

CASE NO. A06-0347

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State of Minnesota  
In Court of Appeals

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Ronald Enright, as attorney in fact for S.E. and  
Marlys Enright, dba Pride-One Co.,

Respondent,

vs.

Robert H. Lehmann,

Appellant,

and

Lehmann Engineering, Inc.,

Defendant.

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APPEAL FROM DISTRICT COURT ORDER

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BRIEF OF RESPONDENT AND APPENDIX

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Robert J. Bruno  
Atty. Reg. No. 12415  
ROBERT J. BRUNO, LTD.  
1601 East Hwy. 13, Suite 107  
Burnsville, MN 55337  
952-890-9171

*Attorney for Respondent*

Carol S. Cooper  
Atty Reg. No. 161548  
C.S. Cooper Law Firm, Ltd.  
26437 Galaxie Avenue  
Farmington, MN 55024  
651-460-2056

*Attorney for Appellant*

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## **STATEMENT OF LEGAL ISSUES**

1. Did the trial court err when it refused to quash the garnishment of a joint bank account containing funds of debtor's wife?

TRIAL COURT HELD IN THE NEGATIVE.

Apposite cases and statutes: Park Enterprises v. Trach, 233 Minn. 467, 47 N.W.2d 194 (1951).

2. Is the trial court's refusal to vacate the two judgments against Robert Lehmann on the grounds of excusable neglect an abuse of its discretion?

TRIAL COURT HELD IN THE NEGATIVE.

Apposite cases and statutes: Hinz v. Northland Milk & Ice Cream Co., 237 Minn. 28, 53 N.W.2d 454, (1952).

## STATEMENT OF THE CASE

Enright commenced the instant action against Robert H. Lehmann and Lehmann Engineering, Inc. for rent payments totaling \$7,287.50 arising from a lease of commercial premises in Burnsville, Minnesota. Complaint, A-19. The Complaint alleges that the tenant under the lease is Defendant Lehmann individually, and that Defendant Lehmann Engineering, Inc. is liable for rent as an occupant of the premises. Id. Judgment by default was entered against Lehmann Engineering, Inc. on March 14, 2005 in the amount of \$8,823.00 which includes attorney's fees, costs, and disbursements. A-72. Lehmann interposed an Answer, pro se, denying liability and the case continued against Lehmann individually.

On May 20, 2005 the court ordered both Mr. Lehmann and his corporation to respond to discovery, and awarded judgment for attorney's fees against both Lehmann and the corporation of \$682.50, pursuant to Rule 37.01(d). A-73, A-26. Neither Lehmann nor the corporation appeared in opposition. A-26.

On July 13, 2005, Enright's counsel served a motion on Mr. Lehmann for sanctions for failure to comply with the May 20, 2005 Order and the requirements of the Rules of Civil Procedure and General Rules of Practice. A-28, A-73. The motion specifically notified Lehmann that Enright was

seeking the sanction of striking the Answer and awarding judgment by default. Id. Mr. Lehmann did not respond or appear in opposition. A-73. On August 2, 2005, the Court granted the motion and ordered the Answer stricken and judgment entered totaling \$9,350 including attorney's fees and costs. A-73, A-32.

On December 5, 2005, Mr. Lehmann moved the district court for an order staying executions on the judgments, vacating the garnishment of a joint account at Associated Bank owned by Lehmann and his wife Zandra Lehmann, ordering the garnishee to release the garnished funds to Zandra Lehmann, vacating the judgments against Robert Lehmann under Rule 60.02, reinstating the Answer of Robert Lehmann, ordering Enright's attorney to return the original Answer to Lehmann, and allowing Lehmann to amend his Answer to add a claim for attorney's fees. A-43.

On December 20, 2005, the trial court made findings of fact concerning Mr. Lehmann's medical problems. A-83. The trial court found that

Mr. Lehmann has produced evidence documenting the serious health problems he has experienced since 2000. However, the documents submitted by Mr. Lehmann do not state that Mr. Lehmann was unable to understand the nature of the proceedings that have taken place herein. Likewise, the submissions do not state that Mr. Lehman was incapable of contracting an attorney or otherwise acting in a manner that would protect his interests in this lawsuit.

A-85. The trial court further concluded that “Mr. Lehmann has failed to establish cause to vacate the judgments against him or to quash the garnishments herein.” Id. As a result the trial court denied all of Mr. Lehmann’s motions. Id.

Lehmann filed this appeal from the Order dated December 20, 2005.

### **STATEMENT OF FACTS**

Appellant’s brief has fails to comply with the requirement of M.R.A.P. 128.02(c) that a party alleging that findings of fact are not supported by the evidence to summarize the evidence supporting the findings.

After the service of the Complaint, Mr. Lehmann appeared unannounced at the office of Enright’s attorney on February 28, 2005, and he delivered his Answer that he had drafted. A-72. The only thing Mr. Lehman said was “this is the answer to the lawsuit,” or words to that effect. Id. Mr. Lehmann appeared to be in good health, with no apparent problems with speech, cognition, or affect. Id. He did not disclose any medical problems. Id.

On March 17, 2005, Enright made a discovery request directed to both Lehmann Engineering, Inc. and its president Robert H. Lehmann to produce a comprehensive set of financial documents relating to Lehmann Engineering, Inc. A-73, 76. When no response was made, Enright’s

attorney sent a letter to Mr. Lehmann on April 22, 2005 requesting compliance with the discovery request. A-78. A few days later Robert Lehmann called Enright's counsel and told him that he didn't have some of the requested documents. A-73. Enright's counsel told him that he had to produce the documents he did have. Id. In that phone call Mr. Lehmann didn't disclose any medical problems, he appeared to understand what was being requested, and his affect was normal and appropriate. Id.

On May 4, 2005, after receiving no further response from Mr. Lehmann, Enright served a motion to compel discovery noticed for May 20, 2005, directed to both Mr. Lehmann, individually, and the corporation. A-73. Neither Mr. Lehmann nor his corporation responded. Id. The court's Order and Partial Judgment dated May 20, 2005 ordered both Mr. Lehmann and his corporation to respond to the discovery, and awarded judgment for attorney's fees against both Lehmann and the corporation of \$682.50. A-73, 26. On May 24, 2005 the Order and Partial Judgment dated May 20, 2005 were personally served upon Mr. Lehmann. A-73. Mr. Lehmann continued to ignore the Court's Order and the requirements of this action. Id.

On August 16, 2005, Enright made and filed a Request For Order For Disclosure by the corporation and Mr. Lehmann. A-74. The Court issued

such an order on August 19, 2005. Id. Mr. Lehmann and the corporation continued to ignore this action and did not respond to the Order For Disclosure. Id.

On September 14, 2005, Enright made and filed Affidavits in Support of Orders To Show Cause, and on September 16, 2005, the Court made and entered its Orders to Show Cause (2), which were personally served upon Mr. Lehmann on September 26, 2005. A-74. Afterwards, Enright's attorney received written disclosures of assets from Mr. Lehmann and the corporation dated October 10, 2005. Id.

On October 18, 2005, Enright's attorney issued garnishment summons to Associated Bank on the judgments against Mr. Lehmann and the corporation. Id. I received disclosures from the garnishee of \$5,481.08, \$4,101.87, and \$54.85. RA-8, RA-10, RA-12.

Shortly after the garnishment disclosures, Enright's attorney received a phone call from Mr. Lehmann, which is the third contact he had with him. A-74. Lehmann said he had been ill with high blood pressure and heart problems and asked him to release the garnishments because he needed the money to pay his doctor bills. Id. Enright's attorney told Lehmann that he could talk directly to Enright about that. Id. Lehmann at first sounded like he was in distress about his money being garnished, but he quickly gained

control of himself and said he would look into calling Enright and getting back to Enright's counsel. A-73 to A-74. Lehmann sounded otherwise in good health and had appropriate affect and cognition. Id.

Shortly afterwards, on November 2, 2005, Enright's counsel received two exemption notices signed by Mr. Lehman in an envelope from his attorney, Ms. Cooper. A-75. Enright's attorney responded with a letter dated November 2, 2005, and a Creditor's Objection to Exemption Claim.

Lehmann's motion to vacate the garnishments and the judgments is supported by an affidavit of Mr. Lehmann revealing a vivid recollection of all of the events of this litigation over a period of ten months prior to his motion, his ability to obtain the advice of legal counsel to assist him in drafting a pro se Answer, his understanding of his legal rights and obligations, his ability to obtain medical advice and treatment from various physicians and hospitals, and his ability to converse with Enright's counsel about his obligations to cooperate in discovery. A-45. In addition, Lehmann supported his motion with the affidavits of two physicians attesting to the fact that he has had medical problems, but neither of them attested to an inability to conduct his legal affairs or attend to the affairs of daily living. A-68, A-70.

## ARGUMENT

### I. STANDARDS OF REVIEW.

A decision of the district court whether to vacate a judgment is within its discretion and will not be reversed absent a showing of an abuse of that discretion. Nelson v. Siebert, 428 N.W.2d 394 (Minn.1988). A district court abuses its discretion if its ruling is based on an erroneous view of the law or on a clearly erroneous assessment of the evidence. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990).

Review of the trial court's conclusions of law is de novo. Jadwin v. Minneapolis Star & Tribune Co., 367 N.W.2d 476, 483 (Minn. 1985). Statutory interpretation is an issue of law that is reviewed de novo. Ill. Farmers Ins. Co. v. Glass Serv. Co., 683 N.W.2d 792, 803 (Minn. 2004). Statutes are not construed to modify or abrogate common law unless the statutes so provide. Minn. Equal Access Network Servs. v. Burlington N. & Santa Fe R.R. Co., 646 N.W.2d 911, 914 (Minn. App. 2002). Generally, common-law remedies are not abrogated unless a statute clearly expresses the intention to abrogate them. Anderson v. Federated Mut. Ins. Co., 481 N.W.2d 48, 49 (Minn. 1992). Implied repeal of laws is not favored unless the later law purports to be a revision of all laws upon a particular subject or sets up a general or exclusive system covering the entire subject matter

of a former law and is intended as a substitute for such former law. Minn. Stat. Sec. 645.39 (2005).

Appellate review of documentary evidence and affidavits is not de novo as Appellant contends. App. Br., p. 20. The decision in NSP v. Williams, 343 N.W.2d 627, 630 (Minn.1984), cited by Appellant has been supplanted by the amendment to Minn.R.Civ.Pr. 52.01. City of Lake Elmo v. City of Oakdale, 468 N.W.2d 575 (Minn.App. 1991):

[T]he proposition for which appellant cites Northern States Power is no longer the law. That case was decided before the change in Minn.R.Civ.P. 52.01, which now provides, in part, "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous \* \* \*."

Id., p. 578 (Emphasis in original). Factual findings are clearly erroneous when they are "manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole." Tonka Tours, Inc. v. Chadima, 372 N.W.2d 723, 726 (Minn.1985).

## **II. THE TRIAL COURT PROPERLY DENIED LEHMANN'S MOTION TO QUASH THE GARNISHMENT OF HIS JOINT ACCOUNT.**

### **A. Lehmann Lacks Standing To Object to The Garnishment of His Wife's Funds In The Joint Account.**

A genuine conflict in the interests of opposing litigants is not enough to create jurisdiction; a litigant must also have standing. State by

Humprhey v. Philip Morris, Inc., 551 N.W.2d 490, 493 (Minn.1996). A litigant has standing when the litigant has suffered an actual injury or otherwise has a sufficient stake in a justiciable controversy to seek relief from a court. Cochrane v. Tutor Oaks Condominium Project, 529 N.W.2d 429, 433 (Minn.App.1995), review denied (Minn. May 31, 1995). Standing is jurisdictional because it goes to the existence of a justiciable controversy. Kilpatrick v. Kilpatrick, 673 N.W.2d 528, 530 (Minn. App. 2004).

Mr. Lehmann's assertion that the garnishment should be quashed because the funds in the joint account are the property of his wife, does not present a controversy that Mr. Lehmann has a sufficient stake in to establish his standing. As a result, the district court's order must be affirmed, and the appeal dismissed.

**B. The Multi-Party Accounts Act Does Not Conflict With the Rule In Park Enterprises.**

Lehmann next argues that the funds in the joint account with his wife may not be garnished as a matter of law, and the trial court erred in refusing to quash the garnishment. However, the trial court correctly applied the law when it refused to vacate the garnishment.

In Park Enterprises v. Trach, 233 Minn. 467, 47 N.W.2d 194 (1951), the Court held that a joint bank account where the debtor has the absolute

right to withdraw any or all of the funds is subject to the garnishment or levy by a creditor of either joint owner, regardless of which joint owner actually deposited the funds. The basis for the Court's decision Park Enterprises is the right of subrogation that the creditor acquires by the garnishment or levy:

Since in purpose and legal effect a garnishment proceeding is virtually an action brought by defendant in plaintiff's name against the garnishee, resulting in the subrogation of the plaintiff to the right of the defendant against the garnishee, we have concluded that plaintiff here may not only garnishee this joint account, but also that it would be entitled to recover judgment against the garnishee for the entire amount of the account if its judgment against defendant were sufficient to exhaust it. Defendant is entitled to withdraw any part or all of the account, and plaintiff, in effect, is subrogated to that right.

Id., 233 Minn. at 470, 47 N.W.2d at 196 (Citing Midland Loan Finance Co. v. Kisor, 206 Minn. 134, 287 N.W. 869).

Since Lehmann has the absolute right of withdrawal of the funds in the account, Enright's subrogation to his rights gives Enright the same right to the funds against the garnishee bank. This analysis is not modified by the enactment of the Multiparty Accounts Act in 1973. No Minnesota court has held that the Multiparty Accounts Act has changed the Park Enterprises

holding and Lehmann has cited none.<sup>1</sup> In fact, the district court in Bar-Meir v. North American Die Casting Association, No. C6-03-331, 2003 WL 2201544 (Minn.App., Aug. 26, 2003), a case cited by Appellant, followed the Park Enterprises rule and held that the joint account was subject to garnishment. The district court in Bar-Meir was affirmed by the Minnesota Court of Appeals.

If the legislature had intended by enactment of the Multi-Party Accounts Act to abrogate the common law rule or construction of the garnishment statute in Park Enterprises, supra, and Midland Loan Finance Co. v. Kisor, supra, it did not do so by clear and unequivocal language. The language of Minn. Stat. Sec. 524.6-202(2005) is far from a clear and unequivocal abrogation of the Park Enterprises rule. Sec. 524.6-202 states that Secs. 524.6-203 to 524.6-205 are “relevant to controversies between these persons and their creditors and other successors.” However, Secs. 524.6-203 to 524.6-205 deal with survivorship, and not garnishment or the rights of the creditor against a garnishee bank, inter vivos. At the very

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<sup>1</sup> Minnesota and Connecticut may be the only two states that hold that a joint account may be garnished to satisfy the debt of one of the joint owners, regardless of ownership of the deposits. See, Fleet Bank Connecticut, N.A. v. Carillo, 240 Conn. 343, 691 A.2d 1068 (1997); M. Churchill, Joint Bank Account As Subject To Attachment, Garnishment, or Execution By Creditor of One Joint Depositor, 86 A.L.R.5th 527.

least, those sections are not a clear and unequivocal abrogation of the Park Enterprises rule. If anything, the portion of Sec. 524.6-202 stating that it has “no bearing on the power of withdrawal of these persons as determined by the terms of account contracts” is an affirmation of the rule in Park Enterprises. Therefore, as a matter of statutory construction, the common law rule of Park Enterprises has not been abrogated by the Multiparty Accounts Act.

Park Enterprises justified its holding on a number of public policy and jurisprudential reasons:

The peculiar features of a joint bank account, such as this case presents, make it difficult, if not impossible, in most cases, to determine what portion of the account belongs to each depositor. A long series of deposits which cannot be traced to their source, and a similar series of withdrawals which cannot be traced to their destination, are normally involved. This defect is inherent in the severalty feature of such bank accounts wherein each depositor is allowed to treat joint property as if it were entirely his own. Like any loose system of dealing with money, joint bank accounts sacrifice precision to convenience and becloud the respective rights of the depositors. The courts should not encourage parties to do their bookkeeping in court when, by their private contract, they have virtually declared that they do not wish to be inconvenienced by any strict accountability as between themselves. A joint bank account of this kind is a creature of contract between parties avowedly indifferent to the exact percentage of ownership between themselves. The law should take them at their word and give effect to their contract without making detailed and belated evidentiary inquiries to establish factual ownership. Any presumption, whether conclusive or rebuttable, that part or all of these joint accounts are immune from garnishment has the effect of either creating or tending to create a nonstatutory exemption for the parties using them, and any attempt

to base the extent of garnishment upon the respective amounts of the account owned by each depositor will compel courts and juries to grope with problems which the depositors themselves have declared to be of no consequence. Let them abide the results which flow from their own declared purposes.

Thus, far from “allow[ing] a presentation of evidence of contributions to the account,” as Lehmann argues, Park Enterprises specifically disclaims the propriety of such an undertaking by the court. See Appellant’s Br., pp. 22-23.

Appellant further argues that applying subrogation theory to the “different statutory rights” in the Multiparty Accounts Act results in the creditor not being able to garnish. See Appellant’s Br., p. 23-24. However, Lehmann misapplies the subrogation theory to reach this result. The garnishee is the bank and not the other joint owner. As a result, a creditor subrogated to the non-contributing owner’s rights vis-à-vis the bank has a right to withdraw all of the funds, the same result as in Park Enterprises. The “no bearing on the power of withdrawal” language in Sec. 524.6-202 (2005) supports this interpretation.

Park Enterprises remains the law of this state unless the legislature has abrogated it by clear and unequivocal language. All of the out-of-state court decisions cited by Appellant do not support the abrogation of the settled law, as declared by the highest court of this state. See Appellant’s

Br., pp. 24-26. The district court's refusal to vacate the garnishment was not erroneous.

### **III. THE TRIAL COURT CORRECTLY EXERCISED ITS DISCRETION WHEN IT REFUSED TO VACATE MULTIPLE JUDGMENTS AGAINST THE DEFENDANT.**

To obtain relief from a judgment based on mistake, inadvertence, or excusable neglect, the moving party must show a reasonable claim on the merits, a reasonable excuse for failure to act, due diligence after notice of entry of judgment, and no substantial prejudice to the opponent. Bentonzize, Inc. v. Green, 431 N.W.2d 579, 582 (Minn.App.1988). These are often referred to as Hinz factors. Hinz v. Northland Milk & Ice Cream Co., 237 Minn. 28, 53 N.W.2d 454, (1952). The trial court's ruling on a motion to reopen a default judgment will not be reversed on appeal except for a clear abuse of discretion, particularly where the determination of the trial court is made on conflicting affidavits. Standard Oil Co., v. King, 238 Minn. 81, 55 N.W.2d 710 (1952).

An application of the Hinz factors to the showing, or rather lack of it, made by Lehmann, results in the conclusion that the district court did not abuse its discretion.

#### **A. Lehmann Has Failed To Show Reasonable Excuses For Multiple Failures To Act On the Two Judgments.**

Lehmann does not claim that the trial court applied an erroneous

view of the law in exercising its discretion, rather he argues that it made a clearly erroneous assessment of the evidence. If the trial court's findings of fact are supported by substantial evidence, they are not clearly erroneous. However, contrary to M.R.Civ.A.P. 128.02(c) Lehmann does not summarize the evidence tending, directly, or by reasonable inference to sustain the findings of fact or determination.

**1. Substantial Evidence Supports the Trial Court's Findings That Lehmann Had No Reasonable Excuse For Failure to Defend the May 20, 2005 Judgment.**

The judgment entered on May 20, 2005 in the amount of \$682.50, was entered pursuant to Rule 37.01(d) for failure of both defendants to respond to Plaintiff's Request For Production of Documents. Enright had served a Request for Production of Documents on both defendants on March 17, 2005, pursuant to Rules 34 and 69. In April, 2005, Lehmann called Enright's counsel about his responses to this discovery, promising to provide what he could. He didn't disclose any medical problems, he appeared to understand what was being requested, and his affect was normal and appropriate. On May 4, 2005, when Lehmann did not respond to the discovery as promised, a motion with a hearing date of May 20, 2005, was served on both defendants, to which neither of the defendants

responded. Neither Mr. Lehmann nor his corporation appeared in opposition to the motion to compel discovery.

In support of the argument that Lehmann has a reasonable excuse for failure to defend this judgment, Lehmann points to the affidavit of Dr. Widdifield and his statement that his blood pressure problem over the past five years is the worst case he has seen. Conspicuously absent from the record, however, is any statement from a physician, or indeed Mr. Lehmann himself attesting to his inability to comprehend and protect his interests in this litigation.

In fact, Lehmann's assertions of disability are contradicted by his own conduct, his contacting and consulting with an attorney friend of his wife, his drafting of an answer, his delivery of it personally to the office of plaintiff's counsel, his telephone contact with plaintiff's counsel to discuss the availability of the requested documents, his promise to provide what he had, his lack of disclosure of his medical condition to plaintiff's counsel or the court, and his clear recollection of all of the events of this litigation in an extensive affidavit.

Lehmann's extensive affidavit fails to disclose that he was physically or mentally prevented by his high blood pressure from attending to the ordinary affairs of daily living during the period between March 18, 2005

and May 20, 2005. He wasn't prevented from understanding the discovery request, placing a telephone call to plaintiff's counsel about it, discussing it in a rational and cogent manner, and promising to provide what he had -- all without disclosing his alleged total physical and mental disability. His alleged confusion about the legal process is indistinguishable from the ordinary confusion that any non-lawyer would have about the rules of civil procedure or court requirements. Nothing prevented Mr. Lehmann from seeking the advice of a professional about the requirements of the legal system, and he alleges nothing that would have prevented it.

As a result, Defendant Lehmann has failed to meet his burden of proving that he has a reasonable excuse for failure to comply with the discovery requests, or to defend the motion for an order compelling discovery. The trial court's finding that Lehmann was not so disabled that he could not attend to his legal affairs concerning the May 20, 2005 judgment is supported by substantial evidence and is not clearly erroneous.

**2. Substantial Evidence Supports the Trial Court's Findings That Lehmann Had No Reasonable Excuse For Failure to Defend the August 2, 2005 Judgment.**

The judgment entered on August 2, 2005 in the amount of \$9350.00, was entered pursuant to a motion and order imposing sanctions upon Defendant Lehmann for failure to defend the action. He had failed to

respond to discovery, failed to file an answer, and failed to otherwise comply with the rules of court. Responses to discovery would have provided Plaintiff with evidence about Mr. Lehmann's defense to the action, and would have allowed the Plaintiff to learn which one of the defendants was actually in possession of the premises during the period of non-payment, so that liability for the rent could have been determined under Minn. Stat. Sec. 504B.125:

Every person in possession of land out of which any rent is due, whether it was originally demised in fee, or for any other estate of freehold or for any term of years, shall be liable for the amount or proportion of rent due from the land in possession, although it be only a part of the land originally demised. Such rent may be recovered in a civil action, and the deed, demise, or other instrument showing the provisions of the lease may be used in evidence by either party to prove the amount due from the defendant. Nothing herein contained shall deprive landlords of any other legal remedy for the recovery of rent, whether secured to them by their leases or provided by law.

Defendant Lehmann argues that his "extremely serious and disabling medical condition" prevented him "from being able to defend against Enright's claims or complying with procedural requirements or discovery demands." Appellant's Br., p. 30.

In response, the scant affidavit of Dr. Widdifield, the lack of any statement from a physician or Mr. Lehmann himself attesting to his inability to comprehend and protect his interests in this litigation, his

meticulous affidavit, and his own conduct contradict Lehmann's arguments. See, supra, Sec. III.A.1.

As a result, Lehmann has failed to meet his burden of proving that he has a reasonable excuse for failure to comply with the discovery order, rules of court, or respond to the motion for sanctions. The trial court's refusal to vacate the August 2, 2005 judgment was based on substantial evidence and was not clearly erroneous.

**B. Lehmann Did Not Act With Due Diligence After Each Of the Judgments.**

Lehmann argues that he acted with due diligence after notice of entry of judgments. Appellants' Br., p. 31. The trial court did not make specific findings as to whether or not Lehmann acted with due diligence. However, there is substantial evidence in the record that Lehmann did not act with due diligence.

Lehmann does not disclose when he learned that a judgment had been entered against him on May 20, 2005. Presumably, he was aware of it promptly after it occurred. Other than undergoing surgery on his carotid artery "at the end of September," Lehmann has failed to explain how he has acted with due diligence between May 20, 2005 and November 17, 2005, when his motion to vacate the judgments was made.

As a result, Lehmann has failed to meet his burden of proving that he has acted with due diligence with respect to the discovery sanctions judgment. The trial court did not err when is refused to vacate the May 20, 2005 judgment.

Similarly, Lehmann does not disclose when he learned that a judgment had been entered against him on August 2, 2005. Presumably, he was aware of it promptly after it occurred. Other than undergoing surgery on his carotid artery “at the end of September,” Lehmann has failed to explain how he has acted with due diligence between August 2, 2005 and November 17, 2005 when he brought his motions to vacate. His actions are consistent with a pro se defendant who simply intentionally ignores the proceedings against him.

As a result, Defendant Lehmann has failed to meet his burden of proving that he has acted with due diligence with respect to the sanctions. The trial court denial of the motion to vacate the August 2, 2005 judgment is supported by substantial evidence and is not clearly erroneous.

### **C. Lehmann Does Not Have A Case On the Merits.**

Lehman argues that he does not have personal liability for the May 20 partial judgment for attorney’s fees for failure to provide discovery. Appellant’s Br., p. 30. The district court did not make findings as to

whether there are merits in Lehmann's favor on this issue, however, there is substantial evidence that there are no merits in Lehmann's favor.

Enright's discovery request dated March 17, 2005 was addressed to both defendants and served upon both defendants. Lehmann called Enright's counsel and promised to provide the documents he had. Enright's motion to compel discovery was addressed to both defendants and served upon both defendants. The court's order was addressed to both defendants and was served personally upon Lehmann. To the extent that Mr. Lehmann has the documents requested in discovery he is required to produce them and he cannot escape that obligation by saying the documents belong to his corporation. His corporation hasn't been in business since 2001. The court properly exercised its discretion by ordering both defendants to produce the requested documents and ordered attorney's fees against both parties.

Lehman argues that he does not have personal liability on the lease because the Lease was signed individually. Appellant's Br., p. 29. The district court did not make findings as to whether there are merits to Lehman's liability under the Lease. However, there is substantial evidence on the record to support a finding that Lehmann has not established the merits in his favor. The Lease is at best ambiguous. Robert H. Lehmann is

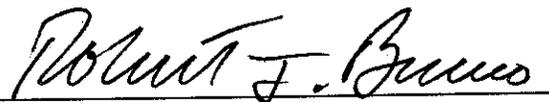
listed as the tenant on pages 1 and 9 of the Lease. A-50. Lehmann may also be liable for the rent under Minn. Stat. Sec. 504B.125 after his engineering business folded and he occupied the premises individually to start a church. A-79. Lehmann's affidavit is intentionally vague as to the dates when his engineering business folded. A-45.

The trial court's order refusing to vacate the judgments is supported by substantial evidence and is not clearly erroneous.

### **CONCLUSION**

Respondent respectfully requests that this Court affirm the order of the district court.

Respectfully submitted,



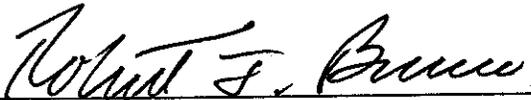
Robert J. Bruno (#12415)  
ROBERT J. BRUNO, LTD.  
Attorney for Appellant  
1601 E. Highway 13, Suite 107  
Burnsville, MN 55337  
952/890-9171

Dated: April 19, 2006.

**CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 132.01, Subd. 3 of the Minnesota Rules of Civil Appellate Procedure, I, as counsel of record herein for Respondent, hereby certify that the Brief For Respondents is proportionately spaced, has a typeface of 14 points and contains 4,966 words as measured by Microsoft WORD 2002 word count.

Dated: April 19, 2006.

  
\_\_\_\_\_  
Robert J. Bruno  
Attorney for Respondent

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).