This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).

STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0609

Athena 2004, LLC,
Respondent,

vs.

LC Rochester, Inc., et al.,
Appellants.

Filed February 6, 2023
Affirmed in part and reversed in part
Worke, Judge

Olmsted County District Court
File No. 55-CV-18-3303

Daniel J. Heuel, O'Brien & Wolf, L.L.P., Rochester, Minnesota (for respondent)

John T. Giesen, Ken D. Schueler, Dunlap and Seeger, P.A., Rochester, Minnesota (for appellants)

Considered and decided by Smith, Tracy M., Presiding Judge; Worke, Judge; and Wheelock, Judge.

NONPRECEDENTIAL OPINION

WORKE, Judge

Appellants challenge the district court's denial of their motion for amended findings or a new trial, arguing that a contractual liquidated-damages clause is enforceable and that respondent did not substantially complete its work under the contract. By notice of related

appeal (NORA), respondent challenges both parties' attorney-fee awards. We affirm in part and reverse in part.

FACTS

Appellant LC Rochester, Inc. (LC) operates a Little Caesar's pizza restaurant in south Rochester (the south store). LC operated another Little Caesar's in north Rochester (the north store) until July 2018. Respondent Athena 2004, LLC (Athena) owns the building in which LC operates the south store (the premises). In June 2014, LC and Athena entered into a contract requiring Athena to construct the premises and LC to lease part of the premises from Athena.

Section 7(b) of the contract required Athena to "[s]ubstantially [c]omplete" its work by September 1, 2014. Section 8(b) provided that Athena's work is not substantially complete until, among other things, Athena "obtained a certificate of occupancy (or local equivalent)." Section 7(c) provided that "for each day" substantial completion "is delayed beyond" September 15, 2014, LC would be entitled to "liquidated damages" of two days' rent.

Construction of the premises was delayed. In October 2016, the parties entered into an addendum to the lease with a new substantial-completion deadline of December 1, 2016, and a "[r]ent [c]ommencement [d]ate" of January 1, 2017. LC agreed to "waive its right to enforce the [l]iquidated[-][d]amages [c]lause" if Athena met the new substantial-completion deadline. If Athena did not meet the new substantial-completion deadline, the addendum would be void and LC's "right to enforce the [l]iquidated[-][d]amages [c]lause [would] be deemed fully restored."

On January 13, 2017, the City of Rochester issued a "temporary certificate of occupancy." According to the building inspector, the city issues a temporary certificate of occupancy when a building is safe enough for public use but does not fully comply with the state building code.

LC opened the south store for business on January 17, 2017. The temporary certificate of occupancy expired in June 2018. LC nonetheless continued operating the south store without interference from the city.

LC did not pay Athena any rent, however, because Athena had not obtained a permanent certificate of occupancy for the premises. As a result, Athena commenced a breach-of-contract action against LC for back rent. LC answered that Athena breached the contract by failing to substantially complete its work and that LC was entitled to liquidated damages.

The district court held a bench trial. The primary witnesses were appellant Tom Gommels (part owner of LC) and Ari Kolas (part owner of Athena).

On the issue of breach, the district court ruled that the lease addendum controlled and that both parties breached the addendum. The district court awarded Athena almost $45,000 in damages. The district court awarded $5,421.13 in damages to LC, including $3,293.07 in lost profits. The district court denied LC's motion for amended findings or a new trial, ruling that even if substantial completion were a condition precedent, it was immaterial and would cause disproportionate forfeiture if strictly applied. The district court also awarded contractual attorney fees of $10,000 to Athena and $1,000 to LC.

In LC's first appeal, this court reversed in part because Athena did not plead the disproportionate-forfeiture exception. *Athena 2004, LLC v. LC Rochester, Inc.*, No. A20-0333, 2021 WL 318045, at *4, *7 (Minn. App. Feb. 1, 2021). This court also ruled that because substantial completion was a material condition precedent, and because Athena did not meet the substantial-completion deadline in the addendum, the addendum was void and the original contract controlled. *Id.*, at *5-7. This court remanded for further proceedings. *Id.*, at *7.

On remand, the district court determined that Athena substantially completed its work when the city issued the temporary certificate of occupancy.[1] The district court also ruled that both parties breached the contract but that the liquidated-damages clause is an unenforceable penalty. The district court denied LC's motion for amended findings or a new trial, increased Athena's damages award to $59,271.70, reaffirmed LC's damages award for lost profits, and reaffirmed both parties' attorney-fee awards.

This appeal followed.

DECISION

Enforceability of liquidated-damages clause

LC argues that the district court erred by denying its motion for amended findings or a new trial. We review a district court's decision on whether to amend its findings or

[1] The district court found that Athena substantially completed its work on December 15, 2016. However, the district court noted in its order denying LC's motion for amended findings or a new trial that the substantial-completion date should have been January 13, 2017, when the city issued the temporary certificate of occupancy. But the district court also noted that correcting the substantial-completion date would not have changed its analysis on the issue of liquidated damages.

grant a new trial for an abuse of discretion. *Christie v. Est. of Christie*, 911 N.W.2d 833, 838 (Minn. 2018); *Landmark Cmty. Bank, N.A. v. Klingelhutz*, 927 N.W.2d 748, 754 (Minn. App. 2019). A district court abuses its discretion by misapplying the law or relying on clearly erroneous factual findings. *Klingelhutz*, 927 N.W.2d at 754; *Zander v. Zander*, 720 N.W.2d 360, 364 (Minn. App. 2006), *rev. denied* (Minn. Nov. 14, 2006). Findings of fact are not clearly erroneous if the record reasonably supports them. *In re Civ. Commitment of Kenney*, 963 N.W.2d 214, 221, 223 (Minn. 2021).

The district court denied LC's motion because the court concluded that the liquidated-damages clause is an unenforceable penalty. Liquidated-damages clauses "fix the amount to be paid *in lieu of performance*" "when actual damages are difficult to ascertain or prove." *Frank v. Jansen*, 226 N.W.2d 739, 743 (Minn. 1975); *In re Qwest's Wholesale Serv. Quality Standards*, 702 N.W.2d 246, 262 (Minn. 2005). But a liquidated-damages clause that constitutes a "penalty" is unenforceable. *Frank*, 226 N.W.2d at 743.

Waiver of Athena's penalty argument

LC argues that the district court erred by ruling on Athena's penalty claim because Athena waived the issue by failing to plead it as an affirmative defense. The district court ruled that any error in ruling on the penalty issue without Athena pleading it did not prejudice LC given LC's notice of and response to Athena raising the issue in its trial brief.

We agree with the district court. Athena raised the penalty defense in its trial brief. LC responded in its trial brief that Athena should have pleaded the penalty defense and that the liquidated-damages clause is enforceable and not a penalty. At trial—as LC admits—"LC made a record" to negate the penalty defense. Thus, we reject LC's waiver argument

because any error in failing to plead the penalty defense did not affect LC's substantial rights. *See* Minn. R. Civ. P. 61; *cf. Harry N. Ray, Ltd. v. First Nat'l Bank of Pine City*, 410 N.W.2d 850, 855 (Minn. App. 1987) (stating that party challenging amendment of pleadings raising new issues has burden of showing prejudice from the amendment).

District court briefing deleted from court file

LC relatedly contends that the district court prejudicially erred by deleting LC's reply to Athena's written closing argument from the court file twice and redacting LC's memorandum supporting its motion for amended findings or a new trial (which discussed the refiled reply) on remand.[2] The district court did this because LC filed the reply after the court had filed a notice intending to deny LC's request to file a reply, but ambiguously denying only Athena's request to respond to any reply by LC.

LC offers no Minnesota law showing that the district court erred. In any event, the deleted reply to Athena's closing argument contains a liquidated-damages argument that LC duplicated and expanded on in its postremand memorandum supporting its motion for amended findings or a new trial. Any error in deleting and redacting LC's district court briefing was harmless. Minn. R. Civ. P. 61; *Bloom v. Hydrotherm, Inc.*, 499 N.W.2d 842, 845 (Minn. App. 1993), *rev. denied* (Minn. June 28, 1993) (stating that challenger has burden of showing prejudice under harmless-error doctrine).

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[2] LC moved this court to supplement the record. This court denied the motion but ruled that we may consider the deleted or redacted documents to address a challenge to the deletions and redactions. *Athena 2004, LLC v. LC Rochester, Inc.*, No. A22-0609 (Minn. App. June 7, 2022) (order).

Reasonable forecast and ability to ascertain actual damages

If substantial completion has not occurred, the applicable liquidated-damages period based on when the damages phase of this case occurred is September 1, 2014, to November 9, 2018. But the district court based its calculation of approximately $141,000 in accrued liquidated damages on a substantial-completion date in December 2016. Regardless of the correct substantial-completion date, we agree that the liquidated-damages clause constitutes a penalty. Because the substantial-completion issue is immaterial to our liquidated-damages conclusion, we resolve this case without deciding LC's claim that substantial completion has not occurred.[3] We now proceed to the penalty issue.

Liquidated-damages clauses are prima facie valid, meaning proof of actual damages is not required for enforcement. *Dean Van Horn Consulting Assocs., Inc. v. Wold*, 395 N.W.2d 405, 407 (Minn. App. 1986); *Dean Van Horn Consulting Assocs., Inc. v. Wold*, 367 N.W.2d 556, 560 (Minn. App 1985), *rev. denied* (Minn. July 17, 1985). But a liquidated-damages clause is enforceable only "(1) if the fixed amount is a reasonable forecast of just compensation for the harm caused by the breach; and (2) if the harm is

[3] We nonetheless observe that—viewing the contract in context—the district court incorrectly ruled that substantial completion can occur under the contract without a permanent certificate of occupancy issuing. *Storms, Inc. v. Mathy Constr. Co.*, 883 N.W.2d 772, 776 (Minn. 2016) (stating that courts should interpret a contract "as a whole and attempt to harmonize all of its clauses"). Under section 7(a) of the contract, the "[l]andlord's [w]ork" includes "all work" necessary to make the south store "compliant with all applicable laws." Thus, substantial completion requires a permanent certificate of occupancy under the Minnesota State Building Code. Minn. R. 1300.0220, subps. 1 (stating that no building shall be used or occupied until the building official has issued a certificate of occupancy), 6 ("The building official is authorized to issue a temporary certificate of occupancy before the completion of the entire work covered by the permit, provided that the portion or portions shall be occupied safely.") (2021).

incapable or very difficult of accurate estimation." *Bellboy Seafood Corp. v. Nathanson*, 410 N.W.2d 349, 352 (Minn. App. 1987). A liquidated-damages clause is an unenforceable penalty if its purpose "is to secure performance" rather than fairly compensate a party for an injury caused by a breach. *Frank*, 226 N.W.2d at 743; *Qwest's Wholesale Serv.*, 702 N.W.2d at 262.

"The controlling factor" in determining enforceability is not the parties' intent but "whether the amount agreed upon is reasonable . . . in . . . light of the contract as a whole, the nature of the damages contemplated, and the surrounding circumstances." *Gorco Constr. Co. v. Stein*, 99 N.W.2d 69, 74 (Minn. 1959). If the actual damages resulting from a breach are measurable and liquidated damages are "greatly disproportionate" to them, the liquidated-damages clause is unreasonable and a penalty. *Id.* at 75. Whether a liquidated-damages clause constitutes an unenforceable penalty under established facts is a question of law reviewed de novo. *Maslowski v. Prospect Funding Partners LLC*, 978 N.W.2d 447, 455 (Minn. App. 2022), *rev. granted* (Minn. Sept. 28, 2022).

Kolas's alleged admissions

LC argues that Kolas testified that the liquidated-damages measure is reasonable, precluding the district court from concluding otherwise. We disagree. Kolas's testimony was perhaps relevant but not legally conclusive on the penalty issue. At any rate, Kolas did not admit in his trial testimony that the liquidated-damages measure is reasonable. Kolas testified only that the contract *says* that the liquidated-damages measure is a reasonable forecast of damages and that he admitted in his deposition that the measure is a reasonable forecast. Moreover, LC did not offer Kolas's deposition as an exhibit. To the

extent that the district court's penalty determination rests on factual findings regarding Kolas's testimony, those findings are not clearly erroneous.

Nature of the damages contemplated

Gommels testified that LC entered into the contract believing that it would have time to evaluate the performance of both the south and north stores before the December 2015 deadline to terminate or renew the north-store lease—six months before that lease would expire in May 2016. Gommels testified that because of the south store's construction delays, LC missed its termination-or-renewal deadline for the north store and was forced to negotiate a five-year lease extension for the north store or risk having no income given the uncertainty around the south store's construction. LC therefore claims that $116,000 in north-store lease payments and $77,000 in lost north-store profits due to the north- and south-store leases overlapping are the kind of damages that the parties contemplated. We assume that LC is correct given an apparent lack of contrary findings or record evidence and the prima facie validity of liquidated-damages clauses.

Lost profits are generally the kind of hard-to-prove damages reasonably covered by a liquidated-damages clause. *Meuwissen v. H. E. Westerman Lumber Co.*, 16 N.W.2d 546, 550 (Minn. 1944). But as to the north-store lease payments, the district court found that the terms of the north-store lease "were known and readily ascertainable to LC" when entering into the south-store contract, and that LC "always contemplated" closing the north store. LC does not challenge these findings. Because lost profits are generally unascertainable and the prospective damages for the north-store lease payments were ascertainable, we conclude that the nature of the damages contemplated is close to neutral.

Contract as a whole

Regarding the contract as a whole, we note that liquidated damages perpetually accrue until substantial completion notwithstanding whether LC opened the south store or whether LC sustained actual damages after opening the south store. Yet, section 7(c) of the contract allowed LC to terminate the lease any time before substantial completion. Section 7(c) thus lessened any need for liquidated damages by allowing LC to search for rental space while maintaining its lease at the north store in case of delays in opening the south store. Even so, section 7(c) also provided that if LC terminated the contract before substantial completion, Athena would still owe LC "an amount equal to any accrued [r]ent credits." Because section 7(c) of the contract would have allowed LC to terminate the contract and still recoup liquidated damages, the perpetually accruing liquidated damages are designed at least partially to "secure" substantial completion rather than compensate for any prospective loss. *Frank*, 226 N.W.2d at 743; *Qwest's Wholesale Serv.*, 702 N.W.2d at 262. The contract as a whole suggests that the liquidated-damages clause is a penalty.

Surrounding circumstances

The surrounding circumstances favor ruling the liquidated-damages clause a penalty. As discussed, LC could have terminated the contract any time during the construction delay and still recouped the liquidated damages accrued at the time of termination. As the district court found, this suggests that LC "had not suffered any loss due to the delay" when it nonetheless entered into the addendum in October 2016—shortly before opening the south store in January 2017. This opening date was just 16 days later than scheduled under the now void addendum. And as to any damages from the north-

store lease payments, the district court found that they ultimately were "not related" to Athena's breach.

LC does not assert that these findings are clearly erroneous. These findings show that any damage to LC from Athena breaching the contract was minor and "bears [no] reasonable relation" to the free rent accrued under the liquidated-damages clause. *Gorco*, 99 N.W.2d at 76. In turn, these findings show that the liquidated-damages clause has chiefly functioned to "secure" substantial completion. *Frank*, 226 N.W.2d at 743. We conclude that the liquidated-damages clause is not a reasonable forecast of loss, but rather constitutes an unenforceable penalty.

The district court also found that it lacked sufficient evidence to determine whether LC lost any income in 2017 from the north store due to Athena's breach of the contract. But assuming that LC lost $77,000 in north-store profits, the district court determined that $141,000 in liquidated damages is "manifestly disproportionate," rendering the liquidated-damages clause unenforceable. We agree that this disproportionality is too great to enforce the liquidated-damages clause. *Maslowski*, 978 N.W.2d at 456 (concluding that $14,850 in liquidated damages was greatly disproportionate to $6,000 in actual damages).

LC mainly contends that Athena failed to meet its burden on the penalty issue by offering no evidence. Athena instead relied primarily on cross-examination of Gommels and LC's evidence. LC also claims that the district court erroneously required LC to prove actual loss.

LC is correct that Athena needed to persuade the district court on the penalty issue based on the evidence. But LC offers no law precluding the legal conclusion that the

liquidated-damages clause is a penalty based on Athena's cross-examination of Gommels and evidence presented by LC. LC cites only inapposite caselaw stating that a party fails to establish an affirmative defense "if *all* the evidence fails" to prove it. *Howard v. Marchildon*, 37 N.W.2d 833, 836 (Minn. 1949) (emphasis added).

LC also misinterprets the district court's findings as requiring proof of actual loss. The district court did highlight LC's failure to offer evidence of actual loss. But the district court properly recognized the prima facie validity of the liquidated-damages clause and found the presumption of validity rebutted based on all the evidence. *See id.*; *see also Schmit Towing, Inc. v. Frovik*, No. A12-0989, 2012 WL 6652637, at *4 (Minn. App. Dec. 24, 2012) ("The district court did not find that Schmit had to prove actual damages. Rather, it concluded that Frovik presented sufficient evidence to show that damages from the breach . . . were susceptible of definite measurement, and that Schmit failed to present sufficient evidence to rebut Frovik's assertion."), *rev. denied* (Minn. Mar. 19, 2013).[4] We reject LC's position that Athena needed to offer more evidence on the penalty issue and that the district court required LC to prove actual damages.

Attorney fees

By NORA, Athena challenges the attorney-fee awards. Generally, litigants may not recover attorney fees unless authorized by contract or statute. *Osborne v. Chapman*, 574 N.W.2d 64, 68 (Minn. 1998). Here, the district court awarded attorney fees under the contract.

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[4] Nonprecedential opinions are not binding but may be persuasive. Minn. R. Civ. App. P. 136.01, subd. 1(c). We find the reasoning of *Schmit Towing* persuasive here.

Athena's attorney-fee award

Athena contends on several grounds that its $10,000 attorney-fee award is insufficient compared to its request for $54,345.84. "The proper method to calculate an award of attorney fees is a question of law" reviewed de novo. *State by Comm'r of Transp. v. Krause*, 925 N.W.2d 30, 32 (Minn. 2019). The underlying factual findings, including the "reasonable value of counsel's work[,]" are reviewed for clear error. *Northfield Care Ctr., Inc. v. Anderson*, 707 N.W.2d 731, 735-36 (Minn. App. 2006). But "the reasonableness of a particular award" is reviewed for an abuse of discretion. *Krause*, 925 N.W.2d at 33.

The parties and the district court assumed that the "lodestar method" of calculating attorney fees applied. Under that method, the district court must first "calculate the initial lodestar amount by multiplying the reasonable number of hours expended by a reasonable hourly rate." *Id.* Reasonableness depends on "all relevant circumstances, including the time and labor required; the nature and difficulty of the responsibility assumed; the amount involved and the results obtained; the fees customarily charged for similar legal services; the experience, reputation, and ability of counsel; and the fee arrangement existing between counsel and the client." *State by Head v. Paulson*, 188 N.W.2d 424, 426 (Minn. 1971); *Milner v. Farmers Ins. Exch.*, 748 N.W.2d 608, 621 (Minn. 2008) (setting forth *Paulson* factors as part of calculating lodestar amount). "Then, other considerations may lead the district court to enhance or decrease the lodestar amount[.]" *Krause*, 925 N.W.2d at 33.

Athena claims that the district court erroneously applied "a lodestar discount" without determining the initial lodestar amount. But our supreme court has adopted the

lodestar method only for statutory attorney fees. *Id.* And this court has reviewed the reasonableness of contractual attorney fees with straightforward reference to the *Paulson* factors. *Northfield Care Ctr.*, 707 N.W.2d at 736. In effect, the district court properly did the same here by straightforwardly applying *Paulson* after finding insufficient evidence to determine the initial lodestar amount.

Athena also claims that the district court could not consider Athena's fault for the litigation when determining the reasonableness of its attorney fees. But *Paulson* allows district courts to consider "all relevant circumstances." 188 N.W.2d at 426. Athena cites no law suggesting that the district court could not consider Athena's fault a relevant factor. We conclude that the district court did not abuse its discretion by doing so. *Bloom*, 499 N.W.2d at 845 (stating that appellant has burden of showing error).

Athena argues further that the district court abused its discretion when applying the *Paulson* factors and clearly erred in its underlying factual findings. Athena seemingly claims that the district court erroneously found the evidence insufficient to evaluate most of the *Paulson* factors because Athena provided the documentation required by Minn. R. Gen. Prac. 119.02. Rule 119.02 requires the moving attorney to submit an affidavit describing the specific work performed, providing the hourly rate for each person seeking compensation, detailing amounts sought for disbursements and expenses, and confirming that the work was for the client's benefit. Minn. R. Gen. Prac. 119.02.

Rule 119.02 "is intended to provide a standard set of documentation that allows the majority of fee applications to be considered by the court without requiring further information." Minn. R. Gen. Prac. 119 1997 advisory comm. cmt. But the "rule is not

intended to limit the court's discretion" to determine reasonable attorney fees. *Id.*; *cf. Gully v. Gully*, 599 N.W.2d 814, 826 (Minn. 1999) (holding that district court could waive requirements of rule 119.02 in part because the rule does not limit the court's discretion). We reject Athena's suggestion that rule 119.02 bound the district court to any particular factual finding or attorney-fee award.

Athena also contends that the district court could not analyze Athena's attorney-fee request for reasonableness because LC did not object to the request. For this proposition, Athena asserts that "when the reasonableness of the charges [is] challenged . . . the [district] court must . . . provide a concise but clear explanation of its reasons for the fee award." *Anderson v. Hunter, Keith, Marshall & Co.*, 417 N.W.2d 619, 629 (Minn. 1988) (quotation omitted). But this principle does not limit the district court's discretion to sua sponte analyze an attorney-fee request for reasonableness.

We now turn to the district court's evaluation of the *Paulson* factors. The district court found that Athena's attorney's affidavit and billing statements provided "limited information" and did not allow the court to determine the time and labor required. The district court nonetheless found that both parties spent an unreasonable amount of time on the litigation. This finding is not clearly erroneous given that a district court may base its reasonableness determination on "its observation of the services performed." *Bowman v. Bowman*, 493 N.W.2d 141, 146 (Minn. App. 1992). Even if the district court ignored the time and labor required and thereby abused its discretion, any error did not affect Athena's substantial rights because the time-and-labor factor weighed against Athena. *See* Minn. R. Civ. P. 61.

Regarding the nature and difficulty of the responsibility assumed, the district court found that it lacked sufficient information to determine whether the issues in this case supported the amount of attorney fees sought by Athena. Athena does not explain how the district court abused its discretion or clearly erred by requiring more evidence on the nature-and-difficulty factor before factoring it into the court's reasonableness calculus. We therefore conclude that the district court properly evaluated the nature-and-difficulty factor. *Bloom*, 499 N.W.2d at 845.

On the amount involved and results obtained, Athena claims that the district court abused its discretion because Athena obtained approximately 97% of the damages it sought. But the district court focused on the proportionality of the damages obtained to the attorney fees sought, which is important to the amount involved and results obtained. *Milner*, 748 N.W.2d at 623-24 (stating focus is on whether attorney-fee award is reasonable "in relation" to results obtained (quotation omitted)); *Bloomington Elec. Co. v. Freeman's, Inc.*, 394 N.W.2d 605, 608 (Minn. App. 1986) (reducing district court's attorney-fee award by more than half in part because award was "nearly equal" to the damages obtained), *rev. denied* (Minn. Dec. 17, 1986). The district court did not abuse its discretion as to the amount involved and results obtained by granting Athena $10,000 in attorney fees when Athena requested $54,345.84—nearly equal to its damages award of $59,271.70.

As to the customary fees for similar legal services, the district court found that Athena presented "[n]o information." Athena claims this was clear error because its attorney's affidavit states that the hourly rates of those worked on the case were "consistent" with charges "for legal services in this community" by personnel "with

equivalent character, experience, and ability." But Athena provided no evidence substantiating this conclusory statement. The district court did not clearly err by finding that Athena presented no information on the customary fees for similar legal services.

As for the experience, reputation, and ability of counsel, the district court found that Athena's attorney is "experienced" but that this factor was "not at issue." In light of the district court's familiarity with this matter and its superior "position to evaluate the reasonableness of requested attorney fees," we conclude that the district court did not abuse its discretion by giving the experience factor no weight. *Kelbro Co. v. Vinny's on the River, LLC*, 893 N.W.2d 390, 399 (Minn. App. 2017) (quotation omitted).

The district court also found that Athena provided no "documentation of the fee arrangement." While Athena did not submit a written fee agreement, it provided an affidavit from Kolas explaining the fee agreement. But even if the district court clearly erred by finding no documentation of the fee agreement, Athena offers no reason why its fee agreement would have led the district court to award more attorney fees. Thus, Athena has not shown that any error affected its substantial rights. *See* Minn. R. Civ. P. 61; *Bloom*, 499 N.W.2d at 845. Given the district court's focus on the amount involved, the results obtained, and Athena's responsibility for the litigation, we will not disturb the court's $10,000 attorney-fee award to Athena.

LC's attorney-fee award under indemnity clause

Finally, Athena argues that the contractual indemnity provision under which the district court awarded attorney fees to LC does not apply. This argument requires us to interpret the indemnity provision. To do that, we must determine de novo whether the

indemnity provision is ambiguous. *See Dykes v. Sukup Mfg. Co.*, 781 N.W.2d 578, 582 (Minn. 2010). The provision is "ambiguous if it is susceptible to two or more reasonable interpretations." *Id.* If the indemnity provision is unambiguous, we give effect to the contract's language. *Halla Nursery, Inc. v. City of Chanhassen*, 781 N.W.2d 880, 884 (Minn. 2010).

The indemnity provision states that Athena "shall indemnify" LC "against and hold [LC] harmless from," among other things, all "damages," "liabilities," and "reasonable expenses . . . incurred in connection therewith (including . . . reasonable attorney[], consultant[] and expert[] fees and costs) arising out of . . . any breach or default" of the contract by Athena. The district court ruled that this provision unambiguously permitted an award of attorney fees to LC because the definition of "[i]ndemnify" includes reimbursing a loss caused by "a third party's or one's own act or default." But this reading is redundant. Athena would not need to indemnify or "hold [LC] harmless from" damages to LC caused by Athena's own breach of contract in a suit between the parties. Athena would be liable for those damages regardless of any indemnity provision. The indemnity clause is naturally read as only covering attorney fees incurred by LC in a lawsuit between LC and a third party arising from Athena's breach of the contract. We conclude that this is the unambiguously correct reading given that only a "*specific* contract" may authorize contractual attorney fees. *Osborne*, 574 N.W.2d at 68 (emphasis added).

Other context supports this conclusion. Section 26 of the contract entitles LC to reimbursement of attorney fees incurred "to remedy" Athena's "default." LC did not argue below that section 26 allowed it to recover attorney fees. And it does not so argue to this

court. We cannot suppose that the parties intended recovery of LC's attorney fees under the indemnity clause when section 26 specifically allows reimbursement of attorney fees incurred to remedy Athena's default.

We also recently concluded that a similar indemnity provision did not authorize an attorney-fee award. *See Onofre v. Hernandez*, No. A18-1452, 2019 WL 1983496, at *2-3 (Minn. App. May 6, 2019).[5] The provision stated that "[b]uyer shall indemnify, defend and hold [s]eller harmless from and against any and all . . . costs and obligations . . . (including reasonable counsel fees), which [s]eller may suffer . . . arising out of or based upon" the buyer's breach of the contract. *Id.*, at *2. This court stated that "the context . . . implie[d] the narrow, more typical application as to losses caused by a third person" because "[t]he contract refer[red] to losses specifically 'arising out of or based upon . . . the breach,' not losses incurred to enforce rights under the contract or costs to prove a breach of the contract." *Id.*, at *3. "Given the presumption against the court's authority to order one party to pay another's attorney fees and given the need for specific contract language to activate that authority, the indemnity provision . . . [was] insufficient." *Id.*

Although the indemnity provision here does not include a duty to "defend," the reasoning from *Onofre* applies. We follow that reasoning by reversing LC's attorney-fee award.

Affirmed in part and reversed in part.

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[5] Nonprecedential opinions are not binding but may be persuasive, as *Onofre* is here. Minn. R. Civ. App. P. 136.01, subd. 1(c).