IN THE COURT OF APPEALS OF THE STATE OF NEVADA

PIERRE A. HASCHEFF,
Appellant/Cross-Respondent,
vs.
LYNDA HASCHEFF,
Respondent/Cross-Appellant.

No. 82626-COA

ORDER AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

Pierre A. Hascheff appeals from a district court order granting a motion for clarification or declaratory relief, thereby denying his motion for an order to enforce and/or for an order to show cause and request for indemnification of attorney fees and costs as provided for in a decree of divorce, as well as attorney fees and costs for having to move to enforce the indemnification provision. Lynda Hascheff cross-appeals from the district court's order denying her request for attorney fees and costs as she prevailed on her motion. Second Judicial District Court, Family Court Division, Washoe County; Sandra A. Unsworth, Judge.

The parties were married in 1990.[1] Throughout the marriage, Pierre was an attorney while Lynda was primarily a stay-at-home mother. In April 2013, Pierre filed a complaint for divorce; that same year, he was elected as a Justice of the Peace for Reno Justice Court. In September 2013, the parties reached a Marital Settlement Agreement (MSA) that resolved the issues of their divorce and was ratified, merged, and incorporated in the decree of divorce. The MSA included an "Indemnity and Hold Harmless"

[1]We do not recount the facts except as necessary for our disposition.

provision set forth in § 40.[2] Relevant here is the part of that provision that states "[i]n the event Husband is sued for malpractice, Wife agrees to defend and indemnify Husband for one half (1/2) the costs of any defense[3] and judgment. Husband may purchase tail coverages of which Wife shall pay one half (1/2) of such costs."[4] The MSA also included a provision that if

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[2]MSA § 40 in its entirety provides that

> Except for the obligations contained in or expressly arising out of this Agreement, each party warrants to the other that he or she has not incurred, and shall not incur, any liability or obligation for which the other party is, or may be, liable. Except as may be expressly provided in this Agreement, if any claim, action, or proceeding, whether or not well founded, shall later be brought seeking to hold one party liable on account of any alleged debt, liability, act, or omission of the other, the warranting party shall, at his or her sole expense, defend the other against the claim, action, or proceeding. The warranting party shall also indemnify the other and hold him or her harmless against any loss or liability that he or she may incur as a result of the claim, action, or proceeding, including attorney fees, costs, and expenses incurred in defending or responding to any such action. In the event Husband is sued for malpractice, Wife agrees to defend and indemnify Husband for one half (1/2) the costs of any defense and judgment. Husband may purchase tail coverages of which Wife shall pay one half (1/2) of such costs.

[3]We note that the parties and the district court use "fees and costs" when referencing the obligation stemming from the indemnification provision, and therefore we use this terminology as well.

[4]We assume that the indemnification provision resulting from a possible future malpractice claim was agreed to in part because Pierre earned income as an attorney during the pendency of the marriage. *Cf.*

enforcement of the decree was necessary, the prevailing party in the lawsuit would be entitled to reasonable attorney fees and costs. Specifically, MSA § 35.1 provides that

> If either party brings an action or proceeding to enforce any provision of this Agreement, or to enforce any judgment or order made by a court in connection with this Agreement, the prevailing party in that action or proceeding shall be entitled to reasonable attorney fees and other reasonably necessary costs from the other party.

In July 2018, Pierre was subpoenaed as a witness in a trust litigation dispute between beneficiaries to testify regarding legal work he had previously performed as an attorney, including preparation of estate planning documents. Through his legal malpractice insurance carrier, Pierre retained counsel to represent his interests as a witness in the trust litigation in which he was not a party. Subsequently, in December 2018, Pierre's former client, a trustee in the trust litigation, filed a complaint for legal malpractice against Pierre. The malpractice case was subsequently stayed pending resolution of the collateral trust litigation.

In 2020, Pierre notified Lynda that he was seeking the reimbursement of fees and costs associated with his participation as a witness in the collateral trust litigation as well as the fees and costs that he had incurred as a party in the stayed legal malpractice case. Lynda did not pay Pierre, contending that she did not have to pay the fees and costs

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Culculoglu v. Culculoglu, No. 67781, 2016 WL 3185998, at *2 (Nev. June 6, 2016) (Order of Affirmance) (noting that a separate debt that was not incurred for the benefit of the community is not a community debt). The record also reflects that Lynda confirmed to Pierre that she would pay her half of the fees and costs in defending the malpractice action, if Pierre demonstrated that the reimbursement he demanded was within the scope of the indemnification language.

associated with Pierre being called as a witness in the trust litigation because Pierre had not been sued for malpractice in that action, and further that she should not be required to reimburse any fees and costs in the malpractice case as he had failed to timely notify her of it. Subsequently, Lynda filed a motion for clarification or declaratory relief, asserting her position based on the foregoing reasons and arguing that she should not be required to indemnify Pierre for his legal fees and costs. Pierre filed an opposition and a motion for an order to show cause, or in the alternative, to enforce the divorce decree. Both parties requested attorney fees and costs necessarily incurred to resolve the dispute.

After conducting an evidentiary hearing, the district court entered an order finding that while the fees and costs incurred by Pierre in both the collateral trust litigation and his legal malpractice case were covered by the "Indemnity and Hold Harmless" provision of the MSA § 40, Pierre was barred from recovering his fees and costs based on the doctrine of laches. Specifically, the court found that Pierre's "conscious disregard and selective enforcement" of the indemnification provision was comparable to a claim for laches, and Pierre's actions prejudiced Lynda as she was given no say in the fees and costs expended by Pierre in the underlying trust action. The district court denied both parties' requests for attorney fees and costs after resolving the matter. This appeal and cross-appeal followed.

On appeal, Pierre contends that the district court erred by applying the doctrine of laches to essentially re-write MSA § 40, as this section does not require Pierre to provide Lynda with advanced notice of a legal proceeding before seeking indemnification, and that Lynda was obligated to indemnify him. Pierre also argues that there was no evidence of prejudice or harm to Lynda from any alleged delay in seeking indemnification from her. Lynda contends, as she did below, that Pierre's

request was not timely, and he was not transparent in seeking fees and costs thus depriving her of the opportunity to exercise her equal and equivalent right to manage the litigation. Lynda also cross-appeals from the district court's denial of her attorney fees and costs request for having to file a motion to resolve the dispute.[5]

Indemnification for fees and costs incurred in the collateral trust litigation

We first consider the district court's denial of Pierre's request for indemnification for the fees and costs he incurred to protect his interests as a percipient witness in the collateral trust litigation. Although the district court determined that he was entitled to indemnification for these fees and costs under MSA § 40, the court ultimately denied his request. In denying Pierre's request, the court correctly recognized that the indemnification provision at issue did not require that Lynda be notified of the litigation by a certain time. However, the court also determined that the delay in notifying Lynda of the trust litigation adversely affected her because she was "given no say in the fees and costs expended by [Pierre] in the collateral trust action." The court also found that Pierre's lack of transparency about the amount of fees and costs he incurred, along with his failure to provide accurate, unredacted billing records, as well as the total amount of the financial obligation incurred, precluded recovery. Pierre argues that he supplied the district court with supporting information and if the court had concerns, it could have conducted an in camera review of the billing records.

This court reviews a district court's order resolving a request for declaratory relief de novo. *Nevadans for Nev. v. Beers*, 122 Nev. 930, 942,

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[5]Based on our disposition we need not address the merits of Lynda's cross-appeal as the district court will necessarily be required to address each party's request for attorney fees and costs on remand.

142 P.3d 339, 347 (2006). Further, the interpretation of an agreement-based divorce decree presents a question of law, *see Shelton v. Shelton*, 119 Nev. 492, 497, 78 P.3d 507, 510 (2003), and we also review questions of law de novo, *Evans v. Dean Witter Reynolds, Inc.*, 116 Nev. 598, 606, 5 P.3d 1043, 1048, (2000). When interpreting an agreement, this court must avoid rewriting the terms to encompass more than what was intended by the parties. *See Rivero v. Rivero*, 125 Nev. 410, 429, 216 P.3d 213, 226 (2009) (holding that the appellate court will not rewrite parties' contracts), *overruled on other grounds by Romano v. Romano*, 138 Nev., Adv. Op. 1, 501 P.3d 980, 984 (2022); *see also Reno Club, Inc. v. Young Inv. Co.*, 64 Nev. 312, 323, 182 P.2d 1011, 1016 (1947) ("This would be virtually creating a new contract for the parties, which they have not created or intended themselves, and which, under well-settled rules of construction, the court has no power to do."); *Edelstein v. Bank of N.Y. Mellon*, 128 Nev. 505, 518, 286 P.3d 249, 258 (2012) ("When interpreting a written agreement between parties, this court is not at liberty, either to disregard words used by the parties . . . or to insert words which the parties have not made use of." (internal quotation marks omitted)).

First, we disagree that MSA § 40 allows for indemnification for legal fees and costs incurred by Pierre while acting in his professional capacity in all circumstances, including testifying as a percipient witness in collateral litigation. Under the relevant provision of MSA § 40, Pierre must first be sued for malpractice before he can seek indemnification for his legal fees and costs. Thus, the condition precedent for Pierre to seek indemnification under § 40 for fees and costs incurred in his professional capacity requires that he be sued for malpractice. *See Cain v. Price*, 134 Nev. 193, 195, 415 P.3d 25, 28-29 (2018) (noting that a condition precedent is an event that must occur before the promisor becomes obligated to

perform); *cf. Gonzalez v. Gonzalez*, No. 82011-COA, 2022 WL 213845 (Nev. Ct. App. Jan. 4, 2022) (Order of Affirmance) (concluding that the plain language of the decree did not place a condition precedent that the wife must satisfy before receiving real property). As Pierre was not sued as a party in the collateral trust litigation, he is precluded from seeking indemnification from Lynda for his decision to retain counsel to represent his interests as a witness. As Lynda aptly points out, the indemnification provision *could* have been written to include indemnification for legal representation in cases where he was not named as a party. As written, however, MSA § 40 does not contemplate indemnification where Pierre testifies as a witness in collateral litigation. Simply, the plain language of this section supports that Pierre must first be sued for malpractice before seeking indemnification for his legal fees and costs and those legal fees and costs must arise from the malpractice action only.

Second, it appears from the district court's order the court may have relied on the language contained in the first part of MSA § 40 to conclude that Pierre could seek indemnification for fees and costs incurred in the collateral trust litigation. Generally, the first part of MSA § 40 contemplates that each party to the agreement warrants that he or she has not incurred or shall not incur a liability or obligation or future liability or obligation for which the other party is or may be liable. And, if the other party is sued for such obligation, the warranting party will defend, indemnify and hold harmless that party for any losses incurred. In essence, this part of MSA § 40 contemplates where the party who did not incur the obligation is sued for it, that party is entitled to indemnification from the other party who warranted that no such liability or obligation existed when the MSA was signed.

This case does not involve the factual scenario where Pierre was sued for an obligation incurred by Lynda that she had failed to disclose or warrant did not exist thereby entitling him to seek indemnification from her. Instead, it was Pierre who incurred the obligation by hiring a lawyer to defend his interests in testifying as a percipient witness in the collateral trust litigation for which he is now seeking indemnification from Lynda. It should be noted that Pierre's obligation is not a shared or mutual obligation for which both parties could ultimately be liable as contemplated by the first part of § 40. Lynda could never have incurred the obligation of attorney fees and costs incurred in the trust litigation on her own or in place of Pierre. Indeed, Lynda, a nonlawyer who did not retain counsel, could never have been sued by the attorney representing Pierre in the collateral trust litigation to collect the fees and costs owed by Pierre. Further, Pierre by signing the MSA, warranted that he would not seek indemnification from Lynda for any obligation he incurred post-divorce, other than for malpractice suits, as discussed herein. Therefore, the first part of the "Indemnification and Hold Harmless" provision in MSA § 40 as written does not permit indemnification from Lynda for the fees and costs incurred in the collateral trust litigation. Further, because Pierre was not sued for malpractice in that litigation, he is not entitled to seek indemnification under the second part of § 40.

In this case, we need not decide whether the district court erred in its evaluation of Pierre's request for fees and costs in the collateral trust litigation, including by not conducting an in camera review, because the court reached the correct result by denying his request. We therefore affirm this part of district court's order. *See Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010) (holding that we

will affirm the district court if it reaches the correct result, even if for the wrong reason).

Indemnification for fees and costs related to the malpractice action

We next address the district court's denial of indemnification for the fees and costs incurred by Pierre in the malpractice action based on laches. We review the court's application of the doctrine of laches for abuse of discretion. *See Radecki v. Bank of New York Mellon as Tr. for Certificateholders of CWABS Inc., Asset-Backed Certificates, Series 2006-BC5*, No. 80892-COA, 2021 WL 2328355, at *1 (Nev. Ct. App. June 4, 2021) (Order of Affirmance). The doctrine of laches is an equitable remedy and appropriately applied where (1) there was an inexcusable delay in seeking action, (2) an implied waiver arose from the petitioner's conduct leading up to the legal action, and (3) the respondent has been prejudiced by the delay.[6] *Bldg. & Constr. Trades Council of N. Nev. v. State,* 108 Nev. 605, 611, 836 P.2d 633, 637 (1992). Whether laches applies "depends upon the particular facts of each case." *Carson City v. Price,* 113 Nev. 409, 412, 934 P.2d 1042, 1043 (1997). "Laches is more than mere delay in seeking to enforce one's rights, it is delay that works a disadvantage to another." *Home Sav. Ass'n*

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[6]The Nevada Supreme Court has recognized that the doctrine of laches applies when a party is prejudiced by a delay in notification such that the party is placed in a changed position to the party's detriment. *See, e.g., Kancilia v. Claymore & Dirk Ltd. P'ship*, No. 61116, 2014 WL 3731862 *2 (Nev. Jul. 24, 2014) (Order of Affirmance) (concluding that the application of laches was appropriate where, as a result of the appellant's delay in filing suit, the respondents destroyed documents and were prejudiced in their ability to present evidence supporting their position that otherwise would have been available); *see also Nationstar Mortg. LLC v. W. Sunset 2050 Tr.*, No. 79271, 2020 WL 6742725 *1 (Nev. Nov. 13, 2020) (Order of Affirmance) (holding that a party's failure to produce evidence until two months before trial constituted sufficient prejudice to support the district court's application of laches).

v. Bigelow, 105 Nev. 494, 496, 779 P.2d 85, 86 (1989). "The condition of the party asserting laches must become so changed that he cannot be restored to his former state." *Id.*

As discussed above, under the plain language of the indemnification provision, Pierre was not required to notify Lynda as to the existence of the pending malpractice claim against him before seeking indemnification. The district court acknowledged in its order that the party's indemnification provision did not contain "express and unambiguous language requiring [Pierre] to have provided immediate notice of . . . the malpractice action to [Lynda]." The court further recognized that it was "barred from undertaking equitable considerations regarding MSA § 40's contractual language." *See, e.g., Reyburn Lawn & Landscape Designers, Inc. v. Plaster Dev. Co.,* 127 Nev. 331, 339, 255 P.3d 268, 274 (2011) ("When the duty to indemnify arises from contractual language, it generally is not subject to equitable considerations; rather, it is enforced in accordance with the terms of the contracting parties' agreement."). Nevertheless, the court applied the doctrine of laches to deny Pierre's request for indemnification in the malpractice action. While we are uncertain as to the current status of the malpractice case, it was previously stayed pending resolution of the collateral trust litigation. Because of this, plus the undisputed language in MSA § 40 that does not require immediate notification of the action, Lynda is unable to demonstrate the necessary legal prejudice resulting from any alleged delay in notification to support the application of the doctrine of laches. We conclude therefore that the district court abused its discretion in applying laches to grant Lynda's motion and deny Pierre's request for indemnification in the malpractice action. *Radecki*, 2021 WL 2328355, at *2.

On remand, the district court must necessarily determine whether the fees and costs incurred in the malpractice action are covered by the indemnification provision. In doing so, the district court must make specific factual findings supporting how the court reached its determination. *See Wilford v. Wilford*, 101 Nev. 212, 215, 699 P.2d 105, 107 (1985) ("The district court . . . is required to make specific findings of fact sufficient to indicate the basis for its ultimate conclusions."). Further, insofar as the indemnification provision contains ambiguous terms such that it is unclear which fees and costs are covered by the provision, the district court is required "to clarify the meaning of a disputed term in an agreement-based decree" and "must consider the intent of the parties in entering into the agreement." *Mizrachi v. Mizrachi*, 132 Nev. 666, 677, 385 P.3d 982, 989 (Ct. App. 2016). "And in doing so, the court may look to the record as a whole and the surrounding circumstances to interpret the parties' intent." *Id.* If the words of a contract are ambiguous, the court will consider "parol or extrinsic evidence" to determine the intent of the parties. *M.C. Multi-Family Dev., LLC v. Crestdale Assocs., Ltd.*, 124 Nev. 901, 913-14, 193 P.3d 536, 544-45 (2008). The district court must make these determinations in the first instance. *See Ryan's Express Transp. Servs. Inc. v. Amador State Lines, Inc.*, 128 Nev. 289, 299, 279 P.3d 166, 172 (2012) ("An appellate court is not particularly well-suited to make factual determinations in the first instance.").

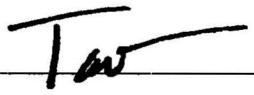
The district court must consider an award of attorney fees and costs in accordance with MSA § 35.1

Finally, the district court failed to apply MSA § 35.1 when it denied both parties an award of attorney fees and costs in bringing their respective motions regarding enforcement of the indemnification provision. Because the district court already concluded that the parties complied with

the specific provisions in advance of being able to request attorney fees and costs, on remand the court may only need to determine which party is the prevailing party, and then consider an award of reasonable attorney fees and costs in accordance with the MSA § 35.1.[7] Therefore, we

ORDER the judgment of the district court AFFIRMED IN PART, REVERSED IN PART, and REMAND this matter to the district court for proceedings consistent with this order.[8]

_____, C.J.
Gibbons



_____, J.
Tao

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cc: Hon. Sandra A. Unsworth, District Judge, Family Court Division
Melissa Mangiaracina, Settlement Judge
Gordon & Rees Scully Mansukhani LLP/Reno
Leonard Law, PC
Washoe District Court Clerk

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[7]We note that MSA § 35.2 sets forth certain requirements that the parties must comply with prior to requesting fees and costs for having to move to enforce a provision of the MSA. It appears that the district court considered this, and in its order, the court found that both parties had complied with MSA § 35.2 and satisfied their obligations. Although on appeal it appears that each party continues to dispute whether MSA § 35.2 was complied with by the other, the district court summarily denied both parties' requests for fees and costs without making specific findings regarding compliance. Therefore, the court may need to revisit this issue on remand when considering an award under § 35.1.

[8]Insofar as the parties raise arguments that are not specifically addressed in this order, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given our disposition of this appeal.