

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.

RESPONDENTS' BRIEF AND APPENDIX

FULBRIGHT & JAWORSKI LLP.

Patrick R. Martin (#259445)

Kelly A. Moffitt (#341009)

2100 IDS Center

80 South Eighth Street

Minneapolis, MN 55402

Tel: (612) 321-2800

Fax: (612) 321-2288

Attorneys for Appellants

BRIGGS AND MORGAN, P.A.

Kevin M. Decker (#0314341)

Jonathan P. Schmidt (#0329022)

2200 IDS Center

80 South Eighth Street

Minneapolis, MN 55402

Tel: (612) 977-8400

Fax: (612) 977-8650

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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INTRODUCTION

Judge Kathryn D. Messerich surveyed the undisputed material facts, applied established precedent to this evidence, and found no justification for upending the status quo of the 2005 agreements at issue. The district court's enforcement of precedent leaves no error to correct:

- A contract cannot be reformed when the parties execute the exact terms they negotiated and agreed to, and positively did not agree to the terms sought to be judicially imposed;
- A mutual mistake is not possible when only one party had the requisite knowledge to have been mistaken;
- There is no viable mistake claim when parties make the sale of corporate stock the subject matter of a transaction and years later it is discovered that the seller's due diligence failed to identify the extent of assets owned by the corporation; and
- Mutual assent to a contract for sale of corporate stock is not lacking simply because the seller neglected to accurately determine the assets underlying the stock.

Unable to controvert binding precedent, SCI Minnesota Funeral Services, Inc. ("SCI") attempts to create a straw man to knock down. Namely, SCI persists in arguing that Washburn-McReavy Funeral Corporation ("Washburn-McReavy") advocated for stripping courts of power to reform stock transactions, and that Judge Messerich actually ruled on that basis. Washburn-McReavy said nothing of the sort, and the district court most certainly held no such thing.

From the very beginning, Judge Messerich appreciated that reformation and rescission requests are assessed by finding and applying facts to specific claim elements. The district court gave SCI every opportunity to establish the elements of its causes of

action, but Judge Messerich ultimately found that SCI cannot satisfy all the established requirements for reformation and rescission.

Thus this appeal is not about whether a district court has power to reform or rescind a stock transaction; the answer is indisputably "yes." Rather, this appeal is simply about whether Judge Messerich committed reversible error by preserving the status quo in light of SCI's failure to satisfy every element of reformation and rescission.

SCI, a billion-dollar conglomerate and with assets across the world, had all the resources and sophistication to avoid any mistake. SCI's failure of due diligence is its own fault. Such self-inflicted mistakes, even when coupled with a so-called "windfall" to the other party, do not justify *ad hoc* judicial intervention into commercial transactions in which parties execute the exact terms they negotiated. The law is the law, no matter if SCI's mistake costs it \$200, \$2 million, or \$200 million.

In short, the Supreme Court demands proof that SCI admittedly does not have. There is no reversible error for this Court to correct; the decision below should be affirmed.

STATEMENT OF ISSUES

1. Did the district court commit reversible error in declining to reform a contract when the parties executed the exact terms to which they had agreed and had never even discussed (much less agreed to) the terms sought to be added?

- No. The district court correctly adhered to precedent precluding contract reformation when the reformed terms were not expressly agreed to prior to execution of the underlying contract.

Most apposite authorities:

Nichols v. Shelard Nat'l Bank, 294 N.W.2d 730 (Minn. 1980);

Theros v. Phillips, 256 N.W.2d 852 (Minn. 1977); and

Norwest Bank Minnesota, N.A. v. Ode, 615 N.W.2d 91 (Minn. App. 2000).

2. Did the district court commit reversible error in declining to find a “mutual” mistake when only the plaintiff possessed the requisite knowledge to have labored under the alleged mistake and the defendant had no fault in the plaintiff’s error?

- No. The district court properly followed Minnesota law in holding that a contract cannot be rescinded on mutual mistake grounds when only the plaintiff was mistaken and the defendant had no part in the plaintiff committing the unilateral mistake.

Most apposite authorities:

Hanson v. N. States Power Co., 198 Minn. 24, 268 N.W. 642 (1936);

Jablonski v. Mut. Serv. Cas. Ins. Co., 408 N.W.2d 854 (Minn. 1937); and

Keller v. Wolf, 239 Minn. 397, 58 N.W.2d 891 (1953).

3. Did the district court commit reversible error in declining to rescind a stock transaction on grounds of lack of mutual assent and/or a mistake regarding the underlying assets?

- No. The district court found the executed contract did exactly what the parties expected it to do (*i.e.*, transfer stock ownership), and adhered to jurisprudence rejecting mistake claims regarding assets underlying stock transactions.

Most apposite authorities:

Costello v. Sykes, 143 Minn. 109, 173 N.W. 907 (1919);

Beasley v. Medin, 479 N.W.2d 95 (Minn. App. 1992); and

First Nat'l Bank of Birmingham v. Perfection Bedding Co., 631 F.2d 31 (5th Cir. 1980).

STATEMENT OF THE CASE

On June 10, 2008, SCI commenced this lawsuit against Washburn-McReavy seeking to reform or rescind transactions executed three years earlier. SCI filed an amended complaint on June 27, 2008, naming Corinthian Enterprises, LLC (“Corinthian”) as a co-defendant. SCI later reached an understanding with Corinthian whereby SCI’s counsel began representing Corinthian; on November 20, 2008, SCI amended the complaint to make Corinthian a plaintiff rather than a target of the litigation. *See* Second Amended Complaint (reproduced in respondents’ appendix (“RA”) at RA1-RA9).

The district court, the Honorable Kathryn D. Messerich presiding, denied Washburn-McReavy’s motion to dismiss the lawsuit on the pleadings, concluding that SCI stated a claim upon which relief could be granted and that a factual record must be developed before the court could decide whether the evidence satisfied Minnesota’s standards for reformation and/or rescission. *SCI Minnesota Funeral Services v. Washburn-McReavy Funeral Corporation*, No. 19HA-CV-08-1902, slip op. (Minn. Dist. Ct. Sept. 18, 2008) (RA10-RA15).

After conducting written discovery and taking the deposition testimony of four witnesses, the parties filed cross motions for summary judgment. Following the hearing, the parties filed supplemental memoranda at Judge Messerich’s direction.

The district court found the material facts to be undisputed and granted summary judgment for Washburn McReavy and denied SCI’s contrary motion. *SCI Minnesota Funeral Services v. Washburn-McReavy Funeral Corporation*, No. 19HA-CV-08-1902,

slip op. (Minn. Dist. Ct. Apr. 2, 2009) (“*Summary Judgment Order*”) (reproduced in SCI’s addendum at Add. 1-12). This appeal follows.

STATEMENT OF UNDISPUTED FACTS

Pursuant to Minnesota precedent, the material facts in an alleged “mistake” case relate to (1) the terms the parties actually agreed to and (2) the terms the parties executed. *See, e.g., Nichols v. Shelard Nat’l Bank*, 294 N.W.2d 730, 734 (Minn. 1980); *Costello v. Sykes*, 143 Minn. 109, 110-12, 173 N.W. 907, 908-09 (1919). Judge Messerich found the evidence on these points to be undisputed, and SCI takes no issue with the district court’s findings.

In 2005, SCI’s parent corporation decided to sell a number of business interests, including the holdings of SCI. *Summary Judgment Order* at 3 (discussing deposition of Lowell Kirkpatrick at 6-7 (reproduced in SCI’s appendix at A.156-199)). Among the SCI interests up for sale was ownership of Crystal Lake Cemetery Association (“Crystal Lake”). *Id.* (Kirkpatrick depo. at 17).

Corinthian (run by former SCI executive Lowell Kirkpatrick) agreed to purchase the corporate stock of Crystal Lake in a Stock Purchase Agreement (and separately agreed to acquire certain assets in an Asset Purchase Agreement). *Id.* at 4 (Kirkpatrick depo. at 9). SCI and Corinthian always intended to structure the Crystal Lake portion of their deal as a stock transaction. *Id.* at 4 (Kirkpatrick depo. at 5, 18; Deposition of Christopher Cruger at 17 (reproduced at SCI’s appendix at A.204-214)).¹ Minnesota law

¹ SCI peppers its brief with distortions that the parties “ultimately” settled on a stock deal. Based on SCI’s own witnesses, the district court found that the parties never even considered another form of agreement, and certainly the parties never actually agreed to another form of contract. *Summary Judgment Order* at 4 (“From the very beginning, SCI and Corinthian intended to structure the Crystal Lake portion of their deal”).

required that the agreement be a stock transaction to enable Crystal Lake to continue to be operated as a for-profit corporation. *Id.* at 4. The record reflects, and Judge Messerich found, that “Crystal Lake’s stock was the subject matter of the parties’ ultimate Stock Sale Agreement.” *Id.*

The district court also found all parties to understand that transferring the stock of a company automatically transferred ownership of all underlying assets and liabilities of that company. *Id.* at 8. *See* Kirkpatrick depo. at 28-29 (agreeing that when stock is sold it includes “everything known and unknown”). This reflects the reality of Minnesota law. *Specialized Tours, Inc. v. Hagen*, 392 N.W.2d 520, 536 (Minn. 1986) (“When a business is sold through a stock transfer the buyer assumes not only the assets of the corporation, but also the liabilities.”) (quotation omitted). In fact, the parties demonstrated their knowledge and agreement that all Crystal Lake assets would automatically transfer by taking steps (and actually agreeing) to exclude certain cash held by Crystal Lake prior to closing. Kirkpatrick depo. at 18 (“Q. You agreed to exclude certain assets? A. Yes sir. Q. Which assets are those? A. Cash. I think that would probably be it.”) (emphasis added). Clearly, the parties knew that all assets left in Crystal Lake would transfer with the stock.

The assets underlying the Crystal Lake stock include:

- A cemetery/crematory located at 3816 Penn Avenue North, in Minneapolis, Minnesota;

as a stock transaction.”) (emphasis added) (citing Kirkpatrick depo. at 18; Cruger depo. at 17).

- Don Valley Funeral Home/Memorial Park located at 9940 East Bush Lake Road, in Bloomington, Minnesota;
- Glen Haven Memorial Gardens, located at 5100 Douglas Drive North, in Crystal, Minnesota;
- Approximately 8 acres of land in Burnsville, Minnesota; and
- Approximately 3.6 acres of land in Lakewood, Colorado.

Second Amended Complaint at ¶¶ 4-5.²

SCI had ample opportunity and responsibility to conduct due diligence regarding the Crystal Lake assets. Cruger depo. at 17-19. Indeed, SCI had the upper hand in ascertaining the extent of assets underlying the Crystal Lake stock; after all, it was SCI's own business being sold. *See* Cruger depo. at 23 (“Q. Did SCI have the means of discovering that these two parcels were owned by Crystal Lake? A. Yes, I suppose it did.”). Not surprisingly, Judge Messerich found that SCI corporately knew the Crystal Lake stock included ownership of the Vacant Land. *Summary Judgment Order* at 7 (“Someone at SCI knew that the vacant land was part of the Crystal Lake assets – the land did not spontaneously become a Crystal Lake asset without the action of an SCI agent or employee.”). *See* SCI brief at 10 (describing the supposedly “unique” history of Crystal Lake's acquisition of the Vacant Land).

Christopher Cruger (the SCI executive in charge of the deal) testified that adequate due diligence could have and should have confirmed all of the underlying substantive assets – including the Vacant Land:

² For ease of reference, the Burnsville and Lakewood properties will be referred to as the “Vacant Land.”

I would expect that identifying the ownership of these two parcels of land would have been identified during the necessary title work and perhaps in some of the legal due diligence and steps in the divestiture. So that would make up Maggie Reynolds, and Ray Gipson would have – I would have hoped had identified that early on in this process.

Cruger depo. at 19-20.

The agreement transferring ownership of the Crystal Lake corporate stock from SCI to Corinthian was closed on July 20, 2005. *Summary Judgment Order* at 4. Importantly, SCI admits that it did not ask Corinthian to exclude the Vacant Land assets from the transaction, and Corinthian did not agree to exclude the Vacant Land from the deal. Admissions at 3, 5 (SCI's Response Nos. 2-4; Corinthian's Response Nos. 2-3) (RA16-RA22). It is undisputed that ownership of the Vacant Land did, in fact, transfer to Corinthian by virtue of Corinthian's ownership of the Crystal Lake corporate stock.

Corinthian immediately sold to Washburn-McReavy most of what it had just purchased from SCI, including the Crystal Lake stock. The total price of the agreements between Corinthian and Washburn-McReavy was \$6.5 million. Deposition of John Edson at 36 (reproduced at SCI's appendix at A.116-143).³

In selling the Crystal Lake stock, Corinthian admits that it did not ask that the Vacant Land assets be excluded, and that Washburn-McReavy did not agree to exclude the Vacant Land from the assets underlying the stock. Kirkpatrick depo. at 23; Admissions at 6-7 (Corinthian's Response Nos. 8-9). It is undisputed that ownership of

³ Not that it matters to precedent, but SCI's *ad nauseum* refrain about this being a \$1 million deal with a \$2 million mistake is not right. The parties agreed to a \$6.5 million price tag for all the agreements, and for business reasons SCI required an allocation of \$1 million to the Crystal Lake stock. Edson depo. at 49-50.

the Vacant Land did, in fact, transfer to Washburn-McReavy by virtue of Washburn-McReavy's ownership of the Crystal Lake stock and that Washburn-McReavy has owned the Vacant Land ever since.

Nearly three years after these transactions, SCI declared for the first time that it did not want to transfer the Vacant Land assets underlying the Crystal Lake stock despite having negotiated and then executed a contract that accomplished exactly that. *See generally* Second Amended Complaint. In fact, SCI admits that at the time of the transactions it had no intent to exclude the Vacant Land assets, but says it "could not have considered whether to exclude the Vacant Land." Admissions at 3 (SCI's Response Nos. 2-4). SCI most certainly could have considered whether to exclude the Vacant Land -- its corporate knowledge of the assets leaves no other conclusion. *See Summary Judgment Order* at 7.

SCI asked Judge Messerich to reform the transactions by adding a new clause "so that the Vacant Land is expressly excluded" from Crystal Lake's ownership. Second Amended Complaint at ¶ 32. At its core, SCI's demand flies in the face of unequivocal testimony that the parties had no such agreement:

Q. [W]ere you asked to exclude the Colorado parcel from that transaction [with SCI], from the Crystal Lake transaction?

A. No sir.

* * *

Q. [W]ere you asked to exclude the Burnsville parcel from the Crystal Lake transaction?

A. No, sir.

* * *

Q. [D]id Corinthian ask Washburn-McReavy to exclude this Colorado parcel from the Crystal Lake transaction?

A. No, sir.

* * *

Q. Just so we are clear on the record, Corinthian did not ask Washburn-McReavy to exclude the Burnsville parcel from the Crystal Lake transaction?

A. No, sir.

Q. No, Corinthian did not ask?

A. No, Corinthian did not ask.

Kirkpatrick depo. at 22-23.

For SCI, Cruger was even more blunt:

Q. Was there ever an agreement to exclude these parcels from the Stock Sale Agreement?

A. There was no specific agreement to exclude them from this transaction.

Cruger depo. at 23 (emphasis added).

The record could not be more clear that SCI executed the exact terms it negotiated and agreed to, yet Judge Messerich is the one accused of error.

DISCUSSION

I. THE DISTRICT COURT'S DENIAL OF REFORMATION WAS NOT MANIFESTLY CONTRARY TO THE EVIDENCE.

A. Standard of review.

SCI is correct that this Court reviews reformation determinations for whether the ruling is “manifestly contrary to the evidence.” SCI brief at 18 (quoting *Metro Office Parks Co. v. Control Data Corp.*, 295 Minn. 348, 353, 205 N.W.2d 121, 124 (1973)). This deferential standard of review applies even to reformation cases on appeal from summary judgment. See, e.g., *Norwest Bank Minnesota, N.A. v. Ode*, 615 N.W.2d 91, 95 (Minn. App. 2000).

Nonetheless, SCI declares this case to be an exception to the rule because the district court supposedly saw itself as powerless to reform stock transactions. SCI brief at 19-23. In reality, Judge Messerich never suggested that the district court lacked power to reform a stock transaction, and even found that SCI pleaded a claim upon which the court could grant relief:

This Court previously denied Defendants’ motion to dismiss pursuant to Minn. R. Civ. P. 12 because the Court found that the Plaintiffs had stated a claim upon which relief could be granted and that discovery was warranted particularly as to the issue of mutual mistake.

Summary Judgment Order at 3. If the district court believed it was powerless to reform these stock transactions, it would have simply granted Washburn-McReavy’s motion for judgment on the pleadings. SCI’s arguments are irreconcilable with Judge Messerich’s words and actions.

The only references in the *Summary Judgment Order* to judicial authority stem from conclusions that “the Court cannot rewrite a contract that did what it was intended to do – sell 100% of the stock of one company to another company,” and that, “[u]nder Minnesota law, without evidence to satisfy the elements for reformation for this Stock Purchase agreement, this Court cannot reform the contract[.]” *Summary Judgment Order* at 8-9. Judge Messerich never suggested that the court lacked power to reform a contract transferring corporate stock when the legal grounds to do so have been established. The district court simply recognized that courts should not grant extraordinary remedies when evidence is lacking as to the fundamental elements of a claim. As such, this case is no different than a court being “powerless” to find negligence in the absence of duty, or to find a contract without evidence of consideration. Thus the reality of Judge Messerich’s analysis is far afield from SCI’s presentation.

In a similar vein, SCI incorrectly suggests that Washburn-McReavy deems stock transactions to be immune from reformation actions. SCI brief at 22, 27. With the straw man propped up, SCI retorts: “There is no case from the Minnesota courts saying that.” SCI brief at 22. Of course there are no Minnesota cases supporting such a proposition. Like any other contract, a stock sale agreement is subject to reformation in this state so long as the evidence satisfies the elements required by the Supreme Court. This is the precise analysis presented by Washburn-McReavy and followed by Judge Messerich.

Clearly, this is not a case in which a district court refused to act due to a misperceived lack of authority. *Cf.* SCI brief at 19-21 (discussing such cases). If the facts were otherwise and SCI had the requisite evidence to satisfy the legal standards for

reformation, there is no reason to think that the district court would have refused the request. Instead, Judge Messerich surveyed the evidence, found the material facts to be undisputed, and ruled that reformation was not warranted in light of settled precedent. *Summary Judgment Order* at 9 (“The legal requirements for reformation have not been met here.”).

Thus this reformation case is no different from any other when it comes to appellate review. This Court’s job is simply to assess whether Judge Messerich’s reformation denial is “manifestly contrary to the evidence.” *Metro Office Parks*, 295 Minn. at 353, 205 N.W.2d at 124. As demonstrated below, this is not a close call.

B. There is no error to correct: “The legal requirements for reformation have not been met here.”⁴

The predicates to reformation are neither ambiguous nor controversial:

A written instrument can be reformed by a court if the following elements are proved: (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, or a unilateral mistake accompanied by fraud or inequitable conduct by the other party.

Nichols, 294 N.W.2d at 734 (citations omitted). *Accord Summary Judgment Order* at 7.

A determination that SCI failed to establish even one of these considerations is sufficient to affirm.

⁴ Summary Judgment Order at 9.

1. No other actual agreement in the record.

Minnesota law could not be more clear that an action for reformation requires proof of “a valid agreement between the parties” different from the contract actually executed. *See, e.g., Nichols*, 294 N.W.2d at 734. More specifically, the proponent must have proof that the parties actually agreed to the terms that would be imposed by the reformation. *See, e.g., Theros v. Phillips*, 256 N.W.2d 852, 858 (Minn. 1977). Thus, in this case, precedent requires proof that the parties actually agreed to exclude the Vacant Land from the transactions. *See* Second Amended Complaint at ¶ 32 (asking the courts to reform the transactions to now exclude the Vacant Land).

Judge Messerich found no evidence of an agreement different than the one executed by the parties. To the contrary, the district court found that “the July 20, 2005 contract did exactly what the parties expected it to do – it sold the stock of the Crystal Lake Cemetery Association first to Corinthian and then to Washburn.” *Summary Judgment Order* at 7. *See id.* at 8 (“Everyone agrees that the deal here proceeded as everyone expected and that everyone really was on the same page.”).

As it tried to do before the district court, SCI can only attempt to overwhelm this Court with arguments about whether the parties intended to include the Vacant Land in the transaction. SCI brief at 24-28. Such distraction tactics failed at the district court and, according to precedent, meet that same fate on appeal.

a. Different intent is not sufficient.

SCI has much to say about “intent,” but has never presented a shred of evidence establishing that the parties actually agreed to terms different from those executed on

July 20, 2005. As the district court concluded, reformation is not available under Minnesota law absent clear evidence of an actual agreement differing from the Stock Purchase Agreement. *Summary Judgment Order* at 8-9.

i. Indistinguishable precedent.

For instance, *Nichols* contemplates reformation as being appropriate when “both parties agree as to the content of the document but that somehow through a scrivener’s error the document does not reflect that agreement.” 294 N.W.2d at 734. On the other hand, “[w]hen both parties acted in good faith and neither misled the other, but nevertheless each party was mistaken and thought he was making a different contract from what the other party supposed he was making, reformation is not an appropriate remedy.” *Id.* at 734 (emphasis added) (citing *Bancharel v. Patterson*, 64 Minn. 454, 67 N.W. 356 (1896)). “Absent ambiguity, fraud or misrepresentation, a mistake of one of the parties alone as to the subject matter of the contract is not a ground for reformation.” *Id.* (citing *Olson v. Shephard*, 165 Minn. 433, 206 N.W. 711 (1926)).

Nichols addressed a note and mortgage drawn up by the bank-defendant in the amount of \$30,000. *Id.* Although the debtor-plaintiff’s intent and belief were that the mortgage would be for \$10,000, the documents were signed as drafted. *Id.* at 733-34. In seeking reformation the plaintiff presented no evidence that the parties had ever agreed to a \$10,000 mortgage; nonetheless, the district court reformed the mortgage from \$30,000 to \$10,000. *Id.* at 731-32.

The Supreme Court reversed the district court, concluding that the contract could not be changed because the terms reflected exactly what the parties had discussed and

agreed to, and there was no “fraud, misrepresentation or inequitable conduct by the defendant.” *Id.* at 734. Although the *Nichols* plaintiff may have intended to agree to different terms, the high court observed: “had plaintiffs read the documents before they signed them, their mistake as to the contents would have been discovered before they suffered any harm. Were this court to allow reformation, it would not only destroy the defendant’s right to rely on plaintiff’s written assent to the agreement, but would reward plaintiffs for their negligence.” *Id.* (emphasis added). Because the plaintiffs sought to reform the contract to a deal that had never been struck, reformation could not be allowed.

This Court enforced the same standard in *Norwest Bank Minnesota, N.A. v. Ode*, 615 N.W.2d 91 (Minn. App. 2000). *Norwest* concerned a mortgage agreement in which a trustee pledged trust assets in his individual capacity rather than as trustee. *Id.* at 94. The trustee later refused to execute quit claim deeds in his capacity as trustee to correct the “error.” *Id.* The *Norwest* plaintiff prevailed upon the district court to amend the mortgage agreement to avoid “unjust enrichment” that would result from the trustee obtaining financing with an empty pledge. *Id.* at 94.

This Court correctly rejected the reformation claim despite the trustee’s enrichment, concluding that the bank failed to present “consistent, clear, unequivocal, and convincing” evidence as required for a reformation claim. *Id.* at 95 (quotation omitted). The evidence established no other agreement by which the trustee had committed to signing as the trustee, and thus the contract as executed accurately reflected the parties’ negotiations and could not be reformed to now reflect such a new term. *Id.*

at 95-96. Notably, this Court held that reformation in such circumstances was “an abuse of discretion because it amended the actual agreement” that the parties had reached. *Id.* at 96.

Similarly, in *In re Estate of Savich*, 671 N.W.2d 746 (Minn. App. 2003), this Court refused a reformation claim when the proposed “reformed” agreement consisted of terms to which the parties had never actually agreed. The case concerned several parcels of farm land that Savich gave to her relatives. *Id.* at 749. Thereafter, Savich decided to keep the farm intact and asked that the donees execute quit claim deeds to Savich so that she could then transfer the properties into an LLC. *Id.* at 749-50.

Several of the quit claim deeds were not executed until after Savich died, prompting the plaintiffs to seek to have the documents “reformed” so that the grantee would be the LLC. *Id.* at 750. In denying reformation, this Court emphasized that “the proponent of reformation must demonstrate not only that a mistake was made, but must also submit clear proof of the actual agreement made between the parties.” *Id.* at 751 (citing *Theros*, 256 N.W.2d at 858) (emphasis added). Minnesota law precluded the reformation because “there is no evidence that respondents intended, but mistakenly failed, to deed the property to the estate or to the LLC.” *Id.*

Also instructive is *Theros*, in which a plaintiff sought reformation of a deed to exclude certain land that the plaintiff wanted back. 256 N.W.2d at 854. The plaintiff alleged a mistake because the boundary line as stated would leave the plaintiff’s neighboring restaurant without parking space. *Id.* at 857. In reality, no party had contemplated leaving space for a restaurant and thus there could not have been a mistake

in failing to exclude such land from the deed. *Id.* (“There could hardly have been a mistake about the location of the boundary line in relation to the restaurant when the restaurant was not in existence.”).

The Supreme Court made clear that “in a reformation action the plaintiff, in addition to demonstrating mistake, must prove what the actual agreement was between the parties.” *Id.* at 858 (emphasis added) (citation omitted). “The trial court found that no actual agreement existed other than the one contained in the 1941 deed. ... The record demonstrates that the plaintiffs did not present consistent, clear, unequivocal, and convincing evidence of a specific and different [contract].” *Id.* (emphasis added).

A seller with proof of different intent – but not evidence of a different agreement – likewise failed in *Cool v. Hubbard*, 293 Minn. 349, 199 N.W.2d 510 (1972). The *Cool* seller sought to reform a land deal so as to exclude certain bluff property that the seller hoped to recover. *Id.* at 351, 199 N.W.2d at 511. The evidence established that the seller never intended for the bluff property to transfer, but also confirmed that the seller did not ask for the exclusion until after the deal had closed. *Id.* at 352, 199 N.W.2d at 512. The Supreme Court again held that the judiciary cannot grant reformation absent clear proof “that there was in fact a valid agreement sufficiently expressing in terms the real intention of the parties.” *Id.* at 354, 199 N.W.2d at 513 (quotation omitted). The high court concluded: “Clearly, the evidence, which we have fully reviewed, supports the trial court’s refusal to find mutual mistake in this case.” *Id.*

More recently, in *Alpha Real Estate Co. of Rochester v. Delta Dental Plan of Minnesota*, 664 N.W.2d 303 (Minn. 2003), the Supreme Court reaffirmed that a

reformation plaintiff needs evidence that the parties actually agreed to (not merely intended) terms different from those in the contract as executed. In *Alpha Real Estate* a prospective tenant agreed to enter into a lease that required remittance of 5% of adjusted cash receipts to the lessor during the lease's first 10 years. *Id.* at 305. The lease was to include an option to purchase, and also specify that if the option were invoked the 5% term "shall continue for the remainder of the 10 year period" (the "survival clause"). *Id.* The tenant and landlord subsequently negotiated and entered into a fully-integrated lease that included the 5% obligation and the purchase option, but not the survival clause. *Id.* at 306. Litigation ensued years later when the landlord refused to honor the purchase option unless the tenant agreed that the survival clause remained in effect. *Id.*

The district court effectively reformed the lease to include the survival clause, reasoning that "the absence of language regarding the five percent surcharge from the 1997 Lease was the result of an error; the absence of the language regarding the five percent surcharge did not reflect the intent of either party. It was not negotiated." *Id.* (emphasis added). The Supreme Court reversed, however, having found "no evidence of a drafting error, nor is there evidence of mutual mistake, fraud, misrepresentation or inequitable conduct. Reformation was not an appropriate remedy." *Id.* at 314.

Finally, Minnesota law has also been applied by the Eighth Circuit to preclude reformation when there is no evidence that the parties had an actual agreement different from the contract as executed. *Employers Mut. Cas. Co. v. Wendland & Utz, Ltd.*, 351 F.3d 890 (8th Cir. 2003). *Employers Mutual* arose after a law firm attempted to reform auto insurance contracts to include coverage for a car accident involving one of its

lawyers. *Id.* at 892. The district court rejected reformation because “the law firm never contacted [the insurer] about providing coverage for ... employee-owned vehicles.” *Id.* Adhering to Minnesota’s “onerous burden of proof” on the party seeking reformation, the Eighth Circuit affirmed because “above all, there must be evidence that there was an actual agreement as to the terms of the policy.” *Id.* at 895 (quotation omitted).

ii. SCI lacks essential evidence.

There is no distinguishing these precedents. The fatal flaw common to these reformation claims is the plaintiffs’ lack of proof that the parties actually agreed to terms different than those executed. Under settled case law it has never been sufficient that the plaintiff simply establish a different intention for the contracts – to survive summary judgment the plaintiff also must have evidence that establishes an actual agreement different from the one executed. *See, e.g., Alpha Real Estate*, 644 N.W.2d at 314; *Cool*, 293 Minn. at 354, 199 N.W.2d at 513.⁵

As Judge Messerich found, there is no evidence that the parties to the Stock Sale Agreement and Share Purchase Agreement actually agreed to terms different from those in the executed contracts. *Summary Judgment Order* at 8 (“[T]he Court cannot rewrite a contract that did what it was intended to do – sell 100% of the stock of one company to another company.”). This Court has ruled that it would be an abuse of discretion to

⁵ SCI relies upon a single, unpublished decision from this Court, but in that case reformation was allowed because the parties actually agreed to transact 25 acres but the land turned out to be 38.2 acres. SCI brief at 36 (discussing *Demming v. Scherma*, No. CI-00-1906, 2001 WL 741427 (Minn. App. July 3, 2001)). *Demming* neither alters the legal landscape nor suggests that Judge Messerich’s declination to upset the status quo was “manifestly contrary to the evidence” in this case.

reform contracts in such circumstances. *Norwest*, 615 N.W.2d at 96. Per this Court's directives, Judge Messerich correctly preserved the status quo and rejected SCI's calls for a new contract.

Moreover, the reason that the district courts were reversed for ordering reformation in *Nichols* and *Norwest* is as applicable as ever: "were the court to allow reformation, it would not only destroy the defendant's right to rely on plaintiff's written assent to the agreement, but would reward plaintiffs for their negligence." *Nichols*, 256 N.W.2d at 734. This is yet another case of a plaintiff having failed to conduct adequate due diligence. Cruger depo. at 24-25 ("Q. Is it fair to say that SCI did not perform adequate due diligence in this case? A. I certainly would have hoped that – I think that's a fair assumption."). Like the plaintiffs in *Nichols*, *Norwest*, *Savich*, and all the other precedents discussed above, SCI's neglect of due diligence and/or failure to negotiate different terms has turned out to be a costly mistake, but under Minnesota law such a mistake is insufficient to fill the void of having no evidence of an actual agreement different than the terms executed. The decision below should be affirmed as it plainly cannot be said to be "manifestly contrary to the evidence."

b. Uniform testimony confirms there was no agreement to exclude the Vacant Land.

SCI does not simply lack evidence of an actual agreement different from the executed terms – its own witnesses testified that the parties absolutely did not agree to the proposed reformed terms. Kirkpatrick depo. at 22-23; Cruger depo. at 23. SCI deals

with this record by accusing Washburn-McReavy of being “clever” and “nonsensical” (SCI brief at 26); no matter what it is called, this evidence is dispositive.

As Judge Messerich found, Minnesota law requires that SCI present evidence proving the parties actually agreed to exclude the subject assets from the stock deals. *Summary Judgment Order* at 9. That specific burden is compelled by a combination of SCI’s complaint, settled precedent, and the reality of equity ownership.

To start with, for a reformation claim the Supreme Court requires proof that the “reformed” term was, in fact, the parties’ actual agreement. *See, e.g., Nichols*, 294 N.W.2d at 734. SCI’s specific reformation demand calls for the judiciary to amend the Crystal Lake stock contracts “so that the Vacant Land is expressly excluded from the transactions.” Second Amended Complaint at ¶ 32. To correspond to SCI’s reformation demand, the legal determination necessarily turns upon whether the evidence establishes that the parties did, in fact, agree to exclude the Vacant Land assets as SCI would have the contracts now say.

Moreover, stock transactions carry their own legal ramifications that require a legal analysis based upon whether the parties agreed to exclude particular assets in the stock deal. By operation of Minnesota law, a stock transaction automatically includes all underlying assets and liabilities. *Specialized Tours*, 392 N.W.2d at 536. The automatic inclusion of all underlying assets is black letter law. *See* R. Clark, *CORPORATE LAW* 405 (1986) (“Unless transferred or gotten rid of before [a stock transfer], all assets and liabilities of [the company sold] become assets and liabilities of [the new owner of the stock]. ... This automatic transfer includes assets and liabilities of which the acquiring

corporation had no knowledge[.]”) (emphasis added). Consistent with the legal reality, both SCI and Corinthian knew that all underlying assets and liabilities automatically transfer with the stock. *Summary Judgment Order* at 8 (“All parties were aware of the potential consequence of a stock sale purchase agreement; that is, that all of the assets and liabilities would transfer.”). *Accord* Kirkpatrick depo. at 27; Cruger depo. at 29. Logically and legally, given that all underlying assets are automatically included in a stock transaction, the question in a case like this necessarily turns upon whether the parties separately agreed to exclude particular assets.

SCI inverts both the law and logic by focusing on the parties’ intent to include assets. SCI brief at 26-27. With corporate stock an intent to include underlying assets is the default understanding. Adopting SCI’s contrary argument would ignore Minnesota law, and also absurdly require parties to identify every particular asset that they want to transfer with the stock. Indeed, if the law is now going to require that parties to a stock transaction identify the particular assets they agree to transfer (as SCI would have it), then the necessary implication would be that assets not so identified are not included in the stock transaction. Such a rule of law would fly in the face of governing legal standards, not to mention destroy the understanding by which commercial stock deals have been transacted since the dawn of corporate law. Yet such would become the rule of law if Judge Messerich’s analysis is sacrificed for SCI’s apparent blunder.

It is readily apparent that SCI did not execute a contract different from the parties’ actual agreement, but instead failed to investigate the extent of the assets that would transfer pursuant to that actual agreement. *Summary Judgment Order* at 7 (“Someone at

SCI knew that the Vacant Land was part of the Crystal Lake assets[.]”). Unfortunately for SCI, this means it cannot satisfy the Supreme Court’s reformation prerequisite of clear proof of a different, actual agreement. Again, SCI’s own witness dispositively testified that “[t]here was no specific agreement to exclude [the Vacant Land assets] from this transaction.” Cruger depo. at 23. From any vantage point, a court cannot rationally grant reformation when the proponent’s own dealmaker testified that the parties did not have the different, actual agreement that the judiciary is asked to impose. Judge Messerich’s conclusion certainly is not “manifestly contrary to the evidence.”

2. No evidence of mutual mistake.

In addition to lacking clear proof of an actual agreement different from the terms executed, SCI did not establish a “mutual mistake of the parties, or a unilateral mistake accompanied by fraud or inequitable conduct by the other party.” *Nichols*, 294 N.W.2d at 734 (citations omitted). Judge Messerich found no mutual mistake; rather “[t]he mistake was made solely by SCI.” *Summary Judgment Order* at 7. Completing the *Nichols* analysis, the district court found “no evidence that there was any fraud or misrepresentation by either party as to what was going to happen. While the result appears inequitable, it is not because of some inequitable conduct by a party during the negotiation process.” *Id.* Under Minnesota law these findings are dispositive regardless of SCI’s lack of “different actual agreement” evidence, yet SCI completely ignores this independent basis for Judge Messerich’s reformation denial. While SCI should be

precluded from addressing these findings for the first time on reply,⁶ a brief tour of precedent confirms that a rebuttal effort is pointless.

Nichols holds that when the underlying document reflects at least one of the parties' understanding of the agreement, there can be no "mutual" mistake. 294 N.W.2d at 734 ("There is no evidence of a scrivener's error, since the documents did reflect the defendant's understanding of the agreement."). It is undisputed that the agreements perfectly reflect the unequivocal stock transactions that Washburn-McReavy negotiated and executed, and that Washburn-McReavy had no reason to think to exclude the Vacant Land assets and thus could not have been mistaken in that regard. *Summary Judgment Order* at 7 (the contract "did exactly what the parties expected it to do"). The Supreme Court rejects mutual mistake claims in such circumstances. *See, e.g., Hanson v. N. States Power Co.*, 198 Minn. 24, 268 N.W. 642 (1936).

Hanson arose from a car accident involving serious injuries. *Id.* at 25, 268 N.W. at 642. In negotiating a settlement with the driver, defendants secured releases from all passengers in the car. *Id.* at 25, 268 N.W. at 643. The driver's wife later filed suit against the defendants for her injuries, alleging the contractual release could be voided due to a mutual mistake regarding the extent and nature of her injuries. *Id.*

The Supreme Court flatly rejected the "mutual mistake" charge because the defendants bought a general, unqualified release and had no awareness regarding the

⁶ *See State v. Stockwell*, 770 N.W.2d 533 (Minn. App. 2009) (issue not raised in principal brief and raised for first time in reply brief would not be addressed on appeal); *McIntire v. State*, 458 N.W.2d 714, 717 n.2 (Minn. App. 1990) (arguments not made in appellant's brief may not be revived in a reply brief).

nature and extent of the underlying injuries at the time of executing the contract, and thus could not have made a mistake regarding those facts. *Id.* at 28, 268 N.W. at 644. As the high court put it:

[Defendants] did not have her examined, nor did they contact her for the purpose of discussing and determining whether she had suffered injuries or the extent and nature thereof.... Under these circumstances, it is clear that defendants would be laboring under no mistake or misapprehension in making the settlement. While it may be that plaintiff was mistaken as to her injuries at the time of signing of the release, the mistake, if any, was not shared by defendants, and therefore, as a matter of law, there was clearly no mutual mistake.

Id. (emphasis added).

Also on point is *Jablonski v. Mut. Serv. Cas. Ins. Co.*, 408 N.W.2d 854 (Minn. 1987), in which the Supreme Court held that reformation is not an appropriate claim when the contracting parties had no intention one way or the other regarding the subject matter of the proposed amendment. *Jablonski* dealt with an insurance policy for which the insured sought to add underinsured motorist coverage after an accident. *Id.* at 855-57. The high court observed that “reformation contemplates alteration or amendment of the policy language to reflect the true intent of the parties at the time of its inception.” *Id.* at 857 (quotation omitted). The court rejected the reformation contentions pressed by the plaintiff because the evidence established that “the parties had no intent either way

concerning [the proposed term] because ... it was neither offered [by the insurer] nor considered by [the insureds].” *Id.*⁷

Hanson and *Jablonski* are indistinguishable. Washburn-McReavy did not give the Vacant Land assets any thought in executing the Crystal Lake stock transaction. Admissions at 3, 5 (SCI’s Response Nos. 2-4; Corinthian’s Response Nos. 2-3). The Vacant Land assets, like the injuries in *Hanson* and insurance questions in *Jablonski*, simply were not part of the discussion. Judge Messerich’s findings squarely address this dispositive consideration: “There is no evidence either way that the parties intended to include or exclude the vacant land.” *Summary Judgment Order* at 8. Because Washburn-McReavy lacked knowledge about the Vacant Land assets, it “could be laboring under no mistake or misapprehension.” *Hanson*, 198 Minn. at 28, 268 N.W. at 644.

In contrast, SCI knew the Vacant Land assets were owned by Crystal Lake. *Summary Judgment Order* at 7. See *Travelers Indem. Co. v. Bloomington Steel & Supply Co.*, 718 N.W.2d 888, 895-96 (Minn. 2006) (“[A] corporation is charged with constructive knowledge ... of all material facts of which its officer or agent ... acquires knowledge while acting in the course of employment within the scope of his or her authority.”) (quoting 3 William Meade Fletcher, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 790 (2002)). Judge Messerich logically found that any

⁷ SCI’s citation to foreign precedent (arising in an asset purchase context, no less) does not detract from the binding law before this Court. SCI brief at 27 (citing *Standard Brands, Inc. v. Millard*, 273 F.2d 882 (7th Cir. 1960)).

mistake was SCI's alone. *Summary Judgment Order* at 7 ("the mistake was one made solely by SCI."). By definition, SCI's reliance on a mutual mistake theory is for naught.

Even had it been raised, a unilateral mistake claim would also fail in this case because unilateral mistake requires "concealment or, at least, knowledge on the part of one party that the other party is laboring under a mistake." *Keller v. Wolf*, 239 Minn. 397, 401-02, 58 N.W.2d 891, 895 (1953). SCI makes no allegation – and Judge Messerich found no evidence – of concealment or knowledge of mistake on Washburn-McReavy's part.

Keller concerned a client who signed a settlement agreement for \$7,000 on the mistaken belief that the amount was above and beyond a \$2,000 lien filed by her own attorney. *Id.* at 401, 58 N.W.2d at 895. The Supreme Court rejected the "mistake" theory because the client was aware that the lien had been filed and would have to be satisfied out of the \$7,000 settlement. *Id.* Equally important, the unilateral mistake theory failed as a matter of law because there was no "concealment on the part of the [lawyer] or knowledge that [the client] had been laboring under any mistake." *Id.* Consequently, "mistake" offered no grounds for redress. *Id.*

The Supreme Court reached the same conclusion in *Hanson*. Having found no mutuality of mistake in that case, the high court observed that the mistake about injuries could only be unilateral in nature. 198 Minn. at 28, 268 N.W. at 644. That cause of action also failed because the "unilateral mistake under which plaintiff was laboring was in no way due to the fraud or other misconduct of defendants or their agents." *Id.*

Judge Messerich got it right. Any mistake regarding excluding the Vacant Land assets rests solely with SCI because SCI is the only party who knew anything about those assets in the first place. *Summary Judgment Order* at 7. Plus, Washburn-McReavy had nothing to do with SCI's error. Hence the record before the district court fell squarely into the standards cut in *Jablonski*, *Hanson*, and *Keller*. Again, Judge Messerich's conclusions of fact are far from "manifestly contrary to the evidence."

3. A mistake about assets underlying stock does not cut it.

Even if this Court disagreed with Judge Messerich's determinations that SCI proved no other actual agreement and SCI committed an unforced, unilateral error, maintaining the status quo still would have been the right decision because the Supreme Court forecloses lawsuits alleging a mistake about the assets underlying a stock transaction. *Costello v. Sykes*, 143 Minn. 109, 173 N.W. 907 (1919).

Costello arose out of a transaction in which Calhoun State Bank stock was sold on the assumption that the underlying assets included paid-in capital of \$35,000, a surplus of \$5,250, and undivided profits of \$6,000. *Id.* at 110, 172 N.W. at 908. Based upon that understanding of the company's assets, the defendant sold ten shares of the stock to the plaintiff for \$1,360. *Id.* at 110-11, 172 N.W. at 908. In reality, "the parties to the sale were mutually mistaken as to the assets of the bank, the actual value and the book value of its stock, and the amount of its surplus and undivided profits." *Id.* (emphasis added).

The aggrieved party sued to rescind the stock deal on account of this mutual mistake about the assets, but the Supreme Court had none of it: "the subject-matter of the contract of sale was ten shares of the capital stock of the bank. There was no mistake as

to its identity or existence. A mistake relating merely to the attributes, quality, or value of the subject of a sale does not warrant a rescission.” *Id.* Notwithstanding the mistake about the assets, the Court found that the plaintiff got exactly what it bargained for, namely, the ten shares of bank stock. *Id.* at 112, 172 N.W. at 908. Indeed, the high court noted that:

If the question were one of first impression, we should not be inclined to open up a new field for litigation by adopting the rule that a contract for the sale of corporate stock may be rescinded merely because both parties were mistaken about the nature or extent of the assets or liabilities of the corporation, if the means of information are open alike to both and there is no concealment of facts or imposition.

Id. at 113-14, 172 N.W. at 909 (emphasis added). It does not get more apposite than that.

This Court has enforced *Costello* as precluding relief from a stock deal on grounds of a mistake about underlying assets. *Beasley v. Medin*, 479 N.W.2d 95 (Minn. App. 1992). In *Beasley*, the district court had found that “rescission was appropriate because the parties were mistaken about [the company’s] financial condition at the time of the stock sale.” *Id.* at 98. This Court reversed, however, because the aggrieved party had failed to make a pre-closing “reasonable inquiry” into the financial condition of the company whose stock had been sold. *Id.* at 98.

Like the *Costello* parties, SCI complains that the parties to the transactions were mistaken about the true extent of the underlying assets. But, as Judge Messerich found, SCI has produced absolutely nothing in the record suggesting any party labored under a mistake as to the actual subject matter of the transaction: the stock. *Summary Judgment Order* at 4 (“The parties agree that Crystal Lake’s stock was the subject matter of the

parties' ultimate Stock Sale Agreement.”). The parties got exactly what they bargained for. These are the exact same allegations and facts as in *Costello*; thus, as the district court concluded, the disposition must be the same. *Summary Judgment Order* at 9 (“*Costello* is still good law and sets forth the analysis that this Court must follow[.]”).

As in *Beasley*, the complaining party here failed – and admits that it failed – to undertake a reasonable inquiry into the underlying assets. Cruger depo. at 19 (confessing mistakes in due diligence efforts), at 23 (confirming SCI had means to realize ownership of the Vacant Land assets), at 24-25 (conceding SCI failed to perform adequate due diligence). More than that, SCI precluded Washburn-McReavy from attempting its own inquiry regarding the extent of Crystal Lake’s assets. Edson depo. at 33-34 (SCI refused to produce balance sheet). On these facts Judge Messerich correctly refused the equitable remedies sought by SCI.

SCI loses the forest for the trees in saying *Costello* is irrelevant to reformation because the precedent arose in the rescission context. SCI brief at 35. *Costello* declared that an error about assets underlying a stock transaction does not justify a “mutual mistake” conclusion, which is a predicate to reformation. *See Nichols*, 294 N.W.2d at 734 (identifying all elements required for reformation). The fact that different remedies were sought does not obscure the high court’s clear rules regarding the exact sort of mutual mistake claim that SCI makes here.⁸

⁸ SCI also opines that *Costello* and *Beasley* apply only to “value” cases. SCI brief at 35. The suggestion that this case is not about “value” is laughable in light of SCI’s relentless reminders about a “\$2 million mistake” in a “\$1 million deal.”

The only superficial difference between this case and *Costello* is that the underlying assets were presumed to be less in this case and more in *Costello*. This is a distinction without difference for purposes of Minnesota law: the Supreme Court's unqualified rule turns upon whether the parties were mistaken in making the stock the subject matter of the contract, not whether a party mistakes the underlying assets to be more or less. Rest assured, the legal principles that the Supreme Court embraced for Minnesota have been applied with equal force when parties mistakenly assume the assets underlying a stock transaction to be less than reality. *First Nat'l Bank of Birmingham v. Perfection Bedding Co.*, 631 F.2d 31 (5th Cir. 1980).

First National Bank arose after National Mattress Company ("National") purchased the stock of Perfection Bedding Company ("Perfection") for \$162,000 pursuant to a stock purchase agreement. *Id.* at 32. Months before the stock sale, Perfection's employee pension fund had been terminated with \$611,193 in excess assets. *Id.* National was not aware of these assets when it purchased the stock. *Id.* at 33. In litigation to determine ownership of the assets, the district court awarded 66.47% (or \$406,260) of the previously unknown assets to National (as the new owner of Perfection) and the remainder to the employee-participants; the former Perfection stockholders got nothing. *Id.*

On appeal, the former Perfection stockholders argued "that, while they were aware of the excess assets, they were mistaken in believing that the assets did not pass to National as an incident of the sale of stock. Secondly, they contend that since National was unaware that this additional corporate asset existed and that the sale of Perfection's

stock transferred the excess assets, National was similarly mistaken.” *Id.* Mimicking *Costello*, the Fifth Circuit rejected the mutual mistake arguments because National had purchased the stock and hence, by operation of law, acquired whatever underlying assets followed the company. *Id.* The appellate court reasoned: “there has been no showing that National misunderstood the legal implications of a stock transfer, namely, that in its stock purchase National was assuming both the assets and liabilities of Perfection. Moreover, the record is devoid of any suggestion of fraud or misrepresentation on the part of National.” *Id.* Even though enforcement of the law would result in a tripling of National’s investment on account of the former stockholders’ mistake, the law prevailed.

Exactly like the aggrieved parties in *Costello* and *First National Bank*, the parties here were not mistaken about the subject matter of the Stock Sale Agreement and Share Purchase Agreement – *i.e.*, the Crystal Lake stock. *Summary Judgment Order* at 4. And the parties knew all assets automatically transfer in a stock deal. *Id.* It is impossible to distinguish this case from *Costello* and *First National Bank*.

4. SCI bore the risk.

Adopting SCI’s contrary rationale would suddenly place all the risk on a buyer who overestimates underlying assets (*Costello*) and no risk on a seller who underestimates the same. The mantra would become “buyer beware; seller, who cares.” There is absolutely no justification for so altering the playing field, especially considering that a seller like SCI is the party with the most complete and unfettered access to ascertain the assets of the company whose stock was being sold. In fact, it is black-letter

law that in these circumstances, the risk that the stock may transfer more extensive assets than the parties believe must rest with the seller:

[I]t is commonly understood that the seller of farm land generally cannot avoid the contract of sale upon later discovery by both parties that the land contains valuable mineral deposits, even though the price was negotiated on the basic assumption that the land was suitable only for farming and the effect on the agreed exchange of performance is material. In such a case a court will ordinarily allocate the risk of the mistake to the seller, so that he is under a duty to perform regardless of the mistake.

Restatement (Second) of Contracts, § 154, cmt. a.⁹

Courts do, in fact, place the risk on the seller in cases like this. *Wood v. Boynton*, 64 Wis. 265, 25 N.W. 42 (1885). *Wood* concerned the sale of a stone to a jeweler in which both the seller and buyer believed the stone to be worth \$1. *Id.* at 268, 25 N.W. at 42-43. As it turns out, the stone was an uncut diamond worth \$700 to \$1,000. *Id.* The seller tried to unwind the deal but the law would not condone the lawsuit.

The Wisconsin Supreme Court observed that “upon the plaintiff’s own evidence, there can be no just ground for alleging that she was induced to make the sale she did by any fraud or unfair dealings on the part of [the defendant]. Both were entirely ignorant at the time of the character of the stone and of its intrinsic value.” *Id.* at 270, 25 N.W. at 44. The court held: “if she chose to sell it without further investigation as to its intrinsic value to a person who was guilty of no fraud or unfairness which induced her to sell it for a small sum, she cannot repudiate the sale because it is afterwards ascertained that she

⁹ SCI reads a different Restatement section (§ 157) as condoning this lawsuit (SCI brief at 32), when in fact the provision merely says that a party’s fault is not an automatic bar to reformation. Section 154 and its comments make clear the appropriate resolution for circumstances like those now before the Court.

made a bad bargain.” *Id.* (citing *Kennedy v. Panama, etc., Mail Co.*, L.R.2 Q.B. 580). Because “there is no pretense of any mistake as to the identity of the thing sold” (*i.e.*, the stone), there can be no action at law. *Id.*

Like the seller in *Wood*, SCI had every opportunity and right to investigate the thing being sold. In fact, SCI actually knew about the Vacant Land assets. *Summary Judgment Order* at 7. Plus, Washburn-McReavy did not – and is not alleged to have – engaged in any fraudulent or otherwise wrongful conduct to induce SCI to sell the stock (and along with it all assets) at the price that it did. This is simply a case of negligent due diligence by SCI. On this evidence, and pursuant to settled Minnesota law, Judge Messerich properly granted summary judgment for Washburn-McReavy.

Finally, SCI has bemoaned that Washburn-McReavy should not gain the benefit of any unknown assets. The Court’s duty is not to contemplate who should get the benefits and be saddled with the burdens of a commercial transaction, but rather to enforce the law and let the benefits and burdens lie where they may. Judge Donovan Frank recently rejected a reformation claim pursuant to Minnesota law despite his apparent personal belief that it would have been fair to remedy the error. *Cengage Learning, Inc. v. Earl*, No. 08-1285, 2008 WL 4857938 (D. Minn. 2008) (RA23-RA29).

In *Cengage*, an asset purchase agreement required a post-closing “adjusted sales” calculation that would result in an additional payment to the sellers based upon the sales of the underlying company at year end. *Id.* at *1. Cengage performed the calculation and paid the sellers a surplus payment of \$1,950,000. *Id.* Cengage alleged that it made an error in the calculation and overpaid the sellers by \$657,000. *Id.*

Following Minnesota law, the district court rejected the request to reform the contract to correct the calculation. *Id.* at *3. Judge Frank reasoned that “Cengage is a sophisticated party ... and could have foreseen that it might make an error in calculating sales numbers for a company it had fairly recently purchased. Cengage could have negotiated for a term that better protected its interests in that event.” *Id.* Judge Frank also noted the apparent windfall that would result from his decision, but that did not change the ruling required by Minnesota law: “the Court is aware that Cengage’s mistake has turned out to be a costly one. If the facts are as Cengage alleges and if the Court could award equitable relief in this case, it would likely do so. The Court, however, is constrained by the law and cannot rewrite the parties’ agreement at this late stage to provide Cengage with an equitable remedy for its unintended error.” *Id.* at *6.

Courts have never picked “sellers” or “buyers” as winners or losers in a mistake case, but instead have faithfully applied the law regardless of which side “should gain the benefit.” Indeed, under the exact same legal principles the seller of stock in *Costello* and the seller in *Cengage* got the benefit of mistake, whereas the buyer of stock in *First National Bank*, the buyer of the release in *Hanson*, and the buyer of the mortgage in *Nichols* ended up better off. Thus it is not a question of which side should get the benefit; it is which side has the law.

The district court’s cautious approach gave SCI every opportunity to establish the elements of its causes of action, but Judge Messerich ultimately found (on undisputed facts) that SCI cannot satisfy all the established predicates to reformation and rescission. This is not the stuff of “manifestly contrary to the evidence.”

II. THE DISTRICT COURT CORRECTLY REFUSED TO RESCIND THE TRANSACTIONS.

Judge Messerich dealt with SCI's "mutual assent" and "mutual mistake" theories in one fell swoop. *Summary Judgment Order* at 9-11. For the ease of this Court's review, Washburn-McReavy will separate the discussion per SCI's lead.

A. Mutual assent is everywhere in the record.

SCI's entire purpose for contriving a "mutual mistake" claim is to shoehorn the case into a Washington court opinion that ruled on those grounds. SCI brief at 40-41 (discussing *West Coast Airlines, Inc. v. Miner's Aircraft & Engine Svc.*, 403 P.2d 833, 836-37 (Wash. 1965)). No effort of legal gymnastics can contort this case into any semblance of *West Coast Airlines*.

To begin with, "mutual assent" merely refers to the parties agreeing to the same thing. *Cederstrand v. Lutheran Brotherhood*, 263 Minn. 520, 532, 117 N.W.2d 213, 221 (Minn. 1962) ("Expressions of mutual assent, by words or conduct, must be judged objectively, not subjectively."). Importantly, "[w]hether a contract is formed is judged by the objective conduct of the parties and not their subjective intent." *Commercial Associates, Inc. v. Work Connection, Inc.*, 712 N.W.2d 772, 782 (Minn. App. 2006) (citing *Cederstrand*, 263 Minn. at 532, 117 N.W.2d at 221).

That the parties mutually assented to the Crystal Lake stock transactions cannot be credibly disputed. The record is undisputed that SCI offered to sell the Crystal Lake stock to Corinthian, that Corinthian accepted that offer, that Corinthian then offered to sell the stock to Washburn-McReavy, and that Washburn-McReavy accepted

Corinthian's offer. *Summary Judgment Order* at 3-4, 7. Moreover, "[t]he parties agree that Crystal Lake's stock was the subject matter of the parties' ultimate Stock Sale Agreement." *Summary Judgment Order* at 4. Even more damning, the district court found that the executed contract "did exactly what the parties expected it to do – it sold the stock of the Crystal Lake Cemetery Association first to Corinthian and then to Washburn." *Summary Judgment Order* at 7. Judge Messerich reached the only rational conclusion possible: "the parties' rights were governed by a valid contract." *Summary Judgment Order* at 11.

West Coast Airlines has nothing to do with this case. The *West Coast Airlines* parties agreed to a sale of "cans" and it turned out the cans held some aircraft engines. 403 P.2d at 518-19. The court simply held that ownership of the engines did not pass along with the cans because the buyer merely bought the cans, not the contents of the cans. *Id.* at 519.

SCI takes *West Coast Airlines* to mean "the outer vessel in any sales transaction – in that case a metal container, in this case Crystal Lake stock – does not matter." SCI brief at 41. Apparently in SCI's world a stock purchaser merely obtains stock certificates and nothing else. The proposition is ridiculous on its own, but in this case it is downright disingenuous as it is directly contrary to both Minnesota law and the testimony of SCI's own witnesses that a buyer of stock automatically obtains all underlying assets and liabilities. *Summary Judgment Order* at 4 (Kirkpatrick depo. at 27; Cruger depo. at 29).

Similarly absurd is SCI's would-be holding that "[w]hat matters is whether the parties had any idea concerning what was inside that outer vessel." SCI brief at 41. Did

the mistake about what was “inside” the stock matter in *Costello*, *First National Bank*, or *Beasley*? What matters under the law is that the parties actually agreed to exchange money for corporate stock and the contracts they executed perfectly match that actual agreement. It is those legal standards – not some fictional “outer vessel” doctrine – that Judge Messerich brought to bear. There is no error to correct.

B. The mistake is neither “mutual” nor actionable.

SCI contends that a “fundamental, \$2 million mistake” also calls for rescission. SCI brief at 43. There is no need to reiterate the controlling precedent dispelling SCI’s theory. *Supra* at 26-35. The Supreme Court could not have been more prescient in expressly rejecting “the rule that a contract for the sale of corporate stock may be rescinded merely because both parties were mistaken about the nature or extent of the assets.” *Costello*, 143 Minn. at 114, 172 N.W.2d at 909.¹⁰

One last decision from this Court bears mentioning. In *Wahl & Wahl, Inc. v. Campbell, Knutson, Scott & Fuchs*, No. C2-92-1396, 1993 WL 27758 (Minn. App. Feb. 9, 1993) (RA30-RA32), the Campbell firm leased telephone equipment from Wahl & Wahl Leasing Company (“Wahl Leasing”) and the equipment was serviced by Wahl & Wahl, Inc. (“Wahl, Inc.”). *Id.* at *1. Campbell subsequently purchased additional telephone equipment from Wahl, Inc. to upgrade its existing system. *Id.* Later, a third party offered to sell its telephone system to Campbell, prompting Campbell to ask Wahl,

¹⁰ SCI embraces *Clayburg v. Whit*, 171 N.W.2d 632, 626 (Iowa 1969), which rejected the Minnesota Supreme Court’s analysis and holding in *Costello*. SCI brief at 44. Needless to say, this Court is not in a position to do anything but enforce *Costello*.

Inc. whether it would buy the telephone equipment back so that Campbell could purchase the used system. *Id.* Wahl, Inc. accepted, but weeks later attempted to dishonor the contract because it claimed that it was unaware that some of Campbell's telephone equipment had been leased. *Id.*

Campbell brought suit to enforce the contract, and Wahl, Inc. asserted rescission due to mutual mistake regarding ownership of the equipment. *Id.* This Court affirmed the district court's refusal to rescind the underlying contract. Relying on *Costello*, this Court held that the "mistake claimed by Wahl, Inc. goes to the 'quality or value' of the telephone equipment. Wahl, Inc. does not allege that Campbell concealed facts relating to ownership of the telephone equipment.... [I]nformation about the actual ownership of the telephone equipment was as accessible, if not more so, to Wahl, Inc. as it was to Campbell." *Id.* at *2.

If ever the rule of *Costello* were to be reconsidered, surely this is not the vehicle to do so given that – as in *Wahl* – the party complaining about an ownership mistake was the party with all the information and resources to prevent the mistake in the first place. SCI held all the cards in these transactions and screwed up: it is that simple. On this record Judge Messerich's preservation of the status quo cannot be said to be "manifestly contrary to the evidence."

CONCLUSION

As Judge Messerich found, under Minnesota law the material evidence in this record compels a preservation of the status quo: SCI is the only party who knew about the Vacant Land, SCI is the only one who could have thought to exclude those assets, SCI is the only one to blame for its negligence, and SCI – together with Washburn-McReavy and Corinthian – executed the exact, unconditional stock transaction that had been negotiated and expressly agreed to. There is no rational basis by which such facts could be applied to settled precedent to result in either reformation or rescission. Judge Messerich's determination should be affirmed.

Dated: September 16, 2009

BRIGGS AND MORGAN, P.A.

By: _____

Kevin M. Decker (#0314341)

Jonathan P. Schmidt (#0329022)

2200 IDS Center

80 South Eighth Street

Minneapolis, MN 55402-2157

(612) 977-8400

**ATTORNEYS FOR WASHBURN-
MCREAVY FUNERAL CORPORATION
AND WASHBURN-MCREAVY
CEMETERY ASSOCIATION**

CERTIFICATE OF COMPLIANCE

The undersigned counsel for Washburn-McReavy Funeral Corporation and Washburn-McReavy Cemetery Association certifies that this brief complies with the requirements of Minn. R. Civ. App. P. 132.01, subd. 3(a)(1) in that it is printed in a 13-point, proportionately spaced typeface utilizing Microsoft Word 2003 and contains less than 14,000 words, excluding the Table of Contents and Table of Authorities.

Dated: September 16, 2009



Kevin M. Decker

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