

NO. A08-576

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State of Minnesota  
**In Court of Appeals**

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Sharon Bender,

*Appellant,*

vs.

Mary Swenson,

*Respondent.*

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**APPELLANT'S BRIEF AND APPENDIX**

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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).

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## Statement of Issues

- I. Does an independent reviewer at an online university owe a fiduciary duty to a prospective PhD candidate?**

The trial court held in the affirmative.

- II. Was an award of attorneys' fees against the Defendant for bringing a motion to modify the scheduling order?**

The trial court made no findings and simply signed Respondent's proffered order and there is nothing in the record to support this award.

- III. Can a party stipulate to dismiss a claim, draft the order, file it, have it signed by the judge and entered by the clerk, and then resurrect it at a motion hearing right before trial?**

The trial court held in the affirmative.

- IV. Do state common law intellectual property interests spring spontaneously from people's thoughts and ideas thus invoking the Minnesota State District Court's subject matter jurisdiction over the "conversion" of them?**

The trial court held in the affirmative and engaged in a lengthy analysis of Respondent's claims about her thoughts and ideas being stolen by the Appellant and held that there are state common law protected intellectual property interests in the state of Minnesota.

### Statement of the Case and Facts

Respondent sued Appellant, a person she only knew from the Internet, for conversion, defamation, tortious interference with prospective business advantage, intentional infliction of emotional distress, breach of fiduciary duty and injunction. (A. at 1). Appellant was an independent reviewer on the second of three review committees at Capella University, an online university based in Minneapolis, Minnesota. (T. at 297). The Appellant is a resident of New Jersey (T. at 262, A. at 1). Respondent stipulated to dismiss all claims except for the conversion claim shortly before trial. (A. at 15). Shortly after dismissing all claims, Respondent brought an untimely motion to revive her breach of fiduciary duty claim, which was granted by the trial court. (A. at 14).

This is an appeal from three Orders from Anoka County District Court. The first Order was signed entered by the District Court on August 3, 2007. (A. at 10). In this order relating to Appellant's motion to modify the scheduling order, the trial court did not make any findings relating to the conduct of the Appellant, rather, just signed the order offered by the Respondent, which simply stated "Plaintiff is awarded her attorneys fees [sic] in the amount of \$1,500." (A. at 11).

The second order appealed from was entered on September 14, 2007 by the district court, and it revived Respondent's claim for breach of fiduciary duty and denied summary judgment to the Appellant on Respondent's common law intellectual property conversion claim. (A. at 12).

The third order appealed from was the order entered by the trial court after a bench trial. (A. at 26). This order retained subject matter jurisdiction over state common law intellectual property claims. Id. The court further found that the Appellant, as an independent reviewer on the second of three dissertation committees, owed a fiduciary duty to the Respondent and breached this duty. (A. at 47). For damages, the court awarded a judgment against the Appellant, who never collected any money or anything from the Respondent, in the amount of \$60,000, which appears to be an approximation of all of the money Respondent paid to Capella University, who was not a party to the case. (A. at 47). No one from Capella University testified at the trial. Respondent did not offer any expert testimony about fiduciary duty under the circumstances she alleges.

### Standards of Review

On appeal from a judgment, the scope of review of the Minnesota Court of Appeals is limited to deciding whether the trial court's findings are clearly erroneous and whether it erred in its legal conclusions. Citizens State Bank of Hayfield v. Leth, 450 N.W.2d 923, 925 (Minn. App. 1990). When a trial court's findings are reasonably supported by the evidence, they are not clearly erroneous and must be affirmed. Id. An award of Attorneys fees is reviewed with an abuse of discretion standard. Gully v. Gully, 599 N.W.2d 814, 825 (Minn. 1999). The Trial Court lacked subject matter jurisdiction over "state common law intellectual property claims." The existence of subject matter jurisdiction is a question of law subject to de novo review on appeal. Neighborhood Sch. Coalition v. Independent Sch. Dist. No. 279, 484 N.W.2d 440, 441 (Minn. App. 1992), *review denied* (Minn. June 30, 1992). Therefore, there are three standards of review applicable to the issues in this case.

## ARGUMENT

### **I. THE TRIAL COURT ERRED IN ITS FINDING THAT APPELLANT HAD A FIDUCIARY DUTY TO THE RESPONDENT.**

Actions for breach of fiduciary duty sound in equity. R.E.R. v. J.G., 552 N.W.2d 27, 30 (Minn. App 1996). Equity allows the recovery of the lost value of an asset, the profit of which a beneficiary was deprived, or any improper financial gains made by the fiduciary. Id. (citing the Restatement (Second) of Torts § 927). Fiduciary duty is the highest standard implied by law. D.A.B. v. Brown, 527 N.W.2d 168, 172 (Minn. App. 1997). Minnesota has rejected breach of fiduciary duty claims against physicians, Id. at 173, against banks, Vacinek v. First National Bank of Pine City, 416 N.W.2d 795 (Minn. App. 1987), and against architects, Carlson v. SALA Architects, 732 N.W.2d 324 (Minn. App. 2007). In his order, Judge Hoffman concedes that: “Minnesota law does not appear to classify the student-professor relationship as fiduciary per se.” (A. at 43).

Since there is no explicit claim for breach of fiduciary duty against professors or independent reviewers on dissertation committees in Minnesota, the trial court appears to have found a fiduciary duty somewhere in the relationship of these parties, who only knew each other from the Internet and the telephone. A fiduciary relationship is characterized by a “fiduciary” who enjoys a superior position in terms of knowledge and authority and in whom the other party places a high level of trust and confidence. Carlson at 330. Such a relationship transcends the ordinary business relationship which, if it involves reliance on a professional, surely involves a certain degree of trust and a duty of

good faith and yet is not classified as a “fiduciary.” Id. Whether a fiduciary relationship exists is a fact question. Id.

A case involving the disposition of trust monies for an adopted heir to one of the founders of Archer Daniels Midland Company, Toombs v. Daniels, 361 N.W.2d 801, (Minn. 1985) appears to be inapposite to this case entirely on facts, but entirely necessary for any discussion of individual “fact-based” findings of fiduciary duty in Minnesota. In that case, the Minnesota Supreme Court found a fiduciary relationship between trustees of a trust and an adopted prospective heir and trust beneficiary. In that case a fiduciary relationship was found between the parties based upon the facts that there was a familial relationship with two of the trustees, the trustees had greater access to facts and legal resources, and “complete control of her financial affairs had been given to [one of the trustees].” Id. at 809. In the instant case, there was no money exchanged or held, no trust, and no familial relationship.

At trial, when asked on what day Appellant breached her fiduciary duty to her, Respondent responded: “I think when she inserted my proposal into her template and did not carefully make sure she didn’t leave parts of her own paper in there. That was not a good thing to do. I also think that she breached her fiduciary duty to me by advising that I could replace anyone whenever I wanted. That simply isn’t true, and I know that now. I think she misguided and misdirected me during the dissertation. I think that she was using me to get herself a core position at the university.” (T. at 227). Respondent also testified that “that was the thing that caused the breach,” referring to the end to the

relationship in 2005, a year and a half after the dissertation committee on which Appellant served had concluded in June 2003. (T. at 138).

Respondent also claimed that other people on the dissertation committee at Capella University owed her a fiduciary duty and had breached that duty. (T. at 228). Therefore, by the Respondent's own admission, assertion and sworn testimony, it was not some special relationship arising out of Appellant's alleged theft of Respondent's thoughts that singled this Appellant out for fiduciary responsibility to her. The Respondent also testified that the rest of the members of her Committee breached their alleged fiduciary duty to her. Id. Respondent's own testimony was that the Appellant had never administered any tests to her and that she never had a business with the Appellant (T. at 204 & 228).

Respondent's sworn testimony at her deposition and her sworn testimony at trial about what really happened with regard to her experience with her second dissertation committee contradict each other. When asked at trial if she had any problems with the school before Appellant came to her committee, she responded: "I thought it was a deplorable university, but my program was going very well." (T. at 232). At her deposition, Respondent said: "I didn't have any issues or problems with the school until Dr. Bender came to my committee." When asked at trial what the factual basis was for her allegation that the Appellant had a fiduciary duty to her, Respondent responded: "She's an employee at Capella University, and she was on my committee, and she had

access to my materials.” (T. at 214). Respondent further testified that the Appellant’s duty to her flowed from Appellant’s affiliation with Capella University. (T. at 215).

One of the most puzzling components of the trial court’s finding of a fiduciary duty on the part of the Appellant is that the Appellant was not even associated with the dissertation committee that finally denied a PhD to the Respondent. (T. at 220). After the second committee, which consisted of the Appellant and several other people, the Respondent was assigned another committee (T. at 220 & 276). The Appellant had nothing to do with the committee that finally rejected Respondent’s dissertation. (T. at 277). Further, Respondent testified that Appellant never held any money for her and never held on to any physical thing belonging to Respondent and failed to return it. (T. at 226 & T. at 272). The Appellant ceased her role as an independent reviewer for the Respondent five years ago – in June 2003. (T. at 297).

The Trial Court did not rely on the Respondent’s assertions about when, where, why and how the Appellant allegedly owed and in turn allegedly breached her fiduciary duty to her. As stated above, according to the Respondent, the Appellant was not the only one on the Committee who owed her a fiduciary duty – she asserted at trial that everyone on her dissertation owed her a fiduciary duty. (T. at 227). Respondent further testified that the Appellant breached her fiduciary duty to her the first time in 2002. (T. at 227). In addition to the Respondent having absolutely nothing to do with it, the dissertation committee that rejected Respondent’s dissertation was a collective effort and not the sole responsibility of Appellant. (T. at 272-273).

The trial court's twenty-two page order contains rather odd and obscure findings of fact that oftentimes do not appear to be anywhere in the record (e.g., "Bender had always been very active in editing Swenson's writing and was fully informed about her research. After Jim Weeks had become ill and subsequently died, Swenson made revisions with the help of Bender" (A. at 37) and "Approximately a year later, Bender started to put more of these constructs on her student website for Capella students. Based on the Leadership card sort, Swenson had also come up with several constructs and tools which are utilized directly on Bender's website, including CAR template, SOR analysis, the characteristic triangle, the FFF (fight, flight, flee) response array as well as all aspects of the quotient construct and multi-research strategy constructed by Swenson. Although Bender slightly modified some of the ideas – referring to "CAR" for instance as ARC – it is clear that she took these ideas from Swenson. It does not appear that these constructs were on Bender's website prior to 2005" (A at 39 to 40).

The lengthy findings with the confusing details involve "over 100" concepts in which Respondent claims a state common law intellectual property interest, which she claims were stolen from her by the Appellant. (T. at 224). These ideas, Respondent alleges, are a moving target: "a developing, living, breathing construct that can be applied anywhere to do anything." (T. at 225). This would seem to cover a lot of territory – even more than that which is covered in the Court's twenty-two page order. It would be hard for anyone to not infringe on the Respondent's "more than one-hundred"

“infinticable” [sic] alleged state common law protected intellectual property interests. (T. at 224).

The trial court did not rely on the Respondent’s assertions about everyone on the dissertation committee owing her a fiduciary duty and breaching it. Rather, he concluded that “Swenson and Bender enjoyed a uniquely close relationship as professor and student.” (A. at 44). This conclusion begs the question about what the fiduciary duty was that the Respondent allegedly had to the Appellant. The Court never defines in its order what this duty was. It is subject to judicial notice and common sense that not everyone seeking any particular degree gets one. There is no such thing in our society as a sort of third-party “fixer” who makes sure that people get the degrees that they seek. Such a thing would thwart a lot of the purported functions of higher education. Further, it could not possibly be the law in the state of Minnesota that people serving on dissertation committees owe a fiduciary duty to people defending their dissertations to ensure that they succeed in obtaining their PhD.

The Court further concluded that: “As a member of Swenson’s Committee, Bender’s sole function was to assist Swenson with her thesis, whether it was an independent reviewer or ultimately as an advisor. Furthermore, the evidence reflects that Swenson relied heavily on Bender’s knowledge and authority in refining her original thesis, reforming her doctoral committee, and in performing her research and writing.” (A. at 44).

The Respondent herself testified that she relied upon all committee members and not exclusively on Appellant. (T. at 47). The Appellant was not the only person with whom Respondent claimed she had a problem -- in Exhibit 41, Respondent's own Exhibit, it is shown that Respondent tried to "fire" three other people on her dissertation Committee. (A at 58, T. at 351). This document also notes that: "it remains unclear how much of the current draft of her dissertation represents [Respondent's] work and how much represents the work of Dr. Bender and other editors." (A. at 59). This document about the Respondent attempting to fire other people on her committee contradicts her testimony about the Appellant not having any problems with anyone else until the Appellant came around. Further, Respondent did not furnish any correspondence to show that she had anything but a good relationship with Appellant the entire time they were acquainted both in an academic role (October, 2001 - June, 2003) and later in a personal role (June, 2003 - December, 2004).

Despite acknowledging in his order that Respondent had to "start over with a third committee," the court appears to confuse the facts and the testimony about who was on that third Committee, because the testimony of both parties was undisputed that the Appellant did not have anything to do with that third committee which ultimately rejected Respondent's bid for a PhD. (T. at 220, 276 & 277). There does not appear to be any evidence in the record about what it was that caused the Respondent to fail to get her PhD, much less any act of the Appellant. There was no testimony offered from any members of the third dissertation committee, and not even any documentary evidence

from Capella University about the rejection of the Respondent's bid for a PhD. There are sixty-one exhibits, such as Exhibit 16: "Handwritten Adaptive Therapy," Exhibit 17: "Card Sort," and Exhibit 39: "Placemat w/ Writings." None of this unmitigated nonsense adds up to anything at all, much less a breach of fiduciary duty, "the highest standard implied by law." D.A.B. v. Brown, 527 N.W.2d 168, 172 (Minn. App. 1997).

To get around this tricky problem of causation – that is, how it could be that the Appellant allegedly caused the Respondent to not get her PhD, the Court, by its own words, engages in pure speculation. In his Conclusion of Law about causation, Judge Hoffman writes: "the Court views the Committee's ultimate conclusion about Bender with great suspicion. It cannot help but wonder if the University did not fall short of finding that Bender had sabotaged Swenson's degree." (A. at 46). What's even more odd about this speculation, is that the document from whence the Court determines Appellant "sabotaged" Respondent's PhD is from 2004 (A. at 57 to 59), which is many years before Respondent was ultimately rejected by another, third committee for her PhD. (T. at 220, 276 & 277). Therefore, the court looked back in time to a document from 2004, and speculated about predictions for the future that the committee left out about what might happen several years into the future, and out of this speculative divination from this document, found a fiduciary duty on the part of the Appellant.

The Court's conclusion that the Appellant's special fiduciary duty sprung from a "close relationship" with the Respondent (A. at 44) is not only contradicted by the Respondent's testimony at trial about everyone on the Dissertation Committee owing her

a fiduciary duty, but also by a new lawsuit Respondent has brought in Hennepin County, Minnesota, which asserts a new entity which owed her a fiduciary duty: Capella University. (A. at 20). Surely this vast number of people and parties do not or have not shared the same “close relationship” with the Respondent. A copy of this lawsuit was provided to the Court below prior to issuance of his order, and it is subject to judicial notice, as it is part of the court records of this state, and such notice of this filed lawsuit may be taken here on appeal. *See Smisek v. Commissioner of Public Safety*, 400 N.W.2d 766 (Minn. App. 1987) (This Court taking Judicial Notice of Court Record in another proceeding on appeal). In this lawsuit, Respondent seeks recovery of her tuition all over again against another party. (A. at 24). The Respondent’s own assertions in this proceeding and her new litigation about fiduciary duties contradict the findings of the Court.

Other than the speculation about what might have been, there is nothing in the record to support finding of the existence of a fiduciary duty, a breach of any such duty, and most certainly damages against the Appellant in the amount of \$60,000. Further, the e-mails show that the Respondent was concerned that she would have to retake the dissertation “course” had she failed, not an entire program. The Respondent complained to Appellant, “At this rate I will have to retake the course which will cost me 3K and another 6 months. If I have to I will go to the Dean and fire away.” (A. at 51).

As explained above, Minnesota Courts have refused to classify the bank/customer, architect/customer and even the physician-patient relationship as fiduciary in nature.

Surely this Respondent does not have fiduciary relationships with an online university and people working on her dissertation committee at said online university. To classify these interactions as fiduciary in nature would be disastrous for Minnesota and invite untold hoards of vexatious, repetitive, frivolous and wasteful litigation such as the instant case and Respondent's new lawsuit. The Respondent has already been emboldened to start yet another lawsuit in Hennepin County as a result of the order in the instant case.

There is less than a paucity of facts in this case for establishing a fiduciary relationship between these parties. There is no evidence in the record indicating that the Appellant owed the Respondent any fiduciary duty or that any duty, if one existed, was breached.

**II. THE TRIAL COURT ERRED IN AWARDING ATTORNEYS FEES AT MOTION HEARING AT WHICH DEFENDANT SOUGHT TO EXTEND THE DISPOSITIVE MOTION DEADLINE AND OTHERWISE MODIFY THE SCHEDULING ORDER**

At a motion hearing wherein the Appellant sought to extend the deadlines in the scheduling order to bring a summary judgment motion, the trial court simply adopted the order drafted by the Respondent, which for no reason at all provided for an award of \$1,500 in attorneys fees. (A. at 11). There was no rule, statute, or anything cited by the trial court. This was because there was no reason to award such fees. Asking for time to bring a summary judgment motion regarding the Respondent's state common law "thought stealing" conversion claims is legitimate. It is disappointing that two Minnesota District Court Judges believe that this claim exists. Regardless of this, the truth remains that there is no such thing as a state common law intellectual property interest claim –

which arises because someone simply claims that they “developed” them. (T. at 204).

For the purposes of proving the legitimacy of this motion, and the illegitimacy of frivolity of the Respondent’s claims, the argument about this is set forth briefly below.

Such awards absent any reason or findings whatsoever at motion hearings are best described as “family law” type awards creeping into regular civil motion practice and should not be countenanced. There are no findings or any evidence of any conduct in the record to support an award of attorneys fees. In light of this complete absence of anything to support such fees, such an award was an abuse of discretion by the trial court below.

**III. THE TRIAL COURT ERRED IN RESURRECTING THE FIDUCIARY DUTY CLAIM THAT RESPONDENT STIPULATED TO DISMISS AND EVEN DRAFTED THE ORDER FOR AND FILED.**

A search for case law in reviewing this issue does not turn up very much at all. It’s a sad fact of life in court these days that people and attorneys who lie usually get a lot of mileage out of their lies and are rarely punished. The victims of these lies are other parties and our society. After much negotiation, in the cover letter to counsel for Appellant, Respondent agreed to dismiss all claims “except for the conversion claim” on August 6, 2007. (A. at 15). Later on at a motion hearing on August 20, 2007, after the dismissal had been signed and filed with the court administrator, counsel for Respondent, Gregg Corwin, blatantly and willfully lied to the Court and represented to it that “the stipulation inadvertently included the claim for breach of fiduciary duty.” (A. at 13). As usual, a bold faced liar got the best of someone else in Court. There is not much else to

say about this other than that, and that this burdened the Respondent in defending this claim, and prevented the Respondent from bringing a Summary Judgment Motion/Motion in Limine on this matter. Courts should pay more attention to whether or not people are telling the truth.

The undersigned has complained to this Court, lower Courts and even on one occasion the Office of Lawyers Professional Responsibility before about lying witnesses and lawyers on several occasions – with documented and provable lies. To date, no one has cared one bit about documented lies that have hurt people. Even so, even if you are a minority of one, the truth is the truth and truth stands, even if there is no public support for it. It is self-sustained. There is a good reason the latin phrase *falsus in uno, falsus in omnibus* has stuck with us over the centuries, even though it is not very popular in our present time.

**IV. THE TRIAL COURT LACKED AND CONTINUES TO LACK SUBJECT MATTER JURISDICTION OVER THE CONVERSION CLAIM BECAUSE THERE IS NO SUCH THING AS STATE COMMON LAW SPRINGING PROPERTY INTEREST FOR INTELLECTUAL PROPERTY.**

Lack of subject matter jurisdiction can be raised at anytime including, for the first time, on appeal. *See, e.g., Mangos v. Mangos*, 264 Minn. 198, 202, 117 N.W.2d 916, 918 (1962) (lack of subject matter jurisdiction may be raised at any time); *Norris Grain Co. v. Nordaas*, 232 Minn. 91, 98, 46 N.W.2d 94, 99 (Minn. 1950) (may challenge subject matter jurisdiction at any stage). The existence of subject matter jurisdiction is a question of law subject to de novo review on appeal. *Neighborhood Sch. Coalition v. Independent*

Sch. Dist. No. 279, 484 N.W.2d 440, 441 (Minn. App. 1992), *review denied* (Minn. June 30, 1992).

The Trial Court appropriately ruled in favor of the Appellant on the Respondent's conversion claim, however, for completely the wrong reasons. It is important that this Court decide this issue to clarify it in Minnesota. As things stand with these lower court orders and their interpretations of the law in Minnesota, Minnesota stands as radically different and seemingly alone on this issue. While this issue is not squarely before this Court, everyone has thoughts in this Country on a daily basis, and an exception to the mootness doctrine is merited. As things stand, according to two Anoka County District Court Judges, infinite numbers of Minnesota state common law property interests are arising on a daily basis with interactions of Minnesotans with other people around the world. No entity is capable of protecting all of these interests that, according to these two Anoka County District Court Judges, is operating and continues to operate to this day outside of the Federal Courts in this country.

This situation is capable of repetition yet evades review and therefore falls under the exception to the mootness doctrine enunciated in State v. Brooks, 604 N.W.2d 345, 347 (Minn.2000). Therefore, an exception to the mootness doctrine is in order to avoid future confusion in Minnesota on this issue. There is really no point in getting any State or Federal statutory intellectual property protection so long as this comprehensive Minnesota state common law intellectual property regime exists. This order will also provide a heretofore unknown avenue for such litigation and would produce an enormous

burden on Minnesota's state judicial system. In light of the fact that two Minnesota District Court Judges have found this claim to be a valid state law claim in Minnesota, it deserves to be addressed to clear up any confusion.

Article I, Section 8 of the United States Constitution specifically enumerates (in relevant part) the following power to the United States Congress:

*"To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."*

There is a limited area in which state law, by statute relating to powers within the province of the states can implicate state powers relating to intellectual property, and these laws pertain to trademarks and service marks within their respective jurisdictions, and there are no such statutory claims relating to the proceedings which have been asserted in this case.

State governments are limited in the area of intellectual property by the United States Constitution in its plain words and as interpreted by the United States Supreme Court in Bonito Boats v. Thundercraft Boats, 489 U.S. 141 (1989), which held that a state statute protecting a boat hull design, which purported to protect via the power of the State of Florida the molding design for a speedboat, was found to be outside of the powers of any state on its own. This is otherwise known as a "pre-emption" argument, meaning Federal law pre-empts state law. The Plaintiff did not provide any testimony

about any property interest protected under the laws of the State of Minnesota, the Constitution of the United States, or any Federal Statute.

Tate v. Scanlon, 403 N.W.2d 666 (Minn. 1987) involves express and implied contract claims relating to a proposed business venture, and no such venture exists in this case, and in any event, any state common law intellectual property claim purporting to arise out of dicta in this case is superceded by the holding of the United States Supreme Court in *Bonito Boats*, in which Federal law explicitly pre-empts state law relating to intellectual property. So even if Tate v. Scanlon was good law in 1987, it was expressly overturned by the United States Supreme Court in Bonito Boats in 1989. Outside of the breach of a private contract between two parties, written or oral, there does not exist a protected property interest independently deriving itself from the common law of the state of Minnesota.

### CONCLUSION

In light of the foregoing arguments and the record herein, the Appellant respectfully requests that the orders and judgments of the Trial Court below in favor of the Respondent be reversed.

Respectfully submitted,

Dated: June 11, 2008



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**Certificate of Compliance**

This brief complies with the word/line limitations of Minn. R. Civ. App. P. 132.01, subd. 3(a). The brief was prepared using Microsoft Word 2000, which reports that the brief contains 399 lines and 4,826 words.

Dated: June 11, 2008



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