

APPELLATE COURT CASE NUMBER A06-1940 and A06-1957

STATE OF MINNESOTA

IN THE COURT OF APPEALS

Margaret Brickner, Margaret Brickner as trustee
of the Thomas E. Brickner Credit Trust and
Braam Investments, Inc.,

Respondents,

v.

One Land Development Company and
John Andrew Duckwall,

Appellants.

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LEGAL ISSUES

- I. Was One Land Development Company's ("One Land") Interest in the Agreement, and Any Interest John Andrew Duckwall ("Duckwall") Claims to Have in the Agreement, Lost Upon Cancellation of the Purchase Agreement?

The Trial Court held that Duckwall and One Land have no interest in the Property because the Agreement was cancelled effective January 8, 2003. (R.App. 7).

- II. Did Duckwall Have Any Interest in the Property?

The Trial Court held that Duckwall had no interest in the Property. (R.App. 7).

- III. Did One Land and Duckwall Abandon the Agreement Where Neither One Contacted Any of the Respondents for Nearly Twelve Months After the Effective Cancellation of the Agreement?

The Trial Court held that Appellants abandoned whatever interest they may have had in the Agreement by failing to timely exercise their remedies under paragraphs 3.2 and 9.2 of the Purchase Agreement. (R.App. 7).

- IV. Did Duckwall Slander Respondents' Title in the Property When He Made False Statements About the Title of the Property With Malicious Intent Which Resulted in Damages?

The Trial Court held that Duckwall slandered the title of the Property owned by Respondents. (R.App. 7).

- V. Did the Trial Court Have the Authority to Appoint a Special Master to Determine Costs and Fees?

The Trial Court held that it did have the authority to appoint a Special Master to determine costs and fees.

- VI. Did the Trial Court Properly Deny One Land's Motion to Assert a Claim for Punitive Damages Where One Land Could Not Establish the Elements of Its Counterclaim for Fraud?

The Trial Court denied Appellants' Motion for Punitive Damages at the pretrial conference and after a full trial on the merits.

- VII. Were Clark Goset's Damage Calculations Too Speculative to Award Damages to

Appellants?

The Trial Court held that Clark Goset's calculations were too speculative to determine. (R.App. 45).

VII. Did the Trial Court Make Reversible Errors of Fact When its Findings of Fact are Supported by the Record?

The Trial court made its Findings of Fact based on the evidence at trial.

STATEMENT OF FACTS

This dispute revolves around a December 2002 cancellation of a Purchase Agreement between Respondents and One Land. The facts as found by the Trial Court, and as supported by the evidence, are set forth below.¹

THE PARTIES

Margaret A. Brickner, a 70 year old retiree, and Margaret A. Brickner as trustee of the Thomas E. Brickner Credit Trust are the owners of the land in Fridley, Minnesota commonly called Sandee's Restaurant. (Tr. 4/26-27/05, p. 161, l. 22-25; p. 163, l. 7-10; A.App.² 1). Braam Investments, Inc. leases the restaurant building and operates the restaurant business. Braam Investments owns the personal property in the restaurant. (Tr. 4/26-27/05, p. 163, l. 14-16; A.App. 1).

One Land Development Company ("One Land" or "Buyer") is a Minnesota Corporation whose sole shareholder and officer is Thomas J. Gambucci. ("Gambucci"). (Tr. 5/12-13/05, p. 10, l. 10-17).

John Andrew Duckwall ("Duckwall") is an individual residing in Vadnais

¹ Appellant One Land cites to Thomas Gambucci's trial testimony at least 73 times in its Statement of Facts. This is important to note where, as here, the Trial Court found "much of Gambucci's testimony at trial to be self-serving and not credible when there is conflicting testimony from other witnesses." (R.App. 5-6 ¶ 29). The Trial Court also found that the "testimony of Duckwall on several material issues throughout this trial was not credible. (R.App. 6, ¶34; Tr. 5/13/05, p. 104, l.12-p. 105, l. 5; p. 106, l. 14-25; p. 109, l. 1-10; p. 114, l.24-p.115, l. 22; p. 117, l. 3-p. 118, l. 13; p. 119, l. 23-p. 120, l. 10; p. 127, l. 5-p. 128, l. 18; p. 143, l. 9-22).

² "A.App." refers to Appellant's Appendix. "R.App." refers to Respondent's Appendix.

Heights, Minnesota. (Tr. 5/13/05 p. 5, l. 11-13). One Land purportedly assigned its interest in the Purchase Agreement to Duckwall. (Tr. 5/13/05, p. 33, l. 19–p. 34, l. 1).

THE INTRODUCTION OF THE PARTIES

In June 2001, Gambucci approached Margaret Brickner about purchasing a piece of real property on Moore Lake Drive. (Tr. 4/25/05 (morning), p. 59, l. 8-18, 23-25; 4/26-27/05, p. 164, l. 14-25, p. 165, l. 1-9). Mrs. Brickner indicated that the Moore Lake Property had been sold but that Sandee's Restaurant Property was for sale. (Tr. 4/26-27/05, p. 165, l. 10-19).

The Property was encumbered by two easements. (Tr. 4/25/05 (morning) p. 60, l. 8-15; 4/25/05 (afternoon) p. 10, l. 7–p. 11, l. 5; 4/26-27/05, p. 71, l. 4-8; A.App. 29, 166). The first was a sixty (60) foot ingress and egress easement from Central Avenue and the second was a utility easement (the "Easements"). (Tr. 4/25/05 (afternoon) p. 26, l. 1-23, p. 30, l. 2; A.App. 29, 166). Gary Braam testified at trial that he met Gambucci at Sandee's Restaurant walked him around the Property and showed him the location of the two Easements on the Property. (Tr. 4/26-27/05, p. 114, l. 12-p. 115, l. 4). The Trial Court found Gary Braam's testimony credible on this issue. (R.App. 3, ¶7).

THE PURCHASE AGREEMENT

In April 2002, Margaret Brickner, individually and as trustee for the Thomas Brickner Credit Trust and Braam Investments d/b/a Sandee's Restaurant (the "Sellers" or "Respondents") entered into a Purchase Agreement (the "Agreement") with One Land to purchase the Property at 6490 Central Avenue. (Tr. 4/25/05 (afternoon), p. 11, l. 25-p. 12, l. 13, p. 7, l. 21-p. 8, l. 17; A.App. 60). Barna, Guzy & Steffen Ltd., including Jeffrey

Johnson, represented Sellers with respect to the Agreement. (Tr. 4/25/05 (afternoon), p. 7, l. 21–p. 8, l. 17; p. 44, l. 18–p. 45, l. 17; 4/26-27/05, p. 123, l. 16-18; p. 167, l. 7-22, p. 170, l. 9–p. 172, l. 14; 4/27/05, p. 299, l. 22–p. 300, l. 8; A.App. 60).

Under the Agreement, “Buyer” is defined as “One Land Development Company, a Minnesota corporation.” (A.App. 60). The term “Sellers” is defined as Braam Investments, Inc. d/b/a Sandee’s Restaurant, a Minnesota Corporation, Margaret A. Brickner as trustee of the Thomas E. Brickner Credit Trust and Margaret A. Brickner. (A.App. 60).

The Agreement provides:

1.3. Governmental Approval. Within one hundred twenty (120) days of the execution of this Agreement, Buyer shall have obtained any and all necessary governmental approvals, including without limitation necessary approvals from any environmental agencies and the City of Fridley to enable Buyer to construct a senior citizens apartment on the Property near the existing restaurant structure.

Duckwall and One Land never sought or obtained any government approvals. (Tr. 4/27/05, p. 303, l. 10-15; 4/25/05 (afternoon) p. 15, l. 19-p. 16, l. 5; 4/26-27/05, p. 117, l. 5-19; 5/12-13/05, p. 87, l. 1-24; A.App. 61). One Land was to pay \$20,000 in additional earnest money at the time of waiving governmental approvals or obtaining governmental approvals. (A.App. 63). Paragraph 4.2(b) provides:

Payment of the Purchase Price shall be as follows:

(b) \$20,000.00 in Additional Earnest Money within seven (7) days following approval by the City of Fridley for Buyer’s intended use of the Real Property or within seven (7) days following Buyer’s waiver of such approval as provided herein.

(A.App. 63). One Land claims that it sent a waiver of governmental approvals letter.

(Tr. 5/12-13/05, p. 87, l. 17 – p. 88, l. 11). However, One Land never paid the additional \$20,000. (Tr. 5/12-13/05, p. 176, l. 10-14).

The Agreement also provides:

3.2. Title. As soon as possible after execution of this Agreement, Seller, at its sole cost and expense, shall deliver to Buyer for Buyer's approval a Commitment for the issuance of an ALTA owner's policy of title insurance issued by Seller's choice (the "Title Company"), certified to date and to include proper certifications of searches covering bankruptcies, state and federal tax liens, judgments, unpaid taxes, assessments and pending assessments ("Title Evidence"). Buyer shall be allowed twenty (20) days after receipt of the last of such Title Evidence for examination and making of any objections to the marketability of the title, such objections to be made in writing or deemed waived. If any objections are so made, Sellers shall be allowed sixty (60) days from receipt of notice of such objections to make title marketable. If such defects are cured within said sixty (60) day period, Buyer shall be notified in writing of the curing of the defects, in which case the Closing shall be the later of the Closing Specified in Article VI or ten (10) ten days after the notice of cure to the Buyer. If such title is not marketable and is not made so within sixty (60) days from the date of Seller's receipt of the written objections and Buyer does not waive the curing of the defects, Buyer may elect (i) to declare this Agreement void, in which event neither Buyer nor the Seller shall be liable for damages hereunder to the other and all money paid by Buyer to the Seller shall be refunded forthwith to Buyer, or (ii) Buyer may proceed to Closing and waive any objections to title.

(A.App. 62). Duckwall has no personal knowledge of whether One Land ever objected to title, and Duckwall himself never objected to marketability of title under paragraph

3.2. (Tr. 5/13/05, p. 109, l. 20–p. 110, l. 20). According to Gambucci, One Land

received the title evidence on October 11, 2002. (Tr. 5/12-13/05, p. 90, l. 18–p. 91, l. 11).

The Agreement further provides that:

5.1. Time and Place of Closing. The Closing on the purchase and sale herein provided (the “Closing”) shall take place not later than thirty (30) days after the expiration of the Approval Period, at the offices of counsel for the Seller and shall be effective as of the close of business on the actual day of Closing. On or before the expiration of the Approval Period, Buyer shall have the right either (i) terminate this Agreement with the Earnest Money retained by Seller, or (ii) to extend the Approval Period once for sixty (60) days upon written notice to Seller and payment of \$20,000 in additional Earnest Money. Upon such extension, the \$35,000 of Earnest Money deposited at the execution hereof shall become non-refundable to Buyer, but applicable to the Purchase Price at Closing.

(A.App. 63-64). One Land extended the date for closing on the Agreement once, but failed to close by January 8, 2003. (Tr. 4/25/05 (afternoon) p. 44, l. 11-13; 4/27/05, p. 226, l. 6-13; 4/27/05, p. 326, l. 17–p. 329, l. 1; p. 383, l. 3-9).

The Agreement also provided for a method of giving notice, stating:

12.5 Notices. All notices, requests, demands and other communications which are required to be or may be given under this Agreement shall be in writing and shall be deemed to have been duly given after dispatch by certified, or registered first class mail, postage prepaid, return receipt requested, to the party to whom the same is so given or made:

If to the Seller, to:
Braam Investments, Inc.
d/b/a Sandee’s Restaurant
1436 – 66th Avenue
Fridley, MN 55432

With copy to:
Barna, Guzy & Steffen Ltd.
400 Northtown Financial Plaza

200 Coon Rapids Boulevard
Minneapolis, MN 55433
Attn: Jeffrey S. Johnson, Esq.

If to the Buyer to:

One Land
14440 Round Lake Blvd.
Andover, MN 55304

With copy to:

n/a

or to such other address as such party shall have specified by
notice to the other party hereto.

(A.App. 70-71). No notice of any assignment of the Agreement was ever given to the Sellers pursuant to paragraph 12.5 of the Agreement. (Tr. 4/25/05 (afternoon), p. 14, l. 12-22; 4/27/05, p. 330, l. 5-p. 331, l. 10, p. 334, l. 1-p. 335, l. 20). This is particularly important since Duckwall claims he was never served with the Notice of Cancellation under the Agreement, even though no written notice to Sellers was provided by One Land or Duckwall to change paragraph 12.5's Buyer notice designation. (Tr. 5/13/05, p. 51, l. 23- p. 52, l. 1).

The Agreement provided as one method for termination of the agreement as follows:

9.1. By Seller. If Buyer defaults in the performance of this Agreement, Seller may cancel this Agreement upon thirty (30) days notice given pursuant to Minnesota Statutes Section 559.21, and the payments made by Buyer to Seller shall be deemed the liquidated damages hereunder, and may be retained by Seller free and clear of any claim by Buyer. This provision shall not deprive Seller of any other remedies provided by law, including enforcement of specific

performance.

(A.App. 68-69). Any action for specific performance by the Buyer had to be commenced within sixty days of the Seller's Breach. (A.App. 69 ¶9.2). No action was commenced within 60 days of January 8, 2003 by the Buyer (One Land) or by Duckwall. (Tr. 4/25/05 (afternoon), p. 42, l. 20-25; 5/13/05, p. 129, l. 13-24; 4/27/05, p. 340, l. 2-16; A.App. 69 ¶9.2).

No exhibits reflecting the Easements were attached to the Agreement and therefore the Agreement did not contain any evidence of the Easements on the Property. (Tr. 4/26-27/05, p. 134, l. 25-p. 135, l. 7, p. 136, l. 21-p. 137, l. 5; 4/27/05, p. 236, l. 19-p. 237, l. 1, p. 237, l. 17- p. 238, l. 4). Jeffrey Johnson testified that an exhibit was mistakenly omitted from the Agreement. (Tr. 4/27/05, p. 358, l. 16 – p. 360, l. 1). The Trial Court found Jeffrey Johnson's testimony credible on this issue. (R.App. 3, ¶10). There is no evidence that Sellers knew that the Easements were omitted from the Agreement or that the Sellers intentionally omitted the Easements from the Agreement. (Tr. 4/26-27/05, p. 134, l. 14-18, 25; p. 136, l. 19-p. 137, l. 5; 4/27/05, p. 214, l. 13-14; p. 215, l. 24-p. 216, l. 5; p. 217, l. 14-21).³

EXTENSION OF THE AGREEMENT

On August 22, 2002, One Land sent Cindy Braam of Braam Investments, a letter exercising its right by the contract, per paragraph 5.1, to extend the approval period for an additional 60 days. (Tr. 4/25/05 (afternoon) p. 20, l. 11-17; 4/27/05, p. 305, l. 25-p. 306,

³ In fact, Respondents had told One Land's Gambucci about the Easements. (Tr. 4/26-27/05, p. 114, l. 12-p. 115, l. 4).

l. 5; 5/12-13/05, p. 89, l. 15-21; A.App. 50). Attached to the letter was a check for \$20,000. (Id.; A.App. 51).

On October 11, 2002, One Land received a Title Commitment with an effective date of August 19, 2002. (Tr. 4/26-27/05, p. 55, l. 5-12; 5/12-13/05, p. 91, l. 5-11; p. 181, l. 16-21). The Trial Court found that this August 19, 2002 Title Commitment, which was received on October 11, 2002, is the “last of such Evidence of Title” under the Agreement. (R.App. 13, 21-23; Tr. 4/25/05, p. 23, l. 23 – p. 24, l. 17; 4/27/05, p. 317, l. 9-13). Sellers did not receive any written objections to this Title Commitment. (Tr. 4/27/05, p. 317, l. 14-17; p. 318, l. 4-7; 4/25/05 (afternoon) p. 25, l. 8-11). Tonseth of Land Title Inc., the company that issued the Title Commitment, testified that Gambucci did not have any concerns about the two Easements on the Property. (Tr. 4/26-27/05, p. 57, l. 23 – p. 58, l. 6; p. 71, l. 9-17). The only concern Gambucci had was about a third easement that was mistakenly listed on the Title Commitment and which was removed. (Id.; 4/25/05 (afternoon) p. 25, l. 8 – p. 27, l. 12). The Trial Court found Tonseth’s testimony credible. (R.App. 3-4 ¶14).

A second Title Commitment dated November 6, 2002 was then issued correcting the objected to easement and leaving the two Easements not objected to on the second Title Commitment. (Tr. 4/25/05, p. 113, l. 24 – p. 114, l. 10; 5/12-13/05, p. 181, l. 6-15; A.App. 105-106). Gambucci testified he received this November 6, 2002 Title Commitment in November 2006. (Tr. 5/12-13/05, p. 96, l. 10-20). No timely objections

to the November 6, 2002 Title Commitment were made by either Defendant.⁴ (Tr. 4/27/05, p. 428, l. 13-16; 5/13/05, p. 109, l. 20-p. 110, l. 20; A.App. 62, 118-119).

ASSIGNABILITY OF THE PURCHASE AGREEMENT

The Agreement limited assignments “to one or more entities formed to acquire the assets or portion of the assets.” (A.App. 60). Specifically, the assignability of the Agreement was limited by the parties as follows:

12.11 Assignment. Buyer shall be entitled to assign this Agreement to one or more entities formed to acquire the Assets or portion of the Assets, provided that such assignment shall not release Buyer from any liability hereunder.

(A.App. 69). The Respondents understood that this meant that One Land could only assign the Agreement to a legal entity it formed for purposes of acquiring assets or a portion of the assets. (Tr. 4/25/05 (afternoon) p. 36, l. 17 – p. 38, l. 1; 4/27/05, p. 322, l. 20-p. 323, l. 7). The Respondents never intended that the Agreement could be assigned to an individual such as Duckwall. (Tr. 4/25/05 (afternoon), p. 37, l. 22 – p. 38, l. 1; 4/27/05, p. 323, l. 7-8).

On November 12, 2002, Respondent gave notice to One Land that Respondents would deem One Land in default if it failed to close by November 22, 2002. (Tr. 4/27/05, p. 326, l. 10-24; A.App. 111).

Gambucci claimed that in 2002 he entered into a purported assignment with

⁴ Gambucci testified that he relies on what the title commitment says, not what the Seller tells him. (Tr. May 12–13, 2005, p. 18, l. 25–p. 19, l. 21). This shows One Land did not justifiably rely on the Agreement’s representation that there were no easements on the Property except as disclosed in exhibits.

Duckwall. (Tr. 5/12-13/05, p. 115, l. 10-p. 117, l. 24). The Trial Court found, and the evidence supports, that Gambucci's testimony and documents are consistent with Respondent's theory that the purported assignment was merely a sham to avoid Plaintiff's Minnesota Statute Section 559.21 cancellation of the Agreement. (R.App. 23; Tr. 4/25/05 (afternoon) p. 38, l. 2-7, 24 – p. 40, l. 21; 4/27/05, p. 323, l. 9-14; p. 334, l. 21-p. 335, l. 16; 4/26-27/05, p. 121, l. 3-23; p. 148, l. 7-p. 149, l. 25).

Appellants Gambucci and Duckwall testified that they met Gary Braam at Sandee's Restaurant to notify him of the agreement to assign. (Tr. 5/12-13/05, p. 133, l. 16- p.135, l. 5; 5/13/05 p. 47, l. 1 – p. 49, l. 16). The Trial Court found that Gambucci and Duckwall's testimony on this issue was not credible. (R.App. 4 ¶19). Gary Braam testified that he had never met Duckwall prior to this litigation and that he was never notified of a purported assignment. (Tr. 4/26-27/05, p. 121, l. 3-p. 122, l. 13). The Trial Court found Gary Braam credible on this issue and found that there was never a meeting at Sandee's Restaurant where Gambucci and Duckwall notified Gary Braam of the purported assignment agreement.⁵ (R.App. 4 ¶20).

⁵ Gambucci also claimed that he gave notice of the assignment through a misdated August 27, 2002 letter to the Sellers. (Tr. 5/12-13/05, p. 191, l. 1-p. 192, l. 13). However, that letter was found by the Trial Court to not be genuine as supported by the fact that the letter was not received by the Sellers or their counsel, the letter contained a date prior to the date the Title Commitment referenced in the letter was produced by Land Title and received by Gambucci, the letter was not delivered via certified mail, the letter was unsigned, and Gambucci attributes the date to a computer error, but was unable to produce the computer which generated the letter to substantiate his claim. (Tr. May 12-13, 2005, p. 182, l. 2 – p. 189, l. 10; p. 94, l. 10 – p. 95, l. 8; p. 174, l. 19-p. 175, l. 10; R.App. 152).

SERVICE OF NOTICE OF CANCELLATION

On December 9, 2002, Sellers served a Notice of Cancellation on One Land, which gave One Land until January 8, 2003 to close on the Agreement. (Tr. 4/25/05 (afternoon), p. 43, l. 1-p. 46, l. 4; 4/27/05, p. 327, l. 2-p. 329, l. 1; p. 382, l. 1-16; p. 383, l. 3-9; A.App. 113). Jeffrey S. Johnson, an attorney with Barna, Guzy & Steffen, Ltd., represented the Sellers in drafting and serving the Notice of Cancellation. (Tr. 4/27/05, p. 327, l. 3-8; A.App. 114). Neither One Land, nor Duckwall notified Seller in writing or by any other method of the purported assignment until after the Notice of Cancellation had been served. (Tr. 4/25/05 (afternoon), p. 46, l. 21-p. 47, l. 3; 4/26-27/05, p. 121, l. 9-17; A.App. 118-119). In fact, the first time that One Land claimed to Respondents that it had assigned its interest in the Agreement was on January 6, 2003 in a phone call from One Land's counsel to Respondents' counsel. (Tr. 4/25/05 (afternoon), p. 46, l. 21 – p. 47, l. 11; 4/27/05, p. 330, l. 5 – p. 331, l. 10; p. 334, l. 1 – p. 335, l. 20).

Margaret Brickner testified at trial that Cindy Braam notified her of their intent to cancel the Agreement with One Land and that she agreed to cancel the agreement. (Tr. 4/26-27/05, p. 170, l. 9-13; p. 171, l. 9-12; p. 188, l. 20-22). The Trial Court found Margaret Brickner's testimony credible on this issue and that Margaret Brickner authorized the cancellation of the Agreement. (R.App. 5 ¶23). The Trial Court found and the evidence shows that all Sellers authorized the Notice of Cancellation. (Tr. 4/26-27/05, p. 171, l. 9-12; p. 123, l. 16-18; 4/25/05 (afternoon), p. 44, l. 18-p. 46, l. 4).

FAILURE TO CLOSE OR ENJOIN CANCELLATION

Neither One Land, nor Duckwall tendered the \$250.00 in attorneys' fees, or costs

of Service to Sellers pursuant to the Notice of Cancellation, nor did either one tender the purchase price, or apply for a court order to suspend the Notice of Cancellation. (Tr. 5/12-13/05, p. 144, l. 15-p. 147, l. 6; 5/13/05, p. 119, l. 4-11; 4/26-27/05, p. 128, l. 6-15).

The testimony at trial established that One Land and Duckwall were unable to perform on the Agreement. (Tr. 5/12-13/05, p. 215, l. 5 – p. 218, l. 25). By the terms of the purported assignment, Duckwall was responsible for paying \$1,100,000 for the assignment by assuming the balance due of \$715,000 at closing. (A.App. 112).

Duckwall testified that he was going to get the money for the purchase from his mother, Elaine Duckwall. (Tr. 5/12-13/05, p. 217, l. 9-15; 5/13/05 p. 55, l. 19 – p. 56, l. 25).

Mrs. Duckwall testified:

Q. You never agreed to provide your son Duckwall money to purchase that Property?

A. No.

Q. Right?

A. I didn't have a thing to do with that.

(Tr. 5/13/05, p. 77, l. 21-25). Gambucci testified that he had helped Duckwall prepare some loan application documents, but that he did not know if Duckwall ever actually applied for a loan. (Tr. May 12–13, 2005, p. 233, l. 7-11; p. 215, l. 5 – p. 216, l. 2; p. 234, l. 2-4). No documents were introduced indicating that either Gambucci or Duckwall had been approved for a loan for the purchase of the Property. (Tr. 5/12-13/05, p. 234, l. 5-8). As a result, Duckwall and One Land did not have the ability to close on the Property.

On April 8, 2003, Sellers entered into a purchase agreement to sell the Sandee's Property to Town Center Development Company. (Tr. 4/25/05 (afternoon), p. 51, l. 4-8; 4/27/05, p. 345, l. 3-12; 5/13/05, p. 152, l. 18 – p. 153, l. 15). One Land and Duckwall made no communication with Sellers for nearly twelve (12) months after termination of the Agreement. (Tr. 4/25/05 (afternoon), p. 47, l. 7-11; p. 48, l. 19-p. 49, l. 3; 4/26-27/05, p. 123, l. 19-22; 4/27/05, p. 340, l. 2-16).

Duckwall testified that he had no contact with Sellers from January 9, 2003 through January 5, 2004, and that he made no attempt to close on the Property from January 10, 2003 through January 5, 2004. (Tr. 5/13/05, p. 128, l. 24 – p.132, l. 18). There is no testimony that Duckwall had any contact or communication with Sellers from January 9, 2003 through December 30, 2003 when the Notice of Adverse Claim was recorded. (Tr. 4/27/05, p. 337, l. 3-7; p. 339, l. 9-15; p. 340, l. 6-16; 5/13/05, p. 125, l. 16 – p. 126, l.18; 5/12-13/05, p. 208, l. 1-p. 209, l. 10). Duckwall testified that he was not aware of any demands from January 9, 2003 through January 2004 related to any issues with the title of the Property. (Tr. 5/13/05, p. 132, l. 15-18). He also testified that the first time he made a demand for specific performance was in a Counterclaim in his Answer to the Complaint some time after January 27, 2004. (Tr. 5/13/05, p. 136, l. 4-24).

On December 3, 2003 Appellant Duckwall signed a Notice of Adverse Claim which was recorded on December 30, 2003 against the Property. (Tr. 4/27/05, p. 337, l. 23-24; p. 347, l. 20-25; A.App. 139). On January 9, 2004, Jeffrey Johnson, attorney for the Seller, asked Duckwall to remove the Notice of Adverse Claim. (Tr. 4/27/05, p. 339, l. 3-6; 5/13/05, p. 60, l. 7-12; p. 141, l. 24 – p. 142, l. 3; A.App. 143-144). Duckwall did

not remove the Notice of Adverse claim. (Tr. 4/27/05, p. 339, l. 3-8; 5/13/05, p. 62, l. 22 – p. 63, l. 3). In order to quiet title to the Property and close with Town Center Development Company, Seller filed a lawsuit in the Anoka County District Court. (Tr. 4/25/05, p. 57, l. 4 – 12).

SPECULATIVE DAMAGE CLAIM

The Trial Court also found that Appellants' alleged lost profits were too speculative to determine. (R.App. 45). The Trial Court specifically found, and the evidence supports, that Goset was not provided with enough data regarding costs of construction and market analysis to reach a reasonable estimate of damages. (R.App. 45; Tr. 5/16/05, p. 51, l. 21–p. 54, l. 24; p. 133, l. 12–p. 137, l. 24; p. 145, l. 1 – p. 151, l. 7). Appellants had no final building plans, no governmental approvals, no contractor estimates, and no money to close. (Tr. 5/13/05, p. 77, l. 21 – 25; p. 107, l. 12–p. 109, l. 10; p. 143, l. 23 – p. 145, l. 6; 5/12-13/05, p. 215. l. 9–p. 221, l. 17). Appellants simply had no proof of what they were going to build so they could not estimate with a reasonable degree of certainty what the damages were. (Tr. R.App. 45). The Trial Court's conclusion is supported by the record.

GAMBUCCI'S CREDIBILITY

There was introduced into evidence a December 1994 decision from Hennepin County District Court wherein Gambucci (who was then functioning as the managing partner of a partnership) was found liable for \$86,000 because he had sold to his father, (Joseph Gambucci, Sr.) land owned by the partnership. (Tr. 5/12-13/05, p. 159, l. 16–p. 162, l. 9; R.App. 90, Court File 94-15733). This sale was without consideration. (Id.).

The transaction was found by that court to be a fraudulent conveyance. (Id.).

Numerous times during Gambucci's testimony, he was presented with his deposition transcript to impeach his testimony because he was often feigning forgetfulness about what he had stated in his deposition. (Tr. 5/12-13/05, p. 139, l. 7-19; p. 140, l. 6-22; p. 142, l. 11 – p. 144, l. 10; p. 151, l. 7-23; p. 152, l. 10-24; p. 154, l. 5-p. 155, l. 15; p. 158, l. 2 – p. 159, l.13; p. 163, l. 25 – p. 165, l. 22; p. 166, l. 21 – p. 167, l. 17; p. 167, l. 18 – p. 168, l. 24; p.170, l. 7-24; p. 174, l. 19 – p. 175, l. 10; p. 184, l. 17 – p. 185, l. 3; p. 186, l. 11 – p. 187, l. 11; p. 188, l. 20 – p. 189, l. 10; p. 193, l. 6-21; p. 194, l. 4 – p. 195, l. 18; p. 199, l. 21 – p. 202, l. 3; p. 203, l. 1-16; p. 204, l. 16 – p. 206, l. 23; p. 206, l. 24 – p. 207, l. 25; p. 216, l. 3 – p. 217, l. 8; p. 218, l. 8-25; p. 219, l. 13 – p. 220, l. 4; p. 220, l. 18 – p. 221, l. 17; p. 224, l. 13 – p. 225, l. 1; p. 225, l. 2-21; p. 225, l. 22 – p. 227, l. 1).

Gambucci was confronted with the fact that in 2001 he reapplied to the Minnesota Department of Commerce for his real estate license and he failed to disclose the fraud judgment against him. (Tr. 5/12-13/05, p. 157, l. 14 – p. 159, l. 13; R.App. 97-101).

Gambucci was also presented with a purchase agreement offer he had made to Sellers dated June 20, 2001 (unexecuted by the Sellers of the Property) wherein he stated that "Thomas Gambucci is a licensed real estate broker." (Tr. 5/12-13/05, p. 227, l. 19 – p. 228, l. 2; R.App. 111). Gambucci conceded that in fact he was not a licensed real estate broker at the time he made that representation. (Tr. 5/12-13/05, p. 228, l. 3-7).

STANDARD OF REVIEW

This Court should affirm the findings of the Trial Court. This case comes to the

Court of Appeals on appeal from a bench trial. As to questions of fact, Rule 52.01 of the Minnesota Rules of Civil Procedure states, “Findings of fact, . . . shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.” Minn. R. Civ. P. 52.01 (2007).

“Findings of fact are clearly erroneous only if the reviewing court is ‘left with the definite and firm conviction that a mistake has been made.’” Fletcher v. St. Paul Pioneer Press, 589 N.W.2d 96, 101 (Minn. 1999) (quoting, Gjovik v. Strobe, 401 N.W.2d 664, 667 (Minn. 1987)). When applying Rule 52.01 of the Minnesota Rules of Civil Procedure, the record of the trial court must be viewed in the light most favorable to the conclusions of the district court. Rogers v. Moore, 603 N.W.2d 650, 656 (Minn. 1999). The findings of the trial court should not be set aside simply because the appellate court does not agree with the trial court’s evaluation of the evidence. Id. Accordingly, the trial court’s findings will only be set aside if they are “manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole.” Id. Thus, if the fundamental findings of the district court are not clearly erroneous, and there is no evidence the district court has abused its discretion, then the court’s findings must be affirmed. Maxfield v. Maxfield, 452 N.W.2d 219, 221 (Minn. 1990). Questions of law are reviewed by the appellate court de novo. Great Lakes Gas Transmission L.P. v. Comm’r of Revenue, 638 N.W.2d 435, 438 (Minn. 2002). Because the evidence supports the findings of the Trial Court this Court should affirm the Trial Court.

ARGUMENT

The Trial Court should be affirmed. First, the Trial Court properly found One

Land has no right or standing to contest the cancellation, or to bring any claims based on the Agreement, because of the effective cancellation of the Agreement. Second, the Trial Court appropriately held Appellant Duckwall has no interest in the Property. Third, the Trial Court properly ruled One Land and Duckwall abandoned any interest they may have had under the Agreement. Fourth, the Trial Court found, based on the evidence at trial, that Duckwall slandered Respondent's Title. Fifth, the Trial Court properly appointed a Special Master without objection, and properly awarded costs, disbursements and attorneys' fees. Sixth, the Trial Court appropriately denied One Land's motion to amend for punitive damages on the eve of trial. Seventh, Appellant's claimed damages were speculative. Eighth, the Trial Court's findings involve credibility judgments based on the evidenced presented and should be affirmed. As a result, this Court should affirm the Trial Court.

I. ONE LAND DEVELOPMENT'S INTEREST, AND ANY INTEREST DUCKWALL CLAIMS TO HAVE, WAS LOST UPON CANCELLATION.

The Agreement was cancelled effective January 8, 2003.⁶ As a result, One Land no longer had any rights or standing to contest the cancellation.⁷

⁶ Appellants request *de novo* review of Counts 1, 2, 3, and 6 of the Conclusions of Law as to Respondents' Complaint, and Counts 1, 2, 3, and 4 of the Conclusions of Law as to Appellants' Counterclaims. (One Land's Brief, at 48; see R.App. 7-9). The Trial Court's Conclusions of Law regarding cancellation of the Purchase Agreement, abandonment of the Purchase Agreement, breach of the Purchase Agreement, Slander of Title, Assignment of the Purchase Agreement, waiver, and no justifiable reliance as to fraud are in accord with the law, for the reasons stated in the Argument section of this brief.

⁷ The cancellation of the Purchase Agreement renders any of Respondents' alleged breaches of the contract irrelevant. *Tarpy v. Nowicki*, 286 Minn. 257, 262, 175 N.W.2d

The Agreement permitted Respondents to cancel it upon thirty days notice given pursuant to Minnesota Statute Section 559.21 (A.App. 68-69, ¶ 9.1). Here, the cancellation alleged a default of Appellants' failure to close no later than November 22, 2002. (A.App.113). Respondents had the right to cancel the Agreement under Minnesota Statute Section 559.21. Minnesota law provides:

A statutory cancellation of a contract for deed results in the vendee's forfeiture of all payments made and restoration of full legal and equitable title in the Property to the vendor.

...

Proceedings under section 559.21 for the cancellation of a contract for deed which is in default, are in the nature of a statutory foreclosure, akin to a foreclosure under a power of sale in a mortgage. Furthermore, **once statutory notice has been served and cancellation effected all rights between**

443, 447 (Minn. 1970). Appellants argue that Respondents committed a breach of representations and warranties, breach of their obligation to obtain title commitments "as soon as possible," breach of their obligation to afford One Land twenty days to object to the last title commitment/evidence of title, breach of the closing date in accord with One Land's extension, and breach of the covenant of good faith and fair dealing. However, as the Trial Court found, there was no breach, and One Land waived the breaches and/or One Land's interest in the purchase agreement was cancelled. (R.App. 9-23).

In one instance, the Trial Court found that Respondents breached the purchase agreement by failing to remove easements on the Property. However, the Trial Court also found that Appellants breach did not bar them from canceling the purchase agreement. (R.App. 14 (citing Tarpy v. Nowicki, 175 N.W.2d 443, 447 (1970))). Further, the Trial Court found that Respondents removed one of the easements and Appellants waived the existence of the other two Easements. (R.App. at 9). As such, even where the Trial Court found a breach of contract, it also found that the purchase agreement had been cancelled and Appellants waived the existence of the alleged breach. (Id.). With respect to the other breaches, the Trial Court found that Appellants' claims were extinguished by the valid cancellation of the Purchase Agreement or did not constitute a breach of contract. (R.App. 9-23). As such, Respondents focus on the cancellation of the Purchase Agreement.

the parties under the contract for deed are terminated.

In re Butler, 552 N.W.2d 226, 230 (Minn. 1996) (emphasis added). The statutory cancellation procedure applies to purchase agreements. Romain v. Pebble Creek Partners, 310 N.W.2d 118, 121 (Minn. 1981). Statutory cancellation cancels the entire purchase agreement, including those portions related to real estate and those portions related to personalty. Rudnitzki v. Seely, 452 N.W.2d 664, 668 (Minn. 1990); Zirinsky v. Sheehan, 413 F.2d 481, 484-85 (8th Cir. 1969) (stating that Minnesota law is clear “that once statutory notice has been served and cancellation effected, all rights under the contract are terminated.”). Upon expiration of the time period to cure, the contract is terminated. Tran v. Estate of Ditzler, 411 N.W.2d 6, 8 (Minn. Ct. App. 1987); Butler, 552 N.W.2d at 230.

Service of cancellation is to be accomplished in the same manner as service of a summons in a civil action. Minn. Stat. § 559.21, subd. 4 (2006). Service of a summons may be made by serving the Minnesota Secretary of State if an officer cannot be found at the address on file with the secretary of state. Minn. Stat. § 5.25, subd. 1 (2006); Minn. R. Civ. P. 4.03(b) (2007).

The Agreement was cancelled. One Land is a Minnesota Corporation with offices at 14440 Round Lake Boulevard, Andover, Minnesota. On December 7, 2002, Plaintiffs attempted to serve notice of cancellation on One Land, but no officer was found. (A.App. 117). As a result, on December 9, 2002, Plaintiffs served the Minnesota Secretary of State. (A.App. 116). One Land received the Notice of Cancellation from the Minnesota Secretary of State via U.S. mail. (Tr. 5/12-13/05, p. 138-141; 5/13/05, p. 118, l. 20-23; A.App. 113-117; R.App. 154-160). One Land did not close on the Property by January

8, 2003. (Tr. 4/27/05, p. 327, l. 3-p. 328, l. 23). Since the notice of cancellation was served on One Land, and One Land failed to cure, all its rights under the Agreement were cancelled. As a result, One Land's rights under the Agreement are terminated, and One Land has no claim to the Property under the Agreement and no claim to damages under the Agreement.⁸

All alleged breaches of the Agreement are irrelevant. Appellants argue that Respondents breached the Agreement five times.⁹ This is a futile argument because Respondents cancelled the Agreement, and as such, the alleged prior breaches are irrelevant. Tarpy v. Nowicki, 286 Minn. 257, 262, 175 N.W.2d 443, 447 (1970). As the Trial Court held, the question of who breached the Agreement first is irrelevant because the Agreement was cancelled.

Defendants argue that plaintiff cannot recover because she was in default under the terms of the contract. Whatever validity this principle may have in the ordinary contract situation, it is without force when applied to a contract for deed, cancellation of which is provided for by Minn. St. 559.21.

⁸ One Land argues that Respondents' cancellation of the Purchase Agreement was void at its inception because (1) One Land's performance under the contract was excused by Respondents' prior breaches and repudiations, (2) there can be no statutory cancellation due to Respondents' continuing and ongoing repudiation and the fact that Appellants did not default on the Purchase Agreement, and (3) there were parties absent from the cancellation. (One Land's Brief, at 33-39). These arguments fail, among other reasons, because the effect of Appellants' failure to seek a temporary restraining order prior to January 8, 2003, during the statutory redemption period is that the Purchase Agreement was cancelled and Appellants "no longer had rights or standing to challenge the cancellation." Thomey v. Stewart, 391 N.W.2d 533, 536 (Minn. Ct. App. 1986).

⁹ For Respondents' arguments regarding each breach, please refer to the Trial Court Transcript, Respondent's written Closing Arguments and the Trial Court's Memorandum.) (Tr. 5/25/05 p. 108 l. 4-p. 118 l. 11; R.App. 76-78, 79, 9-17).

Tarpy v. Nowicki, 286 Minn. 257, 262, 175 N.W.2d 443, 447 (1970). Tarpy is consistent with paragraph 9.1 of the Agreement, wherein Respondents' invocation of Minnesota Statute Section 559.21 is not conditioned upon an absence of breach of the Agreement by Respondents. (R.App. 14-15; A.App. 68-69).

To the extent Appellant argues that the cancellation was void because Margaret Brickner and the Thomas E. Brickner Credit Trust did not join in the cancellation, the testimony at trial and the Trial Court findings show Appellants are wrong. "Findings of fact, . . . shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Minn. R. Civ. P. 52.01. In this regard, Margaret Brickner testified at trial that Cindy Braam notified her of their intent to cancel the Agreement with One Land and that she agreed to cancel the agreement. (Tr. 4/26-27/05, p. 170, l. 9-13; p. 171, l. 9-12). The Trial Court found Margaret Brickner's testimony credible on this issue and found that Margaret Brickner authorized the cancellation of the Agreement. (R.App. 5, ¶23). The Trial Court further found, and the evidence shows, that all Sellers authorized the Notice of Cancellation.¹⁰ (Tr. 4/26-27/05, p. 171, l. 9-12; 4/27/05, p. 329, l. 25 – p. 330, l. 4).

However, even if it could be established that Margaret Brickner did not authorize

¹⁰ Appellant One Land characterizes Margaret Brickner's Errata sheet as a "self-serving" affidavit. Appellant is incorrect. Margaret Brickner did not submit an affidavit contradicting deposition testimony; she simply complied with Rule 30.05. Minn. R. Civ. P. 30.05. It was for the Trial Court to judge Mrs. Brickner's credibility. D. Herr and R. Haydock, 1A, Minnesota Practice, § 30.31 (4th ed. 2003). The Trial Court found her testimony credible. (R.App. 5 ¶23).

the cancellation, the cancellation is still effective under the ratification doctrine. The Trial Court's finding, in the alternative, that there was at the very least a ratification of the cancellation is supported by the law and evidence. A trustee may ratify the actions of agents even if the trustee did not grant specific authorization before the agent performed the act. See Hill v. Peoples, 95 S.W. 990 (Ark. 1906) (a ratification of a sale made by an agent was equivalent to trustee making a sale themselves). Ratification occurs when one "confirms, approves, or sanctions, by affirmative act or acquiescence, the originally unauthorized act of another, thereby creating an agency relationship and binding the principal by the act of his agent as though that act had been done with prior authority." Anderson v. First Nat'l Bank of Pine City, 303 Minn. 408, 410, 228 N.W.2d 257, 259 (1975). Minnesota law expressly provides for ratification by a personal representative of acts done by others: "A personal representative may ratify and accept acts on behalf of the estate done by others where the acts would have been proper for a personal representative." Minn. Stat. § 524.3-701 (2006). Therefore, even if One Land could establish that Margaret Brickner as trustee did not authorize the cancellation of the Agreement, Respondents proved at trial that she ratified the cancellation. (Tr. 4/26-27/05, p. 171, l. 9 – 17; A.App. 160). Thus, as the Trial Court found, Margaret Brickner cancelled the Agreement and ratified it. (R.App. 5 ¶ 23, 15-17).

Once cancelled, Appellants lack standing to even contest the cancellation of the Agreement. The effect of Appellants' failure to seek a temporary restraining order prior to January 8, 2003 is the determinative factor in this case. On this issue, the Minnesota Court of Appeals has reasoned as follows:

Taken together, D.J. Enterprises and Hommerding establish that a claim against [sellers] in a cancellation action **must be initiated within the applicable statutory redemption period**. In the present case, [the purchaser] did not assert his defense . . . until the day of the . . . summary hearing . . . after the redemption period had expired. **In short, he asserted a defense based on the contract when he no longer had rights or standing to contest the cancellation**. His interest under the contract terminated as of [the end of the statutory redemption period].

Thomey v. Stewart, 391 N.W.2d 533, 536 (Minn. Ct. App. 1986) (emphasis added).

Accordingly, once a party fails to redeem or seek a temporary restraining order within 30 days after a notice of cancellation is served the purchaser no longer has rights or standing to contest the cancellation. Thomey v. Stewart, 391 N.W.2d 533, 536 (Minn. Ct. App. 1986); Am. Fed. Savings Bank v. Peterson, No. C3-88-138, 1988 WL 88534 (Minn. Ct. App. Aug. 30, 1988)(A claim against a canceling party must be initiated within the applicable statutory period of redemption under § 559.21)(R.App. 125); see Hommerding v. Peterson, 376 N.W.2d 456, 458 (Minn. Ct. App. 1985)(claim for misrepresentation cannot be brought after statutory redemption period expires); Zirinsky v. Sheehan, 413 F.2d 481, 484-85 (8th Cir. 1969). One Land did not move for a temporary restraining order in 2002 or 2003 to stop the cancellation. (Tr. 5/12-13/05, p. 144, l. 11-p.147, l. 6; 5/13/05, p. 118, l. 20-p. 120, l. 10) As a result under Minnesota law, One Land has no rights or standing to challenge the statutory cancellation.

II. DUCKWALL HAD NO INTEREST IN THE PROPERTY.

Duckwall had no interest in the Property. First, Duckwall could not be assigned

an interest in the Agreement under the terms of the Agreement. Second, any interest Duckwall could have claimed was cancelled on January 8, 2003, as is the case for One Land. As a result, the Trial Court should be affirmed.

A. The Agreement could not be assigned to Duckwall.

The Agreement could not be assigned to Duckwall by its plain and ordinary meaning.¹¹ Unambiguous contract language must receive its plain and ordinary meaning. Denelsbeck v. Wells Fargo & Co., 666 N.W.2d 339, 346-47 (Minn. 2003).

The court applies the following rules in deciding the meaning of a contractual agreement:

- (1) whether a contractual provision is ambiguous is a legal question;
- (2) a contract provision is ambiguous if it is reasonably susceptible to more than one meaning;
- (3) if the provision is ambiguous, determining that ambiguity requires a factual determination; and
- (4) if the language is not ambiguous then it should receive its plain and ordinary meaning.

Id.

The Agreement limited assignments to one or more entities formed to acquire the assets or portion of the assets. Specifically, the assignability of the Agreement was limited by the parties as follows:

12.11 Assignment. Buyer shall be entitled to assign this Agreement to one or more entities formed to acquire the

¹¹ Gambucci's son, Ryan Gambucci, was involved in a scenario much like the one in this case. See Gambucci v. Bruestle, No. CX-00-1807, 2001 WL 826801 (Minn. Ct. App. July 24, 2001)(R.App. 148). In Bruestle, Transact, Inc. entered into a purchase agreement for property with Bruestles. Id. at *1. Bruestles served Transact with a notice of cancellation of the purchase agreement. Id. In response to the cancellation, Transact informed Bruestle that it had assigned its interest in the property to Gambucci. Id. As such, the instant case is not the first time Gambucci has tried to circumvent a cancellation by assigning an interest to another person.

Assets or portion of the Assets, provided that such assignment shall not release Buyer from any liability hereunder. Duckwall is a natural person. He was not “formed to acquire the Assets.” Duckwall’s attempt to define the single word “entities” to the exception of the greater context of the paragraph 12.11 distorts the paragraph’s meaning.

Moreover, the Sellers understood that Paragraph 12.11 meant that One Land could only assign the Agreement to a legal entity it formed for purposes of acquiring assets or a portion of the assets. (Tr. 4/25/05 (afternoon) p. 36, l. 17 – p. 38, l. 1; 4/27/05, p. 322, l. 20)-p. 323, l. 7). The Sellers never intended that the Agreement could be assigned to an individual such as Duckwall. (Tr. 4/25/05 (afternoon), p. 37, l. 22 – p. 38, l. 1; 4/27/05, p. 323, l. 7-8; p. 371, l. 17-25). The Trial Court’s finding that the Agreement could not be assigned to Duckwall should be affirmed.

B. Duckwall’s purported interest was cancelled.

Any interest Duckwall allegedly had was validly cancelled. A seller is not required to serve a buyer’s assignee with notice of cancellation where the sellers were not put on notice of the assignee’s interest at the time of service of the notice of cancellation under Minn. Stat. 559.21. Zirinsky v. Sheehan, 413 F.2d 481, 483-84 (8th Cir. 1969). The reason for this is that it is “well settled that, while notice to an obligor is not essential to the validity of an assignment as between an assignor and an assignee, until such notice has been given, the obligor may continue to regard the assignor as the owner of the interest or thing assigned. . .” Pillsbury Inv. Co. v. Otto, 242 Minn. 432, 437, 65 N.W.2d 913, 916 (1954). Here, Respondents did not know that Duckwall was an alleged assignee of the Agreement until January 6, 2003, when Jeff Johnson received a telephone call from

One Land's counsel, John Schoonover. (Tr. 4/25/05 (afternoon), p. 46, l. 21 – p. 47, l. 11; 4/27/05, p. 330, l. 5 – p. 331, l. 10; p. 334, l. 1 – p. 335, l. 20). Respondents never received written notice of any alleged assignment to Duckwall until after the cancellation was effective on January 8, 2003. (Tr. 4/27/05, p. 334, l. 9 – p. 335, l. 16). Further, the Trial Court specifically found Gambucci and Duckwall not credible on their testimony that they met Gary Braam at Sandee's Restaurant to notify him of the agreement to assign to Duckwall. (R.App. 4, ¶ 19). Additionally, the Trial Court found Gary Braam's testimony credible that he had never met Duckwall prior to this litigation and that Respondents were never notified of the assignment. (*Id.* at ¶ 20). The Trial Court's finding that the Agreement was validly cancelled as to Duckwall should be affirmed.

III. ONE LAND AND DUCKWALL ABANDONED ANY INTEREST.

Even if this Court were to find that Respondent did not properly cancel the Agreement, Appellants abandoned the Agreement, and as a result, gave up any claim based on the Agreement.

In this regard, while Minnesota Statute Section 559.21 specifies a cancellation procedure to be followed in terminating a buyer's interest under a purchase agreement, failure to follow that procedure does not prevent termination of the purchase agreement where the purchaser abandons his interest. Application of Berman, 310 Minn. 446, 451-52, 247 N.W.2d 405, 408 (1976). Abandonment is the voluntary relinquishment of an interest by the owner which may be ascertained from the acts of the parties. Ahlstrand v. McPherson, 285 Minn. 398, 401, 173 N.W.2d 330, 333 (1969). A finding of abandonment is predicated on all of the facts and circumstances concerning the owner's

relationship with the subject property and seller. Berman, 310 Minn. at 452, 247 N.W.2d at 408. In upholding findings of abandonment, courts have relied on a number of factors, including: (1) failure to pay on the contract for a period of time; (2) failure to take possession of the Property; (3) failure to pay real estate taxes; and (4) awareness of the seller's intent to terminate the contract, coupled with a failure to assert any right to the Property for a period of time. Id. (citing Ahlstrand v. McPherson, 285 Minn. 398, 173 N.W.2d 330 (1969); Stadelmann v. Boothroyd, 170 Minn. 430, 212 N.W. 908 (1927)). Abandonment has been found where a party has failed to assert an interest in the Property for nine (9) months, Berman, 310 Minn. at 452-53, 247 N.W.2d at 408-409, for thirty-three (33) months until a suit was started, Ahlstrand, 285 Minn. at 402, 173 N.W.2d at 333, and for eighteen (18) months from the date a Buyer was suppose to close, Boulevard Plaza Corp. v. Campbell, 254 Minn. 123, 135, 94 N.W.2d 273, 283 (1959).

In Berman, the buyer defaulted in failing to make payments in February, March and April 1974. Berman, 310 Minn. at 453, 247 N.W.2d at 409. In April 1974 the Seller attempted to cancel the interest through a Notice of Cancellation proceeding. Id. at 453, 247 N.W.2d at 408. On May 6, 1974, the Seller gave another notice of the default. Id. Attorneys for the buyer contacted the Seller twice between June and September 1974, but made no attempts to negotiate or tender payments. Id. The Court found the cancellation was not effective. Id. at 452, 247 N.W.2d at 408. The Seller, however, argued that the actions of the Buyer showed abandonment. Id. The Minnesota Supreme Court concluded:

Two visits and two telephone calls by alleged agents of defendants, without any attempt to negotiate or tender payment, take possession, actually make repairs or in any

other way actively assert an interest in the Property between the time those agents learned of the default in May and June and the commencement of this action in October 1974 are **not** sufficient to overcome the . . . conclusion of abandonment. **Defendant's failure to actively assert their interest in the subject Property coupled with the long period of arrearage, adequately justifies a conclusion of abandonment.**

Id. at 453, 247 N.W.2d at 409. (emphasis added). All totaled, the buyer in Berman failed to make payments for 9 months from the last date payment was due and not made, to the date the action was commenced (or a total of two years from the last date payment was due and not made, and disposition by the Supreme Court) and failed to actively assert an interest in the Property for nine months. Id.

Here, Duckwall knew that a Notice of Cancellation had been given to One Land. (Tr. 5/13/05, p. 118, l. 20-23). Despite this knowledge, Duckwall never set up a closing date, and took no action whatsoever from the time he alleges he asserted an interest on January 9, 2003 until he filed a Notice of Adverse Claim—a period of nearly 12 months.¹² (Tr. 5/13/05, p. 125, l. 8 – p. 126, l. 18; p. 128, l. 10 – 18; p. 128, l. 24 – p. 129, l. 24; p. 131, l. 12 – 15; p. 137, l. 3 – 139, l. 3). Further, Jeffrey Johnson testified that he did not hear from One Land or Duckwall, or an attorney on their behalf from January 9, 2003 until the end of December, 2003. (Tr. 4/27/05, p. 339 l. 9 – 15).

Instead of attempting to close on the Agreement or somehow show that he still claimed an interest in the Agreement, Duckwall waited until Respondents had finished their very public approval process, and then filed a notice of adverse claim which

¹² Moreover, Duckwall never objected to the marketability of title to the Sellers. (Tr. 5/13/05, p. 110, l. 4 – 6; p. 132, l. 15 – 18; 4/27/05, p. 339, l. 9-15).

prevented the closing with Town Center Development, LLC from occurring. (Tr. 5/13/05, p. 137, l. 3 – p. 139, l. 3; A.App. 139). Waiting twelve months to clear up easements is contrary to the Agreement and shows Duckwall and One Land abandoned the Agreement.

The Agreement at paragraph 3.2 provides that if Buyer objects to title, Sellers are allowed sixty (60) days from receipt of the objections to make title marketable. The Agreement further provides that if title is not marketable, Buyer may void the Agreement or waive objections to title and proceed to closing. (A.App. 62). Thus, in failing to close within 60 days of allegedly objecting to title, Duckwall and One Land evidenced an intent to abandon the Agreement. (A.App. 62).

Duckwall's and One Land's inaction show a complete abandonment of the Agreement even more so than in Berman. As a result, Duckwall and One Land abandoned the interest in the Agreement which means they gave up any claim to the Property, and any claim based on the Agreement for alleged breaches. The Trial Court's finding on abandonment should be affirmed.

IV. DUCKWALL SLANDERED RESPONDENTS' TITLE.

Duckwall slandered the title of the real property preventing the closing with Town Center. Slander of title is shown if: (1) a false statement is made; (2) about the title of Property; (3) with malicious intent; and (4) which resulted in special damages. Kelly v. First State Bank of Rothsay, 145 Minn. 331, 332, 177 N.W. 347, 347 (1920).

Here, in the Notices of Adverse Claim,¹³ Duckwall claimed that he had an interest in the Property. (A.App. 139; 141). This claim is false for at least four reasons. (R.App. 39). First, the Agreement was cancelled effective January 8, 2003. (Tr. 4/27/05, p. 383, l. 3-9). Second, Duckwall did not enjoin the cancellation. (Tr. 5/13/05, p. 118, l. 20 – p. 119, l. 8). Third, Duckwall and One Land abandoned the Agreement because neither of them exercised any of their remedies under the Agreement. (R.App. 8, 32-37). And, fourth, Duckwall was not a valid assignee of the Agreement. (R.App. 8, 23-32). As such, Duckwall's statements in the Notices of Adverse Claim are false.

Further, both Notices of Adverse Claim were filed with the Anoka County Recorder, and therefore, were published to the world. (A.App. 140; 142). Duckwall signed both Notices and both were filed for Duckwall's benefit. (*Id.*) As such, the Notices were published to others.

Moreover, the false statement was published with malice. "In a slander-of-title case, malice requires that the disparaging statements be made without a good-faith belief in their truth." Bridgeplace Associates, L.L.C. v. Lazniarz, No. A04-2218, 2005 WL 1869657, at *7 (Minn. Ct. App. Aug. 9, 2005)(R.App. 136). Here, Duckwall knew about the Cancellation of the Agreement because Gambucci told Duckwall about the service of the Notice of Cancellation. (Tr. 5/13/05, p. 118, l. 20-23). In addition, in a letter dated

¹³ Specifically, Duckwall filed two Notices of Adverse Claim: (1) Notice of Adverse Claim on Registered Land dated December 3, 2003 and filed December 30, 2003 with the Anoka County Registrar as document number 1885950 (A.App. 139); and (2) Amended Notice of Adverse Claim on Registered Land dated December 17, 2003, and filed January 5, 2004 with the Anoka County Recorder as document number 1886970 (A.App. 141).

January 9, 2004, Duckwall was put on notice that Respondents objected to the Notice of Adverse Claim and that Respondents demanded Duckwall execute a Quit Claim Deed releasing the Property from the Notice of Adverse Claim. (A.App. 143-144). Assuming Duckwall had any rights under the Agreement, the remedies under paragraphs 3.2 and 9.2 if the Agreement had long expired before Duckwall filed the Notices of Adverse Claim. (A.App. 62; 69). Duckwall also testified that he filed the Notices of Adverse Claim in order to prevent the sale of the Property to Town Center Development. (Tr. 5/13/05, p. 58, l. 11-24). Duckwall further testified that in 2002 he discussed with Gambucci the need to get their then-attorney, Schoonover, to obtain a temporary restraining order to prevent the cancellation of the Agreement from being effectuated. (Tr. 5/13/05, p. 118, l. 20 – p. 119, l. 8). Additionally, Duckwall did not have any contact with Respondents for nearly a year after the Agreement was cancelled. (Tr. 5/13/05, p. 125, l. 16 – p. 126, l. 18). For all these reasons, Duckwall did not have a good faith belief that he possessed an interest in the Property, and as such, the filing of the Notices of Adverse Claim was malicious.

Duckwall argues that a person cannot slander title without bad faith, and there can be no bad faith on Duckwall's part because he hired counsel to assist him with his Notice of Adverse Claim. (Duckwall's Brief, at 32). This argument fails for several reasons. "[R]eliance on advice of counsel by a defendant in a slander-of-title action, although not conclusive, is evidence of good faith and probable cause, where the defendant has 'fully and fairly' informed counsel of all relevant facts known to the defendant." Bridgeplace Associates, L.L.C. v. Lazniarz, No. A04-2218, 2005 WL 1869657, at *9 (Minn. Ct. App.

Aug. 9, 2005)(R.App. 136). First, there was no testimony from Duckwall’s counsel, the Van House law firm, as to whether Duckwall “fully and fairly” informed his counsel of all relevant facts known to him. (See trial transcript generally.) Second, just because counsel files a document for a client, does not mean Duckwall did not lie to counsel. In fact, Duckwall’s testimony was found not credible, and his transaction with One Land was found to be a sham. (R.App. 6 ¶34, 23, 41). For these reasons, Duckwall cannot simply rely on the fact that counsel filed a Notice of Adverse Claim, which Duckwall signed, on his behalf to show he had no malice in filing the document.

Further, “[i]n an action for slander of title, the presence or absence of malice is generally a question of fact.” Bridgeplace Associates, L.L.C. v. Lazniarz, No. A04-2218, 2005 WL 1869657, at *7 (Minn. Ct. App. Aug. 9, 2005) (citing Restatement (Second) of Torts § 652(2)(f) (1977) (stating that in slander-of-title cases, “the jury determines whether ... the defendant had knowledge of the falsity of the statement or acted in reckless disregard of its truth or falsity”)(R.App. 136). “[W]here there is sufficient evidence, or where there may be a fair difference of opinion, on the issue of malice, the question whether the defendant in an action for slander of title was actuated by malice is one of fact.” Bridgeplace Associates, L.L.C., 2005 WL 1869657, at *7 (citing 50 Am.Jur.2d Libel and Slander § 568 (2004) (summarizing Restatement rules). Here, the Trial Court found, for several reasons, that Duckwall’s “filing of the Notice of Adverse Claim was malicious.” (R.App. 39-41). As a fact issue, this Court will only overturn the finding if it is clearly erroneous—i.e. whether the finding is “manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a

whole.” In this case, the Trial Court used Duckwall’s own testimony to find that Duckwall acted with malice. (R.App. 40-41). As such, the Trial Court’s finding that Duckwall acted with malice is reasonably supported by the evidence as a whole. The Trial Court should be affirmed.

Duckwall argues that Respondents did not prove up damages in their case-in-chief.¹⁴ This is not true. At the beginning of trial, the parties stipulated that the issue of attorneys’ fees would be brought by motion after trial. (See Tr. 4/25/05 (morning), p. 7, l. 4-p.8, l. 6.) Further, according to Cindy Braam’s testimony, Respondents incurred attorneys’ fees of approximately \$100,000, based on the last bill she received prior to trial. (Tr. 4/25/05 (afternoon) p. 58, l. 12-21). As a result, the fourth element of slander of title is met. Respondents are entitled to judgment against Duckwall for Slander of Title for the attorney’s fees incurred in this action as recommended by the Special Master and adopted by the Trial Court.

V. THE TRIAL COURT HAS THE RIGHT TO APPOINT A SPECIAL MASTER TO DETERMINE COSTS AND FEES.

The appointment of the Special Master and the Special Master's findings are supported by the record. First, the Special Master was properly appointed. Second, the Respondents met their burden of proving their costs and disbursements. Third, the Trial Court properly awarded attorneys' fees based on the Special Master's report. As a result, the Trial Court’s findings should be affirmed.

¹⁴ Duckwall makes this same argument in section IV of his brief at pages 41-42. This argument fails because Cindy Braam did testify about attorneys fees incurred. (Tr. 4/25/05 (afternoon) p. 58 l. 12-21). As such, Duckwall’s argument that Respondents failed to offer proof of damages in the form of attorneys’ fees has no merit.

A. The Trial Court Has Authority to Appoint a Special Master.

After receiving the Special Master's final report, and now on appeal, Duckwall argues that the Trial Court was without authority to appoint the Special Master. (A.App. 284; Duckwall's Brief, at 43). As an initial matter, Appellants' original objection to the appointment of the Special Master was untimely, and as such, Appellants waived the right to object to the appointment of the Special Master.

The Trial Court appointed Eric Magnuson as the Special Master in an Order dated February 21, 2006. Pursuant to the Trial Court's email dated February 27, 2006, the parties were given an opportunity to object to the appointment of the Special Master. (R.App. 122). No party objected to the appointment of the Special Master. (A.App. 278). On March 10, 2006, the Trial Court issued a second Order appointing Eric Magnuson as the Special Master. (A.App. 278). The Special Master issued his final Report and Recommendation on April 6, 2006. (A.App. 284).

Appellants are incorrect on the merits of their argument. Appointment of a Special Master is provided for by the Minnesota Rules of Civil Procedure. Minn. R. Civ. P. 53.01 (2007). The decision to appoint a Special Master is within the Trial Court's discretion. Minn. R. Civ. P. 53.01. There is nothing improper or inappropriate about appointing a Special Master. The Trial Court did not abuse its discretion by doing so.

Further, Appellants were given the chance to object to the appointment of the Special Master and they chose not to do so. (A.App. 278). Appellants only showed an interest in challenging the Special Master's appointment after the Special Master's report did not provide favorable findings to them. It would be unfair and prejudicial to allow

Appellants the opportunity to object to the Special Master's appointment after they received the final report and after all parties have incurred costs for the Special Master's services. Because Defendants did not timely object to the appointment of the Special Master, they have waived their right to object to the appointment of the Special Master.

B. Respondents Met Their Burden of Proof on Costs and Disbursements.

Duckwall claims that Respondents have failed to meet their burden of proof for their requested costs and disbursements. Duckwall is incorrect. In previous submissions at the lower court, Respondents have filed ample support and documentation for their requested costs and disbursements.¹⁵ The Special Master dismissed Duckwall's argument, as follows:

Defendants argue repeatedly that there is insufficient documentation to support the claimed costs and disbursements. Except as noted in the specific discussion above, each item claimed is supported by adequate information to establish that the costs or disbursements were incurred or paid. It is not necessary that a party seeking an award establish that expenses were actually paid; they need only show that the expenses were incurred. See Minn. Stat. § 549.04, subd. 1, allowing "reasonable disbursements paid or incurred." (emphasis added) The Affidavit of Bradley Kletscher, and the memoranda submitted in support of the request for costs and disbursements state clearly the nature of the claimed expense. No more documentation is needed.

(A.App. 293).

The Special Master's finding is correct. (R.App. 161). Because Respondents have met their burden of proof, the Court should uphold the Special Master's report.

¹⁵ See Affidavit of Bradley A. Kletscher, dated September 28, 2005, submitted with Respondents' Request for Taxation of Costs and Disbursements. (R.App. 161).

C. Respondents Are Entitled to Attorneys' Fees.

Duckwall argues that the Special Master lacked familiarity with this case.¹⁶ (Duckwall's Brief, at 44). Duckwall's argument misses the point. The relevant inquiry is whether the fees are reasonable. The Special Master need not have personal involvement in the case or with the law firm requesting fees to determine whether those fees are reasonable. The Special Master's experience reviewing bills for his own law firm only aids him in determining what fees are reasonable. Moreover, the Trial Court reviewed the Special Master's findings and adopted them. (A.App. 304). The Trial Court most certainly observed the attorneys' work during trial.

Duckwall further argues that Respondents' fee agreement with Town Center mitigates his responsibility to pay for his torts. The Special Master specifically addressed and rejected this argument. The Special Master's report provides:

Additionally, the fact that Town Center has agreed to share with plaintiffs the cost of this litigation is irrelevant as to both costs and fees. An insured party is entitled to tax costs and disbursements despite the fact that they will be reimbursed by an insurance company. There is no material difference here.

(A.App. 293). Duckwall fails to cite any legal authority to the contrary. The Special Master considered and rejected Duckwall's objection to Respondents' claim for

¹⁶ It is true that the Special Master was not in court to see arguments and trial. However, the Special Master did review submissions from the parties and as such did observe work performed by the parties.

attorneys' fees and the Trial Court upheld the Special Master's report in its entirety.

In addition, Duckwall contends that Respondents are not entitled to their attorney's fees from Duckwall because they chose not to sue Thomas Gambucci on a personal guaranty to seek attorney's fees pursuant to the Agreement. Duckwall's argument is misplaced. Respondents' decision not to sue and seek attorney's fees from Thomas Gambucci individually has no bearing on the reasonableness of attorney's fees incurred for Respondents' slander of title claim against Duckwall or the fact that Duckwall's actions resulted in these fees being incurred. Duckwall cites no authority for his argument. Duckwall's citation to the District of Kansas case Sheldon v. Vermonty, 237 F. Supp. 2d 1270 (D. Kan. 2002), has nothing to do with barring attorney's fees against one defendant because they could possibly have been awarded against another defendant. The language from Sheldon as quoted by Duckwall states that fees that could not be billed to the "client" cannot be recovered from an adversary. (Duckwall's Brief, at 47). Gambucci is certainly not a Respondent or Respondents' attorney's client. Thus, Sheldon is inapposite and should be disregarded by the Court.

Respondents must show their attorney's fees were reasonable, not whether another defendant could have been responsible for attorney's fees as well under a completely different legal theory.¹⁷ Civil judgments are subject to joint and several liability. Even indulging Duckwall's theory and assuming Respondents had sued Thomas Gambucci personally and had been awarded attorney's fees pursuant to the Agreement, both

¹⁷ See Affidavit of Laura R. Gurney, submitted with Respondents' Motion for Attorneys Fees dated September 28, 2005. (R.App. 306).

Gambucci and Duckwall would be liable for Plaintiffs' attorney's fees. Certainly an award of attorney's fees against One Land would not support a denial of attorney's fees against Duckwall. Thomas Gambucci did not file an adverse claim to Respondents' property. Only Duckwall filed the notice of adverse claim. Duckwall chose to take the risk of filing an adverse claim against the Property. Duckwall should be required to pay all of Respondents' attorney's fees as special damages to their successful Slander of Title cause of action.

Duckwall also asks the Court to award no fees at all to Respondents. Duckwall cites to cases from the Fourth, First, Seventh and D.C. Circuits for this proposition. (Duckwall's Brief, at 47-48). The cases cited by Duckwall apply only to Section 1988 claims under federal law. Duckwall does not cite an Eighth Circuit case or a Minnesota case for his position. Therefore, the cases have no bearing here. In addition, the rationale of the cases cited by Duckwall does not apply to this case. As a result, Duckwall's arguments are unfounded.

VI. THE TRIAL COURT PROPERLY DENIED ONE LAND'S MOTION TO AMEND TO INSERT A CLAIM FOR PUNITIVE DAMAGES

The Trial Court properly denied One Land's motion to amend to assert a claim for punitive damages. One Land's claim for punitive damages, which was originally brought on April 4, 2005, was denied by the Trial Court before trial began. (R.App. 123-124). Appellants brought an oral motion for punitive damage at the end of trial, as well, which was also denied. Tr. 5/25/05, p. 8, l. 8-p. 10 l. 20.

The district court has broad discretion to grant or deny a motion to amend a

complaint, and its ruling will not be reversed absent a clear abuse of discretion. Fabio v. Bellomo, 504 N.W.2d 758, 761 (Minn. 1993). Here, Appellants did not, and cannot, prove any of their substantive claims, as such they cannot meet their burden to show that punitive damages would be warranted. See Azbill v. Grande, No. A04-2139, 2005 WL 1331718, at *8 (Minn. Ct. App. June 7, 2005) (holding that because appellant failed to show causation as to her substantive claims, she could not sustain her burden to show that punitive damages would be warranted)(R.App. 129). Moreover, Appellants' motion for punitive damages was late—i.e. on the eve of trial—and late motions to amend the complaint cause prejudice and therefore should be denied. See Watts v. Blood Plasma Services, Inc., No. CO-88-1263, 1988 WL 106278, at *2 (Minn. Ct. App. Oct. 18, 1988) (“Prejudice can be shown by appellant’s late effort to impose a new theory of liability that respondent would have to defend.”) (citing Ericksen v. Wilson, 266 Minn. 401, 123 N.W.2d 687 (1963)(R.App. 150). Further, One Land does not address how the Trial Court’s ruling on the issue of punitive damages was an abuse of discretion. Additionally, in its brief, One Land does not provide the facts it relies on to make a prima facie case of punitive damages, relying instead on the facts set forth elsewhere in the brief.¹⁸ As such, One Land should not be permitted to add a claim for punitive damages.

Even though One Land does not assert the claim on which it bases its claim for punitive damages, Respondents assume One Land is discussing its fraud counterclaim.

¹⁸ Appellant One Land did not adequately brief this issue. As such, the Court should decline to reach the punitive damages issue. See Minn. Dep’t of Labor & Industry v. Wintz Parcel Drivers, Inc., 558 N.W.2d 480, 480 (Minn. 1997) (declining to reach issue in absence of adequate briefing).

On the issue of fraud, there is no evidence that there was any reasonable reliance upon any statement by Respondents regarding easements on the Property. Specifically, Gambucci testified that he did not rely on what any seller of the Property told him about easements—instead, he testified that he relied on the title examination for such information. (Tr. May 12- 13, 2005, p. 18, l. 25 – p. 19, l. 2). Further, there is no evidence that the missing Easement document from the Agreement was purposely left off the Agreement with the intent to defraud Appellants about Easements. In this regard, the testimony at trial was that there should have been an Exhibit listing the Easements on the Property, but the exhibit was mistakenly not attached to the Agreement. (Tr. 4/27/05, p. 358, l. 16 – p. 360, l. 4). As such, Appellants cannot satisfy the elements of a claim for fraud and as such, cannot establish punitive damages are warranted. (R.App. 9, 42-45). Therefore, Appellants cannot base a claim for punitive damages on a claim they cannot establish after a full trial on the merits. The Trial Court did not abuse its discretion in denying Appellants’ motion to amend the complaint to add a claim for punitive damages, before and after trial, and the decision should be affirmed.

VII. CLARK GOSET’S DAMAGE CALCULATIONS WERE TOO SPECULATIVE TO AWARD DAMAGES TO APPELLANTS

As an initial matter, the Trial Court noted that a decision in favor of Respondents rendered any discussion of Appellants’ expert’s testimony moot. (R.App. 45). However, the Trial Court did address Appellant’s expert and found that based on the testimony of both Goset and Robert Lunieski, Respondents’ expert, and all other witnesses, the lost profits of Appellants were too speculative to determine. (Id.). In that regard, the Trial

Court found that Goset was not provided with enough data regarding costs of construction and market analysis to reach a reasonable estimate of damages. (Id.); (see Tr. 5/16/05, p. 51, l. 21 – p. 52, l. 22; p. 52, l. 25 – p. 54, l. 24; p. 133, l. 12 – p. 134, l. 10; p. 135, l. 4 – p. 137, l. 24; p. 145, l. 1 – p. 151, l. 7).

Damages must be shown to be reasonably certain and cannot be speculative or conjectural. Jackson v. Reiling, 311 Minn. 562, 249 N.W.2d 896 (1977). Further, absolute certainty is not required to determine damages and an award of damages will not be denied merely because of difficulty in ascertaining them. Bonhiver v. Graff, 311 Minn. 111, 248 N.W.2d 291 (1976). There is no general test for speculative or conjectural damages; such matters should usually be left to the judgment of the trial court. Jackson, 311 Minn. at 563, 249 N.W.2d at 897. Here, the Trial Court found Appellant's damages were too speculative. (R.App. 45).

On appeal, Appellants now argue that the damages are “inherently speculative due to the wrongful acts of the Respondents.”¹⁹ (One Land's Brief, at 43-44). However, as the evidence shows, any speculative damages are the direct result of One Land and Duckwall's failure to pursue building plans, governmental approval, contractor estimates, and money to close. (Tr. 5/13/05, p. 77, l. 21 – 25; p. 107, l. 12 – p. 108, l. 4; p. 108, l. 19

¹⁹ At the Trial Court, Appellants argued that Goset's opinions regarding approximately \$1.7 million in damages were supported by city minutes, drawings by Paul Holmes, and Fridley zoning codes. (Tr. 5/25/05, p. 44, l. 6-p. 51, l. 1; p. 75, l. 22-p. 78, l. 3). This argument is contrary to Appellants' argument on appeal that the damages are speculative due to acts by Respondents. The Court of Appeals will generally not consider matters not argued and considered in the trial court. Thiele v. Stich, 425 N.W.2d 580, 582 (Minn. 1988). The issue of whether Respondents caused the uncertainty of damages was not raised at the Trial Court and should not be considered on appeal.

– p. 109, l. 10; p. 143, l. 23 – p. 144, l. 17). Appellants simply had no proof of what they were going to build so they could not estimate with a reasonable degree of certainty what the damages were. As such, Goset was not provided with enough data regarding costs of construction and market analysis to reach a reasonable estimate of damages. (R.App. 45; Tr. 5/16/05, p. 51, l. 21 – p. 52, l. 22; p. 52, l. 25 – p. 54, l. 24; p. 133, l. 12 – p. 134, l. 10; p. 135, l. 4 – p. 137, l. 24; p. 145, l. 1 – p. 151, l. 7). Therefore, Appellants damages are speculative, and the speculative nature of the damages is due to Appellants’ actions, not Respondents’ actions.

VIII. THE TRIAL COURT DID NOT MAKE REVERSIBLE ERRORS OF FACT

Appellants argue that various finding of the Trial Court are clearly erroneous. “Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.” Minn. R. Civ. P. 52.01. The trial court’s findings will only be set aside if they are “manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole.” Rogers v. Moore 603 N.W.2d 650, 656 (Minn. 1999). Here, Appellants fail to point out the facts in the record that support their claim. In fact, the findings of the Trial Court are supported by the record, and Respondents cite to the facts in the record that support each finding of the Trial Court.

The Findings of Fact in paragraphs 13-14 of the Trial Court states:

13. On October 11, 2002, One Land received a Title Commitment with an effective date of August 19, 2002. Sellers did not receive any written objections to this title commitment.

14. Tonseth testified that Gambucci did not have any concerns about the two Easements on the Property. The only concern Gambucci had was about a third easement that was mistakenly listed on the Title Commitment.

Appellants failed to cite any testimony or documents in the record that show these findings are not supportable. In fact, these findings are supported by the evidence. (Tr. 4/26-27/05, p. 55, l. 5-12; p. 57, l. 23 – p. 58, l. 6; p. 71, l. 9-17; p. 155, l. 8-11; 5/12-13/05, p. 90, l. 18-p. 91, l. 11; p. 109, l. 20 – p. 110, l. 20; p. 181, l. 16-21; 4/27/05, p. 317, l. 14-17; p. 318, l. 4-7; 4/25/05 (afternoon) p. 25, l. 8 – p. 27, l. 12).

The Findings of Fact in paragraph 15 of the Trial Court states:

15. A Second title commitment dated November 6, 2002, was then issued correcting the objected to easement from August 19, 2002 Title Commitment. No timely objections to the November 6, 2002 Title Commitment were made by either Defendant.

Here, Appellants cannot show that they ever objected to the November 6, 2002 Title Commitment. In fact, this finding is supported by the record. (Tr. 4/27/05, p. 428, l. 13-16; 5/13/05, p. 109, l. 20-p. 110, l. 20; A.App. 62, 118-119).

The Findings of Fact in paragraph 21 of the Trial Court states:

21. On December 9, 2002, Sellers served a Notice of Cancellation on One Land, which gave One Land until January 8, 2003 to close on the Agreement. Barna, Guzy, & Steffen represented the Sellers in drafting and serving the Notice of Cancellation.

Appellant One Land states that the cancellation of the Agreement was invalid. However, One Land cites no facts to supports its contention. The Trial Court's findings in paragraph 21 are supported by the record. (Tr. 4/25/05 (afternoon), p. 43, l. 1-p. 46, l. 4;

4/27/05, p. 327, l. 2-p. 329, l. 1; p. 382, l. 1-16; p. 383, l. 3-9; A.App. 113; 4/27/05, p. 327, l. 3-8; A.App. 114).

The Findings of Fact in paragraph 23 of the Trial Court states:

23. Margaret Brickner testified at trial that Cindy Braam notified her of their intent to cancel the Purchase Agreement with One Land and that she agreed to cancel the agreement. This Court finds that Margaret Brickner was credible as to this issue and that Margaret Brickner authorized the cancellation of the Purchase Agreement. Therefore, all Sellers authorized the Notice of Cancellation.

Appellant One Land asserts that if Margaret Brickner's Errata sheet is stricken,²⁰ the findings in paragraph 23 of the Trial Court Memorandum would be clearly erroneous.

Appellant is wrong. In order to show that the Trial Court's finding was clearly erroneous, Appellant must show that the finding is "manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole." Here, Margaret Brickner testified that she agreed to cancel the Agreement. (Tr. 4/26-27/05, p. 170, l. 9-13; p. 171, l. 9-12; p. 123, l. 16-18; p. 188, l. 20-22; 4/25/05 (afternoon), p. 44, l. 18-p. 46, l. 4). This is a credibility finding. As such, the Trial Court's finding cannot be clearly erroneous.

Appellant One Land cannot show that any of the Trial Court's findings were clearly erroneous. As such, the Trial Court findings should be upheld and the Trial Court decision upheld.

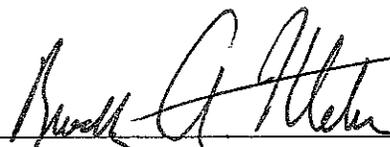
²⁰ The Trial Court properly made a judgment of credibility related to this issue. (R.App., at 15-17).

CONCLUSION

The Trial Court had the opportunity of hearing the testimony, watching the witnesses and seeing the testimony unfold before it. The evidence in the record supports the Trial Court's findings. The fact is that the Trial Court saw through Appellants' attempts to squeeze money from Respondents and Town Center Development through the assertion of a claim of an interest in the Property well after the Agreement was cancelled. The Appellants made their bed when they failed to seek a TRO in December 2002. Appellants cannot now rely on their own testimony that the Trial Court found not credible to undo the ruling of the Trial Court. The Trial Court's findings should be affirmed.

Dated: 3/9/07

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