STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0148

Jeffrey Noack, et al.,
Appellants,

vs.

Colson Construction, Inc., et al.,
defendants and third party plaintiffs,
Respondents,

vs.

Scherer Bros. Lumber Co.,
third party defendant,
Respondent,

Mark Entsminger d/b/a Mark's Stucco,
third party defendant,
Respondent,

Trevor Foss d/b/a Trevor Foss Roofing,
third party defendant,
Respondent.

Filed February 10, 2009
Affirmed in part, reversed in part, and remanded
Hudson, Judge

Hennepin County District Court
File No. 27-CV-06-2314

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Considered and decided by Larkin, Presiding Judge; Hudson, Judge; and Collins, Judge.*

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

HUDSON, Judge

On appeal from the district court's final order denying their motion for judgment as a matter of law or, alternatively, a new trial, appellants argue that (1) there is no evidence in the record to support the jury's award; (2) the district court erred by excluding evidence of respondents' construction practices and similar defects found in other homes built by respondents; (3) the district court erred in instructing the jury; and (4) the district court erred by granting summary judgment to Colson Custom Homes on the matter of successor liability. On notice of review, respondent Colson Construction

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

alleges error in the district court's failure to reduce appellants' award by the percentage of negligence attributed to appellants by the jury. Also on notice of review, respondent Trevor Foss claims that the district court erred by denying him costs and disbursements against appellants. We reverse and remand to the district court in regard to Foss's claim for costs and disbursements. In all other respects, we affirm.

FACTS

In October of 1998, appellants Jeffery and Jill Noack purchased a home at 7004 Howard Lane in Eden Prairie. The home was built by respondent Colson Construction, Inc. (Colson). Colson constructed the framing of the home, including the installation of windows that were manufactured by respondent Scherer Brothers. Colson subcontracted with respondent Mark Entsminger to perform the stucco work on the home and with respondent Trevor Foss to install the roof.

In 2005, several of appellants' neighbors were having construction-related problems with their homes, and appellants decided to have their home inspected for potential problems. The inspection revealed several defects in the home's construction and resulting damage to the structure and exterior of the home. Appellants brought suit against Colson, alleging negligent design and construction, breach of statutory warranties, and breach of express and implied warranties. The suit also named Colson Custom Homes, LLC (CCH), as a defendant, with appellants asserting that after Colson was dissolved in 2000, CCH became a successor corporation to Colson and is, therefore, subject to the same liability as Colson.

In turn, Colson and CCH brought third-party claims against Scherer Brothers, Entsminger, and Foss, seeking contribution and indemnity. Appellants then brought a direct claim against the third-party defendants pursuant Minn. R. Civ. P. 14.01.

Prior to trial, respondents brought several motions in limine to prevent appellants from introducing evidence of claims and lawsuits brought against respondents by other homeowners. Appellants argued that they did not intend to introduce evidence of other claims or lawsuits against respondents, but instead wanted to present evidence of similar construction practices and defects found in other homes built by respondents. The district court granted respondents' motions, finding that although relevant, the evidence would likely confuse and mislead the jury and was therefore more prejudicial than probative.

CCH moved the district court for summary judgment on the issue of successor liability. Appellants claimed that CCH was a mere continuation of Colson and that CCH was formed to fraudulently escape liability. The district court granted CCH's motion, finding that appellants failed to produce any evidence that CCH was a continuation of Colson and that appellants' assertion of fraud was unsupported by any evidence.

At trial, appellants presented evidence of defects in the construction of their home, including the failure to use two layers of grade D tar paper behind the stucco, failure to install weep screeds, failure to install appropriate flashing on the windows and doors, and failure to comply with minimum thickness requirements for the application of stucco, all of which violated the 1994 Uniform Building Code (code) in effect when the home was built. The code violations existed throughout the home, and it was generally agreed upon

by the witnesses at trial that the only way to remedy the code violations was to remove all of the stucco from appellants' home.

Appellants also presented evidence of physical damage to the exterior and structure of their home. There were varying levels of damage in several places, but the vast majority of the serious structural damage was located in one place—the area around the lower window on the left elevation of the home. Appellants' expert Mark Soderlund testified that the structural damage to the home was the result of respondents' construction defects. Based on the code violations and the physical damage to appellants' home, Soderlund recommended the removal and replacement of all of the home's stucco, repair of all deteriorated framing, installation of new sheathing and insulation, and installation of new windows and patio doors.

Mr. Noack testified that, as a result of the construction defects, his home value decreased from $576,000 to $327,000. He also stated that if the code violations were not repaired, he would have to disclose the violations to potential buyers. Mrs. Noack, a licensed real estate agent, confirmed that the code violations would have to be disclosed to potential buyers. Mr. Noack received two estimates to repair the home and bring it up to compliance with the code—one for $222,389.56 and one for $240,139.00. The repair work contemplated in both estimates was consistent with Soderlund's recommendations.

Kevin Schmieg—the building official for the City of Eden Prairie—testified that a complete stucco removal was the only way to remedy the type of code violations that exist on appellants' home. He also said that in Eden Prairie, if anything is done to correct the stucco on a home, the stucco must be brought "up to code" from "corner to corner."

Respondents presented evidence that appellants' own negligence caused the structural damage to their home. On cross-examination, Mr. Noack admitted that there are two holes in the stucco near the structural damage and he could not recall whether the holes were present when he purchased the home from the original owners. He also acknowledged that even though water could get into the holes, he made no attempt to fix or patch them. Stefan Helgeson, one of respondents' experts, testified that samples taken from areas of the home where there were no holes revealed no damage to the home.

Respondents also presented evidence regarding the repairs necessary to fix appellants' home. On cross-examination, Schmieg testified that appellants are not required by the city of Eden Prairie to remedy all of the code violations in their home; instead, they can simply repair the specific areas with structural damage. Likewise, Helgeson stated that the damage to appellants' home was isolated and could be repaired without major construction. Helgeson thought that even with all of the code violations, there was no reason to believe that the undamaged area of the home would become damaged. Geoffrey Jillson, respondents' second expert, agreed that a localized repair to the damaged area was sufficient and said that there was no justification to remove all of the home's stucco.

On behalf of respondents, George Pavek prepared an estimate of $154,950 for a complete repair of appellants' home, which included the removal of all of the home's stucco. Pavek's estimate did not include replacement of the windows, but it did include a removal and reinstallation of the windows already in place. The estimate was also

itemized and contained a quote for $23,000 for repair of only the most seriously damaged area, the left elevation.

At the close of trial, appellants requested that the district court instruct the jury that respondents' violation of the code was negligence per se. Appellants also requested that the jury be instructed on damages available to appellants if repair to their home does not restore the home to the same condition as before the discovery of the defects attributable to respondents' negligent construction. The district court denied both requests. Appellants withdrew their claim for breach of express or implied warranties, and that claim was not presented to the jury.

The jury found Colson and Entsminger negligent in the construction of appellants' home, but it also found appellants negligent in the maintenance, repair, or upkeep of the home. The jury apportioned 65% of the negligence to Colson, 25% to appellants, and 10% to Entsminger. No negligence was attributed to Scherer Brothers or Foss. The jury also found that Colson was in breach of statutory warranties. The jury awarded damages in the amount of $55,000.

The district court issued an order pursuant to the jury's findings. Appellants subsequently moved the district court for judgment as a matter of law or, alternatively, a new trial, alleging that the jury's award was legally insufficient, improper exclusion of evidence, error in the jury instructions, and error in the grant of summary judgment to CCH. After several additional motions and amendments to the original order, the district court issued a final order denying appellants' motion. The district court awarded

appellants $55,000 against Colson under appellants' claim for breach of statutory warranties. Colson was awarded $5,500 against Entsminger.

In awarding the prevailing parties' costs and disbursements, the district court found that Foss was a prevailing party against appellants but held that, as a matter of justice, Foss could not recover against appellants because he was already involved in the litigation when appellants filed their third-party claim against Foss and he was not required to defend any additional claims than he would have otherwise had to defend.

This appeal follows.

D E C I S I O N

I

Appellants first challenge the district court's denial of their motion for judgment as a matter of law or, alternatively, a new trial. We review de novo a district court's denial of a motion for judgment as a matter of law. *Pouliot v. Fitzsimmons*, 582 N.W.2d 221, 224 (Minn. 1998). On appeal, the district court's denial of such a motion "must be affirmed, if, in the record, there is any competent evidence reasonably tending to sustain the verdict." *Id.* (quotation omitted). We review a district court's denial of a motion for new trial for an abuse of discretion. *Halla Nursery, Inc. v. Baumann-Furrie & Co.*, 454 N.W.2d 905, 910 (Minn. 1990). An appellate court "will not set aside a jury verdict on an appeal from a district court's denial of a motion for a new trial unless it is manifestly and palpably contrary to the evidence viewed as a whole and in the light most favorable to the verdict." *Navarre v. S. Washington County Sch.*, 652 N.W.2d 9, 21 (Minn. 2002) (quotation omitted).

Appellants argue that they are entitled to judgment as a matter of law because there is no evidence to support the jury's award of $55,000. They claim that the undisputed evidence in the record establishes that respondents violated the code in constructing appellants' home and that the only way to remedy the code violations is to remove and replace all of the home's stucco. Appellants assert that the lowest bid in evidence for a complete stucco removal and replacement was Pavek's bid for $154,950, and therefore the award of $55,000 is unsupported by the evidence. We disagree.

There was evidence in the record that the significant structural damage to appellants' home was limited to the left elevation. Schmieg testified that appellants are not required by the city of Eden Prairie to remedy all of the code violations and can simply repair the specific area with structural damage. Helgeson and Jillson agreed that localized repair to the damaged area was sufficient and that the home could be repaired without major reconstruction.

Because the evidence indicates that the structural damage to appellants' home is isolated and that appellants are not required to correct all of the code violations, there is sufficient support for the jury's award. Appellants presented the jury an estimate of $240,139.00 to remove all of the stucco from their home. Respondents presented evidence that an award of $23,000 would cover the cost to repair to the home's left elevation. Thus, any award between $240,139.00 and $23,000 is within the evidence presented to the jury, and the jury's award of $55,000 is supported by the record.

Appellants' argument rests on the theory that code violations are injuries in and of themselves, such that the code violations entitle appellants to an award for damages even

in the absence of actual damage to their home. But appellants cite no authority in support of their theory. In regard to their claim for negligent construction, appellants were required to establish, "(1) the existence of a duty of care; (2) a breach of that duty; (3) an injury was sustained; and (4) breach of the duty was the proximate cause of the injury." *State Farm Fire & Cas. v. Aquila, Inc.*, 718 N.W.2d 879, 887 (Minn. 2006) (citing *Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn. 1995)). Even if the code violations constitute the breach of a duty of care, appellants, without citing any authority, have not established that code violations without resulting damage constitute an injury sufficient to establish a claim of negligence.

Concerning their claim for breach of statutory warranties, appellants direct this court to Minn. Stat. § 327A.05, subd. 1 (2006)—the remedy provision for breaches of statutory warranties—as authority for their entitlement to damages for code violations. Section 327A.05, subdivision 1, provides that

> [u]pon breach of any warranty imposed by section 327A.02, subdivision 1, the vendee shall have a cause of action against the vendor for damages arising out of the breach, or for specific performance. Damages shall be limited to: (a) the amount necessary to remedy the defect or breach; or (b) the difference between the value of the dwelling without the defect and the value of the dwelling with the defect.

While section 327A.05, subdivision 1, may contemplate an award for code violations without resulting damage, it certainly does not entitle appellants to such an award, and given Schmieg's testimony that appellants do not have to remedy all of the code violations, the jury was not required to treat the code violations as damage for which appellants were entitled to an award.

Because there is evidence in the record to support the jury's award and because appellants cite no authority to show that code violations without resulting damages constitute a compensable injury, the district court did not err by denying appellants' motion for judgment as a matter of law. For the same reasons, the district court did not abuse its discretion in denying appellants' motion for a new trial.

II

Next, appellants contend that it was error for the district court to exclude evidence of similar construction practices and defects found in other homes built by respondents. "Evidentiary rulings . . . are committed to the sound discretion of the [district] court and those rulings will only be reversed when that discretion has been clearly abused." *Pedersen v. United Servs. Auto. Ass'n*, 383 N.W.2d 427, 430 (Minn. App. 1986).

The district court treated the evidence in question as evidence of prior bad acts that must be proven by a preponderance of the evidence to be admissible. The district court was not convinced that the evidence was, in its entirety, proven by a preponderance of the evidence. Ultimately, however, the district court excluded the evidence because it found that the evidence was likely to confuse and mislead the jury and was, therefore, more prejudicial than probative. *See* Minn. R. Evid. 403 (stating that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury").

Appellants claim that the district court erred in treating the construction practices and defects as evidence of prior bad acts. They argue that the evidence should have been treated as habit or routine-practices evidence under Minn. R. Evid. 406, which states that

"[e]vidence . . . of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice."

While we acknowledge that the district court incorrectly concluded that the evidence in question was evidence of prior bad acts, we cannot say that the district court's ruling was an abuse of discretion. In its final analysis, the district court excluded the evidence because it found that the evidence would confuse or mislead the jury. It is well within a district court's discretion to exclude, under Minn. R. Evid. 403, evidence that will confuse or mislead the jury. Therefore, even if the evidence was relevant as evidence of habit or routine practice, it was still subject to exclusion under rule 403.

Appellants argue that even if the district court's original ruling was proper, Mr. Colson's testimony "opened the door" to the admission of the evidence. Appellants' assertion is based on Mr. Colson's following testimony:

> Q: Mr. Colson, my question is, do you have any reason to believe that some of the windows were shimmed and some weren't?
> A: Yes.
> Q: You do?
> A: Yes.

Appellants contend that because Mr. Colson was able to testify about the shimming of all of appellants' windows—as opposed to just the windows that appellants tested—they should have been allowed to introduce evidence of respondents' previous construction practices. Appellants assert that, without the evidence of respondents' construction

practices, they could not effectively rebut Mr. Colson's testimony and Colson's theory of the case. Appellants' argument is without merit.

"The doctrine of curative admissibility allows a party to present otherwise inadmissible evidence on an evidentiary point where an opponent has 'opened the door' by introducing similarly inadmissible evidence on the same point." *Busch v. Busch Constr., Inc.*, 262 N.W.2d 377, 386 (Minn. 1977). "[T]o be entitled as a matter of right to present rebutting evidence on an evidentiary fact: (a) the original evidence must be inadmissible and prejudicial, (b) the rebuttal evidence must be similarly inadmissible, and (c) the rebuttal evidence must be limited to the same evidentiary fact as the original inadmissible evidence." *Id.* at 387.

Appellants do not argue, nor can they establish, that Mr. Colson's testimony was inadmissible. Additionally, the only claim appellants make as to the prejudicial nature of Mr. Colson's testimony is that the jury did not get the "complete picture," and that, out of fairness, appellants should have been allowed to rebut Mr. Colson's testimony with evidence of respondents' construction practices. But the doctrine of curative admissibility is not a doctrine of "fair play," and "[i]f the original evidence is admissible or nonprejudicial . . . the issue is addressed to the [district] court's discretion." *Id.* Accordingly, Mr. Colson's testimony did not "open the door" to the admission of respondents' construction practices and similar defects.

III

Appellants also allege error in the district court's jury instructions. District courts are allowed considerable latitude in selecting the language in jury instructions, and

appellate courts will not reverse a district court's decision unless the instructions constituted an abuse of discretion. *Alholm v. Wilt*, 394 N.W.2d 488, 490 (Minn. 1986). Where instructions fairly and correctly state the applicable law, an appellate court will not grant a new trial. *Alevizos v. Metro. Airports Comm'n*, 452 N.W.2d 492, 501 (Minn. App. 1990), *review denied* (Minn. May 11, 1990).

Appellants first argue that the district court should have instructed the jury that respondents' violation of the code was negligence per se. We disagree. A negligence-per-se instruction may be given if (1) "the persons harmed by [the] violation [of a statute] are within the intended protection of the statute" and (2) "the harm suffered is of the type the [statute] was intended to prevent." *Alderman's Inc. v. Shanks*, 536 N.W.2d 4, 8 (Minn. 1995) (citing *Pac. Indem. Co. v. Thompson-Yaeger*, 260 N.W.2d 548, 558–59 (Minn. 1977)). Appellants cannot establish that they are within the intended protection of the code. Section 101.2 of the 1994 Uniform Building Code states that "[t]he purpose of this code is not to create or otherwise establish or designate any particular class or group of persons who will or should be especially protected or benefited by the terms of this code." Therefore, the district court did not abuse its discretion by declining to instruct the jury on negligence per se.

Second, appellants allege error in the district court's failure to instruct the jury on damages available to appellants in the event that repairs to appellants' home do not restore the home to the same condition as before the discovery of the defects attributable to respondents' negligent construction. Specifically, appellants argue that the district

court should have given the jury the following instruction from 4A *Minnesota Practice* CIVJIG 92.10, B3 (2006):

> If the repair did not restore the (specify the property) to substantially the same condition as before the damage:
>
> a. Determine the reasonable cost of repair, and
>
> b. Add the difference between the fair market value of the property before the damage and the fair market value after the repairs.
>
> The total damages cannot exceed the difference in value before and after the damage.

We find no abuse of discretion in the district court's instruction on damages. "A claimant suing for less than total destruction to his property has an election under the law of damages to choose the cost of repair or the [difference in] value [of his property] before and after the [damages]." *Id.* at Use Note. "This election is exercised by the evidence introduced by the claimant." *Id.* If "[p]laintiff in his case-in-chief introduces only . . . evidence about the difference in value of the [property] before and after the [damages]," plaintiff has elected damages for the difference in the value of his property and CIVJIG 92.10, B1 is the proper instruction. *Id.* "If plaintiff, on the other hand, introduces repair costs," he has elected damages for the cost of repair, and CIVJIG 92.10, B2 is the proper instruction. *Id.*

The instruction that appellants requested—CIVJIG 92.10, B3—is the proper instruction when a "plaintiff in his case-in-chief introduces evidence of the cost of repair, testifies that the repairs did not restore the [property] to its former condition, and gives opinion evidence of the reduction in value." *Id.* Thus, in order for CIVJIG 92.10, B3 to be the appropriate instruction, actual repairs must be made to the property. *See, e.g.*,

Rinkel v. Lee's Plumbing & Heating Co., 257 Minn. 14, 20, 99 N.W.2d 779, 783 (Minn. 1959) (affirming an award of damages for loss of value and cost of repair where repairs were actually made). Otherwise, there could be no testimony or other evidence that repairs did not restore the property to its former condition, and the jury would have no way to make the determinations required under CIVJIG 92.10, B3, which include calculating "the difference between the fair market value of the property before the damage and the fair market value *after the repairs*." *Id.* at B3 (emphasis added).

Here, appellants introduced evidence of both the cost of repair and the difference in the value of their home before and after the discovery of the defects attributable to respondents' negligent construction. But no repairs were made to appellants' home, and thus there was no evidence that repairs did not restore the home to its former condition. As a result, there was not sufficient evidence to support an instruction under CIVJIG 92.10, B3.

By requesting an instruction on damages that the evidence did not support, appellants, in effect, failed to elect a measure of damages. "If plaintiff fails to elect his measure of damages and introduces evidence of the difference in value of the [property] before and after the [damages] and also the cost of repair, plaintiff is deemed to have elected as his measure of damages that which will give the lowest recovery." *Id.* at Use Note. "In such a case, that part of CIVJIG 92.10 (Part B) that will give the lowest recovery is the proper instruction." *Id.*

CIVJIG 92.10, B1 provides damages for the actual value of appellants' home, which, according to Mr. Noack's testimony, was $327,000. CIVJIG 92.10, B2—the

instruction given by the district court—provides for damages for the cost of repair, which ranged from $240,139 for the entire home to $23,000 for repair of only the left elevation. Recovery under instruction B2 is clearly lower than recovery would have been under instruction B1. Accordingly, the district court properly instructed the jury on damages because its instruction provided the lowest recovery.

IV

Finally, appellants challenge the district court's grant of summary judgment in favor of CCH on the question of successor liability. On appeal from summary judgment, we review the record to determine whether there is any genuine issue of material fact for trial and whether, in granting summary judgment, the district court committed an error of law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). We review 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).

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to a judgment as a matter of law." *Id*. There is no genuine issue of material fact when the evidence does not "permit reasonable persons to draw different conclusions." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997).

The moving party has the burden of showing the absence of a genuine issue of material fact. *Anderson v. State Dep't of Natural Res.*, 693 N.W.2d 181, 191 (Minn. 2005). To defeat a summary judgment motion, the non-moving party cannot rely on

denials or general averments, but must offer specific facts to show that there is a genuine issue of material fact for trial. *DLH, Inc.*, 566 N.W.2d at 71. No genuine issue of material fact exists when "the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions." *Id.*; *see also Schroeder v. St. Louis County*, 708 N.W.2d 497, 507 (Minn. 2006) (stating that "[a] party need not show *substantial evidence* to withstand summary judgment. Instead, summary judgment is inappropriate if the nonmoving party has the burden of proof on an issue and presents *sufficient evidence* to permit reasonable persons to draw different conclusions.").

Minnesota follows the traditional approach to corporate-successor liability, setting forth four circumstances under which successor corporations may be held liable for actions of a transferor corporation:

> [W]here one corporation sells or otherwise transfers all of its assets to another corporation, the latter is not liable for the debts and liabilities of the transferor, except: (1) where the purchaser expressly or impliedly agrees to assume such debts; (2) where the transaction amounts to a consolidation or merger of the corporation; (3) where the purchasing corporation is merely a continuation of the selling corporation; and (4) where the transaction is entered into fraudulently in order to escape liability for such debts.

Niccum v. Hydra Tool Corp., 438 N.W.2d 96, 98 (Minn. 1989) (citing *J.F. Anderson Lumber Co. v. Myers*, 296 Minn. 33, 206 N.W.2d 365 (1973)). In support of its motion for summary judgment, CCH put forth evidence that none of Colson's assets were transferred to CCH; Colson was dissolved in order to pursue an equitable division of

assets upon divorce, pursuant to Mr. Colson's marital-termination agreement; all of Colson's assets were sold to companies other than CCH at a reasonable marketable price; CCH was in existence two months prior to Colson's decision to dissolve; and CCH has a different majority shareholder than Colson.

In response, appellants alleged that there was a genuine issue of material fact regarding whether CCH was a mere continuation of Colson. Appellants put forth evidence that CCH has the same officers and shareholders as Colson; the two entities have the same registered agent, same address, perform the same work, and share the same contractor's license; and CCH advertises continuity of business over the years. Appellants also argued that there was a genuine issue of material fact concerning whether CCH was created to fraudulently escape liability, relying on deposition statements from Mr. Colson to support their claim.

The district court found that appellants failed to produce any evidence that CCH was a continuation of Colson and that appellants' assertion of fraud was unsupported by any evidence. On appeal, appellants reassert that there is a genuine issue of material fact concerning the creation of CCH to fraudulently escape liability. Appellants also recite facts that could be used to support a claim of continuation, but they do not raise a continuation claim and rely on those facts only to bolster their claim of fraud.

To substantiate their fraud claim, appellants again rely primarily on excerpts from Mr. Colson's depositions, during which, appellants aver, Mr. Colson testified that the sale of Colson was required by the marital-termination agreement he entered into with his (former) wife upon their divorce. Appellants—citing to the actual marital-termination

agreement—argue that the sale of Colson was not required by the agreement, and instead, Mr. Colson retained full ownership of Colson with the exception that he was required to transfer 40% ownership interest in Colson to his son. Appellants contend that Mr. Colson's "lack of veracity" in regard to his motives for selling Colson raises a genuine issue of material fact concerning whether CCH was created in order to fraudulently avoid liabilities. We disagree.

When the isolated statements upon which appellants rely are read in the context of Mr. Colson's entire testimony, it is clear that Mr. Colson was only stating that Colson was dissolved in order to prevent his wife from retaining any interest in the company—not that Colson's dissolution was mandated by the marital-termination agreement. Thus, even when viewed in the light most favorable to appellants, Mr. Colson's deposition excerpts do not raise a genuine issue of material fact concerning CCH's successorship to Colson.

Additionally, appellants assert that the continuity of business between Colson and CCH indicates that CCH was fraudulently created to escape liability.[1] Continuity of business and similar facts may be relevant to a continuation claim, but as we note above, appellants have not raised that claim on appeal. In the context of appellants' fraud claim,

[1] To establish continuity of business between Colson and CCH, appellants rely, in part, on transcript excerpts from *Shultz v. Colson Constr., Inc. & Colson Custom Homes, LLC*, Hennepin County Court File No. 27-CV-06-1683. The *Shultz* transcripts were presented to the district court for the first time upon appellants' motion for judgment as a matter of law or a new trial. On December 2, 2008, this court filed an order denying CCH's motion to strike the *Shultz* transcript from the appellate record, holding that the transcript is properly part of the record on appeal.

these facts have limited relevance and raise no more than a metaphysical doubt, which is not sufficient to establish a genuine issue of material fact.

Appellants also assert that fraud can be inferred from the fact that CCH was created and Colson dissolved only after Colson became involved in a lawsuit over its construction practices. This inference, too, raises no more than a metaphysical doubt. As a result, appellants have raised no genuine issue of material fact regarding the creation of CCH to fraudulently escape liability. The district court, therefore, did not err by granting summary judgment in favor of CCH.

V

Respondent Colson argues that appellants' statutory-breach award should have been reduced by the percentage of negligence the jury attributed to appellants. Whether the comparative-fault statute is applicable to appellants' statutory-breach award is a question of law, which we review de novo. *See In re Estate of Torgersen*, 711 N.W.2d 545, 550 (Minn. App. 2006) ("The construction and application of a statute is a question of law, which this court reviews de novo."), *review denied* (Minn. June 20, 2006).

Appellants presented two theories of recovery to the jury—negligent construction and breach of statutory warranties. The jury returned an award in favor of appellants for $55,000. Because of the prohibition against double recovery for the same harm, appellants were entitled to only one award. *See Wirig v. Kinney Shoe Corp.*, 461 N.W.2d 374, 379 (Minn. 1990) (holding that double recovery for same harm is prohibited). The district court's order indicates that if appellants recovered under their negligent-construction claim, appellants' award would have been reduced pursuant to the jury's

apportionment of negligence to appellants. But the district court awarded appellants the full $55,000 award under the claim for breach of statutory warranties and did not reduce the award to account for the jury's negligence determination.

Colson claims that appellants' award must be reduced by the percentage of negligence that the jury attributed to appellants. In support of this claim, Colson relies on *Peterson v. Bendix Home Sys., Inc.*, 318 N.W.2d 50, 53 (Minn. 1982), which states that "comparative fault should . . . be a defense to consequential damages in breach of warranty actions." Appellants assert that applying the comparative-fault statute to their award is "unnecessary and duplicative" because the jury already accounted for their negligence when it found that Colson was in breach of statutory warranties. At oral argument, Colson responded by arguing that there is no indication that the jury accounted for appellants' negligence in its finding. We agree with appellants.

Minn. Stat. § 327A.03(g) (2006) states that

> [t]he liability of the vendor or the home improvement contractor under sections 327A.01 to 327A.07 is limited to the specific items set forth in sections 327A.01 to 327A.07 and *does not extend to . . . loss or damage from negligence, improper maintenance or alteration of the dwelling or the home improvement by parties other than the vendor or the home improvement contractor*[.]

(Emphasis added.) The jury was specifically instructed that respondents could not be held liable for breach of statutory warranty for loss or damage resulting from appellants' own negligence, improper maintenance or alteration, failure to maintain the home, or failure to minimize loss or damages. We presume that the jury followed these instructions. *See Flatin v. Lampert Lumber Co.*, 298 Minn. 577, 580 n.3, 215 N.W.2d

783, 785 n.3 (1974) (stating that the jury is presumed to follow the trial court's instructions).

Therefore, the jury could not hold Colson liable for breach of warranty unless the jury first found that appellants suffered some loss or damage that is not attributable to appellants' own negligence. The jury's finding thus indicates that it considered appellants' negligence and concluded that appellants suffered some harm that arose solely from Colson's breach of statutory warranties. It would be inappropriate to reduce appellants' award when the jury already considered and discounted appellants' negligence in regard to the harm caused by Colson's breach of warranty.

We also find Colson's reliance on *Bendix* misplaced. Although *Bendix* states that comparative fault should be a defense to consequential damages in breach-of-warranty actions, the *Bendix* court did not consider, as we must, whether comparative fault applies when the jury was required to account for the plaintiffs' fault before rendering a judgment in their favor in the first instance. As a result, *Bendix* is neither germane nor helpful to our analysis.

Because the jury already considered and discounted appellants' negligence in regard to the harm caused by Colson's breach of warranty, the comparative-fault statute should not be applied to reduce appellants' award. Therefore, we find no error in the district court's failure to reduce appellants' award for breach of statutory warranties.

VI

Respondent Foss claims that, as a prevailing party, it was an abuse of discretion for the district court to deny him costs and disbursements against appellants. Minn. R.

Civ. P. 54.04 (2006) states that "[c]osts and disbursements shall be allowed as provided by statute." Minn. Stat. § 549.04, subd. 1 (2006), provides that "[i]n every action in a district court, the prevailing party . . . shall be allowed reasonable disbursements paid or incurred." We review the district court's award of costs and disbursements for an abuse of discretion. *Kellar v. Von Holtum*, 605 N.W.2d 696, 703 (Minn. 2000), *superseded by rule on other grounds*, Minn. R. Civ. P. 11.03.

The district court was apparently concerned that Foss did not actually incur any costs or disbursements in defending against appellants' direct claim, given that Foss was already obligated to defend against Colson's third-party claim for indemnity. If Foss did not incur any costs associated with appellants' direct claim, any costs and disbursements Foss recovered from appellants would be unnecessary and duplicative—a legitimate concern that was properly taken into account by the district court. *See Green-Glo Turf Farms, Inc. v. State*, 347 N.W.2d 491, 495 (Minn. 1984) (holding that "[o]rdinarily, . . ., cumulative, duplicative, or peripheral depositions would not be considered necessary" disbursements). It is well within a district court's discretion to deny costs or disbursements that are unnecessary or duplicative.

But a district court is required to make sufficient findings regarding the necessity and reasonableness of costs and disbursements. *Illinois Farmers Ins. Co. v. Brekke Fireplace Shoppe, Inc.*, 495 N.W.2d 216, 222 (Minn. App. 1993). Here, the district court did not make sufficient findings regarding the costs and disbursements Foss sought from appellants. We, therefore, reverse and remand for a hearing and appropriate findings on the reasonableness and necessity of Foss's costs and disbursements against appellants.

Affirmed in part, reversed in part, and remanded.