In the Missouri Court of Appeals
Eastern District

DIVISION ONE

PELOPIDAS, LLC, ET AL.,	)	No. ED109395
	)	
Respondents,	)	Appeal from the Circuit Court of
	)	St. Louis County
vs.	)	
	)	Honorable Dean P. Waldemer
RACHEL KELLER,	)	
	)	
Appellant.	)	Filed: August 10, 2021

OPINION

Rachel Keller ("Keller") appeals from the judgment of the Circuit Court of St. Louis County, entered on November 30, 2020 ("Judgment"), which fully disposed of all the claims filed against her by Pelopidas, LLC ("Pelopidas") and Travis Brown ("Brown") (Pelopidas and Brown are hereinafter collectively the "Respondents"), as well as fully disposed of Keller's counterclaim against Respondents in this matter. The Judgment granted Respondents' motion for summary judgment against Keller with respect to Respondents' claims for breach of contract and a declaration that Keller had transferred her fifty percent (50%) ownership interest in Pelopidas to Brown, effective September 30, 2019, which was the date the parties initially agreed to resolve their prior lawsuit that Keller had commenced in 2016 ("2016 Lawsuit"). The Judgment also denied Keller's motion for summary judgment against Respondents with respect to her counterclaim seeking damages for their alleged failure and refusal to make an accelerated payment of $8.6 million pursuant to the terms of the settlement of the 2016 Lawsuit. In the

Judgment, the circuit court also: (1) *sua sponte* dismissed Keller's counterclaim against Respondents with prejudice; (2) enjoined Keller from claiming that she was still a member or owned fifty percent (50%) of Pelopidas; (3) instructed the parties to execute a written agreement to finalize the settlement of the 2016 Lawsuit whereupon Keller was to be paid the second installment payment of $1.1 million that Brown had placed in escrow; (4) denied all remaining claims asserted in this case; and (5) ordered Keller to pay Respondents' attorneys' fees in the amount of $408,326.

Keller raises six points on appeal, arguing that the circuit court erred in various ways in granting summary judgment for Respondents on their claims and her own counterclaim, denying her cross-motion for summary judgment with respect to Respondents' claims, *sua sponte* dismissing her counterclaim, and awarding Respondents their attorneys' fees.

We reverse and remand.

I. Factual and Procedural Background

A. Relationship of the parties

In 2007, Keller and Brown, who were married at the time, formed Pelopidas as a holding company for several "media-related brands," which engaged in certain political work and other related activities for a wealthy investor and political activist ("Investor"). At all relevant times, Keller and Brown each owned a fifty percent (50%) interest in Pelopidas. Keller and Brown divorced in 2014, but thereafter agreed to retain their respective ownership interests in Pelopidas. Brown became the company's sole manager, and Keller remained an employee of the company, drawing a salary and other benefits.

B. The 2016 Lawsuit and related events

In 2016, Keller commenced a lawsuit against Brown and Pelopidas, which sought damages and other relief arising from Brown's management of the company ("2016 Lawsuit"). Keller amended her petition several times, and following the dismissal of Pelopidas on March 6, 2019, she ultimately asserted six counts against Brown in her Verified Fourth Amended Petition. Keller alleged a variety of financial misconduct and breaches of fiduciary duty, including allegations that Brown used certain "phony loans" to steal large amounts money from Pelopidas and that he had wrongfully caused Pelopidas to terminate her employment with the company when she reported his unlawful activity. Keller also asserted a derivative claim against Brown on behalf of Pelopidas, in which she raised similar issues of misconduct and breaches of fiduciary duty.

In September 2019, two additional key events occurred: (1) Brown resigned as the sole manager of Pelopidas; and (2) Investor—the company's largest client and source of revenue—terminated his relationship with Pelopidas.[1]

C. Settlement of the 2016 Lawsuit

On September 30, 2019, the parties met with a mediator in an effort to resolve the claims asserted by Keller in the 2016 Lawsuit.[2] After an all-day mediation session that lasted late into the evening, the parties entered into a written agreement, entitled "Memorandum of Settlement" ("Settlement Memorandum"), whereby Keller agreed to transfer her fifty percent (50%) ownership interest in Pelopidas to Respondents, and in exchange Respondents agreed to pay

[1] At oral argument, Respondents' counsel represented that Pelopidas is now out of business, and thus, has no income. However, the parties also acknowledged that there is no evidence in the summary judgment record to this effect.

[2] Although Pelopidas had been dismissed from the 2016 Lawsuit, it nonetheless participated in the mediation with the consent of Keller and Brown.

Keller a total of $8.85 million. Although the Settlement Memorandum contained several other key terms, the parties acknowledge that the single-most important provision was the transfer of Keller's fifty percent (50%) membership interest in Pelopidas to Respondents, which was memorialized in ¶ 7 of the Settlement Memorandum as follows: "Plaintiff's stock ***shall be*** surrendered/sold, escrowed and pledged back to plaintiff" (emphasis added).[3] In addition, ¶ 1 of the Settlement Memorandum contained a payment schedule requiring Respondents to pay the $8.85 million to Keller in eight separate installments of varying amounts between October 31, 2019, and April 1, 2023.

The Settlement Memorandum does not state the effective date for the transfer of Keller's "stock" in Pelopidas (which, as will be addressed more fully below, is the core issue in this case), nor does it state when the escrowing and pledging back of Keller's "stock" will occur. Nevertheless, the introductory paragraph of the Settlement Memorandum specifically contemplates that the parties will, on some *unspecified* future date(s), prepare and execute supplemental documents to fully consummate their agreement, where the parties agreed as follows: "The parties shall jointly prepare a formal settlement agreement and release and all appropriate purchase and sale documents that include the following terms…." The Settlement Memorandum contains a total of twenty-one (21) numbered paragraphs, several of which are discussed below.

Paragraph 2 provides that the "settlement agreement" the parties contemplated executing on some future date must provide that Respondents' ongoing payment obligations will be

[3] The parties acknowledge that because Pelopidas was a limited liability company (not a corporation), Keller's fifty percent (50%) membership interest in Pelopidas was not actually represented by stock or stock certificates, as suggested in ¶ 7 of the Settlement Memorandum; accordingly, the parties always understood that the "stock" referenced in ¶ 7 referred to Plaintiff's fifty percent (50%) membership interest in Pelopidas. Thus, in order to be consistent with this language of the Settlement Memorandum, we likewise refer to Keller's "stock" in Pelopidas throughout the remainder of this opinion.

reduced in any year in which Pelopidas's revenues fall below $10,000,000, in which case the required payments for that calendar year will be prorated based on the shortfall. Thus, it appears that if Pelopidas had zero revenue in a given year during the period the installment payments were due, then Respondents would not owe Keller any of the required payments for that year. The following is a summary of the other relevant provisions in the Settlement Memorandum:

- Paragraph 6 provides that Keller is entitled to one percent (1.0%) interest on any "balances due and unpaid;"

- Paragraph 8 provides that there must be "[r]easonable notice and cure provisions" (but does not further explain what this entails);

- Paragraph 9 provides that the 2016 Lawsuit "shall be dismissed without prejudice," but further provides that Keller "shall execute a covenant not to sue;"

- Paragraph 10 provides that the parties must execute a mutual "Full and General Release" with respect to "all claims known or unknown through the date set forth on the Release, excepting the obligations set forth in the settlement documents;"

- Paragraph 11 provides that if any of the required installment payments are missed and not cured, "all payments are accelerated" and Keller may file suit to enforce the parties' settlement, including all interest due. This clause further provides that Respondents waive "all defenses" in any lawsuit filed to enforce the payment provisions of the parties' settlement, except the defenses of "accord and satisfaction" and "breach of the covenant not to sue;"

- Paragraph 12 provides that Respondents "shall use their best efforts to remove [Keller] from all debts, loans, lines of credit, and leases [of Pelopidas];"

- Paragraph 14 provides that "[i]nsurance beneficiary changes shall be allowed upon execution of settlement documents, but all other Florida MSA obligations shall remain in place;" and

- Paragraph 19 provides as follows: "Attorneys' fees to prevailing party if a party sues to enforce settlement agreement, release or buy-sell documents."

Finally, the Settlement Memorandum contains several other standard contract provisions not relevant to the issues raised in this appeal.

D. The parties' attempts to prepare and finalize the contemplated settlement documents

Following the parties' execution of the Settlement Memorandum on September 30, 2019, they began the process of completing the additional tasks required therein, including drafting the documents necessary to effectuate the transfer of Keller's "stock" to Respondents, as set forth in ¶ 7. For example, pursuant to ¶ 12, Respondents removed Keller as a guarantor of Pelopidas's lease agreement. In addition, the parties do not dispute that Respondents made the initial installment payment of $250,000 required under ¶ 1(a) of the Settlement Memorandum on or before October 31, 2019. However, with respect to the second installment payment of $1.1 million required under ¶ 1(b), Respondents did not pay that amount to Keller on or before the due date of April 1, 2020; rather, for reasons explained below, Respondents unilaterally paid that amount into escrow and made it payable to Keller upon her execution of Respondents' version of the additional settlement documents contemplated in the Settlement Memorandum.

For her part, Keller timely dismissed the 2016 Lawsuit without prejudice on January 10, 2020, as required in ¶ 9 of the Settlement Memorandum. In the dismissal, Keller represented to the circuit court that, "[a]ll essential terms of the parties' agreement were included in [the Settlement Memorandum]." Respondents have also made several representations in briefings to the circuit court and this Court that the Settlement Memorandum contains all the essential terms for their agreement in order to be effective and binding on the parties. Thus, although the parties disagree on many things, they do agree on this basic proposition.

With respect to the transfer of Keller's "stock" in Pelopidas, although the parties exchanged several drafts of the supplemental documentation necessary to accomplish this key requirement in the months following the execution of the Settlement Memorandum and agreed on much of the necessary language, they ultimately reached an impasse in early 2020 with

respect to the effective date of the "stock" transfer. Specifically, Respondents demanded that Keller sign documents reflecting an effective date of September 30, 2019, which was the same date the Settlement Memorandum was executed, and which Keller refused to sign. In addition, although several early versions of Respondents' proposed documents did not contain the necessary escrow and pledge back provisions, Brown subsequently agreed to include a pledge back provision. On the other hand, Keller proffered documents that reflected an effective date as of the date the parties actually executed the supplemental documents, which Respondents refused to sign. Thus, the parties still have not signed the key supplemental documents contemplated in the Settlement Memorandum.

In support of their respective positions, both parties have primarily relied on the plain language of ¶ 7 of the Settlement Memorandum, which provides as follows: "Plaintiff's stock ***shall be*** surrendered/sold, escrowed and pledged back to Plaintiff" (emphasis added). Keller argues that "shall be" is the operative phrase in ¶ 7, which she asserts clearly indicate that the transferring, escrowing, and pledging back of her "stock" was not intended to occur on September 30, 2019, but rather, would occur on some ***future*** date (i.e., whenever the parties could negotiate, draft, and execute the necessary supplemental documentation). Conversely, Respondents argue that ¶ 7 clearly contemplates an ***immediate*** transfer of Keller's "stock," notwithstanding the use of "shall be," and notwithstanding the undisputed fact that the parties did not execute any documents effecting the escrowing and pledging back of Keller's "stock" on September 30, 2019. As further explained below (*see infra* **III. Discussion**, Points IV and V), the resolution of this issue is dispositive of this appeal.[4]

[4] Although not critical to the disposition of this appeal, it is not entirely clear ***why*** the parties are so concerned about the effective date of the transfer of Keller's "stock," which appears to be the sole stumbling block to their full and final resolution of the underlying dispute that is the genesis of this matter. For her part, Keller appears to be primarily concerned about a potential misrepresentation to the IRS if the supplemental settlement documents reflect

As noted, Respondents did not make the second installment payment of $1.1 million to Keller on the due date of April 1, 2020. Rather, Respondents unilaterally placed this amount in escrow and made it payable to Keller upon her execution of Respondents' version of the additional settlement documents contemplated in the Settlement Memorandum, which Respondents insisted reflect an effective date for the transfer of Keller's "stock" of September 30, 2019.[5] Respondents claim they did so because of the impasse regarding the effective date of the transfer of Keller's "stock," as the parties had still not fully agreed upon or executed any of the supplemental documents contemplated in ¶ 7 of the Settlement Memorandum when the due date for the second installment payment arrived. After missing the April 1 payment deadline, Keller gave Respondents notice and an opportunity to cure by April 7, but the second payment was not forthcoming.[6] Thus, pursuant to ¶ 11 of the Settlement Memorandum, all then-outstanding payments due were accelerated (which totaled $8.6 million at the time), and Keller declared that Respondents had defaulted on the Settlement Memorandum.

E. The current lawsuit

Following the breakdown of the parties' negotiations to finalize the necessary supplemental documents contemplated in the Settlement Memorandum, Respondents

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that the "stock" transfer was effective as of September 30, 2019, but the documents are executed on some later date. However, as long as the supplemental documents clearly reflect the actual execution date thereof, it is not clear how that would be deceptive or misleading. On the other hand, Brown appears to be mired in his belief that the parties simply agreed to an effective date of September 30, 2019, and he is sticking to it at all costs. In response, based on her prior experience with Brown, Keller appears convinced that he has some nefarious objective for insisting on an effective date of September 30, 2019, which she claims is a practice he has used in the past to steal hundreds of thousands of dollars from Pelopidas via bogus "loans" from the company using backdated documents. Regardless of the parties' reasons for their respective positions regarding how the operative language in ¶ 7 of the Settlement Memorandum should be interpreted, this is apparently the hill they are each willing to die on in disposing of this appeal, leaving us to decide who will remain standing (figuratively, of course).

[5] Keller maintains that Respondents' unilateral act of placing the second installment payment required under ¶ 1(b) in escrow was not permitted under the terms of the Settlement Memorandum. As further explained below, we agree.

[6] Pursuant to the Judgment subsequently entered by the circuit court in this case on November 30, 2020, the escrowed amount of $1.1 million was paid to Keller sometime thereafter.

commenced this lawsuit on February 21, 2020, by filing their initial petition, as amended on April 6, 2020 ("Enforcement Petition"), which seeks to enforce the Settlement Memorandum. The Enforcement Petition asserts the following four claims against Keller: **Count I** seeks a declaratory judgment that, *inter alia*, Keller lost all right, title, and interest in and to Pelopidas, effective September 30, 2019, and that she must effectuate all documents and take all actions set forth in the Settlement Memorandum; **Count II** seeks an order requiring Keller to execute the "necessary settlement documents" acknowledging the assignment of her interest in Pelopidas on September 30, 2019; **Count III** is a claim for breach of contract alleging that Respondents have been damaged by Keller's refusal to execute a document acknowledging the assignment of her interest in Pelopidas effective September 30, 2019; and **Count IV** is a petition for preliminary and permanent injunction seeking: (a) to "compel settlement according to the terms of the [Settlement Memorandum] and specifically an acknowledgement that Keller's right, title and interest in Pelopidas were assigned as of September 30, 2019"; and (b) an order enjoining Keller from "making any false and erroneous statements to the effect that she is an owner/member of Pelopidas after September 30, 2019." In each count of the Enforcement Petition, Respondents also seek their reasonable attorneys' fees.

On April 16, 2020, Keller filed her one-count counterclaim in this matter ("Counterclaim"), which asserted a claim for breach of contract against Respondents arising from the Settlement Memorandum. Keller alleges that the Settlement Memorandum is an "enforceable contract" and that Respondents are in breach thereof for missing the second installment payment due on April 1, 2020, which accelerated all then-outstanding payments, for total damages of $8.6 million, plus interest of 1.0% per month pursuant to ¶ 6 of the Settlement Memorandum. Keller further alleges that, pursuant to ¶ 11 of the Settlement Memorandum,

Respondents have waived any affirmative defenses to a suit to enforce the failure to make a payment required under ¶ 1, except the defenses of "accord and satisfaction" and "breach of the covenant not to sue." With respect to the defense of accord and satisfaction, Keller alleges that this defense is not available to Respondents because they have not paid Keller the entire $8.85 million due.[7] Regarding the defense of breach of the covenant not to sue, Keller also alleges that this defense is not available to Respondents because, after dismissing the 2016 Lawsuit, she did not file a lawsuit against Respondents "at any time before they failed to pay on April 1, 2020, and failed to cure by April 7, 2020." In her Counterclaim, Keller also seeks her attorneys' fees and costs.

F. The parties' motions for summary judgment and the judgment thereon

Following the parties filing the foregoing claims in this matter, they then filed their respective motions for summary judgment. First, Keller filed her motion for summary judgment with respect to her Counterclaim (seeking $8.6 million in damages arising from the missed second installment payment, plus 1.0% monthly interest and attorneys' fees). Second, Respondents filed their own motion for summary judgment with respect to each count of the Enforcement Petition and Keller's affirmative defenses thereto. Third, Keller filed her cross-motion for summary judgment with respect to each count of the Enforcement Petition. These three motions sought summary disposition of all claims pending before the circuit court.

[7] It is worth noting that Keller did not allege that Respondents breached the Settlement Memorandum by not executing supplemental documentation reflecting an effective date of the "stock" transfer as of the same date the parties execute said documentation (which she had proffered to Respondents prior to their commencement of this action). Thus, we need not decide whether Respondents' refusal to execute Keller's proffered documentation, standing alone, would constitute a material breach of the Settlement Memorandum (which would, in turn, involve determining, *inter alia*, whether Respondents failed to execute said documentation within a reasonable period of time after entering into the Settlement Memorandum). This is because, first, Keller did not plead such a breach in her Counterclaim, and second, as explained below (*see infra* **III. Discussion**, Points I, III), we find that Respondents' failure to make the second installment payment of $1.1 million to Keller by the due date of April 1, 2020, and to cure within a reasonable time after notice, standing alone, constitutes a breach of the Settlement Memorandum.

Following a full briefing on the parties' summary judgment motions, the circuit court held a hearing thereon. After permitting the parties to submit proposed orders, the circuit court issued its First Amended Judgment and Order on November 30, 2020 ("Judgment"), which fully disposed of all the parties' claims. As a preliminary matter, the circuit court noted that, "[b]y each party's admission in their pleadings, they entered into an enforceable settlement agreement evidenced by the [Settlement Memorandum]." The circuit court also noted that the parties agree they "resolved their dispute on September 30, 2019, by entering into an enforceable contract," which they further agree "contains all the essential terms of their contract." Without substantial explanation, the circuit court made the following key findings: (1) the Settlement Memorandum was a "valid and enforceable contract;" (2) no additional documents or terms are needed to effectuate the contract; (3) Respondents "performed or tendered performance pursuant to the contract;" and (4) Keller "surrendered, transferred and assigned all right, title and interest in Pelopidas, LLC effective September 30, 2019." Based on the foregoing findings, the circuit court ordered, adjudged, and decreed as follows:

- Granted Respondents' motion for summary judgment with respect to the claims in the Enforcement Petition, and entered judgment in favor of Respondents and against Keller;

- Denied Keller's motion for summary judgment with respect to the claims in the Enforcement Petition;

- Denied Keller's motion for summary judgment with respect to her Counterclaim; in addition, the circuit court, *sua sponte*, dismissed Keller's Counterclaim with prejudice;

- Permanently enjoined Keller from "making statements to the effect that she was an owner or Member of Pelopidas, LLC after September 30, 2019;"

- Ordered the parties to execute a "settlement agreement" reflecting the Judgment no later than November 30, 2020, which was the day the judgment was issued, whereupon the second installment payment of $1.1 million held in escrow was to be paid to Keller;

- Found that the proof of attorneys' fees that Respondents had previously submitted (via a hearing on November 18, 2020) was "reasonable and necessary in the context of the case," and entered judgment in favor of Brown as and for his attorneys' fees and expenses against Keller in the amount of $244,753.50, as well as entered judgment in favor of Pelopidas as and for its attorneys' fees and expenses against Keller in the amount of $163,578.00;

- All claims not specifically enumerated in the Judgment were denied; and

- Taxable costs were assessed against Keller.

This appeal followed.

II. Standard of Review

The Supreme Court of Missouri recently affirmed the standard of review for summary judgment as follows in *Green v. Fotoohighiam*:

> The trial court makes its decision to grant summary judgment based on the pleadings, record submitted, and the law; therefore, this Court need not defer to the trial court's determination and reviews the grant of summary judgment *de novo*. In reviewing the decision to grant summary judgment, this Court applies the same criteria as the trial court in determining whether summary judgment was proper. Summary judgment is only proper if the moving party establishes that there is no genuine issue as to the material facts and that the movant is entitled to judgment as a matter of law. The facts contained in affidavits or otherwise in support of a party's motion are accepted as true unless contradicted by the non-moving party's response to the summary judgment motion. Only genuine disputes as to material facts preclude summary judgment. A material fact in the context of summary judgment is one from which the right to judgment flows.
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> The record below is reviewed in the light most favorable to the party against whom summary judgment was entered, and that party is entitled to the benefit of all reasonable inferences from the record. However, facts contained in affidavits or otherwise in support of the party's motion are accepted as true unless contradicted by the non-moving party's response to the summary judgment motion.

606 S.W.3d 113, 115-16 (Mo. banc 2020) (quoting *Goerlitz v. City of Maryville*, 333 S.W.3d 450, 452-53 (Mo. banc 2011)). "In addition, the non-movant must support denials with specific

references to discovery, exhibits, or affidavits demonstrating a genuine factual issue for trial. Rule 74.04(c)(2), (c)(4).[8] Facts not properly supported under Rule 74.04(c)(2) or (c)(4) are deemed admitted." *Id*. at 116 (quoting *Cent. Trust & Inv. Co. v. Signalpoint Asset Mgmt., LLC*, 422 S.W.3d 312, 320 (Mo. banc 2014)).

III. Discussion

Keller raises six points on appeal. In her first point, Keller argues that the circuit court erred as a matter of law in *sua sponte* dismissing her Counterclaim for failure to state a claim upon which relief can be granted because she pleaded the elements of a claim for breach of contract against Brown. In her second point, Keller argues that the circuit court erred as a matter of law in *sua sponte* granting summary judgment for Respondents with respect to her Counterclaim because it did not have the authority to do so in that summary judgment is not available absent a proper motion filed pursuant to Rule 74.04 or Rule 55.27(a)(6) and Respondents filed no such motion. In her third point, Keller argues that the circuit court erred as a matter of law in denying her motion for summary judgment with respect to her Counterclaim because the summary judgment record established that she was entitled to judgment as a matter of law and there was no genuine dispute regarding the facts supporting her breach of contract claim against Respondents. In her fourth point, Keller argues that the circuit court erred in granting summary judgment in favor of Respondents with respect to the claims in their Enforcement Petition because Respondents were not entitled to judgment as a matter of law in that the Settlement Memorandum contained a promise of future performance regarding the transfer of her "stock" in Pelopidas to Brown. In her fifth point, Keller argues that the circuit court erred as a matter of law in denying her cross-motion for summary judgment with respect to

[8] All rule references are to Missouri Supreme Court Rules (2020).

the claims against her in the Enforcement Petition because she was entitled to judgment as a matter of law for the same reasons asserted in her fourth point. In her sixth point, Keller argues that the circuit court erred in awarding attorneys' fees to Respondents because they were not the prevailing party in that Keller is entitled to summary judgment with respect to both her Counterclaim and the claims in the Enforcement Petition as a matter of law.

Because the arguments raised in Keller's fourth and fifth points are dispositive of this appeal, we address them first, and then address Keller's remaining points accordingly.

Points IV and V

Keller's fourth and fifth points on appeal address the parties' cross-motions for summary judgment with respect to Respondents' claims against Keller arising from the Settlement Memorandum. The dispositive issue raised in these two points involves the parties' dispute regarding when the transfer of Keller's "stock" would occur pursuant to ¶ 7 of the Settlement Memorandum. As noted above, Respondents maintain that this transfer occurred on September 30, 2019—the same date the parties entered into the Settlement Memorandum. On the other hand, Keller maintains that under the plain language of ¶ 7, the transfer has not yet occurred; rather, the parties agreed that the transfer would be effective as of the date they execute the supplemental documentation contemplated in the Settlement Memorandum (which still has not taken place). Thus, the parties' dispute raises a simple issue of contract interpretation, which, as further discussed below, is a question of law that may be resolved via summary judgment.

It is well established that "[t]he cardinal principle for contract interpretation is to ascertain the intention of the parties and to give effect to that intent." *State ex rel. Missouri Highway and Transp. Com'n v. Maryville Land Partnership*, 62 S.W.3d 485, 491 (Mo. App. E.D. 2001). To that end, "[w]e use the plain, ordinary, and usual meaning of the contract's

words and consider the document as a whole." *Id*. "Each term and clause is construed to avoid an effect that renders other terms and provisions meaningless." *Id*. at 492. "A construction attributing a reasonable meaning to each phrase and clause, and harmonizing all provisions of the agreement is preferred to one that leaves some of the provisions without function or sense." *Id*.

Furthermore, summary judgment is only appropriate in contract cases "where the language of the agreement is so clear and unambiguous that the meaning of the portion of the contract in dispute is so apparent that it may be ascertained from the four corners of the document." *Zeiser v. Tajkarimi*, 184 S.W.3d 128, 132 (Mo. App. E.D. 2006) (quoting *Board of Educ. City of St. Louis v. State*, 134 S.W.3d 689, 695 (Mo. App. E.D. 2004)). However, "[s]ummary judgment is inappropriate in an action arising out of a contract … where the disputed contract language is ambiguous and parol evidence is required to interpret the contract and the parties' intent." *Id*. (quoting *Northwest Plaza, L.L.C. v. Michael-Glen, Inc.*, 102 S.W.3d at 552, 557 (Mo. App. E.D. 2003)). "Where a contract is ambiguous, then a question of fact arises as to the intent of the parties as to its meaning, and thus it is error to grant summary judgment." *Id*. at 132-33. In those cases, "the determination of the parties' intent should be left to the jury." *Id*. at 133.

"Whether a contract is ambiguous is a question of law for the court, that we determine without deference to the trial court's decision." *Id*. But "[a] contract is not ambiguous merely because the parties disagree as to its construction." *Id*. "Rather, a contract is ambiguous only if its terms are susceptible of more than one meaning so that reasonable persons may fairly and honestly differ in their construction of the terms." *Id*. "[I]f language which appears plain considered alone conflicts with other language in the contract, or if giving effect to it would render other parts of the contract a nullity, then we will find the contract to be ambiguous." *Id*.

In this case, although the parties clearly disagree regarding the meaning of ¶ 7 of the Settlement Memorandum, they appear to agree that it is not ambiguous with respect to when the transfer of Keller's "stock" was to occur. Thus, neither party is asking this Court to remand for a factual determination by a jury regarding their intent on this critical issue. Accordingly, the parties are content for this Court to decide this key issue based on the summary judgment record they presented to the circuit court in connection with their respective motions. We agree with the parties that ¶ 7 is not ambiguous, as we do not believe it could have more than one meaning, or that reasonable persons could fairly and honestly differ in their interpretation of ¶ 7. Therefore, we next address whether Keller's or Respondents' proposed interpretation of ¶ 7 is correct.

As an initial matter, we note that ¶ 7 clearly commands that Keller's "stock" must be surrendered/sold to Respondents, escrowed, and pledged back to Keller. Furthermore, it is plain to see that the parties intended for each of these things to occur either on September 30, 2019 (as Respondents have argued), or sometime later (as Keller has argued). This is because the operative words in ¶ 7—"shall be"—plainly apply to each of these three requirements. Thus, this case requires us to determine whether the parties' use of the words "shall be" in ¶ 7 expressed an intent for these three requirements to create an *immediate* performance or to impose a *future* obligation.

In analyzing the plain, ordinary, and usual meaning of the words "shall be," as used in ¶ 7 of the Settlement Memorandum, and considering the parties' use of these words in view of the entire document, we determine that they express an intent for these three requirements to impose a *future* obligation (and <u>not</u> to effect an *immediate* performance). We reach this determination

because, very simply, it is the only reasonable interpretation of the words "shall be" in ¶ 7, which clearly commands that each of these requirements occur sometime after September 30, 2019.

In her briefing to this Court, Keller primarily relied on the A.B.A's *A Manual of Style for Contract Drafting*, a highly regarded authority on contract drafting. *See* Kenneth A. Adams, *A Manual of Style of Contract Drafting* (4th ed. 2017) [hereinafter *Manual of Style*]. The *Manual of Style* notes that drafters can employ different types of operative language in a contract, including "language of performance" and "language of obligation," among other types. *Id*. at 43-47. Language of performance, which expresses actions accomplished by means of signing the contract itself, is typically accomplished by use of the word "hereby." *Id*. at 51-52. In contrast, language of obligation is used to state any duty a contract imposes on one or more parties and is typically accomplished by use of the word "shall." *Id*. at 57-58. More to the point, § 3.73 of the *Manual of Style* specifically notes that "[c]ourts have long recognized [the] use of *shall* to express obligations."[9] *Id*. at 58. In addition, § 3.77 further notes that because obligations and intentions concern "future conduct," and because there is no future tense in the English language (similar to the present and past tenses), the terms "shall" and "will" have "come to be used with future time." *Id*. at 59. Likewise, § 3.78 states that both "shall" and "will" are used "to mark future time." *Id*. Finally, § 3.79 notes that although the word "shall" is now used in a variety of other ways in common parlance, "in the stylized context of the language of business contracts, … *shall* continues to serve as the principal means of expressing obligations." *Id*.

With respect to the unique facts of this case, we believe that the foregoing provisions of the *Manual of Style* represent how the words "shall be," as used in ¶ 7 of the Settlement

[9] Furthermore, it is worth noting that § 3.72 expressly recommends that the word "shall" should not be used to express anything other than language of obligation in a contract. *Manual of Style* at 57.

Memorandum, are commonly understood in the context of a contract such as the Settlement Memorandum. *See First National Bank of Joplin v. Johnson*, 431 S.W.2d 65 (Mo. banc 1968) (holding that an insurance trust agreement which provided that the trustee "shall pay" to the beneficiary the sum of $250.00 per month for as long as she lived and remained unmarried was an unambiguous requirement of the agreement).

Keller's proposed interpretation of ¶ 7 is also entirely consistent with dictionary definitions of the word "shall," which indicate that this term expresses a mandatory duty or command. For example, *Black's Law Dictionary* defines "shall" as follows: "[h]as a duty to; more broadly, is required to," and further notes that, "[t]his is the *mandatory* sense that drafters typically intend and that courts typically uphold." *Shall*, *Black's Law Dictionary* (11th ed. 2019) (emphasis added). Although *Black's Law Dictionary* covers several other senses in which the word "shall" can be used (i.e., "should," "may," and "will"), the definition concludes by stating that the *mandatory* sense is the **only** one that is acceptable "under strict standards of drafting." *Id*. *See also Mind & Motion Utah Investments, LLC v. Celtic Bank Corp.*, 367 P.3d 994, 1002 n.36 (Utah 2016) (similarly noting that *Black's Law Dictionary* recognizes that drafters typically intend, and courts typically uphold, the mandatory sense of the word "shall").

Likewise, Webster's Dictionary similarly notes that "shall" is "used to express a command or exhortation." *Webster's Third New International Dictionary* (2003). *See also U.S. Cent. Underwriters Agency, Inc. v. Hutchins*, 952 S.W.2d 723, 725 (Mo. App. E.D. 1997) (citing *Webster's Third New International Dictionary* (1976) for the proposition that, "[t]he definition of 'shall' states that it is 'used in laws, regulations, or directives to express what is mandatory"); *AAA Laundry & Linen Supply Co. v. Dir. of Revenue*, 425 S.W.3d 126, 132 (Mo. banc 2014)

(noting that *Webster's Third New International Dictionary* is the "institutional dictionary of choice" of Missouri courts).

We also note that if the parties had intended any contrary meaning, they easily could have worded ¶ 7 differently to clearly express that intent. For example, if the parties had intended for all three of these requirements to occur on September 30, 2019 (as Respondents have argued), they could have substituted the words "is hereby" (for "shall be"), as the words "is hereby" are commonly understood to be "language of performance" and to reflect an immediate effect. *See Manual of Style* at 51-52. Thus, ¶ 7 would read as follows: "Plaintiff's stock **is hereby** surrendered/sold, escrowed and pledged back to Plaintiff." However, the parties did not adopt this wording, which makes sense under the circumstances because even though the surrender/sale of Keller's "stock" by itself was a simple enough task, the parties most likely realized that they needed additional time to hammer out the details of the escrowing and pledging back of the "stock" after their marathon mediation session on September 30, 2019.

Likewise, if the parties had intended for the "stock" to be surrendered/sold on September 30, 2019, but intended for the escrowing and pledging back to occur on some later date, they easily could have used a combination of "is hereby" and "shall be" in ¶ 7, which would read as follows: "Plaintiff's stock **is hereby** surrendered/sold and **shall be** escrowed and pledged back to Plaintiff." However, the parties did not adopt this wording either, which also makes sense under the circumstances because it is well understood that the whole point of Respondents escrowing and pledging the "stock" back to Keller was to provide her with security for the $8.85 million in installment payments that were due under ¶ 1 of the Settlement Memorandum between October 31, 2019, and April 1, 2023. Thus, it is virtually inconceivable that Keller, who was represented by able counsel during the negotiation of the Settlement Memorandum, would have agreed to the

immediate transfer of her "stock" (which the parties agreed was worth as much as $8.85 million, subject to adjustments per ¶ 2 of the Settlement Memorandum), and then relied on Respondents' good graces to subsequently execute the documents necessary to effect the escrowing and pledging back of the "stock" without that valuable security firmly in hand.

However, it is not necessary to know the subjective reasons the parties agreed to the wording they adopted in ¶ 7 of the Settlement Memorandum because the bottom line is that their adopted words of "shall be" clearly and unambiguously express an intent for this paragraph to create a future obligation with respect to the three key requirements therein, which would occur sometime *after* September 30, 2019.

The parties' use of the words "shall be" in ¶ 7 of the Settlement Memorandum, given the broader context in which this paragraph operates within the entire agreement, clearly expressed a *future* duty or requirement with respect to the surrendering/selling, escrowing, and pledging back of Keller's "stock" by using commonly understood "language of obligation." There is **no** reasonable interpretation of ¶ 7 where the words "shall be" could be understood to express an intent for the *immediate* surrendering/selling, escrowing, and pledging back of Keller's "stock," since these words are simply not understood to operate as "language of performance," as Respondents have incorrectly suggested.

Our interpretation of ¶ 7 is reinforced by several other similar provisions of the Settlement Memorandum that use the words "shall be" (or similar variants) to command subsequent acts that could not be accomplished on September 30, 2019. For example, ¶ 9 provides as follows: "This lawsuit **shall be** dismissed without prejudice but Plaintiff **shall** execute a covenant not to sue" (emphasis added). However, Respondents have not taken the position that Keller is in breach of ¶ 9 for not immediately dismissing the lawsuit or not

immediately executing a covenant not to sue. Indeed, such a position would be completely untenable, as the parties fully understood that Keller would do these things sometime after September 30, 2019. In fact, Keller did not dismiss her claims in the 2016 Lawsuit until January 10, 2020, which was a little over three months after the parties executed the Settlement Memorandum. Furthermore, due to the impasse regarding the effective date of the "stock" transfer, Keller still has not executed a covenant not to sue, which was included in the drafts of the supplemental settlement documentation the parties exchanged in the months following September 30, 2019. Regardless, Respondents have not claimed that Keller has breached ¶ 9, or any other provision of the Settlement Memorandum that uses the phrase "shall be" or similar words, simply because she did not immediately perform them on September 30, 2019, each of which would have been a practical impossibility.

Given the phrasing of ¶ 7, Respondents' proposed interpretation would not only effectively require us to conclude that the parties intended for Keller to surrender/sell her "stock" to them on September 30, 2019, but also conclude that Respondents were not required to escrow or pledge the "stock" back to Keller until some later date (i.e., when the parties subsequently negotiated and executed appropriate documentation to that effect). Otherwise, Respondents would arguably be in breach of the escrow and pledge back requirements because the parties do not dispute that they still have not executed any documentation effecting these key requirements, which provided Keller's only security for the installment payments required under ¶ 1. Accordingly, to avoid potential liability for breach of the escrow and pledge back requirements, Respondents must accept that the surrender/sale of Keller's "stock" was to occur concurrent with their satisfaction of the important escrow and pledge back requirements, which the parties understood would require additional time to negotiate and execute. Any other interpretation of ¶

7 would require a tortured reading of the plain and unambiguous language the parties agreed to and adopted.

Having determined that the parties did not intend for the three items described in ¶ 7 to take effect or occur on September 30, 2019, we must next address the question posed by Respondents: if the transfer of Keller's "stock" was not intended to occur on September 30, 2019, then when was it to occur? As noted, the Settlement Memorandum itself is silent as to any specific timeframe for these requirements to occur. However, the parties have agreed that the Settlement Memorandum contains all essential terms. We may therefore proceed to analyze the final piece of this puzzle—*when* must the parties complete the requirements of ¶ 7?

In answering Respondents' question, Keller suggests that Missouri case law supplies the answer: a "reasonable time." Of course, determining when the three requirements of ¶ 7 must occur is important because Respondents rely on this paragraph for their breach of contract claim, which argues that Keller has refused to execute documents acknowledging that the transfer of her "stock" was effective on September 30, 2019.[10] Although not expressly stated in the Judgment, in granting Respondents' summary judgment motion with respect to the Enforcement Petition, the circuit court presumably found that Keller's refusal to execute Respondents' proposed settlement documents constituted a breach of this requirement. Regardless, because we have determined that ¶ 7 does not express an intent that the surrender/sale of Keller's "stock" occurred on September 30, 2019, Keller cannot possibly be in breach of the Settlement Memorandum for

[10] Specifically, ¶ 40 of Respondents' Enforcement Petition alleges as follows: "Despite all reasonable efforts by Brown and Pelopidas, Keller refuses to execute a document required under the [Settlement Memorandum] which acknowledges that Keller assigned all her right, title and interest in Pelopidas as of September 30, 2019." In addition, ¶ 41 contains the following similar allegations: "Despite all reasonable efforts by Brown and Pelopidas, Keller refuses to execute a document which acknowledges the assignment of all Keller's interests in Pelopidas effective September 30, 2019."

refusing to execute documents reflecting an effective date of September 30, 2019, which Respondents improperly insisted she do.

We agree with Keller that because the Settlement Memorandum is silent on this issue, a "reasonable time" is appropriate, as Missouri courts indeed recognize that "[w]hen a contract does not specify a time period for performance, performance must be made within a reasonable time." *Hemsath v. City of O'Fallon*, 261 S.W.3d 1, 6 (Mo. App. E.D. 2008). "What constitutes a reasonable time depends upon the circumstances of each case." *Id.*

In this case, we cannot (and need not) state what a "reasonable time" would be for the parties to execute the supplemental documentation contemplated in the Settlement Memorandum, as that would entail a highly fact intensive inquiry beyond the scope of the summary judgment record. As discussed at length above, the reason the parties have so far failed to execute the contemplated documents is the impasse regarding the effective date of the surrender/sale of Keller's "stock." Although we ultimately conclude that Keller's interpretation of ¶ 7 is the correct one (and thus, she is not in breach), we need not address whether Respondents' refusal to execute documents in accordance with Keller's position with respect to ¶ 7 constitutes a breach of the Settlement Memorandum. This is because, as noted above, Keller's breach of contract claim does not assert a breach based on Respondents' failure to execute the supplemental documentation she proffered; rather, Keller's breach of contract claim only relies on Respondent's failure to pay the accelerated installment payments required under ¶ 1. Thus, that issue is not before this Court.

For these reasons, the circuit court erred as a matter of law in determining that Keller breached the Settlement Memorandum, which was the essential basis for each of Respondents' claims in the Enforcement Petition. Accordingly, the entry of summary judgment in favor of

Respondents with respect to each such claim is hereby reversed. Keller's fourth point on appeal is granted. For the same reasons, the circuit court erred as a matter of law in denying Keller's cross-motion for summary judgment with respect to each claim in the Enforcement Petition, and thus, that decision is also hereby reversed. Furthermore, pursuant to Rule 84.14, summary judgment is hereby entered in favor of Keller with respect to each claim in the Enforcement Petition, which is hereby dismissed with prejudice. Keller's fifth point on appeal is granted.

Points I, II and III

Keller's first, second, and third points on appeal address the circuit court's denial of her motion for summary judgment with respect to her Counterclaim against Respondents, as well as the circuit court's *sua sponte* dismissal of the Counterclaim and the *sua sponte* granting of summary judgment in favor of Respondents with respect thereto. However, because the circuit court did not explain its basis for dismissing the Counterclaim, Keller has advanced two theories of error with respect the circuit court's possible basis for the dismissal: (1) failure to state a claim upon which relief could be granted; or (2) summary judgment in favor of Respondents (even though Respondents filed no such motion). Because we find that the circuit court erred in determining that the surrender/sale of Keller's "stock" occurred on September 30, 2019, we must apply that finding to these three points on appeal since each of the circuit court's rulings with respect to Keller's Counterclaim were likewise premised on this erroneous determination.

In her first point on appeal, Keller argues that the circuit court erred as a matter of law in *sua sponte* dismissing her Counterclaim for failure to state a claim upon which relief can be granted because she pleaded the elements of a claim for breach of contract against Respondents. Keller's Counterclaim alleges that Respondents breached the Settlement Memorandum by not paying the second installment of $1.1 million by April 1, 2020, as required by ¶ 1(b) of the

Settlement Memorandum, and by not curing after being given notice, as permitted in ¶ 8. The Counterclaim further alleges that upon Respondents' failure to cure the second installment payment, all outstanding installment payments under the Settlement Memorandum were accelerated pursuant to ¶ 11, which totaled $8.6 million at the time; in addition, Keller seeks accrued interest of one percent (1.0%) per month on all outstanding amounts pursuant to ¶ 6.

Although the circuit court did not explicitly explain the rationale for its decision to dismiss the Counterclaim *sua sponte*, it appears to be premised on its express finding that Keller surrendered/sold her "stock" in Pelopidas effective September 30, 2019, as Respondents have argued. In addition, the circuit court's decision appears to be premised on a finding that Keller committed a prior material breach of the Settlement Memorandum by failing and refusing to execute the supplemental settlement documents proffered by Respondents, which reflected an effective date of September 30, 2019. Thus, in light of these findings, the circuit court presumably held that Respondents had not breached ¶ 1(b) by placing the $1.1 million payment in escrow, and likewise, Respondents were not in breach for failing to pay the accelerated amount of $8.6 million Keller seeks in the Counterclaim. Although the circuit court did not explain its rationale for dismissing the Counterclaim, the foregoing appears to be the only logical path for doing so (albeit ultimately an erroneous one).

Regardless of the path traveled by the circuit court to arrive at its destination, we find that it erred in dismissing Keller's Counterclaim because, very simply, Keller has alleged the elements of a claim for Respondents' breach of the Settlement Memorandum, and Respondents' performance was <u>not</u> excused by Keller's *purported* prior material breach based on her failure and refusal to execute the supplemental settlement documents that Respondents demanded, which improperly reflected an effective date for the surrender/sale of Keller's "stock" of

September 30, 2019. This determination is based on our finding, discussed in connection with Points IV and V above, that ¶ 7 did not contemplate an effective date of September 30, 2019, but rather contemplated an effective date of when the parties subsequently executed the appropriate supplemental settlement documentation, which needed to be done within a "reasonable time" of the execution of the Settlement Memorandum. Accordingly, the circuit court's *sua sponte* dismissal of Keller's Counterclaim is hereby reversed. Keller's first point on appeal is granted.

In her second point, Keller argues that the circuit court erred as a matter of law in *sua sponte* granting summary judgment for Respondents with respect to her Counterclaim because it did not have the authority to do so, as summary judgment is not available absent a proper motion filed pursuant to Rule 74.04 or Rule 55.27(a)(6), and Respondents filed no such motion. In their briefing, Respondents argued, *inter alia*, that the circuit court's Judgment does not contain an express holding that it entered summary judgment in favor of Respondents with respect to Keller's Counterclaim; rather, the Judgment simply states, in pertinent part, that the "Counterclaim is dismissed with prejudice." We initially agree with the general proposition, posited by Keller, that in order for a circuit court to grant summary judgment for a party, "it must normally have a motion for summary judgment before it and notice of a hearing must be made." *Williams v. Mercantile Bank of St. Louis NA*, 845 S.W.2d 78, 82 (Mo. App. E.D. 1993) (citing Rules 55.26(a) and 44.01(d) and further noting that, in certain circumstances, a court may treat a motion to dismiss as a motion for summary judgment). On the other hand, we also agree with Respondents that the Judgment does not contain an express holding that the circuit court entered summary judgment in their favor. However, we need not further address Keller's second point on appeal because our holdings with respect to Keller's first and third points on appeal effectively render it moot. Keller's second point on appeal is therefore denied.

In her third point, Keller argues that the circuit court erred as matter of law in denying her motion for summary judgment with respect to her Counterclaim because the summary judgment record established that she was entitled to judgment as a matter of law and there was no genuine dispute regarding the facts supporting her breach of contract claim against Respondents for failing to pay the accelerated amount of $8.6 million.

As a threshold matter, we initially note that an order denying a motion for summary judgment is generally not a final judgment and cannot be reviewed on appeal. *Stone v. Crown Diversified Indus. Corp.*, 9 S.W.3d 659, 664 (Mo. App. E.D. 1999). However, the denial of a motion for summary judgment may be reviewable "where the merits of that motion are intertwined with the propriety of an appealable order granting summary judgment to another party." *Id*. In this case, because the merits of Keller's motion for summary judgment with respect to her Counterclaim are intertwined with the propriety of the circuit court's order granting summary judgment in favor of Respondents on the Counterclaim (which is an appealable order), we may address the denial of Keller's motion for summary judgment.

Although the circuit court again did not fully explain the basis for its decision to deny Keller's motion for summary judgment with respect to her Counterclaim, we presume it was premised on the circuit court's erroneous finding that the surrender/sale of Keller's "stock" occurred on September 30, 2019. Regardless, because we find that ¶ 7 of the Settlement Memorandum clearly expressed an intent for the surrender/sale of Keller's "stock" to occur within a reasonable period *after* September 30, 2019, we find that the circuit court not only erred in denying Keller's motion for summary judgment with respect to her Counterclaim, but also erred in not entering summary judgment in her favor. Accordingly, we hereby reverse the circuit court's denial of Keller's motion for summary judgment with respect to her Counterclaim and,

pursuant to Rule 84.14, direct the circuit court to enter summary judgment in her favor and against Respondents, jointly and severally, in the amount of $7.5 million, which is the amount of installment payments then outstanding at the time of the breach ($8.6 million), less the $1.1 million held in escrow that was paid to Keller following the entry of the Judgment on November 30, 2020, plus interest of 1.0% per month on the outstanding $7.5 million through the date of satisfaction, as well as interest of 1.0% per month on the $1.1 million while that amount was held in escrow.[11]

This holding, like those reversing the circuit court's decisions regarding Respondents' claims in the Enforcement Petition, is based on our core finding with respect to ¶ 7 of the Settlement Memorandum, since Keller's breach of contract claim hinged on whether Respondents were justified in their undisputed failure and refusal to make the second installment payment of $1.1 million by April 1, 2020 (and cure by April 7, 2020), on the basis of their argument that Keller had previously committed a material breach of the Settlement Memorandum. For all the reasons set forth above, we conclude that Keller has not previously materially breached the Settlement Memorandum; therefore, the summary judgment record establishes that Respondents—not Keller—breached the Settlement Memorandum. While we recognize that Respondents most likely could not have asserted Keller's purported prior material breach as an affirmative defense because of the provisions of ¶ 11 (whereby Respondents waived

[11] We note that the parties have represented to this Court that Pelopidas is currently defunct (but it is not clear exactly when this occurred). If true, pursuant to ¶ 2 of the Settlement Memorandum (which permits a reduction of the installment payments required under ¶ 1 if Pelopidas's revenue is less than $10 million in a given year), Respondents would have been able to argue that any remaining installment payments should be reduced or eliminated altogether. However, in their answer to Keller's Counterclaim, Respondents did not assert any facts that would have supported such an affirmative defense. Moreover, even if Respondents had timely asserted such an affirmative defense, there is no evidence in the summary judgment record supporting Respondents' entitlement to a reduction pursuant to ¶ 2. Thus, Keller is entitled to the full amount of the accelerated payments due at the time of Respondents' default (i.e., April 1, 2020) and failure to cure (i.e., April 7, 2020), plus interest, notwithstanding any subsequent events that may have otherwise entitled Respondents to a reduction pursuant to ¶ 2 if they had not previously breached ¶ 1(b) by failing to make the second installment payment when due.

all defenses to such a claim, except "accord and satisfaction" and "breach of the covenant not to sue"), we need not decide whether ¶ 11 bars Respondents' affirmative defense because we find that this affirmative defense is not supported by the summary judgment record. Keller's third point on appeal is granted.

Point VI

Finally, Keller's sixth point on appeal addresses the circuit court's award of attorneys' fees in favor of Respondents, which was premised on each of the aforementioned rulings in their favor with respect to the claims in the Enforcement Petition and Keller's Counterclaim. Because we have reversed each of those rulings and find in favor of Keller, we find that she is now the prevailing party for purposes of all claims asserted in this action. Accordingly, we hereby reverse the award of attorneys' fees in favor of Respondents and remand to the circuit court to permit Keller to submit her request for attorneys' fees, pursuant to ¶ 19 of the Settlement Memorandum, and direct the circuit court to award Keller her reasonable attorneys' fees in connection with this action, which shall be entered against Respondents, jointly and severally.

IV. Conclusion

For the foregoing reasons, we find that the circuit court erred in (1) granting Respondents' motion for summary judgment with respect to the claims in the Enforcement Petition; (2) denying Keller's cross-motion for summary judgment with respect to Respondents' claims against her in the Enforcement Petition; (3) denying Keller's motion for summary judgment with respect to her Counterclaim; (4) *sua sponte* dismissing Keller's Counterclaim with prejudice; and (5) not entering summary judgment in favor of Keller with respect to her Counterclaim. Accordingly, each of those decisions are reversed, as set forth in our discussion of Keller's first through fifth points on appeal. In addition, pursuant to Rule 84.14, Keller's

motion for summary judgment with respect to her Counterclaim is granted, and the circuit court is directed to enter judgment in Keller's favor and against Respondents, jointly and severally, in the amount of $7.5 million, plus appropriate interest, as set forth in our discussion of Keller's third point on appeal. Finally, the circuit court's award of attorneys' fees in favor of Respondents is reversed and remanded to the circuit court for a determination and award of reasonable attorneys' fees in favor of Keller, which shall be entered against the Respondents, jointly and severally, as set forth in our discussion of Keller's sixth point on appeal.

Kelly C. Broniec, Judge

Colleen Dolan, P.J. and
Robert M. Clayton III, J. concur.