

*This opinion is nonprecedential except as provided by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
A22-1455**

Liberte Construction, LLC,
Appellant,

vs.

Dustin D. Smith,
Respondent,

Wells Fargo Bank, N.A.,
Defendant.

**Filed August 7, 2023
Affirmed
Segal, Chief Judge**

Hennepin County District Court
File No. 27-CV-19-19013

Stephen F. Buterin, Tim L. Droel, Grace F. Jacobson, Droel, PLLC, Bloomington,
Minnesota (for appellant)

Rebecca F. Schiller, Bernick Lifson, P.A., Minneapolis, Minnesota (for respondent)

Considered and decided by Wheelock, Presiding Judge; Segal, Chief Judge; and
Halbrooks, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

NONPRECEDENTIAL OPINION

SEGAL, Chief Judge

In this construction dispute, appellant-contractor argues that the district court erred in determining that respondent-homeowner was entitled to recover on his counterclaim for breach of implied warranty because appellant was prevented by respondent from completing the project without justification. Appellant further argues that the recovery to respondent was erroneous because the cause of action for breach of the implied warranty had not yet accrued and because appellant did not have a chance to cure the defective work. We affirm.

FACTS

On June 8, 2018, appellant Liberte Construction, LLC entered into a contract with respondent Dustin D. Smith to perform construction work on Smith's home, including repairing the roof, siding, and gutters that had hail and wind damage. Liberte informed Smith that the work would be completed by September 8, 2018—approximately 90 days after the date the contract was signed. The contract price was \$62,755.94 and included the following warranty clause:

LIBERTE DISCLAIMS ALL WARRANTIES, EXPRESS OR IMPLIED, INCLUDING THE IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, EXCEPT AS SPECIFICALLY EXPRESSED HEREIN. Liberte warrants that for the one-year period from and after the substantial completion of the Scope of Work, the home improvement shall be free from defects caused by faulty workmanship or defective materials due to noncompliance with building standards. This Agreement and warranty shall not be assigned except by or with the written permission of Liberte.

Smith made a partial payment of \$19,000, and Liberte began work on the home in August 2018.

The work on the home was not completed by September 8, and the owner of Liberte subsequently met with Smith to do a walk-around inspection of the work completed to date. Smith identified issues with the siding and pointed out that some of the roof tiles installed by Liberte were broken. The owner assured Smith that those problems would be fixed. The parties then signed an addendum to the contract in which Liberte also agreed to install new window trim, repaint areas, and install new outdoor lights to be provided by Smith.

In October 2018, the City of Brooklyn Park, where the home is located, conducted its first inspection. The inspection report noted that cardboard shims had been installed on the corners under the new siding and that the cardboard must be removed and replaced with proper shims. On November 30, the city reinspected the property and determined that it failed inspection because no corrections had been made to replace the cardboard with proper shims. A city inspector returned for the third time in January 2019 and noted that the cardboard on the corners had been replaced with proper shims but that a section of siding had become unattached.

After the initial payment of \$19,000, Smith made no further payments on the contract. On February 6, 2019, Liberte filed a mechanic's lien statement asserting that Smith owed \$40,142.29 on the contract.

Liberte returned to Smith's property in the spring of 2019 to do some roof repairs and address the issues identified by the city inspectors. In July 2019, over ten months after

the projected completion date, a city inspector returned to the property for the fourth time. The property once again failed inspection. This time, the city inspector concluded that the siding on the home was installed incorrectly with drywall screws and observed that there was loose siding on one of the corners of the home and front porch. The inspector also noted that there were cardboard shims under the siding on one corner of the home by the vent pipes.

In August 2019, the owner of Liberte sent Smith an email expressing concern about the lack of communication and asking to meet. The two did not meet until November 2019. In the interim, Smith hired a private home inspector to identify issues with the construction. The inspector noted several problems with the roof and siding, among other issues. The private home inspector later testified at trial that he believed the only way to repair the defects in workmanship would be to “take it off and start over.”

After Smith and Liberte’s owner met in November 2019, the owner sent Smith an email outlining the items that needed to be corrected as outlined by the city inspectors. These repairs included replacing the drywall screws and cardboard shims with the proper screws and shim material, and resealing the detached or loose siding. In his email, the owner informed Smith that Liberte would start the repairs that month and asked for a progress payment upon satisfactory completion. Smith, however, refused to allow Liberte to perform further work on his home.

Liberte then amended the mechanic’s lien statement, asserting that \$35,719.18 was due on the contract. That same day, Liberte filed a complaint against Smith to foreclose on its mechanic’s lien, and for breach of contract, unjust enrichment, and quantum meruit.

Smith counterclaimed, asserting as relevant here breaches of contract, statutory warranty, express warranty, and implied warranty. The district court ordered a bifurcated trial with the jury deciding all issues except for the mechanic's lien claim.

After a four-day trial, the case was submitted to the jury and the jury was asked to complete a special verdict form with 15 questions. The form had been agreed upon by the parties.

During the deliberations, the jury submitted a note with the following questions:

How do we ensure that during the verdict reading that it is made clear that the only amount of damages to be awarded is addressed in question 4 of the special verdict form?

How do we ensure that this verdict signifies that any existing contract/invoice/balance due between parties is cancelled/null + void beyond the damages addressed in question 4 of the special verdict form?

How do we ensure that it is clear that any amounts listed in questions 10 + 13 of the special verdict form do not need to be exchanged between parties but simply address the differences between value accepted + value warranted?

The district court responded: "You must read the jury instructions carefully, read the special verdict form carefully, and answer the questions on the special verdict form." The jury then completed its deliberations.

The jury answered the questions on the special verdict form, which we summarize as follows:

Breach of contract by Smith (questions 1–4): the jury found that Smith breached the construction contract with Liberte and that Liberte suffered damages as a result in the amount of \$12,000;

Breach of contract by Liberte (questions 5–7): the jury found that Liberte breached the construction contract with Smith but that Smith suffered \$0 in damages;

Breach of express warranty (questions 8–10): the jury found that Liberte breached an express warranty and that “the difference between the value of the goods, services, or both accepted and the value of the goods, services, or both if they had been as warranted” was \$28,697.75;

Breach of implied warranty (questions 11–13): the jury found that Liberte breached “an implied warranty of fitness for a particular purpose conveyed by Liberte” and that “the difference between the value of the goods, services, or both accepted and the value of the goods, services or both if they had been as warranted” was \$28,697.75;

Substantial completion (question 14): the jury found that Liberte’s work on the project did not “reach ‘substantial completion’”; and

Prevented performance (question 15): the jury found that “Smith hinder[ed], obstruct[ed], or prevent[ed] Liberte . . . from substantially performing or ma[d]e it impossible for Liberte . . . to perform without justification.”

After review of the jury’s answers on the special verdict form, the district court requested posttrial briefs from the parties to address: (1) the interpretation of the jury’s answers to the special verdict questions, including damages awarded; (2) the motion for judgment as a matter of law that Liberte had filed before trial;¹ and (3) the determination of Liberte’s mechanic’s lien foreclosure claim.

Liberte submitted its posttrial brief along with a renewed motion for judgment as a matter of law. Liberte argued that the jury’s verdict must be interpreted as a single award of \$12,000 in damages to Liberte. Liberte maintained that, based on the jury’s questions to the court, it was clear that the jury did not intend to award any damages to Smith. Liberte

¹ The district court had taken Liberte’s initial motion for judgment as a matter of law under advisement, indicating that it would rule on the motion at a later point in the proceedings.

posited that “Smith’s breach of warranty claims are [merely] different formulations of a breach of contract,” and that they are subsumed by the jury’s responses to the breach of contract questions (questions 1-7 on the special verdict form) awarding Liberte \$12,000 and awarding Smith zero dollars in damages. Liberte argued, in the alternative, that the express and implied warranties were not applicable because the jury found that Smith prevented Liberte from completing the work.

Smith argued that he was entitled to a net award of \$45,395.50, representing the sum of the \$28,697.75 the jury provided as damages for breach of express warranty and breach of implied warranty, minus the \$12,000 award to Liberte for breach of contract.

The district court (1) determined that the jury’s responses to the questions on the special verdict form were unambiguous; (2) affirmed the jury’s award to Liberte of \$12,000 for breach of contract; (3) granted Liberte’s motion for judgment as a matter of law as to Smith’s express warranty counterclaim, determining that Smith could not recover damages for breach of express warranty because the jury found that Liberte’s work did not reach substantial completion; (4) determined that Smith was entitled to the jury’s award of \$28,697.75 in damages for Liberte’s breach of implied warranty of fitness for a particular purpose; and (5) quashed Liberte’s mechanic’s lien because the award to Smith of \$28,697.75 exceeded Liberte’s award of \$12,000.

DECISION

Liberte asserts that the district court erred in determining that Smith was entitled to recover on his breach-of-implied-warranty counterclaim. “On appeal from a judgment, this court’s scope of review is whether the evidence is sufficient to support the [district]

court's findings and whether the findings support its conclusions of law." *Dairy Farm Leasing Co. v. Haas Livestock Selling Agency, Inc.*, 458 N.W.2d 417, 418 (Minn. App. 1990). We do not set aside a district court's findings of fact unless clearly erroneous. *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999). But "[w]e review a district court's application of the law de novo." *Harlow v. State, Dep't of Hum. Servs.*, 883 N.W.2d 561, 568 (Minn. 2016).

I. The district court did not err in ruling that Smith was entitled to recover on his counterclaim for breach of the implied warranty of fitness for a particular purpose.

Liberte asserts that the district court erred in ruling that Smith was entitled to recover on his breach-of-implied-warranty counterclaim because "a claim for breach of a construction contract's implied warranty for a particular purpose cannot accrue prior to a project's substantial completion." Liberte posits that denying Smith recovery on his counterclaim would also be consistent with the jury's intent based on the questions they submitted to the district court during deliberations. Liberte, however, fails to provide persuasive authority to support its position and we decline to adopt its argument under the facts presented here.

Minnesota courts have recognized the doctrine of implied warranty of fitness for a particular purpose in the context of construction contracts. *See, e.g., Robertson Lumber Co. v. Stephen Farmers Coop. Elevator Co.*, 143 N.W.2d 622, 625-26 (Minn. 1966). But whether a construction project must be complete or at least substantially complete before a claim for breach of the implied warranty of fitness for a particular purpose can be brought is a novel question. Liberte points to the fact that cases involving an implied warranty in

the construction context have all involved completed construction. Liberte asserts that this demonstrates that completion of the project is a prerequisite to being able to assert a claim for breach of implied warranty. We are not persuaded.

Liberte cites *Robertson* as an example. In *Robertson*, the parties contracted for the construction of a “pole-type” building. *Id.* at 623. During the negotiations for construction of the building, the customer “made known” to the contractor that the building was intended to be used for the storage of 100,000 bushels of grain. *Id.* After completion, the customer proceeded to store 95,000 bushels of grain in the building and it collapsed, giving rise to litigation. *Id.* The district court found that the customer relied on the contractor to furnish a building reasonably fit for the purpose intended, but that the building was only fit to store 75,000 bushes of grain, not 100,000 as the customer had expected. *Id.* at 624. The supreme court liberally construed the doctrine of implied warranty and held that the doctrine of implied warranty of fitness for a particular purpose was applicable. *Id.* at 626. *Robertson* thus involved the application of the implied warranty of fitness for a particular purpose to a completed structure, but nowhere in *Robertson* did the supreme court address, let alone hold, that a cause of action for breach of an implied warranty can only accrue after the construction project is substantially or fully complete. The other cases cited by Liberte are from the courts of other states and England and similarly fail to provide affirmative support for appellant’s argument.

With no persuasive authority cited by Liberte and under the facts presented here, where Liberte had numerous opportunities to fix the identified defects, we decline to impose a requirement that causes of action for breach of implied warranty of fitness for a

particular purpose can be brought only after completion or substantial completion of the project. In so ruling, we note that the question on damages for breach of implied warranty in the verdict form here applied only to the work actually performed by Liberte, not to the completed project. Thus, the measure of damages—the difference in value of the work as performed compared to the value of the work as warranted—was proportionate and did not include damages for work not performed by Liberte.

We also reject Liberte’s argument that the district court abused its discretion in construing the jury’s answers to the questions on the special verdict form. “[A] special verdict form is to be liberally construed to give effect to the intention of the jury and on appellate review it is the court’s responsibility to harmonize all findings if at all possible.” *Dunn v. Nat’l Beverage Corp.*, 745 N.W.2d 549, 555 (Minn. 2008) (quoting *Kelly v. City of Minneapolis*, 598 N.W.2d 657, 662 (Minn. 1999)). As the district court noted, “[t]he test is whether the answers can be reconciled in any reasonable manner consistent with the evidence and its fair inferences.” *Reese v. Henke*, 152 N.W.2d 63, 66 (Minn. 1967); *see also Hauenstein v. Loctite Corp.*, 347 N.W.2d 272, 275 (Minn. 1984) (“If the answers to special verdict questions can be reconciled on *any* theory, the verdict will not be disturbed.”). In rejecting Liberte’s argument concerning the proper interpretation of the jury’s verdict, the district court reasoned that Liberte’s argument seeks to turn this established principle on its head by asking the court “to use the jury note to *create* [an] ambiguity instead of using it to *resolve* an ambiguity that already exists.”

We, like the district court, discern no ambiguity in the jury’s answers to the special verdict form. We conclude that the jury’s award of damages for breach of implied warranty

is supported by the record and is not irreconcilable with the damages award to Liberte for breach of contract. At trial, Smith’s expert—the private home inspector—testified that the work performed was so defective that the only way to properly repair it was to start over. The jury’s special verdict form roughly reflects that viewpoint. The jury’s award of \$12,000 to Liberte for breach of contract, combined with the initial contract payment of \$19,000 made by Smith, meant that Liberte would receive \$31,000 under the contract. The jury then awarded approximately \$29,000 to Smith as the difference in value between the work as warranted and the work as performed, just shy of the \$31,000 total sum for Liberte. The jury essentially awarded Smith an amount so that Smith could hire someone else to start the project over, consistent with the testimony of Smith’s expert. We thus see no basis to alter the district court’s determination on this issue.

As to Liberte’s argument that Smith prevented it from completing the project “without justification,” this issue is subsumed by our conclusion in Liberte’s “substantial completion” argument. Without a ruling that Smith could only sue after the project was substantially complete, the fact that Smith prevented Liberte from completing the project is irrelevant. We thus reject this argument as well.

II. Liberte’s remaining arguments are forfeited because it failed to assert them before the district court.

Finally, Liberte raises two additional arguments on appeal: (1) that Smith’s claim for breach of the implied warranty of fitness for a particular purpose is barred under Minn. Stat. § 541.051 (2022); and (2) that a construction contract’s implied warranty of fitness for a particular purpose does not apply when a contractor is not given an opportunity to

cure its work. We decline to address these arguments because, as Smith argues in his brief, neither argument was asserted before the district court.

Section 541.051 is a statute of limitations provision that, as relevant here, states:

For purposes of determining only when the statute of limitations begins to run pursuant to paragraph (a), a cause of action accrues: . . . for an action for injury to real or personal property, upon discovery of the injury, but in no event does a cause of action accrue earlier than substantial completion, termination, or abandonment of the construction or the improvement to real property.

Minn. Stat. § 541.051, subd. 1(c). Liberte failed to assert any argument relating to Minn. Stat. § 541.051 before the district court. Generally, appellate courts do not consider matters not first presented to or considered by the district court, and we see no reason to depart from that rule here. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988); *Antonson v. Ekvall*, 186 N.W.2d 187, 189 (Minn. 1971) (concluding that an issue was raised too late when it was raised before the district court but only in a motion for a new trial).

Liberte's argument concerning a right to cure suffers a similar fate. Liberte made no argument to the district court concerning a right to cure and cannot now be heard on that issue for the first time on appeal. *See Pitzen v. Nord*, 218 N.W. 891, 891-92 (Minn. 1928) (holding that, "[w]here a case has been tried by the parties, and submitted to the jury by the [district] court without objection," a party is bound by the theories it raised during trial and in pleadings). Moreover, we do not view this as a case where the interests of justice demand a different course of action. It appears from the record that Liberte had the opportunity to fix the defects, but the same types of defects identified by the city inspector at the outset (cardboard shims) were still present when the inspector conducted its fourth

inspection, a full year after the start of the work and ten months after Liberte's projected completion date.

Affirmed.