

2

APPELLATE COURT CASE NUMBER A09-879

STATE OF MINNESOTA
IN COURT OF APPEALS

Chad DeRosier,

Respondent,

v

Utility Systems of America, Inc ,

Appellant

BRIEF AND APPENDIX OF APPELLANT

Attorney for Respondent

Sean M Quinn, #20397X
Falsani, Balmer, Peterson, Quinn & Beyer
1200 Alworth Building
306 W Superior Street
Duluth, MN 55802
(218) 723-1990

Attorney for Appellant

Robert H Magie, III, #66370
501 Lake Ave South
Suite 400
Duluth, MN 55802
(218) 722-2500

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUES	1
STATEMENT OF THE CASE	2
STATEMENT OF THE FACTS	4
STANDARD OF REVIEW	9
ARGUMENT	10
CONCLUSION	15
APPENDIX INDEX	16

TABLE OF AUTHORITIES

RULES AND STATUTES

Minn. R. Civ. P. 52.01	9
------------------------------	---

CASES

<u>Basich v. Bd. of Pensions of Evangelical Lutheran Church in Am.</u> , 493, N.W. 2 nd 293 (Minn. App. 1992).....	11
<u>Bemidji Sales Barn, Inc. v. Chatfield</u> , 250 N.W. 2 nd 185 (1977).....	1, 13
<u>Bondy v. Allen</u> , 635 N.W. 2 nd 244 (Minn. App. 2001).....	9
<u>Cardinal Consulting Co. v. Circo Resorts</u> , 297 N.W. 2 nd 267 (Minn. 1980).....	11
<u>Casper v. Frederick</u> , 146 Minn. 112 N.W. 936 (1920).....	1, 13
<u>Folk v. Home Mutual Ins. Co.</u> , 336 N.W. 2 nd 265 (Minn. 1983).....	1, 11
<u>Hubbard v. UPI, Inc.</u> , 330 N.W. 2 nd 428 (Minn. 1983).....	15
<u>In Re Estate of Whish v. Bienfang</u> , 622 N.W. 2 nd 847 (Minn. App. 2001).....	9
<u>Langford Tool & Drill Co. v. Phenix Biocomposites, LLC.</u> , 668 N.W. 2 nd 4348 (Minn. App. 2003).....	9
<u>Leismaster v. Dilly</u> , 330 N.W. 2 nd 95 (Minn. 1983).....	11
<u>Porch v. Gen. Motors Acceptance Corp.</u> , 642 N.W. 2 nd 473 (Minn. App. 2002).....	9
<u>Pullar v. Indep. Sch. Dist. No. 701</u> , 582 N.W. 2 nd 273 (Minn. App. 1998).....	1, 10
<u>Roberge v. Cambridge Coop Creamery Co.</u> , 243 Minn. 230, 67 N.W. 2 nd 400 (1954).....	11

SECONDARY AUTHORITIES

61A Am Jur 2 nd , PLEADINGS, Sec. 4 p. 42.....	10
---	----

STATEMENT OF ISSUES

- I. Is the trial court's Finding of Fact #19, which awards damages of \$8000 for "delay", unsustainable as a matter of law, unsustainable on the evidence and otherwise reversible error because:
 - a. The complaint, which specifically itemizes alleged damages, makes no reference to damages for delay, and
 - b. There was no evidence of delay damages

- II. Is the trial court's Finding of Fact #20, which awards damages of \$22,829 for "removing the excess fill", unsustainable as a matter of law, unsustainable on the evidence and otherwise reversible error because:
 - a. Plaintiff failed to mitigate his damages, and
 - b. Testimony in alleged support of this damages claim was too indefinite, too imprecise, too vague, mere guesswork, speculation, and included costs not due to defendant's alleged breach of the contract

THE TRIAL COURT, UPON POST-TRIAL MOTION, FAILED TO CORRECT THESE ERRORS AND REAFFIRMED THE ORIGINAL FINDINGS.

As to issue I., the most apposite cases are:

Pullar v. Indep. Sch. Dist. No. 70, 582 N.W. 2nd 273 (Minn. App. 1998)

Folk v. Home Mutual Ins. Co., 336 N.W. 2nd 265 (Minn. 1983)

As to issue II., the most apposite cases are:

Casper v. Frederick, 146 Minn. 112, 177 N.W. 936 (1920)

Bemidji Sales Barn. V. Chatfield, 250 N.W. 2nd 185 (1977)

STATEMENT OF THE CASE

This St. Louis County (Duluth) case was tried to the court, Hon. Sally L. Tarnowski, on September 11, 2008. On January 8, 2009, Judge Tarnowski issued Findings of Fact and ordered judgment for Plaintiff/Respondent, Chad DeRosier, in the amount of \$30,289. Defendant/Appellant, Utility Systems of America, Inc., made a timely motion for amended findings, which motion was denied in all respects on March 20, 2009.

Chad DeRosier (DeRosier) and wife purchased a vacant lot in Duluth, MN in January, 2004 with the intent to build a house on the lot. The lot was low. In places it was 16 feet below the grade of the street fronting the lot. The lot required fill material before a residence could be constructed.

Utility Systems of America, Inc. (USA), commenced working on a nearby street and utility project within Duluth in June, 2004. USA's project involved the need to dispose of excess excavated materials. DeRosier contacted USA in July to obtain his needed fill, which USA agreed to supply.¹ The agreement between the parties was entirely oral and the details are disputed.

DeRosier alleges, and the trial court agreed, that the agreement was for a specific amount of fill, 1500 cubic yards, because that was the amount of fill allowed by permit. It is undisputed that USA placed more than 1500 cu. yds of fill on DeRosier's property. DeRosier further alleges that the excess amount of fill placed by USA

¹ At times DeRosier has characterized this case as a situation whereby USA took unfair advantage, for monetary gain, of a short haul route for excess fill disposal. USA denies this in total. Because DeRosier's site was within Duluth city limits, USA incurred costs at this fill site that it did not incur at the other disposal sites. This point, however, is irrelevant to the issues on appeal.

(approximately 3500 cu. yds.) was required to be excavated from his property and trucked to another location, thus adding additional, unnecessary cost to his new home. Once again the trial court agreed with DeRosier.

In awarding damages to DeRosier for breach of the oral contract (\$8000 for delay in construction of the new house and \$22,289 for removal of excess fill), the trial court made several errors according to USA. First, DeRosier was awarded \$8000 in damages for "delay". This item of damages was not included in a very specific complaint and no proof of delay damage was provided. Secondly, the trial court ignored the fact that USA sought to mitigate its damages by offering to remove the excess fill at its' out-of-pocket cost of \$9500. Thirdly, the contractor that ultimately removed the excess fill was unable to articulate the costs related to removal of excess fill. The trial court accepted DeRosier's counsel's suggested cost of fill removal.

USA appeals the award to DeRosier.

STATEMENT OF FACTS

Chad DeRosier (DeRosier) purchased an unimproved Duluth lot in January, 2004. (Transcript, p. 106). The lot was low, swampy in places and had a substantial elevation differential (16' in parts) from the fronting street (Minneapolis Avenue). (T. p. 36,47, 50; Exhibits 2,7,8,9,10 and 20)² DeRosier wanted to construct a new home on the lot that fall. In a spring meeting with his original contractor, Karl Tarnowski (Tarnowski), DeRosier was informed that he would need to place fill on the property. (T. p.37,107). Tarnowski suggested that a contractor doing a close-by street project might have available fill. (T. p.38,107).

The contractor was Utility Systems of America, Inc. (USA). USA's project foreman was Anthony Norman (Norman). In early July, DeRosier and Norman went to the premises and Norman agreed that USA would provide fill for the lot. (T. p. 40). The agreement was simple and oral; there was never a written document. (Norman trial depo. p. 24, 30). The understanding, according to Norman, was that USA would provide fill until DeRosier said to stop filling. (Norman Trial depo p. 41). At this time DeRosier was informed by Norman that a Duluth fill permit was necessary before dumping could occur. (T. p. 40). Norman further advised DeRosier that he (DeRosier) would need to retain an engineering firm to act as a Special Inspector on the fill project. (T. p. 57). Special Inspectors are retained by the landowner/fill permittee to observe the fill placement and insure code compliance in connection with the fill project. (T. p.

² The trial transcript consists of (i) 218 pages of proceedings on September 11, 2008; (ii) trial depositions of witnesses Anthony R. Norman, Dan L. Johnson and Karl F. Tarnowski; (iii) 19 pages of post-trial proceedings on March 6, 2009. The notation "T" refers to the 218 pages of court proceedings. The notation "Trial depo" refers to trial deposition testimony. Appendix references are denoted with "A". Exhibit references are to trial exhibits, not deposition exhibits.

173,192,193; Exhibit 13). In this instance, compaction of the fill was an important reason for the special inspection. (T. p. 173).

Compaction is a significant matter in this dispute. By code, compaction of all fill placed on the premises, regardless of location, is required. In other words, it doesn't matter if the fill is placed in an intended green area, an intended driveway area or an intended house area. Compaction is necessary for erosion control, site stability, and potential future construction (T. p. 193). USA provided two dozer's (D3 and D8) on the site to level off its' deposited materials, but did not have compaction equipment or engineers to monitor compaction requirements (T. p. 212; Norman Trial depo p. 38-40). DeRosier was made aware of this. (T. p. 123). To insure compliance with compaction requirements, DeRosier purportedly retained GME Consultants (GME). GME does this work routinely and has expertise in geotechnical and construction materials, together with testing. (T. p. 172). GME's manager of the Duluth office was Eric Edlund (Edlund) In connection with DeRosier's fill project, Edlund provided a proposal outlining GME's suggested services. (Exhibit 13). This was a common proposal for these circumstances and called for GME to make four site visits to: (i) Observe the site prior to filling; (ii) Observe the subgrade soils after all topsoil and vegetation had been stripped; (iii) Perform nuclear density testing on compacted fill ; (iv) Complete the special inspection form. (Exhibit 13).

Unfortunately, DeRosier did not follow the prescribed protocol on the matter of compaction. It is reasonably clear that he was looking to avoid this cost. First of all, prior to any fill placement, DeRosier sought a waiver of the compaction requirements from the city. (T. p. 118,191). On August 4, Wendy Rannenberg (Rannenberg), Code

Plan Review Consultant for the City of Duluth, advised DeRosier by letter that there would be no waiver of the compaction requirements, which are essentially non-waivable. (Exhibit 11). This admonition to DeRosier was not sufficient because he proceeded to request fill from USA without any plans whatsoever to comply with compaction requirements. (T. p. 177, 179). He did not provide the August 4 letter of Rannenberg or the fill permit to GME and told GME, falsely, that the city waived all compaction requirements. (T. p. 177, 179, 180, 181; Exhibit 17). This misrepresentation by DeRosier resulted in GME never visiting the site after the date of the fill permit. (T. p. 181).

USA proceeded to fill DeRosier's property site with fill. Compaction requirements were not monitored by GME, which ultimately lead to the showdown in this matter. USA believes that it, like GME, was never provided with the fill permit, but it is undeniable that USA dumped in excess of the 1500 cu. yds. of fill allowed by the city permit. (Norman Trial depo. p. 14; T. p. 208; Exhibit 14). It is probable that USA deposited a total of 5000 cu. yds of fill on the DeRosier property. (T. p. 208). Regardless of all other facts and arguments, it is undeniable that all the fill placed on DeRosier's property by USA would have to be moved and/or compacted in some manner. (Exhibit 17).

On November 2, 2004, Rannenberg wrote to DeRosier concerning his fill project. (Exhibit 17) Rannenberg informed DeRosier that his fill project was not in compliance with the 2003 Minnesota State Building Code or Duluth City Code, Chapter 10-1. (T. p. 141). The reason for non-compliance related to the fact that compaction was not monitored and there was no waiver of compaction requirements as "There is no basis in the regulating codes for waiving compaction for your project. Waiving the requirement

for compaction would be inconsistent with both the code and the application of the code to previous fill projects by other permit applicants.”. Rannenbergs letter said nothing about excess volume of fill, although 1500 cu yds. was the maximum allowed by the existing permit. (Exhibit 17).

Upon hearing from Rannenbergs, DeRosier demanded that USA resolve his problems. (Exhibit 18). Ultimately, Dan Lamppa (Lamppa), USA’s president and co-owner, agreed (on April 16, 2005) to remove 3500 cu yds of excess fill at USA’s out-of-pocket cost of \$9500. (T. p. 208). Lamppa’s offer was not accepted and DeRosier claims to have paid in excess of \$20,000 for the same excavation work in May-July, 2005. DeRosier testified that he didn’t trust USA at the point of Lamppa’s offer (T. p. 92), which was only 16 days after DeRosier’s attorney demanded removal of the fill by USA. (DeRosier was impeached with his prior deposition testimony wherein he said that he never told his new contractor about Lamppa’s offer. (T. p. 94,95, 96)).

Testimony on the issue of damages was supplied exclusively by Dan L. Johnson (Johnson). Johnson gave a trial deposition. Johnson is an excavating contractor and goes by the name of G & T Construction. (Johnson Trial depo. p. 6). DeRosier’s ultimate general contractor, Zierden Builders (Zierden), hired Johnson to do the excavation work. (Johnson Trial depo. p. 8). Johnson essentially testified from three handwritten pages of notes on preprinted invoice forms with a G & T Construction heading. (Johnson Trial depo. exhibit 2). The entries purport to set out dates, equipment, hauled loads, hours and dollars-in unorganized, barely understandable fashion. The morning of the deposition was the first time that Johnson ever tried to place any kind of numbers on the amount of fill hauled off the site. (Johnson Trial depo.

p. 42). Even granting the trial judge broad deference in her fact finding, it is beyond dispute that Johnson acknowledges the following: (i) in addition to hauling material off site, material was hauled onto the site (Trial depo. p. 44); (ii) material hauled onto the site was necessary regardless of USA's fault (Trial depo. p. 44, 45); (iii) some of the excavation was of native soil, a job necessary in all instances (Trial depo. p. 47,48; 49, 53, 54); (iv) he never estimated or calculated any amount of cubic yards of fill that he removed from the site; (Trial depo. p. 55, 56, 61, 63); (v) his assumptions were "guesswork" (Trial depo. p. 42); (vi) he could not provide an estimate of the amount of fill he hauled away (Trial depo. p. 63).

There was no testimony whatsoever about whether DeRosier's house project was actually delayed, how long it was delayed, or how any delay caused him damage.

STANDARD OF REVIEW

This case was tried as a bench trial. This court is required to give the trial court's pure factual findings great deference and does not set them aside unless clearly erroneous. *Minn. R. Civ. P. 52.01*. Furthermore, this court does not reconcile conflicting evidence upon which the trial court has made factual judgments. *Porch v. Gen. Motors Acceptance Corp.*, 642 N.W. 2nd 473, 477 (Minn. App. 2002).

On issues that involve mixed questions of law and fact, the trial court's applications of law are not binding on this court and are reviewable independently on appeal. *In Re Estate of Whish v. Bienfang*, 622 N.W. 2nd 847, 849 (Minn. App. 2001). The trial court's ultimate conclusions of mixed law and fact are reviewed under an abuse of discretion standard. *Langford Tool & Drill Co. v. Phenix Biocomposites, LLC.*, 668 N.W. 2nd 4348, 442 (Minn. App. 2003).

Pure questions of law are freely reviewable by the appellate court without deference to the lower court's decision. *Bondy v. Allen*, 635 N.W. 2nd 244, 249 (Minn. App. 2001).

Issue I a. is a pure question of law, reviewable without deference.

Issue I b. is a mixed question of law and fact, reviewable under an abuse of discretion standard.

Issue II a. is a mixed question of law and fact, reviewable as an erroneous application of law and also reviewable as an ultimate conclusion.

Issue II b. is essentially involves factual findings, reviewable under the clearly erroneous standard.

ARGUMENT

I.

The trial court's Finding of Fact #19, which awards damages of \$8000 for "delay", is not sustainable as a matter of law, having not been pled or otherwise revealed to the defense, and is unsupported by the evidence, having not been proved.

A. The complaint and discovery responses make no reference to damages for delay.

DeRosier's complaint makes very specific claims for damages. At paragraph 10, it alleges damages of \$34,299 for "cost of removal of the fill". At paragraph 11, the complaint makes claim for \$12,330 because "the foundation walls ...had to have four (4) feet of extra height...". The "WHEREFORE" clause demands judgment for the specific amount of \$46,629-the exact sum of the claims set out in paragraphs 10 and 11. (Appendix, p. 2).

Furthermore, USA's Interrogatories to DeRosier (Interrogatory #14) requested an itemization of all damages allegedly suffered. DeRosier's responses made no mention of damages for delay in construction of his home. (Appendix, p. 47-64).

Pleadings are intended to generally notify the opposing party of the facts which the pleader expects to prove. Pleadings establish certain boundaries with regard to the evidence. An often used description is: "Pleadings have two major purposes: to inform the court of the facts in issue, so that it may declare the law, and to inform the opposing parties, so that they know what to meet by their proof, although it is said that the role of providing notice of the claim or defense to the adversary is paramount." *61A Am Jur 2nd, PLEADINGS*, Sec. 4, p. 42; *Pullar v. Indep. Sch. Dist. No. 701*, 582 N.W. 2nd 273, 276 (Minn. App. 1998).

While it is true that modern notice pleadings are liberally construed in favor of the pleader, adequate notice must be afforded the opposition. *Basich v. Bd. of Pensions of Evangelical Lutheran Church in Am.*, 493, N.W. 2nd 293, 295 (Minn. App. 1992); *Folk v. Home Mutual Ins. Co.*, 336 N.W. 2nd 265, 267 (Minn. 1983). If not amended, the scope of the pleadings binds a party to the matters raised, unless a further matter is litigated by consent. *Roberge v. Cambridge Coop Creamery Co.*, 243 Minn. 230, 233, 67 N.W. 2nd 400, 403 (1954)

Delay damages were not litigated by consent. In his opening statement, counsel for USA informed the court that he would be objecting to any claims for delay damages. (T. p. 25).

B. There was no evidence of delay damage.

DeRosier made only one general reference to the fact that he did not build on time. The response was to a question about the house he was planning with his original builder, Mr. Tarnowski. (T. p. 76). Apparently Tarnowski took on other jobs and DeRosier wound up with a new builder, Zierden. It was also the fact that Tarnowski was having a rough time in his personal life (T. p. 76).

DeRosier offered no testimony about when, absent USA's actions, Tarnowski could have started DeRosier's house project. In other words, there was no evidence if delay actually occurred. Even assuming some delay (which USA does not concede), there was no proof of how that delay translated into monetary damages (or the amount).

Damages are not presumed and must be supported by evidence. Speculative, remote and conjectural damages are not recoverable. *Cardinal Consulting Co. v. Circo Resorts*, 297 N.W. 2nd 267 (Minn. 1980); *Leismaster v. Dilly*, 330 N.W. 2nd 95, 103

(Minn. 1983). The trial court made no mention of the factual or legal basis upon which she awarded delay damages. She merely stated that the original builder, Tarnowski, could not build in 2004 and could not fit it into his 2005 schedule. (Appendix, p. 12). The court said delay is a “consequential damage”, but said nothing about how building the house in 2005 damaged DeRosier.

II.

The trial court’s Finding of Fact #20, which awards Damages of \$22,829 for “removing the excess fill”, is not sustainable as a matter of law, because plaintiff failed to mitigate, and is unsupported by the evidence, because it is based on guesswork and speculation

A. DeRosier did not mitigate his damages.

DeRosier’s complaint alleges and acknowledges that USA offered to remove the excess fill for \$9500 (Appendix, p. 2). The complaint, at paragraph 9, reads: “Defendant subsequently agreed to remove the excess fill but only if Defendant was paid approximately \$9500.”. This was also the undisputed trial evidence of USA. Lamppa testified that USA would have removed the fill for \$9500 (T. p. 208).

A party asking for damages must act reasonably to limit his damages. Reasonable action by DeRosier, in these circumstances, would have been his advising Zierden, the builder, that USA offered to remove the excess fill for \$9500 and having USA do that job. DeRosier failed to do so. In his deposition, DeRosier said that he never told Zierden about USA’s offer to remove the excess fill. He simply let Zierden and Johnson, the excavator, handle the removal (T. p. 94, 95, 96). At trial, DeRosier changed his story. He said that he didn’t trust USA to do the job (T. p. 92). This testimony, USA urges, is disingenuous because USA’s offer to remove the fill was made

directly in response to DeRosier's demand that USA remove it-made only 16 days before the offer. (Appendix, p. 49, 50, 51).

Case law supports the application of a mitigation of damages (otherwise known as the doctrine of avoidable consequences) analysis. An injured party cannot recover damages that might have been prevented by efforts to lessen the damages. *Casper v. Frederick*, 146 Minn. 112, 177 N.W. 936 (1920). In *Bemidji Sales Barn, Inc. v. Chatfield*, 250 N.W. 2nd 185,189 (1977) the Supreme Court held: "While the law provides the claimant with a remedy whether he seeks to avoid injurious consequences or not, the amount of damages recoverable is limited to the extent that he acted reasonably to prevent his own loss."

B. The testimony of Dan L. Johnson, excavator, is no more than guesswork, speculation and vague estimation.

Johnson supplied all of the testimony and evidence on the cost of removing excess fill. It is on the basis of Johnson's testimony alone, that the court awarded excavation and hauling damages.

Johnson testified by trial deposition. Johnson is the owner of G & T Construction, which does residential sewer, septic and related work. (Johnson trial depo. p. 6, 7). Zierden hired G & T to do the fill removal together with the entire site preparation for footings, utilities, landscaping, etc. In other words, G & T did more than simply remove excess fill. (Trial depo. p. 44, 45)

Prior to his testimony, Johnson had never tried to put any numbers on the fill removed from the DeRosier site. (Trial depo. p. 42). Johnson was handed 9 pages of writing. (Trial depo. p. 18). The first three are his hand-written entries on preprinted G & T Construction invoice forms. (reproduced at Appendix, p. 98-100 for convenience.)

The remaining 6 pages of handwritten notes (reproduced at Appendix, p. 101-106). were not authored by Johnson and he did not know what any of those pages meant. (Trial depo. p. 19, 20). The objective in Johnson's testimony was to calculate the cost of excess fill removal by adding together truck loads and/or hours of work. (Trial depo. p. 20, 21, 22). In attempting this grossly leading calculation process, DeRosier's attorney encountered numerous problems, as follows: (i) Johnson couldn't say how many loads of material equated with hours of work (Trial depo. p. 23), in part because the eventual dump sites varied in distance from the DeRosier site (Trial depo. p. 24); Johnson could only supply hours (Trial depo. p. 32); (ii) fill had to be excavated and replaced in landscape areas (as distinguished from the site of the house foundation) because there had been no original compaction-as required by code- and stabilization of the fill was needed (Trial depo. p. 27, 46); (iii) Johnson's assumptions in this process were admittedly guesswork (Trial depo. p. 42); (iv) there was a lot of hauling onto the site of materials (sand, rock, etc.) that would have been hauled to the site regardless of the problems with excess fill (Trial depo. p. 44, 45); (v) excavation of top soils, roots, and other soft materials, down to the native, hard ground, was necessary regardless of the excess fill problem (Trial depo. p. 49, 52) and that cost was included in the calculations supplied to DeRosier's attorney (Trial depo. p. 55); (vi) Johnson had no estimate or measurement of total fill on the property (Trial depo. p. 61; (vii) Johnson had no estimate of total fill hauled away (Trial depo. p. 63).

In the end, DeRosier's attorney simply testified to amounts-over objection by USA. (Trial depo. p. 63, 64, 65).

Unfortunately, the trial court has never provided an explained calculation of this damage item. What is clear is that the court merely accepted a calculation submitted by counsel for DeRosier. (Appendix, p. 22). This calculation, very obviously, was taken from the hand written documents given to Johnson and which Johnson was unable to identify or explain. (Trial depo. p. 19, 20); (Note the references in counsel's proposed findings to the entries for Grubb Trucking and the Zierden excavator) (Appendix, p. 22).

The trial court's findings of fact are clearly erroneous when they are not "reasonably supported by the evidence in the record considered as a whole". *Hubbard v. UPI, Inc.*, 330 N.W. 2nd 428, 441 (Minn. 1983). In this instance, there is no possible way to arrive at a reasonably estimated or calculated damage figure from the testimony of Johnson. One has to make reference to hand-written notes, not identified by Johnson, but obviously used by counsel for DeRosier to provide a suggested calculation for the trial court. There is no indication that the trial court did anything but simply accept counsel's word on the matter.

CONCLUSION

For the reasons set forth above, the entire award to DeRosier should be reversed, with directions to enter judgment of dismissal of the case with prejudice.

Dated: July ~~2~~³, 2009.



Robert H. Magie, III, # 66370
Attorney at Law
501 Lake Ave. South
Suite 400
Duluth, MN 55802
(218) 722-2500