STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1115

Ronald Duy, et al.,
Respondents,

vs.

Lake Weed-A-Way, Inc., d/b/a Professional Lake Management,
a Michigan corporation, et al., defendants and third party plaintiffs,
Appellants,

vs.

Minnesota Shoreline Restoration, Inc., third party defendant,
Respondent.

Filed July 7, 2009
Reversed and remanded
Toussaint, Chief Judge

Crow Wing County District Court
File No. 18-C1-03-000382

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Considered and decided by Lansing, Presiding Judge; Toussaint, Chief Judge; and Halbrooks, Judge.

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

TOUSSAINT, Chief Judge

This is an appeal after remand in which appellants Lake Weed-A-Way, Inc., d/b/a Professional Lake Management, Gregory R. Cheek, and Jessica Cheek assert that the district court erred by failing to hold a trial following this court's reversal of summary judgment and remand for further proceedings. Because we agree that the district court did not comply with this court's mandate on remand, we reverse and remand.

FACTS

This case arises out of alleged breaches of an asset-purchase agreement governing the sale of the lake-weed-removal business of respondents Ronald Duy, Rita Duy (the Duys), Ronald Duy, Jr. (Duy, Jr.), and Aquatic Plant Management, Inc., f/k/a R&J Aquatic Weed Control, Inc., to appellants. The underlying facts are more fully addressed in *Duy v. Lake Weed-A-Way, Inc.*, No. A04-1721 (Minn. App. May 17, 2005) (*Duy I*).

Respondents commenced this action in February 2003 after appellants ceased making payments due under the parties' agreement. Appellants asserted defenses and counterclaims based on respondents' alleged antecedent breaches of the agreement. The parties filed cross-motions for summary judgment. The district court denied appellants' motion for summary judgment and granted respondents' motion for summary judgment on liability, reserving the issue of damages for trial.

The district court addressed numerous alleged breaches of the asset-purchase agreement by respondents and concluded that the following did not constitute breaches: (1) respondents' continued sales of aquatic herbicides; (2) the failure of Ronald Duy, Sr.

(Duy, Sr.) to surrender his state license to apply aquatic herbicides; (3) respondents' failure to change their home phone number, which also had been used as, and was listed as, a business phone number; (4) respondents' use of business stationery in a manner harmful to appellants; (5) respondents' failure to inform appellants, prior to the sale, of the loss of a large customer; (6) respondents' failure to provide requested business records; (7) respondents' failure to refer clientele to appellants; (8) respondents' sharing of information about appellants' equipment; and (9) respondents' sharing of customer information with Duy, Jr. The court concluded that there was insufficient evidence to support appellants' claims that the contract had been fraudulently induced, either by misrepresentations regarding Duy, Jr.'s physical ability to engage in the business or failure to disclose the loss of a large customer.

On appeal, this court affirmed in part, reversed in part, and remanded. The remanding opinion begins with a summary of its disposition, including the reversal of "the grant of summary judgment on the issue of an alleged violation of a noncompete agreement" and "remand for further proceedings consistent with this opinion." *Duy I*, 2005 WL 1154291, at *1. The opinion is framed by the following characterization of appellants' argument on appeal: "Lake Weed-A-Way contests the district court's determination that it was presented with no disputed facts which would allow a jury to find in Lake Weed-A-Way's favor on either its defensive or affirmative claims for relief." *Id.* at *2.

This court rejected appellants' claims that issues of material fact existed with respect to claims of: (1) fraudulent misrepresentations regarding Duy, Jr.'s health; (2) deliberate concealment of the Duys' intent to continue an herbicide-sales business, including surreptitious changes to the asset-purchase agreement; and (3) misappropriation of confidential information in violation of the asset-purchase agreement. *Id.* at *3-4.

But this court did find that genuine issues of material fact existed regarding whether "the Duys' actions resulted in Lake Weed-A-Way's loss of a particular customer to [Duy, Jr.'s] business, [respondent Minnesota Shoreline Restoration, Inc.]." *Id.* at *5. We explained that our "review of the record reveals evidence that could support a conclusion that the Duys provided their son with customer information." *Id.* We cited two examples of such evidence: (1) an alleged statement by Duy, Sr. (in response to an inquiry by appellants after losing the account) that he had no knowledge of Minnesota Shoreline Restoration; and (2) testimony from Jessica Cheek that certain of the names on a customer list created by Duy Jr. could not have been obtained from public sources. *Id.*

On remand, respondents moved for an order limiting the evidence that could be presented by appellants to the two examples cited in our remanding opinion. The district court denied this request, reasoning that:

> The Court of Appeals decided that the issue of [respondents'] alleged breach of the non-compete agreement must be decided by a jury. . . . [T]hat decision results in the revival of two of [appellants'] claims: antecedent breach of the agreement by [the Duys] and tortious interference with contract by [Duy, Jr. and Minnesota Shoreline Restoration]. Nothing about the Court of Appeals' decision indicates that it intended the examples it noted to be an exhaustive list of evidence available to support a finding on the issue of [respondents'] alleged breach of the non-compete agreement. The Court of Appeals does not address possible evidence available to

> support or oppose findings by the jury on the other elements of the tortious interference with contract claim. Based on these facts, the Court finds that evidence other than the two examples noted by the Court of Appeals may be relevant to proving [appellants'] claims.

The district court subsequently held a pretrial conference, at which it requested from the parties their understanding of the issues remaining for trial after remand. Appellants submitted a letter summarizing the multiple claims and affirmative defenses that they asserted remained for trial. The district court issued an order articulating "a complete list of the issues remaining for trial," rejecting what it characterized as appellants' "position that the remand resurrected each and every claim and defense asserted in their original answer and counter-claim and third-party complaint."

The district court determined that appellants were foreclosed, by this court's affirmance of portions of the district court's summary-judgment order, from asserting that the following constituted a breach of the asset-purchase agreement: (1) respondents' continuing sales of aquatic herbicides; (2) Duy, Sr.'s refusal to surrender his applicator license; (3) respondents' acquisition of an applicator licensure for a new corporate entity; (4) respondents' failure to change the phone number associated with the business; (5) respondents' continued use of business stationery; (6) respondents' failure to disclose the pre-sale loss of a large customer; (7) respondents' fraudulent inducement of appellants into a contract; (8) respondents' failure to provide business records; (9) respondents' failure to refer clientele to appellants; (10) respondents' alleged misrepresentation regarding Duy, Jr.'s disability; (11) respondents' alleged alteration of the purchase agreement; (12) respondents' billboard advertisement for their new business; and (13)

respondents' renaming of their business.

The district court identified four issues relevant to appellants' assertion of an antecedent breach:

> (1) whether [the Duys] provided [Duy, Jr.] with confidential customer information, (2) if [the Duys] provided [Duy, Jr.] with confidential customer information, did they do so prior to [appellants'] breach of the contract or following [appellants'] breach of contract, (3) if [the Duys] provided confidential customer information to [Duy, Jr.] prior to [appellants] breach of contract, did they materially breach the asset purchase agreement or simply default on fulfilling their obligations under the non-compete clause of the asset purchase agreement, [and] (4) if [the Duys] breached the asset purchase agreement or defaulted on their obligations under the non-compete clause of the asset purchase agreement, what, if any, damages are [appellants] entitled to receive.

The court concluded that rescission of the asset-purchase agreement was not an available remedy because the alleged breach was not material. It relied on the characterization of the contract as an asset-purchase agreement to find that the noncompete covenant was not "so fundamental to the contract that the failure to perform that obligation defeats an essential purpose of the contract." The court further reasoned that rescission was not available because damages would adequately compensate appellants for any proven breach.

The district court also issued an order limiting the evidence to be presented at trial. This order prohibited appellants from "referenc[ing], discuss[ing], or present[ing] evidence in the presence of the jury" related to the 13 allegations that the court had found did not constitute breaches of the asset-purchase agreement. The district court also excluded evidence of the alleged misappropriation of respondents' technology, and evidence that Duy, Sr. sold a boat and tank to Duy, Jr.. The court reasoned that the

evidence was not relevant, or, if relevant, the probative value of the evidence was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.

Following the issuance of these orders, the case was reassigned to another judge, and appellants brought a motion seeking clarification of the order in limine, arguing that it was unclear whether the order precluded use of the identified evidence for any purpose, and making offers of proof pursuant to Minn. R. Civ. P. 103 as to how the evidence was relevant to the claims remaining for trial. Respondents countered with a motion to compel disclosure of specific lost customers or, if not disclosed, to dismiss all of appellants' claims and defenses.

The district court held a hearing on the motions and reaffirmed the order in limine, construing it to "limit [the trial] to the confidential customer disclosure issues." The district court then asked for an "offer of proof with regard to the status of the proceedings." Appellants' counsel responded that their case was "largely circumstantial" and argued that the jury would need the excluded evidence to infer that a breach of the noncompete had taken place. Counsel stated that

> we can show you the circumstantial evidence we do have that's allowed within the confines of the . . . order [in limine], but to do that and to present it to the jury without any context whatsoever I submit would be a waste of time and resources.

The court responded: "With that offer of proof, the Court at this time dismisses all remaining claims of the [appellants]."

The district court subsequently issued written findings of fact, conclusions of law, and an order drafted by respondents, granting judgment based both on Minn. R. Civ. P. 56.03 (summary judgment) and Minn. R. Civ. P. 41.02(a) (authorizing court to dismiss claims for rule violations). Appellants dispute both bases for the dismissal order and also challenge the order in limine.

D E C I S I O N

"On remand, it is the duty of the district court to execute the mandate of this court strictly according to its terms." *State v. Roman Nose*, 667 N.W.2d 386, 394 (Minn. 2003); *see also Rooney v. Rooney*, 669 N.W.2d 362, 371 (Minn. App. 2003) (adding that district court "lacks power to alter, amend or modify" the mandate (quotation omitted)). Thus, our review here is guided by the nature and scope of our mandate in *Duy I*.

We first address the district court's grant of summary judgment dismissing appellants' claims and defenses on substantive grounds. We are mindful that in *Duy I* this court did not explicitly direct the district court to try particular defenses or claims. *See* 2005 WL 1154291, at *1 (reversing "grant of summary judgment on the issue of an alleged violation of a noncompete agreement" and "remand[ing] for further proceedings consistent with this opinion"). Moreover, we acknowledge that there may be circumstances in which a subsequent grant of summary judgment is appropriate following reversal of a summary-judgment decision and remand for further consistent proceedings. For instance, the development of additional facts or legal theories may warrant dismissal after remand. On the facts presented to us in this case, however, we conclude that the district court's post-remand order granting summary judgment violated

the mandate of *Duy I.*

Following remand, the district court correctly focused on the triable issue of whether respondents had violated their noncompete covenant in a manner that would support either the discharge of appellants' further obligations under the asset-purchase agreement (and thus was a defense to respondents' breach-of-contract claim) or an affirmative breach-of-contract claim, from which any damages awarded would offset the damages award to respondents. But the district court subsequently narrowed its focus to the possibility of a damages award/offset, after concluding that the alleged breach of the noncompete covenant was not material as a matter of law. This conclusion was contrary to, and thus violated the mandate of, this court's remanding opinion.

Although we did not explicitly address the issue of materiality in *Duy I*, a finding of genuine fact issues with respect to materiality was implicit in *Duy I* for two reasons. First, this court found genuine issues of material fact "relevant to rescission," which, as the district court acknowledged, is not available in absence of a material breach. *See Heyn v. Braun*, 239 Minn. 496, 501, 59 N.W.2d 326, 330 (1953) ("[O]nly a material breach of a contract or a substantial failure in its performance justifies a party thereto in rescinding it."). Second, this court did not distinguish between appellants' defense to respondents' breach-of-contract claim—which as noted would require a material breach—and appellants' own breach-of-contract claim, for which any breach would support an award of (provable) damages. Thus, it is clear that this court in *Duy I* required the issue of materiality to go before the jury.

Even assuming that *Duy I* had not precluded the district court's materiality determination, we cannot agree with the district court's conclusion that breach in this case was immaterial as a matter of law. In reaching this conclusion, the district court focused on the characterization of the agreement as an asset-purchase agreement, presumably concluding that because the noncompete covenant was not an "asset," it was not integral to the parties' agreement. But the customer information allegedly disclosed to Duy, Jr. is specifically identified as one of the "Purchased Assets," and the asset-purchase agreement allocated $377,000 of the $400,000 purchase price to the customer accounts and records. Moreover, the noncompete covenant expressly states that the

> services which will be sold and/or provided by Sellers to Buyers [sic] vary little from those sold and/or supplied by its competitors, that competition in the business of the Buyer is intense, and that it is the intention of the parties that the rights of the Buyer in and to the purchased accounts, trade, business, work and customer relations be protected as property, both tangible and intangible, of the Buyer.

Under these circumstances, we reaffirm and make explicit our conclusion in *Duy I* that there is a genuine issue of material fact as to whether the alleged breach of the noncompete covenant was a material breach. Accordingly, we conclude that the district court erred in granting summary judgment and dismissing appellants' claims and defenses on substantive grounds.

Further, we can discern no proper basis for the district court to order dismissal on the basis of rule violations. There is no mention of this basis in the hearing transcript, and we see no conduct justifying the extreme sanction of dismissal. *See Kmart Corp. v. County of Becker*, 639 N.W.2d 856, 860 n.2 (Minn. 2002) (noting that rules of civil

procedure allow dismissal for failure to comply with discovery obligations "only under exceptional circumstances").

With respect to the orders in limine, we also find error. The district court apparently accepted respondents' assertion that there is conclusive evidence that a large account was not lost through improper conduct by respondents. But the existence of a material fact in this regard was part of the very foundation for our remand in *Duy I*. This court found evidentiary support for the existence of a breach in Duy Sr.'s alleged statement that he had not heard of the organization (Duy Jr.'s corporation, Minnesota Shoreline Restoration) that obtained the account and Jessica Cheek's testimony that certain accounts could not have been identified through public records.[1] The district court's acceptance of respondents' asserted explanation for the loss of the account necessarily usurps the jury's role of weighing competing evidence and making credibility determinations. *See, e.g.*, *Laska v. Anoka County*, 696 N.W.2d 133, 140 (Minn. App. 2005) (holding that "weight and credit to be accorded conflicting evidence . . . must be determined by a finder of fact"), *review denied* (Minn. Aug. 16, 2005).

The result of the district court's orders in limine was to limit appellants to proving a breach through direct evidence, i.e., identification of specific accounts lost. Although appellants cannot permissibly rely on speculation, they are permitted to establish a breach through circumstantial evidence. *See Zaske ex rel. Bratsch v. Lee*, 651 N.W.2d 527, 533

[1] Respondents assert that Cheek has since recanted this testimony. Of course, the credibility of any testimony given by Cheek at trial will be for the jury's determination. *See Lewis v. Comm'r of Pub. Safety*, 737 N.W.2d 591, 594 (Minn. App. 2007) (explaining that inconsistencies in testimony "are merely factors to consider when making credibility determinations, which is the role of the fact-finder").

(Minn. App. 2002) (providing that "jury may rely on circumstantial evidence so long as the inferences are reasonably justified by the proof in the case"), *review denied* (Minn. Dec. 17, 2002). Indeed, the evidence identified by this court as creating a genuine issue of material fact was circumstantial evidence. We conclude that the district court erred in determining that the excluded evidence was not relevant because it was not direct evidence of a breach.

Although the district court also based the evidentiary exclusions on Minn. R. Evid. 403, its analysis under that rule was necessarily impacted by its determination that none of the alleged conduct was relevant. On remand the district court is directed to revisit its evidentiary rulings, taking into consideration "the high standard of Minn. R. Evid. 403," which requires that evidence "be *substantially more prejudicial than probative* before it is excluded." *Peterson v. BASF Corp.*, 711 N.W.2d 470, 483 (Minn. 2006) (emphasis in original). The court should also consider whether the use of a proper limiting instruction could ameliorate any prejudicial effect of the evidence appellants seek to introduce. *Cf. State v. Slowinski,* 450 N.W.2d 107, 114-15 (Minn. 1990) (observing that trial court can lessen the danger of unfair prejudice and undue weight being given by jury by giving cautionary instructions).

Reversed and remanded.