranty date was soon to expire and the problem was not yet fixed, in February 2000, it was

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<sup>3</sup> Trial Ex. 15 contains the bills for coolant. (T. 154; A. 94-104.)

decided that Sheridan Motors would conduct additional tests to determine the cause of the leak. The problem was determined to be a leak in the radiator's side tank. To fix the problem the radiator needed to be replaced. (T. 155, 157, 208; Trial Ex. 13; A. 92.)

If the radiator was an OEM radiator it would be replaced under the manufacturer's warranty. (T. 208.) On February 21, 2000, Toth learned from Sheridan that an aftermarket radiator had been put in his vehicle and that his manufacturer's warranty had been voided. (T. 209; Trial Ex. 13; A. 92.) Toth asserts this is when he first learned Arason had used a non-OEM part. (T. 204.)

Because the manufacturer's warranty had been voided and Toth could not afford to replace the radiator, Toth went back to Arason. He asked Arason to install a new radiator. (T. 210.) Arason refused and only offered to rebuild the radiator, which was unacceptable to Toth. (T. 210; Trial Ex. 8; A. 88.)

Toth then demanded an invoice on the radiator. Arason provided him with a handwritten note that says: "I Gerald Arason installed the radiator GM . . ." (T. 32-33; Trial Ex. 22; A. 107.) Attached by Arason was the Northern Factory Sales invoice which Arason states is "the way it's billed out." (T. 45; Trial Ex. 6; A. 87.) Arason testified he told Toth "[w]e installed that GM radiator that's on that invoice. It says GM radiator in the invoice. That's what I told him." (T. 33.) When asked at trial what GM stands for, Arason said "General Mechanics, I guess." (Id.) When asked whether GM instead means "General Motors," Arason replied, "It could be." (Id.)

Whether Arason claims he put in an OEM or non-OEM A/C condenser is unclear.

(T. 24.) Arason states that the A/C condenser he had ordered and installed was made by Delco:

It's made by Delco. General Motors have handled these parts and others also handle these parts, other than General Motors.

(T. 279.)

**F. Toth's Efforts to Obtain a Remedy.**

Having learned of Arason's deception with regard to the radiator, Toth in March 2000 contacted Western National. (T. 210.) Western National began an investigation.

Investigators Peter Dahl and Nancy Jacobson went to see Arason on March 28, 2000.

(Trial Ex. 8; A. 88.) No information had ever been provided by Arason to Western National that he had used an aftermarket radiator or an aftermarket A/C condenser.

Western National had paid Arason for OEM parts. (T. 135-36.) Prior to meeting with Arason, the Western National investigators had reached this conclusion:

Per the invoice that [Arason] provided to David Toth [referring to Trial Exs. 6 and 22] and service work for Sheridan Motors it already appears that Arason installed the aftermarket radiator and condenser despite being paid for OEM parts at a substantially higher cost.

(Trial Ex. 8; A. 89.)

The investigators interviewed Arason and found him to be evasive and confrontational. (Id.) Arason did not provide the investigators with any paperwork relating to parts that he installed on Toth's vehicle. (Id.) Jacobson's investigation

revealed that the A/C condenser and radiator that were installed by Arason were aftermarket parts. (T. 134.) This was confirmed by Peter Dahl's call to Northern Factory Sales, the supplier to Arason of the parts. Northern Factory Sales confirmed from the information contained in its August 27, 1997 invoice that the radiator and A/C condenser installed by Arason are aftermarket and not OEM parts. (Trial Ex. 8; A. 88; Trial Ex. 6; A. 87.) It was only through Western National's investigation that Toth claims he learned a non-OEM A/C condenser had been installed in his vehicle. (T. 211.)

Ms. Jacobson testified that under Minnesota law, an insurance company must specify in the repair estimate that a part not recognized by the manufacturer is being used. It would be a violation by the insurer of the Minnesota Fair Claims Practices Act to do otherwise.<sup>4</sup> (T. 136.) If nothing is specified on the estimate, that means that an OEM part is to be used. (T. 136-37.) Ms. Jacobson acknowledged that the consequence for using an aftermarket part is that the dealer will not honor the manufacturer's warranty. (T. 137.)

Sheridan Motors parts and services director, Mr. Pat Harris, testified at trial. Mr. Harris explained that the use of the non-OEM parts had voided Toth's vehicle's warranty. (T. 148.) According to Mr. Harris, someone experienced in auto work can easily

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<sup>4</sup> Ms. Jacobson was referring to Minn. Stat. § 72B.091, subd. 2, that provides that "the appraisal must disclose to the vehicle owner any parts to be used, other than window glass, which are not original equipment parts or which are not covered by the manufacturer's warranty on such parts."

distinguish between an OEM and a non-OEM part whereas the general public would have difficulty making that distinction. (T. 150.)

Testimony was also presented by William Hardwig, the owner and operator of North County Collision. (T. 169.) Mr. Harding has been doing automotive body repairs since 1974. (Id.) Mr. Hardwig explained that there can be a quality difference between an aftermarket part and an OEM part. (T. 172-73.)

On a very new vehicle such as Toth's, Mr. Hardwig would never have selected an aftermarket part in order to get the job done more quickly because of the effect on the vehicle's warranty. (T. 179.) Mr. Hardwig testified:

Q. Okay. And are there occasions when you talk to the customer or talk to the insurance company and tell them, well, if we can get these parts that are similar we can get the job done quicker, if you want to do that?

A. Yes, I have.

Q. Okay. And then are there occasions when the customer says, yeah, go ahead, let's get the car on the road?

A. Yes. However, that occasion is not when the vehicle is in warranty. That's the only time.

(T. 180.)

Toth also sought resolution of his dispute with Arason through the Minnesota Attorney General's office. (T. 218; Trial Ex. 23; A. 108.) Toth informed the Attorney General that he had also called Northern Factory Sales and they told him the parts "are an

aftermarket jobber . . .” (Id.) He also informed the Attorney General’s office that he talked to Arason about this and “he claims he put in GM radiator original but it is nothing other than an aftermarket radiator.” (Id.) Toth’s investigation stalled when Arason told the Attorney General’s office the matter was resolved. (Trial Ex. 24; A. 110.)

Arason’s attempt at resolution was providing Toth a \$100.00 check for the coolant costs and stating he would make repairs. (Id.) When the \$100.00 check was presented to Toth containing the words “as agreed,” Toth requested that Arason “put in writing just exactly what he was going to fix on my truck.” Arason refused. (T. 91-92, 220-21; Trial Ex. 10; A. 91.) Toth did not cash Arason’s check. (T. 221.)

The total amount expended by Toth for replacing the radiator was \$810.44, which was not covered under warranty. (T. 152-53; Trial Ex. 16; A. 105.) In addition, he incurred additional expenses for radiator testing and coolant in the amount of \$235.93, which also was not covered because of the void warranty. (Trial Ex. 13, 14, 15; A. 92-104.) The estimated cost to Toth to replace the aftermarket A/C condenser with an OEM condenser was \$503.87. (T. 153-54; Trial Ex. 17; A. 106.) Toth has not yet replaced the condenser although according to Toth “[i]t doesn’t seem to be as cooling.” (T. 233-34.)

## STATEMENT OF THE CASE

### **A. Toth’s Amended Complaint.**

Toth brought this lawsuit asserting a violation of Minnesota’s deceptive trade practices statute. Subsequently permission was granted, the Honorable Charles H. LeDuc

presiding, to amend the complaint to add claims asserting violations of Minnesota's consumer fraud statute, violations of Minnesota's Truth in Repairs Act and breach of contract. (A. 13, 25.) The trial court also granted Toth leave to amend his complaint to add a claim for punitive damages. (Id.) The trial court stated:

[Toth] has alleged facts which, if true, establish a prima facie case by clear and convincing evidence that [Arason] acted in conscious or intentional disregard or willful indifference to the high probability of injury to the rights or safety of others.

(A. 13.)

**B. Trial Court's Findings and Conclusions of Law.**

The case was tried to the court, the Honorable Donald J. Aandal presiding. After hearing the evidence, the trial court requested briefs because Toth "is requesting attorney fees and punitive damages." (T. 304.)

Toth asserted that based on the testimony at trial, it was established that Arason violated Minn. Stat. § 325F.60 as well as the Consumer Fraud Act, Minn. Stat. § 325F.69.

(A. 40, 41.) Minn. Stat. § 325F.60 states in pertinent part:

Upon completion of repairs, a shop<sup>5</sup> shall provide the customer with a copy of a dated invoice for the repairs performed. If the customer receives a repaired motor vehicle or appliance without face to face contact with the shop, the shop shall mail the invoice to the customer within two

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<sup>5</sup> "Shop means an individual, corporation, partnership or any other form of business organization which derives income, in whole or in part, by engaging in the business of repairs." Minn. Stat. § 325F.56, subd. 6. "Customer means a customer of a shop and the agents of a customer." Id. at subd. 7.

business days after the shop has knowledge of removal of the item. The invoice shall contain the following information:

...

(e) a notation specifying which parts, if any, are new, used, rebuilt, reconditioned, or replated if that information is known by the shop. If parts, other than window glass, used in the repair are new parts, the invoice must indicate whether or not those parts are original equipment parts.

(A. 22.) Toth presented to the trial court an outline of Minn. Stat. § 325F.69 and the remedies available for its violation. (A. 48, 53.) The same was provided for the Truth in Repairs Act. (A. 53-54.) As damages, Toth sought \$235.93 for the expenses incurred for antifreeze and mechanic charges plus the expended \$810.44 for replacing the radiator. Toth also sought \$503.87 for the cost to replace the A/C condenser with an OEM A/C condenser. (T. 105-06.) Toth presented his claim for attorneys' fees. Punitive damages were also sought pursuant to Minn. Stat. § 549.20.<sup>6</sup>

In Arason's post-trial memorandum and argument, Arason asserted that Minn. Stat. § 325F.56, subd. 2, was not applicable because the repairs exceeded \$7,500.00 but that Minn. Stat. § 325F.60 would apply. (A. 36.) Arason asserted that if the trial court determined he had violated § 325F.60, all he was responsible for was \$855.44 which was the "costs of replacing the radiator with an OEM radiator and antifreeze up to the point of

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<sup>6</sup> Also sought were damages to repair the peeling clear coat, which was a breach of contract claim. That claim is not the subject of Toth's review request to this Court. Accordingly, the details of that claim will not be presented in this brief.

diagnosis of the problem.” (A. 39.) Arason also contended that Toth could not claim damages by relying on Minn. Stat. § 325F.63 because § 325F.64 exempts insurance or service contracts and Toth “is not out any money.” (A. 37.)

More than a month after trial the trial court issued the following findings of fact:

1. That in August of 1997, [Arason] provided a written estimate to [Toth] for repairs to his new pickup that was damaged in an accident.
2. That this estimate included installation of an OEM radiator.
3. That [Arason] subsequently repaired [Toth’s] vehicle and installed an aftermarket radiator.
4. That [Arason] later testified that he verbally informed [Toth] of this change which was necessitated by a six week waiting list for OEM radiators.
5. [Toth] denied being informed of this.
6. That there was no evidence that the aftermarket radiator was inferior. [Arason] testified it was actually superior to an OEM radiator. There was no defect identified in the sold radiator.
7. After the repairs, [Toth] developed a radiator leak.
8. That because of the installation of the aftermarket radiator rather than an OEM radiator, [Toth’s] warranty from General Motors was voided.
9. As a result, [Toth] had to pay for a new radiator and air conditioning unit which was installed by the GM dealer nearly three years after [Arason’s] work.

10. [Arason] volunteered to correct the problems prior to the dealer doing the work.

(A. 9-10.) Based on these findings, the trial court in its conclusion of law awards Toth \$803.44. (A. 10.) No statutory provisions were cited in the trial court's conclusion of law. (Id.)

In the accompanying memorandum, the trial court states it was issuing an award reflecting the cost of replacing the radiator. The trial court states it was "compelled to rely on the written estimate" and was excluding damages for "replacement of the air conditioner as unnecessary." (A. 12.) The trial court continued:

Further, the court awards no punitive damages or attorney fees as no evidence of fraud on the part of [Arason] was proven. In fact, the Court finds [Arason's] testimony extremely credible regarding his reason for the substitution and his informing [Toth].

(A. 12.)

**C. Toth's Post-Trial Motion and Resulting Order.**

Toth sought post-trial relief, asserting entitlement to amended findings of fact and conclusions of law or in the alternative a new trial. (A. 55.) Toth again asserted that the actions of Arason violated both the Truth in Repairs Act and the Consumer Fraud Act. He sought to recover all the costs he had expended to service and replace the radiator as well as the cost to replace the A/C condenser. He again sought his attorneys' fees.

In response to Toth's post-trial motions, Arason submitted two proposed orders to the trial court. (A. 57, 58, 61.) The first proposed order denied Toth's motion for a new

trial and contained a brief memorandum. (A. 57, 58.) Even though Arason had not brought a post-trial motion, Arason submitted a second order by which he sought to amend “the Findings of Fact and Conclusions of Law retaining the Judgment with the clarification that [Arason] has an opportunity to tax costs against [Toth] pursuant to Rule 68 of the Minnesota Rules of Civil Procedure.” (A. 57, 61.) This proposed order contained, as findings, many of the assertions contained in Arason’s pre-decision brief which the trial court had not previously found as fact. (Compare A. 30 with A. 61.)

The trial court signed both of Arason’s alternative proposed orders and issued a memorandum to support one of the orders, which memorandum is also taken word for word from Arason’s proposed memorandum. (Compare A. 58 with A. 111.) In one order, the trial court denied Toth’s request for amended findings of fact, conclusions of law and for a new trial. (A. 111.) In the other order, the trial court again denied Toth’s motion for a new trial but issued the amended findings of fact and conclusions of law as proposed by Arason. (Compare A. 15 with A. 61.) The pertinent amended findings include:

4. . . . On August 25, 1997 the Defendant, Arason, explained to the Plaintiff he could not obtain a GM Radiator for 6 weeks and also explained that other radiators of the same or better quality were available and could be obtained right away. This conversation took place at the time the Plaintiff was given a “rental” vehicle to use during the repair of the pick-up. (See Exhibit 30, Rental Agreement dated August 25, 1997.) Plaintiff advised the Defendant to obtain a replacement radiator which was accomplished through Northern

Factory Sales. The invoice (Exhibit 6) refers to the radiator as a GM replacement radiator and the condenser as a Delco # (see Exhibit) which was the exact condenser specified by General Motors, but not sold through a General Motors dealer.

5. Testimony from the Defendant, Jerry Arason, a certified radiator repairman since 1957, established that the replacement radiator obtained was of better quality with greater cooling capacity than the radiator initially installed in the vehicle. The Court had an opportunity to compare the radiator installed by the Defendant (Exhibit 5) with an actual OEM General Motors radiator produced for comparison by the Defendant and it appeared to the Court that the radiator installed by Arason was indeed of greater capacity than the OEM General Motors radiator.

...

9. The Plaintiff contacted Western National Mutual Insurance Company regarding the claim that a non-OEM part was used in the repair of his pick-up truck. The insurance company dispatched Nancy Jacobson, special investigations unit, and Peter Dahl, investigator, to Arason's Body Shop. The insurance investigators made a careful examination of the Plaintiff's pick-up truck and confirmed that front fenders, front bumper, core support, battery tray, bumper mounting brackets, front grill, lower air dam, marker and parking lights all appeared to be genuine OEM parts with what appeared to be either a GM stamp or a GM part number. It was confirmed that the radiator appeared to be a non OEM radiator received from Northern Factory Sales, Inc. The air conditioning condenser appeared to have the appropriate part numbers for the vehicle. (See Exhibit 8.)

...

12. Plaintiff further submitted a repair estimate from Sheridan Motors, Inc. indicating replacement of the air conditioning condenser would cost \$503.87. However, there was no testimony that the condenser was faulty, that it was not an actual AC Delco part with the same number specified by the GM dealer, Sheridan Motors, Inc. or that the repair or replacement was required. (See Exhibit 17.)

(A. 17-20.)

Based on these amended findings, the trial court reached the following conclusions of law:

- Toth's motion for a new trial is denied.
- Minn. Stat. § 325F.56, subd. 2, applies.
- Minn. Stat. § 325F.64 specifically exempts the transactions between Toth and Arason from application of consequential damages, reasonable attorneys' fees and punitive damages . . .
- The estimate initially provided to Toth did not specifically list the radiator replacement as an OEM radiator. It also did not list the radiator as a "replacement radiator." Toth was, at most, damaged to the extent of \$803.44 in replacing the non-OEM radiator installed by Arason, which was not covered by his new truck warranty, with an OEM radiator later installed by the GM dealer, Sheridan Motors.

(A. 20-21.) Based on these conclusions of law, the trial court ordered judgment in favor of Toth in the amount of \$803.44. (A. 21.) The trial court granted Arason his costs and disbursements pursuant to Rule 68 of the Minnesota Rules of Civil Procedure. (Id.) It is

from the resulting judgments and the orders denying a new trial that Toth brought this appeal.

**D. Court of Appeals Decision.**

The Court of Appeals affirmed in part and reversed and remanded in part. (A. 1.) The Court of Appeals refused to address whether the district court's adoption of both of Arason's alternative proposed orders undermined the orders' legitimacy.<sup>7</sup> (A. 7-8.) It did acknowledge the confusion created by the trial court's entry of two post-trial orders and two sets of findings:

It is not clear whether the district court intended the amended order to replace the initial order or whether parts of the initial order remain in effect.

(A. 6.) The Court of Appeals did not resolve the issue.

The Court of Appeals agreed with Toth that Minn. Stat. § 325F.60, subd. 1, not Minn. Stat. § 325F.56, subd. 2, applies. (A. 3-4.) Arason had violated § 325F.60 by his failure to provide an invoice showing that aftermarket parts had been substituted for OEM parts.<sup>8</sup> (A. 4.)

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<sup>7</sup> The federal court has so held in Bright v. Westmoreland County, 380 F.3d 729, 732 (3d Cir. 2004); see also Chudasama v. Mazda Motor Corp., 123 F.3d 1353, 1373 (11th Cir. 1997); see also Bliss v. Bliss, 493 N.W.2d 583, 590 (Minn. Ct. App. 1992).

<sup>8</sup> Minn. Stat. § 325F.56, subd. 2, merely provides a definition of the term "repairs" and states it "means work performed for a total price of more than \$100 and less than \$7,500." In contrast, Minn. Stat. § 325F.60 provides that the Minn. Stat. § 325F.56, subd. 2, definition does not apply to the invoice requirements set out in § 325F.60.

The Court of Appeals affirmed the trial court's amended conclusion of law that Minn. Stat. § 325F.64 exempts the transactions between Toth and Arason from "application of consequential damages, reasonable attorneys' fees and punitive damages." (A. 4-5.) The Court of Appeals considered five statutes -- Minn. Stat. §§ 325F.60, subd. 1; 325F.63, subd. 3; 325F.69, subd. 1; 8.31, subd. 3a; and 325F.64, subd. 1, to ultimately reach this conclusion:

Therefore under the exemption in section 325F.64, subd. 1, section 325F.63 does not apply to Arason's violation of section 325F.60, subd. 1, and, as a result, the violation is not deemed a violation of Minn. Stat. § 325F.69, subd. 1, and the remedies available under section 8.31, subd. 3a, do not apply to Arason's violation.

(A. 5.)

After so concluding, the Court of Appeals addresses the damages awarded for the radiator and the failure to award damages for the A/C condenser. (A. 6.) As to the radiator, the Court of Appeals states it could find no explanation as to why the damage award "does not include any amount for the cost of testing the radiator and adding coolant before the radiator was replaced." (Id.) Further, the Court of Appeals recognized the invoice shows the cost of replacing the radiator was \$810.44 but the award was \$803.44. Because the Court of Appeals could not discern the basis for the trial court's damage award, it reversed the award as to the radiator and sent it back to the district court for reconsideration. (Id.)

The Court of Appeals acknowledges that the A/C condenser, like the radiator, was an aftermarket part. (A. 2.) But as to the A/C condenser, Toth was not entitled to damages. (A. 6.) The Court of Appeals reasoned:

Toth also argues that the district court erred in failing to award him damages of at least \$503.87 for the cost of replacing the A/C condenser. This is the amount of a March 2000 Sheridan Motors estimate to replace the condenser. But Toth has not cited to any authority that indicates that the cost of replacing a condenser that has not been replaced is the applicable measure of damages. See Ganguli v. Univ. of Minnesota, 512 N.W.2d 918, 919 n.1 (Minn. Ct. App. 1994) (stating court need not address allegations unsupported by legal argument).

(Id.)

Toth had also argued that regardless of Minn. Stat. § 325F.60, when the trial court accepted Arason's testimony, it also necessarily accepted Arason's testimony that:

- Arason told Toth that it would make no difference if the parts installed were an aftermarket part or an OEM part;
- Arason knew the manufacturer's warranty is important to a vehicle owner and was familiar with the General Motors warranty pertaining to this truck; and
- Arason never informed Toth that by installing a non-OEM part he would void the truck's manufacturer's warranty.

Toth asserts this is in violation of Minn. Stat. § 325F.69, subd. 1, regardless of whether Arason also violated Minn. Stat. § 325F.60. The Court of Appeals refused to address this

§ 325F.69, subd. 1 claim, asserting this claim was being raised for the first time on appeal. (A. 5.)

The Court of Appeals further concludes that even if Toth had asserted a § 325F.69, subd. 1, claim, such action could not proceed because “Toth did not assert, or present any evidence, that his cause of action against Arason benefits the public.” Therefore, the Private Attorney General Statute does not apply to Toth’s claim.” (A. 6.) The Court of Appeals did reverse the award of costs and disbursements to Arason finding no basis for such an award under Minn. R. Civ. P. 68. (A. 8.) Toth sought further review with this Court which was accepted by order dated July 19, 2005.

### ARGUMENT

#### **I. TOTTH IS ENTITLED TO RECOVER MORE THAN THE \$803.44 AWARDED BY THE TRIAL COURT DUE TO ARASON’S VIOLATION OF MINNESOTA’S TRUTH IN REPAIRS ACT.**

Toth is entitled to damages, as well as his attorneys’ fees and costs, due to Arason’s violation of Minn. Stat. § 325F.60. In addition, and regardless of Arason’s violation of § 325F.60, Arason violated Minn. Stat. § 325F.69, subd. 1, which also entitles Toth to his damages, as well as his attorneys’ fees and costs.

##### **A. Standard of Review De Novo.**

This case presents the interplay of five statutes: Minn. Stat. §§ 325F.60, 325F.63, 325F.64, 325F.69 and 8.31. The interpretation of a statute presents a legal issue, which

this Court reviews de novo. Hibbing Educ. Ass'n v. Public Employment Relations Bd., 369 N.W.2d 527, 529 (Minn. 1985).

**B. Statutes at Issue Are To Be Liberally Construed in Favor of Consumers Such as Toth.**

Minn. Stat. §§ 325F.56 to 325F.65 comprise Minnesota's Truth in Repairs Act. Minn. Stat. § 325F.66. The purpose of the Truth in Repairs Act is to regulate auto repairs, service calls and estimates. See, e.g., Minn. Stat. § 325F.65. Minnesota's Truth in Repairs Act, like Minnesota's consumer fraud statute, Minn. Stat. § 325F.69, provides consumer protection. Consumer protection laws are "intended to broaden the cause of action to counteract the disproportionate bargaining power present in consumer transactions." State by Humphrey v. Alpine Air Products, Inc., 490 N.W.2d 888, 892 (Minn. Ct. App. 1992), aff'd, 500 N.W.2d 788 (Minn. 1993); see also Jenson v. Touche Ross & Co., 335 N.W.2d 720, 727 (Minn. 1983) (the public policy which prompted the Consumer Fraud Act was for the protection of innocent customers). Consumer protection statutes, being remedial in nature, are to be liberally construed in favor of protecting the consumer. Wiegand v. Walser Auto. Groups, Inc., 683 N.W.2d 807, 812 (Minn. 2004); Boubelik v. Liberty State Bank, 553 N.W.2d 393, 402 (Minn. 1996), reh'g denied; Alpine Air Products, 490 N.W.2d at 892.

Minn. Stat. § 325F.60, subd. 1(e), explicitly requires that the repair shop provide its customer with a dated invoice that contains a notation indicating whether or not the new parts used to repair the vehicle were OEM parts. Arason did not provide such an

invoice to Toth. The Court of Appeals ruled that Arason violated Minn. Stat. § 325F.60, subd. 1. Arason has not challenged that ruling by seeking further review by this Court.

Minn. Stat. § 325F.63, subd. 3, provides the remedies for violation of Minn. Stat. § 325F.60, subd. 1. It states:

Any violation of sections 325F.56 to 325F.66 shall be deemed a violation of section 325F.69, subdivision 1 [the consumer fraud statute], and the provisions of section 8.31 [the private attorney general statute], shall apply.<sup>9</sup>

Minn. Stat. § 325F.64, subd. 1, entitled “Exemptions,” exempts certain transactions from the Truth in Repairs Act. Notably, § 325F.64 was amended in 1981 to remove § 325F.60 from the list of exemptions. A repair shop has no exemption for a violation of § 325F.60. As amended, § 325F.64, subd. 1, provides:

Sections 325F.57 to 325F.59 and 325F.61 to 325F.66 shall not apply if an insurer or service contract company pays up to 90 percent of the charge for repairs or pays a charge for

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<sup>9</sup> Minn. Stat. § 325F.69, subd. 1, states: “The act, use, or employment by any person of any fraud, false pretense, false promise, misrepresentation, misleading statement or deceptive practice, with the intent that others rely thereon in connection with the sale of any merchandise, whether or not any person has in fact been misled, deceived, or damaged thereby, is enjoined as provided in section 325F.70.”

The private attorney general statute, Minn. Stat. § 8.31, subd. 3a, enables individuals to obtain private remedies. It provides: “In addition to the remedies otherwise provided by law, any person injured by a violation of any of the laws referred to in subdivision 1 may bring a civil action to recover damages, together with costs and disbursements, including costs of investigation and reasonable attorney’s fees, and receive other equitable relief as determined by the court. The court may, as appropriate, enter a consent judgment or decree without the finding of illegality.”

repairs above a deductible amount specified in an insurance agreement or service contract.

**C. Court of Appeals Failed to Construe Statutes in Accord with Basic Rules of Statutory Construction.**

**1. Court of Appeals' Construction of the Statutes.**

The Court of Appeals agreed with Toth that Minn. Stat. § 325F.60, subd. 1, is not subject to the Minn. Stat. § 325F.64 exemption. Nonetheless the Court of Appeals by its statutory construction concludes that a consumer, such as Toth, has no remedy where a repair shop has violated § 325F.60 and the insurer pays up to 90% of the initial charge for repairs. The Court of Appeals so holds because the remedy section -- § 325F.63 -- is listed in the § 325F.64 exemption. The Court of Appeals reasoned:

Under Toth's own statutory analysis, Minn. Stat. § 325[F].60, subd. 1, does not provide that the remedies available under section 8.31, subd. 3a, apply to a violation of Minn. Stat. section 325[F].60, subd. 1. Instead, it is Minn. Stat. § 325F.63, subd. 3, that states that section 8.31 applies to a violation of section 325F.60. Therefore, if Minn. Stat. § 325F.63, subd. 3, does not apply to the transactions between Toth and Arason, the remedies available under section 8.31, subd. 3a, do not apply to the transactions.

(A. 5.)

Based on the Court of Appeals' interpretation of the statutes, Toth would not be entitled to any damages -- even damages that resulted from the aftermarket radiator -- but for Arason's acknowledgment in this case that if he was found to have violated Minn. Stat. § 325F.60, he is responsible to pay the actual damages incurred because of the

radiator. (A. 6; see also A. 36-37.) Because Arason had not filed a Minn. R. Civ. App. P. 106 notice of review, the Court of Appeals concludes, “the district court’s liability determination is not before us.”<sup>10</sup> (Id.) The Court of Appeals suggests that if that issue were before it, no damages could be awarded for a violation of § 325F.60 unless the trial court also determined whether the “Private Attorney General Statute applies to Toth’s claim.” (A. 6.)

As to the radiator, the Court of Appeals concludes the damages awarded are less than what the record supports and remands the amount awarded for reconsideration by the trial court. (A. 6.) As to the A/C condenser, the Court of Appeals holds no damages were properly awarded because no authority has been cited “that indicates that the cost of replacing a condenser that has not been replaced is the applicable measure of damages.” (Id.)

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<sup>10</sup> The Court of Appeals’ footnote 2 is confusing. (A. 6.) Contrary to the Court of Appeals’ statements in that footnote, the trial court never states that Arason violated Minn. Stat. § 325F.60 but that may be implicit in its initial decision. (A. 9.) In its amended order the trial court states Arason violated Minn. Stat. § 325F.56, subd. 2, but that is a definition and the Court of Appeals concludes that is error. (A. 20.) Moreover, the Court of Appeals incorrectly asserts Toth “did not seek review of the liability determination” and cites Rule 106. (A. 6.) The Court of Appeals obviously was referring to Respondent Arason. Toth is the Appellant.

The Court of Appeals apparently did apply its construction of § 325F.64 to “Toth’s claim for consequential damages, attorneys’ fees and punitive damages” to deny Toth his requested relief.<sup>11</sup> (A. 4.)

**2. Based on Rules of Statutory Construction, Toth is Entitled to a Remedy.**

In construing Minnesota’s Truth in Repairs Act, the Court of Appeals failed to apply well settled rules of statutory construction. To determine the meaning of a statute, the Court looks first to the language of the statute itself. Minn. Stat. § 645.16 (setting forth the plain meaning rule). If on its face and as applied to the facts a statute’s meaning is plain, judicial construction is neither necessary nor proper. Id.

The plain meaning rule presupposes the ordinary use of words that are not technical or defined by statute, relies on conventional rules of grammar, and draws from the full context of the act or statutory provision. American Tower, L.P. v. City of Grant, 636 N.W.2d 309, 312 (Minn. 2001); Glen Paul Court Neighborhood Ass’n v. Paster, 437 N.W.2d 52, 56 (Minn. 1989) (sections of the statute must be read together to give words their plain meaning).

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<sup>11</sup> The Court of Appeals states that “Toth argues that the district court erred in concluding that under Minn. Stat. § 325F.64, subd. 1 (2002), Arason is not liable for consequential damages, attorney fees and punitive damages.” (A. 4.) The Court of Appeals apparently is referring to § 325F.63, subd. 1, which is not the provision at issue in this case. Toth’s recovery would be pursuant to Minn. Stat. § 325F.63, subd. 3.

Although plain meaning is the governing principle in applying all statutory language, Minnesota courts will not give effect to plain meaning if it produces an absurd result or an unreasonable result that is plainly at variance with the policy of the legislation as a whole. Minn. Stat. § 645.17(1); Olson v. Ford Motor Co., 558 N.W.2d 491, 494 (Minn. 1997) (discussing alleged absurdity); Wegener v. Comm’r of Revenue, 505 N.W.2d 612, 617 (Minn. 1993) (discussing unreasonable result at variance with manifest intention).

If the statutory language is not plain, courts construe the law to effectuate the intention of the Legislature. Minn. Stat. § 645.16. Construction is necessary to ascertain legislative intent when the words of a law are ambiguous, unclear or not sufficiently explicit. Id. To ascertain legislative intent, courts consider factors which include the need for the law, the circumstances of enactment, the purpose of the statute, the consequences of a particular interpretation and the contemporaneous legislative history. Id. A statute is to be construed as to make it effective rather than to nullify it. Sandy v. Walter Butler Shipbuilders, 221 Minn. 215, 21 N.W.2d 612, 616 (1946). Where a statute contains inconsistencies caused by clauses in apparent conflict, the entire act must be construed as a whole to ascertain its proposed objective, to the end that such predominant purpose may be made effective. Id. at 617.

The Court of Appeals failed to look at the entire act in context and ignored the fact that as a consumer protection statute it is to be liberally construed in favor of the

consumer. The Legislature, by its 1981 amendment to § 325F.64, removed § 325F.60 from its reach. When the Legislature changes a statute, the courts are to presume that the Legislature intends a change in the law unless it appears that the Legislature only intended to clarify the earlier statute. Northern States Power Co. v. Comm’r of Revenue, 571 N.W.2d 573, 575-76 (Minn. 1997). Clearly, the Legislature intended to change the law so that a violation of § 325F.60 is actionable in all circumstances.

Further, as this Court has held, statutory exceptions are to be narrowly construed. This is especially true where the statute at issue is remedial legislation. Nordling v. Ford Motor Co., 231 Minn. 68, 42 N.W.2d 576, 581-82 (1950). See 3A Sutherland Statutory Construction § 74:6 (6th ed. 2004) (“Exceptions to statutes are to be strictly construed, and those who claim the benefit of an exemption have the burden of proving that they come within the limited class for whose benefit the exemption was established”); Johnson v. Ford Motor Co., 289 Minn. 388, 184 N.W.2d 786, 796 (1971).

When the Legislature amended § 325F.64 to remove § 325F.60 from its reach, it failed to address § 325F.63. Section 325F.63, subd. 3, declares that “any violation of sections 325F.56 to 325F.66 shall be deemed a violation of section 325F.69, subdivision 1, and the provisions of section 8.31, shall apply.” Section 325F.63, subd. 4, provides that “the remedies of this section are to be construed as cumulative in addition to those provided by the common law and other statutes of this state.” As the Court of Appeals views it, the Legislature intended to make a violation of § 325F.60 actionable by the

consumer, regardless of whether an insurer paid for the repairs, but the consumer has no remedy for the statute's violation because § 325F.63 is subject to the § 325F.64 exemption. To so construe produces an absurd result and one plainly at variance with the policy of the legislation as a whole.

By its amendment to § 325F.64 to remove § 325F.60 from the exemption, the Minnesota Legislature recognized that the shop owner cannot escape responsibility and the consumer is entitled to compensation from the repair shop even if the original repairs were paid by the insurance company. There could be no other reason for the amendment.

With the removal of § 325F.60 from the exemption, the Legislature once again declared that its violation, regardless of circumstances, "shall be deemed a violation of section 325F.69, subd. 1 and the provisions of section 8.31 shall apply." Construing the entire act as a whole to ascertain its proposed objective, one can reach no other conclusion. To hold to the contrary defeats the very purpose of the amendment. Only if the statute is construed as Toth asserts is the amendment's purpose attained. Because Arason violated Minn. Stat. § 325F.60, Toth is entitled to his damages, including attorneys' fees.

That such compensation is necessary is illustrated in this case. After all, it is Toth and not his insurer who ends up paying for the replacement of the non-OEM installed part. It is Toth, not his insurer, who pays when his vehicle warranty is voided by use of the non-OEM parts. It is also Toth, not his insurer, who suffers further depreciation on

his vehicle and a lower resale value on resale because of the installation of inferior aftermarket parts. Toth is entitled to a remedy.

**3. Toth Is Entitled to Damages for the Radiator and A/C Condenser.**

Arason has admitted that by violating Minn. Stat. § 325F.60 he is to be held responsible for the cost of replacing the aftermarket radiator with an OEM radiator. But he is also responsible for any other consequential damages that flow from his violation -- such as for coolant, lower resale value on the vehicle, etc.

Arason, however, has taken the position and the trial court agreed, that Toth is entitled to no damages as a result of Arason's installation of an aftermarket A/C condenser. The trial court states it "excluded damages for replacement of the air conditioner as unnecessary." (A. 12.) So under Arason and the trial court's view of the law, even though Arason had agreed to install an OEM A/C condenser and was paid \$443.25 for the part, no damages flow from the installation of an aftermarket part, at a cost to him of only \$151.66. In other words, Arason is entitled to just pocket the difference and profit from his deceit. It is Toth's position that where the shop violated the Truth in Repairs Act by delivering nonconforming parts, Toth is entitled to the replacement cost of those parts, which included installation.

The Court of Appeals states that Toth "has not cited any authority that indicates that the cost of replacing a condenser that has not been replaced is the applicable measure of damages." (A. 6.) But the Legislature had declared that a violation of § 325F.60

“shall be deemed” a violation of § 325F.69, subd. 1. The Legislature has further decided that the provisions of § 8.31 “shall apply.” Minn. Stat. § 325F.63, subd. 3. “Shall” means mandatory. Minn. Stat. § 645.44, subd. 16. Under § 325F.69, all Toth need show is a “causal nexus” between his damages and Arason’s wrongful conduct. Group Health Plan, Inc. v. Philip Morris Inc., 621 N.W.2d 2, 14 (Minn. 2001).

Toth paid for the installation of an OEM A/C condenser. Arason did not install that which Toth paid for and never told Toth in writing that he had instead installed an aftermarket part. Arason then pocketed the difference between that for which he was paid to install and that which he did install.

As the federal courts have recognized, Minnesota courts have taken a broad view of what constitutes out-of-pocket losses, holding that the rule permits a recovery of consequential damages proximately caused by the misrepresentation. Commercial Property Investments, Inc. v. Quality Inns Int’l, Inc., 61 F.3d 639, 647 (8th Cir. 1995). As this Court has recognized, the out-of-pocket rule requires flexibility in the means of measuring damages to ensure a just result. Jensen v. Peterson, 264 N.W.2d 139, 143 (Minn. 1978).

In Lewis v. Citizens Agency of Madelia, Inc., 306 Minn. 194, 235 N.W.2d 831 (1975), for example, the plaintiff relied on an insurance agent’s misrepresentation that she had a life insurance policy on her husband’s life. Id. at 833. After her husband became ill and uninsurable, she discovered that her policy was only an annuity. Id. While one

measure of damages would have only recognized that plaintiff's loss was her out-of-pocket expense for the annuity premiums, this Court observed that the plaintiff could not be made whole by the mere return of the premium cost. Id. at 835. Consequently, the plaintiff could recover the amount of life insurance proceeds the premiums would have purchased. Id. at 835-36. This Court declined to strictly apply the out-of-pocket rule when it would not restore the plaintiff to her former position. Id., see also Hart v. North Side Firestone Dealer, Inc., 235 Minn. 96, 49 N.W.2d 587, 588 (1951) (plaintiff may, at his election, recover the reasonable cost of restoration of the chattel, where feasible, to the condition in which it was before the harm).

Under these circumstances, Toth should be compensated so as to restore his truck to its pre-accident condition. Arason is entitled to the cost of replacing the aftermarket A/C condenser with an OEM condenser.

**4. The Public Benefit Analysis Has Been Applied Only to a Determination of Attorneys' Fees.**

Minn. Stat. § 325F.63. subd. 2, declares that "any violation of sections 325F.56 to 325F.66 shall be deemed a violation of section 325F.69, subdivision 1, and the provisions of section 8.31, shall apply." As previously stated, the Court of Appeals suggests in a footnote that in order to obtain any relief under Minn. Stat. § 325F.60, the trial court must first determine "whether the Private Attorney General Statute applies to Toth's claim for the cost of replacing the radiator." (A. 6.) The Court of Appeals does not address that issue because Arason did not file a notice of review and "consequently the district court's

liability determination is not before us.” (Id.) The Court of Appeals then suggests the same would be true if Toth was proceeding only under Minn. Stat. § 325F.69, subd. 1. (Id.) As the Court of Appeals views it, before a consumer such as Toth is entitled to proceed under the Truth in Repairs Act or Minnesota’s Consumer Fraud Act, Toth must show that his “action benefits the public.” The Court of Appeals has misconstrued Minnesota law.

The public benefit analysis has only been applied to the issue of whether one, after having prevailed under Minnesota’s consumer fraud statute, is entitled to attorneys’ fees. Collins v. Minnesota School of Business, Inc., 655 N.W.2d 320, 323 (Minn. 2003). The public benefit test is not applied to determine whether a party might proceed under § 325F.69, subd. 1, or any other consumer protection statute, in the first instance.

In Ly v. Nystrom, 615 N.W.2d 302, 311 (Minn. 2000), this Court first enunciated and then applied the public benefit test but only to the issue of whether attorneys’ fees should be awarded to the claimant pursuant to the private attorney general statute; not whether the claimant could bring an action under Minnesota’s consumer fraud statute and recover damages under that statute.

In Ly, the seller of his restaurant business misrepresented to the buyer of his restaurant his monthly profits and the condition of the restaurant and inventory. Id. at 305-07. After operating the restaurant at a loss for six months, Ly, the buyer, brought suit against Nystrom, the seller, for common law fraud and a violation of Minnesota’s

Consumer Fraud Act. Id. at 307. At trial, the district court concluded that Nystrom was liable to Ly for common law fraud, but held there was no violation of Minnesota's Consumer Fraud Act, and therefore no attorneys' fees. Id. at 307. The Court of Appeals upheld the trial court's determination. Id. This Court reversed, finding that Minnesota's Consumer Fraud Act did apply. Id. at 310. This Court nonetheless did not require Nystrom to pay Ly's attorneys' fees, adopting for the first time the "public benefit requirement." Id. at 314.

Three years later, this Court in Collins v. Minnesota School of Business, Inc., 655 N.W.2d 320, 329-330 (Minn. 2003), another Minn. Stat. § 325F.69 case<sup>12</sup>, specifically stated that this public benefit decision in determining entitlement to attorneys' fees does not turn on the number of plaintiffs who were injured. Id. at 330. This Court looked instead to the fact that the defendant in that case, a business school, had offered its service to the general public and presented its program to the public at large. Id. Because the presentation was to the public at large, prosecution of the claim benefitted the public and attorney fees were payable.

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<sup>12</sup> Also at issue was § 325F.67, another statutory section listed in Minn. Stat. § 8.31, subd. 1.

**5. Toth is Entitled to Attorneys' Fees.**

**a. Public Benefit Analysis Needs To Be Clarified.**

Since this Court's decision in Ly, in deciding whether a party is entitled to attorneys' fees the courts have struggled with the standard for determining whether a party's cause of action benefits the public. As one commentator has noted, courts have been "left to apply a version of Justice Potter Stewart's 'I know it when I see it' theory to the public benefit rule." Ad Hoc Deceptions in Private Disputes: When Does a Private Plaintiff Confer a Public Benefit Under Minnesota's Private Attorney General Statute?, 29 Wm. Mitchell L. Rev. 321, 331 (2002).<sup>13</sup> In a search for standards by which to judge a public benefit, it is useful to start where this Court started before it imposed that requirement -- with the purposes behind the private attorney general statute itself. Ly, 615 N.W.2d at 310-14.

The private attorney general statute is part of the statute defining the duties of the Minnesota attorney general. Thus, a private litigant necessarily acts as a substitute for the attorney general.

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<sup>13</sup> Minnesota's requirement of a public benefit is a minority position which Toth respectfully suggests the Court should reconsider. See Patterson v. Beall, 19 P.3d 839-847 (Okla. 2000) (noting that a minority of states have adopted such a requirement and declaring to read such a requirement into Oklahoma's statute); 29 Wm. Mitchell L. Rev. at 333 (stating public benefit requirement has been the subject of harsh criticism as judicially created and unnecessarily restrictive to private plaintiffs).

The private attorney general statute was adopted by the Legislature in 1973 as part of the statutory charter for the duties and responsibilities of the attorney general. It provides a reward to private parties for uncovering and bringing to a halt unfair, deceptive and fraudulent business practices that had been the responsibility of the attorney general. Ly, 615 N.W.2d at 313.

Part of the legislative intent behind the private attorney general statute is to “eliminate financial barriers to the vindication of a plaintiff’s rights” and “the award should provide incentive for counsel to act as private attorney general.” Liess v. Lindemyer, 354 N.W.2d 556, 558 (Minn. Ct. App. 1984), quoted in Ly, 615 N.W.2d at 311. Unless consumers, such as Toth, are allowed their attorneys’ fees in a case like this, the high cost of litigation will bar vindication of consumers’ rights.

Because the private attorney general statute gives private citizens the right to act as a “private” attorney general, the role and duties of the attorney general concerning the enforcement of fraudulent business practice laws define the limits of a private claimant under that statute. Ly, 615 N.W.2d at 313. Minnesota law requires its attorney general to appear for the state in civil lawsuits “whenever, in the attorney general’s opinion, the interests of the state require it.” Minn. Stat. § 8.01. Accordingly, “the purpose of any statute granting private citizens authority to bring a lawsuit in lieu of the attorney general, is the protection of public rights and the preservation of the interests of the state.” Ly, 615 N.W.2d at 313.

Certainly it falls within the duty and the responsibility of the attorney general to enforce Minnesota's truth in repairs provisions and to bring to a halt practices that are in violation of that statute. As the Wisconsin Supreme Court noted in Shands v. Castrovinci, 340 N.W.2d 506, 509 (Wis. 1983), private actions provide a necessary backup to the state's enforcement power and aid the effective enforcement of the act. Private attorney generals also effectively "limit [government] bureaucratic growth by placing enforcement . . . in private hands." Fressell v. AT&T Technologies, Inc., 103 F.R.D. 111, 114 (N.D. Ga. 1984). As the Arizona Supreme Court stated, "[w]ithout effective private remedies the widespread economic losses that result from deceptive trade practices remain uncompensable and a private remedy is highly desirable to control fraud in the marketplace." Sellinger v. Freeway Mobile Home Sales, Inc., 521 P.2d 1119, 1122 (Ariz. 1974).

- b. There Are Two General Sets of Statutes That Fall Within the Private Attorney General Statute.**
  - i. First Set - Nonexclusive List Contained in § 8.31, Subd. 1, Was the Statute at Issue in Ly and Collins.**

Moreover, as enacted by the Legislature, two general sets of actions fall within the parameters of the Minnesota private attorney general statute, Minn. Stat. § 8.31, subd. 3. The first set is the nonexclusive list of laws specifically referenced in § 8.31, subd. 1, including the Nonprofit Corporation Act, the act against unfair discrimination and

competition, the Unlawful Trade Practices Act, the Antitrust Act, the Consumer Fraud Act, as well as the others listed.

Section 8.31, subd. 1, directs the attorney general to investigate violations of laws that address unfair, discriminatory or unlawful practices in business, commerce or trade. Subd. 1 states that the list of laws is not exclusive. Subd. 3a then states that “any person injured by a violation of any of the laws referred to in subdivision 1 may bring a civil action and recover damages, together with costs and disbursements, including costs of investigation and reasonable attorney’s fees, and receive other equitable relief as determined by the court.”

The Legislature has periodically amended the list of laws included in § 8.31, subd. 1, adding the Nonprofit Corporation Act in 1989 and the regulation of telephone advertising services and currency exchanges in 1992.

Both the Ly and Collins actions fell within that nonexclusive list of laws specifically referred in § 8.31, subd. 1.

**ii. Second Set Is Statutes in Which the Legislature Specifically Directs § 8.31 Applies But Are Not Listed in § 8.31, Subd. 1, and Per Se the Party Should Be Entitled to Attorneys’ Fees.**

There is another set of actions that fall within the parameters of Minn. Stat. § 8.31, subd. 3a. In these instances, the legislature has not simply amended Minn. Stat. § 8.31, subd. 1, to include a reference to certain acts. Instead, it has specifically directed by separate statute that the provisions of § 8.31 shall apply.

The Legislature has directed that § 8.31 “shall” apply to the Truth in Repairs Act, Minn. Stat. §§ 325F.56 through 325F.66; manufactured home sales, Minn. Stat. § 327B.12; consumer protection relating to bedding, Minn. Stat. § 325F.29; and the regulation of formaldehyde gases in building materials, Minn. Stat. § 325F. 18. The Legislature has also determined the provisions of § 8.31 apply to the Credit Services Act, Minn. Stat. § 332.59. A person who violates trade regulation and assumed names, Minn. Stat. § 333.065, is subject to the penalties and remedies provided in § 8.31. In each instance, the Legislature has directed as follows:

- § 325F.63: . . . the provisions of section 8.31 shall apply (adopted 1978);
- § 327B.12: . . . the provisions of section 8.31 shall apply (adopted 1982);
- § 332.59: . . . the provisions of section 8.31 apply (last amended in 1993);
- § 333.065: . . . is subject to the penalties and remedies provided in section 8.31 (adopted 1997);
- § 325F.29: . . . the penalty provisions of section 8.31 shall apply . . . (last amended 1986); and
- § 325F.18: . . . the penalty provisions of section 8.31 shall apply (last amended 1985).

It is Toth’s position that as to these statutes the Legislature has already determined that lawsuits to enforce these statutory enactments serve a public purpose and serve the interests of the state. There is no need for the public interest test to be applied in these

instances to determine entitlement to attorneys' fees. The Legislature, in each of the instances where language has been added to the statute directing that § 8.31 applies, has made the determination that the lawsuit is in the public interest. By its enactment, the Legislature created a system of private attorneys general to aid the statute's enforcement.

In fact, following this Court's decision in Collins, the Minnesota Legislature in 2004 tweaked the same language used above in a newly enacted statute relating to the violation of certain mortgage foreclosure statutes, to specifically state that:

a private cause of action under § 8.31 by a foreclosed homeowner is in the public interest.

See Minn. Stat. §§ 325N.06 and 325N.18.

Here, the Minnesota Legislature by its enactment of the Truth in Repairs Act has enacted specific and detailed provisions governing repair shops. The Legislature, by its enactment of these provisions, has recognized that auto repair shops possess special knowledge and expertise upon which Minnesota's citizens rely. These provisions were enacted to protect the public. Consumers do not have and cannot reasonably gain access to truthful information relevant to their transactions unless it comes from the person offering the goods or service. It is obviously in the public interest that these regulations be followed and enforced. A prevailing party under the Truth in Repairs Act should be per se entitled to attorneys' fees.

**D. Attorneys' Fees Are Payable in This Instance Even if the Ly and Collins Public Interest Test is Applied**

Even if the Court decides to apply the public interest test set out in Ly and Collins to the Truth in Repairs Act, Toth is entitled to his attorney's fees. Arason's is a business which advertises to the general public and it and the public which he serves occupy an unequal position in terms of knowledge and expertise. Arason testified that he was aware of the Truth in Repairs law but simply chose not to follow them. He was paid to install a certain type of part but instead installed a much cheaper part and pocketed the difference. As in Collins, there is the potential for countless consumers to be caught in the deceit that was perpetrated by this public business operation.

Unlike Ly, this is not transaction involving two sophisticated business people involving the sale of a business. In Ly, there was little to no likelihood that others would be injured by the seller in the same fashion. Presumably, this Court's decision in Ly would have been much different if the seller had been a broker who advertises and regularly engages in the business of selling restaurants to others.

Unlike Ly, given Arason's deception and violations here, there is a great likelihood that additional customers have been or will be injured in exactly the same fashion. As Arason admitted, 90-95% of his work is paid by insurance companies. Here, Arason misled not only Toth but Toth's insurance carrier. Western National (through premiums paid by its insureds) was forced to expend the funds to investigate whether Arason had committed fraud. However, the one who really suffers in this case is not the insurer but

the insured. It is the insured's manufacturer's warranty that is voided, resulting in the insured having to personally pay for the OEM replacement parts to his vehicle. Where, as here, a business operator has potential to injure a large number of citizens, the lawsuit affects the public interest. Toth's victory does serve the important public purpose of encouraging repair shops in this state to take seriously its obligations to properly inform its customers as required by the Truth in Repairs Act. Toth's suit will have the effect of deterring impermissible conduct by repair shops because, if they violate § 325F.60, they will be subject to damages and will be responsible for costs, including attorneys' fees. The deterrent effect of the statute strengthens the bargaining power of consumers in dealing with repair shops.

Also telling of the public interest factor is the attorney general's own involvement in this very matter. Toth initially turned to the attorney general's office to remedy his dispute with the repair shop. The attorney general's office did, in fact, get involved. Its involvement, however, ended when Arason advised the attorney general's office that the dispute had been settled. But then Arason refused to document how and what he would do to remedy Toth's complaints. When Arason refused to "put in writing just exactly what he was going to fix on [Toth's] truck," Toth moved forward to prosecute the action. He stepped into the shoes of the attorney general. This lawsuit ensued. Not only is the public likely to be snared by the deceit committed by a repair shop, but the facts

supporting a public interest are actually stronger than in Collins as the attorney general's involvement demonstrates that the protection of public rights was at stake.

Here the attorney general would certainly view Toth's lawsuit as suiting a public purpose and serving the interests of the state. The challenged practice here has the significant potential to impact other consumers in the future. Whereas Toth is seeking enforcement of a statute that protects the public, he is acting in the public interest.

Toth has been forced to expend great sums of money to enforce Minnesota's business practices law against one who holds himself out to the public as providing quality repair services. This case has involved much time and labor. If there are no attorneys' fees awarded, Toth's entire damage award will be spent to pay his attorneys and he will still owe substantial amounts of money in legal fees. The public interest is advanced by this lawsuit. Toth is entitled to his attorneys' fees.

**II. TOTTH IS ENTITLED TO ALSO RECOVER UNDER MINN. STAT. § 325F.69, SUBD. 1.**

Minn. Stat. § 325F.63, subd. 4, declares that the "remedies of [the truth in repairs statute] are to be construed as cumulative in addition to those provided by the common law and other statutes of this state." Therefore, regardless of the truth in repairs statute, Toth was entitled to proceed under § 325F.69, subd. 1, and the facts of record show that Arason so violated.

The trial court, while finding Arason credible, ignored Arason's testimony with regard to the truck's manufacturer's warranty. Arason admits he never informed Toth

that the manufacturer's warranty on his vehicle would be voided by the use of non-OEM parts. Instead Arason claims he told Toth that regardless of whether it was an OEM part or not, he would have the same guarantee. Arason so stated even though he claims he was aware of the manufacturer's warranty on this particular truck and that the warranty is important to a vehicle owner.

Based on Arason's own assertions at trial, Arason violated Minn. Stat. § 325F.69, subd. 1. The Legislature has obviously recognized the importance of utilizing original equipment parts when a vehicle is still under the manufacturer's warranty. See Minn. Stat. § 72B.091, subd. 2. Arason's claim of the same guarantee is obviously not only a misleading statement but a false statement. Not only was Toth's manufacturer's warranty voided, but the use of non-OEM parts on such a new vehicle had ramifications on his resale value.

Auto repair shops and their employees possess special knowledge and expertise that most citizens do not possess and upon which most citizens must rely. Therefore it stands to reason that people must place and do place reasonable trust in auto repair shops. Here, Arason violated that trust.

Arason's reason for stating that the guarantee would be the same regardless of whether a non-OEM part was used could be for no other reason than to induce Toth to agree to the installation of non-OEM parts. This in turn results in a windfall to Arason. Arason was paid to provide OEM parts. The aftermarket parts he purchased were

substantially cheaper. Arason did not inform Toth of that fact. It is exactly this type of consumer transaction for which the consumer fraud statute was enacted. Toth is unsophisticated in these matters. Arason, who has been doing this work for over 50 years, obviously used his specialized knowledge and expertise to take advantage of Toth's ignorance.

An omission or misrepresentation through silence is actionable under Minnesota's Consumer Fraud Act if the information is material and there is a duty to disclose based on a relationship of trust or confidence or an unequal access to information. Cashman v. Allied Products Corp., 761 F.2d 1250, 1255 (8th Cir. 1985) (approving jury instructions stating that "silence . . . may be a misrepresentation if it relates to a material fact and there is a duty to disclose the matter" and the duty to disclose "may arise out a relationship of trust or confidence, an inequality of bargaining position, an awareness that the undisclosed fact would prevent a previous representation from being misleading or an unequal access to information").

The Minnesota Court of Appeals denied Toth recovery on his § 325F.69, subd. 1, claim stating:

But we find nothing in the record that indicates that Toth claimed in the district court that even if Arason did not violate Minn. Stat. § 325F.60, Arason's statements and omissions violated Minn. Stat. § 325F.69, subd. 1.

(A. 5.) The Court of Appeals has misconstrued the record before it.

Specifically in Toth's amended complaint he asserted "[t]he actions of [Arason] constitute a violation of the Truth in Repairs Act and the Consumer Fraud Act as defined by Minn. Stat. § 325F." (A. 26; emphasis added.) It is important to note that prior to trial, Arason was denying that had installed non-OEM parts. It was not until trial that Arason changed his story and asserted that he indeed had installed at least one non-OEM part but now claimed that he told Toth orally he was so doing. Accordingly, in Toth's post-trial brief, which was submitted pursuant to the order of the trial court and before the trial court issued its findings, Toth pointed out Arason's change in story and asserted Arason should not be believed. Toth asserted:

Prior to discovery of his deception, [Arason] provided no one, including [Toth], with evidence that he had not followed the estimate from which he was paid. In fact, [Arason] went to great lengths to deny he did anything improper in the installation of the non-O.E.M. radiator and the non-O.E.M. a/c compressor. At trial [Arason] begrudgingly confirmed that in the Request for Admissions he denied he had installed a non-O.E.M. radiator. . . . On the other hand, I believe, [Arason] testified at trial that he told [Toth] he was using a non-O.E.M. radiator. [Toth] however, denies [Arason] ever told him that a non-O.E.M. radiator would be used.

(A. 45.)

Despite Arason's change in story at trial, the trial court found Arason's "testimony extremely credible regarding his reason for the substitution and his informing [Toth]."

(A. 12.) If the trial court is accepting Arason's version of events, it therefore necessarily must accept Arason's testimony of how he induced Toth to use aftermarket parts. Upon

receipt of the trial court's findings of fact and conclusions of law, Toth again asserted to the trial court that the actions of Arason constitute not only a violation of the Truth in Repairs Act but Minnesota's Consumer Fraud Act. (A. 55.)

Given Toth's assertion throughout that Arason's conduct violated Minnesota's Consumer Fraud Act, the trial court had an obligation, even if it accepted Arason's testimony as credible, to determine whether this testimony nonetheless also supported Toth's claim of a violation of Minnesota's consumer fraud statute. The trial court had an obligation to consider this issue and the Court of Appeals was not free on appeal to assert that a violation of Minn. Stat. § 325F.69, subd. 1, was being raised for the first time on appeal.

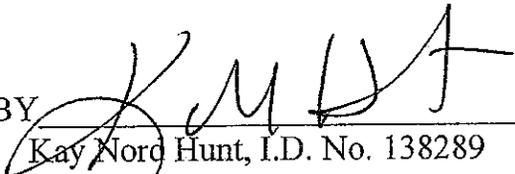
The Court of Appeals also states that "even if Toth asserted a claim that Arason violated Minn. Stat. § 325F.69, subd. 1, regardless of whether he violated Minn. Stat. § 325F.60, Toth did not assert, or present any evidence, that his cause of action against Arason benefits the public." (A. 6.) As previously stated, this Court has not imposed a public benefit analysis on the determination, in the first instance, whether a party can proceed under Minn. Stat. § 325F.69, subd. 1. Instead, the public benefit analysis has been applied only to the issue of attorneys' fees. As previously set forth, this action does benefit the public. Accordingly, not only was Toth entitled to damages for Arason's violation of § 325F.69, subd. 1, but he was also entitled to his attorneys' fees.

CONCLUSION

Appellant Toth respectfully requests that the Court of Appeals be reversed in accord with the arguments put forth by Toth and that the case be remanded to the trial court for a determination of his damages. Toth is also entitled to have his attorneys' fees and costs paid by Respondent and the trial court should be directed to so order. Appellant Toth will petition this Court, pursuant to Rule 139.06 of the Minnesota Rules of Civil Appellate Procedure, for his attorneys' fees incurred both before the Minnesota Court of Appeals and before this Court.

Dated: August 15, 2005

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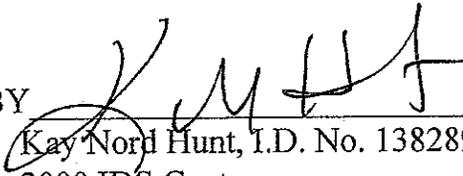
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**CERTIFICATION OF BRIEF LENGTH**

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3, for a brief produced with a proportional font. The length of this brief is 12,863 words. This brief was prepared using Word Perfect 10.

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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) (with amendments effective July 1, 2007).