STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1602
A19-0006

AllenMax Construction, LLC, et al.,
Respondents,

vs.

The Wright Group, LLC, a Colorado limited liability company, et al.,
Appellants.

Filed September 23, 2019
Affirmed in part, reversed in part, and remanded
Smith, Tracy M., Judge

St. Louis County District Court
File No. 69DU-CV-16-2126

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Considered and decided by Reyes, Presiding Judge; Smith, Tracy M., Judge; and Florey, Judge.

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

SMITH, TRACY M., Judge

In these consolidated appeals, appellants, a property owner and its general contractor, assert entitlement to judgment as a matter of law or a new trial in their

commercial dispute with respondents, two subcontractors. We affirm in part, reverse in part, and remand.

FACTS

Appellant Morex Properties LLC hired appellant The Wright Group LLC as a general contractor to build a hotel on Morex's property in Duluth. Wright, in turn, hired respondent AllenMax Commercial to serve as project manager of the construction. Wright hired another entity, respondent AllenMax Construction, to provide framing services.

Original contracts and payments

Wright's contract with AllenMax Commercial was signed in June 2014. Under the contract, AllenMax Commercial was to be paid a total of $200,000 for project management. The contract price was to be paid on a percent-complete basis. AllenMax Commercial had to submit payment applications for the work it performed, and the applications had to be approved by Wright before payment occurred. AllenMax Commercial submitted monthly payment applications. For each month's work, AllenMax Commercial earned $18,000 but requested $16,200, taking into account a ten-percent "retainage" or "retention," which, pursuant to the contract, was to be withheld temporarily for future exigencies. It is undisputed that AllenMax Commercial submitted payment applications for eight months' work, from June 2014 to January 2015, and was paid $129,600 in total.

Wright's contract with AllenMax Construction was signed in September 2014. Under the contract, AllenMax Construction was to be paid a total of $400,000 for framing services. AllenMax Construction was compensated for its work in a similar manner to

AllenMax Commercial. AllenMax Construction submitted a payment application to Wright for each month's work: $111,600 for September; $102,600 for October; $123,377 for November; $27,000 for December; and $27,245 for January. The amounts all reflected the ten-percent retainage, and it is undisputed that all but the January application—$364,577 in total—were approved and paid.

Change orders terminating contracts

In January 2015, before completion of the project, Wright and the AllenMax entities agreed to terminate their contracts, apparently because key employees at the AllenMax entities were leaving. The parties entered into "change orders" to terminate the contracts. The AllenMax Commercial change order, signed on January 30, 2015, reduced the contract price from $200,000 to $162,000 to account for the early termination. The AllenMax Construction change order, signed on February 4, 2015, accounted for the early termination by deducting $15,000 from the original contract price of $400,000. But there had been previous charge orders that increased the price of the contract. The final change order included other deductions and additions resulting in a final contract price of $433,094. Both change orders contained the following statement:

> This change is to incorporate all extra work that is known or should have been known through Change Order Date above.
>
> Signing below will terminate your contract with The Wright Group, LLC effective immediately. All outstanding work will be deducted from your remaining contract and retention held until all outstanding issues are resolved, final lien waivers are received from all subcontractor/suppliers and verification of all union dues paid.

Following the change orders, AllenMax Commercial and AllenMax Construction ceased work on the project. Neither was paid more than the amounts noted above—$129,600 and $364,577, respectively.

RMS's mechanic's lien

In March 2015, Morex, the developer, learned that a mechanic's lien had been filed against its hotel by Road Machinery and Supplies (RMS). The lien amount was about $42,000. RMS was the company from which AllenMax Construction had rented a crane when AllenMax Construction was working on the project. The crane-rental expenses were included in AllenMax Construction's contract price, and RMS sent its bills to AllenMax Construction. AllenMax Construction and Morex communicated about the payment owed to RMS, and the parties disputed whether Morex had already paid AllenMax Construction for RMS's services under previous payment applications. In late 2015, RMS brought a mechanic's lien action against AllenMax Construction, Morex, and others. AllenMax Construction settled with RMS, paying RMS $57,154.57. Morex did not contribute to the settlement award.

The lawsuit

In May 2016, the AllenMax entities sued Wright for breach of contract, principally seeking to recover the unpaid portions of the contract prices under the change orders.

Wright asserted three counterclaims against the AllenMax entities: breach of contract, negligent construction, and civil theft. Wright's first two counterclaims related to alleged shortcomings in AllenMax Construction's performance of its contractual duties and construction services. Wright's civil-theft counterclaim was to recover costs it incurred

from being entangled in RMS's mechanic's lien action. By stipulation, Morex was then joined as a defendant and asserted the same counterclaims against the AllenMax entities as did Wright.

The AllenMax entities then amended their complaint to add a claim of unjust enrichment against Morex.

In October 2017, the district court granted the AllenMax entities' motion to exclude appellants' evidence of construction defects as a sanction for Morex and Wright's spoliation of evidence. Based on that evidentiary ruling, the district court granted partial summary judgment in favor of the AllenMax entities on (1) appellants' counterclaim for negligent construction and (2) appellants' counterclaim for breach of contract to the extent it was based on defective construction.

On February 15, 2018, several weeks before trial, the AllenMax entities filed nine motions in limine. They sought to exclude, based on relevancy under Minn. R. Evid. 401, 402, and 403, the following:

> 1. . . . [A]ll evidence related to alleged defects regardless of its intended purpose;
> 2. . . . [A]ll evidence related to Defendants' claims that they paid Plaintiffs a [*sic*] for a higher % of work than Plaintiffs allegedly completed;
> 3. . . . [A]ll evidence and argument of Defendant Wright's damages;
> 4. . . . Defendant Morex is precluded from arguing that it has a right to recover under the AllenMax Contracts with Defendant Wright;
> 5. . . . [A]ll evidence pertaining to any amounts Defendants allegedly paid to finish the Project;
> 6. . . . [A]ll expert testimony on lost income or any other topic requiring an expert opinion;

> 7. . . . [A]ll evidence and argument pertaining to consequential damages, including lost income;
>
> 8. . . . [A]ll evidence and argument that AllenMax Construction committed civil theft by representing that RMS was going to receive a net of $70,721 in payments in the Subcontractor Requests for Payments or by submitting change orders;
>
> 9. . . . [A]ll evidence regarding Defendants' civil theft damages . . . .

Wright and Morex did not respond to the motions in writing but did orally contest the motions at a pretrial hearing in February 2018. The district court granted all of the motions in limine except for the fifth, seventh, and ninth, on which it reserved ruling.

On March 6, the first day of trial, the AllenMax entities moved for judgment as a matter of law (JMOL). They sought JMOL in their favor on appellants' counterclaims for breach of contract and civil theft. AllenMax Commercial also sought JMOL in its favor on its breach-of-contract claim against Wright. After hearing arguments, the district court granted the respondents' motion for JMOL in its entirety. Specifically, the district court granted JMOL in favor of the AllenMax entities on Wright's and Morex's counterclaims for breach of contract and civil theft, and it granted JMOL in favor of AllenMax Commercial on its breach-of-contract claim against Wright, awarding AllenMax Commercial $32,700 in damages. Thereafter, the claims remaining for trial were (1) AllenMax Construction's breach-of-contract claim against Wright and (2) AllenMax Construction's unjust-enrichment claim against Morex.

Following a trial on those two claims, the jury found in favor of AllenMax Construction on both, awarding AllenMax Construction $68,517.53 against Wright for breach of contract and $21,067.79 against Morex for unjust enrichment. Appellants

brought post-trial motions for JMOL and/or a new trial. The district court denied the motions.

Wright and Morex appeal.

D E C I S I O N

I. The district court did not abuse its discretion by granting respondents' motions in limine.

Appellants challenge the district court's decisions granting the AllenMax entities' motions in limine. "The admission of evidence rests within the broad discretion of the [district] court and its ruling will not be disturbed unless it is based on an erroneous view of the law or constitutes an abuse of discretion." *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 45-46 (Minn. 1997) (quotation omitted). "In the absence of some indication that the [district] court exercised its discretion arbitrarily, capriciously, or contrary to legal usage, the appellate court is bound by the result." *Id.* at 46.

A. The district court did not err by considering the motions in limine.

First, appellants argue that the district court erred by even considering the AllenMax entities' motions in limine because the motions as a whole functioned as a motion for summary judgment. Appellants rely on *Hebrink v. Farm Bureau Life Ins. Co.*, 664 N.W.2d 414, 418-20 (Minn. App. 2003). In *Hebrink*, a policyholder brought a breach-of-contract claim against his disability insurer after being denied coverage for an injury. 664 N.W.2d at 417. The breach-of-contract claim depended on whether the policyholder had been "totally disabled." *Id.* "Total disability" meant that a policyholder had been under the care of a physician for at least 90 days. *Id.* But the fact of "total disability" was not at the

forefront of the dispute—the answer filed by the insurer "did not assert that appellant failed to establish he was 'totally disabled.'" *Id.* A week before the trial began, the insurer filed a motion in limine requesting that the district court "bar[] the plaintiff from submitting any testimony relating to 'total disability' . . . *because it is undisputed that plaintiff was not under the care of [a] physician [for] more than 90 days*[.]" *Id.* at 417-18 (alterations in original). The district court granted the motion in limine and ultimately granted, sua sponte, summary judgment in favor of the insurer. *Id.* at 417. This court reversed and remanded based partly on the following reasoning: "Because [the insurer's] motion in limine functioned as a motion for summary judgment, compliance with [procedural rules for summary judgment motions] was required." *Id.* at 419. The insurer's motion in limine did not follow the procedural rules for summary judgment motions. *Id.*

Appellants argue that, as in *Hebrink*, respondents' motions in limine as a whole were the functional equivalent of a motion for summary judgment. This argument is unconvincing. In *Hebrink*, this court, in determining that the motion in limine "was tantamount to a motion for summary judgment," looked to the purpose of a motion in limine. *Id.* at 418. "The purpose of a motion in limine is to prevent 'injection into trial of matters which are irrelevant, inadmissible and prejudicial.'" *Id.* (quoting *Black's Law Dictionary* 1013 (6th ed. 1991)). The motion in limine in *Hebrink* did not serve this purpose because

> there [was] no reference in . . . the motion . . . or the memorandum in support of the motion to any rules of evidence or other authority that would make the evidence regarding "total disability" inadmissible. Nor did [the insurer] argue that the evidence would be irrelevant or prejudicial. Instead, the gist

> of [the insurer's] motion was that the evidence regarding "total disability" should be excluded because appellant could not prove that he met the policy condition by relying on evidence then in the record.

Id. In other words, in *Hebrink*, this court focused on the lack of invocation of the evidentiary rules in the motion in limine, rather than the effect that the motion happens to achieve.[1]

Appellants do not dispute that the AllenMax entities' motions in limine all referred to relevant evidentiary rules. Thus, at least on the face of the motions, *Hebrink* does not apply. Appellants' citation to *Hebrink*, standing by itself, cannot show that all of the motions in limine were disguised motions for summary judgment and that the district court erred by considering them.

B. Granting the fourth motion in limine was not reversible error.

But appellants present specific arguments why one of the motions in limine—the fourth—was actually a motion for summary judgment. The fourth motion in limine sought exclusion of evidence regarding Morex's rights under the contracts between Wright and the AllenMax entities on the ground that Morex was not a party to the contracts between Wright and the AllenMax entities. That motion did not explicitly argue that the evidence would be prejudicial or irrelevant; instead, it argued that the evidence must be excluded

[1] As respondents note, two unpublished opinions of this court strongly affirm this proposition. *See Heng v. Heng*, No. A12-1322, 2013 WL 1395589, at *4 (Minn. App. Apr. 8, 2013) ("That the effect of the district court's order granting the motion was to eliminate son's cause of action does not convert the motion in limine into a summary judgment motion."), *review denied* (Minn. July 16, 2013); *Legacy Rest., Inc. v. Minn. Nights, Inc.*, No. A11-1730, 2012 WL 3023397, at *5-6 (Minn. App. July 23, 2012) ("But, in *Hebrink*, this court focused on the *nature* of the motion, not the *effect*.").

because Morex's breach-of-contract claim failed as a matter of law. Thus, the gist of the argument made by the motion was that the AllenMax entities were entitled to summary judgment on Morex's counterclaim and that evidence related to that claim was therefore subject to exclusion on the grounds that it was irrelevant. In order to decide the evidentiary issue the motion presented, the district court first had to decide whether the AllenMax entities were entitled to summary judgment on Morex's breach-of-contract claim. Under *Hebrink*, the district court should not have considered this motion. 664 N.W.2d at 419.

However, *Hebrink* also recognized that a district court's improper consideration of a motion in limine that is, functionally, a motion for summary judgment, does not require automatic reversal. *Id.* Because district courts may grant summary judgment sua sponte, a functional grant of summary judgment on a motion in limine is not reversible error when sua sponte summary judgment would be appropriate. *Id.* A district court may "grant summary judgment, sua sponte, when (a) no genuine issues of material fact remain, (b) one of the parties deserves judgment as a matter of law, and (c) the absence of a formal motion creates no prejudice to the party against whom summary judgment is granted." *Id.* The nonmoving party also must have "a meaningful opportunity to oppose" summary judgment. *Id.*

The first issue is whether there were any genuine issues of material fact. *Id.* There is no dispute that Morex was not a party to the contract. Thus, Morex could only bring a breach-of-contract claim if it was an intended beneficiary of the contract. *Hickman v. SAFECO Ins. Co. of Am.*, 695 N.W.2d 365, 369 (Minn. 2005) ("Generally, a stranger to a contract does not have rights under the contract, but an exception exists if a third party is

an intended beneficiary of the contract."). On the first day of trial, Morex objected to the district court's order granting the fourth motion in limine, arguing that Morex was a third-party beneficiary of the contract. The district court rejected that argument because Morex had not previously asserted the theory that it was an intended third-party beneficiary. The district court likened Morex's argument to amendment of pleadings and stated that "it's too late" for Morex to advance a new theory of relief.

Morex argues that it asserted from the outset that it was an intended third-party beneficiary. Morex points, first, to the parties' stipulation to join Morex as a defendant; in it, the parties agreed "that in the interest of judicial economy and efficiency Morex . . . should be joined as a party to this case so that its claims for damages may be litigated and resolved in this case." Morex points, next, to a statement contained in its answer to the complaint: "Morex . . . was a beneficiary of the contracts between [the AllenMax entities] and . . . Wright."

But the facts that Morex asserted claims for damages against the AllenMax entities and that Morex would benefit from the AllenMax entities' contracts do not necessarily give Morex any rights under the contract. To assert a contractual right to the AllenMax entities' performance without signing contracts with them, Morex must be an "intended beneficiary" of the AllenMax entities' contracts. *Hickman* 695 N.W.2d at 369.

> Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either
>
> (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary . . . ; or

> (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance
> . . . .

Id. (quoting Restatement (Second) of Contracts § 302 (1979)).

Morex tries to lay claim to the AllenMax entities' promises under their contracts; the "promisee" of those promises was Wright. Because the AllenMax entities' performance of their promises had nothing to do with satisfying "an obligation of [Wright] to pay money to [Morex]," provision (a) of the Restatement (Second) of Contracts § 302 does not apply. Restatement (Second) of Contracts § 302. Therefore, the only material issues were whether making Morex an intended third-party beneficiary was "appropriate to effectuate the intention of the parties" and whether "the circumstances indicate that [Wright] intend[ed] to give [Morex] the benefit of [the AllenMax entities'] performance," satisfying provision (b). *Id.* But Morex did not bring forth these issues at the district court. As a result, there was no genuine factual dispute that Morex had no rights under the contract between Wright and the AllenMax entities.

The second issue is whether the AllenMax entities were entitled to judgment as a matter of law. *Hebrink*, 664 N.W.2d at 419. Because there was no genuine factual dispute that Morex lacked rights under the construction contracts, the AllenMax entities were entitled to judgment as a matter of law. *See Caldas v. Affordable Granite & Stone, Inc.*, 820 N.W.2d 826, 835 (Minn. 2012) (affirming summary judgment on a breach-of-contract claim against non-parties to the contract that failed to establish that they were intended third-party beneficiaries of the contract).

The third issue is whether Morex was prejudiced by the absence of a formal motion for summary judgment. *Hebrink*, 664 N.W.2d at 419. While Morex asserts that the procedural impropriety of the motion in limine denied it an opportunity to respond, the claim is only a bare assertion of prejudice. Morex does not explain how it would have responded differently to a formal motion for summary judgment. Nor does Morex claim that a formal motion would have allowed it to identify evidence creating a genuine issue of material fact. Because appellants bear the burden of showing error on appeal, we will not assume that Morex was prejudiced in the absence of any showing. *See Waters v. Fiebelkorn*, 13 N.W.2d 461, 464-65 (Minn. 1944) ("[O]n appeal error is never presumed. It must be made to appear affirmatively before there can be reversal . . . [and] the burden of showing error rests upon the one who relies upon it.").

The final issue is whether Morex had a "meaningful opportunity to oppose" summary judgment. *Hebrink*, 664 N.W.2d at 419. In *Hebrink*, this court concluded that an appellant lacked a meaningful opportunity to oppose the motion because nothing in the record indicated that the appellant knew he would need to address a "potential summary-judgment motion" on the day of trial. *Id.* at 419-20. This court distinguished that situation from a case where the parties had 18 days to submit briefs on the issue of the validity of a contract. Here, the AllenMax entities' motions in limine were submitted 12 days before a pretrial hearing on those motions was held.

While 12 days is a relatively short period of time, we believe that Morex was not denied a meaningful opportunity to oppose summary judgment. Morex filed no written opposition to the motions. Nor, at the hearing on the motions, did it argue for additional

time in which to respond. At the same time, however, Morex's counsel's arguments at that hearing addressed its assertion that the motions in limine were functionally motions for summary judgment. Thus, Morex was familiar with the motions in limine and had time to compose arguments against them. Thus, unlike the appellant in *Hebrink* who was surprised on the day of trial by a motion challenging a previously uncontested issue, Morex had notice of what it had to show. *Cf. id.* Yet Morex never sought more time to marshal evidence or file a response opposing a motion that it believed to be a motion for summary judgment. Nor did Morex argue that it was a third-party intended beneficiary until after the court ruled against it on the fourth motion in limine. Morex had a meaningful opportunity to oppose the motion, even if it did not fully take advantage of that opportunity.

Because the district court could have granted summary judgment sua sponte on Morex's breach-of-contract counterclaim, Morex was not prejudiced by the absence of a formal motion, and Morex had a meaningful opportunity to oppose the motions, the district court's grant of the improper fourth motion in limine does not require reversal. *See Hebrink*, 664 N.W.2d at 419.

C. Granting the ninth motion in limine was not an abuse of discretion.

Appellants also challenge the district court's grant of the ninth motion in limine. The ninth motion in limine sought exclusion of all evidence regarding Morex's alleged civil-theft damages. The district court originally reserved ruling on that motion. But, on the first day of trial, the district court implicitly granted the motion when it granted JMOL in favor of AllenMax Construction on the civil-theft counterclaim, apparently based on an absence of evidence supporting the claim. Appellants' claim for civil-theft damages was

based on alleged costs and attorney fees it incurred in connection with responding to RMS's mechanic's lien, although the lien was eventually satisfied by AllenMax Construction. The AllenMax entities argue that appellants' evidence of civil-theft damages was not disclosed before trial and therefore was properly excluded. Appellants counter that they disclosed evidence of those damages by claiming approximately $7,500 in attorney fees in an interrogatory answer and by disclosing, on an unidentified date, an invoice.

Appellants bear the burden of showing error. *See Waters*, 13 N.W.2d at 464-65. Despite several citations by appellants in their brief, our review of the record reveals no instance—either during the pretrial hearing on the motions in limine or during the parties' arguments on the first day of trial—in which appellants responded to the AllenMax entities' assertion of nondisclosure by demonstrating to the district court that appellants had, in fact, disclosed evidence of damages through an invoice or other evidence. On this record, appellant has failed to demonstrate that the district court abused its discretion by granting the motion to exclude evidence of civil-theft damages.

II. The district court did not abuse its discretion by denying appellants' motion for a new trial.

Appellants challenge the district court's denial of their motion for a new trial. Minn. R. Civ. P. 59.01 permits a district court to grant a new trial when an irregularity in the proceedings deprives the moving party of a fair trial. Minn. R. Civ. P. 59.01(a). Appellate courts "review a district court's decision to grant or deny a new trial for an abuse of discretion." *Christie v. Estate of Christie*, 911 N.W.2d 833, 838 (Minn. 2018).

A. Motions in limine

Appellants argue that the district court's consideration of respondents' motions in limine was an irregularity that entitled them to a new trial because the motions were actually disguised motions for summary judgment. Because, as we explain in Section I.A above, the district court did not abuse its discretion by considering respondents' motions in limine, appellants' new-trial argument on this basis fails.

B. Grant of JMOL to respondents at start of trial

Appellants also argue that the district court engaged in another irregularity by granting JMOL in favor of AllenMax entities on several claims at the start of trial. The district court granted JMOL in favor of the AllenMax entities on appellants' counterclaims for breach of contract and civil theft and in favor of AllenMax Commercial on its breach-of-contract claim against Wright.

As an initial matter, appellants, in their brief, challenge the grant of JMOL on these claims as a basis for a new trial. But, because JMOL was granted on these claims at the start of trial, they were not tried to the jury, and appellants make no argument why the grant of JMOL would require a new trial on the claims that were actually tried to the jury.

But, if their brief is read more generously, appellants are arguing that the grants of JMOL should be reversed and those claims should be tried (not re-tried). They assert that the grant of JMOL was premature, citing Minn. R. Civ. P. 50.01. Rule 50.01 provides:

> If *during a trial by jury a party has been fully heard on an issue* and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court . . . may grant a motion for judgment as a matter of law against that party.

Minn. R. Civ. P. 50.01(a) (emphasis added). The district court granted respondents' motions for JMOL on the first day of trial, before the jury was impaneled. Thus, appellants argue, respondents' motions for JMOL were granted before appellants had been "fully heard" at trial. Respondents counter that appellants were fully heard and that JMOL was procedurally appropriate.

Even if the district court violated rule 50.01 by prematurely granting JMOL, appellants still must show that they were prejudiced by the error. *See* Minn. R. Civ. P. 61 (requiring harmless error to be ignored); *Plate v. St. Mary's Help of Christians Church*, 520 N.W.2d 17, 20 (Minn. App. 1994) (holding that the district court's "unusual handling of the directed verdict motion" does not warrant reversal because the nonmoving party "has not shown any prejudice from the procedure"), *review denied* (Minn. Oct. 14, 1994). Appellants make no such showing. The grant of respondents' motions was largely based on their successful motions in limine. Because appellants fail to show that the rulings on the motions in limine were reversible error, as explained in Section I above, they also fail to show prejudice from the alleged violation of Rule 50.01—being "fully heard" would not have enabled them to introduce excluded evidence. Minn. R. Civ. P. 50.01(a).

III. The district court did not err in denying Morex JMOL on its civil-theft counterclaim against AllenMax Construction.

Morex argues that the district court erred in denying its posttrial motion for JMOL under Minn. R. Civ. P. 50.02 on its civil-theft counterclaim against AllenMax Construction. Here, Morex argues not that JMOL on the civil-theft claim in favor of

AllenMax was erroneous and the claim should be tried, but rather that Morex was, in fact, entitled to JMOL.

Appellate courts "apply de novo review to the district court's denial of a Rule 50 motion." *Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910, 919 (Minn. 2009). "Viewing the evidence in a light most favorable to the nonmoving party, this court makes an independent determination of whether there is sufficient evidence to present an issue of fact for the jury." *Jerry's Enters., Inc. v. Larkin, Hoffman, Daly & Lindgren, Ltd.*, 711 N.W.2d 811, 816 (Minn. 2006). A motion for JMOL should be granted

> only in those unequivocal cases where (1) in the light of the evidence as a whole, it would clearly be the duty of the trial court to set aside a contrary verdict as being manifestly against the entire evidence, or where (2) it would be contrary to the law applicable to the case.

Id. (quotation omitted).

Morex claimed civil theft under Minn. Stat. § 514.02 (2018). That statute authorizes civil actions for damages. Minn. Stat. § 514.02, subd. 1a. As discussed in Section I.C above, the district court excluded all evidence of civil-theft damages. With no evidence of damages, Morex's assertion that it was entitled to JMOL on the claim is without merit.

IV. The district court did not err in denying Wright's motion for JMOL on AllenMax Construction's breach-of-contract claim but did err in denying Morex's motion for JMOL on AllenMax Construction's unjust-enrichment claim.

Two claims were tried to the jury: (1) AllenMax Construction's breach-of-contract claim against Wright and (2) Allen Max Construction's unjust-enrichment claim against Morex. The jury found in favor of AllenMax Construction on the breach-of-contract claim

against Wright and awarded damages of $68,517.53. It also found in favor of AllenMax Construction on the unjust-enrichment claim against Morex and awarded damages of $21,067.79. Appellants challenge the district court's denial of their posttrial motions for JMOL on those claims.

A. AllenMax Construction's breach-of-contract claim against Wright

AllenMax Construction's breach-of-contract claim was based on the contention that it was entitled to $433,094 under the final change order but was paid only $364,577. In other words, AllenMax Construction alleged that Wright breached the contract by not paying the difference—$68,517.

JMOL should only be granted when it is unequivocal that the evidence cannot support a verdict against the moving party or when a verdict against the moving party would be contrary to law. *Jerry's Enters.*, 711 N.W.2d at 816. "The construction and effect of a contract is . . . a question of law unless the contract is ambiguous." *Denelsbeck v. Wells Fargo & Co.*, 666 N.W.2d 339, 346 (Minn. 2003). "[W]hether a contract is ambiguous is a question of law, but the interpretation of an ambiguous contract is a question of fact for the jury." *Id.* (citation omitted). Wright advances three arguments for why it was entitled to JMOL on AllenMax Construction's claim.

First, Wright argues that, as a matter of law, it did not have to pay AllenMax Construction the $68,517 because "it was specifically agreed in the [change order] that 'all outstanding work will be deducted from [AllenMax Construction's] remaining contract'" and "replacement subcontractors were needed to be hired and paid . . . to complete the project." In essence, Wright's argument is that the change order did not require Wright to

pay more than $364,577 to AllenMax Construction, because the change order allowed for the deduction of the cost of "all outstanding work" and there was no dispute that Wright hired subcontractors to complete the project.

We reject Wright's argument. There are two plausible interpretations of the phrase "all outstanding work" as used in the change order. The first interpretation is that phrase means all work left to reach the point at which the parties expected, after the change in circumstances that led to the change order, that AllenMax Construction would stop working. Under this interpretation, the $15,000 deduction represented the dollar amount that the parties negotiated as representing the value of the work that AllenMax Construction would leave uncompleted. Thus, this interpretation required Wright to pay AllenMax Construction a total of $433,094, regardless of how much it cost to complete the project.

The second interpretation is that the parties intended "all outstanding work" to refer to all work left to complete the framing of the hotel. Under this interpretation, the $15,000 deduction from the contract price was purely a penalty, a deduction that was in addition to an unspecified deduction to be based on Wright's additional costs to complete the framing.

The jury heard testimony that the parties intended the change order to establish the final amount Wright owed to AllenMax Construction, regardless of what Wright had to pay a successor subcontractor to finish the project. Thus, Wright was not entitled to judgment as a matter of law on AllenMax Construction's breach-of-contract claim based on the language of the change order because the jury could reasonably have concluded that Wright breached the contract by paying AllenMax only $364,577. *See Jerry's Enters.*, 711

N.W.2d at 816 (explaining that JMOL is appropriate only when the verdict is manifestly contrary to the evidence or the law).

Second, Wright argues that its obligation to pay AllenMax Construction was not triggered because a condition precedent did not occur. The original contract between Wright and AllenMax Construction included the following provision:

> [I]t is mutually agreed that it shall be an express condition precedent to any obligation owing by [Wright] to [AllenMax Construction] to pay for any work, including changed, extra or additional work performed or claimed by [AllenMax Construction] under this [contract], that [Wright] actually received payment on account thereof from [Morex].

Wright argues that Morex's bank records conclusively establish the nonoccurrence of the condition precedent. Morex's bank records list disbursements made from June 2014 to July 2015, identify who the payees are, and provide a short description about each disbursement. Although Morex paid more than enough money to Wright around the time of the change order, the disbursements all seem to have been designated for uses other than compensating AllenMax Construction. But the bank records' descriptions of the purposes of the payments are not perfectly clear, and the jury could reasonably have concluded that the condition precedent was met.

Third, Wright argues that AllenMax Construction waived its claim for payment by signing a final-lien-waiver-and-release form on February 4, 2015. The lien waiver and release reads:

> With reference to construction of the [hotel] . . . , the undersigned . . . for value received, acknowledges that it has been paid $433,094 (cumulative dollars to date) for all labor, services, equipment, and materials provided or transported . . .

> through January 2015 . . . , and hereby fully and UNCONDITIONALLY waives and releases any and all . . . claim for payment it now has or asserts, or may have or assert . . . .

Wright argues that the language of the lien waiver and release conclusively proves that AllenMax Construction waived its breach-of-contract claim. But there was evidence in the record suggesting that the waiver was not valid. Under *Engstrom v. Farmers & Bankers Life Ins. Co.*, waiver "is a voluntary relinquishment of a known right. Both intent and knowledge . . . are essential elements." 41 N.W.2d 422, 424 (Minn. 1950) (citations omitted). And, in this case, the owner of AllenMax Construction testified that his intent in signing the waiver was to receive the promised payment, not to actually waive his claim to the agreed-upon contract price. He testified: "You have to sign it to get paid, so I signed it so we'd get our funds."

Therefore, the issue is whether the language of the waiver, as a matter of law, trumps the owner's own stated intention. In the realm of contracts, the supreme court has "consistently stated that when a contractual provision is clear and unambiguous, courts should not rewrite, modify, or limit its effect by a strained construction." *Valspar Refinish, Inc. v. Gaylord's, Inc.*, 764 N.W.2d 359, 364-65 (Minn. 2009). But waiver is not a contract; it has its roots in equity. *See* 28 Am. Jur. 2d *Estoppel and Waiver* § 183 (2019) ("Waiver is an equitable doctrine invoked to further the interests of justice . . . ."). It is unclear whether, or to what extent, the rules of contract construction should apply to waiver. In any event, Wright does not cite any legal authority on this issue, and it fails to conclusively show that there was a valid waiver.

AllenMax Construction's breach-of-contract claim was properly presented to the jury. The district court did not err by denying Wright's motion for JMOL.

B. AllenMax Construction's unjust-enrichment claim against Morex

Morex argues that it should have prevailed, as a matter of law, on AllenMax Construction's claim of unjust enrichment. "Unjust enrichment is an equitable doctrine that allows a plaintiff to recover a benefit conferred upon a defendant when retention of the benefit is not legally justifiable." *Caldas*, 820 N.W.2d at 838. "To establish an unjust enrichment claim, the claimant must show that the defendant has knowingly received or obtained something of value for which the defendant in equity and good conscience should pay." *Id.* (quotation omitted).

At trial, AllenMax Construction's owner testified that RMS's services were accounted for in AllenMax Construction's contract with Wright and that AllenMax Construction was responsible for paying RMS. The owner testified, however, that AllenMax Construction was unable to pay a balance remaining to RMS of $42,135.58 because appellants had not paid AllenMax Construction what it was owed under the contract. Morex denied responsibility, contending that, according to AllenMax Construction's previous payment applications, Morex had already paid AllenMax Construction for RMS's services.

AllenMax Construction's owner testified that, when he was in discussions with Morex about RMS's outstanding balance, Morex offered to split the RMS bill but later refused to do so. After RMS brought the mechanic's lien action, AllenMax Construction paid $57,154.57 to RMS in settlement of the claim. Although the owner testified that the

ultimate payment to RMS exceeded the original balance owing by about $15,000, he disclaimed any request for the difference and repeatedly stated that, in this action, he was seeking only the amount remaining on his contract with Wright—$68,517.53.

In closing argument, AllenMax Construction asked the jury to return a verdict in the amount of $68,517.53. It suggested that the jury split that amount in the special verdict by awarding $47,517.53 for Wright's breach of contract and $21,000 for Morex's unjust enrichment, which was based on "the amount that [Morex] agreed to split with regards to the RMS bills." The jury returned a verdict that, as AllenMax requested, awarded exactly half of the remaining RMS balance—$21,067.79—against Morex for unjust enrichment. But the jury also awarded the full $68,517.53 against Wright for breach of contract.

Morex moved for JMOL on the unjust-enrichment claim, which the district court denied, concluding that sufficient evidence at trial supported the unjust-enrichment verdict. The district court wrote, "While [Morex] alleges the only basis for the claim was the crane rental charges, there was additional testimony and evidence presented by which the jury could have used to base its award." The district court cited testimony regarding work performed by AllenMax Construction "for the benefit of [appellants]."

On appeal, AllenMax Construction does not assert that it was not responsible for paying RMS. Instead, it argues that it is "untrue" that its claim for unjust enrichment was based "solely on an argument" that Morex "still owed AllenMax Construction for crane rental." It cites AllenMax Construction's framing work, rental of equipment, and material and labor costs for doing "everything from erecting framing to shoveling snow" as alternative evidentiary bases for its unjust-enrichment claim.

We conclude that the jury's verdict on unjust enrichment is manifestly contrary to the evidence. The jury awarded AllenMax Construction the sum of $68,517.53 for breach of contract by Wright. That number is the difference between the contract price and what AllenMax Construction was paid. On top of that, the jury awarded AllenMax Construction $21,067.79 from Morex for unjust enrichment. In other words, despite AllenMax Construction's argument to the jury that it should split the $68,517 between Wright and Morex, the jury did not do so. AllenMax Construction now justifies the $21,067.79 for unjust enrichment based on evidence showing that AllenMax Construction performed work that resulted in a "beautiful hotel," but the contract with Wright already accounted for that work and the jury awarded full contract damages. We see no other record evidence that justifies finding that Morex was unjustly enriched in the amount of $21,067.79. We therefore reverse the district court's denial of Morex's motion for JMOL on AllenMax Construction's claim for unjust enrichment and remand for entry of judgment in Morex's favor.

V. The district court did not abuse its discretion by presiding over the case.

"Minn. R. Civ. P. 63.03 provides that a party must file its notice to remove a judge before the judge first presides in an action, unless the party makes an affirmative showing of the judge's prejudice or implied or actual bias." *Matson v. Matson*, 638 N.W.2d 462, 469 (Minn. App. 2002). We review a decision to deny a motion to recuse for bias for an abuse of discretion. *See Durell v. Mayo Found.*, 429 N.W.2d 704, 705 (Minn. App. 1988) ("Whether to honor a request for removal based on allegations of actual prejudice is a matter for the trial court's *discretion*."), *review denied* (Minn. Nov. 16, 1988).

Immediately before trial, and well after the judge had first presided in the action, appellants' attorney twice orally moved the district court for the judge's recusal based on bias. The district court entertained the oral motions and, after giving appellants time to submit a supporting affidavit, denied them. Appellants argue that the district court abused its discretion.

Each motion was made in response to a ruling adverse to appellants. Adverse rulings, especially those that are not shown to be erroneous, cannot constitute prejudice or bias. *Olson v. Olson*, 392 N.W.2d 338, 341 (Minn. App. 1986). Appellants' attorney also cited as evidence of bias that the judge had told him earlier, "I know you hate me." This comment was part of the following comments by the district court:

> I know you hate me, okay, I get that, but I don't feel the same way about you. I—it is not that important. Any of our personal stuff, whatever it is, you think I hate you just because I rule against you does not—it's not personal. It's based on the law. It's based on the case . . . . I've read everything over and over and over and I'm going to tell you straight up, motions in limine, I was generous. I was generous.

The district court made these comments after appellants' counsel vehemently opposed a ruling, to assure appellants' counsel that the rulings were not based on any personal animus. The context and full content of the comments did not demonstrate bias, they dispelled it. Because appellants failed to affirmatively show prejudice or bias, denial of their motions for recusal was not an abuse of discretion.

Affirmed in part, reversed in part, and remanded.