21-123731-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

SASHA BHADURI,

Plaintiff / Appellant,

vs.

L.M.K. CONSTRUCTION, INC.
and LINC MORTENSON,

Defendants / Appellants.

On Appeal from the District Court of Douglas County
Honorable Mark Simpson, District Judge
District Court Case No. 2016-CV-000299

REPLY BRIEF OF THE APPELLANT

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Table of Contents

Authorities:

Reply Argument and Authorities

Rule 6.05 Statement

This reply brief is made necessary by new material in the appellees' brief. Specifically, that new material is the appellees' arguments:

(1) that the parties' Agreement did not contain a condition precedent to LMK seeking damages of providing Ms. Bhaduri written notice of termination (Brief of the Appellee ["Aple.Br."] 18-21);

(2) that LMK providing Ms. Bhaduri written notice of termination would have been redundant or futile (Aple.Br. 21-22);

(3) that LMK substantially complied with the written notice requirement by filing suit without written notice of termination (Aple.Br. 23-25);

(4) that KRPC 1.5 makes it reasonable to award attorney fees to a contract plaintiff who a jury awarded zero damages (Aple.Br. 27-29);

(5) that the Agreement allowed LMK to obtain attorney fees for prevailing against Ms. Bhaduri's claims, rather than only on its own counterclaim, and that the district court held this (Aple.Br. 32-33);

(6) that viewed under the summary judgment standard, Mr. Mortenson's 15% markup was an industry standard (Aple.Br. 44-51), Mr. Mortenson's non-disclosure of the cost of the deck doors was neither willful nor deceptive (Aple.Br. 47-50), and Mr. Mortensen "made an honest mistake" in quoting costs for the garage doors (Aple.Br. 41); and

(7) that Ms. Bhaduri failed to specify into which of the K.S.A. § 50-626(b)(1) categories her knowing misrepresentation claims fell (Aple.Br. 39).

I. The Agreement's provision requiring LMK to provide Ms. Bhaduri written notice of termination in a specific manner was a condition precedent to LMK seeking attorney fees for an action for damages, and LMK failed to comply with it.

In her first issue in her opening brief, Ms. Bhaduri explained that the district court erred in awarding LMK any attorney fees, costs, or expenses under the Agreement because the Agreement did not entitle LMK to any of these (Brief of the Appellant ["Aplt.Br."] 21-30). This is because when a contract creates a condition precedent to a party's ability to seek attorney fees, the party seeking fees must fulfill that condition in order to have a right to attorney fees under the contract (Aplt.Br. 22-26). Ms. Bhaduri cited numerous decisions holding a party was not entitled to attorney fees for this reason, including *In re Marriage of Poplin*, No. 123241, 2021 WL 3701345 at *10 (Kan. App. Aug. 20, 2021) (unpublished), in which this Court held a party was not entitled to attorney fees under an agreement when she failed to provide written notice of default as the contract required (Aplt.Br. 22-26).

Here, to pursue a valid action for damages against Ms. Bhaduri for default, the Agreement expressly required LMK to provide her written notice of termination of the Agreement in person, by certified mail, or facsimile to her address in the contract or to her real estate agent, and LMK did not do so (Aplt.Br. 26-30). Therefore, as in *Poplin* and the other decisions Ms. Bhaduri cited, LMK was not entitled to attorney fees under the Agreement for pursuing that action for damages.

In response, LMK does not contest that it did not provide Ms. Bhaduri written notice of termination of the Agreement in person, by certified mail, or facsimile to her address in the contract or to her real estate agent (Aple.Br.

17-25). Nor does it address *Poplin* – or indeed any decision Ms. Bhaduri cited in her argument over her first issue in her opening brief (compare Aple.Br. 17-25 with Aplt.Br. 21-30).

Instead, LMK first argues the notice provision was not a condition precedent to suit at all, but instead "merely provides LMK's method for terminating the contract if [Ms.] Bhaduri defaulted" (Aple.Br. 18-21). It says this is because "termination by written notice was among the remedy options available to LMK in the event of [Ms.] Bhaduri's default," so what she is doing is "attempt[ing] to transform the method of termination into a condition precedent to all of LMK's remedies except specific performance" (Aple.Br. 19-20).

LMK's attempt to shirk the Agreement's requirement of specific written notice is in error, and cannot be squared with the Agreement's plain language. This requirement *is* a condition precedent to all of LMK's remedies except specific performance, which makes sense given that specific performance obviates termination and instead continues the Agreement. But in order to maintain an action for damages, the Agreement's plain, unambiguous language required LMK to "terminate this Contract by written notice to [Ms. Bhaduri] **and**, at [LMK]'s option, **either** retain the Earnest Money as liquidated damages as [LMK]'s sole remedy ... **or** pursue any other remedy and damages available at law or in equity" (Ex. 167 p. 12).

So, the Agreement directly connects the notice-of-termination requirement to LMK's ability either to retain Ms. Bhaduri's earnest money or pursue an action for damages, using the connector "and." LMK may

terminate the agreement *and* pursue an action for damages to enforce its rights. It must do one *and* the other. They are part and parcel of the same provision. Indeed, had LMK obtained any damages, which it did not, Ms. Bhaduri would be arguing that it never had the right to pursue damages in the first place, as in *Rosson v. Cutshall*, 11 Kan. App. 2d 267, 270-71, 719 P.2d 23 (1986), which she discussed in her opening brief (Aplt.Br. 23). And as LMK's action for damages failed this condition precedent, LMK cannot obtain attorney fees for hiring an attorney to pursue a remedy the contract did not make available to it. *See id.*; *see also Nat'l City Mortg. Co. v. Richards*, 182 Ohio App. 3d 534, 544-46, 913 N.E.2d 1007 (2009) (where notice was required to pursue action under contract, successful party's failure to provide that notice meant it could not recover attorney fees for that action).

LMK's argument effectively seeks to nullify the connection between the Agreement's notice-of-termination requirement and its provision for maintaining an action to pursue damages, and make that connection superfluous. But "a contract must be interpreted in light of its provisions, and every provision must be construed, if possible, to be consistent with every other provision and to give effect to all." *Daggett v. Bd. of Pub. Utils. of Unified Gov't of Wyandotte Cnty.*, 46 Kan. App. 2d 513, 516, 263 P.3d 847 (2011). LMK's reading of termination by written notice being simply "among the remedy options available" fails to give effect to the Agreement's actual language specifically making this requirement part of LMK's ability to maintain an action for damages.

For, under LMK's preferred reading, there would be no reason to include the termination requirement in the clause providing its ability to maintain an action for damages at all, let alone separate out the termination requirement *and* the ability to maintain an action for damages *together* from its ability to seek specific performance. The separation out and the connection language "and" would have no effect. Plainly, that is not what the Agreement does. On a default, it allows LMK either (1) to seek specific performance or (2) to terminate the Agreement by written notice *and* seek damages. It does not provide LMK an independent ability to seek damages *without* written notice of termination. The Agreement could have provided this. It even could have left any limitations on its remedies out entirely, leaving them to the law. It did not.

So, the Agreement's written notice requirement plainly is a condition precedent, which is just "something that is agreed must happen or be performed before a right can occur to enforce the main contract." *Weinzirl v. Wells Grp., Inc.*, 234 Kan. 1016, Syl. ¶ 3, 677 P.2d 1004 (1984). To activate its right to enforce the contract by seeking damages, LMK must provide written notice of termination. And a court cannot add to the remedies the Agreement provides. *Rosson*, 11 Kan. App. 2d at 270-71.

Tellingly, the few authorities LMK cites (Aple.Br. 20) do not hold anything similar to what it argues. First, it cites two general entries in *Corpus Juris Secundum* and one Kansas decision, *Carl I. Brown & Co. v. Carlton Mortg. Servs., Inc.*, No. 74,777, 1996 WL 35070281 at *5 (Kan. App. 1996) (unpublished). *Carl I. Brown* is inapposite. There, there was no

language connecting one party's compliance with HUD guidelines to the other's performance at all. *Id.* That is not so here.

LMK also cites two Texas decisions, *Solar Applications Eng'g, Inc. v T.A. Operating Corp.*, 327 S.W.3d 104, 110 (Tex. 2010), and *Arbor Windsor Ct., Ltd. v. Weekley Homes, LP*, 463 S.W.3d 131, 137-38 (Tex. App. 2015), which are equally inapposite. In *Solar Applications*, a lien-release provision was not a condition precedent to a party's recovery on the contract because it was not connected to any language about the ability to recover, and instead itself was a separate covenant subject to an action for breach. 327 S.W.3d at 108-10. And *Arbor Windsor* does not help LMK, as there the court held notice of default *was* a condition precedent to the other party's ability to recover under a contract, noting that language connecting the two provisions was sufficient to accomplish this. 463 S.W.3d at 138-39.

LMK's argument that the Agreement's notice of termination requirement was not a condition precedent to its ability to maintain an action for damages, and therefore recover attorney fees for that action, is erroneous.

LMK also argues that because *Ms. Bhaduri* terminated the Agreement, giving her notice of its own termination would have been "redundant or futile" (Aple.Br. 21-22). LMK is wrong that Ms. Bhaduri terminated the agreement before LMK filed its counterclaim, as she sought specific performance as a remedy and had not yet elected to forego it (R1 at 11-12). Regardless, the Agreement's default provision was about *LMK's* ability to recover, not Ms. Bhaduri's (R6 at 206-08). It levied on *LMK* a requirement to give Ms. Bhaduri notice that *it* was terminating the Agreement. Even if Ms.

Bhaduri stated she terminated the agreement, LMK remained free under the Agreement to reject that and seek specific performance. One party's termination did not obligate the other to do so, too. The notice provision was there to require LMK to provide written notice of termination before electing to pursue damages, so Ms. Bhaduri's seeking her own remedies did not make LMK's requirement of notice redundant or futile. LMK must be held to the Agreement's requirements as they are. *Rosson*, 11 Kan. App. 2d at 270-71.

The only two authorities LMK cites in arguing it should be excused from compliance because Ms. Bhaduri was pursuing her own remedies (Aple.Br. 22) are entirely off-base. First, it cites *Anderson v. Dugger*, 130 Kan. 153, 285 P. 546, 547 (1930), a 90-year-old decision not involving a condition precedent in a contract at all, but instead holding that where a property is mortgaged for more than it is worth, an execution on the property would be futile. It also cites *Allen v. Att'y Gen. of State of Me.*, 80 F.3d 569, 573 (1st Cir. 1996), which held federal courts may relieve a habeas corpus petitioner of the obligation to pursue available state appellate remedies first if the federal courts can provide adequate relief. *Id.* Neither decision has anything to do with Ms. Bhaduri's first issue at all.

Finally, citing no authority, LMK argues that while it did not comply with the Agreement's written notice requirement, it "substantially complied" because she had "actual notice" of this by LMK's filing its lawsuit (Aple.Br. 23-25). That LMK cites no authority for this – and does not address any of Ms. Bhaduri's authorities – is telling, as no authority supports LMK's position, which is nonsensical. The Agreement did not allow LMK to seek

damages unless it *also* had given written notice of termination. LMK's argument effectively would mean that anytime a party shirks a contract's condition precedent to filing an action but files the action anyway, it is automatically excused from the condition precedent.

In the context of tort claims against municipalities, which requires a specific written notice by statute as a precondition to bringing suit, the notion that simply filing suit, even where the municipality waives notice, is sufficient notice because it is "substantial compliance" has been resoundingly rejected. *Zeferjohn v. Shawnee Cnty. Sheriff's Dep't*, 26 Kan. App. 2d 379, 381-82, 988 P.2d 263 (1999). Similarly, the remedies the Agreement allows are the remedies the Agreement allows, and this Court cannot add or subtract from them. *Rosson*, 11 Kan. App. 2d at 270-71. As LMK concedes, it did not provide Ms. Bhaduri the required written notice at all. Its filing suit anyway is not substantial compliance with that requirement.

As in *Poplin* and the other decisions Ms. Bhaduri cited in her opening brief, LMK had no right to seek attorney fees, costs, or expenses under the Agreement. The district court erred as a matter of law in holding otherwise. This Court should reverse the district court's award to LMK.

II. LMK's recovery of any attorney fees on its breach of contract claim for which the jury awarded it zero damages is unreasonable as a matter of law.

In her second issue, Ms. Bhaduri explained that even if the Agreement allowed LMK to recover attorney fees, it only allowed reasonable fees, and as a matter of law the jury's award of zero damages to LMK made the only reasonable amount of attorney fees zero (Aplt.Br. 31-37). In support, she

cited the U.S. Supreme Court's decision in *Farrar v. Hobby*, 506 U.S. 103, 115 (1992), holding that zero recovery usually means the only reasonable fee award is zero, this Court's decision in *Wolfert Landscaping Co. v. LRM Indus., Inc.*, No. 106989, 2012 WL 5392143 at *6 (Kan. App. Nov. 2, 2012) (unpublished), affirming the denial of attorney fees from a breach of contract claim when the district court found the party seeking fees suffered no damages from the breach, and decisions from throughout the United States applying this principle to hold if a party is awarded no damages, any award of attorney fees is unreasonable (Aplt.Br. 32-35).

Most any reply to Ms. Bhaduri would give to LMK's response would be re-argument. LMK argues she waived any argument that the district court was legally unauthorized to award fees under the Agreement (Aple.Br. 26-27). But that was already the subject of Ms. Bhaduri's first issue. Her second issue concerns the reasonable amount of those fees if LMK is so entitled. LMK argues the fees charged were customary and the amount of time its attorneys spent was reasonable (Aple.Br. 31-32). The problem is they incurred this to achieve *zero recovery* on the claim for which fees would be authorized. It argues *Harder v. Foster*, 54 Kan. App. 2d 444, 454, 401 P.3d 1032 (2017), makes the Agreement's fee provision different from an ordinary "prevailing party" attorney fee provision (Aple.Br. 34). Ms. Bhaduri already conceded that, but explained why *Harder* was distinguishable as the party there recovered damages (Aplt.Br. 34), which LMK does not address.

Still, two responses by LMK merit a reply. First, LMK argues the award of fees to it was reasonable under KRPC 1.5(a) *as a whole*, regardless

of the amount involved and results obtained, which was only one factor (Aple.Br. 27-29). It argues "[w]hile 'the amount involved and the results obtained' is one of the factors to be considered under Rule 1.5(a), it should not form the sole basis for the award" (Aple.Br. 28) (quoting *Snider v. Am. Fam. Mut. Ins.* Co., 45 Kan. App. 2d 196, 202, 244 P.3d 1281 (2011)).

In an ordinary case, LMK might be correct. If it had obtained any recovery from the jury's verdict on its claim, then some amount of attorney fees may have been reasonable. But none of the decisions LMK cites in any part of its response to Ms. Bhaduri's second issue involved awarding attorney to a party who obtained no relief, let alone affirmed such an award. *See Consolver v. Hotze*, 306 Kan. 561, 568, 395 P.3d 405 (2017) (attorney's work resulted in tort plaintiff's recovery of $300,000 settlement); *Est. of Kirkpatrick v. City of Olathe*, 289 Kan. 554, 571, 215 P.3d 561 (2009) ($17,000 verdict to inverse condemnation plaintiff); *Snider*, 45 Kan. App. 2d at 201 ($5,000 summary judgment to contract plaintiff); *Wenrich v. Empls. Mut. Ins. Cos.*, 35 Kan. App. 2d 582, 585, 132 P.3d 970 (2006) ($8,724.01 verdict to contract plaintiff); *York v. InTrust Bank, N.A.*, 265 Kan. 271, 307, 962 P.2d 405 (1998) ($33,183.28 judgment for KCPA plaintiffs); *Johnson v. Westhoff Sand* Co., 281 Kan. 930, 940, 135 P.3d 1127 (2006) ($4 million judgment for K.S.A. § 40-256 plaintiffs); *Curo Enters., LLC v. Dunes Residential Servs., Inc.*, 51 Kan. App. 2d 77, 87, 342 P.3d 948 (2015) (plaintiff obtained the relief it requested in its petition in declaratory action).

That LMK is unable to find a single case affirming an award of attorney fees after a plaintiff's recovery of zero damages on a breach of

contract claim, especially any Kansas authorities, is unsurprising. This is because, as Ms. Bhaduri explained in her opening brief, while ordinarily – as in the above cases – the amount involved and the results obtained is just one of the factors to be considered in determining a reasonable fee, when the plaintiff recovers zero damages it is the governing factor (Aplt.Br. 32-34).

The only Kansas authorities, like *Wolfert*, refused a fee award in this situation, and Kansas courts also follow the U.S. Supreme Court's rule from *Farrar*. *See, e.g.*, *Hildenbrand v. Avignon*, No. 120,245, 2021 WL 137339 at *10 (Kan. App. Jan. 15, 2021) (unpublished); *Taylor v. Kan. Dep't of Health & Env't*, 49 Kan. App. 2d 233, 245, 305 P.3d 729 (2013); *DPR, Inc. v. City of Pittsburg*, No. 84,631, 2000 WL 36746096 at *1 (Kan. App. Sept. 1, 2000) (unpublished).

As the Supreme Court of Washington explained in *Sintra, Inc. v. City of Seattle*, 131 Wash.2d 640, 664-66, 935 P.2d 555 (1997), *abrogated on other grounds*, *Yim v. City of Seattle*, 194 Wash.2d 682, 703, 451 P.3d 694 (2019), following *Farrar*, "the central issue to be addressed in [a court's] consideration of an award of attorney's fees" for a damages claimant is "the degree of success obtained," and when "[r]ecovery of private damages was the primary purpose of" the plaintiff's action, a recovery of zero or nominal damages means the plaintiff "is not entitled to an award of attorney fees …"

LMK does cite three decisions in which a party who recovered zero damages was held to be a prevailing party entitled to "reasonable attorney fees," though it offers no discussion of them. *See Khodam v. Escondido Homeowner's Ass'n, Inc.*, 87 So. 3d 65, 66 (Fla. App. 2012); *Benchmark*

Builders, Inc. v. Schultz, 294 Ga. 12, 15, 751 S.E.2d 45 (2013); *Regency Realty Invs., LLC v. Cleary Fire Prot., Inc.*, 260 P.3d 1, 6 (Colo. App. 2009).

These decisions are inapposite. Apparently unlike Kansas these states may not follow the *Farrar* rule, as none of these decisions cited or discussed *Farrar* or its progeny. More importantly, none of these decisions actually affirmed an award of fees to a party who was awarded no damages. In *Khodam* and *Regency*, the courts held the appellants were prevailing parties and reversed and remanded for an award of reasonable attorney fees, though they did not clarify or analyze what those would be. 87 So. 3d at 66; 260 P.3d at 6. In *Benchmark*, unlike here (R6 at 208-09), the plaintiff prevailing on the other party's counterclaim was deemed sufficient recovery to entitle them to attorney fees under the specific provision of the contract at issue, regardless of the zero recovery on its own claim. 294 Ga. at 15.

Under these circumstances, as a matter of law the governing KRPC 1.5(a) factor is the amount of LMK's recovery, zero. This makes an award of attorney fees to LMK unreasonable.

LMK also argues its right to attorney fees were *not* limited to its own claim against Ms. Bhaduri, but also its defense to Ms. Bhaduri's counterclaim, and the district court had not held otherwise. It argues this is because the district court held many of the fees were intertwined (Aplt.Br. 32-33). This is mistaken. The district court directly held the Agreement's attorney fee provision *did not* extend to LMK's defense to Ms. Bhaduri's counterclaim, and instead foreclosed that (R6 at 208-09):

> One cannot say that the parties contemplated at the time of contracting that Plaintiff would have to pay Defendant's legal

> fees if Plaintiff sued Defendant and lost. The plain language of the contract deals only with attorney fees in instances where Defendant sues Plaintiff to enforce his rights.
>
> The contract does not make any provisions for attorney fees if Plaintiff sues Defendant. The parties could have included a provision that the prevailing party in any litigation connected to the contract is entitled to reasonable attorney fees. However, they did not do that. …
>
> Taken together, this court cannot find that Defendant's expenses in defending against Plaintiffs claims are in connection with Plaintiffs default. The parties did not contemplate such an outcome at the time of contracting and the plain, unambiguous language of the contract must be enforced. Accordingly, to the extent that they can be segregated, Plaintiff is not responsible for attorney fees, costs, or expenses incurred by Defendant in defense against Plaintiffs claims.

LMK does not cross-appeal from this decision.

The fact LMK defeated Ms. Bhaduri's counterclaim, and whatever result they obtained by that, including Ms. Bhaduri not recovering her up-front non-refundable deposits, has nothing to do with the only claim for which LMK could have been entitled to attorney fees: its own claim, for which it recovered nothing. As a matter of law, its fee award is unreasonable.

III. Viewing the summary judgment record in Ms. Bhaduri's favor, the defendants violated the Kansas Consumer Protection Act and were not entitled to summary judgment on that claim.

In her third issue, Ms. Bhaduri explained the district court also erred in granting LMK and Mr. Mortensen summary judgment on her KCPA deceptive conduct claims (Aplt.Br. 38-50). The district court failed to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of Ms. Bhaduri, the summary judgment non-movant, as it was bound to

(Aplt.Br. 42-45). So viewed, the defendants made knowing misrepresentations in violation of K.S.A. § 50-626(b)(1) (Aplt.Br. 46-47) and made willful falsehoods and omissions in violation of K.S.A. § 50-626(b)(2)-(3) (Aplt.Br. 47).

Like the district court, the defendants wholly fail to view the record most favorably to Ms. Bhaduri or draw inferences in her favor (Aple.Br. 44-50). For example, they argue Mr. Mortenson's 15% markup was an industry standard (Aple.Br. 44-51). Ms. Bhaduri showed Mr. Mortenson *did not* always use a 15% markup and only suddenly claimed he did when she caught him in a falsehood, and then used this claimed markup to double-charge her (Aplt.Br. 44-45). They argue Mr. Mortenson's non-disclosure of the cost of the deck doors was neither willful nor deceptive (Aple.Br. 47-50). Ms. Bhaduri showed he knew that without that information, she could not compare prices and find doors that were better priced, which was something the Agreement allowed her to do (Aple.Br. 45, 50). Finally, they argue Mr. Mortensen "made an honest mistake" in quoting costs for the garage doors (Aple.Br. 41). Ms. Bhaduri showed that this was grossly untrue, and instead viewing the record favorably to her and drawing inferences in her favor, Mr. Mortenson knowingly misrepresented to her the allowance for a garage door and the cost of the door she selected, and did so to pad the costs to his benefit (Aplt.Br. 42-43). This Court should reject the defendants' preferred reading of the summary judgment record, and under unlimited review view the record favorably to Ms. Bhaduri as the district court should have but did not (Aplt.Br. 42-45).

In her opening brief, Ms. Bhaduri noted the district court ignored her knowing misrepresentation claims under K.S.A. § 50-626(b)(1) entirely, only addressing her willful omission claims under § 50-626(b)(2)-(3) (Aplt.Br. 46). The defendants argue this was proper, because § 50-626(b)(1) is limited to the subcategories (A)-(G) in that subsection, and Ms. "Bhaduri does not specify into which of the categories contained in subsection (b)(l) her allegations fall" (Aple.Br. 39). They argue Ms. "Bhaduri assumes the knowingly-or-with-reason-to-know standard provided in subsection (b)(l) applies to all alleged misrepresentations and omissions under the KCPA," which "would make the willful standard in subsections (b)(2) and (b)(3) superfluous" (Aple.Br. 39).

The defendants' argument is in error. As she did below, Ms. Bhaduri explained in her opening brief that her knowing misrepresentation claims fall into § 50-626(b)(1)(A) or (F): "Property or services have sponsorship, approval, accessories, characteristics, ingredients, uses, benefits or quantities that they do not have; [or] … uses, benefits or characteristics unless the supplier relied upon and possesses a reasonable basis for making such representation" (Aple.Br. 40) (quoting § 50-626(b)(1)). The defendants' knowing misrepresentations that (1) they always charged 15% to changes, (2) her costs for the garage door was $8,225, and (3) her garage door allowance was $2,760, all fit into these (Aplt.Br. 46-47).

Conclusion

This Court should reverse the district court's fee and cost award. It also should reverse the partial summary judgment on Ms. Bhaduri's KCPA claims and remand the case for further proceedings on those claims.

Respectfully submitted,

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by /s/Jonathan Sternberg

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Certificate of Service

I certify that on February 15, 2021, I electronically filed a true and accurate Adobe PDF copy of the foregoing with the Clerk of the Court by using the electronic filing system, which will send notice of electronic filing to the following:

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Appendix

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All Citations

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2000 WL 36746096
Only the Westlaw citation is currently available.

Court of Appeals of Kansas.

DPR, INC. a Kansas Corporation d/b/a Pat's Lounge; Patricia Rohrbaugh, as President of DPR, Inc.; and Don Rohrbaugh, as Secretary/Treasurer of DPR, Inc.; as officers of said corporation and in their own proper persons, Appellants,
v.
CITY OF PITTSBURG, Kansas, Appellee.

No. 84,631
|
Opinion filed September 1, 2000.

Appeal from Crawford District Court; DAVID F. BREWSTER, judge.

Attorneys and Law Firms

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Before BRAZIL, C.J., LEWIS and KNUDSON, JJ.

MEMORANDUM OPINION

Per Curiam:

***1** DPR, Inc. (DPR) appeals the trial court's denial of attorney fees in an action brought under 42 U.S.C. § 1983 (1995). Two issues are raised: (1) Did DPR make a timely request for attorney fees; and (2) was DPR the "prevailing party" under 42 U.S.C. § 1988 (1995).

DPR filed an original action challenging as unconstitutional an ordinance of the City of Pittsburg, Kansas, and seeking injunctive and declaratory relief. The ordinance involved regulated activities in establishments licensed to sell liquor and was aimed primarily at nude dancing. After a bench trial, the trial court upheld the constitutionality of the ordinance.

DPR appealed to this court. In *DPR, Inc. v. City of Pittsburg*, 24 Kan. App. 2d 703, 953 P.2d 231, *rev. denied* 264 Kan. 821 (1998), this court struck down three provisions of the ordinance as unconstitutional, while upholding the balance of the ordinance, including its central purpose—the ban on totally nude dancing.

DPR then filed a motion requesting taxation of court costs, including reasonable attorney fees. The trial court denied DPR's request for attorney fees as being untimely since it was not included in the pretrial order and because DPR was not a prevailing party as required under 42 U.S.C. § 1988 (1995).

42 U.S.C. § 1988 (1995) states, in material part: "(b) Attorney's fees. In any action or proceeding to enforce a provision of [section 1983], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

DPR's petition requested that costs be assessed against the City of Pittsburg. K.S.A. 60-2002(a) provides costs are ordinarily allowed "to the party in whose favor judgment is rendered."

We find analogous *Grove v. Orkin Exterminating Co.*, 18 Kan. App. 2d 369, 375-76, 855 P.2d 968 (1992). The Groves prevailed at trial but the trial court denied an award of attorney fees as part of the court costs because no timely claim had been made before judgment was entered. On appeal, this court reversed, finding the Groves' request for costs in their petition to be sufficient.

We believe that under K.S.A. 60-2002, the taxation of costs is an inherent issue and need not be specifically requested or identified in a pretrial order. We conclude the trial court erred in its ruling that DPR is precluded from an award of reasonable attorney fees because the claim was not made and preserved in the pretrial order.

We next consider whether DPR is entitled to attorney fees under 42 U.S.C. § 1988(b) (1995).

A "prevailing party" within the meaning of 42 U.S.C. § 1988(b) (1995) has been defined as a party which succeeds on " ' "any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.' " " *Farrar v. Hobby*, 506 U.S. 103, 109, 121 L. Ed. 2d 494, 113 S. Ct. 566 (1992) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433, 76 L. Ed. 2d 40, 103 S. Ct. 1933 [1983], and *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 [1st Cir. 1978]). The judgment obtained must affect the behavior of the defendant toward the plaintiff. 506 U.S. at 110. In essence, the judgment must materially alter the legal relationship between the parties. See *Texas Teachers Assn. v. Garland School Dist.*, 489 U.S. 782, 792, 103 L. Ed. 2d 866, 109 S. Ct. 1486 (1989); *Ortega v. City of Kansas City, Kan.*, 723 F. Supp. 1426, 1427 (D. Kan. 1989).

***2** In denying DPR's request for attorney fees, the trial court found the decision of the Court of Appeals did not materially alter the legal relationship between the parties. In other words, the trial court reasoned that because the ban on total nude dancing was upheld, the precise activity performed by DPR's employees, DPR had achieved only a de minimis victory and was not a "prevailing party" entitled to attorney fees.

The trial court's reasoning is consistent with 42 U.S.C. § 1988(b) (1995) and supported by substantial competent evidence. Accordingly, we conclude the trial court did not abuse its discretion in denying DPR's request for attorney fees.

Affirmed.

All Citations

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478 P.3d 795 (Table)
Unpublished Disposition
This decision without published opinion
is referenced in the Pacific Reporter.
See Kan. Sup. Ct. Rules, Rule 7.04.
NOT DESIGNATED FOR PUBLICATION
Court of Appeals of Kansas.

Jim HILDENBRAND, and James B. Hildenbrand, Trustee of the James B. Hildenbrand Living Trust, Dated March 1, 2012, Appellees/Cross-appellants,
v.
AVIGNON VILLA HOMES COMMUNITY ASSOCIATION, INC., Appellant/Cross-appellee.

No. 120,245
|
Opinion filed January 15, 2021.

Appeal from Johnson District Court; RHONDA K. MASON, judge.

Attorneys and Law Firms

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Eldon J. Shields, of Gates Shields Ferguson Swall Hammond, P.A., of Overland Park, for appellees/cross-appellants.

Before Atcheson, P.J., Bruns, J., and Burgess, S.J.

MEMORANDUM OPINION

Atcheson, J.:

***1** A long-running legal battle between James B. Hildenbrand and Avignon Villa Homes Community Association that oversees the development where he lives has returned to us for a second visit. In the first appeal, we reversed and remanded a judgment the Johnson County District Court entered for the Homes Association requiring Hildenbrand to remove extensive and unapproved landscaping to his home. In a bench trial, the district court incorrectly applied the governing statutory standard in reviewing the determination of a Homes Association committee to reject Hildenbrand's landscaping plans. After reopening discovery and hearing additional evidence on remand, the district court ultimately: (1) found the Homes Association's Architectural Review Committee did not act in good faith and, therefore, violated K.S.A. 2015 Supp. 58-4604(a) when it rejected the bulk of Hildenbrand's landscaping plans; (2) set aside the earlier order requiring Hildenbrand to remove the landscaping; (3) rescinded an award of attorney fees to the Homes Association; and (4) ordered Hildenbrand to pay $25,000 in contractual fines to the Homes Association because he did not get approval from the Architectural Review Committee before landscaping his home.

The Homes Association has appealed, and Hildenbrand has cross-appealed. We affirm the district court in all respects except the amount of the fines. The district court's reasoning and the record support fines of $17,600. We remand to the district court for the limited purposes of revising the amount of the fines.

FACTUAL AND PROCEDURAL HISTORY

A. History Through First Appeal

We draw on our earlier opinion to set out the factual background and the procedural history leading up to the first remand to the district court. See *Hildenbrand v. Avignon Villa Homes Community Association, Inc.*, No. 114,040, 2016 WL 6350201 (Kan. App. 2016) (unpublished opinion) (*Hildenbrand I*). In what *Hildenbrand I* described as a condensed account, we stated:

> "In 2012, Hildenbrand moved into Avignon Villa Homes, a residential development catering to adults with grown children. The homes are, by design, quite similar in appearance. The Homes Association arranges for mowing, snow removal, and other maintenance services for the community residents. The homeowners pay fees to the Homes Association and agree to abide by the extensive covenants, rules, and regulations governing land use in the development. Hildenbrand was informed of and received a copy of those materials during the purchase process.
>
> "To promote the common appearance of the community, the Homes Association has developed several model landscape plans. The association's covenants require a homeowner to submit any contemplated landscaping to the Architectural Review Committee for advance approval. The committee consists of development homeowners elected by their peers.

"Shortly after Hildenbrand moved in, he and the Homes Association were at odds over some flower pots he put around his residence, his apparently continuing failure to park a car in his garage, and the placement of a satellite dish in his backyard. While Hildenbrand and the association were warring over the satellite dish, he submitted a plan for landscaping of his backyard that was considerably more elaborate than the suggested approaches. The association refused to consider his plan, since the dispute over the satellite dish had not been resolved. The association assessed daily 'fines' against Hildenbrand because he refused to move the satellite dish to an approved location on his property.

***2** "In response to a request from Hildenbrand, the Federal Communications Commission issued an opinion letter to the effect that the Homes Association could not dictate where the satellite dish should be placed. The association withdrew its demand the dish be moved and rescinded the fines.

"In the meantime, Hildenbrand had been working with a professional landscaper to design plans for both his backyard and front yard. In late 2012, Hildenbrand submitted that landscape plan for his backyard to the association. The Architectural Review Committee approved parts of the plan and rejected other components. The next spring, Hildenbrand e-mailed a revised backyard plan and says he had a front yard plan hand delivered to the association's management office. During the court proceedings, the Homes Association suggested Hildenbrand didn't provide a front yard plan. The parties do agree the front yard plan never went to the Architectural Review Committee for consideration.

"In late April 2013, Hildenbrand spoke with the Homes Association property manager about his landscaping plans. She apparently looked at a file and seeing the review of the backyard plan from the preceding fall told Hildenbrand something to the effect that the landscaping had been approved. Taking that representation as a categorical go-ahead, Hildenbrand had the landscaper begin the extensive changes to his front and backyards. In June, the Homes Association and its lawyer sent letters to Hildenbrand telling him to stop the landscaping because his plan had not been approved. Although not directly relevant to the point we decide, we mention conflicting trial evidence some of which suggests the landscaping had largely been completed by then and some of which suggests the most sweeping aspects of the plan remained to be done. The undisputed trial evidence established Hildenbrand completed the landscaping and paid about $17,000 for the project.

"Rather than responding directly to the Homes Association or its lawyer about the demand he halt the landscaping, Hildenbrand hired his own lawyer and filed a Chapter 61 limited action in the district court alleging the association's position violated his legal rights. The Homes Association counterclaimed for an order requiring removal of the landscaping—characterized as specific performance of the association's covenants—and for a money judgment reflecting both fines it had levied against Hildenbrand for the unapproved landscaping and its legal fees. Given the issues and the relief each side sought, the district court removed the case from the limited actions docket and treated it as a regular Chapter 60 civil suit, substantially expanding the discovery options and pretrial motions routinely available to litigants.

"Hildenbrand and the Homes Association tried the case to the district court sitting without a jury in early 2014. Broadly characterizing the evidence, the Homes Association did not contend the landscaping was aesthetically objectionable in any abstract sense or offer specific evidence it would materially diminish property values within the community. Rather, the association argued that Hildenbrand patently violated the covenants, rules, and regulations to which he agreed by making substantial changes to his property without advance approval and that the landscaping was far and away the most elaborate and ostentatious in the community. The association suggested both current owners and potential buyers might be put off by widely varying landscaping of the homes or especially elaborate landscaping of a few homes, thus undercutting a fundamental goal of presenting a common appearance throughout the development. Hildenbrand presented evidence, albeit questioned by the Homes Association, that removing the landscaping and restoring his property would cost about $40,000. The district court ruled against Hildenbrand on his claims against the Homes Association and entered an order that the landscaping be removed. In its ruling, the district court noted that Hildenbrand's overall landscaping plan had never been submitted to or considered by the Architectural Review Committee. So the district court stayed its order and directed that the Architectural Review Committee render a decision on the landscaping plan. The district court also gave Hildenbrand the option to challenge the

committee's decision if he believed it were improperly made.

***3** "Hildenbrand promptly submitted his full landscaping plan to the Architectural Review Committee, and the committee, a week later, rejected the bulk of the plan and, thus, the actual work that had been done. Exercising his prerogative under the district court's order, Hildenbrand disputed the decision.

"The district court heard testimony and received other evidence regarding the Architectural Review Committee's decision. The district court ruled that the committee acted in 'good faith' in denying Hildenbrand's landscaping plan and, therefore, satisfied the governing legal standard. The district court rejected Hildenbrand's arguments that the committee applied unwritten or nonexistent restrictions to the plan and had allowed comparable landscape motifs for other residents. The district court reasoned that good faith could shield a committee decision that differed from earlier decisions for other residents or was 'erroneous or unfair.' In its memorandum decision on this point, the district court focused on what it perceived to be the 'state of mind' of the committee members as they reviewed the landscaping plan. Hildenbrand filed a notice of appeal seeking review of the district court's determination and other issues arising from the trial.

"After the notice had been filed, the district court took up the Home Association's request for a judgment covering the fines assessed against Hildenbrand and an award of its litigation costs, including attorney fees. The district court awarded the association $85,000 in attorney fees but withheld any ruling on the association's fines specifically to await the outcome of Hildenbrand's appeal. The district court also stayed its order for removal of the landscaping during the appeal, conditioned on Hildenbrand posting a bond for the attorney fees. We understand Hildenbrand has posted the bond. He then filed a second notice of appeal pertaining to the attorney fees." 2016 WL 6250201, at *1-3.

In considering Hildenbrand's initial appeal, we recognized the covenants, rules, and regulations form a contractual agreement creating mutual rights and obligations between Hildenbrand and the Homes Association. As the parties and the district court understood, the overarching agreement is subject to the Kansas Uniform Common Interest Owners Bill of Rights Act, K.S.A. 2015 Supp. 58-4601 et seq., a statutory scheme designed to preclude oppressive and secretive practices by homes associations in dealing with their members. Particularly pertinent here, K.S.A. 2015 Supp. 58-4604(a) provides: "Every contract or duty governed by this act imposes an obligation of good faith in its performance or enforcement."

In *Hildenbrand I*, we held K.S.A. 2015 Supp. 58-4604(a) imposes both a duty to act in subjective good faith, meaning honesty in fact, and an objective duty to engage in reasonable standards of fair dealing. 2016 WL 6350201, at *5. We do not again detail the legal reasoning behind the determination. The parties have not disputed that construction of the statute, and it has become the law of the case. See *State v. Collier*, 263 Kan. 629, Syl. ¶ 3, 952 P.2d 1326 (1998); *Garetson Brothers v. American Warrior, Inc.*, 56 Kan. App. 2d 623, 650-51, 435 P.3d 1153 (2019). Although the district court acknowledged the application of K.S.A. 2015 Supp. 58-4604(a), it considered only a form of subjective good faith in assessing the actions of the Architectural Review Committee. We, therefore, found its approach legally incomplete and insufficient to support the resulting judgment for the Homes Association.

B. History Following Remand

***4** In remanding, we afforded the district court considerable discretion in how best to address the statutory good-faith requirement. By then, the district court judge who first heard the case had retired and a new judge had been assigned. Consistent with the latitude in *Hildenbrand I*, the district court then reopened discovery and later reconvened the bench trial to hear additional evidence. The new evidence included e-mails among the members of the Architectural Review Committee shortly before their consideration of Hildenbrand's landscaping plans for his front and back yards. As we have explained, the committee reviewed the plans at the direction of the district court in the midst of the initial litigation long after Hildenbrand actually had landscaping done. None of the committee members testified in the reconvened bench trial, and only one of them testified during the initial district court proceedings. The parties also introduced evidence about other nonstandard landscaping plans submitted to the Architectural Review Committee and instances in which homeowners undertook landscaping without approval.

In June 2018, the district court issued a 14-page journal entry of judgment that largely reversed course based on the expanded body of evidence. The district court concluded the Architectural Review Committee did not consider

Hildenbrand's landscape plans in good faith, thereby violating K.S.A. 2015 Supp. 58-4604(a). The district court relied, in part, on the e-mails the committee members exchanged before the review and characterized them as betraying a prejudgment against Hildenbrand and an intent to take a "hard line" with him and "to stand tall." The district court also weighed what it termed the "contentious relationship" between the Homes Association and Hildenbrand predating the landscaping and this litigation and found that history adversely colored the Architectural Review Committee's decision to reject the bulk of landscape plans. The district court pointedly concluded: "[B]ecause the ARC took a hard line, it was not observing the reasonable standards of fair dealing and did nothing more than stand its ground."

The district court also concluded the record evidence failed to show "the landscaping was poorly done or was likely to have a negative impact on the value of surrounding homes in the community." That conclusion, the district court observed, bore heavily on the nature and scope of any potential remedy.

The district court largely discounted the comparative evidence on how the Architectural Review Committee treated other landscaping proposals that differed from the approved pattern plans. None of those were of the same scale as what Hildenbrand proposed or had put in at his home. Likewise, the other landscaping done without approval was consistently of a much smaller scale, rendering that evidence essentially irrelevant from the district court's perspective.

The district court clearly found the Architectural Review Committee's decision rejecting Hildenbrand's landscaping plan did not conform to the objective fair-dealing component of good faith required under K.S.A. 2015 Supp. 58-4604(a). Despite the overall length and thoroughness of the journal entry, the district court only briefly discussed the subjective honesty-in-fact aspect of good faith. The discussion indicates the district court found a lack of subjective good faith, as well. The journal entry is nearly as pointed in its finding on that part of the statutory requirement. Any lack of clarity ultimately would have no legal effect on our review or determination of the appeal. The Architectural Review Committee was obligated to act with both subjective and objective good faith and the lack of either violated K.S.A. 2015 Supp. 58-4604(a).

In assessing the remedy, the district court found that Hildenbrand "did not have clean hands in this matter" because he had undertaken the extensive landscaping of his home knowing he lacked approval from the Architectural Review Committee for much, if not all, of the work. We take the district court to mean Hildenbrand acted in a way worthy of some blame for having bypassed and, thus, breached the Homes Association's procedures for getting advance approval for landscaping plans. The district court's findings that the Architectural Review Committee failed to act in good faith and that Hildenbrand breached the contractual agreement are neither mutually exclusive nor otherwise in conflict in some way. But Hildenbrand's breach would not have permitted the committee to ignore its statutory duty of good faith under K.S.A. 2015 Supp. 58-4604(a).

***5** The district court concluded that, on balance, the evidence did not warrant the Homes Association's requested remedy for an injunction requiring Hildenbrand to remove the landscaping. In coming to that conclusion, the district court considered the Architectural Review Committee's lack of good faith in rejecting the landscaping plans, along with the estimated cost of removing the landscaping and suitably restoring the yard and the lack of any demonstrably deleterious effect the landscaping had on property values. The district court similarly rejected removal of the landscaping as an inappropriately expansive remedy grounded in specific performance of the contractual agreement between Hildenbrand and the Homes Association. See *Hochard v. Deiter*, 219 Kan 738, 740, 549 P.2d 970 (1976) (district court may decline equitable remedy of specific performance if result would be oppressive or result in undue hardship).

The district court, however, initially found the Homes Association was entitled to money damages as an alternative remedy for Hildenbrand's failure to abide by the requirement for obtaining approval of the landscaping plans. The district court ordered Hildenbrand to pay the Homes Association $25,000 in damages for his breach of the agreement but provided no explanation for the amount.

On the matter of attorney fees to the Homes Association, the district court noted that *Hildenbrand I* found the issue was not ripe in light of the reversal of the underlying judgment for the Association and the remand for further proceedings. 2016 WL 6350201, at *4. With the reversal of the judgment, there no longer remained a legal basis to award attorney fees under the Homes Association agreement. Given the limited success of each side on remand, the district court declined to award attorney fees and ordered Hildenbrand and the Homes Association to bear their own legal costs and expenses.

As with many of the rulings in this case, the district court's journal entry triggered a motion from each side for reconsideration. The Homes Association asserted multiple issues in its motion. The district court denied all of them, and we do not catalogue them here. We consider them to the extent the Homes Association has incorporated them into its points on appeal.

Hildenbrand challenged the judgment for damages the district court entered against him. We do outline the district court's handling of that issue because it retained the $25,000 judgment against Hildenbrand but revised the legal basis for the award—the point Hildenbrand has raised in his cross-appeal. In his motion for reconsideration to the district court, Hildenbrand argued that the Homes Association sought only specific performance or injunctive relief requiring removal of the landscaping as the remedy for his ostensible violation of the contractual agreement and never made an alternative claim for money damages.

In its written order on the motions for reconsideration, the district court retained the $25,000 amount but recharacterized it as fines the Homes Association imposed on Hildenbrand rather than damages for breach of contract. Under the Homes Association's Rules Enforcement and Fines Policy, the Association can impose a private fine of up to $25 a day on a homeowner for a "continued failure" to comply with his or her contractual obligations. The Homes Association imposed fines against Hildenbrand, deeming his lack of advance approval for the landscaping and then his refusal to abate the violation by removing the landscaping to be a continued failure.

The fines have become a sticky wicket over the course of this litigation. In the original judgment, the district court held the Homes Association's request for fines in abeyance to await the outcome of the first appeal. But in *Hildenbrand I*, we questioned whether the undecided fines left the parties without a final appealable order and invited them to address that concern. See *Wilkinson v. Shoney's, Inc.*, 265 Kan. 141, Syl. ¶ 4, 958 P.2d 1157 (1998). The Homes Association filed a notice with this court that its pending "request for fines is hereby withdrawn for the purposes of this litigation." We were satisfied that the notice rendered the judgment appealable and proceeded to decide the case. *Hildenbrand I*, 2016 WL 6350201, at *3.

***6** In its order, the district court found that the Homes Association had relinquished its claim for fines only through the date it filed the notice with us withdrawing them. The district court determined the fines accrued thereafter through the date of its journal entry. The district court concluded $25,000 in fines would be appropriate and substituted the fine for what it had awarded as contract damages in that amount.

The Homes Association duly appealed, and Hildenbrand has cross-appealed. That is what we now have in front of us.

LEGAL ANALYSIS

We first take up the points the Homes Association has raised on appeal and then consider Hildenbrand's cross-appeal of the fines the district court enforced against him.

Homes Association's Issues on Appeal

• The Homes Association contends the opinion in *Hildenbrand I* left intact the district court's conclusion made as part of the first judgment that the Architectural Review Committee acted in subjective good faith or with honesty in fact. And, therefore, the district court erred in reassessing that component of statutory good faith on remand. We disagree. The opinion contains no express statement affirming the district court's conclusion on subjective good faith. The discussion of the legal requirements of K.S.A. 2015 Supp. 58-4604(a) and the broad directive to the district court on remand are quite the contrary. The opinion calls for a reevaluation of good faith under the statute and permits the district court to reopen the bench trial for additional evidence, if necessary. Nothing in that discussion limited the district court to a review of only the fair dealing component of good faith. In summarizing the scope of remand, *Hildenbrand I* states: "[T]he district court must decide the matter of good faith in conformity with the twin requirements of K.S.A. 2015 Supp. 58-4604(a) addressing both subjective honesty in fact and objectively reasonable standards of fair dealing." 2016 WL 6350201, at *7. The Homes Association's point is without merit.

• The Homes Association next argues the district court incorrectly imposed the burden of proof of good faith on it rather than on Hildenbrand. In the journal entry, the district court does not identify which party bore the burden of persuasion. We assume without deciding that Hildenbrand had the obligation to prove the Architectural Review Committee failed to act in good faith consistent with K.S.A. 2015 Supp. 58-4604(a). Here, the Homes Association

asserted a counterclaim against Hildenbrand for breach of the contractual agreement and sought injunctive relief or specific performance. So the Homes Association had the burden to prove a material breach and circumstances warranting those remedies. The Architectural Review Committee's lack of good faith appears to constitute an avoidance that might excuse Hildenbrand. If so, he would bear the burden of proving facts establishing the avoidance. See *Estate of Randolph v. City of Wichita*, 57 Kan. App. 2d 686, 696, 459 P.3d 802, *rev. denied* 312 Kan. —— (August 31, 2020).

But nothing in the district court's journal entry indicates it misallocated the burden. Kansas appellate courts presume a district court has applied the correct burden of proof absent a clear showing otherwise. See *State v. Gideon*, 257 Kan. 591, 615, 894 P.2d 850 (1995); *Fox v. Wilson*, 211 Kan. 563, Syl. ¶ 4, 507 P.2d 252 (1973). The Homes Association suggests an ambiguous remark from the district court in speaking from the bench demonstrates the burden of proof had been incorrectly placed. We are unpersuaded, especially since a detailed written decision in a civil case will be given primacy over earlier oral comments from the bench. *Valadez v. Emmis Communications*, 290 Kan. 472, 482, 229 P.3d 389 (2010); *Gill Mortuary v. Sutoris, Inc.*, 207 Kan. 557, 562, 485 P.2d 1377 (1971).

***7** Ultimately, however, the issue lacks legal significance, given the district court's ruling. The district court found that the evidence established the Architectural Review Committee did not act in good faith under K.S.A. 2015 Supp. 58-4604(a) when it considered Hildenbrand's landscape plans. In other words, the weight or preponderance of the evidence as the district court viewed the record demonstrated no good faith. Accordingly, it doesn't matter where the district court placed the burden. That finding obviously satisfied the burden Hildenbrand had to carry, if the obligation were his. And that's the standard the Homes Association says governs. If the burden were properly on the Homes Association, then the finding established it failed to cross that evidentiary threshold.

We would have to determine who, as a legal matter, actually bore the burden of proof if the district court found the evidence on good faith to be evenly balanced or in equipoise and ruled for Hildenbrand for that reason. The legal conclusion would be error if he bore the burden of proof. That would likewise be true if neither side offered any relevant evidence on good faith.

But here, there was a fair amount of relevant evidence. The district court weighed that evidence and found the Architectural Review Committee acted without the requisite good faith. If the district court accurately weighed the evidence, then the conclusion is legally correct regardless of who bore the burden of proof. This procedural argument, which presumes the sufficiency of the evidence, does not require us to reverse the judgment. The Homes Association also challenges the sufficiency of the evidence, and that's a different argument for reversing the district court. We turn to it next.

• In examining the sufficiency of the evidence following a bench trial, we ask whether substantial evidence supported the district court's factual findings and, in turn, whether those facts support the legal conclusions. See *Stormont-Vail Healthcare v. Board of Shawnee County Comm'rs*, 59 Kan. App. 2d ——, 2020 WL 7270688, at *3 (Kan. App. 2020); *Kansas Healthcare Stabilization Fund v. St. Francis Hospital*, 41 Kan. App. 2d 488, 503, 203 P.3d 33 (2009). We do not reweigh the evidence or make independent credibility findings—we defer to the district court's assessment of conflicting evidence. But we exercise unlimited review in determining if that evidence warrants the ultimate legal conclusions. *Stormont-Vail Healthcare*, 2020 WL 7270688, at *3.

A district court, of course, can consider no more evidence than the parties choose to present during a bench trial. Here, some members of the Architectural Review Committee were conspicuously missing, creating a gap in what might be considered highly relevant evidence. The district court could not fill in that gap with guesswork and had to weigh only the available testimony and exhibits.

Here, the district court relied heavily on the e-mail comments among the committee members in advance of their review of Hildenbrand's landscape plans and also considered the continuing animosity between the Homes Association and Hildenbrand as lending context to those remarks. Although the e-mail includes references to being fair, the district court largely discounted those statements as window dressing or lip service. The district court lent far more weight to the comments we have already mentioned. The committee members agreed to taking a “hard line” with Hildenbrand and not backing down. Remarks of that tenor certainly can be read to evince hostility toward Hildenbrand and an unwillingness to objectively examine his landscape plans. The district court read them in just that manner. We are not at liberty to reject

that reasonable interpretation of the evidence. Moreover, our standard does not shift simply because the trial record consists largely of written materials or because the district court did not hear extensive live testimony. See *State v. Garcia*, 297 Kan. 182, 186-88, 301 P.3d 658 (2013).

***8** As the district court pointed out, the mere assertion of an intent to be fair or to act in good faith provides no particular insulation. See *CIT Group/Sales Financing, Inc. v. E-Z Pay Used Car, Inc.*, 29 Kan. App. 2d 676, 680, 32 P.3d 1197 (2001). A fact-finder must be able to look behind such self-serving representations. Honesty in fact basically rests on a state of mind and may be proved or disproved with circumstantial evidence. See *Ball v. Credit Bureau Services, Inc.*, No. 111,144, 2015 WL 4366440, at *9 (Kan. App. 2015) (unpublished opinion). While the district court stopped short of imputing outright maliciousness to the members of the Architectural Review Committee, it found their collective attitude and approach to be something less forthright than required for honesty in fact as a component of statutory good faith.

Similarly, the district court found that attitude and approach failed to comport with the sort of reasonable standards of fair dealing marking the objective requirement of good faith under K.S.A. 2015 Supp. 58-4604(a). The e-mails indicated the Architectural Review Committee members approached their task not in a neutral, evenhanded way to objectively evaluate the landscape plans but with a disposition bent toward rejection of the major components of the plans for ulterior reasons including what they viewed as Hildenbrand's obduracy and recalcitrance.

Given the narrow standard of review we apply, the district court's factual findings on the Architectural Review Committee members' state of mind or intent were supported in the record evidence. As we have indicated, evidence bearing on state of mind tends to be circumstantial and often elusive. Seldom do those animated by bad intent (or lack of good faith) directly announce the true reasons for their actions. Although there was some contrary evidence, we would have to engage in an impermissible appellate reweighing of the evidence to set aside the district court's key factual findings.

The Homes Association suggests the district court ignored some evidence in fashioning its findings of fact. But the suggestion is largely premised on the district court not mentioning that evidence in the journal entry. In presenting findings of fact and conclusions of law, a district court is not obligated to catalogue and comment on each witness and each piece of physical evidence admitted during a bench trial. Rather, the district court is expected to evaluate the kaleidoscope of evidence and to enunciate the governing facts it has derived from that evaluation. A district court may choose to explain in detail its reasoning. And explicit credibility findings resolving conflicting witness testimony greatly aid (and constrain) appellate review. But a district court's omission of some evidence from an order or a journal entry does not equate to a failure to consider the unmentioned evidence. See *State v. Cheatham*, No. 106,413, 2012 WL 4678522, at *2 (Kan. App. 2012) (unpublished opinion) (appellate court recognizes implicit credibility finding in district court's "editorial selectivity" in written ruling but points out benefit of explicit credibility determinations).

We turn to whether the district court's factual findings support its legal conclusion that the Architectural Review Committee did not act in good faith under K.S.A. 2015 Supp. 58-4604(a) in rejecting the plans, meaning Hildenbrand would have had to remove the landscaping under the court order then in effect. The subjective feature of statutory good faith requires honesty in fact. Drawing on the Uniform Commercial Code, which served as a model for this part of the Kansas Uniform Common Interest Owners Bill of Rights Act, and other legal sources, we again conclude this requirement entails "a subjective intent to be forthright and fair." *Hildenbrand I*, 2016 WL 6350201, at *5. This standard is captured, for example, in K.S.A. 2015 Supp. 84-1-201, comment 20; *Jackson v. State Bank Wapello*, 488 N.W.2d 151, 156 (Iowa 1992) (honesty in fact " 'requires honesty of intent' ") (quoting *Farmers Co-op Elevator, Inc. v. State Bank*, 236 N.W.2d 674, 678 [Iowa 1975]); *Town & Country State Bank of Newport v. First State Bank of St. Paul*, 358 N.W.2d 387 (Minn. 1984); and Black's Law Dictionary 836 (11th ed. 2019) (defining "good faith" as "honesty in belief or purpose" and "absence of intent to defraud or to seek unconscionable advantage"). The converse entails an intent to be dishonest or disreputable—a state of mind inconsistent with fairness, although not necessarily rising to a depravity of heart or wickedness.

***9** The district court's factual findings support a lack of honesty in fact on the part of the Architectural Review Committee members. They did not review Hildenbrand's landscape plans with an honest intent but in furtherance of ulterior purposes and objectives.

Similarly, the district court's factual findings support a lack of good faith in the Architectural Review Committee's deviation from reasonable standards of fair dealing in considering the plans. Without repeating all that we have described, the committee members assessed the landscaping based, in part, on a perceived need to resist Hildenbrand and to respond to his ostensible animosity. Those elements have no place in an objective standard premised on fair dealing.

In short, there can be no statutory good faith under K.S.A. 2015 Supp. 58-4604(a) for decisions made and conclusions reached through prejudices or pernicious preconceptions. The district court's factual findings support its legal conclusion to that effect.

• The Homes Association challenges the district court's refusal to grant injunctive relief requiring Hildenbrand to remove the landscaping he had installed without advance approval from the Architectural Review Committee. As we have outlined, the district court similarly declined to order specific performance of the agreement between the Homes Association and Hildenbrand that also would have required removal of the landscaping. Injunctive relief and specific performance are both equitable remedies and, thus, afford the district court broad discretion in gauging their appropriateness in a particular case. See *Hochard*, 219 Kan. at 740 (specific performance); *Roll v. Howard*, 59 Kan. App. 2d ——, 2020 WL 7292506, at *9 (Kan. App. 2020) (permanent injunction); *Hunter Health Clinic v. Wichita State University*, 52 Kan. App. 2d 1, 13, 362 P.3d 10 (2015) (injunction). We review decisions granting or denying injunctions for abuse of discretion. A district court exceeds that discretion if it rules in a way no reasonable judicial officer would under the circumstances, if it ignores controlling facts or relies on unproven factual representations, or if it acts outside the legal framework appropriate to the issue. *State v. Darrah*, 309 Kan. 1222, 1227, 442 P.3d 1049 (2019); see *Biglow v. Eidenberg*, 308 Kan. 873, 894, 424 P.3d 515 (2018).

A district court should look at an array of factors to assess the appropriateness of permanent injunctive relief in favor of party who has proved a cognizable injury: (1) whether the absence of an injunction would result in irreparable harm; (2) no adequate remedy at law; (3) the proved injury outweighs the harm an injunction would cause the party to be enjoined; and (4) the injunction would not impair a public interest or good. *Roll*, 2020 WL 7292506, at *1, Syl. 3; see *Empire Mfg. Co. v. Empire Candle, Inc.*, 273 Kan. 72, 86, 41 P.3d 798 (2002). Injunctions typically avert harm by prohibiting specific actions and, thus, maintaining the status quo. But they can compel the enjoined party to engage in some sort of affirmative conduct, thereby taking on a mandatory rather than prohibitory character. A mandatory injunction of the sort the Homes Association sought is considered "an extraordinary remedy" demanding the district court's exacting scrutiny and an especially compelling case for the relief. See *Mid-America Pipeline Co. v. Wietharn*, 246 Kan. 238, 242, 787 P.2d 716 (1990).

***10** The district court did not abuse its discretion in denying the Homes Association a mandatory injunction or specific performance requiring Hildenbrand to remove the landscaping. The cost to Hildenbrand to do so would have been substantial—$40,000 according to a credible estimate from the first part of the trial. The landscaping may have been extensive and even grandiose, but no one characterized it as grotesque. No evidence established the landscaping depressed property values. And the evidence failed to show the landscaping itself created any harm, let alone irreparable harm. The Homes Association may have been entitled to monetary damage of some amount to remedy Hildenbrand's breach in failing to get approval for the landscaping. But the Homes Association never pursued damages as an alternative relief. The significant financial harm the injunction would have inflicted on Hildenbrand seems to outstrip the rather abstract idea the Homes Association had to ruthlessly enforce its rules as an end in itself or as a means necessary to prevent anarchy from reigning. Finally, the public interest would seem to be wholly indifferent to whether the landscaping stayed or vanished.

Those considerations quite arguably would support the district court's denial of a mandatory injunction even if the Architectural Review Committee had reviewed and rejected Hildenbrand's landscaping plans in good faith consistent with K.S.A. 2015 Supp. 58-4604(a). But we have affirmed the district court's conclusion the committee did not act in good faith, and that represents a compelling ground cutting against a mandatory injunction. See *Bouton v. Byers*, 50 Kan. App. 2d 34, 61, 321 P.3d 780 (2014) (recognizing maxim that party must do equity to receive equity). The district court, in turn, did not abuse its discretion in denying injunctive relief to the Homes Association. It identified the legal standards, understood the facts, and ruled in a way we are confident other district courts would have in comparable circumstances.

• The Homes Association appeals the district court's decision denying its request for attorney fees. Under the contractual agreement with the property owners, the Homes Association may recover "reasonable attorneys' fees" it has incurred in enforcing the agreement. The Homes Association sought and received an award of $85,000 from the district court before the appeal in *Hildenbrand I*. Because we reversed the underlying judgment and remanded for further proceedings, we found the award premature. Following the remand, the Homes Association again sought attorney fees. The district court denied the request and ordered both sides to bear their own attorney fees.

We mention that the Kansas Uniform Common Interest Owners Bill of Rights Act permits a district court to award reasonable attorney fees. See K.S.A. 2015 Supp. 58-4621(a). The statute is not as clear as it might be as to the precise condition precedent for a fee award. Presumably, a party prevailing on claims brought under the Act would be eligible. See Uniform Common Interest Owners Bill of Rights Act, § 21, comment 1 (language mirroring K.S.A. 58-4621[a] intended to give court discretion to award attorney fees to a prevailing party).

The Homes Association preserved the award of attorney fees as an issue but had not filed a motion requesting additional attorney fees for its legal representation in the district court after remand. The district court's journal entry following the reconvened bench trial effectively foreclosed such a request and expressly declined to reinstate the earlier award of $85,000.

Based on their experience and knowledge of the legal profession, district courts are deemed to be experts on attorney fees and may draw on that expertise in rendering an award in a given case. *Johnson v. Westhoff Sand Co.*, 281 Kan. 930, 940, 135 P.3d 1127 (2006). Accordingly, fee awards are another matter entrusted to the district court's sound discretion. See *Unruh v. Purina Mills*, 289 Kan. 1185, 1200, 221 P.3d 1130 (2009); *Johnson*, 281 Kan. at 940.

The Kansas Supreme Court has adopted the eight factors in Rule 1.5(a) (2020 Kan. S. Ct. R. 297) of the Kansas Rules of Professional Conduct, bearing on an ethically "reasonable" attorney fee, as a guide for district courts in making contractual or statutory fee awards. 281 Kan. at 940-41. The criteria revolve around the time required to undertake the work, the complexity of the litigation, customary fees or rates for comparable legal services, constraints the litigation imposes on the lawyer in terms of deadlines or forgoing other work, the experience and skill of the lawyer, the ongoing professional relationship (if any) between the lawyer and the client, the value of what was at stake in the case and the result obtained, and whether the fee arrangement is "fixed or contingent." 281 Kan. at 940-41; see Rule 1.5(a) (The factors in Rule 1.5[a] remain unchanged from 2006, when *Johnson* was decided.). A statutory attorney fee award to a prevailing party typically takes into account the degree of success—a factor similar to the result obtained. See *Farrar v. Hobby*, 506 U.S. 103, 114-15, 113 S. Ct. 566, 121 L. Ed. 2d 494 (1992); *Yellow Pages Photos, Inc. v. Ziplocal, LP*, 846 F.3d 1159, 1164-65 (11th Cir. 2017). If a party obtains substantially less than the relief sought, its requested attorney fees properly may be reduced or even denied to reflect that lack of success. See *Farrar*, 506 U.S. at 115 (plaintiff seeking substantial monetary damages but recovering only nominal damages may be denied statutory attorney fee award, despite technically being prevailing party).

***11** The Homes Association principally sought injunctive relief or specific performance of the contractual agreement and a resulting judgment requiring Hildenbrand to remove the landscaping from his home. The fines were entirely secondary. They could be enforced through a lien on the homeowner's property and considerably narrower litigation to foreclose the lien. Arguably the Homes Association's failure to obtain an order abating Hildenbrand's violation through removal of the landscaping precluded a contractual award of attorney fees. The district court, however, did not rest its ruling on such a construction of the contractual agreement. Rather, the district court presumably relied on the limited result the Homes Association obtained. That is, the Homes Association expended far in excess of $85,000 in attorney fees and recovered only $25,000 in fines in the district court. The district court, in its discretion, could find that to be unreasonable, thereby precluding an award under the contractual agreement.

Similarly, the district court properly could deny the Homes Association a statutory attorney fee based on a notable lack of success on the merits. Although the Homes Association prevailed on a comparatively minor and entirely secondary piece of the litigation, it failed to obtain relief on its primary claim. Under the circumstances, we find no abuse of discretion in the district court's determination.

Hildenbrand's Cross-Appeal

Hildenbrand has appealed the district court's $25,000 judgment against him for private fines levied by the Homes Association because he failed to get approval for and then failed to remove the unapproved landscaping. He contends the Homes Association relinquished its claim for fines in response to this court's show cause order in *Hildenbrand I*. As we have explained, the Homes Association filed a response in which it "agreed to withdraw" its request for fines—an issue the district court had left unresolved—to ensure this court had a final appealable judgment for review.

On remand, the district court construed the Homes Association's withdrawal to apply only to those fines that might have accrued up to the filing of the response. The district court, then, determined the Homes Association retained an unlitigated claim for fines going forward that could be considered on remand. The Homes Association's response clearly waived the claim for fines it had already asserted but which the district court had declined to decide. In *Hildenbrand I*, the court did not parse the response and briefly observed only that it erased any concerns about the appealability of the judgment. 2016 WL 6350201, at *3.

We suppose the notice can be read the way the district court has, consistent with the theory a waiver should be clear and unambiguous. See *Lewis v. Kansas Production Company, Inc.*, No. 115,174, 2017 WL 3575551, at *4 (Kan. App. 2017) (unpublished opinion) ("The hallmark of a waiver is 'a clear, unequivocal and decisive act of the party showing such a purpose.' ") (quoting *Lyon v. Kansas City Fire & Marine Ins. Co.*, 176 Kan. 411, 414, 271 P.2d 291 [1954]). The Homes Association's notice does not contain an explicit waiver of a right to assert a claim for future fines regardless of the later course of the litigation.

The Homes Association rules set fines at "up to $25 per day" for violations. The record is not immediately clear as to the Homes Association's calculation of the fine amount. Correspondence between the Homes Association's lawyer and Hildenbrand admitted as exhibits during the bench trial state fines were being assessed at $25 a day. The district court, however, calculated the fines at $50 a day for each day between the filing of the Homes Association's response to this court in *Hildenbrand I* and the entry of its journal entry following the reconvened bench trial. The district court measured the period as 704 days. Those givens—$50 a day for 704 days—would yield a fine of $32,200. But the district court set the total fines at $25,000, matching the contractual damages the fines ostensibly replaced.

***12** There are several problems with the district court's handling of the fines. First, it used $50 as the daily rate by treating Hildenbrand's failure to get approval for the front yard landscaping and the backyard landscaping as distinct violations of the contractual agreement and its rules governing fines. That seems demonstrably duplicative. The unapproved landscaping more naturally presents a single, if significant, violation. The Homes Association treated the violation that way when it informed Hildenbrand of the fine rate. We question whether the district court could fairly use a higher daily rate.

Second, the district court reduced what it determined to be the total fine to fit its $25,000 figure. We similarly question whether a district court can adjust a private, contractual fine in that manner. The declaration and rules did not give the district court the authority to fix a fine; the authority rested with the Homes Association and the Architectural Review Committee. Absent a conclusion the total fines were unconscionable or otherwise legally unenforceable—and the district court made no such determination—the district court had the authority to enforce the fines required under the rules consistent with the Homes Association's demand on Hildenbrand. Here, that would be $25 a day for 704 days or $17,600.

We, therefore, conclude the district court erred in awarding a fine amount of $25,000 to the Homes Association and reverse that part of the judgment. We remand to the district court for the limited purpose of revising the judgment to reflect an award of $17,600 for the Homes Association and entering any other orders necessary to implement that revision.

Affirmed in part, reversed in part, and remanded with directions.

All Citations

478 P.3d 795 (Table), 2021 WL 137339

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NOT DESIGNATED FOR PUBLICATION
Court of Appeals of Kansas.

In the MATTER OF the MARRIAGE OF Allen Justin POPLIN, Appellant/Cross-appellee,
and
Elizabeth Leigh Poplin (n/k/
a Weltz), Appellee/Cross-Appellant.

No. 123,241
|
Opinion filed August 20, 2021.

Appeal from Johnson District Court; NEIL B. FOTH, judge.

Attorneys and Law Firms

Allen Justin Poplin, appellant pro se.

Thomas E. Hammond, II, of Gates Shields Ferguson Swall Hammond, P.A., of Overland Park, for appellee.

Before Arnold-Burger, C.J., Gardner and Isherwood, JJ.

MEMORANDUM OPINION

Per Curiam:

***1** Allen Justin Poplin appeals from the district court's decision granting certain supplemental maintenance payments to his former wife, Elizabeth Leigh Poplin, n/k/a Weltz, based on the parties' property settlement agreement. Poplin argues that he did not have to make such payments after Weltz began cohabitating with her fiancé. Poplin further argues the district court erred in granting Weltz' motion to quash Poplin's discovery requests about the date she began cohabitating, and also granting Weltz' request for attorney fees for the litigation of his discovery motion. Finally, Poplin argues that the district court should have awarded him attorney fees for the cost of defending against Weltz' cross-appeal. Weltz cross-appeals the district court's denial of her request for the attorney fees she incurred after being compelled to enforce the parties' settlement agreement, as well as the district court's failure to address her request for additional supplemental maintenance. Lastly, like Poplin, Weltz also filed a motion with this court under Supreme Court Rule 7.07(c) (2021 Kan. S. Ct. R. 51), seeking an award for the attorney fees incurred in litigating this appeal.

We affirm the district court's decisions on each issue raised by the parties, apart from the court's award of attorney fees to Weltz for litigating a motion to quash Poplin's discovery request. Because that award is not supported by substantial competent evidence the court's decision is reversed. We also find that neither party is entitled to attorney fees for the cost of litigating this appeal.

FACTUAL AND PROCEDURAL BACKGROUND

Allen Justin Poplin and Elizabeth Leigh Weltz divorced in July 2018, and the district court adopted the parties' property settlement agreement in its divorce decree. At the time of their divorce, Poplin was employed as an attorney at a large law firm. He received regular, semi-monthly payments on the fifteenth and final day of each month, as well as more cash distributions and retirement distributions at various points each year. Relevant to the issues on appeal, the parties' property settlement agreement provided:

- Poplin would pay Weltz base maintenance of $2,047 per month in equal installments of $1,023.50 on the first and sixteenth days of each month;
- Poplin would pay Weltz supplemental maintenance of 25 percent of the difference between all cash distributions and bonuses Poplin earned each year and any other income Weltz received beyond her annual income of $17,000;
- Poplin would also pay Weltz 28.25 percent of the difference between any retirement distributions he received and any income Weltz earned beyond her $17,000 annual salary not already counted for purposes of supplemental maintenance on cash distributions;
- Poplin had to pay supplemental maintenance within 45 days of receiving any cash or retirement distributions;
- Upon Poplin's request, Weltz had to provide Poplin her most recent paystub within 7 days; and
- Poplin's obligations to pay maintenance terminated upon Weltz cohabitating.

***2** Weltz quit her job in January 2020 and had not taken a new job as of the district court's decision following the

enforcement proceeding. In March 2020, Weltz informed Poplin she intended to move in with her fiancé, likely in late April or early May, but the date remained somewhat unsure because of ongoing construction at the property. In the latter part of May 2020, Weltz began cohabitating with her fiancé. The exact date she began doing so is a central point of dispute in this appeal. Weltz claimed she began cohabitating on May 26, 2020. Yet it was Poplin's contention that the two began living together at least as early as May 20, 2020, even possibly May 15, 2020, if not earlier. In its ruling, the district court found Weltz began cohabitating with her fiancé on May 20, 2020. The district court explicitly rejected Poplin's assertion cohabitation may have begun on or before May 15, 2020, finding he proffered no evidence to support such a contention. The district court stated the only thing in the record remotely supporting a date earlier than May 20, 2020, was Poplin's own assertion he "believe[d] that the cohabitation began at least as early as May 15, 2020." But, as the district court noted, this was simply a statement made in an attached exhibit to Poplin's response to Weltz' motion entitled "Declaration of Justin Poplin," which the district court correctly characterized as "essentially ... an un-notarized affidavit."

There is no dispute that Poplin paid base maintenance through May 16, 2020. Weltz acknowledged Poplin's future maintenance obligations were extinguished as of the date she began cohabitating with her fiancé. Yet Poplin received a retirement distribution on April 14, 2020, and a cash distribution on April 15, 2020, yet opted not to pay Weltz supplemental maintenance on those distributions within 45 days of their receipt. On June 5, 2020, Weltz filed a motion to enforce the property settlement agreement, arguing she was entitled to $7,419.58 for Poplin's most recent retirement distribution and $7,297 for Poplin's most recent quarterly cash distribution.

Poplin responded, arguing he did not have to pay supplemental maintenance for the April 2020 distributions based on Weltz' cohabitation with her fiancé. Poplin asserted his obligation to pay did not arise under the property settlement agreement until 45 days after receipt of the distributions. Thus, it was his position that supplemental maintenance for any retirement or cash distributions he received in April 2020 was not owed to Weltz because she began cohabitating on May 20, 2020. Poplin asserted his obligations to pay supplemental maintenance did not arise until May 29 and 30, 2020, which marked the 45th day after they were received, respectively, and he had been absolved of those obligations by Weltz cohabitating with her fiancé.

In response to Weltz' pursuit of legal enforcement of the parties' settlement agreement, Poplin sought discovery related to Weltz' cohabitation with her fiancé, including interrogatories and requests for production of documents on:

- Whether Weltz ever shared or benefitted from any account with her fiancé, such as a bank account, zoo pass, credit card account, mortgage, utility, swimming pool pass, streaming service, gym membership, warehouse club membership, food delivery or transportation service, rewards account, or any other monthly subscription service;
- Any agreement Weltz had with her fiancé regarding the division of household tasks, including cooking, cleaning, and yard work;
- The number of meals Weltz prepared for her fiancé between January 1, 2020, and April 14, 2020;
- All holidays and relevant dates that Weltz spent at least a portion of with her fiancé since 2017; and
- All people Weltz visited at a particular address in Overland Park before May 26, 2020.

Poplin also requested discovery on the date and location of Weltz' engagement to her fiancé, as well as the specific dates for all nights she spent with her fiancé in 2020, and whether Weltz' or her fiancé's children were present on those dates. Poplin further made a request for admission asking whether Weltz and her fiancé had been in a sexual relationship since December 31, 2017, a date which preceded their divorce.

Weltz moved to quash Poplin's discovery requests, arguing they sought irrelevant and inappropriate information; were intended to harass Weltz and her fiancé; and were made without legitimate effort or basis to request relevant information. The district court granted Weltz' motion, finding Poplin made no colorable claim that cohabitation occurred before May 20, 2020. As a result, his requests were not proportionate to the pending litigation, and the contents and tone of his requests revealed his true motivation, which was to harass Weltz. The district court also granted Weltz attorney fees of $750 for preparing the motion to quash.

***3** The district court also rejected Poplin's substantive argument, finding it differed from the plain language of the relevant portions of the property settlement agreement. The district court reasoned that Poplin's obligation to pay

supplemental maintenance arose on the date he received the distributions. It held that the language " '[s]uch supplemental maintenance shall be paid within forty-five (45) days of [Poplin] receiving the cash bonus/distribution,' " merely set forth a timeframe in which Poplin could request information on Weltz' income and have a qualified domestic relations order prepared, if necessary, before making the payments. The judge noted that Poplin did not object to the calculations of the amounts owed to Weltz for the April 14 and 15, 2020, distributions; his argument was simply limited to whether he owed anything under the terms of the property settlement agreement based on Weltz' subsequent cohabitation.

Weltz requested additional attorney fees related to the costs of her motion to enforce the property settlement agreement, which the district court denied. Weltz does not dispute Poplin paid the required base maintenance; she simply asserts the district court's determination of Poplin's supplemental maintenance obligations for the April 2020 distributions was proper. But Weltz also argued before the district court that Poplin owed additional supplemental maintenance because certain retirement and cash distributions Poplin would receive after the date she began cohabitating were earned prior to the cohabitation date. But the district court did not address Weltz' argument on this point.

Poplin timely appealed and Weltz timely cross-appealed.

ANALYSIS

DID THE DISTRICT COURT ERR IN DETERMINING POPLIN NEEDED TO PAY SUPPLEMENTAL MAINTENANCE FOR CASH AND RETIREMENT DISTRIBUTIONS HE RECEIVED PRIOR TO THE DATE WELTZ BEGAN COHABITATING WITH HER FIANCE?

Standard Legal Principles

The issues on appeal mainly arise from a dispute over the terms of the parties' separation and property settlement agreement. A separation agreement is subject to the normal rules of contract law so, when the issue on appeal involves its interpretation, review is de novo. *In re Marriage of Knoll*, 52 Kan. App. 2d 930, 939, 381 P.3d 490 (2016); see *Born v. Born*, 304 Kan. 542, 554, 374 P.3d 624 (2016) (appellate court exercises unlimited review over the interpretation and legal effect of written instruments and is not bound by the lower court's interpretations or rulings). " 'The primary rule for interpreting written contracts is to ascertain the parties' intent. If the terms of the contract are clear, the intent of the parties is to be determined from the language of the contract without applying rules of construction.' " *Peterson v. Ferrell*, 302 Kan. 99, 104, 349 P.3d 1269 (2015).

> " '[A]n interpretation of a contractual provision should not be reached merely by isolating one particular sentence or provision, but by construing and considering the entire instrument from its four corners. The law favors reasonable interpretations, and results which vitiate the purpose of the terms of the agreement to an absurdity should be avoided.' Citation omitted." *Waste Connections of Kansas, Inc. v. Ritchie Corp.*, 296 Kan. 943, 963, 298 P.3d 250 (2013).

This overarching standard of review has some bearing on all issues presented in this appeal. While other issues in this appeal present more specific points of law, the relevant standards of review are set forth as necessary.

Poplin's appeal

The district court properly determined Poplin was obligated to pay supplemental maintenance for cash and retirement distributions he received prior to Weltz cohabitating.

Poplin argues the district court erred in its interpretation of the relevant portions of the parties' property settlement agreement over supplemental maintenance. Poplin asserts he did not have to pay Weltz until the 45th day after receiving the distributions. Thus, it is his position that the district court erred in finding he needed to pay Weltz supplemental maintenance for distributions he received in April 2020 because she began cohabitating less than 45 days after he received the distributions.

***4** Contrary to Poplin's argument, the district court soundly concluded the plain language of the property settlement agreement imposed an obligation for Poplin to pay supplemental maintenance upon receipt of any distributions. The relevant portion of the agreement states: "supplemental maintenance shall be paid *within* forty-five (45) days of [Poplin] receiving the cash bonus/distribution." (Emphasis added.) Poplin unpersuasively asserts: "The forty-five days is not a grace period; it sets forth when the obligation to pay arises."

Poplin's argument is a woefully unavailing exercise in semantics that strays far from any reasonable interpretation

of the words "shall be paid within forty-five (45) days of ... receiving the ... distribution[s]." Here, the district court properly focused on the importance of the words "within" and "receiving." As defined in Webster's New World College Dictionary 1663 (5th ed. 2014), "within" is a preposition used as "1 in the inner part of; inside [;] 2 not beyond in distance, time, degree, range ... 3 inside the limits of." Simply put, "within forty-five (45) days" specifies the difference or margin between the time Poplin receives the distribution and when he must pay Weltz. But it does not mean Poplin's obligation to pay only *arises* on the 45th day *after* receiving payment; the obligation must be satisfied "*within* forty-five (45) days *of* ... *receiving* the ... distribution." (Emphases added.)

Here, the district court properly concluded that Poplin's obligation to pay Weltz arose when he received the distributions. The district court soundly and sensibly reconciled various provisions of the agreement, reasoning the 45-day period for Poplin to pay reflected the agreement's provisions allowing Poplin time to request Weltz' most recent paystub and seek a qualified domestic relations order before paying, if necessary. The law favors reasonable interpretations of contracts, and contract provisions should not be construed in isolation. The district court's interpretation of the supplemental maintenance provision reflects these principles. In contrast, Poplin's interpretation tends to "vitiate the purpose of the terms of the agreement to an absurdity," and is, therefore, one this court cannot abide. See *Waste Connections of Kansas, Inc.*, 296 Kan. at 963. Nothing in the plain language of the maintenance termination clause supports a conclusion that already-existing obligations are extinguished upon cohabitation. It would be a baseless interpretation to conclude Poplin can avoid an obligation already due and owing simply by running out the clock. This court cannot, and will not, permit such a result. See *Waste Connections of Kansas, Inc.*, 296 Kan. at 963.

The district court properly granted Weltz' motion to quash Poplin's discovery requests but erred in awarding attorney fees related to her motion.

Poplin argues the district court erred in granting Weltz' motion to quash his discovery requests because Weltz violated the requirements of K.S.A. 2020 Supp. 60-226(c). He contends that Weltz neglected to confer or attempt to confer with Poplin to resolve the issue(s) prior to filing her motion and the motion lacked the required certification as to the steps taken by all attorneys to attempt to resolve the issues in dispute. Poplin further argues the district court erred in finding that his discovery requests were inappropriate. Finally, Poplin argues the district court's award of attorney fees related to Weltz' discovery motion was improper.

A district court's ruling on discovery issues is reviewed for an abuse of discretion. *Miller v. Glacier Development Co.*, 284 Kan. 476, 498, 161 P.3d 730 (2007). Whether a district court can award attorney fees is a question of law subject to unlimited review. Once it has been determined such authority exists, the district court's decision is reviewed for an abuse of discretion. *Unruh v. Purina Mills*, 289 Kan. 1185, 1200, 221 P.3d 1130 (2009). A judicial action constitutes an abuse of discretion if (1) it is arbitrary, fanciful, or unreasonable; (2) it is based on an error of law; or (3) it is based on an error of fact. *Biglow v. Eidenberg*, 308 Kan. 873, 893, 424 P.3d 515 (2018). To the extent that the parties' arguments require this court to interpret statutes, they present questions of law subject to unlimited review. *Nauheim v. City of Topeka*, 309 Kan. 145, 149, 432 P.3d 647 (2019).

1. The district court did not err in granting Weltz' motion.

***5** Poplin is generally correct that Weltz did not try to confer with him prior to filing her motion. Still, his argument that this issue warrants reversal of the district court's ruling is unpersuasive.

In relevant part, K.S.A. 2020 Supp. 60-226(c) provides:

> "A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending .... The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action and must describe the steps taken by all attorneys or unrepresented parties to resolve the issues in dispute. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense."

Poplin argues the district court abused its discretion based on an error of law because of Weltz' purported dereliction. But he offers no authority supporting his assertion that this issue mandates reversal of the district court's decision. The only authority he cites is the statute itself, which is effectively silent on whether the district court can still issue a protective order forbidding or limiting discovery absent

such certification. When a litigant fails to press a point by supporting it with pertinent authority, or by showing why it is sound despite lack of authority, or in the face of contrary authority, he waives or abandons the issue. *McCain Foods USA, Inc. v. Central Processors*, Inc., 275 Kan. 1, 15, 61 P.3d 68 (2002). All the same, Weltz did not seek a protective order, she merely sought to quash the request, so no certification was required. See *In re Marriage of Smith*, No. 117,664, 2018 WL 1247164, at *2 (Kan. App. 2018) (unpublished opinion).

"The purpose of discovery is to eliminate the element of surprise from trials, simplify issues and procedures by full disclosure to all parties of anticipated evidence and factual and legal issues, and to consider such matters as may aid disposition of action." *Ryan v. Kansas Power & Light Co.*, 249 Kan. 1, 11-12, 815 P.2d 528 (1991). Thus, "statutes and rules governing discovery and pretrial procedures are to be broadly construed to accomplish their intended objectives." *Burkhart v. Philsco Products Co.*, 241 Kan. 562, 570, 738 P.2d 433 (1987). For this reason, "[t]he trial court is vested with broad discretion in supervising the course and scope of discovery." *Olathe Mfg., Inc. v. Browning Mfg.*, 259 Kan. 735, 768, 915 P.2d 86 (1996). Under K.S.A. 60-226(c), "a court can limit discovery pursuant to its general supervisory powers over discovery." *Kansas Medical Mut. Ins. Co. v. Svaty*, 291 Kan. 597, 621, 244 P.3d 642 (2010). Our Supreme Court has recognized "the well-established principle that district courts have the authority, independent of a statutory privilege, to prevent or limit the power of compulsory process when necessary to prevent abuse, harassment, undue burden or expense," a principle consistent with the district court's statutory authority under K.S.A. 60-226(c). *State v. Gonzalez*, 290 Kan. 747, 767, 234 P.3d 1 (2010).

The overall substance of Weltz' motion reflects the grounds for relief afforded under K.S.A. 2020 Supp. 60-226(c)—preventing undue burden, expense, embarrassment, harassment, delay or inquiries into irrelevant issues. The district court was well within its broad discretion to "prevent or limit [discovery] ... to prevent abuse, harassment, undue burden or expense." *Gonzalez*, 290 Kan. at 767.

***6** Poplin alternatively argues that even if the deficiencies he alleges existed in Weltz' motion do not constitute reversible error, the district court was still incorrect in holding that his discovery requests were irrelevant to the issues. He asserts the district court abused its discretion because its decision was (1) unreasonable, and (2) based on an error of fact. Poplin asserts no reasonable person would have denied his discovery requests because there was "a serious question as to when cohabitation began." But as the district court correctly noted, the record does not show Poplin ever questioned whether Weltz was cohabitating prior to the date she moved in with her fiancé. Although Poplin was notified in March 2020 of Weltz' intention to move in with her fiancé in April or May, Poplin never alleged she was cohabitating or questioned his obligation to make regular maintenance payments, which he made on April 1, April 16, and May 1, 2020. The record reveals Poplin's assertion there was "a serious question as to when cohabitation began," because he never appeared to question it until after Weltz filed her motion to enforce the property settlement agreement.

Poplin also asserts "there was constructive cohabitation since at least January [2020] when [Weltz] quit her job." But again, the record reflects Poplin was generally aware of the various facts and circumstances underlying his theory of constructive cohabitation well before Weltz filed her motion to enforce the property settlement agreement. Even though cohabitation would have extinguished Poplin's maintenance obligations, he took no action. Yet Poplin's theory of constructive cohabitation is flawed. In support of his argument, Poplin relies on *In re Marriage of Knoll*, 52 Kan. App. 2d 930, 935-38, 381 P.3d 490 (2016). In that case, we discussed several factors relevant to whether cohabitation occurred, including: The existence of a romantic or sexual relationship; the division of household tasks; the intermingling of finances; and integrating the couple's children into a single family unit. Many of Poplin's discovery requests were generally in line with these considerations. But Poplin seemingly overlooks a key aspect of our holding in that case which is "it is the fact of *living with* another person as husband and wife ... which triggers cohabitation." (Emphasis added.) 52 Kan. App. 2d at 937. Poplin does not allege Weltz and her fiancé were actually living together prior to May 2020. In fact, to the contrary, Poplin asserts in his brief that his children were with him between May 15 and May 19, 2020, and it is likely Weltz moved in with her fiancé during that time. Poplin also emailed Weltz' attorney on May 26, 2020, stating: "[Weltz] and the kids have moved in with her fiancé." At that time, Poplin asked Weltz to agree to a proposed order terminating maintenance, providing, in relevant part: "[Poplin's] obligation for maintenance and supplemental maintenance has terminated on or before 5/26/2020."

The district court properly concluded Poplin had no right to discovery relating to his theory of constructive cohabitation because it was generally irrelevant to the issues and Poplin never voiced any concerns as to Weltz' cohabitation prior to the admitted date she began doing so. A party has no right to discover matters irrelevant to the issues in a case. See *Frontier Ditch Co. v. Chief Engineer of Div. of Water Resources*, 237 Kan. 857, 866, 704 P.2d 12 (1985).

As to Poplin's other assertion that he "believe[d]' that the cohabitation began at least as early as May 15, 2020," the district court correctly found Poplin offered no evidentiary support for his belief. Poplin claimed his children told him Weltz and the children were living with Weltz' fiancé at least as early as May 20, 2020. Yet Poplin argues the district court erred in finding his "children will apparently contradict him regarding a date of physical cohabitation before May 20" because his children were with him between May 15 and 19, 2020. His argument on this point is circuitous and unsound. Poplin asserted—and continues to assert—Weltz likely moved in with her fiancé while the children were with him. Even assuming his children had no basis to *contradict* his allegation, they would have no basis to *corroborate* his allegation because they were with him, not Weltz, during the relevant timeframe. At best, Poplin has shown slightly inartful wording in the district court's otherwise-sound conclusion. But contrary to Poplin's argument, the district court did not base its decision on an error of fact.

***7** Poplin has no valid claim that the district court erred in denying his discovery requests. The district court made a factual finding that cohabitation began on May 20, 2020, and that finding has evidentiary support. It is not the role of this court to reweigh the evidence underlying the district court's determination. It can only find error if the district court's finding is not supported by substantial competent evidence. *In re Marriage of Knoll*, 52 Kan. App. 2d at 937. The district court's findings on the relevant facts and circumstances giving rise to any plausible claim of cohabitation are properly supported for the reasons previously discussed. That ruling is thus affirmed.

2. The district court erred in awarding Weltz attorney fees.

Poplin advances the other claim that the district court lacked authority to award Weltz attorney fees, but if it had the authority to do so, it abused its discretion because there is no support for the amount awarded. The bulk of Poplin's argument is generally unpersuasive given that it focuses on whether the district court could award attorney fees. He asserts the district court could not do so because granting Weltz' motion was improper. But, as discussed above, the district court properly granted Weltz' motion to quash.

Poplin acknowledges an award might be allowed under K.S.A. 2020 Supp. 60-237(a)(5), but then contends that no such award is permitted unless the movant conferred or tried to confer in accordance with K.S.A. 2020 Supp. 60-226(c). His argument is misplaced because K.S.A. 2020 Supp. 60-237(a)(5)(i) refers to a movant who "attempt[s] ... *to obtain* the disclosure or discovery." (Emphasis added.) Weltz was *opposing* Poplin's attempts to obtain discovery.

But whether attorney fees would be authorized by statute is essentially irrelevant. The district court can award attorney fees as authorized by statute *or* agreement. *Unruh*, 289 Kan. at 1200. Poplin incorrectly asserts "[t]here is no applicable agreement" for attorney fees. This assertion turns a blind eye to the property settlement agreement he entered into with Weltz which clearly states, in relevant part: "In the event either party initiates litigation for enforcement of any of the terms of this Agreement, the prevailing party shall be awarded judgment against the other party for all costs reasonably incurred by the prevailing party, including reasonable attorney fees." Still, this is generally of little consequence because Poplin is correct that the district court abused its discretion in that the amount it awarded Weltz is arbitrary and lacks an evidentiary foundation.

"Fees which are not supported by 'meticulous, contemporaneous time records' identifying the specific tasks being billed should not be awarded." *Davis v. Miller*, 269 Kan. 732, 748, 7 P.3d 1223 (2000). *Davis* suggested district courts look to the criteria of Rule 1.5(a) (2021 Kan. S. Ct. R 327) of the Kansas Rules of Professional Conduct to determine the reasonableness of the attorney fees. 269 Kan. at 751. This criteria includes:

> "(1) [T]he time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> "(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

"(3) the fee customarily charged in the locality for similar legal services;

"(4) the amount involved and the results obtained;

"(5) the time limitations imposed by the client or by the circumstances;

"(6) the nature and length of the professional relationship with the client;

"(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

***8** "(8) whether the fee is fixed or contingent." Rule 1.5(a).

There is no indication that Weltz ever provided information of this nature to the district court, and the district court's order is silent on these points. " 'It is well-settled that the burden is on a party to designate a record sufficient to present its points to the appellate court and to establish its claims.' " *Friedman v. Kansas State Bd. of Healing Arts*, 296 Kan. 636, 644, 294 P.3d 287 (2013). The district court's award of attorney fees is not supported by substantial competent evidence and therefore amounts to an abuse of discretion. See *In re Marriage of Emerson*, No. 118,219, 2018 WL 3485663, at *8 (Kan. App. 2018) (unpublished opinion). The award of attorney fees for Weltz' discovery motion is reversed.

Weltz' Cross-Appeal

In her cross-appeal, Weltz argues the district court erred by not awarding additional attorney fees on her motion to enforce the property settlement agreement. She also argues the district court erred in failing to rule on her claim that she is owed additional supplemental maintenance for future distributions Poplin might receive because those distributions represent income earned for work Poplin performed between January 1, 2020, and April 1, 2020.

Weltz is not entitled to additional attorney fees.

There are several deficiencies in Weltz' briefing of this issue. She cites no standard of review and fails to support her argument with any citation to pertinent authority. Failure to support a point with pertinent authority or show why it is sound despite a lack of supporting authority, or in the face of contrary authority, is akin to failing to brief the issue. *In re Adoption of T.M.M.H.*, 307 Kan. 902, 912, 416 P.3d 999 (2018). Additionally, while Weltz offers a general explanation as to the basis for her argument, there is not a sufficient record to determine the reasonableness of any award she believes she may be entitled to. Weltz fails to cite to any record evidence reflecting that she requested and was denied a specific amount for attorney fees, much less sufficient facts to determine whether her request was reasonable. Again, it is Weltz' burden to designate a record sufficient to present her points to this court and to establish her claims. *Friedman*, 296 Kan. at 644. Her brief to this court likewise fails to clarify the precise amount she believes she is entitled to and why that amount is reasonable in this case.

As discussed above, a review of Weltz' motion reveals that she failed to provide the district court with the necessary information and tools to support an award for attorney fees. This court cannot find the district court abused its discretion in declining to award Weltz attorney fees where no evidence, much less substantial competent evidence, exists to support such an award. See *In re Marriage of Emerson*, 2018 WL 3485663, at *8.

Weltz is not entitled to additional supplemental maintenance.

Weltz accurately states that the district court failed to address the issue she raised on additional supplemental maintenance to which she might be entitled based on cash and retirement distributions Poplin had *earned*. That said, there is no need for this court to remand because the issue turns on a pure question of law, as well as an interpretation of the parties' property settlement agreement, and the relevant material facts are not in dispute. Weltz' argument on this issue generally runs contrary to her position on the first issue in her Appellee's brief. As discussed above, Poplin's obligation to pay supplemental maintenance under the parties' property settlement agreement arises when he *receives* cash or retirement distributions. When those distributions were *earned* is of no bearing under the plain language of the agreement. That document makes clear that Poplin's maintenance obligations terminate upon Weltz cohabitating. Weltz does not allege Poplin actually received any additional distributions between April 15, 2020, and May 20, 2020, the date she began cohabitating. Poplin does not have to pay supplemental maintenance for distributions received after Weltz began cohabitating. Weltz is entitled to no further supplemental maintenance beyond what Poplin owes for the April 2020 distributions.

***9** As a final matter, both parties filed motions with this court under Supreme Court Rule 7.07(c) seeking award of attorney's fees. Poplin argues that he should be is entitled to such fees for the cost of defending against Weltz' cross-appeal. For her part, Weltz refutes Poplin's claims and argues she is entitled to attorney fees for the entire costs she incurred before the district court, in filing her brief as Appellee, and as a product of her cross-appeal.

Under Supreme Court Rule 7.07(c) (2021 Kan. S. Ct. R. 52), this court may award attorney fees if it "finds that an appeal has been taken frivolously, or only for the purpose of harassment or delay."

> "An appeal is frivolous if it presents 'no justiciable question' and is 'readily recognized as devoid of merit,' meaning 'that there is little prospect that it can ever succeed.' *Blank v. Chawla*, 234 Kan. 975, Syl. ¶ 5, 678 P.2d 162 (1984).... Moreover, because Rule 7.07 requires a finding that 'an appeal' is frivolous, the presence of even a single nonfrivolous issue renders the entire appeal nonfrivolous. See *Porter v. Stormont-Vail Hospital*, 228 Kan. 641, 647-48, 621 P.2d 411 (1980) (denying attorney fees for an appeal that was not 'totally without merit')." *In re Marriage of Ruda*, No. 121,746, 2020 WL 6372274, at *8 (Kan. App. 2020) (unpublished opinion), *rev. denied* 313 Kan. —— (March 31, 2021).

Poplin's motion is denied.

Poplin asks this court to award attorney fees of $1,215 for 5.4 hours he spent responding to Weltz' cross-appeal. While his motion is more circumspect, supported with better documentation, and the amount requested largely appears to be reasonable, Rule 7.07(c) contemplates that this court "may assess ... a reasonable attorney fee for the *appellee's counsel*." (Emphasis added.) (2021 Kan. S. Ct. R. 52).

The use of "may" vests this court with discretion on whether to award attorney fees. While Weltz' arguments on cross-appeal are far from persuasive, it cannot be said they are completely frivolous. Had Weltz taken the appropriate steps at the district court, she arguably may have had a sound basis, emanating from the parties' agreement, to obtain reasonable attorney fees for the costs incurred below. Further, a statutory basis would have existed to award such fees. See K.S.A. 2020 Supp. 23-2715. Weltz' other argument on cross-appeal, however, strains the plain language of the parties' agreement. Yet it is perhaps no more unpersuasive than Poplin's interpretation of that agreement. It is also generally recognized this court should hesitate to award attorney fees when a party has not prevailed on all issues on appeal. See *Richardson v. Murray*, 54 Kan. App. 2d 571, 588, 402 P.3d 588 (2017). Although Poplin has prevailed on both issues raised in Weltz' cross-appeal, he only prevails on a single issue in his direct appeal. Given this court's discretion, it declines to award Poplin attorney fees based on the overall circumstances of this case.

Moreover, the plain language of Rule 7.07(c) relates to "attorney fee[s] for the *appellee's counsel*." (Emphasis added.) (2021 Kan. S. Ct. R. 52). Poplin does not have counsel, and he cites no Kansas caselaw holding that a pro se attorney litigant is entitled to an award of attorney fees under the rule. The only authority he cites relating to an award for attorney fees for a pro se attorney is *American Council of the Blind of Colorado, Inc. v. Romer*, 962 F.2d 1501, 1503 (10th Cir. 1992). But the award of attorney fees at issue in that case was premised on a statutory basis under 42 U.S.C. § 1988, which the United States Supreme Court has interpreted to require " '[t]he prevailing party should ordinarily recover an attorney's fee unless special circumstances would render such award unjust.' " 962 F.2d at 1503 (quoting *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402, 88 S. Ct. 964, 19 L. Ed. 2d 1263 [1968]).

***10** The authority Poplin relies on is distinguishable from Rule 7.07(c). The attorney fee provision of 42 U.S.C. § 1988(b) provides, in relevant part: "the court, in its discretion, may allow the prevailing party, other than the United States, *a reasonable attorney's fee* as part of the costs." (Emphasis added.) In contrast, Rule 7.07(c) refers to "*attorney fee[s] for the appellee's counsel*." (Emphasis added.) (2021 Kan. S. Ct. R. 52). Here, Poplin is not the appellee's counsel. He should not be awarded attorney fees as a pro se litigant simply because of the fact he is an attorney. Poplin admits the time spent responding to Weltz' cross-appeal did not preclude him from accepting other work and did not impose any special time constraints. His request for attorney fees is denied.

Weltz' motion is denied.

Weltz seeks $10,808 for attorney fees on appeal and $2,766 for attorney fees incurred before the district court. We decline to honor her request for attorney fees in responding to Poplin's appeal because Poplin raised at least one meritorious issue

on appeal—that the district court should not have awarded attorney fees for Weltz' motion to quash his discovery requests. See *Porter*, 228 Kan. at 647-48.

Weltz requests additional attorney fees for the cost of "prosecuting the cross-appeal and drafting [her] Motion for Attorney's fees." This argument lacks support under Supreme Court Rule 7.07(c), which provides for an award of attorney fees to the appellee "assess[ed] against the appellant or appellant's counsel." (2021 Kan. S. Ct. R. 52). For purposes of Weltz' cross-appeal, Poplin is not the appellant; he is the cross-appellee. Weltz cannot seek an award because Poplin has frivolously defended against the arguments raised in her cross-appeal. Any response by Poplin followed Weltz raising the issues on cross-appeal. And the issues raised in Weltz' cross-appeal were (1) adversely decided against Weltz (her request for additional attorney fees), or (2) not decided by the district court (her request for additional supplemental maintenance).

Additionally, as Poplin correctly notes in his response to Weltz' motion, the affidavit and billing records she attached to her motion failed to properly segregate the time spent working on the appellee's section of her brief from the time spent on the cross-appellant's portion of her brief. To the extent there is any differentiation between the two, it consists of only two entries, 1.2 hours for "Drafting notice of Cross Appeal," and 1.2 hours for "Drafting of Docketing Statement for Cross Appeal." In total, the attached billing statement reflects 41.8 hours of work performed in relation to all matters on appeal. But it is largely impossible to differentiate between time spent on (1) Weltz' appellee's brief, (2) Weltz' cross-appeal, and (3) any time spent on her motion for appellate attorney fees. In fact, despite her request for attorney fees related to the present motion, Weltz fails to include anything showing the cost of it. Yet such an award is not authorized under the plain language of Supreme Court Rule 7.07(c), and Weltz fails to offer any argument or explanation for why it should be allowed.

As to her request for attorney fees related to the proceedings in the district court, such an award is denied because, as we noted previously, Weltz failed to properly present the issue to the district court and failed to properly brief the issue on cross-appeal.

Further, given that Weltz claims that the authority to award such fees is permitted under the parties' property settlement agreement, Poplin counters that they cannot be awarded because Weltz violated a condition precedent, specifically, the obligation to send written notice of the alleged failure to perform to the breaching party and allow 10 days for the breach to be cured. We agree. For Weltz to affirmatively rely on the attorney fee provisions of the agreement, she bears the burden to establish that she complied with all terms and conditions thereof. Weltz has not made such a showing, so her requests for attorney fees for all stages of the proceedings is denied.

***11** Affirmed in part and reversed in part.

All Citations

Slip Copy, 2021 WL 3701345 (Table)

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287 P.3d 300 (Table)
Unpublished Disposition
(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)
Court of Appeals of Kansas.

WOLFERT LANDSCAPING COMPANY, L.L.C., Appellee,
v.
LRM INDUSTRIES, INC. and Federal Insurance Company, Appellants.

No. 106,989.
|
Nov. 2, 2012.

Appeal from Douglas District Court; Michael J. Malone, Judge.

Attorneys and Law Firms

Christopher F. Burger, of Stevens & Brand, L.L.P., of Lawrence, for appellants.

Bruce W. Beye, of Overland Park, for appellee.

Before BRUNS, P.J., PIERRON and MARQUARDT, JJ.

MEMORANDUM OPINION

PER CURIAM.

***1** LRM Industries, Inc. (LRM) entered into a contract to build a parking facility at the University of Kansas (KU). Subsequently, Wolfert Landscaping Company, L.L.C. (Wolfert) entered into a subcontract with LRM to perform landscape work to enhance the visual image of the parking facility. Because LRM believed Wolfert had materially breached the subcontract, LRM removed Wolfert as subcontractor and replaced it with another landscape company. As a result, Wolfert sued LRM in an attempt to recover the remaining funds it believed were due under the subcontract and to recover for approved extra work on the project. In response, LRM filed a counterclaim against Wolfert seeking to recover damages for breach of contract and to recover attorney fees under the subcontract.

Following a bench trial, the district court found that Wolfert had substantially breached the terms of the subcontract. But the district court did not award LRM any damages as a result of the breach, and it denied LRM's request for attorney fees. Moreover, the district court denied Wolfert's breach of contract claim against LRM. Nevertheless, the district court entered judgment in favor of Wolfert and against LRM under a quantum meruit theory. The district court also awarded Wolfert a judgment for extra work that was approved by LRM.

On appeal, LRM contends that the district court erred in not awarding it damages for Wolfert's breach of the subcontract and in not awarding attorney fees. LRM also contends that the district court erred by applying quantum meruit in a case where the obligations of the parties were set forth in an express contract. For the reasons set forth in this opinion, we conclude that the judgment of the district court should be affirmed in part and reversed in part.

FACTS

On February 8, 2006, LRM entered into a contract with KU to serve as general contractor for a construction project described as the West Campus Park and Ride Lot. Thereafter, on February 17, 2006, Wolfert signed a subcontract with LRM to provide labor and materials for the project's landscaping and irrigation work. The deadline for the first phase of Wolfert's work on the project was August 1, 2006, with the entire project to be finished by October 30, 2006. But because Wolfert needed additional time to complete its work, LRM extended the deadline on several occasions.

Because of Wolfert's " 'failure to perform under the contract within the time available,' " LRM removed Wolfert as the landscaping subcontractor on August 20, 2007. As of that date, LRM had paid Wolfert $256,136.22, with the last payment to Wolfert having been made on January 6, 2007. Subsequently, LRM paid Lawrence Landscape, Inc. (LLI) $68,437 to complete the landscaping and irrigation work on the project.

On November 30, 2007, Wolfert filed a petition against LRM in Johnson County District Court. The petition also named Federal Insurance Company, which served as the surety on the parking facility project. In the petition, Wolfert asserted claims for breach of contract and quantum meruit against

LRM. In response, LRM filed an answer and counterclaim. In the counterclaim, LRM asserted claims for breach of contract and indemnification against Wolfert.

***2** On March 8, 2008, the case was transferred to the Douglas County District Court. After completion of discovery, a final pretrial conference was held and a pretrial order was entered by the district court. Specifically, the pretrial order identified Wolfert's claims against LRM to be "for breach of contract in wrongfully terminating Plaintiff." Moreover, the pretrial order stated that it "shall supersede the pleadings and control the future course of this action unless modified to prevent substantial injustice." It is undisputed that the pretrial order was never modified and that neither party requested modification.

The district court held a 5–day bench trial at which it heard the testimony of eight witnesses. The witnesses included Wolfert's principal, Henry J. Wolfert, and LRM's president, Stephen E. Glass. Additionally, more than 90 exhibits were admitted into evidence. There was no mention of quantum meruit at trial or in the proposed findings of fact and conclusions of law submitted by the parties following trial. On September 11, 2011, the district court entered a 14–page memorandum decision, which included findings of fact and conclusions of law.

In the memorandum decision, the district court first addressed LRM's counterclaim, finding that "KU set forth some specific landscaping conditions in its contract with [LRM] and thus in [Wolfert's] subcontract with [LRM]." The district court also found that Wolfert's actions—or lack thereof—"were not technical but *substantial breaches of the contract.*" (Emphasis added.) Accordingly, the district court found that LRM "had justifiable reasons to replace [Wolfert]."

Notwithstanding, the district court awarded no damages to LRM for Wolfert's breach of the subcontract, nor did it award LRM any attorney fees incurred as a result of defending the lawsuit or prosecuting the counterclaim. Moreover, the district court found that LRM had failed to mitigate its damages. Specifically, the district court concluded that there was "no persuasive argument [presented] to find [LRM] incurred additional overhead costs." Hence, the district court awarded no administrative costs to LRM relating to the replacement of Wolfert as subcontractor on the parking facility project.

Although the district court denied Wolfert's breach of contract claim and did not find that LRM breached the subcontract, it found that Wolfert was entitled to recover $13,730 plus interest for approved extra work not included in the subcontract. The district court further found that Wolfert had "proven it is entitled to a quantum meruit award ... for the reasonable value of the labor and materials provided to [LRM]." The district court then calculated the quantum meruit award to be in the amount of $41,139.58. Thus, the total judgment entered against LRM and in favor of Wolfert was $54,869.58, plus prejudgment interest to be paid on the $13,730 beginning on August 20, 2007.

ANALYSIS

Quantum Meruit

***3** On appeal, LRM contends the district court erroneously awarded damages to Wolfert under a quantum meruit theory. Specifically, LRM argues that the district court should not have entertained a quantum meruit claim because it was not contained in the pretrial order. LRM also argues that a claim for quantum meruit was barred because there was an express contract covering the respective obligations of the parties to one another. We agree.

K.S.A. 60–216(e) states that the pretrial order shall control the subsequent course of the action unless modified by the district court to prevent manifest injustice. "It is generally accepted that a pretrial order which specifies the issues to be tried, supersedes and replaces the pleadings." *Herrell v. Maddux,* 217 Kan. 192, Syl. ¶ 2, 535 P.2d 935 (1975). Accordingly, it is the pretrial order that controls the claims and defenses on which a case will be decided. See *Halley v. Barnabe,* 271 Kan. 652, 656–57, 24 P.3d 140 (2001).

"The purpose of the pretrial conference ... is to eliminate the element of surprise from trials and to simplify the issues and procedure by full disclosure to all parties of the anticipated evidence, and factual and legal issues...." *McCain Foods USA, Inc. v. Central Processors, Inc.,* 275 Kan. 1, 18, 61 P.3d 68 (2002). When there has been no modification of the pretrial order, it is binding on the parties. See *Wenrich v. Employers Mut. Ins. Co.,* 35 Kan.App.2d 582, 590–91, 132 P.3d 790 (2006); see also *Brown v. Hardin,* 197 Kan. 517, 519, 419 P.2d 912 (1966) ("Orders entered at pretrial conference have the full force of other orders of court and they control the subsequent course of the action, unless modified at the trial

to prevent manifest injustice."). Thus, "[a]n issue or claim for relief that is not contained in the pretrial order should not be entertained by the trial court." *McCain,* 275 Kan. at 19.

Here, Wolfert initially asserted a claim of quantum meruit in its petition, but this claim was not preserved at the pretrial conference or in the pretrial order. Furthermore, neither party requested modification of the pretrial order. Consequently, because the pretrial order was never modified, the parties proceeded to trial on the belief that Wolfert was seeking relief on a breach of contract claim—not on a quantum meruit claim. In fact, when proposed findings of fact and conclusions of law were submitted following the trial, neither party mentioned quantum meruit.

It appears that the district court inserted the theory of quantum meruit back into the case in an attempt to find an equitable solution to the parties' differences. Nevertheless, we find that quantum meruit should not have been considered by the district court because the claim was not preserved in the pretrial order. Because the case was tried on a breach of contract theory, quantum meruit could not form the basis for recovery.

Of course, had Wolfert moved to amend the pretrial order to include a quantum meruit claim and had the district court granted the motion upon a showing of manifest injustice, our conclusion would be different. But Wolfert never even made an attempt to amend the pretrial order or to show manifest injustice. Thus, we find that having tried the case on a breach of contract theory and having never sought to amend the pretrial order, Wolfert waived its claim for quantum meruit.

***4** We pause briefly to note that even if Wolfert had not waived its quantum meruit claim, it was not entitled to recover under this equitable theory because an express or special contract controlled the relationship between the parties. Clearly, "[r]ecovery for payment under the terms of a contract and recovery for quantum meruit are mutually exclusive legal concepts." *Midwest Asphalt Coating v. Chelsea Plaza Homes* 45 Kan.App.2d 119, Syl. ¶ 5, 243 P.3d 1106 (2010). Accordingly, quantum meruit is not available when an express contract addresses the obligations of the parties. See *Fusion, Inc. v. Nebraska Aluminum Castings, Inc.,* 934 F.Supp. 1270, 1275 (D.Kan.1996); *Phillips v. Noland,* No. 103,254, 2011 WL 1376980, at *3 (Kan.App.2011) (unpublished opinion) (Kan.App .2011); *Diagnostic Imaging Center, P.A. v. Waddell,* No. 102, 430, 2010 WL 2217588, at *7 (Kan.App.2010) (unpublished opinion).

Here, it is undisputed that a comprehensive subcontract existed between LRM and Wolfert that explicitly set out detailed terms regarding the obligations of the parties, including—but not limited to—the plans and specifications for the landscaping work to be performed, the maintenance of the landscaping work, the definition of substantial completion, and the procedure for the resolution of disputes between the parties regarding substantial completion. The subcontract also explicitly addressed the process to be followed to obtain approval for extra work and to obtain extensions of time for completion. Thus, we find that it would be inappropriate as a matter of law to allow Wolfert to avoid the result of its failure to meet the terms of the subcontract under the guise of quantum meruit. See *Valley, Inc. v. Ward Parkway Bld Co.,* 3 Kan.App.2d 131, 133–34, 590 P.2d 1100(1979).

We, therefore, reverse the judgment of the district court to the extent that it was based on a theory of quantum meruit.

Approved Extra Work

In addition to its breach of contract claim, which was denied by the district court, Wolfert preserved a claim in the pretrial order for approved extra work in the amount of $33,894.95. After considering the evidence presented at trial, the district court found that Wolfert had indeed performed approved extra work on the parking facility project before it was dismissed by LRM. This included $9,000 for additional seeding, $4,580 for an irrigation change from drip to spray, and $800 for computer-aided design. After deducting $650 for a plant size change, the district court determined that LRM owed Wolfert $13,730 for approved extra work, plus interest from August 20, 2007.

To the extent the damage awards implicate the district court's factual findings, we review the findings to determine if substantial competent evidence supported them. See *Source Direct, Inc. v. Mantell,* 19 Kan.App.2d 399, 408–11, 870 P.2d 686 (1994). From our review of the conflicting evidence in the record, we find that there was substantial evidence presented to support the district court's damage award for the approved extra work performed by Wolfert prior to its dismissal from the project. Accordingly, we will not substitute our judgment for that of the district court.

***5** We, therefore, affirm the district court's award of damages to Wolfert for approved extra work in the amount of $13,730 plus interest from August 20, 2007.

LRM's Counterclaim

LRM contends that the district court erred in ruling on its counterclaim. Although the district court found that Wolfert substantially breached certain terms and conditions of the subcontract, it found that LRM had not proven that it suffered damage as a result of the breach. When reviewing a negative finding, we will not disturb the district court's decision absent proof of an arbitrary disregard of undisputed evidence or proof of some extrinsic consideration such as bias, passion, or prejudice. See *General Building Contr., LLC v. Board of Shawnee County Comm'rs,* 275 Kan. 525, 541, 66 P.3d 873 (2003).

As a general rule, when a party establishes a material breach of contract it is entitled to nominal damages at a minimum. See *Freeto Construction Co. v. American Hoist & Derrick Co.,* 203 Kan. 741, 747, 457 P.2d 1 (1969). In the present case, it is unclear whether the district court intended to find a material breach of the subcontract when it found that Wolfert's actions or inactions "were not technical but substantial breaches of the contract." Regardless, an award of actual damages arising from a breach of contract must be proven with sufficient certainty to justify the award. See *State ex rel Stovall v. Reliance Ins. Co.,* 278 Kan. 777, 789, 107 P.3d 1219 (2005) ("A party is not entitled to recover damages 'not the proximate result of the breach of contract and those which are remote, contingent, and speculative in character.' ").

The basic goal in awarding contract damages is to put the nonbreaching party in the position it would have been in had the breach never occurred, without allowing that party a windfall. See *Stovall,* 278 Kan. at 789. Although LRM argues that it did not receive a windfall, the district court determined, based on the evidence presented at trial, that the total amount of LRM's payments to Wolfert and to the landscaping company that replaced Wolfert on the project was less than the amount that would have been due under the contract.

In reaching its conclusion regarding the award of damages, the district court adopted Wolfert's position that the total amount of the subcontract was $340,574.05. The district court then found that LRM had paid $256,136.22 to Wolfert and $68,437 to LLI—for a total of $324,573.22—to have the landscaping and irrigation work completed. Moreover, the district court found that the evidence presented at trial showed that LRM had failed to mitigate its replacement or administrative costs.

On appeal, we must review the evidence relating to a particular issue in the light most favorable to the prevailing party. See *Smith v. Massey–Ferguson, Inc.,* 256 Kan. 90, 115–16, 883 P.2d 1120 (1994). In the present case, Wolfert was the prevailing party on the issue of damages. As such, viewing the record in the light most favorable to Wolfert, we find that the conclusions reached by the district court regarding damages were supported by substantial evidence. Likewise, we find that that the district court did not arbitrarily disregard undisputed evidence. Similarly, we find that the district court's decision regarding damages was not based on bias, passion, or prejudice.

***6** We, therefore, affirm the district court's decision not to award damages to LRM as a result of Wolfert's breach of the subcontract.

Attorney Fees

Finally, LRM contends that the district court abused its discretion by denying its request for attorney fees under the terms of the subcontract. Specifically, the subcontract provides that Wolfert was responsible to indemnify and hold LRM and KU harmless for " 'attorneys' fees *suffered or incurred on account of* any breach of the ... contract." (Emphasis added.) Also, we note that LRM has filed a motion for attorney fees and costs associated with this appeal under Supreme Court Rule 7.07 (2011 Kan. Ct. R. Annot. 64). We will first address the district court's denial of LRM's request for attorney fees and then address the question of whether LRM should be awarded attorney fees on appeal.

We review the district court's decision under an abuse of discretion standard. See *State ex rel Slusher v. City of Leavenworth,* 285 Kan. 438, 450, 172 P.3d 1154 (2007). The district court is an expert in the area of attorney fees and can draw on its own knowledge and experience making decisions regarding attorney fees. See *Johnson v. Westhoff Sand Co.,* 281 Kan. 930, 940, 135 P.3d 1127 (2006). Although an appellate court is also an expert in the area of attorney fees, we do not substitute our judgment for that of the district court unless its decision was not supported by substantial

competent evidence. See *In re Marriage of Burton*, 29 Kan.App.2d 449, 454, 28 P.3d 427, *rev. denied* 272 Kan. 1418 (2001).

As indicated above, the district court reasonably concluded, based on the evidence presented at trial that LRM had failed to establish that it was entitled to recover monetary damages for Wolfert's breach of the subcontract. Hence, we find that it was also reasonable for the district court to conclude that LRM had not "suffered or incurred [attorney fees] on account of" Wolfert's breach. Likewise, we find that the district court's refusal to award attorney fees was reasonable in light of the fact that LRM failed to pay Wolfert for approved extra work performed on the project prior to August 20, 2007.

Turning to LRM's motion for attorney fees on appeal, we note that Supreme Court Rule 7.07(b) (2011 Kan. Ct. R. Annot. 64) permits an appellate court to "award attorney fees for services on appeal in any case in which the trial court had [that] authority." By virtue of the language of the subcontract entered into by the parties, the district court had such authority and, in turn, we may also entertain a fee request. Although LRM has prevailed on the issue of quantum meruit in this appeal, it has not prevailed on its claim for damages and attorney fees. Moreover, we have affirmed Wolfert's judgment against LRM for approved extra work performed prior to August 20, 2007. Accordingly, LRM has only received part of the relief it requested on appeal and, under these circumstances, we find that it would be appropriate for each party to pay its own attorney fees.

***7** We, therefore, affirm the district court's decision not to award attorney fees, and we deny LRM's application for attorney fees on appeal.

Affirmed in part and reversed in part.

All Citations

287 P.3d 300 (Table), 2012 WL 5392143