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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A19-1681**

Village Homes of Grandview Square II Association,  
Respondent,

vs.

R. E. C., Inc. d/b/a Ron Clark Construction, et al.,  
Defendants,

and

R. E. C., Inc. d/b/a Ron Clark Construction,  
Third-Party Plaintiff,

vs.

Savenok Construction, Inc., et al.,  
Third-Party Defendants,

Fox Valley Contractors, LLC, third-party defendant,  
Appellant.

**Filed August 3, 2020  
Affirmed  
Smith, Tracy M., Judge**

Hennepin County District Court  
File No. 27-CV-16-2304

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

## UNPUBLISHED OPINION

**SMITH, TRACY M.**, Judge

Respondent, a condominium homeowners' association, obtained a jury verdict against appellant, an exterior-cladding subcontractor, on claims arising from construction defects in the stucco system of respondent's condominium building. In this second appeal in the case,<sup>1</sup> appellant argues that the district court erred (1) by not dismissing respondent's claims as untimely under the statute of limitations, (2) by denying appellant's motion for judgment as a matter of law, and (3) by denying appellant's motion for a new trial based on alleged evidentiary and special-verdict-form errors. Because we conclude that respondent's claims were not untimely and that appellant's remaining arguments do not warrant reversal or a new trial, we affirm.

### FACTS

Respondent Village Homes of Grandview Square II Association (Village Homes) is an association of condominium owners who own units in a building known as Grandview Square II. Grandview Square II (the building) has 50 units and was built between 2002 and 2005. R.E.C., Inc. (R.E.C.) was the general contractor that managed the construction of the building. Relevant for this case, R.E.C. subcontracted with appellant Fox Valley

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<sup>1</sup> Before trial, appellant brought an unsuccessful interlocutory appeal arguing lack of personal jurisdiction over it. *Village Homes of Grandview Square II Assoc. v. R. E. C. Inc.*, No. A17-1747, 2018 WL 2090576, at \*1 (Minn. App. May 7, 2018) (*Village Homes I*).

Contractors, LLC (Fox Valley) to perform the exterior stucco work on the building. R.E.C. also contracted with Pope Associates, Inc. (Pope) to serve as architect of the building, with Nordic Insulation, Inc. (Nordic) to provide insulation for the building, and with a number of other subcontractors to handle different aspects of the project. Village Homes, R.E.C., Pope, and Nordic are Minnesota-based entities. Fox Valley is based in Illinois.

In 2014, Village Homes learned that moisture problems had been discovered in an associated property, so it hired a company to investigate its building. An engineer inspected the building in May 2014 and informed Village Homes' board of several construction defects in July 2014. On September 26, 2014, the engineer issued an initial report to Village Homes' board, describing areas in the building walls with "elevated moisture content." The initial report made recommendations to address the moisture and prevent it from getting worse. The engineer conducted additional evaluation and issued another report on December 18, 2015, expanding on the observations and recommendations from his initial report.

### ***Stucco system and its deficiencies***

The engineer described his findings in the subsequent trial as an expert witness for Village Homes. At issue was the stucco system installed by Fox Valley—specifically, three components of the stucco system: the control joints, the accent bands, and the weep screed.

Control joints are metal joints placed inside stucco cladding to reduce the amount of cracking that occurs in panels of stucco when they shift or change size due to temperature and moisture. Control joints divide up large panels of stucco into smaller pieces and help accommodate movement by the inflexible, cement-like stucco. Village Homes' expert

explained that the control joints installed in the building had gaps on every outside corner of the building, which resulted in holes that allowed water to get behind the stucco system. The expert testified that the building is not a rectangular building and estimated that there were about 30 of these outside corners on the building.

Accent bands are foam pieces glued onto the stucco façade and covered with a finish coat to create a visual break or architectural enhancement to a building. Village Homes' expert testified that the accent bands installed on the side of the building had a top surface that was relatively flat or, in some cases, angled. He stated that this was a problem because, when stucco is flat or angled, water tends to pool on it, which results in the stucco breaking down more quickly. The expert also addressed photographs of the finishing coat failing on one of the accent bands. He explained that, once the finishing coat starts to fail, the materials behind it tend to be more susceptible to moisture. He testified that, to address the accent band issue with the building, he recommended removing the finishing coat from the accent bands and applying a more durable finish coat material.

Lastly, a weep screed is a metal piece installed along the bottom of the wall before the stucco is applied. It typically has holes at the bottom so that, if water gets behind the stucco, the water can drain out through the weep screed. Village Homes' expert testified that building codes require that weep screeds be installed at least two inches above paved areas. He further testified that the weep screeds used in the building were installed "below the level of the pavers," causing moisture to accumulate and leading to the weep screeds corroding. He stated that he thought that the accumulated water was also getting through the waterproofing membrane, which was intended to protect the wooden structure of the

building from moisture, by following pathways created by the nails attaching the weep screed to the building.

***Procedural history***

On February 22, 2016, Village Homes sued general contractor R.E.C. for construction defects in the building and the resulting damage. On June 9, 2016, R.E.C. initiated third-party actions against 11 subcontractors, including Fox Valley. R.E.C. filed an affidavit of service, stating that Fox Valley had been served on June 10 with a copy of the third-party complaint by personal delivery to a paralegal, L.S. The affidavit states that the delivery was made to the office address of Fox Valley's authorized agent, and a later affidavit by R.E.C.'s server stated that the paralegal informed the server that she was authorized to accept service for Fox Valley. A lawyer at the address was Fox Valley's authorized agent.

After R.E.C. filed its third-party actions, Village Homes amended its complaint on June 30, adding a new claim against R.E.C. and asserting all of its claims directly against the subcontractors. Village Homes filed an affidavit stating that it served its amended complaint on Fox Valley by mailing it to the same address to which R.E.C.'s server had delivered its third-party summons and complaint.

Fox Valley claims that the case came to its attention based on a letter sent to its insurance company, though Fox Valley does not indicate when that occurred. An affidavit in the record shows that, even if Fox Valley did not receive actual notice when the paralegal received the complaint, Fox Valley's president received a tender letter from R.E.C. with a copy of Village Homes' complaint on June 13, 2016.

Fox Valley made no appearance in the lawsuit in the district court until almost a year later when, on May 26, 2017, it filed its answer to R.E.C.'s third-party complaint. Its answer asserted that R.E.C. had failed to provide sufficient service of process. On August 31, Fox Valley moved for summary judgment on all claims against it in R.E.C.'s third-party complaint and in Village Homes' amended complaint, arguing that there was no evidence that it performed its work negligently and that R.E.C.'s indemnification claim failed as a matter of law. In an October 2 order, the district court denied Fox Valley's motion as untimely under the scheduling order in the case.

On October 20, Fox Valley filed a motion in limine, arguing that the district court should exclude from trial any evidence against it because of inadequate service of process resulting in a lack of jurisdiction. Village Homes responded with a request for a determination of jurisdiction. On October 26, Fox Valley then moved for dismissal of the case based on ineffective service of process. Fox Valley also argued that the statute of limitations and statute of repose barred Village Homes' claims and that the claims were also barred based on Village Homes' settlement with the other parties.

In an order filed on November 1, the district court denied Fox Valley's motion to dismiss, in part because it concluded that Fox Valley had submitted to its jurisdiction by participating in the litigation. On November 3, Fox Valley appealed that order. On November 7, the district court ruled on Village Homes' motion for a determination of jurisdiction, concluding that Fox Valley had been served with process, effective June 10, 2016, and had waived any objections as to service by participating in the litigation. The district court then entered judgment the following day and stayed proceedings pending Fox

Valley's appeal. While the appeal was pending, Village Homes finalized settlements with R.E.C. and the subcontractors other than Fox Valley, and all claims by and against R.E.C. and those subcontractors were dismissed with prejudice.

On appeal, this court affirmed the district court's determination that Fox Valley had submitted to the district court's jurisdiction by moving for summary judgment on bases other than lack of jurisdiction. *Village Homes I*, 2018 WL 2090576, at \*2. Although Fox Valley also raised the other arguments that it had made in its summary-judgment motion, we declined to reach those arguments because they were outside the scope of the interlocutory appeal. *Id.* at \*3.

On remand, Fox Valley again moved for summary judgment. It argued that, even if it waived its jurisdictional defense, the district court did not acquire jurisdiction until the date of its waiver and that, by that time, the claims had become time barred. The district court denied Fox Valley's motion, electing not to disturb the November 7 order's determination that Fox Valley had been served on June 10, 2016, which was undisputedly within the statute of limitations. The district court also concluded that, even if service was defective, Village Homes' amended complaint related back to its timely original complaint.<sup>2</sup>

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<sup>2</sup> Fox Valley appealed this decision, along with the November 7 order, but this court dismissed the appeal, determining that *Village Homes I* resolved the jurisdictional question and that the order denying summary judgment was not appealable. *Village Homes of Grandview Square II Assoc. v. Fox Valley Contractors, LLC*, No. A18-1753 (Minn. App. Dec. 4, 2018) (order).

A six-day jury trial took place between February 26 and March 5, 2019. The jury, through a special-verdict form, found that Fox Valley had been negligent in its work performance and that Fox Valley breached its contract with R.E.C. The jury determined that the negligence and breach of contract had caused damages in the amount of \$846,652.01 to Village Homes. The district court determined that there was \$230,103.78 of preverdict interest, pursuant to Minn. Stat. § 549.09 (2018), and entered a judgment of \$1,076,755.79 for Village Homes. Fox Valley moved for judgment as a matter of law and for a new trial, which the district court denied.

This appeal follows.

## **D E C I S I O N**

### **I. Village Homes' claims were not time barred.**

Fox Valley argues that the district court erred by denying it summary judgment on the ground that Village Homes' claims were barred by the statute of limitations. Fox Valley contends that, even though it forfeited its ineffective-service-of-process argument as a *jurisdictional* defense, the effectiveness of service is still relevant to determining the commencement date of the action for purposes of its *statute-of-limitations* defense, and the commencement date, it contends, was outside the limitations period.

A district court “shall grant summary judgment if the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law.” Minn. R. Civ. P. 56.01. Appellate courts apply a de novo standard of review to a district court's legal conclusions on summary judgment and view the evidence in the light most favorable to the nonmoving party. *RAM Mut. Ins. Co. v. Rohde*, 820 N.W.2d 1, 6



(Minn. 2012). An appellate court will affirm summary judgment if it can be sustained on any ground. *Doe v. Archdiocese of St. Paul*, 817 N.W.2d 150, 163 (Minn. 2012). Appellate courts review “construction and application of the Minnesota Rules of Civil Procedure de novo.” *Melillo v. Heitland*, 880 N.W.2d 862, 864 (Minn. 2016) (quotation omitted).

Under Minnesota law, except when fraud is involved, a party may not bring a cause of action arising out of the construction of an improvement to real property more than two years after the cause of action accrues. Minn. Stat. § 541.051, subd. 1(a) (2018). Barring some exceptions with respect to ongoing construction projects, a cause of action accrues upon the discovery of the injury. *Id.*, subd. 1(c) (2018).<sup>3</sup> The commencement date of the action determines whether an action is barred by the statute of limitations. *See Cox v. Mid-Minn. Mut. Ins. Co.*, 909 N.W.2d 540, 546-47 (Minn. 2018) (concluding that a party’s action commenced upon personal service of process by the sheriff, but that that conclusion “may be cold comfort,” as the commencement was after the date that the district court determined that the statute of limitations expired).

Village Homes does not dispute that its cause of action accrued, at the earliest, in July 2014 and that the statute of limitations therefore expired, at the earliest, in July 2016. Thus, if Village Homes commenced its action before July 2016, it was timely. The following dates are relevant. On February 22, 2016, Village Homes commenced this

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<sup>3</sup> Fox Valley unsuccessfully asserted both a statute-of-limitations and a statute-of-repose defense in the district court. Under the relevant statute of repose, no cause of action for an injury arising out of the construction of an improvement to real property shall accrue more than ten years after “substantial completion of the construction.” Minn. Stat. § 541.051, subd. 1(a). On appeal, Fox Valley argues only its statute-of-limitations—and not its statute-of-repose—defense.

litigation by a complaint against the general contractor, R.E.C. Thereafter, on June 10, 2016, R.E.C. initiated a third-party action against Fox Valley by personally serving a summons and third-party complaint on a paralegal at the address of Fox Valley's registered agent. On June 30, 2016, Village Homes, pursuant to a stipulation with R.E.C., amended its complaint—adding claims against Fox Valley—and mailed the amended complaint and stipulation to Fox Valley via certified mail. Almost a year later, on May 26, 2017, Fox Valley answered the amended complaint, asserting a service-of-process/jurisdictional defense. On August 31, 2017, Fox Valley moved for summary judgment but failed to assert its jurisdictional defense, thus waiving it.

Thereafter, the district court determined that the action against Fox Valley commenced on June 10, 2016—the date of R.E.C.'s service of its third-party complaint against Fox Valley—and that Village Homes' claims were thus timely.

Relevant here, a civil action is commenced against a defendant (1) “when the summons is served upon that defendant” or (2) “at the date of signing of a waiver of service pursuant to Rule 4.05.” Minn. R. Civ. P. 3.01. The rules of civil procedure specify how a party may personally serve a summons on a domestic or foreign corporation. *See* Minn. R. Civ. P. 4.03. The rules also specify how a party may request, via first-class mail or other reliable means, that the defendant waive service of a summons. *See* Minn. R. Civ. P. 4.05. A party may serve other pleadings and documents “by delivering a copy to the [party's] attorney or party; by mailing a copy to the [party's] attorney or party at the attorney's or party's last known address; or, if no address is known, by leaving it with the court administrator.” Minn. R. Civ. P. 5.02(a).

In the context of third-party practice, a third-party plaintiff may “serve a summons and complaint on a nonparty who is or may be liable to it for all or part of the claim against it.” Minn. R. Civ. P. 14.01. If a third-party defendant is brought into the action, “[t]he plaintiff may assert against the third-party defendant any claim arising out of the transaction or occurrence that is the subject matter of the plaintiff’s claim against the third-party plaintiff.” Minn. R. Civ. P. 14.03.

Fox Valley contends that R.E.C.’s attempted personal service of the summons and third-party complaint was deficient and that Village Homes’ later service by mail did not independently effect service. Fox Valley argues the action cannot be determined to have commenced any earlier than the date that Fox Valley waived its service-of-process defense—specifically, when it moved for summary judgment on August 31, 2017, well outside the statute of limitations. Addressing Village Homes’ service first, we observe that rule 14 did not require Village Homes to serve a summons on Fox Valley as a third-party defendant. Under rule 14, it is the third-party plaintiff—R.E.C. in this case—that had to serve the summons on Fox Valley. Minn. R. Civ. P. 14.01. Rule 14 permitted Village Homes to assert claims against the third-party plaintiff “arising out of the transaction or occurrence that is the subject matter of” Village Homes’ claim against R.E.C. *See* Minn. R. Civ. P. 14.03. Because Fox Valley was already in the litigation as a third-party defendant, Village Homes only had to serve Fox Valley its amended pleading under rule 5.02, which it complied with by mailing the amended complaint to the address of Fox Valley’s authorized agent.

But, as noted, Fox Valley argues that R.E.C.'s service was defective and therefore did not commence Village Homes' action. With respect to when Village Homes' action against Fox Valley commenced, rules 3.01 and 14 do not specify when a plaintiff's action commences against a third-party defendant when the plaintiff brings claims against the third-party defendant under rule 14.03. Here, Village Homes timely served its amended complaint by mail on June 30. Fox Valley cites no authority for the proposition that a plaintiff's timely and properly served amended complaint should fail on statute-of-limitations grounds based on an independent third-party plaintiff's failure to effectively serve a third-party defendant—particularly when the third-party defendant has waived the jurisdictional defense of ineffective service.

Fox Valley claims support in *MW Ag, Inc. v. New Hampshire Ins. Co.*, 107 F.3d 644, 647 (8th Cir. 1997). There, the Eighth Circuit concluded that, under Minnesota law, when a summons was never properly served on a defendant but the defendant waived the insufficient-service-of-process defense, the suit was commenced against the defendant for statute-of-limitations purposes on the date of the acts that constituted the waiver. *MW Ag*, 107 F.3d at 647. Fox Valley argues that, consistent with *MW Ag*, no action commenced against it until Fox Valley waived its service-of-process defense in August 2017—beyond the limitations period.

We are not persuaded. The Eighth Circuit's *MW Ag* decision is not binding on this court but in any event is distinguishable. In *MW Ag*, the commencement of plaintiff's action depended on the *plaintiff's* own attempt to serve a summons on the defendant. *Id.* at 646. The commencement date of the plaintiff's action was deemed to be the date that the

defendant waived its challenge to the plaintiff's ineffective service. *Id.* at 647. Thus, the plaintiff did not get the benefit of its own ineffective service until the date of the defendant's waiver. Here, in contrast, the plaintiff, Village Homes, was not responsible for the initial service of the third-party complaint, and, in fact, Village Homes thereafter properly served Fox Valley with its amended complaint via mail pursuant to rule 5.02. The different responsibilities for service due to the multi-party nature of this case distinguishes this case from *MW Ag.* Moreover, the record suggests that Fox Valley had actual notice of the action against it, and Fox Valley does not argue that it was prejudiced by Village Homes' reliance on R.E.C.'s service of summons.

We need not evaluate the effectiveness of R.E.C.'s service to decide that Village Homes' claims are timely when Fox Valley waived its service-of-process defense as to R.E.C.'s attempted service of the third-party complaint on June 10, 2016, and Village Homes timely served its amended complaint against the third-party defendant by mail on June 30, 2016. And, because both dates were within the statute of limitations, we need not decide on which of the two June dates the action commenced. The district court did not err by rejecting Fox Valley's argument that Village Homes' claims were time barred.

**II. The district court did not err by denying Fox Valley's motion for judgment as a matter of law.**

Fox Valley raised a number of arguments after trial in its motion for judgment as a matter of law that it now reasserts on appeal. First, Fox Valley contends that it owed Village Homes no legal duty in tort or contract and thus cannot be held liable under a theory of negligence or breach of contract. Second, it argues that it cannot be held liable when it

followed R.E.C.’s building plans. Lastly, it argues that the damages award includes the cost of a replacement stucco system, which was an economic harm for which Village Homes could not recover in tort. Appellate courts review a district court’s decision to deny a motion for judgment as a matter of law de novo, viewing the evidence in the light most favorable to the nonmoving party. *In re Estate of Butler*, 803 N.W.2d 393, 399 (Minn. 2011).

**A. Duty in tort and contract**

We begin with Fox Valley’s argument that it had no legal duty to Village Homes in tort or contract.

**1. Negligence claim**

The tort for which the jury found Fox Valley liable is negligence. Negligence claims are comprised of a duty owed by the defendant to the injured party, a breach of that duty, an injury, and a causal link between the breach and the injury. *Foss v. Kincade*, 766 N.W.2d 317, 320 (Minn. 2009). “In the absence of a legal duty, the negligence claim fails.” *Gilbertson v. Leininger*, 599 N.W.2d 127, 130 (Minn. 1999). The existence of duty of care is a question of law, which appellate courts review de novo. *Domagala v. Rolland*, 805 N.W.2d 14, 22 (Minn. 2011).

Fox Valley argues that it “acted only because of its subcontract with R.E.C.” and, thus, “even if Fox Valley breached its contractual duty to R.E.C., . . . it has no responsibility in tort to [Village Homes].” But “Minnesota law holds that a contractor has a duty, independent of the contract itself, to erect a building in a reasonably good and workmanlike manner.” *Arden Hills N. Homes Ass’n v. Pentom, Inc.*, 475 N.W.2d 495, 499-500 (Minn.

App. 1991) (rejecting developer’s argument that it had no duty outside of contractual duties “to construct townhouses in a workmanlike manner”), *aff’d mem.*, 505 N.W.2d 50 (Minn. 1993).

Fox Valley contends, however, that this principle does not apply here because, at the time of construction, R.E.C., and not Village Homes, was the owner and any duty that Fox Valley owed was owed to R.E.C., not Village Homes. Fox Valley bases this argument on the fact that, in the cases relied on by Village Homes, *Brasch v. Wesolowsky*, 138 N.W.2d 619 (Minn. 1965), and *Arden Hills N. Homes Ass’n*, the negligence cause of action was brought by the owner of the defective buildings.<sup>4</sup>

But Fox Valley does not address another case highlighted by Village Homes, *Julian Johnson Constr. Corp. v. Parranto*, 352 N.W.2d 808 (Minn. App. 1984). In *Parranto*, this court affirmed the recovery by a third-party beneficiary in connection with a negligence claim. 352 N.W.2d at 810-11. There, a township hired a contractor to excavate some land in preparation for a development project. *Id.* at 809-10. We affirmed the district court’s

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<sup>4</sup> For completeness, we note that Fox Valley relies heavily on *D & A Dev. Co. v. Butler*, 357 N.W.2d 156 (Minn. App. 1984), and *Glorvigen v. Cirrus Design Corp.*, 816 N.W.2d 572 (Minn. 2012). But these cases are distinguishable. In *D & A Dev. Co.*, we concluded that a party could not sue a subcontractor in tort for failing to deliver plans on time because the duty to deliver the plans arose in contract. 357 N.W.2d at 158-59. But the duty described in *Arden Hills N. Homes Ass’n* to construct buildings in a “reasonably good and workmanlike manner” was not implicated in *D & A Dev. Co.* by the failure to deliver plans in a timely manner; instead, the due date of the plans was a specific contractual obligation. With respect to *Glorvigen*, Fox Valley points out how the supreme court noted that “when a contract provides the only source of duties between the parties, Minnesota law does not permit the breach of those duties to support a cause of action in negligence.” 816 N.W.2d at 584 (quotation omitted). But here, *Arden Hills N. Homes Ass’n* shows that contract was not the only source of duties between the parties.

award of damages to a third-party developer on the developer's counterclaim against the contractor for negligence. *Id.* at 810-11. This court concluded that there was sufficient evidence to establish that (1) the contractor was negligent and (2) the developer was a third-party beneficiary of the contract between the township and the contractor, despite the developer not being named in the contract. *Id.*

Under *Parranto*, Fox Valley had a duty to perform its work in a "reasonably good and workmanlike manner" for any intended third-party beneficiaries to the contract between R.E.C. and Fox Valley. Whether the evidence established that Village Homes was an intended third-party beneficiary is discussed next.

## **2. Contract claim**

Fox Valley argues that Village Homes was not entitled to recover from it on breach-of-contract grounds because Fox Valley's contract was between it and R.E.C. Fox Valley contends that, despite the district court's conclusion to the contrary, Village Homes was not an intended third-party beneficiary of the contract. Under the third-party-beneficiary doctrine, a third party may recover on a contract to which it is not a party if it can show that it is an intended beneficiary under either the intent-to-benefit or the duty-owed test. *Cretex Cos. v. Constr. Leaders, Inc.*, 342 N.W.2d 135, 139 (Minn. 1984). Under the intent-to-benefit test, "the contract must express some intent by the parties to benefit the third party through contractual performance." *Id.* at 138. Under the duty-owed test, "the promisor's performance under the contract must discharge a duty otherwise owed the third party by the promisee." *Id.*



The district court concluded that R.E.C. had a duty to the unit purchasers to “deliver a building free from defective materials and constructed in accordance with applicable law, according to sound engineering and construction standards, and in a workmanlike manner,” pursuant to Minn. Stat. § 515B.4-113 (2018). According to the district court, R.E.C. contracted with Fox Valley to construct the building’s stucco exterior, “a critical component of the finished building,” and so Fox Valley was discharging a portion of R.E.C.’s duty to the unit purchasers. Thus, under the duty-owed test, Village Homes, as the association of unit purchasers, was a third-party intended beneficiary of R.E.C. and Fox Valley’s contract.

Fox Valley contends, however, that, because Village Homes could have enforced its claim against R.E.C., Village Homes cannot bring claims against Fox Valley. Fox Valley asserts that *Cretex* stands for the proposition that third-party beneficiaries claiming entitlement to a promise for their benefit “may enforce that promise only in the event they otherwise would be unable to seek its enforcement.” Its argument is unpersuasive. *Cretex* discusses how a third-party beneficiary can be established through either the duty-owed or the intent-to-benefit test and concludes that neither test was met in that case. 342 N.W.2d at 139. *Cretex* did not hold that a third-party beneficiary’s claim was barred because an alternative enforcement remedy was available.

Fox Valley also argues that the district court could not assess whether Village Homes was a third-party beneficiary because the contract between R.E.C. and Fox Valley was never entered into evidence. Fox Valley points to language in a precursor case to *Cretex*, which states, “A duty or liability to guarantee or to warrant performance to another

party to a construction contract must be found in the express provisions of the contract and cannot arise solely by implication.” *Buchman Plumbing Co. v. Regents of the Univ. of Minn.*, 215 N.W.2d 479, 481 (Minn. 1974). But that principle was applied in the context of analyzing an alleged breach of contract between two contracting parties, *id.* at 486-87; it was not relevant to a separate issue in the case involving an alleged third-party-beneficiary claim under a contract with another party. *See id.* at 484.

Certainly, the language of a contract is relevant to whether that contract is intended to benefit or satisfy a duty owed to another party. *See Cretex*, 342 N.W.2d at 139 (analyzing contractual terms to assess whether a beneficiary was intended or incidental). But a written contract is not the only means of reaching that conclusion. *E.g. Parranto*, 352 N.W.2d at 811 (discussing the facts that supported the district court’s determination that a developer was an intended third-party beneficiary, despite the contract lacking language explicitly stating that it was intended to benefit a third party). Fox Valley points to no evidence that the district court’s determination that Village Homes was an intended third-party beneficiary was incorrect, other than its assertion that it was not the case and that the contract was necessary in order to determine otherwise.

Fox Valley next suggests that the district court incorrectly imposed on it the duties created by Chapter 515B. But the district court’s order makes it clear that R.E.C. bore the responsibilities of Chapter 515B. The district court explained that R.E.C. contracted with Fox Valley to perform a portion of those duties, thus satisfying the requirements of the duty-owed test. Fox Valley claims that, for Village Homes to be a third-party beneficiary under the duty-owed test, “the performance under scrutiny must be the same.” But nothing

in the duty-owed test suggests that the duty owed cannot be a portion of a larger set of duties.

Finally, Fox Valley implies that the district court allowed Village Homes to recover twice by different theories of liability. But it points to nothing in the record that indicates that the district court permitted Village Homes to recover duplicative damages.

In sum, we conclude that the district court correctly determined that Fox Valley owed a duty, in both contract and tort, to Village Homes as an intended third-party beneficiary.

#### **B. Adherence to architectural plans**

Fox Valley argues that it is entitled to judgment as a matter of law because there is no evidence that it deviated from Pope's architectural plans.

“[I]f [a] contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications.” *United States v. Spearin*, 248 U.S. 132, 136, 39 S. Ct. 59, 61 (1918); *see also Friederick v. Redwood County*, 190 N.W. 801, 803 (Minn. 1922) (noting that a contractor was not required to go beyond the plans and specifications in digging a ditch).

Despite this general rule, there are several factors distinguishing this case from *Spearin*. First, in *Spearin*, the owner—the U.S. government—assumed the risk of defective plans. *See* 248 U.S. at 135-36, 39 S. Ct. at 60-61. Here, while R.E.C.—the owner at the time—“provided the plans,” the plans came from Pope; it was not necessarily the case that R.E.C. assumed the risk of defective plans. But even if R.E.C. did assume the risk of

defective plans, the jury considered whether Pope, as the architect, was responsible for the damage to the building and still assigned most of the fault to Fox Valley.

Second, Village Homes was not the designer of the plans or the owner of the building; instead, it was a third-party beneficiary. *Spearin* does not indicate that it protects subcontractors against all parties with respect to all possible liability related to their work so long as they follow provided plans. Instead, *Spearin* was a recognition of the allocation of the risk of deficient plans to the party who provided plans.

Finally, while Fox Valley claims that there is insufficient evidence to show that it did not follow the plans, the record shows otherwise. Village Homes' expert testified that Fox Valley had not done its work in a "workmanlike" manner. Even if a contractor follows the plans, the contractor remains liable for "defects resulting from improper workmanship or other fault on his part." *Friederick*, 190 N.W. at 802. Fox Valley contends that it is unrefuted that it was in "full compliance with the architectural plans and specifications," but the special-verdict form specifically found Fox Valley more at fault than the plan designers. Given the expert testimony and a standard of the review in which the evidence is viewed in the light most favorable to Village Homes, the evidence supports the determination that the issues arose from Fox Valley's improper workmanship, not defects in the plans. The district court did not err by rejecting Fox Valley's *Spearin* argument.

### **C. Replacement stucco system**

Fox Valley argues that the district court incorrectly permitted Village Homes to recover the cost of a replacement stucco system. Fox Valley characterizes the replacement stucco system as an economic loss that is not recoverable in tort, citing *Ptacek v. Earthsoils*,

*Inc.*, 844 N.W.2d 535, 538 (Minn. App. 2014). But, as the district court explained, *Ptacek* states that Minnesota’s statutory economic-loss doctrine precludes the common-law doctrine and does not bar tort recovery except in the case of certain product-defect and common-law misrepresentation tort claims. 844 N.W.2d at 538-39 (discussing Minn. Stat. § 614.101 (2012)). Village Homes’ negligence claim was neither a product-defect claim nor a misrepresentation claim. So the economic-loss doctrine does not apply here.<sup>5</sup> Furthermore, the jury also found Fox Valley to be in breach of contract; Fox Valley does not explain why, even if the damages were barred on a negligence theory, the district court could not impose the damages as a remedy for the breach of contract. The district court did not err by rejecting Fox Valley’s economic-loss argument.

### **III. Fox Valley’s alleged trial errors do not warrant a new trial.**

Fox Valley contends that trial errors by the district court warrant a new trial. The alleged errors are a combination of evidentiary errors and challenges to the verdict form. Evidentiary determinations “rest[] 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. District courts also have broad discretion

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<sup>5</sup> Fox Valley appears to have argued to the district court that the stucco system amounted to a sale of goods and thus the doctrine would apply, but it has not renewed that argument on appeal.

in drafting special-verdict questions. *Russell v. Johnson*, 608 N.W.2d 895, 898 (Minn. App. 2000), *review denied* (Minn. June 27, 2000). Absent an abuse of discretion, appellate courts will not reverse a district court's decision on a special-verdict form. *See Kronebusch v. MVBA Harvestore Sys.*, 488 N.W.2d 490, 496 (Minn. App. 1992), *review denied* (Minn. Oct. 20, 1992).

**A. Adding other parties to the special verdict form**

Fox Valley argues that the district court abused its discretion by refusing to submit to the jury the issue of the negligence of Nordic (the insulation contractor) or R.E.C. Fox Valley claims that Village Homes' expert testified that Nordic failed to install vapor barriers with the building's insulation, which was a violation of Minnesota codes and resulted in the exterior stucco cladding needing to be removed. It also claims that R.E.C. was responsible for the plans and specifications, and thus should have been included in the verdict form as well.

“If there is evidence of conduct which, if believed by the jury, would constitute negligence or fault on the part of the person inquired about, the fault or negligence of that party should be submitted to the jury.” *Frey v. Snelgrove*, 269 N.W.2d 918, 923 (Minn. 1978) (quotation omitted).

With respect to Nordic, the district court noted that there was no evidence linking Nordic's defective installation of the insulation system to the damages sought by Village Homes. Fox Valley overstates the expert's testimony. Fox Valley claims that the expert “admit[ted] that he had recommended the removal and replacement of every square inch of stucco cladding because of the defects he found in the insulation system.” But the expert

only agreed that his report stated that a lack of vapor barriers along the floor line was a building code violation and resulted in condensation within the wall assembly. He did not link this lack of a vapor barrier to his recommendation for the removal of all of the existing stucco cladding in the manner that Fox Valley claims.

While there was evidence that Nordic did not properly install vapor barriers, as claimed by Fox Valley, Village Homes' expert testified that the sections of wall with stucco affected by the vapor barrier issues were separate from the sections on which Village Homes was basing its claims. The district court concluded that there was no evidence contradicting this point, and, on appeal, Fox Valley only appears to identify testimony that it elicited during cross-examination that there were sections—as in, *other* sections—of wall identified in the expert's report that were affected by the improper vapor barrier issues. Given that Fox Valley identifies no evidence suggesting that Village Homes' expert failed to correctly isolate which sections of wall with stucco were damaged as a result of Fox Valley's work, it was not an abuse of discretion to exclude Nordic from the verdict form.

The district court also explained that, while there was testimony about R.E.C.'s role in managing the project as a general contractor, there was no evidence showing that R.E.C.'s management resulted in the damage to Village Homes' property. Fox Valley identifies no contrary evidence on appeal, beyond its assertion that R.E.C. has the ultimate responsibility. It also claims that R.E.C. not being on the verdict form limited its ability to argue that it was simply following R.E.C.'s plans and specifications. But Pope, the party that produced the plans, was on the special verdict form, so nothing prevented Fox Valley

from making its argument that the plans were the issue, not its installation. It was not an abuse of discretion to not include R.E.C. on the special verdict form.

**B. Evidence of settlements**

Fox Valley contends that the district court erred by excluding evidence of Village Homes' settlement with R.E.C. and the other subcontractors. Evidence of a settlement is admissible when "it is offered for a purpose such as proving bias or prejudice of a witness." *Frey*, 269 N.W.2d at 923. But it is "within the [district] court's discretion to determine whether to admit the actual agreement into evidence, or the details thereof." *Id.*

Fox Valley claims that, under *Bunce v. A.P.I., Inc.*, 696 N.W.2d 852, 857 (Minn. App. 2005), it was free to try to shift as much of the negligence blame onto the settling parties as it could. As a threshold matter, this argument seems to go to why the other parties should have been on the verdict form, not to why the settlement agreement was relevant. But even so, while Fox Valley was free to try to shift blame onto the other defendants under *Bunce*, Fox Valley still needed to offer relevant evidence in support of its effort.

Under *Frey*, the settlement could be admissible to show bias or prejudice, but Fox Valley identifies no witness that it could have impeached with the settlement agreements. The district court noted that most of Village Homes' evidence related to Fox Valley's liability came in through an expert who "had nothing to gain or lose personally by shifting blame between settling defendants and non-settling defendants." Fox Valley offers no explanation for how the settlement showed that the expert witness was biased, beyond the general argument that an expert is biased in favor of his client, which is not enough to establish bias. *Cf. In re Buckmaster*, 755 N.W.2d 570, 582 (Minn. App. 2008) (explaining



that an agreement for corrective action could not be used for impeachment purposes if it did not provide a witness any “additional incentive to provide false testimony”).

Fox Valley claims that the expert modified his repair estimates after Village Homes settled with the other parties. But the relevant impeachment evidence to that point would be the changing repair estimates, not the settlement agreements themselves. Fox Valley was permitted to cross-examine Village Homes’ expert on that point.

The district court permitted Fox Valley to make its case that the settling defendants were to blame for the damage to Village Homes’ building; the fact that, as noted above, Fox Valley failed to present evidence showing that parties other than Pope were negligent means that presenting the settlement would have only invited the jury to speculate that other parties might be to blame. The district court did not abuse its discretion by excluding the evidence of Village Homes’ settlement with other parties.

**C. Exclusion of rebuttal testimony**

Finally, Fox Valley contends that the district court improperly suppressed rebuttal testimony from its expert witness. Fox Valley’s counsel informed the district court that its expert witness was going to testify on Village Homes’ control-joint claims and the district court prevented it because the expert’s report did not set forth those opinions. Fox Valley argues the content of their expert’s suppressed testimony did not have to be in his report because it was rebuttal testimony, which is intended to counter “new unforeseen facts” brought out in the other side’s case. Fox Valley also complains that a “double standard” was applied because Village Homes’ expert testified on details related to the control joints that did not appear in his report.

“If a party fails to provide information or identify a witness as required by Rule 26.01 or 26.05, the party is not allowed to use that information or witness to supply evidence . . . at a trial, unless the failure was substantially justified or is harmless.” Minn. R. Civ. P. 37.03(a).

The district court determined that Fox Valley had not disclosed its expert’s opinion on the control joints, despite having had Village Homes’ expert opinion since September 2017, over a year before the trial. It also noted that Fox Valley declined to inspect the building during that time. It concluded that, while a continuance may be appropriate in some cases to address a failure to disclose an expert opinion, it was not appropriate here, when multiple continuances had delayed the trial, the trial had already begun, and Village Homes would face additional expense due to the delay. The district court also noted that rebuttal evidence is offered to refute unexpected evidence and, in this case, Fox Valley had notice from the September 2017 report that Village Homes intended to testify on control joints.

Fox Valley cites to nothing in the record that shows that it disclosed, in its expert reports, the information that it wanted to present at trial. It claims that there was a double standard but, again, cites to nothing in the record contradicting the district court’s determination that Village Homes disclosed the relevant information about its expert’s opinions. And, based on our examination of the record, Fox Valley’s expert was allowed

to offer a rebuttal—he simply was not allowed to testify on a new, undisclosed opinion regarding the control joints.<sup>6</sup> We conclude that there was no abuse of discretion.

**Affirmed.**

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<sup>6</sup> Fox Valley’s expert planned to testify that the control joints were installed per the plans and that the moisture intrusion was not caused by the control joints.