ED101847

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

WHELAN SECURITY COMPANY,

Respondent / Cross-Appellant,

vs.

CHARLES KENNEBREW, SR.,

Appellant / Cross-Respondent.

On Appeal from the Circuit Court of St. Louis County
Honorable Maura B. McShane, Circuit Judge
Case No. 10SL-CC00006-01

REPLY BRIEF OF THE APPELLANT AND BRIEF OF THE CROSS-RESPONDENT

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REPLY OF THE APPELLANT

Reply as to Point I

In his first point in his opening brief, Appellant Charles Kennebrew explained that the trial court erred in granting Respondent Whelan Security Company summary judgment on its claim that Mr. Kennebrew had violated the customer non-solicitation clause in § 3(a) of the Agreement by soliciting Park Square's business after leaving Whelan (Opening Brief of the Appellant ("Aplt.Br.") 20, 24-32). As Mr. Kennebrew explained, viewing the evidence in a light most favorable to him, there was a genuine dispute of material fact precluding summary judgment as to whether, in fact, Park Square had solicited *him*, which would not have violated § 3(a) (Aplt.Br. 25-28).

He also explained that, contrary to the trial court's decision, the Supreme Court's observation in the statement of facts in its prior decision that, "In November and December 2009, Mr. Kennebrew solicited the business of Park Square Condominiums, a client of Whelan in Houston," was not a decision on an issue under consideration and could not bind the trial court to find this (Aplt.Br. 29-32). Rather, the Supreme Court merely was following the summary judgment standard and viewing the facts in a light most favorable to Whelan, then the summary judgment non-movant, and was not the "law of the case" when Mr. Kennebrew now is the non-movant (Aplt.Br. 29-32).

In response, Whelan argues the Supreme Court's observation *was* the "law of the case." Alternatively, impermissibly viewing the facts in a light most favorable to *it*, Whelan argues its own evidence should be taken as true, under which Mr. Kennebrew *did* solicit Park Square. Both arguments are without merit.

A. As the Supreme Court did not "decide," "find," "rule," or "hold" on appeal from prior the summary judgment in Mr. Kennebrew's favor that Mr. Kennebrew had solicited Park Square, nor could it have, that cannot be the "law of the case" and bind the trial court and this Court on remand.

In response, Whelan initially attempts to bolster its use of the Supreme Court's brief observation as the supposed "law of the case" (Brief of the Respondent-Appellant ("Resp.Br.") 25-28). Whelan says the Supreme Court "did not mince words or leave any ambiguity in *holding* that Mr. Kennebrew solicited Park Square" or "*rul[ing]* that Mr. Kennebrew solicited Park Square," this was the Supreme Court's "express determination," it "did not remand for a factual finding whether or not Mr. Kennebrew solicited Park Square," it "contemplated that further proceedings would be based on its *finding* that Mr. Kennebrew solicited Park Square," and "this *ruling* cannot be overturned" (Resp.Br. 25-29) (emphasis added).

This is without merit. Whelan ignores, as Mr. Kennebrew already explained (Aplt.Br. 30), that the Supreme Court was reviewing the grant of Mr. Kennebrew's prior motion for summary judgment, and thus was faithfully following the standard of review to view the facts in a light most favorable to Whelan, at the time the non-movant. *Whelan Sec. Co. v. Kennebrew*, 379 S.W.3d 835, 839 (Mo. banc 2012).

Plainly, the statement on which Whelan relies appears in the Supreme Court's section titled "Factual and Procedural Background." *Id.* It was not a "holding," a "ruling," or a "finding." It was an observation about the facts of the case viewed in a

light most favorable to Whelan, placed in the opinion before any discussion of the issues then on appeal.

Indeed, as the non-movant, Whelan generally could not obtain judgment in its favor on its appeal, but only could undo the summary judgment in Mr. Kennebrew's favor and remand for further proceedings. *Levinson v. City of Kan. City*, 43 S.W.3d 312, 323 (Mo. App. 2001). Only where "there are no disputed facts" could Whelan obtain judgment in its favor, but even then the Supreme Court expressly would have had to "remand to the circuit court with directions to enter judgment in favor of" Whelan. *Id.* This is because the Supreme Court, like this Court, has the power to direct judgment where appropriate. Rule 84.14.

Here, however, unlike in *Levinson*, the Supreme Court *did not* do that. Instead, holding that, in fact, "there remain genuine issues of fact that must be resolved by the trier of fact – namely, … *whether Mr. Kennebrew's actions violated his covenant not to compete*," it concluded, "the judgment of the trial court is reversed, and the case is remanded." *Whelan*, 379 S.W.3d at 847 (emphasis added).

Whether Mr. Kennebrew's actions violated the covenants plainly remained a genuine question of fact, regardless of the Supreme Court's discussion of the facts viewed in a light most favorable to Whelan, the non-movant. As such, this was not a situation in which there were "no disputed facts;" rather, Whelan *could not* obtain judgment in its favor, and the only thing the Supreme Court could do was reverse the trial court's judgment, which it did. *Levinson*, 43 S.W.3d at 323.

Thus, as Mr. Kennebrew already explained, the Supreme Court's decision was a "complete reversal," which "annul[ed] the judgment below," put the case back "in the same posture in which it was before the judgment was entered," and was "as if no trial has yet been held" (Aplt.Br. 29) (quoting *Century Fire Sprinklers, Inc. v. CNA/Transp. Ins. Co.*, 87 S.W.3d 408, 423 (Mo. App. 2002)). Whelan has no response to the fact that this was a complete reversal, and does not address it at all.

But because this was a complete reversal, on remand, to obtain summary judgment in its own favor, Whelan had to prove there was no genuine dispute of fact that Mr. Kennebrew violated the covenants and it was entitled to judgment as a matter of law. Whelan sought to do so. What it could not do, however, was equate the Supreme Court's observation of the *facts* viewed in a light most favorable to *it* with a holding of *law* as to the issues in the case. Due to the posture of the case, the Supreme Court was not making any "findings," but rather merely was determining whether Mr. Kennebrew, then the movant, had proven there was no genuine dispute of material fact and that *he* was entitled to judgment as a matter of law. *Whelan*, 379 S.W.3d at 841.

Therefore, the Supreme Court's observation, viewing the facts in a light most favorable to Whelan, that, "In November and December 2009, Mr. Kennebrew solicited the business of Park Square Condominiums," was *not* "the law of the case."

Whelan faults Mr. Kennebrew from citing decisions about the "law of the case," such as *Century*, which involved whether a trial court's prior reversed holding was now the law of the case, rather than something in an appellate court's decision (Resp.Br. 27-28). But it does not correct this alleged deficiency with different authority. This is

because that authority would be wholly unhelpful to it. *See, e.g.*, *Fisher v. Brancato*, 174 S.W.3d 82, 86 (Mo. App. 2005); *Oldaker v. Peters*, 869 S.W.2d 94, 97 (Mo. App. 1993).

In *Fisher*, this Court observed that, while "[t]he law of the case doctrine governs successive appeals involving the same issues and facts," it only "precludes re-examination of *issues decided in the original appeal*, … either directly or by implication. *Id.* (emphasis added). Thus, where, due to the procedural posture of the case in a prior appeal, an issue *could not have been* "decided," it remains open on general remand. *Oldaker*, 869 S.W.2d at 97 (reversal of summary judgment for defendant did not preclude defendant later from asserting comparative fault, which could not have been decided previously). *See also Wolff v. Light*, 169 N.W. 93, 96 (N.D. 1969) (appellate "court, by holding on the former appeal that summary judgment should not have been granted" for a defendant "did not determine that the plaintiff … should have judgment").

Here, whether Mr. Kennebrew solicited Park Square was not an issue the Supreme Court decided, or was asked to. Rather, the issues decided were that the covenants, as modified, were valid. *Whelan*, 379 S.W.3d at 842-47. The Supreme Court's decision on *those* issues are the law of the case. But the Supreme Court completely reversed the trial court's judgment and generally remanded to determine "whether Mr. Kennebrew's actions violated his covenant not to compete." *Whelan*, 379 S.W.3d at 847.

Thus, for Whelan to obtain judgment in its own favor, it remained for Whelan to prove, using evidence, that there was *no* genuine dispute of material fact and that it was entitled to judgment as a matter of law that Mr. Kennebrew actually had solicited Park Square's business after leaving Whelan. Whelan did not do this, because it could not.

B. Viewing the evidence in a light most favorable to Mr. Kennebrew, the non-movant, which Whelan *does not,* there was a genuine dispute of material fact as to whether Park Square solicited Mr. Kennebrew, which did not violate the customer non-solicitation clause in § 3(a).

In his opening brief, Mr. Kennebrew explained that, viewing the evidence in a light most favorable to him, both his own testimony and that of Janice VerVoort, Park Square's manager, that Mr. Kennebrew *did not* solicit her business, but rather *she* solicited *Mr. Kennebrew's* services, meant there was a genuine dispute of material fact as to whether he did, in fact, solicit Park Square's business in violation of § 3(a) (Aplt.Br. 26-28).

Below, Whelan only pointed to the Supreme Court's prior decision as its "evidence" that there was no genuine dispute of material fact that Mr. Kennebrew solicited Park Square (L.F. 14). Now, however, it points to other evidence in the record favorable to *it* to argue the record "leaves no doubt that" Mr. Kennebrew "aggressively solicited Park Square's business (Resp.Br. 29-31).

In order to do this, however, Whelan has to violate cardinal principles of summary judgment review. A genuine issue of material fact exists when there is the "slightest doubt about a fact." *Gast v. Ebert*, 739 S.W.2d 545, 546 (Mo. banc 1987). To determine whether there is such a doubt, this Court must view the evidence "in the light most favorable to the non-movant and dra[w] all reasonable factual inferences in that party's favor." *Piatt v. Ind. Lumbermen's Mut. Ins. Co.*, No. SC94364, 2015 WL 1926378 at *1 (Mo. banc slip op. Apr. 28, 2015).

Whelan's argument wholesale fails this standard. To reach its conclusion, it is forced to view the evidence in a light most favorable to *itself* and accord *itself* inferences from that evidence.

Whelan first points to an e-mail Mr. Kennebrew sent his associates on November 19, 2009, stating one of the "follow-up items we need to focus on" was "Park Square Condos" (Resp.Br. 29-30). Viewing that in a light most favorable to Mr. Kennebrew, however, that does not show in any way that he solicited Park Square. It does not direct his associates to solicit Park Square. In fact, it does not mention what the "focusing on" was about at all. It does not state, "I intend to solicit Park Square's business."

Moreover, regardless of any intent reflected in that e-mail, the question is whether Mr. Kennebrew *did* solicit Park Square's business. On this, Ms. VerVoort was emphatic that he did not:

> Q. Did Mr. Kennebrew … solicit Park Square Condominiums on behalf of Elite, to your knowledge? …
>
> A. No. …
>
> Q. Do you believe that … Defendant Charles Kennebrew, Sr. … solicited Park Square Condominiums' business on behalf of Elite? …
>
> A. No. …
>
> Q. And why do you feel this way?
>
> A. Because I know they didn't.
>
> Q. How do you know they didn't?

A. How do I know they didn't? *Because they didn't, because I was there. I was the one that called them.*

Q. So is it your testimony that *you were the one, on behalf of Park Square Condominiums, that solicited the services of Elite Protective Services? …*

A. ***Yes.***

(S.P.L.F. 44-46) (emphasis added).

Without citing the record, Whelan nonetheless argues that, despite this clear evidence that this Court must take as true, Mr. Kennebrew nonetheless solicited Park Square's business because of its own supposed favored timeline of the facts, and because Mr. Kennebrew is engaging in "wordplay" (Resp.Br. 30).

But this is not "prov[ing] a horse-chestnut to be a chestnut horse" (Resp.Br. 30) (quoting ABRAHAM LINCOLN, FIRST DEBATE WITH DOUGLAS (Aug. 21, 1858)). If Mr. Kennebrew solicited Park Square, it would violate § 3(a). If, on the other hand, Park Square solicited Mr. Kennebrew, and Mr. Kennebrew accepted, it would not violate the agreement. Due to the abundance of testimony that Mr. Kennebrew *did not* solicit Park Square, but instead Park Square solicited *him*, the standard of review commands this Court to hold there is a genuine dispute of material fact on this issue.

Perhaps realizing this, Whelan then seeks to argue for the first time that this difference does not matter, because it "is entitled to protection in circumstances where [its] 'customers … well might seek [the defendant employee] at his new location, without any effort on his part" (quoting *Osage Glass, Inc. v. Donovan*, 693 S.W.2d 71, 75 (Mo.

banc 1985)). The Supreme Court's point in *Osage Glass*, though, was that this is one reason a customer non-solicitation clause *can* be subject to *injunctive relief* as a matter of public policy because of the risk to the plaintiff. *Id.*; *see also Paradise v. Midwest Asphalt Coatings, Inc.*, 316 S.W.3d 327, 329 (Mo. App. 2013). Here, though, the trial court denied an injunction (L.F. 679-80), and Whelan does not appeal that decision.

But neither the Supreme Court in *Osage Glass* nor any other Missouri appellate decision ever has held a defendant can be *held liable for breach of contract damages* for violating a customer non-solicitation clause when he did not actually solicit the customer. Moreover, *Osage Glass* was decided on judgment after a trial in which a trier of fact had determined the facts, *not* summary judgment in which the movant had to prove no genuine dispute of material fact. *Id.* at 73.

Here, under the summary judgment standard, and in this procedural posture, Whelan was required to prove – as it expressly sought to (L.F. 14) – that there was no genuine dispute of material fact that Mr. Kennebrew solicited Park Square's business, not the other way around. It did not and could not. Mr. Kennebrew's and Ms. VerVoort's testimony alone, which must be taken as true and all inferences accorded to Mr. Kennebrew from it, show there was a genuine dispute of material fact.

Viewing the facts in a light most favorable to Mr. Kennebrew, there is a genuine dispute of material fact as to whether Mr. Kennebrew solicited Park Square's business in violation of § 3(a) of the Agreement. The trial court's entry of summary judgment that he violated § 3(a) because he had done so was error. The Court must reverse the trial court's judgment and remand this case for further proceedings.

Reply As to Point II

In his second point, Mr. Kennebrew explained the trial court erred in granting Whelan summary judgment that he had violated the 50-mile non-competition clause in § 3(c) of the Agreement, because, viewing the evidence in a light most favorable to him, there is a genuine dispute whether, at least implicitly, Whelan waived that clause by his former superiors knowing about, tolerating, and affirmatively agreeing to allow him to operate Elite in Houston (Aplt.Br. 33-39).

In response, Whelan argues "the undisputed facts" do not "permit" an "inference" that it had waived § 3(c) (Resp.Br. 35). As with its response to Point I, *supra*, to reach this conclusion Whelan is forced to ignore the summary judgment standard and view all facts and inferences in a light most favorable to itself. Whelan's argument is without merit.

Whelan says there is no "dispute" that it did not waive § 3(c) because its CEO, Greg Twardowski, did not expressly testify he "told Mr. Kennebrew that he could operate his own business in competition with Whelan in Houston" (Resp.Br. 36) (emphasis in the original). But Mr. Kennebrew testified this was not true (L.F. 77). "Intent in nearly every case" is a question of fact "proven by circumstantial evidence" and "is an improper basis for summary judgment." *Butler v. Mitchell-Hugeback, Inc.*, 895 S.W.2d 15, 20 (Mo. banc 1995). "[S]ummary judgment is seldom appropriate in cases involving proof of elusive facts such as intent, motive, … and the like, which must almost always be proved by circumstantial evidence." *Crow v. Crawford & Co.*, 259 S.W.3d 104, 113 (Mo. App. 2008).

So, too, is it inappropriate here. Mr. Twardowski testified he did not intend for his allowing Elite to operate in Houston to compete with Whelan (Resp.Br. 36-38). But his testimony shows he did know Elite existed and was in operation (Resp.Br. 36-38). He testified he was fine with Elite's existence as long as it "did not violate the terms of the Non-Solicitation Agreement as it relates to [Whelan's] employees and [its] customers" (Resp.Br. 39). But Mr. Kennebrew's waiver defense is not about the employee or customer non-solicitation clauses; it goes only to the 50-mile non-competition clause in § 3(c) that sought to prevent Mr. Kennebrew from operating a security business.

Moreover, Mr. Kennebrew testified, contrary to Mr. Twardowski, that he *long* had informed his supervisors at Whelan about Elite's existence and *never* told any of them that minority or government contracts would be his main focus (P.Tr. III 70). He testified Whelan verbally agreed to allow him to operate Elite in Houston while simultaneously running Whelan's Dallas branch (P.Tr. I 3-6; P.Tr. III 109). Later, in testimony Whelan does not discuss, Mr. Twardowski intimated the same, explaining he "was and continue[s] to be very supportive of [Mr. Kennebrew's] endeavor with Elite Protective," and knew that Mr. Kennebrew was "provid[ing] valuable service on behalf of Whelan" during the time when Mr. Twardowski *knew* he was operating Elite (P.Tr. I 77).

To the extent Mr. Kennebrew's testimony differs from Mr. Twardowski's (or Mr. Porterfield's (Resp.Br. 41)) in this regard, Mr. Twardowski's testimony must be ignored and Mr. Kennebrew's taken as true. Viewed in that light, there plainly was evidence that Whelan "waived the non-competition provision of the agreement [in § 3(c)] because [it]

allowed Mr. Kennebrew to open and operate a competing business wherever he wanted, including Houston or Dallas" (L.F. 77).

Whelan does not seem to understand this. Instead, it argues Mr. Twardowski's and Mr. Porterfield's selective testimony it quotes "permits no inference that Whelan … waived the restrictive covenants in the Agreement" (Resp.Br. 41). This Court must ignore that testimony and take Mr. Kennebrew's contrary testimony as true. So viewed, there plainly is sufficient evidence that Whelan at least implicitly waived the agreement (Aplt.Br. 36, 39) (citing *Frisella v. RVB Corp.*, 979 S.W.2d 474, 477 (Mo. App. 1998)).

Whelan takes issue with Mr. Kennebrew's citation to *Frisella*, in which this Court reversed a summary judgment for a plaintiff on a breach of contract when the defendant introduced evidence that the plaintiff's conduct at least implicitly may have waived its enforcement. 979 S.W.2d at 475, 477. It points out that the conduct at issue there possibly equating to waiver was an employer making two severance payments but not the third, which the employer said was mistaken (Resp.Br. 42). It says this case is different because "[t]here is no act or omission on the part of Whelan to suggest Waiver," and, "[i]n fact, once Whelan learned that Mr. Kennebrew was violating his Agreement by soliciting Park Square, it immediately filed suit against him" (Resp.Br. 42).

Viewed in a light most favorable to Mr. Kennebrew, however, the evidence and reasonable inferences therefrom is that Whelan long knew about Elite, long allowed Mr. Kennebrew to operate Elite without restriction, and entered into a verbal agreement under which Mr. Kennebrew could operate Elite, all the while never thinking it would be successful. When Elite ultimately was *very* successful, even taking on a former Whelan

client, Park Square, who had fired Whelan and then, later, switched to Elite after soliciting its business, Whelan decided to turn its back on its prior waiver and sue.

At the very least, just as in *Frisella*, "While [Whelan]'s interpretation of its right [to pursue its action against Mr. Kennebrew as to § 3(c) of the Agreement], [its] conduct may have waived this right. Whether [its] acts can be construed as an implied waiver is a question of fact." *Id.* at 477. As a result, and as with most questions of intent, there is a genuine issue of fact as to whether Whelan's conduct in allowing Mr. Kennebrew to operate Elite in Houston (until Elite became successful) implicitly waived § 3(c), and the trial court's grant of summary judgment on § 3(c) was improper.

Whelan could not show that Mr. Kennebrew's affirmative defense of waiver failed as a matter of law. This Court must reverse the trial court's summary judgment otherwise and remand this case for further proceedings.

Reply as to Point III

In his third point, Mr. Kennebrew explained that the trial court also erred in granting Whelan summary judgment that Mr. Kennebrew had violated the 50-mile non-competition clause in § 3(c) of the Agreement by operating Elite in Houston, where he previously had "provided services" for Whelan (Aplt.Br. 40-47). He explained this was because, viewing the evidence in a light most favorable to him, he only ever had "provided services" for Whelan in in Dallas, which work in Dallas occasionally involved giving Whelan some Houston contacts or otherwise assisting with its Southern markets (Aplt.Br. 40, 43-47). As a result, there was a genuine dispute of fact as to whether Mr. Kennebrew "provided services" for Whelan in Houston, precluding summary judgment.

In response, Whelan briefly tries to waive away the issue of where Mr. Kennebrew had "provided services" by noting that § 3(c) also talks about "a fifty (50 mile) radius of any location where EMPLOYEE has provided or arranged for EMPLOYER to provide services" (Resp.Br. 46) (emphasis in the original) (citing P.L.F. 39). It says that because "Mr. Kennebrew arranged for Whelan to provide services in Houston," whether Mr. Kennebrew provided services in Houston or not is immaterial (Resp.Br. 46).

This is the first time Whelan ever has injected any claim that Mr. Kennebrew violated the "arranged for" language. In its petition, it only ever alleged the breach as to § 3(c) was that Mr. Kennebrew "work[ed] for Elite in competition with Whelan within a fifty-mile radius of the last location where he had provided services for Whelan" (P.L.F. 28). In the previous appeal, the Supreme Court noted the parties' dispute was "whether Mr. Kennebrew provided services in Houston while employed with Whelan in the Dallas

office." *Whelan*, 379 S.W.3d at 847. In its summary judgment motion, Whelan only ever argued that "Mr. Kennebrew did provide services in Houston while employed by Whelan" (L.F. 45, 47-48, 51). It concluded that, "Because Mr. Kennebrew provided services for Whelan in Houston, it follows … that Mr. Kennebrew breached" § 3(c) (L.F. 51).

Whelan cannot now, for the first time, raise a new claim that Mr. Kennebrew violated § 3(c) by working for Elite within a 50-mile radius of a location where he "arranged for [Whelan] to provide services." There has been no discovery or other litigation about such a claim or any exploration about what "arrange for providing services" means in this circumstance. Whelan's attempt to inject an entirely new claim into this five-year-old case is without merit. As Whelan put it in its summary judgment motion, the only question as to § 3(c) is "whether Mr. Kennebrew performed services in Houston while employed by Whelan" in Dallas (L.F. 45).

Mr. Kennebrew and Whelan do agree on one thing: "whether he was physically present in Houston or somewhere else when providing services for Whelan, is irrelevant" to this question (Resp.Br. 45). But in arguing the answer to this question is indisputably in its favor, Whelan points to the "sales blitz" in which Mr. Kennebrew participated, providing Whelan with some Houston customer contacts from his time there, and the fact that his job in Dallas took him to Houston "a few times," including to assist Whelan there during a hurricane (Resp.Br. 45-46). Mr. Kennebrew already generally acknowledged all of this (Aplt.Br. 43-44).

As Mr. Kennebrew already explained, however, viewing the evidence and inferences therefrom in a light most favorable to him, these were all part of the services he provided Whelan in Dallas as its branch manager, and did not constitute "providing services" in Houston (Aplt.Br. 44-46). Mr. Kennebrew never worked in Houston, only in Dallas. His performing these tasks for Whelan were part of his provision of services in Dallas. He did not separately provide services in Houston.

In the context of this case, Whelan seeks to interpret § 3(c)'s "provided services" language as meaning any place with which Mr. Kennebrew had any remote connection during his work for Whelan. At this procedural stage, though, it is obviously possible not to view it this way. Whelan seeks to infer from the evidence that Mr. Kennebrew's (limited) contact with Houston while working in Dallas constituted "providing services" in Houston. But Mr. Kennebrew is entitled to the inferences in his favor, not vice-versa, including that those contacts only ever were part of his services in Dallas, as he and other witnesses testified, whose testimony must be taken as true (Aplt.Br. 45-46).

For this reason, the Supreme Court held whether Mr. Kennebrew "provided services" in Houston was a genuinely disputed issue of material fact. *Whelan*, 379 S.W.3d at 847. But the evidence then was the same as the evidence now, and the dispute is just as glaring. Viewed in a light most favorable to Mr. Kennebrew, the evidence and inferences plainly are that any connection he had with Houston were part of his "providing services" in Dallas, not Houston. As the Supreme Court plainly contemplated, this is an issue for trial, not summary judgment.

RESPONSE OF THE CROSS-RESPONDENT[1]

The trial court did not abuse its discretion in awarding Whelan $165,000 in attorney fees, rather than the more than $700,000 Whelan claimed *because* a trial court is an expert on the amount of attorney fees and its decision as to that amount cannot be reversed unless reasonable minds cannot disagree that it was so arbitrary and unreasonable that it shocks the sense of justice and indicates a lack of careful consideration *in that* the trial court carefully considered both its observations of the course of this case and its experience in similar cases, found Whelan's claimed fees were excessive and unreasonable, and found instead that $165,000 was a reasonable fee.

Standard of Review

When a trial court awards a party attorney fees, "the determination of the amount of attorney fees is within the sound discretion of the trial court and" may not be "disturbed on appeal absent a clear abuse of discretion." *Mihlfield & Assocs., Inc. v. Bishop & Bishop, L.L.C.*, 295 S.W.3d 163, 175 (Mo. App. 2009).

An abuse of discretion only occurs when a trial court's "ruling is clearly against the logic of the circumstances then before the court and is so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful, deliberate consideration." *Hancock v. Shook*, 100 S.W.3d 786, 795 (Mo. banc 2003). "If

[1] If the Court reverses the summary judgment against Mr. Kennebrew as to liability addressed in his appeal, the attorney fees awarded to Whelan necessarily will be vacated and Whelan's cross-appeal of the amount of those fees will be moot.

reasonable persons can differ as to the propriety of the trial court's action, then it cannot be said that the trial court abused its discretion." *Id.* at 795. This is "[t]he most deferential standard of review" and "severely limits the power of the appellate court to reverse or otherwise alter the rulings of the lower court." *In re Marriage of Stephens*, 954 S.W.2d 672, 678 (Mo. App. 1997).

* * *

As Whelan points out, the parties' contract at issue entitled it to an award of "attorney's fees" because it "incur[red] expenses to retain attorneys … to enforce" the contract (Resp.Br. 53-54) (citing P.L.F. 40). Below, Whelan requested $707,410 in attorney fees through April 2014, claiming that was the actual amount of attorney fees it incurred since the start of the litigation below four years earlier (L.F. 649-53; Tr. 58).[2]

The trial court disagreed with Whelan that $707,410 was a reasonable fee and held instead that, given its observations of the course of the litigation and its experience in similar cases, a reasonable fee for Whelan was $165,000:

> The Court … finds the fees Whelan seeks are excessive. The Court has reviewed the invoices supplied by Whelan to support its request for

[2] Besides the oral testimony of its CFO to this amount, Whelan's only evidence at trial of any amount of attorney fees it incurred was its Exhibit 28, containing invoices only from November 2013 to March 2014 (Tr. 59). Moreover, throughout its point on cross-appeal, Whelan never cites to the record at all, let alone to justify its claimed $707,410 (Resp.Br. 55-60), violating Rule 84.04(e).

> attorney fees and the arguments of counsel. Whelan makes no argument the attorney fees it seeks are reasonable. Some of the hours worked appear to the Court as excessive. Over four hundred thousand dollars in attorney fees were incurred in the first fifteen months of this case, at an average cost of almost $28,000 a month and the total of the invoices averaged throughout the litigation to be just under $13,000 a month. The Court also finds some of the hours worked for specific tasks to be excessive.
>
> Additionally, there originally was a co-defendant against whom Whelan pursued three individual claims against but he was dismissed with prejudice by Whelan over a year ago. Thus, Whelan was unsuccessful in four of the seven counts in its Petition. Furthermore, Whelan repeatedly pursued motions for sanctions despite repeated comments and rulings by the Court that such motions lacked merit.
>
> The Court also finds that even after allowing for the appeals in this case, this case involved a straightforward non-compete agreement that could have been resolved quickly. After considering all the facts and circumstances, based on the Court's experience in similar cases, the Court awards Whelan $165,000 in attorney fees.

(L.F. 681-82) (internal citation omitted). Whelan did not file a motion to amend the judgment challenging any of these findings or this holding.

Instead, in an argument partially copied-and-pasted from its trial brief (*cf.* L.F. 649-50 *with* Resp.Br. 54-55), Whelan now argues on cross-appeal that awarding it

$165,000, rather than the $707,410 it claimed, was an abuse of discretion, because it was "entitled" to "its full attorneys' fees of $707,410.00" (Resp.Br. 23, 55-62). It takes issue with each of the trial court's findings as to the excessiveness of its fees and the course of the litigation, claiming that, as a result of that criticism, the trial court's findings and ultimate decision were "unjust" and "a 'shock' to 'the sense of justice'" (Resp.Br. 55-62).

Whelan's argument is without merit. First, it is not preserved for appeal. What Whelan *really* alleges is that the trial court erred in entering the findings it did so as to hold $707,410 was unreasonable and $165,000 was reasonable. An allegation that a finding in a judge-tried case was error is a challenge to the form or language of the judgment. Rule 78.07(c) requires such a challenge be preserved in a motion to amend the judgment. As Whelan filed no such motion, its point is not preserved for review.

Even if the point were preserved, Whelan seems to misunderstand the nature of the trial court's nearly unfettered discretion in determining the amount of fees. It was not bound by Whelan's invoices, hourly rates, or indeed any evidence at all. The law of Missouri is its statement that Whelan's claimed fees were excessive and its expert experience led it to conclude $165,000 was reasonable cannot be an abuse of discretion.

Therefore, if the Court somehow does not reverse the trial court's summary judgment holding Mr. Kennebrew liable for breach of the Agreement, it nonetheless still must affirm the trial court's award of attorney fees to Whelan in the amount of $165,000.

A. Whelan's point is not preserved for review.

Whelan argues the trial court abused its discretion in awarding it $165,000 in attorney fees, rather than the $707,410 it claimed, because the trial court erred in finding:

- "Whelan makes no argument the attorney fees it seeks are reasonable" (Resp.Br. 57)
- "some of the hours worked appear to be excessive" (Resp.Br. 57)
- "$400,000.00 in attorney fees were incurred in the first 15 months of the case" (Resp.Br. 57)
- "average monthly invoices amount[ed] to just under $13,000.00 per month" (Resp.Br. 58)
- Whelan "pursu[ed] motions for sanctions despite comments and rulings by the [trial c]ourt that such motions lacked merit" (Resp.Br. 59)
- "co-defendant W. Landon Morgan was dismissed with prejudice" (Resp.Br. 59)
- "Whelan was unsuccessful on four of seven counts" (Resp.Br. 60)
- "this case involves a straightforward non-compete agreement that could have been resolved quickly" (Resp.Br. 60)

Whelan argues each of these findings was error in some way. But Whelan did not file a post-trial motion to amend the judgment specifying any such error. As a result, the law of Missouri is Whelan's point is not preserved for review, and the Court must deny it.

Generally, in a judge-tried case, "neither a motion for a new trial nor a motion to amend the judgment or opinion is necessary to preserve any matter for appellate review." Rule 78.07(b). The exception to this, however, is that, "In all cases, *allegations of error*

relating to the form or language of the judgment … must be raised in a motion to amend the judgment in order to be preserved for appellate review." *Id.* at (c) (emphasis added).

The primary purpose behind the adoption of Rule 78.07(c) in 2005 was to alleviate this Court of child custody appeals in which required statutory findings were not made unless that failure first was brought to the trial court's attention. *In re Holland*, 203 S.W.3d 295, 302 (Mo. App. 2006).

Subsequently, however, this Court has held it applies to *any* allegation that either the failure to make any finding *or making* any finding in *any* type of judge-tried case was error. *Roberts Holdings, Inc. v. Becca's Bakery, Inc.*, 423 S.W.3d 920, 930 (Mo. App. 2014). Simply put, "'in all cases' [a] claim regarding the sufficiency of the findings in the judgment must be preserved by including it in a motion to amend the judgment," and otherwise are not preserved for appellate review *Id.* This applies both to allegations that a trial court erred in failing to make a finding, *id.*, or, as Whelan alleges, erred in making a finding it did. *See, e.g.*, *In re Marriage of Adams*, 414 S.W.3d 29, 37 (Mo. App. 2013) (argument that "trial court erred by finding that the parties had agreed to split post-secondary educational expenses because no evidence to that effect was presented at trial" was not preserved where appellant failed to file Rule 78.07(c) motion alleging this).

Here, Whelan did not file a post-trial motion of any kind (L.F. 7), let alone a Rule 78.07(c) motion to amend the judgment raising an allegation that the trial court had erred in making or giving certain weight to the eight findings, *supra* at 21, that Whelan now challenges for the first time on cross-appeal. As a result, Whelan's point on cross-appeal is not preserved for review. For this reason alone, the Court must deny it.

B. The trial court's expert determination that Whelan's claimed $707,410 in fees was excessive and unreasonable and instead that $165,000 was reasonable was not an abuse of its discretion.

Even if Whelan's point were preserved, it still would be without merit. Whelan seems to misunderstand both the trial court's role in fixing an amount of attorney fees and the nature of its nearly unfettered discretion in doing so.

As Whelan admits (Resp.Br. 54), "the trial court is considered an expert on the necessity, reasonableness, and the value of attorneys' fees," *WingHaven Residential Owners Ass'n, Inc. v. Bridges*, No. ED101499, 2015 WL 1119476 at *2 (Mo. App. Mar. 10, 2015). It "is presumed to know the character of the attorney's services rendered in duration, zeal, and ability," *id.*, as well as "the value of them according to custom, place, and circumstance." *Essex Contracting, Inc. v. Jefferson Cnty.*, 277 S.W.3d 647, 656 (Mo. banc 2009) (citation omitted).

Whelan mistakenly "assumes that because the amount of attorney's fees awarded was significantly less than [it]s request, the trial court did not properly consider the evidence" of its fees. *WingHaven*, 2015 WL 1119476 at *2. But "a significant difference between the amount of attorneys' fees awarded and the amount requested does not, standing alone, establish an abuse of discretion." *Id.*

Rather, a "trial court 'is not bound either by the number of hours performed … or the hourly charge.'" *Id.* (quoting *McIntosh v. McIntosh*, 41 S.W.3d 60, 72 (Mo. App. 2001)). "In fact, as an expert on the question of attorneys' fees, the trial court does not"

even "require any evidence or other opinion as to their value" and is not even "required to explain its reasons for [an] award of attorneys' fees …." *Id.*[3]

Thus, "Given the deference accorded to a trial court's assessment of attorneys' fees," *Essex*, 277 S.W.3d at 656, unless a statute sets out a specific, more rigorous calculation, *see, e.g.*, *Berry v. Volkswagen Grp. of Am., Inc.*, 397 S.W.3d 425, 430-31 (Mo. banc 2013) (Merchandising Practices Act requires precise calculation of "lodestar amount" of attorney fees and multiplication of that amount based on specific factors), showing an abuse of discretion in deviating significantly downward from a claimed amount of attorney fees is basically impossible. *See, e.g.*, *Gilliland v. Mo. Athletic Club*, 273 S.W.3d 516, 523 (Mo. banc 2009) (affirming award of $22,000 in attorney fees to party who had claimed $170,000 in fees); *WingHaven*, 2015 WL 1119476 at *2 (affirming award of $500 in attorney fees to party who had claimed $4,700 in fees).

Tellingly, the only decision Whelan cites in which the amount of attorney fees awarded was raised on appeal was one in which the respondent actually had stipulated that the appellant was owed more in fees than she received. *Williams v. Trans State Airlines, Inc.*, 281 S.W.3d 854, 878 (Mo. App. 2009). Essentially, barring something as

[3] Whelan argues the trial court *must* consider a list of seven factors in deciding an amount of attorney fees (Resp.Br. 56) (citing *Gilliland*, 273 S.W.3d at 523). But it omits that those "factors [are] relevant to an award of statutorily authorized fees," not common fees under a contract. *Id.* (using factors in Missouri Human Rights Act case, citing *Hensley v. Eckhart*, 461 U.S. 424, 429 (1983), for federal analogue under 42 U.S.C. § 1983)).

extraordinary as that, a trial court cannot be said to have abused its discretion in determining the amount of attorney fees in a non-statutory case.

Here, the trial court's award to Whelan of $165,000 in fees in this breach of contract action, rather than the $707,410 Whelan claimed, plainly was not against the logic of the circumstances then before the trial court and so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful, deliberate consideration.

To the contrary, the court carefully and deliberately considered its observations of the case and its experience in similar cases and found: (1) hours Whelan's attorneys reported to have worked were excessive, both generally and for specific tasks; (2) the fees Whelan was seeking from Mr. Kennebrew included fees expended on pursuing claims against a now-dismissed co-defendant; (3) Whelan was unsuccessful on most counts in its petition; (4) Whelan was seeking fees for pursuing motions for sanctions that were denied and that the trial court had told it had no merit; and (5) Whelan offered no explanation how, given all this, $707,410 was reasonable (L.F. 681-82).

As such, the court found "the fees Whelan seeks are excessive" (L.F. 681). It held that, "[a]fter considering all the facts and circumstances," and "based on" its "experience in similar cases," an award of $165,000 in attorney fees was reasonable (L.F. 682). Plainly, the court was entirely within its discretion to find this.

Citing neither the record nor any authority, Whelan argues its fees were reasonable because it "submitted detailed billing information, which included time entries of its attorneys' fees, and advised the [trial c]ourt that the fees had been paid in full" (Resp.Br. 57). This misses the mark. The trial court found that many of the hours in those bills

both generally and for specific tasks were excessive (L.F. 681). Simply submitting a bill to a client and getting the client to pay it does not make that bill reasonable. The trial court gets to determine whether it is so, and the court here determined Whelan's was not.

Whelan next argues, again not citing the record or any authority, that its hours actually were not excessive because of the character of all the proceedings in which it engaged, especially during the first 15 months of the case (Resp.Br. 57-58). It again misunderstands the trial court's point. Whatever the proceedings were in which it engaged, the trial court found its "hours worked [for] those specific tasks" to be excessive (L.F. 681). That Whelan disagrees does not make for an abuse of discretion.

Still not citing the record or any authority, Whelan argues $165,000.00 "would have required" its counsel "to conduct [four] years of litigation, including appeals to this court and the Missouri Supreme Court," facing four attorneys over that time, and all "for a total of 550 hours" (Resp.Br. 59). It complains this was an abuse of discretion because "No lawyer could have undertaken this amount of work in only 550 hours" (Resp.Br. 59).

Woe to Whelan's large-firm attorneys! Only 550 billable hours! Does that mean they actually overbilled? Might the client complain or, worse, fire counsel?[4] Whelan's

[4] No disrespect is meant by these tongue-in-cheek comments. Undersigned counsel has found Whelan's counsel to be amicable, collegial, and professional. But regardless of the fact that Whelan's counsel are reasonable people, so was the trial court. "If reasonable persons can differ as to the propriety of the trial court's action, then it cannot be said that the trial court abused its discretion." *Hancock*, 100 S.W.3d at 795.

argument is based on its notion that its counsel's average hourly rate was $300.00, which the trial court did not find excessive (Resp.Br. 56). But the court did not find it *not* excessive. To the contrary, it *did* find "the fees Whelan seeks are excessive" (L.F. 681).

The trial court was not "required to explain its reasons for the award of attorneys' fees," and any facts not addressed will be considered on appeal "to have been found in accordance with the result reached …." *WingHaven*, 2015 WL 1119476 at *2 (citing Rule 73.01(d)). Therefore, even if "[n]o lawyer could have undertaken" the work below "in only 550 hours" at $300/hour – a statement for which Whelan offers no evidence – this Court must view the trial court as having found Whelan's hourly rate excessive, too.

Whelan argues the trial court could not fault it "for pursuing motions for sanctions despite comments and rulings from the trial court that such motions lacked merit," and on which "the circuit court did not rule in favor of Whalen [*sic*]," because "the motions were not inappropriate" and "comprised a *de minimis* portion of" the fees it sought (Resp.Br. 59). Whelan does not cite any such motions in the record. Still, it misses the trial court's point: that Whelan's multiple, frivolous motions for sanctions were part of a pattern of unreasonable, excessive litigation. Again, that Whelan disagrees with that assessment does not make for an abuse of the trial court's discretion.

Next, and still not citing the record or any authority, Whelan takes issue with the trial court's observation that it unreasonably was seeking fees from Mr. Kennebrew for prosecuting claims against a dismissed co-defendant, Landon Morgan, because Mr. Morgan actually was dismissed due to bankruptcy (Resp.Br. 60). That this was indeed so

(L.F. 55), though, does not obviate the inequity of charging Mr. Kennebrew for claims asserted against that other person. That was the court's point.

Whelan also argues the court's "statement that Whelan was unsuccessful on four of seven counts" in its petition was "an inaccurate characterization" (Resp.Br. 60). On this one tiny morsel, Mr. Kennebrew must agree. The trial court was incorrect to intimate that Whelan had succeeded on three of its seven counts. In fact, *Whelan was successful on only one of its seven claims*, not three.

Either Whelan dismissed or the trial court denied its claims for: (1) injunctive relief against Mr. Kennebrew;[5] (2) unjust enrichment against Mr. Kennebrew; (3) injunctive relief against Mr. Morgan; (4) breach of contract against Mr. Morgan; (5) unjust enrichment against Mr. Morgan; and (6) civil conspiracy against Mr. Morgan (L.F. 55, 679-80; P.L.F. 9, 12-14). The *sole* claim on which Whelan prevailed out of its seven was breach of contract against Mr. Kennebrew (L.F. 238; P.L.F. 11). As the trial court observed, it plainly had the power to determine Whelan deserved fewer fees than it claimed when it only prevailed on one count (L.F. 681) (citing *Grissom v. First Nat'l Ins. Agency*, 364 S.W.3d 728, 736 (Mo. App. 2012)). Considering that $165,000 is more than one seventh of $707,410, there is nothing wrong with the court's determination.

[5] Whelan now argues injunctive relief "became moot with the passage of time" (Resp.Br. 60). Below, however, it pressed for an injunction even at trial (L.F. 654 (arguing "[d]espite the passage of time, injunctive relief remains appropriate"). The trial court denied this claim on the merits (L.F. 679-80), a decision Whelan does not appeal.

Whelan also takes issue with the trial court's conclusion that, based on its observations of the case and its experience in similar cases, this case involved "a straightforward non-compete agreement that could have been resolved quickly" (Resp.Br. 60). It says this was "illogical, arbitrary and unreasonable" because this case and other non-compete clause cases like this are "vitally important to Whelan" (Resp.Br. 60). Good for Whelan. The trial court, however, did not see it that way. Again, that Whelan disagrees does not make the trial court's decision an abuse of its discretion.

While Whelan cites no authority as to any of its arguments, as to this point that absence is particularly glaring. Whelan cites no authority reversing an amount of an attorney fee award due to an appellate court's criticism of a trial court's observation about the character of the case. This is *because no such authority exists or could exist*, given the standard of review. The trial court is the learned expert and knows the reasonable value of a case and an attorney's work on it. Regardless of how Whelan feels, the trial court's point here was that, "considering all the facts and circumstances, based on [its] experience in similar cases," $707,410 was an excessive fee request, and instead $165,000 was a reasonable attorney fee for Whelan (L.F. 682).

The law of Missouri is it had discretion to determine this. Its decision was not "clearly against the logic of the circumstances then before the court and … so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful, deliberate consideration." *Hancock*, 100 S.W.3d at 795. That Whelan cites neither authority nor the record on appeal in arguing otherwise is telling.

Conclusion

The Court should reverse the trial court's judgment against Mr. Kennebrew and remand this case for trial on: (1) whether Mr. Kennebrew solicited Park Square in violation of § 3(a) of the Agreement; (2) whether Whelan waived § 3(c) of the Agreement; and (3) whether Mr. Kennebrew "provided services" for Whelan in Houston so as to make Houston a locus of § 3(c) of the Agreement. Otherwise, the Court should affirm the trial court's decision to award Whelan $165,000 in attorney fees.

Respectfully submitted,

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Certificate of Compliance

I hereby certify that I prepared this brief using Microsoft Word 2013 in Times New Roman size 13 font. I further certify that this brief complies with the word limitations of Supreme Court Rule 84.06(b) and this Court's Rule 360(a)(1)(a), and that this brief contains 8,006 words.

/s/Jonathan Sternberg
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Certificate of Service

I hereby certify that, on June 1, 2015, I filed a true and accurate Adobe PDF copy of this brief via the Court's electronic filing system, which notified the following of that filing:

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