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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0630**

Tony Flattum,
Respondent,

vs.

Pro Tech Restoration, Inc.,
Defendant,

Brian Jovan,
Appellant.

**Filed December 16, 2019
Affirmed
Hooten, Judge**

Wright County District Court
File No. 86-CV-17-3247

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Considered and decided by Cochran, Presiding Judge; Johnson, Judge; and Hooten,
Judge.

UNPUBLISHED OPINION

HOOTEN, Judge

In this dispute arising from the termination of a business relationship, appellant challenges the district court's denial of a motion for judgment as a matter of law (JMOL) and a motion for a new trial. Appellant argues that Minnesota law should be read to relieve corporate promoters from personal liability after a corporation is formed and therefore the district court erred when it denied his motion for JMOL. Appellant also argues in the alternative that the district court abused its discretion when it denied a motion for a new trial on his breach of contract and promissory estoppel claims and in denying his motion for a new trial as to damages because the methodology used by respondent's expert lacked foundational reliability. Because the issue of promoter liability was not properly preserved for appeal and because the expert witness's methodology had sufficient foundation to be presented to the jury, we affirm.

FACTS

In the autumn of 2013, respondent Tony Flattum was winding down his storm restoration company. Flattum and appellant Brian Jovan, then an employee of Flattum's, discussed going into business together as co-owners of a new storm restoration company called Pro Tech Restoration, Inc. But because Flattum had three outstanding consent orders entered against him by the Minnesota Department of Labor and Industry, the pair orally agreed before Pro Tech's incorporation that Jovan would be the sole owner of Pro Tech and Flattum would be an employee entitled to one-half of Pro Tech's profits. In reliance on this agreement, Flattum brought his existing sales team to Pro Tech, used his contacts

with vendors to obtain materials on credit for Pro Tech, and personally contributed one-half of the company's start-up capital. As agreed, when Pro Tech incorporated in early 2014, Jovan was the sole owner.

The company did very well for the first few years of its existence in part due to Flattum's guidance and experience. And yet, Jovan terminated Flattum's employment in mid-2016. Flattum claimed that after his termination, he did not receive his one-half share of the profits to which he was entitled under his contract with the parties.

Flattum sued Jovan and Pro Tech for breach of contract and promissory estoppel, among other claims. In September 2018, the jury found Jovan personally liable for breach of contract and promissory estoppel and awarded Flattum \$734,141. This figure was approximately the same figure calculated by Flattum's damages expert, Allan Chermak, based on the estimated accrued profit owed to Flattum at the time he was terminated. No damages were awarded against Pro Tech.

In response, Jovan filed a motion for JMOL, or in the alternative, a motion for a new trial. The district court denied both motions finding "ample evidence in the record justifying the jury's verdict" and that a proper foundation was laid for Chermak's profit-calculation method. This appeal followed.

D E C I S I O N

I. Jovan did not preserve the issue of promoter liability for appeal.

Jovan argues that the district court erred as a matter of law when it denied his motion for JMOL after a jury found him to be personally liable to Flattum for breach of contract and promissory estoppel. Jovan argues that he was a pre-incorporation promoter and for

the first time on appeal, requests that we change existing Minnesota promoter liability law to provide that even without an explicit agreement between the parties, any liability for a breach of the promoter contract belongs to the corporation, not the promoter. “We review de novo a district court’s decision to deny a motion for judgment as a matter of law, applying the same standard used by the district court and viewing the evidence in the light most favorable to [the non-moving party].” *Christie v. Estate of Christie*, 911 N.W.2d 833, 838 n.5 (Minn. 2018) (quotation omitted).

A promoter of a yet-to-be-formed corporation may make contracts on the corporation’s behalf. *Veigel v. O’Toole*, 236 N.W. 710, 711 (Minn. 1931). Once the corporation comes into existence, the corporation becomes liable on any pre-incorporation contract it expressly or implicitly adopts. *Id.* However, even if a corporation adopts a contract made by a promoter on the corporation’s behalf, a promoter remains individually liable for the contract absent an explicit agreement between the parties to relieve the promoter of all liability. *Almac, Inc. v. JRH Dev., Inc.*, 391 N.W.2d 919, 924 (Minn. App. 1986) (superseded by statute on other grounds), *review denied* (Minn. Oct. 17, 1986); *see, e.g., State v. Indus. Tool & Die Works, Inc.*, 21 N.W.2d 31, 37 (Minn. 1945).

Jovan’s theory could only be successful if we expand the state’s existing pre-incorporation promoter liability law to allow a promoter to escape liability when a contract is entered into by the promoter on the credit of the future corporation, or when the corporation subsequently adopts the promoter’s contract after its incorporation. Jovan points to the law of a small minority of sister states who have adopted some form of this exception and urges us to adopt this law in Minnesota. *See, e.g., Coopers & Lybrand v.*

Fox, 758 P.2d 683, 685 (Colo. App. 1988) (noting that a formal agreement to release a promoter from liability is not necessary when one is shown by the circumstances); *Blue Paper, Inc. v. Provost*, 914 So.2d 1048, 1051 (Fla. Dist. Ct. App. 2005) (holding where a promoter contracts in the name of a corporation to be formed later, but does not intend to be personally liable on the contract, and the other party knows this, the promoter is not personally liable); *Marconi's Wireless Tel. Co. v. Cross*, 16 Haw. 390, 394 (Haw. 1905) (stating a promoter is not personally liable on a contract that expressly or impliedly limits liability to the corporation); *Schwedtmann v. Burns*, 11 S.W.2d 348, 349–50 (Tex. Civ. App. 1928) (limiting promoter liability when contracts are made on the credit of a corporation and later adopted).

Because Jovan did not properly preserve this issue for appeal, we decline to examine the expansion of Minnesota's promoter liability law. Generally, we will not consider matters not argued to, or considered by, the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). A party may neither raise a new issue on appeal nor “obtain review by raising the same general issue litigated below but under a different theory.” *Id.*; see also *Crowley v. Meyer*, 897 N.W.2d 288, 293 (Minn. 2017).

Although we may base our decision upon a theory not presented to the district court where justice requires, Minn. R. Civ. App. P. 103.04, or “where the question . . . is plainly decisive of the entire controversy on its merits,” *Watson v. United Servs. Auto. Ass'n*, 566 N.W.2d 683, 687 (Minn. 1997) (quotation omitted), absent those circumstances, parties are “bound . . . by the theory or theories, however erroneous or improvident, upon which the action was actually tried below.” *Annis v. Annis*, 84 N.W.2d 256, 261 (Minn. 1957).

In *Watson*, the Minnesota Supreme Court articulated an exception to the general rule that an issue not argued before the district court was not properly preserved for review. 566 N.W.2d at 687. The exception allows us to hear issues otherwise not properly preserved when the issue is decisive over the suit and would not unjustly benefit one party. *Id.* Factors in support of the application of this exception are: (1) the issue is a novel legal issue of first impression; (2) the issue was raised prominently during briefing; (3) the issue was “implicit in” or “closely akin to” other arguments made at trial; and (4) the issue is not dependent on any new or controverted facts. *Id.* at 688.

The parties agree that the issue of pre-incorporation promoter liability was not specifically presented to the district court during the jury trial. The jury instructions, to which both parties agreed, lacked any instruction on pre-incorporation promoter liability. Once the jury instructions are presented to the jury, the instructions become the law of the case. See *Wolner v. Mahaska Indus. Inc.*, 325 N.W.2d 39, 42 (Minn. 1982) (noting that “where a party makes no objections to jury instructions before the jury retires . . . the instructions are the law of the case”); *Coenen v. Buckman Bldg. Corp.*, 153 N.W.2d 329, 334 (Minn. 1967) (noting that unobjected-to jury instructions become the law of the case after the district court charges the jury). The first time the issue of promoter liability was raised in general terms was during the post-trial hearing on Jovan’s motion for JMOL or a new trial. And, even then, Jovan made no request that the district court adopt an exception to the law in Minnesota that a promoter remains individually liable for the contract absent an explicit agreement between the parties to relieve the promoter of all liability.

Applying the *Watson* factors, the issue of promoter liability was not preserved so as to be heard by this court. Though this issue was prominently argued in the parties' appellate briefs, such devotion to this issue in briefing alone is insufficient for us to consider the issue on appeal. And although Jovan did argue that he is not personally liable to Flattum before the district court—an argument with the same consequence as his promoter liability argument—Jovan only raised the issue of the bounds of promoter liability law in his appeal. Two arguments resulting in the same outcome are not, by virtue of that outcome, sufficiently akin so as to be functionally the same argument. Finally, justice would not be served by allowing Jovan to raise this issue for the first time on appeal in that the parties undoubtedly would have adjusted their litigation strategies before the jury if the issue had been raised during the proceedings before the district court.

Even if Jovan were able to show that we should consider this issue under the *Watson* factors, we, as an error-correcting court, would not have the authority to create a new exception to promoter liability which is contrary to existing Minnesota law. See *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988) (stating that “[t]he function of the court of appeals is limited to identifying errors and then correcting them”); *Lake George Park, L.L.C. v. IBM Mid-America Emps. Fed. Credit Union*, 576 N.W.2d 463, 466 (Minn. App. 1998) (stating that “[t]his court, as an error correcting court, is without authority to change the law”), *review denied* (Minn. June 17, 1998).

Even though pre-incorporation liability for promoters may be a relatively obscure area of law, it is still the law and must be presented before the district court to be preserved on appeal absent specific exceptions not present here. Therefore, the district court did not

err when it denied Jovan's motion for JMOL under Jovan's subsequent theory of promoter liability as the issue was never presented to the district court during the trial.

II. The district court did not abuse its discretion when it denied Jovan's motion for a new trial.

Jovan argues that the district court abused its discretion when it denied his motion for a new trial on breach of contract and promissory estoppel claims because there was insufficient evidence for a jury to find that a contract existed between Jovan and Flattum. Flattum asserts that the district court did not abuse its discretion as the record contains sufficient, if not ample, evidence to support the finding of a contract. "We review a district court's decision to grant or deny a new trial for an abuse of discretion." *Christie*, 911 N.W.2d at 838.

A party may be granted a new trial based on a trial irregularity, a legal error, or a jury verdict unjustified on the evidence or the controlling law. Minn. R. Civ. P. 59.01. "On appeal from a denial of a motion for a new trial, an appellate court should not set aside a jury verdict unless it is manifestly and palpably contrary to the evidence viewed as a whole and in the light most favorable to the verdict." *Raze v. Mueller*, 587 N.W.2d 645, 648 (Minn. 1999) (quotation omitted).

"A contract is formed when two or more parties exchange bargained-for promises, manifest mutual assent to the exchange, and support their promises with consideration." *Med. Staff of Avera Marshall Reg'l Med. Ctr. v. Avera Marshall*, 857 N.W.2d 695, 701 (Minn. 2014). Furthermore, a claim for promissory estoppel requires there to be a clear and definite promise upon which the promisor intended to induce reliance, the promisee

relied on the promise, and the promise must be enforced to prevent injustice. *Hous. & Redevelopment Auth. of Chisholm v. Norman*, 696 N.W.2d 329, 336 (Minn. 2005).

Here, both parties testified in detail about the timing and the nature of the pre-incorporation contract. During this testimony, Jovan stated that he agreed to share the profits of his new business with Flattum before the corporation was formed. In reliance on this agreement, Flattum brought his sales team to Pro Tech, used his contacts with vendors to obtain materials on credit for Pro Tech, and contributed one-half of the company's start-up capital. The jury found that this interaction bound Jovan to Flattum either through an oral contract or through promissory estoppel.

Therefore, we conclude that the district court did not abuse its discretion when it denied Jovan's motion for a new trial because there was sufficient evidence in the record for a reasonable jury to find that a binding agreement existed between Jovan and Flattum.

III. The district court did not abuse its discretion when it denied Jovan's motion for a new trial due to the admission of expert testimony.

Flattum argues that Jovan's objection to the foundational reliability of Flattum's expert, Chermak, was not properly preserved for appeal because Jovan failed to object to the foundational reliability at a pre-trial motion in limine hearing and at trial. We agree. Nevertheless, were we to examine the objection, "[w]e review evidentiary rulings, including those related to the admissibility of expert testimony, for an abuse of discretion." *State v. Thao*, 875 N.W.2d 834, 840 (Minn. 2016).

Minnesota Rule of Evidence 702 provides that an expert may testify in the form of an opinion if his or her scientific, technical, or other specialized knowledge will assist the

trier of fact to understand the evidence or to determine a fact in issue. To be admissible, expert testimony “must have foundational reliability.” Minn. R. Evid. 702; *see also Kedrowski v. Lycoming Engines*, 933 N.W.2d 45, 56 (Minn. 2019).

To determine if foundational reliability exists, the district court must “(1) analyze the proffered testimony in light of the purpose for which it is being offered, (2) consider the underlying reliability, consistency, and accuracy of the subject about which the expert is testifying, and (3) determine if the proffered evidence is reliable.” *Pfeiffer ex rel. Pfeiffer v. Allina Health Sys.*, 851 N.W.2d 626, 638 (Minn. App. 2014) (citing *Doe v. Archdiocese of St. Paul & Minneapolis*, 817 N.W.2d 150, 167–68 (Minn. 2012)), *review denied* (Minn. Oct. 14, 2014). “The factual foundation of an expert’s opinion is inadequate if (1) the opinion does not include the facts and/or data upon which the expert relied in forming the opinion, (2) it does not explain the basis for the opinion, or (3) the facts assumed by the expert in rendering an opinion are not supported by the evidence.” *Kedrowski*, 933 N.W.2d at 56.

However, an expert “need not be provided with every possible fact, but must have enough facts to form a reasonable opinion that is not based in speculation or conjecture.” *Gianotti v. Indep. Sch. Dist.*, 889 N.W.2d 796, 802 (Minn. 2017). Furthermore, it is the jury, and not the district court, who determines the weight and the credibility of an expert’s testimony. *Knuth v. Emergency Care Consultants, P.A.*, 644 N.W.2d 106, 112 (Minn. App. 2002), *review denied* (Minn. Aug. 6, 2002). And we will not reverse a district court’s decision regarding sufficiency of foundation absent a clear abuse of discretion. *Doe*, 817 N.W.2d at 176.

Jovan argues that: (1) the figure calculated by expert witness Chermak was based on “accrual-based” accounting while Pro Tech used “cash-based” accounting, and (2) the actual method for calculating the profits to which Flattum is entitled is not the most precise method possible and therefore lacks foundational reliability.

Chermak’s calculated profit figure was determined using an accrual-based method of accounting, meaning income is recognized by the corporation when earned even if accounts have yet to be received. However, Pro Tech operated on a cash-based method of accounting where income is not recognized until the money is actually received. Under the accrual-based method of accounting, profits are recognized by the corporation when incurred or payable as opposed to the cash-based method of accounting where profits are not recognized until the money is actually in the bank.

Jovan argues that the problems with using the accrual-based accounting method to calculate the profit to which Flattum was entitled are compounded by the imprecise methodology used by Chermak to calculate expected profits. Accordingly, Jovan suggests that under the first prong of the foundational reliability analysis, this lack of precision renders the figure reached unfit for the purpose for which it is being offered.

Although a more precise method would certainly lead to a more accurate figure, caselaw suggests a perfect result is not required for an expert’s opinion to be foundationally reliable. *See, e.g., Sandhofer v. Abbott-Nw. Hosp.*, 283 N.W.2d 362, 367 (Minn. 1979) (finding the opinion of a medical expert need only have a reasonable basis in fact to meet the standard for foundational reliability). Indeed, all that is necessary for a district court to

find foundational reliability is that the expert have sufficient facts to create a reasonable opinion not based on speculation. *Gianotti*, 889 N.W.2d at 802.

At trial, Chermak explained that he chose the accrual-based method of accounting based on financial information made available to him by Pro Tech, and that it was his explicit intention to determine how much profit Flattum would be entitled to receive for the jobs that had been commenced or completed with his help but which had not been paid as of the date of his termination. Jovan had the opportunity to cross-examine Chermak on his decision to use an accrual-based accounting method but failed to do so. Jovan claims that Chermak's methodology was inadequate because it was based on his use of a job tracking list to approximate the profit to which Flattum would be entitled under an accrual-based system. Yet, Chermak noted that he received this job tracking list from Pro Tech and acknowledged that while his methodology was not perfect, it was reasonable under the circumstances based upon the information provided. Jovan cross-examined Chermak on his use of various financial records provided by Pro Tech and had every opportunity, but failed, to present an alternative figure that was based on a cash-based accounting method.

The jury considered Chermak's methodological deficiencies, assessed the weight and credibility of the figures and methods presented and still decided to award Flattum the amount calculated using Chermak's method. As the district court noted, the accounting problems Jovan claims are prejudicial speak to the weight of the evidence, not foundation, and should have been thoroughly explored during cross-examination.

Accordingly, we conclude that the district court did not abuse its discretion when it denied Jovan's motion for a new trial. Chermak's methodological flaws were for the jury

to weigh, as they did, and do not form the basis of an unreasonable opinion so as to lack foundational reliability.

Affirmed.