

*This opinion is nonprecedential except as provided by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
A23-1941**

Oehlerts & Sons Construction,
Respondent,

vs.

Thomas A. Baustian,
Appellant.

**Filed September 16, 2024
Affirmed
Bratvold, Judge
Dissenting, Larkin, Judge**

Rock County District Court
File No. 67-CV-22-44

Travis J. Smith, Smith & Johnson, Slayton, Minnesota (for respondent)

Krystal M. Lynne, Stermer & Sellner, Chtd., Montevideo, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Bratvold, Judge; and Reilly,
Judge.*

NONPRECEDENTIAL OPINION

BRATVOLD, Judge

This case involves two neighbors, both of whom live on farms near Luverne about two miles apart. They sometimes worked for each other. After a bench trial on respondent

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

neighbor's company's breach-of-contract claim for work done on appellant neighbor's house, the district court found for respondent, concluding that there was an enforceable contract and that appellant is liable for breach of contract because he failed to pay respondent for the work.

Appellant challenges the judgment, arguing that no enforceable contract was created for two reasons: (1) the parties "never discussed" the cost of respondent's "services"; and (2) the alleged agreement required appellant to custom farm for respondent for two years, and therefore, the contract was void under the statute of frauds. Because the record supports the district court's findings of fact and the district court did not err in its application of contract law or the statute of frauds, we affirm.

FACTS

In 2019 and 2020, appellant Thomas A. Baustian did custom farming for Kevin Oehlerts. Baustian agreed that Oehlerts could work off his debt for the custom farming by remodeling a then-unoccupied house on Baustian's property. Oehlerts is the owner of respondent company Oehlerts & Sons Construction (the company), which Oehlerts described as doing "[p]retty much anything and everything," including house remodeling.

The company worked on Baustian's house and submitted an invoice to Baustian, who refused to pay. The company then sued Baustian, seeking to foreclose on a mechanic's lien. Baustian moved for summary judgment, and the district court invalidated the

mechanic's lien for failure to comply with the statutory requirements for prelien notice, citing Minn. Stat. § 514.011, subd. 1 (2022).¹

The district court gave leave to amend the complaint, which the company then filed. The amended complaint asserted claims for a mechanic's lien and breach of contract. No equitable claims were asserted. The breach-of-contract claim alleged that the parties orally agreed in January 2021 for the company "to clean and repair the basement" of Baustian's house, that the company presented a bill for labor and materials with a balance of \$26,714 after an offset of \$3,150 for "planting and harvesting expenses" from 2019 and 2020, that Baustian "has not paid anything," and that, therefore, the contract was breached.

After an August 2023 bench trial, the district court entered findings of fact, conclusions of law, and an order for judgment for the company in the amount of \$27,614.² The following summarizes the district court's findings along with the record evidence that facilitates understanding of the issues on appeal. The evidence is viewed in a light favorable to the district court's decision.

Oehlerts and Baustian met at the house on January 8, 2021, to discuss the work. Baustian was concerned about the wet basement in the house. Oehlerts recommended

¹ We cite the most recent version of Minn. Stat. § 501B.17 because it has not been amended in relevant part. *See Interstate Power Co. v. Nobles Cnty. Bd. of Comm'rs*, 617 N.W.2d 566, 575 (Minn. 2000) (stating that, generally, "appellate courts apply the law as it exists at the time they rule on a case"). For the same reason, we also cite the current versions of other statutes cited in this opinion.

² It is unclear from the record why the judgment was entered in this amount. Baustian does not challenge the amount of the judgment on appeal.

installing tiling and a new sump pump. Baustian agreed; the district court found that he authorized Oehlerts “to perform the repairs but stated he did not want to go over \$3,000.”

The district court also found that, when Oehlerts and Baustian met on January 8, the house was not ready for work. Oehlerts’s son, who worked on Baustian’s house, testified that the house was “destroyed.” The district court found that the company “cleaned up the feces and dead rodents, removed the carpet, and moved the personal belongings” before they started the tiling and sump-pump project.

The parties disagreed about how long the tiling and sump-pump project lasted. Oehlerts’s son testified that it took ten days. When asked whether that estimate was accurate, Baustian said, “Nope,” and testified that he “was there” and it took two days. And Baustian disputed that the company cleaned up a mess or moved belongings to do the work. Baustian explained, “I would stop in once in a while every day or every other couple days. They weren’t there every day like his bill says.”

The parties also disagreed about what happened after the company finished the tiling and sump-pump project. Oehlerts testified that he told Baustian they were “at \$3,000” and that Baustian told him to continue by repairing sheetrock in the basement. Baustian denied this conversation occurred and testified that he “was never told it was going to be over budget.” Oehlerts testified that, in later discussions, Baustian added projects, such as buying and staining doors and replacing trim, ceiling tile, and more.

Baustian testified that the agreement was “always [for Oehlerts to] stop at \$3,000.” Baustian, however, testified that, besides the tiling and sump-pump project, he agreed to pay for buying, staining, and installing five doors. Baustian testified that “the five doors

was going to be extra” and that he “figured between 100-150 dollars per door.” He also agreed that he authorized the company to “fix the sheetrock” and told them to “replace” the ceiling tile, even though they did not discuss the price. On the one hand, Baustian testified that he told Oehlerts to “[f]ix whatever you can in the basement for \$3,000.” On the other hand, after Oehlerts installed the doors, which were hollow-core, Baustian testified that he wished that “they would have got the higher-priced ones, it would look nice.”

The district court, which heard the testimony of both Oehlerts and Baustian, found that, after the tiling and sump-pump project was done, Oehlerts told Baustian that they were at the \$3,000 limit and Baustian authorized more work. The district court’s finding credited the company’s witnesses—Oehlerts and his son. The district court explained that, although Baustian “disputes” that Oehlerts told him they had reached the \$3,000 limit,

the Court finds [Oehlerts and his son’s] testimony was credible. Nevertheless, [Baustian] continuously authorized additional projects including the sheetrock replacement, sheetrock texturing, painting, ceiling tile replacement, door and trim replacement, door and trim staining, and upstairs hole repairs. . . . At each stage, [Oehlerts] and [Baustian] discussed what was to be done

The record evidence includes before and after photographs, the company’s daily time records, and material invoices. Oehlerts testified that they started work on the tiling and sump-pump project on January 11 and finished all of the work sometime in early March. According to Oehlerts, when he gave Baustian his invoice, Baustian swore, “[s]tormed out,” and “got in his pickup and floored it down the road.” Baustian similarly

testified that he “was so mad” when he got the invoice. The invoice was received into evidence.

Both Oehlerts and Baustian testified that they did not discuss pricing for the other work done after the \$3,000 limit was reached, and the district court credited this testimony. For example, Baustian testified that he agreed to pay for the replacement and staining of the doors but that he and Oehlerts did not discuss pricing for work done after the tiling and sump pump project was completed. Oehlerts also testified that he did not provide Baustian price estimates for the other work because Baustian knew what things cost from building a home “not that many years before.” Baustian’s testimony established that his new home was built in 2001.

To be clear, the value of the materials and labor was not disputed during district court proceedings. The district court found that the company’s request for \$26,714 “is reasonable” and noted that Baustian did not offer any evidence to contradict the value of the remodeling project.

The district court concluded that Oehlerts and Baustian had a “valid contract” and that, while Baustian “may not have intended to spend more than \$3000 on the project, his objective conduct showed otherwise.” The district court also concluded that Oehlerts performed the contract, that Baustian did not, and that, therefore, Baustian is liable for breach of contract.

Baustian appeals the judgment.

DECISION

We review a district court's decision after a bench trial to determine whether the findings of fact are clearly erroneous, giving "due regard . . . to the opportunity of the trial court to judge the credibility of the witnesses." Minn. R. Civ. P. 52.01. In this context, an appellate court examines the record to see "if there is reasonable evidence" to support the district court's findings. *Rasmussen v. Two Harbors Fish Co.*, 832 N.W.2d 790, 797 (Minn. 2013) (quotation omitted). We "view the evidence in the light most favorable to the verdict." *Id.* To conclude that a factual finding is "clearly erroneous," we must be "left with the definite and firm conviction that a mistake has been made." *Id.* (quotations omitted). A de novo standard of review applies to the district court's application of the law. *Melrose Gates, LLC v. Moua*, 875 N.W.2d 814, 820 (Minn. 2016); *see also Schweich v. Ziegler, Inc.*, 463 N.W.2d 722, 729 (Minn. 1990) (stating that a district court's judgment after a bench-trial verdict is reviewed for errors in its conclusions of law).

An appellate court does not "weigh, reweigh, or inherently reweigh the evidence when applying a clear-error review; that task is best suited to, and therefore is reserved for, the factfinder." *In re Civ. Commitment of Kenney*, 963 N.W.2d 214, 221 (Minn. 2021). "Instead, it is the duty of an appellate court to fully and fairly consider the evidence, but so far only as is necessary to determine beyond question that it reasonably tends to support the findings of the factfinder." *Id.* (quotation omitted). A fact-finder is also in the best position to "evaluate the credibility of witnesses." *In re Civ. Commitment of Ince*, 847 N.W.2d 13, 23-24 (Minn. 2014).

I. The record evidence and relevant caselaw support the district court’s finding that the parties entered into an enforceable contract.

Baustian argues that the district court clearly erred when it found that Oehlerts told Baustian “the project was at \$3,000.00, and [Baustian] authorized an additional \$23,000.00 in improvements” and that “the parties knew and agreed on the necessary essential term of cost of the project.” Baustian also contends that the district court erred in its application of contract law. The company argues that the record evidence supports the district court’s factual findings and that Baustian’s “objective conduct shows that he agreed to additional improvements knowing full well that the cost exceeded the previously agreed upon amount.” The company urges that cost is not an essential element of a contract “as a matter of law” and that, “[b]y authorizing these additional projects without inquiring after their cost, [Baustian] demonstrated that the cost of the additional projects was not an essential element.”

The company also argues that the district court correctly applied the law, citing caselaw affirming judgments for breach of an implied contract. In his reply brief, Baustian contends that the company raises implied contract for the first time on appeal and therefore “is prevented from now arguing this theory.” Baustian’s reply brief cites but does not analyze the implied-contract caselaw the company cites.

A. The company tried this case under a theory of implied contract.

“It is elementary” that, on appeal, a case will be reviewed on “the theory on which it was pleaded and tried” and that a party “cannot for the first time on appeal shift his position.” *Sec. Bank of Pine Island v. Holst*, 215 N.W.2d 61, 62 (Minn. 1974) (quotation

omitted). To determine whether the company asserts implied contract for the first time on appeal, we examine the pleadings and the theory advanced at trial to determine whether the company raised implied contract during district court proceedings. *See id.*

An implied contract is a “true contract.” *Roberge v. Cambridge Co-op. Creamery*, 79 N.W.2d 142, 145 (Minn. 1956). Like other contracts, implied contracts require mutual assent. *Id.* at 145-46. “The question of whether there is a contract to be implied in fact usually is to be determined by the trier of facts as an inference of fact to be drawn from the conduct of the parties.” *Id.* at 146. Mutual assent “may be partly expressed in words and partly implied in fact from acts and circumstances.” *Id.* “The test of contractual formation is an objective one, to be judged by the words and the actions of the parties and not by their subjective mental intent.” *Hill v. Okay Constr. Co.*, 252 N.W.2d 107, 114 (Minn. 1977).

“When an implied contract is relied upon as the basis for legal relief and thus deduced from the circumstances, relationship, and conduct of the parties, it is not expected that the elements of a contract will be as vividly portrayed” *Gryc v. Lewis*, 410 N.W.2d 888, 891 (Minn. App. 1987) (quotation omitted). But the plaintiff retains the burden of establishing “all essential contractual elements.” *Id.* And “the simple fact of benefit without more does not impose contractual liability.” *Id.* at 891-92 (emphasis omitted) (quotation omitted).

We first examine the pleadings and agree with Baustian that the company did not expressly assert an implied contract in its amended complaint. Nor did the company assert an express contract in the amended complaint. The amended complaint asserted breach of an oral contract for “labor and materials to clean and repair the basement of [Baustian’s]

house.” We conclude that the amended complaint gave notice of the essence of an implied-contract claim because the elements are identical for implied and express contracts. *See id.* at 891; *DeRosa v. McKenzie*, 936 N.W.2d 342, 346 (Minn. 2019) (“Minnesota is a notice-pleading state and does not require absolute specificity in pleading, but rather requires only information sufficient to fairly notify the opposing party of the claim against it.” (quotations omitted)). Express- and implied-contract theories differ only in the way the objective manifestation of mutual assent is proved. *Gryc*, 410 N.W.2d at 891; *Bergstedt, Wahlberg, Berquist Assocs. v. Rothchild*, 225 N.W.2d 261, 263 (Minn. 1975) (“[N]o legal distinction can be made in the effect of a promise whether it is expressed in writing, orally, in the acts of the parties, or in a combination of means.”).³

Perhaps the more important question is on what theory the company tried the case to the district court. Oehlerts testified that, after he finished the tiling and sump-pump project, he told Baustian they had reached the \$3,000 limit and that Baustian modified the original contract for \$3,000 by asking for more work, one project at a time. Oehlerts testified that they did not discuss price and that Baustian assented to paying the reasonable value of that work by his conduct and other circumstances. To explain the contract terms, Oehlerts’s testimony repeatedly relied on Baustian’s verbal requests to do more work along with Baustian’s conduct and the circumstances under which Baustian asked Oehlerts to do

³ We observe that the parties did not submit memoranda or legal authority before or after trial citing applicable contract law—whether express or implied. This does not seem unusual for a claim of this amount. *See* Minn. Stat. § 491A.01, subd. 3a(a)(1) (Minn. 2022) (establishing the \$20,000 jurisdictional limit for the informal procedures of conciliation court). The only dispositive motion filed was Baustian’s motion for summary judgment on the mechanic’s-lien claim.

the added work. Oehlerts candidly testified on cross-examination that he “[n]ever really said what the price was.” Baustian “didn’t care,” according to Oehlerts. Oehlerts also testified that Baustian said to “continue on the sheetrock and then every job afterwards [Oehlerts] always asked him and he said keep going.”

Based on the evidence the company offered during the trial, we conclude that it is the same theory that the company’s brief argues on appeal—that an implied contract modified the earlier express contract for \$3,000 of tiling and sump-pump work on the basement. The district court’s written analysis after trial also reflects the same theory. The district court’s decision briefly discusses caselaw establishing the elements of breach of contract. Still, the district court appears to have relied on implied-contract caselaw because it refers to Baustian’s conduct showing his objectively manifested assent to the added work for the reasonable value of the work. Thus, we conclude that the company is not raising a new theory on appeal.

B. The district court did not clearly err in its findings of fact or in its legal analysis.

The evidence supports the district court’s findings, and those findings allow recovery for breach of an implied-in-fact contract under Minnesota law. Our analysis is guided by the Minnesota Supreme Court’s decision in *Roberge*, in which the court affirmed a judgment based on implied contract. 79 N.W.2d at 151. The breach-of-contract action arose after a creamery cooperative in Cambridge opened a bottling plant in Minneapolis and hired Roberge to oversee the new plant. *Id.* at 144-45. The parties had an initial agreement to pay Roberge’s expenses, with the understanding that he would receive a

commission later. *Id.* at 148. The plant failed; Roberge was not paid for his services, and he sued the creamery. *Id.* at 145.

The supreme court noted that, as in an earlier case, the parties began with an express contract, but as “frequently happens,” they left “their original compact behind;” they “conduct[ed] themselves, one performing services or rendering benefit to the other which the latter accepts, [such] that a promise to pay may or even must be implied from their conduct.” *Id.* at 148 (quotation omitted). The supreme court determined that the record included “ample evidence that, regardless of what the original intention of the parties was, as operations continued and difficulties were encountered, the parties so conducted themselves that it must be inferred that defendant expected to pay plaintiff the reasonable value of his services.” *Id.* The supreme court affirmed the district court’s award of damages for Roberge. *Id.* at 151.

Under Minnesota law, an implied contract based on the parties’ conduct may be established, even though some contract terms were unclear—as with Roberge, who was promised a commission and, when that failed, was entitled to “the reasonable value of his services.” *Id.* at 148; *see Bergstedt*, 225 N.W.2d at 263-64 (affirming judgment entered for an architect’s fee under a theory of implied contract where there was no express agreement on the fee and the record included an unsigned fee proposal).

We conclude that this caselaw supports the district court’s decision. The district court found that Baustian objectively manifested his assent to pay the reasonable value for the added work because he “knew or had reason to know what the price of materials and labor was.” The district court cited two findings in support of this conclusion—Baustian’s

experience building a house and that Baustian “frequently visited the house” on which the company was working “and had a continuing opportunity to view the progress.” Indeed, as noted above, Baustian himself referred to being present at the house, knowing Oehlerts was not there every day, and commenting on the added work done by the company. *See Bergstedt*, 225 N.W.2d at 263 (concluding that evidence that “Rothchild initiated contact with plaintiff, was kept informed of its progress, accepted its sketches, suggestions, and plans, and at all times accepted the benefits of plaintiff’s services” supported the finding of an implied contract).

We accept the district court’s crediting of Baustian’s experience building a house. Baustian was asked under cross-examination about his experience using a general contractor to build a house in 2001; Baustian agreed that he was “familiar with construction costs.” His testimony continued:

Q: [W]hat I don’t understand about this is why you thought all the work that was done could be done for \$3,000? How . . . did you reach that conclusion?

A: Well, we were only doing four foot of the bottom of the walls. And sheetrock’s like \$11 a sheet. So, you put in 20 sheets, that’s \$220.

Q: How about his labor in installing all of that?

A: He told me he was giving me a deal on it because we were friends.

Similarly, when Baustian testified about his request for Oehlerts to replace the doors, he said that he “figured” the doors would cost \$100-\$150 each.

The district court found this testimony weighed in favor of finding that Baustian agreed to an implied contract for the added work at reasonable value. Oehlerts testified that Baustian’s experience with construction was why they did not expressly discuss price, and

this experience is part of the “circumstances or acts of the parties” from which the district court could infer Baustian’s objective manifestation of assent. *Roberge*, 79 N.W.2d at 146.

At its core, this is a case about the credibility of Oehlerts and Baustian, and we defer to the district court to decide credibility in a bench trial. Minn. R. Civ. P. 52.01 (stating that “due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses”). The district court credited Oehlerts’s testimony that he told Baustian the \$3,000 was exhausted and, even so, that Baustian repeatedly asked Oehlerts to do more work. It was undisputed that the parties did not discuss the price of the added work. The district court found that Baustian agreed to pay for the reasonable value of that work because Baustian saw the work as it was being done and conceded that he was familiar with construction costs.

In short, the district court found that Baustian agreed to pay for the added work because, even though he “may not have intended to spend more than \$3,000 on the project, his objective conduct showed otherwise.” This finding, along with the district court’s other findings, is supported by the record evidence and aligns with caselaw upholding implied contracts. *Roberge*, 79 N.W.2d at 148-49.

Baustian’s argument that price was an essential term of this contract is not persuasive for three reasons. First, Minnesota has not adopted the rule of law that price is an essential term. Baustian cites one precedential opinion, which we conclude is inapt. In *Poser v. Abel*, this court affirmed a judgment for breach of contract after finding that several documents, when read together, provided “all of the essential terms of the agreement,” including the amount of payment of a commission. 510 N.W.2d 224, 228

(Minn. App. 1994), *rev. denied* (Minn. Feb 24, 1994). In *Poser*, we did not consider an implied contract, and the analysis did not focus on whether price is an essential term of a contract. *Id.* at 224-28. Appellant claimed that the essential term missing from the parties' express contract was "the name of the party who is to receive the commission" and did not argue that price was the missing term. *Id.* at 227. For these reasons, *Poser* does not suggest that price is an essential term of a contract.

And other Minnesota caselaw recognizes that a contract may be affirmed with missing terms if the missing term is not essential or can otherwise be supplied. *See TNT Props., Ltd. v. Tri-Star Devs. LLC*, 677 N.W.2d 94, 101 (Minn. App. 2004) (affirming district court's decision to enforce a settlement agreement despite incomplete and missing terms and stating that a "binding contract can exist despite the parties' failure to agree on a term if the term is not essential or can be supplied"); *Triple B & G, Inc. v. City of Fairmont*, 494 N.W.2d 49, 53 (Minn. App. 1992) (stating that "an agreement should be upheld where, despite some incompleteness and imperfection of expression, the court can reasonably find the parties' intent by applying the words as the parties must have understood them").

Second, under Minnesota law, the "terms and construction of [an implied] contract are questions of fact to be determined by the factfinder." *Bergstedt*, 225 N.W.2d at 263. This implies that what is an essential term of a contract is a question of fact. We will affirm a district court's factual finding as long as it is reasonably supported by record evidence. Minn. R. Civ. P. 52.01; *Kenney*, 963 N.W.2d at 221.

Third, both *Roberge* and *Bergstedt* affirmed monetary judgments based on implied contracts and evidence of the reasonable value of services, even though the record did not show an express agreement about how much the plaintiff would be paid for those services. *Roberge*, 79 N.W.2d at 150 (affirming award for reasonable value of services rendered); *Bergstedt*, 225 N.W.2d at 264 (determining that the record supported the district court’s determination that the architect’s services would “be reimbursed by the measure of its costs plus 25 percent”).

Thus, we conclude that the record evidence and the applicable law support the district court’s determination that a valid contract existed for the tiling and sump-pump project, as well as for the other work done after the \$3,000 limit was reached.

II. The statute of frauds does not apply to the company’s claim for breach of contract.

Baustian argues that the district court erred when it determined that the oral contract between the parties did not violate the statute of frauds. The company contends that Baustian’s brief ignores well-established caselaw on the statute of frauds. We review the application of the statute of frauds de novo. *Simplex Supplies, Inc. v. Abhe & Svoboda, Inc.*, 586 N.W.2d 797, 800 (Minn. App. 1998), *rev. denied* (Minn. Feb. 24, 1999).

Minnesota Statutes section 513.01 (2022) provides that, unless the agreement is in writing, “[n]o action shall be maintained” on any agreement that “by its terms is not to be performed within one year.” Baustian argues that, if there was an enforceable contract, it could not be completed within one year because Oehlerts offered for Baustian to offset the amount he owed by custom farming in 2021 and 2022. The district court rejected this

argument, concluding that “[b]ecause the terms of the agreement did not specifically schedule” the work “to be completed more than a year out, the statute of frauds does not apply.”

The district court’s decision aligns with relevant caselaw. In *Bolander v. Bolander*, this court summarized the relevant test for the statute of frauds as “whether the contract by its terms is *capable* of full performance within a year, not whether such occurrence is likely.” 703 N.W.2d 529, 547 (Minn. App. 2005) (emphasis added). We rejected a statute-of-fraud challenge to an oral agreement to extend an employment contract by two years. *Id.* We reasoned that the two-year term was a “maximum” and that the employment was capable of ending within one year because the employee “could have died, voluntarily departed, or been fired during that time.” *Id.*

Here, the parties’ contract was capable of full performance within one year because—as actually happened—Baustian declined to do custom farming for Oehlerts and work off his debt. Thus, the statute of frauds does not apply to the company’s claim for breach of contract.

Affirmed.

LARKIN, Judge (dissenting)

I respectfully dissent. I would reverse because the record does not support a finding that the parties had a meeting of the minds regarding an essential contract term, specifically, the price of the additional projects that Baustian requested after Oehlerts installed the sump pump and tiling for \$3,000, as the parties had expressly agreed. Because there was no meeting of the minds regarding the price of the additional projects, the district court erred in concluding that the parties had contracted for those projects. Thus, there could be no recovery based on the sole claim tried in district court: breach of contract. I therefore conclude that the judgment is, in essence, an impermissible award of equitable relief.

As to the facts, the district court found that the underlying home-improvement projects were completed in exchange for Baustian's earlier provision of custom-farming services for Oehlerts. As the district court found:

In 2019 and 2020, [Baustian] performed custom planting, combining and grain hauling for [Oehlerts]. As a result of this custom farm work, [Oehlerts] owed [Baustian] \$3,000. Rather than pay [Baustian], the two discussed that [Oehlerts] would do some work on one of [Baustian's] homes at some point. On January 8, 2021, [Oehlerts], [his son], and [Baustian] met and discussed what [Baustian] needed done on his home. [Baustian] told [Oehlerts] that water was coming into the basement which ruined the sheetrock, and [Oehlerts] recommended that tiling and a new sump pump be installed. [Baustian] agreed and authorized [Oehlerts] to perform the repairs but stated he did not want to go over \$3,000.

Based on those facts, the district court correctly found that “[b]ecause there was communication of a specific and definite offer, acceptance, and consideration, a valid

contract was formed.” The parties expressly contracted that Oehlerts would install a sump pump and tiling in Baustian’s property to satisfy Oehlerts’s outstanding \$3,000 debt to Baustian. The district court also found that after completion of the sump pump and tiling installation, Kevin Oehlerts and his son “informed Baustian that they were at the \$3,000 limit.” In other words, at that point in time, both parties had satisfied their obligations under the express contract found by the district court.

But the district court went on to award damages to Oehlerts for the full amount that Oehlerts invoiced for the additional projects, reasoning that Baustian “continuously authorized additional projects” and that “[a]t each stage, [the parties] discussed what was to be done and the parties entered into a series of enforceable agreements.” Although the parties discussed what was to be done at each stage, they never discussed or agreed on the amount that Oehlerts expected to be paid—or that Baustian was willing to pay—for each of the additional projects. The testimony of Kevin Oehlerts and his son indisputably established that other than a price related to replacing and staining basement doors, Oehlerts did not give Baustian a proposed price for any of the additional projects. Indeed, it is undisputed that with the exception of the basement-door project, the parties never discussed the price of any of the additional projects. Despite the absence of such evidence, the district court found that the parties “formed a series of agreements which created a valid contract,” relying on its finding that Baustian “had previously built a new home and knew or had reason to know what the price of materials and labor was.”

In my view, that reasoning was flawed. Although the record supports a finding that Baustian had built a home 20 years earlier and knew or had reason to know the price of

materials and labor associated with the additional repairs to his home, there is no evidence to support a finding that Baustian knew *what Oehlerts would charge* for the additional repairs to Baustian's home. Again, the parties were not strangers to each other. Instead, the underlying improvements were the result of an exchange of services—Oehlerts provided home-improvement services in exchange for Baustian's custom-farming services. The district court's finding that Oehlerts's final invoice for the additional projects "included a credit for future custom farm work in the amount of \$3,150" is evidence of the parties' special relationship. And the findings show that within the context of that special relationship, when the parties intended to set a price for services or to trade services, they did so explicitly. In sum, given the parties' relationship and their willingness to barter instead of paying cash for services, it is not clear that Oehlerts and Baustian intended to agree or did agree to fair-market-value pricing for Oehlerts's services.

Essential Term

Baustian contends that because he and Oehlerts never discussed a price for the additional projects other than the basement-door project, they did not agree on an essential term, and that, therefore, a contract for the additional projects was never formed. "If an alleged contract is so uncertain as to any of its essential terms that it cannot be consummated without new and additional stipulations between the parties, it is not a valid agreement." *Triple B & G, Inc. v. City of Fairmont*, 494 N.W.2d 49, 53 (Minn. App. 1992). "When the parties know that an essential term of their intended transaction has not yet been agreed upon, there is no contract." *Malevich v. Hakola*, 278 N.W.2d 541, 544 (Minn. 1979).

I am not aware of precedential authority holding that price is necessarily an essential term. However, our caselaw has treated price as an essential term of a contract for services.¹ For example, in *Poser v. Abel*, we said that a commission document and counteroffer provided the essential terms of the contract because they included the amount and method of payment of the commission, as well as a portion of the commission arrangement. 510 N.W.2d 224, 228 (Minn. App. 1994).

Oehlerts asserts that price is not an essential term of every service contract and that Baustian's actions show that price was not an essential term of the purported contract for the additional projects. Oehlerts argues that because Baustian requested the additional work without discussing the price, price was not important to Baustian and was therefore not an essential term. But the record does not show that there was no limit to what Baustian was willing to pay. Indeed, he set a limit on what he was willing to pay for the sump pump and tiling: \$3,000. Again, that \$3,000 cap was the same amount that Oehlerts owed Baustian for his farming services. Thus, Baustian capped the amount he was willing to pay for the sump pump and tiling installation at an amount that did not require him to pay Oehlerts *anything* out of pocket. I therefore am not persuaded by Oehlerts's argument that "[b]y authorizing these additional projects without inquiring after their cost, [Baustian] demonstrated that the cost of the additional projects was not an essential element and his agreement to pay the costs of those projects, *whatever they might be*." (Emphasis added.)

¹ In a nonprecedential decision, *Newman v. Newberg*, this court said that "[a] service contract's essential terms include amount of payment." No. A07-1307, 2008 WL 3835502, at *5. Although nonprecedential opinions are not binding, they may be persuasive. See *Dynamic Air, Inc. v. Bloch*, 502 N.W.2d 796, 800 (Minn. App. 1993).

This record does not suggest that money was no object for Baustian or that the difference between the \$3,000 price for the sump pump and tiling—which did not actually require a payment—and the final \$26,714 bill was insignificant to Baustian.

In sum, I conclude that price was an essential term of each one of the “series of agreements” that purportedly “created a valid contract” as found by the district court. The district court did not make a finding or discuss whether price was an essential term in this case. To the extent that identification of an essential term is a finding of fact and the district court impliedly found that price was not an essential term, that finding is not reasonably supported by the evidence as a whole. *See In re Civ. Commitment of Kenney*, 963 N.W.2d 214, 221 (Minn. 2021) (stating that findings are clearly erroneous if they are “manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole” (quotation omitted)). And in the absence of a meeting of the minds on that essential term, there could be no contract for the additional projects.

Contract Implied in Fact

Oehlerts also asserts, for the first time on appeal, that the parties formed a contract implied in fact. An implied-in-fact contract “is in all respects a true contract. It requires a meeting of the minds the same as an express contract.” *Roberge v. Cambridge Co-op. Creamery (Roberge II)*, 79 N.W.2d 142, 145-46 (Minn. 1956) (footnote omitted). The difference between an express contract and an implied-in-fact contract has “no difference in legal effect[] but lies merely in the mode of manifesting assent.” *McArdle v. Williams*, 258 N.W. 818, 820 (Minn. 1935) (quoting Restatement (First) of Contracts § 5 cmt. a (1932)).

“When an implied contract is relied upon as the basis for legal relief and thus deduced from the circumstances, relationship and conduct of the parties, it is not expected that the elements of a contract will be as vividly portrayed” *Gryc v. Lewis*, 410 N.W.2d 888, 891 (Minn. App. 1987) (quotation omitted). But the plaintiff retains the “burden of establishing all essential contractual elements.” *Id.* And “the simple fact of benefit without more does not impose contractual liability.” *Id.* at 891-92 (emphasis omitted) (quotation omitted). “The question of whether there is a contract to be implied in fact usually is to be determined by the trier of facts as an inference of fact to be drawn from the conduct of the parties.” *Roberge II*, 79 N.W.2d at 146.

Baustian argues that Oehlerts did not plead or advance an implied-in-fact theory in the district court and that the issue therefore cannot be raised in this appeal. “A reviewing court must generally consider only those issues that the record shows were presented and considered by the trial court in deciding the matter before it.” *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (quotation omitted). Oehlerts pleaded only a mechanic’s lien action² and breach of contract. Oehlerts did not plead or otherwise assert breach of an implied-in-fact contract. In addition, the district court’s breach-of-contract analysis does not refer to an implied-in-fact theory. I therefore question whether the issue is properly before us on appeal.

² Oehlerts initially brought a mechanic’s lien foreclosure action. The district court dismissed that action for failure to comply with statutory notice provisions. That dismissal is not challenged in this appeal.

Assuming that Oehlerts's implied-in-fact theory is properly before us, it fails on the merits because that theory does not account for the fatal flaw in Oehlerts's breach-of-contract claim: there was no meeting of the minds regarding an essential term of the alleged contract, that is, the price of the additional projects at Baustian's property.

Bergstedt, Wahlberg, Berquist Assocs. v. Rothchild is instructive here. 225 N.W.2d 261 (Minn. 1975). In that case, an architect brought a claim against a property owner to recover the amount due under an alleged contract for architectural services. *Id.* at 262, 263. The architect in *Bergstedt* had provided the property owner with a proposed fee arrangement—in writing—stating that the price of the architectural work to be provided would be “actual costs plus a fee of 25 percent of such costs.” *Id.* at 262. The writing contained a space for the property owner to sign, indicating agreement with the fee arrangement, but the property owner never signed the agreement. *Id.* However, the property owner manifested his assent to the fee arrangement as follows: he regularly communicated with the architect regarding the work the architect was completing on the project; he wrote to the architect indicating that he had reviewed the architect's sketches for the project, agreed with the architect's approach, and made specific suggestions regarding the sketches; he met with the architect at informal progress meetings regarding the nature and scope of the project; he sent the architect a letter after the architect sent bills for the service, requesting that the bill be sent in the name of a particular entity; and he made one \$5,000 payment in response to the billings. *Id.* at 262-63.

The district court in *Bergstedt* found that an implied contract for architectural services existed between the architect and property owner. *Id.* at 261. The supreme court

affirmed, stating that “[i]t is settled law in Minnesota that where the evidence fails to disclose an express agreement, the law may imply a contract from the circumstances or acts of the parties.” *Id.* at 263.

The property owner’s engagement with the architect in *Bergstedt* is similar to Baustian’s engagement with Oehlerts. Baustian requested each of the additional repairs and communicated with Oehlerts as the work progressed. But there is a significant factual difference here: unlike the architect in *Bergstedt*, with the exception of one price related to the additional basement-door project—which was approximately \$500-\$750—Oehlerts never provided Baustian a proposed price for any of the additional projects. Unlike the architect in *Bergstedt*, Oehlerts never told Baustian what it intended to charge Baustian for the additional projects other than the basement-door staining. In addition, unlike the property owner in *Bergstedt*, Baustian clearly communicated an intent to limit the cost of the initial project. The parties in *Bergstedt* discussed cost estimates, “but not in terms of a limitation beyond which the cost could not go.” *Id.* at 262.

In sum, the actions of the property owner in *Bergstedt* were found to support a finding of a contract implied in fact based on the property owner’s actions after the architect communicated the price of the proposed architectural services in writing and asked the property owner to sign off on that price. *Id.* at 262-63. The property owner’s subsequent actions indicated that the property owner assented to the price that the architect had offered. *Id.* at 262-63, 264. Those are not the circumstances here. Baustian could not assent to a price that was never disclosed or discussed. Although I agree that these facts do not support a conclusion that Baustian expected to pay nothing for the additional projects, I cannot

conclude that Baustian's conduct manifested assent to the previously undisclosed price of \$26,714 for the additional projects.

Another example of a manifestation of assent sufficient to support a finding of a contract implied in fact is found in *Krueger v. State Dep't of Highways*, 202 N.W.2d 873 (Minn. 1972). In that case, the supreme court affirmed a workmen's compensation judge's finding that Krueger "had retained her attorney under a contingent-fee agreement of one-third of the sum recovered" on her behalf, reasoning that "Krueger positively testified that she understood, at the time she retained [the attorney], that she would be charged a fee for his services and that she knew that the fee would be one-third of whatever was recovered." *Id.* at 874, 875. The "agreement was one implied in fact, rather than express." *Id.* at 875. The supreme court explained:

The finding of an implied-in-fact agreement rests on the credited testimony that respondent retained her counsel in the knowledge and expectation that she was to pay a fee and that the fee was to be contingent upon the amount of the recovery. A finding that the services were not to be gratuitous is aided by the presumption that services performed by a stranger are intended to be compensated. Although there is no presumption that a fee is to be contingent and in the amount of one-third of a successful recovery, respondent's testimony establishes that she intended to hire her counsel on a contingent-fee basis and that she "knew," presumably from knowledge of the attested prevailing practice in her community, the amount of such contingent fee. *Both client and counsel unequivocally asserted their respective understandings of the fee basis upon which the professional service was to be rendered. Performance and acceptance of service in these circumstances could be found to constitute a manifestation by conduct of that mutual assent upon which a contract is implied in fact.*

Id. at 875-76 (emphasis added).

The same cannot be said in this case. Neither Baustian nor Oehlerts “unequivocally asserted their respective understanding[]” of the fee for Oehlerts’s completion of any project other than the sump pump and tiling and the basement-door staining. *Id.*

I also cannot conclude that *Roberge II* supports the district court’s unstated finding of a contract implied in fact. The underlying pleadings in *Roberge II* alleged an implied contract and unjust enrichment. *Id.* at 145. The supreme court had previously remanded the case “on the ground that, where only an express contract is pleaded, recovery on the theory of implied contract or unjust enrichment cannot be sustained.” *Id.*; see *Roberge v. Cambridge Co-op. Creamery (Roberge I)*, 67 N.W.2d 400, 401 (Minn. 1954) (stating, “recovery cannot be had on the basis of quantum meruit where the complaint alleges only an express contract”). But the supreme court had authorized amendment of the pleadings on remand, which occurred. *Roberge II*, 79 N.W.2d at 145.

Roberge II involved a purported service contract in the employment context. *Id.* The issue presented in *Roberge II* was “whether the evidence sustains the court’s findings that recovery could be had on the theory of an implied contract or on the theory of unjust enrichment.” *Id.* The supreme court noted that “[i]f the evidence sustains a recovery on either theory, there must be an affirmance.” *Id.* The supreme court emphasized that a contract implied in fact “is in all respects a true contract” requiring “a meeting of the minds the same as an express contract” and that it is not a form of equitable relief. *Id.* at 145-46.

The *Roberge II* court concluded that there was “ample evidence that, regardless of what the original intention of the parties was, . . . the parties so conducted themselves that it must be inferred that defendant expected to pay plaintiff the reasonable value of his

services.” *Id.* at 148. The supreme court therefore affirmed the district court’s determination in plaintiff’s favor on the theory of a contract implied in fact and did not determine whether plaintiff’s recovery was also proper on the alternative equitable grounds that plaintiff had pleaded and the district court had found. *Id.* at 145, 151.

However, the supreme court’s decision in *Roberge II* seemingly was influenced by equity. For example, the supreme court stated that *Benedict v. Pfunder* was “of interest” and quoted that decision as follows:

[I]t frequently happens, as on plaintiff’s evidence it may have happened here, that, starting with an express contract, the parties soon and plainly, although tacitly, deliberately leave their original compact behind, and so conduct themselves, one performing services or rendering benefit to the other which the latter accepts, that a promise to pay may or even must be implied from their conduct. That is, their actions rather than their words produce implications from which a new contract appears.

Id. at 148 (quoting *Benedict v. Pfunder*, 237 N.W. 2, 4 (Minn. 1931)).

In *Benedict*, the plaintiff had pleaded two causes of action: an express contract and a contract implied in fact. 237 N.W. at 3. Although the *Benedict* court said that the difference between an express contract and a contract implied in fact “involves no difference in legal effect, but lies merely in the mode of manifesting assent,” the supreme court seemed to conflate the concept of a contract implied in fact with equitable relief. *Id.* at 4 (quotation omitted). The supreme court explained that the plaintiff was entitled “to go to the jury on the issue of implied contract” because plaintiff’s actions were “highly beneficial” to defendant and that

if it could be reasonably concluded that plaintiff was the procuring cause, and that the original contract, expressed in writing, was superseded by another expressed by conduct, that is, if plaintiff performed his services for defendant at the latter's instance and request or with his consent under circumstances implying a promise to pay, *recovery on quantum meruit would necessarily follow*.

Id. at 4-5 (emphasis added). The conflation of a recovery under a contract-implied-in-fact theory and a recovery under an equitable theory also appears in *In re Est. of Beecham*, 378 N.W.2d 800, 803 (Minn. 1985) (stating that the claimant asserted “neither an oral nor a written contract for personal services rendered to her in-laws” and that her claim was “an equitable one based on quantum meruit or contract implied in fact”).

In sum, I recognize that language in *Roberge II*, including its quotation of *Benedict*, supports the idea that a contract implied in fact for the reasonable value of services provided may result if the parties to an express contract—such as the agreement to install a sump pump and tiling in satisfaction of a \$3,000 debt in this case—go beyond the specific terms of the express agreement. But the decisions in those cases have an underlying equitable component that is inherently inconsistent with the notion that a contract implied in fact is not a form of equitable relief—it is a contract like any other.

I therefore conclude that the record does not show a contract implied in fact. Again, Baustian could not have assented, through his conduct, to pay the undisclosed price of \$26,714 for the additional projects. Under the circumstances, Oehlerts may have had a cognizable claim for equitable relief, but it is undisputed that Oehlerts did not include an equitable claim in its pleadings or request equitable relief from the district court. Recovery cannot be had on the basis of equity if the complaint alleges only breach of contract.

Roberge I, 67 N.W.2d at 401. Moreover, we cannot grant an award of equitable relief based on an equitable theory that has never been raised—either here or in the district court. *See Thiele*, 425 N.W.2d at 582. “The function of the court of appeals is limited to identifying errors and then correcting them.” *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988). We are not a court of equity.

It may seem inequitable to deny Oehlerts any recovery for the additional improvements to Baustian’s property. But it also seems inequitable to require Baustian to pay a bill of over \$26,000 when he was never informed that the bill would be that high and he never agreed to that price. Moreover, I cannot overlook the fact that Oehlerts had two non-contract avenues to a potential recovery: a mechanic’s-lien action and an equitable claim. But Oehlerts failed to perfect its mechanic’s lien and did not plead a claim for equitable relief. Allowing what appears to be equitable relief under the guise of contract law in an effort to provide a remedy embodies the adage that bad facts make bad law.

In sum, the record indicates that price was an essential term of the purported contract for additional projects and the evidence does not show that the parties agreed to the price for those projects. Thus, the record does not sustain the district court’s determination that the parties formed a contract for the additional projects. *See Malevich*, 278 N.W.2d at 544 (“When the parties know that an essential term of their intended transaction has not yet been agreed upon, there is no contract.”). Because the parties did not form a contract for the additional projects, I would reverse and remand for entry of judgment in Baustian’s favor on Oehlerts’s breach-of-contract claim.