STATE OF MINNESOTA
IN COURT OF APPEALS
A09-776

Jeff P. Leighton,
Respondent,

vs.

Rick Rossow,
d/b/a Rick Rossow House Moving,
Appellant.

Filed March 9, 2010
Affirmed
Huspeni, Judge[*]

Meeker County District Court
File No. 47-CV-08-167

John R. Koch, Riechert, Wenner, Koch & Provinzino, St. Cloud, Minnesota (for respondent)

Frank J. Rajkowski, Rajkowski Hansmeier Ltd., St. Cloud, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Stoneburner, Judge; and Huspeni, Judge.

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

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

HUSPENI, Judge

In a suit brought on a contract to move a house, Rick Rossow was awarded damages for some of the services he provided, but was found to have breached the contract and was also ordered to pay for damage to the house that occurred while it was in his possession. In this appeal, Rossow challenges (1) the denial of a continuance, (2) the district court's reliance on a bailment theory, (3) the failure to apportion fault for damage to the house, (4) the interpretation of the contract's price terms, and (5) the sufficiency of relief granted him for the services he performed. We affirm.

FACTS

Jeff Leighton and Rick Rossow entered into a contract to move a house for Leighton in June 2006. The house was in Edina and Leighton wanted it moved to Saint Paul Park. The contract indicated a price of $12,500, additional expenses of $2,000 "to [r]un the [r]oute," and also contained a number of standard provisions dividing responsibilities between the parties.

At the end of June, Rossow lifted the house from the foundation in Edina in preparation for the move, but the house remained in that state for several months. By December, the City of Edina had issued an ultimatum that the house be moved or demolished. Leighton and Rossow discussed their options and, on December 7, Leighton paid Rossow $17,500, and they agreed that the house would be moved from Edina to Rossow's place of business in Eden Valley. On December 11, Rossow moved the house to Eden Valley, where it remained until March 2008. Ultimately the house was moved to

Saint Paul Park by another house-mover hired by Leighton, to whom he also paid $17,500.

The house suffered water damage while sitting in Eden Valley. The cause of that damage is the gravamen of the litigation that resulted in this appeal.

In January 2008 while the house was still in Eden Valley, Leighton brought this action against Rossow, claiming that Rossow was wrongfully retaining the house and seeking recovery of it. Leighton also claimed that Rossow had breached the parties' contract and sought "damages due to deterioration of the house [while] it [was] on [Rossow's] land." In his answer and counterclaim, Rossow alleged that Leighton's "shoddy workmanship" caused the damage to the house, that Leighton had breached the contract and had failed to pay Rossow fees he (Rossow) had earned.

Both parties were initially represented by counsel. Discovery was completed and a bench trial was scheduled for February 9, 2009. On January 2, 2009 Rossow's counsel filed notice that he was withdrawing from representation. On February 2, Rossow wrote a note to the court stating that he could not afford to replace his attorney and needed more time. In a hand-written response at the bottom of Rossow's note, the court stated that if Leighton objected to the continuance it would be denied, unless Rossow set up a phone conference to discuss it. Leighton's attorney appeared to agree to a forty-five day continuance, but for reasons not apparent from the record, neither the court nor the parties discussed a continuance again. On the scheduled trial date, the court asked Rossow if he was ready to proceed without counsel. Rossow replied that he was.

Testimony of the parties at trial to the court was in sharp conflict. Regarding why the house remained in Edina for so many months, Rossow claimed that Leighton did not have the money to pay for the move and had not prepared the site in Saint Paul Park; Leighton testified that money was available, denied any delay in preparing the site, and claimed that delay was caused by Rossow's failure to secure an appropriate route for the move and by street work being done in Edina. Regarding why the house was not moved directly to Saint Paul Park, but instead to Eden Valley, Rossow testified that the site in Saint Paul Park was not prepared; Leighton testified that Rossow still had not found a suitable route.

Regarding why the house remained in Eden Valley for 15 months, Leighton testified that Rossow initially told him he had another big job and that he still had not run Leighton's route. Leighton testified further that he asked his excavator to prepare the site in Saint Paul Park; that the work there was completed in half a day; that Leighton continued to attempt to secure delivery of the house to Saint Paul Park, both on his own and through a lawyer; and that Rossow never did secure a route for the move. Rossow testified that, at first, he was waiting for Leighton to finish preparing the Saint Paul Park lot, and as time wore on that Leighton owed him more money under the contract, including a charge for storage in Eden Valley. Testimony also conflicted regarding whether the $17,500 Leighton paid Rossow in December 2006 obligated Rossow to move the house to Saint Paul Park, or whether Leighton owed Rossow more money to complete the move.

While testimony addressing why there were delays in moving the house and who was at fault for those delays conflicted strongly, perhaps the most difficult issue for the trial court to resolve concerned the cause of the water damage that occurred to the house while it was in Eden Valley. Leighton testified that in late November, 2006, before the move to Eden Valley, he removed the top part of the house's chimney and covered the roof opening with a sheet of plywood; he testified that he did not take further steps because Rossow assured him the move would be temporary. Leighton testified further that when the house was still in Eden Valley six months later, he observed that the plywood was no longer in place and he documented extensive damage. Rossow testified that Leighton had removed the entire chimney before the house was lifted off the foundation in June 2006, arguably implying that damage could have occurred before the move to Eden Valley. Rossow also testified that Leighton, after discovering the damage in June 2007, admitted to full responsibility for the failure to secure the hole in the roof, and that damage likely occurred after June 2007, when Leighton knew about the plywood and could have taken steps himself to secure the house from damage.

Upon completion of trial, the district court issued extensive findings, documenting the extended disagreements between the parties, discrediting Rossow's claims that delay in moving the house had been caused by Leighton's failure to prepare the Saint Paul Park lot, finding that the December 2007 contract was incomplete and ambiguous, concluding that Leighton "expected to pay $17,500 plus the costs of escorts and fees" to move the house, and concluding that Rossow breached the agreement by failing to move the house to its final destination. The district court also concluded that a bailor/bailee relationship

existed when the house was moved to Eden Valley, and that Rossow was responsible for the water damage that occurred there. The district court awarded Leighton the $17,500 he had paid Rossow, less permit and escort fees, plus $13,755 for damage to the house. The district court also concluded that Leighton had breached the original contract by not paying Rossow when work commenced in June 2006. The district court offset Leighton's damages by $3,000 for the services Rossow performed then, when he first lifted the house off its foundation in Edina.

Rossow retained counsel after the judgment but no post-trial motions were filed. This appeal is from the judgment.

D E C I S I O N

"[M]atters 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). Absent a motion for new trial, review is limited to "whether the evidence sustains the findings of fact and whether such findings sustain the conclusion of law and the judgment." *Gruenhagen v. Larson*, 310 Minn. 454, 458, 246 N.W.2d 565, 569 (1976). A new-trial motion is not required for appellate review of a "substantive question[] of law [that was] properly raised and considered in the district court." *Alpha Real Estate Co. of Rochester v. Delta Dental Plan of Minn.*, 664 N.W.2d 303, 311 (Minn. 2003) (discussing and clarifying "question of law" exception to new-trial-motion requirement). Questions of law are reviewed de novo. *Id.*

I.

We turn first to the issue of Rossow's request for a continuance. As a threshold matter, we note that a continuance is procedural, and generally may only be reviewed if the party raised the issue in a post-trial motion. *Sauter*, 389 N.W.2d at 201. Rossow did not do so. But because we must be mindful as we address all issues raised by Rossow of how the lack of a continuance may have impacted those issues, and may also have impacted the absence of post-trial motions, we address the continuance issue in the interests of justice.

The record of Rossow's continuance request is not fully developed. Indeed, the documents offering evidence of the request are not part of the district court file, although Rossow has provided them on appeal, without objection from Leighton. He has provided a copy of the note he wrote to the district court asking for additional time and a copy of a letter from Leighton's attorney agreeing to a 45-day continuance. The record does not otherwise indicate why the trial was held without a continuance. The district court's handwritten response at the bottom of Rossow's note offers only a conditional denial, suggesting that a continuance would be granted with Leighton's agreement. Leighton apparently did agree. It appears, however, that Rossow then abandoned his request for a continuance. On the trial date, Rossow stated that he was ready to proceed and made no mention of a continuance; nor did Leighton. The district court noted that Rossow was unrepresented and asked, "Do you understand that you have a right to be represented by an attorney in these proceedings?" Rossow said he understood. In reviewing the totality of the record before us, we cannot conclude that the district court was responsible for the

absence of a continuance, and while we are not insensitive to how the pro se status of Rossow during trial may have made conduct of the proceedings more difficult for all, the trial court did not abuse its discretion by proceeding with the trial when both parties agreed to do so.

On appeal, Rossow argues that the lack of a continuance impinged upon his right to be represented by counsel. But his argument mischaracterizes what happened in the district court. As he acknowledges, this was not a criminal matter in which a right to representation was absolute. Rossow had a right to be represented by counsel, but he was required to do so at his own expense. The record substantiates that the continuance request was based upon Rossow's inability to continue to pay his counsel as the trial date approached. He did have counsel representing him on pre-trial matters such as pleading, discovery, and scheduling. And he was able to retain his present counsel soon after judgment was entered.

Our careful review of the record indicates that Rossow's self-representation at trial —although he seemed understandably frustrated or confused at times—did not result in unfair prejudice to him. We do not reach this conclusion lightly, inasmuch as all other issues he raises on appeal possibly could have been avoided or ameliorated had legal counsel been available for him. Ultimately, we conclude that though the trial was not a perfect one, it was a fair one. *Gum v. Medcalf Orthopaedic Appliance Co.*, 380 N.W.2d 916, 920 (Minn. App. 1986) (stating that party "is entitled to a fair trial, not a perfect trial"). The district court provided continuous assistance to Rossow, by helping him to understand procedures, define issues, and present evidence. Based on this assistance and

the counsel he had pre-trial, we are not persuaded that the outcome of trial was affected by the absence of a continuance. *See Lanzo v. F & D Motor Works*, 396 N.W.2d 631, 635 (Minn. App. 1986) (requiring showing of prejudice and finding none when denied continuance affected presence of counsel).

II.

Rossow next challenges the district court's conclusion that the existence of a bailment made Rossow liable for the damage that occurred to the house. First, he argues that the evidence was insufficient to find that a bailment existed. We disagree. A bailment occurs when property is delivered to a party, without ownership being transferred, under an agreement that the property will be returned. *Wallinga v. Johnson*, 269 Minn. 436, 438, 131 N.W.2d 216, 218 (1964). Here, Leighton contracted with Rossow to remove property from Edina to Rossow's storage yard. Ownership was not transferred. The parties impliedly agreed that the property would be returned to Leighton when it was delivered to his site in Saint Paul Park. We conclude that all of the elements of a bailment are present here.

Alternatively, Rossow argues that relief on a bailment theory was unavailable to Leighton because he did not plead bailment as a cause of action. Pleading rules are generally procedural, and review would be restricted because the district court was not given the opportunity to address this issue in a post-trial motion. However, appellate courts nonetheless review procedural issues when they implicate rights that are *sui generis* because they "define the basic nature of the decision-making process itself." *See Tyroll v. Private Label Chems., Inc.*, 505 N.W.2d 54, 57 (Minn. 1993) (deciding to

review appellant's right to jury trial, despite absence of post-trial motion). The content of pleading implicates fair notice to a litigant, which is essential to the decision-making process because it establishes what the litigation will, and will not, encompass. *See Schulte v. Transp. Unlimited, Inc.*, 354 N.W.2d 830, 834 (Minn. 1984) (stating that notice, as a matter of due process, must "meaningfully inform persons so that they can protect their interests"). We therefore address this question without Rossow having raised it in a post-trial motion.

Although Leighton's complaint did not use the word "bailment," its allegations plainly established the elements, as discussed above, and also alleged that the house sustained damages while under Rossow's control. Under the common law, a litigant did not necessarily have to explicitly plead bailment as a cause of action, so long as its elements were either "proven or admitted by the pleadings." *See Wickstrom v. Swanson*, 107 Minn. 482, 484-85, 120 N.W. 1091, 1091 (1909) (upholding relief on bailment theory in case stating cause of action for conversion). Indeed, the bailment concept is a fairly straightforward and intuitive one: when a person is compensated for holding another's property temporarily, he has to be careful not to harm it while it is in his possession. *See Nat'l Fire Ins. Co. v. Commodore Hotel, Inc.*, 259 Minn. 349, 351, 107 N.W.2d 708, 709 (1961) (stating that "[t]he bailee's duty to exercise due care with respect to the goods arises because of his acceptance of their possession and his subsequent custody and control over them"). Rossow adequately understood the concept, because in his answer he directly addressed the damage to the house and alleged that it was not his fault, but was caused by Leighton's "shoddy workmanship" in removing the chimney. At

trial, Leighton specifically referred to bailment, and both parties presented evidence about how the roof came to be secured against the elements. The issue was noticed, understood, and fairly litigated by the parties.

Nor was it unfair that a bailment theory placed the burden of proof on Rossow. *See Wickstrom*, 107 Minn. at 485, 120 N.W. at 1091 (stating that prima facie evidence of bailment and breach thereof places burden on bailee "to excuse the breach"). The fact that Rossow had control of the house simply established a presumption that, if it was damaged while in his control, he was responsible. He therefore was required to show otherwise. He vigorously attempted to do so, and was not prejudiced by the presence of burden-shifting.

III.

Rossow next argues that comparative fault for damage to the house should have been analyzed by the district court, because the evidence allowed a conclusion that Leighton bore some proportion of responsibility for the damage. The district court did not expressly apportion fault, but awarded damages to Leighton without a reduction for any negligence on his part. Absent a post-trial motion, our review is limited to "whether the evidence sustains the findings of fact and whether such findings sustain the conclusion of law and the judgment." *Gruenhagen*, 310 Minn. at 458, 246 N.W.2d at 569.

We first address whether comparative fault applies to liability arising under a bailment. Under common law, a bailment relationship is one arising out of contract. *Dennis v. Coleman's Parking & Greasing Stations Inc.*, 211 Minn. 597, 601, 2 N.W.2d

33, 35 (1942). Comparative fault generally does not apply in contract actions because they are not predicated on fault. *Lesmeister v. Dilly*, 330 N.W.2d 95, 101-02 (Minn. 1983). However, a duty of due care arises in a bailment relationship, and damage to the bailee's property is therefore addressed under a negligence theory, and not merely as a breach of the bailment contract. *See Dennis*, 211 Minn. at 601, 2 N.W.2d at 35 (stating that liability turned on bailee's exercise of due care); *see also Nat'l Fire Ins. Co.*, 259 Minn. at 351, 107 N.W.2d at 709 (discussing bailee's "duty to exercise due care with respect to the goods"). By statute, comparative fault applies to "acts or omissions that are in any measure negligent." Minn. Stat. § 604.01, subd. 1a (2008). Negligence that arises out of a bailment relationship, therefore, is subject to the comparative fault statute.[1]

Minn. Stat. § 604.01, subd. 1 (2008) provides that the district court must instruct the fact-finder to determine "the amount of damages and the percentage of fault attributable to each party" if any of the parties requests such a determination. Neither party asked the court to apportion fault in this case. While it might be argued that such a request would have been made if Rossow had been represented by counsel at trial, we conclude that such would not have been the case. He had counsel when he filed his answer in this action, and he asserted that the damage to the house was Leighton's fault, not that fault should be apportioned between them. Finally, the district court is only

[1] Under common law, the rule of contributory negligence also applied to bailment, and permitted consideration of the bailor's relative fault for damage to the property. *See Dennis*, 211 Minn. at 601, 2 N.W.2d at 35 (noting that contributory negligence was submitted to the jury). Comparative fault replaced contributory negligence by statute. *K. R. v. Sanford*, 605 N.W.2d 387, 391 (Minn. 2000).

required to address apportionment when asked to do so. We see no error in the failure of the court to address the issue of comparative fault.[2]

The district court, as fact-finder, found Rossow liable for those costs of repairs that it awarded, and our standard of review is limited to whether this determination is supported by the record. *Mathews v. Mills*, 288 Minn. 16, 23, 178 N.W.2d 841, 845 (1970). We review the facts presented in a light favorable to the fact-finder's conclusion. *Rogers v. Moore*, 603 N.W.2d 650, 656 (Minn. 1999). We defer to the fact-finder's assessment of witness credibility. *Hasnudeen v. Onan Corp.*, 552 N.W.2d 555, 557 (Minn. 1996). If there is reasonable evidence to support the district court's findings, the district court's decision should not be reversed merely because this court views the evidence differently. *Rogers*, 603 N.W.2d at 656.

The district court's findings indicate that the house was moved to Rossow's property on December 11, 2006, and that the house had suffered water damage there sometime before June 25, 2007. The contract states that storage was "temporary for not more than [thirty] days." The court found that, in January, Rossow did not comply with Leighton's request to move the house because Rossow "was very busy and was still working on a route." The findings state that Leighton continued, unsuccessfully, to press Rossow to complete the move "throughout the winter and early spring." The district

[2] We note that the court could have acted on its own initiative and addressed the issue of apportionment of fault without either party having requested it. *See* § 604.01, subd. 1. Again, we discern no error in the district court's failure to do so. While the record is silent as to whether the court engaged in an apportionment analysis, we note that the district court did not award the full cost of repairs to the house as established by Leighton's testimony.

court also found that, on May 11, Rossow assured Leighton "the move would be accomplished by July 4," but that Rossow did not do so. The findings also indicate that Leighton filed an insurance claim after discovering damage to the house, after which Rossow demanded more money for the move and "advised [Leighton] that he would not move the [house]" while Leighton was pursuing an insurance claim. The district court found that Leighton withdrew his claim "[i]n order to facilitate the move." The move still did not happen until the following March, over eight months after Leighton had discovered the damage.

These findings are all substantiated by Leighton's testimony at trial, which the district court credited. Viewed in a light favorable to the conclusion reached by the district court, the findings support a conclusion that Rossow was at fault for the water damage because he had caused the delay between December and June, during which the damage occurred. We note Rossow's assertion that further damage might have occurred after June, but the findings support a conclusion that Leighton made efforts to address the damage after discovering it, and that those efforts were obstructed by Rossow. We also note Rossow's insistence that Leighton bears some portion of responsibility because he was the one who secured the roof with plywood. The district court's findings state this fact, and it likely would have been capable of supporting the conclusion Rossow argues for. Although a conclusion different than that reached by the district court might also be supportable, the standard of review on appeal does not permit reweighing the evidence or substituting our own judgment. *Rogers*, 603 N.W.2d at 656. The record supports the conclusion the district court reached, and we will not disturb it.

IV.

Rossow argues that the district court ignored the plain language of the December 2006 contract, which he says established payments under the contract above and beyond the $17,500 that Leighton paid. He argues that the district court improperly considered evidence beyond the language of the contract itself.

The aim of contract interpretation is to determine and enforce the intent of the parties. *Motorsports Racing Plus, Inc., v. Arctic Cat Sales, Inc.*, 666 N.W.2d 320, 323 (Minn. 2003). If the contract's language is clear and unambiguous, the court should not "rewrite, modify, or limit its effect by a strained construction." *Travertine Corp. v. Lexington-Silverwood*, 683 N.W.2d 267, 271 (Minn. 2004). If the language is incomplete or ambiguous, evidence relevant to the intent of the parties—parol evidence—may be considered. *Material Movers, Inc. v. Hill*, 316 N.W.2d 13, 17 (Minn. 1982).

Interpretation of a contract is a legal question, as is the application of the parol evidence rule. *Travertine*, 683 N.W.2d at 271; *Anchor Cas. Co. v. Bird Island Produce, Inc.*, 249 Minn. 137, 145, 82 N.W.2d 48, 54 (1957) (stating that parol evidence rule is a matter of substantive law, not a rule of evidence). Legal issues are reviewed de novo. *Alpha Real Estate*, 664 N.W.2d at 311 (permitting, without post-trial motion, review of a legal issue raised in district court).

We agree with the district court that the price terms in the language of the December 2007 contract were incomplete and ambiguous. The contract does not state a price for the move to Eden Valley, which was the move precipitating the signing of the contract. Nor does it anywhere state $17,500 as a price term, which is the amount

Leighton paid when signing the contract. The contract does refer to some costs for the eventual move "to owner[']s] new location," but it is unclear what relationship these costs bear to the move to Eden Valley, or to the amount Leighton paid. In short, it is impossible to determine from the language alone what Rossow was agreeing to do, and for what price. Assuming, as the parties have, that the document comprises an enforceable contract at all, its description of the parties' mutual obligations is incomplete. As a matter of law, parol evidence was admissible to discern the parties' intentions in making the contract.

Having considered parol evidence, the district concluded that the expectation of the parties was that Leighton was to pay $17,500, plus escort and permit fees, for the entire move, including the move from Eden Valley to Saint Paul Park. That conclusion is a valid one. Leighton testified that he thought the move to Saint Paul Park was included for the price of $17,500. The contract explicitly states that the move to Eden Valley was temporary, and enumerates certain costs associated with the move "[to the] new location." The parties' earlier contract stated a price of $14,500 to move the house from Edina to Saint Paul Park. Assuming that same amount paid for a move from Edina to Eden Valley, the additional $3,000 paid in December could be understood to be the price of the extra two nights it was expected to take to complete the move, from Eden Valley to Saint Paul Park. The December contract specifically states a price of $1,500 a night "for moving to [the] new location," and the record shows that this move eventually did take two nights to complete. The contract did not state specific amounts for the permits and escort fees involved in this move, and therefore they are reasonably understood to have

been costs above and beyond the $17,500 price. Based on the prior contract and the parties' understanding, the district court's interpretation reflects their intentions.

V.

Lastly, Rossow argues that the district court's award to him of the value of the services that he did perform for Leighton was insufficient. The district court found that Leighton had breached the June 2006 contract, and awarded Rossow $3,000 for the work he did to raise the house from its foundation in Edina, as well as other unpaid sums related to the move from Edina to Eden Valley. The amount was awarded under quantum meruit, because the June contract had been voided by the December agreement, and was unenforceable.

A party may recover under quantum meruit where he or she "has conferred a benefit to another and has not received reasonable compensation for this act." *Busch v. Model Corp.*, 708 N.W.2d 546, 552 (Minn. App. 2006). Under quantum meruit, the measure of relief for a partially completed project is "the reasonable value of the fraction of the project that was completed." *E.C.I. Corp. v. G.G.C. Co.*, 306 Minn. 433, 437, 237 N.W.2d 627, 630 (1976). Our review addresses "whether the evidence sustains the findings of fact and whether such findings sustain the conclusion of law and the judgment." *Gruenhagen*, 310 Minn. at 458, 246 N.W.2d at 569.

Rossow argues that the court should have awarded him $17,500—the amount that he claims was the price of the move from Edina to Eden Valley—because otherwise Leighton would be unjustly enriched. We disagree. The move to Eden Valley was a temporary and imperfect solution to Leighton's situation, and it caused other significant

losses. He lost use of the house for fifteen months. The damage incurred in Eden Valley caused Leighton costly repairs. And the move did not improve Leighton's position in the most basic sense, because he was still required to pay another mover $17,500 to move the house to its intended destination. The only work the second mover did not have to perform was lifting the house from its original foundation. Rossow did so in June 2006, and the district court awarded him a reasonable amount for that task. The record supports the district court's award.

Affirmed.