IN THE COURT OF APPEALS OF IOWA

No. 3-113 / 12-0931
Filed March 13, 2013

MICHAEL JON SUTTON,
Plaintiff-Appellant/Cross-Appellee,

vs.

IOWA TRENCHLESS, L.C.,
Defendant-Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Guthrie County, Gary G. Kimes, Judge.

Michael Sutton appeals and Iowa Trenchless cross-appeals a district court order awarding attorney fees and refusing to extend the restrictive covenant. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Matthew J. Hemphill of Bergkamp, Hemphill & McClure, P.C., Adel, for appellant.

Edmund J. Sease and Jeffrey D. Harty of McKee, Voorhees & Sease, P.L.C., Des Moines, for appellee.

Heard by Vaitheswaran, P.J., and Tabor and Mullins, JJ.

TABOR, J.

This case returns to us after the remand hearing we ordered in *Sutton v. Iowa Trenchless, L.C.*, 808 N.W.2d 744 (Iowa Ct. App. 2011). In the first appeal we decided Michael Sutton's covenant not to compete with Iowa Trenchless was enforceable, but Iowa Trenchless did not carry its burden to show damages. *Sutton*, 808 N.W.2d at 753. We held the contract entitled Iowa Trenchless to recover reasonable attorney fees, and remanded for the district court to determine the proper amount. *Id*.

In this second appeal, Sutton claims the district court erred in awarding $54,000 in attorney fees because Iowa Trenchless did not prove a violation of the covenant. He also claims Iowa Trenchless failed to comply with the attorney fee affidavit statute. On cross-appeal, Iowa Trenchless contends the amount of fees awarded was arbitrary and without factual support. The company also challenges the court's refusal to extend injunctive relief.

Under law-of-the-case principles, we decline to reconsider the company's entitlement to attorney fees for establishing the enforceability of the covenant. Assuming the company's original affidavit did not satisfy Iowa Code section 625.24 (2011), its amended affidavit removed any impediment to awarding attorney fees. We also uphold the district court's refusal to extend the duration of covenant. But we do find it necessary to remand the case to the district court so that it can provide findings of fact concerning the amount of attorney fees awarded. Without an explanation of what factors the court considered, we are unable to determine the reasonableness of the attorney fee award.

I. Background Facts and Proceedings

Iowa Trenchless, L.C. is in the business of laying cable and pipe by boring underground instead of digging open pits. The company was founded in 2002 by Jason Clark, Clark's father, and Michael Sutton. On August 20, 2005, Sutton sold his share in Iowa Trenchless and entered into a seven-year covenant not to compete within a 350-mile radius of Des Moines.

In August 2009, Sutton filed a declaratory judgment action seeking to prove the non-compete covenant was unconscionable, unenforceable, and void. Iowa Trenchless counterclaimed the agreement was enforceable and Sutton was in breach for working at a competitor of Iowa Trenchless, contacting Iowa Trenchless customers, and attempting to hire Iowa Trenchless employees. On November 24, 2010, the district court granted Sutton declaratory relief, striking further enforcement of the covenant not to compete and denying all claims raised by Iowa Trenchless. Iowa Trenchless appealed the decision.

We reversed and remanded the district court's decision on November 23, 2011. *Sutton*, 808 N.W.2d at 753. We found the non-compete covenant to be valid and enforceable, but because Iowa Trenchless failed to prove damages, the company could not succeed in its counterclaim against Sutton for breach of contract. *Id.* at 752. Turning to the provision in the agreement authorizing attorney fees, we held Iowa Trenchless was not entitled to recover fees sustained in its breach-of-contract counterclaim, but that the company was "entitled to recover the attorney fees it incurred in establishing that the terms of the covenant are enforceable." *Id.* at 753. We sent the case back to district

court for a hearing on the appropriate amount of attorney fees recoverable by Iowa Trenchless, declining to retain jurisdiction. *Id.* After the supreme court denied Sutton's petition for further review, the case returned to district court.

On February 15, 2012, the district court enjoined Sutton from competing with Iowa Trenchless until August 20, 2012, an order consistent with the terms of the contract clause.[1] Iowa Trenchless then submitted its motion seeking $114,097.49 in attorney fees and costs, along with a supporting affidavit. Sutton resisted and proposed the fees should not exceed $47,491.63. The district court ultimately awarded Iowa Trenchless $54,000 in attorney fees on April 9, 2012. On April 23, 2012, the court overruled Sutton's motion to amend and enlarge, and both parties appealed. During the attorney fee dispute, Iowa Trenchless also submitted a motion to extend the non-compete injunction. The court denied the motion to extend on August 9, 2012, which Iowa Trenchless separately

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[1] The injunction order reads, in part:

> Michael J. Sutton is effective immediately, and through August 20, 2012, enjoined from, without the express written approval of Iowa Trenchless, L.C., competing with Iowa Trenchless, L.C. within a three hundred fifty mile (350) mile [sic] radius of Des Moines, Iowa, directly or indirectly, solicit, offering to provide, or providing any services similar to those Iowa Trenchless, L.C. has offered its customers during the period from August 20, 2004 to August 20, 2005, or working for or becoming associated with any of Iowa Trenchless, L.C.'s competitors as an employee, independent contractor, officer, director, investor, or in any other capacity involving trenchless methods, such as, but not limited to, auger boring, utility tunneling, micro tunneling, and sliplining.
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> During the term of this injunction, Michael Jon Sutton, will not, without the express written approval of Iowa Trenchless, L.C., for the purpose of doing business, have contact with any customer or potential customer with whom he had contact while associated either as a member or employee of Iowa Trenchless, L.C.
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> Michael Jon Sutton, will also not during the term of this injunction, directly or indirectly solicit any of Iowa Trenchless, L.C.'s employees or independent contractors, for the purpose of hiring them or inducing them to leave their position with Iowa Trenchless, L.C.

appealed. On September 24, 2012, the supreme court consolidated the two appeals.

II. Scope and Standard of Review

We review Sutton's statutory challenges for correction of legal error. *Van Sloun v. Agans Bros., Inc.*, 778 N.W.2d 174, 182 (Iowa 2010).

We review the award of attorney fees for an abuse of discretion. *Boyle v. Alum-Line, Inc.*, 773 N.W.2d 829, 832 (Iowa 2009). We will reverse the court's award "only when the court rests its discretionary ruling on grounds that are clearly unreasonable or untenable." *Id.*

Because the case was tried as an action at law in the district court, our review of the court's denial of the request to extend the injunction is for correction of legal error. *Sutton*, 808 N.W.2d at 748–49.[2] Accordingly, we are bound by the district court's findings of fact if substantial evidence supports them. *Id.* at 749.

III. Sutton's Challenges on Appeal

A. Law-of-the-Case Doctrine

Sutton initially argues because we found no violation of the covenant and Iowa Trenchless did not obtain a favorable judgment, the district court erred in holding Iowa Trenchless was entitled to recover attorney fees. The contract provision relating to attorney fees reads: "If I, Michael Jon Sutton, violate this non-compete agreement, Iowa Trenchless, L.C., may seek injunctive relief and/or

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[2] In *Sutton*, our court found that although Sutton filed his case in equity, the district court ruled on multiple evidentiary objections; the decision was captioned as "Findings of Fact, Conclusions of Law and Ruling," rather than "decree;" and Iowa Trenchless's request for injunctive relief "is not dispositive of whether an action is at law or in equity, as an injunction may issue in any action." *See* 808 N.W.2d at 748. On these bases, we determined the appropriate review was for correction of legal error. *See id.*

any other remedy allowed by law, and collect from me reasonable attorneys' fees and costs incurred in enforcing the terms of this non-compete agreement." Sutton cites our court's language that the remand was "for a hearing on the amount of attorney fees." *See Sutton*, 808 N.W.2d at 753. He argues that after the hearing, the court could have returned an award of zero dollars.

When read in context, our ruling unambiguously stated the purpose of remand was to determine the amount of attorney fees Iowa Trenchless incurred by enforcing the covenant:

> Iowa Trenchless is not entitled to recover attorney fees incurred in its attempt to prove its breach-of-contract counterclaim. However, as stated above, Iowa Trenchless is entitled to recover the attorney fees it incurred in establishing that the terms of the covenant are enforceable. Thus, this case must be remanded for a hearing on the amount of attorney fees Iowa Trenchless is entitled to recover.

Id.

When the supreme court denied Sutton's application for further review, the ruling of our court became binding on the parties at the remand hearing. *See Bahl v. City of Asbury*, 725 N.W.2d 317, 321 (Iowa 2006) ("Under the law of the case doctrine, an appellate decision becomes the law of the case and is controlling on both the trial court and on any further appeals in the same case.") (internal quotation marks omitted).

Our determination that Iowa Trenchless was "entitled" to recover attorney fees contradicts Sutton's suggestion that the district court could have awarded zero dollars or a nominal amount. *See Sutton*, 808 N.W.2d at 753. The district court was obligated to follow our court's holding. *See City of Okoboji v. Iowa Dist. Court for Dickinson Cnty.*, 744 N.W.2d 327, 331 (Iowa 2008) ("It is a

fundamental rule of law that a trial court is required to honor and respect the rulings and mandates by appellate courts in a case."). Therefore Iowa Trenchless was entitled to "the fees it incurred in establishing that the terms of the covenant [were] enforceable." *See Sutton*, 808 N.W.2d at 753.

B. Attorney Fee Affidavit Statute

Sutton next argues that because the affidavit for attorney fees submitted by Iowa Trenchless failed to comply with the requirements in section 625.24, the district court erred in awarding fees. He asserts the company's initial affidavit did not satisfy the statute and its supplemental affidavit was not on record when the court originally made its award. Sutton contends the court's order denying his motion to enlarge or amend did not enter judgment for attorney fees, so the original ruling remains invalid.

Iowa Trenchless contends its initial affidavit complied with section 625.24, but even if it did not, the court received its supplemental affidavit before entering the final ruling on April 23, 2012.

A party's right to recover attorney fees as costs may arise through legislative authority or through contract. *Van Sloun*, 778 N.W.2d at 182; *see* Iowa Code § 625.22 ("When judgment is recovered upon a written contract containing an agreement to pay an attorney fee, the court shall allow and tax as part of the costs a reasonable attorney fee to be determined by the court."). The requesting party must tender an affidavit before the court orders an award:

> The attorney fee allowed in sections 625.22 and 625.23 shall not be taxed in any case unless it appears by affidavit of the attorney *that there is not and has not been an agreement between the attorney and the attorney's client or any other person, express or implied, for*

> *any division or sharing of the fee to be taxed.* This limitation does not apply to a practicing attorney engaged with the attorney as an attorney in the cause. The affidavit shall be filed prior to any attorney fees being taxed. When fees are taxed, they shall be only in favor of a regular attorney and as compensation for services actually rendered in the action.

Iowa Code § 625.24 (emphasis added).

An affidavit is historically regarded as a prerequisite to an award of attorney fees. *See Van Sloun*, 778 N.W.2d at 183 (holding lack of affidavit does not divest court of jurisdiction, but merely limits its authority to tax attorney fees to those cases where affidavit has been filed); *Moser v. Thorp Sales Corp.*, 334 N.W.2d 715, 719 (Iowa 1983); *Weible v. Kline*, 100 N.W.2d 102, 105 (Iowa 1959) *Holden v. Voelker*, 293 N.W.2d 32, 32 (Iowa 1940).

Because the company's February 28 affidavit in support of its motion for attorney fees did not include language consistent with the italicized wording above, the affidavit arguably did not comply with section 625.24. Sutton raised the alleged deficiency during the April 4, 2012 hearing. Notwithstanding his objection, on April 10, 2012, the district court entered its judgment, awarding Iowa Trenchless $54,000 in attorney fees. Sutton moved to amend and enlarge under Iowa Rule of Civil Procedure 1.904(2), based on the affidavit's statutory noncompliance.

At 9:02 am on April 23, 2012, Iowa Trenchless resisted Sutton's post-judgment motion and attached a supplemental affidavit of its attorney, Edmund Sease, who reaffirmed his February 28 affidavit and averred "[p]ursuant to Iowa Code § 625.24, there is not and has not been an agreement between myself or my law firm, McKee, Voorhees & Sease, and Iowa Trenchless or any other

person, express or implied, for any division or sharing of the fees that were requested to be taxed in this case." At 9:06 that same morning, the district court entered its order finding Iowa Trenchless timely resisted, and overruling Sutton's motion.

Even if the first attorney affidavit fell short of the requirements in section 625.24, we believe the supplemental affidavit remedied any deficiency. The supplemental affidavit was a part of the record when the district court entered its final ruling denying Sutton's rule 1.904(2) motion. *See generally In re Marriage of Okland*, 699 N.W.2d 260, 264 (Iowa 2005) (explaining time for appeal runs from court's ruling on motion properly filed under rule 1.904(2)). It was not necessary for the court to amend its initial order. The fees were not taxed under section 625.24 until the court's final order.

IV. Iowa Trenchless's Challenges on Cross-Appeal

A. Lack of Findings Supporting Fee Award

Iowa Trenchless challenges the district court's $54,000 fee award as unreasonable and not based on evidence provided by either party. The company submitted with its motion numerous exhibits demonstrating the fees incurred and explaining the manner in which it calculated its final amount spent enforcing the covenant. Iowa Trenchless argues the district court's lack of reasoning reveals an abuse of discretion in calculating the award.

Sutton contends that if Iowa Trenchless was entitled to an award of fees, the district court did not abuse its discretion in determining the amount. Sutton takes aim at the "unreasonably high" hourly rates charged by the attorneys for

Iowa Trenchless for "an uncomplicated breach of contract matter" in a rural Iowa county. He argues the company's method of dividing the trial transcript pages between Sutton's claim and the company's counterclaim to arrive at a reduction rate of only 15.58% of its bill was overly simplified and inaccurate. Sutton concludes the district court had no duty to expressly list the factors that influenced its $54,000 award.

The party seeking a fee award bears the burden to prove the reasonableness of the services and the amount charged. *City of Riverdale v. Diercks*, 806 N.W.2d 643, 659 (Iowa 2011). The opposing party then must challenge, by affidavit or brief, the reasonableness of the requested fee. *Boyle*, 773 N.W.2d at 832.

Both parties submitted evidence and arguments supporting their respective attorney fee calculations. After reviewing the record, the district court held:

> Defendant Iowa Trenchless argues they are entitled to attorney fees of $135,155.14. Plaintiff proposes that Defendant is not entitled to any attorney fees, but in the event the Court awards fees, they should not exceed $47,491.63.
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> Defendants are entitled to attorney fees based upon the ruling of the Iowa Court of Appeals. The amount of attorney fees is largely a matter of discretion.
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> Therefore, it is hereby ordered Defendant Iowa Trenchless, L.C. is awarded attorney fees in the fair and reasonable amount of $54,000.00 payable by the Plaintiff.

Because we consider the district court to be an expert in what constitutes reasonable attorney fees, we afford it wide discretion in determining an amount. *Diercks*, 806 N.W.2d at 659. The court should consider several factors, including: "[t]he time necessarily spent, the nature and extent of the service, the

amount involved, the difficulty of handling and importance of the issues, the responsibility assumed and results obtained, the standing and experience of the attorney in the profession, and the customary charges for similar service." *GreatAmerica Leasing Corp. v. Cool Comfort Air Conditioning and Refrigeration, Inc.*, 691 N.W.2d 730, 733 (Iowa 2005). The reasonableness of hours expended and rate charged depends upon the facts of each case. *Boyle*, 773 N.W.2d at 832–33 (noting reductions may also be appropriate for partial success, hours not reasonably expended, or duplicative hours).

In asserting the district court erred in not offering factual findings, Iowa Trenchless cites *Dutcher v. Randall Foods*, 546 N.W.2d 889, 897 (Iowa 1996), a case setting forth the appropriate manner to determine attorney fees under the Fair Labor Standards Act. In that case, our supreme court held "detailed findings of fact with regard to the factors considered must accompany the attorney fee award." *Dutcher*, 546 N.W.2d at 897. The purpose of including these fact findings is so the record will allow a reviewing court to analyze the reasonableness of the fee award. *See id.* (citing *U.S. ex Rel. Taxpayers Against Fraud v. Gen. Elec. Co.*, 41 F.3d 1032, 1048–49 (6th Cir. 1994)). Our supreme court reiterated the fact-finding requirement in *Boyle*, a case involving an attorney fee claim under the state and federal civil rights acts. *See* 733 N.W.2d at 832 (quoting *Dutcher*, 546 N.W.2d at 897). When analyzing "just and reasonable" estate fees under Iowa Code section 633.199, our supreme court remanded an attorney fee award for the district court to make specific findings so that the basis

of its decision could be readily ascertained. *See In re Estate of Bockwoldt*, 814 N.W.2d 215, 232 (Iowa 2012) (citing *Boyle*, 733 N.W.2d at 833–34).

We believe the necessity of fact finding applies equally to a district court's award of reasonable attorney fees under a contractual provision. *See Blumberg v. Nealco, Inc.*, 427 S.E.2d 659, 661 (S.C. 1993) ("When an award of attorney's fees is requested and authorized by contract or statute, the court should make specific findings of fact on the record."). Even if the record contained sufficient evidence to support the $54,000 award, because the district court did not articulate its rationale, we are unable to determine whether the award was reasonable. Therefore, we reverse the fee award and remand for the district court to include appropriate findings of fact to justify the amount of the award. We do not retain jurisdiction. Moreover, we do not presuppose the district court will order the same amount of attorney fees. *Cf. State v. Luedtke*, 279 N.W.2d 7, 8 (Iowa 1979) (allowing court latitude to impose different sentence after appeal, reasoning "to remand for statement of reasons presupposes that the trial court will reach the same result on resentencing, while it is possible that a trial court, in enunciating the reasons for the disposition, might feel inclined to reach a different result").

B. Extension of Injunction

Iowa Trenchless alleges Sutton violated the non-compete covenant on multiple occasions over the course of the proceedings. The company argues because of these violations, the district court's injunctive order should be extended so that Iowa Trenchless may receive the full benefit of the seven-year

restrictive agreement. It compares the present circumstances to those involved in *Presto-X-Company v. Ewing*, 442 N.W.2d 85 (Iowa 1989).

In *Presto-X*, an employee violated his two-year restraint by providing service to his employer's customers almost immediately after being terminated. *See* 442 N.W.2d at 87. Our supreme court found the covenant was enforceable and the employee had violated the agreement, but that the two-year period would end shortly after the appeal. *See id.* at 89. The court held that where an employer receives the benefit of an injunction for only a fraction of the time specified in the covenant, it is necessary "to use our equitable powers to extend the restraint period, so as to accomplish full and complete justice between the parties." *See id.* at 89–90 (recognizing goal "to impose such terms and conditions as the justice and equities of the case require").

The court exercised its equitable powers to extend the covenant for one year from the date of the opinion for three reasons: (1) to ensure the integrity of the judicial process, as holding otherwise would encourage defendants in similar cases to delay litigation by expending the maximum amount of the restraint period; (2) to protect the effectiveness of restrictive covenants; and (3) to give the employer a chance to regain its customers lost due to the employee's violation. *Id.* at 90.

Sutton distinguishes *Presto-X* and contends Iowa Trenchless should have filed a supersedeas bond or requested a stay of the district court's original ruling to maintain the covenant's effect. He argues because Iowa Trenchless did

neither, the district court's order remained in effect until reversed and he was free to compete during the pendency of the appeal.

Assuming without deciding that Iowa Trenchless preserved error on this issue,[3] we agree *Presto-X* is distinguishable. Most notably, the district court did not find Sutton breached the non-compete agreement. Moreover, our supreme court expressly rooted its rationale for extending the non-compete clause in equitable principles, whereas the present case is at law. *Compare id. with Sutton*, 808 N.W.2d at 748–49. Iowa Trenchless did not file a bond to stay the district court's ruling. *See* Iowa R. App. P. 6.601(1). Where the district court found no violation of the contract, we do not believe the court erred in refusing to extend the injunction.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

[3] At the conclusion of the February 10, 2012 hearing regarding the terms of injunction, the district court granted Sutton's requested language and ordered Iowa Trenchless to prepare an injunctive order for the court to sign. The district court entered its order on February 21. On June 21, Iowa Trenchless filed its motion to extend injunctive relief, based on the company's discovery of alleged additional violations of the non-compete agreement. While Sutton contends the company's motion to extend is a late attempt to amend or enlarge the injunction, Iowa Trenchless alleges the challenge is actually to the court's denial of its motion to extend rather than the initial injunction. Because the court separately ruled on the motion, we address Iowa Trenchless's claim.