This opinion is nonprecedential except as provided by Minn.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
A24-1621

Mark Lukens, et al.,
Respondents,

vs.

Snowman Construction, LLC,
Appellant.

Filed August 4, 2025
Affirmed
Cochran, Judge

Blue Earth County District Court
File No. 07-CV-22-713

Natalie R. Walz, David J. McGee, McGee Walz PA, Minneapolis, Minnesota (for respondents)

Ryan R. Dreyer, Fafinski Mark & Johnson, P.A., Eden Prairie, Minnesota (for appellant)

Considered and decided by Cochran, Presiding Judge; Reyes, Judge; and Schmidt, Judge.

NONPRECEDENTIAL OPINION

COCHRAN, Judge

Following a court trial in this construction dispute, the district court entered judgment in favor of respondent-homeowners on their claims and awarded damages. On appeal, appellant-contractor seeks reversal of the judgment, raising several arguments. First, appellant argues that the district court erred in granting relief to respondents because respondents' claims were barred by their failure to comply with the contractual requirement that the parties participate in mediation prior to bringing a lawsuit. Alternatively, appellant argues that respondents' claims were released by the terms of the contract when respondents took occupancy of the home. Additionally, appellant argues that respondents failed to mitigate their damages, that the district court erred by rescinding a valid change order, and the district court erred by dismissing appellant's fraud claim against respondents. We affirm.

FACTS

This appeal involves a dispute regarding a contract between appellant Snowman Construction, LLC and respondents Mark and Pamela Lukens for the construction of a home. The Lukenses brought suit against Snowman, asserting claims for breach of contract and negligence. The matter proceeded to a court trial. The following summarizes the district court's factual findings and is supplemented by record evidence when helpful to understand the issues on appeal.

In August 2020, the Lukenses contracted with Snowman for the construction of a new home in Lindstrom. The parties agreed that the home would be built according to plans and specifications provided for in the contract, subject to any modifications or change orders. Section 1.2 of the contract addresses change orders and provides that "the [Lukenses] may request changes in the work and at [Snowman's] discretion [Snowman] may perform the work" (the change-order provision). Section 1.2 also specifies that change orders "should be in writing and agreed upon by [the parties] prior to completion of [the] work."

The parties executed four change orders related to the home, but only one change order is at issue on appeal. In October 2020, Snowman presented the Lukenses with a change order that included costs for connecting the home's sewer and water systems to the city system. The Lukenses did not request the change order. They thought the contract included this work and did not believe they were responsible for these additional expenses included in the change order. Nevertheless, Pamela Lukens signed the change order because she believed that Snowman would stop working on the project and place a lien on the property if she did not sign. Bradley Snow, the owner of Snowman, stated that the parties discussed the change order, and he acknowledged that he threatened to stop working on the project and put a lien on the property if the Lukenses did not sign the change order.

Section 4.4. of the contract sets forth the parties' agreement related to punch-list items. Section 4.4 provides that the Lukenses would give Snowman a punch list within five working days of substantial completion of the home, or upon notification by Snowman. The contract defines "substantial completion" as "occur[ing] when a certificate of occupancy is issued by the local building official." Upon receiving the initial punch list, Snowman would then have 14 working days to complete the items identified on this list. Section 4.4 provides that the parties would then "agree on a final punch list within ten working days of [the Lukenses'] Occupancy" and that "[a]ny and all items not listed on the final punch list [would] be deemed accepted, and thereafter [] only subject to the New Home Warranty Act."

Section 4.5 of the contract provides that: "Occupancy of the Home by [the Lukenses] shall be deemed to be unconditional acceptance of the Home by [the Lukenses] and shall release [Snowman] from any further obligations" under the contract, except for "completion of Punch List items which could not be completed within the time allowed" and "warranty obligations."

On March 3, 2021, the county issued a certificate of occupancy for the home. The Lukenses closed on the home the following day and moved into the home. On March 7, they submitted a 12-item punch list to Snowman. Snowman returned a copy of the punch list to the Lukenses on March 12 that included a response to each of the 12 items. The 14-working-day deadline to complete the punch list was March 25. However, Snow acknowledged at trial that Snowman did not complete the items on the list by the March 25 deadline.

The contract also addresses the parties' understanding regarding the resolution of disputes. Section 6.6 provides that the parties "shall endeavor to resolve their claims by mediation . . . in accordance with the Construction Industry Mediation Rules of the American Arbitration Association [(the AAA)]" (the dispute-resolution clause). It is uncontested that the parties did not engage in mediation prior to litigation.

Instead, the Lukenses commenced this lawsuit against Snowman in February 2022, asserting claims for breach of contract and negligence. Under the breach-of-contract claim, the Lukenses alleged that Snowman breached the contract by failing to complete substantial construction of the home in a timely manner and by initiating change orders that they did not request. They further claimed that Snowman did not complete the punch-list items on the initial punch list within 14 days and did not work with them to compile a final punch list. As to the negligence claim, the Lukenses contended that

Snowman failed to complete the work in a workmanlike manner. Snowman filed an answer denying the claims and asserting numerous affirmative defenses including failure to mitigate damages. Snowman also brought counterclaims for breach of contract and fraud.

The district court held a two-day bench trial in March 2024. It determined that Snowman breached the contract by charging the Lukenses for change orders that the Lukenses "did not request and had no responsibility for, resulting in large upcharges." As to the punch-list items, the district court found that Snowman did not complete the items on the punch list by the 14-day deadline, and that "[n]o other punch list was provided." It also found that Snowman was negligent in its duty to construct the driveway and install the patio doors in a workmanlike manner. The district court did not make any findings related to Snowman's argument that the Lukenses failed to mitigate their damages related to the patio doors. In reaching these decisions, the district court rejected Snowman's argument, raised in its written closing argument, that the Lukenses' claims were barred because they did not participate in mediation prior to filing the lawsuit. And it further rejected Snowman's argument that the Lukenses were liable for fraudulent misrepresentation and breach of contract. The district court awarded damages to the Lukenses.

Snowman appeals.

DECISION

"On appeal from judgment following a court trial, this court reviews whether the district court's findings were clearly erroneous and whether the district court erred as a matter of law." *In re Distrib. of Att'y's Fees*, 855 N.W.2d 760, 761 (Minn. App. 2014), *aff'd*, 870 N.W.2d 755 (Minn. 2015). To conclude that findings of fact are clearly erroneous, a reviewing court must be "left with a definite and firm conviction that a mistake has been committed." *In re Civ. Commitment of Kenney*, 963 N.W.2d 214, 221 (Minn. 2021) (quotation omitted). In determining whether a finding of fact is clearly erroneous, an appellate court views the evidence in the light most favorable to the district court's findings and examines the record to see if there is reasonable evidence to support the district court's findings. *Id.* This standard is deferential to the district court's findings because the district court is in the best position to observe the witnesses and assess their credibility. Minn. R. Civ. P. 52.01; *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988). Under this standard, an appellate court will not reweigh the evidence or substitute its judgment for that of the district court. *Sefkow*, 427 N.W.2d at 210.

However, contract interpretation presents a question of law, which an appellate court reviews de novo. *Glacier Park Iron Ore Props., LLC v. U.S. Steel Corp.*, 961 N.W.2d 766, 769 (Minn. 2021). The purpose of contract interpretation is to determine and enforce the parties' intent. *Travertine Corp. v. Lexington-Silverwood*, 683 N.W.2d 267, 271 (Minn. 2004). To discern that intent, we look to the language of the contract as a whole. *Trebelhorn v. Agrawal*, 905 N.W.2d 237, 242 (Minn. App. 2017). If the language of the contract is unambiguous, "the plain and ordinary meaning of the contract language controls." *Linn v. BCBSM, Inc.*, 905 N.W.2d 497, 504 (Minn. 2018) (quotation omitted).

On appeal, Snowman asserts that we should reverse the judgment in favor of the Lukenses because: (1) the Lukenses did not pursue mediation prior to commencing this lawsuit; (2) the district court erred in determining that the Lukenses' claims were not barred under sections 4.4 and 4.5 of the contract; (3) the Lukenses are not entitled to damages for the patio doors because they failed to mitigate their damages; (4) the district court erred in determining that Snowman breached the contract by presenting the Lukenses with a change order the Lukenses did not initiate; and (5) Snowman is entitled to relief on its fraud claim. Each argument is addressed in turn.

I. Snowman's mediation argument is forfeited.

Snowman argues that the Lukenses' claims are barred because the contract contemplates that the parties will engage in mediation prior to bringing a lawsuit, which did not occur. The district court concluded that the mediation provision did not bar the claims. Based on our review of the undisputed facts, we conclude that Snowman forfeited this argument by failing to raise the issue of mediation until the end of trial, more than two years after the Lukenses commenced this litigation.[1]

[1] The district court did not address the question of forfeiture. However, an appellate court may affirm on any ground that supports the district court's decision. *See, e.g.*, *Day Masonry v. Indep. Sch. Dist. 347*, 781 N.W.2d 321, 331 (Minn. 2010) (stating that a party may on appeal "stress any sound reason for affirmance" (quotation omitted)). Because we conclude that Snowman forfeited its claim, we do not address the merits of this argument.

"[F]orfeiture is the failure to make the timely assertion of a right . . . ." *State v. Beaulieu*, 859 N.W.2d 275, 278 n.3 (Minn. 2015) (quotation omitted); *see also Leiendecker v. Asian Women United of Minn.*, 895 N.W.2d 623, 631 n.3 (Minn. 2017) (applying *Beaulieu* in the context of civil litigation). Caselaw involving arbitration helps inform our analysis. *See Prod. Credit Ass'n of Worthington v. Spring Water Dairy Farm, Inc.*, 392 N.W.2d 15, 17 (Minn. App. 1986), *aff'd*, 407 N.W.2d 88 (Minn. 1987) (analogizing mediation to arbitration proceedings). The supreme court has held that "a party to a contract containing an arbitration provision will be deemed to have waived any right to arbitration if judicial proceedings based on that contract have been initiated and have not been expeditiously challenged on the grounds that disputes under the contract are to be arbitrated." *Bros. Jurewicz, Inc.*, 296 N.W.2d 422, 428 (Minn. 1980). In that case, the supreme court determined that the complaining party forfeited its right to arbitration because it answered on the merits and participated in litigation for nearly a year without moving the court to stay the proceedings and compel arbitration. *Id.*; *see also Bautch v. Red Owl Stores, Inc.*, 278 N.W.2d 328, 330 (Minn. 1979) (concluding that it was "incumbent" on the responding party to raise the issue of arbitration "immediately in the interests of effective judicial administration"). A party forfeits its right to arbitrate a dispute by answering on the merits and litigating. *Anderson v. Twin City Rapid Transit Co.*, 84 N.W.2d 593, 602-03 (Minn. 1957).[2]

[2] *Brothers Jurewicz* and *Anderson* use the term "waiver" rather than the term "forfeiture" to refer to a party's failure to make a timely assertion of its right to enforce an arbitration clause in a contract. *Bros. Jurewicz*, 296 N.W.2d at 428; *Anderson*, 84 N.W.2d at 602-03;

Because mediation and arbitration are both dispute-resolution alternatives to trial, we apply the supreme court's precedent addressing forfeiture of a right to arbitration to resolve the question of forfeiture before us. *See Peterson v. City of Minneapolis*, 892 N.W.2d 824, 829 (Minn. 2017) (discussing the similarities between mediation and arbitration in that "a 'dispute resolution process' [including arbitration and mediation] includes formal processes capable of providing relief to the complainant"); *see also Black's Law Dictionary* 98 (12th ed. 2024) (defining alternative dispute resolution as a "procedure for settling a dispute by means other than litigation, as by arbitration or mediation"). Here, section 6.6 of the contract provides in relevant part:

> The parties shall endeavor to resolve their claims by mediation which . . . shall be in accordance with the Construction Industry Mediation Rules of the American Arbitration Association currently in effect. Request for mediation shall be filed in writing with the other party to this Contract and the American Arbitration Association.

Assuming without deciding that this provision imposes an obligation on the parties to engage in mediation prior to commencing a lawsuit, we conclude that Snowman forfeited its right to demand mediation by failing to promptly raise the issue after the Lukenses commenced this lawsuit and instead litigating the Lukenses' claims on the merits at trial. It is undisputed that, in its March 2022 answer to the complaint, Snowman did not raise the

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Beaulieu, 859 N.W.2d at 278 n.3 ("We have sometimes used the phrase 'waived . . . appellate review' when discussing a defendant's failure to object to an error in the district court."). *Beaulieu* clarifies that "forfeiture is the failure to make the timely assertion of a right," whereas "waiver is the intentional relinquishment or abandonment of a known right." *Id.* (quotations omitted). Despite the different terms used in *Brothers Jurewicz* and *Anderson*, these cases provide guidance on the issue of forfeiture.

issue of mediation. Nearly two years later, in March 2024, a bench trial was held. In the interim, Snowman did not demand mediation, seek a stay to engage in mediation, or otherwise seek dismissal of the lawsuit on the basis that the dispute must first be mediated. Indeed, Snowman did not raise this issue until its written closing arguments following trial. Because the undisputed facts show that Snowman did not "expeditiously challenge[]" the Lukenses' initiation of the lawsuit and chose to fully litigate the matter instead, *Bros. Jurewicz*, 296 N.W.2d at 428, we conclude that Snowman forfeited any right to enforce the mediation provision.

To persuade us otherwise, Snowman contends that it raised an affirmative defense in its answer that the Lukenses' complaint was "barred by . . . [the Lukenses'] own breach of contract." However, Snowman's answer did not specify that its breach-of-contract defense was based on the mediation clause of the parties' contract. An affirmative defense "must be pleaded specifically." *Rhee v. Golden Home Builders, Inc.*, 617 N.W.2d 618, 621 (Minn. App. 2000). Snowman's pleading did not provide the Lukenses with sufficient notice that the mediation clause was at issue. We therefore reject this argument.

II. Sections 4.4. and 4.5 do not bar the Lukenses' claims.

Snowman next argues that the district court erred when it concluded that the Lukenses' claims were not released by the language of sections 4.4 and 4.5. We disagree.

A. The Lukenses' claims are not barred by section 4.4.

Snowman argues that most of the Lukenses' claims were released under section 4.4, which sets forth the parties' understanding about the completion of unfinished work identified on a punch list. Specifically, this section provides that:

> [The Lukenses] are to give a punch list to [Snowman] within 5 working days after substantial completion, or upon notification by [Snowman]. [Snowman] will have 14 working days to complete this punch list. Thereafter, [the parties] shall agree on a final punch list within 10 working days of [the Lukenses'] Occupancy. Any and all items not listed on the final punch list will be deemed accepted and thereafter are only subject to the New Home Warranty Act.

"A punch list is an enumeration of work items that need to be done in order for the project to be considered fully complete." 3 Philip L. Bruner & Patrick J. O'Connor, Jr., *Bruner & O'Connor on Construction Law* § 8:24, at 65 (2024).

Snowman contends that most of the Lukenses' claims are barred by operation of this clause because they waived any alleged defects that they did not include on the punch list provided to Snowman. The Lukenses respond that their claims are not barred because Snowman failed to complete the items on the initial punch list within 14 working days and did not reach an agreement with them on a final punch list.

We first consider whether completion of the initial punch list within 14 days and the creation of a final punch list was a condition precedent to Snowman's work being accepted under section 4.4. We then address whether the district court erred by determining that the condition precedent was unfulfilled because Snowman did not complete the items on the initial punch list and the parties did not mutually agree to a final punch list. Finally, we consider whether the district court erred by concluding that the Lukenses' claims were not barred under section 4.4.

i. Completion of the items on the initial punch list and the creation of a final punch list was a condition precedent to a waiver of claims.

We begin by analyzing whether the timely completion of the items on the initial punch list and the creation of a final punch list operated as a condition precedent. "A condition precedent is a contract term that calls for the performance of some act or the happening of some event after the contract is entered into, and upon the performance or happening of which the promisor's obligation is made to depend." *Capistrant v. Lifetouch Nat'l Sch. Studios, Inc.*, 916 N.W.2d 23, 27 (Minn. 2018) (quotation omitted); *see also Carl Bolander & Sons, Inc. v. United Stockyards Corp.*, 215 N.W.2d 473, 476 (Minn. 1974) (explaining that a condition precedent is a fact that must occur before the promisor is obligated to perform).

Resolution of this issue requires us to examine the language of section 4.4. "When the intent of the parties can be determined from the writing of the contract, the construction of the instrument is a question of law for the court to resolve, and this court need not defer to the district court's findings." *Alpha Real Est. Co. of Rochester v. Delta Dental Plan of Minn.*, 671 N.W.2d 213, 221 (Minn. App. 2003) (quotation omitted), *rev. denied* (Minn. Jan. 20, 2004). "If a contract is unambiguous, the contract language must be given its plain and ordinary meaning, and shall be enforced by courts even if the result is harsh." *Denelsbeck v. Wells Fargo & Co.*, 666 N.W.2d 339, 346-47 (Minn. 2003) (quotation omitted).

At issue is whether Snowman's completion of the items on the initial punch list and the creation of a final punch list under section 4.4 is a condition precedent under the parties' contract. We conclude that it is. As the district court noted, section 4.4 provides that the Lukenses were to give an initial punch list to Snowman within five working days of substantial completion, and that Snowman would then have 14 working days to complete the items on that list. Section 4.4 further provides that the parties "shall agree on a final punch list within [ten] working days of" the Lukenses occupying the home and that "[a]ny and all items not listed on the final punch list will be deemed accepted." The plain language of section 4.4 unambiguously directs that completion of the items on the initial punch list and the parties' creation and agreement on "a final punch list" is a condition precedent to the Lukenses's "deemed accept[ance]" of all work by Snowman other than items on that list, subject only to the New Home Warranty Act.

ii. The condition precedent was not fulfilled.

We next consider whether the condition precedent was met. The district court determined that Snowman did not complete the items on the initial punch list and that the parties then did not agree to a final punch list. As noted above, we review the district court's factual findings for clear error. *In re Distrib. of Att'y's Fees*, 855 N.W.2d at 761. In conducting clear-error review, "we examine the record to see if there is reasonable evidence in the record to support the [district] court's findings." *Rasmussen v. Two Harbors Fish Co.*, 832 N.W.2d 790, 797 (Minn. 2013) (quotation omitted). We determine that the district court's factual findings are not clearly erroneous.

First, the record supports the finding that the items identified on the initial punch list were not completed. Snowman received the initial punch list on March 7, which was within five working days of substantial completion. The contract required Snowman to complete the items on the list within 14 working days, or March 25. Bradley Snow admitted at trial that Snowman failed to complete the items on the initial punch list by the agreed-upon 14-day deadline. The record supports the district court's findings that Snowman did not complete the items on the initial punch list within the timeframe specified in section 4.4 of the contract.

The record likewise supports the district court's finding that the parties did not mutually agree upon a final punch list within ten days of the Lukenses occupying the home, as required by section 4.4. The final punch list was due on March 19, ten working days from the date the Lukenses occupied the home. But as the district court noted, "[n]o other punch list was produced or agreed upon," other than the initial March 7 list. Snow agreed at trial that he could not produce a final punch list signed by both parties.

Instead, Snowman points to a version of the initial punch list that has an additional column added by Snowman that responds to each of the 12 items identified in the initial list. This document is dated March 12. Snowman suggests that its March 12 responses constituted the final punch list. The district court rejected this argument, finding that there was an "absence of evidence" of a final punch list agreed upon by both parties. And on appeal, Snowman bears the burden of showing that the district court erred. *See Leininger v. Anderson*, 255 N.W.2d 22, 26 (Minn. 1977) (noting that the appellant has a "heavy" burden to show that the district court's factual findings are clearly erroneous or that its legal conclusions are unsupported). Because there is no evidence in the record that the parties mutually agreed on the responses included by Snowman on the initial punch list or that they intended the initial punch list with those responses to constitute a final punch list, Snowman has not met its burden of showing that the district court clearly erred in its factual findings.

In sum, the plain language of section 4.4 requires Snowman to complete the items on the initial punch list within 14 days and contemplates that the parties would agree to a final punch list within ten days of occupancy. The district court found that this condition precedent was not met because Snowman did not complete the items on the initial punch list within 14 days and the parties did not mutually agree to a final punch list. Because the record supports these determinations, they are not clearly erroneous.

iii. The Lukenses are not barred from bringing claims for alleged defects not included on a final punch list.

Having concluded that the district court did not err in its determination that the condition precedent in section 4.4 was not met, we turn to whether the Lukenses are barred by section 4.4 from bringing claims for alleged defects that were not included on a final punch list.

"Under general contract law, unfulfilled conditions prevent enforcement of a contract." *Crossroads Church of Prior Lake MN v. County of Dakota*, 800 N.W.2d 608, 615 (Minn. 2011); *see also Nat'l City Bank of Minneapolis v. St. Paul Fire & Marine Ins. Co.*, 447 N.W.2d 171, 178 (Minn. 1989) ("[N]o legal principle permits violation of a contract condition to be completely ignored."). Thus, "if the event required by the condition does not occur, there is no breach of contract." *Capistrant*, 916 N.W.2d at 27 (quotation omitted).

Here, Snowman argues that section 4.4 bars most of the Lukenses' claims because the Lukenses did not include alleged defects on a final punch list. The district court concluded that because Snowman did not fulfill the condition precedent to complete the items on the initial punch list within 14 days or agree to a final punch list, none of Lukenses' claims were barred by section 4.4. We agree.

The final-punch-list requirement in section 4.4 creates a condition precedent, as discussed above. Section 4.4 contemplates a two-step process: first, that the Lukenses would submit an initial punch list within five working days of occupying the home and that Snowman would complete the items on the list within 14 working days; and second, that the parties would agree on a final punch list within ten working days of the Lukenses moving into the home. The record supports the district court's finding that only one punch list existed—the initial punch list submitted on March 7 and returned with responses on March 12. Snowman did not timely complete the items on this list. Nor is there evidence that the Lukenses and Snowman mutually agreed upon a final punch list. The district court did not err in its determination that, because the condition precedent was unfulfilled, Snowman could not rely on section 4.4 as a bar to the Lukenses' claims.

B. The Lukenses' claims are not barred by section 4.5.

Snowman next argues that the Lukenses waived their claims under section 4.5 by taking occupancy of the home. This section provides that:

> Occupancy of the Home by [the Lukenses] shall be deemed to be unconditional acceptance of the Home by [the Lukenses] and shall release [Snowman] from any further obligations pursuant to this agreement EXCEPT 1) completion of Punch

> List items which could not be completed within the time allowed, and, 2) warranty obligations.

The district court determined that section 4.5 did not bar the Lukenses' claims for breach of contract or negligence because it is an invalid exculpatory clause. We agree.

"An 'exculpatory clause' is '[a] contractual provision relieving a party from liability resulting from a negligent or wrongful act.'" *Dewitt v. London Rd. Rental Ctr., Inc.*, 910 N.W.2d 412, 420 n.7 (Minn. 2018) (quoting *Black's Law Dictionary* 687-88 (10th ed. 2014)); *see also Black's Law Dictionary* 710 (12th ed. 2024) (same definition). These clauses are generally disfavored in the law because they exonerate a party from liability. *Justice v. Marvel, LLC*, 979 N.W.2d 894, 898 (Minn. 2022). Exculpatory clauses are strictly construed. *Id.* "Under strict construction, contractual provisions that purport to release the benefited party from liability for intentional, willful or wanton acts are void and unenforceable." *Lund v. Calhoun Orange, Inc.*, 20 N.W.3d 871, 876 (Minn. 2025) (quotation omitted).[3] "But parties to a contract may, without violation of public policy, protect themselves against liability resulting from their own negligence." *Id.* (quotation omitted). To do so, the contractual provision "must use specific, express language that clearly and unequivocally states the contracting parties' intent, *regardless* of whether the provision is so broad that it necessarily includes the released party's own negligence." *Justice*, 979 N.W.2d at 901-02 (emphasis added) (quotation omitted). In cases of doubt, exculpatory clauses are strictly construed against the benefited party. *Id.* at 898.

[3] Nonprecedential opinions are not binding authority but may be cited for their persuasive value. Minn. R. Civ. App. P. 136.01, subd. 1(c).

The supreme court's decision in *Justice* is instructive. In *Justice*, the complaining party signed a waiver containing a liability release in which the party agreed to "release and hold harmless" the defendant "from and against any and all claims, injuries, liabilities or damages" arising from the activity. *Id.* at 896. The supreme court determined that the waiver's exculpatory clause seeking to release the defendant from "any and all claims" did not "fairly apprise the parties in clear and unequivocal language" that the party signing the waiver was releasing the defendant from its own acts and omissions. *Id.* at 902 (quotations omitted). The supreme court emphasized that the waiver did not state that the signing party "was releasing [the defendant] for [the defendant's] own conduct, whether negligent or intentional." *Id.* Consequently, the supreme court held that the waiver, strictly construed, did not release the defendant from its own negligence. *Id.* at 902-03.

In the present case, section 4.5 is akin to the waiver at issue in *Justice*. Snowman's waiver includes a statement that the Lukenses "shall release [Snowman] from any further obligations" except "completion of [p]unch [l]ist items" and "warranty obligations." This waiver did not "fairly apprise" the Lukenses "in clear and unequivocal language" that they were releasing Snowman from its own negligent or intentional conduct. *See id.* at 902 (quotations omitted). Therefore, we agree with the district court that section 4.5 constitutes an invalid exculpatory clause because it "makes no exceptions for willful or wonton recklessness, intentional torts, or [Snowman's] own negligence."

We further conclude, like the district court, that section 4.5 is an invalid exculpatory clause because it is ambiguous. An exculpatory clause is unenforceable if it is ambiguous as to scope. *Justice*, 979 N.W.2d at 899. "An exculpatory clause is ambiguous when it is susceptible to more than one reasonable construction." *Beehner v. Cragun Corp.*, 636 N.W.2d 821, 827 (Minn. App. 2001), *rev. denied* (Minn. Feb. 28, 2002).

As noted above, section 4.5 contains an exception from its release of liability for "[p]unch [l]ist items which could not be completed within the time allowed." The district court found that this clause was ambiguous because it did not "identify which punch list" was referenced in the provision. Again, we agree. The contract identifies two punch lists: an initial punch list and a final punch list. The initial punch list provided a deadline for the completion of work, which was within 14 working days of receiving the list from the Lukenses. But the contract did not articulate a deadline for the completion of any items identified in the final punch list. And section 4.5 does not clarify which punch list is being referenced—the initial list or the final list. Moreover, if we were to assume that "time allowed" referred *only* to the first punch list, then the requirement for a final punch list would become meaningless. In other words, if section 4.5 absolved Snowman of liability for defects not stated in the initial list, then there would be no reason for the parties to create a final list. But it is not clear that section 4.5 refers to the final punch list because the contract does not expressly specify a time for completion of items on the final punch list. When an exculpatory clause is ambiguous in scope—as here—then it "will not be enforced." *Justice*, 979 N.W.2d at 899. Given the ambiguity as to the scope of the purported release in section 4.5, we agree with the district court that the ambiguity provides an additional basis for concluding that section 4.5 does not bar the Lukenses' claims.

Snowman asks us to conclude that section 4.5 is not an invalid exculpatory clause because the release language includes an exception for punch-list items and an exception for warranty obligations. But Snowman provides no support for its contention that the exceptions to the exculpatory clause somehow cure the ambiguity or "fairly apprises" the Lukenses "in clear and unequivocal language" that Snowman was being released from its own negligent or intentional conduct. Instead, Snowman argues that the supreme court's decision in *Justice* is not binding on the issue before us because *Justice* was not decided until 2022—two years after the contract between Snowman and the Lukenses was signed. This argument is unpersuasive. Minnesota has long recognized that exculpatory clauses must be "strictly construed against the benefited party." *Schlobohm v. Spa Petite, Inc.*, 326 N.W.2d 920, 923 (Minn. 1982). Applying that principle here, we construe section 4.5 in favor of the Lukenses and conclude that section 4.5 is an invalid exculpatory clause.

III. Snowman's mitigation-of-damages argument does not warrant reversal.

Snowman argues that the district court's decision to award damages to the Lukenses related to Snowman's installation of patio doors should be reversed because the Lukenses failed to mitigate their damages. "It is a well-settled principle of contract law that a nonbreaching party is duty-bound to use reasonable diligence to mitigate damages." *Deutz-Allis Credit Corp. v. Jensen*, 458 N.W.2d 163, 166 (Minn. App. 1990). If the nonbreaching party fails to mitigate its damages, it is not entitled to any damages that could have been avoided through reasonable mitigation. *Lanesboro Produce & Hatchery Co. v. Forthun*, 16 N.W.2d 326, 328 (Minn. 1944). Reasonableness is a question of fact left to the fact-finder, *Larson v. Urb. Unit Corp.*, 360 N.W.2d 451, 452 (Minn. App. 1985), while duty is a question of law reviewed de novo, *DeRosier v. Utility Systems of America, Inc.*, 780 N.W.2d 1, 6 (Minn. App. 2010).

At trial, the Lukenses testified that the patio doors were faulty and not installed properly, and that Snowman failed to remedy the defect adequately. The Lukenses paid for the installation of new patio doors and blinds. An expert retained by the Lukenses testified that the door frame was "bowed downward in the center," which was inconsistent with Minnesota construction standards. The expert opined that this was not the result of a manufacturing defect. The expert further stated that the patio doors could not be fixed due to their distortion. The district court found that Snowman "had a duty to install working doors into the property," but "failed to correct the issue" until after the lawsuit was commenced about ten months later. The district court expressly found that the testimony offered by the Lukenses' expert was credible. Based on the evidence and the credibility determination, the district court found that Snowman breached its duty to install the patio doors "in a reasonably good and workmanlike manner" and awarded damages.

On appeal, Snowman argues that the district court erred in awarding damages to the Lukenses related to the patio doors because the Lukenses "had a duty to mitigate their alleged damages and have the patio doors reinstalled correctly." Snowman claims that the property did not need new patio doors or blinds. This argument is not persuasive.

Although the nonbreaching party has an affirmative duty to mitigate damages, the breaching party—here, Snowman—bears the burden of showing that damages could have been reasonably mitigated. *Lanesboro Produce & Hatchery Co.*, 16 N.W.2d at 328 ("[I]t is also well established that in the case of a breach of contract the burden of proof is upon the defendant to show that damages were or could have been mitigated by reasonable diligence."). Snowman has not satisfied that burden. Snowman did not present any evidence to support its contention that the Lukenses could have reasonably reinstalled the doors rather than replace them. Rather, the record reflects the Lukenses' expert testified that the doors were warped and could not be reinstalled. The district court credited this unrebutted testimony. Snowman has not sustained its burden of showing that the Lukenses failed to mitigate their damages with reasonable diligence. We therefore discern no error in the district court's determination.

IV. The district court did not err in its determination that the change order for the sewer and water connection was not a valid modification of the contract.

Snowman argues that the district court improperly rescinded the change order for sewer and water connection and erred by requiring Snowman to refund the amount paid by the Lukenses for that work.[4] In response, the Lukenses argue that the district court did not rescind the change order, but rather found that the change order was not a proper modification of the parties' contract. We agree with the Lukenses.

"Rescission is the unmaking or abrogation of a contract." *Graves v. Wayman*, 859 N.W.2d 791, 799 (Minn. 2015) (quotations omitted). Here, however, the district court did not "unmake" the change order related to sewer and water connections. Rather, it found that the change order was not valid. The district court explained that the contract did not permit Snowman to use a change order to "require [the Lukenses] to pay for a cost that [Snowman] failed to include in the [c]ontract." We discern no error in this decision.

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[4] The change order at issue covered (1) sewer and water connection to the City of Lindstrom and (2) excavation. Only the sewer and water connection is at issue on appeal.

The contract includes a provision governing change orders. It specifies that, "[w]ithout invalidating this contract, [the Lukenses] may request changes in the work and at [Snowman's] discretion [Snowman] may perform the work. Changes or overages to the home should be in writing and agreed upon by [the parties] prior to completion of said work." The provision unambiguously authorized the Lukenses to initiate change orders, but did not grant this same allowance to Snowman. Nevertheless, Bradley Snow testified that he presented the Lukenses with the change order. The Lukenses did not initiate this change order because they believed this work was included in the original contract. The district court agreed, determining that "[t]he [c]ontract does not require [the Lukenses] warrant this additional work of bringing the utilities into the property." The plain language of the contract, coupled with the testimony showing that Snowman—and not the Lukenses—requested the change order, supports the district court's determination that the change order was not a valid modification of the contract.

We further note that Snowman did not present the Lukenses with the change order until after the work was completed. The contract anticipated that change orders "should be . . . agreed upon by [the parties] prior to completion of said work." The district court found that Snowman did not give the Lukenses the change order until "months after the two items on the [change order] were already completed." The record supports this finding. Pamela Lukens testified that she received the change order only after the work had been completed, and became aware of the cost of the items only at that time. We recognize that the expectation that the change order "should be . . . agreed upon . . . prior to completion of [the] work" was not mandatory. *See State v. Jacobs (In re Jacobs)*, 802 N.W.2d 748, 754 (Minn. 2011) (explaining that "should" is a permissive term (quotation omitted)). However, it lends further support to the district court's determination that Snowman's attempt to modify the contract through the change order was improper.

In sum, the district court did not err when it determined that the change order was invalid or when it ordered Snowman to refund to the Lukenses the amount that they paid for sewer and water connection under the change order.[5]

V. Snowman is not entitled to relief on its fraud claim.

Snowman argues that the district court erred by rejecting its fraud claim. "[P]arties pleading fraud must meet a heightened pleading standard" under Minnesota Rule of Civil Procedure 9.02. *Hardin Cnty. Sav. Bank v. Hous. & Redevelopment Auth.*, 821 N.W.2d 184, 191 (Minn. 2012). Rule 9.02 provides that, "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Minn. R. Civ. P. 9.02. The party claiming fraud must identify "the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what [they] obtained thereby." *Angeles v. Medtronic, Inc.*, 863 N.W.2d 404, 422 (Minn. 2015) (quotation omitted).

Snowman raised a counterclaim in its answer asserting that the Lukenses committed fraud. The district court rejected this argument, determining that Snowman failed to

[5] The parties raise additional arguments, including: (1) whether the change order was invalid for lack of consideration; and (2) whether the district court erred by finding that the change order was unenforceable because Snowman threatened to leave the project and file a lien on the property unless the Lukenses signed the change order. We need not reach these issues.

support its claim. On appeal, Snowman argues that the district court erred by dismissing its fraud claim because the Lukenses admitted at trial that they did not intend to pay Snowman for the items in the change order. This argument lacks merit.

In its answer, Snowman asserted a counterclaim for fraud on the ground that the Lukenses promised to release escrow funds to Snowman if Snowman completed certain work items. On appeal, however, Snowman now asserts that the Lukenses committed fraud because they did not intend to pay Snowman for the expenses identified in the change order. Snowman did not put the Lukenses on notice that it had altered its fraud claim to focus on the change order, rather than the escrowed funds. And "[i]t is an elementary principle of appellate procedure that a party may not raise an issue or argument for the first time on appeal and thereby seek appellate relief on an issue that was not litigated in the district court." *Doe 175 by Doe 175 v. Columbia Heights Sch. Dist., ISD No. 13*, 842 N.W.2d 38, 42 (Minn. App. 2014). For these reasons, we reject Snowman's argument that the district court erred when it dismissed Snowman's fraud claim.

Affirmed.