IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 27074

CASPER LODGING, LLC,

Plaintiff/Appellee,

vs.

ROBERT W. AKERS,

Defendant/Appellant.

Appeal from the Circuit Court
Seventh Judicial Circuit
Pennington County, South Dakota

The Honorable Wally Eklund, Presiding Judge

BRIEF OF APPELLANT

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Notice of Appeal filed April 24, 2014

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

REFERENCE LEGEND

The trial transcript will be cited as "T" followed by page numbers. Trial exhibits will be cited as "Ex" followed by the exhibit number. Hearing transcripts will be cited as "HT date," where the date of the transcript will be included. The circuit court record will be cited as "R" followed by the page number assigned by the clerk.

JURISDICTIONAL STATEMENT

Defendant/Appellant Robert W. Akers ("Akers") appeals from the judgment upon jury verdict (including the trial court's award of prejudgment interest and post-judgment interest) in favor of Plaintiff Casper Lodging LLC ("Casper") entered on February 14, 2014, notice of entry of which was served on February 19, 2014. (R 4734) Akers appeals from the order denying his motion for mistrial entered February 14, 2014, notice of entry of which was served on February 19, 2014. (R 4728) Akers appeals from the order denying his renewed motion for judgment as a matter of law and alternative motion for a new trial entered March 26, 2014, notice of entry of which was served on March 26, 2014. (R 4801) Akers appeals from the order granting Casper's motion to strike Akers' third-party complaint against The Koehler Organization ("TKO") for contribution and indemnity based on TKO's maintenance of the hotel property in question, and order denying Akers' motion to compel joinder of TKO entered August 28, 2013, notice of entry of which was served on September 6, 2013. (R 766) As reflected in the aforementioned orders, Akers filed post-trial motions under SDCL 15-6-50(b) and 15-6-59. (R 4752) Akers timely filed notice of this appeal on April 24, 2014. (R 4819)

STATEMENT OF THE ISSUES

A. Judgment as a Matter of Law

1. Whether the trial court committed reversible error by denying Akers' motion for judgment as a matter of law due to Casper's failure to present evidence of the amount by which the alleged breach of contract diminished the market value of the hotel improvements.

   The trial court denied Akers' motion for judgment as a matter of law, implicitly finding that a party asserting a claim for damages to real property does not need to present evidence of diminished market value for the jury to award the lesser of the cost of repairs or diminution in market value.

   Most relevant authorities: *Ward v. LaCreek Elec.*, 163 N.W.2d 344 (SD 1968); *Rupert v. Rapid City,* 2013 SD 13, 827 N.W.2d 55; *Willer v. Chicago, M. & St. P. Ry.*, 210 N.W. 81 (SD 1926).

2. Whether the trial court committed reversible error by denying Akers' motion for judgment as a matter of law when Casper failed to identify any terms of the contract that were breached by Akers.

   The trial court denied Akers' motion for judgment as a matter of law.

   Most relevant authorities: *Kernelburner LLC v. MitchHart Mfg*, 2009 SD 33, 765 N.W.2d 740; *Rogers v. Black Hills Speedway,* 217 N.W.2d 14 (SD 1974); *Bunkers v. Jacobson*, 2002 SD 135, 653 N.W.2d 732.

3. Whether the trial court committed reversible error by denying Akers' motion for judgment as a matter of law based upon Casper's failure to mitigate damages, failure to pursue warranty rights, or both.

   The trial court denied Akers' motion for judgment as a matter of law.

   Most relevant authorities: *Ducheneaux v. Miller,* 488 N.W.2d 902 (SD 1992); *Winter v. Pleasant,* 222 P.3d 828 (Wyo. 2010); *Moxley v. Laramie Builders, Inc*., 600 P.2d 733 (Wyo. 1979); *Ortega v. Flaim,* 902 P.2d 199 (Wyo. 1995).

B. Mistrial and New Trial

4. Whether the trial court committed reversible error by denying Akers' motion for mistrial based upon Casper's structural engineer's undisclosed expert opinions that the hotel was structurally unsafe and structurally defective upon delivery, when the trial court later struck the opinions due to Casper's nondisclosure.

   The trial court denied Akers' motion for mistrial.

   Most relevant authorities: *City of Sioux Falls v. Johnson*, 1999 SD 16, 588 N.W.2d 904; *Kaiser v. University Physicians Clinic*, 2006 SD 95, 724 N.W.2d 186; *Papke v. Harbert*, 2007 SD 87, 738 N.W.2d 510.

5. Whether the trial court committed reversible error by denying Akers' motion for mistrial due to the exclusion of testimony from Akers' expert, Merl Potter, which Akers offered to rebut Casper's damages evidence and expert opinions that were not disclosed in detail until after Akers' expert disclosure deadline and after Akers' expert was deposed.

   The trial court denied Akers' motion for mistrial.

   Most relevant authorities: *Mawby v. United States*, 999 F2d 1252 (8th Cir. 1993); *Stender v. Vincent*, 992 P2d 50 (Hawaii 2000).

6. Whether the trial court committed reversible error by denying Akers' motion for mistrial based upon Casper's counsel's statement during closing argument that Akers could seek compensation from the contractor or subcontractors, which violated both the trial court's prior order and the collateral source rule.

   The trial court denied Akers' motion for mistrial.

   Most relevant authorities: *Schoon v. Looby*, 2003 SD 123, 670 N.W.2d 885; *Jurgensen v. Smith*, 2000 SD 73, 611 N.W.2d 439.

7. Whether the trial court committed reversible error by denying Akers' motion for mistrial based upon Casper's counsel's statement during closing arguments that Casper's failure to produce 700 pictures documenting damages to the hotel was due to Akers' failure to request the pictures, when Akers, in fact, requested the pictures during discovery.

   The trial court denied Akers' motion for mistrial.

   Most relevant authorities: *Schoon v. Looby*, 2003 SD 123, 670 N.W.2d 885.

8. Whether the trial court committed reversible error by denying Akers' motion for a new trial, based on the same reasons Akers moved for a mistrial set forth in issues 4 through 7 above.

   The trial court denied Akers' motion for new trial.

   Most relevant authorities: *See* Legal Issues 4 through 7.

C. Jury Instructions

9. Whether the trial court committed reversible error by refusing to instruct the jury on Casper's warranty rights as part of Casper's contractual obligations and as part of Akers' mitigation of damages and waiver defenses.

   The trial court refused Akers' proposed jury instruction which would have instructed the jury on the law with respect to Casper's warranty rights.

   Most relevant authorities: *Atkins v. Stratmeyer*, 1999 SD 131, 600 N.W.2d 891; *Winter v. Pleasant,* 222 P.3d 828 (Wyo. 2010); *Moxley v. Laramie Builders, Inc*., 600 P.2d 733 (Wyo. 1979); *Ortega v. Flaim,* 902 P.2d 199 (Wyo. 1995).

10. Whether the trial court's instructions to the jury on mitigation of damages amounts to reversible error, on the basis that the jury instruction given by the trial court required the jury to find in Casper's favor on mitigation of damages, if Casper took any reasonable steps to mitigate damages, even if the jury concluded that additional reasonable steps were necessary.

    The trial court overruled Akers' objection and provided Jury Instruction No. 50 to the jury.

    Most relevant authorities: *Ducheneaux v. Miller,* 488 N.W.2d 902 (SD 1992); *Vetter v. Cam Wal Elec.*, 2006 SD 21, 711 N.W.2d 612.

11. Whether the trial court committed reversible error by refusing to instruct the jury that the measure of damages is the lesser of repair costs or diminution in market value.

    The trial court refused Akers' proposed jury instruction which would have instructed the jury that the measure of damages is the lesser of repair costs or diminution in market value.

Most relevant authorities: *Ward v. LaCreek Elec.*, 163 N.W.2d 344 (SD 1968); *Rupert v. Rapid City,* 2013 SD 13, 827 N.W.2d 55; *Willer v. Chicago, M. & St. P. Ry.*, 210 N.W. 81 (SD 1926).

D. Entry of Judgment on Jury Verdict

12. Whether the trial court committed reversible error by entering the jury's verdict in the amount of $1,019,468.74 due to the issues set forth in issues 1 through 11 above.

    The trial court entered judgment on the jury's verdict despite the issues raised by Akers as set forth in issues 1 through 11 above.

    Most relevant authorities: *See* Legal Issues 1 through 11.

E. Interest

13. Whether the trial court committed reversible error by awarding prejudgment interest from the date the hotel opened, March 11, 2004, given that the actual dates of Casper incurring damages are determinable, nearly all of Casper's losses were incurred in 2010, and Casper's failure to notify Akers of water intrusion for years prevented Akers from taking action.

    The trial court awarded Casper damages from the date the hotel opened on March 11, 2004, despite most of the damages not being incurred until years later; the trial court further failed to make a finding as to when Casper incurred damages and instead used the date of the hotel's opening as the beginning date for calculation of prejudgment interest in the amount of $997,682.83.

    Most relevant authorities: SDCL 21-1-13.1; *Bunkers v. Jacobson*, 2002 SD 135, 653 N.W.2d 732; *Miller v. Hernandez*, 520 N.W.2d 266 (SD 1994).

14. Whether the trial court committed reversible error in awarding post-judgment interest to accrue on the full amount of the judgment, including prejudgment interest.

    The trial court ordered an award of post-judgment interest on the principal amount of the judgment as well as the $997,682.83 award of prejudgment interest.

    Most relevant authorities: *City of Sioux Falls v. Johnson*, 2003 SD 115, 670 N.W.2d 360; *Tri-State Refining and Investment Co., Inc. v. Apaloosa*

Co., 431 N.W.2d 311 (SD 1988); *Jackson v. Lee's Travelers Lodge, Inc.*, 1997 SD 63, 563 N.W.2d 858.

F. Involvement of TKO

15. Whether Casper should have been compelled to join as a defendant The Koehler Organization ("TKO"), which was responsible for hotel maintenance, as an indispensable party.

    The trial court denied Akers' motion to compel joinder of TKO, finding that TKO was not an indispensable party.

    Most relevant authorities: SDCL 15-16-19(a), 15-16-19(b), 15-8-15, 15-6-14(a); *J.K. Dean, Inc. v. KSD, Inc.*, 2005 SD 127, 709 N.W.2d 22; *Thieman v. Bohman*, 2002 SD 52, 645 N.W.2d 260; *Renner v. Crisman*, 127 N.W.2d 717 (SD 1964); *City of Bridgewater v. Morris, Inc*., 1999 SD 64, 594 N.W.2d 712 .

16. Whether the Court committed reversible error by striking Akers' third-party complaint against TKO and denying Akers leave to file the third-party complaint against TKO, when Akers filed the third-party complaint before expiration of the amended pleadings deadline and within ten days of originally answering the first tort claims asserted against him.

    The trial court granted Casper's motion to strike Akers' third-party complaint against TKO and denied Akers' motion for leave to file a third-party complaint against TKO.

    Most relevant authorities: SDCL 15-6-14(a), 15-6-13(g).

STATEMENT OF THE CASE

This case was tried by a jury before the Honorable Wally Eklund, Judge for the Seventh Judicial Circuit, Pennington County, South Dakota.

This case involves the October 15, 2003, Improvement Purchase Agreement ("the Agreement") between Akers and Casper's assignor, James Koehler ("Koehler"). Koehler conditionally agreed to purchase a hotel that Akers was having built in Wyoming. If conditions precedent were unsatisfied, Koehler could decline to close or waive

unsatisfied conditions. On February 5, 2004, Koehler purchased the hotel before construction was finished. By purchasing the incomplete hotel, Koehler agreed that all conditions were either met or waived. Koehler assigned his rights to Casper making Casper the hotel's owner. Casper hired The Koehler Organization ("TKO") to staff, operate, and maintain the hotel.

Six years later, Casper sued Akers alleging breach of contract. Casper alleged construction defects caused water to penetrate the hotel's exterior over the course of six years resulting in repairs. Casper did not pursue warranty claims against the contractors responsible for the construction defects. Casper did not sue TKO, the entity responsible for maintenance. TKO and Casper are sister organizations controlled by Koehler. Casper did not notify Akers of water intrusion until 2007.

Akers filed third-party complaints seeking indemnity from contractors. Akers settled the subcontractor claims, the general contractor claim was bifurcated. While Casper asserted a contract claim, subcontractors filed tort counterclaims against Akers. Under Rule 14(a), within ten days of answering the first tort claim, Akers filed a third-party complaint against TKO seeking contribution. The trial struck Akers' claim against TKO, and denied Akers' motion to compel joinder of TKO.

Casper's contract claim was tried to a jury. Akers moved for judgment as a matter of law, arguing: (1) Casper failed to present evidence of the amount of diminution in market value of the hotel ; (2) Akers performed all contractual obligations; (3) Casper waived its rights by failing to pursue warranty claims; and (4) Casper failed to mitigate damages by failing to caulk leaks and ignoring water intrusion. The trial court denied Akers' motions.

Akers moved for mistrial as a result of undisclosed expert opinions offered by Trent Nelson, Casper's expert, that the trial court initially allowed the jury to hear based on misrepresentations of Casper's counsel. Nelson testified that the hotel was structurally unsound and unsafe from day one due to inadequate nailing of OSB sheathing, regardless of long-term water damage. On cross-examination, Nelson admitted such opinions were not previously disclosed as represented by Casper's counsel. The trial court struck Nelson's new opinions, provided a short cautionary instruction to the jury, but denied a mistrial.

Akers moved for a mistrial based on: (1) exclusion of his expert's opinions offered to rebut untimely disclosed damages evidence and undisclosed damages opinions from Casper's expert; (2) arguments of Casper's counsel that violated a court order; and (3) misleading arguments from Casper's counsel that Casper's nondisclosure of 700 photographs was due to Akers' failure to request the photographs, which was untrue. The trial court denied Akers' motion for mistrial and motion for new trial.

In addition to transferred warranty rights, Wyoming law provides warranty rights to Casper. The trial court refused Akers' requested jury instruction that would have instructed the jury regarding warranty rights, which relate to Akers' waiver and mitigation of damages defenses. Over Akers' objection, the trial court provided Jury Instruction No. 50 which dictated a finding in Casper's favor, if Casper took *any* reasonable steps to mitigate damages, even if additional reasonable steps were necessary.

The jury rendered a verdict for Casper in the full amount requested: $1,019,468.74. By agreement, the trial court determined prejudgment interest. For six years, water penetrated the hotel. Repair invoices include dates Casper incurred damages,

most of which were in 2010. Instead of determining the dates on which Casper incurred damages, the trial court awarded $997,682.83 in prejudgment interest from the date the hotel opened, March 11, 2004. The trial court awarded post-judgment interest to accrue upon prejudgment interest.

STATEMENT OF FACTS

The Agreement

Akers and Koehler executed the Agreement on October 15, 2003. (Ex 1 ¶ IX; T 1141-42) The purpose of the Agreement was "to set forth the terms and conditions under which [Akers] agrees to sell to [Koehler] the improvements [Akers] is constructing[,]" which was a Holiday Inn Express ("HIE") hotel in Casper, Wyoming ("the hotel"). (Ex 1 ¶ II) Koehler has built over one-hundred hotels. (T 1218-19)

At the time of the Agreement, the hotel was partially constructed. (Ex 1 ¶ IX) Akers had hired Zakco Commercial Consultants ("Zakco") as the general contractor to build the hotel. (Ex 1 ¶ II) HIE approved the hotel blueprints. (Exs 503, 528-29; T 1256-60, 1291-94) Koehler monitored construction of the hotel. (Ex 1 ¶ IX; T 1262-64) Koehler requested no changes to construction. (Ex 1 ¶ X; T 1256)

Akers transferred warranties from Zakco and subcontractors to Koehler. (Ex 1 ¶ XI; T 1294-95) Akers did not personally construct the hotel and made no promises regarding the quality of construction. (Ex 1) Rather, Koehler had the right to purchase the hotel if all conditions were satisfied or waived by him. (*Id.*)

Prior to completion, Koehler purchased the hotel to timely conclude a 1031 exchange. (T 1134-36, 1271-74) Koehler admittedly purchased something other than a

"turn-key" hotel. (T 1273-74) At closing, Koehler accepted the construction, which he found "cosmetically satisfactory," but years later changed his mind. (T 1276-77)

On February 5, 2004, Akers sold the hotel to Koehler. (Ex 532.) Koehler opened the hotel on March 11, 2004. (T 1096) Koehler assigned his rights under the Agreement, including ownership of the hotel, to Casper. (T 1096-97) Casper entered into a management agreement with TKO and entrusted the hotel to TKO's care. (T 313-14, 399, 480, 1097)

Water Problems

Within the first year, water penetrated the hotel's exterior, leaking through windows and noticeably moistening sheetrock. (T 234, 328, 472-73) Water penetrated guest rooms, the pool area, and corridor hallways. (T 328-30, 472-73) Instead of investigating the source of water intrusion, pursuing warranty rights, or notifying Akers, Casper made cosmetic interior repairs by replacing moist sheetrock, repainting walls, and applying caulk to some window penetrations. (T 329-31, 473-74) Casper first notified Akers of water intrusion in 2007, long after warranty expiration. (Ex 553) Caulking prevented leakage where it was applied. (T 151-52, 214-15)

John Farr provided opinions on causation for Casper. (T 154-313) In 2007, three years into operation, Farr inspected the hotel. (T 161) TKO personnel told Farr "that they would routinely access multiple rooms during precipitation events to place towels and collection vessels for infiltration to the interior of the room." (T 234)

Water penetrated the building due to lack of caulk where windows and Packaged Thermal Air Conditioning (PTAC) units penetrated the stucco. (T 1530-31, 1546-47,

1556-60). Casper or TKO was responsible for periodic caulking of stucco penetrations. (Ex 564 pgs. 66, 73) Farr testified that original construction lacked caulk at stucco penetrations, but some post-construction caulk had been applied inconsistently. (T 214-15)

In 2007, Farr advised Casper to make repairs to prevent exacerbation of problems, but Casper ignored Farr's recommendations for three more years. (T 181-88) Casper repaired nearly 95% of the water damage in 2010, after moisture festered beneath the stucco, on the OSB sheathing, and in wall cavities for six years. (Ex 6A-6B; T 53, 135, 161, 234, 328-31, 472-74, 1560)

During Casper's 2010 renovations, the project superintendent, Ryan Pace, took numerous photographs. (T 52, 135; Ex 73-75, 77-95, 97-104) Pace did not photograph the handful of windows that had caulk, explaining, "I didn't take those pictures [of windows that had caulk]…because they weren't problem areas to me. We were looking for reasons and places where the water was getting in." (T 152) Farr acknowledged the absence of water damage near caulked penetrations. (T 232-33)

The vast majority of damage came from water entering uncaulked stucco penetrations. (T 240-42) "Where there weren't penetrations, things were in relatively good shape." (T 244) Farr admitted caulk is the first line of defense to water intrusion. (T 245)

Stucco terminations lacking caulk were plainly visible when the hotel opened. (T 246-48) Farr and Akers' expert testified that as early as 2004, stucco penetrations could have been properly caulked, which would last fifteen years and cost $15,000 (if not

obtained for free under warranties) compared to Casper's $840,000 repair bill. (T 246, 1545-46, 1534-35; Exs 6A-6B)

The hotel also had noticeably excessive humidity in the pool room immediately. (T 472, 676-78) There were signs that "structural components of that poolroom [were] being compromised." (T 680) TKO disconnected the outside air intake during the winter months exacerbating moisture problems. (T 696-97) Casper failed to address this problem for five years. (T 681-83)

Performance of the Agreement

Akers acknowledged the presence of construction defects, but contended that Casper and TKO's failure to periodically caulk stucco penetrations caused Casper's damages. (T 36-43, 350-51, 376-79) Akers contended that Casper should have mitigated damages by applying caulk, reporting leaks to Akers, and pursuing warranty rights. (T 1552-54, 1775-84)

This case is not a traditional construction defects case involving contractors as defendants. (R 2, 4395) This case involves the parties' obligations under the Agreement. (*Id.*) Akers cooperated with Koehler's 1031 exchange needs, sold the hotel, and transferred warranties as required by the Agreement. (Ex 1; T 1134-36, 1271-74, 1294-95) The Agreement included conditions precedent, which had to be satisfied or waived before Koehler became obligated to close. (Ex 1 ¶ VII) Some conditions were extended post-closing, but escrowed funds were reserved to complete construction if needed. (Ex 2; T 1274) This case does not involve Koehler's refusal to purchase the hotel due to unsatisfied conditions. (R 2, 4395) By opening day, all conditions were satisfied. (Exs

539-41, 551; T 1276, 1289-90, 1293-94) HIE wrote, "Congratulations on your new hotel opening. It was recently observed that all of the construction and related finish work has been satisfactorily completed." (Ex 539)

Evidence Related to Sound Insulation Claim

Casper believed the hotel was too noisy due to poor sound insulation. (T 1147, 1155) Casper presented testimony from architect Dave Stafford regarding "STC" sound rating of the blueprints. (T 518-26) The Agreement contains no "STC" requirement. (Ex 1) HIE approved the blueprints, including sound insulation, and approved final construction. (Exs 503, 528-29, 539) Despite no evidence that construction varied from the approved plans, the jury awarded $180,000 for sound insulation damages. (Exs 6A-6B; R 4461)

Evidence of Damages

Casper presented evidence of repair costs, but neglected to present evidence of the amount of diminution in value of the hotel. (Exs 6A-6B; T 1644-49) Akers moved for a directed verdict based on this evidentiary deficiency, but the trial court denied the motion. (T 1643-53) The trial court refused Akers' Requested Jury Instruction 45, which would have instructed the jury to award the lesser of repair costs or diminished market value. (T 1722; R 4395)

Undisclosed Opinions of Casper's Expert, Trent Nelson

Casper's claim consisted primarily of the cost of repairing long-term water damage. (Ex 6A-6B; T 53, 135, 161, 234, 328-31, 472-74, 1560) A central dispute at trial was whether Casper mitigated damages by making interior repairs and failing to caulk, and whether Casper caused its own damages. (T 1739-40, 1772-76)

Trent Nelson, Casper's structural engineer, addressed three issues: (1) a wall that was missing a tie-down; (2) dirt piled too high near the foundation; and (3) structural unsoundness due to long-term water damage. (T 552-86, 619) The cost of repairing the first two items totals approximately $10,000. (Ex 6A-6B) Nearly all of Casper's $840,000 repair bill related to remedying long-term water damage, which was subject to Akers' mitigation and causation defenses. (Exs 6A-6B; T 1739-40, 1772-76)

Casper presented testimony that 25,000 nails were needed to fasten OSB sheathing during renovations. (T 62, 128, 565-67) Anticipating that Casper intended Nelson to offer undisclosed opinions regarding the adequacy of OSB fastening (or nailing) during original construction, Akers objected to such undisclosed opinions. (T 552-55)

Casper's counsel represented that such opinions were disclosed. (T 553-55) Casper's counsel read the following deposition excerpt in which Nelson stated the OSB fastening was inadequate, because the OSB was subjected to long-term water damage, not because the original fastening was inadequate:

> Based on the plans, and specifically the structural portion of the plans, the specifications of those plans indicate properties of the wood members used in the construction of the design of this building that were *assumed to be in a dry condition*. The moisture content were specified on the plans and they relate to a dry condition. *So there was no indication on the structural plans*

> *that the structure was designed under the assumption that it would be in a wet condition when in use*. And it also stated that the exterior walls of the structure were designated as shear walls and it gave a specific fastening pattern for the OSB sheathing to be attached to the structural studs of the exterior walls. So with that, that led me to the conclusion and *that it was important to maintain the integrity of the existing envelope. Meaning, the OSB sheathing and the load bearing studs* of the structure, in order to maintain the integrity of the building, *because those components of the building were assumed to be installed and maintained in a dry use type condition* based on the information I saw in the structural plans.

(T 553-54 (emphasis added)) Casper's counsel then represented, "He talks about fastening pattern, Your Honor. That means nailing." (T 554)

Akers' counsel responded:

> Judge, that's – as he says right there, he just read it. The problem is, this was in a wet environment. *The OSB was too wet to be fastened properly and function structurally as designed in the plans. There's never been a discussion about there not being enough nails in the thing.* That's a completely new issue.

(T 554 (emphasis added)) Akers' counsel argued, "[Nelson] didn't say in his deposition or report at any point that the OSB *as originally constructed* was improperly fastened. His opinion is that it was *too moist and that was the structural problem.*" (T 555 (emphasis added))

The trial court overruled Akers' objection, reasoning, "he's got a problem with the fastening pattern, and he's disclosed that, so I'm going to allow him to talk about that. Now, to me, a nail is a fastener, that's it." (T 555) The trial court did not appreciate the distinction between fasteners being inadequate after six years of festering moisture and inadequate fastening in original construction, the latter being immune to criticisms of Casper's mitigation efforts. (*Id.*)

Nelson spent significant time testifying about nailing deficiencies in the original construction. (T 561-70) Nelson opined that original construction lacked 18,000 nails. (T 567) Nelson testified that the hotel violated building code and was "unsafe" due to the risk of "blowing over" from inadequate OSB fastening. (T 567-68) Nelson testified, "*this building was unsafe the day Mr. Koehler received those keys*." (T 569 (emphasis added)) Nelson explained that the hotel was a "public nuisance" needing repairs or demolition. (*Id*.) Nelson implied that all repairs were needed regardless of neglectful maintenance, an implication of which the jury was reminded in closing argument. (T 554, 1746)

On cross-examination, Nelson admitted his opinions about structural unsoundness due to inadequate fastening of original OSB were never disclosed. (T 594-95) Regarding his opinion "that the building [was] *structurally unsound because of the lack of nails*," Nelson conceded, "*that opinion is not in my report*." (T 594 (emphasis added)) Nelson testified:

> Q The opinion that you've given here today is that the *entire building was structurally unsound because it wasn't nailed appropriately. Was that in the deposition*?
>
> A *No*.

(T 594-95 (emphasis added))

Nelson's pretrial opinions related to the OSB being rotted from long-term water damage. (T 552-55, 594-95) Casper never disclosed that Nelson would render opinions that the hotel was structurally unsound, unsafe, and in violation of building code at the time of sale due to inadequate fastening. (T 594) This was an entirely new opinion, but Casper's counsel represented otherwise to the trial court. (T 553-55)

Following Nelson's admission of nondisclosure, Akers moved for a mistrial. (T 616) The trial court stated, "I'm a little *disturbed*, Mr. Erlandson [Casper's counsel], *that the part you read from your deposition, your witness departed from that* … to come here with *an entirely new opinion, that is disturbing to me*." (T 617 (emphasis added)) The trial court observed that Nelson's "opinion rests on the testimony of Mr. Pace which came up Monday. *That troubles me.* And that is *not an opinion that obviously was told to defense counsel or revealed to them previously*." (T 620 (emphasis added))

Advocating for a mistrial, Akers' counsel argued, "this is a bell that cannot be unrung … The opinion in this case was that due to long-term exposure of water, that the OSB became structurally unsound. And now it is, it was unsound from the day that the keys were handed over based on a nailing pattern[.]" (T 619) Akers' counsel explained the significance of this distinction:

> [T]here has been no report or opinion disclosed in deposition testimony that the building was unsound at the time of the sale. It was unsound based on long-term exposure to water. Our defense to that, Your Honor, it was exposed to water because they failed to maintain it. (T 621)

The trial court struck Nelson's undisclosed opinions and instructed the jury to disregard "Mr. Nelson's opinions that the building was structurally unsound at the time Mr. Akers sold the building to the plaintiff based on improper fastening or not having enough nails in the OSB[.]" (T 627; R 4357) The trial court reserved ruling on granting a mistrial. (T 619)

In closing argument, Casper's counsel acknowledged that if repairs had been made earlier, some of the OSB would not have needed replacement, yet the jury awarded every penny Casper requested. (T 1749-50; R 4461, 4725; Ex 6A-6B) In closing

arguments, Casper's counsel improperly reminded the jury: "Mr. Nelson … identified the codes and other applicable standards that were breached on the opening day[.]" (T 1746) The cautionary instruction had not specifically addressed that stricken testimony, but certainly encompassed it. (T 627; R 4357)

Following trial, the trial court denied Akers' motion for mistrial. (R 4728)

Exclusion of Opinions of Merl Potter

Casper introduced exhibits summarizing its damages. (Ex 6A-6B) Casper introduced another exhibit identifying unclaimed expenses. (Ex 16) Casper made known its claimed damages through a damage summary after Akers' expert disclosure deadline and after Akers' damages expert, Merl Potter, was deposed. (T 1520-21) Wendell Potratz was Casper's renovation construction manager and its damages expert. (T 861) Potratz was unable to answer deposition questions about the then recently produced damages summary. (T 1053-54, 1638-39) During discovery, Casper produced voluminous receipts, invoices, and bills, only some of which were claimed, and Casper failed to disclose the details of Potratz's damages opinions. (*Id.*)

At trial, Potratz provided hours of testimony about the damages summary. (T 873-939) Akers sought to rebut Potratz's specific opinions and the damages summary through the testimony of Potter. (T 1574-75, 1656-71) Potter testified as follows:

> Q And you heard Mr. Potratz go line by line by line through the damages summary?
>
> A I did.
>
> Q And you first saw those damage summaries [Exs. 6A & 6B] before or after your deposition?

A After.

Q And when did you first become aware of Mr. Potratz's explanations as to line-by-line items?

A Just a few days ago sitting here.

(T 1574-75)

When Casper objected to Potter's damages testimony, Akers argued that Potter should be permitted to testify, because Potter's opinions were fairly disclosed or were being offered to rebut newly disclosed damages summary and opinions from Potratz:

> Additionally, these *damage summaries, 6B, I think we got this week. And the original version of this thing, we got a couple of months ago after the disclosure deadline, after Mr. Potter was deposed.* And when I asked Mr. Potratz about -- or when he was asked about the damages summary at his deposition, he had just started looking at it the day before and *was not able to answer any questions. He went through it for the first time and we got his opinion here in court*.
>
> * * *
>
> *Mr. Potratz for the first time ever was able to talk about the damage summary here in court, we have to be able to respond to that and we indicated Mr. Potter would be talking about that.*

(T 1520-21 (emphasis added))

The trial court refused to allow Potter to rebut the untimely disclosed damages summaries and Potratz's undisclosed damages opinions. (T 1656) Akers made an offer of proof setting forth Potter's testimony. (T 1656-71) If the jury accepted only some of Potter's damages opinions, it would have resulted in dramatically lower damages, as some repairs were betterments, unnecessary, or avoidable through mitigation. (*Id*.)

Jury Instructions

Akers requested the following jury instruction addressing Casper's warranty rights:

> As a purchaser of property, Plaintiff was given implied warranties from the contractors who performed work on the Casper, Wyoming, Holiday Inn Express. Those warranties provided that the contractors' work would be performed in a skillful, careful, diligent, and workmanlike manner. Plaintiff had the ability to assert warranty claims and enforce their warranty rights against the contractors involved in the project with regard to any allegedly defective work performed on the project.
>
> As a non-builder seller of the hotel, Defendant Robert W. Akers did not provide any warranties, express or implied, to Plaintiff or James Koehler with regard to the work performed at the hotel.

(R 4390-92) The trial court refused Akers' requested instruction and provided no guidance to the jury on warranty rights. (T 1725)

The trial court provided Instruction 49 (quoted *infra* §I.C.3.a) addressing mitigation of damages. (R 4395; T 1694) The trial court also provided Instruction 50, stating:

> Akers has the burden of proving that Casper Lodging failed to mitigate its damages. Casper Lodging claims that it mitigated its damages. If you find that Casper Lodging took reasonable steps in an effort to mitigate its damages, then you must find that Casper Lodging properly mitigated its damages.

(R 4430; T 1695) Akers objected to Instruction 50, because it required a finding in Casper's favor, if Casper "took reasonable steps," but failed to take additional reasonable steps necessary to mitigate damages. (*Id*.)

Closing Argument – Collateral Source and Third-party Claims

Akers filed a third-party complaint against Zakco and several subcontractors seeking indemnity, which claims were settled prior to trial, except the bifurcated Zakco claim. (R 164 & 4226) Akers and Casper disputed whether evidence of the subcontractor settlements, and the fact that Akers asserted third-party claims, were admissible at trial. (HT 12/3/2013) The trial court ruled that Casper could impeach Akers with such evidence. (R 4226) The trial court ruled that the existence of the settlements (but not the amounts) "may be used on cross-examination for purposes of establishing financial bias on the part of Defendant Akers[.]" (*Id*.) The trial court's order did not require Akers or his experts to contradict prior testimony before "financial bias" could be shown using evidence of the third-party claims or settlements. (*Id*.)

At trial, Akers sought clarification of whether he or his experts needed to contradict prior testimony or positions before Casper could "impeach" them with evidence of third-party claims and settlements. (T 1359-60) The trial court instructed the parties to approach the bench before broaching this topic in open court. (T 1362)

Casper's counsel neither approached the bench on this topic nor offered any evidence of Akers' third-party claims. (T 1375-1411, 1435-1656) However, in closing argument, Casper's counsel argued that Akers could pursue remedies against collateral sources, such as subcontractors or Zakco:

> The specific example I used of that HVAC system, under this contract, Mr. Akers then sold the defective HVAC system in the poolroom to Mr. Koehler. And by him doing that, he breached his obligation to sell non-defective and deficient construction. Mr. *Akers has his own remedies against Sheet Metal and Zakco*. In this case Mr. Koehler's remedy is against Mr. Akers for the breach of the contract between Mr. Koehler and Mr. Akers.

(T 1743-44 (emphasis added)) Moving for a mistrial based on the above remark, Akers argued the following:

> Your Honor, in Mr. Hofer's rebuttal, he indicated to the jury that there was a collateral source to which we would have an opportunity to sue, which implied that he did not. And so on that basis, we're moving for a mistrial. As a matter of law in Wyoming, he had warranty rights. The jury was misinformed and in addition to that, it was inappropriate to indicate to the jury that there was a collateral source available to the defense.

(T 1801) Akers' motion for mistrial was denied. (*Id.*; R 4724)

Closing Argument – Non-disclosure of Construction Renovation Photographs

The parties spent considerable time examining renovation photographs to analyze alleged construction deficiencies (*e.g.*, caulking and flashing at stucco penetrations). (T 1575-92; 952-82; 190-94) Akers attacked the credibility of photographs, particularly whether they reflected original construction defects and whether Casper's experts actually inspected original construction elements. (T 167-68, 190-94, 966-79, 1575-92).

At trial, Akers learned that Casper failed to disclose 700 renovation pictures. (T 952-53, 1675) Akers was unable to review these picture for his defense. (*Id.*; T 1801) Despite Akers requesting production of this evidence, Akers did not learn of the non-production until Potratz testified at trial. (T 1801; R 4758)

In the rebuttal closing argument, Casper's counsel told the jury: "This photo discussion, we submitted 2,000 pages of photos. *If they wanted it, all they had to do was ask.* That's all nonsense." (T 1794 (emphasis added)) Casper's counsel blamed Akers for nondisclosure of the photographs. (*Id.*)

Akers' counsel argued to the court:

> Mr. Hofer stated if they wanted all these pictures that Mr. Potratz for the first time at trial said he never produced to us, all they had to do was ask. We did ask. So I think that's misleading, that's a huge issue as the credibility of the original pictures. We would add to our basis of mistrial of not getting those 700 pictures that we didn't know was missing until Mr. Potratz was on the stand.

(T 1801; *see* R 4758) Akers' motion for mistrial and new trial were denied. (R 4724, 4800)

Prejudgment Interest and Post-judgment Interest

By agreement, the trial court determined prejudgment interest. (T 1697-99) The trial court selected March 11, 2004, as the beginning date for prejudgment interest awarding $997,682.83. (R 4725)

Akers advocated awarding prejudgment interest from the dates Casper incurred expenses. (T 1697-99; HT 1/28/2014 at 32-34) The dates of damages may be determined by Casper's invoices. (Ex 6A-6B.) Akers provided the trial court a calculation of $493,000 in prejudgment interest based on the dates of Casper incurring damages. (HT 1/28/2014 at 33) The trial court failed to determine when Casper incurred damages. (R 4725) Rather, the trial court concluded, "under South Dakota law, prejudgment interest began to accrue on the date the hotel was delivered to [Casper] namely, March 11, 2004." (*Id.*) The trial court observed, "It's contrary to my thinking that you can collect interest on something before you expended the money for repair[.]" (HT 1/28/2014 at 33) The trial court believed that it had to award interest from March 11, 2004, regardless of when Casper incurred expenses, and did so. (*Id.*; R 4725) The trial court ordered post-judgment interest to accrue on prejudgment interest. (R 4725)

TKO

Akers argued that Casper failed to mitigate damages by ignoring water intrusion for six years. (T 234, 328-31, 472-73, 1530-31, 1546-47, 1556-60) The hotel personnel were TKO employees, a sole proprietorship of Koehler responsible for operating the hotel. (T 313-14, 399, 480, 1097) TKO's employees made cosmetic repairs, but failed to prevent water intrusion for six years. (T 234, 328-31, 472-73)

Casper sued Akers for breach of contract, but did not allege a tort claim. (R 2 & 4395) The first time tort claims were asserted against Akers was when third-party defendant subcontractor Sheet Metal Specialties ("SMS") asserted a negligence counterclaim on July 10, 2013. (R 534) Akers replied to SMS's counterclaim on July 16, 2013. (R 547) On July 23, 2013, less than ten days later, and before the deadline to amend pleadings (R 544), Akers filed a third-party complaint against TKO seeking contribution as to SMS's counterclaim. (R 564) Under SDCL 15-6-13(g), Akers asserted a claim against TKO seeking contribution for Casper's claim against Akers. (*Id.*)

Despite Akers' claim of mandatory entitlement to assert claims against TKO given the timing of SMS's counterclaim, and despite the scheduling order permitting amended pleadings, in an abundance of caution, Akers filed a motion seeking leave. (R 603) Further, Akers filed a motion to compel Casper to join TKO as a defendant. (*Id.*)

The trial court struck Akers' third-party complaint against TKO, denied Akers leave to file claims against TKO, and denied Akers' motion to compel joinder of TKO (R 763) This Court denied Akers' petition for intermediate appeal of the TKO issues. (R 1609)

ARGUMENT

I. Judgment as a Matter of Law and Related Jury Instructions

The standard of review when reviewing motions for judgment as a matter of law is abuse of discretion. *Harmon v. Washburn*, 2008 SD 42 ¶ 10, 751 N.W.2d 294. If no judicial mind could have reached the trial court's decision, reversal is required. *Id.* ¶ 8.

Trial courts have no "discretion to give incorrect, misleading, conflicting, or confusing instructions: to do so constitutes reversible error if it is shown not only that the instructions were erroneous, but also that they were prejudicial." *Vetter v. Cam Wal Elec.*, 2006 SD 21 ¶10, 711 N.W.2d 612. "Erroneous instructions are prejudicial…when in all probability they produced some effect upon the verdict and were harmful to the substantial rights of a party." *Id.* "[W]hen the question is whether a jury was properly instructed overall, that issue becomes a question of law reviewable de novo." *Id.*

A. Lack of Evidence of Diminished Market Value

Casper presented evidence of repair costs, but failed to introduce evidence of diminution in market value of the hotel, or any amount of such diminution. When claims involve repairable damage to property, damages are measured by the lesser of "[t]he difference between the reasonable value of the building with and without the injury, or [t]he reasonable expense of repair if the building can be substantially restored to its former condition." *Ward v. LaCreek Elec.*, 163 N.W.2d 344, 349 (SD 1968). A party "may generally only recover restoration costs if that amount does not exceed the diminution in value of the property." *Rupert v. Rapid City,* 2013 SD 13 ¶ 27, 827 N.W.2d 55. A jury "cannot award restoration costs if these costs exceed the diminution in value of

the property." *Id.* ¶ 28; *Subsurfco, Inc. v. B-Y Water Dist.*, 337 N.W.2d 448, 455 (SD 1983).

To avoid economic waste, courts permit recovery of the lesser of repair costs or diminished market value in construction contract disputes. *Sanborn Electric v. Bloomington Athletic Club*, 433 N.E.2d 81 (Ind.App. 1982); *Northern Petrochemical v. Thorsen & Thorshov*, 211 N.W.2d 159 (Minn. 1973); *State Prop. & Blds. Comm'n. v. H. W. Miller Constr.*, 385 S.W.2d 211, 213 (Ky. 1964); *Stamm v. Reuter*, 432 S.W.2d 784 (Mo.App. 1968); *Mort Wallin of Lake Tahoe v. Commercial Cabinet Co.*, 784 P.2d 954 (Nev. 1989).

Casper failed to present evidence of diminished market value of the hotel. Casper's fatal shortcoming entitles Akers to judgment as a matter of law. *Willer v. Chicago, M.&St.P. Ry.*, 210 N.W. 81, 83 (SD 1926) (directed verdict when plaintiff failed to introduce evidence of market value to assess damages in case involving delayed livestock delivery); *Ag Partners v. Chicago Central & Pacific Railroad*, 726 N.W.2d 711, 716-17 (Iowa 2007) (dismissal warranted if plaintiff omits market value evidence, remanded to consider reopening evidence).

Judicial minds cannot differ. Casper failed to introduce evidence of diminished market value, an essential element of its claim. This Court should reverse the trial court and enter judgment in favor of Akers.

Alternatively, Akers is entitled to a new trial with a correct jury instruction on the measure of damages. *Vetter*, 2006 SD 21 ¶ 10 (trial court lacks discretion to improperly instruct the jury and resulting prejudice warrants new trial). The trial court refused Akers' Requested Jury Instruction 45, which would have instructed the jury to award the lesser

of repair costs or diminished market value. The jury was improperly instructed on damages. Casper recovered 100% of its claimed damages, making prejudice from the error undeniable. This case should be remanded for a new trial in which Casper is required to present evidence of diminished market value and the jury is instructed correctly.

B. Performance of the Agreement

Casper had to prove that Akers breached the Agreement, not whether construction defects existed. Akers sold the hotel and transferred warranties as required. The Agreement contains no promises regarding construction quality. Koehler voluntarily purchased something other than a "turn-key" hotel, as construction was incomplete. Final construction passed inspections and received HIE's approval. Akers had no further obligations.

Contract interpretation is a legal issue reviewable *de novo*. *Bunkers v. Jacobson*, 2002 SD 135 ¶ 11, 653 N.W.2d 732. The four corners of the Agreement determine Akers' obligations. *Kernelburner LLC v. MitchHart Mfg*, 2009 SD 33 ¶ 7, 765 N.W.2d 740. Casper cannot recover if Akers did not breach a duty delineated in the Agreement. *Rogers v. Black Hills Speedway,* 217 N.W.2d 14 (SD 1974). "[T]here must be evidence that the damages were in fact caused by the breach." *Bunkers* 2002 SD 135 ¶ 39; R 4415-16.

Defective construction is not a breach of the Agreement. To the contrary, the parties contemplated that defects would be discovered and corrected pursuant to assigned warranties. Casper failed to identify a term of the Agreement that Akers breached. Akers is entitled to judgment as a matter of law.

Specifically on Casper's sound claim, the Agreement contains no sound rating requirement. Rather, the Agreement required HIE's approval of blueprints and final construction, which occurred. Casper's dissatisfaction with noisiness does not establish a breach of contract. Deficient sound rating does not establish a breach of contract. Casper failed to identify a term of the Agreement that Akers breached causing the $180,000 sound renovation. Akers is entitled to judgment as a matter of law and the trial court should be reversed.

C. Mitigation of Damages and Warranty Rights

1. Mitigation of Damages

Casper had the duty of making reasonable exertion to render its injury as light as possible. *Ducheneaux v. Miller,* 488 N.W.2d 902, 917 (SD 1992). Damages avoidable through performance of this duty fall on Casper; Casper cannot recover damages avoidable through reasonable diligence. *Id*.

Improper stucco terminations and missing caulk were visible in 2004. Casper observed water intrusions immediately, which intrusions persisted for six years. For six years, Casper made cosmetic repairs (replacing sheetrock and painting), but ignored solving the problem. In 2007, Farr advised Casper to make repairs to prevent water intrusion. Casper ignored Farr's advice until 2010.

Areas away from stucco penetrations sustained no water damage. Water damage was isolated to areas of stucco penetrations. More specifically, water damage was present where penetrations were not caulked. The handful of windows that were caulked had no adjacent water damage. The vast majority of damage to the hotel came from bulk water entering improperly terminated stucco penetrations that lacked caulk. Both parties'

experts agreed that in the first year, stucco penetrations could have been caulked, with such repair lasting fifteen years. If not free under the assigned warranty, the cost of such repair would have been nominal. Casper failed to prevent water intrusion for six years, and also ignored humidity problems for years.

Casper failed to mitigate its damages as a matter of law. The trial court abused its discretion by denying a directed verdict and should be reversed.

2. Warranty Rights

The hotel was built in Wyoming. Under Wyoming law, there is an implied warranty that attaches to construction contracts, including commercial buildings. *Winter v. Pleasant,* 222 P.3d 828, 836 (Wyo. 2010). The warranty obligates all contractors. *Moxley v. Laramie Builders, Inc*., 600 P.2d 733, 735 (Wyo. 1979). Subsequent purchasers have the same warranty rights. *Id*. "The warranty is to be honored by the builder even as to remote purchasers, but is not applicable in sales between a non-builder vendor and a vendee." *Ortega v. Flaim,* 902 P.2d 199, 204 (Wyo. 1995). As a subsequent purchaser (and express assignee under the Agreement), Casper had warranty rights, including the assigned one-year call back warranty.

Casper chose not to pursue its warranty rights. Casper made no effort to have contractors make repairs to stop water intrusion during the warranty period. Casper also failed to notify Akers of water intrusion until 2007. Lack of notice precluded Akers from contacting contractors in an effort to have problems repaired at no expense. For example, the stucco contractor indicated that repairs would have been made during the warranty period if requested. (T 1435 (Shoell Dep. 33-34))

The risk of construction defects was allocated to Casper, which is why Akers assigned warranties to Casper and made no promises regarding construction quality. To

the contrary, both parties expected defects which would require correction through warranty repairs. Casper's claim is barred as a matter of law due to its failure to mitigate damages and waiver, because Casper sat on its warranty rights. *Ducheneaux,* 488 N.W.2d at 917; *A-G-E Corp. v. State*, 2006 SD 66 ¶ 22, 719 N.W.2d 780 ("waiver is volitional relinquishment" of rights or acting inconsistently with rights).

The trial court abused its discretion by denying a directed verdict and should be reversed.

3. Jury Instruction: Mitigation

The trial court provided Instruction 49:

> In determining the amount of money which will reasonably compensate the plaintiff, you are instructed that a person whose property is damaged must exercise reasonable diligence and effort to minimize existing damages and to prevent further damages. The law imposes upon a party injured by another's breach of contract the active duty of making reasonable exertion to render the injury as light as possible. If, by his negligence or willfulness, he allows the damages to be unnecessarily enhanced, the increased loss, which was avoidable by the performance of his duty, falls on him. Plaintiff cannot recover money for damage to property which could have been avoided by the exercise of reasonable diligence and effort. (R 4430)

The trial court also provided Instruction 50, stating:

> Akers has the burden of proving that Casper Lodging failed to mitigate its damages. Casper Lodging claims that it mitigated its damages. If you find that Casper Lodging took reasonable steps in an effort to mitigate its damages, then you must find that Casper Lodging properly mitigated its damages. (*Id.*)

Akers objected to Instruction 50, because it required a finding in Casper's favor, if Casper "took reasonable steps," but failed to take additional reasonable steps necessary to mitigate damages adequately. If the jury found Plaintiff took *any* "reasonable steps" to

mitigate, it was *required* to find Plaintiff properly mitigated. Instruction 50 required the jury to find in Casper's favor on mitigation of damages, because it took reasonable steps (caulking some windows), even though Casper failed to take additional reasonable steps (caulking all windows).

Instruction 50 misled and incorrectly instructed the jury. Casper made cosmetic repairs, but failed to prevent water intrusion for six years. Casper's experts admitted that Casper's damages were the result of long-term water intrusion. Casper admitted in closing argument that some damages could have been avoided through making repairs earlier. Yet, the jury awarded Casper every penny of its claim. Akers was prejudiced by Instruction 50, because it required a finding for Casper. If the jury believed that Casper should have taken additional reasonable steps, it was nevertheless required to find in Casper's favor. Instruction 50 "in all probability...produced some effect upon the verdict [and harmed Akers'] substantial rights[.]" *Vetter*, 2006 SD 21 ¶10. This Court should remand this case for retrial with correct jury instructions.

4. Jury Instruction: Warranty Rights

Akers requested the following jury instruction:

> As a purchaser of property, Plaintiff was given implied warranties from the contractors who performed work on the Casper, Wyoming, Holiday Inn Express. Those warranties provided that the contractors' work would be performed in a skillful, careful, diligent, and workmanlike manner. Plaintiff had the ability to assert warranty claims and enforce their warranty rights against the contractors involved in the project with regard to any allegedly defective work performed on the project.
>
> As a non-builder seller of the hotel, Defendant Robert W. Akers did not provide any warranties, express or implied, to Plaintiff or James Koehler with regard to the work performed at the hotel. (R 4391)

The above is a correct statement of the law. *See supra* § III.A.2; *Barlage v. Key Bank of Wyoming,* 892 P.2d 124 (Wyo. 1995); *Matheson Drilling, Inc. v. Padova,* 5 P.3d 810 (Wyo. 2000). The trial court refused the above instruction and provided no guidance regarding Casper's warranty rights. That refusal prevented Akers from adequately arguing to the jury that Casper's failure to call the contractors to have warranty repairs made constituted failure to mitigate.

"On issues supported by competent evidence in the record, the trial court should instruct the jury… Failure to give a requested instruction that correctly sets forth the law is prejudicial error." *Atkins v. Stratmeyer*, 1999 SD 131 ¶ 55, 600 N.W.2d 891 (citations omitted). Despite evidence of Casper's warranty rights, examination of witnesses regarding warranty rights, and Akers' requested instruction, the trial court provided no instruction regarding warranty rights. The trial court's failure to instruct the jury on warranty rights is prejudicial error.

The lack of a correct jury instruction on Casper's warranty rights "in all probability…produced some effect upon the verdict[,]" and is "prejudicial error[.]"*Vetter*, 2006 SD 21 ¶10; *Atkins*, 1999 SD 131 ¶ 55. The jury needed guidance regarding Casper's warranty rights to assess mitigation of damages, but received none. This Court should remand this case for retrial with correct jury instructions.

II. Motion for Mistrial and New Trial

The trial court denied Akers' motion for mistrial and motion for new trial. The denials are reviewed under an abuse of discretion standard. *Behrens v. Wedmore*, 2005 SD 79 ¶ 67, 698 N.W.2d 555; *Tuneder v. Minnaert*, 1997 SD 62 ¶ 9, 563 N.W.2d 849.

A. Undisclosed Opinions of Nelson

Casper offered undisclosed expert opinions from Trent Nelson that the hotel was unsafe, structurally unsound, and in violation of code from day one due to inadequate nailing, regardless of Casper's years of neglect. Nelson's undisclosed opinions were immune to Akers' mitigation defense, because repairs were needed regardless of ignoring water intrusion. Akers's counsel advised the trial court that Nelson's opinions were undisclosed, and that Nelson's prior "nailing" opinions related only to the fastening of OSB subjected to long-term water damage. Casper's counsel misrepresented its pretrial disclosures by telling the trial court that Nelson addressed nailing in his deposition.

The trial court did not appreciate the distinction between Nelson's prior and new opinions, and permitted the testimony. Nelson testified extensively about inadequate nailing, including that the hotel was unsafe and structurally unsound from day one. On cross-examination, Nelson admitted that these opinions were never disclosed in his report or deposition. When Akers moved for mistrial, the trial court stated that Casper's counsel's conduct was "disturbing" and "troubl[ing]." (T 617, 620) The trial court struck Nelson's testimony and provided a cautionary instruction, but denied a new trial. That a curative instruction was read after the jury had heard considerable testimony from Nelson and had time to digest it "tends to negate the curative impact the court's admonishment might have had." *Young v. Oury*, 2013 SD 7 ¶ 24, 827 N.W.2d 561. Moreover, Casper's counsel referenced the stricken testimony in closing argument. (T 1746)

Despite the cautionary instruction, irreparable damage had already been done. The jury was permitted to hear testimony and argument that the building was structurally unsound regardless of subsequent water damage. This powerful testimony affected the outcome of the trial and denied Akers a fair trial. The jury made no deductions for

Casper's failure to mitigate, even deductions Casper conceded. The jury simply did not care who was responsible for water damage after hearing Nelson's undisclosed opinions.

A new trial is proper "where the violation has prejudiced the party or denied [such party] a fair trial." *City of Sioux Falls v. Johnson*, 1999 SD 16, ¶ 28, 588 N.W.2d 904. "Prejudicial error is error which in all probability produced some effect upon the jury's verdict and is harmful to the substantial rights of the party assigning it." *Id.*

In *Kaiser v. University Physicians Clinic*, a new trial was granted, because an expert utilized previously undisclosed photographs during his examination. 2006 SD 95, 724 N.W.2d 186. Permitting use of undisclosed photographs on a critical issue was an abuse of discretion, and a new trial was granted because the prejudice was "obvious and substantial[.]" *Id*. ¶ 49. Using undisclosed photographs to provide an additional basis for an opinion is not nearly as prejudicial as Nelson's undisclosed testimony that undermined Akers' mitigation defense.

In *Papke v. Harbert*, a new trial was granted, because an expert provided undisclosed causation opinions. 2007 SD 87, ¶ 53, 738 N.W.2d 510. Causation was at the heart of the dispute, yet the expert never disclosed causation opinions before trial. *Id*. ¶ 57 (finding no bad faith by counsel).

The purpose of pretrial disclosure "is to promote the truth finding process and *avoid trial by ambush*." *Kaiser* ¶ 34 (emphasis added). Casper engaged in trial by ambush. Akers did everything possible to prevent unfair surprises, but Casper's counsel made misrepresentations to the trial court to perpetrate the ambush. There is simply no excuse for such misconduct. Casper's counsel knew Nelson's opinions were undisclosed and obscured that fact from the trial court. Casper's counsel rung the proverbial bell

which prevented the jury from hearing anything Akers presented in his defense for the duration of trial. Akers is entitled to a new, fair trial.

B. Exclusion of Damages Opinions of Potter

Akers disclosed that Potter would address damages. After Akers' expert disclosure deadline and Potter's deposition, Casper made known the expenses it claimed in its damages summary. Casper's damages expert, Potratz, was unable to answer any deposition questions regarding the damages summary, because it was not available until the day before his deposition. At trial, Potratz testified for hours about the damages summary. Akers offered testimony from Potter at trial to rebut Casper's new damages summary and Potratz's new trial opinions. The trial court excluded Potter's rebuttal testimony. If the jury believed only some of Potter's excluded opinions, the verdict would have been reduced significantly as some repairs were improvements, unnecessary, or avoidable through reasonable mitigation efforts.

The trial court improperly excluded Potter's rebuttal testimony. *See Mawby v. United States*, 999 F2d 1252, 1254 (8th Cir. 1993) ("fundamental fairness requires that…appellant should have been afforded an opportunity to present rebuttal to the surprise evidence…considering the last-minute nature of appellee's disclosure"); *Stender v. Vincent*, 992 P2d 50 (Hawaii 2000) (untimely disclosure of information and exclusion of rebuttal expert testimony justified new trial).

Despite overwhelming evidence of Casper's failure to mitigate damages, and Casper's admission that prompt action would have reduced damages, the jury awarded Casper 100% of its alleged damages. The jury was denied the opportunity to hear Potter's rebuttal testimony. The trial court abused its discretion by excluding Potter's rebuttal

testimony, which prejudiced Akers. This Court should remand for retrial to include Potter's excluded testimony.

C. Closing Argument

This Court reviews a "trial court's ruling on whether to grant a new trial because of counsel's misconduct in closing argument on an abuse of discretion standard." *Schoon v. Looby*, 2003 SD 123 ¶ 18, 670 N.W.2d 885. Qualifying misconduct includes: (1) asserting personal knowledge of facts; (2) misstating facts; (3) misstating the law; and (4) inflammatory statements. *Id*. ¶¶ 7, 10, 13-14. A new trial is warranted, if "either party was prevented from having a fair trial" *Id*. ¶ 18 (quoting SDCL 15-6-59(a)(1)). Where a party has been prejudiced or denied a fair trial due to improper closing arguments, a new trial is required. *Id*.

1. Third-party Claims and Collateral Sources

The trial court instructed counsel to approach the bench before broaching the topic of Akers' third-party claims in open court. Casper neither approach the bench nor introduced evidence of Akers' claims against contractors. Instead, during closing argument, Casper's counsel argued, "Akers has his own remedies against Sheet Metal [a subcontractor] and Zakco." (T 1744) Casper's counsel identified collateral sources from whom Akers could seek remedies, when those remedies belonged to Casper.

Casper's counsel thwarted the trial court's order and told the jury that Akers had remedies against contractors. Such evidence of collateral sources is not admissible, and the trial court properly instructed counsel to approach the bench before broaching this topic. SDCL 19-12-3, 19-12-4; *Jurgensen v. Smith*, 2000 SD 73 ¶ 30, 611 N.W.2d 439. Casper's argument was equivalent to telling the jury that Akers had insurance in the form

of remedies against contractors. *LDL Cattle Co., Inc. v. Guetter*, 1996 SD 22 ¶ 27, 544 N.W.2d 523 (evidence of insurance is prejudicial and inadmissible).

The remarks of Casper's counsel: (1) involved personal knowledge of facts not before the jury; (2) were factual misstatements; (3) were misstatements of law; and (4) were inflammatory. *Schoon* ¶¶ 7, 10, 13-14. Akers is entitled to a new, fair trial.

2. Undisclosed Renovation Photographs

One issue at trial was the original construction beneath the stucco, in particular, flashing at stucco penetrations. Casper's renovation team took hundreds of photographs during renovations. The photographs in evidence did not accurately depict original construction, as conditions were altered before expert inspections (such as removal of flashing). Akers attacked the credibility of evidence underlying Casper's theory of the case.

At trial, Potratz admitted nondisclosure of 700 renovation photographs. Akers requested all photographs and Potratz's file during discovery, but learned of Casper's noncompliance at trial. As if Casper's nondisclosure was not prejudicial enough, Casper's counsel then blamed Akers for the non-disclosure during closing argument: "If they wanted it, all they had to do was ask. That's all nonsense." (T 1794)

Casper's counsel undercut a central defense theory by blaming Akers for Casper's nondisclosure. The remarks of Casper's counsel: (1) involved personal knowledge of facts not before the jury; (2) were factual misstatements; (3) were misstatements of law, as Casper was required to produce the photographs; and (4) were inflammatory. *Schoon* ¶¶ 7, 10, 13-14. Akers is entitled to a new, fair trial.

III. Prejudgment Interest

Casper opened the hotel on March 11, 2004. Casper experienced persistent water problems immediately. Casper failed to notify Akers of water problems until 2007. Casper did not incur the $840,000 in related repairs until 2010. Using the dates that Casper paid for repairs and incurred damages results in prejudgment interest totaling $493,000. The trial court failed to determine dates on which Casper incurred damages, even though the damages were itemized in Casper's summary, every item of which the jury awarded. Instead, the trial court awarded prejudgment interest beginning March 11, 2004, resulting in interest totaling $997,682.83.

Prejudgment interest is recoverable "from the day that the loss or damage occurred, except during such time as the debtor is prevented by law, or by act of the creditor, from paying the debt." SDCL 21-1-13.1. This Court should remand this case to the trial court to determine dates Casper incurred damages. Casper incurred no damages from water intrusion until it paid for repairs in 2010, and the trial court should be directed to determine prejudgment interest based on the dates Casper paid for repairs. *Bunkers*, 2002 SD 135 ¶ 45.

In contract actions, "[p]rejudgment interest is allowed from 'the day that the loss or damage occurred.'" *Bunkers*, 2002 SD 135 ¶ 44. *Bunkers* did not hold that prejudgment interest accrues from the date of breach, date of expected performance, or date that construction is turned over to plaintiff. *Id*. Prejudgment interest begins when "damage occurred." *Id*.

Casper will likely cite *Gettysburg School District v. Helms & Associates*, 2008 SD 35, 751 N.W.2d 266, in support of its argument. In *Gettysburg*, a defective track was delivered in September 2002. *Id*. ¶ 2. The jury awarded prejudgment interest beginning

July 4, 2004. *Id*. ¶ 24. The holding of *Gettysburg* addresses entitlement to prejudgment interest when damages are undetermined, and review of the jury's determination of when damages "occurred," which was a date other than when defective construction was turned over to the school. *Id*. ¶¶ 22-24. *Gettysburg* did not hold that prejudgment interest is recoverable from the date of construction delivery in the absence of incurring damages. Rather, the jury determined when damages occurred. *Id*. ¶ 24. Here, the trial court failed to determine when Casper incurred damages. Additionally, in *Gettysburg*, the defective track was unusable, whereas Casper presented no evidence that it lost any business or use of the hotel for the six years predating repairs. *Id*. ¶¶ 2-4, 6. The trial court erroneously concluded that it was *required* to award interest from the date the hotel opened based on *Gettysburg*. (HT 1/28/2014 at 32-33)

At a minimum, Casper should be not permitted to recover prejudgment interest prior to giving Akers notice of water problems on March 8, 2007. (Ex 553) Without notice, Casper prevented Akers from paying the debt. SDCL 21-1-13.1.

"Prejudgment interest is not recoverable on future damages[.]" SDCL 21-1-13.1; *Miller v. Hernandez*, 520 N.W.2d 266, 271 (SD 1994). If Casper is allowed to recover prejudgment interest from March 11, 2004, that effectively awards Casper prejudgment interest on future damages that it did not incur until six years into the future; meanwhile, Casper is rewarded with a brand new hotel exterior and a half million dollars in interest for a period of time in which it did not expend money.

The trial court's award of prejudgment interest should be reversed and remanded for a determination of when Casper incurred damages, with appropriate guidance regarding that determination.

IV. Post-judgment Interest

The trial court ordered post-judgment interest to accrue on prejudgment interest. South Dakota law does not allow for interest to accrue on interest. *Sioux Falls v. Johnson,* 2003 SD 115 ¶ 17, 670 N.W.2d 360; *Tri-State Refining and Investment Co., Inc. v. Apaloosa Co*., 431 N.W.2d 311, 317 (SD 1988).

The purpose of interest is to compensate the plaintiff for having been deprived of the use of money. *Jackson v. Lee's Travelers Lodge, Inc.,* 1997 SD 63 ¶ 40, 563 N.W.2d 858. Prejudgment interest compensates loss of use of the *principal* loss before judgment, while post-judgment interest compensates loss of use of the *principal* loss after judgment. *Becker Holding Corp. v. Becker*, 78 F.3d 514, 516-17 (11th Cir. 1996); *Larsen v Pacesetter Sys.*, 837 P.2d 1273, 1297 (Haw. 1992) (post-judgment interest accruing on prejudgment interest is a punitive, non-compensatory windfall); *Summa Corp. v. Trans World Airlines, Inc.*, 540 A.2d 403, 410 (Del. 1988). The trial court's award of post-judgment interest to accrue on prejudgment interest should be reversed.

V. TKO

TKO operated the hotel. TKO personnel ignored water intrusion except for making cosmetic repairs. Akers' efforts to compel joinder of and to assert a third-party contribution claim against TKO were erroneously denied by the trial court.

A. Joinder

SDCL 15-6-19 mandates joinder of indispensable parties. To determine indispensability, the court considers prejudice to parties and the adequacy of a judgment in the nonparty's absence. SDCL 15-6-19(b). A trial court has no discretion to exclude

indispensable parties. *J.K. Dean, Inc. v. KSD, Inc.*, 2005 SD 127 ¶ 14, 709 N.W.2d 22. If final judgment will be "inconsistent with equity and good conscience" without the presence of the third party, it is indispensable. *Thieman v. Bohman*, 2002 SD 52 ¶ 13, 645 N.W.2d 260. If a complete determination of a controversy cannot be made without the presence of the third party, that party is indispensable. *Renner v. Crisman*, 127 N.W.2d 717, 721 (SD 1964).

TKO is an indispensable party. Casper sued Akers for breach of contract. Akers is subject to additional liability due to the odd interplay between SDCL 15-8-15 and 15-6-14(a). SDCL 15-8-15 states that when fault is disproportionate between joint-*tortfeasors*, then relative degrees of fault shall be considered in determining pro rata shares of liability. "[T]he provisions of § 15-8-15 apply only if the issue of proportionate fault is litigated…*in that action*." SDCL 15-6-14(a) (emphasis added). Akers cannot subsequently pursue contribution from TKO, since pro rata liability must be litigated in the underlying action. Akers was prejudiced by non-joinder of TKO.

City of Bridgewater v. Morris, Inc., held that "[a] party who is joint or severally liable on an obligation arising from a contract claim has the right to seek proportionate contributions *from the joined parties*"). 1999 SD 64, ¶ 11, 594 N.W.2d 712 (emphasis added). In order for Akers to seek contribution from TKO as to Casper's contract claim, TKO first had to be a "joined part[y]." *Id*. Non-joinder of TKO denied Akers the ability to seek contribution from TKO, thereby prejudicing Akers.

SDCL 15-6-19(a)(2) states that a necessary party includes a non-party claiming an interest when its absence subjects any party to additional liability. *Citizen Potawatomi Nation v. Norton*, 248 F.3d 993, 998, *opinion modified on reh'g*, 257 F.3d 1158 (10th Cir.

2001) ("claiming" an interest does not mean asserting an interest, but rather means a non-frivolous interest).

TKO's absence prejudiced Akers. The jury could have concluded that Casper's act of hiring TKO to operate the hotel was reasonable, but that TKO's mitigation efforts were unreasonable, a conclusion that negates Akers' mitigation defense. In a subsequent action, Akers may be unable to shift pro rata liability to TKO through contribution due to SDCL 15-8-15 and 15-6-14(a). Joinder of TKO is mandatory. The trial court erred and prejudiced Akers by denying joinder of TKO. This Court should order joinder of TKO and retrial of this case.

B. Third-party Claim

Casper sued Akers for breach of contract, which prevented Akers from making a *tortfeasor* contribution claim against TKO. On July 10, 2013, third-party defendant SMS filed a negligence counterclaim against Akers, which was the first time Akers was alleged to be a tortfeasor. Akers timely replied to the counterclaim and less than ten days later (before the amended pleadings deadline) filed a third-party complaint against TKO seeking contribution. Akers also sought leave from the trial court. The trial court struck Akers' claim against TKO.

Under SDCL 15-6-14(a), any party may assert a third-party complaint within ten days of serving his "original answer." Akers sued TKO within ten days of originally answering the first tort claim against him. Previously, Akers had no ability to assert a contribution claim against TKO, because Akers had not been sued in tort. Under SDCL 15-6-13(g), Akers also asserted a claim against TKO seeking contribution as to Casper's claim.

Akers had a right to sue TKO, both because the scheduling order permitted it and SDCL 15-6-14(a) granted Akers the right. Akers required no leave of court and the trial court's striking of Akers' claim against TKO was clearly erroneous and an abuse of discretion.

CONCLUSION

This Court should reverse the trial court and direct entry of judgment in favor of Akers. Alternatively, Akers is entitled to: (1) a new trial; (2) remand for determination of prejudgment interest; (3) reversal of the trial court's award of post-judgment interest accruing upon prejudgment interest; (4) other relief Akers requests in this appeal; and (5) other relief that this Court deems appropriate.

Dated at Sioux Falls, South Dakota, this 2nd day of September, 2014.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Brief of Appellant complies with the type volume limitations set forth in SDCL 15-26A-66. Based on the information provided by Microsoft Word 2010, this Brief contains 9,986 words, excluding the table of contents, table of authorities, jurisdictional statement, statement of legal issues, any addendum materials, and any certificates of counsel. This Brief is typeset in Times New Roman (12 point) and was prepared using Microsoft Word 2010.

Dated at Sioux Falls, South Dakota, this 2nd day of September, 2014.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing "Brief of Appellant" was filed electronically with the South Dakota Supreme Court and that the original and two copies of the same were filed by mailing the same to 500 East Capital Avenue, Pierre, South Dakota, 57501-5070, on September 2nd, 2014.

The undersigned further certifies that an electronic copy of "Brief of Appellant" was emailed to the attorneys set forth below, on September 2nd, 2014:

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 27074

CASPER LODGING, LLC,

Plaintiff/Appellee,

vs.

ROBERT W. AKERS,

Defendant/Appellant.

APPEAL FROM THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
PENNINGTON COUNTY, SOUTH DAKOTA

The Honorable Wally Eklund
Circuit Court Judge

Notice of Appeal filed April 24, 2014

APPELLEE'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

This breach of contract case has seen more than four years of litigation, thirty-one depositions, substantial written discovery, the addition of sixteen third-party defendants, an attempted interlocutory appeal, two trial judges, and, ultimately, a two-week jury trial. The jury returned a verdict in favor of Casper Lodging in the amount of $1,019,468.74. Judge Eklund entered a judgment on the jury verdict and awarded prejudgment and post-judgment interest thereon.

Akers now appeals, presenting seventeen issues for review and effectively claiming that the proceedings below were nothing short of a kangaroo court. He asks this Court to depart from well-established principles of appellate review and substitute its own judgment for that of the trial court and the jury. This Court should decline Akers' invitation to deviate from settled law and should uphold the Circuit Court in all respects.

In this Brief, Appellant Robert Akers will be referenced as "Akers." Appellee Casper Lodging, LLC will be referenced as "Casper." Witnesses will be referenced by name. Casper's Appendix will be identified as "Casper App." and Akers' Appendix will be

identified as "Akers App." Trial Exhibits will be identified as "Tr. Ex.," and the Settled Record will be cited as "SR." The Trial Transcript will be cited as "TT." Other hearing transcripts will be cited as "HT."

JURISDICTIONAL STATEMENT

On August 28, 2013, the circuit court, the Honorable Wally Eklund, entered an Order Granting Plaintiff's Motion to Strike Third-Party Complaint against TKO and Order Denying Defendant Robert W. Akers' Motion to Compel Joinder. SR at 763-775. Notice of Entry was served on September 6, 2013.[1] SR at 766-773.

The circuit court entered its Order Denying Defendant's Motion for Mistrial on February 14, 2014. SR at 4724. Notice of Entry was served on February 19, 2014. SR at 4728-4733.

The circuit court entered a Judgment Upon Jury Verdict on February 14, 2014, *nunc pro tunc* December 20, 2013. SR at 4725-4727. Notice of Entry was served on February 19, 2014. SR at 4734-4741.

[1] Akers filed a Petition for Intermediate Appeal on September 20, 2013. *See generally* SDSC Appeal No. 26816. This Court denied Akers' petition on October 11, 2013. *Id.*

The circuit court entered its Order Denying Defendant's Renewed Motion for Judgment as a Matter of Law and, in the Alternative, Motion for New Trial on March 26, 2014. SR at 4800. Notice of Entry was served on March 26, 2014. SR at 4801-4805.

Akers filed a Notice of Appeal from these rulings on April 24, 2014. SR at 4819-4821. This Court has jurisdiction pursuant to SDCL §15-26A-3(1) and §15-26A-7.

STATEMENT OF LEGAL ISSUES

I. WHETHER THE CIRCUIT COURT ABUSED ITS DISCRETION IN DENYING AKERS' MOTION FOR JUDGMENT AS A MATTER OF LAW BASED ON INSUFFICIENT EVIDENCE OF DAMAGES?

The circuit court denied Akers' motion on this ground.

Most Relevant Authority:

SDCL §21-2-1
Bunkers v. Jacobson, 2002 SD 135, 653 N.W.2d 732
SDPJI (Civil) 50-70-10

II. WHETHER THE CIRCUIT COURT ABUSED ITS DISCRETION IN DENYING AKERS' MOTION FOR JUDGMENT AS A MATTER OF LAW BASED ON AN ALLEGED INSUFFICIENCY OF EVIDENCE OF BREACH OF CONTRACT?

The circuit court denied Akers' motion on this ground.

Most Relevant Authority:

Brandriet v. Norwest Bank SD, N.A.,
499 N.W.2d 613 (S.D. 1993)
Heiser v. Rodway, 247 N.W.2d 65 (S.D. 1976)

III. WHETHER THE CIRCUIT COURT ABUSED ITS DISCRETION IN DENYING AKERS' MOTION FOR JUDGMENT AS A MATTER OF LAW BASED ON AKERS' AFFIRMATIVE DEFENSE OF FAILURE TO MITIGATE?

The circuit court denied the motion on this ground.

Most Relevant Authority:

Brandreit v. Norwest Bank SD, N.A.,
499 N.W.2d 613 (S.D. 1993)
Heiser v. Rodway, 247 N.W.2d 65 (S.D. 1976)

IV. WHETHER THE CIRCUIT COURT ABUSED ITS DISCRETION IN DENYING AKERS' MOTION FOR JUDGMENT AS A MATTER OF LAW BASED ON AKERS' AFFIRMATIVE DEFENSE OF WAIVER?

The circuit court denied Akers' motion on this ground.

Most Relevant Authority:

Brandreit v. Norwest Bank SD, N.A.,
499 N.W.2d 613 (S.D. 1993)
Heiser v. Rodway, 247 N.W.2d 65 (S.D. 1976)

V. WHETHER THE CIRCUIT COURT ABUSED ITS DISCRETION IN FINDING THAT TRENT NELSON'S TESTIMONY DID NOT WARRANT A MISTRIAL?

The circuit court gave an immediate curative instruction after the subject testimony and denied Akers' motion on this ground.

Most Relevant Authority:

Young v. Oury, 2013 SD 7, 827 N.W.2d 561
State v. Buller, 484 N.W.2d 883 (S.D. 1992)
Kibert v. Peyton, 383 F.2d 566 (4th Cir. 1967)

VI. WHETHER THE CIRCUIT COURT ABUSED ITS DISCRETION IN DENYING A MISTRIAL BASED ON THE EXCLUSION OF UNDISCLOSED EXPERT TESTIMONY FROM MERL POTTER?

The circuit court ruled that Potter's proffered testimony was an inadmissible, undisclosed expert opinion and denied Akers' motion on this ground.

Most Relevant Authority:

State v. Anderson, 2000 SD 45, 608 N.W.2d 655
Papke v. Harbert, 2007 SD 87, 738 N.W.2d 520

VII. WHETHER THE CIRCUIT COURT ABUSED ITS DISCRETION IN DENYING A MISTRIAL BASED ON CASPER'S COUNSEL'S STATEMENT DURING CLOSING ARGUMENT REGARDING AKERS' REMEDIES?

The circuit court denied Akers' motion on this ground.

Most Relevant Authority:

State v. Kidd, 286 N.W.2d 120 (S.D. 1979)
Veith v. O'Brien, 2007 SD 88, 739 N.W.2d 15
State v. Beck, 2010 SD 52, 785 N.W.2d 288
Roden v. Solem, 431 N.W.2d 665 (S.D. 1988)

VIII. WHETHER THE CIRCUIT COURT ABUSED ITS DISCRETION IN DENYING A MISTRIAL BASED ON CASPER'S COUNSEL'S STATEMENT DURING CLOSING ARGUMENT REGARDING PHOTOS EXCHANGED DURING DISCOVERY?

The circuit court denied Akers' motion on this ground.

Most Relevant Authority:

State v. Kidd, 286 N.W.2d 120 (S.D. 1979)
Veith v. O'Brien, 2007 SD 88, 739 N.W.2d 15
State v. Beck, 2010 SD 52, 785 N.W.2d 288
Roden v. Solem, 431 N.W.2d 665 (S.D. 1988)

IX. WHETHER THE CIRCUIT COURT ABUSED ITS DISCRETION IN DENYING AKERS' MOTION FOR NEW TRIAL?

The circuit court denied the Motion for New Trial.

Most Relevant Authority:

Parmely v. Hildebrand, 2001 SD 83, 630 N.W.2d 509
Baddou v. Hall, 2008 SD 90, 756 N.W.2d 554
Thompson v. Mehlhaff, 2005 SD 69, 698 N.W.2d 512
SDCL §15-26A-60

X. WHETHER THE CIRCUIT COURT COMMITTED PREJUDICIAL ERROR BY REFUSING TO INSTRUCT THE JURY ON WYOMING WARRANTY LAW?

The circuit court refused Akers' requested instruction on warranty rights under Wyoming state law.

Most Relevant Authority:

Carpenter v. City of Belle Fourche,
2000 SD 55, 609 N.W.2d 751
Dwyer v. Christensen, 92 N.W.2d 199 (S.D. 1958)

XI. WHETHER THE CIRCUIT COURT COMMITTED PREJUDICIAL ERROR IN ITS MITIGATION OF DAMAGES INSTRUCTIONS?

The circuit court gave two instructions (Nos. 49& 50) on mitigation of damages to the jury.

Most Relevant Authority:

Carpenter v. City of Belle Fourche,
2000 SD 55, 609 N.W.2d 751
Ducheneaux v. Miller, 488 N.W.2d 902 (S.D. 1992)
SDPJI (Civil) 50-140-20

XII. WHETHER AKERS WAIVED HIS ABILITY TO ARGUE THAT THE CIRCUIT COURT ERRED IN REFUSING TO GIVE AKERS' REQUESTED INSTRUCTION CONCERNING MEASURE OF DAMAGES?

The circuit court refused Akers' Requested Instruction No. 45. Akers did not identify this as an issue for appeal in his Notice of Appeal or his Docketing Statement, but presented it as Issue C.11 in his Brief.

Most Relevant Authority:

SDCL §15-26A-4
First Nat. Bank v. Cranmer, 175 N.W.2d 881 (S.D. 1920)
City of Chamberlain v. R.E. Lien, Inc.,
521 N.W.2d 130 (S.D. 1994)

XIII. WHETHER THE CIRCUIT COURT ABUSED ITS DISCRETION IN ENTERING THE JURY'S VERDICT?

The circuit court entered the verdict for the full amount awarded by the jury.

Most Relevant Authority:

See Sections I-XII, *supra*.

XIV. WHETHER THE CIRCUIT COURT ERRED IN AWARDING PREJUDGMENT INTEREST FROM THE DATE OF DELIVERY?

The circuit court awarded prejudgment interest from the date the defective hotel was delivered to Casper.

Most Relevant Authority:

Gettysburg Sch. Dist. 53-1 v. Helms & Assoc.,
2008 SD 35, 751 N.W.2d 266
City of Aberdeen v. Rich, 2003 SD 27, 658 N.W.2d 775
Shuette v. Beazer Homes Holdings Corp.,
124 P.3d 530 (Nev. 2005)
Commonwealth v. Johnson Insulation,
682 N.E.2d 1323 (Mass. 1997)

XV. WHETHER THE CIRCUIT COURT ERRED IN AWARDING POST-JUDGMENT INTEREST ON THE FULL AMOUNT OF THE JUDGMENT?

The circuit court awarded post-judgment interest on the full amount of the judgment, including prejudgment interest.

Most Relevant Authority:

47 C.J.S. *Interest & Usury* § 129
47 C.J.S. *Interest & Usury* § 63
SDCL §54-3-5.1
State Highway Comm'n v. DeLong Corp.,
551 P.2d 102 (Or. 1976)

XVI. WHETHER AKERS SHOULD HAVE BEEN GRANTED LEAVE TO ADD TKO AS A THIRD-PARTY DEFENDANT?

The circuit court denied Akers' Motion for Leave because the motion was untimely and would prejudice Casper and the other parties.

Most Relevant Authority:

SDCL §15-6-14(a)
SDCL §15-6-16
Independent Sch. Dist. of City of Aberdeen v. First Nat. Bank, 289 N.W. 425 (1939)

XVII. WHETHER THE CIRCUIT COURT ERRED IN DENYING AKERS' MOTION FOR JOINDER?

The circuit court denied Akers' motion for joinder because it found TKO was not an indispensable party.

Most Relevant Authority:

SDCL §15-6-19(a)
Titus v. Chapman, 2004 SD 106, 687 N.W.2d 918
Temple v. Synthes Corp., 498 U.S. 5 (1990)
SDCL §15-8-13

STATEMENT OF THE CASE

This is an appeal from the Seventh Judicial Circuit, Pennington County, Judge Wally Eklund.

In October 2009, Casper instituted this action against Akers, alleging that Akers breached the parties' Improvement Purchase Agreement ("IPA") when Akers sold Casper a newly constructed Holiday Inn Express ("HIE") that was ridden with latent construction deficiencies. SR at 2-11. Akers answered and impleaded the general contractor he hired to build the hotel, Zakco Commercial Consultants, Inc. SR at 13-30.

In June 2012, Akers impleaded fifteen additional third-party defendants, all of whom were subcontractors of Zakco. SR at 172-173; SR at 130-137. Akers settled with the subcontractors in November of 2013. SR at 4211-4213.

The parties went to trial on Casper's breach of contract claim on December 9, 2013 through December 20, 2013; Akers' third-party claim against Zakco was bifurcated and not presented to the jury. SR at 4226-4228. On December 20, 2013, the jury returned a verdict in Casper's favor in the amount of $1,019,468.74. SR at 4461-4462.

The trial court entered a judgment on the jury verdict, with pre- and post-judgment interest thereon, and denied all of Akers' post-trial motions. *See* SR at 4724, 4725-4727, 4800. Akers now appeals.

STATEMENT OF THE FACTS

On October 15, 2003, the parties entered into the IPA.[2] Casper App. at 001. Under the IPA, Akers agreed to sell "the improvements [Akers] is constructing . . . [consisting of] a turn key Eight-four (84) unit Holiday Inn Express." Casper App. at 1. The purchase price was $4,850,400.00. Casper App. at 2. The hotel was being constructed "pursuant to the plans and specifications" prepared by Associated Architects, Inc. Casper App. at 1. The estimated completion date was "the end of 2003 or the beginning of 2004." Casper App. at 4.[3]

In January of 2004, construction was not complete. Akers knew that Koehler was involved in a 1031 exchange, and had agreed "to cooperate," so the parties executed an Addendum to the IPA. Casper App. at 8. The Addendum accelerated the closing date on the

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[2] Jim Koehler was Casper's predecessor-in-interest to the IPA. TT at 1096:10-1097:4. By separate agreement, Akers retained ownership of the land upon which the hotel sits, and Koehler would make monthly rental payments to Akers commencing on the day the hotel opened for business. Tr. Ex. 40.

[3] Akers had previously contracted with Zakco for construction of the hotel. Tr. Ex. 7.

purchase, but did not relieve Akers of any of his duties. *Id.* Indeed, the Addendum expressly noted Akers' "continuing obligation to construct and finish the Improvements in accordance with all governmental requirements and the standards and specifications of the Holiday Inn Express system." Casper App. at 8.

After taking possession and opening the hotel on March 11, 2004, Casper began experiencing problems, which steadily grew in number and severity. The problems began with a lack of room-to-room quietness; water penetration in the pool room and residential areas; and a defective dehumidification system in the pool room. TT at 161:18-23, 162:9-18 (John Farr); 322:8-323:14, 327:24- 335:17 (Doug Vogt); 405:5-12, 408:4-427:25 (Jim Hopkins); 723:8-726:20 (Rod Eisenbeisz). Casper remedied the sound problems in-house. TT at 325:3-327:6 (Doug Vogt). Its efforts to remedy the remaining problems, however, proved ineffective.

Ultimately, Casper hired an engineer, John Farr, and an architect, Wendel Potratz, to inspect the property. Farr and Potratz discovered the existence of severe, latent defects. *See*, *e.g.*, TT at 120:21-24, 125:8-126:11 (Ryan Pace); 177:14-21, 179:18-25 (John Farr); 800:5-808:1, 813:9-819:1, 823:15-825:5, 826:23-833:24,

836:2-839:11 (Wendel Potratz). Some of the repair work Casper undertook included removal and replacement of the interior wall system, windows, and roof; corrective modifications to the pool room dehumidification system; and replacement of the exterior stucco system. *See* TT at 839:12-858:20 (Wendel Potratz). Most of this work was done in 2010, and was the same work that would have been required in 2004 to bring the hotel to code. TT at 232:1-4 (John Farr). Total repairs cost more than $1,000,000. Tr. Ex. 6b.

Casper brought this breach of contract action against Akers. After a two-week jury trial, the jury found in Casper's favor and returned a verdict of $1,019,468.74. Casper App. at 10.

ARGUMENT

I. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN DENYING AKERS' RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW.

Standard of Review: A trial court's ruling on a Rule 50(b) motion is reviewed under an abuse of discretion standard. *Alvine Family Ltd. Partnership v. Hagemann*, 2010 SD 28, 780 N.W.2d 507, 512-13. This Court must view the "evidence in the light most favorable to the jury verdict and give the prevailing party the benefit of every

inference and resolve in its favor every controverted fact." *Brandriet v. Norwest Bank SD, N.A.*, 499 N.W.2d 613, 616 (S.D. 1993). So long as there was sufficient evidence presented to the jury from which reasonable minds could reach "differing conclusions," the jury verdict "should not be disturbed[.]" *Heiser v. Rodway*, 247 N.W.2d 65, 69 (S.D. 1976).

A. Casper was not Required to Present Evidence of Diminution in Value.

In contract actions, the measure of damage is "the amount which will compensate the aggrieved party for all detriment legally caused by the breach, or which, in the ordinary course of things, would be likely to result from the breach." SDCL §21-2-1; SDPJI (Civil) 50-70-10. *See also Bunkers v. Jacobson*, 2002 SD 135, ¶39, 653 N.W.2d 732, 743. "The purpose of contract damages is to put the injured party in the same position it would have been had there been no breach." *Lamar Advertising v. Heavy Constructors, Inc.*, 2008 SD 10, ¶14, 745 N.W.2d 371, 376.

Akers argues Casper's damages were limited to the lesser of cost of repair or diminution in value. SDPJI (Civil) 50-20-10. (Damages – Personal Property – Repairs and Depreciation or Difference in Value Before and After Damage). This is not the law.

Casper's damage was not property damage, but damage sustained from not receiving what was due to it under the IPA. The fact that this contract action happened to involve property does not transform it into a tort action for property damage, and the cases Akers relies upon are distinguishable on this very ground. *See Ward v. LaCreek Elec. Ass'n*, 163 N.W.2d 344 (S.D. 1968) (negligence action arising out of improper installation of transformer); *Rupert v. City of Rapid City*, 2013 SD 13, 827 N.W.2d 55 (action for inverse condemnation, trespass, and negligence arising out of city's use of de-icer).

The only South Dakota case to arguably support Akers' position is *Subsurfco, Inc. v. B-Y Water Dist.*, 337 N.W.2d 448 (S.D. 1983). In *Subsurfco*, the Court addressed the measure of damages recoverable to an owner against a contractor under a construction contract, finding that if a contractor's defective work could not "be remedied without reconstruction of a substantial portion of the work, the measure of damages is the difference in value between what would have been if built according to the contract and what was actually built." *Subsurfco*, 337 N.W.2d at 455.

The *Subsurfco* measure of damages might make sense when an owner sues a contractor under a construction contract.[4] But, as Akers admits, the IPA is not a construction contract; it is a contract for the sale of a hotel. *See Appellant's Brief* at 12; Casper App. at 1. Under the IPA, Akers was selling an improvement: a turn-key hotel. Casper App. at 1. It is therefore impractical to apply the *Subsurfco* measure of damages to this case, when Akers' breach did not involve him literally performing defective work.

The circuit court did not abuse its discretion in rejecting Akers' argument that Casper's damages were to be measured by an inapplicable standard.

B. There was Overwhelming Evidence that Akers Breached the IPA.

Under the IPA,[5] Akers promised to provide Casper a turn-key hotel, built in compliance with the plans and specifications, governmental codes, and the HIE standards. Casper App. at 1. The

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[4] It is not clear that this measure of damages should apply in all construction cases. *See* John P. Ludington, Annotation, *Modern status of rule as to whether cost of correction or difference in value of structures is proper measure of damages for breach of construction contract*, 41 A.L.R. 4th 131, §23 (noting difficulty in applying diminution in value rule when dealing with defective construction).

[5] Akers' Appendix does not include the entire IPA – he omitted the parties' Addendum. Akers' App. at G. This is particularly troubling in light of Akers' reliance on the accelerated closing in support of his waiver argument. Casper has produced the entire IPA in its Appendix. Casper App. at 1-9.

Addendum did not relieve Akers of this obligation; indeed, it specifically recognized Akers' "*continuing obligation* to construct and finish the Improvements in accordance with all governmental requirements and the standards and specifications of the Holiday Inn Express system". Casper App. at 8 (emphasis added); Tr. Ex. 3.

There was considerable evidence at trial that the hotel was not turn-key and did not comply with the plans, specifications, governmental codes, or the HIE standards:

- In 2004, the hotel violated the applicable Code provisions regarding weatherization, weather barrier, window installation, and wind-load requirements. TT at 181:24-182:24, 183:3-4, 228:17-21 (John Farr).

- The stucco system was not constructed properly or protected from water penetration. Windows and PTAC (packaged terminal air conditioner) units were not flashed so as to keep water out of the building. TT at 67:6-25 (Ryan Pace); 164:20-22, 171:19-172:1 (John Farr).

- Portions of the hotel roof lacked underlayment or tar paper. TT at 106:5-23 (Ryan Pace).

- There was black mold in window framing, subfloors, and behind the vinyl wallpaper. TT at 57:14-20, 83:20-25, 112:11-18 (Ryan Pace).

- Many wall assemblies did not contain vapor barrier, a plastic sheet designed to stop moisture from entering the wall unit. TT at 59:13-24, 115:13-17, 179:18-25 (Ryan Pace and John Farr).

- Most windows were stapled, not nailed, resulting in cracking to the flanges. TT at 127:2-7 (Ryan Pace). Windows were installed in violation of manufacturer instructions. TT at 225:18-226:2 (John Farr).

- PTAC sleeves did not have adequate drain lines. TT at 127:10-20, 167:21-168:1 (Ryan Pace and John Farr).

- There were gaps in the stucco around the PTAC units and windows. This, coupled with defective window installation, defective flashing, and improper wall assemblies, resulted in water penetrating the building. TT at 85:20-23, 296:10-24 (Ryan Pace and John Farr).

- The HIE Standards Manual required a sound rating of STC 50 in party walls. The plans did not meet this rating and, even if they did, the walls as constructed did not meet this rating. TT at 506:23-507:20; 519:23-520:9; 531:22-532:5 (Dave Stafford); Tr. Ex. 3.

- The pool room dehumidification system was defective: the design fell below generally accepted industry standards because it lacked an exhaust fan and auxiliary heat source; it was not constructed pursuant to the plans, specifications, instruction manuals, or HIE Standards; and the pool room improperly maintained a positive pressure. TT at 650:18-25; 656:9-16; 658:1-4; 659:12-19; 660:22-661:16; 668:21-670:16; 671:21-673:2 (Loren Schoeneman).

- Akers' experts agreed the dehumidification system was dysfunctional (TT at 1381:7-12, 1400:4-19 [James Partridge]); parts of the building were defectively constructed (TT at 1596:6-13 [Merl Potter]); the plans and specifications were incomplete (TT at 1609:3-8 [Merl Potter]); the gutters, downspouts, and stucco system were not installed properly (TT at 1610:15-22, 1613:2-15 ([Merl Potter]); and the failure to comply with the plans/specifications, industry standards, and building codes contributed to the moisture intrusion (TT at 1625:23-1626:13, 1635:11-17 [Merl Potter]).

Akers challenged this evidence through vigorous cross-examination, expert witness opinions, and closing argument. Indeed, Akers' cross-examinations were often as long as, if not longer, than Casper's direct examinations. *See*, *e.g.*, TT at 648-717 (Casper's Direct of Loren Schoeneman, 28 pages; Akers' Cross, 40 pages).

The jury heard Akers' arguments and rejected them. There was ample evidence to support the jury's verdict. The trial court did not abuse it discretion in denying Akers' motion.

C. The Jury Rejected Akers' Argument that Casper Failed to Mitigate.

At trial, one of Akers' primary arguments was that Casper did not mitigate its damages. *See*, *e.g.*, TT at 1783:21-1791:25 (closing argument); TT at 361-380 (Doug Vogt Cross); 441:10-447:4, 450:1-456:1 (Jim Hopkins Cross); 475:1-480:5, 483:10-485:9, 489:14-19, 491:8-18, 494:6-495:22, 497:18-500:21 (Tom Pogroszewski Cross). Akers presented expert testimony that Casper should have addressed the problems differently, and its failure to do so caused more damage. *See* TT at 1382:1-1383:1 (James Partridge); 1549:23-1552:7, 1554:23-1557:20, 1562:24-1563:3, 1593:21-1594:6 (Merl Potter).

On the other hand, Casper's witnesses testified to substantial efforts to mitigate the damages. They remedied the room-to-room

quietness problem; caulked and patched when they noticed water intrusion in the pool room, guest rooms, and corridors; repainted or replaced dampened drywall patches; replaced the exercise room floor due to its noisiness; replaced the pool roof; called contractors to look at the dehumidification system, pool room windows, and the pool itself; and repaired the deteriorated parking lot. *See*, *e.g.*, TT at 327:24-335:17 (Doug Vogt); 408:4-427:25, 432:8-14 (Jim Hopkins); 461:12-462:8, 464:2-468:1, 468:11-470:9 (Tom Pogroszewski). One of Casper's experts testified that no degree of maintenance would have corrected the latent defects. TT at 251:18-20 (John Farr).

There was sufficient evidence from which reasonable minds could reach "differing conclusions," and the jury found in Casper's favor. *Heiser*, 247 N.W.2d at 69. There was no basis for the trial court to override the verdict, and there is no basis for this Court to override the trial court. *Brandriet*, 499 N.W.2d at 616.

D. The Jury Rejected Akers' Argument that Casper Waived its Rights under the IPA.

Akers also focused heavily on his argument that Casper waived its claims, in whole or in part, by failing to pursue warranty claims against subcontractors. *See* TT 388:14-390:12 (Doug Vogt Cross); 436:22-445:11 (Jim Hopkins Cross); 1015:7-17 (Wendel Potratz

Cross); 1217:2-11, 1294:21-1299:16 (Jim Koehler Cross); 1332:15-18 (Deborah Ford); 1388:17-22 (James Patridge); 1549:23-1554:22, 1561:19-1563:3, 1639:11-20 (Merl Potter); 1766:4-9, 1768:20-1771:1, 1775:16-1776:2, 1783:21-1784:23, 1791:13-1794:6 (closing argument).

Casper presented evidence that it never received a list of the subcontractors from Akers, TT 340:14-341:24 (Doug Vogt); the subcontractors they did know about refused to come back because they were not being paid by the general, TT at 457:6-21 (Jim Hopkins); neither the general, nor Akers, nor the subcontractors would respond to requests for help, TT at 1145:8-13 (Jim Koehler); and the problems Akers claim should have been caught during a "one-year warranty walk-through" were observable by Zakco and Akers before he transferred ownership, TT at 1623:11-1624:7 (Merl Potter Cross). Finally, Akers' expert had no evidence that Akers physically gave Casper the warranty information. TT at 1632:8-18. *See also* Casper App. 5 (IPA at § XI).

There was sufficient evidence from which reasonable minds could reach "differing conclusions," and the jury opted to reject Akers' position. *Heiser*, 247 N.W.2d at 69. The circuit court's denial of Akers' motion on this ground should be upheld.

II. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN DENYING AKERS' MOTION FOR MISTRIAL.

Standard of Review: A denial of a motion for mistrial "will not be disturbed unless [the Court is] convinced that there has been a clear abuse of judicial discretion." *State v. Bogenreif*, 465 N.W.2d 777, 783 (S.D. 1991). The moving party must make an "actual showing of prejudice." *State v. Anderson*, 2000 SD 45, ¶36, 608 N.W.2d 644, 655. A circuit court has "considerable discretion not only in granting or denying a mistrial but also in determining the prejudicial effect of a witness' statements." *Id.*

A. Trent Nelson's New Opinions Were Excluded and Any Prejudice was Remedied by the Immediate Curative Instruction.

Ryan Pace, Casper's first trial witness, was the project manager of the repair work done in 2010. TT at 52:11-14. Pace testified that he had to use five boxes of nails to properly affix the OSB to the studs. TT at 62:9-22, 127:25-128:12. At 5,000 nails per box, this meant that his crew used 25,000 nails to secure the OSB.[6] *Id.*

Nelson, who was present for Pace's testimony, took the stand on Wednesday, December 11, the third day of trial. TT at 533. On the morning of Thursday, December 12, before Nelson re-took the stand,

[6] Pace was not deposed before trial. *See* SR at 4579.

Akers' counsel objected to Nelson opining as to whether "there were an inadequate number of nails in the OSB." TT at 552:10-14. In response, Casper read a portion of Nelson's deposition to the Court, wherein Nelson discussed the importance of fastening patterns:

> So there was no indication on the structural plans that the structure was designed under the assumption that it would be in a wet condition when in use. *And it also stated that the exterior walls of the structure were designated as shear walls* and it gave a specific fastening pattern for the OSB sheathing to be attached to the structural studs of the exterior walls. So with that, that led me to the conclusion it was important to maintain the integrity of the existing envelope.

TT at 553:7-554:4 (emphasis added). The trial court overruled Akers' objection and Nelson was permitted to testify about the improper nailing. TT at 555:17-20.

Importantly, in the quoted deposition testimony, Nelson described the shear wall designation as a consideration *in addition to* the assumption that the structure would be maintained in a dry condition. The shear wall designation is important because, as Nelson explained to the jury:

> Shear walls are there to keep the building from falling down when this wind blows or in a seismic event. It's there to aid in the lateral resistence [sic] of the building and so the connection and the condition of the exterior sheathing is what provides that lateral stability for the structure itself. If the condition of that sheathing is

> deteriorated, especially like we see here, it obviously has lost its strength and no longer can perform as intended by the original design engineer and would not be able to resist the calculated design force as required by the code for this building.

TT at 560:2-13. Nelson further testified that shear walls were subject to a specific fastening pattern required by the plans. TT at 563:12-23. Based on Pace's earlier testimony, Nelson calculated that approximately 18,700 nails were used to "correctly fasten the OSB sheathing that apparently wasn't there when they originally constructed the building." TT at 565:15-567:15. Nelson opined that this meant the OSB was improperly nailed during the original construction. *Id.*

Nelson was then asked if this impropriety implicated any Code provisions. TT at 567:16-569:18. Akers did not object to this line of questioning. *Id.* In response, Nelson opined that, under the Code and based on the improper nailing, the building was unsafe, and violative of the Code, on the day it was delivered to Casper. TT at 569:5-18. Akers still did not object. *Id.*

After giving these opinions, Nelson testified about other defective portions of the building. TT at 570-592. Akers then embarked on a lengthy cross-examination of Nelson, during which

Nelson admitted that his new opinions were based on Pace's trial testimony. TT at 596:19-22. Akers continued his cross-examination until the Court called for a break. TT at 592-615.

During the break, Akers moved for a mistrial on the grounds that Nelson's testimony constituted an inadmissible undisclosed opinion. TT at 616:5-15.

The Court agreed that Nelson's opinions were undisclosed, reserved ruling on the motion for mistrial, and granted Akers' motion to strike. TT at 620:11-18, 622:8-23. The Court, immediately upon the jury's return, issued a curative instruction, instructing it to not consider any of Nelson's testimony regarding the OSB fastening pattern and its effect on the building's safety. TT at 626:24-627:13; Casper App. at 12 (admonishment).[7]

"[I]f a court excludes improperly admitted evidence and directs the jury to disregard it, the error is cured." *Young v. Oury*, 2013 SD 7, ¶18, 827 N.W.2d 561, 567. In determining whether an exclusion of the evidence, plus a curative instruction, sufficiently overcame any prejudice, this Court has outlined four "helpful" factors:

[7] The court indicated it would re-read the admonishment during final instructions. TT at 626:15-18. During the settling of instructions, Akers did not request that the court re-read the admonishment, nor did he object to the court's failure to do so. TT at 1672:10-1727:12 (settling of instructions); SR at 4395-4434 (final instructions).

(1) to what extent did the evidence go directly to a critical issue;
(2) is the evidence inherently prejudicial and of such a character that it would likely impress itself upon the minds of the jurors;
(3) was the curative instruction firm, clear, and accomplished without delay; and
(4) was there any misconduct on the part of the offering party?

A review of these factors makes clear that the trial court sufficiently quelled any error.

a. There was already overwhelming admissible evidence that the hotel was defective – and there was ample subsequent evidence as well.

The critical issue in this case was whether Akers breached the IPA. Casper's position was that the hotel, as delivered to Casper, was not turn-key, violated the plans and specifications, and did not comply with HIE Standards. Before Nelson testified, Casper had presented hours of testimony and scores of exhibits establishing these defects. *See, e.g.*, TT at 45-153 (Ryan Pace); 154-299 (John Farr); 503-529 (Dave Stafford).

Nelson's first challenged opinion was that the OSB sheathing was not properly fastened. Akers objected to this opinion before Nelson took the stand. *See* TT at 552:3-555:20.

Nelson's second challenged opinion was that the building was structurally unsound on the day it was turned over to Casper. Akers did not object to this testimony until long after the testimony was given and Akers conducted a lengthy cross-examination on it. *See* TT at 569:5-18 (Nelson's opinion); 592-608 (Akers' cross-examination); 616 (Akers' objection). Failure to object to testimony is a failure to preserve the issue for appeal. *State v. Buller*, 484 N.W.2d 883, 888 (S.D. 1992). Thus, if any error resulted from Nelson's second opinion, Akers waived it. *Id.*

Each of the two opinions bore upon one small piece of the critical issue – i.e., one violation of the plans.[8] Their individual impact on the overarching critical issue – whether Akers breached the IPA – was minimal in light of the copious evidence presented, both before and after Nelson's testimony, of many other violations. *See* Section I.B., *supra*.

b. The evidence was not inherently prejudicial.

"This factor deals with what the jury actually saw and heard and how much the jurors were expected to disregard."

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[8] Nelson opined that there were *several* code violations throughout the building. *See* TT at 581:11-582:25, 585:7-586:20, 589:15-590:24. Akers knew of these opinions for several years, yet never elected to hire a structural engineer to respond to those opinions. *See* SR at 148-150.

Young, ¶21, 827 N.W.2d at 567. Nelson's testimony on the first and second opinions lasted approximately 10 pages. *See* TT at 560:25-570:11. There were no charts or demonstrative exhibits presented to the jury. *Id. See Young*, ¶22, 827 N.W.2d at 568 (noting prejudicial nature of exhibit that would be impressionable on jury).

Any inherent prejudice of these opinions comes not from the testimony itself but from Akers' failure to have an expert to rebut these opinions. It was Akers' choice to not identify a responsive structural engineering expert.

c. The Court's curative instruction was firm, clear, and swift.

The Court gave a curative instruction to the jury immediately upon the jury's return to the courtroom. This is distinguishable from *Young*, where the court waited a full ½ day to give the curative instruction, after having multiple opportunities to so instruct the jury. *Young*, ¶¶23-24, 827 N.W.2d at 568. There was no such delay here, where the court read the instruction at its first opportunity, and the admonishment itself was clear and concise. Casper App. at 12.

d. There is no evidence of misconduct.

Akers claims that Casper's counsel "misrepresented its pretrial disclosures by telling the trial court that Nelson addressed nailing in

his deposition." *Appellant's Brief* at 33. There was no such misrepresentation. As detailed above, the portion of Nelson's deposition that was read to the Court discussed the importance of fastening patterns for shear walls *in addition to* the assumption that the building would be maintained in a dry condition.

Counsel acted in good faith in relying on Nelson's deposition testimony for the first opinion and on Pace's trial testimony for the second opinion. TT at 616:17-617:5. "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing." SDCL §19-15-3 (Rule 703). *See also Kibert v. Peyton*, 383 F.2d 566, 570 (4th Cir. 1967) ("It is elementary that an expert witness is permitted to take into account the testimony of others as to what they observed, and upon his interpretation to offer an informed professional opinion.").

Finally, *Kaiser* and *Papke* are distinguishable because the trial courts in those cases admitted the undisclosed evidence; the evidence was not based on testimony presented at trial; and counsel in those cases timely objected. *See Papke v. Harbert*, 2007 SD 87, 738

N.W.2d 520; *Kaiser v. University Physicians Clinic*, 2006 SD 95, 724 N.W.2d 186.

Here, Nelson's new opinions were based on new factual testimony presented at the trial. SDCL §19-15-3 (Rule 703) (allowing experts to base opinions on testimony adduced at trial). The trial court deemed Nelson's opinions inadmissible and promptly instructed the jury to disregard the same, thereby quelling any prejudice.

The trial court did not abuse its discretion in denying Akers' motion for mistrial on this ground. *See Supreme Pork, Inc. v. Master Blaster, Inc.*, 2009 SD 20, 764 N.W.2d 474.

B. Merl Potter was Properly Precluded from Offering New Opinions at Trial.

Before trial, Casper prepared Rule 1006 Damage Summaries.[9] Tr. Exs. 6, 12-16. These summaries were provided to Akers on September 18, 2013, approximately three months before trial. SR at 4657.

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[9] SDCL §19-18-6 (Rule 1006) provides:

> The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court.

Prior to that, Casper produced all of the documents forming the basis for the Rule 1006 summaries in discovery in May 2010, June 2011, and September 2011. SR at 4582-4583, 4609-4647. Additionally, on June 21, 2011, Casper produced "Contractor/Vendor Spreadsheets," which outlined and itemized the amount Casper spent on each vendor, for each item of repair (except for room-to-room quietness repairs, which were produced separately). SR at 4631-4632, 4644, 4691-4699.

Potter became involved in the case in May of 2012 and was deposed on September 16, 2013. SR at 4684, 4687. At the time of Potter's deposition, he had access to all of the damage documentation, including the contract/vendor spreadsheets; he merely did not have Casper's Rule 1006 Summaries.

At his deposition, Potter assured counsel that his reports contained all of his opinions. SR at 4688-4690. His reports did not reference specific damage categories or amounts supporting Akers' mitigation defense. SR at 4658-4683. Two days after his deposition, however, Casper provided the Rule 1006 Summaries. Despite this, Potter never supplemented his report, nor did Akers give notice that

Potter's opinions would include a detailed examination of the damages claimed.[10]

At trial, Casper objected to any new opinions from Potter dissecting Casper's claimed damages. TT at 1519:1-17, 1565:23-1567:25. The Court agreed. TT at 168:15-1569:2, 1570:3-4.

Akers cannot show actual prejudice resulting from the trial court's exclusion of Potter's new, undisclosed opinions. The circuit court did not abuse its discretion in denying Akers' motion for mistrial on this ground.

C. Counsel's Statements in Closing

a. Akers' Failure to Object is a Waiver.

"[I]t has long been the rule in this state that a defendant on appeal may not complain of alleged misconduct by the [plaintiff] in argument to the jury unless such remarks were objected to when made and an admonition promptly requested." *State v. Kidd*, 286 N.W.2d 120, 122-23 (S.D. 1979). "[T]he objection to argument of counsel must be made at the time of the improper argument, remark, or other misconduct." *Veith v. O'Brien*, 2007 SD 88, ¶67, 739 N.W.2d 15, 34.

[10] Akers does not explain why he did not supplement Potter's report in those three months prior to trial. *Papke*, ¶55, 738 N.W.2d at 529 (noting duty to supplement).

"When a party fails to object to argument of counsel at trial, he deprives the trial court the opportunity to rule on the issue and admonish the jury or give a curative instruction. When a party deprives the trial court an opportunity to rule on the issue by failing to object to argument at the time the objectionable comments are made, he waives his right to argue the issue on appeal." *Id.*

Akers did not object to the comments during closing argument. TT at 1743:22-1744:4, 1756:6-16, 1794:15-19. In fact, he did not object until *after the verdict was read.* TT at 1801:3-1802:3. This is a complete waiver of his right to complain about those comments. *Kidd*, 286 N.W.2d at 122-23. *See also State v. Handy*, 450 N.W.2d 434, 435 (S.D.1990).

The circuit court did not err in denying Akers' motion on this ground.

b. Even if he Had Preserved his Right to Argue this Issue, Akers Cannot Show Actual Prejudice

Even if Akers had preserved his right to argue this issue, he cannot succeed. First, the comment about Akers' "remedies" was an explanation of the relationship between the parties in this case. TT at 1743:22-1744:4, 1756:6-16. Counsel did not mention Akers' claims against, or settlement with, the subcontractors, and therefore did not

implicate the *in limine* rulings. SR at 4227. Moreover, these comments were made during closing, not rebuttal; Akers had an opportunity to respond, but he elected not to do so. *See* TT at 1743, 1756.

As to Potratz's photographs, Akers' accusations of wrongdoing were significant and it was Akers' counsel that opened the door to comments "involv[ing] personal knowledge of facts not before the jury." Specifically, Akers' counsel stated:

> [W]e heard Mr. Potratz say, I have 1,200 pictures. *I haven't seen 1,200 pictures.* We heard Mr. Pace say, We didn't take pictures of the windows that were caulked because we knew they weren't a problem. Folks, *we've had to work with the pictures that were provided* to try to get to the truth of this matter.

TT at 1767:6-12. Counsel improperly injected his experience in an effort to discredit Wendel Potratz. *Schoon v. Looby*, 2003 SD 123, ¶7, 670 N.W.2d 885, 888.

Akers believed there was a failure to produce evidence, and he successfully argued for the court to issue a spoliation instruction. *See* TT at 1675:10-1676:10; SR at 4403 (Instruction 12). Instead of focusing on the instruction, counsel personalized the issue and claimed that he, personally, had not seen photos. This is a textbook example of the doctrine of invited error.

> The doctrine of 'invited error' embodies the principle that a party will not be heard to complain on appeal of errors which he himself induced or provoked the court or the opposite party to commit. It has been held that for the doctrine of invited error to apply it is sufficient that the party who on appeal complains of the error has contributed to it.

Veith, ¶27, 739 N.W.2d at 24. Akers obviously contributed to this alleged error by making personalized comments during closing. He cannot now complain that Casper responded. *Id*.

Finally, the jury was instructed that:

> While the final argument of counsel is intended to help you in understanding the evidence and applying the law as set forth in these instructions, final argument is not evidence. You should disregard any argument, statement, or remark of counsel which has no basis in the evidence.

SR at 4398 (Instruction 5).

Akers cannot show that counsel's comments affected the outcome of the proceeding, particularly in light of this explicit instruction. He cannot show that these comments, "in the context of the entire argument involving extensive evidence and jury instructions," caused him actual prejudice. *State v. Beck*, 2010 SD 52, ¶17, 785 N.W.2d 288, 294; *Roden v. Solem*, 431 N.W.2d 665, 670 (S.D. 1988) ("We do not believe that one improper comment

significantly swayed the jury, especially when considering all of the damning evidence produced.").

The circuit court did not abuse its discretion in denying Akers' motion on this ground.

III. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN DENYING AKERS' MOTION FOR NEW TRIAL BASED ON ISSUES IN II. A, B & C.

Standard of Review: The decision to grant or deny a new trial under SDCL §15-6-59(a) is left to the "sound judicial discretion of the trial court and the decision will not be disturbed absent a clear showing of abuse of discretion." *Tornow v. Sioux Falls Civil Serv. Bd.*, 2013 SD 20, ¶10, 827 N.W.2d 852, 856.

A. Akers' Failure to Cite Legal Authority Constitutes a Waiver.

Appellate Rule 60 requires that the Argument portion of an appellant's brief contain "the contentions of the party with respect to the issues presented, the reasons therefore, and the citations to the authorities relied on." SDCL §15-26A-60(6). This Court has repeatedly held that a failure to cite supporting legal authority constitutes a waiver of the issue on appeal. *See, e.g.*, *Veith*, ¶50, 739 N.W.2d at 29.

Akers fails to identify any portion of SDCL §15-6-59(a) in support of his appeal. His Brief does not mention the matter, except for a passing reference to the circuit court's denial of his motion. *Appellant's Brief* at 32. He does not articulate the Rule 59(a) standards, nor does he present any analysis of those standards to this case. *See generally Appellant's Brief.*

Akers' failure to cite legal authority "is a violation of SDCL 15-26A-60(6) and the issue is thereby deemed waived." *Parmely v. Hildebrand*, 2001 SD 83, ¶ 7, 630 N.W.2d 509, 512, n.5.

Should the Court reach the merits of this issue, Casper responds as follows.

B. Trent Nelson's Testimony did not Give Rise to Grounds for a New Trial.

Akers does not specify which grounds in Rule 59 apply to this issue. Ostensibly, he would invoke Rule 59(a)(1) (irregularity/trial misconduct) or Rule 59(a)(3) (accident/surprise). SDCL §15-6-59.

When trial misconduct is "urged as grounds for a new trial, the aggrieved party must convince this Court that there has been a miscarriage of justice." *Baddou v. Hall*, 2008 SD 90, ¶12, 756 N.W.2d 554, 558.

As discussed above, the trial court immediately gave a curative instruction and struck the challenged testimony. The testimony was given on the morning of the 4th day of a 10-day trial, and there was overwhelming evidence that other code violations existed on the day that Casper received this hotel. Other than reference to trite platitudes (e.g., the bell cannot be unrung), Akers cannot establish a "miscarriage of justice."

"To constitute grounds for new trial, accident or surprise must be such that ordinary prudence could not have guarded against it." *Egan v. Shindelbower*, 41 N.W.2d 225, 226 (S.D. 1950). Additionally, Akers must prove prejudicial error and that the curative instruction and exclusion of the evidence was insufficient to overcome any prejudicial effect. *Young*, ¶18, 827 N.W.2d at 567. Akers cannot meet his burden.

First, if Akers would have deposed Ryan Pace, this whole scenario would have likely been avoided. Moreover, as set forth above, any prejudice that befell Akers was cured quickly with the Court's instruction.

The circuit court did not err in denying Akers' motion for new trial on this ground.

C. Merl Potter's Undisclosed Opinions were Properly Excluded.

Casper guesses that Akers would invoke Rule 59(a)(7) (error of law) on this issue. SDCL §15-6-59. In alleging error in the rejection of evidence, the moving party must show an abuse of discretion and that the "evidence might and probably would have resulted in a different verdict." *Thompson v. Mehlhaff*, 2005 SD 69, ¶32, 698 N.W.2d 512, 519-20.

The trial court did not abuse its discretion in refusing to permit Potter to give new opinions at trial, particularly in the wake of the prior dispute over Nelson's opinions. Nor can Akers show that Potter's opinion would have resulted in a different verdict. Potter's proposed opinions went directly to Akers' failure to mitigate defense, which, as demonstrated above, Akers fully argued to the jury.

The circuit court did not abuse its discretion in denying Akers' motion for new trial on this ground.

D. Counsel's Comments in Closing did not Justify a New Trial.

Casper assumes that Akers is relying on Rule 59(a)(1) (trial misconduct). *See Baddou*, ¶12, 756 N.W.2d at 558.

Casper incorporates its arguments from Section II.C. For the same reasons Akers cannot show that counsel's comments entitled him to a mistrial, he similarly cannot show that they entitled him to a new trial.

IV. THE CIRCUIT COURT'S JURY INSTRUCTIONS GAVE A FULL AND CORRECT STATEMENT OF THE LAW.

Standard of Review: This Court reviews the refusal of proposed jury instructions under the abuse of discretion standard. *State v. Nuzum*, 2006 SD 89, ¶9, 723 N.W.2d 555, 557.

In alleging error in jury instructions, the moving party must show "prejudicial error, establishing that under the evidence, the jury would probably have returned a different verdict if the proposed instructions had been given. Instructions are adequate if they correctly state the applicable law." *Carpenter v. City of Belle Fourche*, 2000 SD 55, ¶27, 609 N.W.2d 751, 762.

Jury instructions "must be considered as a whole and when as a whole [they give] a full and correct statement of the law applicable to the case, they are not erroneous because the particular instructions taken alone may not have embodied all the law applicable."

Dwyer v. Christensen, 92 N.W.2d 199, 204 (S.D. 1958). *See also State v. Webster*, 2001 SD 141, 637 N.W.2d 392.

A. Wyoming Warranty Law

At trial, Akers claimed Casper could have mitigated its damages by pursuing certain warranty claims that might be available under Wyoming[11] law against the contractor and/or subcontractors. Akers claims the trial court erred by refusing the following jury instruction:

> As a purchaser of property, Plaintiff was given implied warranties from the contractors who performed work on the Casper, Wyoming, Holiday Inn Express. Those warranties provided that the contractors' work would be performed in a skillful, careful, diligent, and workmanlike manner. Plaintiff had the ability to assert warranty claims and enforce their [sic] warranty rights against the contractors involved in the project with regard to any allegedly defective work performed on the project.
> As a non-builder seller of the hotel, Defendant Robert W. Akers did not provide any warranties, express or implied, to Plaintiff or James Koehler with regard to the work performed at the hotel.

SR at 4391.

Considering the instructions as a whole, the jury was properly instructed on Akers' legal defenses of failure to mitigate and waiver.

---

[11] The Wyoming implied warranty Akers references is "limited to latent defects which are not discoverable by the subsequent purchasers by reasonable inspection and which become manifest only after the purchase." *Moxley v. Laramie Builders, Inc.*, 600 P.2d 733, 735-36 (Wyo. 1979). Akers argued at trial that all of the major defects, including the stucco application issues, were not latent and could have been discovered during the first year warranty walk through. TT at 1561:22-1563:3, 1593:24-1594:9 (Merl Potter).

SR at 4408, 4409, 4424, 4425, 4430, 4431. The jury didn't buy Akers' defense, not because it wasn't properly instructed, but because there was substantial evidence to the contrary. *See* Section I.D., *supra*.

Akers argues he was prevented "from adequately arguing to the jury that Casper's failure to call the contractors to have warranty repairs made constituted failure to mitigate." *Appellant's Brief* at 32. Nonsense. Akers presented evidence and argument on this very point. TT at 1550, 1554 (Merl Potter); TT at 1784 (closing argument).

The second portion of Akers' refused instruction states:

> As a non-builder seller of the hotel, Defendant Robert W. Akers did not provide any warranties, express or implied, to Plaintiff or James Koehler with regard to the work performed at the hotel.

SR at 4391.

Akers contends the "risk of construction defects was allocated to Casper [and that] Akers made no promises regarding construction quality." *Appellant's Brief* at 29. This assertion is absurd and misleading, in that it would have extinguished Akers' contractual duties (whether termed warranties, promises, or otherwise) to sell the hotel in an agreed-upon condition. Casper App. 1-9; Tr. Ex. 3 (HIE Standards Manual).

As detailed above, Akers spent the entire trial arguing that Casper did not mitigate its damages, did not pursue warranty rights, and that Akers was not responsible for the defects. The jury was correctly instructed on the law pertaining to Akers' defenses but, as the verdict reveals, it rejected them. Casper App. at 10.

B. Mitigation of Damages

The Court gave the following two instructions on mitigation (SR 4430-31):

Instruction No. 49[12]

> In determining the amount of money which will reasonably compensate the plaintiff, you are instructed that a person whose property is damaged must exercise reasonable diligence and effort to minimize existing damages and to prevent further damages.
>
> The law imposes upon a party injured by another's breach of contract the active duty of making reasonable exertion to render the injury as light as possible. If, by his negligence or willfulness, he allows the damages to be unnecessarily enhanced, the increased loss, which was avoidable by the performance of his duty, falls on him.
>
> Plaintiff cannot recover money for damage to property which could have been avoided by the exercise of reasonable diligence and effort.

[12] *See* SR at 3733 (Akers' Requested Inst. 37).

Instruction No. 50[13]

> Akers has the burden of proving that Casper Lodging failed to mitigate its damages. Casper Lodging claims that it mitigated its damages.
>
> If you find that Casper Lodging took reasonable steps in an effort to mitigate its damages, then you must find that Casper Lodging properly mitigated its damages.

The jury was *not*, as Akers contends, instructed that if Casper took "any" reasonable steps to mitigate, it was required to find that Casper mitigated. *See Appellant's Brief* at 30-31. When read together, Instructions 49 and 50 gave a full and correct statement of South Dakota law on mitigation of damages. *See* SDPJI (Civil) 50-140-20; *Ducheneaux v. Miller*, 488 N.W.2d 902, 917-918 (S.D. 1992) (supplying language for Instruction 50).

The circuit court did not err in giving these instructions and did not abuse its discretion in denying Akers' motion for mistrial on this ground.

C. Akers Did not Appeal the Circuit Court's Refusal of His Requested Instruction No. 45.

A party taking an appeal must identify the issues presented for appeal in his Notice of Appeal. SDCL §15-26A-4. A notice of appeal "specifies particularly the portions of the judgment appealed from,

[13] *See* SR at 4288 (Casper's Requested Inst. 39).

and thus eliminates from our consideration several of the alleged errors specified below as well as several assigned in this court." *First Nat. Bank v. Cranmer*, 175 N.W. 881, 882 (S.D. 1920). *See also City of Chamberlain v. R.E. Lien, Inc.*, 521 N.W.2d 130, 131 n.1 (S.D. 1994) (issues not contained in Notice of Review are "not properly before this court and will not be addressed").

In his Brief, Akers raises the issue of whether the circuit court erred "by refusing to instruct the jury that the measure of damages is the lesser of repair costs or diminution in market value." *Appellant's Brief* at 4, 26-27. This issue is not contained in his Notice of Appeal or Docketing Statement. SR at 4819-4827. Akers' failure to identify this issue constitutes a waiver. *See Schmaltz v. Nissen*, 431 N.W.2d 657, 661 (S.D. 1988).

Should the Court reach the substance of this issue, it must be rejected for the reasons identified in Section I.A., *supra*.

V. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN ENTERING ITS JUDGMENT UPON JURY VERDICT.

A. The Circuit Court Properly Entered Judgment on the Verdict.

Akers does not independently challenge the Court's entry of the verdict, but simply incorporates his arguments from the other issues.

Appellant's Brief at 5 (Issue D.12). The circuit court did not err in denying Akers' various motions and, consequently, did not err in entering the jury's verdict. *See* Sections I –IV, *supra*.

B. The Circuit Court Properly Calculated Prejudgment Interest Because the "Loss or Damage" Occurred when Casper Received the Defective Hotel.

Standard of Review: "Prejudgment [interest] calculations are done as a matter of law. As such, the standard of review is de novo." *JAS Enterprises, Inc. v. BBS Enterprises, Inc.,* 2013 SD 54, ¶44, 835 N.W.2d 117, 129.

Prejudgment interest is mandatory. *Colburn v. Hartshorn*, 2013 SD 92, 841 N.W.2d 267. Prejudgment interest begins to accrue on "the day that the loss or damage occurred [.]" SDCL §21-1-13.1. In this case, the parties stipulated that the trial court would determine when "the loss or damage occurred." TT at 1698:10-1699:13. The circuit court found that the loss or damage occurred on the day the hotel was turned over to Casper. *See* HT, 1/28/14 Motions Hearing, 31:24-34:7.

In *Gettysburg Sch. Dist. 53-1 v. Helms & Assoc.*, 2008 SD 35, 751 N.W.2d 266, the plaintiff School District contracted with Bituminous Paving "for the construction of an outdoor track," which

turned out to be defective. *Gettysburg*, at ¶24, 751 N.W.2d at 276. The District sued Bituminous for breach of contract, negligent construction of the track, and breach of warranties. The jury found in favor of the District and awarded compensatory damages and prejudgment interest. *Id.* at ¶7, 751 N.W.2d at 270.

On appeal, Bituminous argued that "any damages sustained by the District were future damages because the District has not expended funds to replace the defective track," rendering prejudgment interest on those damages improper. *Id.* at ¶24, 751 N.W.2d 275. This Court disagreed:

> The loss or damage occurred *when the District received the faulty track*. Just because the District has not incurred the expense of replacing the track does not make its loss a future damage. The trial court properly instructed the jury on how to determine damages and the date for prejudgment interest.

Id. at ¶24, 751 N.W.2d at 275-76 (emphasis added). *See also City of Aberdeen v. Rich*, 2003 SD 27, ¶19, 658 N.W.2d 775, 781 ("[P]rejudgment interest is allowed from the day the loss or damage occurred regardless of whether the damages are certain.").

Other jurisdictions agree that loss or injury occurs when a defective product is delivered to a buyer. For example, in *Commonwealth v. Johnson Insulation*, 682 N.E.2d 1323 (Mass.

1997), the court explained that "[t]he injury . . . occurred *when asbestos-containing products were installed in its buildings*." *Id.* (awarding prejudgment interest from date of installation). The Nevada Supreme Court reached the same conclusion in *Shuette v. Beazer Homes Holdings Corp.*, 124 P.3d 530 (Nev. 2005):

> [W]e conclude that prejudgment interest was properly awarded on the entire verdict, as the award represented only past damages, because the damages occurred when the homes were built, regardless of when the homeowners actually made or will make necessary repairs.

Id. at 537, 550.

Florida courts also follow this trend. In *Centex-Rooney Construction Co., Inc. v. Martin County*, 706 So.2d 20 (Fla. Dist. Ct. App. 1997), the court held that "a jury verdict awarding damages for construction defects . . . had the effect of fixing damages as of the date on which the owner turned over the property to the condominium association, and that prejudgment interest was awardable as of that date." *Id.* (citing *Pine Ridge at Haverhill Condominium Ass'n, Inc. v. Hovnanian of Palm Beach II*, 629 So.2d 151 (Fla. Dist. Ct. App. 1993)). *See also Contract Freighters, Inc. v. J.B. Hunt Transport, Inc.*, 245 F.3d 660, 665 (8th Cir. 2001) (holding in an "action for breach of contract, interest ordinarily runs from the date of the

breach or the time payment was due under the contract."); *R.E. Schweitzer Construction v. University of Cincinnati*, No. 10AP-954, 2011 WL 3210644 (Ohio Ct. App. 2011); *Halsey v. Connor*, 287 A.D.2d 597, 731 N.Y.S.2d 760, 761 (2001).

All of these cases support the *Gettysburg* holding that "[j]ust because [a party] has not incurred the expense [of repairs] does not make its loss a future damage." *Gettysburg*, ¶24, 751 N.W.2d at 276.

Akers delivered a defective hotel on March 11, 2004. Prejudgment interest was properly awarded as of that date. The trial court's prejudgment interest calculation should be affirmed.

C. The Circuit Court's Imposition of Post-Judgment Interest Did Not Constitute Improper "Compounding" of Interest.

Standard of Review: The application of post-judgment interest is a question of law, reviewed *de novo*. *See JAS Enterprises, Inc.*, ¶44, 835 N.W.2d at 129 (prejudgment interest is question of law).

The circuit court calculated prejudgment interest using simple interest at the statutory rate of 10%. SR at 4725-4727.[14] The court

[14] "'Simple interest' is straight interest computed on the principal from the time interest is to commence to the time of payment or judgment. *Wieland v. Loon*, 116 N.W.2d 391, 393 (S.D. 1962). When interest is compounded, accrued interest is added to the principal amount, and the total is then treated as "new principal" for the application of interest in the next period. 47 C.J.S. *Interest & Usury* §2.

then awarded post-judgment interest on the total judgment, which included $997,682.83 in prejudgment interest. *Id.*

Akers claims the court improperly awarded "interest on interest," or, compound interest. Casper agrees that interest may not be compounded. *See Sioux Falls v. Johnson,* 2003 SD 115, ¶ 18, 670 N.W.2d 360, 365. But awarding post-judgment interest on a judgment that includes prejudgment interest does not constitute compounding interest:

> Interest generally is to be computed so as to avoid the payment of compound interest, although the computation of postjudgment interest on prejudgment interest is allowed.
> ...
> The trial court generally is responsible for identifying the date of accrual of prejudgment interest and calculating the amount thereof. Since the total amount of a judgment bears interest even though such amount consists partially of prejudgment interest, where prejudgment interest is awarded, it may be included in the judgment so that postjudgment interest will apply to it.

47 C.J.S. *Interest & Usury* § 129 (collecting cases).

This Court has not specifically addressed whether post-judgment interest is allowable on a judgment that includes prejudgment interest. The majority view, however, favors doing so. *State Highway Comm'n v. DeLong Corp.*, 551 P.2d 102, 104-05 (Or. 1976)(collecting cases);

Texas E. Transmission Corp. v. Marine Office-Appleton & Cox Corp., 579 F.2d 561, 568 (10th Cir. 1978); 47 C.J.S. *Interest & Usury* § 63 (collecting cases). This practice "most closely comports with the purpose of post-judgment interest articulated by the Supreme Court," which is "to compensate the successful plaintiff for being deprived of compensation for the loss from the time between the ascertainment of the damage and the payment by the defendant." *Quesinberry v. Life Ins. Co. of N. Am.*, 987 F.2d 1017, 1031 (4th Cir. 1993).

Awarding post-judgment interest on a judgment containing prejudgment interest is not a windfall to a plaintiff. Rather, the "failure to award Plaintiff's post-judgment interest on the prejudgment interest would wrongly decrease the present value of their monetary judgment." *Bancamerica Commercial Corp. v. Mosher Steel of Kansas, Inc.*, 103 F.3d 80, 82 (10th Cir. 1996).

Under South Dakota law, prejudgment interest is mandatory, and runs through the date of the verdict. SDCL § 21-1-13.1. Post-judgment interest then attaches on the "full amount due" on the judgment. *American Federal Sav. & Loan Assn of Madison v. Kass*, 320 N.W.2d 800, 804 (S.D. 1982); SDCL § 54-3-5.1.

The trial court did not err in awarding post-judgment interest on the full judgment, which included prejudgment interest.

VI. THE CIRCUIT COURT DID NOT ERR IN DENYING AKERS' ATTEMPTS TO ADD TKO.

Standard of Review: The denial of a motion to amend pleadings is reviewed under the abuse of discretion standard. *McDowell v. Citicorp Inc.*, 2008 SD 50, ¶7, 752 N.W.2d 209, 212.

Whether TKO was indispensable under Rule 19 is a question of law, reviewed *de novo*. *J.K. Dean, Inc. v. KSD, Inc.*, 2005 SD 127, ¶14, 709 N.W.2d 22, 25.

A. The Circuit Court did not Abuse its Discretion in Denying Akers Leave to add TKO as a Third Party.

Casper instituted this action in October of 2009. SR at 1. Akers impleaded Zakco on October 14, 2009, alleging claims of contribution and apportionment of liability. SR at 13-30; SR at 19, ¶9. In April of 2012, the trial court entered a scheduling order identifying July 1, 2012 as the deadline to seek to add new parties. SR at 117-119.

In May of 2012, Akers sought leave to add several third parties. SR at 138-39. At this time, he was well aware of the presence of

TKO[15] because his expert witness disclosure identified three experts to testify "to the substandard and unreasonable response of Plaintiff, James Koehler and The Koehler Organization to issues that, had they been reasonably addressed, Plaintiff would not have suffered damages [sic]." SR at 148-150.

The trial court granted Akers' motion and Akers named an additional fifteen parties, none of whom were TKO. SR at 164-171, 172-173. In his new third-party complaint, Akers alleged contribution and negligence against the new parties. SR at 164-171. Trial was continued to December of 2013. SR at 172-173, 421-423.

On July 23, 2013, Akers attempted to add TKO as a third-party defendant. SR at 564-606, 730-731. As shown above, Akers knew of TKO's involvement in May of 2012 but did not seek to add TKO as a party until 14 months later.

Under Rule 14(a), a party must obtain leave of court to serve a third-party complaint, unless it is done within 10 days after serving "his original answer." SDCL §15-6-14(a). Akers filed his original Answer in 2009. SR at 13. Thus, in July of 2013, he was required to obtain leave to add TKO as a third-party.

[15] The Koehler Organization ("TKO") is the management company for Koehler's hotels. TT at 1097:5-13.

A scheduling order that limits the time to "join other parties and to amend the pleadings … shall not be modified except by leave of the judge upon a showing of good cause." SDCL § 15-6-16. Akers did not move to amend the scheduling order; he just filed his third-party complaint and motion for joinder. SR at 564-602, 603-606.

The most "relevant factor" in considering an amendment to a scheduling order is "the effect that the amendment will have on delaying the ultimate disposition of the case." *Tosh v. Schwab*, 2007 S.D. 132, 743 N.W.2d 422, 430.[16]

The circuit court struck Akers' third-party complaint, noting the lawsuit was filed in 2009, there had been at least two rounds of discovery, and the third trial date had been set for nearly six months. HT, 8/13/13 Motions Hearing, at 16:18-25. Akers filed his motion one year after the July 1, 2012 deadline and less than 5 months before trial. SR at 117-19.

Casper had the right to sue the parties of its choosing. Contrary to Akers' position, Rule 14 was never intended to require a plaintiff to "sue any others than parties he should choose." *Independent Sch.*

[16] Adding TKO would have delayed the trial yet again and resulted in additional, prolonged discovery. *See Response to Petition for Intermediate Appeal*, SDSC Appeal No. 26816.

Dist. of City of Aberdeen v. First Nat. Bank, 289 N.W. 425 (1939). Akers had the right to argue and present evidence that other parties and non-parties were responsible for Casper's damages. Over the course of the two week trial, he fully exercised that right. In fact, Akers was free to argue that TKO was an agent of Casper. *See* TT at 1689:24-1690:22; SR at 4417-4421.

The trial court did not abuse its discretion in striking Akers' third-party complaint against TKO and denying leave to amend.

B. The Circuit Court did not Err in Finding TKO was not an Indispensable Party.

Under Rule 19(a),

> A person who is subject to service of process shall be joined as a party in the action if:
>
> (1) In his absence complete relief cannot be accorded among those already parties; or
>
> (2) He claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may
>
> (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

Whether a person is an indispensable party is determined "on a case-by-case basis and is dependent upon the facts and

circumstances of each case. Persons who might conceivably have an interest in the outcome of litigation are not to be considered indispensable parties." *Titus v. Chapman*, 2004 SD 106, ¶36, 687 N.W.2d 918, 927. An indispensable party is one "who has such an interest in the controversy or subject matter that a final adjudication cannot be made, in his or her absence, without injuring or affecting such interest." 67A C.J.S. *Parties* § 4.

Subsection (a)(1) is not implicated, as it was possible to determine Casper's breach of contract claims in TKO's absence because TKO was not a party to the IPA. SDCL § 15-6-19(a)(1). TKO was not necessary to determine Akers' defenses, as Akers had the ability to argue that TKO was Casper's agent for purposes of his mitigation defense. *See* TT at 1689:24-1690:22. Finally, TKO was not necessary for Akers' joint tortfeasor claim, as the "United States Supreme Court has flatly rejected this argument." *RPR & Associates v. O'Brien/Atkins Associates*, P.A., 921 F. Supp. 1457, 1463-64 (M.D.N.C. 1995) *aff'd sub nom. RPR & Associates, Inc. v. O'Brien/Atkins Associates, P.A.*, 103 F.3d 120 (4th Cir. 1996). "It has long been the rule that it is not necessary for all joint tortfeasors to be named defendants in a single lawsuit." *Temple v. Synthes Corp.*, 498

U.S. 5 (1990). *See also Atlantic Aero, Inc. v. Cessna Aircraft Co.*, 93 F.R.D. 333, 335 (M.D.N.C.1981).

Subsection 19(a)(2) is inapplicable because TKO did not claim an interest in the subject of the action. SDCL §15-6-19(a)(2). Indeed, Akers fails to articulate what interest TKO could conceivably claim in the litigation. Instead, Akers impermissibly focuses on his interest. *See id.* (both prongs of 19(a)(2) focus on non-party's "interest"). He claims he was prejudiced by TKO's absence because it precluded him from seeking contribution. *Appellant's Brief* at 41-42. This argument fails because an action for contribution does not begin to accrue until "the time of payment of the underlying claim, payment of a judgment thereon, or payment of a settlement thereof, or at the time of other satisfaction or discharge of such claim." Maurice T. Brunner, Annotation, *When statute of limitations commences to run against claim for contribution or indemnity based on tort*, 57 A.L.R.3d 867, §3[a]. *See also* SDCL §15-8-13.[17]

The trial court did not err in finding TKO was not an indispensable party to the litigation.

[17] Additional authority for this proposition is cited in Casper's *Response to Petition for Intermediate Appeal*, 8-9, n.18 (SDSC Appeal No. 26816).

CONCLUSION

In reviewing a jury verdict, this Court presumes the lower court's rulings "were correct and will not seek reasons to reverse. The appellate court views the evidence in the light most favorable to support the jury verdict. It is not the function of the appellate court to weigh the evidence and substitute its judgment for that of the jury." *Christie v. Dold*, 524 N.W.2d 866, 874 (S.D. 1994).

As the circuit court aptly noted, "both parties received a fair trial in this matter." HT, Motions Hearing, 1/28/14, 31:16-18. Nothing in this record constitutes reversible error. The circuit court should be affirmed in all respects.

Respectfully submitted this 4th day of November, 2014.

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CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66(b)(4), Appellee's counsel states that the foregoing brief is typed in proportionally spaced typeface in Georgia 14 point. The word processor used to prepare this brief indicated that there are a total of 9,993 words in the body of the brief.

/s/ Sarah Baron Houy
Sarah E. Baron Houy

CERTIFICATE OF SERVICE

The undersigned hereby certifies that November 4, 2014 the foregoing *Appellee's Brief* was filed electronically with the South Dakota Supreme Court and that the original and two copies of the same were filed by mailing the same to:

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APPENDIX

27074

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 27074

CASPER LODGING, LLC,

Plaintiff/Appellee,

vs.

ROBERT W. AKERS,

Defendant/Appellant.

27074

Appeal from the Circuit Court
Seventh Judicial Circuit
Pennington County, South Dakota

The Honorable Wally Eklund, Presiding Judge

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Notice of Appeal filed April 24, 2014

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

A purchaser of real property improvements should not be allowed to evade his duty to mitigate by simply using the property without correcting defects until the resulting damage is exponentially greater than the cost of correcting the defects when they became apparent. Further, that purchaser should not be permitted to collect interest on the cost of repairing damage which has not yet occurred, but which will occur as a direct result of the delay in correction.

If Casper's position is accepted, a party would be encouraged to wait as long as possible before repairing the defects and filing suit. By waiting, the owner of the property will recover far greater damages, and will also recover prejudgment interest on those damages at the statutory rate of 10% per annum for years in which he had full use of the property sold to him *and for years in which much of the damage had not yet occurred.* Such a result would be particularly egregious when, by his inaction, the owner allows the express warranty rights available to him to expire without even notifying the seller of any problem.

The law abhors a forfeiture. Nonetheless, that is exactly what the trial court's rulings impose upon Akers in granting a windfall to Casper. This cannot be the case under South Dakota law, and Akers respectfully requests that this Court remedy these errors.

ARGUMENT

I. Judgment as a Matter of Law and Related Jury Instructions

A. Casper's Failure to Introduce Evidence of Diminished Market Value is Fatal to its Claims.

Casper recovered an improper measure of damages contrary to South Dakota law when the jury awarded it the cost of repairing the hotel. In an effort to justify this fatal flaw, Casper claims this is not a property damage case[1] but a breach of contract case, which inexplicably changes how damages are calculated under South Dakota law. (Casper 14).[2]

Regardless of the subject-matter of a contract dispute, "no person can recover a greater amount in damages for the breach of an obligation than he could have gained by the full performance thereof on both sides[.]" SDCL 21-1-5. The Agreement required Akers to provide Casper a hotel. (Ex 1) Casper claimed Akers provided a defective hotel in breach of the contract. Because Casper cannot recover more in damages than it could have gained by full performance, Casper's measure of damages is the lesser of: (1) the difference in value between the hotel built according to the Agreement and what was actually built, or (2) the reasonable expense of necessary repairs.[3] *Reed v. Consol. Feldspar Corp.*, 23 N.W.2d 154, 157 (S.D. 1946); *Subsurfco, Inc. v. B-Y Water Dist.*, 337

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[1] Casper's claim this is not a property damage case is preposterous because, just two pages later, Casper describes the property damage allegedly entitling it to damages. (Casper at 16-17).

[2] Casper's Appellee Brief will be cited as "Casper __."

[3] This method of calculating damages avoids economic waste and prevents a plaintiff from receiving a windfall. *See* Appellant's Brief at 26.

N.W.2d 448, 454-55 (S.D. 1983); *Rupert v. Rapid City*, 2013 S.D. 13, ¶¶ 26-28, 827 N.W.2d 55; *Ward v. LaCreek Elec.*, 163 N.W.2d 344, 349 (S.D. 1968).

Reed invalidates Casper's argument that, as a breach of contract case, damages are somehow calculated differently. In *Reed*, the plaintiff sued for breach of contract and was awarded damages in the amount it cost to restore the property. *Id.* at 155. The South Dakota Supreme Court reversed, holding the cost of restoration is not the proper measure of damages if "such cost is greater than the diminution in value of the [property at issue], in which case the difference in market value before and after the injury would be the proper measure of damages." *Id.* at 157. Just as in *Reed*, Casper's proper measure of damages is the lesser of: (1) the difference in market value before and after the alleged breach, or (2) the reasonable expense of necessary repairs.

Casper failed to present evidence regarding the diminished market value of the hotel resulting from the alleged breach, thereby failing to establish an essential element (i.e., damages) of its claim. (Exs 6A-6B; T 1644-49). This failure entitles Akers to judgment as a matter of law. *Willer v. Chicago, M.&St.P. Ry.*, 210 N.W. 81, 83 (S.D. 1926) (directed verdict when plaintiff failed to introduce evidence of market value); *Ag Partners v. Chicago Central & Pacific Railroad*, 726 N.W.2d 711, 716-17 (Iowa 2007) (dismissal warranted if plaintiff omits market value evidence).

Alternatively, Akers is entitled to a new trial with a correct jury instruction on the measure of damages. The trial court refused Akers' Requested Jury Instruction 45, which would have instructed the jury to award the lesser of repair costs or diminished market value. (T 1722; R 4395). The trial court's refusal resulted in an improper instruction on damages. Casper recovered 100% of its claimed damages (which were entirely based on

costs of repairs), making prejudice from the error undeniable. A new trial is warranted. *Vetter v. Cam Wal Elec. Coop. Inc.*, 2006 S.D. 21, ¶ 10, 711 N.W.2d 612, (trial court lacks discretion to improperly instruct the jury; resulting prejudice warrants new trial).

Casper contends the issue regarding Akers' Requested Jury Instruction 45 is not contained in the Notice of Appeal or Docketing Statement and was waived. However, the Notice of Appeal identifies the "Judgment Upon Jury Verdict" as an issue being appealed. The instructions on which the verdict was based are encompassed in the notice. Moreover, the form for the Docketing Statement notes that "parties will not be bound by these statements." *See* S.D. R. of App. P. Form 5. Thus, no waiver occurred.

B. Casper Presented No Evidence of Breach

In this breach of contract case, the four corners of the Agreement determine Akers' obligations. *Kernelburner LLC v. MitchHart Mfg*, 2009 S.D. 33 ¶ 7, 765 N.W.2d 740. Casper cannot recover if Akers did not breach an obligation delineated in the Agreement. *Rogers v. Black Hills Speedway*, 217 N.W.2d 14 (S.D. 1974). Further, "there must be evidence that the damages were in fact caused by the breach." *Bunkers v. Jacobson*, 2002 S.D. 135, ¶ 39, 653 N.W.2d 732. General allegations of defective construction are not enough to establish a breach and causation of damages.

Casper contends Akers promised to provide a turn-key hotel built in compliance with the plans and specifications, governmental codes, and HIE standards. (Casper 15) Casper, however, agreed to accept the building before it was done, (T 1273-74), thereby relinquishing any claim for breach due to a failure to provide a turn-key hotel.[4] Final

[4] The trial court ruled Casper agreed not to receive a "turn-key" hotel. (T 1685-86)

construction passed inspections and received HIE's approval. (Exs 503, 528-29, 539) Akers performed his obligations under the Agreement.

Casper attempts to transform its breach of contract action into a negligence/warranty action by providing a list of construction defects in hopes that the Court, like the jury, will conflate the separate causes of action. (Casper at 16-17) As noted above, however, defective construction does not equate to breach of contract. Casper must prove Akers breached an obligation within the four corners of the Agreement. Casper has not done so.

An example of Casper's shortcoming is its sound/noise claim. The Agreement required HIE's approval of blueprints and final construction (Ex 1), which it did. (Exs 503, 528-29, 539) Nothing more was required in terms of sound or noise. Nevertheless, Casper was awarded $180,000 for sound/noise upgrades. (Exs 6A-6B; R 4461) Because the renovation costs were in no way caused by a breach of the Agreement, Casper is not entitled to such damages.

C. Mitigation of Damages and Warranty Rights

1. Mitigation of Damages

No reasonable mind could have concluded Casper mitigated its damages in accordance with South Dakota law. A party cannot recover damages that are reasonably avoidable. *See Sun Mortg. Corp. v. W. Warner Oils Ltd.*, 1997 S.D. 101, ¶16, 567 N.W.2d 632 (applying that rule to breach of contract actions). Most of Casper's alleged (and awarded) damages were avoidable through reasonable diligence. (T 234, 246-48, 328-30, 472-73 (stucco terminations and missing caulk); T 234, 328-30, 472-73 (immediate water intrusion); T 329-31, 473-74 (cosmetic changes without investigating and correcting root problems); T 161, 181-88 (ignoring Farr's advice to make repairs in

2007); T 240-42 (damage from water entering stucco penetrations); T 246, 1545-46, 1534-35, Exs 6A-6B (caulking at minimal cost would have prevented water penetrations for fifteen years); T 472, 676-78, 680-83 (ignoring humidity problems)). The trial court abused its discretion by refusing to find Casper failed to mitigate as a matter of law.

Casper generally identifies a few mitigation efforts and claims "no degree of maintenance would have corrected the latent defects." (Casper 18-19). Casper completely ignores one of Akers' primary contentions: the timing of the "mitigation" attempts was unreasonable as a matter of law. (T 41-42) Casper became aware of the damages soon after taking over the hotel and *chose* to do nothing for years while extensive damage continued. For example, the stucco terminations lacking caulk were *plainly visible* when the hotel opened. (T 246-48) Both parties' experts testified that as early as 2004, stucco penetrations could have been properly caulked, which would last fifteen years and cost only $15,000 (if not obtained for free under the assigned and implied warranties) compared to Casper's $840,000 repair bill. (T 246, 1534-35, 1545-46; Exs 6A-6B). The law does not reward someone for sitting on his hands and allowing physical damage to occur that could easily be avoided. *Sun Mortg.*, ¶¶ 26-28.

2. Warranty Rights

Casper claims the jury rejected Akers' argument that Casper waived its rights under the Agreement, because Casper did not have enough information regarding the warranties from the subcontractors. The testimony cited by Casper is misleading. Although Casper claims it never received a list of the subcontractors from Akers, such a list was not required. (Ex.1) Additionally, Jim Koehler admitted he knew how to get a hold of the subcontractors, and that he did so. (T 1218).

Casper contends the problems Akers claims should have been caught during the one-year warranty walk-through were also observable by Zacko and Akers before the sale. That means *Casper* could have equally observed those deficiencies and would have been able to walk away from the deal. Casper closed on the sale anyway. Casper accepted the construction with its only remedy being the assigned warranties, which it did not utilize. Instead of investigating the source of water intrusion, pursuing warranty rights, or notifying Akers, Casper made cosmetic *interior* repairs by replacing moist sheetrock, repainting walls, and applying caulk to some window penetrations. (T 329-31, 473-74).

Casper highlights Koehler's testimony that Akers would not respond to his requests for help. (T 1623-1624) Casper ignores the fact Akers never agreed to perform warranty work. Instead, Akers assigned his rights to Casper to pursue warranty rights against the contractors.

Further, the hotel was built in Wyoming. Pursuant to Wyoming law, Casper was given the implied warranty that attaches to construction contracts. *Winter v. Pleasant,* 222 P.3d 828, 836 (Wyo. 2010). That warranty applies to all contractors, and subsequent purchasers are provided those warranty rights. *Moxley v. Laramie Builders, Inc.*, 600 P.2d 733, 735 (Wyo. 1979). As a non-builder, Akers did not provide such warranties to Casper. *Ortega v. Flaim,* 902 P.2d 199, 204 (Wyo. 1995). As a subsequent purchaser—and express assignee under the Agreement—Casper had warranty rights, including the assigned one-year call back warranty. Casper chose not to pursue those rights. Indeed, Casper did little to stop the water intrusion during the warranty period and did not notify Akers of those problems until 2007. Casper's inaction prevented it from having the problems repaired at no expense.

By signing the Agreement, Casper received the assignment of warranty rights. Those warranty rights were provided by the Agreement and by Wyoming law. Casper's inaction amounts to waiver and failure to mitigate. Accordingly, Casper's claim is barred as a matter of law. *Ducheneaux v. Miller,* 488 N.W.2d 902, 917 (S.D. 1992); *A-G-E Corp. v. State*, 2006 S.D. 66 ¶ 22, 719 N.W.2d 780.

3. Jury Instructions: Mitigation

Jury Instructions 49 and 50 misled and incorrectly instructed the jury on the issue of mitigation. Instruction 50 allowed the jury to find in Casper's favor if *any* reasonable steps were taken to mitigate. The law requires Casper to take *all* reasonable steps. *Ducheneaux*, 488 N.W.2d at 917 (*any* damages arising from failure to mitigate are not recoverable). Casper failed to take several reasonable steps to mitigate, yet the jury awarded Casper 100% of its alleged damages. Instruction 50 thus "produced some effect upon the verdict" and harmed Akers' rights, which requires a retrial. *Vetter*, ¶ 10.

4. Jury Instruction: Warranty Rights

Significantly, Casper does not argue Akers' requested jury instruction on warranty rights under Wyoming law is an incorrect statement of the law, nor does Casper argue those warranty rights are inapplicable to this case. Instead, Casper claims that, considering the instructions "as a whole," the jury was properly instructed on failure to mitigate and waiver and that the jury simply did not "buy" Akers' argument. This argument is nonsensical.

Casper's argument rests on the premise the jury was *actually instructed* on Casper's warranty rights under Wyoming law, which it was not. The jury was not even allowed to *consider* Akers' defense of waiver, despite ample evidence Casper failed to pursue those rights. "On issues supported by competent evidence in the record, the trial

court should instruct the jury… Failure to give a requested instruction that correctly sets forth the law is prejudicial error." *Atkins v. Stratmeyer*, 1999 S.D. 131 ¶ 55, 600 N.W.2d 891 (citations omitted). Despite competent evidence, the court refused to instruct the jury on Akers' waiver defense. Because of the refused instruction, Akers was not allowed to effectively argue to the jury that Casper's failure to act upon its warranty rights amounted to failure to mitigate.

II. Motion for Mistrial and New Trial

A. Undisclosed Opinions of Nelson

Casper goes to great lengths to support its argument that the trial court's curative instruction relating to Nelson's undisclosed expert opinion sufficiently minimized any prejudice to Akers. No matter how Casper attempts to justify its use of Nelson's undisclosed opinions, Casper cannot avoid the fact it amounted to trial by ambush. South Dakota law does not permit such tactics.

Casper's attempt to justify its use of Nelson's opinions is a non-issue: the opinions were stricken by the trial court for being improper, undisclosed expert opinions. Casper does not challenge that ruling. In fact, Casper admits the opinions were new. (Casper 24) Instead, Casper claims the Court's curative instruction was sufficient. That was simply not the case.

1. The undisclosed opinions were critical to the jury's verdict.

The hotel's defects were the central theme in Casper's case. Then, Nelson took the stand and testified the hotel was unsafe, structurally unsound, and in violation of code from day one. Casper cannot—and does not—dispute these were new opinions. Although the trial court read a cautionary instruction once it understood the impropriety of

Nelson's undisclosed opinions, there is no curative instruction capable of curing the prejudice that resulted.

The trial court did not appreciate the significance of Nelson's undisclosed opinions regarding the nailing pattern. Casper took advantage of this situation, and misled the court by taking Nelson's deposition testimony out of context. On cross-examination, Nelson *admitted* these opinions were never disclosed. When Akers moved for mistrial, the trial court stated that Casper's counsel's conduct was "disturbing" and "troubl[ing]." (T 617, 620) The trial court struck Nelson's testimony and provided a cautionary instruction, but denied a new trial.

Casper also claims Akers failed to preserve for appeal Nelson's opinion that the building was structurally unsound because he did not object until after the testimony was given. That argument is misleading. Akers objected to the entire line of questioning relating to nailing and code violations, which was the basis for Nelson's subsequent opinion that the building was unsafe from day one. The trial court overruled Akers' objection. (T 555) A party is not required to continue objecting to each and every question once the court makes a firm ruling on an evidentiary issue. SDCL 19-9-3; *Liebig v. Kirchoff,* 2014 S.D. 54, ¶19, 851 N.W.2d 743, 749. Thus, Casper's argument is misplaced.

Casper is critical of Akers for not requesting the trial court re-read the admonishment during final instructions. At that point, the bell simply could not be un-rung. The jury had already heard Nelson opine that the hotel was unsafe, structurally unsound, and in violation of code from day one. Requesting that the trial court again highlight those damning opinions would only have focused the jury's attention on that

testimony. Further, Casper does not cite any legal authority for the premise that Akers was required to ask the court to re-address previously stricken testimony.

2. Akers cannot refute undisclosed opinions.

Casper blames Akers for the prejudice resulting from Nelson's undisclosed opinions by claiming it was Akers' choice not to hire an expert to rebut those opinions. This argument ignores the fact the opinions at issue *were never previously disclosed.* Casper *admits* the opinions were new. Nonetheless, Akers was somehow expected to anticipate these new opinions, and retain an expert to refute them. There was simply no way Akers could have been prepared to respond to the opinions.

3. The curative instruction was insufficient.

By the time the trial court gave the curative instruction, the damage had been done. The jury was permitted to hear testimony from Nelson that the building was structurally unsound from day one. Nelson's undisclosed opinions were immune to Akers' mitigation defense because the testimony meant repairs were needed *regardless* of whether Casper ignored years of water intrusion. This powerful testimony affected the outcome of the trial and denied Akers a fair trial. The jury made *no deductions whatsoever* for Casper's failure to mitigate, even deductions Casper conceded. Retrial is warranted. *Sioux Falls v. Johnson*, 1999 S.D. 16, ¶ 28, 588 N.W.2d 904.

4. Casper's counsel misrepresented to the trial court whether the opinions had been previously disclosed.

Casper attempts to justify its actions by claiming they acted in good faith by relying on Nelson's deposition testimony and Pace's trial testimony. Casper ignores it mischaracterized the deposition testimony of Nelson, conduct the trial court found

troubling. Nelson even admitted on cross-examination that the opinions were new and not previously disclosed.

Casper also cites SDCL 19-15-3 for the proposition Nelson was entitled to come up with new opinions after hearing Pace's testimony. The flaw in this argument is Nelson's opinions *were never previously disclosed to Akers*. Had the opinions been disclosed prior to trial and Nelson simply utilized Pace's testimony for further support, there would be no issue.

Even the case cited by Casper, *Kibert v. Peyton,* 383 F.2d 566 (4th Cir. 1967), does not support this argument. In *Kibert,* the trial court improperly precluded two doctors from testifying as to observations of others made prior to and at trial. *Id.* at 570. The testimony at issue was based on an examination previously conducted and a diagnosis previously rendered. *Id.* at 569-570. There is no indication the experts were attempting to assert new, undisclosed opinions. Permitting Casper to benefit from damning undisclosed opinions on the justification the expert derived the opinion after listening to another witness would only promote trial by ambush, which does not support its argument.

Finally, Casper incorrectly asserts *Kaiser v. University Physicians Clinic*, 2006 S.D. 95, 724 N.W.2d 186, and *Papke v. Harbert,* 2007 S.D. 87, 738 N.W.2d 510, are distinguishable from the instant case. *Kaiser* and *Papke* held a new trial was necessary when an expert utilized undisclosed photographs and opinions. *Id.* The opposing party was prejudiced, which warranted a new trial. Here, there is no dispute Nelson's opinions were undisclosed, and essentially gutted Akers' mitigation defense without any ability

whatsoever to respond. Any curative instruction could not cure the prejudice resulting from that testimony, and retrial is warranted.

B. Exclusion of Merl Potter's Damages Opinions

The trial court excluded Potter's opinions on damages, ruling they were not disclosed prior to trial. Casper notes it provided the Rule 1006 damage summaries approximately three months prior to trial. What Casper ignores, however, is the summaries were not provided until *after* Akers' expert disclosure deadline, and *after* Potter had been deposed. Accordingly, there was no way Potter could answer specific questions regarding Casper's damages, as Akers still had no idea what Casper would be claiming as causation and damages in this case. At the time of his deposition, all Potter had were stacks of invoices with no guidance as to what allegedly related to this lawsuit. Those random invoices were in no way helpful in Potter's attempt to formulate opinions based on Casper's claimed damages.

Casper's own damages expert, Wendel Potratz, was unable to answer any questions during his deposition regarding the damages summary, as the summary was not available until the day before his deposition. Yet, Potratz was permitted to testify for hours about the summary. The result was Casper was permitted to ambush Akers at trial with new damages testimony that Potter was not allowed to rebut.

Akers was undoubtedly prejudiced by the court's ruling, as Akers was left with no expert to testify as to the causation of the individual elements of Casper's claimed damages and in support of Akers' mitigation defense. Potratz's specific opinions on damages were not provided to Akers before trial. Nonetheless, he was allowed to testify. Akers should have been able to rebut that evidence. *See Mawby v. United States,* 999

F.2d 1252, 1254 (8th Cir. 1993); *Stender v. Vincent,* 992 P.2d 50 (Hawaii 2000). The trial court abused its discretion by excluding Potter's rebuttal testimony.

C. Closing Argument

1. Third-party Claims and Collateral Source

Casper's counsel's statements during closing arguments regarding third-party claims and collateral sources were improper, involved personal knowledge of facts not before the jury, were factual misstatements, were misstatements of law, were inflammatory, and denied Akers a fair trial. *Schoon v. Looby*, 2003 S.D. 123 ¶¶ 7, 10, 13-1418, 670 N.W.2d 885. Casper contends Akers waived his right to make such arguments. Under SDCL 19-9-3, no waiver occurred, because the court previously determined that Casper's counsel could not go into such areas, particularly without first approaching the bench. (T 1326) Casper never approached the bench on this topic and was never permitted to introduce such evidence. (T 1375-1411, 1435-1656) Thus, a final determination regarding the admission of such evidence was made, and no objection was required. *Liebig*, ¶ 19.

Casper also contends that the statement, "Akers has his own remedies against Sheet Metal and Zakco" was an explanation of the relationship between the parties in the case. The statement goes far beyond explaining the relationship between the parties, and instead, told the jury that Akers could seek reimbursement from other sources. Such an inference is not allowed. *LDL Cattle Co., Inc. v. Guetter*, 1996 S.D. 22 ¶ 27, 544 N.W.2d 523 (evidence of insurance is prejudicial and inadmissible). Retrial is warranted.

2. Undisclosed Renovation Photographs

Casper's counsel's statement regarding the undisclosed renovation photographs (i.e., "If they wanted it, all they had to do was ask. That's all nonsense.") also requires

retrial. The statement was a factual (Akers did ask for the photographs) and legal (Casper was required to disclose them) misstatement and involved personal knowledge of facts not before the jury. Casper contends Akers' counsel invited the error by injecting its own personal knowledge. Akers' counsel did not inject its own personal knowledge; to the contrary, Potratz *admitted* that he never turned over the photographs. (T 952-53, 1675)

III. Prejudgment Interest

The trial court's award of prejudgment interest from the date the hotel was turned over to Casper (March 11, 2004) was erroneous.[5] Prejudgment interest is recoverable "from the day that the loss or damage occurred, except during such time as the debtor is prevented by law, or by act of the creditor, from paying the debt." SDCL 21-1-13.1.

The earliest prejudgment interest could have begun to accrue was March 8, 2007, because that is the date Casper notified Akers of the water problems. (Ex 553) Because Akers was unaware[6] of the problems due to Casper's failure to notify him, Akers was prevented, "by act of [Casper], from paying the debt." SDCL 21-1-13.1. Just as a plaintiff cannot ignore mitigation steps and watch damages increase, a plaintiff cannot silently sit by and accrue prejudgment interest to the detriment of an unwitting defendant. *Arcon Constr. Co. v. S.D. Cement Plant*, 405 N.W.2d 45, 47 (S.D. 1987) ("When the person who is liable does not know what sum he owes, however, or cannot ascertain the amount he ought to pay with reasonable exactness, then he cannot be in default for not paying.").

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[5] Casper agrees this issue is reviewed de novo. (Casper at 45)

[6] Akers' ignorance of the damages here is particularly relevant because the nature of the contract was such that Akers was not actually performing construction. Accordingly, he had to rely upon notification by Casper.

Moreover, prejudgment interest accrues from the day the loss or damage occurred. Casper contends the day the damage occurred was the day the hotel was turned over to Casper and cites *Gettysburg Sch. Dist. 53-1 v. Helms Assoc.*, 2008 S.D. 35, 751 N.W.2d 266, to support its contention. But *Gettysburg* does not stand for the proposition that damages accrue when a product is turned over to the purchaser. The defective track in *Gettysburg* was turned over to the school in September 2002. *Id.* at ¶ 2. The day the damage occurred, however, was determined to be July 4, 2004. *Id.* at ¶ 17. Additionally, *Gettysburg* is distinguishable from the facts here because: (1) the defective track in *Gettysburg* was unusable, whereas the hotel was operational and there is no evidence of lost profits; (2) notice was given immediately, whereas notice here was not given until three years after the hotel was turned over; (3) the defect was not such that the damages grew exponentially, whereas the defect here caused new and extensive damage; and (4) there were no mitigation issues, whereas there are serious mitigation concerns here. Not only did the trial court misapply *Gettysburg*, but the inapplicability of *Gettysburg* to these facts is clear.

Akers submits that the date damage occurred should be determined by the individual dates Casper paid for the repairs. It is on those dates Casper actually sustained damages and was denied use of its money. *Bunkers v. Guernsey*, 41 S.D. 381, 170 N.W. 632 (1919) (noting the payment of interest ought to become due whenever the injured person's money is wrongfully detained). Those dates are absolutely ascertainable. Any other finding would result in Casper reaping over a $500,000 windfall at the expense of Akers. (*See* Akers 38) Alternatively, if the date damage occurred was March 11, 2004, then Akers should only be accountable for those damages that were present and readily

ascertainable on March 11, 2004, not the resulting damages that occurred due to Casper's failure to mitigate. *Fullerton Lumber Co. v. Reindl*, 331 N.W.2d 293, 296 (S.D. 1983).

IV. Post-judgment Interest

The trial court erred, in violation of South Dakota law,[7] by ordering post-judgment interest to accrue on prejudgment interest. *Sioux Falls v. Johnson,* 2003 S.D. 115 ¶ 18, 670 N.W.2d 360; *Tri-State Refining and Investment Co., Inc. v. Apaloosa Co.*, 431 N.W.2d 311, 317 (S.D. 1988); *Larsen v Pacesetter Sys.*, 837 P.2d 1273, 1297 (Haw. 1992) (post-judgment interest accruing on prejudgment interest is a punitive, non-compensatory windfall). Such order should be reversed, and retrial should be ordered.

V. TKO

The trial court erroneously denied Akers' requests to compel joinder of TKO and to assert a third-party contribution claim against TKO.

A. Joinder

TKO was required to be joined because it is a necessary and indispensable party. Without TKO, Akers was subjected to additional liability and is not allowed to seek proportionate contributions from TKO. SDCL 15-8-15 and 15-6-14(a); *City of Bridgewater v. Morris, Inc.*, 1999 S.D. 64, ¶ 11, 594 N.W.2d 712 ("A party who is joint or severally liable on an obligation arising from a contract claim has the right to seek proportionate contributions *from the joined parties.*") (emphasis added). In other words, complete relief was not accorded among the parties, and Akers incurred multiple and inconsistent obligations. SDCL 15-6-19(a)(1) and (2).

[7] In response, Casper cites an assortment of authorities from jurisdictions other than South Dakota. (Casper 49-50)

Casper claims SDCL 15-6-19(a)(1) is inapplicable, because the parties' relevant claims could be determined without TKO. But SDCL 15-6-19(a)(1) requires joinder if "complete relief cannot be accorded," not if the claims can be determined. Casper also incorrectly claims TKO claimed no interest in the action. *Citizen Potawatomi Nation v. Norton*, 248 F.3d 993, 998 (10th Cir. 2001) ("claiming" an interest does not mean asserting an interest, but rather means a non-frivolous interest). Moreover, Casper ignores the prejudicial issue that arises from the interplay between SDCL 15-8-15 and 15-6-14(a).

The judgment against Akers, without joining TKO as a party, was highly prejudicial and "inconsistent with equity and good conscience." *Thieman v. Bohman*, 2002 S.D. 52 ¶ 13, 645 N.W.2d 260. Joinder of TKO was mandatory. *J.K. Dean, Inc. v. KSD, Inc.*, 2005 S.D. 127 ¶ 14, 709 N.W.2d 22 (no discretion to exclude indispensable parties).

B. Third-Party Claim

The court also erred when it struck Akers' third-party complaint against TKO. On July 10, 2013, third-party defendant SMS filed a negligence counterclaim against Akers. (R 534) Because this was the first *tort* claim against Akers (and called for an "original answer"), this was the first time Akers could seek contribution from TKO, as Akers had no contractual relationship with TKO.[8] Akers promptly answered the counterclaim and asserted a third-party contribution claim against TKO within the ten-day window imposed by SDCL 15-6-14(a). (R 564) This was also before the court's deadline to

[8] The fact that Akers knew of TKO's involvement early in the lawsuit is irrelevant because Akers arguably could not bring a third-party contribution action against TKO with respect to Casper's breach of contract claim.

amend pleadings. (R 544) Thus, the court erred when it struck Akers' third-party complaint against TKO.

CONCLUSION

For the reasons set forth herein, and in Akers' Brief of Appellant, this Court should reverse the trial court and direct entry of judgment in favor of Akers. Alternatively, Akers is entitled to: (1) a new trial; (2) remand for determination of prejudgment interest; (3) reversal of the trial court's award of post-judgment interest accruing upon prejudgment interest; (4) other relief Akers requests in this appeal; and (5) other relief that this Court deems appropriate.

Dated at Sioux Falls, South Dakota, this 19 day of November, 2014.

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

CASPER LODGING, LLC, Plaintiff/Appellee, vs. ROBERT W. AKERS, Defendant/Appellant.	No. 27074 **CERTIFICATE OF COMPLIANCE**

STATE OF SOUTH DAKOTA)
: ss.
COUNTY OF MINNEHAHA)

Anthony M. Hohn, being first duly sworn upon oath, states and alleges as follows:

1. I am an attorney licensed to practice law in the State of South Dakota and a member of the law firm of Davenport, Evans, Hurwitz & Smith, L.L.P., attorneys for Appellant in the above matter.

2. Appellant's Reply Brief was prepared using Microsoft Word 2010 with Times New Roman 12-point font, in both body text and footnotes.

3. Appellant's Reply Brief contains 4,934 words.

Further affiant sayeth not.

Dated at Sioux Falls, South Dakota, this 19 day of November, 2014.

Anthony M. Hohn

Subscribed and sworn to before me this 19 day of November, 2014.

Sarah L. Scherr
Notary Public, South Dakota
My commission expires: 2/25/16

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

CASPER LODGING, LLC, Plaintiff/Appellee, vs. ROBERT W. AKERS, Defendant/Appellant.	No. 27074 **CERTIFICATE OF COSTS**

STATE OF SOUTH DAKOTA)
: SS
COUNTY OF MINNEHAHA)

Anthony M. Hohn, being first duly sworn upon his oath, deposes and says:

That he is one of the attorneys for Appellant in the above-entitled action. That the cost of the reproduction and copying of the Appellant's Reply Brief in this action is $11.25, calculated by multiplying 25 pages times 3 times $0.15 per page for copying.

Anthony M. Hohn
Attorney for Appellant

Subscribed and sworn to before me this 19 day of November, 2014.

SARAH L. SCHERR
SEAL NOTARY PUBLIC SOUTH DAKOTA SEAL

Notary Public, South Dakota
My Commission expires: 2/25/16

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

CASPER LODGING, LLC, Plaintiff/Appellee, vs. ROBERT W. AKERS, Defendant/Appellant.	No. 27074 **CERTIFICATE OF SERVICE**

The undersigned, one of the attorneys for Appellant, hereby certifies on this 19th day of November, 2014, I caused the following documents:

- **Appellant's Reply Brief;**
- **Certificate of Compliance;**
- **Certificate of Costs; and**
- **Certificate of Service**

to be filed electronically with the Clerk of the Supreme Court via email and that the original and two copies of the brief were mailed by United States mail, postage prepaid, to:

Shirley Jameson-Fergel
Clerk, South Dakota Supreme Court
500 East Capitol
Pierre, SD 57501

The undersigned further certifies that the above documents were also emailed to Plaintiff/Appellee's attorney:

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Dated this 19th day of November, 2014.

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