STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1541
A19-1654

Gerald L. Trooien,
Respondent,

vs.

Talon OP, L.P., et al.,
Appellants.

Filed June 1, 2020
Affirmed
Bryan, Judge

Hennepin County District Court
File No. 27-CV-17-9833

Skip Durocher, Eric A.O. Ruzicka, Michael D. Stinson, Ian Blodger, Dorsey & Whitney LLP, Minneapolis, Minnesota (for respondent)

Ryan J. Hatton, Jonathon D. Nelson, Gurstel Law Firm, P.C., Golden Valley, Minnesota (for appellants)

Considered and decided by Bryan, Presiding Judge; Reyes, Judge; and Bratvold, Judge.

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

BRYAN, Judge

Appellants challenge the district court's denial of their motion for judgment as a matter of law for two reasons: (1) because respondent failed to establish an element of his breach-of-contract claim; and (2) because respondent materially breached his contract with

appellants, justifying appellants' nonperformance. We affirm the district court because the arguments misconstrue both the language of the contract and the verdict form used in the trial below, and because appellants have not submitted a sufficient record for us to reverse the district court.

FACTS

In May 2014, Talon OP LP and Talon Bren Road LLC (appellants) entered into multiple agreements to purchase a property known as the "Gift Mart Building" from respondent Gerald L. Trooien and a company that Trooien owns: Bren Road LLC. These agreements included the following: (1) a contribution agreement regarding the sale of a property; (2) an agreement guaranteeing an annual net operating income (NOI) amount the property would produce; (3) two notes detailing loans Talon Bren Road received from Bren Road to replace the property's HVAC system and roof; (4) a stock pledge agreement to secure Bren Road's performance of its obligations under the transaction; and (5) a consulting services agreement (CSA). The instant lawsuit concerns Trooien's claim that appellants breached the CSA.

Section 1 of the CSA states that "[Trooien] shall provide to [appellants] the advice, consultation, and services as set forth on the attached Exhibit A ('Consulting Services') in connection with [appellants'] Business." Exhibit A requires Trooien to "[p]rovide general advice and consultation on the current and historical operating, maintenance, leasing, occupancy, financing, insurability, contractual services, construction and related matters for the Gift Mart Building located in Bloomington, Minnesota ('Project')." Section 2 of the CSA provides that "[i]n consideration for all past and future services hereunder,

[appellants] shall pay [Trooien] a fee ('Consulting Fee') as provided on Exhibit B attached hereto." The relevant portion of Exhibit B reads: "Monthly consulting fee of $43,750.00 payable on the fifteenth (15th) date of each month commencing August 15, 2014, and continuing for 59 months thereafter (unless such amount is reduced or terminated sooner in accordance with the terms of this Agreement)."

Trooien provided consulting services to appellants prior to February 2017, such as providing appellants with current and historical operating information related to the Gift Mart Building. He also provided services to help reconcile rents owed at the Gift Mart Building. In January 2016, appellants stopped making the CSA payments to Trooien to offset an unrelated debt. In a separate court file,[1] the same presiding judge determined that because the debt was unrelated to the CSA and there was no evidence that Trooien had defaulted under the CSA, appellants were not justified in withholding any monthly payments. Accordingly, the district court entered judgment for Trooien to recover the withheld payments under the CSA through February 2017. Aside from satisfying this judgment,[2] appellants made no payments under the CSA after February 2017 and Trooien provided no further services under the CSA. Trooien sued appellants for breach of contract, and appellants counterclaimed for breach of contract and the right to rescind the CSA. Twice Trooien moved for summary judgment, and twice the district court denied Trooien's motions because genuine issues of material fact existed about whether Trooien

[1] Court File No. 27-CV-16-8820.
[2] Appellants satisfied the judgment July 19, 2017.

performed under the CSA. The case proceed to a four-day jury trial. The district court summarized the evidence at trial:

> The jury heard testimony that [Trooien] provided services to [appellants] in the past; that [Trooien] was ready to provide services at [appellants'] request; that [appellants] never asked [Trooien] to provide any Consulting Services after February 2017; that [appellants] did not make payments as required under the Agreement; and that [appellants] acknowledged that payments were owed but believed they should be used to offset an unrelated alleged debt.

Prior to submitting the case to the jury, the district court granted a directed verdict against appellants on their counterclaim for breach of contract, but allowed the issue to be asserted as a defense to Trooien's claim.[3] The district court also denied appellants' request to include a jury question regarding whether appellants' nonperformance was justified, reasoning that "whether a party is excused from performing a contract is a question of law." Consistent with appellants' proposed jury instructions, the district court instructed the jury that "[a] contract is breached when there is a failure to perform a substantial or an important part of the contract." The district court further instructed: "The Court has ruled the [CSA] to be clear and unambiguous. Therefore, as you consider the terms, you must give the terms their plain and ordinary meaning."

After deliberations, the jury returned a verdict in Trooien's favor. The jury found that there was a contract between the parties, that appellants breached the contract by failing to pay Trooien after February 2017, that appellants' breach caused Trooien damages, and that $525,000 (50% of the contracted amount) would fairly and adequately

[3] Appellants do not appeal this decision.

compensate Trooien. The jury also found that Section 1 of the CSA was a "substantial or an important part of the contract," and that Trooien breached the contract by failing to provide the consulting services specified in the CSA after February 2017.

Appellants moved for judgment as a matter of law [4] arguing that Trooien failed to prove the elements of his breach-of-contract claim, that Trooien materially breached the CSA, and that Trooien's material breach justified appellants' nonperformance and entitled them to rescission.[5] The district court denied this motion because it determined the evidence supports the jury's verdict and the jury did not find that Trooien materially breached the CSA. This appeal follows.[6]

D E C I S I O N

Appellants raise two related challenges to the jury's verdict. First, appellants argue that the jury's $525,000 verdict cannot stand because Trooien failed to prove an element of his breach-of-contract claim (occurrence of any conditions precedent). We do not accept this argument, however, because it misconstrues both the CSA and the verdict form. The CSA does not contain a condition precedent, and the jury never determined whether a

[4] Appellants also moved for a new trial, but do not appeal the denial of this part of their motion.

[5] Appellants use the concepts of justified nonperformance and the equitable remedy of rescission interchangeably. Both are raised as defenses to Trooien's breach-of-contract claim. As discussed below, because the jury did not find a material breach, the verdict precludes both defense theories.

[6] Appellants initially sought review of the order denying their motion for judgment as a matter of law, which is generally not reviewable absent an appeal taken from the judgment itself. *See Omnetics, Inc. v. Radiant Tech. Corp.*, 440 N.W.2d 177, 182 (Minn. App. 1989). After we issued an order questioning jurisdiction, appellants filed a new appeal from the merits judgment and the order. We consolidated the appeals.

condition precedent occurred. In addition, appellants waived any challenge to the verdict form. Second, appellants argue that jury determined that Trooien materially breached the CSA, justifying their non-performance. We conclude that, contrary to appellants' argument, the special verdict form does not establish a material breach.

As a threshold matter, we observe that given the deference afforded to jury verdicts, we will rarely reverse on an incomplete record. Appellants bear the burden of providing an adequate record for us to examine on appeal. *Mesenbourg v. Mesenbourg*, 538 N.W.2d 489, 494 (Minn. App. 1995). The record must be "sufficient to show the alleged errors and all matters necessary for consideration of the questions presented." *Truesdale v. Friedman*, 127 N.W.2d 277, 279 (Minn. 1964). When appealing a district court's decision to deny its motion for judgment as a matter of law, an appellant's submission must permit this court to determine whether the record contains "any competent evidence reasonably tending to sustain the verdict." *Pouliot v. Fitzsimmons*, 582 N.W.2d 221, 224 (Minn. 1998) (quotation omitted); *see also, Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910, 919 (Minn. 2009) (noting that when reviewing decisions to grant or deny motions for judgment as a matter of law, appellate courts apply the same standard as the district court, viewing the evidence in the light most favorable to the prevailing party); *Jerry's Enters, Inc. v. Larkin, Hoffman, Daly & Lindgren, Ltd.*, 711 N.W.2d 811, 816 (Minn. 2006) (holding that judgment as a matter of law should only be granted in those cases when the jury's verdict is manifestly against the evidence as a whole, or when it is contrary to law); *Brubaker v. Hi-Banks Resort Corp.*, 415 N.W.2d 680, 683 (Minn. App. 1987), *review denied* (Minn. Jan. 28, 1988)

(holding that if a verdict has any reasonable evidentiary support, then both the trial court and appellate court must accept it as final).

In this case, appellants submitted a very limited record for us to review. Despite four days of trial, appellants submitted only 109 pages of transcript. The only testimony in the transcript is that of a single witness, and appellants did not produce any of Trooien's testimony. We also do not have the testimony of the other six witnesses listed on the parties' witness lists. Such a limited record hinders our ability to determine whether there is "any competent evidence reasonably tending to sustain the verdict." As noted below, without a more comprehensive record, we cannot conclude that the jury's verdict lacks reasonable evidentiary support. While in some contexts,[7] an insufficient record requires dismissal of the appeal, we decline to do so in this case. Instead, we address the merits of appellants' arguments and analyze the limited record in the light most favorable to Trooien.

I. Absence of a Condition Precedent

Appellants first argue that the district court should have granted their motion for judgment as a matter of law because Trooien failed to prove the elements of a breach-of-contract claim. Specifically, appellants argue that Trooien failed to prove the occurrence of a condition precedent. We disagree and affirm the district court's denial of the judgment as a matter of law for the following three reasons: (1) the contract does not include a condition precedent; (2) appellants' argument misconstrues the jury's verdict, which did

[7] Failing to provide transcripts on appeal can result in dismissal of the appeal. *Noltimier v. Noltimier*, 157 N.W.2d 530, 531 (Minn. 1968) (dismissing an appeal of husband's post-decree modification motion to modify child support where the record was "barren of material necessary for an understanding of the issues").

not determine whether a condition precedent occurred; and (3) appellants waived any challenge to the verdict form.

A. The CSA

We first conclude that the CSA does not contain any conditions precedent. Interpretation of an unambiguous[8] contract is a question of law that we review de novo. *Valspar Refinish, Inc. v. Gaylord's, Inc.*, 764 N.W.2d 359, 364-65 (Minn. 2009); *Roemhildt v. Kristall Dev., Inc.*, 798 N.W.2d 371, 373 (Minn. App. 2011), *review denied* (Minn. July 19, 2011). Although courts in Minnesota typically include performance of any conditions precedent as an element of a breach-of-contract claim, *e.g.*, *Park Nicollet Clinic v. Hamann*, 808 N.W.2d 828, 833 (Minn. 2011), not every contract contains a condition precedent, *see, e.g.*, *Hegseth v. Am. Family Mut. Ins. Grp.*, 877 N.W.2d 191, 198 (Minn. 2016); *Lee v. Fresenius Med. Care, Inc.*, 741 N.W.2d 117, 135 n.1 (Minn. 2007) (Page, J. dissenting) ("Here, there are no conditions precedent on the earning of vacation."). When a contract lacks "any conditions precedent," this element does not apply. Plaintiffs are not required to prove the occurrence of something that does not exist.[9]

A condition precedent is an event, not certain to occur, which must occur before performance under a contract becomes due. Restatement (Second) of Contracts § 224

[8] Neither party contested the district court's ruling that the CSA was unambiguous, and they have forfeited any argument to the contrary on appeal. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

[9] We are careful to distinguish a mutual exchange of promises from a condition precedent and cannot adopt an argument that converts every contractual promise into a condition precedent or that would require dismissal of all claims for breach of contracts that do not contain a condition precedent.

(1981), *quoted in Seman v. First State Bank of Eden Prairie*, 394 N.W.2d 557, 560 (Minn. App. 1986); *see also, e.g., Nat'l City Bank of Minneapolis v. St. Paul Fire & Marine Ins. Co.*, 447 N.W.2d 171, 176 (Minn. 1989) (defining a condition precedent as "any fact or event, subsequent to the making of a contract, which must exist or occur before a duty of immediate performance arises under the contract"); *Carl Bolander & Sons, Inc. v. United Stockyards Corp.*, 215 N.W.2d 473, 476 (Minn. 1974) ("any fact except mere lapse of time which must exist or occur before a duty of immediate performance by the promisor can arise"); *Nat'l Union Fire Ins. v. Schwing Am., Inc.*, 446 N.W.2d 410, 412 (Minn. App. 1989) ("When a contract contains a condition precedent, a party to the contract does not acquire any rights under the contract unless the condition occurs."). It is not the same thing as a contractual promise, which is a manifestation of intention to act or refrain from acting in a specified way. *E.g.*, Restatement (Second) of Contracts § 2 (1981).

No special terms or particular code words are necessary to create a condition precedent, but there must be some "clear and unequivocal" language that indicates the agreement, or its terms, are conditioned upon some event. *See Carl Bolander & Sons*, 215 N.W.2d at 476; *Mrozik Constr., Inc. v. Lovering Assocs., Inc.*, 461 N.W.2d 49, 52 (Minn. App. 1990) ("We hold here that a condition precedent will not be found absent unequivocal language."). Parties typically use terms such as "unless," "until," "contingent upon," "subject to," "provided that," "as soon as," and "after," among others. *See, e.g., Comprehensive Care Corp. v. RehabCare Corp.*, 98 F.3d 1063, 1066 (8th Cir. 1996) (Phrases such as "if," "provided that," "when," "after," "as soon as," and "subject to" traditionally indicate conditions precedent as opposed to contractual promises (citing

Standefer v. Thompson, 939 F.2d 161, 164 (4th Cir.1991)); *see also Aslakson v. Home Sav. Ass'n*, 416 N.W.2d 786, 789 (Minn. App. 1987) (finding a condition precedent when the contract used the term "contingent upon"); *451 Corp. v. Pension Sys. for Policemen & Firemen*, 310 N.W.2d 922, 923-24 (Minn. 1981) (finding a condition precedent when the contract used the term "subject to"); *Carl Bolander & Sons, Inc.*, 215 N.W.2d at 476 (finding a condition precedent when the contract used the term "assuming that"); *Nat'l Union Fire Ins.*, 446 N.W.2d at 413 (finding a condition precedent when the contract used the term "subject to").

In this case, we are not persuaded that the unique language in the CSA constitutes a condition precedent. The CSA states: "In consideration for all past and future services hereunder, [appellants] shall pay [Trooien] a fee ('Consulting Fee') as provided on Exhibit B attached hereto." Exhibit B dictates the payment terms: payment is due on the 15th of every month for the 60 months beginning two and a half months after the execution of the CSA. Appellants contend that the condition precedent lies in the phrase "[in] consideration for all past and future services hereunder, [appellants] shall pay [Trooien]." We cannot agree because the plain language[10] of the CSA does not describe a "clear and unequivocal" event that must occur before appellants' contractual duty can arise. *See Carl Bolander & Sons*, 215 N.W.2d at 476.

First, the phrase "in consideration for" typically refers to a contractual promise. As defined above, a contractual promise constitutes consideration, not a separate event that

[10] We afford the contract language its plain and ordinary meaning even if it yields a harsh result. *Denelsbeck v. Wells Fargo & Co.*, 666 N.W.2d 339, 346-47 (Minn. 2003).

has to occur before the promise is actionable. Appellants argue in their reply brief that the phrase "in consideration of" creates a condition precedent based on *Larson v. Union Cent. Life Ins. Co.*, 137 N.W.2d 327 (Minn. 1965). In fact, the supreme court held just the opposite. The *district court* found that the phrase "in consideration of" made the payment of premiums a condition precedent. *Id.* at 330. The Minnesota Supreme Court disagreed, concluding that no language acted as a condition precedent and requiring the insurance company to pay death benefits during the term of the policy, even after nonpayment of premiums:

> [T]here is no language in the master policy or in the certificate of insurance issued to [Larson] which imposed on him the obligation to pay premiums in any amount at any given time as a condition precedent to the continuance of the duty of the insurer to pay death benefits in the event of his death during such time as the master policy was in force and effect. Having applied for the protection, Larson was undoubtedly under a legal obligation to pay for the insurance of which his designee was to be the beneficiary. But this does not mean that the penalty for nonpayment at any given time was unilateral termination of the coverage afforded.

Id. at 332-333.

Second, appellants' argument misconstrues the very term relied on. The phrase "[i]n consideration for all past and future services" creates an obligation to pay Trooien for both past and future services.[11] We conclude, however, that this cannot create a condition precedent because of the plain meaning of the term "future services." No condition

[11] Given that the first payment was due on August 15, 2014, two and half months after the contract date on May 29, 2014, the term "past services" could relate to services provided during June and July, prior to the due date for the first installment.

requiring "future services" can ever be completed during the term of the contract. If appellants' duty to pay the consulting fee is contingent on the occurrence of this event, then appellants would have no obligation to pay anything until the end of the contract, after the event has occurred.[12] The clear and unambiguous language contemplates payments every month, not a single lump sum at the conclusion of the contract term. Exhibit B requires payment "on the fifteenth (15th) date of each month commencing August 15, 2014, and continuing for 59 months thereafter" and Section 2 requires late fees of 5% for payments "not received within ten (10) days of its due date" and 18% for payments "not received within thirty (30) days of its date." Therefore, we conclude that, as a matter of law, the contract does not contain any conditions precedent.

B. The Special Verdict Form

Appellants interpret the jury's answer to Question 3 as a finding that a condition precedent did not occur.[13] Even assuming that the CSA contained the condition precedent identified by appellants, we must affirm the district court because appellants' argument misconstrues the jury verdict.

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[12] Appellants appeared to suggest at oral argument that "future services" meant those services provided since the previous payment was due and that every month, the time started anew. The CSA, however, does not include such language delineating services provided after the payment due date on the 15th of the month and continuing only until the 14th of the next month. Nor does the CSA require Trooien to provide services every month. We cannot revise the language of the contract as appellants suggest. *Valspar*, 764 N.W.2d at 364-65 ("when a contractual provision is clear and unambiguous, courts should not rewrite, modify, or limit its effect by a strained construction").

[13] Through the litigation, trial, and appeal, appellants are primarily concerned with the defense of justified nonperformance and the equitable remedy of rescission, which both require a material breach. It seems likely that Questions 2 and 3 related more to these defenses than to the occurrence of a condition precedent.

Occurrence of a condition precedent, like performance of any contract term, is a question of fact for the jury to decide. *See, e.g.*, *Carl Bolander & Sons*, 215 N.W.2d at 476 (holding that whether the condition precedent occurred "must be determined by the trial court as a fact"). Question 3 of the special verdict form required the jury to answer to the following question: "Did Plaintiff Trooien breach the contract with Defendants Talon OP, L.P. and Talon Bren Road, LLC by failing to provide the consulting services specified in the Consulting Services Agreement after February 2017?" The jury answered "Yes."

Contrary to appellants' argument, this answer does not establish nonoccurrence of a condition precedent. Even assuming that the phrase "[i]n consideration for all past and future services" constitutes a condition precedent, the jury was never asked whether "past and future services" occurred. Nor was the jury asked to determine whether Trooien's services prior to February 2017 satisfied the condition precedent. The verdict form only related to a failure to provide services "after February 2017." To determine occurrence of the identified condition precedent, Question 3 would need to mirror the language of the CSA and would need to refer to both "past and future services." As written, and on this record,[14] we cannot conclude that the verdict is manifestly against the evidence or contrary to law.

[14] If the jury had been asked to determine whether a condition precedent occurred, we would then review the record to determine whether any reasonably competent evidence could sustain the verdict. In this case, the record is insufficient for such a review because we cannot determine what evidence was introduced regarding Trooien's performance prior to February 2017. The $525,000 verdict could stand if Trooien's performance prior to February 2017 satisfied the "condition precedent" regarding "past and future services."

C. Waiver

Appellants had the opportunity to propose different or more precise jury questions. They also had an opportunity to object to the wording of the special verdict form. To the extent that appellants' arguments require a review of the language used in the special verdict form, we conclude that it would be improper for this court to do so and deem such issues to be waived.

When a party seeks judgment as a matter of law, but did not submit the challenged issue to the jury by special-verdict form, it would be improper to grant the motion for judgment as a matter of law. *See In re Shigellosis Litig.*, 647 N.W.2d 1, 9-10 (Minn. App. 2002) (concluding that it would be improper to grant judgment notwithstanding the verdict where moving party did not submit challenged issue to jury), *review denied* (Minn. Aug. 20, 2002). Generally, we consider such issues to be waived on appeal. *See* Minn. R. Civ. P. 49.01(a), 51.03; *H Window Co. v. Cascade Wood Prods.*, 596 N.W.2d 271, 274 (Minn. App. 1999) (stating that "a party who fails to object to a special verdict form before its submission to the jury, waives any later objection"), *review denied* (Minn. Aug. 17, 1999); *see also, e.g.*, *Thielbar v. Juenke*, 189 N.W.2d 493, 498 (Minn. 1971) (concluding that failure to object to special verdict constitutes waiver of any objection a party may have to verdict form); *Larson v. Degner*, 78 N.W.2d 333, 338 (Minn. 1956) (holding that, by failing to propose additional questions for submission, party waived right to jury trial on issues not submitted to jury on special verdict).

Even assuming that the CSA contained the condition precedent identified by appellants, we cannot reverse the denial of the motion for judgment as a matter of law

because appellants waived any challenge to the wording of the special verdict form and the jury was never asked to determine whether the "condition precedent" occurred.

II. Material Breach

Appellants argue that we must reverse the district court's decision because the jury's answers to Questions 2 and 3 establish that Trooien materially breached the CSA, justifying appellants' failure to pay the monthly consulting fee and satisfying one element of the equitable remedy of rescission.[15] We affirm the district court's decision because the jury did not determine whether Trooien materially breached the CSA.

A plaintiff's material breach can excuse a defendant's nonperformance. *MTS Co. v. Taiga Corp.*, 365 N.W.2d 321, 327 (Minn. App. 1985) (acknowledging that a party cannot raise to its advantage a breach of contract against another party when it has first breached the contract itself and listing cases), *review denied* (Minn. Jun. 14, 1985). Similarly, "rescission of a contract is justified only by a material breach or substantial failure in performance." *Cloverdale Foods of Minn., Inc. v. Pioneer Snacks*, 580 N.W.2d 46, 49 (Minn. App. 1998) (citing *Cut Price Super Markets v. Kingpin Foods, Inc.*, 98 N.W.2d 257, 266 (Minn. 1959)); *see also Busch v. Model Corp.*, 708 N.W.2d 546, 551 (Minn. App. 2006). Not every breach constitutes a material breach. *See Boatwright Constr., Inc. v. Kemrich Knolls*, 238 N.W.2d 606, 607 (Minn. 1976) (failing to provide oiling of the streets constituted a nonmaterial breach). "[E]ven when express conditions of the contract are violated, the breach is not necessarily material." *BOB Acres, LLC v.*

[15] Rescission is the unmaking of a contract. *Abdallah, Inc. v. Martin*, 65 N.W.2d 641, 644 (Minn. 1954).

Schumacher Farms, LLC, 797 N.W.2d 723, 728-29 (Minn. App. 2011), *review granted* (Minn. June 14, 2011) *and appeal dismissed* (Minn. Aug. 12, 2011).

Whether nonperformance rises to the level of a material breach is a question of fact for the jury. *See Cloverdale Foods of Minn.*, 580 N.W.2d at 49-50 (citing *Juvland v. Plaisance*, 96 N.W.2d 537, 542 (Minn. 1959)). "A material breach is '[a] breach of contract that is significant enough to permit the aggrieved party to elect to treat the breach as total (rather than partial), thus excusing that party from further performance and affording it the right to sue for damages.'" *BOB Acres, LLC*, 797 N.W.2d at 728 (quoting *Black's Law Dictionary* 214 (9th ed. 2009)); *Sitek v. Striker*, 764 N.W.2d 585, 593 (Minn. App. 2009). A breach is material if "one of the primary purposes" of the contract is violated, *Steller v. Thomas*, 45 N.W.2d 537, 542 (Minn. 1950), or if it "goes to the root or essence of the contract," *BOB Acres, LLC*, 797 N.W.2d at 728 (quotation omitted). The party asserting excuse of performance or rescission has the burden to prove materiality. *Berg v. Ackman*, 431 N.W.2d 264, 266 (Minn. App. 1986) (regarding rescission); *Brunsoman v. Lexington-Silverwood*, 385 N.W.2d 823, 825 (Minn. App. 1986) ("The party claiming rescission must prove it by clear and convincing evidence"), *review denied* (Minn. Jun. 13 1986); *Juvland*, 96 N.W.2d at 540 (construing the defendant's claim as an affirmative defense which carries with it the burden of proof).

In this case, appellants misconstrue the jury's finding in Questions 2 and 3.[16] Question 2 asked the jury the following question: "Was the Services Clause as set forth in Section 1 of the Consulting Services Agreement a substantial or an important part of the contract?" As noted above, Question 3 asked the jury the following question: "Did Plaintiff Trooien breach the contract with Defendants Talon OP, L.P. and Talon Bren Road, LLC by failing to provide the consulting services specified in the Consulting Services Agreement after February 2017?" The jury answered both questions, "Yes." Appellants argue that, when read together, the answers indicate that the jury found a material breach. We cannot conclude that the jury found a total (rather than partial) or material breach for three reasons.

First, Question 2 does not ask the jury to determine materiality. Question 2 is derived from the model civil jury instruction guides defining an unqualified "breach of contract," not a material breach of contract: "A contract is breached when there is a failure to perform (a substantial) (an important) part of the contract." 4 *Minnesota Practice,* CIVJIG 20.45 (2019). In addition, the instruction included both adjectives, not just one. While the term "substantial" could mean "one of the primary purposes of the contract" or "the root or essence of the contract," the term "important" has a much broader meaning. We cannot interpret the special verdict in this case to include a finding of material breach because the parties and the district court asked the jury to decide whether the services

[16] As noted above, to the extent that appellants challenge the language of the jury verdict form, they have waived this challenge. *See In re Shigellosis Litig.*, 647 N.W.2d at 9-10; *H Window Co.*, 596 N.W.2d at 274; *Thielbar*, 189 N.W.2d at 497; *Larson*, 78 N.W.2d at 338.

provision was important, not whether it was "one of the primary purposes of the contract" or "the root or essence of the contract." *See Steller*, 45 N.W.2d at 542; *BOB Acres, LLC*, 797 N.W.2d at 728.[17]

Second, viewing the record in the light most favorable to prevailing party, we cannot conclude that the answers to Questions 2 and 3 establish a material breach because the language in Question 2 differs from the language in Question 3. Question 2 refers to the CSA, which includes language regarding "all past and future services" provided by Trooien, unbound by specific dates. Question 3, however, does not refer to "all past and future services," but instead refers specifically to services "after February 2017." For the answers to Questions 2 and 3 to constitute a finding of material breach, both questions would need to refer to the same thing. Either both must refer "all past and future services," or both must refer to services provided "after February 2017." As written, however, the jury's answer to Question 2 could indicate a belief that services provided prior to February 2017 were a "substantial or important part of the contract," and the jury's $525,000 verdict could relate to the value of those services. Therefore, we cannot agree that the jury found a material breach.

[17] We also observe that a party can breach a "material" *provision* in the contract without committing a material *breach*. For example, a contract to remove snow may have at its essence the provision to plow snow. Failing to plow a foot of snow in January would likely constitute a material breach. Failing to plow two inches of snow in May, however, might not constitute a material breach. In this case, the jury was never asked to determine whether Trooien materially breached the contract because the special verdict form asked two, separate questions; one regarding whether the services provision was substantial or important and another regarding whether there was a breach.

Third, we cannot reverse the district court because we are unable to review the full record. We do not know the extent of the services Trooien provided or the parties' expectations regarding his services. For example, we do not know whether the parties intended for Trooien to provide the bulk of the consulting services in the two and half months after the contract date on May 29, 2014, and before the first payment came due on August 15, 2014. We also do not know whether any competent trial evidence related to the method of requesting services or the method of providing them. Without a more complete record to review, we cannot agree with appellants' conclusion that the jury's verdict is manifestly contrary to the evidence.

Affirmed.