

NO. A11-329

State of Minnesota
In Court of Appeals

Robert G. Dimke and Mary L. Dimke,
Appellants,

v.

Naomi Farr, Darrel Farr, and Jon Muir
Respondents,

**BRIEF OF RESPONDENTS
NAOMI FARR AND DARREL FARR**

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INTRODUCTION

For Respondents Naomi Farr and Darrel Farr (the “Farrs”), the Robert G. Dimke and Mary L. Dimke’ (the “Dimkes”) appeal presents three issues: (1) whether the trial court, after applying the plain language of Minn. Stat. § 559.217, subd. 4(c) and 7(a) (2010), to the undisputed facts of this case, correctly concluded that the Farrs’ statutory cancellation of the purchase agreement between the Dimkes and the Farrs is complete, final, and dispositive of the Dimkes’ claims against the Farrs in this case; (2) whether the trial court correctly rejected the Dimkes’ untimely defense that the Farrs’ cancellation was allegedly ineffective pursuant to the terms of the already voided purchase agreement between the Farrs and Dimkes; and (3) whether it was clearly erroneous for the trial court to reject the Dimkes’ untimely request for an equitable injunction to suspend the Farrs’ already complete and final cancellation.

STATEMENT OF THE ISSUES

ISSUE ONE

Pursuant to Minn. Stat. § 559.217, subd. 4(c), a declaratory cancellation of a residential purchase agreement “is complete, unless, within 15 days after the service of the notice upon the other party to the purchase agreement, the party upon whom the notice was served secures from a court an order suspending the cancellation.” Pursuant to Minn. Stat. § 559.217, subd. 7(a), once the cancellation is complete, the “purchase agreement is void and of no further force or effect” Minnesota courts have long recognized the finality of statutory cancellation proceedings once they are complete. Here, there is no dispute that Farrs served a notice of cancellation on the Dimkes, and that the Dimkes failed to seek or obtain an order suspending the Farrs’ cancellation within fifteen days after service. Did the trial correctly conclude that the Farrs’ Cancellation of the Dimke Purchase Agreement is complete, final, and dispositive of the Dimkes’ claims against the Farrs in this case?

Trial Court Decision:

The trial court found that the Farrs' cancellation was dispositive of the Dimkes' claims against the Farrs. The trial court reasoned that, because the Dimkes failed to seek or obtain an order suspending the Farrs' cancellation during the fifteen-day cancellation period, the cancellation was complete and final, the purchase agreement between the Farrs and the Dimkes was void, and any remedies the Dimkes may have had under the voided purchase agreement were extinguished.

Authorities:

Minn. Stat. § 559.217.

Zirinsky v. Sheehan, 413 F.2d 481 (8th Cir. 1969), *cert. denied*, 396 U.S. 1059 (1969).

In re Butler, 552 N.W.2d 226 (Minn. 1996).

Olson v. Northern Pac. Ry. Co., 126 Minn. 229, 148 N.W. 67 (1914).

ISSUE TWO

Pursuant to Minn. Stat. § 559.217, subd. 4(a), "if an unfulfilled condition exists after the date specified for fulfillment in the terms of a purchase agreement for the conveyance of residential real property, which by the terms of the purchase agreement cancels the purchase agreement, either party may confirm the cancellation" by serving a notice of cancellation. The party served with a notice of cancellation then has fifteen days to obtain a court order suspending the cancellation, or the cancellation is complete and the purchase agreement is void. Minn. Stat. § 559.217, subsd. 4(c) and 7(a). Here, the Dimkes argued that the Farrs' cancellation was ineffective pursuant to the terms of the purchase agreement, but the Dimkes did not raise this argument until after the fifteen-day cancellation period had expired. Did the trial court err by rejecting the Dimkes' untimely argument and concluding that the Farrs' cancellation was complete and the purchase agreement was void?

Trial Court Decision:

The trial court concluded that the Farrs' cancellation was effective and the purchase agreement void. After the fifteen-day cancellation period had expired, the Dimkes argued in their motion for summary judgment that the Farrs' cancellation was ineffective. (Dimke Memo in Support of Motion for Summary Judgment, at pp. 13-16; Dimke Reply Memo in Support of Motion for Summary Judgment, at pp. 2-3.) The trial

court rejected this argument and found instead that the Farrs served the Dimkes with a cancellation of the purchase agreement “pursuant to Minn. Stat. § 559.217.”

Authorities:

Minn. Stat. § 559.217.

Brickner v. One Land Development Co., 742 N.W.2d 706 (Minn. Ct. App. 2007) review denied (Minn. March 18, 2008).

Block v. Litchy, 428 N.W.2d 850 (Minn. Ct. App. 1998).

Pachtchenko v. Minich, 2004 WL 2938834 (Minn. Ct. App. 2004).¹

ISSUE THREE:

Minnesota courts have found occasion to halt a statutory cancellation of a contract for deed after the cancellation period where (1) there is a reasonable explanation for why the party served with the cancellation did not suspend the cancellation during the cancellation period, (2) the party served with the notice of cancellation is in possession of the property, and (3) the party served with the notice of cancellation has invested significant equity in the property. Here, after the cancellation period expired, the Dimkes argued for the first time that they were entitled to an equitable injunction halting the Farrs’ cancellation. The Dimkes, however, offered no explanation for why they did not seek to suspend the Cancellation during the cancellation period. Moreover, the Dimkes never took possession of the property and never invested any equity in the property. Did the trial court abuse its discretion by denying the Dimkes’ untimely request for an equitable injunction?

Trial Court Decision:

The trial court denied the Dimkes’ motion for summary judgment. The Dimkes argued in their motion for summary judgment that they were entitled to an equitable injunction halting the cancellation. (Dimke Memo in Support of Motion for Summary Judgment, at pp. 17-18; Dimke Reply Memo in Support of Motion for Summary Judgment, at pp. 3-4.) Therefore, in denying the Dimkes’ motion for summary judgment, the trial court denied the Dimkes’ request for an equitable injunction.

Authorities:

¹ A copy of *Pachtchenko v. Minich*, 2004 WL 2938834 (Minn. Ct. App. 2004) is included in the Dimke Appendix at pp. 346-351.

Minn. Stat. § 559.217.

Follingstad v. Syverson, 160 Minn. 307, 200 N.W. 90 (1924).

Codden v. Youngrantz, 562 N.W.2d 39 (Minn. Ct. App. 1997).

D.J. Enters. of Garrison, Inc. v. Blue Viking, Inc., 352 N.W.2d 120 (Minn. Ct. App. 1984).

STATEMENT OF THE FACTS

I. THE PROPERTY.

Respondent Naomi Farr owns the property located at [REDACTED] [REDACTED] Minnesota 56468, and legally described as Lot 2 Block 1 Farr Gull Lake Addition consisting of 220' of lakeshore and 3 acres – Parcel #90-353-0120 Section 32 Township 135 Range 29 (the “Property”). (Dimke Appendix (“D. App.”) 291.) Respondent Darrel Farr has a marital interest in the Property. (D. App. 291.)

II. THE MUIR PURCHASE AGREEMENTS, THE MUIR CANCELLATION NOTICE, AND THE MUIR LAWSUIT.

On or around April 7, 2010, Naomi Farr and Respondent Jon Muir (“Muir”) entered into three purchase agreements, including a purchase agreement for the Property (collectively, the “Muir Purchase Agreements”). (D. App. 364.) Although all the contingencies in the Muir Purchase Agreements were satisfied, Muir initially refused to close. (D. App. 365.) On April 22, 2010, Muir attempted to cancel the Muir Purchase Agreements by executing and causing to be delivered to the FARRS a non-statutory Cancellation of Purchase Agreement (the “Muir Cancellation Notice”). (D. App. 364.) The FARRS never accepted or agreed to the Muir Cancellation Notice. (D. App. 364.) Instead, on May 21, 2010, Naomi Farr commenced an action against Muir in Cass

County District Court captioned *Naomi Farr v. Jon Muir*, Court File No. 11-CV-10-2114 (the “Muir Lawsuit”) seeking, in the alternative, specific performance of the Muir Purchase Agreements or damages caused by Muir’s breach of the Muir Purchase Agreements. (D. App. 291, 364-365.) The FARRS never determined that the Muir Purchase Agreements were invalid. (D. App. 291, 364-365, 367.) If the FARRS had made such a determination, it would contradict the FARRS’ allegations in the Muir Lawsuit. (D. App. 364-365, 367.)

III. THE FARRS RETAIN CHRISTENSEN, MAKE CERTAIN DISCLOSURES TO CHRISTENSEN, AND BEGIN REMARKETING THE PROPERTY.

A few weeks after the FARRS commenced the Muir Lawsuit, in an effort to mitigate their damages, the FARRS began taking steps to remarket the Property. (D. App. 365.) On June 27, 2010, the FARRS retained Jim Christensen (“Christensen”) as their new listing agent for the sale of the Property. (D. App. 365.) Prior to signing the listing agreement with Christensen, the FARRS met with Christensen to discuss the Property. (D. App. 365.)

At that meeting, the FARRS disclosed two important pieces of information to Christensen. First, the FARRS told Christensen about the Muir Purchase Agreements, the Muir Cancellation Notice, and the Muir Lawsuit. (D. App. 365, 370.) Second, the FARRS told Christensen that the FARRS were not willing to do anything that could jeopardize their claims in the Muir Lawsuit. (D. App. 365-366.) The FARRS explained to Christensen that, if the FARRS sold the Property for less than the price listed in the Muir Purchase Agreements, the FARRS intended to pursue a damages claim against Muir. (D. App. 365-

366.) Importantly, Christensen does not deny that the Farrs disclosed to him information about the Muir Lawsuit. (D. App. 288-290.)

IV. THE DIMKE PURCHASE AGREEMENT.

On or about August 8, 2010, the Farrs and the Dimkes entered into a purchase agreement concerning the Property (the "Dimke Purchase Agreement"). (D. App. 292, 294-325, 366.) The Dimke Purchase Agreement set a closing date of September 10, 2010. (D. App. 294.) When the Farrs and Dimkes entered into the Dimke Purchase Agreement, the Farrs again disclosed the Muir Purchase Agreement, the Muir Cancellation Notice and the Muir Lawsuit to Christensen. (D. App. 366.) The Farrs again told Christensen that they were unwilling to do anything that could jeopardize their claims against Muir in the Muir Lawsuit. (D. App. 366.) When the Farrs and the Dimkes entered into the Dimke Purchase Agreement, the Dimkes knew about the Muir Purchase Agreements and the Muir Cancellation Notice. (D. App. 240, 295.)

V. ALTHOUGH HE WAS THE DIMKES' AGENT UNDER THE DIMKE PURCHASE AGREEMENT, CHRISTENSEN DID NOT TELL THE DIMKES ABOUT THE FARRS' DISCLOSURES.

Christensen was a dual agent representing both the Farrs and the Dimkes under the Dimke Purchase Agreement. (D. App. 299, 366.) All communication between the Farrs and the Dimkes was conducted through Christensen. (D. App. 366.) Unfortunately for the Dimkes, it appears that Christensen did not tell the Dimkes about the Farrs' initial disclosures to Christensen. (D. App. 240-241, 365-366.)

A. Christensen Did Not Tell The Dimkes About The Muir Lawsuit Until The Night Before The Scheduled Closing.

The Dimkes claim the Muir Lawsuit was “undisclosed.” (Dimke App. Brief, at p. 6-7.) Because the Farris told Christensen about the Dimke Lawsuit and Christensen was the Farris’ and Dimkes’ dual agent, the Farris believed that the Dimkes were fully aware of the Muir Lawsuit. (D. App. 366.) According to the Dimkes, Christensen did not disclose the Muir Lawsuit to the Dimkes until the day before the scheduled closing under the Dimke Purchase Agreements. (D. App. 240-241.)

B. Christensen Did Not Tell The Dimkes About The Farris’ Unwillingness To Jeopardize Their Claims Against Muir.

In addition to not telling the Dimkes about the Muir Lawsuit, the Dimkes state that Christensen never told the Dimkes that the Farris were unwilling to do anything to jeopardize their claims against Muir in the Muir Lawsuit. (D. App. 240.) Instead, according to the Dimkes, Christensen told them that the Farris had agreed to sign and accept the Muir Cancellation Notice once the Dimkes signed the Dimke Purchase Agreement. (D. App. 240.) The Farris never told the Dimkes, Christensen, or anyone else that they agreed to sign and accept the Muir Cancellation Notice upon receiving the Dimke Purchase Agreement. (D. App. 365-366.) The Farris understood that, if the Farris had agreed to sign the Muir Cancellation Notice, the Farris would be jeopardizing their claims against Muir because Muir could argue that, after a cancellation, there are no longer any contracts upon which the Farris can predicate their claims against Muir. (D. App. 365-366.)

VI. THE DIMKE PURCHASE AGREEMENT DID NOT OBLIGATE THE FARRS TO SIGN OR ACCEPT THE MUIR CANCELLATION NOTICE.

Although the Dimke Purchase Agreement was expressly made subject to the cancellation of the Muir Purchase Agreement, the Dimke Purchase Agreement did not require the FARRS to execute the Muir Cancellation Notice. (D. App. 294-325, 365-366.) The Dimke Purchase Agreement provided that it was subject to cancellation of the Muir Purchase Agreements, and that “said cancellation shall be obtained no later than N/A , N/A .” (D. App. 295.) This provision did not obligate the FARRS to execute and accept the Muir Cancellation Notice. (D. App. 295, 365-366.)

The Dimke Purchase Agreement also provided that the FARRS would use their best efforts to provide marketable title to the Property “by the date of closing.” (D. App. 296.) Notably, this provision does not obligate the FARRS to provide marketable title **before** the day of closing. (D. App. 296.) Additionally, it was not necessary for the FARRS to sign and accept the Muir Cancellation Notice in order to provide marketable title to the Dimkes by the date of closing. (D. App. 357-363, 367.) Specifically, instead of signing the Muir Cancellation Notice, the FARRS provided Christensen with documentation from the Muir Lawsuit. (D. App. 357, 360-361.) In response, Christensen’s representative told the FARRS’ representative that the FARRS and the Dimkes could proceed towards closing under the Dimke Purchase Agreements without the FARRS having to sign the Muir Cancellation Notice because Christensen had determined that the documentation from the Muir Lawsuit was sufficient to cancel the Muir Purchase Agreements. (D. App. 357,

362-363.) As a result, the Farrs met their obligation of using their best efforts to provide clear title to the Dimkes by the closing. (D. App. 357-363.)

VII. THE FARRS HAD EVERY INTENTION OF CLOSING WITH THE DIMKES WHEN THEY ENTERED INTO THE DIMKE PURCHASE AGREEMENT.

The Farrs entered into the Dimke Purchase Agreement fully expecting to close with the Dimkes. (D. App. 366-367.) After the Farrs entered into the Dimke Purchase Agreement, the Farrs expended significant effort and incurred significant expense proceeding to a closing with the Dimkes. (D. App. 366-376.) This included obtaining a survey of the Property, obtaining and negotiating a lot split, and negotiating the sale of certain personal property. (D. App. 366-367.) Additionally, the weekend before the scheduled closing under the Dimke Purchase Agreement, the Farrs spent much of their time preparing the Property to be turned over to the Dimkes, which included cleaning the Property and removing certain personal items. (D. App. 366-367.)

VIII. MUIR INDICATES HE INTENDS TO PURCHASE THE PROPERTY AND THE FARR-DIMKE CLOSING IS CANCELLED.

On September 9, 2010, Muir's attorney wrote to the Farrs' attorney and stated that Muir intended to proceed to closing on the purchase of the Property as referenced in the Muir Purchase Agreements. (D. App. 219-222.) Because Muir claimed an interest in the Property under the Muir Purchase Agreements, the Farrs were no longer able to provide clear title to the Property to the Dimkes by the scheduled closing date. (D. App. 223-226.) The Farrs had nothing to do with Muir's decision to assert an interest in the Property. (D. App. 367.)

Christensen contacted the Farrs on the evening of September 9, 2010, and informed them that the title company had cancelled the September 10, 2010, closing based on the September 9, 2010, letter from Muir's attorney. (D. App. 367.) The Farrs did not share the September 9, 2010, letter from Muir's attorney with the title company. (D. App. 367.) At that time, the Farrs were still willing to close with the Dimkes. (D. App. 367.)

IX. THE DIMKES' TITLE OBJECTION LETTER ACKNOWLEDGES THAT THE FARRS HAD ONLY THIRTY DAYS TO PROVIDE MARKETABLE TITLE.

On September 20, 2010, the Dimkes' attorney sent a title objection letter to the Farrs objecting to the title to the Property as unmarketable (the "Title Objection Letter"). (D. App. 223-226.) Notably, although the Title Objection Letter deals directly with how the Muir Purchase Agreements affect the title to the Property, it says nothing about the Farrs' alleged promise to sign the Muir Cancellation Notice. (D. App. 223-226.) More importantly, the Title Objection Letter states that the Dimkes recognized that the Farrs were unable to deliver marketable title to the Property on the day of closing under the Dimke Purchase Agreement, and the Farrs had only thirty days, until October 12, 2010, to present marketable title. (D. App. 223-226.)

X. BECAUSE THE FARRS COULD NOT PROVIDE MARKETABLE TITLE IN THIRTY DAYS, THE FARRS CANCELLED THE DIMKE PURCHASE AGREEMENT.

Because the Farrs were still unable to provide clear title to the Property to the Dimkes thirty days after receiving the Title Objection Letter, the Farrs cancelled the

Dimke Purchase Agreement pursuant to the terms of the Dimke Purchase Agreement and then pursuant to Minn. Stat. 559.217. (D. App. 292.)

A. The Farrs' Cancellation Of The Dimke Purchase Agreement Pursuant To The Dimke Purchase Agreement.

Pursuant to the Dimke Purchase Agreement, if the Farrs were unable to provide marketable title on the day of closing or within thirty days thereafter, the Farrs had the right to declare the Dimke Purchase Agreement cancelled. (D. App. 296.) If the Farrs exercised this right and declared the Dimke Purchase Agreement cancelled, the Dimkes were obligated to "immediately sign a Cancellation of Purchase Agreement" (D. App. 296.)

On October 13, 2010, more than thirty days after the scheduled closing date under the Dimke Purchase Agreement, the Farrs were still unable to provide marketable title to the Dimkes. (D. App. 286.) As a result, the Farrs exercised their right to declare the Dimke Purchase Agreement cancelled and delivered to the Dimkes a cancellation of the Dimke Purchase Agreement (the "Original Contractual Cancellation"). (D. App. 292, 326-327.) Based on discussions between the Dimkes' attorney and the Farrs' attorney, the Original Contractual Cancellation was modified on October 18, 2010, to include additional terms demanded by the Dimkes (the "Revised Contractual Cancellation"). (D. App. 292, 328-330.)

Upon receiving the Original Contractual Cancellation and the Revised Contractual Cancellation (together, the "Contractual Cancellation Notices"), the Dimkes' were **obligated** to sign and accept the Contractual Cancellation Notices. (D. App. 296.)

Despite this contractual obligation, the Dimkes refused to sign the Contractual Cancellation Notices. (D. App. 241.)

B. The Farrs' Cancellation Of The Dimke Purchase Agreement Pursuant To Minn. Stat. §559.217, Subd. 4.

On October 20, 2010, pursuant to Minn. Stat. § 559.217, subd. 4, the Farrs caused a statutory Notice of Cancellation of the Dimke Purchase Agreement (the "Notice of Cancellation") to be personally served upon the Dimkes. (D. App. 292, 331-335.) The Notice of Cancellation informed the Dimkes that an unfulfilled condition existed in the Dimke Purchase Agreement and warned the Dimkes that the cancellation would be complete in fifteen days unless the Dimkes obtained a court order suspending the cancellation. (D. App. 331.)

There is no evidence in the record that the Dimkes sought to suspend the Farrs' statutory cancellation of the Dimke Purchase Agreement (the "Cancellation") at any time within fifteen days after being served with the Notice of Cancellation. Therefore, the fifteen-day cancellation period ended on November 4, 2010. (D. App. 331-335.) Although the Dimkes filed their Complaint during the cancellation period, on October 25, 2010, the Dimkes failed to obtain a court order or even attempt to obtain a court order suspending the Cancellation of the Dimke Purchase Agreement during the fifteen-day cancellation period. (D. App. 1-5, 381.) Therefore, the Farrs' Cancellation pursuant to Minn. Stat. § 559.217, subd. 4, was complete and final on November 5, 2010. (D. App. 331-335.)

XI. THE CANCELLATION AFFIDAVIT.

On November 8, 2010, pursuant to Minn. Stat. § 559.217, subd. 7, the Farrs prepared an Affidavit of Cancellation (the “Cancellation Affidavit”) and served it upon the Dimkes’ counsel. (D. App. 292, 336-342.) The Cancellation Affidavit is prima facie evidence that the Cancellation is complete and the Dimke Purchase Agreement has been terminated. (D. App. 338-342.)

LEGAL ARGUMENT

I. STANDARDS OF REVIEW.

The Dimkes appealed from the trial court’s grant of summary judgment in favor of the Farrs. In granting the Farrs’ motion for summary judgment, the trial court construed Minn. Stat. § 559.217, applied Minn. Stat. § 559.217 to the undisputed facts of this case, rejected the Dimkes’ untimely argument that the Notice of Cancellation did not comply with Minn. Stat. § 559.217, and rejected the Dimkes’ untimely request for an equitable injunction.

Statutory construction is a question of law, which this court reviews de novo. *Brookfield Trade Ctr., Inc. v. County of Ramsey*, 584 N.W.2d 390, 393 (Minn. 1998). “When interpreting a statute, [appellate courts] first look to see whether the statute’s language, on its face, is clear or ambiguous. A statute is only ambiguous when the language therein is subject to more than one reasonable interpretation.” *Am. Family Ins. Group v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000). When interpreting a statute, “words and phrases are construed according to rules of grammar and according to their common and approved usage[.]” Minn. Stat. § 645.08 (1).

When the district court grants summary judgment based on the application of a statute to undisputed facts, the result is a legal conclusion, reviewed de novo by the appellate court. *Lefto v. Hoggsbreath Enters., Inc.*, 581 N.W.2d 855, 856 (Minn. 1998) (citing *Wallin v. Letourneau*, 534 N.W.2d 712, 715 (Minn. 1995)). “On an appeal from summary judgment, [appellate courts] ask two questions: (1) whether there are any genuine issues of material fact and (2) whether the [trial court] erred in [its] application of the law.” *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). No genuine issue of material fact exists “[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party.” *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997) (alteration in original) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356 (1986)).

“A decision on whether to grant a temporary injunction is left to the discretion of the trial court and will not be overturned on review absent a clear abuse of that discretion.” *Carl Bolander & Sons Co. v. City of Minneapolis*, 502 N.W.2d 203, 209 (Minn. 1993); *LaValle v. Kulkay*, 277 N.W.2d 400, 402 (Minn. 1979) (holding that a district court’s findings regarding entitlement to injunctive relief will not be set aside unless clearly erroneous).

II. THE TRIAL COURT CORRECTLY CONCLUDED THAT THE FARRS’ CANCELLATION OF THE DIMKE PURCHASE AGREEMENT PURSUANT TO MINN. STAT. § 559.217 IS DISPOSITIVE OF THE DIMKES’ CLAIMS AGAINST THE FARRS IN THIS CASE.

The trial court correctly concluded that the Dimkes’ claims against the Farris in this case fail as a matter of law. First, the trial court properly construed Minn. Stat. §

559.217, subd. 4, as providing a cancellation procedure that renders a residential purchase agreement void unless the party served with notice of the cancellation obtains a court order suspending the cancellation within fifteen days. Second, the trial court, after applying the plain language of Minn. Stat. § 559.217, subd. 4, to the undisputed facts that (1) the Dimkes were served with the Notice of Cancellation and (2) the Dimkes failed to obtain a court order suspending the Cancellation within fifteen days, correctly concluded that the Dimke Purchase Agreement is void and that the Dimkes' claims against the Farris fail as a matter of law.

A. The Trial Court Correctly Construed Minn. Stat. § 559.217 As Providing A Statutory Cancellation Procedure That Renders Residential Purchase Agreements Void After Fifteen Days.

1. Minn. Stat. § 559.217.

Minnesota Statute § 559.217, subd. 4, sets forth a statutory procedure for cancelling residential purchase agreements:

Declaratory cancellation. (a) If an unfulfilled condition exists after the date specified for fulfillment in the terms of a purchase agreement for the conveyance of residential real property, which by the terms of the purchase agreement cancels the purchase agreement, either the purchaser or the seller may confirm the cancellation by serving upon the other party to the purchase agreement and any third party that is holding earnest money under the purchase agreement a notice:

- (1) specifying the residential real property that is the subject of the purchase agreement, including the legal description;
- (2) specifying the purchase agreement by date and names of parties, and the unfulfilled condition; and
- (3) stating that the purchase agreement has been canceled.

...

(c) The cancellation of the purchase agreement is **complete, unless, within 15 days after the service of the notice** upon the other party to the purchase agreement, the party upon whom the notice was served secures from a court an order suspending the cancellation.

(emphasis added). Thus, pursuant to Subdivision (c), a party who receives a notice of cancellation **must** obtain a court order suspending the cancellation within fifteen days, or the cancellation is complete. Once the cancellation is complete, Subdivision 7(a) provides that the “purchase agreement is **void and of no further force or effect . . .**” (emphasis added). This language is clear and unambiguous on its face.

Notably, Minn. Stat. § 559.217 includes a statutory deterrent against improper cancellations. Specifically, so long as a party timely seeks to obtain a court order suspending an improper cancellation, the court is authorized to “award court filing fees, attorney fees, and costs of service actually expended to the prevailing party in an amount not to exceed \$3,000.” *See* Minn. Stat. § 559.217, subd. 6.

2. **The Injunction Requirement.**

Minn. Stat. § 559.217 also contemplates that a party challenging a cancellation under this section is required to post a bond or other form of security to protect the adverse party. This is because:

- The **only** way to stop a declaratory cancellation of a residential purchase agreement is to obtain “from a court an order **suspending** the cancellation.” Minn. Stat. § 559.217, subd. 4(c) (emphasis added);
- The only way to **suspend** a cancellation is “temporarily or permanently restrain or enjoin a cancellation proceeding . . . pursuant to the provisions of **section 559.211.**” Minn. Stat. §

559.217, subd. 1(d) (defining the term “suspend” in Section 559.217) (emphasis added); *see also* Minn. Stat. § 559.217, subd. 6;

- The provisions of **Section 559.211** are “subject to the requirements of **Rule 65** of the Rules of Civil Procedure for the District Courts” Minn. Stat. 559.211, subd. 1 (emphasis added); and
- **Rule 65**, which governs injunctions and restraining orders, requires “**the giving of security by the applicant.**” Minn. R. Civ. P. 65.03 (emphasis added).

Moreover, if a party challenges a cancellation under Section 559.217, loses, and appeals, Minn. Stat. § 559.217 contemplates that the trial court may, in its discretion, require a bond or otherwise condition the appeal to protect the adverse party. This is because, as discussed above, any proper challenge to a cancellation under Minn. Stat. § 559.217 is subject to Rule 65, which governs injunctions. Rule 62.02 governs appeals from injunctions and provides that:

When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal **upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party.**

Minn. R. Civ. P. 62.02 (emphasis added).

3. **Minn. Stat. § 559.217 vs. Minn. Stat. § 559.21.**

Minn. Stat. § 559.217 was enacted in 2004 and is modeled after Minn. Stat. § 559.21, which is commonly known as the contract for deed cancellation statute. These sections are similar. For instance, both Minn. Stat. § 559.217 and Minn. Stat. § 559.21 set forth a procedure whereby one party to a contract for the purchase and sale of real estate can initiate a cancellation of the contract by serving a notice of cancellation upon

the other party. *Compare* Minn. Stat. § 559.21 *with* Minn. Stat. § 559.217. Also, both these Sections provide that, if the party who is served with the notice of cancellation fails to take action within a certain period of time, the cancellation is complete. *Compare* Minn. Stat. § 559.21 *with* Minn. Stat. § 559.217.

There is, however, one important difference between these two section. Unlike Minn. Stat. § 559.21, which provides that the contract is “terminated” once the cancellation is complete, Minn. Stat. § 559.217 takes the finality of a cancellation a step further by expressly stating that, once the cancellation is complete, “the purchase agreement is void and of no further force or effect” *Compare* Minn. Stat. § 559.21, subd. 4(d) *with* Minn. Stat. § 559.217, subd. 7(a) (emphasis added). This language is unequivocal and provides that, if a party receives a cancellation notice and does not obtain a court order suspending the cancellation within fifteen days, the cancellation is final and the purchase agreement is void. Minn. Stat. § 559.217, subs. 4(c) and 7(a).

Courts analyzing Minn. Stat. § 559.21 have long recognized the finality of statutory cancellations once they are complete. *Zirinsky v. Sheehan*, 413 F.2d 481, 484-85 (8th Cir. 1969), *cert. denied*, 396 U.S. 1059 (1969) (stating that “[t]he cases are clear that once statutory notice has been served and cancellation effected, all rights under the contract are terminated”); *Olson v. Northern Pac. Ry. Co.*, 126 Minn. 229, 148 N.W. 67 (1914) (holding that a statutory cancellation terminates the contract and, after a statutory cancellation, a purchaser cannot predicate any claims upon the non-existent contract); *International Realty & Securities Corp. v. Vanderpoel*, 127 Minn. 89, 92-93, 148 N.W.

895, 896 (1914) (holding that “[t]he statute is absolute” and that a statutory cancellation “terminated the right to enforce specific performance, and no act of plaintiff thereafter could reinstate it”); *In re Butler*, 552 N.W.2d 226, 230 (Minn. 1996) (stating that the statutory procedure for cancelling a contract for deed is akin to a statutory strict foreclosure); *Gatz v. Frank M. Langenfeld and Sons Construction, Inc.*, 356 N.W.2d 716, 718 (Minn. Ct. App. 1984) (stating that “[i]t is long-standing law in Minnesota that once statutory notice has been served and cancellation effected, all rights under a contract for deed are terminated”) (citations omitted); *see also* Roberts, 25 Minn. Pract., *Real Estate Law* § 6:3 (2010-2011 ed.) (stating that Minnesota courts have consistently enforced statutory cancellations in order to preserve the simplicity and finality that cancellation affords).

The trial court below recognized that the Minnesota Legislature intended cancellations under Minn. Stat. § 559.217 to be final once they are complete because such finality provides stability in the Minnesota real estate market:

This is a legislatively provided remedy apparently enacted **to make clear the interests of parties in a purchase agreement that has not been fulfilled.** This result, although harsh in the view of [the trial court], does **provide for a method of stability in the real estate market which extinguishes claims unless immediate action is taken** to preserve those claims.

(Addendum to Brief of Appellants Robert G. Dimke and Mary L. Dimke (“Add.”) 004 (emphasis added).) This Legislative intent underlying Minn. Stat. § 559.217 should guide this Court’s review and analysis of the trial court’s decision below.

B. The Trial Court Correctly Concluded That The Dimkes' Claims Against The FARRS Fail Because The Cancellation Renders The Dimke Purchase Agreement Void Under Minn. Stat. § 559.217.

The trial court correctly concluded that the Dimke Purchase Agreement was cancelled pursuant to Minn. Stat. § 559.217, and that the Dimke Purchase Agreement is therefore void and of no further force or effect. Two undisputed facts support this conclusion:

1. On October 20, 2010, the FARRS caused the Notice of Cancellation to be personally served upon the Dimkes; and
2. More than fifteen days passed after the Notice of Cancellation was served upon the Dimkes, and the Dimkes did not obtain or even attempt to obtain a court order suspending the Cancellation.

(Add. 002.) The trial court applied the unambiguous language of Minn. Stat. § 559.271 to these two undisputed facts and correctly concluded that the Dimke Purchase Agreement is void. (Add. 004.) Therefore, because the Dimkes' claims against the FARRS for specific performance, breach of contract, and breach of implied covenant of good faith and fair dealing are all predicated on a voided contract, the trial court correctly granted the FARRS' motion for summary judgment and dismissed the Dimkes' cause of action against the FARRS with prejudice and as a matter of law. (D. App. 001-005; Add. 004-005.)

III. THIS COURT SHOULD CONCLUDE THAT THE TRIAL COURT DID NOT ERR BY REJECTING THE DIMKES' UNTIMELY DEFENSE THAT THE CANCELLATION WAS ALLEGEDLY INEFFECTIVE.

Even though the fifteen-day cancellation period had already expired, the Cancellation was already complete, and the Dimke Purchase Agreement was already

void, the Dimkes argued below that Cancellation was ineffective because the Notice of Cancellation was allegedly invalid under the terms of the Dimke Purchase Agreement. (See Dimke Memo in Support of Motion for Summary Judgment, at pp. 13-16; Dimke Reply Memo in Support of Motion for Summary Judgment, at pp. 2-3; Transcript of Hearing on Motions for Summary Judgment; at pp. 3-10). The trial court correctly rejected this argument. (Add. 002-005.) Now, the Dimkes argue that the trial court erred by failing to analyze whether the Notice of Cancellation was valid under the terms of the Dimke Purchase Agreement. (Dimke App. Brief, at p. 13-19.)

The Dimkes' argument on appeal fails for three reasons. First, the Dimkes argument that the Cancellation was ineffective is untimely under Minn. Stat. § 559.217. Second, the Dimkes never obtained an injunction or a restraining order during the cancellation period, which was a prerequisite to raising defenses to the Cancellation. Third, the undisputed facts in this case establish that the Notice of Cancellation was valid under Minn. Stat. § 559.217, subd. 4. Therefore, this Court should find that the trial court did not err by rejecting the Dimkes' argument that the Cancellation was ineffective.

A. The Dimkes' Argument That The Cancellation Is Ineffective Fails Because It Is Untimely Under Minn. Stat. § 559.217.

As discussed above, under the plain language of Minn. Stat. § 559.217, subd. 4(c) and 7(a), if a party fails to obtain a court order suspending a statutory cancellation within fifteen days after being served with a cancellation notice, the cancellation is complete and the purchase agreement is void. Because there is no dispute that the Farris served the Notice of Cancellation upon the Dimkes on October 20, 2010, and that the Dimkes failed

to obtain a court order suspending the cancellation within fifteen days, the Cancellation was complete and the Dimke Purchase Agreement was void on November 5, 2010. *See* Minn. Stat. § 559.217, subd. 4(c) and 7(a).

The Dimkes' defense that the Cancellation was allegedly ineffective is untimely. The first time the Dimkes argued that the Cancellation was ineffective was on November 22, 2010. (*See* Dimke Memo in Support of Motion for Summary Judgment, at pp. 13-16.) At that point, the Cancellation was already complete. (D. App. 338-342.) Moreover, the Dimkes' alleged defense to the Cancellation is based on the argument that the Notice of Cancellation "is not valid under the clear terms of the [Dimke] Purchase Agreement." (Dimke App. Brief., at p. 15.) At the time the Dimkes first raised this defense, the Dimke Purchase Agreement was already void under Minn. Stat. § 559.217, subd. 4(c) and 7(a). Simply put, the Dimkes cannot predicate their defense to the Cancellation on the terms of an already voided contract.

Finding that the trial court did not err by rejecting the Dimkes' untimely defense to the Cancellation is consistent with Legislative intent underlying Minn. Stat. § 559.217. If this Court was required to evaluate untimely defenses to statutory cancellations under Minn. Stat. § 559.217, subd. 4, it would lead to uncertainty regarding the finality of such cancellations. This uncertainty would lead to instability in the real estate market, and directly contradict the Minnesota Legislature's intent when it enacted Minn. Stat. § 559.217.

Therefore, based on the plain language of Minn. Stat. § 559.217, the undisputed facts of this case, and the Legislative intent underlying Minn. Stat. § 559.217, this Court

should find that the trial court did not err by rejecting the Dimkes' untimely defense to the Cancellation.

B. The Dimkes' Argument That The Cancellation Was Ineffective Fails Because The Dimkes Failed To Obtain A Court Order Suspending The Cancellation During The Cancellation Period.

In this case, the Dimkes are trying to raise a defense to the Cancellation even though they did not obtain a court order suspending the Cancellation during the cancellation period. There is a recent trend in Minnesota cases analyzing Minn. Stat. § 559.21 that suggests that obtaining an injunction during the cancellation period “now serves as a prerequisite to raising all defenses [to the cancellation].” *See* Roberts, 25 Minn. Pract., *Real Estate Law* § 6:20(b) (2010-11 ed.).² Based on this recent trend, “[n]o prudent practitioner should rely on the ability to raise a defense after the running of the notice period.” *Id.* This Court should apply this same reasoning to the Cancellation in this case under Minn. Stat. § 559.217, subd. 4.

One case illustrating the recent trend in Minnesota that obtaining an injunction is a prerequisite to raising defenses to a statutory cancellation under Minn. Stat. § 559.21 is *Brickner v. One Land Development Co.*, 742 N.W.2d 706 (Minn. Ct. App. 2007) *review denied* (Minn. March 18, 2008). In *Brickner*, this Court held that purchasers who fail to seek an injunction during the cancellation period waive their right to oppose the

² Notably, the author of this section, Larry M. Wertheim, was involved on behalf of the Real Property Section of the Minnesota State Bar Association with the drafting of Minn. Stat. § 559.217. *See* Larry M. Wertheim, *Canceled Residential Purchase Agreements*, Bench & Bar of Minn. May/June 2004, at 19, July 2004, at 6.

cancellation. 742 N.W.2d at 711 (citing *Thomey v. Stewart*, 391 N.W.2d 533, 535-36 (Minn. 1986)).

The Dimkes attempt to distinguish *Brickner* from the present action on the basis that the party challenging the cancellation in *Brickner* took no action during the cancellation period, unlike the Dimkes who filed a lawsuit during the cancellation period. (Dimke App. Brief, at pp. 17-18.) This distinction does not help the Dimkes for at least two reasons. First, Dimkes' Complaint says nothing about any defenses to the Cancellation. (D. App. 001-005.) Indeed, the Dimkes did not raise any defenses to the Cancellation until long after the fifteen-day cancellation period had expired. Second, merely filing a complaint before the expiration of the cancellation period is not enough to suspend the Cancellation. Minn. Stat. § 559.217, subd. 4(c) (requiring a party to obtain a court order suspending the cancellation); *see also Olson*, 126 Minn. at 230, 148 N.W. at 68 (holding that a cancellation pursuant to 8081, G. S. 1913, was complete and the contract was terminated after the expiration of the thirty-day cancellation period even though the non-cancelling party filed and served a complaint during the cancellation period).

A second case supporting the notion that a party must obtain an injunction to raise defenses to a statutory cancellation is *Sundberg v. Sundberg*, 2006 WL 1806394, at *3-4 (Minn. Ct. App. 2006).³ The *Sundberg* court held that a party who is properly served with a cancellation notice and fails to take action on the cancellation during the statutory

³ A copy of *Sundberg v. Sundberg*, 2006 WL 1806394, at *3-4 (Minn. Ct. App. 2006) is included in the Dimke Appendix at pp. 352-355.

redemption period “cannot wait to attack the cancellation in an eviction proceeding by asserting defenses that should have been presented during the statutory redemption period.” 2006 WL at *4 (citing *Thomey*, 391 N.W.2d at 536).

The Dimkes attempt to distinguish *Sundberg* from the present action on the basis that *Sundberg* involved an appeal from an order granting summary judgment in an eviction action. (Dimke App. Brief, at pp. 18.) The holding in *Sundberg*, however, is merely “consistent with the statutory definition of eviction as a ‘summary court proceeding[.]’” *Id.* at *4 (emphasis added). Moreover, the fact that *Sundberg* was an appeal from a summary judgment order in an eviction action does not change the *Sundberg* court’s analysis of *Block v. Litchy*, 428 N.W.2d 850, 852-53 (Minn. Ct. App. 1998). The *Sundberg* court reasoned that *Block*, which did not involved an eviction action, demonstrated the necessity of obtaining an injunction in order to raise defenses to the cancellation. *Sundberg*, 2006 WL at *3 (“*Block* implies that, if there had not been an injunction, the contract cancellation would have been effective even though full payment had been made under the contract.” (citing Roberts, 25 Minn. Pract., *Real Estate Law* § 6:20, at 301)).

A third case supporting the proposition that obtaining an injunction is a prerequisite to raising defenses to a statutory cancellation is *Pachtchenko v. Minich*, 2004 WL 2938834, at *5 (Minn. Ct. App. 2004). The *Pachtchenko* court held, as a threshold matter, that “when the district court granted respondents’ summary judgment motion, the contract had been terminated pursuant to section 559.21. As such, the issues relating to

the question of default and alleged defects in the notice were not material to that court.” *Id.* at *3 (emphasis added).

In their Brief, the Dimkes also attempt to distinguish *Pachtchenko* from the present action. (Dimke App. Brief, at pp. 18-19.) In *Pachtchenko*, the appellant argued that the trial court erred by failing to determine whether the appellant defaulted on the contract for deed. *Pachtchenko*, 2004 WL at *3. The Dimkes contend that the *Pachtchenko* court rejected this argument because “the district court had evaluated [the appellant’s] default and determined [that the appellant] defaulted.” (Dimke App. Brief, at pp. 18.) The Dimkes’ argument ignores the fact that, in *Pachtchenko*, the district court only evaluated the appellant’s default in connection with the district court’s denial of the appellant’s timely motion for injunctive relief. *Id.* at *4. Here, the Dimkes did not timely move for an injunction. (Add. 002.) Instead, by the time the Dimkes brought their motion for summary judgment and argued, for the first time, that the Cancellation was ineffective, the Cancellation was already complete, the Dimke Purchase Agreement was already void, and issues related to alleged defects in the Notice of Cancellation were immaterial.

In addition to trying to distinguish *Brickner*, *Sundberg*, and *Pachtchenko*, the Dimkes cite three cases in support of their argument that the trial court should have expressly analyzed the Dimkes’ argument that the Cancellation is ineffective even though it was raised, for the first time, after the expiration of the cancellation period: *Mattson v. Greifendorf*, 183 Minn. 580, 237 N.W. 588 (1931); *Vieths v. Thorp Fin. Co.*, 232 N.W.2d 776, 778 (Minn. 1975); and *Coddon v. Youngkrantz*, 562 N.W.2d 39 (Minn. Ct. App.

1997). (Dimke App. Brief, at pp. 16-17.) These cases are distinguishable from the present action and do not support the Dimkes' contention that the Dimkes can challenge the Cancellation after the Cancellation is already complete and the Dimke Purchase Agreement is already void.

In order to effectively analyze why *Mattson*, *Vieths*, and *Coddon* are distinguishable from this case, it is important to first understand a critical distinction between a cancellation under Minn. Stat. § 559.217, subd. 4, and cancellations under Minn. Stat. § 559.21. Specifically, the only way to stop cancellations under Minn. Stat. § 559.217, subd. 4, from becoming effective is by obtaining a court order suspending the cancellation. Cancellations under Minn. Stat. § 559.21, however, generally involve a default under the contract being cancelled. Therefore, there are two ways to stop a cancellation under Minn. Stat. § 559.21 from becoming effective: (1) obtain judicial relief, or (2) cure the default.

Mattson and *Coddon* are easily distinguishable from this case because, in both cases, the non-cancelling party substantially exercised one of its statutory options to stop the cancellation from becoming effective during the cancellation period. *Mattson*, 183 Minn. at 582-84, 237 N.W. at 589 (holding that the statutory cancellation under Minn. Stat. § 559.21 was ineffective where the non-cancelling party paid all but \$2.90 during the cancellation period to cure the default that formed the basis of the statutory cancellation); *Coddon*, 562 N.W.2d at 44 (holding the statutory cancellation under Minn. Stat. § 559.21 was ineffective where, during the cancellation period, the non-cancelling party substantially cured the default that formed the basis of the statutory cancellation).

Therefore, *Mattson* and *Coddon* do not stand for the proposition that a party who fails to challenge or cure a statutory cancellation **during** the cancellation period can then challenge or cure the cancellation **after** the expiration of the cancellation period.

Vieths is also distinguishable from the present action. The *Vieths* court reversed the trial court's grant of summary judgment because there was a fact issue regarding whether the cancelling party's actions precluded the non-cancelling party from curing the default during the cancellation period. 232 N.W.2d at 778. Therefore, *Vieths* stands for the proposition that, where the cancelling party's own actions bar the non-cancelling party from exercising one of its statutory options for stopping the cancellation, the court may look past the fact that the cancellation has already become effective. 232 N.W.2d at 778.

Unlike *Vieths*, in the present action there is no evidence or allegation in this case that the Farrs' actions in any way prevented the Dimkes' from stopping the Cancellation from becoming effective. Instead, the Dimkes admit they were properly served with the Notice of Cancellation, which warned the Dimkes that:

THE CANCELLATION WILL BE CONFIRMED 15 DAYS AFTER SERVICE OF THIS NOTICE UPON YOU UNLESS BEFORE THEN YOU SECURE FROM A DISTRICT COURT AN ORDER THAT THE CONFIRMATION OF CANCELLATION OF THE PURCHASE AGREEMENT BE SUSPENDED UNTIL YOUR CLAIMS OR DEFENSES ARE FINALLY DISPOSED OF BY TRIAL, HEARING, OR SETTLEMENT.

IF YOU DO NOT OBTAIN SUCH A COURT ORDER WITHIN THE TIME PERIOD SPECIFIED IN THIS NOTICE, THE CONFIRMATION

OF CANCELLATION OF YOUR PURCHASE AGREEMENT WILL BE
FINAL AT THE END OF THE PERIOD

(D. App. 331-332 (emphasis in original).) Despite this explicit warning, the Dimkes failed to raise any defenses to the Cancellation within fifteen days. Notably, the Dimkes have never offered any explanation for why they failed to raise any defenses to the Cancellation within the fifteen-day cancellation period. (Transcript of Hearing on Motions for Summary Judgment; at p. 27.)

Therefore, the Court should reject any implication by the Dimkes' that *Mattson*, *Vieths*, or *Coddon* somehow stand for the proposition that the Dimkes can raise defenses to the Cancellation based on the terms of the Dimke Purchase Agreement after the cancellation period is expired and the Dimke Purchase Agreement is void. Instead, this Court should adopt the reasoning in *Brickner*, *Thomey*, *Sundberg*, *Block*, and *Pachtchenko*, and find that, under the plain language of Minn. Stat. § 559.217, subds. 4(c) and 7(a), the Dimkes were required to obtain an injunction during the cancellation period in order to raise defenses to the Cancellation. Because the Dimkes did not obtain an injunction during the cancellation period, this Court should conclude that the trial court did not err by rejecting the Dimkes' alleged defense to the Cancellation.

C. The Trial Court Implicitly Found That The Cancellation Was Effective When It Correctly Concluded That The Farrs Served The Notice Of Cancellation Pursuant To Minn. Stat. § 559.217.

Even if this Court concludes that the trial court was required to expressly evaluate the merits of the Dimkes' untimely defense that the Cancellation was allegedly ineffective, this Court should still find that the trial court did not err in rejecting the Dimkes' untimely defense because the trial court implicitly and correctly found that the Cancellation was effective.

In Minnesota, an express finding includes findings implied by the express finding. *See Cleluch v. Economy Tire & Battery Co.*, 207 Minn. 1, 6-7, 290 N.W. 302, 305 (Minn. 1940) *reargument denied* Feb. 28, 1940; *see also Prahl v. Prahl*, 627 N.W.2d 698, 703 (Minn. Ct. App. 2001) (holding that appellate courts may “treat statutory factors as addressed when they are implicit in the findings” (citing *Dobrin v Dobrin*, 569 N.W.2d 199, 202 (Minn. 1977))). Therefore, the trial court need not have expressly determined that the Cancellation was effective if such a finding was implied in the trial court's other express findings.

The trial court found that “Farrs served Dimkes with a cancellation . . . pursuant to Minn. Stat. § 559.217.” (Add. 002 (emphasis added).) The Dimkes' argued below that the Cancellation was ineffective. (*See* Dimke Memo in Support of Motion for Summary Judgment, at pp. 13-16; Dimke Reply Memo in Support of Motion for Summary Judgment, at pp. 2-3; Transcript of Hearing on Motions for Summary Judgment; at pp. 3-10). The trial court's express finding that the Cancellation was done “pursuant to Minn. Stat. § 559.217” was “[b]ased on all the files, records and

proceedings[.]” (Add. 001.) Therefore, this finding implies that the trial court considered the Dimkes’ argument that the Cancellation was ineffective, rejected it, and concluded that the Cancellation was effective pursuant to Minn. Stat. § 559.217.

The undisputed facts of this case support the trial court’s implicit finding that the Cancellation was effective. The declaratory cancellation procedure under Minn. Stat. § 559.217, subd. 4, is used to confirm a cancellation when “an unfulfilled condition exists after the date specified for fulfillment in the terms of a purchase agreement for the conveyance of residential real property, which by the terms of the purchase agreement cancels the purchase agreement[.]” *Id.*, subd. 4(a). The cancellation notice must specify the “unfulfilled condition[.]” *Id.*, subd. 4(a)(2). The Notice of Cancellation served upon the Dimkes stated that the unfulfilled condition in the terms of the Dimke Purchase Agreement was the Dimkes’ failure and refusal to sign the Contractual Cancellation Notices confirming the cancellation of the Dimke Purchase Agreement, as required by the Dimke Purchase Agreement. (D. App. 331.)

The Notice of Cancellation confirmed a prior cancellation under the terms of the Dimke Purchase Agreement. Specifically, the Dimke Purchase Agreement included a contractual procedure for cancellation by written notice if marketable title was not provided on the day of closing or within thirty days thereafter:

Seller shall use Seller’s best efforts to provide marketable title by the date of closing. In the event Seller has not provided marketable title by the date of closing, Seller shall have an additional 30 days to make title marketable, or in the alternative, Buyer may waive title defects by written notice to Seller. In addition to this 30-day extension, Buyer and Seller may, by mutual agreement, further extend the closing date. Lacking such extension, **either party may declare this Purchase Agreement cancelled by written**

notice to the other party, or licensee representing or assisting the other party, in which case this Purchase Agreement is canceled. If either party declares this Purchase Agreement cancelled, Buyer and Seller shall immediately sign a Cancellation of Purchase Agreement confirming said cancellation and directing all earnest money paid hereunder to be returned to the Buyer.

(D. App. 296.) Thus, once a party exercises its right under the Dimke Purchase Agreement to declare the Dimke Purchase Agreement cancelled, the Dimke Purchase Agreement “is cancelled.” (D. App. 296.) Then, the other party “shall immediately” sign a document confirming the cancellation. (D. App. 296.)

The Farrs were unable to provide marketable title on the day of closing or within thirty days thereafter. (D. App. 223-226.) Therefore, the Farrs cancelled the Dimke Purchase Agreement by sending the Contractual Cancellation Notices to Christensen. (D. App. 292, 326-330.) Pursuant to the Dimke Purchase Agreement, the Dimkes were then obligated to immediately sign the Contractual Cancellation Notices. (D. App. 296.)

When the Farrs served the Notice of Cancellation to confirm the contractual cancellation of the Dimke Purchase Agreement, the unfulfilled condition that existed was the Dimkes’ refusal to immediately sign the Contractual Cancellation Notices. (D. App. 331.) By the terms of the Dimke Purchase Agreement, the Dimkes’ signing of the Contractual Cancellation Notices was a required condition to confirm that the Dimke Purchase Agreement was cancelled. (D. App. 296.) Therefore, this Court should conclude that the Dimkes’ failure and refusal to sign the Contractual Cancellation Notices constitutes an unfulfilled condition that, by the terms of the Dimke purchase agreement, cancels the Purchase Agreement.

Based on the foregoing, this Court should conclude that, by finding that the Cancellation was done “pursuant to Minn. Stat. § 559.217[,]” the trial court implicitly and correctly found that the Cancellation was effective.

IV. THE TRIAL COURT’S DENIAL OF THE DIMKES’ REQUEST FOR INJUNCTIVE RELIEF WAS NOT CLEARLY ERRONEOUS.

In connection with their motion for summary judgment, the Dimkes’ sought an equitable injunction against the Cancellation. (Dimke App. Brief, at p. 19; Dimke Memo in Support of Motion for Summary Judgment, at pp. 17-18; Dimke Reply Memo in Support of Motion for Summary Judgment, at pp. 3-4; Transcript of Hearing on Motions for Summary Judgment; at pp. 3-10). The trial court denied the Dimkes’ request for injunctive relief. (Add. 001.) As noted above, “a district court’s findings regarding entitlement to injunctive relief will not be set aside unless clearly erroneous.” *LaValle v. Kulkay*, 277 N.W.2d 400, 402 (Minn. 1979); *see also Carl Bolander & Sons Co. v. City of Minneapolis*, 502 N.W.2d 203, 209 (Minn. 1993).

For at least three reasons, the trial court below was not clearly erroneous in denying the Dimkes’ request for injunctive relief. First, the trial court was not required to consider the Dimkes’ untimely equitable defenses to the Cancellation. Second, the trial court was not required to expressly address the authority cited by the Dimkes below in support of their request for injunctive relief because such authority is distinguishable from this case. Third, the trial court’s implicit finding that the Dimkes were not entitled to an equitable injunction was not clearly erroneous.

A. The Trial Court Was Not Required To Consider The Dimkes' Untimely Request For An Equitable Injunction To Halt The Cancellation.

If the Dimkes believed they had an equitable defense to the cancellation, the Dimkes had fifteen days to assert such a defense. *See* Minn. Stat. § 559.217, subd. 4(c). As discussed above, when this fifteen-day cancellation period expired, the Cancellation was complete and final, and the Dimkes' opportunity to seek an equitable injunction to halt the Cancellation ended. Minn. Stat. § 559.217, subds. 4(c) and 7(a). Therefore, this Court should conclude that it was not clearly erroneous for the trial court to deny the Dimkes' request for injunctive relief.

B. The Trial Court Was Not Required To Address The Authority Cited By The Dimkes Below Because Such Authority Does Not Provide A Basis For Considering The Dimkes' Untimely Equitable Defense.

The Dimkes cite four cases in support their argument that the trial court erred by not considering its equitable jurisdiction to halt the Cancellation even though the Dimkes' request for an equitable injunction was made, for the first time, after the Cancellation was complete. These cases are: *Follingstad v. Syverson*, 160 Minn. 307, 200 N.W. 90 (1924), *Codden v. Youngrantz*, 562 N.W.2d 39 (Minn. Ct. App. 1997), *Mattson v. Greifendorf*, 183 Minn. 580, 237 N.W. 588 (1931), *D.J. Enters. of Garrison, Inc. v. Blue Viking, Inc.*, 352 N.W.2d 120 (Minn. Ct. App. 1984). This Court should conclude that the trial court was not required to address these cases because they are each distinguishable from the present action.

In order to effectively analyze why *Codden*, *Follingstad*, *Mattson*, and *Garrison* are distinguishable from the present action, it is important to understand another set of

critical differences between contracts for deed and purchase agreements – the equitable differences. Generally, there are fewer equities in favor of a buyer under a purchase than a buyer under a contract for deed. This is true for at least two reasons. First, a buyer under a contract for deed typically earns significant equity in the property through the down payment, installment payments, and improvements. *See Roberts, 25 Minn. Pract., Real Estate Law* § 6:2 (2010-2011 ed.). A buyer under a purchase agreement, however, has typically not created any real equity in the property. *See id.* Second, a buyer under a contract for deed has typically gained actual possession and use of the Property. *See id.* A buyer under a purchase agreement, however, has typically not yet taken possession of the property. *See id.*

The shorter fifteen-day cancellation period for cancellations of purchase agreements under Minn. Stat. § 559.217, when compared to the longer sixty-day cancellation period for cancellations of contracts for deed under Minn. Stat. § 559.21, illustrates that the Minnesota Legislature has determined that there are fewer equities involved with a cancellation of a purchase agreement than with a cancellation of a contract for deed. *See e.g.* Minn. Stat. §559.21, subs. 1c and 1d (providing shorter the cancellation periods where the vendee has less equity invested in the property).

The courts in *Follingstad*, *Mattson*, *Coddon*, and *Garrison*, which all involved cancellations under Minn. Stat. § 559.21, not Minn. Stat. §559.217, each considered an equitable defense to a statutory cancellation of a contract for deed after the cancellation period had expired because: (1) there was some explanation for why the non-cancelling party did not cure the alleged default during the cancellation period, (2) the non-

cancelling party had attained equity in the property through possession, and (3) the non-cancellation party stood to lose significant equity in the property gained through payments on the contract or improvements to the property. *See Follingstad*, 160 Minn. 307, 200 N.W. 90 (holding that the failure to pay an undetermined amount due under the contract for deed could not form the basis of a statutory cancellation where the vendee stood ready to pay the amount due as soon as it was determined, had possession for two years, and stood to lose significant equity in the property from the cancellation because he had already paid 56% of the total purchase price); *Matteson*, 183 Minn. 580, 237 N.W. 588 (finding that vendee's failure to pay taxes when due could not form the basis of a statutory cancellation where the amount of taxes due had not been determined at the time of the cancellation, vendee substantially cured the alleged monetary default during the cancellation period, and the vendee stood to lose possession and over a year of payments made on the contract for deed.) *Codden*, 562 N.W.2d 39 (finding that a slight delay in a single payment under a contract for deed could not form the basis of a statutory cancellation when the vendee had substantially cured the default, had been in possession for almost three years, and stood to lose significant equity in the property from the cancellation in the form of \$40,000 in payments and \$60,000 in improvements); *Garrison*, 352 N.W.2d 120 (finding that the failure of the vendee to obtain an order suspending the cancellation within the cancellation period could not form the basis of a statutory cancellation because the vendee sought an injunction within the statutory cancellation period, but the court did not issue the injunction suspending the cancellation until after the cancellation period had expired, and the vendee been in possession for

nearly one year and had paid 75% of the purchase price under a contract for deed at the time of the purported cancellation).

Unlike the vendees in *Follingstad*, *Mattson*, *Codden*, and *Garrison*, in the present case, (1) the Dimkes offer no explanation for why they failed to obtain a court order suspending the Cancellation during the statutory redemption period, (2) the Dimkes never took possession of the Property, and (3) the Dimkes have no equity in the form of payments or improvements to the Property. Furthermore, none of the cases cited by the Dimkes stands for the proposition that trial courts **must** expressly address untimely equitable defenses to a statutory cancellation. Therefore, this Court should find that the trial court below was not clearly erroneous by not expressly addressing *Follingstad*, *Mattson*, *Codden*, and *Garrison*.

C. The Trial Court Was Not Clearly Erroneous When It Implicitly Concluded That The Dimkes Were Not Entitled To An Equitable Injunction Because The Equities Weigh In Favor Of The Farrs.

The Dimkes argue that that “[t]he trial court erred by failing to consider its equitable jurisdiction to halt the Farrs’ declaratory cancellation.” (Dimke App. Brief, at p. 19.) The trial court, however, expressly concluded that “the Dimkes’ motion for summary judgment is denied.” (Add. 1.) One of the Dimkes arguments in its motion for summary judgment was that the Dimkes are entitled to an equitable injunction. (Dimke Memo in Support of Motion for Summary Judgment, at pp. 17-18; Dimke Reply Memo in Support of Motion for Summary Judgment, at pp. 3-4.) Therefore, in denying the Dimkes’ motion for summary judgment, the trial court implicitly concluded that the Dimkes were not entitled to an equitable injunction. *See Cleluch v. Economy Tire &*

Battery Co., 207 Minn. 1, 6-7, 290 N.W. 302, 305 (Minn. 1940) *reargument denied* (Minn. Feb. 28, 1940) (holding that an express finding includes findings implied by the express finding). Because the equities in this case weigh in favor of the FARRS, this court should find that the trial court's implicit conclusion that the DIMKES were not entitled to an equitable injunction was not clearly erroneous.

The equities of this case weigh in favor of the FARRS for at least four reasons. First, “[e]quity will not take from him who is diligent what he has secured thereby, and turn it over to him who has lost by his inaction.” *Follingstad*, 160 Minn. at 313, 200 N.W. at 93 (Wilson, C.J., dissenting). Here, the FARRS diligently secured the cancellation of the DIMKE Purchase Agreement. (D. App. 291-293.) The DIMKES, on the other hand, failed to take action to obtain a court order within the fifteen-day cancellation period. (Add. 2.) Therefore, equity cannot resurrect the DIMKES’ lost opportunity to suspend the Cancellation.

Second, the FARRS did not hide or fail to disclose anything to the DIMKES. Instead, the undisputed facts of this case demonstrate the DIMKES knew or should have known about the MUIR Purchase Agreement, the MUIR Cancellation Notice, and the MUIR Lawsuit when they entered into the DIMKE Purchase Agreement. The DIMKE Purchase Agreement was expressly conditioned on the cancellation of the MUIR Purchase Agreement. (D. App. 295.) The DIMKES admit that they knew about the MUIR Cancellation Notice. (D. App. 240.) Finally, CHRISTENSEN knew about the MUIR Lawsuit, and CHRISTENSEN was the DIMKES’ agent. (D. App. 240, 299, 365, 370.) Minnesota law imputes knowledge of an agent to the agent’s principal. *Rognrud v. Zubert*, 165 N.W.2d 244, 249 (Minn. 1969).

Therefore, because Christensen knew about the Muir Lawsuit, the law imputes knowledge of the Muir Lawsuit to the Dimkes.

Third, by failing to utilize the proper statutory procedures for challenging a cancellation under Minn. Stat. § 559.217, the Dimkes have been able to challenge the Cancellation without posting a bond or other type of security to protect the Farris. As discussed above, Minn. Stat. § 559.217 contemplates that parties challenging a statutory cancellation under this section are required to post a bond or other form of security to protect the adverse party. *See* Minn. Stat. §§ 559.217, subd. 1(d), 4(c), and 6; 559.211, subd. 1; and Minn. R. Civ. P. 65.03. Moreover, Minn. Stat. § 559.217 contemplates that when a party appeals from a challenge to a statutory cancellation under this Section, the district court will have discretion to condition the appeal to protect the adverse party. *See id.*, Minn. R. Civ. P. 62.02. There is no evidence in the record that the Dimkes have ever posted a bond or other form of security to protect the Farris in this case. Thus, the Dimkes have effectively skirted the requirement of posting a bond or security to protect the Farris by failing to follow the proper statutory procedures for challenging the Cancellation.⁴

Fourth, the Dimkes have offered no explanation for why they failed to utilize the proper procedure under Minn. Stat. § 559.217 to challenge the Cancellation. Even when this question was directly posed by the trial court below, the Dimkes provided no clear answer. (Transcript of Hearing on Motions for Summary Judgment; at p. 27.) Thus, the Dimkes have never given this Court or the trial court any reason to ignore the plain

⁴ On May 3, 2011, the Farris and Muir moved the trial court for an order requiring the Dimkes to post security to protect the Farris during the pendency of this appeal, and as of May 9, 2011, the trial court has not ruled on this motion.

language of Minn. Stat. § 559.217, subd. 4(c) and 7(a) and exercise its equitable jurisdiction in this case.

In an effort to breeze past their failure to properly challenge the Cancellation, the Dimkes argue that they filed their Complaint during the statutory cancellation period. The Dimkes' Complaint, however, makes no mention of any defenses to the Cancellation. (D. App. 001-005.) More importantly, filing a complaint is not sufficient to stop a cancellation under the plain language of the declaratory cancellation statute, which unequivocally requires a "party to obtain a court order suspending the cancellation." Minn. Stat. § 559.217, subd. 4(c); *see also Olson*, 126 Minn. at 230, 148 N.W. at 68 (finding statutory cancellation pursuant to 8081, G. S. 1913, was complete and final even though non-cancelling party filed a complaint before the expiration of the statutory cancellation period).

For these reasons, this Court should find that the trial court was not clearly erroneous when it implicitly found that the Dimkes were not entitled to an equitable injunction.

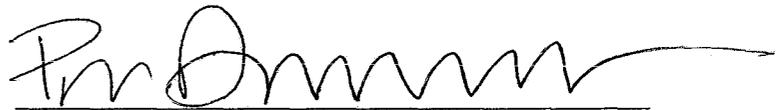
CONCLUSION

Based on the foregoing, this Court should find that the trial court correctly concluded that the Farrs' Cancellation of the Dimke Purchase Agreement pursuant to Minn. Stat. § 559.217 is complete, final, and dispositive of the Dimkes' claims against the Farrs in this case. Specifically, this Court should conclude that the trial court did not err in rejecting the Dimkes' untimely defense that the Cancellation was allegedly ineffective pursuant to the terms of the already voided Dimke Purchase Agreement. This

Court should also conclude that the trial court was not clearly erroneous in denying the Dimkes' untimely request for an equitable injunction to halt the already complete and final Cancellation. For all of these reasons, this Court should affirm the trial court's January 14, 2011 Findings of Fact, Conclusions of Law, Order for Judgment and Judgment and Decree.

Dated: May 9, 2011

Respectfully submitted,



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