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A08-735

State of Minnesota
In Court of Appeals

JEM Acres, LLC d/b/a Birch Haven Resort,

Plaintiff/Respondent,

v.

Patrick J. Bruno and Susan B. Bruno,

Defendants/Appellants.

BRIEF OF APPELLANTS PATRICK J. BRUNO AND SUSAN B. BRUNO

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STATEMENT OF THE ISSUES

I. BASED ON THE EVIDENCE PRESENTED, VIEWED IN A LIGHT MOST FAVORABLE TO RESPONDENT AND AS APPLIED TO MINNESOTA LAW, ARE APPELLANTS ENTITLED TO JUDGMENT AS A MATTER OF LAW AND, THEREFORE, RESPONDENT'S CLAIMS BASED ON ALLEGED VIOLATION OF MINN. STAT. § 115.55, BREACH OF CONTRACT AND FRAUD MUST BE ORDERED DISMISSED?

Longbehn v. Schoenrock, 727 N.W.2d 153 (Minn. Ct. App. 2007).

Anderson v. First Northtown Nat'l Bank, 361 N.W.2d 116 (Minn. Ct. App. 1985).

Bruggeman v. Jerry's Enterprises, 591 N.W.2d 705 (Minn. 1990).

Tysk v. Griggs, 253 Minn. 86, 91 N.W.2d 127 (1958).

II. IN THE ALTERNATIVE, ARE APPELLANTS ENTITLED TO A NEW TRIAL?

Halla Nursery, Inc. v. Baumann-Furrie & Co., 454 N.W.2d 905 (Minn. 1990).

Johnson v. State, 733 N.W.2d 834 (Minn. Ct. App. 2007), *rev. denied.*

Minn. Stat. § 115.55.

STATEMENT OF THE CASE AND FACTS

This appeal from the judgment and denial of a new trial concerns the sale and purchase of real property. The trial court, the Honorable Paul T. Benshoof, denied Appellants/Defendants Patrick J. Bruno and Susan B. Bruno's motion[1] for judgment as a matter of law and/or in the alternative for a new trial. (A. 1.) The Brunos appeal, asserting they are entitled to judgment as a matter of law and, in the alternative, that they are entitled to a new trial. (A. 107.)

In reviewing the facts of record on appeal, the Respondent/Plaintiff JEM Acres, LLC d/b/a Birch Haven Resort (JEM Acres) is entitled to have the facts viewed in a light most favorable to it. *Dean v. Weisbrod*, 300 Minn. 37, 217 N.W.2d 739, 742 (1974). So while the Brunos and other witnesses' testimony and recollection of various events may differ from that of JEM Acres and those connected with JEM Acres, the facts as presented are presented in a light most favorable to JEM Acres.

A. The Brunos Did Not Know or Have Reason to Know That There Was a Problem With the Septic System in June 2005.

1. Septic system was in compliance on June 11, 2002.

On April 23, 2003, Susan purchased for $525,000 the Birch Haven Resort (Resort), located on Gull Lake in Beltrami County. (T. 262-263, 266, 271, 360.) The

[1] When Appellants are referred to collectively, they will be referred to as Brunos. When referred to individually, Patrick J. Bruno will be referred to as Pat and Susan B. Bruno as Susan.

Resort was run by Susan and her husband, Pat. (T. 270.) Birch Haven Resort consists of 10 cabins, the owner's residence, four RV sites and utility buildings. (T. 268-269.)[2] The Brunos did not expand the Resort during their ownership. (*Id.*)

When purchased, the Brunos had no experience in the buying and selling of real estate. They had never even owned a home. (T. 280.) Pat had worked for 40 years in the hospitality, food and beverage business. (T. 261.) Susan worked as a designer and as a manager of a Cold Water Creek store in Colorado. (T. 342.)

The decision to purchase the Resort and move to Minnesota was made because Pat wanted to be closer to his family who lived in the Alexandria area. (T. 262, 342.) The real estate agent who represented them in the purchase was Frank Jerchovich with Realty Sales. (T. 263.) The Jansens were the Resort owners who sold their Resort to Susan. (T. 263.)

The Jansens told the Brunos to pump the septic system once a year and provided them with the June 11, 2002 Certificates of Compliance Inspection Form for Existing Individual Sewage Treatment Systems (Certificates of Compliance). (T. 265, 272; Trial Ex. 34; A. 98.) A certificate of compliance is good for three years. (T. 157, 163, 183); *see also* Minn. Stat. § 115.55, subd. 5(c); Minn. R. 7080.0315, subp. 3(2) ("Certificates of compliance for existing systems remain valid for three years from the date of issuance

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[2] The owner's residence was originally Unit 9, which is a three-bedroom mobile home. (T. 270.) Later, the Brunos moved into Unit 8. (*Id.*)

unless the local unit of government finds evidence of an imminent threat to public health or safety.")[3]

The June 11 Certificates of Compliance inform the reader that septic inspection for the Resort had been done on June 2, 2002 by Laird Hensel, a Minnesota licensed inspector. (Trial Ex. 34; A. 98.) The Resort's septic system was constructed in 1986. (A. 98, 100.) It consists of two systems. System one serves Cabins 8-11, its four RV sites and the restrooms. (A. 98.) Its components are one 1500 G Precast Septic Tank, one 400-500 G Sealed Tank for Grey Water and one "600 ft^2 mound." (A. 99.) System two serves Cabins 1-7, the laundry and shower house. (A. 100.) It consists of two 1500 G Precast Septic Tanks, one 500 G Precast Lift Tank and one "560 ft^2 mound." (A. 101.) In finding the systems compliant, Mr. Hensel examined construction records, probed the tank bottom, searched for seepage in the yard, talked to the Jansens and conducted soil bearings. (A. 99, 101.)

2. The Brunos hired Nenson Plumbing to perform any needed septic system repairs during their ownership.

During Susan's ownership, Susan handled the Resort's administration, such as its bookkeeping and reservations. (T. 271.) Pat was in charge of the Resort's routine

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[3] William Patnaude, Beltrami County Environmental Services District Director, testified that until the property is transferred, the June 11, 2002 Certificate of Compliance was valid for three years – i.e., until June 11, 2005. (T. 159, 182, 183.) He based this on Beltrami County Shoreland Management Ordinance, Section 802, which states that "[a] state Certificate of Compliance issued under this *Ordinance* shall be effective for five (5) years from the date of issuance for new systems or three (3) years for existing systems or until ownership of the property is transferred, whichever occurs first." (Trial Ex. 12; A. 77.)

maintenance. (T. 270-271.) If anything beyond routine maintenance with regard to plumbing/septic was needed, Pat called Nenson Plumbing, located in Blackduck, Minnesota. (T. 274.) Nenson had done work at the Resort for the previous owner. (T. 322.) The primary contact person at Nenson Plumbing was Tony Nendick. (T. 274.)

Mr. Nendick is licensed in septic system installation and design and has been pumping such systems for 12-13 years. (A. 322.) Mr. Nendick recalled that when the Brunos purchased the Resort, the prior owner had Mr. Nendick come out to the Resort and introduce himself to the Brunos. Mr. Nendick's company had pumped the septic tanks at the Resort throughout the years. (T. 324-325.) Nendick continued to do regular yearly pumping maintenance during the Brunos' ownership. (T. 325.)

During the Brunos' ownership, they had only two problems related to the septic system. In 2003, a sewer pump needed to be replaced. (T. 148, 324.) Mr. Nendick replaced the pump. He explained that a septic system is designed with an alarm system on it and it is on a float system. When the level in the tank gets to a certain point, it sounds an alarm which gives you 24 hours to change the pump. (T. 324.)

In the summer of 2004, a toilet backed up in Unit 11. (T. 152, 275.) Again, Pat called Nenson Plumbing. The problem was discovered to be a sewer pipe collapse. (T. 148, 153.) As a result, Pat performed further preventative maintenance and replaced 30-40 feet of the main sewer line between Cabins 9 and 11. (T. 145-146, 154.)

Other than those two instances, there was no work required on the septic system while the Brunos owned the Resort. (T. 276.) Pat had no reason to believe there was any problem with the septic system. (T. 276-277.) Pat testified:

> Q. Other than those two instances, were there anything that required work on the septic system by anything?
>
> A. No.
>
> Q. Anything that caused you to believe there were problems with the septic system?
>
> A. No.

(T. 276.)

Susan concurred that other than the pump and pipe replacement, the Brunos had no septic problems. (T. 343.) At no time did the septic system do anything to cause Susan to believe there was a problem with it. (T. 344.)

Mr. Nendick also had no concerns with the Resort's septic system or mounds. (T. 156, 325.) And the Brunos never told Mr. Nendick they had any problem with the mound systems. (T. 326.)

John Cole owns a resort across the lake from Birch Haven. (T. 279.) John Cole never saw fresh dirt on the Birch Haven sewer mounds. (T. 243.)

B. Susan Bruno Entered Into a Purchase Agreement to Sell Birch Haven to Kate Stelten (now Gaslin) and Jerry Gaslin in February 2005.

In December 2004, Pat and Susan decided to sell the Resort. (T. 277.) Making ends meet was a problem and Susan had started working at Home Depot. (T. 277-278.)

The Brunos decided that if the Resort sold, they would stay in the area because they owned a 20 acre parcel separate from the Resort but in close proximity. (T. 278-279.)

The Brunos hired Norm Cole, a realtor, to sell the Resort. They learned of Mr. Cole through his son John, who owned a resort across the lake. (T. 279.) Mr. Cole was familiar with the property, having listed it for sale many years earlier. (T. 206.) The Brunos expected Mr. Cole to put everything together for the sale. (T. 280.)

1. The Gaslins and Susan first entered into an Evaluation Agreement.

Mr. Cole created a disclosure agreement which he entitled "Evaluation Agreement." (T. 209; Trial Ex. 3; A. 38.) Once signed by the potential buyer, exhibit materials related to the Resort were furnished to the potential buyer. Provided to the potential buyer were five exhibits broken down into five different subjects. (T. 201-204; Trial Ex. 3; A. 38.) Exhibit C to Mr. Cole's Evaluation Agreement contained maps of the Resort, a satellite picture of the land, the drinking water report, the fire inspection report and all compliance documents, including the June 2002 sewer compliance reports. (*Id.*; T. 204, 348.)

Mr. Cole worked primarily with Susan, gathering the exhibit documents together for the potential buyers, and Susan provided the documents requested by Mr. Cole. (T. 281, 346.) Although the packet was put together for the first person to sign Mr. Cole's Evaluation Agreement, the same packet was to be used by anyone who was potentially interested in purchasing the Resort. (T. 347-349, Trial Ex. 31; A. 112.)

The initial Evaluation Agreement was signed by Mr. Strange. (T. 283.) Because of health problems, Strange did not purchase the Resort. (T. 284-285.) A few days later, in February 2005, Kate Stelten (now Gaslin) and Jerry Gaslin contacted Norm Cole expressing interest in purchasing the Resort.[4] (T. 285.) Kate Gaslin is a licensed real estate agent who sells residential property. (T. 33.)

The Gaslins had, in fact, looked at other resorts in the fall of 2004 with Mr. Cole, and Mr. Cole found the Gaslins to be "reasonably educated" and "[t]hey had looked at a lot of resorts." (T. 93, 94, 208, 227-228.) Mr. Cole helped them find the Resort. (T. 76.) After putting down a small deposit of $2,000 and signing the Evaluation Agreement, the Gaslins were given the exhibits to review. (T. 209-210; Trial Ex. 31; A. 112.)

The Evaluation Agreement was entered into between Kate Stelten/Jerry Gaslin and/or Assigns as Buyers and Susan Bruno ABA [sic] Birch Haven Resort and/or assigns as Seller. (Trial Ex. 3; A. 38.) The Evaluation Agreement is considered to be a "working document." (T. 211.) It provides for a 20-day evaluation period by which the potential buyers evaluate "the strength and weaknesses of the Resort." (A. 38.) The Evaluation Agreement requires the Buyers to notify "the Sellers of acceptance or rejection of the exhibit material." (A. 38.) Once everything was agreed to, it was placed "into a purchase

[4] In this litigation, JEM Acres, LLC d/b/a Birch Haven Resort is the Plaintiff and is the Respondent on appeal. There was no evidence presented at trial with regard to the relationship, if any, between the Gaslins and JEM Acres, LLC. For purposes of this brief, Kate Stelten will be referred to as Kate Gaslin.

agreement document and it says this is a binding agreement." (T. 211.) The Evaluation Agreement further provides:

> If the Exhibits are all accepted by both Seller and Buyer and each of them have had an opportunity to obtain legal counsel and the information from their counsels has been accepted by them. This document will become a binding purchase agreement between the parties.

(A. 38.)

The Evaluation Agreement listed a closing date of April 1, 2005. (Trial Ex. 3; A. 39.)

Mr. Cole went through the prepared exhibits with the Gaslins. He had the Gaslins walk through the property and look at "everything about the place." (T. 209.) The Gaslins admit they were given a copy of the June 11, 2002 Certificates of Compliance. (T. 67-69, 111-112; Trial Ex. 34; A. 98.) The Gaslins saw the Resort three times before they entered into the Purchase Agreement. (T. 37.)

2. On February 14, 2005, Susan and the Gaslins entered into a Purchase Agreement.

The Purchase Agreement was entered into on February 14, 2005 between Kate Stellen [sic] and Gary [sic] Gaslin or Assigns, as Buyers, and Susan B Bruno ABA [sic] Birch Haven Resort and/or assigns, as Seller. (T. 39; Trial Ex. 2; A. 31.) The Gaslins agreed to pay $580,000 for the Resort. (T. 40; A. 39.) The Purchase Agreement states that the closing will take place on or before June 1, 2005. (A. 33.)

In that Agreement, the Sellers "warrant and represent that they are in compliance with the laws and regulations applicable to their property and to the Business at the time of closing." (A. 33.) The Purchase Agreement also provides:

> J. To the best of Sellers' knowledge, all sewage disposal systems located on the Real Property are approved by the Zoning Administrator and when installed were in compliance with all applicable laws and regulations at that time and are currently in compliance and in working condition.

(A. 34.)

Pursuant to the terms of the Purchase Agreement, the buyers are to take possession of the property on the closing date. (A. 36.) However, it also provides the buyers the right to be involved in the Resort prior to ownership. The Purchase Agreement states that the

> Sellers shall provide a 4 day demo period starting at the opening of the resort for spring. Sellers shall assist the buyers with turning on the water, putting in the docks, racking [sic] the yard, cleaning the cabins, and other tasks necessary to open the resort and how to operate the resort and demonstrate that all equipment not demonstrated prior to closing is in operating order.

(A. 36.)

It also grants the buyers "the right to inspect and test all equipment when they assist in the opening of the resort prior to closing." If, at that time, equipment is found not to be in working order, it will be repaired or replaced by the sellers immediately at no charge to the buyers. (A. 34.) Kate Gaslin admits they never took advantage of their ability to be so involved in the opening of the Resort. (T. 69-70.)

The Purchase Agreement specifically states that "Sellers disclaim any warranties following the date of closing, of any nature, of any kind whatsoever whether expressed or implied, including but not limited to structural, environmental, zoning, health code, building code, fire code and legal description." (A. 34.) It also states that "[t]he

representations, warranties and covenants of Buyers and Sellers contained herein shall survive the closing of this Agreement until the delivery of the warranty deed." (A. 37.)

Although Pat Bruno is not a "seller" (A. 31), according to the Gaslins, it was Pat who orally promised when the Purchase Agreement was signed to have the septic system inspected before the closing. (T. 40-42, 87, 89.) There are no claims of such representation by Susan, and Susan believes that she has complied with all the terms of the parties' contract. (T. 356.) Susan provided everything requested of her. (T. 357.)

3. The Gaslins obtained possession of the Resort prior to the closing.

Under the terms of the Purchase Agreement, the Gaslins were to have a letter of finance commitment on or before May 1, 2005. (A. 36.) The closing, however, was postponed by the Gaslins because of financing problems. (T. 71, 294.) When it did not close on the scheduled June 2, 2005 closing date, the parties reached an agreement whereby the Gaslins were given possession anyway. (T. 296.) This has been referred to as a "dry closing." (*Id*.) At this "dry closing," "[e]verything was signed . . . except for the final deed." (T. 296.) The closing was then rescheduled for June 7, 2005. (T. 70.)

There was no discussion of the septic system at the dry closing. (T. 71-72.) The Gaslins were placed in possession of the Resort on June 2nd and received the profits from that week. (T. 117.) They admit that during their possession from June 2 until the June 7 closing there were no problems with the septic system. (T. 72.) They received no further documentation regarding the septic system. (*Id.*)

On June 7, 2005, the parties closed and "there was just the signing of the final deed and that was it." (T. 297-298; *see also* T. 72.)[5] At the June 7 closing, Kate Gaslin brought up the septic system inspection and Pat "said it was good to go, all good to go, and kind of did the thumbs up thing." (T. 42, 98, 218.) Kate Gaslin did not think Pat was referring to the 2002 Certificates of Compliance obtained when the Brunos bought the Resort. (T. 43.) Jerry Gaslin said they went forward with the closing because of what Pat had said. (T. 119.) Susan was not present when Pat purportedly gave the thumbs up and said the system had been inspected and was good to go. (T. 360.)

Kate Gaslin admits that as a real estate agent she knew that the sale could have been postponed if she did not have all the documents she required. (T. 65.) The Gaslins admit that they knowingly closed without receiving any further documentation regarding the septic system. (T. 72, 98.) Kate Gaslin testified that there was never a question in her mind that Pat had agreed to inspect the septic system just prior to closing. (T. 87.) Mr. Cole testified that it was his understanding that Pat was going to get a new inspection done of the septic system before closing. (T. 215.)

4. The Gaslins have no evidence that the septic systems were not in compliance or not in working order on the date of closing.

The Gaslins admit they have nothing to show that the septic systems were not in compliance and were not in good working order when they closed on June 7, 2005. (T. 89-90, 120.) Kate Gaslin testified:

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[5] If the sale did not close, Mr. Cole would not have received his $29,000 commission. (T. 228.)

Q. You have nothing in your possession that said that the system failed on June 7 of 2005; is that correct?

A. I have nothing in my possession that says that the system failed in 2005?

THE COURT: The question was June 7, 2005.

A. June 7, no.

(T. 89.)

Likewise, Jerry Gaslin testified:

Q. You have nothing in your possession to say the septic system wasn't in compliance in June of 2005?

A. Say that again.

Q. It's true that you have nothing in your possession that says that Certificate of Compliance failed on June 7, 2005; isn't that correct?

A. There is no failed compliance.

(T. 120.)

C. After the Closing, One of the Septic Mounds Failed.

After the June 7 closing and sometime before the 2005 Fourth of July weekend, Jerry Gaslin asserts he removed some slab wood from one of the septic mounds and discovered it was "wet and mushy" and smelled of septic. (T. 99-100.)[6] Jerry Gaslin did

[6] The record is unclear as to when this discovery by Jerry Gaslin purportedly occurred. Kate Gaslin says this occurred "a couple of days after closing." (T. 45.) Norm Cole originally concurred in her testimony. (T. 219.) Mr. Cole contends he then tried to find Laird Hensel, the inspector. (T. 219.) Later, Mr. Cole admits he did not try to contact Laird until receiving Schilla's July 12 inspection. (T. 227.) Pat Bruno states a conversation with Jerry Gaslin regarding the septic system first occurred on July 11, 2005. (T. 299-300.)

not call his brother, who is a septic inspector. (T. 110.) Instead, he called Pat, who told him that it had been a wet spring and to just put dirt on it. (T. 100.) Pat testified that this conversation with Jerry occurred on July 11. Pat agrees that he told Jerry Gaslin it was a wet spring but that he should contact Tony Nendick to look at it. (T. 299-300.) It stands undisputed that the Gaslins did not immediately seek an inspection or otherwise hire anyone to take a look at the septic system. (T. 100-101.)

Later, when Kate Gaslin went to get a building permit to build a game room at the Resort, she was informed by William Patnaude, Beltrami County's Environmental Services District Director, that a septic inspection was needed. (T. 45-46, 159.) *See* Minn. R. 7080.0315, subp. 2 ("A compliance inspection shall be conducted: c. for all new construction or replacement."). Kate Gaslin then learned that there was not a recent inspection on file. (T. 45-46.)

On July 12, 2005, Herb Schilla did a septic inspection pursuant to the Gaslins' request. (T. 46; Trial Ex. 4; A. 44.) Mr. Schilla failed system one and found it to be an imminent threat to public health or safety because there was discharge of sewage to the ground surface. (A. 46.) As to the second system, he found it was not an imminent threat to public health or safety but that it was failing because "[l]ess than THREE feet of vertical separation between system bottom and saturated soil or bedrock." (T. 46; A. 44.)

In August 2005, Norm Cole contacted Laird Hensel, who had done the 2002 septic inspection. He did another inspection. (T. 51, 222, 227; Trial Ex. 14; A. 80.) As to system one, Mr. Hensel agreed it was an imminent threat to public health and safety, not

because there was discharge of sewage to ground surface but because it was a "[s]ituation with the potential to immediately and adversely impact or threaten public health or safety." Mr. Hensel explained that "[a]ny excessive water use by added guests or added RVs could have easily caused this mound to hydraulically fail." (A. 80, 84.)

As to system two, Mr. Hensel found it fully compliant. (A. 82.) He did not conclude that it was an imminent threat to public health or safety nor that it was failing. (*Id.*; T. 51.) Hensel did comment that both systems were undersized for the size of the Resort. (*Id.*; A. 84-85) As to system two, Mr. Hensel said that if not upgraded, "it is on the verge of hydraulic failure." (A. 85.)

Pursuant to Minn. Stat. § 115.55, subd. 5a, when a septic system is found to constitute an imminent threat to public health or safety and "if not repaired, must be upgraded, replaced or its use discontinued, within ten months of the notice . . . ."

Jerry Gaslin admits that Laird Hensel told him during this August 2005 inspection that Hensel had inspected this system for previous owners and he had stated in those previous reports also that the septic system was severely undersized. (T. 105.) Nonetheless, Mr. Hensel had found the system in 2002 to be in compliance. (Trial Ex. 34; A. 98.) *See* Beltrami County Shoreland Management Ordinance, Section 803 (". . . a sewage treatment system shall not be considered nonconforming if the only deficiency is the size of the system or the setback of the sewage treatment system from the ordinary high water level."). (Trial Ex. 12; A. 77.)

In light of the conflicting septic system reports, William Patnaude, the Beltrami County Environmental Services District Director, came out to the Resort. (T. 159, 165, 167.)[7] Mr. Patnaude's duties include enforcement of the Shoreline Management Program for Beltrami County. (T. 159, 161.) Mr. Patnaude was familiar with the Resort. He had worked with Mr. Lee, who sold the Resort to the Jansens, and he knew the septic system was installed in 1986. (T. 164-165.) Having received Mr. Schilla's report, which had failed the second mound because of separation, and Mr. Hensel's subsequent inspection which disagreed with Schilla's report as to the second mound, Mr. Patnaude discussed the matter with Hensel. (T. 167-168.) Mr. Patnaude concluded that based on Laird Hensel's August 2005 inspection that one of the mounds was in compliance, and Beltrami County could not force the owner to do anything with the compliant mound. (T. 173.)

Mr. Patnaude also explained that the fact that septic mounds "are squishy . . . doesn't mean [the septic system] is going to fail," nor does weepage mean the septic system has failed. (T. 168.) He testified:

> We have encountered mound septic systems that have, for a period of time will have some weepage. Those normally will correct themselves or a contractor will have to put additional berm material on them. It's when a system is discharging constantly that's when it means the system can't handle it anymore.

(T. 171.)

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[7] It was JEM Acres that called Mr. Patnaude as a witness, as well as Norm Cole. (T. 159, 200.)

Mr. Patnaude also explained that there is a difference between an inspector saying the system was going to fail and stating it was hydraulically overloaded. (T. 168-169.) And it does not matter whether the septic system is undersized for compliance purposes. (T. 172-173.) The county can force the owner to do something only if the system is a public health threat. (T. 173.)[8] Accordingly, the County could only force the correction of the system that is an imminent public health threat and not the other septic system which was not found to be such a threat. (T. 169.) If the system one mound was replaced with a 1,274 square foot mound, the County would accept that as being in compliance "based on the calculations submitted by the designer." (T. 176.)

Mr. Patnaude acknowledged that the Brunos' Certificate of Compliance dated June 11, 2002 was valid for three years – i.e., until June 11, 2005. (T. 174.) Mr. Patnaude stated:

> Q. So what you testified to here today is that on June 7, 2005 there was a valid Certificate of Compliance, correct?
>
> A. That is correct.

(T. 182.)

According to Mr. Patnaude's reading of the Ordinance, the certificate of compliance is good for three years or up until the point the property is transferred. (T. 185.)

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[8] The Gaslins have since asserted that the fact the septic system was undersized means it was out of compliance with state and county regulations. (T. 400.) There is no testimony that supports that assertion and the record is to the contrary. *See* Beltrami County Shoreland Management Ordinance, Section 803. (A. 77.)

Mr. Nendick concurred in Mr. Patnaude's assessment of the septic system. A hydraulic overload can cause a mound to fail. (T. 332.) Mr. Nendick explained that in a resort situation you see peaks and valleys in occupancy. This corresponds with peaks and valleys in septic usage. Sometimes the peak will stress the system but not break it. (T. 333.) If more guests were at the Resort than its capacity for a weekend, that could result in a temporary, not permanent, problem. (T. 335.)

There are two fixes to a mound that is overloaded. One is to rest it. The other is to replace the material underneath and rebuild it. (T. 330.) Mr. Nendick concurred that compliance is not based on the size of the system. (T. 337-338.) Mr. Nendick testified that he could fix the mound that failed for $12,000 to $14,000. (T. 328, 330-331; Trial Ex. 38; A. 106.)

Upon learning of septic system one's noncompliance, the Gaslins demanded that the Brunos replace the Resort's entire septic system. The Brunos have refused. (T. 308.) It is the Brunos' position that the system was in compliance and working order when the Resort was sold. (T. 308.)

The Brunos assert they concealed nothing from the Gaslins. (T. 309, 315.) When they sold the Resort, its septic system was fully operational. (T. 316.) Moreover, under the terms of the Purchase Agreement, once the buyer accepted the warranty deed, the septic system was the buyer's problem, not the sellers. (T. 318.)

JEM Acres has subsequently listed the Resort for sale with Mr. Cole. (T. 230.)

D. JEM Acres, LLC Sues the Brunos.

In October 2006, JEM Acres, LLC d/b/a Birch Haven Resort brought suit against the Brunos. (A. 17.) In its Complaint, JEM Acres is described as a "Limited Liability Company" and "the current owners" of the Resort. (*Id.*) There is no allegation in the Complaint connecting JEM Acres with Kate and/or Jerry Gaslin. (A. 17.) In its Complaint, JEM Acres states that on February 14, 2005 it "entered into a purchase agreement with [Pat and Susan Bruno]," and then quotes paragraphs from the purported purchase agreement. (A. 17-18.) No such agreement is attached.

In Count I, entitled "Breach of Contract," JEM Acres incorporates Paragraphs 1 through 14 of the Complaint and asserts that "[JEM Acres] and [Pat and Susan Bruno] had a valid contract whereby [JEM Acres] purchased Property from [Pat and Susan Bruno] for $580,000.00." (A. 19.) JEM Acres asserts that the Brunos "breached their duties and obligations under the contract by failing to properly disclose the true condition of the septic systems and by breaching the warranties in the agreement." (A. 19.)

In Count II, entitled "Fraud – Intentional Misrepresentation," JEM Acres asserts that the Brunos made false representations to JEM Acres regarding the condition of the septic system prior to and at the closing of the sale of the property "including but not limited to, written statements that all sewage disposal systems were in compliance with all applicable laws and regulations and in working condition," and a verbal statement of ". . . all inspected and good to go." (A. 19-20.) JEM Acres asserts that the Brunos knew the facts that were being represented to JEM Acres were false and were made to induce

JEM Acres to purchase the Property. JEM Acres asserts it was justified in relying on such representations. (A. 20.)

Count III, entitled "Negligent Misrepresentation," asserts that the Brunos breached their duty by negligently conveying false information to JEM Acres regarding the condition of the septic system at the time of the purchase of the property. (A. 20-21.)

Count IV of the Complaint asserts a violation of Minn. Stat. § 513.52, subd. 1(a). (A. 21-22.)

In Count V, JEM Acres asserts that the Brunos violated Minn. Stat. § 115.55, subd. 6, which provides in pertinent part that:

> (a) before signing an agreement to sell or transfer real property, the seller or transferor must disclose in writing to the buyer or transferee information on how sewage generated at the property is managed . . .
>
> (b) unless the buyer or transferee and seller or transferor agree to the contrary in writing before closing of the sale, a seller or transferor who fails to disclose the existence or known status of an individual sewage treatment system at the time of sale, and who know or had reason to know of the existence or known status of the system is liable to the buyer or transferee for costs relating to bringing the system into compliance with the individual sewage treatment system rules and for reasonable attorney fees for collection of costs from the seller or transferor.

(A. 22.)

JEM Acres asserts that the Brunos "failed to exercise ordinary care in communicating the condition of the septic system on the Property prior to the time of the purchase of the Property." (A. 22.)

In response to this lawsuit, the Brunos brought a third-party complaint against Norman Cole RSG, Inc. and Resort Sales Group, Inc. Third-Party Defendant Cole was subsequently dismissed by summary judgment, and judgment was entered pursuant to Minn. R. Civ. P. 54.02. (A. 12.) The court denied JEM Acres' motion for summary judgment against the Brunos. (*Id.*) The case proceeded to trial.

E. The Jury Returns a Verdict in Favor of JEM Acres.

The jury was presented with no testimony establishing any relationship between JEM Acres, LLC and Kate and Jerry Gaslin. At trial, no evidence was presented, expert or otherwise, that the sewer system was not in compliance or not in good working order at the time of the June 7, 2005 closing. In asserting the Brunos breached their contract, JEM Acres nonetheless asserted to the jury in its closing argument that there was not a working septic system at the time of sale. (T. 399-400.) Its argument, in large part, was based on the fact that the inspectors had referred to the septic system as undersized. (*Id.*) JEM Acres argued "[y]ou cannot have a severely undersized septic system and still be compliant with the law and call it a working system. It's not a working system." (T. 400.) The jury was then asked the following question:

Did Defendants breach their contract with JEM Acres, LLC?

The jury answered that question "yes." (A. 9; T. 420.)

The Gaslins argued that under the Beltrami County Ordinance, property must be inspected for sewer compliance before sale. (T. 395.) However, no question was put forward to the jury on that question. Instead, the jury was only asked whether the Brunos

had violated Minn. Stat. § 115.55. Specifically, the jury was asked the following question:

> Did Patrick Bruno and/or Susan Bruno violate Minnesota Statute Section 115.55 by failing to disclose the existence or known status of the Birch Haven Resort sewage treatment system at the time of sale when they knew or had reason to know of the existence or known status of the system?

The jury answered "yes." (A. 10; T. 421.)

In asserting that the jury should answer that question yes, JEM Acres argued that "[t]he law throws it all on the seller to properly disclose. That's what the legislature says. That's the law in the State of Minnesota. And they've put forth absolutely no proof that they ever complied with that law. It's unrefuted." (T. 398.)

JEM Acres also asserted that the Brunos had made material intentional misrepresentations. (T. 402.) It argued that there were two misrepresentations. The first misrepresentation was that the system has been inspected and the second is that the system is in working order. (T. 402.) These purported misrepresentations were made to Kate and Jerry Gaslin. The jury was asked the following questions and gave the following answers:

> Did Patrick Bruno and/or Susan Bruno falsely represent a past or present material fact to [JEM Acres]?

The jury answered "yes."

> At the time the false representation was made, did Patrick Bruno and/or Susan Bruno know the representation was false or did they represent that they knew about the facts when they did not know if they were true or false?

The jury answered "yes."

> Was the false representation made by Patrick Bruno and/or Susan Bruno intending that [JEM Acres] would rely on them?

The jury answered "yes."

> Did [JEM Acres] rely and act on the false representation?

The jury answered "yes."

> Was [JEM Acres] harmed as a direct result of relying on the false representation?

The jury answered "yes."

(A. 9-10; T. 420-421.)

The jury was asked to answer only one damage question. (T. 385.) That damage question was:

> What sum of money, if any, will fairly and adequately compensate [JEM Acres] for damages directly caused by Defendants' alleged breach of contract, alleged misrepresentation and alleged violations of Minnesota Statute Section 115.55?

(A. 10; T. 421.)

The jury inserted the sum of $94,000.00. (*Id.*)

The septic system had not been replaced at the time of trial and the Resort was still being operated. (T. 73, 113.) The trial testimony with regard to damages was based on JEM Acres' assertion that both septic systems one and two needed to be replaced. (T. 56.) And this assertion was based solely on the inspector's report that both systems were undersized. (*Id.*) After receiving the inspector's report, the Gaslins had Jerry Gaslin's brother design a new septic system. (T. 56-57.) The new system designed by

Jeff Gaslin had five mounds. (Trial Ex. 7; T. 125, 250.) Based on this design, the Gaslins submitted it to various construction companies seeking to find out the cost of the new septic system pursuant to this design. Sparky's Construction said it would cost $122,000 to build. (T. 60, 138-139.) Miciah Medicraft testified it would cost $159,433 to build. (T. 61, 125.) Mr. Medicraft admitted that replacing one mound and making it 1,200 square feet would cost in the range of $20,000. (T. 131.)

JEM Acres also presented testimony by Marlowe Vogeltanz. He is president of Drec, Inc. (T. 253.) Mr. Vogeltanz has done work with Norm Cole in the past. (T. 255.) In July 2007, Norm Cole asked Mr. Vogeltanz to look at the Resort and see what was required to update the septic system. Mr. Vogeltanz testified that the only good spot for a decent mound system is where the two mounds are presently located, which mounds he said were "very inadequate for the flowage from the resort." (T. 257-258.)
Mr. Vogeltanz testified that when he was on the property in July of 2007, it was his opinion that "the system was failing." (T. 259.) His bid was $94,500. (T. 257.)

F. The Trial Court Adopts the Jury's Findings and Denies the Brunos Post-Trial Relief.

By Order filed January 31, 2008, the trial court adopted the findings of the jury and, based on those findings, concluded that JEM Acres was entitled to judgment in the sum of $94,000, together with attorney's fees, disbursements and prejudgment interest. (A. 7.) JEM Acres then presented its motion for attorney's fees and costs. (A. 8.) The Brunos sought judgment as a matter of law and in the alternative a new trial. (A. 30.)

By Order filed March 28, 2008, the trial court denied the Brunos post-trial relief. (A. 1.) The trial court awarded the Gaslins attorney's fees in the amount of $74,423. (*Id.*) The trial court stated that the attorney's fees were being awarded on two grounds: (1) because the jury found the Brunos had acted fraudulently, and (2) pursuant to the provisions of Minn. Stat. § 115.55. (A. 4.)

It is from the judgment and the order denying new trial that the Brunos bring this appeal. (A. 107.)

ARGUMENT

I. THE BRUNOS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW OR IN THE ALTERNATIVE A NEW TRIAL.

A. Standard of Review.

A motion for judgment as a matter of law (JMOL) raises pure legal questions – have the elements of the cause of action been proven? *Am. Mach. & Tool Co. v. Strite-Anderson Mfg. Co.*, 353 N.W.2d 592, 598 (Minn. Ct. App. 1984), *rev. denied.* JMOL is appropriate when a jury verdict has no reasonable support in fact or is contrary to law. *Longbehn v. Schoenrock*, 727 N.W.2d 153, 159 (Minn. Ct. App. 2007). The court has the power to grant JMOL and to set aside a special verdict when "it appears that the evidence cannot sustain the verdict." *Diesen v. Hessburg*, 455 N.W.2d 446, 452 (Minn. 1990), *reh'g denied.*

On appeal, this Court must determine whether, viewing the evidence in a light most favorable to the nonmoving party, the verdict is manifestly against the entire evidence or whether, despite the jury's findings, the moving party is entitled to judgment

as a matter of law. *Dean v. Weisbrod,* 300 Minn. 37, 217 N.W.2d 739, 742 (1974). A jury's verdict is to be set aside if it cannot be sustained on any reasonable theory of the evidence. *Obst v. Microtron, Inc.*, 614 N.W.2d 196, 205 (Minn. 2000). The standard of review is de novo. *Id.* at 199-200.

B. Based on the Record Presented, JEM Acres' Lawsuit Must Be Dismissed Because It Had No Standing to Proceed on Causes of Action Asserted.

While not raised before the trial court, this case presents an issue of JEM Acres' standing to sue the Brunos. Because standing presents a question of jurisdiction, a party may raise this issue at any time. *State by McClure v. Sports & Health Club, Inc.*, 370 N.W.2d 844, 850 (Minn. 1985). As this Court has held, "standing goes to the existence of a cause of action and, when the facts are not disputed, is a legal issue that this Court may determine." *Joel v. Wellman,* 551 N.W.2d 729, 730 (Minn. Ct. App. 1996), *rev. denied.*

As the record reflects, at no time, either in its Complaint or in its presentation of the case to the jury, did JEM Acres establish any relationship between itself and the Gaslins. What the record shows is that the Gaslins entered into a Purchase Agreement with Susan Bruno for the purchase of the property and it was to the Gaslins that the Brunos purportedly made representations which are the basis for the fraud action. The record is devoid of any showing of any connection, whether it be factual or legal, between the Gaslins and JEM Acres. JEM Acres had no standing to pursue the Brunos on the causes of action submitted. As a matter of law, JEM Acres' action should be ordered dismissed.

C. Even if This Court Concludes JEM Acres Has Standing, the Brunos Are Entitled to Dismissal as a Matter of Law.

1. Based on evidence viewed in a light most favorable to JEM Acres as applied to Minn. Stat. § 115.55, the Brunos did not violate Minn. Stat. § 115.55.

The trial court found that the Brunos had violated Minn. Stat. § 115.55 based on the jury's answer yes to the following question:

> Did Patrick Bruno and/or Susan Bruno violate Minnesota Statute Section 115.55 by failing to disclose the existence or known status of the Birch Haven Resort sewage treatment system at the time of sale when they knew or had reason to know of the existence or known status of the system?

(A. 7, 10.)

The question posed to the jury is the exact language of a portion of Minn. Stat. § 115.55, subd. 6(b), which section states in its entirety:

> Unless the buyer or transferee and seller or transferor agree to the contrary in writing before the closing of the sale, a seller or transferor who fails to disclose the existence or known status of an individual sewage treatment system at the time of sale, and who knew or had reason to know of the existence or known status of the system, is liable to the buyer or transferee for costs relating to bringing the system into compliance with the individual sewage treatment system rules and for reasonable attorney fees for the collection of costs from the seller or transferor.

Based on the facts of record viewed in a light most favorable to JEM Acres and as applied to the statutory language, the jury's verdict must be reversed. This question also involves a question of statutory interpretation, which this Court reviews de novo. *Ryan Contracting, Inc. v. JAG Invs., Inc.*, 634 N.W.2d 176, 181 (Minn. 2001).

There is no dispute that the Gaslins were provided the 2002 compliance inspection forms which set out that the Resort has a two-mound septic system, set out its components and that it was in compliance. It is undisputed that Mr. Cole walked through the Resort with the Gaslins prior to their signing of the Purchase Agreement, they saw the Resort three times before entering into the Purchase Agreement, and the Gaslins were in possession of the Resort prior to the closing. (T. 37, 72, 209, 296.)

There is no evidence that the status of the sewage treatment system changed in the two-year period that Susan owned the Resort and in the time period between the sale to JEM Acres and the June 2002 septic inspection. There is no evidence of record that the system was not in fact a fully compliant system at the time of the sale to JEM Acres, and the Gaslins have admitted they have no evidence it did not in fact comply. During Susan's ownership, the Resort was not expanded. The Brunos had no septic problems after the summer 2004 repair of a septic line. There can be no breach of the statute on this record.

As this Court acknowledged in *Kellogg v. Woods*, 720 N.W.2d 845, 850 (Minn. Ct. App. 2006), the seller is not made a guarantor of the septic system under Minn. Stat. § 115.55. And the statute does not impose an independent obligation on sellers to obtain compliance inspections before the sale of real estate. *Id.* at 851.[9] The trial court, in denying JEM Acres summary judgment, so held, stating: "Minn. Stat. § 115.55, subd. 6

[9] In *Kellogg*, it was the specific terms of the purchase agreement that required Woods, as seller, to obtain a "current septic inspection and warrant[] its compliance." *Id.* at 851.

does not require such an inspection [prior to sale]; rather, the statute provides that a certificate of inspection is valid for three years." (A. 14-15.)

And contrary to any insinuation in *Kellogg*, the Legislature's use of the phrase "reason to know" is not the same as "should know." 720 N.W.2d at 850. The Minnesota Legislature has utilized both "reason to know" and "should know" in numerous statutes and there is no basis to conclude that these two phrases mean the same thing. A Westlaw search reveals the Legislature has used the phrase "know or reason to know" in 120 statutes. Such statutes include Minn. Stat. § 65B.45 ("knows or has reason to know"); Minn. Stat. § 115C.021 ("owner did not know or have reason to know"); Minn. Stat. § 148A.03 ("employer knows or has reason to know"). The Legislature has also used the phrase "know or should know" at least 35 times. Such statutes include Minn. Stat. § 80D.04 ("facility knows or should know"); Minn. Stat. § 148E.200 ("social worker knows or reasonably should know"). A holding that "reason to know" and "should know" are one and the same would be contrary to the basic rules of statutory construction. Minn. Stat. § 645.08(1).

In fact, the law has long held that "reason to know" denotes the fact that the actor has information from which a person of reasonable intelligence would infer that the fact in question exists or that there is substantial chance of its existence. *Wesche v. Martin*, 822 P.2d 812, 817 (Wash. Ct. App. 1992). The applicable standard can be found in Restatement (Second) of Agency § 9. *Id.* That is also the standard underlying Restatement (Second) of Torts §§ 12 and 358.

Courts, in fact, have long relied on both Section 12 of the Restatement (Second) of Torts and Section 9 of the Restatement (Second) of Agency in distinguishing "reason to know" from "should know."[10] For example, in adopting the "reason to know" rule for purposes of the common law attractive nuisance doctrine, the Wisconsin Supreme Court quoted Comment d to Section 9 of the Restatement (Second) of Agency to the effect that: "'Reason to know' imports no duty to ascertain facts not to be deduced as inferences from facts already known" while "should know" indicates "a duty to others to ascertain facts . . . ." *Christians v. Home Stake Enters , Ltd.*, 303 N.W.2d 608, 619 n. 17 & 18 (Wis. 1981).

Other courts have likewise held that "there is a significant legal difference between the phrases reason to know and should know." *Owens-Corning Fiberglas Corp v. Watson*, 413 S.E.2d 630, 634-35 (Va. 1992). "Reason to know" imposes no duty of inquiry; it merely requires that a person draw reasonable inferences from information already known to him. *Novicki v. Cook*, 946 F.2d 938, 941 (D.C. Cir. 1991). As explained by the Connecticut Supreme Court in a case involving an allegedly defective deck:

> To establish that the defendant in this case had "reason to know" of the defective condition of the deck, the plaintiff was required to proffer evidence that the defendant had factual information that would have led a person of reasonable intelligence to conclude that the deck's condition was dangerous.

Furstein v. Hill, 590 A.2d 939, 947 (Conn. 1991).

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[10] Comment a to Restatement (Second) of Torts § 12 states: "Both the phrases 'reason to know' and 'should know' are used throughout the Restatement of Torts in the same sense as they are used in the Restatement of Agency. (See Restatement (Second) of Agency § 9.)"

There was no evidence that the Brunos knew or had reason to know of any lack of compliance or problems with the septic system. The undisputed testimony of record is that the Brunos had no problems with the septic system at any time during the sale process. The Gaslins, in fact, occupied the property a week before the closing and they, too, admit they experienced no problems with the septic system. The Brunos are entitled to judgment in that the record does not support a violation of Minn. Stat. § 115.55.

a. The trial court invited confusion by its instructions to the jury and failure to address the legal issue presented.

Although the jury was specifically only asked on the special verdict form whether the Brunos had violated Minn. Stat. § 115.55, the trial court confused the issue by not only reading Minn. Stat. § 115.55 to the jury but also reading a portion of "Bemidji [sic] County Shoreland Management Ordinance 802." (T. 382-385.)[11] At the conclusion of the reading of the ordinance, the trial court then states: "You must decide then, Members of the Jury, if any of these laws and/or ordinances were violated based on the evidence." (T. 384-385.)

Prior to trial, and in response to JEM Acres' motion for summary judgment, the trial court acknowledged that whether the Brunos had a legal duty to perform another inspection of the system prior to sale "is an issue of law I could decide as a matter of law." (A. 14.) As previously stated, the trial court admits that Minn. Stat. § 115.55 does not require such an inspection. (A. 15-16.) As to whether the Beltrami County Shoreland

[11] The Brunos admit there was no objection to the jury instructions made at trial and, accordingly, no such error can be assigned on appeal.

Management Ordinance so requires, the trial court did not so decide, concluding that "the language is subject to more than one interpretation." (A. 15.)

Contrary to the trial court's ruling before trial, it was the trial court's obligation to interpret and construe the ordinance. "The interpretation of an existing ordinance is a question of law for the court." And "the manner of applying the ordinance to the facts is for the court." *Frank's Nursery Sales, Inc. v. City of Roseville*, 295 N.W.2d 604, 608 (Minn. 1980); *Staeheli v. City of St. Paul*, 732 N.W.2d 298, 307 (Minn. Ct. App. 2007). And while the ordinance requires that the seller provide the potential buyer a Certificate of Sanitary System Compliance, it does not require that it be reinspected if the seller has in hand a valid certificate, as was the case here. The ordinance states:

> No owner of a tract of land upon which a dwelling is located, or a tract of land upon which a structure having an on-site sewage treatment system is located, shall sell or contract to sell by conveyance or contract for conveyance without providing a copy of a Certificate of Sanitary System Compliance to the buyer prior to the sale in accordance with the following requirements:
>
> A. Time of sale shall mean when a written purchase agreement is executed by the buyer, or, in the absence of a purchase agreement, the time of the execution of any document providing for the conveyance by deed or contract.
>
> B. The Seller must obtain and provide a State Certificate of Compliance.
>
> C. The proposed purchaser shall not take occupancy of a dwelling or structure prior to the issuance of a Certificate of Compliance by the Beltrami County Environmental Services Director, except that upon the filing of an executed written agreement by the present and prospective owners, which agreement sets forth the date by which the new owner will complete the necessary corrective action, and

which agreement and corrective action dates are approved by the County Environmental Services Director and found to be adequate in his or her discretion, the occupancy may be permitted pending issuance of the Certificate of Compliance.

D. A State Certificate of Compliance issued under this *Ordinance* shall be effective for five (5) years from the date of issuance for new systems or three (3) years for existing systems or until ownership of the property is transferred, whichever occurs first.

(Trial Ex. 12; A. 76-77.)

Here, it stands undisputed that the Brunos provided the Gaslins with the 2002 Certificates of Sanitary System Compliance prior to the execution of the written purchase agreement. These Certificates, having been issued in June 2002, were valid in February 2005, the date the Purchase Agreement was executed and were valid at the time of closing. The Brunos complied with the ordinance.

In any event, the question presented to the jury was solely premised on Minn. Stat. § 115.55, which the trial court had previously ruled did not require a new inspection prior to sale. JEM Acres is bound by the verdict question presented and as a matter of law there was no violation of Minn. Stat. § 115.55.

b. Since there was no violation of Minn. Stat. § 115.55, the grant of attorney's fees to JEM Acres must be reversed.

Since the Brunos did not violate Minn. Stat. § 115.55, this Court must reverse the award of attorney's fees to JEM Acres in the sum of $74,423.00. The trial court held that it was awarding attorney's fees on two grounds: (1) because the jury found the Brunos had acted fraudulently, and (2) pursuant to the provisions of Minn. Stat. § 115.55.

(A. 4-5.) As will be explained, the evidence of record does not support the finding of fraud, but even if it did, attorney's fees are not appropriate damages to be awarded based on a finding of common law fraud.

Under Minnesota law, attorney's fees are not recoverable unless there is a specific contract provision permitting their payment or a statute authorizing such recovery. *See Midway Nat'l Bank v. Gustafson*, 282 Minn. 73, 165 N.W.2d 218, 224 (1968), *reh'g denied.* If the Brunos did not violate Minn. Stat. § 115.55, which does have an attorney's fees provision, there is no basis for an award of attorney's fees. A finding of common law fraud does not support an award of attorney's fees. *Erlandson Implement, Inc. v. First State Bank of Brownsdale*, 400 N.W.2d 421, 427 (Minn. Ct. App. 1987) ("Unless authorized by statute, attorney fees generally are not allowed in civil actions."). Attorney's fees awarded without authority are to be excised from the judgment on appeal. *Id.*

As a matter of law, since there was no violation of Minn. Stat. § 115.55, the award of attorney's fees must be reversed.

c. In the alternative, even if this Court concludes there was a violation of Minn. Stat. § 115.55, a new trial must be granted.

Upon receipt of the jury's verdict, and in addition to seeking judgment as a matter of law, the Brunos sought a new trial on damages, arguing that the damages awarded were excessive. Even if the Court were to conclude there was a violation of Minn. Stat. § 115.55, any award of damages must be statutorily limited to the repair, replacement or upgrade of system one and not replacement of the entire septic system, as JEM Acres contends and the trial court awarded.

Ordinarily, appellate courts will not disturb the district court's decision to grant or deny a new trial absent a clear abuse of discretion. *Halla Nursery, Inc v. Baumann-Furrie & Co.*, 454 N.W.2d 905, 910 (Minn. 1990) (noting that if district court's decision to grant new trial is based on error of law and not exercise of discretion, standard of review is de novo). A trial court abuses its discretion if it misinterprets or misapplies the law. *Johnson v. State*, 733 N.W.2d 834, 836 (Minn. Ct. App. 2007), *rev. denied.* A verdict also cannot stand where it is manifestly and palpably contrary to the evidence, viewed in the light most favorable to the verdict. *ZumBerge v. N. States Power Co.*, 481 N.W.2d 103, 110 (Minn. Ct. App. 1992), *rev. denied.* On the record before this Court, the award of damages is contrary to law and is excessive as a matter of law.

Under Minn. Stat. § 115.55, only a system that is found to constitute an imminent threat to public health or safety can be ordered repaired, upgraded, replaced or discontinued. Minn. Stat. § 115.55, subd. 5a. The Court cannot expand the penalty for violating a Minnesota statute beyond that expressly provided by the Legislature.

The testimony of record is that the Resort had two septic systems, only one of which was noncompliant. Fixing septic system one – the noncompliant system – would cost in the range of $12,000 to $20,000. (T. 131, 328, 330-31; Trial Ex. 38; A. 106.) The jury's award, however, was to update both septic systems and its $94,000 award correlates with the bid submitted by Marlowe Vogeltanz, who testified that $94,500 was the replacement cost of the Resort's entire system. (T. 257.) This is beyond what is required by state law. Minnesota law requires that if there is a violation of Minn. Stat.

§ 115.55, subd. 6, a seller is liable to the buyer "for costs related to bringing the system into compliance with the individual sewage treatment system rules and for reasonable attorney fees for collection of costs from the seller or transferor."

The trial court, in denying the Brunos post-trial relief, shows the trial court itself operated under a basic misunderstanding of the law and also understood that the jury's damage award was based on an entirely new septic system for the Resort, not just replacement of the noncompliant septic system one. The trial court, in addressing the jury's verdict of $94,000 post-trial, states:

> Marlowe Vogeltanz, for example, testified that the resort's septic system was "very inadequate." He opined that both mounds were failing and that the problem could not be remedied merely by adding dirt to the mounds. He further testified that it would cost $94,500 to give the Birch Haven Resort a functional septic system that complied with all applicable laws and regulations. Significantly, Vogeltanz was requested to inspect the system and give his opinion, not by Plaintiff but by Defendants' Realtor, Norm Cole. The jury's verdict of $94,000 almost exactly mirrored the Vogeltanz' estimate.

(A. 3.)

What the trial court ignored is that Marlowe Vogeltanz testified that he went out to the Resort in 2007, which is two years after the sale to JEM Acres and the summer before the trial, to "see what it required to be updated or whatever." (T. 255, 258.) His company then put a preliminary plan together so it could bid on a new septic system. (T. 256.) Its bid was $94,500 to put in an entirely new septic system. (T. 257; Trial Ex. 10; A. 60.) It was in the context of an inspection two years after the sale to JEM Acres that Mr. Vogeltanz offered his testimony that "the [septic] system was failing." (T. 259.)

The trial court also ignored the fact that Mr. Cole, as he acknowledged at trial, had become JEM Acres' realtor after the Bruno sale. (T. 230.) So it is incorrect to reference the opinion of Mr. Vogeltanz solicited by Norm Cole in July 2007, which was almost a year after the Brunos had brought a third-party complaint against Mr. Cole, to be, in any respect, on behalf of the Brunos. It was the Gaslins who called both Norm Cole and Mr. Vogeltanz to testify. (T. 200, 253.)

The jury's award of damages is palpably contrary to law as applied to the evidence of record. At minimum, the Brunos are entitled to a new trial.

2. The jury's verdict for breach of contract cannot stand as a natter of law.

A jury's verdict is to be set aside if it has no reasonable support in fact or is contrary to law. *Longbehn*, 727 N.W.2d at 159. Based on that standard, the jury's verdict on breach of contract must be set aside and the trial court's denial of JMOL must be reversed.

a. JEM Acres is not a party to the Purchase Agreement of record.

The only contract terms that JEM Acres has put in issue is the Purchase Agreement between the Gaslins and Susan. (Trial Ex. 2; A. 31.) JEM Acres is not a party to that Agreement. Under Minnesota law, strangers to a contract acquire no rights under the contract. *Anderson v. First Northtown Nat'l Bank*, 361 N.W.2d 116, 118 (Minn. Ct. App. 1985). For that reason alone, the jury's verdict cannot stand.

Moreover, even if JEM Acres had standing to proceed based on the terms of the Purchase Agreement between the Gaslins and Susan, the language of that Purchase

Agreement and Minnesota law of merger precludes, as a matter of law, any breach of contract claim.

b. The merger doctrine precludes JEM Acres' breach of contract claim.

The trial court instructed the jury on Minnesota's merger doctrine. (T. 381.) The trial court, however, was required, based on the undisputed facts of record, to dismiss the breach of contract claims as a matter of law based on this doctrine.

There was no showing by JEM Acres that any of the language in the Purchase Agreement upon which its breach of contract claim depends was repeated in the warranty deed that JEM Acres accepted. "The merger doctrine generally precludes parties from asserting their rights under a purchase agreement after the deed has been executed and delivered." *Bruggeman v. Jerry's Enters.*, 591 N.W.2d 705, 708 (Minn. 1990). This is because a purchaser, "by accepting a deed, presumably waived his rights under the purchase agreement." *Id. See also In re Brown's Estate*, 126 Minn. 359, 148 N.W. 121, 122 (1914) (stating that the merger doctrine "applies to all stipulations and agreements contained in the executory contract by which the performance of specified acts are expressly made conditions precedent to the right to enforce the same"). "The merger doctrine generally works well as a rule that forces parties to respect the sanctity and finality of a deed." *Bruggeman*, 591 N.W.2d at 710 (internal quotation omitted).

With the delivery and acceptance of the deed conveying the real estate, the rights of the parties are to be determined solely by the deed. Here, the Purchase Agreement specifically states that the Sellers "disclaim any warranties following the date of closing,

of any nature, of any kind whatsoever whether expressed or implied including but not limited to structural, environmental, zoning, health code, building code, fire code and legal description." (A. 34.) The Purchase Agreement also provides that "[t]he representations, warranties and covenants of Buyers and Sellers contained herein shall survive the closing of this Agreement until the delivery of the warranty deed." (A. 37.)

The construction and effect of an unambiguous contract present questions of law, which this Court reviews de novo. *Denelsbeck v. Wells Fargo & Co* , 666 N.W.2d 339, 346 (Minn. 2003). When interpreting a written instrument, "the intent of the parties is determined from the plain language of the instrument itself." *Travertine Corp. v. Lexington-Silverwood*, 683 N.W.2d 267, 271 (Minn. 2004). The Court will not rewrite, modify or limit the effect of a contract provision by a strained construction when the contractual provision is clear and unambiguous. *Id.*

In asserting to the jury that the Brunos had breached the contract, JEM Acres refers to the terms of the Purchase Agreement to the Gaslins and specifically argued to the jury that "one of the promises was that it had a working septic system and that it was compliant with the law. We know now that that representation was false, that that is a breach of contract." (T. 399.) But as a matter of law, JEM Acres, having accepted a deed, could no longer make such arguments and necessarily had to proceed only on a claim based on the deed, which it did not do. No proof or argument was put forward by JEM Acres based on the deed. As a matter of law, the breach of contract claim must be ordered dismissed.

c. JEM Acres did not prove a breach of contract.

Moreover, JEM Acres offered no proof that at the time the representations and warranties under the Purchase Agreement were in effect, there was not in fact a working septic system that was not compliant with the law. Absent such a showing, there was no proof of a breach of the contract and no basis under Minnesota law for the jury to conclude as it did and for the court to deny the Brunos judgment as a matter of law.

3. JEM Acres' claim of fraud cannot stand as a matter of law.

The Brunos are also entitled to judgment as a matter of law on the fraud claim. Evidence of fraudulent representations cannot be admitted to vary the terms of a contract but only to establish that, because of such fraudulent representations, the purchaser did not get what he bargained for. *Hafner v. Ritzinger*, 256 Minn. 196, 97 N.W.2d 839, 842 (1959). Accordingly, in *Rosenquist v. Baker*, 227 Minn. 217, 35 N.W.2d 346, 349 (1948), the Supreme Court said:

> It is well settled that the parol evidence rule is not applicable to exclude evidence of fraudulent oral representations by which one party induces another to enter a written contract, provided the representations were such that the other party might reasonably rely upon them.

The burden of proof for a party asserting fraud rests with the party asserting the fraud. *Berg v. Berg*, 201 Minn. 179, 275 N.W. 836, 841 (1937). The evidence of record, viewed in a light most favorable to JEM Acres, does not support the jury's finding of fraud.

a. No evidence was presented of fraudulent statements to JEM Acres or its reliance.

Here, there is no evidence that any statements were made by the Brunos to JEM Acres that were in any respect fraudulent and which induced JEM Acres to purchase the property. As previously stated, the record is devoid of any connection between the Gaslins and JEM Acres. All that the jury was presented were purported statements made by Pat to the Gaslins. But that fact is not sufficient to show that there was a representation upon which JEM Acres justifiably relied or that any such statement to the Gaslins was the proximate cause of any damages suffered by JEM Acres.

To succeed on its fraud claim, JEM Acres was required to show that (1) there was a representation by Pat or Susan Bruno; (2) the representation had to do with a past or existing fact; (3) the factual representation was false; (4) the factual representation was material; (5) the factual representation was susceptible of knowledge; (6) the Brunos knew the representation to be false or in the alternative asserted it as of their own knowledge without knowing whether such representation was true or false; (7) the Brunos intended to have JEM Acres induced to act, or justified in acting upon the factual representations; (8) JEM Acres was so induced to act, or so justified in acting, upon the Brunos' representation; (9) JEM Acres took actions in reliance upon the representations; (10) JEM suffered damages; and (11) that damage must be attributable to the misrepresentation, that is, the statement must be the proximate cause of the injury. *Davis v. Re-Trac Mfg. Corp.*, 276 Minn. 116, 149 N.W.2d 37, 38-39 (1967); *Lampert Lumber Co. v. Ramp Constr.*, 413 N.W.2d 878, 881 (Minn. Ct. App. 1987).

b. Statements made not false or even if false, not the proximate cause of JEM Acres' claimed injury.

Even ignoring the fact that the record shows no representations, false or otherwise, were made to JEM Acres, the purported representations made by Pat to the Gaslins do not establish fraud. First, as previously set forth, the assertion that the statement by Pat that the septic system was in good working order has not been shown to be false. While there certainly is testimony that after closing, and upon inspection in July of 2005, septic system one was found not to be compliant, there is no evidence, expert or otherwise, to establish the fact that the system was not in compliance and in good working order at the time Pat made the statement.

The second statement claimed to be false is that Pat purportedly stated at the closing that he had the sewer system inspected and that it was good to go. It should be noted that Pat has denied making the promise to have it inspected as well as the statement that it was inspected other than in 2002. Minnesota law is clear that it is wrong legally to hold that denial of such a promise and nonperformance are evidence that, if the promise was made, it was made fraudulently. *McCreight v. Davey Tree Expert Co.*, 191 Minn. 489, 254 N.W. 623, 625 (1934).

Moreover, under Minnesota law, the evidence must show that a person has suffered injury and the injury must be attributable to misrepresentation; that is, the statement must be the proximate cause of the injury. *Florenzano v. Olson*, 387 N.W.2d 168, 174 n. 4 (Minn. 1986). As the Minnesota Supreme Court has held, damage is the essence of an action for fraud and not merely a consequence flowing from it. *Bishop v*

Fillenworth, 220 Minn. 118, 18 N.W.2d 775, 776 (1945). Here, there is no such evidence connecting the purportedly fraudulent statement with the damages awarded.

Even if the misrepresentation was found to be made and that it was false, the fact that the septic system was not compliant in July 2005 cannot be the injury attributable to that misrepresentation on this record. Without evidence that the system was not, in fact, fully compliant on the date of the closing and that an inspection at that time would have so revealed, a purported false statement that a new inspection had been undertaken and is good to go is not the proximate cause of the purported need of JEM Acres to bring the septic system into compliance simply because after closing the septic system became noncompliant.

4. Brunos are entitled to judgment on the breach of contract claim and fraud claim because no proof damages claimed are direct result of claimed breach of contract or fraud.

The premise of JEM Acres' lawsuit is that someone cannot "sell a resort and represent to unsuspecting buyers that it has a working septic system that's been inspected and that it's compliant with law when that's not true." (T. 394.) JEM Acres' damage claim was that the Brunos should bear the cost of replacing the entire septic system. As previously stated, what is missing is any evidence that the septic system was in fact not in working order and in need of replacement at the time of closing. To this crucial fact, JEM Acres offers no evidence. Without establishing this fact, JEM Acres cannot claim as damages the replacement of the septic system on either a basis of fraud or breach of contract. The Brunos are entitled to judgment.

a. Minnesota law follows the "out-of-pocket" rule and JEM Acres presented no such evidence.

In seeking compensation for fraud or misrepresentation, Minnesota adheres to the "out-of-pocket" rule and not the benefit of the bargain approach to damages. *B.F Goodrich Co. v. Mesabi Tire Co.*, 430 N.W.2d 180, 182 (Minn. 1988); *Strouth v. Wilkison*, 302 Minn. 297, 224 N.W.2d 511, 513 (1974). Accordingly, in cases involving the fraudulent misrepresentation to a buyer of real estate, the measure of damages is the amount paid less the fair market value of the property. *Peterson v. Johnston*, 254 N.W.2d 360, 362 (Minn. 1977); *Tysk v. Griggs*, 253 Minn. 86, 91 N.W.2d 127, 133 (1958).[12] In accord with Minnesota law, the jury was instructed that "[d]amages for fraud or misrepresentation are limited to the actual value of the property received and the price paid for it and any other damages that were directly caused by relying on the fraud or misrepresentation." (T. 386.) No such damage testimony was submitted in this case. Given the lack of any evidence of damage under Minnesota's out-of-pocket rule, JMOL must be granted.

Even if the Court were to ignore Minnesota's out-of-pocket rule of damages, awarding to JEM Acres the cost of replacement of the Resort's entire septic system is not a damage that is even arguably a direct and natural consequence of JEM Acres having acted on the faith of the Brunos' representations. As to fraud, JEM Acres submitted two claims. JEM Acres asserted that its claim of fraud was premised on Pat's statement that

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[12] As this Court recognized in *Noske v. Friedberg*, 713 N.W.2d 866, 876 (Minn. Ct. App. 2006), negligence damages are broader than fraud damages.

"the system's been inspected and it's the system is in working order." (T. 402.) As with the breach of contract claim, without evidence that the septic system was in fact not in working order at the time of closing, there can be no claimed damages as a result of the purported misrepresentation.

As previously presented, as to Pat's statement that the system had been inspected and assuming that this refers to an inspection conducted after the 2002 inspection, even if this statement is false, JEM Acres cannot recover as damages the cost of replacing the septic system. Without proof that the system was not, in fact, compliant on the day of closing, there is no causal connection between that statement and the cost of replacement. Since there was no such testimony, the damage award cannot stand.

b. JEM Acres failed to prove damages for purported breach of contract.

A plaintiff in a contract action has the burden of proving damages. *D.H. Blattner & Sons, Inc. v. Firemen's Ins. Co* , 535 N.W.2d 671, 675 (Minn. Ct. App. 1995), *rev. denied.* A non-breaching party may recover only for damages that are directly and proximately caused by a breaching party's breach of contract. *Wild v. Rarig*, 234 N.W.2d 775 (Minn. 1975); *Peters v. Mut. Benefit Life Ins. Co.*, 420 N.W.2d 908 (Minn. Ct. App. 1988). The damage award is to place the plaintiffs in the same situation as if the contract had been performed. *Christenson v. Milde*, 402 N.W.2d 610 (Minn. Ct. App. 1987). Speculative, remote or conjectural damages are not recoverable at law. *Cardinal Consulting Co. v. Circo Resorts, Inc.*, 297 N.W.2d 260, 267 (Minn. 1980). The courts cannot award damages that place the non-breaching party in a better position than had the

contract been fully performed. *W. Oil & Fuel Co. v. Kemp*, 245 F.2d 633, 634 (8th Cir. 1957), quoted in *Port Auth. of St. Paul v. Austin/King Med. Office Enters.*, 1993 WL 79569 at *4 (Minn. Ct. App. 1993). (A. 130.)

Again, to recover as damages the cost of replacing the entire septic system on a breach of contract theory, it was necessary for JEM Acres to prove that the system was not, in fact, in working order on the day of closing. There is no such evidence of record.

No recovery can be had on the breach of contract theory, because even under JEM Acres' view of the law, the Brunos did not breach any contract if the system was in working order and compliant with applicable law on the day of closing. Since JEM Acres has the burden of proof and made no showing that prior to or at the time of closing the septic system was noncompliant and not in working order, there is no evidence connecting any purported breach of contract with its claim of damages to replace the entire septic system.

The fact that Laird Hensel states in his August 2005 inspection report that the septic system is undersized is not a basis for imposing contractual liability on the Brunos. The fact that the septic system is undersized does not affect compliance, as the record reflects. Jerry Gaslin himself testified that in August 2005 Mr. Hensel told him that in earlier inspections he had told previous owners that the septic system was undersized. (T. 105.) Nonetheless, the system had been found compliant. The Gaslins were made aware of the septic system size prior to the signing of the Purchase Agreement because

the 2002 Certificates provide such detail. The Gaslins knew exactly what the Brunos knew regarding the size of the septic system.

The costs of replacement of the entire septic system are not damages recoverable by JEM Acres on this record.

CONCLUSION

Appellants Patrick J. Bruno and Susan B. Bruno respectfully request that the judgment be reversed and the Court order that Respondent JEM Acres' lawsuit be ordered dismissed. In the alternative, Appellants request a new trial be ordered.

Dated: July 18, 2008

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CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 12,324 words. This brief was prepared using Word Perfect 10.

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