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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0280**

Pohocogo, LLC,
Appellant,

vs.

Paul Cassidy, et al.,
Respondents.

**Filed September 9, 2019
Affirmed
Worke, Judge**

Olmsted County District Court
File No. 55-CV-16-5304

Daniel P. Doda, Doda & McGeeney, Rochester, Minnesota (for appellant)

David J. Jones, Jones Law Firm, Rochester, Minnesota (for respondents)

Considered and decided by Jesson, Presiding Judge; Worke, Judge; and Bratvold,
Judge.

UNPUBLISHED OPINION

WORKE, Judge

In this construction case, appellant-property-owner challenges the district court's denial of its unjust-enrichment and fraud claims brought against respondent-subcontractor for alleged overbilling. We affirm.

FACTS

Appellant Pohocogo LLC buys and sells commercial real estate. James Gander is part-owner of Pohocogo. Gander also owns a daycare facility that is on Pohocogo's property. In 2015, Pohocogo planned to expand the facility and received bids from general contractors. TLS Companies submitted a bid that included a price of \$50,000 for earthwork. On July 15, 2015, Pohocogo and TLS entered into a contract for the project.

On July 20, 2015, Gander talked to respondent Paul Cassidy who owns respondent Irish Excavating Inc. (collectively referred to as Cassidy). Cassidy had done projects for Gander. Gander showed Cassidy the plans for the project and asked if he would be interested in doing the earthwork on a time-and-materials basis. Cassidy said that he would and could bring the cost under \$50,000. Gander contacted TLS and instructed them to have Cassidy do the earthwork. Pohocogo and Cassidy did not enter into a written contract.

The project began on August 3, 2015. On August 13, Cassidy told Gander that he encountered problems with the soil that could cost an additional \$30,000. Gander told Cassidy to keep working and to keep track of costs. On August 15, Cassidy told Gander that the situation worsened and that it could cost an additional \$100,000. Gander, again, told Cassidy to keep track of costs.

By mid-September, Cassidy had not been paid, although he had submitted invoices totaling \$158,000. On September 15, 2015, Cassidy assured Gander that the invoices were accurate. Gander gave Cassidy a check for \$71,250, which Cassidy did not believe was fair. Gander then contemplated a fair amount to pay Cassidy, and asked other excavators

and general contractors for opinions. Gander gave Cassidy a check for \$70,000.¹ Gander requested that Cassidy provide his backup invoices—invoices from Cassidy’s subcontractors and suppliers supporting the amounts invoiced to Pohocogo—so that they could be compared to Cassidy’s invoices. Cassidy told Gander that he would provide the invoices. When Cassidy failed to submit backup invoices, Pohocogo sued Cassidy for unjust enrichment and fraud. During discovery, Cassidy provided backup invoices, which Gander believed showed that Cassidy overbilled \$41,093.01.

During a court trial, Gander testified that he has over 35 years of experience in construction projects and has hired many subcontractors, including excavators. Gander testified that his preferred, and most commonly used, method of hiring subcontractors is based on time and materials, which involves a subcontractor billing for actual time worked and materials used. He testified that an invoice from an excavator will generally include the hours an excavator is using the equipment, but not for time the machine is idle. Gander testified that Cassidy’s invoices for materials concerned him because none were itemized. Gander testified that Cassidy’s invoices for time were concerning because they indicated that six machines were being operated 12 hours a day, which would mean that six people were running the machines all day, and Cassidy told Gander that he did not have any employees.

TLS’s owner testified that he has 16 years of experience as a general contractor and has hired many excavators. He testified that on a time-and-materials basis, he pays for

¹ Pohocogo paid Cassidy \$141,250. Cassidy refunded \$13,065 after detecting a billing error. The total amount that Pohocogo paid Cassidy was \$128,185.

material that is supported with a receipt and equipment for the time it is operated. He testified that on a time-and-materials basis, an excavator is not paid for equipment sitting idle, but admitted that he was unaware of Gander and Cassidy's agreement.

Cassidy testified that when Gander told him about the project, he "had a footing plan and [they] went out to the site." Cassidy testified that the project "looked pretty basic, and "[n]othing stood out or concerned [him]." When Cassidy began working and had access to site plans and civil-engineering plans, he realized the scope of the job, which included a water main removal and installation. Cassidy testified that he called Gander and told him to "expect it to cost \$30,000 extra." Cassidy also told TLS that they needed a soil engineer. After the soil engineer's analysis, Cassidy told Gander that it "could be up to \$100,000 extra." The district court asked: "[W]as that \$100,000 . . . extra to the \$30,000 extra you had already told him?" Cassidy replied: "Yes." The district court asked: "[Y]ou're saying it may be up to \$180,000?" Cassidy replied: "Yes."

Cassidy testified that during the project he used a Komatsu excavator, a Bobcat, and numerous trucks. Cassidy testified that he owns the Komatsu, the Bobcat, and a dump truck, and operated all three. Cassidy testified that he worked seven days a week, "twelve hours a day nonstop." Cassidy testified that he hired two individuals to drive trucks and paid them in cash.

Cassidy testified that on soil-correction work, he bills for equipment on site, even when they are not being used. Cassidy testified that this is standard billing in the industry. Cassidy testified that he billed the Komatsu at \$150/hour, the Bobcat at \$100/hour, and the dump truck at \$100/hour, which included machine and operator. He billed the drum-roller

attachment to the Bobcat at \$400/day, and service trucks at either \$45 or \$50/hour. Thus, on one day, Cassidy billed 60 hours of work when he used five pieces of equipment that were on site 12 hours. Cassidy testified that he billed consistent with an earlier job he did for Gander; he billed 9.5 hours on the Komatsu because he was on site for 9.5 hours, even though he operated the Komatsu for three hours.

Regarding the difference between what Cassidy billed Pohocogo for materials and what Cassidy's backup invoices showed he actually paid, Cassidy testified that there were two possible explanations: he initially included an upcharge that he failed to remove from the final bill, or he misplaced an invoice to support his billing.

The district court concluded that Pohocogo failed to show that Cassidy had been unjustly enriched or committed fraud, because there was nothing "morally wrong or unconscionable" about his billing, and he did not make false representations of material fact. This appeal followed.

D E C I S I O N

Unjust enrichment

Pohocogo argues that Cassidy was unjustly enriched by retaining the overpayment that exceeded the value of time and materials contributed by Cassidy. Pohocogo asserts that Cassidy's backup invoices show that Cassidy overbilled Pohocogo \$41,093.01—\$1,600.51 in materials; \$10,902.50 in subcontractor costs; and \$28,590 for Cassidy's actual hours. Unjust enrichment is an equitable doctrine. *Southtown Plumbing, Inc. v. Har-Ned Lumber Co.*, 493 N.W.2d 137, 140 (Minn. App. 1992). Appellate courts review a district court's denial of an unjust-enrichment claim for an abuse of discretion. *See City of Cloquet*

v. Cloquet Sand & Gravel, Inc., 251 N.W.2d 642, 644 (Minn. 1977) (stating that standard of review in equitable-relief cases is whether the district court abused its discretion).

A party succeeds on an unjust-enrichment claim by establishing that (1) a party knowingly received something of value, (2) the recipient was not entitled to the thing of value, and (3) it would be unjust to allow the recipient to retain the benefit. *Schumacher v. Schumacher*, 627 N.W.2d 725, 729 (Minn. App. 2001). Generally, an unjust-enrichment claim does not lie simply because a party benefits from the efforts of another; instead, “it must be shown that a party was unjustly enriched in the sense that the term unjustly could mean illegally or unlawfully.” *First Nat’l Bank of St. Paul v. Ramier*, 311 N.W.2d 502, 504 (Minn. 1981) (quotation omitted); see *Cady v. Bush*, 166 N.W.2d 358, 361-62 (Minn. 1969) (“The theory of unjust enrichment . . . has been invoked in support of claims based upon failure of consideration, fraud, mistake, and in other situations where it would be morally wrong for one party to enrich himself at the expense of another.”); see also *Park-Lake Car Wash, Inc. v. Springer*, 394 N.W.2d 505, 514 (Minn. App. 1986) (stating that unjust can also mean “unconscionable by reason of a bad motive”).

The district court concluded that “there was no evidence that Cassidy’s billing method was immoral, illegal, unconscionable, inappropriate, or in bad motive.” The district court further concluded that it would not be morally wrong for Cassidy to retain the payment received.

The record supports a conclusion that, while Cassidy might have overbilled Pohocogo for materials because he could not sufficiently explain the discrepancy at trial, he did not do anything illegal or immoral. The issue came down to whether the district

court believed that Cassidy's approach was standard for him or, if in a time-and-materials agreement, equipment is billed only when it is used. Without a written agreement, the district court had to make a credibility determination, and the district court took "Cassidy at his word." We generally defer to a fact-finder's assessment of witness credibility. See Minn. R. Civ. P. 52.01 ("[D]ue regard shall be given to the opportunity of the [district] court to judge the credibility of the witnesses."). Further, there was evidence that Cassidy billed in this manner during another project with Gander, and Gander and Cassidy both testified that there was no issue with Cassidy's billing on that project.

Based on the record, the district court did not abuse its discretion in denying Pohocogo's claim for unjust enrichment because although Cassidy received something of value, Pohocogo failed to show that Cassidy is not entitled to retain the benefit or that his "billing method was immoral, illegal, unconscionable, inappropriate, or in bad motive."

Fraud

Alternatively, Pohocogo asserts that the district court erred in denying its fraud claim, alleging that Cassidy made false representations of material facts. On appeal from a bench trial, this court does not reconcile conflicting evidence, and gives great deference to the district court's factual findings, which will not be set aside unless clearly erroneous. *Id.*; *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999). But this court is not bound by the district court's decision on a purely legal issue. *Frost-Benco Elec. Ass'n v. Minn. Pub. Utils. Comm'n*, 358 N.W.2d 639, 642 (Minn. 1984). When reviewing mixed questions of law and fact, this court will correct "erroneous applications of law, but accord the [district] court discretion in its ultimate conclusions and review such

conclusions under an abuse of discretion standard.” *Rehn v. Fischley*, 557 N.W.2d 328, 333 (Minn. 1997).

To establish fraud, Pohocogo must prove that Cassidy made a false representation of a past or existing material fact, that Cassidy knew that the representation was false or did not know whether it was true or false, that Cassidy intended to induce Pohocogo to act in reliance on the false representation, that the representation caused Pohocogo to rely on it, and that Pohocogo suffered pecuniary damages as a result of the reliance. *See Valspar Refinish, Inc. v. Gaylord’s, Inc.*, 764 N.W.2d 359, 368 (Minn. 2009). District courts evaluate reliance in fraud cases “in the context of the aggrieved party’s intelligence, experience, and opportunity to investigate the facts at issue.” *Id.* at 369.

The district court determined that no representations by Cassidy were false representations of material facts. Pohocogo asserts that Cassidy made two false representations of material fact: one, that the invoices submitted were accurate, and two, that Cassidy would provide backup invoices.

The record supports the district court’s finding that Cassidy did not make a false representation of material fact. First, Cassidy testified that he told Gander that it “could be up to \$100,000 extra.” The district court clarified that Cassidy meant that “it may be up to \$180,000.” Cassidy initially billed \$158,000, but ended up receiving \$128,185. Gander testified that he thought the project would run up to \$100,000. But a misunderstanding between Gander and Cassidy does not mean that Cassidy falsely represented a material fact that the project could cost up to \$180,000, and that the invoiced amount of \$158,000 was accurate.

Further, Cassidy stood by his invoices. The issue, again, seems to surround what Gander believed time-and-materials billing meant, and how Cassidy billed for time and materials. The main contention relates to Cassidy billing for idle equipment. Gander testified that Cassidy should have billed only for the time the equipment was being used. The record seemingly supports Gander's contention because Cassidy testified that the hourly rate for each piece of equipment included equipment *plus operator*. It would seem that billing an hourly rate for "equipment and operator" would mean when the operator is operating the equipment. However, Cassidy testified that that is not his standard billing practice and that he bills for the hours the equipment is on site regardless of whether it is being operated. The district court determined that this was reasonable. Further, there is no evidence in the record that Cassidy represented to Gander that he would bill only for the time he operated the equipment.

Pohocogo apparently contends that it paid Cassidy based on Cassidy falsely representing that he would provide backup invoices. Pohocogo claims that it detrimentally relied on this false representation because the backup invoices showed, only after the lawsuit was commenced, that Cassidy overbilled. But Cassidy maintained that the invoices were accurate and that the billing was standard in the industry. The district court determined that Cassidy was credible and the billing reasonable. Thus, there is no evidence of a false representation of material fact. Therefore, the district court appropriately denied Pohocogo's fraud claim.

Findings of fact

Pohocogo also challenges several of the district court's findings of fact. Again, on appeal from a bench trial, this court gives great deference to the district court's factual findings and will not set them aside unless clearly erroneous. Minn. R. Civ. P. 52.01, *Fletcher*, 589 N.W.2d at 101. Based on the record, not only are the challenged findings of fact not clearly erroneous, but they are hardly relevant to Pohocogo's claims.

First, Pohocogo argues that the district court erred in finding that witnesses "could not speak to the agreement between Cassidy and Gander as to what 'time and materials' meant." True, TLS's owner testified about his understanding of a time-and-materials agreement, but he also admitted that he was not aware of Gander and Cassidy's agreement. Gander and Cassidy did not have a written contract. And the record shows that TLS's owner was not present when Gander and Cassidy agreed to work together. The record supports a finding that, although witnesses could testify generally about a time-and-materials contract, they could not testify about Gander and Cassidy's agreement.

Second, Pohocogo argues that the district court erred in finding that Gander failed to establish the terms of the time-and-materials contract. Gander testified to his understating of a time-and-materials contract, but he did not establish the terms of his agreement with Cassidy.

Third, Pohocogo argues that the district court erred in a finding regarding Gander and Cassidy's communications regarding the cost increases. Pohocogo urges this court to "reverse the [d]istrict [c]ourt's mistake and order a finding the project could cost up to \$100,000." Cassidy testified that he told Gander that the project could cost up to \$180,000.

The district court credited Cassidy's testimony and found that "Cassidy stated that the poor soil conditions would cost up to an additional \$100,000 on top of the \$80,000 estimate." Reversal of this finding would require this court to reevaluate the evidence, make a credibility determination, and engage in fact-finding, all of which we do not do. *See Cohen v. Steinke*, 26 N.W.2d 843, 846 (Minn. 1947) (stating that it is improper for an appellate court to reweigh the evidence or reassess witness credibility); *Fontaine v. Steen*, 759 N.W.2d 672, 679 (Minn. App. 2009) (stating that an appellate court does not determine issues of fact on appeal); *Novack v. Nw. Airlines, Inc.*, 525 N.W.2d 592, 598 (Minn. App. 1995) (stating that an appellate court is required to give deference and due regard to the district court's credibility determinations).

Fourth, Pohocogo argues that the district court erred in finding the rate at which service trucks were billed. Cassidy concedes that there is an inconsistency between Cassidy's testimony and the documentary evidence regarding the rate for the service trucks. Cassidy billed the trucks at \$100/hour, but he testified that he "believe[d]" that the rate was "50 bucks an hour, \$45," he could not recall. Cassidy billing \$100/hour and then testifying that he believed that he billed at \$45 or \$50/hour does not affect the unjust-enrichment and fraud claims. Cassidy's inability to recall the rate during his testimony does not result in his billing being illegal or immoral, nor does it lend to a conclusion that he made a false representation of material fact.

Fifth, Pohocogo argues that the district court clearly erred in finding:

Cassidy billed this project as he bills other projects of this type. Cassidy typically adds an upcharge to materials purchased from suppliers but chose not to in this project to

keep costs down. All equipment was billed at a standard hourly or daily rate, depending on the pieces of equipment, and Cassidy billed according to its standard practices for all equipment at the site.

Pohocogo argues that “Cassidy’s inconsistent testimony, and his inconsistent billing practices on this project, and a prior project, makes [his] testimony incredible, and his billing practices non-standard.”

But Cassidy testified that he billed other soil-correction work “in similar ways.” He also testified that his “standard practice is to add an upcharge,” but that he did not add an upcharge because “Gander was having a problem with the costs.” Finally, Cassidy testified to the hourly or daily rate that he charges for his equipment. Thus, Cassidy’s testimony supports the district court’s findings.

Pohocogo asserts that Cassidy billed another project with Gander differently, which supports a determination that Cassidy does not regularly charge for idle equipment. Cassidy testified that on a previous project, he billed for 9.5 hours for the Komatsu even though he used it only three hours. Pohocogo asserts that Cassidy’s testimony and billing practices are inconsistent because the invoice for the prior project shows that Cassidy also billed for “[e]quipment move” and “17 tons of sand,” but did not bill for the “dump truck . . . on the site” for 9.5 hours. But this invoice does not establish that Cassidy had a dump truck on site for 9.5 hours, only that he billed for “[e]quipment move” and sand. Therefore, there is no glaring inconsistency that would result in this court concluding that the district court’s finding is clearly erroneous.

Sixth, Pohocogo argues that the district court erred in finding that there was no agreement that Cassidy would bill only for time on the equipment and that was not Cassidy's standard method of billing. There was no written agreement memorializing Gander and Cassidy's agreement, and the district court believed Cassidy's testimony regarding his standard method of billing. This finding is not clearly erroneous.

Seventh, Pohocogo argues that the district court clearly erred in finding "Cassidy billed for 16 days of work, starting on August 7, 2015, and ending on September 2, 2015." Pohocogo urges this court to reverse this finding "and order a finding that Cassidy worked a total of 134 actual hours for 16 days of work, starting on August 7, 2015, and ending on September 2, 2015, and that Cassidy's actual costs for its time equals \$20,100." But this court does not make factual findings. *See Fontaine*, 759 N.W.2d at 679. Additionally, the district court's finding is accurate; just because Pohocogo wishes to extrapolate and include additional language to the finding does not make it clearly erroneous.

Finally, Pohocogo argues that the district court erred in finding that "Cassidy refused Gander's refund request because charging for all equipment regardless of actual use was his standard billing practice. Cassidy testified that while working on a project, he bills full rate for all of his equipment that is on the site." Pohocogo argues that this finding is clearly erroneous because Cassidy's "actual billing on this project, and a prior project, contradicts [his] testimony." However, the district court's finding that this was Cassidy's testimony is accurate.

None of the district court's challenged findings are clearly erroneous. The issue appears to stem from the fact that the parties did not have a written agreement and

ultimately disagreed as to what a time-and-materials invoice would include. This disagreement, however, does not indicate that Cassidy was unjustly enriched or that he committed fraud. Accordingly, the district court did not abuse its discretion in denying Pohocogo's claims.

Affirmed.