

No. A-05-1293

STATE OF MINNESOTA
IN SUPREME COURT

HOYT PROPERTIES, INC. AND HOYT/WINNETKA, LLC,

Respondents,

v.

PRODUCTION RESOURCE GROUP, LLC,
HAAS MULTIPLES ENVIRONMENTAL MARKETING AND DESIGN, INC.
D/B/A ENTOLO-MINNEAPOLIS AND ENTOLO, INC.,

Appellants.

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STATEMENT OF THE ISSUES

1. Whether an attorney's response, during settlement negotiations, to an opposing party's query regarding the viability of a potential legal claim under a "piercing the corporate veil" theory constitutes an actionable misrepresentation of fact that could justify rescission of a settlement agreement.

The District Court held that the attorney's response constituted a nonactionable legal opinion. The Court of Appeals reversed.

Apposite Authority:

Miller v. Osterlund, 154 Minn. 495, 191 N.W. 919 (1923)

Simonsen v. BTH Properties, 410 N.W.2d 458 (Minn. Ct. App. 1987)

Victoria Elevator Co. of Minneapolis v. Meriden Grain Co., Inc., 283 N.W.2d 509
(Minn. 1979)

Spitzmueller v. Burlington N. R.R. Co., 740 F. Supp. 672 (D. Minn. 1990)

2. Whether a reasonable jury could have concluded that a sophisticated and experienced attorney and businessman, who was represented by counsel and has a practice of memorializing all material representations in writing, actually and reasonably relied on opposing counsel's representations during settlement negotiations, where the settlement agreement—which was intended by the parties to include their entire agreement—made no mention of the alleged representation.

The District Court held that the party's reliance on opposing counsel's remarks was unreasonable as a matter of law. The Court of Appeals reversed.

Apposite Authority:

Berg v. Xerxes-Southdale Office Bldg. Co., 290 N.W.2d 612 (Minn. 1980)

Nicollet Restoration, Inc. v. City of St. Paul, 533 N.W.2d 845 (Minn. 1995)

Nuetzel v. Saatzer, No. C3-99-314, 1999 WL 1011947 (Minn. Ct. App. Nov. 9, 1999)

Witzig v. Philips, 274 Minn. 406, 144 N.W.2d 266 (1966)

3. Whether Respondents' complaint, which expressly alleges a cause of action for partial rescission that is barred by Minnesota law, should be construed to allege a cause of action for rescission of an entire settlement agreement, where Respondents had been on notice for more than eighteen months of the infirmity of their pleading, were granted leave to amend, and elected not to do so.

The District Court did not rule on this argument. The Court of Appeals held that Respondents' complaint, liberally construed, alleged a cause of action for rescission of the entire agreement.

Apposite Authority:

Merickel v. Erickson Stores Corp., 255 Minn. 12, 95 N.W.2d 303 (1959)

Prince v. Sonnesyn, 222 Minn. 528, 536, 25 N.W.2d 468, 473 (1947)

Carlson v. Segog, 60 Minn. 498, 62 N.W. 1132 (1895)

Hatch v. Kulick, 211 Minn. 309, 1 N.W.2d 359 (1941)

4. Whether the District Court properly exercised its discretion to dismiss with prejudice claims that Respondents had not formally filed but had voluntarily litigated, when Respondents had successfully sought leave to add the claims to the complaint and requested entry of a final judgment to pursue an appeal as a matter of right.

The District Court dismissed these claims with prejudice in its Amended Order for Judgment. The Court of Appeals reversed.

Apposite Authority:

Minn. R. Civ. P. 41.01(b), 41.02(a), 60.01 & 60.02

Willard v. Max A. Kohen, Inc., 202 Minn. 626, 279 N.W. 553 (1938)

Falkenstein v. Braufman, 251 Minn. 444, 88 N.W.2d 884 (1958)

Roberge v. Cambridge Co-op. Creamery Corp., 234 Minn. 230, 67 N.W.2d 400
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Minn. Pet Breeders, Inc. v. Schell & Kampeter, Inc., 41 F.3d 1242 (8th Cir. 1994)

STATEMENT OF THE CASE

Respondents Hoyt Properties, Inc. and Hoyt/Winnetka, LLC (collectively, “Respondents”), brought this action against Appellants Production Resource Group, LLC (“PRG”), Haas Multiples Environmental Marketing and Design, Inc., d/b/a Entolo-Minneapolis (“Haas”), and Entolo, Inc. (“Entolo”) (collectively, “Appellants”) to rescind a portion of a settlement agreement on the ground of fraudulent inducement. (App. 59-62.) Respondents’ original Complaint asserted claims for “Breach of Contract/Piercing Corporate Veil” (Count I), “Rescission” (Count II), and “Fraudulent Transfer” (Count III). (App. 59-62.)

On April 20, 2005, the Honorable Isabel Gomez granted Respondents leave to amend the Complaint to add Count IV (agency) and Count V (fraud and negligent misrepresentation), and set a trial date of June 20, 2005 for these new claims.¹ (App. 22-24.) The following day, the District Court granted Appellants’ motion for summary judgment on all claims asserted by Respondents in their original Complaint. (App. 25-44.)

On May 4, 2005, the District Court entered judgment dismissing the original claims in Respondents’ complaint. (App. 45-46.) Because Respondents elected not to file their amended complaint or proceed to trial on Counts IV and V but instead wished to appeal as a matter of right, the District Court amended the order and judgment on May 9, 2005, to dismiss with prejudice all of Respondents’ remaining claims, including Counts

¹ In the amended complaint attached to Respondents’ Motion to Amend Complaint, Count V was titled “Fraud and Fraudulent Inducement,” but the substance of Count V is the same in both the First Amended Complaint and the revised First Amended Complaint.

IV and V. (App. 47-48.) Respondents thereafter timely appealed the District Court's amended Order and Judgment on June 29, 2005. (App. 51-52.)

On June 20, 2006, the Court of Appeals reversed the District Court's grant of summary judgment in favor of Appellants in a published opinion. Hoyt Properties, Inc. v. Prod. Res. Group, L.L.C., 716 N.W.2d 366 (Minn. Ct. App. 2006); App. 1-21.

On July 20, 2006, Appellants timely petitioned this Court for review of the Court of Appeals' decision. In an Order filed on August 23, 2006, this Court granted Appellants' Petition. (App. 415-416.)

STATEMENT OF THE FACTS

I. RESPONDENTS BROUGHT AN UNLAWFUL DETAINER ACTION ON A COMMERCIAL LEASE, WHICH WAS SETTLED BY AN AGREEMENT EXECUTED BY SOPHISTICATED PARTIES REPRESENTED BY COUNSEL.

This case arises out of a multi-million-dollar commercial lease, litigation over a default on that lease, and a settlement agreement negotiated by two sets of sophisticated parties represented by counsel. Steven Hoyt, an experienced attorney and businessman, owns and operates Hoyt Properties, Inc. and Hoyt/Winnetka, LLC, Minnesota corporations engaged in the real estate business. 716 N.W.2d at 369. Entolo is the successor corporation to Haas, a Minnesota corporation engaged in the tradeshow and retail display business. Id. PRG is Entolo's parent corporation. Id.

On November 27, 2001, Haas entered into a ten-year lease agreement with Hoyt Properties for office and warehouse space in New Hope, Minnesota. (App. 64-93.) On

January 6, 2002, before Haas took possession of the property, Haas (with Hoyt's consent) assigned its rights and duties under the lease to Entolo. (App. 100-101.) Hoyt Properties subsequently assigned its rights and duties under the lease to Hoyt/Winnetka, LLC. (App. 102-103.) In December 2002, after Entolo failed to make a payment under the lease, Respondents filed an unlawful detainer complaint to evict Entolo. (App. 106-108.) Appellants moved to dismiss the suit based on Respondents' failure to join GMAC Business Credit, LLC ("GMAC"), a party to the lease, whom they argued was a necessary and indispensable party to the suit under Minnesota Rule of Civil Procedure 19. (App. 214-215.) A hearing was set for December 26, 2002. (App. 57, 106-108, 198.)

On the morning of the unlawful detainer hearing, pursuant to the Court's instructions, representatives of Entolo and Hoyt/Winnetka met to hammer out a settlement agreement. 716 N.W.2d at 370. Hoyt, who attended in his capacity as principal and sole owner of Respondents, was represented by attorney Michael Meyer in both the unlawful detainer proceedings and the settlement negotiations. Entolo was represented by two attorneys: Hart Kuller, senior shareholder with Winthrop & Weinstine, P.A., with whom Hoyt had dealt in the past, who attended to negotiate any settlement for Appellants; and Karl Robinson, a litigation associate with Winthrop & Weinstine, P.A., whom Hoyt had never met before and who was present for the sole purpose of representing Haas and Entolo in the unlawful detainer proceedings if the matter did not settle. (App. 216, Robinson Dep. at 23:15-24:13; App. 200, Hoyt Dep. at 90:10-20.)

Hoyt was no newcomer to the negotiating table or to litigation. A licensed attorney, Hoyt practiced law for approximately five years in the areas of litigation, property damage, and other general legal matters for businesses, and personally tried 10 to 15 cases. (App. 190-192, Hoyt Dep. at 6:25-7:4, 9:6-10:5, 12:25-13:5.) In addition, Hoyt has testified as an expert witness on real estate matters (App. 190, 192-93, Hoyt Dep. at 15:9-16:1, 16:22-17:3, 6:7-16), and has participated in numerous lawsuits, both individually and through his businesses. (App. 191-192, 195, Hoyt Dep. 12:25-13:5, 26:15-27:13.) Hoyt is also a sophisticated commercial businessman who has established numerous commercial entities for his own business purposes. (App. 191-192, Hoyt Dep. at 11:18-12:24, 16:16-21.) Hoyt is CEO and sole owner of Hoyt Properties, and he has formed some 30 single-purpose entities, including Hoyt/Winnetka, whose “bankruptcy-remote” status is intended to avoid legal issues in the event of a foreclosure. (App. 191-193, Hoyt Dep. at 11:18-12:24, 16:16-21, 17:6-20, 19:7-14.) Hoyt has negotiated hundreds of commercial transactions, including commercial leases. (App. 194, Hoyt Dep. at 22:16-22.) He uses both his business and legal experience when negotiating these transactions. (App. 194, Hoyt Dep. at 22:23-23:11.)

After the parties reached an agreement, Michael Meyer, Hoyt’s attorney, who testified that he has a standard practice of reducing all material terms and representations of the parties’ agreement to writing (App. 224, Meyer Dep. at 8:2-13), prepared the draft Settlement Agreement. (App. 228, Meyer Dep. at 46:15-47:8.) Meyer transmitted the draft to Hart Kuller, Appellants’ attorney, for review, and they then worked together on behalf of their respective clients to revise and finalize the Settlement Agreement. (App.

229; Meyer Dep. at 50-52.) Several drafts of the Settlement Agreement were exchanged and reviewed by principals and counsel in a process culminating in a final Settlement Agreement resolving the unlawful detainer action. (App. 236, 229-230, 245-249.) Hoyt gave Meyer comments on a draft agreement (App. 229), before personally reviewing and executing the final Settlement Agreement on behalf of Respondents. (App. 210, Hoyt Dep. at 137:17-25.)

The final Settlement Agreement executed by the parties provided that Entolo's lender, GMAC, would pay Respondents a total of \$104,666.23 in December 2002 and January 2003 and that, in return, Respondents would not dispute Entolo's right to occupy the leased premises until January 31, 2003. (App. 245-246, Settlement Agreement at ¶¶ 1-3.) From January 31, 2003, until February 28, 2003, Entolo had the right to occupy the westerly half of the leased premises at a rent of \$1,308 per day, payable weekly. (App. 246, Settlement Agreement at ¶ 3.) Respondents were immediately given access to build out the remaining portion of the premises. (App. 245-246, Settlement Agreement at ¶ 2.)

Respondents released PRG from all claims, subject to two specific reservations for any possible claims for fraudulent transfer to PRG and misrepresentations by PRG as to Entolo's financial condition. (App. 246, Settlement Agreement at ¶ 7.) These reservations are consistent with Meyer's testimony that, when he and Hoyt discussed a global release for PRG with Kuller and Robinson, Meyer indicated that Respondents were prepared to release PRG only if there were carve-outs for creditor's remedies, such as fraudulent transfers. (App. 226, Meyer Dep. at 38:16-39:22.)

The final Settlement Agreement also includes an integration clause, which provides that “[t]his Agreement constitutes the full agreement of the parties concerning its subject matter. . . .” (App. 246, Settlement Agreement ¶ 9.)

II. SEVERAL MONTHS AFTER AGREEING TO THE SETTLEMENT, AND AFTER ALL THE TERMS OF THAT SETTLEMENT HAD BEEN PERFORMED, RESPONDENTS BROUGHT SUIT TO RESCIND THEIR RELEASE OF PRG ALLEGING THAT, DURING SETTLEMENT NEGOTIATIONS AND CONTRARY TO HIS STANDARD BUSINESS PRACTICES, HOYT SOLICITED AND RELIED ON OPPOSING COUNSEL’S ORAL ASSESSMENT OF THE VIABILITY OF A “PIERCING THE CORPORATE VEIL” CLAIM.

Some six months later, after all of the parties had performed all of their respective obligations under the terms of the Settlement Agreement (App. 57), Respondents decided to seek partial rescission of the Settlement Agreement. (App. 53-113.) The alleged trigger for Respondents’ suit was Hoyt’s discovery of a complaint filed in December 2002 by Bruce Knight (“the Knight Complaint”), a former Entolo employee, for breach of contract against Entolo and piercing the corporate veil against PRG. Hoyt, 716 N.W.2d at 370. The Knight Complaint contained numerous untested allegations of parent PRG’s control over Haas’s and Entolo’s corporate and financial affairs. Id.

To support their claim for partial rescission, Respondents alleged that in response to Hoyt’s inquiry about the viability of a “piercing the veil” claim, Robinson had falsely represented to Hoyt during the settlement negotiations that there were no “issues” of piercing PRG’s corporate veil, and that Haas and Entolo were “entirely separate” from PRG. (App. 61.) Hoyt further alleged that he relied on those representations by agreeing to give PRG a limited release in the Settlement Agreement. (App. 61.)

According to Hoyt's testimony, at some point during the December 26, 2002, settlement negotiations, Meyer informed him that Haas and Entolo required a release for their parent company, PRG, as a condition of settlement. (App. 204, Hoyt Dep. at 111:24-112:4.) Hoyt testified that he and Meyer then approached Kuller and Robinson to discuss the proposed release. (App. 204, Hoyt Dep. at 112:5-9.) Hoyt testified that when he and Meyer reached Kuller and Robinson, Meyer said to Hoyt, "Well, ask them." (Hoyt Dep. at 112:10-11.) Hoyt testified that he then said to Kuller and Robinson, "The thought of piercing the veil hadn't occurred to me. I don't know of any reason to believe PRG could be held liable. Do you?" (App. 204, Hoyt Dep. at 114:1-8.) As alleged by Hoyt, while Kuller simply stared straight ahead and said nothing, Robinson—whom Hoyt had never met or dealt with before that day—responded to Hoyt's question by stating, "There isn't anything. PRG and Entolo are totally separate." (App. 205, Hoyt Dep. at 114:1-8.) Hoyt testified that he replied, "Well, you would know" and then instructed Meyer—who, according to Hoyt's testimony, had at some point during this short discussion of this allegedly critical issue left his client and wound up at the far end of the hallway—to insert a release for PRG in the settlement agreement. (App. 205, Hoyt Dep. at 114:9-12, 115:3-15.)

Kuller and Robinson have each testified unequivocally that the alleged discussion of PRG's liability under a piercing-the-veil theory did not occur. (App. 237-238, Kuller Dep. at 66:15-68:6, 70:25-71:17; App. 220-221, Robinson Dep. at 48:4-49:8, 52:2-9.) Meyer, Hoyt's attorney, likewise testified that he witnessed no such conversation. (App. 227, Meyer Dep. at 42:6-43:23.) In fact, Meyer testified that Hoyt never mentioned the

issue of piercing the corporate veil in his presence. (App. 227, Meyer Dep. at 42:6-43:19.)

Even accepting Hoyt's story, he violated his undisputed standard business practices. Hoyt testified that, based upon his legal training and experience, he always makes sure to have any and all material terms of his agreements put in writing. (App. 194, Hoyt Dep. at 24:1-4.) Hoyt also testified that it is his standard practice to reduce all representations and warranties relating to a transaction to writing. (App. 194, Hoyt Dep. at 24:5-14.) Hoyt takes care to put everything in writing to eliminate any ambiguities and to ensure that the written document reflects the precise terms to which the parties have agreed. (App. 194-95, Hoyt Dep. at 24:21-25:3.)

Hoyt testified that he takes an identical approach to settlement agreements: as with any other type of contract or agreement, he makes sure that representations relied upon by the parties are reflected in the written settlement agreements to which he is a party. (App. 195, Hoyt Dep. at 25:20-26:14.) Yet, it is undisputed that Robinson's alleged representations are not in the draft agreements produced by Respondents' attorney (App. 229), nor in the final Settlement Agreement, which was personally reviewed and executed by Hoyt. (App. 137, 245-249.)

III. FOLLOWING A COMPLICATED PROCEDURAL HISTORY IN BOTH FEDERAL AND STATE COURT, THE DISTRICT COURT DISMISSED ALL OF RESPONDENTS' CLAIMS WITH PREJUDICE.

Respondents' convoluted pleadings require explanation. Respondents' original complaint had three claims: "Breach of Contract/Piercing PRG's Corporate Veil" (Count I), "Rescission" (Count II), and "Fraudulent Transfer" (Count III).² (App. 59-60, 62.)

A. On November 17, 2004, Respondents filed (without required leave of court) a First Amended Complaint seeking to add new claims and new parties. (App. 305-318.) The prayer for relief in the First Amended Complaint only sought "an order stating that ¶ 7 [the release of PRG] of the Settlement Agreement in [sic] null and void and of no effect due to Entolo/PRG's fraudulent inducement of such paragraph." (App. 317.) The partial rescission sought was identical to the relief sought in the original Complaint, down to the typographical error. (App. 63.) However, because Respondents filed the First Amended Complaint without moving for leave to amend, in violation of the trial court's scheduling order and the Minnesota Rules of Civil Procedure, the First Amended Complaint was never properly filed. (App. 291, 320.)

B. Respondents finally moved for leave to amend the Complaint on December 2, 2004. (App. 291-304.) At a hearing on that motion, Judge Gomez indicated that, while she would not allow Respondents to add new parties (App. 259), she would allow Respondents to amend the complaint to add Count IV (agency) and Count V (fraud and

² The District Court granted Appellants summary judgment as to Count III (fraudulent transfer). (App. 37.) Respondents abandoned their appeal of the District Court's dismissal of this claim by failing to brief it in the Court of Appeals. In re Application of Olson for Payment of Servs., 648 N.W.2d 226, 227 (Minn. 2002). The Court of Appeals recognized this by not even discussing this count.

negligent misrepresentation).³ (App. 260.) On December 22, 2004, Respondents' attorney, George Eck, sent a "courtesy copy" of a revised First Amended Complaint to the Court "for [its] review." (App. 329.) The revised First Amended Complaint contained Counts IV and V, as well as a new prayer for relief seeking "an order stating that the Settlement Agreement (including ¶ 7) is null and void and of no effect."⁴ (App. 347.) But the revised First Amended Complaint, too, was never filed.

C. While the revised First Amended Complaint remained unfiled, Respondents conducted discovery on the new claims of agency and fraud/negligent misrepresentation.

D. On April 20, 2005, the District Court confirmed the prior oral ruling by granting Respondents leave to amend the Complaint to add Counts IV and V, even setting a trial date of June 20, 2005 on these claims. (App. 22-24.)

E. The next day, on April 21, 2005, the District Court granted summary judgment in favor of Appellants on Counts I-III. (App. 25-44.)

³ Count IV alleged that PRG's control over Entolo constituted an agency relationship, and that PRG was therefore responsible for Entolo's debts and obligations. (App. 314-315.) Count V alleged that Thomas Vogt (Entolo's former president and CEO), Entolo, and PRG had misrepresented Entolo's financial condition to Hoyt, and that Hoyt had relied on these misrepresentations in entering the lease agreement. (App. 315-317.) Between the First Amended Complaint and the revised First Amended Complaint, Respondents changed the name of Count V from "Fraud and Fraudulent Inducement" (App. 315) to "Fraud and Negligent Misrepresentation" (App. 344).

⁴ Appellants had raised the issue of partial rescission much earlier, before the case was remanded to state court from federal district court in Minnesota. In a Report and Recommendation issued on October 14, 2003 as to Appellants' Rule 12(b)(6) motion to dismiss, Magistrate Judge Jonathan Lebedoff noted that while Respondents' prayer for relief pleaded only partial rescission, he would construe the complaint as requesting rescission of the entire Settlement Agreement for the limited purposes of the Rule 12(b)(6) motion before him. (App. 398.)

F. Finally, in a letter dated May 3, 2005, Respondents' attorney George Eck informed the District Court that Respondents had "decided not to file and serve the amended complaint" (which included Counts IV and V and the prayer for relief seeking rescission of the entire Settlement Agreement) and requested an "entry of final judgment" to facilitate an "immediate appeal." (App. 354.) On May 4, 2005, the District Court entered judgment dismissing the original claims in Respondents' complaint. (App. 45-46.) The District Court amended the order and judgment on May 9, 2005, to reflect its dismissal with prejudice of all of Respondents' claims, including Counts IV and V, which Respondents had been granted leave to add and which had been the subject of discovery. (App. 47-48.) Respondents contended that the dismissal of Counts IV and V was "an error" in a letter delivered to the District Court on May 31, 2005 (App. 357-358), but they never made a motion for relief from the judgment under Minnesota Rule of Civil Procedure 60.

SUMMARY OF THE ARGUMENT

The Court of Appeals erred in reversing the District Court's grant of summary judgment in favor of Appellants. First, by holding that an attorney's alleged statement of a legal opinion—uttered during settlement negotiations to an opposing party in response to an inquiry about the viability of a potential legal claim—can constitute an actionable misrepresentation justifying rescission of the settlement agreement, the Court of Appeals significantly expanded the exception to Minnesota's general rule requiring that fraudulent misrepresentations concern a past or present fact. This departure from established

precedent on the distinction between legal opinions and statements of fact opens the door to countless rescission claims, and could disturb the finality of many settlements.

Second, the Court of Appeals also erred in concluding that, in spite of the undisputed facts concerning the settlement context of the alleged statements, Hoyt's business and legal sophistication, and Respondents' failure to observe their own customary business practices in documenting the alleged representation, Respondents could have reasonably and actually relied on the alleged representations.

Third, the Court of Appeals erroneously construed Respondents' complaint as alleging a cause of action for rescission of the entire settlement agreement, rather than partial rescission, based on its misunderstanding of this case's complicated procedural history. This Court should construe the complaint as seeking only partial rescission, a claim that is barred by Minnesota law.

Finally, this confusion regarding Respondents' pleadings also infected the Court of Appeals' reversal of the District Court's dismissal with prejudice of Respondents' claims for agency and fraud/negligent misrepresentation. The District Court acted within its discretion in dismissing with prejudice Respondents' claims for agency and fraud/negligent misrepresentation because those claims had been voluntarily litigated, if not formally filed, and Respondents, who requested entry of final judgment, had been granted leave to amend the complaint to add those claims.

This Court should therefore reverse the Court of Appeals' rulings on Respondents' claims for rescission, agency, and fraud/negligent misrepresentation, and affirm the District Court's entry of judgment in favor of Appellants.

ARGUMENT

I. IN REVIEWING THE COURT OF APPEALS' REVERSAL OF THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT, THIS COURT SHOULD APPLY THE PUBLIC POLICY FAVORING THE FINALITY OF SETTLEMENT AGREEMENTS.

On appeal from summary judgment, this Court “must determine whether there are any genuine issues of material fact, and whether the lower court erred in its application of the law.” Olmanson v. LeSueur County, 693 N.W.2d 876, 879 (Minn. 2005). Minnesota has a “strong public policy interest in the finality of settlements.” Johnson v. St. Paul Ins. Co., 305 N.W.2d 571, 574 (Minn. 1981). Under Minnesota law, settlements are encouraged, and the validity of a settlement agreement is presumed. Id. at 573; Clark v. Allstate Ins. Co., 405 N.W.2d 463, 465 (Minn. Ct. App. 1987). The Court of Appeals, unlike the District Court, failed to accord sufficient weight to the settlement context in analyzing the elements of fraudulent misrepresentation in its summary judgment analysis.

The Court of Appeals' published decision, if allowed to stand, will give dissatisfied parties to settlements a roadmap to rescission. One party's claim of reliance—no matter how sophisticated the party or unsubstantiated the claim—based on opposing counsel's oral statement of legal opinion or bargaining position will be sufficient to disturb the finality of a fully negotiated and integrated written settlement agreement, as long as the party seeking rescission asserts that the alleged representation had an implied basis in fact. The threat posed to the stability of negotiated and fully integrated settlement agreements is particularly troubling since the party who claims reliance need not have made any attempt to include the alleged oral representation as a

term in the written agreement. Attorneys and sophisticated businesspeople, such as Hoyt and Meyer, put their representations in writing so that they know exactly what the other party is relying upon and to ensure that casual comments or misstatements do not become actionable. This is especially true where, as here, the existence of the alleged statements is vigorously contested. To avoid this undesirable result, which would flood the Minnesota courts with rescission lawsuits brought by parties who regret the deals they previously struck, this Court should adopt a rule holding that statements regarding the viability of a legal claim, made by one lawyer to another lawyer during settlement negotiations, are not actionable.

II. ROBINSON'S ALLEGED REMARKS CONCERNING THE VIABILITY OF A PIERCING-THE-VEIL CLAIM CONSTITUTED A NONACTIONABLE LEGAL OPINION RATHER THAN A FACTUAL REPRESENTATION.

A. The Court of Appeals Mischaracterized the Alleged Oral Statements as Factual Representations, and Thus Erred in Holding That They Were Actionable.

By his own allegation, Hoyt asked Robinson for a legal opinion, and, according to Hoyt's version, Robinson provided him with a legal opinion. Hoyt does not allege that he asked Robinson for specific factual information. Under Minnesota law, an actionable representation must be "false" and "material," and "have to do with a past or present fact." Florenzano v. Olson, 387 N.W.2d 168, 174 n.4 (Minn. 1986) (citing Davis v. Re-trac Mfg. Corp., 276 Minn. 116, 149 N.W.2d 37, 38-39 (1967)). Because they lack this required factual element, misrepresentations of the law and opinions are not actionable and cannot constitute the basis for a fraudulent inducement claim.

Spitzmueller v. Burlington N. R.R. Co., 740 F. Supp. 671, 677 n.6 (D. Minn. 1990) (applying Minnesota law). Robinson’s alleged representations concerning the viability of a piercing-the-veil claim therefore cannot support Respondent’s rescission claim because they were statements of legal opinion, rather than statements of fact.

The District Court—accepting Hoyt’s description of his alleged conversation with Robinson as true for purposes of ruling on Appellants’ motion for summary judgment—properly concluded that Hoyt merely alleged a legal discussion between lawyers, concerning the viability of a legal claim, in the context of settlement negotiations. (App. 35.) The Court of Appeals’ opinion, by contrast, virtually ignores the significance of the context in which the alleged representations were made. According to Hoyt’s testimony, he initiated the discussion of piercing the corporate veil during settlement negotiations. Hoyt alleged that, after being informed that Appellants required a release of PRG as a condition of settlement, he stated to Kuller and Robinson, “Well, that would be *piercing the veil* I don’t know of any reason why [PRG] could be *liable*, do you?” (App. 205, Hoyt Dep. at 114:1-8.) (emphases added). Robinson allegedly responded, “There isn’t anything. PRG and Entolo are totally separate.” (App. 205, Hoyt Dep. at 114:1-8.)

As alleged, Hoyt solicited Robinson’s view of a legal claim (liability for “piercing the veil,” which only a lawyer would understand), and, not surprisingly, received a legal opinion in response. Hoyt did not ask about specific facts. He did not ask about how Appellants operated their businesses or whether anyone had ever asserted a claim for piercing against them. The parameters set by Hoyt’s question are crucial: Hoyt specifically invoked the term “piercing the veil,” which the Court of Appeals correctly

recognized as a “reference to a legal concept,” accompanied by the narrow question of PRG’s “liability” under such a theory.

Under Minnesota law, whether to pierce a corporate veil to impose liability is a legal question for the court. In Goblirsch v. Heikes, 547 N.W.2d 89 (Minn. Ct. App. 1996), the Court of Appeals held that, in reviewing the district court’s decision to pierce the corporate veil, it was “not bound by and need not give deference to a district court’s determinations on a purely legal issue.”⁵ Id. at 91; see also Stoebner v. Lingenfelter, 115 F.3d 576, 579 (8th Cir. 1997) (“Whether to pierce a corporate veil is a legal determination that, in our circuit, is governed by state law.”) (applying Minnesota law). “Liability,” defined as “[t]he quality or state of being legally obligated or accountable” or “legal responsibility to another or to society,” is of course a purely legal concept. Black’s Law Dictionary 932 (8th ed. 2004). Thus, both “piercing the veil” and “liability” are legal concepts, not statements of fact.

The Court of Appeals’ reliance on Minnesota case law to reach a contrary conclusion is fundamentally misplaced. In Miller v. Osterlund, 154 Minn. 495, 191 N.W. 919 (1923), this Court held that “[a] misrepresentation though involving [a] matter of law will be held actionable if it amounts to an implied assertion that facts exist that justify the conclusion of law which is expressed.” Id. at 496, 191 N.W. at 919. The Miller Court

⁵ Although in Goblirsch the Court of Appeals remanded the piercing-the-veil issue to the district court “to perform factfinding . . . of facts relevant to the district court’s determination . . . of personal liability,” 547 N.W.2d at 92, this does not mean that piercing the veil is a factual determination. Rather, it simply reflects the district court’s complete failure to make “any findings of fact” on which to base its legal conclusion that piercing the veil was warranted. Id.

held that an out-of-state insurance company's misleading representations that it was legally authorized to do business within Minnesota, while "incidentally involv[ing] matters of law, are to all intents and purposes, representations of fact." *Id.* at 497, 191 N.W. at 919. The Court in *Miller* reasoned that, "[t]o say of a foreign insurance company that it has the right to write insurance in Minnesota, *conveys the meaning to the average man* that the company has complied with the *well-known requirements* of our laws, and has received the Insurance Commissioner's license or authority to transact insurance business here." *Id.* (emphases added).

Similarly, in *Simonsen v. BTH Properties*, 410 N.W.2d 458 (Minn. Ct. App. 1987), the Court of Appeals held that a representation that a property for sale was a six-unit building when sellers knew it was zoned and registered for five units, "was not a misrepresentation of law, but rather, a misrepresentation of a factual condition" because "through nondisclosure respondents may have misrepresented the fact that the building violated the law." *Id.* at 461. This was a factual representation involving the specific features and characteristics of the property in question.

The Court of Appeals also relied on *Nodak Oil Co. v. Mobil Oil Corp.*, 533 F.2d 401 (8th Cir. 1976), which interprets North Dakota law. *Nodak* is factually inapposite because the statement in question, which involved the existence of a contract between Mobil and Nodak, "constituted a representation of fact, although it may *technically* have also stated a legal conclusion." *Id.* at 406 (emphasis added). Thus, the cases relied on by the Court of Appeals involve representations dealing with specific facts (e.g., whether a

license has been obtained, whether a building has been zoned for five or six units, whether a contract actually exists), not general discussions of broad legal concepts.

Whether to pierce the corporate veil, by definition, is the antithesis of a straightforward legal question that can be resolved by answering a simple factual question or two. Minnesota case law demonstrates that the requirements for piercing the corporate veil are not “well-known” and convey no meaning to “the average man.” See Victoria Elevator Co. of Minneapolis v. Meriden Grain Co., Inc., 283 N.W.2d 509, 512 (Minn. 1979) (setting forth multi-factor balancing test for piercing the veil). As the District Court astutely observed, Hoyt’s question “was an inquiry concerning a legal doctrine unlikely to be of concern to, or even to be known by, a lay businessman trying to reach a settlement. In responding, adverse counsel gave a legal opinion.” (App. 35.)

This Court has developed a two-prong test for piercing the veil, the first prong of which “focuses on the shareholder’s relationship to the corporation.” Barton v. Moore, 558 N.W.2d 746, 749 (Minn. 1997). In Victoria Elevator Co., this Court instructed that the following non-exclusive eight factors were “significant” to this first prong when deciding whether to pierce the corporate veil to impose liability on a sole shareholder of a corporation:

[I]nsufficient capitalization for purposes of corporate undertaking, failure to observe corporate formalities, nonpayment of dividends, insolvency of debtor corporation at time of transaction in question, siphoning of funds by dominant shareholder, nonfunctioning of other officers and directors, absence of corporate records, and existence of corporation as merely façade for individual dealings.

283 N.W.2d at 512; see also Ass'n of Mill & Elevator Mut. Ins. Co. v. Barzen Int'l, Inc., 553 N.W.2d 446, 449-50 (Minn. Ct. App. 1996) (applying Victoria Elevator factors to parent-subsidiary relationship). Piercing the veil requires “not only that a number of these factors be present” but also that a party satisfy a second prong by showing that there is “an element of injustice or fundamental unfairness.” Victoria Elevator, 283 N.W.2d at 512; see also Barton, 558 N.W.2d at 749. Thus, wholly apart from including an assessment of a wide variety of facts, the eventual conclusion requires a subjective determination as to equitable principles.

Like most legal opinions, a piercing-the-veil decision is ultimately grounded in a subjective assessment of various facts and circumstances. Unlike the legal conclusions at issue in Miller, Simonsen, or Nodak, however, a piercing-the-veil decision requires serious legal analysis in the form of a complex balancing inquiry; it is not a simple factual representation that “incidentally” or “technically” touches on matters of law.

The Restatement confirms that the District Court, and not the Court of Appeals, correctly drew the line between legal opinions and statements of fact. Under the Restatement, “[i]f a misrepresentation as to a matter of law includes, expressly or by implication, a misrepresentation of fact, the recipient is justified in relying upon the misrepresentation of fact to the same extent as though it were any other misrepresentation of fact.” Restatement (Second) of Torts § 545(1) (1977).

The comments and illustrations to this provision indicate, however, that, as in the Minnesota case law, this exception is strictly limited to representations about matters of law where the legal requirements are so cut-and-dried that they amount, as a practical

matter, to statements of fact. See *id.* § 545(1) cmt. c (“Thus the statement that the maker has good title to land, although in form one of a legal conclusion, ordinarily will be understood to assert the existence of those conveyances or other events necessary to vest good title in him. So likewise a statement that one mortgage has priority over another may imply an assertion that one was made before the other; and a statement that a corporation has the legal right to do business in a state may carry with it an assurance that it has as a matter of fact taken all of the steps necessary to be duly qualified.”); *id.* § 545 illus. 1-2 (representations regarding ability to obtain particular land from government by patent free from mineral reservations and existence of legal maximum price for commodity are actionable misrepresentations).⁶

What further distinguishes this case from the Minnesota cases and Restatement examples is the crucial difference between a legal opinion that necessarily implies that a certain factual predicate exists, and a legal opinion that implies, at most, that some undefined combination of facts does not exist. Under Minnesota’s rigorous test for piercing the veil,⁷ no single fact is dispositive. See *Victoria Elevator*, 283 N.W.2d at 512 (holding that an unspecified “number of” factors must be present to satisfy first prong of

⁶ That two of these examples are drawn from this Court’s cases—*Pieh v. Flitton*, 170 Minn. 29, 211 N.W. 964 (1927) and *Miller v. Osterlund*, 154 Minn. 495, 191 N.W. 919 (1923)—indicates that the Restatement’s view of implied misrepresentations of facts is in line with Minnesota precedent.

⁷ “Piercing the corporate veil is an exception to be used only under limited circumstances.” *Groves v. Dakota Printing Servs., Inc.* 371 N.W.2d 59, 62 (Minn. Ct. App. 1985). Courts regard Minnesota’s piercing-the-veil inquiry as a demanding hurdle. *Agristor Leasing v. Guggisberg*, 617 F. Supp. 902, 906 (D. Minn. 1985) (“Under Minnesota law, the corporate veil is not lightly pierced.”); *In re Intelefilm Corp.*, 301 B.R. 327, 331 (Bankr. D. Minn. 2003) (characterizing Minnesota’s veil-piercing test as “a difficult one to meet”).

test). Moreover, each fact has to be judged in the context of the particular circumstances of a case. For instance, the Minnesota Court of Appeals has held that the fact that a parent corporation became increasingly involved in a poorly performing subsidiary's operations and decisionmaking did not weigh in favor of piercing the veil because "[t]his increase in control by the parent constitutes a reasonable reaction of a parent to its failing subsidiary." Ass'n of Mill & Elevator Mut. Ins. Co., 553 N.W.2d at 450.

Indeed, it is not enough even if all eight factors under the first prong of the test exist, because there is no viable piercing-the-veil claim absent injustice or unfairness. This second prong, which requires "an element of injustice or fundamental unfairness," Victoria Elevator, 283 N.W.2d at 512, is vague, inherently subjective, and does not imply a specified set of facts. Thus, a statement regarding the viability of a piercing-the-veil claim does not, in and of itself, imply the existence (or absence) of any particular state of facts.

A consideration of the piercing-related factual questions Hoyt could have asked—but did not—highlights the stark difference between the legal opinion he solicited and received from Robinson and a factual representation. Under the Victoria Elevator test, relevant factual questions might have included, "Are Entolo's officers and directors nonfunctioning?" and "Does Entolo fail to observe corporate formalities?" See 283 N.W.2d at 512. Most directly, Hoyt did not ask Robinson whether anyone had ever asserted claims for "piercing the corporate veil" in a lawsuit against PRG—which is the only specific fact that Robinson is alleged to have concealed. Instead of asking for any underlying factual information, Hoyt, according to his own allegations, asked his

adversary's attorneys for a legal conclusion, which Robinson allegedly succinctly provided.

The Court of Appeals also erred by parsing Robinson's alleged nine-word response into two discrete representations rather than as a coherent, unified statement of a legal position in reply to Hoyt's legal query. By divorcing the statements both from the context in which they were allegedly uttered and from each other, the Court of Appeals mistakenly concluded that one statement was a legal opinion ("There isn't anything [to a veil-piercing claim].") that was actionable because it "implied knowledge of facts that substantiated the representation," 716 N.W.2d at 373, and that the second sentence (PRG and Entolo were "totally separate") was "entirely a representation of fact," *id.* (quoting Simonsen, 410 N.W.2d at 461).

Contrary to the Court of Appeals' holding on the alleged "totally separate" representation, Minnesota case law demonstrates that "separateness" is a legal term of art in piercing-the-veil cases. Under Minnesota law, in any action seeking to pierce the veil of a subsidiary to reach the parent, "[t]here is a presumption of separateness the plaintiff must overcome to establish liability by showing that the parent is employing the subsidiary to perpetrate a fraud and that this was the proximate cause of the plaintiff's injury." Ass'n of Mill & Elevator Mut. Ins. Co., 553 N.W.2d at 449 (quoting 1 Charles R.P. Keating & Gail O'Gradney, Fletcher Cyclopedic of the Law of Private Corporations § 43, at 729 (rev. ed. 1990)); Busch v. Mann, 397 N.W.2d 391, 395 (Minn. Ct. App. 1986) (same), abrogated on other grounds by Valspar Corp. v. Lukken Color Corp., 495 N.W.2d 408, 411 (Minn. 1992).

The case law indicates that the term “separate” does not describe a particular factual predicate in a piercing-the-veil case, but rather, a general legal conclusion that piercing is not warranted. In Ass’n of Mill & Elevator Mutual Insurance Co., the Court of Appeals summed this up by stating, “In conclusion, the facts do not rebut the presumption of corporate separateness in this case. Most of the Victoria Elevator factors reflect this separateness, and none of these factors, alone or jointly, support piercing.” 553 N.W.2d at 450. This Court has held that “[w]hether the corporation is a *separate entity* or not depends on a number of factors,” namely, the eight factors under the first prong of Victoria Elevator, as well as the second prong’s required element of injustice or fundamental unfairness. Snyder Elec. Co. v. Fleming, 305 N.W.2d 863, 868 (Minn. 1981) (emphasis added). Thus, the term “separate” is simply shorthand for the legal conclusion that a piercing-the-veil claim is not viable.

As a result of its failure to recognize “separate” as a legal term of art in piercing-the-veil cases, the Court of Appeals erred by mischaracterizing the alleged “totally separate” representation as a “direct factual representation.”⁸ Considered in context,

⁸ In its summary judgment memorandum, the District Court stated that Robinson’s “legal opinion” “adds up to ‘PRG and Entolo are separate corporations that have maintained separate boundaries and formalities, and, therefore are not vulnerable to piercing claims.’” (App. 35.) The Court of Appeals treated the trial court’s explanation of Robinson’s legal position as a “finding” that was “inconsistent with its determination that the representation was a nonactionable statement of opinion” and instead supported the contrary conclusion, namely, that “[t]he representation that PRG and Entolo were separate corporations with separate boundaries is a direct factual assertion.” 716 N.W.2d at 373. This was error. The District Court made no such finding in the “Findings of Fact” section of its Order (App. 25-27), and the Memorandum contained no independent factual findings.

Robinson's alleged remark was plainly a lawyer's reply to an inquiry laden with legal concepts made by another lawyer, where both attorneys were familiar with the concept of piercing the corporate veil. Viewed in this light, Robinson's alleged response to Hoyt's request for a legal opinion makes perfect sense. As alleged, Robinson simply asserted that Entolo and PRG were "totally separate," meaning that piercing the veil was not warranted. As Minnesota case law demonstrates, "separateness" is both a legal presumption and a legal conclusion arrived at after the Victoria Elevator factors have been weighed; it is not a factual representation.

The alleged circumstances in which the remark was made further evidence that Hoyt understood Robinson's remark as it was intended: as a legal conclusion. According to Hoyt, he asked no additional questions after Robinson allegedly voiced his legal opinion, and the alleged remarks concluded the negotiation over the issue of granting PRG a global release. (App. 205, Hoyt Dep. at 114:9-115:7.)

In view of the intricacies of the piercing-the-veil analysis, this Court should hold that Robinson's alleged oral statements constitute nonactionable statements of legal opinion. To extend the rule of Miller v. Osterlund to reach legal opinions based on a two-prong test requiring (1) a discretionary and unguided balancing of eight non-dispositive and non-exhaustive factors, and (2) an inherently subjective evaluation of "injustice or fundamental unfairness," would distort the definition of "factual representation" beyond recognition.

Declining to extend Miller v. Osterlund to cases such as this is sound public policy because it is consistent with conventions of negotiation that currently result in favored

settlements of disputes. The current rule already prevents attorneys and others from avoiding liability by couching factual misrepresentations as legal conclusions. In contrast, the Court of Appeals' decision, if not reversed, would result in an enormous increase in potential liability for attorneys and their clients, and would threaten the stability of settlement agreements because, in practice, all statements of legal opinion and settlement positions concerning potential claims uttered during settlement negotiations could be asserted to imply representations of facts. Such an unwise extension of the law is certainly not justified in this case, where the alleged statements of legal opinion concern a complex question of law.

B. Robinson's Receipt of the Knight Complaint Did Not Inform Him of "Facts" That Make This Statement False.

The Court of Appeals did not address Appellants' argument that Respondents' claim for fraudulent misrepresentation, which is premised on Robinson's knowledge of the unproven allegations in the Knight Complaint, fails as a matter of law because Robinson's alleged representations, even if viewed as factual, are not made false by the pendency of the Knight Complaint. The mere fact that a party has initiated legal proceedings and made factual allegations in pleadings does not mean that those claims are true. Therefore, being aware of them cannot make false a statement that rejects them. If the Knight litigation is relevant at all, it is because it demonstrates the consistency of Appellants' rejection of the viability of a piercing-the-veil claim over time. Indeed, Robinson's alleged statement is the functional equivalent to the answer Appellants asserted in denying the complaint in the Knight litigation.

Robinson's knowledge of the pending Knight litigation did not automatically convert his alleged representations regarding a piercing-the-veil claim into misrepresentations. In Spitzmueller v. Burlington Northern Railroad Co., 740 F. Supp. 671 (D. Minn. 1990), a Minnesota federal district court, applying Minnesota law, held that a defendant-employer who advised a plaintiff-employee that it was in his interest to accept a settlement and release of claims related to the abolition of the employee's position had not misrepresented an "existing fact" by failing to disclose another employee's pending legal claim asserting the same rights. Id. at 674, 677. The Spitzmueller court reasoned that "a pending legal claim . . . may be susceptible to a number of outcomes, some advantageous and some adverse to a party such as this defendant. But which outcome was likely to occur could not have been more than rank conjecture." Id. at 677. Given the uncertain result of the litigation, the defendant "did not misrepresent an existing fact" by presenting a positive assessment of settlement. Id. Further, the Spitzmueller court noted that it had "found neither case nor statutory law in Minnesota supporting the novel proposition that defendant is liable for failing to disclose pending or ongoing litigation." Id.

The reasoning of Spitzmueller applies equally here. PRG has never conceded the allegations in the Knight Complaint and did not have to treat its underlying factual allegations as true to avoid incurring liability for fraudulent misrepresentation.

Appellants have at all relevant times consistently maintained they are totally "separate" companies and that there is no legitimate basis for any creditor to seek relief in the form of piercing the corporate veil. Indeed, Appellants believed the evidence in the

Knight litigation was so conclusive that they moved for summary judgment on the “piercing” claim in that case. Knight v. Prod. Res. Group, LLC, No. Civ. 036443, 2005 WL 1630523, at *6-7 (D. Minn. July 11, 2005). While the District Court denied Appellants’ motion, the Honorable Michael Davis confirmed that ample evidence exists to support Appellants’ denial of the piercing claim. Id. In other words, the District Court held there was sufficient merit to the position allegedly stated by Robinson to Hoyt to require a trial on the merits to reach an ultimate determination. Attaching liability to a party’s statement of its legitimately held legal positions based on untested allegations in complaints would severely hamper settlement negotiations, thereby frustrating Minnesota’s “strong public policy of encouraging settlement.” Wall v. Fairview Hosp. & Healthcare Servs., 584 N.W.2d 395, 404 (Minn. 1998).

III. THE UNDISPUTED FACTS DEMONSTRATE THAT NO REASONABLE JURY COULD HAVE CONCLUDED THAT HOYT REASONABLY AND ACTUALLY RELIED UPON ROBINSON’S ALLEGED REPRESENTATIONS.

The Court of Appeals also erred in holding that whether Hoyt reasonably relied on the alleged representations raised a genuine issue of material fact that precluded summary judgment, 716 N.W.2d at 374, and in failing to address in any meaningful manner Appellants’ separate argument that no jury could find that Hoyt demonstrated actual reliance. Establishing actual reliance, as well as the reasonableness of that reliance, are essential and separate elements of fraud. Florenzano, 387 N.W.2d at 174 n.4 (actual reliance); Nicollet Restoration, Inc. v. City of St. Paul, 533 N.W.2d 845, 848 (Minn. 1995) (reasonable reliance).

Respondents, as plaintiffs in the fraud action, bear the burden of establishing that reliance on the alleged misrepresentation both existed *and* was reasonable under the circumstances. Davis v. Re-Trac Mfg. Corp., 276 Minn. 116, 149 N.W.2d 37, 38-39 (1967); Simplex Supplies, Inc. v. Abhe & Svoboda, Inc., 586 N.W.2d 797, 803 (Minn. Ct. App. 1998). While the reasonableness of reliance is ordinarily viewed as a fact question for the jury, summary judgment is appropriate where, as here, the record reflects a complete failure of proof on this issue. Nicollet Restoration, Inc., 533 N.W.2d at 848. Summary judgment on actual reliance is proper when the plaintiff fails to “demonstrate[] its own reliance.” Simplex Supplies, 586 N.W.2d at 803.

A. In View of Hoyt’s Business and Legal Sophistication Regarding Adversarial Settlement Negotiations, As Well As Hoyt’s Undisputed Failure to Follow His Standard Business Practices, Hoyt’s Reliance Was Unreasonable As a Matter of Law.

The Court of Appeals’ ruling on reasonable reliance is fatally flawed because it analyzed the various undisputed facts illustrating the unreasonableness of Hoyt’s reliance in isolation rather than cumulatively. Nuetzel v. Saatzer, No. C3-99-314, 1999 WL 1011947, at *4 (Minn. Ct. App. Nov. 9, 1999) (“A court or jury may infer reliance from plaintiff’s conduct and the surrounding circumstances.”) (citing Davis, 276 Minn. at 118, 149 N.W.2d at 39). Contrary to the Court of Appeals’ suggestion, Appellants do not ask this Court to adopt a general rule that reliance is unreasonable as a matter of law whenever (1) representations are made in the course of adversarial negotiations; (2) the representations were made to an experienced businessperson; or (3) the settlement agreement fails to make reference to the alleged representation. See 716 N.W.2d at 374-

75. Rather, Appellants simply contend that, given all the circumstances of this case—the settlement context, Hoyt’s extensive business and legal experience, Hoyt’s undisputed standard business practices, and the fact that the parties intended to put their entire agreement in writing—as a matter of law, Hoyt could not have reasonably relied on the alleged misrepresentations.

Minnesota case law endorses this sort of particularized reasonable reliance inquiry. Reasonable reliance is not measured by the understanding of “the average man” but rather by “a person of the capacity and experience of the particular individual who received the representations.” Berg v. Xerxes-Southdale Office Bldg. Co., 290 N.W.2d 612, 616 (Minn. 1980); see also Boubelik v. Liberty State Bank, 553 N.W.2d 393, 400 (Minn. 1996) (“Fraud is proved with reference to the specific intelligence and experience of the aggrieved party rather than the reasonable person standard.”). In Spiess v. Brandt, 230 Minn. 246, 41 N.W.2d 561 (Minn. 1950), this Court emphasized that in rescission actions for fraud, “the question is whether the representations were of such a character and were made under such circumstances that they were reasonably calculated to deceive” the plaintiff. Id. at 254, 41 N.W.2d at 567. The Court of Appeals failed to take into account both the totality of the circumstances surrounding the alleged representations and Hoyt’s unique capacity, experience, and typical conduct in business and legal matters.

First, the Court of Appeals erred in holding that Hoyt’s knowledge of attorneys’ ethical obligation to tell the truth raised a genuine issue of material fact regarding the reasonableness of Hoyt’s reliance. The Court of Appeals cited Minnesota Rule of

Professional Conduct § 4.1, which provides that “[i]n the course of representing a client a lawyer shall not knowingly make a false statement of fact or law.” Minn. R. Prof. Conduct § 4.1. Notably, the 2005 comments to Rule 4.1 expressly provide that, “[u]nder generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact.” Id. at cmt.2.

Minnesota’s rule is based on the American Bar Association’s Model Rule of Professional Conduct 4.1(a). In a recent formal opinion, the ABA applied Rule 4.1(a) to the generally accepted conventions of the negotiation process. Significantly, the ABA opinion acknowledges that

[a] party in a negotiation . . . might exaggerate or emphasize the strengths, and minimize or deemphasize the weaknesses, of its factual or legal position. . . . Such remarks, often characterized as ‘posturing’ or ‘puffing,’ are *statements upon which parties to a negotiation ordinarily would not be expected justifiably to rely*, and must be distinguished from false statements of material fact.

ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 439 (2006) (emphasis added). Further, “overstatements or understatements of the strengths or weaknesses of a client’s position in litigation or otherwise, or expressions of opinion as to the value or worth of the subject matter of the negotiation . . . generally are not considered material facts subject to Rule 4.1.” Id. Thus, even assuming arguendo that Hoyt is correct that Appellants overestimated the strength of their litigation position on a potential piercing-the-veil claim, this overstatement was not a material fact on which Hoyt could reasonably rely. As an experienced attorney and businessman well-versed in the conventions of

negotiations, Hoyt could not reasonably rely on Robinson's alleged representation as a matter of law.

Second, the Court of Appeals noted only Hoyt's "extensive business experience" and utterly failed to consider Hoyt's formal legal training and significant time in private practice as factors in the reasonable reliance analysis. 716 N.W.2d at 374-75. However, Hoyt's legal background is crucial to this case because, as a lawyer, he should have known that when he invoked "piercing the veil" issues, he was asking a legal question and receiving a legal conclusion in response. As an attorney, Hoyt could not reasonably rely on the bare "assumption that attorneys have an ethical obligation to tell the truth," 716 N.W.2d at 375, because opposing attorneys will invariably advocate contrary positions on such complex legal issues as "piercing the veil." Rather, the reasonableness of Hoyt's reliance on representations made in the settlement context must be discounted by his familiarity with the conventions of negotiation. In sum, Hoyt's legal experience combined with his business expertise in commercial real estate, made him a particularly sophisticated party to this transaction, a point which the Court of Appeals completely ignored. See Restatement (Third) of Law Governing Law. § 98, cmt. b (2000) ("[T]he sophistication in similar transactions of a person to whom a representation is made is relevant in determining such issues as the reasonableness of the person's reliance on the representation.").

Third, the cases relied on by the Court of Appeals do not support its conclusion that "an experienced businessperson is entitled to rely on statements by an opposing party to a transaction, unless his or her experience makes the truth or falsity of the

representation apparent.” 716 N.W.2d at 375 (citing Berg, 290 N.W.2d at 616, Placke v. White-Price Co., 179 Minn. 147, 150, 228 N.W. 554, 555 (1930)).⁹ This Court in Berg said no such thing. Rather, in Berg, this Court reasoned that because the sophisticated businessperson in question was only one partner in a limited partnership, it was impossible on the existing record to attribute the partner’s sophistication to the entire partnership absent a “record concerning the reasonableness of the [other] partners’ reliance.” 290 N.W.2d at 616. The clear implication of Berg is that, given a more fully developed record, the unreasonableness of the partners’ reliance could be proven.

Placke supports precisely the type of particularized reasonable reliance inquiry urged by Appellants in this case. In Placke, this Court held that the reliance of plaintiff, an individual “of ordinary business ability,” was not unreasonable as a matter of law when the contract was prepared by the defendant’s attorney, and plaintiff testified that he had not read the voluminous paperwork (loan application, long mortgage document, and “large stack of notes”) relating to the transaction. 179 Minn. at 148-50, 228 N.W. at 555-56. Here, the facts could not be more different: Hoyt’s business and legal ability is far above “ordinary,” the Settlement Agreement was short (two pages) and drafted by Hoyt’s

⁹ Appellants do not contest the Court of Appeals’ general propositions that an “attorney who makes affirmative misrepresentations to an adversary . . . may be liable for fraud,” 716 N.W.2d at 374 (quoting L & H Airco, Inc. v. Rapistan Corp., 446 N.W.2d 372, 380 (Minn. 1989)) and that “[u]nder Minnesota law, a fraudulent misrepresentation can void a contract even though the misrepresentation was not included in the contract” (citing Ganley Bros. v. Butler Bros. Bldg., 170 Minn. 373, 375, 212 N.W. 602, 602 (1927)). However, these general statements of law are irrelevant to the specific and un rebutted record of unreasonable reliance present in this case.

attorney, who received Hoyt's comments on the draft before Hoyt read and personally executed the agreement on behalf of Respondents.

Finally, the undisputed record of Hoyt's standard business practices with regard to material terms and representations confirms that Hoyt's reliance was unreasonable as a matter of law. Hoyt makes a practice of including all material terms and representations in his written agreements, and he expressly advises adversaries in transactions and litigation to do likewise. Hoyt also acknowledged that he has a standard clause in his commercial leases advising tenants not to rely on representations of the broker but to seek the advice of their own attorney. (App. 196-197, Hoyt Dep. at 43:9-45:1.) Hoyt further acknowledged that lawyers represent specific parties, and that he would typically rely on his own lawyer for legal opinions, not on the legal opinions of opposing counsel. (App. 207-208, Hoyt Dep. at 124:18-125:1.) Meyer, the attorney who negotiated and drafted the Settlement Agreement on behalf of Respondents, similarly testified that he does not normally rely on the legal opinions of opposing counsel, and that if he were to do so that legal opinion would have to be put in a written document and attached to the transaction documents. (App. 224-225, Meyer Dep. at 8:14-9:1.)

Under the facts as alleged, Hoyt violated all of these customary practices in negotiating the release of PRG without getting the alleged representations in writing and failing to inform, or to seek the opinion of, his separate counsel regarding his reliance on those representations. (App. 207, Hoyt Dep. at 123:11-13; App. 228, Meyer Dep. at 47:9-21.) Indeed, Meyer had no knowledge of the alleged representations—much less any understanding that this was in any way a material term of the contract he drafted.

Hoyt's nondisclosure of Robinson's alleged representation is even more unreasonable in light of Meyer's initial hesitation at including any release in the Settlement Agreement. (App. 236, Kuller Dep. at 63:1-64:3.) Meyer initially told Appellants' attorneys that Respondents were not going to release claims they did not know about, such as creditor's remedies claims. (App. 226, Meyer Dep. at 39:10-18.) Meyer felt strongly that any potential creditor's remedy should be preserved and expressed these views in Hoyt's presence. (App. 226, Meyer Dep. at 39:10-40:11.) In light of his own counsel's clearly articulated concerns about the scope of any release, Hoyt's assertion—that he simply said to opposing counsel, after Robinson's alleged statement about piercing the veil, "Well, you would know," and subsequently instructed his attorney to add the requested release of PRG to the settlement agreement without any explanation or discussion (App. 205, Hoyt Dep. at 114:9-115:7)—provides additional undisputed evidence of unreasonableness. Viewing Hoyt's conduct under the circumstances as a whole, no reasonable jury could conclude that Hoyt reasonably relied on Robinson's alleged representation.

B. The Undisputed Evidence Demonstrates Respondents Did Not Actually Rely Upon The Alleged Representation.

The Court of Appeals failed to address directly Appellant's argument that, based on the undisputed facts, no reasonable jury could find that Hoyt actually relied on Robinson's alleged representations. The various versions of sworn assertions submitted by Hoyt as to his alleged reliance upon the alleged representations do not create a genuine issue of material fact, and, moreover, are overwhelmed by the totality of the

circumstances under which the release was negotiated, drafted, and executed. Witzig v. Philips, 274 Minn. 406, 412, 144 N.W.2d 266, 270 (1966) (“It is well established law that the defrauded party may testify directly as to the effect of the representations on his mind and whether or not he acted in reliance upon them. Nevertheless, the facts and circumstances surrounding the situation are the best measure of whether there was reliance or not.”) (citations omitted) (appeal of trial court decision holding that plaintiff had failed to establish prima facie case of fraud); see also Watson v. Gardner, 183 Minn. 233, 237, 236 N.W. 213, 215 (1931) (“The testimony of a party that he relied upon representations made to him is, at most, only a statement as to his own mental reaction or state of mind. While he may directly so testify, such facts as intent, belief, and reliance, are perhaps more cogently shown by the facts and circumstances surrounding a transaction and the acts of the parties thereto.”) (appeal from judgment in district court).

Respondents initially indicated that Hoyt had not used the words “piercing PRG’s corporate veil,” as they had placed those words in brackets in their answers to interrogatories that had been verified under oath by Hoyt himself. (App. 241-242.) Respondents also originally asserted, again in answers to interrogatories verified under oath by Hoyt, that Meyer was already talking with Kuller and Robinson and had called Hoyt over to participate in that conversation. (App. 241-242.) Finally, Respondents made no mention in the answers to interrogatories verified by Hoyt that Meyer had wandered off and left his client alone with Kuller and Robinson to discuss “piercing” issues. (App. 241-242.) It is well established under Minnesota law that “a party may not create an issue of material fact through its own inconsistent submissions.” Williams v.

Dayton Hudson Corp., No. C9-98-1957, 1999 WL 387337, at *1 (Minn. Ct. App. 1999) (citing Banbury v. Omnitrition Int'l, Inc., 553 N.W.2d 876, 881 (Minn. Ct. App. 1995)).

The circumstances surrounding this transaction, and the conduct of the parties throughout, preclude a finding of actual reliance as a matter of law. At no stage of the settlement negotiations did Hoyt or Hoyt's attorney manifest actual reliance on Robinson's alleged representation. Hoyt's subjective, after-the-fact impressions cannot create a genuine issue of material fact regarding actual reliance on the part of Respondents where there is no evidence of such reliance in the Settlement Agreement, which indisputably contains no reference whatsoever to any alleged representation made by Robinson. Even Meyer, Hoyt's attorney—the negotiator and the drafter of the Settlement Agreement—denied reliance on (or even hearing or being informed of) any such representation, and could testify to no indications of actual reliance on the part of his client. (App. 227, Meyer Dep. at 42:6-43:19.)

The terms of the Settlement Agreement further undermine Respondents' claim of actual reliance. The parties clearly intended to memorialize their entire agreement in the written document. The Settlement Agreement contains an integration clause, which disclaims reliance on extrinsic representations by expressly providing that “[t]his Agreement constitutes the full agreement of the parties concerning its subject matter.” (App. 246-247, Settlement Agreement at ¶ 9.) The lack of a contractual term memorializing the alleged piercing-the-veil representation is also noteworthy because the Settlement Agreement specifically reserves two other claims against PRG for (1) any fraudulent transfers and (2) any fraudulent misrepresentation of financial statements —

provisions that reflect attorney Meyer's and Hoyt's concerns regarding PRG's potential liability. (App. 206, Hoyt Dep. at 119:14-18; App. 246, Settlement Agreement at ¶ 7.)

Significantly, Hoyt testified that he understands settlement agreements are contracts, and he believes that all material terms of the parties' agreement should be put in writing as part of the written contract in a settlement agreement just as in any other agreement. (App. 194-195, Hoyt Dep. at 24:5-26:14.) Meyer testified that he, too, makes it a practice to put all of the material terms of an agreement in writing. (App. 224, Meyer Dep. at 8:2-13.) In the absence of any evidence purporting to explain this deviation from Hoyt and Meyer's standard practices, no reasonable jury could conclude that Hoyt actually relied on Robinson's alleged representations.

Thus, the undisputed evidence demonstrates that neither Hoyt nor Hoyt's attorney manifested through their conduct any actual reliance upon Robinson's alleged representations in the Settlement Agreement. It is not enough to claim actual reliance after the fact, when all the undisputed evidence establishes no such reliance. The record easily overcomes Hoyt's subjective and wholly unsupported assertions of actual reliance, especially in light of the fact that Hoyt's version of this alleged conversation has changed over time. Although the Court of Appeals did not expressly reach this argument, this Court should affirm the District Court's conclusion that Respondents failed to establish actual reliance as a matter of law.

IV. THE COURT OF APPEALS ERRED IN CONSTRUING RESPONDENTS' COMPLAINT TO ALLEGE A CAUSE OF ACTION FOR RESCISSION OF THE ENTIRE AGREEMENT.¹⁰

Notwithstanding that (1) a claim for partial rescission is barred as a matter of well-established Minnesota law and (2) Respondents' Complaint seeks rescission only of paragraph 7 of the Settlement Agreement, which contains the release of PRG, rather than rescission of the Settlement Agreement in its entirety (App. 62; App. 313), the Court of Appeals held that Respondents had adequately alleged a cause of action for rescission of the entire agreement. 716 N.W.2d 366.¹¹ This Court should reverse the Court of Appeals' decision because, in light of Respondents' procedural maneuvering, its interpretation of Respondents' Complaint is unjustifiable even under a liberal construction of the pleadings. Respondents have only pleaded partial rescission and have only sought partial rescission, which is relief that is not permitted under Minnesota law.

¹⁰ Sections IV and V address critical issues which, while not expressly raised in Appellants' Petition for Review, bear directly on the viability of Respondents' claims. This Court has noted that a petition for review, which is subject to a maximum length of five pages, Minn R. App. P. 117, subd. 3, provides "limited opportunity for discussion of multiple issues" and that the Rules of Civil Appellate Procedure imply "that the art of advocacy is better served by focusing the argument on the issue which best satisfies the criteria for review." Hapka v. Paquin Farms, 458 N.W.2d 683, 686 (Minn. 1990). Therefore, "unless the order granting review specifically limits the issues," this Court "customarily allow[s] parties considerable latitude in their presentation of the case." Id. The order granting Appellants' Petition for Review did not limit the issues (App. 415-416), and the issues addressed in Section IV and V, while of critical importance to the resolution of this case, are fact-specific to the pleadings and would not present as strong a case for this Court's discretionary review. Thus, this Court should resolve these issues on appeal.

¹¹ As a consequence of this holding, the Court of Appeals also reversed the District Court's dismissal of Respondents' veil-piercing claim against PRG on this separate ground. 716 N.W.2d at 376.

The Court of Appeals erred in adopting the federal magistrate judge's liberal construction of Respondents' pleading on a Rule 12(b)(6) motion to dismiss, rather than relying on the state trial court's assessment of the complaint presented by Respondents after remand. 716 N.W.2d at 375-76; Ayres v. Wiswall, 112 U.S. 187, 190-91 (1884) ("It will be for the state court, when the case gets back there, to determine what shall be done with pleadings filed and testimony taken during the pendency of the suit in the other jurisdiction."). Unlike the federal magistrate judge, who issued his report and recommendation back in October 2003 (App. 388-400), the District Court witnessed firsthand the procedural contortions engaged in by Respondents in state court.

The District Court noted that Respondents' "complaint focuses on the rescission of a particular portion of the settlement agreement," and held that Respondents "cannot seek partial rescission of the agreement" under Minnesota law. (App. 387.) Significantly, even after the District Court characterized the Complaint as pleading only partial rescission, Respondents never bothered to file their revised First Amended Complaint of December 22, 2004, which would have corrected the problem.

The Court of Appeals' liberal construction of Respondents' pleadings is unwarranted where Respondents were on notice for more than 18 months of Appellants' contention that their pleadings and claim for relief were legally infirm and the corresponding need to amend their pleadings to allege a cause of action for rescission of the entire Settlement Agreement, yet (even after moving for and receiving leave to amend) ultimately decided not to file an amended complaint. After receiving leave to amend, Respondents proposed to modify their rescission claim in pleadings that sought

“an order stating that the Settlement Agreement (including but not limited to ¶ 7) is null and void.” (App. 343.) Although a “courtesy copy” of the revised First Amended Complaint was provided to the District Court “for [the court’s] review” on December 22, 2004, Respondents decided not to serve and file these pleadings. (App. 329-330.) Because Respondents failed to amend the prayer for relief in a properly filed pleading, the complaint stated a claim only for partial rescission.

Moreover, even if Respondents had repleaded, they have never sought and can never attain anything more than partial rescission. Respondents cannot return all of the benefits they received under the Settlement Agreement, such as the right of early entrance to build out the premises to re-lease them. Thus, this is, at best, a case of partial rescission, because the impossibility of restoring the status quo ante precludes a claim for rescission under Minnesota law. Carlson v. Segog, 60 Minn. 498, 500, 62 N.W. 1132, 1133 (1895) (Plaintiff “was not in a position to rescind, as the parties could not be placed in statu quo.”); Hatch v. Kulick, 211 Minn. 309, 310-311, 1 N.W.2d 359, 360 (1941) (“Rescission abolishes the contract and all its incidents. . . . What remains is a legally imposed obligation of the parties, each to the other, to restore the status quo ante.”).

This Court should therefore affirm the district court’s dismissal of the rescission claim because there is no such thing as partial rescission under Minnesota law. “Rescission as a general rule must be exercised in toto and is applied to the contract in its entirety with the result that what has been done is wholly undone and no contract provisions remain in force to bind either of the parties.” Merickel v. Erickson Stores Corp., 255 Minn. 12, 16, 95 N.W.2d 303, 306 (1959); see also Prince v. Sonnesyn, 222

Minn. 528, 536, 25 N.W.2d 468, 473 (1947) (“a party cannot repudiate a contract or compromise so far as its terms are unfavorable to him and claim the benefit of its residue”) (quoting 12 Am. Jur. Contracts § 444).

The situation in this case exemplifies why partial rescission is disfavored: Respondents seek to rescind only that portion of the Settlement Agreement that prevents them from bringing suit against PRG. It is true that Respondents offered to return the consideration received under the agreement. However, Respondents have already reaped benefits from other terms of the Settlement Agreement, such as retaking possession of (and re-leasing) the premises before the end of the lease term, and gaining immediate access to part of the leased premises to build it out. (App. 245-246, Settlement Agreement ¶¶ 1-2.) This Court should not permit Respondents to pinpoint, through partial rescission, only those portions of the Settlement Agreement it no longer likes and rescind only those. That would seriously undermine the finality of settlements.

V. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DISMISSING RESPONDENTS’ CLAIMS WITH PREJUDICE.

Respondents asked the District Court to enter final judgment so they could take an immediate appeal as a matter of right. Based on Respondents’ general request—which made no reference to Counts IV and V, or dismissal without prejudice—the District Court acted well within its discretion by entering the Amended Order for Judgment that dismissed with prejudice all claims that were brought or could have been brought by Respondents. Only after this dismissal with prejudice did Respondents note their intent to dismiss Counts IV and V without prejudice pursuant to Minnesota Rule of Civil

Procedure 41.01(a). Notwithstanding Respondents' after-the-fact change of heart, the District Court properly exercised its discretion to dismiss Counts IV and V, claims Respondents had asserted and litigated in the District Court proceedings, in its Amended Order for Judgment.

Where plaintiff requests a dismissal, the matter is entirely discretionary with the court. Willard v. Max A. Kohen, Inc., 202 Minn. 626, 628, 279 N.W. 553, 554 (1938). Moreover, the District Court has wide discretion in determining whether dismissals shall be with or without prejudice. Falkenstein v. Braufman, 251 Minn. 444, 452, 88 N.W.2d 884, 889 (1958); Holleran v. W. Oil & Fuel Co., 187 Minn. 490, 492, 246 N.W. 23, 24 (1932). Accordingly, this Court should apply an abuse of discretion standard in reviewing the District Court's ruling in this regard.

Minnesota courts recognize that issues not raised in a pleading can be litigated by consent. Roberge v. Cambridge Co-op. Creamery Corp., 234 Minn. 230, 233-34, 67 N.W.2d 400, 403 (1954) ("Where a party fails to take advantage of [Rule 15's procedure for amending pleadings], he is bound by the pleadings unless the other issues are litigated by consent. Clearly relief cannot be based on issues that are neither pleaded nor voluntarily litigated."); Great Am. Ins. Co. v. Golla, 493 N.W.2d 602, 605 (Minn. Ct. App. 1992) ("A party is bound by its pleadings unless other issues are litigated by consent").

The claims that Respondents seek to keep alive are claims that were the subject of consensual litigation and discovery in the District Court. After receiving Appellants' motion for summary judgment on their original Complaint, Respondents moved to amend

their pleadings to add new claims for agency and fraud/negligent misrepresentation. On December 15, 2004, Judge Gomez advised the parties that she intended to permit Respondents to add the new claims. (App. 253-255, 259-262, 268.) Having received this clear message from the District Court that leave to amend would be granted, Respondents actively engaged in discovery on those claims. Indeed, by April 20, 2005, the District Court contemplated that the parties had conducted whatever discovery was necessary with respect to Counts IV and V and, therefore, issued a Memorandum Order formally granting leave to amend to add those claims and setting a trial date of June 20, 2005. (App. 24.)

However, following the District Court's issuance of its orders granting Appellants' motion for summary judgment on the original claims and granting Respondents' motion to amend, Respondents decided to forego further litigation of the new claims and to pursue an immediate appeal instead. Respondents therefore requested the District Court to enter final judgment to facilitate an immediate appeal. Based upon Respondents' request for entry of a full, final, and immediately appealable judgment, the District Court acted well within its discretion in dismissing Counts IV and V, claims that had been voluntarily, consensually, and extensively litigated.¹² Further, the District Court properly exercised its discretion under either Minnesota Rule of Civil Procedure 41.01(b) or 41.02(a) to dismiss these claims with prejudice.

¹² It is also worth noting that in Count IV, the "agency" claim, Respondents sought an order stating that as principal, PRG is responsible for Haas and Entolo's debts. (App. 344.) This claim is clearly barred by the terms of PRG's release under the Settlement Agreement. (App. 246, Settlement Agreement ¶ 7.)

The Court of Appeals held that the District Court abused its discretion in dismissing Counts IV and V with prejudice because the Amended Order for Judgment included the express determination required by Minnesota Rule of Civil Procedure 54.02, which permits a trial court “to direct the entry of a final judgment as to one or more but fewer than all of the claims or parties.” 716 N.W.2d at 377; Minn. R. Civ. P. 54.02. Yet, given the nature of the new claims, a Rule 54.02 determination would have constituted an abuse of discretion. Under Rule 54.02, a trial court has discretion to certify a partial appeal “if the parties or claims are clearly separable and no prejudice would result from appeal.” Novus Equities Corp. v. EM-TY Partnership, 381 N.W.2d 426, 428 (Minn. 1986) (quoting 2A D. Herr & R. Haydock, *Minnesota Practice* 8 (1985)). As Respondents themselves noted in their Motion to Amend the Complaint, “these claims are closely related to the current claims” for breach of contract/piercing PRG’s corporate veil, rescission, and fraudulent transfer. (App. 301.) Appellants would therefore suffer prejudice from being forced to litigate a piecemeal appeal on essentially inseparable claims.

Further, even if this Court holds that the District Court did not abuse its discretion in making a Rule 54.02 determination, the Court of Appeals offered no precedent or rule indicating that the District Court abused its discretion in also dismissing Respondents’ voluntarily litigated claims with prejudice.

Principles of judicial economy and concern for “disruption, delay, and expense to litigants” militate against piecemeal review. Emme v. C.O.M.B., Inc., 418 N.W.2d 176, 178 (Minn. 1988); First Nat’l Bank of Windom v. Rosenkranz, 430 N.W.2d 267, 268

(Minn. Ct. App. 1988). When Respondents sought an entry of final judgment on their claims for the purposes of taking an immediate appeal, they were not entitled to hold back certain voluntarily litigated claims and preserve the prospect of litigating those claims at some later time of their own choosing. Respondents are prohibited from arguing that they were entitled to “a tongue-in-cheek dismissal” of these claims by arguing they were dismissed without prejudice under Rule 41.01(a) while, at the same time, seeking review of a final judgment that is appealable as a matter of right. Minn. Pet Breeders, Inc. v. Schell & Kampeter, Inc., 41 F.3d 1242, 1245 (8th Cir. 1994).

As a final point, it again bears noting that Respondents did not seek relief from the District Court to modify the order and judgment under either Minnesota Rule of Civil Procedure 60.01 or 60.02. Rather, in another unusual procedural move, Respondents’ attorney simply wrote a letter to Judge Gomez indicating that Respondents believed the dismissal of Counts IV and V was “an error.” The letter also stated Respondents’ (heretofore unexpressed) desire to dismiss Counts IV and V without prejudice pursuant to Rule 41(a) and requesting (without invoking Rule 60) that the court amend its order to that effect. Had Respondents moved promptly under the Minnesota Rules of Civil Procedure, they may have been able to proceed to trial on Counts IV and V on June 20, 2005 had they actually wanted to do that. However, they decided instead to accept the judgment as entered so they could immediately appeal from the District Court as a matter of right. Having elected to forego relief under either Rule 60.01 or 60.02 in favor of seeking immediate review, Respondents should not be permitted to raise this as an issue on appeal.

CONCLUSION

For the above-stated reasons, Appellants respectfully request that this Court reverse the decision of the Court of Appeals and affirm the District Court's entry of judgment in favor of Appellants.

Respectfully submitted,

Dated: September 22, 2006

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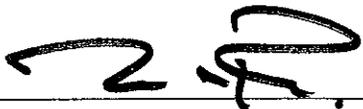
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CERTIFICATE OF COMPLIANCE

Pursuant to Minnesota Rule of Civil Appellate Procedure 132.01 subd. 3, the undersigned hereby certifies, as counsel for Appellants, that this brief complies with the type-volume limitation as there are 13,473 words of proportional space type in this brief. This brief was prepared using Microsoft Word 2002.

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