
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' REPLY BRIEF

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INTRODUCTION

Contrary to the position Washburn takes in its brief, the trial court felt powerless to reform a stock sale and return \$2 million in Vacant Land to its rightful owner, SCI Minnesota. After declaring that its “result is inequitable” and “does give [Washburn] a windfall,” the trial court ultimately concluded:

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]. Washburn never addresses this fundamental conclusion by the trial court that it lacked the authority to reform a stock sale. This conclusion compels a *de novo* review here, and shows that this is a case of first impression.

Yes, the trial court’s Order also made the statements cited in Washburn’s brief like the “legal requirements for reformation have not been met,” but those statements were made through the lens of the trial court believing Washburn’s repeated and emphatic warnings about the trial court’s powerlessness to reform a stock sale:

The nature of a stock deal is you automatically get all assets except those that are excluded. If an exception is going to be made to Costello, this Court is not in a position to make the exception. It has to be through the appellate courts. Make no mistake about it. You have to make an exception to Costello to rule in SCI’s favor.

[A.32 (summary judgment hearing)]. The trial court took this warning to heart.

Regardless, SCI Minnesota prevails under any other standard, including the “manifestly contrary to the evidence” standard claimed by Washburn, because the testimony from Washburn’s owner, William McReavy, establishes each reformation element and establishes a lack of mutual assent. Instead of addressing this testimony,

Washburn’s 43-page brief never even mentions Mr. McReavy’s name. Not once. This decision to ignore Mr. McReavy’s astonishing testimony (and, indeed, his very existence) is not surprising, because that testimony establishes all reformation elements:

<u>Reformation Elements</u>	<u>Mr. McReavy’s Testimony</u>
<p>1. Valid agreement expressing the parties’ real intentions</p>	<p>Mr. McReavy testified that “SCI, Corinthian, and Washburn-McReavy were all under the belief that the major assets transferred” in the 2005 Crystal Lake stock sale were the three cemeteries. [A.57].</p>
<p>2. Written agreement failed to express the parties’ real intentions</p>	<p>Although the 2005 Crystal Lake sale was structured as a stock deal, Mr. McReavy testified that nobody intended to sell the Vacant Land [A.56], that he understood he was getting the three cemetery businesses, and that he had “no idea” he might be getting the Vacant Land. [A.53].</p>
<p>3. Failure to express real intent was due to a mutual mistake</p>	<p>Mr. McReavy testified that if the Court granted SCI relief in 2009, he would be back in the position he thought he had bargained for when he entered into the stock sale in 2005. [A.59-60]. <u>See also</u> testimony above on elements 1 and 2.</p>

These are just a few of Mr. McReavy’s unvarnished admissions. He could have qualified these sworn answers with “this was a stock deal, so everything goes.” But he did not. When added to Mr. Edson’s testimony and the Agreements themselves – which list the three cemeteries as “all real property,” which provide title commitments and legal descriptions only for the cemeteries, and which list every mop bucket and trash can – there can be but one conclusion: SCI Minnesota has proven all reformation elements.

SCI Minnesota must also win for a reason entirely independent of reformation – namely, **lack of mutual assent**. There was no “meeting of the minds” concerning the

contract's essential elements because the parties did not intend to transfer the Vacant Land. There is no case in Minnesota standing in the way of rescission due to lack of mutual assent under the Washington Supreme Court's decision in West Coast Airlines, Inc. v. Miner's Aircraft & Engine Svc., 403 P.2d 833 (Wash. 1965), and Washburn cites none. This claim, too, is subject to a *de novo* review on appeal because it was a separate claim that was never addressed by the trial court, and a claim that Washburn incorrectly told the trial court was never pleaded.

Washburn's only defense is to repeat the refrain: this is a stock deal – as if saying it enough times will block out all other evidence and issues. But the fact that this is a stock deal is not the be-all, end-all. The Iowa Supreme Court has held in the rescission context that a court 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). The Clayburg Court declined to extend Washburn's favorite case Costello from mistaken share value situations (*i.e.* Costello) to mistakes concerning “the existence or non-existence of corporate assets” (*i.e.*, the situation here).

At bottom, Washburn spends 43 pages ignoring the equities and explaining why it should get to keep the \$2 million wallet that it found. But neither the law nor equity allow Washburn to make off with \$2 million for which it paid nothing.

ARGUMENT

Because lack of mutual assent has received short shrift from Washburn and was not addressed by the trial court, this reply begins with lack of mutual assent.

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

The lack of mutual assent claim was front and center as an identified claim in the Second Amended Complaint. [A.231-32]. But before the trial court, Washburn called the claim “absurd” and strenuously argued that it was “never alleged” and “cannot be on for [the trial court] to rule on.” [A.21]. Although this misstatement was corrected, the trial court’s Order only made passing reference to the lack of mutual assent claim and never addresses it. As a result, this claim must be considered *de novo*. See Olmanson v. Le Sueur County, 673 N.W.2d 506, 516 (Minn. App. 2004) (where trial court did not separately discuss claim, standard is *de novo*), *aff’d*, 693 N.W.2d 876 (Minn. 2005).

In Minnesota, mutual assent is required for contract formation. Crince v. Kulzer, 498 N.W.2d 55, 57 (Minn. App. 1993). Further, “[a] contract requires a meeting of the minds concerning its essential elements.” Minneapolis Cablesystems, Inc. v. City of Minneapolis, 299 N.W.2d 121, 122 (Minn. 1980). Here, the Vacant Land is about as essential as it gets, and there was no meeting of the minds concerning its transfer.

Washburn’s only answer on this issue is to call the mutual assent claim “ridiculous” and say that this is a stock deal. [Washburn’s Br., pp. 39-41]. In so arguing, Washburn fails to answer the fundamental question of whether the parties had a meeting of the minds to transfer \$2 million in Vacant Land in a \$1 million deal for three cemeteries. Thankfully, Washburn’s Mr. Edson has already supplied the answer for Washburn:

Q. Are you aware of whether in 2005, Corinthian and Washburn-McReavy were of one mind that yes, we’ll transfer the vacant land?

A. No. They didn’t know about it.

[A.139]. This is the ultimate mutual assent question, answered in SCI Minnesota’s favor. Mr. McReavy similarly testified that he paid nothing for the Vacant Land, that nobody intended to sell the Vacant Land, that all parties understood that the three cemeteries were the major assets sold, and that he did not know about the Vacant Land until 2008.

Washburn provides no Minnesota or other authority contrary to the Washington Supreme Court’s analysis in West Coast. That is because there is no such authority, and West Coast applies here. In that case, West Coast Airlines agreed to sell several large cans filled with scrap metal, but two of the cans contained valuable aircraft engines that nobody intended to transfer. 403 P.2d at 835. The Court rescinded for lack of mutual assent and returned the aircraft engines to West Coast. Id. at 836-37.

The West Coast analysis provides a roadmap for analyzing this case:

<u>West Coast Airlines</u>	<u>SCI Minnesota v. Washburn-McReavy</u>
<p>- “The parties never made a contract for the sale of the engines.”</p> <hr/>	<p>- SCI Minnesota and Washburn never made a contract for the sale of the Vacant Land.</p> <hr/>
<p>- “West Coast intended to sell ‘cans’ [filled with scrap metal] and Junk Traders intended to buy them.”</p> <hr/>	<p>- SCI Minnesota intended to sell three cemeteries, and Washburn intended to buy three cemeteries.</p> <hr/>
<p>- “Unknown contents of the subject matter of a sale that are not essential to its existence or usefulness, but which are merely deposited therein, and which are not within the contemplation of or intention of the contracting parties, do not pass by the sale.”</p>	<p>- The Vacant Land is:</p> <ul style="list-style-type: none"> • unknown contents of the subject matter of a sale; • not essential to the existence or usefulness of the Crystal Lake sale; • merely deposited in Crystal Lake; and • not within the contemplation of or intention of the contracting parties.

<p>- "There was no meeting of the minds" concerning the sale of the engines.</p> <hr/> <p>- The seller (West Coast) was in the best position to avoid the mistaken transfer.</p>	<p>- There was no meeting of the minds concerning the sale of the Vacant Land.</p> <hr/> <p>- The seller (SCI Minnesota) was in the best position to avoid the mistaken transfer.</p>
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There is no distinction between this case and West Coast. Yes, Washburn argues that this is a contract to sell stock, and ordinarily everything transfers when you sell stock. But that is the same as arguing that West Coast entered into a contract to sell cans filled with metal, and ordinarily everything within the cans transfers when you enter into such a contract. That argument did not prevail before the Washington Supreme Court, and should not prevail here. Following the lead of West Coast, this Court can simply carve off the item for which there was no mutual assent (*i.e.*, in West Coast, the engines; here, the Vacant Land) and leave alone the contract items for which there was mutual assent (*i.e.*, in West Coast, the cans and scrap metal; here, the cemeteries and contents).

The West Coast case is no outlier. In American Nat. Bank of Nashville v. West, 212 S.W.2d 683, 683-84 (Tenn. App. 1948), a decedent's box of clothing was sold at auction for \$9.50, and the purchaser of that box found valuable rings worth \$2,500 in the pocket of a bathrobe. Id. The Court held that the rings did not pass through the sale because there was no intent to sell the rings. Id. at 685. The Court reasoned that

neither party had any idea that these valuable rings might be secreted in this box of clothes, or any intention that they should pass by the sale. As to them there was no contract, no meeting of the minds, no sale. A

sale must rest on mutual assent of the parties as to all its terms, including the identity of the thing sold.

Id. (emphasis added). Similarly, in Hoeppner v. Slagle, 231 N.E.2d 51, 52 (Ind. App. 1968), a house purchaser found stocks and bonds in a drawer. Although the deed selling the house provided that the house was being sold “together with the contents,” the Court returned the stocks and bonds because “nobody intended to pass title” to those items. Id.

Like the rings found in the clothing in American Nat. Bank, like the stocks found in the house in Hoeppner, and like the aircraft engines found in cans in West Coast, the Vacant Land found by Washburn did not pass by virtue of the Crystal Lake stock sale. **Each of those published cases involved “everything in” contracts akin to a stock sale** (e.g., a box of clothes, a house “with the contents,” and cans filled with metal), and in each case, the valuable items found did not transfer due to a lack of mutual assent. Further, in those cases involving “everything in” contracts, nobody sought to “exclude” rings, stocks, or aircraft engines – which negates Washburn’s “exclusion” argument.

Further, the trial court here made findings that actually support the lack of mutual assent claim under the American Nat. Bank, Hoeppner, and West Coast cases: the “parties were not aware that the vacant properties were Crystal Lake assets” [A.10-11]; “[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]; and “[t]here was no intent to either include or exclude the vacant properties from the * * * transaction.” [A.8]. The same can be said of the valuable items in the cited cases.

Adopting West Coast here would not open the floodgates by invalidating stock sales across Minnesota. Finding a substantial, hidden, and unknown asset in a stock sale is virtually unheard of. Mr. Edson – Washburn’s experienced CFO who has worked on 50 corporate sales – has never seen “a situation where a significant asset was parked in a corporate entity and nobody knew it existed until after the deal was done.” [A.131]. He also agreed that this was a “one-of-a-kind occurrence.” [Id.]. Further, the fact that the Minnesota appellate courts – and perhaps the courts of 49 other states – have never had to address a case where an unknown asset allegedly transferred in a stock sale shows that this is an extremely rare situation involving a unique constellation of facts:

- significant, unknown assets allegedly transfer in a stock sale;
- the assets have nothing to do with the operation of the company sold or the sale itself (in the words of the West Coast Court, the assets “are not essential to” the sale’s “existence or usefulness”); and
- there is no prejudice in returning the assets.

Stock deals will still be stock deals in Minnesota if this Court adopts West Coast.

The lack of prejudice is important. Washburn cannot argue that applying West Coast would result in any prejudice, because Washburn never paid for the Vacant Land, never relied on getting the Vacant Land, and never acted as the owner of the Vacant Land from 2005 through 2008. As Mr. McReavy agreed, if the Court grants SCI Minnesota relief, he would be “back in the position” that he thought he was in, “which is the owner of three locations” for \$1 million. [A.59-60].

Quite simply, Washburn cannot win on lack of mutual assent. Indeed, Washburn’s “golden child” case of Costello [A.26] cannot save Washburn because it says

nothing about mutual assent, and neither do any of Washburn's other cases. Further, Washburn's 10-page argument concerning the alleged lack of a mutual mistake is rendered meaningless here because, as West Coast points out, "the law of 'mutual mistake' is not applicable" to a claim for lack of mutual assent. Id. at 836.

In the final analysis, the parties never had a meeting of the minds concerning the transfer of \$2 million in Vacant Land in this \$1 million stock sale for three cemeteries. There was no mutual assent, and the Vacant Land belongs to SCI Minnesota.

II. THE TRIAL COURT ERRED IN DENYING REFORMATION.

A. The Trial Court had the Power, the Standard is *De Novo*, and This is a Case of First Impression

Despite telling the trial court that it lacked the power to reform, Washburn now apparently agrees that the trial court had the power. [Washburn's Br., p.14]. But what Washburn thinks about the trial court's power is irrelevant. What matters is what the trial court expressed in the Order, and that Order shows that the trial court thought it was powerless to avoid an inequitable result and a windfall in Washburn's favor. This gives rise to a *de novo* standard on appeal under the Personalized Marketing, Nguyen, and In re Slingerland cases cited in SCI Minnesota's brief at pages 19-21.

Washburn argues that if the trial court truly felt powerless, then the trial court would have granted Washburn's motion to dismiss before discovery. But in the motion to dismiss, Washburn did not argue that the trial court lacked the power – rather, that argument arose at the summary judgment argument ("this Court is not in a position to make the exception. It has to be through the appellate courts." [A.32]).

By arguing that the trial court lacked the power and that a ruling in SCI Minnesota's favor can only occur "through the appellate courts," Washburn highlighted that this is a case of first impression on reformation. In fact, Washburn's counsel conceded to the trial court that "we have not seen a lot of cases on this" but every case he has seen "would" reject SCI Minnesota's theory. [A.32]. Washburn's use of the word "would" is telling; it shows that despite Washburn's effort to cite case after case, **this is a case of first impression on whether stock sales are immune from reformation.** But regardless of whether this Court treats the issue as one of first impression or not, SCI Minnesota must win because it has proven all reformation elements.

B. The Undisputed Facts Establish All Reformation Elements.

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

SCI Minnesota has proven the first reformation element, that "there was a valid agreement between the parties expressing their real intentions" to buy and sell only the three cemeteries. See Owatonna Country Club, Inc. v. Kohlmier, 353 N.W.2d 227, 230 (Minn. App. 1984). Washburn apparently concedes that the parties' "real intent" was to sell only the three cemeteries and that there was no intent to sell the Vacant Land. [Washburn's Br., p.16-17]. However, Washburn argues that there was no "actual agreement" reflecting that intent. [Id.]. This argument fails for at least two reasons.

First, Mr. McReavy's testimony establishes actual agreement:

- When asked whether "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 * * *." [A.57].

- 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].
- 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 “yes.” [A.59-60].

This testimony leads to a single, inescapable conclusion: **in Mr. McReavy’s mind, the agreement was three cemeteries for \$1 million.** Although Washburn’s brief never utters Mr. McReavy’s name, Washburn apparently believes that this testimony by Mr. McReavy – which accords with testimony from SCI Minnesota’s Mr. Cruger and Corinthian’s Mr. Kirkpatrick – only establishes “real intentions” and does not establish “actual agreement.” But this testimony establishes both “real intentions” and “actual agreement.” *Black’s* defines “agreement” as a “mutual understanding between two or more person about their relative rights and duties.” *Black’s Law Dictionary* 67 (7th ed. 1999). The fact that all parties understood that “the major assets transferred” were the three cemeteries is itself an actual agreement. [A.57]. *Webster’s* similarly defines “agreement” to mean “harmony of opinion, action, or character.” *Merriam Webster’s Collegiate Dictionary* 26 (11th ed. 2004). Certainly, the opinions and actions of the parties are in harmony; after the 2005 sale, SCI Minnesota continued to act as the Vacant Land’s owner by paying taxes, and Washburn never acted as the owner of the Vacant Land (much less set foot on it). Element one has been proven.

Second, the documents show that the “actual agreement” was to sell only the three cemeteries. Simply stated, this stock sale for Crystal Lake walked and talked like an

asset sale for three cemeteries, because what the parties truly wanted was a sale for those three cemeteries and only those three cemeteries:

- The parties used the structure of the stock sale solely to comply with Minnesota law and accommodate Washburn's desire to operate the cemeteries as for-profit businesses under Minn. Stat. § 306.88. [A.125, 127, 135-36, 142, 269-70].
- The parties used an I.R.C. § 338h(10) election, which **treats the sale for tax purposes as an asset sale**. [A.270; see 26 U.S.C. § 338h(10) (entitled "Certain stock purchases treated as asset acquisitions")].
- The letters of intent never mention the Vacant Land, but both specifically list the three cemeteries. [A.147-54, 201-03]. Indeed, the initial letter of intent contemplates an asset sale. [A.201].
- The Agreements never reference the Vacant Land, but both Agreements prominently list the three cemeteries in the first WHEREAS clause. [A.64, 272].
- The Agreements list the three cemeteries as "**all real property** owned or leased by Crystal Lake" and give legal descriptions and title commitments for the three cemeteries only. [A.68, 278, 288-89, 313-64 (emphasis added)].
- The Agreements list every asset covered by the stock sale – every mop bucket, waste basket, and extension cord – without ever identifying the Vacant Land worth \$2 million. [A.320-26, 336-46, 355-64].

In the words of Mr. Edson, "this is an unusual stock purchase agreement" because it lists the three specific cemetery businesses being sold. [A.137-38]. Why is this unusual agreement drafted this way? Because the parties wanted to reflect their "valid agreement" and "real intention" to sell only the three cemeteries (and the mop buckets, etc. at those cemeteries) without losing the "for-profit" status under Minnesota law. One cannot look at the Agreements without thinking that all the parties ever intended and agreed to sell was three cemeteries. The Agreements and documents cry out "asset sale."

What better evidence do we have of “agreement” than asking Mr. McReavy himself what he agreed to? And what better evidence do we have of “agreement” than looking at the documents to see what the parties were trying to accomplish? SCI Minnesota has proven the first reformation element.

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

SCI Minnesota has proven the second element of reformation – namely, that “the written instrument[s] failed to express the real intentions of the parties.” Owatonna Country Club, 353 N.W.2d at 230. The parties’ real intent was to transfer the three Crystal Lake cemeteries for \$1 million and no other real property, but the Agreements failed to express that intent because the Agreements also mistakenly transferred title to \$2 million in Vacant Land. Washburn’s Brief is silent on this second element and simply jumps from element one to element three. SCI Minnesota must prevail on this element.

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

On the third element, SCI Minnesota has proven that the Agreements’ failure to express the parties’ real intentions “was due to a mutual mistake of the parties.” See Owatonna Country Club, 353 N.W.2d at 230. The three parties here were mutually mistaken from 2005 through 2008 concerning the existence and ownership of the Vacant Land, as well as whether it would transfer. This is a “mutual mistake.”

Washburn claims that a mutual mistake is not possible because this is a stock deal and because only SCI Minnesota could have known about the Vacant Land. But at the hearing, Washburn admitted that the “parties were mistaken about the assets in this case” [A.26] but that the “The Supreme Court has never, never rescinded a stock deal on

account of a mutual mistake about the assets.” [A.21]. Thus, Washburn apparently believes that **this is a mutual mistake about assets**, but not a mutual mistake for which the courts can grant relief because it is not a mutual mistake as to whether this was a stock deal. However, Washburn does not get to define the contours of what is a proper mutual mistake. At bottom, Washburn’s only argument is: this is a stock deal; this is a stock deal; and, by the way, did I tell you this is a stock deal? But a stock deal does not prevent a court from reforming where the reformation elements are met.

Washburn spends 10 pages citing inapplicable case after inapplicable case without ever addressing the two Minnesota Supreme Court mutual mistake cases quoted by SCI Minnesota – Haley and Pettyjohn. These cases show that mutual mistakes are not limited to scrivener’s errors and include what happened here. In Haley, the Supreme Court held that reformation based on a 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). In Pettyjohn, the Court held that reformation may be granted “not only where the language used * * * 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). These rules from Haley and Pettyjohn apply directly here:

- **Applying the Haley rule here:** All parties were mistaken about the “material fact[s]” concerning the existence and ownership of the Vacant Land. Unknown Vacant Land worth \$2 million is as material as it gets.
- **Applying the Pettyjohn rule here:** All parties were in error concerning “the thing to which [the] language applies” – namely, that the sale of three cemeteries for \$1

million might also apply to and result in the transfer of \$2 million in Vacant Land having nothing to do with the Crystal Lake business operations.

The Pettyjohn rule continues to be cited as good law by *CJS Reformation of Instruments* § 34 (2009), and these two Supreme Court rules are binding here.

Washburn also argues that the trial court's statement that "the mistake was one made solely by SCI" is dispositive on this element. But this statement is not only colored by perceived powerlessness, but also, the statement is contrary to Haley and Pettyjohn – the existence and ownership of the assets is material under Haley, and the parties were in error concerning application of the Agreements to anything beyond the three cemeteries. Further, the trial court's statement is manifestly contrary to the evidence because the undisputed facts show that the SCI individuals involved in the sale (from the Corporate Development Department) had no idea that the Vacant Land had been parked years ago in Crystal Lake's stock by individuals in another SCI department. Although it is unfortunate that SCI failed to discover this material fact, the trial court and this Court should not impute "corporate knowledge" to the individuals involved in the sale.¹

¹ Washburn cites an insurance coverage case concerning charging a company with constructive knowledge of information known by officers or agents. See Travelers Indem. v. Bloomington Steel, 718 N.W.2d 888, 895-96 (Minn. 2006). But here, there is no evidence that an "officer or agent" with authority to bind SCI Minnesota knew that the Vacant Land was parked in Crystal Lake, much less that it might transfer. See 2446 University Ave., LLC v. I.F.P. Minnesota, 2009 WL 1048591 (Minn. App. April 21, 2009) (unpub. op. at A.367) (imputing knowledge where president had authority to bind the company). Further, applying an imputed knowledge standard here would swallow the rule of reformation because the party "at fault" for the mistake often has an employee whose knowledge could have avoided the mistake. For example, in Nemer v. PaineWebber, 1992 WL 295130 (Minn. App. Oct. 20, 1992) (unpub. op. at A.255), the Court reformed and refunded a double payment – certainly somebody at PaineWebber

There was a material, mutual mistake by all parties involved in the sale. SCI Minnesota has proven the elements of reformation.

4. SCI Minnesota's "fault" does not matter.

Washburn claims that the risk of a mistake must be allocated to SCI Minnesota, citing *Restatement (Second) of Contracts*, §154, cmt. a. [Washburn's Br., p.36]. But that §154 comment merely says that a court will "ordinarily" allocate the risk of a mistake to the seller where the parties sell farm land and it turns out that the "land contains valuable mineral deposits." This case is hardly analogous to the farm hypothetical. When a party sells a farm, it no doubt knows that there could be minerals under the land just like there could be minerals under any land. Here, on the other hand, nobody ever thought it possible that Crystal Lake might also include \$2 million in unrelated Vacant Land assets. Indeed, SCI Minnesota kept acting as the owner for three years after the 2005 sale, while Washburn was pleased with its \$1 million purchase of three cemeteries.

SCI Minnesota may have been in the best position to prevent this mistake, but *Restatement (Second) of Contracts* § 157 holds that the risk should not be allocated to SCI Minnesota: "[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 * * *." This Court has continued to follow *Restatement* § 157 and has granted relief to the party "at fault" for failing to discover the mistake. See, e.g., Hein-Marg, Inc. v. Hunter, 1991 WL 185100 (Minn. App. Sept. 24, 1991) (unpub. op. at A.252) ("that the builder could have

knew or could have known about the first payment, but that did not bar reformation under *Restatement (Second) of Contracts* § 157. (See II.B.4 below).

avoided the mistake by the exercise of reasonable care does not preclude relief”); Nemer, 1992 WL 295130, at *2 (unpub. op. at A.255) (refunding double payment even though PaineWebber could have learned of mistake before making that double payment).

The bottom line is that Washburn would suffer no harm through reformation. As Mr. McReavy admitted, reformation would put him in the exact position he negotiated in 2005. There is no reason to allocate the risk of a mistake to SCI Minnesota.²

5. *Costello is no “Golden Child,” and Washburn’s cases do not apply.*

Washburn admits that “we have not seen a lot of cases on this” and that the existing precedents merely “would” reject SCI Minnesota’s theory. [A.32]. Thus, none of the cases cited by Washburn truly stand in the way of reformation here.

But Washburn persists with the notion that Costello v. Sykes, 143 Minn. 109, 173 N.W. 907 (1919) is the “golden child.” [A.26]. In Costello, the Court declined to rescind a stock deal for the sale of Calhoun State Bank when the assets ended up being worth less than the parties anticipated, reasoning that a “mistake relating merely to the attributes, quality, or value of a sale does not warrant a rescission.” Id.

Beyond the fact that Costello has never been applied to a reformation claim, Costello also does not apply because this case is not about the “attributes, quality, or value” of the Crystal Lake stock. Instead, this case is about the fundamental existence

² Washburn warns that granting reformation would lead to the mantra “buyer beware; seller, who cares.” This is not so. First, Mr. Edson agreed that hidden assets are never a concern and that this situation is rare. Second, the representations and warranties in stock sales protect buyers like Washburn against hidden liabilities. Third, having to litigate a reformation lawsuit is reason enough for sellers to perform due diligence. Fourth, denying reformation would lead to the mantra: “finder’s keepers; losers weepers” – a notion that runs contrary to why Minnesota allows equitable claims.

and ownership of specific assets that have nothing to do with the subject of the sale (*i.e.*, three cemeteries). Thus, Washburn is attempting to extend the Costello holding so that it applies where the mistake concerns the existence of certain assets in a stock sale. **This attempt to stretch Costello has been specifically rejected by the Iowa Supreme Court.** Almost 50 years after Costello, the Iowa Court reviewed Costello and

reject[ed] the proposition that the existence or non-existence of corporate assets is immaterial * * * . [a court in a rescission case may] look beyond the form of the asset transferred (corporate stock) to the substance of the transfer * * * in deciding whether there was a mutual mistake [justifying rescission].

Clayburg, 171 N.W.2d at 626 (emphasis added) (denying rescission). Clayburg underscores SCI Minnesota's argument that the Minnesota Supreme Court in Costello would not have reached the same result if the parties had learned post-sale that Calhoun State Bank not only owned a bank, but also, had parked *two grocery stores worth 200% more* than the bank in the bank's stock. Like the issue here, that hypothetical involves the *existence* of fundamental, unknown assets, and would have led to a different result.

The block quote from Clayburg not only points out how Washburn attempts to take Costello into uncharted waters, but also, reveals the fallacy of Washburn's attempt to reframe the intent/agreement issue to whether the parties intended to *exclude* the Vacant Land from the stock deal. As Clayburg makes clear, this Court should "look beyond the form" of this stock sale, which renders irrelevant the testimony from SCI Minnesota's Mr. Cruger and Corinthian's Mr. Kirkpatrick that nobody specifically agreed to exclude the Vacant Land from the 2005 stock sale. [See Washburn's Br., pp.11-12].

At bottom, SCI Minnesota agrees with Washburn that there are “not a lot of cases on this.” That is why Washburn’s barrage of cases is curious. Regardless, SCI Minnesota provides a brief response to each of Washburn’s main cases:

This case is not **Alpha Real Estate v. Delta Dental**, 664 N.W.2d 303 (Minn. 2003). In Alpha, the Court would not insert a term from the parties’ previous agreement into a fully-integrated later agreement. Both parties knew that the term was a subject of possible negotiation, because they had included it before, so there could not have been a mistake of the type at issue in this case. Here, nobody knew the Vacant Land existed, let alone knew it was a possible subject of negotiation.

This case is not **Cengage Learning, Inc. v. Earl**, 2008 WL 4857938 (D. Minn. Nov. 10, 2008). In Cengage, there was no mistake in the making of the agreement. Rather, one party miscalculated a sales figure after the fact. The Court did not reform because

reformation is available to remedy mistakes made by one or both parties during the process of making a contract * * *, not for mistakes that occur in connection with the later performance of the contract.

Id. at *3 (emphasis added). Here, the mistake was not in connection with later performance; it was in the making of the contract itself. Cengage actually endorses reformation here.

This case is not **Cool v. Hubbard**, 293 Minn. 349, 199 N.W.2d 510, 512 (Minn. 1972). In Cool, Hubbard sold Cool an ill-defined tract of land that actually included a desirable bluff that Hubbard apparently did not want to sell. Prior to the sale, Cool “became aware that the bluff was included,” and so the Court found no mutual mistake.

Cool does not apply here, where there was a mutual mistake and nobody “became aware” that the Vacant Land would be included. Cool also does not apply because the bluff was not an unknown asset like the Vacant Land, totally unrelated to the sale. It was known.

This case is not Employers Mut. Cas. v. Wendland, 351 F.3d 890 (8th Cir. 2003), where the Court would not add insurance coverage to which the parties never agreed. Here, the parties had an actual agreement to sell three cemeteries, and that agreement did not include the Vacant Land. Further, the attempt in Employers Mut. to add coverage not bargained for is nothing like SCI Minnesota’s efforts to limit the transfer to the three cemeteries (bargained for) and to prevent the transfer of Vacant Land (not bargained for).

This case is not First Nat’l Bank v. Perfection Bedding, 631 F.2d 31 (5th Cir. 1980). Unlike the case at hand, First Nat’l Bank involved a “*unilateral mistake of law*” – *i.e.*, where only one party misunderstood the legal implications of a transaction, thinking that excess assets in a pension fund vested in it when the pension fund terminated prior to the stock sale. Id. at 34. But here, we have a *mutual mistake of fact* because nobody knew about or intended to transfer the Vacant Land. Further, everyone here understood the relevant law, including the notion that generally everything transfers in a stock sale. First Nat’l Bank would arguably apply only if SCI Minnesota was unilaterally mistaken about whether the Vacant Land would transfer under the law.

This case is not Hanson v. N.S.P., 198 Minn. 24, 268 N.W. 642 (Minn. 1936). In that case, the Court would not set aside a release of known and unknown injuries in an auto accident because there was no mutual mistake as to the unknown injuries. But here, we do have a mutual mistake concerning unknown assets. Moreover, the Hanson Court

relied on a premise that has no application here – *i.e.*, that where “parties expressly and intentionally settle for unknown injuries, the release is uncontestable.” Id.

This case is not Jablonski v. Mutual Service Cas. Ins., 408 N.W.2d 854 (Minn. 1987). In Jablonski, the Court refused to reform an insurance contract and add UIM coverage where there was no claim that the company ever “offered” or that the individual ever “considered” the coverage. Thus, the parties “had no intention either way” on UIM coverage. Id. at 857. Jablonski does not apply here, where all parties intended to transfer only the three cemeteries. Indeed, if the Court in Jablonski had reformed, the individual would have received something for which it did not bargain. But here, SCI Minnesota merely seeks to put Washburn back in the position it had bargained for in 2005.

This case is not Theros v. Phillips, 256 N.W.2d 852 (Minn. 1977). In Theros, the surveys, the deed, and the mortgage all showed the boundary line at issue, but one party apparently misunderstood that line. The Court held that the “actual agreement” was contained in the deed, and the plaintiffs presented no clear evidence of a different boundary line. Here, the documents did not show the Vacant Land, and instead showed every mop bucket while also listing the three cemeteries as “all real property.”

This case is not Wahl & Wahl v. Campbell, 1993 WL 27758 (Minn. Ct. App. Feb. 9, 1993). In Wahl, plaintiff’s mistake as to the ownership of telephone equipment when entering into an agreement to purchase that equipment went to the “quality or value” of the equipment. But again, the mistake here – related to \$2 million in Vacant Land – concerned more than asset “quality or value.” The mistake concerned the *identity*

and existence of assets. Further, in Wahl, any mistake would be unilateral because only one party claimed to “not know that some of the equipment had been leased.” Id. at *1.

This case is not Wood v. Boynton, 64 Wis. 265, 25 N.W. 42 (Wis. 1885). In Wood, the Court refused to rescind the sale of a stone for \$1 where the parties did not know that the stone was a diamond worth \$700. For Wood to apply here, the facts would have to have been that the parties thought they were transferring just one stone, but mistakenly transferred two extra stones for the price of that one stone. Under those facts, the Wood Court would not have allowed Boynton to walk off with two free stones. In other words, Wood would only apply here if the parties knew they were transferring the Vacant Land and simply misunderstood its value.

SCI Minnesota continues to rely on its response to Washburn’s other cases, like Nichols, Norwest, Savich, and Beasley. [SCI Minnesota’s Br., pp.35-36]. None of Washburn’s cases block the path to reformation. This case continues to be more like Deming v. Scherma, 2001 WL 741427 (Minn. App. July 3, 2001) (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 reformed.

6. *Factual clean-up.*

There are several factual errors in Washburn’s brief. Most are irrelevant, but three bear mentioning. First, Washburn claims that it is a “distortion” that the parties considered an asset sale. [Washburn’s Br., p.7, n.1]. But the first letter of intent clearly references selling “all of the operating assets.” [A.200]. Second, Washburn argues (for

no apparent reason) that the \$1 million paid for Crystal Lake was part of a series of sales totaling \$6.5 million, and then suggests that the \$1 million figure is arbitrary.

[Washburn's Br., p. 10, n.3]. But Mr. McReavy agreed that Washburn "got fair value" in paying \$1 million for Crystal Lake without the Vacant Land. [A.52]. Third, Washburn suggests there is something fishy about SCI Minnesota's counsel also representing Corinthian. But Corinthian's Lowell Kirkpatrick testified that he will gain "nothing" if SCI Minnesota wins; he joined this lawsuit because "it's the right thing." [A.196].

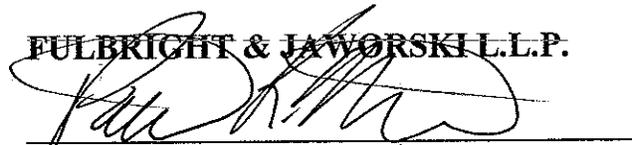
CONCLUSION

The facts, law, equity, and justice are all on SCI Minnesota's side. Don Marshall – the former University of Minnesota Law School professor – used to proclaim loudly in class, "JUSTICE! Never whisper the word JUSTICE!" Washburn would have this Court ignore the facts, law, equity, and justice. There is no mutual assent concerning the Vacant Land. Further, all reformation elements have been proven. The Vacant Land belongs to SCI Minnesota, and Washburn cannot keep \$2 million in free assets in a \$1 million deal.

Respectfully submitted,

Dated: September 29, 2009

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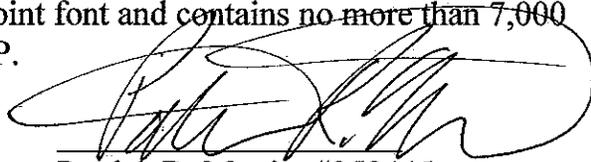
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CERTIFICATE OF COMPLIANCE

I certify that the above reply brief conforms to Minn. R. Civ. App. P. 132.01, Subds. 1 and 3. The brief is written in 13-point font and contains no more than 7,000 words, as determined by Microsoft Word XP.

A handwritten signature in black ink, appearing to read 'Patrick R. Martin', is written over a horizontal line. The signature is stylized and somewhat cursive.

Patrick R. Martin, #259445