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Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1266**

Capacity Wireless, LLC,
Appellant,

vs.

Board of Regents of the University of Minnesota,
Respondent.

**Filed June 1, 2021
Affirmed
Worke, Judge**

Hennepin County District Court
File No. 27-CV-18-9683

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Peter C. Magnuson, Courtney N. Baga, Faegre Drinker Biddle & Reath LLP, Minneapolis, Minnesota; and

Douglas R. Peterson, General Counsel, Timothy J. Pramas, Senior Associate General Counsel, University of Minnesota, Minneapolis, Minnesota (for respondent)

Considered and decided by Worke, Presiding Judge; Johnson, Judge; and Gaïtas, Judge.

NONPRECEDENTIAL OPINION

WORKE, Judge

After a jury trial in this contract action, appellant argues that the district court erred by granting partial summary judgment on appellant's damages claim based on out-of-

pocket expenses. Appellant also argues that the district court made several erroneous rulings at trial. We affirm.

FACTS

Respondent Board of Regents of the University of Minnesota (the university) was interested in deploying a distributed antennae system (DAS) network on campus. A DAS network allows wireless carriers (such as AT&T, T-Mobile and Verizon) to provide more reliable service. Thus, the university issued a request for proposals (RFP) for bids to the DAS network. The university's primary goals were to have the DAS network provide coverage in underground areas and that it be built at no cost to the university.

A DAS network can be an attractive project for the entity that builds it because, after the network is deployed, the entity may then charge carriers to use it and earn a profit. Appellant Capacity Wireless LLC (Capacity), in conjunction with several other entities, including Lemcon USA Corporation (Lemcon) and Premise Concepts, responded to the RFP. According to the proposal, Capacity is an asset-holding company and an affiliate of Lemcon. The proposal describes Lemcon as a "Prime Contractor" and Premise Concepts as a "local RF Consultant" that had recently been acquired by Lemcon. In September 2016, the university chose Capacity to deploy the DAS network.

Lawrence Rosenfeld, part-owner of Capacity, had a strategy to leverage the carriers' desire to have greater wireless coverage for the upcoming 2018 Super Bowl in Minneapolis to persuade them to fund the underground portions of the DAS network. Rosenfeld eventually represented to the university that Capacity could not effectively negotiate with

carriers until he had a signed contract with the university. Consequently, the university entered into a Memorandum of Understanding (MOU) with Capacity.

The MOU was primarily a nonbinding, preliminary agreement, with some exceptions. The MOU indicated that the parties were negotiating a binding Master License Agreement (MLA) that would allow Capacity to construct and operate a DAS network on campus. The MOU did not require the parties to enter into an MLA. One of the few binding provisions of the MOU was a provision that granted Capacity the “exclusive right” to negotiate with carriers regarding the DAS network and the placement of communications equipment on campus. The same provision also indicated that Capacity would be the “sole point of contact” with carriers. If the parties did not enter into a binding MLA, the MOU would expire in January 2019.

Capacity alleged that it spent nearly one year and almost \$1 million negotiating with carriers and designing a DAS network for the university. Rosenfeld explained at his deposition that several entities had conducted tests and done other preliminary work to design a DAS network for the university.¹ Notably, however, Rosenfeld testified that entities other than Capacity (specifically, Lemcon and Premise Concepts) had directly paid for that work. Rosenfeld also acknowledged that Capacity did not have any bank accounts.

By October 2017, the parties had not reached an agreement on an MLA. On October 16, the university sent a letter to Rosenfeld indicating that it was terminating negotiations with Capacity regarding the DAS network. The letter stated that the university

¹ According to expert trial testimony, this sort of preliminary work was necessary to effectively negotiate with carriers.

did not believe that any of Capacity's proposals met the university's objectives because they did not provide sufficient revenue² or cellular coverage. Rosenfeld attempted to meet with the university to discuss the negotiations. But on October 17, Bernard Gulachek, the university's chief information officer, wrote Rosenfeld an email indicating that he would not attend a meeting because there were "no circumstances" that would change the university's position.

The university notified the carriers that had been negotiating with Capacity that the university would no longer be negotiating an MLA with Capacity. Gulachek's subordinate employee then decided to research Capacity and discovered that Rosenfeld had been a defendant in a Massachusetts lawsuit and was found liable for defrauding and deceiving his business partners.

Gulachek sent a letter to Rosenfeld on October 30 indicating that the university planned to work directly with the carriers to install temporary coverage for the Super Bowl. Gulachek wrote that the university had "significant concerns" about Capacity and had "gathered and received information that confirms the [u]niversity's decision to not do business with [Capacity]." Thereafter, the university worked with carriers to reach agreements on cellular coverage. The carriers made one-time payments to the university totaling \$52,300 relating to the coverage. No DAS system was ever installed on campus.

Capacity sued the university, alleging that the university breached the MOU by violating Capacity's exclusive right to negotiate with carriers and breached the implied

² A portion of the profits made by charging carriers to use the DAS network would have been allocated to the university.

covenant of good faith and fair dealing by terminating its negotiations with Capacity in bad faith.³

The university eventually moved for summary judgment on several issues, including the issue as to whether Capacity incurred “out-of-pocket” expenses—i.e., the nearly \$1 million that Capacity allegedly spent negotiating and designing the DAS network. Citing Rosenfeld’s testimony that entities other than Capacity paid those costs and that Capacity did not have a bank account, the university argued that there was no evidence that Capacity incurred any expenses. The district court interpreted Capacity’s claim for these expenses to be a form of reliance damages, concluded that there were no genuine issues of material fact on the issue, and granted partial summary judgment in favor of the university.

The case proceeded to a jury trial. Consistent with its partial-summary-judgment ruling, the district court granted the university’s motions to (1) exclude Capacity’s proposed expert witness testimony regarding out-of-pocket expenses, and (2) instruct the jury that it was not permitted to award damages for Capacity’s alleged out-of-pocket expenses. The district court also granted the university’s motions to introduce evidence of its own knowledge of the Massachusetts lawsuit and to cross-examine Rosenfeld regarding the lawsuit under Minn. R. Evid. 608(b).

The jury found that the university breached the MOU and caused damages to Capacity as a result of the breach. The jury also found that the university breached the implied covenant of good faith and fair dealing with respect to the MOU, but that the

³ Capacity also brought an unjust-enrichment claim. The district court dismissed that claim at summary judgment. It is not at issue in this appeal.

university did not cause any damage to Capacity by that breach. The jury found that Capacity suffered \$52,300 in damages. The district court entered judgment consistent with the jury's award.

Capacity moved for a new trial on damages, arguing that the district court erred by granting summary judgment and in its evidentiary rulings and jury instructions. The district court denied the motion. This appeal followed.

DECISION

Capacity argues that the district court erred by granting summary judgment on the issue of Capacity's claimed out-of-pocket losses and abused its discretion by denying Capacity's motion for a new trial based on erroneous evidentiary rulings and jury instructions. We address Capacity's arguments regarding summary judgment before turning to the district court's evidentiary rulings and jury instructions.

Summary judgment

Capacity argues that the district court erred by granting partial summary judgment. "We review the grant of summary judgment de novo to determine whether there are genuine issues of material fact and whether the district court erred in its application of the law." *Montemayor v. Sebright Prods., Inc.*, 898 N.W.2d 623, 628 (Minn. 2017) (quotation omitted). A district court must grant summary judgment if the "movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Minn. R. Civ. P. 56.01. The moving party has the burden to "demonstrate no genuine issue of material fact exists." *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988).

If the moving party meets that burden, the burden then shifts to the nonmoving party to produce facts that “raise a genuine issue” of material fact. *Id.*

In reviewing a grant of summary judgment, “[w]e view the evidence in the light most favorable to the party against whom summary judgment was granted.” *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn. 2002). We resolve all doubts and factual inferences against the moving party. *Montemayor*, 898 N.W.2d at 628. Summary judgment is “inappropriate when reasonable persons might draw different conclusions from the evidence presented.” *Id.* (quotation omitted).

Here, the district court granted summary judgment regarding a specific measure of damages—Capacity’s out-of-pocket expenses incurred in relation to the DAS project under the MOU and in anticipation of a possible MLA. Generally, the amount of damages is a question of fact to be submitted to the jury, not determined at summary judgment. *Alsides v. Brown Inst., Ltd.*, 592 N.W.2d 468, 475 (Minn. App. 1999). To survive summary judgment regarding damages, a plaintiff need only show a “reasonable basis for approximating loss.” *Jensen v. Duluth Area YMCA*, 688 N.W.2d 574, 579 (Minn. App. 2004); *see also Logan v. Norwest Bank Minn., N.A.*, 603 N.W.2d 659, 663 (Minn. App. 1999) (stating that summary judgment is inappropriate when the facts “support a viable theory of damages that naturally and necessarily” result from the defendant’s breach of contract). Still, the party opposing summary judgment “may not establish genuine issues of material fact by relying upon unverified and conclusory allegations, or postulated evidence that might be developed at trial, or metaphysical doubt about the facts.” *Dyrdal v. Golden Nuggets, Inc.*, 689 N.W.2d 779, 783 (Minn. 2004). Thus, in this case, to survive

summary judgment, Capacity was required to identify a “viable theory of damages” and evidence that established a fact issue regarding whether it actually sustained those damages. *See id.*; *Logan*, 603 N.W.2d at 663.

After the university made a showing that there was no genuine issue of material fact that Capacity incurred no expenses related to the DAS project, the burden shifted to Capacity to identify evidence in the record that established a material fact that would preclude summary judgment.⁴ *See Hagen*, 947 N.W.2d at 850-51 (describing summary judgment burdens). The nonmoving party’s burden to preclude summary judgment is to identify “specific facts showing that there is a genuine issue for trial.” *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997) (quotation omitted). If the nonmoving party fails to make such a showing, the district court may enter summary judgment, if appropriate. *Id.* In reviewing whether the district court erred in granting summary judgment, we are not required to consider facts in the record that the nonmoving party did not identify to the district court. *Geraci v. Eckankar*, 526 N.W.2d 391, 398 (Minn. App. 1995), *review denied* (Minn. Mar. 14, 1995); *see also Beecroft v. Deutsche Bank Nat’l Tr. Co.*, 798 N.W.2d 78,

⁴ Capacity asserts that the university failed to meet its initial burden to demonstrate that no genuine issue of material fact existed because the university only demonstrated that Capacity did not *pay* any of the costs for the preliminary DAS work (as opposed to *incurring* those costs). We understand the distinction but are not persuaded. The university sufficiently identified evidence in the record that showed that Capacity did not actually pay the expenses, and therefore did not suffer any out-of-pocket losses. Capacity could have avoided summary judgment if it then identified evidence in the record that showed that fact issues remained over whether Capacity was ultimately liable for those other entities’ expenses. Accepting, for argument’s sake, Capacity’s assertion that the university misrepresented the record at the summary-judgment stage, Capacity should have clarified that misrepresentation to the district court.

82 (Minn. App. 2011) (“[T]o oppose a motion for summary judgment successfully, a party is required to extract *specific*, admissible facts from the record that demonstrate that a genuine issue of material fact exists.” (quotation omitted)), *review denied* (Minn. Jul. 19, 2011).

Capacity did not genuinely dispute that it did not incur *direct* expenses and does not dispute that premise on appeal. Instead, to oppose summary judgment on its alleged out-of-pocket expenses, Capacity only identified John Beck’s expert report, which concluded that Capacity incurred \$871,838 in out-of-pocket expenses related to the project. Capacity also asserted that it, “as Lemcon’s affiliate and as the communications asset holding company for Lemcon,” was the proper party to recover expenses attendant to the DAS project. Elsewhere in its summary-judgment memorandum, Capacity cited (1) an email in which Rosenfeld stated that “[w]e have spent already more than \$1 million to get this far and continue every day to put more at risk just to keep this project alive with the carriers,” and (2) an excerpt from another expert’s report indicating that “Capacity/Lemcon undertook substantial work” related to the design of the DAS network.⁵ On appeal, Capacity refines its argument—contending that a genuine fact issue existed regarding

⁵ On appeal, Capacity argues that other portions of Rosenfeld’s deposition testimony support its assertion that Capacity incurred the expenses paid by the other entities because it was ultimately liable to them for those costs. Capacity asserts that this evidence establishes that Capacity had agreed to pay the costs. But Capacity failed to identify those specific facts in the summary-judgment proceedings. We do not consider the facts and evidence that Capacity failed to identify to the district court. *See Geraci*, 526 N.W.2d at 398; *see also Beecroft*, 798 N.W.2d at 82.

whether Capacity agreed or otherwise became obligated to repay the direct payments of other entities.

But even viewing the evidence that Capacity identified to the district court in a light most favorable to Capacity, we cannot conclude that this evidence established a genuine issue of material fact regarding whether Capacity incurred an obligation to reimburse other entities for their expenses related to the DAS project. Based on his review of the pleadings, deposition testimony, business records, and his own independent research, Beck opined that Capacity incurred \$871,838 in out-of-pocket expenses. But Beck's report does not explain what entity paid the costs identified and how Capacity became obligated to pay those expenses. Instead, the report appears to make a conclusory assumption that Capacity is ultimately responsible for the expenses.⁶

The other evidence that Capacity cites adds little support for its position. The excerpt from another expert's report stating that "Capacity/Lemcon" performed work on the project does not establish that Capacity was obligated to reimburse Lemcon's payments relating to work on the project. And Rosenfeld's email indicating that "we" had spent more than \$1 million on the DAS project is similarly unilluminating. In short, Capacity responded to the university's motion for summary judgment regarding claimed out-of-

⁶ We reject the university's argument that it is improper to consider Beck's expert report at summary judgment because the university did not contest the admissibility of Beck's report for purposes of summary judgment, and the supreme court has considered unsworn expert reports in similar circumstances. *See Montemayor*, 898 N.W.2d at 627, 632-33, 640 (considering whether an unsworn expert's report, submitted as an exhibit to an attorney's affidavit, established a genuine issue of material fact when opposing party did not argue to district court that the report was inadmissible).

pocket expenses by identifying vague evidence establishing that money had been spent on the project, but no explanation of how Capacity was ultimately responsible for the expenses. Capacity failed to meet its burden at summary judgment to extract *specific* facts establishing that a genuine fact issue existed regarding whether it incurred out-of-pocket expenses. *See Beecroft*, 798 N.W.2d at 82. The district court did not err by granting partial summary judgment in favor of the university on Capacity's out-of-pocket expenses.

New trial motion

Capacity argues that the district court abused its discretion by denying Capacity's motion for a new trial. *See Christie v. Estate of Christie*, 911 N.W.2d 833, 838 (Minn. 2018) (stating that we review denial of motion for new trial for an abuse of discretion). A district court abuses its discretion if it makes clearly erroneous findings of fact or bases its decision on an erroneous view of the law. *Dahl v. Dahl*, 765 N.W.2d 118, 123 (Minn. App. 2009). In its motion, Capacity argued that it was entitled to a new trial on the issue of damages, claiming that the district court abused its discretion in related evidentiary rulings and jury instructions. We address each claim in turn.

Evidentiary rulings

Capacity challenges two of the district court's evidentiary rulings. We review a district court's evidentiary rulings for an abuse of discretion. *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 45 (Minn. 1997).

Capacity first argues that the district court abused its discretion by excluding Beck from testifying as an expert at trial. Beck would have testified to Capacity's out-of-pocket expenses. But because the district court had granted partial summary judgment regarding

out-of-pocket expenses, the district court concluded that Beck's testimony on that subject was irrelevant and therefore inadmissible. *See* Minn. R. Evid. 402 (providing that irrelevant evidence is inadmissible).

Capacity, however, attempts to recharacterize Beck's testimony as evidence of its expectation damages resulting from the university's breach of contract. Capacity asserts that evidence of its expenditures was relevant to prove how much money Capacity expected to make had the university not breached the MOU. *See Logan*, 603 N.W.2d at 663 (defining expectation damages). Thus, Capacity argues that, even if the district court properly granted summary judgment on its out-of-pocket expenses, or reliance damages, Beck's testimony was still relevant to establish its expectation damages.

To understand this argument, we must consider the difference between reliance damages and expectation damages. Reliance damages are intended to place a party in the same position that it would be in had a contract never been made—by reimbursing “losses arising from a party's change in its position in reliance on a contract.” *Id.* Reliance damages may include “expenditures made in preparation for performance or in performance” of a contract. Restatement (Second) of Contracts § 349 (1981); *see also Dick Weatherston's Associated Mech. Servs., Inc. v. Minn. Mut. Life Ins. Co.*, 100 N.W.2d 819, 825 (Minn. 1960) (concluding that party could recover expenses incurred in “part performance or in preparation for performance” of a contract). Expectation damages, on the other hand, “attempt to place the plaintiff in the same position as if the breaching party had *complied* with the contract.” *Logan*, 603 N.W.2d at 663 (emphasis added).

Essentially, Capacity argued to the district court that Beck's testimony regarding out-of-pocket expenses was relevant to its expectation damages because Capacity expected to recoup its investment and then make additional profit.⁷ But the district court properly granted summary judgment regarding Capacity's out-of-pocket expenses. The district court did not abuse its discretion by excluding Beck from testifying about an issue that it had removed from the case via summary judgment.⁸

Capacity next argues that the district court abused its discretion by admitting evidence concerning the Massachusetts lawsuit. The district court admitted the evidence for two purposes. First, the district court allowed the evidence as substantive evidence of the university's reasons for terminating negotiations with Capacity and as evidence relevant to the issue of damages. Second, the district court allowed the university to cross-examine Rosenfeld about the lawsuit under Minn. R. Evid. 608(b). We consider whether the district court abused its discretion by admitting the evidence for each purpose.

Substantive evidence

Evidence is relevant if it has a "tendency to make the existence of [a] fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Minn. R. Evid. 401. Relevant evidence is generally admissible.

⁷ We observe that it is common sense that an entity making expenditures on a business venture would almost always expect to recoup its initial investment and make an additional profit.

⁸ To the extent that Capacity's expenditures were relevant to the discounted-cash-flow analysis that it used to estimate the value of its rights under the MOU, and the potential MLA, we observe (as Capacity does in this appeal) that evidence of the general expenditures on the project was introduced at trial.

Minn. R. Evid. 402. Here, the district court concluded that evidence of the university's knowledge of the Massachusetts lawsuit was relevant because it was probative to the university's contention that it acted in good faith when it terminated negotiations. The district court also concluded that the same evidence was relevant to whether Capacity suffered damages—reasoning that the evidence could show that Capacity never would have realized profits from a future MLA because the university, knowing about the lawsuit, never would have entered into the agreement. Capacity argues that the district court erred in making these determinations and consequently abused its discretion by allowing the evidence.

We see no abuse of discretion in the district court's decisions. Both Gulachek and his subordinate employee testified that there was a slight possibility that the university would work with Capacity even after the email indicating that there were “no circumstances” under which the university would reconsider its position, but that the chances of entering into an MLA reduced to zero after the university learned about the Massachusetts lawsuit. The university sent a subsequent letter to Capacity confirming its decision to terminate negotiations. Whether that testimony was credible was a determination for the jury to make. *Covey v. Detroit Lakes Printing Co.*, 490 N.W.2d 138, 141 (Minn. App. 1992). But the evidence was relevant, and therefore admissible, because

it made the university's claim that it acted in good faith when it terminated negotiations with Capacity more probable. *See* Minn. R. Evid. 401.⁹

The evidence was also relevant to Capacity's damages. Capacity's expert witness conceded that if Capacity never built a DAS network, there was "no money to be made." Thus, the jury could reasonably conclude that, if the university never would have entered into an MLA with Capacity, Capacity's claim for expectation damages from a prospective MLA would fail. Again, the district court did not abuse its discretion in allowing the evidence because it was relevant to damages.

Rule 608(b)

Capacity also asserts that the district court abused its discretion by allowing the university to cross-examine Rosenfeld about the Massachusetts lawsuit under Minn. R. Evid. 608(b). Rule 608(b) allows a party to attack the credibility of a witness by inquiring into specific instances of conduct on cross-examination, so long as the inquiry is probative to the witness's character for truthfulness or untruthfulness.

Capacity first contends that the university, by asking questions about the Massachusetts judge's findings, effectively introduced extrinsic evidence of the lawsuit in violation of rule 608(b). *See* Minn. R. Evid. 608(b) (disallowing use of extrinsic evidence to establish witness's character for truthfulness or untruthfulness). But Capacity never made this argument to the district court. Thus, we do not review it on appeal. *See Thiele*,

⁹ Capacity's claim that the university breached the implied covenant of good faith and fair dealing was premised on the allegation that the university acted in bad faith when it terminated negotiations with Capacity.

425 N.W.2d at 582 (stating that a party may not “obtain review by raising the same general issue litigated below but under a different theory”).

Relying primarily on *Staffing Specifix, Inc. v. TempWorks Mgmt. Servs., Inc.*, 896 N.W.2d 115 (Minn. App. 2017), *aff’d*, 913 N.W.2d 687 (Minn. 2018), Capacity also asserts that the university’s questions to Rosenfeld about the Massachusetts lawsuit were more prejudicial than probative because the university asked about what the judge in that case found, which might cause a jury to give undue credit to the judge’s findings. *See also* Minn. R. Evid. 403 (stating that relevant evidence may be excluded if its probative value is outweighed by unfair prejudice). In *Staffing Specifix*, we determined that evidence that a judge, in a separate matter, found that a witness gave testimony that was not credible was not admissible under rule 608(b) because it was not probative of the witness’s character for truthfulness—the judge could find a witness’s testimony not credible for a number of reasons. 896 N.W.2d at 133-34. We also concluded that evidence of the credibility determination, if it was probative of the witness’s character for truthfulness, was unduly prejudicial because the witness’s credibility was a central issue in the case, and the credibility finding came from a judge, “a person usually held in high esteem in the community.” *Id.* at 134.

Staffing Specifix is distinguishable from this case—the cross-examination in *Staffing Specifix* involved a judge’s credibility finding, not findings regarding the actual acts of the witness. Moreover, Capacity is primarily concerned with the university’s cross-

examination questions, not the evidence that the questions elicited.¹⁰ The district court informed the jury in its instructions that “the attorneys’ questions are not evidence.” We presume that the jury follows the district court’s instructions. *Frazier v. Burlington N. Santa Fe Corp.*, 811 N.W.2d 618, 630 (Minn. 2012). Ultimately, considering that the jury found that the university breached both the MOU and the implied covenant of good faith and fair dealing, we conclude that Capacity has not demonstrated that the district court abused its discretion when it determined that the probative value of the inquiry was not outweighed by the potential for unfair prejudice.¹¹

Jury instructions

Finally, Capacity argues that the district court abused its discretion by instructing the jury that it was not permitted to award out-of-pocket expenses. A district court has “considerable latitude” in giving jury instructions, and we will not reverse based on jury

¹⁰ Generally, Rosenfeld denied knowledge of the Massachusetts court’s findings, testifying that he had not read the order at issue.

¹¹ Because we conclude that the district court did not abuse its discretion by allowing the evidence regarding the Massachusetts lawsuit, we need not consider whether Capacity has demonstrated that it was prejudiced by the district court’s ruling. *See* Minn. R. Civ. P. 61 (providing that harmless error in the admission or exclusion of evidence is not a basis for granting a new trial); *see also Jerry’s Enters., Inc. v. Larkin, Hoffman, Daly & Lindgren, Ltd.*, 691 N.W.2d 484, 494 (Minn. App. 2005) (stating that appellant must demonstrate prejudice resulting from district court’s evidentiary ruling to obtain relief), *aff’d as modified*, 711 N.W.2d 811 (Minn. 2006). Capacity, however, has not met its burden of demonstrating prejudice. The jury found for Capacity on the issues of breach of contract and breach of the implied covenant of good faith and fair dealing. Its damages award was consistent with evidence in the record regarding how much money the university made as a result of the breach, and consequently, what Capacity might have earned had the university respected its exclusive right to negotiate with the carriers.

instructions if the instructions “fairly and correctly state the applicable law.” *Russell v. Johnson*, 608 N.W.2d 895, 898 (Minn. App. 2000), *review denied* (Minn. June 27, 2000).

Here, the district court granted partial summary judgment on the issue of out-of-pocket expenses, removing that issue from trial. We concluded above that the district court did not err by granting partial summary judgment in that regard. Because the claim for out-of-pocket expenses was no longer at issue in the litigation, the district court’s instruction fairly and correctly stated the applicable law. We discern no abuse of discretion in the district court’s instructions.

In sum, the district court did not err by granting partial summary judgment because Capacity did not identify evidence establishing a genuine issue of material fact regarding whether it incurred out-of-pocket expenses. Consequently, the district court did not abuse its discretion by denying Capacity’s motion for a new trial due to alleged errors in evidentiary rulings and jury instructions.

Affirmed.