NO. A09-1293

State of Minnesota
In Court of Appeals

301 Clifton Place Condominium Association,

Respondent,

vs.

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

Appellants.

RESPONDENT'S BRIEF AND APPENDIX

FABYANSKE, WESTRA, HART & THOMSON, P.A.
M.T. Fabyanske (#28022)
Thomas A. Forker (#246682)
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

2009 – BACHMAN LEGAL PRINTING – FAX (612) 337-8053 – PHONE (612) 339-9518 or 1-800-715-3582

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 CASE

Appellant 301 Clifton Place, LLC ("301 Clifton") (and, the district court found, Appellants David Nixon ("Nixon") and Clifton Properties, LLC ("Clifton Properties")) were developers of the 301 Clifton Place Condominiums. Respondent 301 Clifton Place Condominium Association is a condominium association made up of the owners of the developed units. Appellants, directly and through their agents, as well as in various marketing materials, promised Respondent's affected condominium owners that the condominiums units, touted as luxury spaces, would have "hardwood floors." When Respondents moved in, the floors appeared to them to be hardwood floors – but in fact, as they later discovered, the floors were actually an engineered flooring with just an extremely thin (2 millimeter, 1/13 inch) veneer of hardwood on top.

Respondent sued Appellants under several theories of law. Approximately three weeks before trial on this matter, Appellants fired their attorney (a lawyer from Best & Flanagan), alleging that he was incompetent, and specifically requested to proceed to trial *pro se*. David Nixon conducted Appellants' defense during the three-day bench trial.

On April 16, 2009, the district court concluded that Appellants had in fact deceived Respondents as to the flooring, violating statutory warranties and the Minnesota Consumer Fraud Act. The district court further noted that Appellant

David Nixon had deliberately drained all the money out of the Appellant LLCs to his own personal bank account, leaving the LLCs with no funds to satisfy any warranty or other judgments against them as developers. The district court concluded that Appellants were alter egos of one another. The district court further concluded that the Appellants' attempts in a section of their purchase agreements with the affected unit owners to curtail the statute of limitations for their warranty violations to two years was ineffective under Minn. Stat. § 515B.4-115(b), because the time limitation was not in a separate instrument as required by the statute but was explicitly part of the purchase agreement itself. Appellants made a motion for a new trial, which the district court denied on July 22, 2009. This appeal followed.

STATEMENT OF THE FACTS[1]

The following facts were testified to and found by the district court.

The Parties

As noted above, Appellant 301 Clifton was a Nevada limited liability company and the developer of the 301 Clifton Condominium complex. (FOFCOL ¶2.) Nixon was 301 Clifton's president and 90% owner. (*Id.* ¶4, 2/26/09 Tr. p.14.) Clifton Properties is also a Nevada limited liability company controlled and owned

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1 In this brief, Respondents use the abbreviations "Tr. Ex." for trial exhibits, "R.App." for citation to Respondent's Appendix, "App." for citation to Appellants' Appendix, and "FOFCOL" for citation to the district court's April 16, 2009 Findings of Fact and Conclusions of Law and amendment of April 21, 2009 (included in Appellants' Addendum). Citations to the trial transcript are abbreviated as [transcript date] Tr. [page number].

by Nixon. (FOFCOL ¶¶3-4.) Respondent is the condominium association for the developed condominium, made up of the unit owners. (FOFCOL ¶1.)

Marketing Efforts by 301 Clifton Place: Luxury Living with Hardwood Floors

The 301 Clifton Place Condominium building was marketed and advertised by Appellants as "Distinctive Urban Living" with "traditional finishes" to provide the "feel of a renovated mansion." (FOFCOL, ¶14.) Appellants' brochures assured prospective buyers that it was "not your typical condominium building," but instead contained "elegant" "classically designed," "luxury condominiums." (*Id.*; Tr. Ex. 1.) Appellants' website echoed these claims.

All of Appellants' marketing materials further expressly provided that as part of the "Distinctive Urban Living" the building's interior features would include a "car washing area" and "**hardwood floors** with sound cushions at entry, hall, living, dining and kitchen." (FOFCOL ¶ 15 (emphasis added); Tr. Exs. 1, 2.) Additionally, 301 Clifton's on-site sales agent, Jessica Alexander, and representative James MacCallum (the other 10% owner of 301 Clifton), expressly told all the prospective buyers that the unit would have hardwood floors. (FOFCOL ¶ 16; 2/25/09 Tr. 14, 2/27/09 Tr. 32-33.)

Buyers' reliance on the representation of hardwood floors

Each and every one of the affected owners was told multiple times, through the marketing materials and through Appellants' representatives, that they would be receiving "hardwood floors." (FOFCOL ¶¶15-18, 45-49; 2/25/09 Tr. 58, 59, 93-97, 107-9, 140, 199, 201-02, 210, 221-22, 232; 2/26/09 Tr. 73-74, 149; 2/27/09 Tr. 32-33) They all believed that this meant hardwood floors – i.e., floors made out of planks consisting entirely of unbroken hardwood. (FOFCOL ¶¶ 15-18, 52-57, 2/25/09 Tr. 58, 59, 127; 2/26/09 Tr. 73-74, 139, 151.) Their belief was reinforced by the fact that they were all pointedly assured by Appellants' representatives and marketing materials that the condominium was "luxury" "high end" and "high quality." (2/25/09 Tr. 54, 58, 69, 93, 107, 112, 124-25, 211, 221; 2/26/09 Tr. 73).

One buyer, telling Alexander that one of the things he specifically wanted in a condominium was hardwood floors, asked if the flooring would be true hardwood or a laminate or pergo. (2/25/09 Tr. 140.) He was told absolutely not, the condominiums would all have "true hardwood flooring." (*Id.*) Another affected owner, when told the floor was a "floating floor" (i.e. not nailed down), asked Alexander "but is it a hardwood floor?", to which she replied, "oh yes, absolutely." (2/25/09 Tr. 97.) Alexander admitted she only ever used the term "hardwood floors." (2/27/09 Tr. 33.)

All the affected owners reasonably relied on the representations that the floors were hardwood floors. (FOFCOL ¶ 18; 2/25/09 Tr. 62, 94, 111, 124, 142-43, 201-02, 223, 232-34, 2/26/09 73, 149.) They specifically wanted – and believed that they had purchased – hardwood floors. (2/25/09 Tr. 62, 69, 96, 109-12, 118, 127, 130-31, 140, 142, 146, 200-02, 212, 214, 224-25; 2/26/09 Tr. 73, 149, 151.) When they performed the walk-through inspections of their apartments, they believed the floors were hardwood. (2/25/09 Tr. 61, 96, 142, 202, 212-13, 224; 2/26/09 Tr. 74.) The affected owners trusted Appellants and believed their representations about the floors. (2/25/09 Tr. 120, 125, 2/26/09 Tr. 142.)

<u>Actual Nature of the Floors</u>

Despite the fact that the marketing materials and representations of 301 Clifton's sales agents identified the building's flooring as "hardwood floors," by March 2004, 301 Clifton had actually already decided that all the wood flooring in the building was to be Award® Longstrip engineered laminated flooring. (FOFCOL ¶ 53.) As Respondents' flooring expert, Frederick Katter, testified at trial, and as the district court found, the engineered flooring provided by Appellants is not a hardwood floor. (FOFCOL ¶ 50, 2/26/09 Tr. 102.)

Upon removing a small section of the flooring, Katter found that it was not wood flooring, as it simply disintegrated in his hand as he tried to remove it. (2/26/09 Tr. 94) He removed a larger section[2] and discovered the flooring was simply a wood veneer – a layer of wood only one-thirteenth of an inch thick – over two additional layers. (Tr. Ex. 58, 2/26/09 Tr. 95, 102-05.) The layer below the

2 The section removed and a photo of the section are respectively Trial Exhibits 58 and 59.

thin veneer, the "core" that makes up the bulk of the flooring, is a man-made, five-layer plywood. (Tr. Ex. 58, 59, 2/26/09 Tr. 103.) The bottom layer is a 3 millimeter layer of spruce, a softwood. (2/26/09 Tr. 102.) Katter found that both the core layer and the bottom layer could be easily marked by a fingernail. (*Id.* at 105.) As Katter explained:

> The floor actually consists of three different materials. The floor consists of a roughly 1/8 mil[imeter] thick hardwood top wearing course. And that is a hardwood. It consists of approximately 3 mil thick base course which is spruce and is very soft wood. One of the difficulties with the wood is that that base course is used as a part of the locking mechanism that locks the floor together. And because it's soft, it won't under certain circumstances, particularly expansion and contraction, should be a – may not be sufficiently stable to hold the floor together. And the photographs show several instances where it is not sufficiently stable to allow the floor to stay together.
>
> There is one other point and that's simply this. The floors use as assistance to the locking mechanism because of that very soft lower base floor, they use a man made, high density particle board product to support, and that's not a wood product at all. It's a man made synthetic product, and they use that to support the strength of the locking mechanism. So the floor is made of hard wood, soft wood, and artificial materials. That's supported by the language of the installation instruction which says right in the instruction that the primary constituent of the floor is wood. But it doesn't say all the constituents are even wood.

(2/26/09 Tr. 102-03; FOFCOL ¶ 52.) Engineered wood flooring is also called "laminated flooring" because it is laminated in layers.[3] (2/26/09 Tr. 159.) The pad

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[3] In contrast, a "laminate" floor is one that does not have a hardwood veneer surface, but rather a photograph of wood covered by laminate, in order to give a wood appearance. (2/26/09 Tr. 89, 99, 159.)

under the floor is a thin pad used for laminate floors, not the thicker pad used for actual hardwood floors. (2/26/09 Tr. 114-15.)

The engineered flooring is far less durable than hardwood, and the layers expand at different rates. (FOFCOL ¶ 58, 2/26/09 Tr. 108-09.) The affected owners' engineered flooring has consequently been deteriorating. Katter presented several photos to the court showing the damage to the flooring (cracking, delaminating, and separation) caused by the different layers of the flooring expanding at different rates. (Tr. Ex. 66, 69, 71, 72, 2/26/09 Tr. 115-127.) The flooring has also noticeably lost color in places because color loss shows so clearly on the thin veneer. (Tr. Ex. 70, 2/26/09 Tr. 124-25.)

Katter also presented photos of damage to the floor, which, he testified, cannot be sanded out under industry standards because the veneer is so thin. (Tr. Ex. 67, 68, 2/26/09 Tr. 122, 106.) The court found that even if it is technically possible to sand the floors, a true hardwood floor can be sanded far more times and consequently has a much longer lifespan. (FOFCOL ¶ 58.) The court also found that engineer wood floors are a relatively new product and cannot be considered a "traditional" flooring choice as Appellants' marketing materials stated. (*Id.*)

True nature of flooring withheld from affected owners

Despite having already chosen the flooring, none of Appellants' representatives told the affected owners the flooring was to be "Award flooring" or engineered flooring. (FOFCOL ¶17, 60-62; 2/25/09 Tr. 85-86, 110-11, 146-47, 200, 224, 232, 235; 2/26/09 Tr. 73; 2/27/09 Tr. 33.) The affected owners were not given any Award brochures or product information on the flooring. (FOFCOL ¶17, 59; 2/27/09 Tr. 38.) They were simply told they would be getting "hardwood floors." (FOFCOL ¶17; 2/27/09 Tr. 33.) While some of the affected owners saw small samples of the flooring glued to a board, they thought that was only a sample for choosing colors. (FOFCOL ¶47; 2/25/09 Tr. 127, 145.) In the words of the district court, "Through its marketing and sales efforts, [Appellants] withheld from the unit owners the distinction between a solid hardwood floor and an engineered wood floor." (FOFCOL ¶62.)

Conveyance of Units Between 301 Clifton Place and Clifton Properties

On January 18, 2006, by Warranty Deed, 301 Clifton (a company owned by Nixon, with potential warranty claims) conveyed to Clifton Properties (a new company owned by Nixon, without any potential warranty claims) 11 of the 12 remaining unsold condominiums and 19 garage spaces. (FOFCOL ¶ 68, 69.) According to the Warranty Deed, the "Total consideration for this transfer of real property is $500 or less." *Id.* In fact, the units were worth $5,027,000.00. (*Id.* ¶ 71.) The remaining unit was transferred to Jim MacCullum.

At trial, Nixon claimed that a promissory note for $1,000,000.00, executed on January 18, 2005 (a year before the Warranty Deed was executed), constituted the actual consideration for the transfer. This promissory note was payable within a year of issuance. (FOFCOL ¶72.) It was later "paid" in the following way: on December 27, 2005, Nixon transferred by computer $999,999.99 out of his own bank account into Clifton Properties' account, then transferred the $999,999.99 out of the Clifton Properties' account and into the 301 Clifton account. (FOFCOL ¶73.) He then transferred $810,000.00 of the money out of the 301 Clifton account right back into his own bank account, and the remaining $225,000.00 into another company he solely owned. (*Id.*) He did all these transfers online in one day. (*Id.*) As the court noted, "by the close of business on December 27, 2005, 301 Clifton Place, LLC's bank account had a zero balance." (*Id.*)[4]

Questionable sales of remaining units – all proceeds to Nixon

Even before the transfer occurred, Appellants had begun to sell the 11 remaining units. (FOFCOL ¶ 78.) Nixon sold all the units, which he referred to as

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4 Appellants now claim that these transactions were "documented" and "easily traceable". (App. Brief, p.9, 10.) This is ironic considering that Appellants, when asked through discovery to produce such documentation or even describe where the money came from and where it went, refused to produce any documentation or explanation, replying that "given the time that has passed since the conveyance in early 2005, and given that the bank accounts for both limited liability companies have been closed for some time, Respondent is able to retrieve financial documentation as easily or more easily as Answering Appellants by way of subpoena." (R.App. 59-65.) Appellants also refused to identify the "identifiable bank accounts" at issue (despite the fact that Nixon obviously knew it was his own personal bank account at issue), and only admitted the account identity when presented at trial with Nixon's own check issued for a subpoena fee. (*Id.*) Appellants refused to voluntarily identify the accounts.

"turkeys" and could previously not sell, over a period of less than four months, to "buyers" mysteriously produced by an "old acquaintance" of Nixon's. (FOFCOL ¶78, 2/26/09 Tr. 46-48.) As soon as the money for each purchase was received by Clifton Properties, Nixon immediately transferred the money into his own personal bank account. (FOFCOL ¶ 78-91.) Nixon received over $3.6 million from these sales. (*Id.*) The "buyers" never occupied the units, which immediately went into foreclosure. (*Id.*)

<u>Dissolution of 301 Clifton, leaving no warranty assets</u>

On May 10, 2006, 301 Clifton filed Articles of Dissolution for a Nevada Limited-Liability Company with the Nevada Secretary of State. (FOFCOL ¶ 75.) David Nixon signed the Articles of Dissolution as the manager or member of 301 Clifton. (*Id.* ¶ 76.) The Articles state at paragraph 2(a) that "All debts, obligations and liabilities have been paid and discharged or that adequate provision has been made therefore." (*Id.* ¶ 77.)

However, this was untrue. All of 301 Clifton's obligations had not been discharged as obligations remain for, among other things, warranty obligations under Minn. Stat. § 327A and Minn. Stat. § 515B related to 301 Clifton's role as the declarant of 301 Clifton condominiums. (FOFCOL ¶ 77.)[5] Appellants were

[5] Appellants claim they thought they limited all warranties to two years, but as the court concluded, they failed to do so.

aware that, in fact, warranty claims were being made *at that time* as to the flooring. (2/26/08 Tr. 142-44.)

Respondent, finding that Appellants would not address various warranty issues, brought suit against 301 Clifton on September 28, 2006, serving 301 Clifton by mail with an acknowledgement form. (R.App. 2, App. 9.) Nixon, though acknowledging summons verbally, refused to execute the form. (R.App. 2.) Therefore, out of an abundance of caution, Respondent served 301 Clifton through the secretary of state on December 7, 2006. (*Id*; App. 97-100.)

Despite the ongoing suit, Nixon revoked Clifton Properties's status as a Nevada limited-liability company effective December 1, 2008. (2/26/08 Tr. 63.) Neither 301 Clifton nor Clifton Properties have any remaining assets to pay any warranty claims. (*Id.* at 53.) Nixon made approximately $2 million in profit off the condominium development. (2/26/09 Tr. 48.)

<u>Addition of Nixon and Clifton Properties to the suit: car wash conflict</u>

Respondent brought its Complaint in this case against 301 Clifton on September 28, 2006. Appellants repeatedly represented to prospective buyers, through marketing materials and verbally, that a car wash area was an amenity of the building, along with other amenities such as the lobby and gym. (FOFCOL ¶ 63; R.App.25.)

But rather than deliver the car wash area as expressly promised to the unit owners, after the owners purchased their units, in 2007, Nixon began demanding via email that Respondent *purchase* the designated car wash area (garage space G29) and threatened to tow any car using it in the meantime. (R.App.10, 26.)

While the car wash area was theoretically the property of Clifton Properties, Nixon continually referred to the car wash area as "my property". (R.App. 9-19, FOFCOL ¶ 64-65.) For example, in October 2007, Nixon stated in e-mail to Respondent, "I think the Association should either rent or buy stall G29 **from me** for use as a car wash.....I have not and do not give the Association, or any of its owners, permission to trespass on **my property**, without some kind of legal arrangement...this email shall serve as my formal notice of this position and any further violation of **my rights** will be dealt with severely." (R.App. 10 (emphasis added.))

In responding to the fact that 301 Clifton's marketing brochure included a car wash area as a common building amenity, Nixon informed the Association that "your efforts to seize this stall on the basis of some nebulous marketing efforts is ridiculous and will be met with fierce opposition...Any trespass or violation of **my legal rights** for the "quiet enjoyment" of **my private property** will be met with severe action" and "[A]ny attempt to interfere with any sale … will be construed as an obvious effort to illegally confiscate **my personal property** and will be litigated in both a criminal and civil manner..." (R.App. 9, 18 (second emphasis in original.))[6]

Nixon set February 8, 2008 at 5:00 p.m. as the deadline for Respondent to purchase the parking stall, or he would sell it elsewhere. (R.App. 15-16.) As a result, on February 12, 2008, Respondent filed a motion for injunctive relief to prevent any such sale. On February 15, 2008, Respondent also amended its Complaint and motion to add Clifton Properties (the ostensible owner of the space) and Nixon (the acting owner of the space). (R.App. 22, 43.)

Service issue

Respondent was stymied to serve the Amended Complaint and motion papers on Nixon himself, because Nixon refused to disclose his location (somewhere in New Zealand), communicating his threats to Respondent by email only. (R.App. 2-3.) Nixon continued to conceal his location until trial, even refusing to reveal to the court the city in which he lived. (R.App. 48-49.)

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6 Nixon additionally indicated that the provision in the Common Interest Community Declaration restricting ownership of the garage spaces to owners of the condominium units did not apply because "I do not believe that it is intended to restrict the INITIAL sale of the units by the developer." (R.App. 14.) As Respondent pointed out in response, 301 Clifton – the ostensible developer – had already theoretically "sold" the units to Clifton Properties, as Nixon knew because he owned both companies and had effectuated the "sale" himself. (R.App. 13, 26.)

However, Respondent emailed a copy of Respondent's motion papers for Respondent's motion for a Temporary Restraining Order to Nixon on February 11, 2008 for 301 Clifton, and then again, with a copy of the Amended Complaint, on February 15, 2008, for all Appellants. (R.App. 2-3; App. 83-100.) The same papers were mailed via FedEx to Nixon at the address listed for 301 Clifton and served on 301 Clifton through the Minnesota Secretary of State. (*Id.*)

<u>Nixon's personal submission to the court's jurisdiction</u>

Nixon undisputably received the copies of the Complaint and motion papers and immediately took action to oppose the motion. On February 18, 2008, three days after Respondent sent the Nixon and Clifton Properties the Amended Complaint and motion documents via email and mail, Respondent's counsel received an email from Nixon attaching a letter, dated February 19, 2008, addressed to the Court. (R.App. 40-41, 37-39.) The email requested that Respondent's counsel send the letter and another letter from Nixon to the court dated February 12, 2008, to the court to be read into the record "as my written testimony and evidence in this matter." (*Id.*) Respondent's counsel complied. Nixon also personally filed this second letter with the Court. This letter identified the responding defendants as 301 Clifton, Clifton Properties, and David H. Nixon. (*Id.*) As requested by Nixon, both letters were read into the record during the hearing. (*Id.*; R.App. 43-45.)

The Court granted the TRO, and the matter was set for a preliminary injunction hearing in March 2008. (RA 20-21.) On or about February 27, 2008, defendants Clifton Properties, 301 Clifton Place and David Nixon submitted "Defendants Motion to Delay Hearing" to the court requesting a continuance of the preliminary injunction hearing until May 2008. (R.App. 33-34, 24.)

Neither Nixon's letters nor his motion mention insufficiency of process. Nixon subsequently submitted an Informational Statement and a Joint Stipulation without protesting insufficiency of process. (Informational Statement dated April 8, 2008, and Stipulation dated May 30, 2008.) Months later, in July 2008, Appellants brought a motion to vacate Respondent's injunction on sale of the car wash space based in part on insufficiency of service. The district court, denying the motion, pointed out that all Appellants had already personally appeared before the district court multiple times and sought affirmative relief in the case, and therefore had waived their defense of insufficiency of service. (R.App. 42-46.)

Invalid curtailment of statute of limitations.

In their motion to vacate, Appellants also argued that Respondent's warranty claims were outside the statute of limitations, which, though normally six years, Appellants claimed to have limited to two years. (R.App. 42-46.) Specifically, the affected owners' Purchase Agreements (by which they purchased their condominium units) purport to limit the new construction statutory warranty periods to two years in Paragraph 7C and in an "Exhibit C" to the Agreements. (FOFCOL ¶94, 95; Tr. Exs. 7-26, ¶7C, Ex. C; R.App. 42-46.) Paragraph 14 of the Purchase Agreements explicitly incorporates Exhibit C into the Agreement, stating "This Agreement is subject to and shall be performed in accordance with the terms ...set forth in the Exhibits and Addendums attached hereto and by this reference incorporated herein... any reference herein to "The Agreement" shall include said Exhibits and Addendums." (FOFCOL ¶96; Tr. Exs. 7-26, ¶14 (Emphasis added).)

In its August 6, 2008 order, the district court concluded that Appellants had failed to provide Respondent's affected unit owners with a separate writing modifying the statute of limitations to two years. Therefore, the limitation was void under Minn. Stat. § 327A.04, subd. 2 and Minn. Stat. § 515B.4-115(b), and Respondent's claims were not time-barred. (R.App. 42-46.) The district court reiterated this conclusion after trial. (FOFCOL ¶125-26.)

Case proceeding to trial

The case proceeded to trial, which was scheduled for February 23, 2009. Best & Flanagan represented Appellants, but on February 6, 2009, Appellants fired them claiming incompetence, and subsequently requested to proceed with the case *pro se*. (2/25/09 Tr. 160, 4, R.App. 74.) Just prior to trial, Nixon conceded the issue of the car wash space and agreed to voluntarily formally transfer the title to the space to Respondent. (2/25/09 Tr. 29-31; FOFCOL ¶67.)

Only four days before the scheduled trial, Appellants produced a witness list to Respondent that included a previously undisclosed expert. (2/25/09 Tr. 6-14.) Respondent immediately made a motion in limine, requesting that the court not allow Appellants to call their last-minute expert. (*Id.*) The expert was not admitted.

Trial began on February 25, 2009. The parties stipulated to waive a jury trial and agreed to a bench trial. (R.App. 70.) Nixon further never objected to the district court's conducting of the proceedings and never requested a jury trial.

On April 17, 2009, the district court issued its Findings of Fact, Conclusions of Law, and Order for Judgment. The district court found that Appellants had, in fact, deliberately and repeatedly promised the affected owners hardwood floors; that the affected owners had relied on that promise; and that the floors they received were not hardwood floors. (FOFCOL ¶¶ 10-19, 44-62.) The court found that Appellants had concealed the true nature of the floors from the affected owners and mislead them. (*Id.* ¶¶ 58-62.)

Consequently, the district court concluded, Appellants had violated the Minnesota Consumer Fraud Act ("MCFA"), breached their contracts with the affected owners, breached express warranties in violation of Minn. Stat. § 515B.4-

112, and breached implied warranties in violation of Minn. Stat. § 515B.4-113. (*Id.* ¶¶ 102-17.) The court concluded that Appellants had not breached the structural warranties of Minn. Stat. 327A.02. (*Id.* ¶¶105-106.) The district court further assessed attorney's fees under the MCFA, found that Appellants were alter egos of one another. (*Id.* ¶¶118-26, 128-31.) Finally, the court re-affirmed that the statutory warranties were not limited beyond the normal statute of limitations and the claims were timely brought. (*Id.* ¶¶ 123-27.)

ARGUMENT

I. STANDARD OF REVIEW.

This case comes on appeal after a full bench trial. Many of Appellants' arguments (for instance, all those referencing whether the term "solid hardwood" was relevant) directly challenge the district court's findings of fact. "'On appeal, a [district] court's findings of fact are given great deference, and shall not be set aside unless clearly erroneous.... If there is reasonable evidence to support the [district] court's findings of fact,' an appellate court will not disturb those findings." *Kutscheid v. Emerald Square Properties, Inc.*, 770 N.W.2d 529, 532 (Minn. Ct. App. 2009) (citing *Fletcher v. St. Paul Pioneer Press,* 589 N.W.2d 96, 101 (Minn. 1999)).

While conclusions of law are reviewed *de novo*, mixed questions of law and fact are reviewed under a generous abuse of discretion standard, "mindful of the discretion of the trial court in the exercise of its equitable jurisdiction." *Maxfield v. Maxfield*, 452 N.W.2d 219, 221 (Minn. 1990). Alter ego determinations are considered equitable decisions, reviewed for abuse of discretion only. *Tom Thumb Food Markets, Inc. v. TLH Properties*, 1999 WL 31168, *3 (Minn. Ct. App. 1999).

II. THE DISTRICT COURT'S CONCLUSION THAT THE PURCHASE AGREEMENTS DID NOT CURTAIL THE STATUTE OF LIMITATIONS WAS CORRECT UNDER THE PLAIN LANGUAGE OF MINN. STAT. § 515B.04.

Appellants argue that Respondent's claims were not timely brought, because, Appellants allege, they were not brought against 301 Clifton until December 7, 2008, and language in the Purchase Agreements shortened the period in which Respondent could bring its breach of warranty claims from six years to two years. (App. Brief p.15-17.) The district court disagreed. (FOFCOL ¶123-27.)

This Court reviews the district court's interpretation of statutes *de novo*. *American Nat. Bank of Minnesota v. Housing and Redevelopment Authority for City of Brainerd*, 773 N.W.2d 333, 339 (Minn. Ct. App. 2009). The construction and effect of an unambiguous contract is reviewed *de novo* also; but where there is an ambiguity in the contract, the district court's determination of the meaning of the ambiguous contractual provision is a finding of fact which this Court reviews for clear error. *Trondson v. Janikula*, 458 N.W.2d 679, 682 (Minn.1990).

As an initial matter, Appellants' claims that 301 Clifton was not served until December 7, 2008 are baffling – 301 Clifton was served with this case on September 28, 2006, within even a two-year statute of limitations. (R.App. 2; App. 96.) Out of an abundance of caution, Respondents again served 301 Clifton via the secretary of state on December 8, 2006. (R.App. 2, App. 88-90.) The case was *tried* in February 2009, only two months after 301 Clifton claims it was commenced.

But, as the district court concluded, even if somehow the case was not commenced until December 2008, it was still timely, as Appellants' attempted curtailment of the normal six-year statute of limitations period to two years is invalid. (FOFCOL ¶¶ 123-27.) This is because the curtailment was not, as required by Minn. Stat. § 515B.4-115(b) for any shortening of the normal statute of limitations period, contained in a separate instrument. (FOFCOL ¶¶ 123-27, R.App. 44-45.) Rather, it was explicitly part of the Purchase Agreement itself. (*Id.*)

The Minnesota Common Interest Ownership Act (Minn. Stat. § 515B) was passed in order to protect homeowners in common interest communities. As part of those protections, Minn. Stat. §515B.4-112 provides certain express warranties and Minn. Stat. § 515B.4-113 provides implied warranties to such homeowners.[7] Furthermore, the legislature foresaw that unscrupulous developers might slip waivers or curtailments of these warranties into the large, legalistic purchase agreements they presented to prospective homeowners. The legislature wanted to ensure that any limitations to warranties were truly understood and accepted by homeowners. Therefore, the legislature included Section 515B.4-115(b), which states the following:

> (b) A judicial proceeding for breach of an obligation arising under section 515B.4-112 or 515B.4-113 shall be commenced within six years after the cause of action accrues, but the parties may agree to reduce the period of limitation to not less than two years. ... With respect to a unit that may be occupied for residential use, **<u>an agreement to reduce the period of limitation must be evidenced by an instrument separate from the purchase agreement</u>** signed by the purchaser.

Minn. Stat. § 515B.4-115(b). Under the plain language of this statute, an agreement to shorten the limitation period to bring claims requires a separate written instrument from the purchase agreement. *Id.*

As the legislature foresaw, Appellants twice slipped curtailments of the statute of limitations for warranties to the absolute minimum time allowed (two

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7 The district court denied Respondent's claim under The Housing and Home Improvement Statutory Warranties Act (Minn. Stat. §327A), which contains similar homeowner protections, because, the court concluded, the engineered flooring was not a "structural defect." However, should such structural defects be discovered, they are subject to a ten-year statute of limitations – for which Appellants have made no provision, because Nixon has removed all their assets.

years) into the affected owners' purchase agreements. But, as the district court pointed out, these attempts were unavailing, because they are plainly and explicitly contained in the purchase agreements themselves, and therefore are ineffective under Minn. Stat. § 515B.4-115(b). One attempt is contained in Paragraph 7C of the purchase agreements. (FOFCOL ¶94; Tr. Exs. 7-26, ¶7C.)[8] The other is contained in an "Exhibit C" to the purchase agreements. (FOFCOL ¶ 95; Tr. Exs. 7-26, Ex. C.) This Exhibit, along with all other exhibits to the purchase agreements, were attached to the agreements and signed at the same time as the agreements. They were also ***explicitly incorporated into the agreements by the language of the agreements themselves.*** Paragraph 14 of the Purchase Agreements states:

> **Exhibits of Additional Terms.** This Agreement is subject to and shall be perfomed in accordance with the terms and contingencies if any, **set forth in the Exhibits and Addendums attached hereto and by this reference incorporated herein**. Any contingencies and other terms contained therein shall be a part of this Agreement and **any reference herein to "The Agreement" shall include said Exhibits and Addendums**.

(FOFCOL ¶96; Tr. Exs. 7-26, ¶14 (Emphasis added)). Appellants' own purchase agreements, which they drafted themselves, explicitly included Exhibit C in its

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8 Appellants even personally described this provision as contained in the purchase agreement. Memorandum of Law in Support of Motion to Dismiss Claims Against 301 Clifton Place, LLC at 3; Nixon Affidavit, Exhibit A (Purchase Agreement) ("Each owner of a unit in the Condo signed a purchase agreement containing the following clause, which was printed in boldface type in all capitals and in a font size greater than 10 points").

own definition of "the Agreement." Therefore, Exhibit C cannot possibly, by the Purchase Agreement's own terms, constitute a "separate instrument," and the time limitation is consequently invalid under Minn. Stat.§ 515B.4-115(b). The language of the contract is plain, but even if it were not, any ambiguity in the documents should be interpreted against Appellants, the drafters, and in favor of the determination of the district court. The case was therefore brought well within the statute of limitations under anyone's calculation of the time of service.[9]

For these reasons, Respondent respectfully requests that this Court uphold the district court's conclusion that Respondent's case was timely brought.

III. THE DISTRICT COURT'S DECISION TO ALLOW THE LLC APPELLANTS TO APPEAR *PRO SE*, EVEN IF ERRONEOUS, WOULD RESULT IN A FINDING OF DEFAULT, NOT A NEW TRIAL.

LLC Appellants protest here, as they did in their motion for a new trial below, that since LLCs are required to be represented by an attorney in court, their voluntary, deliberate failure to appear via counsel entitles them to a new trial. The

[9] Appellants confusingly claim that the district court's conclusion that, in accordance with the law, developers of condominiums' limitations of the statute of limitations must be contained in an instrument separate from the purchase agreement would "revive countless stale claims." (App. Brief p.17). In fact, the only result of the district court's conclusion is to allow homeowners who have not signed away their rights in a separate instrument to bring warranty claims up to the normal statutory time limit for such claims set by the legislature. It is confusing how a claim could be "stale" when it is brought within the time limit set by statute.

district court agreed that it should have required them to appear via counsel – but noted that the result of their failure to follow the law and appear by counsel should have been that they were found in default, not that they be granted a new trial. (R.App. 72-74.) This Court reviews the district court's conclusion of law *de novo*. *Mordrow v. JP Foodservice, In.*, 656 N.W.2d 389, 393 (Minn. 1984).

A. <u>**Under Minnesota law, a corporation failing to appear via counsel is held to have defaulted and failed to appear; they are not entitled to a new trial, hearing, or proceeding.**</u>

As the district court explained, <u>**under Minnesota law, a corporation's failure to appear via counsel results in the corporation not being heard by the court.**</u> The corporation is held to have <u>defaulted</u> and not appeared at all. The corporation is not entitled to new trials, motion hearings, or reschedulings simply because they refused to follow the law and appear via counsel.

In *Nicollet Restoration*, the Minnesota Supreme Court stated that a corporation's failure to procure counsel and appear with counsel did not result in a new trial or in a continuation – rather, it resulted in a dismissal with prejudice of the corporation's case. *Nicollet Restoration, Inc. v. Turnham*, 486 N.W.2d 753, 756 (Minn. 1992.) Subsequently, in *Horizon Development Group, L.L.C. v. Cavalier Condominium Ass'n*, the Minnesota Court of Appeals stated that a defendant corporation who appeared at trial without counsel, as herein, had defaulted and could not be heard at trial. No. C6-99-260, 1999 WL 787593, *2

(Minn.App. Oct. 5, 1999). There, as here, the defendant had fired his attorney soon before trial and deliberately failed to secure alternative counsel. *Id.* at *1. The district court therefore granted default judgment to the plaintiff, and the court of appeals affirmed:

> The trial court determined Horizon would be harmed if a continuance were granted because, due to the court's busy calendar, trial could not be rescheduled for several months. The court further determined that Cavalier had to be represented by an attorney under *Nicollet Restoration,* * * * The court thereafter struck Cavalier's answer and took testimony from Horizon's property manager regarding damages.
>
> * * *
>
> Cavalier nevertheless argues *Nicollet Restoration* does not hold that default judgment is the proper remedy when a corporation appears without counsel. We disagree. In *Nicollet Restoration,* 486 N.W.2d at 756, the district court dismissed the corporation's action with prejudice. Here, a default judgment was entered against the corporation, a party defendant. The result in either case is the same: relief was granted to the non-defaulting party and denied to the defaulting party.

Id. at *2.

Several other cases (in fact, apparently all that have addressed the issue) have repeatedly and firmly held that a corporation's failure to appear without counsel results in the corporation being held to not have appeared at all. In each case, the court concluded that the corporation simply could be heard by the court. *See Save Our Creeks v. City of Brooklyn Park*, 699 N.W.2d 307, 311 (Minn. 2005) (without cure of lack of attorney signature on complaint, corporation could not be heard in court and complaint had no force); *Wells Fargo Home Mortg., Inc. v. McCarthy*, 2003 WL 21791219, *5 (Minn.App. 2003) (filings offered on behalf of a corporation by a non-attorney were appropriately excluded from consideration by the district court); *P.H.T. Systems, Inc. v. Tropical Flavors, Inc.*, No. A05-833, 2006 WL 1516022, *1 (Minn. App. May 30, 2006) (corporation held to not be present in appeal as it was no longer represented by an attorney). [10]

The reason for the Minnesota Supreme Court's conclusion in *Nicollet Restoration* is clear: if it were not the case that a corporation appearing without counsel is held to have defaulted, corporations would be able to indefinitely stop proceedings by simply refusing to appear with counsel. Or, as here, they might proceed without counsel and then attempt to void unfavorable verdicts by protesting that they were not represented by counsel.

Appellants imply that corporations are required to have counsel in order to ensure that their rights are protected, that they were prejudiced by their failure to appear via attorney, and that therefore the trial should be reversed. (App. Brief p.19.) But in fact, the rule that a corporation must be represented by an attorney in court was not instituted because of any prejudice that might result to the

[10] Appellants cite *Lake Street Federal Credit Union v. Tretsven*, No. A07-1542, 2008 WL 2732111 (Minn. Ct. App. July 15, 2008), for the proposition that they should receive a new trial because they appeared without an attorney. In *Lake Street*, however, the court did *not*, in fact, grant the unrepresented, losing corporate defendant a new trial; it simply said (as dicta) that the defendant should not have been allowed to prosecute its claims unrepresented.

corporation by virtue of not having attorney representation. It was instituted in order to protect the courts from bad actor corporate representatives (for instance, debarred attorneys representing corporations). *Nicollet Restoration*, 486 N.W.2d at 755 (stating that the rules exists "to avoid the dangers inherent in representation by those without legal training or professional discipline and standards.") There is therefore no policy basis for granting a new trial to Appellants; they have no standing to object, and have not been denied any rights.

Under Minnesota law, the failure of Appellant LLCs to be represented at trial should have resulted in a finding of default against them, and a striking of all their defenses and arguments, not a new trial. For these reasons, Respondents respectfully request that this Court uphold the determination of the district court.

B. <u>LLC Appellants' failure to procure counsel was not a technical defect, and the "cure" of a new trial is not available here.</u>

Appellants further argue that LLC Appellants' failure to appear by counsel was a "curable defect" as discussed in *Save Our Creeks*, 699 N.W.2d at 311 – the cure being a new trial. (App. Brief 19.)

But *Save Our Creeks* specifically limited the allowable cures to <u>technical defects</u> that do not prejudice the opposing party. In *Save Our Creeks*, the corporate plaintiff's complaint was not signed by an attorney, and so was not properly before the court; but the court allowed the corporation to amend its complaint to add the signature. 699 N.W.2d at 309. The court emphasized that the lack of attorney signature was curable only because it was a mere technical defect. *Save Our Creeks*, 699 N.W.2d at 310. Furthermore, the court stated that such defects are not curable if their cure would result in prejudice to the opposing party. *Id.* at 311.

Obviously, here, the defect claimed was not a minor technicality, but was representation all throughout a trial. Furthermore, substantial prejudice would result to Respondent if Respondent were required to once again litigate an entire trial simply because Appellants initially refused to procure counsel for trial. Punishing the opposing party in such a way because of a corporation's failure to procure counsel is directly contrary to the holding of *Save Our Creeks*. Additionally, in *Save Our Creeks*, the court emphasized that the rules should not give any encouragement to corporations to avoid the attorney representation rule. *Save Our Creeks*, 699 N.W.2d at 311. But if the Court were to grant a new trial in this case, LLC Appellants would actually be *rewarded* for having not obtained counsel, encouraging others to try to do the same. Again, this is directly contrary to the holding in *Save Our Creeks*.

As noted above, the purpose of the rule requiring corporations to be represented by counsel is not to ensure that corporations are not prejudiced. It is to safeguard the court from bad representation. *Nicollet Restoration*, 486 N.W.2d at

755. Corporations that do not follow the rule cannot later complain that they deserve new trials.

C. <u>Appellants have waived the issue of attorney representation, and are judicially estopped from now protesting their lack of counsel.</u>

As the district court pointed out in its order denying a new trial, Appellants, after firing their attorneys for alleged incompetence three weeks before trial, actively *asked* to go forward with trial without counsel – and now, having lost at trial, are attempting to obtain a new trial on the very ground that they were allowed to proceed without counsel. (R.App. 74.) The doctrine of judicial estoppel forbids a party from assuming inconsistent or contradictory positions during the course of a lawsuit. *See generally* 31 C.J.S. Estoppel and Waiver § 139 (1996). "[T]he purpose of judicial estoppel is to protect the integrity of the judicial process from a party who plays 'fast and loose with the courts.'" *State v. Profit*, 591 N.W.2d 451, 462 (Minn. 1999) (citing *Konstantinidis v. Chen*, 626 F.2d 933, 937 (D.C.Cir.1980)). For judicial estoppel to apply, a party's subsequent position must be clearly inconsistent with its original position. *Id.*

LLC Appellants' election to deliberately proceed without counsel – in fact, to argue to be allowed to do so – judicially estops them from making any argument later that would void the judgment. Furthermore, LLC Appellants did not raise this issue as an objection at trial. Consequently, they have waived the issue. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

Appellants argue that they did not know of the law as they were *pro se*, and therefore can not be held to have waived it; but *pro se* litigants are charged with knowledge of the law, and are generally held to the same standards as attorneys. *Heinsch v. Lot 27, Block 1 For's Beach, Section 21, Tp. 69, Range 21 (Unorganized Tp.), St. Louis County*, 399 N.W.2d 107, 109 (Minn. Ct. App. 1987); *Buckley-Wallace v. Kresien*, No. C5-96-252, 1996 WL 380585, *1 (Minn. App. July 9, 1996) (where pro se litigant failed to raise an issue in the district court, it was waived.)

For the above reasons, Respondent respectfully requests that this Court deny Appellants' motion for a new trial and, if anything, conclude that Appellants defaulted in appearing without counsel.

IV. THE DISTRICT COURT'S FINDING THAT HARDWOOD FLOORS WERE PROMISED AND NOT RECEIVED IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

Appellants argue that, because Appellants and their agents did not use the term "*solid* hardwood floors," there was insufficient evidence for the district court to conclude that the affected owners were deceived by the term "hardwood floors". (App. Brief. p.21-22.) Appellants assert that the district court should have believed Appellants' preferred witnesses, Patrick Duffy and Derek Cooper (neither of whom was admitted as an expert), instead of Respondent's expert witness and affected owners. (*Id.*)

This Court reviews the district court's findings for clear error. "'On appeal, a [district] court's findings of fact are given great deference, and shall not be set aside unless clearly erroneous.... If there is reasonable evidence to support the [district] court's findings of fact,' an appellate court will not disturb those findings." *Kutscheid v. Emerald Square Properties, Inc.*, 770 N.W.2d 529, 532 (Minn. Ct. App. 2009). "It is not this court's role 'to reconcile conflicting evidence.'" *Id.*

The district court was the factfinder in this trial. It saw and heard the witnesses, and drew its own conclusions about their credibility. As described and cited in detail in the Facts section above, the court heard from all the affected owners that they believed "hardwood floor" meant unbroken planks of wood, as this is the common usage of the term. The court also heard expert testimony that the flooring was not a hardwood floor. Finally, as the court noted, the indisputable fact of the matter is that this flooring is overwhelmingly *not* hardwood, but rather almost entirely plywood with a softwood base, with only the thinnest of hardwood veneer on top. Selling this to a consumer as a "hardwood floor" is like selling a lead chain with a thin gold plating on it as a "gold chain."[11]

The district court had far more than "reasonable" evidence upon which to base its factual conclusion that the floors at issue are not, in fact, hardwood floors, and that the affected owners were deceived by Appellants – it had overwhelming evidence. The factual findings of the district court are therefore not clearly erroneous and should not be overturned.

V. **THE DISTRICT COURT CORRECTLY CONCLUDED THAT APPELLANTS BREACHED THEIR CONTRACTS WITH THE AFFECTED OWNERS.**

Appellants claim that the district court erred in concluding that Appellants had breached their contracts (Purchase Agreements) with the affected owners because (1) the Agreements stated both that the flooring was "Award flooring, Longstrip" and that neither party relied on any representations "not expressly set forth herein," and (2) the term "solid hardwood" was not used.[12] (App. Brief. p.22.) Where a contract provision is unambiguous, the district court's determinations are reviewed *de novo*; but a district court's determination of the meaning of an ambiguous contractual provision is a finding of fact reviewed for

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[11] Furthermore, defendants can be liable under the MCFA for making "statements of fact regarding its own products… which are either literally false, or are literally true but are likely to mislead customers." *LensCrafters, Inc. v. Vision World, Inc.*, 943 F.Supp. 1481, 1488 (D.Minn. 1996).

[12] In response to this second argument, see Section IV above.

clear error. *Dorsey & Whitney LLP v. Grossman*, 749 N.W.2d 409, 417-18 (Minn.App.2008); *Trondson v. Janikula*, 458 N.W.2d 679, 682 (Minn.1990).

As an initial matter, this particular argument was never raised to the district court (let alone decided on) and is therefore waived. *Thiele*, 425 N.W.2d at 582 ("Nor may a party obtain review by raising the same general issue litigated below but under a different theory.")

Furthermore, "where a written agreement is ambiguous or incomplete, evidence of oral agreements tending to establish the intent of the parties is admissible." *Alpha Real Estate Co. of Rochester v. Delta Dental Plan of Minnesota*, 664 N.W.2d 303, 312 (Minn. 2003). Here, the contract was rendered ambiguous to the affected owners because they were told that they were receiving hardwood floors, and the term "Award flooring, Longstrip" did not indicate otherwise. Appellants told the affected owners that this meant a hardwood floor. In fact, it did not mean a hardwood floor. The district court found that the affected owners were in fact deceived as to the nature of the floors and did in fact rely on that deception. (FOFCOL ¶¶ 10-19; 20-49.) The court found that the Purchase Agreements stated that the flooring was "Award longstrip", but that the affected owners did not know that this meant an engineered flooring. Instead, they believed that it referred to hardwood flooring, because that is what Appellants told them repeatedly they would be receiving, and Appellants never provided them with any information on what Award flooring was. The district court's findings of fact are not clearly erroneous. *Kutscheid*, 770 N.W.2d at 532.

Additionally, the representations upon which the affected owners relied were *not* outside the contract – the representations were about the term "Award flooring, Longstrip," which is contained in the contract. Therefore, they were not relying on something outside the contract, but rather something within it. The district court's conclusion on breach of contract was correct and should not be reversed.

VI. <u>THE DISTRICT COURT CORRECTLY CONCLUDED THAT APPELLANTS VIOLATED THE MINNESOTA CONSUMER FRAUD ACT.</u>

Appellants argue that they did not violate the MCFA because (1) the affected owners were only told they would receive "hardwood floors" and not "*solid* hardwood floors" and therefore they could not have been deceived; and (2) the purchase agreement language said that the affected owners did not rely on any extra-contractual representations, and therefore the court could not legitimately find that they had so relied. (App. Brief p.25.)[13] This Court reviews the district court's findings of fact regarding Appellants' deception and the affected owners' reliance for clear error. *Kutscheid*. 770 N.W.2d at 532.

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[13] Appellants also make arguments based on evidence of the usage of the term "hardwood floors" that is entirely outside the record, introduced for the first time on appeal (attached to an affidavit of David Nixon dated November 5, 2009) and never before seen, let alone examined at trial, by Respondent. Respondent has moved this Court to strike that evidence as plainly outside the record and therefore will not address it substantively here.

As an initial matter, again, these particular arguments were never raised to the district court (let alone decided on) and is therefore waived. *Thiele*, 425 N.W.2d at 582. This brief will nevertheless proceed to address the arguments.

A. <u>The MFCA.</u>

The legislature enacted the MFCA in order to protect consumers from commercial fraud. The MCFA prohibits "[t]he act, use, or employment by any person of any fraud, false pretense, false promise, misrepresentation, misleading statement or deceptive practice, with the intent that others rely thereon in connection with the sale of any merchandise, whether or not any person has in fact been misled, deceived, or damaged thereby[.]" Minn. Stat. § 325F.69. Under Minn.Stat. § 325F.69, subd. 1, and Minn.Stat. § 8.31, subd. 1, subd. 3a, a private plaintiff may also recover attorneys' fees and costs in an MCFA if a public interest is at issue. *Cashman v. Allied Products Corp.*, 761 F.2d 1250, 1255 (8th Cir. 1985). The Minnesota Supreme Court has noted that the MCFA "'reflect[s] a clear legislative policy encouraging aggressive prosecution of statutory violations' and thus should be 'generally very broadly construed to enhance consumer protection.'" *Ly v. Nystrom*, 615 N.W.2d 302, 308 (Minn. 2000).

The district court found that Appellants engaged in deceptive practices regarding the flooring, and that these deceptive practices caused the affected unit owners to incur damages. (FOFCOL ¶¶114-17.) The district court concluded that Appellants therefore violated the MCFA. (*Id.*)

B. <u>The district court has concluded that the term "hardwood floors" is misleading; the word "solid" is unnecessary.</u>

As discussed in Section IV above, the district court found, based on substantial evidence, that the floors Respondent received were not "hardwood floors" and that Respondents were deceived by this term. (FOFCOL ¶ 50-53, 57.) The district court's findings of fact cannot be overturned unless they are clearly erroneous; here, they are not. *Kutscheid*, 770 N.W.2d at 532.

Furthermore, defendants can be liable under the MCFA for making "statements of fact regarding its own products... which are either literally false, or are literally true but are likely to mislead customers." *LensCrafters, Inc. v. Vision World, Inc.*, 943 F.Supp. 1481, 1488 (D.Minn. 1996). The district court explicitly concluded that even if the term "hardwood floors" might, in some industry circles, include engineered flooring, the term is misleading to normal consumers. (FOFCOL ¶¶50-53, 57.) "To people not in the business of wood flooring, the term "hardwood" is not a generic term that includes engineered or laminated floors. It refers to solid hardwood floors...The unit owners expected solid hardwood floors and were not aware of any wood flooring industry standard that refers to hardwood floors as a mix of both hardwood and softwood." (FOFCOL ¶ 52, 57.) Here, usage of the term "hardwood floors" for an engineered product is, as the district court found, misleading to consumers. (*Id.*)

C. <u>**The integration clauses in the Purchase Agreements are not dispositive of consumer reliance under Minnesota law.**</u>

Appellants argue that the clause in the Purchase Agreements stating that the signors were not acting in reliance on any representations outside the contract is dispositive of the issue of reliance. This court reviews the district court's conclusion on reliance for clear error. *Johnson Bldg. Co. v. River Bluff Development Co.*, 374 N.W.2d 187, 194 (Minn.App. 1985). Minnesota courts have concluded that:

> We could find that reliance on an oral representation was unjustifiable as a matter of law only if the written contract provision explicitly stated a fact completely contradictory to the claimed misrepresentation. ....When a promise is not in plain contradiction of a contract <u>**or, if contradictory, when it is accompanied by misrepresentations of other material facts in addition to the contradictory intent, the question of reasonable reliance is for the trier of fact.**</u>

Johnson Bldg.Co., 374 N.W.2d at 194. In that case, a plain contradiction in the terms of the contract from the oral representations was concluded to *not* result in an automatic finding of non-reliance because of other misrepresentations in the context. That is also the case here – the affected owners were deceived as to the entire meaning of the term "Award Longstrip flooring."

Furthermore, the Minnesota Supreme Court has specifically concluded that even when oral representations made by a seller are contradicted by plain, clearly understandable terms (which those at issue herein were not) of the contract the consumer signs, the consumer may still have been mislead in violation of the Minnesota Consumer Fraud Act. *Wiegand v. Walser Automotive Groups, Inc.*, 683 N.W.2d 807, 812 (Minn. 2004). As the court explained, "This is so because the Consumer Fraud Act reflects the legislature's intent 'to make it easier to sue for consumer fraud than it had been to sue for fraud at common law'.... Furthermore, one of the central purposes of the Consumer Fraud Act is to address the unequal bargaining power that is often found in consumer transactions." *Wiegand*, 683 N.W.2d at 812; *Ly v. Nystrom*, 615 N.W.2d 302, 308 (Minn.2000).

Appellants appear to believe that boilerplate language in a complicated, legalistic purchase agreement for a condominium unit is somehow conclusive, indisputable evidence of what the person signing the agreement actually knew or believed. This is not the case. Even if the integration clause controlled the parties' agreement under the contract, the MCFA is not controlled by the contract. Simply put, under Minnesota law, the integration clause in the Purchase Agreement is only one piece of evidence regarding the affected owners' reliance. It is not dispositive of the issue of reliance.

The district court had overwhelming evidence that the affected owners *were* deceived as to the nature of their floors and *did* act in reliance on that deception, including: the marketing materials and Appellants' agents, all stating that the units would have hardwood floors and none mentioning engineered flooring; the testimony of each and every affected owner that they thought hardwood floors meant actual planks of unbroken wood, and that they purchased their condominium units in that belief; the testimony of expert Katter; the fact that the floors are not, in fact, actually comprised of hardwood (apart from a thin veneer) while the affected owners were told that they were; etc. Against all this, Appellants place some of the weakest possible evidence of actual non-reliance: boilerplate language in large legal documents signed by laypersons. Under the MCFA, Appellants cannot commit fraud and then protect themselves from the consequences with such boilerplate language.

In every case that goes to trial there is factual evidence on both sides, some contradictory. That does not mean a conclusion that contradicts some of the proffered evidence is "clearly erroneous" – rather, it is a valid decision made by the factfinder. *Kutscheid*, 770 N.W.2d at 532 ("It is not this court's role 'to reconcile conflicting evidence.'") Here, the district court looked at all the presented evidence and drew the obvious conclusion: the affected owners did in fact rely on the representations of hardwood flooring. The district court did not clearly err and therefore should not be reversed.

VII. THE DISTRICT COURT CORRECTLY PIERCED THE CORPORATE VEIL.

Appellants argue that the corporate veil was inappropriately pierced because (1) the corporations were not "a sham" (though Appellants deliberately avoid arguing that failing to pierce the veil would not work an injustice), (2) there was no comingling of funds or disregard of the corporate entities. (App. Brief p.29-31.) This Court reviews the decision of the district court to pierce the corporate veil under an abuse of discretion standard, because piercing the corporate veil is an equitable remedy. *Roepke v. Western Nat'l Mut. Ins. Co.*, 302 N.W.2d 350, 352 (Minn.1981); *Edin v. Josten's, Inc.*, 343 N.W.2d 691, 693 (Minn.App.1984). An abuse of discretion is only shown if the court disregarded the facts or applicable principles of equity.

These arguments were never raised to the district court (let alone decided on) and are therefore waived. *Thiele*, 425 N.W.2d at 582. This brief will nevertheless proceed to address the arguments.

A. Piercing of the corporate veil was appropriate under Nevada law.

The district court's decision to pierce the corporate veil is appropriate under Nevada law. N.R.S. §78.747 is a fairly new Nevada law, passed in 2001, codifying

Nevada's common law adaption of the doctrine for piercing the corporate veil. It provides in relevant part:

> a1. 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.

N.R.S. 78.747. The courts have held that the statute incorporates Nevada's common law factors for determining alter ego status, which are: (1) commingling of funds; (2) undercapitalization; (3) unauthorized diversion of funds; (4) treatment of corporate assets as the individual's own; and (5) failure to observe corporate formalities. *In re Giampietro*, 317 B.R. 841, 846 (Bkrtcy.D.Nev. 2004); *LFC Marketing Group, Inc. v. Loomis*, 116 Nev. 896, 904, 8 P.3d 841, 846-47 (Nev. 2000). Though not conclusive, these factors may indicate the existence of an alter ego relationship. *Id.*

Appellants are alter egos of one another under Nevada law. The first factor under N.R.S. 78.474 is whether "The corporation is influenced and governed by the stockholder, director or officer." The record (in particular, the whole of Nixon's testimony) shows that Nixon completely governed the corporations, asking no one's permission to act on their behalf, transferring their money between their accounts and his own freely, etc. (FOFCOL ¶ 122; 2/26/09 Tr. 13-52.)

The second factor is whether "[t]here is such unity of interest and ownership that the corporation and the stockholder, director or officer are inseparable from each other." In this case, the corporations had no real identity beyond that of Nixon. They were created, owned, operated, governed, and wound up by him. He controlled their money and spoke for them. (FOFCOL ¶ 122; 2/26/09 Tr. 13-69.)

The third factor is whether "Adherence to the corporate fiction of a separate entity would sanction fraud or promote a manifest injustice." Here, as the district court specifically found, refusing to pierce the veil would leave Respondents with no means of recovery for the fraud perpetrated on them. (FOFCOL ¶ 122.) Nixon has singlehandedly transferred all the money and assets out of the companies and into his own bank account, despite the remaining potential warranty claims against the companies. (*Id.*)

Regarding the five additional common law factors listed above, first, Appellants do not bother to try to argue that Nixon ever observed any corporate formalities with regard to his LLCs; he did not. Second, the district court concluded the LLCs were undercapitalized because Nixon removed all their money into his own accounts as soon as any such money came in, leaving nothing to satisfy any warranty claims against the LLCs.[14] (FOFCOL ¶ 122; 2/26/09 Tr. 13-69.) Third, the district court concluded that Nixon's and the LLC's funds were commingled in that Nixon transferred them freely between his and his LLC's accounts as he saw fit; the accounts were merely a smokescreen he obviously did not take at all seriously (for example, in arbitrarily and unilaterally "waiving" the "promissory note interest" that was due to 301 Clifton). (*Id.*; 2/26/09 Tr. 37.) Fourth, the fund transfers were never formally "authorized" at the time they took place; Nixon simply performed them at will, and treated all company assets as his own. (FOFCOL ¶ 68-71, 122.) Fifth, as the record shows, Nixon clearly considered and treated the assets of the corporation, including the units, money, bank accounts, and car wash space as his own, to transfer and use as he saw fit, without permission from any third party. (FOFCOL ¶ 122; 2/26/09 Tr. 13-69.)

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[14] Appellants claim that the LLCs were not undercapitalized because Nixon provided for re-transfer back to 301 Clifton of a unit to cover its warranty claims. But he actually sold the final Clifton Place unit in December 2007 and immediately transferred the money to himself, leaving nothing for warranty claims. He claims now that he thought the warranty claims had expired, but the law on this is plain, and his failure to consider it does not change the fact that the LLCs WERE in fact undercapitalized. <u>Undercapitalization does not hinge on whether the LLC's owner *thinks* the LLC is undercapitalized, but whether it *is* undercapitalized.</u>

Nixon's shell games with his corporations are illustrated most clearly by his various asset transfers between the companies and himself. He "sold" all the assets of 301 Clifton – 11 condominium units and 19 garage spaces with a market value of over $5 million – to Clifton Properties for $500 according to the warranty deed. (FOFCOL ¶ 68-71). A promissory note for $1 million, executed a year earlier, that Nixon after-the-fact declared was the *real* price of the units was satisfied by the convenient expedient of computer-transferring $999,999.99 from his personal bank account to Clifton Properties', then from Clifton Properties' to 301 Clifton's, then from 301 Clifton's back to his own (and another corporation he owned). (FOFCOL ¶ 68-77.) Nixon "waived" the interest on the note:

> Q: The promissory note required an interest payment of five percent to 301 Clifton Place, correct?
>
> Nixon: Correct.
>
> Q: That wasn't made, correct?
>
> Nixon: Yeah. We waived that.
>
> Q: You waived that. You waived the asset of 301 Clifton Place? Who made that decision, you?
>
> Nixon: Yes.

(2/26/09 Tr. 37.) Nixon later characterized the transfer from his account to Clifton Properties' as a "loan." This "loan" was, of course, never "repaid." After the fact, Nixon labeled the transfer back to his account as a "distribution," but none of the "distribution" went to the other putative owner of 301 Clifton. The district court found that these transfers, particularly in their timing, were indicative of a sham arrangement. "By the close of business on December 27, 2005, 301 Clifton Place, LLC's bank account had a zero balance." (FOFCOL ¶ 73.)

Similarly, when Clifton Properties sold the transferred units in 2006, as soon as each sale was completed, Nixon immediately transferred the sale amounts to his own bank accounts, leaving Clifton Properties penniless. (FOFCOL ¶78-93.)

In *Frank McCleary Cattle Co. v. Sewel, 317 P.2d 957, 959 (Nev. 1957), overruled on other grounds, Callie v. Bowling,* 160 P.3d 878, 880 (Nev. 2007)*l*, the Nevada court concluded that two businesses were alter egos of one another under the following circumstances:

> The evidence establishes the following facts: The action below was based upon an agreement entered into between respondents and the timber company on February 14, 1952. The cattle company was incorporated February 9, 1952. In December 1952 and obligation of the timber company under its agreement with respondents in the sum of approximately $25,000 was paid by the cattle company. In March, 1956 the charter of the timber company, both in Washington, the state of its domicil [sic], and in Nevada, was revoked by official state action. Prior to that date all the assets of the timber company had been transferred to the cattle company. The value of the assets so transferred amounted to several million dollars, and the transfer was for tax reasons. All stock in each corporation was owned by Frank McCleary and Catherine McCleary. As to each stockholder the number of shares held in the cattle company was the same as the number held in the timber company. Frank McCleary was president of both corporations. Costs of the litigation with the timber company were borne by the cattle company.

> There can be no question but that, under these circumstances, the trial court was justified in disregarding the corporate fiction and in holding the cattle company to be the alter ego of the timber company.

317 P.2d at 959. The situation here is nearly identical. Both corporations had the same owner, incorporator and President – Nixon. 301 Clifton "sold" its assets to Clifton Properties for a ridiculously small sum and a sham transaction, and 301 Clifton was simultaneously wound up. The Nevada court noted that the transfer at issue, like the ones herein, were performed "for tax reasons." (FOFCOL ¶74.) As Appellants admit that the LLCs have no assets and have not had assets for a long time, Nixon has obviously been paying the LLCs' legal bills. He paid Clifton Properties' "promissory note" obligation to 301 Clifton himself, and never had Clifton Properties pay him back.

Because the two corporations were owned, operated, and manipulated by Nixon to the same purpose, and without independent operations or interest, the first two prongs of N.R.S. § 78.747 are satisfied. And as the district court found, the fact that Nixon deliberately shifted the funds that should have remained with 301 Clifton in order to satisfy warranty and other claims into Nixon's own pocket shows that "Adherence to the corporate fiction of a separate entity would sanction fraud or promote a manifest injustice." (FOFCOL ¶ 122.) The district court did not abuse its discretion in concluding that Appellants were alter egos of one another.

B. **<u>There is no requirement in Nevada alter ego law that the corporation be a "sham", but even if it were, Appellant LLCs were shams.</u>**

Appellant claims that the district court abused its discretion in concluding that Appellants cannot be alter egos because the LLCS were not "shams." As shown above, the word "sham" appears nowhere in the Nevada alter ago statute or Nevada common law alter ego factors. Furthermore, the Nevada courts have emphasized that "[t]here is no litmus test for determining when the corporate fiction should be disregarded; the result depends on the circumstances of each case." *Id.* While it appears that some Nevada courts indicated that it was necessary or desirable for a corporation to be a "sham" to warrant piercing of the veil, under the new statute, this is not the case. As discussed by *Brown v. Kinross Gold U.S.A., Inc.*, 531 F.Supp.2d 1234, 1243 (D.Nev. 2008):

> The third requirement for application of the alter ego doctrine [under N.R.S. 78.747] requires that adherence to that corporate form would perpetuate a fraud or injustice. *Mallard Auto. Group, Ltd.*, 153 F.Supp.2d at 1216. It does not require fraud, or that a corporation was set up as a sham at its inception. *Id.; Polaris Indus. Corp.*, 747 P.2d at 886.

See also Polaris Indus. Corp. v. Kaplan, 103 Nev. 598, 601, 747 P.2d 884, 886 (Nev. 1987) ("It is not necessary that the plaintiff prove actual fraud. It is enough if the recognition of the two entities as separate would result in an injustice.") In effect, the Nevada law (like Minnesota law) focuses on whether inequity would result if the veil were not pierced – which is natural, as piercing the veil is an equitable doctrine. *Roepke*, 302 N.W.2d at 352.

Even if Nevada did require that the LLCs be "shams" to pierce the veil, they clearly were. It is difficult to conceive of actions more indicative of a sham than, for example, Nixon's fiction "payment" of the promissory note issued from Clifton Properties to 301 Clifton "in exchange" for the $5,000,000 in 301 Clifton assets, described above. Similarly, Nixon's immediate transfer of all proceeds of unit sales from Clifton Properties' account to his own personal bank account showed that the Clifton Properties account was, to him, nothing more than a sham.. As the district court found, "the timing of the [monetary] transfers and leaving the LLCs penniless in the interim shows that Defendant Nixon was using the LLCs as a corporate fiction for his personal business." (FOFCOL ¶ 112.)

C. <u>Nixon clearly commingled his funds with those of the LLCs.</u>

Appellants claim that they could not be alter egos because they had separate bank accounts, and therefore the district court abused its discretion in concluding that Appellants' funds were "commingled." But this is semantics. As noted above, that separation was never regarded by Nixon. He simply transferred money between the accounts whenever he saw fit, labeling this after-the-fact as a "distribution" or a "loan," and arbitrarily forgiving interest owed to one corporation by the other. Each time Clifton Properties sold a condominium, he immediately transferred the proceeds into his own bank account, leaving Clifton Properties without funds. To satisfy the "promissory note" from Clifton Properties to 301 Clifton, he simply transferred money from his account, to 301 Clifton's, to Clifton Properties, all in one day. This is *de facto* commingling.

The district court did not abuse its discretion but rather concluded appropriately that Appellants were alter egos under Nevada law.

VIII. <u>THE DISTRICT COURT DID NOT ERR IN ENTERING JUDGMENT AGAINST CLIFTON PROPERTIES.</u>

Appellants argue that the district court could not enter judgment against Clifton Properties because while the district court found that both Clifton Properties and 301 Clifton were alter egos of Nixon, it did not explicitly find that Clifton Properties and 301 Clifton were alter egos of *one another*.

This hypertechnical argument violates the principles of basic logic. The district court explicitly found that both LLCs were essentially shams used by Nixon to conduct his personal business. As the term "alter ego" suggests, both LLCs were actually Nixon himself. The district court concluded that all three Appellants were in fact the same entity: Nixon, just moving his money from one bank account to the other. Therefore, entry of judgment against Clifton Properties was proper.

IX. APPELLANTS WAIVED THEIR RIGHT TO (AND INDEED NEVER ASKED FOR) A JURY TRIAL, AND THEREFORE IT WAS NOT ERROR FOR THE DISTRICT COURT TO HOLD A BENCH TRIAL.

Appellants argue that the district court erred in denying Appellants a jury trial. (App. Brief p.32-33.) This is a very strange argument given that Appellants were never denied a jury trial at all. Appellants stipulated to a waiver of a jury trial, as the court noted in its order denying Appellants' motion for a new trial. (R.App. 74) Appellants never objected to a bench trial throughout the entirety of the trial or in any motion papers previously. The district court made no ruling denying Appellants a jury trial; the matter was never raised.

Because this argument was never raised to the court in any form below at trial, it is waived on appeal. *Thiele*, 425 N.W.2d at 582. A different outcome would give parties an incentive to stipulate to a bench trial, and then, if they did not like the outcome, to protest the lack of a jury trial and automatically obtain a new trial.[15]

X. NIXON WAIVED HIS OBJECTIONS TO SERVICE BY ACTIVELY PARTICIPATING IN THE CASE FOR SOME TIME BEFORE RAISING ANY OBJECTIONS TO SERVICE.

Appellants next argue that the district court lacked jurisdiction over Nixon because he was never properly served. (App. Brief p. 34-35.)

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15 Again, Appellants bring forth new "evidence", including the aforementioned brand-new affidavit of David Nixon, to support their argument here. This "evidence" was never part of the record and Respondents have moved to strike it. Respondents therefore will not respond to the "evidence" here.

A party may waive a defense of insufficient service of process by submitting itself to the court's jurisdiction and affirmatively invoking the court's power. *Shamrock Development, Inc. v. Smith*, 754 N.W.2d 377, 381 (Minn. 2008). Simple participation in the litigation does not, standing alone, amount to waiver of a jurisdictional defense; rather, 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. *Id.* A party may put forward other defenses at the same time as an insufficiency of service defense without waiving the defense, but they cannot assert other defenses *first* and *later* assert the insufficiency of service defense. *Id.* Their assertion of other defenses in the case first subjects them to the court's jurisdiction and waives the insufficiency of process defense. *Id.*

Here, Appellants submitted themselves to the jurisdiction of this Court by seeking affirmative relief invoking the power of this Court long before they asserted any insufficiency of process defense.

Appellants attempt to downplay Nixon's active participation in the case, but in fact, as the district court found, on February 18, 2008, three days after Respondent sent the Nixon and Clifton Properties the Amended Complaint naming them as defendants and motion documents for a TRO via email and mail, Respondent's counsel received an email from Nixon attaching a letter, dated

February 19, 2008, addressed to the Court. The email requested that Respondent's counsel send Appellants' two letters to the court to be read into the record as a defense to the motion for a TRO. (R.App. 37-39.) Respondent's counsel complied. Nixon also personally filed this second letter with the Court. Nixon's February 19, 2008 letter asserts various defenses to and arguments against the TRO motion, and states, *inter alia*, "**I, once again, wish to have my original letter dated February 12, 2008 read into the record for this hearing in addition to this letter dated February 19, 2008 collectively as evidence for the Defendants in this Matter**." (R.App 60.) This letter identified the responding defendants as 301 Clifton, Clifton Properties, and David H. Nixon. (*Id.*) As requested by Nixon, both letters were read into the record during the hearing. (*Id.*; R.App. 43-45.)

Furthermore, on or about February 27, 2008, defendants Clifton Properties, 301 Clifton Place and David Nixon submitted "Defendants Motion to Delay Hearing" to the court requesting a continuance of the preliminary injunction hearing until May 2008. (R.App. 44, 33-34.) The motion states that "I [Nixon] wish to defend myself and my affiliated Defendants in this matter and do not intend to retain outside legal representation. The additional time is necessary for me to return to the country and too properly prepare for this hearing." (*Id.*)

As the district court found, these documents sought affirmative relief on the merits – two defending against the TRO motion on the merits, and one requesting a delay of the TRO – submitting him to the court's jurisdiction. Furthermore, none of these documents protested service or jurisdiction. Consequently Nixon waived his objection to service of process under Minnesota law. Appellants argue that Nixon, being *pro se*, did not know of the defense or that he was waiving it, and therefore he could not have waived it. But *pro se* litigants are generally held to the same standards as attorneys, and cannot avoid waiver by claiming to have not known of a legal argument. *Heinsch*, 399 N.W.2d at 109; *Buckley-Wallace*, 1996 WL 380585, *1. The district court correctly held that Nixon cannot now complain of insufficiency of process.

XI. THE DISTRICT COURT APPROPRIATELY AWARDED ATTORNEY'S FEES.

Appellant protests that the district court did not perform sufficient analysis of Respondent's attorney's fees before granting them, and therefore the attorney's fees were improperly granted. (App. Brief 36-37.) This court will reverse a district court's award of attorney fees only if the award constitutes an abuse of the district court's broad discretion. *Mutual Service Cas. Ins. Co. v. Midway Massage, Inc.*, 695 N.W.2d 138, 143 (Minn.App. 2005).

When Respondent presented its attorney's fees to the court, Appellant made absolutely no opposition to Respondent's presented attorney's fees amounts. Appellants did not argue the amounts were inappropriate or too high (in fact, Appellants *still* do not make any such argument.) Appellants have waived this argument by their failure to raise it in the district court. *Thiele*, 425 N.W.2d at 582.

Furthermore, the evidence of Respondent's attorney's fees that was before the court includes an extremely detailed record of all time and cost entries on the case, plus an affidavit of Respondent's attorney stating that this time was reasonably expended on the litigation, and a reasonable hourly rate, as required by law. (Affidavit of Thomas Forker attached to Respondent's Motion for Attorney's Fees.) The fees were entirely reasonable in consideration of the large amount of work required on the case, including several motions brought by Defendants, many witnesses, experts and a full trial. The court so found, and specifically stated that (1) it had reviewed the fees submitted (FOFCOL ¶135) and (2) the fees were reasonable (FOFCOL ¶133, 136).

Furthermore, the district court, far from simply rubber-stamping Respondent's attorney's fees affidavit, explicitly examined and reduced it, removing all charges associated with (1) the car wash dispute; (2) the KA settlement; and (3) the attorney's lien filed by Appellants' former attorney. (FOFCOL ¶¶133-137.)

While the district court did not specifically go through the factors of the lodestar method in its order, its order indicates that it obviously had considered the factors, and the order reflects the relevant factors (that the fees and time expended were reasonable). The district court's determination of attorney's fees was therefore not an abuse of discretion, and remand to determine attorney's fees is inappropriate.

XII. THE DISTRICT COURT APPROPRIATELY REFUSED TO ORDER DISCLOSURE OF THE IRRELEVANT AND CONFIDENTIAL SETTLEMENT AGREEMENT BETWEEN RESPONDENT AND THE GENERAL CONTRACTOR.

Finally, Appellants argue that the district court's refusal to force Respondent to disclose Respondent's confidential settlement agreement with the general contractor, Krause Anderson ("KA"), was reversible error. (App. Brief p.38-39.) Appellants argue that KA may have paid for some flooring repairs and that that amount should be deducted from Respondent's recovery. (*Id.*) A district court has considerable discretion in granting or denying discovery requests, and its decision will not be reversed absent a clear abuse of discretion. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003).

But, as the district court twice explained to Appellants, KA was not responsible for the claims at issue here; Appellants were. In the succinct words of the district court in addressing this argument in its denial of a new trial: "The settlement agreement between [KA] and [Respondent] is not relevant as to the [Appellants'] defense. [KA] was not responsible for the alleged fraud and the settlement between the parties had nothing to do with [Appellants]." (R.App. 75.) Appellants, not KA, made the representations that the affected owners were receiving hardwood floors, and Appellants, not KA, selected the flooring that was actually used. KA merely installed the flooring. Appellants, not KA, must pay for their own fraud and warranty violations.

Furthermore, the remedy for the fraud is not repair, but rather replacement of the engineered flooring with hardwood flooring. Appellant's argument that repair of installation problems (by KA) and then replacement years later (by Appellants) constitutes double recovery is inaccurate – several years have passed since the settlement with KA and the affected owners still have not received the replacement flooring. Any flooring repairs performed by KA have been necessary to prevent the affected owners from living with flooring defects for all those years.

Finally, even if the court should have allowed disclosure of the settlement agreement, the only issue that would bear upon is damages, and therefore remand should only be as to that issue, not as to liability. But as the district court's conclusion was not an abuse of discretion, it certainly does not constitute grounds for reversal.

CONCLUSION

The District Court did not err in its conclusions at trial. For the foregoing reasons, Respondent respectfully requests that this Court affirm the Findings of Fact, Conclusions of Law and Order for Judgment granted by the District Court.

Dated: December 7, 2009

Respectfully Submitted,

M. T. Fabyanske (#28022)
Thomas A. Forker (#246682)
Hannah R. Stein (#0345908)
800 LaSalle Avenue, Suite 1900
Minneapolis, MN 55402
(612) 359-7600
(612) 359-7602
ATTORNEYS FOR RESPONDENT 301
CLIFTON PLACE CONDOMINIUM
ASSOCIATION

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The brief was prepared using Microsoft Word 2003, utilizes 14 point type, a Times New Roman font and contains 12,519 words.

Dated: December 7, 2009

FABYANSKE, WESTRA, HART & THOMSON, P.A.

M.T. Fabyanske (#28022)
Thomas A. Forker (#246682)
Hannah R. Stein (#0345908)
800 LaSalle Avenue, Suite 1900
Minneapolis, MN 55402
(612) 359-7600
(612) 359-7602
ATTORNEYS FOR RESPONDENT 301 CLIFTON PLACE CONDOMINIUM ASSOCIATION