

IN THE COURT OF APPEALS OF IOWA

No. 2-366 / 11-1242
Filed June 13, 2012

**GILBERT JOHN HART and
DONNA FLOWERS,**
Plaintiffs-Appellees,

vs.

**CARSON CUSICK
d/b/a A GOOD PLUMBER,**
Defendant-Appellant.

Appeal from the Iowa District Court for Fremont County, Kathleen A. Kilnoski, Judge.

Carson Cusick appeals the district court's denial of his postjudgment application for trial attorney fees and other motions, as well as the interest calculated on the judgment by the district court. **AFFIRMED.**

Alan H. Kirshen, Red Oak, for appellant.

Edward E. (Gene) Eaton of Eaton Law Firm, Sidney, for appellee.

Considered by Vaitheswaran, P.J., and Doyle and Danilson, JJ.

DOYLE, J.

Carson Cusick appeals the district court's denial of his post-judgment application for trial attorney fees and other motions. He also asserts prejudgment interest should be calculated on a compound rather than a simple basis. We affirm.

I. Background Facts and Proceedings.

On June 2, 2009, Carson Cusick filed a mechanic's lien against Gilbert Hart and his daughter Donna Flowers (collectively the plaintiffs) for labor he performed and materials he furnished at the plaintiffs' residence pursuant to a contract between the parties. The lien stated \$6281.31 was owed by the plaintiffs, "together with interest as provided in the . . . Contract at 1.5% per month (18%) from and after March 27, 2009 for which sum and interest, costs and attorneys fees as provided by law" An invoice for the labor and materials was attached, stating the total due was \$6281.31. It further stated, "1.5% interest per month will be accrued if no payment is received. 18% per annum. Legal fees may be applied to the customer's bill if necessary." The contract was signed by Hart.

Thereafter, the plaintiffs filed a petition in district court, later amended, to cancel the mechanic's lien and to request damages for alleged defective work by Cusick in 2007. Cusick answered and filed a counterclaim seeking, among other things, foreclosure of the mechanic's lien plus interest, costs, and attorney fees. The plaintiffs filed their answer in response to Cusick's counterclaims, generally denying Cusick's claims.

Following a trial¹ on the matter, the district court on June 1, 2011, entered its findings, conclusions, and judgment ruling in Cusick's favor. The court dismissed the plaintiffs' petition to cancel the lien and to request damages, and it ordered that Cusick's lien be foreclosed. The court's order stated: "[J]udgment is entered in the amount of \$6281.31, with accruing interest at the rate of 1.5% per month from June 2, 2009, through May 27, 2011; and post-judgment interest at the rate of 2.26%." The court ordered that court costs be assessed against the plaintiffs. The ruling did not address Cusick's request for attorney fees. Cusick did not file a 1.904(2) motion to amend or enlarge the court's ruling to address his request for attorney fees. The plaintiffs did not appeal the court's ruling and judgment.

On June 28, 2011, Cusick filed an "application for order to permit inspection and entry upon [the plaintiffs'] property and other relief." The application stated the plaintiffs owed a total of \$8954.20 plus post-judgment interest at a rate of 2.26% from the date of the court's ruling. The plaintiffs resisted. Attached to their resistance was a letter from the plaintiffs' attorney dated June 27, 2011, sent to Cusick's attorney. The letter stated, in relevant part:

We are willing to offer in full settlement of the judgment interest and costs the sum of \$8624.28 which according to our calculations would be the amount required to fully discharge the judgment, interest and costs. That amount has been deposited by Heartland Community Bank into my trust accountant [sic] and will be first applied to court costs, with balance being remitted to your client upon his agreement to accept same and to execute a release and satisfaction of judgment and release of the mechanic's lien to be filed with the clerk of court.

¹ We do not have the benefit of a trial transcript.

Referring to your letter, your calculation of the pre-judgment interest is incorrect according to my calculations and the [bank's]. I don't know how you calculated it but there would be no compounding, either monthly or annually. The [bank] and I both agreed that the prejudgment interest would be \$2242.69. The post judgment interest accrues at the daily per diem rate of \$0.52. On that basis, the [post-judgment] interest accrual . . . would be \$20.28. . . . [T]he only court costs to be paid are \$80.00 The court did not allow attorney's fee and Section 572.32 which you cited in your letter makes such allowances permissive, not mandatory. . . .

[W]e are tendering this amount in full payment of the judgment, interest and costs and request that your client agree to accept this I will then pay the court costs and send you a check for the balance payable to both you and your client.

On July 11, 2011, Cusick filed an "application for assessment of attorney's fees." Attached to the application was an affidavit of Cusick's attorney and an itemized statement showing 122 hours of work at a rate of \$110 dollars per hour plus a previous balance of \$2165.90, for a total amount due of \$15,585.90. The application asserted that attorney fees were "required by Iowa Code Sections 572.32 and 625.22 [(2009)].² Cusick also filed a "Bill of Costs and Attorney's Fees," which set forth several amounts he claimed were due as costs, including attorney fees, postage, copying, and deposition costs. Additionally, Cusick filed a "praecipe for special execution" requesting the sheriff be instructed to sell the plaintiffs' residence to satisfy the judgment. The plaintiffs resisted all of Cusick's motions and filed a motion to quash Cusick's praecipe for special execution.

² The application also asserted that the plaintiffs' claims about defective work performed by Cusick in 2007 were spurious, frivolous, and in bad faith bordering on fraud intended to delay the trial, and as a result required a large additional amount of Cusick's attorney's time and efforts, both prior to and at trial. However, Cusick abandoned this claim on appeal. We accordingly do not address it.

An unreported hearing on Cusick's motions was held July 18, 2011. That same day, the district court entered its order dismissing Cusick's motions.

Concerning attorney fees, the court's ruling stated:

[The court's] judgment . . . was filed on June 1, 2011. No appeal was taken from that judgment. No motion pursuant to Iowa Rule of Civil Procedure 1.904 was timely made. The judgment was final before [Cusick] filed his application for attorney fees. The court declines to award attorney fees for this reason.

The court further found:

Even if [Cusick's] claim for attorney fees was timely, . . . the attorney fees [requested] of \$15,585.90 are not reasonable in this counterclaim to enforce a mechanic's lien totaling \$6281.31. This was not a case of first impression. It was not legally complicated. The claim for attorney fees is unreasonable.

The court also denied Cusick's application to inspect the plaintiffs' premises and stated: "[The plaintiffs] are willing and able to satisfy the judgment. [Cusick] has chosen not to be satisfied." The court specifically ordered that Cusick's "application for attorney fees and his bill of costs are denied," and it quashed Cusick's praecipe for special execution and dictation to sheriff. The court assessed court costs against the plaintiffs.

Cusick now appeals.

II. Scope and Standards of Review.

We review the district court's decision that it was not authorized to award attorney fees for errors at law. *FNBC Iowa, Inc. v. Jennessy Group, L.L.C.*, 759 N.W.2d 808, 810 (Iowa Ct. App. 2008). "Our review of the interest issues is for error at law." *Opperman v. Allied Mut. Ins. Co.*, 652 N.W.2d 139, 142 (Iowa 2002).

III. Discussion.

On appeal, Cusick contends the district court erred in not awarding him attorney fees, in calculating the amount of interest due on the judgment, and in quashing Cusick's praecipe for special execution. We address his arguments in turn.

A. Trial Attorney Fees.

Attorney fees are generally not allowable in the absence of statute or an agreement by the party to be charged. *Van Sloun v. Agans Bros., Inc.*, 778 N.W.2d 174, 182 (Iowa 2010). Cusick submits he is entitled to attorney fees under one, or both, of two statutes. The mechanic's lien statute provides: "In a court action to enforce a mechanic's lien, if the plaintiff furnished materials directly to the defendant, a prevailing plaintiff may be awarded reasonable attorney fees." Iowa Code § 572.32. For written contracts: "When judgment is recovered upon a written contract containing an agreement to pay an attorney fee, the court shall allow and tax as a part of the costs a reasonable attorney fee to be determined by the court." *Id.* § 625.22. Cusick argues his invoice, which stated "[l]egal fees may be applied to the customer's bill if necessary," was sufficient to entitle him to attorney fees and litigation expenses under sections 572.32 and 625.22.

In Iowa, there is no established procedure to follow in making a claim for statutory attorney fees. See *Nelson Cabinets, Inc. v. Peiffer*, 542 N.W.2d 570, 573 (Iowa Ct. App. 1995). However, attorney fee awards "are considered to be a special kind of compensatory damages," and as such must generally be pleaded to warrant recovery. *Id.* Here, attorney fees were properly before the district

court via Cusick's mechanic's lien, his counterclaim for foreclosure of the lien, and his post-trial brief.

Nonetheless, the district court did not address the issue of Cusick's attorney fees in its judgment. It is a fundamental doctrine of appellate review that issues must ordinarily be both raised *and* decided by the district court before we will decide them on appeal. *Metz v. Amoco Oil Co.*, 581 N.W.2d 597, 600 (Iowa 1998). Generally, if the district court fails to rule on an issue properly raised by a party, the party who raised the issue must file a motion requesting a ruling in order to preserve error for appeal. *Benavides v. J.C. Penney Life Ins. Co.*, 539 N.W.2d 352, 356 (Iowa 1995).

Iowa Rule of Civil Procedure 1.904(2) permits a party to file a motion to request the district court to amend or enlarge its findings and conclusions, and to enable the court to modify its judgment or enter a new judgment. Cusick did not file a 1.904 motion. Instead, he waited more than thirty days after the judgment was entered to file an application for assessment of attorney fees. He also filed a notice of attorney's lien. After a hearing on the matter, the district court found that no appeal had been taken from the judgment, nor had a 1.904 motion been filed. The court concluded the judgment was final before Cusick filed his application for attorney fees and declined to award fees for that reason. Further, the court found the claim for attorney fees to be unreasonable. Because the issue of attorney fees was properly raised before the district court but not decided and Cusick did not file a 1.904 motion, he failed to preserve error on the issue. See *Meier v. Senecaut*, 641 N.W.2d 532, 537, 539 (Iowa 2002). There is

nothing for our review, and we cannot decide the issue on appeal. *Id.* We therefore affirm the ruling of the district court on the issue of trial attorney fees.

B. Computation of Prejudgment Interest.

Interest may be recovered in mechanic's lien foreclosure actions. *Rohlin Constr. Co., Inc. v. Lakes, Inc.*, 252 N.W.2d 403, 408 (Iowa 1977). The May 27, 2011 judgment provided for "accruing interest at the rate of 1.5% per month from June 2, 2009 [date the mechanic's lien was filed³], through May 27, 2011 [date of judgment]; and post-judgment interest at the rate of 2.26%."⁴ In his appellate

³ Although one commentator opines the date from which such statutory interest accrues is unclear, see Roger W. Stone, *Mechanic's Liens in Iowa*, 30 Drake L. Rev. 39, 75 (1980), it would appear that interest would run from the time the money became due and payable. See *Olberding Constr. Co., Inc. v. Ruden*, 243 N.W.2d 872, 879 (Iowa 1976) ("We find that the amount of [the] bill was not due and payable until February 1. Interest did not begin to run until then and trial court erred to the extent it assessed interest from January 1 through January 31, 1973."). Nevertheless, neither party argues interest started to run at any other time, and we therefore do not address it.

⁴ We observe that the district court's judgment entry did not aggregate the principal and prejudgment interest.

[I]nterest accruing on an obligation prior to entry of judgment is part of the damages to be awarded by the court in the judgment. This requires the court, at some point, to aggregate the total of principal and interest owing into a single sum. Decretal interest under section 535.3 is then imposed on that aggregate.

Fed. Bank of Omaha v. Woods, 520 N.W.2d 305, 308 (Iowa 1994) (internal citation omitted). "[T]his aggregation . . . should take place as of the date of filing [the judgment] and accrued interest should be computed only to that date." *Id.* The aggregated total draws interest from the date of judgment at the rate specified in section 535.3. See *Schimmelpfennig v. Eagle Nat'l Assur. Corp.*, 641 N.W.2d 814, 816 (Iowa 2002); see also *Wilson v. Farm Bureau Mut. Ins. Co.*, 770 N.W.2d 324, 332 (Iowa 2009) ("When judgment was entered on the contract action, we held the underlying damages award and the prejudgment interest should be aggregated and then draw interest under Iowa Code section 535.3, just like any civil judgment") (citing *Opperman v. Allied Mut. Ins. Co.*, 652 N.W.2d 139, 143 (Iowa 2002)).

Iowa Code section 535.3(1) provides for the allowance of interest "on all money due on judgments and decrees of courts at a rate calculated according to section 668.13." See also *Opperman*, 652 N.W.2d at 142-43. Section 668.13(2) in turn provides: "If the interest rate is fixed by a contract on which the judgment or decree is rendered, the interest allowed shall be at the rate expressed in the contract . . ." The invoice provided for interest at the rate of 1.5% per month.

brief, Cusick asserts the district court's July 18, 2011 order "arbitrarily and inexplicably changed the calculation of the rate of interest from 1.5% per month to 18% per annum, thus reducing the amount of accrued interest to \$2242.69, a \$630.00 difference." The court did no such thing. The court merely made a statement of fact that the plaintiffs had deposited into their attorney's trust account the "judgment amount of \$6,281.31, plus \$2,242.69 in pre-judgment interest from June 2, 2009, (calculated at 18% per annum), plus court costs." Further, the court noted Cusick refused the tender of these amounts, plus court costs, to satisfy the judgment. The court did nothing to change its previously entered judgment. Although the calculation of prejudgment issue was raised before the district court in Cusick's "Brief in Support of Bill of Costs, Application for Attorney's Fees, and Motion to Permit Inspection," the court did not address the issue of interest. Cusick did not file a Rule 1.904 motion.

Nonetheless, in view of the ongoing dispute, the prejudgment interest issue should be resolved. On one hand, Cusick contends his contract (the invoice) provides for prejudgment interest compounded at 1.5% per month. On the other hand, the plaintiffs claim interest is calculated on a simple, not compound, basis at 18% per annum.

The judgment itself provides for prejudgment interest at 1.5% per month, the rate expressed in the invoice, and that rate was not challenged by either

Any error in the failure to aggregate or in the post-judgment interest rate assessed by the judgment entry has been waived by Cusick's failure to appeal from the May 27, 2011 judgment.

party via appeal from the judgment. Consequently, we apply the district court's prejudgment rate of interest at 1.5%.⁵

However, the judgment is silent as to whether interest is to be computed on a compound or simple basis. "The general rule in the United States is that, when interest is allowable, it is to be computed on a simple rather than a compound basis in the absence of express authorization to the contrary." *Landals v. George A. Rolfes Co.*, 454 N.W.2d 891, 896 (Iowa 1990). Section 535.2 does not provide for an allowance of compound interest. The invoice upon which the judgment is founded does not provide for compounding of interest.⁶ *See Power Equip., Inc. v. Tschiggfrie*, 460 N.W.2d 861, 864 (Iowa 1990) ("Compounding is prohibited absent an agreement between the parties which speaks directly to the matter of compounding."). Therefore, the judgment's prejudgment interest of 1.5% per month is to be computed on a simple, not compound, basis.⁷

⁵ We note that the rate of prejudgment interest is governed by Iowa Code section 535.2. *See also Schimmelpfennig*, 641 N.W.2d at 816.

⁶ We recognize this dispute concerns the interpretation of the unchallenged judgment, not the invoice. So, at this point, it really matters not what the invoice provides. Nonetheless, computing the judgment's prejudgment interest on a simple basis at a 1.5% per month rate is consistent with Cusick's invoice and mechanic's lien. Neither says anything about compound interest. And even if one argued the invoice and mechanic's lien interest provisions were unclear and fairly susceptible to two interpretations, the provisions would be strictly construed against Cusick. *See Iowa Fuel & Minerals, Inc. v. Iowa State Bd. of Regents*, 471 N.W.2d 859, 863 (Iowa 1991) ("[W]hen there are ambiguities in a contract, they are strictly construed against the drafter."). Construed strictly against Cusick, the applicable contract interest rate is 1.5% per month, calculated on a simple basis.

⁷ 1.5% per month or 18% per annum? It's six of one, half a dozen of another. Interest computed on a simple basis, whether it is computed at a rate of 1.5% per month or 18% per annum, yields the same result.

C. Appellate Attorney Fees.

Cusick also seeks appellate attorney fees. He has not prevailed in this appeal, and we therefore decline to make an award of appellate attorney fees.

D. Praecipe.

Cusick argues the court's grant of the plaintiffs' motion to quash Cusick's praecipe effectively eliminated his post-judgment remedies, nullifying the foreclosure of his mechanic's lien. He cites no authority in support of his argument. We acknowledge that a judgment unaided by an execution or attachment would have no validity. *Gohring v. Koonce*, 278 N.W. 283, 285 (Iowa 1938). However, the court's July 18, 2011 order did not enjoin Cusick from future efforts to execute upon the judgment to satisfy the amount due. The district court quashed Cusick's first attempt of execution after a hearing on several post-judgment motions including the issue of attorney fees. Cusick's special execution included a request for payment of attorney fees in the sum of \$15,585.90. But, his application for attorney fees was still pending before the court at that time and had not been ruled upon. Our supreme court has recognized that an execution may be stayed pursuant to statute, such as Iowa Code section 626.58, as a consequence of an appeal, and also by the court that rendered the judgment "that, for some cause, the execution of the judgment ought to be postponed to some subsequent date, or, perhaps, ought not to take place" *Brenton Bros. v. Dorr*, 239 N.W. 808, 809 (Iowa 1931) (citation omitted). Here a temporary stay was not requested, but we view the order filed July 18, 2011, as a stay that the execution "ought not to take place" upon the special execution filed. Because Cusick was not enjoined from future attempts to

execute, he may again pursue his rights to enforce the judgment pursuant to chapter 626. See Iowa Code § 626.12. In the event Cusick declines any future tender of the amount due and makes a further attempt of execution, the plaintiffs are entitled to discharge their obligation by payment of the indebtedness to the sheriff. *Id.* § 626.23.

IV. Conclusion.

For the above stated reasons, we affirm the district court's ruling.

AFFIRMED.