No. 14-113025-A

IN THE COURT OF APPEALS FOR THE STATE OF KANSAS

KAPE Roofing and Gutters, Inc., and Chuck Cooper,

Appellants,

v.

Chad Chebultz, an individual; and Community First National Bank, a banking corporation,

Appellees.

BRIEF OF APPELLANTS

APPEAL FROM THE EIGHTH JUDICIAL DISTRICT
DISTRICT COURT, DICKINSON COUNTY, KANSAS
THE HONORABLE DAVID R. PLATT, DISTRICT JUDGE
DISTRICT COURT CASE NO. 12-CV-73

ORAL ARGUMENT: THIRTY MINUTES

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BRIEF OF APPELLANT

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No. 14-113025-A

IN THE COURT OF APPEALS IN THE STATE OF KANSAS

KAPE Roofing and Gutters, Inc., and Chuck Cooper

v.

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---

BRIEF OF APPELLANT, KAPE ROOFING AND GUTTERS, INC. AND CHUCK COOPER

NATURE OF THE CASE

This was a claim for injunction, defamation, interference with prospective business advantage, breach of contract and foreclosure of a mechanic's lien. The District Court granted default judgment against the Plaintiffs and an affirmative judgment in favor of the Defendant upon his counterclaim. The Plaintiffs bring this appeal.

ISSUES

1. Whether the District Court erred in granting summary judgment on the Defendants' counterclaim and default judgment dismissing the Plaintiffs' Petition?
2. Whether the District Court erred in granting judgment for violation of the Consumer Protection Act?
3. Whether the District Court erred in granting judgment for outrageous conduct and punitive damages flowing therefrom?
4. Whether the District Court erred in failing to dismiss the counterclaim or deny judgment to the Defendants based upon the advice of counsel defense?

STATEMENT OF FACTS

1. The Plaintiffs sued the Defendant for defaming and slandering the Plaintiffs and causing damage to the Plaintiffs' roofing business in the form of lost income. In addition, the Plaintiffs requested foreclosure of a mechanic's lien to satisfy the remaining balance owed for labor performed upon and materials incorporated into the Defendant's home in Abilene, Dickinson County, all as set forth more particularly in the Plaintiffs' Amended Petition, which is attached to this brief at the (Please see the Appendix to this Brief, Copy of Amended Petition, Record Volume 1, pages 14 to 46).
2. During the Pretrial process in this case, Counsel for the Plaintiffs had a conflict in his schedule because he was required to travel to Eastern Pennsylvania to attend a deposition on March 7, 2014, which the District Court had set for the date of the Pretrial Conference and hearing of Partial Motions For Summary Judgment upon the issue of mechanic's lien foreclosure. Counsel for the Plaintiffs had informed the court and other counsel of that fact sometime before March 7, 2014, during a telephone conference call, in which all Counsel agreed to reschedule the March 7, 2014 hearing and to re-set it for a later date (Record, Volume 7, page 12, line 3 to line 23; See Also, Record Volume 8, page 11, line 9 to page 23, line 18; see also Record Volume 8, page 23, line 19 to page 35, line 21).
3. Counsel for the Plaintiffs was in the process of preparing the Journal Entry of Continuance but did not have at hand the new hearing date. Plaintiffs' Counsel

therefore had contacted opposing counsel and the Court's administrative assistant to determine that date by telephone. Despite making these telephone calls, Counsel for the Plaintiff did not receive return telephone calls with this information (Record Volume 8, page 11, line 9 to page 23, line 18; see also page 23, line 19 to page 35, line 21).

4. Counsel for the Plaintiffs was attempting to comply with the Court's orders and was simply trying to complete the drafting of the order for continuance and had inadvertently misplaced the note containing the correct new date and time for the hearing (Record Volume 8, page 11, line 9 to page 23, line 18; see also page 23, line 19 to page 35, line 21).
5. When Counsel contacted the Court's Administrative Assistant, the Administrative Assistant did not have the new date and time and so Plaintiffs' Counsel contacted Defense Counsel to obtain that date, as stated above (Record Volume 8, page 11, line 9 to page 23, line 18; see also page 23, line 19 to page 35, line 21).
6. The court conducted a hearing with Defense Counsel on March 7, 2014 and struck the Plaintiffs' pleadings and granted default judgment against the Plaintiffs on their Petition and granted Summary Judgment against the Plaintiffs upon the previously-filed Partial Summary Judgment Motions (Record Volume 18, page 1 to page 14, line 21).
7. The oral contract which the parties entered into did contain an agreement for KAPE to provide or subcontract interior repair or remodeling work on the basement of the Chebultz home. Chad Chebultz requested that work and KAPE located, provided

and supervised Chad Olson to perform such work, with Chad Chebultz' knowledge, consent and approval. Jarrod Sawyer described the whole oral contract with Chebultz as "a lee-wise, go ahead and do that kind of a contract. You know, we were working in close proximity from the month of June until August on his [Chad Chebultz'] home. He has a very large house." (Jarrod Sawyer Deposition, Record Volume 3, page 161 (deposition page 11), lines 18-21; also page 161 (deposition page 11), line 2 to line 19; page 163 (deposition page 18), lines 19-20; page 160 (deposition page 8), line 17 to page 161 (deposition page 10), line 19; especially, page 160 (deposition page 9), lines 16 to 17; and page 161 (deposition page 10), lines 14 to 19).

8. Jarrod Sawyer, a KAPE representative, has personal direct knowledge that Chad Chebultz was introduced to Chad Olson because Jarrod Sawyer, on behalf of KAPE, himself introduced Chebultz to Olson, which is direct evidence that Chad Chebultz certainly knew he was being introduced by KAPE to Chad Olson (Deposition of Jarrod Sawyer, Rec. Vol. 4, page 4 (deposition page 47), line 10 to page 4 (deposition page 48), line 5).

9. Chad Chebultz suggested, KAPE agreed and facilitated, and KAPE assisted Chad Olson in carrying out, the terms of the contract which KAPE had with its subcontractor Chad Olson for the Chad Chebultz home, which were: "The basics of the insurance claim of what they were covering. I believe it was some carpeting, some drywall, an area around a chimney, a window, a light fixture to be removed and reset and some painting on the drywall after it was replaced. That's the main thing" (Jarrod Sawyer Deposition, Rec. Vol. 3, page 162 (deposition page 17), lines 16 to 25; Sawyer

Deposition, Rec. Vol. 3, page 162 (deposition page 15), lines 3 to 18; page 162 (deposition page 16), line 12 to page 162 (deposition page 17), line 25).

10. Chad Olsen did in fact work as a subcontractor for KAPE Roofing (Deposition of Brian Weary, Rec. Vol. 4, page 12 (deposition page 17), line 17 to page 13 (deposition page 21), line 5).

11. Brian Weary and Jarrod Sawyer helped Chad Olson with difficulties in the performance of his construction duties (Deposition of Brian Weary, Rec. Vol. 4, page 12 (deposition page 15), line 25 to page 12 (deposition page 16), line 5; page 13 (deposition page 18), line 11 to line 16; page 13 (deposition page 20), line 16 to 21, line 5; Jarrod Sawyer Deposition, Rec. Vol. 4, page 2 (deposition page 41), line 19 to page 3 (deposition page 42), line 13).

12. Jarrod and Brian also helped answer numerous other questions which Chad Olson had, from time to time, via telephone, as any principal contractor or contracting supervisor would (Deposition of Brian Weary, Rec. Vol. 4, page 10 (deposition page 8), lines 9 to 19, especially 18-19; page 11 (deposition page 13), line 1 to page 12 (deposition page 17), line 10).

13. Brian Weary was asked to explain the reason he referred to Chad Olson as a subcontractor: "Q: If he [Chad Olson] went to Chad Chebultz directly, called him, got together with him, arranged the work, how does that make him [Chad Olson] a subcontractor under KAPE? A: Because he [Chad Olson] checked up with us every day of the job. He'd discuss questions or whatnot, and like I said, nine times out of

ten, he was calling Jarrod and not myself." (Brian Weary Deposition, Rec. Vol. 4, page 13 (deposition page 20), line 16 to line 23).

14. Jarrod Sawyer, a KAPE employee who worked on the Chebultz home repair, testified: "we [KAPE] ended up doing some basement work on the insurance claim via Chad Olson" (Deposition of Jarrod Sawyer, Rec. Vol. 3, page 162 (deposition page 14), lines 5-70).

15. Chad Olson had been previously engaged as a subcontractor to KAPE on various other occasions when KAPE needed "a fix-it guy [who] does smaller jobs, or touch-ups or ceiling work" (Sawyer Deposition, Rec. Vol. 3, page 162 (deposition page 16), lines 5 to 7; See also Sawyer Deposition, Rec. Vol. 4, page 12 (deposition page 15), line 5 to page 12 (deposition page 17), line 12).

16. In this case, KAPE, pursuant to its normal practice with Olson, made an oral subcontract, the terms of which were easily defined by the circumstances: "We then found Chad Olson. . . . We then did the sub-basement work that sometime finished after Thanksgiving. It would have been in the beginning of December. . . . [Our contract] was all verbal with him. He did some work for us as well on a couple other homes. . . . So we're always finding a gentleman like Chad Olson to do those types of jobs, and we had found Chad to do siding repair on one home, painting on another and then Chad Chebultz' basement work" (Sawyer Deposition, Rec. Vol. 12 (deposition page 14), line 16 to line 24; page 12 (deposition page 15), line 5 to 7; page 12 (deposition page 16), lines 7 to 11).

17. Brian Weary and Jarrod Sawyer did find Chad Olson, solicit his labor for the Chebultz home, and accomplish the referral of Chad Olsen to the Chebultz home job in Abilene which consisted of basement renovation work (Deposition of Brian Weary, Rec. Vol. 4, page 11 (deposition page 13), line 1 to page 12 (deposition page 17), line 10; Jarrod Sawyer Deposition, page 4 (deposition page 47), line 10 to page 4 (deposition page 49), line 13).

18. Chad Olson was under the supervision and control of Jarrod Sawyer and Brian Weary, his general contractor supervisors, and Olson daily, and repeatedly, contacted them by telephone for specific instructions concerning the job and for help with difficult details and other arrangements (Brian Weary Deposition Rec. Vol. 4, pages 10-14: page 8, lines 9 to 19; page 13, line 1 to page 17, line 10; page 20, line 16 to line 23; Deposition of Brian Weary, Rec. Vol. 4, pages 10-14: page 15, line 25 to page 16, line 5; page 18, line 11 to line 16; page 20, line 16 to 21, line 5; Jarrod Sawyer Deposition, Rec. Vol. 4, pages 2-8: page 41, line 19 to page 42, line 13).

19. KAPE did make a concerted effort to specifically locate and procure Chad Olson to perform necessary work for Chad Olson (Deposition of Jarrod Sawyer, Rec. Vol. 3, pages 159-162: page 14, lines 5-7; page 16, lines 7-11; page 16, lines 6 and 12-14; page 17, lines 16-25).

20. Olson was working for KAPE, under the supervision of KAPE, as a subcontractor for KAPE, and Olson daily and regularly called upon KAPE for assistance with numerous details concerning Olson's work at the Chebultz home. Brian Weary and Jarrod Sawyer did find Chad Olson, solicit his labor for the Chebultz home, and accomplish

the referral of Chad Olsen to the Chebultz home job in Abilene which consisted of basement renovation work (Deposition of Brian Weary, Rec. Vol. 4, pages 12: page 13, line 1 to page 17, line 10; Jarrod Sawyer Deposition, Rec. Vol. 4, page 4: page 47, line 10 to page 49, line 13).

21. The oral basement remodeling contract which was made between KAPE and Chebultz did exist and was part of the oral contract which KAPE had with Chebultz. Jarrod Sawyer described the whole oral contract with Chebultz as "a lee-wise, go ahead and do that kind of a contract. You know, we were working in close proximity from the month of June until August on his [Chad Chebultz'] home. He has a very large house." (Jarrod Sawyer Deposition, Rec. Vol. 3, pages 161-162: page 11, lines 18-21; also page 11, line 2 to page 11, line 19, page 18, lines 19-20; page 8, line 17 to page 10, line 19; especially, page 9, lines 16 to 17; and page 10, lines 14 to 19).

22. There were numerous aspects of the KAPE-subcontracted basement remodeling job, performed by subcontractor Chad Olson, which were not completed until after Thanksgiving, or, in other words, not until sometime in December, 2011, well after July 14th (Jarrod Sawyer Deposition, Rec. Vol. 3, pages 161-162: page 13, line 11 to page 14, line 24; See also Wayne Ducolon Deposition, Rec. Vol. 4, pages 17-18: page 94, line 1 to page 99, line 18).

23. Chad Olson was paid by insurance proceeds which were transmitted from Texas by Colonel James, the owner of the house at the time the hail damage occurred, and were given to Chad Olson only upon the approval of KAPE, acting through KAPE representative Wayne Ducolon who personally attended a final work-related meeting

on or about December 31, 2011, at the Chebultz home (Deposition of Wayne Ducolon, Rec. Vol. 4, page 16: page 87, lines 7 to 16).

24. Chad Olson would not have been paid unless Wayne Ducolon of KAPE had approved payment to Chad Olson directly, which he did during the December 31, 2011 meeting (Wayne Ducolon Deposition, Rec. Vol. 4, page 16: page 87, line 7 to line 16).

25. Jarrod Sawyer corrected his deposition at page 46, lines 6 to 8 to state that KAPE's insurance does cover interior work (Sawyer Deposition, Rec. Vol. 4, page 4: page 46, lines 6 to 8).

26. Jarrod Sawyer testified that Chad Olson commenced work on the Chebultz basement project after Thanksgiving, 2011, because Chad Chebultz did not want basement work taking place in his home due to visiting family members and because Chad Olson had medical problems and those medical problems interrupted and slowed Olson's work on the Chebultz home (Jarrod Sawyer Deposition, Rec. Vol. 4, page 4: page 48, line 24 to page 49, line 13).

27. Jarrod Sawyer testified: "It would have been after Thanksgiving that he [Chad Olson] commenced [work] on the basement because there was a question on - he has medical issues and concerns." (Sawyer Deposition, Rec. Vol. 4, page 4: page 49, lines 1 to 4).

28. Chad Olson gave his invoice to KAPE to obtain payment for his work because he was a subcontractor for KAPE and was obtained to do the Chebultz work by KAPE, and KAPE was Olson's general and supervising contractor (Sawyer Deposition, Rec. Vol. 4, pages 3-4: page 45, line 18 to page 46, line 8; page 47, line 10 to page 48, line 1).

29. Chad Olson's work was not completed until after Thanksgiving, 2011, or sometime during December, 2011. Jarrod Sawyer testified specifically that Chad Olson commenced work on the Chebultz basement project after Thanksgiving, 2011, because Chad Chebultz did not want basement work taking place in his home due to visiting family members and because Chad Olson had medical problems and those medical problems interrupted and slowed Olson's work on the Chebultz home (Jarrod Sawyer Deposition, Rec. Vol. 4, page 4: page 48, line 24 to page 49, line 13).

30. The Defendant Chad Chebultz did not sign the written roofing contract with the Plaintiff KAPE, which is the contract at issue in this lawsuit (Rec. Vol. 19, page 74, line 22 to page 75, line 16).

31. The Defendant Chad Chebultz never promised to sign the roofing contract with the Plaintiff KAPE, or return it to the Plaintiff KAPE's agent Jarrod Sawyer, with his (Chad Chebultz') signature upon it (Rec. Vol. 19, page 74, line 22 to page 75, line 16).

32. Chad Chebultz told KAPE's agent Jarrod Sawyer: "I do not own the home." And "I was never going to sign a contract"(Rec. Vol. 19, page 74, line 22 to page 75, line 16).

33. The homeowner's roof damage insurance policy insured name was never changed from Colonel James to Chad Chebultz. The true owner of the homeowner's insurance policy and the true named insured under the homeowner's insurance policy which provided coverage for the roof and structure damage at issue in this case was always Colonel James who was the only person who had the right to receive the insurance company checks or policy proceeds resulting from the adjustment of the

roof/structure damage or loss at issue in this case (Rec. Vol. 19, page 75, line 17 to page 76, line 8; Rec. Vol. 19, page 76, line 20 to page 78, line 14).

34. Chad Chebultz did not have access to any of the homeowner's insurance proceeds or funds. He had no control over the homeowner's insurance funds. He, "as a businessman," would never sign a contract which he did not have the financial ability to take care of; therefore, Chad Chebultz told KAPE's agent Jarrod Sawyer he did not intend to sign the KAPE Roofing contract (Rec. Vol. 19, page 94, line 5 to page 96, line 9; Rec. Vol. 19, page 74, line 22 to page 76, line 8).

35. Chad Chebultz as a layman never considered that the benefits or provisions of the KAPE roofing contract would accrue to him because he did not own the roof/structure property damage insurance policy and the policy was still in the name of Colonel James, and he told Jarrod Sawyer so on June 3, 2011 (Rec. Vol. 4, page 74, line 22 to page 76, line 8).

36. Chad Chebultz testified that KAPE's work on the home "was wonderful, they did a great job." And: "There wasn't a speck of nail, shingle, anything in the yard." (Rec. Vol. 19, page 84, line 6 to line 24).

37. Chad Chebultz testified that KAPE's roofing work "was wonderful" and KAPE "really had this roof knocked out, including the garage, within three days. They spent the next morning cleaning up and taking extra materials with them. It was wonderful." (Rec. Vol. 19, page 84 line 6 to line 24).

38. Chad Chebultz had no criticism of the quality of the work that KAPE did (Rec. Vol. 19, page 84 line 6 to line 24).

39. The Plaintiff KAPE, its representatives and Chuck Cooper and his representatives believed in good faith that the oral contract which the parties entered into did contain an agreement for KAPE to provide or subcontract interior repair or remodeling work on the basement of the Chebultz home. Chad Chebultz requested that work and KAPE located, provided and supervised Chad Olson to perform such work, with Chad Chebultz' knowledge, consent and approval. Jarrod Sawyer described the whole oral contract with Chebultz as "a lee-wise, go ahead and do that kind of a contract. You know, we were working in close proximity from the month of June until August on his [Chad Chebultz'] home. He has a very large house." (Jarrod Sawyer Deposition, Rec. Vol. 3, pages 161-163: page 11, lines 18-21; also page 11, line 2 to page 11, line 19, page 18, lines 19-20; page 8, line 17 to page 10, line 19; especially, page 9, lines 16 to 17; and page 10, lines 14 to 19).

40. Jarrod and Brian also helped answer numerous other questions which Chad Olson had, from time to time, via telephone, as any principal contractor or contracting supervisor would (Deposition of Brian Weary, Rec. Vol. 4, pages 10-12: page 8, lines 9 to 19, especially 18-19; page 13, line 1 to page 17, line 10).

41. The Plaintiff KAPE, its representatives and Chuck Cooper and his representatives believed in good faith that Chad Olson was their subcontractor. Jarrod Sawyer, a KAPE employee who worked on the Chebultz home repair, testified: "we [KAPE] ended up doing some basement work on the insurance claim via Chad Olson" (Deposition of Jarrod Sawyer, Rec. Vol. 3, page 162: page 14, lines 5-70).

42. Chad Olson had been previously engaged as a subcontractor to KAPE on various other occasions when KAPE needed "a fix-it guy [who] does smaller jobs, or touch-ups or ceiling work" (Sawyer Deposition, Rec. Vol. 3, page 162: page 16, lines 5 to 7; See also Sawyer Deposition, Rec. Vol. 3, page 162: page 15, line 5 to page 17 line 12).

43. The Plaintiff KAPE, its representatives and Chuck Cooper and his representatives believed in good faith that Brian Weary and Jarrod Sawyer did find Chad Olson, solicit his labor for the Chebultz home, and accomplish the referral of Chad Olsen to the Chebultz home job in Abilene which consisted of basement renovation work (Deposition of Brian Weary, Rec. Vol. 4, pages 11-12: page 13, line 1 to page 17, line 10; Jarrod Sawyer Deposition, Rec. Vol. 4, page 4, page 47, line 10 to page 49, line 13).

44. The Plaintiff KAPE, its representatives and Chuck Cooper and his representatives believed in good faith that Chad Olson was under the supervision and control of Jarrod Sawyer and Brian Weary, his general contractor supervisors, and Olson daily, and repeatedly, contacted them by telephone for specific instructions concerning the job and for help with difficult details and other arrangements (Brian Weary Deposition, Rec. Vol. 4, pages 10-13: page 8, lines 9 to 19; page 13, line 1 to page 17, line 10; page 20, line 16 to line 23; Deposition of Brian Weary, Rec. Vol. 4, pages 12-13: page 15, line 25 to page 16, line 5; page 18, line 11 to line 16; page 20, line 16 to 21, line 5; Jarrod Sawyer Deposition, Rec. Vol. 4, pages 2-3: page 41, line 19 to page 42, line 13).

45. The Plaintiff KAPE, its representatives and Chuck Cooper and his representatives believed in good faith that KAPE did make a concerted effort to specifically locate and

procure Chad Olson to perform necessary work for Chad Olson (Deposition of Jarrod Sawyer, Rec. Vol. 3, page 162: page 14, lines 5-7; page 16, lines 7-11; page 16, lines 6 and 12-14; page 17, lines 16-25).

46. The Plaintiff KAPE, its representatives and Chuck Cooper and his representatives believed in good faith that Jarrod Sawyer, a KAPE representative, has personal direct knowledge that Chad Chebultz was introduced to Chad Olson because Jarrod Sawyer, on behalf of KAPE, himself introduced Chebultz to Olson, which is direct evidence that Chad Chebultz certainly knew he was being introduced by KAPE to Chad Olson (Deposition of Jarrod Sawyer, Rec. Vol. 4, page 4: page 47, line 10 to page 48, line 5).

47. The Plaintiff KAPE, its representatives and Chuck Cooper and his representatives believed in good faith that Olson was working for KAPE, under the supervision of KAPE, as a subcontractor for KAPE, and Olson daily and regularly called upon KAPE for assistance with numerous details concerning Olson's work at the Chebultz home. Brian Weary and Jarrod Sawyer did find Chad Olson, solicit his labor for the Chebultz home, and accomplish the referral of Chad Olsen to the Chebultz home job in Abilene which consisted of basement renovation work (Deposition of Brian Weary, Rec. Vol. 4, pages 11-12: page 13, line 1 to page 17, line 10; Jarrod Sawyer Deposition, Rec. Vol. 4, page 4: page 47, line 10 to page 49, line 13).

48. The Plaintiff KAPE, its representatives and Chuck Cooper and his representatives believed in good faith that there were numerous aspects of the KAPE-subcontracted basement remodeling job, performed by subcontractor Chad Olson, which were not

completed until after Thanksgiving, or, in other words, not until sometime in December, 2011, well after July 14th (Jarrod Sawyer Deposition, Rec. Vol. 3, pages 161-162: page 13, line 11 to page 14, line 24; See also Wayne Ducolon Deposition, Rec. Vol. 4, pages 17-18: page 94, line 1 to page 99, line 18).

49. The Plaintiff KAPE, its representatives and Chuck Cooper and his representatives believed in good faith that Chad Olson was paid by insurance proceeds which were transmitted from Texas by Colonel James, the owner of the house at the time the hail damage occurred, and were given to Chad Olson only upon the approval of KAPE, acting through KAPE representative Wayne Ducolon who personally attended a final work-related meeting on or about December 31, 2011, at the Chebultz home (Deposition of Wayne Ducolon, Rec. Vol. 4, page 16: page 87, lines 7 to 16). Chad Olson would not have been paid unless Wayne Ducolon of KAPE had approved payment to Chad Olson directly, which he did during that meeting (Wayne Ducolon Deposition, Rec. Vol. 4, page 16: page 87, line 7 to line 16)

50. The Plaintiff KAPE, its representatives and Chuck Cooper and his representatives believed in good faith that KAPE's insurance did cover interior work (Sawyer Deposition, Rec. Vol. 4, page 4: page 46, lines 6 to 8).

51. The Plaintiff KAPE, its representatives and Chuck Cooper and his representatives believed in good faith that Chad Olson commenced work on the Chebultz basement project after Thanksgiving, 2011, because Chad Chebultz did not want basement work taking place in his home due to visiting family members and because Chad Olson had medical problems and those medical problems interrupted and slowed Olson's work

on the Chebultz home (Jarrod Sawyer Deposition, Rec. Vol. 4, page 4: page 48, line 24 to page 49, line 13). Jarrod Sawyer testified specifically: "It would have been after Thanksgiving that he [Chad Olson] commenced [work] on the basement because there was a question on - he has medical issues and concerns." (Sawyer Deposition, Rec. Vol. 4, page 4: page 49, lines 1 to 4).

52. The Plaintiff KAPE, its representatives and Chuck Cooper and his representatives believed in good faith that Chad Olson gave his invoice to KAPE to obtain payment for his work because he was a subcontractor for KAPE and was obtained to do the Chebultz work by KAPE, and KAPE was Olson's general and supervising contractor (Sawyer Deposition, Rec. Vol. 4, pages 3-4: page 45, line 18 to page 46, line 8; page 47, line 10 to page 48, line 1).

53. Olson was working for KAPE, under the supervision of KAPE, as a subcontractor for KAPE, and Olson daily and regularly called upon KAPE for assistance with numerous details concerning Olson's work at the Chebultz home. Brian Weary and Jarrod Sawyer did find Chad Olson, solicit his labor for the Chebultz home, and accomplish the referral of Chad Olsen to the Chebultz home job in Abilene which consisted of basement renovation work (Deposition of Brian Weary, Rec. Vol. 4, pages 11-12: page 13, line 1 to page 17, line 10; Jarrod Sawyer Deposition, Rec. Vol. 4, page 4: page 47, line 10 to page 49, line 13).

54. Chad Olsen did in fact work as a subcontractor for KAPE Roofing (Deposition of Brian Weary, Rec. Vol 4, pages 12-13: page 17, line 17 to page 21, line 5).

55. Jarrod and Brian also helped answer numerous other questions which Chad Olson had, from time to time, via telephone, as any principal contractor or contracting supervisor would (Deposition of Brian Weary, Rec. Vol. 4, pages 10-12: page 8, lines 9 to 19, especially 18-19; page 13, line 1 to page 17, line 10).

56. Brian Weary was asked to explain the reason he referred to Chad Olson as a subcontractor: "Q: If he [Chad Olson] went to Chad Chebultz directly, called him, got together with him, arranged the work, how does that make him [Chad Olson] a subcontractor under KAPE? A: Because he [Chad Olson] checked up with us every day of the job. He'd discuss questions or whatnot, and like I said, nine times out of ten, he was calling Jarrod and not myself." (Brian Weary Deposition, Rec. Vol. 4, page 13: page 20, line 16 to line 23).

57. The Plaintiff KAPE, its representatives and Chuck Cooper and his representatives believed in good faith that Chad Olson's work was not completed until after Thanksgiving, 2011, or sometime during December, 2011. Jarrod Sawyer testified specifically that Chad Olson commenced work on the Chebultz basement project after Thanksgiving, 2011, because Chad Chebultz did not want basement work taking place in his home due to visiting family members and because Chad Olson had medical problems and those medical problems interrupted and slowed Olson's work on the Chebultz home (Jarrod Sawyer Deposition, Rec. Vol. 4, page 4: page 48, line 24 to page 49, line 13). Jarrod Sawyer testified specifically: "It would have been after Thanksgiving that he [Chad Olson] commenced [work] on the basement because there

was a question on - he has medical issues and concerns." (Sawyer Deposition, Rec. Vol. 4, page 4: page 49, lines 1 to 4).

ARGUMENT AND AUTHORITIES

I. THE DISTRICT COURT'S GRANTING OF SUMMARY JUDGMENT WAS ERRONEOUS AND AN ABUSE OF DISCRETION BECAUSE IT WAS A DEFAULT JUDGMENT AGAINST THE PLAINTIFFS AND THE ACCOMPANYING STRIKING OF THE PLEADINGS OF THE PLAINTIFFS WAS A DEFAULT JUDGMENT ALSO WHICH DEFAULT JUDGMENT ORDER WAS VOID FOR LACK OF NOTICE OR SHOULD BE REVERSED DUE TO ABUSE OF DISCRETION

Standard of Review on Appeal

When considering whether the granting of a Default Judgment was error: "Statutory interpretation is a question of law over which an appellate court exercises unlimited review. State v. Cott, 288 Kan. 643, 645, 206 P.3d 514 (2009)" *Forer v. Perez-Lambkins*, 42 Kan.App.2d 742, 743, syl. paras. 1 & 2 (2009). "The **standard** of **review** on appeal when considering the denial of a motion to set aside **default judgment** is abuse of discretion, and the movant has the burden of proving grounds for relief by clear and convincing evidence. State ex rel. Stovali v. Alivio, 275 Kan. 169, 173, 61 P.3d 687 (2003). An abuse of discretion occurs if discretion is guided by an erroneous legal conclusion or goes outside the framework of or fails to consider proper statutory limitations or legal standards. O'Brien v. Leegin Creative Leather Products, Inc., 294 Kan. 318, 331, 277 P.3d 1062 (2012)." *Clinton v. Kaiser*, 318 P.3d 1020, 2014 WL 802046 (Kan.App. 2014). "'**Summary judgment** is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The trial court is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought. When opposing a motion for **summary judgment**, an adverse party must come forward with evidence to establish a dispute as to a material fact. In order to preclude **summary judgment**, the facts subject to the dispute must be material to the conclusive issues in the case. On appeal, we apply the same rules and where we find reasonable minds could differ as to the conclusions drawn from the evidence, **summary judgment** must be denied.' Waste Connections of Kansas, Inc. v. Ritchie Corp., 296 Kan. 943, Syl. ¶ 1, 298 P.3d 250 (2013)." *Bouceck v. Boucek*, 297 Kan. 865, 869-870 (2013). And: "This court applies an unlimited appellate **standard** of **review** when considering judicial conclusions of law and questions of statutory interpretation. Polson v. Farmers Ins. Co., 288 Kan. 165, 168, 200 P.3d 1266 (2009); see Martin v. Naik, 297 Kan. 241, 246, 300 P.3d 625 (2013) (exercise unlimited review of legal conclusions); Adams v. Board of Sedgwick County Comm'rs, 289 Kan. 577, 584, 214 P.3d 1173 (2009)" *University pf Kansas Hospital Authority v. Board of Commissioners of County of Wabaunsee*, 327 P.3d 430, 436, 305 Ed. Law Rep. 1114, (Kan. Sup. Ct., June 27, 2014).

The District Court erred in failing to grant the Plaintiffs'/Appellants' Motion to Dismiss the default judgment proceedings for the reason that the entire Default process, and all the hearings to implement it, were dependent upon or based upon the assumed validity of the Default Judgment Hearing which was held on March 7, 2014, without proper notice as required by K.S.A. 60-255(a) (Transcript of Pretrial Conference (3-7-14), Rec. Vol. 18, page 2, line 1 to page 17, line 23, especially page 4, line 21 to page 5, line 20; page 6, line 5 to line 14; page 7, line 25 to page 8, line 1; page 10, line 12; page 14, lines 16 to 21).

The District Court erred in granting summary judgment on the mechanic's lien issue because that summary judgment was in effect the result of an abuse of discretion which operated as effectively a default judgment against the Plaintiffs on that issue. Please see for authority all of the default judgment-related argument in this brief. The Plaintiffs submit that the same reasoning applies to the erroneous summary judgment grant as well as the striking of the remainder of the plaintiffs' pleadings, all of which amounted to a total default judgment against the plaintiffs and in favor of the defendants.

The District Court's intended June 4, 2014 Default Judgment hearing and all other related or succeeding Default Judgment-related proceedings held in this case required for their foundation a valid original March 7, 2014 Default Judgment Order, upon proper notice as is required by Kansas Law. Without having first issued a valid Default Judgment Order upon proper notice as required by Kansas Law no later proceedings could have been validly held by the District Court to determine the amount of judgment, K.S.A. 60-255 (Rec. Vol. 18, page 2, line 1 to page 17, line 23, especially page 4, line 21 to

page 5, line 20; page 6, line 5 to line 14; page 7, line 25 to page 8, line 1; page 10, line 12; page 14, lines 16 to 21).

K.S.A. 60-255(a) requires seven days notice in writing before default judgment can be granted. In the March 7, 2014 Pretrial Conference transcript which is cited above, the District Court entered an order striking the Plaintiffs' Petition which was the same as a default (Rec. Vol. 18, page 14, lines 16 to 21) (see further citations to Rec. Vol. 18 in the paragraph above). The Court did so without any written notice having been given because there is none described in the record elsewhere or in the transcript of the hearing which is Record Volume 18. There is also a fourteen day notice requirement set forth in Kansas Supreme Court Rule 118(d) which requires 14 days' notice of default. In *Matter of Marriage of Thompson,* 17 Kan. App.2d 47, 55 (1992) the Court of Appeals through Judge Larson held that failure to give the seven days written notice mandated by K.S.A. 60-255(a) rendered a default judgment voidable and held that it may be set aside for good cause *Id.* 56.

The District Court also erred in failing to strike the request for monetary assessment pursuant to Supreme Court Rule 118(d) and K.S.A. 60-254(c). On April 18, 2014 in a hearing recorded in Record Volume 7 the Court was to set the monetary amount of judgment of default against the Plaintiff and in favor of the Defendant but fourteen days' notice had not been given. Plaintiffs' counsel appeared at the hearing and objected to a continuance and demanded an immediate hearing on the motion to strike (Rec. Vol. 7, page 6, line 22 to page 7, line 13). The Plaintiffs argued that the Motion to Strike should

be heard immediately and no continuance should be allowed (Rec. Vol. 7, page 8, line 21 to line 25).

Defense counsel admitted that fourteen days' notice was required and that insufficient notice had been given (Rec. Vol. 7, page 9, line 13 to page 10, line 5). The Defendant requested a continuance (Rec. Vol. 7, page 10, line 6 to line 12). The Plaintiff objected to a continuance and demanded that the Court rule immediately and strike the notice of default judgment hearing and dismiss the application for default (Rec. Vol. 7, page 10, line 22 to page 19, line 12 and page 21, line 2 to page 22, line 4). Over the Plaintiffs' objection the Court granted a continuance (Rec. Vol. 7, page 23, line 3 to line 16). The Plaintiffs respectfully submit that this was an abuse of discretion which was highly prejudicial to the Plaintiffs in light of the fact that the Court refused to consider similar circumstances on March 7, 2014 and denied a continuance to the Plaintiffs, which was agreed upon by all of the Defendants.

In K.S.A. 60-255(a) there is a requirement that in any monetary-judgment-amount-determination proceedings, the Court allow a jury trial which is required if the right to jury trial is properly invoked. The Plaintiffs in their reply to the Counterclaim and in their original Petition, filed in the District Court, demanded a jury trial properly (Rec. Vol. 1, pages 14 through 46; Plaintiffs' Reply to Counterclaim of Defendant Chad Chebultz by Fax, Rec. Vol. 2, pages 1 through 3). That demand surely was a sufficient demand which the District Court should have properly regarded as being timely made to correctly preserve the right of jury trial of the Plaintiffs upon any question susceptible of factual determination. The District Court struck the jury trial demand for failure of the

Plaintiffs to file requested instructions, but, immediately thereafter, granted a continuance of the proceedings. Therefore, the Plaintiffs respectfully submit that the District Court abused its discretion in striking the jury trial demand or in denying a jury trial which was otherwise originally properly demanded, because there was no prejudice or impediment to the judicial process in the Plaintiff's failure, on that specific date, to file requested instructions (Transcript of Evidentiary Hearing (6-4-14), Rec. Vol. 8, pages 1 through 89).

Surely the question of the amount of monetary damages was precisely just such a question upon which the Plaintiffs were entitled to a jury trial, K.S.A. 60-255(a)(2) & (3) & (4). The failure to grant a jury trial seriously prejudiced the Plaintiffs' right to a fair trial on all the post-default-related factual issues triable to a jury.

The Plaintiffs request that this court reverse the District Court's Default Judgment for the above reasons. In addition or in the alternative the Plaintiffs request that the Court grant relief from the order of default pursuant to K.S.A. 60-260 and/or K.S.A. 60-259 as set forth below (Journal Entry of Judgment, Rec. Vol. 6, pages 1 and 2).

Since no original notice of Default Judgment was given, this court must reverse the District Court's Default Judgment, reinstate the Plaintiffs' Petition and order that the District Court proceed with the original Pretrial Conference all consistent with the result described in *Forer v. Perez-Lambkins*, 42 Kan.App.2d 742, 216 P.3d 718 (2009) (Journal Entry of Judgment, Rec. Vol. 6, pages 1 and 2).

The March 7, 2014 purported Default Judgment Order did not contain a statement that was an express determination that "there is no just reason for delay" as required by

K.S.A. 60-254(b) and therefore, the 28 day time limit for the filing of a motion under K.S.A. 60-259 or K.S.A. 60-260, did not begin to run because there was no final appealable order rendered in this case at that time. There existed then, multiple claims by multiple parties, chiefly the counterclaim by the Defendants, which had not at that time been adjudicated. All of those claims had to be fully adjudicated, finally determined and ended before a final appealable order could have arisen in this case pursuant to K.S.A. 60-254(b).

Therefore, the Plaintiffs' Motions under K.S.A. 60-260 and/or K.S.A. 60-259, filed after March 7, 2014, were timely because the 28 day time limit for filing them had not yet begun to run.

Counsel for the Plaintiffs was in Eastern Pennsylvania on March 7th. Counsel for the Plaintiffs had informed the court and other counsel of that fact sometime before March 7, 2014.

Counsel for the Plaintiffs was in the process of preparing the Journal Entry of Continuance but did not have at hand the new hearing date. Plaintiffs' Counsel therefore had contacted opposing counsel and the Court's administrative assistant to determine that date by telephone. Despite making these telephone calls, Counsel for the Plaintiff did not receive return telephone calls with this information.

Counsel for the Plaintiffs was attempting to comply with the Court's orders and was simply trying to complete the drafting of the order for continuance and had inadvertently misplaced the note containing the correct new date and time for the hearing.

When Counsel contacted the Court's Administrative Assistant, the Administrative Assistant did not have the new date and time and so Plaintiffs' Counsel contacted Defense Counsel to obtain that date, as stated above.

The Court of Appeals' Opinion set forth in *French v. Moore*, 2010 WL 481280 (Kan.App. 2010) is persuasive of the result requested by the Plaintiffs/Appellants here. The Plaintiffs believe that the discussions of meritorious defense and excusable neglect found in this opinion, in addition to the discussion of prejudice, are very persuasive and are based upon facts in *Forer, supra.* which are similar to the facts in this case.

The plaintiffs request this court reverse the District Court's Order of Default Judgment and effectively Dismiss the Default Proceedings or grant relief from the March 7, 2014 Default Judgment Order, and restore this case to the Pretrial Conference process which was underway before the time that the March 7. 2014 default judgment was entered.

The issue of whether the Plaintiffs should be granted relief from default judgment must be determined by a consideration of the meritorious nature of the Plaintiffs' basic claims upon which default judgment was granted. Not all of the claims were tested by the summary judgment process.

The Plaintiffs' claims for injunction were acquiesced in or temporarily conceded by the Defendant in that a temporary restraining order was agreed *pendente lite*. That is, the Defendant agreed to remove the allegedly defamatory signs and not to re-erect them or to utter or disseminate any similar statements or communications during the pendency of the case.

The claims of interference with prospective business advantage and breach of contract were not the subject of the motion for summary judgment with the exception of the portion of the contract related to the mechanic's lien.

The Motion for Partial Summary Judgment filed by the Defendants had only to do with the claims of the Plaintiffs for foreclosure of the mechanic's lien.

The Plaintiffs' mechanic's lien theory was based upon the claim that Chad Olsen as a subcontractor for the Plaintiffs had performed services as late as December 2011 and that therefore the filing of the mechanic's lien on March 23, 2012 was timely. The issues raised by the summary judgment motion were whether Chad Olsen was actually a subcontractor of the Plaintiff KAPE Roofing, and whether his final services were performed as late as December 2011 so as to render the March 23, 2012 mechanic's lien timely. The Plaintiffs respectfully submit that all of their claims were meritorious and deserve a full or plenary consideration in a jury trial which they demanded in their Petition and Amended Petition.

First, the claim for injunction was substantial and meritorious as set forth in the original Petition and the Amended Petition (Record Vol. 1, page 15 to page 21). The meritorious nature of this claim of the Plaintiffs is bolstered by the fact that it was temporarily conceded by the Defendant *pendente lite.*

The claim of the Plaintiffs for defamation and interference with prospective business advantage was directly related to the claim for injunction. That is, the injunction was sought to enjoin the Defendant from slandering or libeling the Plaintiffs. Therefore,

any concession of the meritorious nature of the injunction would be a concession of the meritorious nature of the claim of defamation and the related tort claims.

The defamation and related tort claims were substantial and involved alleged losses of substantial profit and income by the Plaintiffs. The Defendant did not challenge these claims at the summary judgment stage (Rec. Vol. 1, page 22 to page 29)

The issue of the merit of the Plaintiffs' claims of timeliness of lien and subcontractor relationship of Olsen, were the subject of the summary judgment motion. The evidence on those is reviewed below so that this Court may judge the merit of those claims.

First, the Plaintiffs/Appellants cite to this Court the relevant authority, followed by a review of the facts which are also set forth in the Statement of Facts above in this brief.

In *Wagner Interior Supply of Kansas City, Inc. v. Associated Drywall Contractors, Inc.*, 2013 WL 5188682 (Kan. App. September 13, 2013) at electronic page *3, the Kansas Court of Appeals has recognized that the Kansas Supreme Court in *Calvert Western Exploration Company v. Diamond Shamrock,* 234 Kan. 699, 704 (1984) has held: "[A] subcontractor was one who assumed a portion of a contract from an original contractor or another subcontractor for the performance of all or part of the services or work which the other had obligated itself to perform under the contract with the owner." *Id.* 704.

In this case, Chad Chebultz orally requested KAPE to repair and remodel a basement room. In describing the discussions of the job which Chad Chebultz had with Jarrod Sawyer and Brian Weary, Jarrod Sawyer explained: "There was a thing about some

basement work. We were trying to make sure and cover all of our bases before we started . . . ." (Jarrod Sawyer Deposition, page 9, lines 16 to 19). Jarrod Sawyer described the whole oral contract with Chebultz as "a lee-wise, go ahead and do that kind of a contract. You know, we were working in close proximity from the month of June until August on his [Chad Chebultz'] home. He has a very large house." (Jarrod Sawyer Deposition, page 11, lines 18-21; also page 11, line 2 to page 11, line 19, page 18, lines 19-20; page 8, line 17 to page 10, line 19; especially, page 9, lines 16 to 17; and page 10, lines 14 to 19).

Jarrod Sawyer also testified: "The basement thing that was included in the insurance paperwork with these contracts, there's some leeway - we have certain parts of the contract that show that we're able to do the work that's on the insurance paperwork if the customer's allowing us, so . . . ." (Jarrod Sawyer Deposition, page 10, lines 14 to 19).

Further, Jarrod testified: "[B]ut I will say on this, with this contract it also has the things of supplements that the insurance agrees to if the customer goes with this, that we can do - we ended up doing some basement work on the insurance claim via Chad Olson." (Jarrod Sawyer Deposition, page 14, lines 2 to 8; Please also see the rest of the page, and further, from page 14, line 9 to page 19, line 16).

The above testimony clearly provides the evidence of an oral contract between Chebultz and KAPE for KAPE to perform basement repair and remodeling work, within the legal definition of " . . . a portion of a contract from an original contractor or another subcontractor for the performance of all or part of the services or work which the other had obligated itself to perform under the contract with the owner." *Calvert, supra.,* 234 Kan. at 704 (bottom portion).

Now, of course, that oral contract between KAPE and Chebultz contained basement repair and remodeling duties which could have been, and were, properly delegated by KAPE to Chad Olson as KAPE's subcontractor. In this case, KAPE, pursuant to its normal practice with Olson, made an oral subcontract, the terms of which were easily defined by the circumstances: "We then found Chad Olson. . . . We then did the sub-basement work that sometime finished after Thanksgiving. It would have been in the beginning of December. . . . [Our contract] was all verbal with him. He did some work for us as well on a couple other homes. . . . So we're always finding a gentleman like Chad Olson to do those types of jobs, and we had found Chad to do siding repair on one home, painting on another and then Chad Chebultz' basement work" (Sawyer Deposition, page 14, line 16 to line 24; page 15, line 5 to 7; page 16, lines 7 to 11). The terms of the contract which KAPE had with its subcontractor Chad Olson for the Chad Chebultz home were: "The basics of the insurance claim of what they were covering. I believe it was some carpeting, some drywall, an area around a chimney, a window, a light fixture to be removed and reset and some painting on the drywall after it was replaced. That's the main thing" (Sawyer Deposition, page 17, lines 16 to 25; Sawyer Deposition page 15, lines 3 to 18; page 16, line 12 to page 17, line 25).

By making the above oral subcontract with Chad Olson, KAPE was legally and properly engaging a subcontractor to assist KAPE with the performance of KAPE's general duties to Chad Chebultz, the homeowner, so that Chad Olson was one "who assumed a portion of a contract from an original contractor [KAPE] . . . for the

performance of . . . part of the services or work which the other [KAPE] had obligated itself to perform . . . ." *Calvert, supra.,* 234 Kan. at 704 (bottom portion).

The issue of whether there was a subcontract presents a question of fact for the jury to decide. The testimony above-cited by the Plaintiffs demonstrates that there was an oral contract for KAPE to perform basement remodeling and repair work, which KAPE then subcontracted Olson to execute. There was a close connection between KAPE and Olson because KAPE procured Olson and provided daily advice and support services to him because Olson called Jarrod Sawyer several times a day for help. Olson also had medical problems which hampered his progress, so it makes sense that Weary and Sawyer would understand that he might need daily help, or direction of some kind, in completing his tasks. Sawyer provided this help in the form of verbal instructions and advice, daily, to Olson over the telephone.

The Plaintiffs here are not required to prove that KAPE had direct control over Olson as an employee or servant. Proof of that fact is not required in this case to sustain the Plaintiffs' claims or their defenses to the counterclaim. The Plaintiffs only have to prove a general contractor and subcontractor relationship between KAPE and Olson. The facts clearly support this, when construed in a light most favorable to KAPE. KAPE procured Olson. KAPE introduced Olson to Chebultz. KAPE helped Olson, who was experiencing medical problems, by providing support services to Olson in the form of daily advice and direction through Jarrod Sawyer and Brian Weary. KAPE's consent was required before Olson could be paid in the December 31, 2011 final meeting at Chad Chebultz' home. All these facts prove that Olson was, truly, the subcontractor of KAPE.

There were, before the District Court, and now, before this court, based upon the record below, sufficient facts to require the conclusion that, at this stage, there is a genuine dispute of material fact over whether Olson was KAPE's subcontractor. The Plaintiffs therefore request this court reverse the District Court's Judgment.

The Plaintiffs are not required here to prove a "meeting of minds" or *consensus ad idem* by documentary evidence. The contract was an oral contract. There is oral testimony which articulates the oral agreement which embodies the parties' *consensus ad idem* or meeting of the minds. That is all that is necessary. The jury must be allowed to consider the oral testimony, weigh it, and determine precisely what the parties did agree. The testimonial or oral evidence in the record is sufficient to demonstrate genuine disputes of material fact which the jury should be allowed to determine: whether the parties made and agreement, and if so, what the terms of that agreement were. No documents are required to present these bona fide issues to the jury.

There is a course of conduct which proves the subcontract. The Plaintiff KAPE provided daily advice and direction to Olson throughout his work on the Chebultz home, all at Olson's request, when Olson would call KAPE time after time. This is a course of conduct which proves that Olson, the subcontractor, needed, requested, and required advice from KAPE about details concerning the construction task at hand. There is testimonial evidence of this, which is in the record and cannot be ignored. This evidence provides sufficient foundation for a conclusion that there is a genuine dispute of material fact about whether Olson was KAPE's subcontractor.

Olson gave an invoice to KAPE. The Defendants themselves alleged this in their arguments presented to the District Court below, in their Summary Judgment Statement of Facts at paragraph 27, page eight of their Summary Judgment Brief. The fact that Olson gave an invoice to KAPE is evidence of Olson's expectation of receipt of payment from KAPE. General contractors pay their subcontractors unless other arrangements, such as a novation, may be ultimately made. If Olson himself *conducted himself in such a manner as to manifest his expectation of ultimately receiving payment from KAPE then such actions support the argument that there was a subcontractor-general contractor relationship.* The court must acknowledge this and reverse the District Court's Judgment because this act by Olson is persuasive evidence that he himself desired to receive payment from KAPE, his general contractor.

There is evidence that KAPE did observe proper practice with respect to providing insurance to cover the activities of its subcontractor, Olson, and KAPE therefore did not fail to perform its responsibilities as the principal insured under its regular contractor's liability insurance contract. KAPE did not attempt to shield itself from liability for accidental injury or damage by procuring Olson as a subcontractor because there is testimony that KAPE's liability insurance did cover the activities of performing interior work which Olson was subcontracted to do (See Plaintiff's Statement of Controverted Facts, paragraph 17 at page 12, hereinabove). The fact that KAPE maintained proper insurance to cover the activities of Olson, its subcontractor, further factually supports KAPE's argument that Olson was a bona fide subcontractor, in the ordinary course of business.

II. THE DISTRICT COURT ERRED IN GRANTING JUDGMENT UNDER THE CONSUMER PROTECTION ACT

Standard of Review on Appeal

When considering whether the granting of a Default Judgment was error: "Statutory interpretation is a question of law over which an appellate court exercises unlimited review. State v. Cott, 288 Kan. 643, 645, 206 P.3d 514 (2009)" *Forer v. Perez-Lambkins,* 42 Kan.App.2d 742, 743, syl. paras. 1 & 2 (2009). "The **standard** of **review** on appeal when considering the denial of a motion to set aside **default judgment** is abuse of discretion, and the movant has the burden of proving grounds for relief by clear and convincing evidence. State ex rel. Stovali v. Alivio, 275 Kan. 169, 173, 61 P.3d 687 (2003). An abuse of discretion occurs if discretion is guided by an erroneous legal conclusion or goes outside the framework of or fails to consider proper statutory limitations or legal standards. O'Brien v. Leegin Creative Leather Products, Inc., 294 Kan. 318, 331, 277 P.3d 1062 (2012)." *Clinton v. Kaiser,* 318 P.3d 1020, 2014 WL 802046 (Kan.App. 2014). "'**Summary judgment** is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The trial court is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought. When opposing a motion for **summary judgment**, an adverse party must come forward with evidence to establish a dispute as to a material fact. In order to preclude **summary judgment**, the facts subject to the dispute must be material to the conclusive issues in the case. On appeal, we apply the same rules and where we find reasonable minds could differ as to the conclusions drawn from the evidence, **summary judgment** must be denied.' Waste Connections of Kansas, Inc. v. Ritchie Corp., 296 Kan. 943, Syl. ¶ 1, 298 P.3d 250 (2013)." *Bouceck v. Boucek,* 297 Kan. 865, 869-870 (2013). And: "This court applies an unlimited appellate **standard** of **review** when considering judicial conclusions of law and questions of statutory interpretation. Polson v. Farmers Ins. Co., 288 Kan. 165, 168, 200 P.3d 1266 (2009); see Martin v. Naik, 297 Kan. 241, 246, 300 P.3d 625 (2013) (exercise unlimited review of legal conclusions); Adams v. Board of Sedgwick County Comm'rs, 289 Kan. 577, 584, 214 P.3d 1173 (2009)" *University pf Kansas Hospital Authority v. Board of Commissioners of County of Wabaunsee,* 327 P.3d 430, 436, 305 Ed. Law Rep. 1114, (Kan. Sup. Ct., June 27, 2014).

Chad Chebultz did not enter into a Consumer Transaction as defined by the Kansas Consumer Protection Act K.S.A. 50-624(c). Therefore, the alleged deceptive acts and practices of the Plaintiffs were not in violation of the Kansas Consumer Protection Act with respect to Chad Chebultz, because they were not "in connection with a consumer transaction" which the Plaintiffs made with Chad Chebultz K.S.A. 50-626(a).

Chad Chebultz did not sign the Plaintiffs' contract. He was not the named insured. He did not have access to any insurance proceeds (Statement of Uncontroverted Facts

hereinabove, paragraphs 1 to 6). The contract, Chad Chebultz Deposition Exhibit 21, was intended by the Plaintiffs to be paid for by insurance proceeds entirely (Wayne Ducolon Affidavit). Therefore, no money other than insurance policy proceeds money, was to flow from the insurance company to the Plaintiffs to compensate the Plaintiffs for any of the Plaintiffs' work on the home (Wayne Ducolon Affidavit).

Chad Chebultz has testified under oath *in the proceedings in this case* that he did not sign the roofing/remodeling contract, that he never had access to the insurance proceeds which paid the debt set forth in the written roofing/remodeling contract, and he was not the named insured under the policy that paid the price set forth in the written roofing/remodeling contract. He further testified that, with respect to the written roofing/remodeling contract, that he did not own the home (Statement of Facts Above, paragraphs 1 to 6). If he so testified, he is not a real party in interest to any Consumer Protection Act violation claim, and he cannot claim that he was damaged by any deceptive acts or practices in connection with a "consumer transaction" the contract for which *he did not sign.*

In *Berry v. National Medical Services, Inc.*, 41 Kan.App.2d 612, 622, syl. paras. 11, 12 & 13 (2009) the Court of Appeals held that a consumer transaction was not entered into between the Plaintiff, Judith Berry, a nurse, and a urinalysis testing service which only had a contract directly with the Board of Nursing, despite the fact that nurse Berry did personally participate in urinalysis testing herself:

> In Count II of her amended petition Berry incorporates the foregoing facts and adds that she "purchased the defendants EtG test for allowable purposes under the act and is therefore entitled to an award of [damages]." This reference to a

> "purchase" seems to be a contradictory characterization of the transactions described in detail earlier in her amended petition. Her factual allegations disclose transactions between the Board and the defendants but not a consumer transaction between Berry and the defendants.
>
> Nowhere in her amended petition does Berry allege facts one could characterize as her exchanging anything of value with the defendants to secure their services. The Act only applies to "consumer transactions," which are "sales" or other "dispositions for value" of consumer goods or services. K.S.A. 50-624(c). Black's Law Dictionary 1364 (8th ed. 2004), defines "sale" as the exchange of "a thing" for "a price in money paid or promised." It defines "value" as the "money that something will command in an exchange." Black's Law Dictionary 1586.
>
> While we liberally construe Berry's amended petition in search of any viable theory of recovery, we cannot ignore the obvious import of her specific allegations and accept her mischaracterization of them in order to preserve a consumer protection claim that obviously does not arise from a consumer transaction. Accordingly, we conclude that the district court did not err in dismissing Berry's consumer protection claim.

Id., 41 Kan.App.2d at 622.

In this case, the same thing has occurred. Chebultz did not purchase the Plaintiffs' services: Colonel James did. Chebultz' money did not pay for the Plaintiffs' services: Colonel James' USAA Insurance Proceeds did. Chebultz was neither the named insured under the applicable policy nor did he have any access to the insurance proceeds. *And most importantly, Chebultz did not sign the contract with the Plaintiffs, and refused to do so, and stated clearly to KAPE's agent Jarrod Sawyer that he would not sign.*

No money of Chebultz or things of value owned by Chebultz was given in exchange for the Plaintiffs' services. The money was all Colonel James' money, or arose due to Colonel James' ownership of an insurance policy which Colonel James purchased and which Colonel James controlled.

Nurse Berry's purported Consumer Protection Act claims failed because she could not prove that they were associated with a consumer transaction *between her and a supplier (the Urinalysis Testing Laboratory).* Likewise, Chebultz cannot prove that there was a consumer transaction between him and the Plaintiffs. A consumer transaction is a sale or an exchange of value. There was no sale or exchange of value which occurred between the Plaintiffs and Chad Chebultz. All the money which was involved was Colonel James' money or USAA Insurance Proceeds, which arose as a result of Colonel James' insurance policy purchase: not as a result of anything Chad Chebultz paid or did.

A careful examination of the Defendant's Counterclaim reveals at page 14, paragraphs 25 through 31 that the Defendant claims that the contract, Chebultz Deposition Exhibit 21, was the source or reason for the additional items encompassed by the Counterclaim:

a. O & P (Overhead and Profit) of 10% (paragraph 27);

b. Chad Olson's "subcontractor" work for KAPE as "general contractor" in an effort to justify or "enhance [KAPE's] entitlement to O&P paid by the insurer" (paragraph 28);

c. Charge for extra power vents to increase the amount due to approach the full amount of insurance proceeds (full "O&P") (paragraph 29); and

d. An attempt to obtain the total amount of USAA payments, or another approach to attempting to recover the full "O&P" balance (paragraph 30).

The evidence concerning the relationship between chad Olsen as a subcontractor and KAPE as a general contractor is reviewed in argument I above. This evidence is relevant to item (d) above. In addition, there is further evidence to support this found at Rec. Vol. 20, page 296, line 15 to page 298, line 11.

The evidence which establishes the validity of overhead and profit and its inclusion as part of the contract between KAPE and Chebultz, is found in Rec. Vol. 20, page 182, line 1 to page 183, line 4; page 186, line 5 to page 187, line 1; page 193, line 6 to page 194, line 25; page 189, line 11 to page 190, line 11; page 190, line 22 to page 193, line 25; page 203, line 24 to page 222, line 25; page 257, line 14 to page 262, line 16; page 264, line 7 to page 265, line 11; page 270, line 20 to page 273, line 17; page 289, line 16 to page 296, line 14.

Further evidence in support of the fact that Chad Olsen had not completed his work until December 2011, was provided by the testimony of Jerrod Sawyer at Rec. Vol. 20, page 285, line 7 to page 287, line 24.

Everything in the Consumer Protection Count II of the Counterclaim hinges upon the operation and effect of the written Contract. Therefore, the claimed liability of the Plaintiffs under Count II must rise or fall depending upon the real party in interest status of the Defendant under that very contract. K.S.A. 60-217(a) requires every action to be prosecuted by the real party in interest. There is nothing in that statute which excuses the Defendant here. That statute requires that the substantive law of Kansas applicable to the claim, fix the real party in interest status of the Defendant/Counterclaimant here, to allow him to bring his Counterclaim as set forth in this case. The Counterclaim in this case at Count II is what he is required to justify under these substantive rules, now. And, given the law of Kansas, and the requirement of proof of a consumer transaction, an exchange of value between Chebultz and the Plaintiffs, the Defendant is unable to meet his burden of proof of real party in interest status. He can prove no deceptive acts and

practices which have been allegedly perpetrated concerning a consumer transaction *in which he has given or exchanged something of value with the Plaintiffs.* True, Colonel James may have; however, as we have seen from the outcome of *Berry, supra.,* that is not enough. The exchange must have originated with Chad Chebultz to endow him with real party in interest status.

In the alternative to the above, in the event this court determines that Summary Judgment should be denied on any of the four Consumer Protection Act Claims within Count II, the Plaintiff respectfully submits they should all be merged into one, because only one contract was involved, one home was repaired/remodeled, and all the actions of the Defendant and the Plaintiff were centered around the accomplishment of one single unitary task: the refurbishing of one home.

III. THE DISTRICT COURT ERRED IN GRANTING JUDGMENT FOR OUTRAGEOUS CONDUCT AND PUNITIVE DAMAGES FLOWING THEREFROM

Standard of Review on Appeal

When considering whether the granting of a Default Judgment was error: "Statutory interpretation is a question of law over which an appellate court exercises unlimited review. State v. Cott, 288 Kan. 643, 645, 206 P.3d 514 (2009)" *Forer v. Perez-Lambkins,* 42 Kan.App.2d 742, 743, syl. paras. 1 & 2 (2009). "The **standard** of **review** on appeal when considering the denial of a motion to set aside **default judgment** is abuse of discretion, and the movant has the burden of proving grounds for relief by clear and convincing evidence. State ex rel. Stovali v. Alivio, 275 Kan. 169, 173, 61 P.3d 687 (2003). An abuse of discretion occurs if discretion is guided by an erroneous legal conclusion or goes outside the framework of or fails to consider proper statutory limitations or legal standards. O'Brien v. Leegin Creative Leather Products, Inc., 294 Kan. 318, 331, 277 P.3d 1062 (2012)." *Clinton v. Kaiser,* 318 P.3d 1020, 2014 WL 802046 (Kan.App. 2014). "'**Summary judgment** is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The trial court is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought. When opposing a motion for **summary judgment,** an adverse party must come forward with evidence to establish a dispute as to a material fact. In order to preclude **summary judgment,** the facts subject to the dispute must be material to the conclusive issues in the case. On appeal, we apply the same rules and

where we find reasonable minds could differ as to the conclusions drawn from the evidence, **summary judgment** must be denied.' *Waste Connections of Kansas, Inc. v. Ritchie Corp.*, 296 Kan. 943, Syl. ¶ 1, 298 P.3d 250 (2013)." *Bouceck v. Boucek*, 297 Kan. 865, 869-870 (2013). And: "This court applies an unlimited appellate **standard** of **review** when considering judicial conclusions of law and questions of statutory interpretation. *Polson v. Farmers Ins. Co.*, 288 Kan. 165, 168, 200 P.3d 1266 (2009); see *Martin v. Naik*, 297 Kan. 241, 246, 300 P.3d 625 (2013) (exercise unlimited review of legal conclusions); *Adams v. Board of Sedgwick County Comm'rs*, 289 Kan. 577, 584, 214 P.3d 1173 (2009)" *University pf Kansas Hospital Authority v. Board of Commissioners of County of Wabaunsee*, 327 P.3d 430, 436, 305 Ed. Law Rep. 1114, (Kan. Sup. Ct., June 27, 2014).

The Plaintiffs acted in good faith to file what they believed to be a timely lien for legitimate work upon the home in which the Defendant was living. Further, the Defendant testified that the Plaintiffs' work was "wonderful" or the equivalent of very good or excellent. The Plaintiffs charged a sum which they legitimately believed was justified based upon their ordinary procedures and practices throughout the insurance restoration industry. The Plaintiffs engaged in various meetings and discussions with the Defendant in which they requested payment for their services, but there is no allegation that the Plaintiffs caused physical injury, or engaged in unusual physical actions or hostile verbal threats to attempt to harass the Defendant or to violently coerce payment by the Defendant. Please see Statement of Facts above.

The Plaintiffs did nothing which could be called outrageous. The Defendant's outrage tort claims should have been dismissed by the District Court as insufficient as a matter of law. *Mai v. Williams Industries, Inc*, 899 F.Supp. 536, 541-542 (1995) (Strong Settlement Negotiation Tactics Not Outrageous); *Harris v. American General Finance, Inc.*, 2005 WL 1593673 (D. Kan. 2005) (Foreclosure Not Outrageous); *compare: Caputo v. Professional Recovery Services, Inc.*, 261 F.Supp.2d 1249, 1265-1268 (2003) (Existence of Disability, Knowledge of and Exploitation of Disability led to Outrage); *Martin v. Litton*

Loan Servicing, L.P., 2014 WL 977507 III.D.3., at *14 (E.D. Cal. 2014) (Threatening Foreclosure Against Borrower With Systemic Lupus Erythematosus Not Outrageous); *Weaver v. Acampora,* 227 A.D.2d 727, 728, 642 N.Y.S.2d 339, 341 (N.Y. Sup. Ct., App. Div., 3d Dept., 1996) (Filing Mechanic's Lien Not Outrageous); *Applin v. Deutsche Bank National Trust,* 2014 WL 1024006 III.D. at *6 (S.D. Tex., 2014) (Creditor's Pursuit of Legal Rights Not Outrageous); *McKinsey v. GMAC Mortgage, L.L.C.,* 2013 WL 3448483 *12-*13 (D. Colo. 2013) (Alleged Fraudulent Attempt to Foreclose on Real Property Not Outrageous); *Mbaku v. Bank of America,* 2013 WL 6978531 at E., *4-*5 (D. Colo. 2013) (Instituting Foreclosure based upon Allegedly Forged Instrument Not Outrageous).

The Plaintiffs' alleged outrageous conduct consisted of filing a mechanic's lien which the Plaintiffs believed in good faith was timely and represented the remaining balance due upon the roofing and remodeling contract. The Plaintiffs were entitled to file the lien to collect payment of that portion yet unpaid. Acting to do this was not outrageous. It was not, as a matter of law, outside the bounds of decency in modern civilization. The Defendant may have legal arguments against these actions, but those legal arguments do not transform these actions into intentional infliction of emotional distress.

IV. THE DISTRICT COURT ERRED IN FAILING TO GRANT JUDGMENT TO THE PLAINTIFFS OR DISMISS THE DEFENDANT'S COUNTERCLAIM BASED UPON THE ADVICE OF COUNSEL DEFENSE

When considering whether the granting of a Default Judgment was error: "Statutory interpretation is a question of law over which an appellate court exercises unlimited review. State v. Cott, 288 Kan. 643, 645, 206 P.3d 514 (2009)" *Forer v. Perez-Lambkins,* 42 Kan.App.2d 742, 743, syl. paras. 1 & 2 (2009). "The **standard** of **review** on appeal when considering the denial of a motion to set aside **default judgment** is abuse of discretion, and the movant has the burden of proving grounds for relief by clear and convincing evidence. State ex rel. Stovali v. Alivio, 275 Kan.

169, 173, 61 P.3d 687 (2003). An abuse of discretion occurs if discretion is guided by an erroneous legal conclusion or goes outside the framework of or fails to consider proper statutory limitations or legal standards. O'Brien v. Leegin Creative Leather Products, Inc., 294 Kan. 318, 331, 277 P.3d 1062 (2012)." *Clinton v. Kaiser*, 318 P.3d 1020, 2014 WL 802046 (Kan.App. 2014). "'**Summary judgment** is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The trial court is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought. When opposing a motion for **summary judgment**, an adverse party must come forward with evidence to establish a dispute as to a material fact. In order to preclude **summary judgment**, the facts subject to the dispute must be material to the conclusive issues in the case. On appeal, we apply the same rules and where we find reasonable minds could differ as to the conclusions drawn from the evidence, **summary judgment** must be denied.' Waste Connections of Kansas, Inc. v. Ritchie Corp., 296 Kan. 943, Syl. ¶ 1, 298 P.3d 250 (2013)." *Bouceck v. Boucek*, 297 Kan. 865, 869-870 (2013). And: "This court applies an unlimited appellate **standard** of **review** when considering judicial conclusions of law and questions of statutory interpretation. Polson v. Farmers Ins. Co., 288 Kan. 165, 168, 200 P.3d 1266 (2009); see Martin v. Naik, 297 Kan. 241, 246, 300 P.3d 625 (2013) (exercise unlimited review of legal conclusions); Adams v. Board of Sedgwick County Comm'rs, 289 Kan. 577, 584, 214 P.3d 1173 (2009)" *University pf Kansas Hospital Authority v. Board of Commissioners of County of Wabaunsee*, 327 P.3d 430, 436, 305 Ed. Law Rep. 1114, (Kan. Sup. Ct., June 27, 2014).

In the alternative, or in addition to the above, the Plaintiffs believe they are entitled to the Advice of Counsel Defense. They were represented by Attorney Michael Alley. He wrote demand letters and eventually acted to prepare and file the mechanic's lien for the Plaintiffs. The Plaintiffs acted in good faith and procured the services of an Attorney to take proper legal action to collect the unpaid bill for their work on the home in question. The intervening participation of learned counsel and the advice of that counsel must afford the Plaintiffs a further defense to the Defendant's Counterclaim of Outrage in this case.

The Plaintiffs are entitled to the Advice of Counsel Defense. The Plaintiffs were represented by Attorney Michael Alley. He wrote demand letters and eventually acted to prepare and file the mechanic's lien for the Plaintiffs. The Plaintiffs acted in good faith

and procured the services of an Attorney to take proper legal action to collect the unpaid bill for their work on the home in question. The intervening participation of learned counsel and the advice of that counsel are proven by the evidence in this case and the Court concludes as a mixed matter of fact and law that the Plaintiffs in filing and attempting to collect the balance represented by the Mechanic's lien:

a. Acted reasonably

b. Acted in good faith

c. Acted without malice

d. Acted based upon proper advice of their legal counsel

e. Followed the advice of their legal counsel

f. Acted properly and within the bounds of the law applicable to the filing and the collection of mechanic's liens in Kansas

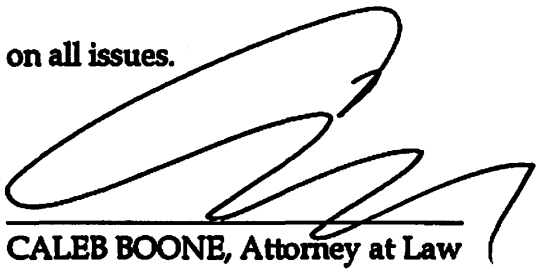
g. Did nothing other than attempt to lawfully collect a mechanic's lien which they believed in good faith represented a valid or just debt which was owed to them by the Defendant.

The evidence is overwhelming, in the form of the testimony of Michael P. Alley, Esq. that the Plaintiffs are entitled to the advice of counsel defense with respect to all of the counterclaims of the Defendant (Rec. Vol. 21: Michael Alley Deposition page 14, line 18 to page 56, line 14 and Michael Alley's Deposition Exhibits numbered 1 through 7). *Evello Investments, N.V. v. Printed Media Services, Inc.*, 1995 WL 409021 (D.Kan.,1995) at *8.

PRAYER FOR RELIEF ON APPEAL

WHEREFORE, the Plaintiffs pray this Court reverse the District Court's granting of default judgment in its entirety and order that the Plaintiffs' pleadings be reinstated

and remand this case to the District Court for further pretrial proceedings and jury trial on all issues.



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CERTIFICATE OF SERVICE

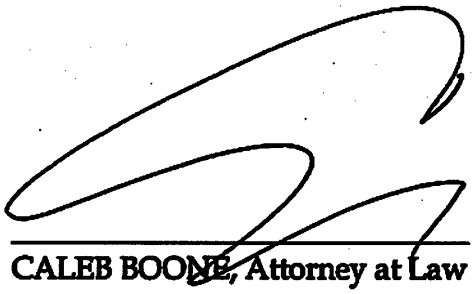
I, CALEB BOONE, do hereby certify that on the ~~11th~~ 20th day of May, 2015, I sent via telefacsimile machine, true and correct copies of the above and foregoing document to:

Pedro Irigonegaray, Esq.
Elizabeth Herbert, Esq.
1535 SW 29th
Topeka, KS 66611
F: 785-267-9458

Tim W. Ryan, Esq.
Jacobson Ryan LC
555 Poyntz Avenue, Ste. 290
Manhattan KS 66502
Fax: 785-539-3330

And:

Clerk of the Kansas Court of Appeals
Kansas Judicial Center
301 SW 10th Ave.
Topeka, Kansas 66612
F: 785-296-1028



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APPENDIX

RECORD VOLUME ONE

EXCERPT

PAGES 14-46

IN THE DISTRICT COURT OF DICKINSON COUNTY, KANSAS

KAPE Roofing & Gutters, Inc. and Chuck Cooper, **Plaintiffs,**

v. **Case No. 12-CV-73**

Chad Chebultz, an individual; and Community First National Bank, a banking corporation, **Defendants.**

AMENDED PETITION BY FAX

1. The Plaintiff KAPE Roofing & Gutters, Inc. is a corporation organized and existing under the laws of the state of Colorado, properly authorized to do business in Kansas as a foreign corporation, having its principal place of business in Jefferson County, Colorado, at 12096 West 50th Ave., Wheat Ridge, Colorado 80033.

2. The Plaintiff Chuck Cooper is a citizen and resident of Jefferson County, Colorado.

3. Defendant Chad Chebultz is a citizen and resident of Dickinson County, Kansas living at 1100 Buckeye, Abilene, Kansas 67410.

4. Defendant Community First National Bank is a Kansas banking corporation organized and existing under the laws of the state of Kansas, having its principal place of business at 215 South Seth Child Road, Manhattan, Kansas 66502 in Riley County, Kansas where it must be served with personal service upon its president Rob Stitt.

COUNT I: INJUNCTION
Pursuant to K.S.A. 60-901 et. seq.

5. The allegations set forth in this Count I against "the Defendant" shall be and must be considered to be only against Defendant Chad Chebultz, and not against Defendant Community First National Bank of Manhattan, Kansas.

6. This Count I has been previously verified and sworn to by Wayne Ducolan, on behalf of the Plaintiffs as a duly authorized representative and agent of KAPE Roofing and Gutters. All of the allegations of the Verified Petition which has been previously filed, and a copy of which is attached to this Amended Petition, are fully incorporated herein as if set forth *verbatim* and are repeated in substance below.

7. On or about March 9, 2012 and continuing from day to day thereafter to the present time (except as more particularly described below), the Defendant has performed the following unlawful malicious and intentional acts:

8. The Defendant has erected upon the front lawn of his residential property at 1100 North Buckeye, Abilene, Kansas, two or three or more signs which state: "Ask us how we feel KAPE Roofing ripped us off" and "Beware of KAPE Roofing we do not recommend them" and "We feel for a horrible time [frowning face] call KAPE Roofing" and "We do not recommend KAPE Roofing beware".

9. The above signs were erected by the Defendant on or about March 9, 2012 and continued to remain on display on his property until about March 20, 2012 when they were removed.

10. The Defendant removed the signs described above on March 20, 2012 after the Plaintiffs demanded that they be removed and communicated that demand to the Defendant.

11. However, the Defendant re-erected and re-displayed and re-established some of the signs on or about June 20, 2012 in the front yard of his residence in about the same position or locations thereon, and the signs as re-erected, have remained and have not been removed and are presently in place on display for all of the public to see.

12. In addition, the Defendant added a new sign which now reads "KAPE Roofing wants $500,000.00 from us for warning you is this the type of people you want working in our town?" Some of the original signs plus this new sign are now on display in the front yard of the Defendant's residence.

13. The location of the Defendant's home is adjacent to Buckeye Street which is the most well traveled and the busiest street in Abilene. Approximately 13,000 vehicles travel that street every day, and pass by the Defendant's front yard. The signs described herein were and are clearly and easily visible from passing cars and other vehicles traveling that street.

14. The above signs or similar signs are presently in place on the front yard or lawn of the residence of the Defendant Chad Chebultz and were erected by him and are maintained by him there at 1100 North Buckeye, Abilene, Kansas in Dickinson County.

15. The Defendant Chad Chebultz has threatened to post further similar statements *via* printed media, radio, and billboards throughout the Abilene, Dickinson County, and surrounding areas, and Denver, Colorado and the surrounding area and *via* mass media and the internet, throughout the Midwestern United States and elsewhere, and communicated these threats to the Plaintiffs on or about March 20, 2012 from his residence at 1100 North Buckeye.

16. The actions of the Defendant have caused extreme financial damage to the Plaintiffs and have already caused, and will if allowed to continue, cause irreparable harm and permanent irreparable economic damage to the Plaintiffs in the following manner.

17. These actions have already caused the Plaintiff, a roofing contractor in the Denver, Colorado, and Dickinson and Saline County, Kansas, and surrounding area, to lose a substantial number of roofing contract customers and roofing business in that area.

18. Numerous previously ready, willing and able customers of the Plaintiffs have ceased making contact with the Plaintiffs and the Plaintiffs have lost business as a direct result thereof. The Plaintiffs have had gross income from their roofing activities in this area in the amount of approximately $1,400,000.00 per year, for about the last six years, from about 2006 to 2011.

19. As a direct and proximate result of the activities of the Defendant and the erection of the signs described herein, the Plaintiffs have lost approximately 75% of

all new business and 75% of all new customers in Saline County, Dickinson County and the surrounding area in Kansas, and have and are experiencing therefore a loss of approximately 75% of their annual gross income of approximately $1,400,000.00.

20. The Plaintiffs have requested the Defendant to cease and desist and to remove the signs and to stop making similar statements either directly or indirectly by other means either oral or written, direct or electronic or through other media. However, the Defendant has refused.

21. The reputation of the Plaintiffs before the actions of the defendant herein, was an excellent reputation.

22. Before the Defendant's actions the Plaintiffs earned a substantial gross income as described above and enjoyed excellent rapport and relationships with the Plaintiffs' customers in the Dickinson County, Saline County and surrounding areas.

23. Before the actions of the Defendant the Plaintiffs' business was thriving, profitable and substantial and generated a large net income for the Plaintiffs each and every year between about 2006 and 2011.

24. The statements made by the Defendant were made willfully, intentionally, maliciously and with the desire to cause economic harm and economic loss to the Plaintiffs.

25. The statements made by the Defendant were and are false.

26. The Defendant knew and does know that the statements are false and misleading, defamatory, libelous, and slanderous.

27. The Plaintiffs have informed the Defendant that the statements are false, libelous, slanderous, defamatory and misleading.

28. The Defendant has willfully, intentionally and maliciously ignored the falsity and the libelous and slanderous nature of his written statements embodied in the messages on the signs and the defendant's other communications described herein.

29. The Plaintiffs, as a result of the actions of the Defendant, have fallen in the esteem of the general public of Dickinson County, Saline County and the surrounding area including but not limited to those persons who are customers of the Plaintiffs and those persons who are potential customers of the Plaintiffs.

30. Beginning immediately on and after the first publication of the Defendant's statements set forth herein on or about March 9, 2012, the Plaintiffs' business dropped or fell off and was reduced in the amount of approximately 75% and such reduction has continued steadily and regularly and has persisted to the present time.

31. As a direct and proximate result of the willful, malicious and intentional actions of the Defendant set forth herein, the Plaintiffs have suffered loss of their excellent reputation and loss of their substantial business and gross and net income set forth herein to the extent and degree described above.

32. But for the actions of the Defendant the Plaintiffs would not have suffered any loss of reputation and would not have suffered any financial economic or business loss.

33. The Defendant has tortiously interfered with existing roofing contracts of the Plaintiffs and caused them to be cancelled by the Plaintiffs' customers.

34. The actions of the Defendant have also tortiously interfered with prospective business and prospective business advantage which the Plaintiffs would have enjoyed in the form of continuing profitable roofing business but for the actions of the Defendant.

35. All of the actions of the Defendant set forth in this Count were without justification, and were taken willfully, maliciously and intentionally by the Defendant either himself or indirectly through agents, servants or intermediaries.

36. Pursuant to K.S.A. 60-901 et. seq., including but not limited to K.S.A. 60-903, the Plaintiffs pray this Court grant a temporary restraining order, followed by a temporary injunction, to be followed by a permanent injunction covering the area of Abilene, Dickinson County, Saline County and all locations within a radius of 100 miles in all directions from any geographical point therein, and Denver, Colorado and all points within a 100 mile radius in all directions from Denver, Colorado, and further including any geographical area encompassed by the coverage of the internet, restraining, enjoining and preventing the Defendant either himself directly or indirectly through agents, servants or intermediaries, from performing any or all of the following acts and any similar actions of the same kind, character, nature or effect:

a. Erecting signs, placards or any other painted, written, electronic or other projection visible to anyone at any location at any time of the day or night whether lighted or unlighted, having to do with the Plaintiffs or their business, and in any way disparaging, criticizing, maligning, attacking, speaking derogatorily, negatively of or concerning the Plaintiffs and their roofing business or the quality of their work;

b. Creating, transmitting, posting, displaying, uploading, emailing or in any other way broadcasting, telecasting, or otherwise circulating by any telephone, internet, television, radio, electronic media and other media of any kind whatsoever, messages or information which are in any way disparaging, criticizing, maligning, attacking, speaking derogatorily, negatively of or concerning the Plaintiffs and their roofing business or the quality of their work;

c. Saying, speaking, orally communicating and/or communicating by any other means to individuals or through mass distribution by letter, mail, newspaper, magazine, flyers, handbills, pamphlets, and any and all other like or similar methods, information or statements which in any way are disparaging, criticizing, maligning, attacking, speaking derogatorily, negatively of or concerning the Plaintiffs and their roofing business or the quality of their work;

d. Performing any like or similar actions or disseminating circulating or displaying any like or similar statements, messages or communications in any way or any manner whatsoever, directly or indirectly through agents, servants, intermediaries or others.

COUNT II: DEFAMATION, AND INTENTIONAL INTERFERENCE WITH PROSPECTIVE BUSINESS ADVANTAGE AND/OR BREACH OF WRITTEN OR ORAL CONTRACT

37. All of the allegations of Count I set forth hereinabove, consisting of those appearing between paragraphs 4 and 36 set forth above, are incorporated herein as if set forth *verbatim.*

38. All of the allegations set forth in this Entire Count II are intended to be made and are made only against Defendant Chad Chebultz, and not against Community First National Bank of Manhattan, Kansas.

39. On or about June 2, 2011 in Abilene, Dickinson County, Kansas, the Plaintiffs KAPE Roofing and Gutters, Inc. and Chuck Cooper, and Defendant Chad Chebultz, entered into a written contract and/or an oral contract, for the purpose of performing work upon the Defendant Chad Chebultz' home, located at 1100 North Buckeye Ave., Abilene, Kansas 67401, upon property with the legal description of: "Rice and Austin's subdivision, block 4, east 200 feet lot 9, section 16, township 13, range 02 West of the 6th Prime Meridian, in the City of Abilene, Dickinson County, Kansas".

40. By the terms of the contract, the Plaintiffs were to perform for the Defendant, certain repair, refurbishment and remodeling, and re-roofing, and roof repair. The contract called for the Defendant to pay the Plaintiffs, the sum of $11,138.25, in addition to any adjustments, additions or corrections, which are referred to, described and set forth in greater detail in the contract, a true and correct copy of which is attached hereto as exhibit A.

41. The Plaintiffs correctly, properly and diligently entered into the contract and performed all of their obligations thereunder, repairing, restoring, refurbishing and otherwise performing the appropriate work upon the residence of the Defendant's home, all as set forth in the contract, further, pursuant to the itemization of activities described in the invoice which is labeled exhibit A1 and exhibit A2, attached hereto, as an attachment to the contractor's lien statement which is also attached.

42. On or about December 20, 2011, after due demand had been made by the Plaintiffs, Defendant Chad Chebultz refused without just cause, in violation of the terms of the agreement, to pay the remaining balance due upon the contract in the amount of $5,109.52, all as set forth in the contractor's lien statement attached hereto.

43. The Plaintiffs caused the contractor's lien statement to be properly docketed and filed with the Clerk of the District Court of Dickinson County, Kansas, on March 23, 2012 at 1:18 p.m. The document which was filed as set forth herein, is attached: Contractor's Lien Statement lien number 92SL6.

44. The allegations set forth in this Count II against "the Defendant" shall be and must be considered to be only against Defendant Chad Chebultz, and not against Defendant Community First National Bank of Manhattan, Kansas.

45. This Count II has been previously verified and sworn to by Wayne Ducolon, on behalf of the Plaintiffs as a duly authorized representative and agent of KAPE Roofing and Gutters. All of the allegations of the Verified Petition which has been

previously filed, and a copy of which is attached to this Amended Petition, are fully incorporated herein as if set forth *verbatim* and are repeated in substance below.

46. On or about March 9, 2012 and continuing from day to day thereafter to the present time (except as more particularly described below), the Defendant has performed the following unlawful malicious and intentional acts:

47. The Defendant has erected upon the front lawn of his residential property at 1100 North Buckeye, Abilene, Kansas, two or three or more signs which state: "Ask us how we feel KAPE Roofing ripped us off" and "Beware of KAPE Roofing we do not recommend them" and "We feel for a horrible time [frowning face] call KAPE Roofing" and "We do not recommend KAPE Roofing beware".

48. The above signs were erected by the Defendant on or about March 9, 2012 and continued to remain on display on his property until about March 20, 2012 when they were removed.

49. The Defendant removed the signs described above on March 20, 2012 after the Plaintiffs demanded that they be removed and communicated that demand to the Defendant.

50. However, the Defendant re-erected and re-displayed and re-established some of the signs on or about June 20, 2012 in the front yard of his residence in about the same position or locations thereon, and the signs as re-erected, have remained and have not been removed and are presently in place on display for all of the public to see.

51. In addition, the Defendant added a new sign which now reads "KAPE Roofing wants $500,000.00 from us for warning you is this the type of people you want working in our town?" Some of the original signs plus this new sign are now on display in the front yard of the Defendant's residence.

52. The location of the Defendant's home is adjacent to Buckeye Street which is the most well traveled and the busiest street in Abilene. Approximately 13,000 vehicles travel that street every day, and pass by the Defendant's front yard. The signs described herein were and are clearly and easily visible from passing cars and other vehicles traveling that street.

53. The above signs or similar signs are presently in place on the front yard or lawn of the residence of the Defendant Chad Chebultz and were erected by him and are maintained by him there at 1100 North Buckeye, Abilene, Kansas in Dickinson County.

54. The Defendant Chad Chebultz has threatened to post further similar statements via printed media, radio, and billboards throughout the Abilene, Dickinson County, and surrounding areas, and Denver, Colorado and the surrounding area and via mass media and the internet, throughout the Midwestern United States and elsewhere, and communicated these threats to the Plaintiffs on or about March 20, 2012 from his residence at 1100 North Buckeye.

55. The actions of the Defendant have caused extreme financial damage to the Plaintiffs and have already caused, and will if allowed to continue, cause irreparable

harm and permanent irreparable economic damage to the Plaintiffs in the following manner.

56. These actions have already caused the Plaintiff, a roofing contractor in the Denver, Colorado, and Dickinson and Saline County, Kansas, and surrounding area, to lose a substantial number of roofing contract customers and roofing business in that area.

57. Numerous customers of the Plaintiffs have ceased making contact with the Plaintiffs and the Plaintiffs have lost business as a direct result thereof. The Plaintiffs have had gross income from their roofing activities in this area in the amount of approximately $1,400,000.00 per year, for about the last six years, from about 2006 to 2011.

58. As a direct and proximate result of the activities of the Defendant and the erection of the signs described herein, the Plaintiffs have lost approximately 75% of all new business and 75% of all new customers in Saline County, Dickinson County and surrounding area in Kansas, and have and are experiencing therefore a loss of approximately 75% of their annual gross income of approximately $1,400,000.00.

59. The Plaintiffs have requested the Defendant to cease and desist and to remove the signs and to stop making similar statements either directly or indirectly by other means either oral or written, direct or electronic or through other media. However, the Defendant has refused.

60. The reputation of the Plaintiffs before the actions of the defendant herein, was an excellent reputation.

61. Before the Defendant's actions the Plaintiffs earned a substantial gross income as described above and enjoyed excellent rapport and relationships with the Plaintiffs' customers in the Dickinson County, Saline County and surrounding areas.

62. Before the actions of the Defendant the Plaintiffs' business was thriving, profitable and substantial and generated a large net income for the Plaintiffs each and every year between about 2006 and 2011.

63. The statements made by the Defendant were made willfully, intentionally, maliciously and with the desire to cause economic harm and economic loss to the Plaintiffs.

64. The statements made by the Defendant were and are false.

65. The Defendant knew and does know that the statements are false and misleading, defamatory, libelous, and slanderous.

66. The Plaintiffs have informed the Defendant that the statements are false, libelous, slanderous and defamatory and misleading.

67. The Defendant has willfully, and intentionally and maliciously ignored the falsity and the libelous and slanderous nature of his written statements embodied in the messages on the signs and the defendant's other communications described herein.

68. The Plaintiffs, as a result of the actions of the Defendant, have fallen in the esteem of the general public of Dickinson County, Saline County and the surrounding area including but not limited to those persons who are customers of the Plaintiffs and those persons who are potential customers of the Plaintiffs.

69. Beginning immediately on and after the first publication of the Defendant's statements set forth herein on or about March 9, 2012, the Plaintiffs' business dropped or fell off and was reduced in the amount of approximately 75% and such reduction has continued steadily and regularly and has persisted to the present time.

70. As a direct and proximate result of the willful, malicious and intentional actions of the Defendant set forth herein, the Plaintiffs have suffered loss of their excellent reputation and loss of their substantial business and gross and net income set forth herein to the extent and degree described above.

71. But for the actions of the Defendant the Plaintiffs would not have suffered any loss of reputation and would not have suffered any financial economic or business loss.

72. The Defendant has tortiously interfered with existing roofing contracts of the Plaintiffs and caused them to be cancelled by the Plaintiffs' customers.

73. The actions of the Defendant have also tortiously interfered with prospective business and prospective business advantage which the Plaintiffs would have enjoyed in the form of continuing profitable roofing business but for the actions of the Defendant.

74. All of the actions of the Defendant set forth in this Count were without justification, and were taken willfully, maliciously and intentionally by the Defendant either himself or indirectly through agents, servants or intermediaries.

75. The Plaintiffs respectfully submit that the actions of the Defendant set forth hereinabove in this Count II, constitute defamation in the form of libel and slander, tortious interference with existing and/or prospective business advantage, tortious interference with existing contracts, and breaches of contract both oral and written as set forth more particularly in this Count.

COUNT III: MECHANIC'S LIEN FORECLOSURE

76. All of the allegations of Count II are fully incorporated herein as if set forth *verbatim*.

77. The allegations herein are intended to set forth the facts relevant to the property ownership, liens and mortgages, concerning the tract of land commonly known as 1100 North Buckeye, Abilene, Kansas, Dickinson County, Kansas, for the purpose of requesting foreclosure of the Plaintiffs' Mechanic's Lien thereon, based upon the repairs and improvements which the Plaintiffs made on the property as more particularly described in this Petition.

78. The real estate described in Count II and known by its common address 1100 North Buckeye, is encumbered by a mortgage in the amount of $138,000.00, filed of record in July, 2011 in the records of the Dickinson County, Kansas Register of Deeds at Abilene, Kansas.

79. The above mortgage is in favor of mortgagee Community First National Bank, Defendant herein.

80. The Plaintiffs' Mechanic's Lien, described in Count II above, is superior and senior to the Mortgage of Community First National Bank (CFNB) because the Plaintiffs' Lien is based upon work which began in the month of June, 2011, which was before the recordation of the CFNB Mortgage in July, 2011, and the Plaintiffs' Lien relates back to and takes its priority date as the first date of work performed by the Plaintiffs upon the real property at 1100 North Buckeye.

81. The Plaintiffs' roof repair contract is in default and the Defendant Chad Chebultz has not paid the past-due amount set forth herein. The Plaintiffs are entitled to foreclosure of their Mechanic's Lien, a declaration of its first priority against all the world, and a judgment requiring the public auction sale of the property at 1100 North Buckeye, and all other necessary and proper foreclosure sale orders required by Kansas Statutes.

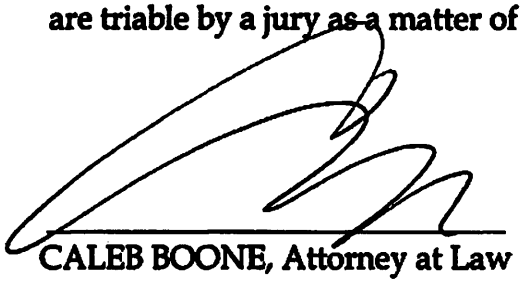
PRAYER FOR RELIEF APPLICABLE TO ALL COUNTS

82. WHEREFORE, the Plaintiffs pray this court allow foreclosure of the real estate in question, grant the Plaintiffs a first and prior lien upon the real estate, grant a temporary restraining order, followed by an appropriate temporary injunction, followed by a permanent injunction after trial or hearing, as set forth above, in favor of the Plaintiffs and against the Defendant, grant money damages in excess of

$75,000.00 after a jury trial as set forth herein, attorney fees pursuant to contract, and any and all other and further relief this Court deems just and equitable.

DEMAND FOR JURY TRIAL

The Plaintiffs demand a trial by jury of twelve persons on all issues herein which are triable by a jury as a matter of right.



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APPENDIX

RECORD VOLUME SEVEN

EXCERPT

PAGES 12-23

ORIGINAL

IN THE EIGHTH JUDICIAL DISTRICT
DISTRICT COURT, DICKINSON COUNTY, KANSAS

KAPE ROOFING & GUTTERS, INC,
Plaintiff,
v.
CHAD CHEBULTZ,
Defendant.

Case Number 12 CV 73

TRANSCRIPT OF EVIDENTIARY HEARING

Proceedings had and entered of record in the above-entitled case on April 18, 2014, before the Honorable David R. Platt, District Judge of Division Number Five of the Eighth Judicial District of Kansas.

APPEARANCES

The Plaintiff, Kape Roofing & Gutters, Inc, appeared in person and by their attorney, Mr. Caleb Boone, PO Box 188, 1200 Main St., Suite 304, Hays, Kansas 67601.

The Defendant, Chad Chebultz, appeared in person and by his attorney, Ms. Elizabeth R. Herbert, Irigonegaray & Associates, 1535 SW 29th St, Topeka, Kansas 66611-1901.

Please?

THE COURT: Okay.

MR. BOONE: Thank you. The other comment that I would like to make about this is this: On March the 7th, when the Court last conducted a hearing, that was a hearing when I was taking a disposition of an expert witness in Pennsylvania. And so I was absent and not able to be here.

In advance of that, I was able to obtain the agreement of counsel and we had a conference call some days before that, about a week or so. Well, a week and a half, maybe two weeks before that. In which your administrative assistant made the arrangements for that to be continued.

Now, I don't want to get into all the details of that now, but I want to simply say this, Your Honor, that in that case, what I believe that I did, was act in good faith to obtain that continuance and reschedule it. And then with all do respect, I don't believe that what was done after that on March the 7th, was -- this is just my opinion -- was correct.

Now, the point, though, that I want to make, Your Honor, is this, if we view what happened

on March the 7th, as a denial to the plaintiff of a continuance, due to the circumstance, which I believe is de minimis of me not sending the actual documentation, but calling -- I had -- I had to double check my notes on the exact new date, which would be today's date. I would just tell the Court that I was unclear in my notes that today's date would be that new continued date, which, in fact, is what it was. It just coincides with this, which has now been set for today. But I was -- I made -- I placed phone calls to do all that.

But the point is, Your Honor, I just want the Court to know about that circumstance. But let me go on and say this, if we view what happened on March the 7th, essentially, as a denial or a rejection of a continuance to the plaintiff, or the conduct of a hearing, then I do respectfully submit, Your Honor, that in this circumstance now, that we find ourselves in today, that it is the -- the mirror image of that, or the reverse of that, if I may say. Because in this situation, it is the defendant counter claimants who were supposed to have prepared for the hearing today.

Now, the date of today is April the 18th. The hearing at which this date was set and

the date upon which counsel for the defendant counter claimant were notified of this being the date, was March the 7th. Now, on March the 7th, then, that would have been -- well, that would be 30 days -- be about 11 -- be about 41 days ago.

So, what I would respectfully say to the Court is this, there have been 41 days that have elapsed since March the 7th, up to today's date. Now, during those 41 days, there was more than ample time, which the defendants counter claimants, could have availed themselves of to send the 14-day certified mail notice, which is required in these circumstances. And there are plenty of cases, I will tell the Court, I -- I reviewed all of them. There are a total of about, oh, I think, 45 cases. There are maybe 15 to 18 to 20 that are more directly on -- on point.

Um, but the Kansas case law is perfectly clear and the rules are perfectly clear. There is a Supreme Court rule 118 which requires this. I believe it's subsection D of that rule. And then there is also a K.S.A. 4254, subsection C, I believe, of that rule, both of which provide almost exactly the same thing.

Now, they've changed -- they've changed

the number of days, Your Honor, with the new change in day calculations from 10 to 14 days. But it should be, as I understand it, because I looked on the computer, it is in the newest version, it's 14 days.

Now, perhaps it's best to consider the statute, because K.S.A. 60-254, refers to default. And, certainly, that is one characterization of exactly what the Court did on March the 7th.

Now, I understand that there are other arguments in favor of my client concerning that. And I don't want to waive those or overlook those, but just for the purposes of today, I'm just referring right now to this hearing today, and these are some background facts to that. And what I respectfully want to say, and I must urge it upon the Court, I cannot give way on this point, is that the plaintiffs do not yield and will not agree to, and will not participate in, any motion for continuance of today's hearing, because the motion that was filed was filed yesterday, less than really 24 hours of the hearing today. And it's not within the 7-day or more notice of requirement for a regular motion as set by Supreme Court rule.

And so the plaintiffs object to and ask

that the Court strike that motion for continuance, because it was filed just yesterday.

Now, in addition, Your Honor, I ask the Court to understand, of course, that my arguments are legal arguments. They are legal arguments made by me, based upon the law. They are not really a motion as such. They are legal arguments based upon the circumstances that we find ourselves now in.

Now, if the Court please, it was the obligation, not of my clients, and it was not my obligation, to file a notice and serve it by certified mail and so forth, 14 days or more ago, under K.S.A. 60-254. It was the obligation of the defendants and counter claimants to file that motion.

Does the Court wish to see a copy of that statute? I believe it's -- I know it's cited in all the documents. Okay.

What I want to say, Judge, is that that statute clearly requires, and it's a mandatory requirement. It's not directory, and there is no substantial complaint. I want the Court to know I read every case I could get my hands on. There is no substantial compliance with that at all, that is allowed by the cases.

Now, I want to say this to the Court, because I think it's -- it's appropriate. I suppose, Your Honor, I suppose that my client, given that state of affairs, could actually today have not appeared at all. And I not appeared with them, and done nothing, and simply said that the 14-day notice had not been given. But I will say this, Judge, to show due respect to the Court, and to be here, I believe it is appropriate for us to now urge this argument. But now that I am here now, at this time, and that I am here today on the day that it was notice -- that this was noticed for hearing and ordered for hearing by the Court, and if I know that the 14 days notice has not been given, then I believe it behoove me to be here and to argue that and to say to the Court, at very explicitly on the record, that that notice has not been given. And there have been 41 days opportunity for it to have been given.

Now, I respectfully have to say this, Judge. I think what's good for the goose is good for the gander. And I think that I'll use that expression. I say it rhetorically. But I believe that once restated and simply say what is good for one party is good for the other. And in this case,

Your Honor, I must vigorously advocate the rights of my client to a rule of strictissimi juris, which means the strictest of law, concerning the default judgment application requirement. And that is especially true when I am aware, that the defendant's counter claimants desire that this court assess and adjudge an actual damages and a punitive damages award against my client, which I respectfully disagree with.

But in any case, the point I make is this, if that is exactly what is at play, if that is exactly what is at issue today, which, Your Honor, it is. And so I make no mistake about how serious that is.

Then again, it behooves me to come to this lecture and say that I do not waive the seven days, that I demand that the Court strike the requests for failure to give the required and mandatory 14-day notice, which cannot be dismissed with -- under any circumstances. And I do so, Your Honor, knowing that there have been a more -- it's been more than a month. More than enough time. No extenuating circumstance, no unusual situation, no problem, no difficulty, nothing has been mentioned by counsel for the defendant's counter

claimants that has -- that would in any way constitute any kind of impediment, excusable neglect, unusual circumstance, unusual events, that would have -- that prevented in any way this happening. And I'm meaning the -- the prolongation of the notice and the sending of it. And my clients and I are here today to ask the Court, strike the counterclaim, strike the requests, and to order that since the required detailed notice and specification was not given, that those claims be denied.

Thanks, Your Honor. And I would like to have a moment or two to reply to counsel's comment.

THE COURT: Do -- do you have any comment?

MS. HERBERT: Just to address the procedural -- additional procedural issue that Mr. Boone has waived, I would have to say that we have at least, perhaps, dueling motions, if what I did was make a motion for continuance, Mr. Boone made that motion for continuance yesterday in his filing. So it appears we've got, potentially, two motions for continuance. Both seeking the same thing, neither of which was filed seven days before today's hearing.

Um, I'm not sure there's law on that,

Your Honor --

THE COURT: Okay.

MS. HERBERT: -- but it appears -- but -- but the difficulty we find ourselves in is the fact that -- and no question that it was -- it's -- the blame falls on me, is that the Court would be -- if the Court proceeded today, to take evidence and to make a ruling on -- on the counterclaim, it would be entering an order that is void or voidable under the case law, which would, essentially, be asking the Court to conduct a nullity and -- and so that makes no sense for any of us.

Um, as far as Mr. Boone's, um, plea that the Court simply strike the counterclaim, is a result of this error. I think that simply would be overkill and I don't think that it has anything to do or is anywhere near the same thing as what happened when Mr. Boone arranged for a continuance that he then did not follow through with and get off the Court's calendar. That was the Court's date to manipulate, or not manipulate, and he did not do what he promised to do.

Um, those are my comments.

MR. BOONE: I'd like to respond to that, Your Honor.

THE COURT: Okay.

MR. BOONE: The -- the motion that I just made, I make without any apology and without any reservation. And as an independent motion, which really is legal argument that I have the right to make, upon the circumstances that we have right now. I can, in the alternative, mention in my motion, a continuance, but only after the Court would consider this.

Now, Your Honor, I do not request a continuance. I do not. I request only that the Court order that the request by the defendant counter claimant be denied for failure to follow the mandatory 14-day certified mail notice, which counsel has agreed or stipulated, has not been done.

And I have to say to the Court, my clients have traveled all the way from Denver, Colorado -- or Chuck Cooper has traveled -- well, I guess Wayne Ducolon, also. They both -- they both traveled all the way from Denver, Colorado to be here today. And, yes, Your Honor, it would be a tremendous legal prejudice and factual prejudice to them for the Court to rule otherwise, because they are prepared today. And the Court should be -- I respectfully asked, be prepared to rule accordingly

and to strike and deny the request for failure to follow the mandatory notice requirement, which the other side had 41 days to do. And I will not give way one iota on that point. Thank you.

THE COURT: Okay. Well, Court will note back on March 7th, I believe, defense counsel advised the Court about some conversations concerning continuances, and that's all on the record and I don't need to rehash it. But, obviously, the Court wasn't involved in it, other than maybe my secretary or one of the secretaries had been. But I don't rule on phone calls or letters or whatever.

So, I rule on motions and so we took up the hearing last time. I believe at the end of it, I suggested to defense counsel to prepare a journal entry and forward that to plaintiff's counsel, but I suspect that I did not, specifically, mention 60-254. Wasn't really thinking of it. Just, obviously, wanted to make sure that plaintiff's counsel was aware of today's proceedings.

But I'll note, as has been stated by both counsel, they noticed as required by 60-254. Apparently has not been given. Pretty sure plaintiff isn't waiving that and, therefore,

obviously, there's no reason to proceed here today with an evidentiary hearing, as the Court had said.

So, I will note that the plaintiff has objected to any motions that haven't been given with seven days notice and, also, obviously, the Court takes into consideration, Supreme Court rule 137, where I'm supposed to get motions at chambers. I believe I'm entitled to that same notice.

But, in any event, obviously, there's no reason to proceed here today on the taking of any evidence. And so the fact that the notice hasn't been given, I will continue this and take up any motions that may get properly noticed up before the Court, with notice to this Court.

Well, I'm back here May 9th, if that works.

MS. HERBERT: It does for us, Your Honor.

THE COURT: Okay.

MR. BOONE: I have a jury trial in Kansas City, Your Honor.

THE COURT: June 4th.

MS. HERBERT: That's fine, Your Honor.

MR. BOONE: What time, Your Honor?

THE COURT: 10:00 is fine with the

APPENDIX

RECORD VOLUME EIGHT

EXCERPT

PAGES 11-35

ORIGINAL

IN THE EIGHTH JUDICIAL DISTRICT
DISTRICT COURT, DICKINSON COUNTY, KANSAS

KAPE ROOFING & GUTTERS, INC,
Plaintiff,
v.
CHAD CHEBULTZ,
Defendant.

Case Number 12 CV 73

TRANSCRIPT OF EVIDENTIARY HEARING

Proceedings had and entered of record in the above-entitled case on June 4, 2014, before the Honorable David R. Platt, District Judge of Division Number Five of the Eighth Judicial District of Kansas.

APPEARANCES

The Plaintiff, Kape Roofing & Gutters, Inc, appeared in person and by its attorney, Mr. Caleb Boone, PO Box 188, 1200 Main St., Suite 304, Hays, Kansas 67601.

The Defendant, Chad Chebultz, appeared in person and by his attorney, Ms. Elizabeth R. Herbert, Irigonegaray & Associates, 1535 SW 29th St, Topeka, Kansas 66611-1901.

and in favor of the defendant.

Now, I have read the brief of the defendant, that the defendant believes that no default as such was entered. And what I would like to say in response to that, is that the practical effect of the Court's order on March the 7th, was a default. An order striking all of the plaintiff's pleadings for nonappearance.

Now, I need to go immediately, then, now to the circumstances of that, which I've -- I've mentioned before. What the Court must know, is that the plaintiffs do have a meritorious position. I know the statute and the language says meritorious defense, yes. That would be a meritorious defense to the counterclaim. But more importantly, I believe, is that the plaintiffs have a meritorious position with respect to all of their claims in the petition, because those were still alive at the time of March the 7th.

Now, therefore, at this stage, since I'm just presenting my oral argument, what I would say to the Court mechanically is, that I would proffer, at this time, the allegations of the initial petition that were filed by the plaintiffs, and the reply to the counterclaim. And I would proffer

argumentatively, at this time, that Chuck Cooper and Wayne Ducolon, who are here with me live today, would testify to the same effect as those allegations. And the reason I'm doing that now, Your Honor, and I believe that's what the Court wants us to do, at least procedurally now, is just to outline that and to offer it as a proffer. Am I correct, Your Honor? At least procedural?

THE COURT: That's fine. As you wish.

MR. BOONE: Okay. All right. I'm just doing that at this time.

Um, I'm reserving the right to present their testimony, at the later stage -- at a later stage in these proceedings, but I'm just presenting the argument at this time.

Now -- so, therefore, the first element of my argument against the rendition of the sanction of the, um, cancellation, um, striking of the pleadings. If it's not considered to be a default judgment, then on behalf of the plaintiffs, I ask the Court to respectfully reconsider that sanction. And so the central part of my argument is the request to this Court, whether it be deemed to be a default, or whether it be deemed to be some type of a sanction order, to respectfully reconsider it.

And, yes, I place against that, the background of what I said earlier, about the treatment of the Court of the plaintiff on the 7th of March, and then the continuance, which was effectively allowed the defendant, if it is viewed that way, on April the 18th, which I've already talked about.

And, Your Honor, I also must present to the Court the circumstances surrounding the March 7th proceedings. What the Court should know, and again I do offer this. This is my statement as counsel, about the factual circumstances that obtained when I was engaged in communication with the Court and other counsel, during the days leading up to March 7th.

When I must offer to the Court is this, first of all, Your Honor, a telephone conference call hearing was conducted with the Court's administrative assistant. That was done about March the 1st, but I believe a day or two before that. And, in any case, that conference call was held. At that time, there were two extensions that were agreed upon by counsel, that being myself and Elizabeth Herbert. And I will also state for the Court, that it was my understanding, and I believe it was announced, at some point during that

conference call, or acknowledged, that Elizabeth Herbert was, essentially, engaged in whatever summary judgment briefing and responses would be filed on behalf of all defendants as one single counsel, procedurally, at that point. And I believe that if Tim Ryan was present on that phone call, which I believe that he was, that he acknowledged that that was agreed by his particular party for -- for efficiency sake and for the streamline proceedings.

And so, Your Honor, what happened in that telephone conference call hearing, is that I informed counsel -- I actually previously informed them by telephone -- that I was to be involved in a deposition in the state of Pennsylvania. In Lancaster, Pennsylvania, for an unrelated case. And that I would not be able to attend those proceedings, because of that conflict in my schedule. And counsel, Elizabeth Herbert, was kind enough to agree to that continuance and also, then, therefore, Tim Ryan, because Elizabeth Herbert had his permission to act. And so she did that. And that is what occurred in my telephone calls to Elizabeth, before we had the conference call with Your Honor's administrative assistant.

Now, then, Your Honor, we had the conference call, we confirmed that situation, and then your administrative assistant got a new date and a time for us, and she -- we discussed that on the conference call. And once that was arranged, that was the end of the conference call.

Now, yes, during that conference call, I was informed that as the counsel requesting the continuance, it was my obligation to prepare a journal entry, a written document, to memorialize that phone conference call and transmit it to the Court.

Now, I did that, but as I was looking at my notes, during the days after the telephone conference call, I was unsure that I had the date and the time exactly right. And so, therefore, I made telephone inquiry, and my memory is that I spoke to the Court's administrative assistant or personnel of the Court, and, unfortunately, she had not retained a note of that date, and did not have that at hand when I called on the phone, or something to that effect.

And so, therefore, Your Honor, when I had that -- when that situation occurred, then I contacted opposing counsel, which was Elizabeth,

primarily. And I spoke with -- I didn't speak directly with her, I don't believe. I spoke with her secretary. She was out. And I said, Well, please ask her to call me back. And my memory is, Your Honor, that I did call her office more than once. It may have been three times, but I think at least two times, but probably -- probably three, in which I tried to reach her again, to see if she may have returned to the office. And what occurred in those exchanges was -- were short discussions by myself with her secretary, asking her to please call me back. And so I did that. And those telephone conversations, were on the day before March the 7th, or leading up to that time.

And so I -- what I'm trying to tell the Court is that, um, shortly before that, when I realized I had some difficulty with my notes, having the date and the time recorded. Then I made those efforts to get that information correct, so I could then submit that to the Court. And that's what I did. And the record should also reflect that Elizabeth did not call me back. Now she may have been on the road, there may have been various circumstances, but that's -- that's what happened in effect.

And then I had to proceed in -- well, and then on the very day that our, um -- on the very day that the pretrial was to take place, literally, that was the day where I was supposed to be, um, in Lancaster, Pennsylvania, for a deposition. And that deposition took place as scheduled and I was there. It was a defense deposition of an expert witness. And those are very difficult to -- it was very difficult to arrange that and, of course, it was on that basis that Elizabeth and I had agreed to the continuance.

So I'm informing the Court of what happened, and I'm offering that as my statement of fact, which I asked the Court to respectfully consider, as the factual basis that would show the factual circumstances, upon which I must respectfully submit that excusable neglect has been shown.

Now, Your Honor, then, the Court -- well, the counsel, then, attended the pretrial conference. I was not there, because I was in Pennsylvania. And then the Court's journal entry was prepared and I was not there.

Now, after that point in time, I was not aware of that journal entry. I filed my summary

judgment response as I had arranged with Elizabeth to do. And so the Court's record will reflect that that was served and filed at the time that it was, on the record. And so I asked the Court to consider that, and I believe, also, there was a -- an amendment or a correction to that, so that there was a typographical error -- or an error in one of the, I believe, a factual statement that was corrected. And it was not until some time later that I was made aware of the fact that the Court had held a hearing on March the 7th, and had stricken the pleadings. And in my opinion, and my construction of what occurred, to grant that judgment. Which I -- I believe it was effectively a default judgment.

So, therefore, Your Honor, what we have in that scenario, is the, uh, demonstration of, I believe, a clear demonstration of excusable neglect.

Now, I would like, immediately, to cite for the Court, to remind the Court of the cases that I have cited in my briefs. And, particularly, the case of *French versus Moore*.

Now, Your Honor, you have -- you noted that you have a supplement to authorities, and so I direct the Court's attention to that. And you can see there on page one of that, Your Honor, that

there's a first paragraph one, and it refers to the case of *French versus Moore*.

Now, I asked the Court, respectfully, to pay particularly close attention to that decision. I have the West Law citation there. It's a 2010 case from the Kansas Court of Appeals. I've Shepardized that and I find no -- nothing to -- to vitiate its force and affect as good authority. And I ask the Court to please consider it. And I will recite to the Court, or summarize the facts of that case briefly.

In the case of *French versus Moore*, the plaintiff was to attend a pretrial conference. And, in this case, there was a pretrial conference scheduled for March the 7th. The plaintiff, also, was to file a pretrial questionnaire.

Now, in the case of *French versus Moore*, the plaintiff neither attended the pretrial conference, nor did the plaintiff file a pretrial questionnaire. In this case, the plaintiff, myself, requested a telephone conference call and an extension of time was agreed to and announced to the Court to reschedule the conference and to extend, a little bit, the time for the plaintiff's response to the motion for summary judgment.

And so, in this case, what I believe is shown, is something much more than what the plaintiff did in the case of *French versus Moore*.

Now, in that case, I'm going back to the *French versus Moore* case. In that case, the plaintiff stated to the Court, at some point, and I believe it is one of his motions after the default judgment was granted. The plaintiff stated that he was unsure of the date that he was to appear at the pretrial conference and so forth.

In this case, I had already requested a continuance that had been agreed to. And I had -- I was in the process of preparing the journal entry and needed to speak with counsel about the exact date so it would be correct. And I was in communication with counsel about that. The circumstances are not exactly the same in that specific regard, but they are similar.

Now, the next thing, Your Honor, that I'd like to bring to the Court's attention, is the opinion of the Court of Appeals about those things. I don't -- I'm not trying, Your Honor, just to discuss the case just to make a long discussion. I'm going right to the point. In the last part of the opinion, in the *French versus Moore* case,

Your Honor, the -- the Court considers whether or not there was excusable neglect shown by the plaintiff in the *French versus Moore* case.

Now, I understand, and I'm not -- I'm not trying to gloss over the point that has previously been made by Elizabeth in her briefs, and that I -- no doubt she will make at the lectern today, that this is not a default judgment, in this case. She contends that it is more of a sanction of the striking of pleadings.

What I would say is, I understand that. However, in reading all of the cases talking about all of these things, either under rule 37 or in the default judgment related cases, K.S.A. 60-255 and the other -- just -- just the decisions that lead up to those K.S.A. 60-255 scenarios, Judge.

What is clear, is that excusable neglect is an -- is a factor to be considered, and it is relevant to be considered, whether or not this would be called a sanction or it would be called a default.

Now, in the *French versus Moore* case, the Court of Appeals decided that the, uh, the defaulting party was not able to show excusable neglect, under those circumstances of not attending

the pretrial conference, and not filing the pretrial questionnaire. That the party in that case, was not able to show excusable neglect. But, nevertheless, the Court decided that a default judgment should be reversed, because the policy of the Kansas courts is to favor consideration of disputes on their merits, and to favor a plenary consideration of disputes on their merits.

Now, I ask the Court to keep that in mind, because I think that is a point very much in the plaintiff's favor, in this case, because I believe that, in this case, I think that quite reasonable decorum and respect was shown to the Court. Careful attention to the continuance was made by having a telephone conference call and anticipating all of that, which -- and none of that is present in the *French versus Moore* case.

So, in this case, I do believe that the overall circumstances clearly demonstrate a showing of reasonable and excusable neglect, because the only thing that was missing from this case, is simply a -- a paper journal entry. Just a piece of paper, if I may say.

I understand that the Court's proceedings and the normal practices of the Court,

must always be respected by counsel. And I agree with that. But I would also respectfully say, Judge, that when all of the circumstances of this case are considered, then it is clear that this circumstance does not justify the granting of the striking of the pleadings and the striking, if you will, of the plaintiff's pretrial contentions and those kinds of orders.

And, therefore, Judge, I believe that *French versus Moore* is an excellent authority for the Court to rely upon to reach that conclusion.

Now, there is another case that I've cited in my brief, which relates to another motion, which I'll -- which I will have to reserve, because Your Honor has not asked to hear that now. But it does talk about excusable neglect, and that's *Canaan versus Bartee*. Now that's 272 Kan. 720 from the Supreme Court.

Judge, do you mind if I get something to drink there?

THE COURT: No. No problem.

MR. BOONE: Is that -- is that a pitcher of water?

THE COURT: There's a train coming by anyway.

MR. BOONE: I'll wait a minute or two, Judge. Or a few seconds anyway.

All right. Judge, there is another case that I'd like to bring to the Court's attention. It's in my -- it's in my main motion to dismiss default proceedings. And that is, um, *Forer versus Perez-Lambkins*, and that is 42 Kan. App. 2d, Your Honor. That's on page two of my motion, paragraph number six. 42 Kan. App. 2d, 742. That's a 2000 -- 2009 decision, Judge. So the *Canaan versus Bartee* is '01 Supreme Court. And the *Forer* is 2009 Court of Appeals. And then this, um -- the other case, *French versus Moore*, Your Honor, is in 2010.

In the *Canaan versus Bartee* case, the facts are pretty dramatic. And they involve some very serious misconduct by an attorney, on the part of one of the parties. And I'm -- I cited that case, because that case presents a very extreme example in which the Court found that the -- the party, the litigant, should not be punished for the wrongdoing of counsel. And that really does present a rather dramatic example, but it is a Supreme Court decision, which does discuss this issue of excusable neglect. Now, then, finally, Judge, I ask the Court

to consider the *Forer versus Perez-Lambkins* on that issue.

Now, I want to go back to another aspect of this case, which is the aspect of prejudice. There are really three factors: Number one, meritorious defense; number two, consideration of prejudice to any party, by allowing a relief or a reconsideration of the judgment or the sanction; and then number three, the excusable neglect.

Um, Your Honor, in the case of prejudice, I turn the Court's attention, again, back to *French versus Moore*. The reason for that, Judge, is that in the *French versus Moore* case, the -- the district court considered that if the -- the successful party, which was, I believe, it was also a counter claimant in that case, but the claimant maybe -- maybe was the plaintiff. The claimant in that case would be deprived of a judgment. In other words, there would be prejudice that would be worked -- that would be suffered by the party who won the default, or who won the sanction judgment order. And that there would be a prejudice that would be suffered by that party, if that sanction or that default judgment were removed or reopened or reconsidered. And the Court of appeals held that

that was an erroneous conclusion to make in that case, because what the Court of Appeals' reason was, if that were true, then in every case, where a party would be deprived of a judgment, then there would always be prejudice. And the Court of Appeals concluded that that was incorrect, and it's set forth and acknowledged, the rule of law, that that is not a proper basis for a finding of some kind of prejudice against the responding party.

And, again, we have these three factors, the meritorious position, the meritorious defense aspect, then the aspect of prejudice or lack thereof. And, then, finally, the factor of excusable neglect.

And, again, I -- I will repeat for the Court, that in the *French versus Moore* case, even when the Court of Appeals found that there was no excusable neglect, the Court still reversed and remanded and reversed the district court's granting of that default judgment.

So, I ask the Court, please, to consider that *French versus Moore* case. I believe it is, uh, the most recent case involving a pretrial conference situation. And an assessment of the sanction of default, or some other sanction. So I do believe,

Your Honor, that it is the most pronouncement of our appellate courts in this area. And it's closely comparable, because it does involve a pretrial conference.

Now, the other aspect that I have to cite for the Court is this, the other argument I'd like to make concerning my motion for default -- to dismiss the default proceedings.

One of the statements that was made by counsel and their responses to me, I think either on April the 18th, in the courtroom here. Or perhaps, I mean, I know in the briefs that have been filed. Is that, um, the judgment that was made on March the 7th, it was a final appealable order, and we are past the time for any appeal or any reconsideration of that.

And I have to say, respectfully, I disagree with that, and I've cited my -- the authority for that, um, in my motion. And that, particularly, Judge, I would ask the Court to consider paragraph number seven of page number two of my motion to dismiss. That discusses K.S.A. 60-254, which talks about the certification of finality that's required for something to be a final judgment that would otherwise be an interlocutory

order.

What I must say, Your Honor, is I do believe that the order that was made on March the 7th, was an interlocutory order. It was not a final order. Um, I don't intend to spend a lot of time on this point, because I believe it's -- it's perfectly clear that that's true. And I, with all due respect to counsel, I understand that counsel thought that it -- that it was a final order, but to say that it was a final order, would mean -- would be to declare that the case would be entirely over and all of the judgments necessary to end all the claims of all of the parties, would have been granted and I just don't believe that's the case. And clearly, uh, the, um, statute recognizes that until a final order is made of all -- disposing of all the claims, that there's nothing that's final and appealable to deal with. And so I ask the Court to, please, bear that in mind. And -- and what that, of course, means is that the order of March 7th, is still available to be reconsidered. And it is proper, at this time, for the Court to have jurisdiction, to reconsider that.

Now, Your Honor, um, I would like to make a general statement, if I can, about these

circumstances all together. In this case, the arguments of the defendant in the counterclaim, and the arguments of the plaintiff on the main issue that are presented -- that is presented to the Court, are whether or not there was some type of slander or liable involved. And then the defendant has raised some issues of Consumer Protection Act violations that the defendant contends are relevant to the manner in which the plaintiff dealt with the defendant. And other similar contentions.

All of those things, Judge, all of those present a single just issuable controversy. And because they do, there would be no prejudice to any party, by allowing those proceedings to be reopened and to proceed to a plenary consideration, which I believe is the goal of the law, and it's the goal of the judicial system, and it should be -- and I believe that it is, the goal of this Court to do that.

And so I ask the Court, please, to consider that philosophy of the judicial system, and that goal of the judicial system, to be one that is -- it's a salutary end, and it is a proper goal and a proper object for all of us to be concerned with.

It is true that the Court has control

and -- and should have control over its calendar and its proceedings. And, yes, I believe that what was done on the part of the plaintiff by me, under the circumstances, was reasonable. I do not believe that it constituted inexcusable neglect, and I believe that under all of these circumstances, there is a very reasonable and proper foundation for this Court to conclude, all things considered, that the circumstances present excusable neglect under these -- under this situation. And that there is no, uh -- that nothing has occurred and there would be no prejudice that would be worked against any litigant by allowing a full consideration of all the issues at a normal jury trial, which was demanded by both parties, by all parties in this case. I guess I should say by the defendant Chad Chebultz and, then, by the -- by the plaintiff.

Now, yes, I also direct my comments towards the summary judgment, because that was a subject of the conference call that we had, and the schedule for the response to that was the subject of that. And the plaintiff did comply with that. I understand that in the interim, the hearing on March the 7th had been held, and that was not -- that was not known to me, at the time that I did that. That

I should say that I filed that response and the Court has that of record. So I ask the Court to consider that.

Your Honor, the -- the purpose -- the purpose of the judicial system is to allow the parties to present their claims on the merits. And to allow each party to have his or her day in court.

In this case, we've engaged in extensive discovery. The parties have had to go, if I can say it this way, literally -- literally, the extra mile to get all of the documents and to exchange all that was necessary. And I think that that should be considered. The good faith actions of the litigants in trying to comply to provide the other party who was -- which was requesting in particular, my clients had to provide thousands of pages of documents in response to request for production. And I ask the Court to consider that circumstance, because doing that is, I believe, also showing the Court good faith. And I think that's relevant.

What this really does boil down to, Your Honor, is one piece of paper. The memorialization of the telephone conference call and the issue of whether or not my failure to transmit that by fax, a day or two or so before March the

7th, and whether or not my telephone calls to get the right date and time to place on that form, and my attempts to contact counsel and the Court's assistant to do that. Whether that circumstance, whether those things, whether those actions demonstrate some type of disregard for the Court's procedures, or some type of inexcusable neglect, when all this considered.

And in light of *French versus Moore*, Your Honor, I believe that they do, and I respectfully ask the Court to reopen the judgment made on March the 7th, and to reopen the proceedings and to allow the pretrial conference to take place, essentially, discovery, I believe, has been concluded. And so all that would be left to accomplish would be the finalization of the pretrial order and the pretrial conference proceedings, and that would be it.

Now, I have one last comment to make, Your Honor, about the Court's, uh, exercise of discretion in this matter. The Court does have the authority to control its proceedings and to make whatever orders the Court feels in its discretion are justified or warranted. I presented by argument today, about why I believe those, in this particular

situation, were in -- an intentional error or were erroneous as considering all -- after considering all the facts. But I would like to step back away from that, Your Honor, for a moment and present some further comments in the alternative.

What actually happened, physically, on March the 7th, was this, counsel for the defendant bank attended the pretrial conference, came to the pretrial conference. Counsel for defendant Chebultz, also came to the pretrial conference. I was not able to be there, because of circumstances already known, really, to everyone.

Now, what happened there, Your Honor, if the Court please, was a circumstance where one, certainly, could conclude, that time was taken by Tim Ryan and time was taken by Elizabeth Herbert, to attend that conference.

One of the concepts in the cases, and there are -- and in -- all of the cases talk about this, are -- one of the concepts is, whether or not the Court considered any lesser sanctions than a striking of all the pleadings in this case, which, in my opinion, does -- is tantamount to really a default judgment in affect.

So -- so that concept, in the cases, is

always raised. And that concept is whether or not the Court, the district judge, considered lesser sanctions than an outright striking of all the pleadings of the party and things to that effect.

And, in this case, Your Honor, I believe that's very important for Your Honor to consider at this time. And I ask the Court, respectfully, to do so.

Now, I realize that it is the Court that has the discretion, and it's the Court that has the judgment and the choice to exercise among its various choices; various options.

But I ask the Court to consider that, in this case, a monetary sanction could be issued against me personally, for the time taken by Tim Ryan and the expense of his travel and the response of Elizabeth Herbert's time and travel on March the 7th. And I say so, because that is one of the options that is discussed in the cases. There are other options, which the Court has.

I believe that, in this case, that specific option is very probably the most appropriate one, because I believe that it's most properly suited to what exactly happened. And that is a -- a hearing took place when it was just --

when not all participants were there. And I do ask the Court to reopen its decision and to reconsider the sanction that it issued. And to recast it, to cancel or resend the previous sanction, and then issue a sanction of a monetary sum to make whole, the litigant -- the litigants involved, in terms of attorney fees, a time and expense on that date.

Now, I realize that's -- that's my suggestion as an attorney. I realize the Court has the ultimate control over that. But I do believe that in this circumstance, that would be, um, a very appropriate alternative. And, in fact, I do also believe that the cases -- the Court's -- the appellate courts do require that this court, specifically, alternatively, consider that and do that, rather than some more severe sanctions, such as a default judgment or a striking of all of the pleadings.

Now, I would like to have the opportunity, Your Honor, to reply -- argument a reply to what I just said. Thank you.

THE COURT: Sure.

Defense. Elizabeth. Okay.

MS. HERBERT: I may, sort of, go backwards on some of this, Your Honor. Um, I will