STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1098

JanOne Inc., formerly known as Appliance Recycling Centers of America, Inc.,
Appellant,

vs.

Skybridge Americas, Inc.,
Respondent.

Filed August 29, 2022
Affirmed
Smith, Tracy M., Judge
Concurring in part, dissenting in part, Connolly, Judge

Hennepin County District Court
File No. 27-CV-17-1038

Carl E. Christensen, Aaron D. Sampsel, Christensen Law Office PLLC, Minneapolis, Minnesota (for appellant)

Paul W. Chamberlain, Ryan R. Kuhlmann, Chamberlain Law Firm, Wayzata, Minnesota (for respondent)

Considered and decided by Smith, Tracy M., Presiding Judge; Connolly, Judge; and Larkin, Judge.

NONPRECEDENTIAL OPINION

SMITH, TRACY M., Judge

Following a bench trial and post-trial motions in this contract dispute, appellant JanOne, Inc., formerly known as Appliance Recycling Centers of America, Inc. (ARCA), appeals the district court's judgment in favor of respondent Skybridge Americas, Inc.

ARCA argues that the district court erred by determining that (1) ARCA, and not Skybridge, terminated the parties' contract; (2) a 90-day termination provision did not govern Skybridge's suspension of services; (3) ARCA's breach-of-contract claim and its defense to Skybridge's breach-of-contract claim based on Skybridge's routing of calls to its Canada call center failed, and (4) Skybridge was entitled to contract-based attorney fees following a post-trial process. By notice of related appeal, Skybridge argues that the district court erred by denying Skybridge's contract claim to recover a $40,000 credit that it had granted ARCA.

Because the district court did not err by determining that ARCA breached the contract or by awarding attorney fees, and because Skybridge did not sufficiently establish a binding agreement in relation to the $40,000 credit, we affirm.

FACTS

ARCA manages appliance recycling and replacement programs for its utility clients' customers. Skybridge provides call-center services to businesses. Skybridge operates call centers in Greenfield, Minnesota, and in Winnipeg, Canada. On November 22, 2014, the parties executed a Master Services Agreement (MSA) under which Skybridge would provide call-center services for ARCA. The MSA set forth the general terms of the parties' contractual relationship. The parties began with a pilot program. After that program's success, the parties executed a Full Program Statement of Work (SOW) effective January 1, 2015. Both the MSA and the SOW govern the parties' relationship, but, under the MSA, the SOW "shall prevail when in direct conflict with any term" of the MSA.

Under the terms of the contract, Skybridge agreed to certain performance standards. Specifically, Skybridge agreed to answer 80% of calls within 30 seconds, with an abandonment rate of 5% or less. But if call volume exceeded ARCA's projections by 10% on either a daily or monthly basis, then Skybridge was released from these standards. The standards were referred to as the service-level agreements (SLAs). Additionally, Skybridge was required to use the Minnesota call center as "the primary facility" and to use the Canada call center as a "backup/overflow to the Minnesota office." The contract did not define "primary," "backup," or "overflow."

The MSA provided exclusive remedies for any failure to "substantially conform" by Skybridge:

> In the event that any deliverable described in a SOW fails to substantially conform to the specifications for such deliverable set forth in the SOW, and provided ARCA has given [Skybridge] written notice of such non-conformity within thirty (30) days after delivery of the deliverable, as the exclusive remedy, [Skybridge] shall, within a reasonable period of time, and without further payment with respect to such deliverable, correct the non-conformance. Any liability for breach by [Skybridge] shall be limited to the Exclusive Remedies defined herein.

The parties dispute whether the contract required ARCA to pay Skybridge's invoices within 45 or 60 days. Under the MSA, ARCA was to pay Skybridge within 30 days after receipt of each invoice, with interest accruing at 1.5% per month after 30 days, and with full payment due within 60 days. Also, under the MSA, "[i]n the event ARCA fails to pay any amounts when due, [Skybridge] may terminate services without further notice," and ARCA would need to pay all invoices plus interest and attorney fees. Another

provision in the MSA added a five-day notice requirement for a default termination based upon ARCA's failure to pay: "In the event ARCA fails to make payments herein, then [Skybridge] may terminate this Agreement at any time upon five (5) days written notice to ARCA." This default-termination provision followed a general termination provision that allowed for either party to "terminate this Agreement for its own convenience at any time upon sixty (60) days written notice to the other party."

The SOW also addressed the payment of invoices, providing that "[a]ll invoices will be due on a net-45 day basis." The SOW did not include a provision about termination of services due to nonpayment. The SOW included a general termination clause, allowing either party to terminate the agreement "with or without cause," with 90 days' written notice. The district court found that payments were due within 45 days of the invoice.

Throughout 2015, ARCA paid all its invoices to Skybridge within 45 days. In early 2016, ARCA began to make payments after 45 days from receipt of an invoice. Skybridge's January 31, 2016 invoice was not paid within 45 days of receipt. ARCA sought a reduction in the amount owed, though the parties dispute the reasons why. ARCA claimed that it sought a reduction because of allegedly inappropriate billing for training, though the contract allowed for billing for training. Skybridge claimed ARCA asked for leniency due to financial difficulties. In any event, Skybridge agreed to give ARCA a $40,000 credit, and ARCA agreed to pay Skybridge's invoices on time going forward and to extend the contract by six months. Skybridge sent a letter to ARCA to confirm this agreement, but ARCA did not reply. The district court found that Skybridge did not establish that there

was a binding contract regarding the credit or that ARCA was liable to repay Skybridge the credit due to failure to abide by the conditions in the letter.

ARCA continued to make payments more than 45 days after receipt of Skybridge's invoices. In October 2016, after a power outage in Canada caused a service outage at both Skybridge's Minnesota and Canada call centers, ARCA's CEO claimed to be shocked that Skybridge was using the Canada call center in more than a backup role to the Minnesota center. He also claimed that this practice violated the parties' agreement. The parties met later that month. At that meeting, ARCA requested a price reduction, arguing that Skybridge was gaining improper economic advantage by using mostly the Canada call center, allowing it to pay using less-valuable Canadian dollars. Skybridge denied ARCA's request for a $1.2 million credit.

After the meeting, ARCA failed to pay its September 30, 2016 invoice within 45 days. In response, Skybridge sent a notice to ARCA on November 21, 2016. The notice stated: "Per section 3.2 of the MSA 'In the event ARCA fails to pay any amounts when due, SA may terminate services without further notice' . . . Therefore, Skybridge is suspending account servicing due to non-payment effective five days from the date of this notice." Skybridge's CFO, who wrote the notice, testified that he did not intend to terminate the contract but merely sought to prompt ARCA to pay the September invoice. ARCA responded to the notice, claiming that the payment was due within 60 days, not 45 days. ARCA did not make a payment within 45 or 60 days.

In the few days immediately following Skybridge's notice, Skybridge received no more communication from ARCA but experienced an abrupt drop-off in call volume from

ARCA. By November 24, Skybridge was receiving zero calls from ARCA because ARCA had transitioned all calls away from Skybridge to its own internal call center in Minnesota and to an ARCA-subsidiary call center in Las Vegas. ARCA never paid its September, October, and November 2016 invoices and never gave Skybridge any notice of objection to services. The parties dispute which party terminated the contract. The district court determined that ARCA terminated the contract when it decided to stop sending calls to Skybridge; it found that Skybridge did not terminate the contract but rather only threatened to suspend services if not paid and planned to service ARCA over the five-day notice period and to continue the contract if it received payment on the September invoice.

ARCA sued Skybridge in December 2016 for breach of contract and breach of the implied covenant of good faith and fair dealing. Skybridge counterclaimed for ARCA's nonpayment of the three invoices and for a refund of the $40,000 credit, alleging that ARCA breached the contract and the implied covenant of good faith and fair dealing. After the parties filed cross-motions for summary judgment, the district court dismissed ARCA's claims and entered judgment in favor of Skybridge.

ARCA appealed. In *Appliance Recycling Centers of America, Inc. v. Skybridge Americas, Inc.*, No. A18-0355, 2019 WL 1006799 (Minn. App. Mar. 4, 2019) (*ARCA I*), we affirmed in part, reversed in part, and remanded. The *ARCA I* court reversed (1) the district court's dismissal of ARCA's breach-of-contract claim based on Skybridge's use of the Canada versus Minnesota call centers and (2) the district court's grant of summary judgment in favor of Skybridge because there was ambiguity as to whether payment was due within 45 or 60 days. 2019 WL 1006799, at *2-5. The *ARCA I* court affirmed the

district court's grant of summary judgment to Skybridge dismissing ARCA's claim for breach of contract for failure to meet SLA requirements. *Id.* at *6-7.

On remand, Skybridge moved for summary judgment on ARCA's claims relating to Skybridge's use of the Canada call center and the ambiguity of the payment deadline. The district court granted partial summary judgment to Skybridge, dismissing ARCA's breach-of-contract claim based on Skybridge's use of the Canada call center because the district court concluded that it was undisputed that ARCA had failed to provide Skybridge with the required 30-day notice of non-conformity. But the district court permitted ARCA to present evidence of Skybridge's alleged breaches in defense of ARCA's own nonperformance. The district court also concluded that the payment deadline was ambiguous and should be presented to a factfinder, and it reserved ruling on damages until trial.

At an agreed-upon bench trial, ARCA argued that Skybridge breached the contract by threatening to terminate services for nonpayment before the 60-day payment deadline. ARCA also argued that it suffered significant damages due to having to rapidly set up an internal call center after Skybridge's alleged breach. Skybridge argued at trial that ARCA breached the contract by failing to pay the three invoices. Skybridge sought payment of the invoices plus interest, repayment of the $40,000 credit, and attorney fees. As affirmative defenses to Skybridge's damages claims, ARCA argued that Skybridge failed to meet performance-standard requirements (i.e., SLAs) and improperly routed calls to Canada instead of Minnesota, thus excusing ARCA's nonpayment of the invoices.

The district court concluded that ARCA breached the parties' contract and granted judgment in favor of Skybridge, awarding the invoice amounts of $715,276.84 plus interest as well as contractual attorney fees. The district court dismissed ARCA's breach-of-contract claim against Skybridge. In addition, the district court found that the parties did not enter into a binding contract regarding Skybridge's claim for repayment of a $40,000 credit and denied Skybridge's claim for that amount. To determine the amount of attorney fees, the district court ordered that Skybridge submit an application for attorney fees, costs, and expenses "in accordance with the requirements of Minn. R. Gen. Prac. 119." Following the submission of evidence by Skybridge and briefing by the parties, the district court awarded $475,797.32 in attorney fees and expenses to Skybridge.

ARCA moved for amended findings and conclusions or for a new trial on all issues, and Skybridge moved for amended findings and conclusions on the district court's denial of repayment to Skybridge of the $40,000 credit. The district court denied both motions. The district court then awarded supplemental attorney fees in the amount of $48,580 to Skybridge.

ARCA appeals the district court's judgment and award of attorney fees in favor of Skybridge. Skybridge appeals the district court's denial of repayment of the $40,000 credit.

DECISION

In general, appellate courts review the district court's application of law de novo. *Harlow v. State, Dep't of Hum. Servs.*, 883 N.W.2d 561, 568 (Minn. 2016). Appellate courts review a district court's factual findings for clear error, viewing the evidence in the light most favorable to the findings. *Rasmussen v. Two Harbors Fish Co.*, 832 N.W.2d 790,

797 (Minn. 2013). Appellate courts do not "reconcile conflicting evidence," and, on appeal, a district court's factual findings are "given great deference." *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999).

Regarding contracts, "[a]bsent ambiguity, the interpretation of a contract is a question of law." *Roemhildt v. Kristall Dev., Inc.*, 798 N.W.2d 371, 373 (Minn. App. 2011), *rev. denied* (Minn. July 19, 2011). But, if in dispute, "the existence and terms of a contract are questions for the fact finder." *Morrisette v. Harrison Int'l Corp.*, 486 N.W.2d 424, 427 (Minn. 1992); *see Denelsbeck v. Wells Fargo & Co.*, 666 N.W.2d 339, 346 (Minn. 2003) (stating that "the interpretation of an ambiguous contract is a question of fact"). A contract is ambiguous "if it is susceptible to two or more reasonable interpretations." *Dykes v. Sukup Mfg. Co.*, 781 N.W.2d 578, 582 (Minn. 2010).

I. Termination of the Contract

ARCA, in its first challenge to the district court's determination that it breached the parties' contract, argues that the law of the case, based on *ARCA I*, is that Skybridge, not ARCA, terminated the contract and that Skybridge did so due to non-payment. For that reason, ARCA argues, the district court erred by determining that ARCA terminated the contract by moving calls in-house without notice to Skybridge, in breach of the parties' contract.

ARCA relies on this court's previous decision in *ARCA I*, which reversed and remanded for trial "both parties' claims for breach of contract stemming from Skybridge's termination of *services* due to non-payment." 2019 WL 1006799, at *7 (emphasis added). ARCA also cites to *ARCA I*'s statement: "When the September invoice remained unpaid

after 45 days, Skybridge provided ARCA notice on November 21, 2016, that it was terminating its services in five days due to ARCA's failure to pay. In response, ARCA moved all of its customer service call-handling in-house four days after Skybridge's termination notice." *Id.* at *1.

ARCA's arguments are without merit. In *ARCA I*, we did not decide which party terminated the contract. Instead, we reversed and remanded the case for determination of the parties' breach-of-contract claims. *Id.* at *7. Our use of the words "termination" and "terminating" referred to Skybridge's letter that threatened to suspend *services* in five days if ARCA did not pay the September 2016 invoice. We did not decide whether this letter terminated the *contract*.

ARCA also argues that, in *ARCA I*, we "held that ARCA's action of moving the call center function in-house, in response to Skybridge's termination of the contract did not breach or terminate the contract." ARCA relies on a quote from *ARCA I*: "ARCA never sought to terminate the contracts." *Id.* at *1. But ARCA takes this quote out of context. The quoted language immediately follows our discussion of ARCA's concerns in 2015 regarding Skybridge's difficulties in meeting the SLA requirements. *Id.* The statement that "ARCA never sought to terminate the contracts" in context plainly means that ARCA never gave notice of termination in relation to Skybridge's inability in 2015 to meet the SLA requirements, not that ARCA never intended to terminate the contracts in general or in relation to moving the call center in-house. *Id.*

Therefore, the district court was not required by the law-of-the-case doctrine to find that Skybridge, not ARCA, terminated the contract based on our previous ruling in *ARCA I*.

II. Ninety-Day Termination Provision

ARCA next argues that the district court erroneously concluded that ARCA, not Skybridge, breached the parties' contract because the district court wrongly construed the contract "in a manner which ignored the 90-day termination provision." ARCA contends that the 90-day termination provision in the SOW supersedes the MSA provisions allowing for termination of services or the agreement upon ARCA's nonpayment. Thus, according to ARCA, Skybridge materially breached or anticipatorily breached the contract by threatening to suspend services in five days if ARCA did not pay the September invoice instead of giving ARCA 90 days' notice of termination.

The MSA contained two provisions related to ARCA's failure to pay: (1) "In the event ARCA fails to pay any amounts when due, [Skybridge] may terminate services without further notice" and ARCA would need to pay all invoices plus interest and attorney fees; and (2) "In the event ARCA fails to make payments herein, then [Skybridge] may terminate this Agreement at any time upon five (5) days written notice to ARCA." The first provision involved termination of services for nonpayment, which could be done at any time without notice. The second provision dealt with default termination of the agreement, which required five days' notice. This default-termination provision directly followed a general-termination provision that allowed either party to terminate the agreement for any reason with 60 days' notice. The SOW then added a provision that allowed either party to terminate the agreement, "with or without cause," with 90 days' notice.

When reading the MSA and the SOW in tandem, it is unambiguous that the termination-of-services provision and the default-termination provision were separate from

the general-termination provision. *See Roemhildt*, 798 N.W.2d at 373 ("Absent ambiguity, the interpretation of a contract is a question of law."). Thus, the SOW's 90-day general-termination provision superseded the MSA's 60-day general-termination provision, but it did not supersede the MSA's provisions regarding termination of services or default termination. Those latter provisions are distinct from the parties' general right to terminate because both require a specific act—nonpayment—to precede the termination of services or the default termination of the agreement. Therefore, as a matter of law, Skybridge did not have to give ARCA 90 days' notice before terminating services or the agreement due to nonpayment and the district court did not err in so interpreting the contract.

With that legal backdrop, the district court found that "[t]he parties' contractual relationship ended due to ARCA's unilateral decision to stop sending calls to Skybridge, not due to a premature termination of the contract by Skybridge." The district court further found:

> While Skybridge threatened to suspend its services to ARCA if its September invoice was not paid within five days of November 21, 2016, Skybridge remained ready to serve ARCA throughout those five days, and planned to continue to serve ARCA for the remainder of the contractual term, provided it received payment on the overdue September invoice. The Court found credible [Skybridge's chief financial officer's] testimony that Skybridge did not intend by the November 21 notice to terminate the parties' contract, but instead sought to prompt ARCA to pay an overdue invoice.

Based on these findings, the district court determined that ARCA, not Skybridge, improperly terminated the contract. The district court's findings were based on the trial testimony. The findings therefore have support in the record, and the district court did not

clearly err by determining that ARCA terminated the contract. *See Rasmussen*, 832 N.W.2d at 797.

III. Call Routing to Canada Call Center

ARCA next argues that the district court's conclusions that it, and not Skybridge, breached the contract are erroneous because Skybridge materially breached the contract in its routing of calls to its Canada call center, which both entitled ARCA to affirmative relief and precluded Skybridge's claims against ARCA.

Under the SOW, Skybridge was obligated to "develop a program at [its] Greenfield facility in Minnesota as the primary facility and to use the Winnipeg office as backup/overflow to the Minnesota office." Under the exclusive-remedy provision of the MSA:

> [Skybridge] warrants the deliverables specified in a SOW will substantially comply with the specifications for such deliverables set forth in the SOW and that the Services shall be performed with reasonable care in a diligent and professional manner consistent with reasonable commercial standards. In the event that any deliverable described in a SOW fails to substantially conform to the specifications for such deliverable set forth in the SOW, and provided ARCA has given [Skybridge] written notice of such non-conformity within thirty (30) days after delivery of the deliverable, as the *exclusive remedy*, [Skybridge] shall, within a reasonable period of time, and without further payment with respect to such deliverable, correct the non-conformance. *Any liability for breach by [Skybridge] shall be limited to the Exclusive Remedies defined herein*.

(Emphasis added.)

The district court determined that ARCA's breach-of-contract claim and its defense to Skybridge's claim based on Skybridge's call routing failed because ARCA was required

to, but did not, give Skybridge 30 days' written notice of the alleged non-conformity regarding call-agent location. The district court also determined that ARCA failed to establish that Skybridge materially breached the contract in its manner of handling calls.

As to the 30-day notice provision, ARCA contends that the 30-day notice provision in the MSA did not apply to Skybridge's use of the Canada call center. ARCA argues that the MSA provision relates to "deliverables" and the term "deliverable" does not include call routing but instead refers only to the SLAs. ARCA points to *ARCA I*, which stated that the 30-day notice provision "provides the warranty and exclusive remedy for deliverables—i.e. SLAs—detailed in the . . . SOW." 2019 WL 1006799, at *6. ARCA also relies on an online definition of "deliverable" as "something that can be provided or achieved as a result of a process."

ARCA's arguments fail. As to ARCA's reliance on *ARCA I*, though we noted in that case that the exclusive-remedy provision was for "deliverables—i.e. SLAs," we did not determine whether "deliverables" included call routing. Our discussion of the exclusive-remedy provision is nestled in the section of the opinion related to ARCA's claim for breach due to Skybridge's failure to meet the SLAs; we were not discussing call routing. *Id.* at *6. Thus, it was not error for the district court to determine whether the term "deliverable" included call routing. Nor was it error for the district court, in making that determination, to conclude that "deliverable" included call routing. Even using ARCA's definition, "deliverable" is a broad term, and call routing fits easily within it. Thus, the district court did not err when it determined that ARCA was required to but failed to give the required 30-day notice for non-conformance in relation to call routing.

ARCA argues, though, that even if the 30-day notice provision applied to call routing and barred ARCA's breach-of-contract claim against Skybridge, ARCA's failure to give notice did not preclude its affirmative defense to Skybridge's breach-of-contract claim. ARCA observes that the district court determined in an earlier summary-judgment decision that "the notice provision contained in section 8.1 of the MSA applies to . . . ARCA's affirmative claims, and not to ARCA's defenses to performance" and argues that that determination should have remained the law of the case.

We need not determine whether ARCA's failure to give notice precludes ARCA's defense to Skybridge's claim if the defense fails for another reason. Generally, the rescission of a contract is only justified by a material breach or a substantial failure in performance. *Cloverdale Foods of Minn., Inc. v. Pioneer Snacks*, 580 N.W.2d 46, 49 (Minn. App. 1998) (citing *Cut Price Super Mkts. v. Kingpin Foods, Inc.*, 98 N.W.2d 257, 266 (Minn. 1959)). Consistent with these principles, if Skybridge did not materially breach the contract by routing calls to its Canada center, then ARCA's defense to Skybridge's claim fails.

The district found that "ARCA failed to establish that Skybridge breached the contract by providing call agent services to ARCA from both the Greenfield and Winnipeg call centers." The district court noted that there was "no contractual requirement that Skybridge perform any particular amount of call center services at Greenfield, as opposed to Winnipeg" and that "the evidence established that ARCA was well aware throughout the parties' relationship that Skybridge was providing services under the contract from both locations" and yet made no complaint or request to stop. Further, the district court found

that none of ARCA's clients required call services to be performed exclusively in the United States at the time of the contract and that after the parties began working together, Skybridge accommodated ARCA's request that four clients' calls be answered only in the United States. The district court found that "ARCA retained Skybridge to answer customer calls," that "Skybridge answered the calls routed to it" in the months at issue, and that "Skybridge's routing of calls to both of its call centers did not defeat the essential purpose of the parties' contract." It concluded that, "[b]ecause ARCA failed to establish a breach by Skybridge in the way it routed calls to both of its call centers, ARCA was not excused from performing under the contract."

We discern no error in the district court's findings or conclusions. ARCA argues that the provision designating the Minnesota call center as primary and the Canada call center as backup/overflow was a material provision of the contract, citing reasons such as data security, client preferences related to "accents," and "the bad optics of sending jobs offshore." The argument is unconvincing since the contract specifically contemplates that at least some calls would be routed to Canada. Moreover, the district court correctly observed that the contract did not specify the relative amounts of call-center services at the Minnesota and Canada locations. The record supports, and ARCA does not challenge, the district court's finding that Skybridge in fact answered the calls from ARCA's customers during the months at issue. The district court did not err by ruling against ARCA on its call-routing defense to Skybridge's breach-of-contract claim.[1]

[1] ARCA argues in its appellate brief that the district court erred by determining that its "defensive claims" are barred by its failure to provide written notice of non-compliance.

IV. Attorney Fees

ARCA next argues that the district court erred by awarding Skybridge attorney fees when Skybridge did not present evidence of its fees at trial and instead relied on submission of its fees request pursuant to Minn. R. Gen. Prac. 119. Under Minn. R. Gen. Prac. 119, "[i]n any action or proceeding in which an attorney seeks the award . . . of attorneys' fees in the amount of $1,000.00 for the action, or more, application for award or approval of fees shall be made by motion." ARCA argues that, because *United Prairie Bank-Mountain Lake v. Haugen Nutrition & Equipment, LLC* grants a constitutional right to a jury determination of contract-based attorney fees, Skybridge needed to prove up its attorney fees during the trial, not via a rule 119 motion after trial. 813 N.W.2d 49, 51 (Minn. 2012).

Under *United Prairie*, there is a constitutional right to a jury trial for determination of contract-based attorney fees. *Id.* However, in civil cases, the right to a jury trial can be waived where "an intention to do so appears affirmatively or by necessary inference from unequivocal acts or conduct." *301 Clifton Place L.L.C. v. 301 Clifton Place Condo. Ass'n*,

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ARCA is apparently referring to not just its call-routing defensive claim but also its defensive claim that Skybridge failed to satisfy the SLAs. One reason that the district court rejected the SLA-related defensive claim was ARCA's failure to give notice of non-compliance. But, as with the call-routing defensive claim, the district court also rejected the SLA-related defensive claim for lack of evidence of a material breach; it found that "ARCA failed to show any material breach by Skybridge related to the SLAs that would excuse ARCA's obligation to pay Skybridge's . . . invoices." ARCA does not argue that the district court erred by not finding that Skybridge materially breached the contract by failing to comply with the SLAs. And issues that are not argued in briefs are deemed forfeited. *See Woischke v. Stursberg & Fine, Inc.*, 920 N.W.2d 419, 422 n.2 (Minn. 2018); *Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982). Thus, even if the district court did err by applying the 30-day notice requirement to ARCA's SLA-related affirmative defense, that error would be harmless because the district court's determination that Skybridge did not materially breach the contract stands.

783 N.W.2d 551, 562 (Minn. App. 2010) (quotation omitted). "An agreement to a bench trial effectively waives the jury right." *Id.* Further, the "failure to make a timely demand for a jury also constitutes an unequivocal act from which the waiver is a necessary inference." *Id.* (quotation omitted).

ARCA agreed to a bench trial and did not demand a jury trial. Before trial, ARCA argued in its opposition to Skybridge's motion for summary judgment that Skybridge's entitlement to attorney fees was a factual issue for trial. In its later proposed findings of fact, conclusions of law, and order following trial, ARCA proposed a determination that Skybridge breached the contract and proposed a provision that "ARCA may submit an application for its attorney fees . . . in accordance with Minn. Gen. R. Prac. 119." In other words, the proposed order submitted by ARCA contemplated that, if ARCA prevailed on its breach-of-contract claim against Skybridge, the district court would use a rule 119 procedure to award ARCA attorney fees. In its later written closing argument, though, ARCA did not seek attorney fees as damages for its breach-of-contract claim and argued that, if Skybridge prevailed on its contract claim, it could not be awarded costs or fees because it did not introduce evidence as to those damages at trial.

In the district court's order following trial, it concluded that ARCA breached the contract and that Skybridge was entitled to judgment based on the invoice amounts and interest plus contract-based attorney fees and expenses. It ordered that "[w]ithin 10 days of this Order, Skybridge shall submit its application for attorney's fees . . . in accordance with the requirements of Minn. R. Gen. Prac. 119." ARCA then wrote to the district court, requesting a briefing schedule for the attorney-fee issue and stating that the district court

"has broad discretion to enforce or waive procedural requirements related to a motion for attorney fees presented pursuant to General Practice Rule 119." ARCA then argued in its briefing on the attorney-fee issue that Skybridge should be barred from making a post-trial request for attorney fees because ARCA has a constitutional right to a jury trial on the issue and Skybridge should have presented evidence related to attorney fees at the bench trial.

On this record, we see no reversible error in the district court's procedure for determining the amount of attorney fees after concluding that Skybridge was entitled to contract-based fees. ARCA agreed to a bench trial, waiving its right to a jury trial on the amount of fees. ARCA points to no authority requiring reversal when a district court determines the amount of contract-based fees via a contested motion following a bench trial. Moreover, ARCA implicitly agreed with the use of a rule 119 procedure for the prevailing party in its proposed order for the district court and did not object to the procedure until its written closing argument, after both parties had finished their case-in-chief. Finally, both parties had an opportunity to submit evidence and arguments to the district court on the amount of attorney fees, even though it was via a motion. The district court therefore did not err by its awarding contract-based fees as part of the judgment against ARCA.

V. Skybridge's Claim for $40,000 Credit

In a notice of related appeal, Skybridge argues that the district court erred by denying Skybridge's claim to recover a $40,000 conditional credit because the evidence and the court's findings show an offer and acceptance of the credit with documented, undisputed terms, and ARCA failed to abide by those terms.

A claim of breach of contract requires proof of three elements: "(1) the formation of a contract, (2) the performance of conditions precedent by the plaintiff, and (3) the breach of the contract by the defendant." *Thomas B. Olson & Assoc., P.A. v. Leffert, Jay & Polglaze, P.A.*, 756 N.W.2d 907, 918 (Minn. App. 2008), *rev. denied* (Minn. Jan. 20, 2009). Formation of a contract requires an offer, acceptance, and consideration. *Id.* Existence of a contract is generally a question for the factfinder. *Id.* "It is well established that conduct, as well as verbal communication, may constitute acceptance of an offer and that silence may also constitute acceptance where a duty to deny otherwise exists." *Sonneman v. Blue Cross & Blue Shield of Minn.*, 403 N.W.2d 701, 704 (Minn. App. 1987).

Here, the district court found:

> Skybridge agreed to give ARCA a $40,000 credit, spread out over the next four months, and ARCA agreed to pay Skybridge's invoices timely going forward. [Skybridge's chairman] sent a letter to [ARCA's CEO] to confirm his understanding of the parties' agreement. [ARCA] did not reply to the letter or dispute any of its terms. . . . The Court found [Skybridge's chairman's] testimony on the subject . . . to be more credible than [ARCA's CEO's] testimony. [ARCA] did not dispute [Skybridge's] letter outlining the parties' agreement . . . . Nevertheless, the Court does not find that Skybridge established that [Skybridge's chairman's] letter to ARCA constituted a binding contract, or that ARCA was liable to repay Skybridge the entire $40,000 credit for failure to abide by all of the conditions set forth in [Skybridge's chairman's] letter to ARCA.

The agreement additionally included that ARCA would extend the contract by six months. The district court later determined, in its post-trial order, "that Skybridge did not prove an agreement existed between the parties requiring a refund of the credit if, at any point in the future, ARCA were to miss a payment."

The district court did not make explicit findings as to which of the requirements of contract formation—offer, acceptance, and consideration—were not met with respect to repayment of the $40,000 credit. But the district court pointed to evidence that ARCA did not reply to the letter, and it found that there was no agreement regarding a refund of the credit if ARCA were to be late on a payment. Based on our review of the record, the district court did not clearly err by determining that Skybridge did not establish that there was a binding agreement that ARCA would repay the $40,000 credit if, in any future month, it did not timely pay an invoice. The district court therefore did not err by rejecting Skybridge's $40,000 breach-of-contract claim.

Affirmed.

CONNOLLY, Judge (concurring in part, dissenting in part)

I concur in the majority's opinion except for Part V dealing with affirming the district court's determination that Skybridge is not entitled to recover a $40,000 credit. As to that part, I respectfully dissent.

Skybridge argues that the district court erred by denying Skybridge's claim to recover a $40,000 conditional credit because the evidence and the court's findings show an offer and acceptance of the credit with documented undisputed terms and ARCA failed to abide by those terms. I agree.

As the majority points out, a claim of breach of contract requires proof of three elements: "(1) the formation of a contract, (2) the performance of conditions precedent by the plaintiff, and (3) the breach of the contract by the defendant." *Thomas B. Olson & Assoc., P.A. v. Leffert, Jay & Polglaze, P.A.*, 756 N.W.2d 907, 918 (Minn. App. 2008), *rev. denied* (Minn. Jan. 20, 2009). Formation of a contract requires offer, acceptance, and consideration. *Id.* Existence of a contract is generally a question for the fact-finder. *Id.* Additionally, "[i]t is well established that conduct, as well as verbal communication, may constitute acceptance of an offer and that silence may also constitute acceptance where a duty to deny otherwise exists." *Sonneman v. Blue Cross & Blue Shield of Minn.*, 403 N.W.2d 701, 704 (Minn. App. 1987).

The district court made the following findings:

> 60. Regardless of the reason, as a result of the parties' meeting, Skybridge agreed to give ARCA a $40,000 credit, spread out over the next four months, and ARCA agreed to pay Skybridge's invoices timely going forward. Morris sent a letter to Isaac to confirm his understanding of the parties'

> agreement. (*See* Exhibits 92, 104.) Isaac did not reply to the letter or dispute any of its terms. (Day 4 Transcript at 11.)
>
> 61. The Court found Morris's testimony on the subject of the January 2016 invoice to be more credible than Isaac's testimony. Isaac did not dispute Morris' letter outlining the parties' agreement concerning that invoice, and ARCA produced no documentation to substantiate Isaac's claim that the invoice wrongly billed for agent training, or to refute that the contract authorized Skybridge to bill for agent training.

The agreement additionally included that ARCA would extend the contract by six months.

Based on the district court's factual and credibility findings, Skybridge offered the credit, ARCA accepted it through silence and by literally accepting the credit on their invoices, and there was consideration because the credit was worth $40,000, and ARCA would need to extend the contract. Skybridge then complied with the agreement by giving ARCA the $40,000 credit. ARCA then breached the agreement by failing to pay invoices on time and eventually terminating the contract.

Since the district court's findings constitute a binding agreement, we need only determine the amount of damages arising from ARCA's breach of the agreement. A nonbreaching party "may recover those damages that naturally and necessarily result from the alleged breach." *Logan v. Norwest Bank Minn., N.A.*, 603 N.W.2d 659, 663 (Minn. App. 1999). Those damages are generally measured as the amount that will place the nonbreaching party in the same situation as if the contract had been fully performed. *Peters v. Mut. Ben. Life Ins. Co.*, 420 N.W.2d 908, 915 (Minn. App. 1988). The agreement here specifies the amount of damages as the $40,000 credit given to ARCA. Because ARCA breached the agreement, $40,000 should be awarded to Skybridge.

Thus, the district court's conclusion that Skybridge did not establish that there was a binding contract was error and Skybridge should be awarded an additional $40,000. Accordingly, I dissent.