

APPELLATE COURT CASE NUMBERS A05-0800 and 05-1533
STATE OF MINNESOTA
IN COURT OF APPEALS

Lake Superior Center Authority, a public corporation,
and Lake Superior Center, a non-profit corporation,
d/b/a Great Lakes Aquarium,

Appellants,

vs.

Hammel, Green & Abrahamson, Inc.,
defendant and third-party plaintiff,

Respondent,

and

Rutherford & Chekene, a California corporation,
defendant and third-party plaintiff,

Respondent,

vs.

Melander, Melander & Schilling, Inc., Adolphson &
Peterson, Inc./Johnson Wilson Construction Management,
Inc., a joint venture, LLP, Koosmann Project
Management Services, Inc., a Minnesota corporation,
American Engineering Testing, Inc. and
Krech/Ojard & Associates, P.A.,

Third-Party Defendants,

and

Rutherford & Chekene, a California corporation,

Defendant and Fourth-Party Plaintiff,

vs.

Concrete Restorers, Inc.,

Fourth-Party Defendant.

APPELLANTS' BRIEF

**FRYBERGER, BUCHANAN, SMITH &
FREDERICK, P.A.**
By Stephanie A. Ball
Attorney for Appellants Lake Superior
Center Authority and Lake Superior Center
302 West Superior Street
700 Lonsdale Building
Duluth, MN 55802
(218) 722-0861

COLEMAN, HULL & VAN VLIET, PLLP
By Jeffrey W. Coleman
Attorney for Respondent Rutherford &
Chekene, Inc.
5800 Normandale Lake Boulevard
Suite 2110
Minneapolis, MN 55437
(952) 841-0001
Attorney Registration No. 157922

CLAPP & ERICKSON
By Donald Clapp
Attorney for Respondent Hammel,
Green and Abrahamson, Inc.
386 North Wabasha Street, No. 1450
St. Paul, MN 55102
(651) 223-8100
Attorney Registration No. 17000

**ARTHUR, CHAPMAN, KETTERING,
SMETAK & PIKALA, P.A.**
By Robert W. Kettering
Attorney for Respondent Melander,
Melander & Schilling Architects, Inc.
500 Young Quinlan Building
81 South Ninth Street
Minneapolis, MN 55402-3214
(612) 339-3500
Attorney Registration No. 55499

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Statement of the Case	1
Legal Issues	10
Statement of Facts	11
Argument	25
I. <u>THE COLLUSIVE SETTLEMENT AGREEMENTS PREJUDICED THE RIGHTS OF NON-AGREEING PARTIES, DISTORTED THE ADVERSARY PROCESS, ARE VOID AS AGAINST PUBLIC POLICY AND CONSTITUTE IRREGULARITIES IN THE PROCEEDINGS OF THE COURT AND PREVAILING PARTIES WARRANTING A NEW TRIAL.</u>	25
A. Based on HGA’s Representation to the Court that HGA has Settled with Third-Party Defendants on a <i>Pierringer</i> Basis, Third-Party Defendants are Dismissed and do not Actively Participate in Trial and Defend Claims Against Them.	27
B. The Collusive Settlement Agreements Distorted the Adversary Process and Warrant a New Trial	28
C. The Trial Court Erred by Limiting Cross Examination of Cooperating Witnesses Based on the Settlement Agreements	36
II. <u>THE JURY’S SPECIAL VERDICT FINDINGS ARE AGAINST THE OVERWHELMING EVIDENCE</u>	39
III. <u>THE PREVAILING PARTIES ENGAGED IN PREJUDICIAL MISCONDUCT WARRANTING A NEW TRIAL</u>	43
A. Defense Counsel Engaged in Prejudicial Misconduct by Making Testimonial Assertions and Asking Questions Calculated to Prejudice LSC and LSCA in the Eyes of the Jury	44
B. Defense Counsel’s Closing Argument Incorporating Matters	

	Which Were Not a Matter of Record and Calculated to Envoke the Passion and Prejudice of the Jury, Constitutes Misconduct, Intentional in Nature and Warrants a New Trial	46
C.	Defense Counsel’s Communication With the Jury Regarding His Appraisal of the Evidence is Presumptively Prejudicial and Warrants a New Trial	52
D.	LSC and LSCA Are Entitled to a New Trial Based on The Surprise Testimony of Cooperating Witnesses Craig Kronholm and David Krech ...	53
IV.	<u>ERRORS OF LAW OCCURRED AT TRIAL AND WARRANT A NEW TRIAL.</u>	55
A.	Duluth Ready Mix Should Have Been Included as an Absent Party on the Special Verdict Form	55
B.	Helen Fehr’s Testimony Regarding Budget For Repairs Was Inadmissible and Lacking in Foundation	56
C.	An Engineering Firm is Liable in Indemnity for Defective Plans and Specifications, Zontelli & Sons v. City of Nashwauk, 353 N.W.2d 600 (Minn. 1985) and a Jury Instruction Regarding an Engineering Firm’s Liability In Indemnity Should Have Been Submitted to the Jury to Counter a Defense Expert’s Misstatement of the Law	57
D.	Evidence and Testimonial Assertions Concerning Marcy’s Reputation, Prior Work History, Work Other Than On the Isle Royale Tank, Alleged Statements Made by Marcy to AET Regarding Eclipse and Activities Claimed to be the Responsibility of Marcy Should Have Been Excluded and the Admission of Such Evidence was Prejudicial to LSC and LSCA Warranting a New Trial	58
E.	The Computer Animation Introduced By R&C as Part of Its Claim That Marcy was Liable for Problems in Placement Was Lacking in Foundation and Otherwise Inadmissible.	60
V.	<u>THE TRIAL COURT ERRED BY DECLINING TO GRANT POST-TRIAL RELIEF IN CONNECTION WITH THE JURY TRIAL INCLUDING AMENDMENT OF THE PLEADINGS IN ACCORDANCE WITH RULES 14.01 AND 15.02 OF THE MINNESOTA RULES OF CIVIL</u>	

PROCEDURE AND DETERMINING HGA IS LIABLE IN INDEMNITY FOR THE FAULT ALLOCATION TO AET 62

VI. THE FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER FOR JUDGMENT AND JUDGMENT RELATING TO THE FEE DISPUTE ARE CLEARLY ERRONEOUS AND SHOULD BE REVERSED 65

VII. THE TRIAL COURT ADOPTED A FLAWED TAXATION ANALYSIS AND THE AWARD OF COSTS AND DISBURSEMENTS IS ERRONEOUS AS A MATTER OF LAW 65

A. HGA and R&C Failed to Comply With the Rules of Civil Procedure and Other Rules Applicable to the Adversary Process and Have Forfeited Their Right to Tax Costs and Disbursements 66

B. Taxation of Expert Witness Fees is Governed by Rule 127 of the General Rules of Practice for the District Courts and Fees May Only be Awarded for Actual Trial Testimony of Experts 66

Conclusion 73

TABLE OF AUTHORITIES

STATUTES	Page
Minn. Stat. § 357.25	67
Minn. Stat. § 549.04	66
Minn. Stat. § 549.211	70
RULES	
Minn. Gen. R. Prac. 127	passim
Minn. R. Civ. P. 14.01	63, 64
Minn. R. Civ. P. 15.02	63, 64
Minn. R. Civ. P. 54	66
Minn. R. Civ. P. 59.01	28,53,55
Minn. R. Evid. 804	60
Minn. R. Prof. Cond. 3.4	32, 33
CASES	
<i>Abbott Laboratories v. Granite State Ins. Co.</i> , 104 F.R.D. 42 (N.D. Ill. 1984)	69
<i>American Home Assur. Co. v. Major Tool and Mach , Inc.</i> , 767 F.2d 446 (8 th Cir. 1985)	26
<i>Boas Box Co. v. Proper Folding Box Corp</i> , 55 F.R.D. 79 (E.D.N.Y. 1971)	69
<i>Bush v. Havir</i> , 234 Minn. 397, 68 N.W.2d 220 (1955)	45
<i>Daniel v. Penrod Drilling Co.</i> , 393 F.Supp. 1056 (E.D. La. 1975)	31
<i>Edgewater Motels, Inc. v. Gatzke</i> , 277 N.W.2d 11, 14 (Minn. 1979)	39
<i>Ellwein v. Holmes</i> , 234 Minn. 397, 68 N.W.2d 220 (1955)	45
<i>Faber v. Roelofs</i> , 298 Minn. 16, 212 N.W.2d 856 (1973)	32

<i>Fischer v. Mart,</i> 241 N.W.2d 320 (Minn. 1976)	51
<i>Frey v. Snelgrove,</i> 269 N.W.2d 918 (Minn. 1978)	passim
<i>Frost-Benco Electric Association v. Minnesota Public Utilities Commission,</i> 358 N.W.2d 639 (Minn. 1984)	63, 65
<i>Griggs, Cooper & Co, Inc. v. Lauer's, Inc.,</i> 264 Minn. 338, 119 N.W.2d 850 (1962)	72
<i>Halla Nursery, Inc. v. Baumann-Furrie & Co.,</i> 454 N.W.2d 905 (Minn. 1990)	26
<i>Hauenstein v. Loctite Corp.,</i> 347 N.W.2d 272, 275 (Minn. 1984)	39
<i>Hoffman v. Wiltschek,</i> 411 N.W.2d 923 (Minn. App. 1987)	30
<i>Jack Frost, Inc. v Engineered Building Components, Inc.,</i> 304 N.W.2d 346 (Minn. 1981)	64
<i>Johnson v. Moberg,</i> 334 N.W.2d 411 (Minn. 1983)	28, 38
<i>Lamont v. Independent School District No. 395 of Waterville,</i> 278 Minn. 291, 154 N.W.2d 188 (1967) ..	52
<i>Larson v. Belzer Clinic,</i> 292 Minn. 301, 195 N.W.2d 416 (1972)	47
<i>Lockett v. Hellenic Sea Transports, Ltd ,</i> 60 F.R.D. 469 (Pa. 1973)	68
<i>Magistad v. Potter,</i> 227 Minn. 570, 36 N.W.2d 400 (1949)	47
<i>New York Trust Co. v. Eisner,</i> 256 U.S. 345, 349 (1921)	68

<i>Pacific Indem Co v Thompson-Yaeger, Inc.</i> , 260 N.W.2d 548 (Minn. 1977)	28, 32, 38
<i>Patton v Minneapolis St Ry Co.</i> , 247 Minn. 368, 77 N.W.2d 433 (1956)	44
<i>Perkins v Hegg</i> , 212 Minn. 377, 3 N.W.2d 671 (1942)	32
<i>Peterson v. Little Giant-Glenco Portable Elevator Div. of Dynamics Corp. of America</i> , 366 N.W.2d 111 (Minn. App. 1985)	38
<i>Pierringer v. Hoger</i> , 21 Wis.2d 182, 124 N.W.2d 106 (1963)	passim
<i>Reese v. Ross & Ross Auctioneers, Inc.</i> , 276 Minn. 67, 149 N.W.2d 16 (1967)	43
<i>Riewe v. Arnesen</i> , 381 N.W.2d 448 (Minn. App. 1986)	38
<i>Schmidt v. Clothier</i> , 338 N.W.2d 256 (Minn. 1983)	28
<i>Sievert v. First Nat. Bank in Lakefield</i> , 358 N.W.2d 409 (Minn. Ct. App. 1984)	43, 44
<i>State v. Boice</i> , 157 Minn. 374, 196 N.W. 483 (1923)	49
<i>State v. DeZeler</i> , 230 Minn. 39, 46-47, 41 N.W.2d 313 (1950)	61, 62
<i>State v. Haney</i> , 219 Minn. 518, 18 N.W.2d 315 (1945)	44
<i>State v Silvers</i> , 230 Minn. 12,40 N.W.2d 630 (1950)	44
<i>State v. Stewart</i> , 643 N.W.2d 281 (Minn. 2002)	62

Wild v. Rarig,
302 Minn. 419, 234 N.W.2d 775 (1975) 43, 44

Zontelli & Sons, Inc. v City of Nashwauk,
373 N.W.2d 744 (Minn. 1985) 57

SECONDARY AUTHORITIES

Page

Knapp, Keeping the Pierringer Promise: Fair Settlements and Fair
Trials, 20 Wm. Mitchell L.Rev.1(1994) 31

Herr & Fett, 3A Minnesota Practice: General Rules of Practice Annotated (ed. 1994) 67

Simonett, Release of Joint Tortfeasors: Use of the Pierringer Release in
Minnesota, 3 Wm. Mitchell L. Rev. 1(1977) 30

STATEMENT OF THE CASE

This appeal involves issues which are fundamental to preserving the integrity of the adversary process and are of importance to all civil litigants: the propriety of settlement agreements which include anti-cooperation clauses and promote collusion and disclosure of material facts between only the settling parties and outside of the discovery process, prejudicing the rights of non-settling parties and distorting the adversary process, misconduct of prevailing parties jeopardizing a litigant's right to a fair trial and the proper standard for taxation of costs and disbursements, including recognition of Rule 127 of the General Rules of Practice for the District Courts governing expert witness fees and prohibiting an award for expert witness fees for other than actual trial testimony.

The trial of this action proceeded based on collusive settlement agreements which subverted the adversary process at all stages and prejudiced the rights of litigants who were not parties to the settlement agreements. Witnesses agreeing to cooperate with the defense and to refrain from cooperating with others secretly met with the defense and shared material facts not disclosed during discovery and contrary to discovery which subsequently became the subject of trial testimony. Where, as in the present case, settlement agreements prejudice the rights of non-settling parties and, more importantly, undermine the integrity of the adversary process, such settlement agreements are invalid under Minnesota law and proceeding to trial based on the settlement agreements deprives the non-agreeing parties of a fair trial. The collusive settlement agreements, alone and in combination with the misconduct of prevailing parties and other errors which occurred at trial, compromised the adversary process and, as a result, LSC and LSC are entitled to a new trial.

This appeal also concerns the proper standard for taxation of costs and disbursements. Taxation is governed by a set of rules, including Rule 127 of the General Rules of Practice for the

District Courts. Rule 127 governs taxation of expert witness fees and prohibits an award of expert witness fees for preparation time. The trial court, departing from the applicable rules governing taxation and adopting a flawed taxation analysis, provided for an extraordinary award of costs and disbursements, including expert witness fees greater than authorized by Rule 127. Because the award is not authorized by applicable rules governing taxation, the award should be vacated. While the award is adverse to specific litigants and reversible on that basis alone, appellate relief is also warranted because the award establishes an erroneous precedent for taxation which will chill litigants from pursuing meritorious claims

The litigation which is the subject of this appeal involved claims by LSC and LSCA against HGA and R&C arising out of design of the Isle Royale tank, the largest exhibit tank featured in the Great Lakes Aquarium (the “aquarium”).¹ The Isle Royale tank is the centerpiece exhibit of the aquarium, consists of three separate tanks, two stories in height and holds 80,000 gallons of water and fish indigenous to Lake Superior.

LSCA is a public authority created by the legislature to design and construct a facility with a public interest mission of freshwater education. LSC is the administrative arm of the LSCA and manages the operations of the aquarium pursuant to an agreement with LSCA.

Hammel, Green and Abrahamson, Inc. (“HGA”), an architectural engineering firm, served as the lead design professional responsible for overall design of the Great Lakes Aquarium. HGA concluded it did not have the experience necessary to design the large exhibit tanks featured in the aquarium and hired Rutherford & Chekene, (“R&C”), a California based structural engineering firm

¹The aquarium features five large exhibits tanks which highlight the wildlife, vegetation and geology of the Lake Superior region.

to design the large exhibit tanks. LSC and LSCA alleged HGA and R&C deviated from the standard of care applicable to design professionals in connection with design of the Isle Royale tank and preparation of specifications governing construction of the tanks.

On September 16, 1999, notwithstanding a series of "red flags"² concerning the design of the tank, including problems with the mix design specified by R&C and the level of reinforcing congestion incorporated in the design, concrete was placed in the tank and difficulties in placement occurred. Once the problems were evaluated, R&C represented that the tank was repairable and as repaired would be structurally sound. Based on R&C's representations, the tank was repaired with repairs being performed over several months. The repairs and remedies to the tank caused a delay in completion of the tank, a critical work activity and a delay in other work activities in construction of the aquarium, resulting in a two-month delay in opening of the aquarium. LSC and LSCA sought to recover from HGA and R&C damages which were the direct result of their negligent design. As a result of delay in opening, LSC lost revenue it would have earned during peak tourism season in Duluth.

The liability issue in this case centered on whether the problems in placement were due to design of the tank or due to conduct of those involved in construction of the tank. LSCA and LSC alleged the design of the Isle Royale tank did not properly take into consideration the element of constructability and, as a direct result, there were difficulties in placement of the concrete in the tank.

²Such red flags included problems in placement of concrete in mockups. Charles Koosmann, the owner's representative, criticized HGA's acceptance of the second tank mockup and, in doing so, forecasted the acceptance would result in repairs and remedies to the tank at great expense to LSCA. LSC 553.

LSCA and LSC alleged R&C's design incorporated a superfluous, seismic level³ of reinforcing which created reinforcing congestion and prescribed concrete design mix requirements (an aggregate size which was too large given the level of reinforcing congestion and certain parameters for slump and shrinkage factor) resulting in a stiff mix lacking workability. LSC and LSCA alleged the reinforcing congestion, in combination with the design mix lacking workability, caused problems in placement.

HGA and R&C contended that the problems in placement were due to work activities of those involved in construction of the tank and after settling with and obtaining the "cooperation" of certain parties whom they originally claimed were negligent in construction related activities, HGA and R&C focused solely on Marcy Construction Company ("Marcy"), the contractor responsible for placement of concrete in the tank. Marcy was an absent party and the "empty chair" at trial. Any fault allocated to Marcy became the responsibility of LSC and LSCA as a result of an indemnity agreement between Marcy and LSCA relating to a claim by Marcy against LSCA⁴ and as a result of the trial court's ruling that the agreement was binding on LSC and LSCA even though LSC was not a party to the release.

HGA and R&C were initially adverse to each other by virtue of HGA's commencement of a third party action against R&C and each alleged, originally, that the other was responsible for problems in placement in the tank and, in addition, alleged others (Melander, Melander & Schilling,

³R&C's work related to design of aquatic containment structures is primarily California based which is governed by seismic code. LSC 1521.

⁴Prior to this litigation, Marcy had asserted a claim against LSCA for additional compensation in connection with its work related to substantial repairs and remedies to the Isle Royale tank. LSCA paid Marcy \$465,000 and executed a *Pierringer* release.

Inc. ("MM&S"); Adolphson & Peterson/Johnson-Wilson Construction Management, Inc. ("A&P/J-W"); Koosmann Project Management Services, Inc. ("Koosmann"); American Engineering Testing, Inc. ("AET"); Krech/Ojard & Associates, Inc. ("K/O"); Duluth Ready Mix Concrete, Inc. ("DRM"); Concrete Restorers, Inc. ("CR") and Marcy) involved in construction of the aquarium were responsible for problems in placement of the tank and a delay in opening of the aquarium.

After vigorously prosecuting claims against the third-party defendants, including successfully defending dispositive motions by the third-party defendants, HGA and R&C and, subsequently, HGA and certain third-party defendants, entered into settlement agreements that included anti-cooperation clauses which had the affect of realigning the interests of parties and distorting the adversary process. In the spring of 2004, HGA and R&C (facing a potential judgment in excess of then eroding policy limits) agreed to cooperate with each other and HGA agreed to defend, hold harmless and indemnify R&C for and in consideration of R&C tendering its remaining insurance coverage to HGA and agreeing to other conditions. Pursuant to the settlement agreements, R&C and HGA withdrew their claims against each other. Just 30 days prior to trial, HGA entered into settlement agreements with AET, A&P/J-W and K/O, a party insured by the same insurance company insuring HGA and sharing common claims counsel with HGA. Pursuant to the settlement agreements, HGA agreed to defend, hold harmless and indemnify each of the settling parties. Due to the defense, hold harmless and indemnity obligations of HGA under each of the settlement agreements with the settling parties, HGA (and R&C by virtue of the duties it owed to HGA under the HGA-R&C Agreement) withdrew its claims against A&P/J-W, K/O and AET. After the interests of the primary defendants and third-party defendants were realigned due to the cooperation clauses

in the settlement agreements, contrary to the adversity which previously existed between the parties, the case proceeded to trial.

K/O, A&P/J-W and AET, third-party defendants previously adverse to HGA and R&C, all testified at trial, through their representatives and former employees, in a manner favorable to the defense theory that Marcy was responsible for problems in placement in the Isle Royale tank. Throughout the trial, HGA, R&C and cooperating witnesses attributed a host of activities relating to the tank as falling within the scope of Marcy's responsibility, including design of concrete mix and quality control and inspection of mix to be delivered to the site, which HGA and R&C had previously advocated was the responsibility of AET. Cooperating witnesses offered gratuitous testimony concerning Marcy which was hearsay in nature and otherwise inadmissible. Cooperating witnesses testified concerning facts never disclosed during discovery and contrary to disclosures made during discovery. With the aid of cooperating witness testimony, undisclosed material evidence became the subject of trial testimony.

From beginning to end, the trial was punctuated by misconduct of defense counsel, including testimonial assertions and references to matters outside of the record, the effect of which was to prejudice the jury to decide the case on issues other than those relevant to claims involved in the litigation. The trial ended with a closing argument by defense counsel which was clearly intended to appeal to the passion, prejudice and emotion of the jurors. Defense counsel's closing argument was highlighted by reliance on matters which were not a matter of record, including telling the jury a key defense witness, Helen Fehr, R&C's engineer primarily responsible for design of the tank, was "scared to death" and "burst into tears" as he escorted her to the witness stand prior to her trial.

testimony, all of which would tend to depict her in a better light and provide an explanation for her impeached and inconsistent testimony which undermined her credibility.

The evidence presented at trial regarding the negligence of HGA and R&C, as well as delay in opening of the aquarium, was disputed and the subject of competing expert testimony. HGA and R&C benefitted from undisclosed trial testimony of cooperating witnesses who secretly met with the defense outside of the discovery process. HGA and R&C benefitted from defense counsel's reference to matters outside of the record clearly intended to appeal to the passion, prejudice and emotion of the jury concerning its evaluation of the trial testimony of a key defense witness whose credibility was in question. By taking advantage of collusive settlement agreements and resorting to passion, prejudice and emotion, the case was transformed from one involving disputed evidence upon which the jury could make findings free of passion, prejudice and emotion to one in which the balance was unfairly struck in favor of HGA and R&C by virtue of collusion and an appeal to passion, prejudice and emotion, and matters outside of the record.

After more than two and a half years of litigation, extensive discovery and having survived multiple dispositive motions, LSC and LSCA, in reliance on discovery and the rules applicable to the adversary process, proceeded to a trial of their claims against HGA and R&C. HGA and R&C obtained a defense verdict. The jury also concluded there was no delay in opening due to the defective condition of the Isle Royale tank. On November 4, 2004, the trial court, the Honorable Terry C. Hallenbeck, Sixth Judicial District, entered an order based on the jury's special verdict findings and determined HGA and R&C were the prevailing parties. Following the jury verdict, LSCA and LSC timely served and filed post-trial motions and a motion seeking other relief in connection with the jury verdict, including indemnity obligations of HGA with respect to the fault

allocation to AET. On February 22, 2005, the trial court also entered *Findings of Fact, Conclusions of Law, Order for Judgment and Judgment* relating to a fee dispute between HGA and LSCA which, by agreement of the parties, was tried to the court following the fall jury trial of the negligence claims against HGA and R&C.

The February 22, 2005 orders and judgments are the subject of a notice of appeal served and filed by LSC on April 22, 2005. The April 22, 2005 notice of appeal also identifies additional orders and judgments which are the subject of the appeal.

On May 3, 2005, six months after the jury verdict, a hearing was held on applications by HGA and R&C seeking to tax costs and disbursements against LSC and LSCA. HGA and R&C sought to tax nearly \$500,000 in costs and disbursements. More than 75% of the amounts included in the applications represented sums claimed for "expert witness fees," including fees for individuals other than experts, and all fees incurred by them in connection with expert witness services, including fees for other than actual trial testimony. LSC and LSCA objected to taxation in any sum on the grounds of forfeiture and equity in light of the collusive settlement agreements and misconduct of defense counsel which were also the basis of the request for certain post-trial relief. LSC and LSCA also objected to taxation of certain items on specific grounds, including an objection to taxation of expert witness fees in a sum greater than authorized by Rule 127 of the General Rules of Practice for the District Courts. In a June 7, 2005 order, the trial court awarded \$346,059.59 in costs and disbursements to HGA and R&C. Most of the award represents expert witness fees which are governed by Rule 127 of the General Rules of Practice for the District Courts which prohibits an award of expert witness fees for "preparation time" and only permits an award of expert witness fees for individuals who qualify as experts.

In connection with any costs and disbursements judgment, LSC sought a stay of any costs and disbursements judgment pending an appeal. The trial court declined to grant a stay in favor of LSC but granted a stay in favor of LSCA as to the costs and disbursements judgment.⁵ The trial court's costs and disbursements award is the subject of an appeal filed on August 3, 2005.

The appeals related to the adverse jury verdict and the costs and disbursements award have been consolidated for briefing, argument and decision. *See* Court of Appeals Order dated August 10, 2005.⁶

LSC and LSCA seek an order from the Court of Appeals reversing the trial court's denial of their post-trial motions and recognizing LSC and LSCA are entitled to a trial free of distortion and prejudice caused by collusive settlement agreements, cooperating witness testimony, misconduct of prevailing parties and errors of law. LSC and LSCA also seek an order from the Court of Appeals vacating the costs and disbursements award because the trial court departed from rules applicable to taxation and adopted a flawed taxation analysis. Appellate relief is necessary to provide a remedy to LSC and LSC who were deprived of a fair trial. Appellate relief is also warranted because the issues involved in this appeal are of importance to all litigants interested in the integrity of the adversary process.

⁵The trial court declined to grant a stay in favor of LSCA with respect to the fee dispute judgment.

⁶Two separate appeals were filed only because the time period for appeal of the February 22, 2005 orders and judgment expired prior to the trial court's ruling on costs and disbursements, necessitating an initial appeal of the February 22, 2005 orders and judgments and a subsequent appeal of the costs and disbursements award.

LEGAL ISSUES

LSC and LSCA incorporate by reference the legal issues set forth in their post-trial motions.

LSC 399-398. The legal issues included within the contents of this formal brief are identified below.

I. **WHETHER THE COLLUSIVE SETTLEMENT AGREEMENTS PREJUDICIAL TO THE RIGHTS OF NON-SETTLING PARTIES AND DISTORTING THE ADVERSARY PROCESS CONSTITUTE IRREGULARITIES IN THE PROCEEDINGS OF THE COURT AND PREVAILING PARTIES AND WARRANT A NEW TRIAL?**

Trial court held: The trial court answered in the negative.

II. **WHETHER THE MISCONDUCT OF THE PREVAILING PARTIES, PREJUDICIAL TO LSC AND LSCA, WARRANTS A NEW TRIAL?**

Trial court held: The trial court answered in the negative.

III. **WHETHER THE TRIAL COURT MADE ERRORS OF LAW IN CONNECTION WITH "EVIDENCE" CONCERNING MARCY, PREJUDICIAL TO LSC AND LSCA WHO ARGUABLY STEPPED INTO THE SHOES OF MARCY, WHICH WARRANTS A NEW TRIAL?**

Trial court held: The trial court answered in the negative by denying the JNOV/new trial motion of LSCA and LSC which was based on errors of law concerning evidence relating to Marcy and supportive of the defense theory of liability.

IV. **WHETHER THE TRIAL COURT CLEARLY ABUSED ITS DISCRETION AND/OR ERRED AS A MATTER OF LAW WITH RESPECT TO CERTAIN EVIDENTIARY RULINGS?**

Trial court held: The trial court held in the negative by denying the JNOV/new trial motion of LSC and LSCA based upon errors of law concerning evidentiary rulings.

V. **WHETHER HGA AND R&C FORFEITED THEIR RIGHT TO TAX COSTS AND DISBURSEMENTS BY FAILING TO COMPLY WITH THE RULES OF CIVIL PROCEDURE AND OTHER RULES APPLICABLE TO THE ADVERSARIAL PROCESS?**

Trial court held: The trial court held in the negative.

VI. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO RECOGNIZE RULES GOVERNING TAXATION OF COSTS AND DISBURSEMENTS, INCLUDING RULE 127 OF THE GENERAL RULES OF PRACTICE FOR THE DISTRICT COURTS PROVIDING FOR AN EXPRESS LIMITATION ON EXPERT WITNESS FEES?

Trial court held: The trial court awarded costs and disbursements which are not authorized by rules applicable to taxation and failed to comply with Rule 127 of the General Rules of Practice for the District Courts which expressly prohibits an award of expert witness fees for "preparation time."

VII. WHETHER THE TRIAL COURT APPLIED A FLAWED TAXATION ANALYSIS CAUSING IT TO BE MORE LIBERAL IN TAXATION OF COSTS AND DISBURSEMENTS?

Trial court held: The trial court applied a flawed taxation analysis and departed from rules and policy applicable to taxation.

VIII. WHETHER LSC AND LSCA WERE DEPRIVED OF THEIR FUNDAMENTAL RIGHT TO A FAIR TRIAL DUE TO CUMULATIVE IRREGULARITIES IN THE PROCEEDINGS OF THE COURT AND PREVAILING PARTIES, ALL OF WHICH COMPROMISED THE ADVERSARY PROCESS?

Trial court held: The trial court held in the negative.

STATEMENT OF FACTS

A. In May of 2002, LSCA and LSC Commenced An Action Against HGA.

LSCA and LSC commenced an action against HGA based on HGA's negligence as the lead design professional responsible for design of the aquarium and based on its vicarious liability for the negligence of its subconsultant, R&C. LSC 1-48. LSC also pled an indemnity claim based on an engineer's liability under Minnesota law for defective plans and specifications.⁷ *Id.* LSCA and LSC

⁷LSC also pled in the alternative a breach of contract claim but elected to proceed on its negligence based claims, consistent with Minnesota law. *See Plaintiffs' Proposed Jury Instructions and Plaintiffs' Proposed Special Verdict Form* dated August 16, 2004.

alleged HGA and R&C deviated from the standard of care applicable to design professionals responsible for design of an aquatic containment structure by failing to properly take into consideration constructability of the tank and including in its design a superfluous, seismic level of reinforcing creating reinforcing congestion and prescribing concrete design mix requirements which resulted in a mix which lacked flowability Tr. at 2840-2842, 3987. R&C prepared the specifications governing tank structures (trial exhibit 1008) in which it prescribed the mix design for use in the tank structures, including the shrinkage factor (.040) and maximum slump (4 inches). LSC 479. In the specifications, R&C referenced ACI 309 entitled Standard Practice for Consolidation of Concrete as the governing standard rather than ACI 309R providing guidelines for placement in congested areas. Id. The reinforcing congestion, in combination with the prescriptive requirements for the concrete design mix and R&C's failure to acknowledge the design required unconventional placement methods, caused problems in placement. LSC 521-535, 2872-3086.

HGA commenced a third-party action against its subconsultant, R&C, and other parties involved in construction of the tank, including R&C, MM&S, A&P/J-W, Koosmann, AET and K/O alleging that problems in placement were due to R&C's negligence and work activities related to construction, rather than design. LSC 49-57. MM&S served as the local architect responsible for making observations of work on the project. Tr. at 386. A&P/J-W was the construction manager responsible for coordination and management of the work activities of all trade contractors. Tr. at 2772. Koosmann was the owner's representative on the project. Tr. at 291. AET had two roles on the project, including responsibility for preparing design mix according to requirements prescribed by R&C in the specifications and as special inspector responsible for quality control of the design mix. Tr. at 2279-2445; LSC 494-520. K/O, a local structural engineering firm, served as the special

inspector responsible for inspecting the work of Marcy Tr. at 1741-1749; LSC 500-520. R&C subsequently commenced a fourth-party action against Marcy, Duluth Ready Mix, Inc and Concrete Restorers, Inc. LSC 72-96.

In the fall of 2003, HGA and R&C, as well as all third-party defendants with the exception of AET, brought summary judgment motions and, pursuant to a series of orders dated September 17, 2003, the court denied the motions. *See* Order Regarding Krech/Ojard Summary Judgment Motion; Order Regarding Koosmann Summary Judgment Motion; Order Regarding R&C Summary Judgment Motion; Order Regarding HGA Summary Judgment Motion; Order regarding A/P-JW Summary Judgment Motion; and Order regarding Melander Summary Judgment Motion.⁸ In the fall of 2003, contemporaneous with the dispositive motions, HGA and R&C obtained an order granting them leave to add Marcy as a party and adding DRM and CR as fourth-party defendants. Marcy moved for summary judgment on the grounds of a release and indemnity agreement between LSCA and Marcy Construction Company relating to arbitration of a claim asserted by Marcy against LSCA. Marcy contended LSC was also bound by the release and indemnity agreement although it was not a party to the agreement. The trial court concluded LSC was bound by the *Pierringer* agreement even though it is not a party to the *Pierringer* agreement and granted Marcy's motion. LSC 105-112. As a result of the motion practice in the fall of 2003 and spring of 2004, the following parties

⁸At the time dispositive motions were made by most parties in September of 2003, AET had previously moved for summary judgment and had obtained a partial summary judgment in its favor. The partial summary judgment in favor of AET was subsequently reversed by an order of the court dated May 5, 2004 in which the court noted that it improvidently granted partial summary judgment in favor of AET. *See* Court's Order as to AET Summary Judgment Motion dated May 5, 2004.

remained as defendants in the litigation in the summer of 2004: HGA, R&C, MM&S, A&P/J-W, AET, K/O, DRM and CR.⁹

After jury selection and before LSCA and LSC began presentation of their case, R&C voluntarily dismissed its claim against DRM based on an affidavit of Michael Robertson, a principal of DRM. R&C represented to the court that based on the affidavit of Michael Robertson, it had no basis for any claim against DRM based upon its delivery of the T-1 design mix (rather than T-1 revised) to the site, two loads of which were placed in the Isle Royale tank. Tr. at 5708-5716.

B. R&C, HGA and Continental Enter into Agreement Which They Memorialize in Writing as Settlement, Defense and Indemnity Agreement and Execute in April of 2004.

In the spring of 2004, R&C, HGA and Continental entered into an agreement concerning this action which they subsequently reduced to a written agreement executed in April of 2004 and entitled *Settlement, Defense and Indemnity Agreement* (hereinafter referred to as the “HGA-R&C Agreement”). LSC 436-446. In the HGA-R&C Agreement, HGA agreed to release its claim against R&C. *Id.* HGA agreed to defend, hold harmless and indemnify R&C to the extent of the policy of insurance available to HGA from Continental. *Id.* The HGA-R&C Agreement purports to be a Pierringer release. *Id.*¹⁰ Pursuant to the HGA-R&C agreement, R&C paid HGA its remaining insurance coverage, assigned to HGA all of its rights, claims and defenses in the action, agreed to

⁹HGA voluntarily dismissed, without prejudice, its claim against Koosmann pursuant to stipulation dated November of 2003. *See* Court’s Order for Dismissal of Koosmann Without Prejudice Pursuant to Stipulation dated November 26, 2003.

¹⁰Pursuant to a stipulation on May 28, 2004 between the parties, a redacted version of the HGA-R&C agreement was provided to LSC and LSCA. LSC 130-140. The HGA-R&C agreement was provided to LSC’s counsel only upon LSC’s counsel making a request for the agreement and negotiating a stipulation with HGA and R&C concerning disclosure of the agreement. *Id.* In accordance with Minnesota law, the agreement should have been immediately provided by HGA and R&C to LSC and LSCA.

cooperate with HGA and dismissed its claim against HGA. *Id.* R&C continued to be represented by separate counsel but HGA and Continental agreed to compensate R&C's counsel. While the written agreement was executed in April of 2004, provisions of the agreement suggest that some form of agreement was reached at an earlier date because the agreement provides that HGA and Continental shall pay R&C's attorneys fees and costs as of January 1, 2004, approximately four months preceding the execution of the agreement and to pay expert costs according to a separate accounting set forth in a redacted provision of the agreement. *Id.*, ¶ 14. After HGA and R&C entered into the HGA-R&C agreement, HGA entered into agreements with third-party defendants K/O, AET and A&P/J-W.

C. Within the 30 Days Preceding Trial, HGA Entered into Settlement Agreements with K/O, AET and A&P/J-W.

On July 28, 2004, K/O and HGA, both of whom were insured by Continental, entered into a settlement agreement bearing the label "*Pierringer* Release and Indemnification Agreement" (hereinafter referred to as the "HGA-CNA-K/O agreement"). LSC 447-456. Continental, as the insurer for K/O, is also a party to the agreement. Glenn Bredahl, common claims counsel for Continental insureds K/O, HGA and Koosmann,¹¹ executed the document on behalf of Continental, purportedly only in its capacity as K/O's insurer. *Id.*

On August 4, 2004, HGA, Continental and AET entered into an agreement similar to the HGA-CNA-K/O agreement labeled "*Pierringer* Release and Indemnification Agreement" (hereinafter referred to as "HGA-Continental-AET agreement"). LSC 457-465.

¹¹Continental was also the insurer for Marcy.

On August 27, 2004, just four days before the start of the trial of this action, HGA, Continental, A&P/J-W and Lexington entered into an agreement entitled *Pierringer* Release and Indemnification Agreement (hereinafter referred to the “HGA-Continental-A&P/J-W agreement”). LSC 466-478.

Each of the settlement agreements contain substantially similar provisions. Each of HGA’s settlement agreements with A&P/J-W, K/O and AET include (1) payment of \$100,000 to HGA/R&C (then one defense unit by operation of the HGA-R&C agreement); (2) a cooperation clause – an agreement to cooperate with the defense and not cooperate with LSC and LSCA; (3) a release of claims; and (4) an agreement to defend, hold harmless and indemnify the settling defendant to the extent of available insurance coverage. LSC 447-478. While each of the agreements contain titles and recitals suggesting each agreement is a *Pierringer* release – which contemplates a full release and indemnity in favor of the settling party – each agreement purports to limit HGA’s release and indemnity obligation to insurance coverage available to HGA from Continental *Id.* Each of the settlement agreements includes an anti-cooperation clause requiring the settling party to cooperate with HGA/Continental and to refrain from cooperating with parties other than HGA and Continental. For example, the HGA-Continental-A&P/J-W agreement includes the following provision:

COOPERATION: A&P agrees to cooperate with HGA/Continental in the defense of the matter and to meet with HGA representatives and counsel for A&P on reasonable notice and for reasonable periods of time to prepare for and assist in the trial of the matter. Further, A&P agrees not to consult with in any fashion any other party to the proceeding except HGA and/or Continental.

See HGA-Continental-A&P/J-W agreement (emphasis added). LSC 452, 462, 472.

Prior to the start of trial, HGA moved for dismissal of K/O, AET and A&P/J-W on the basis that the agreements were true *Pierringer* releases (which would include a full indemnity clause) and

based on that representation, the trial court dismissed each of the settling parties. LSC 143-145. During trial, LSC's counsel sought to impeach cooperating witnesses based on the existence of settlement agreements and conditions in the agreements. Tr. 1671-1672, 1870-1878, 2446-2450. Defense counsel objected to such cross examination.

Based on HGA's and R&C's representations that the indemnity provisions in the agreements were partial, LSC's counsel was instructed to refer to the settlement agreements as "partial" settlement agreements and cross examination on the indemnification clauses was limited.¹² Tr. at 24, 1030, 1337-1342, 1682-1729, 1771-1788, 1815-1830, 3774-3775.

D. Procedural Posture of Litigation and Alignment of Interests Prior to April 19, 2004.

Prior to April 19, 2004, the procedural posture of the case was as follows:

- HGA had asserted claims against R&C, A&P/J-W, AET, K/O, MM&S and Marcy and vigorously prosecuted such claims through discovery and retention of experts who offered opinions supporting the claims against such parties. *See HGA's Third-Party Complaint.*
- HGA and R&C previously opposed motions for summary judgment made by AET, K/O and A&P/J-W and was successful in doing so based on evidence presented in opposition to each of the motions.
- R&C had asserted a cross-claim against HGA and third and fourth-party claims against A&P/J-W, AET, K/O, MM&S, DRM, CR and Marcy. R&C, like HGA, vigorously

¹²Defendants obtained a pre-trial ruling from the court whereby LSC's counsel was instructed to refer to the HGA-R&C settlement agreement as a "partial" settlement agreement. During trial, HGA and R&C obtained another favorable ruling on the settlement agreements with third-party defendants. Tr. at 24.

prosecuted its claims through discovery, retention of experts and defense of dispositive motions.

- The discovery deadline as to claims involved in the primary action, including AET, A&P/J-W and K/O had expired as of July 7, 2003. *See Court's Order as to Scheduling (January 14, 2004)* dated January 14, 2004.
- On April 19, 2004, HGA and R&C execute an agreement entitled *Settlement, Defense and Indemnity Agreement* but fail to produce a redacted form of the agreement until May 4, 2004 and fail to disclose the substance of the agreement until May 28, 2004. As of the date HGA and R&C enter into the HGA-R&C agreement, the following parties were parties in the litigation: HGA, R&C, MM&S, A&P/J-W, K/O and AET.

E. Procedural Posture of Litigation and Realignment of Interests as a Result of Settlement Agreements.

As a result of the settlement agreements between HGA and R&C and, in turn, HGA and certain third-party defendants, the interests between parties were realigned as follows:

- R&C and HGA withdrew claims against each other and aligned their interests.
- Within 30 days of trial, R&C and HGA withdraw their claims against AET, K/O and A&P/J-W and vice versa. The realignment of interest occurs after the close of discovery and motion practice.

F. Misconduct of the Prevailing Parties During Trial Proceedings.

During trial, defense counsel engaged in conduct LSC and LSCA allege constitutes misconduct of the prevailing parties, all of which is detailed in the notice of motion and motion for a new trial incorporated by reference herein.

One of the theories of liabilities advanced by the defense is that two loads of the wrong design mix (T-1 versus T-1 revised design mix) was placed in the Isle Royale tank (this theory of liability is hereinafter referred to as the “T-1 versus T-1 revised theory”).

HGA and R&C dismissed DRM based on representations to the court that the affidavit of Michael Robertson, a DRM representative, indicated the T-1 versus T-1 theory was without evidentiary support. Tr. at 5708-5716. At trial, through cooperating witnesses, HGA and R&C suggested there was a basis for imposing liability on Marcy based on the T-1 versus T-1 revised theory. Post-trial, LSC sought to have DRM added as an absent party on the verdict form because HGA and R&C presented evidence, largely through testimonial assertions, regarding the T-1 versus T-1 revised theory even though they had dismissed DRM based on the representation that T-1 versus T-1 revised design mix was not an issue. Tr. at 5708-5716. In response to the court’s inquiry as to HGA’s and R&C’s intentions on the T-1 versus T-1 revised design mix issue, remarkably, defense counsel first stated the T-1 versus T-1 revised theory would not be argued to the jury because the DRM affidavit indicated it was without evidentiary support and only minutes later indicated he would be arguing the T-1 versus T-1 revised theory to the jury as a basis for imposing liability on Marcy. Id. LSC’s counsel indicated that if the T-1 versus T-1 revised design mix issue was submitted to the jury, then all parties, including DRM, having a role related to the T-1 versus T-1 revised design mix should also be on the verdict form, not merely Marcy.¹³ Id. If, as R&C represented at trial, DRM was dismissed because the T-1 versus T-1 revised design mix was without

¹³HGA sought post-trial relief in connection with the fault allocation to AET because of HGA’s obligation to indemnify AET. In support of its motion seeking JNOV as to the AET fault allocation, HGA contended there was no competent evidence presented on the T-1 versus T-1 revised design mix theory.

evidentiary support, then its testimonial assertions and arguments based on T-1 versus T-1 revised design mix were similarly without evidentiary support. The trial court, while noting he was “mystified,” did not add DRM as an absent party yet permitted defendants to argue the T-1 versus T-1 revised design mix issue. Tr. at 5709, 5712. The jury verdict allocating fault to Marcy and AET, in its role as a special inspector, indicates the jury based its fault allocation on the T-1 versus T-1 revised design mix issue because the only commonality between Marcy and AET, in its role as a special inspector, is the delivery of concrete to the site.

Defense misconduct also included repeated questioning of witnesses concerning matters which were not relevant and prejudicial. While on occasion such questions were sustained as objectionable, the questions nonetheless injected matters into the case which were highly prejudicial. Tr. at 1221, 2759-2769, 3184, 3203-3203, 3210, 3251; LSC 378-398.

R&C’s counsel communicated to the jury his appraisal of the evidence presented by LSC, including theatrically putting his head down on the counsel table during cross examination by HGA’s counsel of LSC’s expert, which mocked the expert. LSC’s counsel brought to the court’s attention this violation of the rules of decorum. Tr. at 3369. The court reminded all counsel to abide by the rules of decorum. Defense counsel acknowledged in chambers his conduct related to the soirée incident yet referred to the soirée incident in his closing argument. *Id.* While there was no issue in this case which in any way related to a soiree, defense counsel inappropriately made reference to the soirée incident (his demonstrative negative appraisal of expert testimony presented by LSC) in his closing argument, his negative appraisal of LSC’s expert. Tr. at 5914.

During his closing argument, defense counsel referred to matters which were not a matter of record. In his closing argument, defense counsel explained Helen Fehr was “scared to death” and

described for the jury his observations of Helen Fehr “bursting into tears” when he showed her the witness stand prior to the testimony Tr. at 5934. Defense counsel’s observations of Helen Fehr was that Helen Fehr was “scared to death” and burst into tears were not a matter of record before the jury. Id. As acknowledged by R&C’s counsel, Helen Fehr’s credibility was called into question because she was impeached on multiple occasions. *See e.g.* Tr. at 708, 771, 779, 5033-5035, 5043.

Defense counsel also referred to matters which were outside of the record when referring to a portion of Craig Kronholm’s testimony as a “curve ball” and indicating that the attorneys did not know about the curve ball testimony prior to Mr. Kronholm taking the stand. Defense counsel characterized as a “curve ball” Craig Kronholm’s testimony that he had prior experience working with Marcy, that based on his prior experience with Marcy he had made a recommendation to “the partnership” (A&P/J-W) that Marcy not be allowed to work on the project and that the partnership overruled his recommendation. Tr. at 5344-5348. The record in the case did not include any evidence that the attorneys or the parties were unaware of this testimony prior to trial.

G. Craig Kronholm, A&P/J-W and David Krech, K/O, Cooperating Witnesses, Testified in a Manner Undisclosed Prior to Trial and Contrary to Discovery.

During trial, two cooperating witnesses, Craig Kronholm and David Krech, testified in a manner which was undisclosed prior to trial and contrary to discovery.

Mr. Kronholm’s testimony was highly favorable to the defense theory that Marcy was responsible for problems in placement of the Isle Royale tank. At trial, Craig Kronholm testified in a manner which was undisclosed prior to trial. Craig Kronholm testified to the follow undisclosed facts: (1) he had prior experience working with Marcy; (2) based on his prior experience, he had recommended, in a letter, that Marcy be disqualified from working on the aquarium project; and (3)

A&P/J-W, overruled his recommendation. Tr. at 5344-5348. Neither A&P/J-W nor any other party disclosed the factual basis and grounds for Craig Kronholm's opinions critical of Marcy which were required by virtue of discovery requiring disclosure of expert witness opinions. During discovery, neither A&P/J-W nor any other party ever produced a letter in which Mr. Kronholm recommended disqualification of Marcy from working on the project or disclosed Mr. Kronholm's prior experience with Marcy and his disqualification recommendation which became the subject of trial testimony. Tr. at 5350-5355.

David Krech, K/O, the "special inspector" responsible for making observations of Marcy's work and a cooperating witness, also testified to facts which were not disclosed during discovery. K/O, given its responsibility for making observations of Marcy's work, would have naturally aligned itself with defending Marcy's work and, accordingly, would have been adverse to HGA and R&C who had an interest in condemning Marcy's work. At trial, David Krech offered testimony favorable to the defense theory of liability and contrary to field inspection reports authored by Mr. Krech contemporaneous with work on the project.

Prior to trial, K/O produced field inspection reports which had been prepared contemporaneous with Marcy's work related to placement of concrete in the Isle Royale tank. In a field inspection report authored by Dave Krech, engineer Krech noted:

Carpenters were forming around window openings and constructing access holes at base (sill) of windows for hand placement of concrete and vibrating.

See Field Inspection Report dated September 14, 1999. Tr. at 1761. In his September 16, 1999 Field Inspection Report, David Krech stated:

The contractor tried every technique any of us could think of to properly consolidate the concrete, but the quality of the product appears likely to have some defects, the extent of which cannot be evaluated till forms are stripped.

See Field Inspection Report No 87-2 (emphasis added). Jennifer Babcock, an engineer also present on September 16, 1999 and working under the direction of David Krech, noted:

Adding to the problem was severe steel reinforcement congestion at window rebates which interrupted the flow of material to the outside face. It appears that the contractor made every reasonable attempt to install tanks as outlined in the design/construction documents, but still had great difficulty placing material and building a good product.

See Field Inspection Report dated September 16, 1999 (emphasis added). Tr. at 1603-1624. At trial, in contrast to K/O's field inspection reports authored on the same day of Marcy performing its work, David Krech testified concerning certain ways in which Marcy failed to utilize proper means and methods Tr. at 1843-1865. Moreover, while Dave Krech's September 14, 1999 field inspection report states that Marcy built access holes in the sill of the window "for hand placement of concrete and vibrating," he testified at trial that the holes were merely for "observation." *Id.* When LSC's counsel attempted to impeach Krech with a field inspection report in which he identified the holes were intended for placement, rather than observation, defense counsel asserted a hearsay objection which was sustained by the trial court. Tr. at 176. Whether the holes were for placement or observation is important because HGA and R&C contended at trial that one of the means and methods available to Marcy included pour ports, also known as access holes. If Marcy built access holes or pour ports, as was noted by Mr. Krech in his field inspection report, HGA and R&C were foreclosed from criticizing Marcy based on the failure to utilize pour ports. Mr. Krech was a material witness because K/O was responsible for special inspection of the structural work, including

Marcy's work on the Isle Royale tank, and his opinions would likely be afforded great weight by the jury because he is a local engineer and has worked with at least two of the jurors.¹⁴

H. Errors of Law Occurring at Trial Objected to at the Time Or, If No Objection Need Have Been Made Pursuant to Rules 46 and 51, Plainly Assigned in the Notice of Motion and Motion.

In their notice of motion and motion, LSC and LSCA have delineated errors of law occurring at trial, including rulings regarding the admissibility of evidence, the manner in which questions were framed on the special verdict form, the failure to submit Duluth Ready Mix as a party on the verdict form and the failure to submit a jury instruction required to counter a defense expert's misstatement of the law that a contractor "buys" specifications. LSC and LSCA incorporate by reference herein the notice of motion and motion and errors of law enumerated in the notice of motion and motion.

I. Post-Trial Proceedings.

On October 23, 2004, the jury made special verdict findings adverse to LSC and LSCA. LSC 195. In contrast to the trial court's admission of evidence concerning other portions of work on the aquarium project, the trial court sustained objections to LSC's introduction of evidence concerning difficulties in placement encountered in the Shedd Aquarium, an aquarium designed by R&C and utilizing the same template specifications utilized for the Great Lakes Aquarium.

The court concluded that the issues involving common claims counsel constituted an insured-insurer issue. However, as trial unfolded, the existence of common claims counsel became another level of collusion. LSC and LSCA timely served and filed post-trial motions. On February 22, 2005,

¹⁴Two jurors indicated in voir dire that they were familiar with K/O given their occupations.

the trial court entered orders denying the motions for post-trial relief. LSC 240-252. On February 22, 2005, the trial court also entered findings of fact, conclusions of law, order for judgment and judgment concerning a fee dispute between HGA and LSCA which was tried to the court in January of 2005 by agreement of the parties. LSC 276-285.

Following trial, HGA and R&C sought to tax costs and disbursements against LSC. LSC 398-412. HGA sought to tax \$400,811.96 in costs and disbursements, \$287,738.76 of which constituted expert witness fees. LSC 398-405. R&C sought to tax \$98,744.65 in costs and disbursements, \$77,052.58 of which constituted expert witness fees. LSC 406-412. LSC objected to taxation in any sum and objected to taxation of expert witness fees other than as authorized by Rule 127 of the General Rules of Practice for the District Courts. LSC 413-419. On May 3, 2005, a hearing was held on taxation of costs and disbursements. In a June 7, 2005 order, the trial court awarded \$346,059.56 in costs and disbursements, \$256,612.52 to HGA and \$89,447.04 to R&C. The trial court also awarded MM&S costs and disbursements against HGA and then reallocated those costs and disbursements to be included within the costs and disbursements taxable by HGA against LSC. LSC 286-347.

ARGUMENT

I. THE COLLUSIVE SETTLEMENT AGREEMENTS PREJUDICED THE RIGHTS OF NON-AGREEING PARTIES, DISTORTED THE ADVERSARY PROCESS, ARE VOID AS AGAINST PUBLIC POLICY AND CONSTITUTE IRREGULARITIES IN THE PROCEEDINGS OF THE COURT AND PREVAILING PARTIES WARRANTING A NEW TRIAL.

Trial proceeded based on settlement agreements between HGA and third-party defendants which prejudiced the rights of LSC and LSCA and distorted the adversary process as made evident by trial testimony of cooperating witnesses which included testimony undisclosed prior to trial and

materially different from discovery, all to the benefit of the defense. Because the effect of the settlement agreements was to unfairly distort the trial process, prejudicial to LSC and LSCA, the trial court should have granted a new trial. The trial court's failure to grant a new trial based on the settlement agreements which compromised the adversary process constitutes a clear abuse of discretion. *Halla Nursery, Inc. v Baumann-Furrie & Co*, 454 N.W.2d 905, 910 (Minn. 1990). The issue of whether the settlement agreements are invalid under Minnesota law presents a question of law to be reviewed de novo on appeal. *Alpha Real Estate Co. of Rochester v. Delta Dental Plan*, 664 N.W.2d 303 (Minn. 2003).

The collusive settlement agreements caused at least three problems which distorted the trial process. The first problem resulting from the collusive settlement agreements is that prior to the start of the trial the defendants originally advanced the position that the settlement agreements were *Pierringer* releases (which would include a full indemnification in favor of the settling party) and moved for dismissal of A&P/J-W, K/O and AET. Thus, certain parties, including A&P/J-W, K/O and AET with whom HGA had been adverse and but for the settlement agreements would have been at trial actively defending the claims against them, were dismissed and were not active participants at trial but, rather, appeared as "cooperating". The second problem presented by the settlement agreements is that each agreement includes an anti-cooperation clause which promoted secret meetings between the defense and cooperating witnesses resulting in facts being disclosed between the settling parties outside of the discovery process and causing cooperating witnesses to testify in a manner which was undisclosed prior to trial or materially different than discovery. The third problem with the settlement agreements is that at trial, in contrast to the pre-trial position advanced by HGA and R&C that the indemnification clauses in the agreements were partial (limited to

available insurance coverage) and based on the claim, the trial court permitted only limited cross examination on the settlement agreements. The conundrum created by the different interpretations advanced by HGA and R&C regarding the indemnification clauses in the settlement agreements is that if, as HGA and R&C advocated during trial, the indemnification clauses were truly partial, the settling parties should have been actively participating at trial rather than dismissed.

A. Based on HGA's Representation to the Court that HGA has Settled with Third-Party Defendants on a *Pierringer* Basis, Third-Party Defendants are Dismissed and do not Actively Participate in Trial and Defend Claims Against Them.

Prior to the start of trial, HGA moved for dismissal of third-party defendants A&P/J-W, K/O and AET based on settlement agreements represented to the court as *Pierringer* in nature which would support dismissal of the third-party defendants. Based on the representation made by HGA regarding the nature of its releases with third-party defendants, the trial court dismissed A&P/J-W, K/O and AET, expressly finding HGA had represented the agreements were *Pierringer* in nature.

With a true *Pierringer* release, a settling party enjoys the benefit of a full indemnity clause, thus making it unnecessary for the settling party defendant to participate at trial. *Frey v. Snelgrove*, 269 N.W.2d 918 (Minn. 1978). Because the third-party defendants were dismissed, they did not participate at trial other than as cooperating witnesses as described in section B. As a result of dismissal of the third-party defendants, third-party defendants were transformed from defendants be actively defending claims against them (and contrary to the defense theory of liability advanced prior to trial) to cooperating witnesses.

B. The Collusive Settlement Agreements Distorted the Adversary Process and Warrant a New Trial.

The settlement agreements between HGA and the third-party defendants promote collusion and secrecy between the settling parties, including exchange of material information between the settling parties and to the exclusion of non-settling parties – outside of the discovery process – which then becomes the subject of trial testimony. Settlement agreements which jeopardize a fair and proper adversarial setting constitute misconduct and an irregularity in the trial proceedings. Because the settlement agreements distorted the trial process and prejudiced the rights of non-agreeing parties, a new trial is warranted pursuant to Rule 59.01, subs. (a) and (b), of the Minnesota Rules of Civil Procedure. *See Johnson v. Moberg*, 334 N.W.2d 411 (Minn. 1983) (recognizing that settlement agreements which influenced testimony at trial must be known by the jury). Minnesota law does not favor settlement agreements which prejudice the rights of non-settling parties:

It is not proper or desirable for this Court to condone or condemn types of settlement agreements generically. Rather, we must examine them on a case by case basis and assess their validity and effect. If there is no secrecy surrounding a settlement, and if it does not act to prejudice the rights of the non-agreeing parties, then we so no general prohibition against such agreements.

Pacific Indem. Co v Thompson-Yaeger, Inc. 260 N.W.2d 548 (Minn. 1977) (emphasis added). In *Pacific Indem.*, the judiciary recognized its obligation to examine settlement agreements on a case by case basis and assess the validity and effect of settlement agreements. Minnesota courts have carefully scrutinized releases in a variety of contexts in which the rights of non-settling parties may be affected, and in such cases have either imposed requirements to protect the rights of non-settling parties or clearly cautioned that settlement agreements which prejudice the rights of non-agreeing parties or which otherwise jeopardize the adversary process may be invalid. *See e.g. Schmidt v.*

Clothier, 338 N.W.2d 256 (Minn. 1983) (requiring notice to insurance company providing underinsured motorist coverage before settling a claim against an at-fault driver so as not to prejudice the rights of the non-settling party, the insurance company providing underinsured motorist coverage); *Frey v. Snelgrove*, 269 N.W.2d 918 (Minn. 1978) (approving the use of a true *Pierringer* release but recognizing that certain steps must be taken to protect the rights of non-settling parties who may be affected by such a release) The settlement agreements in this case do not merely create rights and obligations between the settling parties but, rather, distort the adversary process at many stages, to the prejudice of the non-settling parties. Because the agreements prejudice the rights of non-agreeing parties and jeopardize the integrity of the adversary process, judicial intervention is required to protect the rights of the non-agreeing parties and preserve the integrity of the adversary process.

The issue before the Court of Appeals concerning the settlement agreements is one of first impression in the State of Minnesota. While the issue is one of first impression, resolution of the issue is aided by rules and policy serving as the foundation of the adversary system and by principles adopted by the courts when evaluating the propriety of settlement agreements. As applied to the settlement agreements in this case, such principles warrant the conclusion that the settlement agreements are void as against public policy because they distort the trial process and, in doing so, prejudice the rights of non-agreeing parties.

Independent of case law specific to settlement agreements, general rules of contract law and the rules of professional conduct also demonstrate the agreements are invalid on public policy grounds and proceeding to trial based on such agreements constitutes misconduct or irregularities in the proceedings, requiring a new trial.

The starting point for analyzing the settlement agreements is to determine whether they are appropriately characterized as true *Pierringer* releases. *Frey v. Snelgrove*, 269 N.W.2d 918 (Minn. 1978) (sanctioning the use of the so-called *Pierringer* release which takes its name from the case of *Pierringer v Hoyer*, 21 Wis.2d 182, 124 N.W.2d 106 (1963)). The courts welcomed the *Pierringer* release as a principled way to encourage settlement in complicated, multi-party litigation. A true *Pierringer* is considered a valid alternative to other forms of releases presenting problems of collusion and distortion of the trial process. Where, as here, a release other than a *Pierringer* release is involved and collusion and trial distortion results, there is no rationale for recognizing the agreement is valid. The offending settlement agreements are not true *Pierringer* releases which have been approved by the Minnesota Supreme Court. See *Simonett, Release of Joint Tortfeasors: Use of the Pierringer Release in Minnesota*, Wm. Mitchell L. Rev. 1 (1977). See *Hoffman v Wiltschek*, 411 N.W.2d 923 (Minn. App. 1987) (review denied Nov. 13, 1987) (the plaintiff's indemnification of the settling tortfeasor is the indispensable characteristic of a *Pierringer* release because it protects the non-settling defendant from having to pay more than its share of liability). In the case of a *Pierringer* release, the courts have recognized that even a *Pierringer* release may cause some distortion of the trial process but that distortion is offset by a non-settling party's right to impeach a settling party based on the existence of the settlement agreement. *Frey v. Snelgrove*, 269 N.W.2d 918 (Minn. 1978). In the case of a true *Pierringer* release, the settling party is dismissed from the action and does not actively participate at trial because it is fully indemnified for any potential adverse judgment. The releasing party "steps into the shoes" of the released party for purposes of any judgment.

Contrary to the label and recitals set forth in the settlement agreements suggesting they are true *Pierringer* releases, the agreements include conditions which have not been approved or sanctioned by Minnesota courts, including an anti-cooperation clause and partial indemnification provisions. The salutary purpose of promoting settlement through partial settlement agreements, like a *Pierringer*, should not be sacrificed to a litigant's basic right to a fair trial which is compromised by an anti-cooperation clause. Where, as here, a release other than a *Pierringer* release is involved, the court should examine the settlement agreement to determine whether it prejudices non-agreeing parties and causes trial distortion. If the effect of the agreement is to prejudice non-agreeing parties and distort the adversary process for which there is no adequate remedy, the agreements are invalid

The second step in analyzing the settlement agreements is to determine if they prejudice the rights of non-agreeing and distort the adversary process such that they should be deemed invalid. Settlement agreements which are collusive in nature and distort the adversary process have been severely criticized by the courts and legal scholars.¹⁵ Knapp, *Keeping the Pierringer Promise Fair Settlements and Fair Trials*, 20 Wm. Mitchell L. Rev. 1 (1994). *Daniel v Penrod Drilling Co.*, 393 F.Supp. 1056, 1060-61 (E.D. La. 1975) (recognizing that while lawyers owe a duty to their clients, they owe a primary duty to the administration of justice). "The search for truth, in order to give

¹⁵In *Daniel*, the court recognized:

Courts are not merely arenas where gains of counsel's skill are played. Even in football, we do not tolerate point-shaving. It is perhaps because the trial is adversary that each side is expected to give its best, without secret equivocation. Counsel have no duty to seek ultimate truth in a system where the lawyer's duty is primarily to represent his client. But even if a lawyer has no duty to disclose the whole truth, he does have a duty not to deceive the trier of fact and an obligation not to hide the real facts behind a facade.

justice to the litigants, is the primary duty of the courts ” Id. If settlement agreements prejudice the rights of non-agreeing parties, thwart the search for truth or provide that only some determine the truth and not others, such settlement agreements undermine the adversary process, and a new trial is warranted.

The Minnesota judiciary has voiced its displeasure at collusive, settlement agreements and the unfairness promoted by such agreements. *See Faber v. Roelofs*, 298 Minn. 16, 212 N.W.2d 856 (1973). *See Pacific Indem. Co. v. Thompson-Yaeger, Inc* 260 N.W.2d 548, 557 (Minn. 1977) (in the context of an agreement construed as similar to a loan receipt agreement, Minnesota Supreme Court recognized “[d]isclosure and an adequate opportunity to cross examine insure that the adversary process is not so subverted as to deny a fair trial”). If the effect of a settlement agreement is to subvert the adversary process and deprive a litigant the right to a fair trial, a new trial is warranted. The adversary process was subverted due to the collusive settlement agreements, depriving LSC and LSCA of the right to a fair trial.

Contracts, the subject, operation and/or tendency of which violates public policy or the established interests of society, are void and unenforceable. *Perkins v. Hegg*, 212 Minn. 377, 3 N.W.2d 671 (1942). Contracts are contrary to public policy if they clearly intend to injure the public health or morals or the fundamental rights of the individual, or if they undermine confidence in the impartiality of the administration of justice. *In re Peterson’s Estate*, 230 Minn. 478, 42 N.W.2d 59 (1950).

A settlement agreement is a contract. The offending settlement agreements are contrary to public policy and established interests of society. They tend to injure the fundamental right of a litigant to a fair trial and, due to the collusive nature of the anti-cooperation clauses, undermine the

administration of justice. Rule 3.4 of the Rules of Professional Conduct recognize that fairness to opposing parties and counsel requires an attorney shall not:

Request a party other than a client to refrain from voluntarily giving relevant information to another party.

Minn. R. Prof. Con. 3.4. The integrity of the adversary system is the basis for recognizing an ethical responsibility to the opposing party. Rule 3.4 is intended to safeguard the integrity of the adversary system by imposing certain ethical obligations on attorneys:

The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in the discovery procedure, and the like.

Minn. R. Prof. Cond. Rule 3.4, comment 1. The HGA settlement agreements not only request – they contractually require – a person other than the client, the settling party, to refrain from voluntarily giving relevant information to another party. Because the settlement agreements are injurious to the public interest and established interests, they are void as against public policy and proceeding to trial based on such agreements is prejudicial.

The adversary process was subverted at all stages, including settlement negotiations, dismissal of third-party defendants from the action based on the pretext that settlement agreements are *Pierringer* in nature, transformation of third-party defendants from parties adverse to HGA and R&C to cooperating witnesses, direct and cross-examination of cooperating witnesses resulting in testimony favorable to the defense which was not disclosed during discovery, opening statements and closing arguments by defense counsel having the advantage of being privy to material information exchanged outside of the discovery process, expert witness testimony which was

revamped to take into consideration the exchange of material information outside of the discovery process and, ultimately, the jury verdict. The agreements realigned interests and reshaped the positions of the parties, contrary to discovery, distorting the trial process. Parties against whom HGA and R&C were previously adverse became allies. Third-party defendants who would have otherwise actively participated at trial and vigorously defended the claims against them (which would have been at odds with the defense theory of liability) became cooperating witnesses, causing a distortion in the trial process. The settlement agreements promoted secret meetings between defendants and third-party defendants in which defendants met one on one with third-party defendants and as a result of those cooperative secret meetings, defendants obtained material information outside of the discovery process and also had the benefit of adapting their trial strategy in light of information they obtained outside of the discovery process. Defense counsel examined cooperating witnesses through the use of leading questions and obtained testimony highly favorable to the defense, including gratuitous testimony critical of Marcy and attributing to Marcy a host of responsibilities which HGA and R&C had previously advocated were the responsibility of others, including the third-party defendants.¹⁶ At trial, two cooperating witnesses testified in a manner which had not been previously disclosed and which was highly favorable to the defense. One witness testified in a manner which was directly inconsistent with reports produced during

¹⁶At trial, R&C and HGA, with the benefit of testimony of cooperating witnesses, attempted to shift to Marcy responsibility for nearly every aspect of the project concerning concrete, including mix design, special inspection of Marcy's work and special inspection related to concrete quality control, even though they had previously claimed others were primarily responsible for such work. Even the statement of the case agreed to by the parties and read by the court to the jury at the beginning of the case outlined the role of parties other than Marcy related to concrete work, including AET, Duluth Ready Mix and K/O. *See Statement of the Case.*

discovery. Expert witness testimony presented by HGA and R&C failed to include opinions held by experts critical of the third-party defendants and when elicited on cross examination by LSC's counsel, such opinions were minimized from those previously disclosed.¹⁷ A settlement agreement which includes an anti-cooperation clause exceeds the boundaries of what is permissible to promote the laudable goal of settlement, because it not only creates rights and obligations between the settling parties but it distorts the trial process and, as a result, adversely affects non-agreeing parties.

The distortion caused by the settlement agreements must also be evaluated in light of the mutuality of interests between certain defendants created by common claims counsel. Marcy Construction Company, the party to whom HGA attributed fault, HGA, K/O and Koosmann Project Management Services were all insured by CNA. HGA, K/O and Koosmann had common CNA claims counsel. K/O, a CNA insured and cooperating witness, was the special inspector responsible for inspecting the work of Marcy Construction Company and would have an interest in demonstrating Marcy's work was proper and in accordance with contract documents. Indeed, K/O authored field inspection reports contemporaneous with Marcy performing its work memorializing such opinions. Koosmann was the owner's representative and should have had an interest which was in alignment with the owner. HGA had an interest which was diametrically opposed to Marcy and K/O, also CNA insureds, in that it contended improper placement in the Isle Royale tank was due to Marcy's work, not design. At trial, and in contrast to the position which K/O would naturally advance, David Krech disavowed many of the observations and conclusions contained in his field

¹⁷At trial, R&C relied on expert Matthys Levy. Mr. Levy offered the opinion that R&C complied with the standard of care and, on cross examination, reluctantly acknowledged AET, Duluth Ready Mix and K/O failed to discharge their obligations related to the concrete work on the Isle Royale tank. LSC 4061-4064.

inspection reports and was critical of Marcy. There were many ways in which the defendants were connected and interested in the defense of this action which were never before the jury and distorted the trial process. Even the trial court was critical of the manner in which various parties were defended by common claims counsel but felt he was unable to grant any relief based on the mutuality of interest created by common claims counsel and collusive settlement agreements. Tr. at 3258-3274 (the trial court expresses he does not “like it one bit” that three defendants shared common claims counsel).

C. The Trial Court Erred by Limiting Cross Examination of Cooperating Witnesses Based on the Settlement Agreements.

The trial court erred as a matter of law and abused its discretion by limiting LSC’s cross examination based on the settlement agreements and requiring all of the settlement agreements be characterized as “partial” settlement agreements. Prior to trial, HGA and R&C obtained a ruling from the trial court requiring LSC’s counsel to refer to the HGA-R&C agreement as a “partial” settlement agreement. During trial, HGA and R&C obtained a similar ruling from the court in connection with HGA’s settlement agreements with third-party defendants even though it had obtained dismissal of the third-party defendants based on the representation that the settlement agreements were *Pierringer* in nature (and, necessarily, included a “full” indemnification). In addition to the court’s ruling requiring LSC’s counsel to refer to all of the settlement agreements as “partial,” the court limited cross examination based on the settlement agreements, depriving LSC and LSCA of meaningful cross examination based on the settlement agreements and the mutuality of the interests between certain defendants created by such agreements and common claims counsel.

Consistent with HGA's pretrial characterization of the releases as true *Pierringer* releases – including as an essential element a full indemnification clause – the court dismissed K/O, AET and A&P/J-W. The rationale for dismissal of a settling defendant is that the settling defendant has fixed its limits of financial liability to the plaintiff by entering into a *Pierringer* release. During trial and contrary to its pretrial position, R&C and HGA advocated that the indemnity provisions in the agreements were limited to available insurance coverage, contrary to what is essential for a true *Pierringer* release, and succeeded in obtaining a ruling restricting cross examination on the indemnity provisions, which are, in the case of a true *Pierringer* release, recognized as admissible for purposes of impeachment and permitting the jury to assess the realignment of interests of settling parties. *Frey v. Snelgrove*, 269 N.W.2d at 923 (“the jury should be given the facts necessary to arrive at a fair verdict”).

The court yielded to the defense proposition even though the court had previously dismissed the third-party defendants based on the rationale that they had no exposure at trial due to the existence of full indemnity provisions. The admissibility of the indemnity provision does not hinge on whether the provision is partial or full; rather, the issue is whether the indemnity provision bears upon the bias or motive of the witness then testifying. The credibility of a witness and its bias or motive in testifying in a certain way may be suspect due to the existence of an indemnity clause, regardless of whether it is full or partial.

Moreover, the trial judge instructed LSC's counsel to refer to each of the settlement agreements as “partial,” suggesting the bias of settling parties was minimal due to the “partial” nature of the releases. The trial court clearly abused its discretion by requiring settlement agreements be characterized as partial by limiting cross examination based on the settlement agreements.

When pretrial settlement agreements are reached at the very beginning of the case, any limitations imposed on introduction of the details of the settlement agreements which deprive counsel of an opportunity to present to the jury the full impact of the settlement is highly prejudicial and reversible error. *Riewe v. Arnesen*, 381 N.W.2d 448, 455 (Minn. Ct. App. 1986) (“[a]ffording the opportunity for effective cross examination was a means to accomplish the end, insuring a fair trial”). See also *Peterson v. Little Giant-Glencoe Portable Elevator Div. of Dynamics Corp. of America*, 366 N.W.2d 111, 114 (Minn. Ct. App. 1985) (recognizing an indemnity agreement between parties is admissible to impeach witness). *Johnson v. Moberg*, 334 N.W.2d 411 (Minn. 1983) (settlement “can effect the motivation of the parties and, indeed, the credibility of witnesses, and only by bringing the settlements into the open can a trial proceed in a fair and proper adversarial setting”). By characterizing the settlement agreements as “partial” and limiting cross examination based on the settlement agreements, the effect of the settlement agreements on the motivations of the parties was not brought into the open such that the trial could proceed in a fair and proper adversary setting.

In a case involving a true *Pierringer* release, the distortion caused by a settlement agreement may be ameliorated by disclosure and cross examination. The Minnesota judiciary has recognized that while encouraging settlement through the use of settlement agreements is a laudable goal, steps must be taken to protect the interests of the non-agreeing parties such that the adversarial process is not sacrificed. *Pacific Indem.*, 260 N.W. 2d at 557 (in the case of a settlement agreement otherwise valid and enforceable under Minnesota law, “disclosure and an adequate opportunity to cross examine insure that the adversary process is not so subverted as to deny a fair trial”). In the case of a settlement agreement including an anti-cooperation clause which subverts the adversarial process,

disclosure and an adequate opportunity to cross examine does not remedy the prejudice to the non-settling parties. Settlement agreements contractually obligating settling parties to cooperate with defense and refrain from cooperating with non-settling parties, prejudicing such non-settling parties, go too far and invade the truth-seeking function and integrity of the adversary process. The cooperation and non-cooperation clauses promote collusion and secrecy concerning material facts which then become the subject of trial testimony previously undisclosed to non-settling parties. The “cooperation” and “non-cooperation” cannot be undone or remedied by disclosure and cross examination.

Reversible prejudicial error occurred as a result of the trial court’s rulings characterizing the settlement agreements as partial and limiting cross examination based on the settlement agreements. More importantly, even had the court permitted meaningful cross examination on the settlement agreements, such cross examination would not have remedied the distortion caused by the settlement agreements. The collusive settlement agreements constitute irregularities in the proceedings of the court and prevailing parties and warrant a new trial.

II. THE JURY’S SPECIAL VERDICT FINDINGS ARE AGAINST THE OVERWHELMING EVIDENCE.

On appeal from a trial court’s denial of a JNOV motion, the appellate court applies the same standard the trial court uses to review the verdict. *Edgewater Motels, Inc. v. Gatzke*, 277 N.W.2d 11, 14 (Minn. 1979). JNOV should be granted if no reasonable minds could find as the jury did. *Hauenstein v. Loctite Corp.*, 347 N.W.2d 272, 275 (Minn. 1984). The jury could not have made special verdict findings in the affirmative on the negligence and direct cause questions involving Marcy and at the same time find other parties, including K/O, AET (in both of its roles on the

project) and A&P/J-W were also negligent. Necessarily, if the jury found, as defendants HGA and R&C advocated, that Marcy was responsible for problems in placement of the concrete, then it had to also find negligence on the part of other parties, whose responsibilities were tied to the work of Marcy, including K/O, the special inspector of Marcy's work, AET, the firm responsible for mix design and quality control/special inspection of concrete delivered to the site and A&P/J-W, responsible, in the first instance, for determining whether Marcy was qualified to work on the aquarium project.

If, as defendants advocated at trial, Marcy was responsible for problems in placement of the Isle Royale tank then, necessarily, reasonable minds could only reach but one conclusion: A&P/J-W, the construction manager, breached its duty to disqualify Marcy as a contractor eligible to work on the project.

HGA cannot benefit from the testimony of Craig Kronholm concerning Marcy's "appalling" work representing the worst concrete placement he had ever seen and at the same time disavow Craig Kronholm's un rebutted testimony establishing A&P/J-W was negligent.

Craig Kronholm, an employee of A&P/J-W, offered testimony as follows: (1) he had experience with Marcy prior to the Great Lakes Aquarium; (2) based on his prior experience, he formulated the opinion that Marcy was not qualified to work on the aquarium project; (3) he made a recommendation to A&P/J-W that Marcy be disqualified from working on the project; and (4) A&P/J-W overruled his recommendation. Craig Kronholm's testimony was un rebutted.¹⁸ The un rebutted testimony of Craig Kronholm required that reasonable minds could only reach but one

¹⁸The only rebuttal to Craig Kronholm's testimony would be the "curveball" impeachment of Mr. Kronholm, a testimonial assertion not based on the record, made by R&C's counsel during his closing argument.

conclusion if they concluded the problems in placement in the Isle Royale tank were due to Marcy: A&P/J-W was also negligent in its responsibility to disqualify Marcy from working on the project. In other words, if the jury elected to make findings consistent with the defense theory that Marcy was responsible for placement of concrete in the Isle Royale tank, the jury also had to find A&P/J-W was negligent. A special verdict finding that Marcy was negligent exclusive of a special verdict finding that A&P/J-W was also negligent, is against the overwhelming evidence and the un rebutted testimony of Craig Kronholm

Similarly, if the jury concluded Marcy was responsible for problems in placement of concrete in the Isle Royale tank, it could not make that finding and at the same time exonerate K/O, the engineering firm responsible for special inspection of Marcy's work, including preparation for placement, as testified to by Jennifer Castillo-Babcock. The jury's special verdict findings are contrary to the overwhelming evidence establishing that if the jury concluded the problems in placement were due to construction and Marcy was to be held to be at fault, others were, necessarily, also negligent. The jury's findings are further evidence that their findings were based on passion, prejudice and emotion, rather than a consideration of the duties and responsibilities of the various parties on the project and the evidence in the case. The jury's failure to find K/O negligent given it found Marcy negligent is particularly troubling because of K/O's role as a special inspector and its field inspection reports declaring Marcy's work as in compliance with contract documents and announcing Marcy had used all techniques that the parties could think of to place the concrete. If Marcy failed to comply with contract documents or did not use means and methods which it should have, then why did the K/O field inspection reports represent Marcy had complied with contract

documents and had utilized all possible techniques that the special inspector and Marcy thought were appropriate?

Finally, the jury made a special verdict finding that AET, in its role as a special inspector, was negligent. The only argument (not evidence) presented to the jury regarding the negligence of AET related to its role as a special inspector and its responsibility for quality control, including checking of batch tickets on site when concrete was delivered for placement in the Isle Royale tank. The jury's special verdict finding concerning AET must be based upon the argument advanced by defense counsel concerning the placement of T1 versus T1 revised in the Isle Royale tank which was not supported by any competent evidence but, rather, was based on testimonial assertions made by defense counsel. Defendants should have called individuals with foundation to offer opinions regarding T1 versus T1 revised, including DRM but failed to do so. The only evidence which the jury could have relied upon to find "yes" to the question of AET in its role as a special inspector would have been based upon testimonial assertions by defense counsel which does not constitute competent evidence upon which a finding may be sustained. The special verdict findings which were made by the jury concerning Marcy and AET, in its role as a special inspector, were based on testimonial assertions, not competent evidence, and are against the overwhelming evidence. The jury's affirmative special verdict findings regarding the negligence of Marcy and AET are not justified by competent evidence. Moreover, the jury's affirmative special verdict findings on the negligence and direct cause of Marcy and AET, exclusive of affirmative special verdict findings on the negligence and direct cause of other parties, including K/O and A&P/J-W, are against the overwhelming evidence and undisputed testimony of Craig Kronholm. In light of the special verdict findings made by the jury and the manner in which the jury made its special verdict findings,

judgment notwithstanding the verdict is warranted and the trial court erred by declining to grant JNOV.

III. THE PREVAILING PARTIES ENGAGED IN PREJUDICIAL MISCONDUCT WARRANTING A NEW TRIAL.

Rule 59.01(b) provides that a new trial will be granted on the grounds of misconduct of the prevailing parties. The prevailing parties engaged in numerous instances of misconduct, prejudicing the rights of LSC and LSCA to a fair trial and warranting a new trial. The trial court clearly abused its discretion by denying the motion for a new trial based on grounds of misconduct.

The importance of preserving the purity and integrity of jury trials and general confidence in the mode of trial is a controlling consideration in granting new trials due to misconduct of counsel or the prevailing party. *Sievert v First Nat Bank in Lakefield*, 358 N.W.2d 409 (Minn. Ct. App. 1984); *Reese v Ross & Ross Auctioneers, Inc.*, 276 Minn. 67, 149 N.W.2d 16 (1967) (new trial on grounds of counsel misconduct was not granted as disciplinary measure but as means for correction of wrongs in practice, for prevention of injustice and as means of restoring status quo where, by his counsel's misconduct, a successful litigant gained undue advantage and his defeated opponent suffered an undeserved injury). Numerous instances of misconduct may cause several mild instances, when taken together, to be cumulatively prejudicial. *See Wild v. Rarig*, 302 Minn. 419, 234 N.W.2d 775 (1975), appeal dismissed, 42 U.S. 902 (1976), rehearing denied, 425 U.S. 945 (1976). Each instance of misconduct in this case was prejudicial in and of itself; the numerous instances of misconduct constitute a pattern of conduct, the cumulative effect of which deprived LSC of its right to a fair trial. *See Sievert v. First Nat. Bank of Lakefield*, 358 N.W.2d 409 (Minn. Ct. App. 1984) (reversal based on misconduct due to a pattern of improper conduct making it difficult for the jury to arrive at an impartial verdict).

Due to page constraints, LSC and LSCA dedicates this section of its brief to a discussion of certain instances of misconduct by defense counsel and also incorporates by reference its notice of motion and motion detailing additional instances of misconduct by defense counsel.

A. **Defense Counsel Engaged in Prejudicial Misconduct by Making Testimonial Assertions and Asking Questions Calculated to Prejudice LSC and LSCA in the Eyes of the Jury.**

Throughout the trial, defense counsel injected matters into the trial which were not relevant and calculated to prejudice LSC and LSCA in the eyes of the jury. Such matters were injected by way of testimonial assertions and questions by defense counsel to witnesses and closing argument. The effect of introducing such prejudicial matters was clearly intended to prejudice LSC and LSCA in the eyes of the jury, coloring the jury's perception of LSC and LSCA and framing the jury's fact-finding by reference to matters highly prejudicial in nature. Defense counsel's misconduct made it difficult for the jury to arrive at an impartial verdict and warrants a new trial.

Questions by counsel tending to prejudice a party in the jury's eye, even if sustained and stricken from the record, may nonetheless have a prejudicial effect on the jury which may not, as a practical matter, be mitigated by a ruling from the court and an instruction to disregard the question. State v. Silvers, 230 Minn. 12, 40 N.W.2d 630 (1950); Sievert v. First Nat. Bank of Lakefield, 358 N.W.2d 409 (Minn. App. 1984); State v. Haney, 219 Minn. 518, 18 N.W.2d 315 (1945) (state was not permitted to plant in jurors' minds prejudicial belief in existence of other offenses that would be inadmissible evidence through insinuation by asking improper questions and thereby preventing a party from having a fair trial). A new trial may be granted due to misconduct of counsel and the prevailing party in the absence of objections and even if a cautionary instruction has been given to the jury. Wild v. Rarig, 302 Minn. 419, 244 N.W.2d 779 (1975); Patton v. Minneapolis St. Ry. Co.,

247 Minn. 368, 77 N.W.2d 433 (1956). Where the lines are closely drawn and disputed on the question of liability, prejudicial misconduct of counsel warrants a new trial. *Bush v. Havir*, 253 Minn. 318, 91 N.W.2d 784 (1958); *Ellwein v. Holmes*, 234 Minn. 397, 68 N.W.2d 220 (1955).

Defense counsel sought to question witnesses on many issues which were not relevant to the issues involved in the case, including the court's pre-trial ruling on the issue of whether certain communications between LSC and the owner's representative were protected by the attorney-client privilege (Tr. at 3251), the resignation of Andrew Slade (Tr. at 3184, 3203-3232), the former education director, from the aquarium, guarantors on aquarium debt (Tr. at 1221) and Ripley's role as a manager of the aquarium, among other issues, some of which have been publicly debated in the local community.

Defense counsel's improper questioning was oftentimes the subject of an objection which was sustained. While the objections were on occasion sustained, the questions had the intended impact on the jury. LSC's counsel was forced to object, trial testimony was interrupted, and a sidebar conference was held, all of which only served to highlight various issues which had no relevance to the case.

Defense counsel's misconduct included repeated testimonial assertions and questioning of witnesses concerning matters which were not relevant and highly prejudicial, including references to other aquariums experiencing financial difficulties and Listul filing bankruptcy,¹⁹ testimonial assertions regarding T-1 versus T-1 revised design mix and questions directed to witnesses concerning T-1 versus T-1 revised design mix even though R&C dismissed DMR prior to trial based

¹⁹Listul was the trade contractor responsible for fabrication, delivery and erection of steel on the project. HGA and R&C alleged Listul was responsible for any delay in completion of the project. HGA and R&C had an interest in showing Listul failed to perform on the project.

on the representation that the T-1 versus T-1 revised design mix theory was without evidentiary support. The questions and testimonial assertions were not relevant to any issues involved in the case and were clearly calculated to appeal to the bias and prejudice of the jury. The effect of defense counsel's questions and testimonial assertions concerning non-relevant matters intended to appeal to the bias and prejudice of the jury was to transform the case from one involving negligence claims against design professionals to a political debate regarding the project in general for the purpose of evoking the passion, prejudice and emotion of the jury, prejudicial to LSC and LSCA. The effect of the questions and testimonial assertions was to plant in the jurors' minds a variety of matters unrelated to the issues involved in this case, controversial in nature, which would have the effect of prejudicing LSC and LSCA in the eyes of the jurors.

B. Defense Counsel's Closing Argument Incorporating Matters Which Were Not a Matter of Record and Calculated to Envoke the Passion and Prejudice of the Jury, Constitutes Misconduct, Intentional in Nature and Warrants a New Trial.

R&C faced two problems which it had to overcome in closing argument. Helen Fehr, R&C's engineer primarily responsible for design of the Isle Royale tank had been impeached on multiple occasions and her credibility was in question and R&C had to explain certain testimony of Craig Kronholm, A&P/J-W, which would likely mean a substantial fault allocation to A&P/J-W, a party for whom HGA had an indemnity obligation.²⁰ R&C overcame these problems by referring to matters which were not a matter of record. Defense counsel's reference to matters outside of the record which bore upon the credibility of a key defense witness and provided an explanation for

²⁰Pursuant to the HGA-R&C agreement, R&C had an interest in assisting HGA in the defense of any claims for which HGA had an indemnity obligation.

testimony R&C desired to have the jury minimize, constitutes defense misconduct, intentional in nature and warrants a new trial.

Misleading and inflammatory argument is prejudicial and warrants a new trial. *Larson v Belzer Clinic*, 292 Minn. 301, 195 N.W.2d 416 (1972). Prejudicial and improper comments were made by defense counsel during closing argument. Such comments were objected to at the time of argument and at the close of argument and a new trial is warranted. *Magistad v. Potter*, 227 Minn 570, 36 N.W. 2d 400 (1949) (a new trial is warranted where prejudicial and improper comments are made during closing arguments and objected to at the time or at the close of the argument). Defense counsel's closing argument was highlighted by numerous improper comments and statements as follows:

- Reference to a "soiree," the incident in which R&C's counsel by his conduct communicated to the jury his negative appraisal of expert testimony presented by LSC and LSCA. (Tr. at 5914).
- Repeatedly reading verbatim from the transcript and suggesting LSC's closing argument should not be afforded the same weight as R&C's closing argument and implying the parties had equal access to the transcript. (Tr. at 5919, 5922, 5944, 5948-5951).
- Knowing that the law does not recognize a contractor assumes liability for defective plans and specifications, telling the jury a contractor "buys" specifications. (Tr. at 5258).
- Reliance on that T-1 versus T-1 revised design mix as a basis for imposing liability on Marcy even though HGA and R&C dismissed Duluth Ready Mix based on a representation that the T-1 versus T-1 revised design mix theory was without evidentiary support. (Tr. at 5923).

- A suggestion that the jury should draw a negative inference from LSC's failure to call Marcy to defend its work. (Tr. at 5927).
- A suggestion that a negative inference should be drawn by LSC not calling Chuck Koosmann, a defendant who shared common claims counsel with HGA, a fact never made available to the jury. (Tr. at 5962).
- An explanation to the jury that Mr. Kronholm's testimony regarding his recommendation to disqualify Marcy was a surprise to the attorneys.

Now, we did get a bit of a curve ball in this case a few weeks ago. You probably didn't know it because we are good at sitting there and looking like nothing ever happens. Mr. Kronholm testified that he didn't even think Marcy was qualified to bid the job. He didn't even think Marcy was qualified to bid the job. That was, actually, a bit of a surprise.

Tr. at 5928.

- An acknowledgment of Helen Fehr's credibility being called into question (Tr. at 5929) which was followed by the following:

Is Helen Fehr incompetent? Was she unqualified to do this work? That's your decision. I'll leave that to you. She came here, she explained that work to you. She was scared to death. The first time I brought her in to show her the witness stand, she burst into tears. This is not what she normally does.

Tr. at 5934 (emphasis added).

- Defense counsel inappropriately drew upon his experience in commenting on the evidence.

Defense counsel identified himself as having done a lot of construction legal work:

I'll let you in on another secret. You know what? I have done a lot of construction work, legal work, but I have never handled a construction case dealing with an aquatic containment structure ... I have never handled a legal case dealing with aquatic containment structures and neither has Mr. Clapp.

R&C's comments regarding his background and experience are then followed by his statements to the jury that LSC should not have paid Marcy \$465,000 in settlement of the arbitration claim which was one of the amounts LSC was seeking to recover in this action as a result of the negligence of R&C and HGA.

The trial court rejected LSC's motion for a new trial on the grounds of misconduct by defense counsel and prevailing parties. The trial court recognized that defense counsel had incorporated within his closing argument comments which were not a matter of record, but declined to grant a new trial. The trial court clearly abused its discretion by declining to grant a new trial based on defense counsel's misconduct.

A party's substantial rights are prejudiced when an attorney makes statements in his closing argument which are entirely outside of the record, including statements calculated to place his witnesses in a better light and add weight to their testimony. *State v. Boice*, 157 Minn. 374, 196 N.W. 483 (1923). Defense counsel's statements in his closing argument to matters which were entirely outside of the record were calculated to overcome two problems R&C faced, including the credibility of Helen Fehr and providing the jury with a basis for rejecting a portion of Craig Kronholm's testimony which would mean a likely fault allocation to A&P/J-W, a party for whom HGA had an indemnity obligation.

Helen Fehr was a key defense witness because she was the engineer primarily responsible for design of the aquatic containment structures. Her qualifications and credibility were in question. At trial, LSC and LSCA demonstrated that Helen Fehr had no prior experience with design of aquatic containment structures similar to the structures in the aquarium. At trial, Helen Fehr was impeached by her prior deposition testimony on multiple occasions. Her credibility, given her

inexperience and inconsistent, impeached testimony, was an issue. For example, in an effort to overcome her lack of experience in design of aquatic containment structures, Ms. Fehr testified at trial that she consulted on a regular basis with more senior engineers at R&C (including Harold Davis and Bruce Starkman) with far more experience in design of aquatic containment structures, yet in her deposition, she testified that she primarily designed the tank without consulting other engineers.

Helen Fehr's "bursting into tears" was not relevant to any issue in this case. Helen Fehr's "bursting into tears" was not a matter of record. Defense counsel's reference to Helen Fehr's emotional state was improper and the only reason it was incorporated in closing argument was to cause the jury to base its decision on emotion and sympathy. By explaining to the jury that Helen Fehr had burst into tears when shown the witness stand and was "scared to death," defense counsel supplied the jury with a way to believe that Helen Fehr's inconsistent, impeached testimony was a function of her nerves and emotional state rather than not telling the truth, upon which the jury could reject her testimony. The natural reaction of any person when told another individual has burst into tears is to be empathetic and sympathetic.²¹ Defense counsel's comments concerning Ms. Fehr "bursting into tears" can only be characterized as improper and grossly prejudicial to LSC and LSCA.

After defense counsel was reminded that his closing argument should be based on the record, defense counsel then explained to the jury that the testimony of Craig Kronholm concerning his prior experience with Marcy and recommendation that Marcy be disqualified from working on the

²¹Three female jurors in the front row nodded in empathy when defense counsel made the statement. One of the three female jurors appeared so sympathetic that she herself looked like she was about to cry as a result of defense counsel's comments.

aquarium project was not known by the attorneys prior to trial. Defense counsel's references to matters outside of the record concerning Craig Kronholm's testimony constitutes misconduct.

During closing arguments, counsel for HGA and R&C both argued to the jury that LSC's failure to call Charles Koosmann and representatives of Marcy as trial supported a negative inference against LSC. Such comments are not supported by Minnesota law and were prejudicial. No adverse inference is permissible from the failure of one party to introduce evidence equally available to both parties *Fischer v Mart*, 241 N.W.2d 320, 321 (Minn. 1976). During arguments on jury instructions, LSC requested a jury instruction providing the jury with guidance on when failure to call a witness may support an unfavorable inference against the party failing to call the witness. The trial court declined to give that jury instruction. In those circumstances in which the court has recognized a negative inference may be drawn from the failure to call a witness, the witness must be within the control of the party against whom the unfavorable inference is drawn. HGA and R&C made no showing that Marcy was within the "control" of LSC. Moreover, HGA and R&C, not LSC, had the burden of establishing Marcy was negligent and its negligence was the cause of problems in placement of concrete in the tank. Rather than calling Marcy representatives, HGA and R&C chose to introduce hearsay evidence and evidence otherwise lacking in foundation to establish Marcy's liability. Any negative inference to be drawn from the failure to call Marcy should have been drawn against HGA and R&C, not LSC.

Defense counsel's closing argument included statements regarding matters which were not part of the record ("curve ball" and Ms. Fehr bursting into tears as witnessed by defense counsel, not the jury), appeals to passion and prejudice (jury service is akin to service of our country in the war and a reference to the "soiree" incident previously the subject of objection by LSC's counsel and

pursuant to an in-chambers conference with the court, the subject of a cautionary instruction not to engage in conduct in violations of the rules of decorum), disparaging comments regarding counsel for LSC (including, but not limited to, LSC's counsel's failure to utilize the trial transcript in her closing argument, leaving the jury with the impression that both parties had equal access to the trial transcript) and references to matters not relevant to the jury's determination of the issues involved in the case (a contractor "buys" specifications). Defense counsel's closing argument violated every tenet fundamental to a fair and proper argument and warrants a new trial.

C. Defense Counsel's Communication With the Jury Regarding His Appraisal of the Evidence is Presumptively Prejudicial and Warrants a New Trial.

During trial and in his closing argument, defense counsel communicated with the jury concerning his appraisal of the evidence. Defense counsel's communication with the jury regarding his appraisal of the evidence is prejudicial and warrants a new trial. *Lamont v. Independent School District No. 395 of Waterville*, 278 Minn. 291, 154 N.W.2d 188 (1967) (it is improper and prejudicial for counsel in his closing argument to advise the jury of his experience in the practice of law and his appraisal of the evidence or the case based on that experience). During trial, defense counsel improperly communicated with the jury concerning his appraisal of evidence presented by LSC. During cross examination of Robert Hillebrecht, an accountant called by LSC and LSCA to establish its economic loss, R&C's counsel theatrically shook his head and put his head down on counsel table, causing the attention of the jury to be diverted away from expert testimony to his demonstrative, negative appraisal of the expert's testimony. Three of the female jurors seated in the front row paying great attention to defense counsel's reaction to the testimony and in response to his conduct, smiled and laughed in kind, tacitly joining in defense counsel's appraisal of the expert

testimony. Even after LSC's counsel raised a concern about the conduct representing a departure from the rules of decorum and an improper appraisal of the evidence by an attorney, defense counsel chose to reemphasize the improper incident by incorporating within his closing argument a reference to the soiree incident.

During his closing argument, defense counsel also let the jury in on a "secret," his experience in doing "a lot of" construction legal work, and after letting them in on the "secret," he provided his appraisal of certain evidence.

Defense counsel's appraisal of the evidence was prejudicial and warrants a new trial.

D. LSC and LSCA Are Entitled to a New Trial Based on The Surprise Testimony of Cooperating Witnesses Craig Kronholm and David Krech.

Rule 59.01 provides a new trial shall be granted on the grounds of accident or surprise which could not have been prevented by ordinary prudence. Minn. R. Civ. P. 59.01(c). At trial, two material cooperating witnesses offered surprise, undisclosed testimony in support of the defense theory that Marcy was responsible for problems in placement of the Isle Royale tank. Judged against the backdrop of this case, including pretrial collusive settlement agreements, the undisclosed surprise testimony of Craig Kronholm and David Krech warrants a new trial. The trial court clearly abused its discretion by declining to grant a new trial based on the surprise testimony of cooperating witnesses.

Craig Kronholm testified at the end of the defense case. At trial, Craig Kronholm offered an opinion concerning Marcy's work which was very damaging to LSC's case and which supported the defense theory that Marcy was responsible for problems in placement of concrete.²² Craig

²²Marcy was the empty chair and pursuant to an indemnification clause in a *Pierringer* release, LSC assumed any liability allocated to Marcy.

Kronholm's testimony was undisclosed prior to trial. At trial, Craig Kronholm testified that the factual basis for his opinion that Marcy's work was "appalling" was based upon his experience with Marcy prior to the Great Lakes Aquarium project, a recommendation made by him to the construction manager that Marcy be disqualified from working on the project based on Kronholm's prior experience with Marcy and that ultimately the partnership overruled Kronholm's recommendation. The Kronholm testimony was extremely damaging testimony, occurred late in the trial when LSC and LSCA were unable to meet or address the testimony properly despite having engaged in extensive discovery for nearly two years prior to trial. As the record reflects, LSC and LSCA made a request for production of the letter referenced by Mr. Kronholm in his testimony which had been the subject of discovery requests requiring its production. LSC is entitled to a new trial based on the surprise testimony of Craig Kronholm.

In addition to the surprise testimony of Craig Kronholm, David Krech, a cooperating defense witness, also offered surprise testimony at trial which was not disclosed prior to trial. David Krech is an engineer employed by K/O. K/O was the special inspector responsible for taking observations of Marcy's work prior to placement and during placement and noting any deviations from the contract documents as well as noting whether Marcy's work complied with the contract documents. K/O is a CNA insured and was represented in this action by the same attorney representing Koosmann Project Management Services, Inc., the owner's representative. Koosmann, K/O and HGA all had common claims counsel. K/O, in contrast to HGA and R&C, would have an interest in demonstrating that Marcy's means and methods were not the cause of problems in placement in the Isle Royale tank precisely because K/O was responsible for inspecting Marcy's means and methods and had liability exposure if Marcy's means and methods were deficient. K/O, through its

two engineers David Krech and Jennifer Castillo, authored field inspection reports setting forth their observations of Marcy's work on the project, including reports setting forth their observations of Marcy's work prior to placement and during placement. In the field inspection reports, David Krech and Jennifer Castillo-Babcock set forth their contemporaneous observations of Marcy's work and, based on their observations and K/O's role as a special inspector, indicated that Marcy had done all it could in terms of placement and had complied with the contract documents. At trial, David Krech testified in a manner inconsistent with the field inspection reports and disavowed certain observations initially made by him in his field inspection reports.

The surprise testimony of Craig Kronholm and David Krech was prejudicial because the testimony related to the defense theory that Marcy was responsible for problems in placement of the Isle Royale tank and, accordingly, LSC is entitled to a new trial.

IV. ERRORS OF LAW OCCURRED AT TRIAL AND WARRANT A NEW TRIAL.

Errors of law occurring at trial which are prejudicial to a litigant warrant a new trial. Minn. R. Civ. P. 59.01(f). Numerous errors of law occurred at trial which were prejudicial to LSC and LSCA and warrant a new trial. *See* Amended Notice of Motion and Motion for JNOV/New Trial. The errors of law were prejudicial because they related to the liability issue of whether Marcy was negligent with respect to its construction activities or, in the alternative, HGA and R&C were negligent in design of the tank.

A. Duluth Ready Mix Should Have Been Included as an Absent Party on the Special Verdict Form.

Following the close of evidence, LSC sought to have Duluth Ready Mix ("DRM") added as an absent party to the verdict form. LSC sought to have DRM added as an absent party based on the

theory advanced by HGA and R&C at trial that problems in placement were due to the use of two loads of T-1 design mix rather than T-1 revised design mix. R&C and HGA opposed adding DRM to the verdict form (a party for whom HGA and R&C would be jointly and severally liable), claiming that the T-1 versus T-1 revised theory was without evidentiary support based on an affidavit of Michael Robertson, a DRM representative, obtained by HGA and R&C from DRM prior to trial and upon which they represented to the court that dismissal of DRM was appropriate. The trial court declined to add DRM as an absent party based on its prior dismissal of DRM but noted that it was “mystified” by the evidence presented by HGA and R&C at trial concerning T-1 versus T-1 revised design mix.

The trial court clearly abused its discretion and erred as a matter of law by declining to add DRM as an absent party to the special verdict form. If, as HGA and R&C advocated throughout trial and during their closing arguments, the use of T-1 versus T-1 revised design mix was a basis for imposing liability on Marcy, the T-1 versus T-1 revised theory also implicated DRM, the party responsible for delivering the correct design mix to the site and AET, responsible for special inspection of design mix delivered to the site. The failure to add DRM to the verdict form was prejudicial precisely because the jury apparently adopted the T-1 versus T-1 revised design mix theory of liability in that it allocated fault to Marcy and AET in its role as a special inspector and the only commonality between those parties is the T-1 versus T-1 revised design mix theory.

B. Helen Fehr’s Testimony Regarding Budget For Repairs Was Inadmissible and Lacking in Foundation.

At trial, HGA and R&C adopted as part of its defense strategy that Marcy had no incentive to perform competent work because it would be paid for its work in connection with repairs and

remedies of the Isle Royale tank. This theory was advanced based upon testimony of various individuals that because a \$40,000 budget had been established for repairs on the Isle Royale tank, Marcy had no incentive to adequately perform its work because it would be paid for repairs. This theory was not proven through testimony of witnesses with foundation to offer such testimony. Rather, this theory was advanced through testimony of witnesses speculating as to Marcy's state of mind which was totally lacking in foundation. For example, over objection by LSC's counsel, Helen Fehr was permitted to offer an opinion regarding the budget for repairs and Marcy's state of mind given that budget. Tr. at 5020. Her testimony was clearly lacking in foundation and speculative, supported the defense strategy in this case, and was prejudicial.

C. **An Engineering Firm is Liable in Indemnity for Defective Plans and Specifications, Zontelli & Sons v. City of Nashwauk, 353 N.W.2d 600 (Minn. 1985) and a Jury Instruction Regarding an Engineering Firm's Liability In Indemnity Should Have Been Submitted to the Jury to Counter a Defense Expert's Misstatement of the Law.**

The trial court declined to submit a jury instruction recognizing an engineering firm's liability in indemnity for defective plans and specifications as recognized by the Minnesota Supreme Court in *Zontelli & Sons, Inc. v. City of Nashwauk*, 373 N.W.2d 744 (Minn. 1985). The jury instruction is a correct statement of the law on indemnity, one of the claims asserted by LSC and LSCA against R&C. The instruction was necessary to counter a defense expert's misstatement of the law, subsequently relied upon by defense counsel in his closing argument, that a contractor "buys" specifications prepared by an engineer and the engineer is shielded from liability for defective plans and specifications. R&C had to acknowledge that its specifications were defective and present some theory which would shield it from liability because the specifications were defective. Tr. at 1130. R&C attempted to do so by introducing evidence that the specifications did not constitute "rigid"

requirements and that the contractor “buys” specifications. Under Minnesota law, an engineering firm is liable in indemnity for defective plans and specifications. *Zontelli & Sons v. City of Nashwauk*, 353 N.W.2d 600 (Minn. 1985). In the absence of an appropriate *Zontelli*-based instruction, the jury was left with the incorrect proposition offered by defense expert James Metzler and others suggesting that R&C is not responsible for defective plans and specifications and the contractor “buys” specifications even defective plans and specifications. The trial court abused its discretion and erred by failing to submit an appropriate *Zontelli*-based instruction.

D. Evidence and Testimonial Assertions Concerning Marcy’s Reputation, Prior Work History, Work Other Than On the Isle Royale Tank, Alleged Statements Made by Marcy to AET Regarding Eclipse and Activities Claimed to be the Responsibility of Marcy Should Have Been Excluded and the Admission of Such Evidence was Prejudicial to LSC and LSCA Warranting a New Trial.

During trial, defense counsel repeatedly questioned witnesses other than representatives of Marcy concerning Marcy’s “reputation,” its state of mind, prior work history, work other than on the Isle Royale tank and alleged statements made by Marcy to AET regarding Eclipse and activities claimed to be the responsibility of Marcy, all of which supported the defense theory of liability and depicted Marcy as a company with bad character. Witnesses who had agreed to cooperate with the defense offered gratuitous testimony concerning Marcy’s responsibility on the project which became all encompassing and greater than that testified to during discovery and which failed to acknowledge that others (such as AET) were responsible for certain activities. Such questioning and testimony included:

1. Questions directed to John Carlson, Craig Kronholm and David Schilling concerning Marcy’s work on the aquarium project in general and other than on the Isle Royale tank, without establishing that its other work involved a similar degree of reinforcing congestion,

placement methods and other factors similar to the Isle Royale tank which would make it relevant to the claims at issue in this case (Tr. at 3848);

2. By questioning AET's representative, Robert Christen, concerning claimed statements made by Marcy regarding the design mix results using Eclipse. Mr. Christen, a cooperating witness, testified on examination by defense counsel that Marcy told him not to send the test results to R&C, suggesting Marcy engaged in fraudulent conduct. Tr. at 2374. Mr. Christen failed to identify any particular representative of Marcy who made the statement and simply referred to Marcy in general; and
3. By questioning witnesses concerning the responsibilities of Marcy which, at the time of trial, and due to realignment of certain interests of parties due to cooperation clauses and settlement agreements was far and wide ranging, contrary to discovery in which HGA and R&C sought to make others primarily responsible for certain aspects of work related to the Isle Royale tank, including mix design.

HGA and R&C repeatedly introduced hearsay and incompetent evidence concerning Marcy, ranging from its reputation for doing substandard work to a claimed mandate that Marcy gave to AET not to send to R&C results of a design mix using Eclipse. HGA and R&C sought to introduce such evidence in support of its theory that Marcy was responsible for problems in placement of the Isle Royale tank. LSC's counsel initially objected to introduction of such testimony on hearsay and foundation grounds but was overruled.

The Marcy hearsay evidence and testimonial assertions relating to Marcy's reputation, prior work history, work other than on the Isle Royale tank, alleged statements made by Marcy to AET

regarding Eclipse and activities claimed to be of the responsible of Marcy are all inadmissible under the Minnesota Rules of Evidence.

Rule 804 define certain hearsay exceptions and defines unavailability for purposes of the hearsay exceptions. The unavailability of a witness include certain circumstances delineated in the rule, none of which were demonstrated by the proponent of the hearsay testimony.²³ Evidence concerning an alleged statement made by Marcy by AET regarding Eclipse which was not attributed to a specific Marcy employee was inadmissible hearsay. Tr at 2374. Bob Christen's testimony that Marcy, a corporate entity, made a particular statement to him without him identifying the specific Marcy representative is improper hearsay. See Minn. R Evid 804(b)(3). Numerous letters authored by Eclipse representatives attesting to the quality and use of Eclipse were introduced through individuals other than Eclipse representatives notwithstanding hearsay objections by LSC, leaving LSC's counsel at a disadvantage for cross examination concerning the matters described in the Eclipse documents and offered for the truth of the matter asserted. Tr. at 2384-2397 Eclipse is a product which HGA and R&C claim should have been used by Marcy on the project and would have allowed for successful placement of concrete in the tank. Permitting introduction of hearsay evidence regarding claimed successful use of Eclipse without an opportunity to cross examine an Eclipse representative, was prejudicial

E. **The Computer Animation Introduced By R&C as Part of Its Claim That Marcy was Liable for Problems in Placement Was Lacking in Foundation and Otherwise Inadmissible.**

²³The record establishes Marcy representatives were "available," because R&C had them under subpoena.

At trial, R&C was permitted to introduce as an illustrative exhibit a computer animation. Prior to trial, LSC objected to introduction of the computer on multiple grounds. The trial court granted the motion in part but permitted the introduction of an animation showing means and methods Marcy could have used in construction on the Isle Royale tank. *See Order Granting In Part Plaintiff's (sic) Motion to Exclude Computerized Animation*. At trial, LSC again objected to the animation as lacking in foundation and highly prejudicial to LSC because it purported to depict various simple means and methods which could have been utilized in placement of concrete in the Isle Royale tank and showed a perfect result. While the animation showed certain means and methods, it also showed a result: perfect placement. Placement is the function of many variables and the animation showing certain means and methods and a perfect result, without foundation showing the other variables which may impact placement, was prejudicial. The animation shown to the jury was essentially a cartoon which was fictional in nature because it showed concrete which was easily flowing through the reinforcing congestion when, in reality, the concrete prescribed by R&C did not easily flow through the reinforcing congestion.

The standard for the admissibility of demonstrative evidence and visual aids is whether the evidence is relevant and accurate and assists the jury in understanding the testimony of a witness. *State v. DeZeler*, 230 Minn. 39, 46-47, 41 N.W.2d 313, 318-19 (1950). This same standard is also applicable to computerized animations. *State v. Stewart*, 643 N.W.2d 281, 293 (Minn. 2002). Demonstrative evidence must be an accurate representation of the evidence in the record to which it relates. *DeZeler*, 230 Minn. at 46-47, 41 N.W.2d at 318-19. The court in *State v. Stewart* cautioned:

Animation is a new and powerful evidentiary tool, but must be used with great care. McCormick has cautioned that one party's staged reproduction of facts creates the danger that "the jury may confuse art with reality" and that "the impressions generated by the evidence may prove particularly difficult to limit" 2 John William Strong, *McCormick on Evidence* 19 (5th ed. 1999). Because of its dramatic power, proposed animations must be carefully scrutinized for proper foundation, relevancy, accuracy and the potential for undue prejudice.

643 N.W.2d at 296 (citations omitted) (emphasis added). The Minnesota judiciary has primarily addressed the issue of admissibility of computer animations in the criminal cases in which a computer animation is introduced in connection with an expert's testimony to reconstruct a particular crime scene. Unlike the typical use of computerized animation, Rutherford & Chekene used an animation to show how the Isle Royale tank should have been constructed had the contractor used appropriate means and methods. Such a use of an animation is clearly improper as it does not represent a "reconstruction." Rutherford & Chekene's animation "contains a great deal of material that [is] based on conjecture and [does] not illustrate [Matthys] testimony on the precise record" and, accordingly, under Minnesota law is inadmissible. *State v. Stewart*, 643 N.W.2d at 294. The court should be cautious in admitting evidence in the form of new technology, including computerized animation, to ensure that it satisfies the standards of admissibility otherwise applicable to evidence. The computer animation did not constitute a reconstruction or reproduction of facts but, rather, constituted pure fiction, showing certain means and methods but also showing perfect placement given certain means and methods, the latter of which was not based on adequate foundation.

V. **THE TRIAL COURT ERRED BY DECLINING TO GRANT POST-TRIAL RELIEF IN CONNECTION WITH THE JURY TRIAL INCLUDING AMENDMENT OF THE PLEADINGS IN ACCORDANCE WITH RULES 14.01 AND 15.02 OF THE MINNESOTA RULES OF CIVIL PROCEDURE AND DETERMINING HGA IS LIABLE IN INDEMNITY FOR THE FAULT ALLOCATION TO AET.**

Following the trial, LSC and LSCA sought an order from the court determining certain questions of law based on the jury's special verdict findings. LSC and LSCA sought an order from the trial court permitting an amendment of the pleadings in accordance with Rules 14.01 and 15.02 of the Minnesota Rules of Civil Procedure and determining as a matter of law HGA is liable in indemnity for the fault allocation to AET pursuant to the HGA-CNA-AET settlement agreement. LSC 352-373. The trial court declined to grant the relief requested by LSC. LSC's motion for post-trial relief presented pure questions of law concerning its right to amend its pleadings in accordance with Rules 14.01 and 15.02 of the Minnesota Rules of Civil Procedure and the indemnity obligations of HGA pursuant to certain settlement agreements.

On appeal, questions of law are reviewed de novo. *Frost-Benco Electric Association v. Minnesota Public Utilities Commission*, 358 N.W.2d 639, 642 (Minn. 1984). The trial court's order erred by denying the motion to amend the pleadings in accordance with Rules 14.01 and 15.02 of the Minnesota Rules of Civil Procedure to make certain parties, previously third and fourth party defendants in the action, direct party defendants and determining, as a matter of law, that HGA is liable in indemnity. When HGA advised the court at the pretrial conference of potential settlements with AET and K/O and the pending settlement with A&P/J-W, the court expressly indicated HGA was in "dangerous waters" and suggested LSC and LSCA maintained the right to plead over at the end of the case. A post-trial motion by a plaintiff to amend its complaint to make a third party defendant a direct party defendant is proper under Rules 14.01 and 15.02 of the Minnesota Rules of Civil Procedure. *Jack Frost, Inc. v. Engineered Building Components, Inc.*, 304 N.W.2d 346 (Minn. 1981). Under Rule 14.01, a plaintiff is permitted to "assert any claim against the third-party

defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff."

The jury allocated fault to two parties: Marcy and AET in its role as a special inspector. In accordance with Rules 14.01 and 15.02 of the Minnesota Rules of Civil Procedure and the record in the action, AET, in its role as a special inspector, should be added as a direct party defendant. Minn. R. Civ. P. 14.01, Minn. R. Civ. P. 15.02; *Jack Frost, Inc. v. Engineered Building Components, Inc.*, 304 N.W.2d 346 (Minn. 1981).

LSC and LSC also sought to have the trial court determine as a matter of law HGA is contractually liable in indemnity for the fault allocation and judgment against AET. Pursuant to the HGA-CNA-AET agreement, HGA is, as a matter of law, contractually liable for the judgment of AET. LSC and LSCA also sought to have the trial court determine as a matter of law that A&P/J-W is liable in indemnity for the judgment against Marcy based on the unrebutted testimony of Craig Kronholm that he recommended disqualification of Marcy. LSC 349-351. Had the trial court granted LSC's motion, a judgment would have been entered in favor of LSC and LSCA in the amount of \$202,250, 25% of the damages award made by the jury which would then become the responsibility of AET and, in turn, the responsibility of HGA pursuant to the HGA-CNA-AET agreement. That judgment, in turn, represents an offset to any costs and disbursements judgment in favor of HGA and R&C. *Id.*, Exhibit A.²⁴

²⁴HGA and R&C defended the post-trial motion, in part, based on the dismissal of A&P/J-W, K/O and AET which, as noted previously, may have been improvidently granted due to the interpretation of the settlement agreements advanced by HGA and R&C at trial that the agreements included partial indemnification clauses. The court's order denying certain post-trial relief in favor of LSC and LSCA further illustrates the effect of the settlement agreements on the trial proceedings.

VI. THE FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER FOR JUDGMENT AND JUDGMENT RELATING TO THE FEE DISPUTE ARE CLEARLY ERRONEOUS AND SHOULD BE REVERSED.

Following the fall jury trial of the negligence claims, a court trial was held on a fee dispute asserted by HGA by way of a counterclaim against LSCA. On February 22, 2005, the court entered findings of facts, conclusions of law, order for judgment and judgment on the fee dispute counterclaim.

The trial court's findings and conclusions of law on the fee dispute counterclaim are clearly erroneous and should be set aside. *Schweich v Zeigler*, 463 N.W.2d 722, 729 (Minn. 1990) (in a case tried by the court, trial court findings which are clearly erroneous should be reversed); *Frost-Benco Electric Association v Minnesota Public Utilities Commission*, 358 N.W.2d 639, 642 (Minn. 1984) (questions of law are reviewed de novo). LSC 211-235.

VII. THE TRIAL COURT ADOPTED A FLAWED TAXATION ANALYSIS AND THE AWARD OF COSTS AND DISBURSEMENTS IS ERRONEOUS AS A MATTER OF LAW.

In a June 7, 2005 order, the trial court awarded HGA and R&C costs and disbursements in the amount of \$347,000 and declined to grant a stay in favor LSC as to the costs and disbursements judgment. See June 7, 2005 order and judgment entered on June 29, 2005. The trial court adopted a flawed taxation analysis and awarded costs and disbursements not authorized by the rules of civil procedure and Minnesota statutes. Because the trial court awarded costs and disbursements which are not authorized by the rules of civil procedure and Minnesota statutes, it clearly abused its discretion and erred as a matter of law and the costs and disbursements judgment should be vacated.

LSC and LSCA asserted a number of meritorious objections to taxation of costs and disbursements in any sum (forfeiture, equity and immunity from taxation as to Lake Superior Center Authority) and also asserted meritorious objections to each individual item sought to be taxed.

A. HGA and R&C Failed to Comply With the Rules of Civil Procedure and Other Rules Applicable to the Adversary Process and Have Forfeited Their Right to Tax Costs and Disbursements.

A prevailing party is entitled to tax certain costs and disbursements as authorized by Minnesota statutes and rules. Minn. R. Civ. P. 54; Minn. Stat. § 549.04. Taxation is a benefit afforded a prevailing party under the rules and presumes that the prevailing party has otherwise complied with the rules and is entitled to invoke the benefit of the rules. Defense misconduct admittedly occurred in this case and has been acknowledged by the trial court. While the trial court declined to grant a new trial based on such misconduct, such misconduct should have been taken into consideration by the trial court when taxing costs and disbursements. HGA and R&C conducted themselves with impunity throughout the trial proceedings and as those the rules do not apply to them. HGA and R&C should be foreclosed from invoking the benefit of Rule 54 of the Minnesota Rules of Civil Procedure based on their failure to comply with other rules applicable to the adversary process. HGA and R&C have forfeited their right to tax costs and disbursements.

B. Taxation of Expert Witness Fees is Governed by Rule 127 of the General Rules of Practice for the District Courts and Fees May Only be Awarded for Actual Trial Testimony of Experts.

Rule 127 of the General Rules of Practice for the District Courts governs taxation of expert witness fees and provides for taxation of fees for “experts” and prohibits an award of fees for “preparation time.” The trial court’s award of costs and disbursements includes sums for fees of individuals other than experts testifying at trial and includes fees for other than actual trial testimony

which are not authorized by Rule 127 of the General Rules of Practice for District Courts. Accordingly, the award should be vacated.

The trial court's extraordinary award of costs and disbursements fails to recognize rules and statutes applicable to taxation. The rules and statutes governing taxation of costs and disbursements in general and the rules applicable to expert witness fees specifically do not support the trial court's award of expert witness fees.

Minn. Stat. § 357.25 provides that the court may allow such fees or compensation as may be just and reasonable. Minn. Stat. § 357.25 provides:

The judge of any court of record, before whom any witnesses summoned or sworn and examined as an expert in any profession or calling may allow such fees or compensation as may be just and reasonable.

Minn. Stat. § 357.25 (emphasis added). Minn. Stat. § 357.25 specifically cross references Rule 127 of the General Rules of Practice for the District Courts which provides for a limitation on an award of expert witness fees.

Rule 127 of the General Rules of Practice for the District Courts governs taxation of expert witness fees. The court administrator is empowered to tax \$300.00 per day for an expert witness fee as a disbursement in a civil case. Minn. Gen. R. Prac. 127. The \$300.00 per day expert witness fee may be increased or decreased by the judge but “[n]o allowance shall be made for preparation or in conducting of experiments outside the courtroom by an expert.” *Id.* Rule 127 specifically prohibits taxation of expert witness fees related to preparation time. Herr & Fett, Minnesota Practice: General Rules of Practice Annotated (Ed. 1994) at 48 (“The final sentence of the rule restates the general rule that the allowance of expert witness fees serves to reimburse them for their appearance as a witness, not their entire participation in the case. The rule specifically states that preparation time or time

spent conducting experiments is not taxable”). Rule 127 permits taxation of \$300.00 per day per expert or, in the court’s discretion, fees for actual trial testimony. Should the court tax costs and disbursements, \$300.00 per day per expert should be allowed and no more than a “reasonable” amount representative of one day’s trial testimony²⁵ is authorized according to Rule 127 of the General Rules of Practice for the District Courts.

The limitation on taxation of expert witness fees is consistent with principles otherwise applicable to the adversary process. A litigant is entitled to recover its costs incurred in litigation only where a statute expressly provides that litigation expenses in their entirety are recoverable, such as recognized in certain consumer fraud statutes, where public policy favors such an award. In a typical civil case, an award of costs and disbursements does not consist of an award of all costs and disbursements incurred by a litigant but, rather, is limited to costs and disbursements statutorily recognized as taxable. Taxing expert witness fees representative of all fees incurred by a litigant and in an extraordinary sum is inconsistent with the American system of justice in which parties are not punished for litigating meritorious claims.

Statutory provisions governing taxation of costs and disbursements are in derogation of common law, penal in nature, and should be strictly construed so as not to impose a penalty or punishment. *Lockett v. Hellenic Sea Transports, Ltd.*, 60 F.R.D. 469 (Pa. 1973). The policy underlying the American rule is that the imposition of costs should not act as a bar to meritorious litigation and, accordingly, the type of costs which are recoverable are carefully circumscribed and limited. *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921). Taxation of costs and disbursements is “founded on the egalitarian concept of providing relatively easy access to the courts

²⁵Rule 127 specifically provides that “preparation time is not taxable.”

to all citizens and reducing the threat of liability for litigation expenses as an obstacle to commencement of a lawsuit or the assertion of a defense that might have some merit ” *10 Wright*, § 2665 at 202. *See Boas Box Co v Proper Folding Box Corp* , 55 F.R.D. 79, 81 (E.D.N.Y. 1971) (court denied costs based on disparity of economic resources between the parties, concluding “... it would be unfortunate to use the possible taxation of costs as a sword of Damocles ...”).

As a result of a summary hearing based on submissions of documentary evidence by HGA and R&C, the trial court awarded \$346,059.56 in costs and disbursements, 75% of which constitutes expert witness fees clearly subject to limitations under Rule 127 of the General Rules of Practice for the District Courts. Construing Rule 127 according to its plain language so as to exclude compensation for expert witness fees other fees for actual trial testimony is consistent with common law, the goals of the adversarial process, and Rule 1 of the Minnesota Rules of Civil Procedure. Taxation of costs should be sparingly exercised in order to prevent litigation costs becoming so high as to discourage litigants from pursuing meritorious claims. *Abbott Laboratories v. Granite State Ins. Co.*, 104 F.R.D. 42 (N.D. Ill. 1984).

The Rules of Civil Procedure, state and federal, recognize a limit on taxation of expert witness fees. The statutory presumption, under both state and federal law, is that expert witness fees are limited. Minnesota provides that expert witness fees shall be allowed in a sum of \$300.00 per day per expert. Federal statutes provide that \$40.00 per day per expert may be awarded. Both statutes recognize that an award of expert witness fees is limited by providing a cap on expert witness fees and in the case of Minnesota statutes, by providing that if expert witness fees are awarded in a sum greater than \$300.00 per day, to fees are limited to actual trial testimony. If a litigant chooses to spend extraordinary sums on experts, a choice it may make as part of its litigation

strategy, it does so knowing the costs incurred may yield a return, increasing the likelihood of a favorable verdict – but not at the expense of a non-prevailing party. Rule 127 places a cap or limitation on expert witness fees of \$300 00 and, at most, permits fees representative of one day of actual trial testimony. Finally, the court is guided by Rule 1 of the Minnesota Rules of Civil Procedure and the underlying goal of the adversarial process, including fairness to all litigants and construction of the rules so as to avoid penalizing a litigant prosecuting a meritorious claim.

The trial court abused its discretionary power and exceeded its authority by providing for an extraordinary award of costs and disbursements not authorized by rules and statutes and clearly penal in nature. There is no basis for the trial court awarding expert witnesses fees (e.g. contract or Minn. Stat. § 549.211) other than the rules and statutes governing taxation of costs and disbursements.

The trial court substantially departed from rules and principles applicable to taxation of costs and disbursements and relied on a flawed taxation analysis. The trial court disregarded Rule 127 of the General Rules of Practice for the District Courts which places an express limitation on expert witness fees which may be taxed and upon which expectations of litigants have been established. The trial court has also disregarded the prohibition contained in Rule 127 providing that expert witness fees shall not be awarded for preparation time. Finally, the trial court has disregarded the requirement of Rule 127 that only expert witness fees may be awarded. Fees for staff other than experts is not taxable. The trial court has also included within its award of costs and disbursements against LSC and LSCA a sum it deemed taxable by Melander, Melander & Schilling against R&C and HGA. In other words, the court shifted to LSC certain costs and disbursements recoverable by HGA and R&C against Melander, Melander & Schilling even though LSC did not assert a claim

against Melander, Melander & Schilling. There is no legal authority for shifting such costs and disbursements. The trial court's authority to tax costs and disbursements is based on rules governing taxation of costs and disbursements and the trial court has exceeded its authority by disregarding the rules applicable to expert witness fees.

The award in this case is extraordinary, penal, unprecedented and not justified by the rules.

The award reflects a departure from the rules in several ways, including a failure to comply with the Rule 127 limit on expert witness fees, a flawed taxation analysis which included consideration of a Rule 68 settlement offer as an equitable consideration warranting application of a more liberal taxation standard favorable to the defense,²⁶ shifting to LSC and LSCA costs and disbursements taxable by a third-party defendant against HGA and R&C without any legal authority for doing so, and by awarding fees of non-expert staff working with experts. The trial court's extraordinary award of costs and disbursements – based on its failure to follow rules applicable to taxation of costs and disbursements and based on the trial court's adoption of a flawed analysis incorporating a Rule 68 settlement offer warranting, in the view of the trial court, a more liberal taxation standard – if left alone, will create a precedent which will dissuade others from pursuing meritorious claims. Because the award is not supported by the rules and creates a precedent at odds with basic principles of the adversarial process, the order and judgment should be vacated.

²⁶As the trial court's memorandum accompanying its June 7, 2005 order reflects, the trial court relied on a Rule 68 Settlement Offer in support of application of a more liberal taxation standard and in determining whether to grant a stay in favor of LSCA and LSC. The trial court's reliance on the Rule 68 Settlement Offer is misplaced and erroneous. The Rule 68 Settlement Offer is inapplicable in the present case because HGA and R&C were deemed prevailing parties entitled to tax costs and disbursements in accordance with Minn. Stat. § 549.04. A Rule 68 Settlement Offer has no bearing upon a party's right to a stay nor does a Rule 68 Settlement Offer support more liberal taxation of costs and disbursements.

Because the trial court departed from the rules and statutes applicable to taxation and adopted a flawed taxation analysis, it clearly abused its discretion and the costs and disbursements judgment should be vacated. *See Griggs, Cooper & Co., Inc v. Lauer's, Inc*, 264 Minn. 338, 119 N.W.2d 850 (1962) (a trial court exceeds its jurisdiction when it issues an order granting relief not authorized by rule or statute)

The trial court's failure to abide by the Rule 127 limitation and its application of a flawed taxation analysis, representing a substantial departure from the rules and common practice, creates uncertainty regarding a rule of practice affecting all litigants and will serve to chill litigants from pursuing meritorious claim.

CONCLUSION

LSC and LSCA request an order from the Court of Appeals reversing the trial court's denial of its post-trial motions. As a result of collusive settlement agreements, misconduct by defense counsel and errors of law occurring at trial, the adversary process was distorted and compromised, depriving LSC and LSCA of a fair trial. In the event the Court of Appeals recognizes LSC and LSCA are entitled to a new trial, the trial court's award of costs and disbursements should, necessarily, be vacated.

In the event the Court of Appeals declines to reverse the trial court's denial of LSC's post-trial motions, LSC seeks an order vacating the June 7, 2005 order providing for an extraordinary award of costs and disbursements. Independent of any relief granted by the Court of Appeals with respect to the post-trial motions, the trial court's award of costs and disbursements is based on the trial court's adoption of a flawed taxation analysis and its departure from statutes and rules applicable to taxation and should be vacated. Vacating the costs and disbursements award is

warranted because it is based on the trial court's adoption of a flawed taxation analysis and a departure from statutes and rules applicable to taxation and because it creates precedent which will chill future litigants from pursuing meritorious claims. As outlined in this brief, several considerations warrant reversal of the trial court's June 7, 2005 order on taxation of costs and disbursements. First, the philosophy of our adversary system and taxation of costs and disbursements recognizes that each party bears the costs of litigation and litigants with meritorious claims should not be punished for prosecuting such claims. Second, an award of costs and disbursements is in derogation of common law and a trial court making an award of costs and disbursements must apply the relevant statutes and rules narrowly so as to avoid penalizing a litigant who asserts a meritorious claim. A six-figure award of costs and disbursements against a non-prevailing litigant having prosecuted a meritorious action will serve to chill future litigants from prosecuting meritorious actions. Third, the rules of civil procedure provide for an express limitation on expert witness fees which the trial court failed to recognize. Such a limitation is appropriate when expert fees incurred by one party may be a function of that party's resources and its decision to dedicate resources to expert witnesses which may also be a variable which increases the likelihood of a favorable verdict. Minnesota recognizes that fees may be awarded for only in-court testimony and the applicable rule contains an express mandate that expert witness fees shall not be paid for time spent by an expert preparing for trial. HGA and R&C are not entitled to tax the extraordinary sums they chose as a matter of trial strategy to pay to expert witness fees. Fourth, the trial court has awarded as "expert witness fees" certain sums for individuals who are not qualified as experts (e.g., staff of experts who testified at trial) and for which there is no statutory authority for taxation. Fifth, the trial court has shifted to LSC certain costs and disbursements which were taxable by defendants

against third-party defendants. There is no statutory authority for including within the sums taxed against LSC, sums which are taxable by HGA and R&C against third-party defendants. Based on a consideration of all factors relevant to the issue of taxation and judged against the backdrop of the entire proceedings of this case and applying the appropriate rules for taxation, the trial court's order awarding a six-figure sum in costs and disbursements should be reversed. The award is based on a flawed taxation analysis, including consideration of a Rule 68 Settlement Offer as a basis for applying a more liberal taxation standard and an award of expert witness fees greater than that authorized by applicable rules.

While this appeal involves a jury verdict adverse to specific litigants, the issues presented on appeal impact all civil litigants and the integrity of the adversary process. Appellate relief is warranted because specific litigants were deprived of a fair trial and to preserve the integrity of the adversary process which is of interest to all litigants.

Dated this 6th day of September, 2005.

Respectfully submitted,



FRYBERGER, BUCHANAN, SMITH
& FREDERICK, P.A.

By Stephanie A. Ball
Attorney for Appellant
302 West Superior Street
700 Lonsdale Building
Duluth, MN 55802
(218) 722-0861
Attorney Registration No. 191991