

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2008).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-285**

Dennis Drewes, Inc.,
Appellant,

vs.

Middle Snake Tamarac River Watershed District,
f/k/a Middle River - Snake River Watershed District,
Respondent.

**Filed December 15, 2009
Affirmed
Connolly, Judge**

Marshall County District Court
File No. 45-CV-06-449

Paul A. Sortland, Sortland Law Office, 431 South Seventh Street, Suite 2440,
Minneapolis, MN 55415 (for appellant)

Jeffrey W. Hane, Denise A. Sollund, Brink, Sobolik, Severson, Malm & Albrecht, P.A.,
217 South Birch Avenue, P.O. Box 790, Hallock, MN 56728 (for respondent)

Considered and decided by Bjorkman, Presiding Judge; Peterson, Judge; and
Connolly, Judge.

UNPUBLISHED OPINION

CONNOLLY, Judge

Appellant challenges the district court's denial of its motion for judgment as a matter of law after a jury-trial verdict. Appellant alleges various errors, including the district court's instruction on substantial performance, the district court's decision not to instruct the jury as to the effective date of the contract, and the district court's award of fees and costs. Appellant also challenges the earlier failure of the district court to grant it summary judgment. Because the district court's denial of appellant's motion for summary judgment is outside the scope of appellate review, the evidence supports the jury's decision that the contract was breached, the district court did not abuse its discretion in its award of fees and costs, and all other claims of error are waived, we affirm.

FACTS

This case arises out of a breach-of-contract claim. The contract at issue is a settlement agreement between the parties that resolved a previous lawsuit. In the previous litigation, appellant had constructed a flood-control impoundment for respondent. The impoundment was a man-made lake, which controls the release of floodwaters. Respondent was dissatisfied with the work done by appellant, believing that there was excessive seepage because the impoundment was constructed improperly. Respondent withheld payment, and appellant brought suit. The parties ultimately settled, resulting in the settlement agreement at issue in this case.

The settlement agreement resulted in respondent paying appellant \$230,507. Respondent was required to make repairs itself, and agreed to spend at least \$75,000 constructing a toe drain or impervious cutoff repair within two years. A toe drain is a tile system at the toe of an embankment, which is designed to control a seepage problem. The parties dispute whether mulching and seeding, which prevents erosion, is a secondary aspect to the toe drain repair, or whether it is an integral part of the toe drain repair. The agreement further provided that, if the repair cost less than \$75,000, respondent would pay appellant the difference between the cost of repair and \$75,000.

Following construction of the toe drain repair, appellant again sued respondent, this time for breach of contract. Appellant alleged that respondent had breached the terms of the settlement agreement by not completing the toe drain repair within two years, and therefore was required to pay appellant \$75,000. Appellant also alleged that respondent had spent less than \$75,000, and therefore, in the alternative, respondent owed appellant the difference in damages.

After discovery, appellant and respondent both moved for summary judgment. The district court denied both motions. A jury trial was held. In response to specific interrogatories on the special verdict form, the jury found that respondent was required by the settlement agreement to complete the toe drain repair by October 28, 2005, and that respondent breached the settlement agreement. The jury found that respondent owed appellant \$9,600 in damages. The district court adopted and incorporated the jury's responses on the special verdict form in its order for judgment. The district court found that appellant was entitled to judgment against respondent in the amount of \$9,600, that

appellant was the prevailing party, and that appellant was entitled to certain taxable costs and disbursements allowed by law. Appellant made posttrial motions for judgment as a matter of law and for a new trial, which the court denied. Appellant also sought particular disbursements and expert fees, which the court granted in part and denied in part.

D E C I S I O N

I. The district court’s denial of appellant’s motion for summary judgment is not within the scope of appellate review.

Denial of a motion for summary judgment is outside of the appellate court’s scope of review where a trial has been held and the parties have been given a full and fair opportunity to litigate their claims. *Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910, 918-19 (Minn. 2009). While an appellate court has the authority to review orders that “affect” the judgment being appealed under Rule 103.04 of the Minnesota Rules of Civil Appellate Procedure, denial of a motion for summary judgment in a case that proceeds to trial cannot be viewed as affecting the judgment being appealed “because the district court’s conclusion at the summary judgment stage that there was a genuine dispute of fact becomes moot once the jury reaches a verdict on that issue.” *Id.* at 918. We believe that, under *Bahr*, the district court’s denial of appellant’s motion for summary judgment is not within the scope of appellate review.

We further conclude that even if the district court’s denial of summary judgment were within the scope of appellate review, the district court did not err in its decision. A district court’s denial of a motion for summary judgment is subject to de novo review

because summary judgment involves a determination of whether a party is entitled to judgment as a matter of law. *Martin v. Spirit Mountain Recreation Area Auth.*, 566 N.W.2d 719, 721 (Minn. 1997). Summary judgment is appropriate if there is no genuine issue of material fact and either party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03.

The parties presented conflicting evidence, and the district court decided that there was a genuine issue of material fact as to whether respondent completed the toe drain repair within two years. There is sufficient evidence in the record to support the district court's conclusion. The parties disagreed about whether backfilling, seeding, and mulching are an integral part of toe drain repair. According to appellant, this is an important part of a toe drain, and a toe drain is not finished until seeding and mulching have been done. According to respondent, seeding and mulching may be the finishing touches on the project as a whole, but they are not essential to a toe drain repair.

Additionally, the parties disputed the completion date. Much of appellant's evidence attempted to prove that the toe drain repair was not complete by October 15, 2005. Appellant offered an October 14, 2005 photograph, pay records, and deposition testimony in support of the conclusion that respondent did not finish construction within two years. Respondent offered deposition testimony indicating that the October 14 photograph should be interpreted differently than appellant proposed, as well as deposition testimony defining a toe drain as a tile system at the toe of the embankment, the purpose of which is to control a seepage problem. Respondent offered evidence that the toe drain was functioning in early October. Because the parties offered conflicting

evidence as to whether the toe drain repair was completed within the two-year timeframe, there was a genuine issue of material fact.

The district court also found the actual cost of repair to be a genuine issue of material fact. The parties disagreed as to the cost of the repair. Appellant presented evidence that some of respondent's claimed costs were not attributable to the repair. Respondent presented evidence of costs exceeding \$75,000. Again there was conflicting evidence to create a genuine fact issue that only the jury could resolve. Consequently, the district court did not err by denying appellant's motion for summary judgment.

II. Because the jury's special verdict answers can be reconciled with the evidence under the theory that the toe drain repair was entirely completed within two years, we need not consider the district court's alleged error in instructing the jury as to the doctrine of substantial performance.

The heart of this appeal is appellant's contention that the district court erred in applying the doctrine of substantial performance to the settlement agreement and then instructing the jury on substantial performance.

In its motion for judgment as a matter of law, appellant argued that the district court erred as a matter of law in applying the doctrine of substantial performance. Where the district court denies a motion for judgment as a matter of law, we must affirm the district court if, considering the evidence in the light most favorable to the prevailing party, the verdict can be sustained on "any reasonable theory of the evidence." *Pouliot v. Fitzsimmons*, 582 N.W.2d 221, 224 (Minn. 1998). We will only set aside the verdict if it is "manifestly against the entire evidence," or the evidence is "practically conclusive against the verdict." *Id.* (quotation omitted). On appellate review, we liberally construe a

special verdict in an attempt to harmonize the findings. *Dunn v. Nat'l Beverage Corp.*, 745 N.W.2d 549, 555 (Minn. 2008). “The test is whether the special verdict answers can be reconciled in any reasonable manner consistent with the evidence and its fair inferences. If the answers to special verdict questions can be reconciled on *any* theory, the verdict will not be disturbed.” *Id.* (quotation omitted). “An answer to a special verdict question should be set aside only if it is perverse and palpably contrary to the evidence, or where the evidence is so clear as to leave no room for differences among reasonable persons.” *Kelly v. City of Minneapolis*, 598 N.W.2d 657, 662 (Minn. 1999) (quotation omitted). We therefore review the jury’s findings to see whether they can be reconciled with the evidence on any theory.

The jury, through answers to special verdict questions, made five findings in the special verdict. First, that the settlement agreement required respondent to “complete a toe drain repair within two years.” Second, that the effective date of the settlement agreement was October 28, 2003. Third, that respondent was required to fulfill the terms of the settlement agreement regarding the toe drain repair by October 28, 2005. Fourth, that respondent breached the settlement agreement. And fifth, that \$9,600 was the sum of money that “fairly and adequately compensate[d] [appellant] based upon the Settlement Agreement” for the breach.

One theory we will examine is that the jury found that respondent breached the terms of the settlement agreement by failing to pay appellant the difference between \$75,000 and the actual cost of the toe drain repair. The settlement agreement required respondent to spend at least \$75,000 on the toe drain repair. If respondent spent less than

\$75,000, respondent was required to pay appellant the difference between what it spent and \$75,000. Here, respondent did not pay appellant the difference. Appellant's expert witness testified at trial that respondent actually spent "like 60 some thousand, 62, 60 some thousand" on the toe drain. Appellant's expert testified that engineering costs, which would push the total spent well over \$75,000, should not be included as part of respondent's costs of constructing the toe drain repair. One of respondent's witnesses testified that the cost of the toe drain components was \$62,280. He also testified to mobilization costs in the amount of \$1,750. The jury's finding that respondent owed \$9,600 as compensation for its breach of contract is consistent with a finding that respondent spent \$65,400—\$9,600 less than the required \$75,000—on the toe drain repair. Based on the evidence, the jury could have reasonably concluded that respondent only spent \$65,400 constructing the toe drain repair and failed to pay appellant the difference between these costs and \$75,000.

We conclude that it is not necessary to reach the issue of whether the district court erred in applying the doctrine of substantial performance to decide this case. *See Friends of Twin Lakes v. City of Roseville*, 764 N.W.2d 378, 383 (Minn. App. 2009) (finding it unnecessary to decide an issue because resolving the issue would leave the court's decision unchanged). Based on the way the case was argued to the jury, the evidence in the record, and the questions submitted to the jury, the jury could have concluded that the settlement agreement required respondent to complete the toe drain repair within two years and that *all* repairs were indeed completed within two years, but that respondent

breached the agreement by failing to pay appellant the difference between the actual repair costs and \$75,000.

III. Appellant's argument that the district court erred by allowing the jury to decide the effective date of the contract is waived.

A party cannot shift his position on appeal, nor can he argue the general issue litigated below on a new theory on appeal. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). At trial, appellant specifically and repeatedly argued that the settlement agreement was ambiguous as to its effective date and that the effective date of the contract was a question of fact for the jury. Appellant cannot now argue on appeal that the effective date of the contract presented a question of law for the district court to decide. This issue is waived.

IV. The district court did not abuse its discretion in awarding \$3,000 in expert witness fees.

Minn. Stat. § 357.25 (2008) provides that “[t]he judge of any court of record, before whom any witness is summoned or sworn and examined as an expert in any profession or calling, may allow such fees or compensation as may be just and reasonable.” Determination of reasonable expert witness fees is soundly within the discretion of the district court. *Casey v. State Farm Mut. Auto. Ins. Co.*, 464 N.W.2d 736, 740 (Minn. App. 1991), *review denied* (Minn. Apr. 5, 1991). “[A] discretionary award of expert witness fees will be disturbed only in cases where abuse of discretion is apparent.” *Carpenter v. Mattison*, 300 Minn. 273, 280, 219 N.W.2d 625, 631 (1974).

Appellant requested, and respondent objected to, an award of \$4,586 for the fees of its expert witness. The district court awarded \$3,000 in expert witness fees. The

district court specifically acknowledged that it had the authority to award compensation for preparation time, and explained that it was discounting the amount because it excluded some of the testimony of appellant's expert witness. The district court did not abuse its discretion in making this decision.

V. The district court did not abuse its discretion by denying the taxation of costs of two motion fees.

The prevailing party in district court "shall be allowed reasonable disbursements paid or incurred." Minn. Stat. § 549.04, subd. 1 (2008). We review a district court's award of costs and fees under an abuse-of-discretion standard. *Carlson v. Mut. Serv. Cas. Ins. Co.*, 527 N.W.2d 580, 584 (Minn. App. 1995), *review denied* (Minn. Apr. 27, 1995).

Appellant objects to the district court's denial of a \$55 motion fee for February 20, 2007, and a \$55 motion fee for October 31, 2007. The first represents appellant's motion for summary judgment, which the district court properly denied. The second represents appellant's motion fee in resisting respondent's motion in limine to exclude expert testimony. The expert report and some expert testimony were excluded at trial. The district court sustained respondent's objection to taxation of these costs, which represent motion fees on issues on which appellant did not prevail. The district court did award costs to appellant on other issues, such as deposition fees, which indicates that the district court carefully considered which costs were reasonable. The district court did not abuse its discretion.

Affirmed.