STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1437

Frontier Pipeline, LLC,
Appellant,

vs.

Metropolitan Council,
Respondent.

Filed July 25, 2011
Affirmed
Schellhas, Judge

Ramsey County District Court
File No. 62-CV-08-2263

James T. Martin, Gislason, Martin, Varpness & Janes, P.A., Minneapolis, Minnesota (for appellant)

Perry M. Wilson III, P. Joshua Hill, Dorsey & Whitney LLP, Minneapolis, Minnesota (for respondent)

Considered and decided by Minge, Presiding Judge; Peterson, Judge; and Schellhas, Judge.

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

SCHELLHAS, Judge

Following a court trial on claims arising out of the construction of a diversion sewer pipe, appellant challenges the district court's order for judgment. Appellant argues that the court erred by denying its Type-I and -II differing-site-condition claims, which

appellant based on its encounter of unanticipated groundwater volumes and flow rates during excavation, and by denying its other non-water-related differing-site-condition claims. Respondent also challenges the court's order for judgment, arguing that the court erred by denying its counterclaim for the costs incurred to repair damage to the existing sewer pipe and by imposing spoliation sanctions. We affirm.

FACTS

In 2005, respondent Metropolitan Council engaged Camp, Dresser, and McKee Inc. (CDM) to design and engineer a project to augment an existing sewer line near Bald Eagle Lake with a diversion pipe. CDM designed a plan to install 17,000 feet of 28-inch pipe at an average depth of eight to ten feet with a lift station and five forcemain access structures. CDM retained GME Consultants Inc. to prepare a geotechnical report.

GME prepared a report based on information from 43 borings: 32 were drilled to a depth of approximately 20 feet and 11 were drilled to a depth of approximately 50 feet. The report discloses the presence of groundwater in 39 borings and stated: "Based on the conditions found in our borings, we anticipate that the contractor will encounter hydrostatic groundwater in excavations for the sewer, manholes, and lift station." The report also includes the following statement: "Significant variations in the subsurface conditions were encountered and it is likely that additional variations exist that could not be determined from our borings or our site reconnaissance. These variations would not become apparent until excavation is started." The report includes no explicit representations regarding groundwater volume or flow rates.

As a potential bidder on the project, appellant Frontier Pipeline LLC expressed reservations concerning the constructability of the project. Frontier's owner, Dan Baillargeon, testified that he expressed his concerns to the council's project manager, Adam Gordon, who told him to submit a bid and Frontier would be treated fairly if design changes were required. Frontier submitted a bid, and the council awarded the contract to Frontier.

Frontier's project manager, Mel Olson, proposed to construct the project approximately ten feet deeper than CDM's design to reduce "the risk of damaging adjacent structures and roadways or contamination to area watercourses." CDM approved Frontier's proposed design change, and the parties adopted it.

Before agreeing to a price for construction at the increased depth, Frontier obtained an independent geotechnical report to analyze soil conditions for the project at the proposed greater depth. New soil borings were obtained at a depth of approximately 40 feet. This geotechnical report notes that groundwater was encountered in 10 of the 12 borings. The report also states the following:

> [W]e encountered a waterbearing sand unit . . . . [B]ased on previous experience in this area, it is likely that the hydrostatic head in this waterbearing sand unit is above the top of the sand unit. Because of this, excavations to within a few feet of this waterbearing stratum could lead to uplift or heave of clay soils at the base of the excavation. This can cause soils to weaken and/or fail, and allow groundwater to enter the excavation. The rate of groundwater inflow could be significant and difficult to manage.

The parties reached agreement on a contract price based on the revised design that called for construction of the project at a greater depth. The contract provides the following terms:

> 4.2.1. **Limited Reliance by CONTRACTOR Authorized with Respect to Technical Data:** CONTRACTOR may rely upon the general accuracy of the factual information (not opinions or conclusions) contained in the "Technical Data." Except for such reliance on factual "Technical Data" CONTRACTOR may not rely upon or make claim against COUNCIL . . . with respect to:
>
> > 4.2.1.1 the completeness of "Technical Data" for CONTRACTOR's purposes, including, but not limited to, aspects of the means, methods, techniques, sequences, and procedures of construction to be employed by CONTRACTOR and safety precautions and programs incidental thereto; or
> >
> > 4.2.1.2 other data, interpretations, opinions and information contained in the "Technical Data"; or
> >
> > 4.2.1.3 CONTRACTOR interpretations of or conclusions drawn from factual "Technical Data" or other data, interpretations, opinions, or information; or
> >
> > 4.2.1.4 facts as to which knowledge or accuracy is expressly disclaimed in the Contract Documents, "Technical Data" or other reports or drawings; or
> >
> > 4.2.1.5 facts as to which knowledge of or incompleteness was known or should have been known by the CONTRACTOR
>
> . . . .
>
> 4.2.4.4 CONTRACTOR shall not be entitled to adjustment in the Contract Price . . . if;
>
> > .1 CONTRACTOR knew of the existence of such conditions at the time CONTRACTOR made a final

> commitment to COUNCIL in respect of Contract Price . . . by . . . becoming bound under a contract; or
>
> .2 the existence of such condition could have been discovered or revealed as a result of: (i) reasonable inquiry into generally available information; (ii) special information available or referenced in the Information Available To Bidders; or (iii) examination, investigation, exploration, test, or study of the Site and contiguous areas required by the Bidding Requirements or Contract Documents to be conducted by or for CONTRACTOR prior to CONTRACTOR's making such final commitment[.]

Frontier commenced construction and while attempting to construct forcemain access structure number 4 (FAS 4), water rapidly entered the excavation from a pressurized aquifer below the excavation. Frontier's project manager estimated that the flow rate was approximately 2,500 gallons per minute. Work was halted at FAS 4 and eventually FAS 4 was eliminated from the project. Because of the existing sewer line's proximity to FAS 4, the council became concerned about its integrity. A December 2006 video of the pipe revealed a sag in the existing sewer line near FAS 4 that did not appear in a May 2004 video. The council believed the sag was caused by Frontier's work at FAS 4. Prior to trial, Frontier acknowledged the possibility that its excavation at FAS 4 caused the sag but, at trial, denied that it caused the sag, asserting that an unrelated October 2004 construction project could have caused the sag. The council hired LaMetti & Sons Inc. to correct the sag near FAS 4 at a cost of $1,140,543.18. Before LaMetti removed the sagging pipe, Frontier requested to examine the pipe. But the sagging pipe was exposed, removed, and destroyed before Frontier had an opportunity to examine it.

Frontier subcontracted the remaining FAS work to Engineering & Construction Innovations Inc. (ECI). Although ECI completed most of the work without significant water problems, it encountered similar conditions to FAS 4 at FAS 5, where pressurized water entered the excavation at approximately 2,000 to 3,000 gallons per minute.

The construction contract requires the parties to submit disputes to a dispute resolution panel consisting entirely of council employees. Frontier submitted a claim for additional compensation due to differing site conditions (i.e. unexpected water volume and flow rates at FAS 4 and FAS 5). The panel denied the claim.

Frontier commenced this action against the council for, among other claims, breach of contract and breach of warranty. Frontier sought to recover damages of approximately $4,100,000 for the extra costs incurred to complete the project. The council answered, denied liability for extra compensation, and counterclaimed for damages of approximately $1,140,000 for expenses incurred to replace the sagging pipe plus $1,570,000 in liquidated damages for a 314-day delay in completing the project. After a three-week court trial in which the district court heard testimony from 25 witnesses and received 349 exhibits, the court dismissed both parties' claims and entered judgment. The court's decision contains 86 findings of fact and 32 conclusions of law, and it reflects the court's careful attention to the parties' thorough presentation of the evidence and arguments on the law.

Both parties moved for amended findings or a new trial, which the district court denied. Both parties bring this appeal.

D E C I S I O N

"Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Minn. R. Civ. P. 52.01. In reviewing findings of fact, an appellate court views the record in the light most favorable to the findings, and "the decision of a district court should not be reversed merely because the appellate court views the evidence differently." *Rogers v. Moore*, 603 N.W.2d 650, 656 (Minn. 1999). A finding of fact is clearly erroneous only if this court is "left with the definite and firm conviction that a mistake has been made," and this court will not disturb a finding if "there is reasonable evidence to support the district court's findings." *Id.* (quotation omitted). "[W]e do not defer to the district court's decision on purely legal questions." *Friend v. Gopher Co.*, 771 N.W.2d 33, 37 (Minn. App. 2009).

Frontier's Breach- of-Warranty Claims for Water-Related Differing Site Condition

Type-I Claim

"A differing site condition may generally be described as a subsurface or other unknown physical condition at the site which differs materially from that indicated in the contract or from that which is ordinarily encountered, which leads to a material change in the cost of construction." *City of Morton v. Minnesota Pollution Control Agency*, 437 N.W.2d 741, 743 (Minn. App. 1989). To prevail on a Type-I differing-site-condition claim, a contractor must prove the following:

> (i) the contract documents must have *affirmatively indicated or represented* the subsurface conditions which form the basis of the plaintiff's claim; (ii) the contractor must have acted as

> a reasonably prudent contractor in interpreting the contract documents; (iii) the contractor must have *reasonably relied* on the indications of subsurface conditions in the contract; (iv) the subsurface conditions actually encountered, within the contract site area, must have differed materially from the subsurface conditions indicated in the same contract area; (v) the actual subsurface conditions encountered must have been reasonably unforeseeable; and (vi) the contractor's claimed excess costs must be shown to be solely attributable to the materially different subsurface conditions within the contract site.

Rice Lake Contracting Corp. v. Rust Env't & Infrastructure, Inc., 616 N.W.2d 288, 293 (Minn. App. 2000) (emphasis added) (quoting *Weeks Dredging & Contracting, Inc. v. United States*, 13 Cl. Ct. 193, 218 (Cl. Ct. 1987), *aff'd*, 861 F.2d 728 (Fed. Cir. Sept. 2, 1988)), *review denied* (Minn. Oct. 25, 2000). "The elements are cumulative, not in the alternative." *Id.*

The district court found that Frontier failed to establish the first element because the GME report, which is part of the contract documents, does not make a representation regarding water-flow rates or water volume. The district court also found that Frontier failed to establish the third element because "Frontier could not reasonably rely on the information contained in the GME geotechnical report once the [deeper] revised design" was implemented. Frontier argues that the district court erred in its conclusions because the evidence establishes that it proved all of the required elements by a preponderance of the evidence. We consider the evidence as it relates to the district court's conclusions that the evidence fails to establish the first and third elements of a Type-I differing-site-condition claim.

Affirmative Indications or Representations of the Subsurface Conditions

Whether a contract affirmatively indicates subsurface conditions "is a matter of contract interpretation and thus presents a question of law." *P.J. Maffei Building Wrecking Corp. v. United States*, 732 F.2d 913, 916 (Fed. Cir. 1984). "A proper technique of contract interpretation on this problem is for the court to place itself into the shoes of a reasonable and prudent contractor and decide how such a contractor would act in appellant's situation." *Id.* at 917 (quotation omitted). "While it is true that a contract 'indication' need not be explicit or specific, the contract documents must still provide sufficient grounds to justify a bidder's expectation of latent conditions materially different from those actually encountered." *Id.* at 916.

Frontier concedes that the GME report contains no explicit statements regarding groundwater volume or flow rates. Frontier argues that groundwater volume and flow rates are *indicated* based on Darcy's Law. Darcy's Law is a well-recognized principle for determining groundwater flow rates. Frontier argues that the factual description of soil types, soil classifications, hydraulic gradients, and water-table information in the GME report, *indicate* the groundwater flow rates through the application of Darcy's Law. But the contract states that Frontier may not base a claim on its "interpretations of or conclusions drawn from factual 'Technical Data' or other data, interpretations, opinions, or information." Frontier's argument is misplaced because calculating groundwater flow rates using Darcy's Law requires interpretations and conclusions based on factual data.

Because the GME report contains no explicit statements regarding groundwater volume or flow rates and the contract prohibits Frontier from basing a claim on its own

interpretation of or conclusions drawn from the factual data in the report, we conclude that the district court did not err in its conclusion that Frontier failed to establish the first element of a Type-I claim.

Reasonable Reliance on the Indications

Frontier argues that it reasonably relied upon the GME report to estimate the amount of groundwater that would be encountered during construction. Whether a contractor reasonably relied on the indications of subsurface conditions in the contract is a question of fact. *Int'l Tech. Corp. v. Winter*, 523 F.3d 1341, 1349 (Fed. Cir. 2008).

The original plan called for the installation of a sewer pipe at an average depth of eight to ten feet. The GME report states that "[i]f there are any changes in the nature, design, location, or elevation of the proposed sewer, the opinions and recommendations contained in this report will not be considered valid." At the request of Frontier, the parties agreed to changes in the design of the project, which increased the depth of the pipe installation by approximately 10 feet and provided for depths greater than 20 feet at certain locations, including FAS 4 and FAS 5.

Because a soil boring contains no representation regarding conditions below the depth at which it terminates, Frontier could not reasonably rely on most of the borings in regard to installation of pipe at the revised depths. And while 11 borings went to a depth of 50 feet, Frontier obtained its own geotechnical report using 12 borings at an approximate depth of 40 feet to further analyze the soil conditions at the proposed greater depths, indicating that Frontier did not consider the GME report a sufficient report on which to rely. Based on the record, we conclude that the district court did not clearly err

by finding that Frontier did not reasonably rely on the GME report. The district court did not err by concluding that Frontier failed to establish the first and third elements of a Type-I differing-site-condition claim.

Type-II

To succeed on a Type-II claim, plaintiff must show that (1) "it did not know about the physical condition," (2) "it could not have anticipated the condition from inspection or general experience," and (3) "the condition varied from the norm in similar contracting work." *Fru-Con Const. Corp. v. United States*, 44 Fed. Cl. 298, 311 (1999). "It is well settled that a claimant seeking to establish a Type-II claim has a heavy burden of proof because of the wide variety of materials ordinarily encountered when excavating the earth's crust." *Hardwick Bros., II v. United States*, 36 Fed. Cl. 347, 409 (1996); *see also Randa/Madison Joint Venture III v. Dahlberg*, 239 F.3d 1264, 1277 (Fed. Cir. 2001) ("[P]roving a Type II differing site condition is more difficult than proving a Type I differing site condition, involving a heavier burden of proof and a stiffer test."); *Servidone Constr. Corp. v. United States*, 19 Cl. Ct. 346, 360 (1990) ("The burden . . . is heavy because in a Type II case the standard is somewhat amorphous. Unlike in a Type I case, where the contract serves as the basis of comparison, in a Type II case, there is no clear written point of reference."). Whether a Type-II differing site condition exists is a question of fact. *Randa/Madison*, 239 F.3d at 1277; *Turnkey Enters., Inc. v. United States*, 597 F.2d 750, 758 (Ct. Cl. 1979).

The council argues that Frontier did not plead or present a Type-II differing-site-condition claim at trial and is therefore barred from raising the claim on appeal. The

district court found that "Frontier did not argue" a Type-II claim, but presented "some evidence" that "might go towards establishing a Type II claim." The district court therefore addressed a Type-II claim on the merits and stated, "[T]here is no evidence . . . that directly speaks to what would ordinarily be expected as subsurface conditions in construction projects such as, or similar to, that at issue here." Consequently, the court found that Frontier failed to meet the heavy burden of proof regarding whether the condition varied from the norm in similar contracting work.

Citing *Youngdale & Sons Constr. Co. v. United States*, 27 Fed. Cl. 516, 537–38 (1993), Frontier argues that to prove a Type-II claim, it need only establish one of the first two elements. But prior and subsequent decisions from the same court indicate that the elements are conjunctive. *See Fru-Con*, 44 Fed. Cl. at 311 (quoting *Lathan Co. v. United States*, 20 Cl. Ct. 122, 128 (1990)); *Hardwick Bros.*, 36 Fed. Cl. at 409 ("[The contractor] has not proved to this court's satisfaction the existence of any condition . . . that reasonably could be characterized as unknown *and* unusual." (emphasis added)).

Frontier argues that it nonetheless met all three elements. Frontier indisputably encountered high groundwater flow rates, but high groundwater flow rates are not enough to prove a Type-II claim. Frontier must meet a "heavy burden of proof" that the conditions were unusual based on similar contracting work. Frontier points to one witness with experience with the subsurface conditions in the area who testified that the groundwater flow rates encountered by Frontier were significantly higher than he had ever experienced in the area. But the witness also testified that he had never been involved in a project that went as deep as the project in this case. Based on the evidence

in the record, we are not left with a definite and firm conviction that a mistake has been made. Therefore, the district court's finding that Frontier failed to prove the third element for a Type-II claim is not clearly erroneous. Because the district court addressed the Type-II claim on the merits and its finding is not clearly erroneous, we do not address whether Frontier properly pleaded a Type-II claim.

Non-Water-Related Differing-Site-Condition Claims

Frontier sought more than $204,000 in damages in connection with the following non-water-related differing-site-condition claims.

Underground Utilities

Frontier argues that the district court erred by concluding that Frontier is contractually precluded from recovering damages with respect to underground utilities. Frontier argues that it encountered two undisclosed sewer lines that required an alternative drill route; it damaged a third undisclosed sewer line, which it had to repair; and it encountered an undisclosed water main that required it to temporarily re-route the water main and then restore it to its original location.

The contract states that "[t]he actual location of such underground facilities may vary from that shown in the Bidding Documents." The contract also states that the council "will not be responsible for the accuracy and completeness" of "[t]he information and data shown or indicated in the Contract Documents with respect to existing Underground Facilities at or contiguous to the Site." Frontier had full responsibility for the following:

> (i) reviewing and checking such information and data; (ii) locating Underground Facilities shown or indicated in the Contract Documents; (iii) coordination of the Work with the owners of such Underground Facilities during construction; and (iv) the safety and protection of such Underground Facilities . . . and repairing damage thereto resulting from the Work.

The district court did not err by concluding that Frontier is contractually precluded from recovering damages with respect to underground utilities.

Overhead Utilities

Frontier argues that the district court erred by denying its claim for expenses incurred while relocating overhead utility lines near FAS 7 because the contract "included a $100,000 allowance for work that might be required in moving overhead utilities in the course of the project."

The contract contains a "L78 Lift Station Site Overhead Utility Relocation Allowance" of $100,000. An employee for the council testified that this allowance "was for a utility that we knew had to be moved to provide power to the new lift station, but we didn't know how much it was going to cost" and "[n]o other similar allowance was made for any other utility relocation costs that a contractor might incur." He further testified about why the council denied Frontier's claim:

> As part of the contract, the contractor's responsible for relocating or supporting utilities that are shown on the drawings to complete the work. This claim was to move overhead utilities that needed to be relocated . . . and additional compensation wasn't warranted . . . [b]ecause the utility . . . was shown on the drawings and could be seen from the surface.

The district court denied Frontier's claims, stating:

> In addition to the Contract disclaimers as to utility location and the fact that the overhead utilities are plainly visible, this claim is related to the adequacy of the two designs and the reasonableness of Frontier's reliance on any of the design documents and, therefore, barred . . . .

According to the plain language of the contract, the overhead utility relocation allowance applies to L78; the allowance does not apply to FAS 7. Frontier points to nothing in the contract that supports its argument that it is entitled to compensation for overhead utility relocation costs at FAS 7.

Work Stoppage

Frontier argues that the district court erred by denying its claim for expenses incurred when the City of White Bear Lake ordered work stoppage. But, again, Frontier points to no record evidence supporting its claim. Viewing the record in a light most favorable to the decision, we conclude that the district court did not err by denying Frontier's claim.

Readjusting Manhole Elevations

Frontier argues that the district court erred by denying its claim for expenses incurred readjusting the manhole elevations after the City of White Bear Lake repaved the street. The district court found that "there was very little, if any, evidence presented at trial" with respect to this claim. Frontier points to no record evidence supporting its claim. Viewing the record in a light most favorable to the decision, we conclude that the district court did not err by denying Frontier's claim.

The Council's Claims for Damages Related to the Sagging Pipe and Spoliation

The council counterclaimed for the costs incurred to repair damage to the existing sewer line. The council argues that the court erred by imposing sanctions for spoliation of the sagging pipe. The council also argues that the district court erred by concluding that the council failed to prove that Frontier caused the sag by a preponderance of the evidence.

Spoliation

"The term 'spoliation' generally refers to the destruction of relevant evidence by a party." *Willis v. Ind. Harbor Steamship Co.*, 790 N.W.2d 177, 184 (Minn. App. 2010), *review denied* (Minn. Dec. 22, 2010). "Minnesota courts have held that spoliation does not have to be intentional to constitute obstruction of justice deserving of a sanction." *Id.* "Regardless of intent, disposal of evidence may be subject to a spoliation sanction when a party knows or should know that the evidence should be preserved for pending or future litigation." *Id.* As a sanction against the council for spoliation of the sagging pipe, the district court retroactively excluded the testimony of two witnesses regarding the cause of the sag.

"The district court has broad authority in determining what, if any, sanction is to be imposed for spoliation of evidence." *Id.* "On review, an appellate court considers whether the district court is authorized to impose a sanction for spoliation of evidence and, if so, whether it abused its discretion by imposing such a sanction." *Id.* (quotation omitted). "The propriety of a sanction for the spoliation of evidence is determined by the prejudice resulting to the opposing party." *Hoffman v. Ford Motor Co.*, 587 N.W.2d 66,

71 (Minn. App. 1998). A district court's finding of prejudice will not be reversed unless the finding is clearly erroneous. *Id.* at 70. But a party may avoid sanctions for spoliation of evidence if it provided the opposing party with reasonable notice of its claims. *Id.* Notice affords the potential adverse party the opportunity to correct any defect, prepare for negotiation and litigation, and safeguard against stale claims. *Id.* The sufficiency of the notice is a factual determination that will not be set aside unless clearly erroneous. *Id.*

The council argues that the district court erred by imposing sanctions because Frontier had sufficient notice of the council's claims and did not timely request to inspect the pipe. By imposing spoliation sanctions, the court implicitly found that the council failed to provide Frontier sufficient notice to inspect the sagging pipe.

The record reflects that Frontier requested to inspect the damaged pipe in situ on April 9, 2008. On June 17, 2008, as part of a discovery response, LaMetti sent Frontier's council numerous documents, including the minutes of a June 10 progress meeting. The June 10 meeting minutes include one paragraph indicating that the sagging pipe would be exposed in late June and removed in early July 2008. On June 18, the council e-mailed Frontier directly regarding a separate matter and attached minutes of a June 17 progress meeting, which indicate that the sagging pipe would be exposed by the end of the week and removed shortly thereafter. On July 1, the sagging pipe was removed and pulverized without inspection by Frontier. On July 30, Frontier requested to inspect the pipe, not knowing that it had been destroyed. Under these circumstances, we conclude that the court's implicit finding is not clearly erroneous.

The council also argues that the district court's finding that Frontier was prejudiced by the removal and destruction of the pipe is clearly erroneous. The court found that Frontier was prejudiced because "[i]nspecting the pipe in place, together with the adjacent soil structures, would have been of value to Frontier." The council points to testimony indicating that no relevant evidence could be gleaned from inspection of the pipe in situ or after it was removed because "[t]here's nothing that . . . the presence of or something being there that would [provide] a clue as to why the sewer sagged" and nothing "on the pipe itself" would reveal the cause of the sag. Frontier points to testimony indicating that it would have been helpful to inspect the type of bedding around the pipe to determine the cause of the sag.

Because the record contains reasonable evidence that supports the district court's finding that Frontier was prejudiced by the council's removal and destruction of the sagging pipe, we conclude that the court's finding of prejudice is not clearly erroneous.

Causation

The council asks this court to reverse the district court's dismissal of its counterclaim on the basis that it proved by a preponderance of the evidence that Frontier caused the sag. "Causation is generally a question of fact left to the finder of fact . . . ." *Paidar v. Hughes*, 615 N.W.2d 276, 281 (Minn. 2000). In reviewing the decision of a district court sitting without a jury, we defer to the district court's credibility determinations. *Patterson v. Stover*, 400 N.W.2d 398, 400 (Minn. App. 1987).

The record reflects that the council's videotape of the pipe shows no sagging in May 2004. Construction in the vicinity of the sagging pipe, prior to and unrelated to this

project, was commenced in October 2004 and completed by 2005. Frontier worked in the vicinity of the sagging pipe in the fall of 2006. The council's videotape of the pipe in December 2006 shows the pipe sagging. The council alleges that Frontier caused the sag by its inadequate shoring methods, water movement transporting soils into an excavation adjacent to the pipe, excavation below the bottom of the shoring adjacent to the pipe, or backfilling the excavation with loose dirt, which failed to provide lateral support when the trench box was removed. Frontier argues that the construction in 2004 could have caused the sag. Frontier also argues that photographs of the sagging pipe indicate that clay was located under the pipe through which water would not have flowed and therefore would not have washed away the bedding.

As discussed above, the district court acted within its discretion when it retroactively excluded the council's two witnesses' causation testimony as a sanction for spoliation. And, even if the court had not excluded the testimony, the court questioned the credibility of both witnesses. The court noted that one of the witnesses was "a long-time Council employee and . . . his actions [were] at the heart of this case," and the other was "a long-time Council retainer," who was not independent.

Citing *JEM Acres, LLC v. Bruno*, 764 N.W.2d 77, 81 (Minn. App. 2009), the council also argues that Frontier judicially admitted that it caused the pipe to sag in its answer to the council's counterclaim. In *JEM Acres*, this court said that "[w]here a fact is admitted in the pleadings, the admission stands in the place of evidence." 764 N.W.2d at 81 (quoting *Phelps v. Benson*, 252 Minn. 457, 480, 90 N.W.2d 533, 548 (1958)). In its answer to the council's counterclaim, Frontier admitted "that a sag in the existing sewer

pipeline occurred during construction activities, but denie[d] the sag was caused by [Frontier.]" Frontier did not admit that it caused the sag; it admitted only that the sag occurred during the time period of its construction activities. Although this admission undermines its argument that construction in 2004 could have caused the sag, the disputed evidence about whether the bedding underneath the pipe was clay and the credibility and exclusion of the council's causation witnesses provided a sufficient basis for the district court to find that the council failed to show causation by a preponderance of the evidence.

Because we are not left with a definite and firm conviction that the district court made a mistake, we conclude that the court's findings are not clearly erroneous.

Affirmed.