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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1733**

Kevin Chouanard, et al.,
Respondents,

vs.

Oak Lake Construction, Inc., et al.,
Defendants,
Huepenbecker Construction,
Appellant.

**Filed July 22, 2019
Affirmed
Florey, Judge**

Hennepin County District Court
File No. 27-CV-17-9256

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Considered and decided by Worke, Presiding Judge; Florey, Judge; and Cochran,
Judge.

UNPUBLISHED OPINION

FLOREY, Judge

In this construction-defects lawsuit, commenced by respondents Kevin and Melinda Chouanard against appellant Huepenbecker Construction¹ and other contractors that worked on a home-remodeling project, appellant challenges a district court order finding that it breached an implied warranty of fitness for purpose, and is liable for \$9,527.60 in damages. We affirm.

FACTS

Between the fall of 2006 and summer of 2007, respondents engaged with separate contractors to construct a deck, screen porch, and carpentry room for their two-story residence. The carpentry room was to be used as a shed for storage and general shop-type work. The different contractors, including appellant, were each assigned to construct different parts of the addition. Respondents did not hire a general contractor to oversee the project.

Of the various contractors, Prairie Creek Builder drew up the architectural plans for the project; Jeremy Boeson handled the foundation block work and constructed a cement block wall; Oak Lake Construction provided all the carpentry work and presented the proposed plans to the city; TCR provided masonry work, including the cultured stone veneer on the outside of the project; and appellant installed a rubber membrane between the enclosed carpentry room and the deck above it. Respondents paid all of the contractors

¹ Because appellant was not yet a corporation at the time of the incident, our reference to appellant in this decision refers to the entity's principal rather than the corporate entity.

in full for their work on the project. Respondents did not have any background in construction. They relied on the expertise of the separate contractors to provide a safe, reasonably built, defect-free addition to the home.

Sometime after the completion of the addition, respondent Kevin Chouanard (Chouanard) insulated the walls of the carpentry room. His reason for adding insulation was to provide some heat during the winter months. He had prior experience insulating a wall, but he did not have any training in the procedure, nor did he get a permit. Chouanard also installed a vapor barrier of polyurethane, and caulked the barrier's edges.

Respondents did not observe any issues with the addition to their home until November 2016 while they were in the process of removing stairs leading to the deck. Respondents had removed the stairs, as well as stone planters connected to one of the deck's plinths.² During this process, respondents observed what appeared to be water damage in the plinth previously connected to the stone planter. Respondents hired Collins Forensics to investigate the water damage.

On November 15, 2016, and December 29, 2016, Collins Forensics performed a site-visit to investigate the water damage, focusing on the deck and the walls of the carpentry room. Meanwhile, on November 23, 2016, respondents contacted appellant and the other contractors, notifying them that they had discovered "construction defects related to the work [they] performed relative to the addition project." Respondents requested that the contractors "immediately repair the damages caused by [their] deficient work." On

² As described by respondents' expert witness, Collins Ofori-Amanfo, at trial, plinths are "the extensions of the columns above the deck."

December 16, 2016, respondents initiated a lawsuit against appellant and the other contractors.

In January 2017, Collins Forensics completed its investigative report on the water damage. The report concluded that “[t]he deterioration was the result of condensation of interior moisture in the unconditioned carpentry room,” and that the “moisture/water damage in the exterior walls and plinths appear[ed] to have begun soon after the addition and the landscape improvement were completed, and ha[d] continued since that time.” The report identified errors by the contractors that “contributed to the rising moisture/humidity and condensation within the unconditioned space,” and it offered recommendations for repair.

Respondents hired CRJ Construction to repair the water damage. At the recommendation and under the guidance of Collins Forensics, CRJ replaced the south wall of the carpentry room, installed ventilation in various parts of the addition, and reconstructed the plinths, stone, and railings. The cost of the investigation and repairs totaled \$47,638.

In May 2018, a court trial was held. Respondents called Chouanard and their expert witness, Ofori-Amanfo, to testify. Appellant testified in his own defense.³ At the start of trial, appellant requested that the court strike from evidence copies of CRJ’s invoices. Appellant argued that the invoices were “pretty vague,” that there was “no proposal or anything saying what [CRJ] fixed,” and that CRJ was not present for cross-examination.

³ Appellant represented himself at trial. Because appellant was not yet a corporation at the time of the incident, appellant was permitted to represent himself without counsel.

Respondents' attorney argued that, because appellant failed to participate in pretrial discovery, the court should preclude appellant from challenging any evidence and offering any witness testimony or exhibits. The district court took the parties' motions under advisement, explaining that it would decide the motions as part of its order.

Ofori-Amanfo, principal engineer and project manager of Collins Forensics, testified as respondents' expert witness. He testified that he had over 30 years of experience working as an engineer. As part of his experience, he had investigated over 3,000 structures, including residential and commercial buildings, and had worked on projects for both plaintiffs and defendants. His experience also included providing assistance and guidance to construction companies in various repair projects.

Ofori-Amanfo explained his investigatory process. He testified that his first site visit to respondents' residence was in November 2016. He testified that, during his initial visit, he observed a "significant growth of fungus and water damage within the plinths." He recommended, during the visit, that respondents contact the contractors and invite them to look at the damage before he engaged in further investigatory work.

Ofori-Amanfo testified that, as part of the investigative process, he took several photographs of the addition that was constructed by the various contractors. He then prepared a report with his opinions of the cause and extent of the damages, as well as recommendations for repair.

Ofori-Amanfo testified that his investigation revealed "water damage within the plinths and also on the walls, particularly the south wall." He testified that he believed the damage was "caused by moisture or water," specifically, "condensation of interior moisture

on the walls.” He explained that the condensation was caused by natural moisture, such as people breathing inside the carpentry room. He testified that he was very familiar with this type of damage, explaining that he had observed damage caused by interior condensation “about a thousand times,” and that he had published on similar issues.

Ofori-Amanfo testified that the addition, including the roof and plinths, should have been ventilated in order to release interior moisture. He testified that the process of installing ventilation was straight-forward and brief, taking “no more than five minutes to 30 minutes.” He testified that, regardless of the trade—whether it is a block trade, wall trade, carpentry trade, or roofing trade—all trades “should take steps to accommodate for moisture in making sure that moisture with whatever the work they do is eliminated.” He further testified that implied in building codes is the requirement that contractors and subcontractors undertake their work in a manner that is defect-free, without relying on building officials to check their work.

During his testimony, Ofori-Amanfo offered his opinion as to which particular contractors were at fault. With regard to appellant’s work, Ofori-Amanfo testified, “I would assign like about 35 percent to the membrane.” He testified, “[M]ost of the venting needs to go through the membrane on the decking.” He explained:

All the moisture within the building, because of the warmth or the heat within that moisture, it forces the moisture to rise up. And then when it gets to the top, we have the water-proofing membrane or the deck or the ceiling that provides like an umbrella and it holds the moisture up. And then if it is trapped there for a long time and it is cooled, then, it condenses. And also as it condenses, we have frost that develops, and when the frost falls, then we have water. It is that water that then does the damage that we see here in the walls.

He testified that he would “not assign any percentage to whoever installed the insulation.”

On cross-examination, Ofori-Amanfo conceded that the ceiling membrane did not have any leakage nor did it contain any moisture. He testified that the “membrane material, itself, was good.” He also elaborated on why the south wall accumulated more moisture than the other walls of the carpentry room. He explained, “[T]he east wall is below the porch . . . and there’s a roof over that, and that wall is protected from the water that may accumulate in the soil along the wall,” and “you have walls on the other sides of the east wall” so “[t]here isn’t as much cold accumulating or building up along that east wall, as you have on the south wall, which is exposed.” He explained, “[I]f you look at the east wall, which is below an enclosure, we don’t have this cyclic frosting and melting, because the sun is not hitting that east wall as it does on the south wall.”

Ofori-Amanfo disputed appellant’s allegations that Chouanard’s insulation of the carpentry room caused the water damage. He explained, “It has nothing to do with the insulation. If anything, it would have been a help.” Ofori-Amanfo also challenged appellant’s interpretation of the building code and his understanding that the code did not require the roof to be ventilated.

Appellant testified that he had been in the roofing business for 40 years, that he had worked on hundreds of roofing projects, and that he had never before been sued for any job he had done. Appellant disputed Ofori-Amanfo’s position that he should have included ventilation, and testified that the damages were caused by Chouanard’s insulation of the carpentry room—making respondents 80 percent at fault. He testified that respondents

“didn’t pull any of the proper permits,” and alleged that, had they done so, “maybe some of this stuff would have been done right.”

In August 2018, the district court issued an order wherein it ruled on the parties’ pretrial motions and, overall, found in favor of respondents. With regard to respondents’ pretrial motions, the district court ruled that (1) respondents’ motion requesting the court preclude appellant from offering any exhibits was moot “[s]ince [appellant] offered no exhibits—other than the [c]ourt [e]xhibit proving that [his] namesake company was incorporated after the events at issue”; (2) respondents’ motion requesting the court preclude appellant from offering any witness testimony was denied “to the extent that it [sought] to prevent [appellant] from calling himself as a witness . . . [and] moot in all other respects”; and (3) respondents’ motion requesting the court preclude appellant from challenging any evidence was denied.

The district court sustained appellant’s pretrial motion to strike the invoices from CRJ Construction as inadmissible hearsay. However, the district court ruled that, even if the underlying invoices were inadmissible, it could “rely on Mr. Chouanard’s first-hand testimony” about the work performed and the associated payments he made. It stated, “Since Mr. Chouanard’s testimony came in by referencing the invoices . . . the [c]ourt will consider [them] to be a demonstrative court exhibit, but will not rely on any of the information printed on those invoices as evidence.”

With regard to its findings of fact, the district court found the testimony of respondents’ expert witness, Ofori-Amanfo, to be credible. It found “[Ofori-Amanfo], a professional engineer with an advanced degree in civil engineering from the University of

Minnesota, and a bachelor's degree in the same discipline from the University of Science and Technology, Ghana, to be credible on the point of ventilation and the appropriate standard." It found that Ofori-Amanfo had "no direct interest in [the] litigation, he [was] a credentialed civil engineer, and his conclusions were supported by photographic evidence as well as his written expert opinion."

In contrast, the court found appellant to be "an interested defendant." It stated that, "while the [c]ourt [did] not doubt his experience or practical expertise, he lack[ed] any formal training as a forensic engineer." The court further noted that, because appellant "did not seek to be qualified as an expert witness[,] . . . his testimony was received as a knowledgeable fact witness."

With regard to damages, the district court concluded that "[respondents'] cost to investigate and cost to repair [were] recoverable." It found that "[a]ll repairs were done consistent with the recommendations of Collins Forensics . . . [and] that they were reasonable and necessitated by the water damage at issue in [the] litigation." It found the total damages were \$47,638.

While the district court found that Ofori-Amanfo's testimony established that appellant's work "was a contributing factor to the damage," it did not "entirely accept [Ofori-Amanfo's] opinion on the allocation of fault." It concluded:

Taking into account all of the testimony, including [Ofori-Amanfo's] credible expert opinion that the waterproof membrane installed by [appellant] prevented moisture egress and that a reasonable contractor in [appellant's] position should have installed ventilation, balanced against the fact that even [Ofori-Amanfo] acknowledged that some of the moisture in the walls would not have been present but for the grading

issues and lack of block caps, the [c]ourt finds [appellant] is 20% responsible for the water damage to [respondents'] structure.

The district court concluded that appellant “breached the implied warranty of fitness for purpose by failing to install ventilation,” and that the “failure was a direct and significant cause of the water damage.” It found that appellant “knew or had reason to know that Mr. Chouanard was not an expert in installation of waterproofing membranes and was relying on his expertise.” Consequently, the district court awarded respondents judgment against appellant for \$9,527.60. This appeal followed.

DECISION

I. The district court did not err in finding that appellant breached an implied warranty of fitness for purpose and apportioning appellant 20 percent of the fault.

“On appeal from a judgment, this court’s scope of review is whether the evidence is sufficient to support the [district] court’s findings and whether the findings support its conclusions of law.” *Dairy Farm Leasing Co. v. Haas Livestock Selling Agency, Inc.*, 458 N.W.2d 417, 418 (Minn. App. 1990). We will not set aside a district court’s findings of fact unless they are clearly erroneous, and we defer to the district court’s credibility determinations. See Minn. R. Civ. P. 52.01. A finding of fact is clearly erroneous if it is “manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole.” *N. States Power Co. v. Lyon Food Prods., Inc.*, 229 N.W.2d 521, 524 (Minn. 1975). We view the evidence and its reasonable inferences in the light most favorable to the prevailing party. *State, Dep’t of Pub. Welfare v. Thibert*, 279 N.W.2d 53, 56 (Minn. 1979).

Minnesota recognizes an implied warranty of fitness for purpose in construction contracts.⁴ See *Robertson Lumber Co. v. Stephen Farmers Coop. Elevator Co.*, 143 N.W.2d 622, 626 (Minn. 1966). The implied warranty exists where:

(1) the contractor holds himself out, expressly or by implication, as competent to undertake the contract; and the owner (2) has no particular expertise in the kind of work contemplated; (3) furnishes no plans, design, specifications, details, or blueprints; and (4) tacitly or specifically indicates his reliance on the experience and skill of the contractor, after making known to him the specific purposes for which the building is intended.

Id. Whether an implied warranty exists is a question of law. *Dworsky v. Vermes Credit Jewelry, Inc.*, 69 N.W.2d 118, 122 (Minn. 1955). Minnesota courts construe the doctrine of implied warranty liberally. *Robertson*, 143 N.W.2d at 626.

Appellant argues that the district court erroneously found that he breached an implied warranty of fitness for purpose and caused respondents' water damage. First, appellant contends that the district court "erred by failing to attribute any fault to respondents[,] who chose to act as their own general contractors despite having no knowledge of construction practices."

⁴ Minnesota law also provides statutory warranties in certain circumstances. See Minn. Stat. § 327A.02 (2018). Section 327A.02 provides relief "in a contract for the sale of home improvement work involving major structural changes or additions to a residential building" if the damage is caused by "noncompliance with building standards." *Id.*, subd. 3. The district court found, however, that "[respondents] failed to establish that [appellant's] workmanship or materials were out of compliance with the State Building Code and therefore they c[ould] [not] recover under Minn. Stat. § 327A.02." The district court stated, "However, § 327A.[02] establishes an additional, rather than exclusive warranty and therefore [respondents'] implied warranty claims survive." See Minn. Stat. § 327A.06 (2018) ("The warranties provided for in section 327A.02 shall be in addition to all other warranties imposed by law or agreement.").

Second, appellant argues that respondents failed to present evidence that ventilation was necessary to prevent water damage. Appellant argues that respondents' expert witness, Ofori-Amanfo, "cit[ed] no building code or other authority for either the necessity of such venting or that the installation of such venting is the responsibility of a roofing contractor." Further, appellant contends that, if ventilation was necessary, it was Prairie Creek Builder who breached an implied warranty of fitness for purpose. He argues that "[r]espondents relied on Prairie Creek Builder for the plans, specifications, and all of the structural details inasmuch as they paid Prairie Creek Builder for those services."

And third, appellant disputes that any fault should be attributed to him. He argues that the district court "erroneously relied on expert testimony that . . . never articulated why fault should be apportioned as the expert apportioned it," and that the record supports "no basis to attribute any percentage of fault to [a]ppellant."

Contrary to appellant's position, the district court's findings were amply supported by evidence demonstrating that ventilation was necessary to prevent water damage, and appellant's failure to ventilate the rubber membrane was a significant factor in bringing about water damage to the addition. Respondents' expert, Ofori-Amanfo, testified that the rubber membrane roof constructed by appellant acted as an "umbrella" holding in moisture. Ofori-Amanfo explained that the moisture condensed into frost in the cooler months, and melted into water when warmed. Consequently, as Ofori-Amanfo testified, "It is that water that then does the damage that we see here in the walls." Ofori-Amanfo testified that, in order to prevent water damage, "most of the venting need[ed] to go through the membrane on the decking."

While Prairie Creek Builder was the contractor responsible for providing architectural plans for the project, Ofori-Amanfo testified that, regardless of the respective trade, it is common practice for each contractor to “take steps to accommodate for moisture.” He explained that implied in building codes is the requirement that contractors independently undertake their work in a manner that is defect-free. Ofori-Amanfo also testified that respondents’ installation of insulation was not a contributing factor to the damage of the structure.

The district court found Ofori-Amanfo to be credible, highlighting the expert’s credentials, his thorough and documented investigation, and his lack of “direct interest in t[he] litigation.” In contrast, the district court found that appellant was both “an interested defendant” and that “he lack[ed] any formal training as a forensic engineer.” Appellate courts must defer to the district court’s credibility determinations and refrain from second-guessing them on appeal. *See Pechovnik v. Pechovnik*, 765 N.W.2d 94, 99 (Minn. App. 2009); *see also* Minn. R. Civ. P. 52.01.

Appellant also appears to misconstrue *Robertson*. He argues that, in order for the implied-warranty-of-fitness-for-purpose doctrine to extend to a construction contract, the contractor must not furnish any “plans, design, specifications, details, or blueprints.” *See Robertson*, 143 N.W.2d at 626. Appellant argues, “To apportion any fault to [him] under the theory of an implied warranty of fitness is a clearly erroneous application of that doctrine” because respondents relied on Prairie Creek Builder, not appellant, for the architectural plans of the project. We reject this argument for three reasons.

First, appellant's contention that Prairie Creek Builder is liable for failing to include ventilation in its architectural plans is an argument that it did not raise below. At trial, appellant challenged Ofori-Amanfo's testimony that ventilation was necessary and argued that the primary cause of the damage was, instead, the insulation installed by Chouanard. Generally, appellate courts decline to address issues first raised on appeal. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

Second, even if appellant had properly preserved the issue, our decision would be the same. Following trial, the district court found that Prairie Creek Builder was, in fact, 25 percent at fault for the damages, concluding that, through Ofori-Amanfo's testimony, respondents proved that the architect failed to account for the risk of water damage in the plans it drew up for the project.

And third, appellant's contention that, because he was not the contractor who furnished the architectural plans, he cannot be found liable under the implied-warranty doctrine is an argument based on a misreading of *Robertson*. The implied warranty of fitness for purpose exists in a construction contract where "*the owner . . . furnishes no plans, design, specifications, details, or blueprints.*" *Robertson*, 143 N.W.2d at 626 (emphasis added). The fact that appellant did not provide the architectural plans is irrelevant to the *Robertson* analysis.

Here, it is undisputed that: appellant held himself out as competent to undertake the construction contract; respondents had no particular expertise in the kind of work contemplated; and respondents tacitly or specifically indicated their reliance on the experience and skill of appellant. *Id.* Respondents did not, themselves, offer any plans or

specifications for the addition—but, rather, they hired another contractor, Prairie Creek Builder, to provide the architectural drawings. Reviewing the criteria prescribed by the *Robertson* court in which the doctrine extends to construction contracts, we conclude that the district court correctly found that an implied warranty of fitness for purpose applied to the agreement between respondents and appellant. *See id.*

We are also not persuaded by appellant’s argument that the district court “erroneously relied” on Ofori-Amanfo’s testimony which “never articulated why fault should be apportioned as the expert apportioned it.” The district court stated that, while it found Ofori-Amanfo’s testimony established that appellant’s work was a contributing factor to the water damage, it did “not entirely accept [the expert’s] opinion on the allocation of fault.” Based on its independent review of all the evidence, the district court rejected Ofori-Amanfo’s proposal that appellant was 35 percent at fault, and, instead, found that appellant was only 20 percent liable for the water damage.

Viewing the evidence in the light most favorable to the judgment, and deferring to the district court’s findings of fact and credibility determinations, we conclude the district court did not err in finding that appellant breached an implied warranty of fitness for purpose, and apportioning appellant 20 percent of the fault.

II. The district court did not abuse its discretion in its determination of damages.

The district court ruled that, because no one from CRJ Construction testified, the invoices prepared by the company were generally inadmissible. However, it determined that, because Chouanard “testified that he in fact paid each invoice and he also testified about the work done under each invoice,” and Chouanard’s “testimony drew on his own

knowledge of the work performed and the payments made,” the district court could rely on Chouanard’s testimony, and it could consider the invoices as a demonstrative exhibit.

“The admission of evidence rests within the broad discretion of the [district] court and its ruling will not be disturbed unless it is based on an erroneous view of the law or constitutes an abuse of discretion.” *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 45-46 (Minn. 1997) (quotation omitted). To be granted a new trial on the basis of improper evidentiary rulings, the complaining party must demonstrate prejudicial error. *Id.* at 46.

District courts also have broad discretion in determining damages. *W. St. Paul Fed’n of Teachers v. Indep. Sch. Dist. No. 197*, 713 N.W.2d 366, 378 (Minn. App. 2006). We review the district court’s determination for a clear abuse of discretion, and “will not set aside a damage award unless it is manifestly and palpably contrary to the evidence.” *Id.* (quotation omitted). A district court’s fact findings underlying the damages award are reviewed for clear error and will be “upheld if they are reasonably supported by the evidence.” *In re Trusteeship of Tr. of Williams*, 631 N.W.2d 398, 407 (Minn. App. 2001), review denied (Minn. Sept. 25, 2001).

Appellant argues that, in determining the amount of damages, the district court “erroneously relied on summary invoices” that “were prepared for litigation by someone not appearing to testify about the document.” Appellant contends that the invoices failed to reference “what work, specifically, was performed and whether that work was reasonably necessary or reasonably related to the moisture damage.” He argues that, “[w]ithout the actual, detailed invoices or proposals describing the labor and materials, there was no basis for the court to award any monetary damages.” Further, appellant

argues, because Chouanard “knew nothing of construction,” respondents failed to establish that the invoices were relevant and had probative value.

The district court did not abuse its discretion in its determination of damages. Chouanard testified to each invoice, stating that each one, with the exception of the invoice for \$1,400,⁵ was for work CRJ did to repair the water damage. Respondents also provided copies of corresponding checks that totaled the amount they paid CRJ for the repair work. Ofori-Amanfo testified that CRJ’s work was done in accordance with his recommendations and that he provided guidance to CRJ throughout the repair process. The district court also found that the repairs “were reasonable and necessitated by the water damage at issue.” Contrary to appellant’s position, the district court did not rely on the “summary invoices” in making its damages determination; rather, the district court relied on the first-hand testimony of Chouanard, as well as the credible testimony of Ofori-Amanfo. Because we defer to the district court’s findings of fact and credibility determinations unless they are proven clearly erroneous, we conclude the district court did not abuse its discretion determining damages.

Affirmed.

⁵ Chouanard testified that \$1,400 included payment for both “the initial investigation into the plinth,” as well as for “some initial work that we were doing unrelated to the actual damage.” So, Chouanard testified, “although there was some additional work on the damage, we were going to be paying that anyway.” Accordingly, respondents provided copies of checks that totaled \$46,238 (\$47,638 - \$1,400).