Court Case No. A05-1293

STATE OF MINNESOTA
IN COURT OF APPEALS

Hoyt Properties, Inc., and Hoyt/Winnetka, LLC,

Appellants,

v.

Production Resource Group, LLC,
Haas Multiples Environmental Marketing and Design, Inc.,
d/b/a Entolo-Minneapolis and Entolo, Inc.

Respondents.

RESPONDENTS' BRIEF

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STATEMENT OF LEGAL ISSUE

1. Whether the District Court properly exercised its discretion by enforcing the parties' Settlement Agreement which unambiguously releases Appellants' claims against Production Resource Group, LLC, for breach of contract and piercing the corporate veil.

Apposite Authority:

Johnson v. St. Paul Ins. Co., 305 N.W.2d 571 (Minn. 1981)

Schoenfeld v. Buker, 114 N.W.2d 560 (Minn. 1962)

Clark v. Allstate Ins. Co., 405 N.W.2d 463 (Minn. Ct. App. 1987)

2. Whether the District Court correctly held Appellants' claim for partial rescission of the Settlement Agreement based on alleged fraudulent inducement failed as a matter of law because the alleged representation constituted a legal opinion, could not have been reasonably relied upon, and was not, in fact, relied upon by Appellants.

Apposite Authority:

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

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

Spitzmueller v. Burlington N. R.R. Co., 740 F. Supp. 671 (D. Minn. 1990)

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

3. Whether the District Court properly dismissed Appellants' breach of contract claim as to Respondents Haas Multiples Environmental Marketing and Design, Inc. and Entolo, Inc. because Appellants' claim for breach of contract against those parties, as pleaded and presented, was contingent upon whether Appellants could rescind their release of Respondent Production Resource Group, LLC.

Apposite Authority:

Roth v. Weir, 690 N.W.2d 410 (Minn. Ct. App. 2005)

Minn. R. Civ. P. 60.01 & 60.02

4. Whether the District Court properly exercised its discretion to dismiss all of Appellants' claims, including those claims for which Appellants had been granted leave to add and had conducted discovery, in order to accede to Appellants' request for a dismissal, thus allowing them to appeal immediately as a matter of right.

Apposite Authority:

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

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

Minn. Pet Breeders, Inc. v. Schell & Kampeter, Inc., 41 F.3d 1242 (8th Cir. 1994)

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

STATEMENT OF THE CASE

Appellants Hoyt Properties, Inc. ("Hoyt Properties") and Hoyt/Winnetka, LLC ("Hoyt/Winnetka") (collectively, "Appellants") filed this suit against Respondents Production Resource Group, LLC ("PRG"), Haas Multiples Environmental Marketing and Design, Inc. ("Haas"), and Entolo, Inc. ("Entolo") (collectively "Respondents") asserting claims for "Breach of Contract/Piercing Corporate Veil" (Count I), "Rescission" (Count II), and "Fraudulent Transfer" (Count III). (SA5-SA8)[1]

Respondents moved for summary judgment on all of the claims in Appellants' original Complaint. (APP30-APP60, SA232-SA244) Appellants responded with a motion for leave to file a First Amended Complaint to add claims for "Agency" (Count IV) and "Fraud and Negligent Misrepresentation" (Count V), and to add additional defendants. (SA194-SA221)

During the December 15, 2004 hearing at which both motions were argued, the Honorable Isabel Gomez advised the parties that Appellants would be permitted to add Counts IV and V, but Appellants would not be allowed to bring in the additional parties. (SA248-SA250, SA 254-SA257, SA263) Appellants subsequently submitted a revised First Amended Complaint dated December 22, 2004, that included Counts IV and V without the additional defendants, and proceeded with extensive discovery on those claims. (SA286-SA303)

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[1] Appellants' Appendix will be referred to herein as, "APP___," and Respondents' Supplemental Appendix as, "SA___."

On April 20, 2005, the District Court issued a Memorandum Order Granting Leave to Amend to add Count IV and Count V, and held that those claims would proceed to trial on June 20, 2005. (APP27-APP29)

On April 21, 2005, Judge Gomez granted Respondents' motion for summary judgment on Counts I, II, and III in their entirety. (APP7-APP19)

By letter dated May 3, 2005, Appellants' counsel advised Judge Gomez they had decided to forego the formal filing and service of their First Amended Complaint, and requested entry of final judgment so they could immediately appeal the District Court's order granting Respondents' motion for summary judgment. (SA304) On May 4, 2005, Judge Gomez entered an Order for Judgment providing "[t]hat final judgment of dismissal be entered in defendants' favor." (APP3-APP4)

By letter dated May 5, 2005, Respondents' counsel suggested that, in order to accomplish Appellants' request for a final appealable judgment, the District Court should clarify its entry of judgment as to all matters, including Counts IV and V of Plaintiffs' proffered First Amended Complaint which the District Court had granted leave to file. (SA305-SA306) Concurring with Respondents, Judge Gomez issued an Amended Order for Judgment dated May 9, 2005, providing that "[a]ll remaining claims that Plaintiffs actually did assert or could otherwise have asserted are hereby dismissed with prejudice and on the merits." (SA307-SA308)[2]

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[2] By letter dated May 31, 2005, Appellants' counsel expressed their disagreement with the terms of the Amended Order for Judgment. (SA309-SA309A) On June 2, 2005, Respondents' counsel wrote to Judge Gomez to note that, "[i]n order for the judgment to be final and appealable now as a matter of right, rather than partial and interlocutory in nature, the judgment has to constitute a final judgment as to [Appellants'] entire case—

Appellants subsequently filed and served their Notice of Appeal on June 29, 2005. (APP1-APP2)

STATEMENT OF THE FACTS

Appellants' Brief contains a number of assertions that are either inaccurate or misleading. Therefore, at the outset, Respondents wish to clear up the following basic unrebutted facts in this case.

Appellants claim to have sustained grievous economic harm as a result of Haas and Entolo's inability to make their rental payments on the leased property. (Appellants' Br. at 3-4) However, Respondents have learned that this is simply not true. Appellants actually generated a $3,880,000 profit from the sale of this property. Even when factoring in the cost of tenant improvements (which Appellants have alleged to be $1,300,000), Appellants netted a profit of at least $2,580,000 in the less than three years they owned the property.[3]

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including those claims which the Court has granted them leave to assert in its ruling on [Appellants'] motion to amend." (SA310-SA311) Since Appellants had been litigating Counts I–V, the District Court had discretion to dismiss all of these claims with prejudice under either Minn. R. Civ. P. 41.01(b) or 41.02(a). (SA310-SA311) By letter dated June 13, 2005, Judge Gomez stated the Amended Order for Judgment would remain in place, expressly noting that her "analysis of the posture of the case at the time I ordered judgment was essentially that expressed by Mr. Boyd in his June 2 [2005] statement on the matter." (SA312)

[3] Notwithstanding Respondents' demands for supplementation of their discovery responses (as well as their independent duty to do so under Minn. R. Civ. P. 26.05), Appellants failed to disclose that they sold the property for an enormous profit. Publicly available certificates of real estate value filed with the Minnesota Department of Revenue reveal that Appellants purchased the property in question on or about February 12, 2002 for $6,720,000, and sold the property on or about December 14, 2004, for $10,600,000. (SA313-SA319)(Certificates of Real Estate Value Nos. 786618 and 879245) Certificates of real estate are public documents. Kohl's Dep't Stores v. County of Hennepin, 1992 WL 154084, at *5 (Minn. Tax Ct. 1992). It is well established that the Court of Appeals

Appellants erroneously assert "[t]here is no question that the substance of the Knight Complaint was true." (Appellants' Br. at 6) By order dated July 11, 2005, the Honorable Michael J. Davis held that the facts alleged by Mr. Knight in support of his "piercing the corporate veil" theory are disputed and will require a trial on the merits for ultimate determination. Knight v. Prod. Res. Group, LLC, 2005 WL 1630523, at *6-8 (D. Minn. July 11, 2005).

Appellants seek to minimize the roles of the individuals who actually negotiated and drafted the Settlement Agreement. For example, Appellants portray their own attorney, Michael Meyer, as merely a passive observer in the negotiations who, as Steven Hoyt has "carefully recollected," just "walked away prior to th[e] conversation" in which Karl Robinson is alleged to have represented there are no "piercing issues." (Appellants' Br. at 7)[4] Yet, the unrebutted evidence demonstrates Mr. Meyer was at the center of the negotiations and the drafting of the Settlement Agreement. Mr. Meyer's testimony conclusively establishes that Mr. Hoyt did not rely on the representation allegedly made by Mr. Robinson. Mr. Meyer testified he never heard such a representation, that Mr. Hoyt never advised him of any such representation, and that, as drafter of the fully

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may take judicial notice of public documents even when they have not been made part of the record below. State v. Rewitzer, 617 N.W.2d 407, 411 (Minn. 2000); United Power Ass'n v. Comm'r of Revenue, 483 N.W.2d 74, 77 & n.3 (Minn. 1992); In the Matter of the Wetland Conservation Act, 2004 WL 2857357, at *7 (Minn. Ct. App. 2004); 5th Street Ventures, LLC v. Frattallone's Hardware Stores, Inc., 2004 WL 1878822, at *3 (Minn. Ct. App. 2004).

[4] Notably, Appellants' Brief provides no citation whatsoever to any of Mr. Meyer's testimony. Appellants did not even include a single page from Mr. Meyer's deposition transcript in the 369 pages of materials that make up their two-volume Appendix.

integrated settlement agreement, he did not include this representation as a term of the parties' agreement. (SA154-SA157)

Finally, Appellants now assert that in the "several days" following the courthouse negotiations, Appellants' lawyer "[Mr.] Meyer worked with [Mr.] Robinson to draft the Settlement Agreement." (Appellants' Br. at 7)(citing APP69) In fact, the uncontroverted evidence in the record demonstrates that Mr. Meyer worked with Hart Kuller—not Mr. Robinson—in the drafting of the Settlement Agreement. (SA156) It is undisputed that Mr. Robinson was a litigation associate whom Mr. Hoyt had never before encountered and who was present at the courthouse for the sole purpose of representing Respondents in their motion to dismiss those proceedings. There is no evidence that Mr. Robinson had any role whatsoever in either negotiating or drafting the Settlement Agreement. Indeed, the unrebutted evidence in the record demonstrates the central participants in the negotiation and drafting of the Settlement Agreement were Messrs. Meyer and Kuller, who have both testified that they never engaged in any discussions with anyone regarding "piercing" issues. (SA154, SA170-SA171)

A. ENTOLO DEFAULTED ON THE LEASE AND APPELLANTS COMMENCED AN UNLAWFUL DETAINER ACTION THAT WAS RESOLVED IN A SETTLEMENT NEGOTIATED ON DECEMBER 26, 2002

On November 27, 2001, Haas entered into a ten-year lease agreement with Hoyt Properties for office and warehouse space located at 5000 Winnetka Avenue North in New Hope, Minnesota. (SA12-SA41) On January 6, 2002, before Haas took possession of the property, Haas assigned the Lease to Entolo. (SA48-SA49) At approximately this

same point in time, Hoyt Properties assigned its interest in the Lease to Hoyt/Winnetka. (SA50-SA51)

The tragic events of September 11, 2001 combined with the nationwide economic recession caused a downturn in tradeshow and retail display work which, in turn, resulted in a substantial reduction in Haas' and, subsequently, Entolo's business. On December 1, 2002, Entolo failed to make the monthly rent payment due under the Lease. (SA5) Appellants filed an unlawful detainer complaint seeking to evict Entolo from the premises. (SA5, SA54-SA55) Appellants' unlawful detainer action was set for hearing on December 26, 2002. (SA123)

Steven Hoyt attended the unlawful detainer proceedings in his capacity as principal and sole owner of Appellants, and was represented by attorney Michael Meyer in those proceedings and the settlement negotiations that ensued. (SA123-SA124) During the course of that morning, the parties and their counsel met and negotiated the terms of a Settlement Agreement that resolved the unlawful detainer matter, allowed Hoyt and Entolo to remain on the property long enough to conduct an orderly liquidation, and provided PRG with a general release subject to two narrow "carve outs." (APP195-APP199) Appellants' attorney, Mr. Meyer, took responsibility for drafting the Settlement Agreement that memorialized the terms negotiated and agreed to by the parties on December 26, 2002. (SA156) It is undisputed that all of the parties performed all of their respective obligations under the terms of the Settlement Agreement. (SA5)

Long after the fact, Mr. Hoyt claimed he had been fraudulently induced to enter into this Settlement Agreement by a representation supposedly made by Karl Robinson,

the litigation associate who was present at the courthouse on December 26, 2002 solely to handle the unlawful detainer hearing and who had no involvement in the settlement negotiations. No one else recalls that Mr. Robinson made any such representation. Mr. Hoyt never mentioned this alleged representation to anyone, including his own lawyer. Mr. Hoyt never indicated to anyone, including his own lawyer, that he had relied upon this alleged representation. This alleged representation, of course, never made its way into the terms of the fully integrated Settlement Agreement which was drafted by Appellants' own lawyer and expressly states that it contains the entirety of the parties' agreement. (APP196-APP197)

B. STEVEN HOYT IS AN EXPERIENCED LAWYER AND SOPHISTICATED BUSINESSMAN WHO DOES NOT RELY ON ORAL REPRESENTATIONS MADE BY OPPOSING COUNSEL.

Mr. Hoyt is a licensed attorney who, following his graduation from law school in 1977, practiced law for approximately five years in the areas of litigation, property damage, and other general legal matters for businesses, and who has personally tried 10 or 15 cases, including jury trials. (SA115-SA117)

Mr. Hoyt is also a sophisticated commercial businessman who has established multiple commercial entities for his own business purposes. (SA116-SA117) Mr. Hoyt is CEO and sole owner of Hoyt Properties, and he has formed some 30 single-purpose entities, including Hoyt/Winnetka. (SA116-SA118) Mr. Hoyt has formed these single-purpose entities for the purpose of creating a "bankruptcy-remote entity" to avoid legal issues in the event of a foreclosure on the property. (SA118)

Mr. Hoyt has negotiated hundreds of commercial transactions, including commercial leases. (SA119) He uses both his business and legal experience when negotiating these transactions. (SA119) Mr. Hoyt testified that, based upon his legal training and experience, he makes sure to have any and all material terms of his agreements put in writing. (SA119)

Mr. Hoyt also testified that it is his standard practice to reduce all representations and warranties relating to a transaction to writing. (SA119) The reason he puts everything in writing is to eliminate any kind of ambiguities and vagaries so that the written document reflects the terms to which the parties have agreed. (SA119-SA120)

Mr. Hoyt testified that he takes this very same approach in settlement agreements. (SA120)[5] He testified that, as with any other type of contract or agreement, he makes sure that representations relied upon by the parties are reflected in the written settlement agreements to which he is a party. (SA120)

C. THE UNDISPUTED MATERIAL EVIDENCE RELATING TO THE DECEMBER 26, 2002 SETTLEMENT NEGOTIATIONS CONCLUSIVELY DEMONSTRATES THERE WAS NO "FRAUDULENT INDUCEMENT."

In addition to Mr. Hoyt and his attorney, Mr. Meyer, the other persons present at the Courthouse on December 26, 2002, were Hart Kuller, senior shareholder with Winthrop & Weinstine, P.A. with whom Mr. Hoyt was acquainted and had dealt with in the past, who was present to negotiate any settlement on the part of Respondents; Karl Robinson, a litigation associate with Winthrop & Weinstine, P.A. who Mr. Hoyt had

[5] Mr. Hoyt is certainly no stranger to litigation. In addition to personally trying 10 to 15 cases while in private practice, Mr. Hoyt both individually and through his businesses has participated as a party in numerous lawsuits. (SA116, SA120) Mr. Hoyt has also testified as an expert witness on real estate matters. (SA115, SA117)

never met before and who was present for the sole purpose of representing Haas and Entolo in the unlawful detainer proceedings if the matter did not settle; Judy Arrett, as Haas and Entolo's corporate representative; and Jim Bartholomew, a consultant who had been engaged to oversee and direct Haas and Entolo's liquidation. (SA142)

As noted, while Mr. Hoyt was well acquainted with Mr. Kuller from their previous dealings, he had never met Mr. Robinson prior to December 26, 2002. (SA125) Mr. Robinson was in attendance for the sole purpose of arguing Respondents' motion to dismiss the unlawful detainer actions based on, *inter alia*, Appellants' failure to give GMAC Business Credit LLC ("GMAC") proper notice and an opportunity to cure the default as provided for in the Landlord Waiver and Consent Agreement that Appellants had previously executed in connection with the underlying Lease. (SA109-SA111, SA141)

Pursuant to the Court's instructions, the parties engaged in settlement negotiations that morning concerning the central issues of how long Entolo could remain in possession of the premises so as to allow for an orderly liquidation and the payment Appellants would receive as consideration therefor. (SA126-SA127, SA143, SA145)

Mr. Hoyt has testified that, at some point during these discussions, Appellants' attorney, Mr. Meyer, informed him that Haas and Entolo required a global release for their ultimate parent company, PRG, as a condition for settlement. (SA129) Mr. Hoyt testified that he and Mr. Meyer then approached Messrs. Kuller and Robinson to discuss the proposed release. (SA129)

Mr. Hoyt testified that when he and Mr. Meyer reached Messrs. Kuller and Robinson, Mr. Meyer said to Mr. Hoyt, "Well, ask them." (SA129) Mr. Hoyt testified that he then said to Messrs. Kuller and Robinson, "The thought of piercing the veil hadn't occurred to me. I don't know of any reason to believe PRG could be held liable. Do you?" (SA130) Mr. Hoyt testified that Mr. Kuller—with whom Mr. Hoyt was acquainted—simply stared straight ahead and said nothing, and that Mr. Robinson—who Mr. Hoyt had never met or dealt with before that day—allegedly responded to Mr. Hoyt's question by stating, "There isn't any. PRG and Entolo are entirely separate." (SA130) Mr. Hoyt testified that he then allegedly replied, "Well, you would know," walked over to Mr. Meyer—whom Mr. Hoyt has now "carefully recollected" had at some point left his client in the midst of this short discussion of an allegedly critical issue and somehow magically materialized at the far end of the hallway—to instruct him to insert a release for PRG in the settlement agreement. (SA130)[6]

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[6] While the allegations of what happened in the courthouse hallway are ultimately irrelevant in light of the unequivocal lack of reliance on any purported representation, it nonetheless bears noting that Mr. Hoyt's version of this alleged conversation has changed over time. Appellants initially indicated that Mr. Hoyt had not used the words "piercing PRG's corporate veil," as they had placed those words in brackets in their answers to interrogatories which had been verified under oath by Mr. Hoyt himself. (SA160-SA164) Appellants also originally asserted, again in answers to interrogatories verified under oath by Mr. Hoyt, that Mr. Meyer was already talking with Messrs. Kuller and Robinson and had called Mr. Hoyt over to participate in that conversation. (SA160-SA164) Finally, Appellants made no mention in the answers to interrogatories verified by Mr. Hoyt that Mr. Meyer had wandered off and left his client alone with Messrs. Kuller and Robinson to discuss "piercing" issues. (SA160-SA164) It is well established under Minnesota law that "a party may not create an issue of material fact through its own inconsistent submissions." Williams v. Dayton Hudson Corp., 1999 WL 387337, at *1 (Minn. Ct. App. 1999) (citing Banbury v. Omnitrition Int'l, Inc., 533 N.W.2d 876, 881 (Minn. Ct. App. 1995)).

Messrs. Kuller and Robinson have each testified unequivocally that the conversations variously described by Mr. Hoyt regarding "piercing issues" did not occur. (SA146-147, SA170-SA171)

Mr. Meyer, who was present at the courthouse throughout the morning of December 26, 2002, for the purpose of representing Appellants' interests, testified that no such conversation ever occurred in his presence. (SA154) Mr. Meyer also testified that Mr. Hoyt had never mentioned the issue of piercing the corporate veil in his presence. (SA154)

Mr. Meyer testified that, while the parties never discussed any "piercing" issues, Mr. Meyer himself had expressed some concerns regarding the issue of providing PRG with a global release. (SA153) Specifically, the parties carefully carved out two exceptions to the otherwise general release provided to PRG: Appellants retained the right to pursue (1) claims against PRG for any fraudulent transfers and (2) claims for any fraudulent misrepresentations made by PRG with respect to Haas and Entolo's financial condition. (SA153) Mr. Hoyt testified that he did not ask any questions about either of these exceptions. (SA134)[7]

Mr. Meyer drafted the Settlement Agreement. (SA155) Mr. Meyer testified that he has a standard practice of reducing all material terms and representations of the parties' agreement to writing. (SA151) Mr. Meyer transmitted the draft Settlement

[7] Mr. Meyer testified that, when he and Mr. Hoyt discussed a global release for PRG with Messrs. Kuller and Robinson, Mr. Meyer took the position that Appellants were only prepared to release PRG if there were carve outs for creditor's remedies, such as fraudulent transfers. (SA153) Interestingly, Mr. Hoyt now claims he does not remember any such conversation. (SA131)

Agreement to Mr. Kuller for review, and Messrs. Meyer and Kuller then worked together on behalf of their respective clients to revise and finalize the terms of the Settlement Agreement. (SA156) Several drafts of the Settlement Agreement were exchanged and reviewed by principals and counsel in a process that culminated in a final Settlement Agreement that resolved the unlawful detainer proceedings. (APP195-APP199)

The final Settlement Agreement executed by the parties provides that Respondent's lender, GMAC, would pay Appellants a total of $104,666.23 in December 2002 and January 2003 and that, in turn, Appellants would not dispute Entolo's right to occupy a portion of the originally leased space for two months. (APP195-APP196) During that time, Appellants were provided access to construct a build out on the remaining portion of the originally leased space. (APP195-APP196) Entolo was to vacate the entire premises no later than February 28, 2003. (APP196) Appellants released PRG from all claims, with the two specific "carve outs" negotiated by Mr. Meyer for any possible claims for fraudulent transfer to PRG and misrepresentations by PRG as to Entolo's financial condition. (APP196)

Mr. Hoyt acknowledged this was a major transaction in his mind given the significant amounts of money involved and because it involved his largest property. (SA120) Both Messrs. Hoyt and Meyer have admitted that it would have been very simple to add into the Settlement Agreement a clear statement that Appellants were relying upon a representation allegedly made by Mr. Robinson to Mr. Hoyt that there were no piercing claims. (SA131-SA132, SA157-SA158) Mr. Hoyt testified that he personally reviewed the Settlement Agreement and executed it on behalf of Appellants,

verifying that "[t]his Agreement constitutes the full agreement of the parties concerning its subject matter." (APP196, SA135) The Settlement Agreement, of course, does not contain any reference or incorporation of the representation allegedly made by Mr. Robinson. (APP195-APP199)

D. APPELLANTS SUBSEQUENTLY COMMENCED THIS LITIGATION SEEKING PARTIAL RESCISSION OF THE SETTLEMENT AGREEMENT.

When Appellants later became dissatisfied with the terms to which they had agreed, Appellants decided to seek partial rescission of the Settlement Agreement. Toward this end, Appellants Hoyt Properties and Hoyt/Winnetka alleged that Mr. Robinson had made a representation to Mr. Hoyt during the settlement negotiations that Haas and Entolo were "entirely separate" from PRG, and that Mr. Hoyt relied upon that representation by agreeing to give PRG a limited release as part of the Settlement Agreement.

In Count I of their Complaint, which Appellants entitled "Breach of Contract/ Piercing PRG's Corporate Veil," they asserted a claim against all of the Respondents for nonpayment under the Lease. (SA7-SA8) The breach that was alleged by Appellants was based on Haas and Entolo's failure to pay rent under the terms of the Lease. (SA7) Because Haas and Entolo were the only parties to the Lease and because Haas and Entolo have no assets, Appellants asserted a claim for "piercing PRG's corporate veil" as an essential component of their breach of contract claim—thus pleading that it would be necessary for Appellants to impose liability against PRG directly in order to recover any relief for breach of contract. (SA7-SA8)

However, Appellants had released any claims they might have had for breach of contract against PRG. Accordingly, in order to pursue their "piercing" claim against PRG, Count II of Appellants' Complaint sought rescission of the release they had agreed to provide PRG under the terms of the Settlement Agreement. (SA8-SA10)[8]

E. THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT AND DISMISSED APPELLANTS' CLAIMS.

On April 21, 2005, the District Court granted summary judgment to Respondents on all of the claims asserted by Appellants in their original Complaint. (APP7-APP19) For purposes of ruling on the motion for summary judgment, the District Court accepted as true Mr. Hoyt's contention that he had asked adverse counsel whether there were "any piercing issues" and that opposing counsel supposedly replied, "there isn't anything. PRG and Entolo are totally separate." (APP13-APP14, APP17)

The District Court held the alleged representation could not form the basis of a fraudulent representation as a matter of law:

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[8] Appellants also asserted a cause of action for fraudulent transfer as Count III—the only claim in their Complaint not barred by the terms of the release in the Settlement Agreement. (SA10) The District Court granted Respondents summary judgment as to Count III based on the undisputed evidence that GMAC is, and at all relevant times has been, a senior secured creditor who has fully perfected lien interests in all of Respondents' assets. (APP8-APP10, APP14, APP15, APP19, APP20-APP26) As such, the property in question does not fall within the scope of the Minnesota Fraudulent Transfer Act because it is fully encumbered by valid liens. (APP8-APP10, APP14, APP15, APP19, APP20-APP26) Appellants must be deemed to have abandoned their appeal of the District Court's dismissal of the fraudulent transfer claim as they have not addressed this issue in their brief. See In re Application of Olson for Payment of Servs., 648 N.W.2d 226, 227 (Minn. 2002); Balder v. Haley, 399 N.W.2d 77, 80 (Minn. 1987); Melina v. Chaplin, 327 N.W.2d 19, 20 (Minn. 1982); Greuling v. Wells Fargo Home Mortgage, Inc., 690 N.W.2d 757, 762 (Minn. Ct. App. 2005); State v. Jackson, 655 N.W.2d 828, 837 (Minn. Ct. App. 2003).

> *Mr. Hoyt's question was a legal question.* It was an inquiry concerning a legal doctrine unlikely to be of concern to, or even to be known by, a lay businessman trying to reach a settlement. *In responding, adverse counsel gave a legal opinion.* The second sentence—"PRG and Entolo are totally separate"—might be seen as a statement of fact. To the extent it is [a] fact, it is [a] fact of which Mr. Hoyt was clearly aware when he thought of the possibility of "piercing", which only arises when there are separate entities. In stating this obvious fact, adverse counsel made no false representations.
>
> *In giving his legal opinion* (which adds up to "PRG and Entolo are separate corporations that have maintained separate boundaries and formalities and, therefore, are not vulnerable to piercing claims.") *defendants' lawyer articulated the position that defendants have held to this day.* Plaintiffs have not shown that the opinion was contrary to any trier's findings. They have merely established that they and another party have sued defendants, both asserting that the opinion is false. Certainly, *defense counsel have no legal or ethical duty to concede that their clients' adversaries might have a winning claim. The remark at issue here is not a false representation regarding a past or present fact,* the essential requisite of every claim for fraudulent misrepresentation.

(APP17)(emphasis added)

The District Court further held "it is impossible to find that Mr. Hoyt's reliance on the remarks was reasonable." (APP18) The District Court cited the undisputed evidence establishing Mr. Hoyt's extensive experience as a "business attorney and litigator," and as a businessman who engaged in his "own big-dollar real estate developing" and utilized many "limited liability entities" in his business endeavors. (APP18) The District Court also noted "Mr. Hoyt's own practice to advise parties with whom he is contracting to consult with their own attorneys, and not to rely on his [attorneys]," and concluded that, by definition, it would have been "unreasonable for him not to have raised his 'piercing' concern with his lawyer, Mr. Meyer, and not to have told [Mr.] Meyer of opposing counsel's view of the matter." (APP18) The District Court observed that "[i]t is even more unreasonable to rely on opposing counsel in an adversarial negotiation process,

based on a notion that a competent lawyer would undercut his client by giving an assessment of the client's possible weaknesses, if any." (APP18) The District Court also pointed out that the fact that the Settlement Agreement itself "made no mention of [Mr. Robinson's] having advised Mr. Hoyt that they were not vulnerable to 'piercing' claims or of Mr. Hoyt's having entered into the deal in reliance upon their opinion" eliminated any possibility that Mr. Hoyt had, in fact, relied upon any alleged representation by Mr. Robinson. (APP18) "It is unreasonable of Mr. Hoyt to have relied on a statement not important enough to record, when it is his practice to make certain that all representations and warranties of the parties with whom he deals are set down in writing." (APP18)

While dismissing all of the causes of action contained in Appellants' original Complaint, the District Court confirmed that it had granted Appellants leave to assert their claims for "agency" and "fraud and negligent misrepresentation," and set those claims for trial on June 20, 2005. (APP27-APP29) Appellants, however, decided that, rather than litigating any remaining claims, they wished to have the District Court's ruling on the dismissal of their original claims reduced to a final judgment that they could immediately appeal as a matter of right. (SA304) The District Court accommodated Appellants' request by entering an order for entry of judgment of all claims that were brought or could have been brought by Appellants in the underlying District Court proceedings. (SA307-SA308)

ARGUMENT

The District Court correctly exercised its discretion in upholding and enforcing the terms of the parties' fully negotiated and arms-length Settlement Agreement, including the negotiated release of Appellants' claims against PRG.

Appellants' claim for partial rescission of the Settlement Agreement to void their release of PRG under a theory of fraudulent inducement was properly rejected by the District Court based on the undisputed material evidence demonstrating the representation as alleged was a legal opinion and, in any event, Appellants could not have reasonably relied and did not, in fact, rely on any such representation.

The District Court also correctly dismissed Appellants' breach of contract claim against Haas and Entolo, as well as PRG, because Appellants had pleaded and presented their breach of contract cause of action as an all-or-nothing proposition that was inextricably intertwined with and dependent upon Appellants' claim for partial rescission of their release of PRG.

Finally, the District Court properly exercised its discretion in granting Appellants' request for a dismissal of this case so as to allow them to immediately appeal the District Court's rulings by entering a final judgment on all claims that were brought or could have been brought in the District Court proceedings.

Based on the foregoing, Respondents respectfully request that the Court affirm the District Court's entry of judgment in all respects.

I. APPELLANTS' CLAIM FOR PARTIAL RESCISSION OF THE SETTLEMENT AGREEMENT IS UNTENABLE BOTH AS A MATTER OF LAW AND BASED UPON THE UNDISPUTED MATERIAL FACTS.

Appellants acknowledge, as they must, that the "heart" of their case lies in their ability to rescind their release of claims against PRG. (Appellants' Br. at 17) The release Appellants seek to rescind is contained in the Settlement Agreement. The District Court correctly recognized that settlement of disputes is highly favored and presumed to be valid, noting that "Minnesota encourages the settlement of disputes and generally presumes the validity of releases" and that a "party seeking to avoid a settlement has the burden of showing sufficient grounds for its rescission." (APP16)(citations omitted)

Based on these well established principles of Minnesota law, the decision to vacate a settlement agreement is left to the discretion of the District Court and will not be reversed unless it can be shown that the District Court acted in such an arbitrary manner as to frustrate justice. Johnson v. St. Paul Ins. Co., 305 N.W.2d 571, 573 (Minn. 1981); Myers v. Fecker Co., 252 N.W.2d 595, 599 (Minn. 1977); Schoenfeld v. Buker, 114 N.W.2d 560, 566 (Minn. 1962); Clark v. Allstate Ins. Co., 405 N.W.2d 463, 465 (Minn. Ct. App. 1987); Gould v. Johnson, 379 N.W.2d 643, 646 (Minn. Ct. App. 1986).

The District Court's ruling, whether reviewed for abuse of discretion or considered under a *de novo* standard of review, was correct and should be affirmed on several independent grounds. First, partial rescission is simply not permitted under Minnesota law. Second, the representation that forms the basis of Appellants' fraudulent inducement claim, as alleged, constitutes a legal opinion that does not contain any false assertion of a past or present fact. Third, as the District Court correctly held, the

unrebutted evidence demonstrates conclusively that Appellants could not have reasonably relied upon the alleged representation. Finally, the undisputed evidence also conclusively establishes that Appellants did not actually rely on the alleged representation. For any or all of these reasons, Respondents respectfully request that this Court affirm the judgment dismissing Appellants' partial rescission claim as a matter of law.

A. Appellants' Novel Theory For Partial Rescission Of The Settlement Agreement Is Fatally Flawed As A Matter Of Law.

Appellants' claim for partial rescission is barred as a matter of well established Minnesota law. Appellants' Complaint seeks rescission only of paragraph 7 of the Settlement Agreement which contains their release of PRG, rather than rescission of the Settlement Agreement in its entirety. (SA10, SA216) There is no such thing as partial rescission under Minnesota law. "Rescission as a general rule must be exercised in toto and is applied to the contract in its entirety with the result that what has been done is wholly undone and no contract provisions remain in force to bind either of the parties." Merickel v. Erickson Stores Corp., 95 N.W.2d 303, 306 (Minn. 1959); see also Prince v. Sonnesyn, 25 N.W.2d 468, 473 (Minn. 1947) ("a party cannot repudiate a contract or compromise so far as its terms are unfavorable to him and claim the benefit of its residue"); Mathews v. Am. Family Mut. Ins. Co., 207 B.R. 631, 641 n.14 (Bankr. D. Minn. 1997) (same).

The District Court noted that Appellants' "complaint focuses on the rescission of a particular portion of the settlement agreement," and held that "[Appellants] cannot seek partial rescission of the agreement" because "[r]escission as a general rule must be exercised in toto and is applied to the contract in its entirety with the result that what has

been done is wholly undone . . ." (SA105)(quoting Merickel v. Erickson Stores Corp., 95 N.W.2d 303, 306 (Minn. 1959))

Appellants proposed to modify their rescission claim in pleadings that were never formally served and filed in which they sought "an order stating that the Settlement Agreement (including but not limited to ¶ 7) is null and void." (SA298) However, Appellants decided not to formally serve and file this pleading. (SA304) Therefore, the only legally-cognizable pleading filed by Appellants in the District Court seeks partial rescission.

Finally, to the extent Appellants seek rescission of the Settlement Agreement in its entirety, it is well established that all of the parties to the Settlement Agreement must be named as parties in the legal proceeding. GMAC, which was a party to the Settlement Agreement, is thus a necessary and essential party in any action for rescission of the Settlement Agreement. (APP195-APP199) However, Appellants did not name GMAC as a party to the District Court proceedings. There is "no procedural principle [that] is more deeply imbedded in the common law than that, in an action to set aside a lease or a contract, all parties who may be affected by the determination of the action are indispensable." Lomayaktewa v. Hathaway, 520 F.2d 1324, 1325 (9th Cir. 1975), cert. denied, 425 U.S. 903 (1976); Fluent v. Salamanca Indian Lease Auth., 928 F.2d 542, 547 (2d Cir.), cert. denied, 502 U.S. 818 (1991) (quoting Lomayaktewa, 520 F.2d at 1325); United States ex rel. Hall v. Tribal Dev. Corp., 100 F.3d 476, 479 (7th Cir. 1996) (same); Travelers Indem. Co. v. Household Int'l Inc., 775 F. Supp. 518, 527 (D. Conn. 1991) ("precedent supports the proposition that a contracting party is the paradigm of an

indispensable party"). In particular, it is well settled that all of the parties to the contract are indispensable parties in a lawsuit where rescission of that contract is sought. In re United States ex rel. Hall, 825 F. Supp. 1422 (D. Minn. 1993), aff'd, United States ex rel Hall v. Creative Games Tech., Inc., 27 F.3d 572 (8th Cir. 1994) (Indian tribes which were parties to contracts that suit sought to rescind were indispensable parties); Ward v. Deavers, 203 F.2d 72 (D.C. Cir. 1953) (decree rescinding agreement could not be issued without affecting absent party's interest); Chiodo v. Gen. Waterworks Corp., 380 F.2d 860 (10th Cir.), cert denied, 389 U.S. 1004 (1967) (party who allegedly agreed to buy corporate stock was indispensable party to lawsuit for rescission of entire transaction). Appellants cannot seek rescission of the Settlement Agreement given GMAC's absence as a party in the proceedings.[9]

B. The District Court Correctly Held That, As Alleged, The Representation Constituted A Legal Opinion In Response To A Legal Question And Did Not Contain A False Assertion Of Any Past Or Present Fact.

The District Court—accepting Mr. Hoyt's description of his alleged conversation with Mr. Robinson as true for purposes of ruling on Respondents' motion for summary judgment—properly concluded that Mr. Hoyt alleged a legal discussion between lawyers. Misrepresentations of the law and opinions are not actionable and cannot constitute the basis for a fraudulent inducement claim. See Spitzmueller v. Burlington N. R.R. Co., 740 F. Supp. 671, 677 n.6 (D. Minn. 1990). Accordingly, the representation alleged by

[9] Respondents raised this issue before the District Court in a motion to dismiss that was denied. (SA103-SA105) Respondents are free to raise the issue with this Court as a basis for affirmance of the judgment without need of having filed a cross-appeal. United States v. Am. Ry. Express Co., 265 U.S. 425, 435-36 (1924); Penn Anthracite Mining Co. v. Clarkson Sec. Co., 287 N.W. 15, 17 (Minn. 1939); Hunt v. Sherman, 345 N.W.2d 750, 753 n.3 (Minn. 1984).

Mr. Hoyt cannot constitute an adequate basis to support Appellants' claim for fraudulent inducement.

The Minnesota Supreme Court has held that representations of legal opinions on matters such as the legal effect of language in a contract, rights given by a contract, liability on a certificate of stock in a corporation, and the legal effect of an endorsement cannot support claims of fraudulent inducement. Miller v. Osterlund, 191 N.W. 919, 919 (Minn. 1923). This proposition is particularly true when the alleged representations are made by opposing counsel in the course of adversarial proceedings. Restatement (2d) of Torts § 545 Comment d ("as between bargaining adversaries there can ordinarily be no justifiable reliance upon an opinion" and "[t]he recipient is not justified in accepting the opinion of a known adversary on the law and is expected to draw his own conclusion or to seek his own independent legal advice.").

Applying these well settled principles, the District Court correctly held that a discussion between lawyers concerning "issues" of piercing the corporate veil involves the discussion of a legal doctrine. In this case, that legal doctrine was raised in a question allegedly posed by Mr. Hoyt—a licensed and experienced attorney—to another attorney who he knew was engaged by adverse parties to represent them as an advocate in pending adversarial legal proceedings. The District Court correctly held that the only conclusion that could be drawn from the facts as alleged by Mr. Hoyt is that the conversation involved a discussion of legal opinions by lawyers that is not actionable as a matter of law. Miller, 191 N.W.2d at 919.

The District Court went on to note that, even if Mr. Robinson's alleged representation that "PRG and Entolo are totally separate" could be viewed as a statement of fact, such a statement was accurate and consistent with the information already available to Mr. Hoyt. (APP17) Specifically, as the District Court noted, Mr. Hoyt necessarily knew that Haas and Entolo were separate from PRG because he alleged he initiated a discussion regarding "piercing" of the corporate veil which, in turn, had to have been predicated upon his understanding that the entities were separate. (APP17)

Appellants disingenuously characterize Mr. Hoyt's alleged inquiry as to whether there are any "piercing issues" as constituting a question that "necessarily depended upon the factual question of the degree to which PRG participated in and interfered with [Haas and] Entolo's affairs," and should have been construed as implicitly asking specific questions such as "did PRG siphon off Entolo's funds," "was Entolo's board an active, functioning entity," and "did Entolo have control over its own money, cash, and receivables." (Appellants' Br. at 24) The problem with Appellants' argument is that Mr. Hoyt did not allege that, in fact, he asked any of these questions. Instead of asking for this factual information, Mr. Hoyt, according to his own allegations, asked Mr. Robinson for a legal conclusion. Mr. Robinson's alleged response did not imply any facts that related to any of these "implicit" questions because Mr. Hoyt, under any of his own various versions and accounts of this exchange, never asked for any of this specific factual information.

Appellants' reliance on the Minnesota Supreme Court's decision in Miller v. Osterlund, 191 N.W. 919 (Minn. 1923), is fundamentally misplaced. In Miller, a party

was alleged to have falsely represented that it had the authority and right to do business in the State of Minnesota on behalf of a particular insurer, and further represented that the insurer had the authority and right to execute insurance under the laws of Minnesota. Id. The Minnesota Supreme Court held that, "[t]o say of a foreign insurance company that it has the right to write insurance in Minnesota, *conveys the meaning to the average man* that the company has complied with the well-known requirements of our laws, and has received the Insurance Commissioner's license or authority to transact insurance business here." Id. (emphasis added).

In contrast to the facts in Miller, the exchange that Mr. Hoyt alleges he had with Mr. Robinson did not deal with any matters of fact, but instead was an exchange among lawyers that revolved around a necessarily subjective legal opinion. Mr. Hoyt did not request a description of the structure of the corporate entities (of which he was fully aware) and he did not seek information regarding Respondents' financing arrangements (about which, of course, Appellants had been fully informed and to which Appellants had contractually consented). The exchange, as alleged by Mr. Hoyt, instead focused on Respondents' legal position concerning the equitable claim for relief in the form of "piercing" the corporate veil. This is a legal claim about which Mr. Hoyt, by definition, would have necessarily been seeking a legal opinion. The alleged representations by Mr. Robinson that there were not any "piercing issues," and that Haas and Entolo were "entirely separate" from PRG, would have constituted statements of legal positions, and as such would have been analogous in form and nature to non-actionable statements of a party's position as to "the legal effect of language in a contract, or as to rights given by a

contract, or as to liability on a certificate of stock in a corporation, or as to the legal effect of an indorsement." Miller, 191 N.W. at 919 (citations omitted).[10]

The exchange that Mr. Hoyt allegedly had with Mr. Robinson also stands in sharp contrast to the facts that gave rise to Nodak Oil Co. v. Mobil Oil Corp., 533 F.2d 401 (8th Cir. 1976), another case upon which Appellants have relied heavily. As a threshold matter, it is important to note that Nodak involved the application of North Dakota law by a federal court, and therefore has no precedential value outside of that litigation. However, even if considered, the alleged fraudulent statement in Nodak provides a helpful contrast to the alleged representation in the instant case. The communication in Nodak was not a representation made by and between licensed attorneys in the midst of adversarial litigation; Nodak instead arose out of communications between businessmen who were discussing business matters. Id. at 404 & 406. Mobil's area manager represented that Mobil and Nodak had actually entered into such a contract when, in fact, the evidence showed that the very same Mobil area manager knew and understood that those parties had not, in fact, entered into such a contract. Id. at 404-05. The Court concluded that a statement made by this Mobil area manager to the effect that a contract

[10] Appellants rely heavily on the Honorable Jonathan Lebedoff's citation to Miller in his Report and Recommendation denying Respondents' motion to dismiss, which was issued while this case was pending in the United States District Court for the District of Minnesota. Appellants' reliance on that order is wholly unfounded. First, as this Court is well aware, it need not defer to a federal court with respect to the interpretation of state law. Second, Judge Lebedoff issued his decision without knowledge or benefit of the evidence developed during discovery that was submitted to Judge Gomez in connection with Respondents' motion for summary judgment. Finally, Judge Lebedoff was quite clear that he was not precluding the possibility of a future motion for summary judgment on this issue, stating that "[w]hether the statements ultimately contain enough factual thrust to constitute fraudulent misrepresentation, such as to allow for the extraordinary remedy of rescission, is not now before this Court." (APP92)

had, in fact, been executed by Nodak and Mobil constituted a representation of fact. Id. at 407.

In contrast to the situation in Nodak, Mr. Hoyt alleges representations by Mr. Robinson which are inherently subjective and necessarily constitute legal opinions. Mr. Hoyt did not ask Mr. Robinson whether anyone had ever asserted claims for "piercing the corporate veil" in a lawsuit against PRG. Instead, Mr. Hoyt has alleged he asked Mr. Robinson for his legal opinion as to whether there were any "piercing issues." As alleged, this was a discussion about legal claims, not a discussion about specific facts.

Appellants have incorrectly argued the instant case is analogous to the facts that gave rise to Simonsen v. BTH Properties, 410 N.W.2d 458 (Minn. Ct. App. 1987). In Simonsen, a seller had advertised certain property as a six-unit building even though it knew the property was zoned and registered for only five units. Id. at 461. Indeed, the seller went even further and "repeatedly told [the eventual buyer] it was a six-unit building, and [their] discussions as to expected income from the property presumed six rental units." Id. In Simonsen, the Court concluded these representations could be viewed as "a misrepresentation of a factual condition." Id. Notably, the seller in Simonsen was not asked for a legal opinion, and did not set forth his position with respect to a potential legal claim. As such, the facts in Simonsen are not analogous to the facts in the instant case.

Finally, Appellants claim Mr. Robinson's knowledge of the allegations asserted in the Complaint filed by Bruce Knight somehow demonstrates that he "deliberately schemed" and "knowingly misrepresented" PRG's relationship with Haas and Entolo in

order to induce Mr. Hoyt to enter into the Settlement Agreement. Appellants' claim that Mr. Robinson's knowledge of the Knight Complaint can support a claim for misrepresentation fails as a matter of law.

First, as Mr. Hoyt himself certainly knows and fully understands as an experienced trial lawyer and seasoned litigant, the mere fact that a party has initiated legal proceedings and made factual allegations in pleadings does not mean that those claims are meritorious or that those factual allegations are true. Indeed, in their brief, Appellants themselves have acknowledged the evidence obtained in discovery in connection with the Knight proceedings is "not directly relevant to this appeal." (Appellants' Br. at 9)

Second, Respondents have at all relevant times consistently maintained they are totally separate companies and that there is no legitimate basis for any creditor to seek relief in the form of piercing the corporate veil. Indeed, Respondents believed the evidence was so conclusive that they moved for summary judgment on the "piercing" claim asserted in Knight. While the District Court denied Respondents' motion as to that claim, the Honorable Michael Davis confirmed that ample evidence exists to support Respondents' position. Knight v. Prod. Res. Group, LLC, 2005 WL 1630523, at *6-7 (D. Minn. July 11, 2005).

Third, Mr. Hoyt does not allege he asked Mr. Robinson any specific factual questions that required precise factual responses. On the contrary, as shown by Mr. Hoyt's own testimony, he asked Mr. Robinson a general question to which Mr. Robinson is alleged to have responded with an accurate description of Respondents' position concerning allegations of alter ego and piercing of the corporate veil.

Respondents' position on these issues and claims as allegedly stated by Mr. Robinson on December 26, 2002, has remained consistent and unchanged throughout these proceedings as well as in the Knight case.

In short, Appellants' allegation that Mr. Robinson could not honestly and accurately state that "PRG and Entolo are totally separate" simply because he received a copy of Bruce Knight's Complaint is wholly unfounded. The Complaint itself does not constitute evidence and therefore does not impact the veracity of the alleged statement. Further, Appellants have failed to provide any legal authority to establish that either Respondents or their attorneys had any obligation to disclose the fact that Mr. Knight had served them with his complaint.

C. The District Court Correctly Held The Undisputed Facts In The Record Demonstrate That Mr. Hoyt Could Not Have Reasonably Relied Upon Mr. Robinson's Alleged Representation.

The undisputed evidence demonstrates that Mr. Hoyt could not have reasonably relied upon the representation allegedly made by Mr. Robinson in connection with the negotiation of the Settlement Agreement. Mr. Hoyt is a trained and experienced lawyer, a sophisticated and successful businessman, and a court appointed expert in real estate. Mr. Hoyt himself makes a practice of including all material terms and representations in his written agreements, and he expressly advises adversaries in transactions and litigation to do likewise. Bearing these undisputed facts in mind, there can be no conceivable justification for Mr. Hoyt, who was represented in these negotiations by his own separate counsel, to have relied upon any alleged representation made by opposing counsel in the contested and adversarial unlawful detainer proceedings.

Establishing the reasonableness of reliance is an essential requirement in proving a cause of action for fraud. Nicollet Restoration, Inc. v. City of St. Paul, 533 N.W.2d 845, 848 (Minn. 1995). Appellants bear the burden of establishing that reliance on the alleged misrepresentation would have been reasonable under the circumstances. Davis v. Re-Trac Mfg. Corp., 149 N.W.2d 37, 38-39 (Minn. 1967). While reasonableness of reliance is often a question of fact for a jury to decide, summary judgment is appropriate where the record reflects a complete failure of proof on this issue. Nicollet Restoration, Inc., 533 N.W.2d at 848 (affirming summary judgment dismissing fraud claim where reliance was not reasonable); see also Hughes v. Coyne's & Co., 2001 WL 215696, at *2 (Minn. Ct. App. Mar. 6, 2001) (upholding summary judgment on promissory estoppel claim where there was no reasonable reliance as a matter of law).

In determining whether a plaintiff can establish reasonable reliance, the issue is not whether the representation would deceive an average man but rather whether the representations were calculated to deceive a person of the capacity and experience of the particular individual to whom the representation is alleged to have been made and who claims to have relied upon the representation. Berg v. Xerxes-Southdale Office Bldg. Co., 290 N.W.2d 612, 616 (Minn. 1980). "Fraud is to be proved with reference to the specific intelligence and experience of the aggrieved party rather than the reasonable person standard." Boubelik v. Liberty State Bank, 553 N.W.2d 393, 400 (Minn. 1996). Evaluation of whether a party's reliance was reasonable may also properly include consideration of typical business practices. See, e.g., Nave v. Dovolos, 395 N.W.2d 393, 396 (Minn. Ct. App. 1986). See also Barry v. Barry, 78 F.3d 375, 380 (8th Cir. 1996).

Given his formal legal training, his significant time in private practice, and his wealth of experience in sophisticated business matters, it would be unreasonable as a matter of law for Mr. Hoyt to rely on an alleged statement by Mr. Robinson without any clarification, specification, documentation, or other form of due diligence. See, e.g., Boubelik, 553 N.W.2d at 400.

Mr. Hoyt has acknowledged that he generally does not rely on the legal opinion of opposing counsel. (SA132) Mr. Hoyt also acknowledged that he has a standard clause in his commercial leases advising tenants not to rely on representations of the broker but to seek the advice of their own attorney. (SA121-SA122) Hoyt further acknowledged that lawyers represent specific parties, and he would typically rely on his own lawyer for legal opinions. (SA132-SA133)

Mr. Meyer, the attorney who negotiated and drafted the Settlement Agreement on behalf of Appellants, also acknowledged that he does not normally rely on the legal opinions of opposing counsel, and that if he were to do so that legal opinion would have to be put in a written document and attached to the transaction documents. (SA151-SA152)

Mr. Robinson was the junior attorney representing Respondents in the court proceedings on December 26, 2002, and was serving as opposing counsel in the pending unlawful detainer case. (SA140-SA141) Mr. Hoyt had no prior knowledge of or dealings with Mr. Robinson up to that time. (SA125) Mr. Robinson was present at the unlawful detainer proceedings as an advocate for Mr. Hoyt's adversaries to argue against Appellants' efforts to evict Entolo in the event the settlement negotiations broke down.

(SA142-SA144, SA168) Mr. Robinson played no role in the settlement negotiations other than he, along with Mr. Meyer, was to periodically inform the District Court as to whether the parties were still in negotiations. (SA142-SA144, SA168) In contrast, Hart Kuller, an experienced transactional attorney with whom Mr. Hoyt was well acquainted, was present to represent Respondents in the settlement negotiations. (SA142-SA144, SA168)

Despite being represented by his own attorney, Mr. Hoyt claims to have relied on statements of his adversary, Mr. Robinson. (SA132) Yet, Mr. Hoyt did not even bother to tell his own attorney that he had any such conversation or that he was relying on any representation allegedly made by Mr. Robinson. (SA132, SA155)

Mr. Hoyt's nondisclosure of Mr. Robinson's alleged representation is even more unreasonable in light of Mr. Meyer's initial hesitation at including any release. (SA169) Mr. Meyer initially told Respondents' attorneys that Appellants were not going to release claims they did not know about, such as creditor's remedy claims. (SA153) Mr. Meyer felt strongly that any potential creditor's remedy should be preserved and expressed these views in Mr. Hoyt's presence. (SA153)

Rather than disclosing Mr. Robinson's alleged representation to Mr. Meyer in order to elicit advice from Appellants' attorney, Mr. Hoyt claims to have simply said to his adversary, "Well, you would know," and later instructed his attorney to add the requested release of PRG to the settlement agreement without any explanation or discussion. (SA130) At no time prior to signing the agreement did Mr. Hoyt even mention to Mr. Meyer that he had had a separate conversation with Mr. Robinson, that

there were any additional representations that might need to be added to the agreement, or that the exceptions to the release of PRG needed to be broader. (SA132, SA155)

Apart from the myriad of other reasons, it would also have been unreasonable as a matter of law for Mr. Hoyt to have relied upon Mr. Robinson's alleged representation because Mr. Robinson did not have the authority to unilaterally bind PRG. As a licensed and experienced attorney, Mr. Hoyt would have been expected to know that attorneys have no authority to settle cases on behalf of a client without that client's express consent and agreement. See Albert v. Edgewater Beach Bldg. Corp., 15 N.W.2d 460, 463 (Minn. 1944) (confirming that Minn. Stat. § 481.08 does not authorize counsel to settle or compromise his client's right of action without express authorization from the client). "Whether a settlement agreement is in writing or not, the attorneys compromising a claim have no authority to settle without the consent or knowledge of their clients." JCB Props., LLC v. Carlson, 1999 WL 561937, at *2 (Minn. Ct. App. 1999) (citing Aetna Life & Cas. v. Anderson, 310 N.W.2d 91, 95 (Minn. 1981)). Accordingly, in order to bind PRG to any representations that are relied upon as terms of a settlement agreement, it was incumbent upon Mr. Hoyt and his own attorney, Mr. Meyer, to include those express terms in the Settlement Agreement to which PRG was to be bound. This would have been necessary, as Mr. Hoyt and Mr. Meyer well knew, in order to expressly bind PRG to such a representation as a term of the parties' Settlement Agreement. Indeed, that is why PRG—rather than its attorneys—were required to execute the actual Settlement Agreement itself.

For any or all of these reasons, even taking the facts as alleged by Mr. Hoyt to be true, Respondents were entitled to summary judgment because Mr. Hoyt could not have reasonably relied on the representation he alleges Mr. Robinson to have made.

D. The Undisputed Evidence In The Record Demonstrates Appellants Did Not In Fact Actually Rely Upon The Alleged Representation.

A key element of fraudulent inducement is a showing that Appellants actually relied on a false representation. In re Minn. Breast Implant Litig., 36 F. Supp. 2d 863, 878-79 (D. Minn. 1998) (interpreting Minnesota law). "Our case law establishes a high threshold of proof for such a claim." Martens v. Minn. Mining & Mfg. Co., 616 N.W.2d 732, 747 (Minn. 2000) (upholding dismissal of fraud claim as a matter of law). The undisputed evidence of the record demonstrates that Appellants did not, in fact, actually rely on Mr. Robinson's alleged representations.

Appellants contend "there is no serious dispute that a reasonable jury could conclude that Mr. Hoyt actually relied upon Mr. Robinson's representations" because "Mr. Hoyt testified that he agreed to the release in PRG's favor because Karl Robinson told him that there was no basis to raise a good faith piercing claim against PRG." (Appellants' Br. at 31)[11] In making this argument, Appellants rely upon the false proposition that the Court must find a fact issue exists as to whether Appellants "actually relied upon Mr. Robinson's representations" simply because Mr. Hoyt has submitted

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[11] Indeed, Appellants' repeated characterization of Mr. Robinson's representations as communicating "there was no basis to raise a good faith piercing claim against PRG" serves to further demonstrate that Mr. Hoyt was apparently seeking a legal opinion. (Appellants' Br. at 31; see also id. at 21, 22, 24, and 30) The assessment of whether there is a "viable" or "good faith basis" for a particular legal claim is inherently a question of law that requires legal analysis and opinion. See Minn. R. Civ. P. 11, 56.01 & 56.02.

various versions of sworn assertions that he relied upon the alleged representations. (Id.) This is certainly not true in the instant case.

Mr. Hoyt's after-the-fact claims of his reliance on this alleged misrepresentation fail as a matter of law because the undisputed material evidence in the record demonstrates Appellants did not, in fact, rely upon any representations that are not contained in the terms of the written Settlement Agreement. Mr. Hoyt's alleged subjective impressions cannot constitute actual reliance on the part of Appellants where there is no manifestation of such reliance by Appellants themselves in the Settlement Agreement to which they bound themselves or by Appellants' attorney who drafted that Settlement Agreement.

It is, of course, undisputed that the Settlement Agreement contains no reference whatsoever to any alleged representation made by Mr. Robinson. In this way, the Settlement Agreement itself conclusively establishes that Appellants did not rely on any alleged representation made by Mr. Robinson regarding "piercing" issues. (APP196) By definition, the fact that that representation is not contained in the Settlement Agreement is proof positive that it was not a material term and did not play a material role in the parties' agreement.

Mr. Hoyt himself testified that he understands settlement agreements are contracts, and he believes that all material terms of the parties' agreement should be put in writing as part of the written contract in a settlement agreement just as in any agreement. (SA119-SA120) Mr. Meyer testified that he, too, makes it a practice to put all of the material terms of an agreement in writing. (SA151) Messrs. Hoyt and Meyer's approach

in this regard is clearly reflected by the fact that the Settlement Agreement itself expressly provides that "[t]his Agreement constitutes the full agreement of the parties concerning its subject matter." (APP196-APP197) Thus, the undisputed fact that the Settlement Agreement, which contains this merger clause, does not refer to or incorporate Mr. Robinson's alleged representation conclusively establishes that Appellants did not rely upon that representation.

The absence of any such term or representation is also noteworthy because the Settlement Agreement does specifically reserve two claims against PRG for (1) any fraudulent transfers and (2) any fraudulent misrepresentation of financial statements. (APP196, SA131) Mr. Hoyt testified that he did not even discuss either of these two "carve outs" in the release with opposing counsel. (SA134) These undisputed facts demonstrate that it was Mr. Meyer, rather than Mr. Hoyt, who had focused on the terms of releasing PRG. In light of this fact, it is quite revealing that, according to Mr. Meyer, Mr. Hoyt never mentioned the issue of piercing the corporate veil in his presence. (SA154)

Thus, the undisputed and unrebutted evidence in the record demonstrates that neither Appellants nor Appellants' attorney manifested any actual reliance upon Mr. Robinson's alleged representations in the Settlement Agreement. On the contrary, under paragraph 7 of the Settlement Agreement, Appellants evidenced their intention to set forth all of the terms and representations of the parties' agreement in the written Settlement Agreement and to exclude all other terms and representations. This clear intention on behalf of Appellants was confirmed by Mr. Meyer who represented

Appellants in the settlement negotiations and who drafted the Settlement Agreement that was ultimately executed by the parties. Thus, based on these undisputed and unrebutted facts, the Court should affirm the District Court's holding that, as a matter of law, Appellants did not actually rely on any representations allegedly made by Mr. Robinson.

II. THE DISTRICT COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT IN FAVOR OF HAAS AND ENTOLO ON APPELLANTS' CLAIM FOR "BREACH OF CONTRACT/PIERCING PRG'S CORPORATE VEIL."

The District Court's dismissal of Appellants' breach of contract claim in its entirety was the natural consequence of enforcing the release of PRG under the terms of the Settlement Agreement. As Appellants themselves recognized in their own pleadings, they had to be able to rescind the release of PRG contained in the Settlement Agreement to be able to pursue a claim against PRG for breach of contract. (SA7-SA8) Indeed, Appellants entitled Count I of their Complaint, "Breach of Contract/Piercing Corporate Veil." (SA7-SA8) Not surprisingly, given the manner in which Appellants had pleaded and presented their breach of contract claim against Haas and Entolo as inextricably intertwined with and contingent upon their "piercing the corporate veil" claim against PRG, the District Court dismissed the breach of contract claim in its entirety as to all Respondents once it had ruled that Appellants' attempt to rescind the release failed as a matter of law. (APP16-APP19)

Throughout these proceedings, Appellants have emphasized that their claim for piercing the corporate veil is at the "heart" of their case. (Appellants' Br. at 17) Appellants repeatedly advised the District Court that Haas and Entolo had been completely liquidated and had no assets or any other means with which to satisfy a

judgment. Appellants thus made it very clear to the District Court that, in order to secure any relief, they had to construct a viable claim for relief against PRG.

Given these representations, the District Court correctly dismissed Haas and Entolo, along with PRG, when it ruled against Appellants on their claim for rescission. Roth v. Weir, 690 N.W.2d 410, 413 (Minn. Ct. App. 2005) (a party may not present its case to trial court under its chosen legal theory and, being unsuccessful, switch theories on appeal and argue "that such chosen theory was really not the correct one after all.") (quoting State v. Adams, 89 N.W.2d 661, 680 (Minn. 1957), cert denied, 358 U.S. 826 (1958)).[12]

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DISMISSING APPELLANTS' CASE WITH PREJUDICE.

Appellants themselves asked the District Court to dismiss their case so they could take an immediate appeal as a matter of right. Based on Appellants' request, the District Court acted well within its discretion by entering the Amended Order for Judgment which dismissed with prejudice all claims that were brought or could have been brought by Appellants in the instant proceeding. As Appellants themselves acknowledge, it was

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[12] Apart from the fact that they pleaded and litigated these claims as inextricably interrelated, it bears noting that Appellants failed to seek relief from the District Court's order and judgment under either Minn. R. Civ. P. 60.01 or 60.02. If Appellants were truly interested in separately pursing their breach of contract claim against Haas and Entolo without PRG, they could have promptly brought a Rule 60 motion to give the District Court the opportunity to reinstate such a claim against Haas and Entolo only. If granted, this would have allowed Appellants to go to trial on their breach of contract claim against Haas and Entolo on June 20, 2005. However, doing so would also have thwarted Appellants' overriding objective of obtaining a judgment that was immediately appealable. Having elected to forego possible relief under Rule 60 in favor of taking an immediate appeal, Appellants are barred from now claiming that the dismissal of Haas and Entolo was an error by the District Court.

only *"[f]ollowing this dismissal"* that they "noted their intent to dismiss certain remaining claims without prejudice pursuant to Minn. R. Civ. P. 41(a)." (Appellants' Br. at 2)(emphasis added) Notwithstanding Appellants' after-the-fact change of heart, the bottom line is that they could not have it both ways, *i.e.* they could not retain claims they had asserted and litigated in the District Court proceedings and yet still be able to take an immediate appeal as a matter of right on the rest of their case. Under these circumstances, the District Court properly exercised its discretion to dismiss the matter in its entirety so as to accommodate Appellants' stated desire to take an immediate appeal.

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

The claims that Appellants seek to keep alive are claims that were the subject of litigation and discovery in the District Court proceedings. After receiving Respondents' motion for summary judgment on their original Complaint and apparently recognizing the vulnerability of their original claims, Appellants moved to amend their pleadings to add additional claims in an effort to keep some aspect of this dispute alive. On December 15, 2004, Judge Gomez advised the parties that she intended to permit Appellants to add the additional claims. (SA248-SA250, SA254-SA257, SA263)

Having received this clear message from the District Court that Appellants could add the additional claims, Appellants actively engaged in discovery relating to those claims. Indeed, the District Court anticipated that the parties had conducted whatever discovery was necessary with respect to these claims and, therefore, ordered those claims to proceed to trial on June 20, 2005. (APP29)

However, following the District Court's issuance of its orders granting Respondents' motion for summary judgment and granting Appellants' motion to amend to add the additional claims in question, Appellants decided that they wished to forego further litigation of the claims that had been the subject of their motion to amend and instead pursue an immediate appeal of the District Court's ruling on Respondents' motion for summary judgment as a matter of right. Appellants therefore requested the District Court to enter a full and final judgment with prejudice so they could appeal as a matter of right. Based upon Appellants' request for entry of a full, final, and immediately appealable judgment, the District Court was well within its authority and discretion in dismissing all of the claims that have been litigated in this matter, including those claims that had been the subject of Appellants' motion to amend.

Principles of judicial economy and fundamental fairness militate against piecemeal litigation. When Appellants sought to dismiss their claims for the purposes of taking an immediate appeal as a matter of right, they were not entitled to hold back certain claims and preserve the prospect of litigating those claims at some later time of their own choosing. On the contrary, when they decided to dismiss their case, Appellants

simultaneously waived any right to hold in reserve those claims that had been the subject of the motion to amend that had been granted by the District Court.[13]

The District Court's Amended Order for Judgment is particularly appropriate given the fact that Appellants had been litigating these particular claims prior to the grant of summary judgment on Counts I, II, and III. After Judge Gomez made it clear at the December 15, 2004 hearing that Appellants' motion to add the additional claims would be allowed, Appellants engaged in discovery of these claims in anticipation that they would be presented in the trial that had been scheduled to take place a few short months later. The District Court subsequently set these claims for trial on June 20, 2005. As such, these claims were in the case and the District Court clearly had the discretion under either Minn. R. Civ. P. 41.01(b) or 41.02(a) to dismiss these claims with prejudice.

As a final point, it bears noting that Appellants did not seek relief from the District Court to modify the order and judgment under either Minn. R. Civ. P. 60.01 or 60.02. State Bank of Morristown v. Labs, 275 N.W.2d 37, 39 (Minn. 1979) ("The appropriate remedy for entry of an unauthorized judgment is a motion under Rule 60, Rules of Civil

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[13] The appellate court's jurisdiction "depends on the existence of a decision by the District Court that 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" Coopers & Lybrand v. Livesay, 437 U.S. 463, 467 (1978) (quoting Catlin v. United States, 324 U.S. 229, 233 (1945)). In order for the judgment to be final and appealable as a matter of right—which was exactly what Appellants requested from the District Court—the judgment had to constitute a final judgment as to their entire case, including those claims which the Court had granted them leave to assert and which Appellants had been actively litigating. Appellants are prohibited from arguing that they were entitled to "a tongue-in-cheek dismissal" of these claims by arguing they were dismissed without prejudice under Rule 41.01(a) while, at the same time, seeking review of a final judgment that is appealable as a matter of right by this Court. Minn. Pet Breeders, Inc. v. Schell & Kampeter, Inc., 41 F.3d 1242, 1245 (8th Cir. 1994).

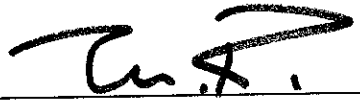
Procedure, to correct the entry.") Had they done so promptly, Appellants could have proceeded to trial on June 20, 2005 with Counts IV and V. However, they elected instead to accept the judgment as entered so as to immediately appeal from the District Court as a matter of right. Having made their election to forego such relief under either Rule 60.01 or 60.02 in favor of seeking immediate review, Appellants should not be permitted to raise this as an issue on appeal.

CONCLUSION

Based on the foregoing, Respondents respectfully request that the Court affirm the District Court's order and judgment in favor of Respondents in all respects.

Dated: October 28, 2005

WINTHROP & WEINSTINE, P.A.



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Appellate Court Case No. A05-1293

STATE OF MINNESOTA
IN COURT OF APPEALS

Hoyt Properties, Inc., and Hoyt/Winnetka, LLC,

Appellants,

v.

Production Resource Group, LLC,
Haas Multiples Environmental Marketing and Design, Inc.,
d/b/a Entolo-Minneapolis and Entolo, Inc.

Respondents.

CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subd. 3(c), for a Brief produced with a proportional 13-point font. The length of this Brief is 12,155 words. The Respondents' Brief was prepared using Microsoft Word 2000.

Dated: October 26, 2005

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