

NO. A05-0874

State of Minnesota
In Court of Appeals

ILLINOIS FARMERS INSURANCE COMPANY,
Plaintiff/ Appellant,

v.

MARIESE MARVIN AND JEFFREY MARVIN,
Defendants/ Respondents.

APPELLANT'S BRIEF AND APPENDIX

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LEGAL ISSUES

I. Whether the trial court erred in denying Appellant's motion for summary judgment.

A. Whether Respondent Marvin is an "insured" for purposes of underinsured motorist coverage.

The trial court ruled that Respondent Marvin was occupying the vehicle and therefore was entitled to underinsured motorist coverage.

B. Whether the injury occurred as a result of use of the vehicle as a motor vehicle.

The trial court ruled that Respondent Marvin's injury occurred as a result of use of the vehicle as a motor vehicle.

STATEMENT OF THE FACTS

This declaratory judgment action arises out of an accident that occurred in Blaine, Minnesota on or about May 2, 2001. (Appellant's Appendix at pg. 1)(hereinafter, "AA-___".) At that time and place, Respondent Mariese Marvin was injured after being pinned between two vehicles, one owned by Mark and Tonya Weigel, and one owned and operated by Joseph Betz. (AA-1) At the time of the accident, the Weigels' 1994 Ford Explorer was insured under a policy issued by Appellant. (AA-60)

Respondent Marvin provided daycare services for Ms. Weigel. (AA-21) On the date of the accident, Ms. Weigel and the Respondent Ms. Marvin stopped at the home of Ms. Weigel's father, Joseph Betz while they were on their way to a garage sale to pick up some toys for the Respondent's daycare. (AA-25-27)

When Ms. Weigel and the Respondent Marvin arrived at the Betz residence, they drove past the front garage, as the driveway goes around the corner past the front garage and Ms. Weigel parked her Ford Explorer in that portion of the driveway near the back garage and back porch area. (AA-28) Both ladies exited the vehicle. (AA-29) Ms. Weigel testified that she opened up the back of the Explorer, and she and the Respondent began loading pieces of a toy slide into the back of the Explorer. (AA-29)

While Respondent Marvin was loading a toy into the rear of the Explorer, Mr. Betz backed out of his front garage without looking, into the rear portion of the driveway and crushed Ms. Marvin between his truck and the Explorer. (AA-40, 207)

In a recent Affidavit attached to Respondents' motion for summary judgment, Respondents claimed for the first time, that Ms. Marvin had been in the back of the

Explorer, and was in the process of *alighting from* the Explorer when she was crushed by the Betz vehicle. (AA-104)

At the hospital following the accident, Ms. Marvin's chief complaint was listed as: "Pedestrian versus car with bilaterally open lower extremity fractures," and that she was caught "in between two trucks at the bumper level." (AA-141) Ms. Marvin reiterated these facts in her discovery responses from her negligence action against Ms. Weigel, wherein Ms. Marvin declared that "I was a pedestrian at the time of the accident," and that she "was crushed between the two vehicles." (AA-47)

Ms. Weigel prevailed in her motion for summary judgment. (AA-50) Respondents subsequently settled with Mr. Betz for the limits of his own insurance policy. (AA-57) Then, Respondents made a demand for underinsured motorist benefits (hereinafter, "UIM") under Ms. Weigel's Illinois Farmers' policy. (AA-4)

Ms. Weigel's Policy (Policy No. 13-12992-44-83) specifically provides in the underinsured motorist coverage endorsement:

- a. Insured person means:
 1. You or a family member.
 2. Any other person while occupying your insured car.
 3. Any person for damages that person is entitled to recover because of bodily injury to you, a family member, or other occupant of your insured car.

(AA-82) Additionally, the general definitions section of the policy states that "Occupying means in, on, getting into or out of." *Id.* (AA-66)

In response to the demand for UIM benefits, Illinois Farmers instituted this declaratory judgment action to determine coverage under the Policy. (AA-1) Illinois

Farmers subsequently brought a motion for summary judgment on the basis that Respondents were not entitled to UIM benefits because they do not qualify as insureds under the Illinois Farmers UIM policy issued to Mark and Tonya Weigel. (AA-6) Respondents made a cross motion for summary judgment. (AA-92)

The motion hearing was held before the Honorable Elizabeth H. Martin on November 12, 2004. (AA-177) By Order and Memorandum dated February 9, 2005, the trial court denied Appellant's motion for summary judgment and granted Respondents' motion for summary judgment. (AA-205) An Amended Order which noted that judgment should be entered according was filed on April 5, 2005. (AA-214) Judgment was entered on the same date. (AA-213) This appeal follows. (AA-216)

LEGAL ARGUMENT

Standard of Review

This appeal presents the Court of Appeals with a purely legal issue. A reviewing court is not bound by a district court's decision on a purely legal issue. Frost-Benco Elec. Ass'n v. Minn. Pub. Utils. Comm'n., 358 N.W.2d 639, 642 (Minn. 1984).

The court uses a de novo standard of review to determine whether the trial court erred in its application of the law. Durfee v. Rod Baxter Imports, Inc., 262 N.W.2d 349, 354 (Minn. 1977).

I. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR SUMMARY JUDGMENT.

A. Ms. Marvin is Not an Insured For Purposes of Underinsured Motorist Coverage.

"It is axiomatic that the burden of proof rests upon the party claiming coverage under an insurance policy."¹ Boedigheimer v. Taylor, 287 Minn. 323, 178 N.W.2d 610 (Minn. 1970); see also SCSC Corp. v. Allied Mutual Ins. Co., 536 N.W.2d 305 (Minn. 1995). Respondents must demonstrate that they qualify under Illinois Farmers' policy for underinsured motorist coverage. This they are unable to do.

In order to qualify for UIM benefits under Illinois Farmers' policy, Ms. Marvin had to be an "insured" under the Illinois Farmers policy. In order to be an "insured", Ms. Marvin had to be "occupying" Ms. Weigel's vehicle at the time of the accident as that term

is used under Illinois Farmers' UIM policy. Thus, resolution of this matter requires policy construction. Insurance policy construction and interpretation is a matter of law. Kemper Ins. Co. v. Stone, 269 N.W.2d 885 (Minn. 1978). In interpreting insurance policies, the courts adhere to the rule that "parties are free to contract as they desire, and so long as coverage required by law is not omitted and policy provisions do not contravene applicable statutes, the extent of the insurer's liability is governed by the contract entered into." Thommes v. Milwaukee Ins. Co., 641 N.W.2d 877, 882 (Minn. 2002). Also, when policy language is clear and unambiguous, "the language used must be given its usual and accepted meaning." Lobeck v. State Farm Mut. Auto. Ins. Co., 582 N.W.2d 246, 249 (Minn. 1998). Finally, an action by a third-party beneficiary to a contract "must be limited strictly to the terms and promises made in the contract involved. His (or her) rights depend upon, and are measured by, the terms of the contract." Brix v. General Accident & Assur. Corp., 93 N.W.2d 542 (Minn. 1958).

Given the above rules of law, the Supreme Court of Minnesota has given clear guidance as to proper interpretation of "occupying" when it is defined in underinsured motorist coverage. In Allied Mut. v. Western Nat. Mut., 552 N.W.2d 561 (Minn. 1996), three friends, McMillan, Decker and Adelman, had traveled in McMillan's vehicle to a local bar. After leaving the bar, the three returned to McMillan's vehicle, where they found that they were locked out of the vehicle. Id. at 562. McMillan attempted to unlock the vehicle

¹ While Minnesota law clearly indicates that the burden of proving coverage rests on the Respondents, the trial court judge noted at the summary judgment hearing that it was actually Appellant that had the burden of "overcoming the sympathy factor in a close interpretation of the

while Decker and Adelman looked on. Id. As they stood waiting for the car to be unlocked, an uninsured driver struck the group and their vehicle. Id.

Decker sought and obtained UIM benefits under her own policy, and her insurer sought contribution from McMillan's UIM insurer. Allied, 552 N.W.2d at 562. McMillan's UIM insurer refused, arguing that at the time of the accident, Decker was not "occupying" the locked vehicle, and therefore was not entitled to UIM benefits under the policy covering McMillan's vehicle. Id. at 563. The policy contained a nearly identical definition of "occupying" as used in the current disputed Illinois Farmers policy: "in, upon, getting in, on, out or off." Id. Rather than rely on the policy language, the trial court disregarded the policy definition, and instead cited several older appellate court decisions that expansively defined occupying as relating to a "reasonable geographic perimeter." Id., see Klein v. United States Fid. & Guar. Co., 451 N.W.2d 901 (Minn. Ct. App. 1990); and Horace Mann Ins. Co. v. Neuville, 465 N.W.2d 432 (Minn. Ct. App. 1991). Based on proximity, the trial court then held that Decker was within a reasonable geographic perimeter and thus occupying the vehicle for purposes of UIM coverage.

The Supreme Court reversed. Allied, 552 N.W.2d 561. The Allied Court first noted its disapproval of the geographic perimeter test as too discretionary and uncertain: "application of such a measure to determine occupancy calls to mind the equity that depended on the length of the chancellor's foot." Id. at 563. The Court then returned to basic principals of insurance contract construction. Id. Using the plain meaning rule, the

policy." The trial court judge not only incorrectly articulated the law with respect to the burden of proof, but also showed clear bias. (AA-180)

court examined the policy definition of “occupying,” and held that the “definition is plain and straightforward and affords no excuse for creating some recondite definition which can be molded to fit whatever conclusion is convenient. Consequently, we are constrained to adhere to the policy definition.” Id.

The Allied Court continued: “When Ms. Decker was struck by the vehicle she was a pedestrian. That she was standing in the vicinity of the McMillan automobile was mere happenstance. Decker was not occupying- i.e., in or getting in- McMillan’s automobile. The McMillan automobile was simply present: it was parked, unoccupied, and unmoving, and was a victim of (the uninsured driver’s) carelessness just as were Decker and McMillan.” Id. at 563-64. As such, the Allied Court declared that Decker was not occupying McMillan’s vehicle when the accident occurred, and so his UIM insurer was not liable under the policy. See also Short v. Midwest Family Mut. Ins. Co., 602 N.W.2d 914 (Minn. Ct. App. 1999); and Ostendorf v. Arrow Ins. Co., 182 N.W.2d 190 (Minn. 1970).

Turning to the present case, the facts are nearly identical to those in Allied; consequently, the same result should be reached here. Like the injured party in Allied, Ms. Marvin seeks to recover UIM benefits from the UIM carrier of a parked, unmoving, and unoccupied vehicle that she had previously traveled in and was standing next to when she was struck by a negligent third party. Like the UIM policy in Allied, the UIM policy in the present case defines occupying to mean “in, on, getting into or out of.” (AA-66)

Respondents have recently claimed that Ms. Marvin was in the process of alighting from the Explorer when the injury occurred, and thus she was occupying the vehicle according to the policy. First, for purposes of Appellant’s motion for summary judgment, is

simply does not matter whether Ms. Marvin was in the process of alighting from the Explorer when the injury occurred, or whether Ms. Marvin had finished loading in the Explorer and was simply standing on the ground when the injury occurred. The fact is that regardless of whether Ms. Marvin was in fact “occupying” the Explorer when the injury occurred, as argued more fully below, Respondents’ claim for coverage fails because they cannot prove that the injury occurred as a result of use of the vehicle as a motor vehicle.

Moreover, the Affidavit of Respondent Marvin creates a fact issue for Respondents as to whether Ms. Marvin was in fact occupying the Explorer when the injury occurred. As such, it was improper for the trial court to grant Respondents’ cross-motion for summary judgment, as the issue of occupying was a material fact for Respondents’ motion. Furthermore, the Affidavit of Ms. Marvin was attached to Respondents’ Memorandum of law in Support of their motion for summary judgment. In order to grant Respondents’ cross-motion for summary judgment the trial court was required to view the evidence in the light most favorable to the party *opposing* the motion. Vieths v. Thorp Finance Co., 232 N.W.2d 776 (Minn. 1975). The trial court instead viewed the facts in the light most favorable to Respondents, and accepted their proposed facts as true. Accordingly, the trial court improperly granted Respondents’ cross-motion for summary judgment.

B. The Injury Did Not Occur as a Result of Maintenance or Use of the Vehicle as a Motor Vehicle.

As noted above, even if this Court finds that Respondent Marvin was occupying the Explorer at the time of the injury, Respondents’ claim still fails as the injury did not occur as a result of use of the Explorer as a motor vehicle as required by the No-Fault Act. The

definition of “maintenance or use” applicable to underinsured-motorist (UIM) coverage is contained in a provision of the No-Fault Act: “ ‘Maintenance or use’ means maintenance or use of a motor vehicle as a vehicle... Maintenance or use of a motor vehicle does not include...(2) conduct in the course of loading and unloading the vehicle unless the conduct occurs while occupying, entering into, or alighting from it.” Minn.Stat. §65B.43, subd. 3 (2002). For UIM coverage to apply to a loss, the accident must occur during maintenance or use of the vehicle as meant by the statute.

Respondents cannot satisfy the maintenance or use requirement crucial to a UIM claim. As stated by statute and explained by the Minnesota Supreme Court, “We do not believe, however, that all loading and unloading injuries incurred while occupying, entering into or alighting from a vehicle are necessarily compensable under the No-Fault Act (which includes UIM coverage). The injury must also arise out of the ‘maintenance or use of a motor vehicle as a vehicle.’” Galle v. Excalibur Ins. Co., 317 N.W.2d 368, 369 (Minn. 1982), *parens added*, quoting Minn.Stat. §65B.43, subd. 3.

The Minnesota Supreme Court has set forth a three-step test to determine if an injury has occurred during “maintenance or use” of the vehicle as a vehicle for purposes of coverage under the No-Fault Act. Cont’l Western Ins. Co. v. Klug, 415 N.W.2d 876 (Minn. 1987). “The first consideration is the extent of causation between the automobile and the injury. Klug, 415 N.W.2d at 878. “The vehicle must be an ‘active accessory’ in causing the injury.” Id., quoting Holm v. Mut. Service Cas. Ins. Co., 261 N.W.2d 598, 603 (Minn. 1977), *emphasis added*. “Courts generally require proof of the active involvement of the vehicle.” State Farm Fire & Cas. Co. v. Strope, 481 N.W.2d 853, 856

(Minn. Ct. App. 1992), rev. den'd (May 15, 1992). This standard is "something less than proximate cause in the tort sense and something more than the vehicle being the mere situs of the injury." Tlougan v. Auto-Owners Ins. Co., 310 N.W.2d 116, 117 (Minn. 1981). Initial causation is satisfied if the claimant can show that: " 'the injury is a natural and reasonable incident or consequence' of the vehicle's use." Medicine Lake Bus Co. v. Smith, 554 N.W.2d 623, 624 (Minn. Ct. App. 1996), quoting North River Ins. Co. v. Dairyland Ins. Co., 346 N.W.2d 109, 114 (Minn. 1984). In Klug, the Court found that the uninsured vehicle was an active accessory because the shooter, not the insured, was using the vehicle to keep up with the insured so he could shoot the insured. Klug, 415 N.W.2d at 878.

If the court finds that the vehicle at issue was actively involved in causing the accident, then the court must "next determine whether an act of independent significance occurred, breaking the causal link between the 'use' of the vehicle and the injuries inflicted." Klug, 415 N.W.2d at 878. An act of independent significance occurs where an independent tortfeasor intercedes to cause the injury. See Edwards v. State Farm Mut. Auto. Ins. Co., 399 N.W.2d 95 (Minn. Ct. App. 1986), rev. den'd (Mar. 13, 1987), (independent act where victim raped by tortfeasor in automobile); and Wieneke v. Home Mut. Ins. Co., 397 N.W.2d 597, 598-99 (Minn. Ct. App. 1986), rev. den'd (Jan. 21, 1987), (independent act where tortfeasor approached claimant occupying insured vehicle, reached into vehicle, and punched him).

Last, even if the court finds active causation on the part of the covered vehicle, "and no intervening independent act, it must consider one final inquiry." Klug, 415

N.W.2d at 878. The court should examine the use to assure that the use of the vehicle was “for transportation purposes.” Id. Only after passing all three steps is the accident considered to arise out of the maintenance or use of the vehicle in question. Id.

Active Accessory

The analysis at hand must turn on whether the Explorer was being maintained or used by Ms. Marvin under the Klug test. Using that test, in the instant case Appellant concedes that the use of the vehicle was for transportation purposes. However, Respondents have failed to establish a prima facie case both as to causation and lack of intervening independent act regarding her injuries. First, Respondents fail as to causation because the Explorer was not an “active accessory” in the accident. It is not enough for Respondents to allege that the Explorer caused the harm because it was a vehicle against which Respondent Marvin was pinned. This merely proves that the Explorer was a passive rather than active accessory to the injury which is insufficient to establish the necessary causation. See, Allied Mut. v. Western Nat. Mut., 552 N.W.2d 561, 564 (Minn. 1996), (“no conceivable causal connection” where claimant and insured vehicle were struck by uninsured vehicle while claimant waited to get into locked insured vehicle.); Short v. Midwest Fam. Mut. Ins. Co., 602 N.W.2d 914 (Minn. Ct. App. 1999), (no coverage for tow truck operator pinned between vehicles); and State Farm Mut. Ins. Co. v. O’Brien, 380 F.Supp. 1279 (D. Minn. 1974), (no causation where claimant unloading car was pinned against house when son started vehicle). The act of being pinned against a vehicle is not “a natural and reasonable consequence of” loading that vehicle.

The facts of the instant dispute are distinguishable from situations where the vehicle was an “active accessory.” See, Galle, 317 N.W.2d at 370, (causation satisfied by claimant where “part of vehicle itself malfunctioned when he was attempting to unload a piece of equipment from rear of the truck”); North River, 346 N.W.2d 109 (causation where claimant fell from trailer while attempting to remove trailer tarp); and Jorgensen v. Auto-Owners Ins. Co., 360 N.W.2d 397 (Minn. Ct. App. 1985), rev. den’d (Apr. 12, 1985), (causation where defective trunk wire of insured vehicle sparked injury-causing fire.); and Klug, 415 N.W.2d 878-79, (*tortfeasor* using uninsured vehicle to keep up with insured so as to shoot the insured). The above case law demonstrates that active causation requires that the vehicle or some part thereof cause the injury in response to its being acted upon by the insured.

In the instant case, Respondents have presented no evidence that the Explorer, or the tortfeasor’s use thereof injured her in response to her acting upon it. All parties agree that the Explorer was parked and unmoving at the time the collision occurred. Given this fact and the above case law, it is clear that the Explorer, like the insured vehicle in Allied, was only passively involved as a stationary object against which Respondent Marvin was pinned by the active Betz vehicle. It “was simply present: it was parked, unoccupied, and unmoving, and was a victim... of [tortfeasor’s] carelessness just as” was the Respondent Marvin. Allied, 552 N.W.2d at 564. The Betz vehicle was clearly the only active accessory in this matter, as it affirmatively struck Respondent Marvin from behind and pushed her against the stationary Explorer. It was not the *use* of the Explorer which caused the injury.

The Explorer was not an active accessory in causing the accident. The act of being struck from behind by a second vehicle is not a “natural and reasonable consequence” of loading the Explorer. Respondent’s Marvin’s injuries are not the result of loading the Explorer. In fact, there are a number of injuries that one could naturally expect as a consequence of loading or unloading a vehicle, such as, back strain, falling, or injuries caused by a malfunction of the Explorer. Such is not the case at hand. Therefore, there is no causation and Respondents have failed to make a prima facie case that they are entitled to UIM benefits.

In a recent Court of Appeals’ case, Auto Owners Ins. Co. v. Great West Casualty, A04-1591 (Minn. Ct. App., May 10, 2005) the Court addressed an accident involving a stalled vehicle loaded on top of a transport trailer and whether the injury was the result of maintenance or use of the stalled vehicle. The court applied the three-part Klug test in deciding that the injury occurred as a result of the maintenance or use of the stalled vehicle and therefore No-Fault benefits should be paid. Great West, A04-1591 at p. 2.

Specifically, in Great West, the driver of the transport trailer loaded with used vehicles parked the trailer on a street and asked for assistance from Mr. Gessel and a friend given that one of the vehicles was stalled on the top deck of the trailer. The driver asked for assistance in manually unloading the stalled vehicle from the trailer so that it could be jump started on the street. Id. The driver sat in the stalled vehicle to release the brake while Gessel and a friend decided to pull back on the stalled vehicle’s fender because there was no room on the trailer to push the stalled vehicle from the front. Id. While Gessel and a friend pulled on the stalled vehicle’s fender, it rolled back quickly

and Gessel jumped out of the way to avoid a collision. Id. However, as Gessel moved out of the stalled vehicle's path, his left foot slipped between two beams on the trailer causing him to become wedged between the beams thus injuring his left leg. Id.

Both parties moved for summary judgment and the district court granted Great West's motion finding that Gessel's injuries arose out of the maintenance and use of the automobile transport trailer. Id. at pg. 3. The Court of Appeals reversed finding that the injury to Gessel occurred as part of maintenance or use of the stalled vehicle. Id. at pg. 8. The Court of Appeals in applying the Klug test, found that the transport trailer was the mere situs for Gessel's injury because the actual cause of his injury arose out of the maintenance and use of the stalled vehicle. Id. at pg. 5. The Court held that the stalled vehicle was not the mere situs of the injury, because it was the movement of the stalled vehicle itself that caused Gessel to jump out of the way and fall between the trailer's beams. Id. As such, the Court concluded that this established the element of causation between the stalled vehicle and Gessel's injuries. Id.

The Court also found under the second prong of the Klug test that there was no active independent significance that broke the causal chain between the stalled vehicle and Gessel's injuries. In other words, the injury "occurred as a reasonable consequence of the plan to pull the stalled vehicle off the trailer." Id. at pg. 7. Under the third prong of the Klug test, the Court also found that the stalled vehicle was being used for transportation purposes at the time of the injury. Id. The Court concluded that under the three-part Klug test, Gessel's injury occurred as a result of the maintenance or use of the

stalled vehicle, not the automobile transport trailer, and the district court erred by granting Great West's motion for summary judgment. Id. at pg. 8.

The facts of the case at hand are similar to those in Great West. Gessel's injuries in Great West were caused when his left foot slipped between two beams on the trailer causing him to become wedged between the beams thus injuring his left leg. While Gessel's injuries were the result of being wedged between two beams on the trailer, the Court of Appeals found that the trailer was only the situs of the injury. In the case at hand, Respondent Marvin was pinned between the Explorer and the Betz vehicle. Despite the fact that Marvin was pinned against the Explorer, similar to Gessel in Great West, Marvin's injuries were not caused by the Explorer. As such, applying the analysis of this Court in Great West, Respondent Marvin's injury was not caused by the Explorer, and the first prong of the Klug test cannot be met by Respondents.

Act of Independent Significance

Respondents have also failed to prove that it was the Explorer or use thereof, rather than an independent act of significance that caused the harm. The evidence conclusively shows that Mr. Betz, an independent tortfeasor, struck Respondent Marvin. This was proven by the deposition of Mr. Betz, as well as by the fact that Ms. Weigel, the owner and one who parked the Explorer, was found not negligent as a matter of law in Respondent Marvin's suit against her for "negligent maintenance, operation, and parking" of the Explorer in the first place. The fact is that Respondent Marvin was in the process of loading the Explorer when she was unexpectedly interrupted by the independent negligent driving of Mr. Betz. Under Minnesota law such an act has the

significance of breaking the casual link between the loading of the Explorer and the injuries sustained. See Wienke, 397 N.W.2d 597, (independent act where tortfeasor approached claimant occupying insured vehicle, reached into vehicle, and punched him). Mr. Betz's negligent driving of his own vehicle had nothing to do with Respondent Marvin's loading of the Explorer, and as such, was an intervening act of independent significance. Accordingly, Respondents have failed to prove the second prong of the Klug test. In sum, Respondents cannot demonstrate that Respondent Marvin was "maintaining or using" the Explorer for purposes of UIM coverage when she was injured by the Betz vehicle. Respondents have failed in meeting their burden of establishing UIM coverage and as such, Appellant's motion for summary judgment should have been granted by the trial court.

CONCLUSION

Based on the foregoing, Appellant Illinois Farmers Insurance Company respectfully requests that this Court reverse the decision of the trial court and direct that Appellant's motion for summary judgment be granted.

Respectfully submitted,



Dated: June 2, 2005.

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**STATE OF MINNESOTA
IN COURT OF APPEALS**

ILLINOIS FARMERS INSURANCE COMPANY,

Plaintiff/Appellant

v.

Trial Court File No. 82-C4-04-004433

Appellate Case No. A05-0874

Date Judgment Entered: April 5, 2005

MARIESE MARVIN AND JEFFREY MARVIN,

Defendants/Respondents.

CERTIFICATION OF BRIEF LENGTH

Pursuant to Rule 132.01, subs. 1 and 3 of the Minnesota Rules of Civil Appellate Procedure, the undersigned hereby certifies that:

1. Appellant's Brief contains 4347 words;
2. The software used is Microsoft Office Word 2003; and
3. The Brief complies with the typeface requirements.

Dated: June 2, 2005



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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).