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NO. A09-935

State of Minnesota
In Court of Appeals

SCI Minnesota Funeral Services, Inc.,
Corinthian Enterprises, LLC,

Appellants,

v.

Washburn-McReavy Funeral Corporation,
Washburn-McReavy Cemetery Association,

Respondents.

APPELLANTS' BRIEF, ADDENDUM, AND APPENDIX

Patrick R. Martin (#259445)
Kelly A. Moffitt (#341009)
FULBRIGHT & JAWORSKI L.L.P.
2100 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
Tel: (612) 321-2800
Fax: (612) 321-2288

Kevin M. Decker (#0314341)
Jonathan P. Schmidt (#0329022)
BRIGGS AND MORGAN, P.A.
2200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
Tel: (612) 977-8400
Fax: (612) 977-8650

Attorneys for Appellants

Attorneys for Respondents

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 ISSUES

- I. Does Minnesota law empower trial courts to reform stock sale agreements to reflect the transaction that both the purchaser and the seller thought was the actual transaction?**

Answer: Yes.

The trial court held: The trial court erroneously held that because the transaction was a stock sale, it did not have the power to reform the agreements to reflect the actual transaction.

- II. Did the trial court err in denying reformation of the agreements as requested by Appellants SCI Minnesota Funeral Services, Inc. (“SCI Minnesota”) and Corinthian Enterprises, LLC (“Corinthian”), where all parties agreed that they did not intend to transfer \$2 million worth of vacant real estate (the “Vacant Land”) from SCI Minnesota to Respondents Washburn-McReavy Funeral Corporation and Washburn-McReavy Cemetery Association (collectively, “Washburn”)?**

Answer: Yes.

The trial court held: The trial court granted summary judgment to Washburn, holding that contracts for the sale of stock are not subject to reformation.

- III. Did the trial court err in failing to grant SCI Minnesota’s and Corinthian’s separate request for rescission of the agreements due to lack of mutual assent, where there was no “meeting of the minds” concerning the transfer of the Vacant Land worth \$2 million and Washburn paid no consideration for the Vacant Land?**

Answer: Yes.

The trial court held: The trial court did not address the issue of rescission due to lack of mutual assent.

- IV. Did the trial court err in denying rescission due to mutual mistake as requested by SCI Minnesota and Corinthian, where all individuals involved in negotiating the agreements agreed that they did not know about and did not intend to transfer the Vacant Land?**

Answer: Yes.

The trial court held: The trial court granted summary judgment to Washburn, holding that contracts for the sale of stock are not subject to rescission due to mutual mistake.

INTRODUCTION AND STATEMENT OF THE CASE

There is such a thing as right and wrong. SCI Minnesota thought it was selling three cemeteries worth \$1 million, and Washburn thought it was buying those three cemeteries for \$1 million. But unbeknownst to SCI Minnesota and Washburn, the stock sale transferring those three cemeteries also resulted in the mistaken transfer of title to an additional \$2 million in vacant land in Colorado and Burnsville (the “Vacant Land”) that SCI Minnesota never intended to transfer and that Washburn never intended to buy. When it discovered this colossal, mutual mistake, SCI Minnesota requested the return of the Vacant Land. But Washburn did the wrong thing and refused, hoping to pocket \$2 million in assets for which it paid nothing.

Through claims for reformation and rescission of contract, Minnesota law empowers trial courts to right such wrongs. But here, after acknowledging that **“the result is inequitable and does give [Washburn] a windfall,”** the trial court (the Honorable Kathryn D. Messerich, First Judicial District Court) declined to reform or rescind the sale agreements under the erroneous belief that its hands were tied and that it lacked the power to reform a stock sale. This decision is wrong and cannot stand. It is now up to this Court to make things right and proclaim that Minnesota law allows reformation of stock sales – just as it does for any other commercial transaction.

The facts compelling a return of the Vacant Land to its rightful owner, SCI Minnesota, are simple and undisputed. Until the 2005 sale, SCI Minnesota owned Crystal Lake Cemetery Association (“Crystal Lake”), a business consisting of three Minnesota cemeteries. Among other assets, SCI Minnesota also owned the Vacant Land,

which it had titled in Crystal Lake's name even though the Vacant Land was unconnected to the Crystal Lake cemeteries. Washburn wanted to buy the three Crystal Lake cemeteries for \$1 million, and SCI Minnesota wanted to sell those three cemeteries for \$1 million. Thus, on July 20, 2005, SCI Minnesota sold the three cemeteries (through Crystal Lake's stock) to Corinthian (an intermediate party) for \$1 million in a Stock Sale Agreement and, on that same day, Corinthian resold those cemeteries to Washburn for \$1 million in a Share Purchase Agreement (collectively, the "Agreements"). In signing those Agreements, all individuals involved in the sale thought the three Crystal Lake cemeteries and only the three Crystal Lake cemeteries would transfer. In fact, none of the parties knew until 2008 that the Agreements had also caused the mistaken transfer of the Vacant Land simply because it was titled in Crystal Lake's name. Indeed, from the 2005 sale through 2008, SCI Minnesota continued to act as the owner of the Vacant Land, including paying property taxes on it.

In the trial court, SCI Minnesota asserted claims for reformation and alternative claims for rescission due to lack of mutual assent and rescission due to mutual mistake.

On its reformation claim, SCI Minnesota had to prove:

- (1) there was a valid agreement between the parties expressing their real intentions;
- (2) the written instrument failed to express the real intentions of the parties;
- and (3) this failure was due to a mutual mistake of the parties.

Owatonna Country Club, Inc. v. Kohlmier, 353 N.W.2d 227, 230 (Minn. App. 1984). On its lack of mutual assent claim, SCI Minnesota had to prove that there was no "meeting of the minds concerning" the contract's essential elements. Minneapolis Cablesystems, Inc.

v. City of Minneapolis, 299 N.W.2d 121, 122 (Minn. 1980). The deposition testimony of

Washburn's owner and CEO, William McReavy, alone establishes these claims:

- When asked whether anybody intended to sell the Vacant Land as part of the 2005 Crystal Lake sale, Mr. McReavy testified, **“Not to my knowledge.”** [A.56 (emphasis added)].
- When asked whether he would agree that “SCI, Corinthian, and Washburn-McReavy were all under the belief that the major assets transferred” were the three cemeteries, Mr. McReavy testified, **“Yeah. I wouldn't have thought any different than that.”** [A.57 (emphasis added)].
- When asked, “But you certainly didn't know” that Crystal Lake owned the Vacant Land in 2005, Mr. McReavy testified, **“No, certainly did not, never heard of it.”** [A.49 (emphasis added)].
- When asked, “[I]n your wildest dreams, did you ever imagine Crystal Lake might be holding \$2 million in vacant land when you purchased it,” Mr. McReavy testified, **“I had no idea.”** [A.56 (emphasis added)].
- When asked whether the amount he paid for Crystal Lake at all factored in “the potential that you might find some vacant land in that corporate entity,” Mr. McReavy testified, **“That had nothing to do with it * * *. We had no idea at the time. * * * [And] I didn't pay anything extra [for the Vacant Land].”** [A.53 & 59 (emphasis added)].
- When asked whether he had acted as the owner of the Vacant Land, whether he had paid taxes on it, or whether he had set foot on it, Mr. McReavy testified, **“No,” “No,” and “No.”** [A.56-57 (emphasis added)].
- And when asked if the Court granted SCI Minnesota reformation relief whether Mr. McReavy would be “back in the position that you thought you were in” when the parties negotiated the deal “in 2005, which is the owner of three locations” for \$1 million, Mr. McReavy ultimately testified that, **“I guess I'd probably say yes with a question mark.”** [A.59-60 (emphasis added)]. When given time to explain that question mark, Mr. McReavy admitted that, **“I can't give you an answer.”** [A.60 (emphasis added)].

This stunning and dispositive testimony by Washburn's own Mr. McReavy says it all on the three reformation elements: **(1)** the parties' real intent was to transfer *only* the three

cemeteries, and the parties *never* intended to transfer the Vacant Land; (2) the Agreements failed to capture that intent because they unintentionally transferred title to the Vacant Land; and (3) this failure arose from the parties' mutual mistake concerning the existence and ownership of the Vacant Land, as well as whether it would transfer.

Further, the Agreements themselves prove the reformation and lack of mutual assent claims by only providing title commitments and legal descriptions for the three cemeteries, and by identifying those cemeteries as "all real property owned or leased by Crystal Lake." [A.68, 278 (emphasis added)]. The Agreements also list every possible asset to be transferred – literally every mop bucket, wastebasket, and extension cord – without ever mentioning the Vacant Land worth \$2 million. These efforts to list even the most trivial assets conclusively prove that nobody agreed or intended that this \$1 million deal for three cemeteries worth \$1 million would *also* include \$2 million in Vacant Land. Quite simply, Washburn is not entitled to \$3 million in value when it bargained for \$1 million in value. The law cannot and does not countenance such an absurd and unintended result.

On cross-motions for summary judgment, Washburn insisted that the trial court had no authority to reform *this contract* because a stock sale structure means that anything and everything transfers. The trial court accordingly denied SCI Minnesota's motion and granted Washburn's motion. In doing so, the trial court was clearly troubled, noting that the "consequence is harsh" and that the "result is inequitable and does give [Washburn] a windfall." [A.11-12 (emphasis added)]. But the trial court reached its inequitable result on the erroneous belief that it had *no power* to reform the Agreements

because this was a stock sale. [Id.]. The trial court explained that it “cannot rewrite a contract that did what it was intended to do – sell 100% of the stock of one company to another company.” [A.11]. Deferring to this Court, the trial court concluded that: “**If another standard applies to the reformation of a stock purchase agreement, then it is the role of an appellate court to announce such a rule.**” [Id. (emphasis added)].

SCI Minnesota now asks this Court to grant the relief the trial court held was just, but nonetheless felt powerless to grant. As recognized by other courts, this Court should recognize and hold that contracts for the sale of stock are not immune from reformation. Such contracts – like all contracts – *can* be reformed and, in this case, *should* be reformed. Because the trial court erred in failing to recognize that it had the power to grant reformation, this case is subject to a **de novo standard of review** and should be reversed. Moreover, because the facts are undisputed and because any result but reformation would be manifestly contrary to the evidence, this Court should reform and enter judgment in SCI Minnesota’s favor.¹ Additionally, the trial court never addressed SCI Minnesota’s alternative claim for rescission due to lack of mutual assent even though all evidence shows that there was no “meeting of the minds concerning” the transfer of the Vacant Land. SCI Minnesota should prevail here as well.

At the end of the day, Washburn should get exactly what it paid for – the three Crystal Lake cemeteries for \$1 million – no more and no less. The Vacant Land belongs to SCI Minnesota. Washburn must be prevented from making off with \$2 million in real estate that it never paid for and never intended to buy.

¹ At the very least, the Court should remand for the trial court to exercise its power.

STATEMENT OF FACTS

As the trial court correctly noted, “[t]he essential and material facts of this case are not in dispute.” [A.6]. Those facts are set forth below.

I. THE 2005 SALE OF CRYSTAL LAKE.

On or about April 1, 2005, SCI Minnesota and Corinthian entered into a letter of intent “regarding the purchase of substantially all of the operating assets” of various businesses owned by SCI Minnesota, including Crystal Lake. [A.201]. Crystal Lake owned and operated three cemetery and funeral home businesses known as Crystal Lake Cemetery/Crematory in Minneapolis, Dawn Valley Funeral Home/Memorial Park in Bloomington, and Glen Haven Memorial Gardens in Crystal (collectively referred to as “the Crystal Lake Business”). [A.49].

As reflected in the letter of intent, SCI Minnesota sought to sell the “operating assets” of the Crystal Lake Business to Corinthian.² [A.201]. But despite intending to sell only the assets, SCI Minnesota and Corinthian ultimately structured the pending Crystal Lake sale as a stock deal to accord with Minnesota law concerning cemeteries. [A.162-63, 177-78, 209, 212, 269-70]. Specifically, a newly-created cemetery entity cannot operate as a for-profit business; it must be a non-profit or else be “grandfathered” in as an existing for-profit cemetery association. Minn. Stat. § 306.88. Thus, Corinthian’s intent was to buy the Crystal Lake Business operating assets, while using a

² Corinthian joined this action as a plaintiff, although it merely sought relief so that the Vacant Land would be returned to SCI Minnesota. Corinthian joins in this appeal for the same purposes. Thus, although this appeal is brought on behalf of all plaintiffs, this appeal generally requests relief in SCI Minnesota’s favor.

structure that would allow Crystal Lake to continue operating as a for-profit business under Minn. Stat. § 306.88. [A.269-70]. SCI Minnesota ultimately agreed to the stock sale structure to accomplish this objective. [Id.]. In short, SCI Minnesota and Corinthian always intended to transfer only the Crystal Lake assets, but the unique challenges posed by Minn. Stat. § 306.88 drove the structure to a stock sale. Despite this structure, the parties treated the transfer like an asset sale. For example, the parties used an I.R.C. § 338h(10) election, which allowed the parties to treat the sale for tax purposes as an asset sale, while keeping the benefits of a stock sale under Minn. Stat. § 306.88. [A.270; see 26 U.S.C. § 338h(10) (entitled “Certain stock purchases treated as asset acquisitions”)].

On July 20, 2005, SCI Minnesota and Corinthian finalized the deal and entered into a Stock Sale Agreement (“the First Agreement”), thereby selling Crystal Lake to Corinthian for \$1 million. [A.272-364].³ The First Agreement contains the following relevant details:

- The First Agreement describes three – and only three – pieces of real property included in the transaction: Crystal Lake Cemetery/Crematory in Minneapolis, Dawn Valley in Bloomington, and Glen Haven in Crystal. [A.272]. The First Agreement never mentions the Vacant Land.
- The First Agreement states that “[l]egal descriptions of *all real property owned or leased* by [Crystal Lake] (the “*Real Property*”)” will be attached and that the parties shall obtain Title Commitments for title insurance “showing title to [Crystal Lake’s] real property.” [A.278, 288-89 (emphasis added)].

³ Corinthian also sold the Werness Brothers funeral home assets to Washburn after acquiring them from SCI Minnesota. That separate transaction was an asset sale because it did not involve any cemetery property that required “grandfathering in” under Minnesota law. [A.135-36].

- The resulting Title Commitments (which became Schedule 1 to Exhibit B of the First Agreement) only contain legal descriptions for the three cemeteries (*i.e.*, Crystal Lake, Dawn Valley, and Glen Haven), and never mention or legally describe the Vacant Land. [A.313-64].
- Schedule A to the First Agreement includes financial statements for the three Crystal Lake Businesses. [A.302-10]. Those financial statements do not describe any additional real property, including the Vacant Land. [*Id.*].
- The First Agreement contains an assignment provision stating “[t]his agreement shall inure to the benefit of and be binding upon the parties hereto and their respective heirs, legal representatives, successors and assigns.” [A.300].
- The First Agreement identifies **every possible asset covered by the stock sale** – right down to the two mop buckets at Glen Haven, the three wastebaskets at Crystal Lake, and the extension cords at Dawn Valley – without ever identifying the Vacant Land worth \$2 million. [A.320-26, 336-46, 355-64].

On the same day Corinthian purchased Crystal Lake from SCI Minnesota, Corinthian sold Crystal Lake to Washburn for \$1 million through a Share Purchase Agreement and Assignment Agreement (collectively referred to as the “Second Agreement”) (the First Agreement and Second Agreement are collectively referred to as “the Agreements”). [A.64-115]. Like the First Agreement, the Second Agreement describes the three properties comprising the Crystal Lake Business, without ever referencing the Vacant Land. [A.64, 86, 88]. Through the Second Agreement, Washburn was assigned Corinthian’s rights to Crystal Lake and, accordingly, Washburn stepped into Corinthian’s shoes for purposes of the First Agreement. [A.86-87, 134]. Because of this assignment, Washburn cannot and does not assert that Corinthian’s involvement in the sale results in a lack of privity between Washburn and SCI Minnesota.

Washburn's Chief Financial Officer, John Edson, negotiated the deal on Washburn's behalf. [A.122-23]. He agreed that, although Washburn would have "preferred an asset purchase," the stock purchase structure was driven by the desire to comply with Minnesota law so as to keep the cemeteries a for-profit business. [A.125, 127, 135-36, 142].

II. THE 2008 DISCOVERY THAT VACANT LAND WORTH \$2 MILLION IS TITLED IN CRYSTAL LAKE'S NAME.

In 2008, the parties learned that Vacant Land thought to be owned by SCI Minnesota – including approximately 8 acres in Burnsville, Minnesota and approximately 3.594 acres in Lakewood, Colorado – was actually titled in Crystal Lake's name. [A.179-80, 210]. The Vacant Land's value is approximately \$2 million. [A.366].

The SCI Minnesota business development personnel negotiating the Crystal Lake sale in 2005 were unaware that the Vacant Land was titled in Crystal Lake's name due to the unique history of the Vacant Land. [A.365-66]. SCI Minnesota's real estate department had facilitated the purchase of the Colorado property for Crystal Lake for tax reasons in the late 1990's as part of a like-kind exchange. [A.366]. The Burnsville property had been carved out of the asset sale of another cemetery property years ago. [Id.]. The individuals involved in those transactions were not involved in the 2005 sale at issue in this case. [Id.]. Moreover, the Vacant Land was not used in the operation of the Crystal Lake Business, nor is it located anywhere near the three Crystal Lake Businesses. [A.49, 57, 125].

III. WASHBURN NEVER INTENDED TO BUY THE VACANT LAND, AND SCI MINNESOTA NEVER INTENDED TO SELL THE VACANT LAND.

A. None of the Parties Knew That the Vacant Land Was Titled in Crystal Lake's Name, and No One Intended to Sell or Buy the Vacant Land.

The Agreements are extraordinarily detailed concerning the real and personal property SCI Minnesota intended to convey for \$1 million. For example, Mr. Edson acknowledged that the Agreements list the three Crystal Lake cemeteries, along with virtually every asset used to run those businesses (*i.e.*, fans, wastebaskets, garden hoses, and rakes). [A.137-38, 320-26, 336-46, 355-64]. But the Agreements never mention the \$2 million in Vacant Land. [*Id.*]. This is because none of the individuals involved in the Crystal Lake sale knew about the Vacant Land when entering into the Agreements, and none of them intended for it to transfer.

1. SCI Minnesota did not intend to sell the Vacant Land.

Christopher Cruger – SCI Minnesota's Vice President of Business Development during the relevant time and the individual who negotiated much of the sale on SCI Minnesota's behalf – testified that, when entering into the First Agreement, SCI Minnesota's Business Development did not know that Crystal Lake owned the Vacant Land and did not intend to transfer it to Corinthian. [A.207-13].

2. Corinthian did not intend to buy or sell the Vacant Land.

Lowell Kirkpatrick – Corinthian's owner and the individual who negotiated the Agreements on Corinthian's behalf – testified that Corinthian did not know about the Vacant Land in 2005 and did not intend to purchase it from SCI Minnesota or transfer it to Washburn. [A.162, 178-80, 183-86, 269-70]. Specifically, Mr. Kirkpatrick testified,

“[w]e intended not to transfer title to [the Vacant Land],” and that “[b]ecause we did not know about [the Vacant Land], it was not our intent to transfer.” [A.186].

3. *Washburn did not intend to buy the Vacant Land.*

Mr. Edson – who negotiated the Second Agreement on Washburn’s behalf – likewise testified that Washburn did not know about the Vacant Land or intend to acquire it when entering into the Agreements. [A.46, 121, 127-28, 131-33, 135, 137, 139, 142].

He testified:

Q In the first agreement and second agreement, which are reflected in Exhibits 1 and 2, as far as you know, did any of the parties know about the vacant land in entering into those agreements?

A Not that I know of.

Q And in those, the first agreement and the second agreement, the parties, as far as you know, never specifically intended to transfer the vacant land. Is that correct?

A Since they didn’t know about it, I guess that would be true.

[A.137].

Mr. McReavy, Washburn’s CEO, agreed that Washburn “had no idea” that it was getting the Vacant Land under the Agreements. [A.53, 56, 59]. When asked whether he knew that Crystal Lake owned the Vacant Land in 2005 when Washburn entered into the Second Agreement, Mr. McReavy replied, “[n]o, certainly did not, never heard of it.”

[A.49]. In fact, Mr. McReavy did not simply state that he was unaware of the Vacant Land when entering into the Second Agreement; he actually testified that he was “very much surprised” when he later found out about it. [Id.]. He further testified that none of the parties intended to transfer the Vacant Land:

Q The piece in Colorado, in Lakewood, Colorado, and the piece in Burnsville that you learned about in either '07 or '08. Did anybody intend to sell those * * * when Crystal Lake was sold in 2005?

A Not to my knowledge.

[A.56].

All Parties Acted Consistent With the Understanding That SCI Minnesota Owned the Vacant Land Long After the 2005 Sale of Crystal Lake.

SCI Minnesota believed that it still owned the Vacant Land following the 2005 sale of Crystal Lake, and it acted in accordance with this belief. [A.365-66]. SCI Minnesota paid the property taxes for the Colorado parcel following the 2005 transactions. [A.366]. SCI Minnesota also continued to act as the Vacant Land's owner by placing it for sale and soliciting bids for it. [Id.]. Specifically, SCI Minnesota had the Burnsville property listed at \$995,000. [Id.]. SCI Minnesota was also recently under contract to sell the Colorado property for \$1,050,000. [Id.].

By contrast, Washburn never exhibited any indicia of ownership over the Vacant Land. [A.56-57]. Washburn never paid taxes on it, never hired anyone to maintain it, and never had anyone from Washburn set foot on either of the properties. [Id.]. In fact, Washburn did not learn of the existence of the Vacant Land – and that it might have some theoretical interest in it – until 2008. [A.49, 220]. It learned of the Colorado parcel when a prospective buyer called Mr. McReavy to inquire about purchasing it [A.49, 220], and it only learned of the Burnsville parcel when SCI Minnesota filed this lawsuit. [A.220].

C. The Sale of Crystal Lake Without the Vacant Land Was Fair.

When entering into the Crystal Lake sale, Washburn never relied on the unknown possibility that Crystal Lake might hold title to \$2 million worth of undeveloped land. [A.57]. When asked whether he would “agree that all three parties – SCI, Corinthian, and Washburn-McReavy – were all under the belief that the major assets transferred were” the three Crystal Lake Business locations, Mr. McReavy replied, “Yeah. I wouldn’t have thought any different than that.” [Id.].

Mr. McReavy also agreed that Washburn “got fair value” in paying \$1 million for the Crystal Lakes Business *without* receiving the Vacant Land. [A.52]. Nobody disputes that the Crystal Lake Business as intended to be sold was worth \$1 million. The Crystal Lake Business was particularly valuable to Washburn because Crystal Lake is “right by” one of Washburn’s chapels, and all of Washburn’s funeral chapels in town now use the Crystal Lake Cemetery. [A.51, 141]. Likewise, Mr. Edson testified that the three Crystal Lake cemeteries have substantially met the projections he had for EBITDA and cash flow from 2005 through the present. [A.140]. Moreover, the Vacant Land alone is worth twice what Washburn paid for the entire Crystal Lake Business. [A.56]. Ultimately, Washburn did not factor the Vacant Land into its analysis of what it would pay for Crystal Lake [A.53, 59], and never paid a dime for the Vacant Land. [A.59].

D. Returning Title to the Vacant Land to SCI Minnesota Will Leave Washburn Exactly Where It Thought It Would Be.

Mr. McReavy’s testimony provides the most compelling evidence that Washburn received fair value and should return the Vacant Land. Specifically, when asked if he

agreed that “if the Court were to grant * * * SCI Minnesota relief in this case, you’d be back in the position that you thought you were in when [the 2005 sale occurred], which would be the owner of the three locations for a million dollars,” Mr. McReavy answered, “I guess I’d probably say yes with a question mark.” [A.59-60]. After being asked to explain that question mark, Mr. McReavy testified, “I can’t give you an answer.” [A.60].

All parties agree that no one intended, or even guessed, that the Vacant Land could be part of the Agreements. And no one intended that it transfer. In the words of Corinthian’s Mr. Kirkpatrick, returning the Vacant Land to SCI Minnesota is “the right thing.” [A.195-96].

IV. PROCEDURAL HISTORY AND THE TRIAL COURT’S DECISION.

In 2008, when Mr. Edson raised the issue of the Vacant Land to Mr. McReavy and indicated that SCI Minnesota wanted a quit claim deed, Mr. McReavy said “no.” [A.59]. Thus – despite the fact that Washburn did not even know the Vacant Land existed back in 2005, that Washburn had no intent to purchase the Vacant Land and, indeed, that Washburn paid absolutely no consideration for it – Washburn flat-out refused to quit claim the Vacant Land to its rightful owner, SCI Minnesota.

In order to prevent a \$2 million windfall to Washburn, SCI Minnesota commenced this action on June 9, 2008. In the Second Amended Complaint [A.225-35], SCI Minnesota asserted the following causes of action:

- Count I for Reformation of the Agreements so that the Vacant Land is returned to SCI Minnesota [A.231];

- Count II (in the alternative) for Rescission of the Agreements due to mutual mistake and/or lack of mutual assent so that the Vacant Land (and the stock of Crystal Lake) is returned to SCI Minnesota [A.231-32]; and
- Count III (in the alternative) for Unjust Enrichment so that SCI Minnesota receives the fair market value of the Vacant Land plus all payments it has made related to the Vacant Land since July 20, 2005 [A.232].

Washburn moved to dismiss, but the trial court denied that motion. [See September 18, 2008 Order]. In that Order, the trial court raised questions concerning whether the parties ever intended to sell the Vacant Land or knew that the Vacant Land would transfer. [Id.]. As set forth above, discovery fully resolved those questions in SCI Minnesota's favor, and, thus, SCI Minnesota moved for affirmative summary judgment.

SCI Minnesota argued that the undisputed evidence, including Mr. McReavy's dispositive deposition testimony, proved the elements of reformation and compelled a single, inescapable result: that the Agreements must be reformed and title to the Vacant Land must be returned to SCI Minnesota. Alternatively, SCI Minnesota sought rescission on two separate and independent grounds – one, that there was no mutual assent because there was no meeting of the minds that the Vacant Land would transfer; and two, that the parties operated under the mutual mistake that the Agreements would transfer only the three cemeteries comprising the Crystal Lake Business. SCI Minnesota also argued its unjust enrichment claim.

Washburn cross-moved for summary judgment, essentially arguing that the trial court was powerless to reform or rescind the stock sale Agreements, that there was no mutual mistake, and that SCI Minnesota's unjust enrichment claim failed because the parties' rights were governed by a contract. In so arguing, Washburn relied heavily on

the inapposite 1919 case of Costello v. Sykes, 143 Minn. 109, 173 N.W. 907 (1919) (refusing to rescind stock deal on grounds of mutual mistake about nature or extent of underlying assets). Washburn also mistakenly argued that SCI Minnesota’s rescission due to lack of mutual assent claim “was never alleged in the complaint” and was thus not before the trial court. [A.21]. This, of course, was not true – and Washburn’s counsel acknowledged this misstatement at the hearing. [A.31, 231-32].

On April 2, 2009, the trial court issued its Order. [A.3-15]. Accepting that there were no material facts in dispute, the trial court agreed with SCI Minnesota that allowing Washburn to have title to the Vacant Land was “inequitable,” “harsh,” and would “give the Defendants a windfall.” [A.6, 11-12 (emphasis added)].

Nevertheless, the trial court denied SCI Minnesota’s motion, granted Washburn’s cross-motion, and dismissed the Second Amended Complaint with prejudice. [A.3-15]. The trial court concluded that it was powerless to reform the Agreements, stating that it “cannot rewrite a contract that did what it was intended to do – sell 100% of the stock of one company to another company.” [A.11]. The trial court did not address SCI Minnesota’s separate legal claim for rescission due to lack of mutual assent, and summarily dismissed SCI Minnesota’s rescission due to mutual mistake claim. [A.3-15].

Despite acknowledging the “harsh” and “inequitable” result [A.11-12], the trial court explained that its hands were tied, and stated that any relief would have to come from the Court of Appeals:

If another standard applies to the reformation of a stock purchase agreement, then it is the role of an appellate court to announce such a rule.

[A.11 (emphasis added)]. Judgment was entered, and this appeal followed.

SCI Minnesota timely filed its Notice of Appeal on May 26, 2009. [A.1-2]. For the reasons stated herein, the Court should reverse the trial court's decision denying reformation and reform the Agreements to return the Vacant Land to SCI Minnesota, or, alternatively, reverse and remand with clear instructions that the trial court is empowered to reform stock sale agreements. Alternatively, the Court should consider SCI Minnesota's separate legal claim for rescission due to lack of mutual assent and reverse and grant judgment in SCI Minnesota's favor, or reverse and remand with instructions to enter judgment in its favor on its rescission due to mutual mistake claim.

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING REFORMATION OF THE AGREEMENTS.

A. Standard of Review and Entitlement to Relief: The *De Novo* Standard Applies, the Trial Court Had the Power to Reform, and This Court Should Reform.

On appeal from a summary judgment, this Court asks whether there are any genuine issues of material fact or whether the trial court erred in its application of the law. State by Cooper v. French, 460 N.W.2d 2, 4 (Minn. 1990). Here, the facts are undisputed, and the issue involves an error of law.

More specifically, on reformation claims, the trial court's decision generally will be reversed if it is "manifestly contrary to the evidence." Metro Office Parks Co. v. Control Data Corp., 295 Minn. 348, 353, 205 N.W.2d 121, 124 (1973) (citation omitted). Similarly, a reformation decision will be reversed if the findings are "clearly erroneous."

Theisen's, Inc. v. Red Owl Stores, Inc., 309 Minn. 60, 66, 243 N.W.2d 145, 149 (1976) (reversing and remanding with directions to reform a lease); see also Kleis v. Johnson, 354 N.W.2d 609, 612 (Minn. App. 1984) (reversing and remanding trial court's decision not to reform because the "legal conclusion * * * is not supported by the findings").

But the reformation claim here is not subject to the general, deferential "manifestly contrary to the evidence" standard, because the trial court mistakenly believed that it lacked the power to reform. Indeed, after holding that failure to reform the Agreements to return the Vacant Land to SCI Minnesota would be "**inequitable**" and "**harsh**," and would give Washburn a "**windfall**," the trial court held that it lacked any power to grant the equitable relief of reformation because the 2005 sale was structured as a stock deal. [A.11-12 (emphasis added)]. Specifically, the Court noted that this was a stock sale and that "**[i]f another standard applies to the reformation of a stock purchase agreement, then it is the role of an appellate court to announce such a rule.**" [A.11 (emphasis added)].

Whether a court *has* the power to grant equitable relief, separate from the issue of whether, in a given case, the court *should* grant equitable relief, is a question of law that this Court reviews *de novo*. See, e.g., Nguyen v. State Farm Mut. Auto. Ins. Co., 546 N.W.2d 37, 38 (Minn. App. 1996) (where district court declined to exercise discretion on grounds it lacked authority to vacate judgment, question was one of law to be reviewed *de novo*), *rev'd on other grounds by* 558 N.W.2d 487 (Minn. 1997); In re Slingerland's Estate, 196 Minn. 354, 357, 265 N.W. 21, 23 (1936) (where court thought it had no discretion in the matter, "the question of whether there was an abuse of it is not before

us”); Bondy v. Allen, 635 N.W.2d 244, 249 (Minn. App. 2001) (appellate court is not bound by, and need not give deference to, trial court’s decision on question of law).

In fact, this Court and the Minnesota Supreme Court have held that the deferential abuse of discretion standard does not apply where a Court mistakenly believes it lacked discretion. Specifically, this Court has held that:

if relief lying within the discretion of the trial court was refused on the ground the trial court lacked discretion to grant relief, the decision is erroneous and will be reversed on appeal and remanded with directions to the trial court to exercise its discretion.

Personalized Marketing Svc., Inc. v. Stotler & Co., 447 N.W.2d 447, 450 (Minn. App. 1989) (emphasis added); see also Seibert v. Minneapolis & St. L. Ry. Co., 58 Minn. 58, 64, 57 N.W. 1068, 1070 (1894) (same).

In Personalized Marketing, the trial court expressed a disinclination to enforce a forum selection clause in a customer agreement, noting that such a result would be unjust, but nonetheless enforced the clause based on a “mistaken belief that enforcement was mandated and thus outside its discretion.” Personalized Marketing, 447 N.W.2d at 450. The trial court manifested this mistaken belief by calling “for the legislature to outlaw forum selection clauses as a means of remedying their ‘injustice,’” and by stating that “it had no alternative but to grant the motion.” Id. at 450-51. This Court reversed outright, without remanding, holding:

The trial court erred in refusing to exercise its discretion in this action. Where it clearly would have been an abuse of discretion to enforce the forum selection clause, we need not remand the issue to the trial court.

Id. at 454 (emphasis added).

What happened in this case is exactly like what happened in Personalized Marketing, and the result here should be the same. In this case, the trial court recognized the injustice of denying SCI Minnesota's requested relief. Indeed, the trial court even went so far as to refer to its Order as "inequitable" and resulting in a "windfall" to Washburn. Despite acknowledging this inequity, the trial court – just like the court in Personalized Marketing – thought it had no power to reach a different conclusion. And, just like the trial court in Personalized Marketing called upon the Legislature to consider requiring a different outcome, the trial court here called upon this Court to clarify the rule governing reformation of stock sale agreements by stating "[i]f another standard applies to the reformation of a stock purchase agreement, then it is the role of an appellate court to announce such a rule." [A.11].

Quite simply, unlike a normal reformation appeal subject to the general "manifestly contrary to the evidence" standard, this is a case in which the trial court did not even think it had the power to grant equitable reformation. Even more importantly, this is a case in which **the trial court actually thought it was bound to do something it recognized was inequitable**. That is not and cannot be the state of the law. Equity has teeth, and stock deals are not reformation-proof.

Although the Minnesota appellate courts have not addressed this issue, a stock sale agreement is just like any other contract that can be reformed. To that end, *Restatement (Second) of Contracts* § 155 (and cases like Owatonna Country Club, 353 N.W.2d at 230) provides that reformation is available where, like here, an agreement "in whole or in part fails to express the" parties' true agreement "because of a mistake of both parties as to the

* * * effect of the writing.” Neither the *Restatement* nor the cases go on to say, as Washburn essentially urges, “except in the case of stock sales, which are immune from reformation.” There is no case from the Minnesota courts saying that. And courts in other jurisdictions have freely reformed stock sale agreements where the elements of reformation are met. For example:

- In Amato v. Amato’s Supper Club, Inc., 269 Or. 520, 525 P.2d 1023 (1974), the court upheld reformation of a stock sale agreement due to mutual mistake to reflect the seller’s warranty that the corporation had no outstanding obligations, which should have excepted notes the corporation owed to the seller, as evidenced by the documents and discussions surrounding the transaction.
- In Vogel v. Kirshner, 139 Or. 474, 10 P.2d 1053 (1932), the court upheld reformation of a stock sale agreement where an accountant’s considering of a surplus account as a liability instead of an asset induced a mutual mistake in the contract. The Vogel case is particularly instructive because it shows that reformation is available when assets are improperly listed.
- In Harris v. Baird, 546 So.2d 497 (La. App. 1989), the court upheld reformation of a stock purchase agreement to correct the parties’ mutual mistake in failing to list an outstanding service agreement between the corporation and a third-party.
- In Kern v. NCD Industries, Inc., 316 A.2d 576 (Del. Ch. 1973), the court reformed a stock deal to conform with the parties’ intent that full payment for the stock was to be a prerequisite to the buyer taking control of the corporation.

These stock sale agreements were reformed, just like the Agreements here should be reformed (see analysis of reformation evidence and reformation elements below).

This Court should reverse and reform the Agreements to return the Vacant Land to SCI Minnesota. No remand is necessary, because any other result would be manifestly contrary to the evidence, particularly given that the trial court recognized that this was the

just result. Alternatively, the Court should reverse and remand to the trial court with instructions that the trial court **can** exercise its equitable power to reform a stock deal, and **should** reform this stock deal.

Nevertheless, if the Court reviews the trial court's decision on the reformation claim under the more deferential "manifestly contrary to the evidence" standard, the Court still must reverse because reformation was the only proper legal conclusion and, as the trial court held, "[t]he essential and material facts of this case are not in dispute." [A.6]. Indeed, this Court "does not defer to the district court's application of the law when the material facts are not in dispute," but instead reviews the matter *de novo*. In re Estate of Grote, 766 N.W.2d 82, 84-85 (Minn. App. 2009). Assuming that the trial court exercised any power in denying reformation, this Court must reverse because the undisputed facts do not support that conclusion. See, e.g., Theisen's, 309 Minn. at 66, 243 N.W.2d at 149 (reversing trial court's denial of reformation of lease); Kleis, 354 N.W.2d at 612 (reversing where legal conclusion that appellants were not entitled to reformation was not supported by findings of fact). Regardless of the standard of review, the Court should reform.

B. The Undisputed Facts Presented to the Trial Court Conclusively Establish All Three Reformation Elements.

Reformation is proper when "(1) there was a valid agreement between the parties expressing their real intentions; (2) the written instrument failed to express the real intentions of the parties; and (3) this failure was due to a mutual mistake of the parties."

Owatonna Country Club, 353 N.W.2d at 230. The evidence supporting reformation must be “clear” and “convincing.” Theisen’s, 243 N.W.2d at 148-49 (citations omitted).

Applied here, the clear and convincing facts presented to the trial court prove each of these reformation elements. First, the parties’ real intent was to buy and sell only the Crystal Lake Business – including the three cemeteries associated with that business – and the parties never intended to buy and sell the Vacant Land. Second, the stock sale Agreements did not capture that intent because they unexpectedly transferred the Vacant Land. Third, all three parties were mutually mistaken from 2005 through 2008 concerning the existence and ownership of the Vacant Land, as well as whether it would transfer. Thus, the trial court should have reformed the Agreements.

1. There was a valid agreement between the parties expressing their real intentions.

The undisputed facts presented to the trial court establish the first element of reformation – that “there was a valid agreement between the parties expressing their real intentions.” Owatonna Country Club, 353 N.W.2d at 230. All evidence proves that the parties’ true intent – as well as their actual agreement – was to transfer the three cemeteries comprising the Crystal Lake Business for \$1 million, no more and no less. This is shown in several ways.

First, the valid agreement expressing the parties’ real intentions is conclusively established by Mr. McReavy’s own testimony. He testified that the parties to the deal were all under the belief that the major assets of Crystal Lake being transferred were the three cemeteries. [A.57]. He similarly conceded that if the Court reforms and gives the

Vacant Land back to SCI Minnesota, Washburn would be in the position it thought it had negotiated in 2005 – which is the owner of three cemeteries for \$1 million. [A.59-60].

Mr. McReavy's testimony alone proves the first reformation element.

Second, the valid agreement expressing the parties' real intentions is further confirmed by the fact that this deal was originally envisioned as an asset deal to transfer three specific cemetery assets. Although it was ultimately structured as a stock deal solely to accommodate Washburn's desire to operate the Crystal Lake cemeteries as for-profits under Minnesota law, the intent always remained the same – to transfer the three Crystal Lake cemeteries. And, despite this being a stock deal, the parties used an I.R.C. § 338h(10) election to treat this like an asset deal, and Agreements still resemble an asset deal. Indeed, Washburn's Mr. Edson testified that “this is an unusual stock purchase agreement” because it lists the three specific businesses being sold, whereas most stock agreements simply state that “100 percent of the outstanding shares” are being sold “[w]ithout listing assets.” [A.137-38].

Third, that the valid agreement expressing the parties' real intentions was to transfer the three cemeteries comprising the Crystal Lake Business for \$1 million is irrefutably demonstrated by the documents surrounding the transaction, including the letters of intent, the written Agreements, the financial statements, and the title commitments. Indeed, the documents themselves are perhaps the most insightful evidence of the valid agreement and the parties' real intentions throughout the process, and they demonstrate the following:

- Neither letter of intent mentions the Vacant Land, but both specifically list the three Crystal Lake Business properties. [A.147-54, 201-03].
- The First and Second Agreements do not even generically reference the Vacant Land, but both specifically and prominently identify the three Crystal Lake Business properties in the very first WHEREAS clause. [A.64, 272].
- The First and Second Agreements require that Exhibit B to those Agreements provide legal descriptions and title commitments for “all real property owned or leased by Crystal Lake,” and the resulting Exhibit B only provides legal descriptions and title commitments for the three properties comprising the Crystal Lake Business without ever providing legal descriptions or title commitments for the Vacant Land. [A.68, 278, 288-89, 313-64].
- The First Agreement goes to great lengths to list every possible asset covered by the stock sale – like the two mop buckets at Glen Haven, the three wastebaskets at Crystal Lake, and the extension cords at Dawn Valley – without ever identifying the Vacant Land worth \$2 million. [A.320-26, 336-46, 355-64].

This last bullet says it all on the first element (*i.e.*, valid agreement between the parties expressing their real intentions). By clearly listing even the most trivial of Crystal Lake’s assets located at the three cemeteries (mop buckets, wastebaskets, and extension cords) without ever referencing \$2 million in Vacant Land, the parties expressed their real intentions and true agreement to transfer only the three Crystal Lake cemeteries and related personal property, not the Vacant Land.

In an attempt to dodge this undisputed evidence, Washburn cleverly tried to reframe the issue concerning the first reformation element as whether the parties intended to *exclude* the Vacant Land from the stock deal, instead of whether the parties in this \$1 million stock deal intended to transfer an additional \$2 million in Vacant Land.

Washburn’s reframing of the issue is nonsensical for numerous reasons.

First and foremost, the parties could not possibly have excluded Vacant Land that they all admit they did not know existed. See, e.g., Standard Brands, Inc. v. Millard, 273 F.2d 882, 883-85 (7th Cir. 1960) (where assignee of assets of business and assignor were not aware of existence of alleged cause of action of assignor against officer, such alleged cause of action was never assigned).

Second, Washburn's reframing of the issue is premised on the inaccurate notion that stock deals are somehow immune from reformation claims. But there is no case law that provides such immunity to stock sale agreements. To the contrary, as discussed above, a court can and should use reformation to make a stock sale agreement accord with the parties' intent in circumstances such as these.

Third, Washburn's reframing wholly ignores the size of the assets at issue here. The Vacant Land is so fundamental that the parties needed a specific intent to transfer it. The fact that the Vacant Land is worth 200% more than the entire Crystal Lake Business cannot be overlooked. This extreme disparity in value makes Washburn's reliance on the general notion that "everything transfers in a stock sale" seem absurd. Proportionality necessarily matters. Indeed, what if the parties negotiating the deal did not realize that hundreds of SCI-owned funeral homes valued at \$200 million were parked in Crystal Lake for tax reasons? Would Washburn still try to claim that "nobody intended to exclude" the hundreds of funeral homes, and that "everything transfers in a stock sale"?

Finally, inverting the issue from whether the parties intended to transfer the Vacant Land to whether the parties intended to exclude the Vacant Land flies in the face of what the parties truly intended. The documents and Mr. McReavy's testimony prove

that the parties had an extremely clear understanding of the assets they intended to transfer in the 2005 stock deal – right down to the mop buckets and extension cords. And, as Mr. McReavy admitted, the intent of all parties to that deal was to transfer the “major assets” of Crystal Lake, which he believed to be the three cemeteries. [A.57].

Washburn’s attempt to reframe the reformation issue does not and cannot trump the fact that the undisputed evidence show that the parties’ intentions and valid, actual agreement was to transfer the three Crystal Lake cemeteries and nothing more. That actual agreement is precisely the deal that SCI Minnesota asked the trial court to arrive at through reformation. SCI Minnesota has proven the first reformation element.

2. *The written instruments failed to express the parties’ real intentions.*

The undisputed facts presented to the trial court also establish the second element of reformation – that “the written instrument[s] failed to express the real intentions of the parties.” Owatonna Country Club, 353 N.W.2d at 230. That is, although the parties’ intent was to transfer the three Crystal Lake cemeteries and no other real property, the Agreements failed to express that intent because the Agreements – unintentionally and unbeknownst to all involved at the time – also transferred title to the Vacant Land.

On this second reformation element, Mr. McReavy’s admissions are again key. Most pointedly, when asked whether anybody intended to sell the Vacant Land as part of the 2005 Crystal Lake stock sale, Mr. McReavy testified, “Not to my knowledge.” [A.56]. Yet, that is exactly what happened here. Contrary to the parties’ intent, the

Agreements transferred title to the Vacant Land. This alone proves the second reformation element and ends the inquiry.

Further, although the Crystal Lake sale was structured as a stock deal, Mr. McReavy testified that he understood he was getting the three cemetery businesses (*i.e.*, the Glen Haven business, the Crystal Lake business, and the Dawn Valley business), but he had “no idea” he might be getting the Vacant Land. [A.53]. Consistent with that lack of knowledge, Mr. McReavy also agreed that he did not factor the Vacant Land into the amount he paid for Crystal Lake, and that Washburn “got fair value” in buying the three cemeteries for \$1 million. [A.52-53]. In light of these conclusive admissions, how can Washburn possibly dispute the conclusion that the written Agreements failed to express the parties’ real intentions by transferring the Vacant Land?

Washburn’s Mr. Edson agreed with Mr. McReavy’s dispositive version of facts. After being asked to confirm that the parties to the stock sale “never specifically intended to transfer the Vacant Land,” Mr. Edson testified that, “Since they didn’t know about it, I guess that would be true.” [A.137]. But title did transfer, despite that lack of intent.

On top of this dispositive testimony, the documents independently prove the second reformation element, just like they prove the first element. The key documents surrounding the transaction – from the letters of intent to the written Agreements to the financial statements and title commitments – all prominently refer to the three Crystal Lake cemetery properties but never once reference the Vacant Land, which is worth two times what Washburn paid for the entire Crystal Lake Business. The Agreements even

specifically list petty assets such as mop buckets, wastebaskets, and extension cords, but never once list \$2 million in Vacant Land.

Indeed, the title commitments tell the whole story on the Agreements' failure to capture true intent. Parties include title commitments in a sale so that everybody knows exactly what is transferring. Here, because the parties only truly intended to transfer the three cemeteries, the Agreements only provide title commitments and legal descriptions for the three cemetery properties and identify those properties as "all real property owned or leased by Crystal Lake." The written Agreements failed to capture this true intent, because title to the Vacant Land also mistakenly transferred.

These numerous and indisputable facts establish the second reformation element, and the trial court should have granted reformation. See, e.g., Deming v. Scherma, 2001 WL 741427 (Minn. App. July 3, 2001) (unpub. op. at A.245) (where parties believed that legal description conveyed 25 acres but later understood that legal description actually conveyed additional 13.2 acre parcel, court affirmed reformation of deed to reflect legal ownership of 25 acre parcel only, noting that the parties "believed that 25 acres was the size of the parcel. The legal description did not reflect their intention, which constitutes mutual mistake" warranting reformation).

3. **The failure was due to a mutual mistake of the parties.**

Finally, the undisputed facts presented to the trial court prove the third reformation element – that the Agreements' failure to express the parties' real intentions "was due to a mutual mistake of the parties." Owatonna Country Club, 353 N.W.2d at 230.

The Minnesota Supreme Court recognizes that reformation relief based on mutual mistake is proper where the parties were “mistaken as to some material fact which formed the consideration thereof or inducement thereto * * *.” Haley v. Sharon Tp. Mut. Fire Ins. Co., 147 Minn. 190, 179 N.W. 895, 897 (1920). Moreover,

“[r]eformation may be granted not only where the language used in the instrument is not such as was intended, but also where **both parties are in error in respect to the thing to which such language applies.**

Pettyjohn v. Bowler, 219 Minn. 55, 17 N.W.2d 82, 84 (1944) (emphasis added) (upholding reformation to include correct legal description of real estate). Thus, the mutual mistake question is: Did the parties know that \$2 million in Vacant Land was titled in Crystal Lake’s name, and that Washburn would get \$2 million in undisclosed real estate in addition to the \$1 million business for its purchase price of \$1 million? Discovery conclusively confirmed that the answer is “no.”

Once again, Mr. McReavy’s admissions fulfill this third reformation element. Specifically, when asked, “But you certainly didn’t know” that Crystal Lake owned the Vacant Land in 2005, Mr. McReavy testified, “No, certainly did not, never heard of it.” [A.49]. Mr. McReavy also agreed that nobody intended to sell the Vacant Land as part of the 2005 Crystal Lake stock sale [A.56]; that he was “very much surprised” when he found out about the Vacant Land three years later in 2008 [A.49]; and that he had not acted as the owner of the Vacant Land, that he had not paid taxes on it, that he never relied on getting it, and that he had exhibited no indicia of ownership over it. [A.56-57].

All other individuals involved in negotiating the Crystal Lake sale – including Mr. Cruger, Mr. Kirkpatrick, and Mr. Edson – likewise testified that they did not know about

the Vacant Land or intend for it to transfer. Indeed, the SCI Minnesota business development personnel negotiating the Crystal Lake sale in 2005 were unaware that the Vacant Land was titled in Crystal Lake's name. [A.365-66]. After reviewing the parties' testimony, the trial court properly concluded that **“[a]ll parties agree that no-one involved in the 2005 transactions and sale of Crystal Lake knew that these vacant parcels had been titled in the name of Crystal Lake.”** [A.8 (emphasis added)]. That is a mutual mistake in every sense of the term. And that is why we have reformation claims. On this undisputed evidence, the trial court could have and should have reformed the Agreements to correct this mutual mistake.

Because Washburn cannot rebut the undisputed facts proving mutual mistake, Washburn focused its efforts below on arguing that reformation is nonetheless improper because the mistake arose from SCI Minnesota's fault. Although SCI Minnesota acknowledges that it was in the best position to prevent this mistake, *Restatement (Second) of Contracts* § 157 makes clear that

[a] mistaken party's fault in failing to know or discover the facts before making the contract does not bar him from avoidance or reformation * * * unless his fault amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing.

Restatement (Second) of Contracts § 157 (1981).

Washburn has never alleged and cannot allege that SCI Minnesota failed to “act in good faith.” Thus, *Restatement* § 157 allows SCI Minnesota to seek reformation and avoidance. In fact, this Court has applied *Restatement* § 157 and granted relief to the party “at fault” for failing to discover or prevent the mistake. See, e.g., Hein-Marg, Inc.

v. Hunter, 1991 WL 185100 (Minn. App. Sept. 24, 1991) (unpub. op. at A.252) (in case involving error as to balance due in contract for deed, Court cited *Restatement* § 157 and held “[t]he mere fact that the builder could have avoided the mistake by the exercise of reasonable care does not preclude relief” through reformation); Nemer v. PaineWebber Inc., 1992 WL 295130 (Minn. App. Oct. 20, 1992) (unpub. op. at A.255) (upholding summary judgment for PaineWebber, thereby refunding double payment on bond made years later, even though PaineWebber could have investigated and learned of mistake before making that double payment).

Moreover, it is worth noting that SCI Minnesota’s “fault” would cause Washburn no harm or prejudice in the event of reformation. Mr. McReavy freely admits that he never relied on obtaining the Vacant Land, that he never paid for the Vacant Land, and that he would be in the position he negotiated in 2005 if the Court grants reformation.

Washburn also tried to divert the trial court’s attention from the undisputed facts proving mutual mistake by arguing that, in a stock deal, a buyer like Washburn bears the risk of unknown liabilities, and so it should gain the benefit of unknown assets. Setting aside the obvious proportionality issue (*i.e.*, that the unknown assets here are worth 200% more than what Washburn paid for Crystal Lake), this argument ignores two key points.

One, in a stock deal, the buyer is never concerned about unknown assets; rather, the concern always involves unknown liabilities. [A.191-92]. Washburn’s Mr. Edson testified that in the fifty or so deals he has handled, he has never before seen a situation where a significant asset was parked in a corporation and remained unknown until after

the deal had closed. [A.130-31]. He further agreed that “people just don’t find assets very often,” and that, in a stock sale, the concern is usually on the liability side. [A.131].

Two, stock deals generally provide buyers like Washburn with fundamental protection against unknown liabilities – namely, the representations and warranties provisions, and indemnification for breaches thereof. Mr. Edson and Mr. Cruger both testified that the First Agreement’s representations and warranties were assigned to Washburn so that it was protected and would have recourse directly against SCI Minnesota for unknown liabilities. [A.133, 138, 213]. In short, the notion that “everything transfers” in a stock sale is tempered by: (1) the recourse Washburn would have for unknown liabilities through the representations and warranties provisions; and (2) the recourse SCI Minnesota has here for unknown assets under through a claim for reformation.

Ultimately, the parties were mutually mistaken about the existence and ownership of the Vacant Land, and about the fact that it would transfer as part of the Crystal Lake sale. Thus, SCI Minnesota established the third and final reformation element, and the trial court could have and should have reformed.

4. *The authorities Washburn relied on below are inapposite.*

Washburn cited many cases to the trial court in an attempt to avoid reformation and reinforce the incorrect notion that the trial court is powerless to reform a stock deal. But, as SCI Minnesota reiterated throughout those proceedings, this case is not like any of those cases. Indeed, Washburn never cited a single case in which a fundamental asset transferred with both sides agreeing that nobody knew it would transfer or intended it to

transfer. Nor did it cite a single case in which a party opposing reformation admits that reformation would put it in the exact position it bargained for – a dispositive admission Mr. McReavy made here. [A.59-60]. Nor did it cite a single case holding that stock sales are immune from reformation. Why? Because there are no such cases. Although SCI Minnesota thoroughly rebutted Washburn’s cases in its Reply in Support of Summary Judgment and incorporates those arguments here, SCI Minnesota addresses Washburn’s primary cases to demonstrate how they are inapposite and do not prevent reformation.

For instance, Washburn relied heavily on the 1919 case of Costello v. Sykes, 143 Minn. 109, 173 N.W. 907 (1919). In Costello, the Minnesota Supreme Court denied rescission of a stock deal for the sale of a bank where the stock was not as valuable as had been anticipated. Id. at 909. But Costello **only applies to and has only been applied to claims for rescission, not reformation.** Id. at 908 (“the sole question presented is whether the mistake alleged * * * gives rise to a right to rescind”). Again, **SCI Minnesota primarily seeks reformation** to make the Agreements accord with what the parties knew and intended, which is a less drastic remedy than rescission and which Costello does not address. Indeed, reformation is laser surgery; rescission is dynamite.

In addition to the fact that Costello is not a reformation case, Costello and the related Beasley v. Medin, 479 N.W.2d 95 (Minn. App. 1992) case cited by Washburn would have no impact as reformation cases because – unlike in Costello and Beasley – this case does not involve mere share value in a stock deal. Rather, this case goes to a more fundamental issue concerning the existence of \$2 million in hidden assets in a \$1 million deal.

Washburn also relied on Nichols v. Shelard National Bank, 294 N.W.2d 730 (Minn. 1980). But that case is inapplicable because only one party was mistaken about the contract terms – thinking the mortgage was for \$10,000 even though the contract stated the mortgage was for \$30,000. Id. at 734. Here, the parties did not have differing views about whether the Vacant Land would transfer, with one party thinking the Vacant Land was included, and the other thinking it was excluded.

Washburn relied on In re Estate of Savich, 671 N.W.2d 746 (Minn. App. 2003). But in Savich, the Court denied reformation because there was “no evidence that respondents intended, but mistakenly failed, to deed the property to the estate.” Id. at 751. Here, we actually have the intent evidence that was missing in Savich, including Mr. McReavy testifying that nobody intended to transfer the Vacant Land.

Washburn further relied on Norwest Bank Minnesota v. Ode, 615 N.W.2d 91 (Minn. App. 2000). In Norwest, the Court refused to reform and thus held that a mortgage signed by Ode as an individual (and not in his role as a trustee) was not binding on Ode as a trustee because both Ode and the mortgage company “**knew** that [Ode] was obtaining a loan in his individual name” and because the mortgage company “ignored the title company’s warnings of title problems for this transaction * * *.” Id. at 96 (emphasis added). But here, none of the parties to the Crystal Lake sale *knew* that the Vacant Land would transfer, and they certainly did not proceed in the face of warnings.

This case is more like Deming, 2001 WL 741427 (unpub. op. at A.245) than it is like the cases cited by Washburn. In Deming, all evidence showed that the parties only intended to convey 25 acres, but mistakenly transferred an additional 13.2 acres. Based

on this intent, the Court granted reformation. Washburn – like the defendant in the Deming case – seeks to retain land that it admittedly never intended to purchase and for which it admittedly paid no consideration. Deming supports reformation here.

Ultimately, this Court is not bound by Washburn’s inapposite cases, and there is not a single Minnesota case standing in the way of reformation. The path is clear. The trial court could have and should have reformed, but mistakenly thought it was powerless to do so. This Court should reverse and reform the Agreements to reflect the terms the parties knew, intended, and agreed upon, and put all parties in the positions for which they originally bargained. The Vacant Land belongs to SCI Minnesota.

II. THE TRIAL COURT ERRED IN FAILING TO RESCIND DUE TO LACK OF MUTUAL ASSENT.

A. Standard of Review and Entitlement to Relief: The *De Novo* Standard Applies, the Trial Court Should Have Addressed The Mutual Assent Claim, and This Court Should Rescind for Lack of Mutual Assent.

In Count II of the Second Amended Complaint, SCI Minnesota expressly alleged a cause of action for rescission of the Agreements due to mutual mistake and/or lack of mutual assent, and separately sought relief for lack of mutual assent. [A.231-32]. But at the summary judgment hearing, Washburn argued that SCI Minnesota “never alleged” a claim for rescission due to lack of mutual assent, and that, therefore, such claim “cannot be on for [the trial court] to rule on.” [A.21]. Although SCI Minnesota corrected Washburn’s misstatement [A.28] and Washburn apologized for it [A.31], the trial court’s Order nevertheless failed to address this separate legal claim. [A.3-15]. Indeed, although the Order makes a passing reference to mutual assent in an introductory paragraph, it

analyzes the rescission claim related to mutual mistake alone. [A.12-14]. That is, this is not a case in which the trial court summarily dismissed a claim; it is a case in which the trial court did not address a claim at all.

SCI Minnesota is entitled to have its rescission due to lack of mutual assent claim considered and, because the trial court did not address it below, this Court should consider it *de novo*. See, e.g., Olmanson v. Le Sueur County, 673 N.W.2d 506, 516 (Minn. App. 2004) (where trial court did not separately discuss claim, appellate court reviewed claim *de novo*), *aff'd*, 693 N.W.2d 876 (Minn. 2005).

Moreover, the cornerstone of this claim is that **the parties never had a meeting of the minds** as to the transfer of the Vacant Land – a fact that discovery revealed is wholly undisputed. Where, as here, the relevant facts are not in dispute, the existence of mutual assent is a legal question which the Court reviews *de novo*. TNT Properties, Ltd. v. Tri-Star Developers LLC, 677 N.W.2d 94, 101 (Minn. App. 2004) (in analyzing lack of mutual assent claim, court stated “where the relevant facts are undisputed, the existence of a contract is a question of law, which this court reviews *de novo*”); see also In re Estate of Grote, 766 N.W.2d at 84-85 (appellate court does not defer to district court’s application of law when material facts not disputed, but reviews *de novo*).

Under the *de novo* standard, this Court should separately consider SCI Minnesota’s claim for rescission due to lack of mutual assent and rescind the Agreements to return the Vacant Land to SCI Minnesota, because the undisputed facts substantiate that the parties had no meeting of the minds to transfer it. Alternatively, even if the Court does not review the trial court’s decision on this claim *de novo*, the Court should

nonetheless reverse and grant rescission because the facts presented compelled this result. Judgment should be entered in SCI Minnesota's favor.

B. The Undisputed Facts and the Law Conclusively Establish a Lack of Mutual Assent Compelling Rescission.

In the event the Court does not reverse and reform the Agreements to return the Vacant Land to SCI Minnesota, then equity demands that the deal be undone because there was no mutual assent as to the transfer of the Vacant Land.

Under Minnesota law, “[m]utual assent of the parties is essential for formation of a contract.” Crince v. Kulzer, 498 N.W.2d 55, 57 (Minn. App. 1993). As this Court said,

A “contract” is a promise or set of promises for the breach of which the law gives a remedy or the performance of which the law recognizes as a duty. *
* * **A contract’s enforceability is premised on mutual assent.** * * * The elements of contract formation – offer, acceptance, and consideration – all flow from the principle that each party has voluntarily assumed some obligation in exchange for the obligations assumed by the other.

City of Lonsdale v. NewMech Companies, 2008 WL 186251, *5 (Minn. App. Jan. 22, 2008) (unpub. op. at A.259) (emphasis added). That is, “[a] contract requires a meeting of the minds concerning its essential elements.” Minneapolis Cablesystems, 299 N.W.2d at 122.

This case law begs the question: Where is the mutual assent in this case? That is, where is the evidence that the parties had a “meeting of the minds” about transferring the Vacant Land? Nowhere. Washburn cannot cite a single shred of evidence demonstrating that the parties mutually assented to the transfer of the Vacant Land. Mr. McReavy’s testimony is dispositive on this claim. He agrees that none of the parties intended to sell the Vacant Land. He agrees that all parties understood the major assets transferred in the

2005 Crystal Lake stock sale were the three cemeteries. He agrees that he never paid for the Vacant Land, nor did he rely on getting it. And he agrees that he never knew about the Vacant Land until 2008. In short, there was no mutual assent.

Further admitting a complete lack of mutual assent, Mr. Edson specifically conceded in response to the question, “Are you aware of whether in 2005, Corinthian and Washburn-McReavy were of one mind that yes, we’ll transfer the vacant land,” that “No. They didn’t know about it.” [A.139 (emphasis added)]. That dispositive concession says it all. A necessary piece of contract formation is missing here. Without mutual assent concerning this essential \$2 million term of the Agreements, no contract was ever formed to sell the Vacant Land. Thus, the Agreements should be rescinded.

The Washington Supreme Court’s decision in West Coast Airlines, Inc. v. Miner’s Aircraft & Engine Svc., 66 Wash.2d 513, 403 P.2d 833, 836-37 (Wash. 1965) is very instructive on the lack of mutual assent claim. In that case, West Coast Airlines sold large containers filled with metal to a scrap company, which then sold them to a third party. Id. But two of the containers – unbeknownst to all involved – contained aircraft engines worth far more than mere scrap metal. Id. The Court rescinded and held there was no mutual assent and no contract regarding the engines, even though the containers housing the engines had been sold, and even though West Coast was in the best position to know that aircraft engines were in the containers. Id. The Court reasoned:

The parties never made a contract for the sale of the engines. Thus, there was no mistake, mutual or otherwise. In the absence of a contract of sale, there is no need for a rescission to regain title that was never lost. * * *
Unknown contents of the subject matter of a sale * * * which are not within the contemplation of or intention of the contracting parties, do

not pass by the sale. A contract of sale, like any other contract, must rest on all essential elements of the sale. There was no meeting of the minds, no contract, and no sale of the engines.

Id. (internal citations omitted) (emphasis added).

The Washington Supreme Court's order in West Coast is buttressed by common sense and, indeed, common decency. The outer vessel in any sales transaction – in that case a metal container, in this case Crystal Lake stock – does not matter. What matters is whether the parties had any idea concerning what was inside that outer vessel. If the parties had no idea that inside the outer vessel is an asset worth far more than either party bargained for, then courts have the power to set things right. In West Coast, the parties did not know that aircraft engines were inside the container; here, the parties did not know that the Vacant Land was inside Crystal Lake's corporate shell. The Vacant Land, like the aircraft engines, was an “unknown content[] of the subject of a sale.” Id. It was “not within the contemplation of or intention of the contracting parties.” Id. And it did “not pass by the sale,” as “[t]here was no meeting of the minds.” Id.

The Costello case – which Washburn hails as the “golden child” allowing it to keep \$2 million worth of Vacant Land for which it admittedly did not pay a dime [A:26] – has absolutely no application to the rescission due to lack of mutual assent claim. Indeed, Costello does not address mutual assent. Nor does it have anything to do with whether rescission should be granted where a party finds \$2 million in hidden assets that no one knew existed in a \$1 million deal and where everyone agrees there was no mutual assent to transfer those assets. The Court should rescind due to lack of mutual assent.

III. THE TRIAL COURT ERRED IN DENYING RESCISSION OF THE AGREEMENTS DUE TO MUTUAL MISTAKE.

A. Standard of Review and Entitlement to Relief.

Generally, the decision of whether to grant equitable relief is reviewed for abuse of discretion. See State by Humphrey v. Alpine Air Prods., Inc., 490 N.W.2d 888, 896 (Minn. App. 1992), *aff'd*, 500 N.W.2d 788 (Minn. 1993). “A district court abuses its discretion when it makes unsupported findings of fact or improperly applies the law.” Dailey v. Chermak, 709 N.W.2d 626, 629 (Minn. App. 2006). Further, on summary judgment, this Court asks whether the trial court erred in its application of the law. State by Cooper, 460 N.W.2d at 4. Because the trial court’s findings (to the extent the trial court found no mutual mistake) were unsupported, because rescission was the correct legal result, and because the trial court erred in applying the law, this Court should reverse and remand.

B. The Undisputed Facts and the Law Conclusively Establish a Mutual Mistake Warranting Rescission.

Under Minnesota law, “[i]f there is a mutual mistake concerning a material fact, parties to a contract may avoid the contract.” Winter v. Skoglund, 404 N.W.2d 786, 793 (Minn. 1987). That is,

where parties enter into a contract while mutually mistaken concerning a basic assumption of fact on which the contract was made, and the mistake has a material effect on the agreed exchange, the contract is voidable by the parties adversely affected.

Dubbe v. Lano Equip., Inc., 362 N.W.2d 353, 356 (Minn. App. 1985); see also

Restatement (Second) of Contracts § 152 (1981) (discussing voiding contract due to

mutual mistake). “Mistake” is defined as “a belief that is not in accord with the facts.”

Restatement (Second) of Contracts § 151 (1981). A mistaken fact is “material” if it is so substantial and fundamental that the mistake defeats the object of the parties who made the contract; the mistake generally must go “to the very nature of” the deal. See, e.g., Gartner v. Eikill, 319 N.W.2d 397, 399 (Minn. 1982).

Under this standard and on the undisputed facts presented to the trial court, SCI Minnesota should have prevailed on its alternative claim for rescission due to mutual mistake. All individuals involved in the Crystal Lake sale unanimously agreed that they understood that the Agreements would transfer only the three cemeteries comprising the Crystal Lake Business and no other properties, when, in fact, the Agreements also transferred title to the Vacant Land. That is, there was a mutual mistake because what the parties believed would transfer was “not in accord with the facts” of what did transfer. See Restatement (Second) of Contracts § 151 (1981). This was a fundamental, \$2 million mistake that went to the very heart of a \$1 million deal. Indeed, Mr. McReavy freely admitted that he paid no money for the Vacant Land and that he was “very much surprised” to learn about it in 2008. [A.49, 59]. Why was he “very much surprised”? Because he was amazed in the way that anybody would be amazed upon receiving an enormous windfall. Quite simply, he found a wallet stuffed with \$2 million.

Further, “[t]he mere fact that a mistaken party could have avoided the mistake by the exercise of reasonable care does not preclude either avoidance or reformation.” *Restatement (Second) of Contracts* § 157, cmt. a (1981); see also Hein-Marg, 1991 WL 185100 (same); Nemer, 1992 WL 295130 (same). Thus, Washburn’s argument that SCI

Minnesota is unable to rescind the Agreements because SCI Minnesota could have avoided the mistake must fail.

Costello, which Washburn relied upon below, is likewise inapposite. In Costello, the Court declined to rescind a stock deal for the sale of Calhoun State Bank. Costello, 172 N.W. at 908. The Court reasoned that, although the parties were mutually mistaken “as to the assets of the bank” and the “value of its stock,” a “mistake relating merely to the attributes, quality, or value of a sale does not warrant a rescission.” Id. In so holding, the Court simply made clear that it would not micromanage and undo stock deals where a company’s financial condition and book value were not fully understood.

This case, on the other hand, is not about the “attributes, quality, or value” of the Crystal Lake stock. Instead, this case is about none of the parties to a \$1 million deal knowing that there was \$2 million in undisclosed real estate parked in Crystal Lake. The parties were fundamentally mistaken as to the subject matter of the contract itself, including the *identity* and *existence* of \$2 million worth of Vacant Land. That mistake – which has nothing to do with share value – compels rescission for at least two reasons.

First, as the Iowa Supreme Court made clear in analyzing Costello and “reject[ing] the proposition that the existence or non-existence of corporate assets is immaterial,” a court in a rescission case should “**look beyond the form of the asset transferred (corporate stock) to the substance of the transfer.**” Clayburg v. Whitt, 171 N.W.2d 623, 626 (Iowa 1969) (emphasis added).

Second, the Costello Court would not have reached the same result if the parties there had learned after closing that Calhoun State Bank not only owned a bank, but also,

had parked *two grocery stores worth 200% more* than the bank being transferred in the corporate shell of the bank. On those facts involving the *existence* of fundamental and unknown assets – which are essentially the facts here – a Court would and should rescind.

The Vacant Land belongs to SCI Minnesota. This Court should rescind.

IV. GRANTING SCI MINNESOTA RELIEF WILL NOT UNDERMINE COMMERCIAL TRANSACTIONS.

Finally, this Court will not undermine “commercial transactions law” by reforming or rescinding the Agreements, as Washburn asserted below. [See Memo. in Support of Washburn’s Motion for Summary Judgment at 12]. Nor would the Court be opening “every single commercial transaction * * * to attack any time a contracting party comes to wish in hindsight that it would have considered other angles of a deal.” [Id. at 13]. Rather, by granting reformation or rescission, this Court would be reinforcing the notion that contracts premised on mutual mistakes may be reformed or undone – a notion that has been the hallmark of Minnesota’s common law for decades. See, e.g., Winter, 404 N.W.2d at 793. That common law empowers courts to correct material mutual mistakes that, like here, go “to the very nature of” a deal. See, e.g., Gartner, 319 N.W.2d at 399. In such unique circumstances, stock sale agreements are neither reformation-proof nor rescission-proof. The Court should reverse and enter judgment in SCI Minnesota’s favor.

CONCLUSION

If ever there was a case for equity, this is it. Essentially, Washburn has found a wallet with \$2 million in it and refused to return it to its rightful owner. Indeed, the trial

court declared that this outcome is “inequitable,” “harsh,” and provides Washburn a “windfall,” but it nonetheless mistakenly thought it was powerless to prevent injustice. The Court should reverse the trial court’s Order and reform the Agreements to return the Vacant Land to SCI Minnesota, or reverse and remand with instructions to grant reformation. Alternatively, the Court should consider SCI Minnesota’s separate legal claim for rescission of the Agreements due to lack of mutual assent – which the trial court did not address – and grant judgment in its favor, or reverse the grant of summary judgment and remand. In the words of Corinthian’s Mr. Kirkpatrick, returning the Vacant Land to SCI Minnesota is “the right thing.”

Respectfully submitted,

Dated: August 17, 2009

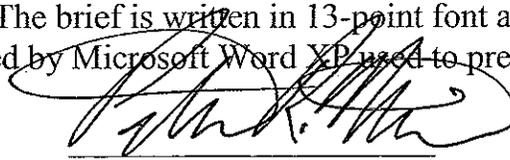
FULBRIGHT & JAWORSKI L.L.P.



Patrick R. Martin, #259445
Kelly A. Moffitt, #341009
2100 IDS Center
80 S. Eighth Street
Minneapolis, MN 55402
tel: (612) 321-2800
fax: (612) 321-2288
Attorneys for Appellants

CERTIFICATE OF COMPLIANCE

I certify that the above and foregoing brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, Subds. 1 and 3. The brief is written in 13-point font and contains no more than 14,000 words, as determined by Microsoft Word XP used to prepare this document.



Patrick R. Martin, #259445