STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0949

Ronald J. Bardine,
Respondent,

vs.

Diana M. Petersen, et al.,
Appellants.

Filed May 3, 2021
Affirmed; motion granted in part
Jesson, Judge

Sherburne County District Court
File No. 71-CV-16-1378

Patrick B. Moore, Joslin & Moore Law Offices, P.A., Cambridge, Minnesota; and

Gary W. Strootman, Strootman Law Offices, P.L.L.C., New Hope, Minnesota (for respondent)

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Considered and decided by Reyes, Presiding Judge; Worke, Judge; and Jesson, Judge.

NONPRECEDENTIAL OPINION

JESSON, Judge

After working together in the securities industry for nearly two years, the business relationship between appellant Diana Petersen and respondent Ronald Bardine soured. Bardine, who was Petersen's supervisor, became concerned when he discovered that

Petersen gave clients unapproved investing documents and had clients sign blank forms. When a compliance investigation—prompted by allegations that Petersen had signed her husband's name on a check—revealed that Petersen had violated company policies, she was dismissed.

Bardine subsequently sued Petersen, and a jury found that she was liable to Bardine for breach of contract and breach of the covenant of good faith and fair dealing. In a separate proceeding, the jury later awarded Bardine attorney fees. Petersen appeals. Because the jury could find in favor of Bardine on his breach-of-contract claims, the compliance testimony at issue was not expert, and the determination of attorney fees was properly submitted to the jury with adequate instruction, we affirm.

FACTS[1]

Appellant Diana Petersen and respondent Ronald Bardine, both employed in the securities industry, went into business together in 2013. At the time, Petersen had her own practice, but was considering retirement. Bardine, who worked with Raymond James Financial Services Inc. (Raymond James), wanted to expand his practice. Believing that each had something to offer the other, Bardine and Petersen entered into a business relationship. They agreed that Petersen would be an independent contractor and work under Bardine's supervision as a registered representative of Raymond James.

[1] The following is a summary of facts established at trial viewed in the light most favorable to the verdict. *Navarre v. S. Wash. Cty. Sch.*, 652 N.W.2d 9, 21 (Minn. 2002).

Three contracts defined the scope of the parties' relationship.[2] The first, an independent contractor agreement, established that Bardine would oversee Petersen's securities work, which she would provide as an independent contractor—not an employee—of Raymond James. The independent contractor agreement was valid for six months, at which time the parties could renegotiate and renew the agreement. If the independent contractor agreement was not renewed, it would expire at the end of the six-month period.

The second contract was a purchase of practice agreement (purchase agreement) to facilitate Petersen's eventual retirement. Under the purchase agreement, Petersen would transfer her securities practice to Bardine by January 1, 2018. Included in the purchase agreement was a merger clause, purporting to "supersede any and all other oral or written agreements prior to the date of execution of this Agreement."

The third contract was a financial advisor agreement between Petersen and Raymond James. The financial advisor agreement established that Petersen was being retained by Bardine as a registered representative of Raymond James to buy and sell securities. Although Petersen was not a Raymond James employee, she was required to "adhere to all applicable laws, rules, regulations and interpretations of local, state, and federal Regulatory Authorities." The contract introduced as an exhibit at trial was signed by Petersen and Bardine, but not by a Raymond James representative.[3]

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[2] Petersen and Bardine also executed a sublease agreement in which Bardine leased office space from Petersen. Neither party disputes that contract on appeal.

[3] We note, however, that another copy of the agreement in the record on appeal includes the signature of a Raymond James representative. And in its order on Petersen's motion

Petersen and Bardine worked together in their established capacities for nearly two years. But in the fall of 2015, Bardine became concerned that Petersen was not complying with Raymond James policies. He knew that she had given clients blank forms to sign and had shown clients unverified investing reports. And in late October 2015, a coworker reported Petersen to the compliance department for signing her husband's name on a check. The Raymond James compliance department subsequently sent a team of compliance officers to investigate the allegations. During the investigation, the officers interviewed Petersen, Bardine, and others, and reviewed documents and emails relating to Petersen's work. The officers discovered that, in addition to the issues Bardine identified, Petersen had been saving client passwords and corresponding with clients via an email address not affiliated with Raymond James. Based on the results of the investigation, Bardine and Raymond James terminated their agreements with Petersen.

When Bardine received a bill from Raymond James for the investigation, he asked Petersen for reimbursement. She refused. Bardine sued, alleging claims of breach of contract, negligence, breach of the covenant of good faith and fair dealing, and unjust enrichment. Petersen countersued for breach of contract, conversion, civil theft, breach of fiduciary duty, and unjust enrichment. She based these claims on assertions that Bardine failed to pay Petersen an agreed-upon commission, wrongfully accused Petersen of violating Raymond James company policies, and failed to pay Petersen for her client list.[4]

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for a new trial the district court stated that "there was evidence adduced at trial that a representative of Raymond James did sign the contract."

[4] Additionally, Petersen filed a Financial Industry Regulatory Authority (FINRA) arbitration action against Raymond James for defamation, tortious interference with

Petersen also moved for the determination of attorney fees pursuant to the purchase agreement by the jury in a separate proceeding, which the district court granted.

Prior to trial, Bardine provided his witness list to Petersen. Included were three compliance officers who had conducted the investigation into Petersen's work. Bardine listed the officers as nonexpert witnesses whose testimony would "pertain to [Raymond James] and FINRA [Financial Industry Regulatory Authority] compliance and investigation into activities of Ms. Petersen." At trial, the officers testified to their individual recollections of what occurred during the investigation, though at times their testimony also included statements about Raymond James company policies and federal regulations and how they related to Petersen's conduct. Petersen objected to this testimony, arguing that the officers were acting as expert witnesses. The district court overruled the objections and allowed the officers to "testify concerning Raymond James policies and [their] findings as a fact witness of [the] audit, [their] conversations, [their] communications with various individuals, but that [their] testimony was not to extend to matters pertaining to or [their] opinion of [their] findings as they related to the law or regulations specifically from FINRA."

At the close of Bardine's case-in-chief, Petersen moved for judgment as a matter of law, but the district court denied the motion, explaining that because the nature of the relationship between Bardine and Petersen was disputed and was at the heart of Bardine's

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contract, tortious interference with prospective economic advantage, aiding and abetting, and intentional and negligent infliction of emotional distress. The arbitration panel awarded Petersen $360,000.

claims, "the jury could differ on each of these counts." At the close of trial, Petersen renewed her motion for judgment as a matter of law, but the district court again denied the motion.

The jury found that Petersen breached the independent contractor agreement and the financial advisor agreement, as well as the covenant of good faith and fair dealing under the purchase agreement. For those breaches, the jury awarded Bardine $175,000. With regard to the remaining claims, the jury determined that Petersen had not breached the purchase agreement or acted negligently and had not proven her counterclaims.

Following the jury's verdict, and pursuant to Petersen's earlier motion, the district court submitted the question of attorney fees to the jury in a separate proceeding. The court instructed the jury to "only award the amount that reasonably compensates the Plaintiff for the costs incurred by the Plaintiff in proceeding with the lawsuit against Defendants and in defending against the lawsuit brought against him by the Defendants." The court also reminded the jury not to include any attorney fees already awarded as part of its previous verdict. The jury awarded Bardine an additional $64,757.17. Adopting the jury's findings, the district court entered judgment in favor of Bardine in the amount of $239,757.17.

Petersen then moved for a new trial, arguing that the verdict was unsupported by evidence because neither the independent contractor agreement nor the financial advisor agreement were valid contracts, and as such, could not be breached. And because the contracts were not valid, Petersen asserted that Bardine could not have an independent action for breach of the covenant of good faith and fair dealing. Petersen also claimed that the district court improperly allowed the jury to determine attorney fees and failed to

provide the jury with proper instructions on how to award damages. The district court denied the motion.

Petersen appeals.[5]

DECISION

Petersen argues that the district court erred by denying her motions for judgment as a matter of law and abused its discretion by denying her motion for a new trial. She also contends that the district court abused its discretion by admitting "expert" testimony from Bardine's fact witnesses, erred by submitting the question of attorney fees to the jury, and provided improper instructions to the jury. Because Petersen's arguments about the district court's denial of her motions rely on the same underlying assertions—that the independent contractor agreement and the financial advisor agreement are not valid—we address those claims together. We then move to Petersen's challenge to the court's admission of the compliance officers' testimony before concluding with Petersen's arguments concerning the jury—whether the question of attorney fees was improperly submitted to the jury, and whether they received adequate instruction to calculate the appropriate damages.

[5] Petersen also moves this court to strike Bardine's addendum and portions of his appellate brief. Petersen claims that Bardine's addendum includes exhibits not admitted at trial and that portions of his brief are unsupported by citations to the record or based on the exhibits not in the record. Bardine concedes that points 2, 5, 17, and 24 of his brief should be stricken or changed. But as to the remaining errors, Bardine provided adequate citation in his reply and corrected any errors asserted by Petersen. As such, we grant in part Petersen's motion to strike with regard to points 2, 5, 17, and 24 of Bardine's brief.

I. Because both the independent contractor agreement and the financial advisor agreement were legally enforceable as to Bardine, the district court neither erred by denying Petersen's motions for judgment as a matter of law nor abused its discretion by denying her motion for a new trial.

Petersen assigns error to the district court's denial of her motions for judgment as a matter of law and her motion for a new trial. The crux of her argument is that the independent contractor agreement and the financial advisor agreement are invalid as a matter of law. As such, Petersen asserts that there was insufficient evidence to support the jury's verdict. We first address whether the district court erred in denying Petersen's motions for judgment as a matter of law before considering whether the court abused its discretion in denying her motion for a new trial.

Motions for Judgment as a Matter of Law

Petersen claims that no reasonable jury could have found in Bardine's favor based on the evidence submitted at trial. According to Petersen, because the independent contractor agreement expired in April 2014, any alleged breach in the fall of 2015 was a legal impossibility. Petersen also claims that because the financial advisor agreement was between herself and Raymond James—and Raymond James did not sign the contract—Bardine cannot enforce the agreement. As a result, she asserts, the district court erred by denying her motion for judgment.

A party seeking judgment as a matter of law must show that "there is no legally sufficient evidentiary basis for a reasonable jury" to find in favor of the opposing party. Minn. R. Civ. P. 50.01(a). We review a district court's ruling on 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). In this case, we consider whether the evidence admitted at trial formed a legally sufficient basis for the jury to find in Bardine's favor on the breach-of-contract claims.

To ground our de novo review of the district court's ruling, we first identify the elements of a breach-of-contract claim. *Id.* To prove that a contract has been breached, the plaintiff must show that (1) a contract was formed; (2) plaintiff performed any conditions of the contract; and (3) defendant breached the contract. *Park Nicollet Clinic v. Hamann*, 808 N.W.2d 828, 833 (Minn. 2011). Because Petersen's arguments only concern the first and third elements, they are the focus of our review.

We first consider the independent contractor agreement, which the parties agree was validly formed. Where the parties disagree is the moment at which the contract was terminated. The termination date of the contract determines whether Bardine could prove the third element of a breach-of-contract claim: that Petersen breached the contract in the fall of 2015. Petersen argues that the agreement was terminated when the six-month period ended, and was therefore not in effect in 2015. Bardine claims that the agreement continued until he terminated the contract in October 2015.

To identify the duration of the contract, we first look to the language of the agreement and determine the intent of the parties. *Caldas v. Affordable Granite & Stone, Inc.*, 820 N.W.2d 826, 832 (Minn. 2012). Included in the agreement is a term-of-contract clause, which establishes that the agreement "shall be effective for six months from date of signing, at which time it may be renegotiated by both parties and renewed for an additional year or be considered terminated." There is no dispute that the parties did not

renew the agreement at the end of the six-month period. By the terms of the agreement, because the parties failed to renew the contract formally, it expired six months after signing, in April 2014. But our analysis does not end here.

Minnesota appellate courts have held that where the parties continue to perform under the terms of an expired contract—or under modified terms as agreed to by the parties—a new contract may be formed. *Fischer v. Pinske*, 243 N.W.2d 733, 734 (Minn. 1976); *Bolander v. Bolander*, 703 N.W.2d 529, 542 (Minn. App. 2005), *review dismissed* (Minn. Nov. 15, 2005). In *Fischer*, the parties entered into a sales representation contract that included the option to renew the agreement after a six-month trial period. 243 N.W.2d at 734. The supreme court held that although the parties did not renew the contract in writing, because "both parties by their *conduct* continued to honor these terms throughout the course of their dealings for *several years*" the parties had waived any argument about the written renewal clause in the original contract. *Id.* at 735 (emphasis added). We applied the same standard in *Bolander*, where the parties continued their employment relationship—with no change in the conditions of employment—past the end date of the employment contract. 703 N.W.2d at 538. In reaching our decision, we stated that parties to an expired contract "may thereafter enter into a new contract by conduct . . . or otherwise, and they may adopt the provisions of their former contract or agree to modify them." *Id.* at 542.

Bardine and Petersen's actions in this case are similar to those of the defendants in *Fischer* and *Bolander*. Bardine and Petersen performed under the terms of the original contract for the six-month period as planned. But when the agreement expired in

April 2014, the two continued to perform under the terms of the agreement. Petersen offers no support for her claim that the parties' conduct changed after April 2014.[6] And our review of the record does not reveal any other evidence to suggest that the parties stopped working under the terms of the original agreement. In short, although the original agreement was only intended to be in place for six months, we conclude that Bardine's and Petersen's continued performance under the terms of the agreement extended the contract until October 2015.

Because the parties continued to perform under the independent contractor agreement until Bardine terminated the agreement in October 2015, Bardine's breach-of-contract claim is not invalid as a matter of law. As such, there was sufficient evidence for a jury to conclude that Bardine had proven his breach-of-contract claim with regard to the independent contractor agreement. The district court did not err by denying Petersen's motion for judgment as a matter of law.[7]

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[6] Petersen disputes whether the parties performed under the terms of the contract, claiming that she only received an 80% commission, rather than the 90% agreed upon in the independent contractor agreement. But, if true, this further supports the conclusion that the parties did not alter their conduct after the agreement expired in April 2014.

[7] Petersen urges us to apply *Camelot LLC v. AMC ShowPlace Theaters, Inc.*, 665 F.3d 1008 (8th Cir. 2012), *Minneapolis Cablesystems v. City of Minneapolis*, 299 N.W.2d 121 (Minn. 1980), and *Tri State Grease & Tallow Co. v. BJB, LLC*, No. A10-1560, 2011 WL 2518954, at *1 (Minn. App. June 27, 2011), and to conclude that the agreement was not renewed or extended because there was no renegotiation of the contract. But *Camelot LLC* involved the renewal of a lease and *Minneapolis Cablesystems* involved the initial formation of a contract. *Camelot LLC*, 665 F.3d at 1009; *Minneapolis Cablesystems*, 299 N.W.2d at 121. Neither case considered the precise issue here: the continuation of an existing contract. And *Tri State Grease & Tallow Co.* is a nonprecedential decision, which is not persuasive. 2011 WL 2518954, at *1; *see also* Minn. R. Civ. App. P. 136.01, subd. 1(c).

In the alternative, Petersen asserts that the independent contractor agreement was terminated when the purchase agreement was signed twenty days later. Petersen relies on the purchase agreement's merger clause, which purportedly supersedes "any and all other oral or written agreements" made prior. We are not persuaded. In *W.R. Millar Co. v. UCM Corp.*, we held that a contract for the sale of cassette recorders was not superseded by a subsequent contract establishing a sales representative relationship between the same parties, despite the inclusion of a merger clause in the latter. 419 N.W.2d 852, 854 (Minn. App. 1988). We reasoned that because the contracts involved different dealings and established distinct responsibilities, the second contract did not supersede the first. *Id.* Furthermore, we noted that the contracts were executed only one month apart, and concluded that if the parties intended the initial contract to fall under the second, "the integration clause would have expressly included it." *Id.*

The same is true here. The purchase agreement and the independent contractor agreement concern distinct transactions between Bardine and Petersen—the sale of her business and the independent-contractor relationship between the parties. Each agreement created different duties for the parties. And the purchase agreement was signed only 20 days after the independent contractor agreement. We conclude that the purchase agreement did not terminate the independent contractor agreement by integration.

Having addressed Petersen's argument that the independent contractor agreement expired prior to her termination in November 2015, we turn to her assertions that the financial advisor agreement was invalid and that Bardine could not enforce the contract. According to Petersen, the financial advisor agreement was invalid because it was not

signed by a Raymond James representative. Because of this, she claims, Bardine could not prove the first element of his breach-of-contract claim: that a contract was formed. Petersen also asserts that because Bardine was not a party to the agreement, he could not enforce its terms. We consider each argument in turn.

A contract, although unsigned, may still be enforceable if the parties have agreed to and acted in conformity with its terms.[8] *Poser v. Abel*, 510 N.W.2d 224, 228 (Minn. App. 1994), *review denied* (Minn. Feb. 24, 1994). Here, it is undisputed that Petersen and Raymond James adhered to the terms of the contract from the time of its execution to Petersen's termination. Petersen worked as an independent contractor of Raymond James and the company provided Petersen with the necessary tools and assistance to buy and sell securities. Despite Petersen's claims otherwise, we conclude that the financial advisor agreement was validly formed.

This leads us to Petersen's second argument—that Bardine cannot enforce the financial advisor agreement because he is not a party to the contract. Generally, a person who is not a party to a contract has no rights under the contract. *Caldas*, 820 N.W.2d at 833. But a third party may enforce a contract if he or she is an intended beneficiary. *Id.* A third party is an intended beneficiary if recognizing the rights of the

[8] We further note that the record contradicts Petersen's claim that the financial advisor agreement was never signed by a Raymond James representative. Although the copy of the agreement admitted into evidence did not include a signature from Raymond James, the district court noted that "there was evidence adduced at trial that a representative of Raymond James did sign the contract." And the copy of the agreement provided to us on appeal does include a signature from a Raymond James representative. But the absence or presence of a signature does not change our analysis.

third party is "appropriate," or in line with the purpose of the contract, and either (1) the parties intended to benefit the third party by performing under the contract; or (2) one party's performance under the contract satisfies a duty owed to the third party that would otherwise be owed by the other party to the contract. *Cretex Cos. v. Const. Leaders*, 342 N.W.2d 135, 138-39 (Minn. 1984).

Here, the financial advisor agreement states that it is "by and between" Raymond James and Petersen. But Bardine is named as the "associate" who had retained Petersen's services, and his signature is on the final page of the agreement. At trial Bardine testified that in signing the agreement, he understood that a "burden" was placed upon him to adhere to the terms of the contract. And Bardine did in fact perform under the terms of the agreement until it was terminated in fall 2015. In spite of the fact that Bardine was not identified as a party in the beginning of the agreement, because he agreed to and performed in accordance with the agreement, we conclude that he can enforce the contract. *Poser*, 510 N.W.2d at 228.[9]

In sum, neither the independent contractor agreement nor the financial advisor agreement were invalid as a matter of law. The independent contractor agreement, although it expired by its terms in April 2014, was extended by the parties' conduct until

[9] Even if Bardine was not a party to the agreement he was still an intended beneficiary and can enforce the agreement. *Cretex*, 342 N.W.2d at 138-39. Classifying Bardine as an intended beneficiary would be appropriate because the agreement explicitly names Bardine as an associate for whose benefit Petersen would be allowed to operate as an independent contractor of Raymond James. And by Raymond James and Petersen performing their duties under the agreement, Bardine would receive the benefit of a portion of Petersen's net commissions.

Bardine terminated the contract in October 2015. And the financial advisor agreement was validly formed and enforceable by Bardine as to Petersen. As such, there is a legally sufficient evidentiary basis for a reasonable jury to find for Bardine on his breach-of-contract claims. Minn. R. Civ. P. 50.01(a). The district court appropriately denied Petersen's motions for judgment as a matter of law.[10]

Motion for New Trial

Next, we consider Petersen's argument that the district court erroneously denied her motion for a new trial. As with her claim that the motions for judgment as a matter of law were denied erroneously, Petersen relies on her assertion that neither the independent contractor agreement nor the financial advisor agreement were valid to support her argument. Although Petersen urges us to employ a de novo standard of review, when reviewing a district court's denial of a motion for a new trial, we apply an abuse-of-discretion standard. *Christie v. Estate of Christie*, 911 N.W.2d 833, 838 (Minn. 2018).

A district court may grant a new trial if it determines that there was some error of law, misconduct by the parties, jurors, or court during the proceedings, or that the verdict

[10] Petersen further argues that Bardine could not bring claims for both breach of contract and breach of the covenant of good faith and fair dealing because the latter is not an independent cause of action. But in *In re Hennepin Cty. 1986 Recycling Bond Litig.*, the supreme court held that while parties may not *recover* under both claims, they may still *assert* both claims. 540 N.W.2d 494, 503 (Minn. 1995). Here, the jury awarded damages for breach of contract under the independent contractor agreement and the financial advisor agreement, but not the purchase agreement. Consistent with that decision, the jury only awarded damages for breach of the covenant of good faith and fair dealing with regard to the purchase agreement, not the independent contractor agreement or the financial advisor agreement. As such, Bardine did not recover damages under both claims on any of the contracts. The district court did not err by denying Petersen's motion for judgment as a matter of law on this issue.

is unsupported by the evidence or is contrary to law. Minn. R. Civ. P. 59.01. Petersen alleges that there was insufficient evidence to support the jury's verdict, relying on her claims that the independent contractor agreement and the financial advisor agreement were invalid. But as we addressed above, both contracts were not invalid as a matter of law and there was sufficient evidence for the jury to find in favor of Bardine on the breach-of-contract claims.

In sum, because the contracts were not invalid as a matter of law, the verdict is supported by the evidence. *Id.* (g). And Petersen did not assert, nor did our review of the record reveal, any clear errors of law, irregularities in the proceedings, or misconduct by the parties, jurors, or the court. *Id.* (a)-(b), (f). The district court did not abuse its discretion by denying Petersen's motion for a new trial.[11]

II. The district court did not abuse its discretion by admitting testimony from the compliance officers.

Petersen also assigns error to the district court's admission of the compliance officers' testimony at trial. She argues that although the officers were not identified by Bardine as experts, the officers nonetheless provided "expert" testimony with regard to Raymond James company policies and federal financial regulations. We review a district court's evidentiary rulings for an abuse of discretion. *Kroning v. State Farm Auto. Ins.*

[11] Petersen also argues that the financial advisor agreement, if valid, must be interpreted under Florida law and enforced in Florida in accordance with the terms of the agreement's forum-selection clause. But Petersen did not raise this issue until she moved for a new trial—*after* the jury delivered its verdict. By failing to timely assert her forum-selection-clause argument, Petersen forfeited that claim. *State v. Beaulieu*, 859 N.W.2d 275, 278-79 (Minn. 2015).

Co., 567 N.W.2d 42, 45-46 (Minn. 1997). Unless there is evidence that the district court erroneously applied the law or did not base its decision on facts in the record, we will not reverse its decision. *Id.*

To determine whether the district court abused its discretion we first consider the scope of witness testimony at trial. Witnesses provide either lay or expert testimony. Minn. R. Evid. 701, 702. A lay witness provides testimony in the form of opinions or inferences that are not based on scientific, technical, or other specialized knowledge. Minn. R. Evid. 701. An expert witness, on the other hand, provides testimony based on his or her specialized "knowledge, skill, experience, training, or education," which must be shown to have foundational reliability. Minn. R. Evid. 702.

Here, Bardine called the compliance officers to testify to their personal knowledge of the compliance investigation and Petersen's actions. Each officer had been involved in the investigation by interviewing Bardine, Petersen, and others, inspecting Petersen's files and correspondence with clients, and reviewing Petersen's compliance record. At trial, the officers' testimony consisted almost exclusively of their first-hand accounts of what occurred during the investigation. The officers' recollection of such personal knowledge lies squarely within the definition of lay witness testimony. Minn. R. Evid. 701.

And when the officers testified to Raymond James policies or federal financial regulations, they did so within the scope of the investigation into Petersen's conduct. The purpose of those statements was not to provide expert opinion on those policies and regulations, but to explain why Petersen was being investigated and why she had been

discharged. As such, the district court did not abuse its discretion by admitting the compliance officers' testimony at trial.

III. The district court did not err by submitting attorney fees and costs to the jury and did not abuse its discretion when providing instructions to the jury.

Petersen claims that the district court erred both by submitting the question of attorney fees to the jury and by failing to provide adequate instructions on how to calculate the award. Because Petersen's challenge to the submission of attorney fees to the jury involves the district court's application of the law, we review the district court's actions on that issue de novo. *Harlow v. State Dep't of Human Servs.*, 883 N.W.2d 561, 568 (Minn. 2016). And we review the court's jury instructions for an abuse of discretion. *Hilligoss v. Cargill, Inc.*, 649 N.W.2d 142, 147 (Minn. 2002).

Attorney Fees

Although Petersen admits that she moved to have attorney fees determined by the jury, she nonetheless assigns error to the district court doing so. Petersen argues that she requested that the jury determine attorney fees only under the purchase agreement, which required that Bardine be the "prevailing party" in order to recover. Because Bardine did not prevail on his breach-of-contract claim with regard to the purchase agreement, Petersen claims it was error for the court to allow Bardine to recover under the indemnification clause of the independent contractor agreement—a different contract and a different theory of recovery.

We begin our de novo review by determining when attorney fees may be submitted to a jury. Where the recovery of attorney fees is based on an indemnification agreement

between the parties, the issue may be submitted to a jury. *United Prairie Bank-Mountain Lake v. Haugen Nutrition & Equip., LLC*, 813 N.W.2d 49, 55, 57 (Minn. 2012) ("[A] claim for a monetary payment under a contractual indemnity provision is a legal claim with an attendant right to a jury trial under Article I, Section 4 of the Minnesota Constitution."). In this case, Bardine's claim for attorney fees was based upon the indemnification clause in the independent contractor agreement. As such, the attorney fees could be properly determined by the jury. *Id.* But because Petersen claims that the indemnification clause does not contemplate attorney fees, we must also look to the language of the agreement to determine whether attorney fees are recoverable.

The independent contractor agreement included an indemnification clause stating that Petersen "indemnifies and agrees to defend and hold harmless" Bardine against "all claims, actions, *costs*, damages and losses incurred by or assessed against" him as a result of Petersen's breach of the contract. (Emphasis added.) Although the clause does not explicitly list attorney fees, the right to indemnity "has been consistently held to include reasonable attorney's fees." *Koehnle v. M.W. Ettinger, Inc.*, 353 N.W.2d 612, 616 (Minn. App. 1984). And our review of the contract reveals no indication that the clause excludes attorney fees. We conclude that the indemnification clause in the independent contractor agreement allows for the recovery of attorney fees.

In sum, the indemnification clause does not preclude Bardine from recovering attorney fees due to Petersen's breach of the independent contractor agreement. Because claims for attorney fees based upon indemnification clauses may be determined by the jury,

we discern no error in the district court's submission of attorney fees to the jury under this theory.

Still, Petersen claims that she had no notice of Bardine's intent to seek attorney fees under the indemnification clause in the independent contractor agreement. We note that when the district court bifurcated the trial and attorney fees decision, the court did not—and could not have—known which party would prevail on which claims. And Bardine, in his initial complaint, explicitly asked for an award of his attorney fees. Further, Petersen, as a party to the independent contractor agreement, certainly had knowledge of that clause and could have expected Bardine to argue for attorney fees under that provision.[12] We are not persuaded by Petersen's argument. The district court did not err by submitting the question of attorney fees to the jury.

Jury Instructions

Petersen further argues that the district court erred when it failed to instruct the jury to consider the degree of success on recoverable reasonable attorney fees. We will not reverse a district court's decision on these grounds unless the court abused its discretion when providing the jury instructions. *Hilligoss*, 649 N.W.2d at 147. Instructions that "overall fairly and correctly state the applicable law" are not grounds for reversal. *Id.*

[12] Petersen also tries to persuade us that because Bardine was not the "prevailing party" with respect to the breach of the purchase agreement, he cannot recover under that claim and the district court erred by submitting the question of attorney fees to the jury. But we need not reach this issue because the district court could properly submit the determination of attorney fees to the jury under the indemnification clause of the independent contractor agreement.

Generally, attorney fees are not recoverable unless there is either a specific contract or statute authorizing recovery. *Fownes v. Hubbard Broad., Inc.*, 246 N.W.2d 700, 702 (Minn. 1976). The contractual indemnification clause included in the independent contractor agreement here is the kind of specific contractual authority that allows recovery of reasonable attorney fees. *Koehnle*, 353 N.W.2d at 616. Comparing the applicable law to the district court's instructions, we determine that the instructions "fairly and correctly" stated the law. *Hilligoss*, 649 N.W.2d at 147.

When the jury reconvened to determine attorney fees, the district court instructed the jury to award only the "amount that reasonably compensates [Bardine] for the costs incurred by [Bardine] in proceeding with the lawsuit against [Petersen] and in defending against the lawsuit brought against him by [Petersen]." These instructions "fairly and correctly" state the law. *Id.* As such, we discern no abuse of discretion in the district court's jury instructions. The court acted within its broad discretion by instructing the jury to award only the amount that reasonably compensated Bardine for Petersen's breach of the independent contractor agreement and the financial advisor agreement.

Still, Petersen argues that it is a "universally recognized principle" to instruct the jury to consider the degree of success on recovering attorney fees. But she provides no legal support for this claim. She also asserts that the jury's award was unreasonable and was a consequence of the district court's failure to provide adequate instruction. We disagree. Bardine had asked the jury to award him over $200,000, which included both his own legal fees and those of Raymond James. But the jury only awarded Bardine

$64,757.17. This was *less* than the amount Bardine identified as his "internal" costs for litigating this case.

In sum, the district court neither erred by submitting the question of attorney fees to the jury nor abused its discretion in its instructions to the jury. The indemnification clause in the independent contractor agreement allows Bardine to recover attorney fees for Petersen's breach. And the court correctly stated the law when it instructed the jury to award only those costs Bardine incurred litigating his claims as a result of Petersen's breach.

Considering this appeal as a whole, we discern no abuse of discretion or error by the district court. The jury instructions correctly stated the law. The submission of attorney fees to the jury was not error, because Bardine could recover under the indemnification clause in the independent contractor agreement. And because the compliance officers testified as fact witnesses, the district court did not abuse its discretion in admitting their testimony. Finally, the court did not err in denying Petersen's motions for judgment as a matter of law or her motion for a new trial because the independent contractor agreement and the financial advisor agreement were not invalid as a matter of law, and the jury could find in favor of Bardine.

Affirmed; motion granted in part.