Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2017-385

JUNE TERM, 2018

Nancy Kotsull v. Raymond E. Knutsen* and Raymond E. Knutsen, PC*	}	APPEALED FROM:
	}	
	}	Superior Court, Rutland Unit,
	}	Civil Division
	}	
	}	DOCKET NO. 723-10-13 Rdcv
		Trial Judge: Helen M. Toor

In the above-entitled cause, the Clerk will enter:

Defendant Raymond Knutsen appeals from the trial court's judgment following a bench trial. He raises numerous arguments. We affirm.

Plaintiff sued defendants in October 2013 raising various claims stemming from the breakup of the parties' veterinary practice; defendant Knutsen filed counterclaims against plaintiff.[1] Following a three-day bench trial, the court issued a judgment largely in plaintiff's favor. Its findings include the following. Plaintiff and Knutsen owned a veterinary practice together, first as a partnership and later as an LLC. Plaintiff and Knutsen were the LLC's only members and they owned equal interests. In 2010, plaintiff changed the way in which the parties' compensation was calculated, switching from a 50/50 split to a calculation based on each party's work. The parties' total draws in 2010 were almost identical. The court rejected Knutsen's calculations to the contrary, finding that Knutsen counted figures on plaintiff's side that were unrelated to compensation.

In June 2010, plaintiff notified Knutsen that she intended to leave the veterinary practice. The LLC's Operating Agreement provided that a member "may require that the Company redeem all . . . of the member's Units of membership" upon 180 days written notice. It further stated that the price would be "determined by appraising the Company as of the date of notice" and that a particular firm, which specialized in valuing veterinary practices, would be deemed an "approved appraiser." The agreement provided that "[a]n appraisal by [this firm] shall be binding on the members, dissociated members, and holders." Payment was due by cash or promissory note with specified terms.

On December 31, 2010, plaintiff and Knutsen signed an agreement stating that plaintiff was interested in selling her interest in the LLC and her interest in the associated real estate to Knutsen, who was interested in purchasing it. The parties indicated that they were still negotiating the terms of the sale but they agreed that: plaintiff would leave that day but remain as operating manager; Knutsen would take over day-to-day management; plaintiff could practice veterinary medicine

[1] The court's judgment order reflects an award of damages against defendant Knutsen only and thus, we refer to Mr. Knutsen as defendant here and not Raymond E. Knutsen, P.C., a legal entity created by Mr. Knutsen in February 2011.

elsewhere with no restrictions; and plaintiff would assist the accountant in preparing tax returns and other year-end financials.

After giving notice of her intent to leave and have Knutsen buy her interest, plaintiff contacted the agreed-upon firm and began the process of appraisal. Knutsen refused to cooperate. The parties did agreeably divide most of the company's tangible assets. Plaintiff later retained the appraiser a second time and in May 2012, the appraisal report was issued. The report concluded that the business (not including the tangible assets already divided) was worth $177,588 as of December 2010. Plaintiff paid the bill for the appraisal, although the business was responsible for it. Knutsen did not pay plaintiff for any portion of the appraisal bill, nor did he pay plaintiff for her interest in the business.

Plaintiff now practices on her own approximately twenty miles away from Knutsen. Knutsen continues to practice in the same location. In February 2011, Knutsen purported to terminate the parties' LLC. He created a new entity, Raymond E. Knutsen, P.C., to operate the veterinary clinic under a new name. The court found that Knutsen had no power to terminate the LLC because under the December 2010 agreement, the parties each still owned 50% of the business and were each "operating managers." In any event, the court explained, Knutsen had continued the practice since December 2010 and the name change had no significance to the practice's value.

Plaintiff sought punitive damages based on Knutsen's behavior. The court found that Knutsen had filed a complaint with the police on the eve of the previously scheduled trial in this case, alleging that plaintiff had embezzled money from him. Knutsen knew that the same facts were at issue in this case and would be the subject of the trial. He told the police that he hoped a criminal investigation would lead plaintiff to drop this case. The court found that Knutsen's actions significantly delayed this case because the court cancelled the initial trial date to avoid forcing plaintiff to testify while the investigation was going on.

Turning to the parties' legal claims, the court concluded that Knutsen breached material terms of the parties' Operating Agreement by refusing to cooperate with the proposed buyout. Plaintiff had followed the terms of the contract and thus, the appraisal was binding on Knutsen. By not paying out half of the appraised value and not paying half the cost of the appraisal, Knutsen breached the agreement.

The court also found that Knutsen breached the duty of good faith and fair dealing. It found that he had no good faith argument for nonpayment of the value established by the appraisal or for not cooperating with the appraisal. The terms of the Operating Agreement were clear and Knutsen was obligated to act with faithfulness to the agreement. He did not do so. Likewise, the court found that Knutsen's report to police on the eve of trial was an intentional act aimed at avoiding his obligations under the contract, which violated the covenant of good faith and fair dealing. The court determined, however, that plaintiff had not pointed to any damages from this breach that were distinct from those resulting from the breach of contract itself. It thus awarded nominal damages of $1.00.

The court found that the parties personally owned the building in which the practice operated. The business rented the clinic building for $30,000 per year. Plaintiff had not been paid her half of that $30,000 since she left in 2010. The court found that the business owed plaintiff $100,000 for her share of the rent owed on the building.[2]

[2] In its final judgment order, it awarded plaintiff judgment against defendant Knutsen for this amount.

Finally, the court awarded plaintiff $20,000 in punitive damages based on Knutsen's report to police on the eve of trial. It found that Knutsen went to the police solely to pressure plaintiff to drop this case, and that he did so maliciously with no legitimate purpose. With respect to the counterclaims, the court found that plaintiff did not pay Knutsen her full share for some of the bills when she left and that she owed Knutsen $5138.05. Knutsen appealed from the court's final judgment order.

Knutsen first argues that the court erred in concluding that he breached the parties' contract by refusing to pay plaintiff half of the appraised value of the business and half of the cost of the appraisal. He asserts that, under the parties' agreement, the LLC must buy out plaintiff's interest in the business. He also argues that the appraisal did not meet the contract's clear terms because: the appraisal valued the company as of December 31, 2010 rather than June 2010; it did not value the "company" but instead only the company's "goodwill"; and the court should have found the appraisal "wholly unreliable on its face."

We agree with plaintiff that Knutsen fails to show that any of these arguments were preserved. See V.R.A.P. 28(a)(4)(A) (explaining that appellant's brief must include "the issues presented" and "how they were preserved," as well as "parts of the record on which the appellant relies"); see also New England P'ship Inc. v. Rutland City Sch. Dist., 173 Vt. 69, 73 (2001) (explaining that Supreme Court "will not search the record to determine if the issue was preserved for review"). Defendant cites an out-of-state case, arguing that preservation is not required here. This is inconsistent with our law. See, e.g., Follo v. Florindo, 2009 VT 11, ¶ 16, 185 Vt. 390 (explaining that "this Court considers plain error in civil cases only in limited circumstances, i.e., when an appellant raises a claim of deprivation of fundamental rights, or when a liberty interest is at stake in a quasi-criminal or hybrid civil-criminal probation hearing" (citations omitted)). Because these arguments were not raised below, we do not address them. See Progressive Ins. Co. v. Brown ex rel. Brown, 2008 VT 103, ¶ 6, 184 Vt. 388 ("[I]n order to rely upon an argument on appeal, an appellant must properly preserve it by presenting it to the trial court with specificity and clarity." (quotation omitted)). We also reject defendant's assertion that he is challenging the sufficiency of the evidence. The plain language of the parties' agreement states that the appraisal was "binding" and the trial court found the appraisal convincing, particularly regarding the effect that the absence of a noncompete agreement had on the business's goodwill value. It is elemental that credibility assessments and assessments of the weight of the evidence are solely for the trial court, not this Court. See, e.g., Mullin v. Phelps, 162 Vt. 250, 261 (1994) (explaining role of Supreme Court in reviewing findings of fact is not to reweigh evidence or to make findings of credibility de novo).

Knutsen next argues that the there was no basis, separate from the breach-of-contract claim, to support the court's finding that he breached the implied covenant of good faith and fair dealing. See, e.g., Monahan v. GMAC Mortg. Corp., 2005 VT 110, ¶ 54 n.5, 179 Vt. 167 ("[W]e will not recognize a separate cause of action for breach of the implied covenant of good faith and fair dealing when the plaintiff also pleads a breach of contract based upon the same conduct."). We reject this argument. As recited above, the court based its conclusion in part on Knutsen's report to the police on the eve of the scheduled trial. This conduct did not form the basis of plaintiff's breach-of-contract claim.

Knutsen next argues that the failure to pay rent was not properly in the case. He also asserts that "the business" owes the back-due rent, not him personally. We reject these arguments as well. The record shows that a renewed motion to amend the complaint regarding nonpayment of rent was granted without objection and that Knutsen received sufficient notice of this. This issue was discussed on the first day of trial. The court indicated that the renewed motion to amend had been granted and it noted that no actual amended complaint had been filed. It stated, without objection, that plaintiff

could "talk about the rent." Plaintiff presented evidence about the rent paid for the building at trial. The court reiterated, after the evidence had closed, that it had agreed that the rent issue was part of this case. It stated this in its written decision as well. By failing to object to the inclusion of this issue either before or during trial, Knutsen waived this argument. The record reflects, moreover, that plaintiff no longer practiced on the jointly owned property as of December 31, 2010 while Knutsen remained at the property. He continues to operate his veterinary practice out of the clinic building. Putting aside any preservation questions, the court did not err in ordering Knutsen personally to pay plaintiff $100,000 in compensatory damages for past due rent.

Finally, Knutsen challenges the court's punitive damages award. He maintains that he had the right to go to the police and that his police report was made in good faith. The trial court found otherwise and it acted within its discretion in doing so. For that reason, among others, the First Amendment case cited by Knutsen is inapposite. See Venetian Casino Resort, LLC v. NLRB, 793 F.3d 85, 89-90 (D.C. Cir. 2015) (explaining that under particular doctrine applicable in labor cases, "conduct that constitutes a direct petition to government, but would otherwise violate the [National Labor Relations] Act, is shielded from liability by the First Amendment," and observing that when "a person petitions the government in good faith, the First Amendment prohibits any sanction on that action" (emphasis added) (quotation omitted)). As set forth above, the court here found that Knutsen went to the police solely to pressure plaintiff to drop this case, and that he did so maliciously with no legitimate purpose. See Monahan, 2005 VT 110 ¶ 4 (explaining that to support punitive damages award, plaintiff must show that defendant's "breach of the contract, or the covenant of good faith implied in the contract, demonstrated actual malice," and "[a]ctual malice may be shown by conduct manifesting personal ill will, evidencing insult or oppression, or showing a reckless or wanton disregard of plaintiff's rights" (quotions omitted)). The court credited evidence that "Knutsen told the police officer that he hoped that having a criminal investigation would lead to [plaintiff] dropping the case." The court reasonably concluded from the evidence that Knutsen acted outrageously and with a bad motive in going to the police on the eve of the previously scheduled trial seeking to have plaintiff investigated for embezzlement. We will not disturb the court's assessment of the evidence on appeal. Mullin, 162 Vt. at 261.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice