

NO. A11-2119

State of Minnesota  
In Court of Appeals

Custom Conveyor Corporation,  
a Minnesota Corporation,

*Appellant,*

v.

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

*Respondent.*

APPELLANT'S BRIEF AND APPENDIX, VOLUME I

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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).

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## LEGAL ISSUES

- I. In a breach of contract action, should the trial court have granted Appellant's post trial motion for judgment as a matter of law based on Respondent's prior breach of its contract with Appellant barring its recovery under a subsequent breach by Appellant.

Trial court held: In the negative.

Apposite law:

MTS Co. v. Taigo Corp., 365 N.W.2d 321, 327 (Minn. App. 1985)

Carlson Real Estate Co. v. Soltan, 549 N.W.2d 376, 380 (Minn. App. 1996)

Minn. Stat. §336.2-106

Minn. Stat. §336.2-602

- II. In a breach of contract action, should the trial court have granted Appellant's post trial motion for a new trial based upon the trial court's pre trial refusal to allow Appellant to preserve testimony of out-of-state, unavailable witnesses via deposition.

Trial court held: In the negative.

Apposite law:

Minn. R. Civ. P. 30

Charles v. F.W. Wade, et al., 665 F.2d 661 (5<sup>th</sup> Cir. 1982)

Estenfelder v. Gates Corporation, 199 F.R.D.351 (D. Col. 2001)

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

- III. In a breach of contract action, should the trial court have granted Appellant's post trial motion for a new trial based upon prejudice resulting from the trial court's refusal to admit the full deposition testimony of Kenneth Eickelberg and the exhibits offered therein.

Trial court held: In the negative.

Apposite law:

Minn. R. Evid. 803 (6)

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### STATEMENT OF THE CASE

Both parties in this matter alleged breach of contract by the other party. The case was decided by jury before the Honorable Mary A. Yunker, Judge of District Court, in Sherburne County. The jury determined both parties breached the agreement and awarded damages to Respondent.

\* \* \* \* \*

### STATEMENT OF FACTS

This case is an action for breach of contract arising out of Respondent TC/American Monorail, Inc.'s fabrication of steel hoppers and support stands on behalf of Appellant Custom Conveyor Corporation for use in a waste water treatment plant in the City of North Las Vegas, State of Nevada. (Trial Exhibit ("Ex.") 6) (Trial Transcript ("Transcript") at 132-136). The parties reached an agreement in June 2009, whereby Respondent agreed to weld the hoppers and stands pursuant to the American Welding Society's D1.1, Structural Welding Code – Steel; agreed to sandblast the surfaces pursuant to the Society for Protective Coatings SP6 standard; and agreed to paint with two (2) mills of enamel on the outside and epoxy on the inside of the hoppers. (Id.) (Ex. 5 and 13) (Transcript at 125). The agreed cost of the fabrication was \$305,000.00, with a later change order increasing the contract price to \$330,520.00. (Ex. 6 and 16).

In early September 2009, the first shipment of materials from Respondent arrived in North Las Vegas, Nevada. (Transcript at 629). This shipment consisted of the beams for the stands and was rejected by the City due to poor welding. (Ex. 232) (Transcript at 149-152, 629-631, 636-637). The City's inspection found welds with holes, cracks, weld spatter, and welding wire left in welds. (Id.). The rejected beams were returned to Respondent, and thereafter the City's rejection was confirmed by an independent certified welding inspector Steve Bengtson with Bengtson, LLC. Mr. Bengtson further discovered missing welds and problems with the surface preparation including areas that were not sandblasted, areas beginning to rust, and areas with thin to non-existent primer. (Ex. 227-231) (Transcript at 255).

In late September/early October 2009, the support beams were again shipped to the City of North Las Vegas, but upon arrival the beams were still missing some welds, were not match-marked (notations on the beams themselves describing how they are to be connected), and had holes drilled on the wrong sides of beams. The City attempted to correct these issues, but was forced again to reject the shipment. (Ex. 292 and 293) (Transcript at 661-664) (Eickelberg Deposition Transcript Rough Draft at 40-50 and 70).

In December 2009, the first two (2) hoppers arrived in North Las Vegas, but were rejected for surface preparation deficiencies. (Transcript at 688-690 and 693-695). Meanwhile, Mr. Bengtson inspected the hoppers still in Minnesota and found weld and surface preparation deficiencies, including rust. (Ex. 230-231). Based on these facts, the hoppers already in North Las Vegas were sent to Bryan Painting in Las Vegas and the

hoppers still in Minnesota were directed to be delivered to Bryan. (Transcript at 695-696).

In December 2009, all steel was removed from the job site in North Las Vegas at the requirement of the City and Appellant received a bid to sandblast and repaint the steel. Respondent, however, refused to take any further action to rectify the issues. (Transcript at 699-704, 755-757, and 1143-1159).

In January 2010, North Las Vegas' construction manager CH2M Hill visually inspected the stands' welds and failed them. (Eickelberg Deposition at 44-50). Accordingly, the City undertook to have ultrasonic testing (UT) performed on the welds, and they failed UT as well. (Eickelberg Deposition at 62-70). Additionally, Appellant hired an independent expert, Tim Williams with Braun Intertec Corporation, to examine the support structure and hoppers. (Transcript at 839-840). Mr. Williams found multiple issues with the support structure and recommended they be completely reblasted and painted. (Ex. 260) (Transcript at 759-760, 853-858, and 861-865).

Based on cost to repair the stands, Appellant decided to have the stands refabricated with another fabricator at a cost of \$120,000.00 and the hoppers were reblasted and painted by yet another company. (Transcript at 757-759 and 1143-1159) But for Respondent's actions, and its failure to repair, these costs would not have been incurred and the jury in this matter found that Respondent did in fact breach its contract with Appellant. (Special Verdict Form Question 5) Accordingly, Appellant withheld payment of \$172,561.00 from Respondent. (Transcript at 1159-1160).

In April 2010, Respondent initiated a lawsuit alleging breach of contract against Appellant seeking payment of the \$172,561.00, plus other amounts not at issue on this appeal, and Appellant counterclaimed for breach of contract. (Complaint and Answer and Counterclaim). As trial approached in June 2011, Appellant became aware that two (2) witnesses who reside in the State of Nevada, Jay Brown and Manual D. Israel, would not voluntarily appear at the trial. (Pretrial Motion Transcript at 4). Accordingly, on April 29, 2011, Appellant filed a motion requesting the District Court issue separate Commissions or Letters Rogatory authorizing the District Court in Clark County Nevada to issue subpoenas for Mr. Brown and Mr. Israel to enable Appellant to preserve the trial testimony of those witnesses via video taped deposition. (Notice of Motion and Motion dated April 29, 2011). The motion was denied by the District Court in its Order dated May 24, 2011, based upon a finding that the discovery deadline had passed. (District Court Order dated May 24, 2011).

Trial commenced in this matter on June 20, 2011, but during Respondent's case-in-chief, Appellant's counsel suffered a medical emergency which necessitated a multiple day recess of the trial. (Transcript at 386-388). Unfortunately, a witness for Appellant, Kenneth Eickelberg, was in town from his home in Nevada to testify on Appellant's behalf but could not remain in Minnesota through the recess. Accordingly and appropriately, Mr. Eickelberg's testimony was preserved by video taped deposition on June 24, 2011. (Eickelberg Deposition Transcript).

On June 28, 2011 and July 1, 2011, the court heard argument on the admissibility of the testimony of Mr. Eickelberg and issued an order that: (1) refused to admit various

testimony as to Mr. Eickelberg's observations and actions; (2) modified certain testimony of Mr. Eickelberg as it relates to specific questions and answers; (3) failed to allow the admission of certain exhibits under various hearsay exceptions; and (4) refused to allow the full transcript of the deposition of Mr. Eickelberg to be presented, including certain testimony solicited by counsel for Respondent regarding the actions, tests, and statements of others. (District Court Order dated July 3, 2011).

On July 6, 2011, the jury returned a verdict finding that both parties breached the contract and ordering Appellant to pay Respondent the sum of \$172,561.00, plus other amounts not at issue on this appeal. (Special Verdict Form). The District Court entered judgment based on the jury's findings on July 18, 2011, and Appellant filed its motion for judgment on the verdict, or in the alternative, a new trial on August 4, 2011. (Order for Judgment) (Notice of Motions and Motions dated August 4, 2011).

\* \* \* \* \*

## **ARGUMENT**

### **I. Summary of Argument**

There are three (3) main issues on this appeal. First, whether the jury's determination that Respondent breached the contract with Appellant in the fabrication of the steel stands and hoppers bars Respondent from recovering on a subsequent breach by Appellant. Next, whether Appellant was substantially prejudiced by the District Court's refusal to allow Appellant to preserve the testimony of two (2) unavailable, out-of-state witnesses for trial. Finally, whether Appellant was substantially prejudiced by the

District Court's actions related to the testimony and exhibits presented by Kenneth Eickelberg.

## **II. Standard of Review**

This court reviews the denial of a motion for judgment on the verdict de novo. *See, e.g., Pouliot v. Fitzsimmons*, 582 N.W.2d 221, 224 (Minn. 1998). The appellate court must consider the evidence in the light most favorable to the prevailing party and may only set aside the verdict if it cannot be sustained on a reasonable theory of the evidence. *Id., citing Stumne v. Village Sports & Gas*, 309 Minn. 551, 552, 243 N.W.2d 329, 330 (Minn. 1976).

As to review of a motion for a new trial, this court must let the verdict stand "unless it is manifestly and palpably contrary to the evidence, viewed in a light most favorable to the verdict." *ZumBerge v. Northern States Power Co.*, 481 N.W.2d 103, 110 (Minn.App. 1992), *citing Mervin v. Magney Construction Co.*, 399 N.W.2d 579, 584 (Minn.App. 1987).

## **III. Argument**

### **A. The District Court committed error in denying Appellant's motion for judgment as a matter of law on its breach of contract claim.**

The jury determined that Respondent breached the contract with Appellant and that Appellant was justified in withholding payment on the CNLV project contract. Special Verdict Form Questions Nos. 5 and 8. It is undisputed that Appellant contracted with Respondent to purchase the four hoppers and accompanying structural steel support systems. Respondent fabricated, manufactured and delivered the completed hoppers and

support structures directly to the ultimate end user, the City of North Las Vegas. The undisputed trial testimony proved that the hoppers and structural supports were delivered to the North Las Vegas job site, and do to numerous deficiencies were rejected by the City. The first shipment of support structures not only were rejected, but were returned to Respondent for repairs. Respondent then admittedly attempted to fix certain welds that were defective, and redelivered the hoppers and support structures directly to the end user, the City of North Las Vegas. Testimony adduced at trial clearly established that the materials fabricated and manufactured by Respondent were rejected, and the jury determined that Respondent therefore breached its contract with Appellant. The jury further determined that Respondent not only breached the contract, but that Appellant was justified in withholding payment.

Minnesota's codification of the Uniform Commercial Code governs commercial transactions for the sale of goods. Minn. Stat. §336.1-103(b). Under the UCC, a party has a right to cancellation of the contract "for breach by the other" and "the cancelling party also retains any remedy for breach of the whole contract or any unperformed balance." Minn. Stat. §336.2-106. The buyer has a right to reject any goods "if the goods or the tender of delivery fail in any respect to conform to the contract," Minn. Stat. §336.2-601. After that failure, the buyer can "reject the whole" or accept any commercial unit." After that rejection, "the buyer has no further obligations with regard to goods rightfully rejected." Minn. Stat. §336.2-602. In addition to being excused from the obligation for further payment on the contract, the buyer (after a breach by the seller)

“may in addition [recover] so much of the price as has been paid” under the contract. Minn. Stat. 336.2-711.

Respondent’s initial breach of contract bars it from recovery on its contract claim. It is a well-settled point of contract law that the first breaching party cannot complain if the other party subsequently refuses to perform. Here, as a matter of law, Respondent breached the contract first. Under the contract, Respondent had the obligation to perform its fabrication and delivery of the hoppers and structural supports. It was only after the acceptance of the goods that an obligation to pay for the goods would arise. Inherently, if Respondent breached the contract, Appellant never had an obligation to pay as a matter of black letter contract law.

Minnesota Courts have repeatedly addressed the issue of the first breaching party being barred from recovery on the same contract. In MTS Co. v. Taigo Corp., 365 N.W.2d 321, 327 (Minn. App. 1985), the Court of Appeals held that a “rule in the law of contracts is that a party cannot raise to its advantage a breach of contract against another party when it has first breached the contract itself.” Id. Fundamentally, as the jury found Respondent breached the contract, and that breach occurred first, any subsequent breach by Appellant of the same contract is excused.

The Court of Appeals later clarified that this rule barring suit from the first breaching party applied when “(1) the initial breach was continuing at the time that the first breaching party brought the action against the subsequent breacher, and (2) the subsequent breach resulted directly from the initial breach.” Carlson Real Estate Co. v. Soltan, 549 N.W.2d 376, 380 (Minn. App. 1996), *citing* MTS 365 N.W.2d at 327.

In Carlson, the Court held that an initial breach would justify a cancellation of the original contract, but would not excuse subsequent unrelated behavior that was a violation of their commercial agreement. Id. (holding that where the lessor breached a contract the lessee would have been justified “in terminating the lease, [but] the breach does not justify [Defendant] in continuing the relationship under a new or modified character” that included failing to operate the premises in a manner outlined in the lease). Id.

When one party has breached the contract, the non-breaching party is excused from continuing further duties under the contract. In the case at hand, Appellant had the immediate right to cancel the contract and stop performance of its duties (i.e. obligation to pay). Additionally, the case meets the requirements of MTS test because 1) Respondent's breach was continuing (there was never performance on the contract) and 2) Appellant's breach through failure to pay on the contract was in *direct* response to Respondent's original breach of failure to deliver acceptable product.

The findings of the jury in this matter were very clear: There was a contract between the parties (Special Verdict Form No. 1); Respondent breached that contract regarding the fabrication and manufacturing of the product applicable to the project (Special Verdict Form No. 5); and Appellant was damaged by Respondent's breach of contract. (Special Verdict Form No. 7).

The jury also found that Appellant breached its contract with Respondent (Special Verdict Form No. 2) and that Respondent was damaged by that breach. (Special Verdict Form No. 3) Given the contract between the parties, however, Appellant's obligation

under the contract arose subsequent to the fabrication and manufacturing of the hoppers and support structures. That is, to pay for the product manufactured by Respondent. Because Respondent was found to have breached the contract regarding the fabrication and manufacturing of the product, its breach could only have occurred *prior to* any breach of contract committed by Appellant.

Accordingly, even reviewing this matter in the light most favorable to Respondent, there is no reasonable theory of evidence on which to affirm the District Court's Order. Quite simply, Respondent is prohibited from any recovery for any subsequent breach by Appellant after Respondent's initial breach, and the judgment awarded in this matter to Respondent must be reduced to the sum of \$75,992.00 which is the sum total of the damages awarded to Respondent on the matters not at issue on this appeal.

To the extent this court does not grant Custom Conveyor's motion for judgment on this claim, Custom Conveyor is entitled to a new trial on this contract issue as the evidence was not sufficient to support the jury verdict and subsequent order of the court related to this special verdict.

A new trial should be granted because the jury's verdict is not justified by the evidence. The jury's verdict is not supported by reasonable evidence in the record. Here, the demonstrable facts and evidence support the conclusion that an injustice will be done unless this court orders a new trial on the City of North Las Vegas contract claims. The evidence supports that the contract was breached by Respondent. With ample support in the evidence for this conclusion it is impossible for the jury to reasonably conclude that Custom Conveyor breached the City of North Las Vegas contract and that

it is liable for damages. Simply stated, the jury's verdict is not justified by the evidence. Given that the jury's verdict is not supported by the evidence, this Court should order a new trial.

**B. The District Court committed error in refusing Appellant the opportunity to preserve trial testimony of unavailable, out-of-state witnesses Jay Brown and Manual Israel which can only be rectified by a new trial.**

On April 29, 2011, Appellant filed with the District Court a motion requesting the District Court issue separate Commissions or Letters Rogatory authorizing the District Court in Clark County Nevada to issue subpoenas for Nevada residents, Jay Brown and Manuel D. Israel to enable Appellant to preserve testimony of these witnesses for trial. This is standard procedure for unavailable witnesses even in the weeks before trial. In fact, about one (1) week after the post-trial motions were heard in this matter, this Court noted that where witnesses are found to be unavailable even three (3) weeks before trial a litigant "could have deposed witnesses and preserved and presented their testimony through deposition." Lindberg v. Luther, A10-1911 (Minn.App. Sept. 6, 2011). Nonetheless, and despite the fact that the District Court later allowed Appellant to preserve the testimony of Kenneth Eickelberg, an unavailable witness, through video deposition, Appellant's motion was denied by the District Court in its Order dated May 24, 2011 based upon the expiration of the discovery period. Because of this ruling, Appellant was deprived of the ability to present testimony of two (2) necessary witnesses at trial.

The purpose of the depositions was not for discovery, but rather, to preserve the testimony of two (2) unavailable, out-of-state witnesses. Mr. Brown 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. Israel is an employee of Aztech Inspection Services and would have testified as to testing he performed on Respondent's product. Appellant and Respondent each 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 Appellant would benefit from their testimony. Instead, Appellant had chosen to utilize these individuals in its case-in-chief, but because they were unavailable nonresidents, Appellant was unable to do so without the issuance of the Commissions or Letters Rogatory.

In denying the request, the District 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, discovery cutoff date as set forth in the District Court's Scheduling Order dated September 3, 2010. The District Court without explanation reasoned that prejudice to Respondent would result if Appellant would have been allowed to conduct the depositions two (2) 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. Instead of seeking new facts and information, Appellant sought to memorialize the known testimony of Brown and Israel to offer at trial.

While it is true the Minnesota Rules of Civil Procedure do not specifically distinguish between discovery depositions and depositions to preserve testimony for trial, the difference between the two is significant and has been examined and addressed by courts within, and outside of Minnesota's borders.

The Fifth Circuit Court of Appeals in Charles v. F.W. Wade, et al., 665 F.2d 661 (5<sup>th</sup> Cir. 1982), held it was an abuse of discretion to refuse 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 the court denied the motion on the grounds that the discovery period had closed. The hearing in the present matter 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.*

Id., at 664 (emphasis added).

Both Jay Brown and Manuel Israel were witnesses to the nonconformity of Respondent's product, were identified by Appellant in its Interrogatory Answers as such, and were further listed in the Joint Statement of the Case. This testimony was critical to support Appellant's basis for withholding payment to Respondent and to support the more than \$300,000.00 spent by Appellant to correct Respondent's poor workmanship.

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 due to unavailability. In fact, at the hearing on Appellant's motion, counsel for Respondent discussed at length the testimony that Mr. Israel would offer, (Motion Transcript at 11-17), and briefly discussed the knowledge of Mr. Brown. (Motion Transcript at 19). Clearly, this was not a question of discovery.

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 a defendant's request to depose four (4) former employees, each of whom resided then 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 "[e]ven though the rules provide no distinctions as between discovery and trial depositions, courts have recognized as a practical matter that, in fact, differences exist." Id. 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. 122 (S.D. Ind. 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 to the District Court by Respondent 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).

In Minnesota, the Henkel case concerned a request to depose a witness for a second time in that case. The party seeking to depose the witness was present at the first deposition but elected not to ask **any** questions of the witness at that time even though the witness was from more than 100 miles outside of Minnesota and as such may well be unavailable for trial. Unquestionably, the knowledge of potential unavailability coupled with the presence but election by the party not to ask any questions factored into the court's decision to deny the request.

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. This is quite clearly the case in the present matter.

Finally, the Estenfelder Court opined that Integra, Integra Lifesciences I, Ltd. v. Merck KGaA, et al., 190 F.R.D. 556 (S.D. Cal 1999), 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." Id. (emphasis added).

As this court is aware, and the Lindberg court agreed, as a practical matter many witnesses are deposed on a regular basis shortly before trial in civil matters and long after discovery is closed. Typically, medical professionals do not appear at trial for testimony, but their depositions are taken 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, and does so for a good reason. Depositions of medical professionals and other experts are incredibly costly and are undertaken only in cases that are clearly going to trial. Should the District Court be affirmed on this issue, experts in all cases from personal injury to breach of contract will need to be deposed during discovery and prior to most settlement discussions. These depositions will therefore serve only to greatly increase the costs of litigation.

Here, the individuals whose testimony Appellant sought to preserve were fully disclosed and well known by Respondent. The discovery answers and Joint Statement fully disclose the intent to call these two (2) individuals to testify. Unfortunately,

Appellant learned shortly before trial that the witnesses would not appear in the State of Minnesota voluntarily. Accordingly, the denial of the ability to conduct and present these two (2) witnesses at trial via video taped deposition was fundamental error resulting in a verdict manifestly and palpably contrary to the evidence and must result in a new trial.

The subsequent actions and occurrences by the District Court in this matter support Appellant's position. Counsel for Appellant suffered a medical emergency during trial necessitating a substantial break in trial. Kenneth Eickelberg had traveled from Las Vegas to Minnesota for trial purposes, but because of this emergency and resulting delay was unable to remain in Minnesota pending recommencement of trial. As a direct result, the testimony of Mr. Eickelberg was taken and preserved in Minnesota during the break in trial and subsequently presented to the jury via video deposition. There is absolutely no difference between the unavailability of Mr. Brown and Mr. Israel and that of Mr. Eickelberg. Accordingly, the underlying trial depositions of Mr. Brown and Mr. Israel should have been allowed on the same basis as Mr. Eickelberg's, and the prejudice experienced by Appellant would not have occurred.

**C. The District Court committed error in refusing to admit the full testimony of Kenneth Eickelberg and exhibits offered during said testimony which can only be resolved by a new trial.**

The failure to admit the full testimony of Kenneth Eickelberg and exhibits as offered was a fundamental error requiring the declaration of a new trial. The fundamental issues regarding the testimony of Mr. Eickelberg are: (1) the refusal to admit various testimony by Mr. Eickelberg of his observations and actions; (2) the modification or alteration of certain testimony of Mr. Eickelberg as it relates to specific questions and

answers; (3) the failure to allow the admission of certain exhibits under various hearsay exceptions; and (4) the refusal to allow the full transcript of the deposition of Mr. Eickelberg to be presented including certain testimony solicited by opposing counsel regarding the actions, tests and statements of others.

The testimony of Mr. Eickelberg was presented via deposition as a result of the medical emergency of counsel for Appellant. This testimony was substantially limited by the District Court through its various rulings on the admissibility of certain questions and answers, and certain exhibits proffered through Mr. Eickelberg.

Mr. Eickelberg was asked certain questions about his observations as set forth in the transcript before the District Court. The District Court refused to allow Mr. Eickelberg to testify regarding certain observations he made about the welds, and certain observations that he made regarding pictures he saw. *See, e.g.*, Eickelberg Deposition Rough Draft page 35, lines 13-22, page 36, line 8-14, page 62, line 24 to page 63, line 16, and page 82, lines 25-5. Mr. Eickelberg was further prevented from testifying about certain observations he made during additional testing performed by entities or individuals retained by the City of North Las Vegas, his employer, relevant to the structural supports. The failure to allow this testimony was prejudicial to Appellant in its defense to the claims of breach of contract and as to Appellant's claims.

Certain testimony was modified in its form or answers pursuant to the direction and order of the District Court wherein clauses, phrases, whole questions and answers were ignored or modified in some manner. By way of example, the following modifications were made:

- 1) At lines 11-12 of page 34 of the transcript rough draft for Mr. Eickelberg's deposition (hereinafter the "rough draft"), Mr. Eickelberg's testimony was altered as follows: "They inspected it, ~~they didn't like what they saw and~~ so they asked for it to be removed from the site." Transcript at 1076-1077. The portion of Mr. Eickelberg's answer struck by the District Court is not hearsay as it is testimony as to what he observed, not for the truth of the matter asserted;
- 2) From line 22 on page 62 of the rough draft to line 21 of page 63, the District Court altered the testimony in such a way as to cause Mr. Eickelberg's answer to counsel's question to be the end of an answer to what was in actuality a subsequent question. Accordingly, the District Court improperly and materially altered the testimony;
- 3) At page 65 lines 18-20 of the rough draft, counsel's question was altered as follows: "And as this process proceeded forward you then had a report to you about the results of the visual testing ~~and the UT testing~~, is that correct?" Transcript at 1211. Accordingly, the District Court improperly and materially altered the testimony;
- 4) From Mr. Eickelberg's answer on page 67 line 12 of the rough draft, reading "[t]hat's correct", the District Court deleted nearly five pages of testimony to add another response of Mr. Eickelberg from page 72, line 5-7. Transcript at 1218-1219. This transformed Mr. Eickelberg's response to counsel's initial question to "[t]hat's correct. This is the contractor notifying the sub that the

material on site is no longer accepted and why it is no longer accepted."

Accordingly, the District Court improperly and materially altered the testimony;

5) At lines 3-11 of page 76 of the rough draft, Mr. Eickelberg's testimony was altered as follows: "Well, first of all, ~~that's what the expectation of the contract says, it's supposed to be removed before any coating goes on it. And that's the only reason I need to know. Historically, if I was writing the specs, the reason I'd write that in there would be for the fact that mill scale may or may not have a decent bond with the underlying steel.~~" Transcript at 1229-1230. Foundation is proper here based on Mr. Eickelberg's testimony regarding his work for the City of North Las Vegas, and his testimony directly dealing with that experience. Certainly the foundation for the portions of the answer which were struck by the District Court is as strong as for the portions retained. Accordingly, the District Court improperly and materially altered the testimony;

6) At line 13 of page 77 through line 16 of page 78 of the rough draft, Mr. Eickelberg's testimony was altered as follows: "Yeah. ~~Because it didn't follow specs, which means~~ there could be [sic] a potential defect or a potential failure of the overall quality of the project or that particular piece of equipment." Transcript at 1230-1233. The District Court makes this change based on an apparent fear of confusion of the jury, and no other basis. Accordingly, the District Court improperly and materially altered the testimony; and

7) The District Court then struck the entirety of Respondent's cross examination of Mr. Eickelberg unless Appellant could make a showing of specific parts it wished to be admitted. *See, e.g.*, Rough Draft pages 151-156. Appellant was then given less than 24 hours over the 4th of July weekend to submit this showing in writing. This ruling is in violation of Minn. R. Civ. P. 32.01 (d), which provides parties the right to offer testimony in response to an offer from the opposition. In this matter, counsel for Respondent elicited information from a witness and when he did not like how that information turned out he tried to strike it in whole. Appellant had an absolute right to present that information to the jury, and the District Court improperly refused to do so.

These modifications or partial exclusions of testimony constituted a prejudicial error that resulted in Appellant not receiving a fair trial. Because of these modifications and partial exclusions, Appellant is entitled to a new trial.

With respect to the exhibits, the exhibits offered were excluded based on hearsay and foundation. Mr. Eickelberg testified that he received the original document as provided in Exhibits 258 and 259, that he did so as the owner's representative for the City of Las Vegas and that these records were maintained by him on behalf of the City of North Las Vegas. Eickelberg Deposition Rough Draft at 51-60 and 70-73. The documents produced were the exact same documents as produced by both parties in discovery. Mr. Eickelberg testified he received the documents in question and maintained the documents for the City of North Las Vegas.

The failure to admit Exhibits 258 and 259 materially prejudiced Appellant and the Court should order that a new trial be held in this matter regarding all issues as a result. The exhibits directly impact the testimony of the various witnesses, and provide direct credible evidence of the breach of contract by Respondent, thereby supporting Appellant's counterclaim. The exhibits support and buttress the refusal of Appellant to pay for the hoppers and structural supports as these documents demonstrate the failures of these goods, and provide direct evidence of the breach of contract and the failure by Respondent to fulfill its contractual obligations regarding the manufacture and production of the structural supports. The failure to allow the admission of these exhibits, that are clearly business records falling within the exceptions to the hearsay rules, was a material mistake that requires a new trial.

Rule 803 of the Minnesota Rules of Evidence sets forth various exceptions to the hearsay rule. The guiding principle underlying Rule 803 is that some hearsay is deemed to be so trustworthy that it is admissible even though the declarant may be unavailable to testify.

A record of regularly conducted business activity is one such exception to the hearsay exclusionary rules. Under Rule 803 (6), "[a] memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the ordinary course of a regularly conducted business activity, and if it was the regular practice of that business activity to make such the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness,

unless the source of information or the method or circumstances of preparation indicate a lack of trustworthiness," is admissible. Minn. R. Evid. 803 (6).

The evidence and testimony adduced at trial demonstrated that these exhibits were records, reports, and data compilations from an individual with knowledge and these documents were a part of the ordinary course of a regularly conducted business activity. The exhibits fell squarely within the hearsay exception and should have been admitted. Such admission is consistent with Rule 803 and with Minnesota case law.

In National Tea Company, Inc., v. Tyler Refrigeration Company, Inc., 339 N.W.2d 59 (Minn. 1983), the Supreme Court of Minnesota found a report of the non-party Underwriters' Laboratories to be admissible under Rule 803 (6) of the Minnesota Rules of Evidence. The Court stated that Rule 803 (6) sets forth three requirements for evidence to qualify under this exception:

First, that the evidence was kept in the course of a regularly conducted business activity. Second, that it was the regular practice of that business activity to make the memorandum, report, or data compilation. Finally, that the foundation for the evidence is shown by the custodian or other qualified witness.

Id., at 61.

The sole issue addressed in National Tea was the admissibility of a business record maintained by a party which was previously prepared by Underwriters' Laboratories indicating that the design of a refrigeration unit was approved by the testing agency. No testimony was offered by a representative of Underwriters' Laboratories, the author of the report. Instead, the foundation was laid by a former employee of the party.

Despite the plaintiff's objection that the business record exception applies only to the business that made the record, both the trial court and the Supreme Court found that the exception addressed in Rule 803 (6) was applicable and the report was admitted.

In the case at hand, the District Court, contrary to established precedence, ruled that exhibits 258 and 259, prepared by the representative of the City of North Las Vegas, as well as Las Vegas Material Testing, Inc., were inadmissible because the author of each report was not present for trial testimony purposes.

Foundation for the various reports was laid by Mr. Eickelberg, the recipient of each report. Not only was Mr. Eickelberg the recipient of each exhibit, he was also very familiar with the contents contained within each exhibit having had multiple conversations with the report authors throughout the course of the construction project and maintained the reports on behalf of the City of North Las Vegas.

There can be no dispute, and in fact the District Court agreed, that the reports were business records of the City of North Las Vegas. Where Appellant and the District Court differed related to the issue as to whether a representative of CNLV Constructors II and Las Vegas Material Testing was required to establish that the reports were likewise business records of the authoring companies. This despite the fact that "nested hearsay" is not a basis to restrict the use of a business record in situations, as here, where expert witnesses routinely rely upon the record. Northland Insurance Co. v. Ace Doran Hauling & Rigging Co., 415 N.W.2d 33, 37 (Minn. App. 1987).

In National Tea, the Court stated the phrase "other qualified witness" in Rule 803 (6) "should be given the broadest interpretation." National Tea, 339 N.W.2d at 61. The

Court further held that the witness need not even be an employee of the drafter of the report, memorandum or data compilation. Id.

Citing United States v. Pfeiffer, 539 F.2d 668 (8<sup>th</sup> Cir. 1976), the National Tea Court provided:

The Eighth Circuit Court of Appeals has held that it is not necessary under the new rules that the declarant be present if the knowledge of the custodian of the record demonstrates that a document has been prepared and kept in the course of a regularly conducted business activity.

National Tea, 339 N.W.2d at 61.

The National Tea Court went on to note the Minnesota Supreme Court has “also held that one business entity may submit the records of another business entity to establish a proposition at trial.” Id. at 61-62. In concluding, the Court held as follows:

We hold that it is not necessary that the person preparing reports such as the UL listings to testify as to their contents. Rule 803 (6) allows not only the custodian of a business record to establish the foundation for its admissibility, but also any “other qualified witness.” ...

In exercising its discretion a trial court could be guided by the following principles:

1. Was the opinion prepared for presentation in the case being tried? If so, then the expert should testify....
2. Was the report made by an independent agency or a hired agency? Here there was an independent agency, which lends more credibility to the report.
3. When was the report made? Was it an existing report, as in this case, or was it prepared in contemplation of the litigation?

4. The nature of the organization preparing the report.

Id. at 61. As was argued before the District Court, the National Tea principles were met in this matter and the documents should have been admitted into evidence.

Exhibits 258 and 259 were clearly not prepared for presentation in the case being tried. To the contrary, the reports were part of the construction process identifying problems with the materials supplied in an effort to notify the supplier of the deficiencies and to enable the supplier to repair or replace the rejected material.

Second, both CNLV Constructors and Las Vegas Material Testing were independent agencies. CNLV Constructors was the construction representative of the project owner and Las Vegas Material Testing was an independent agency hired by the owner to examine the materials manufactured and fabricated by Respondent.

Third, each of the reports were made at or near the date in which the materials were inspected, and as was stated above, were not made in contemplation of litigation, but rather, to identify problems detected by the owner during the construction process so that the necessary repairs could be effectuated.

Finally, with regard to the nature of the organization preparing the report, CNLV Constructors is the consortium of Newcom and CH2M Hill. CH2M Hill is a global leader in consulting and design with over 25,000 employees designing and building projects worldwide. The consortium formed to run this construction project, CNLV Constructors, has experienced personnel that clearly are reputable and are of international renown. Las Vegas Material Testing is AASHTO accredited and specializes in the

testing of construction materials. The nature of both of these organizations demonstrates the underlying trustworthiness of the testing. These two entities have their respective credibility and reputation at stake with regard to this specific massive public project. Given their respective backgrounds and fundamental business, the fourth factor supports the admission of the tests.

In National Tea, the Minnesota Supreme Court noted that even a newspaper article from 60 years earlier would be admissible because there were circumstantial guarantees of trustworthiness of the evidence. As that Court noted, “if they are worth their salt, evidentiary rules are to aid the search for truth.” Id. at 62, Fn 1.

The Minnesota Court of Appeals was presented with a similar situation in Kohn v. La Manufacutre Francaise Des Pneumatiques, 476 N.W.2d 184 (Minn.App. 1991). In Kohn, the Court was presented with mismatched tire tests conducted by the University of Michigan Transportation Research Institute, but the defendant argued that the test results were inherently unreliable. In part the defendant argued unreliability based upon the fact that the tests were commissioned by a tire rim company. The court found that there was no showing of bias and that there was no apparent reason for an influence over test results. There as here, UMTRI was conducting tests and preparing reports directly related to its organization function.

Here, as in Kohn, there was no showing of an unreliability of the test results. The reports were conducted in the ordinary course of business, and there is no showing of bias or unreliability. In fact the evidence demonstrated that these exhibits were accurate and

reliable based upon observations and tests performed directly by the individuals producing the documents.

The District Court, however, attempted to distinguish National Tea by ruling that Las Vegas Material Testing was not independent because they were hired to perform the tests by the City of North Las Vegas, or as the court put it "somebody who has an interest in the outcome of the dispute." Transcript at 1040. This despite the fact that the City has absolutely nothing to do with the underlying case other than an employee of the City being called by Appellant as a fact witness. The District Court further stated that the exhibits were prepared in contemplation of litigation because "business people know that if there is a rejection of product, there is a potential for litigation." Id.

What the District Court failed to understand is that all manufactured products of any type are reviewed to determine whether they meet the specs for their production, and this is not done for the purposes of litigation. In fact, Mr. Eickelberg testified that when he and Dillon Barclay visually inspected the welds his intent was "to say okay is there another way that we can...we can figure out a way to make this acceptable and get this piece of this project moving forward in some way, shape or form." Eickelberg Deposition Rough Draft at 148. Mr. Eickelberg further stated that failing every weld, as Mr. Barclay would do, was "pretty strict" so he authorized further testing under American Welding Society's D1.1, Structural Welding Code – Steel in an effort to get the welds approved. Id. at 148-150. Clearly, Mr. Eickelberg was doing anything he could to get Respondent's product approved. As such if the testing was indeed biased it was actually in favor of Respondent.

Nonetheless, the District Court's rulings kept these exhibits from the jury, and the rulings essentially have the effect of overruling National Tea. There is simply no situation where a testing expert would be hired by a party with absolutely no connection to specific items to be tested and with no potential of being involved in litigation if said testing fails. Accordingly, non general items, such as welds, could never be tested in any manner and this obvious misapplication of National Tea must be reversed.

The District Court also attempted to distinguish Kohn by claiming it "very clearly says that a qualified witness for the producing agency that can testify that the record was kept in the normal course of their regularly conducted business, and it was a regular business practice to produce that record, must testify to the foundation of that record." Transcript at 1041. This is incorrect. The testing in Kohn was introduced by the plaintiff's expert witness who performed a follow up study which was compared to the study at issue. The witness testified he reviewed the initial testing, he was familiar with the results, familiar with how the tests were conducted, and that he kept test results in the regular course of his business. This was sufficient foundation. Kohn at 188-189. Similarly, Mr. Eickelberg testified in this matter that he reviewed the testing, in fact he was present for some of it, was familiar with the results, and the results are kept in the normal course of his business. Accordingly, he provided proper foundation for the exhibits at issue.

Additionally, the exhibits should have been properly admitted under the public records exception to the hearsay rule. Under Rule 803 (8), Minnesota Rules of Evidence, public records and reports should be admitted unless circumstances indicate a lack of

trustworthiness. Here, the reports and records are maintained as a part of the ongoing file for the City of Las Vegas and are directly available to the public. Mr. Eickelberg is the individual who currently maintains these records for the City of North Las Vegas. There is no evidence of any lack of trustworthiness as to the documents and they should have been admitted.

Finally, the District Court refused to allow Appellant to offer the full extent of the cross examination elicited by Respondent. Under the rules, Appellant had the absolute right to offer the entirety of the testimony as set forth in the transcript. Minn. R. Civ. P. 32.01 (d). Further, the court improperly limited specific testimony that was elicited by Respondent. Having elicited certain testimony for trial purposes, Respondent could not set forth new objections that should have been raised by him when he elicited the testimony originally.

In particular, the refusal of the court to allow Mr. Eickelberg to testify about the information told him by Dillon Barkley in response to a question asked by counsel for Respondent was an error that requires a new trial. Pursuant to that question and answer, Mr. Eickelberg set forth particular facts demonstrating the failures of Respondent and its breach of contract. Eickelberg Deposition Rough Draft at 151-156. These facts included:

- 1) Mr. Eickelberg is trained to visually identify bad welds;
- 2) Mr. Eickelberg's practice as construction manager is to have experts review welds that appear poorly done;

3) The City of North Las Vegas' expert found that all 80 welds by Respondent failed visual inspection; and

4) If Respondent had provided all required documentation on its welds that may have satisfied the City.

Id. This specific testimony was critical to Appellant's case, and the failure to allow this testimony to be heard requires the court to order a new trial.

\* \* \* \* \*

### CONCLUSION

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

Appellant additionally seeks a new trial based upon the materially prejudicial rulings of the District Court regarding the refusal to allow the taking of depositions of the unavailable, out-of-state witnesses Jay Brown and Manuel Israel to preserve testimony for

trial, and by its refusal to admit the full testimony of Kenneth Eickelberg and exhibits offered by the Appellant through this witness.

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

Respectfully submitted:

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