

NOS. A06-1940 and A06-1957

State of Minnesota
In Court of Appeals

Margaret A. Brickner, Margaret A. Brickner
 as Trustee of the Thomas E. Brickner
 Credit Trust, and Braam Investment, Inc.,

Respondents,

v.

One Land Development Company,

Defendant (A06-1940)

Appellant (A06-1957)

and

John Andrew Duckwall,

Appellant (A06-1940)

Defendant (A06-1957)

BRIEF OF APPELLANT JOHN ANDREW DUCKWALL

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TABLE OF CONTENTS

Table of Authorities iii

Statement of Issues 1

Statement of the Case 3

Statement of Facts 5

Argument 20

 Standard of Review 20

 I: One Land Development Company properly assigned the Asset and
 Real Property Purchase Agreement to John Andrew Duckwall. 22

 A: The position taken by the trial Court and Plaintiffs’
 Counsel as to who might actually receive an assignment
 violates the doctrine of the free alienability of real property
 and limits the definition of an “entity” too strictly. 22

 B: An assignee of a purchase agreement must be served
 with a notice of cancellation before the cancellation is effective,
 particularly when the identity of the assignee has become known
 to Counsel for the holder of the purchase agreement and
 previously to Sellers. 22

 II: A person cannot slander title with the requisite malice where an
 Adverse Claim to Real Estate is prepared and filed of record on behalf
 of the client by the client’s retained legal Counsel. 32

 A: A person cannot slander title without bad faith. 32

 B: A slander of title claim fails as a matter of proof when
 plaintiffs do not prove up damages, an essential element in a
 slander of title action, during their case-in-chief. 32

III: Sellers in material breach of the Asset and Real Property Purchase Agreement cannot be allowed to use Minnesota Statutes, § 559.21 to cancel the same Purchase Agreement to void the contract Sellers breached ab initio.	38
IV: Sellers have failed to offer proof as to an essential element of their case- in-chief, namely, damages and special damages in the form of attorneys fees.	41
V: The trial court does not have the right to appoint a special master to determine the amount of costs and attorneys fees when the Court Administrator has already determined these costs and disbursements separately and where the Court has an inherent obligation to determine these attorneys fees itself.	43
VI: John Andrew Duckwall did not abandon his claims under the assignment made to him by One Land Development Company.	48
Conclusion	50
Addendum	Add. 1

TABLE OF AUTHORITIES

CASES CITED:

	<u>Page:</u>
<i>Amerman v. Lakeland Dev. Corp.</i> , 295 Minn. 536, 203 N.W.2d 400 (1973)	21
<i>Becker v. Alloy Hardfacing & Engineering Co.</i> , 401 N.W.2d 655 (Minn. 1987)	21
<i>Benigni v. County of St. Louis</i> , 585 N.W.2d 51 (Minn. 1998)	21
<i>Brasher v. Grove</i> , 551 S.W.2d 302 (Mo.App.1977)	26
<i>Brown v. Stackler</i> , 612 F.2d 1057 (7th Cir.1980)	48
<i>Case v. Unified School District No. 233</i> , 157 F.3d 1243 (10 th Cir. 1998)	47
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317 (1986)	42
<i>Chalmers v. Kanawyer</i> , 544 N.W.2d 795, 798 (Minn. Ct. App. 1996)	23
<i>Coddon v. Youngkrantz</i> , 562 N.W.2d 39 (Minn. Ct. App. 1997)	2, 41
<i>Cohler v. Smith</i> , 158 N.W.2d 574 (1968)	31
<i>Desnick v. Mast</i> , 311 Minn. 356, 249 N.W.2d 878 (1976)	49
<i>Edwards v. Southampton Extension Civic Club</i> , 540 S.W.2d 535 (Tex.Civ.App.1976)	26
<i>Environmental Defense Fund, Inc. v. Reilly</i> , 1 F.3d 1254 (D.C.Cir.1993)	47
<i>Fair Housing Council v. Landow</i> , 999 F.2d 92 (4th Cir.1993)	47
<i>Fletcher v. St. Paul Pioneer Press</i> , 589 N.W.2d 96 (Minn. 1999)	21

<i>Folgers Architects Ltd. v. Kerns</i> , 262 Neb. 530, 633 N.W.2d 114 (2001)	23
<i>Frost-Benco Elec. Ass'n v. Minn. Pub. Utils. Comm'n</i> , 358 N.W.2d 639 (Minn. 1984)	20
<i>Holmberg v. Holmberg</i> , 588 N.W.2d 720 (Minn. 1999)	2, 43
<i>In Matter of Turners Crossroad Development Co.</i> , 277 N.W.2d 364 (Minn. 1979)	1, 26
<i>In re L-tryptophan Cases</i> , 518 N.W.2d 616 (Minn. App. 1994)	22
<i>Kelly v. First State Bank of Rothsay</i> , 145 Minn. 331 177 N.W. 347 (Minn. 1920)	33, 34-35
<i>Lewis v. Kendrick</i> , 944 F.2d 949 (1st Cir.1991)	48
<i>Lubbers v. Anderson</i> , 539 N.W.2d 398 (Minn. 1995)	2, 42
<i>Mendota Heights Association v. Friel</i> , 414 N.W.2d 480 (Minn. Ct. App. 1987)	1, 36
<i>Minneapolis, Saint Paul & S.S.M.R. Co. v. St. Paul Mercury Indemnity Co.</i> , 268 Minn. 390, 129 N.W.2d 777, (1964)	32
<i>Minnesota Mutual Life Ins. Co. v. Anderson</i> , 504 N.W.2d 284 (Minn. Ct. App.1993), review denied (Minn. Oct. 19, 1993)	23
<i>Modrow v. JP Foodservice, Inc.</i> , 656 N.W.2d 389 (Minn. 2003)	20
<i>Nicollet Restoration, Inc. v. City of St. Paul</i> , 533 N.W.2d 845 (Minn.1995)	42
<i>Olson v. Orton</i> , 28 Minn. 36, 8 N.W. 878 (1881)	39
<i>O'Meara v. Olson</i> , 414 N.W.2d 563 (Minn. Ct. App. 1987)	41
<i>Paidar v. Hughes</i> , 615 N.W.2d 276 (Minn. 2000)	33, 42

<i>Palatine National Bank v. Olson</i> , 1995 WL 697520 (Minn. Ct. App. 1995)	1, 35
<i>Panwitz v. Miller Farm-Home Oil Service</i> , 228 Neb. 220, 422 N.W.2d 63 (1988)	23
<i>Quevli Farms, Inc. v. Union Savings Bank & Trust Co.</i> , 178 Minn. 27, 226 N.W. 191 (1929)	1, 33, 34, 35
<i>Republic Nat'l Life Ins. Co. v. Marquette Bank & Trust Co.</i> , 295 N.W.2d 89 (Minn. 1980)	49
<i>Ramos v. Lamm</i> , 713 F.2d 546 (10 th Cir. 1983)	45
<i>Rogers v. Moore</i> , 603 N.W.2d 650 (Minn. 1999)	21
<i>Runia v. Marguth Agency, Inc.</i> , 437 N.W.2d 45 (Minn. 1989)	21
<i>Schwickert, Inc., v. Winnebago Seniors, Ltd.</i> , 680 N.W.2d 79 (Minn. 2004)	40
<i>Sheldon v. Vermonty</i> , 237 F.Supp.2d, 1270 (D. Kan. 2002)	47
<i>Space Center, Inc., v. 451 Corporation</i> , 298 N.W.2d 443 (Minn. 1980)	2, 40
<i>Stannard v. Marboe</i> , 159 Minn. 119, 198 N.W. 127 (1924)	1, 30, 31
<i>State v. Harris</i> , 667 N.W.2d 911 (Minn. 2003)	43
<i>Travertine Corporation v. Lexington-Silverwood</i> , 683 N.W.2d 267 (Minn. 2004)	1, 24, 29
<i>Untiedt v. Grand Laboratories, Inc.</i> , 552 N.W.2d 571 (Minn. Ct. App. 1996)	25
<i>Veit v. Anderson</i> , 428 N.W.2d 429 (Minn. Ct. App.1988)	35-36
<i>Vetter v. Sec. Cont'l Ins. Co.</i> , 567 N.W.2d 516 (Minn. 1997)	24

<i>Virtue v. Creamery Package Mfg. Co.</i> , 123 Minn. 17, 142 N.W. 1136 (1913)	36
<i>Winter v. Skoglund</i> , 404 N.W.2d 786 (Minn. 1987)	2, 50
<i>Wolfson v. City of St. Paul</i> , 535 N.W.2d 384 (Minn. App. 1995)	20

STATUTES AND RULES CITED:

Minnesota Statutes, § 559.21	38
Minnesota Statutes, §559.21, Subd. 2(a)	30
Minnesota Statutes, §559.21, Subd. 4(a)	31
Rule 119.02, General Rules of Practice for the Minnesota Courts	45
Rule 52.01, Minn. R. Civ. P.	21

SECONDARY AUTHORITY:

17A C.J.S. <i>Contracts</i> § 458	40-41
76 Am Jur 2d, <i>Trusts</i> , § 313 <i>Delegation of Powers</i>	39-40
Black's Law Dictionary 968 (7th ed.1999)	34
Manual for Complex Litigation, Third, Federal Judicial Center (1995)	45
Restatement (Second) of Contracts, § 237	40

STATEMENT OF ISSUES

I: Whether One Land Development Company properly assigned the Asset and Real Property Purchase Agreement to John Andrew Duckwall?

Travertine Corporation v. Lexington-Silverwood, 683 N.W.2d 267 (Minn. 2004).

A: Whether the position taken by the trial Court and Plaintiffs' Counsel as to who might actually receive an assignment violates the doctrine of the free alienability of real property and limits the definition of an "entity" too strictly?

In Matter of Turners Crossroad Development Co., 277 N.W.2d 364 (Minn. 1979).

B: Whether an assignee of a purchase agreement must be served with notice of cancellation before the cancellation is effective, particularly when the identity of the assignee has become known to Counsel for the holder of the purchase agreement and previously known to Sellers too?

Stannard v. Marboe, 159 Minn. 119, 198 N.W. 127 (1924)

II: Whether a person can slander title with the requisite malice where an Adverse Claim to Real Estate is prepared and filed of record on behalf of the client by the client's retained legal Counsel?

Palatine National Bank v. Olson, 1995 WL 697520 (Minn. Ct. App.)

A: Whether a person can slander title without bad faith?

Mendota Heights Association v. Friel, 414 N.W.2d 480 (Minn. Ct. App. 1987).

B: Whether a slander of title claim fails as a matter of proof when plaintiffs do not prove up damages, an essential element in a slander of title action, during their case-in-chief?

Quevli Farms, Inc. v. Union Savings Bank & Trust, 178 Minn. 27, 226 N.W. 191 (1929).

III: Whether Sellers in material breach of a Purchase Agreement ought to be allowed to use Minnesota Statutes, § 559.21 to cancel the same Purchase

Agreement to render void the very Purchase Agreement which Sellers had previously breached?

Space Center, Inc., v. 451 Corporation, 298 N.W.2d 443 (Minn. 1980);

Coddon v. Youngkrantz, 562 N.W.2d 39, 42 (Minn. Ct. App. 1997).

IV: Whether Sellers have failed to offer proof as to an essential element of their case- in-chief, namely, damages and special damages in the form of attorneys fees?

Lubbers v. Anderson, 539 N.W.2d 398 (Minn. 1995).

V: Whether the trial court has the right to appoint a special master to determine the amount of costs and attorneys fees when the Court Administrator has already determined these costs and disbursements separately and where the Court has an inherent obligation to determine these attorneys fees itself?

Holmberg v. Holmberg, 588 N.W.2d 720 (Minn. 1999).

VI: Whether John Andrew Duckwall abandoned his claims under the assignment made to him by One Land Development Company?

Winter v. Skoglund, 404 N.W.2d 786 (Minn. 1987).

STATEMENT OF THE CASE

Trial in the present matter was conducted in Anoka County District Court before the Honorable James A. Morrow. App. 214.¹ On June 21, 2005, the Court made its Findings of Fact, Conclusions of Law and Order for Judgment, issued as the first part of a two-part Order for Judgment. App. 214-216. Subsequently, on August 23, 2005, the Court issued Part 2 of its Findings of Fact, Conclusions of Law and Order for Judgment, incorporating all of part one into said Order. *Id.* at 217-262. The Court Administrator then entered Judgment on September 26, 2005, but the award of attorney fee and costs and disbursements was left blank. *Id.* at 263.

Defendants John Andrew Duckwall and One Land Development Company filed timely motions pursuant to Rules 52 and 59 of the Minnesota Rules of Civil Procedure. *Id.* at 174-213.

On February 21, 2006, the Court issued an Order denying Defendants' Motions for amended findings or for a new trial and appointing Eric Magnuson as Special Master to

¹ Four court reporters recorded the proceedings. Each court reporter prepared each transcript (or set of transcripts) differently. In an effort to order the chaos of references to these transcripts, the date of the trial proceedings follows the abbreviation "Tr.," followed by the volume, if applicable, and the page(s) cited, for example, Tr. 5/12/05, Vol. 3, p. 10. Trial exhibits are identified with this convention, "Tr. Ex." followed by the number of the exhibit. If a trial exhibit has been included in the Appendix, in virtually every case, the appropriate reference to the Appendix is made, i.e., "App.". The Joint Appendix has two volumes on account of the many exhibits necessary for this Court of Appeals to review. The Appellants prepared a Joint Appendix to ease reference to the same material cited, in many cases, by each Appellant.

determine the amount of attorney fees to be awarded to the plaintiffs by defendant Duckwall and to determine the amount of costs and disbursements. *Id.* at 265-276. Another Order Appointing a Special Master was issued by the Court on March 10, 2006. *Id.* at 277-283.

In April 2006, Defendants Duckwall and One Land Development appealed this matter to the Court of Appeals. These appeals were assigned the numbers A06-778, A06-786, and A06-795. In an Order dated May 16, 2006, this Court dismissed the appeals without prejudice on the grounds that the appeal was premature because the matter of attorney fees had not yet been resolved.

On April 6, 2006, Eric Magnuson filed the Report and Recommendation of Special Master. App. 284-303. The Court then issued an Order Affirming Special Master's Report and Recommendation. App. 304-315. An Amended Order Affirming Special Master's Report and Recommendation, and Judgment was filed on August 12, 2006, App. 316, and the Judgment was entered on August 23, 2006. App. 317. Pursuant to this Order and Judgment, the amounts awarded for attorney fees and costs and disbursements were inserted into the Judgment previously filed September 26, 2005. *Id.* at 320-321. An Order regarding the Special Master's fee was issued on September 1, 2006. *Id.* at 319.

On October 10, 2006, John Andrew Duckwall filed his Notice of Appeal. *Id.* at 322-324. Subsequently, One Land Development Company filed its Notice of Appeal on October 11, 2006. *Id.* at 325-327.

STATEMENT OF FACTS

Margaret Brickner is the sole trustee of the Thomas E. Brickner Credit Trust (Trust). Tr. 4/26/05, pp. 162-163. This Trust owns the land and restaurant at issue here. *Id.* Braam Investments, Inc., (Braam Investments) leases the property from the Trust. *Id.* Cynthia Braam and Gary Braam own Braam Investments which operates the restaurant. Tr. 4/25/05, A.M., pp. 57-58. Cynthia Braam is the daughter of Margaret Brickner. *Id.* at 56. These persons are the Sellers here.

Thomas Gambucci is an officer of One Land Development Company (One Land), the buyer here. Tr. 5/12/05, Vol. 3, p. 10. One Land is a real estate development company which buys and develops real estate. *Id.* at 10-11. Gambucci himself has been involved in real estate development since 1976. *Id.* John Andrew Duckwall is an elementary-school music teacher. Tr. 5/13/05, Vol. 2, p. 5. Duckwall has had no previous experience as a real estate developer. *Id.* at 7. Duckwall later became the assignee of the buyer, One Land development.

Margaret Brickner first met Thomas Gambucci in 2001 to discuss the possible sale of another unrelated property. Tr. 4/26/05, pp. 164-165; Tr. 5/12/05, Vol. 3, pp. 16-17. She informed Gambucci that someone else had already expressed an interest in that property but that the restaurant property was available. Tr. 4/26/05, pp. 164-165.

Gambucci was interested in the property, and he went to look at the property by himself during the Winter of 2001-2002. Tr. 5/12/05, Vol. 3, p. 17. His purpose was to

look at the property, “to see if there’s a lot of trees on it or if there’s bad soil -- or if it looked the neighbors were -- neighborhood was bad.” *Id.* There was snow on the ground and his inspection was limited. *Id.* at 17-18.

When asked about easements at trial, Gambucci testified, “Usually, as a developer, I don’t trust my own judgment, so we leave it up to title commitments and we usually get a title commitment. - - and that will show us what it was.” *Id.* at 19. Gambucci did not believe that you can see where an easement is by visually inspecting the property: “I don’t think anybody, even a surveyor, could see where easements are.” *Id.* This is because “[c]ommercial property is kind of funny because parking lots sometimes are merged together and - - and you really don’t know where the lot lines are even.” *Id.* at 20.

Gambucci, on behalf of One Land Development Company, offered a couple of purchase proposals to Sellers. Tr. 5/12/05, Vol. 3, pp. 77-78; App. 33-49, 53-58 & 154-159 (Tr. Ex. 16, 22 & 102). Sellers rejected these proposals in favor of having their own attorney Jeffrey Johnson, BARNA, GUZY & STEFFEN, draft the purchase agreement. Tr. 4/26/05, p. 167; Tr. 5/12/05, Vol. 3, pp. 79-80. Sellers had significant experience in selling real estate and had been involved with other purchase agreements. Tr. 4/25/05, P.M., p. 106; Tr. 4/26/05, pp. 162, 179-180.

On April 22, 2002, Sellers Margaret Brickner, the Brickner Trust, and Braam Investments signed a Purchase Agreement with One Land. App. 60-82 (Tr. Ex. 24). Cynthia Braam reviewed the purchase agreement before it was signed. Tr. 4/25/05, P.M.,

p. 105. Ms. Brickner signed for herself and for the Trust. Tr. 4/26/05, p. 169. Gary Braam signed on behalf of Braam Investments. *Id.* at 116. Thomas Gambucci signed for One Land. Tr. 5/12/05, Vol 3, p. 82.

The Sellers had the assistance of their counsel, Jeffrey Johnson, Tr. 4/26/05, p. 167; Tr. 4/27/05, pp. 297-298. Johnson represented Margaret Brickner personally and as Trustee of the Thomas E. Brickner Credit Trust, and Braam Investments in the transaction with One Land. *Id.* at 298-299. Johnson never personally spoke with Gambucci. Tr. 4/27/05, p. 355. Gambucci had no real input regarding the terms of the purchase agreement and there was no negotiation as to the purchase price. Tr. 5/12/05, Vol. 3, pp. 81-82.

At the time the purchase agreement was signed, there were two easements on the subject property, including a utility easement and an access easement for a neighboring property. App. 29 & 166. The purchase agreement failed to disclose either of these easements. Paragraph 6.2 of the Purchase Agreement states,

The Seller has good and marketable title to the assets and the real property, free and clear of any and all liens, charges, easements, mortgages, pledges, claims of ownership, security interests, levies, attachments, restrictions, leases, and other encumbrances (collectively, a "lien"), except as disclosed in this Agreement or in any exhibit containing permitted exceptions attached hereto.

App. 65 (Tr. Ex. 24). The sellers did not attach a permitted exceptions exhibit to the Purchase Agreement. Tr. 4/25/05, P.M., p. 28. Cynthia Braam characterized this omission as a mistake and that Gambucci was aware of the easements. *Id.* at 10 & 28.

Gary Braam and Margaret Brickner also testified that they informed Gambucci of the easements. Tr. 4/26/05, pp. 114-116 & 166 & 177. Gambucci testified that, at the time of signing the Purchase Agreement, he was not aware of any easements on the property. Tr. 5/12/05, Vol. 3, p. 82.

Sellers' own Attorney Johnson testified that the Purchase Agreement should have identified the easements on the property; Tr. 4/27/05, pp. 357-358. Johnson admitted that as of the moment Sellers executed the Purchase Agreement, Sellers were in immediate breach, *Id.* at 393. This constituted an ongoing, continuing breach, *Id.* at 394.

The Purchase Agreement itself does not allow for a waiver of these easements. No waiver springs into being even with full knowledge of these easements. Paragraph 12.3 of the Purchase Agreement states, "No action taken pursuant to this Agreement, including any investigation by or on behalf of either party, shall be deemed to constitute a waiver by the party taking such action in compliance with any representation, warranty, covenant or agreement contained herein and/or in any ancillary documents." App. 70 (Tr. Ex. 24). In addition, Paragraph 12.6, of the Purchase Agreement states,

This Agreement (including exhibits hereto) supercedes all prior agreements and understandings, oral and written, including, without limitation, between the parties hereto with respect to the subject matter hereof and cannot be changed or terminated orally, and this Agreement, together with related agreements or ancillary documents related hereto executed in connection herewith, constitute the entire agreement of the parties as to the matters set forth herein and therein. There are no warranties, representations or agreements among the parties in connection with the subject matter hereof, except as set forth or referred to herein.

App. 71 (Tr. Ex. 24).

The Purchase Agreement imposes a number of deadlines on the parties. Paragraph 1.3 of the Purchase Agreement describes an “Approval Period” of one hundred twenty days during which “Buyer shall have obtained any and all necessary government approvals, . . .” App. 61 (Tr. Ex. 24). Paragraph 5.1 of the Agreement then relates that closing had to take place within thirty days of the expiration of this “Approval Period.” *Id.* Paragraph 5.1 also includes a provision which permits the Buyer to extend the Approval Period by an additional sixty days on written notice to Seller and payment of \$20,000 in additional Earnest Money. *Id.* One Land paid this additional \$20,000; and the extension was granted by the Sellers. Tr. 4/25/05, P.M., p. 93. This additional money was received on or about August 22, 2002. *Id.* at 20.

With respect to Article 1, Paragraph 1.3 of the Purchase Agreement, Governmental Approvals, One Land determined that the intended project, based upon the favorable C-1 and C-2 Fridley zoning requirements already in place, did not require city approval for the project and so did not seek any other approval. Tr. 5/12/05, Vol. 3, p. 86. In addition, no city approval was needed for One Land’s parking plans. *Id.* at 87.

Meanwhile, Thomas Gambucci met with Paul Holmes of Pope & Associates, an architectural firm, and Harland Hallquist of Adolphson & Peterson Construction during September, 2002. Tr. 4/27/05, pp. 244-246, 264. Gambucci showed them a drawing of the subject property and explained what he wanted to accomplish with the property. *Id.*

Holmes agreed to try to develop a conceptual site plan that would indicate the development potential of the site. *Id.* at 247. Gambucci told them that he wanted a three or four story senior housing project which could be placed next to and possibly be connected to a restaurant. *Id.* Holmes agreed to do a conceptual plan on a preliminary basis in order to determine its feasibility. *Id.* at 250. They met three times. *Id.* at 260 & 288.

Another deadline in the Purchase Agreement relates to producing and reviewing evidence of title. According to paragraph 3.2 of the Purchase Agreement, Sellers had to select the title company and order the title commitment. App. 62 (Tr. Ex. 24). The Purchase Agreement specifically states:

As soon as possible after execution of this Agreement, Seller, at its sole cost and expense, shall deliver to Buyer for Buyer's approval a Commitment for the issuance of an ALTA owner's policy of title insurance issued by "Seller's Choice" (the "Title Company"), certified to date and to include proper certifications for searches covering bankruptcies, state and federal tax liens, judgments, unpaid taxes, assessments and pending assessments ("Title Evidence").

Id. Sellers admitted these obligations at trial, Tr. 4/25/05, P.M., p. 108. Cynthia Braam believed that the title commitment equaled the evidence of title as referenced in article three of the Purchase Agreement. *Id.* Donald Tonseth, a title examiner with Land Title, agreed, Tr. 4/26/05, p. 73.

After defining "Title Evidence," Paragraph 3.2 goes on to state,

Buyer shall be allowed twenty (20) days after receipt of the last of such Title Evidence for examination and the making of any objections to the

marketability of the title, such objection to be made in writing or deemed waived. If any objections are so made, Sellers shall be allowed sixty (60) days from receipt of notice of such objections to make title marketable. If such defects are cured within said sixty (60) day period, Buyer shall be notified in writing of the curing of the defects, in which case the Closing shall be the later of the Closing specified in Article VI or ten (10) days after the notice of cure to the Buyer.

App. 62 (Tr. Ex. 24).

Sellers hired Land Title. Tr. 4/25/05, P.M., p. 114. Gambucci did not hire Land Title. Tr. 5/12/05, Vol. 3, p. 85. Donald Tonseth of Land Title worked on the title commitment. Tr. 4/26/05, pp. 54-56. Work on the title commitment did not even begin until September 22, 2002. *Id.* at 71-72. On October 11, 2002, Tonseth prepared a title commitment with an effective date of August 19, 2002, given that Anoka County's records were only current through August 19th. *Id.* at 55-56.

The Commitment for Title Insurance prepared by Tonseth states, "This Commitment shall be effective *only when* the identity of the proposed Insured and the amount of the policy or policies committed for have been inserted in Schedule A hereof by the Company, either at the time of issuance of this Commitment or by subsequent endorsement." App. 89 (Tr. Ex. 29). (Emphasis added.)

Tonseth's trial testimony revealed numerous errors in the commitment, including misidentifying the proposed insured. Tr. 4/26/05, pp. 65-66. Schedule A of the Commitment incorrectly identifies one of the Sellers, Braam Investments, as a Proposed Insured. *Id.*; App. 90 (Tr. Ex. 29), Tr. 4/27/05, p. 398. Schedule B also contains errors:

Section I, paragraph D, the Commitment requires that the warranty deed should run in favor of One Land Development *and* Braam Investments, Inc. Tr. 4/26/05, pp. 67-68; App. 91 (Tr. Ex. 29). Accuracy here is crucially necessary to ensure proper transfer of the property. Tr. 4/26/05, pp. 67-68. An inaccurate warranty deed may cause a title problem in the future. *Id.*

In addition, Paragraph 10 of Schedule B - Section II notes an easement identified as Document Number 716076. App. 92 (Tr. Ex. 29). This easement was terminated by the Easement Agreement identified as Document Number 1089330. App. 29 (Tr. Ex. 13). The succeeding easement is described under Paragraph 11 of Schedule B - Section II. App. 93 (Tr. Ex. 29). Title Examiner Tonseth testified that paragraph 10 was an error. Tr. 4/26/05, p. 69. Tonseth testified that Gambucci spoke with him about this easement. *Id.* at 71.

Cynthia Braam also admitted that the title commitment had an easement which needed to be removed and the Sellers needed to provide an additional abstract. Tr. 4/25/05, P.M., p. 110.

The August 19, 2002, title commitment was not the last commitment prepared by Tonseth in the process. Tr. 4/26/05, pp. 73 & 85. Tonseth needed additional information. *Id.* at 73. At some time after October 11, 2002, Tonseth sent a copy of the August 19, 2002, title commitment to Cynthia Braam with his handwritten notes on the first and third pages. *Id.* at 74, App. 94-97 (Tr. Ex. 30). One note states that "This commitment was

based on the review of an abstract for Lots 1 & 2. Lot 3 was searched at the county was [sic] not available at the time the exam was done. I will review the abstract for Lot 3 [and] make any changes as necessary.” App. 94 (Tr. Ex. 30). Cynthia Braam received this annotated document. Tr. 4/25/05, P.M., p. 111. She was aware of the need to remove paragraph 10 of Schedule B, Section II of the title commitment. Tr. 4/26/05, pp. 10-11. Sellers gave the additional abstract to Tonseth on October 14, 2002. *Id.* at 75. After speaking with Tonseth, Gambucci himself learned about the missing abstract and the need for additional title work. Tr. 5/12/05, Vol. 3, at 93.

Tonseth prepared a supplemental title commitment with a new effective date of November 6, 2002. Tr. 4/26/05, p. 84, App. 103-106 (Tr. Ex. 40). This new title commitment came out on a date after November 6, 2002, but, given the fact that the county was “that far behind,” Tonseth could not remember when it had been prepared. Tr. 4/26/05, p. 86. Gambucci recalled picking the November 6, 2002, title commitment up on November 15, 2002. Tr. 5/12/05, Vol. 3, p. 98.

While the supplemental title commitment removed the easement listed as Document Number 716076, it still contained errors. The Proposed Insured again included Braam Investments, Inc. Tr. 4/26/05, pp. 87-88; App. 103 (Tr. Ex. 40). This would need to be changed to have an accurate title commitment. Tr. 4/26/05, pp. 87-88. In addition, the commitment still identified Braam Investments as a grantee on the required warranty deed. *Id.* at 88-89; App. 104 (Tr. Ex. 40).

Cynthia Braam testified that she never saw the November 6, 2002, title commitment. Tr. 4/25/05, P.M., pp. 113-115. However, even without this corrected title commitment, Attorney Johnson sent One Land a letter demanding to close by November 22, 2002. App. 111 (Tr. Ex. 42) This letter was dated November 12, 2002, ten days before the imposed deadline date.

While working with the Sellers on the purchase of the subject property, Gambucci was also speaking with John Andrew Duckwall about investment opportunities in One Land's proposed senior housing project. (Duckwall first met Thomas Gambucci in late Winter or early Spring, 2002. Tr. 5/13/05, Vol. 2, p. 7.) The men discussed a senior housing development; and Gambucci offered to let Duckwall put money towards the purchase of one of these units. *Id.* at 14. On April 26, 2002, Duckwall entered into such an agreement with One Land. In exchange for \$15,000, Duckwall acquired an option to invest in one of a number of One Land's development projects. App. 85-86 (Tr. Ex. 26).

After this first partial assignment, Duckwall and Gambucci began meeting frequently about other possibilities with regard to the property. Tr. 5/13/05, Vol. 2, p. 20. They discussed the possibility of linking the restaurant with the seniors complex. *Id.* at 21. Gambucci and Duckwall discussed having One Land assign its whole interest in the Purchase Agreement to Duckwall. *Id.* at 24. At that point, Duckwall began to do additional research. He went to fifty to sixty restaurants and he looked at over a dozen senior housing projects. *Id.* at 25. He also prepared an application for a liquor license.

Id. at 37.

Duckwall reviewed the Purchase Agreement between One Land and the Sellers. When confronted with the use of the word “entity” in the Purchase Agreement, Duckwall looked the word up on his computer. *Id.* at 29-30. Duckwall noted a number of synonyms for the word. *Id.* He determined “entity” to be a very inclusive word; that it mentioned “individual” and it said, “Persons and corporations are equivalent - - equivalent entities under the law.” *Id.* He also noted that “sole proprietorship” appeared under the definition. *Id.* at 31. Duckwall concluded, “[I]n my mind, owning this restaurant it - - when if - - when it came into my name, that immediately a sole proprietorship would be formed which would be the entity formed.” *Id.*

On November 24, 2002, One Land assigned its entire interest in the purchase of the property at issue to Duckwall. Tr. 5/13/05, Vol. 2, pp. 33-34; App. 112 (Tr. Ex. 43). In exchange, Duckwall agreed to sign over his four-unit property to One Land. *Id.* One Land would also have the exclusive right to develop the property being purchased. *Id.*

Prior to the assignment of the Purchase Agreement to Duckwall, Gambucci sent a letter to Braam Investments notifying the Sellers that One Land intended to assign its interest to Duckwall. Tr. 5/12/05, Vol. 3, p. 136, App. 99 (Tr. Ex. 33). This letter contains a typographical error as to date². Tr. 5/12/05, Vol. 3, pp. 94, 135-136. Even

² Gambucci has more than once put an incorrect date on a letter. Tr. 5/12/05, Vol. 3, p. 94 (“Well, the date is wrong because I done the same thing again.”). Gambucci also put the wrong date on his letter waiving the governmental approvals condition. He put

though the letter is dated August 27, 2002, it was actually sent after Gambucci picked up the first title commitment, probably some time in October, 2002. *Id.*

In late November or early December, 2002, Duckwall went to the restaurant with his mother and Gambucci. Tr. 5/12/05, Vol. 3, pp. 134-135, Tr. 5/13/05, Vol. 2, pp. 46 & 71-73. There Duckwall first met Gary Braam, who was working at the restaurant. *Id.* at 47. Gambucci introduced Duckwall to Braam and told Braam that Duckwall was the assignee to the purchase. *Id.* at 48. Braam looked at Duckwall and nodded his head. *Id.* at 51. Gambucci wanted to keep the meeting simple because he “didn’t want to rock the boat too much because the fact that they were real cautious about letting anybody know the restaurant’s for sale.” Tr. 5/12/05, Vol. 3, p. 134.

Duckwall’s mother had funds necessary to loan him “quite a bit” of the money necessary to purchase the property if he needed it. Tr. 5/13/05, Vol. 2, pp. 85-86. Given the opportunity, Duckwall would have closed on the purchase of the property. *Id.* at 56.

As stated above, on November 12, 2002, Jeffrey Johnson sent One Land a letter warning One Land that, if a closing pursuant to the terms of the Purchase Agreement did not occur by the close of business on November 22, 2002, the sellers would deem One Land to be in default under the Purchase Agreement and they would pursue any and all appropriate remedies. Tr. 4/27/05, p. 326; App. 111 (Tr. Ex. 42). Gambucci testified that

“August 21, 2001” when he actually sent the letter in 2002, *id.* at 88; App. 52 (Tr. Ex. 19).

he never received a copy of this letter. Tr. 5/12/05, Vol. 3, p. 107.

The closing did not happen by November 22, 2002, and the Sellers decided to cancel the Purchase Agreement. Tr. 4/25/05, P.M., p. 44. Johnson prepared a Notice of Cancellation pursuant to Minnesota Statutes, § 559.21. Tr. 4/27/05, p. 327; App. 113-114 (Tr. Ex. 44). On December 9, 2002, this Notice of Cancellation was served on the Minnesota Secretary of State. *Id.* at 115-116. No one served Duckwall with a Notice of Cancellation in any form. Tr. 5/13/05, Vol. 2, pp. 51-52.

In response to the Notice of Cancellation, Johnson received a voice message from an attorney named John Schoonover on January 3, 2003. Tr. 4/27/05, p. 330. Johnson and Schoonover spoke by telephone on January 6, 2003, and Schoonover informed Johnson that One Land had title objections which had not been resolved, and that One Land had assigned its interest in the Purchase Agreement to Duckwall. *Id.* at 330-331. Johnson responded that he knew of no title objections and that he never saw an assignment. *Id.* Schoonover replied with a copy of a letter drafted by Gambucci (mis)dated August 27, 2002. *Id.* at 334. Johnson denied that the letter had been sent to his clients because the date on the letter did not seem to fit the chronology of events. *Id.* Schoonover then responded with another letter dated January 9, 2003. *Id.*, App. 120 (Tr. Ex. 46). In this letter, Schoonover stated that Duckwall was prepared to move ahead with the closing. *Id.* Johnson never responded to this letter. Tr. 4/27/05, p. 336.

In addition, on January 8, 2003, Gambucci sent Johnson a letter informing him of

the fact that One Land had assigned its interest in the Purchase Agreement to Duckwall. Tr. 5/12/05, Vol. 2, p. 21-22; App. 161-164 (Tr. Ex. 117).

After deciding to cancel the Purchase Agreement with One Land, Sellers promptly executed another purchase agreement with Town Center Development.³ The purchase agreement with Town Center was worth \$75,000 more than the purchase agreement with One Land Development, Tr. 4/25/05, P.M., p. 53, App. 121-138 (Tr. Ex. 48), and its text acknowledged that One Land might have a prior claim: “That no action or proceeding has been commenced or threatened by One Land Development attempting or seeking to enforce a Purchase Agreement dated April. 22, 2002.” *Id.* at 129. Johnson testified that this provision was put in the agreement to protect the sellers in the event that there was a subsequent claim by One Land to the property. Tr. 4/27/05, p. 346. Town Center agreed at one point to pay for one-half of the legal fees and costs related to any subsequent litigation involving One Land. App. 148-149 (Tr. Ex. 53).

Upon learning of the sale to Town Center, Duckwall executed a Notice of Adverse Claim on Registered Land because he wished to purchase the property under the terms of the Purchase Agreement. Tr. 5/13/05, Vol. 2, p. 58. In December, 2003, Attorney Johnson received a phone call from Cameron Kelly, Esq., indicating that a Notice of Adverse Claim would be filed against the property. Tr. 4/27/05, p. 337. Johnson then

³ Johnson as Counsel for Sellers kept Town Center Development apprised as early as November 12, 2002, of the status of the Purchase Agreement. Tr. 5/12/05, Vol. 2, p. 7; App. 111 (Tr. Ex. 42).

received a follow-up letter from Kelly dated January 5, 2004, with a copy of the Amended Notice of Adverse Claim. *Id.*; App. 150-151 (Tr. Ex. 67). In response, Johnson sent a letter dated January 9, 2004, demanding that Duckwall remove the Notice of Adverse Claim. Tr. 4/27/05, pp. 338-339; App. 143-147 (Tr. Ex. 52). Anoka County recorded a first Notice of Adverse Claim on December 30, 2003. App. 139-140 (Tr. Ex. 50), and an Amended Notice of Adverse Claim on January 5, 2004. App. 141-142 (Tr. Ex. 51).

Richard Whinnery, one of the owner-developers of Town Center Development, the subsequent purchaser of the property, expected his senior housing project to yield more than \$300,000 in profits. Tr. 5/13/05, Vol. 2, p. 219. In addition, an analysis of the value of the property was performed by Licensed Real Estate Appraiser Clark Goset. App. 168-169. (Excerpt from Tr. Ex. 161). His analysis concluded that the profits from the operation of the restaurant would be between \$3,000-\$4,000 per month and the senior citizen complex would yield a profit to its developers of \$3,256,775 in 2002, and \$4,136,954 in 2005. *Id.*

ARGUMENT

This complex case involves a number of interrelated legal arguments, six days' testimony, at least 150 trial exhibits, a half-day of argument to the trial court, and numerous post-trial submissions. Counsel for John Andrew Duckwall incorporate fully by reference those issues and arguments offered by Attorney Kevin Giebel in the brief submitted on behalf of One Land Development Company. Although John Andrew Duckwall and One Land Development have their own claims in this litigation, it is clear that their interests converge in obtaining the real property at issue or in receiving an award of damages.

Counsel for Duckwall also reincorporate and restate their delineated requests made to the trial court to amend the Court's facts and conclusions of law consistent with Duckwall's two motions for amended facts and conclusions of law.

STANDARD OF REVIEW

A reviewing court is not bound by and need not give deference to a district court's decision on a purely legal issue. *Modrow v. JP Foodservice, Inc.*, 656 N.W.2d 389, 393 (Minn. 2003) (citing *Frost-Benco Elec. Ass'n v. Minn. Pub. Utils. Comm'n*, 358 N.W.2d 639, 642 (Minn. 1984)).

"Where the intention of the parties can be determined wholly from the writing, the construction of the instrument is a question of law for the court to resolve." *Wolfson v. City of St. Paul*, 535 N.W.2d 384, 386 (Minn. App. 1995) (Citations omitted.) — "This

court is not required to defer to the trial court's findings"; the construction and effect of an unambiguous contract are questions of law which we review de novo. *Id.*

In applying Rule 52.01, Minn. R. Civ. P., "we view the record in the light most favorable to the judgment of the district court." *Rogers v. Moore*, 603 N.W.2d 650, 656 (Minn. 1999). * * * [T]he court's factual findings must be clearly erroneous or "manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole" to warrant reversal. *Id.* (quotation omitted). "Findings of fact are clearly erroneous only if the reviewing court is left with the definite and firm conviction that a mistake has been made." *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999) (quotation omitted).

"The standard for review of a bench trial is broader than the standard for jury verdicts . . ." *Runia v. Marguth Agency, Inc.*, 437 N.W.2d 45, 48 (Minn. 1989).

"On review, this court will not reverse a trial court's award or denial of attorney fees absent an abuse of discretion." *Becker v. Alloy Hardfacing & Engineering Co.*, 401 N.W.2d 655, 661 (Minn. 1987).

The district court shall allow reasonable costs to a prevailing party in a district court action. *Benigni v. County of St. Louis*, 585 N.W.2d 51, 54 (Minn. 1998).

The reasonable value of counsel's work is a question of fact and we must uphold the district court's findings on that issue unless they are clearly erroneous. *Amerman v. Lakeland Dev. Corp.*, 295 Minn. 536, 537, 203 N.W.2d 400, 400-01 (1973).

When the question on appeal is “the legal standard to apply to calculate [] attorney fees, our review is de novo.” *In re L-tryptophan Cases*, 518 N.W.2d 616, 619 (Minn. App. 1994).

I: One Land Development Company properly assigned the Asset and Real Property Purchase Agreement to John Andrew Duckwall.

A: The position taken by the trial Court and Plaintiffs’ Counsel as to who might actually receive an assignment violates the doctrine of the free alienability of real property and interprets the definition of an “entity” too strictly.

B: An assignee of a purchase agreement must be served with a notice of cancellation before the cancellation is effective, particularly when the identity of the assignee has become known to Counsel for the holder of the purchase agreement and previously to Sellers.

Two assignments run between One Land Development Company and John Andrew Duckwall. The first assignment, a partial assignment, grants Duckwall the opportunity to purchase a unit in One Land’s proposed senior housing development at a significantly discounted price, Tr. Ex.26, App. 85–89. This assignment came into being less than a week after the execution of the Asset and Real Property Purchase Agreement, *id.* and Tr. Ex. 24. The second assignment, “Addendum,” assigns Duckwall the entire interest held by One Land Development Company, Tr. Ex. 43, App. 112; Tr. 5/13/05, Vol. 2, pp. 36 and 93.⁴ Here, Duckwall is obligated to convey his interest in his personally-owned four-plex as consideration for this assignment. Tr. Ex.43, App. 112.

No “particular form of words is required for an assignment, but the assignor must

⁴ “I get the property. It’s in my name.” Tr. 36.

manifest an intent to transfer and must not retain any control or any power of revocation." *Minnesota Mutual Life Ins. Co. v. Anderson*, 504 N.W.2d 284, 286 (Minn. Ct. App.1993), review denied (Minn. Oct. 19, 1993). "...A court will not examine the adequacy of consideration as long as something of value has passed between the parties," *Chalmers v. Kanawyer*, 544 N.W.2d 795, 798 (Minn. Ct. App. 1996). "...[Consideration] need not pass from the promisee to the promisor to be valid," *id.* (Citations omitted.)

The assignment clause in the Asset and Real Property Purchase Agreement at issue is not an "anti-assignment clause." The actual clause reads: "[¶] 12.11 Assignment. Buyer shall be entitled to assign this Agreement to one or more entities formed to acquire the Assets or portion of the Assets, provided that such assignments shall not release Buyer from any liability hereunder." App. 72. There is no specific language here which indicates that One Land Development Company *cannot* assign its interest to another person.

"[W]here the contract has been fully performed or if the assignee offers and is able to complete performance," an anti-assignment clause has no remaining force, *Panwitz v. Miller Farm-Home Oil Service*, 228 Neb. 220, 422 N.W.2d 63, 66 (1988) (emphasis in original). See also, *Folgers Architects Ltd. v. Kerns*, 262 Neb. 530, 633 N.W.2d 114, 126-27 (2001), where the Court noted "the intent of [a] provision against assignment of rights under a contract [is] generally [] to allow the parties to choose with whom they contract," but the Court refused to enforce an anti-assignment provision where the

assignment did not affect the parties' actual performance of the contract. The Sellers here cannot claim that under circumstances where they are paid the selling price, they are harmed. Money serves as money in either instance.

According to Minnesota law, contract rights are generally assignable, except where an assignment is (1) prohibited by statute; (2) prohibited by contract; or (3) where the contract involves a matter of personal trust of confidence. *Travertine Corporation v. Lexington-Silverwood*, 683 N.W.2d 267, 270 (Minn. 2004) (citing *Vetter v. Sec. Cont'l Ins. Co.*, 567 N.W.2d 516, 521 (Minn. 1997) (“As a general rule, and in the absence of a contractual provision to the contrary, an obligor on a contract may assign all beneficial rights to another, or may delegate his or her duty to perform under the contract to another, without the consent of the obligee.”)).

The actual assignment language in the Asset and Real Property Purchase Agreement between Plaintiffs and One Land Development merely restates Minnesota Law since the Agreement may be assigned to “one or more entities formed to acquire the Assets or portion of the Assets, provided that such assignment shall not release Buyer from any liability hereunder.” Tr. Ex.24, § 12.11, App. 72. The limiting language is meant to force One Land Development Company to remain liable on the debt. There is nothing in this provision *forbidding or prohibiting* One Land Development from assigning the property to Duckwall: “Buyer shall be entitled to assign this Agreement...,” *id.*, § 12.11. There is no negative here, no limiting language. Where an assignment is permitted to an

entity cannot be rewritten into an anti-assignment clause where no other assignments are permitted.

John Andrew Duckwall understood himself to be included within the definition of “entity.” Duckwall checked a dictionary to ensure that the meaning of “entity” included him as an individual person, Tr. 5/13/05, Vol. 2, pp. 29–31. That Plaintiffs’ attorneys, BARNA, GUZY & STEFFEN drafted the Asset and Real Property Purchase Agreement here is readily proved by comparing Trial Exhibits 24, App. 60–82, and Trial Exhibit 48, App. 121–138. —The contract language remains nearly identical from that contract involving One Land Development Company and the subsequent contract to sell the same property to Town Center Development Company, about a year later. The operative canon of construction instructs that where a term in a contract is susceptible of more than one meaning, then the term or word is interpreted to favor the one who did not draft the contract, *Untiedt v. Grand Laboratories, Inc.*, 552 N.W.2d 571, 574 (Minn. Ct. App. 1996).

Any suggestion that Thomas Gambucci drafted the Agreement is blatant nonsense. For a second dose of reality, compare Gambucci’s first two proposed purchase agreements, Tr. Ex. 16, App. 33–17, Tr. Ex. 22, App. 53–58, with the final Purchase Agreement actually executed by the Sellers and One Land Development Company, Tr. Ex. 24, App. 60–82.

The trial court’s decisions, Part I and Part II, violate settled Minnesota law which

favors the free alienability of property: The Minnesota Supreme Court analyzed this issue in the case *In Matter of Turners Crossroad Development Co.*, 277 N.W.2d 364, 369–370 (Minn. 1979). The Court first asks if there is a reciprocal benefit to the Seller and the Purchaser of the land in question. Plaintiffs cannot claim any actual benefit to themselves based on what person or business entity pays the purchase price; this cannot serve as a breach of the Purchase Agreement—Neither Braam Investments, Inc., nor Margaret Brickner can prove any benefit to themselves of having an “entity formed” to buy their land. More significantly, what are the *damages* to the plaintiffs? The trial court received no testimony whatsoever that the Braams or Ms. Brickner would have been harmed if John Andrew Duckwall had been allowed to complete the purchase.

Continuing, the Minnesota Supreme Court then states that the one wishing to enforce such a covenant (and, likewise, to assert the breach of such a covenant as a legal basis to establish another’s breach, as here), then the covenant must benefit plaintiffs in the physical use of their land. Plaintiffs below claimed no such benefit in the physical use of their land since their entire interest is being sold.

Our State Supreme Court notes also that “[m]any courts treat covenants restricting the use of land with disfavor, strictly construing them in favor of the free use of property. See, e. g., *Brasher v. Grove*, 551 S.W.2d 302 (Mo.App.1977); *Edwards v. Southampton Extension Civic Club*, 540 S.W.2d 535 (Tex.Civ.App.1976). “ *Turners Crossroad Development Co.*, *op. cit.* What may be most telling about this *Matter of Turners*

Crossroad case is that the Court uses the reasoning of the Restatement to reach its own holding.

The Purchase Agreement contains a severability clause, ¶ 12.9: “If any term...or condition of this Agreement or the application thereof to any circumstance shall be invalid or enforceable to any extent, the remaining terms, conditions, and provisions of this Agreement shall not be affected thereby....” App. 71. Given that the “entity” language contradicts Minnesota law, it need not be enforced at all, let alone control as the plaintiffs insist.

The trial court in the present case has also misapplied standard contract law: Normal folks do not carry a pocket Black’s Law Dictionary to consult for the meaning of words. Only lawyers and judges have such arcane interests. Other people use standard dictionaries, dictionaries with less erudite and less limiting definitions than Black’s Law Dictionary. “Entity” in standard dictionaries includes “person” within its defined set of meanings. Thomas Gambucci and John Andrew Duckwall cannot be held to a Black’s Law Dictionary definition that is defined only by Jeffrey Johnson, attorney for plaintiffs. Gambucci did not draft the Asset and Real Property Purchase Agreement here. Q. “Do you recall what...changes appeared in [the Asset and Real Property Purchase Agreement] that you recommended or you asked to be inserted into that document? A. I don’t think I had [any] input.” Tr. 5/12/05, Vol. 1, p. 81 (Gambucci); see also *id.*, pp. 80–81. John Andrew Duckwall and Thomas Gambucci had the right to interpret the words of the

contract in simple English.

The trial court's unnecessarily wooden interpretation of the assignment clause is inconsistent with Minnesota law and with simple principles of interpretation.

Sellers had knowledge of the assignment to John Andrew Duckwall. Thomas Gambucci provided a letter to Cindy Braam stating that the contract would be assigned to John Andrew Duckwall. App. 99. Gambucci admits that his date is wrong on the letter, Tr. 5/12/05, Vol. 3, p. 136, App. 99 (Tr. Ex. 33). Gambucci had come by the Braams to deliver other documents, including a check, Exhibit 25, App. 83, Exhibit 31, App. 98, and Exhibit 33, App. 99. (Their daughter signed for the check and its receipt.) No one from plaintiffs, particularly Cindy Braam who acted as go-between for the parties, complained that Thomas Gambucci had hand-delivered documents to Cindy Braam rather than sending these by certified or registered mail.

In addition to the letter, John Andrew Duckwall actually met Gary Braam at the Sandee's Restaurant in late November, 2002, Tr. 5/12/05, Vol. 1., p. 134 (Gambucci); Tr. 5/13/05, Vol. 2, p. 73 (Elaine Duckwall). Duckwall, his mother, Elaine Duckwall, and Thomas Gambucci went to the restaurant "because [John Andrew Duckwall] had purchased some land from the Braams," Tr. 5/13/05, Vol. 2, p. 72 (Elaine Duckwall). These individuals met briefly with Gary Braam, Tr. 5/12/05, Vol. 1, p. 134 (Gambucci); Tr. 5/13/05, Vol. 2, p. 73 (Elaine Duckwall). Gambucci personally introduced John Andrew Duckwall to Gary Braam at Sandees' restaurant as "the assignee or buyer," Tr.

5/12/05, Vol. 1, p. 135 (Gambucci).

The notice provisions in Purchase Agreement does not require that any assignment of the same Purchase Agreement be given to the Sellers by certified mail, Paragraph 12.5, Tr. Ex. 24, App.70–71; neither does the assignment provision itself include any necessity of written notice, *id.*, Paragraph 12.11: “Buyer shall be entitled to assign this Agreement to one or more entities formed to acquire the Assets or portion [sic] of the Assets, provided that such assignment shall not release Buyer from any liability hereunder,” App. 72.

There is no language which precludes an assignment or requires the consent of the Sellers. This Court of Appeals is surely aware that such language is often included in assignments, but even where the consent of the Sellers is demanded, normally, this language inherently obligates the Sellers not to unreasonably withhold consent for an assignment.

The notice provision of the Asset and Real Property Purchase Agreement *does* have a purpose, namely, to establish the presumption that notice has actually been given. This is strongly suggested by this language: Notice “shall be deemed to have been duly given after dispatch by certified, [sic] or registered first class mail...,” Paragraph 12.5, *id.*

There is more. The primary purpose of putting an anti–assignment in the contract is to protect the contracting party from dealing with parties whom the contracting party has not chosen to do business with, *Travertine Corp.*, 683 N.W.2d at 271. Sellers– Plaintiffs’ interpretation of the assignment provision does not advance this purpose in any way. According to Plaintiffs, One Land Development Company could only assign the property

to an entity formed by Duckwall. One would acknowledge that in the end, Sellers-Plaintiffs would be doing business with Duckwall. How can it matter seriously to Sellers what person or what business entity pays the purchase price to the Sellers?

This logic applies to the present situation. It is immaterial whether One Land Development Company hands the money to Plaintiffs or Duckwall hands the money to Plaintiffs. Once Plaintiffs get paid, they no longer have any control over who owns the property.

The Sellers' only fair interest is in having their property sold to a buyer who can perform by paying the sales price. Unless of course, the Sellers want to sell to someone else who has offered an additional \$75,000 to the purchase price. See Tr. Ex.48, App. 121-138. The niceties of language come into particular play when one wishes to disclaim obligations under a contract. This becomes clear when Sellers do not want to close on the sale of the property to John Andrew Duckwall or to One Land, particularly given that Sellers intended to keep the payments previously made by One Land Development and to gain the significant increase in the purchase price offered by Town Center Development.

Plaintiffs' allegation that Minnesota Statutes, §559.21, Subd. 2(a), only requires service of the notice of cancellation on One Land stands as an incorrect interpretation of the law. According to the Minnesota Supreme Court, an assignee of a vendee must be served with the notice of cancellation. *Stannard v. Marboe*, 159 Minn. 119, 121, 198 N.W. 127, 128 (1924) ("We adopt the rule that the constructive notice, in such case, is the

equivalent of actual knowledge, and, either, is sufficient to compel the vendor to serve such notice on the vendee's mortgagee or assignee before he can be deprived of his rights in the interest of the vendee in the property."). In *Stannard*, the Court interpreted substantially the same notice language as the present statute relied on by the Plaintiffs. The statute at the time required notice to be served upon "the purchaser, his personal representatives or assigns . . ." *Id.*, 159 Minn. at 120, 198 N.W. at 127. The Court used the word "assigns" in the context of "assignment," which it defined as "[a] transfer or making over to another of the whole of any property, real or personal, in possession or in action, or of any estate or right therein." *Id.*

"The purpose of serving the notice upon the holders of a vendee's interest in the contract and upon their assigns is to enable them to have notice of, and an opportunity to make up, the default." *Cohler v. Smith*, 158 N.W.2d 574, 577 (1968). In *Cohler*, the Minnesota Supreme Court upheld the lower court's conclusion that the vendors in that case had actual notice of the assignment of the property such that notice of cancellation was required to be given to the assignee. *Id.* at 578.

In addition, under Minn. Stat. §559.21, Subd. 4(a), "The notice required by this section must be given notwithstanding any provisions in the contract to the contrary, except that earnest money contracts, purchase agreements, and exercised options that are subject to this section may, unless by their terms they provide for a longer termination period, be terminated on 30 days' notice." In other words, except for permitting the terms

of purchase agreement to shorten the termination period, Plaintiffs may not contractually limit their obligation to provide notice of the cancellation.

Sellers' attorney, Johnson, had knowledge of the claims of John Andrew Duckwall.

In fact, the Notice of Cancellation directs the reader to communicate directly with the same Jeffrey Johnson. When Attorney Schoonover alerted Johnson as to the fact that John Andrew Duckwall had not been served as Assignee of the Purchase Agreement, Johnson did not respond other than to propose that Schoonover enjoin the cancellation. Communication to an attorney amounts to notice to a client: "The rule that notice to a client is notice to his principal is applicable to attorney and client," *Minneapolis, Saint Paul & S.S.M.R. Co. v. St. Paul Mercury Indemnity Co.*, 268 Minn. 390, 405, 129 N.W.2d 777, 787 (1964). Johnson could not ignore Attorney Schoonover with impunity. Schoonover adequately communicated to Johnson that John Andrew Duckwall had become the assignee of One Land's interest.

II: A person cannot slander title with the requisite malice where an Adverse Claim to Real Estate is prepared and filed of record on behalf of the client by the client's retained legal Counsel.

A: A person cannot slander title without bad faith.

B: A slander of title claim fails as a matter of proof when plaintiffs do not prove up damages, an essential element in a slander of title action, during their case-in-chief.

Initially, the slander of title case against John Andrew Duckwall fails as a matter of proof. The elements required for a slander of title claim are: (1) that there was a

false statement concerning the real property owned by the plaintiff; (2) that the false statement was published to others; (3) that the false statement was published maliciously; and (4) that the publication of the false statement concerning title to the property caused the plaintiff pecuniary loss in the form of special damages, *Paidar v. Hughes*, 615 N.W.2d 276, 279-280 (Minn. 2000). The filing of an instrument known to be inoperative is a false statement that, if done maliciously, constitutes slander of title, *Kelly v. First State Bank of Rothsay*, 145 Minn. 331, 332, 177 N.W. 347 (Minn. 1920). Malice, in a slander of title case, requires only that the disparaging statement be made without a good faith belief in its truth, *Quevli Farms, Inc. v. Union Savings Bank & Trust Co.*, 178 Minn. 27, 30, 226 N.W. 191, 191-192 (1929). Special damages are allowed in the form of reasonable attorney fees and related costs which are a direct consequence of any action to quiet title necessitated by the slander of title, *Paidar*, 615 N.W.2d at 278.

John Andrew Duckwall filed the Amended Notice of Adverse Claim to Real Estate after his then-attorney had reviewed the facts and had drafted the Notice for John Andrew Duckwall to sign. Trial Exhibit 51, App. 141-142, indicates that "This instrument was drafted by... Van House & Associates, P.A." Attorney Van House "represented both Mr. Gambucci and [John Andrew Duckwall]. Tr. 5/13/05, Vol. 2, p. 98, as did Attorney Cameron Kelly at the same firm, *id.*, p. 141. The Answer and Counterclaim attacking plaintiffs' claims as to the cancellation of the Asset and Real Property Purchase Agreement has also been executed by Kelly, Counsel for this firm, Tr. 5/13/05, Vol. 2, p.

136.

Q. Mr. Duckwall, can you identify Exhibit 51 for me?

A. It's an amended notice of adverse claim that was...made out in my behalf.

Id., p. 57. Compare, App.10–20, particularly the signature blocks at the end of this pleading.

John Andrew Duckwall filed this notice of adverse claim because “[He] had learned that the property [assigned to him] had been sold to another party...Town Center Development and because “[he himself] want[ed] to purchase the property...under the asset and real property purchase agreement.” Tr. 5/13/05, Vol. 2, p. 58.

This attention to filing a legal document with the input of trained Counsel ought to mean that there is no slander of title. As *Quevli Farms* teaches a statement is malicious if made with no probable cause, *op. cit.*, 178 Minn. at 30, 226 N.W. at 192; cf. Black's Law Dictionary 968 (7th ed.1999) (defining "malice" as including "the intent, without justification or excuse, to commit a wrongful act [or][r]eckless disregard of the law or of a person's legal rights.") Absolutely no such evidence to support a finding of malice has been offered to this Court. Trained Counsel disagree on a regular basis.

The trial court declares that John Andrew Duckwall had the necessary malice to slander title the Brickner real property at issue here. This is not true.

Slander of title is the “[u]tterance of false and malicious statements disparaging the title to property in which one has an estate or interest, if the statements are untrue and

cause damage * * *,” *Kelly v. First State Bank*, 145 Minn. 331, 332, 177 N.W. 347, 347 (1920).

Sellers in the present case had the burden of proving not only that the statements of John Andrew Duckwall were false and caused plaintiffs actual financial loss in the form of special damages but also that the false statements were made without probable cause.

Quevli Farms, Inc., 178 Minn. at 30, 226 N.W. at 192.

John Andrew Duckwall had retained legal Counsel to represent him with respect to his claims against Braam Investments, Inc., and Ms. Brickner. John Andrew Duckwall consulted with the Van House law firm whose attorneys determined that it was appropriate to file a Notice of Adverse Claim to Real Estate. The trial court has mistakenly burdened John Andrew Duckwall with the obligation to discern the underlying, applicable law, to interpret and parse the terms of a Purchase Agreement, and to second-guess the advice of his legally-trained and licensed Counsel. No layman, acting in good faith, should bear such a burden. John Andrew Duckwall may well have made a legal error, but a legal error is not the maliciousness required in a slander of title action. John Andrew Duckwall teaches school. It should be clear that he is not at all familiar with the law or its finer points. He had a right to rely on his attorney. “[S]uch a mistake does not constitute a slander of title claim,” *Palatine National Bank v. Olson*, 1995 WL 697520 (Minn. Ct. App.). This unpublished decision is appended to this Brief.

A person has the legal right to "seek[] and receive[] legal advice from a lawyer

under circumstances in which a reasonable person would rely on the advice." *Veit v. Anderson*, 428 N.W.2d 429, 432 (Minn.App.1988).

One must also remark that John Andrew Duckwall did not demonstrate any ill will whatsoever toward plaintiffs. He simply wanted the assignment he had from Thomas Gambucci to be enforced. The property, as all parties here acknowledge, valuable property.

Finally, there is no bad faith here. “[B]ad faith is a necessary element of slander of title...,” *Mendota Heights Association v. Friel*, 414 N.W.2d 480, 484 (Minn. Ct. App. 1987).

The burden of proof here is on the plaintiffs to show that John Andrew Duckwall knew that his Notice of Adverse Claim was, in fact, false and “that knowledge of the falsity had been brought home to [Duckwall,]” *Virtue v. Creamery Package Mfg. Co.*, 123 Minn. 17, 46–47, 142 N.W. 1136 (1913). John Andrew Duckwall had obtained Counsel who believed that the Notice of Adverse Claim had a proper purpose (as reflected once again in the Answer and Counterclaim).

John Andrew Duckwall truthfully relates his claim in his Notice of Adverse Claim, Tr. 5/13/05, Vol. 2, p. 137. First, the actual language of Trial Exhibits 50 and 51 is this:

The alleged right or interest claimed by Adverse Claimant is as follows, as Assignee of One Land Development Company, Buyer, and Braam Investments, Inc., d/b/a Sandee’s Restaurant, a Minnesota Corporation, Margaret A. Brickner as Trustee of the Thomas E. Brickner Credit Trust, and Margaret A. Brickner, pursuant to a Purchase Agreement dated April 22, 2002.

Trial Exhibit 51, App. 141, demonstrates that the date is correct, the parties are correct, and that Claim relates to a Purchase Agreement. John Andrew Duckwall testified that he understood himself to be the assignee of these rights under the same Purchase Agreement, Tr. Ex. 24, App. 60–82, and his Assignments, Tr. Ex. 26, App. 85., and Tr. Ex. 43, App. 112; Tr. 5/13/05, Vol. 2, *passim*.

Plaintiffs' Counsel finally established only that the personal address section of the Notice of Adverse Claim offered John Andrew Duckwall *in care of his attorneys* at their business address was "wrong," Tr. 5/13/05, Vol. 2, p.139; Tr. Ex. 51, App. 141.

This eliciting by plaintiffs' Counsel falls rather short of proving that John Andrew Duckwall *knew* that his Notice was inherently false and filed maliciously, that is, without probable cause.⁵

There is one other matter to consider: Even if, for the sake of the argument, the assignment to John Andrew Duckwall had been improper as between Duckwall and plaintiffs, this does not mean that the covenant by One Land Development Company to transfer its interest in the property at issue did not give Duckwall a legal interest or at the least a prospective interest. After all, Duckwall paid \$15,000 initially and this same money was wrapped into the second assignment which required additionally that Duckwall

⁵ There has been an untoward sense in these proceedings on the part of the trial court that the sole arbiter of truth and justice is BARNA, GUZY & STEFFEN and its attorneys. This is not likely. Refer only to their missteps as admitted by Jeffrey Johnson, one of its attorneys and the numerous drafting errors in the Purchase Agreement.

sign over his own four-plex. The consideration for the transfer is certainly adequate. Thomas Gambucci for One Land Development meant to transfer the Sandee's Restaurant Property to Duckwall. Tr. Ex. 43, App. 112. If this Court were to determine that Sellers did not properly cancel the Purchase Agreement but at the same time deem invalid the assignment to Duckwall, Duckwall would still have a legal claim against One Land for the same property.

Duckwall still has an interest in the property at issue on account of the transfer by One Land Development of its own interest to John Andrew Duckwall.⁶ After all, a proper assignment would place John Andrew Duckwall into the shoes of One Land Development; the transfer through One Land Development to Duckwall simply means that there is an intermediate step rather than a direct assignment. Duckwall can still assert a claim to the property through One Land Development Company.

For all these reasons, the slander of title determination by the trial court should be reversed and the concomitant judgment related to attorneys fees against John Andrew Duckwall as well.

III: Sellers in material breach of a Purchase Agreement cannot be allowed to use Minnesota Statutes, § 559.21 to cancel a Purchase Agreement in order to void the very Purchase Agreement which Sellers have already breached.

As part of their Final Submissions, Counsel for John Andrew Duckwall, raised the

⁶ "So, when my cousin sold me the Brooklyn Bridge, he didn't have title to the bridge; but when he actually purchased bought the Brooklyn Bridge two years' later, the bridge became mine..." The same first-year law school analysis applies here.

obvious material defaults of Sellers.⁷

—Sellers did not begin the necessary process to obtain *any* evidence of title until several months after signing the Asset and Real Property Purchase Agreement and never allowed purchasers the opportunity to challenge final title commitment.

—Sellers breached by not removing the easements which were warranted in the Purchase Agreement not to exist. Sellers' own attorney, Jeffrey Johnson, also acknowledged that he made a mistake in not identifying the three easements as permitted exceptions to the Purchase Agreement. Tr. 4/27/05, pp. 357-358, 393-394. *Olson v. Orton*, 28 Minn. 36, 8 N.W. 878 (1881), rejects plaintiffs' assertion that a buyer has the obligation to determine the accuracy and truthfulness of the averments made by a Seller.

—Sellers breached when Trustee Margaret Brickner failed to participate in the Cancellation. She could not delegate this authority to her daughter, Cindy Braam: "The powers granted to the Trustee herein *shall be exercised by the Trustees or Trustee* without the necessity of notice to or license or approval of any court or person," Trust Indenture, page 9, Tr. Ex. 12. If one cannot delegate such authority, then the trial court's decision that Ms. Brickner could *ratify* what she could not delegate is a false conclusion. After all, "[a]s a general rule, a trustee charged with the duty of administering a trust cannot delegate to others powers vested in him which involve the exercise of judgment and

⁷ The breaches related to the failure to provide notice to John Andrew Duckwall as the assignee of the Purchase Agreement have already been discussed. This constitutes another material breach.

discretion,” 76 Am Jur 2d, Trusts, § 313 “Delegation of Powers,” at 532.

—Sellers breached by cooperating with another prospective Buyer, Town Center Development to attempt to cancel the Purchase Agreement and by then selling the Sandee’s restaurant property a second time, but now to Town Center Development.

—Sellers breached by formally petitioning the City of Fridley to re-zone the real property at issue here to suit Town Center Development rather than One Land and John Andrew Duckwall.

—Sellers breached by initiating the underlying lawsuit which forced John Andrew Duckwall and One Land Development Company to retain Counsel and to pay significant attorney’s fees.

Notwithstanding this whole series of breaches, the trial court counted these as “mistakes” or determined that certain breaches might have been waived, completely disregarding the language of the Purchase Agreement itself and the parole evidence rule.

This series of breaches on the part of Sellers made it impossible and legally unnecessary for John Andrew Duckwall to complete his performance. The Restatement (Second) of Contracts, § 237, instructs that the remaining duties of one party to a contract are conditioned on there being no previous “uncured material failure” by the other party. *See, Schwickert, Inc., v. Winnebago Seniors, Ltd.*, 680 N.W.2d 79, 84 (Minn. 2004). A first-breaching party cannot use the other party’s subsequent breach to avoid liability,” *Space Center, Inc., v. 451 Corporation*, 298 N.W.2d 443, 451 (Minn. 1980). Cf. 17A

C.J.S. Contracts § 458.

Coddon v. Youngkrantz, 562 N.W.2d 39, 42 (Minn. Ct. App. 1997) requires a material default on the part of one against whom statutory cancellation is demanded. The Courts of Minnesota are fully aware that a statutory cancellation may be unjust, exactly as here. See, *O'Meara v. Olson*, 414 N.W.2d 563, 564 (Minn. Ct. App. 1987). Equity still stands available to upend an improper statutory cancellation. A party in prior material breach ought not have recourse to statutory cancellation.

For all these reasons, this Court of Appeals should void the purported statutory cancellation and allow John Andrew Duckwall (or One Land Development) the right to close on the Purchase Agreement or enter judgment in favor of John Andrew Duckwall in an amount consistent with the trial testimony of expert witness Clark Goset, Licensed Appraiser.

The expert Appraiser, Mr. Clark Goset, who testified as to the losses suffered by John Andrew Duckwall and One Land Development used hundreds of comparable sales of condominiums in the Metro Area to determine the financial losses suffered by Duckwall and One Land Development Company. These reasonable losses include \$129,500 in lost profits from the Sandee's restaurant operation and \$1,591 953.21 damages related to lost investment income.

IV: Sellers have failed to offer proof as to an essential element of their case-in-chief, namely, damages and special damages in the form of attorneys fees.

Plaintiffs offered no showing whatsoever of pecuniary loss during their case in

chief.⁸ This is an essential element of their claim. In the absence of proof on an essential element of a claim, a defendant is entitled to judgment as a matter of law. *Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn. 1995). See too, *Nicollet Restoration, Inc. v. City of St. Paul*, 533 N.W.2d 845, 847-48 (Minn.1995) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

In truth, Sellers were not harmed. They will receive the contracted-for purchase price paid by John Andrew Duckwall or by One Land Development Company. Sellers might even receive the purchase price from Town Center Development Company but sweetened by another \$75,000, plus keeping the \$35,500 paid by One Land Development Company. As part of any slander of title case, the proponent must prove that “the publication of the false statement concerning title to the property caused the plaintiff pecuniary loss in the form of special damages,” *Paidar, op. cit.* As part of their *case-in-chief*, no witness for the Seller offered a single word to describe the Sellers’ claimed damages: Not a single word. Since damages are an essential element of Sellers’ claims, all their claims must fail as a matter of law. Counsel for John Andrew Duckwall does not recall any decision on the part of the trial court to bifurcate the trial. It is hornbook law that no party failing to offer evidence as to each necessary element of proof of its claim can recover.

⁸ Plaintiffs’ expert witness, Robert Lunieski, MAI, did not provide any testimony as to damages.

V: The trial court does not have the right to appoint a special master to determine the amount of costs and attorneys fees when the Court Administrator has already determined these costs and disbursements separately and where the Court has an inherent obligation to determine these attorneys fees itself.

In the present case, the trial court cannot, under the guise of “sheer volume” of documents or “lack of experience,” App. 276, force the litigants to pay a special master for work that the court ought to do itself. Can a trial court really claim that it lacks the experience to determine the propriety or the amount of attorneys fees? Yes, in the words of the trial court, “[t]his Court has little experience as a civil litigator [so] it sought out the help of a highly regarded civil litigation attorney,” App. 311. The Special Master did not attend the trial in any part. What is telling is that the Special Master is well known and respected as an *appellate* attorney.

If a court does not have the time or expertise to adjudicate a matter, it cannot fairly shift that burden to the litigants, forcing the litigants to pay a special master to perform a judge’s job.⁹

The Special Master did not provide any accounting as that word is commonly understood in the legal community—Instead of working through a set of straightforward maths to calculate a final sum, the Special Master made determinations based on the law

⁹ If this Court of Appeals were to agree with this questionable procedure, one can be sure that it will be misused by the trial courts and will result in another class of quasi-judicial “officials.” The Minnesota Supreme Court has already determined that this is constitutionally unacceptable, *State v. Harris*, 667 N.W.2d 911 (Minn. 2003); *Holmberg v. Holmberg*, 588 N.W.2d 720, 724 (Minn. 1999). (Present Counsel for John Andrew Duckwall initiated and argued *Holmberg*.)

as he understood the law and on “facts” of which he from time to time candidly admits his complete lack of familiarity with this case. See, App. 284–303. How could the Special Master reach conclusions where he had no knowledge? His entire process is no more than second-guessing a trial court where the trial court “lacked experience.” The trial court does not question the Special Master’s Report, or adequately consider the issues raised by Counsel for the defendants: “This Court affirms the Special Master’s costs and disbursements award.... [T]his Court adopts and affirms the Report and Recommendation of the Special Master in its entirety with regards [sic] to the issue of attorneys’ [sic] fees” App. 311. The attorneys fees award to BARNA, GUZY & STEFFEN amounted to \$156,957.00, App. 305. This appears to include every hour billed on this entire case by plaintiffs’ Counsel including all time spent in the case related directly to One Land Development.

Plaintiffs offered their claims as to attorneys fees, costs and expenses, post-trial. Counsel for John Andrew Duckwall complained that there were clearly errors in the claims submitted. The trial court improperly allowed plaintiffs another attempt to establish the fees and costs and disbursements. When the costs and disbursements were challenged before the Anoka Court Administrator, the Court Administrator allowed only \$3,082.10, App. 173. Plaintiffs complained to the Court that they were not being adequately reimbursed for their fees and costs and expenses. The Court’s Special Master upped the costs and disbursements to a breathtaking \$19,080.46. App. 321.

Rule 119.02 General Rules of Practice for the Minnesota Courts, requires that any application for attorneys fees requires an affidavit establishing “*a description of each item of work performed.*” (Emphasis added.) Not so with Counsel for plaintiffs. Given their complete failure to follow the applicable rule, their demand for attorneys fees should have been rejected the first time around. *Compare, Ramos v. Lamm*, 713 F.2d 546, 553 (10th Cir. 1983). — “A party seeking to recover attorneys fees must provide the court with time records that ‘reveal...all hours for which compensation is requested and *how those hours were allotted to specific tasks,*’ (Emphasis added.)

The Manual for Complex Litigation, Third, Federal Judicial Center (1995), offers useful advice:

The number of hours reasonably expended and the reasonable hourly rate must be supported by adequate records and other appropriate evidence. Thus, counsel intending to seek a fee award should maintain time records in a manner that will identify specifically the various tasks and the amount of time spent on them. The failure to keep contemporaneous time records may justify an appropriate reduction in the award. Lawyers should make a good faith effort to exclude excessive, redundant, or otherwise unnecessary hours from a request for attorneys fees, just as a lawyer in private practice would do in billing clients.

Id. at 191–192.

The same Manual for Complex Litigation suggests that “[t]o the extent not previously submitted with the motion [for attorneys fees], time and expense records must be submitted in manageable and comprehensible form, preferably in advance of any hearing to enable parties to prepare, to reach agreements where possible, and to streamline

the hearing,” *id.* at 198.

Town Center Development Company committed itself contractually to pay Sellers for one-half of the bills and litigation costs of this case, Tr. Ex. 53, App. 148, and has paid nothing, Tr. 5/13/05, Vol. 2, pp. 174–175. If one encourages another to litigate against another party and if one promises to share the fees and expenses, that promise should be enforced. John Andrew Duckwall should not be asked to pay for any part of the half of the billings owed by Town Center. “All agreements or understandings with clients and other attorneys regarding fees in the litigation must be submitted or disclosed,” *Manual of Complex Litigation, op. cit.* at 198. Is this contract to share attorneys fees of no consequence whatsoever? App. 148–149. Or, “...not relevant,” as the trial court suggest or “without authority”? App. 313. It may be that Town Center Development has balked at its share of these fees. Appellant John Andrew Duckwall’s argument put simply is that John Andrew Duckwall cannot be required to pay any more than one-half of the total amount of fees charged to plaintiffs by the BARNA, GUZY & STEFFEN law firm. After all, the same firm drafted this contract to protect its own clients. John Andrew Duckwall had brought into evidence the contract between the Sellers and the meddling party, Town Center Development, where Town Center Development promised to pay one-half of the costs and fees incurred by Sellers. The Sellers should be limited to nicking John Andrew Duckwall for no more than one-half of any attorneys fees assessed against him. The same argument applies to any costs and disbursements assessed against

him.

One other important matter: Braam Investments, Inc., and Ms. Brickner decided not to sue Thomas Gambucci on his guarantee, Tr. Ex. 24, App. 80–82. The guarantee burdens Thomas Gambucci with payment of the attorneys fees related to breach of the Asset and Real Property Purchase Agreement. By choosing not to enforce its guarantee at trial, plaintiffs, under a theory of res judicata have released Thomas Gambucci from liability to pay any attorneys fees. It is possible that this decision was made by plaintiffs to keep Gambucci from simply tendering the purchase price and buying the real property at issue here.

Plaintiffs made their own choices. They ought not be able to have their cake and eat it too. Duckwall should not have to pay for *any* of the fees demanded by plaintiffs since plaintiffs determined that they did not need to claim fees from Thomas Gambucci, unfairly prejudicing John Andrew Duckwall. “An attorney may not recover fees from an adversary that could not be billed to the client; such fees are presumptively unreasonable,” *Sheldon v. Vermonty*, 237 F.Supp.2d, 1270 (D. Kan. 2002), citing *Case v. Unified School District No. 233*, 157 F.3d 1243, 1249 (10th Cir. 1998).

At least four federal Circuit Courts have held that when a party submits a § 1988 attorney's fee request that is excessive, the court may respond by awarding no fees at all. See, for example, *Environmental Defense Fund, Inc. v. Reilly*, 1 F.3d 1254, 1258-60 (D.C.Cir.1993); *Fair Housing Council v. Landow*, 999 F.2d 92, 96-97 (4th Cir.1993);

Lewis v. Kendrick, 944 F.2d 949, 958 (1st Cir.1991); *Brown v. Stackler*, 612 F.2d 1057, 1059 (7th Cir.1980). The reason for acting punitively when a party asks for fees that are outrageously excessive is to deter attorneys from "mak[ing] unreasonable demands, knowing that the only unfavorable consequence of such misconduct would be reduction of their fee to what they should have asked for in the first place." *Stackler*, 612 F.2d at 1059.

Without more information from BARNA, GUZY & STEFFEN one cannot compare the hours spent by its attorneys to litigate against Duckwall or to litigate against One Land Development Company. It is not fair that John Andrew Duckwall pay for the serial depositions of Thomas Gambucci or plaintiffs' unsuccessful cross-motions for summary judgment and their responses.

Counsel for John Andrew Duckwall states to the Court that he has never in any case, even in highly document-sensitive cases involving the Resolution Trust Corporation or Deere & Company received so much useless paper, unnecessary correspondence, or repetitive material from any law firm or any attorney.

VI: John Andrew Duckwall did not abandon his claims under the assignment made to him by One Land Development Company.

Abandonment cannot apply to the facts of the present case in that plaintiffs did not provide any trial testimony or one written word of evidence from John Andrew Duckwall or from Thomas Gambucci from One Land Development that either had abandoned his rights under the Purchase Agreement. The trial court's determination that Duckwall had abandoned his interest is ill-founded: John Andrew Duckwall did not have the *time*

under any conceivable analysis to allow Sellers to intone the solemn defense, “abandonment.” Sellers had, within three months of their illegitimate “cancellation” already executed another Purchase Agreement with Town Center Development, Tr. Ex. 48, App. 121–138. The doctrine of abandonment ought not protect a party who acts unfairly, in haste, to sell to yet another party. What should strike the careful reader of the second Purchase Agreement, the one with Town Center Development, is the language Sellers add as a condition precedent to protect their unseemly behavior: “That no action or proceeding has been commenced or threatened by One Land Development attempting or seeking to enforce a Purchase Agreement dated April 22, 2002.” Article VIII, (c), App. 129. Sellers and their attorneys were well aware that One Land Development Company might litigate to enforce its own Purchase Agreement.

John Andrew Duckwall himself retained Counsel who filed an Amended Notice of Adverse Claim to Real Estate, the first document filed of record related to this property in some years, Tr. Ex. 67, App. 141–142, since the first purchase agreement and its pretended cancellation were never recorded.

“Although rights under a contract may be lost by...abandonment, abandonment must be proved by clear and convincing evidence.” *Republic Nat'l Life Ins. Co. v. Marquette Bank & Trust Co.*, 295 N.W.2d 89, 93 (Minn. 1980). Acts indicating waiver or abandonment must be clear, unequivocal, and inconsistent with the existence of the contract. *Desnick v. Mast*, 311 Minn. 356, 365, 249 N.W.2d 878, 884 (1976). Close

does not count either: “Conduct which is equally consistent with the continuance of a contract and with abandonment or waiver simply does not rise to proof by clear and convincing evidence that the parties have abandoned their agreement.” *Winter v. Skoglund*, 404 N.W.2d 786, 796 (Minn. 1987).

The Courts of Minnesota have *never* determined that a contract had been abandoned within three months’ time. One who asks for an equitable determination that a contract has been abandoned should not be in default, should not have the power to ignore telephone communications with John Schoonover, then-attorney for John Andrew Duckwall, should not pretend bafflement and rage at Duckwall’s Notice of Adverse Claim Against Real Estate.

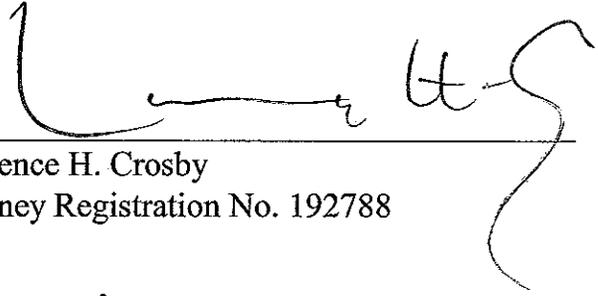
CONCLUSION

For all these reasons, this Court of Appeals should reverse the Orders and Judgments of the trial court and direct entry of judgment in favor of John Andrew Duckwall and One Land Development on account of the uncured breaches of the Purchase Agreement on the part of Sellers.. The judgment should include an order that plaintiffs pay Duckwall and One Land \$129,500 in lost profits from the Sandee’s restaurant operation and at least \$3,256,775 in damages related to lost investment income.

Respectfully submitted,

Dated at Saint Paul, Minnesota, this 5th day of February, 2007

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