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State of Minnesota  
**In Court of Appeals**

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301 Clifton Place Condominium Association,  
*Respondent,*

vs.

301 Clifton Place, L.L.C., Clifton Properties, L.L.C.,  
and David H. Nixon,  
*Appellants.*

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**APPELLANTS' BRIEF AND ADDENDUM**

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FABYANSKE, WESTRA, HART  
& THOMSON, P.A.  
M.T. Fabyanske (#28022)  
Thomas A. Forker (#24682)  
Hannah R. Stein (#345908)  
800 LaSalle Avenue, Suite 1900  
Minneapolis, MN 55402  
(612) 359-7600

*Attorneys for Respondent*

FRUTH, JAMISON & ELSASS, PLLC  
Thomas E. Jamison (#220061)  
Adam A. Gillette (#0328352)  
80 South Eighth Street  
Suite 3902  
Minneapolis, MN 55402  
(612) 344-9700

*Attorneys for Appellants*

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

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## STATEMENT OF THE ISSUES

1. **Did the parties modify the statute of limitations on Plaintiff's claims?**

*The trial court held in the negative.*

**Apposite Statutory Provisions:**

Minn. Stat. § 515B.4-115(b)

**Apposite Cases:**

MacRae v. Group Health Plan, Inc., 753 N.W.2d 711 (Minn. 2008)

Johnson v. Winthrop Labs. Div. of Sterling Drug, Inc., 291 Minn. 145, 190 N.W.2d 77 (1971)

2. **Is a limited liability company required to be represented by an attorney at trial?**

*The trial court held in the negative.*

**Apposite Cases:**

Cary & Co. v. F.E. Satterlee & Co., 166 Minn. 507, 509, 208 N.W. 408, 409 (Minn. 1926)

Save Our Creeks v. City of Brooklyn Park, 699 N.W.2d 307 (Minn. 2005)

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Lake State Federal Credit Union v. Tretsven, No. A07-1542, 2008 WL 2732111 (Minn. Ct. App. 2008)

3. **Did Appellant 301 Clifton Place L.L.C breach express or implied warranties?**

*The trial court held in the affirmative.*

**Apposite Statutory Provisions:**

Minn. Stat. §515B.4-112

Minn. Stat. §515B.4-113

**Apposite Cases:**

Denelsbeck v. Wells Fargo & Co., 666 N.W.2d 339, 346-47 (Minn. 2003)

4. **Did Appellant 301 Clifton Place L.L.C. breach contracts with unit purchasers?**

*The trial court held in the affirmative.*

**Apposite Cases:**

Hunt v. IBM Mid Am. Employees Fed. Credit Union, 384 N.W.2d 853 (Minn. 1986)

TNT Props., Ltd. v. Tri-Star Developers L.L.C., 677 N.W.2d 94 (Minn. Ct. App. 2004)

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Employers Mut. Liab. Ins. Co. v. Eagles Lodge, 165 N.W.2d 554 (Minn. 1969)

5. **Did Appellant 301 Clifton Place L.L.C. violate the Minnesota Consumer Fraud Act (Minn. Stat. §325F.69, subd. 1.)?**

*The trial court held did in the affirmative.*

**Apposite Statutory Provisions:**

Minn. Stat. §325F.69, subd. 1

**Apposite Cases:**

Group Health Plan, Inc. v. Philip Morris Inc., 621 N.W.2d 2 (Minn. 2001)

6. **Did Appellant David Nixon act as the alter ego of Appellants 301 Clifton Place L.L.C. and Clifton Properties L.L.C?**

*The trial court held did in the affirmative.*

**Apposite Statutory Provisions:**

Nev. Rev. Stat. § 78.747

**Apposite Cases:**

F rank McCleary Cattle Co. v. Sewell, 317 P.2d 957, 959 (Nev. 1957)

LFC Marketing Group, Inc. v. Loomis, 8.Pd 841 (Nev. 2000)

Rowland et. al. v. Lepire et. al., 99 Nev. 308, 662 P.2d 1332 (Nev. 1983)

7. **Was judgment against Appellant Clifton Properties proper where there were no findings of liability against it?**

*The trial court held in the affirmative.*

**8. Where Appellants entitled to a Jury?**

*The trial court held in the negative.*

**Apposite Statutory Provisions:**

Minn. Const. art. I §4

**Apposite Cases:**

Abraham v. County of Hennepin, 639 N.W.2d 342 (Minn. 2002)

Morton Brick & Tile Co. v. Sodergren, 130 Minn. 252, 153 N.W. 527 (1915)

Landgraf v. Ellsworth, 267 Minn. 323, 326, 126 N.W.2d 766, 768 (1964)

**9. Were Appellants properly served?**

*The trial court held in the affirmative.*

**Apposite Cases:**

Shamrock Development, Inc. v. Smith, 754 N.W.2d 377 (Minn. 2008)

Smith v. Flotterud, 716 N.W.2d 378 (Minn. Ct. App. 2006)

**10. Did the Trial Court perform the proper analysis in awarding attorneys' fees?**

**Apposite Statutory Provisions:**

Minn. Stat. § 515B.4-116 subd. (b)

**Apposite Cases:**

Specialized Tours, Inc. v. Hagen, 392 N.W.2d 520 (Minn. 1986)

Anderson v. Hunter, Keith, Marshall & Co., 417 N.W.2d 619 (Minn. 1988)

**11. Did the trial court correctly refuse to disclose the terms of the settlement agreement with other defendants?**

**Apposite Cases:**

Oelschlager v. Magnuson, 528 N.W.2d 895, 900. (Minn. Ct. App. 1995).

## STATEMENT OF THE CASE

This is an appeal from a final judgment of the District Court for the Fourth Judicial District, the Honorable Stephen C. Aldrich presiding. The judgment was entered on May 18, 2009, following a three-day bench trial.

This case arises from the development of a 44-unit condominium project called 301 Clifton Place Condominium located near Loring Park in Minneapolis. Appellant 301 Clifton Place, L.L.C. ("301 Clifton" or "Developer") developed the project. Appellant Clifton Properties, L.L.C. ("Clifton Properties") acquired some of the 12 units that remained unsold after the initial selling phase of the development. Clifton Properties later rented and then sold some of these condominium units to third parties. Appellant David H. Nixon ("Nixon") was the manager and one of the members of the Developer and Clifton Properties.

Respondent 301 Clifton Place Condominium Association ("CPCA") is the unit owners association for 301 Clifton Place Condominium. CPCA filed suit against Appellants and against Kraus-Anderson Construction Company ("Kraus-Anderson") on behalf of 21 unit owners, alleging a number of claims including breach of statutory warranties under Minn. Stat. §327A.01 *et. seq.*, breach of statutory warranties under Minn. Stat. §§515B.4-112 and 515B.4-113, negligent construction, breach of contract, breach of express warranties, breach of implied warranties, violations of the Minnesota Consumer Fraud Act, and a veil piercing claim under Nevada law seeking to hold Nixon personally liable for any judgment rendered against 301 Clifton or Clifton Properties.

Some of Respondent's claims against Appellants were resolved prior to trial. Additionally, Respondent's claims against Kraus-Anderson as well as Kraus-Anderson's third-party claims were resolved prior to trial. The remaining claims for trial centered on the question of whether 301 Clifton had somehow promised or represented that the units would contain "solid" hardwood floors, even though it is undisputed that neither 301 Clifton nor its sales agents or marketing materials represented that the units would have "solid" hardwood floors.

For most of this lawsuit Appellants were represented by counsel. However, Appellants' counsel withdrew on February 6, 2009. The case had been set for a jury trial until Respondent withdrew its jury demand a week before trial. The bench trial in this matter was held from February 25, 2009 to February 27, 2009. All the Appellants were represented at trial *pro se*. On April 17, 2009, the district court issued its Findings of Fact and Conclusions of Law ("FOFCOL") and issued a minor amendment on April 22, 2009. The district court concluded as a matter of law that: (1) Appellants did not breach the statutory warranty under Minn. Stat. § 323A.02; (2) Appellant 301 Clifton did breach express and implied warranties under Minn. Stat. §515B.4-112 and Minn. Stat. §515B.4-113, respectively; (3) the statute of limitations on CPCA's warranty claims had not been waived or modified; (4) 301 Clifton breached a contract it had with the 21 unit buyers; (5) 301 Clifton violated the Minnesota Consumer Fraud Act, Minn. Stat. §325F.69, subd. 1; and (6) David Nixon was the alter ego of 301 Clifton and Clifton Properties under Nev. Rev. Stat. §78.747. The district court awarded damages against Appellants and in favor of Respondent in the amount of \$389,888.18, including \$156,355.63 in attorneys'

fees, and conditionally awarded an additional \$200,000 in punitive damages. Judgment was entered on May 18, 2009. This appeal followed.

Among the issues before the Court is an issue of first impression in Minnesota: whether a separate statement signed by the purchasers that modifies the statute of limitations is ineffective merely because it is included as an exhibit to the purchase agreement. The Court must also decide whether it was permissible for 301 Clifton and Clifton Properties to be presented at trial *pro se* by Nixon. Another issue is whether a developer can be held liable for failing to install “solid” hardwood floors when it never promised or represented to owners that they would receive solid hardwood floors and where the purchase agreement specifically included the brand of engineered hardwood floors that were installed. Because the answer to these questions is “no,” the district court must be reversed. Moreover, the court’s conclusions that 301 Clifton breached its contract with the unit purchasers and violated the Consumer Fraud Act are incorrect as a matter of law. Additionally, the district court entered judgment against Clifton Properties despite the fact that Clifton Properties was not found liable on any of the claims upon which CPCA prevailed. Finally, the court’s decision to pierce the corporate veil and hold Mr. Nixon personally liable is unsupported by either the record or the law. These and other errors of law discussed below mandate reversal.

## STATEMENT OF FACTS<sup>1</sup>

### **A. The Parties.**

301 Clifton was a Nevada limited liability company formed in 2002 to develop the 44-unit 301 Clifton Place Condominium project. (FOFCOL ¶ 2.) 301 Clifton Place Condominium is comprised of 44 residential units and 61 garage units. (FOFCOL ¶9.) Clifton Properties is a Nevada limited liability company that was formed in 2004 to acquire 11 residential units and 19 garage units that remained unsold after the initial sales effort. (FOFCOL ¶ 3.) Nixon was the controlling member of 301 Clifton and Clifton Properties. (FOFCOL ¶ 4.)

Respondent CPCA is a Minnesota non-profit corporation formed to serve as the statutory association of unit owners for 301 Clifton Place Condominium. (FOFCOL ¶¶ 1, 6.) As such, the members of CPCA are owners of the condominium units in the 301 Clifton Place Condominium. (FOFCOL ¶1.) CPCA was formed on September 1, 2003. (FOFCOL ¶ 2.) On December 2, 2004, control of the CPCA was transferred from the Developer to the unit owners. (App. 62, ¶ 6.) Of the 44 residential units, 21 owners granted CPCA permission to initiate the lawsuit that is the subject of this appeal. (FOFCOL ¶ 21.)

### **B. Development and Sale of Condominium Units.**

301 Clifton began development of the project in 2003. To ensure that the project would be properly designed and built, 301 Clifton hired BKV Group, a well-known

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<sup>1</sup> Citations in this brief are to the trial court's Findings of Fact and Conclusions of Law ("FOFCOL"), Appellants' Appendix ("App."), Appellants' Addendum ("Add"), Trial Exhibit by number, or court transcript by date and page.

architecture firm, to design the project and retained Kraus-Anderson as the general contractor. (2/26/02 Tr. at 202.) To ensure that the development and sale of the units were properly documented, 301 Clifton retained Walter Graff, a prominent real estate attorney at the Best & Flanagan law firm to draft the purchase agreements and other documents related to the project. (Id. at 12.) 301 Clifton chose Mr. Graff as counsel because of his expertise in matters relating to the development and sale of condominiums in Minnesota. (Add. 34-38.) Mr. Graff drafted the CPCA Declaration and the purchase agreement that each unit owner signed. (See Ex. 35 at P141; Ex. 7 at 7.) Edina Realty, one of the area's largest real estate brokers, was retained to market and sell the units. (FOFCOL ¶10.) Edina Realty kept an on-site representative at the condominiums and 301 Clifton member James MacCallum was also an on-site representative. (FOFCOL ¶11-12.) Owners could also view samples, select finishes, and work with an interior designer at the offices of the BVK Group (2/26/09 Tr. at 202.) The units were marketed and advertised to prospective buyers through written marketing materials such as brochures, magazine advertisements, and newspaper advertisements. (FOFCOL ¶13.) A web site was also created by 301 Clifton to sell the units. (Id.) The brochure and website listed a number of features that would be included in the units. (See generally Exs. 1 and 3.) The list of features included "hardwood floors with sound cushions at entry, hall, living, dining and kitchen." (FOFCOL ¶15.) 301 Clifton Place representatives also told prospective buyers that the units would have hardwood floors. (FOFCOL ¶16.) However, neither 301 Clifton nor its representatives ever represented that the units would feature "solid" hardwood floors. (FOFCOL ¶ 56.)

The hardwood floor that was installed in the units was an engineered hardwood floor manufactured by a company called Award Hardwood Flooring, Inc. (FOFCOL ¶ 17.) According to the testimony of Patrick Michael Duffy, one of the owners of Anderson Ladd, the subcontractor Kraus-Anderson retained to install the hardwood floors, the Award flooring is commonly used and widely accepted within the wood floor industry as a hardwood floor for condominiums and apartments. (2/26/09 Tr. at 155.) An engineered hardwood floor is designed with a multi-ply layer like plywood with a thin layer of hardwood on top. (Id. at 158.) It is used often in condominiums because it can be installed as a “floating” floor over a sound pad to reduce noise. (Id. at 155-156.)

During the sales effort, purchasers had the opportunity to view samples of all the finishes, including cabinets, flooring and tile at the offices of the project’s architect, BKV Group. (2/26/09 Tr. at 202.) Each owner that visited the BVK offices met with Ann Martin, an interior designer at BVK Group. (Id. at 202.) These meetings generally lasted about two hours, during which the purchasers touched and handled the various samples. (Id. at 204, 218.) These samples included a 20” by 20” sample of the Award hardwood floor, which was labeled Award Flooring. (Id. at 202, 216-217.) Ms. Martin met with between 15 and 20 of the purchasers. (Id. at 215.)<sup>2</sup>

Each purchaser of a unit signed a purchase agreement. (FOFCOL ¶¶ 22-38.) The purchase agreements identified the flooring in the condominium units as Award flooring, Longstrip. (Id.) The purchase agreement also included an integration clause that stated:

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<sup>2</sup> Ms. Martin kept a log of all her meetings with the customers (2/26/09 Tr. at 203-204), but apparently neither she nor BVK Group were asked by Appellants to produce the list.

**This Agreement and the matters expressly referred to herein constitute the entire agreement between the parties.** No representations, warranties, undertakings, or promises, whether oral, implied written or otherwise; have been made by either Seller or Buyer to the other unless expressly stated in this Agreement, or unless mutually agreed to in writing between Seller and Buyer after the date hereof, and **neither party has relied on any verbal representations, agreements or understandings not expressly set forth herein.**

(See, e.g. Ex. 4 ¶19 (emphasis added).) Paragraph 7 of the purchase agreement stated in capital letters that the statute of limitations for the warranties on their purchase would be two years. (Tr. ¶ 7.)

**C. Purchasers Sign a Document Plainly Modifying the Statute of Limitations for Express and Implied Warranties.**

In addition to language in the body of the purchase agreement limiting the statute of limitations, the parties also signed a document entitled “301 CLIFTON PLACE CONDOMINIUM MODIFICATION OF STATUTE OF LIMITATIONS” (“the Modification”). (*Id.*) The Modification was attached to each purchase agreement as Exhibit C. (*Id.*) The Modification stated that the purchasers “have entered into a purchase agreement.” (*Id.*) The last paragraph of the Modification states:

NOW, THEREFORE, for good and valuable consideration, the parties agree that any judicial proceeding for breach of an obligation arising under Section 515B.4-112 (express warranties) or 515B.4-113 (implied warranties) must be commenced within two years after the cause of action accrues.

(*Id.*) The Modification was signed by each purchaser of a unit. (Ex. 26 at Ex. C.)

**D. 301 Clifton Place Transfers Control to CPCA.**

The closings for most of the units at issue took place in August and September 2004. (Add. 33.) On December 2, 2004, 301 Clifton Place transferred control of the

Condominium to CPCA. (App. at 62 ¶ 6.) After 301 Clifton surrendered control of the CPCA, 301 Clifton and Kraus-Anderson continued to work with unit owners to fix various construction issues often referred to as punch list items. (See e.g. Ex. 43.)

**E. After 301 Clifton Transfers Control to CPCA, 301 Clifton Transfers Unsold Units to McCallum and Clifton Properties.**

After the initial sales effort and transfer of control to CPCA, 12 units and 20 garage stalls remained unsold, in part because these units were more exposed to freeway noise. (2/26/09 Tr. at 22.) On or about January 13, 2005, one of these units and one garage stall were transferred to Batan Properties L.L.C., an entity owned by Jim McCallum who was a ten percent owner of 301 Clifton. (Ex. 247; 2/26/09 Tr. at 22) This transfer was treated as a distribution to McCallum. (2/26/09 Tr. at 22.) The remaining units and garage stalls were purchased by Clifton Properties in a bulk sale pursuant to a Real Estate Purchase Agreement dated January 5, 2005. (Ex. 94.) The sales price was \$1,000,000, payable by a promissory note from Clifton Properties to be repaid in full within 12 months. (Ex. 94 ¶¶ 3 - 4.) In addition, Clifton Properties agreed to transfer back two of the units to 301 Clifton if needed to resolve final billing issues with Kraus-Anderson and to resolve “any other dispute that may arise for which 301 Clifton would require additional funding.” (Id. ¶ 11.) Clifton Properties re-conveyed one of these units back to 301 Clifton in November 2005, which in turn transferred it to Kraus-Anderson as part of the payment of the final construction bill. (2/26/09 Tr. at 35-36.)

On or about December 27, 2005, Clifton Properties paid off the promissory note to 301 Clifton with an online banking transfer. (Ex. 87; Tr. 33.) Clifton Properties was able to make this transfer because Nixon transferred \$999,999.99 to Clifton Properties from his personal account via an online banking transfer. (2/26/09 Tr. at 32) This same day, 301 Clifton made a distribution to Nixon of \$810,000 and a payment of \$225,000 to a company owned by Nixon and his wife called Unique Property Development. (2/26/09 Tr. at 33.) Unique Property Development provided real estate development services to 301 Clifton. (Ex. 242.) All of these transactions were documented, easily traceable and were paid to and withdrawn from separate identifiable bank accounts. (Exs. 87, 88.) As the trial court found, these transactions were structured for tax purposes, not with intent to defraud. (FOFCOL ¶ 74.)

Clifton Properties decided initially to rent its units, as the condominium market was beginning to soften. (2/26/09 Tr. at 22-23). Clifton Properties retained a professional property management company, which began renting the units. (2/26/09 Tr. at 46.) During this process, Nixon received a call from a real estate broker who said he believed he could sell the units owned by Clifton Properties. (Id.) The broker succeeded and between January 5, 2006 and April 12, 2006 nine units were sold. (FOFCOL ¶ 78.) As the sale of nine units closed, funds from the sales were received from Clifton Properties.<sup>3</sup> In turn, Clifton Properties distributed much of this money to Nixon.

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<sup>3</sup> Unfortunately, those nine units wound up in foreclosure. (FOFCOL ¶ 92.) It was later discovered that the broker that arranged the sales was involved in some sort of sub-prime mortgage scheme. (2/26/09 Tr. at 51-52.) There is no evidence that Nixon was involved in any way or was being investigated in connection with this scheme. (Id.)

(FOFCOL ¶¶ 80-91.) These transactions were also accomplished through separate identifiable bank accounts and were easily traceable. (Id.)

**F. 301 Clifton Winds Down Its Business.**

With the project complete and all the units sold, 301 Clifton began to wind down its business. On May 10, 2006, 301 Clifton held a final meeting with Kraus-Anderson and the CPCA to finalize remaining punchlist items and release the final construction payment to Kraus-Anderson. (See Ex. 235; 2/26/09 Tr. at 192-193.) On that same day, Clifton Properties filed Articles of Dissolution with the Nevada Secretary of State to dissolve 301 Clifton. (Ex. 36.) The Articles of Dissolution require a member or manager of the L.L.C. to declare that “all debts, obligations and liabilities have been paid and discharged or that adequate provision has been made therefore.” (Id.) Nixon signed this declaration on behalf of 301 Clifton. (Id.) It is undisputed that at the time this declaration was signed, Nixon believed that adequate provisions had been made by virtue of the re-convey provision of Clifton Properties’ agreement with 301 Clifton. (2/26/09 Tr. at 41-42.) Subsequently, one of the two units Clifton Properties retained was transferred to Kraus-Anderson as part of 301 Clifton’s final payment. (2/26/09 Tr. at 35-36.)

**G. Clifton Properties Retains its Remaining unit well beyond the Expiration of the Two-Year Modified Limitations Period.**

Nixon and 301 Clifton believed that each purchaser had agreed to reduce the limitations period for express and implied warranty claims from six years to two years. (2/26/09 Tr. at 41-42.) Appellants erroneously believed that the operative date for the

limitations period was December 2, 2006, which was the second anniversary of the date that control of the CPCA was transferred from 301 Clifton to the unit owners. In fact, for most units, the limitations period started running up to three months earlier because most of the units closed between the end of August and the end of October 2004.<sup>4</sup> (Add. P. 33.) Although Appellants believed the statute of limitations expired on December 2, 2006, Clifton Properties retained ownership of the unit it had agreed to re-convey to 301 Clifton for another year. (2/26/09 tr. at 42.) Clifton Properties sold this remaining unit to Nixon's daughter in November or December 2007. (2/26/09 Tr. at 59.)

#### **H. CPCA Initiates a Lawsuit Against 301 Clifton.**

CPCA initially filed suit against 301 Clifton and Kraus-Anderson. The original Complaint was served on 301 Clifton on December 7, 2006. (App. 1.) However, there was no claim relating to the hardwood floors in the initial complaint. (*Id.*) For over a year, CPCA took no action to prosecute its claims. Then in February 2008, CPCA filed an Amended Complaint which added Nixon and Clifton Properties as parties and alleged additional claims, including alter ego claims. (App. 23.) The amended complaint for the first time included a vague allegation that Kraus-Anderson and 301 Clifton failed to install hardwood floors "as intended." (*Id.* at ¶ 12) But there was no allegation that unit owners had been promised "solid" hardwood floors. The Amended Complaint alleged a myriad of claims for breach of statutory warranties for major defects under Minn. Stat. §327A.01 *et. seq.*, breach of statutory warranties under Minn. Stat. §515B.4-113,

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<sup>4</sup> A cause of action accrues for warranty claims that relate to units at the earlier of the time the unit is conveyed (closing) or when the owner takes possession. Minn. Stat. § 515B.4-115(c)(1).

negligent construction, breach of contract, breach of express warranties, breach of implied warranties, violations of the Minnesota Consumer Fraud Act, specific performance, fraudulent transfer, and violation of Nev. Rev. Stat. §78.747 in connection with the building and sale 301 Clifton Place Condominiums. Nixon was never served with the Amended Complaint. (App. 119 ¶ 13.)

CPCA's claims against defendant Kraus-Anderson as well as Kraus-Anderson's third-party claims were settled prior to trial.<sup>5</sup> (Tr. 02/17/09 at 51.) Additionally, some of CPCA's claims against Appellants were also resolved prior to trial. (FOFCOL ¶ 67.) The remaining claims for trial centered on the question of whether 301 Clifton had somehow promised or represented that the units would contain "solid" hardwood floors, even though it is undisputed that neither 301 Clifton nor its sales agents or marketing materials ever represented that the units would have "solid" hardwood floors. (FOFCOL ¶ 56.)

#### **I. Appellants' Attorney Withdraws.**

On February 6, 2009, Appellants' attorney withdrew from the case. (App. 146.) With trial less than three weeks away, Nixon began representing himself, 301 Clifton, and Clifton Properties *pro se*. This meant that Nixon, who has no legal training or litigation experience, had three weeks to prepare for trial, consult with witnesses, prepare and exchange exhibits, prepare for and argue a summary judgment motion that was heard on February 17, 2009, and conduct remaining discovery. During this time Nixon

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<sup>5</sup> Nixon was never provided with a copy of the settlement despite repeated requests to the Court and opposing counsel. (2/17/09 Tr. at 51-52.)

was unable to attend four telephonic trial depositions that were taken by Respondent's counsel on February 19, 2009. (Ex. 99.)

**J. The Trial.**

On February 25-27, 2009, a bench trial was held on CPCA's claims of breach of statutory warranties, breach of implied warranties, breach of contract, breach of express warranties, violation of the Minnesota Consumer Fraud Act, and violation of Nev. Rev. Stat. §78.747. Nixon represented himself, 301 Clifton and Clifton Properties. Nixon is not a lawyer and plainly did not understand how to prepare for or conduct a trial. For instance, Nixon did not cross examine plaintiff's expert. (2/26/09 at 139.) Nixon failed to request or subpoena the notes of a key fact witness, Ann Martin, who was the interior designer that met with many of the unit owners as they viewed flooring samples, including samples of the Award flooring. (2/26/09 Tr. at 218) These notes would have documented which of the purchasers she met with and further supported the testimony of Ms. Martin. (2/26/09 Tr. at 203-204.)

The trial concluded on February 27, 2009. On April 17, 2009, the district court issued its Findings of Fact and Conclusions of Law and issued a minor amendment on April 22, 2009. The district court concluded as a matter of law that: (1) 301 Clifton had not breached the statutory warranties for major defects under Minn. Stat. § 327A.01 et seq.; (2) defendant 301 Clifton breached express and implied warranties under Minn. Stat. §515B.4-112 and Minn. Stat. §515B.4-113, respectively; (3) 301 Clifton breached a contract it had with the 21 unit buyers; (4) 301 Clifton violated the Minnesota Consumer Fraud Act, Minn. Stat. §325F.69, subd. 1; (5) Nixon was the alter ego of 301 Clifton and

Clifton Properties under Nev. Rev. Stat. §78.747; and (6) the statute of limitations on CPCA's claims had not been waived or modified. The court awarded damages against appellants and in favor of respondent in the amount of \$389,888.18, including \$156,355.63 in attorneys' fees, and conditionally awarded \$200,000 in punitive damages. (Add. pp. 27, 29.) Judgment was entered on May 18, 2009.

On May 21, 2009, thirty days after the district court issued its amended filings, Appellants filed a motion for a new trial. Appellants retained new counsel on June 22, 2009 and on June 23, 2009, the district court held a hearing on defendants' motion for a new trial. (App. 204, 06/23/09 Tr.) At that time, defendants' newly-retained counsel argued to the district court that a new trial was warranted because the L.L.C.s were not represented at trial. The district court requested and received further briefing on this issue. On July 27, 2009, the district court issued its order denying Appellants' motion for a new trial. (App. 273.)

## ARGUMENT

### **I. STANDARD OF REVIEW.**

On appeal from a bench trial, a district court's findings of fact will not be set aside unless they are clearly erroneous. Minn. R. Civ. P. 52.01. "Findings of fact are clearly erroneous only if the reviewing court is left with the definite and firm conviction that a mistake has been made." Fletcher v. St. Paul Pioneer Press, 589 N.W.2d 96, 101 (Minn. 1999) (internal quotation omitted). However, questions of law are subject to *de novo* review. Turner v. Alpha Phi Sorority House, 276 N.W.2d 63, 66 (Minn.1979). Put another way, in all actions tried without a jury a reviewing court does not defer to the

district court's application of the law. Durfee v. Rod Baxter Imports, Inc., 262 N.W.2d 349, 354 (Minn. 1977).

In this case, the district court repeatedly misapplied the law and made internally inconsistent findings of fact that are clearly erroneous. As a result the district court's judgment must be reversed and, at a minimum, remanded for a new trial.

**II. THE DISTRICT COURT IMPROPERLY CONCLUDED THAT THE PARTIES HAD NOT MODIFIED THE STATUTE OF LIMITATIONS FOR EXPRESS AND IMPLIED WARRANTIES.**

Minnesota law is clear that parties may shorten the six-year statute of limitations for warranty claims brought under Minn. Stat. §§ 515B.4-112 and 515B.4-113. Under Minn. Stat. § 515B.4-115(b), parties to a residential unit contract may reduce the warranty limitation period to not less than two years by an agreement "evidenced by an instrument separate from the purchase agreement signed by the purchaser." Each purchaser signed the Modification, which reduced the warranty limitations period to two years. (See Trial Exhs 4-26, Ex. C.) The district court found that the parties did not modify the statute of limitations on CPCA's claims. (FOFCOL ¶ 123-127.) The district court apparently based this conclusion on the fact that the Modification was attached as an exhibit to the purchase agreement, and therefore was not an "instrument separate from the purchase agreement." (FOFCOL ¶¶ 125- 127.)

"The construction and application of a statute of limitations, including the law governing the accrual of a cause of action, is a question of law and is reviewed de novo." MacRae v. Group Health Plan, Inc., 753 N.W.2d 711, 716 (Minn. 2008). A court has no power to extend or modify a statute of limitations period. Johnson v. Winthrop Labs.

Div. of Sterling Drug, Inc., 291 Minn. 145, 151, 190 N.W.2d 77, 81 (1971). The statute of limitations is a harsh but strict mechanism designed to prevent one party who has a claim against another from waiting an unreasonable amount of time to bring that claim. Bachertz v. Hayes-Lucas Lumber Co., 201 Minn. 171, 176, 275 N.W. 694, 697 (1937); see also Bustad v. Bustad, 263 Minn. 238, 244, 116 N.W.2d 552, 556 (1962) (stating that the salutary purpose of the statute of limitations is to discourage lawsuits based on stale claims.)

Respondent's warranty claims are time-barred because the claims were not brought against 301 Clifton within two years after the cause of action occurred. The Modification provided that an action based on an express or implied warranty under Minn. Stat. § 515B.4-112 or § 515B.4-113 "must be commenced within two years after the cause of action accrues." With respect to problems affecting individual units, a cause of action accrues under Minn. Stat. § 515B.4-112 or § 515B.4-113 at the earlier of the time the unit is conveyed to the purchaser or the time the purchaser takes possession of the unit. See Minn. Stat. § 515B.4-115(c)(1). All units at issue, with one exception, closed between the end of August 2004 and December 1, 2004. (Add. p. 33.) Accordingly, pursuant to the Modification, express and implied warranty, claims needed to be brought by December 1, 2006. CPCA did not serve 301 Clifton until December 7, 2008.

The Modification comports in all respects to the requirement of a separate writing. It is a separate instrument from the purchase agreement. In fact the Modification acknowledges that the parties have already entered into the purchase agreement. The

Modification required separate signatures from the purchase agreement. As such, the Modification is an “instrument separate from the purchase agreement.”

It is also clear that the parties understood they were reducing the statute of limitations to two years. Not only did purchasers sign the separate Modification, the body of the purchase agreement also included a disclosure that the statute of limitations would be reduced. No purchaser testified that they did not understand they were reducing the limitations period to two years. Moreover, the purchase agreement and exhibits were drafted by Walter Graff, a prominent real estate attorney with extensive experience in condominium law. Mr. Graff has noted in presentations that the warranty limitation periods are routinely reduced. (Add. pp. 34-37.) If the Modification were to be ruled ineffective merely because it was attached as an exhibit, then countless other waivers for other condominium projects would be ineffective as well. This could revive countless stale claims merely because the parties included the separate modification as an exhibit to the purchase agreement. The district court’s conclusion is simply wrong and must be reversed.

### **III. THE DISTRICT COURT IMPROPERLY HELD 301 CLIFTON AND CLIFTON PROPERTIES COULD APPEAR *PRO SE*.**

On February 6, 2009, counsel for Appellants withdrew. (App. 146.) The district court then allowed 301 Clifton and Clifton Properties to appear *pro se* and be represented by Nixon, who is not an attorney. Neither the district court nor CPCA’s counsel informed Appellants that the companies were required to be represented by attorneys. Approximately three weeks later, the trial was held. 301 Clifton and Clifton Properties

were not again represented by counsel until June 22, 2009, the day before the Court held a hearing on Appellants' motion for a new trial. At that time, Appellants' newly-retained counsel argued to the Court that a new trial was warranted because the limited liability companies were not represented at trial.<sup>6</sup>

Over eighty years ago, the Minnesota Supreme Court stated:

the right of a party to a suit in court to appear in person therein does not entitle him to appear for a corporation, even if he owns all its capital stock, for the corporation is a distinct legal entity.

Cary & Co. v. F.E. Satterlee & Co., 166 Minn. 507, 509, 208 N.W. 408, 409 (Minn. 1926). This holding has been reiterated many times. Towers v. Schwan, 2008 WL 4224462 (Minn. Ct. App. September 16, 2008); Save Our Creeks v. City of Brooklyn Park, 699 N.W.2d 307 (Minn. 2005); In re Conservatorship of Miller, 642 N.W.2d 212 (Minn. Ct. App. 2002); In re Evjen, 653 N.W.2d 212 (Minn. Ct. App. 2002); Nicollet Restoration, Inc. v. Turnham, 486 N.W.2d 753, 755 (Minn. 1992).

In Lake State Federal Credit Union v. Tretsven, No. A07-1542, 2008 WL 2732111 (Minn. Ct. App. 2008), the court held that an L.L.C. *must be* represented by an attorney in district court. 2008 WL 2732111 at n.5 (citing Nicollet Restoration, Inc. v. Turnham, 486 N.W.2d 753, 754 (Minn. 1992) (for the proposition that corporations must be represented by attorneys in legal proceedings) and Stone v. Jetmar Properties, L.L.C., 733 N.W.2d 480, 486 (Minn. Ct. App. 2007) (for the proposition that the law governing

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<sup>6</sup> The district court subsequently agreed that the limited liability companies should have been represented by counsel at trial. (App. 279.)

corporations is the basis for, and guides the court's interpretation and application of, the law governing L.L.C.s.)

According to Lake Street Federal, when an L.L.C. attempts to appear *pro se*, the district court must insist that the *pro se* L.L.C. obtain legal counsel. 2008 WL 2732111 at n.5. Here, the district court did not insist and instead allowed 301 Clifton and Clifton Properties to appear through Nixon. The district court's failure to insist that 301 Clifton and Clifton Properties appear by counsel was reversible error.

A new trial is necessary because, as the Minnesota Supreme Court noted in Save Our Creeks, the failure of a company to be represented by counsel is a curable defect. 699 N.W.2d at 309-310. The results of this defect are obvious. Nixon represented himself as well as 301 Clifton Place and Clifton Properties. Nixon is not a lawyer and plainly did not understand how to prepare for or conduct a trial. For instance, Nixon did not cross examine plaintiff's expert. Nixon failed to request or subpoena the notes of a key fact witness, Ann Martin, who met with many of the unit owners as they viewed samples, including samples of the Award flooring. These notes would have documented which of the purchasers Ms. Martin met with. (2/26/09 Tr. at 203-204.) Nixon also failed to introduce at trial evidence relevant to the statute of limitations, such as the closing dates of each unit. Nixon also failed to introduce evidence that the term "hardwood" floors is used in the market place to describe a variety of products including engineered hardwood floors. (Add. pp. 38-44.)

CPCA may argue that 301 Clifton and Clifton Properties waived the requirement that they appear by counsel. "Waiver is the voluntary and intentional relinquishment of a

known right,” and to establish waiver there must be evidence that the possessor of the right knew of the right and intended to waive it. Illinois Farmers Ins. Co. v. Glass Serv. Co., 683 N.W.2d 792, 798 (Minn. 2004). As a general matter, Clifton Properties and 301 Clifton do not have a right to appear by counsel. Instead, they have an *obligation* to appear by counsel. This obligation cannot be waived because Appellants cannot dictate who is licensed to appear in court on their behalf. Nicollet Restoration, 486 N.W.2d at 755 (holding that only the Supreme Court can determine who is licensed to practice law). As such, the law of waiver cannot apply.

Even if the law of waiver were applicable, for a waiver to be effective it must be knowing. Illinois Farmers Ins. Co., 683 N.W.2d at 798. Here, it is clear that 301 Clifton and Clifton Properties *did not* know that they were required to be represented by counsel. They were represented by a non-lawyer. Accordingly, 301 Clifton and Clifton Properties did not waive anything. Remand is necessary to cure this defect and allow 301 Clifton and Clifton Properties to defend themselves.

**IV. THE HARDWOOD FLOOR CLAIMS SHOULD NOT HAVE BEEN TRIED BECAUSE THERE IS NO EVIDENCE THAT 301 CLIFTON PROMISED, WARRANTED OR REPRESENTED THAT SOLID HARDWOOD FLOORS WOULD BE INSTALLED.**

The district court concluded that 301 Clifton’s marketing materials, consisting of a brochure and a website, promised or represented that “solid” hardwood floors would be installed in the units. This conclusion was plainly based entirely on the website and brochure, since the court found that the neither 301 Clifton nor its sales agents ever

described the floors as solid hardwood. (2/27/09 Tr. at 22-23; FOFCOL ¶ 56.) A review of the marketing materials demonstrates this conclusion is wrong as a matter of law.

The brochure and the website both stated that the units would have “hardwood floors with sound cushion at entry, hall, living, dining and kitchen.” (FOFCOL ¶ 15.)

This phrase, which is unambiguous, should be given its plain and ordinary meaning.

Denelsbeck v. Wells Fargo & Co., 666 N.W.2d 339, 346-47 (Minn. 2003.)

The plain and ordinary meaning of hardwood floors is not limited to “solid” hardwood floors. According to the testimony of Patrick Michael Duffy, one of the owners of Anderson Ladd, the subcontractor Kraus-Anderson retained to install the hardwood floors, the Award flooring is commonly used and widely accepted within the wood floor industry as a hardwood floor for condominiums and apartments. (2/26/09 Tr. at 155.) An engineered hardwood floor is designed with a multi-ply layer like plywood with a thin layer of hardwood on top. (Id. at 158.) It is used often in condominiums because it can be installed as a “floating” floor over a sound pad to reduce noise. (Id. at 155-156.) Mr. Duffy testified that over the last eight years Anderson Ladd installed engineered hardwood floors in approximately 3000 units. (Id. at 156-157.) Mr. Duffy stated that an engineered floor is a type of hardwood floor. However, Mr. Duffy was not allowed to testify as an expert because Mr. Duffy was not timely disclosed as an expert witness. (Id. at 154.). Derek Cooper of Kraus-Anderson also testified that the term hardwood floor is not limited to solid hardwood floors.<sup>7</sup> (See 2/25/09 Tr. at 184.)

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<sup>7</sup> Mr. Cooper also testified in response to questions from the court that solid hardwood floors were not necessarily more expensive than engineered hardwood floors. (Id. at 177-

Neither the marketing brochure nor the website described the flooring as “solid” hardwood floors. In fact, other wood features that were solid were described as “solid.” For instance, the brochure and website represented that the entry doors would be “solid” wood. Moreover, it is undisputed that neither 301 Clifton nor any of its agents described the floors as “solid” hardwood floors. (2/27/09 Tr. at 22-23; FOFCOL ¶ 56.) It is also undisputed that 301 Clifton installed a type of hardwood floor called an engineered hardwood floor that is routinely referred to as a type of hardwood floor. (Add. 38-45.) Plainly, the marketplace that serves consumers who are purchasing hardwood flooring refers to engineered floors as hardwood floors. Because the plain and ordinary meaning of hardwood floors includes engineered hardwood floors and because no marketing materials or agent of 301 Clifton ever promised, represented or warranted that the units would have solid hardwood floors, 301 Clifton cannot be held liable for failing to install solid hardwood floors.

**V. THE DISTRICT COURT IMPROPERLY HELD 301 CLIFTON BREACHED ITS CONTRACT WITH THE UNIT PURCHASERS.**

The district court concluded that 301 Clifton breached its contract with unit purchasers by failing to install solid hardwood floors. (FOFCOL ¶¶ 107-113.) The district court’s conclusion was based on two fundamental errors. First, the purchase agreement never mentioned solid floors or even hardwood floors. The purchase agreement described the flooring as Award flooring, Longstrip. (FOFCOL ¶¶ 22-38.) It is undisputed that this is the flooring that the purchasers received. Thus, as a matter law

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178.) The court appeared disappointed with this answer and stated “I’ll just halt my questioning there because it didn’t get me very far.” (*Id.* at 178.)

there is no breach of contract. The second fundamental error was the court's determination that the term "hardwood floors" – which appeared in marketing materials but not in the purchase agreement – meant only solid hardwood floors and did not include engineered hardwood floors. (FOFCOL ¶¶ 108, 110, 113.) Even setting aside the fact that the purchase agreement specifically described the flooring as Award flooring, Longstrip, rather than hardwood floors, there is no sound legal or evidentiary basis for this ruling.

The existence (or interpretation) of a contract is a question of law, to which the Court applies a *de novo* standard of review. Hunt v. IBM Mid Am. Employees Fed. Credit Union, 384 N.W.2d 853, 856 (Minn. 1986); TNT Props., Ltd. v. Tri-Star Developers L.L.C., 677 N.W.2d 94, 101 (Minn. Ct. App. 2004). The only exception to this rule is when an ambiguity exists. Brookfield Trade Ctr., Inc. v. County of Ramsey, 584 N.W.2d 390, 394 (Minn. 1998). An ambiguity exists where contract language, given its plain and ordinary meaning, is reasonably susceptible to more than one interpretation. Id.; Employers Mut. Liab. Ins. Co. v. Eagles Lodge, 165 N.W.2d 554, 556 (Minn. 1969).

To reach its conclusion that purchasers contracted for solid hardwood floors rather than Award flooring, the district court considered marketing materials that described the flooring as "hardwood floors." However, while these extrinsic materials may be relevant to the warranty claims, they are irrelevant to the breach of contract claim. The purchase agreement is unambiguous as to the flooring that would be installed, even identifying it by the brand. (FOFCOL ¶¶ 22-38.) It is also undisputed that no marketing materials and no agent of 301 Clifton ever described the flooring as "solid" hardwood floors (2/27/09

Tr. at 22-23; FOFCOL ¶56.) Furthermore, the purchase agreement also included an integration clause that stated:

**This Agreement and the matters expressly referred to herein constitute the entire agreement between the parties.** No representations, warranties, undertakings, or promises, whether oral, implied written or otherwise; have been made by either Seller or Buyer to the other unless expressly stated in this Agreement, or unless mutually agreed to in writing between Seller and Buyer after the date hereof, and **neither party has relied on any verbal representations, agreements or understandings not expressly set forth herein.**

(See e.g. Ex. 4, ¶ 19. (emphasis added).) Because the purchase agreement identifies Award flooring that was installed and because the purchase agreement unambiguously states that it is the entire agreement between the parties, 301 Clifton did not breach the purchase agreement.

#### **VI. THE DISTRICT COURT IMPROPERLY CONCLUDED THAT 301 CLIFTON VIOLATED THE MINNESOTA CONSUMER FRAUD ACT.**

The trial court concluded that 301 Clifton violated the Minnesota Consumer Fraud Act, § 325F.69 by falsely representing that the units would have “solid” hardwood floors. Because it is undisputed that Appellants never made this representation, this conclusion must be reversed. (FOFCOL ¶¶114-117.)

For CPCA to prevail on its consumer fraud claim, it must show that 301 Clifton *intentionally made a misrepresentation* in regards to the sale and that its participating members suffered damages caused by the misrepresentation. Group Health Plan, Inc. v. Philip Morris, Inc., 621 N.W.2d 2, 12 (Minn. 2001) (emphasis added.) To recover damages on its consumer fraud claim CPCA must also show reliance. As the Minnesota Supreme Court held in Group Health,

[A]s a practical matter it is not possible that the damages could be caused by a violation without reliance on the statements or conduct alleged to violate the statutes. Therefore, in a case such as this, it will be necessary to prove reliance on those statements or conduct to satisfy the causation requirement.

Group Health, 621 N.W.2d at 13.

The district court's conclusion that 301 Clifton violated the Minnesota Consumer Fraud Act is clearly erroneous. Unit purchasers were never told they would receive "solid" hardwood floors. Instead, they were told that they would receive hardwood floors.<sup>8</sup>

Moreover, the purchase agreement also included an integration clause in which the owners expressly agreed they were not relying on any representations beyond the purchase agreement. (See e.g. Ex. 4 ¶19.) The purchase agreements do not mention "solid" hardwood flooring or any flooring other than Award flooring. Because each purchaser represented that they did not rely on any verbal representations not contained in the purchase agreement, the district court's finding that there was reliance is incorrect as a matter of law and also clearly erroneous and must be reversed.

Finally, to find that 301 Clifton committed a fraud, the Court would necessarily have to find that home improvement stores such as Home Depot and Lowe's are committing a fraud upon their customers. Both those companies include engineered floors, like Award flooring, as "hardwood floors" on their respective websites. (Add. 42-

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<sup>8</sup> The website and marketing materials for the condominium both referred to "hardwood floors" but at the same time mentioned "solid" wood entry doors. (Exs. 1, 3.) Having used the term "solid" to describe the entrance doors but not hardwood floors, it cannot be said that 301 Clifton's use of the phrase "hardwood" to describe the floors would mislead the reader to believe they were getting "solid" hardwood floors.

42.) It strains belief to suggest that these entities are engaging in consumer fraud by advertising engineered hardwood floors as hardwood floors.<sup>9</sup> The district court's conclusion that the term "hardwood floors" means only solid hardwood floors is clearly erroneous.

## **VII. THE DISTRICT COURT IMPROPERLY PIERCED THE CORPORATE VEIL.**

The district court found that it was proper to pierce the corporate veil of both 301 Clifton and Clifton Properties under Nev. Rev. Stat. § 78.747. The court concluded that Nixon was the alter ego because (1) there was commingling of funds between Nixon and the company bank accounts, (2) the company (presumably 301 Clifton) was not adequately capitalized to provide for the liabilities of the companies arising under the statutory warranty acts,<sup>10</sup> and (3) that the company funds were diverted to the personal account of Nixon and those funds were treated as his own. (FOFCOL ¶121). The district court's conclusion to pierce the corporate veil is wrong as a matter of law and contrary to the evidence.

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<sup>9</sup> The district court suggested that in fact the floor industry was engaging in consumer fraud. "The problem here is that the wood flooring industry is helping developers mislead people quite tacitly." (2/27/09 Tr. at 23.) Plainly the district court substituted its own belief about the meaning of the term "hardwood floor" for the plain and ordinary meaning ascribed to that term by the hardwood flooring industry and companies such as Lowe's and Home Depot that transact business with million of customers every year.

<sup>10</sup> In addition to its claims under Minn. Stat. §§515B.4-112 and 515B.4-113 for breach of express and implied warranties, Respondent also brought a claim under the major construction defect statute, Minn. Stat. § 327.A.01. However, the district court rejected that claim, ruling that the wood floor issue was not a major construction defect. (FOFCOL ¶ 106.)

Both 301 Clifton Place and Clifton Properties are Nevada Corporations and therefore the district court based its conclusion on Nevada law. Nev. Rev. Stat. § 78.747 states:

(1) Except as otherwise provided by specific statute, no stockholder, director or officer of a corporation is individually liable for a debt or liability of the corporation, unless the stockholder, director or officer acts as the alter ego of the corporation. (2) A stockholder, director or officer acts as the alter ego of a corporation if: (a) The corporation is influenced and governed by the stockholder, director or officer; (b) There is such unity of interest and ownership that the corporation and the stockholder, director or officer are inseparable from each other; and (c) Adherence to the corporate fiction of a separate entity would sanction fraud or promote a manifest injustice. (3) The question of whether a stockholder, director or officer acts as the alter ego of a corporation must be determined **by the court as a matter of law.**

(Emphasis added.)

Courts have held that “[t]his statute essentially codifies the test and result of McCleary Cattle Co.” AE Restaurant Associates, L.L.C. v. Giampietro (In re Giampietro), 317 B.R. 841 (Bankr. D. Nev. 2004) (discussing Frank McCleary Cattle Co. v. Sewell, 317 P.2d 957, 959 (Nev. 1957)). In McCleary Cattle Co. the Nevada Supreme Court set out three requirements for ignoring the separate existence of a corporation: “(1) the corporation must be influenced and governed by the person asserted to be its alter ego; (2) there must be such unity of interest and ownership that one is inseparable from the other; and (3) the facts must be such that adherence to the fiction of separate entity would, under the circumstances, sanction a fraud or promote injustice.” 317 P.2d at 959.

The question of whether a stockholder, director, or officer acts as the alter ego of a corporation is a matter of law. Nev. Rev. Stat. § 78.747(3); Plotkin v. Paintin’ Place, 87

Nev. 51, 482 P.2d 323 (Nev. 1971.) Importantly, under Nevada law, “[t]he corporate cloak is not lightly thrown aside.” Baer v. Amos J. Walker, Inc., 85 Nev. 219, 220, 452 P.2d 916, 916 (1969).

Nevada courts have shown reluctance to pierce the corporate veil. In Rowland v. Lepire, 99 Nev. 308, 662 P.2d 1332 (Nev. 1983), the Nevada Supreme Court considered whether to pierce the corporate veil where the corporation was owned entirely by relatives, had not issued shares of stock until three years after it was incorporated, and had assets consisting almost entirely of an unsecured personal loan from one of the corporation’s shareholders. 662 P.2d at 1337-1338. At the time of trial the corporation had a negative net worth. Id. at 1338. Moreover no formal director or shareholder meetings were ever held. Id. No dividends were paid to shareholders, nor did the officers or directors receive salaries. Id. The corporation did not have a minute book, nor was there evidence that any minutes were kept. Id. At trial, the evidence showed that the corporation was under-capitalized and had little existence apart from the two principals in the corporation. Id. Relying on its reasoning in North Arlington Med., the Nevada Supreme Court in Rowland declined to find that the alter ego doctrine had been satisfied. Id. There was no evidence presented that the financial setup of the corporation was only a sham and caused an injustice. (Id.)

The same reasoning applies here. The district court did not find that 301 Clifton was a sham. Indeed, the court noted that the asset transfers from 301 Clifton were for tax purposes and “not with the intent to defraud the purchasers.” (FOFCOL ¶ 74.) The court did not find any reason for the undercapitalization of 301 Clifton other than its belief that

a two-year statute of limitations period applied and had expired. As such, there is no evidence, let alone a preponderance of evidence, “that the financial setup of the corporation is only a sham *and* caused an injustice.” North Arlington Med., 86 Nev. at 522, 471 P.2d at 244 (emphasis added).

Moreover, there was no commingling of funds or disregard of the corporate entities. The court apparently mistook transfers between entities for commingling, but in fact there was no evidence that funds were commingled. Commingling occurs when money is pooled in the same account. In Re Sand, 431 N.W.2d 107 (Minn. 1988). That did not happen here. Instead, 301 Clifton transferred one unit and a garage stall to an entity controlled by Jim McCallum, a member of 301 Clifton. (Ex. 247; 2/26/09 Tr. at 22.) The remaining units and garage stalls were purchased by Clifton Properties in a bulk sale pursuant to a Real Estate purchase agreement dated January 5, 2005. (Ex. 94.) The sales price was \$1,000,000, payable by a promissory note from Clifton Properties to be repaid in full within 12 months. (Ex. 94 ¶¶ 3 - 4.) As part of the sale, Clifton Properties agreed to transfer back two of the units to 301 Clifton if needed to resolve final billing issues with Kraus-Anderson and “to resolve any other dispute that may arise for which 301 Clifton would require additional funding.” (Id. ¶11.) Pursuant to this agreement, one unit was re-conveyed back to 301 Clifton which in turn transferred it to Kraus-Anderson as part of the payment of the final construction bill. (2/26/09 Tr. at 35-36.) At no point did either L.L.C. share an account with Nixon.

On or about December 27, 2005, Clifton Properties paid off the promissory note to 301 Clifton with an online banking transfer. (Ex. 87; Tr. 33.) Clifton Properties was able

to make this transfer because Nixon transferred \$999,999.99 to Clifton Properties from his personal account via an online banking transfer. (2/26/09 T. at 32) This same day, 301 Clifton made a distribution to Nixon of \$810,000 and a payment of \$225,000 to a company owned by Nixon and his wife called Unique Property Development. (2/26/09 Tr. at 33.) Unique Property Development provided real estate development services to 301 Clifton. (Ex. 242.) All of these transactions were documented, easily traceable and were paid to and withdrawn from separate identifiable bank accounts. No funds were commingled and corporate separateness was maintained at all times.<sup>11</sup> (Exs. 87, 88.). As the trial court found, these transactions were structured for tax purposes, not with intent to defraud. (FOFCOL 74.)

On May 10, 2006, Clifton Properties filed Articles of Dissolution with the Nevada Secretary of State to dissolve 301 Clifton. (Ex. 36.) The Articles of Dissolution required a member or manager of the L.L.C. to declare that “all debts, obligations and liabilities have been paid and discharged or that adequate provision has been made therefore.” (Id.). Nixon signed this declaration on behalf of Clifton Properties. (Id.) At the time this declaration was signed, Nixon believed that adequate provisions had been made by virtue of the re-convey provision of Clifton Properties’ agreement with 301 Clifton. (2/26/09 Tr. at 41-42.) Indeed, one of the two units Clifton Properties retained was transferred to Kraus-Anderson as part of 301 Clifton’s final payment. (2/26/09 Tr. at 35-36.) Although Nixon believed the statute of limitations expired on December 2, 2006, Clifton

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<sup>11</sup> The same is true for the other transfers between Clifton Properties and Nixon that were noted by the district court. (FOFCOL ¶¶ 80-91.)

Properties retained ownership of the unit it had agreed to re-convey to 301 Clifton for another year. (2/26/09 tr. at 42.) Clifton Properties sold its remaining unit to Nixon's daughter in November or December 2007. (2/26/09 Tr. at 59.)

As the above demonstrates, there has been no commingling of funds and the L.L.C.s were not operated as a sham. The district court erred as a matter of law in piercing the corporate veil and must be reversed.

#### **VIII. THE DISTRICT COURT ERRED IN ENTERING JUDGMENT AGAINST CLIFTON PROPERTIES.**

The trial court entered judgment against Clifton Properties on CPCA's claims. However, the trial court did not find that Clifton Properties, who was not the developer or seller of the condos, was actually liable under any of CPCA's claims. Instead, the trial Court found that only 301 Clifton breached warranties, breached its contracts, and violated the Consumer Fraud Act. (FOFCOL ¶ 108, 110, 113, 117). Nor did the court find that Clifton Properties was an alter ego of 301 Clifton. (FOFCOL ¶ 121.) Instead, the trial court found that Nixon was the alter ego of both 301 Clifton and Clifton Properties. (FOFCOL ¶ 121.)

It is axiomatic that a defendant that is not found liable on any claims against it cannot have a judgment imposed on it. The Court's finding that Clifton Properties is liable for all, or for that matter any part, of the judgment is simply wrong and must be reversed.

## IX. THE DISTRICT COURT ERRED BY NOT EMPANELLING A JURY.

On December 5, 2008, the parties submitted a “Joint Statement of the Case” to the trial court. (App. 130) In it, the parties requested a jury trial and stated that the appropriate fee had been paid. (Id.) Consistent with this submission, the trial court issued its Trial Order on December 8, 2008. (App. 140.) The very first paragraph of the Trial Order stated that this “matter is scheduled to come on for a jury trial”. Id. One week before trial, after Appellants’ attorneys had withdrawn from the case, CPCA informed the trial court that the matter would be tried to it and not a jury. (Add. 32 ¶ 32) No motion was presented and no one asked Nixon if Appellants agreed to waive their right to a jury trial. Nixon did not know that Appellants were entitled to a jury. (Id.)

Article I, Section 4, of the Minnesota Constitution guarantees that “the right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy.” Minn. Const. Art. I, §4. This provision is intended to continue, unimpaired and inviolate, the right to trial by jury as it existed in the Territory of Minnesota when the state constitution was adopted in 1857. Olson v. Synergistic Techs. Bus. Sys., Inc., 628 N.W.2d 142, 148 (Minn. 2001); Whallon v. Bancroft, 4 Minn. 109, 111 (Gil. 70, 74) (1860). For almost 100 years Minnesota courts have held that *both parties* to a lawsuit have a right to a jury trial. Morton Brick & Tile Co. v. Sodergren, 130 Minn. 252, 254-55, 153 N.W. 527, 528 (1915).

In Bond v. Welcome, 61 Minn. 43, 63 N.W. 3 (1895), the Minnesota Supreme Court identified those cases at law that are guaranteed the right to jury trial under our

constitution as actions at law for the recovery of money, and concluded that only actions that are equitable in nature are not entitled to jury trials:

If [the action] is an action at law for the recovery of money only, the plaintiff is entitled absolutely to a trial by jury, although it involves the examination of a long account on either side, for the constitution guaranties to him this right. But if the action is equitable in its nature . . . the plaintiff is not entitled to a jury trial . . . for in such cases, at the time of the adoption of the constitution, there was no absolute right of trial by jury.

61 Minn. at 43-44, 63 N.W. at 3-4 (citations omitted). Minnesota Supreme Court decisions following Bond consistently acknowledged the distinction between actions at law, for which the constitution guarantees a right to jury trial, and actions in equity, for which there is no constitutional right to jury trial. See Rognrud v. Zubert, 282 Minn. 430, 434, 165 N.W.2d 244, 247 (1969) (concluding that causes of action that are legal, as opposed to equitable, are entitled to jury trial); Landgraf v. Ellsworth, 267 Minn. 323, 327, 126 N.W.2d 766, 768 (1964) (concluding that suit on contract to recover money is legal action, and as such, triable to jury).

Here, CPCA made claims under a variety of theories, including breach of contract, breach of express and implied warranties, and consumer fraud, for the recovery of money. (App. 23.) While plaintiff requested injunctive relief, that claim was resolved prior to trial. (FOFCOL ¶¶ 63-67.) Because CPCA's claims are at law and for money damages, Appellants were entitled to a jury. Landgraf, 267 Minn. at 327, 126 N.W.2d at 768.

Where a party has a constitutional right to a jury trial, a denial of the right to a jury trial is a reversible error. Landgraf v. Ellsworth, 267 Minn. 323, 326, 126 N.W.2d 766,

768 (1964). Appellants had a constitutional right to a jury trial. That right was taken away. Appellants are entitled to a new trial with a jury.

**X. THE DISTRICT COURT LACKED JURISDICTION OVER APPELLANT NIXON BECAUSE HE WAS NEVER SERVED.**

Nixon was not a defendant in the original complaint and was never served with the Amended Complaint. (App. at 119 ¶ 3.) Nixon raised this defense in a motion to dismiss, but the court denied that motion and ruled that Nixon had waived that defense. (App. at 120 ¶ 4.)

A determination of whether service was effective and personal jurisdiction exists is a question of law that is reviewed de novo. Shamrock Development, Inc. v. Smith, 754 N.W.2d 377, 382 (Minn. 2008). Without sufficient service of process, a district court lacks jurisdiction over a defendant. Smith v. Flotterud, 716 N.W.2d 378, 381 (Minn. Ct. App. 2006). Nixon was never served with the Amended Complaint (App. ¶ 119; ¶ 3.) Therefore, the only issue for this court is whether Nixon somehow waived that defense. In response to a motion to dismiss filed on July 9, 2008, the district court ruled that Nixon had waived lack of jurisdiction as a defense by (1) submitting a letter *pro se* on behalf of 301 Clifton asking the court to deny plaintiff's emergency motion for a temporary restraining order against 301 Clifton; and (2) by submitting a "motion" *pro se* on February 27, 2008, requesting that the court delay a hearing on plaintiff's motion for a temporary injunction. (Id., App. at 118, ¶ 7; App. at 120, ¶ 4.) This conclusion is wrong as a matter of law and must be reversed.

A party may waive a jurisdictional defense by “submitting itself to the court’s jurisdiction and affirmatively invoking the court’s powers.” Shamrock, 754 N.W.2d at 381. However, simple participation in the litigation alone does not waive a jurisdictional defense. Id. (citing Patterson v. Wu Family Corp. 608 N.W. 2d 863, 868 (Minn. 2000). Instead, “it is the failure to provide the court an opportunity to rule on the defense before affirmatively invoking the court’s jurisdiction on the merits of the claim that is determinative.” Nixon plainly gave the district court an opportunity to rule on his defense of lack of jurisdiction, but the court ruled against him based solely on his appearance via the letter and “motion” seeking to delay a hearing for plaintiff’s request for a temporary injunction. (App. at 120, ¶ 4.)

After his lack of jurisdiction argument was rejected by the court, Nixon’s defense was preserved for appeal even though he proceeded with the trial. The Minnesota Supreme Court has repeatedly held that “even proceeding with trial on the merits does not waive the defense where the defendants brought a motion to dismiss that the trial court denied.” Patterson v. Wu Family Corp., 608 N.W.2d 863, 868 (Minn. 2000) (citing Anderson v. Mikel Drilling Co., 102 N.W.2d 293, 300 (Minn. 1960).

Nixon’s letter asking the court to deny emergency relief being requested by plaintiff cannot be considered an affirmative invocation of the court’s jurisdiction. Nixon faxed his letter to the district court the day of the temporary restraining order hearing so that it could be read into the record in a desperate attempt to ward off plaintiff’s request for a temporary restraining order. The temporary restraining order hearing was held on February 19, 2008, only 4 days after plaintiff had filed the Amended Complaint. (App.

43.)<sup>12</sup> Thus, even if Nixon had been served with the Amended Complaint, he still would have had 16 days to move or otherwise contest jurisdiction. The *pro se* motion filed on February 27, only 12 days after the Amended Complaint was filed similarly fails to amount to a waiver. It cannot be seriously contended that these desperate last-minute *pro se* attempts to avoid a temporary injunction against 301 Clifton constitute an affirmative invocation of the court's powers over Nixon. Accordingly, the district court's denial of Nixon's personal jurisdiction defense must be reversed and the claims against him dismissed for lack of jurisdiction.

#### **XI. THE DISTRICT COURT DID NOT PERFORM THE REQUIRED ANALYSIS IN AWARDING CPCA ATTORNEYS' FEES.**

Relying on Minn. Stat. § 515B.4-116 subd. (b), the trial court awarded CPCA \$156,355.63 in attorneys' fees and \$19,992.44 in costs. (FOFCOL ¶137; Add. 28-29.) This amount is 45.2% of the total award to CPCA. This award failed to take into account the relevant analysis and should be reversed. Appellate review of an award of attorney fees is limited to an abuse of discretion. Gully v. Gully, 599 N.W.2d 814, 825 (Minn. 1999). The issue here is the reasonableness of the attorneys' fees award. To award CPCA attorneys' fees, the trial court needed to use the lodestar method. See Specialized Tours, Inc. v. Hagen, 392 N.W.2d 520, 542 (Minn. 1986) (characterizing the procedure set forth by the Supreme Court in Hensley v. Eckerhart, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983), as "a sensible and fair approach"). It did not do so.

The lodestar method "requires the court to determine the number of hours

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<sup>12</sup> The letter was unsuccessful and the court granted the temporary restraining order on February 19, 2008, without anyone appearing at the hearing for Appellants. (App. 43.)

‘reasonably expended’ on the litigation” multiplied by “‘a reasonable hourly rate.’” Anderson v. Hunter, Keith, Marshall & Co., 417 N.W.2d 619, 628 (Minn. 1988) (quoting Hensley, 461 U.S. at 433, 103 S.Ct. 1933). In determining the reasonableness of the hours and the reasonableness of the hourly rates, the court considers “all relevant circumstances.” State v. Paulson, 290 Minn. 371, 373, 188 N.W.2d 424, 426 (1971). Factors considered in determining reasonableness include “the time and labor required; the nature and difficulty of the responsibility assumed; the amount involved and the results obtained; the fees customarily charged for similar legal services; the experience, reputation, and ability of counsel; and the fee arrangement existing between counsel and the client.” Id. at 373, 188 N.W.2d at 426; see also Hensley, 461 U.S. at 430 n. 3 (listing additional factors relevant to the determination of reasonable attorney fees).<sup>13</sup> The district court must “provide a ‘concise but clear explanation of its reasons for the fee award.’” Anderson, 417 N.W.2d at 629-30 (quoting Hensley, 461 U.S. at 437).

Here, the district court does not appear to have considered any of the factors in Paulson or Anderson. Instead, the district court simply adopted the amounts set forth in an affidavit submitted by CPCA’s counsel at the close of trial. (FOFCOL ¶ 133.) The

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<sup>13</sup> The federal courts consider the following factors in determining the reasonableness of attorney fee awards: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the “undesirability” of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. Hensley, 461 U.S. at 430 n. 3; but see City of Burlington v. Dague, 505 U.S. 557, 567, 112 S.Ct. 2638, 120 L.Ed.2d 449 (1992) (holding that an enhancement for contingency is not permitted under federal fee-shifting statutes).

only deductions made by the district court related to matters settled prior to trial. (FOFCOL ¶134-136.) This was not a proper exercise of the lodestar method.

Thus, even if this Court agrees with the district court that 301 Clifton violated Minn. Stat. §§ 515B.4-112 and 515B.4-113, remand is appropriate because the district court failed to utilize the lodestar method. See Anderson, 417 N.W.2d at 630 (remanding attorney fees award where it was not clear the district court took into consideration the “fees incurred on unsuccessful claims”); Specialized Tours, 392 N.W.2d at 542-43 (remanding attorney fees award for the district court to “weigh the results obtained”).

## **XII. THE COURT COMMITTED REVERSIBLE ERROR BY REFUSING TO ORDER DISCLOSURE OF THE KRAUS-ANDERSON SETTLEMENT TERMS.**

The district court refused to order disclosure of the Kraus-Anderson settlement terms. CPCA sued Kraus-Anderson for negligent construction, breach of express and implied warranties and breach of contract. Amended Complaint, Counts I, III, IV, VI, and VIII. Kraus-Anderson settled with CPCA shortly before trial. To ensure that Respondent would not obtain a double recovery, Appellants asked the court to compel CPCA to disclose the terms of the settlement, but the court refused. (2/17/09 Tr. at 51-52.)

A non-settling defendant “has a definite right to complain if it would be required to pay more than its fair share of the damages.” Oelschlager v. Magnuson, 528 N.W.2d 895, 900. (Minn. Ct. App. 1995). Absent disclosure of the settlement with Kraus-Anderson, Appellants have no way to determine the extent to which CPCA has already recovered on its flooring claims. For instance, part of the Kraus-Anderson settlement

may have been paid to cover repairs to the hardware floors. However, the damage award against appellants is based on removal of the old floors and installation of new hardwood floors. Accordingly, any amount CPCA received for floor repairs would amount to a double recovery.

### CONCLUSION

The district court made numerous fundamental errors of law. Any one of these errors, standing alone, provides a basis for a new trial or dismissal as a matter of law. Accordingly, Appellants request that the district court's order be reversed and the case remanded for trial, if not dismissed altogether.

FRUTH, JAMISON & ELSASS, PLLC

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By



Thomas E. Jamison (#220061)

Adam A. Gillette (#0328532)

3902 IDS Center

80 South Eighth Street

Minneapolis, MN 55402

Telephone: (612) 344-9700

Facsimile: (612) 344-9705

tjamison@fruthlaw.com

jbreyer@fruthlaw.com

*ATTORNEYS FOR APPELLANTS*