

No. A08-1482

State of Minnesota

In Court of Appeals

Kathleen Bryan,

Appellant,

vs.

Deonorine Kissoon and Kathleen Kissoon ,

Respondents.

RESPONDENTS' BRIEF

**Jacobberger, Micallef &
Associates, LLC**
Fred R. Jacobberger (#04927X)
P.O. Box 202093
Bloomington, MN 55420
Deliveries: 2701 Overlook
Drive
Bloomington, MN 55431
(952) 948-0600
Attorneys for Appellant

**Stich, Angell, Kreidler & Dodge,
P.A.**
Louise A. Behrendt(#0201169)
Kenneth W. Dodge (#02319X)
The Crossings, Suite 120
250 Second Avenue South
Minneapolis, MN 55401
612-333-6251 (phone)
Attorneys for Respondents

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iii
I. ISSUES PRESENTED.....	1
II. STATEMENT OF THE CASE.....	1
III. STATEMENT OF FACTS	5
A. Appellant’s 2004 purchase of Respondents’ home.....	5
B. Appellant’s occupancy of subject home.	8
C. Appellant commences suit.	9
IV. ARGUMENT	11
A. The trial court did not err in excluding Appellant’s evidence of construction defect damages and, because Appellant had no other evidence of damage, did not err in granting Respondents’ motion for judgment as a matter of law on Appellant’s sole claim of misrepresentation.....	11
1. Standard of review.....	11
2. Under Minnesota’s out-of-pocket rule, evidence of construction related damages was properly excluded as a matter of law because it had no natural or proximate relationship to the claimed misrepresentation.	12
B. Respondents were entitled to summary judgment on the elements of misrepresentation.	20
1. Standard of review	20
2. Appellant had no evidence creating a genuine issue of material fact with respect to whether Respondents made an actionable misrepresentation by nondisclosure with respect to the lightning-strike fire.....	21
3. Appellant had no evidence creating a genuine issue of material fact with respect to whether she reasonably	

relied on Respondents' alleged failure to disclose that
water was used to douse a fire caused by the disclosed
lightning strike. 24

V. CONCLUSION 29

TABLE OF AUTHORITIES

Cases

<i>Ackerman v. American Family Mut. Ins. Co.</i> , 435 N.W. 2d 835 (Minn. Ct. App. 1989).	21
<i>B F. Goodrich Co. v. Mesabi Tire Co.</i> , 430 N.W. 2d 180 (Minn. 1988)	passim
<i>Braith v. Fischer</i> , 632 N.W.2d 716 (Minn. Ct. App.2001).....	11
<i>Brooks v. Doherty, Rumble & Butler</i> , 481 N.W. 2d 120 (Minn. Ct. App. 1992)	15, 16
<i>City of Savage v. Varey</i> , 358 N.W.2d 102 (Minn. Ct. App.1984)	21
<i>Colangelo v. Norwest Mortgage, Inc.</i> , 598 N.W. 2d 14 (Minn. Ct. App. 1999)	1, 23
<i>Danielson v. City of Brooklyn Park</i> , 516 N.W. 2d 203 (Minn. Ct. App. 1994)	18
<i>Drilling v. Berman</i> , 589 N.W. 2d 503 (Minn. Ct. App. 1999).....	20
<i>Florenzano v. Olson</i> , 387 N.W. 2d 168 (Minn. 1986).....	24
<i>Frost-Benco Elec. Ass'n v. Minnesota Pub. Util. Comm'n</i> , 358 N.W. 2d 639 (Minn. 1984).....	20
<i>Goldfine v. Johnson</i> , 208 Minn. 449, 294 N.W. 459 (1940)	27
<i>Greuling v. Well Fargo Home Mortgage, Inc.</i> , 690 N.W. 2d 757 (Minn. Ct. App. 2005) 1, 24	
<i>H.B. ex. rel. Clark v. Whittemore</i> , 552 N.W. 2d 705 (Minn. 1996).....	20
<i>Harpster v. Heatherington</i> , 512 N.W. 2d 585 (Minn. 1994)	1, 18, 19
<i>Hoyt Properties, Inc. v. Production Resource Group, L.L.C.</i> , 736 N.W. 2d 313 (Minn. 2007).....	1, 21
<i>J.W. by D.W. v. C.M.</i> , 627 N.W.2d 687 (Minn. Ct. App.2001)	11
<i>Klein v. First Edina Nat'l Bank</i> , 293 Minn. 418, 196 N.W. 2d 619 (1972).....	22
<i>Kroning v. State Farm Auto. Ins. Co.</i> , 567 N.W.2d 42 (Minn.1997)	11

<i>Kryzer v. Champlin American Legion No. 600</i> , 494 N.W.2d 35 (Minn.1992).....	18
<i>L & H Airco, Inc. v. Rapistan Corp.</i> , 446 N.W. 2d 372 (Minn. 1989).....	22
<i>Langeslag v. KYMN Inc.</i> , 664 N.W.2d 860 (Minn.2003);	11
<i>Lewis v. Citizens Agency of Madelia, Inc.</i> , 306 Minn. 194, 235 N.W. 2d 831 (1975);	passim
<i>Lobe Enterprises, Inc. v. Dotsen</i> , 360 N.W. 2d 371 (Minn. Ct. App. 1985).....	12, 15, 16
<i>Lowrey v Dingman</i> , 251 Minn. 124, 86 N.W. 2d 499 (1957).....	15, 16
<i>Lubbers v. Anderson</i> , 539 N.W. 2d 398 (Minn. 1995)	19
<i>M.H. v, Caritas Family Services</i> , 488 N.W. 2d 282 (Minn. 1992).....	21, 22
<i>Nicollet Restoration, Inc. v. City of St. Paul</i> , 533 N.W. 2d 845 (Minn. 1995).....	20, 24
<i>Plunkett v. Lampert</i> , 231 Minn. 484, 43 N.W. 2d 489 (1950).....	12
<i>Pouliot v. Fitzsimmons</i> , 582 N.W.2d 221 (Minn.1998).....	11
<i>Raach v. Haverly</i> , 269 N.W. 2d 877 (Minn. 1978).....	13
<i>Skurnowicz v. Lucci</i> , 2002 PA Super. 140, 798 A. 2d 788 (2002)	17
<i>Sports Page, Inc. v. First Union Mgmt</i> , 438 N.W. 2d 428 (Minn. Ct. App. 1989) ...	13, 15, 16
<i>Strouth v. Wilkinson</i> , 302 Minn. 297, 224 N.W.2d 511 (1974).....	12, 16
<i>Taylor v. Sheehan</i> , 435 N.W.2d 575 (Minn. Ct. App. 1989).....	27
<i>Umphrey v. Sprinkel</i> , 106 Idaho 700, 682 P. 2d 1247 (1983).....	17
<i>Zehrer v. Holland</i> , 1998 WL 346652 (Minn.Ct. App. 1998)	1, 27, 28

Statutes

Minn. Stat. § 541.051	3
-----------------------------	---

Other Authorities

JIG 57.25 4

Rules

Minn. R. Evid. 402 5

Minn. R. Evid. 403 5

I. ISSUES PRESENTED

1. In a case involving allegations of misrepresentation in the sale of a single-family home, did the trial court appropriately exercise its discretion to exclude Appellant's "cost of repair" damage evidence when such evidence did not bear a natural and proximate relationship to the alleged misrepresentation that formed the basis of her claim against Respondents?

The trial court found: Yes.

Apposite cases: *Lewis v. Citizens Agency of Madelia, Inc.*, 306 Minn. 194, 235 N.W. 2d 831 (1975); *B.F. Goodrich Co. v. Mesabi Tire Co.*, 430 N.W. 2d 180 (Minn. 1988); *Harpster v. Heatherington*, 512 N.W. 2d 585 (Minn. 1994).

2. Did the trial court properly deny Respondents' motion for summary judgment on the essential elements of misrepresentation and reliance, where the undisputed evidence demonstrated that any misrepresentation made by Respondents was not material, and that Appellant neither reasonably nor justifiably relied on the misrepresentation to forego a more intensive moisture inspection at the subject home?

No.

Apposite cases: *Hoyt Properties, Inc. v. Production Resource Group, L.L.C.*, 736 N.W. 2d 313 (Minn. 2007); *Colangelo v. Norwest Mortgage, Inc.*, 598 N.W. 2d 14 (Minn. Ct. App. 1999), *rev. denied* (Minn. Oct. 21, 1999); *Greuling v. Well Fargo Home Mortgage, Inc.*, 690 N.W. 2d 757 (Minn. Ct. App. 2005); *Zehrer v. Holland*, 1998 WL 346652 (Minn.Ct. App. 1998).

II. STATEMENT OF THE CASE

Appellant Kathleen Bryan's claims of misrepresentation against Respondent Deonorine and Kathleen Kissoon arise out of Appellant's 2004 purchase of Respondents' Bloomington home. Appellant admits that Respondents disclosed prior to the sale that the house had been damaged by storms and struck by lightning, which necessitated the replacement of the roof and carpeting, as well as repair to the top two floors of the house.

There was no claimed deficiency in this post-storm remediation. Instead, Appellant's claim arises out of information she believes that Respondents failed to disclose.

Specifically, Appellant claims that sometime after the sale she learned in a casual conversation with a neighbor that the disclosed lightning strike caused an incidental fire, which necessitated that water be poured onto the roof to extinguish it. Thereafter, and subsequent to a 2005 toilet overflow event, Appellant had an extensive inspection of the home. The inspection allegedly revealed that the home was damaged by moisture resulting not from the storms or the water used to extinguish the fire, but rather from defects in the *original construction* of the home.

Appellant commenced the present lawsuit in late 2006, asserting claims against Respondents for negligent misrepresentation and non-disclosure, based on their alleged failure to disclose that the (disclosed) lightning strike also resulted in a fire. While Appellant's original purchase of the subject home was subject to an inspection which did take place, Appellant asserts that had she known of the lightning-strike fire, and particularly known about the (unknown) quantity of water used to douse it, she would have insisted on a more intensive mold and moisture inspection before she agreed to buy the house. She maintains that such an inspection would have uncovered the moisture damage caused by the defects in original construction, and that had she known of these defects she never would have purchased the home. Appellant therefore sought damages from Respondents representing the amounts incurred to repair the original construction defects. She does not allege that Respondents knew anything about these defects prior to the sale.

Respondents moved for summary judgment, arguing that the undisputed facts failed to demonstrate an actionable misrepresentation and that, alternatively, Appellant could not demonstrate the justifiable reliance necessary to support her claim. The court denied the motion, finding that the jury typically decides whether a plaintiff's reliance was reasonable. *See* Appellant's Appendix ("A.A.") 227.

The matter was scheduled for trial beginning May 12, 2008. The only exhibits Appellant identified regarding damages were invoices and receipts related to the approximately \$400,000 in costs she allegedly incurred to rectify the construction defects identified by her experts. *See* Trial Transcript ("T.T"), p 30.

On the first day of trial Respondents moved, in limine, for the exclusion of Appellant's evidence detailing the costs incurred to repair the original construction defects, on the grounds that such evidence was irrelevant and bore no causal relationship to Respondents' alleged misrepresentation about the lightning-strike fire. *See* T.T. pp. 8, 15-16, 31- 32. Appellant alleged that the damages sought "naturally flowed" from the misrepresentation, because she would not have incurred costs to repair the construction-related damages had the initial misrepresentation about the fire not been made. *Id.* p. 32.¹ She admitted she had no evidence of damage specifically caused by the fire and no expert prepared to testify to "what a willing buyer would have paid a willing seller had full

¹ Because the house was completed in the late 1980's, any claim Appellant may have attempted to assert against the original contractors would have been time-barred. *See* Minn. Stat. § 541.051 (providing statutes of limitation and repose for claims arising out of improvements to real property).

disclosure been made,” because “that’s never been our theory of the case.” *Id.* pp. 9, 17-18.

In deciding the issue the court relied upon and construed JIG 57.25, which provides an instruction for damages based on fraud and misrepresentation. *See* T.T. pp. 22, 34-35. The court ultimately granted Respondents’ motion and excluded Appellant’s evidence of damages, finding that they were irrelevant to the measure of damages allowed in Minnesota for claims of misrepresentation. *Id.* pp. 36-37. Appellant then stated that she had no other evidence of damage, asserting that even if she were allowed to present her case to the jury, the court would have to direct a verdict based on lack of evidence establishing damages. *Id.* pp. 37-39. Respondents were prepared to try the liability issue. *Id.* p. 38. Nevertheless, Respondents moved for a directed verdict, and the motion was granted. *Id.* pp. 38-39.

The court thereafter issued an order granting Respondents’ motion for judgment as a matter of law. A.A. 1-2. Appellant’s claims against Respondents were dismissed, with prejudice. A. A. 1 – 10.

In the written order explaining its decision, the court explained that under Minnesota’s out-of-pocket rule, there was no natural or proximate causal connection between the misrepresentation, and the damages alleged. A. A. 6. Instead, the court found that “at best” there is “but for causation: but for the misrepresentation, Plaintiff would not have purchased the home and would not be suffering damages.”*Id.* at 7. Therefore, the court concluded that because Appellant failed to show that the damages complained of were the natural and proximate result of Respondents’ misrepresentation

about the fire, Appellant's evidence of damages was irrelevant under Minn. R. Evid. 402. *Id.* It further found that to the extent it was relevant, it was excludable under Minn. R. Evid. 403. *Id.*

Appellant subsequently commenced the instant appeal. Respondents filed a notice of review, seeking review of the trial court's denial of their motion for summary judgment.

III. STATEMENT OF FACTS

A. Appellant's 2004 purchase of Respondents' home

In April, 2004 Appellant Kathleen J. Bryan purchased a home in Bloomington, Minnesota ("the subject home") from Respondents Deonarine and Kathleen Kissoon. A.A. 11. The home was originally built for Respondents in the late 1980's. A. A. 200 (p. 7-8).

Before she bought the home, and throughout the sale process, Appellant claims she was sensitive to moisture problems because her prior home had water problems resulting from storm damage, and her family had experienced symptoms due to mold. See A. A. 45 (p. 27-29,) 48 (pp. 38-41), 49 (p. 44). As a result she told her realtor that she was concerned about mold and moisture intrusion, and wanted to make sure her new home did not have any of these problems. *Id.* She revoked an offer on another home because the sellers would not permit a mold and moisture inspection. AA. 49 (pp. 44-45).

In the process of listing their home for sale, Respondents completed a "Seller's Property Disclosure Statement," which disclosed that the home had been damaged by lightning and hail in 2002, that lightning rods and surge protection had been added during

2002, that the roof and carpets were replaced because of storm damage during 2002, and that the top two floors of the home had been remodeled. A.A. 94-98 (lines 39-43, 48-50, 60, and 70-77). Appellant admitted that she saw this form before making an offer, and was fully aware of its contents. A.A. 52 (p. 57). Appellant did not ask any questions about why the carpet been replaced, and instead assumed it was because windows were knocked out during the storm. *Id.*; *see also* A.A. 53 (pp. 68-69). While Appellant understood the roof had been replaced in June, 2002, she assumed it was necessitated by storms that went through her neighborhood in the 1990s and that Respondents, like other neighbors, had to wait several years before their roof was replaced. *Id.*; *see also* A.A. 53 (pp. 60-61). She assumed that the remodeling of the top two floors was necessitated by water intrusion from storm damage, but never asked Defendants any questions to confirm her assumptions. *Id.* and A.A. 58 (pp. 78-80). She also admitted that she knew lightning can cause fires, and admitted she never asked Respondents any questions about the lightning strike. *Id.*; *see also* A.A. 52 (p. 54, 56-57).

Appellant's Purchase Agreement on the subject home states, among other things, that "Buyer acknowledges that no oral representations have been made regarding possible problems or water in basement or damage caused by water or ice buildup on roof of the property, and buyer relies solely in that regard on the following statement by Seller: Seller has . . . had a wet basement and has . . . had roof, wall or ceiling damage caused by water or ice buildup. Buyer has received a seller's property disclosure statement" A.A. 102—108. The document further indicates that the offer was subject to an inspection addendum. *Id.*

Appellant did, in fact, arrange for an inspection of the home by a certified inspector prior to the closing. A.A. 110-114. Appellant was present during the entire inspection. *Id.*; *see also* A.A. 59 (pp. 82, 83, 85), 60 (p. 86) and 62 (p. 96). The inspection report states, in relevant part, that the inspector checked exterior components of the subject home, including the roof, and interior components including the kitchen and bathrooms, checked whether there was any evidence of water penetration in the basement, and assessed the condition of electrical, plumbing and heating components. A.A. 110-114. While the report suggests that the entire home was inspected top to bottom, Appellant claims that the inspector was chosen by her realtor and that the inspection was “tremendously superficial.” A.A. 62 (p. 97). Appellant admitted that Respondents were not present when the inspection was conducted. A.A. 63 (p. 98). There was no evidence that Respondent selected the inspector, or in any way restricted the scope of Appellant’s inspection. Appellant agreed that the purpose of the inspection was to determine if there was anything wrong with the home. A.A. 85 (p. 182).

Appellant claimed that she did not think she needed a specific moisture intrusion inspection before buying the subject home even though she knew that storm damage required the remodeling of the top two floors, because she believed that Respondents had “completely remodeled and rectified” all of the damage caused by the storm. A.A. 64-65 (Pp. 106-07). She admitted that Respondents never made any specific representations about the repair of the water damage from the storm. A.A. 65 (pp. 106-07); *see also* A.A. 94-100.

B. Appellant's occupancy of subject home.

At some unknown time after the closing on the subject home, Appellant claims she learned in a "very short and brief" conversation with her neighbors, "Shelley and Mike," that there was a "really big fire" in the subject home that was "pretty extensive." A.A. 78 (p 152), A.A. 82 (p. 168). She claims that Mike and Shelley also told her that the fire department had placed a "chute" or "trough" from the area of the roof where the lightning strike occurred through the house, down the stairs and out the front door, for the purpose of directing water out of the house. A.A. 82 (pp. 167-70). Appellant understood that the purpose of the trough was to direct water through the home so that it did not extend throughout the rest of the house. A.A. 82-83 (pp.170-71, 174).

Appellant acknowledged that Shelly and Mike was her only source of information regarding the fire. A.A. 82 (pp. 169-70). While she believes there was structural damage to the home as the result of the fire, she had no evidence regarding what that damage was, and was unable to identify anything that burned in the fire. A.A. 61-62 (pp. 93-94).

The fire department report on the lightning-strike fire states that the home was struck by lightning during a storm, that a neighbor saw the strike and called the fire department after seeing smoke coming from the wood shingles, that the fire department accessed the attic area and extinguished the fire using "handlines and truck extended to the roof," and that the fire was limited to the roof area hit by lightning. "A.A. 138. The report does not state how much water was used.

There was no evidence that after she spoke to Mike and Shelley, Appellant contacted anyone to inspect the house for any purpose. Instead, the evidence showed that

Appellant contacted someone to investigate the home for mold and moisture problems in early 2006, after a toilet overflow incident that occurred in 2005. A.A. 64 (pp. 102-04). Appellant acknowledged that this incident resulted in two inches of water in a second-level bathroom, wet carpeting in the hallway, and direct passage of water down to the lower bedroom area. *Id.* Remediation of this problem required putting holes in the wall to access the wet areas where the water descended through the house. *Id.*

Several months after the toilet incident Appellant hired an expert to examine the home for mold. A.A. 64 (pp. 104-05). After several investigations between February and July, 2006 the investigator concluded that the home had several defects resulting from original construction. A.A. 195-97. He claims that such defects would have been discovered had his inspection been conducted in 2004. *Id.*

There is no evidence, and no allegation, that Respondents knew about the construction defects at any time prior to Appellant's purchase of the subject home.

C. Appellant commences suit.

Appellant commenced a lawsuit against Respondents in December, 2006, based on their failure to disclose that the subject home not only had been damaged by lightning and hail, but actually suffered what Appellant called a "significant fire incident requiring the inundation of the home with water." A.A. 12-14 (¶¶ 10-18). She specifically alleged, *inter alia*, that Respondents had "special knowledge" of the lightning-strike fire but failed to disclose it, that the Disclosure Statement was materially misleading in that it referred only to storm damage and did not reveal the "significant fire event that had occurred at the home;" that the damages Respondents claimed were caused by lightning and hail

“were actually the result of a significant fire incident requiring the inundation of the home with water,” that Respondents’ failure to disclose this fact was intended to, and did, “induce Appellant to purchase the home without further specific water intrusion inspections;” that Appellant justifiably relied on the disclosures as made in failing to insist that specific moisture intrusion inspections be performed; and that Respondents’ nondisclosure resulted in the need for remediation and reconstruction of the home. *Id.*

Appellant admitted that the allegations relative to the extent of the fire and the quantity of water used to extinguish it are supported only by her brief conversation with neighbors Mike and Shelley, and on the Bloomington Fire Department report. AA. 82-83 (pp. 169-71), A.A. 133 (#12), A.A. 81 (p. 166). She had no evidence that Respondents’ repair of the subject home was necessitated by the water used to douse the fire, rather than the rain water which entered the home due to the storm. She also had no evidence that the fire itself caused any damage.

The only damage evidence produced by Appellant related to costs associated with remediating damage to the subject house, which Appellant’s experts attributed to defects in the original construction. She admits that the moisture-intrusion problems discovered by her experts were not fire-related. *See Appellant’s Brief (“App. Br”.)*, p. 5.

IV. ARGUMENT

A. The trial court did not err in excluding Appellant's evidence of construction defect damages and, because Appellant had no other evidence of damage, did not err in granting Respondents' motion for judgment as a matter of law on Appellant's sole claim of misrepresentation.

1. Standard of review.

On appeal from a motion for judgment as a matter of law, this court ordinarily applies a de novo standard of review. *Langeslag v. KYMN Inc.*, 664 N.W.2d 860, 864 (Minn.2003); *Pouliot v. Fitzsimmons*, 582 N.W.2d 221, 224 (Minn.1998). While the trial court ultimately dismissed Appellant's claims on a motion for judgment as a matter of law, the present appeal centers on the trial court's exclusion of Appellant's evidence of damages resulting from Respondent's alleged misrepresentation concerning the lightning-strike fire. She asserts that the trial court erred in excluding this evidence and, as such, erred in dismissing her claims. She asserts that the trial court's legal determinations regarding exclusion of this evidence is reviewed *de novo*. See App. Br. p. 6.

But the determination of whether to receive or exclude evidence is discretionary with the district court. *J.W. by D.W. v. C.M.*, 627 N.W.2d 687, 697 (Minn. Ct. App.2001), *rev. denied* (Minn. Aug. 15, 2001). Consequently, evidentiary rulings made within the district court's discretion are reviewed for an abuse of that discretion. *Braith v. Fischer*, 632 N.W.2d 716, 721 (Minn. Ct. App.2001), *rev. denied* (Minn. Oct. 24, 2001).

Therefore, the trial court's rulings on whether to admit evidence will not be disturbed absent an erroneous interpretation of the law or an abuse of discretion. *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 45-46 (Minn.1997). Unless there is some indication

that the trial court exercised its discretion “arbitrarily, capriciously or contrary to legal usage, the appellate court is bound by the result.” *Id.* at 46 (citing *Plunkett v. Lampert*, 231 Minn. 484, 492, 43 N.W. 2d 489, 494 (1950)).

2. *Under Minnesota’s out-of-pocket rule, evidence of construction related damages was properly excluded as a matter of law because it had no natural or proximate relationship to the claimed misrepresentation.*

Minnesota uses the minority “out-of-pocket” rule to determine damages for fraud or misrepresentation. This rule “allows damages to be recovered which are the *natural and proximate loss* sustained by a party *because of reliance on a misrepresentation.*” *Lewis v. Citizens Agency of Madelia, Inc.* 306 Minn. 194, 100, 235 N.W. 2d 831, 835 (1975)(emphasis added)(citing *Strouth v. Wilkinson*, 302 Minn. 297, 300, 224 N.W.2d 511, 514 (1974)(further citations omitted). Minnesota has a longstanding preference for application of the “out-of-pocket” rule over the majority “benefit of the bargain” rule. *B.F. Goodrich Co. v. Mesabi Tire Co.*, 430 N.W.2d 180, 182 (Minn. 1988); *see also Lobe Enterprises, Inc. v. Dotsen*, 360 N.W. 2d 371, 373 (Minn. Ct. App. 1985). The Minnesota Supreme Court has observed that the difficulty with the latter rule is that “determining what the plaintiff would have had if the situation had been different too often involves overly hypothetical and speculative proof.” *Id.* Therefore, the court stated that “[w]e prefer the out-of-pocket rule, where ‘it is not a question of what the plaintiff might have gained through the transaction but what he lost *by reason of the defendant’s deception.*’” *Id.* (emphasis added); *see also Lewis*, 306 Minn. at 200, 235 N.W. 2d at 835.

To be sure, Minnesota courts have not rigidly applied the out-of-pocket loss rule in all circumstances, finding that courts should be "flexible" in applying it. *See Lewis* 306 Minn. at 201, 235 N.W. 2d at 835; *see also Raach v. Haverly*, 269 N.W. 2d 877, 881 (Minn. 1978). This "flexible" exception applies where the facts in a particular case dictate that the general rule will not return the party to the status quo. *Id.* Thus while damages recoverable for fraud are those "naturally and proximately" resulting from the misrepresentation, the issue must be "construed in the light of the facts of the case then being considered." *Tysk v. Griggs*, 253 Minn. 86, 99, 91 N.W. 2d 127,136 (1958) (citations omitted); *see also Sports Page, Inc. v. First Union Mgmt*, 438 N.W. 2d 428, 432 (Minn. Ct. App. 1989)(citing *Lewis*, 306 Minn. at 201, 235 N.W. 2d at 835).

In the present case Appellant argues that the "flexible approach" recognized by the court in *Lewis* requires reversal of the trial court's exclusion of her cost-of-repair damages, which consisted entirely of costs incurred to rectify original construction defects. She asserts that the trial court applied the out-of-pocket rule "too strictly," and without regard for the "flexibility" which has been recognized in assessing damages based on misrepresentation. *See App. Br. P. 10.* She argues that her evidence of repair costs should have been deemed admissible: "(1) as evidence of the true value of the home at the time of purchase, (2) as evidence of what Appellant parted with in addition to the purchase price paid to Respondents; (3) as consequential damages allowed in addition to or in lieu of out-of-pocket damages, or as expenditures incurred in an effort to mitigate damages." *Id.* And she argues that the trial court erred in deciding as a matter of law the

question of proximate cause embedded within the out-of-pocket damage issue, asserting that the question must be decided by the jury. *Id.* at 7.

But examination of relevant authority reveals that the “flexibility” allowed in applying Minnesota’s out-of-pocket rule always depends on whether the damages sought bear a natural and proximate relationship to the alleged misrepresentation. The trial court committed no error in concluding as a matter of law that no reasonable juror could find that Appellant’s cost-of-repair damages bore a natural or proximate relationship to the claimed misrepresentation.

The trial court’s determinations were based in large part on *Lewis*, where the court construed damages awarded to a plaintiff for negligent misrepresentations about a life insurance policy. In that case, Plaintiff consulted with a bank officer relative to what she thought was a life insurance policy issued to her husband which was, in actuality, an annuity policy. Plaintiff specifically sought advice on whether she should cancel the policy but, after reviewing incomplete documentation, the bank officer advised plaintiff that the policy was a life insurance policy with a death benefit of over \$4,000 and that she should keep what she had instead of canceling it. But, upon her husband’s death shortly thereafter, plaintiff learned that the policy had no death benefit.

In assessing the trial court’s award of damages the Minnesota Supreme Court applied the out-of-pocket rule flexibly, and held that plaintiff was entitled to recover not only the premiums paid for the annuity policy but damages incurred as the result of her reliance on the bank officer’s misrepresentation, which amounted to the \$4,000 value of the life insurance policy the officer told her that she had. 306 Minn. at 200, 235 N.W. 2d

at 835. In so doing the court noted that recoupment of the premiums alone would not return the plaintiff to status quo, and that “it seems reasonable to us that *the natural and proximate loss* suffered by Mrs. Lewis was the life insurance proceeds she expected to receive upon her husband’s death and not merely the premiums supporting the policy.” *Id.* (emphasis added). The court “purposely avoided” defining a precise rule of damages in all cases of negligent misrepresentation, finding instead that the focus must always be on “the proximate result of reliance on the misrepresentation.” *Id.* 306 Minn. at 200, 235 N.W. 2d at 836; *see also Lowrey v. Dingman*, 251 Minn. 124, 127-28, 86 N.W. 2d 499, 502 (1957)(plaintiff “pony breeder” entitled to damages for injury to reputation which was a “direct and proximate result” of defendant’s fraud regarding the parentage of ponies sold to plaintiff); *Brooks v. Doherty, Rumble & Butler*, 481 N.W. 2d 120,129 (Minn. Ct. App. 1992)(attorney not limited to out-of-pocket losses caused by abrupt termination when evidence showed that his legal career was seriously damaged as a direct result of law firm’s misrepresentation about the job), *rev. denied* (Minn. Apr. 29, 2992); *B.F. Goodrich*, 430 N.W. 2d at 181 (tire company entitled to lost business resulting from reliance on defendant’s misrepresentation, which caused business to refrain from seeking another tire source); *Sports Page*,438 N.W. 2d at 432-33 (lessee-operator of sporting goods store entitled to net profits lost as result of lessor mall’s misrepresentation about not allowing a competitor to lease space at mall); *Lobe Enterprises*, 360 N.W. 2d at 373 (buyer not entitled to recoup cost of new roof allegedly incurred due to misrepresentation in sale of commercial building; buyer did not establish

that building's value was less than the price paid , and repair costs “do not accurately reflect [the buyer's] loss proximately resulting from the misrepresentation”).

In this case Appellant relies on *Lewis, Lowery, Brooks, B.F. Goodrich and Sports Page* to support her argument that the trial court erred in failing to employ a “flexible” approach to out-of-pocket damages. App. Br. p. 12. She argues that excluding her repair costs as irrelevant “flies in the face of common sense.” *Id.* p. 13. Creating several examples of what a group of 100 randomly-selected individuals would pay for a home that required “substantial repairs,” she asserts that the cost of those repairs is “the best method, and may be the only method,” of establishing the value of the home.” *Id.* She goes on to argue that the trial court's decision appears to be supported by *Lobe Enterprises v. Dotsen*, 360 N.W. 2d 371, where the court disallowed damages representing the cost of repairing a roof on a commercial building, and claims that “a better precedent” is found in *Strouth v. Wilkinson*, 302 Minn. 297, 224 N.W. 2d 511, a residential property case where the court awarded plaintiffs not only out-of-pocket damages paid to a contractor who misrepresented his ability to construct a house, but awarded plaintiffs the cost of having the home completed by a different contractor. *See* App. Br. p. 14-15. And finally, she cites several cases from other jurisdictions wherein courts apparently allowed “repair costs” to suffice as evidence of damages for fraud. *See* App. Br. p. 16-17 .

But neither *Lobe Enterprises* nor *Strouth* says anything different than *Lewis, Lowery, Brooks, B.F. Goodrich or Sports Page* with respect to the necessity of evidence demonstrating a causal link between the alleged misrepresentation and plaintiff's claimed

damages. Appellant's inapt analogies about what a buyer might pay for a home needing "substantial repairs" fails to include any hypothetical misrepresentation upon which the court might assess the critical element of proximate cause. And Appellant's recitation of secondary authority on "cost of repair" damages simply misses the point—even that authority premises "cost of repair" on the necessary causal link to the claimed misrepresentation. *See Umphrey v. Sprinkel*, 106 Idaho 700, 682 P. 2d 1247 (1983)(plaintiff entitled to consequential damages resulting from defendant's misrepresentation about roadway); *Skurnowicz v. Lucci*, 2002 PA Super. 140, 798 A. 2d 788 (2002)(buyers of residential real estate entitled to actual damages incurred as direct and proximate result of seller's misrepresentation about flooding problems).

The critical causal link was correctly recognized by the trial court below, which properly applied longstanding Minnesota law to find that damages for misrepresentation must have a natural and proximate relationship to the claimed misrepresentation. The trial court correctly recognized that Appellant had no evidence, at all, that there was any difference between the value of what she parted with (a house "free of fire damage") and what she received (a house free of fire damage but which had significant damage from moisture due to defects in original construction). The trial court therefore appropriately framed and addressed the salient question as whether Appellant's "cost of repair" damages necessitated by defects in original construction bore a causal relationship to Respondents' alleged misrepresentation about the lightning-strike fire. On these facts, the court did not abuse its discretion by concluding that there was no causal relationship, at all, between Respondents' failure to disclose that there was a fire at the subject home as

the result of the disclosed lightning strike, and the damages Appellant claims to have incurred as the result of having to rectify defects in the home that resulted from original construction. As the trial court properly recognized, Appellant's critical causal link was supported by nothing more than "but for" causation.

The "but for" test of causation has long been discredited in this state, and was specifically rejected by the Minnesota Supreme Court in *Harpster v. Heatherington*, 512 N.W. 2d 585, 586 (Minn. 1994); *see also Kryzer v. Champlin American Legion No. 600*, 494 N.W.2d 35 (Minn.1992). As the court stated in *Harpster*, the problem with "but for" arguments is that "it converts events both near and far, which merely set the stage for an accident, into a convoluted series of 'causes' of the accident." 512 N.W. 2d at 586 (finding that defendant's failure to repair backyard gate was not proximate cause of plaintiff's fall, which occurred after plaintiff fell on front stoop in effort to capture dog that escaped through gate). As the court noted in *Harpster*, a "but for" approach to causation "is much like arguing that if one had not got up in the morning, the accident would not have happened." *Id.*; *see also Danielson v. City of Brooklyn Park*, 516 N.W. 2d 203, 207 (Minn. Ct. App. 1994)(city's demand that plaintiff cut down tree was not proximate cause of plaintiff's fall off ladder placed on car in tree-trimming effort).

These principles clearly apply in the present case. Although Appellant claims she went into the home-buying process with a heightened sensitivity to mold and moisture, concedes she knew that the subject home had sustained water damage resulting from lightning strikes and storms, and admits she was free to hire an inspector to fully inspect the home absent involvement or interruption by Respondents, she nevertheless claims

that had she known that the lightning strike also caused a fire which necessitated an unknown quantity of water being poured on the roof to douse it, *that* source of water would have caused her to insist on a more specific water intrusion inspection which, she believes, would have revealed the construction-related moisture intrusion damages that formed the basis of her claim. *See* App. Br. at 7-8. This tortured path between Respondents' supposed misrepresentation about the fire (and the water used to douse it) and Appellant's discovery of damages caused by unknown, pre-existing construction defects is a classic example of "but for" logic. The proposition that Appellant would have done something different "but for" Respondents' failure to disclose the lightning-strike fire is entirely speculative, and wholly convoluted. At best, Respondents' alleged failure to disclose the lightning-strike fire merely set the stage for Appellants' later discovery about damages related to original construction. If this court were to allow Appellant to seek such damages, the court would dramatically redefine the "flexibility" allowed for out-of-pocket damages by eliminating entirely the requirement that damages flow naturally and proximately from the claimed misrepresentation, and in so doing effectively revive the concept of "but for" causation expressly disallowed by *Harpster*.

While proximate cause is generally a question of fact for the jury, it becomes a question of law when reasonable minds can reach only one conclusion. *Lubbers v. Anderson*, 539 N.W. 2d 398, 402 (Minn. 1995). The trial court below appropriately exercised its discretion and properly applied longstanding Minnesota law in excluding Appellant's evidence of construction-defect damages as supported by nothing more than "but for" causation. The trial court's decisions as to damages must therefore be affirmed.

Finally, after the trial court properly excluded Appellant's evidence of construction-related damages, Appellant acknowledged she had no other evidence of damage and essentially conceded she had no case. The trial court thus properly granted Respondents' motion for judgment as a matter of law. That decision must also be affirmed.

B. Respondents were entitled to summary judgment on the elements of misrepresentation.

1. Standard of review

In reviewing a trial court's rulings on summary judgment, this court must determine whether there were any genuine issues of material fact, and whether the trial court erred in its application of the law. *H.B. ex. rel. Clark v. Whittemore*, 552 N.W. 2d 705, 707 (Minn. 1996). The facts must be reviewed in the light most favorable to the non-moving party, and any doubts regarding the existence of a material fact should be resolved in that party's favor. *Id.* This court's review of a legal issue is de novo. *See Frost-Benco Elec. Ass'n v. Minnesota Pub. Util. Comm'n*, 358 N.W. 2d 639, 642 (Minn. 1984).

While assessment of a motion for summary judgment requires the court to view the evidence in the light most favorable to the nonmoving party, the court is not required to draw unreasonable inferences in order to save the nonmoving party's claims. *Drilling v. Berman*, 589 N.W. 2d 503, 506 (Minn. Ct. App. 1999); *see also Nicollet Restoration, Inc. v. City of St. Paul*, 533 N.W. 2d 845, 848 (Minn. 1995)(summary judgment properly

granted on misrepresentation claim where evidence of reliance was not reasonable). Instead, the inferences drawn from undisputed facts must be plausible ones. *See Ackerman v. American Family Mut. Ins. Co.*, 435 N.W. 2d 835, 841 (Minn. Ct. App. 1989). Summary judgment is designed to dispose of specious claims in any type of action, including claims of fraud and misrepresentation. *See City of Savage v. Varey*, 358 N.W.2d 102, 105 (Minn. Ct. App.1984), *rev. denied* (Minn. Feb. 27, 1985)(citations omitted).

2. *Appellant had no evidence creating a genuine issue of material fact with respect to whether Respondents made an actionable misrepresentation by nondisclosure with respect to the lightning-strike fire.*

An intentional misrepresentation claim requires the plaintiff to establish that: (1) there was a false representation by a party of a past or existing material fact susceptible of knowledge; (2) made with knowledge of the falsity of the representation or made as of the party's own knowledge without knowing whether it was true or false; (3) with the intention to induce another to act in reliance thereon; (4) that the representation caused the other party to act in reliance thereon; and (5) that the party suffered pecuniary damage as a result of the reliance. *Hoyt Properties, Inc. v. Production Resource Group, L.L.C.*, 736 N.W. 2d 313, 318 (Minn. 2007)(citations omitted). A misrepresentation may be made either by an affirmative statement that is itself false, or by concealing or not disclosing certain facts that render the facts that *are* disclosed misleading. *M.H. v. Caritas Family Services*, 488 N.W. 2d 282, 289 (Minn. 1992). A misrepresentation may also be actionable even though it is negligently made, as long as the representor owes a duty to the plaintiff. *L & H Airco, Inc. v. Rapistan Corp.*, 446 N.W. 2d 372, 378 n. 3

(Minn. 1989)). As a general rule, "one party to a transaction has no duty to disclose material facts to the other." *Klein v. First Edina Nat'l Bank*, 293 Minn. 418, 421, 196 N.W. 2d 619, 622 (1972). Nevertheless, one who chooses to speak must say enough to prevent his words from misleading the other party. *Id.* (citations omitted). A duty to disclose facts may also exist "when disclosure would be necessary to clarify information already disclosed, which would otherwise be misleading." *M.H. v. Caritas*, 488 N.W. 2d at 289 (citing *L & H Airco*, 446 N.W. 2d at 380).

In this case, Appellant based her claim of misrepresentation on what Respondents allegedly failed to say: that the (disclosed) lightning strike resulted in a fire which caused the fire department to hose water onto the roof to douse it. While Appellant claimed that the fire was "big and major" and that the home was "inundated with gallons and gallons of water" from the fire suppression efforts, in reality she had no evidence about the size of the fire or the quantity of water used to extinguish it. She also had no evidence that the fire caused any structural damage. Thus the question presented by Respondents' motion for summary judgment was whether their alleged failure to disclose the lightning-strike fire made the information they provided in the Seller's Disclosure form "misleading."²

Appellant fully acknowledged that Respondents *did* disclose that: (1) the home was struck by lightning; (2) the home had been damaged by storms; (3) the storm damage necessitated replacement of the roof; (4) the top two floors of the home had been

² Respondent Deonarine Kissoon testified he did tell Appellant about the lightning strike and the fire that resulted, and specifically showed her the safety measures that had been put in place in the home because of it, including lightning rods and surge protection. A.A. 117-18 (pp. 32, 34).

remodeled; and (5) carpet had been replaced. She even admitted that the information she had prior to completing the sale led her to “assume” that the repairs performed by Respondents were required by *water damage from storms*. Therefore, her claim of misrepresentation depended entirely upon the proposition that water damage caused by rain entering through a storm-damaged, lightning-struck roof is somehow materially different from water damage allegedly caused by the fire department’s use of water to extinguish a fire.

Common sense dictates that there is no material difference between these two water sources. Thus, because Respondents *fully disclosed* that the subject home had been water-damaged by lightning strikes and storms to the extent that roof needed replacement, carpets needed replacement, and the top two floors of the home required remodeling, their supposed “failure” to disclose that water may *also* have entered the home via fire department hoses does not make the information they provided in the disclosure form “materially misleading.” Respondents were entitled to summary judgment on this basis. *See Colangelo v. Norwest Mortgage, Inc.*, 598 N.W. 2d 14,19 (Minn. Ct. App. 1999)(summary judgment appropriate where plaintiff failed to introduce evidence that defendants provided false or misleading information in providing mortgage payoff statements), *rev. denied* (Minn. Oct. 21, 1999).

3. *Appellant had no evidence creating a genuine issue of material fact with respect to whether she reasonably relied on Respondents' alleged failure to disclose that water was used to douse a fire caused by the disclosed lightning strike.*

In order to prevail on her claim of misrepresentation Appellant was also required to set forth evidence demonstrating that her reliance on the alleged misrepresentation was reasonable and justifiable. *Florenzano v. Olson*, 387 N.W. 2d 168, 174, n.4 (Minn. 1986); *see also Nicollet Restoration*, 533 N.W. 2d at 848. Whether a party's reliance is reasonable is ordinarily a fact question for the jury, unless the record reflects a complete failure of proof. *Id.* (citations omitted). Summary judgment on this issue is appropriate if the plaintiff fails to come forward with facts supporting a conclusion of reasonable reliance, because such failure "renders all other facts immaterial." *Id.* (citations omitted); *see also Greuling v. Wells Fargo Home Mortgage, Inc.*, 690 N.W. 2d 757, 760 (Minn. Ct. App. 2005) ("whether reliance is justifiable becomes a question of law if there is no evidence supporting a contrary conclusion"). In this case, Respondents argued that even if the court identified an issue of fact concerning whether Respondents "misled" Appellant by failing to specifically disclose the fact that the lightning strike (which they did disclose) caused a fire which resulted in the fire department pouring water on the roof of the subject home, the court should still conclude that Respondents were entitled to summary judgment on the essential element of reliance.

Appellant claimed that before she embarked on the process that led her to buy the subject home, she was especially sensitive to mold and moisture conditions because of mold which developed after storms damaged her previous home. In fact, she claims she

specifically told her realtor about this alleged sensitivity, and even cancelled an offer on a different home when the sellers refused to allow a mold and moisture inspection.

Appellant admits she knew from the information on the Seller's Disclosure form that the subject home had been struck by lightning and had suffered damage as the result of storms; that the storm damage necessitated the replacement of the roof; that the storm damage necessitated the remodeling of the top two floors; and that the storm damage necessitated the replacement of carpet. Appellant even admitted that she understood the carpet damage and remodeling was necessitated by water damage caused by the storms.

Yet she claims she did not undertake any specific testing for mold and moisture intrusion on the basis of several assumptions (and not on any misrepresentations by the Respondents): She assumed that the damage suffered by in the storm was "no different" than the damage she and others in the neighborhood suffered in "bad storms" in the late 1990's; assumed that Respondents delayed doing necessary roof repairs until several years later; assumed that Respondents' carpet replacement was necessitated by broken windows; and assumed that the water introduced to the house via the storm was minimal and that the damage which resulted had been fully rectified and remediated by a competent contractor. By the same token she claims that she assumed the undisclosed lightning-strike fire was "substantial," requiring "gallons and gallons" of water to extinguish it.

There was no actual evidence quantifying the amount of water entering the home due to the storm, or the amount of water hosed onto the house via fire suppression efforts. Appellant would therefore ask the fact-finder to base reasonable and justifiable reliance

on the so-called difference between water damage to a home caused by an unknown quantity of rain, and water damage to a home caused by an unknown quantity of water used to extinguish a fire caused by a lightning strike.

Appellant's assumption that there *is* a material difference between these sources of water is baseless. Water is water. Evidence of Appellant's "heightened sensitivities to mold," coupled with evidence of her previous experience with mold caused by storm damage, together with all of the evidence that Respondents actually did disclose regarding damage to the subject home from storms, does not permit a conclusion that it was reasonable or justifiable for Appellant to forego a specific water intrusion inspection because she did not *also know* that an unknown quantity of water had also been introduced into the home via fire department hoses. It is neither reasonable nor plausible for Appellant to be less concerned about water damage and mold with respect to a home damaged by an unknown quantity of rain water, than a home damaged by an unknown quantity of water poured onto the roof to extinguish a fire.

The implausibility of Appellant's argument is illustrated by the fact even after she claims to have learned about the fire in the casual conversation with her neighbors, she did not at that time arrange for any inspection of the home. Instead, she retained experts to conduct moisture analysis of the home in 2006, after her daughter caused a toilet to overflow. The fact that she did so confirms the essential proposition that drove Respondents' motion: water is water, regardless of the source.

Finally, it is important to consider that Appellant's Purchase Agreement was contingent on a full and complete, independent inspection of the subject home. This court

has held, albeit in an unpublished opinion, that reasonable reliance on the Sellers' Property Disclosure Statement does not exist where the prospective home buyer makes the closing of the sale contingent upon a complete and independent inspection of the house. *See Zehrer v. Helland*, 1998 W.L. 346652 at * 1-2 (Minn. Ct. App. 1998).

A.A.140. The general rule is that a purchaser cannot undertake an independent investigation, rely upon the information obtained, and later successfully assert that he was misled. *Id.* (citing *Taylor v. Sheehan*, 435 N.W.2d 575, 577 (Minn. Ct. App. 1989))(holding that buyer of business may not claim reliance on a statement made by seller regarding the quantity and quality of accounts after having an accountant conduct an independent review of the books, *rev. denied* (Minn. Apr. 4, 1989); accord *Goldfine v. Johnson*, 208 Minn. 449, 452, 294 N.W. 459, 460 (1940).

In the present case, regardless of what was said—or not said—by Respondents in the Seller's Disclosure form, it was undisputed that Appellant's offer was contingent on an independent inspection, and undisputed that an inspection did take place with Appellant in attendance. While Appellant claimed that the inspector was selected by her real estate agent and discounted the inspection as "tremendously superficial," the fact of the matter is that Respondents had no role in selecting or arranging for the inspection, placed no limitations on it, and allowed Appellant and her inspector full access to the home while they (Respondents) were not present. Appellant cannot be allowed to allege any reliance on Respondents' alleged failure to disclose the "fire incident which resulted in the home being inundated with water" as the reason why she chose not to conduct

more specific mold and moisture testing on the home prior to closing. *See Zeher*, 1998 WL 346651 at *1.

The undisputed facts presented to the trial court established that Appellant could not present any evidence that her “reliance” on Respondents’ alleged misrepresentation was either reasonable or justifiable. Respondents were therefore entitled to summary judgment.

V. CONCLUSION

Appellant Kathleen Bryan's claim of negligent misrepresentation against Respondents Deonorine and Kathleen Kissoon was not based on any damage resulting from either the lightning strikes and storms they disclosed prior to the sale of their home, *or* based on any damage resulting from the fact that the (disclosed) lightning strikes caused a fire which necessitated extinguishment with (an unknown quantity of) water. Instead, her claim was for damages due to defects in the original construction of the home. She made no allegation (and there was no evidence) that Respondents ever misrepresented anything with respect to the original construction of the home.

Appellant's claim therefore boiled down to the following proposition: Had Respondents' pre-sale disclosures specifically articulated that the (disclosed) lightning strikes to the home during the (disclosed) June, 2002 storms (which caused enough water damage to necessitate substantial remodeling) *also* caused a fire necessitating extinguishment with (an unknown quantity of) water from fire hoses, Appellant would have retained a consultant to conduct an intensive and specific inspection to detect the presence of mold and moisture *sooner*, and thus would have discovered *sooner* the fact that the home had moisture damage stemming from *original construction*, and thus would not have bought the home.

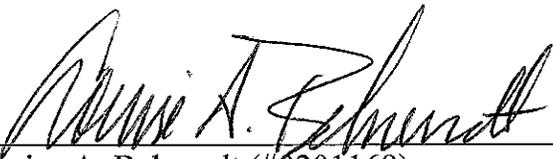
On this evidence, the trial court properly exercised its discretion in granting Respondents' motion in limine with respect to construction-related damages. The court correctly applied longstanding Minnesota law regarding the out-of-pocket damages rule to find that Appellant's evidence of damages was not naturally or proximately caused by

Respondents' alleged misrepresentation. And because Appellant had no other evidence of damages, the trial court properly granted Respondents' motion for judgment as a matter of law and dismissed Appellant's claim with prejudice. These conclusions must be affirmed.

Alternatively, this court should reverse the trial court's denial of Respondents' motion for summary judgment. The undisputed facts did not establish that Respondents' made an actionable misrepresentation by non-disclosure, and the evidence did not support a conclusion that Appellant's reliance on any so-called misrepresentation was either reasonable or justifiable.

Dated this 23rd day of December, 2008.

***STICH, ANGELL, KREIDLER & DODGE,
P.A.***

By 

Louise A. Behrendt (#0201169)
Kenneth W. Dodge (#02319X)
The Crossings, Suite 120
250 Second Avenue South
Minneapolis, MN 55401
612-333-6251 (phone)
612-333-1940 (fax)

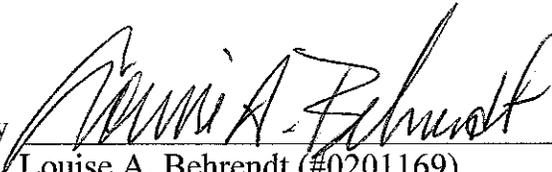
Attorneys for Respondents

CERTIFICATE OF COMPLIANCE

This brief complies with the word/line limitations of Minn. R. Civ. App. P. 132.01, subdiv. 3(a). This brief was prepared using Microsoft Word Version 12.0 in 13-pt. font, which reports that the brief contains 8,770 words.

Dated this 23rd day of December, 2008.

***STICH, ANGELL, KREIDLER & DODGE,
P.A.***

By  _____
Louise A. Behrendt (#0201169)
Kenneth W. Dodge (#02319X)
The Crossings, Suite 120
250 Second Avenue South
Minneapolis, MN 55401
612-333-6251 (phone)
612-333-1940 (fax)

Attorneys for Respondents