

2

NO. A10-875

---

State of Minnesota  
**In Court of Appeals**

---

St. Michael Mall, Inc.,

*Appellant,*

v.

Michael Elsenpeter d/b/a A&M Liquor Store,

*Respondent.*

---

**APPELLANT'S BRIEF, ADDENDUM AND APPENDIX  
IN SUPPORT OF APPEAL**

---

Robert S. Halagan  
HALAGAN LAW FIRM, LTD.  
101 Courthouse Square  
15 Second Street N.W.  
Buffalo, MN 55313

*Attorney for Respondent*

Justin L. Seurer  
SEURER LAW, LLC  
11901 James Road  
Minnetonka, MN 55343

*Attorney for Appellant*

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

**TABLE OF CONTENTS**

PROCEDURAL HISTORY.....4

LEGAL ISSUES.....5

STATEMENT OF THE CASE.....7

STATEMENT OF THE FACTS .....8

ARGUMENT ..... 11

    I.    DISTRICT COURT RECOGNIZED THAT ST. MICHAEL MALL IS  
        THE PREVAILING PARTY..... 12

        A. Appellant St. Michael Mall is the Prevailing ..... 12

        B. Granting of Arbitration on Summary Judgment  
           does Not Qualify Respondent as Prevailing Party ..... 13

    II.   DISTRICT COURT SHOULD HAVE GRANTED ADDITIONAL  
        ATTORNEY FEES TO ST. MICHAEL MALL..... 14

    III.  RESPONDENTS ARE NOT ENTITLED TO ATTORNEY FEES FOR  
        THE DISTRICT COURT’S ORDER TO ARBITRATE. .... 15

        A. The District Court Incorrectly Compelled Arbitration..... 15

        B. The Lease Agreement Does Not Compel Arbitration ..... 17

        C. Respondent did Not Request an Award under Section 9..... 19

    IV.  THE DISTRICT COURT’S AWARD OF ATTORNEY FEES TO  
        RESPONDENT IS EXCESSIVE AND UNREASONABLE..... 19

V.    CONCLUSION .....20

VI.   ADDENDUM ..... 22

## TABLE OF AUTHORITIES

### Cases

<i>Amdahl v. Green Giant Co.</i> , 497 N.W.2d 319 (Minn.App.1993).....	16
<i>Becker v. Alloy Hardfacing &amp; Eng'g co.</i> , 401 N.W.2d 655 (Minn. 1987).....	19
<i>Benigni v. County of St. Louis</i> , 585 N.W.2d 51 (Minn. 1998), <i>review denied</i> (Minn. May 20, 1997) .....	12
<i>Borchert v. Maloney</i> , 581 N.W.2d 838 (Minn. 1998) .....	13
<i>Correll v. Distinctive Dental Servs.</i> , 636 N.W.2d 578 (Minn. App. 2001).....	15
<i>Gross v. Running</i> , 403 N.W.2d 243 (Minn. App. 1987), <i>review denied</i> (Minn. May 20, 1987) .....	13, 15
<i>Heyer v. Moldenhauer</i> , 538 N.W.2d 714 (Minn. App. 1995).....	17
<i>Zelle v. Chicago &amp; N.W.R. Co.</i> , 65 N.W.2d 583 (Minn. 1954) .....	17

### Minnesota Statutes

General Rule of Practice 119.03 .....	20
Minn. Stat. § 572.....	16
Minn. Stat. § 572.08.....	16
Minn. Stat. § 572.09(a) .....	16

## PROCEDURAL HISTORY

1. January, 9, 2008: The matter of *Michael Elsenpeter d/b/a A&M Liquor Store v. St. Michael Mall* was filed in Buffalo, Wright County, Minnesota.
2. June 26, 2008: Motion Hearing for Summary Judgment held on Motions filed by both parties.
3. August 6, 2008: Order regarding Motions entered by the Honorable Judge Halsey.
4. February 11, 2009: Arbitration was conducted by the Honorable Myron S. Greenburg.
5. March 4, 2010: The matter of *Michael Elsenpeter d/b/a A&M Liquor Store v. St. Michael Mall* came on for Bench Trial in Buffalo, Wright County, Minnesota.
6. March 4, 2010: The Court granted a two (2) week briefing schedule, with one (1) week following that for both parties to reply.
7. March 17/18, 2010: Initial Briefs filed by both parties.
8. March 19, 2010: Notice of Entry of Judgment entered by the Honorable Judge Mossey.

9. March 25, 2010: Reply Briefs would have been due, but for Notice of Entry of Judgment filed one (1) week earlier by the Honorable Judge Mossey.
10. April 19, 2010: Notice of Appeal filed.

## LEGAL ISSUES

### Issue I:

**Should the District Court have recognized Appellant St. Michael Mall at the Prevailing Party and Awarded Appellant Attorney Fees?**

Ruling Below:

The District Court ruled in the negative.

Apposite Authority:

*Benigni v. County of St. Louis*, 585 N.W.2d 51 (Minn. 1998), *review denied*

(Minn. May 20, 1997)

*Gross v. Running*, 403 N.W.2d 243 (Minn. App. 1987), *review denied* (Minn.

May 20, 1987).

### Issue II:

**Should the District Court have granted additional attorney fees to Appellant St. Michael Mall?**

Ruling Below:

The District Court ruled in the negative.

Apposite Authority:

*Correll v. Distinctive Dental Sros.*, 636 N.W.2d 578 (Minn. App. 2001)

*Provision 3.05 of the Lease Agreement*

**Issue III:**

**Should the District Court have Awarded Attorney Fees to Respondent for Compelling Arbitration?**

Ruling Below:

The District Court ruled in the positive.

Apposite Authority:

*Amdahl v. Green Giant Co.*, 479 N.W.2d 319 (Minn. App. 1993)

*Gross v. Running*, 403 N.W.2d 243 (Minn. App. 1987), *review denied* (Minn. May 20, 1987).

## STATEMENT OF THE CASE

The matter of *Michael Elsenpter dba A&M Liquor Store* was filed on January 9, 2008 in Wright County, Minnesota. The Respondent requested in his Complaint, among other things, to Compel Arbitration of his claims pursuant to his Lease Agreement and Minn. Stat. 572.09. Summary Judgment Motions were filed by both parties and the Honorable Judge Halsey ordered the parties to Arbitrate the claim of the Respondent.

The Arbitration of *Michael Elsenpter dba A&M Liquor Store* was conducted before the Honorable Myron S. Greenburg came on February 11, 2009. (Addendum, p. 23). The Honorable Judge Greenburg found in favor of the Appellant, St. Michael Mall and determined that Respondent was the losing party. (Addendum, p. 23-25).

The matter of *Michael Elsenpter dba A&M Liquor Store* came on for Bench Trial on March 4, 2010 before the Honorable Judge Dale Mossey in Wright County, Minnesota. Both parties were given two (2) weeks to file Briefs on the issues before the Court, with an additional week following for Reply Briefs to be filed. (Transcript of March 4, 2010 Hearing, pp. 12:24-13:11). The Honorable Judge Dale Mossey issued the Court's Order immediately after the initial briefs were filed on March 19, 2010. The

Order of the Court was filed before either party was provided an opportunity to respond, in contravention of the Court's Original Order.

Appellant, St. Michael Mall contends that Arbitration was not mandatory under the terms of the Lease Agreement, that Appellant is the prevailing party and Respondent is not entitled to any attorney fees, and that the award of attorney fees by the Honorable Judge Mossey were excessive and unreasonable.

#### STATEMENT OF THE FACTS

1. Respondent filed a Complaint in Wright County District Court on or about January 9, 2008. (Complaint).
2. The Respondent requested that Arbitration be compelled under Paragraph 3.05 of the Lease Agreement. (Complaint, ¶ 6; Appendix, p. 4).
3. The relevant portion of Section 3.05 of the Lease Agreement states:

“...The costs and expenses of the arbitrators, the fees of the arbitrators, and all attorney's fees and costs incurred, shall be paid by the losing party in the arbitration proceeding, and the definition of “losing party” shall be a proper subject of the arbitration proceeding.”

(Appendix, p. 4 – Section 3.05).

4. The Honorable Judge Stephen M. Halsey ordered the parties to participate in Arbitration pursuant to paragraph 3.05 of the Lease Agreement. (Addendum, pp. 25-30).
5. As late as November 19, 2008, the Respondent refused to agree that his "demand" for Arbitration would even be binding. (Appendix, pp. 24-25 & 35-36).
6. Arbitration was conducted on February 11, 2009 by the Honorable Myron S. Greenburg. (Addendum, pp. 23-25).
7. The Arbitration proceeding determined that the Respondent was the "losing party." (Addendum, p. 24; ¶4).
8. The Arbitrator found that "Plaintiff and Mr. VanDorf, in violation of the terms of their Lease (Sections 3.03 & 6.02), constructed a wall on their own, without prior required landlord approval, in a location of their choice." (Addendum, p. 24).
9. Section 3.03 of the Lease states in relevant part, "Tenant shall indemnify Landlord and hold Landlord harmless against any and all liabilities, damages, losses, liens, mechanic's liens, foreclosures, injury, suits, actions, claims of any nature whatsoever, including all attorney's fees, arising out of Tenant's work." (emphasis added) (Appendix, p.4).

10. Respondent actually brought this entire action AFTER the Respondent intentionally violated the terms of the Lease. (emphasis added).
11. The Arbitration Decision found that Respondent ... "in violation of the terms of [his] Lease (Sections 3.03 and 6.02), constructed a wall on [his] own, without prior required landlord approval, in a location of [his] choice." (Addendum, pp. 23-25).
12. The Arbitrator declared that Respondent was the losing party. (Addendum, p. 24).
13. The Arbitration Decision found that "Respondent shall receive no refund of rents paid in the past, nor shall Respondent's rent and other obligations under the Lease be abated or reduced in the future." (Addendum, p. 24, ¶ 1).
14. The Arbitration Decision found that Respondent was the losing party in the arbitration and ordered the Respondent to pay \$3,761.00 as cost for the arbitration. (Addendum, p. 24, ¶ 3).
15. The Arbitration also found that the "Plaintiff shall be responsible for its own attorneys' fees as well as \$4,000.00 for Defendant's legal fees and costs." (Addendum, p. 24, ¶ 2).

16. Section 9 of the Lease Addendum states, "In the event either party hereto institutes legal action or proceedings arising out of or in any way connected with this Lease, the non-prevailing party shall reimburse the prevailing party for all reasonable attorney fees and costs incurred in connection therewith." (Appendix, p. 23).

17. The Honorable Judge Mossey correctly found that Appellant, St. Michael Mall was the Prevailing Party. (Addendum, p. 32).

### ARGUMENT

The Respondent, Michael Elsenpeter is the "losing party." The facts are very straight forward; the Respondent demised his own wall without the approval of the St. Michael Mall and in direct violation of his Lease Agreement. (Addendum, p.23). The Respondent created his own problem and forced St. Michael Mall to incur massive legal expenses to litigate an action created by the Respondent himself. (Appendix, pp. 24-36). The Shareholders of St. Michael Mall all agree that the Respondent has forced them to repeatedly incur unnecessary legal expenses for a myriad of issues over the past several years. (Appendix, pp. 24-36).

The Respondent brought this action under Section 3.05 (Arbitration) of the Lease Agreement. That provision clearly states that the "losing

party” is responsible for all of the other party’s costs, including attorney fees. St. Michael Mall respectfully requests the Respondent be awarded nothing and that St. Michael Mall be reimbursed for all of its attorney fees.

***I. DISTRICT COURT RECOGNIZED THAT ST. MICHAEL MALL IS THE PREVAILING PARTY.***

The District Court cannot grant attorney fees to Respondent under Section 9 of the Lease Addendum, as Respondent was not the “prevailing party.”

**A. Appellant St. Michael Mall is the Prevailing Party.**

Appellant, St. Michael Mall, is the prevailing party in this action. The Honorable Judge Greenburg ordered that Appellant St. Michael Mall was the prevailing party and further found that Respondent was the losing party. (Arbitration Order). The Honorable Judge Mossey confirmed that Appellant St. Michael Mall was the prevailing party in the Court’s “Findings of Fact.” (Addendum, p. 32).

The District Court has discretion in deciding who qualifies as a prevailing party. *Benigni v. County of St. Louis*, 585 N.W.2d 51, 54-55 (Minn. 1998), review denied (Minn. May 20, 1997). In this case, both the Arbitrator and District Court found the Appellant, St. Michael Mall as the

"Prevailing Party." Respondent has never been declared the prevailing party.

**B. Granting of Arbitration on Summary Judgment does Not Qualify Respondent as Prevailing Party.**

The Respondent cannot now claim in any way that he is the prevailing party. The Supreme Court has upheld a District Court's determination that a party who prevailed on summary judgment did not qualify as a prevailing party and was not entitled to attorney fees. *See, e.g., Gross v. Running*, 403 N.W.2d 243, 248 (Minn. App. 1987), *review denied* (Minn. May 20, 1987). In determining who qualifies as the prevailing party, "the general result should be considered, and inquiry made as to who has, in the view of the law, succeeded in the action. The prevailing party in any action is one in whose favor the decision or verdict is rendered and judgment entered." *Borchert v. Maloney*, 581 N.W.2d 838, 840 (Minn. 1998) (quotation omitted).

In this case, St. Michael Mall is the prevailing party pursuant to the findings of the Honorable Judge Greenburg in the Arbitration Decision. The Honorable Judge Greenburg found that Appellant St. Michael Mall was the prevailing party AND determined that Respondent was the losing party. (*Arbitration Order*). The District Court verified this finding in its Order. Appellant, St. Michael Mall succeeded in the arbitration action and

judgment was rightfully entered in their favor. Respondent is the losing party.

**II. DISTRICT COURT SHOULD HAVE GRANTED ADDITIONAL ATTORNEY FEES TO ST. MICHAEL MALL.**

St. Michael Mall prayed the Court award them Attorney Fees under the very same provision of the Lease Agreement (3.05) as the Respondent. In this case, it has already been established that St. Michael Mall is the prevailing party. Provision 3.05 of the Lease Agreement clearly states that, “the costs and expenses of the arbitrators, the fees of the arbitrators and all attorneys’ fees and costs incurred, shall be paid by the losing party.” (emphasis added). The Arbitrator awarded St. Michael Mall the amount of \$4,000.00 in Attorney Fees for the Arbitration only. (emphasis added) (Addendum, pp. 23-24). Appellant, St. Michael Mall has incurred substantially more than \$4,000.00 in the arbitration alone of this matter. (Appendix, pp. 35-36).

In fact, Section 3.03 of the Lease Agreement provides in relevant part, “Tenant shall indemnify Landlord and hold Landlord harmless against any and all liabilities, damages, losses, liens, mechanic’s liens, foreclosures, injury, suits, actions, claims of any nature whatsoever, including ALL attorney’s fees, arising out of Tenant’s work.” (emphasis

added). In this case, Respondent has initiated litigation “arising out of [Respondent’s] work.” Respondent made the changes to his own space, without the approval of St. Michael Mall, and now has caused the Shareholders to incur substantial legal fees as a result. Appellant, St. Michael Mall is entitled to additional attorney fees.

**III. RESPONDENTS ARE NOT ENTITLED TO ATTORNEY FEES FOR THE DISTRICT COURT’S ORDER TO ARBITRATE.**

Attorney Fees are governed by Contract and Statute. A party may not recover attorney fees from an opponent unless a statutory or contractual provision expressly allows for such recovery. *Correll v. Distinctive Dental Servs.*, 636 N.W.2d 578, 582 (Minn. App. 2001). The Respondent demanded Attorney Fees under the Lease Agreement. Appellant, St. Michael Mall, argues that there is absolutely no provision within the Lease Agreement which compels Arbitration. Nor is there any provision within the Lease Agreement that allows Attorney Fees to Respondent for “compelling arbitration” against Appellant St. Michael Mall. The issue of arbitration was ripe for determination on Summary Judgment.

Respondent was granted only one theirs issues (to arbitrate) within their multiple Summary Judgment arguments. (Addendum, pp. 25-30).

Respondent is not entitled to Attorney Fees for prevailing on one issue in the Summary Judgment hearing. *See, e.g., Gross v. Running*, 403 N.W.2d 243, 248 (Minn. App. 1987), *review denied* (Minn. May 20, 1987).

**A. The District Court Incorrectly Compelled Arbitration.**

The language within the Lease Agreement is not plain and clear. When considering a motion to compel arbitration, the Court must determine only (1) whether a valid arbitration agreement exists, and (2) whether the dispute falls within the scope of the arbitration agreement. *Amdahl v. Green Giant Co.*, 497 N.W.2d 319, 322 (Minn.App.1993). In this case, the dispute propounded by the Respondent did not fall with the arbitration provision of the Lease Agreement.

The District Court ordered Arbitration based on Minn. Stat. 572. (Addendum, pp.23-24). Honorable Judge Halsey determined that “if there is a written agreement with an arbitration clause, and a party refuses to arbitrate, the court shall order the parties to proceed to arbitration.” (*Id.*; *citing* Minn. Stat. § 572.09(a))(emphasis added). There is not a written provision within the Lease Agreement where Arbitration had to be compelled.

Minn. Stat. § 572.08 states, “[a] written agreement to submit any existing controversy to arbitration or a provision in a written contract to

submit to arbitration any controversy thereafter arising between the parties is valid, enforceable, and irrevocable..." The relevant provision of the Lease Agreement states, "[a]ny matter which is specifically set forth in this Lease to be resolved in accordance with the provisions of this Lease to be resolved in accordance with the paragraph shall be determined by binding arbitration ... ." (Appendix, p. 4).

This was a specific question of law that was submitted to the Honorable Judge Halsey. The issue of law properly raised by Appellant, St. Michael Mall was that nothing "specifically set forth in this Lease" required this dispute to be resolved via arbitration. The language of the Lease Agreement is ambiguous and the Lease Agreement did not require Arbitration.

#### **B. The Lease Agreement Does Not Compel Arbitration.**

In this case, if this Court determines that Arbitration was properly ordered, the only reason for the District Court to order Arbitration would be based on a public policy determination; not the Lease Agreement. The Honorable Judge Halsey found that the arbitration provision in a contract may be in general terms without specification or enumeration as to the various items in dispute. (Addendum, p. 27); *citing, Zelle v. Chicago & N.W.R. Co.*, 65 N.W.2d 583 (Minn. 1954). If it is reasonably debatable

whether dispute is subject to arbitration, the court should forward the dispute to arbitration. *Heyer v. Moldenhauer*, 538 N.W.2d 714 (Minn. App. 1995).

Appellant St. Michael Mall had a reasonable dispute whether this matter was subject to arbitration. This dispute became more problematic by the Respondents position on whether Arbitration would be binding.

It is an important question of fact as to Respondent's continued representations to the Appellant Shareholders that he would not be subject to "Binding" Arbitration. As late as November 19, 2008, the Respondent refused to agree that his "demand" for Arbitration would even be binding. (Appendix, pp. 24-25 & 35-36; *Affidavits of Hosko & Duncombe*). Respondent has continually created issues with Appellant to the point where every other Shareholder has paid Attorney Fees for issues created by the Respondent. (Appendix pp. 24-36).

Appellant would first content that Arbitration is not mandatory under the language of the Lease Agreement. In the alternative, Arbitration was justified based on public policy only; not the language of the Lease Agreement. As such, Respondent would not be entitled to any Attorney Fees pursuant to the Lease for filing his action in District Court.

### **C. Respondent did Not Request an Award under Section 9.**

Respondent is not entitled to any award of attorney fees under Section 9 of the Lease Addendum, as Respondent did not request any award for attorney fees under Section 9 of the Lease Addendum in his Complaint. The Respondent only demands relief under section 3.05 of the Lease Agreement. (Complaint). The District Court found that Respondent was entitled to his attorney fees “pursuant to Section 9 of the parties’ lease addendum, ...” The District Court incorrectly found that Respondent relied on Section 9 of the Lease Addendum, as there is no mention of the Lease Addendum in the Respondent’s Complaint.

It is unreasonable that the District Court creates an avenue of recovery under Section 9 for the Respondent, while declining to recognize the specific avenues of recovery available to the Appellant under the very same Lease Agreement. The District Court further prejudiced the Appellant by issuing its Order immediately after the Initial Briefs were submitted and before Responsive Briefs were prepared.

### ***IV. THE DISTRICT COURT’S AWARD OF ATTORNEY FEES TO RESPONDENT IS EXCESSIVE AND UNREASONABLE.***

Even if the Respondent is entitled to attorney fees, he is only entitled for the limited attorney fees to compel arbitration. The District Court's

award of attorney fees is reviewed under an abuse of discretion standard. *Becker v. Alloy Hardfacing & Eng'g co.*, 401 N.W.2d 655, 661 (Minn. 1987). The District Court concluded that Respondent “is entitled to an award of its attorney’s fees and costs of the action to compel arbitration in the underlying litigation.” (emphasis added) (Addendum, pp 31-32). The

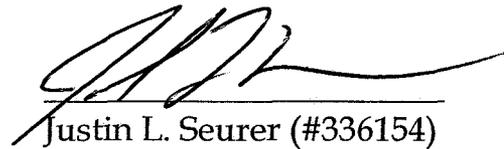
Attorney for Respondent, Halagan, submitted an Affidavit in Support of Attorney Fees on July 2, 2008. (Appendix, pp. 37-38). Attorney Halagan claims an hourly rate of \$275.00 per hour in that Affidavit. *Id.* Attorney Halagan then claims in his Affidavit of March 17, 2010 that he only billed Respondent \$200.00 per hour with an agreement to add an additional \$75.00 per hour at the conclusion of the litigation. (Appendix, pp. 39-42).

Appellant could not respond to the final affidavit of Attorney Fees, as the District Court entered its Order prematurely. Appellant first requested a copy of the Fee Agreement from Respondent. Appellant then filed a Motion under General Rule of Practice 119.03 requesting the Court require Respondent’s Attorney to produce a copy of their Fee Agreement. (Appendix, p.43). Respondent has strongly resisted the production of this one document to justify their claim for an additional \$75.00 per hour at the conclusion of this matter.

property and without permission from St. Michael Mall. The Plaintiff then demanded that St. Michael Mall pay him for a situation that he created. The Plaintiff has continuously created issues with St. Michael Mall and caused the shareholders to incur considerable legal fees in the process. The Plaintiff is the losing party in this matter, and St. Michael Mall is the prevailing party. As the prevailing party, and pursuant to the Lease Agreement, St. Michael Mall is entitled to attorney fees for litigating this matter.

Respectfully submitted,

Dated: 8-13-10



Justin L. Seurer (#336154)  
*Seurer Law, LLC*  
11901 James Road  
Minnetonka, MN 55343  
(612) 455-6669 phone  
(612) 455-2182 fax