

Supreme Court No. A05-0590

STATE OF MINNESOTA

IN SUPREME COURT

---

**Kmart Corporation,**

*Relator,*

vs.

**County of Clay,**

*Respondent.*

---

**RELATOR'S REPLY BRIEF**

---

LISA N. BORGEN  
Clay County Attorney  
MICHELLE CADUFF WINKIS (#2771421)  
Assistant Clay County Attorney  
Clay County Courthouse  
807 11th Street North  
Moorhead, MN 56561-0280  
Phone: (218) 299-7647

*ATTORNEYS FOR RESPONDENT  
COUNTY OF CLAY*

FREDRIKSON & BYRON, P.A.  
THOMAS R. WILHELMY (#117134)  
STEVEN J. QUAM (#250673)  
200 South Sixth Street  
Suite 4000  
Minneapolis, MN 55402-1425  
Phone: (612) 492-7058 (TRW)  
Phone: (612) 492-7183 (SJQ)

*ATTORNEYS FOR RELATOR  
KMART CORPORATION*

**TABLE OF CONTENTS**

	<b><u>Page</u></b>
TABLE OF AUTHORITIES .....	iii
INTRODUCTION.....	1
FACTS .....	3
A.    Brenda Byram served 9 petitions in Becker County in a little over 30 minutes.....	3
B.    The Norman County officials acted in a professional manner.....	4
C.    The Tax Court did not make a specific finding regarding whether the conduct of the Clay County officials was appropriate. ....	4
ARGUMENT .....	4
I.    KMART COMPLIED WITH THE REQUIREMENTS OF MINN. STAT. § 278.01. ....	4
A.    Kmart commenced the action by personally serving the County Auditor.....	4
II.   KMART PERSONALLY SERVED ALL FOUR CLAY COUNTY OFFICIALS.....	5
III.  THE CLAY COUNTY OFFICIALS INTERFERED WITH KMART’S EFFORT TO COMPLY WITH MINN. STAT. § 278.01. ....	6
A.    Treasurer Swetland hindered Kmart’s effort to comply with Minn. Stat. § 278.01.....	7
B.    Assessor Johnson hindered Kmart’s effort to comply with Minn. Stat. § 278.01.....	8
C.    County Attorney Borgen hindered with Kmart’s effort to comply with Minn. Stat. § 278.01.....	9
D.    For public servants, the work day does not end at 4:30. ....	10
IV.   PUBLIC POLICY SUPPORTS REVERSING THE TAX COURT’S DECISION.....	11

V. THE PROCESS SERVER'S FAILURE TO FILE  
PROOF OF SERVICE ON APRIL 30, 2003 DID  
NOT DEPRIVE THE COURT OF JURISDICTION.....12

CONCLUSION.....14

**TABLE OF AUTHORITIES**

**STATE CASES**

*Board of Comm'rs v. Dicky*, 86 Minn. 331, 90 N.W. 775 (1902).....11

*Carlson v. Cohen*, 302 Minn. 531, 223 N.W.2d 820 (1974) .....6

*Homart Dev. Co. v. County of Hennepin*, 538 N.W.2d 907 (Minn. 1995).....10

*Leland v. Heiberg*, 194 N.W. 93 (Minn. 1923).....14

*Nielsen v. Braland*, 264 Minn. 481, 119 N.W.2d 737 (1963).....5

**TAX COURT DECISIONS**

*Guyse v. County of Olmsted*, File No. C3-92-1526  
(Minn. Tax Ct. Jan. 15, 1993).....12

*Hechter Gateway Ltd. P'Ship v. County of Scott*, File No. 94-05536  
(Minn. Tax Ct. Oct. 24, 1994) .....6

*Kwapick v. County of Ramsey*, File No. C2-00-1618  
(Minn. Tax Ct., Oct. 12, 2000) .....12, 13

*Puri v. County of Stearns*, File No. C7-94-4349-S  
(Minn. Tax Ct., May 18, 1999).....6

**STATE STATUTES**

Minn. Stat. § 278.01.....1, 5, 6, 7,  
8, 9, 10

Minn. Stat. § 645.45(9).....10

**MINNESOTA RULES OF CIVIL PROCEDURE**

Minn. R. Civ. P. 1 .....5

Minn. R. Civ. P. 3.01 .....4,5

Minn. R. Civ. P. 4.03 .....4,5

Minn. R. Civ. P. 5.02 .....5

**MINNESOTA GENERAL RULES OF PRACTICE**

Minn. R. Gen. P. 7 .....14

## INTRODUCTION

Minnesota has a proud heritage of public service. Public servants ranging from township board members to Senator Hubert Humphrey have dedicated themselves to serving the citizens of Minnesota. The vast majority of Minnesota's public servants have served their constituents fairly, honorably, and well. Unfortunately, on April 30, 2003, the Clay County Treasurer, the Clay County Assessor, and the Clay County Attorney departed from Minnesota's tradition of public service. Rather than conduct themselves in a professional and decent manner, the Clay County officials acted as if they were participants in control of some sort of game, the goal of which was to deprive a property owner (Kmart) of its right to contest its 2003 property taxes. The conduct of the Clay County officials was the antithesis of public service.

The game began at about 4:15 on April 30, 2003, in the office of the Clay County Treasurer when Treasurer Swetland received Kmart's 2003 Petition. Rather than simply sign the acknowledgement of service attached to the original Petition, Treasurer Swetland slowly read the Kmart Petition (and two others) page by page. After holding Kmart's Petition in her hand for about 18 minutes, Treasurer Swetland informed Kmart's process server that it was 4:33, that her office was closed, and that she would not accept service of Kmart's Petition.

The game did not end there. On April 30, the Clay County Attorney learned that a process server was attempting to serve her with several documents. The County Attorney informed the process server that she was out of luck, and that the process server could serve her the next day. Shortly after speaking to the process server, the County Attorney

returned to her office to work. Even though she was at the County Attorney's office that evening performing the other duties of the County Attorney, County Attorney Borgen refused to meet the process server to accept service of Kmart's Petition. Although she was served the next day as she had requested, the County Attorney moved to dismiss Kmart's Petition on the ground that she (and the County Assessor) had not been served in a timely manner.

Still, the game was not over. On the evening of April 30, the Clay County Assessor spoke to the process server by phone. As a result of the telephone call, Assessor Johnson learned that the process server was attempting to personally serve him with several property tax petitions for major taxpayers. Unsure as to whether he needed to accept service, Assessor Johnson called Assistant County Attorney Michelle Winkis. After speaking with Ms. Winkis, Assessor Johnson believed that he did not have to accept service of the petitions on April 30. On the evening of April 30, County Assessor Johnson heard his doorbell ringing for several minutes. He also heard knocking on the door. Assessor Johnson could have opened the door and accepted service of Kmart's Petition. He chose not to do so. Instead, he ignored the ringing doorbell, ignored the knocking, turned off the lights, and walked downstairs.

In short, the County Attorney, County Assessor, and County Treasurer thumbed their collective nose at Kmart's process server. Rather than act as public servants, the county officials acted in a manner that affirmatively hindered and then obstructed Kmart's efforts to commence a property tax protest. The conduct of the erstwhile Clay County public servants should neither be condoned nor encouraged. Reversing the Tax

Court's decision will both correct a substantial injustice and send the proper message to all public servants.

### **FACTS<sup>1</sup>**

#### **A. Brenda Byram served 9 petitions in Becker County in a little over 30 minutes.**

In its brief, Clay County contends that it took approximately 30 to 45 minutes to complete service in Becker County, and that the service "went very well." Clay County Brief at 3. The implication is that under the best of circumstances, a service would take at least 30 minutes and perhaps up to 45 minutes.

To be precise, Ms. Byram testified that she was in Becker County just a little more than half an hour. (Tr. 50). She testified that she did not think she was in Becker County 45 minutes.<sup>2</sup> (Tr. 50). Further, Ms. Byram served nine petitions in Becker County. Finally, in order to complete the service of the nine petitions, Ms. Byram had to wait for the fourth county official to return to the office after lunch. (Tr. 33).

More importantly, it is undisputed that the Becker County officials acted in a helpful, efficient, and professional manner. In fact, when two of the Becker County officials recognized that property tax petitions were being served, they attempted to assist the process server by telephoning the other two officials that needed to sign the petitions.

---

<sup>1</sup> Petitioner set forth the relevant facts in its initial brief. In its response, Clay County raised a number of additional facts. To be fairly considered, however, the facts cited by the Clay County must be reviewed in context.

<sup>2</sup> Given Ms. Byram's testimony, Clay County's contention that it took Ms. Byram between 30 and 45 minutes, though technically accurate, is at best misleading.

(Tr. 33). None of the Becker County officials took more than a minute to sign the petitions. (Tr. 34).

**B. The Norman County officials acted in a professional manner.**

In Norman County, Ms. Byram completed the service of possibly three petitions at two locations in “maybe half an hour.” (Tr. 52-53). Like the Becker County officials, the Norman County officials similarly acted in a cooperative and professional manner. (Tr. 34). None of the Norman County officials took longer than a minute to sign the petitions. (Tr. 34).

**C. The Tax Court did not make a specific finding regarding whether the conduct of the Clay County officials was appropriate.**

In its brief, Clay County asserts that the Tax Court found that neither the County Attorney nor the County Assessor engaged in any inappropriate conduct. (Clay County Brief, pp. 1, 15). Although the Tax Court granted Clay County’s motion to dismiss, the Tax Court did not make any specific finding regarding whether the conduct of the Clay County officials was appropriate.

**ARGUMENT**

**I. K MART COMPLIED WITH THE REQUIREMENTS OF MINN. STAT. § 278.01.**

**A. Kmart commenced the action by personally serving the County Auditor.**

Kmart personally served the Clay County Auditor on April 30, 2003. That fact is undisputed. As is stated in Kmart’s principal brief, personal service on the auditor commenced the civil action under Rules 3.01 and 4.03(e) of the Minnesota Rules of Civil

Procedure. Once the action was commenced, Rule 5.02 provided Kmart with the authority to make subsequent services by facsimile.

Clay County argues that if the Court adopted Kmart's interpretation of Rule 4.03, the specific requirements of Minn. Stat. § 278.01 would be ignored. To the contrary, Kmart's suggested interpretation of Rule 4.03 is both consistent with Minn. Stat. § 278.01 and consistent with the policy set forth in Rule 1 of the Minnesota Rules of Civil Procedure.

Section 278.01 requires that a petitioner must serve four separate county officials by April 30, 2003. Significantly, the statute does not state that each of the four county officials must be personally served. Rule 1 requires that the Rules of Civil Procedure be construed and administered to secure the "just, speedy, and inexpensive determination of every action." Minn. R. Civ. P. 1. Commencing an action by personally serving the county auditor, followed by serving the assessor, attorney and treasurer by facsimile, is consistent with the policy underlying Rule 1. The suggested interpretation is speedy, just, and inexpensive. Yet, it ensures that each party identified in the statute will be served with the petition by April 30, 2003. Further, because the interpretation offered by Kmart requires personal service on the county auditor, there can be no doubt that the respondent county will receive actual notice of the petition on April 30.

## **II. KMART PERSONALLY SERVED ALL FOUR CLAY COUNTY OFFICIALS.**

As described more fully in Kmart's opening brief, the Assessor and County Attorney were effectively served under this Court's rulings in *Nielsen v. Braland*, 264

Minn. 481, 484, 119 N.W.2d 737, 739 (1963), and *Carlson v. Cohen*, 302 Minn. 531, 223 N.W.2d 820 (1974). Because Kmart's Petition was properly served on April 30, 2003, the Tax Court should be reversed.

**III. THE CLAY COUNTY OFFICIALS INTERFERED WITH KMART'S EFFORT TO COMPLY WITH MINN. STAT. § 278.01.**

For the reasons set forth above, Kmart properly complied with the requirements of Minn. Stat. § 278.01. Nonetheless, the conduct of the Clay County officials provides an alternative ground to reverse the Tax Court's decision.

In its principal brief, Kmart cited two cases – *Hechter Gateway Ltd. P'Ship v. County of Scott*, File No. 94-05536 (Minn. Tax Ct. Oct. 24, 1994) and *Puri v. County of Stearns*, File No. C7-94-4349-S (Minn. Tax Ct. May 18, 1995). *Hechter* and *Puri* stand for the proposition that if county officials contribute (even innocently) to a property tax petitioner's failure to comply with the technical requirements of Minn. Stat. § 278.01, the court may not seek to dismiss the petition for failing to comply with the technical service requirements of the statute.

Significantly, Clay County does not take issue with that Kmart's citation to *Hechter* and *Puri*, or to Kmart's recitation of the legal principles for which they stand. Rather, Clay County contends that none of its officials hindered Kmart's effort to serve and file its Petition.<sup>3</sup> A critical question for this Court then becomes whether the Clay

---

<sup>3</sup> Clay County goes so far as to include the following headings in its brief – A. Treasurer Swetland did nothing inappropriate on April 30, 2003; B. Assessor Johnson did nothing appropriate on April 30, 2003; and C. Attorney Borgen did nothing inappropriate on April 30, 2003.

County officials hindered Kmart's effort to comply with the requirements of Minn. Stat. § 278.01.

**A. Treasurer Swetland hindered Kmart's effort to comply with Minn. Stat. § 278.01.**

The facts regarding Ms. Swetland's conduct are undisputed. She received Kmart's Petition shortly after 4:15 p.m. on April 30. (Tr. 61). After holding the Kmart Petition in her hand for approximately 18 minutes while reading two other petitions, Treasurer Swetland returned the Petition to Kmart's process server at 4:33. (Tr. 36). At that point, Treasurer Swetland stated that the office was closed, and that she would not accept service of the Petition. (Tr. 36). Incredibly, Clay County takes the position that Treasurer Swetland's conduct was entirely appropriate. It was not appropriate. Clay County Brief, p. 16. Nor was it professional, efficient, just, or decent.

As a result of Ms. Swetland's conduct, neither the Court, nor the parties, will ever know whether Ms. Byram would have accomplished personal service on the County Attorney and the County Assessor if Ms. Swetland had simply signed the acknowledgement of service, as did the Becker County officials, the Norman County officials, and the Clay County Auditor. It is safe to say, however, that if Treasurer Swetland had simply signed the Petition (as the previous nine county officials had done) then Ms. Byram certainly would have had the opportunity to enter the Clay County Courthouse. The conduct of Treasurer Swetland alone, which clearly hindered Kmart's effort to comply with the technical requirements of Minn. Stat. § 278.01, justifies reversing the Tax Court's decision.

Rather than accept the fact that Treasurer Swetland's conduct was inappropriate, Clay County blames Brenda Byram for not immediately leaving the County Treasurer's office. Clay County's effort to blame Ms. Byram for the unprofessional and obstructive behavior of Treasurer Swetland typifies the County's approach to this motion to dismiss. As the County views this case, the individuals who represent it and act in its name are free to ignore the rules regarding service, to ignore common courtesy, and to act in an unprofessional manner. On the other hand, Kmart and its agents are required to immediately recognize that the county officials are permitted to act in an unprofessional and obstructive manner, and to take the steps necessary to address the problems created by the county official's unprofessional and obstructive conduct. The County's approach, which is supported by neither law nor common decency, must be rejected.

**B. Assessor Johnson hindered Kmart's effort to comply with Minn. Stat. § 278.01.**

On the evening of April 30, 2003, County Assessor Loren Johnson heard his doorbell ringing. (Tr. 104). Previously, he had spoken to a process server about property tax petitions that needed to be served that day. (Tr. 98). During his conversation, Assessor Johnson learned that Kmart and American Crystal Sugar, and another major taxpayer, were the petitioners seeking to serve petitions. (Tr. 99-100). Assessor Johnson was so concerned about the telephone call with the process server that he called Assistant County Attorney Michelle Winkis. (Tr. 102). After speaking with Ms. Winkis on the telephone, Assessor Johnson believed that he could tell the process server to serve him tomorrow. (Tr. 103).

When he did hear someone knocking at his door on the evening of April 30, Assessor Johnson did not open the door. (Tr. 105). Nor did he even go to the door to see who was there. (Tr. 105). Instead, Mr. Johnson turned off the lights and walked downstairs. (Tr. 105). By refusing to answer his door, Mr. Johnson hindered Kmart's effort to comply with the requirements of Minn. Stat. § 278.01.

**C. County Attorney Borgen hindered with Kmart's effort to comply with Minn. Stat. § 278.01.**

On April 30, 2003, Lisa Borgen spoke with Kmart's process server on the telephone. (Tr. 122). The process server informed County Attorney Borgen that he needed to serve her with documents that evening. Ms. Borgen did not inform the process server that she would be returning to the offices of the County Attorney shortly thereafter that evening. Nor did she arrange to meet the process server at any other convenient time or place. Instead, Ms. Borgen informed the process server that he was out of luck, that the office was closed, that he could serve her the next day. (Tr. 136-37, 122).

Shortly after receiving the call, County Attorney Borgen returned to her office to perform other duties of the County Attorney. (Tr. 131). As requested, the process server served County Attorney Borgen the next day. Nonetheless, Clay County moved to dismiss Kmart's Petition on the ground that it had not been served in a timely manner.

When she went to the office on the evening of April 30, 2003, County Attorney Borgen was working as the County Attorney. She was doing her job, serving the citizens and landowners of Clay County. Other than Kmart. Although she had the opportunity to inform Kmart's process server that she would be working at the office that evening, and

that she could be conveniently served at the County Attorney's office that evening, County Attorney Borgen chose not to do so. Apparently, County Attorney Borgen believed that she could pick and choose to work for some, but not all, of her constituents on the evening of April 30, 2003. The conduct of the Clay County officials, including that of County Attorney Borgen, hindered Kmart's effort to comply with the requirements of Minn. Stat. § 278.01. Accordingly, the Tax Court's decision dismissing Kmart's Petition should be reversed.

**D. For public servants, the work day does not end at 4:30.**

Clay County argues that the conduct of the County Attorney and the County Assessor was appropriate because the Clay County Courthouse closed at 4:30. In other words, once the official workday ended, the Clay County officials had no obligation to serve the public. Clay County further contends that the County Assessor and County Attorney have a right to privacy in his own home, and that they should be free from unwanted intrusion is hollow.

Like it or not, Assessor Johnson and Attorney Borgen are public servants. They should act accordingly. All citizens have certain rights of privacy in their homes. That right of privacy, however, does not permit a citizen, let alone a public servant, to avoid service by refusing to open his or her door.

Moreover, it is undisputed that taxpayers have until midnight on April 30 to serve their petitions. The plain language of the statute does not require service during office hours. A day, then, for this purpose, ends at midnight. Minn. Stat. § 645.45(9), *Homart Dev. Co. v. County of Hennepin*, 538 N.W.2d 907, 911-912 (Minn. 1995) (fax sent after

5:00 p.m. but before midnight to closed office of County Attorney is “furnished” on the day of transmission, since a day ends at midnight). Further, the official duties do not end at the arbitrary moment they choose to close their offices. *See e.g., Board of Comm’rs v. Dicky*, 86 Minn. 331, 341, 90 N.W. 775, 779 (1902) (a public servant is “unquestionably” a public servant “at all times”). Thus, Kmart and other taxpayers had until midnight on April 30 to serve their petitions; correspondingly, Clay County officials had to accept properly tendered service until that time.

#### **IV. PUBLIC POLICY SUPPORTS REVERSING THE TAX COURT’S DECISION.**

Regardless of the outcome, this Court’s decision will send a strong message to state officials. If the Court affirms the Tax Court’s decision, the message will be clear – public servants have the green light to go to almost any length to avoid service. If the decision is affirmed, evasive, inefficient, and unprofessional conduct will be encouraged. Worse, in certain circumstances, the conduct may be rewarded. If the county officials are evasive, inefficient or sly enough, an otherwise valid claim against the county might be dismissed.

If the Court reverses the Tax Court, the message will be equally clear – county officials are public servants, and they should act accordingly. Efficient, professional and transparent conduct will become what is expected from public servants; sly, evasive, and unprofessional conduct will not be tolerated. Stated another way, this Court should not permit a county to benefit from is wrongful and inappropriate conduct.

The officials in Becker County and Norman County, and the Clay County Auditor, treated Kmart's process server in a professional and appropriate manner; a manner that befitted public servants. They were polite, efficient, and helpful. They were in no way obstructive, and they did not hinder Kmart's effort to exercise its right to file a property tax petition. The conduct of the Becker County and Norman County officials reflects true public service. By reversing the Tax Court, conduct similar to that of the Becker County and Norman County officials will be encouraged; obstructive conduct like that of the Clay County officials will be discouraged.

**V. THE PROCESS SERVER'S FAILURE TO FILE PROOF OF SERVICE ON APRIL 30, 2003 DID NOT DEPRIVE THE COURT OF JURISDICTION.**

The Tax Court did not address Clay County's argument that this matter must be dismissed because Kmart failed to file the proof of service by April 30, 2003. Apparently recognizing the weakness of its argument regarding the service of the petitions, Clay County nonetheless leads with this alternative argument in its brief.

Clay County cites two cases to support its position that the failure to file a proof of service by April 30, 2003 deprives the Tax Court of jurisdiction over the Petitions: *Guyse v. County of Olmsted*, File No. C3-92-1526 (Minn. Tax Ct. Jan. 15, 1993) and *Kwapick v. County of Ramsey*, File No. C2-02-1618 (Minn. Tax Ct. Oct. 12, 2000). Both cases are inapposite and Clay County's reliance upon them is misplaced.

In *Guyse*, Olmsted County moved to dismiss the petition on the ground that no service of the petition was made on the County Attorney before what was then the May 16th deadline (under the same statute that is presently before this Court) and that no proof

of service was filed. More than six months later, the petitioner supplied the court with proof of service on the assessor, the auditor, and the treasurer. The petitioner never provided or filed proof of service on the county attorney. This Court held that “[n]o proof of service was filed as required by the statute.”

In *Guyse*, the critical fact was that the Petitioner *never* filed a proof of service. Thus, the petitioner could not establish that he had actually served the county attorney, a fact that was in dispute. In other words, the issue was not merely whether the procedural question of whether proof of service was timely filed, but rather the purely substantive issue of whether service was accomplished at all. Contrary to Clay County’s assertions, *Guyse* simply does not stand for the proposition that this Court lacks jurisdiction when proof of service is not filed simultaneously with the petition.

Clay County’s reliance on *Kwapick v. County of Ramsey*, File No. C2-00-1618 (Minn. Tax Ct. Oct. 12, 2000), is similarly unavailing. In *Kwapick*, the petitioner served the petitions by mail, but failed to file the proof of service with the court administrator. This Court, citing *Guyse*, dismissed the petition on the ground that the petitioner *never* filed the proof of service.

There is a critical distinction between this case and *Kwapick*. Here, on May 1, 2003, the day after the Petitions were served and filed—and as soon as was practicable under the circumstances—Petitioners filed complete proofs of service. Accordingly, neither *Guyse* nor *Kwapick* dictate dismissal of the Petitions in this case.

Further, as is stated in Kmart’s principal brief, it is service, not the filing of proof, that is jurisdictional. Minnesota case law, the Minnesota Rules of Civil Procedure, and

the Minnesota Rules of General Practice all recognize that point of law. Minn. R. Civ. P. 4.06; Minn. R. Gen. Prac. 7; *Leland v. Heiberg*, 194 N.W. 93, 95 (Minn. 1923).

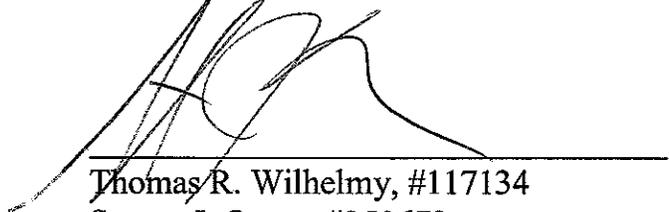
In addition, the filing of the proof of service is directly tied to the service of the documents. In this case, the Clay County officials hindered Kmart's efforts to serve the Petition. Clay County's hindrance and obstruction necessarily and adversely affected Kmart's ability to file the proof of service. In short, Clay County should not be able to take advantage of its own wrongful conduct, and Clay County's argument regarding the proof of service should be rejected.

#### **CONCLUSION**

For the foregoing reasons, and for the reasons stated in Kmart's principal brief, Kmart respectfully requests that the Tax Court's decision dismissing Kmart's 2003 Tax Petition be reversed and that the matter be remanded to the Tax Court with instructions to consider the Petition on its merits.

Dated: June 16, 2005

#### **FREDRIKSON & BYRON, P.A.**



Thomas R. Wilhelmy, #117134  
Steven J. Quam, #250673  
200 South Sixth Street, Suite 4000  
Minneapolis, MN 55402-1425  
Telephone: (612) 492-7058/7183  
Facsimile: (612) 492-7077

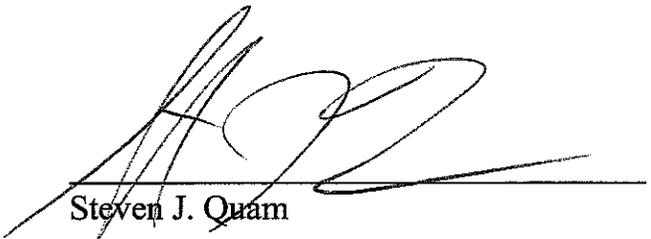
**Attorneys for Petitioner Kmart  
Corporation**

#3131003\1

**CERTIFICATE OF COMPLIANCE**

**WITH MINN. R. APP. P 132.01, Subd. 3**

The undersigned certifies that the Brief submitted herein contains 3,469 words and complies with the type/volume limitations of the Minnesota Rules of Appellate Procedure 132. This Brief was prepared using a proportional spaced font size of 13 pt. The word count is stated in reliance of Microsoft Office Word 2000, the word processing system used to prepare this Brief.



Steven J. Quam