

NO. A06-1413

State of Minnesota
In Court of Appeals

Mark and Laura Sletto, individually and as parents and natural
 guardians of Travis Sletto, and Katrina Sletto, individually,
Plaintiffs/Appellants,

vs.

Wesley Construction, Inc., d/b/a Wesley Homes, a Minnesota
 Corporation, Dale Kleven, individually, ABC Corporation,
 John Doe and Mary Roe,
Defendants/Respondents,

and

Wesley Construction, Inc., d/b/a Wesley Homes,
 a Minnesota Corporation,
Defendant and Third-Party Plaintiff,

vs.

Steve Johnson, d/b/a Quality Construction, Larry Start, d/b/a
 Start Marketing, Automated Building Components, Inc., and SNE
 Enterprises, Inc., d/b/a Crestline Windows and Doors,
Third Party Defendants.

**BRIEF AND APPENDIX OF APPELLANTS
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STATEMENT OF THE ISSUES

- I. Did the Trial Court Err In Holding That The Slettos' Statutory Warranty Claims Under Minn. Stat. Ch. 327A Were Barred By Changes To Minn. Stat. §541.051 Enacted After The Slettos' Causes of Action Had Already Accrued?

The Trial Court incorrectly held that the Slettos' Statutory Warranty Claims were barred by changes to Minn. Stat. §541.051 that were enacted on August 1, 2004, after the Slettos' causes of action had already accrued.

Cases and Statutes

Minn. Stat. § 541.051 (2002)

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- II. Did The Trial Court Err In Finding There Was No Triable Issue Of Fact As To Whether Wesley Construction Committed Fraud Sufficient To Toll The Application Of Minn. Stat. §541.051?

The Trial Court incorrectly held that, as a matter of law, Wesley did not fraudulently conceal the Slettos' potential causes of action and that there was no triable issue of fact for a jury to consider on the issue of fraud.

Cases

Haberle v. Buchwald, 480 N.W.2d 351 (Minn. App. 1992)

Sit v. T&M Properties, 408 N.W.2d 182 (Minn. App. 1987)

Metropolitan Fed. Bank of Iowa, F.S.B. v. W.R. Grace & Co., 999 F.2d 1257 (8th Cir. 1993)

STATEMENT OF THE CASE

This is an appeal by Petitioners Mark and Laura Sletto (the "Slettos") from summary judgment entered by the Dakota County District Court, Honorable Mary E. Pawlenty, in favor of Defendant and Third-Party Plaintiff Wesley Construction, Inc., Ltd ("Wesley") dismissing Plaintiffs' claims against Wesley.

On or about November 16, 2004, Plaintiffs served a Summons and Complaint upon Defendant Wesley. On February 9, 2005, Defendant Wesley served its Third-Party Summons and Complaint upon all other parties, including Automated Building and SNE. Defendant Wesley's Motion for Summary Judgment was heard before Judge Pawlenty on July 14, 2005.

Pursuant to the District Court's order dated August 11, 2005, all defendants' motions for summary judgment were denied pending a determination of whether fraud was committed by Wesley Construction and/or its subcontractors or material suppliers sufficient to toll any statute of repose. See Court Order (A.162-167). The Court further ordered that discovery was to continue solely on the issue of whether fraud was involved under Minn. Stat. §541.051, Subd. 1(a). Id. The parties undertook discovery on the issue of fraud, including several sets of written discovery and depositions of Plaintiffs Mark and Laura Sletto as well as Dale Kleven of Wesley Construction, Inc. On May 17, 2006, the Court modified its order, allowing Plaintiffs to submit their Offer of Proof in writing through sworn

affidavits and statements. (A.168-170). The Trial Court heard Plaintiffs' offer of proof and argument on the issue of fraud on May 23, 2006, and the hearing was deemed a summary judgment hearing. **Id.**

The Trial Court concluded, as a matter of law, that Plaintiffs failed to establish that Respondent Wesley fraudulently concealed Plaintiffs' potential causes of action and that Plaintiffs' claims are barred by the statute of repose set forth in Minn. Stat. §541.051, subd. 1. (A.171-175). The Trial Court summarized, stating "in short, Plaintiffs contend Wesley fraudulently concealed Plaintiffs' potential claims by a) ignoring a residential plan corrections list and b) failing to ask the city of Rosemount for a final inspection." **Id.** The Trial Court issued its order for summary judgment on May 25, 2006, the judgment having been entered on May 30 2006. **Id.**

STATEMENT OF FACTS

This matter arises from significant water intrusion, pervasive damage and mold contamination that occurred to the Sletto Home as a result of negligent construction practices of Respondent Wesley Construction ("Wesley") and its subcontractors. The Slettos' home was constructed in 1990, by Wesley who sold the Home directly to the original homeowners, John and Linda Starks ("Starks") (A.1,A.2, A.126-131)

As part of the process of original construction, Wesley applied for a new construction Building Permit to build at 3959 144th Street West on February 9, 1990. See (A.1-2). The building permit application, signed by Dale Kleven stated:

I hereby apply for a Building Permit and I acknowledge that the information above is complete and accurate; that the work will be in conformance with the ordinances and codes of the City of Rosemount and with the Minnesota Building Codes; that I understand that this is not a permit but only an application for a permit and work is not to start without a permit; that the work will be in accordance with the approved plan in the case of all work which requires review and approval of plans.

(emphasis added) Id. In reliance upon Kleven's and Wesley's assurances, the City of Rosemount issued the Permit on February 12 and also issued a Residence Plan Correction List on February 13, 1990. See (A.2-5)

While the City Documents contained applications, permits and inspection records for HVAC, Plumbing, Municipal Sewer and Framing, no Certificate of Occupancy was requested or issued and no final inspection was requested or performed and approved. See (A.8, A.150-161)

Wesley sold the residence at 3959 144th Street West to the Starks on June 4, 1990. See (A.130-131). The Purchase Agreement entered into with the Starks warranted several circumstances to the Starks, including:

Seller warrants that seller has not received any notice from any governmental authority as to violation of any law, ordinance or regulation. If the property is subject to restrictive covenants, seller warrants that seller has not

received any notice from any person or authority as to a breach of covenants. Any notices received by seller will be provided to buyer immediately.

Upon performance by Buyer, Seller shall deliver a Warranty Deed joined in by spouse, if any, conveying marketable title, subject to: (a) Building and Zoning laws, ordinances, state and federal regulations...

(A.130-131). Wesley was the general contractor of least two other homes on the same street and in a similar timeframe as the Sletto residence at 3959 144th Street West, Rosemount, Minnesota (the "Home" or "Residence"). See (A.6, A.7, A.9)

The Slettos purchased the Home from the Starks in May of 1993 and resided there continuously until February of 2003 when they first noticed water damage and mold contamination. See (A.144-149, A.140 at ¶4)

The Slettos immediately provided Wesley with written notice of the problems in their Home and vacated the residence that same month due to health and related problems caused by the moldy and unhealthy conditions in the Home. See Mark Sletto Aff (A.176-183). The Slettos took the repair and remediation of their Home upon themselves, having the work performed in the Spring/Summer of 2003. Id. The Slettos contracted with Barnes Morris Construction, Inc. ("Barnes") and Envirobate to perform repairs of the Home, including remediation of the mold, and repair of the construction defects, building code violations, and rot,

deterioration and damage to the structural components of the Home, including sheathing and framing members. (A.140 at ¶5)

ARGUMENT

Standard of Review

On appeal, the Slettos contend that the District Court erred in granting summary judgment in favor of the Respondent. In reviewing an order granting summary judgment, this Court makes two determinations: (1) whether there are any genuine issues of material fact; and (2) whether the trial court erred in its application of the law. State by Cooper v. French, 460 N.W.2d 2, 4 (Minn. 1990). The construction and applicability of a statute of limitation or repose is a question of law subject to de novo review. See Benigni v. County of St. Louis, 585 N.W.2d 51, 54 (Minn. 1998); Broek v. Park Nicollet Health Services, 660 N.W.2d 439, 441 (Minn. App. 2003). Further, the reviewing court must view the evidence in the light most favorable to the Slettos, the party against whom summary judgment was granted. Fabio v. Bellomo, 504 N.W.2d 758, 761 (Minn. 1993). All factual doubts and inferences must be resolved against the Respondents, the moving parties. Nord v. Herreid, 305 N.W.2d 337, 339 (Minn. 1981).

I. The Trial Court Erred In Holding That The Slettos' Statutory Warranty Claims Under Minn. Stat. Ch. 327A Were Barred By Changes To Minn. Stat. §541.051 Enacted After The Slettos' Causes of Action Had Already Accrued.

The Trial Court held that, except for where fraud is involved, “the applicable Statute of Repose set forth in Minn. Stat. §541.051 strictly forbids the bringing of a legal action to recover damages for a cause of action accruing more than 10 years after the substantial completion of construction.” (A.165) As a result, the Court improperly found that since the Home was completed by August 1990 and since the Slettos discovered the breach in February 2003, the causes of action asserted by the Slettos accrued after the statute of repose had already run. This finding is incorrect. At the time the Slettos' cause of action for breach of the statutory warranty accrued there was no statute of repose, only a statute of limitations with which the Slettos fully complied. See Minn. Stat. §541.051 (2002).

A. The Trial Court Erred In Applying The Current Statute of Repose to Bar Already Accrued Causes of Action For Breach of Warranty When The Law In Effect At That Time Permitted The Slettos To Assert a Breach of Warranty Claim Against Wesley Construction.

Minn. Stat. § 327A.02, sub. 1, states in pertinent part:

In every sale of a completed dwelling, and in every contract for the sale of a dwelling to be completed, the vendor shall warrant to the vendee that: (a) during the one-year period from and after the warranty date the dwelling shall be free from defects caused by faulty workmanship and defective materials due to noncompliance with building standards; *** (c) during the ten year period from and after the warranty date the dwelling shall be free from major construction defects due to noncompliance with building standards.

The version of Minn. Stat. §541.051, Subd. 4 that was in effect at the time the Plaintiffs' cause of action accrued stated as follows:

This section shall not apply to actions based on breach of the statutory warranties set forth in section 327A.02, or to actions based on breach of an express written warranty, provided such actions shall be brought within two years of the discovery of the breach.

(emphasis added). In fact, there was no statute of repose for claims made under Chapter 327A in 2003 when the Slettos' discovered Wesley's breach of its statutory warranty obligations. Minn. Stat. §541.051, Subd. 4 (2002); Vlahos v. R&I Const. of Bloomington, 676 N.W.2d 672, 677 (Minn. 2004).

B. The Trial Court's Application of The Revised Statute To An Existing Cause of Action, is Retroactive And Improper.

The Minnesota Court of Appeals has held that when a statute is enacted that applies to existing causes of action, application of that statute is deemed to be retroactive. (emphasis added) Midwest Fam. Mut. Ins. Co. v. Bleick, 486 N.W.2d 435, 438 (Minn. App. 1992), *citing* K.E. v. Hoffman, 452 N.W.2d 509, 512 (Minn. App. 1990). The Minnesota Supreme Court has also noted that the legislature, regardless whether the law alters procedural or substantive rights, must still express its intention to make a law retroactive. Lovgren v. People Electric Co., Inc., 380 N.W.2d 791, 795 (Minn. 1986) (the Court in Lovgren ruled that the 1980 re-enacted version of Minn. Stat. §541.051 did not retroactively apply to a cause of

action that accrued prior to the effective date of the statute); See also Minn. Stat. §645.21; Firestone Tire & Rubber Co. v. Acosta, 612 So.2d 1361, 1364 (Fla. 1992)(interpreting and applying a similar statute of repose and finding that despite the repeal of the repose statute, the defendant had already accrued a right not to be sued under the law existing at the time).

The Minnesota Court of Appeals has also noted that while the Legislature may constitutionally modify time limitations and divest a party of previously obtained rights, it [the Legislature] must clearly indicate that such a modification is intended to have retroactive application. Larson v. Babcock & Wilcox, 525 N.W.2d 589, 591-92 (Minn. App. 1994).

C. The Trial Court Erred In Failing To Determine When The Slettos' Breach of Warranty Cause of Action Accrued And What Statutes of Repose or Limitations Applied.

Under Minn. Stat. §541.051, causes of action, including the statutory warranty claims asserted by the Slettos, accrue upon the discovery of the breach of the warranty. See Vlahos v. R&I Const. of Bloomington, 676 N.W.2d 672, 677 (Minn. 2004).

It is undisputed that the date(s) upon which Plaintiffs' causes of action accrued were in early 2003. Specifically, the Slettos received a report from a microbiologist identifying certain molds that were present along with water damage on February 24, 2003; they also notified Wesley of the problems in their

Home by letter on March 25, 2003 and Wesley failed to fulfill its warranty obligations. (A.180-183). It was then, in February/March 2003, when the breach occurred and the causes of action accrued and when the statute of limitations (six months notice; suit brought within two years) began to run. See Dakota County v. BWBR Architects, Inc., 645 N.W.2d 487, 492 (Minn. App. 2002), *rev. denied* (Minn. Aug. 20, 2002).

The Trial Court applied the new Subdivision 4 of Minn. Stat. §541.051, which now states “in no event may an action under section 327A.05 be brought more than 12 years after the effective warranty date.” The current version of the statute was enacted and effective on August 1, 2004. The Trial Court, by retroactively applying this later enacted version of §541.051, which for the first time created a statute of repose for claims under Minn. Stat. Ch. 327A, has improperly divested the Slettos of an already acquired right and claim. See Larson, 525 N.W.2d at 591-92; Lovgren, 380 N.W. 2d at 795. Plaintiffs are unaware of any legislative intent that the amendments to the relevant statute of limitations were to be retroactively applied to existing causes of action. Id. at 796, and no such intent is set forth in the statute itself.

The Slettos’ claims are timely and were improperly dismissed by the Court’s interpretation of an inapplicable statute of repose. Further, the record shows no indication that the Slettos failed to maintain their claim by not complying with the

requirements set forth in Chapter 327A or the applicable version of Minn. Stat. §541.051.

II. The Trial Court Erred In Finding There Was No Triable Issue Of Fact As To Whether Wesley Construction Committed Fraud Sufficient To Toll The Application Of Minn. Stat. §541.051.

In the May 23rd summary judgment and offer of proof hearing, the only issue before the Court was whether a genuine issue of material fact existed as to whether Wesley fraudulently concealed any potential causes of action, preventing the Slettos from discovering their claim within the supposed statute of repose period. The Trial Court interpreted Plaintiffs' Offer of Proof and supplemental argument as arguing that Wesley "fraudulently concealed Plaintiffs' potential claims by a) ignoring a residential plan corrections list and b) failing to ask the City of Rosemount for a final inspection." (A.174). This interpretation fails to acknowledge the great deal of the evidence set forth in the record, including representations made by Wesley to the City of Rosemount and the Starks, as well as documentation of a pattern of such activity at other Wesley-built homes in the neighborhood.

The Court, for purposes of the Motion, assumed several facts, including that Wesley's design and construction of the Home was deficient, failed to comply with the applicable building codes and ordinances and that Wesley: (a) knew its plan

was deficient; (b) failed to take the proper steps to correct the deficiencies; and (c) failed to request a final inspection or obtain a certificate of occupancy. (A.174). While these assumptions were proper on behalf of the non-moving party and supported by the record, the Court failed to address or acknowledge the Plaintiffs' remaining arguments and components of fraudulent concealment. Noticeably absent from the Court's consideration were any of the representations made by Wesley - those to prospective purchasers (including the Starks) as well as to the City of Rosemount. Further absent was any discussion or consideration of the established pattern of activity of Wesley repeatedly building and selling several homes in Rosemount without having the proper and necessary final inspections performed despite several notices and warnings to that effect. It is these representations and assurances made by Wesley, not the underlying negligent activity itself, which fraudulently concealed the causes of action. See Mut. Service Life Ins. Co. v. Galaxy Builders, Inc., 435 N.W.2d 136, 139 (Minn. App. 1989) (noting that the truth or falsity of representations, whether a party was misled, and the other elements of fraudulent concealment are part of the "factual background germane to determination by the trier of fact" of the date a party discovered or should have discovered a cause of action).

A. The Trial Court Erred In Failing To Toll Any Applicable Statute of Repose or Limitations As a Result of Wesley Construction's Fraudulent Concealment of All Potential Causes of Action.

To prove fraudulent concealment, tolling any statute of repose or limitations, a party must show:

- a) an affirmative act or statement that conceals a potential cause of action;
- b) the statement was known to be false or made in reckless disregard of its truth or falsity; and
- c) the concealment could not have been discovered by reasonable diligence.

Haberle v. Buchwald, 480 N.W.2d 351, 357 (Minn. App. 1992). see also Wild v.

Rarig, 234 N.W.2d 775, 795 (Minn. 1975) *citing* 54 C.J.S., Limitations of Actions,

§206(e) and (f). In Wild, the Supreme Court also noted:

Although mere silence or failure to disclose may not in itself constitute fraudulent concealment, any statement, word, or act which tends to the suppression of the truth renders the concealment fraudulent.

Id. *citing* 51 Am. Jur.2d, Limitation of Actions, §148.

In Williamson v. Prasciunas, 661 N.W.2d 645 (Minn. App. 2003), the Minnesota Court of Appeals held that the statute of limitations on an action for conversion was tolled by the defendants' intentionally false statements, which concealed the plaintiff's cause of action, and the plaintiff's inability to discover the concealment with reasonable diligence. In the instant matter, as in Williamson, Defendant Wesley's fraudulent concealment tolls any statute of repose on the Slettos' causes of action for third party beneficiary breach of contract, negligence,

breach of statutory warranties, intentional or negligent misrepresentation, breach of duty of good faith and fair dealing, and personal injury.

B. Plaintiffs Have Demonstrated A Triable Issue of Fact As to Whether Wesley Committed Fraud Without Showing an Affirmative Misrepresentation Made To the Plaintiffs.

A plaintiff “need not show an affirmative misrepresentation to maintain an action of fraud; omissions of a material fact are actionable.” Sit v. T&M Properties, 408 N.W.2d 182, 186 (Minn. App. 1987). The Purchase Agreement entered into with the Starks warranted several circumstances to the Starks, including:

Seller warrants that seller has not received any notice from any governmental authority as to violation of any law, ordinance or regulation. If the property is subject to restrictive covenants, seller warrants that seller has not received any notice from any person or authority as to a breach of covenants. Any notices received by seller will be provided to buyer immediately.

Upon performance by Buyer, Seller shall deliver a Warranty Deed joined in by spouse, if any, conveying marketable title, subject to: (a) Building and Zoning laws, ordinances, state and federal regulations...

(emphasis added). (A.130-131)

Under Minnesota law, a nondisclosure or omission may constitute fraud when there is a “suppression of facts which one party is under a legal or equitable obligation to communicate to the other, and which the other party is entitled to

have communicated to him.” Richfield Bank, 244 N.W.2d at 650. A defendant may have a duty to disclose material facts, such as when the facts already disclosed are incomplete and thus misleading, when one party has special knowledge of material facts to which the other party does not have access, or where there is a confidential or fiduciary relationship between the parties. Id. see also Metropolitan Fed. Bank of Iowa v. W.R. Grace, 999 F.2d at 1260-62. For purposes of its Order, the District Court assumed that Wesley knew its work was deficient and failed to comply with the building code. (A.174) If the District Court assumes this, as it must, then certainly there exists a genuine issue of material fact as to whether, when Wesley made statements disavowing knowledge of “any notice from any governmental authority as to violation of any law, ordinance or regulation”, Wesley was fraudulently concealing a potential cause of action on the part of the Starks, the Slettos or any future vendee.

C. The Construction Practices, the Inspection Record and the Potential Causes of Action At The Sletto Home Were Known to Wesley, and The Record Demonstrates The Existence of a Genuine Issue of Material Fact As To Whether Wesley Knew Its Statements and Actions Were Misleading.

The District Court erred in failing to acknowledge or consider the voluminous amount of evidence set forth in the record to demonstrate, both aside from and in relation to the actual construction of the Home, that Wesley knew its statements, representations and actions misled both the City and all prospective

purchasers and future vendees. The Correction List returned to Wesley by the City shortly after filing its application for the building permit required a number of changes be made to the plans prior to the issuance of the permit, including, but not limited to:

39. Finish garage walls and ceiling adjacent to or under dwelling with materials approved for one-hour fire resistance. Section 503(d), Exception 4. "Coat Tape Required"...
46. Provide at least one window or exterior door approved for emergency escape or rescue for every room used for sleeping purposes. Section 1204. "5.7 Sq. Ft. of Openable Area"...
50. Specify an approved flashing for exterior openings. Section 1707(b).

See (A.3-5). By receipt of this list, Wesley was specifically informed of the above-referenced deficiencies in its building plan for the Sletto Home and was required to address each item to obtain the permit and ensure compliance with the City of Rosemount requirements and applicable building codes. Id. A review of the Home by engineer Mark Soderlund confirms that, despite notice from the City, Wesley failed to perform any of the above-mentioned corrections. (A.85-125). Further, Mr. Morris, who contracted to perform the repairs to the Sletto Home, including removing and replacing all windows, testified that only one window in the entire Home was properly flashed. (A.132-135).

Subsequently, Wesley's statements to the Starks through the original Purchase Agreement including: (1) warranting that it had not received any notice from any governmental authority as to violation of any law, ordinance or regulation; and (2) conveying a warranty deed and marketable title "subject to...Building and Zoning laws, ordinances, state and federal regulations...", were incomplete, misleading and prevented the Starks and all future owners of the Home from discovering any potential causes of action in a timely manner.

The District Court rested its analysis on Wesley's design and construction of the Home. Noticeably, it did not consider Wesley's failure to request or have the inspections performed that would have disclosed multiple violations of the applicable building codes. A jury could surely find that Wesley fraudulently concealed when it represented it had not received a notice of violations if it knowingly sold the Home without ever making the required changes or undertaking the necessary inspections. Secondly, the District Court did not acknowledge or consider that Wesley improperly conveyed the Home and violated numerous building code and city requirements without ever attempting to identify and remedy those violations. An individual or entity who speaks and makes representations to another party must say enough to prevent his words from misleading the other party. Klein v. First Edina Nat'l Bank, 196 N.W.2d 619 (Minn. 1972); Flynn v. Amer. Home Products, Corp. 627 N.W.2d 342, 349-51

(Minn. App. 2001); Richfield Bank & Trust Co. v. Sjogren, 244 N.W.2d 648, 650 (Minn. 1976).

Further, the District Court failed to acknowledge and consider evidence in the record showing that the failure by Wesley to have the proper inspections and certifications was not an isolated event. Wesley received at least one failed inspection notice indicating that a Wesley-built Home was being occupied before a certificate had been issued and it received another letter threatening Wesley with a citation and fine for the same practice on yet another Home. (A.6-9, A.79, A.84)

The Georgia Court of Appeals held that false statements to the effect that the Home was “code approved”, that the Home had a certificate of occupancy, and that the Home was a “quality house” were deemed material and sufficient to survive a motion for summary judgment on the existence of fraud. Hall v. Harris, 521 S.E.2d 638 (Ga. App. 1999). That Court also noted that “fraud is of itself subtle, and slight circumstances may be sufficient to carry conviction of its existence.” Id. (citations omitted).

The Ohio Court of Appeals held that an “as is” disclaimer did not preclude an action based on a positive misrepresentation or fraud in the form of a false denial of a building code violation. Thoman v. Horvath, 2000 WL 709024, *3 (Ohio App. June 1, 2000) (the Court found a material issue of fact existed as to whether the seller had knowledge of housing code violations at the time of sale).

The Washington Court of Appeals found that where a builder admitted to knowing the applicable building code and then proceeded to construct a structure which expert testimony found to be “terrible”, “unsafe”, “unethical” and “out and out dangerous”, knowledge of the defects could be attributed to the builder. Sloan v. Thompson, 115 P.3d 1009, 1015 (Wash. App. 2005). The Court also noted that a vendor’s actual knowledge of a construction defect could be proven by circumstantial evidence and that knowledge of a defect does not necessarily mean actual knowledge that an injury will result. Id. at 1014; see also Blau v. Albert 157 F.Supp. 816, 819 (D.C.N.Y. 1957) (“concealment of that violation, whether intentional or inadvertent, effectively prevents suit and demands the ‘mitigating construction’ of the statute of limitations”).

CONCLUSION

For the above stated reasons, Appellants respectfully request that this Court reverse the order of the District Court granting the Respondent's motion for summary judgment dismissing Appellant's claims, and remand this case to the District Court. Specifically, Appellants ask that this Court find that: (a) the applicable Statute of Repose is that which was in effect at the time the Slettos' causes of action accrued; and (b) a genuine issue of material fact exists as to whether Wesley Construction fraudulently concealed the Slettos' causes of action.

Respectfully Submitted,

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Dated: 8/25/06

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Certificate of Compliance

I hereby certify that the Appellant's Brief conforms to the requirements as provided in Rule 132 of the Minnesota Rules of Civil Appellate Procedure. This Brief is produced using a proportional font with Microsoft Word 2003. The length of the brief is 5,257 words.

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).