

NO. A11-2119

State of Minnesota
In Court of Appeals

Custom Conveyor Corporation,
a Minnesota Corporation,

Appellant,

v.

TC/American Monorail, Inc.,
a Minnesota Corporation,

Respondent.

APPELLANT'S REPLY BRIEF

SHOEMAKER & SHOEMAKER, PLLC
Paul F. Shoemaker (#0178226)
7900 International Drive, Suite 200
Minneapolis, MN 55425
(952) 224-4600

HOVERSON LAW OFFICES, P.A.
Michael K. Hoverson (#0175948)
333 Washington Avenue North, Suite 308
Minneapolis, MN 55401
(612) 349-2728

Attorneys for Respondent

HENNINGSON & SNOXELL, LTD.
By: Mark V. Steffenson (#0178457)
Craig A.B. Freeman (#0336646)
6900 Wedgwood Road, Suite 200
Maple Grove, MN 55311
(763) 560-5700

Attorneys for Appellant

* * * * *

TABLE OF CONTENTS

Table of Authorities 3

Facts 4

 I. Respondent’s Breach of Contract 4

 II. Appellant’s Request to Depose Manuel Israel and Jay Brown 5

 III. The Eickelberg Deposition 6

Argument 7

 I. The District Court Committed Error in Failing to Grant Judgment as a Matter of Law Based Upon Respondent’s Breach of Contract. 7

 A. Respondent’s prior breach of contract renders moot Respondent’s goods sold and delivered claim. 7

 B. Respondent’s prior breach of contract renders moot Respondent’s breach of contract claim... 8

 C. Based upon the Jury’s findings, the holdings in MTS Co. and Carlson Real Estate Co. are applicable to this matter..... 10

 II. The District Court Committed Error in Refusing Appellant the Opportunity to Preserve the Testimony of Unavailable, Out-of-State Witnesses.. 10

 A. This Court recognizes a distinction between discovery and trial depositions... 10

 B. Appellant has demonstrated relevance in the testimony of Mr. Brown and Mr. Israel... 13

 III. The District Court Committed Error in Refusing to Admit the Full Testimony of Kenneth Eickelberg. 14

 A. The District Court’s rulings regarding edits to Mr. Eickelberg’s testimony were prejudicial error.... 14

B. Respondent cannot strike its cross examination as a whole, but must make specific objections to specific portions of the examination..... 15

Conclusion 16

* * * * *

TABLE OF AUTHORITIES

Cases

Carlson Real Estate Co. v. Soltan, 549 N.W.2d 376 (Minn.App. 1996)..... 10

Charles v. Wade, 665 F.2d 661 (5th Cir. 1982)..... 12

Created Gemstones, Inc. v. Union Carbide Corp., 47 N.Y.2d 250 (N.Y. 1979).....7

Elliott v. Caldwell, 45 N.W. 845 (Minn. 1890).....9

Henkel v. XIM Products, Inc., 133 F.R.D. 556 (D.Minn. 1991)..... 11, 12

Insignia Systems, Inc. v. News America Marketing In-Store, Inc., 04-4213, 2011 WL 282632 11, 12

Lindberg v. Luther, A10-1911, 2011 WL 3903194 (Minn.App. Sept. 6, 2011) 10, 11

Marthaler Machine & Engineering Co. v. Meyers, 218 N.W. 127 (Minn. 1928)7

MTS Co. v. Taigo Corp., 365 N.W.2d 321 (Minn.App. 1985) 10

Teeman v. Jurek, 251 N.W.2d 698, 701-702 (Minn. 1977)8

Ylijarvi v. Brockphaler, 7 N.W.2d 314, 318 (Minn. 1942)9

Rules

Minn. R. Civ. P. 32.01(d) 15

Minn. R. Evid. 102..... 15

* * * * *

FACTS

I. Respondent’s Breach of Contract

The Jury found that Respondent TC/American Monorail, Inc. breached its contract to fabricate steel hoppers and support stands on behalf of Appellant Custom Conveyor Corporation for use in a waste water treatment plant in the City of North Las Vegas, State of Nevada. (Trial Exhibit ("Ex.") 6; Trial Transcript ("Transcript") at 132-136; Appellant’s Appendix at 308-310).

The City of North Las Vegas intended to use the steel hoppers and support stands to hold solid waste after its removal from the City’s waste water. It was anticipated that the hoppers would need to hold approximately 2,000,000 pounds of solid waste with vehicles and pedestrians moving underneath the hoppers. (Eickelberg Deposition Transcript at 59, 77-78, 80, and 115). For this reason the twin requirements of welding to D1.1 and preparing the surface to SP-6 are vital to the safety of the structure. Id. The structure was described as:

a lollipop, all the weight is way up high, and the supports are holding up all that weight. So it’s a real thin support with a bunch of weight on top. So if the supports fail, all that weight comes down and not only does it just fail on the equipment, but then it can do other damage to the building or to people or to other equipment that’s in the area.

(Id. at 80). The parties’ contract was for “Net 30”, and did not require Appellant to pay Respondent until performance regarding fabrication was complete. (Trial Exh. 6).

Shortly after the hoppers were delivered to the City of North Las Vegas, Appellant notified Respondent that the hoppers were nonconforming and that Respondent was required to take corrective action. Respondent, however, refused to take any action or to travel to North Las Vegas to view the nonconformance. (Trial Transcript at 689-692).

Appellant did make partial payment to Respondent in this matter. The total claimed by Respondent on this matter was \$172,561.00, (Trial Transcript at 412; Trial Exh. 44), but the total cost of the project was \$330,520.00. (Trial Exh. 6 and 16). Accordingly, Appellant paid Respondent \$157,959.00. The only items manufactured by Respondent used by Appellant were the hoppers, which still needed to be reblasted and primed. (Trial Transcript at 757-759 and 1143-1159). The remaining items could not be used.

The Jury found as a matter of fact that Respondent breached its contract with Appellant. (Appellant's Appendix at 308-310).

II. Appellant's Request to Depose Manuel Israel and Jay Brown

On April 29, 2011, Appellant filed a Notice of Motion and Motion asking the District Court to issue separate Commissions or Letters Rogatory authorizing the District Court in Clark County Nevada to issue subpoenas to enable Appellant to obtain the trial testimony of Manuel D. Israel and Jay Brown. (Appellant's Appendix at 72). Both Mr. Israel and Mr. Brown are residents of the State of Nevada and beyond the subpoena power of the State of Minnesota. Id.

Mr. Israel had personal knowledge of Respondent's fabrication as well as what occurred based upon that fabrication in Las Vegas. (Appellant's Appendix at 98). Mr.

Brown is the head of the project's construction manager, CH2M Hill Contractors/CNLV Constructors II and would have testified as to his knowledge from that position, including the rejections of Respondent's fabrications, as well as laid the foundation for certain documents. Id.

III. The Eickelberg Deposition

Following the taking of the trial deposition of Kenneth Eickelberg, the District Court conducted an extensive hearing regarding the admissibility of various portions of the deposition. The District Court took two entire afternoons and went line by line through the direct examination of Mr. Eickelberg. (Trial Transcript at 1023-1108 and 1193-1265). Suddenly, after completing a review of the direct examination, at the end of the day on Friday, July 1, 2011, counsel for Respondent stated "I believe after approximately page 90, I believe we would simply withdraw the questions asked after that point in time." (Trial Transcript at 1246). Based on this, and over Appellant's objection, the District Court then gave Appellant until the afternoon of Saturday, July 2, 2011, to provide written argument regarding what would be admissible or the District Court would strike the entirety. The District Court stated, "[s]o your alternatives, Mr. Steffenson, Mr. Dokken, is you agree to lop off the balance of the cross-examination and get this to your videographer or to submit an electronic request which can be responded to by plaintiff [sic] so that I can get that back to you sometime on Sunday."

* * * * *

ARGUMENT

I. The District Court Committed Error in Failing to Grant Judgment as a Matter of Law Based Upon Respondent's Breach of Contract.

A. Respondent's prior breach of contract renders moot Respondent's goods sold and delivered claim.

Respondent argues, with no legal support, that the Jury's responses to Questions 18 and 19 of the Special Verdict Form render the issue of Respondent's prior breach of contract moot. (Respondent's Brief at 15). In fact, the Jury's prior determination that Respondent breached the parties' contract defeats this argument just as it does Respondent's claim for breach of contract.

In Minnesota, "[a]n action for goods sold and delivered...is an action on contract." Marthaler Machine & Engineering Co. v. Meyers, 218 N.W. 127 (Minn. 1928). Accordingly, a prior breach of an underlying contract serves to defeat a claim for goods sold and delivered just as it does a claim for a subsequent breach. Therefore, based on Respondent's prior breach of the parties' contract it is Respondent's claim for goods sold and delivered, and not Appellant's argument to this Court, which is actually rendered moot. This position is supported by a decision of the New York Court of Appeals applying the Uniform Commercial Code and using a Minnesota case as the basis for its decision. In Created Gemstones, Inc. v. Union Carbide Corp., 47 N.Y.2d 250 (N.Y. 1979), the Court held that a claim for goods sold and delivered can be defeated "by interposing a valid counterclaim for breach of the underlying sales agreement." Id. at 255. Of particular importance, the Created Gemstones Court specifically noted its ruling

on this point is in harmony with the Minnesota case of Teeman v. Jurek, 251 N.W.2d 698, 701-702 (Minn. 1977).

In the present matter, the Jury's finding that Respondent breached the parties' contract means Respondent delivered nonconforming goods as a matter of fact. Accordingly, Respondent's claim for goods sold and delivered is defeated, just as its claim for breach of contract, and the Jury's responses to Questions 18 and 19 of the Special Verdict Form simply further demonstrate that the Special Verdict Form must be reconciled by the District Court.

B. Respondent's prior breach of contract renders moot Respondent's breach of contract claim.

Respondent next argues, again with no legal support, that it is speculation to state that Respondent's breach occurred first. (Respondent's Brief at 16-17). This argument frankly strains credibility. The parties' contract was for Respondent to supply goods meeting the contractual criteria and for Appellant to then pay for those goods. (Appellant's Brief at 6). Appellant's obligation to pay is on final performance of the contract. (Trial Exh. 6). The Jury found that Respondent breached the contract. (Appellant's Appendix at 308). As the only potential breach by Respondent was failing to supply goods meeting the contractual criteria, and this requirement was prior to Appellant's payment requirement, Respondent's breach occurred first. To argue otherwise is to ignore common sense.

Respondent further argues that its breach includes partial or substantial performance, and as such the Jury's verdict does not require reconciliation.

(Respondent's Brief at 22-23). Respondent makes this claim immediately after arguing that Appellant's position regarding the initial breach of the contract is speculation. This claim, however, requires substantially more speculation as to the Jury's verdict than Appellant's argument regarding prior breach. As noted, the Jury found Respondent to have breached the agreement, and this breach could only have occurred first. There is no similar finding in the Special Verdict Form finding partial or substantial performance. (Appellant's Appendix at 308-310).

Additionally, it is quite clear that based upon the fabrication at issue, partial or substantial performance does not exist if Respondent breached its contract. The case cited by Respondent defines partial or substantial performance to "mean[] performance of all the essentials necessary to the full accomplishment of the purposes for which the thing contracted for has been constructed, except for some slight and unintentional defects which can be readily remedied or for which an allowance covering the cost of remedying the same can be made from the contract price." Ylijarvi v. Brockphaler, 7 N.W.2d 314, 318 (Minn. 1942), *citing*, Elliott v. Caldwell, 45 N.W. 845 (Minn. 1890). Partial or substantial performance in this matter would not leave 2,000,000 pounds of solid human waste over people's heads in a faulty lollipop. Minnesotans are well acquainted with the issues caused by failing welds following the 35W bridge collapse, and the failure of welds on the fabrication at issue, through faulty welds or rust caused by improper surface preparation, would likely cause a similar tragedy. Nonetheless, Respondent was paid 48% of the total contract price when only the hoppers were kept from being scrapped.

Accordingly, any breach of Respondent's duties under the contract defeats a claim for partial or substantial performance.

C. Based upon the Jury's findings, the holdings in MTS Co. and Carlson Real Estate Co. are applicable to this matter.

Despite Respondent's strained attempts to argue MTS Co. v. Taigo Corp., 365 N.W.2d 321 (Minn.App. 1985), does not apply to this matter, (Respondent's Brief at 17-23), it quite clearly does. Respondent argues "there is no reasonable factual support in the record that Respondent breached or was continuing to breach its contractual obligations to Appellant", (Respondent's Brief at 20), but this claim is patently false. The Jury in this matter found that Respondent breached the parties' contract. (Appellant's Appendix at 308). To argue "[t]he factual record supports a finding that Respondent supplied components that were consistent with, or substantially consistent with, the basic specifications and terms of the parties' contract", (Respondent's Brief at 20) (emphasis in original), requires Respondent to utterly ignore the Jury's findings. Accordingly, Respondent's arguments regarding MTS, as well as Carlson Real Estate Co. v. Soltan, 549 N.W.2d 376 (Minn.App. 1996), are completely lacking in merit.

II. The District Court Committed Error in Refusing Appellant the Opportunity to Preserve the Testimony of Unavailable, Out-of-State Witnesses.

A. This Court recognizes a distinction between discovery and trial depositions.

Respondent argues that there is no distinction between depositions taken for discovery and those taken to preserve trial testimony, and does so despite this Court's clear ruling in Lindberg v. Luther, A10-1911, 2011 WL 3903194 (Minn.App. Sept. 6,

2011). (Respondent's Brief at 25-31). In that case, this Court required the appellant to take depositions to preserve testimony a mere three (3) weeks prior to trial. Luther, A10-1911 at *4. Clearly, this requirement, especially in light of the out-of-state cases cited in Appellant's initial Brief, demonstrates that there is in fact a distinction between discovery and trial depositions.

Nonetheless, Respondent argues that under Lindberg taking depositions to preserve trial testimony is just an option, and another option is to subpoena unavailable witnesses. (Respondent's Brief at 27-28). This argument utterly ignores, however, the fact that the witnesses needed by Appellant were unavailable, out-of-state witnesses and thus beyond the subpoena power of Minnesota courts absent a court order. (Appellant's Brief at 16-17). In fact, Appellant's motion filed on April 29, 2011 asked the District Court to do exactly what Respondent claims Lindberg requires Appellant to do: Subpoena unavailable witnesses for trial. (Appellant's Appendix at 72-80). As these unavailable witnesses are out-of-state, however, Appellant could not subpoena them to the State of Minnesota, but could only subpoena them to a deposition in Nevada to take their trial testimony. Respondent opposed Appellant's motion, and the District Court prohibited Appellant from taking the action Respondent now says was required. Accordingly, Respondent's attempts to distinguish Lindberg are without merit, and Respondent's arguments actually support Appellant's appeal.

Respondent also argues that Henkel v. XIM Products, Inc., 133 F.R.D. 556 (D.Minn. 1991) and Insignia Systems, Inc. v. News America Marketing In-Store, Inc., 04-4213, 2011 WL 282632 (Slip Copy) (D.Minn. Jan. 26, 2011), should control in this

matter. (Respondent's brief at 26-27). Respondent goes so far as quote Insignia citing Henkel for the proposition that "the reasoning of the decision was that because defendants had an opportunity to depose the witness, and chose not to do so, they could not go outside the pretrial schedule and depose him at a 'trial deposition' shortly before trial." (Respondent's Brief at 27, citing, Insignia, at *2.)

What Respondent refuses to acknowledge, however, is that Henkel involved an unavailable witness that had previously been deposed, but the party asking to take a trial deposition did not ask **any** questions despite being present at the deposition. Henkel, 133 F.R.D. at 557-558. Henkel itself distinguished this situation with one where the witness had not been deposed and was beyond the subpoena party of the court. Id., *citing*, Charles v. Wade, 665 F.2d 661 (5th Cir. 1982). Henkel specifically notes, "[i]n Charles the court held that it was an abuse of discretion to deny a party leave to depose a witness where the party would otherwise be denied the witness's testimony altogether. The undersigned finds nothing in Charles which would compel the court to permit the taking of the deposition of a witness whose deposition has already been taken." Id. at 558. In the present matter, Appellant was denied the testimony of Mr. Israel and Mr. Brown altogether and no depositions of those gentlemen had previously been taken. Clearly, even the Henkel court would find that its holding does not apply to this matter, and as such this Court should correct the abuse of discretion by the District Court.

B. Appellant has demonstrated relevance in the testimony of Mr. Brown and Mr. Israel.

Respondent argues that Appellant failed to show relevance in the testimony of Manual Israel or Jay Brown, (Respondent's Brief at 33-37). As noted in Appellant's Brief, this claim is false. (Appellant's Brief at 19). Additionally, Respondent's own brief herein sets forth that relevance:

The evidence presented also included many references to a confusing and long list of acronyms used to identify different entities who were involved in North Las Vegas, including CNLY – the City of North Las Vegas; CNLV Constructors II – a joint venture including several entities (including CNLV); and CH2M Hill. However, other than the names of these entities, very little information was presented to the Jury on the distinct roles played by these various parties in such a manner as would fully explain the interrelationships at work in Nevada – nor was evidence presented to the Jury on the individual(s) or various entities who Appellant was answering to. Appellant failed to offer into evidence its own contract with CNLV Constructors II/CNLV and it failed to offer into evidence the substantial list of project specifications and detailed weldment specifications it agreed to in its bid proposal with CNLV Constructors II. Appellant did not call any witness affiliated with CH2M Hill or CNLV Constructors II.

(Respondent's Brief at 6). Respondent was fully aware that much of this information would be obtained from Mr. Israel and Mr. Brown. (Motion Transcript at 11-19). Mr. Brown was an employee, in fact he was the head, of the project's construction manager, CH2M Hill Contractors/CNLV Constructors II and was in charge of the entirety of the construction project. (Appellant's Appendix at 98). Mr. Brown would have testified as to the roles played by the above parties, fully explained the interrelationships at work in Nevada, and would have laid foundation to admit all of the documents listed by Respondent. Mr. Israel had personal knowledge of the shoddy workmanship performed by Respondent and would have testified as to the actions taken thereon in Las Vegas.

Rather than providing this Court with a basis to affirm the District Court, the above section of Respondent's brief acknowledges that the District Court's actions rendered Appellant unable to fully present its case. Put quite simply, Appellant did not present much of the information listed by Respondent because it was forbidden to do so when the District Court refused its request to preserve the testimony of unavailable, out-of-state witnesses. This action constitutes an abuse of discretion and is reversible error.

III. The District Court Committed Error in Refusing to Admit the Full Testimony of Kenneth Eickelberg.

A. The District Court's rulings regarding edits to Mr. Eickelberg's testimony were prejudicial error.

As discussed in Appellant's initial Brief, the District Court did not simply exclude evidence from the Deposition of Kenneth Eickelberg. Rather, the District Court systematically altered the testimony of Appellant's witness by deleting portions of answers while leaving other portions untouched, combining answers to different questions into one answer, and placing answers after unrelated questions. (Appellant's Brief at 24-27).

Appellant has attempted to locate case law to support its argument that this is prejudicial error, but it does not exist. It does not exist because the District Court's action simply does not happen. On evidentiary issues, either a question/answer is admissible or it is not. This allows a continuity of testimony and guarantees the jury hears a witness' testimony in that witness' own words. The rules of evidence are supposed to "be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that

the truth may be ascertained and proceedings justly determined.” Minn. R. Evid. 102. Here, however, the District Court destroyed what continuity existed after its prior rulings and predetermined the truth by altering Mr. Eickelberg’s words and testimony to an extent that rendered the testimony meaningless.

B. Respondent cannot strike its cross examination as a whole, but must make specific objections to specific portions of the examination.

Under Minn. R. Civ. P. 32.01(d), Appellant does have the right to offer the entirety of the Eickelberg cross examination. Respondent then has the right to object to certain portions of that testimony. Respondent does not have the right to withdraw the testimony as a whole and require Appellant to present line-by-line argument on what portions should be entered into evidence in written submissions due in less than 24 hours. This is a blatant violation of Minn. R. Evid. 102, especially in light of Committee Comment to that Rule, which states “[i]n the interpretation of the rules, principles of fairness and convenience should be paramount.” Id.

In this matter, the District Court put Appellant in the impossible position of either allowing Respondent to summarily withdraw the entirety of its cross examination of Mr. Eickelberg or providing Appellant with less than 24 hours over a holiday weekend to provide written argument as to why any portions of the cross examination should be admitted. This action was patently unfair and inconvenient, and also improperly placed the burden on Appellant to demonstrate admissibility without specific grounds for inadmissibility as required by Minn. R. Evid. 103. This was clearly prejudicial to Appellant.

* * * * *

CONCLUSION

For the reasons set forth above and in Appellant's Brief and Appendix, Appellant seeks Judgment on the Verdict or in the alternative a new trial based upon the errors committed by the District Court. With respect to Appellant's request for judgment, Appellant seeks judgment based upon the Jury's findings related to Respondent's breach of contract. Based upon the Jury's finding, Appellant was legally excused from performance under the contract between the parties due to Respondent's failure to honor the terms of the contract in relation to the fabrication and manufacturing of the product at issue herein. To the extent this Court does not reverse the District Court's denial of Appellant's motion for judgment on this claim, Appellant is entitled to a new trial on this contract issue as the evidence was not sufficient to support the jury verdict and subsequent order of the District Court related to the special verdict.

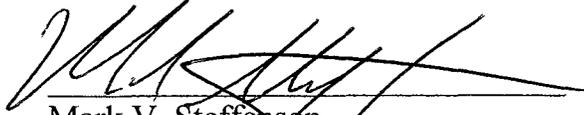
Appellant additionally seeks a new trial based upon the materially prejudicial rulings of the District Court regarding the refusal to allow the taking of depositions of the unavailable, out-of-state witnesses Jay Brown and Manuel Israel to preserve testimony for trial, and by its refusal to admit the full testimony of Kenneth Eickelberg and exhibits offered by the Appellant through this witness.

Each of the aforementioned rulings was prejudicial to Appellant causing an unfair trial which can only be resolved by a new trial.

Dated: June 5, 2012

Respectfully submitted:

HENNINGSON & SNOXELL, LTD.



Mark V. Steffenson
Attorney Reg. No. 178457
Craig A.B. Freeman
Attorney Reg. No. 336646
6900 Wedgwood Road, Ste 200
Maple Grove, MN 55311-3541
(763) 560-5700

Attorneys for Appellant