STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0531

Ricky Johnson, d/b/a Rick Johnson's Deer and Beaver, Inc.,
Respondent,

vs.

Anoka County,
Appellant.

Filed November 27, 2017
Affirmed
Rodenberg, Judge

Anoka County District Court
File No. 02-CV-15-2744

Scott A. Johnson, Todd M. Johnson, Johnson & Johnson Law, LLP, Minnetonka, Minnesota (for respondent)

Anthony C. Palumbo, Anoka County Attorney, Andrew T. Jackola, Assistant County Attorney, Jason J. Stover, Assistant County Attorney, Anoka, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Halbrooks, Judge; and Rodenberg, Judge.

U N P U B L I S H E D O P I N I O N

RODENBERG, Judge

Appellant Anoka County challenges the district court's partial summary judgment ruling that appellant breached the parties' contracts for the collection of deer carcasses on Anoka County highways. Appellant further challenges the district court's finding after trial to the court that respondent Ricky Johnson sustained over $420,000 in damages as a

result of appellant's breach. Because the district court did not err in granting respondent partial summary judgment on liability, and its findings regarding damages are supported by the record, we affirm.

FACTS

Respondent sued appellant Anoka County for breach of contract. The parties had a series of three written contracts from 1999 through 2015. Under the contracts, respondent provided services to remove deer and beaver carcasses from Anoka County highways. The first contract covered the term of March 1, 1999 through February 29, 2000. It contained an option to renew for four additional one-year terms, and was extended through 2004 by the parties' agreement.

The language of the first contract stated that respondent would provide services for the "pick-up and disposal of all deer carcasses located on or near Anoka County highways." In late 2004, appellant re-bid the contract for an initial term of January 1, 2005 to December 31, 2006. Respondent was awarded the second contract, which contained option years to extend its term through 2010. Respondent performed under this second contract until appellant re-bid the contract for a third time, for an initial term of April 1, 2011 through December 31, 2012, with options to extend through 2015. Respondent was awarded the third contract and performed carcass-removal services through December 2015. The second and third contracts included the provision that respondent would pick up and be paid for "all" deer carcasses on Anoka County highways.

The three contracts provided that respondent would be paid a monthly "flat rate" for removal of the first ten deer carcasses, plus a fixed-dollar amount for each beaver carcass

he collected, and a second fixed-dollar amount for each deer carcass beyond the first ten he collected per month. Respondent was responsible for all of his equipment, insurance, cell phone, motor vehicle, winch, and fuel costs under the contracts. After respondent collected a deer carcass, he transported it to a wildlife center where the carcasses were used to feed the center's wolves.

In 2003, appellant began using jail inmates to remove and dispose of some of the deer carcasses. It did not notify respondent that it was doing so. The inmates eventually started taking the carcasses to the same wildlife center that respondent had been using for deer carcass disposal. Appellant continued to use the services of the inmates until 2015. It is appellant's use of inmates to remove and dispose of some of the deer carcasses that is the subject of respondent's breach-of-contract claim. Respondent lost revenue by appellant not allowing him to collect and be paid for removal of "all the deer carcasses" in Anoka County. The record contains no evidence of any agreement to modify the parties' contracts, each of which contained a clause requiring that any modification be made in writing.

The parties agree that respondent became aware of appellant's use of inmates to pick up some of the deer carcasses years before this action was commenced. The parties also agree that respondent complained to appellant's employees regarding the use of inmates. One of appellant's employees assured respondent that the use of inmate labor would stop. Respondent contacted an attorney to consider taking action against appellant for its continuing breach before he bid on the third contract, but he did not then sue appellant.

Respondent eventually sued appellant on May 1, 2015, claiming that appellant breached its contracts with respondent by not permitting him to collect "all" deer carcasses on Anoka County highways. The parties made cross-motions for summary judgment. Respondent moved for partial summary judgment against appellant on the issue of liability for breach of contract. Appellant moved for summary judgment dismissing all claims against it, arguing that it did not breach the contracts because the parties intended the word "all" in the contracts to mean something other than "all." In the alternative, appellant argued that respondent waived his claimed exclusive right to remove deer carcasses under the contracts, because he continued to perform under the contracts despite knowledge that appellant was using the inmates. Appellant also argued that respondent waived his claimed exclusive right under the contract by re-bidding on the second and third contracts without bringing suit for the claimed breach.

The district court granted respondent's motion for partial summary judgment on the issue of liability for breach of contract. It denied appellant's summary judgment motion. It found the contracts between the parties to be unambiguous and that respondent was entitled to collect "all" deer carcasses under the contracts. The district court also rejected appellant's argument that respondent waived his rights under the contracts, finding no evidence in the record creating a genuine issue of material fact that respondent intentionally waived his rights.

The issue of appellant's liability for breach of contract being resolved, the parties proceeded to trial on damages. Appellant moved pretrial for a jury instruction on the issue of mitigation of damages. The district court denied this motion, reasoning that appellant

had not presented enough evidence to warrant the requested instruction. Respondent also moved pretrial to exclude a defense witness from testifying because the witness was not properly disclosed during discovery. The witness had only been identified by appellant in response to one of two relevant interrogatories from respondent. The district court granted this motion. After these pretrial rulings, appellant waived its right to a jury trial, and the damage issues were tried to the court.

At trial, appellant attempted to provide rebuttal evidence to respondent's testimony that the deer population had been consistently increasing over time, through a Minnesota Department of Natural Resources report indicating that the number of deer harvested through hunting had decreased during the years 2009 to 2014. The district court did not find the evidence to be relevant and declined to admit it. At the close of respondent's case-in-chief, appellant moved for dismissal under rule 41.02(b), arguing that respondent had not proven his damages with a reasonable degree of certainty that would allow the court to calculate his damages. Minn. R. Civ. P. 41.02(b). The district court denied the motion.

Appellant argued that respondent's damages should be limited to $71,500. Appellant based this calculation on deer-collection numbers kept by the inmates who collected some of the deer carcasses. The district court did not find these paper records to be credible. The district court found that respondent's resulting revenue loss was pure profit. It found that appellant's arguments regarding any damage-offset amounts would require speculation and therefore made no offset. The district court computed respondent's damages based on his past earnings and testimony regarding the number of deer carcasses provided to the wildlife center. Crediting respondent's testimony, and giving less weight

to the evidence offered by appellant, the district court found that respondent had $420,418 in lost profits from 2009 to 2015. Recoverable damages were limited to that time period by the statute of limitations.

Appellant made no motion for a new trial or for amended findings following the trial. This appeal followed.

D E C I S I O N

The statute of limitations confines damages to the six-year period before this action was initiated.

Respondent acknowledges his recovery is limited by the statute of limitations to the six years preceding his commencement of this action. Minn. Stat. §541.05, subd. 1 (2014). In context, he is entitled to his provable damages during the six years prior to May 1, 2015, the date that the complaint was served on appellant, and up to December 31, 2015, the date the third contract ended.

Despite appellant's initial identification of nine issues in its statement of the case, we address five issues on appeal.

Appellant identified nine issues in its statement of the case. We address five of these issues here. Following a special term order requesting briefing on the jurisdictional basis for a number of the issues, appellant voluntarily abandoned the issues of whether the district court erred by precluding a defense witness from testifying because it failed to adequately disclose the witness to respondent and whether the district court erred by excluding appellant's rebuttal evidence regarding the growing deer population at trial.

We now determine that two other issues identified by appellant are not properly before us. First, appellant argues that the district court erred by prohibiting appellant from

presenting a mitigation-of-damages defense at trial by denying its motion in limine for a mitigation-of-damages jury instruction. "[T]he general rule [is] that matters such as trial procedure, evidentiary rulings and jury instructions are subject to appellate review only if there has been a motion for a new trial in which such matters have been assigned as error." *Sauter v. Wasemiller*, 389 N.W.2d 200, 201 (Minn. 1986). However, substantive questions of law may be decided on appeal without an earlier motion for new trial. *Alpha Real Estate v. Delta Dental Plan of Minn.*, 664 N.W.2d 303, 310 (Minn. 2003). On appeal, we review a district court's jury instructions for abuse of discretion, and will afford relief on appeal "if the jury instruction was erroneous and such error was prejudicial to respondent, or if the instruction was erroneous and its effect cannot be determined." *Daly v. McFarland*, 812 N.W.2d 113, 122 (Minn. 2012) (quotations omitted). Appellant waived its jury-trial right after the district court ruled on appellant's jury-instruction request. After trial to the court, appellant did not move for a new trial. Whether the district court abused its discretion when it declined to give the mitigation-of-damages jury instruction is not properly before us. Because there was no jury trial, the district court's denial of the requested instruction cannot have been prejudicial as there was no jury to instruct.

Second, appellant challenges the district court's denial of its motion to dismiss at the close of respondent's case-in-chief under Minn. R. Civ. P. 41.02(b). The rule permits a defendant to move for dismissal "on the ground that upon the facts and the law, the plaintiff has shown no right to relief." Minn. R. Civ. P. 41.02(b). In a bench trial, the district court judge "may then determine the facts and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence." *Id*. Matters of

trial procedure, evidentiary rulings, and jury instructions are not reviewable on appeal unless a motion for a new trial is made at the end of the trial. *Sauter*, 389 N.W.2d at 201. Appellant has appealed the district court's partial summary judgment for respondent on liability and the district court's damage award. The issues raised by the rule 41 motion are subsumed in the other issues raised.

Accordingly, we address the following issues on appeal (which together encompass the remaining five issues identified in appellant's opening brief): (1) whether the district court erred by denying appellant's motion for summary judgment and granting respondent's motion for partial summary judgment on the issue of liability and (2) whether the district court's findings of fact regarding respondent's damages are adequately supported by the record.

The district court properly granted respondent's motion for partial summary judgment and denied appellant's motion for summary judgment.

Appellant first contends that (1) partial summary judgment should not have been granted for respondent because appellant's defenses of waiver and modification by conduct created factual questions for trial and (2) its own motion for summary judgment should have been granted because respondent waived his right to exclusivity under the contract as a matter of law, or in the alternative that the parties modified the contract by their conduct.

"A motion for summary judgment shall be granted when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to a judgment as a matter of law." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). A reviewing court views "the evidence in the light most favorable to the party against whom judgment

was granted." *Id.* We conduct this review *de novo*. *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010). No genuine issue for trial exists "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997) (alteration in original) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356 (1986)).

The district court's grant of respondent's motion for partial summary judgment on the issue of appellant's liability for breach of contract is supported by the record. First, the contracts between the parties are not ambiguous concerning the duties of the parties. All three contracts, drafted by appellant, provided that respondent was entitled to pick up "all" deer carcasses along Anoka County highways. When we interpret a contract, we must "determine if the language is clear and unambiguous, meaning it only has one reasonable interpretation. If so, we give effect to the language of the [agreement]." *Seagate Tech., LLC v. W. Dig. Corp.*, 854 N.W.2d 750, 761 (Minn. 2014) (quotation omitted). Here, the word "all" is not ambiguous. We apply its plain meaning. Doing so, appellant was entitled to collect all of the deer carcasses on Anoka County highways during the term of the contracts, and appellant was obligated to pay him accordingly. Nothing could be clearer. Appellant breached the contract terms by using inmates to pick up some of the carcasses.

Appellant argues that summary judgment on liability for respondent was inappropriate because, even if the contracts are unambiguous, there was a genuine dispute of fact regarding whether respondent waived his right to remove "all" of the deer carcasses. "Waiver is the voluntary and intentional relinquishment of a known right." *Ill. Farmers*

Ins. Co. v. Glass Serv. Co., 683 N.W.2d 792, 798 (Minn. 2004). Generally, it is a question of fact and "is rarely to be inferred as a matter of law." *Valspar Refinish, Inc. v. Gaylord's, Inc.*, 764 N.W.2d 359, 367 (Minn. 2009) (quotation omitted). "Knowledge and intent are essential elements of waiver . . . [b]ut the requisite knowledge may be actual or constructive and the intent to waive may be inferred from conduct." *Id.* (quotation and citation omitted). "The intent to waive, which involves an operation of the mind, must be clearly established as a fact." *Local 1142 v. United Elec., Radio & Mach. Workers*, 247 Minn. 71, 77, 76 N.W.2d 481, 484 (1956). A party resisting summary judgment based on a waiver defense must "present specific facts showing that there is a genuine issue of waiver for trial." *Valspar*, 764 N.W.2d at 368. And, waiver must arise from "voluntary choice" and "not mere negligence." *City of Minneapolis v. Minneapolis Police Relief Ass'n*, 800 N.W.2d 165, 178 (Minn. App. 2011) (quoting *In re Commitment of Giem*, 742 N.W.2d 422, 432 (Minn. 2007)).

Here, by the accounts of both parties, respondent complained to appellant multiple times regarding appellant's breach of the contract terms. At one point, he consulted an attorney concerning appellant's breach. Appellant presented no evidence contrary to respondent's testimony that he complained about appellant's actions. No evidence in the record would allow us to infer that appellant intentionally waived his right to collect all deer carcasses on Anoka County highways. To the contrary, the evidence definitively establishes that respondent continued to complain to appellant regarding appellant's noncompliance with the contracts.

Appellant argues that the district court's findings regarding respondent's repeated objections to appellant's breach "lacked specificity or support." But the state of the record is that respondent testified regarding his objections and appellant offered no countervailing evidence of any voluntary and intentional statements or conduct amounting to waiver. Because the record contains no evidence that respondent intentionally waived his rights to collect all deer carcasses under the contracts, the district court did not err by granting respondent's motion for partial summary judgment on liability. There was no genuine fact issue to try.

Appellant makes a second, similar argument concerning the district court's grant of partial summary judgment in favor of respondent: that there was a genuine dispute of fact whether the parties modified the terms of the contracts by their conduct. "It is well settled that the conduct of contracting parties may be evidence of a subsequent modification of their contract." *Yaritz v. Dahl*, 367 N.W.2d 616, 618 (Minn. App. 1985) (citing *Wolpert v. Foster*, 312 Minn. 526, 532, 254 N.W.2d 348, 352 (1977)). "Whether a pre-existing agreement has been modified depends on the parties' objective manifestations, not their subjective understanding." *Beer Wholesalers, Inc. v. Miller Brewing Co.*, 426 N.W.2d 438, 440 (Minn. App. 1988), *review denied* (Minn. Aug. 24, 1988). The general prohibition against parol evidence does not apply when evidence is used "to explain the parties' conduct subsequent to the written agreement." *Flynn v. Sawyer*, 272 N.W.2d 904, 908 (Minn. 1978).

In *Alexander v. Holmberg*, we found that a lease agreement was modified by the parties' conduct subsequent to the agreement. 410 N.W.2d 900, 901 (Minn. App. 1987).

There, evidence was provided to the district court that the lessor "agreed to accept payments for lesser amounts, and did so for much of the lease." *Id.* We held that the lessor's testimony and receipts indicating the regular payment of the lesser amounts were sufficient to create a genuine issue of material fact as to whether the lease had been modified by the parties. *Id.*

Here, in contrast, no record evidence indicates conduct demonstrating respondent's agreement to any modification of the contracts between the parties. Instead, he repeatedly objected to appellant's disregard of the terms of the parties' contracts.

Appellant started using inmates to pick up dead deer in 2003. A second contract containing the same exclusivity and modification language was drafted *by appellant* for 2005. And a third contract, again drafted by appellant, contained the same language for the period starting in 2011. Had the parties intended to modify their contractual agreement after the inmates were first used to collect deer carcasses, appellant would doubtless have changed the language of the second and third contracts when it drafted them. Tellingly, it made no such change, and continued to include in each written contract not only the exclusivity language, but also the provision that modifications of the agreement must be made in writing. Although the district court did not make an explicit finding on this issue when it granted respondent's partial summary judgment motion, no record evidence supports appellant's modification-by-conduct defense sufficient to present a factual dispute for trial. The district court did not err in granting partial summary judgment in favor of respondent.

Appellant's further argument that the district court should have granted its summary judgment motion relies on the same argument that respondent waived its contractual rights as a matter of law and that the parties modified the contracts through their conduct. Appellant's waiver-as-a-matter-of-law argument fails for the same reasons discussed above. Waiver is generally a question of fact that should "rarely" be inferred by a court as a matter of law. *Valspar*, 764 N.W.2d at 367. Appellant produced no evidence regarding the element of intent in support of its waiver defense. The record evidence fails to even support an inference that the parties modified the contract through their conduct, as discussed above. Because the evidence in the record admits of no conclusion other than that respondent did not intentionally waive his rights to remove all of the deer carcasses on Anoka County highways under the contract or agree to the modification of the contract by his conduct, the district court did not err by denying appellant's motion for summary judgment.[1]

[1] Appellant also argues that the election-of-remedies doctrine requires a plaintiff to decide whether to affirm and enforce a breached contract, or to disaffirm and rescind a breached contract, citing to our decision in *Loppe v. Steiner*, 699 N.W.2d 342, 349 (Minn. App. 2005). That case is not applicable here. There, we considered whether the election-of-remedies doctrine requires a plaintiff to choose a specific remedy to argue to the fact-finder, an issue not raised here. *Id.* In *Loppe*, we held that "[a]s applied to contracts, the principle of election of remedies requires a plaintiff to choose whether to affirm or disaffirm a contract." *Id.* (citing *Blythe v. Kujawa*, 177 Minn. 79, 82, 224 N.W. 464, 465 (1929)). There, we stated that in a contract-for-deed dispute, the plaintiff-vendee could not seek the remedy of specific performance under a contract while simultaneously demanding to rescind the contract. *Blythe*, 177 Minn. at 82, 224 N.W.2d at 465. Appellant claims that because respondent neither affirmed nor disaffirmed the contract, and instead "sat on his rights for over twelve years," his claim is no longer valid. However, the election-of-remedies doctrine does not give the breaching party the right to decide when its breach is no longer actionable. Appellant's argument is unsupported by Minnesota law.

The record supports the district court's damages findings.

Appellant argues that the district court's damage findings are not supported by the record and that the district court erred in its damages calculation by failing to offset respondent's damages by the amounts that appellant argues he saved on account of its breach. Because appellant made no motion for either a new trial or for amended findings, "our review is limited to determining whether the evidence sustains the findings of fact, and whether the findings sustain the conclusions of law and the judgment." *U.S. Bank N.A. v. Cold Spring Granite Co.*, 802 N.W.2d 363, 370 (Minn. 2011). We review a district court's findings of fact using the "clearly erroneous" standard. *Id.* A finding is clearly erroneous if we are "left with the definite and firm conviction that a mistake has been made." *Rasmussen v. Two Harbors Fish Co.*, 832 N.W.2d 790, 797 (Minn. 2013) (quotation omitted). Generally, a plaintiff has the burden of proving the existence of damages "to a reasonable certainty" and the amount of these damages to a "reasonable probability." *Jacobs v. Rosemount Dodge-Winnebago S.*, 310 N.W.2d 71, 78 (Minn. 1981). While damages may not be "speculative, remote, or conjectural, . . . mathematical precision in proof of loss" is not necessary. *Duchene v. Wolstan*, 258 N.W.2d 601, 606 (Minn. 1977) (citation omitted). "[P]roof to a reasonable, although not necessarily absolute, certainty" is what the law requires. *Id.* (quotation omitted).

After a three-day trial on the issue of damages, the district court made the following findings relevant to its damages calculation: First, that appellant admitted it used jail inmates to collect deer carcasses from 2003 to 2015. Second, that each of these carcasses was "a source of revenue and profits" for which respondent was entitled to be paid pursuant

to his contract to pick up and be paid for "all" of the Anoka County deer carcasses. Third, the district court declined to reduce or offset respondent's damages. It found that the revenue lost by appellant's breach of the parties' agreements would have been "pure profit" because respondent had essentially all of the same expenses each year regardless of the reduction in the number of carcasses he picked up. The district court concluded that offsetting or reducing respondent's damages as appellant requested would require it to speculate. Fourth, the district court found that there was an increase in the deer population from 2003 to 2014. Fifth, it found that, in each year, the Carlos Avery Wildlife Center fed its wolves at least 1,400 deer carcasses from Anoka County; the wildlife center was respondent's sole drop-off point for deer carcasses. These factual findings are all supported by the record.

The district court made detailed calculations of respondent's recoverable damages, all of which are supported by the record. For each year, it calculated what respondent's yearly income should have been under the contract, based on the amount respondent earned for each deer carcass, multiplied by 1,400 (the number of Anoka County deer carcasses delivered annually to the wildlife center). From this subtotal, the district court subtracted the amount appellant paid respondent to determine respondent's net lost profits for each year. Adding up the amount of lost profits so computed for each year, the district court concluded that respondent lost profits of $420,418 as a result of appellant's breach of the parties' contract. These findings and the conclusion are supported by the record.

Because its factual findings are supported by the record, the district court did not clearly err. Because appellant failed to move for a new trial or for amended findings, our

review is limited to determining if the record supports the district court's findings of fact, and whether its conclusions of law and the judgment are supported by these findings. The district court's findings support its conclusions of law and its final determination of respondent's recoverable damages.

The district court did not err by granting respondent's motion for partial summary judgment on the issue of liability for breach of contract and its findings regarding damages are adequately supported by the record.

Affirmed.