
NO. A09-1293

State of Minnesota
In Court of Appeals

301 Clifton Place Condominium Association,
Respondent,

vs.

301 Clifton Place, L.L.C., Clifton Properties, L.L.C.,
 and David H. Nixon,
Appellants.

APPELLANTS' REPLY BRIEF

FABYANSKE, WESTRA, HART
 & THOMSON, P.A.
 M.T. Fabyanske (#28022)
 Thomas A. Forker (#246682)
 Hannah R. Stein (#345908)
 800 LaSalle Avenue, Suite 1900
 Minneapolis, MN 55402
 (612) 359-7600

Attorneys for Respondent

FRUTH, JAMISON & ELSASS, PLLC
 Thomas E. Jamison (#220061)
 Adam A. Gillette (#0328352)
 80 South Eighth Street
 Suite 3902
 Minneapolis, MN 55402
 (612) 344-9700

Attorneys for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES	i
INTRODUCTION.....	1
ARGUMENT	1
I. THE DISTRICT COURT IMPROPERLY HELD 301 CLIFTON AND CLIFTON PROPERTIES COULD APPEAR <i>PRO SE</i>	2
II. FAILURE TO EMPANEL A JURY IS REVERSIBLE ERROR	4
III. DISCLOSURE OF THE KRAUS-ANDERSON SETTLEMENT IS NECESSARY.	7
IV. THE PARTIES MODIFIED THE STATUTE OF LIMITATIONS IN A SEPARATE WRITING.....	9
V. NIXON DID NOT WAIVE AN INSUFFICIENCY OF SERVICE DEFENSE.....	11
VI. PIERCING THE CORPORATE VEIL WAS IMPROPER	13
VII. 301 CLIFTON DID NOT PROMISE, WARRANT, OR REPRESENT THAT SOLD HARDWOOD FLOORS WOULD BE INSTALLED.....	17
VIII. THE PURCHASE AGREEMENT IS UNAMBIGUOUS	18
IX. THE DISTRICT COURT IMPROPERLY CONCLUDED THAT 301 CLIFTON VIOLATED THE MINNESOTA CONSUMER FRAUD ACT	19
X. THERE IS NO FINDING OF LIABILITY AGAINST CLIFTON PROPERTIES.....	20
XI. THE DISTRICT COURT DID NOT PERFORM THE REQUIRED ANALYSIS IN AWARDING CPCA ATTORNEYS' FEES	20
XII. CPCA'S WAIVER ARGUMENTS ARE MISPLACED.....	21
CONCLUSION	25

TABLE OF AUTHORITIES

Cases

<u>AE Restaurant Associates, L.L.C. v. Giampietro (In re Giampietro)</u> , 317 B.R. 841 (Bankr. D. Nev. 2004).....	15
<u>Aetna Ins. Co. v. Kennedy ex rel. Bogash</u> , 301 U.S. 389 (1937).....	5
<u>Anderson v. Hunter, Keith, Marshall & Co.</u> , 417 N.W.2d 619 (Minn. 1988).....	21
<u>Bachertz v. Hayes-Lucas Lumber Co.</u> , 201 Minn. 171, 275 N.W. 694(1937).....	11
<u>Baer v. Amos J. Walker, Inc.</u> , 85 Nev. 219, 220, 452 P.2d 916, 916 (1969).....	14
<u>Basic Management Inc. v. U.S.</u> , 569 F. Supp. 1106 (D. Nev. 2004).....	15
<u>Blakely v. Washington</u> , 542 U.S. 296 (2004).....	4
<u>Connecticut Nat'l Bank v. Smith</u> , 826 F.Supp. 57 (D.R.I. 1993).....	6
<u>Coons v. St. Paul Cos.</u> , 486 N.W.2d 771 (Minn. Ct. App. 1992).....	10
<u>Cooperative Finance Ass'n, Inc. v. Garst</u> , 871 F.Supp. 1168 (N.D.Iowa 1995).....	6
<u>Denelsbeck v. Wells Fargo & Co.</u> , 666 N.W.2d 339 (Minn. 2003).....	18
<u>Employers Mut. Liab. Ins. Co. v. Eagles Lodge</u> , 165 N.W.2d 554 (Minn. 1969).....	19
<u>Finden v. Klaas</u> , 268 Minn. 268, 272, 128 N.W.2d 748 (1964).....	3, 4
<u>Frank McCleary Cattle Co. v. Sewell</u> , 317 P.2d 957 (Nev. 1957).....	15
<u>Greenbush State Bank v. Stephens</u> , 463 N.W.2d 303 (Minn.Ct. App. 1990).....	22
<u>Hauenstein & Bermeister, Inc. v. Met-Fab Industries, Inc.</u> , 320 N.W.2d 886 (Minn. 1982).....	5
<u>Igo v. Chernin</u> , 540 N.W.2d 913, 914 (Minn. Ct. App. 1995).....	13
<u>In Re Sand</u> , 431 N.W.2d 107 (Minn. 1988).....	16
<u>Jacobson v. \$55,900</u> , 728 N.W.2d 510 (Minn. 2007).....	22

Johnson v. Winthrop Labs. Div. of Sterling Drug, Inc., 291 Minn. 145, 190 N.W.2d 77, (1971).....11

Kunza v. St. Mary’s Regional Health Center et. al. 747 N.W.2d 586 (Minn. Ct. App. 2008).....23, 24

Lake State Federal Credit Union v. Tretsven 2008 WL 27321112

Landgraf v. Ellsworth, 267 Minn. 323, 126 N.W.2d 766 (1964).....4

Leasing Serv. Corp. v. Crane, 804 F.2d 828 (4th Cir. 1986).....6

LFC Mktg. Group, Inc. v. Loomis, 116 Nev. 896, 8 P.3d 841 (2000).....14

Lorenz v. Beltio, Ltd., 114 Nev. 795, 963 P.2d 488 (1998).....13

Lundgren v. Green, 592 N.W.2d 888, 890 (Minn. Ct. App. 1999).....10

Morton Brick & Tile Co. v. Sodergren, 130 Minn. 252, 153 N.W. 527 (1915).....4

Nieszner v. St. Paul Sch. Dist. No. 625, 643 N.W.2d 645 (Minn. Ct. App. 2002).....10

North Arlington Med. v. Sanchez Constr., 86 Nev. 515, 471 P.2d 240 (1970).....15

Northland Temps., Inc. v. Turpin, 744 N.W.2d 398 (Minn. Ct. App. 2008).....3

Oelschlager v. Magnuson, 528 N.W.2d 895(Minn. Ct. App. 1995).....8

Patterson v. Wu Family Corp. 608 N.W. 2d 863 (Minn. 2000).....12, 13

Polaris Industrial Corp. v. Kaplan, 103 Nev. 598, 747 P.2d 884 (1987).....13

Rowland v. Lepire, 99 Nev. 308P.2d 1332 (Nev. 1983)..... 14, 15

Save Our Creeks v. City of Brooklyn Park, 699 N.W.2d 307 (Minn. 2005).....3

Shamrock Development, Inc. v. Smith, 754 N.W.2d 377 (Minn. 2008).....12, 13

State v. Hannuksela, 452 N.W.2d 668, (Minn. 1990).....1, 22

State v. Paulson, 290 Minn. 371, 188 N.W.2d 424 (1971).....21

Thiele v. Stich, 425 N.W.2d 580 (Minn. 1988).....22

<u>Watson v. United Servs. Auto. Ass'n</u> , 566 N.W.2d 683 (Minn. 1997).....	22, 23
<u>Wauhop v. Allied Humble Bank, N.A.</u> , 926 F.2d 454 (5th Cir. 1991).....	6
<u>Wirig v. Kinney Shoe Corp.</u> , 461 N.W.2d 374 (Minn. 1990).....	9

Statutes, Rules, and Regulations

Minn. R. Civ. App. P. 103.04.....	1, 22
Minn. R. C.V. P. 60.02.....	3, 4
Minn. Stat. §336.2-313.....	17, 18
Minn. Stat. §336.2-314.....	17, 18
Minn. Stat. §336.2-315.....	17, 18
Minn. Stat. § 515B.4-112.....	10
Minn. Stat. § 515B.4-113.....	10
Minn. Stat. § 515B.4-115(b).....	10

INTRODUCTION

Respondent accuses Appellants of making “hypertechnical” arguments while at the same time it repeatedly asserts waiver as a technical defense of the district court’s errors of law. CPCA’s brief opposing this appeal reminds one of the ill grace with which the pot calls the kettle black.

As an initial matter, CPCA is incorrect that Appellants have failed to preserve their arguments. However, even if CPCA were correct in some instances, this court may review any matter “as the interest of justice may require”. See Minn. R. Civ. App. P. 103.04; State v. Hannuksela, 452 N.W.2d 668, 673 n. 7 (Minn. 1990) (“[It] is the responsibility of appellate courts to decide cases in accordance with law and that responsibility is not to be diluted by counsel’s oversights, lack of research, failure to specify issues or to cite relevant authorities”). This is especially true when, as here, any oversights were not committed by counsel, but by a *pro se* litigant who was erroneously allowed to represent two limited liability companies at trial.

Allowing the LLCs to be represented by a non-lawyer is only one of the many errors made by the district court. Correction of these errors results in, at minimum, a new trial.

ARGUMENT

CPCA’s recitation of the facts sets up two straw men. First CPCA states that one condominium buyer specifically asked if the condominium flooring was laminate or pergo. (Respondent’s Brief at 4.) The suggestion being that the flooring in the condominiums actually was laminate or pergo. However, two pages later CPCA

inadvertently concedes that the flooring installed in the condo units was neither laminate nor pergo. (Respondent's Brief at 6.)

CPCA then engages in an extended discussion of the "car wash conflict". (Respondent's Brief at 11-13.) However, as the district court noted, this issue was resolved by settlement prior to trial. (FOFCOL ¶ 67.) The Court should disregard these attempts to cloud the appeal with issues that are not actually part of this appeal.

I. THE DISTRICT COURT IMPROPERLY RULED THAT 301 CLIFTON AND CLIFTON PROPERTIES COULD APPEAR *PRO SE*.

CPCA argues that the remedy for the district court allowing 301 Clifton and Clifton Properties to appear *pro se* should be a default.¹ (Respondent's Brief at 23-27.) CPCA misinterprets the law. As previously discussed, when a limited liability company attempts to appear *pro se* the district court must insist that the *pro se* LLC obtain legal counsel. Lake State Federal Credit Union v. Tretsven 2008 WL 2732111 at n.5. The district court did not do so here.² Instead, the district court commenced the trial in this matter within 20 days of the withdrawal of Appellants' counsel.

CPCA argues that default judgment is the proper remedy for the *pro se* appearance of the LLCs. If that is true, then Lake State Federal Credit Union's admonition that the Court must insist that *pro se* limited liability companies appear through counsel has no

¹ CPCA wants the court to find that Nixon's *pro se* appearance is a default against 301 Clifton. However, if the Court finds that Nixon's *pro se* appearance is a default then Nixon's letter to the Court in response to CPCA's motion for a temporary restraining order can't be considered as an affirmative invocation of the Court's jurisdiction. The letter cannot be both a default, i.e., a failure to appear and also an appearance.

² There is no question that the district court was unaware that limited liability companies could not appear at trial *pro se* until well after the trial ended. See 6/23/09 Tr. at 2-10.

purpose. Minnesota law is clear that the failure to appear through counsel is a “curable defect.” Save Our Creeks v. City of Brooklyn Park, 699 N.W.2d 307, 309-310 (Minn. 2005). If the only “cure” is default, then the defect can never be cured and the punishment swallows the “cure.” That cannot be the law. The cure for the district court’s failure to insist on representation by counsel is obvious. Remand for a new trial.

CPCA claims that remand for a new trial is prejudicial. However, Minnesota law is clear that this is not so. The only prejudice to CPCA is the expense of reopening its judgment and a new trial. However, the expense of litigation is not sufficient prejudice to prevent remand for trial. Finden v. Klaas, 268 Minn. 268, 272, 128 N.W.2d 748, 751 (1964). If this were true, new trials could never be ordered as a remedy to correct errors below. Because the court can cure the defect caused by the *pro se* appearance of the limited liability companies, remand is appropriate.

Moreover, if CPCA is correct that the Court should have entered a default against the LLCs, the LLCs are entitled to have the default judgment reopened under Minn. R. Civ. P. 60.02. Rule 60.02 motions are analyzed under the factors applied in Finden v. Klaas, 268 Minn. 268, 271, 128 N.W.2d 748, 750 (1964). Under the Finden factors, the court should grant relief under rule 60 where the defendant: (1) has a reasonable defense on the merits; (2) has a reasonable excuse for his failure or neglect to answer; (3) has acted with due diligence after notice of the entry of the judgment; and (4) shows that no substantial prejudice will result to the other party. 268 Minn. at 271, 128 N.W.2d at 750.

Here, this appeal makes clear that the LLCs have reasonable defenses on the merits. Northland Temps., Inc. v. Turpin, 744 N.W.2d 398, 403 (Minn. Ct. App. 2008)

(holding that specific “information that clearly demonstrates the existence of a debatably meritorious defense satisfies this factor”). The LLCs have a reasonable defense. They, like the district court and CPCA, thought that LLCs could appear *pro se*. The LLCs have acted with due diligence after notice of the entry of judgment. They moved for a new trial and commenced this appeal. See Minn. R. Civ. P. 60.02 (allowing one year for motions under the rule to be brought). No prejudice results to CPCA because the only prejudice is retrial and the expense of litigation is not prejudice under the rule. Finden, 268 Minn. at 272, 128 N.W.2d at 751.

II. FAILURE TO EMPANEL A JURY IS REVERSIBLE ERROR.

One of the sacred principles of Minnesota law is that *both parties* to a lawsuit have a right to a jury trial. Morton Brick & Tile Co. v. Sodergren, 130 Minn. 252, 254-55, 153 N.W. 527, 528 (1915). Where a party has a constitutional right to a jury trial, a denial of the right to a jury trial is a reversible error. Landgraf v. Ellsworth, 267 Minn. 323, 326, 126 N.W.2d 766, 768 (1964). As the United States Supreme Court has held, the right to a jury trial is not “mere procedural formality, but a fundamental reservation of power in our constitutional structure.” Blakely v. Washington, 542 U.S. 296, 305 (2004). “Just as suffrage ensures the people’s ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary.” (Id.) (Citing Letter XV by the Federal Farmer (Jan. 18, 1788), reprinted in 2 *The Complete Anti-Federalist* 315, 320 (H. Storing ed. 1981)). The right to trial by jury secures to the people “their just and rightful” control of the judiciary. John Adams, Diary Entry (Feb. 12, 1771), reprinted in 2 *Works*

of John Adams 252, 253 (C. Adams ed. 1850). Appellants were not allowed to present their case to a jury. As a result, a new trial is necessary.

Hoping to set aside this bedrock principle of law, CPCA makes two claims that are contradicted by the pleadings on file in this matter. First, CPCA claims that the parties “stipulated to the waiver of a jury trial.” (Respondent’s Brief. at 50.) In support of this statement, CPCA fails to cite to an actual stipulation filed with the district court. No such stipulation was ever filed. No letter waiving Appellants’ right to a jury trial exists. CPCA cannot point to any place in the transcript where the parties stipulated that the case should be tried by the district court. There is no such point in the transcript. Instead, CPCA points to a single sentence in the district court’s denial of Appellants’ motion for a new trial. (*Id.*) However, the Court’s statement that the parties stipulated to a bench trial, is not supported by any document. It appears that the Court *thought* the parties stipulated to a bench trial because CPCA told the Court on February 17, 2009, that the matter would be tried to the court. CPCA’s oblique citation to the Court’s order simply underscores the fact that there was no stipulation.

Moreover, CPCA’s argument that Appellants waived their right to a jury trial by stipulation overlooks that nothing in the record shows that the purported stipulation was done knowingly and voluntarily. See Hauenstein & Bermeister, Inc. v. Met-Fab Industries, Inc., 320 N.W.2d 886, 892 (Minn. 1982) (“[A] waiver is defined as an *intentional* relinquishment of a known right ...”). In examining the analogous federal right to a jury, the United States Supreme Court has held that “as the right of jury trial is fundamental, courts indulge every reasonable presumption against waiver.” Aetna Ins.

Co. v. Kennedy ex rel. Bogash, 301 U.S. 389, 393 (1937); Wauhop v. Allied Humble Bank, N.A., 926 F.2d 454, 455 (5th Cir. 1991); Leasing Serv. Corp. v. Crane, 804 F.2d 828, 832 (4th Cir. 1986). The burden of demonstrating that a jury waiver is knowing rests with CPCA, the party seeking the enforcement of the waiver. Cooperative Finance Ass'n, Inc. v. Garst, 871 F.Supp. 1168 (N.D. Iowa 1995).

Courts have considered a number of factors to determine whether a contractual waiver of the right to a jury was knowing and voluntary. They have considered whether the waiving party was represented by counsel, whether the waiving party was a sophisticated business person aware of the consequences of the waiver. See, e.g., Connecticut Nat'l Bank v. Smith, 826 F. Supp. 57, 60-62 (D.R.I. 1993) (court considered sophistication of parties, representation by counsel).

Here, CPCA cannot show that the waiver was done knowingly. The waiver apparently occurred at the February 17, 2009, pre-hearing conference in the district court's chambers. At that time, Appellants were no longer represented by counsel. App. 146. Nothing in the record suggests that Nixon knew that Appellants had a right to a jury regardless of whether CPCA suddenly preferred a bench trial. As such, CPCA has failed to meet its burden of proof that there was a knowing waiver of Appellants' right to a jury trial.

CPCA also claims that Appellants "never raised" the issue of being denied a jury trial. (Respondent's Brief at 50.) This statement is incorrect. On May 21, 2009, Appellants filed a motion and brief for a new trial. Written in all capital letters and emphasized in bold, the motion titles itself as "**DEFENDANT'S [sic] MOTION FOR A**

NEW JURY TRIAL” (typographical error in original). See App. 182. Appellants reiterated their request for a jury trial at three other points in the brief. See App. 183, and 189. CPCA’s contention that the issue was never raised with the district court is simply wrong. Therefore, the Court must disregard respondent’s contention that Appellants waived their right to a jury trial issue by not raising the issue below.³ The district court’s judgment must be reversed and this matter remanded for a new jury trial.

III. DISCLOSURE OF THE KRAUS-ANDERSON SETTLEMENT TERMS IS NECESSARY.

CPCA contends that the district court’s failure to order disclosure of the Kraus-Anderson settlement terms is irrelevant. (Respondent’s Brief at 55.) CPCA contends that the claims against Kraus-Anderson were not the claims that it prevailed on against Appellants. CPCA’s own amended complaint in this matter betrays this argument. Paragraph 12 of the Amended complaint claims that Kraus-Anderson failed “to install hardwood floors as intended.” (App. 28.) Consistent with this theory, CPCA sued Kraus-Anderson *and* Clifton Properties for breach of statutory warranties (Counts I and II), breach of contract (Counts III and IV), breach of express warranties (Counts V and VI), and breach of implied warranties (Counts VII and VIII). (Id. p. 29-34.) The language in each of these counts simply differs by the name of the defendant against which it is asserted. Thus, the Kraus-Anderson settlement encompasses at least three of

³ In many ways, the jury trial issue illustrates the prejudice that 301 Clifton and Clifton Properties face as a result of the district court improperly allowing Nixon to represent them. It is undoubtedly no accident that this matter was scheduled to be heard before a jury until Appellant’s counsel withdrew. See App. 130, 140. Had Appellants been represented by counsel, CPCA would have been unable to unilaterally inform the Court that there was no need for a jury trial.

the claims relating to hardwood floors upon which CPCA prevailed, breach of contract, breach of express warranties, and breach of implied warranties.

Moreover, as Appellant inadvertently concedes, the Kraus-Anderson settlement encompassed repairs to the floors at issue. (Respondent's Brief at 56.) Because the settlement terms were not disclosed, the scope of these repairs is unknown. Moreover, there is no reason that purchasers would be entitled to both repair and replacement of the floors. Clearly, if Kraus Anderson repaired the floors or if members of CPCA received money for floor repairs, replacement of the floors would constitute a double recovery. Also, if floors were replaced or repaired by Kraus-Anderson, the amount of damages owed by 301 Clifton would change. CPCA was not awarded specific performance. CPCA was awarded damages that were meant to provide CPCA with the benefit of the bargain. If Kraus-Anderson has provided CPCA with new floors or money to pay in part for repairs or replacement of the floors, that necessarily alters the amount of damages CPCA may recover because the amount necessary for CPCA to receive the benefit of the bargain is less.⁴

A non-settling defendant "has a definite right to complain if it would be required to pay more than its fair share of the damages." Oelschlager v. Magnuson, 528 N.W.2d 895, 900. (Minn. Ct. App. 1995). CPCA has, by settling its claims against Kraus-Anderson, recovered money on the very claims it seeks to have liability assessed against

⁴ CPCA's argument boils down to the following: its members get to have their floors repaired and/or replaced by Kraus-Anderson and then its members get to receive money from Appellants to have those floors replaced with an entirely different floor. It is hard to envision a more blatant example of double recovery.

Appellants. The Court cannot allow CPCA a double recovery. See Wirig v. Kinney Shoe Corp., 461 N.W.2d 374, 379 (Minn. 1990) (allowing parallel actions but disallowing double recovery for the same harm). The district court, which did not see the settlement agreement, was clearly wrong in stating that the settlement agreement was irrelevant.

Finally, CPCA claims that its settlement with Kraus-Anderson happened “several years” ago. (Respondent’s Brief at 56.) CPCA cannot point to any evidence in the record to support the contention that its settlement with Kraus-Anderson happened “several years” prior to the trial. The reason CPCA cannot do this is because Kraus-Anderson was still participating in the litigation less than 12 weeks prior to trial. On December 5, 2008, Kraus-Anderson’s attorney executed the parties’ Joint Statement of the Case. (App. 138.) In the Joint Statement of the Case, Kraus-Anderson asserted its defenses against CPCA’s claims. (App. 132.) Kraus-Anderson also listed six witnesses it intended to call as part of that defense. (Id. 132-133.) Contrary to CPCA’s contention, Kraus-Anderson settled the case only weeks before trial and that settlement is highly relevant to the claims that were tried. Remand is appropriate to disclose the terms of the Kraus-Anderson settlement agreement and allow Appellants to question witnesses with respect to its terms.

IV. THE PARTIES MODIFIED THE STATUTE OF LIMITATIONS IN A SEPARATE WRITING.

CPCA claims that it served 301 Clifton by mail on September 28, 2006. Respondent’s Brief at 20. Because of this, CPCA concludes that even if the parties reduced the statute of limitations to two years, the suit was commenced within the

reduced period. CPCA overlooks the fact that its service in September was not effective. Service must comply strictly with statutory requirements. Lundgren v. Green, 592 N.W.2d 888, 890 (Minn. Ct. App. 1999). Service by mail requires strict compliance with Minn. R. Civ. P. 4.05 and is ineffective if an acknowledgement of service is not signed and returned by the defendant, *regardless of the defendant's actual notice of the lawsuit*. Coons v. St. Paul Cos., 486 N.W.2d 771, 776 (Minn. Ct. App. 1992); see also Nieszner v. St. Paul Sch. Dist. No. 625, 643 N.W.2d 645, 649 (Minn. Ct. App. 2002) (unless plaintiff substantially complies with requirements of personal service in the rules of civil procedure, defendant is not subject to personal jurisdiction regardless of actual notice). Here, there is no question that an acknowledgment of service was not signed and returned by 301 Clifton. That is why CPCA served 301 Clifton again in December 2008. The fact that Nixon knew of the lawsuit is irrelevant. Because the September service was not effective, 301 Clifton was not served until December 8, 2006. Seven days after the statute of limitations period expired.⁵

Minnesota law is clear that parties may shorten the six-year statute of limitations for warranty claims brought under Minn. Stat. §§ 515B.4-112 and 515B.4-113. Under Minn. Stat. § 515B.4-115(b), parties to a residential unit contract may reduce the warranty limitation period to not less than two years by an agreement “evidenced by an instrument separate from the purchase agreement signed by the purchaser.” Each purchaser signed the Modification, which reduced the warranty limitations period to two

⁵ Even if the September 28, 2006 date constituted effective service, remand would still be necessary if a two-year statute of limitations applies because unit owners who closed on their units prior to that date could not recover.

years. See Trial Exhs 4-26, Ex. C. CPCA argues, without citation to any authority, that the separate written modification to the statute of limitations is ineffective because it was attached as an exhibit to the purchase agreement.

CPCA's position defies logic. According to CPCA if the modification were not labeled Exhibit C but was still signed at the same time as the purchase agreement it would be an effective modification of the statute of limitations. The existence of the words "Exhibit C" does not change the separate nature of the writing. The Modification is a separate instrument from the purchase agreement. The Modification specifically states that the parties have already entered into the purchase agreement and required separate signatures from the purchase agreement. As such, the Modification is an "instrument separate from the purchase agreement."

The modified statute of limitations must be enforced even if the consequences are harsh. The Minnesota Supreme Court has long noted that the statute of limitations is designed to be harsh and strict. Bachertz v. Hayes-Lucas Lumber Co., 201 Minn. 171, 176, 275 N.W. 694, 697 (1937). As such, a court has no power to extend or modify a statute of limitations period. Johnson v. Winthrop Labs. Div. of Sterling Drug, Inc., 291 Minn. 145, 151, 190 N.W.2d 77, 81 (1971). By finding the Modification ineffective, the district court exercised power it did not have. The district court's conclusion must be reversed.

V. NIXON DID NOT WAIVE AN INSUFFICIENCY OF SERVICE DEFENSE.

CPCA concedes that Nixon was never served. (Respondent's Brief at 50-53.) CPCA also concedes that the lack of jurisdiction over Nixon is fatal to its judgment

against him. (Id.) CPCA's only argument that dismissal is inappropriate is that, as the district court determined, Nixon waived any defense that he was never served. (Id.; see also App. at 120 ¶ 4.) In support of this argument CPCA can only point to the two things that the district court relied upon when it ruled that Nixon had waived lack of jurisdiction as a defense by: (1) submitting a letter *pro se* on behalf of 301 Clifton asking the court to deny plaintiff's emergency motion for a temporary restraining order against 301 Clifton; and (2) by submitting a "motion" *pro se* on February 27, 2008, requesting that the court delay a hearing on plaintiff's motion for a temporary injunction. (Respondent's Brief at 52; see also App. at 118, ¶ 7; App. at 120, ¶ 4.)⁶

A party may waive a jurisdictional defense by "submitting itself to the court's jurisdiction and affirmatively invoking the court's powers." Shamrock Development, Inc. v. Smith, 754 N.W.2d 377, 381(Minn. 2008). However, simple participation in the litigation alone does not waive a jurisdictional defense. Id. (citing Patterson v. Wu Family Corp. 608 N.W. 2d 863, 868 (Minn. 2000). Instead, "it is the failure to provide the court an opportunity to rule on the defense before affirmatively invoking the court's jurisdiction on the merits of the claim that is determinative." It cannot be that a letter seeking a delay of a temporary injunction hearing being heard prior to the time in which an answer was due is an affirmative invocation of the Court's jurisdiction consistent with

⁶ In opposing Appellants' arguments that a new trial is warranted by the district court's failure to instruct 301 Clifton and Clifton Properties that they must be represented by an attorney, CPCA contends that Nixon's representation of the LLCs results in a failure to appear. (Respondent's Brief at 24.) Twenty-six pages later, CPCA wants Nixon's *pro se* letter and motion to count as an appearance by Nixon. (Id. at 50.) CPCA cannot have it both ways, Nixon's appearance cannot be ineffective for one purpose but effective for another.

Shamrock. Nixon's letter request is a much milder action than cases where a waiver has been found. See Patterson, 608 N.W.2d at 869 (Minn. 2000) (finding waiver when party moved for partial summary judgment on the merits before moving to dismiss on jurisdictional grounds); Igo v. Chernin, 540 N.W.2d 913, 914 (Minn. Ct. App. 1995) (finding waiver when party took opposing party's deposition before challenging jurisdiction). Reversal with instruction to dismiss the claims against Nixon is warranted.

VI. PIERCING THE CORPORATE VEIL WAS IMPROPER.

To defend the district court's decision to pierce the corporate veil, CPCA makes two faulty arguments. First, CPCA is confused as to which state's law controls the standard of review of the piercing claim. Citing to two Minnesota cases, CPCA argues that the trial court's decision to pierce the corporate veil is reviewed under an abuse of discretion standard. (Respondent's Brief at 40.) That may be true if the case involved Minnesota companies. However, the two limited liability companies at issue are both Nevada entities. (FOFCOL ¶¶ 2, 3.) Nevada law adopts a less deferential standard of review to piercing cases. The Nevada Supreme Court will only uphold a district court's determination with regard to the alter ego doctrine if substantial evidence exists to support the decision. See Lorenz v. Beltio, Ltd., 114 Nev. 795, 807, 963 P.2d 488, 496 (1998). Nevada appellate courts do not hesitate to overturn the district court where it is clear that a wrong conclusion has been reached. See Polaris Industrial Corp. v. Kaplan, 103 Nev. 598, 601, 747 P.2d 884, 886 (1987). The substantial evidence required to uphold the district court's decision to pierce the corporate veil is lacking in this case. Accordingly, reversal is appropriate.

Second, CPCA claims that Appellants did not raise any arguments concerning the piercing claim before the district court. (Respondent's Brief at 40.) CPCA is incorrect. Appellants' memorandum in support of their motion for a new trial addresses the district court's conclusion that piercing the corporate veil was appropriate. (App. 198-202.) In that section, Appellants take issue with the court's conclusion that there was commingling of funds and that 301 Clifton was undercapitalized. (App. 198.) Appellants also point out that there were no unauthorized diversion of funds, that corporate assets were not treated as Nixon's own, and that the limited liability companies observed corporate formalities. (App. 199-200.)

Under Nevada law, "[t]he corporate cloak is not lightly thrown aside' and that the alter ego doctrine is an exception to the general rule recognizing corporate independence." LFC Mktg. Group, Inc. v. Loomis, 116 Nev. 896, 903-04, 8 P.3d 841, 846 (2000) (quoting Baer v. Amos J. Walker, Inc., 85 Nev. 219, 220, 452 P.2d 916, 916 (1969)). As Appellants noted in their initial brief, this case is guided by Rowland v. Lepire, 99 Nev. 308, 662 P.2d 1332 (Nev. 1983). In Rowland, the corporation was owned entirely by relatives, had not issued shares of stock until three years after it was incorporated, and had assets consisting almost entirely of an unsecured personal loan from one of the corporation's shareholders. 662 P.2d at 1337-1338. At the time of trial the corporation had a negative net worth. Id. at 1338. The corporation never held formal director or shareholder meetings. Id. The corporation never paid dividends and the officers and directors did not receive salaries. Id. The corporation did not have a minute book, nor was there evidence that any minutes were kept. Id. The corporation was

under-capitalized and had little existence apart from the two principals in the corporation. Id. Despite this, the Nevada Supreme Court declined to find that the alter ego doctrine had been satisfied. Id. The reason the court declined to do so was that there was no evidence presented that the *financial setup* of the corporation was only a sham and caused an injustice. (Id.)

CPCA does not distinguish Rowland, or even acknowledge that Rowland exists.⁷ While CPCA complains about asset transfers done by Appellants, the district court explicitly found that the asset transfers were for tax purposes and “not with the intent to defraud the purchasers.” (FOFCOL ¶ 74.) Additionally, unlike Rowland, the limited liability companies here submitted, as part of the parties’ stipulated exhibits, their minutes of meetings, bank statements, and corporate records. Appellants claim that 301 Clifton was undercapitalized and that refusing to pierce the corporate veil will cause an injustice. However, in North Arlington Med. v. Sanchez Constr., 86 Nev. 515, 522, 471 P.2d 240, 244 (1970), the Nevada Supreme Court stated:

Undercapitalization, where it is clearly shown, is an important factor in determining whether the doctrine of alter ego should be applied. However, in the absence of fraud or injustice to the aggrieved party, it is not an absolute ground for disregarding a corporate entity. In any event, it is incumbent upon the one seeking to pierce the corporate veil, to show by a preponderance of the evidence, that the *financial setup* of the corporation is only a sham and caused an injustice.

⁷ Rowland was decided prior to the enactment of Nev. Rev. Stat. § 78.747. However, courts have noted that “[t]his statute essentially codifies the test and result of” Frank McCleary Cattle Co. v. Sewell, 317 P.2d 957 (Nev. 1957); AE Restaurant Associates, L.L.C. v. Giampietro (In re Giampietro), 317 B.R. 841 (Bankr. D. Nev. 2004). Rowland continues to be cited in veil piercing cases. Id. at 854; Basic Management Inc. v. U.S., 569 F. Supp. 1106, 1118 (D. Nev. 2004).

(emphasis added). Here, the purported injustice is not caused by the financial setup of 301 Clifton. The claimed injustice was purportedly caused by a failure to install “solid” hardwood floors. This, of course, has nothing to do with the financial setup of the LLC.

Finally, CPCA claims that there was a “de facto” commingling of funds. Respondent’s Brief at 49. There was not. Funds are commingled when money is pooled in the same account. In Re Sand, 431 N.W.2d 107 (Minn. 1988). There is no such thing as financial commingling when each entity has separate identifiable accounts. The fact that CPCA is able to identify each inter-company transactions proves that the funds were never commingled. What CPCA calls commingling is a transfer of funds between different bank accounts. CPCA finds these transfers objectionable because some transfers occurred on the same day. CPCA offers no reason why transfers between bank accounts that occur the same day constitutes commingling. That is because there is no principled reason why such a distinction would be necessary to preserve corporate formalities. Moreover, any such distinction would ignore the realities of modern day financial transactions. The simple, undisputed facts are that all of transactions between Nixon and the limited liability companies were paid to and withdrawn from separate identifiable bank accounts. Corporate formalities were maintained at all times.⁸ (Exs. 200-238, FOFCOL ¶¶ 80-91.) Accordingly, the district court was wrong in piercing the corporate veil and must be reversed.

⁸ The same is true for the other transfers between Clifton Properties and Nixon that were noted by the district court.

VII. 301 CLIFTON DID NOT PROMISE, WARRANT, OR REPRESENT THAT SOLID HARDWOOD FLOORS WOULD BE INSTALLED.

The district court correctly concluded that neither 301 Clifton nor its sales agents ever described the floors as solid hardwood. (FOFCOL ¶ 56.) Nevertheless, the district court also concluded that the 301 Clifton's brochure and website somehow promised or represented that "solid" hardwood floors would be installed in the units. Neither the brochure nor website actually said this. The brochure and the website both stated that the units would have "hardwood floors with sound cushion at entry, hall, living, dining and kitchen." (Exs. 1, 3; FOFCOL ¶ 15.) This stands in distinction to other wood features that were described as "solid." For instance, the brochure and website represented that the entry doors would be "solid" wood. (Id.)

Recognizing that no representations of "solid" hardwood floors were made, CPCA argues that because the unit buyers understood that they would receive solid hardwood floors, 301 Clifton breached an express warranty. (Respondent's Brief at 31.) In effect, CPCA argues that an "express" warranty is not what is expressed, or stated, by the party providing the warranty. Instead, according to CPCA, an express warranty is what is unexpressed but yet somehow understood by the party receiving the warranty. This argument is untenable. Minn. Stat. §336.2-313 defines when an express warranty is created. It is created by an "affirmation of fact or promise made by the seller" or "by a description of goods which is made part of the basis of the bargain" or by a sample or

model which is made part of the basis of the bargain. 336.2-313 Subd. 1.⁹ Put another way, an express warranty is created by a representation by the seller not by an unexpressed understanding of the buyer. Similarly, implied warranty does not arise out of the understanding of the buyer. Instead, the implied warranty is created by the seller's act of selling. This creates the implication that the product is fit for the purpose for which it is intended. Minn. Stat. §§336.2-314, 336.2-315. CPCA's contention that an implied warranty is created by the buyer's understanding should be rejected.

It is undisputed that no marketing materials or agent of 301 Clifton ever promised, represented or warranted that the units would have solid hardwood floors. Accordingly, the district court erred as a matter of law in finding that 301 Clifton was liable for failing to install solid hardwood floors. Reversal of the district court is appropriate.

VIII. THE PURCHASE AGREEMENT IS UNAMBIGUOUS.

CPCA claims that the purchase agreement "was rendered ambiguous to the affected owners because they were told they were receiving hardwood floors." (Respondent's Brief at 33.) However, the subjective understanding of the owners is irrelevant. This is because a contract is ambiguous only if "based upon *its language alone*, it is reasonably susceptible of more than one interpretation." Denelsbeck v. Wells Fargo & Co., 666 N.W.2d 339, 346 (Minn. 2003) (emphasis added). An ambiguity exists where contract language, given its plain and ordinary meaning, is reasonably susceptible

⁹ There is no contention that any buyer was ever shown a sample of solid hardwood. The unit owners viewed samples of the Award flooring, which was labeled as such. (2/26/09 Tr. at 202, 216-217).

to more than one interpretation. Employers Mut. Liab. Ins. Co. v. Eagles Lodge, 165 N.W.2d 554, 556 (Minn. 1969).

The purchase agreement is unambiguous as to the flooring to be installed. The flooring was specifically identified by brand. (FOFCOL ¶¶ 22-38.) The purchase agreement described the flooring as Award flooring, Longstrip. (Id.) Because the unit purchasers received exactly what was specified in the contract, there can be no breach.

CPCA also argues that “this particular argument” was not raised with the district court. (Respondent’s Brief at 33.) This is not so. In their motion for a new trial, Appellants argued that “the court ignored the fact that Award Longstrip hardwood flooring was identified and mutually agreed upon by both parties in writing and ultimately installed in the residential units,” (App. 193-194.) This sentence is in bold and written entirely in capital letters. (Id.) It cannot be seriously argued that the issue was not raised below.

IX. THE DISTRICT COURT IMPROPERLY CONCLUDED THAT 301 CLIFTON VIOLATED THE MINNESOTA CONSUMER FRAUD ACT.

CPCA argues, yet again, that Appellants waived the argument that “solid” hardwood floors were not promised to unit owners. (Respondent’s Brief at 35.) However, an examination of Appellants motion for a new trial shows that CPCA is wrong. Appellants clearly discussed the failure of proof regarding CPCA’s claim that purchasers were promised “solid” hardwood floors. (App. 191-195.)

X. THERE IS NO FINDING OF LIABILITY AGAINST CLIFTON PROPERTIES.

Defending against what it calls a “hypertechnical argument”, CPCA claims that the “district court explicitly found that both LLCs were essentially shams used by Nixon to conduct his personal business.” (Respondent’s Brief at 49.) One might expect that CPCA would then cite to the district court’s Findings of Fact and Conclusions of Law to show this purportedly explicit finding. However, CPCA fails to provide any citation in support of the finding it claims is explicit. The reason for the failure is obvious. The district court did not make any such finding. Instead, the district court found that Nixon was the alter ego of both 301 Clifton and Clifton Properties. (FOFCOL ¶ 121.) There can be no alter ego liability as to Clifton Properties because Clifton Properties was not found liable on any of the claims tried to the district court. Damages cannot be assessed against a party unless there is a basis for liability. The Court’s entry of judgment against Clifton Properties is simply wrong and should be reversed.

XI. THE DISTRICT COURT DID NOT PERFORM THE REQUIRED ANALYSIS IN AWARDING CPCA ATTORNEYS’ FEES.

CPCA concedes that the district court incorrectly failed to perform the requisite lodestar analysis on its claim for attorney’s fees. (Respondent’s Brief at 53.) To escape this concession, CPCA claims, yet again, that Appellants waived this issue by not raising it before the district court. (*Id.*) However, Appellant’s motion for a new trial plainly objected to the award of attorneys fees. (App. 198.) In boldfaced capital letters, Appellants’ wrote “**THE CLIFTON DEFENDANTS STRONGLY ASSERT THAT THE AWARDING OF LEGAL FEES . . . [is] INAPPROPRIATE AND**

EXTREMELY EXCESSIVE.” (Id.) It is difficult to see how stating that the court’s award of attorney’s fees as “extremely excessive” is a failure to raise the issue that the amount of attorney’s fees awarded was too high. CPCA is simply wrong.

CPCA next claims that because the Court deducted some of its claimed attorney’s fees, that the Court’s calculation of attorney’s fees was correct. (Respondent’s Brief at 53.) As discussed in Appellants’ initial brief, the lodestar method requires the court to determine the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. Anderson v. Hunter, Keith, Marshall & Co., 417 N.W.2d 619, 628 (Minn. 1988). In determining the reasonableness of the hours and the reasonableness of the hourly rates, the court considers “all relevant circumstances.” State v. Paulson, 290 Minn. 371, 373, 188 N.W.2d 424, 426 (1971). There is no question that the district court did not consider any of the factors in Paulson or Anderson.

XII. CPCA’S WAIVER ARGUMENTS ARE MISPLACED.

CPCA asserts one argument repeatedly throughout its brief. Namely, that Appellants have waived certain arguments by not raising them below. (See Respondent’s Brief at 29, 33, 35, 40, 50, and 54.) First, in many instances, CPCA is simply wrong when it claims that Appellants did not raise a particular issue with the district court. Moreover, even if a particular argument was not raised with the district court, Appellants can still make the argument on appeal.

CPCA relies on Thiele v. Stich, 425 N.W.2d 580, 582 (Minn. 1988) in making its waiver argument. However, following Thiele the Minnesota Supreme Court reiterated that there is

a “well-established” exception to the general rule [that a party may not raise an issue on appeal that the party did not preserve for appeal]: [A]n appellate court may base its decision upon a theory not presented to or considered by the trial court where the question raised for the first time on appeal is plainly decisive of the entire controversy on its merits, and where, as in [cases] involving undisputed facts, there is no possible advantage or disadvantage to either party in not having had a prior ruling by the trial court on the question. Factors favoring review include: the issue is a novel legal issue of first impression; the issue was raised prominently in briefing; the issue was “implicit in” or “closely akin to” the arguments below; and the issue is not dependent on any new or controverted facts.

Watson v. United Servs. Auto. Ass’n, 566 N.W.2d 683, 687-88 (Minn. 1997) (emphasis omitted) (quotation and citation omitted); see also Jacobson v. \$55,900, 728 N.W.2d 510, 523 (Minn. 2007) (holding an appellant may refine an argument made to the district court as long as the argument can be evaluated on the facts already in the record.)

The reason for this exception is that “it is the responsibility of appellate courts to decide cases in accordance with law and that responsibility is not to be diluted by counsel’s oversights, lack of research, failure to specify issues or to cite relevant authorities.” State v. Hannuksela, 452 N.W.2d 668, 673 n. 7 (Minn. 1990) (quotation omitted); Greenbush State Bank v. Stephens, 463 N.W.2d 303, 306 n. 1 (Minn. Ct. App. 1990) (applying Hannuksela in a civil case). Consistent with this “well established” principle, the Minnesota Rules of Civil Procedure specifically provide that appellate level courts can review any matter “as the interest of justice may require”. See Minn. R. Civ.App. P. 103.04.

The case of Kunza v. St. Mary’s Regional Health Center et. al., is instructive. In Kunza, an employee sued her employer and her alleged harasser for sexual harassment and retaliation. 747 N.W.2d 586, 588 (Minn. Ct. App. 2008). Prior to commencing suit,

the parties entered into settlement negotiations in an effort to avoid litigation, and, to give them time to negotiate, the parties executed an agreement to toll the statute of limitations. Id. Under the agreement, Kunza promised not to sue and file a charge during the term of the tolling agreement, and all parties agreed that any party could cancel the tolling agreement upon ten days' notice. Id. When negotiations broke down, the employer and alleged harasser each wrote letters to Kunza providing notice of cancellation of the tolling agreement. Id. Appellant's counsel received both letters on the same day, and less than ten days later, appellant served the summons and complaint. Id. Both defendants raised a contractual defense under the tolling agreement. Id. at 588-589.

After discovery, the defendants moved for summary judgment under the tolling agreement. Id. at 589. The district court granted summary judgment because Kunza brought her action during the time period when she agreed not to initiate an action. Id. Without addressing the merits of the remaining claims, the district court ordered that the claims be dismissed without prejudice. Id. Judgment was entered for respondents. Id.

In her appeal, Kunza raised four new issues for the first time on appeal. Id. The defendants moved to strike the new issues. Id. Relying on the above cited cases, the court denied the motion to strike. Id. at 590. Applying the Watson factors, the court concluded that: (1) whether dismissal is an available remedy for breach a tolling agreement was a novel issue; (2) the parties had asserted opposing arguments on the issue based on available authority; (3) resolving the issue was not dependant on any new or controverted facts; and (4) resolving the question would resolve the appeal. Id.

The analysis is the same here, at least for the issues that CPCA argues were not raised to the district court. For instance, determining the appropriate remedy when a district court errs by allowing limited liability companies to appear *pro se* is a novel issue that the parties have briefed for this appeal based on the authority available to them. Resolving this issue on appeal is not dependant on any new or controverted facts and would potentially resolve this appeal. Similarly, resolving the issue of the district court's failure to empanel a jury resolves this appeal. It is in the interest of justice that the court correct the district court's errors. This is especially true where, unlike Kunza, the party raising the new issues appeared *pro se* at trial. Therefore, even if the district court were to find a waiver on some issues, dismissal of the appeal would not be appropriate.

CONCLUSION

This matter has been replete with fundamental errors. Correction of these errors requires, at minimum, a new trial. For the reasons set forth in Appellants' briefs supporting this appeal, Appellants respectfully request that the district court's order be reversed.

FRUTH, JAMISON & ELSASS, PLLC

Dated: December 18, 2009

By



Thomas E. Jamison (#220061)

Adam A. Gillette (#0328352)

3902 IDS Center

80 South Eighth Street

Minneapolis, MN 55402

Telephone: (612) 344-9700

Facsimile: (612) 344-9705

tjamison@fruthlaw.com

jbreyer@fruthlaw.com

ATTORNEYS FOR APPELLANTS