STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0199

Wat Lao Sirithammaram, Inc., et al.,
Respondents,

vs.

Mark Vinath Saythong, et al.,
Appellants.

Filed February 1, 2021
Affirmed
Florey, Judge

Washington County District Court
File No. 82-CV-18-1280

Kay Nord Hunt, Lommen Abdo, PA, Minneapolis, Minnesota; and

Jeffrey K. Priest, Priest Law Firm, Eagan, Minnesota (for respondents)

Mark A. Olson, Olson Law Office, Burnsville, Minnesota (for appellants)

Considered and decided by Florey, Presiding Judge; Segal, Chief Judge; and Ross, Judge.

NONPRECEDENTIAL OPINION

FLOREY, Judge

On appeal arising from a dispute over control of a religious nonprofit corporation, appellants assert that the district court erred by (1) denying their motion for a continuance of trial following a change in counsel; (2) making a number of erroneous findings of fact and conclusions of law following a bench trial; (3) failing to consider additional defenses

raised in pleadings and other proceedings; and (4) denying their posttrial motions. Appellants also assert that respondents' claims are barred by the doctrines of res judicata, collateral estoppel, actual and apparent authority, and laches. We affirm.

FACTS

Wat Lao Sirithamaram (Wat Lao or the corporation), originally named Lao Temple & Vipassana Center for Minnesota, operates as a Buddhist temple. Three original incorporators formed Wat Lao as a nonprofit corporation in August 2010: respondent Christina Vilay, respondent Thongdee Pongmalee, and Syfong Kongkeo.[1] Appellants are members of the temple congregation who claim to be the legitimate board of directors of Wat Lao. Respondents' position (and the determination made by the district court), is that respondents—not appellants—are the duly authorized directors.

Wat Lao's original articles of incorporation are a one-page form document that lists only the three incorporators' names and contact information as well as the name of the registered agent; there are no provisions providing for voting members or a board of directors. These original articles were filed with the Secretary of State. In December 2011, Vilay attempted to amend these articles with additional provisions (the first amended articles) providing for the corporation's charitable and religious purpose in order to meet the Internal Revenue Code tax-exemption requirements. In the years following this first attempted amendment, appellants have filed other versions of amended articles with the Secretary of State aimed at changing the names of the corporation, original incorporators,

[1] Syfong Kongkeo died in 2015 before this litigation commenced. Christina Vilay and Thongdee Pongmalee are the two surviving incorporators of Wat Lao.

and registered agent, as well as adding provisions regarding selection and composition of the board of directors.

On April 20, 2014, a meeting took place at the temple with approximately 30 members of the congregation and was held primarily in Laotian.[2] Of the three incorporators, only Vilay attended.[3] After his purported "election" as "Chairman," Thamavong purported to appoint eight other individuals to form what appellants contend to be the first and still legitimate board of directors of Wat Lao.[4] Another election was held at the temple by appellants on July 30, 2017 for "Management Chairman." Vilay and Pongmalee attended the gathering but did not vote at this event; they were served with no-trespass notices shortly thereafter. An eviction action between respondents and appellants ensued in the fall of 2017 regarding access to and possession of the temple.

At the same time as the eviction action, another lawsuit arose between the parties. In this separate civil action, respondents sought an injunction against appellants and raised similar issues to those in the current matter regarding corporate governance and the rightful board of directors. As part of this suit, respondents submitted a copy of the first amended articles of incorporation from 2011 as the articles they believed at the time were controlling. On February 8, 2018, the district court in that action declined to rule on the

[2] Prior to this meeting, the parties agree there was no board of directors for the corporation.
[3] Appellants maintain that the first board of directors for Wat Lao was elected at this meeting. At trial, Vilay testified that she speaks limited Laotian and did not know a board of directors was supposedly being "elected" at this meeting. Vilay believed the meeting was being held for the purpose of planning an upcoming Buddhist festival.
[4] Vilay maintains that she never appointed Thamavong or gave him authority to appoint any directors.

substance of the parties' requests, dismissing the case without prejudice. As part of this dismissal, the district court concluded that there was a "fundamental and irreconcilable conflict between [Wat Lao's] Articles of Incorporation, which provide that there are no voting Members, and [Wat Lao's] Bylaws, which provide that Directors are chosen by the Members[.]"

As a result of this prior lawsuit, it was discovered that the first amended articles of incorporation were never filed with the Secretary of State and thus were not legally effective. On February 21, 2018, Vilay and Pongmalee filed amended and restated articles of incorporation with the Secretary of State (second amended articles). These second amended articles provided that Vilay and Pongmalee would act as directors until a board of directors was elected by the incorporators. Several days later, Vilay and Pongmalee signed a corporate resolution appointing what they contend to be the corporation's first board of directors and adopting its first set of bylaws.[5]

Appellants filed this lawsuit in March 2018 seeking a declaratory judgment on which articles of incorporation were valid and a determination of the legitimate board of directors and governing bylaws. On June 5, 2019, appellants' then-attorney, Christopher Paul, filed a notice of withdrawal. On June 17, appellants requested a two-month continuance of trial to which respondents objected. Two days later, the district court denied appellants' request for a continuance.

[5] This newly appointed Board consisted of Vilay, Pongmalee, and attorney James Hewson.

Appellants subsequently retained a new attorney, Mark Anderson, and a two-day bench trial was held in mid-July. Prior to trial, the district court took judicial notice of the two prior cases between the parties. The record was held open for posttrial submissions and closed on August 2. Anderson filed a notice of withdrawal on October 28.

Ultimately, the district court found that as of February 8, 2018, Wat Lao had no directors or voting members under its valid articles of incorporation—the one-page 2010 Articles—nor did it have bylaws before that time. The court further found that Vilay lacked the actual and apparent authority to elect Thamavong to a board position at the April 2014 meeting and that the two incorporators' attendance at the July 2017 election did not ratify appellants' claim to be the legitimate directors of the corporation. The court concluded that Vilay and Pongmalee, as Wat Lao's two surviving incorporators, had the authority under Minn. Stat. § 317A.133, subd. 1, to amend Wat Lao's articles and designate themselves as directors until they appointed a board and that their February 2018 corporate resolution properly established the corporation's first board of directors and bylaws.

After retaining another new attorney, Mark Olson, appellants moved for amended findings or a new trial. The district court denied the posttrial motions. This appeal follows.

DECISION

I. The district court did not abuse its discretion in denying appellants' request for a continuance of trial.

Appellants challenge the district court's denial of their request for a continuance, arguing that they "were forced to try their case with only two-weeks['] time to prepare with an attorney who had no prior knowledge of the case or the parties" and that this lack of

preparation and familiarity resulted in their trial attorney doing a suboptimal job litigating the case, which included failing to make a number of evidentiary objections and conceding key defenses prior to trial.[6]

In its order, the district court outlined the sequence of events leading to appellants' request for a continuance and the reasoning behind the denial of their motion:

> This matter has been set for trial on the week of July 15, 2019. [Appellants] Saythong and Khouanchao's letter [received by the district court on June 17, 2019] requests that trial be continued for 60 days because they are no longer represented by counsel. They have provided practically no information as to why that is the case. Their letter merely states: "Attorney Christopher Paul is no longer our attorney due to irreconcilable differences in how to handle this matter going forward to trial and in trial." The record reflects that Mr. Paul filed a notice of withdrawal on June 5, 2019.

The court went on to conclude, "The only reason that Saythong and Khouanchao have provided to support their request for a continuance is insufficient, under Rule 105. They have not provided any other reason that might warrant granting a continuance in this case."

We review the district court's denial of a motion for a continuance for an abuse of discretion. *Dunham v. Roer*, 708 N.W.2d 552, 572 (Minn. App. 2006), *review denied* (Minn. Mar. 28, 2006). The general test is whether a denial "prejudices the outcome of the trial." *Chahla v. City of St. Paul*, 507 N.W.2d 29, 32 (Minn. App. 1993), *review denied* (Minn. Jan. 20, 1994). As the district court correctly observed, appellants did not have an

[6] To the extent that appellants attempt to raise an ineffective-assistance-of-counsel argument, we observe that such a claim is generally not available to an unsuccessful civil litigant. *See Glick v. Henderson*, 855 F.2d 536, 541 (8th Cir. 1988) ("[Appellant]'s remedy for any ineffective assistance of counsel is a suit against his attorney for malpractice, not a new trial—the same remedy he would be entitled to in a civil case with private counsel.").

automatic right to a continuance upon the withdrawal of their attorney. *See* Minn. R. Gen. Pract. 105 ("Withdrawal of counsel does not create any right to continuance of any scheduled trial or hearing.").[7] Under the facts presented here, the district court did not abuse its discretion by denying appellants' motion for a continuance. These facts include that the case had been pending for over a year, trial had already been postponed once in March 2019, the new trial date was over one month away at the time of counsel's withdrawal, and respondents adamantly opposed the proposed continuance and articulated the prejudice further delay would cause them. The district court appropriately exercised its discretion in weighing the burden on the opposing party and the continuity of litigation against the scant explanation offered by appellants that they were finding it "difficult" to retain another attorney in "such a short time."

II. Appellants' various challenges to the district court's findings of facts and conclusions of law are without merit.

Referring to what they describe as "Rule 52 Duties," appellants appear to argue that the district court failed in its fact-finding responsibilities by neglecting to address arguments raised by appellants in their initial pleadings during the current litigation as well as in prior related lawsuits. Appellants also seem to challenge a number of specific findings and conclusions made by the district court regarding the validity of governing articles and related corporate actions taken by respondents concerning the appointment of a board of directors.

[7] The advisory-committee comment clarifies that "withdrawal or substitution of counsel may be part of a set of circumstances justifying the exercise of the court's discretion to grant a continuance." Minn. R. Gen. Pract. 105 1997 comm. cmt.

On appeal following a bench trial, we will not set aside the district court's findings unless they are clearly erroneous. Minn. R. Civ. P. 52.01. In applying Rule 52.01, "we view the record in the light most favorable to the judgment of the district court." *Rogers v. Moore*, 603 N.W.2d 650, 656 (Minn. 1999). "Findings of fact are clearly erroneous only if the reviewing court is left with the definite and firm conviction that a mistake has been made." *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999) (quotation omitted). And we will not disturb the district court's findings if there is reasonable evidence to support those findings. *Rogers*, 603 N.W.2d at 656.

A. Pleadings and defenses not raised at trial

Appellants contend that the district court erred in its "Rule 52 duties" by failing to consider arguments and issues, including possible defenses, that were not raised at trial but that appeared at the pleading and summary-judgment stages of litigation, as well as in other past lawsuits between the parties. This argument is without merit. "[I]t is not the obligation of this court to research and construct the legal arguments open to parties, especially when they are represented by counsel." *United States v. McLee*, 436 F.3d 751, 760 (7th Cir. 2006) (quotation omitted). Appellants are bound by the theories upon which the case was tried, and this court will not consider matters not argued and considered by the trial court. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (explaining that this court may only consider issues that the record shows were presented to and considered by the district court, and a party may not obtain review by raising the same general issue under a different theory). At the close of trial, the district court instructed the parties to submit letter briefs as final arguments, and in their six-page written submission, appellants articulated a limited

set of what they believed to be dispositive issues for the district court's consideration of this matter. The district court did not err by considering only the issues raised by the parties at trial and in posttrial briefing.

B. February 2018 amended articles and corporate resolution

Appellants' primary challenge appears to center around the district court's finding that the second amended articles were the corporation's valid articles and that the corresponding corporate resolutions, adopted by respondents shortly thereafter, created the corporation's first set of bylaws and board of directors.[8]

In regard to the corporation's original articles of incorporation and the first amended articles, the district court found:

> Because the articles of incorporation previously submitted [in the prior civil case] were never filed with the Secretary of State, from August 2010 (when the corporation was formed) to February 2018 (when Judge Miles issued her order) Wat Lao's governing documents consisted entirely of the one-page form which contains no more than the bare minimum required under Minnesota law: the name of the corporation, the registered address and agent, and the names and addresses of the incorporators.

[8] We note that appellants' reasonable-time argument regarding the two surviving incorporators' delay in appointing a board of directors appears to be an iteration of their challenge to the district court's finding that the second amended articles and the corresponding corporate resolutions established Wat Lao's first board and governing bylaws. Likewise, appellants' collateral estoppel, res judicata, and laches arguments also seem to challenge the district court's findings regarding which amended articles were valid and when a legitimate board of directors for the corporation was actually established. Because appellants did not raise any of these arguments to the district court at trial, we shall not review them now. *See Thiele*, 425 N.W.2d at 582.

The district court went on to observe that the original articles of incorporation—a one-page form document—did not name any directors or voting members and that "there is no evidence to suggest that anyone other than the three incorporators was authorized to act on behalf of the corporation prior to February 2018." Citing Minn. Stat. § 317A.133, subd. 1,[9] the district court further found that Vilay and Pongmalee, as the two surviving incorporators, had the authority to amend the articles of incorporation in February 2018:

> The evidence presented at trial shows that there were no directors named in the original articles, no directors had been elected prior to February 2018, and that there were no members with voting rights. No evidence was presented at trial that would change any of these facts. Pursuant to Minnesota statutes, therefore, the Court concludes that Vilay and Pongmalee had the authority to amend and restate the articles of incorporation in February 2018.

Relying next on Minn. Stat. § 317A. 171,[10] the district court concluded that on February 25, 2018, Wat Lao's first board of directors was elected, and its first bylaws were adopted by written resolution of Vilay and Pongmalee, as the two surviving and majority of the three original incorporators. The court further determined that "The true and correct Articles of Incorporation are the Amended and Restated Articles of Incorporation of Wat Lao Sirithamaram filed with the Minnesota Secretary of State on February 21, 2018."

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[9] Minn. Stat. § 317A.133, subd. 1 (2018), provides: "A majority of incorporators may amend the articles by written action if no directors are named in the original articles, if no directors have been elected, and if there are no members with voting rights."

[10] Minn. Stat. § 317A. l71, subd. 1 (2018), provides: "If the first board is not named in the articles, the incorporators may elect the first board or may act as directors with the powers, rights, duties, and liabilities of directors, until directors are elected. Upon the election and qualification of the first director, the power of the incorporator or incorporators terminates."

In rejecting appellants' version of amended articles, the district court concluded:

> [Appellants'] competing Restated Articles of Incorporation filed with the Secretary of State on March 21, 2018 and amended on April 10, 2018 are invalid based upon [appellants'] lack of authority to adopt Restated Articles of Incorporation.

Likewise, in addressing appellants' contention that the legitimate board of directors was previously elected at the April 2014 meeting, the district court concluded that:

> Christina Vilay did not have the power or authority under Minn. Stat. § 317A.l71 (without the consent and approval of either Kongkeo or Pongmalee) to elect or appoint Onsa Thamavong as a director or chairman of the board, or give Onsa Thamavong authority to appoint other directors.

Overall, we conclude that the record offers ample support for the district court's findings. As respondents well summarized:

> [U]nder Minn. Stat. § 317A.171, the only majority vote that could have elected Thamavong to the position of director would have been a majority vote by the incorporators. [Appellants] do not contest that two of the three incorporators did not attend or otherwise participate in the April 2014 meeting. [Respondent] Vilay did not have the power or authority under Minn. Stat. § 317A.171—without the consent and approval of either incorporator Kongkeo or incorporator [respondent] Pongmalee—to elect or appoint Thamavong as a director or chairman of the board or give Thamavong authority to appoint other directors. As the trial court then succinctly concluded: "Whether or not the individuals at the meeting voted or affirmed Mr. Thamavong's as a director is of no consequence. The corporation did not have members as of April 20, 2014, and there was no authority for the individuals attending the meeting to vote for a director or chairman of the board."

We further observe that appellants have not pointed to any evidence presented at trial that actually undermines the district court's conclusions regarding which articles control and

which board of directors was validly appointed. Indeed, appellants admit that Vilay's trial testimony supports the district court's findings, and conflicting testimony or evidence does not make a factual finding clearly erroneous. *See Rogers*, 603 N.W.2d at 656 (noting that appellate courts view the record in the light most favorable to the district court's judgment and its decision should not be reversed merely because the reviewing court might view the evidence differently); *Fletcher*, 589 N.W.2d at 101 ("It is not the province of this court to reconcile conflicting evidence."). We defer to the district court's opportunity to evaluate witness credibility and based on the record here, the district court did not clearly err by finding that the second amended articles were valid and that the subsequent written resolution created Wat Lao's first board of directors and governing set of bylaws. *See* Minn. R. Civ. P. 52.01 ("Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.")

C. Vilay's actual and apparent authority

Appellants also seem to challenge the district court's determination that Vilay had neither the actual or apparent authority to elect a director to the board at the April 2014 temple meeting where appellants maintain a board of directors was elected. In response to appellants' claim that they relied upon Vilay's apparent authority at the meeting to elect Onsa Thamavong to the position of director and chairman of the Board, the district court concluded:

> Christina Vilay did not exercise any apparent authority at the meeting on April 20, 2014. As an incorporator, Ms. Vilay was a principal and not an agent. There is no evidence that either

> of the other two incorporators held Ms. Vilay out to be their agent. There is also no evidence that Ms. Vilay represented to any third parties that she had the authority of either of the other two incorporators to elect directors.

In response to these findings, appellants appear to suggest that Vilay had the actual authority to elect directors to the Board because she was a principal, not an agent, for the corporation. Appellants also seem to be making the conclusory argument that Vilay had apparent authority to appoint directors based on the "representation made with Wat Lao's authority" and thus is estopped from denying her authority in this lawsuit.

An agent can bind his or her principal if the agent has actual or apparent authority. *Duluth Herald & News Tribune v. Plymouth Optical Co.*, 176 N.W.2d 552, 555 (Minn. 1970). "Apparent authority is that authority which a principal holds an agent out as possessing, or knowingly permits an agent to assume." *Foley v. Allard*, 427 N.W.2d 647, 652 (Minn. 1988).

> The principal must have held the agent out as having authority, or must have knowingly permitted the agent to act on its behalf; furthermore, the party dealing with the agent must have actual knowledge that the agent was held out by the principal as having such authority or had been permitted by the principal to act on its behalf; and the proof of the agent's authority must be found in the conduct of the principal, not the agent.

Id. Here, the district court credited Vilay's testimony regarding the April 2014 meeting—that she did not understand an election was taking place, that she did not appoint Thamavong to the position of director or chairman, that she did not have authority from either of the other two incorporators to appoint a board of directors, and that she did not

make any representations at the meeting that she had such authority. We see no clear error with the district court's no-actual-or-apparent-authority findings regarding Vilay.

D. Ratification of the April 20, 2014 "Elections"

Appellants also appear to briefly challenge the district court's finding that Vilay and Pongmalee, as the two surviving incorporators, did not later ratify appellants' election to the board of directors. In regards to the ratification issue, the district court concluded:

> [Appellants] also claim that Vilay's and Pongmalee's attendance at the election held on July 30, 2017 ratifies their claim to title as directors. The election held on July 30, 2017, was not associated with the election of directors or even officers of the corporation. The election was to determine a manager for the temple. Ms. Vilay attended the event specifically to protest the election, and Pongmalee (as the religious leader of the temple) welcomed the congregation as they arrived at the temple. Neither Vilay nor Pongmalee voted or otherwise sanctioned the event. It is evident that [appellants] were aware that Vilay and Pongmalee opposed the event, because [appellants] had no trespass notices prepared for both of them that were dated prior to the event. [Appellants] did not give Pongmalee notice that an election was going to be held until the same day that it occurred. The evidence does not support [appellants'] claim that either of the two surviving incorporators supported or otherwise ratified their title as directors of the corporation.

As respondents appropriately summed up, "[t]he trial court explained in detail why there was no such ratification. . . . And there is no legal support that Vilay, as one incorporator, could ratify [appellants'] actions that they govern Wat Lao." Because we agree that the district court's findings are supported by the evidence presented at trial, there is no clear error in the district court's lack-of-ratification determination.

III. The district court did not err in denying appellants' posttrial motions.

Appellants also appear to take issue with the district court's order denying their posttrial motions. We observe that the only issue appellants appear to specifically address is their motion for amended findings.[11] The district court may "amend its findings or make additional findings, and may amend the judgment accordingly" upon motion of a party. Minn. R. Civ. P. 52.02. "When considering a motion for amended findings, a district court must apply the evidence as submitted during the trial of the case and may neither go outside the record, nor consider new evidence." *Zander v. Zander*, 720 N.W.2d 360, 364 (Minn. App. 2006) (quotation omitted), *review denied* (Minn. Nov. 14, 2006). We review denials of such posttrial motions for an abuse of discretion. *Id.*

In denying appellants' motion for amended facts, the district court concluded:

> [Appellants'] motion for amended findings fails because [appellants] have not demonstrated that the Court's findings are unsupported by the record. Strikingly, [appellants] have not acknowledged any of the testimony that was offered at trial. Their current attorney, Mr. Olson, was not present for any portion of the trial, and he has never ordered a transcript. As a result, [appellants'] motion for amended findings is based entirely on various pleadings, affidavits, and other documents filed in this case, and in other cases involving the same parties. ([Appellants'] argument ignores, for instance, the testimony of Mark Saythong and Chanda Kouanchao, which undermined the arguments that their previous[] lawyer, Mr. Anderson, was attempting to make on their behalf.) Selectively picking and choosing among the evidence in this fashion cannot demonstrate that the Court's findings are unsupported by the

[11] As part of their posttrial motions, appellants also moved for a new trial. However, this issue was not briefed and thus is not considered. *See State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997) ("An assignment of error based on mere assertion and not supported by any argument or authorities in appellant's brief is waived and will not be considered on appeal unless prejudicial error is obvious on mere inspection.").

> record. . . . Because [appellants] have failed to address all of the evidence contained in the record, their motion for amended findings must be denied. [Appellants'] motion for amended findings also fails for many of the same reasons previously discussed in [the prior section of the denying motion for new trial]. *See Grigsby*, 648 N.W.2d at 726 (issues first raised in a post-trial motion are untimely).

Appellants claim that the district court failed to consider defenses raised in their answer and "at other stages of the proceedings." Appellants contend that the district court erred by considering only facts and arguments raised during trial, even though appellants attempted to bring new issues and defenses to the court's attention in their posttrial motions. As part of this argument, appellants seem to maintain that the district court had a duty to consider all facts, issues, and arguments raised at any point throughout litigation.

As previously noted, the district court did not have a duty to look beyond what was presented by the parties at trial. And based on the record before us, the district court did not abuse its discretion by denying appellants' posttrial motion for amended findings.

Affirmed.