STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1338

Pamela Maslowski,
Respondent,

vs.

Prospect Funding Partners LLC, et al.,
Appellants,

vs.

James Schwebel, Esq., et al.,
Respondents.

Filed June 27, 2022
Affirmed
Connolly , Judge

Hennepin County District Court
File No. 27-CV-15-15143

James R. Schwebel, James S. Ballentine, Matthew J. Barber, Schwebel Goetz & Sieben, P.A., Minneapolis, Minnesota (for respondent Maslowski)

Daniel A. Beckman, Erickson, Bell, Beckman & Quinn, P.A., Roseville, Minnesota (for appellants)

Kay Nord Hunt, Michelle K. Kuhl, Barry A. O'Neil, Lommen Abdo, P.A., Minneapolis, Minnesota (for respondents Schwebel, et al.)

Considered and decided by Connolly, Presiding Judge; Larkin, Judge; and Smith, Tracy M., Judge.

SYLLABUS

1. A litigation financier has unconscionably interfered in the underlying legal claim that is the subject of the financier's litigation-financing agreement with the contracting

litigant if that agreement contains obligations that seek to control the litigant's ability to select counsel or to settle the underlying legal claim.

2. A litigation-financing agreement is a transaction subject to the usury statute.

OPINION

CONNOLLY, Judge

Appellants Prospect Fundings Partners LLC, Prospect Funding Holdings LLC, and Prospect Funding Holdings (NY) LLC (collectively, Prospect) appeal the district court's grant of summary judgment declaring its litigation-financing contract with respondent Pamela Maslowski to be enforceable in part and unconscionable in part and dismissing Prospect's claims against respondents James Schwebel, Esq. and Schwebel, Goetz & Sieben P.A. (collectively, Schwebel). Prospect also appeals from the district court's denial of its motion for attorney fees and costs under the contract. Because the district court did not err in (1) determining that the penalty clauses and the interest rate in the contract were unconscionable, (2) determining that neither party prevailed in the litigation, or (3) concluding that no contract existed between Prospect and Schwebel, we affirm.

FACTS

The underlying dispute between the parties has been the subject of several previous appeals. *See generally Maslowski v. Prospect Funding Partners LLC*, 944 N.W.2d 235 (Minn. 2020). We therefore restate only the facts most pertinent to the present appeal.

Maslowski was injured in an automobile accident in 2012 and retained Schwebel shortly thereafter to pursue a lawsuit against the other driver (the Personal-Injury Lawsuit). Two years later, Maslowski entered into a litigation-financing agreement with Prospect to

secure funds for her living expenses. Prospect is a litigation-financing company that purchases “a financial stake in the outcome of” a legal proceeding “in exchange for money paid to a party.” *Maslowski*, 944 N.W.2d at 236 n.1 (quotation omitted).

The litigation-financing agreement purported to purchase a maximum $25,245 interest in any proceeds recovered from the Personal-Injury Lawsuit in exchange for a net purchase price of $6,000.[1] Maslowski is characterized as the “Seller” and Prospect as the “Purchaser.” The litigation-financing agreement also included a “Repurchase Rate” of “30% every 6 months (60% annually)” that drove the “Repurchase Schedule” up to the maximum $25,245 after 42 months. The agreement stated that if Maslowski “RECOVERS NOTHING FROM THE LEGAL CLAIM,” then Prospect “SHALL RECEIVE NOTHING.” But Maslowski was “NOT ENTITLED TO RECEIVE ANY PROCEEDS” from the Personal-Injury Lawsuit “UNTIL PURCHASER HAS RECEIVED” payment. Maslowski signed the agreement on May 20, 2014.

Schwebel signed the “CERTIFICATION OF SELLER’S ATTORNEY” included in the litigation-financing agreement on the same day. This “CERTIFICATION” indicated Schwebel reviewed the terms of the agreement with Maslowski and that any proceeds of the Personal-Injury Lawsuit would be distributed from “the attorney’s trust account” in accordance with the agreement. The agreement was also accompanied by an “IRREVOCABLE LETTER OF DIRECTION” from Maslowski instructing Schwebel as

[1] The gross purchase price was $7,425, but the net purchase price provided to Maslowski subtracted $1,425 in “Fees.”

to the disbursement of funds. Schwebel executed the "ATTORNEY ACKNOWLEDGEMENT" on this letter that same day.

Maslowski settled the Personal-Injury Lawsuit in July 2015 for $70,000. Several years of litigation ensued, in which Maslowski sought to void the litigation-financing agreement and Prospect sought to enforce the repayment terms against both Maslowski and Schwebel. This litigation led to our decision declaring the agreement to be void under the common law prohibition against champerty.[2] *Maslowski v. Prospect Funding Partners LLC*, No. 18-1906, 2019 WL 3000747, at *5 (Minn. App. July 8, 2019). The Minnesota Supreme Court reversed our decision. *See Maslowski*, 944 N.W. 2d at 238.

Although the supreme court determined that "[t]he lower courts . . . did not err in determining that, under our prior decisions, the contract was unenforceable," it declined "to hold that the contract between Maslowski and Prospect is void as against public policy as we understand it today." *Maslowski*, 944 N.W.2d at 238. The supreme court abolished the common-law prohibition against champerty and remanded, noting that "district courts may still scrutinize litigation-financing agreements to determine whether equity allows their enforcement." *Id.* at 241. The supreme court specifically instructed that "[c]ourts and attorneys should . . . be careful to ensure that litigation financiers do not attempt to control the course of the underlying litigation." *Id.*

[2] "Champerty is an agreement to divide litigation proceeds between the owner of the litigated claim and a party unrelated to the lawsuit who supports or helps enforce the claim." *Maslowski*, 944 N.W.2d at 237 (quotation omitted).

On remand, the parties each filed dispositive motions. Prospect filed a motion for summary judgment against Maslowski and Schwebel. Schwebel moved for judgment on the pleadings on the basis that it was not a party to the litigation-financing agreement and therefore not bound by its terms. Maslowski also moved for judgment on the pleadings, contending that the agreement's penalty clauses[3] are unenforceable and that its interest rate and interference with the attorney-client relationship[4] render it unconscionable. The district court issued a combined order on these and other motions in April 2021. It granted in part and denied in part both Maslowski's and Prospect's motions, finding the agreement is "enforceable in part, but not in whole," and ordered Maslowski to pay Prospect $6,000, plus fees in the amount of $1,425, and interest at 8% accrued from June 3, 2020. The district court also granted Schwebel's motion in its entirety and dismissed Schwebel from the lawsuit.

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[3] The "penalty clauses" are those terms of the agreement that compel Maslowski to "IMMEDIATELY PAY TO [PROSPECT] LIQUIDATED DAMAGES IN THE AMOUNT TWICE THE PURCHASE AMOUNT REGARDLESS OF THE OUTCOME OF THE LEGAL CLAIM OR THE AMOUNT OF THE PROCEEDS" if Maslowski "MAKES ANY FALSE STATEMENTS IN THIS . . . AGREEMENT, . . . REPLACES [HER] ATTORNEY WITHOUT OBTAINING A NEW ACKNOWLEDGEMENT FROM THE REPLACEMENT ATTORNEY," enters into similar agreements in addition to the agreement with Prospect, "DOES NOT COMPLY WITH" the agreement "OR AVOIDS OR ATTEMPTS TO AVOID PAYMENT TO" Prospect.

[4] The litigation-financing agreement states that Maslowski may only "hire new or additional attorneys" if, "prior to such hiring, [Maslowski] shall (a) provide [Prospect] with written notice of such determination and (b) deliver a copy of the [letter of direction] to such new or additional attorney, [and] (c) require such new or additional attorney to execute and deliver to [Prospect] an Attorney Acknowledgement of the [letter of direction]."

Prospect filed a motion seeking over $290,000 in attorney fees and costs in May 2021, claiming authority under the agreement to collect such costs as the prevailing party.[5] The district court denied this motion in August, because, when "[t]aking into consideration the entirety of this litigation, . . . neither Maslowski nor [Prospect] fully prevailed." The district court also rejected Prospect's argument that it is entitled to recover the claimed fees as the costs of collection[6] pursuant to the agreement.

Prospect appeals the district court's determination that some provisions of the agreement are unenforceable, its decision to award interest only from June 3, 2020, its dismissal of Schwebel from the lawsuit, and its determination that Prospect was not the prevailing party and therefore not entitled to attorney fees.

ISSUES

I. Did the district court err by determining that certain provisions of the litigation-financing agreement were unenforceable?

II. Did the district court err by awarding interest only from June 3, 2020?

III. Did the district court err by determining that Schwebel was not a party to a contract with Prospect and dismissing Schwebel from the lawsuit?

IV. Did the district court abuse its discretion by declining to award attorney fees and costs to Prospect?

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[5] The agreement states that "THE PREVAILING PARTY IN ANY DISPUTE SHALL BE ENTITLED TO ALL REASONABLE ATTORNEYS' FEES AND COSTS, EXPENSES AND DISBURSEMENTS WITH RESPECT TO SUCH DISPUTE."

[6] The agreement contains a clause stating that "all costs and expenses incurred by [Prospect] in collecting the [amount due under the contract] shall be and become an additional amount owed to [Prospect] pursuant to [the agreement] including legal fees and expenses."

ANALYSIS

I. The district court did not err when it determined that certain provisions of the agreement were unenforceable.

In a detailed and well-reasoned opinion, the district court determined that two main provisions of the litigation-financing agreement were unenforceable. First, it determined that the purported liquidated-damages provisions were unenforceable penalties and an unconscionable intrusion into the attorney-client relationship. Second, the district court determined that the "repurchase rate" was both subject to and unconscionable under the usury statute. We apply de novo review to both determinations. *See SCI Minn. Funeral Servs., Inc. v. Washburn-McReavy Funeral Corp.*, 795 N.W.2d 855, 861 (Minn. 2011) (stating that legal decisions on cross-motions for summary judgment based on undisputed facts are reviewed de novo even if the matters decided "are for equitable relief"); *St. Jude Med., Inc. v. Medtronic, Inc.*, 536 N.W.2d 24, 27 (Minn. App. 1995) ("Construing and giving effect to the plain meaning of contract language is a question of law" reviewed de novo), *rev. denied* (Minn. Oct. 27, 1995); *Glarner v. Time Ins. Co.*, 465 N.W.2d 591, 595 (Minn. App. 1991) ("Unconscionability is a question of law."), *rev. denied* (Minn. Apr. 18, 1991).

A. The liquidated-damages provisions are unenforceable penalties.

Liquidated damages are "fixed sums payable to a party when actual damages are difficult to ascertain or prove." *In re Qwest's Wholesale Serv. Quality Standards*, 702 N.W.2d 246, 262 (Minn. 2005). But liquidated damages cannot be mere penalties. *Id.*

Courts therefore "scrutinize a particular provision to ascertain if it is one for a penalty or one for damages." *Gorco Constr. Co. v. Stein*, 99 N.W.2d 69, 74 (Minn. 1959).

A penalty is designed "to secure performance" and is unenforceable, while liquidated damages are designed "to fix the amount to be paid in lieu of performance." *Frank v. Jansen*, 226 N.W.2d 739, 743 (Minn. 1975); *see also Gorco*, 99 N.W.2d at 74 ("Punishment of a promisor for breach, without regard to the extent of the harm that he has caused, is an unjust and unnecessary remedy."). The "controlling factor" in ascertaining whether a clause is enforceable "is whether the amount agreed upon is reasonable or unreasonable in the light of the contract as a whole, the nature of the damages contemplated, and the surrounding circumstances." *Gorco*, 99 N.W.2d at 74.

The relevant clause of the litigation-financing agreement states that Maslowski "SHALL IMMEDIATELY PAY TO [PROSPECT] LIQUIDATED DAMAGES IN THE AMOUNT OF TWICE THE PURCHASE AMOUNT REGARDLESS OF THE OUTCOME OF THE LEGAL CLAIM OR THE AMOUNT OF THE PROCEEDS" if Maslowski "DOES NOT COMPLY WITH [THE AGREEMENT] OR AVOIDS OR ATTEMPTS TO AVOID PAYMENT TO" Prospect in any manner. The "purchase price" of the litigation-financing agreement is $7,425. This clause thus compels Maslowski to "IMMEDIATELY PAY" $14,850 if she commits any breach of the agreement, an amount that the agreement states bears no relationship to the outcome of the legal claim or the proceeds received.

Requiring Maslowski to pay $14,850 in the event of any breach is unreasonable in light of the agreement as a whole. Prospect argues it assumed the risk that the Personal-

Injury Lawsuit would not result in any recovery to Maslowski, in which case it "SHALL RECEIVE NOTHING." But the liquidated-damages clause overrides this risk, imposing upon Maslowski the obligation to pay $14,850 regardless of the outcome of the Personal-Injury Lawsuit. The threat of an absolute obligation to repay 200% of the entire purchase amount immediately upon any breach of the agreement is thus designed "to secure performance" rather than to compensate Prospect in the event of Maslowski's failure to perform. *Frank*, 226 N.W.2d at 743.

Moreover, the prospective damages Prospect may incur under the agreement are reasonably susceptible to accurate calculation, and the purported liquidated damages are disproportionate. Liquidated damages are generally appropriate "where the actual damages resulting from a breach of the contract cannot be ascertained or measured." *Gorco*, 99 N.W.2d at 75. For this reason, liquidated damages are generally appropriate where there is a risk of speculative damages such as lost profits or harm to corporate goodwill. *See Meuwissen v. H.E. Westerman Lumber Co.*, 16 N.W.2d 546, 550 (Minn. 1944) (holding that liquidated damages are appropriate where damage to "[t]he value of goodwill" and the cause of "[l]oss of profits" were at issue). But "when the measure of damages resulting from a breach of contract is susceptible of definite measurement," an amount "greatly disproportionate" is unenforceable because it constitutes an impermissible penalty. *Gorco*, 99 N.W.2d at 75.

The damages Prospect may incur if Maslowski breaches the agreement are susceptible to definite measurement. Prospect advanced a net total of $6,000 to Maslowski. If Maslowski neglected her obligations under the litigation-financing agreement, Prospect

would be damaged in the amount it advanced—$6,000. Because $14,850 is "greatly disproportionate" to the risk of loss that Prospect incurred under the agreement, the clauses are unenforceable as a penalty. *Id.* The district court therefore did not err by determining the liquidated-damages provisions were unenforceable penalties.

B. These penalty clauses are unconscionable.

The district court also concluded that the liquidated-damages provisions are thus unconscionable because they interfere with Maslowski's conduct of the Personal-Injury Lawsuit and "freeze Maslowski into an unbreakable relationship" with Schwebel. "A contract is unconscionable if it is such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other." *In re Estate of Hoffbeck*, 415 N.W.2d 447, 449 (Minn. App. 1987) (quotation omitted), *rev. denied* (Minn. Jan. 28, 1988). The supreme court has cautioned that courts should both (1) pay careful attention to "uncounseled agreements, particularly between parties of unequal bargaining power or agreements involving an unsophisticated party" and (2) "ensure that litigation financiers do not attempt to control the course of the underlying litigation, similar to the 'intermeddling' that we described in our early champerty precedent." *Maslowski*, 944 N.W.2d at 241 (citing *Huber v. Johnson*, 70 N.W. 806, 808 (Minn. 1897)). Given the supreme court's evident concern about the possibility of litigation-financing agreements interfering with litigants' power to prosecute the underlying legal claim to their own satisfaction, the district court did not err by concluding that this agreement unconscionably interfered with Maslowski's decisions as to her legal claim, including the decision to select her own counsel.

The supreme court cited *Huber* for the proposition that "it is difficult to conceive of any stipulation more against public policy than one which prohibits a party from settling his own dispute" without the permission of a financier. *Huber*, 70 N.W. at 808. The *Huber* court considered a contract that bound a party "not to settle the claim without the written consent" of the financier, and declared that, if the party did so settle the claim without consent, "he shall pay . . . a fixed and arbitrary sum, without any regard to the amount or value of the services which the [financier] may have performed." *Id.* The *Huber* court found the pre-settlement consent provision to be against public policy and also determined the provisions preventing settlement "except by his subjecting himself to the payment of an arbitrary penalty for doing so" were "void as against public policy." *Id.*

The penalty clauses in the agreement here operate in a manner similar to that of the clauses declared void in *Huber*. They impose an immediate penalty of $14,850 if Maslowski breaches any term of the agreement. Several of the agreement's terms relate to the pursuit of the underlying legal claim. Most notably, the agreement requires prior written notice of Maslowski's intent to hire a new attorney and that Maslowski "require such new or additional attorney to execute and deliver" to Prospect the acknowledgments to the agreement and the letter of direction. In essence, the agreement imposes a $14,850 penalty upon Maslowski for not providing prior written notice of her intent to change attorneys or for hiring an attorney who will not sign the acknowledgements Prospect requires.

"The lawyer-client relationship is jealously guarded and restricted to only those two parties because it is a fiduciary relationship of the highest character." *CPJ Enters., Inc. v.*

Gernander, 521 N.W.2d 622, 624 (Minn. App. 1994). The penalties imposed by the agreement upon a party's choices as to counsel are Prospect's intrusion on this relationship. The penalties may induce a party to either remain with counsel with whom the party is no longer satisfied or to retain counsel with whom Prospect is satisfied, i.e., counsel willing to acquiesce to Prospect's requirements. Because these penalties restrict "the freedom of clients to select counsel of their choice," they are unconscionable. *Barna, Guzy & Steffen, Ltd. v. Beens*, 541 N.W.2d 354, 357 (Minn. App. 1995) (quotation omitted), *rev. denied* (Minn. Feb. 27, 1996).

Moreover, the penalty clauses limit Maslowski's control over her underlying lawsuit. The agreement requires her to make "reasonable efforts not to enter into any settlement agreement or covenant" that would restrict Prospect's contractual rights to "information relating to the [p]roceeds or any settlement in connection therewith" and to use her "best efforts to prosecute" the lawsuit and bring it "to a good faith settlement or final judgment." Restricting Maslowski's freedom to enter into settlements and imposing a fixed penalty on her if she fails to "use reasonable efforts" to protect Prospect's interests offends the same principle as that at issue in *Huber*—namely, an outside party may not influence a litigant's efforts to settle a legal claim through the imposition of fixed penalties. *Huber*, 70 N.W. at 808. Further, "[i]t is well settled that a client may without the consent of his attorney settle and compromise with his adversary all matters in litigation, in such manner and upon such terms as he may deem necessary for the protection of his interests." *Southworth v. Rosendahl*, 158 N.W. 717, 718 (Minn. 1916). Prospect's attempt to restrict

Maslowski's rights with respect to her lawsuit and her attorney by imposing fixed penalties is unconscionable.

C. The interest rate is unconscionable.

The district court determined the 60% annual repurchase rate to be unconscionable as a violation of the usury statute, which states that "[n]o person shall directly or indirectly take or receive . . . any greater sum, or any greater value, for the loan or forbearance of money, goods, or things in action, than $8 on $100 for one year." Minn. Stat. § 334.01, subd. 1 (2020). The district court did not err in its conclusion that the usury statute applies to the litigation-financing agreement, and the 60% interest rate is unconscionable as a result.

Generally, four elements that "must be proven to establish a violation of the usury law:"

> (1) a loan of money or forbearance of debt,
> (2) an agreement between the parties that the principal shall be repayable absolutely,
> (3) the exaction of a greater amount of interest or profit than is allowed by law, and
> (4) the presence of an intention to evade the law at the inception of the transaction.

Miller v. Colortyme, Inc., 518 N.W.2d 544, 549 (Minn. 1994). Prospect argues that the litigation-financing agreement is not usurious because the first two elements are not met: the agreement specifically states it is "not a loan secured by a collateral assignment" and is to be treated "as a sale transaction and not as a loan for all purposes." And the agreement also states that "IF [MASLOWSKI] COMPLIES WITH [THE AGREEMENT] AND RECOVERS NOTHING FROM THE LEGAL CLAIM CITED BELOW, THEN

[PROSPECT] SHALL RECEIVE NOTHING," demonstrating there is no absolute repayment of the principal. But Prospect's argument fails to account for the requirement that courts, in determining whether a transaction is usurious, "must look through the form to the substance of a transaction." *Negaard v. Miller Constr. Co.*, 396 N.W.2d 833, 836 (Minn. App. 1986), *rev. denied* (Minn. Jan. 21, 1987).

Courts determine "the nature of a particular transaction" by "considering all of the evidence to ascertain if the true character of the transaction is in substance a contract to receive a usurious rate of interest for a loan or forbearance of money." *Rathbun v. W.T. Grant Co.*, 219 N.W.2d 641, 647 (Minn. 1974). Accordingly, a statement in an agreement that a transaction is to be treated as a sale and not as a loan is not dispositive. An otherwise valid contract may be usurious if it results in the "actual taking or receiving of excessive interest" or if it contains "a contractual obligation to pay excessive interest." *Citizen's Nat'l Bank v. Taylor*, 368 N.W.2d 913, 919 (Minn. 1985) (quoting *Linne v. Ronkainen*, 37 N.W.2d 237, 239-40 (Minn. 1949)).

The litigation-financing agreement here is designed to result in the actual receiving of excessive interest as a mere device to evade the usury law. Maslowski is subject to an annual interest rate of 60%—far in excess of the 8% annual rate permitted under the usury statute. Minn. Stat. § 334.01, subd. 1. She incurs an absolute obligation to pay this interest rate plus the principal if she recovers in the underlying legal claim; the agreement states she "is not entitled to receive any proceeds until [Prospect] has received" payment according to the "Repurchase Schedule." The obligation to repay is therefore absolute unless Maslowski chooses to forego pursuing a recovery in the underlying legal claim. But

the agreement also requires her to use her "best efforts to prosecute the Legal Claim and to bring the Legal Claim to a good faith settlement or final judgment." Breaching this provision carries a penalty of $14,850. Accordingly, the litigation-financing agreement is designed to compel Maslowski to bring her underlying legal claim to a final resolution, which results in Prospect receiving excessive interest.

This conclusion is bolstered by the supreme court's observations in its decision abolishing the champerty prohibition. The supreme court recognized it is "unlikely that companies like Prospect will fund frivolous claims because they only profit . . . if a plaintiff receives a settlement that exceeds the amount of the advance—an unlikely result in a meritless suit," and that "[l]itigation financing companies have claim valuation procedures to avoid this very problem." *Maslowski*, 944 N.W.2d at 240. Accordingly, by entering into the transaction, Prospect sought to purchase a stake in the outcome of a non-frivolous lawsuit that Maslowski had a contractual obligation to bring to a resolution. The agreement is thus designed to render the obligation to repay Prospect the advanced purchase price plus 60% interest to be absolute, and the agreement's form as a "SALE AND REPURCHASE AGREEMENT" instead of a loan is a mere device to evade the usury law. The district court did not err by reaching this conclusion and imposing the 8% interest rate permitted under the usury statute.[7]

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[7] Prospect also argues that the district court erred in revising the terms of the contract to be enforceable instead of removing these terms and enforcing the remainder as written. Prospect cites to the severability clause of the agreement, which states that, if any clause is deemed "invalid or unenforceable," the remaining unaffected clauses "shall be enforced to the fullest extent permitted by law." But this same clause also grants a court ruling on a dispute between the parties "the power to modify the scope of such term or provision, to

II. The district court did not err by determining that interest began to accrue on June 3, 2020.

The district court concluded that the litigation-financing agreement was not enforceable until the supreme court abolished the common-law prohibition on champerty, and that Prospect was not entitled to interest on its judgment until the day the supreme court's decision was issued—June 3, 2020. Prospect contends the *Maslowski* decision should apply retroactively as if it were the law "even at the date of the erroneous decision" in the previous rulings. *Hoven v. McCarthy Bros. Co.*, 204 N.W. 29, 30 (Minn. 1925). "Whether a judicial decision will apply retroactively is a question of law" reviewed de novo. *Khawaja v. State Farm Ins. Co.*, 631 N.W.2d 106, 111 (Minn. App. 2001), *rev. denied* (Minn. Sept. 25, 2001).

The law upon which Prospect relies is not directly on point. Prospect quotes *Hoven*, 204 N.W. at 30, for the proposition that "[i]t is the law that a decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation—the overruled decision is regarded in law as never having been the law." While this may be true for the black-letter law, it is not necessarily true for the enforcement of contract provisions made under then-existing precedent. Significantly, Prospect omits the remainder of the

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delete specific words or phrases, and to replace any invalid or unenforceable term or provision with a term or provision that is valid and enforceable." Moreover, the district court is empowered, upon a finding of unconscionability, to "refuse to enforce the contract, enforce it without the offending language, or limit application of the unconscionable clause to 'avoid any unconscionable result.'" *Kauffman Stewart, Inc. v. Weinbrenner Shoe Co.*, 589 N.W.2d 499, 502 (Minn. App. 1999) (quoting Restatement (Second) of Contracts § 208 (1981)). The district court did not err by modifying the unenforceable terms of the agreement pursuant to its power under caselaw and as explicitly agreed to by Prospect in the severability clause.

discussion from *Hoven*, which concerns the rights of parties to contracts affected by overruled precedent:

> [but], where a Constitution or statute has received a given construction by the court of last resort, and contracts have been made and rights acquired in accordance therewith, such contracts may not be invalidated nor vested rights acquired under them impaired by a change of construction made by a subsequent decision.

Id. This language suggests that parties who have entered into agreements are entitled to their rights under those agreements even if the law under which they were made is later changed. In this instance, the litigation-financing agreement was unenforceable as contrary to public policy at the time it was made in 2014. *Hoven* suggests that a change in that public policy does not necessarily change the status of the agreement at the time it was made under the previous policy prohibiting champerty.

We also find it significant that *Hoven* relies on the existence of an "erroneous decision" in its proposition that changes in precedent apply retroactively. *Id.* The supreme court here expressly stated that the district court's previous decision declaring the litigation-financing agreement void for being champertous, and our decision affirming that conclusion, were not erroneous: "The lower courts therefore did not err in determining that, under our prior decisions, the contract was unenforceable." *Maslowski*, 944 N.W.2d at 238. There is thus no "erroneous decision" that is being retroactively overruled here. Instead, the supreme court indicated that the litigation-financing agreement was not enforceable under Minnesota law prior to June 3, 2020. Therefore, the district court did

not err when it awarded interest only from the date of the supreme court's *Maslowski* decision.

III. The district court did not err by dismissing Schwebel from the lawsuit because there was no contract between Schwebel and Prospect.

The district court determined that, according to the unambiguous terms of the agreement and the letter of direction, neither document created a contract or obligation between Schwebel and Prospect, and Schwebel must therefore be dismissed from the lawsuit. The interpretation of a contract is a question of law reviewed de novo. *Storms, Inc. v. Mathy Constr. Co.*, 883 N.W.2d 772, 776 (Minn. 2016).

Prospect argues that the terms of Schwebel's Certification of Seller's Attorney and Maslowski's letter of direction demonstrate an enforceable contractual promise by Schwebel to Prospect to follow the terms of the agreement. But the terms of the agreement do not reflect an intent to create a contract between Prospect and Schwebel. Courts are to "look to the language of the contract to determine the parties' intent." *Id.* When such language "is clear and unambiguous," courts "enforce the agreement of the parties as expressed in the language of the contract" and do not "rewrite, modify, or limit" a provision "by a strained construction." *Id.* (quotations omitted).

The agreement clearly identifies the relevant parties. Prospect is identified as the "Purchaser." Maslowski is identified as the "Seller." Schwebel is separately identified as "Seller's Attorney," a term that includes "any substitute, new or additional attorney representing Seller" in the Personal-Injury Lawsuit. The agreement also contains a mechanism by which Maslowski may "hire new or additional attorneys" to represent her,

which states that, if she does so, "[a]ny such new or additional attorney(s) shall be considered part of 'Seller's Attorney in the Legal Claim' upon such hiring for all purposes of this [a]greement." The agreement therefore provides for the complete replacement of Schwebel as "Seller's Attorney" without modifying any other term or obligation relating to Maslowski. The plain terms of the agreement thus treat Schwebel as separate from Maslowski—and therefore separate from Maslowski's obligations under the agreement. To construe the agreement here as imposing contractual obligations upon a party clearly identified as separate from and ancillary to the "Seller" would be impermissible. *See id.*

Moreover, even if the agreement and the letter of direction did identify Schwebel as a party to the contract between Maslowski and Prospect, the essential elements for contract formation between Schwebel and Prospect are absent. "The formation of a contract requires communication of a specific and definite offer, acceptance, and consideration." *Com. Assocs., Inc. v. Work Connection, Inc.*, 712 N.W.2d 772, 782 (Minn. App. 2006). "Consideration may consist of either a benefit accruing to a party or a detriment suffered by another party." *Kielley v. Kielley*, 674 N.W.2d 770, 777 (Minn. App. 2004) (quotation omitted). Courts do not "examine the adequacy of consideration as long as something of value has passed between the parties." *Id.* at 778. Even if Schwebel conferred a benefit upon Prospect by signing the certification, as Prospect contends, Prospect passed nothing of value to Schwebel. Under the agreement, Prospect paid the purchase price to Maslowski. That payment is the only benefit Prospect conferred under the agreement, and that benefit was conferred only on Maslowski, not on Schwebel. Thus, no contract was formed between Schwebel and Prospect.

Finally, Prospect argues that Schwebel may be liable to Prospect under the agreement because Maslowski delegated her contractual duties of payment to Schwebel. But a party may delegate its "duty to perform under a contract" if there is not "an express agreement to the contrary." *Epland v. Meade Ins. Agency Assocs., Inc.*, 564 N.W.2d 203, 207 (Minn. 1997). The agreement here contains such an express agreement: "Seller's rights and obligations under this Sale and Repurchase Agreement may not be assigned or transferred without the written consent of Purchaser" except for a transfer upon death. There is no evidence in the record that Prospect gave written consent for Maslowski to delegate or assign her payment obligations to Schwebel. And there is no indication that Maslowski intended to relieve herself of the obligation to pay under the agreement simply by issuing to Schwebel instructions on how that payment should be effectuated.[8] Accordingly, there is no contractual obligation between Schwebel and Prospect that would support Prospect's claims for relief against Schwebel, and the district court did not err by dismissing Schwebel from the lawsuit.

IV. The district court did not abuse its discretion by determining Prospect was not the prevailing party and declining to award attorney fees and costs.

The district court denied Prospect's motion for attorney fees and costs, reasoning that Prospect was not entitled to fees and costs under the agreement. We "will not reverse

[8] Prospect also argues for the first time on appeal that Prospect is an intended third-party beneficiary to the letter of direction. Prospect did not raise this issue before the district court. Because the issue of whether Prospect is a third-party beneficiary was not presented to the district court, it is forfeited on appeal. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) ("A reviewing court must generally consider only those issues that the record shows were presented and considered by the [district] court in deciding the matter before it." (quotation omitted)).

the district court's decision on attorney fees absent an abuse of discretion." *Carlson v. SALA Architects, Inc.*, 732 N.W.2d 324, 331 (Minn. App. 2007), *rev. denied* (Minn. Aug. 21, 2007). The district court here did not abuse its discretion by denying Prospect's motion for attorney fees.

"[A]ttorney fees are allowed only when permitted by a specific contract or when authorized by statute." *Roach v. County of Becker*, 962 N.W.2d 313, 322-23 (Minn. 2021). The agreement authorizes the recovery of attorney fees: "the prevailing party in any dispute shall be entitled to all reasonable attorneys' fees and costs, expenses and disbursements with respect to such dispute." Whether Prospect should be entitled to recover attorney fees depends on whether it is the "prevailing party."

The district court is afforded discretion to determine "who the prevailing party is for purposes" of an award of attorney fees. *Posey v. Fossen*, 707 N.W.2d 712, 714 (Minn. App. 2006). The district court abuses this discretion only if its decision "is against logic and facts on the record." *Id.* And the party challenging a district court's exercise of its discretion bears the burden to demonstrate "that no reasonable person would agree with the trial court's assessment." *Id.* (quotation omitted).

The determination of which party—if any—is the prevailing party depends on the "careful weighing of the relative success of the parties to a lawsuit, a process that invests a certain amount of discretion in the district court." *Id.* at 715. The district court conducted a review of the totality of the litigation and concluded that Maslowski prevailed "with respect to the choice of forum and choice of law," on the initial determinations that the agreement was unenforceable because it was champertous, and on her "contention that the

[a]greement was unconscionable." With respect to Prospect, the district court determined it "prevailed in its ultimate goal of changing the common law of champerty in Minnesota," but did not achieve "a complete victory with respect to" Maslowski because it was awarded a "modest judgment" and "lost on significant issues" as to the enforceability of the contract. Because both Maslowski and Prospect "won on some significant issues" and "lost on others," the district court concluded that neither of them truly prevailed and denied Prospect's request for relief. The district court's review of the case constitutes the "careful weighing of the relative success of the parties" that is required and is not an abuse of the district court's discretion. *Id.*

DECISION

Because the litigation-financing agreement contains unenforceable penalty clauses that unconscionably interfere with Maslowski's relationship with her counsel, and because the interest rate is unconscionable under the usury statute, the district court did not err in its decision to revise the agreement to be enforceable. In so deciding, it did not err by determining interest is to be applied from June 3, 2020, the date of the *Maslowski* decision. The district court also did not err by dismissing Schwebel from the lawsuit because no contractual obligations existed between Schwebel and Prospect. We therefore affirm the district court's April 2021 decision in its entirety. And we discern no abuse of discretion in the district court's later determination that there was no prevailing party and its denial of Prospect's request for attorney fees and costs.

Affirmed.