

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0098**

Diversified Manufacturing Corporation,
Respondent,

vs.

MBKV LLC,
Appellant.

**Filed February 1, 2021
Affirmed
Connolly, Judge**

Washington County District Court
File No. 82-CV-18-846

John C. James, Minnetonka, Minnesota; and

John D. Hagen, Jr., Minneapolis, Minnesota (for respondent)

Steven R. Coon, Law Offices of Steven Coon, Minneapolis, Minnesota (for appellant)

Considered and decided by Reyes, Presiding Judge; Connolly, Judge; and Gaïtas,
Judge.

NONPRECEDENTIAL OPINION

CONNOLLY, Judge

Appellant, a vendor, challenges the district court's decision to award respondent, a manufacturer, all of respondent's claimed damages, arguing that the district court erred in (1) declining to consider parol evidence as to whether respondent had made an enforceable

promise to provide certain information to appellant, (2) finding that appellant failed to prove that the goods it purchased from respondent were nonconforming, and (3) rejecting appellant's defenses and declining to offset the damages. Because we see no error in the district court's decision, we affirm.

FACTS

Appellant MBKV LLC is a California limited liability company in the business of selling dental care products, specifically a toothpaste and a tooth rinse. Respondent Diversified Manufacturing Corporation (DMC) is a Minnesota corporation in the business of manufacturing dental care products, among other things.¹

In October 2015, the parties executed a one-page agreement (the agreement) providing that appellant would provide specifications and samples of the toothpaste and tooth rinse and respondent would manufacture these products, which appellant would then purchase for resale. The agreement provided in relevant part:

(b) . . . Payment terms shall be specified on the invoice from [respondent] to [appellant], and all payments beyond the due date would be subject to interest charges at the rate of 18% per annum and/or the highest rate under applicable law, unless any other written arrangements are made in advance with [appellant. Appellant] shall pay to [respondent] all costs and collection expenses, including attorney fees, resulting from the failure to pay amounts owed for product manufactured by [respondent] or failure to reimburse [respondent] for product stored or purchased by [respondent] for [appellant].

. . . .

(e) Should there be any Q[uality] C[ontrol] problems with any product produced by [respondent] for [appellant], [respondent's] only responsibility is to rework the merchandise

¹ The terms "appellant" and "respondent" will be used to designate both the corporate entities and individuals acting for those entities.

(if deemed unacceptable beyond industry standards and/or by nonconformance to specification) at its own expense and within a reasonable time frame. [Respondent] is not responsible or liable for product QC problems or delays attributable to product specifications or criteria supplied by [appellant]. IN NO EVENT SHALL [RESPONDENT]'S CUMULATIVE LIABILITY TO [APPELLANT] FOR ANY REASON OR CAUSE, EXCEED THE PURCHASE PRICE OF THE PRODUCTS, AND IN NO EVENT SHALL [RESPONDENT] BE LIABLE FOR ANY INCIDENTAL, CONSEQUENTIAL, INDIRECT, SPECIAL OR PUNITIVE DAMAGES.

....

(n) [Respondent] warrants that products sold to [appellant] will reasonably conform to the description as set forth in the respective invoices and pursuant to industry guidelines on quality levels referenced herein. [RESPONDENT] MAKES NO OTHER REPRESENTATIONS OR WARRANTIES, EXPRESS OR IMPLIED, INCLUDING WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. ALL OTHER WARRANTIES ARE EXPRESSLY DISCLAIMED. ANY LIABILITY FOR BREACH OF WARRANTY SHALL BE SUBJECT TO THE LIMITATIONS IN SECTION (b) ABOVE.

(o) In addition to the respective invoice(s) and corresponding terms supplied by [respondent] for products, this agreement constitutes the full understanding between the parties as to the products and [respondent's] contract manufacturing services.

Respondent reverse-engineered the sample appellant provided to devise formulas and recipes for the products. In 2015 and 2016, appellant ordered the products, respondent filled the orders and delivered the products to appellant, and appellant paid for them without incident. On April 6, 2017, appellant emailed respondent to provide the name of the person who would be appellant's main contact with respondent and to say that this person would issue an order that day for 25,000 of each product. The email concluded

with a sentence saying appellant wanted “to remind [respondent] about providing the recipe/formula, mix and match of the toothpaste and oral rinse.”

On April 10 the products were ordered, and on April 18 appellant received an email from respondent advising it “that 100% of invoice value will be due 30 days after shipment, to which your acceptance is required.” The products were shipped on two dates in May 2017 and were delivered to and accepted by appellant. Invoices for the two shipments totaled \$104,339.98. Appellant testified that he began selling the products on its website, via Amazon, and directly to dentists.

Payment fell due in June 2017, but appellant did not pay and said it would not pay until respondent provided the products’ formulas and recipes. On July 1, 2017, interest on the payment began accruing. On July 21, 2017, appellant received an email from respondent saying, “I need to get paid timely, and I will give you the formulations. The offer to give you the formulation was made in good faith and was never a part of the purchase order, sale or payment.” On July 31, 2017, respondent received an email from appellant saying that: (1) appellant would pay the invoice that week if respondent agreed “to send the formulas within days of receiving the funds” and (2) for each formula, appellant wanted ingredients, ingredient percentages, specific ingredient trade names, specific ingredient suppliers, and the steps to make the product.

In September 2017, Quality Value Convenience network, (QVC), a television retailer, contacted appellant about purchasing the products, seeking documentation of quality control. Specifically, QVC wanted the results of preservative efficacy testing,

which respondent did not do. Respondent knew nothing about the relationship between appellant and QVC.

Appellant did not pay the invoices for the April 2017 order, and in November 2017, respondent brought this action for payment. In February 2018, appellant answered the complaint, asserting affirmative defenses of breach of contract, fraud in the inducement, failure of a condition precedent, nonconforming goods, and offset of damages. Also in February 2018, Bureau Veritas, an independent laboratory hired by appellant, did preservative efficacy testing on the products, using QVC's protocols. The toothpaste passed the test, but the tooth rinse failed.² QVC therefore purchased the toothpaste, but not the tooth rinse.

A bench trial occurred in March 2019. The district court declined to admit parol evidence that appellant claimed would show respondent's providing the formulas and instructions for making the products was a condition precedent to appellant's payment of the invoice. Both parties called expert witnesses on the issue of whether the tooth rinse was a nonconforming good; the district court found respondent's expert more credible. At the conclusion of the trial, the district court ordered judgment for respondent in the amount of \$122,598.98, of which \$104,339.98 was for the unpaid invoices and \$18,259 for prejudgment interest from July 2017 to March 2019. Respondent applied for attorney fees, costs and disbursements, and interim interest. Appellant objected to the application, and a hearing was held.

² Appellant did not and does not argue that the toothpaste was nonconforming.

The district court issued an order amending the judgment to include \$18,906 for attorney fees, \$4,563.10 for costs and disbursements, and \$6,086.50 for interim interest, a total of \$29,555.60, which brought the total judgment to \$152,154.98. Appellant challenges the judgment.

DECISION

1. Exclusion of Parol Evidence

The application of the parol evidence rule is a question of law subject to de novo review. *Mollico v. Mollico*, 628 N.W.2d 637, 640 (Minn. App. 2001).

The parties' agreement says nothing about ownership of the formulas and recipes for the products. Appellant argues that (1) the absence of language about ownership of the formulas and recipes shows that the agreement was incomplete, (2) parol evidence is therefore admissible, and (3) parol evidence would show that respondent's providing the formulas and recipes was a condition precedent to appellant's obligation to pay the invoices.

"[P]arol evidence is ordinarily inadmissible to vary, contradict, or alter the written agreement." *Hruska v. Chandler Assoc's., Inc.*, 372 N.W.2d 709, 713 (Minn. 1985) (quotation omitted). But "where a written agreement is ambiguous or incomplete, evidence of oral agreements tending to establish the intent of the parties is admissible." *Gutierrez v. Red River Distrib., Inc.*, 523 N.W.2d 907, 908 (Minn. 1994) (quotation omitted). However, when the intent of the parties can be ascertained from a merger clause stating that a document constitutes the entire agreement between the parties, parol evidence is not

admissible. *Alpha Real Estate Co. v. Delta Dental Plan*, 664 N.W.2d 303, 313 (Minn. 2003).

This merger clause specifically states that it is the “entire agreement between the parties.” . . . [U]nder these facts, we need not look beyond the writing of the 1997 lease itself to determine whether it is a complete integration.

....

We conclude that the 1997 lease is a complete integration and represents the complete and exclusive statement of the terms of the agreement between the parties and is unambiguous. Therefore, it was error to consider extrinsic evidence, such as the conduct of the parties, and the terms of the 1995 agreement, to reform or modify the terms of the 1997 lease.

Id. at 313-14. *Alpha Real Estate* points out that a case on which appellant relies, *Bussard v. Coll. of St. Thomas, Inc.*, 200 N.W.2d 155, 161 (Minn. 1972) (stating that a contract “must be read in light of the situation of the parties, the subject matter and purposes of the transaction, and like attendant circumstances”), did not involve a merger clause. *Id.* at 312.

The agreement here says that it “constitutes the full understanding between the parties as to the products and [respondent’s] contract manufacturing services.” The district court correctly concluded that, because the agreement did contain a merger clause and did not contain “terms about formula information,” appellant could not argue that respondent’s failure to release formula information was “a valid legal excuse to withhold payment due on the invoices.”

2. Nonconforming Goods

The weight and credibility of expert testimony is for the fact-finder to determine. *Rainforest Cafe, Inc. v. State of Wisc. Inv. Bd.*, 677 N.W.2d 443, 451 (Minn. App. 2004). An appellate court defers to the district court’s factual findings and will not set them aside

unless they are clearly erroneous. *Michaels v. First U.S. Title*, 844 N.W.2d 528, 534 (Minn. App. 2014).

Appellant argues that it is not obligated to pay for the goods because the tooth rinse delivered to appellant in May 2017 did not pass the preservative efficacy test required in March 2018 by QVC and therefore did not conform to the parties' agreement. Respondent did not learn of the alleged nonconformity until this lawsuit was pending and appellant had hired Bureau Veritas to perform a preservative efficacy test. At trial, a representative of Bureau Veritas testified as an expert witness for appellant, and a professor of dentistry who had formulated oral care products testified as an expert witness for respondent.

Appellant's expert witness testified that: (1) the FDA has no approval process for oral care products; (2) some large retailers have their own requirements for testing of oral care products; (3) QVC's protocols involved injecting different pathogens into five samples of a product and checking how many pathogens were present after 7, 14, and 28 days; and (4) appellant's tooth rinse passed on four samples but failed the fifth because the reduction of pathogen was slightly less than 80% of what had been injected and a passing score was a reduction of at least 90%.

Respondent's expert witness testified that: (1) sodium benzoate, the preservative used here, is a very common preservative for oral care products; (2) the tooth rinse had 0.2% of sodium benzoate, which is in the acceptable range and twice the amount appellant had recommended; (3) although the expert witness had seen thousands of test results, he had never seen a test where the preservative was effective against four pathogens and ineffective against the fifth; (4) he would have had the test redone by lab techs or a different testing

organization; and (5) an almost 80% reduction after 28 days was adequate for preservative efficacy.

The district court weighed the parties' and the experts' evidence and found that: (1) while the tooth rinse did not conform to QVC's requirements, respondent did not know that appellant was going to sell the rinse to QVC, that QVC's requirements needed to be addressed, or that "QVC's protocol [was] an industry standard within the meaning of the parties' [a]greement"; (2) appellant did not establish that the QVC standard was an industry standard or that the rinse delivered to and accepted by appellant was a nonconforming good; (3) the experts' testimony about various standards for and ways to measure oral rinse products "was irrelevant to the issue of [appellant's] obligation under the parties [a]greement to pay [respondent] for products manufactured for [appellant] according to [appellant's] specifications"; and (4) even if there was a failure to meet an industry standard, appellant's remedy under the agreement was to have respondent rework the product, which appellant never attempted to do when it became aware of the problem in March 2018. There is no clear error in the district court's findings or in its conclusion that respondent had not provided appellant with nonconforming goods.

3. Award of Damages

A district court's award of damages will not be reversed absent an abuse of discretion. *In re Minnwest Bank Litigation Concerning Real Property*, 873 N.W.2d 135, 141 (Minn. App. 2015). An appellate court will not generally disturb a damages award unless the failure to do so would be shocking or would result in plain injustice. *Id.* at 144. In accord with the agreement, the district court awarded respondent the amounts due under

the invoices with prejudgment interest, attorney fees, costs and disbursements, and interim interest for a total of \$152,154.98.

Appellant argues that this amount should be offset by a total of \$77,729.45, of which \$58,425 is due to the unsold and unsaleable nonconforming goods, \$4,707.50 is due to respondent's failure to provide adequate testing information, \$6,000 is due to reengineering the rinse formula, and \$8,596.95 is due to the unused bottles retained by respondent.³

As to the \$58,425, for the allegedly nonconforming goods, the district court concluded that "[appellant] did not establish . . . that the [tooth] rinse products delivered to and accepted by [appellant] were nonconforming goods." As to the \$6,000 appellant paid a company to reverse engineer the products to give appellant the formula information it wanted, the district court found that respondent had no obligation to give appellant the formula information because it was proprietary: respondent itself had reverse engineered the products to obtain it. Moreover, appellant did not seek the formula information until after it had accepted the products and incurred a debt for them.

As to the \$4,707.50 appellant paid Bureau Veritas to perform the preventative efficacy test, respondent was under no obligation to perform that test and had no knowledge that the test was required by anyone prior to this litigation. The district court noted that QVC's protocol for the test had not been shown to be an industry standard.

³ There is no written district court decision on appellant's requested offsets, but the offsets were discussed at the end of the trial and the district court's denial of them can be inferred from the Order Amending Judgment to Include Costs, Disbursements, Attorney Fees and Interest.

Finally, as to the \$8,596.95 for empty bottles, respondent says they were never mentioned in the pleadings or during the litigation and there has been no testimony relating them to this dispute. Moreover, appellant never asked for the bottles; respondent is now storing them and told appellant at the end of the trial that it was welcome to come and collect them. There is no basis for offsetting the cost of the bottles against the judgment. The district court did not abuse its discretion in awarding damages and rejecting appellant's offset requests.

Affirmed.