

Not Reported in N.W.2d, 2007 WL 2769619 (Minn.App.)  
(Cite as: **2007 WL 2769619 (Minn.App.)**)

## H

Only the Westlaw citation is currently available.

NOTICE: THIS OPINION IS DESIGNATED AS UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINN. ST. SEC. 480A.08(3).

Court of Appeals of Minnesota.  
The CREST GROUP INCORPORATED, Appellant  
(A06-1230, A07-478), Plaintiff (A06-1231),  
v.  
**DELOITTE & TOUCHE**, LLP, defendant and  
third-party plaintiff, Respondent (A06-1230,  
A07-478), Appellant (A06-1231),  
v.  
Forward Technology Industries, Inc., Third-Party  
Defendant (A06-1230), Respondent (A06-1231),  
Appellant (A07-478).

Nos. A06-1230, A06-1231, A07-478.  
Sept. 25, 2007.  
Review Denied Dec. 19, 2007.

Hennepin County District Court, File No.  
27-CV-03-005617.

Joseph W. Anthony, Mark D. Wisser, Courtland C. Merrill, Anthony Ostlund & Baer, P.A., Minneapolis, MN, for Crest Group Incorporated and Forward Technology Industries, Inc.

Larry D. Espel, Lawrence M. Shapiro, Nancy E. Brasel, Greene Espel, PLLP, Minneapolis, MN, for Deloitte & Touche, LLP.

Considered and decided by **MINGE**, Presiding Judge; **SHUMAKER**, Judge; and **HUDSON**, Judge.

### UNPUBLISHED OPINION

**HUDSON**, Judge.

\*1 This court consolidated three appeals involving the same parties and arising out of the same

transactions.

### **A06-1230 (Crest v. Deloitte: Negligent Misrepresentation)**

The Crest Group, Inc. (Crest), acquired Forward Technologies, Inc. (FTI), in 2000 for \$26 million, calculated after Crest reviewed an audit of FTI's financial statements prepared by Deloitte & Touche, LLP (Deloitte). According to Crest, based on FTI's actual financial data, Crest overpaid by \$10 million when it acquired FTI. Crest brought an action against Deloitte for negligent misrepresentation. Deloitte moved for summary judgment on the ground that it had no duty to Crest; that motion was denied. After a jury found no overstatement of FTI's operating profits, the district court concluded there had been no negligent misrepresentation. Crest moved for a new trial or for judgment as a matter of law (JAML).<sup>FN1</sup> That motion was denied, and Crest appealed (A06-1230). Because evidence supports the jury's verdict, because we see no abuse of discretion in the jury instructions or the special-verdict questions, and because the record refutes the allegation of judicial bias, we affirm.<sup>FN2</sup>

**FN1.** Crest actually moved for judgment notwithstanding the verdict (JNOV). That term was replaced by JAML when Minn. R. Civ. P. 50 was amended in 2006. See Minn. R. Civ. P. 50 2006 advisory comm. cmt.

**FN2.** Deloitte argues in the alternative that the district court erred as a matter of law in denying Deloitte's motion for summary judgment. Because our affirmance renders this issue moot, we do not address it.

### **A06-1231 (Deloitte v. FTI: Indemnification)**

Deloitte brought an action for indemnification against FTI based on a contractual agreement between them for legal fees and expenses incurred in defending the Crest negligent-misrepresentation

Not Reported in N.W.2d, 2007 WL 2769619 (Minn.App.)  
 (Cite as: 2007 WL 2769619 (Minn.App.))

lawsuit. The jury found that FTI had made material misrepresentations to Deloitte, and the district court entered judgment requiring FTI to indemnify Deloitte. FTI moved for JAML; the district court granted its motion, vacated the judgment, and entered judgment for FTI. Deloitte appealed (A06-1231). Because the evidence supports the jury's verdict, we reverse the JAML for FTI.

#### **A07-478 (Crest and FTI v. Deloitte: Costs)**

The district court entered an amended order for taxation of costs that reduced the award of costs against Deloitte in the negligent-misrepresentation case to the statutory minimum and, after Deloitte requested leave to petition for reconsideration, reversed an erroneous deduction from the costs awarded to Deloitte. Crest and FTI appeal from these determinations (A07-478). Because our reversal of the JAML granted to FTI eliminates the award of costs in favor of FTI and against Deloitte, that issue is moot. Because we see no violation of [Minn. R. Gen. Pract. 115.11](#) in the district court's correction of its erroneous deduction, we affirm the costs awarded to Deloitte and against Crest.

### **DECISION**

#### **1. Denial of Crest's Motion for JAML or a New Trial**

Crest challenges the denial of its motion for JAML or a new trial on the grounds that the evidence did not support the jury's verdict, that the district court abused its discretion in framing the special-verdict questions and the jury instructions, and that the district court was biased against Crest.

##### *A. Evidence*

Crest claims that it was entitled to JAML because the evidence did not support the jury's verdict. In reviewing the denial of a motion for JAML, this court must affirm “if there is any competent evidence reasonably tending to sustain the verdict.” [Pouliot v. Fitzsimmons](#), 582 N.W.2d 221, 224 (Minn.1998) (quotation omitted). “Unless the evidence is practically conclusive against the verdict, this court will not set the verdict aside.” *Id.* (quotation omitted). “The evidence must be con-

sidered in the light most favorable to the prevailing party and an appellate court must not set the verdict aside if it can be sustained on any reasonable theory of the evidence.” *Id.*

\*2 Crest raises three claims of insufficient evidence.<sup>FN3</sup> First, Crest contends that FTI overstated its 1998 income to Deloitte by at least \$101,000; that this overstatement was “material”; and that “Deloitte's decision to keep FTI's financial misstatement hidden caused ‘false information’ to be disseminated....” But Crest's own expert, when asked if Deloitte had done anything wrong with regard to the \$101,000, testified, “No. I think they did not inherently do anything wrong with regard to ... not taking into consideration the \$101,375 ... I think omitting the \$101,000 from the financial statements was fine, there was nothing wrong with that.” The jury's findings are in accord with and supported by this testimony.

FN3. Crest also argues that Deloitte improperly used an offset method to explain the overstatements of FTI's 1998 income. Because the jury found that there were no overstatements, the district court adopted the jury's finding, and we affirm the district court on this issue, the argument is irrelevant.

Second, Crest contends that the jury's finding that FTI's 1998 financial statements did not overstate operating profits by including a \$179,055 advance on FTI's income statement was contrary to the evidence because Deloitte failed to show what happened to the \$179,055. But the burden of showing how the \$179,055 affected FTI's financial statements was Crest's, not Deloitte's. Crest's expert testified that he “could not find an entry on [FTI's] books[,] a journal entry, that would ... specifically transfer[ ] that 179,000 out of customer advances onto the other side of the board under the income statement.” When asked “You have not found anything that allows you to state with confidence that [the 179,055] went from customer advance in the balance sheet to some expense account in the in-

Not Reported in N.W.2d, 2007 WL 2769619 (Minn.App.)  
(Cite as: 2007 WL 2769619 (Minn.App.))

come statement, you have not seen anything that allows you to stand before this jury and say, I know that's what happened?" the expert answered, "As an absolute fact, that is correct." The jury's verdict is supported by this evidence.

Third, Crest claims FTI's 1998 profits were overstated by \$250,000 in project revenue that should have been allocated to 1999, because work was still being done on those projects in 1999. But the jury heard from Crest's expert that income can be recognized when "the contract is completed or substantially so" and that "a contract may be regarded as substantially completed if remaining costs and potential risks are insignificant in amount." The fact that work was still being done on a project in 1999 does not mean that income from that project could not have been recognized in 1998. Crest's expert's testimony supports the jury's verdict.

Because there is competent evidence reasonably tending to sustain the jury's verdict, we affirm the denial of Crest's motion for JAML.

#### *B. Special-verdict form*

Crest seeks a new trial on the ground that the special-verdict form misled or confused the jury. Crest concedes that, at trial, it "made only a limited objection to the verdict form." When a special-verdict form is not objected to at trial, this court's review is limited "to determin[ing] whether there is an error of fundamental law or controlling principle." *Estate of Hartz v. Nelson*, 437 N.W.2d 749, 752 (Minn.App.1989). A district court has broad discretion in framing special-verdict questions. *Dang v. St. Paul Ramsey Med. Ctr., Inc.*, 490 N.W.2d 653, 658 (Minn.App.1992), review denied (Minn. Dec. 15, 1992).

\*3 The first two questions on the special-verdict form are "Did FTI's 1998 financial statements overstate operating profits by inappropriately recognizing revenues?" and "Did FTI's 1998 financial statements overstate operating profits by including the \$179,055 ... advance on the income statement?"

Crest argues that the questions are irrelevant. But Crest sought to prove at trial that FTI's financial statements had overstated its operating profits; therefore, asking the jury whether FTI's financial statements overstated operating profits was not irrelevant.

Crest argues further that the first question should have been whether Deloitte provided Crest with false information because supplying false information is an element of negligent misrepresentation. See *Hebrink v. Farm Bureau Life Ins. Co.*, 664 N.W.2d 414, 420 (Minn.App.2003) (quoting *Restatement (Second) of Torts § 552(1)* (1977) for elements of negligent misrepresentation). But Crest provides no legal authority for its implied argument that special-verdict questions must track, verbatim, the elements of a tort.<sup>FN4</sup> The failure of the special-verdict form to ask whether Deloitte provided Crest with false information was not an error of fundamental law or controlling principle.

FN4. In any event, subsequent questions on Crest's claim for negligent misrepresentation did track those elements; the jury, having answered the first two questions in the negative, did not reach those questions.

Crest also argues that the word "inappropriately" in the first question was an error of fundamental law or controlling principle because the jury was not instructed as to the meaning of the term. But the jury had heard expert testimony from Crest that FTI's statements did not comply with Generally Accepted Accounting Principles (GAAP) and expert testimony from Deloitte that FTI's statements did comply with GAAP. Thus, the jury could easily have inferred that "inappropriately" in the context of the first question meant "non-compliant with GAAP." There was no need to define the term.

Crest's final argument on this issue is that the verdict form confused the jurors, as is shown by the conflict between their findings on questions 1 and 2 (that FTI's 1998 financial statements did not overstate its operating profits by inappropriately recog-

Not Reported in N.W.2d, 2007 WL 2769619 (Minn.App.)  
 (Cite as: 2007 WL 2769619 (Minn.App.))

nizing revenues or by including a particular advance) and their finding on question 13 (that FTI had made material misrepresentations to Deloitte in connection with the audit of FTI's 1998 financial statements). But consideration of the context and the scope of the questions establishes that the jury's answers to them are not inconsistent and are not indicative of juror confusion.

Questions 1 and 2 follow the heading "Crest's Claim for Negligent Misrepresentation." Question 13 follows the heading "Deloitte's Claim for Indemnification." Thus, the questions pertain to different plaintiffs with very different causes of action: negligent misrepresentation is a tort claim, while indemnification is a contract claim. The scope of questions 1 and 2 is very narrow. To answer either of them in the affirmative, the jury had to find that FTI's financial statements overstated operating profits by doing one of two specific things: inappropriately recognizing revenue or including a particular \$179,055 customer advance on an income statement. The scope of question 13 is much broader. To answer it in the affirmative, the jury had to find only that FTI made some, or any, material misrepresentations to Deloitte in connection with the audit. The jury could reasonably have found both that FTI did make material misrepresentations and that its financial statements did not overstate operating profits by inappropriately recognizing revenue or including a particular advance on an income statement. Because a reasonable theory of the evidence supports the jury's verdict, we decline to set the verdict aside. *Pouliot*, 582 N.W.2d at 224.

\*4 The special-verdict form did not contain an error of fundamental law or controlling principle and did not lead to a verdict that cannot be sustained on a reasonable theory of the evidence. Crest is not entitled to a new trial on the basis of errors in the special-verdict form.

#### C. Jury instructions

Crest also seeks a new trial on the ground that the jury instructions were inadequate. Again, Crest concedes that it did not object to the jury instruc-

tions at trial. Therefore, this court reviews them, as it did the special-verdict form, "to determine whether there is an error of fundamental law or controlling principle." *Hartz*, 437 N.W.2d at 752.

Crest argues that the jury was left in an "informational vacuum" because it was not instructed on "materiality" with regard to financial information. But the jury heard expert testimony as to the meaning of the "materiality threshold," a term of art in accounting. Crest also claims that "issues arise from the court's use of an instruction on ordinary negligence" but does not identify those issues.

Crest fails to identify any error of fundamental law or controlling principle in the jury instructions. Even if there was an abuse of discretion, Crest's failure to object to the instructions makes any abuse irrelevant unless it resulted in an error of fundamental law or controlling principle. *See id.*

#### D. Judicial bias

Finally, Crest claims it is entitled to a new trial because the district court's comments during the testimony of Crest's chief executive officer (CEO) and some of its evidentiary rulings show bias against the CEO. Crest did not object to the district court's conduct during trial. Failure to object to alleged judicial misconduct has been held to bar a request for a new trial based on that misconduct. *See, e.g., Nugent v. Kerr*, 543 N.W.2d 688, 692 (Minn.App.1996); *see also Liteky v. United States*, 510 U.S. 540, 551, 114 S.Ct. 1147, 1155, 127 L.Ed.2d 474 (1994) (judge's conduct must either arise from an extrajudicial source or amount to pervasive bias, which exists when conduct is "so extreme as to display [a] clear inability to render fair judgment"); *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 46 (Minn.1997) ("[e]ntitlement to a new trial on the grounds of improper evidentiary rulings rests upon the complaining party's ability to demonstrate prejudicial error" (quotation omitted)); *Fortier v. Ritter's Hairdressing Studios, Inc.*, 282 Minn. 382, 386, 164 N.W.2d 897, 899-900 (1969) (stating that appellate court will grant a new trial because of judicial bias "only in those rare cases

Not Reported in N.W.2d, 2007 WL 2769619 (Minn.App.)  
(Cite as: 2007 WL 2769619 (Minn.App.))

where the remark of the trial judge was so prejudicial to one party that it rendered a fair and impartial determination by the jury improbable”); *Olson v. Olson*, 392 N.W.2d 338, 341 (Minn.App.1986) (prior adverse rulings do not constitute bias).

We see no bias either in the district court's comments or in its evidentiary rulings. A review of the transcript convinces us that the district court was attempting to clarify for the jury the obfuscating answers of a nonresponsive witness, not that the court was expressing bias towards the CEO. The district court acknowledged that it had been “guiding [the CEO] in understanding that it is counsel that directs the questions, it is the witness that answers the questions.” The record bears this out. For example, when the CEO was questioned about the first item in a memorandum he had written, he gave an answer that applied to the entire memorandum. The district court pointed out that the answer was unresponsive. When the CEO then asked if he was going to be questioned about each item, the district court said, “That's up to counsel. It's not for you to decide.”

\*5 The transcript further shows that the CEO gave many nonresponsive answers in the three days of his testimony. The district court commented on a few of these, saying, for example, “That was a non-responsive answer” when the CEO's answer to whether he believed another person's statement did not indicate whether he believed the statement. Similarly, when the CEO's answer to a question about retaining a law firm to work on a hostile counterbid did not mention retaining a law firm, the district court asked, “Did you retain the firm? That was the question.” On another occasion, the district court said, “That didn't answer the question” when the CEO's answer to whether he was still having communications with one person when another person's bid was the competing bid did not mention communicating with the first person.

And finally, when the CEO was reading portions of his own deposition into the record, the district court interjected to point out that the CEO had

not read the complete answer and to direct the CEO not to add words to the text he was reading. This demonstrates that the district court was clearly paying close attention to a witness whose reading of a document was at variance with the text of the document; it does not demonstrate bias toward that witness. The district court's comments do not indicate judicial bias.

We next consider the five evidentiary rulings challenged by Crest on the basis of judicial bias.

The admission or exclusion of evidence is within the district court's discretion. *Kroning*, 567 N.W.2d at 45-46. Moreover, “when a party fails to object to evidence at trial, that party has generally waived any objection.” *Lake Superior Ctr. Auth. v. Hammel, Green, & Abrahamson, Inc.*, 715 N.W.2d 458, 481 (Minn.App.2006), *review denied* (Minn. Aug. 23, 2006). Crest, which did not object to the admission or exclusion of evidence during the trial, now invokes Minn. R. Evid. 103(d), which permits this court “[to take] notice of errors in fundamental law or of plain errors affecting substantial rights although they were not brought to the attention of the [trial] court.”

Crest alleges that five rulings show bias against the CEO. Even assuming *arguendo* that these rulings were an abuse of discretion, none of them approaches being an error of fundamental law or a plain error affecting a substantial right. Crest argues that the district court should have excluded, *sua sponte*, evidence allegedly implying that the CEO violated British securities law, that he was litigious, that some of his business associates thought he lacked integrity, and that some of his testimony could be impeached. None of these is an error of fundamental law or a plain error affecting a substantial right.

Like the district court's comments, its evidentiary rulings against Crest do not indicate bias. Crest is not entitled to a new trial because of judicial bias.

## 2. Granting of FTI's Motion for JAML on Deloitte's Indemnification Claim

\*6 In Deloitte's engagement letter, FTI "agree[d] to release and indemnify Deloitte ... from all claims, liabilities, and expenses relating to [Deloitte's] services under this engagement letter attributable to any misrepresentation by [FTI's] management." After Crest sued Deloitte for negligent misrepresentation of FTI's financial situation, Deloitte brought an indemnification action against FTI. The jury found that FTI had made material misrepresentations to Deloitte in connection with the audit of FTI's 1998 financial statements. The district court adopted this finding and concluded that Deloitte was entitled to indemnification. FTI then moved for JAML. The district court set aside the jury's verdict, found that FTI had not made material misrepresentations to Deloitte, and awarded JAML to FTI. Deloitte challenges the JAML.

This court reviews a grant of JAML de novo because the district court grants JAML only if the verdict is against the entire evidence or, despite the jury's findings, the moving party is entitled to JAML. *Pouliot*, 582 N.W.2d at 224. "Unless the evidence is practically conclusive against the verdict, this court will not set the verdict aside." *Id.* (quotation omitted). We view the evidence in the light most favorable to the prevailing party. *Id.*

The district court concluded that because Deloitte had "vouched for FTI's clean books[,] ... the [j]ury had no basis to find in Question 13 that FTI made material misrepresentations to Deloitte in connection with the 1998 audit." This statement is inaccurate for two reasons. First, Deloitte did not "vouch for FTI's clean books." Its "Independent Auditors' Report" stated that the financial statements that had been audited were "the responsibility of [FTI's] management" and that Deloitte's responsibility was "to express an opinion on these financial statements based on our audit." Deloitte then said, "In our opinion, such financial statements present fairly, in all material respects, the financial position of [FTI] as of December 31, 1998...." De-

loitte's report does not assert that the financial statements were completely accurate or free from any misstatements.

Second, the jury had an evidentiary basis for its finding that FTI made material misrepresentations to Deloitte. The jury was made aware of FTI's and Crest's position in a counterclaim in a previous action against FTI's former CEO in which Crest and FTI assert that he "intentionally falsified financial statements for [FTI] for the year ending December 31, 1998"; "intentionally made false entries to [FTI's] accounting records of customer deposit accounts from 1998 through 2000"; "intentionally made entries in [FTI's] accounting records showing false pre-billings which overstated actual product shipments"; and "intentionally and falsely overstated inventory by at least \$400,000 in [FTI's] accounting records for the year ending December 31, 1998." These falsified documents were the records FTI presented to Deloitte for the audit, after assuring Deloitte in a letter that its financial statements were "fairly presented in conformity with generally accepted accounting principles" and that "[t]here has been no fraud involving management or employees who have significant roles in internal control." Therefore, contrary to the district court's finding, the jury did not lack "[a] basis to find ... that FTI made material misrepresentations to Deloitte in connection with the 1998 audit."

\*7 The district court found a conflict between the jury's findings on questions 1 and 2 (that FTI's 1998 financial statements did not overstate its operating profits by inappropriately recognizing revenues or by including a \$179,055 advance on the income statement) and its finding on question 13 (that FTI had made material misrepresentations to Deloitte in connection with the audit of FTI's 1998 financial statements). But these findings are reconcilable and can be sustained on a reasonable theory of the evidence, *see id.*, if both the context and the scope of the questions are considered.

Because the jury's finding that FTI made material misrepresentations to Deloitte can be sus-

Not Reported in N.W.2d, 2007 WL 2769619 (Minn.App.)  
(Cite as: 2007 WL 2769619 (Minn.App.))

tained by a reasonable theory of the evidence, the district court erred in overturning it. We reverse the JAML for FTI; therefore, the judgment based on the jury's verdict is reinstated.

### 3. Request for Reconsideration

Deloitte was awarded \$607,902 from Crest in costs. After the posttrial motions had been decided, the district court, sua sponte, amended the order for taxation of costs by deducting from this award \$127,825, the amount Deloitte spent in pursuing its indemnification claim. Deloitte requested reconsideration of this deduction because the district court had previously decided Deloitte was not entitled to the \$127,825 and had already deducted that amount from Deloitte's indemnification award of attorney fees. The district court reversed the deduction, noting that “[b]ecause it is now apparent that the \$127,825.02 reduction should not have been made, the Court finds it is unnecessary to have a formal motion for reconsideration brought and argued.”

Crest and FTI argue that the district court should have required Deloitte to show compelling circumstances under Minn. Gen. R. Pract. 115.11, which provides that “[m]otions to reconsider are prohibited except by express permission of the court, which will be granted only upon a showing of compelling circumstances.” An appellate court reviews interpretation of procedural rules de novo. *In re GlaxoSmithKline plc*, 732 N.W.2d 257, 267 (Minn.2007). If the rules give the district court authority to grant a motion to reconsider, it is reasonable to infer that they also give it authority to resolve the error giving rise to the motion. We see no error in the district court's correction of its error without a formal motion for reconsideration.

We affirm the denial of Crest's motion for JAML or a new trial on its negligent misrepresentation claim against Deloitte because the evidence supports the jury's verdict, there is no abuse of discretion in the special-verdict form or the jury instructions, and the record does not reflect judicial bias. We reverse the JAML granted to FTI on Deloitte's indemnification claim because the evidence

supports the jury's verdict. Finally, we affirm the amendment of the order for taxation of costs to restore the amount incorrectly deducted from Deloitte's cost award.

### \*8 Affirmed in part and reversed in part.

Minn.App.,2007.

Crest Group, Inc. v. Deloitte & Touche, LLP  
Not Reported in N.W.2d, 2007 WL 2769619  
(Minn.App.)

END OF DOCUMENT