

NO. A12-0538

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State of Minnesota  
In Court of Appeals

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Kolberg-Pioneer, Inc.,

*Appellant,*

v.

Belgrade Steel Tank Co.,

*Respondent.*

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**APPELLANT'S REPLY BRIEF**

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## INTRODUCTION

For its entire half-century existence, Belgrade has designed and made products exclusively within Minnesota's borders.<sup>1</sup> In 1996, Belgrade made one of its low-profile portable silos.<sup>2</sup> Belgrade sold that silo to KPI and shipped the silo from its facility in Minnesota to KPI's headquarters in Yankton, South Dakota.<sup>3</sup> KPI promptly resold the silo to a Montana equipment dealer.<sup>4</sup> That dealer in turn sold Belgrade's silo to an environmental-remediation company, Envirocon.<sup>5</sup> For the next decade, Envirocon used Belgrade's silo on projects across the country, apparently without incident.<sup>6</sup>

In October 2006, just having come from a job in Florida, Belgrade's silo allegedly injured Envirocon employee Judith Ficek at a Montana worksite.<sup>7</sup> Ms. Ficek believed that defects in Belgrade's silo caused her injuries.<sup>8</sup> She therefore sued both Belgrade and KPI in Montana federal court on a single theory—strict product liability.<sup>9</sup> It is undisputed that Belgrade alone created each of the alleged silo defects that Ms. Ficek criticized.<sup>10</sup>

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<sup>1</sup> Appellant KPI's Opening Brief at pp. 4–5.

<sup>2</sup> Id.

<sup>3</sup> Id.

<sup>4</sup> Id. at p. 5.

<sup>5</sup> Id.

<sup>6</sup> Id. at p. 6.

<sup>7</sup> Id. at pp. 6–7.

<sup>8</sup> Id. at pp. 7–8.

<sup>9</sup> Id.

<sup>10</sup> Id. at pp. 8–10.

In November 2010, after Belgrade had refused KPI's repeated tenders of defense in the Montana case, KPI commenced the instant suit seeking indemnity from Belgrade under Minnesota common law.<sup>11</sup> A few months later, KPI and Belgrade each reached separate settlements with Ms. Ficek.<sup>12</sup>

Belgrade does not dispute that KPI's liability in the Montana case was merely derivative or vicarious of Belgrade's liability.<sup>13</sup> Therefore, under Minnesota law, Belgrade must indemnify KPI for its settlement payment to Ms. Ficek and for the attorneys' fees and litigation costs KPI incurred in the Montana lawsuit.

This appeal concerns the dispute about which state's law—Minnesota or Montana—governs Belgrade's obligation to indemnify downstream sellers of its product sued in strict liability over alleged defects in Belgrade's product. Instead of standing behind the design of its product, Belgrade attempts to escape the indemnity obligations it has to KPI under Minnesota law. Belgrade does so by invoking a peculiarity of Montana law, which says that, simply by settling with Ms. Ficek, Belgrade "extinguished" KPI's indemnity rights by operation of law.

KPI's indemnity claim is based on the relationship between Belgrade and KPI. That relationship is centered in Minnesota. Under Minnesota conflict-of-laws principles, that relationship is governed by Minnesota law, not Montana law. Belgrade has not

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<sup>11</sup> *Id.* at pp. 7, 10.

<sup>12</sup> *Id.* at p. 11.

<sup>13</sup> Respondent Belgrade's Brief at p. 5.

demonstrated otherwise. Belgrade cannot invoke Montana law to evade its obligations to stand behind its product and indemnify KPI.

### **REPLY TO BELGRADE'S STATEMENT OF FACTS**

KPI replies to only a few of the assertions in the Statement of Facts in Belgrade's response brief:

**Certain assertions in Belgrade's Statement of Facts are irrelevant.** Belgrade bills its Statement of Facts as a recitation of the "controlling and undisputed facts." But Belgrade's Statement includes assertions such as that KPI requested the silo at issue be painted a certain color and that Belgrade "welcomed input from KPI on design and other issues." The color of the silo had nothing to do with Ms. Ficek's accident. Moreover, it is undisputed that KPI provided no input into and had no involvement in creating the aspects of Belgrade's silo that Ms. Ficek criticized in the Montana lawsuit.<sup>14</sup> That is why the District Court held that KPI's liability in the Montana case was purely derivative or vicarious of Belgrade's liability. Belgrade does not challenge this ruling, so it is odd that Belgrade chose to bring up facts like the paint color of the silo.

**Ms. Ficek based her claims against KPI and Belgrade in the Montana case on alleged defects in Belgrade's silo, not KPI's pug mill.** In her complaint, Ms. Ficek inartfully identified the alleged mechanism of her injuries as a "pug mill." But in a court filing that followed shortly thereafter, she clarified that she was hurt by an "exploding

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<sup>14</sup> Appellant KPI's Opening Brief at pp. 8–10 (citing testimony of Belgrade President Les Thompson).

hatch" atop a silo.<sup>15</sup> Belgrade, however, maintains that Ms. Ficek's "sole complaint" against KPI "was that it had manufactured and sold a defective 'pug mill,' which played a role in causing her injuries."<sup>16</sup> The allegations against KPI in Ms. Ficek's complaint were identical to those against Belgrade.<sup>17</sup> Belgrade knows KPI's pug mill had nothing to do with Ms. Ficek's accident.

Ms. Ficek confirmed the irrelevance of the pug mill early in the Montana case. In March 2010, she admitted that the pug mill was not running when she was hurt and that she never came into physical contact with it on the day of her accident.<sup>18</sup> The only reason KPI was sued in Montana was that KPI sold Belgrade's silo in 1996; otherwise, KPI would have been dismissed from the Montana case on summary judgment.

If Ms. Ficek was injured by a product, that product was Belgrade's silo. Belgrade is attempting to use Ms. Ficek's inartfully drawn complaint to obscure the true nature of her strict liability claim against Belgrade and KPI. This is an odd position for Belgrade to take because Belgrade does not dispute that KPI's potential liability in the Montana case derived purely from Belgrade's potential liability.<sup>19</sup>

KPI agrees with Belgrade that "the focus is on the claims [Ms. Ficek] eventually made" in the Montana lawsuit.<sup>20</sup> Any liability that KPI might have had on the claim

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<sup>15</sup> Appellant KPI's Opening Brief at p. 8; AA-239.

<sup>16</sup> Respondent Belgrade's Brief at p. 3.

<sup>17</sup> Appellant KPI's Opening Brief at p. 8; AA-4, -9, -122 to -123.

<sup>18</sup> Appellant KPI's Opening Brief at p. 7; AA-247 to -248, -252.

<sup>19</sup> Respondent Belgrade's Brief at p. 5.

<sup>20</sup> Respondent Belgrade's Brief at p. 3.

against it in the Montana lawsuit would have been based purely on defects in and warnings about Belgrade's silo, for which Belgrade was solely responsible.

### ARGUMENT

In its response brief, Belgrade agrees with KPI that the five choice-of-law factors adopted by the Minnesota Supreme Court in apply to the question whether Montana or Minnesota law governs KPI's and Belgrade's rights and obligations. KPI, of course, disagrees with Belgrade's conclusion that the Milkovich factors compel the application of Montana law. KPI will address Belgrade's arguments under the Milkovich factors in turn.

Before doing so, however, KPI endeavors to put the choice-of-law question into the proper context. Belgrade's response brief and particularly its statement of the issue on appeal attempts to focus the Court's attention on Ms. Ficek, where she was injured, and where her injuries were treated. Ms. Ficek is not and never has been a party to this lawsuit. KPI and Belgrade are the only parties. This case arises from Belgrade's sale of its silo to KPI—a consensual business transaction that occurred here more than a decade before Ms. Ficek was allegedly injured by Belgrade's silo. This suit concerns the rights and obligations of Belgrade and KPI that arise from that transaction. Those rights and obligations are not dependent on where Belgrade's product ultimately caused injury.

The transaction in Minnesota between KPI and Belgrade is the focus of the choice-of-law analysis. In this context, KPI addresses Belgrade's arguments under the Milkovich factors.

**1. Predictability of results—Applying Minnesota law to determine KPI's and Belgrade's rights and obligations enhances the predictability of their contractual arrangement.**

Predictability of results, the first choice-of-law factor the Court must consider, "applies primarily to consensual transactions where the parties desire advance notice of which state law will govern in future disputes. It is intended to protect the justified expectations of the parties to the transaction."<sup>21</sup>

Belgrade says this factor favors neither Minnesota law nor Montana law because neither KPI nor Belgrade expressed a desire to know in advance whose law would govern a future dispute between them. Belgrade's argument begs the question of which state's law should govern. If the parties had explicitly chosen a particular state's law in advance, no choice-of-law analysis would be necessary.

Moreover, it is apparent that in analyzing the predictability of results factor the Minnesota courts are saying that, by their nature, "consensual transactions" are the kinds of encounters in which "the parties desire advance notice of which state law will govern in future disputes."<sup>22</sup>

Applying Minnesota law to determine KPI's and Belgrade's rights and obligations enhances the predictability of their transaction. The transaction occurred in Minnesota. The parties' relationship is centered here. If they became engaged in a dispute arising from the transaction—for example, a breach of warranty claim by KPI against

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<sup>21</sup> Medtronic, Inc. v. Advanced Bionics Corp., 630 N.W.2d 438, 454 (Minn. Ct. App. 2001) (internal citations and quotation marks omitted).

<sup>22</sup> E.g., id.

Belgrade—they would be justified in expecting Minnesota law would govern that dispute. KPI would not have a common law indemnity claim against Belgrade but for the transaction whereby Belgrade sold the silo to KPI in Minnesota. Both Belgrade and KPI should expect that Belgrade's indemnity obligations would be determined according to Minnesota law.

By contrast, applying Montana law in this case would diminish the predictability of the parties' transaction. Belgrade sold the silo to KPI in 1996. KPI resold it the same year. KPI had no more control over where or how the end user employed the silo than did Belgrade. Neither Belgrade nor KPI could justifiably expect that a dispute arising from their transaction would be governed by the law of the state in which the silo happened to be located when it injured a third party.

In its Statement of Facts, Belgrade says, "In April 1996, KPI submitted a purchase order to Belgrade for the purchase of eleven silos for delivery to KPI's principal place of business in Yankton, South Dakota."<sup>23</sup> While incorrect (KPI bought only one silo from Belgrade in April 1996),<sup>24</sup> this statement serves to highlight the importance of the predictability of results factor.

Belgrade has posited a single transaction in which KPI purchased 11 silos from Belgrade. KPI is an equipment manufacturer, not an end user, so it would have resold each of the silos. Suppose each ended up in a different state; each allegedly injured someone in the same manner that Ms. Ficek claimed; and as a result KPI and Belgrade

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<sup>23</sup> Respondent Belgrade's Brief at p. 2.

<sup>24</sup> AA-286 (Invoice from Belgrade to KPI (then Portec) dated 4/22/96).

were sued in strict liability in each state. Is the predictability of the transaction between Belgrade and KPI enhanced by a holding that Belgrade's common law indemnity obligations to KPI are determined by the varying laws of each state in which the 11 silos ended up hurting someone? To ask this question is to answer it. The predictability of the Belgrade-KPI transaction would be enhanced by a holding that, in any event, Belgrade's indemnity obligations to KPI are determined by the law of Minnesota, the state in which their relationship is centered.

The predictability of results factor favors applying Minnesota law to this case. Belgrade's argument to the contrary is without merit.

**2. Maintenance of interstate order—This factor is designed to discourage forum shopping. Because the relevant facts of this case have a substantial connection to Minnesota, this case does not implicate the concerns underlying the policy against encouraging forum shopping.**

Belgrade cites Medtronic, Inc. v. Advanced Bionics Corp., 630 N.W.2d 438 (Minn. Ct. App. 2001), in discussing the second choice-of-law factor, maintenance of interstate order. In Medtronic, this Court stated, "The primary issue under this factor is whether applying Minnesota law would 'manifest disrespect' for [the non-forum state's] sovereignty or impede interstate commerce."<sup>25</sup>

Belgrade's only argument under this factor is that KPI supposedly engaged in forum shopping by asserting its indemnity claim in Minnesota. "Evidence of forum shopping, or that application of Minnesota's law would promote forum shopping, would

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<sup>25</sup> Medtronic, 630 N.W.2d at 455 (quoting Jepson v. Gen. Cas. Co. of Wisconsin, 513 N.W.2d 467, 471 (Minn. 1994)).

indicate" disrespect for the sovereignty of the non-forum state.<sup>26</sup> A plaintiff does not engage in forum shopping merely by filing suit in Minnesota when the law here is more favorable. Rather, as the Minnesota Supreme Court has held, the purpose of the policy against forum shopping is to discourage parties from filing cases here that have "little genuine contact with the state."<sup>27</sup>

This case's connection to Minnesota is not merely tangential or attenuated. The claim here concerns the indemnity obligations of Minnesota resident Belgrade that arise from a business transaction that occurred in this state whereby Belgrade sold a product that it had designed and made within this state's borders. This case has a deep connection to this state. Forum shopping is not an issue here.

In support of its forum shopping argument, Belgrade cites Jepson v. Gen. Cas. Co. of Wisconsin, 513 N.W.2d 467 (Minn. 1994). In that case, the plaintiff Jepson, a Minnesota resident, was hurt in a car wreck in Arizona.<sup>28</sup> Jepson had insurance through the defendant insurer on several vehicles he had registered in North Dakota.<sup>29</sup> Based on the Arizona accident, Jepson sued in North Dakota to obtain no-fault benefits from his insurer under North Dakota's no-fault law.<sup>30</sup> Jepson then sued his insurer in Minnesota to recover underinsured motorist benefits, claiming Minnesota and not North Dakota law

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<sup>26</sup> Medtronic, 630 N.W.2d at 455.

<sup>27</sup> Hime v. State Farm Fire & Cas. Co., 284 N.W.2d 829, 833 (Minn. 1979).

<sup>28</sup> Id. at 469.

<sup>29</sup> Id. at 468.

<sup>30</sup> Id. at 469.

governed his claim. Minnesota law regarding underinsured motorist benefits was more favorable to Jepson than was North Dakota law.<sup>31</sup>

The Minnesota Supreme Court held that North Dakota law applied to Jepson's claim. In discussing the second Milkovich factor—maintenance of interstate order—the high court reasoned:

People who purposefully seek advantages offered by another state ought not be allowed to avoid the burdens associated with their choice. We find evidence that Jepson is forum shopping in bringing this suit in our state's courts **because he commenced, although settling prior to filing suit, litigation in North Dakota to secure no fault benefits payable under North Dakota law.**

Id. at 471 (emphasis supplied).

Unlike the plaintiff in Jepson, KPI did not invoke the judicial process of the non-forum state (Montana) before suing in Minnesota. Rather, KPI was haled into the Montana court. The facts of Jepson are completely distinguishable from those of this case.

The facts of this case do not implicate Minnesota's policy of discouraging forum shopping. And Belgrade has not argued that applying Minnesota law would otherwise manifest disrespect for Montana's sovereignty. Nor has Belgrade suggested that Minnesota is an improper forum for KPI's claim. And Belgrade has not argued that applying Minnesota law in this case would impede interstate commerce. Accordingly, the second choice-of-law factor is not determinative of which state's law should apply to this case.

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<sup>31</sup> Id. at 468–69.

**3. Simplification of the judicial task—This factor is not determinative.**

The parties agree and the District Court held this factor does not weigh in favor of either Montana or Minnesota law.

**4. Advancement of the forum's governmental interest—The predominant interest of Minnesota in this case is the policy of imposing the costs of an allegedly defective product on the maker.**

This factor "goes to which law would most effectively advance a significant interest of the forum state. This factor is designed to assure that Minnesota courts do not have to apply rules of law that are inconsistent with Minnesota's concept of fairness and equity."<sup>32</sup> In applying this factor, courts are to consider the public policy of both jurisdictions whose laws may be applied.<sup>33</sup>

This factor may require a court to consider several relevant Minnesota public policies, certain of which may be diametrically opposed to each other. The Minnesota Supreme Court tackled this issue in Myers v. Gov't Emp. Ins. Co., 225 N.W.2d 238 (Minn. 1974), in which the high court stated, "Upon examination, it is apparent that conflicting policies exist in Minnesota which must be resolved to determine what governmental interest is to be considered."<sup>34</sup> To resolve such a conflict, a court must decide what is the "predominant consideration of Minnesota."<sup>35</sup>

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<sup>32</sup> Danielson v. Nat'l Supply Co., 670 N.W.2d 1, 8 (Minn. Ct. App. 2003).

<sup>33</sup> Id.

<sup>34</sup> Myers, 225 N.W.2d at 243. Myers is discussed in detail in Appellant KPI's Opening Brief at pp. 27–31.

<sup>35</sup> Myers, 225 N.W.2d at 244.

In its response brief, Belgrade focuses on Minnesota's general policy of promoting the finality of settlement, but it ignores the state's predominant consideration—imposing the cost of a defective product on the product's maker. The public policy of Minnesota, expressed by its highest court and legislature, is that product sellers who did not create design flaws in products they have sold should not be saddled with the costs of defending those design flaws in litigation. Rather, those costs should be borne by the product manufacturers and may be recovered by product sellers by way of a common law indemnity claim.<sup>36</sup> By contrast, Montana allows product manufacturers to extinguish downstream sellers' indemnity rights simply by settling with product liability plaintiffs. This rule of law is antithetical to Minnesota's concept of fairness and equity expressed by its highest court and legislature.

To the extent that Belgrade was concerned about the finality of its settlement with Ms. Ficek, Belgrade squandered several opportunities to ensure the finality of that settlement. KPI tendered its defense in the Montana case to Belgrade in September 2009. Belgrade refused. KPI renewed its tender to Belgrade in August 2010. Belgrade again refused. In February 2011, months after KPI had commenced this suit, Belgrade settled with Ms. Ficek without prior notice to KPI. In the spring of 2011, when KPI was negotiating the terms of its settlement with Ms. Ficek, KPI invited Belgrade to participate in those discussions. Belgrade declined KPI's invitation. Belgrade should not be permitted to invoke Minnesota's policy of promoting the finality of settlements; Belgrade

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<sup>36</sup> Minn. Stat. § 544.41; Farr v. Armstrong Rubber Co., 179 N.W.2d 64 (Minn. 1970); In re Shigellosis Litig., 647 N.W.2d 1, 6, 8 (Minn. Ct. App. 2002) (discussing Minn. Stat. § 544.41).

had every opportunity to ensure the finality of its settlement with Ms. Ficek but chose not to do so.

The choice-of-law factor concerned with advancement of the forum's governmental interest favors application of Minnesota law to this case.

**5. Application of the better rule of law—Minnesota has the better rule of law.**

To the extent the Court considers this to be a relevant factor in the choice-of-law analysis, Minnesota has the better rule of law for the reasons discussed in KPI's opening brief.<sup>37</sup> At minimum, this factor is neutral.

**6. The place of Ms. Ficek's accident does not dictate that Montana law applies to this case.**

Relying on Nodak Mut. Ins. Co. v. Am. Family Mut. Ins. Co., 604 N.W.2d 91 (Minn. 2000), Belgrade urges the Court to revert to the rule of *lex loci*. Nodak involved a dispute between the insurers of two drivers (a Minnesota resident and a North Dakota resident) who had been involved in a car wreck in North Dakota. The issue was whether to apply North Dakota law, which allowed equitable allocation of no-fault benefits among insurers, or Minnesota law, which did not.<sup>38</sup> Upon applying the Milkovich factors, the Nodak court determined that none of the factors favored the law of one state over the other. Accordingly, the court held that, "when all other relevant choice-of-law

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<sup>37</sup> Appellant KPI's Opening Brief at p. 31.

<sup>38</sup> Nodak, 604 N.W.2d at 92–93.

factors favor neither state's law, the state where the accident occurred has the strongest governmental interest," and its law should be applied.<sup>39</sup>

Nodak involved a dispute between two parties who had no prior contractual or business relationship, unlike KPI and Belgrade. Thus, Nodak is distinguishable from this case on its facts. Moreover, the rule from Nodak only applies when **none** of the five Milkovich factors favor one state's law. In this case, the first and fourth Milkovich factors favor Minnesota law. Accordingly, Nodak does not apply here.

### CONCLUSION

The claim in this lawsuit arises from the relationship between South Dakota resident KPI and Minnesota resident Belgrade. Belgrade designed and manufactured a silo in this state. Belgrade introduced that silo into the stream of commerce in this state when it sold the silo to KPI. KPI in turn promptly resold it. More than ten years later, the silo allegedly injured someone when it happened to be located in Montana. As a result, KPI was sued in strict liability in Montana. KPI had to spend money defending against a claim that alleged defects in Belgrade's silo caused the injuries complained of. Belgrade was solely responsible for creating the alleged defects in the silo. KPI had nothing to do with the alleged defects.

Under these circumstances, Minnesota law, unlike that of Montana, would allow KPI to obtain indemnity from Belgrade, regardless of whether Belgrade had settled with the product liability plaintiff. Under Minnesota's conflict-of-laws analysis, Minnesota

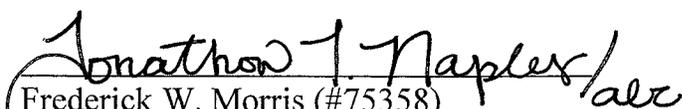
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<sup>39</sup> Nodak, 604 N.W.2d at 96.

law, not Montana law, determines KPI's right to indemnity from Belgrade for the expenses KPI incurred to defend and resolve the product liability lawsuit that was based on Belgrade's silo. Belgrade should not be allowed to invoke Montana law to evade its responsibilities to stand behind its product and indemnify KPI.

The Court should hold that Minnesota law applies to this case and should remand this case for further proceedings consistent with the District Court's ruling that KPI's potential liability in the underlying product liability case was purely derivative or vicarious of Belgrade's potential liability.

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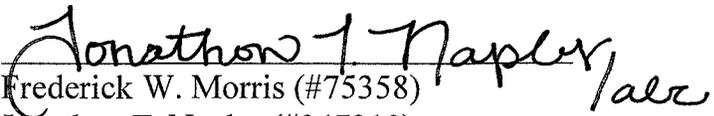
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## CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subdivs. 1 and 3, for a brief produced with a proportional font. By automatic word count, the length of this brief is 3,571 words. This brief was prepared using Microsoft Word 2003.

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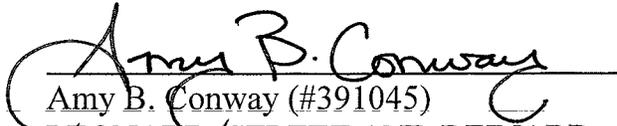
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**DECLARATION OF AUTHORITY TO SIGN**

I, Amy B. Conway, hereby declare under penalty of perjury that I am duly authorized to sign on behalf of Counsel for Appellant Jonathon T. Naples, as he is unavailable to do so himself.

Executed: July 12, 2012

A handwritten signature in black ink that reads "Amy B. Conway". The signature is written in a cursive style and is positioned above a horizontal line.

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