IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID FRIEDMAN, Appellant, vs. ABBIE FRIEDMAN, Respondent.	No. 56265
DAVID FRIEDMAN, Appellant, vs. ABBIE FRIEDMAN, Respondent.	No. 56616
DAVID FRIEDMAN, Appellant, vs. ABBIE FRIEDMAN, Respondent.	No. 57424
ABBIE FRIEDMAN, Appellant/Cross-Respondent, vs. DAVID FRIEDMAN, Respondent/Cross-Appellant.	No. 57480

FILED

DEC 20 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY [signature]
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

These are consolidated appeals from a post-divorce decree district court order granting summary judgment, an order denying an NRCP 60(b) motion to set aside portions of the divorce decree, and a post-divorce decree order awarding attorney fees. Eighth Judicial District Court, Family Court Division, Clark County; Cheryl B. Moss, Judge.

After extensive negotiations, the Clark County district court entered a divorce decree on March 26, 2009, terminating the marriage of appellant/cross-respondent David Friedman and respondent/cross-appellant Abbie Friedman. David and Abbie reached two agreements,

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known as the Settlement Outline (Outline) and the Marital Settlement Agreement (MSA), which detailed the specific terms of the parties' divorce. While the divorce proceeding was pending, the district court entered two orders regarding stipulations that David and Abbie had agreed to relating to the division of their property. One of the court's orders (March 23, 2009 Stipulation) amended the Outline. Ultimately, the MSA incorporated the amended Outline and the MSA was merged into the divorce decree.

On April 22, 2009, David filed a "Motion for an Order to Show Cause, to Compel Compliance with the Decree of Divorce, to Close Line of Credit and for Attorney's Fees" (first motion), claiming that Abbie violated the divorce decree. David later filed two supplements to his first motion. The district court set an evidentiary hearing on David's first motion and supplements. In the meantime, Abbie filed a motion for summary judgment on David's claim in the first motion that Abbie had violated the divorce decree's provisions concerning community expenditures from the "cushion account," which was in place for payment of extraordinary expenses. David opposed Abbie's motion for summary judgment and also filed a countermotion for summary judgment, or alternatively, a motion to set aside the divorce decree pursuant to NRCP 60(b). Ultimately, the district court granted summary judgment in favor of Abbie on the cushion account issue and awarded Abbie $2,500 in attorney fees and costs.

After the district court granted summary judgment in favor of Abbie, David filed a "Motion for Order to Show Cause and for Attorney Fees" (second motion), alleging that Abbie violated additional provisions of the divorce decree. The district court held a hearing on David's second motion prior to the evidentiary hearing on David's first motion. At the hearing on David's second motion, the district court determined that Abbie

had not willfully or deliberately violated any provisions of the divorce decree, and thus could not be held in contempt. The district court therefore denied the motion.

The district court then held a three-day evidentiary hearing on David's first motion. At the conclusion of this hearing, the district court found that Abbie had "breached" only one provision of the divorce decree, by opening a home equity line of credit in both her name and David's name. However, the district court also found that Abbie's "breach" had not been willful or deliberate, and therefore, a finding of contempt was inappropriate. Based on these findings, the district court awarded $200,000 in attorney fees and costs to Abbie and $50,000 in attorney fees and costs to David.

David now appeals, arguing that the district court (1) erred by granting Abbie summary judgment on the cushion account issue, (2) abused its discretion in awarding attorney fees to Abbie based on the summary judgment order, (3) abused its discretion by failing to properly consider his NRCP 60(b) motion, (4) abused its discretion by denying his second motion, (5) abused its discretion when resolving his first motion, and (6) abused its discretion by awarding attorney fees to Abbie based on the order resolving his first motion. Abbie cross-appeals, arguing that the district court abused its discretion when determining the amount of attorney fees to award to David based on the order resolving his first

motion.[1] The parties are familiar with the facts, and we do not recount them further except as is necessary for our disposition.

The district court erred by applying contract principles to the merged MSA and granting summary judgment on a post-decree motion, but ultimately did not abuse its discretion in refusing to find Abbie in contempt on the cushion account issue

As a preliminary matter, we identify two fundamental problems with the district court's response to David's motions. First, the district court improperly used contract principles to interpret the MSA after it was merged into the divorce decree. Second, the district court erred by granting summary judgment in favor of Abbie on the cushion account issue after the divorce decree was already entered. However, because we construe the district court's order granting summary judgment as an order declining to find Abbie in contempt on the cushion account issue, we conclude the district court did not abuse its discretion in finding that David knowing and intelligently waived his rights to the cushion account as a result of the March 23, 2009 Stipulation.

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[1]Abbie further asserts that this court should impose sanctions on David pursuant to NRAP 38 because David's appeal is a waste of this court's time and is only meant to harass Abbie. David replies that Abbie's argument for sanctions is without merit, and that if this court were to impose sanctions, it should be against Abbie for misrepresenting the record. We decline both requests to impose sanctions as both parties make relevant arguments concerning the interpretation of the divorce decree. See NRAP 38(a) (allowing this court to impose monetary sanctions if it determines that an appeal is frivolous).

Once the MSA was merged into the divorce decree, the district court could no longer use contract principles to interpret its provisions

The interpretation of a district court judgment is a question of law for this court. State, University and Community College System v. Sutton, 120 Nev. 972, 985-86, 103 P.3d 8, 17 (2004). Both parties agree that the MSA was merged into the divorce decree. They also agree the settlement outline merged into the divorce decree by way of its incorporation into the MSA. However, David argues the March 23, 2009 Stipulation wherein he waived his rights to challenge the distribution of the cushion account, was not incorporated into the divorce decree. Abbie responds that because the stipulation amended the settlement outline just three days before the MSA (and, therefore, the settlement outline) merged into the divorce decree.

A clear and direct expression of merger in the decree of divorce destroys the independent contractual nature of the marital settlement agreement, and parties may no longer seek to enforce the agreement under contract principles. See Day v. Day, 80 Nev. 386, 389-90, 395 P.2d 321, 322-23 (1964); Renshaw v. Renshaw, 96 Nev. 541, 543, 611 P.2d 1070, 1071 (1980). After merger, the district court may enforce the provisions of the divorce decree by using its contempt power. Hildahl v. Hildahl, 95 Nev. 657, 662-63, 601 P.2d 58, 61-62 (1979) (identifying the dual purposes of the contempt citation as both coercive and punitive). The district court may interpret the language of the divorce decree in order to resolve ambiguity. Kishner v. Kishner, 93 Nev. 220, 225, 562 P.2d 493, 496 (1977).

Even though the district court impermissibly relied on the "contractual language" in the MSA, settlement outline and divorce decree

to find David's waiver was "clear and unambiguous," we agree, based on our own reading of the merged decree, that the waiver was clear and unambiguous. See Allstate Ins. Co. v. Thorpe, 123 Nev. 565, 570, 170 P.3d 989, 992 (2007) (when reviewing a district court's judgment, this court applies the same rules of construction as for other written instruments).

Initially, David and Abbie agreed through a stipulation that Abbie would obtain David's approval before spending funds from the cushion account, and that Abbie would provide David with an accounting of all expenditures from the cushion account. On September 15, 2007, the district court entered an order based on this stipulation. David and Abbie later agreed to the Outline, which stated that all prior court orders would be honored, but also provided that David waived his right to an independent audit of the cushion account and his right to seek any reimbursement from Abbie for expenditures paid from the cushion account. David and Abbie later executed the MSA that incorporated the Outline's terms. The MSA also noted that David and Abbie would divide the cushion account equally if any funds remained.

According to the March 23, 2009 Stipulation, David unambiguously waived any further accountings from Abbie that would otherwise be required. Both David and Abbie also clearly waived any objections to community expenditures by the other or their children. The order declared that David and Abbie were each to "rely[ ] on the good faith of the other party to incur reasonable expenses between this date and March 31, 2009," and thus, David and Abbie waived any objection to those expenditures as well. As a result, the March 23, 2009 Stipulation modified the terms of the MSA relating to David's right to receive prior notice of and to grant approval for Abbie's expenditures from the cushion

account and to receive an accounting from Abbie of expenditures from the cushion account. The MSA merged with the divorce decree. Thus, the district court properly interpreted the divorce decree to include the March 23, 2009 Stipulation, wherein David waived his rights to object to or demand an accounting of Abbie's expenditures from the cushion account. See Ormachea v. Ormachea, 67 Nev. 273, 291, 217 P.2d 355, 364 (1950) ("Judgments must be construed as a whole, so as to give effect to every word and part.").[2]

Therefore, because David unambiguously waived his rights to the cushion account, the district court's application of contract principles does not warrant reversal. See Sengel v. IGT, 116 Nev. 565, 570, 2 P.3d 258, 261 (2000) (correct decision of the district court will be affirmed even if based on the wrong reason).

The district court improperly granted summary judgment after it already entered the divorce decree, which was the final judgment

NRAP 3A outlines the judgments and orders from which a party may appeal in a civil case, and includes, "a final judgment entered in an action or proceeding in the court in which the judgment is entered." NRAP 3A(b)(1). Special orders entered after final judgment may also be appealed. NRAP 3A(b)(8).[3]

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[2]We further conclude that the district court did not abuse its discretion by finding that David waived any claim relating to Abbie's reimbursement payments for monthly expenses from January 2009 to March 2009, as the MSA merged with the divorce decree.

[3]We have appellate jurisdiction over the orders declining to hold Abbie contempt because they served as the basis for the attorney fees award properly on appeal, and grow out of and affect David and Abbie's
continued on next page . . .

Only one final judgment may exist in a case.[4] Low v. Crown Point Mining Co., 2 Nev. 75, 78 (1866). Such a judgment is one that resolves all the parties' claims and rights in the action, leaving nothing for the court's future consideration except post-judgment issues. Simmons Self-Storage Partners v. Rib Roof, 127 Nev. ___, ___, 247 P.3d 1107, 1108 (2011). This rule is designed to promote judicial economy by precluding multiple appeals arising from the same action. Id. Divorce decrees are generally final judgments. See Burton v. Burton, 99 Nev. 698, 700-01, 669 P.2d 703, 704-05 (1983); Elsman v. Elsman, 54 Nev. 20, 26, 2 P.2d 139, (1931) ("[The final determination of an action at law was called a judgment, while in suits of equity it was designated a decree. Divorce suits were equitable in character, hence they were known as decrees.").

The issue of David's rights to the cushion account was resolved in the decree when the amended settlement outline merged into the decree by way of the MSA. Therefore, the decree is the final judgment on that issue. The district court therefore could not have issued summary judgment re-determining rights already unambiguously determined in the

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. . . *continued*

rights arising out of the divorce decree. See Gumm v. Mainor, 118 Nev. 912, 918, 59 P.3d 1220, 1225 (2002) (special order appealable when it affects the rights of some party to the action, grows out of the judgment previously entered, and affects rights incorporated in the judgment).

[4]As this issue goes to the jurisdiction of the district court to issue judgment, the fact that David did not object on this grounds at trial or on appeal is of no consequence. See Old Aztec Mine, Inc. v. Brown, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (jurisdictional issues cannot be waived on appeal).

divorce decree.[5] Cf. Love v. Love, 114 Nev. 572, 959 P.2d 523 (1998) (father barred by res judicata from seeking summary judgment on paternity when issue already litigated in original divorce proceedings).

The district court did not abuse its discretion in finding that David waived his rights to challenge expenditures from the cushion account because his waiver was knowing and intentional

David filed a "motion for an order to show cause, to compel compliance with the decree of divorce, to close line of credit and for attorney's fees," seeking to enforce the provisions of the decree through the court's contempt power. Abbie believed she had a complete defense to his allegations on the cushion account issue, as David had waived any objections to expenditures from that account in the March 23, 2009 Stipulation. While Abbie labeled her filing as a "motion for summary judgment" and used the NRCP 56 standard, she was essentially asking the district court to dismiss or strike the contempt allegations as they

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[5]We have previously made clear summary judgment is a pre-trial tool. Coray v. Hom, 80 Nev. 39, 40, 389 P.2d 76, 77 (1964) (summary judgment, "is to be utilized before trial, not during, or after trial . . . other motions are available during trial, and following trial"). NRCP 56 provides a party may use summary judgment in seeking to recover upon, or defending against, "a claim, counterclaim, or cross-claim." By the time Abbie filed her motion for summary judgment, the divorce decree already extinguished her divorce claim. Moreover, David's motion to hold Abbie in contempt was not a "claim, counterclaim, or cross-claim" under the meaning of NRCP 56. We therefore reject Abbie's argument that because the parties and district court referred to the evidentiary hearing on David's motion as a "trial," that it should be treated as one for the purpose of summary judgment.

related to the cushion account, alleging David had waived any challenge as a matter of law.

Because the summary judgment standard is higher than the standard for an order to show cause, and we do not exalt form over substance, we construe the district court's summary judgment on the cushion account issue as an order declining to issue sanctions against Abbie on that issue. See Murphy v. Murphy, 64 Nev. 440, 447-48, 183 P.2d 632, 636 (1947) (treating an erroneous motion for a motion for a new trial as a motion to construe the judgment and decree). We review contempt orders for abuse of discretion. Matter of Water Rights of Humboldt River, 118 Nev 901, 907, 59 P.3d 1226, 1230 (2002).

"To establish a waiver, the party asserting waiver must prove that there has been an intentional relinquishment of a known right." Gramanz v. T-Shirts and Souvenirs, Inc., 111 Nev. 478, 483, 894 P.2d 342, 346 (1995). Thus, in order to be effective, an individual must enter a waiver with full knowledge of all the material facts. University & Cmty. Coll. Sys. v. Sutton, 120 Nev. 972, 987, 103 P.3d 8, 18 (2004). "A waiver may be implied through conduct evidencing an intent to waive a right, or conduct that is inconsistent with any other intention than waiver." Gramanz, 111 Nev. at 483, 894 P.2d at 346.

David claims that even if he did agree to waive his rights to object to or demand an accounting of Abbie's expenditures from the cushion account, or his right to reimbursement from Abbie for expenditures from the account, he could not have done so knowingly because he was unaware that Abbie had already spent funds from the account without his approval. However, a letter from David's attorney to Abbie's attorney during negotiations indicates that an employee was

attempting to verify various expenditures made by Abbie from the cushion account. David also could view the expenditures from the account online. These facts demonstrate that David had access to the cushion account, and thus had at least constructive knowledge of the amount of funds in the cushion account. Abbie also wrote a check to David for $18,600 from the cushion account, which he cashed on February 6, 2009, before David agreed to waive his rights to the account. Thus, the district court did not abuse its discretion in concluding that David waived his rights to the cushion account.[6]

The district court abused its discretion in awarding attorney fees to Abbie based on the cushion account issue

David contends that the district court abused its discretion by relying on NRS 18.010 to award attorney fees to Abbie based on the cushion account issue when the MSA contained provisions relating to attorney fees. We agree.

[6]David asserts that the district court abused its discretion in denying his NRCP 60(b) motion to set aside the divorce decree because Abbie committed fraud by allowing David to waive his rights to the cushion account without disclosing her expenditures from the account. We disagree. As discussed above, the evidence indicates that David had the ability to view the cushion account transactions and that he also cashed a check from the account. David also failed to present any evidence relating to the elements of fraud, other than alleging that Abbie knew that the cushion account contained no funds at the time he agreed to the waiver. Therefore, the district court did not abuse its discretion by denying David's NRCP 60(b) motion. See Bianchi v. Bank of America, 124 Nev. 472, 474, 186 P.3d 890, 892 (2008) (reviewing a district court's order granting or denying relief from an NRCP 60(b) motion for an abuse of discretion).

This court reviews a district court's award of attorney fees for an abuse of discretion. See Kantor v. Kantor, 116 Nev. 886, 896, 8 P.3d 825, 831 (2000). A district court may award attorney fees as provided for in an agreement between the parties or as authorized by a statute. NRS 18.010(1)-(2). In addition, a district court may award attorney fees when a claim is based on unreasonable grounds or meant to harass the other party. NRS 18.010(2)(b). However, NRS 18.010(2) does "not apply to any action arising out of a written instrument or agreement which entitles the prevailing party to an award of reasonable attorney's fees." NRS 18.010(4).

David and Abbie agreed to a provision in the MSA that entitles the prevailing party to recover attorney fees from the other party in any action to enforce the terms of the MSA or the divorce decree. However, the district court stated that it was awarding Abbie $2,500 in attorney fees and costs pursuant to NRS 18.010. Because David and Abbie had an agreement concerning attorney fees, the district court should have instead relied on the MSA when awarding attorney fees. Furthermore, the district court failed to make any findings on the reasonableness of attorney fees, and therefore the record does not demonstrate how the district court determined $2,500 in attorney fees and costs to be appropriate. See Argentena Consol. Mining Co. v. Jolley Urga, 125 Nev. 527, 540 n.2, 216 P.3d 779, 788 n.2 (2009) (stating that a district court's failure to make any findings of reasonableness based on the Brunzell factors before awarding attorney fees constitutes an abuse of discretion). Thus, the district court abused its discretion when it awarded attorney fees to Abbie based on the cushion account issue. Accordingly, we

reverse the district court's award of attorney fees and costs to Abbie on this issue.

The district court did not abuse its discretion when it awarded attorney fees to both David and Abbie based on the order denying David's first motion for an order to show cause

David argues that the district court abused its discretion by awarding attorney fees to Abbie, because he initiated the proceedings and succeeded on the home equity line of credit issue, and therefore was the prevailing party.[7] On cross-appeal, Abbie contends that the district court abused its discretion by awarding David $50,000 in attorney fees and costs when the district court found him to be the prevailing party on only one minor issue. We disagree with both David and Abbie.

The district court did not abuse its discretion by finding that Abbie was the prevailing party with regard to most of the issues raised in David's first motion for an order to show cause

The district court did not abuse its discretion by finding that Abbie was the prevailing party with regard to the majority of the issues that the parties litigated. The district court also did not abuse its

[7]David suggests the district court erroneously relied on NRS 18.010(2) in awarding attorney fees on this point as well. Although we agree that the district court abused its discretion by relying on NRS 18.010(2) in awarding attorney fees when David and Abbie agreed to an attorney fees provision in the MSA, we conclude that the district court also relied on the MSA in determining which party was the prevailing party, and therefore, any error that the district court made by referencing NRS 18.010(2) was harmless. Cf. Sack v. Tomlin, 110 Nev. 204, 215, 871 P.2d 298, 306 (1994) (recognizing that the district court erred by denying attorney fees without stating a reason for doing so, but determining the error was harmless because the party denied attorney fees was not the prevailing party).

discretion by finding that David was the prevailing party with regard to the home equity line of credit issue. While David points out that Abbie was not the moving party, this court has specifically stated that the term "prevailing party" is not limited to the individual initiating the suit. See Valley Electric Ass'n v. Overfield, 121 Nev. 7, 10, 106 P.3d 1198, 1200 (2005). Furthermore, the district court found that Abbie was the prevailing party on each of the issues where the court's interpretation of the divorce decree, the Outline, and the MSA resulted in a finding that Abbie had not violated any provision of those agreements and that she was not in contempt. Therefore, the district court acted within its discretion by finding a prevailing party with regard to each issue being litigated.[8]

The district court did not abuse its discretion when determining the amount of attorney fees to award

In determining a reasonable amount of attorney fees, a district court must evaluate several different factors. Brunzell v. Golden Gate Nat'l Bank, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969). These factors include the qualities of an attorney, the type of work performed, the

[8]David also suggests that the award of attorney fees cannot be maintained because Abbie failed to support her request for attorney fees with an affidavit. While Abbie did not file an affidavit in support of her request for attorney fees, Abbie provided the billing statements of her attorneys. This constitutes other evidence that may support the Brunzell factors, and therefore, the district court did not abuse its discretion when awarding attorney fees on this basis. Miller v. Wilfong, 121 Nev. 619, 623-24, 119 P.3d 727, 730 (2005) (stating that a party seeking attorney fees must support such a request with affidavits or other evidence that meets the Brunzell factors).

difficulty of the work, how much work was actually completed, and the result obtained. Id. A district court must not give one factor undue weight. Id. at 349-50, 455 P.2d at 33.

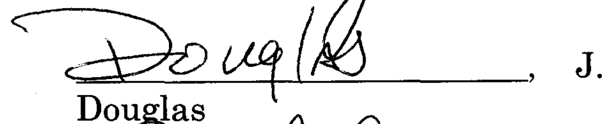
We conclude that the district court did not abuse its discretion in determining the amount of attorney fees to award to David and Abbie. The district court made findings relating to all of the Brunzell factors, and the record supports those findings. The district court was aware that both David's and Abbie's attorneys had extensive experience. Abbie's billing statements and the affidavit of David's attorney demonstrates that the litigation required the attorneys to perform complex and time-consuming work. This evidence also indicated that David's attorney fees had amounted to approximately $150,000, while Abbie's attorney fees totaled about $256,000.

In light of these factors, the district court found that it had the discretion to determine which issues were more difficult to litigate than others and to award an appropriate amount of attorney fees. Accordingly, the district court determined that Abbie should be awarded $200,000 as the prevailing party on all issues, except for the issue involving the reinstatement of the home equity line of credit. The district court further found that David should be awarded $50,000 as the prevailing party on the home equity line of credit issue, leaving Abbie with a remaining award of $150,000. Thus, the district court considered the provided evidence and made its own findings regarding the complexity of the issues at hand and the value of attorney fees to be attributed to each issue. We therefore conclude that the district court did not abuse its discretion when

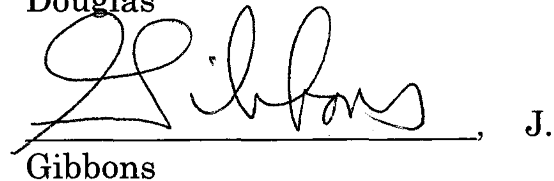
determining the reasonable value of attorney fees to award to David and Abbie.[9] Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.

______________________, C.J.
Cherry



______________________, J.
Douglas



______________________, J.
Gibbons

cc: Hon. Cheryl B. Moss, District Judge, Family Court Division
Denise L. Gentile
Robert Eisenberg
Dickerson Law Group
Jolley Urga Wirth Woodbury & Standish
Black & LoBello
Santoro Whitmire
Eighth District Court Clerk

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[9]We have considered the parties' remaining arguments and conclude they are without merit.