2021 WL 954675 (Mo.App. E.D.) (Appellate Brief)
Missouri Court of Appeals, Eastern District.

Travis H. BROWN and Pelopidas, LLC, Plaintiffs/Respondents,
v.
Rachel KELLER, Defendant/Appellant.

No. ED 109395.
March 1, 2021.

Appeal from the Circuit Court of St. Louis County Case No. 20SL-CC01001 the Honorable Judge Dean P. Waldemer, Circuit Judge

Appellant's Brief

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i** ***TABLE OF CONTENTS

JURISDICTIONAL STATEMENT 1
STATEMENT OF FACTS 2
A. The events leading to the parties' September 30, 2019 contract 2
B. The Brown Parties' promise to pay Keller $8.85 million and waiver of defenses to a claim by Keller for nonpayment 3
C. The parties' agreement that Keller's "stock shall be surrendered/sold, escrowed and pledged back" and that they would prepare "all appropriate purchase and sale documents." 5
D. The Brown Parties' initial challenge to the contract's enforceability 7
E. Keller's status as a Pelopidas owner after September 30, 2019 9
F. Keller's refusal to sign an assignment agreement dated "as of September 30, 2019" in March of 2020 10
G. The Brown Parties' failure to pay Keller the remaining $8.6 million owed on the contract after refusing to cure their nonpayment of the second installment 12
H. The record on the parties' motions for summary judgment 13
I. The trial court's final judgment 17
POINTS RELIED ON 19
STANDARD OF REVIEW 23
RELIEF REQUESTED 23
SUMMARY OF ARGUMENT 25
ARGUMENT 27
ii I. KELLER'S COGNIZABLE BREACH OF CONTRACT CLAIM
The trial court erred as a matter of law in sua sponte dismissing Keller's counterclaim for failure to state a claim for which relief can be granted because the facts pleaded and reasonable inferences drawn therefrom meet the elements of a recognized cause of action for breach of contract, in that Keller alleged an enforceable contract, performance or proffered performance, breach, and damages 27
II. SUA SPONTE SUMMARY JUDGMENT
The trial court erred as a matter of law in sua sponte granting summary judgment for the Brown Parties on Keller's counterclaim because it did not have authority to grant summary judgment, in that summary judgment is not available absent a motion under Rule 74.04 or Rule 55.27(a)(6) and the Brown Parties filed no such motion 29
III. SUMMARY JUDGMENT FOR KELLER ON HER BREACH OF CONTRACT CLAIM

The trial court erred as a matter of law in denying summary judgment for Keller on her counterclaim because the summary judgment record established that she was entitled to judgment in her favor, in that there was no genuine dispute regarding the facts meeting the elements of a breach of contract claim, the Brown Parties did not challenge their waiver of defenses or identify evidence supporting their defense of prior material breach, and the Settlement Memorandum precluded a finding that Keller breached 30
1. The summary judgment record establishes that there is no genuine dispute regarding the facts meeting the elements of Keller's claim 31
a. The existence and terms of the parties' contract and Keller's performance and proffered performance are undisputed 32
b. The Brown Parties' reliance on an admittedly non-existent escrow agreement raises no genuine issue of material fact regarding their breach 32
c. Keller's damages are undisputed 34
2. The Brown Parties broad waiver of defenses to Keller's breach of contract claim precludes their defense of prior material breach 35
3. The Brown Parties failed to identify evidence, or even state facts, in support of their prior material breach defense 36
***iii** 4. The unambiguous language of the Settlement Memorandum precludes the contention that Keller was in breach 37
IV. JUDGMENT CONTRARY TO THE TERMS OF THE CONTRACT
The trial court erred as a matter of law in granting summary judgment for the Brown Parties because the material facts that were not genuinely disputed did not establish that they were entitled to judgment as a matter of law, in that the Settlement Memorandum's statement that Keller's ownership in Pelopidas "shall be surrendered sold/surrendered, escrowed, and pledged back" is unambiguously a promise of future performance precluding a finding that Keller immediately transferred ownership of Pelopidas to Brown when the memorandum was signed 38
1. Paragraph 7 of the Settlement Memorandum is unambiguously a promise of future performance 39
2. Erroneous reference to extrinsic evidence would provide no basis for summary judgment for the Brown Parties 41
V. KELLER'S CROSS MOTION FOR SUMMARY JUDGMENT
The trial court erred as a matter of law in denying Keller's cross-motion for summary judgment on the Brown Parties' claims because the material facts that were not genuinely disputed established that she was entitled to judgment as a matter of law in that the statement that Keller's ownership in Pelopidas "shall be surrendered sold/surrendered, escrowed, and pledged back" is unambiguously a promise of future performance precluding a finding that Keller immediately transferred ownership of Pelopidas to Brown when the memorandum was signed 42
VI. ERRONEOUS ATTORNEYS' FEES
The trial court erred in awarding attorneys' fees to the Brown Parties because they are not the prevailing party in that Keller is entitled to summary judgment on her counterclaim and the Brown Parties' claims as a matter of law 43
CONCLUSION 44
CERTIFICATE OF COMPLIANCE 46

iv** ***TABLE OF AUTHORITIES

Cases

Board of Educ. City of St. Louis v. State,134 S.W.3d 689 (Mo.App. E.D. 2004) 39
Brewer v. Cosgrove, 498 S.W.3d 837 (Mo.App. E.D. 2016) 22, 44
City of Washington v. Warren Cty.,899 S.W.2d 863 (Mo. banc 1995) 19
Dunn Industrial Group, Inc. v. City of Sugar Creek,112 S.W.3d 421(Mo. banc 2003) 21, 39
Eveland v. Eveland,156 S.W.3d 366 (Mo.App. E.D. 2004) 39
Faust v. Associated Eng'g of St. Louis, Inc.,854 S.W.2d 537 (Mo.App. E.D. 1993) 35

Foster v. Neilson, 27 U.S. 253 (1829) 39
Foster v. St. Louis County, 239 S.W.3d 599 (Mo. banc 2007) 31
Heritage Roofing, LLC v. Fischer, 164 S.W.3d 128 (Mo.App. E.D. 2005) ... 35
Kroner Investments, LLC v. Dann, 583 S.W.3d 126 (Mo.App. E.D. 2019) ..... *passim*
Malan Realty Inv'rs, Inc. v. Harris,953 S.W.2d 624 (Mo. banc 1997) 36
Martin v. U.S. Fid. & Guar. Co.,996 S.W.2d 506 (Mo. banc 1999) 20, 33
State ex rel. Missouri Highway & Transp. Comm'n v. Maryville Land P'ship,62 S.W.3d 485 (Mo.App. E.D. 2001) 21, 41
*Monsanto Co. v. Garst Seed*Co.,241 S.W.3d 401 (Mo.App. E.D. 2007) 22, 44
Murphy v. Stonewall Kitchen, LLC,503 S.W.3d 308 (Mo.App. E.D. 2016) .. 23, 27
Qwasi, Inc. v. Advatext, LLC, No. 4:17-CV-00661, 2018 WL 3848822 (W.D. Mo. 2018) 36
R.J.S. Sec., Inc. v. Command Sec. Servs., Inc.,101 S.W.3d 1 ..... 20, 36
Stone v. Crown Diversified Indus. Corp.,9 S.W.3d 659 (Mo.App. E.D. 1999) ..... *passim*
***v** *Vantage Credit Union v. Chisholm*, 447 S.W.3d 740 (Mo App. E.D. 2014) 19, 28, 32
Ward v. W. Cnty. Motor Co., Inc., 403 S.W.3d 82 (Mo. banc 2013) 23
Whitman v. Livingston, 541 S.W.2d 61 (Mo.App. 1976) 35
Williams v. Mercantile Bank of St. Louis NA, 845 S.W.2d 78 (Mo. App. E.D. 1993) 19, 23, 29
Wright v. Dep't of Corr., 48 S.W.3d 662 (Mo.App. W.D. 2001) 27
Zeiser v. Tajkarimi, 184 S.W.3d 128 (Mo.App. E.D. 2006) 21, 29, 39

Statutes and Constitutional Provisions

Missouri Constitution Article V, § 3 1

Rules

Mo. S. Ct. Rule 55.27) ..... *passim*
Mo. S. Ct. Rule 74.04 ..... *passim*
Mo. S. Ct. Rule 84.06 47
Mo. S. Ct. Rule 84.14 ..... 24, 30

Other Authorities

American Bar Association *Manual of Style for Contract Drafting* ..... *passim*

*1 *JURISDICTIONAL STATEMENT*

On February 21, 2020, Pelopidas, LLC ("Pelopidas") and Travis Brown ("Brown") (collectively, the "Brown Parties"), filed an action against Rachel Keller ("Keller") in the Circuit Court for St. Louis County, Missouri, seeking, inter alia, damages for breach of contract and a declaration that Keller transferred her half of Pelopidas to Brown on September 30, 2019. D269, pp. 1-16. [1] On April 16, 2020, Keller filed a breach of contract counterclaim based on the Brown Parties' alleged failure to make a payment of $8.6 million due on April 6, 2020. D278, App 1-16.

On November 30, 2020, the trial court entered a final judgment sua sponte dismissing Keller's counterclaim with prejudice; granting summary judgment for the Brown Parties; enjoining Keller from claiming to own half of Pelopidas; instructing that Keller be paid $1.1 million; instructing the parties to execute an agreement consistent with its judgment; denying the Brown Parties' remaining claims; and ordering Keller to pay attorneys' fees in the amount of $408,326. D370, App 57-64. Keller timely filed a notice of appeal on January 5, 2021.

This appeal does not present issues within the exclusive jurisdiction of the Supreme Court of Missouri. This Court has general appellate jurisdiction over this appeal under Article V, § 3, of the Missouri Constitution.

2 *STATEMENT OF FACTS

This appeal arises from a contract memorialized in a Memorandum of Settlement dated September 30, 2019 (the "Settlement Memorandum"). D279, App 12-16. In that contract, the Brown Parties promised to pay Keller $8.85 million in exchange for her promise to transfer her half of Pelopidas to Brown and to dismiss a lawsuit pending against him in Missouri's Twenty First Judicial Circuit. *Id.*

Keller claims the Brown Parties breached the contract by failing to pay her $8.6 million on April 6, 2020. D278 pp. 9-10, App 9-10. She contends the $8.6 million was due under the contract's acceleration provision because the Brown Parties missed an installment payment due on April 1, 2020 and refused to cure. *Id.*

On March 25, 2020, Keller proffered an assignment agreement that would transfer her half of Pelopidas to Brown. D340 pp. 4-5, App 20-21. But Keller refused to sign a backdated agreement dated "as of September 30, 2019" - a date nearly six months before the day on which she would have actually signed. D278 pp. 7-8, App 7-8. The Brown Parties contend Keller's refusal to sign a backdated assignment establishes the defense of "prior material breach," excusing their obligation to pay remaining installments owed under the contract. D338 p. 19. The claims in the Brown Parties' first amended petition are likewise based on Keller's refusal to sign a backdated assignment. D269 pp. 1-16.

A. The events leading to the parties' September 30, 2019 contract.

In 2007, Keller and Brown formed Pelopidas to provide certain services to Rex Sinquefield, a billionaire investor, philanthropist, and political activist. D278 p. 2, App 2. After Keller and Brown divorced in 2014, they remained 50/50 owners and employees of ***3** Pelopidas - with Brown acting as the company's manager. *Id.* According to Keller, Brown engaged in a variety of unlawful activities after taking control of Pelopidas. *Id.*

By late 2019, Keller was pursuing a lawsuit against Brown seeking damages on behalf of Pelopidas (alleging, inter alia, that he had used phony loans to steal money from Pelopidas) and on her own behalf (alleging that he caused Pelopidas to fire her when she reported his unlawful activity). D278, App 2-3. In September 2019, Brown resigned as Pelopidas's manager and Sinquefield purported to terminate his relationship with the company. D278 p. 3, App 3. That same month, Keller discovered Pelopidas would not be able to pay its employees because Brown had taken roughly $900,000 in unauthorized distributions for himself. *Id.* On September 30, 2019, the parties met with a mediator and, eventually, entered into the contract memorialized in the Settlement Memorandum. D278 pp. 4-5, App 4-5.

B. The Brown Parties' promise to pay Keller $8.85 million and waiver of defenses to a claim by Keller for nonpayment.

In the Settlement Memorandum, the Brown Parties promise to pay Keller $8.85 million in eight installments.[2] D279 p. 1, App 12 (Settlement Memorandum ¶ 1). The ***4** contract expressly states that Keller "shall receive" each installment. *Id.* It does not state that an installment can be placed in escrow for any reason. D279, App 12-16.

The parties agreed that all unpaid installments would become due, with interest, if the Brown Parties missed a payment and did not cure.[3] D279, App 13-14 (Settlement Memorandum ¶ 11). The Brown Parties did not challenge the enforceability of the

contract's acceleration provision in their answers to Keller's counterclaim, their amended petition, or their summary judgment filings. D269, D285, D287, D338.

The Brown Parties waived "all defenses" to a claim by Keller for nonpayment, except a defense based on accord and satisfaction or one based on the breach of a covenant not to sue. [4] D279, App 14 (Settlement Memorandum ¶ 11). The Brown Parties did not challenge the enforceability of that waiver in their answers to Keller's counterclaim, their amended petition, or their summary judgment filings. D269, D285, D287, D338.

***5** According to Keller, she insisted on the express "shall receive" language, the acceleration provision, and the broad waiver of defenses because she was concerned Brown might attempt to pressure her in subsequent disputes by withholding contract payments. D278, App 2; D317, pp. 3, 15-17. That is, Keller claims she feared Brown would withhold installments owed under Paragraph 1 in order to "starve her out" if a dispute arose between the two after September 30, 2019. D361, p. 6.

Keller claims Brown had history of using such tactics. According to Keller, Brown had tried to force her to sell him her half of Pelopidas in 2015 by preventing Pelopidas from distributing money necessary for her to pay personal taxes on company revenue. *Id.* And in 2017, Keller claims Brown pressured her to withdraw a motion seeking an injunction against him by causing Pelopidas to withhold a $622,000 profit distribution despite his admission that she was unquestionably entitled to the payment. [5] D361, p. 7.

C. The parties' agreement that Keller's "stock shall be surrendered/sold, escrowed and pledged back" and that they would prepare "all appropriate purchase and sale documents."

Paragraph 7 of the Settlement Memorandum provides that Keller's "stock shall be surrendered/sold, escrowed and pledged back." D279 p. 2, App 13. The Settlement ***6** Memorandum also instructs the parties to jointly prepare "all appropriate purchase and sale documents" and "a formal settlement agreement and release." D279 p. 1, App 12.

The language in Paragraph 7 is different from language Brown previously used to transfer ownership in his companies. *Compare* D279 p. 2, App 13 *to* D359 p. 9, App 42. In early 2016, Brown created three companies. D359 p. 10, App 43; D352, pp. 20, 23-26. In 2017, he executed an assignment agreement for each of those three companies, purporting to transfer his ownership to Pelopidas. D364 p. 6, App 51; D349, pp. 1-3. Each of Brown's three assignments included the following language of performance: [6] "Transferor *hereby assigns, transfers, surrenders and conveys* unto Assignee and Assignee *hereby accepts* the assignment, transfer and conveyance of all of Transferor's right, title and interest in and to the Membership Interest." *Id.* (emphasis added).

On January 21, 2020, the Brown Parties demanded that Keller execute an assignment agreement with language of performance similar to that used in Brown's 2017 assignments: "Keller *hereby grants, sells, conveys, transfers, assigns and delivers* to the LLC all of Keller's rights, title and interest in and to all of the Assigned Interest and the LLC *hereby accepts the transfer and assignment* of the Assigned Interest." D364, App 47-48, D347 pp. 1-3.

***7** The Settlement Memorandum does not include "*hereby assigns*." or "*hereby accepts*" language like that used in the Brown Parties' other assignments. D279 p. 2-3, App 12-16. Instead, the promise in Paragraph 7 that Keller's "stock *shall be* surrendered/sold, escrowed and pledged back" is worded like the promise in Paragraph 9 that her lawsuit "*shall be* dismissed." [7] D279, App 13-14. To effectuate that dismissal, Keller filed a notice of dismissal on January 10, 2020. D340 p. 3, App 19. To effectuate the transfer of her Pelopidas ownership to Brown, Keller proffered an assignment to the Brown Parties on March 25, 2020. D340, App 20.

D. The Brown Parties' initial challenge to the contract's enforceability.

Keller's March 2020 tender of an assignment agreement was the culmination of a prolonged dispute regarding the form of "buy/sell documents" (App 15 (¶19)) and a formal settlement agreement and release, which began in October of 2019. D278 pp. 5-8, App 5-8. The parties' dispute initially focused (for the most part) on the Brown Parties' insistence that the documents suggest that Keller had asserted a roughly $8 million claim against Pelopidas and their suggestion that there was no enforceable contract absent her agreement on that point. D278 pp. 6-7, App 6-7.

The buy/sell and final settlement documents proposed by the Brown Parties suggested that roughly $8 million of the contract price should be applied for tax purposes to the settlement of a monetary claim asserted by Keller against Pelopidas - as opposed ***8** to being applied to the purchase of Keller's share of the company. D278 pp. 5-7, App 5-7. But Keller had never asserted a monetary claim against Pelopidas. D278 p. 3, App 3. Rather, she had sought to force Brown *to pay Pelopidas* $787,118. *Id.* Keller objected that the Brown Parties' proposed treatment of the contract price could falsely suggest that Pelopidas was entitled to a tax deduction for the settlement of an $8 million claim that was entirely fictional. D278 pp. 5-7, App 5-7.

Responding to Keller's objection, the Brown Parties suggested there could be no enforceable contract unless she agreed to their characterization of the contract price. D278, App 6. They asserted that "the parties potentially failed to come to an agreement on certain material terms" because of "significant disagreements regarding certain open items including, but not limited to, the characterization of payments to be made under the agreement." D303, pp. 1-5. Keller responded that a contractual term that could mislead taxing authorities would likely be void as against public policy and therefore could not be a material term of any contract. D278 p. 7, App 7.

By a letter dated December 17, 2019, Keller informed the Brown Parties that she intended to move to enforce the parties' contract in St. Louis County Circuit Court. D309. Shortly thereafter, the Brown Parties abandoned their suggestion that the contract was unenforceable and themselves moved to enforce the contract. D272, p. 1. Because the Brown Parties no longer contested enforceability, Keller dismissed her lawsuit against Brown on January 10, 2020 - as required by the parties' agreement that her lawsuit "shall be dismissed." Id.; D279 p. 2, App 13.

***9** *E. Keller's status as a Pelopidas owner after September 30, 2019*.

In her December 2019 letter, Keller also reminded the Brown Parties that she remained an owner of Pelopidas and, citing her fiduciary obligations as an owner, demanded through counsel that Brown return roughly $900,000 to Pelopidas:

[W]hile my client is no longer entitled to monthly distributions under the terms of the September 30, 2019 agreement, [8] she remains an owner of Pelopidas. As such, she has a fiduciary obligation to ensure Mr. Brown does not improperly take money from the company for his personal use. Accordingly, on behalf of Pelopidas, Ms. Keller hereby demands that Mr. Brown immediately return to Pelopidas the $920,473 that he improperly withdrew according to the latest financial statements provided in September.

D309. The Brown Parties later contended the December 17, 2019 letter in which Keller insisted that "she remains an owner of Pelopidas" evidences her belief that she stopped being an owner of Pelopidas on September 30, 2019. D312, p. 12.

The Brown Parties made the same claim based on Keller's circulation of draft settlement and buy/sell documents that included "as of September 30, 2019" language on October 28, 2019 and November 26, 2019. D338 p. 2; D365, D366. Both the October 28 drafts and November 26 drafts, however, would have required Keller and the Brown ***10** Parties to confirm - on the day they signed the documents - that "Keller is the owner of a fifty percent (50%) membership interest the Company (the 'Keller Interest')." D365, p. 2; D366, p. 3. And in both drafts Keller herself would have to affirm that "she is the sole owner of the Keller Interest" on the day she signed. D365, p. 4; D366, p. 5. (The assignment proposed by the Brown Parties on January 21, 2020 would have required Keller to acknowledge the following as "true and correct" on the day she signed the document: "Keller is a Member of the LLC and the owner of 50.0% interest in the Company's profits, losses, and distributions, and all of the voting and management rights associated therewith." D364, pp. 1-2, App 46-47; D347, p. 2 (Recital B and Paragraph 1).)

In connection with her tender of an assignment in March 2020, Keller addressed the incorrect date reflected on previous drafts. She noted through counsel that "an uncorrected drafting error wouldn't give the parties the ability to travel back in time" and "wouldn't change what did or did not actually happen on September 30, 2019." D302, p. 1.

F. Keller's refusal to sign an assignment agreement dated "as of September 30, 2019" in March of 2020.

There were two major differences between the assignment Keller tendered to the Brown Parties in March of 2020 and the one they demanded that she sign in January. First, the Brown Parties' assignment did not include the pledge provision mandated by Paragraph 7 of the Settlement Memorandum. D278 p. 7, App 7. Second, the Brown Parties' assignment was dated "as of September 30, 2019." D278 pp. 7-8, App 7-8.

***11** In principle at least, the Brown Parties ultimately consented to some form of the pledge required by the Settlement Memorandum.[9] D302, pp. 1-7. But Keller balked at signing a backdated assignment because in her view ownership could not transfer before she actually executed the agreement. D278 p. 8, App 8.

Keller contends her resistance to signing a backdated assignment was related to Brown's previous use of such backdated assignments to steal hundreds of thousands of dollars from Pelopidas. D346, pp. 14-16. Throughout 2016, Brown "borrowed" $337,000 from Pelopidas by transferring cash from Pelopidas to his companies and causing Pelopidas to make payments on his companies' behalf.[10] D317, pp. 8-10. In 2017, Brown transferred ownership of his companies to Pelopidas. *Id.* But the assignment documents that Brown signed in 2017 were all backdated to January of 2016. *Id.* After executing those backdated assignments, Brown maintained that he had no obligation to repay the $337,000 he had borrowed in 2016 because he had not owned the companies to whom the money was loaned. *Id.* According to Keller, by using backdated documents to rid himself ***12** of the companies through which he had borrowed $337,000, Brown both took $337,000 in illicit personal income from Pelopidas (a "loan" that need never be repaid is no loan) and avoided paying personal income taxes on that additional income. *Id.*

Given the foregoing, Keller was unwilling to sign a document stating that she had transferred ownership of her half of Pelopidas to Brown in September of 2019 when she believed ownership could not possibly transfer before March 2020. D282, p. 8; D284. But Keller did not seek to prevent the Brown Parties from claiming ownership had already transferred. D340 p. 6, App 22.

According to the Brown Parties, the Settlement Memorandum "included unequivocal statements that Keller's ownership interest in Pelopidas would be deemed transferred as of September 30, 2019." D269, p. 11. It is undisputed that Keller agreed that the Brown Parties could share the Settlement Memorandum - and any "unequivocal statements" it may contain - with third parties. D340 p. 6, App 22; D302, pp. 1-7.

G. The Brown Parties' failure to pay Keller the remaining $8.6 million owed on the contract after refusing to cure their nonpayment of the second installment.

The Brown Parties paid Keller the first installment of the contract price on October 31, 2019. D340 p. 7, App 23. But they did not pay Keller the second installment on April 1, 2020. D278 pp. 8-9, App 8-9. *See also* D285, p. 5 ("Pelopidas admits Keller did not receive the payment on April 1, 2020") (Pelopidas Answer to Keller's Counterclaim). The Brown Parties did not cure their nonpayment following Keller's demand that they do so. D278 p. 9, App 9. At that time, $8.6 million of the contract price remained unpaid. *Id.*

***13** *H. The record on the parties' motions for summary judgment.*

Keller moved for summary judgment on her counterclaim on July 22, 2020.[11] D289. The Brown Parties did not cross-move for summary judgment on Keller's counterclaim. D268. They did not move to dismiss Keller's counterclaim pursuant to Rule 55.27(a).[12] *Id.*

The Brown Parties admitted that the parties' contract was enforceable and admitted that "the Settlement Memorandum contains all the essential terms of the agreement reached by the parties on September 30, 2019." D340, App 17-18 (¶¶ 1-3). They further admitted that Keller proffered an assignment, pledge, release, and covenant not to sue in March of 2020 and that she dismissed the lawsuit against Brown - as required by the Settlement Memorandum.[13] D340, App 19-20 (¶¶ 8, 10). The Brown ***14** Parties admitted that Keller notified them of the missed second installment on April 2, 2020 and demanded that they cure. D340, App 24 20).

The Brown Parties denied that they failed to pay Keller $8.6 million on April 6, 2020. D340, App 25 (¶ 22). They likewise denied that they failed to pay Keller $1.1 million on April 1, 2020. D340, App 23 (¶19). The evidence the Brown Parties cited for both denials was an affidavit in which Brown testified that he had placed $1.1 million in an escrow account. D340, App 23, 25; D341, App 30 (¶ 7). By operation of Rule 74.04 (c)(2), the Brown Parties admitted that the parties did *not* agree that they could deposit money into an escrow account instead of paying Keller during a dispute regarding the form of additional documents.[14] D340 pp. 6-7, App 22-23 (¶16).

The Brown Parties did not dispute either the enforceability of their waiver of defenses to Keller's breach of contract claim or its application. D338, pp. 1-9. But they nevertheless argued that Keller's breach of contract claim was barred by the defense of prior material breach. D338, pp. 4-6.

***15** Pursuant to Rule 74.04(c)(2), the Brown Parties submitted a statement of six additional facts in opposition to Keller's motion. D340, App 25-26. Not one of those six additional facts related to the materiality of Keller's alleged "prior material breach." *Id.* In their Rule 74.04(c)(2) statement, the Brown Parties referenced two affidavits setting forth eighteen paragraphs

of testimony by Brown. D341, App 29-31; D342, App 32-33. Not one of those eighteen paragraphs of testimony asserted any fact related to the materiality of Keller's alleged breach. *Id.*

The Brown Parties moved for summary judgment on their own claims on July 28, 2020. D306. On August 27, Keller cross-moved for summary judgment on the Brown Parties' claims. [15] D344.

The Brown Parties' statement of uncontroverted facts included the assertion that Keller had admitted that "as of September 17, 2019, she was 'no longer entitled to ***16** Pelopidas distributions.'" [16] D359, App 37 14). Keller denied the truth of that statement, citing her actual December 17, 2019 letter (which refers to "*monthly* distributions" not "*Pelopidas distributions*"), the Pelopidas operating agreement (which does not provide for monthly distributions to members), and a May 1, 2017 "Management Memo" issued by Brown (in which he announced an ad hoc "monthly distribution" policy separate from profit-sharing and tax-payment distributions under the Pelopidas operating agreement). [17] *Id.*

In the Rule 74.04(c) statement of facts for her cross motion, Keller asserted that Brown had previously used the above-discussed "*hereby* assigns ..." and "*hereby* grants ..." language to transfer ownership of his companies (in contrast to the "*shall be* ..." language used in the Settlement Memorandum). D359 pp. 9-10, App 42-43 (¶¶ 5, 7-8). The Brown Parties admitted those facts. [18] D364 pp. 5-6, App 50-51 (¶¶ 5, 7-8). Keller ***17** also asserted that, on January 21, 2020, the Brown Parties proposed that the parties sign a document acknowledging that Keller was a member of Pelopidas and the owner of a 50% interest in its profits and losses. D364, pp. 1-2, App 46-47 1). The Brown Parties admitted "the documents cited by Keller in this paragraph were forwarded to counsel for Keller on January 21, 2020." *Id.*

In a Rule 74.04(c) statement of additional facts in opposition to Keller's cross motion, the Brown Parties asserted that Keller had circulated draft documents that included effective dates "as of September 30, 2019." D364, p. 10, App 55. In support of those additional statements of fact, the Brown Parties attached the drafts from October and November 2019 that would have required the parties to confirm that "Keller is the owner of a fifty percent (50%) membership interest the Company" on the day they signed. D365, p. 2; D366, p. 3.

I. The trial court's final judgment.

Presented with the above-described summary judgment record, the trial court found (1) that the "September 30, 2019, Memorandum of Settlement between the parties was a valid and enforceable contract"; (2) that "No additional documents or terms are needed to effectuate the contract"; (3) that the Brown Parties "performed or tendered performance pursuant to the contract"; and (4) that Keller "surrendered, transferred and assigned all right, title and interest in Pelopidas, LLC effective September 30, 2019." D370 pp. 5-6, App 61-62.

The trial court *did not* find that Keller breached the parties' contract in any respect. *Id.* To the contrary, its findings that no additional documents were needed to ***18** effectuate the contract and that Keller had already surrendered her ownership interest preclude any suggestion that she could breach by failing to execute additional documents.

The trial court entered a final judgment on November 30, 2020 granting the Brown Parties' pending motion for summary judgment and denying Keller's pending cross motion. D370 p. 6, App 62. The trial court denied Keller's motion for summary

judgment on her counterclaim and sua sponte dismissed that counterclaim with prejudice, without specifying whether that dismissal was a grant of summary judgment to the Brown Parties or a dismissal for failure to state a claim. *Id.*

In the same final judgment, the trial court enjoined Keller from claiming to own half of Pelopidas, ordered that Keller be paid the $1.1 million that Brown claimed was held in escrow, ordered the parties to execute a settlement agreement, and ordered Keller to pay the Brown Parties' attorneys' fees in the amount of $408,326. D370 pp. 6-7, App 62-63. Finally, it denied all of the claims that it had not specifically addressed - *i.e.*, the Brown Parties' breach of contract claim. *Id.*

19 *POINTS RELIED ON

I.

KELLER'S COGNIZABLE BREACH OF CONTRACT CLAIM

The trial court erred as a matter of law in sua sponte dismissing Keller's counterclaim for failure to state a claim for which relief can be granted because the facts pleaded and reasonable inferences drawn therefrom meet the elements of a recognized cause of action for breach of contract, in that Keller alleged an enforceable contract, performance or proffered performance, breach, and damages.

Vantage Credit Union v. Chisholm, 447 S.W.3d 740 (Mo.App. E.D. 2014)

City of Washington v. Warren Cty., 899 S.W.2d 863 (Mo. banc 1995)

II.

***SUA SPONTE SUMMARY JUDGMENT* The trial court erred as a matter of law in sua sponte granting summary judgment for the Brown Parties on Keller's counterclaim because it did not have authority to grant summary judgment, in that summary judgment is not available absent a motion under Rule 74.04 or Rule 55.27(a)(6) and the Brown Parties filed no such motion**.

Williams v. Mercantile Bank of St. Louis NA, 845 S.W.2d 78 (Mo.App. E.D. 1993)

***20 III**.

SUMMARY JUDGMENT FOR KELLER *ON HER BREACH OF CONTRACT CLAIM*

The trial court erred as a matter of law in denying summary judgment for Keller on her counterclaim because the summary judgment record established that she was entitled to judgment in her favor, in that there was no genuine dispute regarding the facts meeting the elements of a breach of contract claim, the Brown Parties did not challenge their waiver of defenses or identify evidence supporting their defense of prior material breach, and the Settlement Memorandum precluded a finding that Keller breached.

Missouri Supreme Court Rule 74.04 (App 65-69)

Kroner Investments, LLC v. Dann, 583 S.W.3d 126 (Mo.App. E.D. 2019)

Martin v. U.S. Fid. & Guar. Co., 996 S.W.2d 506 (Mo. banc 1999)

R.J.S. Sec., Inc. v. Command Sec. Servs., Inc., 101 S.W.3d 1 (Mo.App. S.D. 2003)

IV.

JUDGMENT CONTRARY TO THE TERMS OF THE CONTRACT

The trial court erred as a matter of law in granting summary judgment for the Brown Parties because the material facts that were not genuinely disputed did not establish that they were entitled to judgment as a matter of law, in that the Settlement Memorandum's statement that Keller's ownership in Pelopidas "shall be surrendered sold/surrendered, escrowed, and pledged back" is unambiguously a *21 promise of future performance precluding a finding that Keller immediately transferred ownership of Pelopidas to Brown when the memorandum was signed.

Missouri Supreme Court Rule 74.04 (App 65-69)

Dunn Industrial Group, Inc. v. City of Sugar Creek, 112 S.W.3d 421 (Mo. banc 2003)

Zeiser v. Tajkarimi, 184 S.W.3d 128 (Mo.App. E.D. 2006)

State ex rel. Missouri Highway & Transp. Comm'n v. Maryville Land P 'ship, 62 S.W.3d 485 (Mo.App. E.D. 2001)

V.

KELLER'S CROSS MOTION FOR SUMMARY JUDGMENT

The trial court erred as a matter of law in denying Keller's cross-motion for summary judgment on the Brown Parties' claims because the material facts that were not genuinely disputed established that she was entitled to judgment as a matter of law in that the statement that Keller's ownership in Pelopidas "shall be surrendered sold/surrendered, escrowed, and pledged back" is unambiguously a promise of future performance precluding a finding that Keller immediately transferred ownership of Pelopidas to Brown when the memorandum was signed.

Missouri Supreme Court Rule 74.04 (App 65-69)

Dunn Industrial Group, Inc. v. City of Sugar Creek, 112 S.W.3d 421 (Mo. banc 2003)

Zeiser v. Tajkarimi, 184 S.W.3d 128 (Mo.App. E.D. 2006)

State ex rel. Missouri Highway & Transp. Comm'n v. Maryville Land P 'ship, 62 S.W.3d 485 (Mo.App. E.D. 2001)

***22 VI**.

ERRONEOUS ATTORNEYS FEES

The trial court erred in awarding attorneys' fees to the Brown Parties because they are not the prevailing party, in that Keller is entitled to summary judgment on her counterclaim and the Brown Parties' claims as a matter of law.

Brewer v. Cosgrove, 498 S.W.3d 837 (Mo.App. E.D. 2016)

*23 *STANDARD OF REVIEW*

If treated as a dismissal for failure to state a claim, the trial court's sua sponte dismissal of Keller's counterclaim is reviewed de novo. *Ward v. W. Cnty. Motor Co., Inc.*, 403 S.W.3d 82, 84 (Mo. banc 2013). Reversal is required under that standard if the Court finds the facts pleaded in Keller's counterclaim and reasonable inferences draw therefrom meet the elements of a recognized cause of action. *Murphy v. Stonewall Kitchen, LLC*, 503 S.W.3d 308, 310 (Mo.App. E.D. 2016).

If treated as a grant of summary judgment in favor of the Brown Parties, the trial court's sua sponte dismissal of Keller's counterclaim is subject to summary reversal because the Brown Parties filed no motion under Rule 74.04 or Rule 55.27(a)(6). *Williams v. Mercantile Bank of St. Louis NA*, 845 S.W.2d 78, 82 (Mo.App. E.D. 1993). Because the merits of Keller's motion for summary judgment on her counterclaim are intertwined with the trial court's dismissal of her counterclaim and its grant of the Brown Parties' summary judgment for the Brown Parties, the trial court's denial of her motion is properly subject to appellate review. *See, e.g.,* *Stone v. Crown Diversified Indus. Corp.*, 9 S.W.3d 659, 664 (Mo.App. E.D. 1999). That review is de novo. *Kroner Investments, LLC v. Dann*, 583 S.W.3d 126, 128-29 (Mo.App. E.D. 2019). Granting the Brown Parties all reasonable inferences from the Rule 74.04(c) record, judgment in favor of Keller on her breach of contract claim is required if she has set forth evidence in support of each element of her claim and the Brown Parties have not "set forth specific facts supported by affidavits, discovery, or admissions on file showing a genuine issue for trial." *Id.*

***24** This Court reviews the trial court's grant of the Brown Parties' motion for summary judgment de novo. *Id.* Because the merits of Keller's cross-motion for summary judgment are intertwined with the granting of the Brown Parties' motion, the trial court's decision denying Keller's motion is properly subject to de novo appellate review. *See, e.g.,* *Stone*, 9 S.W.3d at 664; *Kroner*, 583 S.W.3d at 128-29.

RELIEF REQUESTED

Keller seeks reversal of the trial court's sua sponte dismissal of her breach of contract counterclaim and asks that this Court give judgment in her favor for the full contract price with interest, and remand to the trial court for a determination of her attorneys' fees. She also seeks reversal of the trial court's grant of the Brown Parties' motion for summary judgment and asks that summary judgment be entered in her favor on all of the Brown Parties' remaining claims. [19]

Under Rule 84.14, this Court should dispose finally of this case unless "justice otherwise requires." Mo. S. Ct. R. 84.14. Justice does not require remand on the merits because (1) the merits of the final rulings on appeal are intertwined with Keller's two overruled motions for summary judgment and (2) the record under Rule 74.04(c) establishes that judgment is mandated for Keller on all counts.

*25 *SUMMARY OF ARGUMENT*

The trial court did not state whether its sua sponte dismissal of Keller's counterclaim was for failure to state claim or a grant of summary judgment for the Brown Parties. If the former, the trial court erred as a matter of law because the facts pleaded in Keller's counterclaim and the reasonable inferences drawn therefrom establish the elements of her cause of action. If the latter, the trial court erred as a matter of law because it lacked authority to grant summary judgment for parties that had neither moved for summary judgment under Rule 74.04 nor moved to dismiss under Rule 55.27(a)(6).

This Court may properly review the trial court's denial of Keller's motion for summary judgment on her counterclaim because that denial is completely intertwined with both the trial court's sua sponte dismissal of Keller's counterclaim and its grant of the Brown Parties' summary judgment motion. The trial court erred in denying Keller's motion for summary judgment because there was no genuine dispute as to the material facts meeting each element of her claim. The Brown Parties' contention that Keller received a payment of $1.1 million because they placed the second installment payment in an escrow account raises no genuine fact issue because it is undisputed that the parties had no escrow agreement and there is no legal basis for judicially reforming their contract to include an escrow agreement.

The Brown Parties' waived all potentially applicable defenses to Keller's breach of contract claim. But even absent that waiver, their only asserted defense, "prior material breach," fails as a matter of law because the summary judgment record does not include a shred of evidence for the proposition that Keller's alleged breach was material and the ***26** unambiguous language of the Settlement Memorandum precludes any claim that Keller breached by declining to execute a backdated assignment.

The trial court erred in granting the Brown Parties' motion for summary judgment and denying Keller's cross-motion because the Settlement Memorandum's statement that Keller's "stock shall be sold/surrendered, escrowed, and pledged back" unambiguously cannot mean that Keller's "stock is hereby transferred." Neither the plain language of the Settlement Memorandum nor any erroneously considered extrinsic evidence supports the contention that Keller stopped owning her half of Pelopidas on September 30, 2019. Because all of the Brown Parties' claims depend on the presumption that Keller did stop owning half of Pelopidas on September 30, 2019, the trial court erred in denying Keller's cross motion for summary judgment and granting the Brown Parties' motion.

Finally, the trial court erred in awarding the Brown Parties attorneys' fees because its determination that they were prevailing parties rested on the above-described errors.

***27** *ARGUMENT*

I.

KELLER'S COGNIZABLE BREACH OF CONTRACT CLAIM

The trial court erred as a matter of law in sua sponte dismissing Keller's counterclaim for failure to state a claim for which relief can be granted because the facts pleaded and reasonable inferences drawn therefrom meet the elements of a recognized cause of action for breach of contract, in that Keller alleged an enforceable contract, performance or proffered performance, breach, and damages.

A trial court may dismiss a petition or counterclaim sua sponte for failure to state a clam for which relief can be granted. *Wright v. Dep't of Corr.*, 48 S.W.3d 662, 66-67 (Mo.App. W.D. 2001) (recognizing authority to dismiss sua sponte, but reversing where the trial court considered the merits of the plaintiff's claim in deciding to dismiss). But a dismissal for failure to state a claim is only proper where a claimant "can prove no set of facts" that would entitle him or her to relief. *Murphy*, 503 S.W.3d at 310. In considering dismissal for failure to state a claim, the claimant's factual allegations must be "reviewed in an almost academic

manner" to determine if the facts alleged and reasonable inferences drawn therefrom meet the elements of a recognized cause of action. *Id.* This review is undertaken in the light most favorable to permitting the claim to proceed. *Id.*

Here, the facts alleged in Keller's counterclaim meet the elements of the recognized breach of contract cause of action. Those elements are "(1) the existence and terms of a contract; (2) that plaintiff performed or tendered performance pursuant to the contract; (3) breach of the contract by the defendant; and (4) damages suffered by the ***28** plaintiff." *Vantage Credit Union v.*, 447 S.W.3d 740, 745 (Mo.App. E.D. 2014). Keller pleaded the existence and terms of a contract. D278 pp. 4-10, App 4-10 (Counterclaim ¶¶ 19-25, 39-42, 45, 47); D279, App 12-16 (Settlement Memorandum). She pleaded performance and tendered performance. D278 pp. 7-9, App 7-9 (¶¶30-33). And she pleaded both breach and damages suffered because of that breach. D278 pp. 8-10, App 8-10 (¶¶ 35-36, 45-46).

The reasonable inferences that can be drawn from the facts pleaded in Keller's counterclaim are reflected in her assertions regarding, *e.g.*, the history behind the terms of the parties' contract and her resistance to signing a backdated assignment. Those inferences can only bolster Keller's claim: Because Brown had a history of squeezing Keller by withholding money, the parties agreed to a contract explicitly stating that Keller "shall receive" each installment, accelerating all unpaid installments in the event of a default, and waiving virtually all defenses to a claim for non-payment. D279, App 12-16. Because the Brown Parties originally suggested the contract would be unenforceable unless Keller agreed to the potentially deceptive tax treatment of the $8.85 million contract price, Keller's promised dismissal was delayed until after they abandoned that position in January of 2020. D279 p. 2, App 13. And because Brown had previously used backdated assignment agreements to steal more than $300,000 from Pelopidas in 2017, Keller reasonably balked at signing the backdated agreement that the Brown Parties demanded she sign in January of 2020. D346, pp. 14-16; D317, pp. 8-10.

Because the facts pleaded in Keller's counterclaim and the reasonable inferences drawn from those facts meet the elements of a breach of contract claim, the trial court ***29** erred as a matter of law in dismissing Keller's breach of contract claim for failure to state a claim on which relief can be granted.

II.

SUA SPONTE SUMMARY JUDGMENT

The trial court erred as a matter of law in sua sponte granting summary judgment for the Brown Parties on Keller's counterclaim because it did not have authority to grant summary judgment, in that summary judgment is not available absent a motion under Rule 74.04 or Rule 55.27(a)(6) and the Brown Parties filed no such motion.

It is fundamental that trial courts "should not act on their own accord." *Williams v. Mercantile Bank of St. Louis NA*, 845 S.W.2d 78, 82 (Mo.App. E.D. 1993). "In order for a trial court to grant summary judgment, it must normally have a motion for summary judgment before it and notice of a hearing must be made." *Id.* The sole exception to this rule is that a trial court may grant summary judgment after converting a motion to dismiss for failure to state claim to a summary judgment motion pursuant to Rule 55.27(a). *Id.* at 82 n.1. *Id.* Thus, a trial court errors as a matter of law when it grants summary judgment in favor of a party that has not filed a motion under Rule 55.27(a)(6) or Rule 74.04. *See id.* (reversing and remanding where trial court entered summary judgment on counts of a petition that were not the subject of a motion); *Zeiser v. Tajkarimi*, 184 S.W.3d 128, 131 n.7 (Mo.App. E.D. 2006) (reversing and remanding where trial court entered summary judgment on Count II of a counterclaim after the plaintiff moved for summary judgment on Counts I and III).

***30** Because the Brown Parties did not move for summary judgment on Keller's counterclaim under Rule 74.04 or move to dismiss it under Rule 55.27(a)(6), the trial court erred in granting summary judgment for them on that counterclaim.

III.

SUMMARY JUDGMENT FOR KELLER ON HER BREACH OF CONTRACT CLAIM

The trial court erred as a matter of law in denying summary judgment for Keller on her counterclaim because the summary judgment record established that she was entitled to judgment in her favor, in that there was no genuine dispute regarding the facts meeting the elements of a breach of contract claim, the Brown Parties did not challenge their waiver of defenses or identify evidence supporting their defense of prior material breach, and the Settlement Memorandum precluded a finding that Keller breached.

The trial court's dismissal of Keller's counterclaim and its grant of the Brown Parties' summary judgment motion (discussed below) are inextricably intertwined with its denial of Keller's motion for summary judgment on her counterclaim. Therefore, that denial is properly subject to review here. *See, e.g.,* *Stone*, 9 S.W.3d at 664. Moreover, addressing Keller's motion for summary judgment would be consistent with Missouri's policy favoring final disposition of cases on appeal. *Accord* Mo. S. Ct. R. 84.14 ("Unless justice otherwise requires, the court shall dispose finally of the case.").

Summary judgment is proper if there is no genuine dispute of material fact and the movant is entitled to judgment as a matter of law. ***31** *Foster v. St. Louis County*, 239 S.W.3d 599, 601 (Mo. banc 2007). The summary judgment record is strictly limited to only those facts that come in "as required by Rule 74.04(c)(1) and (2), in separately numbered paragraphs or in response addressed to those numbered paragraphs." *Kroner Investments, LLC v. Dann*, 583 S.W.3d 126, 128-29 (Mo.App. E.D. 2019) (citing *Holzhausen v. Bi-State Dev. Agency*, 414 S.W.3d 488, 493 (Mo.App. E.D. 2013)). "A party confronted by a proper motion for summary judgment may not rest upon mere allegations or denials in his or her pleadings, but in order to overcome the motion, the party must set forth specific facts supported by affidavits, discovery, or admissions on file showing a genuine issue for trial." *Id.* "A non-movant who relies only upon mere doubt and speculation in its response to the motion for summary judgment raises no issue of material fact." *Id.*

Here, the summary judgment inquiry properly ends with Keller's prima facie case because the Brown Parties broadly waived "all defenses" to her claim, but for two that they did not assert. D279, p. 3; App 14 (¶ 11). Even ignoring that waiver, the Brown Parties' defense of "prior material breach" provides no basis for denying summary judgment for Keller because they did not identify a shred of evidence for their required proof that her alleged breach was material and the unambiguous language of the Settlement Memorandum precludes the suggestion that she breached.

1. The summary judgment record establishes that there is no genuine dispute regarding the facts meeting the elements of Keller's claim.

The elements of a breach of contract claim are (1) the existence and terms of a contract; (2) performance or tendered performance; (3) breach; and (4) damages. ***32** *Vantage Credit Union*, 447 S.W.3d at 745. Here, Keller's Rule 74.04 statement of facts and the Brown Parties' response established each element.

a. The existence and terms of the parties' contract and Keller's performance and proffered performance are undisputed.

It was undisputed that the parties entered into an enforceable contract and that the Settlement Memorandum set forth its essential terms. D340 pp. 1-2, App 17-18 (Brown Parties' Rule 74.04(c) Response ¶¶ 1-3). The Settlement Memorandum sets forth the Brown Parties' duty to ensure that Keller "shall receive" $8.85 million in installments and their duty to make an accelerated

payment of all unpaid amounts after missing a payment and failing to cure. D279 pp. 1-3; App 12-14 (¶¶ 1, 11). The Brown Parties have admitted that Keller notified them of the missed second installment on April 2, 2020 and demanded that they cure. D340 p. 8, App 24 (¶ 20).

Keller's Rule 74.04 statement and the Brown Parties' response further establish that there is no genuine dispute as to the fact that Keller performed and proffered performance as promised in the Settlement Memorandum by dismissing her lawsuit in January of 2020 and tendering an assignment, pledge, release, and covenant not to sue to the Brown Parties in March. D340 pp. 3-4, App 19-20 (¶¶ 8, 10).

b. The Brown Parties' reliance on an admittedly non-existent escrow agreement raises no genuine issue of material fact regarding their breach.

The Settlement Memorandum states that Keller "shall receive" the second installment on April 1, 2020. D279, p. 1, App 12. In its Answer, Pelopidas judicially admitted that "Keller did not receive the payment on April 1, 2020." D285, p. 5. And, by ***33** operation of Rule 74.04(c)(2), the Brown Parties have admitted that there was no agreement permitting them to place money into an escrow account instead of paying Keller during a dispute regarding the form of additional documents. D340 pp. 6-7, App 22-23 (116). Nevertheless, in their response to Keller's Rule 74.04 statement, the Brown Parties claimed that they paid Keller $1.1 million on April 1, 2020 and denied that $8.6 million of the contract price remained unpaid on April 6, 2020 - all based on an affidavit in which Brown testified that he placed $1.1 million in an escrow account. D340 pp. 7, 9, App 23, 25 (¶¶ 19-22); D341 p. 2, App 30 (¶ 7).

The Brown Parties' escrow claim raises no genuine dispute of fact. The Settlement Memorandum says nothing about escrowing payments to Keller. D279, App 12-16. This is because the parties did not agree that payments to Keller could be escrowed. D340, pp. 6-7, App 22-23 (¶ 16). Instead, the parties explicitly agreed that Keller "shall receive" each installment. D279, p. 1, App 12 (¶ 1). Judicially reforming the Settlement Memorandum to include an escrow agreement would render its explicit "shall receive" instruction - along with its acceleration provision and waiver of defenses - useless and inexplicable. *See* *Martin v. U.S. Fid. & Guar. Co.*, 996 S.W.2d 506, 511 (Mo. banc 1999) ("[T]he Court prefers a contract construction that gives meaning to all provisions of an instrument to a construction that leaves a portion of the writing useless and inexplicable."). The obvious purpose of those provisions was to ensure that Keller received payments without delay. Permitting the Brown Parties to "pay" Keller by moving money from a bank account under their direct control to a bank account under ***34** their indirect control (that of their escrow agent) would eliminate Keller's bargained-for protection.

Appellant has not been able to identify a single judicial opinion in Missouri - or any other jurisdiction - where a court found that a party could satisfy its contractual payment obligations by placing money into an escrow account notwithstanding the absence of an escrow agreement. Keller's allegations regarding the history behind the "shall receive" language, the acceleration provision, and the waiver of defenses demonstrate why it would be poor policy for this Court to issue the first such opinion. To take just one example, if a party with a history of withholding payments to pressure its counterparty is found to satisfy payment obligations by depositing payments in an escrow account, any employer could be found to satisfy its payment obligations by depositing employee paychecks in escrow during contract negotiations. There is no reason for this Court to create new law permitting the payor in an installment contract to starve out the payee.

c. Keller's damages are undisputed.

Just as there is no genuine dispute regarding the Brown Parties' breach, there is no genuine dispute regarding Keller's damages. Under the parties' contract, Keller was to receive $8.6 million following the Brown Parties' nonpayment and failure to cure.

D340 pp. 7-22, App 23-25 17-22); D279, App 12-16. The record under Rule 74.04 establishes that she did not receive that money. *See id.*

Where, as here, a contract includes a fixed price, the measure of damages is that contract price. *See* ***35** *Faust v. Associated Eng'g of St. Louis, Inc.*, 854 S.W.2d 537, 538 (Mo.App. E.D. 1993) ("If the contract is established, the plaintiff is entitled to the entire amount for which it calls."). The Brown Parties did not challenge the enforceability or application of the Settlement Memorandum's acceleration provision. D338. *See also*, e.g., *Whitman v. Livingston*, 541 S.W.2d 61, 63 (Mo.App. 1976) ("Generally, maturity acceleration provisions in contracts are valid and enforceable."). Thus, Keller is entitled to a principal damage award in the amount of $8.6 million, plus interest. *See Faust*, 854 S.W.2d at 538-39 (reversing and remanding for entry of damage judgment for full contract price plus interest where breach was established but jury awarded less than full fixed price); *Heritage Roofing, LLC v. Fischer*, 164 S.W.3d 128, 135 (Mo.App. E.D. 2005) (enforcing contractual 1% monthly interest rate).

2. The Brown Parties broad waiver of defenses to Keller's breach of contract claim precludes their defense of prior material breach.

Keller's counterclaim is a suit to enforce her right to an accelerated payment of all amounts owed under the Settlement Memorandum. D278, App 1-11. The Brown Parties agreed to a broad waiver of virtually all defenses to that suit: "Defendants waive all defenses in such suit other than accord and satisfaction and breach of the covenant not to sue." D279, p. 3, App 14. The Brown Parties did not challenge the enforceability of their broad waiver of "all defenses." *See generally* D338. Nor did they contend their waiver was not voluntary or knowing. *See generally* D338; D340, App 17-28. Where, as here, the waiver is unequivocal, plain, and clear, "the court is bound to enforce the contract as written." *Malan Realty Inv'rs, Inc. v. Harris*, 953 S.W.2d 624, 626-27 (Mo. banc 1997) (enforcing contractual waiver of right to a jury trial).

***36** The only summary judgment defenses available to the Brown Parties were accord and satisfaction and breach of a covenant not to sue. D279 p. 3, App 14. They asserted neither defense in response to Keller's motion. D338.

3. The Brown Parties failed to identify evidence, or even state facts, in support of their prior material breach defense.

Consideration of the Brown Parties' prior material breach defense would provide no basis for denying summary judgment for Keller because they did not identify any evidence or even state facts for the proposition that Keller's alleged breach was material.

While Missouri recognizes the defense of prior material breach, "only a material breach may excuse the other party's performance." *R.J.S. Sec., Inc. v. Command Sec. Servs., Inc.*, 101 S.W.3d 1, 18 (Mo.App. S.D. 2003). Thus, in *R.J.S. Securities*, the southern division of this Court noted that the defendants "gambled when they refused to perform their obligations under the contract" based on the hope that the trial court would find a prior material breach. 101 S.W.3d at 18-19. The court ultimately affirmed the trial court's rejection of the material breach defense (along with its acceleration of payment on the disputed contract and its award of interest) because the evidence presented by the defendant did not mandate a finding of materiality. *Id. Accord, e.g., Qwasi, Inc. v. Advatext, LLC*, No. 4:17-CV-00661, 2018 WL 3848822, at *3-4 (W.D. Mo. 2018) (where "there is no evidence that a jury could rely on to even try to determine whether [movant's] breach was material," the "affirmative defense alleging that [movant] materially breached the contract first, thereby excusing [non-movant's] performance, does not prevent summary judgment from being entered").

***37** Here, the record under Rule 74.04(c) is devoid of any evidence, or even any statements of fact, that a jury could rely on to determine whether Keller's alleged breach was material. The Brown Parties' summary judgment record rested entirely on eighteen paragraphs of testimony by Brown. D341, App 29-31; D342, App 32-33. Not one sentence of that testimony related to the materiality of Keller's alleged breach. *See id.* Moreover, not one of the Brown Parties' six statements of additional facts under Rule 74.04(c)(2) related to materiality. D340 pp. 9-10, App 25-26. There are literally zero facts in the summary judgment record supporting the Brown Parties' materiality claim.

Thus, even if they had not waived all such defenses, the Brown Parties' unsupported assertion of a prior material breach by Keller would provide no basis for denying Keller's summary judgment motion.

4. The unambiguous language of the Settlement Memorandum precludes the contention that Keller was in breach.

If considered, the Brown Parties' prior material breach defense would also fail for the more fundamental reason that Keller did not breach. The Brown Parties' claim that Keller breached the contract necessarily rests on the premise that the following language operated to immediately transfer Keller's half of Pelopidas to Brown on September 30, 2019: Keller's "stock shall be surrendered/sold, escrowed, and pledged back." But a statement that an action "shall be" performed does not perform that action. That a thing "shall be done" does not mean that the thing "hereby is done." Keller did not immediately transfer ownership of her half of the company to Brown on September 30, 2019 any more than the seller of a house immediately transfers ownership of that house by ***38** countersigning a contract weeks or months before the parties sit down at the final closing. The deficiencies in the Brown Parties' contrary contention are addressed further in the points below.

IV.

JUDGMENT CONTRARY TO THE TERMS OF THE CONTRACT

The trial court erred as a matter of law in granting summary judgment for the Brown Parties because the material facts that were not genuinely disputed did not establish that they were entitled to judgment as a matter of law, in that the Settlement Memorandum's statement that Keller's ownership in Pelopidas "shall be surrendered sold/surrendered, escrowed, and pledged back" is unambiguously a promise of future performance precluding a finding that Keller immediately transferred ownership of Pelopidas to Brown when the memorandum was signed.

Both the trial court's grant of summary judgment for the Brown Parties and its denial of Keller's cross-motion for summary judgment depend on the meaning of the Settlement Memorandum's instruction that Keller's "stock shall be surrendered sold/surrendered, escrowed, and pledged back." The Brown Parties' claims all fail if Keller's ownership of Pelopidas did not immediately transfer when the Settlement Memorandum was signed on September 30, 2019.

In a dispute regarding the meaning of contractual terms, summary judgment is required where the language of a contract is unambiguous and "the meaning of the disputed portion of the contract can be ascertained from the four corners of the document." ***39** *Board of Educ. City of St. Louis v. State*, 134 S.W.3d 689, 695 (Mo.App. E.D. 2004) (citation omitted). Here, summary judgment was mandated for Keller because the unambiguous meaning of the statement that her "stock shall be sold/surrendered, escrowed, and pledged back" is that Keller was obliged to transfer her half of Pelopidas to Brown sometime in the future.

1. Paragraph 7 of the Settlement Memorandum is unambiguously a promise of future performance.

The presence or absence of ambiguity is a question of law. *Eveland v. Eveland*, 156 S.W.3d 366, 369 (Mo.App. E.D. 2004). Parties to a contract cannot create ambiguity by disagreeing over the construction of a contractual terms. *Dunn Industrial Group, Inc. v. City of Sugar Creek*, 112 S.W.3d 421, 428 (Mo. banc 2003). Rather, a contractual term is ambiguous if it is susceptible of more than one meaning such that reasonable persons may fairly and honestly differ in its construction. *Zeiser v. Tajkarimi*, 184 S.W.3d 128, 133 (Mo.App. E.D. 2006). Alternatively, language that appears plain by itself may be found ambiguous if it "conflicts with other language in the contract, or if giving effect to it would render other parts of the contract a nullity." *Id.*

A statement that a thing *shall be done* necessarily refers to that thing being done in the future. A statement that a thing *shall be* done cannot reasonably be confused with a statement that that thing *is hereby* done. *See, e.g., Foster v. Neilson*, 27 U.S. 253, 254 (1829) (holding that a treaty agreeing that certain land grants "shall be ratified and confirmed" did not confirm those grants upon execution because the subject treaty "does not say those grants are hereby confirmed"). Thus, where the Settlement Memorandum stated, in Paragraph 9, that Keller's lawsuit "shall be dismissed" (App 13) the subject ***40** lawsuit was dismissed on January 10, 2020 (App 20) - not September 30, 2019. Nothing within the four corners of the Settlement Memorandum suggests the same unambiguous futurity does not attach to the statement that Keller's property "shall be sold/surrendered."

To actually effect an ownership transfer on September 30, 2019, the Settlement Memorandum would have had to include language of performance - as opposed to the language of obligation set forth in Paragraph 7. As explained in the *Manual of Style for Contract Drafting*, language of performance "expresses actions accomplished by signing the contract" and is typically identified by a "herby + simple present" verb structure (e.g., "hereby assigns"). Adams, supra fn. 6, at 44. In contrast, language of obligation is used to "state any duty that a contract imposes on one or more parties" and can be identified by the word shall. *Id.* at 57 (to "state that Acme has a duty to purchase the Shares from Doe, use shall"). The *Manual of Style for Contract Drafting* includes contrasting examples of language of performance, "Acme hereby purchases the Assets from Doe," and of language of obligation, "Acme shall purchase the shares from Doe." *Id.*

The Brown Parties were plainly well-acquainted with the language of performance that would have been necessary to actually transfer ownership on September 30, 2019. Brown used "hereby assigns, transfers, surrenders and conveys" three times to transfer ownership in 2017. D340, pp. 5-6, App 50-51. And the Brown Parties used "hereby grants, sells, conveys, transfers, assigns and delivers" in the assignment that they demanded Keller sign on January 21, 2020. D340, pp. 2-3, App 47-48. But no such language can be found within the four corners of the Settlement Agreement. App 12-17.

***41** The unambiguous meaning of Paragraph 7 is wholly consistent with the other provisions of the Settlement Memorandum. The document's introduction instructs the parties to jointly prepare, inter alia, "all appropriate purchase and sale documents" (App 12) and contemplates separate "buy-sell documents" in Paragraph 19 (App 15). It is by executing separate "purchase and sale documents" or "buy-sell documents" that Keller would perform her duty to *sell/surrender* her ownership interest in Pelopidas and the Brown Parties would simultaneously perform their duty to *escrow* that interest and *pledge it back* to Keller. *See* D279, p. 2, App 13. That Paragraph 21 of the Settlement Memorandum states "the date of this document is September 30, 2019" (App 16) creates no conflict. September 30, 2019 is the date on which, *e.g.*, the Settlement Memorandum was signed and through which the parties' mutual releases would run.

2. Erroneous reference to extrinsic evidence would provide no basis for summary judgment for the Brown Parties.

Because Paragraph 7 unambiguously does not effect an immediate ownership transfer and the parties agree that the Settlement Memorandum contains the essential terms of their contract (D340 pp. 1-2, App 17-18), it would be error to consider extrinsic

evidence to vary or alter the terms of the Settlement Memorandum. *See, e.g., State ex rel. Missouri Highway & Transp. Comm'n v. Maryville Land P'ship*, 62 S.W.3d 485, 489 (Mo.App. E.D. 2001).

In any event, the extrinsic evidence only confirms that Keller intended to remain an owner until her 50% ownership of the company Pelopidas was actually "sold/surrendered," was actually certificated and placed in escrow, and was actually ***42** "pledged back" to her. On December 17, 2019, Keller reminded the Brown Parties that she "remains an owner of Pelopidas" and demanded "on behalf of Pelopidas" that Brown return $920,473 to the Company. D359, p. 5, App 37. On the other side of the ledger, the Brown Parties point to the fact that Keller circulated various unsigned drafts that include the "as of September 30, 2019" language. D364, App 45-56. But even those drafts cannot help the Brown Parties because they would have required the parties to confirm that "Keller is the owner of a fifty percent (50%) membership interest in [the] Company" on the day they signed. D365, p. 2; D366, p. 3.

Because the plain language of the Settlement Memorandum unambiguously precludes the suggestion that Keller immediately transferred her half of Pelopidas to Brown on September 30, 2019, the trial court erred in granting the Brown Parties' motion for summary judgment.

V.

KELLER'S CROSS MOTION FOR SUMMARY JUDGMENT

The trial court erred as a matter of law in denying Keller's cross-motion for summary judgment on the Brown Parties' claims because the material facts that were not genuinely disputed established that she was entitled to judgment as a matter of law in that the statement that Keller's ownership in Pelopidas "shall be surrendered sold/surrendered, escrowed, and pledged back" is unambiguously a promise of future performance precluding a finding that Keller immediately transferred ownership of Pelopidas to Brown when the memorandum was signed.

***43** Because trial court's denial of Keller's cross motion for summary judgment is completely intertwined with its grant of summary judgment for the Brown Parties, it is properly subject to this Court's review. *See* *Stone*, 9 S.W.3d at 664.

The trial court erred in denying Keller's cross motion for summary judgment for the same reasons that it erred in granting the Brown Parties' motion. As discussed in Appellant's fourth point on appeal, the Settlement Memorandum's instruction that Keller's "stock shall be sold/surrendered, escrowed, and pledged back" cannot be read to have immediately transferred Keller's ownership of the company. And all of the Brown Parties' claims necessarily fail if Keller's ownership interest did not immediately transfer on September 30, 2019.

VI.

ERRONEOUS ATTORNEYS' FEES

The trial court erred in awarding attorneys' fees to the Brown Parties because they are not the prevailing party in that Keller is entitled to summary judgment on her counterclaim and the Brown Parties' claims as a matter of law.

The trial court's award of attorneys' fees to the Brown Parties rested entirely on its determination that they should prevail on their claims. For the reasons described in Appellant's first five points on appeal, the trial court erred in that determination. *See Brewer v. Cosgrove*, 498 S.W.3d 837, 843 (Mo.App. E.D. 2016) (reversing trial court's award of attorneys' fees based on prevailing party provision in contract where trial court erred in determining who was the prevailing party); *Monsanto Co. v.*

Garst Seed Co., 241 S.W.3d 401, 417 (Mo.App. E.D. 2007) ("Because Monsanto has not ***44** ultimately prevailed on any of Garst's three breach of contract counterclaims (Counts I, II, or III), or on Monsanto's declaratory judgment claim, we reverse the trial court's judgment awarding Monsanto attorney's fees, costs, and expenses."). The trial court's award of attorneys' fees depended on legal error; therefore, Keller respectfully submits that it too should be reversed.

CONCLUSION

Because the unambiguous language of the Settlement Memorandum precludes any suggestion that Keller breached the contract, she is entitled to summary judgment on all of the Brown Parties' claims. Because the summary judgment record establishes every element of Keller's breach of contract claim, she is entitled to summary judgment on her counterclaim. The Brown Parties can identify no basis for denying summary judgment for Keller because they waived all applicable defenses to her claim and failed to introduce evidence into the summary judgment record for the single defense that they erroneously asserted.

Keller respectfully requests that this court REVERSE the trial court's judgment in its entirety, enter judgment in favor of Keller in the amount of $8,600,000 with prejudgment interest at the contractual rate, dismiss all of the Brown Parties' remaining claims with prejudice, and REMAND to the trial court for a determination of the reasonable attorneys' fees to be awarded to Keller.
***45** Respectfully submitted,

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Footnotes

1 Consistent with 84.04, references to the system-generated legal file are as "D ___" and references to the Appendix are as "App ___."

2 Paragraph 1 of the Settlement Memorandum provides as follows:
Plaintiff [Keller] shall receive the following from Defendants [the Brown Parties]:
(a) $250,000 on October 31, 2019; (b) $1,100,00 on April 1, 2020; (c) $1,100,000 on December 31, 2020; (d) $1,200,00 on April 1, 2021; (e) $1,200,000 on December 31, 2021; (f) $1,300,00 on April 1, 2022; (g) $1,300,000 on December 31, 2022; and (h) $1,400,00 on April 1, 2023. D279 p. 1, App 12.

3 The acceleration agreement is in Paragraph 11 of the Settlement Memorandum:
If any payment required under Paragraph 1 above is missed and not cured, all payments are accelerated and Plaintiff [Keller] may file suit to enforce this settlement, including all interest due. D279 p. 3, App 14.
The contractual interest rate is 1% per month. D279, p. 2, App 13.

4 The waiver is also in Paragraph 11:
Defendants [the Brown Parties] waive all defenses in such suit other than accord and satisfaction and breach of the covenant not to sue - the intent of the parties being that claims such as breach of confidentiality, disparagement, etc. shall not be valid excuses for non-payment of amounts due hereunder. D279, p. 3, App 14.

5 Brown admitted $622,000 was owed Keller, but suggested the decision to withhold the money was an unauthorized gambit pursued by a Pelopidas employee. D331, pp. 38-40.

6 According to the American Bar Association's *Manual of Style for Contract Drafting*, "language of performance" is contractual language that "[e]xpresses actions performed by signing the contract." Kenneth Adams, ABA Manual of Style for Contract Drafting (4th Ed. 2017) at 44.

7 The Manual of Style for Contract Drafting refers to such promises of future performance as "language of obligation." Adams, *supra* fn. 6, at 57.

8 Owners of Pelopidas are not entitled to monthly distributions under the company's operating agreement. D354, pp. 15-16. According to Keller, her letter's reference to "monthly distributions" referred to payments made pursuant to an ad hoc "monthly distribution" policy established by Brown in May of 2017. D346 pp. 13-14; D353. The Settlement Memorandum did not provide for the continuation of Brown's "monthly distribution" policy pending the execution of buy/sell documents. D379, App 12-17.

9 The record does not include an executed pledge agreement. The Brown Parties claim that sometime after September 30, 2019, Brown amended the Pelopidas operating agreement to list himself as the sole owner of the "treasury stock of Pelopidas subject to a pledge." D359 p. 5, App 38. *See also* D341 p. 2, App 30 (Brown Affidavit). But they did not put that amended operating agreement into the record.

10 Pelopidas's general counsel objected to Brown's self-dealing "loans" and sought the assistance of outside counsel in seeking to persuade Brown to stop. D317, pp. 8-10.

11 The Brown Parties' response to Keller's Rule 74.04(c) statement of facts is included in the Appendix. App 17-33. Keller's memorandum of law, Rule 74.04(c) statement, and supporting exhibits are included in the system-generated legal file at document citations D291 through D304. The Brown Parties' opposition memorandum, response to Keller's Rule 74.04(c) statement, and supporting exhibits are included at D338 through 342.

12 All rule references are to the Missouri Supreme Court Rules (2019).

13 The Brown Parties expressly admitted that Keller proffered an assignment, pledge, release, and covenant not to sue and that she provided a notice of default and demanded that they cure. D340 pp. 4, App 20, (¶ 10, 20). Those admissions were

made "subject to" a variety of evidentiary objections. *Id.* The trial court did not sustain those evidentiary objections. D370, App 57-64.

14 The Brown Parties did not deny this fact or adduce evidence in support of a denial in their response to Paragraph 16 of Keller's Rule 74.04 Statement of Facts. D340 pp. 6-7, App 22-23. Rule 74.04(c)(2) provides that "a response that does not comply with this Rule 74.04(c)(2) with respect to any numbered paragraph in movant's statement is an admission of the truth of that numbered paragraph." Mo. S. Ct. R. 74.04(c)(2).

15 Keller's response to the Brown Parties' Rule 74.04(c) statement of facts and the Brown Parties' response to the Rule 74.04(c) statement for her cross-motion are included in the Appendix. App 34-56. The Brown Parties' memorandum of law, Rule 74.04(c) statement, and supporting exhibits are included in the system-generated legal file at D308 through D312. Keller's combined opposition memorandum, response to the Brown Parties' Rule 74.04(c) statement, and supporting exhibits are included at D346 through 359. The Brown Parties' memorandum in opposition to Keller's cross-motion and response to her Rule 74.04(c) statement are included at documents 364 through 368.

16 In the Brown Parties' statement, the word "Pelopidas" was enclosed in brackets, like so "no longer entitled to [Pelopidas] distributions." D308, p. 3.

17 As a 50% owner of Pelopidas, Keller was entitled to 50% of any distribution of the company's profits. D354, pp. 15-16. But the company was not required to actually distribute profits to its owners before Brown's buyout of Keller was complete. *Id.*

18 Each of those admissions was made "subject to" the following objection: "The facts alleged by Keller in this paragraph are not relevant and not reasonable calculated to lead to the discovery of admissible evidence." D364, App 50-51 (¶ 5, 7-8). The trial court did not sustain those objections. D370, App 57-64.

19 Given the trial court's denial of all claims that it did not specifically address, Keller's cross-motion for summary judgment is moot as to the Brown Parties' breach of contract claim. *See* D269.

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