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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A13-0694**

Surgical Principals, Inc.,  
Appellant,

vs.

Minnesota Medical Development, Inc.,  
Respondent.

**Filed April 28, 2014  
Affirmed  
Bjorkman, Judge**

Hennepin County District Court  
File No. 27-CV-11-20086

W. Michael Garner, W. Michael Garner, P.A., Minneapolis, Minnesota (for appellant)

Sandra K. Kensy, Shoreview, Minnesota (for respondent)

Considered and decided by Ross, Presiding Judge; Bjorkman, Judge; and Hooten, Judge.

**UNPUBLISHED OPINION**

**BJORKMAN, Judge**

Appellant/cross-respondent argues the district court erred by disregarding the jury's special-verdict findings related to damages and limiting the attorney-fee award to fees incurred through summary judgment; respondent/cross-appellant argues the district

court erred by dismissing its counterclaims for breach of contract, wrongful termination, and disparagement on summary judgment. We affirm.

## **FACTS**

Appellant/cross-respondent Surgical Principals, Inc. (SPI) sells medical devices to surgeons, hospitals, and medical centers. Respondent/cross-appellant Minnesota Medical Development, Inc. (MMDI) manufactures mesh devices used to repair hernias. SPI and MMDI are parties to a distributor agreement that gives SPI the exclusive right to sell MMDI products within its territory. Section 8(j) of the agreement authorizes SPI to return products under certain circumstances and obligates MMDI to pay for them as long as they are undamaged and in their original packaging. And the agreement further provides that if either party brings a legal action “the prevailing party shall be reimbursed all legal fees, court costs and other expenses it incurred to bring the action.”

In May 2011, MMDI notified SPI that it was suspending product shipments while it investigated a product-quality concern. MMDI authorized SPI to return the products under investigation pursuant to section 8(j) of the agreement; SPI responded by returning its entire inventory, which MMDI received on June 28, 2011. Approximately two weeks after receiving the returned products, MMDI’s investigation determined that the suspended products remained safe and effective. MMDI informed SPI that it could resume selling the products, but SPI refused to order additional products or sell MMDI products until MMDI provided an end-user letter for SPI to send to its customers. In August 2011, MMDI inspected the returned products and determined that a portion of

them were damaged and some were not in the original packaging. MMDI did not pay SPI for any of the returned products.

SPI sued MMDI, alleging breach of contract, fraud, wrongful termination of contract, and disparagement, and seeking attorney fees under the agreement.<sup>1</sup> MMDI counterclaimed for breach of contract, wrongful termination of contract, and disparagement. The district court granted summary judgment to SPI on its breach-of-contract claim relating to the returned products that were undamaged and in the original packaging, and awarded SPI \$30,500 in damages. The district court also granted summary judgment dismissing MMDI's disparagement claim, and dismissed MMDI's contract claims on the ground that MMDI was the first party to breach the agreement.

Trial proceeded on SPI's remaining claims. The special verdict includes four questions related to SPI's returned products, excluding the \$30,500 worth of products at issue in the summary-judgment order.<sup>2</sup> The jury found that SPI did not return the products undamaged and in their original packaging. The jury further determined that MMDI did not inform SPI that the products were damaged or outside of their original packaging within a reasonable time. Finally, the jury found the returned products are worth \$22,275.

The special verdict also includes questions regarding SPI's claimed lost profits. The jury found that SPI lost \$11,000 in profits because it could not sell MMDI's mesh

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<sup>1</sup> SPI also sought indemnification for any potential claims against it arising out of breach of warranty.

<sup>2</sup> MMDI does not dispute that it owes SPI \$30,500.

devices. But the jury found that SPI did not lose profits as a result of MMDI's failure to pay for products returned undamaged and in their original packaging.

After the jury returned its verdict, the parties submitted memoranda regarding SPI's attorney-fee claim. The district court entered judgment, declining to award SPI contract damages pursuant to the agreement's requirement that returned products be undamaged and in their original packaging. The district court also declined to enter judgment for lost profits because the jury found they were not caused by MMDI's failure to pay for products SPI returned in proper condition. And the court limited SPI's attorney-fee recovery to fees incurred through summary judgment (\$69,152.53) because SPI was not awarded any damages at trial. Neither party moved for a new trial or amended findings. This appeal follows.

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

Without a motion for a new trial, our review is limited to whether the evidence supports the jury's findings of fact and whether the findings support the conclusions of law and judgment. *See Rainforest Café, Inc. v. Wis. Inv. Bd.*, 677 N.W.2d 443, 450 (Minn. App. 2004). We will not set aside answers to special-verdict questions unless the evidence, viewed in a light most favorable to the verdict, is so clearly against the verdict that no room exists for differences among reasonable people. *Hanks v. Hubbard Broad., Inc.*, 493 N.W.2d 302, 309 (Minn. App. 1992), *review denied* (Minn. Feb. 12, 1993). A special-verdict form should be read to effectuate the intent of the jury, and it is our responsibility to harmonize all findings if at all possible. *Dunn v. Nat'l Beverage Corp.*,

745 N.W.2d 549, 555 (Minn. 2008) (stating that we will not disturb the verdict if the answers to special-verdict questions can be reconciled on any theory).

**I. SPI is not entitled to recover damages for nonconforming returned products.**

SPI argues the district court erred by declining to award damages for the returned products that were damaged or not in their original packaging (nonconforming returned products) because the jury found that MMDI did not notify SPI of the nonconformity within a reasonable time. The jury was instructed that, under the Uniform Commercial Code (UCC), a buyer waives its objection to defective goods if it does not notify the seller of the defect in a reasonable time. The jury found that the value of the nonconforming returned products is \$22,275.

In support of its argument, SPI cites to the UCC, which provides that a buyer may reject defective goods, but must notify the seller of the defects within a reasonable time after delivery; otherwise any objection to the defects is waived, and the goods cannot be rejected. *See* Minn. Stat. §§ 336.2-602(1), .2-605(1) (2012). We are not persuaded. First, while the UCC applies to all sales of goods, including the sales under the agreement, the waiver provision only applies when a buyer rejects goods it receives from the seller. Under the agreement, MMDI is the seller and SPI is the buyer. SPI's argument that it became a seller when it returned the products to MMDI is unavailing. SPI engaged in a return, not a sale. Second, section 8(j) of the agreement governs the terms of such returns and the circumstances under which SPI is entitled to payment for returned products. *See* Minn. Stat. § 336.1-302(a) (2012) (permitting parties to vary the

provisions in the UCC by agreement). The agreement does not obligate MMDI to pay SPI for nonconforming returned products.

Because the UCC waiver provision does not apply, the jury's finding that MMDI did not timely notify SPI of the nonconformity of the products is irrelevant. The district court did not err by disregarding that finding. *See Orwick v. Belshan*, 304 Minn. 338, 343, 231 N.W.2d 90, 94 (1975) (noting that the district court can set aside the special verdict to conform with the law); *see also Webb Bus. Promotions, Inc. v. Am. Elecs. & Entm't Corp.*, 617 N.W.2d 67, 73 (Minn. 2000) (stating that findings of fact that are "controlled or influenced by error of law are not final on appeal and will be set aside" (quotation omitted)). The district court recognized that SPI was not a seller under the UCC and properly applied the law and the contract terms to the jury's special-verdict answers. SPI is not entitled to damages for the \$22,275 in nonconforming returned products.

**II. The district court did not err by declining to award SPI \$11,000 in damages for lost profits.**

SPI argues the district court misinterpreted and disregarded the jury's special verdict by not entering judgment on the \$11,000 the jury found in damages for lost profits. We disagree. Lost profits are a form of damages that may flow from breach of contract. *See Poppler v. Wright Hennepin Coop Elec. Ass'n*, 834 N.W.2d 527, 546 (Minn. App. 2013), *aff'd*, \_\_\_ N.W.2d \_\_\_ (Minn. Apr. 9, 2014). Accordingly, they are not recoverable unless they are directly caused by the contract breach. *See id.*

The jury found:

With respect to Plaintiff SPI's claim for lost profits, do you find that Plaintiff SPI suffered damages in the form of lost profits because it could no longer sell Defendant MMDI's Mesh Devices?

Answer: Yes.

With respect to Plaintiff SPI's claim for lost profits, do you find that Plaintiff SPI's lost profits were directly caused by Defendant MMDI's failure to pay Plaintiff SPI for the returned, undamaged product?

Answer: No.

What amount of lost profits did Plaintiff SPI suffer as a result of Defendant MMDI's actions?

Answer: \$11,000.

MMDI's only contract breach, as found by the jury and district court, was its failure to reimburse SPI for the products SPI returned that were undamaged and in their original containers. The evidence supports the jury's finding that SPI's lost profits were not directly caused by MMDI's failure to pay for the conforming returned products. One of SPI's principals testified that sales decreased in April and May 2011 because of MMDI's product suspension, which the agreement authorizes. And SPI chose not to sell the products after the suspension was lifted because MMDI did not provide an end-user letter explaining the investigation results, which the agreement does not require. Thus, the district court properly concluded that SPI cannot recover its lost profits under the agreement because they were not directly caused by MMDI's breach.

**III. The district court did not abuse its discretion by limiting SPI's attorney fees to those incurred through summary judgment.**

We review an award of attorney fees for an abuse of discretion. *Swenson v. Bender*, 764 N.W.2d 596, 604 (Minn. App. 2009), *review denied* (Minn. July 22, 2009). Attorney fees are recoverable if authorized by statute or contract. *City of Savage v. Formanek*, 459 N.W.2d 173, 177 (Minn. App. 1990), *review denied* (Minn. Oct. 25, 1990). A prevailing party is one who “prevails on the merits in the underlying action, not one who was successful to some degree.” *Elsenpeter v. St. Michael Mall, Inc.*, 794 N.W.2d 667, 673 (Minn. App. 2011) (quotation omitted). Generally, recovery of damages or receipt of some kind of performance is required to be a prevailing party. *Hewitt v. Helms*, 482 U.S. 755, 760, 107 S. Ct. 2672, 2675 (1987). When a party goes home empty-handed from a trial where damages were sought, “[t]hat is not the stuff of which legal victories are made.” *Id.* at 760, 107 S. Ct. at 2676.

SPI argues that the district court abused its discretion by limiting SPI's attorney-fee recovery to fees incurred before summary judgment. SPI asserts that it prevailed at trial because the jury found that MMDI did not notify SPI that the returned products were nonconforming within a reasonable time, and that SPI sustained lost profits of \$11,000. We are not persuaded. As we have discussed, the district court did not err by determining that SPI is not entitled to recover damages based on the jury's verdict. In other words, SPI did not prevail on its remaining claims at trial.

SPI also points to the broad language in the agreement providing that the prevailing party should recover “all legal fees.” But courts read a reasonableness

requirement into such contract language. *See Green v. BMW of N. Am., LLC*, 826 N.W.2d 530, 537 (Minn. 2013) (holding that damages recovered are relevant in determining whether attorney fees sought are reasonable); *see also United Prairie Bank-Mountain Lake v. Haugen Nutrition & Equip., LLC*, 813 N.W.2d 49, 61 (Minn. 2012) (noting that attorney-fee awards should be fair and reasonable) (citing *Campbell v. Worman*, 58 Minn. 561, 565, 60 N.W. 668, 669 (1894) (holding that party may be awarded payment of attorney fees as provided in contract, but that fees must be reasonable and just)). SPI did not recover damages or otherwise prevail on any of the claims it presented at trial. And the damages it recovered through summary judgment (\$30,500) are substantially less than the attorney fees it sought (approximately \$121,000). On this record, we discern no abuse of discretion by the district court in limiting SPI's attorney-fee recovery to the approximately \$69,000 in fees incurred through the time of summary judgment.<sup>3</sup>

**IV. The district court did not err by granting summary judgment dismissing MMDI's counterclaims.**

Summary judgment is proper “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law.” Minn. R. Civ. P. 56.03. We review a summary-judgment decision *de novo*. *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170

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<sup>3</sup> SPI also seeks its attorney fees on appeal, but has not submitted a motion requesting fees and thus is not entitled to an attorney-fee award. *See* Minn. R. Civ. App. P. 139.06, subd. 1.

(Minn. 2010). And we view the evidence in the light most favorable to the party against whom summary judgment was granted. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

MMDI argues that issues of material fact preclude dismissal of its contract claims, because there is evidence that SPI breached the agreement first by failing to use its best efforts to promote the distribution and sale of MMDI products and failing to maintain a proper inventory, among other allegations. MMDI argues that there are also material fact issues related to its disparagement claim. We address each argument in turn.

### **Breach of Contract and Wrongful Termination Counterclaims**

To prevail on a breach-of-contract claim, the plaintiff must show (1) the formation of a contract, (2) the plaintiff's performance of any conditions precedent to its right to demand performance from defendant, (3) the defendant's breach of contract, and (4) damages caused by the breach. *See Park Nicollet Clinic v. Hamann*, 808 N.W.2d 828, 833 (Minn. 2011); *Nguyen v. Control Data Corp.*, 401 N.W.2d 101, 105 (Minn. App. 1987).

A contract may provide the manner in which a party must give the other party notice of breach of the contract. *See DeWitt v. Itasca-Mantrap Coop. Elec. Ass'n*, 215 Minn. 551, 559, 10 N.W.2d 715, 719 (1943). When a contract requires written notice of breach before a party may terminate the contract, that written notice is required before a party may assert a breach-of-contract claim. *Valspar Refinish, Inc. v. Gaylord's, Inc.*, 764 N.W.2d 359, 365 (Minn. 2009). In *Valspar*, the parties' contract provided that a nonbreaching party "shall have the right to terminate" the contract if the party gives

written notice of the breach and the breaching party does not cure the breach within 60 days. *Id.* The supreme court held that the nonbreaching party's failure to provide the required written notice of breach barred its breach-of-contract, revocation-of-acceptance, and breach-of-warranty claims as a matter of law. *Id.* at 365-66.

Here, the agreement contains a similar provision:

Either party may terminate this Agreement effective upon delivery of written notice to the other party, if the other party breaches or otherwise fails to be in conformance with any term or condition of this Agreement; provided however, if such breach or nonperformance is curable the Agreement shall not terminate if such breach or nonperformance is cured within thirty (30) days after delivery of the written notice of termination . . . .

It is undisputed that MMDI did not give written notice of breach to SPI. As in *Valspar*, MMDI's breach-of-contract and wrongful-termination claims fail as a matter of law and the district court did not err by dismissing them.

### **Disparagement Counterclaim**

MMDI asserts that disputed material facts preclude summary dismissal of its disparagement claim. Our supreme court has not defined a common-law cause of action for business disparagement, but the parties and district court treat MMDI's claim as defamation. A statement is defamatory when it is (1) "communicated to someone other than the plaintiff," (2) false, and (3) tends to harm the plaintiff's reputation and lower the plaintiff in the estimation of the community. *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252, 255 (Minn. 1980). "[T]rue statements, however disparaging, are not actionable." *Id.* The truth must go to the accuracy of the statement as well as its

underlying implications. *See Lewis v. Equitable Life Assurance Soc’y*, 389 N.W.2d 876, 889 (Minn. 1986).

MMDI alleges that SPI disparaged MMDI’s reputation in the medical community “by sending out a letter in which it was critical of [MMDI’s] response to the product quality issue.” The relevant part of the letter states: “Since Minnesota Medical Development Inc. (MMDI), the manufacturer of the surgical mesh that you currently purchase from Surgical Principals, Inc. (SPI), has failed to produce an end-user letter surrounding the details of the recent withdrawal and subsequent release of their products thus I will attempt to do so instead.”

MMDI alleges the statement is disparaging and false because it had no obligation to send an end-user letter and it provided SPI with sufficient alternative information about its investigation. We disagree. Even a disparaging statement is not actionable if it is true. MMDI might not have been legally obligated to send an end-user letter or might have provided other information about its investigation, but MMDI does not dispute that it did not send the end-user letter requested by SPI. Thus, SPI’s statement that it requested and MMDI did not provide an end-user letter is not false. The district court did not err by dismissing MMDI’s disparagement counterclaim as a matter of law.

**Affirmed.**