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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-2029**

Herbert A. Igbanugo, et al.,
Appellants,

vs.

Kent Jennings, et al.,
Respondents.

**Filed August 12, 2019
Affirmed
Rodenberg, Judge**

Hennepin County District Court
File No. 27-CV-16-15663

Herbert A. Igbanugo, Igbanugo Partners Int'l Law Firm, PLLC, Minneapolis, Minnesota
(attorney pro se and for appellants)

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Considered and decided by Reyes, Presiding Judge; Bjorkman, Judge; and
Rodenberg, Judge.

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

RODENBERG, Judge

In this appeal from the district court's order and judgment following a court trial, appellants Herbert Igbanugo and Danielle Igbanugo argue that the district court made clearly erroneous findings and errors of law and abused its discretion by denying their posttrial motions. We affirm.

FACTS

Appellants contacted respondent West Metro Restoration Services Inc. (d/b/a SERVPRO of Plymouth), operated by respondent Kent Jennings, about repairing water damage to their home. Water had been escaping from a bathtub on the home's second floor, causing damage to the main-level ceiling and creating possible mold issues.

The parties disagree about the facts, but the district court found—and the record supports—the following facts. After respondents' employee met with appellants and prepared a "First Notice of Loss" and "Initial Sketch," respondents emailed appellants two different estimates for the proposed remediation of the problems. Both estimates contemplated removing and reattaching an upper-level bathtub, completing mold remediation under the tub, fixing the main-level ceiling, and other related tasks. The estimates identified several costs as "TBD," meaning "to be determined," because respondents were uncertain about the costs before work began. The only difference between the two estimates was the type of ceiling finish. One estimate included a "popcorn" finish, and the other included a "knockdown" finish. Appellants chose the less-expensive "knockdown" finish and paid respondents a down payment of half of the estimated cost. The parties signed an agreement authorizing respondents to begin work.

Respondents started the work, but encountered unexpected problems that increased the cost. Crown molding on the main level broke during removal, necessitating purchasing, staining, and finishing new crown molding. Additionally, the main-level ceiling required a "smooth skim coat" before texturing because of difficulties in scraping off the old texture.

The cost further changed when appellant purchased a larger, “soaker-type” replacement bathtub, which required additional plumbing work.

After respondents began work, Danielle Igbanugo requested an estimate for a knockdown ceiling on the entire main level of appellants’ home. Respondents prepared a revised estimate which reflected the changes discussed above and included an estimate of the cost of the main-level knockdown ceiling. Respondents emailed the revised estimate to Herbert Igbanugo and discussed the changes with him in person before continuing the work. When the work was completed, respondents submitted a final invoice for \$4,344.94, which credited appellants for the initial down payment and reflected the agreed-upon revisions. Appellants refused to pay the balance.

After respondents filed a mechanic’s lien statement and sued in conciliation court to recover the amount owed, appellants sued respondents in district court seeking, along with other relief, discharge of respondents’ mechanic’s lien claim and consequential damages from the assertion of it. The conciliation court action was removed to district court and the cases were consolidated.

The consolidated cases were tried to the district court. The district court rejected appellants’ claim that the parties’ agreement was a “flat-fee” contract. It determined that the parties understood the agreement to be an estimate. It further found that appellants waived objections to the additional costs by directing respondents to include them after agreeing to the additional costs. The district court also concluded that, based on appellants’ involvement in directing and approving the changes, appellants waived the contract’s requirement that modifications to the initial agreement must be in writing. Appellants

moved for a new trial or reopening of the district court's judgment. The district court denied the motions, and awarded respondents their costs and attorney fees. It clarified that, because appellants failed to present any evidence at trial concerning the mechanic's lien or consequential damages because of it, they were not entitled to relief on those issues.

This appeal followed.

DECISION

“In an appeal from a bench trial, we do not reconcile conflicting evidence.” *Porch v. Gen. Motors Acceptance Corp.*, 642 N.W.2d 473, 477 (Minn. App. 2002), *review denied* (Minn. Jun. 26, 2002). “We give the district court's factual findings great deference and do not set them aside unless clearly erroneous.” *Id.* A district court's findings of fact “may be set aside only if this court on the entire evidence is left with the definite and firm conviction that a mistake has been made.” *Minn. Pub. Interest Research Grp. v. White Bear Rod & Gun Club*, 257 N.W.2d 762, 782-83 (Minn. 1977).

Appellants raised to the district court many of the arguments they assert on appeal. We explained in a procedural order concerning this appeal that we would construe it as taken from the judgment and the posttrial order denying appellants relief. “We review a district court's decision to grant or deny a new trial for an abuse of discretion.” *Christie v. Estate of Christie*, 911 N.W.2d 833, 838 (Minn. 2018). A district court may grant a new trial for “[e]rrors of law occurring at the trial” or when the decision is not justified by the evidence or is contrary to law. Minn. R. Civ. P. 59.01.

Contract language is construed according to its plain and ordinary meaning, and we “give effect to the intentions of the parties as expressed in the whole of the document.”

Robert W. Carlstrom Co. v. German Evangelical Lutheran St. Paul's Congregation, 662 N.W.2d 168, 171, 173 (Minn. App. 2003). Where the terms of a contract are susceptible to more than one reasonable interpretation, the contract is ambiguous and a district court may admit parol, or extrinsic, evidence of the parties' intent. *Staffing Specifix Inc. v. TempWorks Mgmt. Servs., Inc.*, 913 N.W.2d 687, 692 (Minn. 2018).

Whether a contract was modified is a question of fact. *Brodsky v. Brodsky*, 639 N.W.2d 386, 392 (Minn. App. 2002), *review denied* (Minn. Apr. 23, 2002). Even where a contract expressly requires modifications to be approved in writing, if the parties later assent to an oral modification, the modification is effective. *Larson v. Hill's Heating & Refrigeration of Bemidji, Inc.*, 400 N.W.2d 777, 781 (Minn. App. 1987), *review denied* (Minn. Apr. 17, 1987); *see New Amsterdam Cas. Co. v. Lundquist*, 198 N.W.2d 543, 551 n.5 (Minn. 1972) (stating that "[i]t is well established" that a written contract may be modified by a later oral contract).

Appellants argue that the district court erred by concluding that respondents' initial cost estimates were not fixed-fee arrangements and were instead preliminary cost estimates.

The email from respondents clearly states that the estimates were just that—estimates. The estimates indicate that several costs were to be determined later. Respondents could not be certain of the final cost until they began working. Given that some costs were explicitly so identified in both estimates, the district court did not clearly err in finding that they were estimates of what the project's cost might be. *See Malmin v. Grabner*, 163 N.W.2d 39, 41 (Minn. 1968) (stating that documents identified as estimates

for carpentry work were nothing more than approximations of what the project's cost might be). On this record, it is difficult to see how the district court could have concluded otherwise.

Appellants also challenge the district court's finding of fact that the parties orally agreed to amend the written agreement despite the writing having provided that amendments must be in writing. As noted above, the law supports this approach when the parties choose to orally modify a written contract. And here, the record supports the district court's finding. See *Larson*, 400 N.W.2d at 781. To be sure, the evidence at trial was conflicting, but resolution of such conflicting testimony is for the district court. See *Porch*, 642 N.W.2d at 477.

Moreover, the district court expressly found that appellants waived their right to modifications in writing because they knowingly received the extra improvements without objecting to the lack of a writing reflecting the modification. See *New Ulm Bldg. Ctr., Inc. v. Studtmann*, 225 N.W.2d 4, 5 (Minn. 1974) (concluding that, despite the terms of an original agreement, homeowners were liable for extras and waived requirement of written notice because owners were fully aware of the fact that extras were being included as the work progressed). The record also supports this finding.

Appellants also argue that the parties' written contract should be construed against the drafter because it was a contract of adhesion. The contract was between a lawyer and a business. On this record, we see no support for appellants' claim that the contract was one of adhesion.

Appellants argue that the district court erred by failing to address their claim for damages by reason of respondent's filing of a mechanic's lien statement and by failing to make a finding as to whether the project was an improvement or a repair to the property. As the district court noted and as the record supports, appellants did not raise the issue of the validity of the claimed mechanic's lien at trial and failed to provide any testimony or evidence at trial of consequential damages they suffered as a result of the lien. See *Eisenschenk v. Eisenschenk*, 668 N.W.2d 235, 243 (Minn. App. 2003) (stating that "a party cannot complain about a district court's failure" to rule in the party's favor "when one of the reasons it did not do so is because that party failed to provide the district court with the evidence that would allow the district court to fully address the question"), *review denied* (Minn. Nov. 25, 2003).

Having not argued this theory at trial, and having produced no evidence to support such an argument, the district court correctly determined that appellants are foreclosed from adopting that theory posttrial. See *Minn. Mut. Fire & Cas. Co. v. Retrum*, 456 N.W.2d 719, 723 (Minn. App. 1990); *Ness v. Ylvisaker*, 412 N.W.2d 769, 769-70 (Minn. App. 1987). We have stated that "a party may not raise an issue for the first time in a new-trial motion." *Ellingson v. Burlington N. R.R. Co.*, 412 N.W.2d 401, 405 (Minn. App. 1987), *review denied* (Minn. Nov. 13, 1987).

Moreover, respondents released their mechanic's lien claim before trial after appellants deposited with the district court sufficient funds to cover the claim in the event that respondents prevailed at trial. Respondents made no further lien claim. The district court acted within its discretion in denying appellants' motion for a new trial on this basis.

Appellants also argue that the district court erred in awarding attorney fees to respondents because the contract providing for such recovery is unenforceable. The district court found that the contract specifically provided for an award of attorney fees, and the record supports that finding. *See Barr/Nelson, Inc. v. Tonto's, Inc.*, 336 N.W.2d 46, 53 (Minn. 1983) (stating that attorney fees are not recoverable in litigation unless there is a specific contract permitting or a statute authorizing such recovery).

We construe appellants' challenge as relating generally to the amount of fees awarded because we construe this appeal as being taken from the district court's posttrial order. "We review an attorney fee award for an abuse of discretion." *650 N. Main Ass'n v. Frauenshuh, Inc.*, 885 N.W.2d 478, 494 (Minn. App. 2016), *review denied* (Minn. Nov. 23, 2016). The reasonable value of an attorney's work is a question of fact, and the district court's findings will be upheld unless they are clearly erroneous. *County of Scott v. Johnston*, 841 N.W.2d 357, 361 (Minn. App. 2013). The district court is most familiar with the litigation below, from its inception through posttrial motions, and it is therefore best situated to evaluate the reasonableness of attorney fees. *650 N. Main Ass'n*, 885 N.W.2d at 494.

The supreme court has approved the use of the lodestar method for determining reasonable attorney fees. *Milner v. Farmers Ins. Exch.*, 748 N.W.2d 608, 620-21 (Minn. 2008). The lodestar method requires the district court to "determine the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Id.* at 621 (quotation omitted). In determining the reasonableness of the hours and the hourly rates, the district court must consider "all relevant circumstances." *Id.* (quotation omitted).

Here, the district court used the lodestar method to determine attorney fees and reviewed invoices and billings submitted by respondents. The record reflects that the district court analyzed the proper factors and acted within its discretion in determining the reasonableness of the attorney fees, and in awarding attorney fees. *See City of Maple Grove v. Marketline Constr. Capital, LLC*, 802 N.W.2d 809, 819 (Minn. App. 2011). The district court also awarded costs and disbursements.¹

Finally, appellants argue that they are entitled to relief under the private attorney general statute, Minn. Stat. § 8.31, subd. 3a (2018). Appellants did not bring this action under that statute, nor have they shown benefit to the public should they prevail. *See Ly v. Nystrom*, 615 N.W.2d 302, 314 (Minn. 2000) (“[T]he Private AG Statute applies only to those claimants who demonstrate that their cause of action benefits the public.”). Appellants are foreclosed from now adopting this theory. *See Antonson v. Ekvall*, 186 N.W.2d 187, 189 (Minn. 1971) (holding that where a complaint includes vague language which could be read to include a particular theory but the party does not actually raise that theory at trial, the theory cannot be raised for the first time after trial).

We see no clear error or abuse of the district court’s discretion.

Affirmed.

¹ Appellants make no argument that the district court abused its discretion in awarding costs and disbursements.