

NO. A11-997

State of Minnesota
In Court of Appeals

COREY BAKER AND JAMIE BAKER,
Plaintiffs – Appellants,

v.

BEST BUY STORES, L.P., AND
CHARTIS WARRANTYGUARD, INC.,
Defendants – Respondents.

BRIEF FOR APPELLANTS COREY AND JAMIE BAKER

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STATEMENT OF ISSUES ON APPEAL

- (1) Did the district court err in concluding that the Service Plan was not a contract for insurance?

Result Below:

The district court decided that Plan was not a contract for insurance.

- (2) When parties to a contract have a reasonable difference as to what the contract requires, the law requires that a jury decide which party has the correct understanding. Best Buy has put forward a relatively reasonable interpretation of the contract. The Bakers have done the same. But the two differ significantly. Did the district court err when it made the decision as to which construction was correct instead of sending the matter to a jury?

Result Below:

The district court decided that Best Buy's construction of the contract was correct and dismissed the contract claim.

- (2) The Supreme Court of Minnesota has held that a complaint brought under Minnesota consumer protection statutes "need only plead that the defendant engaged in conduct prohibited by the statutes and that the plaintiff was damaged thereby." The Bakers' complaint alleged that Best Buy made misrepresentations or misleading statements, which are prohibited by the statutes, concerning the nature of its Plan and that they were harmed as a result. Did the district court err when it dismissed the Bakers' complaint?

Result Below:

The district court dismissed the Bakers' consumer protection claims.

Most Apposite Authority

- *Wiegand v. Walser Automotive Group, Inc.*,
683 N.W. 2d 807, 810 (Minn. 2004).
- *Group Health Plan, Inc., v. Phillip Morris, Inc.*,
621 N.W. 2d 2, 12 (Minn. 2001))

STATEMENT OF THE CASE

This is a breach of contract and consumer protection case, which originated in the District Court for the Second Judicial District of Minnesota (Ramsey County). It was assigned to the Honorable Janet N. Poston, Judge of the District Court for the Fourth Judicial District of Minnesota (Hennepin County) pursuant to Order from the Supreme Court of Minnesota.

This appeal is from the April 6, 2011, entered in Ramsey County. The judgment was entered pursuant to Judge Poston's April 1, 2011, Order and Memorandum of Law dismissing the Appellants' case with prejudice.

STATEMENT OF THE FACTS

On December 20, 2008, Corey and Jamie Baker (“Bakers”) walked into their local Best Buy store in Maplewood Minnesota to buy a television. They found one they liked, a forty-six inch high definition television. (AA-55). The television cost the Bakers \$1,899.00, which was a considerable splurge for the family of three, now four, who are employed by the state of Minnesota. (AA-55). But the television qualified for Best Buy’s 18 month, same as cash financing promotion, so they bought the television.

When the Bakers got to the cash register, they were asked the all-to-familiar-question: would you like to buy a Geek Squad Black Tie Protection Plan (“Plan” or “Contract”)?¹ The Plan cost \$299.99—almost 16%—of the cost of the television. But the Bakers liked what

¹ Chartis WarrantyGuard was a named co-defendant and an obligor under the terms of the Plan. The Bakers’ alleged that Best Buy breached the contract and made the misleading statements on “behalf of itself and Chartis WarrantyGuard.” (AA-4). The district court never addressed the Bakers’ agency theory pleading because she prematurely dismissed the case on the merits. Accordingly, all arguments directed at Best Buy apply with equal force to Chartis WarrantyGuard.

the Plan promised. The Plan would repair their television if broken.

(AA-34). Or replace the television if it was irreparable. And do so for a

four-year-term. (AA-35). The language of the Plan stated,

Your coverage under this Plan is effective beginning on the date you purchased your product or on the date your original product was delivered to you as stated on your purchase receipt and *will expire* either one (1), two (2), three (3), four (4) or five (5) years *from this effective date* depending on the length of the Plan purchased and as stated on your purchase receipt.

(AA-35)(emphasis added). In the Bakers' case, the Plan's coverage

began on December 20, 2008 and would not expire until December

20, 2012. The Bakers' receipt confirmed that calculation, noting that

they had purchased a "4YR" Plan with an "EXP DATE" of

"12/20/2010." (AA-55). The Bakers left the Maplewood Best Buy

store having spent \$2,328.33 on the television and the Plan. (AA-55).

The \$1,899.00 television, however, was broken in less than two years after the Bakers purchased it. The manufacturer's warranty had already expired. The Bakers returned the defective television to

Best Buy for repair pursuant to the terms of the Plan. (AA-4). Best Buy—at its sole discretion—elected to replace the broken television with a new television of comparable quality from its existing stock. (AA-4).²

The Bakers sought confirmation from the Best Buy representative that the remaining two years of the four-year-Plan from the original defective television would transfer to the new television. (AA-6). The Best Buy representative told them that it did not. (AA-6).

Best Buy did not offer to return a prorated share of the cost of the Plan—in this case roughly one-half the value of the Plan or \$150.00. Instead, Best Buy insisted that if the Bakers wanted coverage for their replacement television that they would have to pay an additional \$299.99.

² The record does not show if Best Buy even attempted to repair the television or if it, for whatever reason, simply chose to replace the television.

At this point, the Bakers had every reason to believe that the replacement television was equally susceptible to breaking down within less than two years, so they shelled out another \$299.99 for a second Plan. The Bakers had now spent \$2,628.32 in the Maplewood Best Buy store, \$600.00 for the Plans, which equals approximately 30% percent of the original price for the television.³

Believing that Best Buy had broken its promises and feeling cheated they filed this class action lawsuit for breach of contract and violations of Minnesota's Consumer Fraud Act and Minnesota's False Statements in Advertisement (Collectively, "the Consumer Protection Claims").

SUMMARY OF THE ARGUMENT

The Bakers' only obligation to avoid dismissal of the contract was to present the Court with a reasonable construction of the contract that supported their claim that Best Buy had breached. If the

³ In the end, the Bakers paid \$600.00 for six years of coverage. Ordinarily, \$600.00 would entitle the Bakers to eight years of coverage.

Bakers made such a showing then the district court was obligated to send the matter to a jury for resolution of the ambiguous contract. The district, however, assumed the role of trier of fact and dismissed the case. This was an error in law that must be reversed.

The district court made the same error in law as it relates to the Bakers' consumer protection claims. The Bakers did all that the law required of them: "plead that [Best Buy] engaged in conduct prohibited by the statutes and that [they were] damaged thereby." *Wiegand v. Walser Automotive Group, Inc.*, 683 N.W. 2d 807, 810 (Minn. 2004)(quoting, *Group Health Plan, Inc., v. Phillip Morris, Inc.*, 621 N.W. 2d 2, 12 (Minn. 2001)). The district erred as a matter of law when it held that pleadings that satisfy the holdings of *Wiegand* and *Group Health Plan, Inc.*, were still subject to dismissal. The district court must be reversed.

LEGAL ARGUMENT

I. Standard of Review

This Court must conduct a *de novo* review of the district court's dismissal for failure to state a claim pursuant to Minn. R. Civ. P. 12.02 (e). *Barton v. Moore*, 558 N.W.2d 746, 749 (Minn. 1997). The district court's dismissal can only be upheld if, and only if, it "appears to a certainty that no facts, which could be introduced consistent with the pleading, exist which would support granting the relief demanded." *Elzie v. Comm'r of Pub. Safety*, 298 N.W. 2d 29, 32 (Minn. 1980). "It is immaterial to a reviewing court whether or not the pleader can prove the facts alleged." *U.S. W. Comm., Inc. v. City of Redwood Falls*, 558 N.W.2d 512, 515 (Minn. Ct. App. 1997).

II. Interpreting the Contract with the Proper Burden of Proof in Motions to Dismiss

Courts are not charged with choosing between competing constructions of a contract. *Denelsbeck v. Wells Fargo & Co.*, 666 N.W.2d 339, 346 (Minn. 2003). Instead, the court's job is to decide if the language of the contract reasonably lends itself to more than one

construction. *Id.* It must do so by considering the entire contract and, if possible, giving “force and effect,” to all of the contract language. *Youngers v. Schafer*, 264 N.W. 794, 796 (Minn. 1936). If a contract “is reasonably susceptible of more than one interpretation,” then it is, as a matter of law, ambiguous. *Id.* Put another way, any contract language that could yield to two reasonable, but different, outcomes is ambiguous as a matter of law. *Anderson v. McOskar Enterprises, Inc.*, 712 N.W. 2d 796, 800 (Minn. Ct. App. 2006). In the end, the ambiguities are resolved by jurors, not judges. *Denelsbeck*, 666 N.W.2d at 346. These broad principles of law are properly distilled into a single statement of law: Any contract that can reasonably be understood in more than one way, belongs in front of a jury.

This rule of law must be coupled with the applicable burden of proof. Best Buy has the burden of proof to demonstrate that it is entitled to dismissal as a matter of law. *Kehr Packages, Inc. v. Fidelcor*,

Inc., 926 F.2d 1406, 1409 (3rd Cir. 1991).⁴ Therefore, Best Buy must make two showings in order to prevail. First, it must show that its construction of the contract is reasonable. *Anderson v. McOskar Enterprises, Inc.*, 712 N.W. 2d 796, 800 (Minn. Ct. App. 2006) (“both constructions must be reasonable.”). And Best Buy must demonstrate that the Bakers’ construction of the contract was unreasonable. Merely demonstrating that its construction is good, better, or even the best is not enough. Best Buy must show why the Bakers’ understanding of the contract is so unreasonable that no jury could share that understanding. This Best Buy did not—and could not—do. Accordingly, this Court should reverse the district court and remand for further proceedings.

⁴ “[U]nder Rule 12(b)(6) the defendant has the burden of showing no claim has been stated.” Reference to federal caselaw interpreting federal rules is proper because “[w]here the language of the Federal Rules of Civil Procedure is similar to language in the Minnesota civil procedure rules, federal cases on the issue are instructive.” *T.A. Schifsky & Sons, Inc. v. Bahr Const., LLC*, 773 N.W.2d 783, 788 (Minn. 2009).

III. Best Buy Met Only Half its Burden and Therefore it was Not Entitled to Dismissal as a Matter of Law.

The trial court denied the Bakers a jury trial by permitting Best Buy to try its defenses to the breach of contract claim to the court. This is apparent because Best Buy's entire argument in the trial court centered on why its construction of the contract was correct and as a result it had not breached. It did not explain, as the party with the burden, to the court why the Bakers' construction was unreasonable.

The outline headings of Best Buy's memorandum in support of its motion to dismiss illustrates the point best. Best Buy's entire argument for dismissal as a matter of law was "A. Best Buy Satisfies the Requirements of the Black Tie Service Plan Once it Replaces the Product," "B. Best Buy Replaced Plaintiff's Television as Provided by the Black Tie Plan," and therefore "Plaintiff's Breach of Contract Claim Fails Because Defendants Fully Performed Their Contractual Obligations Under the Plan." (AA-14-20). To sum up Best Buy's

argument: “the defendant is right.” But that determination should be left for a jury.⁵

Those arguments fall far short of Best Buy’s burden to demonstrate that Bakers’ understanding of the contract was so unreasonable that no jury could share it. At best, Best Buy’s argument merely establishes an alternative plausible reading of the contract. Even if the court were to agree that Best Buy’s construction of the contract was reasonable, it could not grant Best Buy’s motion to dismiss until it also found that the Bakers’ construction was unreasonable.

⁵ Both the district court and Best Buy relied heavily upon the *Crail* decision—unpublished—to support Best Buy’s argument that Best Buy had offered the correct construction of the contract. Civ. No. 2006-227, 2007 U.S. Dist. LEXIS 68983 (E.D Ky. September 7, 2007). But the argument misses the point entirely, its not for a judge, state or federal, to decide if Best Buy’s construction was correct but whether there is a reasonable alternative construction of the contract, which would make it legally ambiguous. So to the extent *Crail* has any bearing on the case, it demonstrates that other consumers, unrelated and unknown to the Bakers, understood that the Plan would only terminate at a specified time, not upon a specified event.

Again, it is not the court's job to choose between competing constructions but simply to decide if the contract could reasonably be understood to impose two different points of termination. Best Buy offered a construction that terminates coverage if a certain event occurs (i.e., replacement). The Bakers offered a reasonable construction that the contract terminates at a date certain (i.e., December 20, 2012). "The very fact that [parties'] respective position as to what the [Plan] says are so contrary compels one to conclude that the agreement is indeed ambiguous" *General Mills Inc., v. Gold Medal Ins. Co.*, 622 N.W. 2d 147, 154 (Minn. Ct. App. 2001).

Best Buy had the burden to show that the Plan was unambiguous because its construction was reasonable *and* that the Bakers' construction was unreasonable. It did not make that showing and therefore the district court should be reversed.

IV. The Plan is an Insurance Contract Wherein the Bakers Paid for a Term of Coverage.

The Bakers construction of the Plan as an insurance contract comports with Minnesota law.⁶ MINN. STAT. § 60A.02, Subd. 3. (2008)(emphasis added); *See also, Allen v. Burnet Realty, LLC*, 784 N.W.2d 84 (Minn. Ct. App. 2010). “Insurance is *any agreement* whereby one party, for a consideration, undertakes to indemnify another to a specified amount against loss or damage from specified causes, or to do some act of value to the assured in case of such loss or damage.” MINN. STAT. § 60A.02, Subd. 3. (2008)(emphasis added). This is exactly what the Plan does. For \$299.00, (consideration), Best Buy, agrees to do an act of value (repair or replace the television), for the Assured (the Bakers).

⁶ It is not lost on the Bakers that the Plan states that it is not an insurance contract. But such a declaration is not dispositive. In fact, in some states, the Plan is regulated by the respective Insurance regulating agencies. In addition, the Co-defendant is an affiliate international insurance company. The Plan uses insurance language the consumer associates with insurance such as “Coverage,” “Exclusions to Coverage,” “Limits of Liability,” and “Deductible.”

This Court in *Allen* adopted the “principal object and purpose test,” to help in the application of Minnesota’s insurance statute. 784 N.W.2d 84. Under the principal object and purpose test, “[t]he question turns, not on whether risk is involved or assumed, but on whether that or something else to which it is related in the particular plan is its principal object and purpose.” *Id.* at 88. In simpler terms “[i]n the final analysis, many analysts will ... ask one question: What is the principal object of the contract? Is it indemnity, or is it something else? If the principal object of the contract is indemnity, the contract constitutes ‘insurance’ and is therefore within the scope of state regulation.” Robert H. Jerry, II, 1 NEW APPLEMAN ON INSURANCE LAW LIBRARY EDITION § 1.03[3][b], at 1–27 to –28 (Jeffery E. Thomas & Francis J. Mootz, III eds., 2009).

It is clear that the “principal purpose” of the Plan at issue is to indemnify the purchaser against a loss. The consumer is expecting Best Buy to take on an obligation of repair or replacement for a

specified time that Best Buy would not have but for the Plan provisions.

In fact, in some instances, the consumer can expect this indemnification to reach beyond the covered product to include items associated with the covered product. For instance, when a consumer buys a Plan for a washing machine and that machine is out of service for more than seven consecutive days due to a covered defect, then the Plan will reimburse the consumer up to \$50.00 for laundry cleaning services. (AA-37). Likewise, the Plan reimburses the consumer up to \$350.00 for food spoilage due to the failure of a covered refrigerator or freezer. (AA-37)

Best Buy argued that the insurance analogy is “entirely inappropriate.” From its view, the replacement television represented the full “benefit of the bargain.” But that is not a legal argument rooted in, or even relatable to, the language of the contract—it is a strange equitable argument that ignores the risk-shifting-nature of the Plan. The argument’s true purpose is to paint

the Bakers as unreasonable because they demand continued coverage after Best Buy replaced the defective television—the one Best Buy sold them. The Court would search in vain to find any contractual language to support Best Buy's benefit of the bargain theory.

It is not unreasonable for the Bakers, or this Court, to treat this Plan as an insurance contract. This was discussed in great detail at the time of oral argument. (AA-186, 187) Not only is a finding that this was an insurance contract supported by law, but also by the every-day-common sense. Most families like the Bakers know that if their big-ticket-item fails, they cannot easily afford to replace it. So, the Bakers paid a four-year-premium with the reasonable expectation that should their product break, Best Buy would make it right. In year two of the premiums, their product broke and Best Buy replaced it. But the consumer could reasonably understand the Plan to require Best Buy to continue coverage until its stated expiration *or* refund the premiums. Best Buy does neither and this constitutes a breach of contract.

The Contract is Ambiguous Because the Bakers Have Offered a Reasonable Construction of the Contract that Differs from Best Buy's.

The Bakers' construction of the contract is reasonable even if the Court concludes that the Plan is not a contract for insurance. Under the Bakers construction of the contract, Best Buy was required to do the following:

1. Repair any defect in the product if it failed to operate.
2. If, and only if, the product could not be repaired, Best Buy was required to replace the product.
3. Best Buy was required to provide this coverage for a four (4) year term, ending on December 20, 2012.
4. Best Buy was required to provide that coverage for the original product, its exchanges, or replacements.

In order for Best Buy to prevail in this Court, it must convince the court that the Bakers' understanding of the contract was unreasonable. This is not possible given the plain language of the contract. It was reasonable for the Bakers to understand that Best Buy would first attempt to repair their television should it break

because the contract states, “[t]his Plan covers parts and labor costs to repair your product” (AA-34). Likewise, the Bakers could reasonably expect that if it was impossible for Best Buy to repair the television, that Best Buy would replace the television. This is because the contract states that “[i]f we determine in our sole discretion that your product cannot be repaired, we will replace it. . . .” (AA-34). The Bakers were also reasonable in their understanding that the coverage would continue for a period of four years because the contract states:

Your coverage under this Plan is effective beginning on the date you purchased your product or on the date your original product was delivered to you as stated on your purchase receipt and *will expire* either one (1), two (2), three (3), four (4) or five (5) years *from this effective date* depending on the length of the Plan purchased and as stated on your purchase receipt.

(AA-35)(emphasis added).⁷ The first three of the Bakers' expectations are explicitly supported by the plain language of the contract. The fourth expectation is implied by the contract.

The Bakers' understanding that the Plan covers exchange and replacement products is supported by the fact that *there is not a single provision in the contract that indicates that the Bakers' coverage was limited to the original product*. This is Best Buy's problem: "A fundamental principle of contract law is that . . . ambiguous terms must be construed against the drafter." *Hilligoss v. Cargill, Inc.*, 649 N.W. 2d 142, 148 (Minn. 2002). Moreover, the absence of a provision limiting the Plan to the original purchase is a hallmark of an ambiguous contract because it fails to "*precisely and clearly*[]" inform contracting parties of the meaning of their ostensible agreement. *Anderson v. McOskar Enter., Inc.*, 712 N.W.2d 796, 801 (Minn. Ct. App. 2006).

In addition to the absence of language to the contrary, the contract language supports the Bakers' understanding that the Plan

⁷The Bakers' receipt also states, "EXP DATE 12/20/2012."

provided coverage for more than the original product because as a prerequisite for service under the Plan, the consumer is required to present “*all original purchase and exchange receipts.*” Moreover, the Plan limits its liability for “for any single claim” to replacement of the product. If replacement products were not covered under the Plan, then the limitation of liability “for any single claim” would have no value because replacement would end the coverage. The Plan is implicitly recognizing that replacement(s) may occur and coverage would still continue.

The Bakers have offered a reasonable construction of a poorly drafted contract. Their understanding is supported explicitly and implicitly by the contract language. To avoid dismissal they were *not* required to show that their construction was the correct or the best, but only that it was reasonable. And it is.

Best Buy on the other hand, had the burden to demonstrate that the Bakers’ understanding was unsupportable under the language of the Plan and therefore unreasonable. Best Buy failed to do so.

Therefore the Bakers are entitled to proceed to the trier of fact to resolve the ambiguity. The district court's dismissal of the contract claim must be reversed.

V. Best Buy is Responsible for Statements within the Plan that are Misrepresentation or Misleading.

The Bakers also brought statutory consumer protection claims under the Minnesota's Consumer Protection Act and the False Statements in Advertising Act ("consumer protection claims"). MINN. STAT. §325F.69; MINN. STAT. §325F.67. Both laws prohibit retailers from, among other things, making misrepresentations or misleading statements in connection with a sale of a product or service. MINN. STAT. §325F.69, Subd. 1.; MINN. STAT. §325F.67.

The district court held that consumer protection claims failed because the Plan "contained no false statement with regard to the duration of the agreement." (AA-165). In other words, the Bakers' consumer protection claims failed *because* their contract claim failed.

This Court must reverse the district court first because it limited Best Buy's liability to "false statements," when the plain language of the statute prohibits, in the disjunctive, the use of any "fraud, false pretense, false promise, misrepresentation, misleading statement *or* deceptive practice." MINN. STAT. §325F.69, Subd. 1.(emphasis added). A statement may be technically true in the context of a contract, but totally misleading in the context of a consumer protection claim. The distinction between a misrepresentative or misleading statement and an unadulterated false statement is the subtle distinction between a half-truth and a whole lie. The law protects consumers from both.

Moreover, Best Buy cannot insulate its misleading statements by writing them in a manner that is misleading, but technically true. The law specifically prohibits that conduct. MINN. STAT. §325G.31 ("Except as provided in section 325G.32, every consumer contract *shall be written in a clear and coherent manner* using words with

common and everyday meanings and shall be appropriately divided and captioned by its various sections.”)(emphasis added).

Most importantly, this Court should reverse the district court’s dismissal of the consumer protection claims because it was for the jury to determine whether there was a misrepresentation in the contract. This Court should reverse the district court’s dismissal of the consumer protection claims because a jury could reasonably conclude that Best Buy’s contract leads the consumer to believe that they are purchasing a four-year term of coverage. They could do so, based on the plain language of the Plan which states in an unqualified fashion: “Your coverage under this Plan is effective beginning on the date you purchased your product . . . *and will expire . . . four (4) . . . years from this effective date. . . .*” (AA-35). They could do so based on the plain language printed on the Bakers’ receipt which states that the Plan was a “4YR” Plan that with an “EXP DATE” of “12/20/2012.” (AA-55).

Best Buy can not have it both ways. They can not in defense to the contract claim contend that the contract is not a four-year-contract but may terminate when the product is replaced and at the same time, in defense to the consumer protection claims, say that the plain language which states, without qualification, "Your coverage under this Plan is effective beginning on the date you purchased your product . . . *and will expire . . . four (4) . . . years from this effective date,*" is not misleading. Either the Plan is a four year plan or it is not.

VI. The District Court Dismissed False Advertisement Claim without Seeing the Advertisements.

Even if this Court were to hold that the Bakers' consumer protection claims could not go forward based on the misrepresentations or misleading statements within the Plan, the Court should still reverse the district court because the Bakers also alleged that Best Buy's advertisements also contained misrepresentations or misleading statements.

Here, the district court did something nothing short of puzzling. It granted Best Buy's motion to dismiss the Bakers'

consumer protection claims which were based on the misrepresentations or misleading statements in Best Buy's advertising—without first seeing the advertisements.⁸

The district court did so because “no specific advertisements have been alleged or referenced in the complaint, and none have been presented as exhibits to affidavits or memoranda in response to the Defendant's [sic] Rule 12.02(e) motion.”

The district court's contention that the false advertisement claim should be dismissed because the Bakers failed to identify a specific advertisement is difficult to square with the facts that the Bakers' specifically pleaded that Best Buy put before the public advertisements that “misrepresented, or mislead consumers, [to believe] that their Service Plan expires at the end of a specified term when, under certain circumstances, it expires prior to the specified term.” (AA-8). Which advertisements were false or misleading? All

⁸ The Bakers pleaded that the “Defendants, with the intent to increase sales, placed before the public Service Plan advertisements that were deceptive and or misleading.” (AA-8).

of the advertisements, in any format, that held the Plans out as four-year-terms are misrepresentative or misleading. This very argument was expounded upon in the argument at the district court level. It was noted by counsel at that time that the arguments put forth in the complaint must be accepted as true and that was enough to satisfy any claim for false advertising and/or misrepresentation. (AA-183)

As a practical matter, the Bakers were denied access to the discovery process whereby they could produce those advertisements which were in the custody and control of Best Buy because the district court prematurely dismissed the case.

As a legal matter, the Bakers did not have to make such as showing because it was Best Buy that sought dismissal and therefore had the burden to demonstrate that their advertisements were free from misleading statements. *Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1409 (3rd Cir. 1991). Best Buy was the party asserting that “a certainty that no facts, which could be introduced consistent with the pleading, exist which would support granting the relief

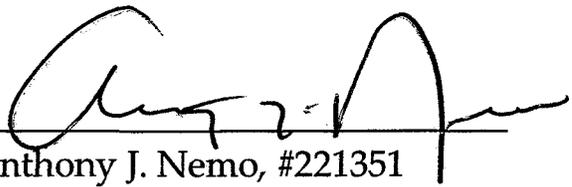
demanded.” *Elzie v. Comm’r of Pub. Safety*, 298 N.W. 2d 29, 32 (Minn. 1980).

Best Buy readily produced a copy of the Plan to the Court by affidavit to support its contract defense and could have done the same as it relates to the advertisements. The district court misappropriated the burden of proof for a motion to dismiss and therefore must be reversed.

CONCLUSION

The Bakers had every reason to believe that the Plan sold to them as a four year plan with a date certain for expiration was just that. Best Buy alleges that it is not but a Plan that may expire before a specified date. It was a jury to decide who was correct. In all regards, the district court usurped the role of the jury. The Bakers, respectfully, ask this Court to reverse the district court and remand for further proceedings.

Dated: 8/4/11



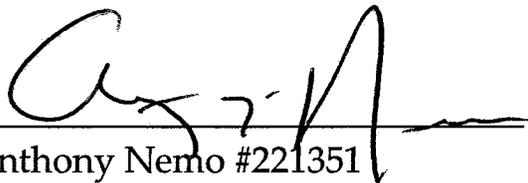
A handwritten signature in black ink, appearing to read 'Anthony J. Nemo', written over a horizontal line.

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CERTIFICATE OF BRIEF LENGTH

The undersigned counsel for the Appellants Corey and Jamie Baker certifies that this brief complies with the requirements of Minn. R. Civ. App. P. 132.01 in that it is proportionately spaced typeface utilizing Microsoft Word 2007 and contains 4875 words, excluding the Table of Contents, Table of Authorities and Appendix.

Dated: August, 4 2011.


Anthony Nemo #221351