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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A08-0265**

Steven M. Hahn,  
Appellant,

vs.

Dwayne Meier,  
Respondent,

Carol J. Hahn,  
Respondent.

**Filed December 30, 2008  
Affirmed  
Kalitowski, Judge**

Hennepin County District Court  
File No. 27-CV-05-003167

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Considered and decided by Kalitowski, Presiding Judge; Halbrooks, Judge; and  
Harten, Judge.\*

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\* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to  
Minn. Const. art. VI, § 10.

## UNPUBLISHED OPINION

**KALITOWSKI**, Judge

In this property dispute between a mother and her son, appellant Steven M. Hahn argues that: (1) the district court's findings supporting its award of damages are clearly erroneous; (2) the district court erred in awarding attorney fees to respondent Carol J. Hahn; (3) the district court erred in failing to dismiss respondent Hahn's claims because her claims are barred by the doctrine of res judicata and by applicable statutes of limitation; (4) the district court exhibited improper bias against appellant requiring a new trial; and (5) the district court erred in granting summary judgment to respondent Dwayne Meier. We affirm.

### DECISION

#### I.

Appellant argues that a number of the district court's findings supporting its award of damages to respondent Carol J. Hahn (respondent) are clearly erroneous and warrant reversal. We disagree.

Findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the district court to judge the credibility of witnesses. Minn. R. Civ. P. 52.01. In applying Minn. R. Civ. P. 52.01 a reviewing court views the record in the light most favorable to the judgment of the district court. *Rogers v. Moore*, 603 N.W.2d 650, 656 (Minn. 1999). And if "there is reasonable evidence to support the district court's findings, we will not disturb them." *Id.* "Findings of fact are clearly erroneous only if the reviewing court is left with the definite and firm conviction that a mistake has been

made.” *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999) (quotation omitted). “The district court has broad discretion in determining damages and will not be reversed except for a clear abuse of discretion.” *West St. Paul Federation of Teachers v. Indep. Sch. Dist. No. 197*, 713 N.W.2d 366, 378 (Minn. App. 2006).

### **Breach of contract**

The district court found that appellant forged the document that purported to give appellant an option to purchase respondent’s property. This alleged option to purchase provided the basis for appellant’s breach of contract claim. Appellant contends that the district court’s finding is clearly erroneous. We disagree.

Appellant’s argument amounts to an attack on respondent’s testimony. But this court gives deference to the opportunity of the district court to assess the credibility of the witnesses. *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988). The district court found respondent’s testimony credible and considered compelling evidence supporting respondent’s testimony that she was in Arizona on the date on which the option to purchase was allegedly executed in Minnesota. The district court further found that appellant submitted falsified evidence in an attempt to demonstrate that respondent was in Minnesota. The district court concluded that appellant was not a credible witness.

We conclude that because overwhelming evidence supports the district court’s finding that appellant forged the option to purchase, that finding is not clearly erroneous. Therefore, the district court correctly decided that appellant failed to demonstrate that respondent breached any contract between appellant and respondent.

### **Damages for unpaid rents**

Appellant argues that the district court's award of damages to respondent for unpaid rents failed to account for a \$1,725.26 balance on a loan owed by respondent to appellant. We disagree. Evidence in the record shows that the loan balance was zero on October 1, 2003, which was the starting date for the district court's calculation of appellant's rent obligation. Thus, we conclude that the district court properly excluded the loan in its calculation.

Appellant also argues that the district court failed to explain in its November 20, 2006 order how it reached the amount of rent due for the month of October 2003. But the court's prior order from April 13, 2006, explains this figure. The April 13, 2006 order shows that in October 2003, appellant owed \$429 in rent and the loan balance was \$135.36. Subtracting these two figures yields the amount of rent due in October 2003. Because the record supports the district court's findings, we conclude that these findings are not clear error and we affirm the damage award of \$2,867.64 for unpaid rent.

### **Damages for capital gains consequences**

The district court awarded respondent \$7,000 in damages for capital gains tax-consequences suffered by respondent. Respondent claimed that as a direct result of appellant's actions, she was unable to sell her house within two years of moving from the property. Appellant argues that this finding is clearly erroneous. We conclude that the record supports the district court's findings on both the amount of damages and appellant's liability for causing the damages.

Appellant argues that the award cannot be upheld because respondent did not submit a copy of a tax statute nor did respondent explain how she arrived at the \$7,000 figure. But appellant provides no authority that this constitutes clear error. The district court accepted respondent's testimony that she paid \$7,000 in capital gains tax and this finding is not manifestly against the weight of the evidence. Therefore, we conclude that the district court did not abuse its discretion in awarding \$7,000 in damages to respondent for capital gains tax-consequences incurred because of appellant's actions.

### **Damages for slander of title**

Appellant argues that the district court's findings supporting an award of \$42,900 to respondent for slander of title are clearly erroneous. We disagree.

Appellant alleges that there is no evidentiary support for the district court's finding that appellant's actions caused a diminution of value in the property's sale price. We disagree.

The district court found that appellant knowingly recorded meritless mechanics' liens, obtained default judgments against respondent by submitting fraudulent documents, and improperly filed multiple notices of adverse claims against the property. The court also found that appellant attempted to intimidate potential purchasers of the property, purposefully damaged the property to prevent its sale, failed to comply with a court order requiring him to provide access to the property, removed light bulbs and hid light switches before showings of the property to potential buyers, and maintained the property in very poor condition. The record supports these findings. Consequently, we hold that

the district court's conclusion that appellant's actions caused a diminution in the value of the property was not clear error.

Appellant also argues that the district court erred in relying on a real estate agent's expert opinion to determine the amount of damage caused by appellant's slander of title. The agent testified that she was hired by respondent to sell respondent's property and she was actively engaged in the listing, marketing, and sale of the contested property. The agent testified that in her expert opinion, absent appellant's actions the property would have sold for approximately \$153,900 instead of the \$111,000 that Meier ultimately paid for the property.

Appellant argues that the low sale price of the home was the result of his below-market lease and that the agent failed to account for that lease. But appellant failed to offer a witness to rebut the agent's testimony. Appellant's argument that other offers for the property in amounts greater than that paid by Meier does not leave us with the definite and firm conviction that the district court made a mistake. The district court properly measured the damages caused by appellant's slander of title by comparing the amount that the property would have sold for absent appellant's actions with the actual sale price of the property. On this record, the district court's findings are supported by evidence and not clearly erroneous. Therefore, the district court did not clearly abuse its discretion in determining the amount of damages.

## **II.**

Appellant challenges the district court's award of \$113,418.08 in attorney fees to respondent.

Attorney fees may be awarded as special damages in a slander of title action. *Paidar v. Hughes*, 615 N.W.2d 276, 279 (Minn. 2000). The district court's determination of damages will not be reversed except for a clear abuse of discretion. *West St. Paul Federation of Teachers*, 713 N.W.2d at 378.

Here, respondent claimed attorney fees as special damages for purposes of her slander of title action against appellant. The district court heard testimony from respondent that she had incurred approximately \$70,000 in attorney fees as a result of appellant's slander of title. And in a posttrial affidavit, respondent's attorneys testified to an additional \$43,418.08 in fees. On this record, we conclude the district court did not abuse its discretion in awarding that amount of attorney fees.

Appellant argues that attorney fees are inappropriate because no slander of title occurred. We disagree. The elements of a slander of title claim are (1) a false statement concerning the ownership of real property; (2) publication of the false statement; (3) malice; and (4) special damages. *Brickner v. One Land Development Co.*, 742 N.W.2d 706, 711 (Minn. App. 2007), *review denied* (Minn. Mar. 18, 2008). Filing a document known to be inoperative constitutes a false statement. *Id.* And the element of malice requires a reckless disregard concerning the truth or falsity of a matter. *Id.* We conclude that the record supports the district court's conclusion that appellant slandered respondent's title.

Appellant disputes that all of the default judgments he obtained against respondent can be the basis for slander of title. But the district court found that two of appellant's default judgments against respondent were obtained through the use of fraudulent

affidavits. The district court also found that respondent went through great expense to have the judgments against her vacated. Consequently, two of the default judgments constitute knowing false statements made and published by appellant that resulted in damages to respondent and we reject appellant's contention that attorney fees are inappropriate.

Next, appellant argues that the two notices of adverse claims do not constitute slander of title. The district court found that each notice claimed an indebtedness of \$50,000 secured by the property and a leasehold interest. But at most, under the lease agreement, there was a single loan of \$50,000. Appellant testified that he recorded both notices of adverse claims because respondent's real estate agent refused to notify potential purchasers of the alleged option to purchase. Although recording one of these notices may have been permissible, recording both was not, because at most, there was a single loan. Thus, the second recorded notice constitutes a knowingly made and published false statement concerning title to the property. Moreover, even after respondent settled the indebtedness, appellant refused to remove the notices from the certificate of title. This further demonstrates appellant's malice in making the false statements. The record also shows that respondent was required to bring legal action to remove the notices from her title. Thus, respondent incurred damages as a result of appellant's slander of title.

Finally, appellant claims that the three mechanics' liens he filed against respondent's property cannot be the basis for slander of title. Appellant argues the first two were valid and that there is no evidence that the third was filed with malicious intent.



But the district court determined appellant's second lien was based on the same work as the first lien, and that the second lien was filed because the first lien expired. The second lien was a knowingly false statement concerning an interest in property.

Moreover, the record indicates that appellant filed the third lien after a conciliation court proceeding adjudicated the basis of the lien and denied appellant relief. The district court determined that appellant knowingly filed the third lien seeking recovery for items denied by the conciliation court. Appellant also refused to remove the mechanics' liens from the certificate of title. In a separate proceeding, these three liens were found invalid and without effect. Thus, the record supports the conclusion that appellant slandered respondent's title by knowingly filing false mechanics' liens.

### III.

Appellant argues that respondent's claims are barred by res judicata and by applicable statutes of limitation. We disagree. The Minnesota Rules of Civil Procedure provide that a party shall affirmatively plead the defenses of estoppel, res judicata and statute of limitations. Minn. R. Civ. P. 8.03. This court will generally not consider matters not argued to and considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

Failure to affirmatively plead res judicata is a waiver of the defense. *See Buetz v. A.O. Smith Harvestore Products, Inc.*, 431 N.W.2d 528, 532 n.3 (Minn. 1988) ("while res judicata is an affirmative defense which must be set forth affirmatively in the pleadings . . . it may be waived by failure to plead it if there is no later amendment of the pleadings."). Appellant failed to affirmatively plead res judicata and did not amend his

pleadings. Therefore, this defense is waived. We are not persuaded by appellant's argument that pleading the defense of estoppel includes pleading the defense of res judicata because estoppel and res judicata are separately listed affirmative defenses. *See* Minn. R. Civ. P. 8.03. Furthermore, the record indicates that appellant first raised res judicata in a posttrial motion to amend the district court's findings and conclusions of law. And an issue is raised too late when first raised in a motion for amended findings. *See Allen v. Central Motors, Inc.*, 204 Minn. 295, 298-99, 283 N.W. 490, 492 (1939) (rejecting implied warranty defense because it was first raised in a motion to amend findings).

Similarly, statute of limitations is an affirmative defense that must be raised in the pleadings to avoid waiver. *Bradley v. First Nat'l Bank of Walker, NA*, 711 N.W.2d 121, 128 (Minn. App. 2006). Appellant did not affirmatively plead the defense of statute of limitations in his reply to respondent's counter claim, nor did appellant argue it to the district court. Thus, appellant waived this defense and it is not properly before us on appeal.

#### IV.

Appellant argues that he is entitled to a new trial because the district court was biased against him, as evidenced by the court's findings, conclusions, order and judgment. We disagree.

To be disqualifying, bias or prejudice "must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from her participation in the case." *In re Welfare of D.L.*, 479 N.W.2d 408, 415 (Minn. App.

1991), *aff'd*, 486 N.W.2d 375 (Minn. 1992). “[A]dverse rulings are not a basis for imputing bias to a judge.” *Ag Servs. of Am., Inc. v. Schroeder*, 693 N.W.2d 227, 236-37 (Minn. App. 2005). A party’s failure to raise a claim of judicial bias during the trial makes the timeliness of the issue “questionable.” *Gummow v. Gummow*, 375 N.W.2d 30, 34 (Minn. App. 1985). Here, the laundry list of items that appellant contends constitute bias are simply findings and rulings adverse to appellant. We conclude this claim is meritless.

## V.

Appellant brought a claim against respondent Meier, the ultimate purchaser of the house, alleging that he had superior title to Meier by virtue of his option to purchase. Prior to the bench trial adjudicating the claims between appellant and appellant’s mother, the district court awarded Meier summary judgment on appellant’s quiet title claim. Appellant now argues that the district court erred because there is a genuine issue of material fact as to whether Meier knew of appellant’s option to purchase.

On appeal from summary judgment we ask two questions: (1) whether there are any genuine issues of material fact and (2) whether the district court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). Here, in the bench trial following the motion for summary judgment, the district court found that the option to purchase was forged, invalid, and unenforceable. As discussed above, this finding is not clear error. Consequently, the unenforceable option to purchase cannot provide a basis for appellant’s claims against Meier. Therefore, it is immaterial whether

Meier knew of the unenforceable agreement. We thus conclude that the district court did not err in granting summary judgment to Meier on appellant's quiet title claim.

**Affirmed.**