

No. A-05-1293

STATE OF MINNESOTA  
IN SUPREME COURT

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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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**RESPONDENTS' BRIEF**

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WINTHROP & WEINSTINE, P.A.  
Thomas H. Boyd, No. 200517  
225 South Sixth Street, Suite 3500  
Minneapolis, MN 55402-4629  
Telephone: (612) 604-6400

Attorneys for Appellants

DORSEY & WHITNEY, LLP  
George C. Eck, No. 0025501  
Andrew Holly, No. 308171  
50 South Sixth Street, Suite 1500  
Minneapolis, MN 55402  
Telephone: (612) 340-2600

Attorneys for Respondents

AKIN GUMP STRAUSS HAUER  
& FELD LLP  
Randall L. Sarosdy (pro hac vice pending)  
300 West 6th Street, Suite 2100  
Austin, TX 78701-3911  
Telephone: (512) 499-6200

Rex S. Heinke (pro hac vice pending)  
Gia Kim (pro hac vice pending)  
2029 Century Park East, Suite 2400  
Los Angeles, CA 90067  
Telephone: (310) 229-1000

Attorneys for Appellant Production Resource Group, LLC

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## STATEMENT OF THE ISSUES

1. Did the unanimous Court of Appeals correctly determine that Steve Hoyt justifiably relied upon Karl Robinson's false factual representations that induced Hoyt to agree to a release for PRG?

The Court of Appeals concluded that the fraudulent statements made by Robinson were actionable factual statements that Hoyt reasonably relied upon.

*Apposite Authority:*

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

Ganley Bros. v. Butler Bros. Bldg. Co., 212 N.W. 602 (Minn. 1927);

L & H Airco, Inc. v. Rapistan Corp., 446 N.W.2d 372, 380 (Minn. 1989).

Restatement (Second) of Torts at § 545(2).

2. Should This Court Examine Issues That Were Not Raised In PRG's Petition For Review And Have No Applicability Outside This Particular Case, Including Whether Hoyt Actually Relied Upon Robinson's Statements And Two Procedural Issues?

The Court Of Appeals had no reason to address this question.

*Apposite Authorities*

In re GlaxoSmithKlein PLC, 699 N.W.2d 749, 757 (Minn. 2005);

Anderly v. City of Minneapolis, 552 N.W.2d 236, 239-40 (Minn. 1996);

Northwest Racquet Swim & Health Clubs, Inc. v. Deloitte & Touche, 535 N.W.2d 612, 613, n. 1 (Minn. 1995).

3. Did The Unanimous Court Of Appeals Correctly Construe Hoyt's Complaint To Seek Total Rescission Of The Settlement Agreement When It Offered To Return All Consideration Received Under The Agreement?

The Court of Appeals recognized that Hoyt's Complaint properly sought full rescission of the entire Settlement Agreement

*Apposite Authorities:*

Minn. R. Civ. P. 8;

Serr v. Biwabik Concrete Aggregate Co., 278 N.W.2d 355, 366 (Minn. 1938);

Beck v. Spindler, 99 N.W.2d 684, 685 (Minn. 1959);

MCC Investments v. Crystal Properties, 415 N.W.2d 908, 911 (Minn. Ct. App. 1987).

4. Did The Unanimous Court Of Appeals Correctly Determine That The District Court Erroneously Dismissed With Prejudice Claims That Hoyt Never Filed?

The Court of Appeals recognized that the district court did not and could not dismiss claims with prejudice that Hoyt never filed.

*Apposite Authority:*

Minn. R. Civ. P. 41.

## STATEMENT OF THE FACTS

PRG's attempts to paint the Court of Appeals' decision as a drastic departure from settled law and a threat settlement agreements holds no merit. Looking past PRG's dire, and exaggerated, rhetoric, the Court of Appeals decision was a carefully reasoned application of long-standing precedent. Simply put, a representative of PRG made a false factual statement to Steve Hoyt. Mr. Hoyt – who had no reason to believe this statement was false – relied upon this statement in deciding to grant PRG a release of claim. When he found out that this statement was untrue, he sued to rescind the contract.

This is a garden variety fraud claim, materially indistinguishable from the thousands of fraud claims prosecuted over the years. The Court of Appeals well-reasoned decision should be affirmed.

### **I. The Parties And The Lease Agreement.**

Appellees Hoyt Properties, Inc. and Hoyt/Winnetka, L.L.C. (collectively “Hoyt”) are Minnesota corporations, both of which are owned and operated by Steven Hoyt. (Complaint at ¶ 1). Mr. Hoyt is a businessman active in the Twin Cities’ real estate business, as well as a non-practicing attorney.<sup>1</sup> Respondent Haas Multiples, Inc. (“Haas”) is a Minnesota corporation that was active in the trade

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<sup>1</sup> See Affidavit of Tom Boyd in Support of Defendants Motion for Summary Judgment (“Boyd Affidavit”) at Ex. E, 6:25-7:4.

show business.<sup>2</sup> Appellant Production Resource Group (“PRG”) is Haas’ parent. (App. 105-06) (all references to the Appendix refer to Respondents Appendix, unless otherwise noted).

In late 2001, Hoyt entered into a ten-year lease agreement (the “Lease”) with Haas. Shortly thereafter, this Lease was assigned to Entolo, Inc.,<sup>3</sup> a new corporation PRG created as Haas’ successor.<sup>4</sup> (Because Entolo is Haas’ successor, and because they are jointly liable under the Lease, they will hereinafter be collectively referred to as “Entolo.”). Steve Hoyt spent approximately \$1.3 million of his own money to make tailor-made tenant improvements to fashion the leased space to Entolo’s requirements. (App. at 49). In return, Entolo was expected to make lease payments of approximately \$10 million over ten years. (App. at 34; Complaint at Ex. A).

Entolo’s first Lease payment was due in October, 2002. But as discussed in greater depth *infra*, in mid-2002 PRG decided that Entolo no longer fit into its long-term plans, in part because its Lease payments were too high. PRG began to liquidate Entolo at this time, using most of its assets to pay PRG’s debt. As Entolo spiraled toward liquidation, it failed to make its third Lease payment in December

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<sup>2</sup> See Complaint at ¶1; Answer at ¶1.

<sup>3</sup> See Complaint at ¶¶3-4, Ex. A, App. at 34-35.

<sup>4</sup> Id.

2002.<sup>5</sup> In late 2002 and early 2003, PRG completed liquidating Haas and Entolo, using their remaining assets and receivables to pay down PRG debt. (App. 105-06). Neither Haas nor Entolo is currently a functioning corporation.

**II. Following Entolo's Liquidation By PRG, Bruce Knight Files A Lawsuit Against PRG And Entolo.**

When the Lease payments began in October, 2002, Steve Hoyt was unaware of PRG's plans to liquidate Entolo and drive it out of business. (App. at 105, 113-114). PRG (which controlled all of Entolo's cash and receivables, see infra p. 10-15) decided to stop paying many of Entolo's creditors, other than those directly involved in the liquidation process. (Id. at 105-106, 113-114).

One of these unpaid creditors was Bruce Knight. Entolo owed Mr. Knight approximately \$750,000 due to be paid in October, 2002. (App. at 183-189). PRG decided not to allow Entolo to pay Mr. Knight the sums he was owed.

As a result, in early December 2002, Mr. Knight filed and served a complaint in Minnesota state court raising a breach of contract claim against Entolo, as well as a piercing the corporate veil claim against PRG seeking to hold it liable for Entolo's debts. (App. at 183-89). It alleged that PRG took all of Entolo's cash, forcing Entolo to send all of its receivables and revenue to PRG. (App. at 183-89). The Complaint further alleged that PRG interfered with and controlled the details of Entolo's daily business and financial affairs— hiring and

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<sup>5</sup> See Complaint at ¶ 4, App. at 195.

firing key Entolo employees, controlling Entolo's budget and its strategic decisions, taking all of Entolo's money and receivables, not following proper corporate formalities, using Entolo employees and resources for PRG business, and otherwise treating Entolo as a mere division and instrumentality of PRG. (Id. at 187-89). When in late 2002 Entolo's debts became too significant because of PRG's actions, the Complaint alleged PRG forced Entolo to shut down its business so Entolo's remaining creditors need not be paid. (Id. at 187-88). PRG then liquidated Entolo's remaining assets and took its money. (Id. at 187-88).

This Complaint was served upon PRG's general counsel, Robert Manners, who retained Karl Robinson of Winthrop & Weinstine to represent both PRG and Entolo, all before the crucial settlement conference with Steve Hoyt on December 26, 2002 (see below). (App. at 73-74). PRG recognized that it had a serious problem – a \$10 million problem – if Hoyt discovered that he had a viable claim to hold PRG liable for Entolo's debts and obligation under a piercing the corporate veil theory.

### **III. Hoyt, Entolo, And PRG Enter Into A Limited Settlement Agreement Based Upon A False Representation By PRG's Attorney.**

Steve Hoyt knew none of these facts when Entolo defaulted by failing to make its third monthly rental payment on December 1, 2002. (App. at 36, 195). After this default, Hoyt filed an unlawful detainer complaint seeking to evict Entolo from the leased premises. (App. at 36, 195). This claim was set for a

hearing on December 26, 2002. (App. at 36, Boyd Affidavit at Ex. E, 82:10-17).

Karl Robinson would represent both Entolo and PRG during this hearing, and PRG was not a party to the proceedings.

Testimony from Karl Robinson established that he had reviewed the *Knight* Complaint along with Robert Manners prior to this hearing. (App. at 74, 77). He went to the Courthouse on December 26, 2002 with a plan to resolve PRG's potential \$10 million problem by securing a release for PRG, even though PRG was not a party to the Lease with Hoyt.

At this eviction hearing, Steve Hoyt was present with his attorney Michael Meyer. (App. at 64). Robinson and another attorney from Winthrop, Hart Kuller, represented PRG and Entolo. (Id.) Robinson and Kuller admit having discussed the piercing allegations in the *Knight* complaint prior to this hearing. (Id. at 76). When the hearing convened, the judge instructed the parties to go into the hallway and attempt to resolve the dispute.<sup>6</sup> The parties did so and came to an agreement that would allow Entolo to remain in the leased premises for a short period of time in return for a small payment. (App. at 64-65). Hoyt would retain the right to sue Entolo for the remaining \$10 million due under the Lease. (Id. at 66-67).

Once the agreement was all but complete, however, PRG's lawyers approached Meyer with a "wrinkle in the deal." (App. at 67). They informed

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<sup>6</sup> See Boyd Aff., Ex. E at 88:13-22.

Meyer that PRG also wanted a release as a part of the agreement. (Id.) Meyer brought this request to Steve Hoyt's attention. (Id.) Steve Hoyt then walked over to ask why PRG wanted this release. Mr. Kuller replied, "I suppose they don't want to get sued after the fact." (App. at 69). Mr. Hoyt responded skeptically, saying "that would be piercing the veil. I don't know of any reason why [PRG] could be liable. Do you?" (App. at 69). Hart Kuller just stared straight ahead. (Id.) He did not say a word. (Id.) Karl Robinson, however, replied, representing to Mr. Hoyt that "There isn't anything. PRG and Entolo are totally separate." (Id. at 69). To which Hoyt replied, "Well, you would know." (Id.) Mr. Hoyt walked over to Michael Meyer (who had walked away prior to this conversation) and told him it was agreeable to insert a "global" release into the settlement agreement.<sup>7</sup> (Id.) Hoyt testified that he agreed to the release based upon Robinson's representations. (App. at 69-71).

Over the next several days, Meyer worked with Robinson to draft the settlement agreement. (App. at 69). Hoyt cautioned Meyer that he did not know anything about PRG or Entolo "except what I've heard here this morning." (Id.) The final release for PRG included two "carve outs:" it allowed Hoyt to raise

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<sup>7</sup> Respondents, of course, contest the accuracy of this conversation. But they agreed that for the purposes of the summary judgment motion, they had to accept these facts as those most favorable to the Plaintiffs. See Defendants Memorandum of Law in Support of Motion For Summary Judgment at 10.

claims against PRG for fraudulent transfers and for any fraud PRG committed in describing Entolo's financials. (App. at 195-99).

Mr. Hoyt did not include a "carve out" for a piercing claim because of Robinson's representation that there was no viable piercing claim against PRG as Entolo and PRG were "totally separate." (Id. at 70-71). Hoyt saw no need to put Robinson's representation in the contract because Hoyt did not believe that an attorney would openly lie:

I mean . . . this is a small community. We tend to believe what, especially what other lawyers say, because we find ourselves not always on the same side.

And you know, at least in this city – maybe not in New York City, but at least in this city I think lawyers are pretty forthright and honest.

I certainly didn't expect that Winthrop & Weinstine or Karl Robinson or Hart Kuller were going to be a party to this agreement, but I also recognized that they knew more about PRG than anybody.<sup>8</sup>

(App. at 70).

Hoyt did not see any need to include Robinson's representation in the written settlement agreement because he relied upon Robinson's integrity. (Id.) Given the ethical duty for attorneys' to tell the truth, there was no reason to mistrust Robinson's statements. (Id.)

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<sup>8</sup> This deposition testimony has been edited to remove speaking errors. No substantive changes have been made.

But in hindsight, Hoyt would learn that Robinson “clearly knew something that he didn’t want to say.” (App. at 71).

**IV. Steve Hoyt Learns Of Robinson’s Fraud And Of PRG’s Complete Dominance Over Entolo.**

PRG would almost get away with its scheme to mislead Steve Hoyt. But a few months after this release was signed Bruce Knight contacted Steve Hoyt and informed him of the facts alleged in the *Knight* complaint. Steve Hoyt learned that Robinson and PRG had deliberately schemed to get him to sign a release in favor of PRG, and had knowingly misrepresented the extent to which PRG controlled and dominated Entolo’s affairs, siphoned its funds, and caused Entolo’s liquidation.

Discovery in the *Knight* and the Hoyt cases has revealed the overwhelming strength of Hoyt’s piercing claim.<sup>9</sup> When PRG purchased Entolo (then Haas) in 1998, it was an independent, thriving Minnesota company, essentially debt free with significant cash reserves and revenue.<sup>10</sup> To refinance a debt offering on

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<sup>9</sup> The district court’s decision in PRG’s summary judgment motion was based on the legal effect of Robinson’s statements (i.e., did Hoyt raise a valid rescission claim based upon Robinson’s statements), rather than on the strength of Hoyt’s piercing claim. PRG therefore filed its motion for summary judgment before most of the discovery was taken in this matter. Nevertheless, evidence before the district court at the time of PRG’s motion demonstrates the strength of Hoyt’s piercing claim. Moreover, United States District Court Judge Davis rejected PRG’s Motion for Summary Judgment in the *Knight* case, based (in part) on further evidence (the “*Knight* Decision”). That decision is contained in PRG’s Appendix at p. 405

<sup>10</sup> See *Knight* Decision at \* 3.

which it had defaulted, PRG entered into two loan agreements with GMAC. (App. at 8, 35. See also *Knight* Decision at \*1-\*2). The first was a \$50 million term loan, to be repaid over time like a traditional loan. (App. at 8, 35, n. 4; See also *Knight* Decision at \*1-2).<sup>11</sup> The second was a \$75 million revolving loan, which allowed PRG to request proceeds and make payments on a revolving basis. (*Id.* at 8, 35. See also *Knight* Decision at \*1-2). PRG forced Entolo to sign on as a guarantor to these loans and to pledge all of its assets to secure the loans. (App. at 8. See also *Knight* Decision at \*1-2). Entolo's management had no choice in the matter: PRG's counsel signed on Entolo's behalf.<sup>12</sup>

Under these agreements Entolo lost all control over its own assets. It was forced to send *all* receivables and *all* cash directly to PRG; PRG would then provide this money to GMAC to pay down the revolving credit loan. (App. 8-9, 100, 110-111, 104; *Knight* Decision at \*1-2).<sup>13</sup> In return, only PRG had the ability to request money from GMAC under the revolving credit loan. (*Id.* 8-9, 159-160; See also *Knight* Decision at \*1-2). Without any funds of its own, and without even a bank account, Entolo had to request every penny it needed to pay creditors and

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<sup>11</sup> See also Affidavit of Joseph Skaferowski in Support of Defendants' Motion For Summary Judgment (Skaferowski Affidavit) at 4.

<sup>12</sup> See Affidavit of Thomas Boyd In Support of Production Resource Group's Motion for Summary Judgment at Ex. A, 00792, 00910

<sup>13</sup> See also Affidavit of Francis McCloskey in Support of Defendants' Motion For Summary Judgment (McCloskey Affidavit) at ¶ 6.

employees and to expand and fund business operations from PRG. (Id. at 8-9, 57, 100, 110-111, 159-160; See also Knight Decision at 3-5). These requests occurred at weekly conference calls convened by PRG with Entolo and PRG's other corporate divisions at which PRG would dole out funds for the week.<sup>14</sup> Entolo rarely received an amount sufficient to fund its operations or pay its creditors.<sup>15</sup> (Id. at 110-111, *Knight Decision* at \*1-2). PRG thus decided what money to provide for Entolo's operation, which Entolo creditors to pay or not to pay, and generally whether to fund Entolo's business operations. (Id. at 100, 110-111. See also Knight Decision at \*1-2).. PRG treated its supposedly separate subsidiary Entolo as just another division, all to the admitted detriment of Entolo.

Around the time the GMAC agreements were finalized, PRG decided that Entolo no longer fit into its long-term plans. As a result, PRG took Entolo's cash and receivables (as required by the GMAC financing) and refused to provide an equivalent amount of cash in return. (*Knight Decision* at \*2). By doing this PRG took \$6 million more from Entolo than Entolo received from PRG during the first few months of 2002. (Id.). Entolo employees testified that PRG's siphoning of funds had a devastating effect. Entolo's inability to pay its vendors or invest in its business jeopardized and severed customer relations. (Id.) Customers fled. It got

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<sup>14</sup> See Knight Decision at 4-5.

<sup>15</sup> See Knight Decision at 5.

to the point where executives at Entolo used their personal credit cards to pay company debt in order to maintain relationships with customers and vendors.

The GMAC agreement was only one facet of PRG's complete dominance over Entolo. As PRG executives have admitted under oath, PRG operated Entolo as a mere division of PRG. (App. at 94; See also *Knight* Decision at \*2). PRG considered Entolo as merely part of one overall PRG economic unit, including various other PRG subsidiaries. (*Knight* Decision at \*2). Entolo employees routinely worked for other divisions of PRG, and executives with Entolo were interchangeable and had PRG duties. (App. at 166; *Knight* Decision at \*2). PRG and Entolo tax returns and financial documents were consolidated, and PRG represented to the world that Entolo was a part of PRG. (*Id.*) PRG controlled all aspects of Entolo's business, including but not limited to hiring, firing, salaries, layoffs, commissions, budgets, projections, etc.. (App. at 93-95, 97, 101, 104, 110-111, 146-47, 161-68). PRG's general counsel signed documents for Entolo. Entolo's board of directors did not even function: Entolo's former CEO was surprised to find out that he was a member of its board of directors; he was never invited to or attended a meeting. (App. at 161-62). Most importantly, PRG controlled all aspects of Entolo's money and capital to the detriment of Entolo and to the benefit of PRG. (App. at 105).

By 2002, PRG's siphoning of Entolo's funds had taken its toll. Entolo's reputation with its service providers and clients was impaired as a result of PRG's refusal to pay Entolo's debts. (App. at 169). (As described above, Entolo did not have any money of its own or even any control over its own incoming revenue). In part because of the significant payments due under the Lease, PRG decided in mid-2002 to liquidate Entolo. (App. at 105-06; 112-113). It terminated most of Entolo's remaining executives. (App. at 105). PRG began an aggressive campaign to collect Entolo's remaining receivables and sell its remaining inventory for PRG's benefit. (App. at 105, 112-114; See also *Knigh*t Decision \*3). The only sums PRG provided to Entolo (or its creditors) in return were those directly necessary to pay parties involved in the liquidation. (App. at 105, 112-114; See also *Knigh*t Decision \*3). This campaign netted PRG over \$1 million over the last months of 2002. (App. at 105, 112-114; *Knigh*t Decision \*3). At the same time, Entolo's remaining business was ruined and most of its creditors were not paid. (App. at 105-06). Then, in December 2002, Entolo would fail to make its lease payment to Hoyt.

This evidence demonstrates that PRG treated Entolo as a mere instrumentality and did not respect Entolo's existence as a separate legal entity. This evidence is so significant that United States District Court Judge Michael Davis recently rejected PRG's motion for summary judgment in the *Knigh*t case,

holding there are genuine issues of material fact on Mr. Knight's piercing claim.

(See Addendum).

V. **The Court Of Appeals' Affirms Hoyt's Claim To Pierce PRG Corporate Veil.**

When Steve Hoyt learned of the facts alleged in the *Knight* complaint, he recognized that Robinson's representations were false, and that PRG and Robinson had planned an elaborate scheme to get him to agree to the release of PRG. This scheme, if successful, would save PRG from a \$10 million liability.

Hoyt subsequently commenced an action against PRG and Entolo, raising two relevant claims:

Count I of the Complaint alleged two separate claims. It first alleged a breach of contract claim against Entolo for breach of the Lease Agreement. It second alleged a claim against PRG, seeking to hold it liable for Entolo's debts and obligations under a piercing the corporate veil theory. (Complaint at Count I).

Count II of the Complaint sought to rescind the settlement agreement. This count alleged that the agreement was induced by Robinson's fraud, and was therefore void. (*Id.* at Count II). It sought to rescind the settlement agreement in full, and offered to return all consideration received under this agreement.

PRG removed this action to the United States District Court and filed a motion to dismiss, arguing that the statements Hoyt alleged Robinson made were non-actionable legal opinions. United States Magistrate Judge Lebedoff rejected

this argument, holding that Robinson's representations "likely amounted to an implied assertion that facts existed justifying PRG's conclusion of law regarding the viability of a veil piercing claim." (App. at 90-92). Relying on such Minnesota cases as Miller v. Osterlund, 191 N.W 919, 919 (Minn. 1929), the Court held that Robinson's assertions contained a sufficient factual thrust to be actionable. (Id.).

The case was then remanded back to state court, and, following discovery, PRG moved for summary judgment on two theories. First, it again argued that Robinson's representation were legal statements and were therefore non-actionable. Second, it argued that Hoyt's reliance was not justifiable. The district court agreed with both arguments.

Hoyt then filed a timely appeal, and the Court of Appeals reversed the district court's decision. It concluded, based upon cases such as Miller, that Robinson's statement that there were no piercing "issues" could reasonably be interpreted to imply "knowledge of facts that substantiated the representation." (Hoyt Decision at 8) (cited to hereinafter as "Hoyt p. \_\_\_"). The court further concluded that Robinson's representation that PRG and Entolo were "totally separate" was a "purely factual assertion about the relationship between PRG and Entolo." (Hoyt p. 10).

The court also concluded that Hoyt justifiably relied upon Robinson's statement. Relying on cases such as Speiss v. Brandt, 41 N.W.2d 561, 566 (Minn. 1950), the court recognized that a party to a business transaction has the right to rely upon a representation, unless its falsity is obvious to him. And there was nothing in the record that indicated that Hoyt's business or other experience made Robinson's representations obviously (or even possibly) false. (Hoyt p. 11). After all, "[u]ltimately, reliance is a jury question."

PRG then filed a petition for review to this court, which was granted.

### **SUMMARY OF ARGUMENT**

The heart of this appeal is Hoyt's attempt to rescind the settlement agreement induced by Robinson's fraud. The evidence below revealed that PRG and its attorney Karl Robinson knew about Entolo's massive debt to Hoyt. They also knew about the allegations in the Hoyt complaint, and that if Steve Hoyt learned about these allegations, PRG faced \$10 million in liability to Hoyt. PRG and Robinson therefore schemed to induce Steve Hoyt into signing a release in PRG's favor. And when Mr. Hoyt expressed skepticism about a release and questioned whether there were any facts that supported a good faith piercing claim against PRG, Robinson abandoned responsible advocacy and represented to Hoyt that there were no issues and that PRG and Entolo were "totally separate."

PRG's arguments not only misstate the law and would require the court to engage in impermissible fact finding, if adopted they would also ratify and encourage this fraud. They argue that Robinson's statements amount to non-actionable "legal conclusions" even in the face of decades of Minnesota law holding that so-called "legal conclusions" can be actionable. Indeed, as the Court of Appeals and United States Magistrate Judge Lebedoff concluded, Robinson's statements were direct factual statements. PRG also wrongly asserts that Hoyt was not justified in relying upon these statements. But a long string of Minnesota cases recognize that a party can rely upon oral statements inducing a written contract.

PRG's arguments would wrongly reward fraudulent behavior as well as overrule decades of well-settled precedent. The Court of Appeals' decision should be affirmed.

### **ARGUMENT**

#### **I. The Court Of Appeals Correctly Concluded That Robinson's Statements To Steve Hoyt Were Actionable.**

The Court of Appeals correctly relied on decades of precedent in holding that a reasonable jury could find that Robinson's statements to Steve Hoyt "asserted or implied [a] knowledge of facts" not known to Mr. Hoyt. (Hoyt p. 8).

As noted earlier, the essential facts are straightforward. Steve Hoyt balked at Robinson's request for a release for PRG because Hoyt would be giving up a claim for "piercing the veil." Hoyt told Robinson he was uncomfortable doing so

because he “did not know of any reason why [PRG] could be liable. Do you?” Robinson replied to this direct question with a direct answer: “There isn’t anything. PRG and Entolo are totally separate.” To which Hoyt replied, “Well, you would know.” Based upon Robinson’s false representation, Hoyt agreed to the release. See supra p. 7-8.

The Court of Appeals recognized that Robinson made two separate representations. First, he responded to Mr. Hoyt’s question asking whether there was “any reason” why PRG might be liable for Entolo’s debts under a piercing the corporate veil theory by telling him there was not “anything” to such a claim. This amounted to a representation that there was no viable, good faith piercing claim against PRG. Second, he went on to represent that, as a factual matter, PRG and Entolo were operated as “totally separate” corporations.

The court also recognized that each of these representations is actionable. The representation that PRG and Entolo were “totally separate” was a straightforward representation of fact that supported Hoyt’s rescission claim. And while the representation that there was not “anything” to a piercing claim may have been couched in legal terms, it nevertheless “implied a knowledge of facts that substantiated the representation.” (Hoyt, p. 8). The court therefore concluded that both Robinson’s statements were actionable.

PRG's response raises a good deal of irrelevant minutia to confuse what is a simple application of existing law. Robinson's statements are actionable under existing law because they asserted and implied factual information: "that, as a matter of fact, PRG did not dominate Entolo's affairs and allowed Entolo to operate as a distinct and separate corporate entity." (Hoyt p. 10). After all, "[w]hether Hoyt had a viable veil-piercing claim depended not on legal abstractions, but on whether PRG and Entolo functioned as a single business entity as a matter of fact." (Id.) Steve Hoyt therefore justifiably relied upon these factual representations.

As should be expected, PRG suggests that a series of apocalyptic events will follow from the Court of Appeal's decision. Disgruntled parties will now have a "roadmap" for rescinding settlement agreements. But this is mere rhetoric. The Court of Appeals' decision protects the settlement bargaining process by ensuring that it is fair and honest. It allows parties to exchange promises and representations (without onerous fact checking or analyzing whether the statement is a "legal conclusion"), and be secure in the knowledge that they have a remedy if the representations turn out to be fraudulent.

At bottom, PRG's position is that it should be allowed to get away with fraud on a technicality. There is nothing in precedent, the law, or equity that

requires or supports such a perverse result. The Court of Appeals decision should be affirmed.

A. The Court Of Appeals Correctly Characterized Robinson’s Statement That There Was Not “Anything” To A Piercing Claim As Actionable.

Robinson’s first statement – that there was not “anything” to a piercing claim – is an actionable statement. A growing number of courts and commentators have abandoned the rule that representations of law are not actionable, and there is no reason for this Court to continue to hold to a doctrine that no longer has any vitality. More importantly, the Court of Appeals recognized that even under existing precedent, Robinson’s statement is actionable because it implies a knowledge of facts that supports his ultimate legal conclusion. This decision should be affirmed.

I. *This Court Should Abandon The “Old Canard” That Statements Of Law Are Not Actionable.*

Although the Court of Appeals’ decision was based upon well-established precedent stretching back over a century, there is a alternative basis on which to resolve this case. This Court should abandon whatever remains of the old, and as a practical matter overruled, rule that a party cannot commit fraud through so-called “statements of law.”<sup>16</sup>

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<sup>16</sup> Because of existing precedent, neither the district court nor the Court of Appeals had the authority to adopt this argument. Nevertheless, Hoyt has consistently presented this argument below. See Hoyt’s Brief To Court of Appeals at n. 6.

The rule that “statements of law” are not actionable stems from the “old canard” that everyone is “conclusively presumed to know the law.” See 2 Harper, James & Grey, The Law of Torts, § 7.8, p. 431 n.27 (1988). Commentators have criticized this distinction between “statements of law” and “statements of fact” as a “useless duffel of an older and more arbitrary day,” and recognize that statements of law “may be intended and understood” as statements of fact. W. Prosser, The Law of Torts, § 109, at 725 (4th ed. 1971).

As a result of the growing recognition that the distinction between “statements of law” and “statements of fact” is ephemeral at best, modern courts have moved to abandon it entirely. E.g., Nelson v. Taff, 499 N.W.2d 685, 688 (Wis. 1993); Lawyers Title Ins. Corp., Pokraka, 595 N.E.2d 244 (Ind. 1992); Bourland v. Huffhines, 244 S.W. 847 (Tex. Civ. App. 1992); Peterson v. Auvel, 552 P.2d 538 (Or. 1976). Instead, these courts and authorities have examined whether the statement satisfies the traditional elements of a fraud claim by directly or indirectly communicating false factual information. Nelson, 499 N.W.2d at 688-89; Prosser, The Law of Torts, § 107 at 725 (“The present tendency is strongly in favor of eliminating the distinction between law and fact. . .”). The authors of the Restatement of Contracts and Torts have adopted the same rule.<sup>17</sup>

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<sup>17</sup> The authors of the Restatement (Second) of Contracts and Torts have abandoned the artificial distinction between so-called “statements of fact” and “statements of law,” and have instead focused on whether the statement falsely conveyed factual

In fact, although some Minnesota decisions have indicated that “statements of law” are not actionable, as a practical matter Minnesota courts have already adopted this exact distinction. As discussed *infra*, Minnesota courts have long held that ‘statements of law’ are actionable if they imply a knowledge of facts that support the legal conclusion. E.g., Miller v. Osterlund, 191 N.W. 919, 919 (Minn. 1923); Willmar Unclaimed Freight, Inc. v. Holmes, 2005 WL 1669919 at \* 2- \*3 (Minn. App. 2005). In essence, this is the distinction spoken of by authorities such as Prosser, the authors of the Restatement, and cases such as Nelson: does the statement in question communicate false factual information?<sup>18</sup> There is no policy reason why parties should be able to mislead another successfully and then escape liability on a meaningless technicality. After all, “courts should not be too indulgent of defendants who have made” knowingly false statements. See Miller, 191 N.W.2d at 919.

Therefore, this Court should abandon the old, arbitrary, distinction between statements of “law” and “fact,” and instead focus on the key question: are the

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information. For example, the Restatement (Second) of Contracts states that “[i]f an assertion is one as to a matter of law, the same rules that apply in the case of other assertions determine whether the recipient is justified in relying on it.” Restatement (Second) of Contracts at § 170. See also e.g., Restatement (Second) of Torts at § 545 (2nd Ed. 1977).

<sup>18</sup> Prosser, The Law Of Torts, § 109 p. 760 (“Since it is obvious that representations of law almost never are made in such a vacuum that supporting facts are not to be ‘implied’, it would seem that very little can be left of the ‘general rule.’”).

traditional elements of a fraud claim satisfied? The Court of Appeals' decision should be affirmed on this basis.

2. *The Court Of Appeals Correctly Characterized Robinson's Representation That There Was Not "Anything" To A Veil Piercing Claim As Conveying Factual Information.*

Even if this Court decides to decide this case under existing precedent, the Court of Appeals correctly concluded that Robinson's first statement was actionable.

As the Court of Appeals recognized, Minnesota courts have long held that "statements of law that imply knowledge of facts are actionable." (Hoyt Decision at 8). E.g., Miller v. Osterlund, 191 N.W. 919, 919 (Minn. 1923) ("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."); Simonson v. BTH Properties, 410 N.W.2d 458, 461 (Minn. 1987); Restatement (Second) of Torts, § 545 (1977).<sup>19</sup> Put another way, a mixed question of law and fact is actionable if the factual assertions on which the legal conclusion is based are untrue. Nodak, 533 F.2d at 406-407 (noting the actionable statement in question "constituted a representation of fact, although it may

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<sup>19</sup> See also e.g., Nodak Oil Co. v. Mobil Oil Corp., 533 F.2d 401, 406-407 (8th Cir. 1976) ("Here the representation concerned the legal effects of facts not disclosed or otherwise known to the recipient; thus, [plaintiff] justifiably interpreted the statement as implying that there were facts which substantiated the statement."); Restatement (Second) of Contracts at § 170.

technically have also stated a legal conclusion.”); Colby v. Life Indem. & Inv. Co., 59 N.W. 539, 542 (Minn. 1894).

Under these authorities, the Court of Appeals correctly determined that this first statement implied a knowledge of facts that “substantiated the representation.” (Hoyt p. 8). As the court said, “[w]hether Hoyt had a valid piercing claim depended not on legal abstractions but on whether PRG and Entolo functioned as a single business entity as a matter of *fact*.” (Id.) (emphasis added). In other words, whether Hoyt could bring a piercing claim against PRG is not an abstract legal question (such as ‘does Minnesota recognize a piercing the corporate veil claim?’). Rather, it is necessarily dependent on the *factual* question of the degree to which PRG participated in and interfered with Entolo’s affairs<sup>20</sup>: did PRG siphon off Entolo’s funds (it did); was Entolo’s board an active, functioning entity (it was not); did Entolo have control over its own money, cash, and receivables (it did not), *etc.* This first representation implied that PRG’s and Entolo’s business operations justified his conclusion that there was not “anything” to a good-faith piercing claim. (Hoyt at 8-9).

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<sup>20</sup> See, e.g., Victoria Elevator Co. of Minneapolis v. Meriden Grain Co., Inc., 283 N.W.2d 509, 512-513 (Minn. 1979) (noting the factual elements necessary to support a claim for piercing the corporate veil); Association of Mill and Elevator Mut. Ins. Co. v. Barzen Intl. Inc., 553 N.W.2d 446, 449-451 (Minn. Ct. App. 1996) (same).

In fact, contrary to PRG's argument, courts across the country have held that "statements regarding the viability of a legal claim" are actionable if they are false. For example, in Rosenbaum Capital v. Boston Communications Group, Inc., \_\_\_ F.Supp.2d \_\_\_, 2006 WL 2423360 (D. Mass., Aug 20, 2006), the court approved a fraud claim based upon a company's statement that it would be successful in litigation. Id. at \* 4. This is consistent with a variety of decisions holding similar representations to be actionable. See generally, Sainsbury v. Pennsylvania Greyhound Lines, 183 F.2d 548 (4th Cir. 1950); Lowther v. Hopper Truck Lines, 377 P.2d 192, (Ariz. 1962); Raymark Industries, Inc. v. Stemple, 714 F. Supp. 460 (D. Kan. 1988).

PRG's rebuttal arguments fail to provide any reason to overturn the Court of Appeals' application of long-standing and well established precedent.

First, PRG cannot avoid the clear holdings of Miller and Simonson by simply asserting that Robinson's statement was a "legal opinion." (PRG Brief at 18). This statement was not phrased in a way that would suggest it was a mere "opinion"; it was a direct factual representation.<sup>21</sup> More importantly, arguing whether this statement was a legal opinion only obscures the real issue: did Robinson's representation communicate facts to Steve Hoyt? After all, a so-called

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<sup>21</sup> See Restatement (Second) of Torts at § 545, comment d (describing a statement of legal opinion as one where the speaker says, "I think that my title to this land is good, but do not take my word for it; consult your lawyer.").

“legal opinion” is actionable if it implies “that the facts known to the maker are not incompatible with his opinion” or that the speaker knows “facts sufficient to justify him in forming it.” See Restatement (Second) of Torts at § 545(2).<sup>22</sup> Here, Robinson’s statement clearly implied that he knew facts “sufficient to justify” his statement, even if it was an opinion.

Second, PRG is simply wrong when it argues that the decision to pierce the corporate veil is solely a “legal question” for the court. (PRG Brief at 19). Minnesota courts have (not surprisingly) long held that a piercing the corporate veil claim depends on the application of legal principles to the specific facts of the case. E.g., Victoria Elevator Co., 283 N.W.2d at 513 (noting the “facts” that led the court to pierce the corporate veil); Association of Mill and Elevator Mut. Ins. Co., 553 N.W.2d 446 at 450 (listing the “facts” that guided the court’s decision). Thus, Robinson’s representation that there was no good faith piercing claim against PRG and Entolo necessarily represented that there were no *facts* that might

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<sup>22</sup> Accord Restatement (Second) of Torts at § 545(2) (“If the misrepresentation of law is only one of opinion as to the legal consequences of facts, the recipient is justified in relying upon it to the same extent as though it were a representation of any other opinion.”); Restatement (Second) of Torts at § 539(a) (recognizing that a statement of opinion may be reasonably understood to imply statements of fact, and therefore be actionable, if it implies “that the facts known to the maker are not incompatible with his opinion” or that the speaker “knows facts sufficient to justify him in forming it.”).

even arguably allow a party to raise a good-faith piercing claim. (Hoyt Decision at 8). This places this case right within the rule announced in cases such as Miller.

The Stroebner and Goblirsch cases PRG cites do not support its argument that piercing the corporate veil is merely a “legal question.” In Stroebner<sup>23</sup> the Eighth Circuit noted that the decision to pierce the corporate veil “involves questions of fact.” Stroebner, 115 F.3d at 579. And PRG recognizes that the Goblirsch case stands for the proposition that a district court’s decision to pierce the corporate veil is dependent on the “findings of fact” in the case.<sup>24</sup> (See PRG Brief at 19, n. 5). In the end, these cases only validate Hoyt’s position. Robinson’s representation that there was not “anything” to a veil piercing claim necessarily communicated that there were no facts to support a claim.

Third, the fact that piercing the corporate veil involves a “complex balancing inquiry” is meaningless. Nothing in any of the Minnesota cases cited by the Court of Appeals (or the Restatement) suggests that the complexity of the issues is a factor to be weighed in determining whether a representation of “law” is actionable. While the complexity of an issue might make it more difficult to prove that the representation were untrue, PRG never moved for summary judgment on that basis.

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<sup>23</sup> Stroebner v. Lingenfelter, 115 F.3d 576, 579 (8th Cir. 1997).

<sup>24</sup> Goblirsch v. Heikes, 547 N.W.2d 89, 92 (Minn. Ct. App. 1996).

3. *Public Policy Supports Holding Those Who Commit Fraud Liable.*

Not only was the Court of Appeal's decision consistent with existing precedent, it was also wise public policy. As the Court knows well, summary judgment is a blunt instrument to be used only in rare cases. Mr. Hoyt deserves his day in court.

Settlement agreements (and indeed other contracts) often involve and depend on so-called "representations of law." To give just one example, parties often settle a case for a certain sum based upon the representation that the amount in question is what remains under an insurance policy. Obviously, the amount an insurance carrier might be liable for under a policy for a particular claim is a question of law, albeit one dependent on underlying facts. And in many cases, particularly complex litigation, this question will require a "complex balancing inquiry." If this court holds that so-called "representations of law" are not actionable even where they imply facts to support the conclusion, lawyers could not rely upon this type of representation as they would not be enforceable.

Indeed, adopting the rule PRG advances would render any number of commonly-made representations non-actionable, and therefore irrelevant to any bargaining context, including:

- Representations regarding success in litigation;
- Representation of tax liability (or the lack thereof);

- Representations regarding the validity of patents;
- Representations regarding real estate ownership.

This list could go on to encompass any number of representations on which parties feel it appropriate to warrant or to make a condition of a contract.

Not only would PRG's arguments make these commonly exchanged 'legal conclusions' non-actionable, it would interject an unneeded element of uncertainty into the bargaining process. Parties would have to wonder whether their representation was a "legal conclusion" to some degree that would make it non-actionable. There is no reason for such a technicality to cause such uncertainty in the bargaining process.

PRG and the amicus suggest that parties should be forced to engage in extensive discovery in order to verify these kinds of representations. As courts have recognized, however, this suggestion would make the settlement process more, not less, difficult.<sup>25</sup> As noted, representations are commonly used as a means to prevent parties from having to engage in discovery "busy work." Instead,

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<sup>25</sup> For example, the court in Fire Ins. Exchange v. Bell by Bell 643 N.E.2d 310 (Ind. 1994), rejected this exact argument, holding:

We decline to require attorneys to burden unnecessarily the courts and litigation process with discovery to verify the truthfulness of material representations made by opposing counsel. The reliability of lawyers' representations is an integral component of the fair and efficient administration of justice. The law should promote lawyers' care in making statements that are accurate and trustworthy and should foster the reliance upon such statements by others.

the law encourages parties to avoid this needless inquiry by giving them security that they are entitled to rescind the contract if the representation proves false. Wise public policy encourages courts to protect reasonable expectations, conserve valuable resources, and encourage the formation of commercial contracts (as well as agreements to settle litigation) by ensuring that the parties can rely upon representations without having to perform extensive discovery or worry about whether a statement is technically a “legal conclusion.”

PRG’s histrionic rhetoric about how the Hoyt decision would lead to “an enormous increase in potential liability” and would “threaten the stability of settlement agreements” lacks any foundation in reality. First of all, the only circumstance in which this would be a problem is where a party knowingly or recklessly misrepresented facts, which – given lawyers’ ethical standards – is not a common experience. Litigation is expensive, and parties unhappy with a settlement agreement are not going to take the time and expense of litigation to challenge a settlement agreement without a strong basis. Indeed, even if the Court of Appeals’ decision is overruled, disgruntled and unethical parties will still have a “roadmap” to rescinding settlement agreements – simply claim that a party misrepresented facts during the settlement negotiations. The Hoyt decision does not materially increase the likelihood of unmeritorious litigation or attacks on settlement agreements.

There are any number of protections that prevent vague and unmeritorious claims from succeeding. Most importantly, the communication in question must reasonably convey factual information to the receiving party. Thus, if a party merely provides a legal interpretation of facts already known to both parties – such as when an attorney boasts of the likelihood of success at trial during a settlement conference – there will not be any liability. Likewise, any statement delivered with appropriate cautionary language would be immune from liability. Moreover, because of the adversarial setting, the misrepresentation would have to be delivered with fraudulent intent (i.e., either knowingly or recklessly false). Negligent misrepresentations would not be actionable. There is therefore little danger that the Court of Appeals’ decision will threaten the viability of settlement agreements or indeed have any significant application outside of this case.

There is no policy reason to overrule the holdings in cases such as Miller. The Court of Appeals’ decision is based upon long-standing precedent and wise public policy.

B. The Court Of Appeals Correctly Interpreted Robinsons’ Statement That PRG And Entolo Were “Totally Separate” As A Straight-Forward Factual Assertion.

As the Court of Appeals also correctly recognized, Robinson’s statement that PRG and Entolo were “totally separate” was a straightforward factual statement. As the Court of Appeals noted, this “representation may reasonably be

interpreted to mean that, as a matter of fact, PRG did not dominate Entolo's affairs and allowed Entolo to operate as a distinct and separate corporate entity." (Hoyt p. 10.) Even if the court determines that Robinson's first statement was overly "legal" to form the basis for a fraud claim, this second factual statement is clearly actionable.

As the Court of Appeals correctly understood, Robinson's second statement followed and supported his first statement. After having represented that there was no viable piercing claim (no "issues"), Robinson then supported this first statement by assuring Hoyt that no facts existed that would even arguably support such a claim (*i.e.*, PRG and Entolo were "totally separate."). In other words, Robinson first stated his ultimate conclusion ('no one can raise a good faith piercing claim against PRG and Entolo'), and then represented the facts on which his conclusion was based ('because there are no facts to support such a claim, as PRG and Entolo operated as separate corporations').

PRG's assertion that this statement was a pure legal conclusion because it impliedly referred to the Victoria Elevator test is a gross mischaracterization. Robinson's statement has a factual meaning apart from Victoria Elevator – whether Entolo operated as a separate and distinct corporation is a matter of historical fact wholly apart from Victoria Elevator. (PRG's own executives testified that Entolo was not run as a separate corporation, but rather was treated as a mere "division"

of PRG. See supra p. 13) More importantly, even if this second statement was made in reference to Victoria Elevator, the question of whether two corporate entities are “separate” under Victoria Elevator is a straightforward question of “fact.” See Stoebner, 115 F.3d at 579.

PRG’s argument also reveals just how fruitless it is to analyze the dichotomy between statements of “law” and statements of “fact.” Even if Robinson’s second statement was made in the context of Victoria Elevator’s factors, it still unambiguously communicated factual information about the day-to-day working relationship between PRG and Entolo.

With this in mind, the dichotomy between statements of “law” and “fact” is both false and pointless. It is false because (as cases such as Miller and commentators such as Prosser have noted) there is no real, clean distinction between statements of “law” and “fact.” At best, they operate on a continuum, with some statements containing more of a factual thrust than others. See supra p.21-28. Applying this dichotomy to an individual case will not only tax the wisest legal mind, it serves no point: there is no reason, as a matter of policy or precedent, to immunize a fraudulent statement from liability based upon the technicality of whether it is a “legal conclusion” or not.

Simply put, Robinson fraudulently misled Steve Hoyt into granting PRG a release. There is no reason to shield Robinson’s fraud based upon a technicality.

**II. PRG's Argument That It Had No Duty To Disclose The Knight Complaint In No Way Contradicts The Court Of Appeals Decision.**

Oddly, PRG claims that the Court of Appeals “did not address” its argument that Robinson did not act with fraudulent intent. In support of this argument, PRG asserts that Robinson’s statements “were not made false by the pendency of the Knight Complaint.” (PRG Brief at 28). This argument is odd for two reasons.

First, PRG argument is odd because it never raised this argument below. PRG never argued to the district court that Robinson’s lacked fraudulent intent as a matter of law. See PRG’s Memorandum of Law in Support of its Motion for Summary Judgment at 12-22. Nor did it raise this issue in its petition for review. See infra p. 46 (noting the “two” issues on which PRG sought review). As a result, PRG has waived this argument. Id. p. 40. 46-47.

Second, this argument responds to an argument Hoyt never made. Hoyt does not assert that Robinson had the requisite fraudulent intent solely because of his knowledge of the Knight Complaint. Rather, Robinson’s knowledge of (and investigation into) the Knight Complaint is merely one piece of evidence on which Hoyt will rely to demonstrate that Robinson’s statement was either intentionally or recklessly false.

Indeed, under prevailing Minnesota law, Hoyt does not have to demonstrate that Robinson had actual knowledge that his statement was false to satisfy the requisite intent. Rather, it is sufficient that Robinson made the statement without

knowing whether it was true. See Florenzano v. Olson, 387 N.W.2d 168, 173 (Minn. 1985).<sup>26</sup> See also e.g., Davis v. Johnson, 415 N.W.2d 755, 757 (Minn. App. 1987); Exeter Bancorporation, Inc. v. Kemper Securities Group, Inc., 58 F.3d 1306, 1312 (8th Cir. 1995); In re Digital Resource, LLC, 246 B.R. 357, 367+ (8th Cir.. 2000); Restatement (Second) of Torts at § 526 (1977). Although PRG did not raise this issue before the district court, (and thus Hoyt had no reason to present all of its evidence supporting Robinson's fraudulent intent) there is clear evidence in the record that Robinson make these statements without knowing whether they were true. See App. at p. 214.<sup>27</sup>

With this in mind, it should be apparent that Spitzmueller has nothing to do with this case. In Spitzmueller, the plaintiff entered into a settlement agreement

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<sup>26</sup> Florenzano at 173. ("Fraudulent intent is also present when a misrepresenter speaks positively and without qualification, but either is conscious of ignorance of the truth, or realizes that the information on which he or she relies is not adequate or dependable enough to support such a positive, unqualified assertion.").

<sup>27</sup> Q. Is it fair to say, Mr. Robinson, that as of the [date of the statements in question] you knew that at least Mr. Knight was raising genuine issues of the conduct of PRG such that PRG faced potential risk or exposure for the debts or obligations [of Entolo]?

...

A. I didn't know if they were genuine issues or not.

....

Q. [H]ad you formed an opinion one way or the other about [whether PRG would be vulnerable to a piercing claim]?

...

A. No.

that released his right to benefits in return for a lump sum. Plaintiff later contested this release, alleging that defendants had an affirmative duty to disclose pending litigation brought by another individual. See Spitzmueller, 740 F. Supp. at 677 (“[Plaintiff] does not claim that a direct false statement was made.”). The court simply held that – in the absence of any direct misrepresentations on the part of defendant -- they had no duty to affirmatively disclose this other litigation to the plaintiff.

Obviously, Robinson did not have any duty to affirmatively disclose the pending Knight litigation to Steve Hoyt. But once Robinson chose to answer Hoyt’s question about Entolo’s and PRG’s operations and potential vulnerability to a piercing claim, he had an obligation to be truthful. See Safeco Inc. Co. of America v. Dain Bosworth, Inc. 531 N.W.2d 867 (Minn. App. 1995) (recognizing that a party who chooses to speak must speak truthfully, even in the absence of a duty to speak). On this record, there is clear evidence that he was not.

**III. The Court Of Appeals Correctly Concluded That A Reasonable Fact Finder Could Find That Hoyt Justifiably Relied Upon Robinson’s Statement.**

A. Hoyt Justifiably Relied Upon Robinson’s Representation.

To advance a claim for fraudulent rescission, a party must demonstrate that he or she justifiably relied upon the alleged fraudulent statement. E.g., Davis v. Re-Trac Mfg. Corp., 149 N.W.2d 37, 38-39 (Minn. 1967); Taylor v. Sheehan, 415

N.W.2d 575 (Minn. 1989). See also Field v. Mans, 516 U.S. 59 (1995); Restatement (Second) of Torts at § 537. The question of justifiable reliance is generally a question for a jury. E.g., Nicollet Restoration, Inc. v. City of St. Paul, 533 N.W.2d 845, 848 (Minn. 1995); Placke v. White-Price Co., 228 N.W. 554, 555 (Minn. 1930) (noting that whether plaintiff, an experienced businessman, was justified in relying upon the defendant's representations was "nevertheless [a] question[] for the jury.").

Minnesota courts have long recognized that a party can justifiably rely upon a representation unless its falsity is known or is obvious to him or her. E.g., Speiss v. Brandt, 41 N.W.2d 561, 566 (Minn. 1950) ("[I]t is the well-established rule that in a business transaction the recipient of a fraudulent misrepresentation . . . is justified in relying on its truth, although he might have ascertained its falsity had he made an investigation."); Nave v. Dovolos, 395 N.W.2d 393, 398 (Minn. Ct. App. 1986); First Nat'l Bank v. Halo Invs., 394 N.W.2d 158, 160 (Minn. Ct. App. 1986); Erickson v. Midgarden, 31 N.W.2d 918, 191 (Minn. 1948).<sup>28</sup>

There is no indication in the record (nor has PRG argued) that Steve Hoyt knew that Robinson's statement was false. Thus, clearly established Minnesota law, faithfully followed by the Court of Appeals, holds that Steve Hoyt justifiably

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<sup>28</sup> See also e.g., Restatement (Second) of Torts, § 540 (1977) ("The recipient of a fraudulent misrepresentation is justified in relying on its truth, although he might have ascertained the falsity of the representation had he made an investigation.").

relied upon Robinson's statements.<sup>29</sup> PRG's two counter-arguments, listed below, provide no reason to avoid this general rule.

B. Robinson Was Not Engaged In "Puffery."

Minnesota's Rules of Professional Conduct provide 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. The Court of Appeals relied upon this provision to support its conclusion that Hoyt justifiably relied upon Robinson's statements. The fact that Hoyt knew that Robinson had an ethical duty to tell the truth about both matters of fact and law supports the notion that Hoyt justifiably relied upon Robinson's statement. (It also undercuts PRG's argument that a so-called representation of law is not actionable.)

PRG relies upon the ABA's interpretation to Rule 4.1 – which have not been adopted by this Court<sup>30</sup> – to argue that Robinson's representation was mere "puffery." This argument fails for several reasons.

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<sup>29</sup> See also e.g., Speiser, The American Law of Torts at § 32:55 ("It is a fundamental and basic rule in the American law of fraud and deceit that the injured person—the recipient of the representation or representatee – has a right to rely, that there is justifiable reliance, upon the representation."); Dan Dobbs, The Law of Torts, § 475 at p. 1360-61 (noting that a party's reliance on a representation is reasonable unless "plaintiff is on notice that the statement is not to be trusted or knows the statement to be false.").

<sup>30</sup> The Court has specifically refused to adopt the ABA's comments to the Rules of Professional responsibility as authoritative interpretations of the Rules. See Order of The Minnesota Supreme Court Amended The Rules of Professional Responsibility dated December 27, 1989 (quoted in "Minnesota Rules of Court" at p. 1134).

Initially, PRG never argued to the Court of Appeals (or the district court, for that matter) that Hoyt's reliance was unjustified because Robinson's statements were mere "puffery." See PRG's Brief to the Court of Appeals at 30-35. Nor was it included in PRG's petition for review. Because this argument was not presented below, it has been waived. See Thiele v. Stich, 425 N.W.2d 580 (Minn. 1988) (arguments not raised below cannot be raised on further review); Pornush v. McGroarty, 285 N.W.2d 91, 93 (Minn. 1979) (party cannot raise a new theory to support argument raised below).

In the event that this Court nevertheless decides to consider this argument, Hoyt will respond briefly.

Courts and commentators have long recognized a class of statements that are so vague and so clearly a pure matter of subjective opinion that a party cannot justifiably rely upon them: "puffery." The "puffing" doctrine applies only where the statement cannot reasonably be interpreted to communicate factual information. It has "no application to false representations of material facts." See Speiser, The American Law of Torts, § 32.26. American Italian Pasta, Co. v. New World Pasta, Co., 371 F.3d 387, 390-91 (8th Cir. 2004) (noting that "puffery and statements of fact are mutually exclusive."). See also e.g., Griggs v. State Farm Lloyds, 181 F.3d 694 701 (5th Cir. 1999) (noting the difference between "non-actionable puffery" and actionable representation of "material fact"); Nasik

Breeding & Research Farm, Ltd. v. Merck & Co., Inc., 165 F. Supp.2d 514, 530 (S.D.N.Y. 2001). Because it is a question of fact based upon the circumstances and context of the statement, whether a statement is characterized as “puffery” is generally a question of fact for a jury. Basquiat ex rel. Estate of Basquiat v. Sakura Intern., 2005 WL 1639413 (S.D.N.Y. 2005).

Because Robinson’s statement at least arguably communicated factual information about PRG and Entolo, it is inappropriate to dismiss Hoyt’s claim on summary judgment. See Cohen v. Koenig 25 F.3d 1168 (2nd Cir. 1994) (noting that a “relatively concrete” factual statement can form the basis for a fraud claim) This case is not like cases involving “puffery,” where the statements in question are so vague and meaningless that they do not actually communicate factual information. Searls v. Glasser, 64 F.3d 1061, 1066 (7th Cir.1995). Instead, Robinson communicated concrete facts to Hoyt, on which he relied.

PRG also cannot inoculate Robinson’s representations by couching them as mere “overestimation[s] of the strength of their [sic] litigation position.” (PRG Brief p. 33). These statements were not phrased as a mere estimation of PRG’s chances of success – Robinson did not predict victory in the *Knight* litigation or in any other litigation. Instead, Robinson indicated that there were absolutely no “issues” that would allow a party to raise a good faith piercing claim – a

representation that clearly communicated facts to Hoyt, even assuming it also may have communicated a “legal opinion.”

The fact that Robinson’s statement deceived Steve Hoyt about factual information distinguishes Robinson’s statements from mere predictions litigation success generally delivered during settlement negotiations. In the traditional settlement negotiation setting, both parties are aware of the factual basis for the claims through discovery, and the only issue in dispute is how the court or fact finder will interpret and weigh the facts. Thus, a lawyer’s representation that he or she would eventually succeed at trial may be characterized as puffery because it does not convey underlying factual information – it merely gives an opinion about how a fact finder will interpret commonly known facts.<sup>31</sup> In contrast, Robinson’s statement did not merely predict success based upon a set of commonly-known facts. Rather, it both directly and impliedly represented factual information to Hoyt about how PRG and Entolo were run. The unique status of this case makes it a stand-alone case, and unlikely to be repeated in future settlement negotiations.

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<sup>31</sup> This line is consistent with the rules cited above in cases such as Miller and authorities such as the Restatement (Second) of Contracts and Tort, concluding that opinions are actionable if it “carr[ies] with it the assertion that the facts known to the maker are not incompatible with his opinion, or that he does know facts that justify him in forming it.” See Restatement (Second) of Contracts at § 170, comment b.

In short, Robinson's statement was not a mere statement of litigation position, prediction of success at trial, or any of the other types of vague, insubstantial statements that amount to puffery.

C. PRG Inappropriately Relies Upon A Negligence Standard To Argue That Hoyt's Reliance Was "Unreasonable."

As the Court of Appeals and PRG recognize there is nothing in the record that suggests that Hoyt's business experience or legal training made the falsity of Robinson's representations obvious to him. (See Hoyt p. 11). Instead, PRG attempts to argue that Hoyt's knowledge and experience made Hoyt's reliance "unreasonable." This argument fails for several reasons.

Most significantly, PRG's argument depends upon the unsupported assertion that Hoyt's negligence (or unreasonableness) acts as a defense to a claim of intentional fraud. This is not the case. Evidence of negligence – such as Hoyt's common practice and habit – may be relevant to a negligent misrepresentation claim, where contributory negligence is a defense. See Florenzano v. Olson, 387 N.W.2d 168, 175-76 (Minn. 1986). But it is not relevant to a fraud claim – where contributory negligence is no defense. See id. at 176 n. 7 (“We also consider it bad policy to permit an intentional tortfeasor the defense of comparative negligence merely because he or she chooses a gullible or foolish victim.”).<sup>32</sup> Courts adopt

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<sup>32</sup> [I]f the representations were willfully false, it does not lie in the vendor's mouth to say that the vendee ought not to have relied upon them.” Wilder v. DeCou, 18 Minn.

this rule because in a negligent misrepresentation claim, a plaintiff should not recover if he or she is more careless than the allegedly negligent defendant. See id. at 175-76. But in a fraud case where the defendant is alleged to have acted maliciously and with bad intent, then plaintiff's mere negligence will not mitigate the defendant's malicious behavior. Id.

Instead, as noted the rule is that a party justifiably relies upon a statement unless its falsity is known or obvious. See supra p. 37-38. This prevents parties from engaging in deceitful behavior and escaping liability through the deceived parties' mere neglect. Id.

With the law in mind, the Court of Appeals' conclusion follows logically. While Steve Hoyt is an experienced businessman, and while he does have legal training, even PRG admits that this training and experience did not make "the truth or falsity of the representations apparent." (Hoyt at p. 11). Contrary to PRG's arguments, Minnesota cases have long recognized that even an experienced businessman or an attorney can be misled by false statements. See Placke v. White-Price, Co., 228 N.W. 554, 555 (Minn. 1930).<sup>33</sup> Indeed, PRG's argument that a "particularized reasonable reliance inquiry" is necessary would only

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470 (1871); Chamberlin v. Fuller, 59 Vt. 247, 256 (1887).

<sup>33</sup> Kempf v. Ranger, 132 Minn. 64, 155 N. W. 1059; Kraus v. National Bank of Commerce, 140 Minn. 108, 167 N. W. 353; Old Colony Life Ins. Co. v. Moeglein, 165 Minn. 117, 205 N. W. 885.

underscores the need for a jury to weigh and apply the facts and circumstances to the law.

In fact, Hoyt's status as an attorney made his reliance more, not less justifiable. As discussed above, Robinson's statement was not merely PRG's "position statement" regarding the Knight litigation – rather, it both directly and indirectly represented facts to Hoyt, on which he relied. Moreover, as an attorney, Hoyt knew that attorneys are not permitted to make false statements "of fact or law." See supra at 39-40. Hoyt also recognized that while some puffery is expected in a negotiation setting, attorneys are not allowed to openly lie about facts.

Similarly, Hoyt's habit and custom of placing terms in a settlement agreement does not mandate the issuance of summary judgment against him. While Hoyt testified that he relies upon his own lawyers for legal advice, Robinson's statement misrepresented facts, not legal advice. More importantly, all of PRG's evidence of Hoyt's "customary practices" at best merely supports an argument that Hoyt was negligent – which is not a defense to a fraud claim.

Because PRG cannot demonstrate conclusively that Hoyt was not justified in relying upon Robinson's representations, the Court of Appeal's decision remanding this case for trial must be affirmed.

**IV. PRG Did Not Seek And Was Not Granted Review Of The Remaining Issues.**

PRG's petition for review sought review only over "two important issues": whether Robinson's statement was immunized as a "statement of law" and whether Steve Hoyt justifiably relied upon it. See PRG's Petition for Review to the Minnesota Supreme Court. PRG's brief nevertheless raises three further issues not presented in its petition for review: (1) whether Steve Hoyt actually relied upon Robinson's statement; (2) whether Hoyt sought full or partial rescission of the Settlement Agreement; and (3) whether the district court correctly dismissed Hoyt's separate claims with prejudice.

This Court generally does not review "issues that were not raised in a petition for review." In re GlaxoSmithKlein PLC, 699 N.W.2d 749, 757 (Minn. 2005); Peterson v. BASF Corp., 675 N.W.2d 57, 67 (Minn. 2004) ("When submitting a petition for review, a party should bring issues ripe for review to the supreme court's attention with specificity, or waive the opportunity to have them reviewed."). Accord Anderly v. City of Minneapolis, 552 N.W.2d 236, 239-40 (Minn. 1996); Northwest Racquet Swim & Health Clubs, Inc. v. Deloitte & Touche, 535 N.W.2d 612, 613, n. 1 (Minn. 1995). These remaining three issues are even more case-specific than the first two issues, and (as PRG admits) do not "present as strong a case for this Court's discretionary review." (See PRG Brief at 41.)

Because PRG has raised these issues, Hoyt has no prudent alternative but to at least briefly respond.<sup>34</sup> But this case does not present the kind of exceptional facts that would warrant reviewing issues not raised in the petition for review. The Court should therefore decline to reach these issues.

V. **The Court Of Appeals Correctly Concluded That A Reasonable Fact Finder Could Conclude That Hoyt Actually Relied Upon Robinson's Statement.**

PRG's argument that Steve Hoyt did not actually rely upon Robinson's representation holds no merit.

Under Minnesota law, a party demonstrates "actual reliance" through evidence that he or she took an action in part because of a representation by a defendant. E.g., Berryman v. Rigert, 175 N.W.2d 438 (Minn. 1970). Here, Steve Hoyt testified that he agreed to give PRG a release because he relied upon Robinson's statement. Thus, PRG's assertion that Hoyt "did not manifest actual reliance on Robinson's alleged representations" is absurd – Hoyt agreed to the release because of Robinson's representation. See supra p. 8-10. This is more than sufficient to create a genuine issue of material fact to survive summary judgment. See e.g., 9 Stuart M. Speiser, et. al., The American Law of Torts § 32.49 (1992) (recognizing that "actual reliance" in a misrepresentation claim only

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<sup>34</sup> This court has refused to review issues not contained in a petition for review although the respondent has addressed those issues in its brief. In re GlaxoSmithKlein PLC, 699 N.W.2d 749, 757 (Minn. 2005);

requires a showing that the party acted or refrained from acting based upon the alleged misrepresentation.). PRG cannot raise any substantial argument in opposition.

First, PRG's argument that there was no direct reliance because Steve Hoyt did not add Robinson's representation to the Settlement Agreement is directly contradicted by decades-old law. As PRG recognizes elsewhere in its brief, Minnesota courts have held that a party to a contract can rely upon an oral representation, even though it was not included in the final integrated contract. E.g., Ganley Bros. v. Butler Bros. Bldg., 212 N.W. 602 (Minn. 1927); Clements Auto Co. v. Service Bureau Corp., 444 F.2d 169, 177 (8th Cir. 1971); Martin v. Guarantee Reserve Life Ins. Co., 155 N.W.2d 744, 749 (Minn. 1968); Financial Timing Publications, Inc. v. Compugraphic Corp., 893 F.2d 936, 944 (8th Cir.(Minn.) Jan 09, 1990); Gopher Oil Co. Inc. v. Union Oil Co. of California, 955 F.2d 519, 526 (8th Cir. 1992).<sup>35</sup>

For example, in Ganley, this Court rejected the argument that a plaintiffs' failure to include a fraudulent statement in a fully-integrated contract precluded

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<sup>35</sup> See also Peggy Rose Revocable Trust v. Eppich, 640 N.W.2d 601, 607 (Minn. Mar 21, 2002) (recognizing continuing authority of Ganley). Wisconsin Mystic Iceless Refrigerator, Inc. v. Minnesota Mystic Iceless Refrigerator, Inc., 180 Minn. 334, 230 N.W. 796 (1930); Roseberry v. Hart-Parr Co., 145 Minn. 142, 176 N.W. 175 (1920); Edward Thompson Co. v. Schroeder, 131 Minn. 125, 154 N.W. 792 (1915); 54 Minn. L. Rev. 846, 850 (1970). Cf., Martin v. Guarantee Reserve Life Insurance Co., 279 Minn. 129, 155 N.W.2d 744 (1968).

plaintiffs' reliance. Ganley, 212 N.W. at 602-03. And the Eighth Circuit has repeatedly cited Ganley for the proposition that a provision disclaiming reliance on oral representations "does not preclude [a] jury from considering other evidence that the plaintiff relied upon [defendant's] alleged misrepresentation." Financial Times, 893 F. 2d at 943; Clements, 444 F.2d at 177. Thus, PRG's argument is directly contradicted by controlling precedent from this Court.

The Weitzig and Watson cases (PRG Brief p. 38) do not support the proposition for which PRG cites them. In Watson, for example, the court actually approved a fraud claim in the absence of any direct testimony of actual reliance, because circumstantial evidence demonstrated that reliance occurred. Watson, 236 N.W. at 215. Likewise, in Weitzig, the Court was merely affirming under the lenient abuse of discretion standard a court's determination that a party failed to prove a fraud claim at trial. Weitzig, 144 N.W.2d at 271.

Second, PRG's argument that there was some inconsistency in Hoyt's submissions ignores reality. Even a brief review of the Complaint, interrogatory responses, and Hoyt's deposition transcript reveals that Steve Hoyt's testimony has remained consistent throughout this litigation: after initially balking, he agreed to give PRG a release after Robinson affirmed that there was no piercing claim against PRG and that PRG and Entolo were "totally separate." Obviously, the nature of each individual response (Complaint, interrogatory, deposition) required

different levels of specificity. But Mr. Hoyt's testimony has remained the same throughout.

Thus, cases such as Williams and Branbury (PRG Brief at 39) have no bearing here. In Branbury, plaintiff resisted summary judgment by affidavit testimony that a defendant made false statements on which plaintiff relied. This was contradicted by plaintiff's deposition statement that the same defendant never made any false statements. Because the two statements were "directly" contradictory, the court refused to consider the affidavit testimony.<sup>36</sup> Clearly that is not the case here.

PRG offers no authority to back up its desperate attempt to argue that Mr. Hoyt did not actually rely upon Robinson's statements. This argument should be rejected.

**VI. The Court Of Appeals Reasonably Construed Hoyt's Complaint As Requesting Total Rescission Of The Settlement Agreement.**

1. Hoyt's Complaint Sought Rescission Of The Entire Complaint.

PRG also seeks to dismiss Hoyt's complaint because it allegedly sought only "partial rescission" of the Settlement Agreement. The Court of Appeals correctly rejected this argument.

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<sup>36</sup> Williams adds nothing to this analysis. It only cites Branbury for the general proposition that a party cannot resist summary judgment through a statement contradicted by earlier testimony, and then fails to discuss the issue further.

Because PRG has so drastically distorted the record on this issue, a short background statement will clarify this issue. In 2003, PRG sought to dismiss Hoyt's initial complaint (then in federal district court) because it allegedly only sought partial rescission of the Settlement Agreement.<sup>37</sup> In return, Hoyt pointed out that the Complaint offered to return all of the consideration Hoyt received under the Settlement Agreement, not just a "partial" portion of it. See Appellants Appendix at p. 61 (p. 25). Federal Magistrate Judge Lebedoff agreed with Hoyt, and construed the Complaint as seeking rescission of the entire Settlement Agreement. See supra p. 15-16.

Once this case was remanded back to state court, PRG never raised this argument again on summary judgment or in any other context.<sup>38</sup> Instead, PRG accepted that the Complaint sought to rescind the entire Settlement Agreement.

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<sup>37</sup> PRG's argument was based upon a stray line in the Complaint that Hoyt sought "rescission of Paragraph 7 of the Settlement Agreement." But the Complaint also offered to return all consideration received under the Settlement Agreement – which included sections of the Settlement Agreement other than Paragraph 7. See Appellants Appendix at p. 61.

<sup>38</sup> PRG's insinuation that the Minnesota district court dismissed Hoyt's claims because they sought partial rescission is false. In PRG's motion to dismiss Hoyt's complaint for failure to join GMAC as a necessary party, the district court noted the general rule that a plaintiff cannot partially rescind an agreement, and then "assumed" that Hoyt "is seeking to rescind the entire agreement," although the Complaint "focus[ed] on the rescission of a particular portion" of the agreement. Id. Thus, PRG's assertion is directly contradicted by the statement on which they rely. This is indicative of PRG's citations throughout the brief.

With this in mind, PRG's argument that Hoyt was "on notice" of a deficiency in the Complaint, and yet failed to amend it over an eighteen month period is revisionist history. Simply put, given the Magistrate's determination that the Complaint did seek rescission of the entire agreement, there was no deficiency to amend. The Complaint, after all, clearly offered to return all consideration Hoyt received back to PRG and Entolo. This, standing alone, demonstrates Hoyt's intent to rescind the entire agreement. Even if there was some technical defect in the pleading, Hoyt's unambiguous representation that it was seeking to rescind the entire agreement served as a judicial admission and would have clearly estopped any attempt by Hoyt to backtrack and seek only "partial" rescission.

PRG's argument is fatally flawed for yet another reason. The only time it raised this argument was on its 2003 motion to dismiss. Had the district court granted the motion to dismiss, Hoyt would have asked (and in fact did ask<sup>39</sup>) for the opportunity to re-plead this claim to cure any deficiencies. This motion would surely have been granted. See Fed. R. Civ. P 15. Thus, even if this Court were to accept PRG's argument, the proper remedy would be to remand the case to the district court and allow Hoyt to amend its complaint. See Minn. R. Civ. P. 15. This, of course, would be a complete waste of time – particularly since the parties

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<sup>39</sup> See Hoyt's Memorandum of Law in Opposition to Defendants' Motion to Dismiss.

have long been on notice (the standard for pleading under Rule 8) that Hoyt seeks rescission of the entire Settlement Agreement.

The rules of civil procedure were drafted precisely to avoid the kind of empty formalism raised by PRG's argument. The Court of Appeals correctly rejected it.

2. Hoyt Adequately Offered To Return All Consideration From The Settlement Agreement.

PRG goes on to argue that Hoyt's rescission claim must be dismissed because it was impossible for Hoyt to return all of the consideration it received under the Settlement Agreement. Specifically, Hoyt obtained the right to move back into the leased premises immediately, which PRG asserts cannot be returned. PRG's argument has specifically been rejected by controlling authority in Minnesota on two grounds.

First, Minnesota courts have long held that a party who seeks to void a release as fraudulently induced need not tender-back any consideration received in connection with the release. See Serr v. Biwabik Concrete Aggregate Co., 278 N.W.2d 355, 366 (Minn. 1938) ("*A party is not bound to return or tender money received under a fraudulent release where the adverse party pleads the release as a defense.*") (italics in original).<sup>40</sup>

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<sup>40</sup> PRG did assert the release as a defense. See PRG's Memorandum of Law in Support of Its Motion For Summary judgment at p. 12. Hoyt thus could have

Second, even where a “tender back” is required, courts have long recognized that “impossible or unreasonable things, which do not accomplish equity in the particular transaction, are not required [to be tendered back].” E.g., Beck v. Spindler, 99 N.W.2d 684, 685 (Minn. 1959); MCC Investments v. Crystal Properties, 415 N.W.2d 908, 911 (Minn. Ct. App. 1987); Proper v. Proper, 237 N.W. 178 (Minn. 1931).<sup>41</sup> As the Court noted in Proper:

That a party seeking rescission of a contract must return, or offer to return, what he has received under it, and thus put the other party as nearly as is possible in his situation before the contract, is the law. But this rule is wholly an equitable one; impossible or unreasonable things, which do not tend to accomplish equity in the particular transaction, are not required.

Proper, 237 N.W. at 179.

Under the rule set forth in MCC and Beck, although Hoyt cannot wind back time and return the consideration it received, it can still provide Entolo with the monetary value of the consideration. The “tender back” rule is an equitable rule

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simply left the rescission claim out of the Complaint, and simply challenged the release once PRG raised it as a defense.

<sup>41</sup> See also e.g., In re Digital Resource, 246 B.R. 357, 370-71 (8th Cir. B.A.P. 2000); A.J.’s Automotive Sales, Inc. v. Freet, 725 N.E.2d 955 (Ind. Ct. App. 2000) (“Rescission of a contract does not require that items acquired under the contract be returned in a condition identical to that in which they were acquired. Rather, if return of items in the original condition is not possible, rescission is appropriate so long as the rescinding party returns the reasonable value of that property.”); Girdner v. Alley, 256 S.W. 832, 833 (Mo. Ct. App. 1923) (noting that if a party was unable to give back the consideration it received, it could provide the equivalent monetary value).

and the authorities noted above do not require the impossible. An offer to return the equivalent monetary value of the consideration is sufficient to satisfy the equitable “tender back” rule. E.g., 27 Williston on Contract, § 69:51 (4th Ed. 2006); A.J.’s Automotive Sales, Inc., 725 N.E.2d at 969.

If adopted, PRG’s argument would lead to absurd and harsh results. A party would be able to egregiously fraudulently induce a second party into a release (or other contract) and would be immune from liability so long as some portion of the consideration received could not be returned. There is no reason to adopt such a rule in this case – particularly where Entolo can be fully restored to the *status quo ante* through a return of the monetary value of any “consideration” it provide Hoyt.

**VII. The Court Of Appeals Correctly Ruled That The District Court Erroneously Dismissed With Prejudice That Hoyt Never Filed.**

To the extent the Court reaches this issues, the Court of Appeals correctly ruled that claims that Hoyt never filed could not be dismissed with prejudice.

After the district court issued its summary judgment order, Hoyt decided not to filed an amended complaint with additional claims Hoyt sought to raise. The district court, however, dismissed these claims with prejudice – even though they had never been filed. As the Court of Appeals recognized, this was error.

Obviously, the district court could not dismiss claims that Hoyt had never filed against PRG. Even had Hoyt filed those claims, under Minn. R. Civ. P. 41(a), where a plaintiff seeks to dismiss claims voluntarily, that dismissal is without

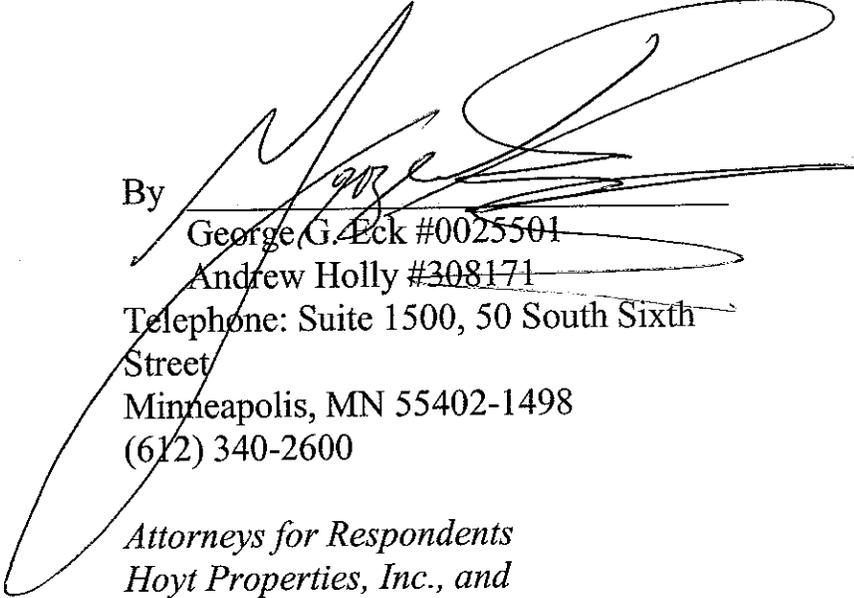
prejudice. See Minn. R. Civ. P. 41(a) (noting that the dismissal of claims by a plaintiff is “without prejudice.”). There is no question that Hoyt’s dismissal of these remaining claims was done on his own volition. The district court therefore erred in dismissing these unfilled claims with prejudice. The Court of Appeals’ decision should therefore be reversed.

### CONCLUSION

For these reasons, the Court of Appeals’ decision should be affirmed in all respects, and this case remanded to the district court for further proceedings.

Dated: October 23, 2006

DORSEY & WHITNEY LLP

By 

George G. Eck #0025501

Andrew Holly #308171

Telephone: Suite 1500, 50 South Sixth  
Street

Minneapolis, MN 55402-1498

(612) 340-2600

*Attorneys for Respondents  
Hoyt Properties, Inc., and  
Hoyt/Winnetka, LLC*

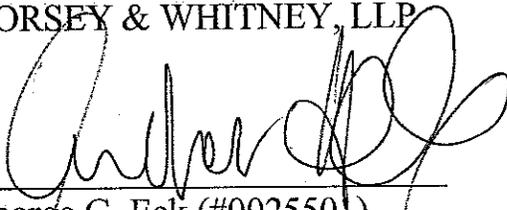
**CERTIFICATE OF BRIEF LENGTH**

The Undersigned hereby certifies that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3, for a brief produced with New Times Roman 14 point font. The length of this brief (excluding the cover page, table of contents, and table of authorities) is 13,339 words. The brief was prepared using Microsoft Word 2000 version of word processing software.

Dated: October 23, 2006

By

DORSEY & WHITNEY, LLP



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George G. Eck (#0025501)

Andrew Holly (#308171)

50 South Sixth Street

Suite 1500

Minneapolis, MN 55402

(612) 340-2600

Attorneys for Respondents Hoyt  
Properties, Inc. and Hoyt/Winnetka,  
LLC