STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0247

Sang Enterprises, Inc.,
d/b/a Sang Landscape & Design,
Respondent,

vs.

Henry Langer,
Appellant,

Pat Langer,
Appellant.

Filed January 27, 2009
Affirmed
Kalitowski, Judge

Hennepin County District Court
File No. 27-CV-06-21532

Reese E. Chezick, Reese E. Chezick, P.A., 2219 Westview Drive, Hastings, MN 55033 (for respondent)

Henry Langer, Pat Langer, 7101 Antrim Court, Edina, MN 55439 (pro se appellants)

Considered and decided by Kalitowski, Presiding Judge; Halbrooks, Judge; and Stoneburner, Judge.

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

KALITOWSKI, Judge

In this breach of contract case, appellants Henry Langer and Pat Langer appeal arguing (1) the judgment was not supported by the evidence; (2) the district court erred

by not properly considering respondent's misconduct; and (3) the district court erred in denying appellants' motion for a new trial by not including a memorandum with its order. We affirm.

D E C I S I O N

I.

Appellants argue that the district court made findings that are clearly erroneous and therefore, the district court's judgment is not supported by the evidence. We disagree.

"Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Minn. R. Civ. P. 52.01. We will not disturb the district court's findings if there is reasonable evidence to support those findings. *Rogers v. Moore*, 603 N.W.2d 650, 656 (Minn. 1999). In applying Minn. R. Civ. P. 52.01, "we view the record in the light most favorable to the judgment of the district court." *Id.* This court will not reverse the district court's judgment merely because we view the evidence differently. *Id.* Rather, the district court's factual findings must be clearly erroneous. *Id.* Findings of fact are clearly erroneous only if the reviewing court is left with the firm and definite conviction that a mistake has been made. *Id.*

Appellants argue that the district court's findings are contradicted by testimony and that several of the findings mirror respondent's statements in closing argument. But appellants failed to provide this court with a transcript of the trial. An appellate court

cannot presume error in the absence of an adequate record. *See Custom Farm Servs., Inc. v. Collins*, 306 Minn. 571, 572, 238 N.W.2d 608, 609 (1976) (declining to consider claims of insufficiency of the evidence and misconduct of counsel in the absence of a transcript). Consequently, appellants' failure to provide a trial transcript precludes this court's review of these arguments. Thus, we have no basis to conclude that the district court's findings are clearly erroneous.

We reject appellants' argument that several exhibits support their claim that the findings are erroneous. Appellants rely on letters sent to respondent to contradict the district court's findings. But at most, these letters constitute evidence contrary to respondent's version of events. The fact that the district court's findings do not conform to these letters indicates that the district court found respondent's evidence more persuasive. And "[i]t is not the province of this court to reconcile conflicting evidence." *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999). We conclude that appellants' letters do not establish clear error.

Appellants also rely on exhibits consisting of information from the Techni-Seal company - the manufacturer of the polymeric sand used by respondent. But these exhibits do not establish clear error because they simply instruct on the proper method of applying the polymeric sand. Thus, these exhibits do not leave this court with the definite and firm conclusion that a mistake was made.

Additionally, appellants rely on several of respondent's exhibits in support of their claim that the district court's findings are erroneous. But an e-mail from the Techni-Seal representative to respondent supports the court's finding that the wider joints between the

flagstones should be replaced. That e-mail states, "We propose that the contractor remove those areas which were not installed according to our standards or specifications and reinstall the correct amount of flagstone. . . ." A letter from the Techni-Seal representative to appellant Henry Langer similarly supports this finding by the district court. Finally, appellants rely on photographs of the installed flagstone. These photographs do not establish clear error with respect to the district court's finding that Techni-Seal suggested that the wider joints between the flagstones be replaced.

Finally, we note that the district court subtracted $5,000 of claimed damages for repairs to appellants' flagstone in its award of $17,941.66 to respondent. We conclude that the district court's findings are not clearly erroneous and that appellants' challenge to the sufficiency of the evidence fails.

II.

Appellants argue that the district court erred by not considering the misconduct of respondent. We disagree.

Appellants allege that respondent's attorney contacted one of their witnesses and complain that they did not receive a complete witness list and index of exhibits from respondent on October 11, 2007. A violation of discovery rules by failure to disclose the identity of a witness does not of itself automatically require the granting of a new trial. *Lundin v. Stratmoen*, 250 Minn. 555, 559, 85 N.W.2d 828, 832 (1957). A party still must show that, absent the violation, the result of the trial would be different. *Id.* Here, it is not clear from the record whether the alleged misconduct even occurred. This case was tried on October 15, 2007, and the amended scheduling order required the parties to

exchange exhibits and witness lists prior to the date of trial, rather than by October 11, 2007. Furthermore, the record contains an affidavit submitted by respondent's counsel stating that he served a witness list along with an index of exhibits on September 26, 2007. The record also contains a copy of a letter from respondent's counsel to appellants dated September 26, 2007, indicating service of a witness list and an index of exhibits. On this record, we cannot conclude that any misconduct occurred. And we cannot conclude that absent the alleged misconduct the result of the trial would have been different.

Moreover, it is not an abuse of discretion for a district court to deny a motion for new trial that raises a new theory and a new factual argument for the first time. *Minn. Mut. Fire and Cas. Co. v. Retrum*, 456 N.W.2d 719, 723 (Minn. App. 1990). This court has stated that "a party may not raise an issue for the first time in new-trial motion." *In re Welfare of T.D.*, 731 N.W.2d 548, 553 (Minn. App. 2007) (concluding challenge to judicial notice raised too late where party had knowledge of motion but did not contest judicial notice until after trial) (citing *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988); *Ellingson v. Burlington N. R.R. Co.*, 412 N.W.2d 401, 405 (Minn. App. 1987), *review denied* (Minn. Nov. 13, 1987)). Here, appellants did not raise the alleged misconduct until their motion for a new trial. This allegation should have been brought to the district court's attention prior to trial. Accordingly, we conclude that the district court did not abuse its discretion by denying appellants' motion for new trial.

III.

Appellants argue that the district court erred by failing to include a memorandum with its order denying their motion for a new trial. We disagree.

Because the decision to grant a new trial lies within the sound discretion of the district court, we will not disturb the decision absent a clear abuse of that discretion. *Halla Nursery, Inc. v. Baumann-Furrie & Co.*, 454 N.W.2d 905, 910 (Minn. 1990). Neither the rules of civil procedure governing new trials, nor the rules of general practice governing motions require a district court to provide a written memorandum along with its order disposing of the motion. *See* Minn. R. Civ. P. 59 (stating the grounds for which a new trial may be granted); Minn. R. Gen. Pract. 115-119 (governing motion practice).

A written memorandum would assist this court in determining whether the district court erred in denying a motion for new trial. But because the findings and conclusions are not manifestly against the weight of the evidence, we will not disturb the denial of appellants' motion for a new trial. *See Van Dervort v. Nw. Fuel Co.*, 85 Minn. 35, 36, 88 N.W. 2, 3 (1901) (refusing to disturb the district court's denial of new trial where findings were sustained by the evidence).

Affirmed.