

IN THE SUPREME COURT OF IOWA

No. 10-1889

TROY McCORMICK and LYNN McCORMICK,

Plaintiffs/Appellants,

v.

NIKKEL & ASSOCIATES, INC. d/b/a NAI
ELECTRICAL CONTRACTORS, A
Corporation,

Defendant/Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR CHEROKEE COUNTY, IOWA
Case No. LACV 019575
THE HONORABLE NANCY L. WHITTENBURG, JUDGE

APPELLEE'S BRIEF

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STATEMENT OF THE ISSUES

I. THE DISTRICT COURT DID NOT ERR AT LAW IN CONCLUDING THAT NAI DID NOT OWE A DUTY TO McCORMICK BECAUSE HIS EMPLOYER OWNED THE EQUIPMENT, THE PREMISES AND RETAINED CONTROL OF THE WORK.

Authorities

Cases:

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Van Fossen v. Midamerican Energy Company, 777 N.W.2d 689 (Iowa 2009)

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29 C.F.R. 1910.333(b) (2)

29 C.F.R. 1926.954(a)

29 C.F.R. 1926.416

29 C.F.R. 1926.417

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Restatement of Torts (Third) §7(a)

Routing Statement:

This case should be transferred to the Court of Appeals because it involves the application of existing legal principles. Iowa R.App.P. 6.1101(3).

Statement of the Case:

Nikkel & Associates, Inc., d/b/a NAI Electrical Contractors (hereinafter "NAI") concurs with McCormick's Statement of the Case with the following additions:

Relevant Events:

NAI's Motion for Summary Judgment was supported by a Statement of Material Facts supported by references to the record. (App. 15-24). The Plaintiffs responded to NAI's Statement of Material Facts in their Resistance (App.185-88) by admitting or denying each material fact.¹ However, where the Plaintiffs "denied" a statement of fact, the Resistance did not set forth specific admissible facts to support the denial as required by Iowa Rule of Civil Procedure 1.981(5) and consequently, the unsupported "denials" should be deemed admitted for summary judgment purposes. See, *Rohlin Construction Co. Inc. v. Lakes, Inc.*, 252 N.W.2d 403, 406 (Iowa 1977).

¹ Parenthetical references to the record "Adm. ____" refer to the paragraph No. of NAI's Statement of Material Facts that was subsequently admitted by McCormick in his Resistance to Motion for Summary Judgment. Where McCormick denied a statement, the parenthetical will reference the record which supports the statement. Note that there are two sets of facts: Background facts, 1-13, all of which were admitted, which will be noted as "B. Adm. ____" and material facts, Nos. 1-47, which will be referenced by their number, e.g. Adm. 2.

Statement of the Facts:

Little Sioux Corn Processors, LLC ("Little Sioux") is the owner of an ethanol production plant located near Marcus, Iowa. (App. 16). In 2006, Little Sioux expanded its production capacity and as part of the expansion installed a new electrical loop to power its plant. (App. 15). Fagen, Inc. ("Fagen") was the contractor who, except for certain specified functions performed by Little Sioux, performed "all design, engineering, procurement, construction services, supervision, labor, inspection, testing, startup, material, equipment, machinery, temporary utilities and other temporary facilities to complete construction of the expansion project." (App. 15).

In its contract with Fagen, Little Sioux agreed to assume responsibility for: "[P]rocurement, installation and maintenance of the site (electrical) distribution system, including, but not limited to, the required substation and all associated distribution lines, switchgear, sectional cabinets, distribution transformers, transformer pads, etc. ..." (App. 16). As part of its work, Fagen designed the electrical loop and specified the electrical equipment that was to be included in the electrical loop. (App. 17).

Little Sioux purchased the electrical equipment for the electrical loop from Graybar, Inc., an electrical equipment supplier. Little Sioux's purchase included the switchgear,

safety equipment, fault indicators and fault indicator mounting brackets among other items. (App. 18). A fault indicator is an optional device that Little Sioux purchased as an add on to the switchgear that signals when there is an interruption or fault in the electrical circuit. (App. 18). The fault indicators are mounted inside the switchgear cabinet on brackets that Little Sioux also purchased. (App. 18). The switchgear safety equipment, fault indicators and the fault indicator mounting brackets were delivered to Little Sioux before November 1, 2006. (App. 18). After the items that Little Sioux had purchased were delivered, Little Sioux employee, John Woods, informed Little Sioux maintenance manager Russell Konwinski that the items had arrived. (App. 18).

As part of its contract with Fagen to procure, install and maintain the site electrical system, Little Sioux hired Schoon Construction Company to bore in and pull the electric cables that connected the components of the electrical loop and to place and install the pad-mounted switchgear on their mounting basement. (App. 17). Schoon in turn hired NAI on a time and material basis to connect the electrical cable to the terminals on the switchgear. (App. 17).

The fault indicator mounting brackets were mounted inside the switchgear cabinet. The doors to the cabinet

were secured by a penta-head bolt that could only be loosened and removed by use of the penta-head socket wrench that Little Sioux had purchased as part of its equipment order. (App. 19). The purpose of the penta-head bolt was to prevent unauthorized access because of the dangerous high voltage inside the switchgear cabinet. (App. 19). Signs warning of the danger were displayed in the outside and on the inside of the cabinet doors. (App. 141).

The mounting holes on the fault indicators did not correspond with the size of the hole on the mounting brackets and consequently, the holes in the mounting brackets needed to be enlarged to accommodate the fault indicators. (App. 18). Because the mounting brackets were located inside the switchgear, it was necessary to open the door to the switchgear cabinet to remove the mounting brackets. (App. 19).

After the fault indicators and mounting brackets arrived at the job site, NAI's projects manager Kenneth (Bufford) Pedersen offered to install them. (App. 19). Little Sioux's maintenance manager Konwinski declined the offer and assigned Little Sioux's maintenance staff to do this work. (App. 19). As Little Sioux's maintenance manager Konwinski had the responsibility for all of the plant's electrical equipment, which responsibility included the installation of the fault indicator mounting brackets.

(App. 16, 51, 52; Roe² 60, 61, 102).

Little Sioux was the owner of the five bay electrical panel that provided power to operate the plant, including the circuit to the pad-mounted switchgear where Troy McCormick was injured. This five bay panel is also referred to as the main switchgear. (App. 19).

Konwinski knew that the main panel contained the switch that energized the line to the switchgear where the accident occurred. (App. 20).

Little Sioux's general manager Steve Roe knew that switchgear number 4, where the injury occurred, was energized, because electrical power to the process section of the plant and the office was being provided by a circuit that ran from the main panel, through switchgear number 4 to switchgear number 3 to a transformer that provided power to process and the office. (App. 99-102). At all times, Roe as the general manager, and Konwinski as the maintenance manager, had the authority and the ability to turn on or shut off the electrical power. (App. 17, 20).

On or before November 7, 2006, the electrical circuit from the main panel to the switchgear where McCormick was injured was energized by Bufford Pederson in the presence of Konwinski and Jacobson. (App. 20; Pedersen² 59, 60). At that time Pedersen demonstrated the operation of the main

² Testimony designated but omitted from Appendix.
² Note 2, supra.

panel and its circuits. (Pedersen² 59-60). In their summary judgment resistance the McCormicks included the affidavit of both Konwinski and Jacobson in which they denied being present at the time the circuit to the subject switchgear was energized. (App. 194-96). In his deposition, Konwinski testified that he did not know what part of the system was energized on November 13, 2006, or when it was energized. (App. 21). NAI contends, that this disputed fact was not controlling or material, because every employee of Little Sioux had a duty pursuant to company policy and OSHA regulation to verify that the upstream source of power was locked out and tagged before commencing work. (App. 21-23).

November 7, 2006 was the last day when NAI was on site before McCormick's accident on November 13, 2006. (App. 166; Pedersen² 22, 23).

At the time when Konwinski informed Pedersen that Little Sioux's maintenance staff would install the fault indicators and the mounting brackets, NAI had no reason to believe that Little Sioux would not comply with the safety rules mandated by OSHA and the mandatory electrical safety policies of Little Sioux. (App. 77, 127, 153).

At the time when Konwinski informed Pedersen that Little Sioux's maintenance staff would install the mounting

² Note 2 supra.

brackets, Pedersen had no reason to know that Little Sioux's maintenance staff was not qualified to do the work or that Konwinski would assign unqualified persons to do the work. (App. 24). NAI had no knowledge as to who, when, or how Little Sioux would go about its work of installing the mounting brackets because no one from NAI had been on site since November 7, 2006. (App. 166).

During the morning meeting of maintenance personnel on November 13, 2006, Konwinski initially assigned two members of his maintenance staff to drill out the mounting brackets and install the fault indicators in the switchgear. (App. 20). Konwinski selected Mike Jacobson, who was employed by Little Sioux as an electrician in the maintenance department and Jeff Sangwin, another maintenance employee. (App. 16). Troy McCormick was subsequently added to the crew. (App. 20). Konwinski instructed Jacobson, Sangwin and McCormick as to how to do the work. (App. 20). At that time, Jacobson was provided with the penta-head socket wrench, which would enable the maintenance team to open the cabinet doors in order to remove the mounting brackets so that their holes could be enlarged to accommodate the fault indicators. (App. 23). The penta-head bolt that secured the switchgear cabinet doors was intended to prevent unauthorized access to the switchgear. (App. 19).

At the time of the assignment, Konwinski told Jacobson

and Sangwin, in McCormick's presence, that the switchgear was not energized. (App. 21). McCormick expressed reservation about doing the work, since he was a welder and not an electrician, but he was assured by Konwinski that: "the boxes aren't live, so you don't have to worry about it." (App. 21). Before making the statement that the switchgear was not energized, Konwinski did not do anything to verify the electrical status of the switchgear. (App. 21). Konwinski testified in his deposition that he did not know what part of the system was energized on November 13, 2006, or when it was energized. (App. 21).

At the time the statements were made by Konwinski, it was the known and mandatory policy of Little Sioux that no work was to be commenced on electrical equipment until the equipment was de-energized, locked out, tagged and the absence of energy verified. (App. 21). In addition to being company policy, the lock out/tag out policy was a safety procedure that was mandated by OSHA regulations. 29 C.F.R. 1910.333(b); 29 C.F.R. 1926.950. (App. 22, 23, 177).

In order to implement the company's lock out/tag out policy, all maintenance employees (including McCormick) were provided with padlocks to place on energy sources before commencing work on electrical equipment. (App. 22). It was also the policy of Little Sioux for its employees to use a "safe work permit" to assure that any electrical equipment

that needed work, was locked out and tagged. (App. 22). The "safe work permit" contained a list of procedures that documented compliance with the policy. (App. 22). When the job was completed, the "safe work permit" was made a part of Little Sioux's permanent record. (App. 22). No "safe work permit" was created or used in connection with the work on the switchgear that Konwinski assigned on November 13, 2006. (App. 22).

On November 13, 2006, no one de-energized, locked out or tagged out any of the switchgear. (App. 22). In addition, no one did anything to verify the electrical status of the switchgear. (App. 22). Instead, Jacobson, Sangwin and McCormick relied on the statement by Konwinski that the switchgear was not energized. (App. 22).

At the time of the statements by Konwinski, it was the known policy of Little Sioux that all employees were to assume that all electrical equipment was energized until proven to the contrary. (App. 22, 23). In addition to being company policy, it was the law that any electrical equipment that was not locked out and tagged was to be treated as if it was energized. 29 C.F.R. 1910.333(b).

At the conclusion of the morning meeting on November 13, 2006, Mike Jacobson, the company electrician, had possession of the penta-head socket wrench and used it to open up the switchgear cabinets that he worked on.

Subsequently, when Jacobson was called away from the switchgear assignment, he gave the penta-head socket wrench to Troy McCormick. (App. 23). When McCormick and Sangwin arrived at switchgear number 4, the cabinet doors were locked closed with the penta-head bolt. (App. 23, 24). Stated otherwise, the last person who had access to the switchgear before their arrival on November 13, had left it in a locked and safe condition. Sangwin opened the cabinet door with the penta-head socket wrench. (App. 23, 24).

On November 13, 2006, Little Sioux had in its possession and control, safety equipment including grounding jumpers, a universal pole, shotgun clamp sticks and voltage testers that it had purchased for use in connection with the electrical equipment for the new electrical loop. (App. 23). Notwithstanding Little Sioux's possession and control of this safety equipment, Konwinski did not provide any of the safety equipment to any of his staff when he assigned them to work on the switchgear. (App. 23).

Troy McCormick's injury occurred when the wrench which he held in his hand came in contact with a charged electrical component inside the switchgear and grounded out through his body.

ARGUMENT

I. THE DISTRICT COURT DID NOT ERR AT LAW IN CONCLUDING THAT NAI DID NOT OWE A DUTY TO McCORMICK BECAUSE HIS EMPLOYER OWNED THE EQUIPMENT, THE PREMISES AND RETAINED CONTROL OF THE WORK.

A. PRESERVATION OF ERROR.

NAI contends that McCormick did not preserve error as to any issue of material fact because he failed to set forth specific evidence supported by reference to the record, to contradict the Defendant's supported Statements of Material Facts, which it offered in support of its Motion for Summary Judgment. Iowa R.Civ.P. 1.981(5). Consequently, no fact issue was created or preserved in the court below.

NAI otherwise concurs that the McCormick preserved error on the legal issue of duty.

B. Standard of review.

The standard of review on appeal of a summary judgment ruling is on error to examine the record before the District Court to decide whether a genuine issue of material fact existed and whether the Court correctly applied the law. *Benavides v. J.C. Penney Life Insurance Co.*, 539 N.W.2d 352, 354 (Iowa 1995), Iowa R.App.P. 4.

C. NAI did not owe a duty to McCormick under Section 384 of the Restatement of Torts (Second) because Little Sioux retained control of the work.

McCormick contends that Pedersen and NAI were negligent

because Pedersen created a dangerous condition when he turned on the power to the loop without informing³ the appropriate persons. McCormick contends that a duty is therefore created by the rule stated in Section 384 of the Restatement of Torts (Second) which provides:

One who on behalf of the possessor of land erects a structure or creates any other condition on the land is subject to the same liability and enjoys the same freedom from liability, as though he were the possessor of the land, for physical harm caused to others upon and outside of the land by the dangerous character of the structure or other conditions while the work is in his charge. (Emphasis added).

McCormick's argument is not supported by the admitted facts or the law. The analytical framework for the determination of a general duty of care, was recently modified by the Iowa Supreme Court in *Thompson v. Kaczinski*, 774 N.W.2d 829 (Iowa 2009). In *Thompson*, the court adopted the framework proposed in the Restatement of Torts (Third): Liability for Physical Harm §7(a), at 90 [Proposed Final Draft No. 2, 2005] which provides that foreseeability of harm is not considered in determining whether an actor owes a general duty to exercise reasonable care. 774 N.W.2d at 835. Under the Restatement (Third) framework adopted in *Thompson*, an actor owes a general "duty to exercise

³ NAI's project manager Bufford Pedersen instructed Konwinski and Jacobson in the operations of the main panel on or before November 7, 2009, when the circuit was energized in their presence. (Pedersen 59, 60). Konwinski and Jacobson's contradicting affidavits filed in resistance to the summary judgment motion do not create a fact issue because the duty determination is based on the admitted exercise of control over the work at the time of the injury, which occurred on November 13, 2009.

reasonable care when the actor's conduct creates a risk of physical harm." Restatement (Third) §7(a), at 90. "However, in exceptional cases, the general duty to exercise reasonable care can be displaced or modified. Citation. An exceptional case is one in which "an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases." *Thompson*, 774 N.W.2d at 835.

In *Van Fossen v. Midamerican Energy Company*, 777 N.W.2d 689 (Iowa 2009), the Supreme Court found an exception to the general duty rule where the defendant Midamerican, as the owner and employer of an independent contractor did not retain or exercise control over the hazard which allegedly caused the death of the wife of the independent contractor's employee. In reaching its legal conclusion the court recognized the retained control standard as an exception to the general duty rule adopted in *Thompson*. *Van Fossen*, 777 N.W.2d at 697.

The retained control standard is consistent with the rule in Section 384 of the Restatement, because the Restatement limits the actor's liability for the dangerous condition "while the work is in his charge." Thus, control of the work is the determinative factor as to the existence of a duty. This rule has been applied in many Iowa cases.

The general duty was subject to modification in *Van*

Fossen, because Mid-American Energy Company did not retain day-to-day control over the operations of its independent contractor who employed the Plaintiff ironworker. The Van *Fossen* court cited *Hoffnagle v. McDonald's Corp.*, 522 N.W.2d 808, 813 (Iowa 1994) to support the principle that the ability to control the risk and/or hazard is an inescapable part of the duty issue. In *Hoffnagle*, McDonald's was the franchisor of a restaurant that employed the plaintiff who was assaulted on the franchisee's premises. The court held that McDonald's owed no duty to the franchisee's employee, as it did not have control over the day-to-day operations of the franchisee and hence, could not control the risk.

In *Downs v. A & H Construction, Ltd.*, 481 N.W.2d 520 (Iowa 1992), the Supreme Court affirmed the district court's grant of summary judgment to a general contractor because the general contractor/landowner did not retain sufficient control of the manner in which the work was done, so that the general contractor/owner had no duty to the injured employee of the subcontractor, notwithstanding that one or the other of the two partners of the general contractor was on site nearly every day.

In *Piper v. Jerry's Homes*, 671 N.W.2d 531 (table) 203 WL 22199580, an injured independent contractor for a framing subcontractor sued the developer for failure to maintain a safe place to work. The district court granted summary

judgment as the developer did not retain operative control over the subcontractor's work. The Court of Appeals affirmed.

Van Essen v. McCormick Enterprises, 599 N.W.2d 716 (Iowa 1999), affirmed the district court grant of summary judgment to the defendant landlord, who did not retain sufficient control over the day to day operation of the grain bin where the injury occurred. 599 N.W.2d at 721.

In *Bomar v. Farmers Cooperative Assn.*, ___ N.W.2d ___, 1999 WL 1255734 (Iowa App.), the court affirmed a grant of summary judgment to the defendant elevator because it did not retain any day to day control over the operations of the independent contractor who employed its injured employee.

In this case, Little Sioux retained and exercised operative and daily control of the work. Its maintenance manager decided to retain the work in house. NAI's offer to do the work was expressly rejected. It assigned McCormick, who was not trained to work on high voltage equipment to assist in the work, and diverted Jacobson, the only electrician to other duties while the work on the switchgear was in progress. It decided that the work would be done when NAI was not on the job site and had no ability to offer advice or otherwise assist.

Not only did Little Sioux's maintenance manager control

the work, he affirmatively assured McCormick that the switchgear was not energized when he had no factual basis for the assurance, notwithstanding his affirmative duty to find out. 29 C.F.R. 1910.333(b)(2); 29 C.F.R. 1926.954(a).

Little Sioux's control of the work after NAI left the job site was the cause of McCormick's injury. Consequently, NAI was not in charge of the work that caused the injury, so that the rule set forth in Section 384 of the Restatement Second of Torts is not applicable.

D. NAI did not create a hazard because it left the switchgear in a locked and safe condition.

The switchgear where the injury occurred was not dangerous when Pedersen completed his work. It is undisputed that the switchgear cabinet doors were locked when McCormick and Sangwin arrived at switchgear number 4, as Sangwin used the penta-head socket to open the cabinet doors. (App. 23, 24).

Pedersen was the last known person who had accessed the cabinet when he connected the electric cable from the main panel to the terminals on the switchgear inside the cabinet on or before November 7, 2009. When he finished his work, he locked the cabinet doors so that no one could gain access without the penta-head socket. There is no evidence in the record that the switchgear posed a hazard while the cabinet doors were locked. By locking the cabinet doors, Pedersen

exercised reasonable care to protect unauthorized persons from the danger and consequently, NAI is not subject to liability under the rule set forth in Section 343 of the Restatement of Torts (Second) which provides in pertinent part:

A possessor⁴ of land is subject to liability for physical harm caused to his invitees by a condition on the land if, he

(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and

(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

(c) fails to exercise reasonable care to protect them against the danger.

Pedersen had reason to expect that Little Sioux employees or others would know of the danger, because the danger of high voltage was clearly disclosed by warnings of danger on the outside and inside of the switchgear cabinet doors. (App. 141). Restatement Second (Torts) §§343(a) and 343A.1.

Pedersen had no reason to believe that the Little Sioux maintenance staff would not discover or realize the danger or protect themselves against it, Restatement Second (Torts) §343(b), because it was reasonable for Pedersen to expect

⁴ NAI was not the general contractor and was not the possessor of the land. But even it was, it would not owe a duty to McCormick under the rules set forth in §343 and §343A of the Restatement.

that Little Sioux's maintenance staff would comply with the company's Electrical Safety Policy (App. 127), its Lock Out/Tag Out Policy (App. 153), and mandatory OSHA regulations that required that they assume that electrical equipment is energized, and that the energy source be locked out and tagged before commencement of the work. 29 C.F.R. 1910.333; 29 C.F.R. 1926.416, 417.

It was also reasonable for Pedersen to rely upon the lock to limit access when he was not present on site, because he knew that the penta-head socket was controlled by Little Sioux's maintenance department, who he knew was in charge of the electrical equipment at the plant, and presumptively knowledgeable as to the hazards of high voltage electricity because the little Sioux plant was a complex manufacturing facility that required high voltage for its operation.

In addition, NAI owed no duty to McCormick under the known and obvious danger rule set forth in Section 343A of the Restatement of Torts, Second, which provides:

(1) A possessor of land is not liable to his invitees for physical harm caused to them by an activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness. ...

McCormick's expressed reservation about work on the switchgear at the time it was assigned by Konwinski (App. 21), is an admission that he knew that the switchgear was

dangerous. His subsequent failure to follow known and mandatory safety procedures clearly manifests his reliance on Konwinski's representations and assurances that the switchgear was safe.

Thus even if NAI were deemed to be a "possessor", NAI would not be liable for McCormick's injuries under the rules set forth in Sections 343 and 343A of the Restatement of Tort, Second.

II. CONCLUSION

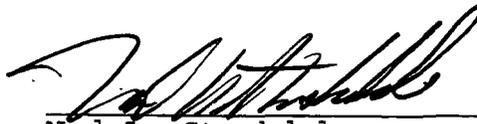
Judge Whittenburg's legal conclusion that NAI owed no duty to Troy McCormick, should be affirmed, because NAI left its work in safe condition when it left the job site and NAI did not control the subsequent work that resulted in the injuries to Troy McCormick.



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ATTORNEY'S COST CERTIFICATE

I hereby certify that the actual cost of printing the necessary copies of the foregoing Appellee's Proof Brief is \$ 87.21 .

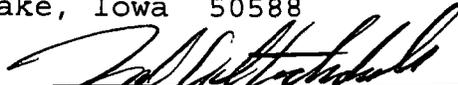


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CERTIFICATE OF SERVICE

The undersigned certifies that on the 23rd day of March, 2011, he served one (1) copy of this Appellee's Brief by ordinary mail, postage fully prepaid, on the following respective parties at the addresses included:

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The undersigned certifies that on the 23rd day of March, 2011, he filed eighteen (18) copies of this Appellee's Brief by ordinary mail, postage fully prepaid,

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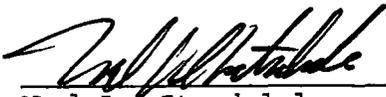


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TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS**

1. This brief complies with the type-volume limitations of Iowa R.App.P. 6.903(1)(g)(2) because this brief uses a monospaced typeface and contains 484 lines of text, excluding the parts of the brief exempted by Iowa R.App.P. 6.903(1)(g)(2).

2. This brief complies with the typeface requirements of Iowa R.App.P. 6.903(1)(e) and the type-style requirements of Iowa R.App.P. 6.903(1)(f) because this brief has been prepared in a monospaced typeface using Microsoft Office Word 2003 with 12 characters per inch using Courier type-style.



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