

No. A08-735

STATE OF MINNESOTA

IN COURT OF APPEALS

JEM Acres, LLC d/b/a/ Birch Haven Resort

Plaintiff/Respondent,

vs.

Patrick J. Bruno and Susan B. Bruno,

Defendants/Appellants.

RESPONDENT'S BRIEF

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STATEMENT OF THE ISSUES

I. WAS THE TRIAL COURT CORRECT IN DENYING APPELLANT'S POST TRIAL MOTION, THUS DETERMINING THAT APPELLANTS ARE NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW ON ANY OF THE GROUNDS ASSERTED?

The District Court ruling: The District Court was correct. It found the verdict fully supported by the evidence.

Apposite Authorities: *Bruggeman v. Jerry's Enterprises, Inc.*, 591 N.W.2d 705 (Minn.1999); *Kellogg v. Woods*, 720 N.W. 2d 845 (Minn. Ct. App. 2006); *Retzman v. City of Litchfield*, 354 N.W. 2d 426 (Minn. 1984)

II. WAS THE TRIAL COURT CORRECT IN DENYING APPELLANTS' MOTION FOR A NEW TRIAL ON THE ISSUE OF DAMAGES?

The District Court ruling: The District Court was correct. It found the verdict fully supported by the evidence.

Apposite Authorities: *Bruggeman v. Jerry's Enterprises, Inc.*, 591 N.W.2d 705 (Minn.1999); *Kellogg v. Woods*, 720 N.W. 2d 845 (Minn. Ct. App. 2006); *Retzman v. City of Litchfield*, 354 N.W. 2d 426 (Minn. 1984)

STATEMENT OF THE CASE

This action arises from the sale of real property known as "Birch Haven Resort." Appellants Patrick and Susan Bruno sold Birch Haven Resort to Respondent JEM Acres, LLC, a Minnesota Limited Liability Company owned by Jerry and Kate Gaslin. In the purchase agreement and during the closing, Appellants made written and oral assertions that the septic system at Birch Haven Resort had been inspected and found to be compliant and in good working order. Within two days of taking possession of the resort, Respondent discovered that the septic system had failed. A subsequent inspection revealed that both the septic mounds had failed and one of the mounds was discharging sewage to the surface of the mound creating an "imminent threat to public health."

Respondent commenced action against Appellants in October of 2006 alleging breach of contract, fraudulent and negligent misrepresentation, and violation of Minnesota Statutes §115.55 and §513.52. Appellants brought a third-party complaint against Norman Cole RSG, Inc. and Resort Sales Group, Inc., the realtor involved in the transaction. In concurrent motions for summary judgment brought by the third party defendants and Respondent, the third party defendants were dismissed and Respondent's motion for summary judgment was denied. Appellants did not move for summary judgment. The matter then proceeded to trial.

A trial by jury was held on January 29, 30, and 31 of 2008. The jury returned a verdict in favor of Respondent on its claims for breach of contract, fraudulent misrepresentation, and violation of Minn. Stat. §115.55. The jury awarded Respondent damages in the amount of \$94,000. The trial court filed its order on January 31, 2008

adopting the jury's findings and ordering judgment against Respondents for \$94,000 plus costs and disbursements, reasonable attorneys' fees, and prejudgment interest.

Post-trial motions were heard on March 24, 2008. Appellants moved for judgment as a matter of law or in the alternative, a new trial.¹ Respondent brought its motion for attorneys' fees, costs and disbursements. Respondent was awarded attorneys' fees, costs and disbursements in the amount of \$74,423. The trial court denied Appellants' motion for post-trial relief. Appellants now appeal from the trial court's judgment and order denying a new trial.

STATEMENT OF THE FACTS

A. The Parties and Birch Haven Resort

Respondent JEM Acres, LLC, d/b/a/ Birch Haven Resort, is a limited liability company and is the current owner of the property known as Birch Haven Resort located in Tenstrike, Minnesota. (A. 17, 25.) Jerry and Kate Gaslin are the sole owners and shareholders of JEM Acres, LLC. (T. 364.)²

¹ Appellants' post-trial motion was titled as a "motion for judgment notwithstanding the verdict." This brief refers to that motion throughout as a "motion for judgment as a matter of law" in accordance with Rule 50.02 of the Minnesota Rules of Civil Procedure.

² Contrary to Appellants' assertions that there was no evidence presented at trial with regard to the relationship, if any, between the Gaslins and JEM Acres, LLC (App. Br. p. 8 at n. 4), at the close of the trial and prior to instructing the jury, Judge Benshoof relayed the following information which the parties agreed should be provided to the jury:

"And one last piece of evidence that we did want to present to you is that this lawsuit is brought by JEM Acres, LLC, d/b/a, Birch Haven Resort as the Plaintiff, and the parties have agreed that I can tell you that Jerry and Kate Gaslin are the sole shareholders of that corporation called JEM Acres, LLC, just so there's no confusion about when

Respondent has owned Birch Haven Resort (hereinafter "Birch Haven") since June of 2005 when the Gaslins decided to go into the resort business. (T. 34, 37.) The Gaslins started looking for a resort to buy in the summer of 2004. (T. 93.) Jerry Gaslin thought it would be a good opportunity for their family and a "great way to make a living." (T. 93.)

The Gaslins began their search for a resort online and they eventually found realtor Norm Cole. (T. 35.) Mr. Cole represented only sellers but had a website with several resorts listed. (T. 35.) The Gaslins learned that Mr. Cole specialized in selling resorts and had, in fact, sold well over one hundred resorts during the past twenty years. (T. 200-201.) The Gaslins were in the process of looking at another resort when Birch Haven came on the market. (T. 35.) Jerry Gaslin was familiar with the area and the lake and the Gaslins decided to take a look at Birch Haven. (T. 35.) Upon seeing it for the first time in the winter of 2005, the Gaslins "loved it." (T. 94.)

Birch Haven is located on Gull Lake in Tenstrike, Minnesota. (T. 37.) Kate Gaslin characterized it as a "classic northern resort" with good fishing and a sandy beach patronized by fishermen and families. (T. 37.) Birch Haven has eleven cabins (including a residence), four RV sites and several other buildings. (T. 260.) Birch Haven has two septic systems. (A. 98-101.) System one serves cabins eight through eleven, the four RV sites, and the restrooms. (A. 98.) System two serves cabins one

you see the final forms about who JEM is. So that is an additional piece of evidence that they agreed I could present to you."

(T. 364.)

through seven, the laundry, and the shower house. (A. 100.) Each system has a separate mound. (A. 99, 101.)

Birch Haven was owned by Appellants Patrick and Susan Bruno who bought it in April of 2003 for \$525,000 on a contract for deed. (T. 263.) The Brunos listed Birch Haven for sale less than two years after buying when they had problems making the payments. (T. 143-144.) Norm Cole was the Brunos realtor/agent. (T. 35.)

B. Respondent Purchases Birch Haven

The Gaslins began to pursue the possible purchase of Birch Haven in the winter of 2005. (T. 94.) The Gaslins visited the resort at least three times. (T. 94.) The first time was in the winter of 2005 and at that time they looked at the buildings and grounds but there was snow and ice on the ground and they were unable to get into the maintenance room and bathrooms. (T. 94.) The second time they looked at the resort was about three weeks later. (T.94.)

Around the time of the second visit the Gaslins began an evaluation process set up by Norm Cole, the realtor who represented the Brunos. (T. 208.) Mr. Cole had developed and used a disclosure process whereby the buyer and seller would enter into an “evaluation agreement.” (T. 209; A. 38.) After the evaluation agreement is entered into, the seller provides various “exhibits” to the potential buyers. (T. 202.) The exhibits provide information to the buyer on the assets being offered for sale with the resort, what assets the seller wants to keep, information about the real estate including surveys, license information and compliance documents, and financial information related to the resort. (T. 37, 201-204; A. 38.) The purpose of this process is to provide buyers with

necessary information on the resort. (T. 205.) Mr. Cole uses this process with every resort he sells. (T. 205.)

The Gaslins and Brunos entered into the evaluation agreement and after paying a \$2,000 refundable deposit had access, for a period of time, to the property and various exhibits provided by the seller. (T. 209.) The evaluation agreement is not a purchase agreement but rather is a disclosure agreement. (T. 209.) Mr. Cole characterized the evaluation agreement as a “mock up of the purchase agreement” wherein all the things the parties agree to are determined and subsequently “loaded” into the purchase agreement which is the “binding” document. (T. 211.)

One of the disclosures the Brunos provided were Compliance Certificates for the septic systems from June of 2002. (A. 122.) While the Gaslins admit the 2002 compliance certificates were in the packet of information they received, they gave the certificates little or no attention because they were told that the septic system would have to be inspected prior to any sale of the resort and that, if found compliant, new compliance certificates would be issued. (T. 41, 67-69, 111-112, 215.)

After the parties entered into the evaluation agreement, there was a meeting at the resort attended by the Gaslins, the Brunos and Norm Cole. (T. 40, 95, 212.) At this point Mr. Cole had obtained and reviewed the disclosure information provided by the Brunos and had questions on the information provided to date. (T. 214.) The specific topic of the resort’s septic system came up at the meeting. (T. 41, 96, 214-215.) Mr. Cole advised Pat Bruno that the septic system had to be inspected. (T. 215.) The last compliance certificate showed the septic system had last been inspected nearly three

years earlier in 2002 when the Brunos purchased the resort. (A. 98-101.) Mr. Cole told Pat Bruno that he could “hook him up” with someone who could do the inspection but Pat Bruno stated that he would take care of having the inspection done himself. (T. 41, 96, 216.) According to the Gaslins and Mr. Cole, Pat Bruno never mentioned the old 2002 Compliance Certificates nor did he at any time state or insinuate that he would be relying on a nearly three year old inspection. (T. 41, 96, 216.) Mr. Cole even brought the subject up to Pat Bruno on numerous occasions after the meeting. (T. 216.) Mr. Cole testified that on numerous occasions when he was visiting his son’s business on the lake he would see Mr. Bruno and asked him, “How we doing on that inspection?” (T. 216.) At no time did Mr. Bruno tell Mr. Cole that he was not having the septic system inspected because he believed the Compliance Certificates were still valid. (T. 216.). Mr. Bruno denies making any statements regarding having the septic system inspected despite those statements being heard by the Gaslins, and by Mr. Cole on numerous occasions.

On or about February 14, 2005 the parties entered into a Purchase Agreement. (A. 31.)³ The purchase price was \$580,000. (A. 31.) Section 5(J) of the Purchase Agreement states:

“To the best of Sellers’ knowledge all sewage disposal systems located on the Real Property are approved by the Zoning Administrator and when installed were in compliance with

³ Although both the evaluation agreement and the purchase agreement listed Kate and Jerry Gaslin “or assigns” as the “buyers,” it is undisputed that JEM Acres, LLC bought the resort and Kate and Jerry Gaslin are the sole owners and shareholders of JEM Acres, LLC.

all applicable laws and regulations at that time and are currently in compliance and in working condition.”

(T. 34.) Further, Section 5 provides that:

“Sellers warrant and represent they are in compliance with the laws and regulations applicable to their property and to the Business at the time of closing.”

(A. 33.) The sellers’ representations regarding the septic systems being compliant with all applicable laws and regulations and being in working condition was an important aspect in the Gaslins evaluation of the resort and the subsequent purchase of the resort.

(T. 40.) The condition of the septic system was important to Gaslins in terms of determining how much they were willing to pay for the resort. (T. 40.)

Respondent took possession of the property on June 2, 2005 and the actual closing occurred on June 7, 2005. (T. 42.)⁴ At closing on June 7, 2005, Kate Gaslin specifically inquired about the septic system inspection. (T. 42.) Pat Bruno responded that he would produce the certificate of compliance and that the septic system had been inspected and was “good to go.” (T. 42, 98, 218.) Pat Bruno then gave the “thumbs up” gesture, further indicating that the septic system was inspected and operational. (T. 42, 98, 218.)

When questioned about why he did not have the compliance certificate in hand at closing, Mr. Bruno stated that he had not had time to pick it up. (T. 218.) The Gaslins, while concerned that the compliance certificate was not available at the closing, believed

⁴ The closing was originally scheduled for June 2, 2005 but was postponed due to a glitch in the Respondent’s financing. (T. 71.) The parties reached an agreement allowing Respondent to take possession on June 2, 2005 and everything was signed except the deed. (T. 296.) The closing was then re-scheduled for June 7, 2005. (T. 70.)

Mr. Bruno's statement that the system had been inspected and trusted that he would deliver the certificate of compliance. (T. 43, 90, 219.) While Pat Bruno denies making these statements and gestures, the Gaslins and Norm Cole all testified assuredly that he did indeed make the statements and gave the "thumbs up" gesture. (T. 42, 98, 218.)

C. The Septic System Fails Two Days After Closing

Two days after the closing, on or about June 9, 2005, while starting to clean up the resort, Jerry Gaslin found slab wood stacked on top of the mound for system number one. (T. 100.) Jerry removed the boards and found the mound was "wet and mushy." (T. 100.) At first Jerry did not think much of it but later that afternoon he could smell septic and when he looked around to see where the smell was coming from, he found sewage spewing out of the top of mound number one. (T. 100.)

Jerry immediately phoned Pat Bruno and advised him that they has septic liquids coming out of the top of mound one. (T. 100.) Pat Bruno told him not to worry about it and that he had similar problems after a wet spring. (T. 100.) Pat advised Jerry to put dirt on the mound and that would take care of it. (T. 100.) Jerry did as Pat advised and put dirt on the wet spots. (T. 101.) Pat Bruno denies hearing anything from Jerry Gaslin until around the 11th of July of 2005. (T. 300.) Mr. Bruno testified that when Jerry called him on July 11th about leaking septic and wet mounds, he told Jerry to call Tony Nendick and have him come take a look at the leaking mound. (T. 300.)

Shortly after the Gaslins discovered the leaking mound, Kate Gaslin went to the County to get a building permit for construction of a game room. (T. 45.) Kate was advised that they would need a septic inspection in order to obtain the building permit at

which time she advised the county official that a septic inspection had just been completed pursuant to their purchase of the resort from the Brunos. (T. 46.) Kate was told by William Patnaud, the Environmental Services District Director for Beltrami County, that there was no current inspection on file. (T. 46.) The Gaslins subsequently learned that Pat Bruno admitted no septic inspection was completed prior to the sale of the property. (T. 46.)

D. The Septic Systems are Inspected

On July 12, 2005, the Gaslins had an inspection of the septic system completed by Herbert Schilla. (T. 46; A. 44-50.) Mr. Schilla failed system one and found it to be an “imminent threat to public health or safety” due to the “discharge of sewage to the ground surface.” (A. 46.) With respect to system two, Mr. Schilla determined that the system was failing due to the lack of the necessary vertical separation between the bottom of the system and the soil. (A. 44.)

After finding out that both septic systems were failing, the Gaslins called Norm Cole to discuss the situation. (T. 47.) Mr. Cole, while surprised because he thought the Brunos had an inspection completed prior to the sale, immediately set up a meeting with the Gaslins and the Brunos. (T. 48-49, 223.) The meeting was attended by the Gaslins, Pat Bruno, Norm Cole, and Norm’s son, John Cole. (T. 49, 223.) At the meeting the Gaslins, Norm Cole and John Cole all heard Pat Bruno say that the failing systems were his “responsibility” and he would “take care of it.” (T. 50, 103, 233, 241.) At trial Mr. Bruno denied making the statement and claims that he requested a copy of the Schilla report and told Norm Cole that he “wanted a second opinion.” (T. 305.)

In August of 2005 the Brunos had a second inspection completed by Laird Hensel (T.51, 305; A. 80-87.) Mr. Hensel agreed with Mr. Schilla's assessment of system one and found it to be an "imminent threat to public health and safety" because it was a "situation with the potential to immediately and adversely impact or threaten public health or safety." (A. 80.) Mr. Hensel reported that the system had to be considered an imminent health threat due to evidence of hydraulic failure causing surface discharge. (A. 84.) Mr. Hensel determined that the 600 square foot "mound is severely undersized" and determined the mound should be at least 1274 square feet. (A. 84.)

With respect to system two, Mr. Hensel opined that the system met the requirement for vertical separation; however, Mr. Hensel found the mound "is very soft and spongy on the top and sides and is very close to hydraulic failure." (A. 84.) Mr. Hensel found that the tank sizing and mound for system two were "severely undersized." (A. 84-85.) Mr. Hensel determined that system two was on the "verge of hydraulic failure" and should be upgraded. (A. 85.) Upon hearing Mr. Laird's opinion regarding the septic systems, Pat Bruno again stated that it as "his responsibility" and he would "take care of it." (T. 53.)

E. The Septic Systems Require Replacement

In July of 2005 William Patnaude, Beltrami County Environmental Services District Director, came out to the resort. (T. 54, 165.) Mr. Patnaude looked at both of the septic mounds, walked on top of the second mound and advised the Gaslins that the whole system needed to be replaced. (T. 106.) In October of 2005, months after the problems were discovered and while the Gaslins were waiting for the Brunos to "take

responsibility” for the problem and fix it, the Gaslins received a letter from Mr. Patnaude advising them that the system needed to be replaced. (T. 106-107; A. 51.) The letter advised the Gaslins that they needed to immediately replace system one and that system two was “seriously hydraulically overloaded” and “ready for failure.” (A. 51.) Mr. Patnaude went on to advise Gaslins that any problem with the seller was a civil matter and that the County would work with them to establish a reasonable time frame for bringing the system into compliance. (A.51.)

After receiving Mr. Patnaude’s letter, the Gaslins proceeded to have a replacement system designed by Jerry Gaslin’s brother Jeff Gaslin. (T. 108-109.) After receiving the design for the replacement system, the Gaslins procured bids for replacement of the system. (T. 109.) The Gaslins got three bids. (A. 54-58, 59, 60.)

The first bid was from Miciah Medcraft and totaled \$159,433. (A. 59.) The Gaslins contacted Mr. Medcraft and asked him to come out to Birch Haven to look at existing septic system and give them a bid for installing a new system in accordance with Jeff Gaslin’s design. (T. 124.) Mr. Medcraft reviewed the design and determined that the five-mound system was appropriate for the size of the resort. (T. 126.) On February 28, 2006 Mr. Medcraft prepared a bid for replacement of the Birch Haven septic system for \$159,433.00. (T. 126; A. 59.)

The second bid was from Sparky’ Construction and estimated the cost of the job to be \$122,000. (A. 54.) The initial bid from Sparky’s Construction was dated March 12, 2006 and included the cost of replacing the septic system with the exception of removing trees/stumps as needed. (T. 137; A. 54.) In June of 2006 Sparky’s Construction

submitted additional bids for the cost of removing stumps in the amount of \$3,000 and including a road repair allowance in the amount of \$2,500.00. (A. 56.) At trial, Arlen Kuechenmeister, the owner of Sparky's Construction, testified that in 2007 he updated his bid with a five percent increase for a total replacement cost of \$134,925. (T. 138.)

After obtaining the first two bids, the Gaslins provided the information to Norm Cole who provided it to the Brunos. (T. 62.) It was at that time that Pat Bruno told the Gaslins that he was not going to take care of the problem and that if the Gaslins "needed to do something" they should contact his attorney. (T. 62)

In 2007 Marlowe Vogeltamz, president of DREC, Inc., was contacted by Norm Cole regarding submitting a bid to replace the Birch Haven septic system because DREC had done some work previously for Mr. Cole. (T. 255.) DREC performed soil borings at the resort, determined the "flowage" from the cabins, RV sites and other buildings, and put together a bid to replace the system. (T. 256.) Mr. Vogeltamz testified that the location of the current system was the only good spot for the mound system and that the limited space for the mound system necessitates a pumps and pump stations which increase the cost of the system. (T. 257-258.) With respect to the existing system, Mr. Vogeltamz testified that the existing mounds were "very small," that there was "quite an odor," and that you had to "watch where you stepped." (T. 259.) Mr. Vogeltamz opined that those were "bad signs." (T. 259.) DREC, Inc. submitted its bid, the third bid obtained by the Gaslins on or about July 23, 2007 in the amount of \$94,500.00. (A. 60.)

The Brunos obtained one bid presumably in response to the three bids obtained by the Gaslins. (T. 328; A. 106.) Tony Nendick submitted a bid on or about July 26, 2007

in the amount of \$12,000. (A. 106.) Mr. Nendick's bid was limited to estimated cost of enlarging the mound for system one by tearing out and replacing the mound . (T. 328; A. 106.) Mr. Nendick admitted that he had no indication from the county that simply enlarging the mound for system one would make the system compliant. (T. 336.)

F. JEM Acres, LLC Brings Action Against the Brunos

In October of 2006, unable to get any satisfaction from the Brunos with respect to taking responsibility for fixing Birch Haven's failed septic systems, JEM Acres, LLC, the owner of Birch Haven, sued the Brunos asserting claims for breach of contract, fraud, negligent misrepresentation, and violation of Minnesota Statutes §§ 115.55 and 513.52. (A. 17-23.) JEM Acres, LLC prevailed at trial obtaining a jury verdict in its favor on its claims for breach of contract, fraud and violation of Minn. Stat. §115.55. (A. 9-10.) The jury awarded the Gaslins \$94,000.00 in damages. (A. 9-10.) After Judge Benshoof denied the Brunos' post-trial motion, the Brunos filed this appeal. (A. 1-2, 107-108.)

ARGUMENT

I. THE TRIAL COURT CORRECTLY DENIED APPELLANTS' POST TRIAL MOTION AND APPELLANTS ARE NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW ON ANY OF THE GROUNDS ASSERTED.

A. Standard of Review

When the trial court considers a motion for judgment as a matter of law it must determine whether, viewing the evidence in the light most favorable to the nonmoving party, the verdict is manifestly against the entire evidence or whether despite the jury's findings of fact, the moving party is entitled to judgment as a matter of law. *Dean v.*

Weisbrod, 300 Minn. 37, 41-42, 217 N.W. 2d 739, 742 (Minn. 1974). Therefore, the standard of review is de novo. *Pouliot v. Fitzsimmons*, 582 N.W. 2d 221, 224 (Minn. 1998) (citing *Diesen v. Hessburg*, 455 N.W. 2d 446, 449 (Minn. 1990)).

Where judgment as a matter of law has been denied by the trial court, on appellate review the trial court must be affirmed, if, in the record, there is any competent evidence reasonably tending to sustain the verdict. *Seidl v. Trollhaugen, Inc.*, 305 Minn. 506, 507 232 N.W. 2d 236, 239 (Minn. 1975). “Unless the evidence is practically conclusive against the verdict, [this court] will not set the verdict aside.” *Rettman v. City of Litchfield*, 354 N.W. 2d 426, 429 (Minn. 1984) (quoting *Sandhofer v. Abbott-Northwestern Hosp.*, 283 N.W. 2d 362, 365 (Minn. 1979)(internal citations omitted)).

The evidence must be considered in the light most favorable to the prevailing party and an appellate court must not set the verdict aside if it can be sustained on any reasonable theory of the evidence. *Stumne v. Village Sports & Gas*, 309 Minn. 551, 552, 243 N.W. 2d 329, 330 (Minn. 1976). “Conflicts in evidence, however sharp, are to be resolved by the jury, and its verdict will not be set aside unless it is manifestly and palpably contrary to the evidence as a whole.” *Waldo v. St. Paul City Ry*, 244 Minn. 416, 424 70 N.W. 2d 289, 294 (Minn. 1955). “The trier of fact, in this instance the jury, is the sole judge of the credibility of witnesses testifying in relation to issuable facts. *Id.* It is only when different minds can reasonably arrive at but one result that fact issues become questions of law justifying a court in substituting its judgment for that of a jury. *Id.* at 425, 295.

In the instant case, the jury found in favor of Respondent on every cause of action the jury was asked to decide. There was more than sufficient evidence, both direct and circumstantial, to sustain the jury's verdict. Appellants' attempt to convert factual issues into legal questions should be seen for what it is – an effort to avoid the very challenging task of overcoming the deference applied to jury verdicts on appellate review. The trial court was correct in denying Appellants' motion for judgment as a matter of law and this court should sustain the trial court's decision not to "undo" the jury verdict. Respondent addresses each of Appellants' arguments for judgment as a matter of law in turn.

B. Respondent has Standing to Proceed on its Causes of Action

To establish "standing" a potential litigant must allege injury in fact, or otherwise have a sufficient stake in the outcome, to have a court decide the merits of a dispute. *Cochrane v. Tudor Oaks Condo Project*, 529 N.W. 2d 429, 433 (Minn. Ct. App. 1995) (citing *Middlewest Motor Freight Bureau v. United States*, 525 F. 2d 681, 683 (8th Cir. 1975)). Standing may be raised at any time. *In re Welfare of Mullins*, 298 N.W. 2d 56, 61 n. 7 (Minn. 1980). Nonetheless, courts appear hesitant to deny standing under circumstances which would prejudice the party whose standing would be found lacking. *Cochrane v. Tudor* at 433.

Appellants assert that Respondent, JEM Acres, LLC has no standing to sue the Brunos because the record is "devoid of showing any connection, whether it be factual or legal, between the Gaslins and JEM Acres." (App. Brief at p. 26) Appellants go on to reason that because the Gaslins signed the purchase agreement and are the persons to whom the misrepresentations were made, that without a connection between JEM Acres,

LLC and the Gaslins, JEM has no standing to sue the Brunos. Appellants' argument fails for the simple reason that Appellants are mistaken about the record being "devoid" of showing any connection between JEM Acres, LLC and the Gaslins.

Contrary to Appellants' assertions that there was no evidence presented at trial with regard to the relationship, if any, between the Gaslins and JEM Acres, LLC, at the close of the trial and prior to instructing the jury, Judge Benshoof relayed, to the jury, the following information which the parties agreed should be provided to the jury:

"And one last piece of evidence that we did want to present to you is that this lawsuit is brought by JEM Acres, LLC, d/b/a, Birch Haven Resort as the Plaintiff, and the parties have agreed that I can tell you that Jerry and Kate Gaslin are the sole shareholders of that corporation called JEM Acres, LLC, just so there's no confusion about when you see the final forms about who JEM is. So that is an additional piece of evidence that they agreed I could present to you."

(T. 364.)

The Gaslins own JEM Acres, LLC. In other words, the Gaslins are JEM Acres, LLC and any statements made to the Gaslins were made to JEM Acres, LLC. Likewise, the purchase agreement was signed and entered into by the principals of JEM Acres, LLC and, therefore, the rights and obligations under the contract belong to JEM Acres, LLC. JEM Acres, LLC, as owner of the property, has a "stake" in the outcome of this litigation and has shown that it has sustained damages and "injury in fact." JEM Acres, LLC has standing to sue the Brunos on the purchase agreement as well as for the fraudulent misrepresentations made to the Gaslins. Respondent's lawsuit should not be dismissed for lack of standing.

C. The Jury's Finding that the Brunos Violated Minnesota Statute §115.55 is Supported by the Evidence and Appellants are not Entitled to Judgment as a Matter of Law.

Appellants claim that there is no evidence supporting the Jury's finding that the Brunos violated Minn. Stat. §115.55 and, therefore, as a matter of law, Appellants are entitled to dismissal of that claim. However, if there is any competent evidence reasonably tending to sustain the verdict, the trial court's denial of judgment as a matter of law must be affirmed. *Seidl v. Trollhaugen, Inc.*, 232 N.W. 2d at 239 (emphasis added). Furthermore, the trier of fact, in this instance the jury, is the sole judge of the credibility of witnesses testifying in relation to issuable facts. *Waldo v. St. Paul City Ry.*, 70 N.W. 2d at 294.

In the instant case the jury had competent evidence that the Brunos knew there were problems with the septic system but failed to disclose those problems to the Gaslins. Additionally, there is evidence showing the Brunos knew, or had reason to know, that the septic system was not compliant and intentionally misrepresented the system's "compliance status" to the Gaslins.

1. The Evidence Shows the Brunos Knew or had Reason to Know the Septic System had Operational Problems.

Appellants set forth a creative argument regarding statutory interpretation and whether the term "reason to know" has the same meaning as "should know." This is little more than a red herring designed to divert the Court's attention from the real question which is whether there is any evidence supporting the jury's finding that

Appellants violated the statute. There is more than enough evidence to sustain such a finding.

Minn. Stat. §115.55, subd. 6(b) provides that:

“Unless the buyer or transferee and seller or transferor agree to the contrary in writing before closing of the sale, a seller or transferor who fails to disclose the existence or known status of an individual sewage treatment system at the time of sale, and who knew or had reason to know of the existence or known status of the system is liable to the buyer or transferee for costs relating to bringing the system into compliance with the individual sewage treatment system rules and for reasonable attorney fees for collection of costs from the seller or transferor. An action under this subdivision must be commenced within two years after the date on which the buyer or transferee closed the purchase or transfer of the real property where the system is located.”

Minn. Stat. §115.55 subd. 6(b). This section of the statute was read to the jury and included in their jury instructions. Based on the statute, the jury could reasonably find a violation of the statute if there was any “competent evidence” presented showing that the Brunos knew or had reason to know the status or condition of the septic system and failed to disclose what they knew about the status or condition of the septic system.

The trial record is replete with direct and circumstantial evidence that the Brunos knew there might be a problem with the septic system. First, there is testimony from Jerry Gaslin regarding what Pat Bruno told him after Jerry first discovered the sewage discharging from system one. Pat told Jerry that he had encountered the same problem but blamed it on a “wet spring.” After testifying that he smelled septic and found sewage discharging from the top of mound one, Jerry testified as follows:

Q. What did you do then?

A. I went up to the lodge and I called up Pat Bruno.

Q. And what did you say?

A. I said there's septic liquids coming out of the top of the mound, what's going on. And he said don't worry about it. It's been a very wet spring and do like I did two years ago when I was there, look at the other mound on the left side and you'll see dirt piled up. Put dirt on it. It will take care of it.

(T. 100.) This is evidence that Pat Bruno knew there might be problem with the septic system. At the very least, he should have disclosed to the Gaslins that the mound had discharged septic liquid in the past after a wet spring and that he had placed dirt on the mound to contain the moisture discharge.

Even more troubling than Mr. Bruno's failure to disclose the fact that the mound for system one was "leaking" is the Brunos' apparent attempt to conceal the evidence that the mound was saturated and discharging sewage. Jerry Gaslin testified that when he was cleaning up a couple of days after closing, he found slab wood stacked on top of the mound for system number one. It was after removing the slab wood from the top of the mound that the sewage discharge problem became apparent. Jerry testified as follows:

Q. What did you discover when you took up some of the garbage that had been lying around?

A. There was slab wood stacked up on top of the mound, and me and my son had taken the slab wood off, only knowing that being told before you don't drive on mound. You don't put things on them. We took it off and it was wet and mushy, didn't think too much of it. Later on that afternoon we could smell septic so I went smelling and looking from where it was coming from and it was coming right out of the top of the mound.

(T. 100.)

Last but not least is the evidence showing that Pat Bruno lied to the Gaslins about having had the system inspected. Jerry Gaslin, Kate Gaslin, and Norm Cole ⁵ all testified that Pat Bruno told them on numerous occasions that he would get the system inspected. Moreover, on the day they closed, when asked about the inspection, Mr. Bruno stated that the septic system had been inspected and was “good to go.” (T. 42, 98, 218.) Pat Bruno then gave the “thumbs up” gesture, further indicating that the septic system was inspected and operational. (T. 42, 218.) The jury certainly could have believed, and apparently did, that Mr. Bruno lied about the inspection because he was aware there were problems with the septic system that would have been revealed had an inspection been completed.

The jury is charged with weighing the credibility of the witnesses at trial for good reason; that being the jury’s opportunity to evaluate the witness’s demeanor as well as their words. That this jury found the Gaslins and Norm Cole to be more credible than Pat Bruno is not an issue for the trial court’s or the appellate court’s consideration.

The record contains more than enough competent evidence for the jury to determine that the Brunos knew or had reason to know that the septic system had operational problems. By representing to the Gaslins that the system was “working properly” when they knew, or had reason to know otherwise, the Brunos violated Minn. Stat. §115.55.

2. There is Evidence that the Brunos Knew or had Reason to Know the Septic System was not Compliant.

⁵ The testimony of Norm Cole on this issue is particularly compelling since he is not a party to the action and had nothing to gain by testifying as he did.

Ultimately it was not even necessary for the jury to address certain issues Appellants find troubling such as whether a compliance certificate has to be provided when a resort is sold if a current/unexpired compliance certificate is on file. Whether the system was “compliant” according to an inspection is not the only measure of the “status” of system and the jury so found (see *supra*). That being said, even if there were not ample evidence showing the Brunos failed to disclose what they knew about certain operational problems related to the septic system, there is also evidence that the Brunos knew, or had reason to know that the system was not compliant when they represented to the Gaslins that it was, in fact, compliant.

While it is true that Minn. Stat. §115.55 does not make the seller a “guarantor” of the septic system, the statute does require a seller disclose the status of the septic system and makes a seller liable when the seller makes representations about a septic system’s compliance when the seller knows or has reason to know the representation is false. See *Kellogg v. Woods*, 720 N.W. 2d 845, 851 (Minn. Ct. App. 2006).

Appellants’ assertion that there was “no evidence that the Brunos knew or had reason to know of any lack of compliance or problems with the septic system” is patently false. Pat Bruno may have testified that the Brunos experienced no problems with the septic system while they owned Birch Haven, however, that testimony is contrary to other testimony from Jerry Gaslin that two days after closing at least one of the mounds was “wet and squishy” and discharging sewage. (T. 100.)

Jurors are not required to check their common sense at the door once they become empanelled on the jury. This jury clearly believed that the problems evident just two days after closing did not mysteriously develop overnight but rather existed, and were known to the Brunos, prior to and on the day of closing. From this evidence the jury could have concluded that had the system been inspected prior to closing, the problems would have been found and the system would have been “non-compliant” just as it was a month later on July 12, 2005 when Herb Schilla completed an inspection of the system.

Appellants also advance the argument that the June 2, 2002 inspection finding the system compliant somehow abrogates the Brunos’ duty to provide truthful information with respect to whether the Brunos had the system inspected prior to closing on the sale in June of 2005. To the contrary, the *Kellogg* court found that very duty to exist holding that a seller is liable under Minn. Stat. §115.55 when the seller makes representations about a septic system’s compliance when the seller knows or has reason to know the representation is false. *Kellogg v. Woods*, 720 N.W. 2d at 851.

In the case at bench Appellants not only failed to disclose that they had experienced septic discharge from mound one, a condition that likely would affect whether the system was “compliant,” they actually told the Gaslins they had the septic system inspected and that it was, in fact, compliant. The truth, however, was that the only inspection finding the Birch Haven septic system “compliant” had been performed three years earlier prior to the Brunos’ purchase of the resort. Jerry Gaslin, Kate Gaslin, and Norm Cole all testified that Pat Bruno told them on numerous occasions that he would get the system inspected. Moreover, on the day they closed, when asked about the

inspection, Mr. Bruno stated that the septic system had been inspected and was “good to go.” (T. 42, 98, 218.) Pat Bruno then gave the “thumbs up” gesture, further indicating that the septic system was inspected and operational. (T. 42, 218.)

The Brunos’ violation of the statute lies not only or necessarily in their failure to have an inspection completed, but in their misrepresentation that they had an inspection completed and that the inspection showed the septic system to be fully compliant when in fact they had not had the system inspected. By representing to the Gaslins that the system had been inspected and was “fully compliant” when they knew it had not been inspected and had reason to know there were problems that could cause the system to be non-compliant, the Brunos violated Minn. Stat. §115.55.

3. The Jury Instructions were Neither Confusing nor Deficient and Appellants Failed to Raise any Objections to the Jury Instructions.

Appellants take issue with the jury instructions which included Minn. Stat. §115.55 subd. 6 and a portion of the Beltrami County Shoreland Management Ordinance 802. The crux of Appellants’ argument seems to be frustration because the Judge did not interpret the statute in the way the Appellants had hoped but instead read the statute and ordinance to the jury and instructed the jury to determine whether the Brunos had violated the statute. Notwithstanding the fact that no objection to the jury instructions was asserted and, therefore Appellants have waived that argument (*See First Nat. Bank of Hastings v. McNamara*, 357 N.W. 2d 171, 173 (Minn. Ct. App. 1984) holding that by failing to object to proposed jury instructions, appellant waived any right to challenge the instructions on appeal), an alleged statutory violation is a question of fact for the jury, not

one of law for the court. *Kolatz v. Kelly* 244 Minn. 163, 174, 69 N.W.2d 649, 657 (Minn. 1955).

The trial court was correct in tasking the jury with determining whether the Brunos violated the statute. Instructing the jury regarding applicable law, in other words the statute and ordinance, was entirely appropriate and Appellants' failure to object to the aforementioned instruction is fatal to any attempt to raise that issue on appeal.

4. Respondent is Entitled to Recover its Attorneys' Fees Pursuant to Minn. Stat. 115.55 subd. 6(b).

As a final note on the issues related to the jury's finding that the Bruno's violated Minn. Stat. 115.55, Appellate argues that if the violation of the statute is reversed and the cause of action dismissed, Respondent would have no claim for attorneys' fees.

Respondent restates its position that there is ample evidence to support the jury's verdict that a violation of Minn. Stat. §115.55 occurred. Since that statute provides for the grant of attorneys' fees, the trial court was within its discretion in awarding attorneys fees to Respondent.

D. The Jury's Verdict Finding that Appellants Breached their Contract with Respondent is not Contrary to the Law and is Supported by the Evidence.

Appellants assert that Respondent's breach of contract claim fails as a matter of law because it is precluded by the "merger doctrine" and because Respondent's claimed damages were not directly caused by Appellants' breach. Appellants' argument fails for two reasons. First, the evidence adduced at trial shows Appellants committed fraud thus placing this case within the "fraud exception" to the merger doctrine. Second, the record

supports the damages awarded by the jury based on the evidence that the entire septic system had failed and needed to be replaced in order to bring it into compliance.

1. Respondent's Claim for Breach of Contract is not Precluded by the "Merger Doctrine."

Appellants argue that the "merger doctrine" precludes Respondent's recovery under a breach of contract theory, however, the facts in this case place it squarely within the fraud exception to the merger doctrine and as such, the jury verdict should not be reversed.

"The merger doctrine generally precludes parties from asserting their rights under a purchase agreement after the deed has been executed and delivered." *Bruggeman v. Jerry's Enterprises, Inc.*, 591 N.W.2d 705, 708 (Minn.1999). However, the doctrine of merger **does not apply** where there is fraud or mistake. *Sullivan v. Eginton*, 406 N.W.2d 599, 601 (Minn. Ct. App. 1987) (citing *McCarthy's St. Louis Park Cafe, Inc. v. Minneapolis Baseball and Athletic Ass'n*, 258 Minn. 447, 454, 104 N.W.2d 895, 901 (1960) (emphasis added)); *Gartner v. Eikill*, 319 N.W.2d 397, 399 (Minn. 1982) (finding a misunderstanding regarding the compliance with zoning laws to be a mistake). "[D]eeds will be conclusive unless it be shown that the grantees have been led by **fraud or mistake of fact** to accept something different from what the executory contracts called for, in which cases the courts will give relief as in other cases of fraud or mistake." *Bruggeman*, 591 N.W.2d at 708 (citing *Griswold v. Eastman*, 51 Minn. 189, 192, 53 N.W. 542, 543 (1892) (emphasis added)).

In this case the jury found that the evidence presented placed the Respondent's breach of contract claim within the fraud exception to the merger doctrine. There is evidence showing that the Brunos misrepresented the status/condition of the septic system by failing to disclose what they knew, attempting to conceal the condition of the system, and lying regarding the completion of an inspection of the system and the status of the consequent compliance document(s). Disclosure regarding the status of the system was required under Section 5(j) of the Purchase Agreement which specifically states:

Sellers warrant and represent that they are in compliance with the laws and regulations applicable to their property and to the Business at the time of closing.

(A. 34.)

The Brunos were not in compliance with the laws and regulations at the time of the closing because Minn. Stat. § 115.55 subd. 6 specifically requires disclosure by the property sellers of the design and known status of sewage treatment systems prior to entering into a purchase agreement and imposes liability on a seller or transferor who fails to disclose the existence or known status of an individual sewage treatment system at the time of sale, and who knew or had reason to know of the existence or known status of the system. Minn. Stat. §115.55 subd. 6(a)(b).

Respondent was induced to close on the property and accept a warranty deed for the property by Pat Bruno's misrepresentation that the inspection was done and the system was "good to go." Pat Bruno's misrepresentation regarding the inspection, in addition to the Brunos' failure to disclose other problems of which they had knowledge, led Respondent to believe the system had been inspected and found to be compliant.

That was not the case and an inspection performed a mere month after closing revealed that the septic system was not compliant. The Bruno's fraud, places this case outside of the merger doctrine and, as such, the Gaslins presented evidence of the Brunos' breach of contract and the jury found that the Brunos did indeed breach the purchase agreement. Appellants are not entitled to judgment as a matter of law dismissing the breach of contract claim.

2. Respondent's Claimed Damages for Appellants' Breach of Contract are Recoverable as a Matter of Law.

Appellants take the position that Respondent's claimed damages, the cost of replacing the septic system, are not recoverable because there was no evidence presented that the septic system was noncompliant and not in working order on the day of closing. Appellants' argument fails because there is evidence, testimonial and documentary, from which the jury could conclude that the system was not compliant and not working properly on the day of closing.

The evidence of noncompliance and operational problems includes testimony that the Brunos failed to disclose previous instances of sewage discharge from mound one, attempted to conceal the condition of the system, and lied about the completion of an inspection of the system and the status of the consequent compliance document. Additionally, the inspection performed by Herbert Schilla one month after closing showed the system to be non-compliant. (A. 44-50.) Mr. Schilla failed system one and found it to be an "imminent threat to public health or safety" due to the "discharge of sewage to the ground surface." (A. 46.) With respect to system two, Mr. Schilla

determined that the system was failing due to the lack of the necessary vertical separation between the bottom of the system and the soil. (A. 44.) The jury could have found from the evidence presented that the septic system was not working properly when parties closed on the sale of the property and, furthermore, that the system was non-compliant at the time of the closing.

With respect to the amount of damages claimed, the appropriate measure of damages for breach of contract is that amount which will place the plaintiff in the same situation as if the contract had been performed.” *Peters v. Mutual Benefit Life Ins.*, 420 N.W.2d 908, 915 (Minn. Ct. App. 1988) (citing *Christensen v. Milde*, 402 N.W.2d 610, 613 (Minn. Ct. App. 1987)). “The purpose of damages for breach of contract is to make the claimant whole.” *Sprangers v. Interactive Technologies, Inc.*, 394 N.W.2d 498, 505 (Minn. Ct. App. 1986). The non-breaching party should recover damages sustained by reason of the breach which arose naturally from the breach or could reasonably be supposed to have been contemplated by the parties when making the contract as the probable result of the breach. *Lesmeister v. Dilly*, 330 N.W.2d 95, 102 (Minn. 1983).

Respondents are entitled to recover the cost of replacing the septic system based on the evidence cited *supra* that the system was noncompliant and not working properly when the parties closed on the sale of the resort. That evidence includes the inspection report of Herb Schilla which clearly states that both system one and two had to be replaced in order to bring the system into compliance, and testimony regarding a conversation Jerry Gaslin had with William Patnaude wherein Mr. Patnaude told Jerry that the entire system was failing and needed to be replaced. (T. 106-107; A. 44-50, 51.)

The fact that there is also evidence that indicates only system one needed to be fixed and that it could be fixed by simply enlarging the mound, does not establish that there is a lack of evidence showing the entire system needed to be replaced or that the bids obtained by the Gaslins were unreasonable or unsubstantiated. The jury was charged with determining the amount of damages and it did so based on the evidence presented. Respondent proved its breach of contract claim and the damages recoverable for that claim. The jury's verdict should not be reversed and/or set aside.

E. The Jury's Verdict Finding that Appellants Committed Fraud is not Contrary to the Law and is Supported by the Evidence.

Appellants' final argument is that there is no evidence supporting the jury's finding that the Brunos made fraudulent misrepresentations, and that the Respondent failed to present evidence of out-of-pocket damages.

1. The Jury was Presented with Sufficient Evidence of the Appellants' Material Misrepresentations.

With respect to the jury's finding that Appellants made fraudulent misrepresentations regarding the status and condition of the septic system, Respondent has thoroughly articulated the exact misrepresentations made and identified the evidence supporting the falsity and materiality of those misrepresentations in sections B and C of its argument and, as such, will not repeat that entire argument. Respondent summarizes the evidence supporting a finding of fraudulent misrepresentation as follows: 1) evidence that the Brunos misrepresented the status/condition of the septic system by failing to disclose what they knew about discharge of septic liquids from system one; 2) evidence that the Brunos attempted to conceal the actual condition of the system; 3) evidence that

the Brunos lied regarding the completion of an inspection of the system and the status of the consequent compliance document(s); and 4) evidence in the Schilla inspection report that the septic system failed and/or was failing, was noncompliant, and needed to be replaced.

The jury was presented with more than enough competent evidence to determine that the Brunos made false and material misrepresentations upon which the Gaslins relied in closing on the sale and paying the \$580,000 purchase price.

2. Respondent's Claimed Damages are Recoverable as a Matter of Law.

Appellants argue that Respondent has failed to present evidence of out-of-pocket damages and, as such, its fraud claim must fail. In fraud and deceit action for damages sustained by the purchaser in buying property in reliance upon the fraudulent representations of the seller, the rule is that where the property is not returned, the measure of damages is the difference between the actual value of the property received and the price paid for it, and in addition thereto, such other or special damages as were naturally and proximately cause by the fraud prior to its discovery, inclusive of restitution for expenses reasonably and necessarily incurred after discovery of the fraud in a bona fide effort to mitigate aforesaid damages. *Strouth v. Wilkison*, 302 Minn. 297, 300 224 N.W. 2d 511, 514 (Minn. 1974). Evidence of the price paid for real property is sufficient evidence to show the market value of what plaintiffs would have received if defendants' representations had been true. *Marion v. Miller*, 237 Minn. 306, 309 55 N.W. 2d 52, 55 (Minn. 1952).

When the out-of-pocket rule cannot restore plaintiff to his previous position, the court may allow an alternative calculation of damages. *See Estate of Jones by Blume v. Kvamme*, 449 N.W. 2d 428, 432 (Minn. 1989) (acknowledging that Minnesota courts have realized the out-of-pocket damage rule may not restore injured party to its former position and carved out an exception to the rule); *See also Lewis v. Citizens Agency of Madelia, Inc.*, 235 N.W.2d 831, 835 (Minn. 1975).

In cases of fraud or deceit, the defendant is responsible for those results which must be presumed to have been within his contemplation at the time of the commission of the fraud, and plaintiff may recover for any injury which is the direct and natural consequence of his acting on the faith of defendant's representations. *Lewis v. Citizens*, 235 N.W.2d at 835.

In the instant case the jury has evidence in the form of testimony from the Gaslins that the status/condition of the septic system influenced the price they were willing to pay for the resort. In short, had the Gaslins known the true condition/status of the Birch Haven septic system, they would have either paid less, or not purchased the resort. In the alternative, the Gaslins would have accepted replacement of the system at the Brunos' expense. Recall that the testimony from the Gaslins, Norm Cole and John Cole establishes that Pat Bruno acknowledged that the failed and/or failing system was their (the Brunos') responsibility and that they would "take care of it." Based on those statements the Gaslins proceeded to have a new system designed and obtained bids from two different contractors for replacement of the system based on Jeff Gaslin's design. The Gaslins expected, and rightly so, that the Brunos were going to pay for cost of

replacing the system. It was not until the Brunos refused to take responsibility and have the system replaced, that the Respondent was forced to bring this action.

This case presents a factual scenario where the best measure of damages which will place the Respondent in the position it would have been in had the septic system been as represented, is the cost of replacing the system. The market value of the property is the price paid by Gaslins, who were purchasing at arm's length. The market value with the fraud is the market value minus the cost to cure, because no one would purchase the resort without having the septic issues cured either before closing or by deduction of that amount from the purchase price to cover the new buyer's expense to cure that. The jury was presented with more than enough evidence regarding the cost and necessity of replacing the entire system to sustain the verdict returned which awarded damages in the amount of the lowest bid, \$94,000.00.⁶ The jury's finding that the Appellants committed fraud is sustained by the evidence and should not be reversed.

II. APPELLANTS ARE NOT ENTITLED TO A NEW TRIAL ON THE ISSUE OF DAMAGES

⁶ Alternatively, Respondent did elicit testimony from the Gaslins that they would have paid less than the asking price had the true condition of the septic system been disclosed to them. Therefore, Respondent presented evidence that it was damaged as a result of Appellants' fraud. To the extent the Court determines the proper measure of damages is the difference between the price paid and the actual value of the resort with failed and/or failing septic system, Respondent would argue that the value of the property is the price paid minus the cost to fix the system. That is clearly what the value would be. Respondent notes, however, that the \$94,000 damages figure is recoverable under the statutory violation and breach of contract claims and, therefore, the lack of evidence on market value only limits the damages Respondent can recover for the fraud claim but does not affect the damages awarded for the other causes of action. In short, it makes no difference what theory of damages is set forth for the fraud claim as long as there is some evidence of damages. The damages awarded by the jury are recoverable in the other causes of action.

Appellants' seek alternative relief in the form of a new trial on the issue of damages awarded for the violation of Minn. Stat. §115.55 on the basis that if the court determines Appellants are not entitled to judgment as a matter of law, they are entitled to a new trial because the damages awarded for the statutory violation were excessive. The trial court denied Appellants' request for a new trial on the issue of damages.

The Appellate Court will not disturb the district court's decision to deny a new trial absent a clear abuse of discretion. *Halla Nursery, Inc. v. Baumann-Furrie & Co.*, 454 N.W. 2d 905, 910 (Minn. 1990). A verdict will stand unless it is manifestly and palpably contrary to the evidence viewed in the light most favorable to the verdict.

ZumBerge v. Northern States Power Co., 481 N.W. 2d 103, 110 (Minn. Ct. App. 1992), *rev. denied*.

Appellants' contention that there is no evidence supporting the jury's award for damages in the amount of \$94,000.00 is, once again, patently false. Appellants' argument is based on the premise that there is no evidence in the record that both systems were noncompliant and needed to be replaced. The inspection report of Herb Schilla along with testimony from the Gaslins regarding William Patnaude's statement to them that the entire system needed to be replaced both represent "competent" evidence that both systems were noncompliant, failing, and needed to be replaced. (T. 106-107; A. 44-50, 51.) The fact that the inspection report of Laird Hensel found only system one to be "noncompliant" represents contradictory evidence which the jury, as fact finder, weighs and determines what evidence they find more credible. However, even Hensel's report,

the Appellants' own expert, said the systems were severely undersized and he failed one system and said the other system was on the verge of failure.

The jury was presented with competent evidence that both systems were noncompliant and needed to be replaced. The jury was then presented with testimony from four witnesses regarding what it would cost to replace the entire system or simply enlarge the mound for system one. From that evidence the jury awarded damages in the amount of \$94,000.00 thus concluding that both systems were failing and noncompliant and needed to be replaced. The jury then selected the lowest of the three bids that were presented to fix the entire system. The jury's award of damages is supported by the evidence and should not be reversed nor should a new trial be ordered.

CONCLUSION

Appellants ask this Court to substitute its judgment for that of the jury. While Appellants seek creative ways to make fact issues appear to be legal questions, the end result is that there is competent evidence in the record supporting the jury's verdict finding that Appellants violated Minn. Stat. §115.55, breached their contract with Respondent, and committed fraud. The jury's damages award is also sustained by the evidence. The trial court correctly denied Appellants motion for judgment as a matter of law or for a new trial. The trial court's ruling should not be reversed nor should a new trial be ordered on any issue. Respondents' respectfully request that this Court uphold the trial court's denial of Appellants' post trial motion for judgment as a matter of law or in the alternative, a new trial.

Respectfully submitted,

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Dated: 8/20, 2008

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