

A04-769

STATE OF MINNESOTA
IN SUPREME COURT

David H. Toth,

Appellant,

v.

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

Respondent.

REPLY BRIEF OF APPELLANT
DAVID H. TOTH

Kay Nord Hunt, #138289
LOMMEN, NELSON, COLE &
STAGEBERG, P.A.
2000 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 339-8131

Lyndon F. Larsen, #60318
438 Third Street
International Falls, MN 56649
(218) 285-7434

**Attorneys for Appellant
David H. Toth**

Steven A. Nelson, #78220
210 Fourth Avenue
International Falls, MN 56649
(218) 283-8402

**Attorney for Respondent
Gerald Arason, Individually, and
d/b/a Arason's Body Shop**

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This appeal is about more than Appellant/Plaintiff Toth's (Toth) attorneys' fees and who is responsible to pay them. This case concerns the interpretation and construction of Minnesota's Truth in Repairs Act, which does include, as one of its compensatory features, the payment of Toth's attorneys' fees. This case also concerns the application of Minn. Stat. § 325F.69 to the facts of record.

STATEMENT OF THE FACTS

As a review of Respondent Arason's (Arason) brief illustrates, most statements presented by Arason as fact are presented without supporting record citations. Many of the statements made by Arason, in addition to being irrelevant to the issues before this Court, are simply not fact.

Arason now asserts that he was unaware that he was to install an OEM radiator until after he had completed the repair of Toth's vehicle. In a footnote he later asserts that the insurer's estimates did not specify that the A/C condenser was to be an OEM part. Arason also states as fact that Toth admitted he had little contact with the insurance company and left the negotiation and dealings up to Arason.

But what the record shows is that Toth did talk directly to his insurance adjuster, Darris Winter, immediately after the accident. Mr. Winter asked Toth if the truck was new and still under warranty. When Toth replied that it was, Toth was specifically informed by Mr. Winter that there was no question that Toth was entitled to have OEM parts installed in the repair of his vehicle. (T. 201-02.) Toth then talked to Arason.

Arason told Toth he was familiar with Western National and had worked with Mr. Winter. (T. 201.) Arason told Toth that “[h]e was going to put in the parts exactly how Darris Winters was going to allow him to put in.” (T. 202.)

Arason acknowledged that he met with Mr. Winter a day or two after Toth’s vehicle was brought to his place of business and Mr. Winter prepared an estimate. (T. 16.) Mr. Winter authorized Arason to do the repair work. (T. 19.) As Western National’s claims representative testified at trial, under Minnesota law, an insurance company must specify on the estimate if it is substituting a part other than the manufacturer’s original equipment part. If nothing is specified by the insurance company, that means an original equipment manufacturer’s part is to be installed. (T. 136-37.) Western National authorized and paid for Arason to install OEM parts. (T. 110, 120, 134-35.) Western National authorized OEM parts because the consequence of using non-OEM parts is that “[t]he dealer will not honor a warranty if a substitute part is being used if there’s a problem with that part.” (T. 137.)

Ninety to ninety-five percent of Arason’s work is paid by insurers and Arason testified insurers never pay on an oral agreement. (T. 36, 67.) Arason admitted that nowhere in either his written estimate or that of Mr. Winter does it indicate that an aftermarket part was to be used. (T. 101.) Arason admitted that if there is no identification made of the parts that were installed, the customer can assume that OEM parts were installed. (T. 103.)

As previously stated, the record stands undisputed that Arason was paid to put in OEM parts. (T. 110, 120, 134-35.) Noticeably Arason does not discuss the fact that he was paid \$356.00 and \$443.25 for the replacement radiator and A/C condenser, respectively. The amount paid by Toth to Arason was exactly Arason's estimated cost for the A/C condenser (\$443.25). (Trial Ex. 2; A. 83; Trial Ex. 1; A. 78.) Arason was paid \$50.00 more than he estimated for the radiator (\$356.00 versus \$313.00). (Trial Ex. 2; A. 83; Trial Ex. 1; A. 78.) The total amount to be paid to Arason was \$10,042.52 plus the \$250.00 deductible. (A. 84.) That is what Arason received. (T. 22; A. 85-86.) But Arason, by purchasing aftermarket parts, only paid \$197.26 for the radiator and \$151.66 for the A/C condenser. (A. 87.) He pocketed the difference. At no time did Arason tell Toth or his insurer of this fact or offer to refund the difference. (T. 24, 26.)

Prior to trial, Arason had denied he had installed non-OEM parts. (T. 85.) At trial, Arason now contended he had conversations with Mr. Winter and Toth in which he told them he was installing an "OEM replacement radiator." (T. 57.)

At trial Arason chose to describe both the air conditioner condenser and radiator he had installed as OEM replacement parts. Arason acknowledged that these parts were not from General Motors. (T. 82-83.) Arason states he personally uses the terms OEM replacement part and aftermarket part interchangeably and to him they meant the same thing. (T. 82-83.) In fact, according to Arason's trial testimony, a non-OEM part, an aftermarket part and an OEM replacement part are one and the same. (T. 81-83.) Arason

apparently assumed that others would understand that any oral reference by him to a part as an OEM replacement part would mean that an aftermarket part was being installed. (T. 57.)

Arason does not address the fact that the form he used does not use the terminology OEM replacement part. Rather, his own form designates a part as an aftermarket part, a new part, a used part or a rebuilt part. (A. 78.) Nonetheless, Arason never stated to Mr. Winter, Western National or Toth orally or in writing that he had used aftermarket parts. (T. 24, 26.)

All the repair experts who testified at trial disagreed with Arason's definition of OEM replacement part. According to Mr. Patrick Harris, the parts and services director at Sheridan Motors, in the auto industry an OEM replacement part is a part supplied by the manufacturer that is to original equipment standards. An aftermarket part is a part supplied by someone other than the manufacturer and is also referred to as a non-OEM part. (T. 146.) These are common terms in the industry. (Id.) Mr. William Hardwig, the owner/operator of North Country Collision and who has been doing auto repair for over 25 years, concurred with Mr. Harris's testimony.¹ (T. 169-70.)

Arason argues that he offered to make good Toth's complaints on several occasions. What the record shows is that after Toth was made aware that the

¹ Later in his brief, Arason contradicts himself and argues that every part he installed was an OEM part except for the radiator. The record is clear that the A/C condenser was also an aftermarket part. (Trial. Ex. 8; A. 90.)

manufacturer's warranty had been voided, Toth went back to Arason. Toth 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.)

After the Attorney General's involvement, Arason's attempt at resolution was to provide Toth a \$100 check for the coolant costs and assert he would make repairs. (Trial Ex. 24; A. 110.) When the \$100 check was presented to Toth, Arason had added the words "as agreed." Toth then 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.)

Arason asserts on appeal that he did not know what was going to be required of him to remedy Toth's complaints until he had an opportunity to look at the truck. But Arason did not so testify. All Arason stated at trial was that when Toth asked him to put in writing that Arason would complete the repairs to Toth's satisfaction, Arason refused. (T. 91-92.) Moreover Toth testified as follows in response to Arason's attorney's questions:

- Q. And you said, "Put it in writing," and he said "Well, I have to look at it first." Didn't he say that?
- A. No, he said he would not put it in writing.
- Q. Okay. But, at least he hadn't had a chance to look at it at that point either, had he?
- A. Yes, he did.

(T. 229.)

There is no dispute that the use of non-OEM parts voided the vehicle's warranty. Sheridan Motors, a General Motors dealer, specifically informed Toth his warranty had been voided by the installation of the non-OEM radiator. (T. 148; A. 92.) If Arason had installed an OEM part, that part would have obtained the remainder of the vehicle's warranty and Toth would not have had to pay for its replacement. (T. 165.) In a footnote on page 6 of his brief, Arason references Exhibit 12. But as Pat Harris, the parts and services director of Sheridan Motors explained, Toth's truck was not a medium duty truck but a light truck. (T. 162.)

Finally, Arason's position as to the amount to which Toth is entitled is not in accord with his position before the trial court. Arason had asserted to the trial court that if the trial court determines that he violated Minn. Stat. § 325F.60, Toth "should be awarded the cost of replacing the radiator with an OEM radiator and anti-freeze up to the point of diagnosis of the problem," for a total award of \$855.00. Before this Court he now contends \$803.44 is a correct damage figure.

ARGUMENT

TOTH IS ENTITLED TO DAMAGES, AS WELL AS HIS ATTORNEYS' FEES AND COSTS, DUE TO ARASON'S VIOLATION OF MINN. STAT. § 325F.60.

A. The Trial Court Did Not Address Minn. Stat. § 325F.60's Interrelationship With §§ 325F.63 and .64.

It is true that both the trial court and the Court of Appeals determined that the remedies contained in Minn. Stat. § 325F.63 do not apply to this case. But the two courts

did so for very different reasons. The trial court, by adopting Arason's post-trial amended findings, held that the statutory provision of Minnesota's truth in repairs statute that was at issue was Minn. Stat. § 325F.56, subd. 2. (A. 20.) The trial court then apparently reasoned that because § 325F.56 is listed in the § 325F.64 exemption, Arason was exempt "from application of consequential damages, reasonable attorney fees and punitive damages." (A. 20.)

But, as the Court of Appeals correctly recognized, § 325F.60 is the statutory provision at issue. (A. 3-4.) Because of the trial court's erroneous focus on § 325F.56, the trial court did not consider § 325F.60, and the fact that § 325F.60 is not subject to the Minn. Stat. § 325F.64 exemption. It was only after the Court of Appeals had agreed with Toth that Minn. Stat. § 325F.60, is the statutory provision at issue that the Court of Appeals addressed the remedy to which Toth is entitled, which decision Toth now challenges. (A. 4.)

B. The 1981 Amendment to Minn. Stat. § 325F.64 Which Removed § 325F.60 From the Exemption Is a Change in the Law Which Must Be Given Full Effect.

It is true, as Arason asserts, that the Legislature by its enactment of Minn. Stat. § 325F.64 does preclude consumers in certain situations from enforcing certain Truth in Repair provisions when the insurer pays up to 90% of the initial charge for repairs. Arason then provides this Court with his own laundry list of reasons as to why he believes that the Legislature so acted. But those reasons, whatever they may be, are irrelevant

given the Legislature's 1981 amendment to § 325F.64 so as to remove § 325F.60 from its reach. So whatever the reasons may have been for the enactment of § 325F.64, the Legislature subsequently declared it does not apply to a § 325F.60 violation.

The Truth in Repairs Act, as originally enacted, must be compared with its amendment in 1981 to determine what defect or defects in the original act the Legislature intended to remedy. It is to be presumed that the Legislature, in adopting an amendment, intended to make some change in the existing law. State v. District Court of Ramsey County, 134 Minn. 131, 158 N.W. 798, 799 (1916). 1A Sutherland Statutory Construction § 22:30 (6th ed. 2005). The fact that the Legislature enacted the 1981 amendment indicates that it intended to change the original act by creating a new right. Obviously the Legislature decided it did not want to deprive customers of a remedy against shop owners for a § 325F.60 violation even when the insurer paid for the initial repairs. There can be no other reason for the amendment.

However, as the Court of Appeals has construed the statute, the legislative amendment is a nullity. It is § 325F.63 that sets out the remedies to which a customer is entitled if the shop violates the Act. The only way the 1981 amendment can have any meaning is to conclude that by removing § 325F.60 from the § 325F.64 exemption the Legislature intended § 325F.63, subd. 3, to mean what it says -- i.e., a violation of § 325F.60 "shall be deemed a violation of section 325F.69 subdivision 1 and the provisions of section 8.31 shall apply." To assert that the remedy provision of § 325F.60

is still subject to the exemption when § 325F.60 is violated cannot be harmonized with the Legislature's act of removal of § 325F.60 from the exemption. As this Court has declared:

Another rule is that, where two sections are so inconsistent that they cannot be reconciled, the one must stand which best conforms to the intent and policy of the statute, and where one section so conforms it is not to be rendered nugatory by an inconsistent provision, though found in a later section, which does not, and the latter will give way.

State, 158 N.W. at 800. In addition, the latest declaration of the Legislature prevails.

Sutherland at 22:22. As this Court has declared:

If there are other provisions in the old act that are inconsistent with these provisions of the new, it would seem that, if they cannot be harmonized, the new should prevail as the latest expression of the legislative will.

State, 158 N.W. at 799.

Under well established rules of statutory construction as enunciated by this Court, the Court of Appeals' construction of the statute so as to deprive a consumer, such as Toth, of a remedy must be reversed.

C. Toth Is Entitled to Have His Attorneys' Fees Paid By Arason.

Despite the language of Minn. Stat. § 8.31, subd. 3a, in Ly v. Nystrom, 615 N.W.2d 302, 315 (Minn. 2000), this Court engrafted onto Minnesota's Consumer Fraud Act a requirement that no attorneys' fees can be awarded unless there is a public benefit.

The Court of Appeals has now continued that judicial engraftment but in the context of a violation of Minnesota's Truth in Repairs Act.

It is in the best interests of the State of Minnesota that consumers, such as Toth, seek to enforce their rights under Minnesota's Truth in Repairs Act. Holding shop owners such as Arason accountable benefits all consumers who use Arason's services. If there are no attorneys' fees awarded in this case, Toth's entire damage award will be spent to pay his attorneys and he will still owe substantial amounts of money in legal fees. If Toth is forced to absorb his own attorneys' fees, he will not be made whole. The public interest cannot be advanced by such a result.

Individuals who are injured by shop owners are out relatively small sums of money although, as is illustrated in this case, such sums of money are large to those individual consumers. Because the amount at issue is relatively small, the legal system inhibits the bringing of such claims unless attorneys' fees are included as part of the statute's compensatory scheme. As a practical matter, unless a party, such as Toth, can obtain his attorneys' fees, the Truth in Repairs Act will have no meaning.

The Legislature saw the need to facilitate the enforcement of the Truth in Repairs Act through private attorneys general. The private attorney general doctrine rests on the recognition that privately initiated lawsuits are essential to the effectuation of the fundamental public policies embodied in the statutory provisions. Without the award of attorneys' fees, private actions to enforce the important public policies embodied in the

Truth in Repairs Act will be, as a practical matter, infeasible. Clearly the Legislature by its declaration that when there is a violation of § 325F.60, Minn. Stat. § 8.31 shall apply, intended that as part of the Truth in Repairs compensatory scheme a successful litigant, such as Toth, is entitled to the payment of his attorneys' fees by the shop owner.

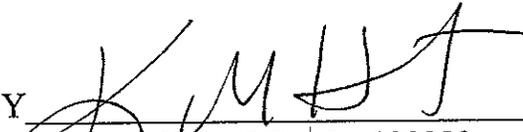
CONCLUSION

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: October 4, 2005

LOMMEN, NELSON, COLE & STAGEBERG, P.A.

BY



Kay Nord Hunt, I.D. No. 138289
2000 IDS Center
80 South 8th Street
Minneapolis, MN 55402
(612) 339-8131

Lyndon F. Larsen, I.D. No. 60318
438 Third Street
International Falls, MN 56649
(218) 285-7434

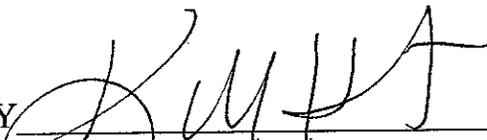
Attorneys for Appellant David H. Toth

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 2,856 words. This brief was prepared using Word Perfect 10.

Dated: October 4, 2005

LOMMEN, NELSON, COLE & STAGEBERG, P.A.

BY 

Kay Nord Hunt, I.D. No. 138289
2000 IDS Center
80 South 8th Street
Minneapolis, MN 55402
(612) 339-8131

Lyndon F. Larsen, I.D. No. 60318
438 Third Street
International Falls, MN 56649
(218) 285-7434

Attorneys for Appellant David H. Toth