STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1079

Sandi Raines,
Appellant,

vs.

Boulder Village Townhomes Association, et al.,
Respondents.

Filed June 8, 2010
Affirmed in part, reversed in part, and remanded
Stauber, Judge

Dakota County District Court
File Nos. 19C707011825; 19C307008842;

Paul F. Shoemaker, John R. Shoemaker, Shoemaker & Shoemaker, P.L.L.C., Bloomington, Minnesota (for appellant)

Charles E. Jones, Melissa Dosick Riethof, Meagher & Geer, P.L.L.P., Minneapolis, Minnesota (for respondents)

Considered and decided by Stauber, Presiding Judge; Stoneburner, Judge; and Ross, Judge.

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

STAUBER, Judge

After hearings in her ongoing dispute with her townhome association, respondent Boulder Village Townhomes Association, the association ruled against appellant Sandi Raines on several issues, fined her, and imposed liens on her unit to secure payment of

those fines. Raines then sued the association and its president Jim DeLong (together, BVTA). The district court granted BVTA summary judgment on both Raines's claims against it and BVTA's counterclaim against Raines. An amended judgment later awarded BVTA attorney fees, and the district court denied Raines's motion to vacate the judgment. Raines appeals. Because the findings supporting the district court's fee award are insufficiently specific for us to review that award, we reverse in part and remand for more specific findings regarding attorney fees. Because the district court did not otherwise misapply the law, abuse its discretion, or make findings unsupported by the record, we affirm the other aspects of the district court's rulings.

D E C I S I O N

I.

Raines challenges the summary judgment granted on her claims against BVTA for slander of title, declaratory judgment, breach of the covenant of quiet enjoyment, and discrimination. On appeal from summary judgment, appellate courts view the evidence in the light most favorable to the party against whom summary judgment was granted, and review de novo whether a genuine issue of material fact exists and whether the district court misapplied the law. *Peterka v. Dennis*, 764 N.W.2d 829, 832 (Minn. 2009).

A. Slander of Title

Slander of title requires, among other things, a false statement about the plaintiff's real property, and that the false statement was published "maliciously." *Paidar v. Hughes*, 615 N.W.2d 276, 279–80 (Minn. 2000). Raines argues that liens BVTA put on her unit are false statements because they are authorized by neither the relevant statutes

nor BVTA's governing documents. The district court ruled that Raines presented evidence of neither falsity nor malice.

1. 2005 Lien

Generally, appellate courts address only questions presented to and considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Here, it is not clear that Raines raised the issue of the 2005 lien in district court. But even if she did, the district court did not address that lien in the summary-judgment order. Nor did Raines later ask the district court to address an omitted issue. Thus, Raines's argument regarding the 2005 lien is not properly before this court, and we decline to address it.[1]

2. 2007 Lien

The crux of Raines's challenge to the 2007 lien is that it allegedly included assessments related to violations of non-existent parking regulations. Some parking regulations were enacted after the assessment in question, but BVTA found that Raines's pre-enactment parking-related conduct violated a series of then-existing Declaration

[1] Even if we addressed Raines's argument, she would not prevail. The 2005 lien stated that its amount could vary depending on costs BVTA might later incur. Because this was accurate, Raines did not show the lien amount to be false. Nor did she show that the fact that BVTA had yet to incur some of the amounts to be secured by the lien meant that BVTA lacked authority to impose the lien. Declaration § 8.3 allows BVTA to make Raines's nonconforming deck conform to the approved plan and to assess her unit for the cost of doing so. Because Raines built a nonconforming deck, the 2005 lien secured her existing, albeit then-unmonetized, obligation to reimburse BVTA for costs BVTA might incur in making her deck conform to the approved plan. That BVTA let Raines's nonconforming deck *temporarily* remain in place waived neither BVTA's right to make the deck conform nor its right to assess Raines's unit for the cost of doing so. Thus, because Raines did not show that BVTA lacked authority to create the lien, she did not show BVTA's exercise of that authority to be malicious.

provisions and Rules and Regulations. On appeal, Raines does not assert that these provisions were improperly applied to her.

Raines also challenges the portion of the 2007 lien securing her obligation to pay an assessment for feeding raccoons on her property. She argues that there is no evidence that she violated a rule prohibiting feeding of animals after such a rule was enacted. But BVTA's raccoon-related assessment was for Raines's violations of the portions of the Declaration and of the Rules and Regulations addressing unit owners' rights to quiet enjoyment, prohibiting conduct that could cause waste or an increase in insurance rates, or could otherwise cause liability, health, or safety risks for BVTA, and barring the "[f]eeding of wild animals other than birds."[2] On appeal, Raines does not assert that these provisions were improperly applied to her.[3]

For the first time in her reply brief, Raines challenges the 2007 lien by arguing that the attorney fees associated with that lien are excessive. Issues not raised in a party's principal brief are not properly before this court. *McIntire v. State*, 458 N.W.2d 714, 717 n.2 (Minn. App. 1990), *review denied* (Minn. Sept. 28, 1990); *see* Minn. R. Civ. App. P.

[2] Raines argues that she was penalized for the feeding of raccoons occurring before enactment of the provision prohibiting the feeding of non-bird wildlife. But BVTA found that (1) Raines admitted to feeding raccoons from her deck after the provision's enactment, and to receiving BVTA's resulting notice of violation and (2) at its hearing, BVTA produced photographs and witnesses of such feeding after the enactment.

[3] On appeal, Raines argues that the district court erred by granting summary judgment in favor of BVTA on her claim for a declaratory judgment regarding the validity of the 2007 lien. But because BVTA had authority to rule that Raines violated the provisions in question, we need not further address Raines's declaratory-judgment argument on this point.

128.02, subd. 4(requiring a reply brief to be confined to "new matter" raised in a respondent's brief). Therefore, we decline to address the question.

B. Declaratory Judgment

Raines argues that under BVTA's "governing documents," BVTA's failure to notify her within six months of the completion of her deck that it encroached on BVTA's common areas waived BVTA's right to take action against her for the encroachment. Raines does not identify the "governing documents" that are the basis for her argument and does not cite any aspect of either the Declaration or the Rules and Regulations, or any other portion of the record, to support her argument. Therefore, her argument is waived. *See State, Dep't of Labor & Indus. v. Wintz Parcel Drivers, Inc.*, 558 N.W.2d 480, 480 (Minn. 1997) (stating that a party who inadequately briefs an issue waives that issue).[4]

[4] If the basis for Raines's argument is Declaration § 8, her argument is unpersuasive. That section addresses a unit owner's ability to alter her unit, forbids alteration without prior written approval of the BVTA board, and states that "[i]f no request for approval is submitted," proposed approvals are denied unless the alterations are reasonably visible and no written notice of violation is given to the unit owner within six months of the alteration's completion. Because this provision applies if a unit owner does *not* request approval for an alteration and because Raines *sought and received* approval for her deck but did not build a deck conforming to the approved plan, this section does not apply here. Also, Raines's deck was completed in spring 2004, and the district court noted that the minutes of BVTA's August 31, 2004 meeting were distributed to all BVTA members. Those minutes, referring to Raines's unit, state that a motion to remove the part of Raines's deck that encroached on the common area, as well as to remove the ramp to Raines's deck, passed "unanimously." Thus, even if Declaration § 8 applied here, it would not be satisfied because Raines received written notice of the violations within six months of the deck's completion.

C. Quiet Enjoyment

Raines argues that BVTA violated her right to quiet enjoyment of her unit by subjecting her to stricter enforcement of the Declaration and of the Rules and Regulations than other BVTA unit owners. The Declaration states that "[a]ll Owners and Occupants" have a right of quiet enjoyment in units and are to act in a manner that will not "unduly restrict, interfere with or impede the use of the Property by other Owners and Occupants and their guests." Because the Declaration defines an "owner" as a person who owns a unit and an "occupant" as a person who resides in a unit but does not own it, it is not clear that this provision applies to BVTA, itself. But even if it does, Raines's citation to *Efta v. Swanson*, 115 Minn. 373, 376, 132 N.W. 335, 336 (1911), for the proposition that a breach of the covenant of quiet enjoyment occurs "[w]hen an outstanding superior title is asserted in hostility to the title of the covenantee" does not require reversal. BVTA has a duty to protect the interests of other unit owners, and here certain assessments against Raines were based on complaints against Raines by other unit owners. Thus, Raines has shown neither that BVTA lacked authority to act against her nor that BVTA's exercise of its authority, which was admittedly detrimental to Raines, was hostile to her, as opposed to a defense of the rights of other unit owners.

Raines asserts that a double standard regarding BVTA's enforcement of its Declaration and its Rules and Regulations is shown by the requirement that she remove her deck's ramp because it encroached on common property while other unit owners were not required to remove "invisible [dog] fences" allegedly encroaching on common areas. But the record does not show that the fences created the possibility of "liability

issues," as does Raines's ramp. Raines also asserts that "affidavits of Lynn and Brian King" are evidence of a double standard, but does not otherwise identify those affidavits.[5] Raines also states that "several third parties averred to facts demonstrating the hyper-sensitive nature in which [BVTA] assessed violations against [Raines] for . . . parking violations." But Raines identifies neither the third parties nor the portion of the record allegedly supporting her assertions. In any event, that BVTA had authority to make its parking determinations resolves this aspect of Raines's argument. And while Raines makes the general assertion that she "described numerous instances of how [BVTA] interfered with work being done on her behalf by her own contractors, or in refusing to perform repairs for her Unit without justification[,]" she does not otherwise identify either the events in question or where in the record her allegations can be found. If Raines refers to her September 16, 2008 affidavit and exhibits, many of her assertions are conclusory, and she ignores the facts that BVTA has a maintenance-and-repair easement over all land in the association, has the authority to remove unapproved alterations of the unit, and that no work is to be done on a unit without prior approval of the board.

[5] If Raines refers to the Kings' affidavits of September 15, 2008, her argument is unpersuasive. To successfully avoid a summary judgment, a party must provide "sufficient specific facts to raise a jury issue." *Lundgren v. Eustermann*, 370 N.W.2d 877, 881 (Minn. 1985). Brian King's September 15, 2008 affidavit generally alleges that BVTA retaliates against those questioning its decisions and BVTA treated Raines unfairly, but the affidavit does not specifically identify the retaliatory conduct against Raines, when it occurred, or whether there were possible non-retaliatory explanations for that conduct. And the bulk of Lynn King's September 15, 2008 affidavit runs afoul of the rule that "hearsay is insufficient to avoid summary judgment." *Rademacher v. FMC Corp.*, 431 N.W.2d 879, 881 (Minn. App. 1988).

D. Discrimination

Raines's amended complaint asserted that BVTA refused to permit reasonable modifications of her property to allow it to be occupied by her disabled mother, and therefore that BVTA violated Minn. Stat. § 363A.10 (2008). The district court granted summary judgment for BVTA on this claim, noting that (1) under Minn. Stat. § 363A.28, subd. 3 (2008), discrimination claims must be brought within one year of the practice at issue; (2) in August 2004, BVTA denied Raines's application to retain her unapproved ramp; (3) Raines filed her first suit in August 2006; and (4) even if Raines's 2008 amended complaint related back to the original complaint, it was still undisputed that "more than one year elapsed between the alleged discriminatory practice and the commencement of [Raines's] lawsuit." Raines, referring to a series of ramp-related activities by BVTA occurring as late as April 2007, argues to the contrary, based on a theory of a continuing violation of the prohibition on discrimination. But because Raines's continuing-violation argument was not presented to and considered by the district court, it is not properly before this court. *Thiele*, 425 N.W.2d at 582.[6]

[6] We also note that because the post-August 2004 events to which Raines refers involve when and how the ramp would be removed, rather than *whether* it would be removed, Raines is essentially arguing for a tolling of the limitations period based on the time BVTA took to implement its otherwise unambiguous decision to remove the encroachment and ramp. No such exemption exists in the statute. Minn. Stat. § 363A.28, subd. 3. Moreover, because BVTA allowed Raines to temporarily retain the ramp until it was no longer needed, this case could involve an accommodation under the statute. *See* Minn. Stat. § 363A.10, subd. 1 (addressing accommodations).

II.

In townhome-association litigation, the district court "may award reasonable attorney's fees and costs of litigation to the prevailing party." Minn. Stat. § 515B.4–116 (2008). But an association's insurer is not subrogated against a unit owner or against the association and members of its board. Minn. Stat. § 515B.3–113(d)(2) (2008); *see* Minn. Stat. § 515B.3–113(a) (2008) (requiring an association to procure insurance). Here, BVTA's insurer defended BVTA against Raines's claims that were covered by insurance, and BVTA had separate counsel pursue its counterclaim against Raines and defend BVTA against Raines's claims that were not insured. The district court awarded BVTA $31,873.46 in attorney fees against Raines, which included an unspecified amount for fees generated by BVTA's attorney in assisting the insurer's attorney with defending BVTA against Raines's claims that were covered by insurance. The district court found that these fees were "reasonable and necessary" and that this work done by BVTA's attorney was not "duplicative" of work done by the insurer's attorney. Raines challenges this award.

An appellate court will reverse a district court's attorney-fee ruling if the ruling is an abuse of discretion. *Becker v. Alloy Hardfacing & Eng'g Co.*, 401 N.W.2d 655, 661 (Minn. 1987). A district court can abuse its discretion regarding attorney fees by (1) basing its decision on either findings of fact that are not supported by the record or an erroneous view of the law or (2) otherwise exercising its discretion in an arbitrary or capricious manner. *See State, Campaign Fin. & Pub. Disclosure Bd. v. Minn. Democratic-Farmer-Labor Party*, 671 N.W.2d 894, 899 (Minn. App. 2003). Appellate

courts review a district court's findings of fact for clear error, but review questions of statutory construction de novo. Minn. R. Civ. P. 52.01 (findings of fact); *Ly v. Nystrom*, 615 N.W.2d 302, 307 (Minn. 2000) (construction of an attorney-fee statute).

Raines argues that, to the extent that BVTA's attorney assisted the insurer's attorney in defending against the insured claims, requiring her to pay the resulting attorney fees violates the anti-subrogation provision of Minn. Stat. § 515B.3–113(d)(2). We agree. To the extent that BVTA's attorney did work necessary to defend BVTA against Raines's uninsured claims or pursue BVTA's counterclaim, that work, even if it had ancillary or collateral benefit to the insurer's defense of the insured claims, was work that could be the basis for a fee award. But to the extent that BVTA's attorney did work that was not required to defend BVTA against Raines's uninsured claims or pursue BVTA's counterclaim against Raines, that work, even if it reduced the fees generated by the insurer's attorney, should not be the basis of a fee award against Raines. Had there been no uninsured claims, the insurer's attorney would have had to do that work from the ground up, and the anti-subrogation provision would have precluded such fees from being the basis of a fee award against Raines. Here, the district court's findings are insufficiently specific for this court to review whether and to what extent the fees awarded against Raines were fees generated by the work of BVTA's attorney that was not required to defend BVTA against Raines's uninsured claims or to pursue BVTA's counterclaim. A cursory review of BVTA's attorney's billing records reveals entries relating to time spent assisting insurance defense counsel. Therefore, we reverse the fee award and remand for the district court to clarify whether and to what extent the fee

award against Raines was for work done by BVTA's attorney on matters not involved in either defending Raines's uninsured claims against BVTA or in pursuing BVTA's counterclaim against Raines.

We note also that our supreme court "is committed to the policy that courts should follow a conservative policy in awarding attorney's fees." *Borchert v. Borchert*, 279 Minn. 16, 21, 154 N.W.2d 902, 906 (1967) (citing *Burke v. Burke*, 208 Minn. 1, 292 N.W. 426 (1940)). Thus, we feel obliged to comment on the extraordinarily high fees charged in this case. In addition to BVTA's private attorney's fees of nearly $32,000, insurance defense counsel charged nearly $112,000. And these fees were for litigation which began with parking issues, feeding of raccoons, and remediation of a nonconforming deck.

In the interest of providing guidance on remand, we briefly address some aspects of the parties' disputes over the reasonableness of the fee award. *See C.O. v. Doe*, 757 N.W.2d 343, 352 (Minn. 2008) (addressing questions to provide guidance on remand). Noting that Minn. Stat. § 515B.4-116(b) allows recovery of "reasonable" fees, Raines argues that to the extent the efforts of BVTA's attorney duplicated those of the insurer's attorney, the fees were not reasonable and not recoverable. Though the district court found "nothing in the submissions that would indicate that the work done by [BVTA's attorney] was unnecessary, or duplicative of [work by the insurer's attorney]," our cursory review does show possible duplication. Raines's only cite to the record identifying specific work that she alleges was duplicative is to the fact that both attorneys appeared at an April 10, 2009 hearing at which BVTA's attorney stated: "I have nothing

to add beyond [what was said by the insurer's attorney]. I'm just here in case he faints or something." Because the April 10, 2009 hearing addressed Raines's motion to vacate the judgment granting BVTA relief on its counterclaim against Raines and because that counterclaim was undisputedly *not* covered by insurance, the merit of Raines's argument on the point is self-evidently dubious. Also, the context of the comment about the insurer's attorney fainting makes it apparent that the comment was part of some good-natured ribbing of the insurer's attorney by BVTA's attorney.

Raines also argues that allegedly duplicative work by BVTA's attorney was motivated by intent to damage her. But the district court made no such finding. And to the extent Raines asks this court to make that finding, she runs afoul of this court's scope of review; appellate courts do not judge credibility and do not make findings of fact. *See Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988) (credibility); *Kucera v. Kucera*, 275 Minn. 252, 254, 146 N.W.2d 181, 183 (1966) (findings of fact).

III.

Raines challenges the district court's denial of her motion to vacate the judgment. Under Minn. R. Civ. P. 60.02, reopening a judgment requires the moving party to show (1) a reasonable defense on the merits; (2) a reasonable excuse for her failure to act; (3) that she acted with due diligence after notice of the entry of judgment; and (4) that no substantial prejudice will result to the other party if the judgment is vacated. *Nguyen v. State Farm Mut. Auto. Ins. Co.*, 558 N.W.2d 487, 490 (Minn. 1997). The burden of showing these factors is on the moving party. If the moving party meets its burden by showing these factors, whether to vacate the judgment is subject to the district court's

discretion. *Nelson v. Siebert*, 428 N.W.2d 394, 395 (Minn. 1988); *Jorissen v. Miller*, 399 N.W.2d 82, 84 (Minn. 1987).

Raines's motion to vacate argues that her failure to receive a copy of an August 29, 2008 discovery order precluded her from seeking discovery allowed by that order, which, she asserts, would have shown the existence of a reasonable claim on the merits. But the district court noted that the discovery order allowed Raines to go through BVTA's file at insurance-counsel's office a *second* time. Moreover, even though the order was sent to Raines's prior counsel due to an "administrative mix-up," Raines learned about the order on the same day as BVTA, and the court stated that Raines was therefore on "inquiry notice" regarding that order, and found Raines's explanation of why she did not seek a copy of the order to be "disingenuous" and "insincere." *See Sefkow*, 427 N.W.2d at 210 (stating that appellate courts defer to district court credibility determinations). Against this background, the district court stated that its prior summary-judgment order showed that Raines lacked a defense on the merits and that, because the only effect of the discovery order would have been to allow Raines to re-examine documents that she had already examined, the lack of a defense on the merits would not have changed as a result of additional discovery, or if it did change, any change would *not* have been the result of evidence that Raines could not have previously discovered. In addressing Raines's failure to act, the district court found that the court administrator's mistake in sending the order to Raines's prior counsel to be insufficient to excuse her failure to seek a copy of the order and that her lack of knowledge of its exact contents "did not deprive her of any discovery that she had not already had the opportunity to

obtain . . . [and that Raines] had already gone through the [BVTA] documents once." Not only does the record not show that the district court misapplied these two 60.02 factors, but Raines does not challenge the district court's analysis of these factors in anything but a conclusory fashion. Therefore, Raines has not shown that the district court misapplied these factors. *See Imperial Premium Fin., Inc. v. GK Cab Co.*, 603 N.W.2d 853, 857 (Minn. App. 2000) (stating that "[t]he existence of a reasonable defense on the merits must ordinarily be demonstrated by more than conclusory allegations in moving papers").

Because the record supports the district court's determinations that Raines failed to show these two elements of the test for vacating a judgment, we need not address whether she satisfied the other two prongs of the analysis. *See Hellerstedt v. MacGibbon*, 489 N.W.2d 247, 251 (Minn. App. 1992) (noting that that while a weak showing on one factor can be overcome by a strong showing on the other three, the district court did not abuse its discretion by denying a motion to reopen where the moving party failed to satisfy two of the four factors).

Whether to reopen the record on remand shall be discretionary with the district court.

Affirmed in part, reversed in part, and remanded.