

CASE 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,

RESPONDENT'S FORMAL BRIEF AND APPENDIX

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STATEMENT OF FACTS

This appeal follows a verdict in favor of Respondent TC/American Monorail, Inc. against Appellant Custom Conveyor Corporation for separate claims of breach of contract and goods sold and delivered. Appendix 1-11 (hereafter "A"). Following almost nine days of testimony, the Jury found Appellant breached its contract with Respondent and that Respondent was entitled to damages in the amount of \$172,561.00 for the CNLV contract, subject to an offset in the amount of \$43,000.00. A308. The Jury found Appellant breached its contract with Respondent on two other contracts (MHC and WPM), and awarded Respondent damages in the amounts of \$8,440 and \$67,552, respectively, for a combined award of \$205,553. A309-10. On its separate claim for goods sold and delivered for all three projects, the Jury found in favor of Appellant for unpaid monies owed for goods sold and delivered in the amount of \$205,553. A310.

Respondent presented direct evidence by nine witnesses: Paul Lague (Respondent's President) Transcript 100-104 (hereafter "T"); William Swanson (Respondent's General Manager) T. 195-213; Larry Novak (Respondent's sales employee) T. 105-116; Loren Loso (Respondent's Project Manager) T. 116- 195; 1287-1291; Steve Kloss (Respondent's Welder/Sandblasting/Painting employee) T. 331-377; Renee Villella (Respondent's Credit and Collections employee) T. 377-380; 406-427; John Eickhoff (expert witness- Certified Welding Inspector (CWI) Respondent's employee) T. 428-506; 555-563; 992-1001; James Ergen (owner, Wright County Sandblasting Inc.) T. 215-239; and Steven Bengtson (expert

witness – CWI hired by CH2MHill) T. 245-323; 512-554.

As background to the CNLV contract, the undisputed evidence showed Appellant solicited Respondent to submit a bid to fabricate an apparatus that included four steel hoppers and four related structural support stands. Prior to soliciting the bid, Appellant provided Respondent with a single set of preliminary plan drawings of the apparatus. T. 119-20. Based upon those preliminary drawings, Respondent's project manager Loren Loso (Loso) prepared and sent a bid proposal to Appellant. Ex. 3. The bid (RFQ) was submitted by email to Appellant's employee Tom Miller. T. 123-27. Miller did not testify at trial.

Respondent offered to fabricate components of the apparatus for a total price of \$305,000.00, to include fabrication of four (4) identical tank isometric solids handling assemblies (four hoppers and four lower stands); material and labor for fabricating; sandblasting to be done to SP-6 standard; painting with 2 mils enamel on outside frame and epoxy on inside of tanks; and, partial assembly, if required for shipping. *See Id.*

Loso testified the welding on the apparatus would be subject to AWS D1.1 – as this Welding Code was referenced in the side notes on the plan drawings. T. 121-22; 444-45. Loso testified the sole reference information he worked from when he submitted his bid proposal to Appellant was the set of preliminary prints he received from Appellant. T. 127-28.

Loso further testified his bid proposal did not include certain components shown in the prints; namely, the top assembly, conveyers, trucking and auger assembly, and the

evidence presented showed Appellant acknowledged these omitted components and items when Appellant confirmed the contract bid price and details of the order in its Purchase Orders. T.125-27; Ex. 6. Appellant's Senior Engineering Manager Thomas Eull ("Eull") made a follow up inquiry with Loso in early June 2009 that asked Loso to confirm his quote made on April 29, 2009. T. 573; Ex. 4. Exhibit 4 showed Loso reviewed and confirmed his earlier quote. No additional contract specifications were added prior to the issuance by Appellant of its four Purchase Orders sent to Respondent on June 24, 2009. There was no evidence presented that any supplemental materials were ever provided to Respondent during its fabrication to further refine the weldments made on the entire apparatus. Exhibit 5, authored by Eull, confirmed only the Loso omitted items – to "*clarify*" the scope of the Loso RFQ. Ex. 5. (emphasis added). Eull's first involvement on the CNLV project started in "mid to late April, early May of 2009." T. 581.

On June 24, 2009, Appellant transmitted 4 separate but almost identical Purchase Orders ("POs") – separate orders were prepared for each of the four hopper/stand assemblies – denominated as "North 1 and 2" and "South 1 and 2." Ex. 6, 253-256. The POs constitute the written acceptance by Appellant of the bid offer made by Respondent. The POs were authored by Eull with assistance from its purchasing agent – and after he consulted with Appellant's President David Casperson on the Order. T 622; 764; 766; 1127. Each PO contains the following statement related to the orders placed by Appellant: A quantity of 1 Hopper with the designation of which Hopper was ordered – e.g., Hopper

South 1- The words appearing under "Description" are "complete fabrication." Additionally, in the description area the following detail is stated: And surface preparation of the CNLV Hopper Weldments. Custom Conveyor to Supply Detail Drawings per DWG Series 319608. TC American to Pre-Fit Legs/Hopper Structure prior to shipping "knocked-down" weldments. The POs contained the following notes:

"Notes: Items not included in TC American scope are per Loren Loso memo of 4/29/2009." The orders specified the following additional terms: "Freight FOB Waite Park, MN 3rd party billing."

Ex. 6; 253-256.

Following receipt of the POs in late June 2009, Loso was advised by Appellant to hold off on ordering any steel for the apparatus and told not to begin any fabrication because of the "fluid and ever changing" nature of the design being requested by Appellant to satisfy its customer. T. 140-42. The design issues involved the manner in which a hopper would ultimately be connected to its structural stand – and it involved possible field welding *versus* a "bolt-up" design. T. 627-28; 808. The final design of the structural stands and hopper connection was not rendered until around August 3, 2009. On August 18, 2009, Appellant advised Respondent of a material change in the Purchase Order. Ex. 15. An addendum Purchase Order was issued on August 21, 2009. Ex. 16.

Exhibits 15 and 16 confirm Appellant modified the design of the apparatus to have the four hoppers "bolt up" to the stands in the field, rather than be connected by field

welding. T. 808. Exhibit 16 confirms this Purchase Order added additional charges of \$25,520.00 for the material and labor to bolt up the four stands. There was no evidence presented at trial to a contract term described as “match marking” in any purchase order.

In June 2009, the person responsible for the design drawing changes at Appellant shifted to a newly hired design engineer Matt Schultz. T. 783. Schultz was hired in June 2009 and took over the drawing and design details of the apparatus from Ms. DeWandeler in July 2009. T. 783. Schultz and Eull worked with Loso on the changing design details. Neither DeWanderler nor Schultz gave testimony at trial.

The testimony showed the first structural components were fabricated across August 2009 and shipped to the Appellant’s customer’s job site following the change order and final design approval from Appellant. The components (a full set of structural stands (comprised of ten separate vertical columns and five connecting cross members)) were completely fabricated, assembled, blasted, and painted (primed) at the Waite Park Minnesota Plant and were inspected by Schultz and Eull prior to the shipment of these components to North Las Vegas, Nevada. T. 470; 540.

Exhibit 74 was an email authored by Eull to his customer made on August 27, 2009 – stating the leg assemblies were being pre-fitted with the moment beams and they were “fitting exceptionally well.” Ex. 74. Exhibit 48, a photograph, depicted the large vertical and horizontal structural stand members fully assembled. T. 450; Ex. 48.

The evidence showed that throughout the course of fabrication of the apparatus,

Schultz and Eull performed regular and periodic visual inspections at the Waite Park manufacturing facility to view and review the fabrication weldments, sand blasting (the “surface profile”), and paint priming operations. T. 913; 929. The evidence confirmed both Eull and Schultz were at the manufacturing facility on a regular basis throughout the entire fabrication process and Eull confirmed they were not denied access to any area of the plant. Ex. 78; T. 540; 944.

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 CNLV – 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 from CNLV Constructors II. Appellant’s contract with the entities in Nevada was under its exclusive control and yet Appellant made no proffer of that contract and its separate specifications at trial.

CWI Steven T. Bengtson testified he was hired by CH2MHill to perform independent inspections in the role of “verification inspector” at the Respondent’s facility. T. 246. Bengtson testified he is a CWI and was engaged to perform on-site inspections of the fabrication and coating/priming work performed by Respondent. T. 256. His hourly rate for inspection work was \$55.00. T. 254. Eull testified Appellant did not hire its own CWI during the fabrication process to perform any welding, surface preparation or coatings inspections during the *entire fabrication* process. T. 812-13.

Eull testified he was not qualified to perform any welding inspections; he was not qualified to perform any surface preparation inspections; he was not qualified to perform any coatings inspections. T. 774. He testified that his use of the words “our inspector” in his email to Appellant’s customer referred to Respondent’s CWI employee, John Eickhoff. T. 937. However, Eull and Schultz were both tasked by Appellant to inspect the apparatus during its fabrication – even to the point that Eull sent a communication that he would be speaking with Bengtson about the “anchor profile” - a term he acknowledged is synonymous with the term “blast profile” as used in SP-6 – in order to meet the SP-6 standard called out in the parties’ contract for surface preparation. T. 553; 788; 813; 930. Ex. 81.

Eull’s email communications confirmed he (and Appellant) were performing their own inspections or were relying upon inspections performed by Bengtson. In fact, Eull stated on September 21, 2009 that he was at TC/American to inspect the hoppers. *See* Ex.

78. He informed his customer that Bengtson finished a weld inspection at TC/American that morning for the support structures and Bengtson gave full approval of all welds. Ex. 214. On September 25, 2009, Eull confirmed Bengtson had approved all of the remaining structures. Ex. 80. Eull advised on October 8, 2009, that Bengtson was inspecting the final shipment of structural supports and upon approval they would be shipped out. Ex. 82. On October 29, 2009 Eull stated CNLV was holding him to the inspection by Bengtson. Ex. 85. In another email, Eull reported he and Schultz had inspected the four hoppers. Ex. 86. In yet another of his communications, Eull stated he was not in favor of shipping the last two hoppers until they were approved by Bengtson. Ex. 90. This communication was made on January 5, 2010, a date almost 3 weeks after the “mandatory meeting” of December 14, 2009, a date at which Mr. Eull testified the entire fabricated apparatus had been removed from the Appellant’s customer’s job site per instructions given by someone in North Las Vegas. T. 694-95; 698; 955.

Bengtson testified he has been a CWI since 1989, and routinely performs about 300 inspection assignments every year and he was engaged by Appellant’s customer to inspect the apparatus supplied by Respondent. T. 246; 256; 302. He testified that his assignment was to perform visual inspection of all weldments and to perform visual inspection of the surface preparation/sandblasting performed and the priming made to the apparatus at Respondent’s production facility. T. 247. He testified to his repeated visits and the five reports he prepared admitted as Exhibits 32 through 36. T. 248. He did not share his written

reports directly with Respondent. T. 248. In each instance he reported that the weld areas he marked for repair were repaired to meet the D1.1 standard for visual inspection. *See, e.g.,* T. 247; 293; 304; 549.

Bengtson's inspection assignment came about in early September 2009 as a result of a weld inspection performed in North Las Vegas on the first load of structural stands. T. 251. The stands were inspected by Appellant's customer. The customer reportedly rejected the visual appearance of some of the welds on the stands. T. 251; 636. Following this rejection, and rejection of its own manufactured components, Schultz himself regarded Appellant's customer as "picky" – and Schultz held the view that its customer held a "tighter standard" than what D1.1 provides. *See* Ex. 89.

Respondent paid for and performed the required welding repairs to place the initially rejected structural members into conformity to the AWS D1.1 standard. T. 152; 454; 1288-89. The repairs were inspected and approved by CWI Eickhoff and CWI Bengtson to meet the D1.1 visual inspection standard and Eull and Schultz were given full access to the components during and after the repair process to conduct their inspections. T. 304. The evidence showed Bengtson's regular inspections were followed by a written report, he would physically note areas that did not conform to the D1.1 visual inspection standards, and his written reports confirmed he re-inspected areas marked for repair to ensure repairs were made. His reports confirm that the repairs were made. *See* Ex. 32 – 36.

The evidence showed the entire custom-built apparatus, including all four structural

stands and four hoppers had been fully inspected and approved by Appellant's employees Eull and Schultz to meet the standards set out in the June 24, 2009 purchase orders. In his direct examination, Eull testified Appellant never rejected any component supplied by Respondent. T. 967. He further testified that Appellant "never took possession" of the apparatus, despite the contract term "FOB", and claimed instead that Potter Trucking took possession of the product and presumed the owner at that time was the City of North Las Vegas. T. 761-63.

The components were approved by CWI Bengtson without any substantial non-performance issues being raised. On cross, Bengtson was asked about field touchups of the primer areas that had tested light in mill thickness testing done by Bengtson. Mr. Bengtson agreed that areas that were testing light on film thickness could be "spot touched" on site. T. 540; 542.

All components of the apparatus were authorized for shipment by Eull only after CWI Bengtson's approvals. CWIs Bengtson and Eickhoff both testified to the standards set out in AWS D1.1 under Section 6.9 and Table 6.1. *See, e.g.*, T. 438-39. Bengtson testified the application of Table 6.1 standards result in some interpretative differences among CWIs. T. 302. When he was asked about the subjective nature of interpreting weldments by the Table 6.1 criteria for visual inspections, he agreed that there could be as many different subjective interpretations of compliance to the visual inspection standards as there are CWIs. T. 311; 314-15.

CWI Eickhoff testified about his credentials and his visual inspections made of the apparatus and the applicable “acceptance criteria” for welds made on the apparatus under the Code. T. 431. The provisions in Exhibit 47 clearly provide that AWS D1.1 Code Section 6.9 is a mandatory provision whenever AWS D1.1 is specified in a contract. T. 438; 442. Ex. 47. Appellant’s plan drawing makes a specific (and the only express) reference to the application of AWS D1.1 -- In fact, the Appellant’s plan drawings stated exactly as follows: “All Welding will be accordance (sic) with ‘AWS D1.1’ Stainless steel hoppers and chutes will be welded continuous exterior only with stiffeners and appurtenances stitch welded to suit the intended purpose.” Ex. 13 (admitted at T. 444). There was no other evidence introduced to support the application of any other reference to AWS D1.1 – or to any other form of non-destructive testing (NDT) as the “acceptance criteria” to the parties’ contract. T. 445.

Eull testified he confirmed his measurements of the structural support beams were all within the Respondent’s production tolerances (i.e., 1/16th of one inch regardless of running length). T.336; 451; 811. Ex. 53. Eickhoff testified the total running feet of welds on the entire apparatus (four hoppers and support stands) was thousands of feet – over one mile of running length of welds. T. 457. Eickhoff testified the total length of the areas marked for repair by Appellant’s customer on the structural stands initially rejected in North Las Vegas was “a few feet” in total. T. 457.

The undisputed evidence presented at trial confirmed that all Respondent’s welds were performed by AWS certified welders, as verified by CWI Eickhoff. T. 333; 344; 464. The

welds and all welder qualifications were inspected by CWI Bengtson (and Eickhoff). T. 312; 465-66; 523; 646. The contract terms for weldments between Respondent and Appellant make absolutely *no reference* to any “acceptance criteria” for the goods other than by “visual inspection.” T. 449. There was no reference to any other form of NDT, including testing that could have been added by Appellant to include UT, particle testing, magnetic testing, or radiographic (x-ray) testing. T. 449.

As to surface imperfections and priming deficiencies, CWI Bengtson included various references to surface preparation and coatings issues in his reports. At all times, Schultz and Eull were viewing the manufacturing process. T. 540. Any deficient items were corrected to meet Bengtson’s approval and except for the issues Bengtson raised in his final report, the coatings and surface issues were approved by him, except for “some minor locations.” T. 544. Upon Bengtson’s approval, the final two hoppers were transported to North Las Vegas – un-tarped, against Loso’s recommendations. T. 164-65. The damage caused in transit by dirt to the hoppers after traveling a mere 50 miles was depicted in Exhibit 48. Even Appellant’s expert witness on coatings, Tim Williams, admitted damage was caused to the primer applied to the apparatus during transit to North Las Vegas, Nevada because the apparatus was not tarped. Ex. 260.

Exhibit 28 is the standard for commercial blast cleaning, known as SP-6. Section 8.1 of the standard provides “work performed and materials supplied under this standard are subject to inspection by a representative of those responsible for establishing the

requirements.” Ex. 28. Eull agreed the party responsible for establishing the requirement in this case was Appellant. T. 786; 789. Eull could provide absolutely no answer on how Appellant was performing inspections to assure itself of the attainment of this standard. Section 8.3 provides that the procurement documents – that is, the contract documents between Respondent and Appellant (by project specification) should establish the responsibility for inspection and for any required affidavit certifying compliance with the specification.” Ex. 28. In this matter, the procurement documents fail to establish any responsibility for inspection. *See, e.g.,* Ex. 6.

The evidence showed Appellant failed to provide any form of reference photograph or comparator to Respondent to demonstrate the desired blast profile – known as “the anchor profile.” T. 786; 790. CWI Bengtson testified to his own color photographs attached to his reports, stating he was not able to confirm or determine if “mill scale” was present on those surfaces. There was not one instance in the Bengtson inspection photographs wherein he testified that mill scale was present. On the subject of surface preparation, Respondent submitted the testimony of James Ergen, owner of Wright County Sandblasting. Ergen staunchly defended his sandblasting work performed at Respondent’s facility whereby he testified to his work in this field for some thirty years. T. 217-223. He was adamant his work performed on some of the components supplied to Appellant met the SP-6 standard. T. 229.

Appellant presented testimony of Kenneth Eickelberg by video deposition. Eickelberg

testified he was a senior engineer for the City of North Las Vegas utilities department. A130. He testified he had no personal knowledge of the terms of the contract between Appellant and Respondent. A135. He admitted he was not a certified welder, was not experienced in welding, was not a certified welding inspector, he was not familiar with Table 6.1 beyond knowing it was in the Code book and that he had never directly applied the standards in Table 6.1 in the course of any work he had performed in the past. A139–142. He further testified the City of North Las Vegas was not a partner in the joint venture known as CNLV Constructors II – and that the City contracted with CNLV Constructors II to build the waste water treatment facility. A145-146.

ARGUMENT

STANDARD OF REVIEW

The decision to deny a motion for a new trial rests in the sound discretion of the district court, and a trial court’s decision will be reversed only for a clear abuse of that discretion. Thus, this Court reviews a district court’s new trial decision under an abuse of discretion standard. *Moorhead Econ. Dev. Auth. v. Anda*, 789 N.W.2d 860, 892 (Minn. 2010) (citing *Halla Nursery, Inc. v. Baumann-Furrie & Co.*, 454 N.W.2d 905, 910 (Minn.1990)). A district court has broad discretion in ruling on evidentiary matters. *See Peterson v. BASF Corp.*, 711 N.W.2d 470, 482–83 (Minn.2006).

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FAILING TO GRANT JUDGMENT AS A MATTER OF LAW ON APPELLANT’S BREACH OF CONTRACT ARGUMENT

A. The Jury's Verdict on Respondent's Goods Sold and Delivered Claim Renders Moot Appellant's Argument of Which Party Breached the Contract First

Appellant argues the district court committed prejudicial error by not granting it judgment as a matter of law on its breach of contract argument. No prejudicial error was committed as the argument is misplaced. First, Respondent's Complaint included separate claims alleging monies were owed for "goods sold and delivered" for the CNLV, MHC, and WPM contracts. The Court instructed the Jury on these claims, as follows:

When a buyer fails to pay the price as it becomes due, the seller may recover, together with any incidental damages, the price of the goods the buyer accepted. "Goods accepted" by the buyer include only goods as to which there has been no justified revocation of the acceptance, as such a justified revocation means that there has been a default by the seller. If the buyer has wrongfully rejected or revoked acceptance of the seller's goods, or has failed to make a payment as due, or has repudiated the contract, a seller who is not entitled to the price is entitled to an award of damages for non-acceptance. The measure of damages, for nonacceptance or wrongful repudiation by the buyer is the unpaid contract price together with any incidental damages incurred by the seller, but less expenses saved by the seller in consequence of the buyer's breach. T. 1361-62.

The special verdict form included Questions 18 and 19 pertaining to goods sold and delivered. In answering questions 18 and 19, the jury found Appellant owed money damages for goods sold and delivered by Respondent to Appellant in the total amount of \$205,553. Appellant completely ignores, and fails to challenge, the Jury's verdict on the claims. The Jury's verdict on the goods sold and delivered renders moot the Appellant's principal, and misconceived argument concerning which party breached the contract first on the separate claims for breach of contract.

B. Appellant Speculates on Which Party Breached the Contract First

The Jury returned answers to a special verdict form provided by the district court. The form and substance of the questions included in the final special verdict form were the subject of oral argument by counsel on the record, orders of the Court to modify and edit the questions submitted, and the questions were the product of the written submissions made by counsel for both parties prior to trial and prior to the matter being submitted to the Jury. *See generally* T. 1293-1329; 1335-1346. Appellant did not request a specific question to answer which party was the first party to breach the parties' contract nor did the Appellant request an answer to whether the Appellant was thereby *excused* from performing the parties' contract. Appellant failed to note any specific objections to the special verdict form as presented to the Jury prior to the submission of the Special Verdict Form to the Jury based upon the absence of such question and the Special Verdict Form does not include any such questions. Given the foregoing, Appellant has waived its right to the form of the verdict form submitted to the Jury.¹

As to the CNLV project, in Questions 3 and 4, the Jury found the Appellant breached its contract with Respondent and Respondent was entitled to damages in the amount of \$172,561.00 directly caused by the Appellant's breach of contract. In Questions 5, 6 and 7,

¹ *See, e.g., Kath vs. Burlington Northern R. Co.*, 441 N.W.2d 569, 572 (Minn. Ct. App. 1989) (Court stating well established rule that party waives its right to jury trial of questions by failing to object until a motion for new trial and a failure to object to a special verdict form prior to its submission to the jury constitutes a waiver of a party's right to object on appeal); *Wormsbecker v. Donovan Const. Co.*, 247 Minn. 32, 76 N.W.2d 643, 651 (1956). Further, no inconsistencies resulted from the Jury's verdict answers.

the Jury found Respondent breached its contract with Appellant and that the Appellant was entitled to damages in the amount of \$43,000. In Question 8, the Jury was asked if Appellant was justified in offsetting any amounts owed to Respondent on all three contractual projects. The Jury found Appellant was justified in offsetting the amount of \$43,000 in Question 9. In Questions 18 and 19, the Jury found Appellant owed money damages for goods sold and delivered by Respondent to Appellant in the total amount of \$205,553. There is thus no inconsistency in the Jury's answers. The Jury's offset award matches the exact amount of its award to Appellant by Respondent's breach of contract.

Further, the total award in the Jury's answer to question 19 is equal to the net sum of the CNLV Project after reducing the award for the offset, and crediting the Jury's awards made in the MHC and WPM projects. The Jury simply offset the same amount it found in Question 9 from the Respondent's total money damages.

C. Appellant's Reliance on the Holdings in *MTS Co.* and *Carlson Real Estate Co.* is Misplaced

The Appellant wrongly contends that "as a matter of law, Respondent breached the contract first." App. Brief 13. No such finding was in fact made by the Jury. The jury did not find sequentially which party breached first. The Appellant failed to request any such specific query in the special verdict form submitted to the Jury and thereby waived its right to a specific finding on this issue. The contention of who breached *first* was not answered by the Jury. Appellant could have requested two special verdict questions – 1) "which party breached the CNLV contract first?" and, 2) "If you find that Plaintiff was the first party to

breach, was the Defendant excused from making any payment?” No such questions were proposed. In short, the Appellant’s present contention that Respondent was first to breach relies wholly on supposition, speculation and conjecture. The evidentiary record fails to reasonably support a conclusion that Respondent breached the contract initially.

Appellant cannot now argue by implication the point Appellant now supposes of the Jury’s answers. Based upon the actual findings made by the Jury, the greater weight of the evidence fairly and reasonably supports a contrary conclusion. Based upon the actual testimonial evidence presented at trial, if the Jury had been queried, it would likely have found the Appellant was the *first* party to breach the contract. The premise of such a finding is founded in Appellant’s failure to remit timely payment of invoices presented by Respondent in November 2009, as required by the parties’ contract, following Respondent’s delivery of components in the four purchase orders, as supported by Appellant’s General Manager William Swanson in his direct testimony. Trans. at 199-200; Exh. 23. There was no testimony or evidence offered by Appellant of any breach of the contract terms by Respondent at the time Appellant was invoiced for product components delivered by Appellant. In fact, all evidence developed at trial confirmed the structural members that were returned from Appellant’s customer’s job site in September 2009 were repaired to a standard that exceeded the applicable welding acceptance criteria set out in the parties’ contract – *vis a vis* “visual inspection” as provided in AWS D1.1 Section 6.9 and Table 6.1.

Moreover, Appellant's own employee Thomas Eull admitted that Appellant never rejected any of the components supplied by Respondent. T. 967.

Further, the Appellant's reliance on the law advanced in *MTS Co. v. Taigo Corp.*, 365 N.W.2d 321, 327 (Minn. App. 1985) is misplaced and incorrectly applied to the instant case. In *MTS Co.*, the Court recognized a rule in contract law "that a party cannot raise to its advantage a breach of contract against another party when it has first breached the contract itself." *Id.* However, as the *MTS Co.* Court cautioned, "this rule should not apply in every case to prevent the initial breaching party from seeking a remedy for another party's subsequent breach." *Id.* The Court applied the rule in *MTS Co.* based upon peculiar circumstances that involved by legal and equitable principals. As applied in *MTS Co.*, the Court found that "at the time MTS brought and tried this action it was still breaching the restaurant agreement" by failing to sell alcoholic beverages and by seeking to dispossess Taiga by its unlawful detainer action. The Court further noted that "Taiga's decision to sell alcoholic beverages directly resulted from MTS's initial breach of the agreements. In effect, Taiga simply supplied an essential service for its business which MTS had promised, but failed, to provide. To declare Taiga in breach of the contract under those circumstances, thus clearing the path for Taiga's removal from the premises, is an inequitable result." *Id.* The Court held under these circumstances MTS could not enforce a restrictive use clause that prohibited sale of liquor in the restaurant when it failed to fulfill the contractual obligations it was bound to provide following the original lessee's default. *Id.*

The holding in *MTS Co.* finds no fair application to the instant facts. First, there is no reasonable factual support in the record that Respondent breached or was continuing to breach its contractual obligations to Appellant during the time it was rendering performance of the contract to supply the custom components to Appellant. The 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 as expressed in the four separate (and identical) purchase orders. The factual record reasonably supports a finding that the *expectations* of Appellant's customer *exceeded* those basic specifications and terms B and led directly to its customer's rejection of components *after* acceptance of the components by Appellant. Appellant's employee Eull himself testified Appellant never rejected any of the components supplied by Respondent. As such, the application of the *MTS Co.* holding is misplaced to the instant facts.

In like manner, the holding reached in *Carlson Real Estate Co. vs. Soltan*, 549 N.W.2d 376 (Minn. Ct. App. 1996), is inapposite to the instant matter. The Court in *Carlson* cited to *Space Center, Inc. vs. 451 Corp.*, 298 N.W.2d 443 (Minn. 1980) for analysis of anticipatory repudiation of a contract and as support to the general rule that "a party who first breaches a contract is usually precluded from successfully claiming against the other party." 549 N.W.2nd at 379. In *Carlson*, the Court found that Carlson's breach of the lease did not excuse Soltan's own subsequent breach. *Id.* at 380. The *Carlson* Court explained that a "first

breach serves as a defense against the subsequent breach.” *Id.* (emphasis added). The holding in *Carlson* does not provide support for Appellant’s contention that it was completely excused from liability for payment of monies owed to Respondent for Respondent’s performance of the parties’ contract following its acceptance of the goods tendered.

The Court in *Space Center Inc.* analyzed the concept of anticipatory repudiation of a contract and advanced the principle that a breach of contract occurs where one party renounces his liability or makes it impossible for the other to perform. 298 N.W.2d at 450. In short, contract performance may be excused when it is hindered or rendered impossible by the other party. *See Zobel & Dahl Const. vs. Crotty*, 356 N.W.2d 42, 43 (1984) (and cases cited therein) (Court found that “[i]n a contract for construction of a home, an owner who unreasonably fails to allow the contractor to complete construction excuses the contractor's performance and breaches the contract.”) (*Syllabus by the Court*).³

The above analysis of breach of contract *vis-a-vis* repudiation clearly does not find fair application in the instant proceeding in that there is no record evidence presented by Appellant of any statements, action or threatened conduct by any employee of Respondent

³ See also *Instrumentation Services Inc. vs. General Resource Corp.*, 282 N.W.2d 902, 908-09 (Minn. 1979)(Court affirmed a trial court finding that contractor (Fluidizer) materially breached a subcontract with a subcontractor (ISI) by unilaterally repudiating the underlying contract Fluidizer had with its customer and by specifically telling ISI that it refused to process an invoice from ISI because of its loss of the customer contract. Court affirmed the subcontractor’s right to recover against the contractor for such breach, even though subcontractor did not fully perform, because the Court found that the contractor's actions essentially prevented the subcontractor from completing the subcontract).

that evinced any intention by Respondent during the contract performance period that Respondent would not perform all of its contractual obligations. For instance, no evidence was presented to even hint that Respondent stated it would not meet the contractual welding acceptance criteria, or that it would not clean the structural metal to an "SP-6" standard, or would not meet the primer specs of 2 mil DFT B or that some other fact prevented it from performing its obligations to build the four separate structures in accordance with the contract terms set out in the four separate purchase orders.

In fact, based upon the express findings made by the Jury, the Jury concluded there was substantial and credible evidence the Respondent performed its obligations – and the Jury's reduction of the contract damages sought by Respondent in the CNLV project suggests the Jury applied its own reasoning and logic based on the record evidence to create a set off – which is explained in the Jury's answer to questions 8 and 9 which awarded the exact amount of the damages awarded to Appellant in Question 7. It is important to recall the Appellant was the party who requested questions 8 and 9 of the special verdict form – the questions are taken almost verbatim from the Amended Special Verdict form submitted by Appellant's counsel email message to the district court on July 4, 2011. Resp. App. 21 ("RA").

Appellant seeks to apply a breach of contract principle to an absurd conclusion: In effect, the *first* party to breach thereby *forfeits* in all instances any and all right to require any performance by the other. Such an extension ignores completely the concept of

substantial or partial performance. The extension finds no support in any case cited by the Appellant. This breach of contract principle has no application in the instant matter. In this matter, there was no evidence presented of any anticipatory breach or repudiation – no statement of any intent not to perform the terms of the contract – and all trial evidence pointed to substantial performance of the contract terms by Respondent to meet the technical fabrication terms it had agreed to.³

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT’S REQUEST TO TAKE THE DEPOSITIONS OF JAY BROWN AND MANUAL ISRAEL

Appellant contends the district court committed prejudicial error in refusing Appellant’s late request to “preserve trial testimony” for unavailable, out of state witnesses Jay Brown and Manual Israel by deposition to be conducted shortly before the commencement of trial. Appellant argues the error can only be rectified by granting a new trial. The Court’s ruling to deny the motion was well within the Court’s broad discretion in governing discovery and trial management issues and was consistent with the Minnesota Rules of Civil Procedure and Evidence. As such, no error was made in denying the Appellant’s request to “preserve” trial testimony of these two witnesses and no new trial is warranted.

³ The substantial performance doctrine has long been recognized in Minnesota and “means 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*, 213 Minn. 385, 390, 7 N.W.2d 314, 318 (1942)(citing to *Elliott v. Caldwell*, 43 Minn. 357, 45

The Appellant's motion was filed on April 29, 2011 and heard on May 26, 2011, less than four weeks prior to the date set for trial. The Court's Scheduling Order dated September 3, 2010, set various dates to govern the proceeding and to aid in its management of the complex dispute. The Scheduling Order provided that all discovery was to be completed by January 21, 2011. Appellant failed to seek an extension of the discovery period by formal motion.

Both parties engaged in formal discovery which included the production of nearly 12,000 pages of written materials related to the terms and performance of the contract at issue between the parties and the separate contract existing between Defendant and the City of North Las Vegas (with the CNLV Constructors II joint venture consortium). Respondent supplemented its prior Answers to Interrogatories, served Interrogatories and Requests for Admission (and explanatory interrogatories) upon Appellant and Respondent took four oral depositions of key fact witnesses and 1 expert witness (CWI Steven Bengtson). Appellant elected to take the oral depositions of only two of Respondent's employees, despite naming 12 witnesses from out-of-state in its Joint Statement of the Case (9 of which were identified as residing in Nevada). See A-115-16. Appellant did not identify Manual Israel or Jay Brown as "experts" in the joint statement of the case nor in its answers to Interrogatories. Rather than stating the knowledge with specificity as requested in Interrogatory Number 3, Appellant gave only a general description of the nature of the

N.W. 845 (1890); *Johnson v. Fehsefeldt*, 106 Minn. 202, 118 N.W. 797 (1908)).

knowledge held by Brown and Israel. See A-98.

Appellant failed to submit any written legal authority to the Court in support of its request. Appellant failed to support its request to the Court with any formal (sworn) or informal statement propounded by either witness of the intended trial testimony sought to be preserved. Appellant made no showing on the unique nature of or critical need for the testimony of either witness to support its defenses or claims, nor did it make any showing of relevance of the expected and “known” “trial testimony” to any issue in dispute.

A. The Rules of Civil Procedure Make No Distinction Between Discovery Depositions and Depositions to Preserve Trial Testimony

Appellant referred the district court to Rules 26, 30 and 45 of the Civil Rules of Procedure as the legal basis for its request. These rules govern the scope, use and methods of discovery in civil actions. However, rules 26 and 30 make no exception in their language to distinguish oral depositions used strictly to “preserve trial testimony” from depositions taken for “discovery” purposes. Rule 32.01 specifies the manner in which an oral deposition can be used at trial. Rule 32 does not, however, distinguish a discovery deposition from a deposition taken merely to preserve trial testimony and there is no Minnesota state case law that has made such a distinction. Various Minnesota District Court (federal) actions have reached the conclusion that no distinction exists in their interpretation of the parallel Federal rules of civil procedure governing discovery in civil actions.

In *Keller v. Orion Ins. Co., Ltd.*, the Minnesota District Court concluded that there is

no reason under the plain language of Rule 26 that discovery depositions should be treated differently from depositions to preserve trial testimony. *Keller v. Orion Ins. Co., Ltd. of London, England*, 285 F. Supp. 906, 906-07 (D. Minn. 1968). This interpretation was followed in *Allen LILLEBO and Patricia Lillebo, Plaintiffs, v. ZIMMER, INC., Defendant.*, 2004 WL 3371107 (D. Minn. 2011). Further, in *Insignia Systems, Inc. v. News America Marketing In-Store, Inc.*, 2011 WL 282632 (Slip Copy) (2011), the Minnesota District Court denied a request to take three (3) depositions to preserve trial testimony on the eve of trial. The request was made on the basis that the three (3) witnesses would be unavailable for trial and that without their deposition testimony, their testimony would be impossible to procure. *Id.* at 1. The Court relied in part on the decision made in *Henkel*, discussed below, to deny the requested relief.

In *Henkel v. XIM Products, Inc.*, 133 F.R.D. 556, 557 (D. Minn. 1991), the District Court considered the following question: “The question before the court is whether, *absent agreement of the parties*, the pretrial schedule governs the time for taking depositions where the purpose of the deposition is to preserve testimony for trial, and not to discover new facts. [Defendant] XIM contends that because the purpose of this . . . deposition is to preserve his testimony for trial, it is not governed by the discovery termination date set forth in the pretrial schedule. For the reasons set forth below the plaintiffs’ motion [for protective order] will be granted.” (Emphasis added) The *Henkel* Court concluded as follows: “The court concludes that absent an agreement of the parties, or *some compelling*

*circumstance that would cause a miscarriage of justice if a late deposition is not allowed, all depositions must be completed is governed by the discovery termination date of the pretrial schedule. As the second deposition of Mr. Klostermeyer was beyond the time permitted for discovery by the pretrial schedule in this case, and as defendants have made no showing of any compelling circumstance that would warrant the retaking of Klostermeyer's deposition, the plaintiffs have shown the requisite good cause for the granting of a protective order. The court will order that the deposition of Mr. Klostermeyer not be had." Id. at 558 (emphasis added). The Court in *Insignia Systems* construed the holding in *Henkel* to provide that: "the reasoning of the decision [in *Henkel*] 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." *Insignia*, at 2. See also *Larson v. Anderson, Taunton & Walsh, Inc.*, 379 N.W.2d 615, 618-19 (Minn. Ct. App. 1985) (court failed to draw any distinction between "discovery" deposition and a deposition conducted when the "witness is unavailable for trial," i.e., to preserve trial testimony, as urged by appellant).*

Appellant urges this Court to stretch the Court's pronouncements made in the unpublished opinion in *Lindberg v. Luther*, A10-1911 (Minn. App. Sept. 6, 2011) (unpublished), as legal precedent for a party's right to take a deposition of an unavailable witness just three weeks before trial. See Appellant's Brief 15. A close read of the discussion in *Lindberg* does not support such an interpretation. Fairly read, the *Lindberg* Court's

statement related to the *option* of presenting evidence by deposition, rather than by live testimony. In short, under the Rules of Civil Procedure, the Court merely recognized that Lindberg had a means of presenting the testimony of witnesses who were unavailable at the time of trial by taking an oral deposition. The Court presented this means of offering trial testimony as an option to the right to compel a witness' attendance at trial by subpoena. *Id.* Under Rule 32.01 of the Minnesota Civil Rules of Procedure, a party may present the deposition testimony of any witness who is "unavailable." While the Court's opinion does not cite to Rule 32.01 as support for this option, it fails to cite to any other legal authority that would support the Appellant's contention that it was meant to strike new legal precedent granting any party a right to take a deposition to "preserve trial testimony" without regard to a governing scheduling order.

Without pointing to any Minnesota case law or rule as support for its position, the Appellant nevertheless draws support for its position by the district court's later grant of permission in the instant proceeding to conduct a video deposition of Kenneth Eickelberg to preserve his testimony for trial. Appellant contends there is no distinction between the requests. This contention lacks merit.

There can be no fair equating of the circumstances under which the two requests were made. First, the deposition of Eickelberg was necessitated *only* because of the medical emergency of Appellant's counsel. But for counsel's medical emergency which occurred during the trial proceedings, Eickelberg would have appeared personally in court to provide

his live testimony. Eickelberg's schedule did not permit him to remain in Minnesota indefinitely so that he could take the stand whenever Appellant's counsel was able to resume the trial. Given Eickelberg's presence in Minnesota solely to give live testimony at the trial for a limited time and his inability to give that testimony based *only* on the medical emergency of counsel, the district court ruled, over objection, that Appellant should be permitted to preserve Eickelberg's trial testimony by means of a deposition. In granting this relief, the district court presumably found sufficient grounds to distinguish the earlier request and little, if any, prejudice to Respondent by using this means to offer trial testimony, as would be sanctioned by Rule 32.01 once the witness was "unavailable." Although somewhat speculative, the district court may have been persuaded by the language advanced in *Henkel* to make an exception where the facts demonstrated a "*compelling circumstance that would cause a miscarriage of justice if a late deposition*" was not allowed. *Henkel*, 133 F.R.D. at 558.

Appellant further contends the purpose for the Brown and Israel depositions was to preserve their "known" testimony. But Appellant made no showing below of the "known" nature of their trial testimony. In support of its motion, Appellant produced no sworn or informal witness statement(s) that it wished to preserve, nor any offer of proof, or report or document authored by Brown or Israel that it was seeking to admit at trial by their testimony. Appellant had provided only basic and scant information on the personal knowledge of both persons to the present dispute in its discovery responses. The Appellant

failed to present *any* credentials describing professional training, education, or qualifications to serve as foundation for the results of ultra-sonic (UT) testing alleged to have been performed by Israel. Neither party had disclosed any statements or reports specifically written by either witness for this proceeding. Based on this presentation below, there is no basis to suggest the testimony of Brown or Israel was actually “known” *by either party*, including the Appellant. Thus, the Appellant’s contention that “Appellant and Respondent each understood what the testimony” would be and that “Appellant sought to memorialize the known testimony of Brown and Israel to offer at trial” is without factual support in the record. Appellant’s Brief 16-17.

Appellant’s reliance on the holding in *Charles v. F.W. Wade, et. al*, 665 F.2d 661 (5th Cir. 1982) is misplaced as the decision does not hold precedential value in Minnesota. Further, the *Charles* court confirmed “appellant knew what Nixon had to say.” *Id.* at 664. In the instant proceeding, Appellant made no such showing to the trial court on the “known” testimony it sought to procure from Brown or Israel. The contention that Brown and Israel were witnesses to “the nonconformity of Respondent’s product” and that their testimony was “critical” to support Appellant’s decision to withhold payment and to support its claim for costs to correct poor workmanship finds no basis in the factual record before the trial court. Without such a showing, the Appellant was requesting the Court to endorse an expensive and remote “fishing” trip to aid in its discovery of information it might seek to offer at trial.

Further, the contention that depositions to “preserve” trial testimony are customarily and routinely taken shortly before trial to be aired at trial is a convention often adopted by lawyers by agreement for trial management, strategic and tactical purposes. The convention is especially well-suited for expert opinion witnesses, e.g., high paid medical professionals or other professional expert witnesses, who have already provided their expert opinions to counsel by written reports exchanged in discovery and their opinions and positions are well established by their prior writings or testimony given in other like cases. This custom and convention does not give way to a party’s right to convene a deposition on the eve of trial to preserve “fact” witness’ testimony, thereby ignoring the plain application of discovery rules and scheduling order mandates.

B. Minnesota Rule of Civil Procedure 27 Provides the Exclusive Means by Which a Proponent May Preserve Testimony in Civil Proceedings

The Minnesota Rules of Civil Procedure do provide one express rule that governs depositions for the singular purpose of perpetuating (preserving) trial testimony (and the use of such depositions at trial are also governed by Rule 32.01).⁴ See Minn. R. Civ. Proc. R. 27.01. The only depositions described in the Minnesota Rules of Civil Procedure, other than those authorized by Rule 30, are depositions taken *before* an action is commenced or taken

⁴ Minnesota Rule of Civil Procedure 32.01 provides that the deposition of any witness may be used by any party for any purpose if the court finds that the witness is at a greater distance than 100 miles from the place of trial, unless it appears that the absence of the witness was procured by the party offering the deposition. As such, Rule 30 depositions taken for general discovery (both as to fact and expert witnesses) purposes are available for use at trial.

pending an appeal as is expressly provided for in Rule 27. The provisions of Rule 27 do not apply here.

Rule 27 thereby addresses the specific purpose of preserving trial testimony and it provides for the taking of a deposition in two limited instances: Prior to the commencement of a proceeding and during the pendency of an appeal. *See* Minn. R. Civ. Proc. R. 27.⁵ Case law and authorities interpreting Rule 27 have made it clear the purpose of this Rule is not for “discovery” purposes. *See, e.g., Sandmann v. Petron*, 404 N.W.2d 800 (Minn. 1987); Louisell, *Discovery and Pre-Trial Under the Minnesota Rules*, 36 Minn. L. Rev. 633, 655 n. 63 (1952) (“Rule 27 pertains to *perpetuation*, rather than *discovery* as such * * *.” (emphasis in original)). Rule 27 is thereby the singular Rule that specifies the procedure allowed “to preserve trial testimony” outside the context of general discovery conducted in all civil actions. By its plain terms, Rule 27 has absolutely no application to the instant request.⁶

⁵ Rule 27 allows for the perpetuation of testimony to prevent a failure or delay of justice. *Sandmann v. Petron*, 404 N.W.2d 800, 802 (Minn. 1987) (*citing* Minn.R.Civ.P. 27.01(3)). The *Sandmann* Court equated perpetuation of testimony to preserving trial testimony by stating and citing as follows: “Perpetuating testimony means “preserving the testimony of witness, which might otherwise be lost before the trial in which it is intended to be used.” *Id.* (*citing* Black’s Law Dictionary 1027 (5th ed. 1979)).

⁶ As argued below, other rules of procedure in Minnesota do recognize and distinguish the use of depositions for the specific purpose of preserving trial testimony, but not in civil litigation proceedings. *See, e.g., State v. Kraushaar*, 470 N.W.2d 509, 515 (Minn. 1991); *State v. Rud*, 359 N.W.2d 573, 578 n. 1 (Minn.1984). The *singular* purpose for depositions in criminal proceedings is to present deposition evidence at trial. The “deposition” referred to in Minnesota Rule of Criminal Procedure Rule 26.03, Subd. 19(1) is a deposition to preserve testimony when there is a reasonable probability that the witness will be unavailable to testify at trial. 470 N.W.2d at 515 (*citing* to Minn.R.Crim.P. 21 and comment thereto)

Under the civil rules that govern this proceeding, Rule 30 makes no distinction between discovery and preservation depositions and Rule 27 does not apply to the requested relief. On this basis, the district court properly exercised its discretion to reject Appellant's request.

C. Defendant Failed to Show Any Relevance in the Testimony of Brown or Israel to the Instant Contractual Dispute

Finally, in its request to the trial court, Appellant failed to demonstrate any *relevance* in the Brown and Israel testimony. It was clear by Appellant's scant submissions that Israel could not offer *any* relevant factual testimony at trial. Any purported testimony about his testing using UT equipment was subject to a well-founded *motion in limine* that such testing was not relevant to the acceptance criteria applicable to any of the goods supplied for the contract at issue. Further, any such testimony would necessarily involve expert opinion testimony and Appellant did not disclose Israel as an expert in the joint statement of the case nor in its answers to interrogatories.

The instant proceeding involved contractual obligations and performance of a contract entered into by and between Respondent, as fabricator, and Appellant, as customer, of a complex, fabricated welded apparatus which Appellant tendered to meet its separate contractual obligations to its customer, CNLV Constructors II ("CNLV"), in

(emphasis added). A Rule 26.03 deposition may not be used for "discovery" purposes. See also Minnesota Rules, part 1400.6900, MN ADC (Depositions to Preserve Testimony). Rule part 1400.6900 specifies in part: "Upon the request of any party, the judge may order that the testimony of any witness be taken by deposition to preserve that witness' testimony in

accordance with the contractual terms and obligations specified in its direct contract with CNLV, the *owner/joint venture consortium*.

It was well established (and undisputed) in argument on the motion and at trial that CNLV specified wholly different “acceptance criteria” in its contractual terms and specifications with Appellant for all weldments on the fabricated apparatus than the acceptance criteria applicable to the parties’ contract. Under the parties’ contract, Respondent was bound to perform its welding to satisfy a “visual inspection” standard as its “acceptance criteria” under Part C, Section 6.9 of the applicable structural steel welding code – AWS D1.1 (2008) (using the criteria set out in Table 6.1 of AWS D1.1). See Ex. 47.

Israel’s *only* relevant testimony would be as an expert witness with information concerning the application of an elevated acceptance criteria and not merely as a fact witness to the parties’ contract acceptance criteria. In fact, based upon the documents offered by Appellant at trial, Israel’s only participation in the dispute appears to have been as an expert resource engaged indirectly by CNLV to conduct ultrasonic testing of certain welds on the components tendered by Appellant to meet CNLV’s elevated acceptance criteria. Israel was employed by Aztech Inspection Services. Aztech provided complex testing services to its client Las Vegas Materials Testing (LVMT). LVMT was contracted by CNLV to provide inspection services on the CNLV Constructors II project. Israel personally performed **UT (ultrasonic testing)** of weldments (on beam moment plates) on the

the manner prescribed by law for depositions in civil actions (emphasis added).

apparatus after it was shipped to Las Vegas, Nevada. Based on the report offered by Appellant (but not received), Israel appears to have taken specific testing actions at the direction of and on behalf of LVMT/CNLV in order to determine Appellant's compliance with different (and elevated) acceptance criteria specifications applicable to Appellant. This testing was performed to the "acceptance criteria" set out in Section 6.13 of the welding code (using the criteria set out in Table 6.2). See Ex. 47 (RA 24).

In brief, the CNLV contract specifications established an "acceptance criteria" that required certain weldments to *pass UT testing (and forms of testing other than visual)*. Israel's testimony of the UT results obtained from his testing of weldments on the apparatus was therefore wholly irrelevant to any performance issue in the instant dispute, given the undisputed *distinction* in the "acceptance criteria" that governed the two distinct contracts referenced above.

As correctly determined by the trial court, there was simply no relevance whatsoever in Israel's testimony concerning the UT test results nor was there any reason to bring such testimony before the jury in this matter. The production of such testimony to the jury would unnecessarily confuse the jury on its interpretation of the contractual obligations in the parties' contract and in the jury's calculation of damages lawfully sought by the parties in this matter. The introduction of such testimony could have resulted in substantial and undue prejudice to the Respondent by intermixing two *separate and completely distinct* contractual obligations related to "acceptance criteria" that were clearly used in the two

separate contracts.

Finally, because Appellant never disclosed Israel in any prior discovery responses nor in the joint statement of the case as an expert qualified to perform UT testing (nor by the expert disclosure deadline of March 18, 2011), Israel's testimony in the purported context (to merely preserve trial testimony) of facts belies the substance of the testimony intended to be captured. Any "factual" testimony he would have offered would necessarily have been founded upon his qualifications as an expert in the *field of ultrasonic testing*, including his experience, knowledge, training, and education in the instrumentation and methods used to perform such tests and his interpretation and application of that experience and knowledge to the testing he performed (and the results of testing) on the subject apparatus. As was set out in Part D, Section 6.14.3 of the AWS D1.1 Code, the procedure and technique of UT testing had to conform with Part F of Section 6 of the Code. Any such testimony would involve "expert opinion" testimony. See RA 9. Section 6.13 of the applicable AWS D1.1 welding code clearly demonstrates the complexity of such testing and the need for expert foundation qualifications for any person opining results of UT testing. See RA 31. The Appellant's last minute request to *preserve* and present testimony from Israel was tantamount to the preservation and subsequent presentation of a surprise expert witness without any prior disclosure of this witness' qualifications or his opinions during the discovery phase or in the Appellant's pretrial disclosures. Given the complete absence of any relevance in the proffered testimony by Israel to the "acceptance criteria" at issue in

the parties' contract, and the foundational need to qualify the witness as competent to offer "expert" opinion testimony on UT testing, the trial court acted within its sound discretion to deny the request to take the deposition of Israel.⁷

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO ADMIT THE FULL DEPOSITION TESTIMONY OF KENNETH EICKELBERG AND EXHIBITS OFFERED DURING HIS TESTIMONY

A. Appellant's Alleged Errors of Law as to the Eickelberg Testimony Edits, with Specific Examples not Argued Before the District Court, Fail to Rise to Prejudicial Error

Appellant argues the district court committed prejudicial error in its editing of the Eickelberg deposition testimony. App. Brief 24-26. As to the Court's rulings on the Eickelberg deposition, the district court engaged in painstaking and patient review of the transcript on a line-by-line basis, and afforded counsel for both parties adequate opportunity to state their objections and argument on the record. *See generally* Trans. 721–745; 1023–1114; 1193–1265. The district court exercised its sound discretion in overruling

⁷ In similar manner, Appellant made no showing of relevance in the instant dispute for any "fact" testimony to be procured from Brown. As Project Manager on the City of Las Vegas Water Reclamation Facility project, Brown was charged with the "successful design and construction completion as measured by *owner* satisfaction, business performance and team satisfaction." He was not identified as an "expert" witness. Appellant did not submit any material to demonstrate any personal knowledge held by Brown regarding the terms or conditions of the parties' contract. While Brown would likely have personal knowledge of the CNLV contract with Appellant, such personal knowledge would not be germane or relevant to the "acceptance criteria" established in the parties' contract. Other CNLV personnel who were identified on the Appellant's trial witness list arguably had the same or similar personal knowledge of Brown. Hence, Brown's testimony would be duplicative and repetitive.

or sustaining objections to the proffered testimony in a manner entirely consistent with a presentation of the evidence as if it had been presented as live testimony.

Under Minnesota law, “[e]ntitlement to a new trial on the grounds of improper evidentiary rulings rests upon the complaining party's ability to demonstrate prejudicial error.” *Uselman v. Uselman*, 464 N.W.2d 130, 138 (Minn.1990). Further, “not every error in the exclusion of evidence may form the basis for granting a new trial . . . before an error in the exclusion of evidence may be grounds for a new trial, it must appear that such evidence might reasonably have changed the result of the trial if it had been admitted.” *Poppenhagen v. Sornsin Const. Co.*, 300 Minn. 73, 79-80, 220 N.W.2d 281, 285 (1974) (citing to Minn. R. Civ. Proc. 61).

In an attempt to meet its burden, Appellant now cites to numerous examples, none of which were specifically argued to the district court below and all of which lack merit. Appellant fails to explain the basis for its claims of prejudicial error, other than to make general and unspecified blanket argument that the cited edits were somehow prejudicial to its defenses. In Appellant’s example 1, the district court struck a portion of Eickelberg’s testimony that states, “they didn’t like what they saw and”. The witness’ testimony was not limited to Eickelberg’s personal observations, but rather included third parties’ opinions. He refers to “they” and was thus testifying to someone else’s observations. Respondent’s objection to the receipt of this testimony on the grounds of lack of foundation, competence, and hearsay were well founded. The district court did not abuse its discretion

in sustaining Respondent's objections as to this testimony. The omission of this testimony cannot serve as prejudicial error warranting a new trial when it involved plain hearsay evidence.

In like manner, the court struck a portion of counsel's question (example 3) that stated "and the UT testing". Respondent objected to any reference to UT testing as lacking relevance, lacking foundation, hearsay, and that such references would confuse and mislead to the jury. T. 1199-1201. UT testing (ultrasonic testing) was not part of the contract between Appellant and Respondent and there was no evidence presented that the acceptance criteria established by Respondent and Appellant specified any form of NDT, other than visual inspection. The court acted within its sound discretion in sustaining the Respondent's objections. Lastly, the court struck a portion of testimony (example 6) that stated "Because it didn't follow specs, which means". Respondent objected to this testimony as lacking foundation and relevance. Eickelberg was talking about specs related to the City's contract, not specs related to the parties' contract. He acknowledged he knew nothing about the contract between the parties, including the contract specs. A135. Again, the court acted within its sound discretion in sustaining the Respondent's objections. In no instance do any of the examples serve to meet the Appellant's burden on these evidentiary issues and the omission of this cited testimony cannot serve as prejudicial error warranting a new trial when it involved plainly irrelevant evidence.

B. The Trial Court Exercised Its Broad Discretion in Denying Admission of Exhibits 258 and 259

Appellant contends it was prejudicial error for the trial court to refuse admission of trial exhibits 258 and 259. The district court sustained objections based upon hearsay, relevance and lack of foundation. Eickelberg testified Exhibit 258 contained two separate “daily” reports received by the project owner, City of North Las Vegas, related to its “special inspections.” A168. The exhibit contained pages purporting to represent testing performed to determine whether the materials received by the Owner met *its* specifications. *See generally* A168-178. As to Exhibit 258, Eickelberg was never asked, nor did he ever testify, that exhibit 258 was a “true and correct copy of the original” business record. Counsel for Appellant referred to the exhibit offered as the “actual original that I think is a better copy.” A170. At the time of the deposition, Respondent’s counsel stated on the record that it had not been established the “copy” was a true and correct copy of the true original record. A177.

Eickelberg testified Exhibit 258 depicted separate results submitted by Dillon Barclay that referenced his “visual” inspection and a purported report of ultrasonic testing performed by Manual Israel on the structural stands. A173-74. The district court sustained objection to receipt of the exhibit on multiple grounds, including foundation, nested hearsay, and lack of relevance of the UT results to the instant contract. T. 1209. The Court also ruled the exhibit was not admissible under Rule 803(6), under the analysis advanced in the *National Tea* decision. *See* Trans. 1039 – 1041; 1062 – 1063. The district court exercised its sound discretion in refusing admission of the exhibits on the ground the

exhibits lacked relevance, constituted inadmissible hearsay and lacked proper foundation. *Id.* The Appellant's contention that the district court committed prejudicial error in its analysis of *National Tea* is therefore misplaced.⁸ The exhibits were not admissible for other well founded reasons, and their admissibility or lack of admissibility under *National Tea* is not controlling. The Appellant conceded it had not brought in any expert opinion testimony on the issue of "gross nonconformance" as referenced in the AWS Code such that the cost of repair borne by Appellant could be shifted to Respondent under the application of AWS D1.1. Section 6.5. T. 1201. In short, Appellant sought to introduce vague remarks made by Dillon Barclay of his visual inspection and the entire report of purported UT results made by witnesses who were not called at trial to authenticate their methods of testing, the equipment used, nor their training, education, skill, or qualifications.

Exhibit 259 was a notice of non-compliance authored by CH2MHill. A187. Eickelberg failed to offer any testimony that Exhibit 259 was a "true and correct" copy of the original and official record on file with the City and offered only scant testimony concerning a legal "duty" imposed by law to keep or make the statement. A188-89. The Court sustained objection to its receipt on several grounds, including foundation, nested hearsay and relevance. Trans. 1039-1041; 1062-1063. The court exercised its sound discretion in

⁸ The district court distinguished the holding in *National Tea* and *Kohn* from application to the proffered exhibit (258 and 259) on multiple grounds, including its determination that the reports were not prepared by an independent agency, but rather were commissioned to protect the City of North Las Vegas on its rejection of the apparatus from which future claims could ensue. Trans. 1039-1041; 1062-1063. The district court's analysis constitutes

refusing to admit the evidence. Appellant fails to show any prejudicial error from non-receipt of the exhibit and Appellant has failed to make any showing of materiality of the evidence for any issue relevant to the parties' contract performance.⁹

C. Appellant's Contention That It Had an "Absolute Right" to Submit Deposition Testimony is Contrary to Minnesota Case Law and Rule 32.02 of the Civil Rules of Procedure

Appellant argues it was prejudicial error for the trial court to strike the deposition testimony given by Eickelberg during his cross-examination by Respondent's counsel. The Court sustained Respondent's objections to certain of the testimony given on cross-examination based on relevance under Rule of Evidence 402, competence and foundation, and under Rule of Evidence 403 (confusion of the issues, misleading the jury), as set forth on the record. Appellant contends it had an "absolute right to offer the entirety of the testimony" of Eickelberg given on his cross-examination as set forth in the transcript. Appellant cites Rule 32.01 (d) as its sole authority for this sweeping premise. Appellant's contention is contrary to Rule 32.02 and Minnesota case law on a party's right to object to the presentation of deposition evidence at trial.

As Respondent asserted to the trial court below, Rule 32.02 specifies in part that "objection may be made at the trial . . . to receiving in evidence any deposition or part

the exercise of sound discretion in the admissibility of only relevant and material evidence.⁹ Defendant recites numerous factual assertions at pages 32-33 of its Formal Brief concerning "the nature of the organization" preparing the purported business reports that are *not* found in the trial court record nor are they rooted in any offer of proof made by Appellant at trial. No weight should be given to these purported facts.

thereof for any reason which would require the exclusion of evidence if the witness were then present and testifying.” Minn. R. Civ. P. 32.02 (2012). The right to object is subject to Rules 28.02 (not applicable here) and 32.04(c). Under Rule 32.04(c) (1), a party’s objection “to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.” Minn. R. Civ. P. 32.04(c)(1) (2012). As plainly specified in Rule 32.02, any party may object to the admission of any deposition testimony offered by an opposing party, regardless of which party was conducting the inquiry of the witness whose testimony is being sought to be admitted.

This rule follows long-settled case law in Minnesota on a party’s right to object to the receipt of deposition testimony presented by an adverse party at trial. It appears our Court first addressed this precise issue in *Smith v. Capital Bank*, 34 Minn. 436, 26 N.W. 234 (1886), when it held as follows:

With reference to the objections taken to particular questions and answers, we think the proper rule is that when a party uses a deposition taken, but not used, by his opponent, he makes it his own, and his opponent has the same right of objection to the interrogatories and answers, as respects matter of substance, as if the deposition had been taken by the party offering it in evidence; and he is not precluded from so objecting by the fact that the interrogatories objected to were propounded by himself. *Hatch v. Brown*, 63 Me. 410; *Jewell v. Center*, 25 Ala. 498. As respects matter of form, the statute cuts off any objection not interposed and noted at the taking of the deposition. Gen. St. 1878, c. 73, § 38. It follows that the petitioner was entitled to object to particular questions and answers in the depositions, as he was permitted to do by the trial court.

Smith v. Capital Bank, 34 Minn. 436, 439, 26 N.W. 234, 235 (1886). *Smith* was cited and its holding followed in a subsequent Minnesota case involving alleged prejudicial error. *See Bd. of Educ. of City of Minneapolis v. Heywood Mfg. Co.*, 154 Minn. 486, 192 N.W. 102 (1923). In *Heywood*, a witness gave testimony by deposition at which a stipulation was reached that objections as to competency, relevancy and materiality of the testimony could be made at trial. 154 Minn. at 489. The district court sustained an objection at trial when the appellant attempted to introduce a portion of the deposition testimony given by the witness on cross-examination. *Id.* at 489-90. On appeal, the appellant contended “that a party who cross-examines a witness whose deposition is taken may not thereafter object to the introduction in evidence of the answers given by the witness on his cross-examination. *Id.* at 490. The Court stated, “[s]uch is not the rule in this state. It was held in *Re Smith*, 34 Minn. 436, 26 N.W. 234, that a deposition taken by one party and not used by him may be introduced by the other party at his option; but when he introduces it he makes it his own, and his opponent has the same right of objection as if the deposition had been taken by the party offering it, and is not precluded from so objecting by the fact that the interrogatories objected to were propounded by himself. *Id.* The *Smith* decision was again cited and its holding confirmed in *Porter v. Grennan Bakeries*, 219 Minn. 14, 23, 16 N.W.2d 906, 910-11 (1944).

Thus, the Appellant’s contention that it had an “absolute right” to introduce deposition testimony elicited during the cross-examination of Eickelberg by Respondent’s counsel runs counter to long-standing Minnesota law. In this matter, no prejudicial error

occurred and the district court acted within its sound discretion in sustaining the Respondent's objections as to relevance, competence, foundation, and on the grounds that the evidence would cause undue confusion of the issues and/or could mislead the jury.

CONCLUSION

For the reasons stated above, Respondent respectfully requests that this Court affirm the judgment entered below in all respects.

Respectfully Submitted,
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Dated: 5-23, 2012.



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