

Case No. A05-943

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STATE OF MINNESOTA

IN COURT OF APPEALS

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Northwestern National Insurance Company  
as Subrogee for David Jerome Swanberg, creditor,

Respondent,

vs.

Dawn Marie Carlson, debtor,

Respondent,

and

Farmers Insurance Group, a foreign corporation,  
garnishee,

Appellant.

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RESPONDENT'S BRIEF AND APPENDIX

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**Table of Contents**

**Table of Authorities** . . . . . 2

**Legal Issues** . . . . . 4

**Statement of the Case** . . . . . 4

**Statement of the Facts** . . . . . 6

**Argument**

1. A garnishment proceeding against an insurer to enforce an insured's right to indemnity under a motor vehicle liability insurance policy is not barred by the six year limitation period of Minn. Stat. §541.05, where the garnishment is commenced more than 6 years after the motor vehicle collision giving rise the liability claim against the insured and more than 6 years after the liability insurer notified the insured it would provide no coverage with respect to the liability claim, but less than 6 years after judgment was entered against the insured establishing her liability with respect to the motor vehicle collision . . . . . 8

2. The undisputed facts in the record before the trial court do not provide any basis for finding that the liability insurer had been prejudiced by reason of the garnishment proceeding against it not having been commenced within six years of the date of the collision giving rise to the liability claim against its insured . . . . . 15

**Conclusion** . . . . . 17

**Appendix and Its Index** . . . . . 18

Table of Authorities

Statutes

Minn. Stat. §65B.49, subd. 3(2) . . . . . 10

Minn. Stat. §541.05 . . . . . 8, 12

Minn. Stat. §555.01 . . . . . 13

Minn. Stat. §571.72 . . . . . 5

Minn. Stat. §571.75, subd. 4 . . . . . 5

Cases

Minnesota Supreme Court

Amdahl v. Stonewall Insurance Company,  
484 N.W.2d 811 (Minn. App. 1992) . . . . . 15

Aronovitch v. Levy,  
238 Minn. 237, 56 N.W.2d 570 (1953) . . . . . 16, 17

Christy v. Menasha Corp.,  
297 Minn. 334, 211 N.W.2d 773 (1973) . . . . . 11

Colby v. Street,  
146 Minn. 290, 178 N.W. 599 (1920) . . . . . 14

Connor v. Chanhassen Tp.,  
249 Minn. 205, 81 N.W.2d 789 (1957) . . . . . 13

Drake v. Ryan, 514 N.W.2d 785 (Minn. 1994) . . . . . 10

Frost-Benco Elec. Ass'n v. Minnesota  
Public Utilities Com'n, 358 N.W.2d 639 (Minn. 1984) . . . . 8

Gjovik v. Bemidji Local Bus Lines,  
223 Minn. 522, 27 N.W.2d 273 (1947) . . . . . 10

Grothe v. Shaffer,  
305 Minn. 17, 232 N.W.2d 227 (1975) . . . . . 11

Johnson Motor Co., Inc. v. Cue,  
352 N.W.2d 114 (Minn. 1984) . . . . . 9

Lynch ex rel. Lynch v.  
American Family Mut. Ins. Co.,  
626 N.W.2d 182 (Minn. 2001) . . . . . 10

<u>Matteson v. Blaisdell,</u> 148 Minn. 352, 182 N.W. 442 (1921) . . . . .	14
<u>Mendota Elec. Co. v. New York Indem. Co.,</u> 169 Minn. 377, 211 N.W. 317 (1926) . . . . .	12
<u>Metropolitan Property and Cas. Ins. Co.</u> <u>v. Metropolitan Transit Com'n,</u> 538 N.W.2d 692 (Minn. 1995) . . . . .	11
<u>Miller v. Market Men's Mut. Ins. Co.,</u> 262 Minn. 509, 115 N.W.2d 266 (1962) . . . . .	10
<u>Miller v. Shugart,</u> 316 N.W.2d 729 (Minn. 1982) . . . . .	5, 12
<u>Montgomery v. Minneapolis Fire Dept. Relief Ass'n,</u> 218 Minn. 27, 15 N.W.2d 122 (1944) . . . . .	13
<u>Oanes v. Allstate Ins. Co.,</u> 617 N.W.2d 401 (Minn. 2000) . . . . .	14, 15
<u>Polzin v. Merila,</u> 258 Minn. 93, 103 N.W.2d 198 (1960) . . . . .	9
<u>State Farm Mut. Auto. Ins. Co. v. Skluzacek,</u> 208 Minn. 443, 294 N.W. 413 (1940) . . . . .	13
<u>Wold v. Wold,</u> 138 Minn. 409, 165 N.W. 229 (1917) . . . . .	14

**Minnesota Court of Appeals**

<u>St. Paul Fire and Marine Ins. Co. v.</u> <u>National Chiropractic Mut. Ins. Co.,</u> 496 N.W.2d 411, 415 (Minn. App. 1993) . . . . .	10
<u>State v. Joseph,</u> 622 N.W.2d 358, 362 (Minn. App. 2001) . . . . .	13
<u>Weed v. Commissioner of Revenue,</u> 489 N.W.2d 525 (Minn. App. 1992) . . . . .	16

Secondary Authorities

<u>Corbin on Contracts</u> (Matthew Bender & Co. 1979) §989 . . . . .	14
Corman, <u>Limitation of Actions</u> (Little Brown & Co. 1991) §7.5 . . . . .	11

## LEGAL ISSUES

1. Is a garnishment proceeding against an insurer to enforce an insured's right to indemnity under a motor vehicle liability insurance policy barred by the six year limitation period of Minn. Stat. §541.05, where the garnishment is commenced more than 6 years after the motor vehicle collision giving rise the liability claim against the insured and more than 6 years after the liability insurer notified the insured it would provide no coverage with respect to the liability claim, but less than 6 years after judgment was entered against the insured establishing her liability with respect to the motor vehicle collision?

**Trial Court Held: In the Negative**

Apposite Authority:

Johnson Motor Co., Inc. v. Cue, 352 N.W.2d 114 (Minn. 1984); Miller v. Market Men's Mut. Ins. Co., 262 Minn. 509, 115 N.W.2d 266 (1962); Metropolitan Property and Cas. Ins. Co. v. Metropolitan Transit Com'n, 538 N.W.2d 692, 695 (Minn. 1995)

2. Do the undisputed facts in the record before the trial court provide any basis for finding that the liability insurer had been prejudiced by reason of the garnishment proceeding against it not having been commenced within six years of the date of the collision giving rise to the liability claim against its insured?

**Trial Court Held: In the Negative**

Apposite Authority:

Aronovitch V. Levy, 238 Minn. 237, 56 N.W.2d 570 (1953)

### Statement of the Case

This is a garnishment case arising from the Hennepin County District Court, Judge Harry Seymour Crump.

On January 7, 2004 Respondent Northwestern National Insurance Company ("Northwestern National") served a garnishment

summons pursuant to Minn. Stat. §571.72 upon Appellant Farmers Insurance Group ("Farmers") to enforce a judgment for \$21,132, entered January 5, 2000, that Northwestern National had obtained against Dawn M. Carlson ("Carlson"). Northwestern National had paid its own insured \$21,000 in uninsured motorist benefits for claims arising from a collision with a car driven by Carlson, and, as its insured's subrogee, had sued Carlson to obtain reimbursement for the uninsured motorist benefits it had paid.

Carlson had claimed in response to Northwestern National's suit against her that she was insured under a motor vehicle liability policy from Farmers entitling her to indemnity for any liability she might have to Northwestern National or its insured. Pursuant to Miller v. Shugart, 316 N.W.2d 729 (Minn. 1982) Carlson and Northwestern National had stipulated to entry of the \$21,132 judgment against Carlson, to be enforced only against Carlson's available insurance coverage.

After Farmers responded to the garnishment summons by denying any indebtedness to Carlson, Northwestern National moved the court pursuant to Minn. Stat. §571.75, subd. 4 for leave to serve Farmers with a supplemental complaint to determine the issue of Farmers' indebtedness to Carlson. On March 11, 2004 the court issued its order granting Northwestern National leave to serve a supplemental complaint upon Farmers.

In March 2005, after discovery had been completed, Farmers moved the court for summary judgment in its favor on the ground that the claims asserted against it in the supplemental complaint

were barred by the applicable statute of limitations. Farmers conceded in its summary judgment motion that it had no evidence to dispute the claims in the supplemental complaint, so that if the court rejected Farmers' statute of limitations defense Northwestern National would be entitled to judgment in its favor against Farmers. See (Appendix to Appellant's Brief, A-21).

The court rejected Farmers' statute of limitations defense and, pursuant to the parties' agreement that the court's decision on the summary judgment issue would dispose of the case (Appendix to Appellant's Brief, A-21), issued its order on March 22, 2005 granting Northwestern National judgment against Farmers for \$21,132, plus interest, costs and disbursements. Judgment was entered on March 22, 2005 pursuant to the court's order, and Farmers has made a timely appeal from that judgment.

#### Statement of the Facts

The material facts are undisputed. Northwestern National insured David Swanberg, who was injured on August 11, 1994 when he was hit by a car driven by Carlson. Carlson thought that she had car insurance at the time with Farmers, but within days after the accident Farmers notified Carlson that it would not provide her with coverage for the accident, claiming that Carlson's policy had gone out of force for nonpayment of premium prior to the accident. Carlson denies that she ever received the advance written notice of such cancellation which Minnesota law requires.

On the strength of Farmers' denial of coverage to Carlson, Swanberg sought compensation for his injuries from his own

insurer Northwestern National under his uninsured motorist coverage. Northwestern National paid Swanberg \$21,000 in full settlement of his uninsured motorist claims and, by having done so, became subrogated to Swanberg's tort claims against Carlson arising from the August 11, 1994 collision.

In 1996 Northwestern National brought a subrogation action against Carlson. Carlson obtained counsel, who in November 1996 telephoned Carlson's Farmers' insurance agent to discuss Carlson's claim to insurance coverage. The Farmers' agent told Carlson's counsel that his file contained no evidence that prior to the August 11, 1994 accident Farmers' had sent Carlson any advance written notice of its intent to cancel her insurance. (Appendix to Respondent's Brief, RA-9). Also, when Northwestern National's counsel contacted Farmers in December 1997 inquiring as to Carlson's coverage claim, Farmers in response was unable in its response to produce any record of having provided Carlson with advance written notice of its intent to cancel her insurance coverage. (Appendix to Respondent's Brief, RA-1).

In 1999, Carlson and Northwestern National stipulated for settlement of Northwestern National's subrogation by Carlson's agreeing to entry of judgment against her for the \$21,000 that Northwestern National had paid its insured and Northwestern National agreeing to collect the stipulated judgment only from any insurance Carlson might have for the loss (such as her disputed Farmers policy). Northwestern National's stipulated judgment against Carlson was entered on January 5, 2000.

After entry of its stipulated judgment against Carlson, Northwestern National began garnishment proceedings against Farmers in February 2004 to enforce Carlson's rights to indemnity under her Farmers' policy. Farmers, claiming that its policy with Carlson was canceled prior to the August 11, 1994 accident for nonpayment of premium.

Farmers has been able to produce any evidence in the garnishment proceedings of its having given Carlson the advance written notice of its intention to cancel her insurance required by Minnesota law. Therefore Farmers only defense to the garnishment has been its claim that such proceedings are barred by the six year limitations period of Minn. Stat. §541.05. Specifically, Farmers argues that since it had denied coverage to Carlson in August 1994, any claim for coverage by her or any claim based on her rights against Farmers, such as Northwestern National's garnishment claim, was barred by the statute of limitations after August 2000.

#### Argument

##### Standard of Review

Both parties agree that the material facts of this case are undisputed and that one party or the other is entitled to summary judgment. This case therefore raises only legal issues, which are examined de novo by this court. Frost-Benco Elec. Ass'n v. Minnesota Public Utilities Com'n, 358 N.W.2d 639 (Minn. 1984).

1. A garnishment proceeding against an insurer to enforce an insured's right to indemnity under a motor vehicle liability insurance policy is not barred by the six year limitation period of Minn. Stat. §541.05, where the garnishment is

commenced more than 6 years after the motor vehicle collision giving rise the liability claim against the insured and more than 6 years after the liability insurer notified the insured it would provide no coverage with respect to the liability claim, but less than 6 years after judgment was entered against the insured establishing her liability with respect to the motor vehicle collision.

Northwestern National's garnishment of Farmers is based on a contractual indemnity obligation which Farmers has to Carlson under the Farmers motor vehicle liability insurance policy issued to Carlson. Northwestern National's claims and rights against Farmers in garnishment are no greater and no less than those that Carlson would have if she sued Farmers directly. See Johnson Motor Co., Inc. v. Cue, 352 N.W.2d 114 (Minn. 1984); Polzin v. Merila, 258 Minn. 93, 103 N.W.2d 198 (1960). Therefore, the statute of limitations can only defeat Northwestern National's garnishment of Farmers if it would also defeat an indemnity action brought by Carlson against Farmers. As the analysis below shows, an indemnity action by Carlson against Farmers would not have been barred by the statute of limitations in February 2004, when the garnishment was commenced. In fact such an action would not be time-barred even now. The statute of limitations on Carlson's indemnity claims against Farmers will not run until January 2006, 6 years after the stipulated judgment against Carlson was entered.

Liability insurance involves two duties on the insurer's part, a duty to defend and a duty to indemnify. The duty to defend is broader than the duty to indemnify and arises when the insurer has notice of a claim any part of which is arguably

within the scope of the risks against which the policy insures. See St. Paul Fire and Marine Ins. Co. v. National Chiropractic Mut. Ins. Co., 496 N.W.2d 411, 415 (Minn. App. 1993).

The separate contractual duty under the policy to indemnify only arises when the insured becomes "liable" on a claim, that is, legally obligated to pay. See Lynch ex rel. Lynch v. American Family Mut. Ins. Co., 626 N.W.2d 182, 188 (Minn. 2001). No action can be brought against a liability insurer to enforce its duty to indemnify until a judgment is entered against the insured or paid by the insured. See Drake v. Ryan, 514 N.W.2d 785, 787-88 (Minn. 1994); Miller v. Market Men's Mut. Ins. Co., 262 Minn. 509, 115 N.W.2d 266 (1962); Gjovik v. Bemidji Local Bus Lines, 223 Minn. 522, 27 N.W.2d 273 (1947).

Minnesota's no-fault motor vehicle insurance statute adopts the commonly understood definition of liability insurance. It says, in pertinent part, at Minn. Stat. §65B.49, subd. 3(2):

Under residual liability insurance the reparation obligor shall be liable to pay, on behalf of the insured, sums which the insured is legally obligated to pay as damages because of bodily injury and property damage arising out of the ownership, maintenance or use of any motor vehicle ....

At the point when Farmers denied Ms. Carlson coverage right after the August 11, 1994 accident, it had only a duty to defend Ms. Carlson. It could yet not have any duty to indemnify her, because she had not yet been found liable for the claim, and she did not owe any party any money on account of any such claim.

A statute of limitations begins running when a cause of action has accrued. In Minnesota, an insured's cause of action

against an insurer for breach of a duty to indemnify only accrues when the insured has suffered a loss to be indemnified, usually when a judgment has been entered against the insured. See Metropolitan Property and Cas. Ins. Co. v. Metropolitan Transit Com'n, 538 N.W.2d 692, 695 (Minn. 1995); Grothe v. Shaffer, 305 Minn. 17, 23-24, 232 N.W.2d 227, 232 (1975); Christy v. Menasha Corp., 297 Minn. 334, 339, 211 N.W.2d 773, 776 (1973).

Corman, Limitation of Actions (Little Brown & Co. 1991) - §7.5 explains the general rule which Minnesota follows:

The statute of limitations begins to run against a party seeking reimbursement or indemnification from the time the party suffers actual loss, usually when he or she pays damages to a third party or has judgment entered against him or her in favor of that party. This differs from the action seeking recovery under a theory of subrogation, where the statute of limitations begins to run at the time of the injury to the subrogee. The loss to the party with right to indemnification does not occur until the rendering of the final judgment on the third-party suit or on its enforcement.

The facts in this case illustrate the rule stated above. By paying its insured Swanberg uninsured motorist, Northwestern National became subrogated to Swanberg's rights against Carlson. As subrogee, Northwestern National had no better rights against Carlson than its subrogor Swanberg had, so Northwestern National's subrogation claims against Carlson were governed by the same six year negligence statute of limitations that would have governed a direct negligence action by Swanberg against Carlson. In other words, Northwestern National was required to commence its subrogation action against Carlson within six years after August 1994, and it did so.

Even after Northwestern National had brought a subrogation lawsuit against her, Carlson still did not have any liability for which she could demand that her insurer Farmers indemnify her. She would only have such a right to demand indemnification after her liability for the August 1994 collision was adjudicated or established by agreement.

An insured whose liability insurer has refused to provide coverage for a claim may settle, rather than let judgment be taken against her, and may then sue her insurer to invoke its indemnity obligation. See Mendota Elec. Co. v. New York Indem. Co., 169 Minn. 377, 211 N.W. 317 (1926). In the present case, Carlson's liability was established via a settlement agreement in a form specifically authorized by the Minnesota Supreme Court. See Miller v. Shugart, 316 N.W.2d 729 (Minn.1982).

Here the Miller-Shugart judgment against Carlson was entered in January 2000. Under the applicable statute of limitations, Minn. Stat. §541.05, Carlson had six years from the January 2000 date of entry of judgment against her to seek indemnity from Farmers under her disputed policy coverage. Since Carlson had until January 2006 to bring such a claim against Farmers, Northwestern National's current garnishment claim, based on Farmers' duty to indemnify Carlson, may likewise be brought within the same six year period.

Farmers' statute of limitations argument appears to be based on the notion that Carlson could have brought a declaratory judgment action against Farmers to decide the coverage dispute

immediately after Farmers denied coverage in 1994. While it is true that Carlson could have brought such a claim in 1994, under Minnesota law her failure to have done so does not now create a statute of limitations defense for Farmers. In the first place, Minnesota's Declaratory Judgment Act (Minn. Stat. §555.01 et seq.) creates a declaratory remedy that is an alternative to, but not a mandatory substitute for, traditional actions for breach of contract. Minn. Stat. §555.01 specifically states (in part):

Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed..... (emphasis added)

See also Connor v. Chanhassen Tp., 249 Minn. 205, 81 N.W.2d 789 (1957); Montgomery v. Minneapolis Fire Dept. Relief Ass'n, 218 Minn. 27, 15 N.W.2d 122 (1944); State Farm Mut. Auto. Ins. Co. v. Skluzacek, 208 Minn. 443, 294 N.W. 413 (1940).

More to the point, the Minnesota Court of Appeals has held that because a declaratory judgment action is an additional and optional remedy that no one is ever required to bring, in the absence of a specific statutory mandate there is no statute of limitations for declaratory judgment actions. See State v. Joseph, 622 N.W.2d 358, 362 (Minn. App. 2001), *rev'd on other grounds*, 636 N.W.2d 322 (Minn. 2001). Since there is no statute of limitations on actions for declaratory relief, Carlson remains free today to bring such an action against Farmers to determine its duty to indemnify her. Neither Carlson's right to seek declaratory relief nor her claims for damages for Farmers breach of its contract to indemnify her are presently time barred.

Farmers' announcement to Carlson in August 1994 that it would not provide her with coverage with respect to her August 11, 1994 accident can be regarded, under contract law principles, as an anticipatory repudiation by Farmers of any duty it might have to later indemnify Carlson. Under Minnesota law, as in most states, the victim of another party's anticipatory repudiation of a contract is not required to bring suit immediately, but may, without fear of having her claim barred by the statute of limitations, wait to sue until the time when the other party's agreed performance comes due and remains unperformed. See Matteson v. Blaisdell, 148 Minn. 352, 355, 182 N.W. 442, 443 (1921); Colby v. Street, 146 Minn. 290, 178 N.W. 599 (1920); Wold v. Wold, 138 Minn. 409, 165 N.W. 229 (1917); 9 Corbin on Contracts (Matthew Bender & Co. 1979) §989.

The cases cited by Farmers in its brief on appeal law offer more support to Northwestern National's position than they do to Farmers'. In Oanes v. Allstate Ins. Co., 617 N.W.2d 401 (Minn. 2000) the Minnesota Supreme Court held that since an action to recover underinsured motorist ("UIM") benefits may not be brought until the underlying liability claim has been resolved either by agreement or adjudication, the statute of limitations on such an action for UIM benefits does not begin to run until the date of such resolution of the underlying liability claim. Thus, under the Oanes ruling, even if a UIM insured has reason to believe immediately after the accident that his UIM insurer will never voluntarily pay him such benefits, he may nevertheless not

commence suit against that insurer to recover UIM benefits until the underlying liability claim has been resolved. This situation would be similar to Carlson's situation in the present case. Carlson knew shortly after her accident that Farmers was denying her coverage, but she had no legal right to sue Farmers for indemnity on account of the accident until her liability had been established by entry of the judgment against her.

Amdahl v. Stonewall Insurance Company, 484 N.W.2d 811 (Minn. App. 1992), also cited by Farmers, holds that the statute of limitations on an insured's so-called "bad faith" action against his liability insurer for failure to settle a claim within coverage limits does not begin to run until the appellate process is complete with respect to the judgment entered against the insured in excess of such coverage limits. As with Oanes v. Allstate, *supra*, Amdahl v. Stonewall does not require an insured to start an action against the insurer as soon as controversy arises between insurer and insured. Such an action need not be commenced until there is an identifiable and definite loss for the insurer to pay. In the present case, the identifiable and definite loss occurred in January 2000 when the stipulated judgment was entered against Carlson.

2. **The undisputed facts in the record before the trial court do not provide any basis for finding that the liability insurer had been prejudiced by reason of the garnishment proceeding against it not having been commenced within six years of the date of the collision giving rise to the liability claim against its insured.**

Northwestern National did not begin this garnishment against Farmers until February 2004, nine and a half years after Farmers

announced to Carlson that it would not cover her for her August 1994 accident. Farmers claims that it has been prejudiced by the lengthy period of delay between its initial denial of coverage and the beginning of the garnishment against it. Farmers claims that on account of the delay documents which would have supported its position in this litigation were lost or routinely destroyed. Farmers argues that on account of that claimed prejudice to it, the statute of limitations should be invoked to bar Northwestern National's garnishment proceedings against it.

Farmers claims of prejudicial delay raise issues of laches rather than strict application of the statute of limitations, but Farmers' laches arguments lack any legal or factual merit.

From a legal standpoint Farmers' arguments based on concepts of laches have no bearing in the present case, where Northwestern National in seeking to enforce a legal right and has brought its action to do so within the applicable statute of limitations. In Aronovitch V. Levy, 238 Minn. 237, 56 N.W.2d 570 (1953) the Minnesota Supreme Court, in rejecting a laches defense, stated, at 238 Minn. 241, 56 N.W.2d 573-74:

Where a party is seeking a legal remedy upon a legal right, we have held that the doctrine of laches has no application and that the remedy will be barred only by the statute of limitations

See also, Weed v. Commissioner of Revenue, 489 N.W.2d 525 (Minn. App. 1992).

Regardless of the statute of limitations, prejudice on account of delay can be evidence of an unreasonable delay in asserting a right and thus a basis for a claim of laches. See

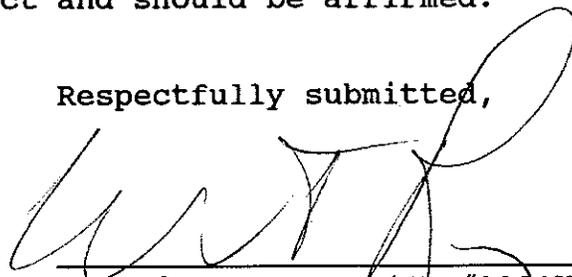
Aronovitch v. Levy, supra. However in the present case the only evidence in the record contradicts, rather than supports, Farmers' claim that it has been prejudiced by any delay.

The Affidavits of Robert E. Wilson and Edward F. Rooney, offered by Northwestern National in opposition to Farmers' motion for summary judgment (RA 1-RA-13) show that on two occasions, in November 1996 and again in December 1997, Farmers was asked to provide evidence to support its claim that it had sent Carlson written notice of its intent to cancel her insurance, and on each occasion Farmers was unable to produce a copy of any such notice of intent to cancel. If Farmers' was twice unable to produce such crucial documentation in the first three and a half years after the event in question, it can hardly claim that it has been the passage of time since then that now makes such documentation unavailable.

#### Conclusion

The parties here agreed that one side or the other was entitled to summary judgment. The trial court's grant of summary judgment in favor of Northwestern National against Farmers was legally and factually correct and should be affirmed.

Respectfully submitted,



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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).