

NO. A11-2119

OFFICE OF APPELLATE COURT

FEB 14 2013

FILED

State of Minnesota
In Supreme Court

Custom Conveyor Corporation,
a Minnesota Corporation,

Appellant,

vs.

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

Respondent.

APPELLANTS' BRIEF AND APPENDIX

HENNINGSON & SNOXELL, LTD.
Mark V. Steffenson (#0178457)
6900 Wedgwood Road, Suite 200
Maple Grove, MN 55311
(763) 560-5700

Attorneys for Appellant

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

and

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

Attorneys for Respondent

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

* * * * *

TABLE OF CONTENTS

Table of Authorities	2
Legal Issues	3
Statement of the Case	4
Statement of Facts	5
Argument	
II. Standard of Review	7
II. Argument	7
A. The Trial Court abused its discretion in refusing Appellant the opportunity to preserve trial testimony of Las Vegas witnesses J B and M I which can only be rectified by a new trial	7
B. The allowance of the Deposition of Mr. Eickelberg to Preserve Testimony Underscores the Abuse of Discretion in Denying the Depositions of B and Isreal.....	16
C. Practical Realities of Minnesota Trial Practice	17
Conclusion.....	21

* * * * *

APPENDIX AND ITS INDEX

Scheduling Order.....	A1-2
Defendant's Answers to Plaintiff's Interrogatories.....	A3-15
Joint Statement of Case	A16-23
Notice of Motion and Motion.....	A24-25
Request for Issuance of a Commission and/or Letter Rogatory for the Deposition of Non-Party Manuel D. I Outside the State of Minnesota.....	A26-28
Request for Issuance of a Commission and/or Letter Rogatory for the Deposition of Non-Party J B Outside the State of Minnesota.....	A29-32

Plaintiff’s Memorandum of Law in Response to Defendant’s Motion for Commissions and Letters Rogatory A33-45

Hearing Transcript – May 16, 2011 A46-83

Order re: Commissions and Letters Rogatory..... A84-86

Notice of Taking Video Deposition of Kenny Eickelberg for Trial Purposes.....A87

Post-Trial Notice of Motions and Motions A88-90

Order Denying Defendant’s Motion for Judgment as a Matter of Law or for a New Trial A91-93

Court of Appeals Decision A94-111

Petition for Review of Court of Appeals Decision A112-117

Order Granting Petition January 15, 2013 A118-119

Lindberg v. Luther, A-10 -1911 (Minn.App. Sept. 6, 2011) A120-123

* * * * *

TABLE OF AUTHORITIES

Cases

Charles v. F.W. Wade, et al., 665 F.2d 661 (5th Cir. 1982) .. 2, 3, 11, 12, 13, 14, 15, 16, 20

Erickson v. MacArthur, 414 N.W. 2d 406, 407 (1987) 2, 7

Estenfelder v. Gates Corporation, 199 F.R.D.351 (D. Col. 2001)..... 2, 3, 12, 13, 14, 16

Henkel v. XIM Products, Inc., 133 F.R.D. 556 (D. Minn. 1991) 2, 13, 14, 15

Integra Lifesciences I Ltd. v. Merck KGaA, et al, 190 F.R.D. 556 (S.D. 1999)
..... 2, 14, 15, 16

Kroning v. State Farm Auto. Ins. Co., 567 N.W. 2d 42, 45-46, (Minn. 1197)..... 2, 7

Lindberg v. Luther, A10-1911 (Minn.App. Sept. 6, 2011)..... 2, 3, 10, 20

Mercer v. Anderson, 715 N.W. 2d 114, 123 (Minn. App. 2006)..... 2,7

Spangler v. Sears, Roebuck and Co., 138 F.R.D. 122 (S.D. Ind. 1991) 2, 12, 13, 16

TC/American v. Custom Conveyor Corp. 822 N.W. 2d 812, 818 (Minn. Ct. App. 2012)...
..... 2, 4

Rules

Minn. R. of General Practice 111.03..... 3, 9
Minn. R. of Court, Rules of Civil Procedure, Introductory Research Note..... 3, 9

Other Legal Authorities

Herr & Haydock 1, 1A, 2, 2A Minnesota Practice-Civil Rules Annotated (4th Edition).....
..... 3, 8, 16
Herr & Haydock 1A Minnesota Practice-Civil Rules Annotated, Rule 30.01 Sec.
30:07(5th Edition)..... 3, 9, 16, 20

* * * * *

LEGAL ISSUES

DID THE TRIAL COURT ABUSE ITS DISCRETION WHEN IT DENIED
APPELLANT’S MOTION TO PRESERVE TRIAL TESTIMONY OF UNAVAILABLE
OUT-OF-STATE WITNESSES?

Trial Court Resolution: The Trial Court denied Appellant’s request to preserve the
trial testimony of unavailable out-of-state witnesses.

Court of Appeals Resolution: The Court of Appeals affirmed the trial court and
found that it did not abuse its discretion in denying Appellant’s motion to take certain
depositions for trial testimony purposes after the close of discovery

Citations: Minnesota Practice, Annotated, R.30.01, Sec. 30:07 (5th Ed.); *Charles v.*
F.W. Wade, et al, 665 F.2d 661 (5th Cir. 1982); *Estenfelder v. Gates Corporation*, 199
F.R.D.351 (D. Col. 2001); *Lindberg v. Luther*, A10-1911 (Minn.App. Sept. 6, 2011).

STATEMENT OF CASE

Respondent brought an action asserting breach of contract against Appellant, which Appellant counterclaimed for breach of contract. The case was before the Honorable Mary A. Yunker, Judge of District Court, in Sherburne County. The Court's Scheduling Order required discovery to be completed on or before January 15, 2011. (A1-2) The trial was scheduled for June 20, 2011. In April, Appellant's counsel learned that two witnesses, Mr. I and Mr. B would be unable to appear at trial as previously represented to Appellant. Appellant's counsel immediately contacted Respondent's counsel to obtain approval to take the depositions of Mr. I and Mr. B in Nevada. Respondent's counsel refused. On April 29, 2011, Appellant sought leave of the District Court to issue Letters Rogatory to take videotaped depositions of Mr. I and Mr. B to preserve their testimony for trial. (A26-28; A29-32) On May 16, 2011, the District Court heard the motion to allow Appellant to preserve this testimony. (A24-25) The District Court denied the motion on May 24, 2011. (A84-86) The trial commenced on June 20, 2011. The jury never heard testimony from either Mr. I or Mr. B. The jury concluded that both Respondent and Petitioner breached their contractual obligations and concluded that Petitioner owed Respondent \$205,553.00.

The Court of Appeals affirmed the District Court. (A94-111) In a published decision that stated "neither the Minnesota Supreme Court nor this court has addressed

the precise issue raised here.” *TC/American v. Custom Conveyor Corp.*, 822 NW2d 812, 818 (Minn.Ct. App. 2012). The Court of Appeals then found that because neither Minnesota’s rules nor its case law recognize a distinction between discovery and trial depositions, because federal case law recognizing such a distinction is distinguishable, and because Appellant did not show good cause for amending the Scheduling Order, the District Court did not abuse its discretion. *Id.*

Appellant then filed a Petition for Review of Court of Appeals decision with this Court. (A112-117) The Petition was granted on January 15, 2012. (A118-119)

STATEMENT OF FACTS

Respondent brought an action asserting breach of contract against Appellant. Appellant counterclaimed for breach of contract. The Scheduling Order required discovery to be completed on or before January 15, 2011. (A1-2) The trial was scheduled for June 20, 2011. Appellant’s counsel had arranged for three out of state witnesses, Mr. I Mr. B and Mr. Eickelberg, to come to Minnesota for trial in June 2011.

Mr. B is an employee of the project’s construction manager, CH2M Hill Contractors/CNLV Constructors II and would have testified as to the defects in Respondent’s fabrication. Mr. I is an employee of Aztech Inspection Services and would have testified as to testing he performed on Respondent’s product. Both individuals were witnesses to the nonconformity of the product. Both of these individuals had been disclosed in Appellant’s Answers to Interrogatories, and both of these individuals had been listed in the Joint Statement of the Case. (A3-15; A16-23)

Respondent was fully aware of the existence of these two individuals and the fact they would be called to testify at trial.

In April, Appellant's counsel learned that Mr. I and Mr. B would be unable to appear at trial as previously represented. Appellant's counsel immediately contacted Respondent's counsel to obtain approval to take the depositions of Mr. I and Mr. B in Nevada. Respondent's counsel refused. On April 29, 2011, Appellant, pursuant to Nevada law, sought leave of the District Court to issue Letters Rogatory to take videotaped depositions of Mr. I and Mr. B to preserve their testimony for trial. At the hearing before the District Court on May 16, 2011, counsel for Respondent discussed at length the testimony that Mr. I would offer and briefly discussed the knowledge of Mr. B (Motion Transcript at 11-17, 19 A46-83) Respondent knew what the testimony of each individual would be. This was not a question of discovery, but preservation. The District Court denied the motion on May 24, 2011. (A84-86).

The trial commenced on June 20, 2011. During trial, Appellant's counsel had a medical emergency necessitating a brief recess in trial. Mr. Eickelberg, another witness from Nevada was present for trial. Appellant requested that this witness' deposition be taken for the purpose of preserving his trial testimony. That motion for the preservation of this trial testimony after the close of discovery, and during the middle of trial, was granted. Mr. Eickelberg's deposition was taken and was presented to the jury. The jury never heard testimony from either Mr. I or Mr. B Appellant was never able to present these two witnesses testimony to the jury. The jury concluded that both

Respondent and Appellant breached their contractual obligations and concluded that Appellant owed Respondent \$205,553.00.

STANDARD OF REVIEW

The decision to refuse to allow Appellant to preserve the testimony of Mr. B and Mr. I is reviewed under an abuse of discretion standard. Kroning v. State Farm Auto. Ins. Co., 567 N.W.2d 42, 45–46 (Minn. 1997); Erickson v. MacArthur, 414 N.W.2d 406, 407 (Minn.1987). Mercer v. Andersen, 715 N.W.2d 114, 123 (Minn.App.2006).

ARGUMENT

A. The Trial Court abused its discretion in refusing Appellant the opportunity to preserve trial testimony of Las Vegas witnesses J B and M I which can only be rectified by a new trial.

On April 29, 2011, Custom Conveyor filed with the Court a motion requesting the Court issue separate Commissions or Letters Rogatory authorizing the District Court in Clark County Nevada to issue subpoenas for Nevada residents, J B and Manuel D. I They originally had agreed to come to Minnesota for trial, but changed their mind after the close of discovery. This request was to enable Appellant to preserve testimony of these witnesses for trial. This motion was denied by the Court in its Order dated May 24, 2011, and Appellant was thereby deprived of the ability to present testimony of these witnesses at trial.

The purpose of the depositions was not for discovery, but rather, to preserve the testimony of two unavailable out-of-state witnesses. Custom Conveyor Corp., (“Custom

Conveyor”) understood what the testimony of each witness would be, and therefore, the depositions were not designed to determine what information was possessed by these individuals or whether Custom Conveyor would benefit from their testimony. Instead, Custom Conveyor had chosen to utilize these individuals in its case-in-chief, but because they were unavailable nonresidents, Custom Conveyor was unable to do so without the issuance of the Commissions or Letters Rogatory.

In denying the request, the Trial Court held the Minnesota Rules of Civil Procedure do not distinguish between discovery depositions and depositions to preserve testimony for trial and that all depositions were required to have been taken prior to the January 21, 2011, the discovery cutoff date. The Trial Court without explanation reasoned that prejudice to the Plaintiff would result if Appellant would have been allowed to conduct the depositions two weeks before the scheduled trial date.

The Scheduling Order in this case provided in paragraph 1 that “formal discovery shall be completed by January 21, 2011.” Formal discovery was completed and Appellant was not continuing in its fact-finding efforts. Rather, Appellant merely sought to memorialize the testimony of B and Manuel to offer at trial.

While it is true the Rules of Civil Procedure do not specifically distinguish between discovery depositions and depositions to preserve testimony for trial, Minn. Prac., Civil Rules Annotated denotes and discusses the significant difference between discovery depositions and preservation depositions. The Minnesota Rules of Court, Rules of Civil Procedure in its introductory Research Note specifically references and

directs individuals to Herr and Haydock 1, 1A,2 and 2A, Minnesota Practice-Civil Rules Annotated (4th Edition) to answer questions about the Rules of Civil Procedure. Essentially, Herr and Haydock is the ultimate guidebook for the civil practitioner. (Minn. Rules of Court, Rules of Civil Procedure, page 1)

Minnesota Practice, Annotated, R.30.01 (5th Ed.) in the author's comments at Sec. 30:07 "Types of depositions" specifically addresses two types of depositions. As stated, "[d]epositions are usually taken to discover information, known as discovery depositions, or to preserve evidence, known as depositions taken to preserve testimony." The annotation goes on to state:

"The initial scheduling order of a court issued pursuant to Minn. R. of General Practice 111.03 may designate a deadline for discovery. Pretrial discovery depositions must be taken before this deadline. . . . A deposition taken to preserve testimony for trial may be taken after this date because the purpose of the deposition is not to discover information but to preserve the testimony of a witness who will be unavailable for trial, *especially if the unavailability of the witness is not determined until late in a case.* "

Id. (Emphasis added).

From this note, it is clear that Minnesota does distinguish between discovery depositions and depositions to preserve testimony. As anticipated by the note, normally the parties would agree under Rule 29 to conduct such a deposition to preserve testimony as necessary. Here, however, opposing counsel refused to agree to the depositions to preserve testimony thereby necessitating the motion before the Court. As anticipated by the Rule, and noted in the annotation, it should only be necessary for court intervention if the trial date was affected. Here, the trial date would not have been affected, as the deposition could have been taken in May, a month before trial.

Given the Rules of Civil Procedure, and the intent underlying the rule as evidenced by the Annotation to the Rules, it was an abuse of discretion not to grant Appellant's motion to conduct these two depositions through the use of the Letters Rogatory.

In addition to this distinction between discovery depositions and depositions to preserve testimony as discussed in the Annotation, this distinction has been addressed by courts within, and outside of Minnesota's borders. The one Minnesota Court of Appeals case that has addressed this issue tangentially is the unpublished decision of *Lindberg v. Luther*, A10-1911 (Minn.App. Sept. 6, 2011). In *Lindberg*, the Court of Appeals faced and addressed the issue involving the unavailability of witnesses for trial and what litigants must do. *Lindberg* was made aware of the trial date three weeks before trial. *Lindberg* claimed he was entitled to a "continuance" or new trial because of the unavailability of two witnesses. In its decision affirming the denial of the "continuance" or new trial, the Court of Appeals specifically stated that *Lindberg* could have deposed witnesses and preserved and presented their testimony through deposition once learning of the unavailability. *Lindberg*, at 4. This Court of Appeals decision directs litigants, when they become aware of the unavailability of witnesses for trial, to seek and preserve that testimony through the use of the preservation deposition. That is exactly what Appellant attempted to do in this case. Under this published Court of Appeals decision however, the readily available remedy for unavailable witness, i.e. the taking of their trial deposition for purposes of preservation and presentation, is no longer available. This change will deny litigants of their fundamental right to present evidence at trial.

Federal Cases

The Fifth Circuit Court of Appeals in *Charles v. F.W. Wade, et al*, 665 F.2d 661 (5th Cir. 1982), held it was an abuse of discretion in refusing to permit the taking of a trial preservation deposition after the discovery period in the case had closed. In *Charles*, the Plaintiff sought to depose an inmate of a Florida federal prison for trial purposes in South Carolina. The Plaintiff's decision to depose the inmate occurred approximately 6 weeks before the trial and following a hearing the court denied the motion on the grounds that the discovery period had closed. The hearing in the case at hand occurred 4 weeks before the scheduled trial date.

The *Charles* Court held as follows:

When appellant sought the court's leave to depose Nixon, the court denied permission on the basis that the discovery period had closed. This was clearly an inappropriate reason for denying appellant's motion to depose. Although the discovery period had indeed closed at the time appellant made his motion, the requested deposition would not have been taken for purposes of discovery but as testimony of a witness unavailable for trial. Appellant's motion underscored this distinction by informing the court that the deposition would "not be taken for discovery purposes, but in lieu of Mr. Nixon's live testimony at trial." *The distinction is a valid one.* Appellant was not seeking to discover Nixon's testimony-appellant knew what Nixon had to say-but was seeking a means for introducing Nixon's testimony at trial. *A party to a lawsuit obviously is entitled to present his witnesses. The fact that the discovery period had closed had no bearing on appellant's need, or his right, to have the jury hear Nixon's testimony.*

Charles, at 664 (emphasis added).

Both J B and Manuel I were witnesses identified by Appellant in its Interrogatory Answers and both were further listed in the Joint Statement of the Case. As was argued at the hearing, Appellant did not seek to find out what these witnesses knew, but rather, requested the opportunity to depose the witnesses in lieu of live testimony for these unavailable witnesses. The right to have the jury hear B and I testimony was denied by the court. As in *Charles*, this was an abuse of discretion.

In addition, the United States District Court for the District of Colorado in *Estenfelder v. Gates Corporation*, 199 F.R.D.351 (D. Col. 2001), a case cited by Appellant at the May 16, 2011 hearing, involved the Custom Conveyor's request to depose four former employees, each of whom then resided in Europe. The Plaintiff in *Estenfelder* argued that the Defendant should not be permitted to take the requested depositions because the discovery cutoff date had passed.

The Court examined Rules 26 and 32 of the Federal Rules and concluded:

Even though the rules provide no distinctions as between discovery and trial depositions, courts have recognized as a practical matter that, in fact, differences exist.

Estenfelder at 354.

The *Estenfelder* Court also went on to quote with approval the United States District Court of the Southern District of Indiana in *Spangler v. Sears, Roebuck and Co.*, 138 F.R.D. 124 (D. Ga. 1991) as follows:

The Court noted that after the discovery cut-off a party may not engage in any further discovery, but the discovery cut-off “does not prevent a party from memorializing a witness’ testimony in order to offer it at trial.” The *Spangler* court found that the difference between discovery and trial depositions was recognized simply “[a]s a matter of custom or practice.

Estenfelder at 354.

Estenfelder questioned the reasoning of courts that treat all depositions the same.

In fact, one of the Minnesota District Court cases cited by TC/American in this matter,

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

questioned by the *Estenfelder* Court. The Colorado District Court stated:

The courts in the *Henkel* and *Integra* cases treat all depositions the same, under a single heading of “discovery depositions,” and attempt to regulate them all under a bright-line rule. These courts are simply ignoring reality. Lawyers use depositions during the discovery phase primarily to discover evidence. However, lawyers do not always know during the discovery phase which witnesses will actually be needed for trial, and whether the testimony of some of the witnesses will need to be presented at trial by means of depositions. Once those decisions are made by attorneys, courts cannot ignore a party’s need to *preserve* testimony for trial, as opposed to the need to *discover* evidence, simply because the period of discovery has expired.

Estenfelder at 355 (emphasis original).

The *Estenfelder* Court, citing again with approval the decision in *Charles*, stated, “in determining whether a deposition is a discovery deposition or a trial deposition, judges may consider several factors, one factor being the purpose for which the deposition is being taken.” *Estenfelder* at 354. The court thereafter correctly reasoned

that attorneys normally do not depose their own, or friendly witnesses, for purposes of discovery.

Finally, the *Estenfelder* Court opined that the *Integra* and *Henkel* may have been correctly decided because the lawyers who sought leave to take depositions after the discovery cutoff had either waived for tactical reasons the opportunity to depose a witness or waived for tactical reasons the opportunity to ask questions of a witness in a previously conducted deposition. The *Estenfelder* Court concluded that “implicit in the courts’ respective conclusions are findings that the depositions were sought by lawyers for ulterior purposes.” *Estenfelder* at 355. (emphasis added)

Estenfelder also cautioned courts not to ignore the very real and practical differences between discovery depositions and trial depositions. The Court appropriately recognized that “any effort to eliminate or ignore [the practical differences between trial and discovery depositions] will likely lead to the exclusion from trial of testimony and evidence which, under the rules, a party is entitled to preserve and present. The result is a trial which is incomplete and unfair.” *Estenfelder* at 355.

In the *Henkel v. XIM Products, Inc.*, 133 F.R.D. 556 (D.Minn. 1991), a case in Minnesota Federal Court before Magistrate Noel, the party seeking to depose the witness was present at the first deposition but elected then not to ask any questions of that witness. In *Henkel*, Magistrate Noel specifically stated “the court’s holding in *Charles* is not inconsistent with the outcome here. In *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." At 558. Magistrate Noel further stated "Unlike *Charles*, the parties to the instant action have deposed the witness in question and counsel for SIM chose not to ask him any questions even though he knew the witness was beyond the subpoena power of the trial court and that the deposition would therefore be admissible under the relevant rules." *Id.* The *Henkel* court further concluded that there was no compelling circumstance that would warrant the "retaking" of the deposition. Implicitly within the language of Magistrate Noel is the consideration that the result would have been different if the party would "otherwise be denied the witness's testimony altogether." *Id.* It is fair to conclude from this language that Magistrate Noel would have allowed the depositions to preserve the testimony of B and I as he acknowledged the reality that it would be 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.

In *Integra Lifesciences I Ltd. v. Merck KGaA, et al.*, 190 F.R.D. 556(S.D. CA. 1999), the Magistrate Judge refused to allow the deposition of a Dr. Yamada after the close of discovery. Dr. Yamada was a commissioned officer in the United States Public Health Service. At that time, in order to take any testimony of a commissioned officer, it was necessary to obtain permission under 45 C.F.R.Part 2. *Id.*, at 558. Although the department agreed to allow the taking of testimony, it refused to allow Dr. Yamada to provide live testimony and further limited the topics on which he would testify. Critically important for the *Integra* court was the fact that Dr. Yamada never indicated or suggested that he "would" be able to testify live at trial. *Id.*, at 560. (emphasis in

original) As concluded by the Magistrate, “[I]t appears Defendants made a tactical decision not to depose Yamada during discovery, but never confirmed that he would be able to testify live at trial.” *Id.* It was this final reason upon which the Integra Court relied in denying the motion to take the deposition of Dr. Yamada.

Here, the evidence is directly contrary to the *Integra* case. Mr. B and Mr. I had confirmed that they would be able to testify live at trial. There was no tactical decision not to depose these individuals during discovery, as these individuals along with Mr. Eickelberg were coming to Minnesota for trial. As soon as Appellant learned that two of the three were not coming to Minnesota, it sought to preserve this testimony in accordance with Minnesota practice as set forth in *Herr & Haydock*.

The better reasoning as set forth in the cases for the distinction between discovery depositions and depositions to preserve testimony is set forth in the *Charles, Estenfelder* and *Spangler* cases. These cases correspond to the direction given on these issues in *Herr & Haydock*. It was an abuse of discretion not to allow Appellant to preserve the testimony of these two witnesses. The case must be remanded to the Trial Court.

B. The Allowance of the Deposition of Mr. Eickelberg to Preserve Testimony Underscores the Abuse of Discretion in Denying the Depositions of B and I

Inherently, the subsequent actions and occurrences in this matter fundamentally support Appellant’s position. In this matter, Appellant’s counsel became ill during trial

necessitating a substantial break in trial. Mr. Eickelberg had traveled from Las Vegas to Minnesota to testify. Because of this illness and resulting delay, Mr. Eickelberg was unable remain in Minnesota pending counsel's return and was required to return to Las Vegas prior to the recommencement of trial. As a direct result, Appellant's counsel moved for, and the Trial Court granted, Appellant's counsel the opportunity to preserve the testimony of Mr. Eickelberg in the middle of the trial. The testimony of Mr. Eickelberg was taken and preserved in Minnesota during the break in trial and then subsequently presented to the jury via video deposition. Similarly, the underlying trial depositions of the two individuals should have been allowed, and the prejudice experienced by Appellant would not have occurred.

C. Practical Realities of Minnesota Trial Practice

As this court is aware, and as a practical matter, many witnesses are deposed on a regular basis shortly before trial, and long after discovery is closed. Typically, medical professionals do not appear at trial for testimony, but their depositions are taken in the days or weeks shortly before trial. Similarly, other expert testimony is often preserved for trial shortly before trial via deposition. This practical reality and understanding exists.

Here, the individuals whose testimony Appellant sought to preserve were fully disclosed and well known by Plaintiff. The discovery answers and joint statement fully disclose the intent to call these two individuals to testify. The denial of the ability to

preserve and present these two witnesses at trial was fundamental error and must result in a new trial.

By treating all depositions the same, under the heading of discovery depositions, the Court of Appeals will cause significant problems in the longstanding and well defined method of trial practice in this state. Lawyers use depositions during the discovery phase primarily to discover evidence. Lawyers do not always know during the discovery phase which witnesses will actually be needed for trial, and whether the testimony of some of the witnesses will need to be presented at trial by means of depositions. With months of delay between the close of discovery and an actual trial, the availability of certain witnesses will not be known until shortly before trial. Once those decisions are made, the courts cannot ignore a party's need to preserve testimony for trial as opposed to the need to discover evidence.

Allowing the Court of Appeals ruling to stand will lead to mischief, incivility, and game playing by trial lawyers when it suits their purposes. Practically speaking, civil trial lawyers in this state currently take "trial depositions" (Depositions to preserve and present testimony at trial) shortly before the actual trial date and long after the close of discovery on a daily basis. Inherently today, there is significant gap in time between the close of discovery and the actual trial date. Here, that gap was approximately 5 months. Parties often times will not know if certain witnesses will be unavailable for trial until shortly before the actual trial date. Then, as here, the parties will seek to preserve and present that trial testimony through a trial deposition. Here, witnesses who indicated

they were coming to testify for trial, decided to not appear for trial. Accordingly, Appellant sought to preserve that trial testimony through the obtaining of the Letters Rogatory and conducting the trial deposition in Nevada.

Allowing this decision to stand will cause significant and important problems and dramatically increase costs in cases where experts will be testifying. Most often, experts do not appear at trial, but instead provide their testimony through the use of the “trial deposition.” These depositions to preserve testimony are taken in the days before trial, long after discovery closes. Allowing the Court of Appeals decision to stand will allow practitioners to engage in unacceptable gamesmanship when they know their expert can appear at trial and the other party’s expert must testify by deposition. Under those circumstances, the attorney will deny the request to take the expert deposition for trial purposes and following this Court of Appeals case, there will be no good cause to amend the scheduling order to allow the expert’s trial deposition to be taken. This is particularly the case in the personal injury practice, which at times dominates court trials throughout the state.

Finally, this runs contrary to the Court’s stated preference for the parties in civil litigation matters to work towards resolution and settlement. Under most current scheduling order structures, discovery closes before the mandatory mediation date. Most civil cases are mediated after the close of discovery. The parties do not want to expend the excessive amount of time and money taking and preserving trial testimony before mediation. Under this decision, litigants will be forced to take these trial depositions

before the close of discovery. This decision causes litigants to expend funds much earlier than necessary and significantly increases the likelihood that the parties to civil litigation matters will be unable to resolve their case in mediation. This will directly cause an unnecessary increase the numbers of civil matters tried, and will thereby significantly increase the consumption of already scarce civil trial time in the Minnesota District Courts.

The practical result of upholding the Court of Appeals decision is a system further burdened by cases that now cannot be resolved in mediation, and cases where litigants will be encouraged to engage in conduct detrimental to the functioning of justice in this state.

The Annotation to Rule 30.01, Sec. 30:07 directly denotes the distinction in this state regarding the real difference between discovery depositions and depositions to preserve testimony. The *Lindberg* Court was correct in stating that the option in this type of situation is to conduct a deposition to preserve the evidence for trial. The *Charles* Court understood and expressed the fundamental unfairness and the deprivation of an individual's right to fair trial when that individual is unable to fully present this his case through the necessary testimony of an unavailable witness. The Trial Court in this matter abused its discretion in refusing to allow these two depositions. Therefore, the

Court of Appeals decision must be reversed, and the matter be remanded to the Trial Court for a new trial.

CONCLUSION

For the reasons set forth above, the Trial Court abused its discretion and materially prejudiced the Appellant when it denied Appellant's motion to preserve the trial testimony of Mr. B and Mr. I. Accordingly, Appellant requests that this Court reverse the Court of Appeals decision and remand the matter to the Trial Court for a new trial.

Dated: February 14, 2013

Respectfully submitted,

HENNINGSON & SNOXELL, LTD.



Mark V. Steffenson, T.D. (#178457)
6900 Wedgwood Rd, Ste. 200
Maple Grove, MN 55311
(763) 560-5700

Attorneys for Appellant