STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0723
A22-0724

Cambria Company, LLC,
Respondent,

vs.

M&M Creative Laminants, Inc.
dba M&M Creative Laminates, Inc.,
Defendant (A22-0723),
Appellant (A22-0724),

Leland P. Schermer,
Appellant (A22-0723).

Filed August 21, 2023
Affirmed
Bratvold, Judge

Le Sueur County District Court
File No. 40-CV-17-662

Bryan R. Freeman, James J. Long, Jevon C. Bindman, Maslon LLP, Minneapolis, Minnesota (for respondent)

Matthew D. Swanson, Greenstein Sellers PLLC, Minneapolis, Minnesota; and

Leland P. Schermer (pro hac vice), Marcus & Shapira, LLP, Pittsburgh, Pennsylvania (for appellants)

Considered and decided by Worke, Presiding Judge; Larkin, Judge; and Bratvold, Judge.

SYLLABUS

1. For purposes of the Minnesota Franchise Act (MFA), Minn. Stat. §§ 80C.01-.22 (2022), a payment for a customized or fabricated good at a bona fide wholesale price is not

a franchise fee under Minn. Stat. § 80C.01, subd. 9, when the predominant purpose of the parties' contracts is a finished product and not services.

2. Under Minn. R. Civ. P. 68.01, an unaccepted offer of zero dollars entitles the offeror to recover costs and disbursements as provided in Minn. R. Civ. P. 68.03 if the relief awarded is less favorable to the offeree than the unaccepted offer.

OPINION

BRATVOLD, Judge

These consolidated appeals are taken from judgments entered after a trial of claims arising out of a business dispute. In 2008, appellant M&M Creative Laminants Inc. (M&M) entered into a business relationship with respondent Cambria Company LLC, some of which was governed by a series of written contracts. For eight years, Cambria cut quartz slabs, finished or fabricated the slabs into countertops, and sold them to M&M, which installed the countertops in homes and other settings. In 2017, Cambria notified M&M that it was terminating the agreements. Cambria sued M&M for unpaid invoices for countertops that had been delivered; M&M counterclaimed for damages caused by Cambria's abrupt termination of their business relationship, among other things.

On appeal, M&M asserts that the district court erred by (1) dismissing at summary judgment M&M's counterclaim that the parties' relationship was a franchise and Cambria violated the MFA, specifically, Minn. Stat. § 80C.14, subd. 3; (2) dismissing at summary judgment M&M's counterclaims for tortious interference with contractual relations and unfair competition; (3) rejecting at summary judgment M&M's defense that Cambria breached their contracts first and thereby excused M&M's performance; (4) awarding attorney fees to Cambria under one of the parties' written contracts; (5) improperly instructing the jury on recoupment damages and denying M&M's motion for a new trial on that ground; (6) failing to enter judgment for M&M on prejudgment interest; (7) awarding costs and disbursements to Cambria based on an unaccepted offer of judgment under Minn. R. Civ. P. 68.03; and (8) imposing sanctions against M&M's attorney, appellant Leland P. Schermer, for violating a protective order. Because we conclude the district court did not err, we affirm.

FACTS

The relevant facts are viewed in the light most favorable to M&M and are taken from the record at the time of the parties' summary-judgment motions.[1] Cambria is a Minnesota company that manufactures and sells quartz countertops. In 2008, Cambria approached M&M, a Pennsylvania corporation, to enter into a business relationship in which Cambria would fabricate and polish quartz countertops based on M&M's purchase orders and M&M would install countertops in homes and commercial buildings.

On May 15, 2009, the parties signed business-partner agreements (BPAs) that Cambria drafted. The BPAs are seven written contracts including, among other things, (1) an agreement on credit in which M&M promised that it would pay Cambria in the timeframe provided on the invoice and that Cambria could recover attorney fees if an account was "placed for collection," (2) order terms and conditions that included a

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[1] The facts pertaining to the attorney-fee motion, rule 68 costs, interest on the judgment, and sanctions for violating the protective order are detailed below with the corresponding analysis of the legal issues.

limitation of liability for Cambria, and (3) business-operating requirements in which M&M agreed to use specific business equipment and that M&M's employees would attend training at "Cambria University" in Minnesota. The BPAs included no provisions about their duration or how to terminate the relationship.

M&M bought countertops from Cambria for eight years. The parties appear to agree that M&M regularly failed to pay Cambria in the timeframe provided on the invoices. On May 2, 2017, Cambria sent representatives to M&M's office in Pennsylvania who informed M&M that Cambria was terminating the BPAs. Cambria claimed that M&M owed over $150,000 for countertops that had been delivered. On May 10, 2017, M&M emailed Cambria stating that it would not pay the amount outstanding on current invoices until the parties agreed on how to terminate the relationship.

On June 20, 2017, Cambria sued M&M to recover the amount owed on invoices already issued, along with attorney fees. M&M answered and asserted counterclaims for (1) violations of the MFA under Minn. Stat. § 80C.14, subd. 3, which requires good cause for terminating a franchise and 90 days' notice of the reasons for termination; (2) breach of contract; (3) unjust enrichment; (4) tortious interference with contract; and (5) unfair competition.

In December 2017, Cambria moved under Minn. R. Civ. P. 12.02(e) to dismiss M&M's counterclaim for violating the MFA. Cambria contended that the parties' relationship was not a "franchise" as defined in the MFA and, alternatively, that M&M was not entitled to sue for damages under the MFA because M&M does not operate in Minnesota. After a hearing, the district court determined that the counterclaim alleged sufficient facts to show a franchise relationship and denied Cambria's motion to dismiss. The district court also certified two questions as important and doubtful for appeal under Minn. R. Civ. App. P. 103.03(i): first, whether the MFA applies to non-Minnesota franchisees, and second, whether the parties' choice-of-law provision "change[s] the answer to the first question." In a nonprecedential opinion, we determined that the "litigation w[ould] not end if we answer the questions certified and the answer will not have statewide impact." *Cambria Co. v. M&M Creative Laminants Inc.*, No. A18-1978, 2019 WL 3543602, at *1 (Minn. App. Aug. 5, 2019). Because the certified questions were not important and doubtful, we dismissed the appeal. *Id.* at *2-4.

On remand, the parties filed cross-motions for summary judgment. Cambria's motion raised four issues that are revisited in this appeal. First, Cambria sought dismissal of M&M's MFA counterclaim, arguing that the MFA did not apply to its business relationship with M&M because M&M did not pay a franchise fee as the statutory definition of "franchise" requires. Second, Cambria sought summary judgment on its breach-of-contract claim. Third, Cambria sought dismissal of M&M's tortious-interference and unfair-competition counterclaims, arguing that the BPAs limited Cambria's liability and excluded the damages M&M sought. Fourth, Cambria argued that unjust enrichment was unavailable to M&M because the BPAs governed the parties' relationship. M&M moved for summary judgment on its MFA counterclaim.

Following a hearing, the district court issued an order granting in part and denying in part Cambria's motion for summary judgment and denying M&M's motion for summary judgment. First, the district court determined that M&M did not pay Cambria a franchise fee and therefore granted summary judgment for Cambria on M&M's MFA counterclaim. Second, the district court granted partial summary judgment for Cambria on its breach-of-contract claim. The district court concluded that "summary judgment is awarded to [Cambria] in that there was formation of the contract, performance by [Cambria], and a material breach by [M&M]. Yet to be determined by a jury is the amount of damages" available to Cambria.

Third, the district court granted partial summary judgment for Cambria on M&M's counterclaims for tortious interference and unfair competition after determining that the BPAs limited the damages available to M&M. But the district court also concluded that M&M may be entitled to damages under an equitable theory of recoupment because M&M was entitled to reasonable notice of termination and

> Cambria, seemingly on a whim, showed up on the doorsteps of M&M one day and ended an ongoing business relationship of eight years. The absence of anything that resembles notice here calls into question the basic fairness of terminating an agreement which M&M relied upon and invested business expenditures in reliance thereon.

Finally, the district court granted Cambria summary judgment on M&M's unjust-enrichment claim because the parties had valid written contracts.

M&M moved for clarification of the district court's summary-judgment decision. M&M argued that its damages were not limited to recoupment because its tortious-interference and unfair-competition claims arose after Cambria terminated their relationship and "d[id] not arise out of the BPA and therefore remain in the case unaffected by the damage waiver/liability provision." M&M also argued that it should be allowed to defend against Cambria's breach-of-contract claim by arguing that Cambria breached the contract before M&M breached the contract. The parties call this second argument M&M's prior-material-breach defense.

In response to M&M's request, the district court issued an order stating that "no damages for [tortious] interference with contractual relation or unfair competition are found," briefly restating its reasoning that the BPAs contained a liability-limitation provision that was "enforceable upon M&M." But the court noted that "M&M may, however, measure alleged losses under the equitable theory of recoupment through any alleged cancelled contracts, lost opportunities, or expenses spent in reliance of the relationship." The district court also determined that M&M was not entitled to a prior-material-breach defense, first noting that "Cambria did not breach the contract" and then stating that M&M materially breached the contract by not "pay[ing] for the performance in a timely manner."

From August 2 to 18, 2021, the parties presented the case to a jury. The jury awarded Cambria $275,285.49 for breach of contract, which was offset by $12,279.15 in credits for M&M. By special verdict, the jury found that Cambria did not have "just cause" to terminate its relationship with M&M and that M&M did not have a "reasonable amount of time to recoup its investments and expenditures before Cambria terminated the business relationship." The jury awarded M&M $44,023.68 in "investments, expenditures, and lost profits" resulting from M&M's "reliance on its business relationship with Cambria and which have not been recouped and offset."

Following a November 1 and 2, 2021 bench trial on attorney fees under the BPAs, the district court awarded Cambria $72,400 in attorney fees along with $77,661.76 in costs and disbursements as a result of Cambria's rule 68.01 offer of judgment, to which M&M did not respond. The district court denied M&M's motions for a new trial and for judgment as a matter of law, among other posttrial motions, and directed entry of judgment.

M&M appeals.

ISSUES

I. Did the district court err by granting Cambria's motion for summary judgment on M&M's MFA counterclaim?

II. Did the district court err by granting Cambria's motion for summary judgment on M&M's tortious-interference-with-contract and unfair-competition counterclaims?

III. Did the district court err by granting partial summary judgment to Cambria on its breach-of-contract claim and rejecting M&M's prior-material-breach defense?

IV. Did the district court err by awarding Cambria attorney fees under the BPAs?

V. Did the district court err in instructing the jury on recoupment damages and denying M&M's motion for a new trial?

VI. Did the district court err by failing to enter prejudgment interest on the money judgment entered for M&M's recoupment damages?

VII. Did the district court err by awarding Cambria costs and disbursements under Minn. R. Civ. P. 68.03?

VIII. Did the district court abuse its discretion by sanctioning M&M's attorney for violating a protective order?

ANALYSIS

I. The district court did not err by granting Cambria's motion for summary judgment on M&M's MFA counterclaim.

M&M argues that it should have been allowed to proceed with its MFA counterclaim because the parties' relationship was a franchise. "We review the grant of summary judgment de novo to determine 'whether there are genuine issues of material fact and whether the district court erred in its application of the law.'" *Montemayor v. Sebright Prods., Inc.*, 898 N.W.2d 623, 628 (Minn. 2017) (quoting *Stringer v. Minn. Vikings Football Club, LLC*, 705 N.W.2d 746, 754 (Minn. 2005)). "We view the evidence in the light most favorable to the party against whom summary judgment was granted." *Cargill Inc. v. Jorgenson Farms*, 719 N.W.2d 226, 232 (Minn. App. 2006). Where, as in this appeal, summary judgment involves the interpretation of a statute, we review the interpretation de novo. *Cocchiarella v. Driggs*, 884 N.W.2d 621, 624 (Minn. 2016).

The MFA was "designed to protect potential franchisees within Minnesota from unfair contracts and other prevalent and previously unregulated abuses in a growing national franchise industry." *Martin Invs., Inc. v. Vander Bie*, 269 N.W.2d 868, 872 (Minn. 1978). Under the MFA, "[n]o person may terminate or cancel a franchise unless . . . that person has given written notice setting forth all the reasons for the termination or cancellation at least 90 days in advance of termination" and "[n]o person may terminate or cancel a franchise except for good cause." Minn. Stat. § 80C.14, subd. 3(a), (b). A party who violates "any provision of [the MFA] shall be liable to the franchisee or subfranchisor who may sue for damages caused thereby." Minn. Stat. § 80C.17, subd. 1. Recovery of actual damages also allows a plaintiff to seek "costs and disbursements plus reasonable attorney's fees." *Id.*, subd. 3.

The MFA defines "franchise" as an express or implied contract, "whether oral or written, for a definite or indefinite period," in which the parties agree that (1) a franchisee is granted the right to offer or distribute goods or services using the franchisor's "name, trademark, service mark, logotype, advertising, or other commercial symbol," (2) the franchisor and franchisee have "a community of interest in the marketing of goods or services at wholesale, retail, by lease, agreement, or otherwise," and (3) the franchisee pays a franchise fee "directly or indirectly" to the franchisor.[2] Minn. Stat. § 80C.01, subd. 4(a)(1).

The MFA defines a "franchise fee" as

> any fee or charge that a franchisee or subfranchisor is required to pay or agrees to pay for the right to enter into a business or to continue a business under a franchise agreement, including, but not limited to, the payment either in lump sum or by installments of an initial capital investment fee, any fee or charges based upon percentage of gross or net sales whether or not referred to as royalty fees, any payment for goods or services, or any training fees or training school fees or charges.

Id., subd. 9. "[T]he purchase of goods or agreement to purchase goods at a bona fide wholesale price" is not "considered the payment of a franchise fee." *Id.*, subd. 9(a).

The parties dispute whether M&M paid Cambria a franchise fee. The district court decided that M&M did not pay Cambria a franchise fee and, for that reason, the parties'

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[2] The MFA provides for four types of franchises. *See* Minn. Stat. § 80C.01, subd. 4(a)(1)-(4). Here, the parties agree that the type of franchise described above is at issue in this case.

relationship was not a franchise. The district court first determined that "[i]t is undisputed by the parties that an identifiable franchise fee was not required or paid by M&M at the start of their relationship." The district court then rejected M&M's argument that "a service fee was paid every time a finished quartz countertop was purchased from Cambria and that the fee qualifies as a franchise fee." The district court reasoned that "[w]hen reviewing the role of services for custom products," some amount of service is always required but the added service does not make a contract for goods into a contract for services. The district court concluded that "M&M did not pay a fee that qualifies under the MFA as a franchise fee."

On appeal, M&M does not contend that Cambria or the BPAs required M&M to pay any lump sum or other easily recognizable franchise fee. Instead, M&M argues that the district court erred for two reasons. First, M&M argues that the district court erred in granting summary judgment because the district court previously determined that M&M paid a franchise fee when it denied Cambria's rule 12 motion to dismiss. We are not persuaded. Even assuming that the district court decided this issue on the merits under rule 12, the district court may revise its ruling "at any time before entry of judgment." Minn. R. Civ. P. 54.02 (stating that a ruling on "fewer than all the claims . . . is subject to revision at any time before the entry of judgment adjudicating all the claims"). The district court was therefore free to revisit its rule 12 ruling during summary-judgment proceedings. Moreover, our review of the district court's rule 12 ruling indicates that the district court did not decide the franchise-fee issue on the merits. Instead, the district court addressed whether M&M's allegations sufficiently stated a claim for relief under the MFA. Also, the amount and nature of M&M's payments to Cambria involved facts on which the parties offered evidence at summary judgment. The district court cannot resolve mixed questions of law and fact on a motion to dismiss "without a developed factual foundation." *Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 235-36 (Minn. 2008). Thus, whether M&M's payments to Cambria were a franchise fee involved a mixed question of law and fact that could not be resolved until the factual foundation was laid during summary-judgment proceedings.

Second, M&M contends in its brief to this court that "[t]he most easily understood franchise fee is based on the undisputed fact that Cambria provided very substantial fabrication services to M&M as a required part of the parties' contractual relationship." Cambria disagrees, relying mainly on the MFA's provision that "the purchase of goods or agreement to purchase goods at a bona fide wholesale price" is not considered a franchise fee. Minn. Stat. § 80C.01, subd. 9(a).

We agree with Cambria that the summary-judgment record supports the district court's determination that M&M paid Cambria a bona fide wholesale price for finished countertops. The deposition of Derik Morrow, owner of M&M, established that after M&M bought countertops from Cambria, it would resell the countertops at "double" the price M&M paid to Cambria. M&M produced no evidence to rebut Cambria's claim that M&M paid a bona fide wholesale price.

Still, M&M emphasizes that the statutory definition of "franchise fee" includes "*any* payment for goods or *services*." *Id.*, subd. 9 (emphasis added). From this definition, M&M argues that when it bought finished countertops, it paid Cambria for "fabrication services" and reasons that means it paid a franchise fee for each countertop. M&M points out that Cambria's fabrication services included cutting slabs, cutting holes for sinks, and polishing and edging countertops.

The district court rejected this argument, determining that paying for a product with some added service "does not transform a contract of sale into a contract for services." The district court cited the Minnesota Supreme Court's decision in *Valley Farmers' Elevator v. Lindsay Bros.* that "[s]ervices are always required to convert raw materials into a useful product." 398 N.W.2d 553, 556 (Minn. 1987). M&M argues that the district court's reasoning was "legal error" because *Valley Farmers' Elevator* resolved an issue under the Uniform Commercial Code (UCC), not the MFA.

Minnesota has some caselaw on what types of payments may be considered a franchise fee under the MFA, but no precedent squarely addresses M&M's argument about paying for fabrication services. We summarize existing caselaw because it helps our analysis. In *Martin Investors*, the supreme court determined that the following were franchise fees: a $30,000 advance payment and performance guarantee from the franchisee to the franchisor, a $400 payment to the franchisor per service used by the franchisee, and a one-percent share of loan profits. 269 N.W.2d at 875. In *OT Industries, Inc. v. OT-tehdas Oy Santasalo-Sohlberg Ab*, we determined that sales under contracts that included a "minimum volume requirement, even at bona fide factory prices, may . . . be a franchise fee." 346 N.W.2d 162, 166 (Minn. App. 1984). In *Unlimited Horizon Marketing, Inc. v. Precision Hub, Inc.*, we held that an upfront payment of $15,000 from the franchisee to the franchisor for marketing was a franchise fee. 533 N.W.2d 63, 66-67 (Minn. App. 1995).

Given the limited caselaw on franchise fees, the district court's reasoning by analogy to UCC caselaw was appropriate. The district court determined that the predominant purpose of the contract between M&M and Cambria was finished countertops rather than fabrication services. *See Vermillion State Bank v. Tennis Sanitation, LLC*, 969 N.W.2d 610, 620 (Minn. 2022) (explaining that appellate courts "adopted the predominant purpose test to determine whether hybrid contracts involving goods and services are governed by the UCC or the common law. . . . Under the predominant purpose test, a hybrid transaction is classified according to its dominant characteristic." (quotation omitted)).

While M&M is correct that the BPAs required M&M to buy "fabrication services" when it placed purchase orders with Cambria, we agree with the district court that the "dominant characteristic" of the BPAs was for Cambria to sell M&M finished countertops. In other words, the BPAs were predominantly a contract for a specific type of finished goods and not a contract for services.

Moreover, as discussed above, the record established that M&M paid a bona fide wholesale price, which is not considered a franchise fee. *See* Minn. Stat. § 80C.01, subd. 9(a). M&M's brief to this court does not discuss or dispute that it paid a bona fide wholesale price.[3] If this court were to recognize payments for fabricated or finished

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[3] M&M also asserts that the district court erred by not considering the expert testimony it offered on franchise fees. M&M's brief to this court, however, provides no citation to the record indicating the relevant portion of the expert testimony. Inadequately briefed issues are waived on appeal. *Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982); *see McKenzie v. State*, 583 N.W.2d 744, 746 n.1 (Minn. 1998) (applying the rule that arguments not briefed are waived where the appellant "allude[d] to" issues but "fail[ed] to address them

products as franchise fees, it would significantly diminish the effect of the unambiguous language in the MFA that provides the purchase of goods at a bona fide wholesale price "shall not be considered the payment of a franchise fee." *Id.* For these reasons, we conclude that the district court did not err by determining that M&M's payments to Cambria for fabricated countertops were not a franchise fee. Thus, Cambria was entitled to summary judgment on M&M's MFA counterclaim because the parties' business relationship was not a "franchise" as defined in the MFA.[4]

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in the argument portion of his brief"). We therefore need not discuss M&M's argument about its expert testimony. We note, however, that although the district court excluded M&M's expert testimony on the MFA, the district court's analysis of the franchise-fee issue considered the expert's affidavit along with the other evidence that M&M submitted on summary judgment. The district court determined that M&M's evidence merely established that M&M bought equipment that was "not specific to Cambria operations." The district court also reasoned that while M&M proved that Cambria required M&M employees to attend Cambria University, the evidence showed that Cambria paid for the training and M&M paid for travel expenses. Based on this record, the district court concluded that the equipment bought and the travel expenses paid were "regular business expenses" and not a franchise fee. *See OT Indus.*, 346 N.W.2d at 167 (rejecting claim that amounts paid to suppliers were franchise fees under the MFA); *see also Schultz v. Onan Corp.*, 737 F.2d 339, 345 (3d Cir. 1984) (applying Minnesota law and holding that payments to third parties do not qualify as franchise fees under the MFA).

[4] Alternatively, we may affirm summary judgment on grounds raised before but not decided by the district court. *See Doe 76C v. Archdiocese of Saint Paul & Minneapolis,* 817 N.W.2d 150, 163 (Minn. 2012) (stating that appellate courts may affirm a grant of summary judgment if it can be sustained on any grounds presented to the district court). At summary judgment, Cambria argued that M&M was not entitled to sue for damages under the MFA because M&M does not operate in Minnesota and the MFA does not "protect a Pennsylvania company operating entirely outside of Minnesota." The district court did not rule on the issue. On appeal, Cambria argues, in the alternative, that the MFA does not apply to M&M because M&M does not operate within Minnesota. This argument has some force under Minnesota caselaw. In *Martin Investors*, the supreme court determined that the MFA "was adopted in 1973 as remedial legislation designed to protect potential franchisees *within* Minnesota from unfair contracts and other prevalent and previously unregulated abuses in a growing national franchise industry." 269 N.W.2d at 872 (emphasis added).

II. The district court did not err by granting Cambria's motion for summary judgment on M&M's counterclaims for tortious interference with contract and unfair competition.

M&M's counterclaims for tortious interference with contract and unfair competition alleged that Cambria was liable for lost profits because M&M lost customer contracts after Cambria abruptly terminated their relationship and Cambria unfairly used M&M's customer information to secure sales post-termination. In its motion for summary judgment, Cambria argued that the damages M&M sought in these two counterclaims were barred by the "liability limitation provisions in the BPA." The district court determined that "[t]his portion of the BPA is not unconscionable" and is, therefore, enforceable. As a result, the district court concluded that M&M was entitled to "no damages for [tortious] interference with contractual relation[s] or unfair competition." The district court added that M&M could seek lost-profit "damages by way of recoupment."[5]

On appeal, M&M makes two arguments. First, it contends that the district court acted sua sponte in granting summary judgment on these two claims because Cambria did

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While not binding precedent for this court, the federal district court's opinion in *Johnson Bros. Liquor Co. v. Bacardi U.S.A., Inc.*, reasoned persuasively that a contract "is not within the purview of the MFA if the franchisee is not located in and does not operate in Minnesota." 830 F. Supp. 2d 697, 703 (D. Minn. 2011). Here, it is undisputed that M&M is located in Pennsylvania and does not operate in Minnesota. We alternatively conclude that M&M is not "within Minnesota" and therefore is not afforded the protections given to franchisees under the MFA. *See Martin Investors,* 269 N.W.2d at 872.

[5] Cambria objected to M&M recovering lost profits as recoupment damages, arguing that it contradicted caselaw holding that damages in an equitable recoupment claim are limited and lost profits are not recoverable. Cambria did not file a notice of related appeal or otherwise raise this issue before this court, so for this appeal, we assume without deciding that lost profits are recoverable on a recoupment theory.

not seek summary judgment on either claim. We disagree. Cambria's issue statement in its summary-judgment memorandum specifically identified M&M's counterclaims for tortious interference and unfair competition. Cambria's argument in the same memorandum contended that the liability-limitation provision in the BPAs barred the damages sought by M&M in its counterclaims. Thus, M&M had notice of Cambria's request for summary judgment on these two claims.

Second, M&M argues that its claims for tortious interference and unfair competition did not arise out of the BPAs because "the acts alleged" in support of those claims "all occurred after Cambria terminated the relationship." M&M raised this argument for the first time in its motion for clarification after the district court granted summary judgment on the claims. The district court rejected this argument, reasoning, based on the language of the liability-limitation provision, that M&M was not entitled to damages for lost profits. We agree with the district court's reasoning. The liability-limitation provision in the BPAs states that Cambria is not liable to M&M for "lost profits . . . however caused and on any theory of liability arising out of this agreement, or this termination," whether based in contract or tort. Because the liability-limitation provision excludes Cambria's liability for lost profits arising from "termination," the district court did not err by granting summary judgment for Cambria on M&M's counterclaims for tortious interference and unfair competition.

Even if we assume that the district court erred by granting summary judgment based on the language of the BPAs, any error was harmless. If an appellant shows that the district court erred, the mere existence of that error is, by itself, insufficient to require a grant of relief; the appellant must also show the district court's error prejudiced them. *See* Minn. R. Civ. P. 61 (requiring that harmless error be ignored); *see also Goldman v. Greenwood*, 748 N.W.2d 279, 285 (Minn. 2008) (citing this aspect of Minn. R. Civ. P. 61).

Here, M&M's damages for recoupment are the same damages it sought for its tortious-interference and unfair-competition claims—lost profits from customer contracts that were pending at termination and from Cambria's use of M&M's customer information. In fact, the district court instructed the jury to consider evidence of "the profits from the disclosure of M&M confidential customer information to its competitors and profits arising from contracts pending between M&M and its customers redirected [to] others by Cambria." Moreover, after considering M&M's evidence of lost customer contracts, the jury awarded M&M "lost profits" damages of $44,023.68.

In sum, the district court did not err by granting Cambria summary judgment on M&M's counterclaims for intentional interference and unfair competition. Alternatively, any error was harmless.

III. The district court did not err by granting summary judgment on M&M's prior-material-breach defense.

M&M argues that the district court "found clearly erroneous facts in granting Cambria summary judgment on M&M's prior material breach defense." In its summary-judgment order, the district court stated it was undisputed that M&M would often "r[un] late" on payments to Cambria and determined that "[a] material breach is found in that [M&M] continuously did not pay for the performance in a timely manner." The district court expanded its reasoning in its order on M&M's motion to clarify: "In deciding that

M&M breached the contract terms, the Court found that M&M cannot use a prior material breach defense to any action moving forward."

M&M argues on appeal, first, that its failure to timely pay Cambria occurred throughout the parties' relationship and that Cambria "did not seek summary judgment on these grounds, . . . as it knew the parties' course of dealing over eight years where Cambria always accepted late payments." We agree with Cambria that M&M's "course of dealing" theory is raised for the first time on appeal. It is therefore forfeited, and we do not consider it. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that appellate courts need not consider arguments raised for the first time on appeal). Also, M&M is incorrect that Cambria did not seek summary judgment based on M&M's failure to pay. Indeed, Cambria contended in its submissions to the district court that M&M breached the BPAs by failing to pay "80 invoices for finished quartz surface products that M&M ordered and received."

Second, M&M argues that Cambria's breach predated M&M's breach and excused M&M's performance. M&M first contends that Cambria materially breached the BPAs on May 2, 2017, by terminating the relationship "without any reasonable advance notice." M&M also argues that any breach of the BPAs by M&M occurred on May 10-11, 2017, when M&M emailed Cambria stating that it would not pay its outstanding obligation to Cambria until they agreed on damages for termination.

We reject this argument because M&M did not raise the May 10-11 emails when opposing Cambria's motion for summary judgment. Indeed, neither M&M's legal memorandum nor the district court's order mentions the May 10-11 emails from M&M.

See id. (stating that appellate courts need not consider arguments raised for the first time on appeal). And even if we assume that Cambria breached the BPAs by failing to give reasonable notice of termination, this breach did not occur until *after* M&M had breached the BPAs by failing to make timely payments for many outstanding Cambria invoices. *See Schwickert, Inc. v. Winnebago Seniors, Ltd.*, 680 N.W.2d 79, 84 (Minn. 2004) (describing prior material breach as the principle that "the remaining duties of one party to a contract are conditioned on there being no previous uncured material failure by the other party" (quotation omitted)). Thus, the district court did not err by rejecting M&M's prior-material-breach defense.

IV. The district court did not err by awarding Cambria attorney fees under the BPAs.

During the bench trial, M&M moved under Minn. R. Civ. P. 50 for judgment as a matter of law, contending that Cambria was not entitled to attorney fees because the relevant provision in the BPAs was ambiguous. The BPAs state that "[i]f the account is placed for collection, [M&M] agrees to pay all costs and expenses of collection, including attorney's fees, court costs and expenses." The district court found the language unambiguous and denied the motion, determining that "placing for collection includes placing with [an] attorney and law firms that need to try [to] enforce their client's right." The district court awarded Cambria $72,400 in attorney fees.

M&M argues on appeal that the relevant provision in the BPAs is ambiguous and therefore "should be construed against Cambria, the undisputed drafter." "We review de novo a district court's decision to deny a motion for judgment as a matter of law, applying the same standard used by the district court and viewing the evidence in the light most favorable to [the nonmoving party]." *Christie v. Est. of Christie*, 911 N.W.2d 833, 838 n.5 (Minn. 2018) (quotation omitted). "Whether a contract is ambiguous is a question of law that we review de novo." *Dykes v. Sukup Mfg. Co.*, 781 N.W.2d 578, 582 (Minn. 2010). "The language of a contract is ambiguous if it is susceptible to two or more reasonable interpretations." *Id.*

M&M argues that the BPAs' provision could reasonably mean either that (1) M&M agrees to pay for attorney fees if the account is sent to a collection agency, or (2) M&M agrees to pay for attorney fees resulting from a lawsuit for collection. Cambria argues that the provision is unambiguous and that "there is no reasonable interpretation of 'placed for collection' that would exclude using attorneys to bring a lawsuit to collect the past-due amount."

We agree with the district court that the BPAs' language is unambiguous and provides that M&M agrees to pay for attorney fees if the "account is placed for collection," and an account is "placed for collection" when an attorney files suit to collect on outstanding invoices. The district court therefore did not err by awarding Cambria attorney fees.

V. The district court did not err in instructing the jury on recoupment damages.

Following trial, M&M moved for a new trial under Minn. R. Civ. P. 59, arguing that the district court's jury instructions were improper. The district court denied M&M's motion. M&M renews its argument on appeal. To obtain a new trial based on erroneous jury instructions, the appellant must establish, first, that "when read as a whole, the instruction materially misstates the law," *Domagala v. Rolland*, 805 N.W.2d 14, 29 (Minn. 2011), and second, that the error "had a reasonable likelihood of affecting the jury's verdict," *Poppler v. Wright Hennepin Coop. Elec. Ass'n*, 834 N.W.2d 527, 537 (Minn. App. 2013) (quotation omitted), *aff'd*, 845 N.W.2d 168 (Minn. 2014). "The district court has broad discretion in determining jury instructions and [appellate courts] will not reverse in the absence of abuse of discretion." *Hilligoss v. Cargill, Inc.*, 649 N.W.2d 142, 147 (Minn. 2002).

The district court instructed the jury that M&M was allowed to recover "damages for recoupment," including lost profits resulting from the termination of the parties' agreement.[6] The jury instructions also stated that the amounts awarded as damages must be proved with "reasonable certainty." *See Pietrzak v. Eggen*, 295 N.W.2d 504, 507 (Minn. 1980) ("In a civil action the plaintiff has the burden of proving future damages to a reasonable certainty.").

M&M argues that the district court "legally erred in its jury instructions on M&M's damages" and that M&M is entitled to a new trial. First, M&M contends that the district court erred by instructing the jury that damages include only "profits arising from contracts pending between M&M and its customers redirected by Cambria to others for a reasonable time following the termination of the parties' relationship." M&M asserts that the "jury did not understand how to calculate" damages because "[t]he incorrect jury instruction

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[6] *See supra* note 5.

essentially told the Jury to limit any award to M&M to just the amount of money that M&M would have made on the pending jobs at termination."

We are not persuaded because M&M is viewing the challenged jury instruction in isolation. The jury instructions, read as a whole, cure the deficiency argued by M&M. The district court instructed the jury that damages "may also include the profits from the disclosure of M&M's confidential customer information to its competitors." The language allowed the jury to consider M&M's theory that it was entitled to recover "lost future profits even for contracts not pending at termination."

Second, M&M argues that the district court erred by rejecting M&M's proposed jury instruction allowing it to recover "[e]xpenses in the form of capital investments." M&M explains that it was prejudiced by this error because the parties "essentially stipulated [to the] amount of investment by M&M" as "$4 million on unrecouped expenses." We disagree. The district court instructed the jury: "[I]f you find that M&M made continuing investments in direct reliance on its business relationship with Cambria, for which it did not have a reasonable amount of time to recoup, those unrecouped expenditures, investments, and profit[s] may be recovered." Because the jury instruction allowed the jury to determine whether M&M was damaged by "unrecouped expenditures, investments, and profit[s]," we conclude that the jury was properly instructed on the evidence submitted.

Alternatively, Cambria argues that any error in the instructions was harmless. We agree that the record includes evidence that M&M recouped much of its expenditures based on its "net profits . . . on the sale of Cambria products." Cambria's damages expert testified that M&M's unrecouped expenditures were operating expenses rather than capital expenditures or investments. In striking contrast, M&M's damages expert testified that she did not have an opinion whether M&M's investments or capital expenditures were recouped.

In sum, the district court did not abuse its discretion by instructing the jury on recoupment damages because M&M failed to establish that the district court materially misstated the law or that M&M was prejudiced by any error.

VI. M&M may yet seek prejudgment interest.

M&M's brief to this court contends that the district court erred by not awarding it prejudgment interest allowed by statute. This is incorrect. In its amended order for entry of judgment, the district court determined that M&M was entitled to "prejudgment interest calculated from October 13, 2017, and the Court Administrator shall enter judgment accordingly." A party may apply for preaward or prejudgment interest under Minn. Stat. § 549.09, subd. 1(b) (2022), from the date of written notice of claim. M&M filed its answer and counterclaim on October 13, 2017, giving Cambria written notice of its claims. Cambria has not challenged the prejudgment-interest award on appeal.

Despite the district court's finding and order on prejudgment interest, the court administrator did not include an amount of prejudgment interest when it entered judgment. On appeal, M&M contends that we must reverse. We disagree because M&M may yet seek prejudgment interest. "Clerical mistakes in judgments . . . arising from oversight or omission may be corrected by the court *at any time* upon its own initiative or on the motion of any party and after such notice, if any, as the court orders." Minn. R. Civ. P. 60.01

(emphasis added). Further, "[d]uring the pendency of an appeal, such mistakes may be so corrected with leave of the appellate court." *Id.* Because M&M is entitled to the prejudgment interest awarded by the district court and M&M can move to correct a clerical mistake "at any time," we need not reverse.

VII. The district court did not err by awarding Cambria costs and disbursements based on its unaccepted offer of judgment under Minn. R. Civ. P. 68.03.

In its order for entry of judgment, the district court awarded Cambria $77,661.76 for costs and disbursements under Minn. R. Civ. P. 68.03. On appeal, M&M argues that the district court erred in awarding this sum because "M&M is aware of no case that has awarded costs under Rule 68 where the offer itself contained no dollar figure." Appellate courts "review legal determinations regarding Minn. R. Civ. P. 68 offers of judgment de novo." *Collins v. Minn. Sch. of Bus., Inc.*, 655 N.W.2d 320, 324 (Minn. 2003).

On June 22, 2018, Cambria served a total-obligation offer of judgment on M&M under Minn. R. Civ. P. 68.01(d). Among other things, Cambria's offer of judgment proposed to settle and dismiss all claims with prejudice if M&M dismissed all counterclaims with prejudice. M&M did not accept the offer. Minn. R. Civ. P. 68.03(b)(2) provides that if "the relief awarded is less favorable to the defendant-offeree than the [unaccepted rule 68.01] offer, the defendant-offeree must pay . . . an amount equal to the plaintiff-offeror's costs and disbursements incurred after service of the offer." "The purpose of Minn. R. Civ. P. 68.01-.03 is to encourage settlement." *Althaus v. Krueger*, 929 N.W.2d 907, 910 n.1 (Minn. App. 2019).

An offer of judgment for the mutual dismissal of claims and counterclaims is a zero-dollar offer. The money judgment that Cambria ultimately obtained is less favorable to M&M than the zero dollars that M&M would have paid had it accepted Cambria's offer of judgment. Because Cambria's rule 68.01 offer to M&M was a zero-dollar offer and Cambria was awarded more than $250,000 in damages plus attorney fees after trial, the district court did not err in awarding Cambria costs and disbursements under rule 68.03.

VIII. The district court did not abuse its discretion by sanctioning M&M's attorney.

The district court sanctioned M&M's attorney, Leland P. Schermer, for violation of a protective order. Schermer challenges that determination. The facts of this portion of the consolidated appeals are taken from the record underlying the district court's October 21, 2019 order from an appeal of a special master's determination that M&M's counsel violated an order protecting confidential information.

On March 2, 2018, the parties agreed to a protective order that included specific provisions prohibiting the disclosure of confidential documents and information. The agreement stated that "[a]ll confidential *documents*, along with *information contained in the documents*, shall be used solely for the purpose of this action, and no person receiving such documents shall, directly or indirectly, . . . communicate in any way the documents or their contents to any person other than" the parties, the representing attorneys, or court staff. (Emphasis added.)

On April 23, 2019, M&M's attorneys deposed Cambria's chief financial officer (CFO). Cambria designated this testimony as confidential, as provided in the protective order. In the following days, the special master conducted an informal telephone conference and ruled on a discovery issue. This oral ruling described the CFO's testimony and was later transcribed. After receiving the transcript of the special master's ruling and waiting 14 days, Schermer disclosed the transcribed ruling, including the special master's description of the CFO's testimony, to "another law firm who published the protected information . . . to staff of the International Trade Commission."

Cambria moved to sanction Schermer, and in a June 17, 2019 order, the special master determined that Schermer violated the protective order. Schermer appealed to the district court, which held an evidentiary hearing. In an October 21, 2019 order, the district court denied M&M's appeal of the special master's determination but reduced the attorney-fee award from $40,546.00 to $26,801.50.

On appeal, Schermer argues that the district court abused its discretion. "The district court's discovery-related orders will not be disturbed absent an abuse of discretion." *Frontier Ins. Co. v. Frontline Processing Corp.*, 788 N.W.2d 917, 922 (Minn. App. 2010), *rev. denied* (Minn. Dec. 14, 2010); *see also Carlson v. SALA Architects, Inc.*, 732 N.W.2d 324, 331 (Minn. App. 2007) ("We will not reverse the district court's decision on attorney fees absent an abuse of discretion."), *rev. denied* (Minn. Aug. 21, 2007).

Schermer contends that the transcript of the special master's ruling was not confidential because he waited 14 days and Cambria did not designate the transcript in the special master's ruling as confidential.[7] Cambria argues that the CFO's testimony was

[7] We are not persuaded that Schermer's 14-day wait to disclose the special master's ruling is relevant to the district court's decision to award sanctions. The protective order includes a 14-day provision, which states that documents produced by third parties may be designated confidential and "shall be treated as confidential for a period of 14 days from

designated as confidential and that, based on the terms of the protective order, the information in the CFO's testimony was therefore confidential. We agree that the protective order prohibits the disclosure of confidential documents, such as deposition transcripts, and the confidential information contained in a deposition, such as a deponent's testimony. The protective order states that "[a]ll confidential documents, along with the information contained in the documents, shall be used solely for the purpose of this action." By its terms, the protective order precluded Schermer's disclosure to an outside law firm of confidential information drawn from the deposition designated as confidential, the description of that testimony by the special master, and the resulting transcript of confidential information discussed during the discovery conference with the special master.[8]

As the district court stated, Schermer

> took the very narrow view that absent a specific designation of the hearing [in front of the special master], he could disclose the hearing transcript to another law firm for use against Cambria in a hearing before the International Trade Commission. Defense counsel risked—perhaps better stated gambled—that he could disclose the information for whatever benefit he could get for his client.

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the date of their production, and during that period any Party may designate such documents as confidential." Neither the CFO's deposition nor the transcript of the special master's ruling is a document produced by a third party.

[8] We observe that, on appeal, no one has raised a challenge to the protective order itself and that Schermer's arguments focus on the interpretation of that order.

Because the district court's decision was supported by the record and the terms of the protective order to which the parties agreed, the district court did not abuse its discretion by determining that Schermer violated the protective order.

DECISION

We resolve eight issues in this hard-fought business dispute. First, we conclude that under the MFA, a franchise fee does not include an agreement to purchase goods at a "bona fide wholesale price," even if the contract between the parties sold fabricated or custom-made goods, when, as here, the predominant purpose of the parties' contract was for a finished product and not services. Thus, M&M's payments to Cambria for fabricated quartz countertops were not a franchise fee under the MFA, and the district court did not err in granting summary judgment to Cambria on M&M's MFA counterclaim.

Second, we determine that the district court did not err by granting summary judgment to Cambria on M&M's counterclaims for tortious interference and unfair competition. Third, we conclude that the district court did not err by granting Cambria partial summary judgment on its breach-of-contract claims and rejecting M&M's prior-material-breach defense. Fourth, the district court did not err by denying M&M's motion for judgment as a matter of law and awarding Cambria attorney fees under the BPAs. Fifth, the district court did not abuse its discretion in instructing the jury on M&M's recoupment damages.

Sixth, we agree with M&M that it is entitled to the prejudgment interest awarded by the district court. We also conclude that M&M may seek to correct a clerical error in the judgment at any time as provided in Minn. R. Civ. P. 60.01.

Seventh, the district court did not err by awarding Cambria costs and disbursements based on Cambria's unaccepted offer under Minn. R. Civ. P. 68.01 to mutually dismiss all claims. Cambria's offer of judgment was to settle for zero dollars. Because the relief awarded against M&M is less favorable to it than Cambria's zero-dollar offer, Cambria may recover costs and disbursements under Minn. R. Civ. P. 68.03. Finally, the district court did not abuse its discretion by sanctioning Schermer for violating the protective order.

Affirmed.