**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A12-0989**

Schmit Towing, Inc.,
Appellant

vs.

Chris Frovik, individually,
d/b/a FTR Towing and Recovery,
Respondent.

**Filed December 24, 2012**
**Affirmed**
**Stauber, Judge**

Hennepin County District Court
File No. 27CV096303

Christopher P. Parrington, Thomas A. Harder, Greta Bauer Reyes, Foley & Mansfield, P.L.L.P., Minneapolis, Minnesota (for appellant)

Suzanne E. Guertin, Charles W. LaDue, Law Offices of Charles W. LaDue, Coon Rapids, Minnesota (for respondent)

Considered and decided by Stauber, Presiding Judge; Rodenberg, Judge; and Harten, Judge.[*]

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

## U N P U B L I S H E D  O P I N I O N

**STAUBER**, Judge

On appeal from a judgment following a bench trial in a breach-of-contract action, appellant argues that the district court erred by (1) denying its motion for summary judgment on the issue of liquidated damages; (2) dismissing with prejudice appellant's claim for liquidated damages; (3) denying appellant's motion for a new trial; and (4) denying appellant's motion for attorney fees. We affirm.

## FACTS

Appellant Schmit Towing, Inc. (Schmit) is a Minnesota corporation engaged in the business of providing vehicle-towing services for private customers, and providing city impound towing for street cleaning, snow emergencies, and other city impound tows. Schmit hires independent contractors to meet the demand for towing services. In February 2004, Schmit signed a contract with respondent Chris Frovik d/b/a Frovik Towing and Recovery (Frovik) whereby Frovik would provide services under Schmit's contracts with the City of Minneapolis.

On July 31, 2007, Frovik was asked to sign a new agreement with Schmit. Frovik was told that if he failed to sign the agreement he would no longer be permitted to work for Schmit. Frovik testified at trial that he was unable to read the contract because of a cognitive disability. The new agreement contained a noncompete clause that prohibited Frovik from towing for any other company during the term of the agreement or within 12 months after termination of the agreement. The agreement also contained a clause that provided that upon each "occurrence" in violation of the agreement, Frovik would have

to pay Schmit $25,000 in liquidated damages. The term "occurrence" was not defined in the contract; however, at trial the parties agreed that occurrence meant either one snow emergency or one street cleaning.

In September 2008, Schmit submitted bids to the City of Minneapolis in an effort to renew its towing contracts with the city. As a result of errors in the bidding process, Schmit initially lost its contracts with the city, but regained a contract for one zone of the city two days later. Although Schmit was temporarily without contracts for future towing services, it continued to have contracts for ongoing services with the city during that time.

While Schmit's contracts with the city were uncertain, Schmit notified its employees and independent contractors that "the bid was up in the air." On November 30, 2008, Schmit invited its employees and contractors to a meeting. The nature of this meeting is disputed. Schmit asserts that it was a party to congratulate their workers and celebrate their new contract with the city. Frovik asserts it was a meeting to inform Schmit employees and contractors that they no longer had sufficient business to keep them working. Schmit denies ever telling Frovik that it lacked work for him.

Subsequently, Frovik began looking for work with other towing companies. The parties do not dispute that Frovik towed for a competing towing company during a snow emergency in December 2008, two snow emergencies in February 2009, a snow emergency in December 2009, and two street cleanings in 2009.

In March 2009 Schmit filed a complaint against Frovik alleging breach of contract and numerous other claims. Frovik moved to dismiss the complaint for failure to state a

claim upon which relief could be granted. The district court treated Frovik's motion as one for summary judgment, and granted the motion. On appeal, this court reversed the district court's judgment and remanded, holding that the district court erred when it found that the noncompete agreement was invalid as a matter of law for lack of independent consideration. *Schmit Towing, Inc. v. Frovik*, A10-362, 2010 WL 4451572, *3 (Minn. App. Nov. 9, 2010).

On remand, Schmit moved for summary judgment. The district court granted Schmit's motion in part, finding that the noncompete clause of the agreement was valid and enforceable, and that Frovik breached the agreement. The district court denied Schmit's motion for summary judgment on the issue of liquidated damages, concluding that the validity of the liquidated damages clause was a question of fact. The district court also denied Schmit's motion for attorney fees as premature.

In July 2011, a bench trial was held on the issue of damages. From the evidence presented at trial, the district court concluded that (1) Frovik lacked equal opportunity to bargain for the liquidated-damages provision, (2) Schmit failed to meet its burden of proof to show the liquidated-damages provision was not a penalty, (3) the number of times Frovik violated the noncompete agreement could not be determined, and (4) Schmit failed to present sufficient evidence to prove actual damages. Schmit moved for a new trial and for attorney fees, and the district court denied both motions. The district court also amended its order to add that (1) there is a rebuttable presumption that the liquidated damages clause was valid, (2) Frovik successfully rebutted the presumption of validity, (3) although the term "occurrence" is undefined in the contract, that the parties agreed on

its meaning, but that the number of times Frovik violated the agreement could not be determined because "occurrence" was undefined, and (4) Frovik's testimony that there were six occurrences in violation of the agreement was more credible than Schmit's evidence that there were seven occurrences. This appeal followed.

## D E C I S I O N

### I.

Schmit argues that the district court erred because it should have granted summary judgment in its favor on the issue of liquidated damages because the validity of a liquidated damages clause is a question of law. On appeal, this court may "review any order involving the merits or affecting the judgment." Minn. R. Civ. App. P. 103.04. Following the denial of summary judgment and a court trial on the merits, the denial of summary judgment cannot be said to "affect[] the judgment." *Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910, 918 (Minn. 2009). After the court trial, review of a pre-trial motion for summary judgment is no longer necessary because the issue of whether there was a genuine issue of material fact prior to trial has become moot. *Id.* Because the parties had a court trial on the merits, Schmit's request for review of the denial of its pre-trial motion for summary judgment is not properly before this court.

### II.

Schmit contends that it was entitled to a new trial because the district court erred by refusing to award appellant liquidated damages pursuant to its contract with Frovik. Upon review of the denial of a motion for a new trial, this court reviews the district

court's decision for abuse of discretion. *Moorhead Econ. Dev. Auth. v. Anda*, 789 N.W.2d 860, 892 (Minn. 2010).

A liquidated damages clause is prima facie valid. *Dean Van Horn Consulting Assocs., Inc. v. Wold*, 395 N.W.2d 405, 407-08 (Minn. App. 1986). This presumption of validity can be rebutted with evidence that the clause was not intended as fair compensation but instead was a penalty. *Id.* at 407-08. The controlling factors are "whether the amount agreed upon is reasonable or unreasonable in the light of the contract as a whole, the nature of the damages contemplated, and the surrounding circumstances." *Gorco Constr. Co. v. Stein*, 256 Minn. 476, 482, 99 N.W.2d 69, 74 (1959). In *Gorco*, the Minnesota Supreme Court, adopting the Restatement of Contracts § 339 (1932), stated that a liquidated damages clause is not enforceable unless:

> (a) [T]he amount so fixed is a reasonable forecast of just compensation for the harm that is caused by the breach, and
> (b) the harm that is caused by the breach is one that is incapable or very difficult of accurate estimation.

*Id.* at 482, 99 N.W.2d at 74-75.

Schmit argues that the district court erred when it considered evidence of Schmit's actual damages caused by Frovik's breach of the noncompete clause in determining whether the liquidated damages clause was a reasonable forecast of damages. However, in determining whether a sum recited as liquidated damages is reasonable in amount, courts often consider whether "a provision for liquidated damages [is] manifestly disproportionate to the actual damages." *Id.* at 483, 99 N.W.2d at 75; *see, e.g.*, *Meuwissen v. H.E. Westerman Lumber Co.*, 218 Minn. 477, 486, 16 N.W.2d 546, 551

(1944) (finding liquidated damages valid based on a comparison between the amount of liquidated damages and what actual damages might have been); *Schutt Realty Co. v. Mullowney*, 215 Minn. 340, 345-47, 10 N.W.2d 273, 275-76 (1943) (affirming district court's finding that liquidated damages were reasonable based on a comparison with the plaintiff's actual damages). A "[p]rovision in a contract for liquidated damages will be deemed a penalty and therefore unenforceable where the liquidated damages so provided are so great as to bear no reasonable relation to the amount of actual injury suffered by the breach." *Stanton v. McHugh*, 209 Minn. 458, 461, 296 N.W. 521, 522 (1941).

Schmit urges that it was impermissible for the district court to have considered evidence of events subsequent to the formation of its agreement with Frovik, and argues that the district court improperly relied on evidence of circumstances the parties could not have known at the time the liquidated damages clause was agreed to. Specifically, Schmit alleges it could not have known "what the City paid Schmit per car; what Schmit paid Frovik per car; how many cars Frovik was able to tow; how many Zones and/or Districts Schmit was responsible for at the time of the breach; and—ultimately—how many 'occurences' took place in the 12 months after the termination of the contract." However, the district court found that several of these factors were susceptible of accurate estimation and that Schmit vastly overestimated the amount of damages. Schmit knew what the city paid it per car because this was fixed by the contracts between Schmit and the city. Schmit also knew what it paid Frovik per tow because that amount was also fixed by contract. Schmit knew how many cars Frovik could tow per occurrence because Frovik was employed by Schmit for over three years prior to the date the contract was

entered into and had ample opportunity to observe Frovik's towing capability. The district court concluded that Frovik credibly testified he was capable of towing between 50 and 60 cars per 12-hour shift, amounting to 150 to 180 cars per three-day snow emergency. Given the evidence before it, the district court concluded that Schmit was capable of accurately forecasting how many tows Frovik could perform for the purpose of calculating its damages flowing from Frovik's breach of the noncompete agreement. Liquidated damages clauses are not valid where damages at the time of contract formation were susceptible of definite measurement. *Gorco Constr. Co.*, 256 Minn. at 482-83, 99 N.W.2d at 75. Therefore, the liquidated-damages clause was not valid.

Schmit argues that its damages would have been greater in 2007 when it had contracts in more zones of the city, but Schmit does not explain how the number of zones for which it was responsible would affect the number of cars Frovik was capable of towing during an occurrence. Likewise, it is unclear why the inability to forecast the number of "occurrences" would affect the ability to forecast damages given that Frovik was charged the same amount for each occurrence.

Schmit also argues that Frovik's breach could have resulted in the loss of Schmit's contracts with the city if Schmit could not supply a sufficient number of tow trucks to satisfy the minimum numbers specified in their contracts, which might have resulted in a loss of good will. But the record presents no evidence that Frovik's breach would have jeopardized Schmit's contracts with the city. Moreover, the district court did not consider the potential loss of city contracts in its consideration of damages. Arguments not considered by the district court are not properly before this court on appeal. *Thiele*

*v.Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Furthermore, Schmit's witness testified as follows regarding how it calculated the liquidated damages amount:

> WITNESS: We calculated it to the best of our ability based upon what we thought the damages to our company would be if Frovik Towing and Recovery was not towing for us and was towing for other people and bringing cars to the impound lot and doing other towing for other people.
>
> ATTORNEY: What formula did you use to determine $25,000?
>
> WITNESS: Based upon the amount of cars he towed, the amount of profit, the amount of potential profit.

Because Schmit provided evidence that it based its liquidated damages provision on a calculation of Frovik's towing ability and Schmit's profit from Frovik's tows, the district court did not err when it considered these factors in determining the reasonableness of the liquidated damages provision and did not consider other factors later raised by Schmit in its brief.

In addition, Schmit contends that the district court erred by concluding that it had to prove actual damages in order to prevail on its claim for liquidated damages. Schmit is correct that a plaintiff need not show actual damages in order to be awarded liquidated damages. *See Willgohs v. Buerman*, 262 Minn. 415, 417-18, 115 N.W.2d 59, 62 (1962). However, Schmit misstates the district court's conclusion. The district court did not find that Schmit had to prove actual damages. Rather, it concluded that Frovik presented sufficient evidence to show that damages from the breach of the noncompete agreement were susceptible of definite measurement, and that Schmit failed to present sufficient evidence to rebut Frovik's assertion. Because there was sufficient evidence in the record

to conclude that Frovik rebutted the presumption that the liquidated damages were valid, the district court did not err by concluding the liquidated damages provision was invalid and unenforceable.

Schmit argues that the district court erred by concluding that the liquidated damages clause was unenforceable because Frovik lacked an equal opportunity to bargain for the provision due to his cognitive disability and lack of education. When evaluating the validity of a liquidated damages clause, the court "look[s] with candor, if not with favor, upon a contract provision for liquidated damages when entered into deliberately between parties who have *equality of opportunity* for understanding and insisting upon their rights . . . ." *Stein*, 256 Minn. at 481, 99 N.W.2d at 74 (emphasis added). Schmit argues that the parties had equality of opportunity because both parties were experienced in the towing industry. However, there is significant evidence in the record to suggest otherwise. Frovik testified that he has a ninth grade education and suffers from a disability that makes it difficult for him to read. As a result, he does not read important documents, but rather relies on his wife, father, and employees to read documents and explain them to him. On the day Frovik was asked to sign the contract containing the liquidated damages provision, he asked to be allowed to take the contract home so he could have someone read it to him, but Schmit would not permit it. Frovik testified that he signed the contract without ever reading it because he was told he had to, or he would not be able to work. The district court believed Frovik's testimony, and did not believe the testimony of Schmit's witnesses. The district court is in a special position to judge the credibility of witnesses, and such findings cannot be set aside unless clearly

erroneous. Minn. R. Civ. P. 52.01. Given all the evidence, it was not clearly erroneous for the district court to find that Frovik lacked equal opportunity to bargain for the liquidated damages provision.

Schmit argues that the district court's conclusion that Frovik lacked equal opportunity to contract for the liquidated damages clause renders the entire contract unenforceable, contradicting the district court's prior ruling that the noncompete agreement was valid and enforceable. However, the district court severed the liquidated damages clause from the remainder of the contract pursuant to section 17.1 of the parties' agreement.[1] Courts look to the intent of the parties to determine whether a contract provision is severable when part of the agreement is unenforceable. *Guercio v. Production Automation Corp.*, 664 N.W.2d 379, 385 (Minn. App. 2003). Where the contract language unambiguously permits severability, as in this case where there is a

[1] Section 17.1 of the Agreement provides:

> The covenants contained in this Agreement constitute a series of separate but ancillary covenants . . . . Further, in the event a court shall hold unenforceable any of the separate covenants deemed included herein, then such unenforceable covenant or covenants shall be deemed eliminated from the provisions of this Agreement for the purpose of such proceeding to the extent necessary to permit the remaining separate covenants to be enforced in such proceeding. Operator and Company further agree that the covenants herein shall each be construed as a separate agreement independent of any other provisions of this Agreement, and the existence of any claim or cause of action by Operator against the Company, whether predicated on this Agreement or otherwise, shall not constitute a defense to the enforcement by Company of any of the covenants herein.

severability clause, courts will sever the unenforceable provision and enforce the remaining provisions of the contract. *Id.* Therefore, the district court did not err by concluding that the noncompete agreement was valid and enforceable but that the liquidated damages clause was not.

**III.**

Schmit argues that the district court erred by denying its motion for attorney fees pursuant to its agreement with Frovik.[2] Whether the district court properly denied Schmit's request for attorney fees is a question we review for abuse of discretion. *Carlson v. SALA Architects, Inc.*, 732 N.W.2d 324, 331 (Minn. App. 2007), *review denied* (Minn. Aug. 21, 2007). Generally, attorney fees are not recoverable in litigation unless there is a contract or statute authorizing the recovery. *Barr/Nelson, Inc. v. Tonto's, Inc.*, 336 N.W.2d 46, 53 (Minn. 1983). Where there is a contract providing for

---

[2] The parties' contract contains two separate clauses for attorney fees. Section 9.6.3 provides that "the Company shall have the right to:"

> An award of Company's attorneys' fees and costs of enforcement or legal action incurred in protecting its interests under and enforcing or attempting to enforce this Agreement, including but not limited to attorneys' fees incurred in litigation, voluntary arbitration, trial and in all appellate courts.

Section 18.1 provides:

> Notwithstanding the foregoing Sections discussing attorneys' fees and costs, if any legal action or other proceeding is brought by Company because of Operator's failure to abide by the terms of this Agreement, Company, its affiliates, successors, assigns, officers, directors, attorneys and employees shall be entitled to recover reasonable attorney fees and other costs incurred in collecting sums owed or in prosecuting an action, claim or proceeding, or appeal in addition to any other relief to which they may be entitled.

attorney fees, the court looks to the meaning and intent of the parties as expressed in the contract to determine whether and how much to award a party for its litigation costs. *Jadwin v. Kasal*, 318 N.W.2d 844, 848 (Minn. 1982).

Schmit argues that refusing to award attorney fees pursuant to its contract with Frovik would reward Frovik for his actions in breach of their agreement. However, the district court found that awarding Schmit attorney fees would be contrary to public policy because the district court concluded that it was not the "prevailing party." Where a litigant "is not a prevailing party . . . and considerations of public policy militate against awarding attorney fees to a nonprevailing party" the court will not award attorney fees. *Id.* at 848. On appeal, this court reviews a district court's prevailing party determination for abuse of discretion. *Elsenpeter v. St. Michael Mall, Inc.*, 794 N.W.2d 667, 673 (Minn. App. 2011). "A prevailing party is one who prevails 'on the merits in the underlying action,' not one who 'was successful to some degree.'" *Id.* (quoting *Borchert v. Maloney*, 581 N.W.2d 838, 840 (Minn. 1998)). Generally the payment of damages or the award of some other kind of performance is required to be deemed the prevailing party. *Hewitt v. Helms*, 482 U.S. 755, 760, 107 S. Ct. 2673, 2675 (1987).

Because Schmit was not awarded damages, the district court did not abuse its discretion in determining that Schmit was not the prevailing party in this lawsuit. And, because Schmit was not the prevailing party, it was not an abuse of discretion for the district court to conclude that Schmit was not entitled to attorney fees.

**Affirmed.**