
State of Minnesota
In Court of Appeals

WILLIAM J. HEMPEL AND KAY L. HEMPEL, Husband and Wife,
Appellants,

vs.

CREEK HOUSE TRUST, FREDERICK S. WEST, CURTIS C. WEST AND TERRY L. SLYE,
Trustees, JUDITH ANNA INGEMANN f/k/a JUDITH ANNA SEYMOUR AND ALL OTHER
PERSONS UNKNOWN CLAIMING ANY RIGHT, TITLE, ESTATE, INTEREST,
OR LIEN IN THE REAL PROPERTY DESCRIBED IN THE COMPLAINT HERE,
Respondents.

**RESPONDENT JUDITH ANNA INGEMANN F/K/A JUDITH ANNA
SEYMOUR'S BRIEF**

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STATEMENT OF LEGAL ISSUES

- I. Did the district court abuse its discretion in determining no issues of material fact existed surrounding the statute of limitations claim?

The district court found no issues of material fact existed because all the facts material to the application of the statute of limitations were not in dispute.

Most apposite authorities:

Northwestern Nat'l Cas. Co. v. Khosa, Inc., 520 N.W.2d 711, (Minn. Ct. App. 1994). ;
Sauter v. Sauter, 244 Minn. 482, 484-485, 70 N.W.2d 351, 353 (1955).

- II. Did the district court error as a matter of law that the six year contract statute of limitations barred Appellants' claims against Respondents because it expired in June 1998?

The district court determined Appellant would have survived a motion to dismiss for failure to state a claim upon which relief can be granted in June 1992, which began the time period for the statute of limitations. The court determined the six year statute of limitation applied.

Most apposite authorities:

Minnesota Statute § 541.05 (2005);
Park-Lake Car Wash, Inc. v. Springer, 352 N.W.2d 409 (Minn. 1984);
Herrmann v. McMenemy & Severson, 590 N.W.2d 641 (Minn. 1999);
Dalton v. Dow Chemical, 280 Minn. 147, 158 N.W.2d 580 (1968).

- III. Did the district court error as a matter of law Appellants' remaining claims were derivative of the breach of contract claim and also barred by the six year contract statute of limitations claim?

Although the remaining claims do no apply to Respondent Ingemann, the district court correctly determined Appellants' remaining claims were derivative of the breach of contract claim.

Most apposite authorities:

Alliance for Metropolitan Stability v. Metropolitan Council, 671 N.W.2d 905 (Minn. Ct. App. 2003);
Cope v. Anderson, 331 U.S. 461 (1947);
Gilbert v. City of Cambridge, 932 F.2d 51 (1st Cir. 1991).

STATEMENT OF THE CASE

Appellants William J. Hempel and Kay L. Hempel (hereinafter “Hempels”) first brought their claim under the right of first refusal in 2005 against both Creek House Trust, its trustees, and Respondent Judith Anna Ingemann (hereinafter “Ingemann”), claiming Ingemann breached the right of first refusal in 1992 when she sold the Creek House Property to Jean V. West and William L. West (hereinafter collectively “Wests”) and that the Hempels now have a superior right to the Creek House Property over Respondent Creek House Trust. (Appellants’ App. 001-007). This assertion was made under three specific claims: (1) that the Hempels have superior rights to the Creek House Property under Minnesota Statute Section 559.01; (2) for a declaratory judgment finding both that the Hempels are entitled to specific performance of the right of first refusal and to force a sale of the Creek House Property to the Hempels; and (3) for a judgment for specific performance or, alternatively, damages for breach of contract. *Id.*

Creek House Trust moved for summary judgment on multiple grounds: (1) Hempels’ claims for breach of contract accrued more than thirteen years before they brought suit and, accordingly, the claims were barred by the six-year statute of limitations in Minnesota Statute Section 541.05; (2) Hempels’ remaining claims were derivative of the breach of contract claim; and (3) Hempels’ own admissions establish that they did not meet the statutory prerequisites for relief under Minnesota Statute Section 559.01 because they did not possess the Creek House

Property and because the Hempels were not claiming title to vacant or unoccupied property. (*Id.* at 019-069).

The District Court granted Creek House Trust's motion, holding that (1) the breach of contract claim accrued in 1992 when Ingemann sold the Creek House Property to the Wests and therefore was barred by the six-year statute of limitations; (2) the Hempels were not entitled to relief under Minnesota Statute Section 559.01 because the Hempels did not possess the Creek House Property, the Creek House Property was not vacant or unoccupied and the Hempels did not have a claim of title to the Creek House Property; and (3) Hempels' remaining declaratory judgment claim could not stand on its own. (*Id.* at 134-140).

Ingemann followed with filing a motion to dismiss the Hempels' claims. (*Id.* at 162-171). The basis for Ingemann's motion was the district court's Order granting summary judgment to Creek House Trust. *Id.* Specifically, the district court held that its May 12, 2006 Order granting summary judgment to Creek House Trust left no issues to be litigated against Ingemann. *Id.*

STATEMENT OF FACTS

Ingemann limits its statement of facts to those facts relevant to the appeal and those addressed by the court in its application of the statute of limitations. The Hempels claim that Ingemann breached a right of first refusal granted by Ingemann to the previous owners of the Hempels' property. Ingemann formerly owned two adjacent tracts of property, one currently owned by Respondent Creek

House Trust ("Creek House Property") and the other owned by the Hempels ("Hempel Property"). (*Id.* at 024).

Ingemann sold the Hempel Property in 1981. *Id.* While selling the Hempel Property and retaining the Creek House Property, Ingemann granted the purchasers of the Hempel Property at that time, William R. Harris and Nancy R. Harris, a right of first refusal over the Creek House Property. (*Id.* at 084). The rights of first refusal specifically states:

"IT IS AGREED AS FOLLOWS:

1. If Seymour receives a bona fide written offer for the purchase of the Subject Property or any portion thereof, Seymour shall not accept such offer without first offering to sell the same to Harris on the same terms and conditions set for in said offer less any real estate broker's commission which Seymour would be obligated to pay if Seymour accepted said offer. Written notice of said offer shall be given by Seymour to Harris and Harris shall have two weeks thereafter to exercise the said right of first refusal by giving written notice thereof to Seymour. If Harris does not exercise said right of first refusal, Seymour shall again have the same right of first refusal with respect to any subsequent offer for the purchase of the Subject Property or any portion thereof.

2. The right of first refusal hereby granted to Harris shall be binding upon Seymour and Seymour's heirs and assigns and shall inure to the benefit of Harris and Harris' heirs and assigns.

3. Notices required hereunder shall be deemed given when deposited in the U.S. Mail, postage prepaid, certified mail, to the following addresses or such other addresses as either party shall notify the other in writing:

a. If to Harris: Mr. and Mrs. William E. Harris
 634 Goodrich Avenue
 St. Paul, Minnesota 51105

b. If to Seymour Judith A. Seymour
 218 South Avon
 St. Paul, Minnesota 55105"

(*Id.* at 036-037). This right of first refusal was assigned to all future owners of the Hempel Property and eventually to the Hempels in 1985. (*Id.* at 040, 043, and 044).

In 1992, Ingemann sold the Creek House Property to the Wests. (*Id.* at 045). At the closing, Ingemann signed a document (“Lapse Statement”) because “Said William R. Harris was deceased and said Nancy R. Harris no longer resided at the neighboring property and to the best of my ability can not locate her.” (*Id.* at 049). In addition, the Hempels make no claim they notified Ingemann of the assignment and the new address to send the notice. The Creek House Property was finally transferred to the Creek House Trust upon William L. West’s death. (*Id.* at 051).

ARGUMENT

On appeal of the district court's summary judgment decision, this court must make two determinations: (1) whether there are any issues of material fact; and (2) whether the district court erred in its application of the law. *See State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). When the genuine issues of material fact surrounding the statute of limitations question are not in dispute, the court's review is limited to whether the trial court erred in its application of the law. *Weeks v. Am. Family Mut. Ins. Co.*, 580 N.W.2d 24, 26 (Minn. 1998). Since the construction and application of a statute of limitations is a question of law, the court should review this matter *de novo*. *See Benigni v. County of St. Louis*, 585 N.W.2d 51, 54 (Minn. 1998).

I. NO ISSUES OF MATERIAL FACT REMAIN IN DISPUTE SURROUNDING THE STATUTE OF LIMITATIONS, LEAVING THE DISTRICT COURT'S APPLICATION OF THE LIMITATION AS THE ONLY ISSUE BEFORE THIS COURT.

The material facts relevant to the statute of limitations claim are not in dispute. "A material fact issue is one which will affect the result or outcome of the case depending on its resolution." *Northwestern Nat'l Cas. Co. v. Khosa, Inc.*, 520 N.W.2d 711, 773 (Minn. Ct. App. 1994). The Respondents met their burden of proof showing no issues of material fact remain and they are entitled to judgment as a matter of law, *see Sauter v. Sauter*, 244 Minn. 482, 484-485, 70 N.W.2d 351, 353 (1955), and the Hempels brought forward no demonstrable evidence establishing that specific facts are in dispute creating a genuine issue for

trial. See *Erickson v Gen. United Life Ins. Co.*, 256 N.W.2d 255, 259 (Minn. 1977). Even when viewing the record in the light most favorable to the Hempels and drawing all factual inferences against the Respondents, no issues of material fact remain involving the application of the statute of limitations. See *Sauter*, 244 Minn. at 484-85, 70 N.W.2d at 353. Accordingly, Respondents are entitled to a “secure a just, speedy and inexpensive disposition” of this case. See *Vieths v. Thorp Fin. Co.*, 305 Minn. 522, 524, 232 N.W.2d 776, 778 (1975).

The material facts relevant to the application of the statute of limitations are three fold: (1) when did the statute of limitations begin to run; (2) was the statute limitations tolled; and (3) when did the statute of limitations expire. Here, the Hempels and Respondents do not dispute any facts regarding when the right of first refusal was allegedly breached. The Hempels and Respondents do not dispute the fact that notice of the sale was never given to the Hempels or that the Hempels were not aware of the sale until 2003 or 2004.¹ These facts provide the basis for applying the statute of limitations and deciding the date upon which the statute of limitations accrued. Since no issues of material fact remain involving the statute of limitations, the court should only consider the district courts application of the statute.

¹ Only for their summary judgment motions, Respondents do not dispute this fact.

II. THE ENTIRE ACTION AGAINST RESPONDENT INGEMANN IS BARRED BY THE SIX YEAR CONTRACT STATUTE OF LIMITATION BECAUSE APPELLANTS' ACTION EXPIRED IN JUNE 1998.

The district court correctly applied Minnesota law in applying the statute of limitations to the right of first refusal. Since the right of refusal is a contract, the statute begins to run when the claims survive a motion to dismiss for failure to state a claim upon which relief can be granted. Notice of a breach is not necessary for the statute to run because ignorance or knowledge are irrelevant. Therefore, the statute of limitation expired in June 1998.

A. APPELLANTS' LIMITATION PERIOD BEGAN TO RUN IN JUNE 1992 WHEN ITS CLAIMS WOULD HAVE SURVIVED A MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

Minnesota Statute Section 541.05 subdivision 1 (1) (2005) states actions upon contract shall be commenced within six years, unless the Uniform Commercial Code provides otherwise. “[A] right of first refusal is a binding option contract so long as it, like any other option, is bargained for and is given in return for consideration.” *Park-Lake Car Wash, Inc. v. Springer*, 352 N.W.2d 409, 411 (Minn. 1984). Therefore, the Hempels must bring their claims under the right of first refusal within six years.

The Minnesota statute of limitations does not state the period when the statute begins to run. In response, the Minnesota Supreme Court adopted the “some damage rule” to establish the start of this period. *Herrmann v. McMenemy & Severson*, 590 N.W.2d 641, 643 (Minn. 1999); *Dalton v Dow Chemical*, 280

Minn. 147, 154, 158 N.W.2d 580, 585 (1968). A cause of action survives a motion to dismiss for failure to state a claim upon which relief can be granted once “some damage” has occurred. *Herrmann*, 590 N.W.2d at 643. Thus, “[a] cause of action accrues and the statute of limitations begins to run when the cause of action will survive a motion to dismiss for failure to state a claim upon which relief can be granted.” *Id.* The statute of limitations for the Hempels’ right of first refusal claims begins to run when some damage occurred to them and the claims would have survived a motion to dismiss for failure to state a claim upon which relief can be granted. *See Id.*

The Hempels’ damage occurred when they were not given notice of the right of first refusal in June 1992. A cause of action for a breach of contract claim accrues and begins to run on the date of the breach. *Bachertz v. Hayes-Lucas Lumber Co.*, 201 Minn. 171, 176, 275 N.W.2d 694, 697 (Minn. 1937). A motion to dismiss for failure to state a claim would also have survived in June 1992 had the Hempels sued for breach of contract on the right of first refusal. Accordingly, the six year statute of limitations began running in June 1992 and expired in June 1998.

**B. APPELLANTS’ NOTICE ARGUMENT IS IN DIRECT
CONFLICT WITH CURRENT MINNESOTA LAW
ADDRESSING WHEN THE STATUTE OF LIMITATIONS IS
TOLLED.**

The Hempels’ argument, which focuses on lack of notice to its right of first refusal, directly conflicts with Minnesota law. “Ignorance or lack of knowledge of

the existence of a cause of action does not toll the . . . limitation period for contract claims.” *Juster Steel v. Carlson Co. ’s*, 366 N.W.2d 616, 618 (Minn. Ct. App. 1985) citing *Wild v. Rarig*, 234 N.W.2d 775 (Minn. 1975). The Hempels’ knowledge of the existence of a cause of action is irrelevant. See *Herrmann*, 590 N.W.2d at 643. Only fraudulent concealment on the part of the Respondents tolls the accrual of a cause of action. *Id* Absent any fraudulent concealment by Respondents, the Hempels’ cause of action was not tolled and began in June 1992.

The Hempels focus their application of the statute of limitations on notice of the right of first refusal. The focus concentrates on cases dealing with “triggering” a right of first refusal and that when the Hempels agreed to a right of first refusal, they were granted a “dormant set of rights” that do not entitled them to take any action until they received notice of the offer. See *Electric Fetus Co. v. Gonyea*, 2000 WL 1778906, *3 (Minn. Ct. App. 2000) (The owner need not have entered into an actual purchase agreement to trigger the right of first refusal. Courts generally consider instead whether the owner made representations that gave the right-holder notice of his willingness to sell) (unreported case attached as Appellants’ App. 229-31); see also *McGehee v. Elliot*, 849 N.E.2d 1180, 1189 (Ind. Ct. App. 2006) (“[w]hen McGehee agreed to the right of first refusal, the Elliots were granted a ‘dormant set of rights’ that did not entitle them to take any action until they received notice of the offer.”) (quoting *Beiger Heritage Corp. v. Estate of Kilbey*, 667 N.E.2d 182, 186 (Ind. Ct. App. 1996). However, notice is essentially “knowledge” of the fact that the “dormant set of rights” under the right

of first refusal has been breached or that the Hempels are entitled to act upon their rights and match the offer to purchase the property. Lack of knowledge or notice does not toll the statute of limitations.

The court in *Herrmann* specifically addressed knowledge as it relates to the accrual of the statute of limitations. 590 N.W.2d at 643 (“Herrmann and AHC contend that it would be unfair to commence the running of the statute of limitations before 1993 when AHC began expending money to address the prohibited transactions because Herrmann and AHC did not have any knowledge of the illegality of the transactions between AHC and Bridlewilde”). The court declined to consider knowledge of the cause of action and reverts to Minnesota law starting the limitation period when the cause of action would survive a motion to dismiss for failure to state a claim. *Id.* at 644. Without notice, the Hempels still maintained an action for breach of contract in June 1992 when they did not receive notice of the proposed sale to the Wests. Since they maintained a cause of action in 1992 for breach of contract, the limitation period began in June 1992.

Moreover, the Hempels’ “notice” argument is simply a variation of the discovery rule. They want the court to adopt a rule finding a right of first refusal cause of action does not begin until the Hempels receive notice, or ultimately have knowledge of the cause of action, or discover the cause of action. The *Herrmann* court, as discussed more fully below, specifically acknowledged that arguments considering knowledge of the cause of action are a variation of the discovery rule. *See Id.* at 643 (The court found the court of appeals rule that “the statute of

limitations began when harm manifests in some form or the client otherwise suffers pecuniary loss” as a variation of the discovery rule). The Hempels also want the court to adopt a variation of the discovery rule.

C. THE MINNESOTA SUPREME COURT HAS ALREADY REFUSED TO ADOPT THE DISCOVERY RULE.

Under the discovery rule, the statute of limitations begins to run on the date the plaintiff knew or should have known of the existence of the cause of action. *Herrmann*, 590 N.W.2d at 643. The Hempels’ variation of the discovery rule and specific request to adopt the discovery rule is a request parties have made in the past. The Minnesota Supreme Court originally addressed the discovery rule in *Dalton* and preferred and adopted the “some damage” rule. 280 Minn. at 154, 158 N.W.2d at 585. The court again refused to adopt the discovery rule when it was discussed in *Herrmann*. 590 N.W.2d at 643. The Minnesota Supreme Court prefers the some damage rule and beginning the statute of limitations when the claim will survive a motion to dismiss, not the discovery rule. *Id*

Moreover, the Hempels’ request is no more compelling than the situation in *Herrmann*. *See*, 590 N.W.2d at 641. In *Herrmann*, the court considered the running of the statute of limitations in the context of a legal malpractice action. *Id.* at 643-44. Counsel failed to advise plaintiff its pension plan was prohibited under federal tax law. *Id.* Although the plaintiff did not become aware of the pension plans violations until later, the statute began to run when the first prohibited transaction took place. *Id.* Just like the plaintiffs in *Herrmann*, the

Hempels claim they did not have notice of the sale of the Creek House Property and allegedly were not aware of it until 2003-2004. *See Id.* The Hempels' lack of notice should not toll the statute of limitations and the Hempels do not provide a new compelling reason for the court to adopt the discovery rule.

D. THE FACTS OF RECORD DO NOT SUPPORT APPELLANTS' FRAUDULENT CONCEALMENT CLAIM TOLLING THE STATUTE OF LIMITATIONS.

For the first time, the Hempels now claim that the sale of the Creek House Property was fraudulently concealed, tolled the statute of limitations and present an issue of fact. This argument was not addressed in its Memorandum for Summary Judgment, (Appellants' App. 070-116), and was not discussed in oral argument. (*Id.* at 182-202).

Although the court should follow its policy regarding new arguments and not consider this new argument, *see Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn.1988), the record does not support the Hempels' fraudulent concealment claim. Fraudulent concealment prevents others from obtaining knowledge that a cause of action exists. *Schmucking v. Mayo*, 183 Minn. 418, 428, 92 N.W.2d 96, 103 (1958). No facts are available that either Respondent intended to prevent the Hempels from obtaining knowledge to the sale. Respondents had no "special knowledge" that caused the concealment of the Wests' purchase of the property. *See Boubelik v. Liberty State Bank*, 553 N.W.2d 393, 398 (Minn. 1996). In fact, the Hempels make no claim they complied with the right of first refusal by giving

Ingemann notice of the assignment or notice of their address for giving notice of a sale.

Furthermore, reasonable diligence by the Hempels would have allowed them to discover the sale. The sale was of public record when recorded in the property records. Some states even apply this constructive notice through recording to rights of first refusal and start the running of the statute of limitations on the date the deed was recorded. *Weik v. Estate of Brown*, 794 A.2d 907, 909 (Pa. Super. Ct. 2002). The property was also right next door to the Hempels property. No facts of record support the Hempels' new fraudulent concealment claim.

E. THE FORTY YEAR MARKETABLE TITLE ACT SHOULD NOT EXTEND APPELLANTS' RIGHT TO COMMENCE ITS BREACH OF CONTRACT CLAIMS AGAINST RESPONDENTS.

The court correctly did not apply the Marketability Act forty year limitation. Minnesota Statute Section 541.023 subdivision 3 (2005) specifically states, "[t]his section does not extend the right to commence any action beyond the date at which such right would be extinguished by any other statute." Thus, this section does not extend the Hempels six year contract limitation under Minnesota Statute Section 541.05.

The interplay of these statutes is not as complex as the Hempels suggest. The Marketable Title Act was intended by the legislature to relieve a title from servitude of provisions contained in ancient records which "fetter the marketability

of real estate,” and to benefit a title so as to relieve it from restriction of “vested or contingent rights” derived from events or documents granting a “condition subsequent or restriction” occurring more than forty years prior to time of commencement of action. *Wichelman v Messner*, 250 Minn. 88, 83 N.W.2d 800 (1957). The Act was designed to be invoked defensively, in situations where a party claims title to property or a party asserts hostile claim to the same property. *Padrnos v. City of Nisswa*, 409 N.W.2d 36 (Minn. Ct. App. 1987). The use of “title” in Section 541.023 subdivision 1 refers to fee-simple absolute title and defeasible fees defined by statute. *Wichelman*, 250 Minn. at 88, 83 N.W.2d at 800. The use of “possession” in Section 541.023 subdivision 1 is possession which is actual, open, and exclusive, and cannot be equivocal or ambiguous, but put a prudent person on inquiry and provide notice of the possessor’s interest in the property. *Township of Sterling v. Griffin*, 309 Minn. 230, 236, 244 N.W.2d 129, 133 (1976). This entire action is based upon a contractual right of first refusal and not title marketability or possession, as defined by law, of the Creek House Property.

This interplay is also apparent in the Hempels’ use of *First Nat’l Bank of Elk River v. Indep. Mortgage Servs.*, 1996 WL 229236 (Minn. Ct. App. 1996) (unreported case attached at Appellants’ App. 232-34). In *First Nat’l Bank of Elk River*, the title records reflected Independent Mortgage Services was assigned certain mortgages at issue although no evidence existed payment was ever made for the mortgages. *Id.* at *1. In order to clear the mortgage assignment cloud on

title and make the title marketable for refinancing, the bank brought its action to clear the cloud on title. *Id.* at *1-2. The court correctly applied the Marketable Title Act limitation for the cloud on title, but refused to apply the limitation to the breach of contract claims involved in the case. *Id.* at *2.

The interplay between the Marketable Title Act forty year limitation and the six year contract limitation would be similar for the facts here. The contract limitation applies to the breach of contract claims and the marketable title act limitation could apply to any subsequent title issue claims involving the right of first refusal on the Creek House Property records. Because unmarketable of title is not at issue and we only have a contract claim or derivative contract claims, the limitation period is six years and expired in June 1998.

III. RESPONDENT INGEMANN CLAIMS NO ESTATE OR INTEREST IN THE PROPERTY AT ISSUE, WHICH IS NECESSARY TO MAINTAIN A DECLARATORY JUDGMENT ACTION FOR SUPERIOR RIGHTS UNDER MINN. STAT. § 559.01 (2005). THEREFORE, APPELLANTS' REMAINING CLAIMS DO NOT APPLY TO RESPONDENT INGEMANN.

Minnesota Statute Section 559.01 (2005) states,

“Any person in possession of real property personally or through the person's tenant, or any other person having or claiming title to vacant or unoccupied real property, *may bring an action against another who claims an estate or interest therein*, or a lien thereon, adverse to the person bringing the action, for the purpose of determining such adverse claim and the rights of the parties, respectively.”

Minn. Stat. § 559.01 (2005) (emphasis added). Ingemann does not claim an estate or interest in the property at issue as she sold the property in June 1992. Therefore, the Hempels' remaining claims do not apply to Ingemann.

CONCLUSION

For the reasons state above, Ingemann requests that the court affirm the district court's decision granting Respondents summary judgment.

PETERSON FRAM & BERGMAN, P.A.

Dated: 3/15/07

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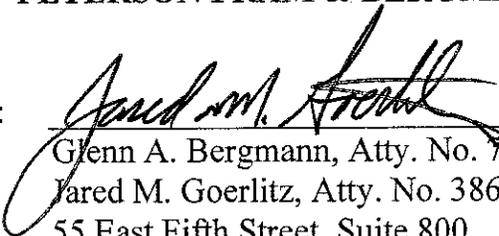
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CERTIFICATE PURSUANT TO RULE 132.01

Jared M. Goerlitz, being first duly sworn upon oath, does hereby depose and state that: This Brief of Respondent Ingemann complies with the word count limit set forth in Rule 132.01 of the Minnesota Rules of Civil Appellate Procedure. The Brief of Respondent Ingemann was prepared utilizing Microsoft Word, and consists of 4,378 words, less than the 14,000 words permitted under the Rule. This Brief of Respondent Ingemann further complies with the typeface requirement of the Rules, utilizing Times New Roman typeface and 13 point font.

PETERSON FRAM & BERGMAN, P.A.

Dated: 3/15/07

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