

Nos. A05-0800 and A05-1533

State of Minnesota
In Court of Appeals

Lake Superior Center Authority, a public corporation, and
Lake Superior Center, a non-profit corporation,
Appellants,

vs.

Hammel, Green & Abrahamson, Inc., et al.,
Respondents.

BRIEF OF RESPONDENT RUTHERFORD & CHEKENE, INC.

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STATEMENT OF LEGAL ISSUES

I. Did the district court abuse its discretion in denying the motion of the LSCA and LSC for judgment notwithstanding the verdict?

The district court denied the motion, ruling that the evidence at trial amply supported the jury's special verdict.

Apposite Cases:

Domtar, Inc. v. Niagara Fire Ins. Co., 563 N.W.2d 724 (Minn. 1997)

Ford v. Stevens, 280 Minn. 16, 157 N.W.2d 510 (1968)

Hanks v. Hubbard Broad., Inc., 493 N.W.2d 302

(Minn. App. 1992), *review denied* (Minn. Feb. 12, 1993)

II. Did the district court abuse its discretion in denying the motion of the LSCA and LSC for a new trial?

The district court denied the motion, ruling that the evidence amply supported the jury's verdict and there were no errors of law or misconduct that deprived the LSCA and LSC of a fair trial.

Apposite Cases:

ZumBerge v. Northern States Power Co., 481 N.W.2d 103 (Minn. App. 1992),
review denied (Minn. Apr. 29, 1992)

Lamb v. Jordan, 333 N.W.2d 852 (Minn. 1983)

Halla Nursery, Inc. v. Baumann-Furrie & Co., 454 N.W.2d 905 (Minn. 1990)

III. Did the district court abuse its discretion in denying the motion of the LSCA and LSC to amend the pleadings after the jury's special verdict and hold certain parties liable in indemnity?

The district denied the motion, ruling that Rule 14 and 15 of the Minnesota Rules of Civil Procedure do not allow the joinder of nonparties after the jury's verdict and that the statute of limitations worked to bar claims against certain parties.

Apposite Cases:

Fabio v. Bellomo, 504 N.W.2d 758 (Minn. 1993)

McDonald v. Stonebraker, 255 N.W.2d 827, 830 (Minn. 1977)

IV. Did the district court abuse its discretion in awarding R&C costs and disbursements that included expert witness beyond \$300.00 per day?

The district court ruled that while its award was large, Rule 127 of the General Rules of Practice did not limit expert witness fees to \$300 per day or prohibit an allowance for preparation time of an expert.

Apposite Cases:

Carpenter v. Mattison, 300 Minn. 273, 219 N.W.2d 625 (1974)

Quade & Sons Refrigeration, Inc. v. Minnesota Min. & Mfg. Co.,
510 N.W.2d 256 (Minn. App. 1994), *review denied* (Minn. Mar. 15, 1994)

V. Did the district court err in denying summary judgment to R&C on the ground that the two-year statute of limitations governing improvements to real property had run?

The district court ruled that genuine issues of material existed on the issue of whether R&C was estopped from asserting the statute of limitations governing improvements to real property based on certain alleged representations made to the LSCA and LSC.

Apposite Cases:

Brandt v. Hallwood Mgmt. Co., 560 N.W.2d 396 (Minn. App. 1997)

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STATEMENT OF CASE AND FACTS

This litigation arises out of the design and construction of the Great Lakes Aquarium located in Duluth, Minnesota ("Project"), a freshwater aquarium conceived by citizens of Duluth to exhibit Lake Superior and surrounding aquatic environments. One feature was the Isle Royal tank, an 85,000 gallon tank, 22-feet deep, with multiple viewing windows. The design and construction of the Isle Royale tank is the subject of this action.

1. The Parties

Appellant Lake Superior Center Authority ("LSCA") is a public corporation that the legislature created in 1990 to, among other things, obtain financing, purchase the land, and enter into contracts for the construction of the Project. (T. 138; Appellants' Appendix, hereinafter "LSC", LSC 556) Appellant Lake Superior Center ("LSC") is a nonprofit corporation formed in 1989 that originally managed the daily operation of the Aquarium. (T. 139) The LSC was formed before the LSCA. The LSCA and LSC are separate entities.

In June 1997, the LSCA contracted with respondent Hammel, Green and Abrahamson, Inc. ("HGA") to serve as project architect. (T. 54-56; Tr. Ex. 358) HGA then contracted with Rutherford & Chekene, Inc ("R&C"), a specialty structural engineering firm located in Oakland, California, with experience in designing large aquarium tanks, to provide the structural design services for the Project's exhibit tanks. R&C is an experienced aquarium tank designer having designed tanks for the Monterey Bay Aquarium and Longbeach Aquariums in California, and the Shedd Aquarium in

Chicago, Illinois, among others. (T. 93-94; Tr. Ex. 370) The R&C/HGA contract incorporates the terms and conditions of the HGA/LSCA contract. (T. 94; Tr. Ex. 370) HGA also contracted with Melander, Melander & Schilling Architects, Inc. ("MMS"), a Duluth architectural firm, to provide on-site architectural site observations. (T. 2268, 3801-02; Tr. Ex. 371)

The LSCA contracted with Koosman Project Management Services, Inc. ("Koosman") to serve as the owner's agent on the Project, and Adolfson & Peterson/Johnson Wilson Construction Management ("AP/JW") to serve as construction managers on the Project. (T. 2268-70; Tr. Ex. 217, Tr. Ex. 356) American Engineering Testing ("AET") served two roles on the Project. The LSCA contracted with AET to provide special inspection and testing services relating to the concrete used for the Project. (T. 2268, 2279; Tr. Ex. 288, 363) The AET contract was the only construction-related contract that the LSCA entered into for the Project. (T. 2220-21) Under this contract, the LSCA agreed to limit AET's liability arising out of the Project to \$50,000. (T. 4137; Ex. 288) The LSCA entered into all other design and construction-related contracts necessary for the Project. (Tr. Ex. 217, 356, 358, 359, 360, 361, 362) In addition, Marcy Construction Company ("Marcy") contracted with Duluth Ready Mix ("DRM"), and eventually AET (either directly or as a subcontractor to DRM), to design the concrete mix for the Project, which was Marcy's contractual obligation in accordance with the Project's plans and specifications. (T. 2395-96; Tr. Ex. 2 page 03301-6, "2.4 proportioning"; see also Tr. Ex. 374 page 03301-6) The LSCA selected Krech/Ojard Associates ("K/O") to provide special inspection services as required by the Minnesota

Building Code. (T. 4552-53; Tr. Ex. 3595 and 1003) These services included inspecting the reinforcing steel and concrete forms before Marcy placed the concrete. (Tr. Ex. 3595 and 373, page 01410-3, 4 (G.2), page 01410-10, 11 (items C., D.)) Based on this selection, AP/JW contracted with K/O to provide those services. (T. 1832-33; Tr. Ex. 3595)

The LSCA also contracted with Marcy to serve as the Project's concrete contractor. (T. 2726-27; Tr. Ex.360) Among other things, Marcy was responsible for constructing the Project's exhibit tanks and agreed to provide the necessary labor and materials for the Project's concrete work. (T. 2729; Tr. Ex. 360) While HGA and R&C provided the Project plans and specifications, including those for the Isle Royale tank, by contract, Marcy was solely responsible for the means and methods used to construct the Project. (T. 100, 108-109, 5144; Tr. Ex. 360) The LSCA contracted with Listul Industries, Inc., ("Listul") to construct the Project's structural steel, which included the building structural frame and roofing. (Tr. Ex. 359)

2. *The Project Schedule*

The Project was originally set to commence on August 20, 1998. (T. 222; Tr. Ex. 364) The LSCA's contracts with Marcy and Listul both contained a substantial completion date of November 26, 1999, "subject to adjustments of this Contract Time as provided in the Contract Documents." There were no "adjustments" but instead the completion date was eventually constructively abandoned. (T. 4703-05; Tr. Ex. 359, 360) AP/JW was contractually responsible for coordinating the activities of the various contractors and creating and revising construction schedules as necessary. (Tr. Ex. 217 ¶

2.3.5) Under its contract, Marcy agreed to "conform to the most recent schedules" that AP/JW issued. (Tr. Ex. 360, ¶ 3.10.4) Unlike the Marcy and Listul contracts, the LSCA's contract with HGA, and HGA's contract with R&C, contain no completion date or "time is of the essence" clauses. (T. 1391; Tr. Ex. 358 and 370) The HGA contract did, however, call for an active construction period of no more than 18 months, but only for purposes of defining the time limit within which HGA was required to provide construction phase services without charging an additional fee. (Tr. Ex. 358 § V, ¶ 3)

Because of a citizen lawsuit challenging the financing for the Project and the decision of the LSCA and LSC to rebid the Project, construction did not commence until January 15, 1999. (T. 1435-36, 4641-43) The date for substantial completion stated in the Marcy and Listul contracts was never changed and the November 26, 1999 completion date was abandoned. (T. 193-94, 1435-36, 4703-05; Tr. Ex. 359 and 360) In April 1999, the owners' representative, Charles Koosman, reported to the Lake Superior Center Building Committee's executive director, David Lonsdale, that the estimated completion date of the Project had been changed to August 7, 2000. (T. 1235-36; Tr. Ex. 381-Mtg. No. 8, ¶ 8.02) And on July 22, 1999 -- 15 days before Marcy began to pour any concrete on the Isle Royale tank -- and again on September 23, 1999, AP/JW pushed the scheduled completion date back to August 21, 2000. (T. 1236-47; Tr. Ex. 381, meetings No. 10 and No. 11 ¶¶ 10.02 and 11.02 respectively) Indeed, the various construction schedules that AP/JW issued between May 1999 and June 2000 and reported to the LSC Building Committee by Koosman showed project completion dates that ranged from June 1, 1999, to October 16, 2000. (T. 4703-04; Tr. Ex. 381)

3. *Problems During Construction*

During the project, there were conversations between several Project participants regarding the complexity of the concrete pour of the Isle Royale tank, given the amount of reinforcing steel contained in the structure and Marcy's ability to perform this work satisfactorily. (T. 4303-04, 5137-39; Tr. Ex. 108 and 171) Prior to the concrete placement on the Isle Royale tank, Craig Kronholm of AP/JW wrote to Chris Rowe, Marcy's foreman, to warn Rowe that he was concerned about Marcy's apparent plan for the placement of concrete and to suggest alternate means and methods for placing the Isle Royale tank concrete, advice that Marcy ultimately ignored. (T. 5137-50; Tr. Ex. 108) The project specifications prepared by R&C allowed the use of pour ports to aid in placement of the concrete and such ports were to be used at the discretion of the contractor, something Marcy chose not to do. (T. 5256-63; Tr. Ex. 374, p 03301-9, § 3.3 (F))

When Marcy started pouring concrete for the Isle Royal tank on September 16, 1999, problems became immediately evident. (T. 1626-27, 1769-71; Tr. Ex. 430, nos. 85-1 and 86) During the pour, it was discovered that the first four trucks that delivered concrete to the job site contained the wrong concrete mix. (T. 2408-2416; Tr. Ex. 285 and 445-82) According to an affidavit from an owner of DRM, on the morning of the pour, Marcy called and ordered the concrete mix designated as "T1", rather than the mix designated as "T1 Revised", the later being the mix that HGA and R&C had authorized for use in the Isle Royale tank. (Respondent R&C's Appendix, hereinafter "R&C"), 295-297) The T1 Revised concrete mix was required because the T1 mix was "difficult to

impossible to pump and consolidate adequately." (Tr. Ex. 445-82) AET, in its role as special inspector for the LSC, failed to discover the delivery and use of the T1 concrete mix until after it had been poured into the bottom of the tank forms. (T. 2408-2416; Tr. Ex. 285) Based on the concrete pour sequence, the T1 mix ended up at the base of the tank walls all the way around the tank. (T. 1862; Tr. Ex. 430, nos. 85-1 and 86) This was the location of numerous defects in the tank, and also the location of leaks that the expert for the LSCA and LSC allegedly identified. (T. 2988-89, 4245-47; Tr. Ex. 39)

Marcy also experienced significant problems in placing and consolidating the T1 concrete mix at the lowest levels of the Isle Royale tank form in part, because of the means and methods they elected to use and because the T1 mix was "difficult to impossible to pump and consolidate adequately." (Tr. Ex. 445-82) In addition, Marcy experienced problems in placing and consolidating the correct T1 Revised concrete mix due to the means and methods it utilized to construct the Isle Royale tank. (T. 5256-75) Marcy failed to use pour ports, which are openings in the sides of the forms through which concrete can be poured and that were authorized under the specifications for the tank that R&C prepared, or leave out the window sill forms to facilitate the placement of concrete around the tank viewing windows. (T. 5256-75; Tr. Ex. 415, photo P9140036.jpg, and 422, photo PA250014.jpg) Both Matthys Levy and James Metzler, experts for HGA and R&C, testified that these were the proper methods to use in such a construction project, and Metzler testified that he used these methods in constructing the aquatic tanks and viewing windows for the Minnesota Zoo's aquarium. (T. 5248-56, 3988-92; Tr. Ex. 3603 (DVD animation used for illustrative purposes)) Based on the

events during the pour, K/O immediately informed the LSCA that "the quality of the product appears likely to have some defects, the extent of which cannot be evaluated till forms are stripped." (Tr. Ex. 430 no. 85-1)

Marcy stripped the forms for the Isle Royale tank in late September through early October 1999, and discovered significant problems. (T. 2796; Tr. Ex. 21) These problems included numerous areas of "honeycombing"; several large voids where there was no concrete; and various other defects. (Tr. Exs. 420 and 421) The LSCA became aware at that time that Marcy would have to provide significant repair and remediation to the Isle Royale tank. A meeting was held at the Project site on October 26, 1999, and a repair plan was discussed between representatives of Marcy, HGA, R&C, A&P, Koosman, MMS, and K/O. (T. 957; Tr. Ex. 21) On March 20, 2002, John Carlson, one of AP/JW's construction managers, wrote to Koosman, advising that "we are most likely heading to court or arbitration" and that the LSCA and LSC should hire an "independent specialist to evaluate all aspects of affecting (sic) the quality of the existing tanks." (T. 2821; Tr. Ex. 38)

The Isle Royale tank was ultimately repaired and the aquarium opened to the public on July 29, 2000. (T. 5457; Tr. Ex. 381-No. 19 ¶ 19.02) Robert Davenport, the construction-scheduling expert for R&C, testified that there was no delay in the opening of the aquarium and that the facility took until July 29, 2000 to open due to the actions of Listul, the LSCA, and the LSC that were unrelated to concrete tank construction. (T. 5541-42, 5458-72; Tr. Ex. 3618)

4. *Procedural Posture*

In March 2001, Marcy brought an arbitration action against the LSCA to recover the additional expenses it allegedly incurred as a result of the repair work on the Isle Royale tank. (T. 3119-3120; Tr. Ex. 1041 and 1044) The LSCA counterclaimed against Marcy, alleging delay damages in excess of one million dollars as a result of Marcy's defective work. (Tr. Ex. 1043) On or about January 10, 2002, Marcy and the LSCA settled their claims against one another by means of a *Pierringer* agreement. (LSC 97-104) *See Frey v. Snelgrove*, 369 N.W.2d 918 (Minn. 1978); *Pierringer v. Hoger*, 124 N.W.2d 106 (Wis. 1963). Under the agreement, the parties agreed to drop their claims against one another and the LSCA agreed to pay Marcy \$465,000. (T. 3127; Tr. Ex. 1048) In addition, the LSCA agreed to indemnify and hold Marcy harmless against any claims arising out of Marcy's work on the Project.

On May 3, 2002, the LSCA and LSC commenced suit against HGA, alleging breach of contract, negligent design, vicarious liability, breach of warranty, and claims for contribution and indemnity. (LSC 1-32) The LSCA and LSC sought damages for the cost to repair the Isle Royale tank and the lost net operating revenues that it alleged were the result of the delay in the opening of the Project. (LSC 10-11) They claimed that the problems with the Isle Royale tank concrete were due to design defects and that these problems caused the Project opening to be delayed, resulting in lost net operating revenues to the LSC. At the time they served their summons and complaint, the LSCA and LSC submitted an affidavit from their counsel that due to the running of the statute of

limitations they could not reasonably obtain the affidavit of expert review required pursuant to Minnesota's Expert Affidavit Statute, Minn. Stat. § 544.42, before commencing the action. (Respondent HGA's Appendix hereinafter "HGA", 13)

HGA denied the claims of the LSCA and LSC, and asserted counterclaims for breach of contract and a violation of Minnesota's Prompt Payment Statute based on the failure of the LSCA and LSC to pay its professional fees under its contract. (LSC 58-71) A short while later, HGA commenced third-party claims for contribution and indemnity against R&C, MMS, AP/JW, K/O, Koosman, and AET. (LSC 49-57)

On August 6, 2002, HGA's counsel requested that the LSCA and LSC voluntarily dismiss their complaint because they had not submitted the affidavit of expert review within 90 days of when they served their summons and complaint as required under Minn. Stat. § 544.42. (HGA 107, ¶ 5) Three days later, the LSCA and LSC filed an Application for Extension of Time Limits because, as the district court noted, "plaintiffs' counsel recognized that more than 90 days had elapsed subsequent to the summons and complaint being served before the affidavit of expert review required by Minn. Stat. § 544.42, subdivision 3(a)(1) had been provided." (HGA 362) During this 90-day period, neither the LSCA nor the LSC had moved for an extension of time to provide the required affidavit of expert certification.

By Order filed September 23, 2002, the district court granted the motion of the LSCA and LSC to extend the time limits under Minn. Stat. § 544.42. (HGA 360-366) Despite recognizing that the LSCA and LSC had failed to submit the required affidavit of expert certification within the time required under the statute, the district court concluded

that good cause existed for their failure to provide the required affidavit(s) within the time prescribed by the statute due to their "excusable neglect" in submitting the affidavit(s). (HGA 364-365)

Less than two weeks later, the district court denied the summary judgment motions of HGA and R&C based on the failure of the LSCA and LSC to provide the required affidavit of expert certification within the strict time periods set forth in Minn. Stat. § 544.42. (HGA 367-369) In denying the motions, the district court relied on its previous order and memorandum granting the LSCA and LSC an extension of time to provide such an affidavit. (Id.) HGA appealed the decision to this court, which denied the appeal. (HGA 393-395) The Minnesota Supreme Court denied further review. (HGA 401-402)

The following spring, HGA and R&C moved the district court for summary judgment on the ground that the two-year statute of limitations governing improvements to real property set forth in Minn. Stat. § 541.051, barred the claims of the LSCA and LSC. (R&C 32-48) By Order filed May 7, 2003, the district court denied the motions after ruling that no "actionable injury" arose when the defective concrete work was discovered in October 1999. (R&C 280-284) The court concluded that the dispute resolution process and claims administration process set forth in the parties' contracts worked to toll the statute of limitations. (R&C 292-294) The court further ruled that genuine issues of material fact existed with regard to the claims of the LSCA and LSC that HGA and R&C were estopped from raising a statute of limitations defense because HGA and R&C allegedly made certain representations concerning the cause of the tank

problems and assurances that the recommended repairs would render the Isle Royale tank structurally sound. (R&C 288)

In October 2003, nearly 18 months after its original summons and complaint against HGA, the LSC asserted direct claims against R&C for negligence and contribution and indemnity. (LSC 33-48) The LSC sought to recover the money that it had paid as part of its settlement with Marcy and the lost net operating revenues it claimed were the result of the alleged delay in the opening of the aquarium that it attributed to the problems with the Isle Royale tank. (LSC 44-47) R&C denied the LSC's claims, and at the same time, brought crossclaims for contribution or indemnity against HGA, Marcy, AP/JW, Melander, K/O, and AET and alternative third-party claims against Concrete Restorers, DRM, Marcy, AP/JW, Melander, K/O, and AET. (R&C 98-108)

In December 2003, not long after the LSC first asserted direct claims against it, R&C moved the district court for leave to designate an additional expert, Thomas J. Martin, on the issues of aquarium marketing, management and financing, and to supplement the previous disclosures of its designated expert on construction scheduling issues, A.W. Hutchinson. Although this was 10 months before trial, the court denied the motion as to Martin, but allowed R&C to supplement the previous disclosures of its expert Robert Davenport of A.W. Hutchinson. (R&C 124-130) As a result, R&C had no damages expert at trial, and instead, relied on HGA's damages expert.

In April 2004, HGA and R&C entered into a settlement agreement and executed a *Pierringer* release. (LSC 436-446) Under the settlement agreement and release, HGA agreed to release its claims against R&C and to indemnify and hold R&C harmless to the

extent of the insurance available to HGA. (LSC 437-440) In return, R&C tendered its remaining available insurance to HGA and assigned all of its rights, claims, and defenses in the action to HGA. (LSC 440) A copy of the settlement agreement was provided to both the district court and the LSCA and LSC.

In May 2004, R&C and HGA jointly made a Rule 68 Offer of Settlement to the LSCA and LSC in the amount of \$1,000,000.00. (R&C 137-140) The LSCA and LSC did not accept the offer.

In late July 2004, approximately a month before trial was set to commence, HGA settled its claims against K/O pursuant to a *Pierringer* agreement. (LSC 447-456) Under this agreement, K/O agreed to pay \$100,000 to HGA in return for a release of all claims against it by HGA. In turn, HGA agreed to defend, indemnify, and hold K/O harmless up to the extent of its available insurance coverage, which was five million dollars. (LSC 451) HGA provided the district court and the LSCA and LSC with copies of this settlement agreement.

Approximately one week later, on August 4, 2004, HGA entered into a *Pierringer* agreement with AET. (LSC 457-465) The agreement was substantially similar to HGA's settlement agreement with K/O. On August 27, 2004, HGA entered into a *Pierringer* agreement with AP/JW that was substantively similar to HGA's settlement agreements with K/O and AET. (LSC 466-478) As it did with the other settlement agreements, HGA provided copies of these settlement agreements to the district court and the LSCA and LSC before trial.

HGA moved to dismiss AP/JW, K/O and AET because the LSCA and LSC had made no direct claims against them. (LSC 143-145) R&C remained in the case as a direct defendant. The district court dismissed the settling parties, and in its order, granted the LSCA and LSC leave to assert direct claims against them "to the extent the law and procedure allowed." (LSC 144-145) The LSCA and LSC did not bring direct claims against AP/JW, K/O, or AET, in either of its roles on the Project. The LSCA and LSC did, however, move the district court to amend its complaint to include a claim for punitive damages against R&C and HGA. (R&C 141-148) The court denied the motion at that time, but reserved the issue for a later reconsideration. (R&C 149-150)

After the parties selected the jury, but before opening statements, R&C dismissed its claim against DRM. (T. 5) It did so because it had no evidence to rebut the affidavit presented by the owner of DRM, who stated that he remembered taking Marcy's order for concrete on the first day of the Isle Royale tank pour and that his company delivered exactly the mix that Marcy had ordered – T1, instead of T1 Revised. (R&C 295-297) Unable to rebut this evidence, R&C, made the decision to dismiss its claims against DRM. (LSC 243)

5. Trial

The case was tried to a jury, with voir dire beginning on August 31, 2004. and trial lasting until October 23, 2004. After nearly eight weeks of trial, the jury returned a special verdict. (LSC 195-210) The jury awarded the LSCA and LSC damages for the defects in the Isle Royale tank in the amount of \$270,000, which is \$1,000 more than what counsel for the LSCA and LSC requested during her closing argument. (T. 6011-12;

LSC 205) The jury found that Marcy and AET, in its capacity as special inspector for the LSCA and LSC, were negligent and that this negligence was the direct and proximate cause of the damage to the Isle Royale tank. (LSC 199-200, 203) The jury apportioned 75% of the fault to Marcy, and the remaining 25% to AET, in its capacity as special inspector for the LSC. (LSC 205) Although the jury found the LSCA, LSC, and Koosman negligent, it found that this negligence was not a direct cause of the damages to the tank. (LSC 201) The jury specifically found that neither HGA nor R&C were negligent in their respective designs and specifications for the Isle Royale tank. (LSC 197-198) It further found there was no negligence on the part of Koosman; AP/JW; K/O; Concrete Restorers; and AET, in its role as designer of the concrete mix, for the damage to the tank. (LSC 199- 203) The jury also found that there was no delay in the completion of the Project as a result of the design or construction of the Isle Royale tank. (LSC 197) The jury also found that that the LSCA and LSC knew, and were aware, of their injury before May 1, 2000. (LSC 208)

6. *Post-trial Motions*

Based on the jury's special verdict, the district court filed an Order for Judgment on November 4, 2004, dismissing DRM and the claims of the LSCA and LSC against HGA and R&C. (LSC 236-239) Only then did the LSCA and LSC moved to amend the pleadings under Rules 14 and 15 of the Minnesota Rules of Civil Procedure, and for an order determining certain parties liable in indemnity as a matter of law. (LSC 349-351) They sought the right to assert direct claims against Koosman, AP/JW, K/O, and AET who

had previously been dismissed and against whom they had not asserted direct claims at trial. (Id.)

On December 10, 2004, the LSCA and LSC moved the district court for judgment notwithstanding the verdict (JNOV) or, in the alternative, a new trial. (LSC 374-376) They also renewed their motion to amend the pleadings and for an order determining certain parties liable in indemnity as a matter of law. (Id.) In addition, they sought an order from the district court ruling that they were prevailing parties under Minn. Stat. § 549.04. (Id.) Three days later, the LSCA and LSC amended their motion for JNOV, or, in the alternative, a new trial. (LSC 378-397)

On February 22, 2005, the district court entered judgment on its November 4, 2004 Order for Judgment, reducing the jury's special verdict to judgment. Also by two separate orders, the district court denied the post-trial motions of the LSCA and LSC in their entirety. (LSC 240-275) In denying the motion of the LSCA and the LSC for JNOV, the district court concluded that "[n]o aspect of the jury findings is manifestly against the evidence adduced at trial. It cannot be said that reasonable minds could not differ and that only one result could be reasonably be reached upon the record at trial." (LSC 256) The court noted that the jury "was as thoughtful and attentive as any the Court has had the pleasure of presiding over [and i]t was obvious throughout that the members of the jury were paying attention, perceptive, and dedicated to their term of service." (Id.) The court ruled that the jury's verdict had reasonable, "indeed ample, support in the record." (Id.)

The district court also rejected the motion for a new trial by the LSCA and LSC. (LSC 254) The court first noted that counsel for the LSCA and LSC failed to object at

trial to many of the numerous errors of law and procedure on which they based their new trial motion. (LSC 257) The court further observed that the other errors "are not accompanied by specific reference to the trial record . . . [and] The Court is thus left at sea in certain instances as to what specific comments or rulings are proffered as the basis for relief." (LSC 257-258)

The court, however, did carefully consider the alleged errors for which the LSCA and LSC had provided sufficient detail, and concluded: (1) the settlement agreements between HGA and the dismissed parties did not result in any prejudice to the LSCA or LSC because the testimony of the released parties was tested by cross examination and there was no evidence presented of any conspiracy or untruthful testimony; (2) defense counsel did not engage in misconduct and that during the long and complicated trial, "[a]ll counsel were professional in their manner and presentations"; and (3) the use of the word "soiree" was not misconduct and merely reflected a word that defense counsel used to refer to a "meeting." (LSC 257-275)

The court similarly rejected the motion for new trial based on the claim of the LSCA and LSC that numerous errors of law occurred at trial. In the terms of the fact that some of the dismissed parties and HGA were insured by the same carrier and shared common claims counsel, the court clarified that its previous concern related to the issue of whether the insureds' interest might be compromised, "not the rights of plaintiffs who had no contractual relationship with the insurance carrier." (LSC 266-267) It also rejected the claim that the LSCA and LSC were entitled to a specific jury instruction based on the holding in *Zontelli v. City of Nashwauk*, 373 N.W.2d 744 (Minn. 1985),

because this case was factually distinguishable. (LSC 269) Finally, the court rejected the claims of the LSCA and LSC that it improperly allowed the admission of evidence relating to Marcy's reputation and Marcy's failure to use the concrete additive "Eclipse," noting that these claims misperceived what occurred at trial and the bases on which the evidence was presented. (LSC 270-271)

By a separate order, the district court rejected the motion of the LSCA and LSC to amend the pleadings and join AET, AP/JW, K/O, DRM, and Concrete Restorers as direct defendants under Rule 14.01. (LSC 240-252) The court rejected the motion noting, among other things, that there was nothing to be gained by the joinder because the jury found that none of the parties, except AET in its capacity as a special inspector, were a direct cause of any of the damages that the LSCA and LSC claimed. (LSC 243) It therefore questioned the utility of joining these parties under Rule 15 in order to conform with the evidence presented at trial. (LSC 243-244) The court further noted that the utility of joining of K/O; AET, as concrete mix designer; DRM; and Concrete Restorers as direct defendants was questionable because neither the LSCA nor the LSC requested any relief against them if joined. (LSC 244) It also refused to join AET, in its role a concrete mix designer, after concluding that they had been dismissed, neither the LSCA or LSC had asserted direct claims against it before dismissal, and the two-year statute of limitations under Minn. Stat. § 541.051 had run. (LSC 245-247) The court similarly denied the request of the LSCA and LSC to enter an order finding that AP/JS has a duty to indemnify Marcy to the extent of damages that the jury attributed to Marcy. (LSC 248-249) The court recognized that the LSCA and LSC were attempting to convert HGA's

indemnity obligation to AP/JW into a direct claim on their behalf. (LSC 249) Finally, the court concluded the LSCA and LSC were subject to the taxation of costs and disbursements after determining that neither was acting in a sovereign capacity in their respective roles related to the Project. (LSC 251-252)

Also on February 22, 2005, the district court issued its findings of fact, conclusions of law, and order for judgment and judgment on the counterclaims asserted by HGA and MMS. (LSC 276-285) Previously, on January 11 and 12, 2005, the district court conducted a bench trial on HGA's counterclaims against the LSCA for breach of contract and violation of Minnesota's Prompt Payment statute, and the counterclaim by MMS against HGA for sums allegedly due for services in connection with the design and construction of the project. (LSC 277) The district court awarded HGA its professional fees against the LSCA, and awarded MMS the professional fees that HGA owed to it for its work on the Project. (LSC 284)

On February 25, 2005, HGA, and on March 3, 2005, R&C served the LSCA and LSC by mail with a notice of filing of the district courts orders entering judgment on the jury's special verdict and denying all post-trial motions. On April 22, 2005, the LSC and LSCA served and filed their Notice of Appeal challenging the district court's February 22, 2005 judgment. (LSC 426)

In late March 2005, HGA and R&C moved the district court for an award of their costs and disbursements. By order dated June 7, 2005, the district court awarded R&C, HGA, and MMS their respective costs and disbursements against LSCA and LSC. (LSC 286-347) The court, however, concluded that the LSCA was a governmental subdivision,

and therefore, entitled to a stay of enforcement on the award pending the appeal of LSCA and LSC without the need to post a supersedeas bond pursuant to Minn. R. Civ. App. P. 108. (LSC 325) The district court denied the LSC's motion for a stay after concluding that significant prejudice would accrue to R&C and HGA if it granted a stay without requiring the LSC to post a supersedeas bond or other security in accordance with Minn. R. Civ. App. P. 108. (LSC 326)

By Notice of Appeal dated June 21, 2005, the LSCA and LSC attempted to appeal the district court's June 7, 2005 order, awarding costs and disbursements to R&C and HGA. (LSC 430-432) This court dismissed that appeal because it was taken from a non-appealable order. (R&C 304) The LSCA and LSC petitioned this court for a Writ of Prohibition, seeking to prevent entry of judgment on the June 7 order and to stay enforcement pending appeal. By Order dated June 20, 2005, this court denied the petition and motion of the LSCA and LSC, concluding that the petition was "an improper attempt to obtain review of the award of costs and disbursements by means of an extraordinary writ." (R&C 306) The court further denied the LSC's request to stay enforcement of the district court's award of costs and disbursement without the need to post a supersedeas bond after determining that the LSC was not a governmental subdivision and the bond was necessary to protect HGA and R&C. *Id.* It also denied the LSCA's request to stay enforcement of the judgment without the posting of a supersedeas bond on the district court's judgment on the fees awarded to HGA following the trial on HGA's counterclaims. *Id.*

By Notice of Appeal filed on August 4, 2005, the LSC and LSCA appealed the district court's June 29 judgment awarding costs and disbursements to HGA and R&C. (LSC 433-435) This Court consolidated these two appeals by Order dated August 10, 2005. (R&C 310).

ARGUMENT

I. The District Court Properly Denied The Motion Of The LSCA And LSC For Judgment Notwithstanding The Verdict Because The Trial Record Supports The Jury's Verdict.

The LSCA and LSC argue that the district court erred in denying their motion for JNOV. They assert that the jury could not have made special verdict findings that Marcy's negligence was the direct cause their injuries relating to the Isle Royale tank without finding that other parties were also negligent, namely AP/JW and K/O. They further argue that the jury's special verdict findings that Marcy and AET, in its role as special inspector, were negligent are unsupported by any competent evidence, and is instead, based on the unsupported testimonial assertions of defense counsel. But as the district court specifically ruled in denying the motion of the LSCA and LSC, the verdict has reasonable, if not ample, support in the record. For this reason, the district court did not abuse its discretion in refusing to grant JNOV to the LSCA and LSC.

A jury's special verdict form answer "can be set aside only if no reasonable mind could find as did the jury." *Domtar, Inc. v. Niagara Fire Ins. Co.*, 563 N.W.2d 724, 734 (Minn. 1997) (citation omitted). The court must consider all evidence, not only the evidence in favor of the motion, but also evidence supporting the verdict. *Fisher v. Edberg*, 287 Minn. 105 109-10, 176 N.W.2d 897, 900 (1970). The evidence must be

viewed most favorably to the verdict with all inferences drawn in favor of supporting the verdict. *Ford v. Stevens*, 280 Minn. 16, 20, 157 N.W.2d 510, 513 (1968). The court may not weigh the evidence or evaluate the credibility of witnesses in determining whether to grant or deny the motion. *Seidl v. Trollhaugen, Inc.*, 305 Minn. 506, 507-08, 232, 239 N.W.2d 236 (1975). "If the jury's special verdict finding can be reconciled on any theory, the verdict will not be disturbed." *Hanks v. Hubbard Broad., Inc.*, 493 N.W.2d 302, 309 (Minn. App. 1992), *review denied* (Minn. Feb. 12, 1993) (citation omitted).

Interestingly, neither the LSCA nor the LSC challenge the jury's special verdict findings that neither HGA nor R&C were negligent in their design of the Isle Royale tank. Because they have not challenged these findings on appeal, nor briefed the issue in their brief, the LSCA and LSC have waived any challenge to the jury's special finding that neither the HGA nor R&C were negligent with respect to the design of the Isle Royale tank. *See Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982) (holding issues not briefed on appeal are waived).¹

The jury was asked to determine what parties were responsible for claims of the LSCA and LSC for damages caused by the delay and expense associated with repairs and remedies of the "defective condition" of the Isle Royale tank. To make a negligence claim against R&C, the LSCA and LSC were required to show a duty owed, a breach of that duty, that the breach of duty was the proximate cause of the damages claimed, and proof of damage. If the Isle Royale tank was constructible as designed, then R&C's

design was not the cause of the "defective condition" and cannot be the proximate cause of the damages that the LSCA and LSC allege to have suffered. The jury considered whether the design of the Isle Royale tank contributed to the "defective condition" and decided it did not.

The record amply supports the jury's special verdict finding that R&C was not negligent. Matthys Levy, a structural engineering expert, testified that R&C was not negligent in providing design services on the Project. (T. 3940-42, 3956-58, 4069) Similarly, the jury heard Miklos Peller, the expert for the LSCA and LSC, testify that the Isle Royale tank was constructible (T. 3021), in direct contravention of the statement that counsel for the LSCA and LSC made during her opening statement that the LSCA and LSC will "show through the evidence in the case that the design of the tank is unconstructible due to the level of reinforcing congestion in the tank and certain parameters included in the specifications which govern the concrete design mix." (T. 12) Chuck Koosman, the Project representative for the LSCA and LSC from AP/JW, testified that R&C "provided excellent professional service and advice on the Project." (T. 4706) Based on this evidence, the jury could reasonably find that R&C was not negligent in designing the Isle Royale tank.

The evidence also reasonably supports the jury's special verdict finding that Marcy was negligent in its construction of the Isle Royale tank and this negligence was the direct cause of the defects found in the tank. The testimony at trial showed, among other

¹ The LSCA and LSC cannot raise this issue in their reply brief. Issues not raised or argued in an appellant's brief cannot be revived in a reply brief. *McIntire v. State*, 458

things, that the defective condition of the Isle Royale tank was the direct result of the means and methods that Marcy used to construct the tank. James Metzler, Craig Kronholm, Matthys Levy, John Carlson, Jennifer Babcock, David Krech, Helen Fehr, Jamison Curry and Robert Christen all testified to many failures by Marcy to follow plans and specification and use appropriate means and methods, including Marcy's failure to: (1) use the "Eclipse" admixture, which would have made the concrete mix more pumpable and placeable; (T. 2386-98, 3959-62, 5259-60); (2) use pour ports and pour through rebate sills (T. 1624, 1657-59, 1843-56, 5261-72); (3) use a starter wall as shown in the Project plans (T. 1165, 1660-63, 4082-83, 4246); (4) include the keyway that was a substitute for the starter wall (T. 1664-65, 4246); (5) properly plan for the Isle Royale tank pour (T. 5256-75); (6) ignored Kronholm's recommendation to alternative means and methods for the Isle Royale tank concrete pour (T. 5137-50; Tr. Ex. 108); and (7) ordered the wrong concrete mix on the day of the pour. (R&C 295-297) Helen Fehr further testified that R&C waived the original Project specification requiring a 4-inch slump and that the "no admixtures" requirement was not what the specifications indicated, or alternatively, was waived as a requirement. (T. 725-26, 5081-82)

The LSCA and LSC claim that the jury could not have made the special verdict finding that Marcy was negligent without finding that K/O was negligent. This argument incorrectly presumes that K/O, as special inspector, was responsible for dictating or inspecting the means and methods chosen by Marcy to pour the Isle Royale tank. The evidence presented at trial showed that K/O was not obligated to review or dictate the

N.W.2d 714, 717 (Minn. App. 1990), *review denied* (Minn. Sept. 28, 1990).

means and methods used by Marcy. (T. 1674, 1863-64) Based on this evidence, the jury could reasonably conclude that K/O was in no way negligent for Marcy's negligent placement of the Isle Royale tank concrete.

Likewise, the evidence at trial does not compel the finding that AP/JW was negligent simply because the jury determined that Marcy was negligent. The basis for the claim of the LSCA and LSC is that the jury should have found AP/JW negligent in failing to pre-qualify Marcy to bid, and be awarded, the Project contract. In support of their argument, the LSCA and LSC apparently focus on a portion of Craig Kronholm's testimony. During his cross-examination by counsel for the LSCA and LSC, Kronholm testified that he had made a recommendation to AP/JW senior representatives during the pre-qualifying process that Marcy not be allowed to bid on the project based on Kronholm's previous experience with Marcy. (T. 5347) The evidence at trial showed simply that senior representatives of AP/JW did not share the same view as Kronholm and allowed Marcy to bid on, and be awarded, the Project. (T. 5343-45) This testimony of Kronholm does not, however, present "unrebutted" evidence that AP/JW was "negligent in its responsibility to qualify Marcy to work on the Project." In the context of all the evidence presented at trial, the jury was free to conclude that Marcy was qualified to do the work on the Project, but simply performed that work in a negligent manner. The jury was not required to find AP/JW negligent just because Marcy performed its work in a negligent manner.

Viewing the evidence in the light most favorable to the jury's special verdict findings, along with drawing all inferences from that evidence in favor of the verdict, the

jury could reasonably find Marcy negligent without necessarily finding others negligent.

The district court properly refused to grant JNOV to the LSCA and LSC.

II. The District Court Did Not Abuse Its Discretion Or Make Any Errors Of Law In Denying The New Trial Motion Of The LSCA And LSC.

In the alternative, the LSCA and LSC argue that the district court abused its discretion and made errors of law that warrant a new trial because they were deprived of a fair trial. The evidence more than amply supports the jury's special verdict and there is no indication that mistake, improper motives, bias or caprice tainted the verdict. Because the district court did not abuse its discretion or make any errors of law in denying the new trial motion of the LSCA and LSC, this court should affirm that decision.

A motion for a new trial should be granted "cautiously and sparingly" and only when necessary to further substantial justice in the application of trial procedure. *Leuba v. Bailey*, 251 Minn. 193, 207-08, 88 N.W.2d 73, 83 (1957). On appeal from a denial of a motion for a new trial, the verdict must stand unless it is manifestly and palpably contrary to the evidence viewed in the light most favorable to the verdict. *ZumBerge v. Northern States Power Co.*, 481 N.W.2d 103, 110 (Minn. App. 1992), *review denied* (Minn. Apr. 29, 1992). This judicial determination must warrant the inference that the jury failed to consider all the evidence and acted under some mistake or from improper motives, bias, feeling, or caprice instead of dispassionately and honestly exercising their judgment on all the evidence. *Lamb v. Jordan*, 333 N.W.2d 852, 855-56 (Minn. 1983); *Brewitz v. City of St. Paul*, 256 Minn. 525, 538-39, 99 N.W.2d 456, 465 (1959). Mere speculation that passion or prejudice exists is insufficient to warrant a new trial. *Vadnais*

v. American Family Mut. Ins. Co., 309 Minn. 97, 104, 243 N.W.2d 45, 49 (1976). And, error is never presumed on appeal. *White v. Minnesota Dept. of Natural Resources*, 567 N.W.2d 724, 734 (Minn. App. 1997). The appellant bears the burden of demonstrating that the alleged error is prejudicial. *Bloom v. Hydrotherm, Inc.*, 499 N.W.2d 842, 845 (Minn. App. 1993), *review denied* (Minn. June 28, 1993). The district court has the discretion to grant a new trial and a reviewing court will not disturb that decision absent an abuse of discretion. *Halla Nursery, Inc. v. Baumann-Furrie & Co.*, 454 N.W.2d 905, 910 (Minn. 1990).

A. The Settlement Agreements Between HGA And Others Did Not Unfairly Prejudice The Rights Of The LSCA And LSC To A Fair Trial.

The LSCA and LSC argue that the settlement agreements between HGA and the third-party defendants, including R&C, promoted impermissible collusion and secrecy between the settling parties. This, they claim, distorted the trial process and allegedly deprived them of a fair trial. The district court carefully considered the arguments of the LSCA and LSC, and correctly concluded that the settlement agreements "were not impermissibly collusive or such as to render the process unfair."

1. No Prejudice

It is unclear what prejudice the LSCA and LSC suffered because of the settlement agreements. Although the LSCA and LSC claim their rights were unfairly prejudiced, they offer no examples of how they would have been able to present their case any differently. Beyond mere assertion, they do not provide any examples of what evidence the settling parties surreptitiously exchanged and allegedly withheld from them. Nor do

they offer specific examples of witnesses who purportedly changed their testimony at trial. There is also no evidence that the LSCA and LSC requested, but were denied access to any representatives of the settling third-party defendants. R&C, and this court, are therefore left to guess how the settlement agreements worked to unfairly prejudice the LSCA and LSC.

Although the LSCA and LSC do not specifically identify by name the witnesses who allegedly "changed" their testimony, it appears that they are referring to the trial testimony of David Krech and Craig Kronholm. There, however, is no evidence that either witness "changed" their testimony from previous testimony given at deposition or otherwise.

With respect to David Krech, the LSCA and LSC in other sections of their brief, appear to refer to his testimony in which he explains his field observation reports. The LSCA and LSC contend that his trial testimony differed from what he had written in his field observation reports, and thus, he "changed" his testimony. The only problem is that the LSCA and LSC never once deposed him before trial. There was therefore nothing for him to change. Among other things and by way of example Mr. Krech recorded in his field report that it appeared Marcy was doing everything conceivable to the "consolidate" the concrete. (Tr. Ex. 430, no. 85-1) Krech then explained at trial that there was a difference between "placement" and "consolidation" and that Marcy had not done everything it could have done to "place" the concrete, a distinction the LSCA and LSC might have elicited if they had elected to depose Krech before trial. (T. 1855-56) As the Minnesota Supreme Court recognizes, "it is a general rule that a witness may always

explain the circumstances under which differing statements have been made" and "courts should be liberal in affording witnesses an opportunity to reconcile versions which are at variance." *Auger v. Rofshus*, 267 Min.. 87, 91, 125 N.W.2d 159, 162 (1963).

As for Craig Kronholm, despite being deposed three times, counsel for the LSCA and LSC never once asked him if he ever had an opinion about Marcy or recommended that Marcy not be allowed to bid, and be awarded, the Project's concrete contract. The first time that Kronholm was asked about his opinion of Marcy and whether Marcy should be awarded the Project's contract was during his cross examination by counsel for the LSCA and LSC during trial. Even though R&C presumably had every reason to gain from such testimony, counsel for R&C never asked the question of Kronholm, or in any way attempted to elicit such testimony, during direct examination. Thus, like Krech, Kronholm never "changed" his testimony – he simply answered a question that he had never been asked previously.

As the district court observed, it provided the LSCA and LSC with "every reasonable opportunity to cross-examine those representatives of the settling parties who offered testimony." (LSC 260) Thus, as the district court noted, "[t]o the extent [witness] testimony varied from earlier testimony they could have been, and in at least certain instances were, challenged during this cross-examination." (*Id.*)

In addition, the district court further provided the LSCA and the LSC the opportunity to question every representative of the settling third-party defendants who testified at trial about the settlement agreements, the indemnity provisions contained in the agreements, and the impact of the settlement agreements on the witnesses' testimony

and if they resulted in any bias on the part of the witness. These individuals included Jennifer Babcock and David Krech from K/O (T. 1670-73, 1866-70, 1878-82; Robert Christen from AET (T. 2446-47); and Craig Kronholm and John Carlson from AP/JW (T. 5381-82, 4332-35, 4353-54, 4357-58) The district court similarly allowed the LSCA and LSC to question each representative about the extent of his or her conversations with counsel for HGA and R&C and the substance of those conversations. Counsel for the LSCA and LSC were also permitted to question the witnesses about the indemnity and hold harmless clauses and the settlement agreements' "cooperation" clauses to show any witness bias. Thus, the LSCA and LSC had every opportunity, through cross-examination, to impeach and establish bias, if any, of the representatives of the settling parties who testified at trial.

Likewise, there is no evidence that the LSCA and LSC requested and were denied access to any employees, agents, or representatives of the settling third-party defendants. As the district court astutely observed, the LSCA and LSC had no right of access to the agents and employees of the settling parties beyond that which the released parties might voluntarily provide them. (LSC 259) The settling third-party defendants were under no obligation to provide the LSCA and LSC with access to their agents and employees, except to the extent required under the applicable rules of civil procedure.

The effect of the settlement agreements was also disclosed to the jury. Counsel for the LSCA and LSC explored the effect of the settlement agreements in great detail when cross examining the representatives of the settling third-party defendants. (T. 1670-74, 1868-70, 1878-81, 2446-47, 5381-83) Counsel also made reference to the

settlement agreements during her opening and closing statements. (T. 24-30, 5977-78, 6022-24, 6039) The district court also informed the jury that settlements had been reached between certain parties, both at the beginning of the trial and at the end of the trial and instructed the jury to use the knowledge of the settlement agreements when weighing the credibility of witnesses. (T. 1881, 5841)

2. *The settlement agreements did not alter the relationship between the LSCA and LSC and the settling parties.*

On appeal, the LSCA and LSC seem to argue, or at least imply, that they were somehow entitled to have the settling third-party defendants remain adverse to HGA and R&C. While the relationship between HGA and R&C may have changed with the settling parties, there is no evidence that the settlement agreements in any way altered the relationship between the LSCA and LSC and the settling third-party defendants. Before and during trial, the LSCA and LSC always held out the threat that they would bring direct claims against the settling third-party defendants. This was their position both before and after the time the settling parties entered into the challenged settlement agreements. As a result of this threat of potential litigation, it is understandable that none of the third-party defendants would agree to voluntarily "cooperate" with the LSCA and LSC lest they subject themselves to direct claims by the LSCA and LSC. Indeed, the LSCA and LSC refused to accept Koosman's tender of defense, which they contractually owed him, because of the possibility that they would assert direct claims against him at the close of evidence. (T. 4593-98; Tr. Ex. 356) Although the LSCA and LSC most certainly would have preferred the third-party defendants to fight amongst themselves

during trial, they were not entitled to have them do so. In fact, HGA took substantial risk in settling and releasing the parties who, having no practical risk thereafter, could have testified inconsistently and against HGA's interests.

The LSCA and LSC also ignore the fact that when the district court dismissed the third-party defendants based on the settlement agreements, it specifically stated that its dismissal "in no manner precludes Plaintiffs from seeking to assert any claims against any party dismissed herein, subject to applicable rules of law and procedure." (LSC 144-45) Thus, the LSCA and LSC were always free to bring direct claims against any the dismissed settling parties while those third-party defendants were parties to the action. They chose not to do so and are now bound by that decision.

3. Lack of Legal Support

The LSCA and LSC cite to a number of cases that they allege support their argument that the settlement agreements were impermissibly collusive. This reliance is misplaced because they concern secret "Mary Carter" agreements, or loan-receipt agreements, and not *Pierringer* settlements, which were used in this case. *See Johnson v. Moberg*, 334 N.W.2d 411 (Minn. 1983) (Mary Carter agreement); *Riewe v. Arnesen*, 381 N.W.2d 448 (Minn. Ct. App. 1986) (loan-receipt agreement); *Daniel v. Penrod Drilling Co.*, 393 F. Supp. 1056 (E.D. La. 1975) (Mary Carter agreement); *Faber v. Roelofs*, 212 N.W.2d 856 (Minn. 1973) (secret agreement made during trial between plaintiff and defendant not to sue defendant).

Moreover, the settlement agreements in this case were not secret agreements. The settling parties provided the district court and the LSCA and LSC immediately, or shortly

after the agreements were finalized and executed. It is because the settling parties disclosed the settlement agreements that the district court ruled that the LSCA and LSC could question witnesses from the settling parties at length about the terms and conditions of the settlement agreements, including the indemnity provisions and the alleged "cooperation" clause, to establish any bias on the part of the witness.

4. *No Violation of the Rules of Professional Conduct.*

The LSCA and LSC argue that the settlement agreements violate Rule 3.4 of the Rules of Professional Conduct. This rule provides, in part, that:

A lawyer shall not:

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Minn. R. Prof. Cond., 3.4(f)(1),(2). The LSCA and LSC blatantly ignore that portion of Rule 3.4 that allows a lawyer to request that an employee or other agent of a client refrain from voluntarily giving information to another party. (*Id.*) This is because they are aware that once HGA settled with the various parties and agreed to defend, indemnify and hold harmless those parties, the settling parties effectively became clients of HGA's counsel for the purposes of defending this case. More problematic is the fact that there is absolutely no evidence that the LSCA or the LSC ever requested to meet with representatives of the settling parties at any time before trial and were denied access.

There is simply no violation of the Rules of Professional Conduct for this court to consider.

5. Conclusion

The LSCA and LSC had the opportunity, and, in fact, did test the testimony of the representatives of the settling parties through cross-examination. They failed to establish any evidence of witness bias, or of a conspiracy between HGA and R&C and the released parties to present untruthful testimony. (LSC 259-260) They have also failed to show what evidence, if any, the settling parties purportedly withheld from them. After carefully considering the settlement agreements in the context of the entire eight-week jury trial, the district court was left with the firm conviction that the settlement agreements did not result in prejudice to the LSCA and LSC, or so skew the trial process to deny any party of a fair trial. (LSC 260) The district court did not abuse its discretion nor make any errors of law in denying the new trial motion of the LSCA and LSC on the ground that the settlement agreements were impermissibly collusive or worked to deprive the LSCA and LSC of a fair trial.

B. The District Court Did Not Abuse Its Discretion In Denying A New Trial For Misconduct.

The LSCA and LSC argue that they are entitled to a new trial because defense counsel engaged in numerous instances of misconduct that prejudiced their right to a fair trial. The district court did not clearly abuse its discretion in refusing to order a new trial based on the alleged misconduct of defense counsel.

Rule 59.01(b) of the Minnesota Rules of Civil Procedure provides that a district court may grant a new trial on the grounds of misconduct of the prevailing parties. The decision to grant a new trial for misconduct of counsel or prevailing party is not governed by any fixed rules, but rests wholly in the discretion of the district court, and its decision will not be reversed on appeal absent a "clear abuse of discretion." *Wild v. Rarig*, 302 Minn. 419, 433, 234 N.W.2d 775, 786 (1975) (citation omitted). This is because the district court judge "is present during the trial and is best positioned to determine whether or not an attorney's misconduct has prejudiced the jury." *Johnson v. Washington County*, 518 N.W.2d 594, 601 (Minn. 1994). The primary "consideration in determining whether to grant a new trial is prejudice." *Wild*, 302 Minn. at 433, 234 N.W.2d at 786.

In order to raise the claim of misconduct there must be an objection at the time of the alleged misconduct, or at the close of the argument when it has been taken down by the reporter, and before the jury retires; there must be a request for a corrective action and the failure of the court to act. *Id.* (citation omitted). A reviewing court will rarely grant a new trial on appeal where the district court instructed the jury to disregard the improper remarks or arguments. *Id.* "An objection to improper remarks, a request for curative instruction, and a refusal by the trial court to take corrective action are generally prerequisites to the obtaining of a new trial on appeal, except where the misconduct is so flagrant as to require the court to act on its own motion, or is so extreme that a corrective instruction would not alleviate the prejudice." *Hake v. Soo Line Ry. Co.*, 258 N.W.2d 576, 582 (Minn. 1977) (citation omitted). A reviewing court will rarely grant a new trial

on appeal where the district court instructed the jury to disregard the improper remarks or arguments. *Wild*, 302 Minn. at 433, 234 N.W.2d at 786.

1. Improper Questions and Testimonial Assertions by Counsel

The LSCA and LSC argue that defense counsel engaged in misconduct by attempting to question witnesses on issues not relevant to the case. In particular, the LSCA and LSC contend that it was improper for defense counsel to question various witnesses about the following: (1) the district court's pre-trial ruling on whether certain communications between the LSC and the owner's representative were protected by attorney-client privilege; (2) the resignation of Andrew Slade, the aquarium's educational director; (3) the guarantors on aquarium's debt; (4) the role of Ripley's Entertainment; (5) other aquariums that are experiencing financial difficulties; (6) Listul (the Project's structural steel contractor) filing bankruptcy; and (7) and references to T1 and T1 Revised concrete mix. The district court rejected the claims of misconduct made by the LSCA and LSC after concluding that "[t]he Court did not observe, in argument or during the presentation of evidence, anything approaching that quality of conduct that would merit, let alone require, new trial relief." (LSC 261)

The LSCA and LSC concede that the district court sustained their objections to some of these questions. The jury was instructed at the opening of trial to disregard any question to which an objection was sustained. (T. 7) More importantly, it is unclear what prejudice the LSCA and LSC suffered as a result of these questions. The jury awarded the LSCA and LSC \$270,000 for the damage to the Isle Royale tank, which is \$1,000 more than what the LSCA and LSC requested in the closing argument. The LSCA and

LSC seem to argue that misconduct warranting a new trial occurs any time counsel for a party asks a question to which the district court sustains the objection of opposing counsel. This was an eight week trial during which it was inevitable that on numerous occasions counsel for all parties would ask certain questions to which the district court sustained an objection. This, however, does not establish a pattern of misconduct.

3. Improper comments during closing argument

The LSCA and LSC argue that counsel for R&C engaged in intentional misconduct by referring to matters outside the record during his closing arguments. These allegedly improper comments refer to counsel's: (1) use of the word "soiree"; (2) reading excerpts from the daily transcript that R&C had ordered from the court reporter; (3) mentioning that the evidence showed that T1 versus T1 Revised was used and poured into the bottom of the Isle Royale tank; (4) noting that R&C called Koosman to testify at trial, and not the LSC; (5) observing that not one witness defended Marcy's work on the Project, and that the LSC elected not to call anyone from Marcy, and allowing the jury to draw its own conclusion; (6) referring to Kronholm's testimony that in his opinion Marcy was not qualified to bid on the Project as a "curveball"; (7) noting that Helen Fehr burst into tears when he first brought her into the courtroom; and (8) commenting that he had never previously handled a construction case involving an aquatic tank. They further contend that R&C's counsel misstated the law by telling the jury that a contractor "buys" specifications.

With respect to the claim that R&C's counsel told the jury that a contractor "buys" specification, R&C's counsel never made such a comment. At one point during trial,

James Metzler testified that "when the contractor bids and takes over, he buys the specs. When I say "buy", I mean when he signs the contract. He's accepting that spec. And at that point he's saying, yeah, I can make it work." (T. 5258). Thus, it was not an improper comment by R&C's counsel designed to appeal to the passion and prejudice of the jury, but instead a comment by a witness that the LSCA and LSC were free to challenge on cross-examination.

With the exception of the comments referring to Helen Fehr bursting into tears and the testimony of Kronholm regarding his opinion of Marcy not being qualified to bid on the Project, which were the sole bases of the motion for mistrial that the LSCA and LSC brought at the conclusion of R&C's closing argument, the LSCA and LSC failed to object at the time of the alleged improper comments or at the conclusion of R&C's closing argument, or request a curative instruction. (See T. 5966) The district court therefore correctly ruled that the LSCA and LSC waived any claim of error in those instances where they failed to object. *See Wild*, 302 Minn. at 433, 234 N.W.2d at 786 (holding to preserve claim of misconduct as basis for new trial, party must object at time of alleged misconduct, or at close of argument when it had been taken down by reporter, and before jury retires, and failure of district court to take corrective action after request to do so).

With respect to the comments referring to Fehr bursting into tears, the district court determined that the comment was based on what occurred at trial, and in part, what occurred outside the presence of the jury. During the discussion in chambers on the mistrial motion of the LSCA and LSC, the district court judge recalled seeing her in tears on the witness stand. (T. 5968). Thus, even though the comment did reference matters

outside the record, it was also based on events that occurred at trial in the presence of the jury. Therefore, in the context of the entire eight-week trial, the district court properly concluded that the comment, which was made in passing, was not "so out of bounds as to taint the fair trial process." (LSC 263)

As for the characterization of Kronholm's testimony regarding his opinion of Marcy as being a "curveball," there was no demonstrable prejudice to the LSCA and LSC. The testimony occurred in the eighth week of the trial and was not elicited by counsel for R&C, who had called Kronholm to testify. For the jury to hear at that point that a project participant considered Marcy not qualified to bid the job based on past poor performance was a "curveball".

In considering the motion of the LSCA and LSC for a mistrial at the conclusion of R&C's closing argument, the district court judge considered the comment and observed that, regarding both the Helen Fehr reference and the Kronholm statement, "I am not at all satisfied that this approaches in any manner the degree of prejudices [sic] that's going to cause this jury to do anything other than carry out its responsibilities. It's been absolutely patent to me throughout this whole eight weeks that they have been attentive, mindful of their responsibilities. I'm confident they're going to follow the instructions of the Court to consider it only on the evidence." (T. 5970) The district court judge was able to observe the effect of the comment on the jury in the context of the entire eight-week trial, the jury's demeanor, and concluded that the comment was not prejudicial. Because the district court judge was in the best position to determine the prejudicial

effect of the comment on the jury, if any, this court should respect the judge's decision that the comment was not prejudicial.

4. *Improper Communication with the Jury*

The LSCS and LSC allege that during the crossexamination of Robert Hillebrecht, appellants' accountant, R&C's counsel theatrically shook his head and put it down on counsel table, causing the attention of the jury to be diverted away from the expert testimony and demonstrating a negative appraisal of the expert's testimony. According to the LSCA and LSC, three female jurors apparently smiled and laughed, thereby "tacitly joining in defense counsel's appraisal of the expert testimony."

The problem with this argument is that the LSCA and LSC never objected at the time of the alleged incident, and now, because no timely objection was made to this nonverbal communication, it is impossible to ascertain what exactly happened. Consequently, it is impossible to determine whether the conduct was egregious as to warrant overturning an eight-week jury trial. Furthermore, the trial court observed that during a lengthy trial there will be instances of levity and laughter, instances that in no way warrant a new trial. (LSC 266) Because the LSCA and LSC failed to timely object, they have waived this issue and not preserved it for appeal.

C. *Surprise Testimony*

The LSCA and LSC argue that district court abused its discretion in refusing to grant a new trial based on the alleged "surprise" testimony of Craig Kronholm David Krech. They allege that these two witnesses offered "surprise" testimony and insinuate

that defense counsel failed to disclose this evidence before trial commenced. The LSCA and LSC argue that this "surprise" warrants a new trial pursuant to Rule 59.01 (c).

The district court's decision to grant a new trial on the ground of surprise is largely within the discretion of the district court and appellate courts will rarely reverse its decision. *Nachtsheim v. Wartnick*, 411 N.W.2d 882, 889 (Minn. App. 1987), *review denied* (Minn. Oct. 18, 1987). Surprise is not a ground for a new trial unless "there is a strong probability that a new trial would result differently." *In re Welfare of D.L.*, 486 N.W.2d 375, 381-82 (Minn. 1992) (quoting *Sward v. Nash*, 230 Minn. 100, 109, 40 N.W.2d 828, 833 (1950)).

A district court may suppress "surprise" evidence "where counsel's dereliction is inexcusable and results in disadvantage to his opponent." *Krech v. Erdman*, 305 Minn. 215, 218, 233 N.W.2d 555, 557 (1975). But the preferred remedy when confronted with surprise evidence or witnesses is to allow a continuance. *Id.*; *Quill v. Trans World Airlines*, 361 N.W.2d 438, 445 (Minn. App. 1985), *review denied* (Minn. Apr. 18, 1985). In fact, this court has stated that a party waives any claim of surprise if it fails to request a continuance. *See Nachtsheim*, 411 N.W.2d at 889. If the allegedly surprised party does not seek a continuance, the district court is justified in finding that the party did not sustain prejudice. *Krech*, 305 Minn. at 218, 233 N.W.2d at 557.

1. Craig Kronholm

The LSCA and LSC argue that Craig Kronholm's testimony regarding his negative opinion of Marcy's work and recommendation to senior AP/JW representatives that

Marcy not be allowed to bid on, or be awarded, the Project was previously undisclosed prior to trial and constituted a "surprise."

The LSCA and LSC have waived any claim of surprise because they failed to request a continuance. (LSC 273) Regardless, any "surprise" was due to the failure of the LSCA and LSC to ask Kronholm his opinion and recommendation concerning Marcy's quality of work and fitness to serve as a contractor on the Project during any of Kronholm's three depositions taken before trial. (*Id.*) The failure to explore a subject in discovery that later is discussed at trial does not constitute "surprise" and does not show ordinary prudence on the part of the party claiming "surprise." *See Vikse v. Flaby*, 316 N.W.2d 276, 285 (Minn. 1982).

Kronholm was deposed three times before trial and was never once asked about his opinion and recommendation concerning the quality of Marcy's work and fitness to serve as a contractor on the Project. Kronholm's testimony is not "surprise" testimony under Rule 59.01 simply because the LSCA and LSC failed to effectively use discovery tools to learn this information. Similarly, Kronholm did not change, or "contradict," his earlier testimony. Simply put, there was no previous testimony for him to change or contradict. The LSCA and LSC cannot now persuasively claim surprise or prejudice due to their own neglect in exploring these topics during any of the three depositions that Kronholm provided before trial.

2. *David Krech*

The LSCA and LSC allege that David Krech testified in a manner inconsistent with his field inspection reports and disavowed certain observations he made in his field inspection reports. According to the LSCA and LSC, this was "surprise" testimony.

The testimony of Krech also does constitute surprise or contradictory testimony because no one in this case ever deposed him. The failure to explore a subject in discovery that later is discussed at trial does not constitute "surprise" and does not show ordinary prudence on the part of the LSCA and LSC. *See Vikse*, 316 N.W.2d at 285. Contrary to their assertion, Krech testified consistently with his field reports. Two days prior to the pouring of the Isle Royale tank, Krech wrote in a field report that he thought Marcy built ports in the forms "for hand placement of concrete and vibration." This was speculation on Krech's part as to why Marcy had cut the ports into the forms. On the day of the pour, Krech observed that Marcy did not use the ports "for hand placement of concrete and vibration," but rather for "observation." (T. 1765) His testimony was not contradictory; it simply explained and clarified the observations contained in his field notes. This is allowed. *See Auger*, 267 Minn. at 91, 125 N.W.2d at 162 (holding witness may always explain circumstances under which differing statements have been made and "courts should be liberal in affording witnesses an opportunity to reconcile versions which are at variance") Any prejudice the LSCA and LSC suffered was solely due to their to depose Krech before trial and not due to the conduct of R&C or HGA.

D. Errors of Law

1. Special Verdict Form.

The LSCA and LSC argue that the district court abused its discretion and erred as matter of law in refusing to add DRM as an absent party on the special verdict form. The district court has broad discretion in framing special verdict questions. *Dang v. St. Paul Ramsey Med. Ctr.*, 490 N.W.2d 653, 658 (Minn. App. 1992), *review denied* (Minn. Dec. 15, 1992). This argument ignores several significant facts. First, DRM was dismissed prior to opening statements because R&C had no good faith basis for continuing with a claim against DRM. R&C decided to dismiss DRM because it had no evidence to rebut the affidavit of DRM's owner that stated DRM delivered the concrete mix that Marcy ordered on the first day of the Isle Royale tank pour. The district court refused to add DRM to the special verdict form because there was no evidence that it did anything wrong. (T. 5709-10).

2. Admission of Evidence

The LSCA and LSC next claim that they are entitled to a new trial because the district court improperly admitted certain testimony and evidence. Absent an erroneous interpretation of the law, the decision to admit evidence is within the district court's discretion. *Kronig v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 45-46 (Minn. 1997). The entitlement to a new trial on the grounds of improper evidentiary rulings rests on the complaining party's ability to demonstrate prejudicial error. *Uselman v. Uselman*, 464 N.W.2d 130, 138 (Minn. 1990). Because the district court did not abuse its discretion or

make any errors of law in allowing testimony and evidence at trial, this court should affirm its decision to deny a new trial on this basis.

i. Helen Fehr's Testimony

The LSCA and LSC contend that a new trial is justified because the district court allowed testimony that to the effect that Marcy had no incentive to adequately perform its work because the budget for the project allotted \$40,000 for repairs to the Isle Royale tank. Aside from one cite to a miniscule comment during Helen Fehr's testimony, they provide no specific transcript cites to this alleged testimony. R&C is once again left to guess what other testimony was improper. The LSCA and LSC also mischaracterize Fehr's testimony. She testified in passing that she was surprised to learn that "Marcy knew they had a budget to repair the tank" before they even started their work. (T. 5019). The LSCA and LSC failed to object to this testimony, and therefore, have waived this issue on appeal. *See Steiner v. Beaudry Oil & Serv., Inc.*, 545 N.W.2d 39, 44 (Minn. App. 1996), *review denied* (Minn. May 21, 1996) (holding when a party fails to object to evidence at trial, party has waived any objection) *see also* Minn. R. Evid. 103(a)(1) (requiring "a timely objection or motion to strike" to claim erroneous admission of evidence).

ii. Marcy's Work on Other Projects

The LSCA and LSC allege that the district court erred in allowing defense counsel to question witnesses about Marcy's work on other project without establishing that the other work involved the same level of reinforcing congestion, concrete placement methods, and other factors similar to the Isle Royale tank. The one transcript cite that the

LSCA and LSC provide in support of their argument curiously has no apparent connection to their claimed argument. (T. 3848) Thus, R&C is unable to meaningfully respond to the challenged questions because the LSCA and LSC do not provide specific transcript cites to the allegedly improper questions.

iv. Marcy's Failure to Use Eclipse

The LSCA and LSC argue the district court erred in allowing defense counsel to question AET's representative, Robert Christen, about the directive he received from Marcy instructing him not to report his test results relating to the inclusion of the concrete admixture "Eclipse" to the concrete mix for the Project. (T. 2374) The LSCA and LSC did not object to the question in which Christen was asked "It's also true, isn't it, that Marcy told you not to report the results of the test mixes with Eclipse to Rutherford & Chekene?" A. Yes." (*Id.*) They have, therefore, waived this issue on appeal. *See Steiner*, 545 N.W.2d at 44 (holding when a party fails to object to evidence at trial, party has waived any objection) *see also* Minn. R. Evid. 103(a)(1) (requiring "a timely objection or motion to strike" to claim erroneous admission of evidence).

The LSCA and LSC further claim that the district court erred in allowing R&C to introduce, over their objection, numerous letters from Eclipse representatives attesting to the quality and use of Eclipse by individuals other than Eclipse representatives because it deprived them of the opportunity to cross-examine Eclipse representatives. The portion of the record to which the LSCA and LSC cites contains only one instance of R&C being allowed to admit a letter regarding Eclipse over the objection of the LSCA and LSC. (T. 2395-96; Tr. Ex. 282) This was a letter sent to Robert Christen of AET from Jim Meyer

at W.R. Grace, the manufacturer of Eclipse, and addresses the use of and safety of Eclipse in aquarium tanks. (Tr. Ex. 282) The district court allowed this letter after concluding that it came within the business records exception under the hearsay rule. (LSC 270)

Notwithstanding the trial court's ruling, the letter to which the LSCA and LSC are apparently referring does not constitute inadmissible hearsay because it was not offered to prove the truth of the matters contained in the letter. Rather, the letter was used to determine if AET had information and understood that Eclipse could be used in the concrete without risk of harm to the aquatic life that would inhabit the Isle Royale tank. Thus, because the letter was not used to prove the truth of the matters contained in it, the letter did not constitute inadmissible hearsay. *See* Minn. R. Evid. 801(c) (stating "hearsay" is a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted")

Even assuming the letter constituted hearsay, it fell within the business records exception to the rule because it was kept in the course of a regularly conducted business activity made as a regular part of that business activity. *See National Tea Co. v. Tyler Refrigeration Co.*, 339 N.W.2d 59, 61 (Minn. 1983) (affirming admission into evidence of report contained in witness' file indicating design of refrigerator approved by another company as business record exception to hearsay rule). More importantly, even if the district court erred in admitting the letter because it is inadmissible hearsay, the error was harmless because there was ample other evidence of Marcy's negligence, i.e. its failure, among other things, to use pour ports to place the concrete, use a starter wall, pour

through rebate sills, and properly plan the Isle Royale tank pour. Viewing the letter in the context of all the evidence presented during the eight-week jury trial, any error in its admission is harmless. *See Lutz v. Lilydale Grand Central Corp.*, 312 Minn. 57, 59 250 N.W.2d 599, 600 (1977) (affirming district court's denial of new trial where admission of evidence, if improper, constituted harmless error when viewed in context of all evidence introduced at trial); Minn. R. Civ. P. 61 (providing district court is to ignore harmless error).

v. Marcy's Responsibilities:

The LSCA and LSC maintain that the district court erred in allowing defense counsel to question witnesses concerning the responsibilities of Marcy because they were allegedly far and wide ranging, and contrary to discovery. R&C is once again left to speculate as to what evidence the LSCA and LSC are specifically challenging because they do not provide cites to the trial record. R&C therefore is unable to meaningfully respond to this claimed error. In addition, the LSCA and LSC have waived the issue because they have failed to present argument and authority, beyond mere assertion, in support of their challenge to the district court's evidentiary rulings on this issue. *See Schoepke v. Alexander Smith & Sons Carpet Co.*, 290 Minn. 518, 519-20, 187 N.W.2d 133, 135 (1971) (holding "assignment of error based on mere assertion and not supported by any argument or authorities in appellant's brief is waived and will not be considered on appeal unless prejudicial error is obvious on mere inspection").

vi. Computer Animation

The LSCA and LSC allege that the district court abused its discretion in allowing, over its objection, R&C to introduce and use as an illustrative exhibit, a computer animation showing the means and methods that Marcy could have used to construct the Isle Royale tank. They object to the animation because it purports to show a "perfect" result.

The animation was the subject of extensive pretrial motions and argument on admissibility that carefully considered any prejudicial impact the animation might have on the jury. (R&C 298-303) The animation was used for illustrative purposes only and the district court issued a carefully worded cautionary instruction before the animation was shown. The court instructed the jury as follows:

THE COURT: Ladies and gentlemen, what you are about to see is not substantive evidence. It is an illustration of the mechanism by which this witness contends this could have been accomplished. You are to regard it as similar to if the witness were to go to the easel and draw a picture, and you need to understand this is not intended to exhibit the result that might have been attained by following this particular procedure, but simply to illustrate the procedure he is suggesting would be appropriate.

(T. 3989) The district court properly instructed the jury and did not abuse its discretion in allowing the computer animation.

3. Jury Instruction

The LSCA and LSC argue the district court abused its discretion and erred in refusing to instruction based on *Zontelli & Sons, Inc. v. City of Nashwak*, 373 N.W.2d 744 (Minn. 1985). They contend the instruction was required to correct defense expert's

misstatement of law that a contractor "buys' specifications prepared by an engineer and the engineer is therefore shielded from liability for defective plans and specifications.

Appellate courts afford the district court considerable discretion in selecting the language in jury instructions. *Alholm v. Wilt*, 394 N.W.2d 488, 490 (Minn. 1986). Therefore, an appellate court will not reverse a district court's decision unless the court abused its discretion. *Id.* When the jury instructions fairly and correctly state the applicable law, a new trial is not warranted. *Alevizos v. Metropolitan Airports Comm'n*, 452 N.W.2d 492, 501 (Minn. App.1990), *review denied* (Minn. May 11, 1990). Jury instructions must be considered as a whole, and there is no reversible error "[w]here the jury instructions, when read together, correctly state the law on a particular issue in language which can be understood." *Hahn v. Tri-Line Farmers Co-op*, 478 N.W.2d 515, 523 (Minn. App.1991) (citation omitted), *review denied* (Minn. Jan. 27, 1992).

In denying the motion of the LSCA and LSC for a new trial, the district court considered the challenged expert testimony in the context in which it was given and concluded that there was no jury confusion about a contractor "buying" defects in plans and specifications. The district court refused to give the requested instruction because it found that the holding in *Zontelli* did not apply to the facts in this case. It ruled that the customary pattern instructions provided by the Jury Instruction Guides adequately framed the legal relationships involved in the case. The district court did not abuse its discretion or make any errors of law in refusing to grant the LSCA and LSC the requested instruction.

III. The District Court Did Not Error In Denying The Post-Trial Motion Of The LSCA And LSC To Amend Their Pleadings To Join Additional Parties And Hold Certain Parties Liable In Indemnity.

The LSCA and LSC allege that the district court erred in denying their post-trial motion seeking to amend the pleadings pursuant to Rule 14.01 and 15.02 to add AET, in its role as special inspector, as a direct party defendant. They further claim that the district court erred in refusing to determine, as a matter of law, that HGA is contractually liable in indemnity for the fault allocation and judgment against AET because under the settlement agreement with AET, HGA is contractually liable for the judgment against AET. The LSCA and LSC also sought to have the district court determine, as a matter of law, that A&P/J-W is liable in indemnity for the judgment against Marcy based on what they allege is the unrebutted evidence of Kronholm that he recommended the disqualification of Marcy.

The issues that the LSCA and LSC raise with respect to the district court's refusal to amend the pleadings to join additional parties as direct defendants postverdict do not directly effect the jury's special verdict as it relates to the alleged liability of R&C. Similarly, the challenge of the LSCA and LSC relating to the district court's refusal to order certain liable in indemnity does not directly effect the jury's special verdict with respect to R&C. Even so, the district did not abuse its discretion in denying the post-trial motions of the LSCA and LSC to join additional parties as direct defendants and to order certain parties liable in indemnity to HGA.

Generally, the decision to permit or deny amendments to pleadings is within the discretion of the district court and will not be reversed absent a clear abuse of discretion.

Fabio v. Bellomo, 504 N.W.2d 758, 761 (Minn. 1993); *LaSalle Cartage Co., Inc. v. Johnson Bros. Wholesale Liquor Co.*, 302 Minn. 351, 357-58, 225 N.W.2d 233, 238 (Minn. 1974). And the futility of a motion to amend due to the running of the applicable statute of limitations is proper grounds for denying the proposed amendment. *Fabio*, 504 N.W.2d at 761-62.

The LSCA and LSC have failed to show exactly how the district court abused its discretion or erred in its decision. The district court properly refused to allow the LSCA and LSC to amend their complaint pursuant to Rule 14 of the Minnesota Rules of Civil Procedure. As the district court ruled, after eight weeks of trial, the jury determined that none of the parties that they seek to join, except AET in its role as special inspector, were the direct cause of any of the damages that the LSCA and LSC claimed. And the utility of the addition, as the court noted, is questionable because the LSCA and LSC were not requesting relief against the targeted entities if they were joined.

The district court also properly denied the motion to join pursuant to Rule 15.03 because the two-year statute of limitations set forth in Minn. Stat. § 541.051 barred any direct claims against AET. In their brief, the LSCA and LSC do not specifically challenge this ruling with any argument or authority. They have therefore waived this issue on appeal. *See Melina*, 327 N.W.2d at 20 (holding issues not briefed on appeal are waived). Likewise, Rule 15.02 does not work to allow the amendment of pleadings to conform to the evidence outside the pleadings that was tried by consent of the parties because, as the district court ruled, the rule applies only to party who is presently a party to the lawsuit. The rule does not allow the amendment of pleadings to join a defendant

who was not a party to the lawsuit. At the time of the motion to amend by the LSCA and LSC, AET was no longer a party to the action. Rule 15.02, therefore, is inapplicable.

In determining whether to allow an amendment to the pleadings, prejudice is a major consideration in the district court's decision. *McDonald v. Stonebraker*, 255 N.W.2d 827, 830 (Minn. 1977). Throughout this case, the district court essentially invited the LSCA and LSC to make direct claims against various third-party defendants. They chose not to do so through the discovery phase, pretrial preparation, and at trial. It was not until the close of evidence by all parties that the LSCA and LSC sought to join the previously dismissed third and fourth-party defendants by moving to amend their complaint. Before the district court could rule on their motion, the LSCA and LSC withdrew the motion the day before closing arguments were made. (T. 5729) At that time, both HGA and R&C articulated their concern to the district court that they would suffer significant prejudice if the LSCA and LSC were allowed to argue to the jury that they had made no claims against anyone other than HGA and R&C, while at the same time, reserving the right to do so after the jury's verdict. (T. 5730-33)

All throughout this litigation, the LSCA and LSC have maintained that the allegedly defective design of the Isle Royale tank caused their damages. They even went so far as to seek punitive damages against R&C for allegedly intentionally misleading them as to the prior success of its tank designs. (R&C 141-148) R&C vigorously defended its work and asserted that the problems with the Isle Royale tank were due to the means and methods employed by Marcy. The jury agreed with R&C and found R&C was not negligent.

The LSCA and LSC now seek to amend their complaint to bring a claim against AP/JW for "allowing" an incompetent contractor (Marcy) to work on the project, despite a finding by the jury that AP/JW was not negligent in this regard. If the LSCA and LSC had brought their direct claims against AP/JW and the other dismissed parties before trial began, or even before closing arguments, R&C could, and would, have argued to the jury that this fact was an acknowledgement by the LSCA and LSC that the problems on the Isle Royale tank were caused by Marcy, not because of a defective design. Instead, R&C was forced to call its witnesses and present its evidence to defend itself against the claim that it was negligent, while the LSCA and LSC were waiting to make claims that were contrary to the arguments and claims they made at trial. To now allow the LSCA and LSC to amend their Complaint to add direct claims would severely prejudice R&C.

The district court did not abuse its discretion or make any errors of law in denying the motion of the LSCA and LSC to join additional parties or to hold them liable in indemnity, and this court should affirm that decision.

IV. Errors Relating To The District Court's Decision Regarding HGA's Professional Fees Trial.

The LSCA and LSC argue that the district court's findings and conclusions of law in the HGA's professional fees case are clearly erroneous and should be set aside. Because R&C was a not party to that aspect of the case, no response is necessary on appeal.

V. The District Court Did Not Abuse Its Discretion In Awarding Costs and Disbursements To R&C.

The LSCA and LSC argue that the district court abused its discretion in awarding HGA and R&C their respective costs and disbursements. Although the court's award of costs and disbursements is large, it carefully considered the requested costs and disbursements, the complexity of the issues involved, the length of the litigation, the impact of the litigation on the parties, and the Rule 68 offer of judgment for one million dollars that HGA and R&C offered, but the LSCA and LSC refused. The district court determined that HGA and R&C were prevailing parties at trial, and issued detailed findings of fact and conclusions of law that allowed them certain costs and disbursements, reduced others, and denied some in their entirety. Because the district court did not abuse its discretion in awarding HGA and R&C their reasonable costs and disbursements, this court should respect that decision.

On appeal, an appellate court reviews the district court's award of costs and disbursements, including expert-witness fees, for an abuse of discretion. *Kellar v. Von Holtum*, 605 N.W.2d 696, 703 (Minn. 2000); *Carpenter v. Mattison*, 300 Minn. 273, 280, 219 N.W.2d 625, 631 (1974) (holding decision to award expert witness fee will be reversed only for abuse of discretion). Statute provides that "[i]n every action in a district court, the prevailing party . . . shall be allowed reasonable disbursements paid or incurred" Minn. Stat. § 549.04 (2004). Absent a specific finding that a particular cost was unreasonable, the district court "shall" approve recovery of all disbursements sought. Minn. Stat. § 549.04; *Jonsson v. Ames Construction, Inc.*, 409 N.W.2d 560, 563 (Minn.

Ct. App. 1987). "The trial court does not have discretion to deny costs and disbursements to a prevailing party." *Quade & Sons Refrigeration, Inc. v. Minnesota Min. & Mfg. Co.*, 510 N.W.2d 256, 260 (Minn. App. 1994), *review denied* (Minn. Mar. 15, 1994).

The district court is statutorily authorized to "allow such fees or compensation as may be just and reasonable" for expert witnesses. Minn. Stat. § 357.25 (2004). The district court may, in its discretion, allow an expert witness' pretrial preparation time in awarding just and reasonable compensation under Minn. Stat. § 357.25. *Quade & Sons*, 510 N.W.2d at 260-61 (Minn. App. 1994).

A. Respondents Have Not Forfeited Their Right to Tax Costs and Disbursements

The LSCA and LSC first argue, without legal support, that HGA and R&C have forfeited the right to tax costs and disbursements under Rule 54 of the Minnesota Rules of Civil Procedure and Minn. Stat. § 549.04 due to the alleged misconduct of defense counsel at trial. This is an equitable argument that lacks either factual or legal support. The district court carefully considered the claims of the LSCA and LSC that defense counsel engaged in misconduct and comprehensively rejected those claims. In addition, there is no legal authority for this proposition. Finally, the district court did not consider nor pass on this issue in its decision awarding costs and disbursements. This argument, therefore, is not properly before this court for consideration. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (holding reviewing court will not consider issue, even if raised below, "if it was not passed on by the trial court").

B. Rule 127 of the General Rules of Practice Does Not Limit An Award of Expert Witness Fees and Costs to \$300 a Day

The LSCA and LSC blatantly ignore well established Minnesota caselaw and challenge the district court's award of costs and disbursements, arguing that Rule 127 of the General Rules of Practice District authorizes a maximum of only \$300 per day for expert witness fees and does not allow for preparation outside the courtroom by an expert. This court has specifically considered and rejected this argument and interpretation of Rule 127.

This court addressed this precise issue in *Quade & Sons Refrigeration, Inc. v. Minnesota Min. & Mfg. Co.*, 510 N.W.2d 256, 260-61 (Minn. App. 1994), *review denied* (Minn. Mar. 15, 1994). In that case, the district court awarded \$10,880 in preparation and trial time for two of the plaintiff's experts. *Id.* at 260. The defendant argued that Rule 127 capped expert witness fees to \$300 per day and did not allow for preparation time outside the courtroom by an expert. *Id.* In rejecting this argument as lacking merit, this court noted that Rule 127 is a limitation on the amount that the court administrator may tax, and the rule expressly provides that the limitation is subject to increase or decrease by a judge. *Id.* The court recognized that a judge may allow expert fees that are just and reasonable pursuant to Minn. Stat. § 357.25. *Id.* With respect to trial preparation fees, this court acknowledged its previous decisions upholding a district court's allowance of pretrial preparation as part of a district court's discretion in awarding just and reasonable compensation under Minn. Stat. § 357.25. *Id.* These decisions included

Mohwinkel v. City of North St. Paul, 357 N.W.2d 174, 177 (Minn. App. 1984), *review denied* (Minn. Feb. 19, 1985), and *Stinson v. Clark Equip. Co.*, 473 N.W.2d 333, 338 (Minn. App. 1991) (holding "Rule 11 [the predecessor to Minn. Stat. § 357.325] disallows outside preparation fees which are merely for convenience, but allows fees that are necessary for testimony), *review denied* (Minn. Sept. 13, 1991); *see also Johnson v. Southern Minnesota Machinery Sales, Inc.*, 460 N.W.2d 68, 73 (Minn. Ct. App. 1990) (holding Rule 11, which was predecessor to Minn. Stat. § 357.25, "does not impose an inflexible limit on expert fees which bars compensation for preparations outside the courtroom if it is necessary for testimony"). This court affirmed the district court's award of costs and disbursements.

Indeed, in interpreting Minn. Stat. § 357.25, the Minnesota Supreme Court has recognized over 30 years ago that: "This statutory provision sets no maximum limits on the awardable amount, but expressly vests the trial judge with discretion to allow 'such fees or compensation as, in his judgment may be just and reasonable.'" *Carpenter*, 300 Minn. at 280, 219 N.W.2d at 631.

There is no legal authority for the argument of the LSCA and LSC, and they have failed to cite to one Minnesota decision that supports their reading of Rule 127. This is because Minnesota courts have expressly rejected the very argument the LSCA and LSC now advance in their attempt to overturn the district court's award of expert witness fees.

On appeal, neither the LSCA nor the LSC specifically challenge the underlying reasonableness of the costs and disbursements that the district court awarded to R&C. Their brief also fails to challenge the district court's decision refusing to grant a stay of

enforcement of the judgment on the award of costs and disbursements to the LSC. As such, these issues are waived on appeal. *See Melina*, 327 N.W.2d t 20 (holding issues not briefed on appeal are waived). And the LSCA and LSC are precluded from reviving these issues in their reply brief. *See McIntire*, 458 N.W.2d at 717 n.2 (observing issues not raised or argued in appellant's brief cannot be revived in reply brief).

Briefly, however, the district court's award of costs and disbursements, including expert witness fees, was not an abuse of discretion. The district court was well aware of R&C and HGA's experts' qualifications, having presided over an eight week trial in this matter. Both R&C and HGA were defending negligent design claims that the LSCA and LSC brought that required the hiring of engineering and architectural experts (Matthys Levy and Robert DeBruin) to defend their respective designs of the Project. In addition to the negligent design claims, the LSCA and LSC asserted an elaborate multi-million dollar claim for delay damages. The delay claim required a complete analysis of the project records by a scheduling expert, in this case, Robert Davenport of A.W. Hutchinson, in order to establish what activities may have delayed the Project. The LSCA and LSC also presented a claim for damages based on lost revenue and associated lost opportunity costs, which required the services of a financial expert, Phillip Williams. Finally, both R&C and HGA defended their actions by demonstrating that the problems in the Isle Royale tank were not caused by a defective design, but rather, by defective construction techniques on the part of Marcy. This defense required the services of a construction expert, James Metzler. Although the district court did not award all the

expert witnesses fees that R&C requested, those expert witness fees it did allow were reasonable and necessary to R&C's defense in this litigation.

Because the district court did not abuse its discretion or make any errors of law in awarding costs and disbursements to R&C and HGA, this should affirm that decision.

Notice of Review Issues

VI. **The Two-Year Statute Of Limitations Governing Improvements To Real Property Under Minn. Stat. § 541.051 Bars The Claims Of The LSCA And LSC Against HGA And R&C.**

In its answer to special verdict question number 41, the jury specifically found that the accident giving rise to the claims of the LSCA and LSC against HGA and R&C occurred on before May 1, 2000. The LSCA and LSC, however, did not commence suit against HGA until May 3, 2002, and R&C until October 13, 2003. The two-year statute of limitations governing improvements to real property contained in Minn. Stat. § 541.051, subd. 1 (2004), therefore, bars their claims against HGA and R&C.

A. **The two-year statute of limitations governing improvements to real property applies to the claims of the LSCA and LSC against HGA and R&C.**

The two-year statute of limitations period set forth in Minn. Stat. § 541.051, subd. 1(a) (2004), governs the claims of the LSCA and LSC against HGA and R&C.

This statute provides, in part, that:

[N]o action by any person in contract, tort, or otherwise to recover damages for any injury to property, real or personal, or for bodily injury . . . arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained on account of the injury shall be brought against *any person performing or furnishing the design, planning, supervision,*

materials, or observation of construction or construction of the improvement to real property or against the owner of the real property more than two years after discovery of the injury or, in the case of an action for contribution or indemnity, accrual of the cause of action, nor, in any event shall such a cause of action accrue more than ten years after substantial completion of the construction.

Minn. Stat. § 541.051, subd. 1(a) (2004) (emphasis added).

An improvement to real property under this section is defined as a permanent addition to or betterment of real property that enhances its capital value and involves the expenditure of labor and money and is designed to make the property more useful or valuable as distinguished from ordinary repairs. *Brandt v. Hallwood Mgmt. Co.*, 560 N.W.2d 396, 400 (Minn. App. 1997) With respect to design or planning activities, "they must result in an actual improvement to real property." *Id.* (citation omitted).

In this case, the Project that HGA and R&C designed constitutes an improvement to real property.

B. The two-year limitations period in Minn. Stat. § 541.051, subd. 1, commenced no later than May 1, 2000.

In this case, the two-year statute of limitations under Section 541.051, subd. 1(a) began to run no later than May 1, 2000, the date by which the jury found that the LSCA and LSC discovered, or should have reasonably discovered, an injury to the Great Lakes Aquarium due to the defective and unsafe condition of the Isle Royale tank. The LSCA and LSC, therefore, had two years from that date in which to bring suit against HGA and R&C.

Under Minn. Stat. § 541.051, subd. 1(b), "a cause of action accrues upon *discovery of the injury.*" (Emphasis added). The statute also provides that "no action . . . arising out of the defective and unsafe condition of an improvement to real property . . . shall be brought against . . . any person performing or furnishing the design [and], planning, . . . of the improvement to real property . . . more than two years after *discovery of the injury.*" Minn. Stat. § 541.051, subd. 1(a) (emphasis added). This clear and unambiguous language establishes that the two-year limitations period commences on a plaintiff's "discovery of the injury," and not the discovery of the defective or unsafe condition of the improvement to property.

Here, the jury specifically found that the LSCA and LSC discovered, or should have reasonably discovered, an injury to the Project due to the defective and unsafe condition of the Isle Royale tank no later than May 1, 2000. In response to special verdict question number 1, the jury also found that the Isle Royale tank was defective in October 1999, when the concrete forms were stripped from the Isle Royale tank. Even so, the two-year statute of limitations under Minn. Stat. § 541.051 began to run no later than May 1, 2000. The LSCA and LSC therefore had until May 1, 2002, in which to bring suit against HGA and R&C. They, however, did not serve HGA with their complaint until May 3, 2002, and R&C with their complaint until October 13, 2003. Because the LSCA and LSC failed to commence suit against HGA and R&C within two years from the date the jury found they discovered, or should have reasonably discovered, their injury, their claims are untimely under Minn. Stat. § 541.051.

C. The doctrine of estoppel does not work to toll the statute of limitations.

In response to R&C's summary judgment motion, the LSCA and LSC successfully argued that the statute of limitations under Minn. Stat. § 541.051 was tolled because R&C was involved in the repair plan for the Isle Royale tank. Indeed, this court has recognized that "a builder may be estopped from asserting the bar of the statute of limitations if his conduct satisfies the elements of equitable estoppel." *Rhee v. Golden Home Builders, Inc*, 617 N.W.2d 618, 621 (Minn. Ct. App. 2000).

But the LSCA, LSC, and district court are in error. The argument of the LSCA and LSC that the district court erroneously adopted, incorrectly assumes that that any time repairs are being made on defective work, *all* parties involved in the repairs are estopped from asserting the statute of limitations while the repair work progresses. This is an incorrect reading of this court's decision in *Rhee*. In that case, this court held that:

[w]hen *a party allegedly responsible for* remedying a defect in real property makes assurances or representations that the defect will be repaired *that party* may be estopped from asserting a statute of limitations defense if the injured party reasonably and detrimentally relied on those assurances and representations.

Rhee, 617 N.W.2d at 622 (emphasis added).

The doctrine of estoppel is based on the inequity that one party may create by promising to repair a defective condition in an attempt to delay a lawsuit. Here, the evidence at trial showed that while R&C was involved in the repair process, it never made any assurances to the LSCA and LSC that it would repair the defect or the design the repair work with the intent to delay any lawsuit. (T. 957-59; 960; 973-75) R&C

always maintained that the defects were due to the means and methods that Marcy used to pour the concrete for the Isle Royale tank, and not any design defects. (T. 1003-04, 1013) The testimony established that throughout the Marcy arbitration, R&C maintained that the problems with Isle Royale tank was the result of Marcy's means and method. (T. 1013) But more importantly, however, the construction manager for the LSCA and LSC implored them to hire an independent firm to investigate the possible causes of the problems in the Isle Royale tank that were discovered in October 1999.

For a party to be estopped from invoking the protection of Minn. Stat. § 541.051, *that* party must be responsible for remedying the defect. Here, Marcy was the party responsible for remedying the defects in the Isle Royale Tank, not R&C. R&C had no contractual or legal responsibility to remedy the defects in the Isle Royale Tank. Because R&C was not the party responsible for remedying the defect and because it did exactly what the LSCA hired them to do -review Marcy's repair procedures- the doctrine of estoppel does not apply to R&C. For this reason, the district court erred in concluding that the two-year statute of limitations set forth in Minn. Stat. § 541.051 had been tolled.

The law imposes a duty upon the owner of real estate, regardless of whether that owner is a public or non-profit entity, to investigate injuries to its property promptly and thoroughly. The LSCA failed to carry out its duty when the problems with the Isle Royale tank were first discovered. The discovery of an actionable injury occurred in October 1999, and on later than May 1, 2000. As such, its claims against R&C are barred because they have been brought more than two years after the injury was discovered.

CONCLUSION

For the foregoing reasons, R&C respectfully requests that this court affirm the judgment of the district court based on the special verdict of the jury following an eight-week jury trial. In addition, it respectfully requests a decision from this court that the claims of the LSCA and LSC against it are time-barred under Minn. Stat. § 541.051.

Respectfully submitted,

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