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NO. A11-1475

State of Minnesota
In Court of Appeals

Conrad William Leifur,

Appellant,

v.

Katherine Fashant Leifur,

Respondent.

APPELLANT'S BRIEF AND APPENDIX

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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).

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ISSUES PRESENTED ON APPEAL

- I. WHETHER THE TRIAL COURT ERRED AS A MATTER OF LAW BY INVALIDATING THE PARTIES' WRITTEN BINDING AGREEMENT REGARDING RETROACTIVITY OF ORDERS MODIFYING PAYMENT OF CHILD SUPPORT AND SPOUSAL MAINTENANCE.

The trial court held: The binding written mediation agreement is unenforceable because a final, complete agreement in mediation was not reached regarding modification of Appellant's spousal maintenance.

Apposite authorities:

Anderson v. Sommer, 381 N.W.2d 22, 24 (Minn. Ct. App. 1986)

Baehr v. Penn-O-Tex Oil Corp., 258 Minn. 533, 538-39, 104 N.W.2d 661, 665 (1960)

Bd. of Regents of the Univ. of Minn. v. Royal Ins. Co. of Am., 517 N.W.2d 888, 892 (Minn. 1994)

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Gran v. City of St. Paul, 274 Minn. 220, 223, 143 N.W.2d 246, 249 (1966)

Holasek v. Holasek, No. A04-2199, 2005 WL 2008721 at *3 (Minn. Ct. App. August 23, 2005)

John v. John, 322 N.W.2d 347, 348 (Minn. 1982)

Telex Corp. v. Data Products Corp., 271 Minn. 288, 294-95, 135 N.W.2d 681, 686-87 (1965)

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The trial court held: The binding written mediation agreement is unenforceable because a final, complete agreement in mediation was not reached regarding modification of Appellant's spousal maintenance.

Apposite authorities:

Karon v. Karon, 435 N.W.2d 501, 503 (Minn. 1989), rev'd judgment 417 N.W.2d 717, superceded by statute on other grounds

Keilley v. Keilley, 674 N.W.2d 770, 774 (Minn. Ct. App. 2004)

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Tell v. Tell, 359 N.W.2d 298, 301 (Minn. Ct. App. 1984), rev'd on other grounds

Toughill v. Toughill, 609 N.W.2d 634, 639 & n. 1. (Minn. Ct. App. 2000)

STATEMENT OF THE FACTS AND CASE

A. Dissolution Proceeding

The parties' marriage was dissolved by Stipulated Findings of Fact, Conclusions of Law, Order for Judgment and Judgment and Decree entered November 21, 2006 (hereinafter "Judgment and Decree"). (A-21, A-45-78). At the time of the divorce in 2006, Husband ("Appellant") was 41 and Wife ("Respondent") was 40 years of age. (A-21, A-46). Conclusion of Law 4 of the Judgment and Decree required Appellant to pay Respondent spousal maintenance in the amount of \$6,600 per month. (A-61-2). Spousal maintenance was based on Appellant's projected income as a managing director at Cargill of \$250,000 per year, which included gross annual base salary of \$175,000 and annual bonuses anticipated to be approximately \$75,000. (A-47-8). Per the same Conclusion of Law, Appellant's spousal maintenance obligation was subject to two review periods: May 1, 2010, and July 1, 2016, based on the standard set forth in the spousal maintenance modification statute, Minn. Stat. § 518A.39. (A-23, A-61).

B. Change in Circumstances

Appellant was terminated from his employment position at Cargill in November 2007. (A-24). Following his termination, Appellant received bi-monthly severance payments equivalent to his salary rate through May 2008. (A-24). Appellant continued to pay his spousal maintenance payments through

January 2009 by depleting his investment account assets awarded to him under the Judgment and Decree. (A-24).

C. Written Binding Mediation Agreement

Conclusions of Law 4 and 20 of the Judgment and Decree required the parties to attend mediation and make a good faith effort to resolve any claim or controversy arising under the Judgment and Decree before filing a Motion with the Court. (A-61-2, A-72-3). In January 2009, the parties commenced mediation with Steve Erickson of Erickson Mediation Institute to address ongoing support issues. (A-34). The parties first attended mediation without counsel. (A-34). The parties retained counsel in March 2009 to assist them and continued in the mediation process. (A-34). The parties attended one of many mediation sessions on May 28, 2009. (A-34). Although the parties were unable to reach agreement on all issues at this mediation session, they agreed to continue with mediation efforts. (A-34).

To avoid the unnecessary expense of filing a motion to preserve retroactivity under Minn. Stat. § 518A.39, the parties reached a partial agreement at the May 28, 2009 mediation session to preserve retroactivity of any child support or spousal maintenance modification to June 1, 2009. (A-34, A-79). The mediator, Steve Erickson, drafted the binding agreement, which memorialized the following:

"5-28-09

LEIFUR, Conrad and Katherine, with their attorneys present.

MEDIATION AGREEMENTS

Katherine and Conrad met in a mediation session with their attorneys present for the purpose of discussing modifications to the Judgment and Decree of Dissolution entered by the Court November 21, 2006. They have scheduled a second mediation session for June 5, 2009 to continue the discussions.

They wish to make the following agreement binding upon them.

- 1. The parties agree that any modification of child support and spousal support be retroactive to June 1, 2009.***

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(A-79). The agreement was executed by both parties and both counsel.

(A-79).

Following the May 2009 mediation session, the parties continued in the mediation process. (A-34) Additional negotiations took place through April 2010. During this time period, neither party sought to revoke the parties' written binding mediation agreement. (A-151).

Beginning June 1, 2009, Appellant continued to pay child support and spousal maintenance based on an arbitrary amount, an amount that proved to be overstated by the District Court later at hearing. (A-34, A-7-9). To be able to pay support to Respondent, Appellant was forced to withdraw \$100,000 from his IRA account in 2009, which was part of his original property award, to continue to

meet his monthly living expenses, as well as to continue to make monthly child support payments and a reduced monthly spousal maintenance payment. (A-34, A-103-4,).

In 2009, Appellant's annual gross income from short term gains totaled \$65,478 from day trading. From this income, he paid a total of \$38,613 in support payments to Respondent (\$18,000 in child support and \$20,613 in spousal maintenance) for the year. (A-33-34). At the time of the October 2010 hearing, Appellant had received no income from his pending business and product ventures. (A-35). His income from day trading on a monthly basis remained speculative. (A-35). Appellant funded his monthly living expenses, continued child support payments and a reduced monthly spousal maintenance payment by depleting his original property award. (A-34-5).

Pursuant to the Judgment and Decree, Appellant was awarded approximately \$1.6 million in assets. (A-35). From 2007 to 2009, he lost approximately \$557,250 in non-deductible capital losses from his stock and private equity accounts based on market depreciation in his day trading activities due to the market recession. (A-35). During this same time period, his housing losses were approximately \$218,000 based on market depreciation. (A-35). At the time of the hearing on October 28, 2010, Appellant's home was valued at approximately \$778,000, subject to a Bank of America first mortgage balance of \$656,056 and a U.S. Bank second mortgage credit line balance of \$137,109. (A-39-40, A-86-89). Appellant explained he was upside down on his mortgage and

it was not feasible to sell his home. (A-40). Appellant's IRA losses were approximately \$161,445. (A-35). Appellant's reduction in net worth from November, 2006 to October, 2010 was approximately \$1.1 million. (A-35, A-82-4). Since entry of the Judgment and Decree, Appellant's available resources has plummeted, resulting in nominal liquid investment accounts at the time of the October 2010 hearing. (A-40). Appellant explained the accounts he still has needed to be preserved to generate income through his day trading activities. (A-40).

At the time of the October 2010 hearing, Respondent's financial picture was greatly superior to Appellant's. (A-40). Respondent was awarded assets totaling approximately \$1.6 million in the Judgment and Decree, plus she was awarded almost all of the household goods, furniture and furnishings. (A-40). During the original dissolution proceeding, both parties purchased their existing homes. (A-40). Respondent purchased her home for \$474,000, encumbered by a mortgage balance of \$245,000. (A-40-1). At the time of hearing, Respondent had approximately \$184,100 in equity in her homestead. (A-41). Respondent was also awarded the parties' cabin, valued at \$450,000 and unencumbered. (A-41). As of June 30, 2010, Respondent's balance in two investment accounts totaled \$516,959. (A-41, A-90-92). Respondent claimed at the October 2010 hearing she was required to liquidate significant funds to pay living expenses due to the reduced support payments. (A-41). However, the withdrawals from her National Financial Services mutual fund account #x3158 show she made

significant withdrawals totaling \$100,628 before June 1, 2009, prior to Appellant reducing his spousal maintenance obligations. (A-41, A-90-92). Her withdrawals from this account after June 1, 2009 totaled \$91,808. (A-41).

Despite Respondent's claim to liquidate funds in her accounts for living expenses, she enjoyed several vacations to such places as Chicago, Italy, Puerto Rico (twice), New York, Paris, and several local trips to North Dakota and the North Shore after Appellant lost his employment in November 2007. (A-41). Many of these vacations took place even after Appellant reduced his spousal maintenance payments in 2009. (A-41-2, A-95). Respondent also spent \$19,794 remodeling her home after spousal maintenance payments were reduced. (A-41; A-93-4).

At the time of the Judgment and Decree, Respondent had a balance of approximately \$110,000 in retirement accounts. (A-42, A-90-2). Respondent claimed significant withdrawals in her National Financial Services IRA #x1726, totaling approximately \$50,745. (A-42). However, records disclosed by Respondent showed that in December 2009, Respondent opened two Roth IRA accounts with the same service provider, totaling approximately \$56,855, a similar amount withdrawn from the #x1726 account. (A-42). One can presume these accounts were transferred for income tax purposes, but documents were not provided in discovery to confirm this assumption. (A-42). At the time of hearing, Respondent's combined balance in retirement accounts was \$251,815. (A-42, A-90-2).

D. Post Dissolution Proceeding

On April 28, 2010, Respondent secured a motion hearing date. (A-1). She filed a motion to enforce the original spousal maintenance award in May 2010. (A-160-162). The original motion hearing was scheduled for July 12, 2010, but was continued at Respondent's request until October 2010 to complete voluminous formal discovery and for Respondent to subsequently take Appellant's deposition. (A-1-3). Respondent served a Supplemental Motion on October 14, 2010, after completion of discovery seeking to enforce the spousal maintenance term under the Judgment and Decree. (A-163-182, A-191-197). Appellant timely served and filed a Motion Raising New Issues on October 18, 2010, seeking to modify spousal maintenance based on his substantial change in circumstances. (A-20-95, A-102-140). Appellant's motion sought relief retroactive to June 1, 2009, consistent with the parties' binding written mediation agreement and the review period established in the Judgment and Decree. (A-20, A-34, A-79). The original hearing took place on October 28, 2010. In response to Appellant's motion to enforce the binding mediation agreement, Respondent's responsive motion claimed there was no agreement. (A-183-190, A-198-210).

The district court granted Appellant's Motion to modify spousal maintenance by Order filed February 2, 2011. (A-4-12). But the district court found the "purported agreement" in mediation did not provide a compelling basis for an earlier retroactive date than when Appellant filed his motion on October 18,

2010, the date implied in Minn. Stat. § 518A.39, Subd. 2(e). (A-10-10a). In reaching its decision, the district court ignored the sole term of the binding written mediation agreement, which directed the Court to supersede the retroactivity provision of this statute. (A-10a). Instead, the binding written mediation agreement directed the Court to modify spousal maintenance (or child support) retroactive to June 1, 2009. (A-79).

Based on the district court's decision, Appellant's spousal maintenance obligation was suspended for only a two month period after Appellant filed his motion: November and December, 2010. (A-10a-11). Commencing January 1, 2011, the Court Ordered Appellant to pay spousal maintenance in the amount of \$3,000 per month, commensurate with Appellant's anticipated future stream of income. (A-10a-11). Based on the Court's decision to invalidate the parties' binding written mediation agreement, the district court entered judgment against Appellant on the accumulated arrears from February 2009 through the October 28, 2010 hearing in the amount of \$104,100. (A-11).

The Court relied on one finding to invalidate the parties' binding written mediation agreement, stating:

"35. Under Minn. Stat. § 518A.39, subd. 2(e) a modification of support or maintenance may be made retroactive only with respect to any period during which the petitioning party has pending a motion for modification. The statute does not authorize the Court to establish an earlier retroactive date. The Court finds that the purported agreement in mediation does not provide a compelling basis for an earlier retroactive date. The parties never reached an agreement to modify Husband's obligation. The Court finds that the parties' agreement to a retroactive date most likely was tied to the

parties' expectation that they would be able to agree on a modification through their ongoing mediation efforts. When the mediation efforts failed, the expected retroactive date effectively failed as well. No independent consideration supported Wife's supposed agreement that the retroactive date would continue indefinitely into the future, regardless of how long it may be before the modification issue was presented to the Court. Despite his decision to unilaterally reduce his payments to Wife and despite the parties' ongoing mediation efforts, Husband did not file and serve his motion to suspend or terminate spousal maintenance until October 14, 2010, more than 16 months after the supposed retroactive date. Furthermore, he did not orally amend his motion to include a request for modification until the hearing on October 28, 2010."

(A-10-10a).

E. Motion for Amended Findings

Appellant brought a Motion for Amended Findings on March 4, 2011, asserting the Court erred as a matter of law in invalidating the binding written mediated agreement based on applicable case law as well as on public policy grounds. (A-141-159). Respondent filed a Motion Opposing Appellant's Motion for Amended Findings. (A-211-227). The District Court denied Appellant's Motion for Amended Findings, determining Appellant's Motion to be a Motion for Reconsideration. (A-13-19)

This Appeal followed. Appellant challenges the Trial Court's determination that the parties' binding written mediation agreement is unenforceable (and the resulting \$104,100 judgment).

STANDARD OF REVIEW

A mediated settlement agreement is a contract and is subject to rules of contract interpretation and enforcement. Theis v. Theis, 271 Minn. 199, 204, 135

N.W.2d 740, 744 (1965); Chalmers v. Kanawyer, 544 N.W.2d 795, 797 (Minn. Ct. App. 1996) (stating settlement agreements are contractual in nature and are binding on the parties). “The construction and effect of a contract are questions of law for the court . . .” Turner v. Alpha Phi Sorority House, 276 N.W.2d 63, 66 (Minn. 1979).

Whether a contract is ambiguous is a legal question reviewed *de novo*. Republic Nat. Life Ins. Co. c Lorraine Realty Corp., 279 N.W.2d 349,354 (Minn. 1979); See also Bd. of Regents of the Univ. of Minn. v. Royal Ins. Co. of Am., 517 N.W.2d 888, 892 (Minn. 1994). The appellate court need not defer to a trial court’s decision on a question of law. Frost-Benco Elec. Ass’n v. Minn. Pub. Utils. Comm’n, 358 N.W.2d 639, 642 (Minn. 1984); See also Salstrom v. Salstrom, 404 N.W.2d 848, 850 (Minn. Ct. App. 1987), *citing* Van de Loo v. Van de Loo, 346 N.W.2d 173, 175 (Minn. Ct. App. 1984).

ARGUMENT

I. THE TRIAL COURT ERRED AS A MATTER OF LAW BY INVALIDATING THE PARTIES’ WRITTEN BINDING AGREEMENT REGARDING RETROACTIVITY OF ORDERS MODIFYING PAYMENT OF CHILD SUPPORT AND SPOUSAL MAINTENANCE.

A mediated settlement agreement is a contract and is subject to rules of contract interpretation and enforcement. Theis v. Theis, 271 Minn. 199, 204, 135 N.W.2d 740, 744 (1965). The existence of a contract requires an offer, acceptance and consideration. Pine River State Bank v. Mettille, 333 N.W.2d 622, 626-27 (Minn. 1983). “A contract is a promise or a set of promises for the

breach of which the law gives a remedy or the performance of which the law recognizes as a duty.” Murray v. MINNCOR, 596 N.W.2d 702, 704 (Minn. Ct. App. 1999), review denied Sept. 28, 1999.

The parties attended one of several mediation sessions on May 28, 2009, at which time they reached partial agreement, resolving one issue related to their case. The parties intended to, and did, continue with additional mediation sessions. The parties continued in the mediation process and negotiations through counsel until April 2010. Respondent’s counsel did not secure a motion hearing dated until April 28, 2010. From June 1, 2009, until October 2010, when the hearing took place, neither party affirmatively revoked the parties’ prior written binding mediation agreement. The parties’ partial binding written agreement preserved retroactivity of any child support or spousal maintenance modification as of June 1, 2009, the sole purpose intended to preserve retroactivity of modification as of June 1, 2009 without the need to incur unnecessary motion filings and supersede the required filing deadline in Minn. Stat. § 518A.39.

A. The binding mediated settlement agreement dated May 28, 2009 is clear and unambiguous as a matter of law.

The complete partial agreement reached in mediation and executed by both parties and counsel stated the following:

“5-28-09

LEIFUR, Conrad and Katherine, with their attorneys present.

MEDIATION AGREEMENTS

Katherine and Conrad met in a mediation session with their attorneys present for the purpose of discussing modifications to the Judgment and Decree of Dissolution entered by the Court November 21, 2006. They have scheduled a second mediation session for June 5, 2009 to continue the discussions.

They wish to make the following agreement binding upon them.

- 1. The parties agree that any modification of child support and spousal support be retroactive to June 1, 2009.*

*Prepared by Stephen K. Erickson
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952-835-3688”*

Whether the language of a contract is ambiguous is a question of law that we review *de novo*. Bd. of Regents of the Univ. of Minn. v. Royal Ins. Co. of Am., 517 N.W.2d 888, 892 (Minn. 1994). The appellate court need not defer to a trial court’s decision on a question of law. Salstrom v. Salstrom, 404 N.W.2d 848, 850 (Minn. Ct. App. 1987), *citing* Van de Loo v. Van de Loo, 346 N.W.2d 173, 175 (Minn. Ct. App. 1984). A district court interprets the language of a contract to determine the intent of the parties. Dykes v. Sukup Mfg. Co., 781 N.W.2d 578, 581-82 (Minn. 2010). If the language is unambiguous, the district court gives the language its plain and ordinary meaning. Id. at 582. The language of a contract is ambiguous when it is subject to two or more reasonable interpretations. Id. “The sense of a word depends on how it is being used; only if more than one meaning applies within that context does ambiguity arise.” Bd. of Regents of the Univ. of Minn. v. Royal Ins. Co. of Am., 517 N.W.2d 888, 892 (Minn. 1994).

Here, the language of the binding agreement was clear and unambiguous, stating:

[The parties] wish to make the following agreement binding upon them.

- 1. The parties agree that any modification of child support and spousal support be retroactive to June 1, 2009.*

The Courts have consistently stated that when a contractual provision is clear and unambiguous, courts should not rewrite, modify, or limit its effect by a strained construction. Telex Corp. v. Data Products Corp., 271 Minn. 288, 294-95, 135 N.W.2d 681, 686-87 (1965); Anderson v. Twin City Rapid Transit Co., 250 Minn. 167, 178, 84 N.W.2d 593, 601 (1957); Grimes v. Toensing, 201 Minn. 541, 545, 277 N.W. 236, 238 (1938). The District Court interpreted the single provision of the binding agreement to not be an agreement because the parties were unsuccessful in reaching an agreement on the remaining issues; mainly, an agreement to modify Appellant's support obligations. Rather, the District Court concluded that the parties' agreement to a retroactive date "most likely was tied" to the parties' expectation that they would be able to agree on a modification of spousal maintenance through their ongoing mediation efforts. The District Court erroneously concluded that "when mediation efforts failed, the expected retroactive date effectively failed as well."

The law does not favor invalidation of contracts or binding agreements because of indefiniteness and if the terms can be reasonably ascertained in a

manner prescribed in the writing, the contract will be enforced. Furuseth v. Olson, 297 Minn. 491, 493, 210 N.W.2d 47, 49 (Minn. 1973). (Emphasis added). This is especially true where, as here, both parties have performed extensively under the contract. Anderson v. Sommer, 381 N.W.2d 22, 24 (Minn. Ct. App. 1986).

The parties attended mediation and reached agreement that any motion for modification would be retroactive to June 1, 2009. This single term agreement is clear and concise. The District Court erred as a matter of law in interpreting the agreement to include additional provisions that did not exist.

Even if the language of the binding written mediation agreement were deemed ambiguous, which it is not, the District Court's inference that this agreement was simply an "agreement to agree" defies logic and common sense. It was understood and agreed the document both parties and counsel signed would be given to the District Court if a motion became necessary. There would have been no reason for the parties and attorneys to sign the agreement if anyone considered it to be confidential. Instead, it was prepared and signed to reflect the binding agreement reached. It was also prepared to provide both parties the ability to submit the Agreement to the District Court if the remaining issues could not be resolved in mediation and a future Court hearing became necessary, which is exactly what happened.

It is common practice that when complete agreements are reached in mediation, they are submitted to the Court for entry. It is also common practice

for the parties to reach partial agreements and later submit the remaining issues to the Court for decision. The binding written mediation agreement reached between the parties in mediation served the purpose of stipulating to a retroactive date for modification of child support and spousal maintenance payments in the event mediation failed and the parties proceeded to District Court. If the District Court's interpretation of the binding agreement were correct, that it was an "agreement to agree" to continue to mediate, a binding agreement would be necessary every time parties required a second or subsequent mediation session, inundating the Court with piecemeal requests. Moreover, following the District Court's reasoning, had the parties reached agreement to reduce Appellant's spousal maintenance and one party would not honor the binding agreement as to the June 1, 2009, retroactive date, the end result would be the same; return to District Court and make the same argument we did here.

B. The absence of a performance date under the binding written mediation agreement dated May 28, 2009 is not fatal to the enforceability of this agreement and Appellant's delay in presenting the same agreement to the Court was reasonable under the circumstances.

Despite the clear and unambiguous language of the parties' binding written mediation agreement, the District Court invalidated the binding agreement because the agreement did not specify a time deadline for which a party was required to file an action with the Court. The District Court specifically found that *"no independent consideration supported Wife's supposed agreement that the retroactive date would continue indefinitely into the future, regardless of how long*

it may be before the modification issue was presented to the Court.” And “[d]espite his decision to unilaterally reduce his payments to Wife and despite the parties’ ongoing mediation efforts, Husband did not file and serve his motion to suspend or terminate spousal maintenance until October 14, 2010, more than 16 months after the supposed retroactive date. Furthermore, he did not orally amend his motion to include a request for modification until the hearing on October 28, 2010.” The District Court erred as a matter of law in determining the binding written mediation agreement was null and void when mediation ended simply because the agreement did not contain a date for which the parties were required to perform; i.e., file the agreement with the Court.

The mere lack of a performance date is not fatal to a draft mediation agreement. Hill v. Okay Const. Co., Inc., 312 Minn. 324, 333, 252 N.W.2d 107, 114 (1977), *citing* Liljengren Furniture & Lumber Co. v. Mead, 42 Minn. 420, 424, 44 N.W. 306, 308 (1890). Where a contract is silent as to the time of performance, the law implies that it is to be performed within a reasonable time; and, if the contract be in writing, parol evidence of an antecedent or contemporaneous oral agreement is inadmissible to vary the construction to be thus legally implied from the writing itself. Holasek v. Holasek, No. A04-2199, 2005 WL 2008721 at *3 (Minn. Ct. App. August 23, 2005)¹; *citing* Liljengren Furniture & Lumber Co. v. Mead, 42 Minn. 420, 424, 44 N.W. 306, 308 (1890).

¹ Unpublished and attached pursuant to Minn. Stat. § 480A.08(3).

What constitutes a reasonable time depends on the act to be done, the nature of the contract, and all related circumstances. Tingue v. Patch, 93 Minn. 437, 441, 101 N.W. 792, 794 (1904). Generally, “what constitutes a reasonable time for the performance of contract obligations is a question of fact or mixed law and fact for determination by the [fact finder]”). Bly v. Bublitz, 464 N.W.2d 531, 535 (Minn. Ct. App. 1990). See Holasek, 2005 WL 2008721 at *3 (acknowledging that a breach of reasonable time for performance of a draft mediation settlement could be excused when the other party did not provide respondent with the necessary information and thus, respondent lacked knowledge of where the payments were to be sent as well as the total amount due to perform.)

In the present case, the parties continued in the mediation process following the May 2009 mediation session and through the summer months. The parties continued negotiations until April 2010. During this time period, neither party sought to revoke the parties’ prior written binding mediation agreement. It was only after many months of negotiations did Respondent file the first motion with the Court. Acting in reliance on the binding written mediation agreement executed May 28, 2009, and the parties’ actions thereafter, Appellant timely filed his Motion Raising New Issues when Respondent filed her Supplemental Motion and corresponding Affidavits on October 14, 2010.

In Keilley v. Keilley, the parties entered into a written stipulation purporting to modify the dissolution decree on October 3, 2001, which included eliminating obligor's annual maintenance payment of \$84,000 and permanently reducing his monthly support payments based on reduction of income. 674 N.W.2d 770, 774 (Minn. Ct. App. 2004). (Emphasis added). Appellant did not move the district court to temporarily suspend his spousal maintenance payments until November 18, 2002, 13½ months later. Id. In Keilley, Wife moved to have the obligor held in contempt for not paying spousal maintenance as required by the judgment and decree, claiming the parties' subsequent stipulation modifying the decree was invalid. Id. at 775. The trial court found the parties' stipulation was void for lack of consideration, denied obligor's motion seeking relief which he sought based on the parties' subsequent stipulation, and ordered him to pay Respondent the difference between what he would paid Wife under that judgment and decree and what he actually paid her under the stipulation. Id. The Appellate Court reversed the trial court's decision, determining the trial court erred in concluding the parties' stipulation was contractually defective for lack of consideration. Moreover, the Appellate Court held that the trial court erred by not addressing whether the parties' stipulation was fair and reasonable. Id.

The timing of circumstances in the Keilley case are nearly identical to the present case. Here, the District Court ordered Appellant to pay the difference between what he would have paid Respondent under the Judgment and Decree and what he actually paid her under the stipulation, which the Court concluded

was \$104,000. Similar to the delay of 13 ½ months in Keilley, the delay of 17 months after execution of the binding written mediation settlement in this case was reasonable based on the existing circumstances.

C. The forbearance of litigation is considered adequate consideration and thus, the binding mediated settlement agreement dated May 28, 2009 is enforceable under Minnesota law.

The District Court erred as a matter of law in determining that *“no independent consideration supported Wife’s supposed agreement that the retroactive date would continue indefinitely into the future, regardless of how long it may be before the modification issue was presented to the Court.”* Consideration may consist of either a benefit accruing to a party or a detriment suffered by another party. C&D Invs. v. Beaudoin, 364 N.W.2d 850, 853 (Minn. Ct. App. 1985), *review denied* June 14, 1985. The amount of consideration is not relevant as long as some benefit or detriment is established. Thomas B. Olson & Associates, P.A. v. Leffert, Jay & Polglaze, P.A., 756 N.W.2d 907, 920 (2008); *citing* Estrada v. Hanson, 215 Minn. 353, 356, 10 N.W.2d 223, 225-26 (1943) and Keilley, 674 N.W.2d at 777. Forbearance of litigation is considered adequate consideration. Cady v. Coleman, 315 N.W. 593, 596 (Minn. 1982) (equating forbearance to consideration); *See also* State v. Hart Motor Exp., Inc., 270 Minn. 24, 49, 132 N.W.2d 391, 394 (Minn. 1964) (holding that forbearance of legal action is adequate consideration for agreement).

As the Minnesota Supreme Court explained in Baehr, "[B]argain" does not mean an exchange of things of equivalent, or any, value. Baehr v. Penn-O-Tex Oil Corp, 258 Minn. 533, 538-39, 104 N.W.2d 661, 665 (1960) (Emphasis added); *See also* Deli v. Hasselmo, 542 N.W.2d 649, 656 (Minn. Ct. App. 1996), *review denied* (Minn. Apr. 16, 1996). Rather, it means a negotiation resulting in the voluntary assumption of an obligation by one party upon condition of an act or forbearance by the other. Baehr, 258 Minn. at 538-39, 104 N.W.2d at 665. Consideration thus ensures that the promise enforced as a contract is not accidental, casual, or gratuitous, but has been uttered intentionally as the result of some deliberation, manifested by reciprocal bargaining or negotiation. Id.

In Keilley, for instance, the parties entered into a extrajudicial stipulation reducing the obligor's maintenance obligation after he was terminated from employment. Keilley, 674 N.W.2d at 777. The Court of Appeals reversed the trial court's determination that the agreement was unenforceable because there was no consideration. Id. at 777. In its explanation, the Court of Appeals indicated "when the parties entered their stipulation, at least a reasonable case for modifying appellant's maintenance obligation existed." Id. The maintenance-related portion of the stipulation eliminated the uncertainty of the result inherent in litigating modification of maintenance as well as the certainty of incurring the considerable attorneys' fees and other costs associated with doing so. Id. In Keilley, this was deemed sufficient consideration.

In the present case, when the parties made their agreement, a reasonable case existed for modifying the maintenance award due to Appellant's loss of employment and the review period established in the Judgment and Decree. By agreeing to modify Appellant's support obligations retroactive to June 1, 2009, both parties did so with the understanding they hoped to avoid the uncertainty of litigation and the associated attorneys' fees. The consideration to both parties was the agreement to continue in the mediation process and the avoidance of legal fees if both parties filed motions with the Court, an unnecessary expense at the time because the parties were attempting to settle.

Additional consideration existed in this case because the parties agreed to participate in further mediation sessions. The parties did in fact continue negotiations through April 2010. Neither party immediately sought relief from the Court. Respondent's counsel did not secure a motion hearing date until April 28, 2010. As in Keilley, forbearance of litigation when the parties executed their binding written mediation agreement is adequate consideration.

D. The language of the binding mediated settlement agreement, combined with the parties' performance under the binding mediated agreement represents mutual assent to the contract.

The plain language of the binding written mediation agreement, combined with the parties' unspoken words and performance during the continued negotiation efforts thereafter, evidence mutual assent to the parties' agreement.

Crucial to contract formation is the manifestation of mutual assent to be bound. Field-Martin Co. v. Fruen Mill. Co., 210 Minn. 388, 298 N.W. 574, 575

(Minn. 1941). Whether a contract has been formed is judged objectively by the parties' conduct, not by the parties' subjective intent. Cederstrand v. Lutheran Bhd., 263 Minn. 520, 532, 117 N.W.2d 213, 221 (1962). The court must determine not what the parties really meant but what words and actions justify the other party to assume what was meant. Crince v. Kulzer, 498 N.W.2d 55, 57 (Minn. Ct. App. 1993); Powell v. MVE Holdings, Inc., 626 N.W.2d 451, 460 (Minn. Ct. App. 2001), *review denied* July 24, 2001. Mutual "assent may be inferred wholly or in part from words spoken or written or from the conduct of the parties or a combination thereof." Cederstrand, 263 Minn. at 532, 117 N.W.2d at 221; *See also* Cut Price Super Markets v. Kingpin Foods, Inc., 256 Minn. 339, 340-341, 98 N.W.2d 257, 259 (1959) (holding that the law will impute to a person an intention corresponding to the reasonable meaning of his words and also his actions. Words are not the only medium of expression. The conduct of the parties is also to be looked to since it often conveys as clearly as words a promise or an ascent to a proposed promise.)

In the present case, the District Court erred as a matter of law by inferring the parties' binding written mediation "agreement to a retroactive date most likely was tied to the parties' expectation that they would be able to agree on a modification through their mediation efforts." (Emphasis added). (A-10a). Respondent's words and actions on May 28, 2009 and thereafter represent her mutual assent to the agreement. First, both parties voluntarily executed the binding written mediation agreement. Second, Respondent failed to formally

object to the binding written mediation agreement or take any other legal action whatsoever when Appellant began paying a reduced spousal maintenance amount from June 2009 through April 2010. Third, Respondent voluntarily participated in continued mediation sessions after May 28, 2009 and continued negotiations with counsel through April 2010. Fourth, Respondent did not affirmatively object to the binding written mediation agreement until October 2010, only five days before the hearing date, and to Appellant's great surprise. Finally, prior to October 2010, neither Respondent nor her counsel affirmatively sought to repudiate, revoke or otherwise terminate the prior binding written mediation agreement.

The agreement did not fail when mediation efforts "failed." The parties attempted mediation and it was unsuccessful. But the actual timeline of events in this proceeding show that the parties ended the mediation process sometime in the summer of 2009 but continued negotiating through counsel for at least another seven months. During this process, both parties and counsel negotiated consistent with the parties' binding agreement. Neither party filed motions with the court. According to the District Court's reasoning that the agreement failed when mediation failed, Respondent should have moved to enforce Appellant's spousal maintenance payment immediately upon the conclusion of mediation.

The actual record does not support the District Court's conclusion. It was not until April 28, 2010 that Respondent secured a motion hearing date originally scheduled for July 12, 2010. On May 11, 2010, Respondent filed her "bare

bones” motion and exhaustive discovery requests, which were much more extensive than most discovery requests in a dissolution proceeding. The hearing was continued until October 28, 2010 to proceed with Respondent’s three separate sets of formal discovery requests and the taking of Appellant’s deposition. Appellant complied with all discovery requests. Acting in reliance on the binding written mediation agreement executed May 28, 2009, and the parties’ actions thereafter, Appellant timely filed his Motion Raising New Issues when Respondent filed her Supplemental Motion and corresponding Affidavits on October 14, 2010.

Here, similar to Keilley, Appellant acted in reliance on a binding written mediation agreement and the parties’ actions following the agreement. Moreover, Appellant relied on ongoing settlement efforts through March 2010. Had Appellant known Respondent would unilaterally revoke a binding agreement, he would have filed motion pleadings on June 1, 2009, ignoring the binding written mediation agreement altogether. Had she filed an interim motion to enforce the Judgment and Decree or move for contempt, Appellant’s inability to pay would have reduced his spousal maintenance obligation sooner, stipulation or not.

Moreover, from May 28, 2009, when the parties executed their binding agreement, until the October 28, 2010 hearing, there was no affirmative request made by either party to revoke the parties’ stipulation. Stipulations are accorded the sanctity of binding contracts. Shirk v. Shirk, 561 N.W.2d 519, 522-23 (Minn.

1997c; *citing* Ryan v. Ryan, 292 Minn. 52, 55, 193 N.W.2d 295, 297 (1971). They cannot be "repudiated or withdrawn from one party without the consent of the other, except by leave of the court for cause shown," but if a stipulation was improvidently made and in equity and good conscience ought not to stand, it may be vacated. Id. See also John v. John, 322 N.W.2d 347, 348 (Minn. 1982); Gran v. City of St. Paul, 274 Minn. 220, 223, 143 N.W.2d 246, 249 (1966),

In the present case, there was no evidence Respondent sought to repudiate or withdraw the agreement. Respondent affirmatively stated the binding written mediation agreement was not valid and enforceable for the first time in a reply Affidavit, filed five days prior to the hearing on October 21, 2010, strategically submitted at a time when Appellant did not have the ability to respond under the Rules.

Moreover, there is no evidence in the record that the binding written mediation agreement was carelessly made or inequitable. Rather, the District Court's invalidation of the binding written mediation agreement resulted in an extreme inequity to Appellant, not Respondent, in this proceeding. Appellant was involuntarily terminated from his employment in November 2007. After his severance pay ended in May 2008, Appellant continued to pay his full child support and spousal maintenance obligations under the Judgment and Decree, despite having no earned income to do so. Appellant met his continued obligation by depleting assets awarded to him in the dissolution proceeding. Appellant finally sought relief in February 2009 when he requested the parties

attend mediation as required by the Judgment and Decree. From February 2009 until October 2010, while the parties attended several mediation sessions, continued negotiations, cooperated with extensive discovery and depositions, and were involved in the Court process leading up to the hearing, Appellant continued to pay his full child support amount and partial spousal maintenance payments, despite having no ability to pay. During this time frame, records prove Respondent's existing financial portfolio stayed intact.

The parties were obligated to share the hardship in the loss of Appellant's income, retroactive to the date of their binding written mediation agreement of June 1, 2009, just as the parties would be required to do had they remained married. The District Court has already determined Appellant made reasonable efforts to seek replacement employment and income and thus, was not acting in bad faith in reducing his income. The District Court further suspended Appellant's spousal maintenance obligation as of the date of hearing, based on his inability to pay and lack of income. These same circumstances existed from February 2009 through the hearing date, with Appellant drawing from assets to make a good faith effort to continue partial spousal maintenance payments as well as continued payment of child support and the dependency medical insurance premiums.

Not enforcing the binding written mediation agreement would be extremely unfair to Appellant. Respondent's signature on the binding agreement and her conduct, as well as the conduct of her counsel, during the course of the following

year made it more than reasonable for Appellant and his counsel to believe and expect that Respondent agreed to the terms set forth in the binding written mediation agreement. Without question, Appellant would have brought a motion to modify his spousal maintenance obligation much sooner than he did but for the parties' binding agreement, continued efforts at mediation, continued negotiation efforts following mediation, and discovery. In fact, he would have brought his motion June 1, 2009 if the parties had not stipulated to a modification of spousal maintenance retroactive to June 1, 2009.

E. The binding mediated settlement agreement dated May 28, 2009 is both contractually sound and fair and reasonable.

The binding written mediation agreement was not only contractually sound, but was more than fair and reasonable under the circumstances. Under Keilley, this Court established a two-part test for determining the validity of extrajudicial agreements. First, the agreement must be "contractually sound." Keilley, 674 N.W.2d at 777. As previously addressed, the binding written mediation agreement meets the elements of a contract (offer, acceptance, consideration and mutual assent) and therefore, is a valid contract. Second, the agreement must be "otherwise fair and reasonable". Id. The Court determined under Keilley, a four-factor analysis to determine whether the stipulated maintenance obligation is unfair and unreasonable. Keilley, 674 N.W.2d at 774.

The first factor under Keilley is "will the obligation be unfair and unreasonable to the children because it will, directly or indirectly, have an

adverse impact on them either by being of such an amount that it will unnecessarily interfere with the child support obligation or for other reasons?” Id. In the present case, the answer is no. Appellant continued to pay his child support obligation in full in the amount of \$1,500 per month in 2009 and 2010. He also paid 50% of the extracurricular child-related expenses for the same two years in the amounts requested by Respondent. The parties maintained a children’s account with an existing balance of approximately \$113,000 at the time of hearing.

The second factor under Keilley is “will the obligation be unfair and unreasonable to one of the parties because of overreaching, lack of full disclosure of the relevant information and lack of an opportunity to consult with counsel or for some other reason?” Id. After Appellant fully disclosed in mediation his financial circumstances and any additional information requested by Respondent, he also fully complied with three sets of extraordinary, detailed formal discovery requests, executing authorization forms as well as compliance in taking of his deposition. The binding written mediation agreement is not overreaching. It simply stated that the Court must modify Appellant’s spousal maintenance obligation as of June 1, 2009, if it concluded he could not comply with the spousal maintenance payments in the Judgment and Decree, which the district court ultimately did determine. Without this binding written mediation agreement, the parties would have been forced to file motions as of June 1, 2009 to protect the right to retroactive relief.

The third factor under Keilley is “will the obligation be unfair and unreasonable to the state because the stipulated maintenance obligation is in an amount that will unnecessarily require either or both parties or their children to seek public assistance?” Id. During the original hearing, Respondent informed the Trial Court she had to request public assistance because Appellant reduced his spousal maintenance payments. However, the record shows Respondent is a highly-educated individual with a law degree. The record further shows that she is a millionaire who owns not only a home, but an unencumbered cabin; she controls the children’s account with a balance that exceeds \$113,000; and she has substantial retirement assets and two investment accounts with a combined balance of \$516,959 as of June 30, 2009. Respondent was in a substantially better financial position than Appellant at the time of the October 28, 2010, hearing. In fact, the district court was informed at the time of the hearing that a judgment of \$104,000 could bankrupt Appellant by depleting his business operating accounts, destroying his ability to earn income as established by the district court’s very same Order. Respondent, on the other hand, had the ability to offset some expenses from assets during the interim period when Appellant attempted to reestablish his earning potential. Further, Respondent, who has a law degree, could seek at a minimum part-time employment while the parties’ three children were in school full-time to meet some of her expenses. A share the hardship approach was no different than if the parties had remained married and had to tighten their belts to make ends meet.

The fourth factor under Keilley is “will the obligation be unfair and unreasonable to the court because the stipulation will unnecessarily complicate future court proceedings because the parties’ income and expenses are not adequately addressed, the rights and duties under the stipulation are not reasonably clear or other reasons?” Id. The parties’ binding agreement is not unfair to the court. The term of the parties’ agreement is absolutely clear. It states only that any modification of spousal maintenance be made retroactive to June 1, 2009. Enforcing the contract was not unduly complicated. It simply incorporated the parties’ express agreement to a date certain to modify spousal maintenance.

In the present case, the district court incorrectly determined the Keilley case was inapplicable to facts in the present case. The district court in the present case distinguished this case from Keilley because in Keilley, the parties entered into a detailed stipulation, which allowed the court to evaluate whether the contract was legally sound and also whether the circumstances of the stipulation were fair. But a stipulation does not require significant detail to be a legal sound contract. Moreover, the District Court ignored the significant record, including Appellant’s loss of income and significant reduction of more than a half million dollars in net worth over two years balanced against Respondent’s net worth in excess of \$1 million. Contrary to the District Court’s findings, the binding written mediation agreement was not only unambiguous and legally sound, but based on the record, enforcement of the stipulation was fair and equitable.

II. THE DISTRICT COURT'S INVALIDATION OF THE BINDING MEDIATED SETTLEMENT AGREEMENT DATED MAY 28, 2009 IS BOTH AGAINST PUBLIC POLICY AND IS CONTRARY TO MINNESOTA'S ENDORSEMENT OF VALIDATING STIPULATIONS.

Dissolution-related stipulations are treated as contracts. Keilley v. Keilley, 674 N.W.2d 770, 777 (Minn. Ct. App. 2004); *citing* Shirk v. Shirk, 561 N.W.2d 519, 521 (Minn. 1997). The district court is “a third party to dissolution actions” and, as a third party, has “dut[ies] to protect the interests of both parties” and “to ensure that the stipulation is fair and reasonable to all.” *Id.*; Karon v. Karon, 435 N.W.2d 501, 503 (Minn. 1989), *rev'd judgment* 417 N.W.2d 717, *superceded by statute on other grounds*. The law does not favor invalidation of contracts or binding agreements because of indefiniteness and if the terms can be reasonably ascertained in a manner prescribed in the writing, the contract will be enforced. Furuseth v. Olson, 297 Minn. 491, 493, 210 N.W.2d 47, 49 (Minn. 1973). (Emphasis added). This is especially true where, as here, both parties have performed extensively under the contract. Anderson v. Sommer, 381 N.W.2d 22, 24 (Minn. Ct. App. 1986).

The Minnesota Supreme Court has overturned lower court decisions when it held that “[e]xtrajudicial modifications of dissolution decrees without subsequent judicial approval are not valid[.]” Keilley, 674 N.W.2d at 775-76; *citing* Tell v. Tell, 359 N.W.2d 298, 301 (Minn. Ct. App. 1984), *rev'd on other grounds*. When referring to this assertion on review, the Minnesota Supreme Court has stated that it was both “contrary to th[e] encouraged policy” of resolving

dissolution matters by stipulation and that the statement was “subject to misinterpretation.” Id. at 776; *citing* Tell v. Tell, 383 N.W.2d 678, 682 (Minn. 1986), *rev’d on other grounds*. The Minnesota Supreme Court later repeated its endorsement of resolving dissolution matters by stipulation in Shirk. See Keilley, 674 N.W. 2d at 776; *citing* Shirk v. Shirk, 561 N.W.2d 519, 521-22 (Minn. 1997).

In Keilley, the Court of Appeals further rejected a broad reading of its opinions in Heldt v. Heldt, 394 N.W.2d 535 (Minn. Ct. App. 1986), Diedrich v. Diedrich, 424 N.W.2d 580 (Minn. Ct. App. 1988) and Christenson v. Christenson, 490 N.W.2d 447 (Minn. Ct. App. 1992), *review granted* (Jan. 15, 1993), *review dismissed* (Feb. 16, 1993), to the extent they are read as contrary to the general rule favoring dissolution stipulations because they include statements that extrajudicial modifications of dissolution judgments are unenforceable until they have been approved by a court. Id. In Heldt, the Court affirmed a district court's determination that an extrajudicial agreement involving child support was not enforceable. Heldt, 394 N.W.2d at 535. Here, the issue is spousal maintenance, not child support. The Diedrich case did not involve minor children. The Court in Diedrich distinguished between stipulations that could affect children and those that do not, and affirmed a district court's decision that an extrajudicial modification of a judgment's maintenance provision was effective before it was adopted by the court, at least to preserve the district court's jurisdiction over the maintenance issue. Diedrich, 424 N.W.2d at 583. Again, the issue here is spousal maintenance. The Christenson case actually predated Minnesota

Supreme Court's statements made in Shirk that, once a husband and wife enter a dissolution stipulation, they are bound by that stipulation absent consent of the other party or leave of the court to withdraw from it. Keilley, 674 N.W.2d at 776 (Emphasis added); *citing* Christenson, 490 N.W.2d 447 (Minn. Ct. App. 1992); see Shirk, 561 N.W.2d at 521-22; see also Toughill v. Toughill, 609 N.W.2d 634, 639 & n. 1. (Minn. Ct. App. 2000); *applying* Shirk. This case law supports the enforcement of stipulations.

In the present case, the parties started mediation in February 2009, consistent with the terms of their Judgment and Decree. During the months following Appellant's reduced payment of spousal maintenance beginning February 2009, he and Respondent met on several occasions in mediation for the purpose of discussing his loss of employment and the need to reduce his spousal maintenance obligation because of inability to pay. At the end of the May 2009 mediation session, the parties executed a binding agreement that any modification of child support and spousal maintenance would be made retroactive to June 1, 2009, with the understanding they were going to continue negotiation efforts rather than file motion pleadings and return to Court.

The Supreme Court has repeatedly endorsed resolving dissolution matters by stipulation. Here, the Court erred as a matter of law in finding no compelling basis for a retroactive modification date of June 1, 2009. The parties had a binding valid, enforceable, fully executed, written agreement signed by counsel and the parties. Neither party moved to withdraw, repudiate, or terminate this

agreement. Hundreds of parties in the dissolution process rely upon Alternate Dispute Resolution reaching identical agreements, sometimes partial agreements and sometimes complete agreements, with the understanding a Court will honor and enforce their agreements. Based on the general principles and the public policy endorsement to validate extrajudicial modifications, as set forth in Keilley, Shirk, Tell, and Toughill, the Court erred as a matter of law by concluding the parties' binding mediated agreement was invalid and unenforceable.

CONCLUSION

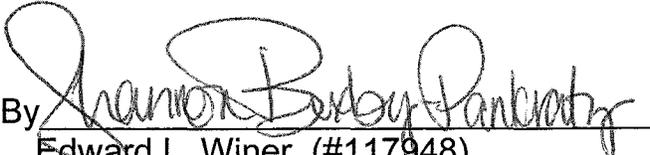
Consistent with public policy and the well-established general principle under Minnesota law that Courts favor resolution of dissolution matters by stipulation, the parties' agreement dated May 28, 2009 was valid, and fair and equitable under Minnesota law. The parties entered into a binding written mediation agreement that "any modification of child support and spousal support be retroactive to June 1, 2009." The fully executed agreement was unambiguous. The circumstances following execution of this agreement show the timeline was not indefinite for enforcing this agreement.

Appellant respectfully requests this Court reverse the decision of the District Court to invalidate the binding written mediation agreement and vacate the resulting judgment. Appellant further requests this Court remand the issue of Appellant's ability to pay spousal maintenance during his period of unemployment from June 1, 2009 until October 31, 2010 based on the factual record currently before the District Court.

Dated: March, 16, 2012

Respectfully submitted,

MOSS & BARNETT
A Professional Association

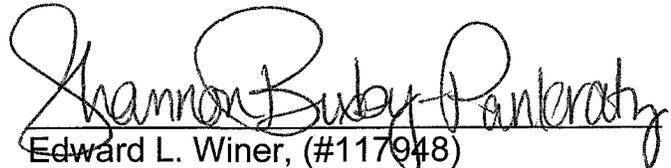
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared using Microsoft Word, in Arial font, 13 point, and according to the word processing system's word count, is no more than 14,000 words, exclusive of the cover page, table of contents, table of authorities, signature block and appendix, and complies with the typeface requirements of Minn. R. Civ. App. P. 132.01.

Dated: March 16, 2012


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