No. 14-113025-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS

KAPE ROOFING & GUTTERS, INC., and CHUCK COOPER,
Plaintiffs - Appellants

v.

CHAD CHEBULTZ, an individual; and
COMMUNITY FIRST NATIONAL BANK,
a banking corporation,

Defendants – Appellees

BRIEF OF APPELLEES

Appeal from the District Court of Dickinson County, Kansas
Honorable David L. Platt
District Court Case No. 2012-CV-000073-OT

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NATURE OF THE CASE

This case arises out of a contract for roof and gutter replacement on a home in Abilene, Kansas. Kape Roofing and Gutters, Inc., [hereinafter "Kape"] and its owner, Chuck Cooper, brought suit against Chad Chebultz, the homeowner, for tortious interference with contract, injunction, defamation, breach of contract, and also against Chebultz and Community First National Bank, the mortgagee, for foreclosure of a mechanic's lien filed against the premises. Chebultz counterclaimed for fraud, outrage and violations of the Kansas Consumer Protection Act. Kape's and Cooper's pleadings were stricken after their counsel failed to appear at a final pretrial hearing on March 7, 2014. After a July, 2014 trial to the court on Chebultz's counterclaims, on Oct. 24, 2014, the district court granted judgment to Chebultz for outrageous conduct, punitive damages, consumer protection penalties, and attorney fees. Kape and Cooper filed their Amended Notice of Appeal on Nov. 12, 2014. [Herein, the plaintiffs/appellants are referred to collectively as "Kape."]

STATEMENT OF THE ISSUES

Chebultz and Community First generally concur with Kape's suggested issues #2-4 (enumerated below as #4-6). However, Kape's first stated issue and argument thereon merge multiple concepts. Chebultz suggests the following are the issues raised by Kape's brief:

1. Did the district court err in ruling that Olson was not a subcontractor of Kape and granting defendants' Joint Motion for Partial Summary Judgment?
2. Did the district court abuse its discretion in striking plaintiffs' pleadings when plaintiffs failed to appear at the final pretrial conference?
3. Did the district court err in conducting a bench trial instead of a jury trial on Chebultz's counterclaims?

4. Did the district court err in granting judgment for violations of the Consumer Protection Act?
5. Did the district court err in granting judgment for outrageous conduct and punitive damages arising therefrom?
6. Did the district court err in failing to dismiss the counterclaim or deny judgment to the defendants based upon the advice of counsel defense?

STATEMENT OF THE FACTS

This case arises out of a re-roofing project at Chad Chebultz's Abilene home. Answer of Defendant Chad Chebultz to Plaintiffs' Amended Petition at R. 1, p. 57 ¶1. Chebultz contracted in the spring of 2011 to purchase the residence at 1100 N. Buckeye Avenue, Abilene, Kansas 67410 from Col.[1] and Mrs. Mike James. On June 1, 2011, three days prior to the scheduled closing, the residence suffered significant damage from a hail storm. *Id.* at ¶2. At the request of his realtor, who informed him that the bank would not close on the purchase as scheduled for June 3, 2011, due to the hail damage, Chebultz promptly, on June 3, 2011, obtained a repair estimate, as requested, in the form of a roofing contract offered by Kape. *Id.* at ¶4; Transcript of Trial [hereinafter "Tr. Tran."] R.19, 35:4-36:5. The contract listed prices for roofing and guttering which totaled $20,226.29 including one power vent, which later became three. *Id.* at ¶4; *see* also two Kape contacts, at R. 2, 108-112; affidavit in support of Chebultz's motion for punitive damages, R.2, 100 ¶6; Tr. Tran., R.19, 34:14-39.4.

Although the Kape contract states that it is for the full scope of insurance proceeds, Kape's representatives knew that Chebultz was not yet the owner of the property, and that the insurance proceeds available would be paid to the owners, Col. and Mrs. James. Chebultz depo.,

[1] In various documents James is referred to as "Major James." At some point during the proceedings he was apparently promoted to Colonel. Thus, he is referred to as "Colonel James" throughout.

at R. 2, 128:15-129:4; Tr. Tran., R.19, 43:23-44:1. Chebultz never signed the contract. See Kape contracts at R.2, 108-112; Chebultz depo. at R.2, 128:15-129:4; 130:8-131:22; Tr. Tran., R.19, 39:13-18.

The proposed contract states the position that Kape is entitled to all insurance proceeds related to the work to be performed, but there is a check-mark placed beside the term "contractor 10% O&P" [overhead and profit] and the blank is filled in with the word "included". Kape Contracts at R.2, 108; 110; Tr. Tran., R. 19, 40:3-10.

The roofing and guttering work was performed, and despite some issues with the power vents and a skylight, Chebultz was very satisfied with the work. Chebultz depo. at R. 2, 118:12-24. Tr. Tran., R. 19, 44:8-10. Kape began making demand for payment but Chebultz informed Kape personnel that he was waiting for payment to arrive from Col. James. He was told that the demands were a formality and he should not worry. Answer of Defendant Chad Chebultz at R. 2, 58, ¶8. . In August a check for $18,826.21 came from Jennifer James made out to Reynolds Real Estate. Funds were transferred to Chebultz who paid $12,500.00 to Kape on Sep. 8, 2011. *Id.* See Kape Final Invoice 9/7/2011 at R. 2, 135, which reflects a credit for this payment; Tr. Tran., R.19, 46:19-47:11. Chebultz was then waiting for the proceeds of a second insurance check expected to be sent to Col. James. Chebultz Answer R. 1, at 58. There were still deck repair, fascia board replacement, and light fixture replacement needed, which Chebultz performed, and repair needed to a basement bedroom (due to gutter failure, water had entered that area). Defendant's Motion for Partial Summary Judgment at R. 3, at 7; Tr. Tran., R. 20, at 329.

Chad Olson repaired the basement bedroom. R. 3, at 7. *Id.* He was given Chebultz's "name and number" after he solicited work from Jarrod Sawyer and Brian Weary, at the time

both Kape employees, at a chance meeting in Salina, Kansas. Olson depo. at R. 3, 47:4-48:12. Olson was painting a house, saw a Kape truck across the street, and went over to introduce himself to the Kape agents. Olson depo. at R. 3, at 47:4-48:12. Olson knew Weary previously, but had not had business dealings with Sawyer or Weary prior to that day. Olson depo. at R. 3, 47:4-48:12. This casual referral from Kape employees to Olson led to Olson approaching Chebultz and on Nov. 10 and 11, Olson and Chebultz agreed upon cost and scope of Olson's work. Olson depo. at R. 3, 48:13-15; C.W. Olson Painting & More Invoices at R. 3, 76-77; Tr. Tran., R.19, 61:2-15.

Weary testified that because they gave Olson information, he was contracted to them and they could rightfully claim O & P [overhead and profit]. Weary Depo. at R. 2, 190:1-10. However, he admitted to having no knowledge of when Olson completed his work. *Id.*, R. 2, 189:2-6. Sawyer testified that he took another potential subcontractor for the basement, by the name of Adam Soakup, to the Chebultz home to see the job. Sawyer depo. at R. 3, 45:11-24. Soakup, in the end, could not do the work and then "we found Chad Olson." *Id.* 27:7-16.

Chebultz testified that he had no knowledge that Olson was even referred to him by Kape until long after the fact. Olson called Chebultz and indicated he had been told Chebultz needed work in his basement. Chebultz depo. at R. 3, 87:1 – 89:1. Chebultz and Olson discussed the "nature and extent" of the work to be done at the Chebultz home and Olson considered Chebultz to be his general contractor. Olson depo. at R. 3, 49:22–50:12. Olson directly gave Chebultz bids for the bedroom renovation on Nov. 10 and 11, 2011. C.W. Olson Painting & More Invoices, at R. 3, 76-77; Tr. Tran., R. 19, at 67:13-21. Chebultz has testified that the basement room needed to be done and was done on the 18th except for Olson perhaps coming back the next day to pick up equipment. The last part of the job was installing carpet on Nov. 18. Chebultz

depo. at R. 2, 115:9 – 116:14; Tr. Tran., R.19, 97:18-98:6. Chad Olson corroborated Chebultz's account. He indicated that Chebultz asked him if he could be done by Thanksgiving because he had family coming; Olson said he could be, and he was. See Olson depo. at R. 2, 161:7–11. He didn't recall Jarrod Sawyer being present for that conversation. Olson depo. at R. 2, 161:19–25. Olson testified firmly that he was done with the work on or before Nov. 20. See Olson depo. at R. 2, 167:3–168:11. Chebultz himself, or Olson using Chebultz's debit/credit cards, purchased the materials. Chebultz depo. at R. 3, 85:6-14. Sawyer depo. at R. 3, at 37:24–38:3; Tr. Tran., R. 19, 61:10-12. Chebultz recalled personally paying for the tile, grout, and paint for the project. Chebultz depo. at R. 3, at 85:15–86:9; Tr. Tran., R.19, 61:5-15.

All payments to Olson for work done at the Chebultz home were made by Chebultz. *Id.*, also Olson depo. at R. 3, 52:19–53:11; Sawyer depo. at R. 3, 37:24–38:3. Olson was given a check for $1,100 on Dec. 30, 2011. Olson depo. at R. 3, 53:2–14. Olson was present at a Dec. 30, 2011 meeting and was paid for his work at that time. See Olson depo. at R. 2, 158:22-160:19. He was paid earlier for the portion not covered by insurance, *Id.*, at 165:8-166:22, 167:9-20, an additional $300-$350. R. 3, 54:3-22.

Olson provided a document dated Nov. 20, 2011, to Sawyer to pass on to the insurance company to facilitate his payment, but he insisted that it reflected work already done. Olson depo. at R. 3, 50:21–51:10; 57:25–58:9; Sawyer depo. at R. 3, 35:5-36:17; "C.W. Olson Painting & More Invoice" at R. 3, 101. He also testified that his Nov. 20 "quote" is a bill, requested by Jarrod. All the work that is on that bill was done as of that date. See Olson depo. at R. 2, 162:25–164:12; C.W. Olson Painting & More Invoices, at R. 3, at 76-77. The bids given to Chebultz by Olson were not provided to Kape because Olson was not working for Kape. Olson depo. at R. 3, 55:20-23. Olson stated he was working for Chebultz, Olson depo. at R. 3, 49:22–

50:12, and vehemently denied that he was working for Kape. *Id.*, at 55:15 – 56:2. He denied that Jarrod Sawyer introduced him to Chebultz. Olson depo. at R. 2, 169:15-170:15. Olson was paid by Kape for work he did on other projects at other customers' homes. Sawyer depo. at R. 3, at 28:21–29:1. That work was done on the exterior of customers' homes. *Id.* at R. 3, at 28:21-29:1.

The contract proposed between Kape and Chebultz, dated June 3, 2011 makes no mention of any work to be done on the interior of the home. Kape Roof and Gutters 6/3/2011 Contract at R. 3, at 22-24. Chebultz was told that Kape was not insured for interior work and could not do the basement bedroom repair job. Affidavit of Chad Chebultz Sr. at R. 3, 98 ¶4-99 ¶5; Sawyer depo. at R. 3, at 42:25-43:25. All work done by Kape at the Chebultz home, other than the allegedly sub-contracted interior work performed by Olson, was completed on or about Sep. 7, 2011, the date of the invoice, or Sep. 5, the date the skylight was installed. Sawyer depo. at R. 3, at 40:4–41:13.

From this seemingly simple course of events evolved a confused series of six conflicting invoices, for the Chebultz roof and guttering, submitted by Kape, dated variously from Sep. 7, 2011, through Feb. 13, 2012. See "Kape Invoices" attached to Chebultz's Punitive Damages Motion, at R. 2, 136-141, and Tr. Tran., R. 19, 44:11-45:2. Of the six (6) invoices from Kape to Chebultz, only the last two (January 5 and February 13) make any mention of Olson's work done at the house. *Id.* also Tr. Tran., R. 19, 64:12-21.

Only the final invoice on Feb. 13, 2010, references overhead and profit. Invoices, R. 2, 140-141; also Tr. Tran., R.19, 45:3-24. Chebultz was more than willing to pay for the roofing job, on which he estimated he owed $1,700 after a Dec. 30 payment of $5,966.41, but sought an adjustment for non-functional power roof vents. Invoice at item #15, R.2, 140:141; Tr. Tran., R.19, 46:19-48:7. However, Chebultz balked at paying an additional $3,205.20 in overhead and

profit which the insurance company had included in its estimate of the loss. Invoices, at items #10 and 11, R.2, 140-141. This "O&P" was reflected only on the Feb. 13, 2012 invoice. Compare invoices, R.2, at 135-141.

Plaintiff Chuck Cooper admitted that if he were the homeowner and received the conflicting series of invoices, he would be "upset." Cooper depo. R. 2, at 202:7-12. Cooper also stated that apparently no one reads the verbiage – his term for the fine print portion of the contract which asserts KAPE's claim for full proceeds of the insurance claim. *Id.*, at 206:2-5. Cooper admitted he did not know whether work was performed or materials provided on Dec. 20, 2011 as alleged in his lien statement, then admitted he didn't believe Kape provided any materials. *Id.*, at 196:22-198:9. Cooper admitted KAPE did not have a written contract with Olson, only a verbal one. He couldn't recite the terms of that oral contract. *Id.*, at 202:18-203:5.

Sawyer admitted in his deposition that before Wayne Ducolon directed him to create the Feb. 13 invoice, he had not looked at Chebultz's project as one that involved O & P, Sawyer depo. at R. 2, 183:9-25, although he was aware in July of 2011 that O & P was in the statement of loss. Tr. Tran., R. 20, 299:4-23. It was his interpretation that it was not owed based on his two plus years with Kape. *Id.*, at 301:6-302:24. He also, when asked if Chebultz specifically asked them to go out and hire subcontractors to work for him, responded "he decided to get it done." *Id.* at R. 2, 185:9-14.

On Dec. 8, Kape President Chuck Cooper wrote to Chebultz claiming an "outstanding" balance due of $7,895.59 as of Sep. 1, 2011. R.2, 145. That amount matches the balance due on one of the two Sep. 7 invoices. Kape Final Invoice at R. 2, at 135. On Dec. 10, 2011, an invoice was prepared on behalf of KAPE claiming a balance due of $7,884.26. R. 2, 145. In the latter part of Dec., 2011, Chebultz received a check from Ms. James for $7,066.41 and paid $5,966.41

to Kape on Dec. 30, 2011, in the belief that he was withholding approximately $1,700 [exactly $1,759.93] from the original bid amount pending correction of the skylight, and resolution of the dispute about the power vents, which were not installed correctly, i.e., had no wiring through which they could be energized. Compare Kape Contract at R. 2, 108, to the payments made. See Chebultz depo. at R. 2, 119:6-11. The Kape, Jan. 5, 2011 invoice, at R. 2, 139, reflected a balance only slightly higher.

A meeting took place at the Chebultz residence on or about Dec. 30, 2011 at which time Chebultz gave KAPE representatives the check for $5,966.41. Defendant's Motion to Amend Counterclaim to Add Claims for Punitive Damages at R. 2, 101 ¶12. At this time KAPE representatives agreed to give Chebultz a $350.00 credit for the power vents if they could not get them wired and to send someone out to fix the skylight, at which point Chebultz would owe KAPE the remaining balance after the payment of $5,966.41 against the Dec. 10, 2011 invoice. Answer of Defendant Chad Chebultz at R. 1, at 58 ¶11; Chebultz depo. at R. 2, at 118:8-119:11, Sawyer depo. at R. 2, at 181:16-182:3; Tr. Tran., R.19, 46:19-48:7.

At the conclusion of this meeting, Chebultz mentioned to Wayne Ducolon that he believed he had received $1,000.00 too little from Col. James. Defendant's Motion to Amend Counterclaim to add Claims for Punitive Damages, at R. 2, 101 ¶ 13. Mr. Ducolon indicated that he had experience as an insurance adjuster and that he could help Chebultz obtain the $1,000.00 deductible from Col. James if Chebultz would give him a copy of the insurance statement of loss. Chebultz depo. at R. 2, 119:12–120:4. Chebultz at that time gave the statement of loss from USAA Insurance to Mr. Ducolon. *Id.*, at 121:16-22; see also Tr. Tran., R. 19, 48:7-25.

Commencing on or about Jan. 5, 2013, Chebultz engaged in email discussions with Wayne Ducolon on behalf of KAPE in which it is clear that a balance due of less than $2,000.00

was under discussion, based on Mr. Ducolon's reference to the "lion's share" being the $1,000.00 deductible that he suggested that Col. James had not to date paid. Emails between Chebultz and Ducolon. at R. 2, at 142. Wayne Ducolon wrote a letter to Chebultz on Jan. 5, the same day that the invoice was submitted for balance due of $2,050.41 (invoice at R. 2, at 139) in which he stated that Col. James owed Chebultz that amount and Chebultz owed KAPE $1,567.85. Ducolon letter at R. 2, 145; Tr. Tran., R.19, 49:4-7. Cooper later testified that even had Chebultz paid, in January, the $2,050.41 that was invoiced as the balance due, he would still have sent another invoice when he figured out that the O & P wasn't included in that invoice. Cooper depo. at R. 2, 192:6-12.

As late as Feb. 7, 2012, Mr. Ducolon emailed Col. James regarding the matter and stated that $2,050.41 was still owed on the project, the same amount reflected in an invoice dated January 5. Exhibit H to Chebultz's punitive damages motion, at R. 2, 152. On or about Feb. 14, 2012, Chebultz received from Kape a new invoice dated Feb. 13, reflecting a balance due of $5,109.52. Kape Invoice (2-13-12) at R. 2, 140-141; Tr. Tran., R.19, 49:12-18. The Feb. 13, 2012 invoice total of $25,536.03 is nearly the same as the total of the checks issued by USAA ($25,892.62). In other words, what was earlier billed as a $20,395 job had grown to almost the exact amount of the insurance proceeds. See copies of checks written by James at R. 2, 143; Kape Invoice at R. 2, 135-141; Comparison Chart at R. 2, 214.

The Feb. 13, 2012 invoice also includes $1,960.10 for basement work done by CW Olson Painting. However, Chebultz hired Olson and paid him directly. Tr. Tran. R. 19, at 66:13-25. Olson's work first appears on the Jan. 5 invoice, with the $1,100 payment deducted but no credit given for materials paid for by Chebultz. See Chebultz depo. at R. 2, 124:15-125:1; 126:1-127:12. On Feb. 15, 2012, Ducolon emailed Chebultz wherein he clearly indicated that he

hadn't known all the particulars when he met with Chebultz initially, but had subsequently reviewed everything, and insisted that the $3,200 of O & P was owed to Kape despite his fellow employee Jarrod Sawyer having not included it. See Duculon Email at R. 2, 151.

On Feb. 22 a letter was sent by Chuck Cooper to Chebultz wherein he demanded payment of the balance due invoiced on Feb. 13 ($5,109.52), insisted that if Chebultz were sued for the bill he would lose in court, and threatened collection by his attorney. See Cooper Feb. 22, 2012 letter at R. 2, 149. Cooper admitted that his Feb. 22 letter was not written by him but stated that he had seen it, authorized it, and it was correct; he later had to admit that it was incorrect. *Id.* at R. 2, at 199:4-200:24; 201:8-201:2.

When Chebultz received a demand letter from Michael Alley, Kape's attorney, on or around March 10, 2012, seeking the increased balance and threatening legal action, Chebultz placed signs in his yard critical of Kape's practices. Chebultz's Motion to Amend Counterclaim to add Claims for Punitive Damages, at R. 2, 88-89. Chebultz, by then, had an attorney, and negotiations ensued which resulted in the signs coming down after a period of two (2) weeks. Amended Petition at R. 1, at 16 0¶12; See also Tr. Tran., R.19, 50:2-12.

Chebultz then received the contractors' lien, filed by Kape's owner Chuck Cooper, on March 23, 2012, claiming a lien of $5,109.52 plus interest from March 16, plus attorney fees, and alleging that work was last performed or material provided on site on Dec. 20, 2011. Contractor's Lien Statement at R. 3, at 95-97. The filing of the lien made Chebultz's relationship with his bank, where he also had business loans, much more difficult. Chebultz's motion for punitive damages at R. 2, 89; Dr. Hough's follow-up letter at R. 2, 211; Tr. Tran., R.19, 52:22-3, 54:6-55:2.

Kape's attorney, Michael Alley, relying on Cooper's completion date for the Chebultz project as Dec. 20, 2011, filed the mechanic's lien. Alley depo. at R. 21, 35:22-36:13. This date was Olson's completion date according to Cooper, reflecting his position that Olson was a subcontractor of Kape. *Id.* However, Kape's Attorney Michael Alley did not have any knowledge of the facts surrounding how Olson came on the job or how or when Olson and Chebultz accomplished it. *Id.* at R. 21, at 59:15-60:17.

Plaintiff Chuck Cooper, owner of Kape, clearly testified that the only work that Kape could allege it was doing in the Chebultz home in order to have timely filed the mechanic's lien was the basement work. Cooper depo. at R. 3, 90:12–91:23. Cooper also testified that he is responsible for the quality of the work done by a subcontractor working for him and inspects that work to determine that it was done correctly and completed. *Id.* at R. 3, at 92:6-22. Cooper expressed that he had no doubt that Olson was Kape 's subcontractor due to the relationship Olson had with Kape and their efforts to procure him for the job, *Id.* at R. 3, at 93:4-13, but he also testified that simply referring Olson to Chebultz entitled KAPE to consider him a subcontractor. *Id.* at R. 2, 204:2-205:7. Cooper opined that referral of a subcontractor was enough to establish the right to receive income generated by the subcontractor and to consider the subcontractor to be his sub. *Id.* at R. 3, 94:3-11.

Sawyer testified that Kape does a lot of its work through subcontractors. Sawyer depo. at R. 3, at 25:2-4; R. 3, at 30:20-24. When they hire subs they pay them and usually pay for materials. The contract is usually in writing but there was no written contract with Olson. Tr. Tran., R. 20, 304:17-305:12. They are responsible for the subcontractor's work; insurance requires they inspect the work. Neither he nor anyone from Kape inspected Olson's work.

Insurance requires that subs be insured; he never saw proof of insurance from Olson. *Id.* 306:5-308:11.

Sawyer testified that there were other subcontractors on the Chebultz roof project. Sawyer depo. at R. 3, 31:5-13. The roof crew leader that did work at Chebultz's home was a subcontractor named Cesar Arosco; the gutter work done at Chebultz's home was done by a subcontractor named Tom Wycoff; the skylight work done at Chebultz's home was done by a subcontractor. Sawyer depo. at R. 3, at 31:5-34:11. Of the four (4) putative subcontractors who worked on the Chebultz home, only Olson was present at a meeting in late Dec., 2011 to receive payment for his services. Ducolon depo.,153:23-154:4, at R. 3, 72-73. Moreover, Chebultz had no discussions with those other contractors about the cost or scope of their work or materials used and did not issue payment to them. Chebultz affidavit at R. 3, 99.

Sawyer stated that Olson was the last sub-contractor to perform work on the Chebultz project. Sawyer depo. at R. 3, 39:9-17. However, Sawyer testified that he had no personal knowledge of when Olson finished the work in the basement of the Chebultz home. *Id.,* at 44:14–22. Sawyer never went down to the basement to review the status of Olson's work at any time after Nov. 20, 2011. *Id.*, at 46:2-12. Sawyer was last in the basement some time prior to that date. *Id.*, at 46:2-12; R. 3, at 44:14–22. Sawyer admitted that the roof, was completed in late July, the guttering in August, the skylight on Sep. 5. Sawyer Depo. at R. 2, 172:16 – 175:11; 176:23 – 177:20. He attempted to justify the Dec. 20 date in the lien statement by stating that he and Brian Weary were visiting the home trying to get paid, but admitted that the last labor or materials otherwise provided would have been by Olson. *Id.* at R. 2, 178:13–180:5. Sawyer also admitted to a financial interest in Kape getting paid for the balance on this job. *Id.* at R. 2, 186:6-187:3.

Wayne Ducolon is, and has been at times in the past, employed by Kape as a salesman and as sales manager. Ducolon depo. 62:11-76, at R. 3, 64-67; Tr. Tran. R. 20, 185:3-10. Ducolon insisted that Olson was working for Kape. Ducolon depo., 159:13-17, at R. 3, 74; Tr. Tran., R. 20, 172:1-8. However, Ducolon admitted that Olson performed work for Chebultz unrelated to the insurance claim, Ducolon depo. 149: 1-3, at R. 3, 71, and that Olson did other jobs for Kape for which they paid him directly, *Id.*, 151:2-4 at R. 3, 72. Ducolon apparently based his opinion that Olson was Kape's subcontractor on the "introduction" of Olson to Chebultz by Kape, *Id.*, 148:15-22 at R. 3, 71, and an alleged request by Chebultz for "permission" to pay Olson at the Dec. 30 meeting, *Id.*, 163:19-21 at R. 3, 75. Wayne Ducolon never once was in the basement to inspect the work done by Olson. *Id.*, 88:18-89:4 at R. 3, 69. Ducolon testified that overhead and profit (O & P) are paid by an insurance company due to the complexity of the claim, and that this was a seriously complex claim. "Complex" refers to handling the claim, i.e., dealing with the insurance company. *Id.*, 106:1-11 at R. 3, 70; Tr. Tran., R. 20, 189:16-20; 257.

Ducolon testified that he agreed to pay for an electrician to wire the power vents. Tr. Tran., R. 20, 201: 22-202: 10; 216:14-217:11. He explained the six invoices: "Things changed during the job." *Id.*, 204:16. The first invoice was likely done to get the insurance company to issue payment to the insured. *Id.*, 206:6-21. He could not explain why the next invoice, which appeared to be the same, was for an amount over a hundred dollars different. *Id.*, 210:1-18. The 11-16-2011 invoice was for a lesser total; he could not explain the difference. *Id.*, 211:9-24. The 12-10 invoice was changed to reflect that two power vents and 86 feet of gutter were not covered by insurance. *Id*, 212:4-12; 213:13-16. The January invoice added the Olson work. *Id.*, 220:16-25.

According to Ducolon, as the project "matured," things changed. *Id.*, 219:1-2, 12-14. However, certainly by November the work was done except the basement – so the only "maturing" was the basement. Id., 251:2-11. The Feb. 13 invoice added the O&P of $3,205.20 and reflected a balance owing of $5,109. *Id.*, 221:13-24.

Kape's general liability insurance policy includes a "Warranty of Subcontractor Limits" endorsement page. Colony Insurance Company Common Policy Declarations at R. 3, at 105-107. Section IV(c)(1), "Commercial General Liability Conditions", states: "You shall provide us upon our request copies of Certificates of Insurance that *you shall require and have obtained from your subcontractors before any work is performed on your behalf.* You shall maintain copies of these Certificates during and for up to 3 years after the term of such work." *Id.* No such documents were produced to substantiate Kape's claim that Olson was Kape's subcontractor. Supplement to Defendants' joint motion for Partial Summary Judgment, R. 3, 102-3.

In a June 15, 2012 letter, Chebultz's April offer to settle the matter was rejected and Kape, *inter alia*, made demand for $500,000 in damages for defamation and threatened legal action; in response, Chebultz erected a second set of the same and/or similar signs critical of Kape. Chebultz's punitive damage motion at R. 2, 89; Tr. Tran., R.19, 111:3-7. Plaintiffs filed a petition which was not served. Appearance Docket at R. 1, 1. An Amended Petition was filed on Aug. 3, 2012. R. 1, at 14. Plaintiffs alleged causes of action for injunctive relief [which was essentially agreed to by Chebultz – the signs were taken down and not re-erected]; foreclosure of contractors' lien; breach of contract; defamation; and tortious interference with existing and/or prospective business advantage and existing contracts. *Id.* at R. 1, 15; 22; 29. For the latter two causes of action KAPE and Cooper sought $7,200,000 in actual damages; the claim for pain,

suffering, and mental anguish was abandoned as of Oct. 7, 2013. Kape's Pretrial Questionnaire at R. 2, 72.

Prior to these events Chebultz had never received a diagnosis of depression, a prescription for anti-depressant medication, nor psychiatric or psychological treatment. Tr. Tran., R. 19, at 69:7-25. As a result of the tremendous stress created by these events, Chebultz and his wife[2] sought evaluation and assistance by a psychologist. Hough letter at R. 2, at 207-209. George Hough, Ph.D., a Topeka psychologist, has interviewed Chebultz and his wife. Hough letter at R. 2, at 207-209. His report is in the form of an evaluation sent to Dr. Mace, their family physician, Sep. 5, 2012, reflecting that they were moving into Major Depression in relation to their legal issues. *Id.* at R. 2, 207. Both were drinking more than usual and Chad was also taking Xanax for anxiety and adding Benadryl. *Id.* at R. 2, 208. A follow-up report of July 8, 2013 reflected that Chad was drinking heavily although he had stopped his prescription medication because it was making him sick. Follow-up Report at R. 2, 211-212. He had stomach pains and reduced appetite, and had lost weight from 220 lbs. to 190. *Id.* R. 2, at 212. His sleep was impaired. *Id.* His energy level was low. *Id.* He was withdrawn from family. *Id.* He described feeling out of control, angry, edgy, and snappy. *Id.* He felt stripped; "I am not who I used to be." *Id.* He connected the anger to the lawsuit and noted that this should not have happened, and his family was paying the price. *Id.* He felt his house is under attack and people are "trying to rob us." *Id.* He reported thoughts of suicide as well as of shooting others but no plans to act on them, and denied he would do such a thing. *Id.* at R. 2, at 213. He had not seen his family physician because they had to drop their insurance. *Id.* at R. 2, 213. He went to a clinic in February with chest pains but was diagnosed with a panic attack. *Id.*

[2] Although not legally married, Chad Chebultz and Ruth Byrd presented as a couple and referred to themselves as either married or engaged.

Dr. Hough's diagnosis was Major Depression, single episode, moderate to severe, without psychotic features, along with Generalized Anxiety and Alcohol Abuse moving toward dependence. Hough letter at R. 2, 208. He found the current and now chronic psychiatric distress and emotional harm directly attributable to the ongoing legal stressors. Hough follow-up letter at R. 2, 211. Chebultz testified that due to the unjust lien filed against his home, he's at this point a hostage. Chebultz depo. at R. 2, 122:25-123:1.

Chebultz testified extensively at trial in support of his damages claim. He indicated he had been emotionally damaged in many ways: he didn't know what's going to go on; he feared losing the home; he felt he had let his family down; there was tremendous stress within the family; he didn't function the same; he was confused in a lot of ways; he became severely depressed; he had not drunk in six years, but gradually began drinking again and ended up drinking heavily; he had thoughts that things would be better if he were not around; he seriously contemplated suicide at points; he reported feeling like he was "in limbo"; he stated "your home is not your home anymore." Tr. Tran., R.19, 51:7-52:8. Chebultz related seeking professional help and reported he was at time of trial still on Celexa for depression. He reported loss of sleep and also loss of weight, having lost 20-25 pounds, regained it, and then lost it again. *Id.*, at 52:9-18.

He also related an impact on his banking relationship with defendant Community First and reported that the bank had taken action against him by holding him liable for its attorney fees in the matter, to the tune of $11,000; he couldn't get business loans any longer, which adversely affected his ability to do business and crippled his income. He had to take out an additional mortgage on the home as well as loan extensions, and incurred overdraft charges. He indicated

these additional expenses totaled approximately $88,000. *Id.*, at 52:22-3; 53:19-24; 54:6-55:2; 58:19-59:8.

Moreover, the home had been purchased in a down market with the intent to "flip" it when the market came back up. The existence of the lien has affected his ability to sell the property, i.e., created what he called a "dirty title." This has crippled him financially. He can't afford the home, on which taxes have risen and utilities are high. He related that the water has been turned off at least three times due to inability to pay, once for roughly 7 days. The electricity has been turned off at least twice. *Id.*, at 59:12-60:22.

In addition, Ruth Byrd, who had been Chebultz's fiancée and lived with him at 1100 North Buckeye, described what she observed of his behavior. Initially after the placement of the lien, he was "beside himself" with concern for what they were going to do, how they would survive, how he was going to support the family. This fueled him with the energy to erect the signs, but afterward be began a period of just shutting down, which she described as "a blank slate." He started drinking, at first little amounts, then larger, then went through episodes of binge drinking. She went through a period of wondering whether she should pack up the kids – whether it would be safer for everyone to be apart. *Id.*, at 119:15-122:13. She validated Chebultz's report of suicidal feelings. *Id.*, at 123:19-124:18.

PROCEDURAL HISTORY

Kape and Cooper filed their Amended Petition on Aug. 3, 2012 seeking an injunction, against Chebultz's display of signs, and alleging causes of action for defamation, tortuous interference, breach of contract, and foreclosure of a mechanic's lien. R. 2, at 14. Both defendants essentially denied plaintiffs' allegations, R. 1, 47 and 68, and Chebultz countersued for fraud, violation of the Kansas Consumer Protection Act, and outrage. R. 1, at 57-61.

On April 4, 2013 defendant bank filed a motion to compel discovery. R. 1, at 84. Defendant Chebultz filed a motion to compel discovery on April 15, 2013. R 1, at 101. On April 26, 2013, Mr. Boone failed to appear at the hearing of those motions, although another attorney, not of record in the case, did file a motion, late the day before, for continuance of the hearing. Order Compelling Discovery Responses at R. 1, 133. The district court issued an order compelling Kape to pay defense attorney fees and respond to both discovery requests owed to defendants within 10 days or plaintiffs' pleadings would be stricken and the case dismissed. *Id.* at 134. On May 6, 2013 Kape requested an extension of time to comply with the court order. Appearance Docket, R. 1, at 3. The discovery requests were satisfied prior to the June 5, 2013 hearing. R. 17, 2:24-3:5.

On June 5, 2013 a pretrial conference was held. Transcript of Pretrial/Discovery Conference (6-5-13), R. 17, at 1. However, it was converted to a status conference and pretrial continued because several of plaintiffs' witnesses had yet to be deposed. *Id.* at 2:16-21; 8:17-21. The pretrial conference was then rescheduled to Oct. 11, 2013. *Id.*, at 15:8-9. On Oct. 11, it was rescheduled again to Jan. 24, 2014 to allow for time for Wayne Ducolon to be deposed. Transcript of Pretrial Conference (10-11-13), R. 16, 11:21-12:9; 26:4-12. On Jan. 24, 2014 it was rescheduled to March 7, 2014 on an agreed motion for continuance to allow defendants' Joint Motion for Partial Summary Judgment to be completed and filed. Appearance Docket, R. 1, 14; Agreed Motion for Continuance (12-24-13), R. 3, at 1.

Unfortunately, Plaintiffs' counsel, Caleb Boone, developed a conflict between the pretrial conference and an expert depostioin which he needed to attend in Pennsylvania on that day. His desire for a continuance resulted in a phone conference of counsel (on or about Feb. 20 or 21), with the Judge's secretary, who suggested a date the court might approve. Transcript of Pretrial

Conference (3-7-2014), R. 18, 3:5-4:8. Mr. Boone, to accomplish his hoped-for continuance, was to file a motion with a proposed order and also send the court a letter verifying that there was an unresolved discovery issue. *Id.* The proposed order was also to include an extended date for plaintiffs' response to defendants' motion for partial summary judgment. *Id.*, at 10:5-18.

When Chebultz's counsel, Elizabeth Herbert, had not received any paperwork by the following Wednesday, Feb. 26, she sent an email to Mr. Boone reminding him that no pleadings had been circulated; Mr. Boone then called Ms. Herbert to inquire what he was to do and was told to do what the district court's assistant had specified, i.e., a motion and order, as well as the letter. Transcript, R. 18, 3:19-4:20; Journal Entry, R.3, 136-137. Finally, on March 6, 2014, the day before the still-docketed pretrial conference, Chebultz filed a response to Plaintiffs' Motion for Punitive Damages (served by email, fax, and U.S. Mail) and late in the day Mr. Boone called Ms. Herbert's office seeking to speak with her secretary, who was out. Transcript, R. 18, 5:24-6:24; Journal Entry, R. 3, 136. The staff person he spoke to was not asked to provide the date that had been agreed upon for the proposed continued pretrial – but even so, that conversation took place at or about 4:00 p.m. the day before the pretrial conference. Transcript, R. 18, 5:24-6:24; Journal Entry, R. 3, 136. Mr. Boone did not attempt to contact the defendant bank's attorney, Mr. Ryan. No mention was even made of plans to email or fax a motion or order, merely a reference to calling the court. Transcript, R. 18, 5:21-6:14; Journal Entry, R. 3, 137.

Mr. Boone did not appear at the scheduled pretrial [in Abilene]; he left a voicemail for the district court judge [in Junction City] on the morning of March 7, 2014. Transcript, R. 18, 2:20-24; Journal Entry R. 3, 136. Both Chebultz and defendant bank appeared. *Id.* When Kape's counsel failed to appear, Chebultz's counsel extensively explained the circumstances to the district court. Transcript, R. 18, 3:5-6:14. The district court responded, "I think I've, previously,

made it pretty clear, to all counsel, that I don't rule on phone calls or letters. I rule on motions that get noticed up." *Id.*, at 7:9-12.

The district court dismissed plaintiffs' count for foreclosure of the mechanic's lien based on lack of evidence that Olson was a subcontractor, and struck the remainder of plaintiffs' claims and answer for failure to prosecute, due to Mr. Boone's absence, *Id.* at 10:24-11:23; 14:5-21; Journal Entry, R. 3, 139, and as a sanction for failure to appear, in response to defendants' oral motion to dismiss Kape's case. *Id.*, at R.18, 8:15-23; 9:6-25; at R.3, 138. At that point, matters remaining for the district court's consideration were defendants' joint Motion for Summary Judgment, which the district court granted; defendant Chebultz's Motion to Amend Counterclaim to Add Claims for Punitive Damages, which the district court granted; plaintiffs' Motion for Punitive Damages, which the court denied, and defendant Chebultz's counterclaims. Transcript, R. 18, 12:14-13:9; Journal Entry, R. 3, at 138-139. The district court and Chebultz's counsel briefly addressed that Chebultz's counterclaims were the only thing left pending and agreed on a date for an evidentiary hearing. Transcript, R. 18, 16:3-19; Journal Entry, R. 3, 139.

Defendant Chebultz failed to give the statutory notice of the default hearing, set for April 18, and for that reason the matter was re-set for June 4. Transcript of Evidentiary hearing (4-18-14), R. 7, 9:14-10:12; *See* K.S.A. 60-254. The district court noted the resetting was due to motions by both parties that were not properly noticed. *Id.*, 24:12-14. The matter was formally noticed as required. Defendant Chebultz's Response to Plaintiffs' Motion to Dismiss Default Judgment Proceedings, R. 4, 71. Plaintiffs' Motion to Dismiss Default Judgment and/or Motion for Relief From Judgment or Order of Default was filed on May 20, 2014.

On June 4, the court heard arguments on pending motions and determined that plaintiffs' would have a jury trial on the counterclaims and the question of whether punitive damages

should be awarded. Transcript of Evidentiary Hearing (6-4-14). A status conference was set for June 25 and jury trial for July 17; counsel were instructed to, prior to the status conference, "File and exchange your proposed instructions." *Id.*, at R. 8, 85:9-15; 82:14-17. On June 24, 2014, Chebultz filed "Defendant Chebultz's Proposed Jury Instructions." See Appearance Docket, R. 1, at 8; R. 4, at 84. Kape did not file its jury instructions. R.1, at 8. (However, Plaintiffs did file a 51-page Motion for Summary Judgment on June 25. R. 4, 114-164.) As a result on June 25, 2014, the trial court changed the jury trial to a bench trial. Appearance Docket R.1, at 8. A civil bench trial was held on July 17, 2015. *Id.*, at 9.

At the conclusion of the bench trial, the Judge took his ruling under advisement. R. 20, at 379:19-12. Two critical witnesses, Mike Alley and Chad Olsen, were not present at the trial; subsequently the parties stipulated that Mr. Olson's deposition could be utilized as if it were trial testimony. Joint stipulation, filed Sept. 10, 2014, R.4, 184. The district court gave counsel the option to present additional evidence or to agree on deposing Mr. Alley. Tr. Tran., R. 20, 379:13-20.

On Sept. 11 the Court noted on the record that it had received a Supplemental Scheduling Order reflecting an agreement to have a deposition of Mr. Alley and subsequent briefing. Tr. Tran., (9-11-14), R.9, 2. The Court set the matter for Oct. 24. *Id.* On Oct. 24, 2014, the district court announced its ruling from the bench, Tr. Tran., R.10, 2-8. The judge noted that he had received copies of the Michael Alley deposition which he had reviewed. R. 10, 2:14-7. He found that this deposition would not alter the district court's earlier ruling that Olson was not a subcontractor. R. 10, at 3:14-24. Finally, the district court ruled in favor of Chebultz: "Therefore, compensatory damages are ordered in the amount of $88,000. The Court will note, under Consumer Protection Act, the Court is ordering the civil penalty of $10,000; the attorney

fees of $20,000. The Court will further order punitive damage in the amount of $10,000, as requested, on the outrageous conduct." Tr. Tran., (10-24-14) at R. 10, at 7:10-16; Journal Entry of Judgment (10-24-14), R. 6, at 1. Furthermore, the district court added: "So, if I didn't specifically state the findings or conclusions, I'll confirm that I'm adopting those as proposed by the plaintiff [sic][3] and have issued the order of damages as previously announced." Tr. Tran., (10-24-14), R. 10, at 8:11-15; *See* Proposed Findings of Facts and Conclusions at R. 4, at 194-204.

Plaintiffs filed a motion to set a supersedeas bond on Oct. 31; defendant Chebultz responded on Nov. 3; plaintiffs replied, and the matter was heard by conference call on Nov. 5. R.6, 3 and 6, Appearance Docket, R.1, 11. The bond was filed on Nov. 12. *Id.*, at 12. On Nov. 12, plaintiffs filed their Amended Notice of Appeal (correcting the failure to list defendant Bank's counsel, Tim Ryan, on the Certificate of Service of their Notice of Appeal filed Nov. 7). R.6, 15 and 24.

On Nov. 21, 2014, plaintiffs filed their Motion for Alternation or Amendment of Judgment and/or Motion for New Trial. R.6, 27; Appearance Docket, R. 1, 12. In that document, plaintiffs restated their prior position that Chebultz was not a consumer pursuant to the Consumer Protection Act, and that outrageous conduct did not occur (these arguments are identical to the arguments presented in Appellant's brief). R. 6, 39; R. 6, 44. Chebultz responded *inter alia*, that jurisdiction no longer lay in the district court because Kape had previously filed its notice of appeal. Defendant Chebultz's Response to Plaintiffs' Motion to Alter or Amend, R. 6, 51. Defendant Community First also took that position. R. 6, 67.

[3] Chebultz, who was awarded judgment, was a defendant but in the position of plaintiff on the counterclaims; his proposed findings and conclusions were adopted. Journal Entry of Judgment (10-24-14) at R. 6, 8.

At the hearing on Dec. 5, 2014, the district court ruled that it did not have jurisdiction to hear Kape's motion to alter or amend, Tr. Tran. (12-5-14) R. 12, 10:6-12, but in case it did have jurisdiction, allowed the parties to argue, and then ruled:

> The Court doesn't believe that you can rely on advice of counsel, when you've given counsel inaccurate information. And as the Court has previously ruled, Chad Olson was not a subcontractor and had Mike Alley been informed of the accurate facts concerning the relationship, clearly, I don't think he would have even suggested that Mr. Olson was a sub and, therefore, the filing of the mechanic's lien would not have been timely . . . . As far as the outrageous conduct, obviously . . . . the Court found the false, misleading actions previously noted in my findings of facts and conclusion. And would confirm those and confirm that there was, in fact, outrageous conduct that met the threshold . . . . and the Court would deny the plaintiffs' motion, if I have jurisdiction, too.

Id. at 18:21-19:18; Journal Entry (12-5-14), R. 6, 90-91. On Dec. 31, 2014, this case was docketed at the Kansas Court of Appeals. Appearance Docket, at R. 1, at 13.

ARGUMENTS AND AUTHORITIES

I. Did the District Court Err in Ruling that Olson Was Not a Subcontractor and Granting Defendants' Joint Motion for Partial Summary Judgment?

Standard of Review

> "Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories and admission 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. [Citations omitted.]

Seaboard Corp. v. Marsh, Inc., 295 Kan., 384, 394, 284 P.3d 314, 321 (2012), citing *Shamberg, Johnson & Bergman, Chtd. v. Oliver*, 289 Kan. 891, 900, 220 P.3d 333 (2009).

Discussion

The district court stated: "it seems pretty clear to me, in reviewing everything, that there wasn't a contractor situation where Olson was the subcontractor. There was not work performed within the statutory period: based on the uncontroverted information before the Court, that Count 3...would be dismissed...concerning foreclosure of mechanic's lien." Tran. (3/7/14), R. 18 at 10-11. The district court did not abuse its discretion when arriving at this ruling, which was more than amply supported by the record developed in discovery and outlined in defendants' joint motion.

The Kansas Supreme Court addressed the issue of contractor/subcontractor relationships in *Calvert W. Exploration Co. v. Shamrock*, 234 Kan. 699, 704-05, 675 P.2d 871, 875 (1984). The court held: "In order for an agreement to be a subcontract, there must be a preexisting prime contract between a principal and a contractor, the latter who then enters into an agreement with a third party, a subcontractor, for the third party to perform all or part of the prime contract." *Id.*

The Kansas Supreme Court also ruled in 1988 that there are some "basic requirements of a subcontract". *J.W. Thompson Co. v. Welles Products Corp.*, 243 Kan. 503, 507, 758 P.2d 738, 741 (1988).

> . . . [T]he terms of the purchase order are significantly lacking in the basic requirements of a subcontract. The instrument speaks of the sale price, contract of sale, return of goods, security interest in goods delivered, delivery dates, etc. *There is no reference to work to be performed, performance bonds, maintenance of general liability insurance, workers' compensation requirements, that proof be supplied of payment of labor and materials used, hold harmless agreements for negligence, etc.*

Id. (emphasis added). Based on these two cases, the Pattern Instructions Kansas 4th, Civil, at § 124.02 "Definition of a Subcontract", provides: "A subcontract is an agreement between a

person and a contractor whereby the person agrees to perform all or part of the work the contractor agreed to perform under a preexisting contract with a third party".

Here, the facts demonstrate that Olson was not a subcontractor under the prime contract between Kape and Chebultz. There are two potential conclusions to draw from the facts: either (1) Kape agents casually referred Olson to Chebultz and had no intention at that time to treat him as a subcontractor, but later changed their view when Olson's status as subcontractor became critical for the mechanic's lien and/or material to entitlement to the overhead and profit from the insurer; or (2) Kape agents were seeking a subcontractor for the job, despite not telling Chebultz that they were, and regarded Olson as subcontractor when Adam Soakup failed to take the job, but did not secure the proper agreements or documentation to substantiate the contract and did not purchase the materials, pay Olson, inspect the job, or in other ways treat Olson as they did their other subcontractors.

In either case, Olson was not Kape's subcontractor. Neither a casual referral, not a unilateral perception, establishes a contractor/subcontractor relationship. Kape's agent Sawyer testified there were four people working on the Chebultz home as alleged subcontractors: the roofing crew chief, the gutter contractor, the skylight installer, and Olson. None of these, other than Olson, had an individual discussion with Chebultz on the scope and nature of the work to be done; none of these, other than Olson, were supplied with the materials for their work individually by Chebultz; none of these, other than Olson, were present at the Dec. 2011 meeting to receive payment; none of these, other than Olson, received payment individually from Chebultz. Chebultz Affidavit, R. 3, at 99-100.

Kape's initial bid for the Chebultz project contains no reference to interior work. While it is certainly true that a contract can be amended orally, Kape has provided no persuasive evidence

to support its assertion that there was a meeting of the minds with either Chebultz or Olson to amend the original contract for roofing and guttering to include the interior work at the Chebultz home. All parties agree that Kape agents gave Chebultz's contact information to Olson, but from there the stories diverge. Kape agents state that Olson worked for Kape, but Olson denies it. Olson gave Kape an invoice, made out to Colonel James and Chebultz (not to Kape), in order to facilitate getting the insurance company to pay for his work, but Olson gave his initial bids to Chebultz, worked through Chebultz to get materials, performed the tasks set by Chebultz and accepted payment from Chebultz. What Kape does not have is any evidence of a meeting of the minds between its agents and Olson that he was working for, and responsible to, Kape. He denied being Kape's subcontractor and they did not treat him as one.

On the other hand, Chebultz and Olson presented documentary, as well as testimonial, evidence of such an agreement between them, as well as a course of conduct of purchase of supplies, payment for supplies, etc. that demonstrates an owner/contractor or general contractor/subcontractor relationship. C.W. Olson Painting & More quotes, R. 3, at 78; see Olson Depo., R. 3, at 49:22-25; R. 3, at 51:9-12. Kape has produced nothing, including testimony, to demonstrate that any of the basic requirements of a subcontract were ever addressed with Olson, including assumption of liability. No certificates of insurance for Olson have been produced nor any evidence that the subject was even broached with him.

The only document that was furnished to Kape from Olson was the Nov. 20, 2011 quote or invoice from Olson. Kape claimed it was a bid proposal, and Olson asserted that it was a final invoice for work done, submitted so he could get paid by insurance. In either case it is irrelevant. The document does not establish or reflect a meeting of the minds constituting a subcontract between Olson and the agents of Kape. It was addressed to Col. James and Chebultz.

The document and the attendant circumstances merely demonstrate that Kape's primary area of business is in insurance restoration claims and its agent was using that expertise to assist Olson in the process necessary to be compensated for his work and to insure that the insurance company had what it needed to issue the second and final check for the claim from which Kape could expect to be paid. Furthermore, that document cannot be used as evidence of an element of a subcontract to establish terms for labor and materials because Kape did not pay for Olson's labor or the materials used by Olson. Chebultz paid Olson and paid for the materials purchased for and used in the basement project, an action that alone would have given Kape reason to deny liability in the event of a complaint against it by Chebultz regarding some aspect of the work performed by Olson.

Kape asserts that its agents' casual encounter with Olson rises to the level of a contractor/subcontractor relationship despite the informal nature of the arrangement. Kape's general liability insurance policy includes a "Warranty of Subcontractor Limits" endorsement page that shows there are at least some requirements of formalization to create such a relationship. Evidence that Kape possessed Olson's Certificates of Insurance, as required by Kape's own insurer, could help substantiate the claim that Olson was Kape Roofing's subcontractor; at minimum, it would be evidence that Kape was properly documenting the relationship as required by its insurance company. Kape made no showing of compliance with that requirement.

Sawyer, Ducolon, and Cooper all primarily based their opinion that Olson was Kape's subcontractor on the notion that they provided his services, i.e., made a referral of Olson to Chebultz, and that he had done some other jobs for them. However, on the other jobs he was paid directly by Kape. On Chebultz's project, Olson was paid by Chebultz. Thus, Kape's

unilateral notion that those factors somehow render Olson their subcontractor is insufficient, as a matter of law, to establish the subcontractor relationship, in the absence of any evidence that (1) Olson considered himself employed by them and responsible to them; (2) Kape required proof of insurance from Olson as its insurance provided; (3) Kape's agents supervised the work or gave the basement project a final inspection; or (4) Olson and Kape had agreed upon even the most basic of contractual terms.

Thus, the district court did not err in ruling as matter of law that Olson was not a Kape subcontractor and in granting defendants' motion for partial summary judgment. The uncontroverted evidence established that Chebultz hired Olson in an owner/contractor relationship, after Kape agents referred Olson to Chebultz. The district court's ruling should be affirmed.

II. Did the District Court Abuse Its Discretion in Striking Plaintiffs' Pleadings When Plaintiffs Failed to Appear at the Final Pretrial Conference?

Standard of Review

When plaintiffs did not appear at the scheduled pretrial on March 7, 2014, defendants moved the court to dismiss plaintiffs' case. The court granted defendant's motion for partial summary judgment, which resulted in dismissal of plaintiffs' Count 1, and struck remaining counts for failure to prosecute, in addition to granting defendant Chebultz's motion to amend his answer to add a claim for punitive damages. The striking of plaintiffs' remaining petition counts for failure to prosecute and as a sanction, in response to defendants' oral motion for dismissal was equivalent to dismissal of them pursuant to K.S.A. 2014 Supp 60-241(b)(1), and also authorized by K.S.A. 2014 Supp. 60-216(f), which provides sanctions for failure to attend pretrial. Either way, this Court reviews the district court's action using the abuse of discretion standard.

> "Orders of dismissal for want of prosecution rest in the judicial discretion of the district courts in order that they may control their dockets, eliminate procrastination and delay, and expedite the orderly flow of business, subject, however, to statutory notice requirements. Such orders will not be reversed on appeal in the absence of a clear showing of abuse of judicial discretion." *Frost v. Hardin*, 218 Kan. 260, 263, 543 P.2d 941 (1975).
>
> Judicial discretion is abused only where the court's action is deemed arbitrary, fanciful, or unreasonable. If reasonable persons viewing the judicial action could differ about the propriety of the action, an appellate court may not declare the action to be an abuse of discretion. See *Shay v. Kansas Dept. of Transportation*, 265 Kan. 191, 194, 959 P.2d 849 (1998) (quoting *Hawkins v. Dennis*, 258 Kan. 329, 340-41, 905 P.2d 678 [1995]).

Namelo v. Broyles, 33 Kan. App. 2d 349, 353, 103 P.3d 486, 488-9 (2004); see also

Fischer v. Roberge, 34 Kan. App. 2d 312, 120 P.3d 796 (2005).

> In general, decisions indicate that discretion though broad is not limitless and that the imposition of sanctions is always subject to appellate review and reversal if abuse of discretion is found....[W]here there is evidence that a party has acted in deliberate disregard of reasonable and necessary orders of a court, and where such party is afforded a hearing and an opportunity to offer evidence of excusable neglect, the imposition of a stringent sanction will not be disturbed.

Lorson v. Falcon Coach, Inc., 214 Kan. 670, 678, 522 P.2d 449, 456 (1974).

Discussion

Kape argues that "the Default Judgment Hearing...[was] without proper notice as required by K.S.A. 60-255(a)," Brief of Appellant at 17, and thus all subsequent proceedings were invalid. Under K.S.A. 60-255(a), before a default judgment may be granted opposing counsel "must be served with written notice of the request for judgment at least seven days before the hearing."

a. The March 7, 2014 Proceeding Did Not Constitute a "Default Judgment Hearing".

Kape inaccurately states that a default judgment hearing was held on March 7, 2014 without proper notice. Before this Court and below plaintiffs have focused on K.S.A. 60-255 and sought to have the district court in essence set aside a default judgment. However, when

Kape failed to appear at pretrial, defendants explained the circumstances to the district court and made oral motion to dismiss Kape's case, the court struck Kape's pleadings, both for failure to prosecute and as a sanction for failure to appear. The striking of pleadings and setting of proceedings to take evidence regarding defendant Chebultz's counterclaim did not constitute a "default hearing," although it had the practical effect of leaving Kape in a "default" posture in regard to defendant Chebultz's counterclaims. K.S.A. 60-241, 216(f) and 237 (b)(2)(A) authorized the district court's rulings on March 7, 2011, to strike Kape's pleadings and set defendant Chebultz's counterclaim for default hearing on April 18, 2014. This date was later reset to June 4, 2014 to comply with the K.S.A. 60-255(a) requirement of notice.

Forer v. Perez-Lambkins, 42 Kan. App. 2d 742, 216 P. 3d 718 (2009), cited by Kape, has no application here. This district court did not grant a default judgment on March 7, *sua sponte* or otherwise. No default was entered. This case is more analogous to *Bazine State Bank v. Pawnee Prod. Serv., Inc.*, 245 Kan. 490, 781 P. 2d 1077 (1989), cert. denied 495 U.S. 932, 110 S. Ct. 2173, 109 L. Ed. 2d 502 (1990), referenced in the *Forer* decision, where an oral request for default was made and not ruled on, and notice mailed to all parties prior to the *exparte* grant of default judgment. Although, after granting defendants' motion for summary judgment on the mechanic's lien and striking plaintiffs' remaining allegations, the district court clearly stated that there was nothing left but Chebultz's counterclaims, Tran. (3/7/14), R. 18, 14: 16-21, and certainly understood that defendant Chebultz wished to proceed to judgment on his counterclaims, the court did not at that time grant judgment against plaintiffs in favor of defendant Chebultz, but set the matter for presentation of evidence. Chebultz filed notice of the money damages he was seeking. Prior to trial the court clearly stated that it had not given default

judgment against plaintiffs, and was requiring Chebultz to prove liability on his counterclaims as well as damages. Tran. (6/25/14), R. 23, 13:9-10; 14:12-15; 17:17-19.

Plaintiffs filed a Motion to Dismiss Default Judgment Proceedings and/or Motion for Relief from Judgment or Order of Default on May 20, 2014. It was denied on June 4, 2014 at a hearing at which all pending motions were taken up and fully argued. There was at that time no actual judgment in existence in Chebultz's favor against plaintiffs. The appropriate standards to be applied in evaluating a motion to set aside a default judgment were argued and applied by the court. Tran. (6/4/14), R.8, 36:9 – 38:3; 57:23 – 59:9. If indeed the March 7 decision were a default order, such a motion could be granted only when three factors had been established: (1) the non-defaulting party will not be prejudiced by the re-opening; (2) the defaulting party has a meritorious defense; and (3) the default was not the result of inexcusable neglect or a willful act. The appellant's failure to demonstrate all three elements is fatal to an appeal. *First National Bank in Belleville v. Stankey Motors, Inc.*, 41 Kan. App. 2d 629, 204 P.3d 1167 (2009). The trial court considered those factors and declined to set aside the order striking the pleadings.

b. Kape's Failure to Appear at the Final Pretrial Was Not Excusable Neglect

Kape should not prevail on appeal based on the district court's denial of the May 20 motion which also sought relief under K.S.A. 60-259 and/or K.S.A. 60-260, suggesting excusable neglect as a basis for reconsideration or relief from judgment. Kape's argument is that Mr. Boone was attempting to prepare a Journal Entry of Continuance but did not have the new date for pretrial at hand and was unable to obtain it from the court or other counsel. This does not amount to excusable neglect in a situation in which the proposed continuance was agreed to by defense counsel in a phone conference on or about Feb. 19, 2014, and a date obtained from the district court's administrative assistant who specified that Mr. Boone needed to file a motion

and an order. Mr. Boone never called or emailed defense counsel for the date. He could have called the clerk of the court for Judge Platt's Abilene docket dates. There is nothing excusable about the total neglect of Mr. Boone's obligation to get his proposed continuance before the district court prior to the docketed pretrial date. The trial judge's secretary had merely provided a date when the judge would be on the bench in Abilene – not a promise of a continuance. That decision was the district court's alone. The matter was never put before the district court other than by an early morning voicemail left for the judge's secretary before the pretrial. Tran. (3/7/14), R. 18, 2:23. There was apparently no attempt made to reach the judge in Abilene during the docket. The district court did not consider the voicemail as a motion; the court "does not rule on phone calls or letters", it rules "on motions that get noticed up." Tran. (3/7/14) R. 18, 7:11-12.

Plaintiffs had ample opportunity at the hearing on June 4 to demonstrate excusable neglect, and the trial court's determination that they had not was well within its discretion. *French v. Moore*, 223 P.3d 323 (2010) (unpublished decision). As in *Moore*, plaintiffs' post-ruling opportunity to be heard vitiates any claim of prejudice stemming from the trial court's exercise of the sanction before the explanation was offered. Moreover, this course of conduct is exactly the "deliberate disregard of reasonable and necessary court orders" that has been held to justify default as a sanction, *Moore*, 233 P.3d 323 *6 (citing) *Canaan v. Bartee*, 272 Kan. 720, 35 P.3d 841 (2001), and it was not the first instance of Kape failing to attend a hearing without properly moving for a continuance sufficiently in advance of the hearing date.

Conclusion

The March 7, 2014 hearing was not a default hearing. It was a pretrial that could not proceed due to the willful neglect of plaintiffs' counsel for which the court ordered plaintiffs'

pleadings stricken, leaving Chebultz counterclaims as the sole issues remaining. The court also granted the defense motion for summary judgment on the mechanic's lien, which was demonstrated to be untimely as a matter of law because Olson was not a subcontractor of Kape. The default hearing on the counterclaims, was reset to June 4, 2014 to allow Chebultz to give the proper 14-days notice to Kape. None of these rulings was an abuse of discretion. Chebultz and Community First National Bank ask the Court to affirm the district court's order granting partial summary judgment and striking plaintiffs' pleadings.

III. Did the District Court Err in Conducting a Bench Trial Instead of a Jury Trial on Chebultz's Counterclaims?

Standard of Review

a. Appellants waived their appellate review of whether medical malpractice screening panel findings of no causation resulted in prejudice in a wrongful death case where they never objected to trial court order to include such finding in panel report. *Walker v. Regeur*, 41 Kan. App. 2d 352, 202 P.3d 712 (2009), *rev denied.*

b. Statutory interpretation is subject to unlimited appellate review. *Redd v. Kansas Truck Center*, 291 Kan. 176, 239 3d 66 (2010).

c. It is within the trial court's discretion whether to set aside a waiver of a jury trial. *Scantlin v. Superior Homes, Inc.*, 6 Kan. App. 2d 144, 146, 629 P.2d 825 (1981). The discretion is abused only if no reasonable person would agree with the trial court. *Hoffman v. Hauz*, 242 Kan. 867, 873, 752 P.2d 124 (1988).

Discussion

a. Kape did not Properly Preserve this Issue for Appeal.

Kape argues that it had properly demanded a jury trial which the trial court granted and then struck for failure of plaintiffs to file instructions, but, "immediately thereafter granted a

continuance of the proceedings." Brief of Appellants, 22. The latter allegation is a complete fabrication; the trial was set for July 17 at the June 4, 2014 hearing. Appearance Docket, R. 1, at 8. Kape filed a motion for continuance on June 18 (*Id.*) which was denied at the pre-trial status conference on June 25. Tran (6/25/14), R. 23, 22:11-17. Apparently plaintiff makes this allegation in an attempt to imply that the trial court was not in any way inconvenienced by plaintiffs' failure to file the instructions when due because the matter was continued anyway.

Nothing could be further from the truth, and in fact the trial court mentioned that the prior order to file motions and instructions, made on June 4, was in consideration of the fact that the court does not take up motions the morning of trial and wanted to cover legal issues in advance. In addition, the court noted that the summary judgment filed that morning by plaintiffs' counsel, and on which he had spent his time instead of on the instructions, was well out of time. *Id.*, 3:6-5:25; *see also* Tran. (6/4/14), R. 8, 85: 4-18; 83:2-7.

The trial court determined that the trial would proceed on July 17, 2014, as a bench trial in light of plaintiffs' not filing jury instructions by that date. Tran. (6/25/14), R. 23, 12:17-13:7. The parties and court then carried on fairly extensive discussion of other matters such as Kape's motion to re-open discovery (denied, *Id.* at 14); the court's planned treatment of the summary judgment motion (not to be considered as such, but arguments and facts could be presented (*Id.* at 26); and the scope of evidence plaintiffs' could present (admissible relevant evidence from either side, *Id.* at 19). At no time did Mr. Boone lodge an objection to the change to a bench trial, request the court to note a continuing objection, or express any other opinion on that matter. Nor did plaintiffs' counsel put an objection on the record at the opening of the trial on July 17. *See* Tr. Tran., R. 19.

Under the circumstances, appellees submit that plaintiffs' failed to properly preserve this issue for appeal, and it is not now properly before this Court.

b. Plaintiffs Were Not in Any Event Entitled to a Jury Trial Because It Was Not Timely Requested.

At the June 4, 2014 hearing defendant Chebultz argued against the jury trial but did not realize, not did the court, that the jury demand was untimely. Normally, an issue not raised before the trial court may not be presented on appeal, but there is an exception when the issue is a question of law which may be decided on established facts. *Bd. of County Comm'rs of Sedgwick County v. Willard J. Kiser Living Trust*, 250 Kan. 84, 825 P.2d 130 (1992). Here, the facts are contained in the appearance docket and the referenced pleadings.

Plaintiffs had requested a jury trial in their Amended Petition, R. 1, at 31, and Reply to Counterclaim, R. 2, at 2. Both those document were stricken by the terms of the court's Journal Entry of the March 7, 2014 pretrial proceedings, R. 3 at 139. Plaintiffs' filed a Demand for Jury Trial & Pretrial Conference on May 27, 2014. K.S.A. 2014 Supp. 60-238 provides that a party may demand a jury trial by serving and filing a "written demand, which may be included in a pleading, no later than 14 days after the last pleading directed to the issue is served...".

Chebultz's last pleading filed prior to May 27 that was "directed to the issue" of the counterclaims was Chebultz's Amended Answer filed on March 17. Appearance Docket R. 1, at 7. Plaintiffs had filed on April 17 a Motion to Strike and/or for Denial of Damages of Any Kind to Counterclaimant which clearly addressed the counterclaims. Appearance Docket, R. 1, at 7. No other pleading "directed to" the issue of the counterclaims was filed even close to 14 days prior to the May 27 Demand for Jury Trial by either party. Plaintiffs did file on May 20 a Motion to Dismiss Default Judgment Proceedings or Order of Default, but it was entirely procedural and

did not address the content of the counterclaims in any way, and thus cannot be considered to be "directed to the issue." R. 4, at 50. Chebultz submits that his March 17 filing would trigger the running of the 14 days, but even if plaintiffs' April 12 filing is the trigger, the jury demand was out of time.

c. The Untimely Request for Jury Trial Resulted in Waiver.

The failure to provide a timely demand constitutes a waiver, K.S.A. 2014 Supp. 60-238(d), although such a waiver can be set aside. *Cooper v. Re-Max Wyandotte County Real Estate, Inc.*, Kan. App. LEXIS 744, 782 P.2d 75 (1989, unpublished); *Proctor v. Farmers State Bank*, Kan. App. LEXIS 595 (1991 unpublished). Even assuming, *arguendo*, that Chebultz had made the showing of untimeliness and the court had exercised its discretion to set aside the waiver, the later exercise of discretion to proceed with the bench trial was justifiable and not an abuse of discretion.

d. Counsel's Conduct Also Constituted Waiver of Jury Trial.

Finally Chebultz submits that there is some support in other jurisdictions for the notion that counsels' conduct can effect a waiver of the right to trial by jury. Defendant will not repeat the chain of events already related except to say that Mr. Boone's failure to follow the court's order to file jury instructions in favor of preparing a 51-page Motion for Summary Judgment that was months out time, coupled with his complete failure to object when the court determined to proceed with a bench rather than jury trial, if indeed there was a right to one in this circumstance, constituted a waiver. The Court is referred to *Holloman v. Hollman*, 228 Ga. 246, 184 Se 2d 653 (1971) (appearing and allowing bench trial to proceed without objection); *Howard S. Lease Constr. Co. & Assocs. v. Holly*, 725 P.2d 712, Alas. LEXIS 391 (1986) (early demand for jury followed by various documents such as pretrial order which indicated a non-jury trial); *Reboy v.*

Cozzi Iron & Metal, Inc., 9 F.3d 1303 (1993) (conduct at trial may effectively waive right to jury trial); *Badger Meter, Inc. v. Grinnell Corp.*, 13 F.3d 1145, 1159 (1994) (judge clearly intended to decide jury issue himself and plaintiff did not object).

Conclusion

For all the above reasons, Chebultz submits that the trial court's conversion of the jury trial to bench trial, imposed as a sanction for Mr. Boone's failure to follow a court order, was in any event the correct result. On appeal, the district court decision will be upheld if it is correct for any reason. *Rivera v. Kansas Dept. of Revenue, Div. of Vehicles*, 41 Kan. App. 2d 949, 206 P.3d 891 (2009).

IV. Did the District Court Err in Granting Judgment for Violation of the Consumer Protection Act?

Standard of Review

An appellate court reviews the trial court's findings of fact "to determine if they are supported by substantial competent evidence and are sufficient to support the trial court's conclusions of law." *Hodges v. Johnson*, 288 Kan. 56, 199 P.3d 1251, 1259 (2009).

Discussion

Kape argues that Chebultz is not a "consumer" within the protections of the Kansas Consumer Protection act because the money used to pay for Kape's services was not originally his and he received no benefit of Kape's work. Chebultz believes the facts presented demonstrate a clear connection between the services offered by Kape and the economic benefit they provided Chebultz. In granting judgment, the district court agreed with Chebultz, "...[E]ven though some of that money was channeled through the prior owner...the Court would find that...Chad Chebultz, was a true party in interest..." R. 10, 4:9-19. At trial, in denying plaintiffs' motion for judgment or dismissal under K.S.A. 2014 Supp. 60-241, the Court stated, "As far as the

defendant not being a party and [sic] interest, now I am not accepting that. Obviously, the plaintiff thought he was and decided to sue him. But in any event, he is, in fact, a party in interest...." R. 19, 152:4-8. The district court ruled that Chebultz was a consumer provided protection under the Kansas Consumer Protection Act.

a. Chebultz Was a Consumer Within the Provisions of the Consumer Protection Act

K.S.A. 2014 Supp. 50-626(a) of the Consumer Protection Acts provides that "[n]o supplier shall engage in any deceptive act or practice in connection with a consumer transaction." A "consumer transaction" is a sale, lease, assignment or other disposition for value of property or services within this state (except insurance contracts regulated under state law) to a consumer; or a solicitation by a supplier with respect to any of these dispositions." K.S.A. 2014 Supp. 50-624(c). A "Consumer" means an "individual, husband and wife, sole proprietor, or family partnership who seeks or acquires property or services for personal, family, household, business or agricultural purposes". K.S.A. 2014 Supp. 50-624(b).

Kape's reliance on *Berry v. National Medical Services, Inc.* is misplaced. In *Berry*, the plaintiff, who struggled with alcohol abuse, appeared before the State Board of Nursing and agreed to urinalysis testing while on the job. She sued when she lost her nursing license following two allegedly false test results which indicated the presence of alcohol. *Berry v. Nat'l Med. Servs., Inc.*, 41 Kan. App. 2d 612, 622, 205 P.3d 745 (2009), *aff'd.* 292 Kan. 917, 257 P.3d 287 (2011). The urinalysis testing was performed by the defendant under contract with the Board. *Id.* The Court of Appeals held that *Berry* was not a consumer protected by the Consumer Protection Act. *Id.* The case at hand is easily distinguished: *Berry* was receiving mandated testing that she did not personally contract for; Chebultz was directly acquiring a service that

would affect the economic value of the house which he was attempting to purchase and later owned. Clearly Chebultz was a consumer, as demonstrated by a number of factors:

(1) The roofing project was indeed a sale of services for value between Chebultz and plaintiffs; they provided the service and he paid for it. The fact that an insurer was the source of the funds is irrelevant. Would the transaction not have been a sale for value if Chebultz had borrowed the money from a bank rather than obtaining it from Col. James who got it from an insurer?

(2) Chebultz flagged down a Kape truck and asked for a bid on roofing and guttering;

(3) Weary and Sawyer, on behalf of Kape, submitted a written contract to Chebultz;

(4) Chebultz did refuse to sign the contract because he was initially not the owner and because he was not the insured, but has acted at all times as though he had, and indeed believed he had, an oral contract for the work to be performed for the prices stated in the written contract. In fact, it was this belief that led to his refusal to pay the O&P when plaintiffs finally billed him for it;

(5) All funds paid to plaintiffs for this project were paid by Chebultz – not by Col. James, not by USAA, but in two checks written by Chebultz to Kape;

(6) Col. James never solicited plaintiffs to perform this project;

(7) Plaintiffs sued Chebultz for breach of written or oral contract – they did not sue Col. James or USAA. Plaintiffs' Amended Petition, R. 1 at 14.

Plaintiffs argue that all the allegations of the consumer protection counterclaim hinge on the operation and effect of the written contract. That is not accurate. There are three allegations that stem from the Feb. 13 invoice and only the O&P being "included" is derived from the contract. See Amended Answer of defendant Chad Chebultz to Plaintiffs' Amended Petition, R.

4, at 33. None of these require that Chebultz be the "real party in interest" of the written contract in order to allege deception under the Consumer Protection Act.

Conclusion

Kape sold roofing and guttering services and the purchaser was Chebultz. The transaction benefited Chebultz who sought to acquire the services for personal and household purposes. He clearly falls into the definition of "consumer" pursuant to K.S.A. 2014 Supp. 50-624. Thus, the district court's judgment should be affirmed.

V. Did the District Court Err in Granting Judgment for Outrageous Conduct and Punitive Damages Flowing Therefrom?

Standard of Review

In the context of a challenge to the sufficiency of the evidence, the reviewing court's function is to "determine whether the trial court's findings of fact are supported by substantial competent evidence and whether the findings are sufficient to support the trial court's conclusions of law." *Wentland v. Uhlarik,* 37 Kan.App. 2d 734, 159 P. 3d 1035 (2007).

Discussion

Outrageous conduct causing severe emotional stress, or the tort of outrage, is the same as the tort of intentional infliction of emotional distress. *Valdez v. Emmis Communications*, 290 Kan. 472, 229 P.3d 389 (2010); *Lovitt ex rel Bahr v. Board of County Commissioners of Shawnee County*, 43 Kan. App. 2d4, 221 P.3d 107 (2009). Chebultz bore the burden of proving that the conduct of plaintiffs was intentional or in reckless disregard of Chebultz; the conduct was extreme and outrageous; there was a causal connection between plaintiffs conduct and Chebultz's mental distress; and his mental distress was extreme and severe. *Valdez, supra.* Conduct is not extreme and outrageous unless a civilized society would regard it as exceeding the bounds of decency or utterly intolerable. *Caputo v. Professional Recovery Services, Inc.*, 261

F. Supp. 2d 1249 (D. Kan. 2003). The classic test of the quality of the conduct is whether "the recitation of the facts to an average citizen would arouse resentment against the actor and lead that citizen to spontaneously exclaim 'outrageous.'" *Caputo, supra*, at 1265, citations omitted. Chebultz must also clear two threshold determinations by the court that KAPE's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery, and that the emotional distress suffered by Chebultz is genuine and in such extreme degree that the law must intervene because the distress inflicted is so severe that no reasonable person should be expected to endure it. *Id.*, citing *Roberts v. Saylor*, 230 Kan. 289, 292-93, 637 P.2d 1175 (1981).

The major thrust of Defendant Chebultz's outrage claim was that Kape's contractor's lien and suit to foreclose on Chebultz's home were essentially "manufactured" using a ridiculously broad concept of subcontracting that was, in reality, unsupported. Mr. Olsen was not a subcontractor of Kape, as the district court determined when it granted defendants' motion for partial summary judgment on the mechanic's lien, and reiterated in his later judgment. Tran. (10/24/14), R. 10 at 3.

In order for a contractor to timely file a lien on real property, its verified lien statement must be filed with the clerk of the district court of the county in which the property is located "within four months after the date material, equipment or supplies, used or consumed, was last furnished or last labor performed under the contract. . . ." K.S.A. 60-1102(a).

Sawyer testified that the last work done on the home by Kape, other than the interior work performed by Olson, was finished on or about the date of the invoice dated Sep. 7, 2011. This would have allowed Kape until Jan. 7, 2012 to file a timely lien against the Chebultz's real property pursuant to K.S.A. § 60-1103. Only if Kape could claim that work performed by Olson was in effect Kape's work because he was Kape's subcontractor, and that Olson's work was at

least partly performed within the four months prior to the filing of the lien statement, could the March 23, 2012 lien notice be valid.

Kape, a corporation familiar with the use of and need for subcontractors, could not establish on the basis of the record herein that such a contractor/subcontractor relationship existed between Kape and Olson. By the admissions of Kape's agents, Olson was not treated as a subcontractor on a site for which there were three other parties apparently representing KAPE as subcontractors. A contract was established between Olson and Chebultz, reflected in an independent agreement for nature and scope of the work; payment for materials was supplied by Chebultz; and Chebultz paid Olson directly for his labor. In the event that Chebultz had complained to Kape about the work performed by Olson, on this project, those uncontroverted facts would have been sufficient to demonstrate that Olson was working independently of Kape. Surely a contractor cannot be allowed to benefit from an alleged subcontractor relationship under circumstances where it could effectively dodge liability for the subcontractor's inadequate performance.

Motivated by greed, with no thought to the affect on Chebultz, Kape and Cooper filed a recklessly false lien statement, threatening the sanctity of Chebultz's home. The lien was a calculated attempt to squeeze Chebultz into paying the Feb. 13 invoice which included the O&P and was based on much less than a good faith interpretation of the available information. The lien has led to severe emotional distress for Chebultz and supports a finding of outrageous conduct.

Chebultz argued below that plaintiffs' use of a recklessly false lien statement, their claim that Olson was a subcontractor, and the series of conflicting invoices constituted outrageous conduct. See Defendant's Motion to Amend Counterclaim to Add Claims for Punitive Damages,

R. 2, 93-97. The district court agreed: "The Court would further find that the plaintiffs' actions do constitute outrageous conduct; that there were, obviously, misrepresentations throughout and changing of their story and theories. They were false, misleading, and knowingly made." Transcript of Proceedings at R. 10, at 6:2-7. However, Chebultz's trial testimony focused exclusively on the mechanic's lien and the attempt to foreclose it as the source of his extreme emotional distress because of the financial losses and insecurity and damaged relationship with the defendant bank that resulted, as well as his fears of not being able to provide a home for his family. Consequently, plaintiff proposed only findings and conclusions on outrage related to plaintiffs' manipulation of the judicial process. See Chebultz's Proposed Findings of Fact and Conclusions of Law, R. 4, 194. .

The trial court adopted Chebultz's proposed findings and conclusions, which included the following:

> The plaintiffs' action of relying on Chad Olson as their subcontractor, without reasonable belief that he was their subcontractor, to allow them to make a timely filing of a lien on defendant's home was intentional. This manipulation of the justice process by plaintiffs resulted in substantial financial loss to Chebultz, which caused him mental distress. The conduct of the plaintiffs was extreme and outrageous and beyond the bounds of decency, to an extent intolerable in a civilized community. The resulting mental distress of Chebultz was genuine, extreme, severe, and beyond that which any reasonable person should have to endure.
>
> The liability of plaintiffs for outrageous conduct does not arise from "mere insults, indignities, threats, annoyances, petty expressions, or other trivialies." *Taiwo v. Vu*, 249 Kan. 585, 593, 822 P.2d 1024, 1030 (1991). This was not a matter of Chebultz merely suffering hurt feelings. *Id.* Plaintiffs manipulated the justice process to meet their own ends. *Id.* Plaintiffs' behavior cannot be explained as the result of a mistaken belief. *Id.* A casual referral does not, absent more, create a contractor/subcontractor relationship, even if the so-called subcontractor had in fact been plaintiffs' subcontractor on other projects. P.I.K. 4th 124.02: *J.W. Thompson Co. v. Welles Product Corp.*, 243 Kan. 503, 507, 758 P.2d 738, 741 (1988).

R.4, 197, 200. The court further found that plaintiffs acted intentionally and maliciously in adding the O&P and in claiming Chad Olson was a subcontractor. Tran. (10/24/14), R. 10, at 6.

Punitive damages are only allowed when plaintiff proves, in the initial phase of the trial, by clear and convincing evidence, that the defendant acted with willful conduct, wanton conduct, fraud or malice. K.S.A. 60-3702(c). "Evidence is clear and convincing if it shows that the truth of the fact asserted is highly probable." PIK – Civil 4th, 171.44.

A district court may allow a plaintiff to pursue a claim for punitive damages only if plaintiff establishes by motion filed at or before pretrial that there is a probability that plaintiff will prevail on the claim. To prevail, plaintiff must establish the willful conduct, wanton conduct, fraud, or malice as referenced above. K.S.A. 60-3703; *Adamson v. Bicknell*, 41 Kan. App. 2d 958, 207 P.3d 265 (2009). In *Fusaro v. First Family Mtg. Corp.*, 257 Kan. 794, 794 P.2d 123, 125 (1995), the Supreme Court of Kansas stated that the district court "shall allow the amendment" when "the evidence is of sufficient caliber and quality to allow a rational fact finder to find that the defendant acted toward the plaintiff with willful conduct, wanton conduct, fraud, or malice". *Fusaro*, 257 Kan. at 801-802, quoted in *Adamson*, 41 Kan. App. 2d at 965-966. The *Fusaro* court went on to hold that such an amendment "will be allowed when plaintiff has established that there is a probability that plaintiff will prevail on a punitive claim." *Fusaro*, 257 Kan. at 802.

That finding was made at the March 7 proceeding. The court did at that time note that Chebultz presented two theories in support of punitive damages and one was somewhat less substantial, Tran.(3/7/14), R.18, 12-13, but found that Chebultz had presented sufficient evidence in quality and quantity to support granting the motion. Chebultz abandoned the counterclaim for

fraud prior to trial. Tran. (6/25/14), R. 23, 15:5-10. In his ultimate judgment the district judge found that plaintiffs had acted intentionally and maliciously in claiming that Chad Olson was their subcontractor, as well as in the changes to the invoices and in adding the O&P. Tran.(10/24/14), R. 10, at 6.

Conclusion

Thus, Chebultz suggests to the Court that the characterization of Olson as a subcontractor and filing of the mechanic's lien, taken together, in the context of Chebultz's refusal to pay the O&P which the written contract declared was "included" and which plaintiffs, in a series of several invoices had not attempted to claim, and which their own agents had not initially even thought was appropriate to claim, are more than sufficient for a reasonable person to find outrageous conduct. Moreover, the district court specifically found that the characterization of Olson as a subcontractor was done intentionally and maliciously. The district court's judgment for outrage and award for punitive damages should be affirmed.

VI. Did the District Court Err in Failing to Dismiss the Counterclaim or Deny Judgment to the Defendants Based Upon the Advice of Counsel Defense?

Standard of Review

Issues that raise questions of law are reviewable de novo. *In re J.D.C.*, 159 P.3d 974, 284 Kan. 155. An appellate court reviews the trial court's "findings of fact to determine if they are supported by substantial competent evidence and are sufficient to support the trial court's conclusions of law." *Hodges v. Johnson*, 288 Kan. 56, 199 P.3d 1251, 1259 (2009).

Discussion

Kape argues that the district court should have granted plaintiffs judgment or dismissed Chebultz's counterclaims based on advice of counsel defense. Brief of Appellant at 39. The trial judge in his judgment indicated that he had reviewed the deposition of Mike Alley, the

attorney, but indicated that the deposition did not alter the previous determination that the mechanic's lien was improper and out of time, because the information given to Mr. Alley, that Olson was Kape's subcontractor, "clearly, was false." Tran. (10/24/14), R. 10, 2-4; 3:19. Chebultz suggests that this defense raised by Kape is misplaced because: (1) the advice of counsel defense traditionally has been solely used for malicious prosecution, and (2) Kape fails to meet the full disclosure requirement of the defense, as found by the district court. Tran. (10/24/14) R.10, 3-4, 8.

a. Kape Fails to Meet the Full Disclosure Requirement.

Kape fails to fulfill the requirements set out by the Kansas Supreme Court. See *Hunt v. Dresie*, 241 Kan. 647, 659, 740 P.2d 1046, 1056 (1987). There the Supreme Court listed the "Advice of Counsel" defense elements required to protect against an allegation of malicious prosecution:

> We believe Hunt must show the following elements for the defense to succeed:
> 1. he believed he had good cause for his suits and did not seek his attorneys' advice to shelter himself;
> 2. he made a full and honest disclosure of all the material facts within his knowledge or belief;
> 3. he was uncertain of his legal rights;
> 4. he had reason to believe his attorneys were capable of giving competent advice about the cases; and
> 5. he honestly pursued their advice.

Id. (citing 52 Am.Jur.2d, Malicious Prosecution § 174). This defense is conditioned on the litigants fully disclosing to the attorney all material facts within their knowledge and which could have been learned with diligent effort. *Id.* at 647, 1046. "To establish the defense, he must prove he disclosed all facts he knew and all he could have learned with diligent effort, and then he must have acted on the attorney's advice in good faith." *Nelson v. Miller*, 227 Kan. at 271, 279, 607 P.2d 438, 445 (1980).

Here, the district court concluded that attorney Michael Alley did not know, nor was he fully informed of, of all material facts:

> And nothing in Mike Alley's deposition would change the Court's prior finding, since Mike Alley would have given them that advice...based upon the information they provided him. That information, clearly, was false....Kape cannot rely on the advice of counsel as far as the mechanics lien, because they gave information to Mike Alley that Olson was their subcontractor, when they knew full well he was not. And the facts were clear that he was not.

R. 10, at 3, 8. Kape cannot satisfy of the elements of the defense because the attorney did not receive "a full and honest disclosure of all the material facts." R. 10, at 3, 8. Thus, Kape does not merit this defense and the district court's finding that the defense was inapplicable should be upheld.

b. The Advice of Counsel Defense as Proposed Here Does Not Fit Within the Traditional Parameters of the Defense.

However, in the unlikely event that this Court determines the trial court's finding was not based on substantial competent evidence, Chebultz and Community First suggest that the law does not support extending this defense in an area outside its traditional area of application. Advice of An Attorney is defined in Pattern Instruction Kansas 4th as:

> The *(decision of a prosecuting attorney) (advice of an attorney sought and acted on in good faith)* as to the initiation of a *(criminal proceeding) (civil action)* is a complete defense for malicious prosecution, but this is so only when all facts known to the defendant, and all facts the defendant could have learned by diligent effort, have been fully and truthfully disclosed to the attorney.

Pattern Instructions Kansas 4th, Civil, at §127.33 (emphasis in original). The advice of counsel defense has been upheld as a complete defense for malicious prosecution charges. *Id.* Kape has not cited authority that would extend this defense to outrage, and/or violation of the Kansas Consumer Protection Act. Brief of Appellant at 37-39.

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CERTIFICATE OF SERVICE

The undersigned person hereby certifies that two true and correct copies of the above and foregoing document were served on counsel of record by placing the same in the United States mail, postage prepaid on **August 31, 2015**, to:

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The only authority Kape cites is a United States district court case, which involved a suit for wrongful attachment/garnishment and malicious prosecution. *Evello Investments, N.V. v. Printed Media Services, Inc.*, No. CIV.A. 94-2254-EEO, 1995 WL 409021 at *8 (D. Kan., June 30, 1995). The United States district court granted summary judgment based on the advice of counsel defense for the malicious prosecution claim. *Id.* at *8. The court did not apply this defense to the wrongful attachment/garnishment claim and granted summary judgment in favor of the plaintiffs on that claim. *Id.* at *9.

Chebultz's counsel has searched Kansas case law and has found no cases that support an application extending this defense outside the scope of malicious prosecution. Kape has not supplied any. Here the parties went to trial on Chebultz's counterclaims for outrage and Consumer Protection Act violations. Tran. (6/25/14), R. 23, 14-15. No allegation of malicious prosecution was made against Kape. *Id.* The application of the advice of counsel defense is misplaced, as it is a defense to malicious prosecution and should not be extended to the subject causes of action.

CONCLUSION

Defendants seek affirmance of all the challenged decisions and rulings of the district court.

Respectfully submitted,

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