

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

GOLDEN VIEW READY-MIX, LLC

Plaintiff and Appellee,

v.

GRANGAARD CONSTRUCTION, INC.

Defendant and Appellant.

App. No. 30643
49CIV22-000040

Appeal from the Circuit Court, First Judicial Circuit,
McCook County, South Dakota

The Honorable Chris S. Giles

APPELLANT'S BRIEF

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The Notice of Appeal was filed on February 29, 2024

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JURISDICTIONAL STATEMENT

The Defendant/Appellant Grangaard Construction, Inc. (“Grangaard”) appeals the Judgment in Favor of Goldenview Ready-Mix, L.L.C. and Against Grangaard Construction, Inc., which was issued on January 31, 2024. Grangaard timely filed Notice of Appeal on February 29, 2024.

STATEMENT OF THE ISSUES

I. WHETHER THE TRIAL COURT ERRED IN ALLOWING THE JURY TO AWARD PUNITIVE DAMAGES BASED UPON CLAIMS THAT, AS A MATTER OF LAW, CANNOT SUPPORT SUCH AN AWARD?

The Jury found in favor of the Golden View on two claims—a claim of breach of contract and a claim of breach of the contractual duty of good faith. As a matter of law, neither such claim can support an award of punitive damages. The Trial Court declined to correct such error in denying Grangaard’s post-trial Motion for.

Relevant Law:

Nygaard v. Sioux Valley Hosps. & Health Sys., 2007 S.D. 34, ¶ 20, 731 N.W.2d 184.

Diesel Mach., Inc. v. Manitowoc Crane Grp., 777 F. Supp. 2d 1198, 1211 (D.S.D. 2011).

Schipporeit v. Khan, 2009 S.D. 96, ¶ 7, 775 N.W.2d 503

II. WHETHER THE TRIAL COURT ERRED IN ALLOWING THE FRAUD AND PUNITIVE DAMAGES CLAIMS TO BE PRESENTED TO THE JURY

Golden View’s fraud claim and corresponding claim for punitive damages were both legally and factually unsupported and should not have been allowed to be presented to the Jury.

Relevant Law:

Wright v. Temple, 2021 S.D. 15, ¶ 57, 956 N.W.2d 436.

Fisher Sand & Gravel Co. v. State by & Through S.D. DOT, 1997 S.D. 8, ¶ 14, 558 N.W.2d 864

SDCL § 21-3-2

STATEMENT OF THE CASE

This is a contract case between two commercial enterprises, a supplier of concrete, Plaintiff/Appellee Golden View Ready-Mix, L.L.C. (“Golden View”), and a general contractor, Defendant/Appellant Grangaard. On August 3, 2022, Golden View filed a complaint in the First Judicial Circuit Court of McCook County alleging that Grangaard failed to pay for all of the concrete Golden View supplied to Grangaard for a certain bridge construction project. On these allegations, Golden View brought claims for: 1) breach of contract; 2) breach of an implied obligation of good faith and fair dealing under South Dakota Uniform Commercial Code; and 3) fraud/deceit. Golden View requested an award of punitive damages. Grangaard counterclaimed alleging that the concrete Golden View supplied was substandard and did not conform to the type of concrete Golden View agreed to supply.

On September 15, 2023, Grangaard brought a motion for summary judgment to dismiss the fraud claim, primarily on the grounds that there was no legal duty here that was independent of Grangaard’s contractual duty to pay for concrete supplied. That motion was denied. On December 11, 2023, Golden View filed a Motion for Permission to Undertake Discovery Regarding the Issue of Punitive Damages and Motion for Submission of the Issue of Punitive Damages to the Jury. On December 27, 2023, Grangaard filed a response in opposition to that motion on the grounds that punitive damages are not allowed on claims arising from contractual obligations. The Court took such motions under advisement and indicated that it would rule on them at trial.

Also on December 27, 2023, Grangaard submitted a motion in limine to exclude evidence of amounts that Grangaard received from the State of South Dakota for the

Project. In bringing this motion in limine, Grangaard argued that “[s]uch evidence has no relevance to the issues presented in this case and would be offered herein only in hopes of causing the jury to perceive Grangaard negatively and to influence it to return a verdict based upon such perception rather than the relevant evidence and law.” The Court, however, denied the motion.

Commencing on January 8, 2024, with Circuit Court Judge Chris S. Giles presiding, a four day jury trial of this matter was held. Over Grangaard’s continued motions and objections, the Circuit Court revisited Golden View’s previously filed Motion for Permission to Undertake Discovery Regarding the Issue of Punitive Damages and Motion for Submission of the Issue of Punitive Damages to the Jury. The Circuit Court granted such Motions and allowed Golden View to submit its claim for punitive damages to the Jury despite the lack of evidence supporting any claim that could support an award of such damages. Based on this ruling, Golden View recalled one of Grangaard’s principles, Jeremiah Grangaard, to testify for the sole purpose of examining him on the profits Grangaard made on the Project and Grangaard’s income and wealth generally.

Again over Grangaard’s objection, the Circuit Court submitted jury instructions and a verdict form which allowed the Jury to award punitive damages and further allowed the jury to award such damages on Golden View’s duty of good faith and fair dealing claim under the UCC. The Jury found that Grangaard breached its contract and awarded Golden View the full amount requested as set forth on the final invoice for the bridge project. Consistent with Grangaard’s repeated arguments that there was no factual support for a fraud claim, the Jury further found that Grangaard did not commit fraud. It

then awarded \$50,000 in punitive damages against Grangaard based solely upon a finding that Grangaard breached its contractual duty of good faith and fair dealing. .

On January 24, 2024, Grangaard filed a Renewed Motion for Judgment as a Matter of Law, or in the Alternative, a New Trial. On January 30, 2024, the Circuit Court denied such motion. On January 31, 2024, the Circuit Court issued Judgment in Favor of Goldenview Ready-Mix, L.L.C. and against Grangaard Construction, Inc. Grangaard appeals.

STATEMENT OF FACTS

In April 2021, Grangaard won the bid to be the prime contractor on a South Dakota Department of Transportation (“DOT”) bridge replacement project in McCook County, South Dakota (the “Project”). The DOT requires that the structural concrete used in its bridges meet certain specifications, as determined by certain DOT tests, to ensure the concrete is sufficiently workable, durable, and strong. (*See* Trial Exhibit (“Ex.”) 46; Trial Transcript (“Tr.”) at p. 467:8-14.) The class of structural concrete required for the Project was A45 concrete, with the “45” referring to the strength specification of being able to withstand 4500 pounds per square inch of pressure before breaking. (Tr. at p. 251:15-252:9.)

If the strength testing shows that A45 concrete breaks at a PSI slightly lower than 4500, the DOT can accept the concrete and keep it in place. (*Id.* at pp. 509:18-510:21.) However, pursuant to the DOT Standards and Specifications Book the DOT would issue a deduction (often called “deduct”) in payment to the prime contract for such sub-specification concrete. (*See* Ex. 9 at p. 46; Tr. at pp. 240:23-242:7.) If the tests show that the concrete is considerably lower than the 4500 specification, the DOT will require that the concrete be removed and replaced, which is costly. (*See* Tr. at pp. 509:18-510:21.)

In South Dakota and elsewhere, the prevailing practice is for these deductions to be passed from the prime contractor to the concrete supplier that supplied the failing concrete. (*Id.* at pp. 481:13-482:4, 493:8-25.) A sample of hardened concrete can be removed or “cored” from a structure to show that the concrete was sufficiently strong, which contractors are required to do in order to avoid removal of concrete testing below 4000 PSI. (*Id.* at pp. 170:2-7, 399:9-400:23, 493:8-25.) Suppliers bear the cost of such coring. (*Id.*)

Golden View’s concrete plant was located within a few miles of the Project. (*See Id.* at p. 250:12-18.) Based on this, prior to securing the bid, Jeremiah Grangaard, one of Grangaard’s principles, called Sam Waldner, Golden View’s concrete plant manager and batcher, to discuss whether Golden View would be interested in bidding the project as a concrete supplier. (*Id.* at pp. 101:8-17, 148:5-7.) In or around April 2021, Sam Waldner and Jeremiah Grangaard reached a verbal agreement whereby Golden View agreed to supply concrete for the entire Project. (*Tr.* at pp. 101:8-17, 148:5-7.) Both Sam and Jeremiah testified that the parties understood and agreed that the concrete needed to be A45. (*Id.* at p. 148:12-14, 503:4-10.) The price agreed upon was \$130 per yard initially and then \$132. (*See Ex. 14; Tr.* at p. 374:4-10.) Golden View was the only concrete supplier listed on the Project, and Mr. Marshall and DOT also understood that Golden View would be supplying concrete for the entire project. (*Tr.* at pp. 444:12-445:25, 482:5-10.)

Golden View had no prior experience serving as a supplier on a DOT bridge project involving A45 concrete. (*Id.* at pp. 218:12-25, 248:1-11, 278:2-10.) Because of this, DOT engineer, Tim Marshall, worked more closely with Golden View. (*Id.* at

218:12-25, 248:1-11, 278:2-10.) Mr. Marshall helped Golden View complete a DOT required Mix Design Form, Form 24. (*Id.* at p. 222:2-9.) Sam signed the form, which listed the “Class of Concrete” as A45. (*See Ex. 10.*)

At trial, it was Golden View’s position that by signing the Form 24, Golden View was only agreeing to mix concrete in a certain way that would be consistent with A45 specification concrete. (*See Tr.* at pp. 153:10-154:13.) During Mr. Marshall’s examination, Golden View’s counsel attempted to get Mr. Marshall to agree that the A45 Class of Concrete is only a name for a mix design and not a class of concrete that would withstand 4500 PSI, but Mr. Marshall declined to follow, stating that “A45 concrete is 4500 PSI concrete.” (*Id.* at p. 251:15-252:9).

Early on in the Project, Sam expressed his belief to Mr. Marshall that as long as Golden View met the mix design criteria, that Golden View was not responsible for its concrete not meeting the strength test. (*Id.* at pp. 288:5-289:2.) Mr. Marshall “told him that that’s not true, that this 4500 PSI is a requirement.” (*Id.*) Sam also testified that Mr. Marshall told him that this belief of Golden View’s was incorrect and that Golden View had to also meet the strength requirement. (*Id.* at pp. 159:21-160:9.) While Mr. Marshall waived on the specifics, he testified clearly that he told Golden View that deductions for failed concrete would be passed down from Grangaard to Golden View. (*Id.* at p. 296:4-18, 465:14-466:11.) Mr. Marshall further informed Golden View about the risks involved if the concrete failed the strength tests, including removal of the concrete, and recommended that Golden View discuss these risks with other concrete suppliers. (*Id.* at pp. 292:5-293:6.) Mr. Marshall and Sam spoke around a hundred times during the course

of the Project and Sam would often inquire, out of concern, about the strength test results. (*Id.* at p. 250:12-21.)

In August 2021, within one week, there were four strength test that indicated that the concrete Golden View delivered to the Project for the footings for the bridge failed to meet 4500 PSI. (*See* Exs. 16, 17, 18, and 19; Tr. at pp. 509:18-510:21.) One of those tests came back at 3530 PSI, which is one of the lowest Grangaard had ever seen. (Ex. 16; Tr. at pp. 509:18-510:21.) Grangaard was forced to core into the footing to get a sample that reached 3,890, which the DOT eventually agreed to accept, and removal and replacement was avoided. (*See* Ex. 16.) This coring work cost over \$16,000. (Ex. 37.) During his examination at trial, Sam agreed that Golden View was responsible for the costs of coring if its concrete failed strength tests. (Tr. at p. 170:2-7.) Golden View knew that Grangaard was coring to try to challenge low test result to prevent Golden View's concrete from being removed. (*Id.* at p. 166:12-19.)

At this time, over concern of the failures, Mr. Marshall approached Jeremiah about finding a new supplier to supply concrete for the next phase of the Project, pouring the bridge deck. (*Id.* at p. 301:5-25.) Jeremiah looked but did not find another supplier. (*Id.* at pp. 388:12-389:7.)

October 21, 2021, Sam, Brian Waldner, a manager with Golden View, and Jeremiah had a meeting at the Project site. (*Id.* at 345:23-353:20.) Mr. Marshall was also on site. (*Id.*) At this time, the bridge footings were completed, with no concrete needing to be removed. (*Id.*) Golden View was aware of the strength problems with the concrete supplied for the footing and asked Jeremiah if their concrete was satisfactory because, if it was not, Golden View did not want to pour the bridge deck. (*Id.*) Jeremiah told Golden

View the bridge footings were “all good.” (*Id.*) Jeremiah testified that meant that the concrete was good in that it did not need to be removed. (*Id.* at 389:11-16, 539:2-12.)

At this meeting Golden View also demanded payment of an outstanding invoice amount of \$16,154.58, and informed Grangaard that it would not pour the bridge deck, as previously agreed, if this amount was not paid. (*Id.* at pp. 172:14-173:7, 345:23-346:11.) Jeremiah paid that amount then, and upon such payment, Golden View agreed to continue to supply concrete for the bridge deck. (*Id.*) Also during the meeting, Golden View requested half-payment for the bridge deck pour on the day that it was poured. (*Id.* at p. 346:12-25.) Jeremiah testified that he agreed to make such payment so long as there were no failed tests that would result in payment deductions. (*Id.* at pp. 539:13-540:8.)

On the day of the bridge-deck pour, it became clear that there would be deductions for the “slump” of the concrete. (*Id.* at pp. 463:7-464:3; *see also* Exs. 20, 21, and 22.) Once Mr. Marshall returned to his office the next day, he informed Jeremiah that the current estimate for the deductions was \$27,000. (Tr. at pp. 463:7-464:3.) Golden View was also aware of this. (*Id.* at pp. 139:6-140:6.) Golden View never requested half payment on that day and did not issue an invoice stating that it was entitled to such payment. (*Id.* at pp. 540:24-542:21.)

At the time of the bridge-deck pour, the DOT estimated payment deductions that would result from the known strength-test failures and withheld payments to Grangaard based on this. (*See id.* at p. 258:13-17.) The first official deduction, however, was not issued until nearly two weeks after the bridge was poured. (*Id.* at p. 464:17-24.)

On November 9, 2021, Golden View submitted its final invoice to Grangaard in the amount of \$89,343.32. (Ex. 14 at p. 3.) On December 14, 2021, Golden View sent

Grangaard an email inquiring as to when it can expect payment on the final invoice. (Ex. 44; Tr. at p. 365:7-24.) Grangaard responded stating that it is “waiting on the test results from the DOT before [Grangaard] send[s] out final payment.” (*Id.*) The final deductions were issued until January 24, 2024. (Tr. at pp. 543:2-544:9.) Golden View retained counsel shortly thereafter, and the parties ceased direct communications. (*Id.*)

At that time, Grangaard calculated all the deductions and other costs caused by Golden View’s non-conforming concrete and found that they set off the amounts Grangaard owed on Golden View’s final invoice. (*See* Exs. 16, 17, 18, 19, 20, 21, 22, 23, 35, 37, 38, 39, 40, and 41; Tr. at pp. 766:22-770:18.) Based on that, Grangaard did not make any additional payments to Golden View. (*Id.*)

At the close of Golden View’s case, Grangaard moved for directed verdict on each of Golden View counts, and arguments were made on Golden View’s fraud claim. (Tr. at pp. 405:12-412:22.) The Circuit Court found that there were sufficient facts to allow the fraud claim to go to the jury. (*Id.*)

Golden View also was allowed to argue on its Motion for Permission to Undertake Discovery Regarding the Issue of Punitive Damages and Motion for Submission of the Issue of Punitive Damages to the Jury which had been filed prior to trial. (*Id.* at p. 413:3-414:22.) As a basis for punitive damages, Golden View argued that Grangaard kept Golden View “in the dark” by not immediately informing Golden View of Grangaard’s intention to set-off payments with any deductions for nonconforming concrete and coring costs (which, again, is the known and customary practice in the industry). (*Id.*, *see also* at pp. 170:2-7, 399:9-400:23, 481:13-482:4, 493:8-25.) Grangaard responded, arguing that punitive damages are improper here under SDCL § 21-3-2, as the

obligation at issue - paying for the concrete set forth in Golden View's final invoice - arises out of a contract. (*Id.* at pp. 414:24-416:8.) The Circuit Court granted the Motion for Permission to Undertake Discovery Regarding the Issue of Punitive Damages and Motion for Submission of the Issue of Punitive Damages to the Jury, finding "[a]nd if the jury finds [Grangaard] is fraudulent and deceitful in basically lying to Golden View to induce them to continue to perform the contract and deliver the concrete for the bridge deck, I believe we'd have clear and convincing evidence for a reasonable basis for punitive damages to be assessed." (*Id.* at p. 416:9-19.) The Circuit Court further found that the "jury could find malice and bad faith on the part of Mr. Grangaard in this type of situation [because the jury would] look at what are the terms of the agreement." (*Id.*) The Circuit Court then concluded again that the conduct that could be punished by punitive damages was "getting [Golden View] to continue with the bridge deck part of this agreement." (*Id.*)

At the beginning of the third day of trial, Golden View was allowed to recall Jeremiah to testify solely for the purpose of eliciting testimony from him to support a claim for punitive damages against Grangaard. (*Id.* at pp. 430:10-435:8.) Grangaard requested a standing objection to all of this testimony and the Circuit Court noted the same (*Id.*) Jeremiah was first asked to testify regarding the amount of profit Grangaard made from the total bid payment Grangaard received from the DOT on the Project, \$3,612,979.96. (*Id.*) Jeremiah was next asked to testify regarding the daily early completion bonuses of \$1,400 Grangaard received. (*Id.*) Finally, Jeremiah was asked to testify as to Grangaard's gross receipts of over \$13 million in 2021, and income exceeding \$3 million in that same year. (*Id.*)

In Golden View's closing argument, its counsel, Mike Fink, focused on the "sweet deal" Grangaard was getting from Golden View and the profit that Grangaard would make therefrom. (*Id.* at p. 746:16-474: 17.) Mr. Fink argued:

And in the bid sheet, if you look at the items related to concrete, the items for concrete total over a million dollars. [Jeremiah] testified that just for the deck he had built in \$400,000 in profit. So there was a lot of profit at stake with the amount that he was going to pay Golden View. There was quite a markup. And, in addition, he knew that he was going to get an early completion bonus of \$1400 per day, which was lucrative as well.

(*Id.* at p. 747:5-17.) Mr. Fink requested that the Jury award Golden View the full amount of its final invoice to Grangaard, \$89,343.23. (*Id.* at 757:1-11.) Mr. Fink went on to argue that "in terms of punitive damages, quite frankly, that's for you to decide what punishment is just." (*Id.* at p. 757:23-25.) Mr. Fink later proposed that the Jury should award Golden View punitive damages in the amount of a quarter of Grangaard's early completion bonus, which would amount to \$55,000, to punish Grangaard and deter future bad behavior. (*Id.* at pp. 757:21-758:14.)

In preparing jury instructions, the Court noted Grangaard's standing objection to instructions relating to fraud, deceit, and punitive damages. (*Id.* at pp. 657:23-5, 683:17-684:4, 732:21-733:19, 739:12-15.) Grangaard further objected specifically to the punitive damages instructions. (684:5-685:15.) Grangaard objected to the verdict form. (691:13-18, 742:18-24.) The verdict form allowed the Jury to award punitive damages solely on Golden View's claim that Grangaard breached its implied contractual duty of good faith and fair dealing. (Appendix at pp. 38-39.)

Thirty instructions were given to the Jury. (Appendix at p. 3-39) These included instructions on each of the claims and counterclaims, applicable provisions of the South Dakota Uniform Commercial Code, and damages. Upon receiving the instructions, the

jury left to each lunch and deliberate at 1:34 p.m. (the transcript erroneously has this as 11:34 a.m.) (See Tr. at pp. 743:11-13; 780:20-22.) The Jury was back in the courtroom with a verdict at 2:55 p.m. (*Id.* at p. 781:16-19.) The Jury found that Grangaard breached its contract with Golden View and assessed damages on that breach in the full invoice amount requested by Golden View with no set-offs for non-conforming concrete under the UCC. The Jury found that Grangaard did not commit fraud but found that Grangaard did breach its duty of Good Faith. The Jury then awarded punitive damages in the amount of \$50,000, nearly a quarter of Grangaard's bonus on the project as suggested by Golden View.

STANDARD OF REVIEW

By its judgment, this Court may reverse, affirm, or modify the judgment appealed from, and may direct a new trial by the trial court of such judgment. SDCL § 15-26A-12. In making such determinations, this Court gives "great deference to the trial court and the jury with regard to findings of fact and credibility determinations, but [] review[s] questions of law de novo, with no deference given to the trial court's legal conclusions." *Harter v. Plains Ins. Co.*, 1998 S.D. 59, ¶ 9, 579 N.W.2d 625, 629.

Generally, a trial court's evidentiary rulings are reviewed under the abuse of discretion standard and are only overturned if erroneous and the error is prejudicial. *Fix v. First State Bank*, 2011 S.D. 80, ¶ 23, 807 N.W.2d 612, 619. A trial court's determination that there was a reasonable basis to submit the issue of punitive damages to the jury will not be disturbed absent a showing that the trial court's findings of fact are clearly erroneous. *Bertelsen v. Allstate Ins. Co.*, 2011 S.D. 13, ¶¶ 38-39, 796 N.W.2d 685, 698-9.

In regard to jury instructions, the trial court's decision to grant or deny instructions is also reviewed under the abuse of discretion standard. *Fix v. First State*

Bank at ¶ 10, 615-16. “However, no court has 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.” *Id.* “Erroneous instructions are prejudicial when in all probability they produce some effect upon the verdict and were harmful to the substantial rights of a party.” *Bertelsen v. Allstate Ins. Co.* at ¶ 26, 695.

“Whether a new trial should be granted is left to the sound judicial discretion of the trial court, and this Court will not disturb the trial court’s decision absent a clear showing of abuse of discretion.” *Biegler v. Am. Family Mut. Ins. Co.*, 2001 S.D. 13, ¶ 17, 621 N.W.2d 592, 598.

ARGUMENT

A. The Trial Court erred in allowing the Jury to award punitive damages based upon claims that, as a matter of law, cannot support such award.

Punitive damages can only be awarded in an “action for the breach of an obligation not arising from contract.” SDCL § 21-3-2. In other words, punitive damages can only be awarded on a tort claim with obligations independent of those set forth in the contract. *Wright v. Temple*, 2021 S.D. 15, ¶ 57, 956 N.W.2d 436, 455.

In South Dakota, “every contract contains an implied covenant of good faith and fair dealing that prohibits either contracting party from preventing or injuring the other party’s right to receive the agreed benefits of the contract.” *Nygaard v. Sioux Valley Hosps. & Health Sys.*, 2007 S.D. 34, ¶ 20, 731 N.W.2d 184, 193. “South Dakota does not recognize an independent tort for breach of the implied covenant of good faith and fair dealing.” *Diesel Mach., Inc. v. Manitowoc Crane Grp.*, 777 F. Supp. 2d 1198, 1211 (D.S.D. 2011). “Punitive damages are recoverable only when a party can prove an

independent tort that is separate and distinct from the breach of contract.” *Schipporeit v. Khan*, 2009 S.D. 96, ¶ 7, 775 N.W.2d 503, 505 (internal quotations omitted). “Thus, a claim of breach of the implied covenant of good faith and fair dealing cannot support a punitive damages claim.” *Diesel Mach, Inc.* at p. 121.

Golden View asserted three claims against Grangaard herein—breach of contract, breach of an implied duty of good faith and fraud. The Jury found in favor of Grangaard on the fraud claim finding that fraud was not committed. The Jury found in favor of Golden View on the remaining claims of breach of contract and breach of the implied duty of good faith and fair dealing. As demonstrated above, neither of these claims can, as a matter of law, support an award of punitive damages.

South Dakota law specifically states that punitive damages can only be awarded on claims of a breach of an obligation “not arising from contract”. SDCL § 21-3-2. Moreover, as stated by the South Dakota Federal District Court in *Diesel Machinery*, “a claim of breach of the implied covenant of good faith and fair dealing cannot support a punitive damages claim”. *Diesel Mach, Inc.* at p. 121.

The Jury did not find in favor of Golden View on any claim that could, as a matter of law, support an award of punitive damages. As such, the punitive damage award was clearly erroneous and in violation of South Dakota law. Grangaard presented the Circuit Court with the opportunity to correct this clear error in its post-trial Motion for Judgment as a Matter of Law. The Circuit Court denied such Motion by Order simply stating that the same was denied.

As the award of punitive damages was made in direct conflict with South Dakota law, Grangaard requests that this Court reverse the Jury’s finding in this regard.

B. The Trial Court erred in allowing the fraud and punitive damage claims to be presented to the Jury.

As discussed above, the fraud claim should have never made it to trial and certainly never should have made it to the Jury. The Jury ended up agreeing that there was no fraud here. Regardless, based on that claim, the Trial Court allowed evidence related to punitive damages to be presented to the Jury. There was no reasonable basis for the submission of the issue of punitive damages to the Jury because all of the claims here arise out of the contractual agreement between the parties to supply concrete. By subjecting Grangaard to punitive damages examination, it opened the door for the jury to believe that punitive damages are warranted on such contractual claims, and the Jury apparently believed as such when it awarded the same. Such an award was prejudicial to Grangaard.

Punitive damages can only be awarded in an “action for the breach of an obligation not arising from contract.” SDCL § 21-3-2. In other words, punitive damages can only be awarded on a tort claim with obligations independent of those set forth in the contract. *Wright v. Temple*, 2021 S.D. 15, ¶ 57, 956 N.W.2d 436, 455. “A party cannot convert a breach of contract cause of action into a tort merely by stating it as such.” *Grynberg v. Citation Oil & Gas Corp.*, 1997 S.D. 121, ¶ 62, 573 N.W.2d 493, 510. If an obligation that was allegedly breached could not have existed but for a manifested intent between the parties, “then contract law should be the only theory upon which liability would be imposed.” *Fisher Sand & Gravel Co. v. State by & Through S.D. DOT*, 1997 S.D. 8, ¶ 14, 558 N.W.2d 864, 868 (quoting Prosser and Keeton on Torts (5th ed 1984)).

Here, the only independent tort alleged by Golden View was a claim for fraud and deceit. As Grangaard argued at summary judgment and again during trial, such claim is

barred by the independent tort doctrine because it is based on the contractual promise to pay for concrete. The Circuit Court disregarded such law and allowed punitive damages on the evidence that Grangaard may have lied to Golden View “to induce them *to continue to perform the contract* and deliver the concrete for the bridge deck.” (Tr. at p. 416:9-19) (emphasis added.) The Circuit Court went on and found that punitive damages could arise from “getting [Golden View] to *continue with the bridge deck part of this agreement.*” (*Id.* at p. 417:14-25.) Such findings are clearly erroneous as the facts and claims identified by the Circuit Court as grounds for punitive damages arise from the contractual agreement between the parties for Golden View to supply concrete for the Project.

It also should be noted that Golden View was awarded the entire amount of its final outstanding invoice for the concrete it delivered for the bridge deck on Golden View’s breach of contract claim. These are the same damages arising from the same promises that are the basis for Golden View’s claim of fraud and deceit. As such, this claim clearly arises from contract and punitive damages cannot be awarded on the same.

Even if there was some independent tort here upon which punitive damages could be awarded, there is no evidence that Grangaard’s conduct here, its failure to pay Golden View’s final invoice, was oppressive, fraudulent, or malicious. Such a finding is first required under SDCL § 21-3-2. And even if punitive damages are awardable under Section 21-3-2, “before any discovery relating thereto may be commenced and before any such claim may be submitted to the finder of fact, the court shall find, after a hearing and based upon clear and convincing evidence, that there is a reasonable basis to believe that there has been willful, wanton, or malicious conduct on the part of the party claimed

against.” SDCL § 21-1-4.1. Section 21-1-4.1 provides due process protections to defendants facing the prospect of the imposition of punitive damages. *Schaffer v. Edward D. Jones & Co.*, 1996 S.D. 94, ¶¶ 45-46, 552 N.W.2d 801, 815.

Here, the Circuit Court found that the “jury could find malice and bad faith on the part of Mr. Grangaard in this type of situation.” (Tr. at 419:14-25.) Again the situation contemplated by the Circuit Court was Grangaard “getting [Golden View] to continue with the bridge deck part of the agreement.” (*Id.*) As an initial matter, the Circuit Court’s analysis begins from the improper standpoint of determining what a jury might find malicious. Such analysis is to the contrary of the intent of Section 21-1-4.1, which requires that judges first serve as gatekeepers to protect defendants from unwarranted punitive damage awards. Without such gatekeeping, juries certainly can and do find malice and bad faith in many situations in which punitive damages are unwarranted as a matter of law.

There is no evidence, clear and convincing or otherwise, of any willful, wanton, or malicious conduct on the part of Grangaard. Again, the only malicious conduct the Circuit Court believed could be the basis for punitive damages is nonpayment of Golden View’s invoice for the concrete supplied for the bridge deck. Putting aside the independent tort doctrine, nonpayment on a contract is not a malicious act. *See Grynberg v. Citation Oil & Gas Corp.*, at ¶ 62, 573 N.W.2d 493, 510. Therefore, the Circuit Court erred in submitting the issue of punitive damages to the Jury.

There is no doubt that the submission of punitive damages to the Jury was prejudicial to Grangaard, as the Jury walked through the door that the Circuit Court left open and did in fact award punitive damages. As discussed below, it also seems likely

that the punitive damages testimony Grangaard was required to give also persuaded the Jury's decision to make a full compensatory award without setting off the nonconforming concrete.

The evidence of Grangaard's profits and income that was improperly presented to the jury during punitive damages discovery became part of Golden View's case for liability against Grangaard and Golden View's compensatory damages. As such, new trial on all issues is warranted.

When the issues of liability and damages are interwoven and inseparable, a new trial on both liability and damages warranted. *Maybee v. Jacobs Motor Co.*, 519 N.W.2d 341, 345 (S.D. 1994). In making this finding in *Maybee*, this Court cited to the Supreme Court of the United States' *Gasoline Prods. Co. v. Champlin Ref. Co.*, 283 U.S. 494, 51 S. Ct. 513 (1931) decision. *Maybee v. Jacobs Motor Co.* at 345. A new trial on damages alone is not feasible

unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice. . . . Here the question of damages on the construction is so interwoven with that of the liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty, which would amount to a denial of a fair trial.

Maybee at 345 (quoting *Gasoline Prods. Co. v. Champlin Ref. Co.*, at 500-01).

Like this Court, many other courts, including the Eighth Circuit Court of Appeals, have relied on the holding in *Gasoline Prods. Co.* and required that new trials be held on all issues unless clearly separable. See *Burke v. Deere & Co.*, 6 F.3d 497, 513-14 (8th Cir. 1993). In *Burke*, the district court improperly submitted the issue of punitive damages to the jury. 6 F.3d 497 at 512. The Eight Circuit found that both the improper punitive award and the compensatory award could not stand because the "verdict [was]

tainted by the improper submission of [punitive] evidence.” *Id.* at 513-14. The court there further held.

Thus, even if we agreed that the evidence supports submission of the case on the question of punitive damages, which we do not, a retrial to a new jury on that issue alone would be improper because the issues underlying compensatory and punitive awards are inextricably intertwined. The law is also squarely against letting a contested compensatory award stand when punitive damages are set aside, as here. *Burke* offered evidence on Deere's net worth and wealth in its quest for a large punitive award. Such evidence is totally irrelevant to the issue of compensatory damages. A jury may not consider a defendant's wealth in setting compensatory damages. It is improper, irrelevant, prejudicial, and clearly beyond the legally established boundaries.

Id. (internal citations and quotations omitted).

Here, as set forth herein, the submission of Golden View's punitive damages claim to the Jury was improper and the resulting punitive damages award should not stand. As discussed in *Burke*, the profit, income, or wealth of a defendant is irrelevant and prejudicial in regard to compensatory claims. The same prejudice can be assumed here after Jeremiah was required to testify as to Grangaard's profit, income, and annual revenue. Once the punitive discovery evidence was admitted, the same was used against Grangaard on liability and the compensatory claims.

Golden View used Grangaard's profits from the Project and the "sweat deal" they got from Golden View to undermine Grangaard's legal right to set-off damages for the nonconforming concrete under the UCC. The evidence showed clearly that the A45 concrete Golden View agreed to supply was 4500 PSI concrete. Tim Marshall and Jeremiah testified clearly on this point. Golden View acknowledged that it understood the same when it signed the DOT's Mix Design Form.

The evidence was further undisputed that certain load of concrete Golden View supplied for the Project were not A45 concrete because they failed to meet the 4500 PSI strength test. As a matter of law, this was a nonconforming good under the UCC and Grangaard was entitled to set-off its damages based on such nonconformity. In the short time the Jury deliberated here, it is clear that it did not review its instructions in this regard. Rather, the verdict shows that the Jury was impassioned by the profit Grangaard made on the project and ignored the law that provides Grangaard with remedy for Golden View's nonconforming concrete. Therefore, the admission of punitive damages evidence tainted the entire Verdict, and Grangaard should be granted a new trial on all issues.

CONCLUSION

For the reasons stated herein, Grangaard respectfully requests that the Court reverse the Circuit Court's denial of Grangaard's Motion for New Trial and remand for new trial on all issues, with the direction that Golden View's fraud and deceit claim and claim for punitive damages be dismissed.

Dated this 20th day of September, 2024.

Ballard Spahr LLP

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CERTIFICATE PURSUANT TO SDCL 15-26A-66 and 15-26A-14

I, Daniel R. Fritz, hereby certify that the *Appellant's Brief* in the above-entitled matter complies with the typeface specifications of SDCL § 15-26A-66 and the length specifications in SDCL § 15-26A-14. The *Appellant's Brief* contains 6,032 words and that said *Appellant's Brief* does not exceed thirty-two (32) pages and was typed in Times New Roman font, 12 point.

Ballard Spahr LLP

/s/ Daniel R. Fritz

Daniel R. Fritz

Attorneys for Appellants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 23rd day of September, 2024, a true and correct copy of the foregoing *Appellant's Brief* were served via Odyssey file and serve system.

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/s/ Timothy R. Rahn
Timothy R. Rahn
Attorneys for Appellant

APPENDIX

OF APPELLANT GRANGAARD CONSTRUCTION INC.

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STATE OF SOUTH DAKOTA)

IN CIRCUIT COURT

:SS

COUNTY OF MCCOOK)

FIRST JUDICIAL CIRCUIT

0-0

**GOLDENVIEW READY-MIX, L.L.C., a South
Dakota Limited Liability Company,**

44 CIV. 22-40

Plaintiff,

JUDGMENT IN FAVOR OF

GOLDENVIEW READY-MIX, L.L.C.

v.

AND AGAINST

GRANGAARD CONSTRUCTION, INC.

**GRANGAARD CONSTRUCTION, INC., a
South Dakota Corporation,**

Defendants.

0-0

This action came on for a jury-trial on January 8 through 11, 2024, the Honorable Chris Giles, Circuit Judge, presiding, and the issues having been tried and a verdict having been duly rendered by the jury on January 11, 2024;

It is Ordered and Adjudged that the Plaintiff, Golden View Ready-Mix, L.L.C., shall have a Judgment against and shall recover of the Defendant, Grangaard Construction, Inc., the following sums:

- | | |
|--|---------------------|
| 1. For Breach of Contract: | \$ 89,343.32 |
| 2. Interest from and after Nov. 9, 2021: | \$ 34,843.89 |
| 3. Punitive Damages: | <u>\$ 50,000.00</u> |
| Total: | \$174,187.21 |

for a total judgment amount of \$174,187.21, plus Plaintiff's costs of action in the sum of
_____ (to be inserted by the Clerk of Court).

BY THE COURT: 1/31/2024 1:51:57 PM

Attest:
Shelton, Diane
Clerk/Deputy



Honorable Chris Giles
Circuit Court Judge

STATE OF SOUTH DAKOTA)

IN CIRCUIT COURT

:SS

COUNTY OF MCCOOK)

FIRST JUDICIAL CIRCUIT

0-0

**GOLDENVIEW READY-MIX, L.L.C., a South
Dakota Limited Liability Company,**

44 CIV. 22-40

Plaintiff,

v.

**GRANGAARD CONSTRUCTION, INC., a
South Dakota Corporation,**

**ORDER DENYING DEFENDANT'S
RENEWED MOTION FOR
JUDGMENT AS A MATTER OF
LAW, OR IN THE ALTERNATIVE
A NEW TRIAL**

Defendants.

0-0

The Defendant having submitted its "Defendant's Renewed Motion for Judgment as a Matter of Law, or in the Alternative, a New Trial", and the Court having considered the records and files herein, and good cause otherwise appearing, now therefor, it is hereby

ORDERED that Defendant's Renewed Motion for Judgment as a Matter of Law, or in the Alternative, a New Trial is denied.

BY THE COURT:

1/30/2024 4:03:31 PM

Attest:
Shelton, Diane
Clerk/Deputy



Chris L. Giles
Honorable Chris Giles

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
) :SS
COUNTY OF MCCOOK) FIRST JUDICIAL CIRCUIT

<p>GOLDENVIEW READY-MIX, L.L.C., a South Dakota Limited Liability Company,</p> <p style="text-align: center;">Plaintiff,</p> <p>vs.</p> <p>GRANGAARD CONSTRUCTION, INC., a South Dakota Corporation,</p> <p style="text-align: center;">Defendant.</p>	<p style="text-align: center;">44CIV22-40</p> <p style="text-align: center;">FINAL JURY INSTRUCTIONS</p>
--	---

The following instructions, numbered 1 through ____ constitute the Final Jury Instructions of the law in the above action.

Dated this 11th day of January, 2024.

Honorable Chris Giles
Circuit Court Judge

Instruction No. 1

Both sides having rested, it is now the duty of the Court to give you the instructions that are to guide and govern you in arriving at a verdict. The law that applies to this case is contained in these instructions and the preliminary instructions previously given, and it is your duty to follow them. You must consider these instructions as a whole and not single out one instruction and disregard others. The order in which the instructions are given has no significance as to their relative importance.

By the language of these instructions, the Court does not intend to imply what any of the disputed facts in this case are, or what your verdict in this case should be.

Each of you must faithfully perform your duties as jurors. You must carefully and honestly consider this case with due regard for the rights and interests of the parties. Neither sympathy nor prejudice should influence you. Your verdict must be based on the evidence and not upon speculation, guess, or conjecture.

SOURCE: SPDJI 1-20-10

Instruction No. 2

It is your duty as a jury to determine the facts, and you must do this from the evidence that has been produced here in open court. This consists of the testimony of the witnesses and the exhibits which have been received. This evidence is governed by various rules of law. Under these rules, it has been my duty as judge to rule on the admissibility of the evidence from time to time. You must not concern yourselves with the reasons for these rulings. You must not consider any exhibit which was not received in evidence or any testimony which has been ordered stricken. Such things you must put out of your mind. Finally, you must not consider anything you may have heard or read about this case other than the evidence which has been properly admitted herein.

SOURCE: SDPJI 1-20-20

Instruction No. 3

The attorneys for the respective parties will present their arguments of the case for your assistance in coming to a decision. The order of their appearance and the length of the time of their arguments are regulated by the court. 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. [However, an admission of fact by an attorney for a party is binding on that party.]

SOURCE: SDPJI 1-20-30

Instruction No. 4

You are the sole judges of all questions of fact and the credibility of the witnesses. In deciding what testimony to believe, you may consider:

- (1) the witnesses' ability and opportunity to observe;
- (2) their intelligence;
- (3) their memories;
- (4) their manner while testifying;
- (5) whether they said or did something different at an earlier time;
- (6) their qualifications and experience;
- (7) any apparent interest, bias or prejudice they may have and;
- (8) the reasonableness of the testimony in light of all the evidence in the case.

SOURCE: SDPJ1 1-30-10

Instruction No. 5

In weighing the evidence in this case, you have a right to consider the common knowledge possessed by all of you, together with the ordinary experiences and observations in your daily affairs of life.

SOURCE: SDPII 1-30-20

Instruction No. 6

Most witnesses are allowed to testify only about what they saw, heard, or experienced. Usually, they are not allowed to give their opinions.

Some witnesses, called expert witnesses, are allowed to give their opinions, because they have special training, education, and experience.

When you evaluate an expert witness's opinion, you should consider the following guidelines:

- (1) The education, training, experience, knowledge, and ability of the witness,
- (2) The reasons given for the opinion,
- (3) The sources of the information relied upon, and
- (4) The other guidelines already given to you for any testimony.

You need not give this opinion testimony any more importance than other evidence.

SOURCE: SDPJ1 1-30-50

Instruction No. 7

The credibility of a witness may be attacked by introducing evidence that on some former occasion the witness made a statement or acted in a manner inconsistent with the witness's testimony in this case on a matter material to the issues. You may consider evidence of this kind in connection with all the other facts and circumstances in evidence in deciding the weight to give to the testimony of that witness.

SOURCE: SDPJI 1-30-80

Instruction No. 8

If you believe that any witness testifying in this case has knowingly sworn falsely to any material matter in this case, then you may reject all of the testimony of the witness.

SOURCE: SDPJ1 1-30-30

Instruction No. 9

In civil actions, the party who asserts the affirmative of an issue must prove that issue by greater convincing force of the evidence.

Greater convincing force means that after weighing the evidence on both sides there is enough evidence to convince you that something is more likely true than not true. In the event that the evidence is evenly balanced so that you are unable to say that the evidence on either side of an issue has the greater convincing force, then your finding upon the issue must be against the party who has the burden of proving it.

SOURCE: SDPJ 1-60-10

Instruction No. 10

You may have heard the terms "direct evidence" and "circumstantial evidence." Direct evidence is the testimony of a person who asserts or claims to have actual knowledge of a fact, such as an eye witness. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact. The law makes no distinction between direct and circumstantial evidence.

The jury must determine the facts from the greater convincing force of all the evidence in the case, both direct and circumstantial.

SOURCE: SDPJ 1-60-20

Instruction No. 11

A contract is an agreement to do or not to do a certain thing. The elements to the existence of a contract are:

- (1) Parties capable of contracting; and
- (2) Their consent; and
- (3) A lawful object; and
- (4) Sufficient cause or consideration.

A contract is either express or implied. In an express contract, the terms are stated in words. In an implied contract, the existence and terms are shown by conduct.

SOURCE: SDPJI 30-10-10

Instruction No. 12

The following provisions of the Uniform Commercial Code apply to the sale of goods in South Dakota:

1. "Goods" means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale.

2. "Lot" means a parcel or a single article which is the subject matter of a separate sale or delivery, whether or not it is sufficient to perform the contract.

3. "Commercial unit" means such a unit of goods as by commercial usage is a single whole for purposes of sale and division of which materially impairs its character or value on the market or in use. A commercial unit may be a quantity.

4. Unless the context otherwise requires, "contract" and "agreement" are limited to those relating to the present or future sale of goods. "Contract for sale" includes both a present sale of goods and a contract to sell goods at a future time. A "sale" consists in the passing of title from the seller to the buyer for a price. A "present sale" means a sale which is accomplished by the making of the contract.

5. Goods or conduct including any part of a performance are "conforming" or conform to the contract when they are in accordance with the obligations under the contract.

6. An order to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of conforming or nonconforming goods.

7. The obligation of the seller is to transfer and deliver and that of the buyer is to accept and pay in accordance with the contract.

8. Unless otherwise agreed, payment is due at the time and place at which the buyer is to receive the goods even though the place of shipment is the place of delivery.

9. Unless otherwise agreed, tender of payment is a condition to the seller's duty to tender and complete any delivery.

10. Acceptance of goods occurs when the buyer, after a reasonable opportunity to inspect the goods, signifies to the seller that the goods are conforming or that he will take or refrain them in spite of their nonconformity.

11. The buyer must pay at the contract rate for any goods accepted.

12. Where the buyer fails to make a payment due on or before delivery, then also with respect to the whole undelivered balance, the aggrieved seller may withhold delivery of such goods.

13. Every contract or duty within the Uniform Commercial Code imposes an obligation of good faith in performance and enforcement.

14. "Good faith," means honesty in fact and the observance of reasonable commercial standards of fair dealing.

15. Remedies for fraud include all remedies available for non-fraudulent breach.

SOURCE: SDCL §§ SDCL 57A-2-105; 57A-2-106; SDCL 57A-2-206; SDCL 57A-2-301; SDCL 57A-2-310; SDCL 57A-2-511; SDCL 57A-2-606; SDCL 57A-2-607; SDCL 57A-2-703; SDCL 57A-1-201(20); SDCL 57A-2-721.

Instruction No. 13

The following provision of the Uniform Commercial Code apply to the sale of goods in South Dakota:

1. The buyer must pay at the contract rate for any goods accepted.
2. Where a tender has been accepted, the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy.
3. Where the buyer has accepted goods and given notification (paragraph 2 above) he may recover as damages for any nonconformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable.
4. The buyer on notifying the seller of his intention to do so may deduct all or any part of the damages resulting from any breach of the contract from any part of the price still due under the same contract.
5. The burden is on the party alleging the breach.
6. A "course of performance" is a sequence of conduct between the parties to a particular transaction that exists if:
 - (1) The agreement of the parties with respect to the transaction involves repeated occasions for performance by a party; and
 - (2) The other party, with knowledge of the nature of the performance and opportunity for objection to it, accepts the performance or acquiesces in it without objection.

A "usage of trade" is any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage must be proved as facts. If it is established that such a usage is embodied in a trade code or similar record, the interpretation of the record is a question of law.

A course of performance between the parties or usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware is relevant in ascertaining the meaning of the parties' agreement, may give particular meaning to specific terms of the agreement, and may supplement or qualify the terms of the agreement. A usage of trade applicable in the place in which part of the performance under the agreement is to occur may be so utilized as to that part of the performance.

The express terms of an agreement and any applicable course of performance or usage of trade must be construed whenever reasonable as consistent with each other. If such a construction is unreasonable:

- (1) Express terms prevail over course of performance and usage of trade; and
- (2) Course of performance prevails over usage of trade.

SOURCE: SDCL §§ 57A-2-607; 57A-2-714; 57A-2-717; 57A-2-607; 57A-1-303.

Instruction No. 14

A contract may be made in any manner sufficient to show agreement, including the conduct of the parties.

SOURCE: SDCL § 57A-2-204.

Instruction No. 15

Terms of a contract may be explained or supplemented by course of performance or usage of trade.

SOURCE: SDCL § 57A-2-202

Instruction No. 16

An express contract is an agreement of the parties that is created by distinct and explicit language at the time of making the contract. An express contract may be created orally or in writing.

SOURCE: SDPJI 30-10-20

Instruction No. 17

A contract may be implied in fact. A contract is implied in fact where the parties do not directly or expressly in words set forth an intention to enter a contract, but where their conduct, language, or acts or other pertinent circumstances attending the transaction causes you to conclude they did, in fact, intend to enter a contract.

SOURCE: SDPJ 30-10-30

Instruction No. 18

Every contract contains an implied covenant of good faith and fair dealing that prohibits either contracting party from preventing or injuring the other party's right to receive the agreed benefits of the contract. The implied duty of good faith is not a limitless duty. It must arise from the language used in the contract or it must be indispensable to carry out the intention of the parties to the contract.

A party may breach the duty of good faith and fair dealing even though that party's conduct did not violate any of the express terms of the contract agreed to by the parties.

SOURCE: SDPI 30-10-40

Instruction No. 19

Every oral or written contract requires that all parties to the contract consent to the making of that contract. The consent of the parties must be:

- (1) Free;
- (2) Mutual; and
- (3) Communicated to each other.

SOURCE: SDPJI 30-10-70

Instruction No. 20

Where the contractor has accepted concrete and given notification of the concrete's nonconformity, he may recover as damages for the nonconformity the loss resulting in the ordinary course of events from the supplier's breach as determined in any manner which is reasonable.

The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the concrete accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.

In a proper case any incidental and consequential damages may also be recovered. "Incidental damages" resulting from the supplier's breach include any reasonable expense incident to the delay or other breach. "Consequential damages" resulting from a supplier's breach include any loss resulting from general or particular requirements and needs of which the supplier at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise.

SOURCE: SDCL §§ 57A-2-714; 57A-2-715.

Instruction No. 21

In deciding damages, you are to determine the amount of money that will fairly and adequately compensate a party for damages caused by the other party's breach(es). The damages award, if any, should put the damaged party in the position it would have been if the other party had not breached the contract and/or its promise.

SOURCE: *Lamar Adver. of S.D., Inc. v. Heavy Constructors, Inc.*, 745 N.W.2d 371, 376 (S.D. 2008); SDCL § 57A-2-701 – 57A-2-725.

Instruction No. 22

The contractor, on notifying the supplier of his intention to do so, may deduct all or any part of the damages resulting from any breach of contract from any part of the price still due under the same contract.

SOURCE: SDCL, § 57A-2-717

Instruction No. 23

To prove fraudulent misrepresentation, Golden View must prove:

- (1) Grangaard made a representation as a statement of fact;
- (2) The representation was untrue;
- (3) Grangaard knew the representation was untrue or he made the representation recklessly;
- (4) Grangaard made the representation with intent to deceive Golden View and for the purpose of inducing Golden View to act upon it;
- (5) Golden View justifiably relied on the representation; and
- (6) Golden View suffered damage as a result.

SOURCE: SDPJI 20-110-20.

Instruction No. 29

To prove fraudulent concealment, Golden View must prove:

- (1) Grangaard had a duty to disclose a material fact to Golden View;
- (2) Grangaard willfully concealed or suppressed the fact;
- (3) Grangaard acted with the intent to induce the Golden View to alter Golden View's position to Golden View's injury or risk;
- (4) The undisclosed information was something Golden View could not discover by acting with reasonable care;
- (5) Golden View relied on the misrepresentation to Golden View's detriment;
- (6) Golden View suffered damage as a result.

SOURCE: SDPJ1 20-110-25

Instruction No. 25

In an action for the breach of an obligation arising from a contract, the jury may not give punitive damages.

SOURCE: SDCL § 21-3-2.

Instruction No. 26

A legal cause is a cause that produces some harmful result in a natural and probable sequence, and without which the harm would not have occurred.

A legal cause does not need to be the only cause of the harmful result. A legal cause may act in combination with other causes to produce the harmful result.

SOURCE: SDPJI 20-10-10

Instruction No. 27

It is your duty to determine the following issues:

1. Whether Grangaard Construction breached it's agreement to pay Golden View for the concrete materials it ordered. If your answer to this question is no, then you need not proceed further with Golden View's claims. If your answer is yes, then you must determine the amount of damages caused by such breach; in such event, you must determine whether Grangaard breached it's duty of Good Faith, and whether Grangaard committed fraud; in such event you must also make additional considerations.

2. Whether Golden View breached it's agreement with Grangaard Construction for the concrete materials it ordered. If your answer to this question is no, then you need not proceed further with Grangaard's claims. If your answer is yes, then you must determine the amount of damages caused by such breach.

Whether any of these damages have been proven, by the greater weight of the evidence, is for you to determine. Your verdict must be based upon the evidence and not upon speculation, guesswork, or conjecture.

SOURCE: SDPJI 1-50-10

Any person who is entitled to recover damages is entitled to recover interest thereon from the day that the loss or damage occurred, except:

1. During a period of time, the person liable for the damages was prevented by law, or an act of the person entitled to recover the damages from paying the damages, or
2. Interest is not recoverable on damages which will occur in the future, punitive damages, or intangible damages such as injury to credit, reputation or financial standing.

You must decide:

- (1) the amount of damages for either party (if any), and
- (2) the amount of damages which are subject to prejudgment interest (if any), and
- (3) whether interest was an element of any contract between the parties, and if it was, the rate of interest as agreed to by such contract, and
- (4) the date or dates on which the damages occurred.

If you return a verdict in favor of either party, you must then indicate on the appropriate verdict form whether you find the such party is entitled to prejudgment interest, and if so, the amount of damages based upon which interest is granted and the beginning date of such interest, and whether the rate was agreed to by contract. (If there was no contract rate, the Court will determine the appropriate rate of interest). Based upon your findings, the Court will calculate the amount of interest due any party entitled to recover damages.

SOURCE: SDPJI 50-130-10 (Modified)

Instruction No. 29

In addition to any actual damages that you may award, you may also, in your discretion, award punitive (exemplary) damages if you find that Golden View suffered injury as a result of the oppression, fraud, malice, intentional misconduct, or willful and wanton misconduct by Grangaard. Golden View has the burden of proof on the issue of punitive damages. The purpose of awarding punitive damages is to set an example and to punish a party.

If you find that punitive damages should be awarded, then in determining the amount, you must consider the following five factors:

1. The intent of the party at fault. In considering such intent, you should examine the degree of reprehensibility of the party's misconduct, including, but not limited to, the following factors:
 - a. Whether the harm caused was physical as opposed to economic;
 - b. Whether the tortious conduct evinced an indifference to, or reckless disregard of, the health or safety of others;
 - c. Whether the target of the conduct was vulnerable financially;
 - d. Whether the conduct involved repeated actions or was an isolated incident; and
 - e. Whether the harm was the result of intentional malice, trickery or deceit, or mere accident.
2. The amount awarded in actual damages.

In considering this factor, you should consider:

- a. Whether the party seeking punitive damages has been completely compensated for the economic harm caused by the party at fault;

- b. The relationship between the harm (or potential harm) suffered by the party seeking punitive damages and the punitive damages award;
- c. The magnitude of the potential harm, if any, that the party at fault's conduct would have caused to its intended victim if the wrongful plan had succeeded;
and
- d. The possible harm to other victims that might have resulted if similar future behavior were not deterred.

The amount of punitive damages must bear a reasonable relationship to the actual damages.

- 3. The nature and enormity of the wrong.
- 4. The party at fault's financial condition.
- 5. All the circumstances concerning the party at fault's actions, including any mitigating circumstances which may operate to reduce, without wholly defeating, punitive damages.

SOURCE: SDPJ 50-100-10

Instruction No. 30

There are certain rules you must follow as you deliberate and return your verdict. I will list those rules for you now.

First, when you go to the jury room, you must select one of your jurors as foreperson. That person will preside over your discussions and speak for the jury here in court.

Second, in order to reach a verdict in this case, ten or more jurors must agree with that verdict. It is your duty to discuss this case with one another in the jury room. Each of you must make your own conscientious decision, but only after you have considered all the evidence, discussed it fully with your fellow jurors and listened to the views of your fellow jurors. Do not be afraid to change your opinions if the discussion persuades you, but do not come to a decision simply because other jurors think it is right, or simply to reach a verdict. Remember at all times that you are judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

Third, if you need to communicate with me during your deliberations, you may send a note to me through the bailiff, signed by one or more jurors. I will respond as soon as possible either in writing or in open court. Remember that you should not tell anyone, including me, how your vote stands numerically or otherwise, until after you have reached a verdict and reported the same into court.

Fourth, your verdict must be based solely on the evidence and on the law which I have given to you in my instructions. You will be provided a copy of these instructions. You will return these instructions to me with your verdict and the exhibits in this case. Nothing I have said or done is intended to suggest what your verdict should be. That is entirely for you to decide.

Finally, if your verdict is for the Plaintiff, indicate accordingly. If your verdict is for the Defendant, indicate accordingly. When you have reached your verdict and have completed, dated, and your foreperson has signed the appropriate verdict form, you will report to the bailiff that you have reached a verdict.

You will then be conducted into court where your verdict will be received and announced.

SOURCE: SDPJ 60-10-10

Dated this ____ day of January, 2024.

BY THE COURT

Honorable Chris Giles
Circuit Court Judge

STATE OF SOUTH DAKOTA)

IN CIRCUIT COURT

:SS

COUNTY OF MCCOOK)

FIRST JUDICIAL CIRCUIT

GOLDEN VIEW READY-MIX, LLC, a South
Dakota Limited Liability Company,

Plaintiff,

v.

GRANGAARD CONSTRUCTION, INC., a
South Dakota Corporation,

Defendant.

44CIV22-000040

VERDICT FORM

We, the jury duly empaneled in the above-entitled action, hereby find as follows:

1. Did Grangaard breach it's agreement to pay Golden View for the concrete materials it ordered? Yes: No:

If your answer is no, then you shall proceed to answer Question 7 below. If your answer is yes, then you must answer the following questions:

2. We assess damages as follows: The sum of \$ 89,347.32 in relation to Grangaard's Breach of Contract;

3. We further find as follows:

a. Was interest a term of an agreement between Grangaard and Golden View?
Yes: No:

b. If it was a term of an agreement, the agreed upon rate was 18 percent;

c. If Golden View is entitled to prejudgment interest, it accrued on 11/9/2021 (date).

4. Did Grangaard breach a duty of Good Faith? Yes: No:
5. Did Grangaard commit Fraud: Yes: No:

If your answers to questions 4 and 5 are both no, then you shall not proceed to answer Question 6. If your answer to either question 4 or 5 (or both) is yes, then you must answer Question 6:

6(a). Do you find that Golden View suffered injury as a result of oppression, fraud, malice, intentional misconduct, or willful and wanton misconduct? Yes No

If your answer to Question 6(a) is no, then you shall not proceed to answer Question 6(b). If your answer to Question 6(a) is yes, then you must answer Question 6(b).

6(b). We further assess against Grangaard the sum of \$ 50 K for punitive damages (if any).

7. Did Golden View breach its agreement with Grangaard by not supplying the concrete materials it agreed to supply for the project? Yes: No:

If your answer to Question 7 is no, complete and sign the verdict form. If your answer to Question 7 is yes, answer the following questions:

8. We assess damages as follows: The sum of \$ _____ in relation to Golden View's breach of contract.

Dated this ___ day of January, 2024.

Foreperson

1	STATE OF SOUTH DAKOTA)	IN SIOUX COUNTY
2	COUNTY OF McCook)	FIRST JUDICIAL CIRCUIT
3	*****		
4	GOLDEN VIEW EAST-MID, LLC,)	440122-00040
5	a South Dakota limited liability)	JURY TRIAL
6	company,)	DAY 1
7	Plaintiff,)	VOLUME 1
8	-vs-)	
9	GRANGAARD CONSTRUCTION, INC.,)	
10	a South Dakota corporation,)	
11	Defendant.)	
12	*****		
13	BY:	THE HONORABLE CHRIS S. JULFS	
14		Circuit Court Judge for the	
15		First Judicial Circuit	
16		130 N. Essex Avenue	
17		Salem, SD 57059	
18	APPEARANCE:	MIKE C. FINK, Esq.	
19		First Law Office PC	
20		225 N. Main Avenue, P.O. Box 444	
21		Bridgewater, SD 57319	
22		finkmlaw@united.sd.com	
23		Attorney for Plaintiff	
24		DANIEL R. FRITS, Esq.	
25		TIMOTHY R. RAHN, Esq.	
		Ballard Spahr LLP	
		100 S. Reid Street, Suite 300	
		Sioux Falls, SD 57103	
		fritsd@ballardspahr.com	
		rahntr@ballardspahr.com	
		Attorneys for Defendant.	
	PROCEEDING:	The Jury trial herein commenced on the	
		8th day of January, 2024, at 9:10 a.m.	
		in the courtroom at the McCook County	
		Courthouse in Salem, South Dakota.	

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1	EXHIBITS		
2	PLAINTIFF'S		
3	Number	Description	Off'r'd Recv'd
4	1	Golden View Delivery Tickets for	131 336
5		June 9-30, 2021 (except June 16)	
6	2	Golden View Delivery Tickets for	131 130
7		June 16, 2021 - reloaded loads	
8	3	Golden View Delivery Tickets for	333 336
9		July 2 to July 24	
10	4	Golden View Delivery Tickets for	336 336
11		August 6 to August 27	
12	5	Golden View Delivery Tickets for	336 336
13		October 22	
14	6	Golden View Delivery Tickets for	336 336
15		October 29 to November 9	
16	7	Grangard/SD07 Contract	313 304
17	8	Grangard's Bid Schedule with	439 435
18		SD07 contract	
19	9	SD07 Standards & Specifications Book	317 308
20	10	Contractor Concrete Mix Design	119 110
21		(Dot-04)form	
22	11	Construction Change Order No. 3	369 369
23	12	Construction Change Order No. 4	353 353
24	13	Summary for Construction Change	-- --
25		Order No. 4	
	14	Invoice Summary for Golden View bills	337 337
		to Grangard with finance charges	
	15	Certificate of Compliance	119 119
	16	SD07 Letter to Grangard/1-11-22	331 331
		(Test No. 12/10)	

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1	INDEX			
2	PLAINTIFF'S WITNESSES:	Direct	Cross	Red. Rec.
3	SMUEL WALSHEN			
4	By Mr. Fink	96		174
5	By Mr. Frits		145	182
6	VICTORY J. MARSHALL, PE			
7	By Mr. Fink	208		312 328
8	By Mr. Frits		277	326 329
9	BRIAN WALDNER			
10	By Mr. Fink	334		367
11	By Mr. Frits		356	369
12	JEREMIAH GRANGAARD			
13	By Mr. Fink	371		400 424
14	By Mr. Frits		395	431
15	DEFENSE WITNESSES:	Direct	Cross	Red. Rec.
16	VICTORY J. MARSHALL, PE			
17	By Mr. Rahn	436		400 403
18	By Mr. Fink		466	462
19	JEREMIAH GRANGAARD			
20	By Mr. Rahn	489		561 566
21	By Mr. Fink		544	
22	ALFRED J. GARDISER, PE			
23	By Mr. Rahn	568		596 598
24	By Mr. Fink		584	
25	VICTORY J. MARSHALL, PE (Plaintiff's Submittal Witness)			
	By Mr. Fink	601		607 --
	By Mr. Rahn		607	
	SMUEL WALSHEN (Plaintiff's Submittal Witness)			
	By Mr. Fink	608		-- --
	By Mr. Rahn		--	
	BRIAN WALDNER (Plaintiff's Submittal Witness)			
	By Mr. Fink	617		616 --
	By Mr. Frits		615	

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1	EXHIBITS		
2	PLAINTIFF'S		
3	No.	Description	Off'r'd Recv'd
4	17	SD07 Letter to Grangard/11-9-21	450 450
5		(Test No. 13/11)	
6	18	SD07 Letter to Grangard/11-9-21	451 450
7		(Test No. 14/12)	
8	19	SD07 Letter to Grangard/11-9-21	451 450
9		(Test No. 15/13)	
10	20	SD07 Letter to Grangard/1-11-22	451 450
11		(Test No. 11/01/1A01)	
12	21	SD07 Letter to Grangard/1-11-22	451 450
13		(Test No. 15)	
14	22	SD07 Letter to Grangard/1-11-22	451 450
15		(Test No. 17)	
16	23	SD07 Letter to Grangard/1-11-22	451 450
17		(Test No. 20/18)	
18	24	7-26-21 Email from Via Marshall	-- --
19		to Grangard	
20	25	7-8-22 Email from Via Marshall	-- --
21		to Grangard	
22	26	4-23-21 Email from Via Marshall	-- --
23		to Grangard	
24	27	Mix Summary Sheet	-- --
25	28	101 Interoffice Memo	-- --
	29	3-3-21 Notice to Proceed	-- --
	30	Paid Invoice for 10-21-21	-- --
	31	7-16-22 Email from Via Marshall	-- --
		to Golden View	
	32	Schmucker, Paul, Mohr lab data	-- --
		for concrete test	

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E X H I B I T S

PLAINTIFF'S

Number	Description	Off'd	Rec'd
33	NOData Results Historical weather data historical weather data	--	--

D E F E N D A N T ' S

Number	Description	Off'd	Rec'd
34	Daily Ticket Report	--	--
35	SDOJ Letter to Grangaard/1-26-22 (Part No. 18/18)	451	452
36	Coring Letter	451	453
37	Invoice from Northwest Coring	515	516
38	Invoice from Geotech	519	519
39	Coring test	522	522
40	Coring test	522	522
41	Spee book page	330	330
42/43	(Not offered)	--	--
44	Email exchange	364	364
45	Grangaard tax return	423	424
46	Coring test	522	522

Plaintiff rents: Page 435

Defense rents: Page 401

Closing Arguments:

By Mr. Fink: Page 745, 775

By Mr. Fritts: Page 758

Verdict: Page 783

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Mr. Fink, did you get a chance to work on that, and is it coming my way to be signed soon?

MR. FINK: It should be in Odyssey probably first thing this morning. You know, I take that back. Our office isn't going to be open for a couple hours because they haven't done any snow removal, but as soon as it opens that order will be submitted through Odyssey with regard to paragraph 6.

THE COURT: And, Mr. Fritts, any comments?

MR. FRITTS: Is that the order about -- I don't have it in front of me -- concerning finances?

THE COURT: This dealt with plaintiff's motion in line number 1, plaintiff's motion in line number 2, Defendant's motion in line, a couple of them.

MR. FRITTS: Okay. The paragraph 6 I was thinking.

THE COURT: The Court had denied your motion in line number 5 regarding exclusions of evidence of amounts Grangaard received from DOT. I did debate that one a little bit, but I think both sides really arguably went parts of it. So that's why it's like, well, it's going to come in, but there may be objections at the time. I'll have to rule on it. It's one of those things that I get both sides why you want parts of it. But if you each want part of it, it's hard to go down that road and not bring in more, and so I think you're both going to get what you want

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JURY TRIAL MONDAY, JANUARY 8, 2024, AT 9:00 A.M.:

* * * * *

(Thereupon, the following proceedings ensued in chambers outside the presence of the jury.)

THE COURT: We're going to go on the record outside the presence of the jury. It is the morning scheduled for trial in the Golden View versus Grangaard case. We're getting started a little late because the weather has not been the most cooperative, but we are getting most of our jurors to come in.

Outside the presence of the jury, there are a couple of things to address. Both sides had a dispute following the most recent hearing on January 3rd. They are in agreement with some items of the Court's proposed order. I did feel like Mr. Fink's proposed order for the most part properly reflected the Court's ruling. I think there were parts in Mr. Fritts and Mr. Kahn's order that more properly reflected how they wanted me to rule versus maybe how I did rule on a couple of things, but their order had a paragraph number 6 that I thought was important.

And I had directed Mr. Fink to include that paragraph number 6 in his proposed order and then send that to me to be signed, which I haven't seen if that has happened yet, but that order did clarify some motions in line that were important for today's hearing.

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to be able to argue. It's hard to be the gatekeeper and cut things off at a certain point. So I just wanted to make a record concerning that one.

And then there have been some additional instructions that have come in that we'll deal with later. But just to make a record, Mr. Fink had submitted plaintiff's additional proposed instruction number 26 that deals with MCC. I'll have to review that at a later point. And then defendant had submitted a special verdict form, and I have to compare that with what we already have. I haven't had a chance to do either of those yet, but those are for the settling of the final instructions. Then, this morning, I think the biggest thing we have to address is the preselection and preliminary, and I think the law clerk has given you each hard copies of those.

MR. FINE: I have those, Judge, and I don't have any objection to any of those instructions.

MR. FRITTS: So do we.

THE COURT: The preselection consists of two.

MR. FRITTS: Yeah.

THE COURT: I'll get to my copy I'm going to use. So I wait, and I don't number them until I make sure there's not an issue. And I have had a recent trial where for some reason or other I forgot to read the preselection, which wasn't a big deal. Then there were eight preliminary

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1 THE COURT: Sustained. Rephrase your question. I
2 don't think he's understanding.
3 Q. (BY MR. FINE) When you first had that discussion on
4 the phone where you gave a price estimate, did you have any
5 other discussion relative to what you would do if Grangard
6 got the project?
7 A. We'll help them out. We'll deliver it.
8 Q. So then, at some point in time, you found out that
9 Grangard did get the low bid?
10 A. Yes.
11 Q. Do you remember how you found out about that?
12 A. He called me.
13 Q. What was said during that conversation?
14 A. "We'll use you. We'll take you up on the bid."
15 Q. Okay. Was this in the spring of 2011?
16 A. Yeah. Right before the bridge project, yeah, when he
17 was starting work on it.
18 Q. Let's talk about this telephone call. During this
19 phone call what do you remember the two of you discussing?
20 A. Well, we discussed the price. We discussed first-time
21 customers and the payments. I mean, we only allow so
22 much -- what they call it?
23 Q. Credit?
24 A. Credit, yeah. And we like to be paid, like, monthly.
25 Q. Did you talk about interest at that point?

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1 A. No.
2 Q. And during this telephone call where he told you that
3 he had the bid, did he tell you about how many yards of
4 concrete he needed?
5 A. No. I don't think he had a clue on it as far as that.
6 Q. Did you make any guarantees about performance of the
7 concrete?
8 A. No, not in performance. But I kind of promised him
9 he's going to be first; whenever he calls and he looks in,
10 that day is yours.
11 Q. So for that price it would be that day.
12 I want to talk about the guarantees. Can you
13 guarantee how concrete is going to perform after it gets to
14 the job site?
15 A. Not really.
16 Q. Explain to the jury why that is.
17 A. Well, cement dehydrates. I mean, when you put
18 concrete on a pile, that's just the way it's going to be.
19 It's got to be taken care of. There's elements. There's
20 heat. There's time span. There's how to lay it out or the
21 condition of the weather, rain or shine. I mean, there's
22 so many things. Just like if you give somebody a cherry
23 pie, you go home and bake it. If the oven goes haywire,
24 goes up to 1000 degrees, the pie is not going to turn out.
25 And that's the way the cement truck is. I mean the way

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1 A. Never talked about interest.
2 Q. Okay. Did that ever come up later?
3 A. No. We had no excuse to even put it on. It's just on
4 our ticket on the bottom.
5 Q. So what interest do you put on the tickets?
6 A. I think it's 1 and a half percent, 1 and a half or
7 18 percent or --
8 Q. So during this conversation where Mr. Grangard tells
9 you he got the bid, you say you talked about first-time
10 credit. What do you mean by that?
11 A. Well, we usually allow anywhere from 5- to \$10,000
12 a month or something like that.
13 Q. Okay. And what was his response to your statement to
14 Mr. Grangard?
15 A. Just small talk, nothing -- we just try to inform
16 every new customer that way.
17 Q. During that phone call did Mr. Grangard ever tell you
18 what his obligations would be under the contract he had
19 with the state?
20 A. No.
21 Q. Did he ever show you any part of the contract he had
22 with the state?
23 A. No.
24 Q. Did Mr. Grangard ever provide you with any document
25 that would memorialize what the agreement was?

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1 cement is. Like I said, the only thing we can guarantee is
2 going out of the plant so long. And after that, the cement
3 starts to, as we all know, get hard.
4 Q. So if it's a really hot day, if it's in the 90s, is
5 that a risky time to be --
6 A. It's about the worst.
7 Q. Explain that to the jury.
8 A. Well, now it's already hot. It goes into degradation,
9 and it's already getting hotter. So as hot as it gets,
10 when you put water out in a cold spot, it will hardly ever
11 dry up. If you put it in a hot spot, it will dry up
12 quicker. So if it shrinks too bad and too quick, it
13 cracks. It just -- it's just got to be taken care of. You
14 can't just lay it out and think it's going to wait for you
15 or you can do something else or you can skip. You only
16 got one chance. It goes through dehydration. It just
17 tells you I'm done in so many hours if it's getting that
18 hot. And most of the state will not let you pour after --
19 they'll start questioning after 90 degrees.
20 Q. So what about humidity and wind? Are those important
21 factors?
22 A. Wind is worse than humidity. Humidity is kind of nice
23 because it doesn't dry it out so fast.
24 Q. Is concrete curing slowly better than concrete curing
25 quickly?

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1 Q. So nobody had told you that there was any problem with
2 any strength testing?
3 A. No.
4 Q. Did Jeremiah tell you that he wanted to go get
5 concrete elsewhere, or did he tell you he would keep buying
6 concrete from you?
7 A. Well, I asked him a couple times if he was satisfied
8 or something is wrong, if he was satisfied with our plant.
9 He said everything is good, it will turn out fine, the test
10 will turn out fine. Everything was good he brought up.
11 Q. Were you concerned that maybe some tests had not
12 turned out fine?
13 A. How would I know?
14 Q. Nobody told you?
15 A. Nobody told me.
16 Q. So how did payment get made that day? Did he come up
17 with the money he owed?
18 A. Well, it didn't show up in the mail, so I was forced
19 to go back to him again.
20 Q. It did or did not show up in the mail?
21 A. It did not show up. It never did show up. It never
22 came and we sent it back. There was no check in the mail.
23 Q. Did payment get made, though, before you saw him?
24 A. I don't know where he got it from. He probably signed
25 it or had to run to the shop and get one. So that was paid

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1 a good relationship.
2 Q. Through that point in time, had he ever made any
3 conversation or made any statements to you about his being
4 penalized or not fulfilling his contract with the DOT?
5 A. No.
6 Q. So the deck was poured?
7 A. Yes.
8 Q. Were you told of any problems with the deck concrete?
9 A. The DOT called us up in the middle of the day. I kind
10 of put it back together why he called about slump. We
11 talked about slump. We talked about temperature. We
12 talked about the time it's in the truck. So the trucker
13 couldn't reach the other side, so there was a problem
14 created in the middle of the bridge. That's the way I saw
15 it. They never stopped the trucks coming. The pumper
16 needs to be moved, and you can't go across the bridge. He
17 has to go probably five to seven miles around that section
18 and come around the other side and set up. And the pumper
19 is very slow. It reaches out like 110 feet. So it's just
20 very slow. Just the process of folding up the pumper can
21 take up to 15, 20 minutes. And then going around, there's
22 a time span, so the slump was off. It was getting off.
23 Those trucks were sized, and they're not being unloaded,
24 and it's in the middle of the day.
25 So DOT calls me up and says, "Something's wrong with

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1 off. The bottom deck was paid off.
2 Q. And was that done the day of this meeting or
3 sometime --
4 A. You'd have to ask Brian. I don't know the date the
5 check arrived or they made the deal, but it was taken care
6 of.
7 Q. Jeremiah Grangard, did he make any other statements
8 about what he would do after the concrete was poured in
9 terms of pay?
10 A. Well, that was in the meeting. He, Brian, and
11 Jeremiah said that's a big pour. It's like 500 yards. We
12 want 50 percent down the day it was poured, and we would
13 let it go for the month, for the rest remaining.
14 Q. Did Jeremiah Grangard agree to that?
15 A. He agreed to that.
16 Q. Did he ever tell you that he was thinking about not
17 paying you?
18 A. It never came up.
19 Q. Based on his actions, did you believe him when he said
20 he would pay under those terms?
21 A. Absolutely. Like I said, we were on good terms.
22 Q. Did he do anything that day that caused you to doubt
23 whether you would get paid?
24 A. Absolutely. He was always very -- whatever he said,
25 that's what I took. And when I suggested something, we had

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1 your slump." And I told him the situation. "I add water.
2 That will keep it to a 4.5. What else can we do?" But
3 then he said, "Well, if it goes straight up, we'll have to
4 shut down." Well, we were supposed to be shut down while
5 they moved, but they never shut the plant down. So that's
6 the condition of it.
7 Q. So did anybody from Grangard call you and tell you to
8 delay while they were moving their pumper around?
9 A. No.
10 Q. If they had called you and told you to wait while they
11 moved their equipment, would you have been able to do that?
12 A. Absolutely, yes.
13 Q. And was the DOT and was Grangard able to correct the
14 slump on the project then?
15 A. I was busy. I would assume they did. The process
16 kept on going. We finished the rest of the bridge and
17 everything. We finished the project, and everything as far
18 as I know went really smooth other than that.
19 Q. Now I'm showing you what's been marked as Exhibit 14.
20 Can you look through these pages and then tell me what that
21 is?
22 A. That would be a billing sheet. See, we make
23 duplicates of every copy we sent with the truck. So
24 there's two copies. The secretary gets one; that would
25 be Brian. And one gets in the truck, delivered to the

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1 and then we'll start with the cross-examination.
 2 MR. FRITS: Thank you, Your Honor.
 3 THE COURT: Also, for my record, all the attorneys and
 4 the parties, as well as all of our jurors, have returned
 5 following the break. We can proceed now.
 6 CROSS-EXAMINATION
 7 BY MR. FRITS:
 8 Q. Good afternoon, Mr. Valdez. My name is Dan Frits. I
 9 represent Grangard Construction.
 10 Sir, we've heard some statements already in this trial
 11 about whether there was a contract. You had a contract
 12 with Grangard, did you not?
 13 A. What kind of contract?
 14 Q. Did you have a contract?
 15 A. No.
 16 Q. Okay.
 17 A. Just a verbal that we're going to deliver concrete.
 18 Q. That verbal was an agreement and it was a binding
 19 agreement?
 20 A. You could say.
 21 Q. You know that Golden View in this case is claiming
 22 a breach of contract? You do know that?
 23 A. No.
 24 Q. Okay. In any event, you had an agreement that you
 25 feel was binding between you and Grangard?

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1 A. Yeah.
 2 Q. You remember you were under oath at that time?
 3 A. Yes.
 4 Q. You affirmed to tell the truth, right? I'm going to
 5 show you a transcript of that deposition. I'm going to
 6 open it here to page 35, and I'll represent that is the
 7 transcript of your deposition where you affirmed to tell
 8 the truth. At page 25, if you would move to line 11. Do
 9 you see that? Do you want some help?
 10 A. To let me put it this way. Did you understand --
 11 Q. No, no, no. Do you see where I'm at?
 12 A. Yes.
 13 THE COURT: Yeah. There's four pages on the one page.
 14 MR. FRITS: I think he's got it.
 15 THE WITNESS: Yeah.
 16 Q. (BY MR. FRITS) So you'll see there that the question
 17 was asked of you: "So let me put it this way. Did you
 18 understand that you were provided concrete for the entire
 19 project?" What was your answer? What was your answer
 20 there?
 21 A. Wait a minute. Let me read the line first. "Let me
 22 put it this way. Did you understand that you were --"
 23 well, yeah. Yes.
 24 Q. Okay. So you did. You did agree to supply concrete
 25 for the entire project?

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1 A. Yeah. I was the contact person, and I take orders
 2 from him, yea.
 3 Q. And that agreement had obligations on behalf of
 4 Grangard, and it had obligations on behalf of Golden View;
 5 right?
 6 A. Yeah. On my part, yeah. We delivered, and he
 7 ordered.
 8 Q. If you'd just answer my question it will move along
 9 faster.
 10 A. Yeah.
 11 Q. Obviously this trial is about a bridge project, and
 12 people know what a bridge is. Golden View agreed from the
 13 outset to supply the concrete for the entire project,
 14 didn't it?
 15 A. That never came up. We just told them that we will
 16 help them out.
 17 Q. Sir, it will go a lot faster if you'll just answer the
 18 question.
 19 A. Okay. No, it didn't.
 20 Q. You did not agree to --
 21 A. No.
 22 Q. Okay. Do you remember having your deposition taken?
 23 A. Yeah. Some of it.
 24 Q. Okay. You were in an office, and Mr. Rahn asked you
 25 some questions, and Mr. Fink asked you some questions.

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1 A. In that form, yea. We had a verbal agreement, yeah.
 2 Q. Do you want to change your testimony today?
 3 A. No. I kind of promised them I'll help them out, we'll
 4 work with them.
 5 Q. My question is did you agree to provide concrete for
 6 the entire bridge project?
 7 A. Yes.
 8 Q. Okay. Thank you.
 9 And you agreed to supply -- the concrete that you said
 10 you'd supply wasn't just any kind of concrete, was it?
 11 A. It was M45.
 12 Q. M45. And Jeremiah Grangard told you it's got to be
 13 M45, didn't he?
 14 A. Yes.
 15 Q. And you agreed that the concrete would meet the specs
 16 for M45, didn't you?
 17 A. What specs are you talking about now?
 18 Q. The state specs for M45.
 19 A. I didn't know any state specs.
 20 Q. You didn't know them at the time?
 21 A. I never know them. I don't even know them now.
 22 Q. Okay. In fact, you testified earlier that you
 23 thought, or maybe still think, that 4000 PSI might be the
 24 right strength?
 25 A. Might. According to my six designs at the plant,

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1 looking at these mix designs would be stronger.
 2 Q. Okay. But you think it's 4000 PSI for M45 concrete?
 3 A. I think it's more, because my 4000 is a 6 bag; the M45
 4 is a 7.2 bag.
 5 Q. You're a concrete supplier for state projects; is that
 6 right?
 7 A. Occasionally.
 8 Q. And the state requires M45 concrete for bridge
 9 projects, doesn't it?
 10 A. It depends. They've got an M6 too.
 11 Q. But at times they require M45 concrete?
 12 A. Most of the time.
 13 Q. And you're telling me you don't know what the specs
 14 are for M45 concrete; is that right?
 15 A. No.
 16 Q. What's not right?
 17 A. It's a mix design to me.
 18 Q. But what I'm asking you is, you don't know what the
 19 specs are for M45 concrete?
 20 A. Like I said --
 21 MR. FINN: I'm going to object as being ambiguous
 22 unless he clarifies what specs he's talking about. Mix?
 23 Strength? Slump?
 24 THE COURT: Objection sustained. Perhaps you can
 25 rephrase the question.

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1 Q. That's what I mean. You identify them as 4000 or 3000
 2 or 3500, don't you? Your mixes?
 3 A. In a way, yes, 3000 or 4000. And you go up to this
 4 other --
 5 Q. Just answer my question, sir, just to move things
 6 along. We're trying to get done here today.
 7 A. Yeah.
 8 Q. And when you say it's a 4000 mix, that means it will
 9 meet 4000 pounds per square inch of compression testing;
 10 right?
 11 A. No.
 12 Q. It's just you pick the code?
 13 A. Just the code, just pick a number.
 14 Q. Okay. In this case you agreed to provide M45. Do you
 15 know what the 45 means?
 16 A. Code.
 17 Q. Other than being -- it's a random number?
 18 A. It's a random number.
 19 Q. Okay.
 20 A. Like an M6, like I told you.
 21 Q. Certainly you know, when you agreed with Grangaard to
 22 supply concrete for this project, you knew that state
 23 bridge projects required M45? Did you know that?
 24 A. Yeah. That's what he called for.
 25 Q. And you knew that the state required that the M45

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1 Q. (BY MR. FINN) Okay. I think you told me earlier you
 2 didn't know at the time, and you still don't know, what the
 3 specs are for M45?
 4 A. I did. Sew, I --
 5 MR. FINN: I'm going to object as ambiguous again.
 6 THE COURT: It's overruled. I think his answer will
 7 stand that he didn't see any specs for it.
 8 Q. (BY MR. FINN) Okay. And you don't know what they
 9 are?
 10 A. No.
 11 Q. Okay. In your plant there you have mix designs that
 12 are intended -- excuse me, are identified as, for instance,
 13 3000 PSI mixes; right?
 14 A. It's a code.
 15 Q. Right.
 16 A. It's just a code, like this M45 is a code.
 17 Q. I understand.
 18 A. I've got 30 mix designs in my plant.
 19 Q. So you label them at times or identify them as, for
 20 instance, 3000 PSI mix?
 21 A. It's just a code. It would be like a 4, just for my
 22 reference. The older guys put down -- they would order a 6
 23 bag, and my mix design would run -- I call it a 4000, but
 24 it usually comes back at 4600 PSI. So it's not actually
 25 4000; it's actually more than 4000. So it's just a code.

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1 concrete meet certain specs?
 2 MR. FINN: Objection. Ambiguous.
 3 THE WITNESS: We went through that already.
 4 THE COURT: Objection sustained. I'm not sure
 5 if that's the best way to describe it.
 6 Q. (BY MR. FINN) Okay. Did you know that the state
 7 required that the concrete, that M45 concrete meet certain
 8 specifications?
 9 A. No.
 10 Q. Okay. You knew that your customer, Grangaard, needed
 11 M45 concrete?
 12 A. Yes.
 13 Q. But you didn't know what that meant?
 14 A. I know what it meant.
 15 Q. You know how to mix it?
 16 A. I knew how to mix it.
 17 Q. Beyond that, you didn't know what it meant?
 18 A. I knew it was stronger cement than regular home base
 19 4000.
 20 Q. And you're here testifying that Jeremiah Grangaard
 21 didn't say anything about how that concrete had to perform?
 22 A. No.
 23 MR. FINN: Can I publish an exhibit that's already
 24 been admitted? 10?
 25 THE COURT: I can see that from here.

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1 MR. FRITS: I just want to show the jury.
 2 THE COURT: Mr. Fink, any objection? There's a blowup
 3 of 10.
 4 MR. FINK: No objection, Your Honor.
 5 THE COURT: All right. You can publish.
 6 Q. (BY MR. FRITS) Do you have Exhibit 10 there, sir?
 7 A. I think I've got it in my memory.
 8 Q. Okay. And you signed that form, didn't you?
 9 A. Yes.
 10 Q. And that's the mix design form. It has mix design
 11 material in here that you testified about, and that's your
 12 signature there; is that right?
 13 A. Yes.
 14 Q. But over here it says "class of concrete," does it
 15 not?
 16 A. Yes.
 17 Q. And it says "A-45." What's the class of concrete that
 18 you agreed to provide; is that right?
 19 A. Mix design.
 20 Q. Well, it doesn't say a mix design, does it?
 21 A. That's what we call it in the field.
 22 Q. But this says "class of concrete"; is that right?
 23 A. Heheh heheh.
 24 Q. And you agreed to that by signing here?
 25 A. Yeah.

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1 THE WITNESS: Yeah.
 2 THE COURT: And, generally, he's going to ask you
 3 questions that require a shorter response, maybe a yes or
 4 no. He just wants you to try to answer the questions.
 5 THE WITNESS: I understand.
 6 THE COURT: Now, Mr. Fink gets another chance if
 7 there's something he wants to follow up on that you can
 8 explain in more detail.
 9 THE WITNESS: Sure.
 10 THE COURT: So just try to give answers that are
 11 responsive to what his questions are.
 12 THE WITNESS: Yeah. Sure.
 13 MR. FRITS: Can you read back my question.
 14 THE REPORTER: Sure.
 15 (The requested portion of the
 16 record was read by the reporter.)
 17 MR. FINK: I'm going to object as ambiguous unless we
 18 have more information on what counsel thinks A45 concrete
 19 is.
 20 THE COURT: The objection is overruled. He can
 21 attempt to answer if he can.
 22 Q. (BY MR. FRITS) Would you expect to get A45 concrete?
 23 A. I expect, yeah.
 24 Q. But you don't know whether -- you don't know of any
 25 specifications that might apply to that concrete. Is that

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1 Q. Do you ever refer to an A45 mix as a 4500 mix?
 2 A. Not really.
 3 Q. Have you ever?
 4 A. I've tested it. It comes back \$100. So why would I
 5 call it 4500? It's just a code.
 6 Q. Okay. If you properly mix or follow an A45 mix, will
 7 you get A45 concrete?
 8 A. Not really. We thought we'd explained that earlier.
 9 Cement doesn't stop. It dehydrates, so it can't -- if it's
 10 mixed, it's supposed to be a Class 4, whatever it's
 11 supposed to be, spec. It will do that, but the elements
 12 like weather and sitting in a truck and heat, so many
 13 things that can factor it.
 14 Q. Before you get in the truck and you mix the A45 mix
 15 design -- you follow that? -- would you expect to get A45
 16 concrete?
 17 A. I think I've got a good hunch --
 18 Q. Would you, sir, expect to --
 19 A. I would, sir, if I got so much -- how would I explain
 20 it to the jury so they understand it?
 21 MR. FRITS: I'd just as soon you'd stick to my
 22 question. And maybe the Court could help me. If he could
 23 just stick to my question.
 24 THE COURT: This is the part of the questions called
 25 cross-examination.

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1 what you're saying?
 2 A. No.
 3 Q. Is that what you're saying?
 4 A. No.
 5 THE COURT: I think he's answering you, he doesn't
 6 know the specifications.
 7 MR. FINK: Yes. Right, right.
 8 THE COURT: Is that true? You don't know of any
 9 specifications?
 10 THE WITNESS: No. I never seen a spec from the state
 11 or a contract or a -- the contractor usually doesn't share
 12 that with me.
 13 Q. (BY MR. FRITS) When Golden View delivered the
 14 concrete to the job site here on the bridge project, you
 15 understood that it was going to be tested for certain
 16 specifications, did you not?
 17 A. Yes.
 18 Q. You know, and you testified earlier, that it would be
 19 tested for temperature; right?
 20 A. Yes.
 21 Q. It would be tested for air entrainment?
 22 A. Yes.
 23 Q. And it would be tested for slump?
 24 A. Yes, right.
 25 Q. And those are specifications, are they not?

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1 A. Yes.
 2 Q. And if the concrete doesn't meet those
 3 specifications -- temperature, air, or slump -- the state
 4 can reject the batch?
 5 A. Yes.
 6 Q. And Golden View would be responsible for that rejected
 7 batch?
 8 A. Yes.
 9 Q. So both of you understood and agreed that the concrete
 10 supplied to Grangaard would have to meet certain
 11 specifications?
 12 A. Yes.
 13 Q. And if it didn't meet those specifications, Golden
 14 View would be responsible for the lead?
 15 A. Yes.
 16 Q. Okay. Sir, I want to show you what's been marked as
 17 Exhibit 41. Are you familiar with that document?
 18 A. As far as coming up at the bridge project, no, never
 19 seen it.
 20 Q. You're not familiar with that document?
 21 A. No. I'm familiar with it but did not read it.
 22 Q. What is it?
 23 A. Construction of concrete.
 24 Q. There's specifications for concrete; right?
 25 MR. FINE: I'm going to object as to relevance and

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1 has to meet temperature specs, it has to meet slump, it has
 2 to meet air entrainment specs; but you don't believe it has
 3 to meet any strength-testing specs. Is that right? Is
 4 that your testimony?
 5 A. I don't follow your question.
 6 Q. I'm just summarizing what I believe you've already
 7 told me.
 8 A. I don't understand. A mixed 4505 --
 9 MR. FRITS: Just a second, Your Honor. I --
 10 THE WITNESS: The 4500 --
 11 MR. FRITS: There's no question. Sir, sir, sir.
 12 THE COURT: Mr. Waldner, you've got to stop. Okay?
 13 Let's rephrase or ask your question again.
 14 Q. (BY MR. FRITS) I just want to summarize. You agree
 15 that the M45 concrete has to meet temperature specs, slump
 16 specs, air entrainment specs?
 17 A. What I understand.
 18 Q. But it does not have to meet any strength-testing
 19 specs?
 20 A. No.
 21 Q. Okay. Do you recall Tim Marshall telling you that you
 22 were wrong about that?
 23 A. Rephrase the question a little.
 24 Q. Did Tim Marshall ever tell you, no, sir, you do have
 25 to meet strength-testing specs with your M45?

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1 foundation.
 2 THE COURT: Sustained at this point. I guess I'd ask
 3 for a little more foundation, because first he indicated he
 4 wasn't familiar with it, and then he gave an indication
 5 that he has some familiarity with the form of the document.
 6 So why don't you go back a little bit, Mr. Frits.
 7 Q. (BY MR. FRITS) Are you familiar with that document?
 8 A. I never seen it, but the numbers are here.
 9 Q. You're familiar with the numbers but not the document?
 10 A. No, never seen one.
 11 MR. FRITS: All right. Well, I think -- it's a page
 12 out of the spec book. I'm going to offer Exhibit 41.
 13 MR. FINE: May I ask a question for purposes of an
 14 objection?
 15 THE COURT: I'm not going to receive it because he
 16 says he's never seen it before, so not through this
 17 witness. I'm not going to receive it.
 18 THE WITNESS: I'd like one if you'd share it with me.
 19 Q. (BY MR. FRITS) So you said that you agreed that the
 20 M45 concrete had to meet certain specifications. Would you
 21 agree that it had to meet strength-testing specifications?
 22 A. Like I said, the mixer doesn't -- he can't --
 23 Q. Is your answer no?
 24 A. No. It doesn't have to meet it, no.
 25 Q. Just so I'm clear, your testimony is the M45 concrete

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1 A. That's why he takes the tests. It needs to pass,
 2 yeah.
 3 Q. But my question was, did Tim Marshall, the state
 4 engineer, tell you, sir, you do have to meet --
 5 A. He didn't tell me the numbers or specs, no, he never
 6 did. But it has to meet. The meet is familiar.
 7 Q. So he told you that you had to meet strength-testing
 8 specs with your M45 concrete?
 9 A. Yeah.
 10 Q. Did you, in response to that, go try to find out what
 11 the specs were?
 12 A. Not really, because I had my tests, I knew what my
 13 tests came back with; and if nobody tells me anything, I
 14 thought everything was all right.
 15 Q. Okay. After speaking with Mr. Marshall, do you now
 16 understand that your M45 concrete has to meet strength-
 17 testing specs?
 18 MR. FINE: Objection, your Honor. Relevance.
 19 THE COURT: I think it's been asked and answered.
 20 THE WITNESS: That's been answered already.
 21 THE COURT: I think it's been asked and answered.
 22 Objection sustained.
 23 Q. (BY MR. FRITS) You understand, don't you, that the
 24 state determined that several batches of the concrete
 25 delivered to the site failed to meet M45 specifications?

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1 MR. FRITZ: Just a second, sir.
 2 THE COURT: They haven't been offered. So I don't
 3 know about the knowledge about this, if that's --
 4 Q. (BY MR. FRITZ) Okay. Have you provided these test
 5 results to your lawyer?
 6 A. Yes.
 7 Q. My reason to know why we haven't been provided --
 8 A. He's got them. He's got one of them for sure. The
 9 last four of them, I showed them today.
 10 THE COURT: Is this something recently that came to
 11 your attention, Counsel?
 12 MR. FREN: So the one that was provided previously was
 13 supplied; it's marked as an exhibit. The others were
 14 provided to me this morning. They were able to find them.
 15 THE COURT: Understood. But there was one previously
 16 provided?
 17 MR. FRITZ: One was provided last week.
 18 THE COURT: Okay.
 19 MR. FREN: They were actually obtained by the
 20 engineering company. They weren't on site. They were
 21 off site.
 22 THE COURT: Mr. Fritz, you can continue.
 23 Q. (BY MR. FRITZ) So you're claiming here today, sir,
 24 that you tested this concrete at the site, on your own,
 25 three or four different times?

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1 A. I said testimony earlier I didn't know the specs and
 2 everything was good. After the coring, Jeremiah said they
 3 were good.
 4 Q. But you know before -- while the coring was going on,
 5 you know the state was challenging Jeremiah on his
 6 concrete, didn't you?
 7 A. They always do.
 8 Q. And you knew he was trying to stand up for the quality
 9 of the concrete; right?
 10 A. Yeah, right.
 11 Q. And, meanwhile, you're sitting on three or four
 12 different reports that show -- I haven't seen them. I
 13 don't know what they say -- that show good concrete, and
 14 you don't provide them to Grangaard?
 15 A. I didn't have to. They were good.
 16 Q. All right.
 17 A. Can I tell something to the jury about this tests?
 18 Q. No.
 19 THE COURT: No. You just have to answer the question.
 20 THE WITNESS: Okay.
 21 Q. (BY MR. FREN) But you test the concrete at the site.
 22 Why?
 23 A. My own reference.
 24 Q. Okay. But you want to know if it meets strength
 25 tests?

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1 A. Yes.
 2 Q. Did you ever provide the results of those tests to
 3 Grangaard?
 4 A. I didn't have to.
 5 Q. Did you ever provide them?
 6 A. No.
 7 Q. Okay. Did you know at some point the state was
 8 challenging the strength of the concrete?
 9 A. The only thing I knew --
 10 Q. Did you know?
 11 A. Yes. Yes.
 12 Q. And did you know that Grangaard was working to try
 13 to defeat these challenges? He was coring, wasn't he?
 14 A. Yes. That's the only way I found out.
 15 Q. And you came to try to challenge those failed samples;
 16 right?
 17 A. Yes.
 18 Q. You knew Grangaard was doing that?
 19 A. I knew that, yeah. I seen it.
 20 Q. And, meanwhile, you're sitting on some reports to show
 21 that your concrete is good?
 22 A. Yes.
 23 Q. And you don't provide them to him?
 24 A. I didn't know they failed.
 25 Q. Okay.

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1 A. That's where I get my interest that I am comfortable
 2 with that.
 3 Q. Okay. But you want to know if it meets certain
 4 strength tests?
 5 A. Yes.
 6 Q. And you earlier testified that you don't have any
 7 responsibility to meet any strength tests there.
 8 A. No.
 9 Q. But you want to know?
 10 A. I want to know.
 11 Q. Okay. This coring that we talked about, it's
 12 a process. Are you familiar with the process?
 13 A. Yes.
 14 Q. Where they actually drill into the component of the
 15 bridge --
 16 A. Yes.
 17 Q. -- and take a hardened sample out?
 18 A. I didn't watch them, but that's how it's done.
 19 Q. And then they take those samples away for compression
 20 pressure testing?
 21 A. Yes.
 22 Q. So it can be an expensive process, can't it?
 23 A. Not very. 1500.
 24 Q. Well, you know there was one coring being done below
 25 grade?

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1 A. I don't know what you're talking.
 2 Q. Did you know it was below grade?
 3 A. No.
 4 Q. Okay. If those core tests confirm that the concrete
 5 did not meet the specs, you as the supplier are responsible
 6 for the cost of the coring, aren't you?
 7 MR. FINE: I'm going to object as to ambiguous unless
 8 we know what statute he's talking about.
 9 THE COURT: Objection sustained. We're talking about
 10 several different specs.
 11 Q. (BY MR. FRITS) Okay. The core tests are designed to
 12 test strength; right?
 13 A. Yes.
 14 Q. Okay. So if the core tests come back and confirm that
 15 the strength-testing specs were not met, you as the
 16 supplier are responsible for the cost of the coring, are
 17 you not?
 18 A. Never heard.
 19 Q. What's that?
 20 A. Never heard.
 21 Q. Never heard what?
 22 A. That it didn't pass or that --
 23 Q. That's not my question, sir. My question is --
 24 A. It happens occasionally, but it never happened to me.
 25 So I wouldn't know. It never happened to me. That's

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1 A. No.
 2 Q. And you said you didn't know that there was a core
 3 test done below grade in this case?
 4 A. All I saw was the truck part. That's all I knew.
 5 Q. Did you see them in the water?
 6 A. No. There wasn't water.
 7 Q. But you would agree that, if Mr. Grangaard has
 8 expenses for coring that confirm the concrete didn't meet
 9 the strength tests, you would be responsible for that?
 10 MR. FINE: Objection, Your Honor. Relevance. No
 11 contract.
 12 THE COURT: Overruled. It's been discussed this was a
 13 verbal agreement. It's based on what his understanding is.
 14 So the question can be answered.
 15 THE WITNESS: But it by me again.
 16 MR. FINE: Can I have you read it back.
 17 THE REPORTER: Sure.
 18 (The requested portion of the record
 19 was read by the reporter.)
 20 THE WITNESS: We never talked about it.
 21 Q. (BY MR. FRITS) But you would be responsible for it?
 22 A. I never -- we never agreed to that.
 23 Q. But you agree in general you're responsible for those
 24 types of costs?
 25 A. I never read it in writing; I just heard it from

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1 what's out in the field.
 2 Q. The question, though, was if those core tests come
 3 back and confirm that the strength-testing specs --
 4 A. Yes.
 5 Q. -- were not met, you as the supplier are responsible
 6 for the cost of the core tests?
 7 A. Yes.
 8 MR. FINE: Objection. Objection.
 9 THE WITNESS: I think so.
 10 THE COURT: Just wait.
 11 MR. FINE: Objection to relevance unless there's some
 12 contract that specifies.
 13 THE COURT: No. The objection is overruled. We are
 14 only talking about the cost of the core tests. And his
 15 response was yes, and that answer will stand. It doesn't
 16 go beyond any other responsibility. The question just asks
 17 for the cost of the core tests. Mr. Frits; correct?
 18 MR. FRITS: Right.
 19 THE COURT: Okay.
 20 Q. (BY MR. FRITS) So it's your testimony you would be
 21 responsible for paying for these tests that confirm for bad
 22 concrete, but you're not responsible for the results of the
 23 poured concrete?
 24 A. No.
 25 Q. You're not held responsible?

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1 hearsay out in the field.
 2 Q. All right. You've accused my client of some pretty
 3 serious things: Bad faith, fraud and deceit. Is that
 4 right? Or Golden Visa has?
 5 A. If it's on the payment side, that would probably be an
 6 answer for Brian.
 7 Q. But have you accused my client of being fraudulent?
 8 A. Only if he doesn't pay. You know, I didn't use those
 9 words, but I just --
 10 Q. And these claims are based upon some argument that you
 11 were induced or tricked into supplying the concrete for the
 12 deck for the remainder of the project; is that right?
 13 A. On account of unpaid bills, yes.
 14 Q. Right. And you weren't going to continue supplying
 15 because the bills weren't paid?
 16 A. Yes.
 17 Q. And then he told you he would pay you?
 18 A. Yes.
 19 Q. And he did pay you?
 20 A. Yes. For the bottom, just for the bottom.
 21 Q. And based upon that payment, you continued supplying
 22 concrete; correct?
 23 A. Yes. That's the only problem we had with it.
 24 Q. So that was the only reason you continued supplying
 25 concrete is because he paid you; right?

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1 A. Yes.

2 Q. Was there any other reason why you continued --

3 A. No. No.

4 Q. Let me finish my question. Was there any other reason

5 why you continued supplying concrete for the project other

6 than he paid you?

7 A. No. It's the only thing I had against him.

8 Q. And you talked about this conversation on October 11st

9 on the bridge deck with you and Brian and Jeremiah. And

10 you said some things that Jeremiah told you everything was

11 good, good, fine.

12 A. Yes.

13 Q. So you have any more detail about what he said to you?

14 A. It's all that was talked about.

15 Q. Okay. That's as best you can describe what he said to

16 you; is that right?

17 A. Yes.

18 Q. Okay. When you said that you were owed money and you

19 tried to get hold of him and he just doesn't respond; is

20 that right?

21 A. Yes.

22 MR. FRITZ: I'll show you what's been marked

23 Exhibit 44. It's an email exchange.

24 THE COURT: Mr. Fritz, this is my copy?

25 MR. FRITZ: You can have that.

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1 Q. So the cylinder samples, which were used to test

2 strength, all passed for temperature, didn't they?

3 A. Mine or theirs? I don't know theirs.

4 Q. Theirs.

5 A. I wouldn't know. That would be a question for Tim

6 Marshall.

7 Q. Okay. But did yours?

8 A. Yes.

9 Q. Okay. Sir, do you agree with me that if you, Golden

10 View, failed to deliver and supply concrete as you agreed

11 to do, that you should be responsible for any damages

12 caused by that?

13 A. I don't think of any.

14 Q. I understand you can't think of any. I'm just --

15 A. I don't think so.

16 Q. You don't think you'd be responsible?

17 A. I didn't think we delivered something that was out of

18 certification.

19 Q. Let me just stop you. You've got to listen to my

20 question. Would you agree with me that, if Golden View

21 failed to deliver concrete as they agreed to do, Golden

22 View should be responsible for payment of any damages

23 caused?

24 A. I don't feel we're supposed to be responsible. I'm

25 under assumption -- I'm under assumption a contract that

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1 THE COURT: Thank you.

2 Q. (BY MR. FRITZ) Between Brian Waldner and Grangaard.

3 Are you familiar with that email exchange?

4 A. That would be a question for Brian. That's not my

5 email.

6 Q. Okay. Were you aware that Grangaard Construction

7 emailed Brian in December of 2021 and said, in response to

8 a question about payment of the bill, "We're waiting for

9 the DOT results --"

10 A. I can't recall it.

11 Q. Okay. Let me finish my question. Are you aware that

12 Grangaard Construction emailed Brian in December of 2021 in

13 response to a question about payment, saying that "We're

14 waiting for the DOT results before we make payment"?

15 A. No.

16 Q. Okay. There's been some questions about heat and

17 concrete. Sorry to skip around. The state would test

18 right there at the site, would they not, the concrete?

19 A. Yes.

20 Q. And if it wasn't within their specifications, it would

21 get rejected?

22 A. Yes.

23 Q. And if it didn't meet the specifications, you wouldn't

24 take cylinder samples, would you?

25 A. No.

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1 would put me liable to something, but we didn't have no

2 contract. So --

3 Q. If you don't perform on your end, you don't have to be

4 responsible?

5 A. No.

6 MR. FRITZ: All right. That's all the questions I

7 have.

8 THE COURT: Mr. Fink, any redirect?

9 REDIRECT EXAMINATION

10 BY MR. FINK:

11 Q. So counsel brought up the cylinder tests and asked you

12 about observations you made. What else did you observe

13 when the state was filling these cylinders on the job site?

14 A. As far as handling the cylinders?

15 Q. Yes.

16 MR. FRITZ: Objection. We're getting into the motion

17 in limine, Your Honor.

18 MR. FINK: He opened the door, Your Honor.

19 THE WITNESS: You talked about the strength tests.

20 THE COURT: I think we just talked about the fact that

21 the tests were conducted while the details of those are not

22 an area we're going into. So the objection is sustained.

23 Q. (BY MR. FINK) Did you have concerns about how those

24 cylinders were being handled?

25 MR. FRITZ: Objection. We're getting the same

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1 the next part of the project?

2 A. Probably a little bit of grading work to get the beams

3 constructed, and then they would have started with

4 construction of cofferdams for the piers.

5 Q. Do you remember about when concrete was beginning to

6 be delivered to the job site?

7 A. I want to say June, but I'd have to look in the

8 computer and see when the first test was made, I guess.

9 Q. June of 2021?

10 A. Yeah, I believe it was 2021. I was trying to think if

11 it was 2020.

12 Q. Now, before any concrete was ever mixed by Golden

13 View, did you or someone under you go and review the Golden

14 View concrete plant?

15 A. Yes.

16 Q. Who did that?

17 A. Either myself or Milo Hanson would have been his name,

18 but yeah.

19 Q. What was the purpose of that?

20 A. Well, when the mix design started, the mix design

21 process, Golden View had done a project a couple years

22 before for the State, a box culvert, but that concrete did

23 not require fly ash. So the first thing I was concerned

24 about was whether we would have fly ash in that mix,

25 because our deck mix design requires fly ash.

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1 be required for these mix designs?

2 A. Yes.

3 Q. Were there more than one mix design?

4 A. Yes. Not that were approved but -- well, there were

5 two, maybe three that were approved, but two for certain

6 that were approved.

7 Q. I'm showing you what has been marked as Exhibit 10.

8 Can you look at that and tell the jury what it is?

9 A. This is the mix design. It's one iteration of the mix

10 design, but this particular one -- it may be the final mix

11 design, but this was not reviewed or approved by the

12 concrete office. Our concrete office in Pierre approves

13 the mix designs.

14 Q. So would the Department of Transportation actually

15 have the approved form?

16 A. Yes.

17 Q. Okay. Would that be substantially the same as what

18 you're holding except for the signatures at the bottom?

19 A. Without seeing the final, you know, the actual final,

20 it appears that this has the correct admixtures, the

21 correct volumetrics, correct cement type, fly ash. It's

22 very close. There may be some minor adjustments, but

23 that's pretty close to the final mix design for that M45.

24 Q. Did the Department of Transportation ultimately

25 approve all of the mix designs used on the bridge?

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1 Q. So did you have conversations with somebody from

2 Golden View about the mixes that would be required?

3 MR. FRITZ: I'm going to object. I'm not sure he said

4 he did the pre-inspection. He said it was him or someone

5 else.

6 THE COURT: The objection is overruled. The question

7 is did he have any conversations.

8 MR. FRITZ: Fair enough.

9 Q. (BY MR. FINK) You can answer.

10 A. Can you repeat the question for me?

11 Q. Did you have any conversations with anyone from Golden

12 View about the mix design?

13 A. Yes.

14 Q. Who did you talk to?

15 A. Ian Waldner.

16 Q. And tell the jury what kind of conversations you had

17 with him about the mix design.

18 A. Well, initially there was a mix design that was

19 roughly submitted, but it didn't have fly ash in it. So

20 the first conversation would have been it needed to -- or,

21 by respect, it's 10 to 25 percent fly ash in one of the mix

22 designs. The other mix design for the columns and piers

23 doesn't require fly ash, but our deck mix design required

24 fly ash.

25 Q. So did you discuss with Ian the ingredients that would

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1 A. Yes.

2 Q. And what happened to those approved forms? Where did

3 they go?

4 A. They're in a file, one probably in Pierre and another

5 copy in my office, I would say.

6 Q. Do you have any information, as you sit here today,

7 that would lead you to believe that Golden View did not

8 follow the mix design?

9 MR. FRITZ: I object to this improper expert testimony

10 and foundation.

11 THE COURT: Overruled. It leads to fact, question of

12 fact.

13 You can answer.

14 MR. VISHUS: Okay. Again, I'll have you repeat that,

15 if you would.

16 Q. (BY MR. FINK) Well, do you have any information that

17 would lead you to believe that Golden View improperly mixed

18 any concrete for the project?

19 A. No.

20 Q. Did you actually meet with Ian and help him fill out

21 the mix design that's shown in Exhibit 10?

22 A. Parts of it I did. I remember helping him do the math

23 work on the fly ash substitution, and at one point there

24 was a submittal that had different admixtures that weren't

25 approved or on the State's approved supplier list. So

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1 those were changed.

2 Q. Now, the actual form. Who creates the actual form
3 that gets filled in?

4 A. Well, it's called a contractor, contractor furnished
5 mix design I believe is how it's worded. So ultimately
6 what I send in -- I may help him fill this out because he's
7 not got that much familiarity with it. So I would have
8 helped him out, but I would -- when he signs it, he should
9 be aware of what he is signing there.

10 Q. And what information is on there? Is there anything
11 on there other than ingredients?

12 MR. FRITZ: Objection. The document speaks for
13 itself.

14 THE COURT: Overruled. He can attempt to answer.

15 THE WITNESS: This has the aggregate sources, a coarse
16 aggregate and fine aggregate source; it has the specific
17 gravity and the absorption.

18 Q. (BY MR. FRITZ) It's basically a recipe, isn't it?

19 A. Yes.

20 Q. And the obligation of the supplier is to follow the
21 recipe?

22 A. Yes.

23 Q. But the form itself, is that a document generated by
24 the Department of Transportation, if you know?

25 A. No. The blank form is but --

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1 source, we don't need the water tested; but I believe this
2 was. And then the cement and fly ash, there would be
3 samples of those that are submitted to Pierre as well.

4 Q. Why does that happen?

5 A. Well, we have specifications on all of these
6 materials; so the testing is to see that it meets
7 specification.

8 Q. And you do that testing, I take it, because when the
9 mix design gets approved, then the department has an idea
10 of what is inside the concrete when it shows up at the
11 location?

12 MR. FRITZ: Objection. Foundation.

13 THE COURT: Sustained.

14 Q. (BY MR. FRITZ) Had question.

15 Did this test of materials at the Golden View site
16 happen more than one time, or was it just the beginning?

17 A. There's requirements for tests every -- there's a
18 certain frequency for these tests. I don't know if it's --
19 I think 2,000. Well, that's for an actual base course.
20 With concrete I think it's based on the amount of cubic
21 yards that are batched. So every 50 or 100, whatever that
22 number is, in cubic yards, you'd run another test.

23 Q. Do you recall if anyone from your engineering
24 department raised any concerns with Golden View about any
25 of the materials located at their site?

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1 Q. That's what I was getting at. The blank form is a
2 Department of Transportation form, but then the supplier
3 fills out that form so that the mix can be approved by the
4 Department of Transportation?

5 A. Yes.

6 Q. And then, before any concrete is mixed, does the
7 Department of Transportation send somebody to review
8 the materials -- the rock, the sand, the other things -- at
9 the supplier's place of business?

10 A. Yes.

11 Q. Who did that?

12 A. I believe Milo Hanson was the technician.

13 Q. And what is the reason for that review?

14 A. Well, the testing for the aggregates is called a
15 gradation. But there's a number of sieves, and we test the
16 aggregates so they meet these sieve requirements with a
17 certain amount of each size of rock. There's -- without
18 looking at the actual form, there's four or five of these
19 spec sieves. So that's one of the tests.

20 Q. Okay. So ahead, then. What else do you do?

21 A. The others are samples of the admixtures, the air
22 reducer -- or the air entrainment and the water reducer.
23 So we send samples of those to Pierre, and they're tested.
24 In this case I think we did send a water sample. But
25 usually if it's a rural water source or a municipal water

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1 A. No. No. All of our tests passed.

2 Q. Now, when concrete is brought to the project site, are
3 you or some other DOT technician there to observe it?

4 A. Yes.

5 Q. How often were you there during this project? A
6 majority of the time? I'm just wondering generally.

7 A. Probably more than 50 percent, but not 100.

8 Q. So when a load of concrete would come to the job site,
9 would you receive a document from the Golden View truck
10 driver?

11 A. Yeah. Yes. I computerized batch ticket.

12 Q. I'm showing you what's been marked as Exhibit 15, and
13 I'm not expecting you to go through all of them. But
14 there's been testimony that these are the batch tickets for
15 the project. Could you review those? And then I'll have
16 some questions for you.

17 A. Where.

18 Q. So, as I understand it, the truck arrives and then the
19 driver has a batch ticket like that.

20 A. Yes.

21 Q. And then you or the other technician will review that
22 batch ticket?

23 A. Yes.

24 Q. Did you ever, during the course of this project,
25 review any batch ticket where you felt there was a mistake

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1 into any specifics about weather. I do know it was a dry
 2 year. The Vermillion River ran dry that year. So for a
 3 long stretch in that summer it was extremely dry.
 4 Q. (BY MR. FINE) And there were actually some loads
 5 brought by Golden View that were rejected by you. True?
 6 A. Yeah. One pour.
 7 Q. Explain to the jury what happened that day.
 8 A. It was hot that day. And then when the concrete got
 9 on site, we tested it for temperature, and it exceeded our
 10 temperature, and it was rejected, so it was not
 11 incorporated into the structure.
 12 Q. What time of day did the concrete get ordered by
 13 Grangaard?
 14 A. On that day I'm not sure. It seems like it was late
 15 morning or around noon, somewhere in that time frame.
 16 Q. Did Golden View bring the concrete in a timely manner?
 17 A. Yes.
 18 Q. How hot was it when the concrete arrived to the
 19 location?
 20 A. About 92, 93 degrees.
 21 Q. Wasn't it more like 105?
 22 MR. FRITZ: Objection. He's testified.
 23 THE COURT: Sustained.
 24 THE WITNESS: The concrete temperature or the air
 25 temperature?

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1 A. We store them on site until they've -- usually about
 2 12 hours you can move the cylinder without marring the
 3 surface or disturbing the concrete. For these to break in
 4 the compressive strength machine, you need a flat surface.
 5 So we let them set for 12 hours. Our spec, I think, is
 6 within 24 hours they have to be moved. But once they got
 7 that set, then we take them to Mitchell, and then they're
 8 stored in a water tank.
 9 Q. So I'm going to go back and kind of plow the same
 10 ground here, but I want to be clear. Are you aware of any
 11 concrete being improperly mixed by Golden View?
 12 A. No.
 13 Q. Is it fairly normal, though, for some concrete, during
 14 the course of a project like this, to be rejected?
 15 A. Yeah. There's usually some concrete that's rejected.
 16 Sometimes for time limits and sometimes for heat but --
 17 it's not frequent, but it happens.
 18 Q. And we talked about this in your deposition. Would
 19 you say that the amount of concrete rejected for this
 20 project was more, less, or about the same as for other
 21 projects?
 22 A. About the same, I guess.
 23 Q. So if these cylinder strength tests fail, does the
 24 contractor have to do anything?
 25 A. In some cases they have to; in some they have the

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1 Q. (BY MR. FINE) The air temperature.
 2 A. Oh, yeah. Yes. It was over 100.
 3 Q. So you took a temperature of the concrete when it
 4 arrived but before it went into the forms?
 5 A. It never went into the forms. It was rejected.
 6 Q. Was that Golden View's fault it was rejected?
 7 A. No.
 8 Q. They didn't choose to pour that day, did they?
 9 A. No. They were asked to deliver concrete and come out,
 10 and it exceeded the heat level.
 11 Q. Were there other days in June and July when it was hot
 12 out during the time concrete was being poured?
 13 A. Not to that -- never to that extreme. I do remember
 14 that we had one short stretch there in June where we had
 15 several days that were around 100; but it's June, so
 16 obviously 85, 90 degrees, I'm guessing, many days.
 17 Q. Did that cause you concern when it was hot out that
 18 the strength might be impacted?
 19 A. No.
 20 Q. Why not?
 21 A. The concern for us and the purpose for this testing is
 22 we're more concerned about the concrete temperature itself,
 23 not the air temperature.
 24 Q. Well, the cylinders, once they're filled with
 25 concrete, what happens to those cylinders?

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1 option. The way the spec is written is if these cylinders
 2 don't break at 4500, if they're between 4,000 and 4500, the
 3 contract will have an option to core those. When the core
 4 result will be the acceptance test. If it's below 4,000,
 5 then they are required to core that if it deviates by more
 6 than 500 PSI.
 7 Q. "They" meaning who is required to core?
 8 A. The contractor.
 9 Q. And if coring is done and the concrete passes, does
 10 the contractor have to eat that testing expenses?
 11 A. No. If it passes, if the cylinder -- or if the core
 12 passes, then we'll pay for that testing; if it fails, then
 13 they have to pay for the testing.
 14 Q. So if it fails, meaning it's got to be removed, whose
 15 responsibility is it to do that under the standards and
 16 specifications book with the DOT?
 17 A. I'm not sure I'm following that question.
 18 Q. Well, is it Grangaard's responsibility to remove that
 19 concrete, or does some other company come in and do it?
 20 MR. FRITZ: Objection. Foundation.
 21 THE COURT: No. Overruled.
 22 THE WITNESS: Yeah, I would assume that they would do
 23 it. I mean, they have the equipment there.
 24 Q. (BY MR. FINE) But if the concrete tests well enough
 25 that it doesn't have to be removed, but it still tests

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1 probably going to say that the contractor is responsible
2 for meeting these specifications.

3 Q. Have you seen any document that would lead you to
4 believe that there was a contract between Grangaard and
5 Golden View to follow the standards and specifications
6 book?

7 A. I can't speak to what their agreement is.

8 Q. Did you ever -- oh, strike that.

9 Now, you understand that Grangaard did receive some
10 penalties related to the concrete; right?

11 A. Yes.

12 Q. But you can't say that any of those penalties resulted
13 from improperly mixed concrete, can you?

14 A. Not to a certainty, no.

15 Q. To your knowledge, all of the concrete met your mixed
16 design standards that are listed on the mixed design form;
17 true?

18 A. Yes.

19 Q. And isn't it true that with the variables related to
20 concrete, it can be properly mixed but still fail later
21 strength testing?

22 A. Can you reword that? Or not reword it. Because we.
23 Just ask again. I didn't catch it.

24 Q. Well, wouldn't it be true that with all the variables
25 with concrete, it might be mixed properly but still later

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1 Q. (BY MR. FINE) Now, did you ever talk to anyone from
2 Golden View about any of the specifics of how this penalty
3 system worked between the Department of Transportation and
4 Grangaard?

5 A. I don't know if it was -- it wasn't real specific, but
6 I did have some conversations with Sam because I was
7 concerned that -- well, my general concern was that this
8 was a new supplier. So, first, I wanted to know some
9 things as to whether we were going to be able to get what
10 we needed for concrete. So that was the first conversation
11 I had.

12 Q. My question was, did you ever talk to Sam about the
13 specific method by which penalties were assessed under the
14 Department's agreement with Grangaard?

15 A. No.

16 Q. Now, as I understand it, by the end of August, the
17 lower parts of the bridge were basically completed and what
18 remained to be poured was the deck. Does that square with
19 your memory?

20 A. That time frame is pretty -- somewhere in there,
21 because we poured the deck in October. And I don't know if
22 it took two months to get ready or six weeks, something
23 like that.

24 Q. But, by the end of August, you became aware of some, I
25 guess I'll call them, suspect cylinder tests?

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1 fail strength testing?

2 A. I think that's possible.

3 Q. Well, it is true?

4 MR. FRITH: Asked and answered.

5 THE COURT: Sustained.

6 Q. (BY MR. FINE) You remember having your deposition
7 taken in this case?

8 A. Yeah.

9 MR. FINE: Okay. If I can approach the witness, Your
10 Honor.

11 THE COURT: You say.

12 Q. (MR. MR. FINE) On page 39, line 19, I'm going to read
13 what I asked and what you answered, and I'm going to ask
14 you if that in fact what's your answer. Okay?

15 Question: "And as you said before, there are a lot of
16 variables with concrete, and so concrete might be mixed
17 properly but still fail later strength testing. Is
18 that --"

19 And did you answer "Yes"?

20 A. I did. So it is a possibility, and I would say yes
21 but --

22 THE COURT: Stop. You've already answered it. If he
23 wants more information, he has to ask another question.
24 All right?

25 THE WITNESS: Okay.

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1 A. I would have known by then. The first test didn't
2 fail, but somewhere not too far into the process, two or
3 three tests in is when we had the first failure. So I
4 suspect that was late June, so by around maybe August let
5 we had -- the first deviation was known.

6 Q. And, in fact, by the end of August, Jeremiah Grangaard
7 knew that he was going to be facing some penalties under
8 his contract with the DOT; true?

9 A. Well, he at least knew that it would have to be cured.
10 At that time, whether he knew what the core results would
11 be and how it would be assessed, I don't know that time
12 frame.

13 MR. FINE: Can I approach, Your Honor?

14 THE COURT: You say.

15 Q. (BY MR. FINE) During your deposition, on page 44, I
16 asked the question: "So would it be fair to say that, by
17 the end of August or early September, Grangaard knew that
18 there could be deductions?"

19 Did you answer "Yes"?

20 A. Yes.

21 Q. Now, at some point in the process, I understand you
22 did talk to Sam about there being some problem with the
23 testing.

24 A. I'm sure that I did. My original contact would have
25 been through Jeremiah. When these deviations happen, the

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1 contractor has a five-day window to decide whether they
 2 want to core or not. So my first conversation on that
 3 failing concrete is always going to be with the prime
 4 contractor first.

5 Q. And then is it your policy to let the prime contractor
 6 have whatever discussions he wants with the supplier?

7 A. I assume that they would, but it's not for me to make
 8 that decision, I guess.

9 Q. You try to stay out of the dealings between the
 10 contractor and the supplier?

11 A. As much as I can, yeah.

12 Q. But I think you said in your deposition that you did
 13 talk to Sam just generally about there being some
 14 strength-testing problem?

15 A. I'm sure that I did. I mean Sam was -- their plant is
 16 only a couple miles apart, and Sam and I were talking
 17 fairly frequently; so I know he was concerned in asking me
 18 what the test results are.

19 Q. It sounds to me like you don't really remember the
 20 details of the conversation. Or am I wrong?

21 A. I probably spoke with Sam close to a hundred times.

22 Q. Okay. But you never told Sam that if there were any
 23 strength-testing failures, Granggaard could somehow avoid
 24 paying Golden View? You never told him that, did you?

25 MR. FRITZ: Objection. Leading.

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1 it -- where on the mix design form does it say that --

2 A. I don't have the mix design form with me anymore.

3 Q. Well, I'm talking about Exhibit --

4 A. Oh, maybe it's here.

5 THE COURT: You took it away, I think.

6 Q. (BY MR. FRITZ) Oh. Sorry.

7 Where on the contractor concrete mix design does it
 8 contain any information about 4500 pounds per square inch?

9 A. Class of concrete, M45.

10 Q. So where on that sheet does it say that the concrete
 11 is designed to withstand 4500 pounds per square inch?

12 MR. FRITZ: Objection. Asked and answered.

13 THE COURT: Overruled.

14 THE WITNESS: It doesn't say that specifically on
 15 there.

16 Q. (BY MR. FRITZ) And in order to understand what the
 17 strength requirements are, one would actually have to look
 18 at the DOT specifications book; right?

19 A. Yeah.

20 Q. And is there any language on this mix design form that
 21 says that reference should be made to the standards and
 22 specifications book?

23 A. Not on this. Well, no, I don't think so. No.

24 Q. Who inspected the bridge after it was finally
 25 constructed? Did you do that?

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1 THE COURT: Sustained.

2 Q. (BY MR. FRITZ) Did you ever tell Golden View that if
 3 there were strength-test problems, Granggaard could avoid
 4 paying Golden View?

5 A. No. No.

6 Q. Now, we've been talking about standards. There are
 7 really two standards here, aren't there? There are mixed
 8 standards and then strength standards?

9 A. Yeah. The mix design is just an approved batch for
 10 that concrete. It's just basically a recipe for that
 11 concrete, and that's what the mix design is. The strength
 12 requirement is --

13 Q. Something different?

14 A. -- the specification in our book, yes.

15 Q. And these strength specifications aren't listed on the
 16 mix design, are they? Do you need to look at it?

17 A. Well, it's -- the mix design is for an M45 concrete.

18 Q. But I'm talking about the actual strength standards.
 19 Are those contained on the face of that document?

20 A. M45 concrete is 4500 PSI concrete.

21 Q. Where does it say that on the document?

22 A. It says M45. And by our specifications, if you look
 23 at the table on our specs, the specification for M45
 24 concrete is 4500 PSI.

25 Q. So my question is -- maybe you're not understanding

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1 A. After everything was done? The deck? Everything?

2 Q. Yes.

3 A. Yeah. I do an inspection, I mean at the end, but we
 4 also have -- our region bridge office comes out and goes
 5 through the bridge and checks for any other deviations.

6 Q. What was the result of the final inspection in terms
 7 of the condition of the bridge?

8 A. There was some punch-list items there. And that's
 9 routine. He sends me a list of -- he's like, well, you
 10 need riprap here, your riprap is not quite right here,
 11 guardrail issues, things like that. And then I have to
 12 address those, and they have to be corrected.

13 Q. Now -- oh, I'm sorry.

14 A. They have to be corrected before I can final the
 15 project.

16 Q. So the punch-list items, those are things that need to
 17 be done before final payment is made?

18 A. Not necessarily.

19 Q. Okay. Was the bridge determined to be a safe bridge?

20 A. Yes.

21 MR. FRITZ: I want to make sure I offer that document,
 22 Your Honor. I would offer Exhibit 12.

23 MR. FRITZ: No objection.

24 THE COURT: Exhibit 12 will be received.

25 Q. (BY MR. FRITZ) All right. So then we're going to go

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1 A. Yeah.

2 Q. Did he ever tell you that he expected Golden View to

3 pay him for any of the penalties he incurred under his

4 contract with the DOT?

5 A. In some form, yes. I knew we had those conversations

6 when the estimates were being made. So somewhere in that

7 process I guess I was aware of that.

8 Q. So, by the time of the bridge project, he had told you

9 he planned on withholding money from Golden View?

10 MR. FRITS: Objection. Misstatement of testimony.

11 THE COURT: The objection is sustained. I think you

12 can rephrase your question, Counsel.

13 Q. (BY MR. FINK) Prior to the deck being poured, did he

14 tell you he planned to withhold money from Golden View?

15 A. I don't think he specifically told me that. I

16 withheld money from them for the deducts. So that money

17 was withheld.

18 Q. Do you know if he passed that information onto Golden

19 View?

20 A. No. I don't know.

21 Q. Did you witness the conversation between Jeremiah,

22 Sam, and Brian where they talked about supplying concrete?

23 A. For the deck or --

24 Q. For the deck, yes.

25 A. I was around there, I'm sure, but I think I -- I

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1 supplied for the deck?

2 A. Other than one slump failure or two, all the strengths

3 were good on that deck.

4 Q. So if the slumps were not good, why was that concrete

5 accepted?

6 A. Well, when you're doing the deck, you're actually

7 running across with a paving machine; so you've got to keep

8 the's -- you don't want to stop your paver, really, even

9 in this process, especially with this bridge, which is

10 a continuous concrete bridge. So there are stipulations

11 about where you can stop on a deck. And it's critical

12 because if you don't stop at those points you could have

13 a deck failure, and the state has had deck failures. So

14 you want to keep the process going with the paver. So you

15 just incorporate it in and then write the deduct.

16 Q. And then, with the slump, is that something that could

17 have been corrected at the site?

18 A. It was -- well, no, not -- you could in theory sit and

19 let that truck wait. But at the time, we're testing down

20 on the ground and this is being pumped onto the deck. So

21 the ability to correct that, other than stopping, there's

22 really not a way to correct it.

23 Q. So comparing this --

24 A. So when I say correct it, you correct it on the next

25 load.

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1 didn't really pay any attention to what they were talking

2 about amongst themselves because, again, I don't consider

3 that my issue.

4 Q. But from what you saw, could you tell that Sam was not

5 happy that Jeremiah had failed to pay for some concrete by

6 that point?

7 MR. FRITS: Objection to form and foundation.

8 THE COURT: Sustained.

9 Q. (BY MR. FINK) Did you hear Sam raise any concerns

10 about nonpayment at this meeting in October?

11 A. I don't know if it was at that meeting, but I know

12 that he did raise concerns to me.

13 Q. Okay.

14 A. Yeah.

15 Q. But at the time of this meeting or shortly thereafter,

16 did you understand that Grangaard had agreed to pay the

17 amount due for the deck concrete?

18 MR. FRITS: Objection to foundation and vague.

19 THE COURT: Sustained.

20 Q. (BY MR. FINK) Did Sam tell you what Sam expected to

21 happen in terms of payment after the meeting in October?

22 A. I don't know if it was at that meeting, but at some

23 point I know he expected -- he raised concerns that they

24 hadn't been paid. And Brian did too.

25 Q. So what was the condition of the concrete that was

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1 Q. Okay. So, compared to other projects, would you say

2 the deck pour went well or average or poor?

3 A. I don't have that much experience with the bridge

4 deck, but it went smooth when it crossed the deck. There

5 were no glitches. That's all you can hope for.

6 Q. And the concrete ultimately tested all good, right?

7 MR. FRITS: Objection. That's not his testimony. On

8 the deck?

9 MR. FINK: On the deck.

10 THE COURT: Objection sustained. I think you have

11 to have to clarify.

12 Q. (BY MR. FINK) The deck concrete tested good?

13 A. Yes.

14 Q. And, in fact, you assumed that Jeremiah Grangaard

15 would pay Golden View for the deck concrete because there

16 wasn't any failing material on it?

17 MR. FRITS: Objection. Leading.

18 THE COURT: Sustained.

19 Q. (BY MR. FINK) Did you assume that Grangaard would pay

20 Golden View for the deck material?

21 MR. FRITS: Objection. Relevance.

22 THE COURT: Overruled. I don't know if he had an

23 answer.

24 THE WITNESS: I'm going to ask you to repeat it.

25 Q. (BY MR. FINK) Since the deck material was good, did

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1 A. No.
 2 Q. Okay. To your knowledge, had they ever done a state
 3 project?
 4 A. A box culvert. I think it was in 2018.
 5 Q. But had they ever done, to your knowledge, a bridge
 6 project?
 7 A. No, not to my knowledge.
 8 Q. And a bridge project would be a much bigger project
 9 than a box culvert project?
 10 A. Yes. Yeah.
 11 Q. Any concerns at that point about Golden View and
 12 whether they were up for the task of this job?
 13 A. No, not really. You know, they had no track record
 14 to speak of, so I had nothing against them supplying
 15 concrete.
 16 Q. And then you talked a bit about this preconstruction
 17 inspection of the facility, the plant.
 18 A. Yeah.
 19 Q. You said that Golden View passed that inspection?
 20 A. They did.
 21 Q. But, of course, that passing inspection doesn't
 22 guarantee that they're going to properly mix or deliver
 23 concrete, does it?
 24 A. No. That's in the delivery process that I verify
 25 that.

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1 requires on all bridge projects: is that right?
 2 A. Bridge decks specifically. Sometimes the piers will
 3 be an M45 concrete.
 4 Q. Okay. But in this case the piers had to be M45?
 5 A. Yes.
 6 Q. And that designation of M45, that is a state
 7 designation: right?
 8 A. Yes.
 9 MR. FINE: I'm going to object to ambiguous, using the
 10 term "state." I think state DOT is --
 11 THE COURT: Objection sustained. You can rephrase.
 12 Q. (BY MR. WHITE) Okay. The state created that M45
 13 designation?
 14 MR. FINE: I'm going to object to ambiguous.
 15 MR. WHITE: Okay. Well, I'll strike it.
 16 Did Golden View come up with that designation?
 17 A. No. No.
 18 Q. It's not a Golden View code; it's a state code?
 19 MR. FINE: Objection. Ambiguous. It's a DOT code
 20 from the spec book.
 21 THE COURT: The objection is sustained as far as
 22 "state." I guess if you refer to them as "DOT" you
 23 probably wouldn't have an objection.
 24 Q. (BY MR. WHITE) Okay. That's a DOT code, not a Golden
 25 View code?

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1 Q. The spec book?
 2 A. We talked earlier about batch tickets. That's what
 3 I'm --
 4 Q. Okay. But that passing grade on the preconstruction
 5 inspection doesn't guarantee they're going to deliver good
 6 concrete. Is that fair?
 7 A. Yeah. Yeah. There's no guarantee.
 8 Q. Sure. It's one thing you check?
 9 A. Yeah.
 10 Q. And speaking of M45 concrete, tell the jury. What is
 11 M45 concrete?
 12 A. I don't know what the A stands for. The 45 is 4500
 13 PSI concrete.
 14 Q. What does that mean, 4500 PSI concrete?
 15 MR. FINE: I'm going to object to the relevance, Your
 16 Honor. So far there's been no discussion about anybody
 17 telling any of this to Golden View.
 18 THE COURT: Overruled. He can respond.
 19 THE WITNESS: Just simply that the design strength is
 20 to reach 4500 PSI.
 21 Q. (BY MR. WHITE) So when you do these cylinder samples
 22 that we've talked about and they put them under compression
 23 testing, it will meet a 45 PSI test?
 24 A. Yeah.
 25 Q. And that is the class of concrete that the state

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1 A. Yes.
 2 Q. Okay. And when you require that a bridge project,
 3 including -- well, let me back up. In this case it was
 4 important that M45 concrete be supplied for the piers and
 5 the deck?
 6 A. Yes.
 7 Q. One thing I want to clear up is there's been a lot of
 8 talk about specs, and the term "mixed specs" has been used.
 9 I've heard it not by you necessarily, but material specs
 10 and then there are what I call performance specs. There's
 11 really just one set of specs: is that right?
 12 MR. FINE: Objection. Your Honor. Relevance.
 13 THE COURT: Overruled.
 14 THE WITNESS: In specific to concrete or --
 15 Q. (BY MR. WHITE) In specific to M45 concrete.
 16 A. Yeah. Yeah. The spec is in our structural concrete
 17 section of our spec book, if that answers that.
 18 Q. Yes. I'm going to get to that here. I'm going to
 19 show you an exhibit that's been marked 41. I'll represent
 20 to you that's a page out of the DOT spec book. Do you
 21 recognize that?
 22 A. Yes.
 23 Q. Okay. Are those the specs that you're talking about
 24 for M45 concrete?
 25 MR. FINE: I'm going to object, Your Honor, on the

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1 MR. FINE: Objection. Relevance. Your Honor.
 2 THE WITNESS: Sorry.
 3 THE COURT: Objection sustained. The jury is to
 4 disregard the last response.
 5 Q. (BY MR. FRITZ) Could any concrete supplier find the
 6 spec book?
 7 MR. FINE: Objection. Relevance and speculation.
 8 THE COURT: Objection sustained as to relevance.
 9 Q. (BY MR. FRITZ) If a concrete supplier said there's
 10 no way for us to know what the M45 specs were, is that
 11 true?
 12 MR. FINE: Objection. Your Honor. Relevance.
 13 THE COURT: Overruled. He can try to answer.
 14 MR. FRITZ: Could you maybe read it back?
 15 (The requested portion of the record
 16 was read by the reporter.)
 17 MR. FINE: I'm going to object, Your Honor.
 18 Speculation.
 19 THE COURT: It's sustained on the grounds of
 20 speculation.
 21 Q. (BY MR. FRITZ) Does the DOT expect that concrete
 22 suppliers know that they have to meet these specs?
 23 A. I guess we expect that the prime contractor does and
 24 that they will pass that knowledge on to their suppliers.
 25 Q. Okay. And part of that is do you expect that they

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1 M45 concrete?
 2 A. I don't know if the conversations were that specific
 3 as to the PSI of it.
 4 Q. But you know they had to supply M45 concrete?
 5 A. Yes.
 6 Q. They knew that?
 7 A. I can't say if they did, but I would assume that they
 8 did.
 9 Q. They did sign this document that said they'd have M5
 10 class concrete, right?
 11 A. Yes.
 12 Q. At some point did you have a discussion with Sam in
 13 which he indicated words to the effect of, as long as
 14 Golden View meets the mix design criteria and passed the
 15 fresh concrete test, that's all they had to do?
 16 A. Yes.
 17 Q. Okay. When was that discussion, roughly?
 18 A. A couple times but fairly early in the project or
 19 fairly early when we started our concrete work.
 20 Q. And you corrected him, didn't you?
 21 MR. FINE: I'm going to object, Your Honor.
 22 Relevance.
 23 THE COURT: Overruled.
 24 THE WITNESS: Yes, I did.
 25 Q. (BY MR. FRITZ) What did you tell him?

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1 will pass on to the suppliers, well, the 4500 PSI?
 2 A. Yes, I hope so.
 3 Q. If a concrete supplier told you that it didn't know
 4 anything about the M45 specs, would that concern you?
 5 MR. FINE: I'm going to object, Your Honor.
 6 Relevance.
 7 THE COURT: Objection is overruled.
 8 You can try to answer. Would that concern you?
 9 THE WITNESS: If it didn't meet --
 10 Q. (BY MR. FRITZ) If they didn't know what they were,
 11 A. Yeah, that would concern me that -- I mean, it's the
 12 basis of what I'm out there for, or a lot of it.
 13 Q. And, again, M45 by its own title or code name it must
 14 meet 4500 PSI, is that right?
 15 A. Yeah, to me that's right.
 16 Q. And we've already talked about Exhibit 10 here, which
 17 is a document signed by Sam Waldner. And there was
 18 discussion about what was on this document, and you
 19 mentioned or you pointed out that it does say "class of
 20 concrete, M45": right?
 21 A. Yeah.
 22 Q. And that's signed by Sam Waldner?
 23 A. Yes.
 24 Q. In your discussions with Sam Waldner or Brian, were
 25 you satisfied that they understood that they were to supply

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1 A. I told him that that's not true, that this 4500 PSI
 2 is a requirement. It's another one of our requirements.
 3 Q. So you told him that he would have to meet that
 4 requirement?
 5 A. Yes.
 6 Q. And there's no doubt in your mind that Sam Waldner at
 7 that point knew that the concrete he was to supply was to
 8 meet the 4500?
 9 A. I better back up, because when I talked to Sam, I
 10 don't think 4500 was ever mentioned. It was just mentioned
 11 that he would have to meet our concrete strength.
 12 Q. Okay.
 13 A. And we never discussed whether that was 4500 or not.
 14 Q. Okay. Did he ask you? Did he say, well, what is the
 15 concrete strength?
 16 A. Well, when we went through the mix design process, I
 17 felt he was aware that we were targeting 4500 PSI.
 18 Q. Okay. Certainly that would be common knowledge for
 19 concrete suppliers doing work with the state?
 20 MR. FINE: Objection. Speculation.
 21 THE COURT: Sustained.
 22 MR. FRITZ: Your Honor, can I approach?
 23 THE COURT: Yes.
 24 (Thereupon, a conference was held at the bench.)
 25 Q. (BY MR. FRITZ) Sir, how many different concrete

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1 suppliers in the state of South Dakota have you worked with
2 over the years?

3 A. It might be maybe ten. Chamberlain, Wimer, Mitchell
4 obviously. Taken in the past when they had their own
5 ready-mix plant. Probably a dozen.

6 Q. Do you have a general understanding of their methods
7 and practices?

8 A. A general understanding, yes.

9 Q. And would it be your experience with those concrete
10 suppliers that they would have knowledge of the M&S
11 specifications?

12 A. Yes.

13 Q. A contractor wouldn't have to tell them?

14 A. No.

15 MR. FINE: Objection, Your Honor. Speculation.

16 THE COURT: I'm going to sustain the objection. You
17 can rephrase your question.

18 Q. (BY MR. FRITZ) In your experience with these ten
19 other concrete suppliers, would you expect a contractor
20 to have to inform them about what the M&S specs are?

21 MR. FINE: I'm going to object to speculation and also
22 relevance.

23 THE COURT: Overruled. He can answer.

24 THE WITNESS: Most of them have experience on other
25 projects; so they probably already have a mix design in

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1 Q. Would there be any reason why a concrete supplier
2 would have to comply with only two of the six
3 specifications?

4 A. No.

5 Q. Did Sen Waldner also express to you at some point that
6 he felt that once the concrete was accepted by the state,
7 he had no further responsibility?

8 A. When I talked to Sen, he felt that if they met the
9 fresh concrete test and batched according to the mix
10 design, that it was out of their hands, I guess.

11 Q. Okay. Did you correct him in that statement?

12 A. I did.

13 Q. What did you tell him?

14 A. I told him that, as we discussed earlier here, that
15 no, the strength requirement is another one of the
16 specifications.

17 Q. And did you talk to him about what his risks were if
18 beyond the point where the concrete is accepted?

19 MR. FINE: I'm going to object to relevance, Your
20 Honor.

21 THE COURT: Overruled. He can try to answer if he has
22 an answer.

23 THE WITNESS: I did. I knew they were know to this,
24 And I had been involved in other bridge projects. So I did
25 try to advise him of the risks, and I asked that he

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1 their office.

2 Q. (BY MR. FRITZ) But not mix design. Would you expect
3 that they would know what the specs are for M&S concrete?

4 MR. FINE: Objection. Speculation.

5 THE COURT: Overruled. He can attempt to answer.
6 This goes with usage of trade.

7 THE WITNESS: I don't know if there would be an
8 expectation, but they would be expected to meet those. But
9 I -- I --

10 Q. (BY MR. FRITZ) And to meet them you'd have to know
11 them; is that right?

12 A. To me, not necessarily. I mean, you could still meet
13 them and not know.

14 Q. All right. Would you expect those other ten concrete
15 suppliers to know the specs?

16 MR. FINE: Objection. Speculation.

17 THE COURT: I'll sustain the objection.

18 Q. (BY MR. FRITZ) All right. Let us move on. Yesterday
19 Sen Waldner acknowledged that Golden View did have to
20 deliver concrete that would pass the fresh concrete test.
21 Okay? And he admitted that he had to meet the test for
22 slump, for air content, and temperature. Okay? As we
23 discussed, slump and air content are two of the
24 specifications for M&S; is that right?

25 A. Yep. Yes.

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1 possibly call another ready-mix supplier to find out what
2 he was actually -- what the risks actually were, because I
3 can't tell how -- I don't have enough knowledge of how to
4 handle it between the prime and the supplier, but I know
5 that we've had these failures, and so I wanted him to be
6 somewhat aware of the potential for --

7 Q. For financial harm?

8 A. I never really talked about financial harm or
9 specifics like that. The conversation was kind of
10 generated by me and my concerns with them being a new
11 supplier of whether we were going to be able to get the
12 deck that we needed. So they were fairly general
13 questions, but we never talked specifics about dollar
14 amounts or anything. I think I may have mentioned, though,
15 that there's the potential that concrete has to be removed
16 if it fails by far enough.

17 Q. And in your experience with these some ten other
18 concrete suppliers, you knew that the concrete supplier
19 might be responsible for any removal?

20 MR. FINE: I'm going to object, and I'm going to ask
21 permission to ask a question for purposes of that
22 objection.

23 THE COURT: The objection is sustained. That is not
24 relevant to this case.

25 MR. FRITZ: We've talked about removal today.

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1 THE COURT: I understand, but what the other ten
2 suppliers have knowledge of is not necessarily relevant to
3 this case.

4 Q. (BY MR. FRITZ) In your experience with these same ten
5 other concrete suppliers in your years of experience, did
6 you have an understanding of how these penalties that might
7 be assessed against the contractor could be assessed
8 further to the concrete supplier?

9 MR. FINE: Objection. Relevance.

10 THE COURT: It's going to be sustained. This witness
11 has limited knowledge between the specifics of the
12 agreement between our two parties.

13 Q. (BY MR. FRITZ) When you said risks, that you were
14 concerned that Sam did not understand the risks, what were
15 you talking about?

16 A. Well, the potential for removal, I mean, that would
17 be the extreme risk, but it was more general than that. I
18 wanted -- since they were new, I wanted them to try to
19 find -- I wanted them to seek another source and find out
20 what goes on when concrete fails. I didn't want it -- I
21 don't have enough knowledge if these are all handled the
22 same all the time, but I just wanted him to be aware that
23 there was -- there's risk involved. I mean --

24 Q. Financial risk?

25 A. Well, like I say, I don't think I ever mentioned that

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1 of your deposition here.

2 I'm sorry. Can I approach?

3 THE COURT: Yes.

4 Q. (BY MR. FRITZ) I'm turning to page 68 right here.
5 If you start at line 11, you can see it was asked: "Did
6 you ever warn anyone from Golden View that they might be
7 liable for deducts?" And you answered "Yes." Is that your
8 answer? Just for now, was that your answer?

9 A. Yeah. The way that's worded, yeah. To me it would
10 have been --

11 Q. What was your answer?

12 A. Yeah.

13 Q. And the next question was: "Who did you tell that
14 to?" And your answer was: "Sam early in the project,
15 that's when we were talking about this risk."

16 Do you recall, now, that maybe you had a conversation
17 with him about possibly being responsible for deducts?

18 A. In this, yes, I guess.

19 Q. Okay.

20 A. I don't know. There's more to it than that, I guess
21 but --

22 Q. Let me ask you this. Did you ever talk to Sam Waldner
23 about deducts?

24 A. Not specifically any amounts or anything and not
25 really deducts. The way this is worded, the way I answered

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1 but --

2 Q. Well, they weren't in physical harm. Well, I'm
3 talking what kind of risk. I'm confused what kind of risks
4 you're talking about.

5 MR. FINE: I'm going to object to the form of the
6 question, if he is talking generally or what he told Sam
7 that day.

8 Q. (BY MR. FRITZ) That's what I'm asking. What did you
9 discuss with Sam? When you said you discussed with him
10 risks, I'm confused what risks you were talking about.

11 MR. FINE: I'm going to object as to asked and
12 answered.

13 THE COURT: Sustained. He said removal of the
14 concrete. That was the response.

15 Q. (BY MR. FRITZ) Were there any other risks you
16 discussed with him?

17 A. Not specific, no.

18 Q. Okay. Didn't you tell Sam Waldner that if the
19 concrete -- after the fresh test results, didn't you tell
20 Sam Waldner that if the strength tests failed, Golden View
21 could be responsible for payment of deducts?

22 A. No. I didn't specifically tell him they would be
23 responsible but --

24 Q. I just want to make sure we're clear, that we're
25 consistent here with your deposition. This is a transcript

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1 that, I don't know if that was entirely correct. What
2 I'm trying to say is that I didn't specifically talk to
3 him about the deduct amounts or what would be deducted.
4 The conversation, as I recall, was his saying that if they
5 met their fresh concrete test and then met the parameters
6 of the mix design, that that was the end of their
7 responsibility. And that's when I pointed out that no,
8 the other responsibility is this strength issue.

9 Q. Okay. I'm going to fast forward, now, to after we're
10 starting to see some of the cylinder test failures. So I
11 think you said maybe into August of 2021. Would that be
12 about right?

13 A. Yeah. Mid to late August, I think it was.

14 Q. At that point did you start to develop some concerns
15 about whether Golden View could perform its obligations to
16 deliver 245 concrete?

17 A. No, not initially, because one failure is not
18 a pattern. It's just -- it happens.

19 Q. But there was more than one failure, wasn't there?

20 A. Right.

21 Q. Roughly, do you remember how many? If I told you nine
22 or ten, would that be about right?

23 A. I was going to say eight, seven or eight.

24 Q. Okay. And it was particularly concerning for you
25 about these failed tests, as you now were starting to get

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1 to the point of constructing the deck: isn't that right?
 2 A. Yes.
 3 Q. What is particularly concerning about quality issues
 4 as you get to the deck?
 5 A. Well, ultimately, if you don't have strength on the
 6 deck, the removal of a deck is a huge cost and huge time
 7 to get that deck replaced. So the risk is, if you have to
 8 back up, you're looking at another year or so before, you
 9 knew.
 10 Q. And one of these strength tests, the cylinder test,
 11 came back well under 4,000 PSI, didn't it?
 12 A. Yes.
 13 Q. And the requirement is for 4500; right?
 14 A. Yes.
 15 Q. And that's low, isn't it?
 16 A. It is.
 17 Q. And that kind of reading can result in a removal of
 18 a pier, can't it?
 19 A. Yes.
 20 Q. And you had those discussions with Jeremiah, didn't
 21 you, that this could result in the removal of a pier?
 22 A. Well, yes. I think he probably already was pretty
 23 familiar with the --
 24 Q. Okay.
 25 A. But, ultimately, when it's that low, then I have to

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1 Honor.
 2 THE COURT: You can answer.
 3 THE WITNESS: Once they get that information, they've
 4 got the software to do the analysis on it to see if it's
 5 structurally sound. And if it's structurally sound, almost
 6 always we're going to choose to leave that in place.
 7 Q. (BY MR. WHITE) And is that what happened here?
 8 A. Yes.
 9 Q. So it was below the 4500. It did not meet the specs;
 10 right?
 11 A. Right.
 12 Q. But through the engineers it was allowed that the pier
 13 could stay in place?
 14 A. Yes.
 15 Q. In October of 2021 do you remember a conversation with
 16 Jeremiah, in conjunction with these test results that we
 17 just talked about, about whether you were going to go
 18 forward with the deck work given the concrete quality
 19 issues?
 20 A. There was discussion, yes.
 21 Q. You and Jeremiah?
 22 A. Yeah. Yeah.
 23 Q. Tell me what is your name about those discussions.
 24 A. Well, I guess with the record of the failures, I was
 25 concerned, and others in my office were concerned, and we

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1 kick it up to the bridge engineer, and they run an analysis
 2 on it to see if it's structurally going to be acceptable.
 3 Q. Okay. And then, as you said, the state ordered coring
 4 at that point?
 5 A. Yes.
 6 Q. And what were the results of those core tests,
 7 generally?
 8 A. I don't know the specific numbers, but it has been
 9 my experience in most of these projects that coring will
 10 generally come back higher than the cylinder break, but
 11 that number is sometimes 200, 300 PSI. Sometimes it
 12 doesn't move at all.
 13 Q. But do you recall whether the coring tests confirmed
 14 that the concrete tested was below 4500 PSI?
 15 A. Yeah.
 16 Q. It was still below that, wasn't it?
 17 A. Yeah.
 18 Q. Did you have a conversation with Jeremiah, then, about
 19 what you were going to do about that?
 20 A. Not immediately. Again, it goes up through our Bridge
 21 office. So until they make that determination, I mention
 22 it, but I don't get too specific about it until I see what
 23 they're going to -- what their stance was on it.
 24 Q. What was their stance?
 25 HE, FIFE: Objection. Hearsay. I'll withdraw, Your

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1 asked -- we did discuss it. I mean, there was some
 2 concern.
 3 Q. I'm really interested more in your conversation with
 4 Jeremiah.
 5 A. Well, I did -- I asked him if he -- I think he
 6 contacted another supplier, and I had asked him if maybe
 7 we should do that.
 8 Q. Contact another supplier?
 9 A. Yeah.
 10 Q. So you asked him, maybe we should do that?
 11 A. Yes.
 12 Q. Okay. And Jeremiah said, okay, I'll look into it?
 13 A. Yes.
 14 Q. Why did you suggest to him that maybe he should look
 15 for another supplier?
 16 A. There was just some doubt there.
 17 Q. About quality?
 18 A. Yeah. I mean, you have to question it when you have
 19 that track record. You just have to.
 20 Q. And did, to your knowledge, did Jeremiah go out and
 21 research whether another supplier could step in at this
 22 late moment?
 23 A. I believe he did.
 24 Q. And what did he tell you?
 25 A. That he couldn't find another supplier.

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1 the fall, did you ever hear Jeremiah Grangard complain
2 about the quality of the concrete?

3 A. No.

4 Q. You just heard Tim Marshall from the DOT testify;
5 correct?

6 A. Yes.

7 Q. He shared that he had some concerns and shared those
8 with Jeremiah. Did you hear anything like that from Tim
9 during the summer of 2021?

10 MS. FRITZ: Objection to vague. What concerns?

11 THE COURT: Overruled. He can try to answer.

12 THE WITNESS: No.

13 Q. (BY MR. FINN) What were you hearing from Tim Marshall
14 and from Jeremiah Grangard in June, July, and August of
15 this project?

16 A. Nothing.

17 Q. Did you ask them about the quality of the concrete at
18 any point in time?

19 A. I asked them, how is it going? Is it going normal?
20 Is it going like it should? And they said, no complaints.
21 It's actually better than expected.

22 Q. Who said that?

23 A. I believe both of them.

24 MS. FRITZ: Both of who?

25 THE WITNESS: Jeremiah and Tim.

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1 construction work, did you ever hear anything about Golden
2 View being held responsible for deductions?

3 A. No.

4 Q. And until this lawsuit started, did you even know the
5 math that's used to come up with those deductions?

6 A. No.

7 Q. Did you even know that it was possible for a deduction
8 or a penalty to be assessed not on what you charge for
9 concrete but 1975 a yard?

10 A. You'll have to repeat that.

11 Q. So you understand to this day how those deductions are
12 assessed?

13 A. No. Can I rephrase that?

14 Q. Sure.

15 A. Yes and no. Yes, the little I caught on what he was
16 explaining here, but I don't know the functionality of it.

17 Q. So while you were sitting here at trial you've learned
18 something about it?

19 A. Yes.

20 Q. Prior to the project, do you know if anyone from
21 Golden View Ready-Mix was ever provided with the
22 three-inch-thick standards and specifications book?

23 A. None was provided as far as I know.

24 Q. If you had known, as the financial manager or
25 bookkeeper, that Golden View could be held liable for

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1 MS. FRITZ: Object to hearsay that he thought that was
2 Tim. Move to strike.

3 THE COURT: Objection sustained. The response as to
4 Tim will be stricken.

5 Q. (BY MS. FINN) As to June, July, and August, did you
6 hear any complaints from Tim Marshall about the quality of
7 the concrete?

8 A. No.

9 Q. As far as you know, did -- let me start over. Did Tim
10 Marshall ever talk to you during the course of the project?

11 A. Yes.

12 Q. Did he ever tell you that he expected things to be
13 going differently than they were?

14 A. No.

15 Q. You seem unsure. Did he -- go ahead.

16 A. There was one issue where I asked him how to get paid.
17 When those crosshairs met there, I wasn't receiving all the
18 payment. I asked him how he pays his customer. And he
19 said his customer gets paid on the terms that he just told
20 us, 15 days, and then that's as far as I went. And I
21 expected payment then after that.

22 Q. You've heard about these deductions that were assessed
23 against Grangard?

24 A. After the fact, yes.

25 Q. And I was going to ask. During the course of the

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1 someone else's contractual penalties, would you have agreed
2 to supply concrete?

3 A. Not under those terms.

4 Q. What terms would you have been looking for?

5 A. I would have wanted more oversight and asked more
6 questions.

7 Q. Would you have wanted more money?

8 A. Yes.

9 Q. Why?

10 A. For risk. I would follow the industry.

11 Q. The agreement you had?

12 A. Yes.

13 Q. So when you say you would want more for risk, explain
14 that to me.

15 A. I would feel if there would be more money in there for
16 what I understand how it's working. I would have to have
17 more on the table to take care of deductions if something
18 happens, and at the same time, read that three-inch
19 handbook.

20 Q. Of course, nobody brought any of that up to you to
21 begin with?

22 A. No.

23 Q. All right. So there was a meeting in October out at
24 the bridge. Do you remember that meeting?

25 A. Yes.

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1 Q. Who was there?
 2 A. Me, Sam, Jeremiah, I believe it's Milo, Tim Marshall,
 3 and then a state guy from Pierre.
 4 Q. At some point in time, was there a conversation
 5 between you, Sam, and Jeremiah Grangard?
 6 A. Yes.
 7 Q. And what was said during that conversation?
 8 A. It was -- it started out we need to get paid for the
 9 rest of the concrete that got used.
 10 Q. What was said at that point in time?
 11 A. \$16,154.58.
 12 Q. All right. Go ahead with the conversation. What else
 13 was said?
 14 A. I said we need -- the concrete that's been delivered
 15 needs to get paid before we move on; second, is there an
 16 issue with us applying concrete. If there's any issue that
 17 you feel uncertain that we can supply you, we are not
 18 interested if you don't feel comfortable. We said
 19 everything was okay, everything was fine, everything came
 20 back good. And then we discussed the 550 or 600 yards in
 21 what they projected to be. It was only 550 yards. Why, I
 22 don't know. We asked for half the payment when the deck is
 23 poured, that day when the deck is poured. And he promised
 24 he'll pay half the deck. When the deck is halfway poured,
 25 he'll pay it, pay halfway.

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1 the mail that morning, ran to town to get the mail, and
 2 there was no check in the mail. And I told him it didn't
 3 show up. Well, he said he still wanted to get going. And
 4 I told him we're not doing it until it gets paid. So he
 5 said -- then he called Jeremiah up, and Jeremiah ran a
 6 check down from Watertown to pay for it, to pay the balance
 7 off. And that is -- when I received that check, that's
 8 when we had that meeting.
 9 Q. So the check was brought with Mr. Grangard to the
 10 October meeting?
 11 A. Either that morning or the afternoon meeting. We
 12 had -- I can't 100 percent confirm if it was right at the
 13 meeting or a couple hours earlier.
 14 Q. You heard Tim Marshall testify that he had some
 15 concerns about the product. You heard that today?
 16 A. Yeah, I heard that today.
 17 Q. Did you hear that from Tim Marshall before today?
 18 A. About the products? What products?
 19 Q. About the concrete, having a concern about the
 20 concrete.
 21 A. I didn't hear nothing from Tim.
 22 Q. And when you were out on the bridge on the 11th of
 23 October, did you hear anything from Mr. Grangard about any
 24 problems at all with the concrete you had supplied?
 25 A. I knew they were running tests and didn't know if they

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1 Q. What did he say as far as paying the rest of it?
 2 A. I told him I'd send a bill at the end of the month
 3 under the terms.
 4 Q. So were you the one that gave those terms to
 5 Mr. Grangard?
 6 A. You mean from the start?
 7 Q. No. I'm talking about this meeting. Who was the
 8 person that told Jeremiah, here's what we will do?
 9 A. I was the person.
 10 Q. During this conversation did Jeremiah act as if he was
 11 disappointed in what you were telling him?
 12 A. No.
 13 Q. How was he acting?
 14 A. Very friendly, very acknowledgeable. I had no bad
 15 feelings about it.
 16 Q. Did he say that he had tried to pay the \$16,000 bill?
 17 A. Yes.
 18 Q. Tell the jury how that came about.
 19 A. Sam told him that I am requesting a payment before we
 20 get started on pouring. So he wanted to pour I think on
 21 the 21st.
 22 Q. Of what month?
 23 A. October.
 24 Q. Okay.
 25 A. And he said the check is in the mail. And I checked

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1 received -- what FBI they were receiving or what they were
 2 going for. When we had that meeting at the deck, I asked
 3 them: Is everything okay? Did everything come back good?
 4 Are you satisfied?
 5 Q. You asked who?
 6 A. I asked Jeremiah.
 7 Q. And what did he say?
 8 A. He said everything is okay, everything came back good.
 9 Q. Was that statement important for you when you decided
 10 to continue and bring concrete?
 11 A. Yes.
 12 Q. Why so?
 13 A. I felt we were -- then I challenged him. "Are you
 14 satisfied with us bringing concrete? Are we meeting your
 15 expectations?" When I told him, "If we can't make your
 16 expectations, I don't want to do that deck, because it's
 17 more -- it's a bigger project on that deck."
 18 And he said, "We'll be fine. You're better than most
 19 ready-mixes."
 20 Q. I'm not sure I understood the first part of that. You
 21 told him that if you can't or cannot meet the expectations,
 22 you would rather not pour; right?
 23 A. I told him, if we cannot meet his expectations, we'd
 24 rather not pour the deck if he feels we're not capable of
 25 doing it.

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1 Q. And at that point in time, he only owed you \$16,000,
2 which he paid that?
3 A. He paid, yes.
4 Q. What did you anticipate the cost of the concrete could
5 be for the bridge deck?
6 A. 550 yards I estimated at \$100 a yard, is what they
7 said it's going to take.
8 Q. Was there any conversation about why Mr. Stanggaard
9 needed 90 days to pay the second half of that upcoming
10 bill?
11 A. No.
12 Q. When he paid the \$16,000, did he also pay the finance
13 charge of 18 percent per year?
14 A. Yes.
15 Q. The bridge deck got poured?
16 A. Yes.
17 Q. Did you hear any complaints about any of the concrete
18 that Golden View supplied for the bridge deck?
19 A. I asked if everything went good. He said yes.
20 Q. Who said yes?
21 A. Jeremiah. Except there's a couple loads of slump
22 issues that there was, which is not going to affect the
23 bridge.
24 Q. Did he say that he expected you to pay any penalties
25 for that slump issue?

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1 expected that when the statement came out -- and it was due
2 on the 10th. We had a couple more pours. Three more pours
3 after that it was. It was on the 3rd -- no. It was on the
4 1st, the 3rd, the 5th, and the 9th, and then it was done.
5 When I believe I told -- that's when I really caught
6 on. I told Sam he hasn't paid for half the deck. You
7 better stop supplying concrete. Well, it was already done.
8 I believe it was already done, unless he got the last small
9 stuff from somewhere else.
10 Q. Was Ken kind of leaving the billing up to you?
11 A. Yes.
12 Q. And Sam didn't tell you that he was continuing to move
13 forward, and you didn't tell him that the bill wasn't paid?
14 A. I actually had a disconnect there. I didn't know he
15 was -- he kept hauling concrete out there four more times.
16 Q. So how much concrete was paid after October 21st
17 when we had this meeting on the bridge? Let me ask it
18 differently. How much was due in terms of billing after
19 the meeting that occurred on the bridge?
20 A. After the meeting. For the total project?
21 Q. How much was due at the end of the project?
22 A. I believe I sent him a statement again when it was
23 finished, when I found out he wasn't paying. That was
24 \$89,343.32.
25 Q. And that total is for all the concrete that follows

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1 A. No.
2 Q. During that conversation was there any discussion
3 about payment, or was that a different time?
4 A. Half the payment was discussed on the front side when
5 we started. When the bridge deck was finished pouring at
6 the end of the day, I didn't expect him to -- he had a lot
7 going on. I figured I'd leave him alone. He'll either
8 mail the check down or he'll bring it the next day when he
9 gets back.
10 Q. So tell the jury what happened going forward.
11 A. Going forward, I billed out that bridge deck a couple
12 days later. I mailed it. I did the next round on the 1st
13 of November, whatever he was due.
14 Q. Well a second. Before the 1st of November, did he pay
15 the first half as he promised?
16 A. No.
17 Q. What was going through your mind when he wasn't
18 paying?
19 A. It was only a couple days when I mailed him that
20 bill. I think I mailed it to him a couple days later. So
21 he only had -- the only thing I had in my mind, I'll give
22 him a couple days or the 10th of the month until I really
23 questioned him where's half that payment. And then we
24 poured on the 10th and on the 30th, and then the statement
25 went out on the 1st. And then we kept on pouring, and I

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1 the October 21 meeting?
2 A. That's correct.
3 Q. And did you ever hear that there was any problems with
4 that concrete that followed the meeting other than the
5 slump issue you talked about?
6 A. Just the slump issue.
7 Q. So tell me what happened going forward. Did you try
8 to get ahold of Jeremiah Stanggaard?
9 A. I actually had Sam remind him that he needed to send
10 half that payment, and I believe his answer was he can't
11 get ahold of him. And then I kept sending statements. So
12 on 12-1 I sent a statement, and I didn't expect -- I
13 expected a payment. And I added -- I didn't add a finance
14 charge. I expected the payment on the 10th, 12-10. Again,
15 when I sent him a statement, I didn't apply any finance
16 charge then. And the middle of December I mailed, when
17 can I expect payment to his account. I think it was to
18 Taylor. And after that I heard -- she replied back to me,
19 "We're still waiting for the State to pay us."
20 I'll go back one step. I asked, "When can I expect
21 a payment? Jeremiah promised to pay for half the deck."
22 And she replied back, saying that they're waiting for the
23 State to pay and then we'll pay you. And I replied back
24 to her, "When can I expect that?" And that's the last they
25 replied back until I got you involved.

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1 A. He told me he will pay half --
 2 Q. Well, I want to talk about the account to date, the
 3 outstanding balance to date. He told you he would pay that
 4 in full?
 5 A. He gave me a check, it's paid in full.
 6 Q. And he fulfilled that promise?
 7 A. That's correct.
 8 Q. And it was based upon that payment that Golden View
 9 then decided to provide the concrete for the deck?
 10 A. When we decided to provide the concrete for the deck,
 11 it was two reasons. We're paid in full and are you happy
 12 that -- do you feel confident that we can supply the
 13 concrete?
 14 Q. Okay.
 15 A. With those two terms, we supplied the concrete for
 16 them.
 17 Q. And he indicated he was comfortable?
 18 A. Yes.
 19 Q. Okay.
 20 A. And I had a comfortable feeling too at the time.
 21 Q. Do you feel he was dishonest in that way in saying he
 22 was comfortable with you?
 23 A. I don't -- what I know now, I don't have no opinion.
 24 Q. Okay. You indicated that you knew there was some core
 25 testing going on at that time?

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1 A. Not necessarily. It's in all the industry. If you
 2 would have some major problem, like with the concrete,
 3 you'd definitely get together and figure out who was the
 4 problem here. That's the only time I get to be involved.
 5 Q. So you know that that's a possibility?
 6 A. In the concrete industry, yes.
 7 Q. And that's a bad thing, isn't it?
 8 A. It is.
 9 Q. Because that's a lot of work to fix?
 10 A. It is.
 11 Q. All right. Let me show you what's been marked as
 12 Exhibit 44. You've talked about these emails that went
 13 back and forth between you and Grangaard in December of
 14 2021 about payment?
 15 A. Yes.
 16 Q. Exhibit 4, does that contain those emails?
 17 THE COURT: 44?
 18 MR. FRITH: 44.
 19 THE WITNESS: Yes.
 20 MR. FRITH: I'd offer Exhibit 44.
 21 MR. FINN: No objection.
 22 THE COURT: 44 will be received.
 23 Q. (BY MR. FRITH) And you heard your father testify
 24 yesterday that once the project was completed, Golden View
 25 never heard another word from Grangaard. Did you hear

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1 A. At that time I knew there was something going on, but
 2 I didn't follow that there was actually physical core
 3 testing going on. I thought they were waiting for the last
 4 sample that run out. I know enough that it takes 28 days
 5 for when they pour something to get that last sample. And
 6 I just did my own math, little bit of math, from the last
 7 pour to when I requested that money. It was past 28 days,
 8 and that's why I questioned it, is there a problem with
 9 paying.
 10 Q. But you knew that there was some efforts going on to
 11 test the concrete?
 12 A. Yes.
 13 Q. And you knew that the testing told you that there
 14 might be some problems?
 15 A. Not that worried me.
 16 Q. I'm not worried about whether that worries you or not.
 17 You knew that there was testing going on that revealed
 18 problems?
 19 A. Not that revealed problems, no.
 20 Q. And you heard Tim Marshall testify that if these
 21 strength tests come back low enough, you might have to rip
 22 out the structure that contains that concrete. Did you
 23 hear that testimony?
 24 A. I heard it here, yeah.
 25 Q. Did you know that that was a procedure of the DOP?

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1 that?
 2 A. I'm said that he could not get hold of him anymore on
 3 a phone call.
 4 Q. But, in fact, Grangaard did respond to your inquiries
 5 after the project --
 6 A. He --
 7 Q. Let me finish. Grangaard did respond to Golden View's
 8 inquiries after the project was completed, didn't he?
 9 A. After a month later when I requested it.
 10 Q. Did they respond?
 11 A. Yes.
 12 Q. Okay. I just want to make sure the jury understands
 13 what exactly was said here. If I'm reading Exhibit 44, on
 14 December 14th -- hold on. Okay. We're starting here. On
 15 December 14th, at 8:42 in the evening, you sent an email
 16 saying when can I expect this payment?
 17 A. That's correct.
 18 Q. And then that evening you got a response from Taylor
 19 Grangaard; is that right?
 20 A. That's correct.
 21 Q. And she said, "Good evening. We are waiting on the
 22 test results from the DOP before we send out payment."
 23 What's the first sentence of what she said?
 24 A. Yes.
 25 Q. Did you know what that meant?

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1 Q. And lines 61, 62, 63, 64, and 66, do those deal with
2 the concrete work for this project?

3 A. Yes, they do.

4 Q. Prior to entering the figures on the right side of
5 that bid form, did you contact Golden View about pricing?

6 A. We -- yes, by phone call.

7 Q. You talked to Sam Waldner about pricing?

8 A. Correct.

9 Q. And during this call, Sam quoted you approximately
10 \$130 a yard, correct?

11 A. Correct.

12 Q. However, during this call there was never any
13 discussion about what kind of obligations Golden View would
14 have if the concrete hadn't met any strength requirements?

15 A. I did have -- no. Sorry.

16 Q. What I said is correct?

17 A. No. We did have a conversation on the phone if he had
18 done any other projects, and he said he did and that he was
19 aware of the circumstances.

20 Q. But you never had any discussion with him about what
21 kind of obligations Golden View would have if any of the
22 concrete did not meet the testing requirements you knew
23 would be imposed if you were to be the winning bidder,
24 true?

25 A. Yes.

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1 if it rains a lot or it's a wet hole or things come up or
2 arise out of our control.

3 Q. So, in terms of the bridge deck, which line item
4 includes your bid amount for the bridge deck? Is that
5 line 61?

6 A. Yes.

7 Q. So, for that line, the estimate was 540 yards. Who
8 made the estimate of 540 yards?

9 A. That would be the DOT.

10 Q. So the DOT actually prepares this bid schedule form,
11 and then you just figure out the unit bid price and then
12 the amount numbers. True?

13 A. Yes. With a set of plans, yeah.

14 Q. So for that bridge deck you bid the total amount for
15 that concrete of \$448,800?

16 A. Correct.

17 Q. At \$130 per yard?

18 A. Correct.

19 Q. And your cost of that yard you anticipated would be
20 \$130 per yard. True?

21 A. True.

22 Q. And about 400,000 of that amount was profit?

23 A. Not true.

24 Q. It was actually putting a half million dollars for the
25 bridge deck. Is that where I'm wrong?

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1 Q. So you took this information you obtained from Sam.
2 Well, first of all, did you go out and get any other
3 estimates?

4 A. Yeah. We got -- it's a two-day process. There's
5 estimates for everything.

6 Q. What were the other estimates?

7 A. Rebar, wood, mobilization.

8 Q. Did you get any other estimates about concrete?

9 A. No.

10 Q. And so with the information you received about an
11 estimate, you then filled out the lines that I stated
12 previously, 61, 62, 63, 64, and 66 of the bid schedule,
13 correct?

14 A. Yes.

15 Q. The totals that you list on your bid, as I understand
16 it, those factor in the cost of concrete, labor, and
17 profit?

18 A. And a bunch of other things.

19 Q. What other things?

20 A. Reinforcing steel, wood, aggregate, pylene,
21 mobilization to the job, and the risks that we take to pour
22 concrete 845.

23 Q. The risks that you take in terms of penalties that are
24 assessed in the DOT concrete?

25 A. No. Just fulfilling our contract with the State, like

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1 MR. FRITZ: Objection. Half a million what?

2 MR. FINK: A half million dollars of profit for the
3 bridge deck.

4 THE WITNESS: Not true.

5 MR. FINK: If I could approach, Your Honor.

6 THE COURT: You may.

7 Q. (BY MR. FINK) I'm showing your deposition testimony.
8 Do you remember being deposed?

9 A. I do.

10 Q. Do you remember being placed under oath?

11 A. Yeah.

12 Q. On page 16, I asked the question: "How much profit,
13 approximately, did you build into the bridge deck part of
14 it?" What was your answer?

15 A. "Probably half a million dollars."

16 Q. And for the concrete footings, the pillars, and the
17 other concrete under the bridge, it looks to me like you
18 bid that at the price of \$975 per yard for a total of
19 \$333,840. Is that true?

20 A. Correct.

21 Q. And that amount also includes the cost of material,
22 the cost of labor, some other incidentals, and profit;
23 correct?

24 A. Correct.

25 Q. It looks to me, if I add those up, that the amount you

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1 down the project?
 2 A. False.
 3 Q. I'm going to point you to page 182. I'm going to read
 4 this and then ask you if this is your testimony from the
 5 deposition.
 6 Question: "So when we talked about these
 7 other deductions that were a few hundred dollars,
 8 you answered 1,400?"
 9 Answer: "Right."
 10 Question: "You could have had those cored,
 11 and if the core testing would have shown that
 12 strength testing was not, you would have been
 13 reimbursed for the cost of that testing?"
 14 Answer: "Yeah. And we would have also lost
 15 six weeks of production on that project."
 16 Was that your testimony?
 17 A. We did lose six weeks of production on that.
 18 Q. A lot of these tests you didn't challenge because you
 19 didn't want to lose any more time; correct?
 20 A. Normally we don't. If it's only 2- to \$600, it isn't
 21 worth it to core that. Some of them are minimal charges.
 22 Q. But you were the one that made the decision to accept
 23 that deduction or to challenge it; right?
 24 A. The ones for \$200, yes.
 25 Q. So you're asking that Golden View pay you for

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1 A. Correct.
 2 Q. Because ultimately under the contract, you're the
 3 person that makes the decision to the DOT about whether you
 4 want to challenge the test. True?
 5 A. True.
 6 Q. You admit that you never told Sam that you expected
 7 Golden View to bear any financial penalties. True?
 8 A. True.
 9 Q. And certainly no one from Golden View agreed to bear
 10 any of your penalties. Is that true?
 11 A. True.
 12 Q. I understand that when the project was ongoing, you
 13 went out and found an estimate for someone else to take
 14 over the job?
 15 A. Yes.
 16 Q. And did you contact Mitchell Concrete?
 17 A. I contacted Mitchell Concrete and Buffalo Ridge.
 18 Q. What did you get for quotes to have them supply
 19 concrete?
 20 MR. FRITZ: Objection to relevance.
 21 THE COURT: Overruled. He can respond if he recalls.
 22 THE WITNESS: There's was expensive because of a
 23 porta-plant and they were busy.
 24 Q. (BY MR. FINK) \$700 a yard?
 25 A. Yeah. They would have had to set a porta-plant up

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1 deductions that you chose not to challenge?
 2 A. The little ones we did.
 3 Q. You expect Golden View to pay even for the little
 4 deductions when you made the decision not to challenge
 5 them; right?
 6 A. I would think that they would help out because they
 7 signed the six design here. We're talking a couple hundred
 8 dollars in charges.
 9 Q. In fact, there was one sample test that you did
 10 challenge, and the bridge was cored. And the result was
 11 that the bridge concrete exceeded 4500 pounds per square
 12 inch; right?
 13 A. Correct.
 14 Q. So you knew that it was possible that by challenging
 15 these results you might end up not paying a penalty?
 16 A. But like the last statement was, you don't want to
 17 holes in the concrete for \$200. You just pay the \$200.
 18 Q. My point is you're making that decision whether to
 19 test further or not; right?
 20 A. On the short bills, yes.
 21 Q. And you never gave Golden View the opportunity to have
 22 any input on whether you test further or not?
 23 A. I told them about it.
 24 Q. But you never told them that you would leave the
 25 decision up to them; right?

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1 right next to the project, which is an extra expense, and
 2 they were busy through the year. So that's why the price
 3 was high.
 4 Q. So you had the opportunity to use them, but you didn't
 5 want to do it for \$700 a yard?
 6 A. They weren't for sure. They didn't give me a
 7 guarantee they would do it.
 8 Q. But you didn't ask them if they would do it. You
 9 heard \$700, and you realized that was too expensive; right?
 10 A. It was more expensive, and we'd lose money then.
 11 Q. So rather than having someone else take on the
 12 project, you told Sam and Brian at a meeting in October on
 13 the bridge that everything was good, didn't you?
 14 A. I did in the means that the concrete is not going to
 15 have to be removed and it's going to be okay, not that
 16 everything was fine.
 17 Q. And on the bridge you never said anything about there
 18 being any penalties that might be passed on to Golden View,
 19 did you?
 20 A. Negative. I did tell them that we had deductions.
 21 Q. And you told them on the bridge that you expected
 22 Golden View to pay those penalties?
 23 A. Again, like I said, in the past they had --
 24 MR. FINK: I'm going to object as nonresponsive.
 25 THE COURT: Nonresponsive. The objection is

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1 A. Yes.

2 Q. You heard Tim Marshall say that that was his
3 suggestion?

4 A. Correct.

5 Q. Would you have had to do any of that if there were no
6 problems with the concrete?

7 A. Normally, no.

8 Q. You don't go looking for new suppliers if the
9 suppliers are doing what they're supposed to do?

10 A. Correct.

11 Q. When there was questions about payment in full for the
12 pier work. Normally would you pay in full, less the
13 deducts or other costs?

14 A. No.

15 Q. Normally do you wait to get those deducts before
16 paying?

17 MR. FINE: I'm going to object to the relevance, Your
18 Honor. This deals with other contracts, with other
19 contractors.

20 THE COURT: Well, we've gone down this road a little
21 bit; so the objection is overruled.

22 You can try to answer.

23 THE WITNESS: Normally they take care of it and we
24 don't have much to do with it.

25 Q. (BY MR. FRITZ) Okay. So you'd wait to pay them until

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1 MR. FRITZ: That's all the questions I have.

2 THE COURT: Mr. Fink?

3 RECESS: EXHIBIT

4 BY MR. FINE:

5 Q. Did you ever provide any bills for coring to Sam or
6 Brian?

7 A. No.

8 Q. Why not?

9 A. They didn't ask for them.

10 Q. You never really expected them to pay them, did you?

11 A. I expected them to pay them, yes.

12 Q. Why didn't you provide them with copies of bills?

13 A. I was going to wait until all the smoke cleared.

14 Q. The fact of the matter is, under your DOT contract you
15 bear the responsibility for the cost of coring. True?

16 MR. FRITZ: Objection. Again, between who and who?

17 THE COURT: It's clear what the question is. The
18 objection is overruled.

19 You can try to answer.

20 THE WITNESS: Say that again, sir.

21 Q. (BY MR. FINE) Under your contract with the DOT, you
22 bear the cost of coring. True?

23 A. Not true. Not necessarily.

24 Q. All right.

25 A. In the past --

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1 that got sorted out?

2 A. They usually take care of it and deal with it with the
3 DOT.

4 Q. "They" being the supplier?

5 A. Correct.

6 Q. At the time that you paid up in full in October, did
7 you know the amount of deducts?

8 A. No.

9 Q. Circling back to that, who pays for the cost of the
10 coring when you get a coring test that confirms a failed
11 cylinder test? Sam Waldner said that Golden View is
12 responsible for that. Did you have a significant bill for
13 coring on this matter?

14 A. Yes.

15 Q. How much did you owe for that coring?

16 A. The one time was 16,600, and that's just for the
17 coring company to come in, not counting our guys and what
18 we have to do for that.

19 Q. Who paid the coring company?

20 A. Grangard did.

21 Q. Has Golden View ever paid you for that?

22 A. No.

23 Q. Did that coring test confirm that the cylinder samples
24 were below the specs?

25 A. Yes.

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1 Q. I'm talking about the contract you had with the
2 specifications book. That's your obligation to do coring
3 if there's a problem with the testing.

4 A. No. It reads in there that the concrete company also
5 has.

6 Q. I'm going to have you find that in the spec book.

7 A. It will take a little time.

8 Q. Well, you're saying that there's something in here
9 that requires the supplier to pay for coring, and I'd like
10 to find that.

11 A. I didn't say that.

12 MR. FRITZ: He didn't.

13 THE WITNESS: What I did say is that in the past the
14 other suppliers, they would ask us, and they would
15 determine if they were going to core that or not, depending
16 on the price, is pretty much what it comes down to.

17 Q. (BY MR. FINE) And that would be true if you had a
18 contractor that had agreed to bear those expenses, right?

19 A. Not true.

20 Q. It would be true that if you had a contract with
21 Golden View where Golden View would bear those costs, they
22 could have jacked up the price of their concrete to factor
23 in that added risk. True?

24 A. Not true.

25 Q. And as Tim Marshall said, when he sees arrangements

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1 where the supplier bears that expense, usually the amount
2 that's charged for concrete is two or more times what was
3 billed in this case?

4 A. Not true.

5 Q. So he's not correct, what Tim Marshall says?

6 A. The concrete is about \$120 in Sioux Falls, South
7 Dakota, for bridge decks of that type, and I got -- they
8 call it abstracts.

9 Q. So Tim Marshall is just wrong when he says it was
10 obvious to him that this was not something where hidden
11 view factored in that added risk?

12 MR. FRITZ: I'm going to object. That's a
13 misstatement of the testimony.

14 THE COURT: Overruled.

15 THE WITNESS: So Tim did it. Like, he's been on one
16 or two poured and placed bridges. So I don't know how he
17 would be able to determine that to be accurate on them.

18 Q. (BY MR. FINK) You think his testimony is wrong, in
19 other words?

20 A. I think that his idea of what the concrete actually
21 costs from a supplier is wrong, yes.

22 Q. The truth of the matter is just on the deck project
23 alone you had \$400,000 of profit built in because you knew
24 you had the risk under your contract with the DOT to pay
25 for all the testing and to guarantee the quality of the

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1 perfect world, all the evidence comes in, and then the
2 attorneys and the Court have to get together and settle the
3 final instructions. So depending upon the timing tomorrow,
4 if it's not terribly late, we'll let you go after all the
5 witnesses are done. We'll work on those things.

6 And what I'd like to do then is, right away Thursday
7 morning, you come back in, I read the instructions, and
8 then they do closing arguments.

9 I'm not sure if the timing will all work out quite
10 that well. If we're still taking testimony and evidence
11 until 5:00 o'clock tomorrow, then we'll probably have you
12 come in a little later Thursday. We'll settle the
13 instructions Thursday morning or something like that. But
14 the goal is, I think at this point, you're going to get it
15 on Thursday, the earlier the better in my mind. And then
16 you get the opportunity to deliberate, hopefully with as
17 much time as you need. I don't like sending juries out in
18 the evening or late in the afternoon, but sometimes that's
19 the way it works. It depends on how much time you take to
20 deliberate. And there's no pressure because this is
21 complex. So it might take you a little bit.

22 We are still probably going to be done on Thursday but
23 no promises. But if that goes the way I anticipate, we
24 won't need to come back in on Friday. We'll see how it
25 goes.

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1 concrete pursuant to the strength standards that are
2 contained in the spec books. True?

3 A. Not true.

4 MR. FINE: I don't have anything further, Your Honor.

5 THE COURT: Mr. Fritz, anything further at this time?

6 MR. FRITZ: Nothing further.

7 THE COURT: All right. Thank you.

8 Can you hand me the exhibits?

9 THE WITNESS: Yeah.

10 THE COURT: Both of them. Thank you. You can go
11 ahead and have a seat again.

12 Mr. Fink, at this juncture, pending the resolution of
13 some motions, does the State -- that's a habit I get into.
14 Does the Plaintiff wish to rest at this juncture, pending
15 the resolution of other motions before the Court?

16 MR. FINE: I'm glad to rest for the day.

17 THE COURT: It's a good time because I was going to
18 get let them go at this point. We have some other business
19 we have to deal with.

20 This is a good time for us to let you folks go. My
21 plan is to resume with additional witnesses and testimony
22 tomorrow morning at 9:00 o'clock. I'm optimistic we can
23 get through the witnesses and testimony tomorrow. I don't
24 know if that is early afternoon, middle afternoon, late
25 afternoon. It kind of depends on how it goes. In a

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1 Again, I need to remind you not to converse amongst
2 yourselves or with anyone else on any subject connected to
3 our trial. Do not form or express any opinions until the
4 case is finally submitted to you.

5 We will recess, and we will look at starting at
6 9:00 o'clock in the morning.

7 All rise for the jury.

8 (Whereupon, the jury left the courtroom, and
9 the following proceedings ensued outside the
10 presence of the jury at 4:54 p.m.)

11 THE COURT: Please be seated.

12 We have a couple of matters we have to deal with at
13 this time. First, I'm going to go to the defense. And I'm
14 treating this somewhat as we are at the conclusion of the
15 Plaintiff's case, dependent upon whether or not there is
16 going to be discovery allowed involving punitive damages.
17 I think there will be questions Mr. Fink would have to --
18 and Mr. Grangaard. That is a good time to cut that off
19 because determinations have to be made by the Court in
20 connection.

21 So, Mr. Fritz, does the Defendant have any motions you
22 want the Court to consider at this point in time based on
23 how the case has been pled?

24 MR. FRITZ: Assuming we are at the close, yes, I would
25 move for directed verdict on all counts.

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1 THE COURT: The Court has heard the evidence and
2 testimony. The complaint has a couple of different
3 claims that are set forth. Count 1 is breach of contract.
4 The Court believes that sufficient facts have been set
5 forth that a reasonable jury could conclude there was a
6 breach of contract. Is the motion for directed verdict on
7 Count 1 is denied. That somewhat dovetails into what we've
8 had on other discussions with other motions.

9 It was clear to the Court right away through Sam
10 Waldner's testimony that there's not a written contract
11 other than a recipe here, but Mr. Waldner testified there
12 was a verbal agreement. The terms of the verbal agreement
13 are what is in dispute here. That's why we have questions
14 of fact which are going to be for the jury to decide. But
15 the Court is not going to allow presentation on any
16 negligence claims that were a part of the counterclaim.
17 This is purely a breach-of-contract situation. I had
18 alluded to that during the earlier motions hearings,
19 depending upon how this all came up. That question for the
20 Court was somewhat answer and resolved with the testimony
21 that's been presented.

22 Mr. Fink, you kind of hemmed and hawed around about
23 this a couple times as to whether there was a contract or
24 not, and it's clear that your clients believe there was
25 a verbal agreement. That can be considered a contract, not

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1 Sam Waldner was very clear: We continued supplying
2 concrete because he paid us. I asked him, was that the
3 reason? Yes. And now this half-payment statement, without
4 any other qualification, he said, Yeah, that was to be made
5 the next day. Well, it wasn't. And they continued to
6 supply the concrete, which I think evidences that that was
7 not -- they continued supplying the concrete because they
8 got paid. They were not induced to supply the concrete for
9 any other reason. So this is another -- you know, if there
10 was some agreement to make payments in a certain way,
11 that's part of this contract. And if the jury feels that
12 that was part of the contract and Grangaard breached it,
13 then so be it.

14 But that's not fraud. Fraud has to be I intended to
15 deceive you, I knew it was false, I said it intending to
16 have you rely on it. You relied on it to your detriment.
17 Fraud is serious stuff. I mean, it happens all the time,
18 people. Hey, I'll pay you in a bit. Oh, I don't get paid,
19 you know. If we get fraud every time a customer said
20 they'd pay for something and then didn't, we'd have fraud
21 going on all the time. That's not fraud. That's a breach.
22 If you believe it, that's a breach of an agreement. That's
23 not fraud. There's nothing here that they said that would
24 rise to the level of fraud, I don't believe.

25 And on review, I'm confident this jury will -- well, I

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1 a traditional written contract. And maybe that's why you
2 were skirting that issue, so to speak, in some respects.
3 But this is a contract case.

4 Now, as to Count 2, that's the bad-faith claim, and
5 that also somewhat couples with Count 3 involving fraud and
6 deceit. The Court does believe there have been a set of
7 facts presented to the jury if they believe and find
8 credible that they could rule for the Plaintiff both in
9 connection with bad faith and on the count of fraud and
10 deceit. For the motion for judgment, notwithstanding a
11 verdict or judgment at this time, those are going to be
12 denied.

13 MR. FEITE: Can I present argument on that, a short
14 one?

15 THE COURT: You may.

16 MR. FEITE: Your Honor, for fraud and deceit and bad
17 faith, I don't really know what it's based on. Maybe you
18 heard something different than I did. There has to be,
19 first of all, a false statement made. I understand there's
20 possibly some things that were said that were false. You
21 know, I'd pay you half. Okay. That's the only one that I
22 think comes close to anything that could arguably be false,
23 but it's not -- but it's not just a false statement. It
24 has to be a false statement that they rely on
25 detrimentally, to their detriment.

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1 think they'll ignore it. But if they don't, I'm afraid
2 we're coming back. So I think the fraud, deceit, and bad
3 faith claims, I don't think there was sufficient evidence
4 to support those, and I'd move for directed verdict as well
5 as a breach of agreement.

6 THE COURT: Mr. Fink, any comments?

7 MR. FINK: In 25 years I've never heard the argument
8 that if the Court doesn't rule this way it's going to be
9 appealed and it's going to come back.

10 THE COURT: I heard it all the time.

11 MR. FINK: I've never heard that. I'm not going to
12 make an argument about what would happen on appeal, but
13 it's very obvious that \$16,000 was past due. It's very
14 obvious that Mr. Grangaard knew that he had some penalties
15 coming. We knew that he hadn't had any discussion with
16 anybody from Golden View about paying those. He didn't
17 provide any bills for coring. We kept Golden View in the
18 dark very obviously. And out on the bridge he made
19 statements designed to keep the concrete flowing so that he
20 could keep his project flowing and he didn't have to pay
21 someone else \$700 a yard to finish up. It's very obvious
22 that there are statements made by witnesses that if
23 believed by the jury would show, number one, that there was
24 bad faith which is implicit in every contract. I see this
25 as a weird contract where you had a series of sales. We

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1 had sales, and so the UCC does apply.

2 But, very clearly, if the jury believes the Waldners,
3 that when the Waldners say they were never told that there
4 was going to be anything that they would be responsible
5 for; that they were kept in the dark about these penalties;
6 and that assurances were made that, number one, everything
7 was all good, which a reasonable person would believe means
8 there aren't any problems with the concrete that had been
9 supplied before. And if the jury believes that Jeremiah
10 Grangaard promised that when the final deck concrete was
11 paid, he would immediately give half of the money and the
12 rest of it later on. If the jury believes that, then
13 they're clearly, in addition to bad faith, there's ground
14 for fraud and deceit to at least go to the jury, Your
15 Honor.

16 THE COURT: In this matter the Court believes there
17 are several false statements, if believed by the jury to be
18 false. First, we have some payment issues. It's not just
19 the half and half; it was payment of the balance owed.
20 That was one part of the statements that were made, paying
21 the balance of the \$16,000 which Mr. Grangaard didn't
22 follow through on. The other part of that was the promise
23 to pay half upon piling of the bridge deck and half within
24 30 days if the facts as presented by the Plaintiff are
25 believed.

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1 false is Mr. Grangaard now says there were discussions
2 about passing of penalties and deductions, and/or
3 deductions, on to the supplier. Obviously that's a very
4 different version of facts. The false statement the Court
5 believes that the jury could find to keep fraud and bad
6 faith and deceit alive would be no problems with the
7 concrete up to that point in time.

8 The Court believes that it would appear Golden View
9 relied on those statements to their detriment. The jury
10 could find those facts, anyway, because then Golden View
11 proceeded after that meeting at the bridge before delivery
12 of the concrete for the bridge deck, which was the lion's
13 share of the concrete delivered. And that's the biggest
14 portion of the bill that Golden View expected Grangaard to
15 pay. Their detrimental reliance on his false statements
16 that there were no problems, they then proceeded to deliver
17 the balance of the concrete that had been ordered. That is
18 somewhat coupled with that he had also promised to pay, and
19 he didn't follow through with that. So I think there's
20 enough facts if the jury were to believe they could
21 potentially find the defendant guilty of fraud and deceit.
22 So the motion by defense is denied at this point in time.

23 Now, Mr. Fink, you have Plaintiff's motion for
24 permission to undertake discovery regarding the issue of
25 punitive damages and for a motion for submission of the

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1 MR. FRITZ: I thought you said he didn't pay the
2 \$16,000.

3 THE COURT: I said he did.

4 MR. FRITZ: Oh. I thought you said he didn't.

5 THE COURT: I said -- he said he paid the 16.

6 MR. FRITZ: Okay.

7 THE COURT: So he partially complied with these
8 payment terms that were discussed. Where the Court finds
9 there to be more of a concern with false statements goes
10 down along the lines of no problems with the concrete at
11 that time. He's got a different version of what he
12 believes was said, but we have the completely opposite
13 version from Brian and Sam Waldner as to no problems at
14 all.

15 Mr. Grangaard wants to qualify that on no problems
16 with the pier to require removal of any concrete. That's
17 essentially his testimony today as I recall it. But
18 there's a very different version of facts which the jury
19 could believe that Mr. Grangaard falsely stated to Golden
20 View and the Waldners in particular that there were no
21 problems with the concrete up to that point in time. That
22 is somewhat vague, but that is general and broad. And he
23 wants to qualify his response, whereas they wanted it to be
24 broad.

25 The other part of it that the jury could find to be

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1 issue of punitive damages to the jury. You may address
2 that at this time.

3 MR. FINK: Your Honor, I've always found that the
4 standard is somewhat confusing on the issue of punitive
5 damages, but basically what the Court would need to find is
6 that there's clear and convincing evidence of a reasonable
7 basis for punitive damages. I think that sometimes gets
8 confused with there being clear and convincing evidence
9 that punitive damages should be assessed. The issue of
10 whether they get assessed is for the jury. So here what
11 the Court would be required to find at this point is that
12 there's clear and convincing evidence of that reasonable
13 basis. I would argue, Your Honor, very simply, that the
14 reasons the Court just gave supporting the fraud and
15 bad-faith claim going forward would be the same issue with
16 respect to punitive damages.

17 One thing I'll note, Your Honor, and it came out at
18 the end of the testimony of Mr. Grangaard. I really didn't
19 expect it, but he basically admitted that he never sent any
20 coring bills to Golden View; and yet, on the other hand,
21 he's saying that he expected those to be paid by Golden
22 View. To me, that's a crucial point because his failure
23 to send those bills indicates that he had an expectation
24 different than what he said he had. If he had sent those
25 bills with a note saying, I expect you to pay it, then I

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1 think a reasonable argument is made that he put Golden View
2 on notice that Golden View might actually owe some money
3 leading up to the bridge deck project.

4 But by not sending those bills, that in conjunction
5 with Tim Marshall's testimony where he indicated that
6 basically he gives the strength test information to
7 Jeremiah Grangaard and then relies on Jeremiah to have
8 discussions with the suppliers, it really looks to me, Your
9 Honor, like there was effort to keep Golden View in the
10 dark and in the game so that Grangaard could profit the
11 most that they could in this project, which after they
12 heard \$750 a yard meant that it was a better financial
13 decision for them to order concrete from Golden View and
14 either paid Golden View or later claim that there was some
15 contractual agreement not to pay.

16 So I think there's evidence of keeping Golden View in
17 the dark. It goes to malice. It goes to bad faith. And
18 so the position we have, Your Honor, is that we should be
19 allowed to undertake discovery. The documents we requested
20 should be produced, and Plaintiff should be allowed to
21 question Mr. Grangaard tomorrow on the issues of those
22 punitive damages.

23 THE COURT: Mr. Fritz?

24 MR. FRITZ: Punitive damages are only allowed in South
25 Dakota when a party reaches, quote, "an obligation not

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1 was appropriate. I'd encourage the Court to take a look at
2 that case and ask how is that significantly distinguished
3 between this case and how are we to square those two. So I
4 think South Dakota law, by its own terms, this is the same
5 obligation that arises under the contract. So, therefore,
6 punitive damages is not allowed. And the Farrock Eighth
7 Circuit Court of Appeals has addressed this issue, this
8 case almost, and said punitive damages are not warranted.

9 THE COURT: If we were only pursuing the
10 breach-of-contract count, I would agree with you. But
11 we're not. The bad-faith count is alive, as well as fraud
12 and deceit. The obligation arising from something other
13 than the contract terms is the obligation of good faith and
14 fair dealing. And if the jury finds your client is
15 fraudulent and deceitful in basically lying to Golden View
16 to induce them to continue to perform the contract and
17 deliver the concrete for the bridge deck, I believe we'd
18 have clear and convincing evidence for a reasonable basis
19 for punitive damages to be assessed.

20 Now, there's a couple things I would agree with
21 Mr. Fisk in the fact that the curing and testing bills were
22 never submitted by Grangaard to Golden View. I think an
23 argument can be made as to what intent there was with that.

24 There's another factor here that the Court also paid
25 attention to as it came in. It appears Mr. Grangaard is

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1 arising from contract." That's 21-3-2. What's the
2 obligation that they claim was breached as the basis of the
3 fraud claim? Failure to pay. What's the obligation that
4 arises from a breach-of-contract claim? Failure to pay.
5 It's the same obligation.

6 So when the law says that punitive damages are only
7 allowed when a party reaches an obligation not arising from
8 a contract, how can you escape that? It's an obligation
9 arising under the contract. It is the obligation. It is
10 the obligation under the contract. So South Dakota law
11 clearly does not allow for punitive damages in this case
12 that are stated.

13 Then we cited to the Farrock case, Your Honor, which
14 is an Eighth Circuit case, Farrock versus Dement. And it
15 is in terms of a fraud case, a fraud claim, it is really,
16 really close to our case. In fact, I would argue that the
17 Farrock case presented a closer case to punitive damages
18 and fraud than would this case, because there the
19 contractor, they have emails where he says, you know, I
20 will not unilaterally deduct monies due to Farrock.
21 That's what the contractor said in that case. And Dement
22 intended to pay the invoices in a timely manner, he told
23 them.

24 In that case, the circuit court, Arkansas, granted
25 summary judgment on that, and the Eighth Circuit said that

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1 a very experienced contractor with numerous projects with
2 the Department of Transportation, yet the testimony was
3 this is the only situation where he does not have a written
4 contract with his supplier for concrete like this. The
5 Court finds that to be very problematic in that what were
6 his intentions. And he is the experienced party with these
7 type of arrangements. It's to his benefit. We wouldn't
8 be here today if he had a proper contract. And I'm not
9 holding that part against him. He's the experienced party
10 dealing with the Department of Transportation on numerous
11 occasions, and all the testimony has been they've had
12 limited contact with DOT and limited involvement in these
13 type of contracts.

14 Now, the Court believes this jury could find malice
15 and bad faith on the part of Mr. Grangaard in this type of
16 situation, because if I were the finder of fact, which I'm
17 not, I would look at what are the terms of the agreement.
18 It's a verbal agreement, and we have a recipe as to what
19 was going to be delivered. We really don't have anything
20 else. So it would appear that the Plaintiff would be
21 entitled to get their payment plus their interest and that
22 there could be a set of facts that they find Mr. Grangaard
23 was fraudulent and deceitful in getting them to continue
24 with the bridge deck part of this agreement. That's where
25 we get to fraud and deceit are on the table. And when

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1 these are on the table, then the punitive damages can
2 potentially be applicable if the jury believes it's
3 appropriate. So I think there's clear and convincing
4 evidence for a reasonable basis for it. It is outside
5 their normal obligations of their contract. We don't have
6 a written contract; we have a verbal agreement with
7 disputed facts as to what that agreement entailed.

8 I think the risk for Mr. Grangaard is what set of
9 facts are they going to believe and what's the credibility
10 that they have to make a determination on as to the
11 witnesses. So far we have Mr. Grangaard saying, here's
12 what I think this was. And we have two witnesses for
13 Golden View that have a very different set of facts that
14 they have testified to. And then we have Mr. Marshall, who
15 is somewhere in the middle as to what the facts were back
16 and forth but doesn't have the information on any details.

17 Why I bring that up in part again is I find it unusual
18 that this is the only situation, based on my recollection
19 of the testimony, in that he doesn't have a written
20 agreement. And then it could have been very clear as to
21 penalties are going to be passed on, here's the situation,
22 here's where we go. That's why I say if there was a more
23 detailed written agreement, we probably wouldn't have gone
24 through all this and this would have been resolved a long
25 time ago. Because we have factual disputes as to what the

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1 Plaintiff will get to wrap up. I do anticipate limited
2 questions to get the information you're looking at. I
3 don't know how much beyond -- we've already talked about
4 the contract. That's probably a big part of where you're
5 going, but I don't know that for certain.

6 MR. FINE: Your Honor, I've issued a subpoena that
7 requires Mr. Grangaard to bring with him to court the
8 corporate tax returns and schedules related to Grangaard
9 Construction for --

10 MR. FRITZ: This is going to be bad.

11 MR. FINE: -- 2021 and 2022. And that goes towards
12 the net worth of the person who has damages assessed
13 against him, and I would ask that those be disclosed
14 tonight so that I can at least look over them before
15 tomorrow.

16 THE COURT: I don't know that that's fair and proper
17 to have those disclosed tonight. You do have a right to
18 make inquiries into those things once the door is open for
19 punitive damages, which the Court has officially ruled it
20 is. There's a lot of material that you have already
21 referenced concerning this contract, the amounts in the
22 contract that potentially can be very applicable for a jury
23 in making a determination if they find fraud and deceit,
24 for potentially an award of punitive damages based on just
25 the facts we have here.

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1 parties' agreements were on the contract itself, that's why
2 this case moves forward like it does. But because of
3 potentially false statements and detrimental reliance upon
4 those statements, that's where these other claims stay
5 alive, in the Court's mind.

6 So defense motions are denied. Plaintiff's motion for
7 permission to undertake discovery regarding punitive
8 damages is going to be granted. When we resume tomorrow,
9 Plaintiff can recall Mr. Grangaard to the stand to ask him
10 questions to further pursue that area of questioning.

11 Then it would be the Court's understanding, Mr. Fink,
12 that you would then officially rest. Would that be right?

13 MR. FINE: Yes.

14 THE COURT: Then we can move on to the defense's case.
15 They can recall Mr. Grangaard first. They also have an
16 expert witness. I don't care the order. It's up to you
17 folks. Do you have any other witnesses besides these two?

18 MR. FRITZ: We have Tim Marshall.

19 THE COURT: You're going to recall Mr. Marshall?

20 MR. FRITZ: Recall Tim Marshall, Jeremiah, and the
21 expert.

22 THE COURT: Is that the anticipated order?

23 MR. FRITZ: I don't know that. Yes.

24 THE COURT: I won't hold you to it. I was just trying
25 to get a roadmap. So when we come back at 9:00 tomorrow,

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1 I think Mr. Fritz is correct, it's a slippery slope,
2 but I've made the first shove. So we're going down the
3 slope potentially. And the items you have requested are
4 appropriate to be released as a part of discovery once
5 punitive damages becomes applicable. I would just ask --

6 MR. FINE: I will keep them in my file and not
7 disclose them to anyone, including my client, and I will
8 return --

9 MR. FRITZ: That's obvious.

10 MR. FINE: I will return them after the testimony is
11 over.

12 THE COURT: There is a confidentiality requirement.
13 So I'm glad you addressed that, because they are going
14 to be confidential documents for Mr. Grangaard, and Mr. Fink
15 has an obligation to secure that confidential information.
16 I'm just trying to find a fair way for timely disclosure so
17 that he has a chance to review them and formulate some
18 questions.

19 What I'm going to suggest, Mr. Fink, to put you under
20 the gun a little bit, but Mr. Grangaard needs to comply
21 with the request from that subpoena by 8:00 o'clock
22 tomorrow morning. You've got to get the information, bring
23 it with him, email it, however you want to do it. Mr. Fink
24 should have that information to review potentially by 8:00,
25 whether that makes counsel and Mr. Grangaard work hard on

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EXHIBITS		
PLAINTIFF'S		
Number	Description	Off'd Rec'd
22	NOData Results Historical weather data Historical weather data	-- --
DEFENDANT'S		
Number	Description	Off'd Rec'd
24	Daily Ticket Report	-- --
25	SDOJ Letter to Granggaard/1-24-12 (Part No. 18/18)	451 452
26	Coring letter	451 452
27	Invoice from Northwest Coring	516 516
28	Invoice from Castech	519 519
29	Coring test	522 522
30	Coring test	522 522
31	Spec book page	330 330
32/33	(Not offered)	-- --
34	Email exchange	364 364
35	Granggaard tax return	423 424
36	Coring test	522 522
Plaintiff rests:		Page 435
Defense rests:		Page 481
Closing Arguments:		
By Mr. Fink:		Page 745, 775
By Mr. Fritts:		Page 758
Verdict:		Page 783

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FURTHER DIRECT EXAMINATION	
BY MR. FINK:	
Q. Mr. Granggaard, I've given you Exhibit 8, and that's the bid schedule. As I understand it, each item that you bid contained an element of profit: is that right?	
A. Some do; some don't.	
Q. I'm going to show you your deposition, page 9. I asked the question: "For each line item, you are figuring out what your actual cost is going to be and then adding a little bit of padding in so that you have --"	
And then you answered what?	
A. "Yes."	
Q. For profit?	
A. And some of them are subcontractor quotes. We don't mark up a subcontractor quote. If you get a quote for the paving or the dirt, they turn a number in to you, and you enter that same number in. You usually don't mark that number up much.	
Q. The profits you testified to relating to the deck concrete, that's not the only profit you made on this project. True?	
A. True.	
Q. And your total bid amount, if you look on page 3, was \$3,812,979.96; right?	
A. Right.	

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1	JURY ORAL HEARING, JANUARY 20, 2024, AT 9:29 A.M.:
2	* * * * *
3	(The jury returned to the courtroom and
4	the following proceedings ensued with Court,
5	Counsel, and parties present, at 9:29 a.m.):
6	THE COURT: The Court will note that all 12 jurors
7	have returned to begin our morning session. All the
8	attorneys and parties are present. At this point we are
9	wrapping up Plaintiff's case.
10	Mr. Fink, you can call your next witness.
11	MR. FINK: Your Honor, I have some brief testimony
12	again from Jeremiah Granggaard.
13	THE COURT: Mr. Granggaard, if you would retake the
14	stand. And I will remind you that you are still under oath
15	from yesterday.
16	THE WITNESS: Okay.
17	MR. FINK: May I approach the witness, Your Honor?
18	THE COURT: You may.
19	MR. FRITTS: Your Honor, can I get a standing objection
20	to all of this evidence based upon our motions?
21	THE COURT: So noted.
22	MR. FRITTS: Okay.
23	JEREMIAH GRANGGAARD,
24	having been previously duly sworn, was
25	examined and testified further as follows:

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1	Q. How much were you paid when the dust settled by the
2	DOT? Was it more or less than that amount?
3	A. Normally, if there's -- well, in this case there was
4	that incentive, and then sometimes there's, like, piling
5	underrun; so that contract could be less. If there's
6	a change order, if the state's made a mistake, that could
7	obscure that number quite a little bit.
8	Q. Did you get paid more or less than the bid amount; or
9	don't you know?
10	A. I would assume that it would probably be more.
11	I don't know that answer without looking at it exactly.
12	Q. And on your bid schedule, item No. 2 indicates
13	"Incentive-disincentive," and then the unit bid price was
14	\$1400. Was that the daily, early-completion bonus that
15	you anticipated?
16	A. Yes.
17	Q. So when you bid this, you knew there was an incentive
18	to complete early. True?
19	A. True.
20	Q. Every time you called for concrete, Golden View
21	supplied concrete. True?
22	A. True.
23	Q. They never delayed any concrete or made you wait more
24	than that day for concrete?
25	MR. FRITTS: Objection. We're getting beyond the scope

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1 of what we're supposed to be doing.
 2 MR. FINK: I'll withdraw, Your Honor.
 3 THE COURT: Very good.
 4 Q. (BY MR. FINK) Your company, as I understand it, had
 5 gross receipts in 2021 exceeding \$15 million. Is that
 6 true?
 7 A. Correct.
 8 Q. And it looks to me like your total income just in 2021
 9 was almost \$2 million. True?
 10 A. Correct.
 11 MR. FINK: That's all the questions I have, Your
 12 Honor.
 13 THE COURT: Mr. Fritze?
 14 MR. FRITZ: Thank you, Your Honor. I have just a few.
 15 RE-CROSS-EXAMINATION
 16 BY MR. FRITZ:
 17 Q. Jeremiah, I want to show you what's been marked
 18 Exhibit 45. Do you recognize that document?
 19 A. Yes.
 20 Q. What is that?
 21 A. It's our S-corp, my final return schedule of what we
 22 make for the year.
 23 Q. Were you requested by Mr. Fink to bring that today?
 24 A. Yes.
 25 MR. FRITZ: Okay. I'd offer Exhibit 45.

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1 determined the wages paid and then the officer
 2 compensation. True?
 3 A. True.
 4 Q. So that figure you just gave is after money has
 5 already been paid out for employees and for officers.
 6 True?
 7 A. Yes. True.
 8 MR. FINK: That's all I have.
 9 THE COURT: Mr. Fritze?
 10 MR. FRITZ: Nothing further.
 11 THE COURT: Mr. Grangard, if you would hand me that.
 12 Thank you.
 13 Was Plaintiff's 8 previously received, Mr. Fink?
 14 No had So. 8.
 15 MR. FINK: Yes. That's already been.
 16 THE COURT: So I have 8 and 45 that I'm providing back
 17 to the clerk.
 18 You can step down. Thank you.
 19 MR. FINK: Your Honor, Plaintiff rests.
 20 THE COURT: All right. Plaintiff having rested, and
 21 we already addressed motions yesterday, Mr. Fritze, are you
 22 comfortable proceeding at this juncture?
 23 MR. FRITZ: Yes.
 24 THE COURT: You can call your next witness.
 25 MR. RAMP: Grangard calls Tim Marshall.

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1 THE COURT: Any objection?
 2 MR. FINK: No, Your Honor.
 3 THE COURT: 45 will be received.
 4 Q. (BY MR. FRITZ) On that Exhibit 45, I believe it's
 5 line 21, what was your net income, Grangard Construction's
 6 net income for 2011?
 7 A. \$280,811.
 8 Q. Okay. What were the amounts of deducts in this case,
 9 roughly?
 10 A. Oh, I think it was between 47- and 60,000, somewhere
 11 in that neighborhood.
 12 Q. Okay. What was the cost of that coxing expense?
 13 Yeah, the big one.
 14 A. The big one was, like, \$16,800.
 15 Q. So those two expenses alone might have been a quarter
 16 of your income for that year?
 17 A. Correct.
 18 MR. FRITZ: That's all the questions I have.
 19 THE COURT: Mr. Fink, any follow-up?
 20 FURTHER RE-DIRECT EXAMINATION
 21 BY MR. FINK:
 22 Q. Net income, that is going to be Grangard
 23 Construction's net income?
 24 A. Yes. S-corp, yeah.
 25 Q. Before you get to net income, though, you first

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1 THE COURT: Mr. Marshall, I will remind you that you
 2 are still under oath from earlier in this proceeding. Do
 3 you understand that?
 4 THE WITNESS: Yes.
 5 Thereupon--
 6 TIMOTHY MARSHALL,
 7 having been previously duly sworn to tell the truth,
 8 was examined and testified further as follows:
 9 DIRECT EXAMINATION
 10 BY MR. RAMP:
 11 Q. Good morning, Mr. Marshall. How are you?
 12 A. Good morning. Good.
 13 Q. Was it just yesterday that you testified?
 14 A. Yeah. Was that just one day?
 15 Q. It feels like a little bit longer ago than that.
 16 You've already been up here plenty. You've had enough
 17 lawyers talking to you, so this will go pretty quickly, and
 18 I'll jump around so we don't cover again what we already
 19 covered.
 20 I think you testified that in 2021 you did some sort
 21 of site inspection of Golden View's plant.
 22 A. Yes.
 23 Q. And were you ever at that plant?
 24 A. Yes.
 25 Q. Could that site inspection be accomplished in one day?

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1 A. Fairly early, around the time of the first or second
2 pour I think is when that happened.

3 Q. Okay. How did it come up?

4 A. Well, that's a good question. I don't know exactly
5 when we were talking about the possible risk factors in
6 that same conversation. That's the best I can recall on
7 that.

8 Q. You testified that he told you he wanted to make a
9 fair bid for the state; is that right?

10 A. Yes.

11 Q. What else did he say along those lines?

12 A. Well, that was about it. We kind of discussed the
13 price, and I think that was the same conversation we were
14 at: recommended to possibly talk to another ready-mix
15 supplier to see -- you know, I didn't see the actual bid
16 prior, but I know what Sen told me. And when I heard it, I
17 was like, you may want to make a call and talk to somebody
18 who's been in this situation before.

19 Q. Did he tell you something along the lines that he did
20 want to gouge the state with his prices?

21 A. Yes, he did.

22 Q. How far is the Golden View plant from the project?

23 A. Three miles.

24 Q. Pretty close?

25 A. About three miles.

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1 Q. Okay. But not on projects you've worked on?

2 A. The one from ten years ago, I can't recall. And not
3 all bridges necessarily have a lot of concrete. When I say
4 I worked on a bridge, there's a type of bridge they call a
5 bulb-tee that's not a poured deck. It's a precast unit,
6 and it's set on some kind of piling. So it's a different
7 type of bridge. And that's the two that I worked on
8 previously. I don't know if that's --

9 Q. I'm trying to understand where -- I'm trying to get an
10 apples-to-apples comparison for this bridge and some other
11 one you did for a sense of price for a bridge project. Do
12 you have a comparable where there's this type of volume for
13 a bridge deck where you know what the supplier's bridge
14 price was to the contractor?

15 A. I have a good idea, because we've had these failures
16 before, and not to expand too far, but this has been an
17 industry wide issue in the state with concrete failures
18 where we've had failures getting quotes from suppliers to
19 supply us mix: so there's definitely been background into
20 what the cost of the concrete is because statewide we've
21 had to deal with this, and we've had projects where we
22 couldn't get a bid for concrete. We have suppliers that
23 won't supply us concrete without that increased price.

24 Q. So you find when things go bad, you sometimes see what
25 the prices are?

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1 Q. Are projects typically that close to the supplier?

2 A. No, not normally.

3 Q. And you testified at the outset, which again feels
4 like a week ago, but I think you said you worked on about
5 six bridge projects?

6 A. Roughly, something like that.

7 Q. Over how many years was that?

8 A. Over 25 years.

9 Q. Okay. How many, let's say since 2020, of those six?

10 A. That's the only bridge, actual bridge. Well, I guess
11 I had one this summer too.

12 Q. But at that time that had been the only one in several
13 years?

14 A. Yeah. Yeah. I'm trying to think if -- we do some
15 work with the counties, and I don't think I had any of the
16 counties' structures. Ten years, maybe.

17 Q. Ten years prior to this project that you had a bridge
18 project that you oversee?

19 A. Yeah.

20 Q. Did I hear you testifying earlier about what you
21 thought the proper bid price for a supplier to bid concrete
22 for a bridge project would be?

23 A. Yeah. I mean, I've never seen the direct quotes
24 between the suppliers and the prime contractor, but I have
25 a fair idea from talking with other ready-mix suppliers.

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1 A. Yeah. And I also -- I know people that is correct in
2 the ready mix industry, and I've had conversations that
3 weren't working related talking with them, and their
4 concerns about supplying concrete. So it's been a
5 statewide thing. There's been several conversations and
6 they weren't necessarily pertaining to this project.

7 Q. Did you have any -- did you ask Sen any more about
8 what went into building that price for his concrete?

9 A. No. I just recommended that he maybe talked to
10 another ready mix supplier that had supplied concrete for
11 the state.

12 Q. How many suppliers, when this project was bid, how
13 many suppliers were listed, concrete suppliers were listed
14 for the project?

15 A. Just one. I don't see Jeremiah's quotes from his
16 subcontractors or suppliers. I don't have -- I don't know
17 that. I don't have that information. So when I see it,
18 it's been let and the supplier -- I don't even really have
19 a listed supplier. It's more of an informal thing
20 where Jeremiah -- we say, "Who are you getting your
21 concrete from?" And he tells me, "We're getting it from
22 Golden View."

23 Q. Do you ever have projects that have a number of
24 concrete suppliers?

25 A. Not typically.

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1 Q. You'd know that ahead of me if there would be multiple
2 suppliers?

3 A. Yeah. The only time I have multiple is if you have
4 concrete paving and a structured project on the same
5 contract. When you'll probably get a paving contractor
6 that's got their own plant, and then you'll get a ready mix
7 supplier for the structure work on there.

8 Q. So, for this project, at the outset did you assume
9 Golden View would supply concrete for the entire project?

10 MR. FINE: Objection, your Honor. Speculation.

11 THE COURT: Sustained.

12 Q. (BY MR. KAMM) Did you ever talk to Mr. Waldner about
13 what he understood -- strike that.

14 So, at the outset, did you have conversations with Mr.
15 Waldner about whether Golden View would be capable of
16 supplying concrete for the project?

17 A. Yes.

18 Q. Did that include the bridge deck?

19 A. Yeah, mostly pertaining to the bridge deck. I always
20 have concerns when we start. We have to maintain a certain
21 rate of pour across the deck. So one of the first
22 questions is: How many trucks do you have? Can you supply
23 this concrete at the rate we need it?

24 Q. For the whole project?

25 A. Yes.

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1 A. Yeah. Yeah. I think that's right. I just looked at
2 the COO yesterday, and I had one this year and it was 1800.
3 So I think this one was 1400.

4 Q. Is there a maximum of how many days they can finish
5 early?

6 A. No, not -- we don't limit that, you know.

7 Q. What about payment? Is there a payment maximum for
8 incentive payment maximum?

9 A. I think there was on this one. I can't remember, but
10 it seems like it might have been 40 days or something like
11 that.

12 Q. Yeah. If I saw it was 30 days for 40,000, does that
13 sound right?

14 A. Yeah. It's in that special provision or whatever, but
15 yeah, that sounds right when you say it.

16 Q. We've talked a lot about this. There's a pre-cone
17 meeting for the deck? Maybe I'm using the wrong term.

18 A. Yeah. Yeah.

19 Q. And you were there, right?

20 A. Yeah. Yeah.

21 Q. And I think you were already asked about whether you
22 heard any conversations between Golden View and Grangaard
23 about promises for going forward. Were you involved in any
24 of those conversations?

25 A. Just that very general knowledge that you just

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1 Q. And Golden View never said anything to you otherwise
2 about not supplying concrete for the whole bridge at the
3 outset?

4 A. Not at the outset, no.

5 Q. They didn't say we can do the footings and see how
6 that goes and maybe do the deck? Did they say that?

7 A. No. Not at the beginning of the project, no.

8 Q. I believe you testified that this bridge was an issue
9 for quite some time. Is that accurate?

10 Let me ask a better question. Prior to the project
11 being started, I think you said something like the bridge
12 was sort of out of commission for a while: is that right?

13 A. Yeah. What was the year? 2019? We had all the
14 flooding around the state, and so this bridge had some
15 score problems underneath, and the bridge office felt that
16 there might be some instability there, so they closed that
17 bridge and then they had temporary traffic on it, one-lane
18 traffic, for a year or so before we started the removal
19 here.

20 Q. That was part of the reason why the DOT put in an
21 incentive for this project?

22 A. Yes. It had been closed or limited traffic for quite
23 some time.

24 Q. And we heard that number was 1400 a day. Does that
25 sound right?

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1 stated. The details I didn't really follow, because to me
2 that was an issue between the prime contractor and the
3 supplier, so I didn't pay a lot of attention. And most of
4 my focus was on this bridge inspection. That's when the
5 region -- or, actually, the state bridge person comes out,
6 and we actually go through that all the reinforcing steel
7 is in place. We check paving depth and do a dry run with
8 the paver. So I had a lot going on that day, and I
9 didn't -- I know they had that conversation, but the
10 details of it, I can't provide anything there.

11 Q. Did the inspection there find that the bridge was
12 good?

13 A. Yeah. Ready to pour, yeah.

14 Q. All right. Let's look at some of these deductions
15 here.

16 MR. KAMM: Your Honor, may I approach?

17 THE COURT: You say.

18 Q. (BY MR. KAMM) Mr. Marshall, I'm showing you what's
19 been marked as Exhibit 16. Do you recognize that?

20 A. I do.

21 Q. What is that?

22 A. Well, it's a price adjustment letter I guess. I think
23 that's the official title, because I always call it a DOT
24 ID, which is the form number.

25 Q. All right. So let's just go through some basic

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1 a bridge deck, if it's not something that's really
2 detrimental to the deck, we're going to proceed with the
3 pour to try and complete that pour in a continuous fashion.
4 I mean we just don't want to stop on our deck in
5 essence.

6 Q. Right. So if it was not -- if it was a regular pier
7 pour, the calculation might be a little bit different on
8 whether to accept that or not?

9 A. There probably would still be a deduct, but the
10 difference would be that I would have that test result
11 before we placed. I would know my results before we
12 replaced.

13 Q. Okay. So you're pumping all this concrete up on the
14 deck, not knowing what the fresh concrete results were as
15 it's getting pumped out? Is that what I'm understanding?

16 A. Yes.

17 Q. It's a large volume that's getting pumped out, right?

18 A. A ready mix truck is usually ten yards, and it's got a
19 hopper on the back, so a lot of times you're one truck.
20 But at times you can get two trucks in there. So you might
21 have 20 yards going up to the deck, but it's not -- they
22 can't see their paving machine at the pace that that pump
23 could put that concrete out, so there's some delay in
24 there. Narrow placing the concrete, stopping pumping,
25 moving the machine, pumping some more. So it's not just

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1 can't -- I could I guess I could calculate by foot how much
2 concrete is in a foot and figure it that way, but basically
3 what I do is I go and I take a measurement on the deck and
4 I go back to a certain point and say this looks like it was
5 25 feet, and then I calculate the yardage that would be
6 theoretically used in 25 feet of placement.

7 Q. All right. Let me ask you this. By the end of that
8 day, did you have a sense, a general sense about how much
9 the deductions would be for those three failed tests we
10 talked about?

11 A. Not at the end of the day, I didn't have that policy
12 with me. I knew there would be a deduct, but I had no idea
13 what the amount would be until I got back into the office
14 the next day.

15 Q. Could it have been, like, 50,000?

16 A. As it turns out, it was pretty significant.

17 Q. Could it have been 50,000?

18 A. I didn't think so at the time. I didn't -- I thought
19 maybe three or 4,000. And when I got back in the office, I
20 was -- frankly, I was stunned that it was, like, \$27,000.
21 So the region engineer -- materials engineer has the final
22 say in these deductions, so he did reduce that some. But
23 initially, the amount of that deduct was significantly
24 more. That's for the slump failure.

25 Q. So you told Jeremiah this \$27,000 number?

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1 instantaneously dumping this ten yards on the deck. But
2 because of the way our spec is worded, I have to take my
3 acceptance test where it's placed. So we can do
4 informational testing going on the ground. I don't believe
5 we did in this case. We took our first test as soon as
6 they started to put this mud on the deck. So we've got
7 about one yard out when we get the sample. But the load
8 has probably been placed in its entirety before I have the
9 result.

10 Q. Okay. That makes sense. So it's all out there before
11 we get a result. So if it's all wrong, then the deduction
12 equation takes in that whole load that was sent out, right?

13 A. Right. And at that point then we trying to get try to
14 get our concrete back into specification, but if it was bad
15 enough or big enough deviation, I would stop the pour at
16 that point, since it was that early in the pour, I would
17 stop that pour and we would shovel that mud out and start
18 again.

19 Q. For each one -- we count three of these fresh test.
20 Each represents a whole load that was dumped out before we
21 knew what the results were?

22 A. Some are by yardage. It looks like they're all by
23 yardage, but some of these like a slump test, it's kind of
24 an estimated yardage. I'm looking at where that failed,
25 and because of the deck is bid in cubic yards, but I

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1 A. I'm sure I did when I knew the number, that I told him
2 what that was. And I believe when I talked to him, I told
3 him I was shocked by how much that actually was.

4 Q. Was he surprised that he was facing \$27,000 for the
5 bridge deck pour?

6 A. I can't say. I can't say what he would have thought
7 of that. I'm assuming he probably thought it was high too,
8 but I'm speaking for him. I can't do that.

9 Q. We're almost done here. Let's go to the last one. I
10 don't have much to do on these. But 35 and 36, this was
11 concrete in a Golden View supplied on these pours; correct?

12 A. Yes. 35 is the one that is the curing compound. But
13 they did supply the concrete.

14 Q. My question is they kept working into November. Is
15 that what these lead you to believe?

16 A. Yes.

17 Q. We've looked at the letter dates. We can go back
18 through, but I believe the first one was sent November 3rd,
19 that would be 17, probably, if you can find that one. A
20 few were sent November 3rd, I believe.

21 A. Yeah.

22 Q. So there's no official deducts before that
23 November 3rd date?

24 A. No. I don't believe so.

25 Q. And after that we have several in January; is that

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1 right? I'm looking at 18, 20 was January 11th: is that
 2 right? Am I going too fast? I'm not trying to trip
 3 you up.
 4 A. I'm going back and forth with these papers, and now
 5 they're out of order. My knowledge to answer it by memory
 6 is not good enough to answer by memory. I need to sort
 7 through these.
 8 Q. I'll just show you this. I cheated. I've got staples
 9 in mine. We're looking at 22. Do you see the letter date
 10 on that?
 11 A. Yeah. January 11th, yeah. Several of these look like
 12 they were sent on January 11th, or a couple of them at
 13 least.
 14 Q. Okay. Did you tell Sam Waldner that if there were
 15 deductions on the project, those deductions would be passed
 16 to Golden View?
 17 A. No, not specifically. I did not tell him that.
 18 Q. Do you remember the first time you were asked that
 19 question under oath?
 20 A. No.
 21 Q. Let's take a look at here?
 22 MR. FINK: I'm going to object as answered.
 23 THE COURT: Overruled. Are you referring to a
 24 deposition transcript, Counsel?
 25 MR. RAMS: Yes. Objection is overruled.

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1 Q. All right. So I'm going to go in reverse order.
 2 You're saying there was a penalty for slump on the deck: is
 3 that right?
 4 A. Yes.
 5 Q. But the DOT was testing for slump all along, weren't
 6 they?
 7 A. Yes.
 8 Q. And why do you test for slump as the project is going
 9 on? Is that something that needs to be adjusted?
 10 A. Well, yeah. We have a specification limit, but a lot
 11 of the slump characteristic, a lot of that is for the
 12 workability of the concrete, although when you get on the
 13 deck, you've got a lower slump requirement when you start
 14 paving.
 15 Q. So the concrete at the plant will be made with a
 16 certain amount of slump: right? So you follow that? Yes?
 17 A. Yes.
 18 Q. Does that slump change between the plant and the job
 19 site?
 20 MR. FRITZ: Objection.
 21 MR. RAMS: Objection. Foundation.
 22 THE COURT: Overruled. You can try to answer if you
 23 know.
 24 THE WITNESS: It does change some, but more so in the
 25 delivery time. If you've got 45 minutes of delivery,

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1 MR. FINK: Page, Counsel?
 2 Q. (BY MR. RAMS) Page 69. Okay. Line 6, Mr. Fink asked
 3 you: "But you didn't tell him as a matter of course that
 4 there was a deduction, that deductions would be passed to
 5 him, did you?"
 6 How did you respond? Line 9.
 7 A. "I think I did."
 8 Q. "I think I did" is what you said. The very first time
 9 you were asked that question, you said, "I think I did"?
 10 A. I knew the results and that there was going to be
 11 a deduction I did tell him.
 12 MR. RAMS: That's all I have.
 13 THE COURT: Mr. Fink?
 14 CROSS-EXAMINATION
 15 BY MR. FINK:
 16 Q. And that's kind of the important point. You brought
 17 this up after the project had already started; right, the
 18 deductions?
 19 A. The actual deduction, yes. The possibility of it
 20 might be a different --
 21 Q. When you told Sam later on as the project was ongoing
 22 that there could be the issue of deductions, Sam told you
 23 no, that Golden View was not responsible for deductions;
 24 right?
 25 A. I believe that's what he told me, yes.

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1 you're going to lose -- your materials are going to change.
 2 Q. (BY MR. FINK) It's tested at the site for slump
 3 because slump can change from the time it leaves the plant;
 4 right?
 5 A. It can.
 6 Q. Did Granggaard ever have somebody on its own testing
 7 the slump at the job site?
 8 A. Not when I was present, and I don't believe so at any
 9 other time either.
 10 Q. Is there any reason that couldn't have somebody test
 11 for slump at the job site?
 12 A. No.
 13 Q. Under the contract they have with the DOT, Granggaard
 14 is responsible for the performance of the concrete. True?
 15 MR. RAMS: Objection. Asked and answered.
 16 THE COURT: Overruled. You can try to answer.
 17 THE WITNESS: Could you ask me that again, please?
 18 Q. (BY MR. FINK) Under the DOT specifications which are
 19 part of Granggaard's contract, Granggaard is responsible for
 20 the performance of the concrete. Is that true?
 21 A. I don't know how our contract language exactly is in
 22 that, but -- but ultimately I'm dealing with the prime
 23 contractor and everything I do is through the prime
 24 contractor. So in essence, yes. But --
 25 Q. So under its contract with the DOT, Granggaard could

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1 THE WITNESS: Yes.

2 Q. (BY MR. RAMM) So if concrete doesn't meet these
3 specifications, and we've seen these deviation letters,
4 does the contractor lose money?

5 MR. FINK: Objection. Argumentative, Your Honor.

6 THE COURT: Overruled. He can try to answer.

7 THE WITNESS: Can you ask that again, please?

8 Q. (BY MR. RAMM) So if the concrete delivered does not
9 meet the DOT specifications, does the contractor lose
10 money?

11 A. I withhold money. What happens with it after that, I
12 don't know, but I withhold money from the contract payment.

13 Q. In your experience, is it common practice in the
14 industry for the supplier to compensate the contractor for
15 any losses as a result of non-specification concrete?

16 MR. FINK: Objection, Your Honor. Relevance.

17 THE COURT: The usage and trade within the industry is
18 relevant, so the objection will be overruled.

19 THE WITNESS: I have my own personal experiences with
20 it.

21 MR. FINK: Then I'm going to object as speculation,
22 Your Honor.

23 THE COURT: It's still overruled. There's a caveat as
24 to his personal experience. Obviously he can't testify
25 beyond as to what he has knowledge of. So he can still try

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1 supplier and the contractor for deductions to be passed on?

2 MR. RAMM: Objection. Speculation.

3 THE COURT: Overruled. I allowed him to give the
4 first part, so he gets to follow up.

5 THE WITNESS: I don't believe there's ever been
6 anything other than prices agreed to. I don't think
7 that -- I don't believe that the suppliers and the prime
8 contractor typically have a contract that they -- they
9 might have a price agreement. I don't know if that
10 constitutes a contract or not; but, to my knowledge, they
11 just have the price agreement.

12 Q. (BY MR. FINK) Well, let me ask. Do you ask the
13 contractors what kind of agreements they make with their
14 suppliers?

15 A. Typically, no.

16 Q. So how do you know if there's a supply agreement or
17 not? You don't, do you?

18 A. I know someone is going to bring concrete, and when
19 they get there, that's who's supplying it. But they're not
20 obligated to that.

21 Q. Here's my question, though. How do you know that
22 there's no written or verbal agreement between the
23 contractor and the supplier about what the supplier is
24 expected to do?

25 A. I don't know that there is.

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1 to answer.

2 THE WITNESS: I've had concrete failures on other
3 projects, and in all my experiences, the defect has always
4 been passed on to the supplier.

5 Q. (BY MR. RAMM) You said you were unsure if Golden View
6 was bound by any contractual agreement to supply concrete
7 for the entire project. But just to clarify, you testified
8 that at the beginning it was their intention to supply
9 concrete for the entire project. Is that true?

10 A. Yes.

11 Q. Mr. Fink asked you about the test results and
12 whether -- sorry. The break results and whether you pass
13 those along to Golden View. But you just testified earlier
14 that you did tell Tom that there was a deduction; correct?

15 A. My first call would have been to Jeremiah, but I know
16 we had some discussions about weak concrete, especially
17 after the first one failed. So at some point, I probably
18 did notify them, but my first notification would have been
19 to Jeremiah.

20 MR. RAMM: Nothing further.

21 THE COURT: Mr. Fink?

22 RECESS--REANIMATION

23 BY MR. FINK:

24 Q. So in your experience with these deductions, has it
25 been your experience that there is an agreement between the

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1 Q. You just never see the supply agreements; right?

2 A. I've certainly never seen one, no.

3 Q. Mr. Grangaard, I will tell you, testified that this is
4 the first time that he didn't have a written supply
5 agreement. All right? So have you ever seen a written
6 supply agreement in all the years that you've worked?

7 A. No. I don't have access. That's not something that
8 they'll show me. Sam showed me that his -- I thought
9 he had a quote there, but I don't know that that was
10 a contract.

11 Q. So all you really know is that in the past it has
12 worked out where the supplier for whatever reason has borne
13 some of the deductions?

14 A. Yes.

15 Q. You don't know if that's from the result of a contract
16 or not, do you?

17 A. No.

18 Q. And the way these deductions work as I'm looking
19 through this, if the bid price supplied on the bid sheet
20 was \$5,600 a yard, the math would basically be the same
21 except we would take out 975 and we would put in 5,000;
22 right?

23 A. Whatever that final unit bid price would be what that
24 final number is. If they bid 5,000, yes, it would be
25 5,000.

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1 THE COURT: Overruled.
 2 You can try to answer.
 3 THE WITNESS: Yes.
 4 Q. (BY MR. BARN) If I say specifications for 365
 5 concrete, can we agree that I'm referring to the
 6 specifications set forth here?
 7 A. Yes.
 8 Q. So, in your experience, have you ever had to explain
 9 the specifications for 365 concrete to a supplier?
 10 A. No, not that I can recall, no.
 11 Q. In your experience, standard specifications practice
 12 in the industry for a supplier to pay the amount of your
 13 damages resulting for nonconforming concrete?
 14 MR. FIRE: Objection to relevance and speculation.
 15 THE COURT: Overruled. He can respond.
 16 THE WITNESS: Every time.
 17 Q. (BY MR. BARN) What about if there's nonconforming
 18 concrete? Is it the practice that the supplier pays for
 19 the coring cost and testing?
 20 MR. FIRE: I'm going to object to the relevance, Your
 21 Honor.
 22 THE COURT: Overruled. He can respond.
 23 THE WITNESS: Yes, if it -- yes, they usually pay it.
 24 Q. (BY MR. BARN) If it fails?
 25 A. Yes. Yeah.

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1 bridge a few times on the desk, paper-trail it, and then a
 2 couple days before the bid, kind of how big it is. Then
 3 the quotes will come in, and you have to put this project
 4 together, and then you have it entered by a certain time
 5 the day of the bid.
 6 Q. Is there an engineer involved in that?
 7 A. No, not really.
 8 Q. Okay. So Grangaard does a design of the bridge or --
 9 A. No. The design gets shipped out to private companies.
 10 The state will award -- you know, they'll put their name on
 11 it and go by it, and then somebody bids for it to put it
 12 out, and then they'll put their name on it.
 13 Q. So the state gets an engineer and the engineer --
 14 A. Will put a stamp, yeah.
 15 Q. And then there's plans, and then you bid on those
 16 plans?
 17 A. Yeah.
 18 Q. Does the state give you a list of potential suppliers
 19 for the project?
 20 A. Yep. They're on the web page there when you do it,
 21 yeah.
 22 Q. And how do you contact a supplier?
 23 A. They show their name and company, email, phone number
 24 for contact.
 25 Q. You have to pick up the phone or send email or

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1 Q. Let's talk about bidding. Do you have to be on an
 2 approved list to be in the bid process?
 3 A. Yeah. You have to be prequalified.
 4 Q. How do you get prequalified?
 5 A. It was while ago. You have to meet requirements and
 6 bonding and work underneath a prime contractor for bridge
 7 construction, and then you get prequalified.
 8 Q. Okay. It sounds like you have to do some work to kind
 9 of show you have the knowledge and skill to build a bridge.
 10 Is that fair?
 11 A. Yes. Correct.
 12 Q. So the bidding process incorporates some of your
 13 expertise and experience?
 14 A. Yeah.
 15 Q. How does Grangaard Construction get paid?
 16 A. We get paid solely by mainly the Department of
 17 Transportation and some city work or some private work too
 18 that takes place. But mostly DOT, and I would say
 19 90 percent.
 20 Q. Mostly bid payments?
 21 A. Correct.
 22 Q. What all is involved with putting a bid together?
 23 A. You know, they have a bid sheet. You look on the
 24 internet there, and there's jobs that come up. Closer to
 25 when it gets let, you get a set of plans. You build a

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1 something?
 2 A. Yeah. We usually, most of the time, if we know them,
 3 it will be verbal on the phone, sometimes by email.
 4 Q. So putting a bid together, you described the project
 5 a little bit. How much of your time does that take?
 6 A. Oh, it could be up to four days of eight, ten hours
 7 a day. It could go into the night if it's a big bid. It's
 8 really late the night of because people aren't putting all
 9 their quotes out. So, you know, four or five days,
 10 40 hours.
 11 Q. Can you charge that time back on the bid to the DOT?
 12 A. No. There's no bid for that.
 13 Q. That's a Grangaard Construction cost?
 14 A. Yep.
 15 Q. Does Grangaard own equipment that it uses for bid
 16 work?
 17 A. Yes.
 18 Q. Does the DOT pay you for that equipment?
 19 A. No.
 20 Q. You have to store that equipment someplace?
 21 A. Yes. Move it around, yeah, and some stuff gets
 22 stored.
 23 Q. Where's transportation costs in there too?
 24 A. Correct.
 25 Q. And those aren't in the bids that you get paid on;

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1 put your side boards on and put all your rebar on the deck,
2 and then you pour the bridge deck.

3 Q. In your experience of each of these steps, would you
4 be able to do those on your own?

5 A. Yes. Yeah.

6 Q. How long would it take you to learn, to feel like you
7 could know all of that?

8 A. It took me a while. We still learn every day. We're
9 never not learning. It takes -- some people are faster
10 than others at learning. Some are slower than others.
11 It's -- so you would think after five or six years you'd be
12 able to get somebody fairly accurate to do work for you, to
13 count on them to do it right.

14 Q. And the DOT doesn't pay Grangard for its training of
15 its employees; right?

16 A. No. The only thing is on certain special jobs a
17 training course might be, but that's just for one
18 individual, and it's just a process. But no, they don't
19 pay us to train nobody.

20 Q. It's just part of your operating costs?

21 A. Correct.

22 Q. Let's talk about this project. Do you remember why
23 you called Golden View about the project?

24 A. Yeah. They were the only bidder.

25 Q. And were you aware as to whether Golden View had

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1 deck, I remember, of course the 500 yards or 550.

2 Actually, only 500 because of the curbs there. But there
3 was talk, a little bit of chatter about that.

4 Q. Did he express any concerns about the job?

5 A. Not really. It's been a while ago. Nothing really
6 stuck out. We talked about that MS and when we were going
7 to start and how many trucks they had.

8 Q. And Sam testified, and I think you would agree, that
9 this was a verbal agreement. Would you agree with that?

10 A. Yeah.

11 Q. All right. So let's go through the terms that you
12 agreed to on the phone. To we're clear, what was the class
13 of concrete?

14 A. 845.

15 Q. What was the price?

16 A. Yeah.

17 Q. What was the price?

18 A. 150 or five. I can't remember exactly. It was in the
19 130s, I think.

20 Q. What was the term of the contract as you understood
21 it?

22 A. Yeah. Yeah.

23 Q. And then what was the amount? Was it for the entire
24 project?

25 A. Yeah. Yeah. For the substructure and the deck. I

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1 performed any DOT projects prior to you talking to them on
2 the phone?

3 A. I didn't -- when we did get the project, I was aware
4 that they did some work for Ed Knowles. He builds box
5 towers and bridges too. So I was aware they did a project
6 with him.

7 Q. And based on that, did you believe that Golden View
8 would be familiar with the DOT's specifications?

9 MR. FINN: Objection. Calls for speculation.

10 THE COURT: Sustained.

11 Q. (BY MR. BARN) So you talked to Sam Waldner?

12 A. Yes.

13 Q. And what class of concrete did you tell him you
14 needed?

15 A. 845.

16 Q. What was his response?

17 A. He said that would be all right. I mean, you know, it
18 was a friendly phone call. So we talked about, you know,
19 the MS-45. And he's like, okay. And we talked about some
20 questions about how long is it going to take that you talk
21 to anybody you're in business with.

22 Q. Did he express any concerns about doing a DOT project?

23 A. That's a long conversation. I don't want to -- I
24 don't really think there was -- I asked him about trucks
25 because we always do, you know. And we talked about the

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1 think it was like a thousand yards almost, I think.

2 Q. And you knew about when the concrete needed to be
3 delivered, the time frame?

4 A. Yeah. We had to explain when we were going to get
5 started.

6 Q. And that was it; right?

7 A. Pretty much. Pretty much, yeah.

8 Q. That's all you needed for your contract; right?

9 A. Right.

10 Q. You mentioned the price you thought. I think in the
11 testimony it was 150. You thought it was something like
12 that?

13 A. Yeah, about.

14 Q. Did you have a reaction at the time whether that
15 price -- or to that price at all?

16 A. I honestly -- and I don't have it in front of me as
17 evidence of it, but we bid all of our work. In Sioux Falls
18 we'd get concrete from \$5 to 125, at the time, dollars. So
19 I thought it was a hair high, you know, than what
20 Sioux Falls and that area brought and Watertown.

21 Q. About how many bid projects do you have a year?

22 A. Some could be, like, five to six, seven maybe.

23 Q. So around '20, '21 would that be true?

24 A. Yeah. We probably had five or six that year.

25 Q. And you got prices for concrete, for MS concrete, I'm

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1 nonconforming concrete: right?

2 A. Yes.

3 Q. Do you know about how many?

4 A. I think it was seven to nine of them.

5 Q. We went through them with Mr. Marshall, and we can go

6 through them again. We looked at Exhibit 16, 17, 18, and

7 19. The time frame was between September 8th and

8 September 16th. There was four failures for strength. Do

9 you recall that?

10 A. Yes.

11 Q. And one of those was the coring: correct?

12 A. Correct.

13 Q. I know there's been a lot of testimony on that, but I

14 want to hear what happened. Let's start with going

15 backwards from the testing date. It sounds like the pour

16 would have been in early August. Does that sound accurate?

17 A. Yeah, 28 days up to that break.

18 Q. Then let's go seven days after that. What happens

19 then?

20 A. They have the four cylinders. The first one is a 7,

21 21, and then two of them are 28. And that first cylinder

22 broke really low. It was concerning. It wasn't such a

23 all. I don't remember what it was, but it was like 1900 or

24 2000.

25 Q. What did you do when you found out it was breaking

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1 A. Of having to remove that, because when it's under

2 4000, it's a removal. And it was like 3500 it came back

3 at. So that 28-day cylinder broke at 28, and we've never

4 seen it that low before. And when they did the coring, it

5 still didn't reach, receive 4500. It was still under

6 4,000. So then the bridge design gets to make that

7 decision of what goes on there.

8 Q. How often have you had a cylinder break that low in

9 your hundred-or-so bridge jobs?

10 A. It happens, but not quite that low.

11 Q. It sounds like you had to assign some of your

12 employees to work on the coring. Were you nervous to

13 continue building up on the bridge if some might be

14 removed?

15 A. We did have speculation. We still poured the pier,

16 but we waited an amount of time for the cylinder coring and

17 the Department of Transportation's decision-making. So it

18 slowed our whole decking process down, because the state is

19 not going to let you put the wall on top of footing that

20 could possibly be removed. And then they warn you that

21 you're at your own risk here.

22 Q. All right. I'm going to skip around a little. I want

23 to get through these deductions. Let's touch on them

24 briefly, and then we can get into them a bit more. The

25 next set of deductions were related to the bridge. Do you

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1 that low?

2 A. We talked. I know I talked to Sam about that. And

3 then the DOT talked to him, too, because when we came for

4 the next pour there was discussions there that the first

5 cylinder broke very low.

6 Q. And they've all testified they were aware of the

7 coring as well too; right?

8 A. Correct.

9 Q. So you said after the 7 day, then there's a 16 day?

10 A. Yeah. Yeah.

11 Q. Tell me about that.

12 A. And the 16 day was not much better.

13 Q. During this time, did you continue to work as usual on

14 the bridge?

15 A. I want to say there was some bridgework to do, but we

16 had to designate people to do that coring, so we designated

17 a crew just to help coring out.

18 Q. We'll come back to the coring, but at this time you

19 had four failed strength tests in a week. Mr. Marshall

20 talked about you began discussing different contractors.

21 Do you recall discussing that with Mr. Marshall?

22 A. A little bit. They were concerned.

23 Q. Were you concerned?

24 A. Yeah.

25 Q. What were your concerns?

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1 recall bridge deductions?

2 A. Yes.

3 Q. And were those fresh concrete tests that failed?

4 A. Yes. Slump.

5 Q. Okay. And we just heard Mr. Marshall say that

6 initially they had one was \$27,000.

7 A. Correct.

8 Q. What was your reaction when you heard that it would be

9 27,000?

10 A. I thought that was extremely high. Like anybody would

11 do when they're taking 27 away from your contract.

12 Q. Did you find that out soon after the pour?

13 A. The DOT has to notify you if there's a failed any type

14 of test on the bridge deck. And then Tim said he had to

15 turn it in, and he didn't get the information until that

16 night.

17 Q. So that night you heard --

18 A. The next morning, I did, the next day after he found

19 out.

20 Q. You heard -- sorry. I was talking over you a little

21 bit.

22 Okay. I want to know about when you heard about the

23 potential \$27,000 deduct. When did you hear that?

24 A. The next day.

25 Q. And then after the bridge deck was poured, was there

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1 Q. What do you choose to do?
 2 A. There was conversation, and I knew that they weren't
 3 liking that they'd possibly be responsible. There was some
 4 talk about the coring, what it cost and what downtime they
 5 were losing. So there was conversation about that.
 6 Q. So at some point did Grangaard pay it?
 7 A. Yes.
 8 Q. So at this time, and the time of this invoice is
 9 October 5, you understand that there's some potential
 10 deductions floating around out there?
 11 A. Yes.
 12 Q. Did Golden View ever say to you, even though there was
 13 coring -- I think you talked a little bit about this. But
 14 did they ever ask to see the invoices for it?
 15 A. No.
 16 Q. Let's go to October 22nd. Well, let's start October
 17 21. I believe that's when we agreed that this pre-cone
 18 meeting took place on the bridge.
 19 A. Yes.
 20 Q. All right. They've testified you said something like,
 21 "The check's in the mail?"
 22 A. Yes.
 23 Q. Did you say that?
 24 A. We did. It was honestly forgotten, and the next day
 25 they got the check.

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1 THE WITNESS: No.
 2 Q. (BY MR. ENNS) At this meeting there's testimony that
 3 you said everything is good, and I think you clarified
 4 this. When you say everything is good, everything is fine,
 5 what are you referring to here?
 6 A. That the concrete does not have to be removed.
 7 Q. Is that a true statement?
 8 A. That is a true statement.
 9 Q. And when you said that everything was good, you didn't
 10 make any other statements regarding giving up your rights
 11 to recover for nonconforming concrete for the piers?
 12 A. No.
 13 Q. Golden View alleged that you promised to pay half of
 14 the deck the next day after the pour. Do you recall their
 15 testimony on that, first?
 16 A. I do.
 17 Q. What did you promise in regard to -- did you promise
 18 to make a half payment?
 19 A. I said that if there is no deductions, I will give you
 20 half payment.
 21 Q. So that deck was poured, and there's already testimony
 22 that there was slump issues; right?
 23 A. Yes, that Tim Marshall made the day of the pour. And
 24 then we knew at that time.
 25 Q. And Golden View testified they knew about this. Would

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1 Q. Did you promise to pay the balance that was
 2 outstanding at that time?
 3 A. Yes.
 4 Q. And did you pay that?
 5 A. Yes.
 6 Q. So was your promise to pay that amount a true
 7 statement?
 8 A. Yes.
 9 Q. Again, at this time had any deductions been assessed,
 10 assessed on you?
 11 A. Yes.
 12 Q. I'm talking assessed by the state on you.
 13 A. No.
 14 Q. When you paid this invoice, were there other
 15 conditions to that other than just paying up what you owed?
 16 A. Yes.
 17 Q. What were those?
 18 A. For the labor and the help with the coring crew
 19 getting down to the bottom of the footing to take the
 20 cores.
 21 Q. Okay, did you promise to give up any of your legal
 22 remedies relating to non-M&E concrete from the piers?
 23 MS. FINN: Objection, Your Honor. Seeks a legal
 24 conclusion.
 25 THE COURT: Overruled.

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1 you agree with that?
 2 A. Yes.
 3 Q. So that day, essentially, you knew you were facing --
 4 how big of a deduction did you think it was?
 5 A. He said it was going to be really large, you know. So
 6 I didn't know that day, but then that night he figured it
 7 like he said he did. And then the next day it was six
 8 digits, you know, twenty -- whatever it was, 22- or 27,000.
 9 Q. All right. So this is October 22nd, 23rd. We've got
 10 these coring invoices that need to be paid. We have
 11 deductions that were coming down the pike, and then now we
 12 have even more potential deductions at this point. Did
 13 that affect your decision on whether to keep paying Golden
 14 View?
 15 A. They questioned me, you know, and we made an agreement
 16 on the phone, and I stood by that. And there were
 17 deductions. And until we knew what it was all going to
 18 consist of for fees on our end, that's why I waited.
 19 Q. So you have Exhibit 14? Okay, so after the pour, the
 20 day goes by; you have the deductions. On that third day,
 21 did Golden View ever say, hey, you promised to pay us half
 22 by now?
 23 A. I can't recall. I mean, I really can't.
 24 Q. Did you get a written invoice from Golden View for the
 25 deck pour?

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1 A. Yes, I would assume so.
 2 MR. RANE: May I approach?
 3 THE COURT: You may.
 4 Q. (BY MR. RANE) This is Exhibit 14. If you could find
 5 October 22nd on there.
 6 A. Okay.
 7 Q. Do you see an invoice number next to that?
 8 A. Yes.
 9 Q. Based on your interactions with Golden View, does that
 10 invoice number represent that they sent a written invoice
 11 to you for that amount?
 12 A. Yes.
 13 Q. Do you recall ever receiving a written invoice that
 14 said you got to pay \$35,000 tomorrow?
 15 A. No.
 16 Q. And we haven't seen this written invoice in this trial
 17 yet, have we?
 18 A. No, we have not.
 19 Q. If you have some kind of agreement for payment for the
 20 deck, would you expect the terms of that to be written out
 21 in the written invoice?
 22 A. Yes.
 23 Q. And it wasn't. Well, we haven't seen it.
 24 A. Correct.
 25 Q. And you haven't seen one that said you had to pay half

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1 A. Yes.
 2 Q. And then we saw an email, I believe it was Exhibit 44
 3 where Brian emailed your office in December asking about
 4 payment, and then Taylor in your office responds that we're
 5 waiting for the final DOT deductions, right?
 6 A. Yes.
 7 Q. And it reflects your testimony right now that you're
 8 waiting to see what everything looks like?
 9 A. Yes.
 10 Q. And we looked at all the deductions. We saw some in
 11 November, right?
 12 A. Yes.
 13 Q. And some on January 11?
 14 A. Yes.
 15 Q. And then some all the way to the end of January,
 16 January of '19?
 17 A. Yes.
 18 Q. And I believe Brian testified yesterday that he
 19 retained a lawyer in February or March.
 20 A. Yes.
 21 Q. Okay. Did he ever tell you -- did you follow up after
 22 December about settling up with him, or did somebody in
 23 your office?
 24 MR. FINE: Objection. Speculation, Your Honor.
 25 THE COURT: Overruled.

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1 the next day. That's what you testified to?
 2 A. Yes.
 3 Q. So if you have a written invoice that sets forth your
 4 payment terms and you have oral negotiations that happened
 5 prior to, which ones are you going to follow in regard to
 6 paying?
 7 MR. FINE: Objection. Ballevance, Your Honor.
 8 THE COURT: Overruled.
 9 You can try to answer.
 10 THE WITNESS: Say that question again. Sorry.
 11 Q. (BY MR. RANE) So you had oral conversations about
 12 making a half payment the next day, right?
 13 A. Yeah.
 14 Q. With the condition of the deducts and then you get the
 15 deducts happening and then you get a written invoice, that
 16 kind of looks like every other one you've gotten, right?
 17 A. Right.
 18 Q. When you got that written invoice, do you still assume
 19 you have an obligation to pay half of it based on the oral
 20 negotiations you had the day before?
 21 A. No.
 22 Q. Okay. And then Golden View kept performing work
 23 through November, right?
 24 A. Yes.
 25 Q. When I say performing work, I mean supplying concrete.

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1 THE WITNESS: Yes.
 2 Q. (BY MR. RANE) And did he tell you, you're going to
 3 have to talk to my lawyer?
 4 A. Yes.
 5 Q. So you wouldn't have, at that point, changed all these
 6 invoices on Brian, would you?
 7 A. No. Not in litigation, no.
 8 Q. Because you had lawyers involved at that point?
 9 A. Correct.
 10 MR. RANE: Thank you, Mr. Songstad. That's all I
 11 have for now.
 12 THE COURT: Mr. Fine?
 13 CROSS-EXAMINATION
 14 BY MR. FINE:
 15 Q. Okay. Mr. Songstad, you just testified that the
 16 conversation on the bridge wasn't in writing. So you feel
 17 you don't have to abide by that conversation. Is that what
 18 you're saying?
 19 A. No.
 20 Q. You're saying that if it's not in writing it's not
 21 a contract?
 22 MR. RANE: Objection. Misstates testimony.
 23 THE COURT: Sustained.
 24 Q. (BY MR. FINE) You're saying there was a conversation
 25 about you paying half on the bridge, but since it wasn't in

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1 case the victim of the loss was Grangaard, who had to pay
2 penalties and deductions based on contractual provisions it
3 agreed to in a completely separate contract. And,
4 essentially, with this case Grangaard is seeking to pass on
5 those losses to a third party, Golden View. So since those
6 types of contracts must be express according to Merk Inc.
7 v. McGuire, we would ask the Court to give this
8 instruction.

9 THE COURT: Does defense have any comments?

10 MR. BASH: We've obviously argued this a number of
11 times. We're not claiming indemnity here. We have damages
12 here, damages that reflect our penalties, but we're not
13 claiming indemnity here.

14 THE COURT: The Court did previously grant the motion
15 in limine already that the plaintiff requested. I believe
16 the parties abided by that. There was no claim of
17 indemnity pled nor argued, nor were there any facts
18 submitted that the defendant in any counterclaim was
19 raising an improper indemnity agreement, because Mr. Fink
20 properly cites the case law. What would have to be an
21 express contract between the parties, and that is clearly
22 not the case. There's a lack of definition to the parties'
23 contract. That's why we're here. But I don't believe this
24 is necessary because of the motion in limine.

25 Now, Mr. Fink, I understand your position, but the
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1 I haven't looked that closely yet. Is it already in these
2 other newly proposed? The court felt usage of trade was
3 appropriate. The Court felt like this instruction should
4 be given. Now, we can revisit this. Maybe I will hold
5 off. But then the next one underneath it is related, and
6 that is based on a different case; but, as well, it also
7 appears to be based on 57A-2-262 as well as 57A-1-303. So
8 let's hold off on those two. We'll come back to them. And
9 maybe the same is true with the next one submitted by the
10 defense. It's based on 57A-1-313, dealing with express
11 warranties. And then the next one is out of 57A-2-314,
12 dealing with implied warranty, a product for a particular
13 purpose and usage of trade. I'll hold those all in
14 abeyance, and then we'll review them when we look at all
15 the UCC supplemental instructions that the parties
16 provided.

17 All right. The next one I had, then, was from the
18 plaintiff. It's based on the pattern 30-1F-00, about every
19 contract contains an implied covenant of good faith and
20 fair dealing. The Court felt this was applicable.

21 Mr. Fink, it's your proposed. Any comments?

22 MR. FINK: No.

23 THE COURT: Any objection?

24 MR. FINK: No.

25 MR. BASH: We'll object as to good faith and fair
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1 defendant's claims for damages under the breach do relate
2 to those penalties provisions, but those are the facts of
3 the case. They have not argued indemnity, and I believe
4 under the UCC and the applicable statutes, they can claim
5 those items as damages, not necessarily under any theory of
6 indemnity, and they have not argued such. So I know you
7 proposed it and you want it, Mr. Fink, but the Court is
8 going to decline to give that at this point in time.

9 The next one is submitted by the defendant. It's not
10 out of the patterns, but it is out of the UCC, essentially,
11 dealing with the term 'usage of trade.' And we might have
12 some other things in the newly proposed, but I'm not going
13 to touch on those yet. The Court felt this was appropriate
14 and applicable, and I did allow the parties to get into
15 testimony and evidence dealing with usage of trade with all
16 the witnesses to some extent as to what their knowledge
17 was.

18 So, Mr. Fink?

19 MR. FINK: This is one of those times where we have
20 a portion of 57A-1-303, and I would ask the Court to
21 include all of that language from that statute. And I've
22 got to look at the statute, but I believe that's the one
23 that talks about course of dealing. Let me look it up.

24 THE COURT: The next instruction also is somewhat
25 based on 57A-1-303. So it's broken down in these two, and

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1 dealing.

2 THE COURT: Understood. The Court made a ruling that
3 fraud and deceit are applicable issues for this jury to
4 look at and note you have a standing objection to this, but
5 I'm going to go ahead and give this one.

6 The next one is based on 30-1F-76. It was submitted
7 by the plaintiff. It discusses about every oral or written
8 contract requires that all parties to the contract consent
9 to the making of that contract. This is a fairly standard
10 contract instruction.

11 Mr. Fink, any comments? You submitted it.

12 MR. FINK: No objection.

13 THE COURT: Mr. Bash?

14 MR. BASH: The objection is just I don't know that
15 there's a question of consent of entering into a contract;
16 but other than that, no objection.

17 THE COURT: I'm going to give it. I don't think
18 consent is contested, but sometimes it's helpful to give
19 some of those basics that we have a contract here.

20 The next one submitted by the defense, based on the
21 Seves Construction case. I was looking, and it appears to
22 be applicable. It is "A contract is breached when one
23 party fails to carry out an important part of the contract
24 that requires immediate performance."

25 Mr. Fink, any objection?

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1 essentially, I didn't change it. Any objection to my
2 using your proposed under 50-130-10?

3 MR. FINK: No.

4 THE COURT: Any objection?

5 MR. RANK: We object. We prefer ours but --

6 THE COURT: All right. I'm going to give the one with
7 Mr. Fink at this point because it includes the interest.
8 Now, if we get done and you both decide we're not going to
9 let them -- I don't think we can do that and here's why.
10 It's a question of fact. Now, if you want the Court to
11 decide that question of fact, I don't like doing that as a
12 mixed bag. And I did think through the merit of that,
13 because the jury can get confused. But, now, as I think
14 about it too, I don't know that I can do that. I don't
15 like doing that.

16 MR. FRITZ: It was an attempt to clean things up.

17 THE COURT: Now, the next one in order, this goes with
18 the punitive. So this is plaintiff's proposed. It is
19 based on pattern 50-130-10, and it's if they find the
20 damages as proposed. I think it's an accurate reflection
21 from the patterns.

22 Mr. Fink, do you wish for this to be given?

23 MR. FINK: Yes.

24 THE COURT: You still have a standing objection?

25 MR. RANK: Yes. And also I'd note we did submit last

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1 "You must find that Grangaard committed oppressive
2 fraudulent, malicious and intentional misconduct. If you
3 find they did, then you may award an amount for," something
4 like that. I read that as they never do find whether they
5 in fact committed oppression, fraud, malice. That's the
6 way I read it.

7 THE COURT: And I note your interpretation. I'm not
8 comfortable modifying the pattern. I think it asks it
9 appropriately, that they have to make that finding first.
10 So I understand your concern, but if this is given without
11 any other modifications, I think it does require them to
12 make the finding first as written. I read it differently
13 than you're reading it. So it's going to stay. But I'll
14 flag that, and we will revisit it again. But, again, I'm
15 inclined to give it as is.

16 All right. The next one, plaintiff had a proposal,
17 and I didn't like it. Right underneath it is the Court's
18 proposed. This is somewhat based on 60-10-10, and I'm
19 trying to think of where and how I will make changes.

20 MR. FINK: Looks good to me, Judge.

21 THE COURT: Just wait. There's changes on the second
22 page. You gave them a cleaner copy than me.

23 MR. RANKER: Yeah.

24 THE COURT: You have it cleaned up. Mine doesn't. We
25 made notes.

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1 night another instruction on punitive damages. And we can
2 get to those later. It may be incorporated in here for the
3 law under SDCL 21-3-2, not being able to recover punitive
4 damages from the breach of contract.

5 THE COURT: I'm inclined to give it, but when we go
6 through the later submissions, we'll revisit this one.

7 MR. FRITZ: Let me say this. This instruction as it
8 reads assumes they're guilty because it says, in addition,
9 you may also award damages because of oppression, fraud,
10 malice.

11 THE COURT: If you find.

12 MR. FRITZ: This doesn't say that. It assumes they
13 are.

14 THE COURT: It's in here. "If you find that they
15 suffered an injury as a result." It's the pattern.

16 MR. FRITZ: That's the caption. If you find Golden
17 View suffered an injury as a result of the oppression or
18 fraud, I read that to be they were. So I have to find
19 there was an injury or result.

20 THE COURT: That's not how it reads. "If you find
21 that they have."

22 MR. FINK: Additional or willful and wanton misconduct
23 if you find Golden View suffered an injury as a result on
24 the issue of punitive damages.

25 MR. FRITZ: Why don't we make this clear and say,

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1 So that second page, first paragraph reads: "Finally,
2 if your verdict is for the Plaintiff, indicate accordingly.
3 If your verdict is for the Defendant, indicate accordingly.
4 When you have reached your verdict and have completed,
5 dated, and your foreperson has signed the appropriate
6 verdict form, you will report to the bailiff that you have
7 reached a verdict."

8 So I cleaned up where it talked about the verdict
9 form.

10 MR. FINK: Do they only sign one verdict form?

11 THE COURT: Yes.

12 MR. FINK: They could sign both.

13 THE COURT: No, that's not going to be two.

14 MR. FINK: Okay.

15 THE COURT: Everything is on one. You'll see it when
16 we have it.

17 MR. FINK: Okay.

18 THE COURT: This cleans it up accordingly. We're
19 giving mine.

20 All right. Next we're not going to look at what you
21 submitted. I did a lot of work from what you guys
22 submitted from my notes that I'm holding up in front of
23 you. You have Court's proposed verdict form. We kind of
24 tried to combine each of your respective verdict forms.
25 And Mr. Fink actually had three different ones, and I got

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1 That standard language appears on so many billing
2 statements merchants send out. It's for them to determine
3 whether it's applicable or not.

4 Mr. Fink, as a question of law, if there are damages,
5 there can be prejudgment interest, even if the jury does
6 not determine that interest was an applicable part of the
7 agreement between the parties.

8 MR. FINK: So now I'm wondering if we need to give the
9 interest instruction if we have this verdict form.

10 THE COURT: I think we have to tell them how to
11 calculate it. I don't think we change anything, because if
12 we're asking in one, we have to have it in the other.

13 Are you okay with this form?

14 MR. FINK: Yes.

15 MR. FRITZ: No.

16 THE COURT: Standing objection on --

17 MR. FRITZ: I have two fundamental -- a standing
18 objection, yes.

19 THE COURT: Okay.

20 MR. FRITZ: I don't see in one or two where they get
21 to account for our setoff.

22 THE COURT: I think they have to find a positive
23 response to No. 7. I think they have to find that first.

24 MR. FRITZ: Yes.

25 THE COURT: And this goes back to they might make a

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1 and use the date that the jury says interest applies and
2 them --

3 THE COURT: The only way it can be complicated is if
4 they say there's interest on both and give different dates
5 and different rates, which we'd have to sort through that.
6 It's problematic.

7 MR. FINK: And that kind of gets me back to the
8 interest. Now that I'm thinking about it, why would there
9 be interest on any damages by Grangaard? They've already
10 applied the setoff.

11 THE COURT: That's a good point. And I was trying to
12 make these --

13 MR. FRITZ: There are expenses, the coring expense,
14 the labor expense, we're going to claim those are monies
15 out the door. So those would be subject to interest. I
16 agree that deducts might not --

17 THE COURT: No. There is one way. I was trying to
18 keep it similar to both as to what they're going to
19 consider, but I don't know that you want to give it up. Do
20 you not want them to consider interest on your claims. I
21 don't know that you pled it out the same way that the
22 plaintiff did.

23 MR. FRITZ: We're not worried about a rate because we
24 didn't --

25 THE COURT: They want a higher rate than the statute

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1 finding for one and an amount of damages and then say but
2 the concrete wasn't good enough, so --

3 MR. FRITZ: Here's the difference. Okay. They've got
4 the \$9,000 of invoices. If we're entitled to set that off
5 such that it comes down to 30 or 5,000, it's interest on
6 that. You're going to calculate interest on \$9,000 when
7 they didn't owe \$9,000.

8 THE COURT: But I think the application of the
9 interest is something that the Court could employ.

10 MR. FRITZ: Later?

11 THE COURT: Because we're having them make a factual
12 determination; right? What are the damages? Is there
13 interest? If so, from what date. If they say but you're
14 entitled -- and my concern is we don't tell them to take it
15 off of the other. But if they say yes, Golden View's
16 concrete wasn't good enough, and there's a \$50,000 damage
17 to your guy, then --

18 MR. FINK: Which leaves 49,000 roughly.

19 THE COURT: The Court then would -- what's the
20 difference? Let's say there's 49,000 and there's an
21 interest rate. The Court can apply any damages you're
22 entitled to as a setoff before we calculate any interest.
23 Does that make sense?

24 MR. FINK: It does to me, Judge. So, in other words,
25 you would take the numbers, do the math, and then go back

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1 allows, so it's question of fact. So if we took the
2 interest questions out, you're still entitled to
3 prejudgment interest.

4 MR. FRITZ: Which ones are subject to interest, which
5 ones aren't. I'm telling you right now I agree with Mike.
6 The deducts, you have to expend the money. That's applying
7 to coring costs and out of pocket.

8 THE COURT: And then you can request judgment --

9 MR. FINK: So if they award one for the plaintiff and
10 give a judgment for 50,000 for defendant?

11 THE COURT: You don't really want them to calculate or
12 mess around with interest because --

13 MR. FRITZ: I don't know what they'd award.

14 THE COURT: There is a question of fact on any
15 interest owed by Golden View to Grangaard.

16 MR. FRITZ: So it's statutory.

17 THE COURT: But they don't have to make a factual
18 determination.

19 MR. FINK: If that were to happen, then I think the
20 Court could look at the amount as long as the amount -- if
21 it were \$50,000, as an example, or 100,000 for the
22 defendant -- let's stick with 50. Then with \$50,000, the
23 setoff has already been applied and there would be no
24 interest.

25 THE COURT: Yeah. If they say Grangaard is entitled

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1 MR. FRITS: Because one is defense and one is
2 affirmative claim.

3 THE COURT: Makes sense. So I was looking at giving
4 the Plaintiff's instructions on fraud and instructive fraud
5 under 30-10-140. Other than the standing objection, any
6 objection to that specific instruction?

7 MR. KANE: Yes.

8 MR. FRITS: Yes.

9 MR. FINE: Your Honor, I would suggest that we pull
10 that one and give the fraudulent misrepresentation and
11 deceit.

12 THE COURT: So the ones proposed even though they
13 don't want us, then we feel deceit, fraudulent
14 misrepresentation, deceit fraudulent concealment. And then
15 we have -- it's saying you can't give punitive damages for
16 contracts, which is true.

17 MR. FINE: Yeah. There can be punitive damages if
18 there's fraud.

19 THE COURT: Exactly. But it's clarifying that if
20 there's breach of contract, you can't give punitive
21 damages.

22 MR. FINE: Right.

23 THE COURT: That's why I think that instruction -- so
24 they have three here. They proposed. And it appeared to
25 me would replace your earlier one.

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1 I get that.

2 THE COURT: It probably should be enlarged.

3 MR. FRITS: Yes.

4 THE COURT: Oh, it is in the beginning.

5 MR. FRITS: This is the one where -- yeah, I thought
6 it read 'if it assumes damages you find that Golden View
7 suffered as a result of the oppression and fraud committed
8 by --'

9 THE COURT: You have your standing objection; correct?

10 MR. FRITS: Yes.

11 THE COURT: And now do you have a specific objection?
12 Or now that you read it, is it okay?

13 MR. FRITS: I would like it to say Golden View can
14 only recover punitive damages if you find that Grangard
15 gives oppression, malice, and misconduct.

16 THE COURT: So noted. I'll give it as is. I believe
17 we had this discussion earlier. It is accurate. It's
18 a matter of semantics and how we're going to interpret
19 that, but I think it works.

20 All right. We're almost done. We will come up with
21 one clean set and give copies, and then we have to go
22 through individually and have to number them on the record.
23 This is so much fun.

24 MR. FINE: Are we off the record, Judge?

25 THE COURT: Sure.

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1 MR. FINE: The third one about the action for breach
2 of obligation arising from contract, that would assume that
3 there's no fraud alleged, and so I would oppose the
4 instruction that says the jury cannot give punitive
5 damages.

6 THE COURT: Objection is noted. It's a proper
7 reflection of the law. The verdict form tries to clarify
8 that, but having this instruction I believe will be
9 helpful. It will be given. So the earlier fraud is going
10 to be no. We're going to put in fraudulent
11 misrepresentation, fraudulent concealment, and then that
12 clarification --

13 MR. FRITS: Do you want both of those?

14 THE COURT: I think he said yes. And I think it makes
15 sense.

16 MR. FINE: They look fine to me.

17 MR. RAMBERG: Which order?

18 THE COURT: Where that was? And then I think there
19 was only one other one. It's down there a little further.

20 MR. FINE: The legal cause.

21 THE COURT: It was Plaintiff's. In addition to actual
22 damages, this is where we're instructing on the punitives,
23 I believe. Yes. It's under 50-100-10.

24 MR. FRITS: It doesn't say anywhere. It has to be
25 willful. They wouldn't know -- it's on the verdict form.

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1 (Discussion off the record.)

2 THE COURT: Back on the record. I had Rachel Wern was
3 the last person called up, and I would excuse her as the
4 alternate.

5 Any objection, Mr. Fink?

6 MR. FINE: No.

7 THE COURT: Mr. Frits?

8 MR. FRITS: No.

9 THE COURT: That's normally how I do it. I will tell
10 her that before I start to read instructions, and if she
11 wants to leave, she can leave, or if she wants a seat in
12 the gallery, she can do that.

13 MR. FRITS: Based on the last one called.

14 THE COURT: Yeah. She's got to clean this up.

15 (Discussion off the record.)

16 THE COURT: On the record. We're going through the
17 final settling of instructions. We have a final cover
18 sheet. It is now prepared so it says 'Final Jury
19 Instructions.' Once we're done with this, we'll fill in
20 the first page where it says how many instructions there
21 are. I have not counted them up again, but once we go
22 through the numbering, they'll come up and fill right in.
23 I am going to sign and date it. Today is the 11th. Any
24 objection to the final form of the cover sheet?

25 MR. FINE: No.

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1 made. Would you agree with that?
 2 MR. FINE: That makes sense to me, yes.
 3 MR. FRITE: Yes.
 4 THE COURT: So your objections have been noted, unless
 5 there's something you feel strongly about that you want to
 6 bring up again. And we're doing this for the timeliness of
 7 it. But don't be afraid to say, if there wasn't an
 8 objection, I'd appreciate that you go back and say no, but
 9 the objections previously raised stand for something. If
 10 you remember you objected, you don't have to go into detail
 11 about it, or if you just want to stand on --
 12 MR. FRITE: I think we just stand on the previous
 13 record. And we're now just confirming that this is the not
 14 that the Court has approved. That would be my suggestion.
 15 THE COURT: And the numbering.
 16 MR. FRITE: And the numbering.
 17 MR. FINE: I agree.
 18 THE COURT: I'm okay with that too. So we have 15.
 19 You're good with that?
 20 MR. FINE: I'm good.
 21 MR. FRITE: I'm good.
 22 THE COURT: The next one would be number 16. This was
 23 off the pattern 38-18-30, "An express contract is an
 24 agreement."
 25 MR. FINE: No objection.

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1 MR. FINE: No.
 2 MR. RANE: No.
 3 THE COURT: Number 23, "To prove fraudulent
 4 misrepresentation."
 5 MR. FINE: No.
 6 MR. RANE: No.
 7 THE COURT: Number 24, "To prove fraudulent
 8 misrepresentation."
 9 MR. FINE: Concealment?
 10 THE COURT: Thank you.
 11 MR. FINE: No objection.
 12 MR. RANE: No objection.
 13 THE COURT: That's 24.
 14 Number 25, "Inaction for the breach of an obligation."
 15 MR. FINE: No.
 16 MR. RANE: No.
 17 THE COURT: 26, "A legal cause is a cause that
 18 produces some harmful result."
 19 MR. FINE: No.
 20 MR. RANE: No objection.
 21 THE COURT: Number 27, "It is your duty to determine
 22 the following issues."
 23 MR. FINE: No objection.
 24 MR. RANE: No objection.
 25 THE COURT: Number 28, "Any person who is entitled to

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1 MR. RANE: No objection.
 2 THE COURT: Next one would be 17, off of 38-18-30,
 3 "The contract may be implied in fact."
 4 MR. FINE: No.
 5 MR. RANE: No objection.
 6 THE COURT: The next one will be 18. It is off
 7 pattern 38-10-49, "Every contract contains an implied
 8 consent."
 9 MR. FINE: No.
 10 MR. RANE: No objection.
 11 THE COURT: 19 off of pattern 38-10-70, "If oral or
 12 written contract."
 13 MR. FINE: No.
 14 MR. RANE: No.
 15 THE COURT: Next one will be number 20. It is off of
 16 provisions in the code under the FCC where the contractor
 17 has accepted concrete.
 18 MR. FINE: No.
 19 MR. RANE: No objection.
 20 THE COURT: Next one will be 21, "In deciding
 21 damages."
 22 MR. FINE: No.
 23 MR. RANE: No.
 24 THE COURT: 22, "The contractor or notify the
 25 supplier."

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1 recover damages."
 2 MR. FINE: No objection to 23.
 3 MR. RANE: No objection.
 4 THE COURT: 23, "In addition to any actual damages."
 5 MR. FINE: No.
 6 MR. RANE: No objection.
 7 THE COURT: 24, "There are certain rules you must
 8 follow."
 9 MR. FINE: No.
 10 MR. RANE: No objection.
 11 THE COURT: And then they would sign and date. And
 12 then we have the proposed verdict form.
 13 MR. RANE: Oh, I didn't put that on because we had
 14 spaced it out. Remember? It was really --
 15 THE COURT: Maybe it's fine the way it is. We're
 16 going to get this to two pages.
 17 MR. FINE: The verdict form?
 18 THE COURT: The verdict form. The content will not
 19 change. It does consist of eight questions.
 20 Mr. Fine, are you comfortable with the format of that?
 21 MR. FINE: Yes, I am.
 22 THE COURT: Mr. Rane?
 23 MR. RANE: Yeah. We agreed to the form, but
 24 objections remain.
 25 THE COURT: So noted. We'll get that consolidated to

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1 two. I'm going to print a version that doesn't have the
 2 cites. I'll have to go through and number again. I'll
 3 give each of you the consolidated verdict form to add to
 4 your pile.
 5 MR. FRITZ: Oh-hum.
 6 THE COURT: And I'll include that on this set with the
 7 cites again. All right. You can go set up at the table,
 8 and we'll get going.
 9 (End of proceedings in chambers at 11:38 a.m.)
 10 * * * * *
 11 (The jury returned to the courtroom, and
 12 the following proceedings ensued with Court,
 13 Counsel, and parties present at 11:51 a.m.:)
 14 THE COURT: The Court will note for the record that
 15 all 13 jurors have returned following reporting this
 16 morning at 10:40 as ordered, and the parties are present
 17 with counsel.
 18 I apologize for the delay. It's a process to go
 19 through the instructions. There's no other way to describe
 20 it. Counsel was very cooperative, and they expressed their
 21 opinions, and we made a record. But it just takes a long
 22 time. So we do have those finally ready and prepared.
 23 Now is the moment of truth when I will release the
 24 alternate juror. And usually how I do it, the last person
 25 called up, Michelle Horn, you get to be excused.

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1 pizza you want to have.
 2 All right.
 3 (Thereupon, the final jury instructions
 4 were read by Judge Giles.)
 5 THE COURT: You will be given a verdict form. It has
 6 two pages. It has eight questions. You must read the
 7 question and follow the instructions. It's kind of a guide
 8 in helping you make your decision. Once you have marked
 9 all the boxes on the questions and have reached your final
 10 decision, then the foreperson will date it and sign it, and
 11 it gets returned.
 12 All right. We will now start the closing arguments.
 13 Mr. Fink, you can proceed first.
 14 MR. FINK: Thank you, Your Honor.
 15 May it please the Court, Counsel: In the spring
 16 of 2021, Jeremiah Grangaard or somebody from Grangaard
 17 Construction caught wind that the South Dakota Department
 18 of Transportation was going to be performing a bridge
 19 project. Grangaard Construction was a seasoned contractor
 20 that had over roughly 100 construction projects like this
 21 kind, and they had worked on many deals involving the DOT.
 22 Grangaard Construction knew full well what was going to be
 23 asked of them with their contract, and they also understood
 24 the obligations that would exist in their contract.
 25 This is the contract that was signed by Grangaard.

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1 You can sit in the gallery. You can hear the
 2 instructions. You can hear the closings. But you don't
 3 get to go back and deliberate, and you're not sharing the
 4 pizza with the rest of them. But you can remain if you
 5 want. And I debated on letting you go earlier, but I
 6 didn't want somebody else to have a heart attack while they
 7 were waiting. So I kept you until we got to this point.
 8 That's what we said we would do. You were attentive, and
 9 you paid attention. We appreciate that, but you're the
 10 alternate. And you can have a seat in the gallery if you
 11 want to stay.
 12 I will now read the instructions. Just to give you a
 13 roadmap, I'll go through it. It will take a little bit of
 14 time, and then the parties get to commence with their
 15 closing arguments. We had discussed it, and we allocated
 16 the time of 30 minutes each.
 17 Mr. Fink as the plaintiff gets to divide part of
 18 it into rebuttal. He'll use approximately 20 minutes the
 19 first time and then 10 at the end. So you'll have to
 20 listen to me for a while, and then they'll argue for about
 21 an hour total, and then you'll recess to deliberate. And I
 22 do promise we'll bring you lunch right away because we're
 23 working kind of through the lunch hour, but I thought it
 24 was best to get it started and get this part of it going.
 25 You can start talking while you figure out which piece of

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1 This is not the contract which is really the subject of
 2 this case. Golden View was never made a party of this
 3 contract. Golden View was never shown this contract.
 4 Golden View was never given any notice by anyone as to what
 5 was inside this contract. The issue in this case is an
 6 agreement that was made between Grangaard and the supplier,
 7 Golden View.
 8 Now, I'm going to give you what I believe is a summary
 9 of the facts of the case. It looks to me, in my opinion,
 10 like Grangaard, specifically Jeremiah Grangaard, when he
 11 decided to bid the project, he made one call. He made a
 12 call to Golden View. And there wasn't testimony, but it
 13 probably makes sense because Golden View was four miles
 14 away from the bridge. He made a call to go and talk to Sam
 15 Waldner.
 16 During that conversation, there was no discussion
 17 about the Department of Transportation rules and
 18 regulations. There was a simple request for a quote, and
 19 Sam gave them a quote for \$130 an hour. And, folks, in my
 20 view, I think at that point in time Jeremiah Grangaard knew
 21 that he was looking at a sweet deal for some cheap
 22 concrete. I think he knew full well, as did Mr. Marshall
 23 from the DOT, that although there's some obligations by
 24 Grangaard under the DOT, he knew full well that those
 25 obligations don't pass down to the supplier of the load.

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1 And I think Mr. Grangaard knew full well that if he could
2 get the concrete for that price, he would have a heck of a
3 deal on his hands.

4 So he bid the project. He filled out the bid sheet,
5 and that bid sheet is Exhibit No. 4. And in the bid sheet,
6 if you look at the items related to concrete, the items for
7 concrete total over a million dollars. He testified that
8 just for the deck he had built in \$400,000 of profit. So
9 there was a lot of profit at stake with the amount that he
10 was going to pay Golden View. There was quite a markup.
11 And, in addition, he knew that he was going to get an early
12 completion bonus of \$1400 per day, which was lucrative as
13 well. He knew all of that, and so he bid based on the
14 number that he got from Sam Waldner. But prior to making
15 that bid, he had no discussion with Sam about what would be
16 expected of Mr. Waldner, so there was no contract made at
17 that time.

18 Once the bid was let, the project began. But before
19 it began, Jeremiah Grangaard signed the contract with the
20 DOT, and I know that you're going to see a great big
21 placard that shows certain standards that are found in that
22 Department of Transportation contract. They're going to
23 show you the second page of a provision that has standards
24 written on it. But if you look on page 307 of the
25 contract, you'll see the Section 400.3 that reads: "The

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1 Look at the concrete materials themselves, review the
2 sheets that came along with the material, make other
3 recommendations. There was no indication of Grangaard
4 doing that. And there's no indication that Grangaard
5 expected any of that type of thing from Golden View. It
6 appears Grangaard was simply happy with how the Department
7 of Transportation was handling things.

8 So we get into the summer, and the concrete is
9 starting to pour, and then we have a change in the pathway.
10 Up until a certain point it sounds like there was good
11 communication between Grangaard and Golden View, but at
12 some point in time things start to move apart. And largely
13 unbeknownst to Golden View, there are some problems with
14 some strength testing that is occurring.

15 Now -- across is. I picked up whatever the judge has.
16 Now, you'll see in the items that will be sent back
17 with you the instructions, the law requires that if there's
18 going to be a complaint by somebody who receives goods,
19 they have a duty to notify the supplier about any kind of a
20 problem. Nonconforming goods. If Grangaard wants to make
21 any claim for nonconforming goods, it had a duty to notify
22 Golden View about that situation. And that makes sense,
23 because if there's a problem, it needs to be fixed.

24 But very clearly, in my view, Grangaard was more
25 interested in the \$1,400 a day early completion bonus than

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1 contractor shall design and be responsible for the
2 performance of all concrete mixes used in the structure.
3 Mix design shall be modified during the course of the work
4 when necessary to ensure compliance with the requirements
5 for strength and consistency. The mix design shall produce
6 a concrete conforming to the following requirements."

7 Then that's when you have the language on the second
8 page. This does not create a contract with any supplier.
9 This creates a contract with Grangaard. And by signing
10 this contract, Grangaard accepted liability if there was
11 any problems with any sections of the contract. And so
12 with this case, what we're talking about is a written
13 contract signed by the Department of Transportation and
14 Grangaard that places clear and express obligations on
15 Grangaard and Grangaard's effort in following along to pass
16 those contractual obligations onto Golden View.

17 The evidence I think was pretty clear that as the
18 project continued, as the project was ongoing, you had Tim
19 Marshall, the state engineer, who helped put together the
20 design. Tim Marshall was the one that was inspecting the
21 resources at Golden View and was following up on how things
22 were going.

23 There's no evidence, though, that even though
24 Grangaard agreed to be responsible for the concrete, that
25 Grangaard itself hired any experts at the time, experts to

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1 it was about any penalties that might be taxed along the
2 way.

3 And very clearly, in my view, we have a situation
4 where Jeremiah Grangaard knows that he's got a sweet deal
5 on some concrete. It looks to me like he didn't want to
6 say anything that was going to make Golden View start being
7 concerned or otherwise not want to keep supplying the
8 concrete.

9 So there was a lack of communication, and that was
10 detrimental to Golden View. Because Golden View was
11 hearing that the concrete was good. It was actually Sam
12 Waldner in Bar who approached Jeremiah Grangaard when he
13 saw that there was some curing being done and started
14 asking whether there's a problem. But nothing was ever
15 said in return that might cause Golden View to take a
16 harder look at what's happening, maybe get him some expert
17 and try to find out what's going on.

18 I think very telling is the events where at some point
19 in time Jeremiah Grangaard goes off to find a new
20 contractor. I believe Brian when he says that was never
21 brought up. I think Jeremiah said nothing about that. I
22 think he said nothing about the possibility of deductions
23 because he wanted to keep his cheap concrete available.
24 And when he got another quote for \$700 a yard, he did the
25 math in his head and he recalled he's using the contractor,

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1 not getting any delays, and getting his bonus at the end,
2 which ended up being \$120,000, as opposed to talking to
3 Golden View, raising concerns, getting everybody together
4 and trying to formulate a different pathway moving forward.

5 So, very clearly, though, Mr. Grangard was very upset
6 in September. We have a situation where he hasn't paid his
7 bill. And I'm here to tell you, folks, when he withheld
8 that payment on the \$16,000 bill that was due, if he could
9 have found another contractor for less money, he would not
10 have paid that \$16,000. He paid the \$16,000 because the
11 best bid he got was \$100 a yard from another contractor.
12 He paid that bill because he was called to task on
13 October 21st on the bridge deck test, and he was told that
14 if he is not going to pay his bill, then Golden View is not
15 going to bring any concrete.

16 And, importantly, Brian Waldner told him at that
17 meeting, he said, look, if there's any kind of problem, if
18 we can't bring what you need, then let's do something
19 different here or don't get concrete from us. He made that
20 statement not knowing that Mr. Grangard already looked
21 elsewhere for a contractor.

22 So what was Jeremiah Grangard's response? His
23 response was everything is all good, the check was in the
24 mail. I think he very much sugarcoated the situation with
25 the concrete that he had, and he brought up nothing about

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1 very best, it's misleading. He should have been telling
2 Golden View that there have been a number of problems. He
3 should have told Golden View that he was expecting that
4 Golden View pay for the deductions, but he didn't because
5 he couldn't find somebody else to take on and he wanted to
6 get the project forward. He wanted to complete early,
7 which it did. Relying upon those statements made by
8 Mr. Grangard, Golden View showed up and they poured the
9 deck.

10 Mr. Grangard didn't have anybody on scene besides the
11 DOT to be watching the concrete as it's dumped. But in
12 every incident with every sale, and there were multiple
13 individual sales, you had a call and offer to buy. You had
14 delivery and you had acceptance. And under the law, as the
15 Court read to you, if a party is going to complain about
16 the quality of goods, there has to be notice given
17 reasonably close to the time of acceptance.

18 Even if Mr. Grangard would have made the comment, can
19 we wait to pay until I filed out to see if there's any
20 deductions, that might show a different kind of a contract.
21 But here, the way the parties performed, it was pour the
22 concrete, an invoice, and then payment due within 30 days.
23 And that was how the parties performed regardless of
24 whether there was a possibility of a deduction, because
25 deductions never got brought up. So even with the October

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1 the possibility of any penalties being passed on to Golden
2 View.

3 And remember, at this point in time there was never
4 any discussion with Golden View about the possibility of
5 penalties coming as a result of contract provisions between
6 the Department and Mr. Grangard. Those penalty
7 provisions, when you look at the exhibit, the exhibits, I
8 will challenge anybody here and I'll challenge counsel for
9 Mr. Grangard to point out in that book exactly how these
10 penalties work and how they're assessed.

11 Mr. Marshall wasn't sure exactly how these penalties
12 got assessed, and that's significant because if there was
13 going to be a challenge to these penalties, then under the
14 terms of the contract it's up to Mr. Grangard to make
15 those challenges. Sometimes he challenged the penalties;
16 sometimes he had no choice and there was curing. But other
17 times, if you remember his testimony, he made no challenge;
18 he just accepted the penalty, which was his right because
19 the penalties are a creature of this contract. So he just
20 simply chose to accept those penalties, and all the while
21 he kept Golden View in the dark about all of these
22 penalties.

23 So October 22nd rolls around. Very clearly, there
24 were misrepresentations made. Jeremiah Grangard saying
25 that 'all good' means that concrete wasn't removed. At the

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1 payment, you had Brian Waldner in here saying, look, the
2 deal is, you've got to pay at the time of delivery. He did
3 at that occasion say half due at delivery, the other half
4 due in the normal invoicing period.

5 So the deck is poured, and what happens is there's no
6 payment whatsoever. And basically from that point in time,
7 it's dead air. Why is it dead air? It's because Jeremiah
8 Grangard didn't need Golden View anymore. He didn't need
9 the concrete. Very soon after the deck pour, the project
10 was finished. Jeremiah didn't need them. He had his
11 completion date. He had his early completion bonus. He
12 didn't feel he needed to give any notice of withholding
13 money from the amount due, which you'll read that in the
14 instructions as well. If somebody is not happy with a
15 product and they want to withhold payment, they have to
16 give notice of that.

17 Jeremiah Grangard didn't do that in September when he
18 withheld payment, and he didn't do it after the deck was
19 poured. Folks, he simply didn't care anymore, because he
20 had his concrete. And he took the position that I've got
21 my concrete, I've still got my money, you come and get it.
22 Thus we have a lawsuit, and thus we're in court here today.

23 One of the instructions the Court gave you was
24 instruction No. 11, and that to me is an important one. It
25 deals with the making of a contract. The existence of a

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1 contract requires parties capable of contracting and then
2 their consent. And I think that is very obvious. If
3 you're going to have a contract, people have to agree to
4 it. All right?

5 This business of the concrete failing, all right, to
6 me that is an issue that should have been dealt with by the
7 Department of Transportation and Grangaard before penalties
8 were assessed. If you remember, even in December of 2021
9 and January of '22 Grangaard still had an opportunity to
10 contest the penalties to present evidence or other
11 information that would allow contest. He never included
12 Golden View in any of that process. He never allowed
13 Golden View to know what's going on.

14 I'm not sure what Golden View would have done. Maybe
15 they would have done their own independent testing. Maybe
16 they would have hired their own expert at that time to help
17 with this contest. But it doesn't matter because the
18 deductions are a creature of this contract, the DOT
19 contract, and not a creature of the law generally.

20 When you look at the concrete that's out there, all of
21 it was accepted. All right. It's all there. It's all
22 been determined safe. The bridge has been determined safe.
23 All of the concrete passed the state's specifications. The
24 difference is, because of certain strength tests, there's a
25 mechanism in the DOT contract which says the contractor,

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1 MR. FROE: I'm at 20 minutes. I better move on. I've
2 got a lot here to talk about, but I want to spend a few
3 minutes on the verdict form. Folks, the amount due Golden
4 View in this case is \$89,343.23. I'm asking that you find
5 that Grangaard breached its agreement to pay that amount.
6 I'm asking that you find that there was a term in the
7 contract that required interest, interest of 18 percent
8 show up on every document that was submitted. And in
9 October when the \$16,000 payment was made, that included
10 18 percent. So the course of performance was to pay
11 18 percent after a month had passed.

12 From my review of the exhibits, prejudgment interest
13 in my view would begin on November 9 of 2021, and I'm going
14 to ask that you find that there's a breach of duty of good
15 faith and fraud because of the statements that were made
16 out on the bridge that induced Golden View not to just deal
17 with the \$16,000 bill that was due but to bring more
18 concrete which Jeremiah Grangaard, never intended to fully
19 pay. He never intended to fully pay that amount. That's
20 bad faith. That's fraud.

21 I'm going to ask that you find that Golden View
22 suffered injury as a result of that fraud, malice, or
23 intentional misconduct. And in terms of punitive damages,
24 quite frankly, that's for you to decide what punishment is
25 just. In my view, Golden View didn't get paid for the

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1 Grangaard, gets paid less for this concrete. And I did
2 some math.

3 Exhibit 16, which deals with a larger amount that
4 tested poorly, wasn't jackedhammered out. That batch dealt
5 with 48.3 yards. Grangaard had a penalty of \$23,000, but
6 it was still paid \$24,600 for that concrete. So Grangaard
7 was paid for the concrete that was the subject of the
8 deduction. Now, interestingly, with that 48.5 yards,
9 Golden View only billed \$6,303 for that concrete. And very
10 importantly, in my mind, that deduction was the subject of
11 a bill that ultimately got paid.

12 All right. So the argument here is not only that
13 Golden View should step into the shoes of Grangaard with
14 respect to this contract; the argument is that Golden View
15 should pay penalties not based on what its cost of the
16 concrete was but what Grangaard was being paid by the
17 Department of Transportation, which was a massive markup.
18 A large chunk of it undisputed, being profit.

19 So if you think about all the evidence together, what
20 happened with that large deduction, it's basically Jeremiah
21 Grangaard lost his profit on the deal and was still paid
22 for not only his cost of that concrete but for other
23 expenses.

24 THE COURT: Mr. Fink, you're at 20 minutes, just so
25 you know.

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1 concrete they supplied. Grangaard kept them in the dock so
2 that they could get their \$226,000 bonus. If this is going
3 to stop, if this type of thing is going to stop, there has
4 to be a punishment that deters people from doing this
5 thing, and I'm going to ask that you consider punitive
6 damages on the bonus that they received. They expect
7 Golden View to bear the burden of that concrete. My view
8 is we had borne that burden for two years. It's time that
9 they pay the bill, they pay interest, and they share some
10 of the benefit of their contract, which is the \$226,000
11 bonus. If you want a number, I'd say take a quarter of
12 that. They can keep two thirds of their bonus. That pays
13 for their deductions, and it still serves as a punishment
14 to deter future bad behavior.

15 Thank you.

16 THE COURT: Thank you, Mr. Fink.

17 Mr. Frite?

18 MR. FINK, you'll have about seven minutes when you
19 come back for rebuttal. The clock won't start during
20 setup.

21 MR. FRITS: Thank you.

22 Good afternoon. Thank you again for serving as jurors
23 in this case.

24 As Mr. Sahn said in his opening statement, this is
25 a case that involves a rather simple story that didn't need

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1 they cored. And Jeremiah says, "Hey, wait. We're pausing
2 this project. We're not going to start the deck while
3 there's these concerns about this pier."

4 They talk about, oh, he just wanted this bonus money.
5 He stopped this project for weeks, delays so that he could
6 defend Golden View's concrete. This is Golden View's
7 concrete he used. And he's on the same page. He wants
8 this to pass. He's trying to get this concrete passed. So
9 he pauses the project.

10 What if he had not done that? What if he had really
11 wanted that bonus bid? Let's push forward and let's get
12 that deck on there. And then later these coring tests came
13 back and the state said you have to remove that pier.
14 Well, off comes that deck. Beam comes that pier. And this
15 would have been a much -- we'd still be here, but we'd be
16 talking about dollars such, much bigger than what we're
17 going to talk about.

18 Again, we go back to the law. They talk about, well,
19 these deducts were part of the contract with GOV. They
20 were, but that doesn't mean that Granggaard can't recover
21 them from Golden View.

22 Jury instruction No. 30 will tell you that you can
23 recover any loss resulting from the ordinary course of
24 events from Golden View's breach. By the way, they said in
25 that same instruction there's a provision that you have to

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1 Then we go to the coring costs that Granggaard had. If
2 you recall, this was the big one, Northwest Corp. And
3 these invoices are in your exhibits as Exhibits 37 through
4 #1. That was the big one for \$16,392. Then there was some
5 smaller ones. If you recall, this was a bigger core
6 project. These were smaller. But here's the total for
7 coring costs.

8 You remember Sam Waldner said, "If these coring costs
9 confirm the bad concrete, we're responsible for them." So,
10 really, there shouldn't be any question that this amount is
11 part of Granggaard's damages.

12 Then Granggaard said, "I had labor costs. I had my
13 guys out there helping them with the coring, and that
14 wouldn't have had to happen if we didn't have bad
15 concrete." Here's the employees. He said these hourly
16 wages at this labor costs for a total of \$4,245 in labor
17 costs that Granggaard incurred because of the bad concrete.
18 Similarly, here's incidental damages for equipment costs.
19 Jeremiah testified that he had to use his own crane, his
20 own backhoe, his own pumping of fuel at this rate per hour,
21 these hours. You come up with an additional \$7,000 in
22 equipment and fuel costs.

23 That leads to this summary which, again, has to be
24 adjusted because of that one test. So if I take this --
25 well, what happens here is this number goes to \$89,075.14,

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1 notify the seller of the nonconformity. Well, there's no
2 doubt they knew about the nonconformity. Well, they knew
3 it now; they're here.

4 We heard evidence that Golden View retained an
5 attorney in February or March of 2022. Why did they retain
6 an attorney? They knew there was a problem. They were
7 notified. Don't let that distract you.

8 So if we get to it, the first element is these
9 deducts, and I've prepared a summary of all of these
10 things. Let me get the right one here. Here, from the
11 deduct letter exhibit is a summary of all the --

12 I have to make a correction on this one because we did
13 hear about that one deduct that wasn't Golden View's fault,
14 if you remember that, and that's this one. We made these
15 before we came to trial, and in fairness we learned that
16 this one was not Golden View's fault. So that comes out.
17 I did some math earlier, and that reduces this to
18 \$35,478.32. Ignore that number. That's the amount of the
19 deducts totaled up that Granggaard incurred because of the
20 bad concrete from Golden View.

21 Remember usage of trade? Tim Marshall said, and
22 I quote, "Every case he's been involved in, these get
23 passed on to the supplier." Jeremiah said every time,
24 every time, usage and trade. You can build that into the
25 contract, but those get passed on to the supplier.

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1 leaving a balance here of Golden View with -- it's really
2 close -- \$268.18. It came out to almost a wash, folks.
3 That's after you offset the amount Golden View billed and
4 claims to be unpaid. That's what it comes out to be as to
5 what they might owe them, \$268.18. So, I take that back.
6 That's not the number. The number for No. 6 is Granggaard's
7 damages. I'll get to this number. This is the offset.
8 We'll get to that. But for No. 6, we assessed the damages
9 as follows: The damages should be \$89,075.14. That's the
10 sum of all of these charts I showed you before.

11 So now we go to Golden View's claim. Let's start with
12 one. Did they breach? Well, no. Granggaard did not breach
13 that agreement because the law says that you can offset --
14 excuse me. You get to offset from any amount owed under
15 the invoices, Granggaard's damages and deducts. So this is
16 where if you offset the \$9,000 and change from the
17 invoices, from his damages right here, then Golden View is
18 owed \$268.18.

19 Now, I'll submit this. You heard Jeremiah say, "You
20 know what? We also lost some opportunities for more work
21 because we got delayed." And he said a number of a hundred
22 thousand. We're not expecting you to award him a hundred
23 thousand dollars. Award him 268.18 for that, and then you
24 can answer the question, did Granggaard breach its agreement
25 to pay Golden View. The answer is no because it was a

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1 South Dakota, we expect that a buyer or a seller, two
2 people in a contract treat each other fairly with open
3 disclosure and not in a way that takes advantage of each
4 other.

5 In this case, from square one, it very much looks to
6 me that Grangaard knew that he had a great deal on some
7 cheap concrete. He knew he had an inexperienced seller of
8 that concrete, and he knew that normally if there was going
9 to be a passage of deductions, he'd be paying far higher
10 than that amount. Again, don't believe for one minute his
11 statement that he thought he could get concrete for \$90 a
12 yard. I think if he could have done that, he would have
13 done that.

14 MR. FRITZ: Objection.

15 THE COURT: Overruled. It's argument.

16 MR. FINK: So when we talk about good faith, we have
17 to look at the whole nature of this contract. Jeremiah
18 Grangaard had every opportunity to treat Golden View
19 fairly, give them information that would allow Golden View
20 to make good decisions. He chose to hide the fact of the
21 deductions. He chose to hide the facts related to the
22 problems that were out at the site. He made the decision
23 to continue the project going on by paying the \$16,095. He
24 was obviously hoping for the best, but it didn't work out
25 for him.

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1 MR. FINK: No, Your Honor.

2 THE COURT: Mr. Fritz?

3 MR. FRITZ: No.

4 THE COURT: All right. Keep your whereabouts known to
5 the clerk. Make sure she has cell phone numbers if you
6 leave the building so we can get back to you if there
7 should be a question or if they return a verdict. I'll
8 pretty much stay around and be in chambers in case they
9 have questions. My normal policy is to get hold of you
10 before I give a response to. And we will remain in
11 chambers to address it should there be a question. We'll
12 be in recess. Thank you.

13 (Thereupon, a recess was taken at 11:06 a.m.
14 awaiting jury deliberations.)

15 * * * * *

16 (Thereupon, the jury returned to the courtroom
17 after deliberating, and the following proceedings
18 ensued with Court, counsel, and parties present
19 at 2:55 p.m.):

20 THE COURT: Please be seated. At this point, the
21 clerk officially needs to call the roll just to make sure
22 all 12 of you who are deliberating are back. When she
23 calls your name, indicate "Present" or "Here."

24 THE CLERK: Harriet King?

25 JUROR KING: Here.

Melinda.Songstad@ujs.state.sd.us

1 THE COURT: You need to wrap it up.

2 MR. FINK: I want to thank you for your time. On
3 behalf of Golden View, I appreciate your hard work, but I'm
4 asking that you enter a verdict for the Plaintiff in the
5 manner that I've indicated previously. Thank you.

6 THE COURT: Thank you.

7 All right. You will get with you the prosecution
8 instructions, the preliminary instructions, and more
9 important, the final instructions. They're all included.
10 I will give these to the clerk. They come back and get
11 filed with the clerk's office when you're done. The clerk
12 will also take the exhibits that were accepted and received
13 with you to be taken for your consideration.

14 At this point, Madam Bailiff, if you would stand
15 and raise your right hand.

16 (Thereupon, the bailiff and the jury
17 were duly sworn.)

18 THE COURT: All right. All rise for the jury to be
19 excused so they can deliberate.

20 (Thereupon, the jury left the courtroom to
21 deliberate, and the following proceedings ensued
22 outside the presence of the jury at 3:34 p.m.):

23 THE COURT: Please be seated.

24 Mr. Fink, any matters to address at this point on the
25 record outside the presence of the jury?

Melinda.Songstad@ujs.state.sd.us

1 THE CLERK: Kristin Vogl?

2 JUROR VOGL: Here.

3 THE CLERK: Clifford Vanbeck?

4 JUROR VANBECK: Here.

5 THE CLERK: Troy Erickson?

6 JUROR ERICKSON: Here.

7 THE CLERK: Kendall Schmidt?

8 JUROR SCHMIDT: Here.

9 THE CLERK: Garry Sempfer?

10 JUROR SEMPFER: Here.

11 THE CLERK: Kim Simonsen?

12 JUROR SIMONSEN: Here.

13 THE CLERK: Lisa Healy?

14 JUROR HEALY: Here.

15 THE CLERK: Mary Painter?

16 JUROR PAINTER: Yes.

17 THE CLERK: Ann Black?

18 JUROR BLACK: Here.

19 THE CLERK: Joyce Carmichael?

20 JUROR CARMICHAEL: Yes.

21 THE CLERK: Kelly Erier?

22 JUROR ERIER: Here.

23 THE COURT: Very good. Has the jury reached a
24 verdict? Mr. Erickson, are you the foreperson?

25 THE FOREPERSON: Yes.

Melinda.Songstad@ujs.state.sd.us

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 30643

* * * *

GOLDEN VIEW READY MIX, LLC,

APPELLEE,

VS.

GRANGAARD CONSTRUCTION, INC.,

APPELLANT,

* * * *

APPEAL FROM THE CIRCUIT COURT
FIRST JUDICIAL CIRCUIT
MCCOOK COUNTY, SOUTH DAKOTA

* * * *

HONORABLE CHRIS S. GILES
Circuit Court Judge

* * * *

BRIEF OF APPELLEE

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Notice of Appeal filed on February 29, 2024.

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PRELIMINARY STATEMENT

For purposes of this brief, Defendant/Appellant Grangaard Construction, Inc. will be referred to as "Grangaard." Plaintiff/Appellee Golden View Ready-Mix, L.L.C. will be referred to as "Golden View."

STATEMENT OF THE ISSUES

I. WHETHER THE TRIAL COURT ERRED IN ALLOWING THE JURY TO AWARD PUNITIVE DAMAGES.

The trial court permitted testimony related to punitive damages; the trial court gave instructions related to the award of punitive damages. The most relevant cases, related to this issue are as follows:

- A. Overfield v. Am. Underwriters Life Ins. Co., 614 NW2d 814 (S.D. 2000)
- B. Grynberg v. Citation Oil & Gas Corp., 573 NW2d 493 (S.D. 1997)
- B. Sundt Corp. V. State of South Dakota by and through SDDOT, 566 NW2d 476 (S.D. 1997).

The most relevant South Dakota statutes, related to this issue are as follows:

- A. SDCL 15-6-51(b)

II. WHETHER THE TRIAL COURT ERRED IN ALLOWING THE FRAUD CLAIM TO BE PRESENTED TO THE JURY.

The trial court instructed the jury as to the issue of fraud and deceit. The most relevant cases, related to this

issue, are as follows:

- A. Rist v. Karlen, 241 N.W.2d 717 (S.D. 1976);
- B. Wasserburger v. Consolidated Mgmt. Corp., 502 N.W.2d 256 (S.D. 1993).

The most relevant South Dakota statutes, related to this issue are as follows:

- A. SDCL 53-4-4

STATEMENT OF THE CASE

This is a U.C.C. Sales case, related to concrete Golden View sold to Grangaard in 2021, after orders were made by Grangaard in relation to a McCook County bridge project. Grangaard, a general contractor, had been awarded a contract with the South Dakota Department of Transportation (SDDOT) in relation to the Hwy 38 project. When construction began, Grangaard ordered loads of concrete from Golden View and Golden View delivered the same. As each order was made, Golden View invoiced Grangaard for the loads delivered. The concrete was mixed consistent with a SDDOT recipe. Grangaard (belatedly) paid all of the invoices related to the first loads supplied in relation to the lower parts of the project, but declined to pay the concrete delivered in relation to the top "deck" portion of the bridge.

Golden View filed a Complaint, alleging 1) Breach of

Contract; 2) Breach of Obligation of Good Faith and Fair Dealing; and 3) Fraud/deceit. In addition to requesting compensatory damages, Golden View asserted a claim for Punitive Damages. Grangaard denied Golden View's allegations, and submitted a counterclaim, alleging breach of contract and negligence on the part of Golden View.

On January 8, 2024, the matter was presented to a McCook County jury; the trial lasted four days. The jury determined that Grangaard breached its contract with Golden View, and awarded Golden View damages in an amount equal to the unpaid invoices (related to the deck work); the amount of damages awarded was \$89,343.32. The jury further determined that the applicable rate of interest for the unpaid invoices was 18% per annum.

In addition, the jury determined that Grangaard did not commit fraud, but did act in bad faith; the jury awarded Golden View an additional \$50,000.00 in punitive damages. The jury determined Golden View did not breach any contract with Grangaard. Grangaard has appealed this verdict.

STATEMENT OF FACTS

In 2021 the South Dakota Department of Transportation (SDDOT) let a bridge project - involving the demolition and new

construction of a Highway 38 concrete bridge which crosses the Vermillion River, near Salem, South Dakota. Tr. at p. 211.

Such SDDOT projects are "let" to a successful contractor, following a bidding process, whereby the contractor submits a bidding cost sheet; the project is awarded to the lowest responsible bidder. Tr. at p. 212. Grangaard, a general contractor, was interested in submitting such a bid for the Highway 38 project; in preparation, Grangaard's Jeremiah Grangaard contacted Sam Waldner of Golden View (a concrete supplier) for a price for concrete materials; Samual gave him an estimate of around \$132.00 per "yard" of concrete. Tr. at p. 99. At the time he gave Jeremiah this estimate, Samual didn't know how many yards would be needed for the project. Tr. at p. 99. And, at this time, Jeremiah never had any discussions with Samual about what kind of obligations Golden View would have, if concrete was later purchased for this project. Tr. at p. 374.

With his bid to the SDDOT, Jeremiah Grangaard entered various bid amounts on a state bid form. . . which amounts related to the different elements of the project. Tr. at p. 375. With respect to the concrete needed for the new bridge, Grangaard bid \$1,200.00 per yard for the bridge "deck" (the top part of the bridge), for a total bid amount of \$648,000.00 for

that deck; When he entered this bid amount, Jeremiah anticipated that his actual "cost" for concrete materials would be \$130.00 per yard (the approximate cost Samuel Waldner had given him). Tr. at p. 376. Notably, Jeremiah Grangaard built into his state concrete bid, a profit of "probably a half a million dollars." Tr. at p. 377.

With respect to the lower portions of the bridge, Grangaard bid the concrete at \$975.00 per yard, for a total amount of \$333,840.00 Tr. at p. 377. When you add this amount to Grangaard's amount bid for the deck work, we see that Grangaard bid a total of \$1,050,000.00 for the concrete elements to be utilized on the bridge. Tr. at p. 378. At the same time, with it's SDDOT bid, Grangaard anticipated paying Golden View (at \$130.00 per yard actual cost) between \$140,000.00 and \$150,000.00 for the concrete supplied. Tr. at p. 378.

Thereafter, Grangaard learned that it had submitted the lowest bid and was awarded the bridge project. Tr. at p. 213. At that point, Grangaard entered into an express written contract with the SDDOT. Tr. at p. 214. Among other things, this Grangaard/SDDOT contract required that Grangaard comply with the provisions found in the SDDOT manual (about two inches thick) which outlines the "standards and specifications" related

to SDDOT projects such as the subject bridge works. Tr. at p. 214. The Grangaard/SDDOT contract required that Grangaard (the general Contractor) pay all suppliers within 15 days. Tr. at p. 217.

However, the SDDOT does not enter into contracts with the various material suppliers which might be used by the general contractor; the SDDOT leaves it up to the individual contractors to come up with their own supply agreements. Tr. at p. 215. As was SDDOT policy, there was no written contract between the SDDOT and Golden View. Tr. at p. 216.

After Grangaard was awarded the contract, a Grangaard agent contacted Golden View's Samuel Waldner and told him Grangaard would be using Golden View for its concrete purchases. Tr. at p. 101. Samuel Waldner and Jeremiah Grangaard then discussed price and the necessity for monthly payments being made for all concremented supplied for the project. Tr. at p. 101. At no time, however, did Grangaard's Jeremy Grangaard ever tell Samuel that Golden View would be obligated for any requirements found in Grangaard's SDDOT contract. Tr. at p. 102. Likewise, Jeremiah never showed Samuel any provisions contained in Grangaard's SDDOT contract. Tr. at p. 102. Jeremiah Grangaard never presented Golden View with a copy of Grangardt's SDDOT contract.

Tr. at p. 102.

And, importantly, Grangaard never told anyone from Golden View, that Golden View might be held responsible for any penalties which Grangaard might face, pursuant to its contract with the SDDOT. Tr. at p. 115. Golden View never agreed to take responsibility for any such penalties. Tr. at p. 123. In fact, at trial, Jeremiah Grangaard acknowledged that the issue of liability for any penalties Grangaard incurred with respect to its SDDOT contract, never came up during any of his discussions with Golden View. Tr. at p. 382

Likewise, Grangaard never provided Golden View with any document outlining the terms of the parties' (Grangaard's and Golden View's) relationship to each other; in fact, Grangaard never told Golden View how much total concrete would be needed. Tr. at p. 103. No written agreement, of any kind, was made with respect to the material Golden View supplied to Grangaard. Tr. at p. 115. This was a unique situation for Grangaard, as this was the first time Jeremiah Grangaard had ever proceeded with a project like this. . . where he didn't have a written contract with his concrete supplier. Tr. at p. 380. (Grangaard has been a party to many of such projects - a hundred or so.) Tr. at p. 372

Prior to any concrete being ordered by Grangaard, SDDOT inspectors came to the Golden View facilities and inspected Golden View's "batching" plant and all of the ingredients which would be used in the different SDDOT mixes (recipes) for the concrete utilized on the project. Tr. at p. 107. During this inspection, the SDDOT raised no concerns about the ingredients they reviewed at the Golden View plant; all of the SDDOT inspection tests were passed. Tr. at p. 225. Likewise, the mix design which is significant to this case ("A-45") was approved by the SDDOT. Tr. at p. 107 220. (The mix design provided by the SDDOT is like a recipe. Tr. at p. 90, 222.) The SDDOT Project Engineer for the Salem bridge, Tim Marshall, testified that the supplier's obligation is to follow the recipe. Tr. at p. 222. As the project moved forward, the SDDOT never requested Golden View make any changes to the approved A-45 recipe. Tr. at p. 110.

Notably, concrete changes from the time it leaves the mixing facility - to where it is ultimately "placed" into forms. Tr. at p. 97. As such, a supplier cannot guarantee how concrete is going to perform after it is delivered to the job site. Tr. at p. 103. Concrete can be mixed properly, but the contractor must still take care to "place" it correctly. Tr. at p. 106.

The contractor also needs to take care to pick the right weather conditions for placing the concrete. Tr. at p. 105. As the SDDOT project engineer, Tim Marshall, explained, concrete is variable, in that there are a lot of things that affect it; "you've got environmental things that are affecting the mix." Tr. at p. 233 - 234.

Golden View utilizes a computerized system for mixing its concrete. Tr. at p. 92. This system keeps track of all of the material that goes into the mixing (and delivery) truck, and produces a certified ticket for each load. Tr. at p. 93. And, with each load of concrete supplied to the project site, the SDDOT project engineer (Marshall or another agent) tested the load before the concrete was removed from the truck and placed into the forms. Tr. at p. 112. Marshall oversaw the entire Salem bridge project. Tr. at p. 112. No rejected concrete was ever unloaded into the bridge forms. Tr. at p. 116.

Likewise, SDDOT's Marshall never raised any concerns, with Golden View, about how Golden View was mixing the material. Tr. at p. 120. Marshall never requested that Golden View adjust the A-45 recipe. Tr. at p. 121. He also never raised any concerns about what was being reflected on the batch tickets. Tr. at p.

121. During the course of the project, no one ever told Golden View that they were unhappy with the material Golden View was delivering. Tr. at p. 132. In fact, during the course of the project, Golden View's Sam Waldner was hearing that the SDDOT was happy with everything. Tr. at p. 132.

And, as the project was progressing, Grangaard never told Golden View that it had any intentions of not paying for any loads. Tr. at p. 132. As each truck arrived from Golden View to the project site, a SDDOT technician reviewed the Golden View batch ticket. Tr. at p. 225. SDDOT project engineer Marshall testified that he never felt there were any mistakes with those tickets. Tr. at p. 225-226. Likewise, Marshall never felt any corrections (to the mixing process) needed to be made by Golden View. Tr. at p. 226. Marshall testified he was not aware of any concrete being improperly mixed by Golden View. Tr. at p. 240.

In terms of visually inspecting the loads delivered, the SDDOT was in charge of examining the concrete brought to the site, and the SDDOT decided whether a load would be accepted and dumped into the forms. Tr. at p. 383. Grangaard chose not to have its own engineer perform any independent testing at the point of sale. Tr. at p. 383. All of the concrete that was

provided by Golden View and accepted by the SDDOT and Grangaard, was poured into the forms. Tr. at p. 383.

There was, on one occasion, an instance where a batch of concrete was rejected (due to excess heat) before it was dumped into the project forms. Tr. at p. 238. However, this rejection was not Golden Views fault; Project engineer Tim Marshall explained:

Q. Was that Golden View's fault it [the batch] was rejected;

A. No.

Q. They [Golden View] didn't choose to pour that day, did they?

A. No. They were asked to deliver concrete [by Grangaard] and came out, and it [the concrete] exceeded the heat level." Tr. at p. 239.

Marshall testified that overall, the amount of concrete rejected at the job site was about the same as for other projects he had worked with. Tr. at p. 240.

As the project moved forward, Golden View's Brian Waldner (book keeper) took the load tickets and mailed a copy to Grangaard's corporate office. Tr. at p. 335. Brian also sent bills out with the truck driver for each load. Tr. at p. 336. Golden View's policy is to allow a contractor credit of up to \$10,000.00 before payment is required up front. Tr. at p. 337.

By August of 2021, Brian began to have concerns about Grangaard's history of payment - related to the concrete supplied up to that point in time. Tr. at p. 338. On one occasion, Grangaard's unpaid balance had risen to \$22,000.00. Tr. at p. 338. But, after Brian communicated with Grangaard, this bill was paid. Tr. at p. 338. Later, however, in September of 2021, Grangaard's unpaid bills had again ballooned to a balance of almost \$16,000.00. Tr. at p. 340.

So, in October of 2021, (before the top "deck" portion of the bridge was scheduled to be poured) a meeting was held at the construction site, between Golden View's Samuel and Brian Waldner and Grangaard's Jeremiah Grangaard; the parties discussed Grangaard's failure to pay the last several invoices (which totaled \$16,154.58). Tr. at p. 133, 141. Brian Waldner was concerned about Grangaard having exceeded its limit and having failed to make monthly payments. Tr. at p. 134. During this meeting, Jeremiah stated that a check was "in the mail." Tr. at p. 135. This was untrue:

Q. You had assured Sam and Brian that a check was in the mail for the \$16,000.00. True?

A. (Jeremiah Grangaard): True.

Q. But you never did put a check in the mail, did you?

A. No. Tr. at p. 392.

Again, up to this point in time, Jeremiah Grangaard had never raised any concerns about the condition of the concrete which had been supplied to the project site. Tr. at p. 135. Likewise, up to the time of the October meeting, Golden View had heard no complaints from the SDDOT, about the concrete supplied for the project. Tr. at p. 136. At this point in time, no one had said anything to Golden View, about any problems with any "strength testing" performed by the SDDOT Tr. at p. 137. No one had told Golden View of any problematic test results. Tr. at p. 132.

But, unbeknownst to Golden View, Jeremiah Grangaard did know, by August of 2021, that Grangaard was facing SDDOT contractual penalties related to some strength tests performed on samples of the concrete materials - which had been supplied up to that point in time. Tr. at p. 249. In fact, by October of 2021, the SDDOT had withheld a portion of a SDDOT progress payments due Grangaard, as a result of some sample test results. Tr. at p. 258. And, by October of 2021, Grangaard knew, from additional testing that had been performed by the SDDOT ("coring"), that Grangaard would be facing penalties by virtue of provisions found in its SDDOT/Grangaard contract. Tr. at p.

303.

But none of this information was relayed to Golden View's Samual and Brian Waldner, at the time of the October bridge meeting; instead, at that meeting, Jeremiah Grangaard promised Sam and Brian that he would pay the entire amount due Golden View for concrete supplied up to that point in time; Jeremiah also promised to immediately pay $\frac{1}{2}$ of the amount due for the upcoming "deck" part of the project; Grangaard promised to pay the rest of the "deck" bill by the end of the month. Tr. at p. 179; 347.

In fact, at the October meeting (when Jeremiah was asked about the quality of Golden View's concrete supplied up to that point in time) Jeremiah told Samual and Brian: "Everything is good, fine. . . everything is going to be fine." Tr. at p. 136. Jeremiah never told Golden View of any "penalties" that he was facing; he never told Golden View that he expected Golden View to be held responsible for any such penalties. Tr. at p. 133.

Likewise, the SDDOT's Marshall never spoke to Samual or Brian about whether Golden View being could possibly be held responsible for any penalties Grangaard was assessed pursuant to Grangaard's contract with the SDDOT. Tr. at p. 130. In fact, no one ever told Golden View about any of the Grangaard/SDDOT

contract provisions related to "strength standards." Tr. at p. 148. Grangaard never told anyone from Golden View about how the concrete had to perform pursuant to Grangaard's contract with the SDDOT. Tr. at p. 152.

Brian Waldner testified that, at this October meeting, Jeremiah Grangaard never acted as if he was disappointed in the (payment) demands Golden View was making. Tr. at p. 347. Jeremiah just stated that he wanted to get going with the deck project. Tr. at p. 348. He gave no complaints about the product that had been supplied up to that point in time; In fact, Jeremiah told Sam and Brian "you're better than most ready-mixes." Tr. at p. 349. He never told Golden View that Grangaard might not pay for the additional concrete it planned to order for the deck. Tr. at p. 138. Jeremiah acknowledged he never told the Waldners that Grangaard expected Golden View to reimburse Grangaard for any SDDOT contractual penalties. Tr. at p. 388.

Of course, after the October 2021 meeting, the "check" from Grangaard never did show up in the mail. Tr. at p. 137. So, in order to persuade Golden View to supply more concrete, Grangaard sent someone to the project site, with a check in hand, in order to pay up the account in full. Tr. at p. 137. This payment was

made on October 21, 2021. Tr. at p. 141. (Importantly, all of the penalties Grangaard would later complain about, were in relation to pre-October 21 concrete deliveries.) Tr. at p. 385.

After this payment was made, Golden View delivered approximately 500 yards of concrete related to the "deck" portion of the project. Tr. at p. 138. A couple of days later, Brian Waldner sent Grangaard an invoice for the deck material. Tr. at p. 351. The amount due was \$89,343.32. Exhibit 14. Grangaard did not immediately pay $\frac{1}{2}$ of this amount due. . . . it didn't pay by the end of the month. . . . Grangaard never paid anything. Tr. at p. 351.

As the weeks and months rolled along, Brian Waldner continued to send statements to Grangaard, and expected to get paid; but payment never came. Tr. at p. 353. Grangaard never gave Samuel Waldner any excuse for non-payment. Tr. at p. 142.

Project engineer Tim Marshall testified that none of the concrete supplied by Golden View for the Salem bridge was structurally unacceptable. Tr. at p. 242. In fact, since the deck concrete tested well, Marshall assumed Grangaard would pay Golden View for the last 500 yards supplied. Tr. at p. 261. Marshall never told Golden View that Grangaard could avoid paying for the materials it had supplied to the job site. Tr.

at p. 251.

After the project came to an end, Grangaard was ultimately assessed penalties related to strength testing that had been performed. But, as Tim Marshall explained, these sample testing penalties (the method of determining the penalty) are part of the contract between Grangaard and the SDDOT. Tr. at p. 245. And, according to Marshall, he could not say that any of the penalties resulted from improperly mixed concrete; to Marshall's knowledge all of the Golden View concrete material was mixed to the design standards listed on the mix design recipe. Tr. at p. 246. In short, Marshall saw no evidence that any actions by Golden View led to any of the sample concrete testing poorly. Tr. at p. 267.

Also, the penalties incurred by Grangaard must be evaluated in light of Grangaard's SDDOT contract as a whole. Notably, Grangaard's SDDOT contract provided an opportunity for Grangaard to receive a "bonus" for completing the project early. Tr. at p. 265. In fact, Grangaard received a \$223,800.00 in early completion bonuses in relation to this project. Tr. at p. 266. This is significant, in that (while the project was ongoing) Grangaard had the opportunity to (but simply chose not to) challenge several of the SDDOT's sample strength test results

which led to strength penalties. Tr. at p. 268. As project engineer Marshall explained, this challenge process (for sample strength testing) slows down the project. Tr. at p. 269. So, with its per-day early completion "bonus" opportunity in the background, Grangaard stood to gain \$1,400.00 for each calendar day they completed the project early. Tr. at p. 269. Challenging a strength test results would have slowed the project, and cut into that early completion bonus.

And, this Court must understand, even with the SDDOT contract deviations/penalties assessed against Grangaard, Grangaard was still paid for all of the concrete supplied to the site; Marshall explained how the Grangaard penalties were assessed: As set forth above, with its bid form, Grangaard bid its concrete at \$975.00 per yard for the bottom portions of the bridge works. Tr. at p. 273. Grangaard bid its deck concrete at \$1,200.00 per yard. (Even though Grangaard's actual cost of that concrete was \$135.00 per yard.) Tr. at p. 274)

When penalties were assessed pursuant to the SDDOT/Grangaard contract, such penalties were based upon the amount bid by Grangaard; so, where SDDOT penalties were assessed, Grangaard was still paid approximately \$400.00 to \$500.00 per yard for the penalized concrete. 273. This

penalty, or "deviation" process is set out in the "Standards and Specifications" portion of the Grangaard/SDDOT contract. 273.

It is true that Marshall has seen Contractor / Supplier agreements whereby deviations related to such sample strength tests have been passed on to the supplier. But, as Marshall explained, in those instances (where penalties are passed on), the concrete supplier usually jacks up its sale price to the contractor, in order to cover the added risk:

Q. But at the beginning of construction, if you would have seen a supplier willing to provide concrete for 300 to \$400. Would that have surprised you?

THE WITNESS (Marshall): I would typically expect - and, again, I don't see the [supply] contracts, and I don't know, but I would anticipate that they bid 250 to 300 a yard.

Q. If the supplier is going to take on the risk of the contractor's contractual deductions through the DOT contract; right?

A. I assume that's the reason." 322 - 323.

Again, as SDDOT project engineer Marshall testified, he had no information which would lead him to believe Golden View improperly mixed any of the concrete used for the project. Tr. at p. 221. Moreover, Marshall was not aware of any contract by which Golden View agreed to be responsible for Grangaard's SDDOT contractual deviations. Tr. at p. 326. In fact, Grangaard

never told Golden View that Grangaard had been penalized until several months after the project was completed. Tr. at p. 354.

In the end, by withholding payment for the deck project, Grangaard ended up paying Golden View less than half of the amount due for all of the concrete placed on site. Tr. at p. 393. At the same time, Grangaard was paid for each yard bid, plus the early completion bonus.

All of the foregoing facts were relayed to the jury by virtue of testimony submitted in Plaintiff's case in chief. Following this testimony, Golden View requested that the Court permit discovery and additional testimony related to the issue of punitive damages. The Court granted this motion and the following additional testimony (by Jeremiah Grangaard - related to Grangaard's finances) was heard by the jury on direct examination:

Q. Your company, as I understand it, had gross receipts in 2021 exceeding \$13 million. Is that true?

A. Correct.

Q. And it looks to me like your total income in 2021 was almost \$3 million. True?

A. Correct. Tr. at p. 433.

This was the only significant punitive damages testimony presented on direct examination.

On cross examination, Grangaard's attorney elicited testimony to the effect that Grangaard's net income for 2021 was just \$200,811.00. Tr. at p. 434. On redirect, Jeremiah testified that the net income is determined after payments are made to employees and officers. Tr. at p. 435. This was the extent of the financial testimony related to punitive damages.

Standard of review.

Appellee, in general, does not take issue with the Standard of review identified by Appellant.

However, this Court does not reverse a trial court's decision regarding jury instructions unless the complaining party was prejudiced by it. See, Overfield v. Am. Underwriters Life Ins. Co., 614 NW2d 814, 816 (S.D. 2000). This Court looks at the instructions "as a whole" to determine if they adequately inform the jury on the law. Id. Moreover, a complaining party must have properly objected to an instruction to preserve the issue for appeal. See, Grynberg v. Citation Oil & Gas Corp., 573 NW2d 493, 503 (S.D. 1997).

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN ALLOWING THE JURY TO AWARD PUNITIVE DAMAGES.

SDCL 15-6-51(b) states that "no grounds of objection to the giving or the refusing of an instruction shall be considered . .

. on . . . appeal, unless presented to the court upon the 'settlement' of such instructions." Sundt Corp. V. State of South Dakota by and through SDDOT, 566 NW2d 476, 480 (S.D. 1997). The complaining party must have specified and stated the grounds for his objection, and a mere general objection is not sufficient to preserve the right to appeal. Id. An attorney must be clear when objecting to jury instructions "so the trial court is advised of what possible errors exist and be granted the opportunity to correct any instructions." See Id.

Prior to submitting the case to the jury, proceedings were held in chambers, regarding the instructions to be read in open court. During those proceedings, counsel for Grangaard submitted general objections to the Court's decision to instruct the jury on the issue of fraud and deceit. See, generally, Volume 4 of the trial transcript. But, notably, Grangaard did not specifically object to the wording the Court suggested be used on the Verdict Form.

Likewise Grangaard did not object to Instruction No. 18 ("Every contract contains an implied covenant of good faith and fair dealing that prohibits either contracting party from preventing or injuring the other party's right to receive the agreed benefits of the contract. . .".) See, Tr. p. 740. And,

other than providing a general objection to the Court's submission of the issue of fraud and punitive damages to the jury, Grangaard did not object to the Verdict Form:

THE COURT: "The verdict form. The content will not change. It does consist of eight questions. Mr. Fink, are you comfortable with the format of that?"

MR. FINK: Yes, I am.

THE COURT: Mr. Rahn?

MR. RAHN: Yeah. We agreed to the form, but objections remain.

This is significant, in that Grangaard did not object to that portion of the verdict form which states: "**If your answer to either question 4 or 5 (or both) is yes, then you must answer Question 6.**" This language specified that the jury could render punitive damages in the event the jury found that Grangaard either committed fraud, or acted in bad faith. If Grangaard was of the opinion that the verdict form should have been drafted differently, it should have stated its specific objection.

Ultimately, the jury answered question 4 by determining that Grangaard breached its duty of Good Faith; and it answered question 5 by determining that Grangaard did not commit Fraud. The jury then followed the language of the verdict form, which stated that it could award damages in such instance, and went on to answer question 6:

"6(a). Do you find that Golden View suffered injury as a result of oppression, fraud, malice, intentional misconduct, or willful and wanton misconduct? Yes X No ___."

Based upon this finding, the jury assessed punitive damages in the amount of \$50,000.

But, again, the trial transcript does not contain any specific objection to this verdict form, by which Grangaard argued its actions (in bad faith) could not serve as the basis for a punitive damages award.

At best, Grangaard presented a general objection to instruction number 18, which explained the covenant of good faith and fair dealing - which exists in every contract. (See Tr. p. 657); this instruction came from the South Dakota Pattern Jury Instructions (SDPJI 30-10-40). But Grangaard did not specifically object to the Court's decision to give the jury two pathways to get to question 6(a). Instead, Grangaard's objection to instruction #18 was made without giving any specific reason:

"THE COURT: Any objection.

MR. FINK: No.

MR. RAHN: We'll object as to good faith and fair dealing.

THE COURT: The Court made a ruling that fraud and deceit are applicable issues for this jury to look at

and note you have a standing objection to this, but I'm going to go ahead and give this one." Tr. p. 657-658.

Grangaard did argue Golden View had not shown sufficient evidence to support a fraud/deceit verdict. But Grangaard did not provide specific objection to the language used in questions 4, 5 & 6 on the Verdict form. As such, it has waived it's right to appeal the contents or structure of that form.

Moreover, Instruction Number 29 properly instructed the jury as to the issue of punitive damages. This instruction came from South Dakota Pattern Jury Instruction number 50-100-10, and states:

"In addition to any actual damages that you may award, you may also, I your discretion, award punitive (exemplary) damages if you find that Golden View suffered injury as a result of the oppression, fraud, malice, intentional misconduct, or willful and wanton misconduct by Grangaard. . . ". See Instruction # 29.

The jury found Grangaard's actions amounted to "bad faith." The jury also found punitive damages were appropriate based upon the elements found in Instruction No. 29, which means that the jury found Grangaard's actions amounted to:

- oppression;
- fraud;
- malice;
- intentional misconduct; or

-willful and wanton misconduct.

Oppression is conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights. Crisman v. Detexman Chiropractic, Inc., 687 N.W. 2d 507 (S.D. 2004). Malice is not simply the doing of an unlawful or injurious act; it implies that the act complained of was conceived in the spirit of mischief or of criminal indifference to civil obligations. Selle v. Trozser, 786 N.W. 2d 748 (S.D. 2010).

In the case before this Court, Grangaard ordered concrete materials from Golden View (for the deck), knowing that it would not pay for those materials. At the very least, Grangaard misled Golden View of its intentions to pay - as was promised by Jeremy Grangaard at the October meeting. During that October meeting, Jeremy Grangaard told Golden View's Brian and Sam Waldner, the concrete supplied up to that point was "all good" and that it was of high quality. Grangaard hid the fact that there were testing problems, in order to keep the project moving forward (so that it could continue to get cheap concrete and receive an early completion bonus). At the same time, Grangaard chose not to challenge many of the penalties it received (and delay the project), even though it had successfully challenged

one such penalty. Later, when Grangaard decided not to pay the bills related to the deck concrete. . . it argued Golden View should be required to indemnify Grangaard for the SDDOT penalties it was assessed for concrete it did pay for - even though it had no contract with Golden View or other reasonable basis for such a claim.

In truth, Grangaard's legal position (Counterclaim) is that Golden View should indemnify Grangaard for its own contractual penalties. Grangaard had an extensive written/express contract with the SDDOT, by which it could be penalized based - upon terms set forth in that contract. Such penalties could be assessed even though the concrete supplied was properly mixed and accepted at the work site. Such penalties could be assessed against the Contractor even though the resulting bridge was safe and strong. As such, by not paying its concrete bill, Grangaard was claiming it had a right to require Golden View to indemnify it for its SDDOT penalties.

Prior to trial, Golden View moved for summary judgment upon Grangaard's claim, arguing that an agreement for indemnity must be an "express" contract (it cannot be implied). Golden View pointed to Mark, Inc. v. Maquire Insurance Agency, Inc., 518 NW2d 227, 230 (SD 1994), where this Court discussed those

limited instances where indemnity is allowed:

"Indemnity shifts the entire burden for loss on another party, and is generally not allowed, except under the following limited situations:

- (1) derivative or vicarious liability;
- (2) action at direction of, and for, another;
- (3) breach of duty to indemnify;
- (4) failure to discover negligence of another;
- and
- (5) **express contract.** Id.

In Mark, Inc., this Court held that indemnification can only be invoked when the party seeking indemnification can show that liability should properly be shifted to the second party." Id.

During the Summary Judgment proceedings, Golden View argued that there is no South Dakota authority suggesting that a concrete supplier has a **duty** to indemnify a Contractor who is penalized pursuant to terms set forth in a contract with the SDDOT. Golden View argued summary judgment (upon Grangaard's counterclaim) was appropriate because there were no facts which supported the contention that any "express" indemnity contract was entered into by Grangaard and Golden View.

The trial court denied Golden View's motion and, as a result, this case was presented to a McCook County jury over the course of four days, most of which time dealt with the issue of whether Grangaard should be allowed to pass on its contractual losses to Golden View - even though Grangaard was paid (by the

SDDOT) for every yard of concrete supplied to the project site (albeit the SDDOT paid Grangaard a lesser amount - a deviated amount - for a small portion of the concrete).

The evidence at trial established Grangaard knew full well it was facing penalties; but it also knew challenging those penalties would slow down the process. Likewise, Grangaard knew that if it brought up these deficiencies with Golden View at the October meeting (and an argument that Golden View would have to indemnify Grangaard for deductions), Golden View would likely have refused to supply any more concrete for the basement bottom price of \$130.00 per yard.

So, Grangaard chose to hide the ball at the October meeting, hoping to keep its basement bottom pricing - and collect its early completion bonus, with an eye toward shafting Golden View after the deck was poured. Punitive damages are warranted in this case.

II. THE TRIAL COURT DID NOT ERR IN ALLOWING THE FRAUD CLAIM TO BE PRESENTED TO THE JURY.

A claim of "Fraudulent Inducement" to enter a contract can arise under either tort or contract law. See SDCL 20-10-2 (Tort); 53-4-5 (Contract); See also, Rist v. Karlen, 241 N.W.2d 717, 719 (S.D. 1976). With respect to contracts, Fraud is either actual or constructive. SDCL 53-4-4.

"Actual fraud in relation to contracts consists of any of the following acts committed by a party to the contract, or with his connivance, with intent to deceive another party thereto or to induce him to enter into the contract:

- 1) The suggestion as a fact of that which is not true by one who does not believe it to be true;
- 2) The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believe it to be true.
- 3) The suppression of that which is true by one having knowledge or belief of the fact;
- 4) A promise without any intention of performing it; or
5. Any other act fitted to deceive.

SDCL 53-4-4.

Again, Grangaard ordered cheap concrete from Grangaard, with the intention of withholding payment later on. It hid the fact that it planned to argue it was entitled to a "set-off", it hid facts which would have given Golden View fair motivation to either raise the price of its concrete (to cover any "deviations") or to decline to supply any more concrete.

Grangaard purposely kept Golden View in the dark about the early strength testing results - related to concrete samples from the first part of the project. And, rather than challenging these results (which it could have done pursuant to its contract with the SDDOT) Grangaard chose to move forward with the project, motivated by the \$1,400.00 per day early

completion bonus.

By hiding the test results, Grangaard placed Golden View in the position where it could not properly investigate the situation or make good business decisions moving forward. Moreover, during the October 2021 meeting, Jeremiah Grangaard suggested that the concrete was all testing good, which was not true - Jeremiah did not believe his statement to be true. (He also lied about the check being in the mail.)

And, Jeremiah Grangaard suppressed other facts, such as his intention to withhold payment for the additional concrete he stated he would order. He suppressed the strength test results; he suppressed the fact that the SDDOT had withheld a portion of a progress payments due Grangaard.

In order to convince Golden View to keep bringing more product to the site, Jeremiah Grangaard made a promise to Golden View's Samuel and Brian Waldner - that he would immediately pay for half of the "deck" concrete, with the other half being paid at the end of the month. The facts clearly show Jeremiah made these promises in order to keep the project moving. (He had secretly tried to find a different supplier prior to the October meeting - but could not find anyone who would supply concrete for the low cost being charged by Golden View.)

And, after the deck was poured, even the SDDOT's Tim Marshall could not understand why Grangaard didn't pay for this concrete - as the strength testing for the deck concrete was fine.

Clearly, the facts supported the Court's decision to allow Golden View's Fraudulent Inducement claim to be considered by the jury. The fact that the jury did not find fraud, is not good reason to grant Grangaard a new trial. In granting or denying a new trial, the trial court has broad discretionary power; it should not disturb the trial court's decision in absence of clear abuse. Wasserburger v. Consolidated Mgmt. Corp., 502 N.W.2d 256 (S.D. 1993).

Ultimately, Golden View asks that this Court affirm the verdict rendered by the Jury, in all respects. However, in the event this Court were to determine that the punitive damages portion of the verdict should not stand, then Golden View maintains this Court should order such amount to be remitted from the Judgment, and to allow the remainder of the verdict to stand.

This Court should not, however, require a new trial upon Golden View's Breach of Contract case. Very clearly, Grangaard failed to pay the amount due for the materials it ordered.

There was no competent testimony establishing Golden View mixed any concrete improperly. Even Grangaard's expert testified that he could not point to any specific load statement and say that it indicated a load was mixed improperly. Grangaard's counterclaim (seeking indemnification) fails upon the facts presented to the jury; it also fails as a matter of law.

CONCLUSION

For the reasons set forth above, Golden View urges this Court to affirm the verdict and Judgment entered herein.

Dated this 19 day of November, 2024.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing brief and all appendices were served via email upon the following:

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Dated this 19 day of November, 2024.

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CERTIFICATE OF COMPLIANCE

In accordance with SDCL 15-26A-66(b)(4), I hereby certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Corel Word Perfect, and contains 6653 words from the Statement of the Case through the Conclusion. I have relied on the word count of a word-processing program to prepare this certificate.

/s/ Mike C. Fink

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

GOLDEN VIEW READY-MIX, LLC

Plaintiff and Appellee,

v.

GRANGAARD CONSTRUCTION, INC.

Defendant and Appellant.

App. No. 30643
49CIV22-000040

Appeal from the Circuit Court, First Judicial Circuit,
McCook County, South Dakota

The Honorable Chris S. Giles

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The Notice of Appeal was filed on February 29, 2024

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PROCEDURAL BACKGROUND ON FRAUD AND PUNITIVE DAMAGES

Golden View argues in its Appellee Brief that the appeal on the punitive damages award should not be heard because Grangaard did not specifically renew its objection to punitive damages being awarded on the breach of implied covenant of good faith and fair dealing claim (“Implied Covenant Claim”) on the verdict form during the settling of jury instructions. There is no merit to this as the Circuit Court decided by that point that punitive damages could be awarded on such a claim and noted Grangaard’s position to the contrary with standing objections during the settling of jury instructions.

In September 2023, Grangaard moved for summary judgement on Golden View’s Fraud and Deceit claim, primarily on the grounds that there was no independent tort here and any remedies available to Golden View were limited to contract law. (Reply Appendix 0014.) The Court denied this motion and allowed the Fraud and Deceit claim to proceed.

On December 27, 2023, Grangaard responded to Golden View filed Plaintiffs’ Motion for Permission to Undertake Discovery Regarding the Issue of Punitive Damages and Motion for Submission of the Issue of Punitive Damages to the Jury (“Punitive Damages Motion”) again arguing that punitive damages were improper because all of the claims arise from contractual duties to pay for concrete and punitive damages cannot, as a matter of law, be awarded on a claim for breach of a contractual duty. (*Id.* 0018-21.)

On December 22, 2023, Grangaard submitted proposed jury instructions and objected to certain of Golden View’s instructions, including on fraud and punitive damages, and specifically objected to Golden View’s special interrogatory and verdict form. (*Id.* 0027.)

On December 27, 2024, Grangaard brought a motion in limine to prohibit the use of evidence of Grangaard's profit of the Project as having no relevance and "would be offered herein only in hopes of causing the jury to perceive Grangaard negatively and to influence it to return a verdict based upon such perception rather than the relevant evidence and law." (*Id.* 0039.)

At the close of Golden View's case, Grangaard moved for directed verdict on each of Golden View's counts. (Tr. at p. 405:12-25.) The Court analyzed the implied covenant claim with the claim for fraud and deceit and found that there were facts supporting these claims. (*Id.* at p. 407:4-12.) Grangaard was allowed to provide argument on this and again argued that all the claims here are contractual and, as a matter of law, there is no additional tort claim here. (*Id.* at pp. 407:16-409:5.) The Court found that "the jury could find to keep fraud and bad faith and deceit alive" based on Golden View's detrimental reliance on false statements that caused Golden View to "proceed[] to deliver the balance of the concrete that had been ordered." (*Id.* at pp. 410:16-22.)

The Court then invited arguments on Golden View's Punitive Damages Motion. Again, Grangaard argued against this motion based on SDCL § 21-3-2, which expressly limits punitive damages to a breach of "an obligation not arising from contract." (*Id.* at pp. 414:24-12.) As such, counsel for Grangaard argued that punitive damages are improper here because the only obligation at issue was Grangaard's contractual obligation to pay for the concrete it ordered from Golden View. (*Id.*) The Court disagreed and denied the motion, finding:

If we were only pursuing the breach-of-contract count, I would agree with you. But we're not. The bad-faith count is alive, as well as fraud and deceit. The obligation arising from something other than the contract terms is the obligation of good faith a fair dealing.

(Id. at p. 416:9-19.)

In settling the jury instructions, Grangaard objected “as to good faith and fair dealing.” *(Id. at pp. 657:17-658:5.)* The Court “understood” this objection as it related to the Court’s “ruling that fraud and deceit are applicable issues for this jury to look at and note you have a standing objection to this...” *(Id.)* On the instruction related to the issues for the jury to decide, Grangaard’s proposed instruction did not include any issues related to the implied covenant of good faith and fair dealing, fraud and deceit, or punitive damages. *(Reply Appendix 0028.)* The Court, however, adopted Golden View’s proposed jury instruction in this regard, with slight modification, settling on Instruction 27. *(Appendix 32.)*

The Court again recognized that Grangaard had “a standing objection to the good-faith fraud part” which erroneously instructed the jury to make additional considerations on punitive damages based on a breach of the agreement to pay Golden View. *(Tr. at p. 680:12-17.)* As for the punitive damages instruction, the Court acknowledged Grangaard’s standing objection to the same but gave the instruction over such objection. *(Id. at pp. 683:17-684:6.)*

After going through the instructions, the Court presented the parties with the Court’s proposed jury verdict form. *(Id. at pp. 686:18-691:18.)* Prior to reading through questions 4, 5, and 6 on breach of duty of good faith, fraud, and punitive damages, the Court instructed the parties, “Don’t object yet.” *(Id. at p. 689:4.)* After going through the form, the Court asked Grangaard if it was okay with the form, with Grangaard responding in the negative and the Court noting that it was based on Grangaard’s standing objection to punitive damages on the contractual claims. *(Id. at p. 691:10-19.)* In going through the

punitive damages instruction again, the Court again noted this standing objection. (*Id.* at pp. 732:21-733:10.)

In going through the jury instructions a final time, the Circuit Court noted that by not restating a previous objection the parties are “not waiving any objections earlier made. (*Id.* at pp. 738:25-739:1.) The Court continued, stating that “objections have been noted,” and for “timeliness” that objections need not be restated in “detail.” (*Id.* at p. 739:4-19.) Grangaard’s counsel confirmed that the parties stood on their previous objections in the record and that during the final review of the jury instructions the parties were “just confirming that this is the set that the Court has approved.” (*Id.*)

The Court made edits to the verdict form, presented that version to the parties, and the Court again noted Grangaard’s standing and previously stated objections. (*Id.* at 739:4-11.) In going through the verdict form the final time, the Court stated that “[t]he content will not change.” (*Id.* at p. 742:18-19.) Given that the Court had already decided that punitive damages could be awarded on contractual claims such as the Implied Covenant Claim and the instruction to counsel that the content of the verdict form would not change, Grangaard agreed to the Court’s form but only over its standing objections. (*Id.* at p. 742:18-25.)

On January 11, 2024, the Jury followed Instruction 27 and the corresponding questions on the verdict form, which led it to erroneously award punitive damages on Golden View’s Implied Covenant Claim. On January 24, 2024, Grangaard filed a Renewed Motion for Judgment as a Matter of Law, or in the Alternative, a New Trial (“Post-Trial Motion”) asking the Circuit Court to correct the clearly erroneous verdict.

The Circuit Court denied the motion without explanation, presumably based on its continued belief that awarding punitive damages on contractual claims was not in error.

ARGUMENT

I. The Circuit Court's error in allowing an award of punitive damages on the Implied Covenant Claim and the jury's error making such award are properly before this Court on appeal, and such errors should be corrected.

In reading Appellee's Brief, it appears that Appellee does not dispute that the Circuit Court's allowing the jury to award punitive damages on a claim based in contract and the jury making such award constitute error. Golden View only contests whether Grangaard properly preserved this issue for appeal. As set forth herein, Grangaard objected at every opportunity it had pre-trial, during trial, and post-trial to Golden View's attempts to submit both the fraud and punitive damages claims to the jury. To suggest that Grangaard did not preserve these issues seems disingenuous. These issues are properly before this Court and this Court should reverse the Jury's improper award of punitive damages.

A. At numerous stages of this litigation, Grangaard made the court aware of the error that would be committed by allowing the jury to award punitive damages in a case involving only alleged breaches of contractual duties.

On many occasions during the course of this litigation, Grangaard advised the Circuit Court of the error that would result if the Jury were allowed to consider and award punitive damages on contractual claims. The pretrial motions in this regard focused on the fraud and deceit claim because that was the only potential independent tort claim pled. It never occurred to Grangaard that the Court would allow the issue of punitive damages to go to the Jury on the Implied Covenant Claim alone.

During trial at the close of the evidence, against Grangaard's arguments and over its objections, the Circuit Court ruled that the Jury could award punitive damages on

Golden View's Implied Covenant Claim. Once the Circuit Court decided as such and after being fully aware of Grangaard's position that it would be in error to award punitive damages on such a contractual claim, Grangaard was left to simply renew its objections in this regard as to each of the Circuit Court's subsequent decisions that led to instructions and a verdict form that allowed punitive damages on the Implied Covenant Claim. Grangaard did object as such during the settling of jury instructions and the Circuit Court noted such objections based on Grangaard's fundamental dispute with Golden View and the Circuit Court as to the law on the award of punitive damages on contractual claims. Therefore, Grangaard properly preserved this issue for appeal.

A party objecting to a jury instruction or verdict form "must do so on the record, stating distinctly the matter objected to and the grounds of the objection." SDCL § 15-6-51(b)(c)(1). An objection need only be "sufficiently specific to put the circuit court on notice of the alleged error so it has the opportunity to correct it." *Weber v. Weber*, 2023 S.D. 64, ¶ 24, 999 N.W.2d 230, 236. An objection once made preserves the objection to similar issues without the necessity of repetition. *Union Elec. Light & Power Co. v. Snyder Estate Co.*, 65 F.2d 297, 303 (8th Cir. 1933). When a party moves for a directed verdict based on the insufficiency of evidence to support a claim and then objects to jury instructions that allow that claim to proceed to a jury, the issue has been sufficiently preserved for appeal. *See Shaul v. Hart*, 327 N.W.2d 50, 53 (S.D. 1982); *see also Wilkins v. Bd. of Regents*, 519 S.W.3d 526, 536-38 (Mo. Ct. App. 2017) (finding a challenge to an instruction allowing the award of future damages was preserved on appeal where the party moved for a directive verdict on such damages, submitted jury

instructions without such an instruction, and objected to the instruction on future damages).

Here, Grangaard put the Circuit Court on notice on several occasions of the legal error of allowing the jury to award punitive damages on contractual claims. Prior to trial, Grangaard made this this argument and presented the Circuit Court with legal authority in this regard in its motion for partial summary judgment and its response in opposition to Golden View's Punitive Damages Motion. Grangaard filed objections to Golden View's proposed jury instructions and verdict form that allowed punitive damages on contractual claims and proposed counter instructions and verdict form that would have prevented an award of punitive damages as to any contractual claims.

At trial, in its motion for directed verdict and arguments in opposition to Golden View's Punitive Damages Motion, Grangaard again notified the Court of the law preventing the award of punitive damages on claims arising from a contract, such as the Implied Covenant Claim. Grangaard further argued that the evidence was insufficient to support a fraud claim, which was the only potential claim upon which punitive damages could be awarded. After hearing these arguments, the Circuit Court disagreed with Grangaard's position on SDCL § 21-3-2 limiting punitive damages to independent tort claims, finding that "[t]he obligation arising from something other than the contract terms is the obligation of good faith and fair dealing." (Tr. at p. 416:9-19.)

The Circuit Court clearly was proceeding on the mistaken belief that a claim for breach of an implied duty of good faith and fair dealing is not a claim based in contract. Based on this mistaken understanding of the law, the Circuit Court submitted jury instructions and a verdict form to the jury that allowed punitive damages to be awarded

on Golden View's Implied Covenant Claim, over Grangaard's standing objections. At this point, after the close of evidence at trial, the Circuit Court was fully aware of Grangaard's position that proceeding in this manner was in error. As such, any further argument on this issue during the settling of jury instructions would have essentially been a motion to reconsider the decisions of the Court relative to multiple pre-trial and at-trial motions. There was no obligation under South Dakota law for Grangaard to seek such reconsideration during the settling of jury instructions to preserve the issue on appeal. The Circuit Court was on notice of the alleged error and noted the standing objections to the same during the settling of jury instructions, and that is sufficient to preserve the issue on appeal.

B. This Court can correct the erroneous punitive award pursuant to its review authority of Grangaard's proper appeal of its denied Post-Trial Motion, and this Court should correct the same.

Objections to the jury instructions and verdict form aside, this Court certainly has authority to review the Circuit Court's denial of Grangaard's Post-Trial Motion which is the subject of this appeal.

When a circuit court denies a motion for judgment notwithstanding the verdict, this Court has the authority to review such ruling by the abuse of discretion standard. *Bland v. Davison Cnty.*, 1997 S.D. 92, ¶ 26, 566 N.W.2d 452. This court reviews the testimony and evidence in light most favorable to the verdict or the nonmoving party. *Id.* Then, without weighing the evidence, the Supreme Court must decide if there is evidence which would have supported or did support a verdict. *Id.* Even if a party does not object to an erroneous verdict form, the issue is preserved on appeal when the party brings "the matter to the circuit court's attention in post-trial proceedings while it [is] still easily correctable." *Mealy v. Prins*, 2019 S.D. 57, ¶ 39, 934 N.W.2d 891, 902.

Here, Grangaard's Post-Trial Motion made it absolutely clear to the Circuit Court that Grangaard believed that the punitive award on the Implied Covenant Claim was in error and provided the uncontroverted authority supporting such position. Grangaard requested that the Circuit Court correct the punitive award. The Circuit Court declined and denied the Motion without addressing the merits of the Motion. Grangaard appeals this decision amongst others, as set forth in the notice of appeal and in the briefing herein.

Putting aside whether Grangaard sufficiently noted its objections to allowing the jury to award punitive damages on claims based in contract, it cannot be denied that this issue was squarely before the Circuit Court in Grangaard's Post-Trial Motion. Golden View submits no argument as to why the Circuit Court's denial of such Motion was not in error. No such argument is raised because no such argument exists. South Dakota law does not allow for punitive damages to be awarded on a claim for a breach of the implied duty of good faith and that is exactly what the jury was allowed to do and did despite Grangaard's repeated attempts to prevent the same. These errors could have been corrected at several points during this litigation and certainly as late as in response to the Post-Trial Motion. The Circuit Court refused to correct its own clear error which lead to the Jury's error. Grangaard now asks this Court to correct these errors by reversing the punitive damage award.

C. There is Plain Error here regarding the award of punitive damages, and this Court has the authority to review such error and correct the same.

As discussed herein, Grangaard could not have been more clear and consistent in its objection to punitive damages being awarded on contractual claims. The Circuit Court consistently disagreed during motion practice and specifically held at trial that the obligation of good faith and fair dealing is an obligation that is not arising from contract

such that punitive damages could be awarded pursuant to SDCL 21-3-2. This is plain error and should be corrected regardless of Grangaard's objections.

In deciding *State v. Brammer* in 1981, this Court recognized the legislatively created plain error rule, now codified at SDCL § 15-6-51(d)(2). 304 N.W.2d 111, 114-15 (S.D. 1981). In deciding *State v. Nelson* in 1998, this Court adopted a four-factor analysis for the plain error rule outlined in *Johnson v. United States*, 520 U.S. 461, 466-67, 117 S. Ct. 1544, 1549, 137 L. Ed. 2d 718 (1997) (citations omitted). 1998 S.D. 124, ¶ 8, 587 N.W.2d 439, 443. Under Nelson, “[p]lain error requires 1) error, 2) that is plain, 3) affecting substantial rights; and only then may [the Supreme Court] exercise [its] discretion to notice the error if 4) it ‘seriously affects the fairness, integrity, or public reputation of judicial proceedings.’” *Id.* (citing *Johnson v. United States*, at 466-67.) In 2004, this Court made it clear that the plain error rule applied to civil appeals. *First Premier Bank v. Kolcraft Enters. (In re Boone)*, 2004 S.D. 92, ¶ 18, 686 N.W.2d 430, 441-42.

A court's deviation from a rule of law or statute is error. *State v. Guziak*, 2021 S.D. 68, 968 N.W.2d 196, 206; *Nelson* at 444. The word “plain” means “clear” or “obvious”. *Nelson* at 444 (citing *United States v. Olano*, 507 U.S. 725, 734, 113 S. Ct. 1770, 1777 (1993)). The error affects substantial rights if it “affects the outcome of the proceedings.” *Bauer v. Curators of the Univ. of Mo.*, 680 F.3d 1043, 1045 (8th Cir. 2012) (citing *United States v. Olano*, at 1774.) Disclosing “prohibited matters” to a jury “seriously affects the fairness, integrity, and public reputation of judicial proceedings.” *First Premier Bank v. Kolcraft Enters. (In re Boone)*, 2004 S.D. 92, ¶ 19, 686 N.W.2d 430, 442 (finding plain error and granting a new trial based on the circuit court allowing

the prejudicial disclosure of plaintiff's previous settlement of a related claim during opening statements.)

Looking at the first two elements of the plain error rule, the Circuit Court certainly erred in finding that punitive damages could be awarded on Golden View's Implied Covenant Claim, which is undoubtedly a claim based in contract. Such error is clear and obvious as the black-letter legal authority is directly to the contrary. *Diesel Mach., Inc. v. Manitowoc Crane Grp.*, 777 F. Supp. 2d 1198, 1211 (D.S.D. 2011) (finding "a claim of breach of the implied covenant of good faith and fair dealing cannot support a punitive damages claim.") Golden View does not now dispute this. As such, there was error and it was plain.

As to the third element, this plain error necessarily affected Grangaard's substantial rights. There is no doubt that the error affected the outcome of the case as the Jury did in fact award punitive damages against Grangaard on the Implied Covenant Claim.

This award also seriously affects the fairness, integrity, and public reputation of the judicial proceedings as it validates the unfortunately all-too-common practice of parties throwing fraud and punitive damages claims in to purely commercial contractual disputes over payment obligations. It seems nearly every year recently this Court affirms what has long been the law - that such claims have no place in such disputes. *See e.g., Sivada v. Muller*, 2022 S.D. 75, ¶¶ 35-37, 983 N.W.2d 548, 560 (finding that the fraud claims fail because they "pertain to whether [plaintiff] satisfied his contractual obligation to complete the project by the contract's deadline."); *Wright v. Temple*, 2021 S.D. 15, ¶ 58, 956 N.W.2d 436, 455 (finding the fraud claims fail because they "arose strictly from

the alleged contractual obligation.”). Despite such clear direction to the contrary, the filing of these improper claims persists. These contractual claims disguised as fraud claims attempt to change the calculus as to the amounts in dispute with the improper threat of punitive damages. See *Grynberg v. Citation Oil & Gas Corp.*, 1997 S.D. 121, ¶ 17, 573 N.W.2d 493, 500 (noting that among the policy reasons for not allowing punitive damages on contractual claims is that “while compensatory damages encourage reliance on business agreements, the threat of additional punitive damages would create uncertainty and apprehension in the marketplace.”). This practice is completely unproductive, frustrates the purposes of contracting parties, and makes resolution in a case like this unnecessarily more difficult.

The fraud and punitive damages claims here arise from an unpaid invoice for goods delivered under South Dakota’s Uniform Commercial Code. The same unpaid invoice is the amount of Golden View’s breach of contract claim, upon which it fully recovered. As a general matter, if punitive damages are allowed to go to a jury under these facts, it is hard to imagine any UCC case over unpaid invoices that would also not involve a claim for punitive damages, rewriting the law on remedies for the nonpayment of goods sold in this state. Here, the punitive award against Grangaard is patently unfair given the black-letter law prohibiting such an award on this contractual claim. The Circuit Court had an undeniable opportunity to correct this plain error on Grangaard’s Post-Trial Motion but refused to do so. Given the above, this forth factor of the plain error rule is clearly satisfied here.

This Court has the authority to fix the erroneous punitive award. Grangaard respectfully requests that this Court exercise such authority and, at a minimum, reverse the punitive damages award.

II. The submission of the fraud claim and punitive damages evidence to the jury was improper, which tainted the compensatory award such that a new trial is warranted.

The Jury was erroneously allowed to hear evidence and argument in regard to Grangaard allegedly acting fraudulently and in a deceitful manner in only making partial payment for the concrete that was delivered for the Project. The Jury was further erroneously allowed to consider evidence, the only relevance of which was in support of an improperly submitted punitive damages claim. Grangaard's income and profit in its annual operations and, more specifically, on the Project was a significant part of Golden View's argument to the jury for finding in its favor on all claims and for both compensatory and punitive damages. As such, the awards are inseparable and, on that basis, this Court should direct the Circuit Court to hold a new trial on all issues.

In attempting to justify the submission of the punitive damages testimony to the Jury, Golden View, in its Appellee Brief, again seems to concede that such damages cannot be awarded on the Implied Covenant Claim and only attempts to reargue the validity of its fraud claim. The problem with such attempt is that it is based on a misplaced reliance upon South Dakota law relating to fraud as a defense to the enforceability of a contract. Golden View did not assert fraud as a defense to the enforceability of the contract at issue in this case. Golden View asserted an affirmative

claim of fraud as an independent tort claim.¹ Yet, in support of its argument on this appeal, it failed to cite to South Dakota law pertaining to an affirmative fraud claim. Such confusion as to the fraud Golden View is alleging here underscores the absurdity of this claim being submitted to the Jury.

In arguing that the Circuit Court did not err in allowing the fraud claim to be presented to the jury, Golden View first distinguishes between South Dakota's law on fraudulent inducement in tort and contract. (Appellee Brief at p. 29.) However, Golden View goes on to argue on fraudulent inducement as a defense to the enforcement of a contract, citing SDCL § 53-4-4. That Chapter provides that a contract is voidable when obtained through fraud. SDCL § 53-4-1. The aforementioned section cited by Golden View provides part of the definition of such fraud. The Appellee Brief goes on to attempt to make its case as to how the Section 53-4-1 definition of the defense of fraud applies to the facts of this case.

Fraud as a defense to performing obligations under a contract, however, cannot give rise to an award of punitive damages. SDCL § 21-3-2. The only relief that could be granted on such defense is avoidance from the contract and the obligations set forth therein. SDCL § 53-4-1. No damages can be awarded under SDCL § 53-4-4, punitive or otherwise. *Id.*

The trial proceeded and the Jury was instructed on Golden View and the Court's false belief that fraud could be found and punitive damages could be awarded if there was deceitful conduct by Grangaard regarding its intentions to perform under the agreement.

¹ Despite such claim being factually unsupported, the Circuit Court allowed it to be presented to the Jury. The Jury, in agreement with Grangaard, found the fraud claim to be factually unsupported.

As a predictable result, the Jury erroneously awarded punitive damages on Grangaard's failure to make full payment for the concrete Golden View delivered. This was improper and should not stand.

Moreover, the Circuit Court's decisions that led to the Jury to consider whether Grangaard was fraudulent and deceitful and award punitive damages also prejudiced Grangaard in regard to its liability on Golden View's breach of contract claim. It is more difficult to assess the effect of allowing the fraud claim to be submitted to the Jury given that the Jury found that there was no fraud, but the same cannot be said of the use of punitive damages evidence, which was part of Golden View's grounds for Grangaard's liability generally. Golden View argued to the jury, in part, that Grangaard should pay the full invoice amount because of Grangaard's "massive markup" and "profit." (Tr. at p. 756:3-23.)

Additionally, as discussed throughout Grangaard's briefing, the only conduct ultimately at issue was Grangaard's nonpayment of the final invoice amount, which provided the same factual basis for both Golden View's breach of contract claim and the fraud claim. So, if the jury believed that punitive damages may be warranted on such conduct, which was likely implied by the Circuit Court allowing in separate punitive damages evidence, then it could assume at the very least that Grangaard was liable for failing to make to make full payment on the contract. As such, it is not surprising that the Appellee Brief makes no attempt to separate the compensatory award on the breach of contract claim from the punitive award.

As discussed in the Appellate Brief, if a compensatory award cannot be separated from a punitive award, all issues should be remanded for new trial. *Maybee v. Jacobs*

Motor Co., 519 N.W.2d 341, 345 (S.D. 1994). As set forth herein and as Golden View concedes with its silence on this point, the awards here cannot be separated. The presentation of the fraud claim and punitive damages evidence to the Jury unfairly tainted the entire verdict. As a matter of law, the inseparable issues that gave rise to the awards must be tried again. Therefore, this Court should order a new trial on all issues.

CONCLUSION

For the reasons stated herein, Grangaard respectfully requests that the Court reverse the Circuit Court's denial of Grangaard's Motion for New Trial and remand for new trial on all issues, with the direction that Golden View's fraud and deceit claim and claim for punitive damages be dismissed.

Dated this 27th day of December, 2024.

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CERTIFICATE PURSUANT TO SDCL 15-26A-66 and 15-26A-14

I, Daniel R. Fritz, hereby certify that the *Appellant's Reply Brief* in the above-entitled matter complies with the typeface specifications of SDCL § 15-26A-66 and the length specifications in SDCL § 15-26A-14. The *Appellant's Reply Brief* contains 4,669 words and that said *Appellant's Reply Brief* does not exceed sixteen (16) pages and was typed in Times New Roman font, 12 point.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 27th day of December, 2024, a true and correct copy of the foregoing *Appellant's Reply Brief* were served via Odyssey file and serve system.

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REPLY APPENDIX
OF APPELLANT GRANGAARD CONSTRUCTION INC.

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STATE OF SOUTH DAKOTA)
 :SS
COUNTY OF MCCOOK)

IN CIRCUIT COURT
FIRST JUDICIAL CIRCUIT

GOLDEN VIEW READY-MIX, LLC, a South
Dakota Limited Liability Company,

Plaintiff,

v.

GRANGAARD CONSTRUCTION, INC., a
South Dakota Corporation,

Defendant.

44CIV22-000040

**BRIEF IN SUPPORT OF
DEFENDANT'S MOTION FOR
PARTIAL SUMMARY JUDGMENT**

Defendant Grangaard Construction, Inc. ("Grangaard"), by and through its undersigned counsel, submits this brief in support of its Motion for Partial Summary Judgment.

I. INTRODUCTION

Grangaard's conduct here was consistent with how it had performed its bridge construction work for nearly thirty years. Golden View attempted to expand its business to perform such bridge work and held itself out as being capable of the same. It turned out that this was not the case and Golden View now wants to pass its risk and liabilities for its out-of-speculation concrete on to Grangaard. Golden View should not be allowed to do so. While some fact issues may remain, it is factually undisputed that there is no fraud here and that Grangaard is not liable for nonpayment of amounts deducted for Golden View's concrete that did not meet DOT specifications.

II. LEGAL STANDARD

Summary judgment is appropriate when the movant demonstrates that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." SDCL § 15-6-56(c). The purpose of summary judgment "is to secure a just, speedy and

inexpensive determination of the action.” *Wilson v. Great N. Ry. Co.*, 157 N.W.2d 19, 21 (S.D. 1968). Accordingly, “it is looked upon with favor” when no genuine issues exist. *Id.*

In ruling on a motion for summary judgment, the Court must view the evidence in the light most favorable to the non-moving party. *Cont’l Grain Co. v. Heritage Bank*, 548 N.W.2d 507, 551 (S.D. 1996). “The non-moving party, however, must present specific facts showing that a genuine, material issue for trial exists.” *Id.* “Unsupported conclusions and speculative statements” simply do not suffice to raise a genuine issue of fact for trial. *Paradigm Hotel Mortg. Fund v. Sioux Falls Hotel Co.*, 511 N.W.2d 567, 569 (S.D. 1994).

The non-moving party must show that it “will be able to place sufficient evidence in the record at trial to support findings on all the elements on which [it has] the burden of proof.” *Bordeaux v. Shannon Cty. Schs.*, 707 N.W.2d 123, 127 (S.D. 2005). Neither general allegations nor proof of a mere possibility suffice to establish a genuine issue of material fact. *See Foster-Naser v. Aurora Cty.*, 874 N.W.2d 505, 508 (S.D. 2016); *see also Greene v. Morgan, Theeler, Cogley & Petersen*, 575 N.W.2d 457, 459 (S.D. 1998) (“The party opposing a motion for summary judgment must be diligent in resisting the motion, and mere general allegations and denials which do not set forth specific facts will not prevent issuance of a judgment.”)

III. ARGUMENT

A. There is no separate legal duty such that an independent fraud claim can lie, and even if there was, Golden View falls well short of meeting its burden to provide evidence for each element of such a claim.

This is a simple contract dispute between two businesses – Golden View and Grangaard – based on alleged breaches of the parties’ Agreement. The undisputed evidence shows that Golden View agreed to provide concrete for the entire project, including the bridge deck, but then tried to get out of the Agreement when Golden View discovered that its concrete might fail and be subject

to deductions. Grangaard tried to find a new supplier, but could not, and Golden View provided concrete for the bridge deck as required by the Agreement. If Golden View believes it was not paid all that it believes it was owed under the Agreement, its remedies for the same are limited to contract law. There is no fraud here, and Count III alleging as such should be dismissed with prejudice.

1. Any assurances from Jeremiah regarding Grangaard's performance of the Agreement would not create a separate independent fraud claim.

“A party cannot convert a breach of contract cause of action into a tort merely by stating it as such.” *Grynberg v. Citation Oil & Gas Corp.*, 573 N.W.2d 493, 510 (S.D. 1997). “If a party could simply, by alleging that a contracting party never intended to fulfill his promise, create a tortious action in fraud, there would be no effective way of preventing almost every contract case from being converted to a tort...” *Id.* (quoting *Hertz Commercial Leasing Corp. v. LMC Data, Inc.*, 343 N.Y.S.2d 689, 694 (Civ. Ct. 1973)). While an independent fraud claim may arise out of a set of circumstances related to a contract, it is generally “conceded that tort usually signifies a breach of a legal duty independent of contract.” *Grynberg v. Citation Oil & Gas Corp.*, 573 N.W.2d 493, 501 (S.D. 1997). The existence of a legal duty is a question of law. *Id.* In determining whether such a duty exists, courts must focus “on whether a legal duty exists independent of the obligations under the contract.” *Wright v. Temple*, 956 N.W.2d 436, 454-55 (S.D. 2021) (internal citations and quotations omitted).

“[D]amages may only be awarded on a deceit claim when the party seeking them ‘can prove an independent tort that is separate and distinct from the breach of contract.’” *Wright v. Temple*, 956 N.W.2d 436 at 454 (citing *Hoffman v. Louis Dreyfus Corp.*, 435 N.W.2d 211, 214 (S.D. 1989)). If an obligation that was allegedly breached could not have existed but for a manifested intent between the parties, “then contract law should be the only theory upon which

liability would be imposed.” *Fisher Sand & Gravel Co. v. State by & Through S.D. DOT*, 558 N.W.2d 864, 867-68 (S.D. 1997) (quoting Prosser and Keeton on Torts (5th ed 1984)).

The obligation at issue in Golden View’s fraud claim is in regard to Golden View’s obligation to “continue supplying materials” for the Project (Complaint at ¶ 65.) It is undisputed, however, that Golden View already agreed to provide such materials under the Agreement. As such, this obligation was entirely contractual and could not be the basis for an independent fraud claim. Therefore, the fraud claim should be dismissed.

2. Golden View acted pursuant to the Agreement and not in reliance on any representation made by Grangaard, and even if there was such reliance, it would be unreasonable here.

Even if there was a basis for an independent tort claim for fraud, such a claim fails as a matter of law because Plaintiff has failed in meeting its burden to provide evidence of each element of the same. Therefore, Count III should be dismissed.

Under South Dakota law, the essential elements of common law fraud are: 1) that a representation was made as a statement of facts, which was untrue and known to be untrue, or else recklessly made; 2) that it was made with the intent to deceive and for the purpose of inducing the other party to act upon it; and 3) that the other party did rely on it and was induced thereby; 4) and damages resulted to the other party as a result. *Dahl v. Sittner*, 474 N.W.2d 897, 900 (S.D. 1991). To avoid summary judgment, the essential elements of fraud must be adequately supported by alleged facts. *Agreva, LLC v. Bailly*, 950 N.W.2d 774, 791 (S.D. 2020).

Fraud is not to be presumed and must be strictly proven. *Id.* “Speculation and innuendo...are not enough to raise a genuine issue of material fact.” *Schwaiger v. Avera Queen of Peace Health Servs.*, 714 N.W.2d 874, 880 (S.D. 2006). Cases of “fraud and deceit require a higher degree of specificity in order to avert summary judgment.” *Olson v. Berggren*, 965 N.W.2d 442,

454-55 (S.D. 2021). There must be something more than a mere evidence of a misstatement. *See Paint Brush Corp. v. Neu*, 599 N.W.2d 384, 391 (S.D. 1999). There must be additional evidence of some “trickery” or “plan” to deceive. *Id.*

To survive a motion to dismiss, a fraud claim must allege facts with particularity showing that the plaintiff relied on an untrue representation of fact. *N. Am. Truck & Trailer, Inc. v. M.C.I. Commun. Servs.*, 751 N.W.2d 710, 714 (S.D. 2008). When such representations are made after contract formation, the representations cannot be used to establish a fraud claim based on the inducement into that contract or performing under the terms of the same. *See Deutz & Crow Co. v. S.D. State Cement Plant Comm'n*, 466 N.W.2d 631, 637 (S.D. 1991).

Here, it is undisputed that the parties all intended for Golden View to supply concrete for the entire project when entering into the Agreement. (Statement of Material Facts at ¶¶ 12 and 13.) Even in October 2021, the evidence is clear that Golden View intended to follow through with its obligations under the Agreement to pour the bridge deck but required payment of outstanding invoices. When those were paid, the deck was poured, as the parties had always intended.

Golden View alleges that Jeremiah made misrepresentations at a meeting in October 2021, months after the Agreement was formed. As such, these alleged representations were not and could not have been relied on by Golden View in entering into the Agreement. Golden View continued to supply concrete under the Agreement and was obligated to do so regardless of Jeremiah’s assurances as to Grangaard’s performance under the Agreement.

The reliance in a fraud claim must be justified and reasonable. *Schwaiger v. Mitchell Radiology Assocs., P.C.*, 652 N.W.2d 372, 377 (S.D. 2002). Even if there was some reliance here extraneous to the contract, such reliance would be unreasonable as it is undisputed that DOT Engineer Tim Marshall warned Golden View that some of its concrete was going to be subject to

deductions and the same would be passed down to Golden View. Golden View disagreed with Mr. Marshall and poured the bridge deck anyway. Therefore, Golden View cannot establish the reliance element of a fraud claim, and dismissal of the same is proper.

3. There is no evidence that Grangaard made any knowingly untrue statement of fact or ever intended to deceive Golden View.

“Opinions cannot form the basis of a fraudulent concealment claim.” *Cleveland v. City of Lead*, 663 N.W.2d 212, 220 (S.D. 2003). Golden View alleges that Jeremiah represented that “everything is fine”; “we’re all good”; “everything came back good”; and “it passed”, apparently referring to the testing and specifications of the concrete Golden View supplied for the Project. These alleged representations are all opinions from Jeremiah that they were good to move forward with pouring the bridge deck. The only alleged statement that is arguably factual is in regard to whether the concrete “passed” the tests. This too, however, is subjective as concrete could “pass” and not have to be removed even if it was subject to deducts, which was the case here.

At the time these statements were allegedly made, no deducts had actually been issued by the DOT. And it was true that the concrete supplied to date was good enough to pour the deck and complete the Project. None of the concrete needed to be removed. As such these alleged statements were not knowingly untrue or recklessly made. Importantly, there is also no allegation here that Grangaard ever represented that it would not pass along deducts for out-of-specification concrete. To the contrary, Grangaard assumed that Golden View was aware that Golden View would be liable for such deducts just as every other concrete supplier was. Grangaard further knew that Golden View had worked on other DOT projects and had good reason to believe that Golden View was familiar with the deducts process.

There is also no evidence that Grangaard made any representations with the intent to deceive. “In fraud and deceit claims, “[s]ummary judgment is proper [when a plaintiff] produces

no evidence of deceitful intent on [defendant's] part. . . .” *Delka v. Cont'l Cas. Co.*, 748 N.W.2d 140, 152 (S.D. 2008) (quoting *Garrett v. Bankwest, Inc.*, 459 N.W.2d 833, 847 (S.D. 1990)). If deceitful intent “rests solely on conjecture...the case should not be submitted to the jury.” *Roper v. Noel*, 143 N.W. 130, 132 (S.D. 1913). “[T]here is a considerable difference between a promise never intended to be performed (fraud in the inducement) and a promise intended to be performed but which ultimately is not (breach of contract).” *Nw. Pub. Serv. v. Union Carbide Corp.*, 115 F. Supp. 2d 1164, 1168 (D.S.D. 2000) (citing *Budgetel Inns v. Micros Sys.*, 8 F. Supp. 2d 1137, 1147 (E.D. Wis. 1998)). In distinguishing between fraud in the inducement and breach of contract claims, *Budgetel* goes on to state. “[a]n outright lie to induce a party to enter a contract differs substantially from a broken contractual promise. Courts and contracting parties should be able to distinguish the two.” *Budgetel Inns v. Micros Sys.*, 8 F. Supp. 2d 1137 at 1147.

Here, Golden View is alleging that Grangaard did not pay Golden View what it was owed under the Agreement following the pouring of the bridge deck. This fact alone, which Grangaard disputes, cannot be the basis for an intent to deceive. Golden View must have something more to sustain a fraud and deceit claim, and there is absolutely no evidence of that here. Therefore, Plaintiff’s fraud claim should be dismissed.

B. The UCC’s “usage of trade” provision applies to this unwritten contract, and the facts are undisputed here that the practice of passing down deductions to concrete suppliers is of such regularity of observance that it is justified to include such practice in the Agreement.

The UCC cannot be ignored here. The “usage of trade” gap-filler set forth in SDCL § 57A-1-303(e) applies to the Agreement. Upon its application, it is undisputed that the passing of deductions to Golden View is part of the Agreement. Therefore, the Court should find as a matter of law that Grangaard did not breach the Agreement or its duty of good faith and fair dealing by not paying Golden View the amounts deducted for Golden View’s out-of-specification concrete.

Under South Dakota's Uniform Commercial Code:

A "usage of trade" is any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage must be proved as facts. If it is established that such a usage is embodied in a trade code or similar record, the interpretation of the record is a question of law.

SDCL § 57A-1-303(c).

"[T]he Uniform Commercial Code [is] controlling with respect to a subcontract for the sale of concrete." *Century Ready-Mix Co. v. Lower & Co.*, 770 P.2d 692, 696 (Wyo. 1989) (citing *Chicopee Concrete Service, Inc. v. Hart Engineering Company*, 20 Mass. App. Ct. 315, 479 N.E.2d 748 (Mass.App. 1985).) Under the UCC, the terms of a written contract may be explained or supplemented by certain extrinsic evidence, including "usage of trade." *Dakota Energy Coop., Inc. v. E. River Elec. Power Coop., Inc.*, 75 F.4th 870, 877 (8th Cir. 2023). "[U]sage of trade must be construed whenever reasonable as consistent" with the terms of the contract. *Id.* Where a contract is silent as to a particular term, evidence of usage of trade is not inconsistent with the contract and should be considered. *Ralph's Distrib. Co. v. AMF, Inc.*, 667 F.2d 670, 673 (8th Cir. 1981). If evidence of usage of trade is undisputed, summary judgment is appropriate. *See id.* A party need not have actual knowledge of a usage of trade when it is so general that he must be presumed to have known it. *Estherville Produce Co. v. Chi. R. I. & P. R. Co.*, 57 F.2d 50, 55 (8th Cir. 1932).

Here, Golden View does not dispute that the passing of deducts to a supplier is the regular practice in South Dakota. Golden View has not put forth any evidence or expert opinion to the contrary. Rather, Golden View attempts to hide its head in the sand and feign ignorance to this common practice. As Mr. Marshall, an objective non-party with no interest in this matter, described this usage of trade, the precedent for it is "tremendous." Moreover, Golden View had

supplied concrete on DOT projects before and held themselves out as capable of doing the same. As such, it cannot be disputed that the usage of trade of passing down deductions is so general that it must be presumed that Golden View, through its work on DOT projects, was aware of it.

Therefore, pursuant to SDCL § 57A-1-303(c), the Court should find that the Agreement incorporated this usage of trade that permitted Grangaard to withhold payment to Golden View for the amounts deducted from Grangaard's pay from the State for the Project. With such term included, Grangaard, as a matter of law, should prevail on liability under Counts I and II for non-payment of such amounts.

IV. CONCLUSION

For the foregoing reasons, Grangaard respectfully requests that Count III be dismissed with prejudice and that Summary Judgment be granted in Grangaard's favor for liability on Counts I and II for nonpayment of deducted amounts.

Dated this 15th day of September, 2023.

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Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of September, 2023, a true and correct copy of the *Brief in Support of Defendant's Motion for Partial Summary Judgment* relative to the above-entitled matter, was served via Odyssey File & Serve system to the following:

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BALLARD SPAHR LLP

By: /s/ Timothy R. Rahn
Timothy R. Rahn (4871)

STATE OF SOUTH DAKOTA)
 :SS
COUNTY OF MCCOOK)

IN CIRCUIT COURT

FIRST JUDICIAL CIRCUIT

GOLDEN VIEW READY-MIX, LLC, a South
Dakota Limited Liability Company,

Plaintiff,

v.

GRANGAARD CONSTRUCTION, INC., a
South Dakota Corporation,

Defendant.

44CIV22-000040

**DEFENDANT’S REPLY BRIEF IN
SUPPORT OF MOTION FOR
PARTIAL SUMMARY JUDGMENT**

Defendant Grangaard Construction, Inc. (“Grangaard”), by and through its undersigned counsel, submits this reply brief in support of its Motion for Partial Summary Judgment.

I. UNDISPUTED FACTS

Golden View does not dispute that the UCC applied to the contract nor does Golden View dispute the regularity of the observance of the practice of passing down the costs of deductions on to the concrete suppliers. (*See* Plaintiff’s responses to Statements 8 and 9.)

Golden View mistakes Jeremiah’s testimony regarding Grangaard’s agreements with other suppliers. Jeremiah testified that in almost all other dealings with suppliers, it is the *supplier* that requires the agreement to contain certain written terms that would limit the supplier’s responsibility for the performance of concrete in certain limited circumstances, such as pouring concrete in cold weather. (*Ex. J to Rahn Opp. Aff* at pp. 109:13-110:8.)

Section 9.13 of the DOT Standards applies to payment to both subcontractors and suppliers. The Section goes on to expressly state that “[t]he prompt payment and release of retainage deviations will be subject to price adjustments as specified in Section 5.3.” There is no language

in that provision that limits its application to only subcontractors and not suppliers. Therefore, it must apply to suppliers as well.

Whether or not the parties agreed that Golden View would be the “exclusive” concrete supplier for the project is irrelevant. That fact that is relevant here is whether Golden View, when accepting the offer, intended to supply concrete for the entire project, including the bridge deck. It is undisputed that this is true. (Ex. A to Rahn Aff. at p. 35:5-13.) As Brian Waldner testified, “[a]nd [Sam Waldner] was already planning to pour the bridge deck.” (See Plaintiff’s Statement 121; see also Ex. A to Rahn Aff. at p. 35:5-13.)

II. ARGUMENT

A. **It remains undisputed that Plaintiff’s fraud claim fails as a matter of law.**

Golden View alleges that by “failing to pay for the concrete it ordered, Grangaard has breached the sales contract.” As such, Golden View concedes that any payment obligations Grangaard owed to Golden View here were contractual. This same obligation to pay for concrete cannot be both contractual and the basis for an independent fraud or deceit claim in tort. It is undisputed that there are no other alleged independent obligations or duties that Grangaard had here. Therefore, there is no basis in fact or law for Plaintiff’s fraud/deceit claim and it must be dismissed.

“In fraud and deceit claims, ‘[s]ummary judgment is proper [when a plaintiff] produces no evidence of deceitful intent on [defendant’s] part. . ..’” *Delka v. Cont’l Cas. Co.*, 748 N.W.2d 140, 152 (S.D. 2008) (quoting *Garrett v. Bankwest, Inc.*, 459 N.W.2d 833, 847 (S.D. 1990)). If deceitful intent “rests solely on conjecture...the case should not be submitted to the jury.” *Roper v. Noel*, 143 N.W. 130, 132 (S.D. 1913).

Even if there were grounds for an independent fraud or deceit claim, they still fail. Disputes over contractual obligations regarding Golden View being the “exclusive” supplier are irrelevant to Plaintiff’s fraud claim. What matters for the fraud claim is whether Golden View altered its position to its detriment in reliance on a false statement from Grangaard. Here, Golden View alleges that its detrimental position was supplying concrete for the bridge deck. It is undisputed, however, that Golden View always intended to supply concrete for the bridge deck, and such intention was independent of any of the alleged misstatements made by Jeremiah. So, Golden View can dispute whether it was contractually obligated to supply all the concrete for the project, but Golden View cannot dispute that its position at the outset of the agreement was to provide concrete for the entire project, including the bridge deck, and by then doing so, it did not change its position. Therefore, Golden View fails to establish the required elements of reliance and inducement, and its fraud claim fails as a result.

A promise made without an intention to perform may constitute deceit but only “if there is no contract between parties.” *Macquarie Bank Ltd. v. Krickel*, 793 F.3d 926, 934 (8th Cir. 2015). In proving that a promise was made without intention of performing, “[p]roof of a mere possibility is never sufficient to establish a fact.” *Weitzel v. Sioux Valley Heart Partners*, 714 N.W.2d 884, 897 (S.D. 2006) (granting summary judgment dismissing a claim under SDCL § 20-10-2(d) of an employee alleging that he was promised employment without an intention of fully performing under the employment contract); *see also Select Specialty Hosp.-Sioux Falls, Inc. v. Hutterian*, No. 4:19-CV-04171-KES, 2021 U.S. Dist. LEXIS 246590, at *25 (D.S.D. Dec. 28, 2021) (granting summary judgment dismissing a claim under SDCL 20-10-2(d) for lack of evidence). The Restatement of Torts (Second), § 530 also addresses the misrepresentation of intention. Comment (d) sets forth the proof required for such a misrepresentation, stating:

The intention that is necessary to make the rule stated in this Section applicable is the intention of the promisor when the agreement was entered into. The intention of the promisor not to perform an enforceable or unenforceable agreement cannot be established solely by proof of its nonperformance, nor does his failure to perform the agreement throw upon him the burden of showing that his nonperformance was due to reasons which operated after the agreement was entered into. The intention may be shown by any other evidence that sufficiently indicates its existence, as, for example, the certainty that he would not be in funds to carry out his promise.

Restat 2d of Torts, § 530, comm. (d).

For suppression of facts to constitute deceit, it must be more than mere nondisclosure. *Beals v. AutoTrac Inc.*, 904 N.W.2d 765, 771 (S.D. 2017). The word “suppression” implies “an active effort to conceal information rather than simply failing to disclose information another person might find interesting.” *Id.*

Here, the promise allegedly not performed is Grangaard’s payment to Golden View for concrete Golden View supplied. This promise and performance obligation was entirely contractual and cannot be the basis for a deceit claim in tort. Regardless, the only evidence of alleged nonperformance here is in regard to nonpayment, but there is no other evidence regarding Grangaard’s intention not to pay or of Grangaard’s efforts to actively conceal any information. Golden View concludes that Golden View never intended to pay for the concrete supplied for the bridge deck, but there is no evidence of the same. Without such evidence, Plaintiff is left with its conjecture and a deceit claim cannot stand on the same. Golden View further alleges that Grangaard failed to disclose the bid amount from a third-party for the bridge deck, but Grangaard had no obligation to disclose this fact to Golden View. And such mere nondisclosure is not grounds for deceit.

This a contractual dispute between businesses. Whatever damages are found here arise from the contractual relationship between the parties. Golden View’s belief that punitive damages should be considered here is absurd and alleging as such is completely unproductive. There is no

fraud or deceit here, and Grangaard's motion for summary judgment to dismiss the claim should be granted.

B. If Golden View did not want usage of trade to fill in terms to this Agreement, it was Golden View's obligation to include terms to the contrary in the Agreement, and Golden View did not.

Golden View also continues to confuse the application of SDCL § 57A-1-303(c). Golden View incorrectly argues that the usage of trade for the regular practice of suppliers and contractors to pass down deductions only applies if there is a written agreement stating as such. This is nonsensical as Section 57A-1-303 exists for the very opposite purpose - filling in terms *when there is no such written terms*. In other words, Golden View has it backward. Grangaard was not obligated to include express terms regarding the passing down of deductions because such terms were established and included in the agreement through usage of trade. If Golden View did not intend to have such terms included in the agreement, Golden View should have required that agreement include express terms contrary. It is undisputed that Golden View did not, and the usage of trade controls in the absence of terms to the contrary here. Therefore the usage of trade applies to this agreement as a matter of law.

There is no evidence or expert opinion here that would support limiting the application of such usage of trade to contracts in which the supplier has higher prices than what Golden View had here, whatever they may be. There is no authority requiring that Grangaard make sure Golden View accounts for potential deductions when it sets the price for its concrete, especially when Golden View had done previous DOT projects and holds itself out as competent to supply concrete for the same. In fact, there is no testimony from Golden View here that establishes whether or not the price it set for the project incorporated the risk of deductions. The only fact in the record is testimony from Sam Waldner in which he explains that Golden View wanted to have a lower price

because it did not want to “gouge the state” when giving Grangaard a price to use for its bid. (Ex. B to Rahn Aff. at pp. 68:11-69:16.)

Finally, the regular practice of passing down of deductions from a contractor to a supplier is a price term, not indemnity. The DOT pays a contractor a certain price if the concrete passes all its test and pays a lower price, by deducting amounts owed on the contract, if it does not pass the tests. The regular practice in the industry is also to include such terms in the agreements between contractors and suppliers. If the supplier’s concrete passes all the DOT test, the supplier gets paid the full price of the concrete. If the concrete fails, then the contractor does not pay full price through deductions of amounts owed. This has nothing to do with indemnifying from liability. The DOT is not making a claim or bringing a cause of action against Grangaard in which Golden View would have an obligation to defend or hold harmless. As such, all of Golden View arguments regarding this being an implied indemnity agreement can be ignored.

III. CONCLUSION

For the foregoing reasons, Grangaard respectfully requests that its motion for partial summary judgment be granted.

Dated this 6th day of October, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of October, 2023, a true and correct copy of the *Defendant's Reply Brief in Support of its Motion for Partial Summary Judgment* relative to the above-entitled matter, was served via Odyssey File & Serve system to the following:

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STATE OF SOUTH DAKOTA)
 :SS
COUNTY OF MCCOOK)

IN CIRCUIT COURT
FIRST JUDICIAL CIRCUIT

GOLDEN VIEW READY-MIX, LLC, a South
Dakota Limited Liability Company,

Plaintiff,

v.

GRANGAARD CONSTRUCTION, INC., a
South Dakota Corporation,

Defendant.

44CIV22-000040

**DEFENDANT GRANGAARD
CONSTRUCTION, INC.'S RESPONSE
TO PLAINTIFF GOLDEN VIEW
READY-MIX LLC'S MOTIONS
REGARDING PUNITIVE DAMAGES**

Defendant Grangaard Construction, Inc. ("Grangaard"), by and through its undersigned counsel, responds to Plaintiff Golden View Ready-Mix, LLC's ("Golden View") motion for permission to undertake discovery regarding the issue of punitive damages and motion for submission of the issue of punitive damages to the jury.

I. ARGUMENT

Golden View's punitive damage claim is factually and procedurally improper and should not be allowed to be made part of this trial.

Punitive damages are only allowed in South Dakota when a party breaches "an obligation not arising from contract". SDCL § 21-3-2 (emphasis added). Even with such a breach, the breaching party must be "guilty of oppression, fraud or malice". *Id.* Moreover, "before any discovery relating [to punitive damages] may be commenced and before any such claim may be submitted to the finder of fact, the court shall find, after a hearing and based upon clear and convincing evidence, that there is a reasonable basis to believe that there has been willful, wanton or malicious conduct on the part of the party claimed against". SDCL §21-1-4.1.

The present case is a standard dispute between a seller and buyer of goods wherein the seller claims it was not paid in full for the goods delivered and the buyer claims that the goods delivered were not conforming to the specifications agreed upon. The fraud claim asserted by Golden View rests upon alleged facts and obligations which, while firmly denied, undoubtedly “arise from the contract” between the parties for delivery of concrete. Accordingly, punitive damages cannot be allowed pursuant to SDCL §21-3-2.

Moreover, Golden View admits that, from the outset, it agreed to provide the concrete for the entire bridge project at issue at an agreed price. (*See Ex. D to Rahn Aff. at 35:5-13.*) In order for Golden View’s fraud claim to survive, it must prove, among other elements, that Grangaard made a false statement that it actually relied on to its detriment. *North American Truck & Trailer, Inc. v. M.C.I. Communications, Inc.*, 2008 SD 45, ¶ 8, 751 N.W.2d 710, 713; *Delka v. Continental Cas. Co.*, 2008 SD 28, ¶ 30, 748 N.W.2d 140, 151-52.

To the extent it is understood, Golden View’s fraud claim is based upon an allegation that Grangaard made a representation to it that induced it to continue supplying concrete for the bridge project. In other words, Golden View alleges that it was somehow induced do what it had already contractually agreed to do—namely supply concrete for the entire bridge project. Grangaard firmly denies the fraud claim and sets forth that the allegations giving rise to such claim are centered upon an alleged breach of a duty “arising from contract”. Golden View also cannot establish that it relied on any purported misrepresentation of Grangaard to its detriment.

The Eighth Circuit Court of Appeals dealt with the issue of whether a fraud claim nearly identical to the fraud claim in this case should survive a motion for summary judgment in *Razorback Concrete. Razorback Concrete Co. v. Dement Constr. Co., LLC*, 688 F.3d 346, 351 (8th Cir. 2012). The trial court in *Razorback* entered summary judgment on the seller’s fraud claim

and the Eighth Circuit affirmed such judgment. *Id.* There, Dement was the prime contractor on a bridge construction project, and Razorback was its concrete supplier. *Id.* at p. 348. Some of the concrete Razorback supplied “failed strength tests after a specified twenty-eight day interval...” *Id.* Following this, Razorback inquired as to whether it was Dement’s “intention to attempt to set off payments due...” *Id.* Dement responded in writing stating that it would not “unilaterally deduct monies due Razorback” and that Dement intended to pay invoices in a timely matter. *Id.* at 349. Later, Dement learned of additional substandard strength-test results and began withholding payment. *Id.* The trial court found that at the time Dement made its representations regarding its intention to continue paying invoices, there was no evidence that Dement had intentions to the contrary, and the Eighth Circuit agreed.

Here, Golden View cannot even put forth any evidence of Grangaard making a representation promising to pay full price for substandard concrete, let alone Grangaard’s intentions of following through with the same at the time the bridge deck was poured. If a fraud claim did not go to a jury in *Razorback*, it certainly must not here.

Not only are the fraud claim and the corresponding claim for punitive damages factually and legally inappropriate, they are procedurally improper. SDCL § 21-1-4.1 sets forth that no discovery can be performed relative to a punitive damage claim and such claim cannot be submitted to a jury before a hearing is held and the Court finds “based upon clear and convincing evidence, that there is a reasonable basis to believe that there has been willful, wanton or malicious conduct on the part of the party claimed against”. In other words, the hearing is to be an evidentiary hearing noticed in such a manner as to give Grangaard a fair opportunity to respond. In addition, Golden View’s Motion seeks to perform discovery as to its punitive damage claim. The discovery deadline in this case passed long ago. Golden View should not be allowed at this late hour to

perform discovery during trial in an attempt to find support for its unfounded punitive damage claim.

II. CONCLUSION

For the foregoing reasons, Grangaard respectfully requests that Golden View's Motion for Permission to Undertake Discovery Regarding the Issue of Punitive Damages and Motion for Submission of the Issue of Punitive Damages to the Jury be denied.

Dated this 27th day of December, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of December, 2023, a true and correct copy of the *DEFENDANT GRANGAARD CONSTRUCTION, INC.'S RESPONSE TO PLAINTIFF GOLDEN VIEW READY-MIX LLC'S MOTIONS REGARDING PUNITIVE DAMAGES* relative to the above-entitled matter, was served via Odyssey File & Serve system to the following:

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Attorney for Plaintiff

BALLARD SPAHR LLP

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PLAINTIFF'S PROPOSED JURY INSTRUCTION NO. 22

DUTY OF THE JURY

It is your duty to determine the following issues:

1. Whether Grangaard Construction breached it's agreement to pay Golden View for the concreted materials it ordered. If your answer to this question is no, then you need not proceed further with Golden View's claims. If your answer is yes, then you must determine whether Grangaard breached it's duty of Good Faith, and whether Grangaard committed fraud; in such event you must also answer the Golden View Special Interrogatories attached to the Verdict Form.

2. Whether Golden View breached any agreement it had with Grangaard; Whether Golden View was negligent. If your answer to this question is no, then you need not proceed further with Grangaard's claims. If your answer is yes, then you must answer the Grangaard Special Interrogatories attached to the Verdict Form.

If you determine any party is entitled to damages (as set out in the Special Interrogatories), you must then answer further questions about your verdict in favor of the appropriate party.

Whether any of these damages have been proven, by the greater weight of the evidence, is for you to determine. Your verdict must be based upon the evidence and not upon speculation, guesswork, or conjecture.

If you answer to questions 4 and 5 are both no, then you shall not proceed to further answer these Special Interrogatories. If your answer to either question 4 or 5 (or both) is yes, then you may answer the following question:

6. We further assess against the Defendant the sum of \$_____ for punitive damages (if any);

Dated this ___ day of January, 2024.

Foreperson

Reference:

South Dakota Pattern Jury Instruction 50-130-20 (Modified).

STATE OF SOUTH DAKOTA)
 :SS
COUNTY OF MCCOOK)

IN CIRCUIT COURT

FIRST JUDICIAL CIRCUIT

GOLDEN VIEW READY-MIX, LLC, a South
Dakota Limited Liability Company,

Plaintiff,

v.

GRANGAARD CONSTRUCTION, INC., a
South Dakota Corporation,

Defendant.

44CIV22-000040

**DEFENDANT GRANGAARD
CONSTRUCTION, INC.'S PROPOSED
JURY INSTRUCTIONS AND
OBJECTIONS TO PLAINTIFF'S
PROPOSED JURY INSTRUCTIONS**

Pursuant to SDCL § 15-6-51 and the Court's request, Defendant Grangaard Construction, Inc. ("Grangaard"), by and through its undersigned counsel, respectfully submits the following Proposed Jury Instructions for the trial of this case. Grangaard requests that its instructions be given to the jury in this case and objects to the use of the instructions proposed by Golden View Ready-Mix, LLC ("Golden View") with the following letters and numbers: B, 12, 13, 14, 15, 20, 21, 22, 23, and 24. Grangaard also objects to Golden View's proposed special interrogatory and verdict form.

Grangaard reserves its right to amend, modify, or delete these proposed instructions, depending on evidence presented at trial, any instructions offered by Golden View, and the Court's rulings, including the Court's rulings on the motions in limine scheduled to be heard on January 3, 2024.

38. Issues for You to Decided

It is your duty to determine the following issues:

- (1) Whether Golden View supplied the kind or class of concrete it agreed to supply to Grangaard for the Project?
- (2) Whether Golden View was negligent in that it failed to use reasonable care as a concrete supplier in supplying concrete for the Project?
- (3) Whether Grangaard owes Golden View any additional amounts of money for concrete Golden View supplied for the Project?

STATE OF SOUTH DAKOTA)
 :SS
COUNTY OF MCCOOK)

IN CIRCUIT COURT

FIRST JUDICIAL CIRCUIT

GOLDEN VIEW READY-MIX, LLC, a South
Dakota Limited Liability Company,

Plaintiff,

v.

GRANGAARD CONSTRUCTION, INC., a
South Dakota Corporation,

Defendant.

44CIV22-000040

SPECIAL VERDICT FORM

We the jury, duly impaneled in the above-entitled action, hereby find as follows:

1. Did Golden View breach its agreement with Grangaard by not supplying the kind or class of concrete it agreed to supply for the Project?

Circle one response: Yes; No.

2. Did Golden View, as a supplier of concrete for DOT projects, fail to use reasonable care in supplying concrete for the Project?

Circle one response: Yes; No.

If you circled "No" to both questions 1 and 2, then you shall skip questions 3, 4, and 5. If you answered "Yes" to either or both questions 1 and 2, then you must answer questions 3, 4, and 5.

3. What is the amount of damages that would fairly compensate Grangaard for Golden Views breach and/or negligence?

\$ _____ [fill in total amount of Grangaard's damages]

4. Is Grangaard entitled to Prejudgment interest on the amount of damages set forth in the answer to Question No. 3 above?

Circle one response: Yes; No.

5. If you answered "Yes" to question 4, what date does the prejudgment interest owed begin? _____ [fill in the date on which the interest begins].

6. Did Grangaard breach its agreement with Golden View by not fully paying Golden View for concrete for the Project that failed the DOT's specifications as a set-off of Grangaard's damages resulting from such failures?

Circle one response: Yes; No.

If you circled "No" to question 6, then you shall not proceed any further. If you answered "Yes" to question 6, then you must answer questions 7 and 8.

7. What is the amount of damages that would fairly compensate Golden View for Grangaard's breach?

\$ _____ [fill in total amount of Golden View's damages]

8. If you answered "Yes" to question 7, what date does the prejudgment interest owed begin? _____ [fill in the date on which the interest begins]

The foreperson should date and sign this Special Verdict and notify the bailiff.

Dated this ____ day of January, 2024.

Foreperson

STATE OF SOUTH DAKOTA)
 :SS
COUNTY OF MCCOOK)

IN CIRCUIT COURT

FIRST JUDICIAL CIRCUIT

GOLDEN VIEW READY-MIX, LLC, a South
Dakota Limited Liability Company,

Plaintiff,

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GRANGAARD CONSTRUCTION, INC., a
South Dakota Corporation,

Defendant.

44CIV22-000040

**DEFENDANT GRANGAARD
CONSTRUCTION, INC.'S RESPONSE
TO PLAINTIFF GOLDEN VIEW
READY-MIX LLC'S MOTIONS IN
LIMINE AND SUBMISSION OF
SUPPLEMENTAL
MOTIONS IN LIMINE**

Defendant Grangaard Construction, Inc. ("Grangaard"), by and through its undersigned counsel, responds to Plaintiff Golden View Ready-Mix, LLC's ("Golden View") motions in limine and hereby submits supplemental Motions in Limine #4 and #5.

I. RESPONSE TO GOLDEN VIEW'S MOTIONS IN LIMINE

It is apparent from Golden View's Motions in Limine that it would like to prevent Grangaard Construction from presenting any evidence at trial. Golden View seeks to prohibit Grangaard from presenting any evidence as to Golden View's contractual or tort duties, any evidence indicating that it breached such duties, any evidence of Grangaard's damages and any evidence that such damages were caused by Golden View's breaches.

Grangaard, most certainly, must be allowed to present evidence establishing the elements of its claims and defenses and to prevent it from doing so would be error.

A. Evidence of Golden View's Contractual and Tort Duties to Grangaard

Golden View's Motion in Limine #1 and #2 seek to prevent Grangaard from introducing evidence of its contractual and tort duties. The Contractor Concrete Mix Design, DOT-24 Form ("Mix Design Form") sets out Golden View's duties with regard to the manufacture and delivery

of the concrete. Golden View seemingly acknowledges that it had a duty to follow the mix design set forth in the Mix Design Form. Inexplicably, Golden View seeks to exclude another very explicit term contained in the Mix Design Form; that being its duty to deliver A-45 Class concrete to the work site.

It is apparent that Golden View not only wants to exclude evidence of its agreement to provide A-45 Class concrete, it wants to also prohibit any reference whatsoever to the SD DOT contract between the DOT and Grangaard. Grangaard does not take the position and will not introduce any evidence for the purpose of suggesting that, by virtue of its entering into the DOT contract, Golden View is also bound by the terms thereof. However, Grangaard cannot be prohibited from making reference to the DOT contract for any other relevant purpose. Golden View has not presented any authority suggesting that such exclusion would be warranted. In fact, there are numerous cases dealing with similar situations in which evidence relating to an underlying contract between an owner and a contractor is allowed in an action between the contractor and a supplier. *See Brasfield & Gorrie, LLC v. Harrod Concrete & Stone Co.*, 534 F.Supp.3d 747 (2021); *Razorback Concrete Co. v. Dement Constr. Co., LLC*, 688 F.3d 346 (8th Cir. 2012).

In *Brasfield*, a general contractor contracted with a concrete supplier to provide concrete for a construction project. The general contractor claimed that the concrete delivered by the supplier did not meet the specifications agreed to between the general contractor and the supplier. To prove its damages, the general contractor was allowed to introduce evidence that "it was contractually responsible to the project owner for making repairs". *Brasfield*, 534 F.Supp.3d at 752. Similarly, *Razorback Concrete* involved a dispute between a bridge contractor and its concrete supplier. The bridge contractor was allowed to introduce evidence of the \$5000 per day

delay charges that would be contractually imposed on it by the project owner. *Razorback Concrete*, 688 F.3d at 348. It is acknowledged that neither the *Brasfield* nor the *Razorback Concrete* cases dealt directly with the issue of whether the terms of a contract between the project owner and the contractor could be introduced in a dispute between the contractor and the concrete supplier. However, it is clear that the trial court allowed such evidence.

Evidence of certain aspects of the SD DOT contract are, undoubtedly, relevant to this action for several reasons including to provide an explanation of why Grangaard made A-45 Class concrete a term of its agreement with Golden View and to establish Grangaard's damages. Once evidence is found to be relevant, "the balance tips emphatically in favor of admission". *St. John v. Peterson*, 2015 S.D. 41, ¶14, 865 N.W.2d 125, 130.

Golden View agreed to provide A-45 Class concrete to the project site in its agreement with Grangaard independently of the DOT contract. It is anticipated that Golden View will deny that it agreed as such despite clear evidence to the contrary. Accordingly, Grangaard must be able to tell the jury about its duty to the DOT to provide A-45 Class concrete in order to explain why it made the same agreement with Golden View.

B. Evidence that Golden View breached its duties to deliver A-45 concrete

In order for concrete to be classified as A-45 it must meet certain criteria. One such criteria is that the concrete must pass a 28-day test indicating that it can withstand at least 4500 pounds per square inch of pressure. This testing is performed by taking samples of the concrete as it is poured out of Golden View's trucks. Such testing revealed that 9 batches of concrete delivered to the work site by Golden View was not A-45 Class concrete.

Golden View has not filed a motion to exclude evidence of the failed concrete tests but the Court did, sua sponte, raise the issue of whether such evidence would be allowed. Grangaard does

not understand how such evidence could not be allowed. It should be noted that the results of the 28 day strength tests were allowed as evidence in *Razorback Concrete*. *Razorback Concrete*, 688 F.3d at 348. Such evidence is undoubtedly relevant and admissible and it would be extremely prejudicial to Grangaard to disallow the same.

C. Evidence of Grangaard's damages

Grangaard's claim for breach of contract is governed by the South Dakota UCC at SDCL § Chapter 57A-2. Under the UCC, Grangaard was a "Buyer" in its relationship with Golden View as it was buying concrete from Golden View. Under the UCC, the damages available to a Buyer who has accepted goods that are not conforming to the agreement of the parties are as set out at SDCL §57A-2-714 and 57A-2-715.

Section 714 states that a buyer, upon giving reasonable notice to the seller of the non-conformity of the delivered goods, may recover damages "as determined in any manner which is reasonable" which can include "the difference...between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount". Moreover, Section 714 allows recovery of "incidental and consequential damages" as provided in Section 715.

Section 715 defines "incidental damages" as including expenses reasonably incurred in the inspection of the non-conforming goods and "any other reasonable expense incident to the delay or other breach". Section 715 goes on to define "consequential damages" as "any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise" and "injury to person or property proximately resulting from any breach of warranty".

Grangaard's damages resulting from Golden View's breach of its duty to deliver A-45 Class concrete amount to:

1. The deductions imposed upon it by the South Dakota DOT reflecting the difference in value of the concrete as delivered by Golden View and the value that such concrete would have had if it had been A-45 Class concrete; and
2. The incidental and consequential costs incurred by Grangaard for the testing and delays in the bridge project caused by the receipt of the cylinder test results reflecting that Golden View failed to deliver A-45 concrete.

Golden View's Motions in Limine seek to exclude evidence of the deductions imposed upon Grangaard directly as a result of the failed cylinder tests reflecting that Golden View did not deliver A-45 Class concrete as it agreed to do. Again, Grangaard agrees that Golden View is not bound by the terms of the SD DOT contract with Grangaard. However, the deductions imposed upon Grangaard are nevertheless relevant to the issue of Grangaard's damages as defined by the SDUCC. *See also, Concrete Sys. v. Fla. Elec. Co.*, 425 So.2d 632 (Fla. 2d DCA 1983) (the amount of liquidated damages assessed against the general contractor may serve as the measure of actual damages when the subcontractor is shown to be solely responsible for the delay).

The deductions certainly were damaging to Grangaard and were undoubtedly caused by Golden View's breach of its duties which lead directly to the failed cylinder tests. Accordingly, these deductions constitute a "loss [incurred by Grangaard] resulting in the ordinary course of events from [Golden View's] breach as determined in any manner which is reasonable". SDCL § 57A-2-714.

Moreover, Grangaard will present evidence at trial that the deductions imposed upon it were calculated in a manner as to reasonably reflect the difference between the value of the non-conforming concrete delivered by Golden View and the value it would have had if it had been A-

45 Class concrete. As such, these deductions are evidence of this difference in value and this difference in value is most certainly recoverable by Grangaard per SDCL §57A-2-714.

Finally, evidence of these deductions is directly relevant to Grangaard's claim for consequential damages under SDCL §57A-2-715(2). Consequential damages can include any loss resulting from any "general or particular requirements or needs" of which Golden View "had reason to know". Obviously, Golden View knew of the "requirement" or "need" to deliver A-45 Class concrete to the work site because it specifically agreed to do so as part of its agreement with Grangaard. Moreover, Grangaard will present evidence that Golden View knew or certainly "had reason to know" of the deductions that would be imposed if the concrete delivered by Golden View was not A-45 Class concrete. Accordingly, and in addition to the reasons set forth above, evidence of the deductions imposed upon Grangaard for failing to deliver A-45 Class concrete for the bridge project are relevant and admissible to prove Grangaard's damages directly caused by Golden View's breach of its duties.

D. Evidence that Golden View caused Grangaard's damages

In its Motion in Limine #3, Golden View seeks to have the Court prohibit Grangaard from introducing evidence that Golden View caused Grangaard's damages. That is absurd as it sounds.

Grangaard is going to present evidence that Golden View agreed that the concrete that it would supply for the bridge project would be A-45 Class concrete. Grangaard will also present evidence that several batches of concrete delivered to the work site by Golden View were not A-45 Class concrete. Grangaard will further present evidence that all of its damages were caused by the failure of Golden View to supply A-45 Class concrete.

Golden View argues that because the bridge was ultimately deemed safe that it somehow could not have caused any damage. That is nonsensical. Golden View's duty was to deliver A-

45 Class concrete. It did not do so in several instances. Grangaard suffered monetary loss due to Golden View's breach of its duties.

E. Evidence of "usage of trade"

Terms of an agreement for sale of goods under the South Dakota UCC may be supplemented by usage of trade. SDCL § 57A-2-202. The term "usage of trade" is defined as "any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question". SDCL § 57A-1-303. Accordingly, Grangaard must be allowed to present evidence of usage of trade in the concrete supply industry.

Golden View has filed a Motion in Limine, #4, to prohibit evidence of "any other agreements Grangaard has had with other suppliers used in this or other projects". It is not entirely clear what Golden View is trying to address with this Motion. Grangaard can confirm that it intends to present evidence that in the concrete-supply industry in South Dakota it is the regular practice observed that a concrete supplier knows that the structural concrete supplied for a South Dakota DOT bridge project requires A-45 Class concrete and that the concrete supplier will be responsible for a contractor's damages in the amount of deductions imposed by the South Dakota DOT for failure to deliver A-45 Class concrete to the work site.

As this evidence is in furtherance of establishing "a practice or method of dealing" that is regularly observed in the concrete supply industry, it necessarily is evidence of "usage of trade". Usage of trade can serve as a supplement to any agreement for sale of goods in South Dakota and thereby such evidence must be allowed.

F. Conclusion

There exists in this case compelling evidence herein that:

1. Golden View had a duty to supply a certain class or grade of concrete to Grangaard for the bridge project;
2. Golden View breached or failed in that duty; and
3. Grangaard suffered damages that were proximately caused by the failures of Golden View to fulfill its duties.

Golden View clearly would prefer that such evidence never be heard or seen by the jury. However, such evidence is undoubtedly relevant to Grangaard's claims and defenses and is otherwise admissible. Accordingly, the jury must be allowed to consider such evidence and it must be admitted. To proceed otherwise would be extremely prejudicial to Grangaard and would be error.

II. GRANGAARD'S SUPPLEMENTAL MOTIONS IN LIMINE

4. Grangaard's Motion in Limine to exclude any purported expert testimony from Tim Marshall.

Golden View cites to excerpts from the deposition testimony of Tim Marshall in support of its motions in limine. The testimony is expert testimony. Mr. Marshall is a project engineer with the South Dakota DOT. He cannot be allowed to provide expert testimony at the trial of this matter for several reasons.

First, Golden View has not disclosed Mr. Marshall, or anyone else for that matter, as a witness who is expected to provide expert testimony at trial. Golden View has never produced any type of report purporting to set forth the disclosures that are required under SDCL §15-6-26(b). In addition, the Court's deadline for disclosure of expert witnesses has long passed and it would be highly prejudicial to allow Golden View to present expert testimony at this late hour.

Second, it has not been established that Mr. Marshall is qualified to provide expert testimony on the subject matters to which his opinion testimony would be related.

Finally, it has not been established that Mr. Marshall has the proper foundation to provide any expert opinions.

5. Grangaard's Motion in Limine to exclude evidence of the amounts that Grangaard received from the State of South Dakota for the bridge project or any profit that he may have derived therefrom.

Golden View has indicated an intent recently to introduce evidence of the amounts Grangaard was paid under its contract with the South Dakota DOT as well as projections about the profit it realized therefrom. Such evidence has no relevance to the issues presented in this case and would be offered herein only in hopes of causing the jury to perceive Grangaard negatively and to influence it to return a verdict based upon such perception rather than the relevant evidence and the law. Allowing such evidence to be introduced would be highly prejudicial to Grangaard.

III. CONCLUSION

For the foregoing reasons, Grangaard respectfully requests that Golden View's Motions in Limine #1, #2, #3, and #4 be denied. Grangaard further requests that its supplemental Motions in Limine Numbers #5 and #6 be granted.

Dated this 27th day of December, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of December, 2023, a true and correct copy of the *DEFENDANT GRANGAARD CONSTRUCTION, INC.'S RESPONSE TO PLAINTIFF GOLDEN VIEW READY-MIX LLC'S MOTIONS IN LIMINE AND SUBMISSION OF SUPPLEMENTAL MOTIONS IN LIMINE* relative to the above-entitled matter, was served via Odyssey File & Serve system to the following:

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By: /s/ Timothy R. Rahn
Timothy R. Rahn (4871)

1	STATE OF SOUTH DAKOTA	IN CIRCUIT COURT
2	COUNTY OF MCCOOK	FIRST JUDICIAL CIRCUIT
3	*****	
4	GOLDEN VIEW READY-MIX, LLC, a South Dakota limited liability company,	44CIV22-00040
5		JURY TRIAL
6	Plaintiff,	JAN 4
7	-vs-	VOLUME 4
8	GRANGAARD CONSTRUCTION, INC., a South Dakota corporation,	
9	Defendant.	
10	*****	
11	REPORTS:	
12	THE HONORABLE CHRIS S. GILES Circuit Court Judge for the First Judicial Circuit 130 N. Mason Avenue Salem, SD 57958	
13	APPEARANCES:	
14	MICK C. FINK, ESQ. Fink Law Office PC 125 N. Main Avenue, P.O. Box 444 Bridgewater, SD 57119 finklaw@netelad.com	
15	Attorney for Plaintiff;	
16	DANIEL R. FRITS, ESQ. TIMOTHY R. RAHN, ESQ. Ballard Spahr LLP 101 S. Reid Street, Suite 300 Sioux Falls, SD 57103 dfrits@ballardspahr.com rahntr@ballardspahr.com	
17	Attorneys for Defendant.	
18	PROCEEDINGS:	
19	The Jury Trial herein commenced on the 11th day of January, 2024, at 8:15 a.m. in the courtroom at the McCook County Courthouse in Salem, South Dakota.	
20	*****	

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1	EXHIBITS		
2	PLAINTIFF'S		
3	Number	Description	Off'r'd Rec'd
4	1	Golden View Delivery Tickets for June 9-30, 2021 (except June 16)	130 336
5	2	Golden View Delivery Tickets for June 16, 2021 - refused loads	130 130
6	3	Golden View Delivery Tickets for July 2 to July 24	335 336
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10	7	Grangard/SKOT Contract	313 314
11	8	Grangard's Bid Schedule with SKOT contract	435 435
12	9	SKOT Standards & Specifications Book	317 318
13	10	Contractor Concrete Mix Design (Dot-24) Form	118 110
14	11	Construction Change Order No. 2	269 269
15	12	Construction Change Order No. 4	253 253
16	13	Summary for Construction Change Order No. 4	-- --
17	14	Invoice Summary for Golden View bills to Grangard with finance charges	337 337
18	15	Certificates of Compliance	119 119
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1	EXHIBITS		
2	PLAINTIFF'S		
3	No.	Description	Off'r'd Rec'd
4	17	SKOT Letter to Grangard/11-3-21 (Test No. 13/11)	450 450
5	18	SKOT Letter to Grangard/11-3-21 (Test No. 14/12)	451 452
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7	20	SKOT Letter to Grangard/1-11-22 (Test No. 01/01/1A01)	451 452
8	21	SKOT Letter to Grangard/1-11-22 (Test No. 05)	451 452
9	22	SKOT Letter to Grangard/1-11-22 (Test No. 07)	451 452
10	23	SKOT Letter to Grangard/1-11-22 (Test No. 23/18)	451 452
11	24	7-26-21 Email from Tim Marshall to Grangard	-- --
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13	26	4-23-21 Email from Tim Marshall to Grangard	-- --
14	27	Mix Summary Sheet	-- --
15	28	DOT Intaroffice Memo	-- --
16	29	3-3-21 Notice to Proceed	-- --
17	30	Paid Invoice for 10-21-21	-- --
18	31	2-16-22 Email from Tim Marshall to Golden View	-- --
19	32	Schuncker, Paul, Mohr lab data for concrete test	-- --
20	*****		

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1 answer to this question is no, then you need not proceed
2 further with Grangard's claims. If your answer is yes,
3 then you must determine the amount of damages caused by
4 such breach."

5 MR. FINK: Do you have a separate setoff, then?

6 MR. FRITE: Well, the setoff, it's kind of
7 interesting. It's really a defense to your claim. I mean
8 it relates more to your claim than mine. The setoff, I
9 don't think is an independent cause of action. I think
10 it's you're claiming you're owed so much. I'm setting off
11 that amount. I mean, the damages are the same. Our
12 damages under the contract are going to be the amount of
13 the setoff. So they're very related.

14 What's your thought?

15 MR. FINK: Theoretically, the jury could find that
16 Grangard breached its duty to pay Golden View and Golden
17 View breached its duty to provide concrete. So,
18 theoretically, they could come up with damages on both
19 sides.

20 THE COURT: They could go very far afield.

21 MR. FINK: But I don't know that we would need to have
22 the jury do the setoff. I think the Court would do the
23 setoff, looking at the --

24 THE COURT: If they come up with something really
25 goofy, we'd have to analyze that at the end. What if they

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1 withdraw the previous submission?

2 MR. BAIN: No. We'll keep the previous objection.

3 THE COURT: So I'm not going to give yours, and we'll
4 utilize the other one.

5 This was plaintiff's proposed. It was based on
6 SD-110-10. The Court was looking at it and this talks
7 about your interest a little bit, and it needed to be
8 modified. The defendant had almost identical. That's the
9 next one in the packet here. They each have prong 1 and
10 prong 2 at the beginning, and the next part says "you must
11 decide." Number 1 and number 2 are identical.

12 Number 3, as submitted by Mr. Fink, is different.
13 "Whether interest was an element of any contract between
14 the parties and if it was the rate of interest as agreed to
15 by such contract."

16 Now, yours didn't have that, but in the verdict form
17 under your potential recovery of damages I made interest an
18 applicable issue. It's for both sides. So the only
19 difference between what you each submitted was his number 3
20 was not included in yours. But I tried to keep what they
21 have to analyze and look at in respect to each of your
22 claims against the other, the wording similar.

23 MR. FINK: We talked about this before trial, and I
24 don't know that we got very far into it but --

25 THE COURT: It's pled out how it's pled out. It's

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1 come up and say they're both at fault and give damages back
2 and forth, and then for some reason they go down the road
3 of fraud or something like that and include additional
4 damages for that because there's fraud at some point. They
5 still might say concrete isn't what it should be, but your
6 guy is fraudulent in the indorsement for the second part of
7 the bridge deck.

8 MR. FINK: Where it gets sticky, Judge, prejudgment
9 interest. If the damages claimed by Grangard are granted,
10 is there prejudgment interest because they didn't pay
11 anything? They've already set off.

12 THE COURT: The verdict form will get to that, a
13 little bit on the verdict form, because it says for both,
14 damages accrued. From what date is there interest and -- I
15 tried to address it in the verdict form when we get it, but
16 we'll talk about it later. Okay. As needed, you have a
17 standing objection to the good-faith fraud part.

18 But, Mr. Fink, are you okay with this as a whole?

19 MR. FINK: Yes.

20 THE COURT: Mr. Bain?

21 MR. BAIN: Yes.

22 THE COURT: Good. I like it. It looks better.

23 Now, with that having been given, the defendant did
24 have their proposed under 1-11-10, but I've incorporated
25 that somewhat in our newly revised. Do you wish to

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1 a factual issue. Is interest applicable and, if so, at
2 what rate.

3 MR. FRITE: Do we just waive that and let you decide
4 this at the end depending on how this comes out?

5 THE COURT: We'll come back to that as we clean this
6 up.

7 As we clean this up, I would propose using plaintiff's
8 versus defendant's submission under SD-110-10, because it
9 does include interest. Now, if we go back, we're all done,
10 and you tell me I don't want the jury to decide interest, I
11 have to modify the verdict form as well.

12 MR. FRITE: Yeah. Let me think about it. I think
13 they're going to go, I have no idea what all this means,
14 because I don't.

15 MR. FINK: As I'm sitting here, I think it will
16 confuse them, but I think we should give the instruction
17 because at some point in time there has to be a decision
18 about whether it's 18 or 10 percent, that type of thing.

19 THE COURT: At this point, the interest rate, if there
20 is interest and at what rate, are issues for the jury. And
21 that can relate to both parties' claims against the other,
22 and that's the way the verdict form that I have, when we
23 get to it, proposes it. So I think the provision with the
24 interest has to be included.

25 Mr. Fink, are you satisfied? It was your submission

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1 why. That gets to be more confusing. Trying to make it
2 simpler, this technically is on a final version, we'll just
3 say, verdict form.

4 So the first question is, number 1, did Grangaard
5 breach its agreement to pay Golden View for the concrete
6 materials it ordered? Yes or no. If your answer is no,
7 then you shall proceed to -- it should say -- no, you
8 should proceed to answer question -- if your answer is yes,
9 you must answer the following questions. Okay? If they
10 say yes, there was a breach by your guy.

11 Then they go to number 2: We assess damages as
12 follows, blank, in relation to Grangaard's breach of
13 contract.

14 Number 3, we further find as follows: A, was interest
15 a term of an agreement between Grangaard and Golden View?
16 Yes or no. If it was a term of an agreement, the
17 agreed-upon rate was blank. If Golden View is entitled to
18 prejudgment interest, it accrued on blank date. I don't
19 make them do a calculation. That can be done later if
20 there's a determination.

21 MR. PRITZ: It could be multiple dates.

22 THE COURT: That gets sideways. I think it's clearer
23 to say, was there interest: if so, what rate. Because
24 that's a factual question they have to make a determination
25 on. It's your guys' case. I can't fix that.

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1 no. So yes or no and then I think it's from what date.
2 And it's the same below for them when we get there, kind
3 of.

4 So keep thinking. Don't object yet.

5 Number 4, did Grangaard breach a duty of good faith?
6 Yes or no. Did Grangaard commit fraud? Yes or no. If
7 your answers to Questions 4 and 5 are both no, then you
8 shall not proceed to answer question 6. There's no good
9 faith, there's no fraud issues, okay.

10 If your answer to either Question 4 or 5 or both
11 is yes, then you must answer Question 6: We further assess
12 against Grangaard the sum of blank of punitive damages, if
13 any. And then that's the plaintiff's case. Those are your
14 spots.

15 Number 7 goes on to did Golden View breach its
16 agreement with Grangaard by not supplying the kind or
17 class, and we changed that before to supplying the concrete
18 materials. I've got to keep it consistent, supplying the
19 concrete materials it ordered. Yes or no. If your answer
20 to Question 7 is no, complete and sign the verdict form.
21 If your answer to Question 7 is yes, answer the following
22 questions. We assess damages as follows: The sum of blank
23 in relation to Golden View's breach of contract.

24 Number 9, we further find as follows: Was interest
25 determined with an agreement between Grangaard and Golden

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1 MR. PRITZ: My head spun.

2 THE COURT: And I can't fix the facts. Neither can
3 you guys. That's a factual determination. Is interest
4 applicable; and, if so, they have to determine the rate.

5 MR. FINE: So should the question be, under we further
6 find as follows, A, is interest applicable.

7 THE COURT: Well, was applicable interest a term of
8 the parties? Yes or no.

9 MR. FINE: They might say no.

10 THE COURT: Then they're done. I didn't say don't
11 answer the next two little provisions.

12 MR. FINE: But Golden View might still be entitled to
13 statutory interest even if it's not part of the contract.

14 THE COURT: That's a question of fact for the jury to
15 decide. Technically, there is statutory prejudgment
16 interest that could be applicable.

17 MR. PRITZ: No-um.

18 THE COURT: A different rate, 10 or 12 percent,
19 something like that. That's a whole different argument.
20 That does not require them to make a factual determination.
21 Where I'm getting to they have to make a factual
22 determination at this point on how this case has been pled
23 out. So yes or no, interest. If they say no, I don't
24 believe they'll try to fill in a rate. And if they say
25 we'll fill in a rate, I'll set that aside because they said

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1 View? Yes or no. If it was a term of the agreement, the
2 agreed-upon rate is blank. If Grangaard is entitled to
3 prejudgment interest, it accrued on blank date.

4 Now, that's not really been finished out, so to speak,
5 but it gives them the same opportunity to make the same
6 considerations. It does not require them to do the actual
7 interest calculation, but they would make a factual
8 determination. Again, is interest applicable? If so, what
9 rate and when would interest have accrued.

10 MR. FINE: So I would be fine with this, your Honor,
11 as long as we can agree that if the jury finds that there
12 was no interest as part of the agreement, then the Court
13 could establish interest.

14 THE COURT: That's as a matter of law, for the either
15 party. Statutorily as a matter of law there could be
16 prejudgment interest. Really what we're asking them is, is
17 there a different rate, kind of. Because it's kind of a
18 standard from what I heard of the testimony, one and a half
19 per month, 18 percent per year.

20 MR. PRITZ: Grangaard didn't agree to that. He didn't
21 state his agreement to that.

22 THE COURT: I understand. But that's the maximum
23 allowed by law. That's why you see most businesses on your
24 monthly billing ticket or whatever it is when you charge
25 your gas at the co-op and pay at the end of the month.

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1 MR. WHITE: You handle this?
 2 MR. RAMM: No.
 3 THE COURT: Okay. The first instruction, and this was
 4 the one from 1-20-10, would be proposed to be number 1,
 5 "Both sides having rested."
 6 Any objection from plaintiff?
 7 MR. FINK: No.
 8 THE COURT: Defendant?
 9 MR. RAMM: No.
 10 THE COURT: It will be given number one next one is
 11 1-10-20, "It will be your duty," numbered as number 2. Any
 12 objection?
 13 MR. FINK: No.
 14 MR. RAMM: No.
 15 THE COURT: The next one is off of 1-20-30. It
 16 starts: "The attorneys further the respective parties,"
 17 number 3. Any objection?
 18 MR. FINK: No.
 19 MR. RAMM: No.
 20 THE COURT: Next one is off of 1-30-10. It would be
 21 numbered as four. You are the sole judges of all questions
 22 of fact. Any objection.
 23 MR. FINK: No.
 24 MR. RAMM: No.
 25 THE COURT: The next one would be numbered as five.

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1 MR. RAMM: No.
 2 THE COURT: The next one off pattern 1-18-20. It
 3 starts, you may have heard the terms "direct evidence."
 4 The next one will be numbered as number 11 off of
 5 pattern 30-10-10. It starts: "The contract is an
 6 agreement."
 7 MR. FINK: No.
 8 MR. RAMM: No.
 9 THE COURT: And I like the shortness. When you're
 10 saying no, that means no objections. Correct, Mr. Fink?
 11 MR. FINK: That's correct.
 12 MR. RAMM: Correct.
 13 THE COURT: Very good. The next one will be numbered
 14 as number 12. It is off of the various provisions of the
 15 code dealing with the UCC. It starts: "The following
 16 provisions of the Uniform Commercial Code apply."
 17 MR. FINK: No.
 18 MR. RAMM: No objection.
 19 THE COURT: All right. That will be 12.
 20 The next one will be number 13. This is also dealing
 21 with the Uniform Commercial Code in various statutes, this
 22 after saying the following provisions of the commercial
 23 code apply to the sale of goods in South Dakota. Then it
 24 starts with number 1, "The buyer must pay at contract
 25 rate."

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1 It's off of pattern one-31-20, in weighing the evidence in
 2 this case. Any objection.
 3 MR. FINK: No.
 4 MR. RAMM: No.
 5 THE COURT: The next one will be numbered as six.
 6 It's off of pattern one-30-50. It starts, most witnesses
 7 are allowed to testify. Any objection.
 8 MR. FINK: No.
 9 MR. RAMM: No.
 10 THE COURT: The next one will be numbered as number
 11 seven. It's off of pattern 1-30-80. It starts: "The
 12 credibility of a witness may be attacked."
 13 Any objection?
 14 MR. FINK: No.
 15 MR. RAMM: No.
 16 THE COURT: The next one will be number 8. It's off
 17 of pattern 1-30-30. It starts: "If you believe any
 18 witness testifying."
 19 Any objection?
 20 MR. RAMM: No.
 21 THE COURT: This one will be numbered as number 9 off
 22 of pattern 1-60-10. It starts: "In civil action the party
 23 who asserts."
 24 Any objection?
 25 MR. FINK: No.

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1 MR. FINK: No objection other than as previously
 2 stated.
 3 MR. RAMM: No objection.
 4 THE COURT: It will be given.
 5 The next one should be numbered as 14. It comes more
 6 specifically from EXCL STAT-204. "A contract may be made in
 7 any manner."
 8 MR. FINK: No objection.
 9 MR. RAMM: No objection.
 10 THE COURT: The next one will be numbered as 15. It
 11 comes from 57A-2-202. "Terms of a contract may be
 12 explained."
 13 MR. FINK: Your Honor, on the remainder of these I'll
 14 just say "No objection" other than as previously stated,
 15 but I'm not sure how the record will know where my
 16 objections came.
 17 THE COURT: We'd have to look at the transcript during
 18 the discussion of when we were settling and going through.
 19 There is a record. It's so noted. You expressed your
 20 position I think adequately at that time.
 21 MR. FINK: Yeah.
 22 MR. WHITE: Would it be fair to say everyone's consent
 23 here is just consent that these are the instructions that
 24 the Court has approved?
 25 THE COURT: And not waiving any objections earlier

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