TABLE OF CONTENTS

Page(s)

Appendix A

United States Court of Appeals
For the Eighth Circuit

No. 24-2333

Selective Insurance Company of America,

Plaintiff

v.

Heritage Construction Companies, LLC;
JAC & Sons Investments; Andrew P. Christensen;
Jennifer A. Christensen,

*Third Party Plaintiff*s - *Appellee*s

v.

Philip Keithahn; Minnesota Medical University, LLC
Third Party Defendants - Appellants John Does, * through 10,

Third Party Defendant

Appeal from United States District Court
for the District of Minnesota

Submitted: October 22, 2025

Filed: February 2, 2026

Before BENTON, KELLY, and GRASZ, Circuit Judges.

BENTON, Circuit Judge.

Heritage Construction Companies, LLC; JAC & Sons Investments; Andrew P. Christensen; and Jennifer A. Christensen (collectively, the "Heritage Plaintiffs") sued Philip Keithahn and Minnesota Medical University, LLC (MMU), alleging, as relevant, breach of contract, indemnification, negligent misrepresentation, fraudulent misrepresentation, and fraud by omission. The jury found defendants liable on all claims except fraudulent misrepresentation. The district court[1] denied motions for judgment as a matter of law or alternatively, for a new trial. Defendants appeal. Having jurisdiction under 28 U.S.C. § 1291, this court affirms.

I.

In 2017, Keithahn formed MMU hoping to establish an osteopathic medical school in Gaylord, Minnesota. In November 2018, Heritage was hired as the general contractor for the school. Andrew Harvala, Heritage's project manager, signed the construction contract.

MMU planned to finance the project primarily

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[1] The Honorable John R. Tunheim, United States District Judge for the District of Minnesota.

by issuing bonds. Part of the financing—the "pre-condition" amount of $9,025,000.00—was immediately available after closing. The rest of the bonds were contingent on MMU's progress toward pre-accreditation.

In January 2019, Andrew P. Christensen, the owner of Heritage, called Keithahn to confirm that all funds necessary would be available at the closing of the bonds. Keithahn told him that the project would be funded. In February, Keithahn told Harvala that $7,000,000.00 would be available to fund construction after closing.

On April 10, the Heritage Plaintiffs learned that the bonds closed. The pre-condition amount ($9,025,000.00) was reduced by the Costs of Issuance ($4,652,539.50) and draw requests by Keithahn ($3,108,458.56). This left $1,264,001.94 to pay MMU's construction and operational costs until it obtained pre-accreditation.

On April 15, construction began under Keithahn's direction. Heritage was paid through the end of April, exhausting the pre-condition amount. MMU had no remaining funds to pay Heritage for its continuing construction.

On April 26, MMU's pre-accreditation application was denied. Keithahn contended that MMU learned only in May that, without pre-accreditation, it could not pay for construction. The jury believed that Keithahn knew, when representing the availability of financing to Harvala and Christensen, that MMU would not have adequate funding without pre-accreditation.

On June 21, an MMU representative told Harvala that MMU had no money. Heritage suspended construction, terminated its contract with MMU, and could not pay its subcontractors. After being sued for indemnification by Selective Insurance Company of America, the Heritage Plaintiffs filed a third-party complaint.

The defendants moved for summary judgment, which was denied. Trial proceeded on claims for breach of contract, indemnification, negligent misrepresentation, fraudulent misrepresentation, and fraud by omission. MMU admitted liability for breach of contract and damages totaling $5,863,685.93.

Before trial, by an *in limine* order, the Heritage Plaintiffs were prohibited from referencing Keithahn's ownership interest in a bank holding company and from emphasizing his Harvard M.B.A. At trial, the Heritage Plaintiffs referenced MMU's inability to pay a judgment, Keithahn's majority share in the bank holding company, and his Harvard M.B.A.

At the close of the evidence, the defendants requested a jury instruction that fraud claims cannot be based on "future assurances." The district court denied the request.

Before the verdict, the defendants moved for judgment as a matter of law, which the district court denied. The jury found the defendants liable on all claims except fraudulent misrepresentation.

After the verdict, the defendants moved for judgment as a matter of law or alternatively, for a new trial. They argued that Keithahn's statements, before the pre-accreditation meeting (that the project would be funded and that $7,000,000.00 would be available after closing), do not amount to a negligent misrepresentation claim. They also argued that a new trial was warranted due to an error in the jury instructions, violations of the *in limine* ruling, the admission of improper statements, and improper impeachment. The district court denied the motions. The defendants appeal.

II.

"We review the denial of a motion for judgment as a matter of law *de novo." **Sanders v. Union Pacific Railroad Co.***, 108 F.4th 1055, 1060 (8th Cir. 2024). "Judgment as a matter of law is appropriate only when all of the evidence points one way and is susceptible of no reasonable inference sustaining [the Heritage Plaintiffs'] position." ***Children's Broad. Corp. v. Walt Disney Co.***, 357 F.3d 860, 863 (8th Cir. 2004).

Under Minnesota law, negligent misrepresentation constitutes fraud. ***Hardin Cnty. Sav. Bank v. Hous. & Redevelopment Auth. of City of Brainerd***, 821 N.W.2d 184, 191 (Minn. 2012). Fraud requires, among other things, proof of "a false representation by a party of a past or existing material fact susceptible of knowledge." ***Specialized Tours, Inc. v. Hagen***, 392 N.W.2d 520, 532 (Minn.

1986). *See also* ***Zutz v. Case Corp.***, 422 F.3d 764, 770–71 (8th Cir. 2005) (same). A representation about a future act or event, however, is merely a prediction, amounts to conjecture, and is not fraud. *See* ***Cady v. Bush***, 166 N.W.2d 358, 361 (Minn. 1969). *See also* ***Schoenhals v. Mains,*** 504 N.W.2d 233, 236 (Minn. Ct. App. 1993) (same).

Invoking *Freitas v. Wells Fargo Home Mortg., Inc.*, 703 F.3d 436 (8th Cir. 2013) the defendants claim Keithahn's representations to Christenson—that "upon closing of the loan, the project would be funded"—and to Harvala—that "there would be $7,000,000.00 of money for construction after the close"—were statements of future assurances, not past or present facts.

In *Freitas*, the alleged misrepresentations were Wells Fargo employees' statements that the plaintiffs' "would qualify for a modification and their mortgage would be modified upon receipt of requested documentation." ***Freitas***, 703 F.3d at 438. This court ruled this was "akin to representations as to expectations and predictions for the future," reflecting predictions of potential outcomes, and did not support a misrepresentation claim. ***Id.*** at 439.

This is not a *Freitas* case. Keithahn's representations, while tied to a future event, related to the existence of committed financing. Unlike in *Freitas*, where the representations were conditioned on future discretionary actions, here the conditional language, addressing only the timing of disbursement, did not convert the statements into conjectural promises. Representations of present facts susceptible of knowledge at that time, even when tied to the occurrence of a future event, are actionable under a negligent misrepresentation claim. *See*, *e.g.*, ***Meecorp Cap. Markets, LLC v. PSC of Two Harbors, LLC***, 776 F.3d 557, 563–64 (8th Cir. 2015) (holding that a misrepresentation of present ownership or pledge rights, even when included in a document predicting property values, is actionable as a representation of present fact); ***Minnesota Forest Prods., Inc. v. Ligna Mach., Inc.***, 17 F. Supp. 2d 892, 909–10 (D. Minn. 1998) (holding that a misrepresentation about a product's capabilities, though implicating future performance, is a representation of present fact as it concerns the product's inherent qualities); ***Ramthun v. Bryan Career Coll., Inc.***, 2013 WL 11816858, at *4 (W.D. Ark. May 10, 2013) (holding that a representation that college credits would transfer to other schools is a representation of present fact, as transferability was knowable at the time from the school's accreditation status).

Relying on *Florenzano v. Olson*, 387 N.W.2d 168 (Minn. 1986), defendants argue that Keithahn's misrepresentations are not actionable because he honestly believed them to be true. In *Florenzano*, the Minnesota Supreme Court recognized that an honest belief may, in some circumstances, negate the scienter required for fraudulent misrepresentation. ***Florenzano***, 387 N.W.2d at 173–74. That court cautioned that "a claim to an honest belief that what is false is true is not automatic protection from liability in fraud, if that claim is, under the circumstances, completely improbable." ***Id.*** at 174. Most importantly, *Florenzano* distinguished fraudulent and negligent misrepresentation. As for negligent misrepresentation, the court explained:

> A misrepresentation is made negligently when the misrepresenter has not discovered or communicated certain information that the ordinary person in his or her position would have discovered or communicated. Proof of the subjective state of the misrepresenter's mind, whether by direct evidence or by inference, is not needed to prove negligence. Negligence is proved by measuring one's conduct against an objective standard of reasonable care or competence.

Id. Because negligent misrepresentation has an objective standard, not a subjective inquiry into intent, a defendant's honest belief is not a defense to negligent misrepresentation.

> The district court did not err in denying judgment as a matter of law.[2]

III.

This court "review[s] the denial of a motion for new trial for abuse of discretion, bearing in mind that such motions are generally disfavored and will be granted only where a serious miscarriage of justice may have occurred." ***Keller Farms, Inc. v. McGarity Flying Serv., LLC***, 944 F.3d 975, 984 (8th Cir. 2019). A miscarriage of justice does not occur unless an error is prejudicial. *See* ***Russell v. Whirlpool Corp.***, 702 F.3d 450, 460 (8th Cir. 2012). Reviewing the

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[2] The defendants' arguments about indemnity are thus moot and need not be considered by this court.

defendants' motion, this court considers the alleged error in the jury instructions, potential violations of the *in limine* order, statements made during open and closing arguments, and the use of deposition testimony for impeachment.

A.

Reviewing a district court's ruling on jury instructions, this court must determine "whether the instructions, taken as a whole and viewed in light of the evidence and applicable law, fairly and adequately submitted the issues in the case to the jury." ***Kansas City Power & Light Co. v. Ford Motor Credit Co.***, 995 F.2d 1422, 1430 (8th Cir. 1993). "The key question is whether a new trial should have been granted to avoid a miscarriage of justice." ***Belk v. City of Eldon***, 228 F.3d 872, 878 (8th Cir. 2000).

Keithahn requested an instruction that "a future assurance cannot constitute a misrepresentation"—which the district court acknowledged as "legally correct." He claims he was entitled to the instruction because it was legally accurate and supported by the evidence, and that without it, the jury was inadequately informed about negligent and fraudulent misrepresentation. *See* ***Lincoln Composites, Inc. v. Firetrace USA, LLC***, 825 F.3d 453, 463 (8th Cir. 2016) ("A party is entitled to a jury instruction on its theory of the case if the instruction is both legally accurate and supported by the evidence.").

The district court instructed the jury using the Minnesota Jury Instruction Guides for negligent and fraudulent misrepresentation. *See* 4 Minn. Dist.

Judges Ass'n, **Minnesota Practice-Jury Instruction Guides**, Civil, CIVJIG 57.10, 57.20 (6th ed. 2023). As for the instruction on negligent misrepresentation—the only instruction at issue—it included all necessary elements: Heritage had to prove that MMU and/or Keithahn supplied false information in the course of business, failed to exercise reasonable care in providing it, that Heritage justifiably relied on the information, and suffered financial harm as a result.

Although the negligent misrepresentation instruction omitted any "future assurances" language, it fairly and adequately stated the law. *See* ***State v. Jones***, 556 N.W.2d 903, 915 (Minn. 1996) (Tomljanovich, J., concurring specially) ("The guides are prepared by experienced trial judges to assist judges in fashioning instructions that are a correct statement of the law."); ***State v. Jedlicka***, 1998 WL 846518, at *3 (Minn. Ct. App. Dec. 8, 1998) ("The instructions in the jury instruction guide are presumptively valid."), *citing* ***Jones***, 556 N.W.2d at 915; ***State v. Pilcher***, 472 N.W.2d 327, 337 (Minn. 1991) (recommending use of the jury instruction guides for direction on instructions).

Most importantly, the district court did not order separate damages for negligent misrepresentation and fraud by omission, instead finding them "duplicative," because both claims compensated the same injury and did not support additional recovery. No party has objected to this conclusion. Even if Keithahn had a new trial on negligent misrepresentation, the amount of damages would not change. *See* ***Morrill v. Becton, Dickinson & Co.***, 747 F.2d 1217, 1224 (8th Cir. 1984) (holding that duplicative awards for contract and fraud claims may be adjusted without retrial). No miscarriage of justice occurred.

The defendants are not entitled to a new trial based on their claimed jury instruction error.

B.

"In order for a violation of an order granting an in limine motion to serve as a basis for a new trial, the order must be specific in its prohibition and the violation must be clear." ***Russell***, 702 F.3d at 460. "[A] new trial may follow only where the violation has prejudiced the parties or denied them a fair trial." ***Pullman v. Land O'Lakes, Inc.***, 262 F.3d 759, 762 (8th Cir. 2001). A violation is prejudicial where it "in all probability produced some effect on the jury's verdict and is harmful to the substantial rights of the party assigning it." ***Id***.

In its *in limine* order, the district court addressed two evidentiary issues: it instructed the Heritage Plaintiffs not to "dwell" on Keithahn's Harvard M.B.A. (although it denied the defendants' motion to exclude all references to it); and the court prohibited testimony that Keithahn was a "majority shareholder" in Progressive Growth Corporation.

The defendants believe that the Heritage Plaintiffs violated the court's order by mentioning Keithahn's Harvard M.B.A. during both cross-examination and closing argument. While the district court instructed the parties not to dwell on that fact, it did not specifically limit the number of possible references to the M.B.A. over the five-day trial. The court concluded that the references were not a "clear violation." Without a specific prohibition, there can be no clear violation, and the references cannot serve as a basis for a new trial. *See* ***Russell***, 702 F.3d at 460.

The defendants argue that the Heritage Plaintiffs also violated that order during the following exchange—which occurred immediately after the district court reiterated its ruling at sidebar to exclude testimony about Keithan's ownership interest in a bank holding company, Progressive Growth Corporation:

> Q. And, Mr. Keithahn, we've heard some discussion about Progressive Growth Corporation. That company, are you the majority shareholder in that company?
>
> A. Yes, I am.

The district court acknowledged that the question violated the order, but ruled that a single passing violation was not prejudicial. *See* ***Pullman***, 262 F.3d at 762–63 (holding that a single reference to insurance, though violating an *in limine* order, did not prejudice the objecting party because it was an isolated comment, not emphasized to the jury, and never mentioned again); ***Res. Converting, L.L.C. v. Dunne***, 2019 WL 13169889, at *24 (S.D. Iowa Sept. 3, 2019) (holding that a violation of an *in limine* order about evidence of a party's wealth did not warrant a new trial where "counsel moved away from the comment without highlighting or dwelling on it or otherwise reinforcing it, and the comment was a single line in a trial transcript over 1300 pages"), *aff'd on other grounds*, 991 F.3d 931 (8th Cir. 2021). Here, the question was asked in isolation, with later questions focusing on Keithahn's background and banking experience, and never mentioned again. The district court did not abuse its discretion.

As the district court noted, the mixed verdict on claims based on the same evidence demonstrates that the jury was not influenced by the questioned conduct, but instead carefully considered the evidence and reached a well-reasoned decision. *See* ***Mahaska Bottling Co., Inc. v. Bottling Grp., LLC***, 6 F.4th 828, 830 (8th Cir. 2021) (stating that when the jury awarded damages to both sides, in all likelihood "the jurors considered all of the evidence and were not moved by prejudice to punish either party based on conduct during trial").

Because any deviation from the *in limine* order did not amount in prejudice or deny a fair trial, the defendants are not entitled to a new trial.

C.

"[W]hen a new trial motion is based on improper [opening statements or] closing arguments, a new trial should be granted only if the statements are plainly unwarranted and clearly injurious and cause prejudice to the opposing party and unfairly influence a jury's verdict." ***Harrison v. Purdy Bros. Trucking Co.***, 312 F.3d 346, 351 (8th Cir. 2002). *See also* ***Johnson v. Bowers***, 884 F.2d 1053, 1055 (8th Cir. 1989) (same).

Invoking *Union Elec. Light & Power Co. v. Snyder Est. Co.*, 65 F.2d 297 (8th Cir. 1933), and *Halladay v. Verschoor*, 381 F.2d 100 (8th Cir. 1967), Keithahn argues that he is entitled to a new trial because Heritage referenced MMU's poor financial condition in both its opening and closing arguments—stating that MMU was "bankrupt," that Heritage was left "hanging out to dry," that the suit was a "worthless gesture," and that a judgment against MMU "was not worth the paper it's written on because they have no money." *See* ***Union Elec.***, 65 F.2d at 303 ("To permit evidence of the wealth of a party litigant, except where position or wealth is necessarily involved in determining the damages sustained, is prejudicial error."); ***Halladay***, 381 F.2d at 112 (recognizing the general rule barring evidence of a plaintiff's insurance or indemnity because it distorts the jury's assessment of damages and constitutes reversible prejudice unless independently material or cured by instruction). He claims this evidence was prejudicial because it was both irrelevant and improper. *See* ***Griffin v. Hilke***, 804 F.2d 1052, 1057 (8th Cir. 1986) ("[T]his court has held that references in closing argument to the wealth of defendant's parent corporation could constitute prejudicial argument."); *Cf.* ***Gearhart v. Uniden Corp. of Am.***, 781 F.2d 147, 153 (8th Cir. 1986) (instructing the district court on retrial to prohibit improper comments in closing argument).

However, the district court correctly found that, even if the Heritage Plaintiffs' statements were "inflammatory" or "problematic," they did not warrant a new trial. This case centered on Keithahn's misrepresentations about MMU's financing for the construction project, its contingencies, and his failure to disclose that MMU did not have the funds to pay for Heritage's work. Keithahn himself testified that MMU was not a success, that he and his wife lost their investment, that MMU failed to secure additional funding after losing its bond financing, that the project collapsed for lack of accessible funds and incurred significant losses, and that MMU had no resources or ongoing operations to pay the Heritage Plaintiffs.

The district court did not abuse its discretion in denying a new trial: Statements that merely restate facts elicited at trial from properly admitted evidence are neither prejudicial nor injurious.

To the extent the statements were prejudicial, the district court remedied any prejudice by instructing the jury—both before opening statements and after closing arguments—that counsel's remarks are not evidence. ***Billingsley v. City of Omaha***, 277 F.3d 990, 997 (8th Cir. 2002) ("Moreover, the district court admonished the jury, at the beginning of trial and prior to the closing arguments, that statements made by the attorneys are not evidence. The admonition remedied any prejudice incurred by Billingsley.").

D.

Evidentiary rulings warrant a new trial only if "the errors misled the jury or had a probable effect on a jury's verdict." ***Reach Companies, LLC v. Newsert, LLC***, 94 F.4th 712, 716 (8th Cir. 2024).

Keithahn argues that the district court should have granted his motion for a new trial because he was improperly impeached. Specifically, he asserts that the Heritage Plaintiffs used his deposition testimony not to directly contradict prior statements, but to emphasize his lack of recollection about facts he later recalled at trial.

However, parties are properly impeached with deposition testimony when they previously testified to a lack of recollection, but at trial claim recollection of the same facts. *See*, *e.g.*, ***Jenkins v. Anderson***, 447 U.S. 231, 239 (1980) ("Common law traditionally has allowed witnesses to be impeached by their previous failure to state a fact in circumstances in which that fact naturally would have been asserted."); ***United States v. Rogers***, 549 F.2d 490, 496 (8th Cir. 1976) (affirming that a witness who previously recalled information could be impeached when later claiming a lack of recollection on the same subject); ***United States v. Moore***, 149 F.3d 773, 781 (8th Cir. 1998) ("But a prior statement need not be diametrically opposite to be inconsistent, and the trial judge has considerable discretion to determine when a statement is inconsistent with the witness's trial testimony.").

The Heritage Plaintiffs properly used Keithahn's deposition testimony for impeachment. Because it neither misled the jury nor affected its verdict, the district court did not err in denying his motion for a new trial.

IV.

The defendants urge this court to conclude that, even if none of their arguments independently warrant a new trial, their cumulative effect does. A series of errors can require a new trial if their cumulative effect impacted a party's "substantial rights" or "affected the judgment." ***Krekelberg v. City of Minneapolis***, 991 F.3d 949, 959–60 (8th Cir. 2021). Although the Heritage Plaintiffs violated some of the district court's *in limine* order and made some inflammatory remarks about MMU's financial condition—even taken together—these violations did not affect the defendants' substantial rights or the jury's verdict.

The district court did not abuse its discretion in denying a new trial.

* * * * * * *

The judgment is affirmed.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

SELECTIVE INSURANCE COMPANY OF AMERICA,

Plaintiff,

v.

HERITAGE CONSTRUCTION COMPANIES, LLC,
JAC & SONS INVESTMENTS,
ANDREW P. CHRISTENSEN, and
JENNIFER A. CHRISTENSEN,

Defendants/Third-Party Plaintiffs,

v.

PHILIP KEITHAHN and
MINNESOTA MEDICAL UNIVERSITY, LLC,

Third-Party Defendants.

Civil No. 19-3174 (JRT/JFD)

ORDER DENYING THIRD-PARTY DEFENDANTS' POST-TRIAL MOTION FOR JUDGMENT AS A MATTER OR LAW OR A NEW TRIAL

Alexander Brian Athmann, **FABYANSKE WESTRA HART & THOMSON, PA**, 333 South Seventh Street, Suite 2600, Minneapolis, MN 55402; Kyle E. Hart and

Richard G. Jensen, **FABYANSKE WESTRA HART & THOMSON, PA**, 80 South Eighth Street, Suite 1900, Minneapolis, MN 55420 for Defendants/Third-Party Plaintiffs.

Alexander David Klein and J. Scott Andresen, **BRADFORD ANDRESEN NORRIE & CAMAROTTO**, 3600 American Boulevard West, Suite 670, Bloomington, MN 55431, for Third-Party Defendants.

This action, which stems from a failed construction project, culminated in a trial between Third-Party Plaintiffs Heritage Construction Companies, LLC ("Heritage Construction"), JAC & Sons Investments, Andrew P. Christensen, and Jennifer A. Christensen (collectively the "Heritage Parties") and Third-Party Defendants Minnesota Medical University, LLC ("MMU") and Philip Keithahn. The jury returned a verdict of liability and awarded damages on the breach of contract, negligent misrepresentation, fraud by omission, and indemnification claims. MMU and Keithahn filed a renewed motion for judgment as a matter of law and alternatively, for a new trial. Because the jury reasonably found liability on the negligent misrepresentation claim, the Court will deny MMU and Keithahn's renewed motion for judgment as a matter of law. Additionally, because any alleged errors did not influence the jury such that it would be a miscarriage of justice to allow the verdict to stand, the Court will not grant a new trial. Finally, the Court will deny MMU and Keithahn's motion for remittitur of $300,000 of the breach of contract damages.

BACKGROUND

The facts and procedural history of this litigation have been addressed extensively in prior orders, so the Court will only provide a brief summary below. *See Selective Ins. Co. of Am. v. Heritage Constr. Cos., LLC*, No. 19-3174, 2022 WL 4096084, *1–4 (D. Minn. Sept. 7, 2022). The original parties, Selective Insurance and the Heritage Parties resolved their disputes in a confidential settlement. *Id.* at *4. The Heritage Parties then filed a third-party complaint asserting various contract and tort claims against MMU and Philip Keithahn. *Id.*; (Answer & Am. Third-Party Compl. ¶¶ 30–63, Oct. 5, 2020, Docket No. 36.) The Heritage Parties' claims for breach of contract, fraudulent misrepresentation, negligent misrepresentation, fraud by omission, and indemnification proceeded to trial. *Selective*, 2022 WL 4096084, at *11. The jury found liability and awarded damages on the breach of contract, negligent misrepresentation, fraud by omission, and indemnification claims. (Jury Verdict, Dec. 19, 2023, Docket No. 169.) The Heritage Parties' post-trial motions addressing damages and interest were resolved in the Court's prior order. *Selective Ins. Co. of Am. v. Heritage Constr. Cos., LLC*, No. 19-3174, 2024 WL 1886124 (D. Minn. Apr. 30, 2024).

MMU and Keithahn filed a motion for judgment as a matter of law and alternatively for a new trial. (Third Party Mot. J. Matter of Law, Jan. 16, 2024, Docket No. 184.) MMU and Keithahn seek judgment as a matter of law on Heritage Construction's negligent misrepresentation claim for two reasons: (1) that the statements were true at the time they were made or (2) concerned future events. (Third-Party Defs.' Mem. Supp. Mot. J. Matter of Law at 4, Feb. 13, 2023, Docket No. 195.) MMU and Keithahn seek a new trial on liability and damages for negligent misrepresentation, fraud by omission, and indemnification due to alleged errors in jury instructions, motions in limine rulings, and testimony. (*Id.* at 9–22.) MMU and Keithahn also seek a new trial on fraud by omission damages because such damages are not supported by the evidence and remittitur of the breach of contract damages because Heritage Construction failed to formally request $300,000 of its alleged damages. (*Id.* at 22–28.)

DISCUSSION

I. JUDGMENT AS A MATTER OF LAW

Under Federal Rule of Civil Procedure 50, the Court may resolve an issue as a matter of law if "a party has been fully heard on an issue during a jury trial" and "a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." "A motion for judgment as a matter of law should be granted when all the evidence points one way and is susceptible of no reasonable inferences sustaining the position of the nonmoving party." *Hunt ex rel. Hunt v. Lincoln Cnty. Mem'l Hosp.*, 317 F.3d 891, 893 (8th Cir. 2003) (quotation omitted).

If the Court does not grant a motion for judgment as a matter of law made during trial pursuant to Federal Rule of Civil Procedure 50(a), the moving party may file a renewed motion regarding legal questions following the verdict and entry of judgment pursuant to Rule 50(b). In deciding a renewed motion, the Court considers the evidence in the light most favorable to the prevailing party and assumes the jury resolved conflicts in the evidence in their favor. *Minneapolis Cmty. Dev. Agency v. Lake Calhoun Assocs.*, 928 F.2d 299, 301 (8th Cir. 1991). Because a Rule 50(b) motion constitutes a renewal of a Rule 50(a) motion made at the close of the evidence, a Rule 50(b) motion is limited to the issues raised in the Rule 50(a) motion. *Hinz v. Neuroscience, Inc.*, 538 F.3d 979, 983–84 (8th Cir. 2008).

MMU and Keithahn moved for judgment as a matter of law after the Heritage Parties had presented their case. MMU and Keithahn renewed their motion for judgment as a matter of law with respect to the negligent misrepresentation claim on the ground that the alleged representations were either true at the time they were made or only related to future assurances, not past or present facts. Additionally, MMU and Keithahn argue that if their motion is granted as to the negligent misrepresentation claim, the indemnification claim must also fail as a matter of law.

The Court denied MMU and Keithahn's Rule 50(a) motion. First, the Court found that even if the statements were true, that the bond financing had closed, there still could be a misrepresentation that once the bond financing closed, the construction funding would be available. The jury needed to resolve if that was a sufficient misrepresentation.

The Court also found, as it did at summary judgment, that the representations were not future assurances but were material present facts because they concerned occurrences if and when the bond financing closed and were not ambiguous or unhinged future promises. The material present fact was that after the bond financing closed, there would be no contingencies on the money available for construction.

The Court finds no reason to alter its decision on MMU and Keithahn's renewed motion for judgment as a matter of law. Viewing the evidence in the light most favorable to the prevailing party and assuming that the jury resolved all conflicts in their favor, the Court finds the jury's verdict reasonable. Accordingly, the Court will deny MMU and Keithahn's renewed motion for judgment as a matter of law on the negligent misrepresentation claim. Because the Court will deny this motion, the argument raised for dismissal of the indemnification claim is moot.

II. NEW TRIAL

The Court may grant a motion for a new trial "on all or some of the issues." Fed. R. Civ. P. 59(a)(1). "A new trial is appropriate when the first trial, through a verdict against the weight of the evidence ... or legal errors at trial, resulted in a miscarriage of justice." *Gray v. Bicknell*, 86 F.3d 1472, 1480 (8th Cir. 1996). "The authority to grant a new trial is within the discretion of the district court." *Id.* The Court may grant a new trial where erroneous rulings "had a substantial influence on the jury's verdict." *Littleton v. McNeely*, 562 F.3d 880, 888 (8th Cir. 2009) (quoting *Harris v. Chand*, 506 F.3d 1135, 1139 (8th Cir. 2007)). Only if the jury's verdict is so against the great weight of the evidence that it constitutes a miscarriage of justice should a motion for a new trial be granted. *Ogden v. Wax Works, Inc.*, 214 F.3d 999, 1010 (8th Cir. 2000).

MMU and Keithahn present several arguments that they believe individually, but especially collectively, require a new trial. Each alleged error will be taken in turn.[1]

[1] The Heritage Parties allege waiver, but MMU and Keithahn properly preserved the arguments they currently make.

A. Jury Instructions

MMU and Keithahn repeatedly requested that the jury be instructed that fraud claims cannot be based on future assurances, which the Court rejected. District Courts have wide discretion in the wording of jury instructions. *Zutz v. Case Corp.*, 422 F.3d 764, 773 (8th Cir. 2005). Jury instructions must, "taken as a whole and viewed in light of the evidence and applicable law, fairly and adequately submit[] the issues in the case to the jury." *Horstmyer v. Black & Decker, (U.S.), Inc.*, 151 F.3d 765, 771 (8th Cir. 1998) (citation omitted). A new trial for errors in the jury instruction is only warranted where the errors misled the jury or had a probable impact on the verdict. *Nicholson v. Biomet, Inc.*, 46 F.4th 757, 762 (8th Cir. 2022).

The Court's instructions adequately informed the jury of the law notwithstanding the fact that MMU and Keithahn requested additional, legally correct information be included. The jury instructions stated that fraud claims must be based on "past or present" facts, which inherently excludes future promises. (Final Jury Instructions at 17, Jan. 11, 2024, Docket No. 177.) Further, neither the Minnesota Jury Instruction Guides for fraudulent misrepresentation or negligent misrepresentation include the proposed future assurances instruction. *See* Minn. Practice–Minn. Jury Instructions Guides (Civil), at CIVJIG 57.10 and CIVJIG 57.20 (6th ed. 2023).

The Court expressed concern about confusing the jury with any further instructions about future events, particularly because the Court had already determined the alleged misrepresentations by Keithahn were not future assurances. (Trial Tr. Vol. IV at 188, Jan. 25. 2024, Docket No. 191.) The Court was not required to provide an instruction it did not believe the record supported. *Lincoln Composites, Inc. v. Firetrace USA, LLC*, 825 F.3d 453, 463 (8th Cir. 2016). The Court properly instructed the jury on the law and believes the absence of a future assurances instruction had no impact. Accordingly, MMU and Keithahn are not entitled to a new trial based on their claimed jury instruction error.

B. Motions in Limine

There are two issues relating to the Court's orders on MMU and Keithahn's motions in limine. First, MMU and Keithahn take issue with the Court's denial of their motion in limine to exclude Keithahn's Harvard University attendance and the Heritage Parties' statements about Harvard. Second, they claim that the Heritage Parties violated the Court's order to not elicit testimony that Keithahn owned a bank.

1. Keithahn's Harvard Education

The Court denied MMU and Keithahn's motion in limine to exclude any reference to the fact that Keithahn received his MBA from Harvard. The Court instructed the parties not to dwell on this fact but acknowledged its relevance to the sophistication of the parties. MMU and Keithahn challenge that ruling and also claim that the Heritage Parties repeatedly violated the "spirit" of the order by referencing Harvard on numerous occasions.

Evidentiary rulings, as with jury instruction decisions, only serve as the basis for a new trial when the jury was misled by the error, or it had a probable effect on the verdict. *Reach Cos. v. Newsert, LLC*, 94 F.4th 712, 716 (8^{th} Cir. 2024). The Court allowed some testimony about Keithahn's Harvard education because the sophistication of the parties played a central role in determining reasonable reliance. The Court rejected MMU and Keithahn's argument that Keithahn's attendance at Harvard as opposed to any other institution was irrelevant and outweighed by unfair prejudice under Federal Rule of Evidence 403. The Court finds Keithahn's educational background to be relevant to the sophistication of the parties such that the information was properly admitted. Further, it served only as one piece of the greater puzzle of his reliability, and the parties more regularly cited to his work experience and various roles in financial institutions, so the Court is unconvinced that excluding this information would have changed the verdict in any way.

MMU and Keithahn contend that even if the order was proper, the Heritage Parties violated the order. When a party violates a motion in limine order, it only serves as the basis for a new trial when the order was specific in its prohibition and the violation was clear. *Warger v. Schauers*, 721 F.3d 606, 609 (8th Cir. 2013). Additionally, the violation must constitute prejudicial error or lead to an unfair trial. *Pullman v. Land O'Lakes, Inc.*, 262 F.3d 759, 762 (8th Cir. 2001). The Court's order denying MMU and Keithahn's motion in limine relating to Keithahn's Harvard education was not specific nor was the violation clear. True, the Court asked the parties to not "dwell" on the fact that Keithahn went to Harvard, but that does not provide firm guidance on how many times a party could mention Harvard throughout a five-day trial. Even if the Heritage Parties had violated the "spirit" of the order, MMU and Keithahn present no evidence that these references produced a prejudicial effect. They explain why reference to Harvard **could** be prejudicial but not how it **was** prejudicial. The Court already rejected those concerns in denying the motion in limine. Without a clear violation or showing of prejudice, the Heritage Parties' mention of Harvard does not serve as the basis for a new trial.

2. Keithahn's Bank Ownership

The Court granted MMU and Keithahn's motion to exclude testimony that Keithahn owned a bank. It reiterated that ruling in a sidebar directly before the alleged violation. (Trial Tr. Vol. IV at 95.) Then, the Heritage Parties proceeded to ask Keithahn about his majority share in the corporation that owned the bank. (*Id.* at 97.) The Court later determined that because the testimony had already been elicited and the Heritage Parties did not "say the magic words" of owner, any objection need not be addressed. (*Id.* at 111.) Upon review of the entire record, the Court is less inclined to grant the Heritage Parties the leeway they received at trial.

Again, the Court must determine if its order was specific, the violation was clear, and prejudice resulted. *Warger*, 721 F.3d at 609. First, the Court's order clearly informed the Heritage Parties not to elicit testimony about Keithahn's bank ownership. Whether the violation was clear is a more difficult question. Upon review of the transcript, it is unclear whether this testimony had been elicited previously. Also, the timing of the Heritage Parties' question, immediately after a sidebar specifically affirming the Court's prior order, is concerning. The Heritage Parties' questioning seemingly tried to walk a fine line of letting the jury hear the precluded testimony without explicitly asking the question using the word owner. The Court finds that to be a clear violation of its motion in limine order.

However, even with a specific order and clear violation, there is no evidence to suggest that one question about Keithahn's ownership interest was prejudicial or impacted the outcome. The Heritage Parties bookended this question with others about Keithahn's background and experience in banking, without emphasizing Keithahn's ownership. *Pullman*, 262 F.3d at 762–63 (finding that one violation of a motion in limine order that did not specifically highlight the improper evidence was insufficient to grant a new trial). Further, the jury returned a mixed verdict, finding no liability on Heritage Construction's fraudulent misrepresentation claim. The result indicates that the jury reached a well-reasoned decision. This singular violation is insufficient to grant a new trial.

C. MMU's Ability to Satisfy a Verdict

MMU and Keithahn argue that the Heritage Parties' reference to MMU's inability to satisfy any verdict was improper because it led the jury to find Keithahn liable. Of the many comments to which MMU and Keithahn object, the only statements requiring review are those specifically about MMU's current ability to pay a judgment. Any statements about MMU's inability to perform on the construction contract were inherently intertwined with the claims at issue and thus were permissible.

MMU and Keithahn raise concerns the Court takes seriously. The Heritage Parties certainly made inflammatory statements. But fortunately for the Heritage Parties, the bar is high for a new trial and the Court is not convinced those statements changed the outcome or resulted in a miscarriage of justice. *CellTrust Corp. v. ionLake, LLC*, No. 19-2855, 2023 WL 8448792, at *6–7 (D. Minn. Dec. 6, 2023) (finding that isolated statements, even uncured, would not have changed the outcome or resulted in miscarriage of justice). Further, many of these statements were made during opening and closing arguments which the Court specifically instructed the jury were not evidence. *Billingsley v. City of Omaha*, 277 F.3d 990, 997 (8th Cir. 2002). Accordingly, the Heritage Parties' problematic statements are insufficient to warrant a new trial.

D. Impeachment of Philip Keithahn

Keithahn was a key witness and thus the subject of significant questioning and attempts at impeachment. The Heritage Parties used his deposition testimony as impeachment evidence. Keithahn did not directly contradict prior statements, but he claimed an inability to recall certain facts at his deposition that he remembered by the time he was questioned at trial. The parties thus dispute whether the deposition testimony was proper impeachment evidence. MMU and Keithahn cite to *Hunt v. Regents of Univ. of Minn.*, for the proposition that amplifying deposition testimony at trial is not appropriate for impeachment. 460 N.W.2d 28, 34 (Minn. 1990). Even setting aside that the Minnesota Supreme Court was not interpreting the Federal Rules of Evidence, the facts of *Hunt* were different. The Heritage Parties did not attempt to impeach Keithahn with prior, more limited statements. Instead, they specifically pointed out failures to recall as inconsistent with recollection at trial. The Eighth Circuit has previously approved the use of inconsistent recollection for impeachment purposes. *See, e.g.*, *United States v. Rogers*, 549 F.2d 490, 495–96 (8th Cir. 1976). Because the Heritage Parties' method was not improper, credibility was appropriately left to the jury.

* * *

MMU and Keithahn urge the Court to find that even if any one of the arguments above do not individually require a new trial, collectively they do. A multitude of errors can require a new trial if the cumulative effect affects a party's "substantial rights" or "affected the judgment." *Krekelberg v. City of Minneapolis*, 991 F.3d 949, 959–60 (8th Cir. 2021) (internal quotation omitted). While the Court found two instances of questionable conduct by the Heritage Parties, neither were so significant that a new trial is warranted. The same is true for the cumulative effect. Even considering both of those errors together, there is still no evidence that they impacted the overall verdict. Instead, the evidence, specifically the mixed verdict on fraud claims relying on the same evidence, weighs heavily against prejudicial impact. Thus, the Court will deny MMU and Keithahn's motion for a new trial on liability.

E. Fraud by Omission Damages

MMU and Keithahn also request a new trial on the fraud by omission damages award. The Heritage Parties used the same damages calculations for all three fraud claims. MMU and Keithahn claim those calculations must be erroneous because the alleged omissions occurred months after the alleged misrepresentations, requiring the jury to speculate on damages. The Heritage Parties counter by explaining that they only seek damages from after both the misrepresentations and the omissions. Because the damages were reasonably based on pay applications submitted after the alleged omissions, the Court will not grant a new trial on damages on the fraud by omission claim.

III. REMITTITUR

MMU and Keithahn seek remittitur of the jury award on Heritage Construction's breach of contract claim. A district court should order remittitur "only when the verdict is so grossly excessive as to shock the conscience of the court." *Ouachita Nat'l Bank v. Tosco Corp.*, 716 F.2d 485, 488 (8th Cir. 1983) (internal quotations omitted).

MMU and Keithahn seek remittitur of $300,000 on an award of over $6 million for breach of contract. They note that Heritage Construction did not include the $300,000 on any pay application, meaning it was never entitled to receive that money under the contract. Testimony reflects that Heritage Construction never included the $300,000 on a pay application. But Heritage Construction only decided not to submit a pay application after at least three previous pay applications had gone unpaid. Because Heritage Construction still provided evidence it would be entitled to that amount, and MMU and Keithahn do not challenge the actual number, remittitur is not appropriate.

CONCLUSION

MMU and Keithahn seek various forms of relief from the jury verdict. However, the jury reasonably found liability based on all the evidence presented and reasonably calculated damages. The jury verdict will stand as returned with the exception of the duplicative damages reduction in the Court's previous order.

ORDER

Based on the foregoing, and all the files, records, and proceedings herein, **IT IS HEREBY ORDERED** that Third-Party Defendants' Motion for Judgment as a Matter of Law and Alternatively for a New Trial [Docket No. 184] is **DENIED**.

DATED: May 28, 2024 s/
at Minneapolis, Minnesota. JOHN R. TUNHEIM
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 24-2333

Selective Insurance Company of America,

Plaintiff,

v.

Heritage Construction Companies, LLC; JAC & Sons Investments; Andrew P. Christensen; Jennifer A. Christensen,

Third Party Plaintiffs - Appellees,

v.

Philip Keithahn; Minnesota Medical University, LLC,

Third Party Defendants - Appellants

John Does, 1 through 10,

Third Party Defendant.

Appeal from U.S. District Court for the District of Minnesota (0:19-cv-03174-JRT)

JUDGMENT

Before BENTON, KELLY, and GRASZ, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

February 2, 2026

Order Entered in Accordance with Opinion:

Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Susan E. Bindler

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Selective Insurance Company of America,
Plaintiff,

vs.

Heritage Construction Companies, LLC;
JAC & Sons Investments, LLC;
Andrew P. Christensen; and Jennifer A. Christensen,

Defendants and Third-Party Plaintiffs,

vs.

Third-Party Defendants.

File No. 19CV3174 (JRT/JFD)

Minneapolis, Minnesota
December 12, 2023
8:45 A.M.

BEFORE THE HONORABLE
JUDGE JOHN R. TUNHEIM AND A JURY
UNITED STATES DISTRICT COURT

(MOTIONS IN LIMINE AND TRIAL - VOLUME I)

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inability to pay for construction, he didn't even deny it.

If you can pull up 169, page 1.

For example, when Mr. Harvala, if you look at his accusations, he accused him of promising that there was money there to pay them. It says -- this is an e-mail from Mr. Harvala to Mr. Keithahn, June 21.

He says, Hello, Phil. It is my understanding that currently there is not money to pay for the work that happened in the month of May or the current month of June. On June 6th, I was told there was enough money to cover the last draw, but that appears to not be the case. The money for the draw was supposed to be in the title company's hands by June 14th. We were also supposed to know if the investor, this mysterious investor who was supposed to put $10,000,000 in, was not working, the investor you were working with was on board this past Wednesday, and they would hopefully have the money in the bank by Friday. That hasn't happened.

And the response from Mr. Keithahn was not, I never told you the money was there. His response is, I completely understand your position. Thanks for your confidence, Andrew. I completely understand your position. Have a great weekend.

In any event, MMU ended up folding. The building was abandoned, and Heritage and the Christensens were left out hanging to dry. Because Heritage wasn't paid, it couldn't pay all of its subcontractors and suppliers, many of whom filed and collected on bond claims.

Selective in turn, we don't have to go back to the exhibit, but after Selective pays money, they come after the indemnitors. They sued Heritage originally. They sued Heritage. They sued Mr. and Mrs. Christensen and JAC & Sons, the entity that owns the building that Heritage works out of.

And those parties in turn sued MMU, which is functionally bankrupt, and Mr. Keithahn personally for indemnity and fraud. The damages sought are in the millions and millions of dollars. Heritage and the Christensens don't have -- didn't have any legitimate defense to Selective's claims.

They signed the General Agreement of Indemnity. They agreed to hold the surety harmless if they had paid out any money. So they had no defense. What we ended up doing was signing a settlement agreement with Selective, which requires us to repay them all the money they paid out, all their attorney fees, all their interests, all their costs over time because -- over time because you can't get blood out of a turnip. So that's the agreement. You will see that agreement in court.

In turn, Heritage, Mr. Christensen, Mrs. Christensen, JAC are now suing MMU, which is really a worthless gesture, quite frankly, because they have no assets, and Mr. Keithahn for indemnification, claiming that we were in effect defrauded multiple ways, affirmatively, by omission, whatever.

And what we want to do is have him reimburse us for all of the money that we lost and that we have to pay to Selective from now until kingdom come. That's why we are here, and we are going to be asking for your verdict at the end of the case.

And we will do our best to make sure that you understand everything that happened so that you can make a just verdict. Thank you.

THE COURT: Thank you, Mr. Hart. Let's take a five-minute break before Mr. Andresen's opening statement.

COURTROOM DEPUTY: All rise.

(Recess taken.)

(in open court with the Jury present)

THE COURT: You may be seated. Mr. Andresen, are you ready to proceed?

MR. ANDRESEN: Before we begin, can we come up?

THE COURT: Sure. Come on up.

THE COURT: Okay.

MR. ANDRESEN: I won't quibble with the facts in the opening statement. One of the things Mr. Hart said was objectionable, and I wasn't going to object. At the very end of his closing that last piece where he said that a judgment against MMU would be worthless.

That's totally inappropriate so would be irrelevant to the issues in this case. The fact that they have closed, the fact that they're not doing business is all irrelevant.

I think you should issue a curative instruction to the jury that just says whether MMU can or cannot satisfy a judgment is not relevant to any of the issues in this case. That's all. The fact that they're not in business, that's totally inappropriate.

MR. HART: I apologize. I think it's true, first of all, and it is relevant. Mr. Keithahn has testified that they have no money to pay us. Mr. Sexter, who they took off their witness list just recently yesterday, I might designate some of his deposition if necessary, he said they're bankrupt.

MR. ANDRESEN: No, he didn't.

MR. HART: Yes, he did.

THE COURT: I'm not going to give a curative instruction right now. If we need to before the end of the trial, I will do that. Okay?

(In open court with the Jury present.)

THE COURT: All right. You may proceed, Mr. Andresen.

MR. ANDRESEN: Thank you. Good afternoon. Remember a couple of things that the judge told you earlier and one of the things that Mr. Hart told you recently. What the lawyers say isn't evidence. That's a good thing. Another thing that Mr. Hart said is that the facts are relatively undisputed. That's not true.

In fact, a large percentage of what he just told you the evidence is going to show you is not true. That's why the judge told you at the beginning, don't listen to the lawyers. Listen to the evidence.

I'm going to talk to you a little bit about what we believe the evidence is going to show but acknowledge to you that what I say isn't evidence, either.

That said, I want you all to hold all of us accountable. If somebody stands up here and tells you they're going to prove something to you, make a note of it, and then see if they do. Come back at the end of the case and say, well, I was told I was going to hear X. I was told that I was going to hear Y.

I have a feeling you're going to find out there prior to the construction -- prior to the commencement of the work?

A. Yes.

Q. Okay. The contractor has to get paid for its work?

A. Yes.

Q. All right. As been discussed already, you are one of the defendants in this lawsuit in addition to MMU University?

A. Yes.

Q. Okay. And you were an employee of MMU at the time of this project?

A. Yes.

Q. You were the chief financial officer for MMU?

A. Yes.

Q. And as I understand it, you were also the secretary?

A. Secretary to the board of governors.

Q. Okay. And you as the chief financial officer of MMU, you were responsible for getting involved in the financing of the company for its projects?

A. Yes.

Q. And that included that you had to know how much -- and we're talking about the project here. We're talking about the development and construction of the teaching hospital in Gaylord, Minnesota?

A. Teaching college in Gaylord, Minnesota.

Q. Okay. And you had to know how much money MMU had raised?

A. Yes.

Q. And you were responsible for knowing how much money MMU had spent?

A. Yes.

Q. And you were responsible for knowing how much money MMU had on hand for the project?

A. Yes.

Q. And you were responsible for knowing what money was there raised from bonds that you could or could not use?

A. Yes.

Q. You were also a cofounder of MMU, correct?

A. Correct.

Q. And in that role, I take it, you have an understanding of MMU's intended purpose?

A. Yes.

Q. What was that?

A. The intended purpose was to develop, construct and operate an osteopathic medical school in Gaylord, Minnesota, with a goal of educating 150 students per year so that after four years we would have 150 graduating physicians, with a goal that half of those physicians would stay in the state of Minnesota and half of those physicians would stay and become physicians in rural America.

Q. Okay. And you were involved in those efforts?

A. Yes, sir.

Q. And let's -- what is the practice of osteopathic medicine?

A. There are two types of certifications for a physician. One is an allopathic medicine, which is a physician that has a degree, an MD degree, which would be as an example the University of Minnesota Medical School.

An osteopathic physician is a DO degree, a Doctor of Osteopathic Medicine. They both have to meet the same educational requirements. They both have to meet the same requirements to be certified to practice medicine in any state around the country.

The difference is that in addition to the training that an MD would get at an allopathic school, the DO physicians get additional training on the use of their hands. They use their hands to diagnose.

They use their hands to treat through manipulation of soft tissue, and they use their hands to communicate care for the patients.

Q. Okay. The osteopathic medicine, it's more of a holistic approach, is it not?

A. I don't know. I don't know how to -- I don't know how to answer that question.

Q. Okay. Let's talk about the construction contract. Part of developing this osteopathic medical school involved renovating a building that was located in Gaylord, Minnesota?

A. Yes.

Q. It was a former school building?

A. Yes.

Q. Who was the construction contractor that was chosen to perform the work?

A. Heritage Construction Companies.

Q. Okay. And MMU entered into an agreement with Heritage to perform the construction work on the building, correct?

A. Yes.

Q. And the legal agreement provided for Heritage to perform the construction work to renovate the building, correct?

A. Yes.

Q. And you were involved in negotiating that agreement?

A. I was one of the parties that was involved in

negotiating the agreement.

Q. Right. You were involved in negotiating the agreement.

A. Yes, sir.

Q. Take a look at Exhibit H 14 if you would.

THE COURT: Is this stipulated or not?

MR. HART: Yes. We have stipulated to almost all of the exhibits. If there is one that I mistakenly bring have to start work until you provided evidence that you had the financing in place to pay them?

A. That's what it says.

Q. Okay. So if MMU hadn't furnished Heritage evidence that MMU had made financial arrangements to be able to pay Heritage for its work, it didn't have to start construction, did it?

A. That's correct.

Q. Okay. Now let's talk about the payment bonds that were issued on the project.

MMU required Heritage to provide not only a payment bond, but MMU required Heritage to provide a payment and a performance bond, which are two different bonds.

Do you recognize that?

A. I think there are multiple questions there.

Q. All right. Let me do this: MMU required Heritage to provide payment and performance bonds for the Gaylord project, correct?

A. The lenders or the bond company and Standard & Poor's, which was issuing ratings on the bonds --

Q. Yes.

A. -- required that, and because they required that, then MMU had to make sure that that was included in this agreement.

. . .

pay the subcontractors and the suppliers, then the surety has to pay them, correct?

A. I know that from this case, correct.

Q. Right. And basically what that bond does is, it insulates the owner from having a mechanic's lien filed against his property.

A. Correct.

Q. Right. Because the contractor can just go to the surety and say pay me. They don't have to go to the problem of filing a mechanic's lien and having to foreclose on your property and that sort of thing.

A. Yes.

Q. And in this case you are aware, are you not, that Heritage retained Selective Insurance Company of America as the surety?

A. Yes.

Q. And Selective issued the bond on Heritage's behalf.

A. Yes.

Q. And by issuing the bond, Selective became Heritage's surety.

A. Yes.

Q. So if Heritage was unable to pay its subcontractors and suppliers, then Selective was obligated to pay them.

A. Yes.

Q. Can you go to H 50, Alex.

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Selective Insurance Company of America,
Plaintiff,

vs.

Heritage Construction Companies, LLC;
JAC & Sons Investments, LLC;
Andrew P. Christensen; and Jennifer A. Christensen,

Defendants and Third-Party Plaintiffs,

vs.

Third-Party Defendants.

File No. 19CV3174 (JRT/JFD)

Minneapolis, Minnesota
December 13, 2023
10:45 A.M.

BEFORE THE HONORABLE
JUDGE JOHN R. TUNHEIM AND A JURY
UNITED STATES DISTRICT COURT

(TRIAL - VOLUME II)

. . .

A. I had to pay them a lump sum of money, and we're making a very large payment every month for the unforeseeable future.

Q. Okay. As part of getting the payment and the performance bond, were you required to sign any other documents?

A. General letter of indemnity.

Q. Okay.

A. My wife, myself, both companies had to post and pledge all our assets.

Q. Okay. That's already been introduced, so we won't look at it again. I believe it is Exhibit H 21 for you guys's reference again.

Was signing that document a big deal for you, your wife and your companies?

A. It was absolutely a big deal, yes.

Q. Okay. And explain to the jury why.

A. Because we had to pledge our entire existence. Everything I had earned and made and was able to achieve in the last 25 years of my career was on the line.

Q. Okay. Did you have enough collateral, money, assets, to convince Selective to give you the bonds by yourself?

A. I did not.

Q. And so how did you end up getting the bonds then?

A. Through the course of events and meetings with the

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Selective Insurance Company of America,

Plaintiff,

vs.

Heritage Construction Companies, LLC;
JAC & Sons Investments, LLC;
Andrew P. Christensen; and Jennifer A. Christensen,

Defendants and Third-Party Plaintiffs,

vs.

Third-Party Defendants.

File No. 19CV3174 (JRT/JFD)

Minneapolis, Minnesota
December 14, 2023
8:38 A.M.

BEFORE THE HONORABLE
JUDGE JOHN R. TUNHEIM AND A JURY
UNITED STATES DISTRICT COURT

(TRIAL - VOLUME III)

. . .

A. I'm not alleging that, no.

Q. Okay. So the one conversation we're talking about here that you allege was a misrepresentation was the verbal communication that you claim to have had with him on January 28th or 29th, correct?

A. That is a misrepresentation because he told me the money would be available upon closing.

Q. We'll get to that, but that's the only one of those communications that you're alleging in this lawsuit, correct, in terms of a verbal communication?

A. I don't know how to answer that.

Q. Just yes or no.

A. I don't have any recollection.

Q. You don't have any other recollections, other than that January 28 or 29 phone call, correct?

A. For me personally, yeah. Yes.

Q. Okay. And just by way of all of us knowing how a calendar works, you would agree with me that the communication you're referring to on January 28 or 29 of 2019 would have occurred after this contract was signed by Heritage, contract?

A. It is.

Q. Okay. After that initial meeting -- you can pull that down, Eric.

After that initial meeting where you met with

• • •

Q. Okay. At least you may have known then, but you don't know now.

A. I may have.

Q. Okay. All right. And did you -- were you also aware back then that construction was in fact going to stop after the demolition and abatement was done until the bond funding closed?

A. That phase, I was not aware of that, that phase, no.

Q. Okay. And then the second half of what you claim he had told you, right, he says construction won't stop, right? He says or you said that Phil represented that you would be funded, that Heritage would be funded; is that accurate?

A. Upon closing of the loan, yeah, the project would be funded.

Q. Okay. So again, upon closing of the loan. In other words, the bond funding that was going to happen sometime in the future.

A. I don't know what kind of funding it is. I wasn't -- I just knew there was funding that was coming and that once construction started, that would have closed already.

Q. Okay. So without regard to whether it was bonds or anything else, right? You knew there was going to have to be some sort of financial closing that was going to happen in the future, correct?

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Q. Let's go to H 218.

And, Mr. Harvala, is this a copy of the official notice of termination?

A. Yes, it is.

Q. Okay. And again, September 17th of 2019?

A. Yes.

Q. Okay. And it looks like you are informing them -- "them" being MMU and Mr. Keithahn -- that you are demanding payment of the work performed, as well as the overhead and profit on the unexecuted work; is that right?

A. Correct.

Q. And at the time that this was submitted or shortly before, did you submit, did Heritage submit, one final pay application?

A. Yes, we did.

Q. Is that Pay Application Number 6?

A. Yes.

Q. Let's take a look at that, H 216.

Mr. Harvala, is this a copy of Payment Application Number 6?

A. It is.

Q. Okay. And again, signed by all three parties?

A. Yes.

Q. So everyone agreed that Heritage was entitled to be paid for the amount of this pay application as well?

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to MMU to this point, all parties agreed Heritage was entitled to be paid?

A. Yes, it is.

Q. Again, I think it's already been said, but Heritage wasn't paid for this pay application either, was it?

A. No, we were not.

Q. So after termination what happened? I'll rephrase. Bad question. I ask them all the time.

Was Heritage after termination able to pay its subcontractors or suppliers?

A. We were not.

Q. Why not?

A. Because we had not been paid for the work.

Q. As a result were claims filed against Heritage's payment bond?

A. Yes, there were.

Q. And did surety pay out claims on the payment bond?

A. Yes, they did.

Q. And the total amount Selective paid out, was that just under 3.1 million dollars?

A. Yes.

Q. And that 3.1 that Selective paid out, is Heritage obligated to pay that back to Selective?

A. Yes. Yes, we are.

Q. And that 3.1 million dollars, was that incurred on

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bringing its fraud and negligent misrepresentation claims?

A. Phil told me numerous times that he had $7,000,000 of money for me to start construction. That was what I was relying on. This is a man that I had worked with for months, that he had paid me previously for work, and seemed like a smart, intelligent guy that was trustworthy.

He was a community banker. I trusted him at his word.

Q. Okay. And, and we'll talk about that that was warranted, but the question before you is, Is there anything else you want the jury to consider as they consider whether or not there was a fraudulent or negligent misrepresentation made to Heritage, and it sounds like your answer is no; is that correct?

A. I don't have anything else to offer you on that right now.

Q. That's all I needed. Thank you.

Am I correct that you testified that the first time Mr. Keithahn made the alleged misrepresentation about the $7,000,000 set-aside was in February of 2019?

A. That's what I recall.

Q. Okay. So even if we take you at your word at the moment, let's take you at your word at the moment that that misrepresentation was made sometime in February of 2019, okay, you agree that that misrepresentation would have been

. . .

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Selective Insurance Company of America,
Plaintiff,

vs.

Heritage Construction Companies, LLC;
JAC & Sons Investments, LLC;
Andrew P. Christensen; and Jennifer A. Christensen,

Defendants and Third-Party Plaintiffs,

vs.

Third-Party Defendants.

File No. 19CV3174 (JRT/JFD)

Minneapolis, Minnesota
December 15, 2023
9:10 A.M.

BEFORE THE HONORABLE
JUDGE JOHN R. TUNHEIM AND A JURY
UNITED STATES DISTRICT COURT

(TRIAL - VOLUME IV)

. . .

Come on up, Mr. Harvala.

COURTROOM DEPUTY: All rise for the jury.

(Jury enters.)

(In open court with the Jury present.)

THE COURT: You may be seated. Good morning, Members of the Jury. We're ready to continue with cross-examination of Mr. Harvala. Go ahead, Mr. Andresen.

MR. ANDRESEN: Thank you, Your Honor.

(Andrew Harvala)

CROSS-EXAMINATION (RESUMED)

BY MR. ANDRESEN:

Q. Good morning, Mr. Harvala.

A. Good morning.

Q. I'll jump right into one of the issues that seems to be at the crux of the case, and that's the statements you made on direct and that were discussed throughout this trial about the $7,000,000.

Tell us again what it is, what's your contention about what Mr. Keithahn had told you starting in February with respect to $7,000,000.

A. My contention is there that no matter what there would be $7,000,000 of money for construction after the close.

Q. I think you maybe just used some words that I hadn't banker or any other capacity, had you ever been involved with the development of a medical school or any other type of school?

A. No, sir.

Q. Okay. Had you ever heard of COCA?

A. Not at all.

Q. Okay. In all your years in community

banking, had you ever had any prior experience with bond funding or trust indentures?

A. No, sir, not at all.

Q. Is investment banking a different type of banking than community different?

A. Completely different.

Q. Let's talk a little bit about the origins of the MMU project or what has been referred to as MNCOM. What did MNCOM stand for?

A. MNCOM stands for the proposed Minnesota College of Osteopathic Medicine.

Q. And MMU was the legal entity that was going to develop and operate the college?

A. Yes, sir. Minnesota Medical University was the legal entity, and we were doing business as MNCOM.

Q. Understood. Okay. Who came up with the idea to create MNCOM in Gaylord, Minnesota?

A. Dr. Jay Sexter.

Q. Okay. And how did -- tell the jury the short version of how that came to be and how you came to be involved.

A. So in -- during 2013, I was working with an entity in Gaylord called R. S. Fiber Cooperative, which was a cooperative of individuals in Renville and Sibley County. And the purpose of R. S. Fiber was to bring high speed Internet access to the farmers, the homeowners and the small business owners in those two counties.

And I was working with their investment bankers and advising them because I had knowledge, some knowledge, of finance to put together the financing for that fiber project. In one of the meetings I had in late 2013, I met a gentleman by the name of Bill Löwenstein.

And after that meeting, I received, within a month after that meeting, I received a call from Dr. Sexter, and he said, I understand you're trying to get -- I'm paraphrasing what he would have said.

I understand you're trying to get high speed Internet access in rural Minnesota, in Gaylord, and Gaylord was a town of about 2500 people, and I said, yes, we are. He says, well, I've opened more osteopathic medical schools in the country than anybody else, and we need high speed Internet access. So if you get that Internet access to Gaylord, we need to talk about bringing a medical school to rural Minnesota.

Q. When would that have been, roughly?

A. November, December 2013.

Q. Okay. And then what happened over the next -- did anything happen with that idea after that first phone call in that first year or two?

A. During the next six months, Dr. Sexter would reach out to me and ask for information, and I was trying to figure out what osteopathic medicine was because I didn't even know about it at the time.

My -- multiple members of my family were physicians, but they weren't osteopathic physicians, and I was asking him questions. He was asking me questions, and then it went radio silent in the summer of 2014.

And then in November of 2014 or so, about that time, Dr. Sexter called me back. And he said, do you have that high speed Internet access in Gaylord, and I said as a matter of fact we're starting construction, and he says, well, good. He said we need to, we need to bring that medical school to Minnesota.

And I said, okay, what does that mean? He said we need a 25,000 square foot building, land and high speed Internet access, and by the way, how far are you from Minneapolis.

I said, well, we're an hour from the airport, and he said, now we need to talk about bringing a medical school to Gaylord.

Q. In your subsequent communications with Dr. Sexter, did he tell you about other people in his world that were interested in being a part of MMU or the future MNCOM?

A. Yes, over about a three-to-four-month period, he told me about Tony Danza who had built the Middletown School for Torou. He told me about the contacts he had in California, Las Vegas and the Harlem and Middletown, four campuses of medical schools that he had developed.

He introduced me by phone and eventually in person to several other individuals that advised us during the first two years of working towards the medical school.

Q. Were you also introduced to Barbara Ross-Lee at some point?

A. Yes. I'm going to refer to Mr. Danza as Tony and Dr. Sexter as Jay and Dr. Barbara Ross-Lee as Barbara because that's how we became over the years.

We had worked on the medical school from 2015, when he asked me to lead the local effort, until we received the first step in the process of becoming an accredited medical school, which was in March of 2016.

And during the next year, we were working on a lot of materials to apply for candidate status, but we had to work principally on a feasibility study, and in the first or second quarter, sometime in late 2017,

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Q. And the jury will have the document later if it wants to read it, but is the gist of that disclaimer to tell the people who are reading that document that everything is a forward-looking prediction and they shouldn't rely on the information that is in this presentation?

A. That is correct.

Q. Okay. Set that aside for a minute.

The idea here is, this was the structure of how things were proposed to go; is that correct?

A. That's correct.

Q. Okay. Go all the way to the last page, Eric.

And that last page there, does it direct any of the people who received this presentation to call Mr. Ramani at Loop if they have any questions?

A. Yes, sir.

Q. They're not being told to call Phil Keithahn about those questions, are they?

A. No.

Q. Because you wouldn't have been able to answer them.

A. No.

Q. Okay. We can pull that down.

You talk just big picture of the financing structure put together by Loop. Was it going to be a mix of cash or equity and then the bond funding?

A. Yes.

Q. Okay. And was the equity the money that you put in and Mr. Christensen put in and all the other board members put in?

A. Yes, there were several types of equity that were put in at different times, but the answer to your question is yes.

Q. How much equity had MMU raised, let's say, by the time you closed on your bond funding?

A. In excess of eight and a half million dollars.

Q. I assume you had spent some of that money on everything that needed to be done to get the school up and running to that point.

A. Yes.

Q. Okay. And then there was a pool of bond funds that would flow under the bond structure; is that right?

A. That's correct.

Q. Okay. And was that roughly $90,000,000?

A. I believe so.

Q. Okay. Was the original plan to close on financing in December of 2018?

A. Yes.

Q. Okay. And ultimately you didn't close on financing until April of 2019. Why did it get pushed back?

A. Several reasons. In December of 2018 we hadn't been able to answer Standard & Poor's questions in order to

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A. As I recall portions of the conversation with Mr. Hart, it was that he was talking about conversations sometime in the first quarter of 2019, and that was before we closed on the financing.

So there were a lot of details and everything that was happening from the beginning of 2019 through April 10th of 2019, so we didn't know at that time how everything was going to work.

But, but the structure that we had been working on with Prakash for multiple months was that after the financing closed, we would have access to the funds, but it wasn't in a set account.

Q. Got it. Okay. And that's because you thought you would be able to use both equity and some of your precondition limit on the bond funds?

A. Absolutely.

Q. Okay. The $7,000,000 number that we have been talking about here for four days, okay, where did that number -- your expectation of having $7,000,000, where did that expectation come from?

A. From Loop Capital.

Q. Okay. Did you and Mr. Ramani from Loop Capital communicate regularly about how things were going to work once funding closed?

A. Yeah, very regularly.

Q. Okay. And was one of the things that you were communicating about is how much money MMU would have on that precondition limit?

A. Yes.

Q. Let's pull up, Eric, Exhibit D 21.

Okay. This appears to be an e-mail, D 21, from Mr. Ramani to you, dated March 29 of 2019; is that correct?

A. Yes.

Q. Okay. And it has an attachment. Do you see that?

A. Not yet.

Q. Reference on the subject line.

A. Oh, I'm sorry. Yes.

Q. And it says, "Senior Investor Payment Analysis V-8." What does V-8 mean?

A. Version 8.1. We had gone through seven previous versions. So this had evolved over months, so this was 8.1.

Q. To your recollection was this the last, and we'll look at the spreadsheet here in a second. Go ahead and pull up the last page.

Was this the last information you got from Mr. Ramani prior to the bond fund closing?

A: I believe so.

Q. Okay. The second page, why don't you just explaint to the jury -- before we get into the numbers, Phil, just what is this? What is this spread sheet?

A. So the spread sheet is divided into the left side and the right side, and the right side simply shows, I don't know if it's simple, but three columns, 2019 A-1, A-2 and B. Those were the three separate bond issues that we were going to be -- expected to close on April 10.

Q. Okay.

A. So that was the detail on the bond issues. The left side of the page was what Prakash had been talking with MMU and me about for months about the funds that we would have available to operate the school through the end -- through the August COCA accreditation hearing, if we did not get approval in April.

Q. Okay. You said "to operate." So the funds that we're going to see here would be for both operation and construction in that early period?

A. That's correct.

Q. Okay. The yellow highlighted column, right, just run down the numbers in the yellow highlighted column from top to bottom. Where does the 14,625,000 come from?

A. The yellow column, the total funds, is the total of the two sums to the left. So the 2019 B column is the proceeds that would come from the subordinated debt, that was that series, that was the 9,025,000 that was defined as the precondition spending limit.

Q. Okay.

A. The other cash was cash equity that MMU had invested up until that date, and so in the middle column there is 5.6 million and 2 million. The total of that was 7.6 million dollars, and we raised 8 million, and of that 8 million, 7.6 million was cash directly for this project.

So the far right column is the sum of the two, and so it showed that there was a gross amount of funds of $14,625,000.

Q. Okay. And then, and then all of the numbers that are below the 14,000,000, right, are numbers that were expected to be spent, right?

A. Yes, sir.

Q. To get down to the precondition limit?

A. Yes.

Q. Is that right?

A. Yes.

Q. Of the funds -- so we talked about the $7,000,000 number. Let's kind of get to that. Is it, is it this analysis from where you got your understanding that MMU would have $7,000,000 or more for early construction?

A. Yes, sir.

Q. Okay. And tell the jury what two numbers you're looking at or what numbers you're looking at to get that.

A. The two numbers are the second and the third rows in that yellow column. The 5.5 million is the amount of our equity, and it closely ties to the 5.6 million from the second column.

And the total cap-I spent of 2,269,094 was a reimbursement that MMU was receiving after the bond closing for expenses incurred prior to the bond closing for operations and construction.

So the combination was a little over $7,700,000 that we expected that we would have to fund the construction and operation of the school through August.

Q. Okay. Well, you would have the whole precondition limit for construction and operation, correct, and the 7.7 million at least for construction?

A. Yes.

Q. Okay. Did bond funding -- and this information, was this the last information you had to your recollection before you closed on bond funding on April 10th?

A. Yes.

Q. Okay. And did that funding close on April 10th?

A. Yes, it did.

Q. Okay. Did construction restart after the bond funding closed?

A. Shortly thereafter, yes.

Q. And we're not going to spend a lot of time because the jury has already heard about this. But Heritage had actually done construction already in the wintertime?

A. Yes, sir.

Q. Okay. And after bond funding closed, right, did MMU pay Heritage for all of that work it had done previously?

A. Yes.

Q. Okay. And after work started and up until, let's say, you went to the COCA meeting in late April, which we'll talk about in a minute, was the construction going fine?

A. Yes.

Q. Did everything seem to be like it was on plan?

A. On plan.

Q. Okay. And later in April we've referenced already that you were going to go to this COCA meeting, and that was to seek preaccreditation for MMU; is that correct?

A. Yes.

Q. Does that mean the ability to recruit and admit students?

A. Yes.

Q. I mean that was the holy grail, correct?

A. Yes, sir.

Q. If you got the ability to recruit and admit students then all of the rest of the bond funding would be unlocked, correct?

A. Yes.

Q. Then you were off to the races?

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the meeting with COCA in late April?

A. Yes.

Q. Okay. That didn't happen.

A. No.

Q. Okay. And do you recall learning on May 1st that MMU was unlikely to get preaccreditation at that time?

A. Yes.

Q. Okay. Were you and the rest of the board members surprised by that?

A. We were shocked.

Q. Okay. At the time did you understand that that would mean the bond funds above the precondition limit wouldn't be available until at least August, because that was the next time you could go back and seek preaccreditation?

A. The funds between the gross bonds and the 9,000,000, within a few days, we realized that that was not going to be available.

Q. Okay. So a few days after learning you weren't going to get your preaccreditation, did MMU learn that it didn't have as much money available as it thought it would have for construction and operations?

A. Yes.

Q. Okay. Were you and the rest of the board surprised by that information?

A. We were at least as shocked and stunned by that information.

Q. Okay. You were shown a bunch of your handwritten notes and some e-mails from that first week of May. Can you tell the jury what all was going on in the first week of May?

A. So we had up until that time been working nonstop on the school, and then we got this two-step or two-punch knock. And so we had nonstop conference calls, e-mails, phone calls, meetings, conversations to figure out what do we need to do to get preaccreditation status in August. Okay?

If we don't get it, if we're not getting it in April, what do we have to do to get preaccreditation status in August? What are all the things that Barbara has to do from the academic side? What are all the things on the financing things?

Just what are all of the activities that we have to do to be ready so that we can absolutely get approval at the August meeting? And the intensity level that we had before the August or the April 25th or 26th COCA meeting just went up higher because we knew we had to really get there in August.

Q. Okay. So it was still your plan then to resubmit in August?

A. Absolutely.

Q. Okay. And on the financial piece of things, did you

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A. Yes.

Q. Okay. And did you explore other possibilities for other investors?

A. Yes.

Q. Okay. And did you do that all the way up until the end of 2019?

A. To the end of 2019 and even into early 2020.

Q. Okay. Did you have conversations with companies called Torou and Salud --

A. Yes.

Q. -- to try to get investments?

A. Sorry. Yes.

Q. Ultimately, MMU wasn't able to get additional investors, was it?

A. No.

Q. Okay. And is that the reason that you didn't go back to COCA in August to try to get preaccreditation?

A. Yes.

Q. Okay. Phil, can you -- let's talk a little bit about, you know, in your assessment in the postmortem that you have done about what happened, right, what is it that happened? Why didn't MMU succeed?

A. I believe we didn't succeed because we had COCA that despite what we thought we had was a great application, they didn't give us preaccreditation status at the April meeting, and as a result of that, we found out that the funds that we thought we would have available were locked up so that we couldn't access our equity, and we couldn't get credit for the equity that we had invested that we would expect to be able to use to get to the August meeting.

And then we were trying to figure out how we can overcome those two big hurdles, and it became a nonstop effort to try to overcome those two hurdles, but those were the two hurdles that we had. We had the leadership. We had the plan. We had the staff. We had the facility.

We had all of these things lined up that we had been working on for four years, and we got blind-sided twice within a week.

Q. If MMU had any idea that the financial structure that was in place as of April 10th would only have given you one shot at preaccreditation in April, three weeks later, if MMU had understood that, would you have gone forward?

A. Not at all.

Q. Okay. Because you always knew while you expected preaccreditation in April that you might have to go to August?

A. Yes.

Q. Is that right?

A. (Moves head in affirmative manner.)

. . .

your attention this week.

THE CLERK: All rise for the jury.

(Jury exits.)

(In open court without the Jury present)

THE COURT: All right. Let's take a break, and then we will come back and deal with any motions, go through the instructions. Okay? How about we take like a 20-minute break or something like that?

MR. ANDRESEN: Okay.

THE CLERK: All rise.

(Recess taken.)

(In open court without the Jury present)

THE COURT: You may be seated. All right. Did you wish to make any motions?

MR. ANDRESEN: I do, Your Honor. May I proceed?

THE COURT: Yeah, you may proceed.

For this one, maybe you should go to the podium. For the instructions, you can stay seated go ahead.

MR. ANDRESEN: Your Honor, third-party defendants, Minnesota Medical University and Philip Keithahn, move for judgment as a matter of law under Rule 50 of the Federal Rules of Civil Procedure based on insufficiency of the evidence on portions of the claims that have been asserted.

Principally, our argument relates to both the fraudulent and negligent misrepresentation claims. On both of those claims, the evidence that you've seen now through the trial really falls into two categories.

There are two alleged misrepresentations, and then there were a couple of e-mails shown to Mr. Harvala where he was asked if he relied on the information in those e-mails. I don't have it off the top of my head, but I will track down before this portion is over the exhibit numbers on those e-mails, but I will start with those e-mails.

The two e-mails, one was I believe March 25th or 26th of 2019 e-mail sent by Mr. Keithahn to all of the members of the LLC. So that would have included Mr. Christensen. In that e-mail, it stated that MMU had received the commitments for the bond funding and was moving towards closing.

The other e-mail that was shown was the e-mail dated April 10th of 2019. There was an e-mail from Mr. Keithahn to both Mr. Harvala and Mr. Christensen saying we've closed on the bond funding.

With respect to both of those e-mails, like I said I will get you the exhibit numbers, all of the evidence that was introduced here was that they were true, the statements in those e-mails were true at the time they were sent.

There is no evidence that on March 25th of 2019 MMU didn't have commitments for the bond funding. Mr. Keithahn testified they did. Mr. Harvala testified he had no basis to dispute that that was true at the time.

On the April 10th e-mail Mr. Keithahn testified that they did in fact close on their bond funding that day, and all of the evidence shows that they did, but we can also go to Mr. Harvala's testimony where he acknowledged that he understood that the bond funds closed that day.

Everybody went back to work the next day, and he had no basis to dispute that the assertion made in that e-mail was untrue at the time. Point being, no reasonable juror could ever base a misrepresentation claim on either of those e-mails.

And to my memory, those were the only two, although we saw lots of e-mails, the only two e-mails where Heritage witnesses were asked if they relied on them. That's why I bring them up separately.

As it relates to the representations, there are two that were presented in trial. There is Mr. Christensen's representation that he had a phone call with Mr. Keithahn on either January 28 or 29 of 2019 and that Mr. Keithahn told him that once the construction started, the funding would be there, and I'm pretty sure that that's within a word of being a direct quote because I went back to my notes.

And that that was the only representation being made by Mr. Keithahn at the time to Mr. Christensen, and then the other representation that they have relied on, as we have heard over and over about in this case, is this representation about having $7,000,000 set aside for construction.

The pleadings that were submitted in this case and the opening statement from Heritage told the jury or asserted a claim that the representation that had been made was that there would be $7,000,000 set aside in a separate account that could only be used for construction.

Mr. Harvala testified only that his recollection of that representation was that that part about being reserved and set aside in an account that it could only be used for construction, he didn't say that. His only testimony was that he was told that there would be, there would be $7,000,000 set aside for construction once the bond funding closed.

And our argument, Your Honor, on those points is that both of those are representations that are future assurances, and I know that we raised this issue in our summary judgment motion, but at the time Your Honor obviously hadn't heard the evidence. And there were pleadings and discovery responses and arguments by lawyers about what was going to be said and what was being alleged, but you got to hear it directly this week from the witnesses.

And all that was said, according to both of those witnesses, is there would be money available in the future. In fact I asked both Mr. Christensen and Mr. Harvala intentionally if the representations that were being made were about things that were going to happen in the future, and both of them said yes.

So on that point having heard the evidence, with the law being that a misrepresentation claim cannot be based on a future assurance of payment, and while these are oral motions and we haven't had time to prepare a brief, I can for the record cite the Court to a few cases. The *American Computer Transportation Leasing* case, which is at 763 F.Supp 1473, page 1487.

That references that representations of future performance are not actionable, and then also says, citing another case, which is the *RJM Sales & Marketing* case, 546 F.Supp 1368, page 1377, from the District of Minnesota applying Minnesota law, and I'll quote from that case.

"Any representation or expectation of future acts is not sufficient to support a fraud claim merely because the represented act or event does not occur."

Last one I will cite, because it applies to both negligent or fraudulent misrep claims, *Davis versus Midwest Discovery Services* I believe it is, 439 N.W.2d 383, page 387, Minnesota Court of Appeals. "Future assurances do not form the basis of a misrepresentation claim."

If instructed on that law, which we contend the jury should be, our position is that no reasonable jury could disregard what Mr. Harvala and Mr. Christensen said and find that those two representations that are at the heart of this case are anything other than a representation of future assurance.

On the issue that I cited earlier, I won't give you a long list of citations, but with respect to the two e-mails that I referenced, I'll cite the Court to -- this relates to our argument that all of the evidence is that the statements in those e-mails were true at the time they were made.

And I'll cite the Court to the notes under Civ. JIG 57.10 and also the *Franklin Theater Corp* case, 198 N.W.2d, 558, page 560. "Truth is an absolute defense to a misrepresentation action."

And the elements itself say that a misrepresentation has to be based on something that is not true at the time that it is spoken or written.

Your Honor, we reserve all other arguments that we have on legal issues. That is the entirety of our motion under Rule 50 for insufficiency of the evidence.

THE COURT: All right. Thank you, Mr. Andresen.

Response?

MR. ATHMANN: Your Honor, so as I understand it, there are two, essentially two arguments. The first related to these e-mails, this March 25th and April 10th e-mail. And I think what counsel failed to mention is the context of those e-mails.

The statements that the e-mails may or may not have been a true statement of what's stated in those e-mails themselves, the context of the e-mails is, Mr. Harvala was told by Mr. Keithahn that there was $7,000,000 set aside for construction without contingency, that that was going to be available no matter what.

So when Mr. Harvala received e-mails saying we've closed on our bond financing, we've lined up the bond financing and then closed, which these two e-mails are in a series of ultimately that April 10th e-mail, the understanding of that was, what bond financing closing meant was, now there is $7,000,000.

And Mr. Harvala and Heritage proceeded to start construction and continued to perform throughout the summer based off of that representation.

. . .

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Selective Insurance Company of America,
Plaintiff,

vs.

Heritage Construction Companies, LLC;
JAC & Sons Investments, LLC;
Andrew P. Christensen; and Jennifer A. Christensen,

Defendants and Third-Party Plaintiffs,

vs.

Third-Party Defendants.

File No. 19CV3174 (JRT/JFD)

Minneapolis, Minnesota
December 18, 2023
8:11 A.M.

BEFORE THE HONORABLE
JUDGE JOHN R. TUNHEIM AND A JURY
UNITED STATES DISTRICT COURT

(TRIAL - VOLUME V)

. . .

Question 1. We think you should fill that out as to be the correct amount of our damages for breach of contract, $6,215,990.82. That judgment is not worth the paper it's written on because they've got no money, but we still want it. I want to put it on the wall in my cabin.

Claim number 2, fraudulent misrepresentation. You need to answer "Yes" to both of them. We were defrauded into performing this work when they knew they didn't have the money to pay us and we thought they did. The damages for that are the $4,878,750.30.

The fraudulent omission one, we think you should say "Yes" to that as to both MMU and to Mr. Keithahn. And the damages are the same number.

With regard to Question 6, we think you should put "Yes" to both of them. The evidence clearly shows that at a minimum -- actually, I think it was fraudulent instead of negligent, but if you don't agree, it was at least negligent.

He should have known. He was supposed -- he was the chief financial officer of the company. He was supposed to know how much money they had available, how much they had spent, what it could be spent on, and how much they had left. And he claims: I had no idea. I'm an idiot. You know, I'm a useful idiot. That's not the case. He is a very, very smart man.

. . .

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Selective Insurance Company of America,

Plaintiff,

vs.

Heritage Construction Companies, LLC; JAC & Sons Investments, L.L.C.; Andrew P. Christensen; and Jennifer A. Christensen,

Defendants and Third-Party Plaintiffs,

vs.

Philip Keithahn; Minnesota Medical University, LLC; and John Does 1 through 10,

Third-Party Defendants.

Civil File No.: 19-CV-03174 (JRT/LIB)

THIRD-PARTY DEFENDANTS' MOTION FOR JUDGMENT AS A MATTER OF LAW AND ALTERNATIVELY FOR A NEW TRIAL PURSUANT TO FED. R. CIV. P. 50(b) AND 59.

Pursuant to Rules 50(b) and 59 of the Federal Rules of Civil Procedure, Third-Party Defendants Philip A. Keithahn and Minnesota Medical University, LLC (collectively the "TPDs") move this Court for an Order granting their Motion for Judgment as a Matter of Law or, alternatively, granting their Motion for a New Trial.

TPDs are entitled to judgment as a matter of law because:

1. The evidence in the record was insufficient to prove that TPDs provided false information or falsely represented past or present material facts;
2. the evidence in the record was insufficient to prove reasonable reliance as it relates to Third-Party Plaintiffs' claims for misrepresentation and indemnification;
3. the jury's verdict was necessarily and improperly based on speculation and conjecture; and
4. the jury's verdict was otherwise unsupported by the evidence or the law.

TPDs are entitled to a new trial because errors occurred before and during trial that prejudiced the outcome, including but not limited to:

1. The jury was improperly instructed, in that the instructions did not inform the jury that a finding of fraud or misrepresentation cannot be based on a future assurance or prediction of future results;
2. Third-Party Plaintiffs violated the Court's Order granting TPD's Motion in Limine No. 1 to preclude any evidence of or reference to Keithahn's ownership interest in the bank for which he is employed;

3. The Court denied Keithahn's and MMU's Motion in Limine No. 2 to preclude any evidence of or reference to Keithahn having earned his MBA at Harvard Business School;
4. The Court permitted Third-Party Plaintiffs to argue and suggest to witnesses that MMU would be unable to pay any judgment; and
5. The Court permitted Third-Party Plaintiffs to improperly impeach Mr.Keithahn's trial testimony;

In addition, TPDs are entitled to a new trial because the evidence at trial was insufficient to support the damages awarded.

Said Motions are based upon the forthcoming Memorandum of Law which, pursuant to L.R. 7.1(e), will be filed in accordance with the Court's briefing schedule after it is obtained from the courtroom deputy, and all of the files, declarations, records and proceedings herein and the arguments of counsel at the hearing. TPDs expressly reserve the right to identify additional or further bases for post-trial relief in its forthcoming memorandum.

BRADFORD ANDRESEN NORRIE & CAMAROTTO

Date: January 16, 2024 By /s/ *J. Scott Andresen*

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