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STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0956

LeMaster Construction, Inc.,
Appellant,

vs.

Ronald J. Woeste, et al.,
Respondents,

Countrywide Home Loans, Inc., et al.,
Defendants,

Ronald J. Woeste, et al.,
Third Party Plaintiffs,

vs.

Illinois Farmers Insurance Company,
Third Party Defendant.

Filed April 21, 2009
Affirmed; motion granted in part and denied in part
Hudson, Judge

Sherburne County District Court
File No. 71-C7-05-002693

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Considered and decided by Hudson, Presiding Judge; Minge, Judge; and Randall, Judge.*

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

HUDSON, Judge

This case primarily concerns respondent homeowners' slander-of-title claim, which arose out of a mechanic's lien dispute between respondents and appellant construction company. The matter was tried to the district court and respondents prevailed. On appeal, appellant construction company argues that the district court: (1) clearly erred when it found that appellant's erroneous mechanic's liens were published with malice; (2) erred by awarding various special damages for the slander-of-title claim; (3) erred and abused its discretion by awarding attorney fees to respondents; (4) erred by awarding breach-of-contract damages to respondents; and (5) erred by using the incorrect measure of damages for conversion of property. We affirm, and grant in part and deny in part, a motion to strike.

FACTS

The home of respondents Ronald and Julie Woeste was substantially damaged by fire on August 29, 2004. Respondents entered into an arrangement with appellant LeMaster Construction, Inc. to remediate the fire loss.[1] The district court found that the

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

[1] Remediation involves repairs and cleaning after a fire. Whether the arrangement constituted a contract is one issue on appeal.

work performed by appellant between August 29, 2004 and December 9, 2004 "was of shoddy, substandard quality and was incompetently performed."

Respondents unilaterally terminated their arrangement with appellant on December 9, 2004 and requested the return of all their personal property still in appellant's possession. Appellant refused to release the personal property, and, according to the district court, "us[ed] it as leverage in an attempt to get back on the job." Although appellant never sent respondents a bill for its services, on January 13, 2005, without notifying respondents, appellant filed a mechanic's lien against respondents' home in the amount of $357,670.84. An amended lien was filed on February 4, 2005 in the amount of $302,670.84, after respondents paid $55,000. When respondents sought to refinance their home in the spring of 2005, they first learned of the lien. Because respondents were unable to pay the required amount to remove the lien, they were unable to refinance. After respondents protested their liability, appellant again amended its lien, reducing the amount by $57,785.14.

Appellant filed a suit in district court to foreclose the lien, as well as for liquidated damages, contents-related services, storage and related charges, interest, and attorney fees. In total, appellant sought damages in the amount of $402,024.10. Respondents filed an answer and counterclaim alleging breach-of-contract, slander-of-title, and conversion. With respect to the slander-of-title claim, respondents alleged that the mechanic's liens contained numerous inaccuracies regarding the amount owed and that "the publication of the false statement[s] concerning title to the [respondents'] property

caused the [respondents] pecuniary loss in the form of special damages including but not limited to an inability to refinance [their] property at more favorable rates."

The case proceeded to trial for seven days in October 2007. The district court ultimately awarded respondents damages of: $84,533.48 for damage to their home due to the acts and omissions of appellant; $53,056.48 for damage to salvageable contents due to appellant's failure to protect and preserve respondents' property while it was under appellant's control; $2,224.92 for conversion of respondents' personal property by appellant; $1,212.40 for a "pack-back" of personal property; and $160,275.44 for slander-of-title ($325 for an appraisal fee in connection with the failed attempt to refinance, legal fees and related costs of $152,744.57, and interest charges and closing costs of $7,205.87 incurred for a line of credit to pay attorney fees in connection with the dispute).

Addressing the malice requirement in connection with the slander-of-title claim, the district court found that "the January 13, 2005 and February 4, 2005 liens on [respondents'] home were inaccurate [and] grossly overstated, [they] included items not properly the subject of a mechanic's lien under the statute[,] and [they] were filed in bad faith." This appeal follows.

Respondents filed motions to strike certain arguments from appellant's brief, asserting that because appellant failed to file posttrial motions pursuant to Minn. R. Civ. P. 59.01, it had not preserved those arguments for appeal. In an order filed on January 16, 2009, this court deferred resolution of the motions.

DECISION

I. The district court did not clearly err when it found that appellant's mechanic's liens were published with malice.

Appellant argues that the district court clearly erred when it found that appellant's erroneous mechanic's liens were published with malice. "When reviewing mixed questions of law and fact, 'we will correct erroneous applications of law, but accord the [district] court discretion in its ultimate conclusions and review such conclusions under an abuse of discretion standard.'" *Langford Tool & Drill Co. v. Phoenix Biocomposites, LLC*, 668 N.W.2d 438, 442 (Minn. App. 2003) (quoting *Rehn v. Fischley*, 557 N.W.2d 328, 333 (Minn. 1997)).

There are four elements in a slander-of-title claim: (1) a false statement was made concerning the real property owned by the plaintiff; (2) the false statement was published to others; (3) the false statement was published maliciously; and (4) the false statement concerning title to the property caused the plaintiff pecuniary loss in the form of special damages. *Paidar v. Hughes*, 615 N.W.2d 276, 279–80 (Minn. 2000). The filing of an instrument known to be inoperative is a false statement that, if done maliciously, constitutes slander-of-title. *Kelly v. First State Bank of Rothsay*, 145 Minn. 331, 332, 177 N.W. 347, 347 (1920). "The element of malice requires a '[r]eckless disregard concerning the truth or falsity of a matter . . . despite a high degree of awareness of probable falsity or entertaining doubts as to its truth.'" *Brickner v. One Land Dev. Co.*, 742 N.W.2d 706, 711–12 (Minn. App. 2007) (quoting *Contract Dev. Corp. v. Beck*, 627 N.E.2d 760, 764 (Ill. 1994)), *review denied* (Minn. Mar. 18, 2008).

Appellant challenges only the third element—that the erroneous liens were published maliciously. In detailed findings, the district court determined that appellant's mechanic's liens were published with malice. Specifically, the district court stated:

> [T]he false liens were certainly published maliciously. [Appellant's] liens contained claims for sums owed to [appellant] for things clearly not "lienable" under Minnesota law, including claims for liquidated damages, contents handling, items that were intentionally overcharged, amounts related to fraudulent invoices from subcontractors, amounts for items that [appellant] purchased but expressly refused to release to the [respondents], work that was not done at the premises and work for which [respondents] had already paid for and received lien waivers. The lien statements were each drafted for the signature of [appellant's president] . . . who cannot be said to be unfamiliar with mechanic's liens or the consequent litigation that can result from foreclosure. . . .
>
> The very best that can be said about these liens is that at a minimum they were sloppily and carelessly prepared without regard to the law by a marginally trained employee who by any objective standard was grossly incompetent to perform this function, and whose lack of training was or should have been known to [appellant's] President.
>
> The placing of such a grossly inaccurate mechanic's lien on the premises under such circumstances is negligent in the extreme. It is also malicious conduct. Malice is supported by [appellant's employee's] expressed understanding that she knew nothing about what was properly includible in a mechanic's lien, but she certainly knew the legal effect on the homeowner of such a large lien. . . . Further, it has been conclusively established to this Court that in its dealings with [respondents] during the course of its employment as restoration contractor, [appellant] was inflating its invoices and was engaged in other billing practices that were not only questionable but outright fraudulent. The liens contained these questionable and fraudulent amounts as part of their total alleged to be owed, and this is clearly malicious conduct.

Appellant argues that malice was not established because the employee who completed the mechanic's-lien forms was trained by an attorney, and her testimony evidenced an intent to complete the lien statements accurately. "But a mere assertion of reliance on an attorney's advice without disclosure of the basis for that reliance or the facts supporting the attorney's advice is insufficient to rebut the deliberate filing of a false statement." *Brickner*, 742 N.W.2d at 712.

Appellant also argues that the district court failed to consider whether appellant had a *reasonable* belief that it had a lien right and "instead found malice solely on the fact that non-lienable items were contained in the lien." Appellant mischaracterizes the district court's findings and the facts in the record. Although the employee who completed the lien forms testified that she did so to the best of her ability and with the information she possessed, the district court found that the liens were "sloppily and carelessly prepared without regard to the law" by an employee who "was grossly incompetent to perform this function, and whose lack of training was or should have been known to [appellant's] [p]resident." Moreover, this employee expressed that she knew nothing about what could properly be included in a mechanic's lien, yet she knew the legal effect on the homeowner of such a large lien. The finding of malice is further supported by the district court's finding that appellant inflated its invoices and was engaged in overtly fraudulent billing practices. The liens contained these fraudulent amounts as part of the total alleged to be owed. The district court found that appellant knowingly inflated the amounts on its invoices, and in turn knowingly employed a person with little knowledge of mechanic's liens to prepare them. The district court considered

and rejected appellant's claim that it had a reasonable belief in the accuracy of the liens. We conclude that the record is more than sufficient to support the district court's finding of malice.[2]

Appellant further argues that there is a limited privilege precluding liability for slander-of-title if one claims a competing interest in land in good faith, even if the claim is legally incorrect or unreasonable. But application of the limited privilege is restricted if there is a finding of bad faith. *See* Restatement (Second) of Torts § 651 cmt. e (1965) (stating that a competing interest is legally protected as long as the claim is not motivated by ill will). While bad faith is not easily defined, it includes "the commission of a malicious, willful wrong" and requires "fraudulent intent." *Mjolsness v. Riley*, 524 N.W.2d 528, 530 (Minn. App. 1994); *Prichard Bros., Inc. v. Grady Co.*, 436 N.W.2d 460, 466 (Minn. App. 1989), *review denied* (Minn. May 2, 1989). Moreover, the existence of good faith is a credibility question on which this court defers to the district court. *See Tonka Tours, Inc. v. Chadima*, 372 N.W.2d 723, 728 (Minn. 1985) (noting that the existence of good faith is a credibility determination); *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988) (stating that appellate courts defer to district court credibility determinations). Here, the record supports the district court's finding that

[2] In making its malice determination, the district court relied on *Anderson v. Breezy Point Estates*, 283 Minn. 490, 493–94, 168 N.W.2d 693, 696 (1969). *Anderson* concerned an action to foreclose a mechanic's lien, included an analysis of mechanic's lien law, and held that a lien will be denied to the extent that claimed improvements are non-lienable. *Id*. at 495, 168 N.W.2d at 697. But *Anderson* did not address slander-of-title. The district court, therefore, erred to the extent that it relied on *Anderson*. This error was harmless, however, because the district court had a separate, proper basis for its finding of malice.

appellant acted in bad faith; accordingly, appellant cannot claim the limited privilege. Although appellant twice amended the mechanic's liens—which appellant argues is a demonstration of its good faith—respondents' title was nevertheless wrongly encumbered for more than two years.

The district court's findings that appellant filed erroneous invoices with the insurance company in bad faith and used those invoices to inflate the amount of the mechanic's liens were sufficient to support its finding of malice for the slander-of-title claim. Accordingly, we affirm on this issue.

II. Appellant failed to preserve the issue of special damages (appraisal fee and related costs).

Appellant challenges the award to respondents of special damages in the form of the appraisal fee and related costs. Respondents argue that appellant failed to preserve the issue of special damages for appellate review when it did not file a new-trial motion pursuant to Minn. R. Civ. P. 59.01. Minn. R. Civ. P. 59.01 establishes the causes for which a court may grant a new trial and limits the grounds for a new trial to those causes. *Ginsberg v. Williams*, 270 Minn. 474, 485, 135 N.W.2d 213, 221 (1965). The general rule is that on appeal from a judgment where there has been no motion for a new trial, appellate review is limited to whether the evidence sustains the findings of fact, and whether the findings sustain the conclusions of law and the judgment. *Alpha Real Estate Co. of Rochester v. Delta Dental Plan of Minn.*, 664 N.W.2d 303, 309 (Minn. 2003); *Gruenhagen v. Larson*, 310 Minn. 454, 458, 246 N.W.2d 565, 569 (1976). "It has long been the general rule that matters such as trial procedure, evidentiary rulings, and jury

instructions are subject to appellate review only if there has been a motion for a new trial in which such matters have been assigned as error." *Sauter v. Wasemiller*, 389 N.W.2d 200, 201 (Minn. 1986). Generally, objections to evidentiary rulings not assigned as error in a posttrial motion are not reviewable by this court. *Id.* at 201–02. But "the *Sauter* rule does not apply to substantive questions of law that were properly raised during trial." *Alpha Real Estate*, 664 N.W.2d at 310.

Here, respondents argue that they incurred special damages as part of their slander-of-title claim; specifically, the appraisal fee in connection with their attempt to refinance, and interest charges and closing costs incurred in establishing a line of credit to pay attorney fees to remove the liens. Respondents raised these special damages in their trial memorandum, through direct questioning at trial, and in their written closing argument. Appellant did not file a posttrial motion to preserve a challenge to the award of these special damages. Even if we were to conclude that these special damages are properly characterized as substantive questions of law, so that appellant was not required to bring a rule 59 motion to preserve the issue for appeal, *Alpha Real Estate* still requires that the issue be properly raised and decided in the district court. *Id.* Our review of the record reveals that appellant failed to object during trial to the district court's consideration of respondents' claims for the appraisal fee, interest charges, and expenses related to the line of credit. Appellant cannot raise objections to these amounts for the first time on appeal. *See id.* at 310; *see also Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (holding that matters not argued to and preserved in the district court are generally

not reviewable). Accordingly, we grant respondents' motion to strike this argument from appellant's brief.

III. Appellant preserved the issue of attorney fees as special damages; the district court did not abuse its discretion in awarding attorney fees as special damages to respondents.

Appellant challenges the award to respondents of attorney fees as special damages. Respondents argue that appellant failed to preserve the issue of attorney fees for appellate review because it did not file the appropriate posttrial motion pursuant to Minn. R. Civ. P. 59.01.

A. Admission of respondents' affidavit of counsel for attorney fees

Respondents sought and were awarded attorney fees as special damages in connection with their slander-of-title claim, even though they did not specifically plead attorney fees in their counterclaim. On the last day of trial, during re-direct examination of respondent Ronald Woeste, respondents' counsel moved the district court to accept his affidavit (exhibit 127) regarding attorney fees. Appellant objected, arguing that this was an improper subject on re-direct because appellant had not been afforded the opportunity to cross-examine Ronald Woeste regarding the affidavit for attorney fees. But appellant did not specifically object to the receipt of exhibit 127. The district court overruled the objection, accepted the affidavit, and directed the parties to address the issue in more detail in their written closing arguments. Appellant did so, asserting that the attorney fees were not pleaded. But appellant did not assert that attorney fees had not been proved at trial or that it was prejudiced by the court's admission of exhibit 127. And, notably, appellant did not file a posttrial motion to preserve this issue for appeal.

In our view, the question of whether the district court properly allowed attorney fees to be addressed on re-direct was an evidentiary and procedural issue and thus, under *Sauter* and *Alpha Real Estate*, appellant was required to file a rule 59.01 posttrial motion in order to preserve this issue for appeal. Accordingly, we grant respondents' motion to strike as it relates to appellant's challenge on appeal to the district court's acceptance of exhibit 127.

B. Attorney fees as special damages—Minn. R. Civ. P. 9.07

Although appellant was required to file a posttrial motion to preserve any challenge to the district court's *evidentiary* ruling regarding the attorney fees, we conclude that the question of whether the attorney fees were adequately pleaded as special damages pursuant to Minn. R. Civ. P. 9.07 is a separate, substantive, legal issue. Therefore, it was not necessary for appellant to file a rule 59.01 posttrial motion to preserve the attorney fees as special damages for appeal. *See Alpha Real Estate*, 664 N.W.2d at 310 (holding that substantive questions of law properly raised during trial are an exception to the *Sauter* rule, and stating that the *Sauter* rule is "consistently enunciated . . . in terms of trial procedure, evidentiary rulings and jury instructions") (quotation omitted). But appellant was still required to preserve the issue by raising and/or objecting to it in the district court, and it did so. Appellant raised this issue when respondents offered exhibit 127 into evidence on redirect, and again in appellant's written closing argument. *See id.* at 311 (stating that "motions for a new trial pursuant to Minn. R. Civ. P. 59.01 are not a prerequisite for appellate review of substantive questions of law

when a genuine issue of law is properly raised and considered at the district court level"). Accordingly, we deny respondents' motion to strike the issue.

We now consider the merits of appellant's claim. Appellant argues that the district court abused its discretion by awarding attorney fees as special damages because attorney fees were not pleaded, requested, or proven, and the district court did not make findings on causation and reasonableness to support the award. "On review, this court will not reverse a [district] court's award or denial of attorney fees absent an abuse of discretion." *Becker v. Alloy Hardfacing & Eng'g Co.*, 401 N.W.2d 655, 661 (Minn. 1987). Attorney fees are considered special damages in a slander-of-title case. *Paidar*, 615 N.W.2d at 280.

Minn. R. Civ. P. 9.07 requires a pleader to state special damages with specificity. "The purpose of [rule 9.07] is to give fair notice to opposing parties of matters not necessarily known to them, and to obviate the giving of such notice as to matters they would already know." 1 David F. Herr & Roger S. Haydock, *Minnesota Practice* § 9.10 (4th ed. 2002). Special damages are those damages that actually result from a wrongful act, but which are not presumed or implied, as is the case with general damages. *Smith v. Altier*, 184 Minn. 299, 300, 238 N.W. 479, 479 (1931).

However, failure to specifically plead special damages is not fatal to a claim if the issue is litigated by consent, without objection from the opposing party. Minn. R. Civ. P. 15.02 states that issues not raised in the pleadings but tried by express or implied consent of the parties "shall be treated in all respects as if they *had* been raised in the pleadings." (Emphasis added.) "Consent to litigate an issue not raised in the pleadings may be

[inferred] where the party does not object to evidence relating to the issue . . . or puts in his own evidence relating to the issue." *Shandorf v. Shandorf*, 401 N.W.2d 439, 442 (Minn. App. 1987) (citing *Roberge v. Cambridge Coop. Creamery Co.*, 243 Minn. 230, 235, 67 N.W.2d 400, 403 (1954)). Finally, a party can move to amend the pleadings to conform to the evidence "at any time, even after judgment; but failure so to amend does not affect the result of a trial of these issues." Minn. R. Civ. P. 15.02. Thus, the failure to plead with specificity *and* the absence of any formal motion to amend is not fatal if attorney fees were actually tried by express or implied consent of the parties.

Respondents did not specifically plead their $140,000 in attorney fees claim in the original counterclaim, and in more than two years of pretrial discovery, respondents never moved to amend to specifically plead the attorney fees. Nevertheless, on this record, we conclude that the issue of attorney fees was litigated by consent.

In their pretrial brief, respondents recited the elements of a slander-of-title claim, including special damages, citing *Paidar*. *See Paidar*, 615 N.W.2d at 279–80. They addressed various elements of their claim and stated, "[a]s for the special damages requirements . . . [respondents] incurred $85,712.77 in legal fees, $1,300.22 in costs associated with travel fees for [a witness] to attend his deposition, $1,656.00 in copy costs, and $5,138.65 in court reporter fees." The brief referred the reader to "[e]xhibit G," which includes very detailed documentation of the claimed legal expenses. While the pretrial brief is not evidence, it clearly put appellant on notice that legal fees were being sought and gave notice of the constituent parts of special damages. Moreover, in respondents' opening statement, there was specific reference to the "legal expenses"

respondents had incurred "over the last three years in dealing with" the legal problems allegedly caused by appellant. Again, opening statements are not evidence, but there was no objection from appellant or claim of surprise that legal fees were being sought by respondents as part of special damages.

On direct examination, counsel for respondents questioned Ronald Woeste (Woeste) as to the contents of exhibit 52. Woeste testified that exhibit 52 consisted of documents showing the damages that respondents claimed were caused by appellant. Exhibit 52 included the same documentation as to attorney fees and related costs that appeared in respondents' exhibit G to the pretrial brief. Although exhibit 52 is a voluminous three-ring binder consisting of hundreds of pages, proper foundation was laid for the admission of exhibit 52, and counsel for appellant specifically stated that there was "no objection." The exhibit was then received. While Woeste was not specifically questioned about the pages of exhibit 52 relating to attorney fees, the entire exhibit was admitted without any objection. The entire exhibit became evidence on which the district court could rely, even if witnesses were not questioned by appellant about every paragraph and page of the exhibit.

On redirect examination of Woeste, his counsel asked about legal fees incurred in connection with the slander-of-title claim. The only objection made was that this *question* was beyond the scope of the cross-examination. The district court indicated that it would permit the testimony because "legal fees can be submitted via affidavit as part of closing arguments; it generally is not something that has to be covered during trial." Counsel for respondents then offered exhibit 127, the affidavit of respondents' counsel,

which provided detailed documentation for all requested attorney fees, costs, and amounts paid to court reporters. Much of this documentation had also been submitted with the pretrial brief and in exhibit 52. There was no objection to the receipt of exhibit 127. Counsel for appellant did not claim that defense of the case was prejudiced or seek a continuance to meet the evidence. Counsel for appellant had the additional opportunity to examine Woeste, but did not inquire about the claim for attorney fees or exhibit 127. Nor did appellant's counsel object to the district court's willingness "to accept an affidavit outlining attorney[ ] fees on either side based upon the representations of the attorneys as officers of the court." After exhibit 127 was received, there was also a brief exchange between the court and respondents' counsel about "the amount reflected on 127." Counsel said that he would "be happy to submit a supplemental affidavit," and the court said he could "do that as part of [his] final submissions." Again, there was no objection.

Both parties were invited to submit written closing arguments and proposed orders. Respondents' closing argument specifically requested legal fees, deposition expenses (including travel expenses for a witness), and costs associated with preparing for trial. Respondents' proposed order again itemized the attorney fees and legal expenses, reflecting the evidence submitted at trial and in the supplemental affidavit invited by the court, including legal fees, pretrial costs, travel fees for a witness, amounts paid to court reporters, and service fees. Appellant's closing argument asserted that attorney fees had not been pleaded, but did not assert that respondents failed to prove the amounts claimed at trial or that appellant was prejudiced by the court's admission of

evidence. In fact, appellant acknowledged that respondents were "ask[ing] the court to order [appellant] to pay their attorney fees for all claims."

The focus of Minn. R. Civ. P. 15.02 is on whether an issue was actually tried. Here, the record reflects that the amount of legal expenses was actually tried without objections from appellant when the evidence was offered. Because rule 15.02 states that amendment "even after judgment" is appropriate and that "failure so to amend does not affect the result of a trial of these issues," the failure to plead attorney fees with specificity does not preclude respondents' recovery.

Appellant further argues that the district court failed to make the necessary findings of causation and reasonableness to support the award of attorney fees. But appellant never raised this issue in the district court and a review of the record reveals that appellant never disputed the reasonableness of the claimed attorney fees. *See Thiele*, 425 N.W.2d at 582 (holding that matters not argued to and preserved by the district court are generally not reviewable).

Appellant did ask that the court limit any award of fees and costs to amounts that were "specific to" the slander-of-title claim, but that position is not supported by caselaw, which authorizes an award of all fees if the legal claims arise from the same core facts. *See Musicland Group, Inc. v. Ceridian Corp.*, 508 N.W.2d 524, 535 (Minn. App. 1993) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 435, 103 S. Ct. 1933, 1940 (1983) and stating that when the claims in a suit "involve a common core of facts or will be based on related legal theories," the district court should not attempt to distinguish between the

claims when awarding attorney fees because "[m]uch of counsel's time will be devoted generally to the litigation as a whole"), *review denied* (Minn. Jan. 27, 1994).

Apportionment of fees between successful and unsuccessful claims is entrusted to the district court's discretion. *Gopher Oil Co. v. Union Oil Co.*, 955 F.2d 519, 527 (8th Cir. 1992). Appellant presented no arguments or evidence in the district court on apportionment, appellant did not dispute the reasonableness of the amount claimed, and appellant has not established that the district court abused its discretion in awarding fees for these closely related claims, on which respondents clearly prevailed.

Because the issue of attorney fees was litigated by consent without timely objections by appellant, and because appellant did not dispute the reasonableness of the claimed fees, we conclude that the district court did not abuse its discretion and the award of attorney fees is affirmed.

IV. The district court did not err when it awarded certain damages to respondents even though the district court's order and memorandum of law appear to be inconsistent regarding whether a contract was formed.

Appellant argues that (1) the district court should not have awarded certain damages to respondents after it found that no contract existed between the parties, and, alternatively, (2) there was insufficient evidence to conclude that water damage to the basement resulted from rainwater or that appellant breached its contract by failing to prevent rainwater from entering the premises. The existence of a contract is generally a question of fact. *Morrisette v. Harrison Int'l Corp.*, 486 N.W.2d 424, 427 (Minn. 1992). If there is reasonable evidence tending to support the district court's findings of fact, an appellate court will not reverse those findings. *Rogers v. Moore*, 603 N.W.2d 650, 656

(Minn. 1999). A reviewing court will not disturb a damage award "unless its failure to do so would be shocking or would result in plain injustice." *Hughes v. Sinclair Mktg., Inc.*, 389 N.W.2d 194, 199 (Minn. 1986).

Breach-of-contract

Appellant argues that the district court mistakenly awarded damages on respondents' breach-of-contract claim. Appellant's argument rests on its analysis of respondents' answer and counterclaim, which detailed damages arising from three claims against appellant: slander-of-title, conversion, and breach-of-contract. Because the district court in its order specifically addressed the slander-of-title and conversion damages, but did not address the source of *additional* damages awarded, appellant argues that the additional damages must have been awarded on the breach-of-contract claim. Appellant maintains that because the district court found in its *memorandum* that no contract existed, it could not award damages in its *order* for breach-of-contract. Appellant concludes that because respondents never amended their pleadings, damages awarded on alternate theories would be improper.

In their answer and counterclaim, respondents characterized their damages as arising from appellant's breach-of-contract, and that is how the issue was litigated. The district court's findings of fact and conclusions of law specifically and repeatedly address the existence of a contract. Specifically, the district court found that: a material misrepresentation induced respondents to enter into a contract for remediation; appellant had completed "some work" under the contract; the contract was unilaterally terminated by respondents; respondents had made partial payment on the contract; appellant had

bonus programs in place that created an incentive for its employees to increase the cost of the contract; and appellant materially breached the contact. While the district court's supporting memorandum creates some confusion as to whether a contract existed, this uncertainty is limited to the final three pages of a 13-page memorandum, which was written in support of a 33 page order and judgment.[3]

Prior to the promulgation of the Minnesota Rules of Civil Procedure in 1951, the memorandum of a judge attached to the findings or order, even if expressly made a part of such findings or order, could not be used to impeach, contradict, overturn, or modify the terms of the findings or order. *Bicanic v. J.C. Campbell Co.*, 220 Minn. 107, 111, 19 N.W.2d 7, 9 (1945) (citing *Wilson v. Davidson*, 219 Minn. 42, 47, 17 N.W.2d 31, 34 (1944)); *see also McGovern v. Fed. Land Bank of St. Paul*, 209 Minn. 403, 406, 296 N.W.2d 473, 475 (1941) (holding that the "memorandum of the court may be resorted to in order to sustain findings, but may not be used to overturn them"). However, Minn. R. Civ. P. 52.01 states that "[i]t will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court or in an accompanying memorandum." Moreover, the advisory committee note in 1985 states that "[t]he changes to Rule 52.01 are intended to permit trial courts to make findings of fact and conclusions of law orally or in a written memorandum . . . ." Minn. R. Civ. P. 52.01 1985 advisory comm. note.

[3] The memorandum cryptically suggests that no contract existed when it states, "even assuming arguendo that a contract was in fact formed," and "there was no agreement of the essential terms of the contract . . . and accordingly there could be no valid contract."

It is clear from the rules of civil procedure that the district court's findings of fact, conclusions of law, and order should be taken as a whole with its memorandum. Here, there is reasonable evidence tending to support the district court's findings that a contract existed. Given the weight of the testimony and evidence, as well as the detailed findings of fact and reasoning of the district court in both the order and the majority of the memorandum, we conclude that the damages were awarded under a breach-of-contract theory and that the award was proper.

Insufficient evidence

Appellant argues in the alternative that there was insufficient evidence to support the district court's findings regarding water damage to respondents' property. In regard to the district court's award of $57,415.35 in damages from the rainstorm ("failure to perform the remediation in a workmanlike manner"), appellant points to the testimony of the contents loss adjuster for Farmers Insurance, who testified that the water damage to respondents' belongings came from rainwater, which would indicate improper "tarping" by appellant. Appellant argues that the district court improperly solicited this testimony from the witness, which caused her to recant her earlier testimony. Even if this were the case, the testimony by the contents loss adjuster was not the only evidence that the district court considered when it determined that appellant was at fault for the improper tarping and water damage. The district court's findings of fact address the appellant's improper placement of a tarp over the home, the opinion of appellant's production manager that "more than one LeMaster representative should have responded to prevent further damage," and an invoice for "re-tarping," which contained the notation "tarp the

right way" (suggesting that it was previously done the wrong way). This evidence, combined with the respondents' testimony, was sufficient to support the district court's findings of fact regarding water damage.

The district court's order is clear in its award of damages for breach-of-contract. Although small parts of the district court's memorandum are inconsistent with some parts of its order, the inconsistencies do not warrant reversal.

V. Appellant waived the issue of proper measure of conversion damages.

At oral arguments, appellant expressly withdrew its argument concerning the proper measure of conversion damages.

Because: (1) the district court did not err in concluding that appellant published the erroneous mechanic's liens with malice; (2) appellant did not properly preserve any arguments regarding the award/recovery of appraisal fee, interest, and closing costs; (3) the district court did not abuse its discretion in awarding attorney fees; and (4) the district court properly awarded breach-of-contract damages, we affirm.

Affirmed; motion granted in part and denied in part.