

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.

**REPLY BRIEF AND SUPPLEMENTAL
APPENDIX OF APPELLANTS
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I. BASED ON THE 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.

A. JEM Acres' Assertions to the Jury of a Seller's Obligations Under Minn. Stat. § 115.55 Are Contrary to Minnesota Law.

It is important when reviewing the facts of record to do so in light of the statutory standard Minn. Stat. § 115.55 imposes upon a seller. The statute does not impose an independent obligation on sellers to obtain septic compliance inspections before sale of the real estate. Minn. Stat. § 115.55, subd. 6. *Kellogg v. Woods*, 720 N.W.2d 845, 850 (Minn. Ct. App. 2006). Nonetheless, JEM Acres argued to the jury that Minn. Stat. § 115.55 “puts the obligation on the seller to have a system inspected and to properly disclose it.” (T. 398.)

JEM Acres also asserted to the jury that by ordinance the Brunos were required to obtain a septic inspection and another certificate of compliance prior to sale. (T. 395.) After so arguing to the jury, JEM Acres now apparently concedes on appeal that this argument was also legally incorrect. (Compare Appellants' Brief at pp. 32-33 with Respondent's Brief at p. 21.)¹

In fact, the Legislature requires the seller only to disclose that which they knew “or had reason to know” at the time of the sale. Minn. Stat. § 115.55, subd. 6. “Reason to

¹ JEM Acres is correct that the Brunos did not object to the jury instructions given to the jury and the Brunos are not raising that issue on appeal. Nor did the Brunos object to JEM Acres' closing argument. What the Brunos are contending is that there was no obligation under the statute or any ordinance that required the Brunos to obtain a septic inspection prior to sale. JEM Acres, after having argued to the contrary at trial, now concedes that the Brunos are correct.

know' imports no duty to ascertain facts not to be deduced as inferences from facts already known." *Christians v. Homestake Enterprises, Ltd.*, 303 N.W.2d 608, 619 and n. 17 & 18 (Wis. 1981).

JEM Acres responds to the Brunos' interpretation of the language of Minn. Stat. § 115.55, which interpretation is a question of law, by asserting this is a "creative argument" and "little more than a red herring." (Respondent's Brief, p. 17.) The Brunos' assertion as to what "reason to know" means is not creative but simply what the phrase has been held to mean uniformly across the country. (See Appellants' Brief, pp. 29-31.) Nor is the statutory language a "red herring" because the Court's obligation is to apply the statute to the facts of record.

B. JEM Acres' Brief Contains Inaccurate Factual Statements.

JEM Acres acknowledges that the Gaslins received the 2002 septic system compliance certificates prior to the Gaslins signing of the Purchase Agreement. (Respondent's Brief, p. 5.) JEM Acres then inaccurately states the Gaslins "gave the certificates little or no attention because they were told that the septic system would have to be inspected prior to any sale of the resort and that, if found compliant, new compliance certificates would be issued," citing pages 41, 67-69, 111-112 and 215 of the transcript. The Gaslins did not testify that they gave the certificates little or no attention and the transcript pages cited do not support that statement. More importantly, the Gaslins certainly were not entitled to simply ignore these certificates which provided detail to the Gaslins concerning the Resort's septic system. (A. 98.)

The fact that the Gaslins had in hand 2002 compliance certificates is especially important because one of JEM Acres' arguments at trial, which it now for the most part ignores on appeal, is its claim that the septic system was not compliant because it was undersized. (T. 400.) That obviously is not true because the size of the septic system and the Resort stayed the same from 2002 to 2005. (Compare A. 80 & A. 98; T. 268-69.) The septic system size met the compliance requirements in 2002 and there was no showing the size standards had changed in 2005.²

More importantly, the Gaslins were well aware of the septic system size because the size is stated on the 2002 compliance certificates. What the record shows is that the Gaslins were provided the 2002 compliance inspection certificates which set out that the Resort has a two mound septic system and set out its components and that it was in compliance. (A. 98.) There is no evidence that the status of the Resort's sewage treatment system changed in between that 2002 inspection and the date of the sale to JEM Acres. There is no evidence of record that the septic system was not in fact a fully compliant system at the time of the sale to JEM Acres. The Gaslins admitted at trial they have nothing to show that the Resort's septic systems were not in compliance and were not in good working order when the sale closed on June 7, 2005. (T. 89-90, 120.)

JEM Acres inaccurately states on page 1 of its brief that "within two days of taking possession of the resort JEM Acres discovered the septic system had failed." The Gaslins

² Only on page 34 of JEM Acres' brief does it assert the septic system was undersized, but it does not explain how that fact equates with septic system compliance requirements.

took possession on June 2. (T. 117, 296-97.) The closing occurred on June 7. (T. 297-98; *see also* T. 72.) Jerry Gaslin asserts that it was sometime after the June 7 closing and the 2005 Fourth of July weekend he discovered one of the septic mounds was “wet and mushy” and smelled of septic. (T. 99-100.) But the fact that a mound is wet and mushy or has seepage does not establish failure, as JEM Acres’ own witness testified. (T. 168.) There is no evidence of record that the septic system had failed in June 2005.

C. Given JEM Acres’ Arguments to the Jury Were Contrary to Minnesota Law, the Court Must Carefully Scrutinize and Apply the Record Evidence to Minnesota Law.

Given the fact that JEM Acres improperly argued the law to the jury when asserting Minn. Stat. § 115.55 was breached, this Court on appeal must carefully evaluate the record evidence as applied to Minnesota law. The Brunos are well aware of the limitations placed on an appellate court, but it is the Court’s duty to set aside a verdict if there is no evidence in the record to justify it when applied to Minnesota law. That is the situation here. The record evidence simply does not support a violation of Minn. Stat. § 115.55, subd. 6.

The undisputed facts of record with regard to the Resort’s septic system are as follows:

- The Resort’s septic system was in full compliance with all laws and regulations on June 11, 2002. (A. 98.) Susan Bruno purchased the Resort in 2003. There was nothing that indicated to the Brunos that as of spring 2005 the septic system was not in full compliance. (T. 276, 343-44.)
- The Gaslins were contractually granted the right under the Purchase Agreement to inspect and test all Resort equipment before closing. If something was

found not to be in working order before closing, the Brunos agreed to repair or replace. (A. 34.)

- The Gaslins took possession of the property on June 2. (T. 117, 296-97.) During that time period, they certainly could have inspected and tested all equipment. They admit that during their possession from June 2 until the June 7 closing, there were no problems with the septic system. (T. 72.)
- 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.)
- Jerry Gaslin states that he called Pat Bruno, who told him it had been a wet spring and to do like Bruno did two years ago with the other mound and just put dirt on it. (T. 100.)³
- Following that conversation with Pat Bruno, the Gaslins did not immediately seek an inspection or otherwise hire anyone to take a look at the septic system. (T. 100-101.)
- The reason the Gaslins ultimately had the septic system inspected at all was because 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.)
- William Patnaude, the Beltrami County Environmental Services District Director, who has been in that post for 36 years, testified 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.)
- On July 12, 2005, Herb Schilla did a septic inspection pursuant to the Gaslins’ request. 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.)

³ Even according to Gaslin, the mound that was found to have failed in July 2005 was not the mound that was allegedly wet two years earlier. (T. 100.)

- A second inspection was undertaken by Laird Hensel on August 20, 2005. 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.” (A. 80.)
- 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.)
- Kate Gaslin admitted that although their resort license allows 4 RV sites, they had more RVs than that at the Resort on the Fourth of July 2005 weekend. (T. 74.) System one – the system that was found to have failed – is the system that applies to the RV sites. (A. 80, 98.) Schilla’s inspection was right after this Fourth of July weekend – i.e., July 12th. (A. 46.)
- Mr. Patnaude explained there is a difference between an inspector saying the system was going to fail and stating it was hydraulically overloaded. (T. 168-169.) The county can force the owner to do something only if the system is a public health threat. (T. 173.)

Based on this record, there is no evidence – direct or circumstantial – that the Brunos failed to disclose to JEM Acres the existence or known status of the sewage treatment system at the time of sale. There is also no evidence that the septic system was not in fact in compliance with applicable sewage treatment laws and rules as of the date of sale and certainly no evidence that the Brunos knew or should have known that it was allegedly not in compliance. Therefore, they cannot be held statutorily liable for costs related to bringing the system into compliance after the sale.

JEM Acres asserts that the fact that sometime after the closing one of the mounds was found to be wet and mushy with slab wood stacked up on top of the mound is sufficient evidence the Brunos knew or should have known the system was not in

compliance and the Brunos were allegedly hiding it from JEM Acres. But such a conclusion is contrary to JEM Acres' own witness testimony and common sense.

Mr. Patnaude, the undisputed expert in this area, testified that weepage does not indicate failure and mushy mounds do not indicate septic failure. (T. 168.) Accordingly, the fact that two years earlier the Brunos experienced weepage on the other mound during a wet spring does not in any fashion support that the Brunos knew or should have known there was a problem with the septic system.

Moreover, there is no testimony that the mound was mushy or weeping sewage prior to June 2 – the day the Gaslins took possession. The Gaslins had full access to the property before the June 7th closing. Pat Bruno admits he stored wood on the side of mound 1, but not for the purpose of covering any purported sewer leaks. (T. 309, 314-15.) To assert that the Brunos were somehow hiding something makes no sense in that the Brunos did not even have control over the property for days prior to the closing. The Gaslins were in full control.

Furthermore, under the Purchase Agreement, the Gaslins were entitled prior to the closing “to inspect and test all equipment” and if prior to the closing equipment was found not to be in working order, the Brunos agreed to replace or repair. (A. 34.) Obviously, it was in the Gaslins' best interests to do a full inspection of the Resort and they certainly had the time to do that without any interference by the Brunos prior to closing. The only evidence of record is that a wet mound appeared only sometime after the closing. (T. 72.)

JEM Acres is not entitled to use its claim that Pat Bruno allegedly told the Gaslins he would get the septic system inspected again prior to sale as evidence that the Brunos were somehow aware of a septic problem and that is why no inspection was completed.⁴ Pat Bruno unequivocally denied throughout the trial that he had ever orally promised he would obtain a septic inspection prior to sale, and no such “promise” is contained in the Purchase Agreement. Pat Bruno testified that he understood that all that was required was the 2002 certificates of compliance which were provided to the Gaslins. (T. 298.)⁵ The Minnesota Supreme Court has long held that one party’s denial of a promise to do some task does not aid “at all the conclusion that there never was an intention of performance.” *McCreight v Davey Tree Expert Co.*, 191 Minn. 489, 254 N.W. 623, 625 (1934). As the Supreme Court explained:

Bad, indeed, would be the case of the honest man who has made no such promise if, when falsely charged with it, he may not deny it without having his truth considered as some evidence either that there was such undertaking or that it was deceitfully made.

Id.

⁴ JEM Acres’ argument in this respect is akin to the Catch 22 question of “when did you stop beating your wife?” Pat Bruno denies making such a promise and his denial cannot be used as circumstantial evidence that he did not do what he promised because he knew the septic system would not pass inspection.

⁵ In this respect, Mr. Cole, the realtor, is certainly not a disinterested participant, as JEM Acres asserts at footnote 5 on page 20 of its brief. (*See Appellants’ Brief*, p. 37.) In addition, Mr. Cole, d/b/a Resort Sales Group, Inc., had effectively shielded himself from liability under the terms of the Purchase Agreement he had prepared. (*See A. 37.*)

Here, JEM Acres is not entitled to use its assertion of a promise by Bruno, which the Brunos deny, as circumstantial evidence that the Brunos somehow knew the septic system was not compliant and that supports a claim of statutory violation.⁶

Nor is JEM Acres entitled to use the Gaslins' testimony of an oral promise on the part of Pat Bruno to obtain another inspection prior to sale as somehow imposing an obligation to do so under Minn. Stat. § 115.55. This Court in *Woods* rejected such an argument. 720 N.W.2d at 851.

In essence, JEM Acres confuses speculation with circumstantial evidence. As this Court has held, "speculation . . . is not circumstantial evidence." *Cokley v. City of Otsego*, 623 N.W.2d 625, 632-33 (Minn. Ct. App. 2001), *rev. denied*. In this case, JEM Acres has presented a theory of "knew or should have known" based on rank conjecture, not premised on fact. As the Arizona Court of Appeals recognized, when the standard is knew or should have known, the appellate court is obligated to carefully review the evidence of record to make sure the evidence of record proves, even circumstantially, that the standard has been met. *Acuna v. Kroack*, 128 P.3d 221, 229-31 (Ariz. Ct. App. 2006). Here, reversal is required because the jury's verdict is supported by nothing but speculation, which is not evidence.

⁶ The Brunos also denied they ever told Norm Cole they would pay to fix the septic system. (T. 315-16.) Pat Bruno explained: "Because we were in compliance when we sold it. It was an operating system and we didn't have anything to do with what happened to it." (T. 316.)

II. IN THE ALTERNATIVE, EVEN IF THIS COURT CONCLUDES THERE WAS A VIOLATION OF MINN. STAT. § 115.55, A NEW TRIAL MUST BE GRANTED.

Minn. Stat. § 115.55, subd. 5a, subd. (c) states that an existing septic system that has none of the conditions listed in paragraph (b) and “has at least two feet of soil separation need not be upgraded, repaired, replaced, or its use discontinued, notwithstanding any local ordinance that is more restrictive.” The conditions detailed in subdivision (b) are (1) sewage discharge to surface water; (2) sewage discharge to ground surface; (3) sewage backup; or (4) any other situation with the potential to immediately and adversely affect or threaten public health or safety.

There is no question that the Resort had two septic systems. Septic system one was found by both inspectors to be an imminent threat to public health or safety. (A. 46, 80.) The second septic system, however, was not so found. (A. 44, 82.) Nonetheless, and as JEM Acres concedes, the jury awarded as damages the cost to replace both septic systems one and two. (Respondent’s Brief, p. 34.) Such a holding cannot be supported under an application of Minn. Stat. § 115.55 to the facts of record and a new trial is mandated because the trial court misapplied the law.

A fundamental problem with JEM Acres’ rendition of events in its Respondent’s Brief is its failure to accurately set out what Beltrami County required based on the after-sale sewer inspection.

JEM Acres called William Patnaude to testify at trial. As previously stated, Mr. Patnaude is Beltrami County’s Environmental Services District Director, a position

he has held for 36 years. (T. 159.) Mr. Patnaude acknowledged that if tells someone they have to replace a septic system, they have to replace it. (T. 160.) In response to the inspections done by Herb Schilla, Mr. Patnaude went out to Birch Haven Resort in July 2005. (A. 44; T. 165-66.)

Thereafter, there was a second inspection conducted by Laird Hensel on August 20, 2005. (A. 80.) Mr. Hensel disagreed with Mr. Schilla's report that the second septic system was failing. Mr. Schilla had found the second system was failing because it had "[l]ess than three feet of vertical separation between system bottom and saturated soil or bedrock." (A. 44; A. 82.) Under Minn. Stat. § 115.55, subd. 5a, subd. (c), that lack of vertical separation is not a ground for repair or replacement unless there was less than two feet of soil separation. There is no showing on this record that was the case, even based on Mr. Schilla's inspection.

Given Laird Hensel's 2005 report and the fact that Laird Hensel had done the compliance inspection report in 2002 where he had found both systems compliant, Mr. Patnaude, after his July visit to the Resort, talked to Mr. Hensel about system two.

(T. 167.) Mr. Patnaude adopted Mr. Hensel's reports. Mr. Patnaude testified:

Laird [Hensel]'s inspection reflects both systems complied with the separation but only one system is an imminent public health threat and that was the one that was discharging. The County could not force the correction of the second system.

(T. 169.)

Mr. Patnaude also unequivocally testified that based upon Laird Hensel's inspection, the County could not force JEM Acres (and therefore the Brunos) to do anything with regard to system two. (T. 173.) This testimony is in accord with his letter to JEM Properties on October 13, 2005, where he states: "The second system appears to have passed the compliance inspection conducted on 8-20-05." (A. 51.) Mr. Patnaude told JEM Acres that as to system two, "this is a civil matter between you and the seller." (*Id.*)

Contrary to JEM Acres' argument to this Court at pages 33-34 of its brief, it was certainly not for the jury to decide which inspector – Mr. Schilla or Mr. Hensel – it would choose to follow. Rather, the jury was obligated to follow what Beltrami County decided to do given the conflicting compliance certificates. The jury's award of damages to replace both system one and system two is contrary to Minn. Stat. § 115.55 as applied to the undisputed facts of record.

III. THE BRUNOS ARE ENTITLED TO DISMISSAL OF BREACH OF CONTRACT CLAIM.

No one testified as to the relationship between the Gaslins and JEM Acres. JEM Acres is correct that after all the testimony was presented, the trial court did inform the jury as follows:

[O]ne last piece of evidence that we did want to present to you is that this lawsuit is brought by JEM Acres, LLC, d/b/a, Birch Haven Resort as the Plaintiff, and the parties have agreed that I can tell you that Jerry and Kate Gaslin are the sole shareholders of that corporation called JEM Acres, LLC

(T. 364.)

The Brunos are therefore incorrect in their assertion at page 26 of their Appellants' Brief that the jury was not informed of the relationship between JEM Acres and the Gaslins. The Brunos apologize to the Court for that error. That, however, does not change the analysis as set out in their Appellants' brief.

A. JEM Acres Has No Standing to Assert Breach of Contract.

JEM Acres' breach of contract claim is based solely on a purported breach of the Purchase Agreement between the Gaslins and Susan Bruno. (Appellants' Brief, p. 37; Respondent's Brief, pp. 16, 26.) And JEM Acres, in response to the Brunos' Appellants' brief, does not assert to the contrary. Minnesota law is unequivocal that only a party to the contract may move to enforce it. *Veerkamp v. Farmers Co-op Creamery of Foreston, Minn.*, 573 N.W.2d 715, 717 (Minn. Ct. App. 1998). Nonparties acquire no rights or obligations under it. *In re Welfare of M.R.H.*, 716 N.W.2d 349, 352 (Minn. Ct. App. 2006), *rev. denied*.

JEM Acres nonetheless states as fact that “[o]n or about February 14, 2005 the parties entered into a Purchase Agreement.” (Respondent's Brief, p. 6.) That is factually inaccurate. The Purchase Agreement was entered into by the Gaslins with Susan Bruno. (A. 31.) There is nothing of record that the Gaslins ever assigned their rights in the Purchase Agreement to JEM Acres and the fact that JEM Acres' shareholders are the Gaslins does not aid JEM Acres. Contrary to JEM Acres' statements on page 16 of its Respondent's Brief, JEM Acres and the Gaslins as a matter of law are not one and the same.

An LLC is a legal entity distinct from its members. See Minn. Stat. §§ 322B.20; 322B.03, subd. 15; *see also Stone v. Jetmar Props, LLC*, 733 N.W.2d 480, 486 (Minn. Ct. App. 2007). An LLC lacks standing to enforce a contract even if it is entered into for its benefit if the LLC is not a party to the agreement. *See Pezold Air Charters v. Phoenix Corp.*, 192 F.R.D. 721, 725 (M.D. Fla. 2000) (cautioning Pezold Air Charters, LLC [PAC] “that PAC is probably not a party to the contract because, even though PAC owned the aircraft and Mr. Lewis issued a check to Phoenix from PAC’s account, PAC is not listed anywhere in the agreement, and the agreement does not provide that Mr. Pezold signed the agreement on behalf of PAC”); *see also A. Servidone, Inc. v. Bridge Tech., LLC*, 721 N.Y.S.2d 406, 408 (N.Y. App. Div. 2001) (holding that an LLC could not enforce a contract entered into and performed by its wholly owned subsidiary).

If LLC members make a contract in their individual capacities, they, not the LLC, have standing to sue for breach – even if the LLC itself has suffered harm from the breach. *Holmes Dev., LLC v. Cook*, 48 P.3d 895, 909 n. 6 (Utah 2002) (“It may be that Holmes Development, LLC and Holmes Ventures, LLC have the same management and may be practically indistinguishable. However, the two are legally separate entities and were created as separate entities for a purpose. Therefore, we refuse to recognize them as the same entity for standing to sue on a contract.”).

As this Court has held, an LLC can enforce a contract made by a promoter on behalf of a non-existent LLC if at the time of contract formation the other party was specifically informed that the contract was being made in anticipation of the LLC’s

formation. *See, e.g., Nelson's Minn. Farms, LLC v. Logan*, 2005 WL 354006 at *2 (Minn. Ct. App. 2005) (Supplemental Appendix [S.A. 1]) (considering a purchase agreement that stated “buyers for themselves and for the limited liability company to be formed by them, represent that they have and when formed, it will have, full power and authority to enter into this agreement and to consummate the transactions contemplated by this agreement” and holding that the subsequently formed LLC could bring a claim for breach of the agreement). The Purchase Agreement here does not so state and there is no testimony of record that the Gaslins ever assigned their rights to JEM Acres. JEM Acres has no standing to sue for purported breach of contract.

B. The Court Cannot Rewrite the Terms of the Purchase Agreement and Application of the Common Law Merger Doctrine Does Not Create a Contract Contrary to the Purchase Agreement's Terms.

1. JEM Acres is asking this Court to rewrite the Purchase Agreement, which it cannot do.

It is difficult to understand JEM Acres' breach of contract claim. JEM Acres is not suing on the warranty deed and JEM Acres does not seek to have the warranty deed reformed. *Commercial Bank, Unincorporated of Mason, Texas v. Satterwhite*, 413 S.W.2d 905, 909 (Tex. 1967), *reh'g denied* (no basis for relief where the grantor of the deed does not assert that through fraud, accident or mistake the deed failed to express the agreement of the parties). Instead, it is suing on the Gaslins' Purchase Agreement. (A. 17-19; Respondent's Brief, p. 16.)

The Purchase Agreement gave the Gaslins the right to inspect and test the Resort's equipment prior to the closing. If prior to closing and based on the buyers' inspection equipment was found not to be working, Susan Bruno, as seller, had agreed to replace or repair. (A. 34.)

The Purchase Agreement also specifically provides as follows:

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, to which JEM Acres is not a party, also states as follows:

The 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.)

Given the fact that the Buyer is specifically told that representations and warranties only survive until delivery of the warranty deed, it does not follow that JEM Acres can affirm the warranty deed but allege breach of contract based on pre-warranty deed representations. And despite the above-quoted specific provisions in the Purchase Agreement, JEM Acres nonetheless argues that it can go back to the Purchase Agreement because the common law doctrine of merger does not apply where there is fraud or mistake. (Respondent's Brief, pp. 25-27.)

But fraud or mistake does not mean that you reinstate the Purchase Agreement and proceed on a breach of contract claim. That argument makes no sense because for JEM Acres to proceed on a breach of contract claim the Court would have to read out the provisions of the Purchase Agreement quoted above that provide that all representations, warranties and covenants expire with the delivery of the warranty deed. The court cannot rewrite the terms of the Purchase Agreement. *Pollock-Halvarson v. McGuire*, 576 N.W.2d 451, 455 (Minn. Ct. App. 1998), *rev denied*.

If the common law merger doctrine does not apply, all it means is JEM Acres can proceed on a fraud claim. *Ross v. Kirner*, 172 P.3d 701, 704 (Wash. 2007). It cannot use purported fraud to rewrite the terms of the Purchase Agreement and proceed also on a breach of that contract claim

2. There is no evidence the septic system was noncompliant on June 7.

Moreover, there is nothing of record that supports the septic system was noncompliant prior to the June 7 closing. The Purchase Agreement was signed in February 2005 and the parties closed on June 7, 2005. Under JEM Acres' view of the facts, at any time within that February to June 2005 period a septic inspection was to be done by the Brunos. (Respondent's Brief, pp. 5-7.) The fundamental problem with JEM Acres' assertion is that there is nothing of record that would allow a jury to compare the status of the septic system as of July 12, 2005, when it was inspected, with its status prior to the closing on June 7, 2005.

To allow a jury to decide whether there was a breach of contract, there must be some evidence beyond mere speculation which would enable a jury to rationally decide it was more probable than not that the septic system was noncompliant before or at the time of sale. The same analysis applies with respect to JEM Acres's theory of fraud. The resolution of this issue in JEM Acres' favor necessarily required the application of science, mechanics and engineering rather than the application of matters of which the jurors would be aware of only by common knowledge. This is made evident by Mr. Patnaude's testimony that weepage does not mean the septic system has failed or is going to fail. (T. 168.)⁷ Having failed to present expert testimony that provides the requisite foundation that the failure found after the sale more probably than not existed prior to the sale, the jury's verdict is rank speculation and must be overturned.

IV. THE FRAUD CLAIM MUST ALSO BE REVERSED AND DISMISSED.

A. JEM Acres Has No Standing to Assert Fraud.

JEM Acres' fraud claim suffers from the same "standing" infirmity that applies to its breach of contract claim. When individuals agree to purchase land, which they thereafter contribute to an LLC, the individuals rather than the LLC have standing to sue the vendors for fraud and misrepresentation. *Roger Boc, LLC v. Weigel*, 744 So.2d 731, 734 (La. Ct. App. 1999). Here, any purported misrepresentations were made to the

⁷ The problem, which JEM Acres ignores, is that over the Fourth of July weekend it had more RVs on site than allowed. The system that was found on July 12 and August 20 by both inspectors to have failed – mound one – is the system that applies to RV sites. (T. 74; A. 46, 80, 98.)

Gaslins. There is no showing on this record that JEM Acres, a separate legal entity from the Gaslins, participated in any of the negotiations that led to the sale of the property. On this record, JEM Acres cannot maintain an action for fraud.

B. Breach of Contract and Breach of Statutory Duty Claims Cannot Be Restated as Fraud Claims.

Furthermore, in setting out its fraud claims, JEM Acres in essence restates its purported breach of contract claim and breach of statutory duty claim and puts the “fraud” label in front of it. (See Respondent’s Brief, pp. 29-30.) What JEM Acres asserts as fraud, is not fraud. A breach of promise sounds in contract, not fraud. A contract claim cannot be converted into one for fraud by the allegation that the contracting party broke his promise. *Int’l Travel Arrangers v. NWA, Inc.*, 991 F.2d 1389, 1402-03 (8th Cir. 1993), *reh’g denied* (applying Minnesota law); *Hanks v. Hubbard Broad., Inc.*, 493 N.W.2d 302, 307 (Minn. Ct. App. 1992), *rev. denied*. Moreover, a claim that the defendant was not sincere when it promised to perform under the contract is still a breach of contract claim, not one in fraud. *Weitz v. Smith*, 647 N.Y.S.2d 236, 237 (N.Y. App. Div. 1996). All JEM Acres asserts as fraud is its “cloaked” breach of contract claims, which it had no standing to assert and which ended with the delivery of the warranty deed.

In order to separate out breach of contract from fraud, the question is whether a relationship would exist which gives rise to a legal duty without enforcement of a statute or a contract. The only allegation that even arguably fits this parameter is JEM Acres’

assertion that Pat Bruno misrepresented that a new inspection was in fact done and the system was good to go. But the question, then, is what damage flows from that statement. It is the Brunos' position that there is no damage and the record evidence does not support a finding of fraud damages.

C. The Jury's Award of Damages Is Contrary to the Standard Applied to Fraud and There Is No Evidence of Out-of-Pocket Damages.

As with the breach of contract claim, there is no showing on this record that the septic system was not in fact compliant with Minnesota law at the time of sale. Given this record, there is nothing that can connect any purported false statement with any purported damages.

Another major problem with the damage award in this case is the jury was given three independent claims for consideration – breach of contract; breach of Minn. Stat. § 115.55 and fraud – all of which have different measurements of damages. (A. 9-10.) The jury was asked to come up with one damage figure. (A. 10.) The jury's damage award cannot stand based on the fraud theory.

The jury was only instructed on the out-of-pocket rule of damages for fraud. (T. 386.) The jury was not told of any exception to the out-of-pocket rule, as JEM Acres now argues for the first time on appeal. (Respondent's Brief, p. 31.)

And contrary to JEM Acres' statement to this Court, JEM Acres did not elicit any testimony that comports with the out-of-pocket rule. The measure of damages for fraud under the out-of-pocket rule is the amount paid for the Resort less the fair market value of

the property. *Peterson v. Johnston*, 254 N.W.2d 360, 362 (Minn. 1977). Notably absent from JEM Acres' brief is any citation to the record of what the fair market value of the property was as of the date of sale with the purportedly noncompliant septic system. (See Respondent's Brief, p. 32.) The reason there is no record citation is no such testimony was presented by JEM Acres. The jury had nothing before it by which it could determine damages for fraud based on the trial court's instruction.

This Court has specifically held that in these situations it is legally insufficient for the buyer to prove only the cost of repair or replacement. *Lobe Enterprises v. Dotsen*, 360 N.W.2d 371, 373 (Minn. Ct. App. 1985); see also *Hart v. Coldwell Banker Northwoods Realty*, 1998 WL 313586 (Minn. Ct. App. 1998) (S.A. 5). Here, as in *Lobe* and *Hart*, there was no showing that the property was not worth the purchase price even with the purported misrepresentation. Since JEM Acres did not meet its burden of proof, as a matter of law no damages can be awarded for any purported fraud.

The trial court's post trial ruling further compounded the jury's error because the trial court held as a matter of law that attorney's fees can also be awarded based on the jury's finding of fraud. (A. 4-5.) JEM Acres does not even attempt to support that erroneous ruling on appeal. (See Respondent's Brief, p. 24.) The determination of fraud and any damage award must be reversed.

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: September 2, 2008

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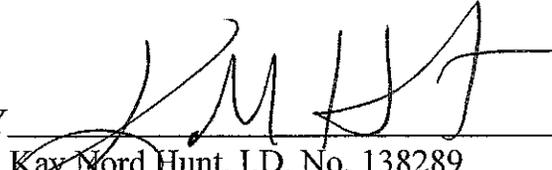
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CERTIFICATION OF BRIEF LENGTH

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 5,913 words. This brief was prepared using Word Perfect 10.

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