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State of Minnesota  
**In Supreme Court**

Roger A. Giersdorf,

*Employee-Respondent,*

vs.

1. A & M Construction, Inc.,
2. Merrimac Construction Co., Inc.,

*Employers-Respondents,*

and

- 1a. Uninsured,
- 1b. The Hartford,
2. General Casualty Co.,

*Respondent,*

*Insurer-Relator,*

*Insurer-Respondent,*

and

1. Rivers Edge Hospital & Clinic,
2. New River Medical Center,
3. Mayo Clinic,
4. Minneapolis Clinic of Neurology,
5. MN Dept. of Labor & Industry/VRU,
6. MN Dept. of Human Services,
7. Hennepin Faculty Associates,
8. Consulting Radiologists,
9. HealthPartners, Inc.,

*Intervenors-Respondents.*

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**BRIEF AND APPENDIX OF INSURER-RELATOR**

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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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## LEGAL ISSUE

**Whether the Workers' Compensation Court of Appeals (WCCA) impermissibly assumed subject matter jurisdiction over a breach of contract claim between an employer and its workers' compensation insurer by mischaracterizing the underlying issue as a coverage dispute.**

- (A) The relator-insurer, The Hartford, filed a Motion to Dismiss, based on subject matter jurisdictional grounds, the employer-respondent's Petition for Declaration of Insurance Coverage in which the employer, although acknowledging the insurer followed the proper procedures to effectuate the cancellation of its workers' compensation insurance policy, alleges the relator wrongfully cancelled the policy for nonpayment of premium approximately one month before the employee's work injury. (A. [Appendix] 9-16)
- (B) The Compensation Judge ruled that the Office of Administrative Hearings, Workers' Compensation Section, has subject matter jurisdiction to address the employer's Petition for Declaration of Insurance Coverage.
- (C) The Hartford filed an interlocutory appeal with the WCCA which affirmed the Compensation Judge's ruling. (A. 17-18; Ad. [Addendum] 5-9)

## MOST APPOSITE CASE

*Tibbetts v. Leech Lake Reservation Business Commission,*  
(*Tibbetts I*), slip op. (Minn. WCCA September 16, 1985)

## MOST APPOSITE STATUTE

Minn. Stat. §175A.01, Subd. 5

## STATEMENT OF THE CASE

Employee-respondent, Roger A. Giersdorf, filed a Claim Petition with the Workers' Compensation Division, alleging he sustained a work-related injury on January 20, 2009 while employed by A & M Construction, Inc. (A. 3; Ad. 1-2) Merrimac Construction Co., Inc. which was insured by General Casualty Co. is the alleged general contractor on the project where the Employee's injury allegedly occurred. (Ad. 2)

The relator, The Hartford, cancelled its workers' compensation policy for A & M Construction effective 12:01 a.m. December 19, 2008 and denies all liability for the claim. (A. 6-8; Exhibit 3) A & M Construction filed a "Petition for Declaration of Insurance Coverage" with the Workers' Compensation Division, specifically alleging The Hartford breached its insurance contract with the employer and is obligated to provide a defense and indemnification for the employee's workers' compensation claim. (A. 1-5)

In its Petition, A & M Construction acknowledged that on November 13, 2008, The Hartford had provided the employer with notice of its intention to cancel the workers' compensation insurance policy for nonpayment of a lump sum premium totaling \$7,653.28 and that on December 18, 2008, The Hartford cancelled its worker's compensation coverage.<sup>1</sup> (A. 3) A & M Construction avers The Hartford breached the terms of the insurance contract by requiring a lump sum payment for a past due premium following an audit for a prior period of coverage instead of allowing for installment

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<sup>1</sup> The actual effective date and time of the cancellation was 12:01 a.m. December 19, 2008.

payments which, A & M Construction asserts, was the prior billing practice. (A. 3-4) A & M Construction further avers that if it had been allowed to make installment payments for the premium, it would have made full payment of all premiums due. (A. 3)

In its Objection to the Petition for Declaration of Insurance Coverage, The Hartford denied it had breached the insurance contract and affirmatively alleged that the workers' compensation courts lack subject matter jurisdiction to address the alleged breach of contract dispute. (A. 7) The Hartford filed a Motion to Dismiss the employer's Petition on jurisdictional grounds. (A. 9-16) Following a hearing on the motion held on May 2, 2011, Compensation Judge James Cannon issued his Order, served and filed May 17, 2011, denying The Hartford's Motion to Dismiss. (Ad. 1-4) On May 24, 2011, The Hartford filed an interlocutory appeal with the WCCA, contending that the compensation judge erred as a matter of law in denying The Hartford's Motion to Dismiss. (A. 17-18)

On September 20, 2011, the WCCA issued its decision affirming Judge Cannon's Order. (Ad. 5-9) While acknowledging it does not have subject matter jurisdiction to address damage claims for a breach of contract, the WCCA assumed jurisdiction by characterizing the underlying issue as a coverage dispute, stating that "what the employer is actually asserting is that The Hartford's purported cancellation of the insurance contract was ineffective and that coverage therefore existed as of the date of the employee's injury." (Ad. 4-5) The WCCA reached that conclusion even though none of the parties had maintained the procedures The Hartford followed to cancel the policy were ineffective but rather alleged The Hartford wrongfully cancelled the policy.

On October 17, 2011, The Hartford filed with this court a Petition for Writ of Certiorari, seeking further review of the decision of the WCCA, and on October 17, 2011, a Writ of Certiorari was issued. (A. 19-24)

### STATEMENT OF THE FACTS

As no evidentiary hearing has been conducted, there are no Findings of Fact. The record consists of the pleadings of the parties, as described in the Statement of the Case, and the exhibits offered at the Hearing on the Motion to Dismiss.

The Hartford's Motion to Dismiss under Minn. R. 1420.2250 is similar to a Motion to Dismiss based solely on the pleadings pursuant to Minn. R. Civ. P. 12.02. The allegations in the employer's Petition for Declaration of Insurance Coverage are deemed admitted solely for the purposes of testing the sufficiency of the pleadings, but such qualified admission should not be construed as an acknowledgment by The Hartford of the underlying merits of the employer's factual allegations in its case-in-chief. The reviewing court must consider only the facts alleged in the Petition, accepting those facts as true, and must construe all reasonable inferences in favor of the nonmoving party. *Cf. Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550 (Minn. 2003).

### STANDARD OF REVIEW

An Order denying a Motion to Dismiss for lack of jurisdiction is appealable as a matter of right. *Janssen v. Best & Flanagan, LLP*, 704 N.W.2d 759 (Minn. 2005); *McGowan v. Our Saviors Lutheran Church*, 527 N.W.2d 830 (Minn. 1995). Jurisdiction is a threshold question that may be raised at any time. *Dead Lake Ass'n, Inc. v. Ottertail County*, 695 N.W.2d 129, 134 (Minn. 2005). As jurisdiction is a question of law, this

court's review is *de novo*. *Hale v. Viking Trucking Co.*, 654 N.W.2d 119, 123 (Minn. 2002).

## ARGUMENT

Under Minn. Stat. § 175A.01, Subd. 5 jurisdiction of the workers' compensation courts is limited to considering "all questions of fact and law arising under the workers' compensation laws of [Minnesota]." The workers' compensation courts are not courts of general jurisdiction but were created by the Minnesota Legislature as an independent agency within the executive branch, charged with the responsibility of addressing issues arising under the Minnesota Workers' Compensation Act, codified at Minn. Stat. ch. 176 (2011). Jurisdiction of the workers' compensation courts extends to addressing issues related to coverage under Minnesota workers' compensation insurance policies where such a determination is ancillary to the adjudication of an employee's claims. *Peterson v. Vern Donnay Construction Co.*, 44 Minn. Workers' Comp. Dec. 664 (1993). *See also* Minn. Stat. § 176.183, Subd. 2. However, such jurisdiction does not extend to interpretation of the terms of an insurance contract in the context of an alleged breach when the insurance policy had been effectively cancelled prior to the occurrence of an alleged work-related injury. *See Tibbetts v. Leech Lake Reservation Business Commission, (Tibbetts I)*, slip op. (Minn. WCCA September 16, 1985).<sup>2</sup>

The crux of the employer's claim, as specifically stated in its Petition for Declaration of Insurance Coverage, is "that The Hartford wrongfully breached its insurance contract with A & M Construction, Inc. . . ." (A. 4) The employer maintains The Hartford should have allowed the employer to make installment payments for the past premiums due, which the employer asserts was the prior billing practice, instead of

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<sup>2</sup> In its appeal brief to the WCCA, The Hartford cited the *Tibbetts* decision as controlling. The WCCA made no specific reference to *Tibbetts* in its decision. In a subsequent second appeal to the WCCA, *Tibbetts* was reversed on other grounds. *See Tibbetts v. Leech Lake Reservation Business Commission, (Tibbetts II)* C0-85-1863, 39 Minn. Workers' Comp. Dec. 238 (1986).

requiring a lump sum payment. If it had been allowed to make installment payments, the employer alleges it would have paid all premiums due. According to the employer, The Hartford breached the terms of the insurance contract by failing to allow for installment payments which, in turn, resulted in an alleged wrongful cancellation of the policy.

The employer's allegations form the basis of a classic breach of contract dispute. *Black's Law Dictionary*, 235, Revised Fourth Edition, defines a "breach of contract," in part, as follows:

Prevention or hindrance by party to contract of any occurrence or performance requisite under the contract for the creation or continuance of a right in favor of the other party or the discharge of a duty by him.

In other words, the employer has alleged that The Hartford prevented or hindered the employer from paying the premiums by requiring a lump payment for previous payments due instead of installment payments, resulting in the discontinuance of protection afforded under the insurance policy.

While The Hartford adamantly denies a breach of the insurance contract, the allegation of a breach, for the purposes of this appeal only, is accepted as true. If an insurer breaches the terms of a contract, it is liable for the losses that naturally and proximately flow from the breach. *Olson v. Rugloski*, 277 N.W.2d 385, 387-88 (Minn. 1979). However, if a contract has been breached, the nonbreaching party is required to act with reasonable diligence to mitigate damages flowing from the breach. *Deutz-Allis Credit Corp. v. Jensen*, 458 N.W.2d 163, 166 (Minn. App. 1990). The Hartford would not necessarily assume full liability for the employee's claims, even if a breach of contract occurs, as arguably under the doctrine of avoidable consequences the employer would be obligated to mitigate potential losses occurring subsequent to the claimed

breach by obtaining alternative coverage upon notice of the cancellation of The Hartford's policy. *Cf. Soules v. Ind. School District No. 518*, 258 N.W. 2d 103 (Minn. 1977). As the employer failed to do so, arguably The Hartford would have no liability or at most greatly reduced liability for the employee's claims, if a breach of contract occurred. As this court recognized in *Zakrajshek v. Shuster*, 307 Minn. 327, 239 N.W. 2d 919 (Minn. 1976), there is no good justification for forcing a workers' compensation insurer to cover a risk it never intended to cover and for which it never collected premiums.

If The Hartford were somehow responsible for the claim, it would be entitled to a setoff for the past due premiums and any premiums that should have been paid for the approximately one month when the employer did not have insurance coverage. As the workers' compensation courts lack subject matter jurisdiction over these defenses and counterclaims and cannot fashion appropriate remedies, The Hartford would be denied its rights of due process guaranteed under the Minnesota and United States Constitutions if required to litigate these claims in the workers' compensation forum. These issues need to be addressed at the District Court level.

The facts in *Tibbetts (Tibbetts I)*, *Id.*, are similar to the facts in the present case, and the holding in *Tibbetts* should apply with equal force. In *Tibbetts*, the employer's workers' compensation insurer, Employers Mutual, cancelled its policy for nonpayment of premium on or about October 24, 1978. On November 30, 1978, Mr. Tibbetts allegedly sustained a work-related injury while working for the Leech Lake Reservation Business Commission. The insurer's cancellation of the policy was done in compliance

with statutory requirements. However, the employer in *Tibbetts* argued that as a result of the early cancellation of the policy, a \$20,000.00 credit was due the Leech Lake Band of Chippewa Indians, and the \$20,000.00 should have been applied to the payment of the next premium due, extending coverage for the claim. The WCCA in *Tibbetts* affirmed the compensation judge's dismissal of Employers Mutual from the case, stating as follows:

This court does not have any authority or power to fashion any remedy other than that which is provided under the statute. This court does not have equitable authority over substantive law.

As in *Tibbetts*, none of the parties dispute that The Hartford followed the proper procedures, as required by law, to effectuate the cancellation, and the employer's workers' compensation insurance policy was cancelled for nonpayment of premium effective 12:01 a.m. on December 19, 2008.<sup>3</sup> As in *Tibbetts*, Mr. Giersdorf's injury occurred approximately one month after the cancellation went into effect, and similar to the facts in *Tibbetts*, the employer, A & M Construction, alleges The Hartford breached the insurance contract with respect to the manner in which the premiums were to be paid.

As the WCCA recognized in *Tibbetts*, when an employer's workers' compensation insurance policy has been properly and effectively cancelled for nonpayment of premiums prior to the occurrence of an alleged work-related injury, the employer's breach of contract claim against the insurer, based upon the manner in which the premiums were to be paid, falls outside the subject matter jurisdiction of the workers'

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<sup>3</sup> The procedure for cancelling a workers' compensation insurance policy for nonpayment of premium is set forth in Minn. Stat. § 176.185.

compensation courts, and the workers' compensation courts do not have the authority or power to fashion a remedy.

The WCCA acknowledged that it does not have jurisdiction to address damage claims associated with a breach of contract action. In order to secure jurisdiction over the present claim, the WCCA mistakenly characterized the underlying issue as a coverage dispute, stating that "what the employer is actually asserting is that The Hartford's purported cancellation of the insurance contract was ineffective and the coverage therefore existed as of the date of the employee's injury." (Ad. 9 [Emphasis in original]) In reaching its conclusion, the WCCA may have been relying upon *Ives v. Sunfish Sign Co.*, 275 N.W.2d 41 (Minn. 1979). In *Ives*, the workers' compensation insurer had issued a binder policy to the employer and alleged the binder had been cancelled prior to the injuries sustained by the employee. The employer maintained the insurer had failed to follow the proper statutory procedures to cancel the binder, and, therefore, the policy was still in effect. The court found the binder had not been properly cancelled and concluded coverage existed for the claim. In *Ives*, the court essentially determined the policy was still in existence at the time of the employee's injury due to the insurer's failure to follow the proper procedures in attempting to cancel the policy. In the present case, none of the parties has disputed that The Hartford followed the proper statutory procedures in cancelling the policy, which cancellation was effective December 19, 2008. No workers' compensation insurance policy issued by The Hartford extending coverage to the employer was in existence at the time of Mr. Giersdorf injury on January 20, 2009. While opposing parties allege The Hartford wrongfully cancelled the insurance

policy, an alleged wrongful cancellation is not the same as an alleged ineffective cancellation. The WCCA's assertion that the cancellation itself was ineffective is incorrect, and its apparent reliance upon the *Ives* decision is misplaced.

Opposing parties have cited a number of decisions in support of their assertions that the workers' compensation courts have jurisdiction to address the present dispute. However, all of the cases relied upon by opposing counsel deal with coverage disputes. The present case is not a coverage dispute; it is an alleged breach of contract dispute.

The cases cited by opposing counsel generally fall into two broad categories. The first category consists of cases where a policy was in existence at the time of the work injury and a question arose as to whether coverage should be extended to a specific claim in dispute. For example, in *Peterson v. Vern Donnay Construction Co., Id.*, a dispute arose between two workers' compensation insurers over which policy or policies covered the employer at the time and place of the employee's injury. Based on the facts in that case, the WCCA held that United States Fidelity & Guaranty had coverage for the injury, as the other insurer, Travelers Insurance Company, only provided insurance coverage for the employer for a specific construction project which was not the project the employee was working on at the time of his injury. A similar fact situation arose in the case of *Adair v. Adair Watch & Jewelry*, 37 Minn. Workers' Comp. Dec. 41 (1984). In both the *Peterson* and *Adair* decisions, the WCCA interpreted the terms of an existing policy to determine coverage.

Opposing counsel had also cited *Martin v. Morrison Trucking, Inc., (Martin II)*, No. WC09-4970 (Minn. WCCA February 11, 2010), in support of their position that the

workers' compensation courts have jurisdiction over the present dispute. Mr. Martin was a Minnesota truck driver who was injured while working in Minnesota for a Wisconsin-based employer. The employer's workers' compensation insurance policy had been issued in the State of Wisconsin and covered Wisconsin claims but, on its face, did not cover Minnesota claims. The WCCA held the Wisconsin insurance policy provision which excluded Minnesota workers' compensation claims was unenforceable and, therefore, found coverage for the claim.<sup>4</sup> On review on certiorari this court reversed and concluded the WCCA did not have subject matter jurisdiction to interpret Wisconsin law. *Martin v. Morrison Trucking, Inc., (Martin II)*, 803 N.W. 2d 365 (Minn. 2011). In general, the *Peterson, Adair, Martin and Wallin* line of cases deal with coverage disputes and whether an existing policy should be extended to cover the claim in dispute. Provided the insurance policy is governed by Minnesota law, the workers' compensation courts have subject matter jurisdiction to address whether a work-related injury is covered under an **existing** policy. However, in the present case, there was no insurance policy issued by The Hartford to the Employer which was in existence at the time of the Employee's injury and, therefore, the cases of *Peterson, Adair, Martin and Wallin* are inapposite.

The second broad category of cases cited by opposing counsel deal with issues of whether an insurer's agent had properly bound an insurer to provide workers' compensation coverage to an employer and whether an employer had reasonably relied

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<sup>4</sup> A somewhat similar issue arose in *Wallin v. Croix Carriers, Inc.*, 45 Minn. Workers' Comp. Dec. 100 (1991), also relied upon by opposing counsel.

upon those representations. Specifically, those issues were raised in the following line of cases relied upon by opposing counsel: *Schmitt v. Innovative Lawn Services*, No. WC-06-244, 67 Minn. Workers' Comp. Dec. 306 (2007); *Steidel v. Metcalf*, 210 Minn. 101, 297 N.W. 324, 11 Minn. Workers' Comp. Dec. 492 (1941); *Nehrig v. Bast*, 258 Minn. 193, 103 N.W.2d 368, 21 Minn. Workers' Comp Dec. 246 (1960); and *Oster v. Riley*, 276 Minn. 274, 150 N.W.2d 43, 24 Minn. Workers' Comp. Dec. 170 (1967).

In *Schmitt*, the WCCA refused to allow a workers' compensation insurer to deny coverage where representations of coverage had been made by the insurer's agent upon which others relied. *Schmitt* involves alleged insurance coverage for multiple entities owned by Mr. Jeff Trog. Mr. Trog ultimately merged a number of the businesses into a company called Total Repair and obtained insurance coverage for Total Repair through West Bend Insurance Company. However, one of the companies he owned, Valley Erosion, was not part of the merger. Eventually Valley Erosion became Innovative Lawn Services which ultimately was operated by his brother, John Trog. Jeff Trog had asked his insurance agent, Dennis Just, to provide him with all of the necessary insurance coverage. Mr. Just initially informed the Trogs that no workers' compensation coverage was needed for Innovative Lawn Services, as there were no employees, and the owners were not electing to provide coverage for themselves. However, over time, Innovative Lawn Services was required to provide workers' compensation insurance certificates in order to secure bids for its lawn care services. Mr. Just provided insurance certificates to Innovative Lawn Services that listed a policy number for the workers' compensation insurance coverage provided by West Bend to Total Repair. Eventually Innovative Lawn

Services hired employees, and on November 30, 2004, Mr. Schmitt, an employee of Innovative Lawn Services, sustained a work-related injury. The claim was submitted to West Bend but coverage was denied. The WCCA held, however, that West Bend was estopped from denying workers' compensation insurance coverage for Innovative Lawn Services based upon the representations of coverage made by its agent. Innovative Lawn Services had reasonably relied upon the representations made by West Bend's agents to its detriment and, therefore, West Bend could not deny coverage for the claim.

In *Schmitt*, the WCCA cited *Steidel v. Metcalf, Id.*, *Nehrig v. Bast, Id.*, and *Oster v. Riley, Id.*, as support for asserting subject matter jurisdiction to address the disputed coverage issues. In *Steidel* this court affirmed the Industrial Commission's finding that the employer's insurance agency had, through its actions, bound the insurer to provide workers' compensation insurance coverage for a claimed injury.

Similarly, in *Nehrig*, this court upheld the decision of the Industrial Commission awarding compensation under a workers' compensation policy based upon an oral contract between the insurer's agent and the employer. Although the agent was not authorized to enter into oral contracts for policy renewals, he had represented he was so authorized, and the employer had justifiably relied upon the agent's representations in renewing its policy.

In *Oster* this court found insurance coverage for a workers' compensation claim and affirmed the findings of the Industrial Commission that the employer had placed an order through its insurance agent for workers' compensation insurance coverage about a half hour to 45 minutes before the employee sustained an injury on the morning of

September 11, 1961. The insurer had not been notified of the request for insurance coverage until the afternoon of September 11, but proceeded to issue a policy which on its face, took effect at 12:01 a.m. on September 11. The court concluded there was no evidence of fraud and found that coverage existed for the injury.

All of the above-cited cases which fall within the second broad category address coverage issues in the context of whether an agent, on behalf of an insurer, properly obtained insurance coverage for the alleged insured. In the present case, the employer has not alleged that it was under the false assumption that The Hartford continued to provide insurance coverage for workers' compensation claims at the time of the Employee's injury. To the contrary, the Employer acknowledges that the workers' compensation insurance policy issued by The Hartford was cancelled in December 2008, approximately one month before the Employee's date of injury. None of the cases that fall within the second broad category apply to the facts in the present case.

If this were simply a coverage dispute, the resolution would be relatively straightforward and axiomatic. If coverage exists, the insurer would be fully responsible for workers' compensation benefits awarded; if no coverage is found, the insurer owes nothing. In a straight-forward coverage dispute, the workers' compensation courts have the authority to require an insurer to pay a claim or to find the insurer has no liability.

However, if the underlying issue involves an alleged breach of contract between an employer and its workers' compensation insurer, the establishment of a breach does not necessarily result in full recovery by the employer of workers' compensation benefits owed, and the workers' compensation courts do not have the power or authority to award

contractual damages and fashion appropriate relief. The workers' compensation courts are courts of limited jurisdiction, and the grant of jurisdiction under Minn. Stat. § 175A.01, Subd. 5 does not extend to interpreting the terms of an insurance contract in the context of an alleged breach when the policy had been effectively cancelled prior to an alleged work injury.

### CONCLUSION

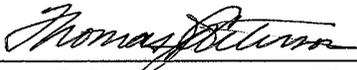
The employer's remedy lies not in the workers' compensation courts but in the district courts of the State of Minnesota. The district courts have the jurisdiction to fully address the defenses raised by The Hartford, including its defense that if a breach of contract occurred, the employer subsequently failed to mitigate its losses by procuring alternative coverage, which failure eliminates or greatly reduces the damages for which The Hartford may be liable as a result of the claimed breach. The district courts would also be in a position to address The Hartford's counterclaims that it would be entitled to a setoff for any premiums past due or that should have been paid for the approximately one month when the employer did not have coverage before the employee's injury, if a court determines that a breach of contract occurred.

The Hartford requests this court reverse the WCCA's decision upholding the compensation judge's Order Denying The Hartford's Motion to Dismiss and issue an Order dismissing The Hartford from these proceedings, as the workers' compensation courts do not have subject matter jurisdiction to address the employer's breach of contract claim.

Respectfully submitted,

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Dated: 11/16/11

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**CERTIFICATE OF BRIEF LENGTH**

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I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subd. 1 and 3, for a brief produced with a proportional font. The length of this brief is 4,168 words. This brief was prepared using Microsoft Word with 13-point Times New Roman font.

Respectfully submitted,

**McCOLLUM, CROWLEY,  
MOSCHET, MILLER & LAAK, LTD.**

Dated: \_\_\_\_\_

*11/16/11*

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