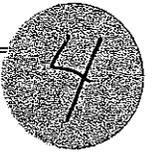


NO. A09-962



State of Minnesota  
In Court of Appeals

STATE BANK OF DELANO,

*Plaintiff—Respondent,*

v.

CENTERPOINT ENERGY,

*Defendant—Appellant,*

And

SWARTZ BROTHERS ASSOCIATES, INC.  
AND KENSINGTON EQUITY PARTNERS, INC.,

*Defendants—Respondents,*

And

GLACIAL HILLS ELEMENTARY SCHOOL,

*Intervenor—Respondent.*

---

APPELLANT'S BRIEF AND APPENDIX

---

Keith S. Moheban (#216380)  
James T. Brand (#387362)  
**LEONARD, STREET AND DEINARD  
PROFESSIONAL ASSOCIATION**  
150 South Fifth Street  
Suite 2300  
Minneapolis, Minnesota 55402  
(612) 335-1544  
*Attorneys for Defendant/Appellant  
CenterPoint Energy*

Bradley Kletscher  
Tammy J. Schemmel  
**BARNA, GUZY & STEFFEN, LTD.**  
400 Northtown Financial Plaza  
200 Coon Rapids Boulevard  
Coon Rapids, MN 55433-5894  
(763) 780-8500  
*Attorneys for Plaintiff/Respondent  
State Bank of Delano*

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).

Neil T. Nelson  
**Obenland & Roth**  
605 South Lakeshore Drive, Suite 1000  
Glenwood, MN 56334  
(320) 634-4581  
*Attorneys for Defendant/Respondent  
Swartz Brothers Associates, Inc.*

David C. McLaughlin  
**Fluegel, Helseth, McLaughlin, Anderson  
& Brutlag, Chtd.**  
25 NW 2nd Street  
Suite 102  
Ortonville, MN 56278  
(320) 839-2549  
*Attorneys for Intervenor/Respondent  
Glacial Hills Elementary School*

William Schluter  
Registered Agent for  
Kensington Equity Partners, Inc.  
11974 Portland Avenue  
Burnsville, MN 55337  
(952) 808-1800  
*Defendant/Respondent Kensington Equity  
Partners, Inc.*

## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	2
STATEMENT OF THE LEGAL ISSUES .....	4
STATEMENT OF THE CASE.....	5
SUMMARY OF ARGUMENT .....	7
STATEMENT OF FACTS .....	9
ARGUMENT.....	11
I. THIS COURT EXERCISES <i>DE NOVO</i> REVIEW OF A SUMMARY JUDGMENT DECISION. ....	11
II. THE TRIAL COURT ERRED IN ENJOINING CENTERPOINT FROM COLLECTING PAST DUE UTILITY BILLS FROM THE RECEIVER.....	12
A. A RECEIVER “STANDS IN THE SHOES” OF THE PROPERTY OWNER.....	12
B. MINNESOTA CASE LAW ESTABLISHES THE RECEIVER’S OBLIGATION TO PAY DELINQUENT OPERATING EXPENSES.....	16
C. EVEN A LIMITED RECEIVER FOR PROPERTY IS SUBJECT TO THE OBLIGATIONS OF THE DEBTOR WITH RESPECT TO THE PROPERTY.....	17
D. MINNESOTA’S RECEIVERSHIP STATUTE REQUIRES PAYMENT OF PAST DUE OBLIGATIONS OF THE PROPERTY.....	21
E. THE TRIAL COURT’S RECEIVERSHIP ORDER MANDATED PAYMENT OF NECESSARY EXPENSES INCLUDING PAST DUE UTILITY BILLS.....	24
F. THE RECEIVER IS NOT A “NEW CUSTOMER” OF THE UTILITY.....	25
III. THE CASE IS NOT MOOT.....	26
CONCLUSION.....	28
CERTIFICATION OF BRIEF LENGTH.....	29

## TABLE OF AUTHORITIES

### Minnesota Statutes

Minn. Stat. § 504B.161 .....	23
Minn. Stat. § 576.01 .....	7, 8, 10, 18, 21, 27
Minn. Stat. § 576.02 .....	4, 22

### Minnesota Rules

Minn. R. Civ. P. 54.02.....	6
Minn. Rules pt. 7820.1000.....	12, 14, 21, 23, 24
Minn. Rules pt. 7820.1100.....	22
Minn. Rules pt. 7820.1300.....	4, 25, 26

### Minnesota Cases

<i>Christensen v. Eggen</i> , 577 N.W.2d 221 (Minn. 1998).....	11, 14
<i>Manchester Locomotive Works v. Truesdale</i> , 46 N.W. 301 (Minn. 1890).....	4, 16, 17, 18, 19, 20, 22, 25

### Other Cases

<i>Manufacturers' Finance Co. v. McKey</i> , 294 U.S. 442 (1935).....	13
<i>Marshall v. People of State of New York</i> , 254 U.S. 380 (1920) .....	13
<i>Rice v. Kempker</i> , 374 F.3d 675 (8th Cir. 2004) .....	27
<i>Maxl Sales Co., v. Critiques, Inc.</i> , 796 F.2d 1293 (10th Cir. 1986) .....	15
<i>Abedon v. Providence Redevelopment Agency</i> , 348 A.2d 720 (R.I. 1975).....	13
<i>American Trust &amp; Sav. Bank v. McGettigan</i> , 146 N.E. 909 (1899).....	14
<i>D &amp; S Farms v. Producers Cotton Oil Co.</i> , 492 P.2d 429 (Ariz. 1972) .....	13
<i>Downey v. Humphreys</i> , 227 P.2d 484 (Cal. Dist. Ct. App. 1951).....	13, 14, 15
<i>Geroy v. Upper</i> , 187 P.2d 662 (Or. 1947).....	13, 15
<i>Irwin's Bank v. Fletcher's Sav. &amp; Trust</i> , 145 N.E.2d 689 (1924) .....	14
<i>Ivy Hill Ass'n Inc. v. Kluckhuhn</i> , 472 A.2d 77 (Md. 1984) .....	13
<i>KeyBank Nat. Ass'n v. Michael</i> , 737 N.E.2d 834 (Ind. Ct. App. 2000).....	4, 13, 14
<i>Kuntsman v. Guaranteed Equities, Inc.</i> , 728 P.2d 459 (N.M. 1986).....	13
<i>Jeffcoat v. Morris</i> , 389 S.E.2d 159 (S.C. Ct. App. 1989) .....	13, 15

<i>Lend Lease Asset Management LP v. Cobra Security, Inc.</i> , 912 S.2d 471 (Miss. 2005) .....	19, 20
<i>Martin v. General Am. Cas. Co.</i> , 76 So. 2d 537 (La. 1954) .....	13
<i>Newcomer v. Miller</i> , 172 A. 242 (Md. 1934).....	13
<i>O’Neal v. General Motors Corp.</i> , 841 F. Supp. 391 (M.D. Fla. 1993).....	13
<i>State ex rel. Ashcroft v. St. Louis No. 2, Inc.</i> , 618 S.W.2d 686 (Mo. Ct. App. 1981).....	13
<i>Title Guarantee &amp; Trust Co. v. Schenectady Ave., Inc.</i> , 183 N.E. 198 (N.Y. 1932).....	20, 21
<i>Wellbro Bldg. Co. v. McConnico</i> , 421 P.2d 837 (Okla. 1966) .....	13

**Other Authorities**

65 Am. Jur. 2d, Receivers § 110 .....	13
---------------------------------------	----

## STATEMENT OF THE LEGAL ISSUES

1. **Whether Minn. Stat. § 576.02 authorizes the district court to rule that a utility customer need not pay past due utility bills and still may maintain utility service?**

The court below ruled that the appointment of a receiver under Minn. Stat. § 576.02 essentially discharged any past due utility obligations with respect to the property operated by the receiver. Relevant Authority: Minn. Stat. § 576.02.

2. **Whether a receiver appointed under Minn. Stat. § 576.02 “stands in the shoes” of the property owner, particularly as respects the operation of the property that is mortgaged, such that the receiver must pay past due utility bills for the property or be subject to disconnect of service?**

The court below ruled that a receiver appointed under Minn. Stat. § 576.02 did not “stand in the shoes” of the property owner, even as respects obligations directly serving the property. Relevant Authority: Minn. Stat. § 576.02; *Manchester Locomotive Works v. Truesdale*, 46 N.W. 301 (1890); *Keybank National Assoc. v. Michael*, 737 N.E.2d 834 (Ind. App. 2000); *Geroy v. Upper*, 187 P.2d 662, 667 (Or. 1947).

3. **Whether a receiver constitutes a new customer under Minn. Rules pt. 7820.1300 such that the receiver may avoid paying past due utility bills?**

The court below ruled that a receiver was a new customer and had no responsibility for the past due bills of the property owner, even though the receiver was empowered to collect past due rents that were generated by virtue of the prior utility service. Relevant Authority: Minn. Rules pt. 7820.1300; *Manchester Locomotive Works v. Truesdale*, 46 N.W. 301 (1890); *Keybank National Assoc. v. Michael*, 737 N.E.2d 834 (Ind. App. 2000); *Geroy v. Upper*, 187 P.2d 662, 667 (Or. 1947).

4. **Whether the case is moot?**

CenterPoint will establish the case is not moot because the Court of Appeals can fashion relief by dissolving the trial court’s injunction and allowing CenterPoint to proceed in the trial court with its breach of contract and unjust enrichment claims.

## STATEMENT OF THE CASE

State Bank of Delano (“the Bank”) initiated this action on March 26, 2008, before the Honorable Jon Stafsholt, District Court Judge for the Eighth Judicial District. The Bank sought a declaratory judgment that the Bank, and the Receiver appointed by the Court in the Bank’s foreclosure action against property owner Kensington Equity Partners, Inc. (“Kensington”), were not liable for utility bills incurred at Kensington’s property prior to the appointment of the Receiver. Appellant’s Appendix [AA] at 42. CenterPoint Energy was the utility that had been providing, and continued to provide, natural gas service to the property.

The Bank named CenterPoint a Respondent, as well as the Receiver Swartz Brothers Associates (“Receiver”), and Kensington. CenterPoint cross claimed for breach of contract and unjust enrichment against the Receiver and Kensington. AA at 53. Tenant Glacial Hills Elementary School later intervened.

The Bank moved for a Temporary Restraining Order preventing CenterPoint from disconnecting utility service or taking other collection action against the Bank or the Receiver with respect to gas bills incurred prior to the appointment of the Receiver. The trial court granted that motion and entered a Temporary Restraining Order. AA at 18. The case then proceeded to cross motions on summary judgment, with the Bank and CenterPoint asserting their arguments as to whether there was any authority for the trial court to essentially discharge the past due utility debt and protect the Receiver from having to pay past due utility bills or be subject to CenterPoint’s right to disconnect service for non-payment. On September 11, 2008, the Court entered an Order granting

the Bank's Motion for Summary Judgment and denying CenterPoint's Motion for Summary Judgment. AA at 1. The Court declined to dissolve the injunction, which remains in effect today. *Id.*

The Court determined that the September 11 order did not address all of the claims against the Receiver and thus the Court required a second summary judgment motion brought by the Receiver. By Order dated November 25, 2008, the Court ruled that the Receiver was not liable for past due utility bills at the property, for essentially the same reasons set forth in the September 11 order. AA at 31. CenterPoint petitioned the Court to issue an order that there was no just reason for delaying an appeal on a partial judgment pursuant to Minn. R. Civ. P. 54.02, so that CenterPoint would be able to appeal the decisions on summary judgment notwithstanding the remaining cross claims between CenterPoint and other parties. The Bank and Receiver opposed that petition and the Court denied it. AA 34. Thereafter, the remaining claims in the action were resolved and the Court entered judgment on April 30, 2009. AA 39. This appeal ensued.

## SUMMARY OF ARGUMENT

Is the appointment of a receiver under Minn. Stat. § 576.01 a *de facto* bankruptcy? May a foreclosing bank, upon appointment of a receiver under Minn. Stat. § 576.01, instruct the receiver to not pay delinquent utility bills in favor of using income from the property to pay more toward the mortgage? May the receiver lawfully accept those instructions in light of its statutory obligation to “pay all expenses for normal maintenance of the mortgaged premises?” May a court enforce the bank’s wishes by issuing a *de facto* discharge of the delinquent utility bills and by ruling that the receiver is not obligated to pay delinquent utility bills? These are the issues for decision in this appeal.

In the present case Respondent State Bank of Delano wanted to ensure that rents or other income of the mortgaged property were preserved to be applied to its mortgage. Although the Bank’s self interest is understandable, it lacked a valid legal basis for bringing this action and seeking a ruling from the trial court that the receiver could ignore the delinquent utility bills with impunity. The Bank overstates the significance of the appointment of a receiver, and wants to treat the appointment as a *de facto* discharge of past due utility bills that benefitted the property and helped generate rents. Nothing in the receivership statute discharges debts and nothing in the statute affects the rights of the utility to disconnect service for non-payment. The receiver, by definition, is not a new property owner who comes to the property with a clean slate, but in fact “stands in the shoes” of the property owner and takes the property as it is.

The trial court thus erred in treating the appointment of a receiver as a bankruptcy and treating the receiver as a “new customer” of the utility who was separate from the property owner and not responsible for the delinquent bills. The trial court’s decision to enjoin CenterPoint from collecting against the Receiver was unprecedented in Minnesota and contrary to established Minnesota Supreme Court precedent. The trial court’s ruling is not grounded in § 576.01 and misreads the statute.

Accordingly the Court of Appeals should reverse the trial court and rule, as a matter of law, that: (1) Minn. Stat. § 576.01 does not discharge past due utility bills, (2) the receiver is not a “new customer” of the utility but instead an officer of the court holding the property on behalf of the property owner, and (3) nothing in Section 576.01 or the appointment of a receiver affects or alters a utility’s remedies for non-payment of a delinquent bill, including disconnection of service, and (4) the trial court’s injunction should be dissolved and CenterPoint be allowed to proceed in the trial court against the Receiver (and ultimately the Bank) on its breach of contract and unjust enrichment claims. Although the statute may not expressly require a receiver to pay the delinquent utility bills, neither does it immunize the property operated by the receiver from the consequences of deciding not to pay such bills.

## STATEMENT OF FACTS

This case involves property located at 610 West Sixth Street, in Starbuck, Minnesota. CenterPoint provides natural gas service to two properties located at 610 West Sixth Street and 612 West Sixth Street in Starbuck, Minnesota (“the Property”). The Property is rented commercially in two units. One unit houses the Glacial Hills Elementary School, and the other housed, at all relevant times, a business known as Ag Code, Inc. The bills were directed to the property owner Kensington Equity Partners, Inc. (“Kensington”).

Kensington was delinquent on both its natural gas bills with CenterPoint and its mortgage with the State Bank of Delano. On September 25, 2007, the State Bank of Delano brought a foreclosure action against Kensington. On December 27, 2007, the trial court granted the Bank judgment in the amount of \$933,754.59 and directed the Sheriff of Pope County to sell the property to satisfy the mortgage and related expenses. In addition, the trial court on motion of the Bank, appointed Swartz Brothers Associates, Inc. (“Receiver”) as Receiver of the property pursuant to terms set forth in the Court’s Order dated December 27, 2007. AA at 62. The Court ordered, among other things, that the Receiver “should be indifferent as to the litigants and to be impartial and disinterested.” AA 70. Order at ¶ 7. The Order also provided that the Receiver shall “pay all expenses for normal maintenance of the Property.” AA 71 at ¶ 2(e).

The Receiver took possession of the property in the first week of January, 2008. The Receiver and CenterPoint had discussions about the payment of the past due balance for the account in the amount of \$23,636.98. The Receiver sought to have the bills sent

“in care of” Swartz Brothers Associates, Inc. as the “Kensington Receiver Account.” AA at 80 ¶ 5. The Receiver Account is a client trust account created by the Receiver, expressly in its role as Receiver, to hold rents and other funds obtained in its role as Receiver. The Receiver indicated it was prepared to pay the current natural gas bills going forward from January, 2008, but would not pay the delinquent balance owing. AA at 84 ¶ 25. When the Receiver refused to pay the past due balance, the attorney for the Bank (not the attorney for the Receiver) became involved and exchanged correspondence with counsel for CenterPoint.

As of March 19, 2008, the total amount owed on the 610 West Sixth Street account was \$21,531.85. AA at 82 ¶ 17. CenterPoint indicated that service may be disconnected absent resolution of the delinquent bill. Ultimately at an impasse, the Bank (not the Receiver) brought this action for declaratory judgment on March 28, 2008, seeking a ruling that the Receiver was not obligated to pay the past due gas bills as a condition of maintaining natural gas service at the property. The Bank moved for a temporary restraining order and its motion was heard on April 1, 2008. The Court granted the temporary restraining order and required Plaintiff to post a \$24,000 bond. AA at 18.

In addressing the likelihood on success on the merits, the Court acknowledged that a receiver has a duty, under Minn. Stat. § 576.01, subd. 2, to pay necessary expenses of the Property. AA at 29. The Court then stated, however, without citation to authority, that “a past due utility bill incurred by Defendant Kensington is unlikely to be a necessary expense of the Receiver, whose role is to preserve the asset during the

redemption period.” *Id.* The Court did not address the fact that maintaining utility service is required to preserve the asset. The Court then stated that the Bank was a secured party and CenterPoint was not, and indicated that if CenterPoint was paid it would elevate its interest above that of the Bank. *Id.* The Court did not address whether it had authority to set aside CenterPoint’s statutory remedy to disconnect service for non-payment. In other words, the Court seemed to be contemplating CenterPoint’s ability to involuntarily attach or garnish rents to obtain payment, as opposed to CenterPoint’s right – not to involuntarily collect funds – but to disconnect service for non-payment.

After entry of the temporary restraining order, the Receiver did not pay the delinquent natural gas bills for service provided prior to its appointment. The Bank enjoyed the benefit of natural gas service, past and present, to generate current and past rents at the property to pay toward the defaulted mortgage obligation. CenterPoint was deprived of its statutory right to disconnect service for non-payment.

After hearing cross motions for summary judgment, the trial court kept the injunction in place against CenterPoint, and the injunction remains in place today.

## **ARGUMENT**

### **I. THIS COURT EXERCISES *DE NOVO* REVIEW OF A SUMMARY JUDGMENT DECISION.**

The standard of review of a summary judgment decision is *de novo*. *Christensen v. Eggen*, 577 N.W.2d 221, 224 (Minn. 1998).

## **II. THE TRIAL COURT ERRED IN ENJOINING CENTERPOINT FROM COLLECTING PAST DUE UTILITY BILLS FROM THE RECEIVER.**

On the day before the district court appointed a receiver, CenterPoint unquestionably was entitled to disconnect service at the Property, based on its customer of record, Kensington, being delinquent in an amount in excess of \$20,000. Minn. Rules pt. 7820.1000(A) provides that a utility may disconnect service, with notice, for failure of the customer to pay a bill for utility service. As demonstrated below, nothing in the appointment of a receiver altered CenterPoint's right to collect the delinquent amounts due or to disconnect service at the property.

### **A. A Receiver "Stands in the Shoes" of the Property Owner.**

The trial court erred in misapprehending the nature and function of a receiver. The receiver does not take control of the property for its own purposes and thus is not a "new customer" of the utility as the trial court held. The receiver has no ownership interest in the property and the appointment does not take away the property owner's interest in the property. To the contrary, the receiver's actions bind the property owner. The receiver does not run its own business at the property. Instead, it serves as an instrumentality of the court, to operate and preserve the property because there are concerns about the manner in which the property owner has operated the property (in this case the failure to pay the mortgage when due). The appointment generally is an equitable remedy, and in this instance also is authorized by statute. The appointment by its nature is limited in scope.

Consequently, a receiver is generally held to “stand in the shoes” of the entity in receivership. *Geroy v. Upper*, 187 P.2d 662, 667 (Or. 1947); *Newcomer v. Miller*, 172 A. 242, 243 (Md. 1934); *see also* 65 Am. Jur. 2d, Receivers § 110. As such, the receiver assumes all of the obligations burdening the property it receives. *O’Neal v. General Motors Corp.*, 841 F. Supp. 391, 398 (M.D. Fla. 1993); *see also Marshall v. People of State of New York*, 254 U.S. 380, 385 (1920). The receiver occupies no better position than the entity whose property is in receivership. *Downey v. Humphreys*, 227 P.2d 484, 492-93 (Cal. Dist. Ct. App. 1951). The receiver takes the property subject to the same claims, liens and equities that existed immediately before the receiver’s appointment. *KeyBank Nat. Ass’n v. Michael*, 737 N.E.2d 834, 849 (Ind. Ct. App. 2000); *Martin v. General Am. Cas. Co.*, 76 So. 2d 537, 541 (La. 1954); *Ivy Hill Ass’n Inc. v. Kluckhuhn*, 472 A.2d 77, 82 (Md. 1984); *State ex rel. Ashcroft v. St. Louis No. 2, Inc.*, 618 S.W.2d 686, 689 (Mo. Ct. App. 1981); *Kuntsman v. Guaranteed Equities, Inc.*, 728 P.2d 459, 461 (N.M. 1986); *Wellbro Bldg. Co. v. McConnico*, 421 P.2d 837, 840 (Okla. 1966); *Abedon v. Providence Redevelopment Agency*, 348 A.2d 720 (R.I. 1975); *Jeffcoat v. Morris*, 389 S.E.2d 159 (S.C. Ct. App. 1989).

The appointment of a receiver does not operate as a determination of the enforceability of contractual rights. *D & S Farms v. Producers Cotton Oil Co.*, 492 P.2d 429, 431 (Ariz. 1972). The appointment of a receiver does not excuse performance under an existing contract. *Manufacturers’ Finance Co. v. McKey*, 294 U.S. 442, 446-47 (1935); *Geroy v. Upper*, 187 P.2d at 666-67.

For example, in *Keybank National Assoc. v. Michael*, 737 N.E.2d 834 (Ind. App. 2000), a receiver sought to subordinate existing debts to new financing as a means to revive the business. *Id.* at 849. The court found the receiver had no authority to do so, quoting with approval a series of cases that stated:

The general rule is that the appointment of a receiver does not divest valid pre-existing rights, but that the receiver takes the property subject to the same equities and rights as existed against it in the hands of the person or corporation out of whose possession it was taken [quoting *Irwin's Bank v. Fletcher's Sav. & Trust*, 145 N.E.2d 689 (1924)] . . . Every legal and equitable lien upon the property of the corporation is preserved, with the power of enforcing it. [quoting *American Trust & Sav. Bank v. McGettigan*, 146 N.E. 909 (1899)].

*Id.* at 850 (citations omitted) (emphasis supplied).

Just as in the *Keybank* case, the receiver in this case took the property subject to CenterPoint's rights to be paid on the existing natural gas account or to disconnect service – essentially holding an equitable lien on the property under Minn. Rules pt. 7820.1000. As the above authorities make clear, nothing in the appointment of the receiver discharged that lien. The receiver has no right to pick and choose who to pay, and certainly cannot lawfully favor the bank that sought its appointment because the receiver is obligated to be “indifferent as to the litigants and to be impartial and disinterested.” AA at 70 ¶ 7.

In a similar case, *Downey v. Humphreys*, a receiver for an insolvent insurance company sued a former insurance agent for recovery of unremitted insurance premiums. 227 P.2d 484, 492-93 (Cal. Dist. Ct. App. 1951). The agent sought to set-off from the amount claimed the amount of any unearned insurance premiums. *Id.* The Court held

that, as of the date the receiver took over the insurance company, the agent had a right of set-off. *Id.* at 493. As to the receiver, the Court ruled that “he takes the property and rights of the one for whom he was appointed precisely in the same condition and subject to the same equities as existed before his appointment, and any defense, good against the original party, is good against the receiver.” *Id.* (emphasis supplied). The Court held that “[a] receiver occupies no better position than that which was occupied by the party for whom he acts.” *Id.* at 492.

In yet another decision, *Geroy v. Upper*, the Court observed that “the general rule is that the appointment of a receiver will not change any existing contractual relation or create any new contractual relation or right of action thereon, and a receiver can do nothing to impair a contract as between the parties thereto.” 187 P.2d 662, 667-68 (Or. 1947) (emphasis supplied). The receiver “stands in the shoes of the corporation” and in this case because the debtor’s interests under a contract had lapsed, the receiver had no greater rights or abilities to revive the contractual rights. *Id.*

Accordingly, some courts state that a receiver is an assignee of the insolvent party whose property is placed in receivership, having exactly the same rights as the insolvent. *Maxl Sales Co., v. Critiques, Inc.*, 796 F.2d 1293, 1297 n.2 (10th Cir. 1986); *Jeffcoat v. Morris*, 389 S.E.2d 159 (Ct. App. 1989).

In summary, this wide range of consistent authority establishes that a receiver essentially acts as the property owner with respect to all of the property owner’s contractual obligations, and that the receiver is not relieved of the property owner’s obligations and liabilities merely by being appointed. A receivership is not a bankruptcy.

As set forth below, the law in Minnesota is consistent with the general rule across the nation.

**B. Minnesota Case Law Establishes The Receiver's Obligation To Pay Delinquent Operating Expenses.**

The Minnesota Supreme Court holds that a receiver is obligated to pay delinquent operating expenses of the property, even when those expenses were incurred prior to the receiver's appointment. In *Manchester Locomotive Works v. Truesdale*, 46 N.W. 301 (Minn. 1890), the court considered a claim where a railroad had been placed in receivership, and a vendor who had sold a locomotive to the railroad sought to require the receiver to pay for the locomotive. In denying the claim, the court distinguished capital purchases incurred before the receivership from operating expenses incurred before the receivership, and stated that a receiver is required to pay operating expenses that were incurred prior to the receiver's appointment. 46 N.W. at 303. The court held:

[T]he decisions which have established the right of the court to require the earnings of such a receivership to be applied in payment of debts incurred prior to the appointment of a receiver, in preference of the claims the mortgagees at whose suit the receiver has been appointed, restrict that right to somewhat narrow limits. It may be said to be confined to what may be deemed the operating expenses of the railroad, including to some extent, or under some circumstances, necessary equipment and repairs, but excluding debts for original construction, and the demands of general creditors of the corporation.

*Id.* (emphasis supplied).

This decision of the Minnesota Supreme Court is the only relevant Minnesota authority located by the parties, and it is dispositive. The Supreme Court unequivocally found that a receiver should be required to pay "operating expenses" that were "incurred

prior to the appointment of a receiver.” Utility service falls clearly into the “operating expense” category of obligations. It is not a capital expense. Without utility service, a landlord cannot lease space and earn rents. For this reason the utility is not a “general creditor” of the corporation.

Unlike other liabilities that may have been incurred by Kensington in aspects of its business, the provision of natural gas service was to the property and expressly benefited the property. Moreover, paying the past due utility bills directly benefits the ongoing maintenance of the property because, without such payment, the utility is authorized to disconnect service. This is what the Supreme Court meant in *Manchester* when it held that a receiver is obligated to pay operating expenses in contrast to a obligations to general creditors or debt creditors.

**C. Even A Limited Receiver For Property Is Subject To The Obligations Of The Debtor With Respect To The Property.**

The trial court erred in making too much of the difference between a receiver of a business as opposed to a receiver of property. Although that distinction might make a difference in some instances, it makes no difference here. First, it is unknown whether the real property in fact constitutes substantially all of the assets of Kensington, such that the Receiver effectively is controlling the entire business. It is notable that the Receiver itself denominates its involvement in the property as the “Kensington Receivership” and not the “610 West 6th Street Receivership.” AA at 80 ¶ 5.

Even assuming, however, that the Receiver here is not holding all of Kensington’s business in trust, it does hold the Kensington asset that receives the benefit of

CenterPoint's gas service – the real property – in trust for Kensington. Even where a receivership is limited in scope, the receiver steps into the shoes of the property owner with respect to the debts that affect the property. For that reason, the receivership statute requires the receiver to pay “all expenses for the normal maintenance of the mortgaged premises.” Minn. Stat. §576.01, subd. 2.

It thus cannot be disputed that the Receiver has stepped into Kensington's shoes with respect to all matters at least relating to the real property. It manages the property, collects rents, collects and refunds security deposits and has voluntarily assumed the current utility payment obligation for the property. The Receiver is entitled to accept rent payments, including delinquent rent payments for rental periods prior to the appointment of the Receiver. It thus is free to take income earned during the time the utility bills were incurred and left unpaid, and if the Receiver (and ultimately the Bank) can obtain the benefit of past due rents earned through the benefit of the prior utility service that is left unpaid, how then can the Receiver avoid payment of those utility bills? Only if the receivership somehow discharges those prior debts, and it is undisputed that no provision of the receivership statute or the lower court's receivership order so operates.

Accordingly, the fact that the Receiver is not a Receiver for all of Kensington's obligations has no impact on the uncontested fact that the Receiver stands in Kensington's shoes at least with respect to all of Kensington's operating expense obligations respecting the property. This is the express holding of the Minnesota Supreme Court ruling in *Manchester*.

Before the lower court, the Bank relied entirely on foreign authority in an effort to convince the trial court to follow the foreign authority and disregard *Manchester*. The trial court erred in doing so. The Bank relied on the Mississippi case of *Lend Lease Asset Management LP v. Cobra Security, Inc.*, 912 S.2d 471, 476 (Miss. 2005). This case is easily distinguished. In that instance, the receiver refused to pay money to a security company for services rendered prior to the establishment of the Receivership and the court did not require such payment. The *Cobra Security* case did not address the more precise issue in this case, which is whether the security company could quit work absent payment of the past due amounts. Of course it could, and so it is equally true that CenterPoint should be entitled to disconnect service if the Receiver chooses not to pay the past due bills.

This reveals the circular reasoning of the lower court's decision. The court acknowledged that the receiver had to pay "necessary expenses" of the property. The court made the payment of past due gas bills not necessary, solely by declaring it so. The receivership statute, receivership order, the *Manchester* decision and Minn. Rules pt. 7820.1000(A) all are to the contrary. Consider also the provision of the Receivership Order, AA at 74 (part n), which states the Receiver is empowered to "negotiate, extend, terminate, modify, renegotiate or enter into contracts, including . . . utility and other services to the property"). If the Receiver is not already a party to the property owner's utility contract, then why does the order authorize the Receiver to renegotiate or extend that contract? Because the Order acknowledges that the Receiver is not a new customer, but is a party to the property owner's existing utility contracts.

Beyond all that, however, the *Cobra Security* court's rationale supports CenterPoint Energy's position, because the Court considered whether the failure to pay the past due bill "would result in lack of maintenance or waste of the mall property." *Id.* at 475. Not paying the security company may not result in a lack of maintenance or waste, because presumably the receiver could hire a different security company to take the place of the claimant that refused to perform further work. Certainly, the court in that case did not require the security company to continue to serve the receiver notwithstanding the delinquent amounts owed, which is what the Receiver and Bank obtained in this case through the trial court's injunction.

Unlike the security business, in the case of utility service, the Receiver would not have a different option for obtaining service, and consequently the Receiver would practically have been required to pay for those services or face disconnection of service. Consequently, the Bank is attempting to recast the issue of being one of whether the Receiver can be required to pay the bill, as opposed to the real issue which is whether the court has any authority to require CenterPoint to continue to provide service despite the delinquency.

The Bank also located a 1932 New York case, *Title Guarantee & Trust Co. v. Schenectady Ave., Inc.*, 183 N.E. 198, 199-200 (N.Y. 1932), that is fact bound and not applicable in Minnesota particularly in light of *Manchester*. In that case a New York court held that a receiver did not have to pay a water bill under New York receivership law. Critical to that decision was the fact that the water company was private and thus had no statutory lien on the property, as did public water companies in New York. *Id.* at

199. Minnesota utilities have an equitable lien under Minn. Rules pt. 7820.1000(A). Also critical to the New York decision was that the receiver was appointed “for the benefit of the mortgagee” and thus was not required to be “indifferent as to the litigants and to be impartial and disinterested” as was the receiver in this case. AA at 62 ¶ 7. The New York court thus was overly concerned with ensuring that the mortgagee had valuable collateral in the context of a receivership that by definition was solely for the mortgagee’s benefit. Because the New York receivership thus was fundamentally different, and because Minnesota courts are bound by *Manchester* and not New York case law, the trial court erred in giving weight to the *Title Guarantee* decision.

**D. Minnesota’s Receivership Statute Requires Payment Of Past Due Obligations Of The Property.**

Beyond considerations of case law, the trial court erred in misconstruing the receiver’s obligations under Minn. Stat. § 576.01. In the case of mortgage foreclosures, and during the period of redemption, a receiver is mandated in certain instances. *Id.* at subd. 2. Under this statute, which was invoked in the present case by the Bank, the Receiver is required to collect rents, profits and income of the property and to:

manage the mortgaged premises so to prevent waste, execute leases within or beyond the period of the receivership if approved by the court, pay the expenses listed in clauses 1, 2 and 3, in the priority as numbered, pay all expenses for normal maintenance of the mortgaged premises and perform the terms of any assignment of rents which complies with § 559.17, subd. 2.

*Id.* at subd. 2 (emphasis supplied).

A receiver thus shall “pay all expenses for normal maintenance of the mortgaged premises.” Minn. Stat. § 576.01, subd. 2(4). Normal maintenance of a premises

necessarily includes maintaining utility service, and neither the Bank nor the trial court asserted otherwise. Maintaining utility service, as a matter of law, means paying all delinquent balances or facing disconnection of service. Minn. Rules pt. 7820.1100(A).

The trial court did not identify any authority in the receivership statute that allowed the receiver to disregard past due utility bills. The court in fact made the negative finding – that nothing in the receivership order specifically required the receiver to pay the bill. AA at 15. That conclusion only avoids the issue of determining what constitutes the “expenses for the normal maintenance of the mortgaged premises” that the receiver is required to pay. The *Manchester* case also addressed the issue of what the receiver must pay, but the trial court made no effort to distinguish *Manchester*. The trial court made the incorrect finding, without citation to authority, that the natural gas debt “does not impinge on the property itself.” AA at 13. Certainly natural gas service directly services the property in the manner contemplated in *Manchester*. If provision of utility service does not impinge on the property, it is difficult to imagine what services would be deemed to impinge on the property. The court thus essentially held by *ipse dixit* and in circular fashion that the bills did not have to be paid because the court so ruled.

The trial court also did not address the numerous instances in the receivership statute where the receiver is required to pay past due and delinquent obligations incurred prior to the appointment of the receiver. With respect to the expenses that a receiver is mandated to pay, these include “payment when due of prior or current real estate taxes or special assessments with respect to the mortgaged premises.” Minn. Stat. § 576.02, Subd.

2(2). Similarly, the receiver statute requires receivers to pay premiums for insurance “of the type required by the mortgage,” and this provision can reasonably be construed to require past due insurance as well as current insurance. Finally, this section of the statute requires a receiver to keep any covenants required of a landlord or licensor pursuant to § 504B.161, subd.(a)(1),<sup>1</sup> which includes the landlord’s warranty of habitability. Receivers thus are obligated to maintain conditions that would ensure compliance with the implied warranty of habitability of leased premises, which necessarily requires that landlords pay for utilities in compliance with applicable terms of service.

In sum, the Receiver in this case is required by statute to pay expenses for the normal maintenance of the mortgaged premises, which necessarily includes all payments that are required to maintain utility service. The trial court asked the wrong question in evaluating whether the receivership statute expressly required payment of these delinquent gas bills. Given that the property had benefitted from natural gas service and the account was delinquent, the right question to ask was whether anything in the receivership statute set aside or discharged the obligations. The answer is that the statute does not discharge the obligations. Consequently, to maintain natural gas service at the premises the receiver was obligated to pay the delinquent balances or be subject to disconnection under operation of law, Minn. Rules pt. 7820.1000(A).

---

<sup>1</sup> This provision applies to residential premises.

**E. The Trial Court's Receivership Order Mandated Payment Of Necessary Expenses Including Past Due Utility Bills.**

Beyond the Receiver's obligations under Minnesota statute and common law, the lower court's order appointing the Receiver established a duty of the Receiver to pay past due utility bills. This order, dated December 27, 2007, required that the Receiver "shall collect the rents, profits and all other income of any kind from the Property . . . and shall apply the rents, profits and other income . . . to payment of all expenses for normal maintenance of the property." AA at 71 (¶ 2(e)). The Court's order expressly subordinates payments to the bank below payment of these expenses. AA at 72 (¶ 2(f)).

The Order also authorizes the Receiver "to pay prior obligations incurred by the Borrower or others responsible for the property only if deemed necessary for the continued operation of the Property and its improvements." AA at 74 ¶ 4 (v). As a matter of law, under Minn. Rules pt. 7820.1000(a), payment of the prior utility bills is necessary for continued operation of the property with natural gas service. If the Receiver deems that natural gas service is required for the continued operation of the property, then under the Court's order it must pay the past due bills.

Similarly, the Receivership Order, AA at 74 ¶ 4 (n), states the Receiver is empowered to "negotiate, extend, terminate, modify, renegotiate or enter into contracts, including . . . utility and other services to the property." A Receiver can extend, terminate or renegotiate a contract only if it acts as a party to an existing contract entered into by the property owner. This is certainly how the receiver handles leases with tenants, for example. The Receivership Order thus expressly acknowledges that the

Receiver is going to take the property subject to existing utility contracts and that the Receiver can try to modify or renegotiate them. The lower court's order – that a receiver comes to the property as a new entity free to disregard existing contracts – cannot be reconciled with the Receivership Order.

**F. The Receiver Is Not A “New Customer” Of The Utility.**

As demonstrated above, application of the controlling *Manchester* case, receivership common law, the receivership statute and the lower court's receivership order all require the Receiver to pay the delinquent gas bills to avoid disconnection of service. The Bank attempted to avoid those authorities by contending that the receiver was a “new customer” of the utility. If the Receiver was a new customer then CenterPoint was prohibited from disconnection of service under Minn. Rules pt. 7820.1300, which states: “A utility may not disconnect service to any customer for . . . delinquency in payment for services rendered to a previous customer who occupied the premises unless the customer continues to occupy the premises.”

The trial court held that “the receiver could not be considered the same entity as Kensington and would be construed as a new customer of CenterPoint.” AA at 16. The trial court simply stated this conclusion and did not support with any factual or legal analysis. The fact is that the Receiver must be considered the same entity as Kensington because “it stands in the shoes” of Kensington. Rents that were payable to Kensington were collected and deposited by the Receiver. The Receiver paid the current utility bills, real estate taxes, insurance and other expense on behalf of Kensington and certainly not on the Receiver's own account. Rents collected after operating expenses were paid to the

Bank to reduce Kensington's debt to the Bank. In all respects the Receiver operated the property on behalf of the property owner, Kensington, and not as a new and separate entity. The court thus was wrong in finding the Receiver to be a new customer.

Also, even if the Receiver were a new customer the rule still provides that disconnection of service is allowed if the prior customer continued to occupy the premises. Minn. Rules pt. 7820.1300. In this case Kensington still owned the property, still was collecting rent from the same tenants, and still had the right to redeem the property. Accordingly, it fairly continued to occupy the premises until the property was sold and the redemption period expired, and thus disconnection of service would be allowed under pt. 7820.1300 even if the Receiver were a new customer.

### **III. THE CASE IS NOT MOOT.**

This case is not moot because the court still can fashion relief for CenterPoint. First, the Court of Appeals can dissolve the injunction that prevented CenterPoint from collecting the delinquent natural gas charges or disconnecting service. The injunction was never dissolved by the Court and remains in effect and burdens CenterPoint. Second, upon a reversal of the trial court, CenterPoint can pursue its claims for unjust enrichment against the Receiver and the Bank. Rents or other property income that should have been used to pay operating expenses such as delinquent natural gas bills instead were presumably used to pay down the Bank's mortgage, or were paid over to the Receiver pursuant to paragraph 2(f)(iv) of the Receivership order that allows the Receiver to retain "excess" property revenues. AA at 72. CenterPoint has an action to recover

those payments from the Receiver under its breach of contract and unjust enrichment claims.

Additionally, to the extent that the position of the parties has changed because of the short duration in which the receiver holds its powers under Minn. Stat. § 576.01, the Court of Appeals should recognize the widely held exception to the mootness doctrine for cases that are “capable of repetition yet evading review.” The United States Supreme Court and the Eighth Circuit recognize the “capable of repetition, yet evading review” exception to the mootness doctrine applies where the factual circumstance giving rise to the complaint is too short in duration for timely review and there is a reasonable expectation that the complaining party will be subject to the same action again. *Rice v. Kempker*, 374 F.3d 675, 678 (8th Cir. 2004). In *Rice*, a religious organization challenged the state’s denial of its request to videotape the execution of a prisoner but the prisoner was executed while the lawsuit was pending, thus arguably mooting the case. *Id.* at 678. The court rejected a mootness claim, however, because future executions similarly likely would evade review.

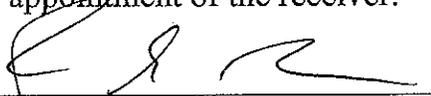
In the present case the court can take judicial notice that mortgage foreclosures are widespread and that in each case of a mortgage foreclosure, it is likely that the property owner also will be delinquent in utility charges. The duration of Section 576 receiverships can be a matter of months, and this duration makes it impossible that any similar dispute between utility and bank can be addressed in the first instance by the trial court, then briefed, argued and decided by the Court of Appeals and possibly the Supreme Court, prior to the termination of the receivership. Consequently, the Court of

Appeals should decide this appeal on the merits, irrespective of whether the Receivership has terminated during the pendency of this case.

### CONCLUSION

For all the foregoing reasons, Appellant CenterPoint Energy respectfully requests that the Court of Appeals reverse the trial court's summary judgment decision, grant CenterPoint's motion for summary judgment, dissolve the injunction, and issue a declaratory judgment that the appointment of a receiver does not alter the rights of the utility with respect to the property owner including disconnection of service for non-payment of utility bills incurred prior to appointment of the receiver.

Dated: June 29, 2009



---

Keith S. Moheban (# 216380)  
James T. Brand (# 387362)

**LEONARD, STREET AND DEINARD  
PROFESSIONAL ASSOCIATION**  
150 South Fifth Street, Suite 2300  
Minneapolis, MN 55402  
Telephone: (612) 335-1600  
Facsimile: (612) 335-1657

**ATTORNEYS FOR APPELLANT  
CENTERPOINT ENERGY**

State of Minnesota  
In Court of Appeals

STATE BANK OF DELANO,

*Plaintiff—Respondent,*

v.

CENTERPOINT ENERGY,

*Defendant—Appellant,*

And

SWARTZ BROTHERS ASSOCIATES, INC.  
AND KENSINGTON EQUITY PARTNERS, INC.,

*Defendants—Respondents,*

And

GLACIAL HILLS ELEMENTARY SCHOOL,

*Intervenor—Respondent.*

---

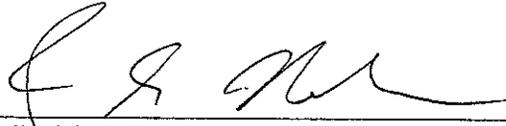
**CERTIFICATION OF BRIEF LENGTH**

---

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs.1 and 3, for a brief produced with a proportional Times New Roman 13-

point font. The length of this brief is 6,834 words. This brief was prepared using Microsoft Word 2003.

Dated: June 29, 2009



Keith S. Moheban (#216380)  
James T. Brand (#387362)

**LEONARD, STREET AND DEINARD  
PROFESSIONAL ASSOCIATION**

150 South Fifth Street, Suite 2300  
Minneapolis, MN 55402  
Telephone: (612) 335-1600  
Facsimile: (612) 335-1657

**ATTORNEYS FOR APPELLANT  
CENTERPOINT ENERGY**