

NO. A09-935

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State of Minnesota  
**In Supreme Court**

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SCI Minnesota Funeral Services, Inc.,  
Corinthian Enterprises, LLC,

*Appellants,*

v.

Washburn-McReavy Funeral Corporation,  
Washburn-McReavy Cemetery Association,

*Respondents.*

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**REPLY BRIEF OF APPELLANTS**

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## INTRODUCTION

The goal of contract law is and has always been to effect the parties' actual and true bargained-for intent. In a perfect world, every contract would fully and precisely memorialize the parties' real intentions. But this is far from a perfect world. Even with sophisticated parties, mutual mistakes happen. Here, all parties understood, intended, and mutually agreed to convey only the Cemeteries, and all mistakenly assumed that a stock sale – a conveyance vehicle subsequently used solely to satisfy a peculiarity of Minnesota funeral law – would effect exactly that mutual intent. The parties were all wrong. And the venerable equitable principles of reformation and rescission exist precisely to correct such mutual mistakes and their unintended and untoward consequences.

Try as it might to argue otherwise, Washburn urges the same absolute, formulaic, and erroneous rule applied below: if any transaction is consummated as a sale of stock, any inquiry into whether the sale effects the bargained-for and true intended “deal” is inappropriate, and equitable relief of reformation, mutual-mistake rescission, or lack-of-mutual-assent rescission is categorically unavailable. In Washburn's view, that is so even where, as here, the conveyance of stock indisputably fails to achieve the true, intended, and agreed benefit of the parties' bargain. If that is the consequence of an application of Minnesota law, then equity has no real meaning. Equity exists specifically to correct mutual mistakes where the written contract – whether mistakenly drafted as an unqualified sale of stock or something else – fails to achieve the parties' true intended and actual agreement.

The law is not a game, let alone a game of “gotcha,” where this Court will permit one party to perpetuate a mutual mistake in order to reap a windfall no party ever intended or understood was part of the bargain. Washburn never disputes Appellants’ point [SCI 29]<sup>1</sup> that Washburn would surely have demanded reformation – even in an unqualified stock sale – had the tables been turned and Washburn failed to acquire the Cemeteries because as it happened Crystal Lake did not have formal title to the Cemeteries. It would have urged, as Appellants do now, reformation, because a bargaining party was achieving an unintended windfall and reformation of the stock-sale contracts would be the only way for Washburn to effect the parties’ intent and obtain the three Cemeteries. And, rescission would be the only way Washburn could undo whatever it got and recover the full money it paid. That the shoe happens to be on the other foot is no reason to insist inequitably on a different result here.

This case is not about the court picking “winners or losers.” [Washburn 38] When equity intervenes to reform a written contract by conforming it to the parties’ mutual and true bargained-for intent, all of the parties win and not one loses because each will receive exactly what was mutually bargained for and that to which each specifically agreed. Similarly, all parties win with rescission, as it places the parties back at square one, so they may then accurately memorialize their true and bargained-for intent accurately and in the correct manner.

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<sup>1</sup> Brackets containing SCI or Washburn and numbers refer to pages of Appellants’ and Respondents’ first briefs in this Court, respectively.

Here, a one-million-dollar contract that the parties mutually understood and agreed would only convey certain property (*i.e.*, Cemeteries) worth an agreed one million dollars inadvertently conveyed property worth three times as much (*i.e.*, Cemeteries and Lots). If this is not a case for reformation or rescission, then little if anything is left of those equitable doctrines.

### REPLY STATEMENT OF FACTS

Washburn incorrectly claims that Appellants take no issue with the district court's findings and also present the record in an incomplete or misleading fashion. In fact, Washburn and the district court have taken considerable liberties with the competent record. Many Washburn's "fact" citations are not to the factual record at all, but rather to the district court's characterization of the facts or to no record at all.<sup>2</sup> [*See e.g.*, Washburn 8-9, citing Addendum 27, the district court opinion] As shown in Appellants' opening brief and below, and as Washburn does not credibly refute, this Court reviews this summary judgment appeal *de novo*. Thus, it is the facts themselves, not a party or lower court's characterization, that govern here.

Those facts, contrary to Washburn's contentions, plainly establish that all parties understood, intended, and agreed to convey *only* the Cemeteries and that they mistakenly

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<sup>2</sup> Notably, Washburn often cites to the district court's opinion when making a claim unsupported by the record, and it also makes bald assertions. For example, at page 8, Washburn unabashedly claims "SCI and Corinthian always intended to secure the Crystal Lake . . . deal as a stock transaction", citing Addendum 27, but the record cites in the district court's opinion at Addendum 27 fail to support this premise. As another example, at page 9, without any record cite, Washburn claims "SCI needed a stock sale in order to market Crystal Lake," but the record contains no evidence of unmarketability absent a stock sale and this is a red herring. It does not change the object of the parties' bargained for intent – the Cemeteries.

used an unqualified stock sale as a means of effecting that intent solely to satisfy a peculiarity of Minnesota funeral law. Appellants' opening brief presented that clear and convincing evidence, and every fact cited by Appellants is accompanied by a specific citation to the competent record, including pages and lines of deposition transcripts and paragraph references in documents where possible. The actual facts show that, notwithstanding the mistaken written contracts, stock was *not* the object and intended benefit of the parties' bargain; it was *merely incidental*. [SCI 3-12] Thus, the Letter of Intent signed by SCI and Corinthian manifests the clear intent to sell, buy, and transfer "all of the operating assets" of the Cemeteries (and a few other unrelated businesses not at issue here). [Addendum 42-44] As this Letter highlights, Corinthian does not assume "any trade accounts payable or accrued liabilities." [*Id.*] The word "stock" appears nowhere in this Letter. [*Id.*]

In describing this Letter, Lowell Kirkpatrick, President of Corinthian (the initial buyer), testified that it "represents the intent of the parties to enter into agreement" and specifically "identif[ies] the assets to be acquired and the price that is being paid and conditions thereto." [A55-57/14:10-28, 15:11-17] As he clearly stated, "Corinthian's intent was to buy the Crystal Lake operating assets. . ." [Addendum 45, ¶2]

Despite the district court and Washburn's erroneous fact characterizations including that "Corinthian always intended to structure the Crystal Lake . . . deal as a stock transaction" [Washburn 8], SCI and Corinthian's bargain (and Corinthian and Washburn's bargain) was always about the purchase of specific assets including the Cemeteries, and the parties merely (and, as it turned out, mistakenly) later employed an

unqualified stock sale as the means of effecting the Cemeteries' conveyance when they subsequently learned this form of sale was needed to satisfy a peculiarity of Minnesota funeral law. All parties understood that stock was ultimately selected as the form of the sale for no reason but to convey the Cemeteries in a manner where they could be operated for profit under Minnesota law. [Addendum 45, ¶2; Addendum 47/5:17-26; A44-45/5:8-6:5, A55-56/14:10-28, A219/16:4-9] As Corinthian made clear, "[t]he structure we were *forced into by the state* was to buy the stock." [A45/6:4-5 (emphasis added)]. When the initial buyer uses "*forced*" to describe the reason for employing stock, there can be no question that stock was never the object or intended benefit of the parties' bargain but rather the mere mechanism the parties had to use to convey the object of the intended bargain.

In fact, only later in the May 7, 2005 Letter of Intent between Corinthian and Washburn is "stock" mentioned. [A203-212] As John Edson, Washburn's Board Member and CFO [A295] testified, this second and subsequent Letter of Intent (between the initial buyer/second seller and the ultimate buyer) specifies stock solely because Washburn's Edson had asked Washburn's legal counsel, Gordon Johnson [A181/14:4-5], to check whether the Cemeteries had to be purchased through a stock sale to enable Washburn to continue to operate them for profit, which they did, and that is "what drove the type of transaction" even though Washburn "would have preferred an asset purchase." [A195/68:4-70:9] Under these facts, no reasonable person could conclude other than that the Cemeteries were always the true and bargained-for subject of the deal and that the stock conveyance method was used (albeit in a mistaken fashion) as the mere

mechanism to effect that intent solely because that form was needed to satisfy a peculiarity of Minnesota funeral law.

The final agreements themselves, while mistakenly employing an unqualified stock sale to effect that intent, confirm that the underlying deal was for the Cemeteries only and not for anything else whatsoever. Indeed, the Agreement between SCI and Corinthian (that formed the basis for the agreement between Corinthian and Washburn) requires attachment of schedules with “all real property,” and its attached real property schedules list only the Cemeteries and no other real property. [A81, A88, A122-125, A136-140, A156-159] It expressly allows SCI to remove unencumbered cash, every computer, all computer software and related information, and all assets not used in operating the Cemeteries. [A94] And the parties set the price of the deal at the *Cemeteries’ fair market value*, as Washburn concedes [A222/31:22-22; *see also* A54/13:7-8, A190/48:21-23] – not the much higher value of the stock – demonstrating that the parties always intended for the Cemeteries themselves to be the sole, bargained-for object of the deal.

All the other evidence is the same. For example, not surprisingly, Corinthian’s Kirkpatrick testified that he hopes when this case ends that the Lots “are returned to SCI” as the “rightful owner” because SCI “didn’t intend to sell the properties we are speaking of” and Corinthian “didn’t intend to buy” them. [Addendum 47/5:1-18] He similarly made clear, in response to Washburn’s inquiry about whether Corinthian sought to exclude the Lots, that “Corinthian wasn’t aware of the [Lots], therefore, the [Cemeteries] were the only ones being negotiated.” [Addendum 48/23:6-12] And he testified that

Corinthian “*intended not to transfer title to those properties [i.e., the Lots],*” given the obvious fact that “[b]ecause we didn’t know about them, it was not our intent to transfer.” [A68/24:7-13 (emphasis added)] Furthermore, SCI’s Cruger similarly testified that “[w]e certainly didn’t intend to exclude something that we didn’t mean to include in the first place because we didn’t know it existed” and again made clear when his deposition was ending that the parties never intended or agreed to sell the Lots. [A290/22:18-24, 292/31:7-16] Moreover and importantly, as Appellants’ opening brief demonstrates from Washburn’s own unequivocal testimony and interrogatory answer, Washburn intended to buy and receive only the Cemeteries and not the Lots. [See e.g., SCI 10-11] Indeed, Washburn conceded this repeatedly. [Id.] For example, when asked to confirm that the parties never intended to convey the Lots, Washburn testified, “*Since they didn’t know about it, I guess that would be true.*” [A196/74:8-13 (emphasis added)]

Washburn also spends pages trying to show that SCI had the opportunity to conduct due diligence and remove the Lots, yet that none of the parties sought to exclude the Lots from the parties’ transactions. [See e.g., Washburn 11-15] But the equitable inquiry is not what *could have* happened in a perfect world – it is what did happen in this less-than-perfect world in which we live. The undisputed facts are that at the times of the bargaining and executing the contracts, all the parties operated under the mistaken but fundamental assumption that only the Cemeteries comprised the real property assets of Crystal Lake. [SCI 8-11] Had any party thought otherwise, the Lots would have been removed from Crystal Lake’s ownership before the stock-sales contracts were executed or the contracts would have expressly omitted them. [Id.] But, because not SCI,

Corinthian, or Washburn knew or understood what “extra” real property the unqualified stock, rather than an asset, sale would purport to convey, none took the remedial steps that would have “fixed” the problem, and we are where we are today. That is the precise reason Appellants seek equitable remedies.

In its repeated quest to misdirect the inquiry, Washburn twists Appellants’ requested reformation [A33, ¶32<sup>3</sup>] and then claims that this requested reformation somehow contradicts the parties’ testimony, excerpting parts of SCI’s Cruger and Corinthian’s Kirkpatrick’s depositions where they note the obvious fact that there was no discussion about the excluding the Lots that neither knew existed. [See Washburn’s Br. 13-14] The same is true for Washburn. [See SCI 10-11] But the question is not whether the parties specifically intended to exclude the Lots. Of course, they did not, because the Lots were not in any party’s mind at the time of contracting. [SCI 5-12] Indeed, even the district court noted that “[a]ll parties agree that no-one [sic] involved in the 2005 transactions and sale of Crystal Lake knew that these vacant parcels [*i.e.*, the Lots] had been titled in the name of Crystal Lake.” [Addendum 28] *The question is whether a court of equity can reform or rescind the written agreements to reflect the parties’ real and bargained-for intent to sell, buy, and transfer only the Cemeteries.* As shown in Appellants’ opening brief and below, the law unquestionably allows such relief.

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<sup>3</sup> This case should not turn on wordsmanship. Requesting that the district court reform the agreement(s) so that the Lots are expressly excluded from the parties’ transactions is the same thing as requesting that the district court reform the agreement(s) so that the Cemeteries are the only assets sold, purchased, and transferred to the buyers.

## REPLY ARGUMENT

### I. *De novo* Review Is Required.

Washburn spends three pages discussing the review standard but never once rebuts the unassailable point that on appeal from summary judgment (as opposed to judgment following trial), an appellate court conducts *de novo* review. See e.g., *FinAg, Inc. v. Hufnagle*, 720 N.W.2d 579, 584 (Minn. 2006) (*de novo* review of questions of law). No other standard would make sense, as an appeal from summary judgment follows a decision on motion papers and involves no credibility assessment or finding of facts. Washburn's citations to cases involving a deferential standard of review fail to apply, because they involved trials and not summary judgments. Washburn fails to cite a single reformation or rescission case (or any case for that matter) where the appeal emanates from a grant of summary judgment, and this Court applied a deferential as opposed to a *de novo* review standard.<sup>4</sup> Washburn thus effectively concedes that *de novo* review is required here.

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<sup>4</sup> Washburn claims that a "manifestly contrary to the evidence" standard applies in a reformation case [Washburn 15], citing *Metro Office Parks Co. v. Control Data Corp.*, 295 Minn. 348, 353, 205 N.W.2d 121, 124 (1973) and *Golden Valley Shopping Ctr., Inc. v. Super Valu Realty, Inc.*, 256 Minn. 324, 329, 98 N.W.2d 55, 58 (1959). But neither case supports its contention. Although not clearly stated in the decision, *Metro Office* obviously involved an appeal following trial because the trial court decided the facts. Thus, in that case, this Court cited the standard from *Golden Valley. Metro Office*, 295 Minn. at 124, 205 N.W.2d at 124 (citations omitted). As Appellants' opening brief noted [SCI 16-17], *Golden Valley* involved an appeal following a trial with disputed facts. Unlike *Metro Office* and *Golden Valley*, no trial occurred here. Washburn also claims this same "manifestly contrary to the evidence standard" applies in a rescission context, citing *Nadeau v. Cnty. of Ramsey*, 277 N.W.2d 520, 524 (Minn. 1979). [Washburn 15] As Appellants' opening brief noted [SCI 18], the rescission case of *Nadeau* involved a

Next in its standard of review discussion, Washburn contends that Appellants did not establish a prima facie case. [Washburn 16] That contention – albeit wrong – relates to the two equitable causes of action and is refuted by Appellants’ opening brief demonstrating that the elements for each equitable claim are satisfied,<sup>5</sup> as this Court’s *de novo* review of the competent record here will conclude.

Finally, Washburn’s argument [Washburn 17] that judgment for Appellants would not automatically follow reversal, although perhaps ordinarily the case, ignores the facts of record. Here, the undisputed facts unequivocally establish that the parties bargained for the sale, purchase, and transfer of only the Cemeteries and nothing else. Under these facts, no reasonable person would conclude other than that the Cemeteries were the sole and intended true benefit of the bargain and that balancing the equities, Appellants (including SCI) are entitled to equitable relief. The district court and court of appeals’ majority relied on the inapposite decision of *Costello v. Sykes*, 143 Minn. 109, 172 N.W. 907 (1919), precluding further inquiry; as that was not appropriate, inquiry properly taken here leads to the inescapable conclusion that relief is required and that further judicial proceedings, other than the entry of judgment for Appellants (including SCI), are not necessary. *See Pergament v. Loring Props., Ltd.*, 599 N.W.2d 146, 151 (Minn. 1999) (reversed, with directions to enter judgment consistent with Court’s opinion). Thus, a remand with instructions to enter equitable relief for Appellants (including SCI)

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different deferential standard, *i.e.*, abuse of discretion, and it likewise fails to apply because the appeal there also followed a trial.

<sup>5</sup> Pages 20 through 23 and pages 33 and 36 of Appellants’ opening brief (and for that matter the facts throughout Appellants’ opening brief) establish the elements of reformation, mutual-mistake rescission, and lack-of-mutual assent rescission.

consistent with this Court's opinion would serve the interests of justice and equity and would conserve judicial resources.

## **II. Minnesota Law Permits Reformation Here.**

### **A. The Reformation Elements Have Been Satisfied.**

Washburn wrongly asserts that Appellants merely pay "lip service" to the elements of reformation while failing to demonstrate that the elements have been met. [Washburn 18] The evidence demonstrates that Appellants satisfied their burden for all three elements. [See SCI 3-13, 23-25; *supra* at 3-9] In summary fashion, a) a valid agreement existed expressing the parties' bargained-for intentions – everyone to the sales transactions unequivocally agrees that the sellers (SCI and then Corinthian) intended to sell and transfer and the buyers (Corinthian and then Washburn) intended to buy and receive *only* the Cemeteries for an agreed total price of \$1,000,000; b) the parties' written contracts failed to express this "real intention" because they inadvertently transferred more; and c) there was mutual mistake – all the parties thought only the Cemeteries were being sold, purchased, and transferred, and none of them thought of or knew about the Lots, let alone intended the Lots to be part of the transaction. [*Id.*] As the district court acknowledged, "no-one involved in the 2005 transactions and sale of Crystal Lake knew that the [Lots] had been titled in the name of Crystal Lake." [Addendum 28]

This is the very definition of mutual mistake. As this Court has held, "[r]eformation may be granted not only where the language used in the instrument is not such as was intended, but also where both parties are in error in respect to the thing to which such language applies." *Pettyjohn v. Bowler*, 219 Minn. 55, 58, 17 N.W.2d 82, 84

(1944) (citation omitted); *see also Haley v. Sharon Twp. Mut. Fire Ins. Co.*, 147 Minn. 190, 193, 179 N.W. 895, 897 (1920) (reformation proper where parties are “mistaken as to some material fact which formed the consideration thereof or inducement thereto”). Here, the language used in the written contracts – an unqualified sale of stock – failed to reflect the parties’ true intended and bargained-for agreement. The written contracts can and should be reformed to reflect that true intent.

Washburn contends, *ad nauseum*, that reformation is unavailable because there was no “actual agreement” of the parties to do anything but convey Crystal Lake’s stock. To the extent Washburn implies that the written contracts are the only “actual agreement” that can be considered, that is, of course, wrong. The entire point of the reformation doctrine is to reform a written contract that does not reflect what the parties actually understood, bargained for, and intended to be their mutual agreement. Although Washburn contends that “[d]ifferent intent is not sufficient” for reformation [Washburn 19], it surely is sufficient where, as here, the different intent was bargained-for and mutual, and the actual written contracts mistakenly failed to carry out that intent. An agreement is, after all, simply a “meeting of the minds.” *Minneapolis Cablesystems v. Minneapolis*, 299 N.W.2d 121, 122 (Minn. 1980) (“[a] contract requires a meeting of the minds regarding its essential elements”). And, contrary to Washburn’s contention that “SCI has never presented a shred of evidence establishing that the parties actually agreed to terms different than” in their written contracts [Washburn 19], as shown in Appellants’ opening brief and this reply, it is undisputed that the parties’ minds met only about one thing – the sale, purchase, and transfer of the Cemeteries, and their written contracts

inadvertently sold, bought, and transferred much more real property than just the bargained-for and intended Cemeteries. Indeed, that the written sales contracts mistakenly sought to accomplish the parties' true intent through an unqualified stock sale was just that – a mistake, and a mutual one at that.

Washburn obfuscates the issue by contending that reformation is unavailable unless the parties specifically agreed to *exclude* the Lots from their written agreement. [See e.g., Washburn 25-26] The parties could not have had such a specific agreement, of course, because, as even the district court noted [Addendum 28], they did not know about the Lots being titled in Crystal Lakes' name. But the law does not turn on such verbal sophistry. When the parties have an intent to include and bargain only for three things – i.e., the Cemeteries – they should not have to have an express intent to exclude everything else under the sun except those Cemeteries. The parties' bargained-for intent and real agreement was to *include only the Cemeteries and nothing else*. The written contracts, which ended up mistakenly including significantly more than that, can and should be reformed to reflect that mutual intent.

In the end, Washburn essentially advocates for the absolute, categorical rule adopted by the court of appeals' majority and rejected by the dissent (whose opinion Washburn tellingly ignores). Washburn argues that “given that all underlying assets are automatically included in a stock transaction, the question . . . turns upon whether the parties separately agreed to exclude particular assets” because “[w]ith corporate stock . . . an intent to include underlying assets is the default understanding.” [Washburn 26] Thus, in Washburn's view, the subject of a stock deal is *always* just the stock, and no

party could ever invoke the doctrine of reformation where, as here, the parties actually intended for their deal to embrace something else, unless it can be shown that they specifically and expressly agreed to exclude particular assets. Washburn's manufactured, rigid rule suits its current position because there was no way the parties here could have specifically agreed to exclude assets about which they did not know. But, as this Court long ago noted, equitable doctrines are, by definition, flexible tools and do not admit of such rigid distinctions. *See Leqve v. Stoppel*, 64 Minn. 74, 83-85, 66 N.W. 208, 211-12 (1896) (equity is "more elastic" and may be exercised in a "more flexible and tolerant" manner). For purposes of reformation, there is no practical and legal difference between an intent to exclude specific assets and an intent to include *only* certain specific and different assets. Either way, if an unqualified stock sale does not comport with the parties' mutual intent, it can and should be reformed to reflect that true intent.

Appellants do *not* argue that the law "require[s] that parties to a stock transaction identify the particular assets they agree to transfer," [Washburn 26], nor does this case break any new ground or threaten the concept of stock sales. In the vast, overwhelming majority of stock sales, the written contracts will reflect the parties' mutual intent to convey the stock itself (including all underlying assets and liabilities), and there will be no evidence of any contrary, shared understanding to convey anything more or less. In this case, however, the evidence unequivocally shows that the true, bargained-for, and shared intent was to convey only the Cemeteries and that the stock form was used in a mistaken fashion to satisfy a peculiarity of Minnesota funeral law. That reformation is required on these facts to avoid injustice does not require the same relief on different

facts. By contrast, the inflexible, absolute rule applied by the court of appeals' majority and the district court and urged by Washburn would set a dangerous precedent by effectively precluding any equitable relief when the subject of a sale is stock.

**B. Washburn's Precedents Are Not Dispositive, And They Do Not Require This Court To Hold Reformation Unavailable Here.**

The court of appeals' majority noted that it was "bound to follow Minnesota Supreme Court precedent" and that *Costello*, 143 Minn. 109, 172 N.W. 907, a case involving a stock-sale structure, compelled it to hold reformation is unavailable here. [Addendum 9] It does not. Tellingly, Washburn runs away from *Costello*, relegating any discussion of the case to the tail-end of its brief. [See Washburn 32-36] That is not surprising, given that *Costello* does not govern here. In the first place, even Washburn admits that *Costello* "arose in the rescission context." [Washburn 34] It therefore does not control Appellants' separate reformation claim. But regardless, Washburn relies on *Costello* to argue that reformation may not be had because the "mistake pertains not to the contract's subject matter (i.e., stock according to Washburn) but to the underlying assets." [Washburn 32] However, that purported rule does not help Washburn in this case. Here, the subject of the parties' bargained-for intent was the Cemeteries, not stock. An unqualified stock sale was merely the mistaken method of conveyance, not the fundamental object of the parties' bargain. Thus, this is not a case where the parties always intended to convey only stock but were mistaken as to the value, as was the case in *Costello*. The Court's dicta in *Costello*, cited at page 33 of Washburn's brief, is simply

that – dicta. And to the extent it is more than that, it should be overturned or limited as contradicting basic principles of equity.

The other decisions from this Court<sup>6</sup> upon which Washburn relies in support of its reformation argument are likewise factually and legally distinguishable. Appellants did not ignore “these dispositive precedents.” [Washburn 23] Far from dispositive, they are inapposite and irrelevant. Each case involves a situation where the plaintiff presented no evidence that the parties’ written contracts utterly failed to capture the parties’ real and bargained-for mutual intent.

In *Nichols v. Shelard National Bank*, 294 N.W.2d 730 (Minn. 1980), the plaintiffs sought to reform a \$30,000 mortgage to a \$10,000 mortgage, but, as Washburn concedes, they “presented no evidence that the parties had ever agreed to a \$10,000 mortgage.” [Washburn 20, 28] Indeed, the defendant always thought the mortgage amount was \$30,000, so there was no *mutual* mistake. And, unlike here, the plaintiffs would have discovered the mortgage amount of \$30,000 had they read the contract as this fact about which the plaintiffs claimed mistake was apparent on the face of the written agreement. Here, the evidence demonstrates that the parties’ mutual bargained-for and true intention involved only the Cemeteries, the parties were mutually mistaken that the method of conveyance in the written agreements would effect that intent, and a reading of the

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<sup>6</sup> Washburn also cites a court of appeals case, specifically *Beasley v. Medin*, 479 N.W.2d 95 (Minn. Ct. App. 1992), which is not a precedent of this Court. See e.g., *Goodyear Tire & Rubber Co. v. Dynamic Air, Inc.*, 702 N.W.2d 237, 245 (Minn. 2005) (court of appeals’ interpretations not binding). Additionally, for the reasons set forth in Appellants’ opening brief and this reply, *Beasley* is inapplicable as the issue here is not one of valuation, as was the case in *Beasley*. *Beasley*, 470 N.W.2d at 98.

written agreements would not have caused anyone to discover or realize the Lots were included.

In *Theros v. Phillips*, 256 N.W.2d 852 (Minn. 1977) [Washburn 21], the plaintiff sought to reform a deed because its boundary lines left the plaintiff's restaurant with little or no room for parking. But the restaurant did not exist at the time of the parties' contracting, and thus there could be no mutual mistake by both parties regarding parking for a phantom restaurant; further, the parcel of land being conveyed was accurately described in the deed. *Id.* at 857. Unlike *Theros*, the Lots in this case existed, the parties bargained only for the Cemeteries, they had no intent to transfer the Lots, and the written contracts failed to capture the parties' mutual intent that only the Cemeteries were being sold, bought, and transferred.

*Cool v. Hubbard*, 293 Minn. 349, 199 N.W.2d 510 (1972) [Washburn 21] involved a dispute about the conveyance of contiguous property, where the evidence revealed the seller thought a contiguous bluff was not part of the sale of real property and, thus, as Washburn notes, "never intended for the bluff property to transfer." [*Id.*] But unlike here, the buyer thought the bluff was part of the sale and repeatedly mentioned it to the seller, and the written deed specifically included the contiguous bluff. Consequently, there was no meeting of the minds on the bluff, and the seller provided no evidence of a mutual meeting of the minds that differed from the actual agreement. *Id.*, 293 Minn. at 350-55, 199 N.W.2d at 511-13. Here, by contrast, all parties had a mutual meeting of the minds as they understood that the Cemeteries were the sole and true

bargained-for object of the sale, and the contracts mistakenly failed to encapsulate the parties' mutual meeting of the minds or intent.

In *Alpha Real Estate Co. of Rochester v. Delta Dental Plan of Minn.*, 664 N.W.2d 303 (Minn. 2003) [Washburn 22-23], the parties' 1997 lease omitted a clause from the parties' prior 1995 lease. *Id.* at 314. But, as this Court noted in holding reformation unavailable there, the record contained no evidence that both parties negotiated for inclusion of that clause in the 1997 lease and no evidence that the bargained-for clause was omitted due to a scrivener's error. *Id.* Here, by contrast, the parties' intent to convey only the Cemeteries was not only mutual but specifically negotiated, and the written contracts mistakenly failed to carry out that bargained-for and agreed intent.

*Emp'rs Mut. Cas. Co. v. Wendland & Utz, Ltd.*, 351 F.2d 890 (8th Cir. 2003) [Washburn 23-24] involved an insurance contract that did not contain automobile accident coverage. In affirming the district court's refusal to reform the insurance contract to include such coverage, the Eighth Circuit noted that reformation based on mutual mistake requires each party to have "labored under the same misconception" and that there was no evidence the insured and insurer both bargained for and intended there would be automobile coverage, even though the executed insurance contract did not contain such coverage. *Id.* at 895. Here, however, all parties unquestionably labored under the same misconception that the written contracts would carry out their mutual and bargained-for intent to convey only the Cemeteries.

*Hanson v. N. States Power Co.*, 198 Minn. 24, 268 N.W. 642 (1936) [Washburn 29] affirmatively undermines Washburn's position. There, although the plaintiff was

mistaken as to her injuries, the defendant was not and had bargained for a blanket and all-encompassing release of all known and unknown injuries. In contrast, here, the mistake was mutual. Moreover, this Court in *Hanson* made clear that reformation could be had where the parties negotiated for a release of the plaintiff's known injuries "in ignorance of other and more serious injuries" and may even be had when the "release expressly includes *unknown injuries*" because "*such expression is not conclusive, and mutual mistake may be shown for the purpose of vitiating the agreement.*" *Id.*, 198 Minn. at 27, 268 N.W. at 644 (emphasis added) (citations omitted). If there can be a "mutual mistake" about unknown injuries, there certainly can be a mutual mistake that stock transferred unknown Lots.

*Jablonski v. Mut. Serv. Cas. Ins. Co.*, 408 N.W.2d 854 (Minn. 1987) [Washburn 30] is not only not "on point," it is irrelevant. There, the party seeking reformation of an insurance contract made "no contention that reformation is necessary to reflect the intent of the parties existing at the time of the issuance of the" written insurance contract. *Id.* at 857. For all the reasons set forth in Appellants' opening brief and this reply, that is not the case here.

*Keller v. Wolf*, 239 Minn. 397, 58 N.W.2d 891 (1953) [Washburn 31], as itself admits, involved a "unilateral mistake" and is entirely off-point. Here, Appellants allege and have demonstrated that the mistake was mutual.

*First Nat'l Bank of Birmingham v. Perfection Bedding Co.*, 631 F.3d 31 (5th Cir. 1980) [Washburn 35], involves a case from another jurisdiction where there was no mutual mistake of fact but rather a unilateral mistake of law – one party did not know

about the excess assets, while the other party was aware of the excess assets but alleged that it made a mistake of law as to whether the excess assets would be conveyed by the stock sale. *Id.* at 33. Here, by contrast, as demonstrated in Appellants' opening brief and this reply, the mutual mistake was one of fact – no one knew about or considered the excess assets (the Lots) – and not a mistake of law.

Finally, *Wood v. Boynton*, 64 Wis. 265, 25 N.W. 42 (1885) [Washburn 37], a hoary case from another jurisdiction, like *Costello*, involved rescission, not reformation. Second, unlike here, the parties were bargaining over an agreed and singular item – a stone, and the dispute involved only the valuation of that stone. The same is true for the farm land discussed in *Restatement (Second) of Contracts* § 154 cmt. a [Washburn 37]. In both situations, there was no mistake or question about the nature, extent, subject matter, identity, or object of the sale, a stone and a farm, respectively. The parties' mutual ignorance related not to the bargained-for and agreed object of their transaction – the stone and the land, respectively – but only to the value of each such object. That is not what happened here. The parties bargained for and agreed upon – and still agree to this day – about the value of the only object of their bargain: the Cemeteries worth \$1,000,000.

In the end, Washburn's argument [Washburn 36] is simply that SCI "assumed the risk" that Washburn would try to take advantage of the parties' mutual mistake and reap an unintended and inequitable windfall. Equity exists precisely to prevent such unjust results. Appellants do not seek to "alter[] the playing field." [*Id.*] Quite the opposite, Appellants' position would equally entitle Washburn to reformation if it turned out that

Crystal Lake did not have title to the Cemeteries that were the real and intended object of the parties' bargain. Regrettably, no party thought to investigate the Crystal Lake's precise holdings, and in hindsight it would have been better if the parties had done so. But the doctrine of reformation does not, as Washburn suggests, depend on whether one party or both could have prevented a mistake from happening. If that were the rule, then reformation would almost never be available since virtually all mistakes are preventable. In our imperfect world, as the *Restatement (Second) of Contracts* § 157 states, a "mistaken party's fault in failing to know or discover facts before making the contract" will not bar reformation unless the "fault amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing." The record contains no such evidence of Appellants' (including SCI's) failure to act in good faith. Indeed, if anything, it is Washburn that is contravening the reasonable standards of fair dealing by insisting upon a multi-million dollar windfall to which it knows it is not entitled.

This case warrants reformation.

**III. In the alternative, Minnesota law permits mutual-mistake rescission or lack-of-mutual assent rescission here.**

Washburn's terse and superficial rescission discussion utterly fails to rebut Appellants' points. [*Cf.* Washburn 39-43 *with* SCI 28-26] Appellants are not seeking to "tear up" every contract. Rather, like the court of appeals' dissent, Appellants seek clarification of *Costello* and to end the lower courts' rigid application of a formulaic rule that elevates form over substance and holds the parties to an inequitable result that was never the intended outcome of their bargain. [Addendum 21-22]

**A. The Record Establishes Mutual-Mistake Rescission.**

Washburn incorrectly claims the mistake here was unilateral. [Washburn 41] But Appellants have shown mutual mistake: all parties bargained for and agreed to sell, purchase, and transfer only the Cemeteries, and all mistakenly thought only the Cemeteries were being conveyed; they all were also mistaken about the Lots, as none thought of or knew about the Lots, let alone intended them to be part of the transactions. [SCI 3-12]

Washburn takes issue with Appellants' statement that *Costello* does not govern mutual-mistake rescission here. [Washburn 41] Yet, Washburn never refutes Appellants' rationale for *Costello*'s inapplicability. [SCI 31-34] For example, unlike *Costello*, here there was enough of a "complete difference in the substance between what was supposed to be and what was taken as would constitute a failure of consideration." *Costello*, 142 Minn. at 111-12, 172 N.W. at 908. As Appellants noted, "what was supposed to be" was the sale, purchase, and transfer of the Cemeteries, "what was taken was" the Cemeteries and the Lots, and as Washburn testified, there was an abject failure of consideration for the Lots. [Addendum 50/35:16-19, Addendum 52/58:21-23 (Washburn "didn't pay anything" for the Lots)].

In a single paragraph, Washburn summarily dismisses *Clayburg v. Whitt*, 171 N.W.2d 623, 626 (Iowa 1969) (mutual-mistake rescission in a stock sale), erroneously arguing that *Clayburg* and SCI "offered no principled basis" for a rule other than the inflexible rule that rescission is unavailable in a stock sale. [Washburn 41] Actually, the *Clayburg* court explained why *Costello* should not be read rigidly and opined that a court

should look beyond the stock form and examine the substance (corporate assets and liabilities) when determining whether mutual mistake justifies rescission, because the existence or nonexistence of corporate assets is not always immaterial. *Id.* at 626. Likewise, Appellants established that applying a rigid rule whenever there is a stock sale “virtually eviscerates” rescission. [SCI 356-37]

Finally, except for its passing comment that this is not the case for clarification or a new rule [Washburn 42], Washburn totally ignores the problem with a rigid rule (discussed by the court of appeals’ dissent, *Clayburg*, and the *Harvard Law Review* commentary set forth in Appellants’ brief) and the need for an equitable standard that examines whether there is a fundamental but erroneous assumption at the time of contracting, as opposed to the blind and absolute application of a formulaic rule that *always* elevates form over substance. [*Cf.* Washburn 41-43 with SCI 32-33] The reason Washburn does this is obvious – Washburn needs the rigid rule to reap the \$2,000,000 windfall that no party ever intended or understood was part of their bargain.

**B. The Record Establishes Lack-Of-Mutual-Assent Rescission.**

Washburn wrongly claims that *West Coast Airlines, Inc. v. Miner’s Aircraft & Engine Serv., Inc.*, 66 Wash.2d 513, 517-19, 403 P.2d 833 (1965) “says nothing about mutual assent.” [Washburn 39] Actually, that court cites a recognized treatise on mutual assent, noting that “[a] contract of sale . . . must rest upon the mutual agreement of the parties on all essential elements of the sale.” *West Coast Airlines*, 66 Wash.2d at 519, 403 P.2d at 836-37, *citing* 77 C.J.S., *Sales, Mutual Assent or Agreement*, § 24, including the identity of the thing sold (other citations omitted). Despite the parties’ agreement to

sell and purchase accumulated unusable scrap metal in the form of cans and their scrap metal contents, the court held that “there was no meeting of the minds, no contract and thus no sale of the engines” that were inside the cans and therefore, the buyer did obtain title to the engines. *Id.* (citation omitted). Likewise, here, there was no meeting of the minds, no contract, and thus no sale regarding the Lots, and the title to the Lots should not transfer to Washburn.

Washburn premises the remainder of its lack-of-mutual-assent rescission argument on its erroneous contention that, despite that the parties’ bargained-for and agreed intent only to convey the Cemeteries and nothing more, stock – the incidental albeit mistakenly used method of conveyance – was the object of the parties’ transactions. [Washburn 40] For the reasons set forth in Appellants’ opening brief and this reply, the objective evidence shows that stock was *not* the object and intended benefit of the parties’ bargain. Even the parties’ subsequent objective conduct demonstrates the stock was not the object and intended benefit of the parties’ bargain, including that the Lots were not part of the deal, as only SCI and not Washburn exhibited any indicia of ownership over the Lots. [SCI 8] *See Cedarstrand v. Lutheran Bhd.*, 263 Minn. 520, 532, 117 N.W.2d 213, 221 (1962) (citations omitted) (mutual assent judged objectively by words or conduct).

As Appellants established, alternatively, this case merits rescission on either ground.

**CONCLUSION**

In light of Appellants' opening brief and above, the judgment should be reversed with instructions to enter judgment in favor of Appellants (including SCI).

*Respectfully submitted,*

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