STATE OF MINNESOTA
IN COURT OF APPEALS
A09-797

Paul W. Bottum,
Respondent,

vs.

James R. Jundt, et al.,
Defendants,

Jundt Associates, Inc.,
Appellant,

Acuo Technologies, L. L. C., et al.,
Defendants.

Filed December 29, 2009
Affirmed in part and reversed in part
Larkin, Judge

Hennepin County District Court
File No. 27-CV-06-11210

Andrew D. Parker, Anthony G. Edwards, Parker Rosen L.L.C., 300 First Avenue North, Suite 200, Minneapolis, MN 55401 (for respondent)

William Z. Pentelovitch, David F. Herr, Shanna Sadeh, Maslon Edelman Borman & Brand, LLP, 3300 Wells Fargo Center, 90 South Seventh Street, Minneapolis, MN 55402-4140 (for appellant)

Considered and decided by Schellhas, Presiding Judge; Minge, Judge; and Larkin, Judge.

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

LARKIN, Judge

In this post-remand appeal, appellant challenges the district court's conclusion that respondent's claim for an unpaid bonus was not barred by the statute of limitations. Appellant also claims that the district court abused its discretion by awarding respondent attorney fees and costs of $126,351.74. Because (1) the parties orally agreed to extend the time for payment and (2) appellant is equitably estopped from raising the statute of limitations as a defense, the district court did not err by concluding that respondent's suit was not barred by the statute of limitations, and we affirm in part. But because the district court abused its discretion by awarding respondent attorney fees and costs as a sanction, we reverse in part.

FACTS

The facts in this case are largely undisputed. In January 2000, James Jundt, chairman of the board of appellant Jundt Associates, Inc. (JAI), orally offered respondent Paul Bottum, a JAI hedge-fund portfolio manager, a $1 million bonus for each year in which JAI's hedge fund outperformed the Standard and Poor's 500 index (S & P 500).[1] Bottum accepted this offer. In September 2000, Marcus Jundt, the majority owner of JAI and James Jundt's son, approached Bottum about his continued employment with JAI.

[1] In its brief, JAI states that "as in the prior appeal, JAI does not challenge the [district] court's factual finding that Bottum was more credible and that JAI promised to pay Bottum" $1 million bonuses for 2000 and 2003.

Bottum reminded Marcus Jundt about the bonus promise, and Marcus Jundt stated that the Jundts were "honorable men" and that he would honor his father's promise.

The JAI hedge fund outperformed the S & P 500 for the year 2000. As of February 2001, Bottum had not been paid his $1 million bonus, and he spoke with Marcus Jundt about the issue. Marcus Jundt acknowledged that the bonus was owed, but stated that JAI could not pay the full amount because it lacked the liquidity to do so. Instead, JAI paid Bottum a partial payment of $175,000 and raised his salary. Marcus Jundt and Bottum discussed the outstanding bonus payment several times in 2001, and each time, Marcus Jundt informed Bottum that JAI did not have the cash to pay him at that time, but assured him that he would eventually be paid. In 2002, Bottum once again approached Marcus Jundt about his unpaid bonus and was reassured that he would be paid.

In late 2002 or early 2003, Marcus Jundt began using his pending divorce as a reason for JAI's failure to pay Bottum's bonus. In 2003, when it appeared likely that JAI's hedge fund would again surpass the S & P 500, Bottum asked Marcus Jundt about his bonus for that year. Marcus Jundt replied that the firm did not have any money because of his pending divorce, and he was not putting money into the firm, nor paying himself, because he did not want to give his wife the impression that he had any money. Nonetheless, Marcus Jundt assured Bottum that he would receive his full bonus once his divorce was "complete." Based on these repeated reassurances, Bottum began making plans to construct a new home.

In September 2003, Bottum and James Jundt attended a conference together in New York City. At that time, it was apparent that JAI's hedge fund would outperform the S & P 500 for 2003. During this trip, Bottum reminded James Jundt of his partially unpaid bonus for 2000 and expressed concern about being paid the additional $1 million bonus for 2003. James Jundt assured Bottum that he would be paid the remaining portion of the 2000 bonus, as well as the 2003 bonus, assuming the hedge fund outperformed the S & P 500 for that year. James Jundt informed Bottum that Marcus Jundt needed to "clean up" some of the issues with his divorce but that the bonuses would be paid as soon as Marcus Jundt's "divorce issue was resolved." In October, based on James Jundt's representations, Bottum spent more than $15,000 clearing and excavating land on which he intended to build his new home.

JAI's hedge fund outperformed the S & P 500 for 2003. In early 2004, Marcus Jundt and James Jundt confirmed and acknowledged that JAI owed Bottum $1.825 million for the 2003 bonus and the remainder of the 2000 bonus. James Jundt agreed that the money was owed, but stated that he was unwilling to put money into the firm for fear that Marcus Jundt's wife would "go after [his] wallet." In the spring of 2004, Marcus Jundt again told Bottum that he would need to wait "until the divorce is settled," but he painted an optimistic picture of the situation. In fact, Marcus Jundt expressed hope that the divorce might be settled amicably and stated that there were few legal issues because of an "iron clad" prenuptial agreement. Based on these repeated representations, Bottum felt confident that the bonuses would be paid, and he began taking bids for the construction of his new home.

Bottum approached James Jundt again in the late summer of 2004 to inquire about the bonuses and remind him that he intended to build a new home with the bonus money. Once again, James Jundt articulated that he could not put money into JAI for fear that Marcus Jundt's wife would go after it, and therefore, Bottum would need to wait until the divorce was settled before he could be paid.

In reliance on the Jundts' promises, Bottum continued to work for JAI and did not take any action to collect on the debt. During his employment with JAI, Bottum was approached by other companies about potential employment, but he chose to stay at JAI. Bottum trusted the Jundts based on his personal relationship with them and the opportunity that they had given him as portfolio manager. He never felt the need to get anything in writing because he knew they preferred to, and had a history of doing, business orally. Furthermore, he had no reason to believe that they didn't intend to pay the bonuses, but rather trusted their repeated assurances that they were "honorable men" who would pay what had been promised.

On April 5, 2005, the final decree was issued in Marcus Jundt's divorce. On April 18, Marcus Jundt informed Bottum that his salary was being moved from JAI to Acuo Technologies, L.L.C., which was controlled by James Jundt. On May 23, James Jundt notified Bottum that his employment was being terminated because James Jundt wanted a "change of philosophy" at Acuo. Bottum asked about his unpaid bonuses and was told that he had been "fairly compensated." This was the first time that either of the Jundts indicated that the bonuses would not be paid.

On May 10, 2006, Bottum filed suit against JAI seeking $1.825 million in unpaid bonuses for 2000 and 2003. The suit resulted in judgment in favor of Bottum for $1.825 million, plus interest. JAI appealed the decision to this court, challenging the district court's conclusion that Bottum's 2000 bonus claim was brought within the applicable three-year statute-of-limitations period.[2] This court reversed and remanded for further findings.

In the meantime, Bottum moved for sanctions against JAI. The district court denied this motion, in part, because Bottum failed to comply with the procedural requirements of Minn. R. Civ. P. 11 and Minn. Stat. § 549.211 (2008) and because the Jundts had corrected their deceptive post-judgment conduct. Nonetheless, the district court granted the motion for sanctions pursuant to its inherent authority and awarded Bottum $126,351.74 in attorney fees and costs.

Following reversal and remand by this court, the district court issued supplemental findings of fact, conclusions of law, and an order. The district court concluded that Bottum's claim to the $825,000 unpaid portion of his 2000 bonus was timely under two theories: the Jundts' repeated promises to pay once Marcus Jundt's divorce was resolved extended the time for JAI's payment until the divorce was settled or concluded in district court; and JAI is equitably estopped from asserting the statute of limitations as a defense. This appeal follows.

[2] JAI does not challenge that portion of the district court's order awarding Bottum his $1 million bonus for 2003.

D E C I S I O N

I.

"Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the [district] court to judge the credibility of the witnesses." Minn. R. Civ. P. 52.01. However, "[a]n appellate court is not bound by, and need not give deference to, the district court's decision on a question of law." *Bondy v. Allen*, 635 N.W.2d 244, 249 (Minn. App. 2001) (citing *Frost-Benco Elec. Ass'n v. Minn. Pub. Utils. Comm'n*, 358 N.W.2d 639, 642 (Minn. 1984)).

Minn. Stat. § 541.07(5) (2008) provides that when an employer's failure to pay is willful, an employee must bring a claim for unpaid wages, including bonuses, within three years.[3] "The statute of limitation starts to run against a cause of action from the moment the cause of action accrues or can be commenced." *Hughes v. Lund*, 603 N.W.2d 674, 677 (Minn. App. 1999). Generally, for breach-of-contract claims, this occurs at the time that the contract is breached. *Guercio v. Prod. Automation Corp.*, 664 N.W.2d 379, 387 (Minn. App. 2003).

This court, in its order for reversal and remand, found that Bottum's claim "accrued on March 1, 2001, when his $1 million bonus was due and JAI failed to pay $825,000 of it." *Bottum v. Jundt*, A07-2200, 2008 WL 4849502, at *3 (Minn. App. Nov. 10, 2008). "Running from this date, the three-year limitations period would have

[3] When the failure to pay is not willful, a two-year limitations period applies. Minn. Stat. § 541.07(5). The district court applied the three-year limitations period, and JAI does not dispute that the three-year period applies.

expired in early March 2004—approximately 15 months before Bottum commenced this action. Therefore, unless the statute of limitations was tolled, Bottum's claim is time-barred under Minn. Stat. § 541.07(5)." *Id.* It is Bottum's burden to show that his claim was not time-barred. *See Mercer v. Andersen*, 715 N.W.2d 114, 120 (Minn. App. 2006) ("The plaintiff bears the burden of proving that the statute of limitations should be tolled."). Bottum must make this showing with clear-and-convincing evidence.[4] *See Bolander v. Bolander*, 703 N.W.2d 529, 541 (Minn. App. 2005) ("[W]hen a party asserts that there has been an enforceable oral modification of the terms of a written contract, that party has the burden of proving the modification [of the written contract] by clear and convincing evidence. The burden is not met by a mere preponderance of the evidence." (quotation omitted) (second alteration in original), *review dismissed* (Minn. Nov. 15, 2005).

"An acknowledgment of a debt tolls the statute of limitations on the debt and starts it running anew on the date of the acknowledgment." *Windschitl v. Windschitl*, 579 N.W.2d 499, 501 (Minn. App. 1998). However, in order to toll the limitations period, the acknowledgment of a debt, and the promise to pay, must generally be embodied in a signed writing. Minn. Stat. § 541.17 (2008). Nonetheless, Minnesota caselaw recognizes two situations in which an oral representation may toll and restart the statute of limitations, notwithstanding Minn. Stat. § 541.17. First, the parties may orally agree to waive or modify a contractual term requiring the debt to be paid by a certain date. *See In*

[4] The parties dispute whether the clear-and-convincing, or the preponderance-of-the-evidence, standard applies. Bottum has met his burden under either standard.

re Estate of Giguere, 366 N.W.2d 345, 347 (Minn. App. 1985) ("Our prior decisions hold that an oral agreement that modifies the method or time for performance is valid and not subject to the statute of frauds."). By extending the date of payment, i.e. the time when performance is due, the parties also effectively postpone the date when a claim based on the debtor's failure to perform accrues. *See id.* at 347 (holding that because the parties agreed to extend the due date of a note to the date when the debtor sold his cabin, the statute of limitations did not begin to run until the cabin was sold). Second, a debtor's oral representations may equitably estop him from asserting a statute-of-limitations defense. *Albachten v. Bradley*, 212 Minn. 359, 362-65, 3 N.W.2d 783, 785-86 (1942). The district court based its decision on both of these theories. We address each in turn.

Modification of Time for Payment

The district court concluded that Bottum proved, "by clear and convincing evidence, that he and the Jundts agreed that he would receive his 2000 bonus upon the conclusion of Marcus Jundt's divorce" and that the divorce was concluded "for the purposes of this issue upon the issuance of [the] divorce decree in April 2005." The district court further concluded that because Bottum filed his action in May 2006, the statute of limitations did not bar the action. "Mr. Bottum timely pursued this matter once the triggering event for payment had occurred and JAI had repudiated its promises." JAI argues that the record does not support the district court's conclusion that the parties agreed to extend the time for payment.

The parties' intent controls whether a contractual term has been modified or waived. *Warrick v. Graffiti, Inc.*, 550 N.W.2d 303, 307 (Minn. App. 1996), *review*

denied (Minn. Sept. 20, 1996). In the first appeal of this case, we explained that "[w]ithout express findings regarding the parties' intent, we are unwilling to assume that the district court found that the parties orally agreed to modify the date when JAI's performance was due." *Bottum*, 2008 WL 4849502, at *5. On remand, the district court found five separate instances in 2003 and 2004 when the Jundts acknowledged JAI's debt to Bottum and/or reiterated a promise to pay the remainder of the 2000 bonus once Marcus Jundt's divorce was settled. The district court explicitly concluded that "the parties' words and actions establish their intent to extend the time for payment of the unpaid portion of [] Bottum's bonuses until Marcus Jundt's divorce was settled or concluded in the district court." JAI does not challenge the factual findings, but argues that "the Court cannot divine the existence of a contract modification from a trial record where none of the alleged contracting persons . . . testified that an offer, acceptance, or agreement to delay payment ever happened." But "a party's intention to make an offer, or to accept an offer made to him, may be inferred from his words and conduct." *Riley Bros. Constr. v. Shuck*, 704 N.W.2d 197, 202 (Minn. App. 2005).

In this case, JAI's statements and Bottum's actions constitute clear and convincing evidence of JAI's offer to pay its debt upon resolution of Marcus Jundt's divorce and Bottum's implicit acceptance of that offer. The Jundts repeatedly acknowledged that JAI owed the debt and indicated that it would be paid upon completion of Marcus Jundt's divorce. Thereafter, Bottum took no legal action to enforce payment of the debt, but instead refused offers from other potential employers and proceeded with plans to construct a new house with the anticipated bonus payment. JAI argues that there is no

evidence that Bottum accepted an offer to delay payment. JAI supports this assertion with the fact that Bottum never testified that he agreed to wait until the issuance of the divorce decree. But as noted above, acceptance can be inferred from conduct. And Bottum's conduct—not filing a lawsuit and taking steps to begin construction of a new home—demonstrated acceptance. *See id.* ("[A] party's intention . . . to accept an offer made to him, may be inferred from his words and conduct.").

JAI also contends that Bottum's continued "demand" for payments "negates the inference that he consented to the delay in payment." We disagree. It is not evident from the record that Bottum ever "demanded" payment from the Jundts. However, it is clear that Bottum occasionally inquired about the status of his bonus. These were reasonable inquiries. Bottum purchased land and prepared it for construction of a home in anticipation of receiving the bonus, and the Jundts were his only source of information regarding the status of Marcus Jundt's divorce, the finality of which was to trigger payment of the bonus. Bottum's inquiries regarding the status of the final bonus payment supports the conclusion that Bottum had agreed that payment was due at a later time, consistent with his conversations with Marcus and James Jundt.

The Jundts' repeated assurances that Bottum would be paid following Marcus Jundt's divorce, and Bottum's acceptance of this delayed-payment offer, constituted an oral modification of the bonus agreement. The district court did not err by concluding that these discussions modified the time for payment. The parties altered the time for payment and thereby simultaneously altered the time at which the cause of action accrued and the statute of limitations began to run. Because payment was not due until Marcus

Jundt's divorce was settled or concluded in district court in April 2005, and Bottum filed suit in May 2006, the action is timely.

JAI last argues that "[e]ven if promises to pay later sufficed as a contract . . . Bottum's testimony establishes two conditions precedent for payment," and cites Bottum's testimony as proof of those two conditions: "we're just waiting for the divorce to be settled, and when the firm has that cash then you'll be able to get your back pay." JAI concludes: "The [district] court did not and could not find that the second condition precedent [i.e., sufficient cash] was satisfied at the time of trial because JAI was broke by 2003." This argument is unavailing. Bottum's testimony is unambiguous and indicates that the Jundts were waiting for the divorce to finalize at which time cash that they had been shielding from the divorce proceeding would be available to pay Bottum. Therefore, the district court correctly found that there was only one condition precedent to payment of the bonus—conclusion of Marcus Jundt's divorce in district court.

Equitable Estoppel

The district court also found that "Bottum's reliance on the Jundts' promises of later payment was reasonable" and that "Bottum will be harmed if equitable estoppel is not applied." JAI argues that the district court erred by applying the doctrine of equitable estoppel.

"Equitable estoppel is a doctrine designed to prevent a party from taking unconscionable advantage of his own actions. To invoke this doctrine plaintiff must show that defendant made representations or inducements upon which plaintiff reasonably relied that will cause plaintiff harm if estoppel is not applied." *Bethesda*

Lutheran Church v. Twin City Const. Co., 356 N.W.2d 344, 349 (Minn. App. 1984), *review denied* (Minn. Feb. 5, 1985).

> The great weight of authority . . . amply supported by sound reason, supports the rule that an oral agreement or promise not to take advantage of the statute of limitations made before the cause of action is barred, upon which the creditor relies and upon the strength of which he refrains from commencing suit during the statutory period, estops the debtor to plead the statute as a defense.

Albachten, 212 Minn. at 364, 3 N.W.2d at 786. The oral representations or promises need not explicitly refer to the statute of limitations. *Id.* at 362, 3 N.W.2d at 785. However, the promise must induce the creditor to reasonably delay bringing suit on an actionable debt until after it is time-barred. *See id.* at 364, 3 N.W.2d at 786.

"A party seeking to invoke the doctrine of equitable estoppel has the burden of proving three elements: (1) that promises or inducements were made; (2) that it reasonably relied upon the promises; and, (3) that it will be harmed if estoppel is not applied." *Hydra-Mac, Inc. v. Onan Corp.*, 450 N.W.2d 913, 919 (Minn. 1990). "Whether the elements of equitable estoppel are present is a question of fact." *Bethesda*, 356 N.W.2d at 349. "This court determines de novo whether equitable estoppel applies to a party's conduct." *Lucio v. School Bd. of Indep. Sch. Dist. No. 625*, 574 N.W.2d 737, 740 (Minn. App. 1998), *review denied* (Minn. Apr. 30, 1998).

As discussed above, the Jundts repeatedly promised Bottum that he would be paid his bonus upon completion of Marcus Jundt's divorce. JAI, however, argues that these were merely vague promises to pay later, and therefore, equitable estoppel does not

apply. JAI asserts that the district court improperly relied on *Albachten* and that *Schueller v. Knapp*, 259 Minn. 338, 107 N.W.2d 376 (1961), should control our decision.

In *Albachten*, plaintiff was the creditor on an $8,000 promissory note. 212 Minn. at 359, 3 N.W.2d at 784. Defendant did not pay when the note was due or at any time before the end of the six-year statute-of-limitations period. *Id.* at 359-60, 3 N.W.2d at 784. Plaintiff, however, pressed defendant for payment prior to the end of the statute-of-limitations period. *Id.* at 360, 3 N.W.2d at 784.

> Defendant requested plaintiff to wait until Thanksgiving time, which was about three months after the statutory period of limitation would have run, and promised that he would then make a new arrangement or settle plaintiff's claim. Among other things, defendant told plaintiff that it was unnecessary for him to commence an action to enforce payment; that defendant expected to procure a return of his collateral from his bank about Thanksgiving time; that then plaintiff would be his only creditor; and that plaintiff would not lose anything by waiting.

Id. After Thanksgiving, plaintiff asked defendant for the money, but defendant's attitude had changed: he laughed at plaintiff and told plaintiff that he had made arrangements so that plaintiff could not collect a cent. *Id.* at 361, 3 N.W.2d at 784. Plaintiff ultimately brought suit more than seven years after the note had come due, and more than one full year after the statute of limitations had run. *Id.* at 359, 3 N.W.2d at 784. The Minnesota Supreme Court concluded that the theory of equitable estoppel applied, stating:

> We adopt and follow the rule that a party may be estopped to set up the statute of limitations as a defense by an oral agreement performed by the other party to his prejudice notwithstanding the requirement . . . that such an agreement be in writing. . . . Of course the statute of limitations should be given full effect as a statute of repose, but that does not

> mean that, where the parties have agreed to extend the period or have waived its provisions or are estopped to assert the statute as a defense, full effect should not be given to the agreement, waiver or estoppel.

Id. at 367, 369, 3 N.W.2d at 787-88.

In *Schueller*, plaintiff constructed a farm home for defendants. 259 Minn. at 338, 107 N.W.2d at 377. Upon completion of the work, plaintiff mailed defendants a statement of account, which they received in March 1946. *Id.* In 1960, after expiration of the applicable limitations period, plaintiff brought an action to recover the balance that he claimed was still due. *Id.* Plaintiff contended that the defendants were estopped from claiming the statute of limitations as a defense, citing *Albachten*. Plaintiff alleged that when he submitted the statement of account to defendants in 1946, defendants requested additional time to pay, and plaintiff agreed to give them eight to ten years to pay the balance. *Id.* at 339, 107 N.W.2d at 377-78. Plaintiff's affidavit stated:

> [defendant] asked if he could have time for paying the balance and I told him he could. . . . Then I told him that he could have eight to ten years time for paying the balance. Then he said that if that should happen he would pay me interest and added that I did not need to have any fears because I would not lose anything on him.

Id. at 339, 107 N.W.2d at 377. Plaintiff sent several invoices to defendants, the last one on December 31, 1954, but he admitted that subsequent to his mailing of the original statement in March 1946, he had had no conversation with defendants regarding their account. *Id.* The Minnesota Supreme Court refused to apply the doctrine of equitable estoppel on these facts stating, "[i]t is clear that in the instant case there are no elements

of estoppel, and *Albachten v. Bradley* . . . has no application." *Id.* at 340, 107 N.W.2d at 378.

JAI contends that this case is more similar to *Schueller* than to *Albachten*, and that equitable estoppel should not apply. While JAI's conduct was not as blatantly egregious as that of the defendant in *Albachten*, the effect of its conduct was to string Bottum along until after expiration of the statute of limitations under the original payment date. The Jundts repeatedly promised Bottum that JAI would pay his outstanding bonus once Marcus Jundt's divorce was concluded. The divorce decree issued on April 5, 2005. On April 18, JAI moved Bottum's salary from JAI to Acuo. On May 23, James Jundt terminated Bottum's employment with Acuo. During the telephone conversation in which Bottum was informed of the termination, JAI, for the first time, repudiated its promise to pay the outstanding bonus. As in *Albachten*, the Jundts lulled Bottum into waiting years for his 2000 bonus with repeated promises to pay upon the occurrence of an event (i.e., completion of Marcus Jundt's divorce) and repudiated their promises after the triggering event occurred (i.e., the divorce decree issued). These facts are inapposite to those in *Schueller*, where plaintiff allegedly had one conversation with the defendants in which he agreed to give them eight to ten years to pay their debt. While admittedly this case seems to fall somewhere between the two extremes, the facts line up more closely with *Albachten* than with *Schueller*. The Jundts' promises to pay upon completion of Marcus Jundt's divorce constituted more than vague promises to pay later.[5]

[5] Several of these promises were made by James Jundt. In the first appeal, we pointed out that because James Jundt had transferred ownership of JAI to Marcus Jundt, and had

The district court found that Bottum's reliance on the Jundts' promises of later payment was reasonable and that it was reasonable for Bottum to take the Jundts at their word. JAI argues that Bottum could not reasonably have relied on its promises because Bottum knew that the company was in financial trouble and that "[a] reasonable person would not have been lulled into a false sense of security by promises to pay later during JAI's financial meltdown." It is undisputed that JAI was in financial trouble in 2001 and 2002. For example, Marcus Jundt informed Bottum in February 2001 that although he was owed a $1 million bonus for 2000, JAI lacked the liquidity to pay the full bonus and therefore only paid Bottum $175,000. Furthermore, Bottum testified that "2002 was an extremely difficult year for JAI" and "many people were laid off." But JAI's financial state improved, and in 2003, its hedge fund once again outperformed the S & P 500, earning Bottum another $1 million bonus. In fact, after 2002 the Jundts did not use the poor financial state of the company as a reason for not paying Bottum's bonus; instead, the Jundts said that they were unwilling to put money into JAI until Marcus Jundt's divorce was final.

JAI also argues that "[a] reasonable person would not have been lulled into complacency when an individual's divorce supposedly hindered the payment of almost $2 million in wages due from a corporation." JAI contends that "[c]ommonsense dictates

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previously directed Bottum to speak with Marcus Jundt about the remainder of the 2000 bonus, "the scope of James Jundt's actual or apparent authority to make promises on behalf of JAI is a factor that the district court would need to address in an estoppel analysis." *Bottum*, 2008 WL 4849502, at *5. The district court did so on remand, and in this appeal, JAI does not dispute James Jundt's authority to bind JAI.

that a person should be alarmed, not lulled, by this condition precedent because divorces can be contentious, lengthy proceedings, which was what happened here" and that "the divorce excuse lacks any logic." There is no evidence in the record to indicate that Bottum was an attorney or had any specialized knowledge of divorce proceedings and the intricacies involved therein. Rather, Bottum relied on the words of men that he trusted and who claimed to be "honorable." It would not be beyond the realm of possibilities for Bottum to believe that Marcus Jundt's wife might have some claim to the company and therefore the Jundts would want to keep it underfunded. Furthermore, Marcus Jundt painted an optimistic picture of his divorce proceeding to Bottum and told Bottum that there were not many legal issues pending in the dissolution proceeding in light of his "iron clad" prenuptial agreement. These representations reasonably indicated to Bottum that the dissolution would conclude quickly. Regardless of how the divorce proceedings actually progressed, we agree with the district court's finding and conclusion that Bottum reasonably relied on the Jundts' promises.

Lastly, it is clear that Bottum will be harmed if JAI is not estopped from asserting the statute-of-limitations defense because he will be unable to collect $825,000 of his 2000 bonus. As noted by the district court, Bottum will suffer additional detriment due to the fact that he cleared and excavated the land on which he intended to build a new home based on the Jundts' assurances that he would receive his year-2000 bonus. Moreover, JAI does not argue that Bottum will be unharmed if his claim is determined to be time-barred. In summary, the district court did not err by concluding that JAI is equitably estopped from asserting the statute of limitations as a defense.

Because the parties altered the time for payment of Bottum's 2000 bonus, and because the Jundts are equitably estopped from asserting a statute-of-limitations defense, we affirm the inclusion in judgment of $825,000 due from Bottum's 2000 bonus.

II.

The district court awarded Bottum $126,351.74 in attorney fees and costs as a sanction for JAI's "bad-faith post-trial conduct." JAI asserts that the district court abused its discretion in doing so. "On review, this court will not reverse a [district] court's award or denial of attorney fees absent an abuse of discretion." *Becker v. Alloy Hardfacing & Eng'g Co.*, 401 N.W.2d 655, 661 (Minn. 1987). "The task of determining what, if any, sanction is to be imposed is implicated by the broad authority provided the [district] court." *Patton v. Newmar Corp.*, 538 N.W.2d 116, 119 (Minn. 1995) (quotations omitted). "One challenging the [district] court's choice of a sanction has the difficult burden of convincing an appellate court that the [district] court abused its discretion . . . ." *Id.*

Bottum's motion for sanctions was based on Minn. R. Civ. P. 11 and Minn. Stat. § 549.211. The district court issued two orders regarding Bottum's motion. In the first, the district court exercised its "inherent authority to award attorneys' fees" and directed Bottum to submit an affidavit setting forth his fees and costs. The order incorporated a memorandum of law, explaining the district court's analysis. The district court determined that Bottum's motion was procedurally defective in two respects. "First, [Bottum] failed to first give [JAI] an opportunity to correct the alleged offenses before he filed the motion with the Court. Second, [Bottum] moved to vacate the judgment under

Minn. R. Civ. P. 60 and for sanctions under Rule 11 and Minn. Stat. § 549.211 at the same time." *See* Minn. R. Civ. P. 11.03 (a)(1) ("A motion for sanctions under this rule shall be made separately from other motions or requests. . . . It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (. . .), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected."); Minn. Stat. § 549.211, subd. 4(a) ("A motion for sanctions under this section must be made separately from other motions or requests. . . . It must be served . . . but may not be filed with or presented to the court unless, within 21 days after service of the motion . . . the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected."). The district court correctly concluded that both of these procedural deficiencies were grounds for denial of Bottum's motion for sanctions. *See In re the Claims for No-Fault Benefits Against Progressive Ins. Co.*, 720 N.W.2d 865, 874 (Minn. App. 2006) ("A district court abuses its discretion if it imposes sanctions when the moving party has not complied with the so-called 'safe-harbor provision' because the offending party is unable to withdraw the improper papers or otherwise rectify the situation.") (quotation omitted)), *review denied* (Minn. Nov. 22, 2006); *Dyrdal v. Golden Nuggets, Inc.*, 672 N.W.2d 578, 589 (Minn. App. 2003) (concluding that "failure to file separate motions for sanctions did not satisfy the requirements of Minn. Stat. § 549.211, subd. 4(a), and the district court abused its discretion by imposing sanctions"), *aff'd* 689 N.W.2d 779 (Minn. 2004).

The district court noted that even though Bottum did not serve JAI before filing his motion for sanctions, thereby failing to afford JAI 21 days to correct the alleged offenses, JAI did, in fact, correct the offenses. And the district court recognized that the main objective of rule 11 is to prompt corrective action by the offending party. *See Johnson ex rel. Johnson v. Johnson*, 726 N.W.2d 516, 518-19 (Minn. App. 2007) (explaining that the safe-harbor provisions in the rule and statute are intended to give the offending party time to "rectify the situation").

Despite its finding that "the Jundts in fact corrected their deceptive post-judgment conduct," the district court nonetheless "deem[ed] it appropriate to exercise its inherent authority to award attorneys' fees in this matter," citing *Rogers v. Meldahl*, No. C4-02-480, 2002 WL 31057010, at *1 (Minn. App. Sept. 17, 2002). But *Rogers* is an unpublished case and has no precedential value. Minn. Stat. § 480A.08, subd. 3(c) (2008) (stating "[u]npublished opinions of the court of appeals are not precedential"); *see also Vlahos v. R & I Constr. of Bloomington, Inc.*, 676 N.W.2d 672, 676 n.3 (Minn. 2004) (stating that district court's reliance on an unpublished opinion of the court of appeals was misplaced "both as a matter of law and as a matter of practice"). Moreover, *Rogers* did not involve an attorney-fee award based on the district court's inherent authority; the award was based on Minn. R. Civ. P. 11.01-.03. 2002 WL 31057010, at *1.

The Minnesota Supreme Court has recognized the district court's inherent authority to impose sanctions, as necessary, to implement "their vital function—the disposition of individual cases to deliver remedies for wrongs and justice freely and

without purchase; completely and without denial; promptly and without delay, conformable to the laws." *Patton*, 538 N.W.2d at 118 (quotation omitted). But *Patton* involved the exclusion of expert evidence as a sanction for spoliation of evidence; it did not involve an award of attorney fees. *Id.* (explaining that the issue was whether the district court "is authorized to impose a sanction for spoliation of evidence and, if so, whether it abused its discretion by excluding" expert evidence as a sanction). Our supreme court has never addressed the circumstances under which the district court may award attorney fees as a sanction when such an award is otherwise unsupported by rule or statute.

Assuming, without deciding, that the district court has inherent authority to award attorney fees as a sanction, such an award is not justified in this case given the district court's explicit finding that it "does not find sanctions appropriate [in] this instance." The district court's first order concludes as follows:

> Even though the Court finds the Jundts' post-judgment behavior to be highly improper and sanctionable, the Jundts, by settling the matter with the help of the receiver purged themselves of this sanctionable behavior. . . . However, even though [Bottum] did not afford [JAI] the opportunity to correct the alleged offenses by way of the 21-day safe-harbor period, [JAI] did in fact correct [its] deceptive post-judgment conduct. *Therefore, an award of sanctions is inappropriate.*

(Emphasis added.)

After Bottum submitted his affidavit regarding fees and costs incurred in response to the first order, the district court issued an amended order, awarding Bottum $126,351.74 in attorney fees and costs. The amended order states "[a]s a *sanction* for the

bad-faith post-trial conduct of Defendant JAI in this matter, [Bottum] is entitled to attorneys' fees and costs." (Emphasis added.) The amended order does not include a memorandum of law explaining why, contrary to its findings and conclusions in the first order, a sanction is appropriate. The district court's unexplained imposition of a sanction in the amended order is wholly inconsistent with its previous conclusion that "an award of sanctions is inappropriate." Because the district court's imposition of a sanction is unsupported by its findings and conclusions, it constitutes an abuse of discretion. *Cf. Mears Park Holding Corp. v. Morse/Diesel, Inc.*, 426 N.W.2d 214, 219-20 (Minn. App. 1988) ("As long as the record reflects a reasonable correlation between the final amount of sanctions imposed, the expenses incurred by the party defending the unfounded claims, and the basis of the court's imposition of sanctions, there will be no abuse of discretion by the [district] court.").

The district court's only other explanation for the attorney-fee award is as follows: "[a]lthough the Court does not find sanctions appropriate [in] this instance, [Bottum] undoubtedly incurred attorneys' fees in connection with his post-trial efforts involving the Receiver. Therefore, [Bottum] is entitled to attorneys' fees . . . ." Ordinarily, attorneys' fees may not be awarded to a successful litigant absent explicit statutory or contractual authority. *Fownes v. Hubbard Broadcasting, Inc.*, 310 Minn. 540, 542, 246 N.W.2d 700, 702 (1976). The district court did not cite statutory or contractual authority as a basis for the award. Because the district court's award of attorney fees is inconsistent with law, it is an abuse of discretion. *See State v. Vang*, 763 N.W.2d 354, 357 (Minn. App. 2009) (citing *Almor Corp. v. County of Hennepin*, 566 N.W.2d 696, 701

(Minn. 1997)) (stating that a district court abuses its discretion when its ruling is based on an erroneous view of the law). Accordingly, we reverse the award of $126,351.74 in attorney fees and costs.

Affirmed in part and reversed in part.

Dated:

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Judge Michelle A. Larkin