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JURISDICTIONAL STATEMENT

This appeal is taken from the Findings of Fact, Conclusions of Law and Judgment entered in favor of Defendants Mohamad Ali Naji (“Ali Naji” or “Naji”) and Hala K. Naji (“Hala Naji”) and against Plaintiff JAS Apartments, Inc. (“JAS”), on April 17, 2009 (“Judgment”), as amended on or about August 12, 2009 (“Amended Judgment”).

JAS timely filed its Motion to Amend the original Judgment on May 18, 2009, which was denied by the trial court in its Amended Judgment on August 12, 2009. The Amended Judgment granted Defendants’ Motion to Amend the Judgment to Award Attorney’s Fees, Costs, Expenses and Prejudgment Interest. JAS timely filed its Notice of Appeal on August 24, 2009.

The 2009 appeal was within the jurisdiction of the court of appeals below because it does not raise any of the issues exclusive to the jurisdiction of the Missouri Supreme Court as contained in Article V, Section 3 of the Missouri Constitution, and Jackson County lies within the jurisdiction of Missouri Court of Appeals, Western District.

The appeal has come within the jurisdiction of this Court because the Court granted transfer of the case after opinion by the Missouri Court of Appeals, Western District.

SUMMARY OF ARGUMENT

This litigation should end. Eight and a half years ago, in November 2002, the parties entered into a standard real estate contract for the sale of the Newbern Apartment Building to JAS by Ali Naji. When the sale was not consummated because Hala Naji refused to consent to the transfer, JAS filed its breach of contract action, seeking specific performance and a declaratory judgment that the sale was not in fraud of the marital rights of Hala Naji. More than eight years of litigation later, after two trials, two prior appeals, and transfer of the case to and from six different district court judges and two prior appellate panels, the matter now comes before the Missouri Supreme Court. It is astounding that such judicial resources, and the resources of the parties, have been so copiously expended, when the entire controversy ultimately boils down to a single question of contractual ambiguity: “whether . . . the title insurer intended the title commitment to *require* Hala Naji’s joining in the contract or whether . . . Hala Naji’s joining in the contract was an *exception* to the promised title insurance.” *JAS Apartments., Inc. v. Naji*, 230 S.W.3d 354, 362 (Mo. App. 2007) (emphasis added).

At first blush, the case appeared to present a simple issue. Ali Naji owned sole title to the Newbern, and actively seemed pleased and excited to sell. Missouri courts had long found contracts to be valid and enforceable where only one married party signed, even if the property was titled in tenancy by the entirety. The sole real barrier here was Hala Naji’s refusal to waive her statutory rights, notwithstanding the fact that she and her husband readily admitted that no fraud was being committed on her marital rights. Surely, since the

Newbern was titled in a single name and there was no marital fraud, the real estate contract could be enforced.

The parties appear before this Court because, after a bench trial on the discrete “exception versus requirement” issue, the trial court issued a Judgment that is wholly unsupported by the evidence; indeed, the trial court’s Judgment is erroneous as a matter of law. Specifically, the trial court held that because “Chicago Title *could reword* Item 15 and Mrs. Naji’s marital interest *would become an exception* to the coverage provided under the title insurance police,” and because “Item 15 *can be converted* by Chicago Title *into an exception*,” “Mrs. Naji’s joining in the agreement was not a requirement imposed by Chicago Title for issuance of a title insurance policy,” but “was an exception to the coverage.” (2009 Legal File (“LF”) 120-21; Appendix (“A”) 6-7).

The trial court’s Judgment is devoid of a finding as to Chicago Title’s intent, but had the trial court made such a finding, it could only have determined that Item 15 was intended by Chicago Title to be a requirement, as most tellingly demonstrated by Chicago Title’s refusal to close the real estate transaction absent Hala Naji’s signature or JAS’s express written waiver thereof. Further, Item 15 was clearly worded in the imperative active verb form characteristic of requirements, and the Najis’ sole witness at trial admitted that, even in order for Item 15 *to become* an exception, the express written consent of JAS would first be required. Because JAS never provided such written consent, the trial court’s holding that

Item 15 was an exception must be reversed as a matter of law, along with the trial court's dependent award of attorney's fees and prejudgment interest.¹

No further judicial resources or resources of the parties should be expended on this matter. Because Item 15 is a requirement as a matter of law, Mr. Naji's inability to procure his wife's signature on the subject real estate contract rendered him incapable of providing the contractual prerequisite of title insurance of fee simple marketable title and, as a result, Naji necessarily must be found to have anticipatorily repudiated the subject contract. The court of appeals has already held, (in a prior opinion that was not the subject of the Court's transfer decision here), that in the event such an anticipatory repudiation finding is made, specific performance in favor of JAS may be ordered so long as it is determined that conveyance of the Newbern property does not defraud Hala Naji of her marital interests in the property. *JAS Apts., Inc.*, 230 S.W.3d at 362. As alluded to above, the Naji Defendants

¹ On the matter of prejudgment interest, the trial court's entry of judgment was so haphazard that even the Najis' respondents' brief below acknowledged that the judgment had to be modified. Specifically, the trial court awarded prejudgment interest *of* \$150,058.50, (the attorney's fees demanded by Mr. Naji in 2005), rather than prejudgment interest *on* \$150,058.50 which, at nine percent per annum, would total \$48,285.00. Consequently, the trial court's prejudgment interest was over *three times* the amount permitted by statute, assuming *arguendo* that prejudgment interest should have been awarded at all (and it should not have been).

have each made binding judicial admissions that Ali Naji did not enter into the Newbern contract with intent or purpose to defraud Hala Naji's marital interest.

On the basis of the complete record in this case, in the interest of conserving judicial resources and the resources of the parties, and in furtherance of this Court's policy that an appeal "dispose finally of the case," JAS respectfully requests that the Court enter Judgment in favor of JAS on its breach of contract and declaratory judgment claims, for an award of attorney's fees and costs in JAS's favor, and for such other and further relief as is just and equitable. At the very least, the Judgment must be modified to reduce the trial court's erroneous prejudgment interest award of \$150,058.50 to \$48,285.00.

STATEMENT OF FACTS

In this action Plaintiff/Appellant JAS sought specific performance, damages, and attorney's fees in a breach of contract claim against Defendant/Respondent Ali Naji, in relation to an unrealized real estate contract, as well as a declaratory judgment against Ali Naji's spouse Hala Naji, finding that the intended sale of real property by Ali Naji to JAS would not be in fraud of Hala Naji's marital rights.

I. Factual Background: The Contract And Unconsummated Transaction To Sell The Newbern Apartments.

JAS is a Minnesota corporation that acquires and manages various properties, with a focus on rehabilitating deteriorated apartment buildings in otherwise good neighborhoods. (Transferred Legal File("TLF") 1, ¶ 1; A140); (Transferred Transcript ("TTr.") 167:7-15; 181:1-186:2; A202-04). Steve Frenz is the president of JAS. (TTr. 188:20-21; A204). John Koneck is JAS's Minneapolis, Minnesota attorney. (TLF 1103, ¶ 37; A170).

Ali Naji is the sole title owner of the Newbern Apartments ("Newbern") located at 520 and 525 East Armour Boulevard, Kansas City, Missouri. (TTr. 424:14-425:1; A214-15); (TLF 4, ¶ 4; 90, ¶ 4; 98, ¶ 4; A143, A148, A156). Ali Naji is married to Hala Naji, and they reside in Walnut Creek, California. (TTr. 451:25-452:17; A218). Originally, title to the Newbern was in the name of a partnership in which the Najis had a half interest, but when the Najis bought out the other partners, the Najis' attorney, Mr. Miller at Armstrong Teasdale, transferred title solely into Ali Naji's name. (TTr. 500:14-501:10; A222).

Ed Stewart was Ali Naji's real estate broker in the attempted sale of the Newbern to JAS. (TLF 1099, ¶ 1; A166). Lane E. Jorgensen of C.B. Richard Ellis, Incorporated, acted

as a transactional broker assisting JAS, to be paid by the seller if the transaction closed. (TTr. 79:12-14; 113:5-114:4; 145:17-25; 193:4-16; A192, A197, A199, A205).

In October of 2002, Mr. Frenz of JAS began looking to purchase a series of apartment buildings in the Kansas City area. (TTr. 81:1-18; A193). Mr. Jorgensen helped Mr. Frenz try to find apartment buildings in the Kansas City area. (TTr. 193:2-18; A205); (TLF 1099, ¶ 3; A166). Mr. Stewart, Ali Naji's broker, first proposed to JAS the possibility of acquiring the Newbern. (TTr. 82:17-19; A193).

In November of 2002, JAS made an offer to purchase the Newbern for \$2.5 million, which was rejected by Ali Naji. (TTr. 84:15-21; A193). A second offer was made and the offered purchase price was ultimately increased to \$3.5 million with a \$350,000 seller carry-back (the "Contract Price"). (TTr. 91:14-25; A195). The parties used a form contract from the Kansas City Metropolitan Board of Realtors for the offer, and Mr. Jorgenson filled in certain blanks on the form contract and added certain non-uniform provisions, thus creating the contract ultimately executed in this matter (the "Contract"). (TLF 1099-1100, ¶¶ 5, 6; A166-67); (TTr. 84:24-85:15; A193-94).

On November 19, 2002, JAS and Ali Naji entered into the Contract to buy and sell the Newbern, respectively, for \$3.5 million dollars. (TLF 1099, 1101, ¶¶ 4, 21; A166, A168); (Contract, A12-19). Both parties intended to be bound by the Contract. (TTr. 195:1-3; 432:14-16; 433:24-434:8; A205, A216-17). The Contract provided in pertinent parts as follows:

8. TITLE INSURANCE: Seller shall deliver and pay for an owners ALTA title insurance policy insuring marketable fee simple title in Buyer in the amount of

the purchase price as of the time and date of recordation of Seller's General Warranty Deed, subject only to the Permitted Exceptions defined below. Seller shall, as soon as possible and not later than fifteen (15) days after the Effective Date of this Contract, cause to be furnished to Buyer a current commitment to issue the policy (the "Title Commitment"), issued through Chicago Title (the "Title Company"). Buyer shall have ten (10) days after receipt of the Title Commitment (the "Review Period") in which to notify Seller in writing of any objections Buyer has to any matters shown or referred to in the Title Commitment. Any matters which are set forth in the Title Commitment and to which Buyer does not object within the Review Period shall be deemed to be permitted exceptions to the status of Seller's title (the "Permitted Exceptions"). With regard to items to which Buyer does object within the Review Period, Seller shall have until Closing to cure the objections. If Seller does not cure the objections by closing, this contract shall automatically be terminated unless Buyer waives the objection on or before Closing.

12. DELIVERY OF DEED: PAYMENT: DISBURSEMENT OF PROCEEDS: At or before Closing, Seller agrees to properly execute and deliver into escrow a General Warranty Deed, a Warranty Bill of Sale for any nonrealty portion of the Property, and all other documents and funds reasonably necessary to complete the Closing. The General Warranty Deed shall convey to Buyer marketable fee simple title to the Property, free and

clear of all liens and encumbrances, other than the Permitted Exceptions. At or before the Closing, Seller and Buyer each agree to deliver into escrow a cashier's check or guaranteed funds sufficient to satisfy their respective obligations under this contract. Seller understands that, unless otherwise agreed, disbursement of proceeds will not be made until after the General Warranty Deed or the instrument of conveyance, and, if applicable, the mortgage/deed of trust have been recorded and the Title Company can issue the title policy with only the Permitted Exceptions.

16. DEFAULT AND REMEDIES: Seller or Buyer shall be in default under this Contract if either fails to comply with any material covenant, agreement or obligation within any time limits required by this Contract If Seller defaults, Buyer may (i) specifically enforce this Contract and recover damages suffered by Buyer as a result of the delay in the acquisition of the Property. . . . If Buyer defaults, Seller may (i) specifically enforce this Contract . . . or (ii) terminate this Contract . . . or pursue any other remedy and damages available at law or in equity. If, as a result of a default under this Contract, either Seller or Buyer employs an attorney to enforce its rights, the defaulting party shall, unless prohibited by law, reimburse the nondefaulting party for all reasonable attorney's fees, court costs and/or legal expenses incurred by the nondefaulting party in connection with the default.

21. TIME AND EXACT PERFORMANCE ARE OF THE ESSENCE UNDER THIS CONTRACT.

(A21-22) (emphasis added). The above paragraphs were part of the “form” contract from the Metropolitan Kansas City Board of Realtors, and were not drafted or added by Mr. Jorgenson or the parties. (TTr. 117:25-118:4; A198); (Contract, A12-19).

On November 20, 2002, Mr. Stewart placed an order for a title commitment (“Title Commitment”) through the Chicago Title Insurance Company. (TLF 1101, ¶ 22; A168); (TTr. 160:3-25; A201). The Title Commitment was not received within the fifteen (15) days as provided in the Contract (December 3, 2002), but rather on the fiftieth (50) day, January 8, 2003. (TLF 1103, ¶ 34; A170); (TTr. 204:12-205:2; A206-07). The Commitment contained the following pertinent provisions under “Schedule B”:

Upon payment of the full consideration to, or for the account of, the grantors or mortgagors, and recording of the deeds and/or mortgages, the form and execution of which is satisfactory to the Company, the policy or policies will be issued containing exceptions in Schedule B thereof to the following matters (unless the same are disposed of to the satisfaction of the Company): . . .

15. The spouse, if any, of Mohamad Ali Naji must join in the proposed agreement.

(A26-27).

Ali Naji tried repeatedly to obtain Hala Naji’s consent for the transaction. (TLF 1102, ¶ 30; A169). Notice of Hala Naji’s initial hesitance was communicated to Mr. Jorgensen by Mr. Stewart on December 10, 2002. (*Id.* at ¶ 32). Ali Naji still hoped to convince Hala Naji to consent to the transaction until late January of 2003. (TTr. 469:15-472:2; A219). In late January 2003, Ed Stewart, after speaking with Ali Naji, told Lane Jorgenson that Hala Naji

would not join in the transaction. (TTr. 106:17-107:5; 471:14-17; A196; A219). Steve Frenz, President of JAS, learned through Lane Jorgenson on January 30 or 31, 2003, that Hala Naji refused to join in the transaction. (TTr. 228:4-229:25; 371:25-372:5; A208-09; A211). JAS's Minnesota attorney, John Koneck, contacted Ali Naji directly on February 10, 2003, the day before the intended closing, and Ali Naji then stated that his wife would not sign any documents allowing the intended sale. (TLF 1103, ¶¶ 37-38; A170).

On February 11, 2003, Mr. Koneck sent Ali Naji a letter referencing their February 10 conversation, and specifically noted the damages that would result from a failure to close. (TTr. 229:14-230:25; A209); (Letter, A29). JAS did not appear at the closing on February 11, 2003 because Ali Naji was not able to obtain Hala Naji's consent and deliver marketable title. (TLF 1103-04, ¶ 41; A170-71); (TTr. 232:9-233:1; A209-10). The Contract did not close. (TLF 1103-04, ¶ 41; A170-71); (TTr. 233:20-21; A210).

II. Litigation Background: Progress, Evidence and Findings.

A. The 2005 Trial.

On February 19, 2003, JAS filed its Petition against the Najis for Breach of Contract, Specific Performance and Damages, and also sought attorney's fees and costs, and a declaratory judgment that the Newbern transaction "does not constitute a fraud" on Hala Naji's marital rights. (TLF 1-6; A140-45). The case was assigned to the Honorable Thomas C. Clark of the Jackson County Circuit Court. (TLF 12; A147). On the Najis' Motion, the case was reassigned to the Honorable Charles E. Atwell on April 22, 2003. (TLF 1115, 1117; A182, A184). The case was reassigned by reciprocal transfer to the Honorable Edith L. Messina on August 11, 2004. (TLF 467; A165).

In 2005, following a three-day bench trial in which testimony and evidence as to both the “exception versus requirement” and marital fraud² issues were received, Judge Messina ruled in her conclusions of law that the Contract terminated under its own terms because JAS Apartments objected to the issue of Hala Naji’s marital interest as set forth in the Title Commitment and Mr. Naji was unable to cure JAS’s objection. (*See* TLF 1099-1114; A166-

² Ali Naji repeatedly testified at the 2005 trial that the Contract Price was a good deal and a fair price for the property, but that Hala Naji would nevertheless not join in the Contract. (TTr. 434:4-13; 473:12-474:5; A217; A220). Hala Naji testified that her refusal to join in the Contract was not based on a lack of value for the transfer, but because she loved the building architecturally and had a desire to maintain the monthly income generated by the apartments. (TTr. 504:18-505:5; 507:17-24; A223-24). Hala Naji admitted that the \$3.5 million was a great deal of money and that her husband was very excited about the deal. (TTr. 511:20-22; A225). When asked if she felt that her husband was trying to defraud her by selling the building, she testified: “He would never do something like that, no. He honestly believed he had a good deal.” (TTr. 512:7-14; A225). And in response to the question “when you signed that contract and faxed it back to Ed Stewart, you weren’t trying to defraud your wife, were you?,” Ali Naji answered, “No, I wasn’t.” (TTr. 434:14-16; A217). Ed Stewart, Ali Naji’s broker, reported that, prior to the JAS negotiations, the Newbern had at times been listed for sale at prices between \$1.8 and \$2.6 million. (TTr. 151:9-18; A200).

81). Therefore, neither JAS nor the Najis were entitled to relief. (*Id.*) JAS appealed and the Najis filed a cross-appeal. (TLF 1127, 1147; A185, A187).

B. The 2007 Court of Appeals Opinion.

In *JAS Apartments, Inc. v. Naji*, 230 S.W.3d 354 (Mo. App. 2007) (2009 Legal File (“LF”) 34-47; A44-57), the Missouri Court of Appeals for the Western District considered eight separate Points Relied On as submitted by JAS, and one Point Relied On submitted by Defendants on cross-appeal. The Najis prevailed on only one of the nine issues considered on appeal, and JAS prevailed on the other eight. *See generally id.* Specifically, the Najis lost on their arguments that:

- The Contract terminated because JAS objected to the marital interest and Ali Naji had no duty to cure this objection. *Id.* at 358-59.
- JAS waived its duty to object in writing to trigger the termination language. *Id.* at 359.
- JAS could not obtain specific performance because Hala Naji was not a party to the Contract. *Id.* at 361-62.
- JAS failed to perform under the Contract. *Id.* at 362.
- JAS could not challenge the marital interest because the issue was not ripe for adjudication. *Id.* at 359-61.
- JAS had no legal standing to challenge the marital interest. *Id.* at 360-61.
- JAS could not challenge the marital interest because the Contract had not closed. *Id.* at 361.

- JAS could not obtain specific performance because it had “unclean hands.”
Id. at 363.

Ultimately, the court of appeals reversed “the circuit court’s judgment on the ground that it erroneously concluded that the contract terminated under its own terms.” *Id.* at 359. According to the appellate court, JAS never made a written objection, which was required under the terms of the Contract, concerning the issue of Mr. Naji’s wife joining in the sales agreement. *Id.* at 358. Therefore, “the contract remained in force and the parties were obligated to perform their duties under it.” *Id.* The court of appeals “reverse[d] the circuit court’s judgment in part and affirm[ed] in part, and . . . remand[ed] for further proceedings.” *Id.* at 357.

Concerning matters pertinent to a trial on remand, the court of appeals set forth the factual background as follows:

1. Naji agreed to sell the Newbern building to JAS for \$3.5 million. *Id.*
2. On November 20, 2002, the parties executed a standard form contract prepared by the Kansas City Metropolitan Board of Realtors. *Id.*
3. The Contract obligated Naji to deliver a general warranty deed that conveyed “fee simple marketable title to the Property, free and clear of all liens and encumbrances, other than Permitted Exceptions.” *Id.*
4. The Contract defined “permitted exceptions” as “[a]ny matters” that the title insurer set out in its commitment to insure the property’s marketable title and that JAS did not object to in writing within 10 days after receiving the title insurance commitment. *Id.*

5. The Contract declared that time and “exact performance” were “of the essence.” *Id.*

6. Mr. Naji was the only person to sign the Contract to sell the property to JAS Apartments. *Id.*

7. Naji submitted an application for Chicago Title’s insurance on November 21, 2002, but Chicago Title did not issue a commitment to insure the property’s title until January 8, 2003. *Id.*

8. Chicago Title’s Commitment included a “Schedule B,” which purported to contain exceptions to Chicago Title’s insurance coverage. *Id.*

9. Among Schedule B’s provisions was Item 15, which stated, “The spouse, if any, of Mohamad Ali Naji must join in the proposed agreement.” *Id.*

10. Naji endeavored to get his wife’s consent to the sale, but she refused. On December 10, 2002, Naji informed JAS of his wife’s refusal, but promised to continue trying to obtain her consent. *Id.*

11. On February 10, 2003, a JAS representative telephoned Naji to ask about the status of the sale scheduled for closing the next day and was advised that Naji’s wife had not consented to the sale and would not. *Id.* at 357-358.

12. JAS refused to proceed with the transaction, choosing instead to file this lawsuit. *Id.* at 358.

13. JAS never made a written objection concerning the issue of Naji’s wife joining in the sale agreement. *Id.*

Additionally, the court of appeals decided several legal questions relevant to the remand trial:

1. “The contract specified that, before it could be deemed to have terminated automatically, two conditions had to occur: (1) JAS Apartments had to object to some issue in the title insurance commitment in writing within 10 days of receiving the title commitment, and (2) Naji had to fail to resolve the objection. JAS Apartments never made a written objection concerning the issue of Naji’s wife joining in the sales agreement. Its objection - assuming it was an objection - therefore did not operate to terminate the contract. The contract remained in force and, the parties were obligated to perform their duties under it.” *Id.* at 358.

2. “The Supreme Court noted that abolishment of dower in Missouri’s probate code in 1955 and the rights recognized in Section 474.150 demonstrate that ‘there can be no conveyances of separate property of a spouse without the other spouse joining.’” *Id.* at 361.

3. “Although JAS Apartments’ sales contract required Naji to convey ‘marketable fee simple title . . . free and clear of all liens and encumbrances,’ JAS Apartments agreed to make exceptions for ‘permitted exceptions.’” *Id.*

4. “In other words, JAS Apartments was willing to take what title Naji had, provided it had the opportunity to raise objections.” *Id.*

5. “JAS Apartments’ obligation to perform” under the terms of the Contract is excused if it is found “that Naji anticipatorily repudiated the contract.” *Id.* at 362.

6. “Naji undisputedly declared that his wife would not join in the sale, but we do not find a contractual obligation that he obtain his wife’s signature on the contract.” *Id.*

7. “We do find a requirement that he obtain a policy insuring marketable fee simple title to the property subject to any exceptions in the title insurance to which JAS Apartments did not object.” *Id.*

8. “This brings us squarely to the issue of whether or not Chicago Title’s provision concerning Hala Naji’s joining in the agreement was an exception or a requirement.” *Id.*

9. “The title insurer did not make it clear whether it was considering its declaration that Naji’s wife ‘join in the proposed agreement’ to be an exception to its coverage or a condition to its issuing a policy insuring title to the property.” *Id.* at 357.

10. “Chicago Title perhaps did not intend for the issue of Hala Naji’s joining in the agreement to be an exception to its coverage, but intended for it to be a requirement for issuance of its insurance policy. In other words, it may have intended to condition its issuance of insurance on Hala Naji’s joining in the sales agreement. Given the placement and wording of the provision, we cannot determine whether it was an exception or a requirement. It is a matter of ambiguity.” *Id.* at 358.

11. If Chicago Title intended Naji’s wife joining in the agreement “to be a requirement for issuance of a policy insuring the property’s title,” the circuit court may well deem Naji to have anticipatorily repudiated the contract because Hala Naji’s refusal “would have thwarted him from fulfilling his obligation to provide title insurance.” *Id.* at 362.

12. On the other hand, “because Hala Naji’s signature was not required and JAS Apartments did not object in writing to the exception,” the circuit court could conclude that JAS Apartments breached the real estate contract if Chicago Title was willing to issue a

policy of title insurance insuring title conveyed by Mr. Naji with an exception to coverage for the marital interest of Hala Naji. *Id.*

Finally, the court of appeals outlined specific issues to be determined by the trial court on remand, as follows:

(1) Because JAS refused to tender performance in the absence of Hala Naji's signature, the primary issue on remand is whether JAS's obligation to perform under the Contract was excused by an anticipatory repudiation on the part of Ali Naji, and this issue is dependent on the trial court's "exception versus requirement" holding. *Id.* at 362.

(2) If it is found that Ali Naji anticipatorily breached the Contract, the trial court must then address JAS's declaratory judgment claim regarding Mrs. Naji's marital rights in relation to JAS's demand for specific performance. *Id.*

(3) Also, since the Contract did not terminate by its own terms, the trial court was to consider ordering attorney's fees in accordance with Contract terms. *Id.* at 364.

C. Remand Proceedings.

On remand, Judge Messina recused herself, and the case was reassigned to the Honorable Jay A. Daugherty. (LF 48; A58). Judge Daugherty, however, had no timely trial availability, and because the parties desired the earliest trial date possible, the case was reassigned to the Honorable John Torrence. (LF 78; A61). Judge Torrence was subsequently administratively reassigned to a different division, and the case was yet again reassigned to the Honorable Robert M. Schieber, who ultimately tried the case. (LF 79; A62).

The parties stipulated to a bifurcated remand trial, with the “exception v. requirement” issue to be determined in the first phase (“Phase I trial”). (LF 117; A3). Specifically, the Phase I trial was to be limited in inquiry to whether “the title insurer intended the title insurance commitment to require Hala Naji’s joining in the contract or whether or not Hala Naji’s joining in the contract was an exception to the promised title insurance,” *JAS Apartments, Inc.*, 230 S.W.3d at 362, and thus whether JAS’s failure to close the real estate transaction in accordance with Contract terms was excused by Mr. Naji’s anticipatory repudiation of the Contract. (LF 117; A3). On this issue, testimony by Steve Frenz, JAS’s title insurance experts Stephen Todd and John Coghlan, Bonnie Vestal, Chicago Title’s “commercial closer” for the intended Newbern transaction, and Kellee Dunn-Walters, vice president, underwriting counsel, and commercial manager for Chicago Title, was offered and admitted in the Phase I trial. (2009 Transcript (“Tr.”) 3:17-50; 88:4-7; A110; A120).

Witnesses for both parties testified that the Commitment’s Schedule B contains both exceptions and requirements. (Tr. 69:4-8; 105:17-19; A116, A122) (Todd and Dunn-Walters testimony, respectively). Expert Stephen Todd was Regional Counsel for Chicago Title in Kansas City for more than thirty years. (Tr. 57:11-58:17; A113). He served as Chair of the Missouri Bar Property Law Committee, authored the West publication on Missouri Foreclosure, and wrote the Missouri Handbook on Title Insurance. (Tr. 59:21-60:14; A113-14). Expert John Coghlan worked for Chicago Title (fourteen years) and Steward Title Insurance (four years) for a combined total of eighteen years, is a partner at Lathrop & Gage LLP, represents the Missouri Title Insurance Association, and spends much of his practice representing title insurers. (Coghlan Tr. 6:13-17; 12:1-9; 13:7-17:19; A124-26). Both

Stephen Todd and John Coghlan testified that Item 15 was Chicago Title boilerplate language, and constituted a “requirement” by Chicago Title Insurance Company. (Tr. 75:10-18; A117; Coghlan Tr. 40:4-41:19; 44:9-25; 51:6-52:23; A129-30; A132).

Witnesses for both parties testified that a title commitment requirement can be “converted into” or “reworded to become” an exception, but that in order for such to occur, Chicago Title would first require that the express written consent of the purchaser be procured. (Tr. 74:21-24; 78:1-10; 82:8-13; 97:11-23; 105:1-106:11; A117-19; A121-22) (Todd and Dunn-Walters testimony).

JAS’s express written consent to waive Hala Naji’s signature under Item 15 was not obtained. *JAS Apartments, Inc.*, 230 S.W.3d at 358. Further, both Ms. Dunn-Walters for the Najis and Bonnie Vestal for JAS affirmatively testified that Chicago Title would not issue a title insurance policy for the Newbern transaction or close that transaction without Hala Naji’s signature or JAS’s express written waiver thereof. (Tr. 106:5-11; A122; Vestal Tr. 18:2-6; A136).

After the Phase I trial, the trial court entered findings of fact, conclusions of law, and its Judgment. (LF 115-22; A1-8). That Judgment set forth, *inter alia*, that (1) “Chicago Title *could reword* Item 15 and Mrs. Naji’s marital interest *would become* an exception to the coverage provided under the title insurance policy”; and that (2) “Item 15 *can be converted* by Chicago Title *into* an exception.” (LF 120-21; A6-7) (emphasis added). Then, explicitly predicating its decision on those two findings, the trial court declared that “Mrs. Naji’s joining in the agreement was not a requirement imposed by Chicago Title for issuance of a title insurance policy” and that “[Item 15] was an exception to the coverage.” (LF 121; A7).

Consequently, the trial court determined that “Mr. Naji did not anticipatorily repudiate the contract.” (*Id.*)

Both parties filed motions to amend the Judgment. JAS sought an amended judgment holding that Item 15 is a requirement and that Naji anticipatorily repudiated the Contract, (*see* LF 153-73; A85-105), and the Najis sought an award of attorney’s fees, costs, expenses and prejudgment interest. (LF 123-29; A65-71). In its amended Judgment, the trial court denied JAS’s motion and granted the Najis’ motion, awarding the Najis “\$299,507.92 for attorney’s fees, court costs and legal expenses and prejudgment interests [sic] of 150,058.50 [sic].” (LF 195; A9).

D. The 2009 Appeal and Subsequent Proceedings

JAS timely filed its appeal of the trial court’s Judgment, as amended. (LF 204; A106). In their respondents’ brief below, the Najis “advise[d] th[e c]ourt that [the] amount of prejudgment interest awarded by the trial court in this case is excessive” because “Section 408.020 mandates that the Najis are entitled to recover nine percent per annum interest *on* \$150,058.50, *not* \$150,058.50.” (A227) (emphasis added). Consequently, the Najis stated that “the trial court’s judgment should be modified to award \$48,285.00 in prejudgment interest to the Najis.” (A228)

After the court of appeals released its opinion reversing the trial court’s Judgment, the Najis alternatively moved for rehearing by or transfer from the court of appeals; both motions were denied. (A229). This Court granted the Najis’ subsequently-filed motion for transfer. (A230).

POINTS RELIED ON

I.

THE TRIAL COURT ERRED IN ENTERING JUDGMENT IN FAVOR OF THE NAJI DEFENDANTS ON JAS'S BREACH OF CONTRACT CLAIM PURSUANT TO THE TRIAL COURT'S HOLDING THAT TITLE COMMITMENT ITEM 15 WAS AN "EXCEPTION" BECAUSE ITEM 15 WAS A "REQUIREMENT" TO CHICAGO TITLE'S ISSUANCE OF TITLE INSURANCE IN THAT EVIDENCE AT TRIAL ESTABLISHED ONLY THAT ITEM 15 COULD BE CONVERTED INTO AN EXCEPTION AND THAT CHICAGO TITLE WOULD NOT ISSUE TITLE INSURANCE OR CLOSE THE REAL ESTATE TRANSACTION UNLESS ITEM 15 WAS SATISFIED OR ITS SATISFACTION WAIVED AND NEITHER OCCURRED.

- *JAS Apartments, Inc. v. Naji*, 230 S.W.3d 354 (Mo. App. 2007).
- *N. Cent. County Fire Alarm Sys., Inc. v. Maryland Heights Fire Protection Dist.*, 945 S.W.2d 17 (Mo. App. 1997).
- *Muilenberg, Inc. v. Cherokee Rose Design & Build, L.L.C.*, 250 S.W.3d 848 (Mo. App. 2008).
- Mo. R. App. P. 84.14.

II.

THE TRIAL COURT ERRED IN GRANTING THE NAJI DEFENDANTS' MOTION TO AMEND THE JUDGMENT TO AWARD ATTORNEY'S FEES, COSTS, EXPENSES AND PREJUDGMENT INTEREST BECAUSE THE REAL ESTATE CONTRACT BETWEEN THE PARTIES CONTAINS NO PROVISION THAT, AS APPLIED, CREATES AN EXCEPTION TO THE MISSOURI RULE THAT LITIGANTS MUST BEAR THE EXPENSE OF THEIR OWN ATTORNEY'S FEES IN THAT THE CONTRACT ONLY PROVIDES FOR PAYMENT OF ATTORNEY'S FEES BY DEFAULTING PARTIES TO PARTIES SEEKING TO "ENFORCE" CONTRACT TERMS, JAS WAS NOT FOUND TO BE A "DEFAULTING PARTY," AND THE NAJIS HAVE NEVER SOUGHT TO ENFORCE THE CONTRACT'S TERMS.

- *Trimble v. Pracna*, 167 S.W.3d 706 (Mo. 2005).
- *First State Bank of St. Charles, Mo. v. Frankel*, 86 S.W.3d 161 (Mo. App. 2002).
- *Turner v. Shalberg*, 70 S.W.3d 653 (Mo. App. 2002).
- *Shirley's Realty, Inc. v. Hunt*, 160 S.W.3d 804 (Mo. App. 2005).

III.

THE TRIAL COURT ERRED IN GRANTING THE NAJI DEFENDANTS' MOTION TO AMEND THE JUDGMENT TO AWARD ATTORNEY'S FEES, COSTS AND EXPENSES IN THE TOTAL AMOUNT OF \$299,507.92 BECAUSE THE AWARD VIOLATES THE CONTRACTUAL ATTORNEY'S FEE PROVISION REQUIRING THAT ANY FEE AWARD BE "REASONABLE" IN THAT THE AWARD GRANTS ATTORNEY'S FEES IN AN AMOUNT GROSSLY DISPROPORTIONATE TO THE NAJIS' LITIGATION SUCCESS.

- *Farrar v. Hobby*, 506 U.S. 103 (1992).
- *JAS Apartments, Inc. v. Naji*, 230 S.W.3d 354 (Mo. App. 2007).
- *Wooten v. DeMean*, 788 S.W.2d 522 (Mo. App. 1990).
- *Bacon v. Uhl*, 173 S.W.3d 390 (Mo. App. 2005).

IV.

THE TRIAL COURT ERRED IN GRANTING THE NAJI DEFENDANTS' MOTION TO AMEND THE JUDGMENT TO AWARD PREJUDGMENT INTEREST IN THE TOTAL AMOUNT OF \$150,058.50 BECAUSE UNDER R.S. MO. § 408.020 PREJUDGMENT INTEREST CANNOT HAVE BEGUN TO ACCRUE UNTIL THE TRIAL COURT'S AUGUST 2009 JUDGMENT AWARDING ATTORNEY'S FEES WAS ENTERED IN THAT NO MONEYS WERE DUE THE NAJIS ON THE CONTRACT UNTIL THE REMAND TRIAL COURT AWARDED THEM ATTORNEY'S FEES.

- *McCormack v. Capital Elec. Constr. Co., Inc.*, 159 S.W.3d 387, (Mo. App. 2004).
- *Children Int'l v. Ammon Painting Co.*, 215 S.W.3d 194 (Mo. App. 2006).
- R.S. Mo. § 408.020.

ARGUMENT

- I. The Trial Court Erred In Entering Judgment In Favor Of The Naji Defendants On JAS’s Breach Of Contract Claim Pursuant To The Trial Court’s Holding That Title Commitment Item 15 Was An “Exception” From Title Insurance Coverage Because Item 15 Was A “Requirement” To Chicago Title’s Issuance Of Title Insurance In That Evidence At Trial Established Only That Item 15 Could Be Converted Into An Exception And That Chicago Title Would Not Issue Title Insurance Or Close The Real Estate Transaction Unless Item 15 Was Satisfied Or Its Satisfaction Waived And Neither Occurred.**

Standard of Review

The general rule is that in reviewing the judgment in a court-tried case, an appellate court will reverse the judgment only if “it against the weight of the evidence, there is no substantial evidence to support it, or the trial court has erroneously applied or declared the law.” *Muilenberg, Inc. v. Cherokee Rose Design & Build, L.L.C.*, 250 S.W.3d 848, 851 (Mo. App. 2008) (citing *Eaton v. Mallinckrodt, Inc.*, 224 S.W.3d 596, 598 (Mo. banc 2007)). Where, however, “the parties do not dispute the underlying facts, disputes arising from the interpretation and application of . . . contract are matters of law for the court,” *Crossman v. Yacubovich*, 290 S.W.3d 775, 778 (Mo. App. 2009), that are “to be reviewed *de novo* on appeal.” *Muilenberg, Inc.*, 250 S.W.3d at 851.

A. The *De Novo* Standard of Review Applies to the Trial Court’s Construction of Item 15, An Ambiguous Contract Term.

After the initial appeal in this matter, the court of appeals remanded the case for further consideration of several issues but, primarily, directed the trial court to determine whether Chicago Title intended its Title Commitment, incorporated into the subject real estate Contract, “to require Hala Naji’s joining in the contract or whether . . . Hala Naji’s joining in the contract was an exception to the promised title insurance.” *JAS Apartments, Inc. v. Naji*, 230 S.W.3d 354, 362 (Mo. App. 2007). The court of appeals further ruled that whether Item 15 was an exception or requirement “is a matter of ambiguity.” *Id.* at n. 3.³

In its findings of fact entered after a bench trial on this discrete issue, the trial court acknowledged that “[t]he evidence presented and testimony of the witnesses at trial on this point was undisputed.” (LF 120; A6). Illustratively, consistent testimony of the opposing expert witnesses was offered on two points relevant to the “exception versus requirement” issue, as follows:

Schedule B Contains Both Exceptions and Requirements

- Schedule B contains exceptions and “also contains requirements.”
(Tr. 69:4-8; A116) (JAS witness, Stephen Todd).

³ The decision of an appellate court is the law of the case on all matters presented and decided, and remains the law of the case throughout subsequent proceedings, both in the trial and appellate courts. *In re Marriage of Bullard*, 18 S.W.3d 134, 138 (Mo. App. 2000).

- Q: “[W]ith respect to this title commitment listed in Schedule B are there both exceptions and requirements?” A: “Yes, there are.” (Coghlan Tr. 20:20-25; A127) (JAS witness, John Coghlan).
- It is “true” that Schedule B “contains exceptions and requirements.” (Tr. 105:17-19; A122) (Naji witness, Kellee Dunn-Walters).

A Requirement Can Become an Exception with Buyer’s Written Consent

- “[A]ny requirement can be converted into an exception.” (Tr. 74:22-23; A117) (Todd). “[T]o convert it into an exception” would require “an expressed waiver signed by the buyer” prior to closing. (*Id.* at 78:3-10; A118) (same).
- “In my opinion,” a requirement “can become an exception.” (Tr. 97:11-13; A121) (Dunn-Walters). For Item 15 “to become a permitted exception . . . [t]here would need to be instruction from Mr. Naji and we would typically want it to be written, yes.” (*Id.* at 105:1-5; A122) (same).
- “Q: [I]sn’t it true that before Chicago Title would close this transaction either Mrs. Naji had to sign or JAS would have had to have signed an express waiver of her signature? A: Yes, sir.” (Vestal Tr. 32:23-33:2; A138-39) (JAS witness, Bonnie Vestal).
- “Q: If this transaction were to close, . . . in order to issue a policy, wouldn’t Chicago Title require an express written waiver by JAS of

condition 15? A: We would expect – we would require written consent from JAS.” (Tr. 106:5-11; A122) (Dunn-Walters).

Thus, as in *Crossman*, the material factual underpinnings of the contract interpretation inquiry are undisputed. 290 S.W.3d at 778. Because the parties nevertheless disagree as to the legal effect of these facts—that is, JAS asserts that these facts require a legal finding that Item 15 is and was intended to be a requirement, and Defendants assert just the opposite—the trial court’s holding presents a question of law concerning the interpretation of an ambiguous contract term,⁴ and this Court’s review of the trial court’s interpretation is *de novo*. *Muilenberg, Inc.*, 250 S.W.3d at 851.

Let us, however, be very clear: although the *de novo* standard applies to this Court’s review of the “exception versus requirement” issue, the trial court’s error on this point is so conspicuous in light of the evidence that reversal is additionally compelled under the *Murphy v. Carron* “against the weight of the evidence” and “unsupported by substantial evidence” standards, as restated in *Muilenberg, Inc. Id.*

B. The Trial Court’s Judgment Is Against the Weight of the Evidence, Is Unsupported by Substantial Evidence, and Erroneously Declares the Law.

On the “exception versus requirement” issue, the trial court heard testimony from two of Missouri’s foremost title insurance experts, Stephen Todd and John Coghlan. Expert

⁴ “Contract interpretation is a question of law.” *Grand Inv. Corp. v. Connaughton, Boyd & Kenter, P.C.*, 119 S.W.3d 101, 112 (Mo. App. 2003).

Stephen Todd was Regional Counsel for Chicago Title in Kansas City for thirty-three years. (Tr. 57:11-58:17; A113). He served as Chair of the Missouri Bar Property Law Committee, authored the West publication on Missouri Foreclosure, and wrote the Missouri Handbook on Title Insurance. (Tr. 59:21-60:14; A113-14). Expert John Coghlan worked for Chicago Title (fourteen years) and Steward Title Insurance (four years) for a combined total of eighteen years, is a partner at Lathrop & Gage LLP, represents the Missouri Title Insurance Association, and spends much of his practice representing title insurers. (Coghlan Tr. 6:13-17; 12:1-9; 13:25-17:19; A124-26).

The unequivocal testimony of both Mr. Todd and Mr. Coghlan, based on their collective forty-seven years of work at Chicago Title Insurance Company, and their expertise developed through decades invested as legal practitioners in the title insurance industry, was that Item 15 contained Chicago Title boilerplate language, and constituted a “requirement” by Chicago Title Insurance Company as a matter of local practice, and as a matter of law, form, and substance. (Tr. 75:10-15; A117); (Coghlan Tr. 40:4-41:19; 44:9-25; 51:6-52:23; A129-30; A132). Illustratively, Stephen Todd testified as follows:

“Q: Item No. 15, can you tell us what that is? A: That’s the requirement that if the seller is a married person that his spouse must join in the document transfer. Q: That’s very standard language of Chicago Title? A: Yes.” (Tr. 75:10-15; A117).

Mr. Coghlan similarly testified, as follows:

“Q: With . . . many years of experience in the industry, is [Item 15] ambiguous in any way to you? In other words, as to whether this is a requirement or an

exception? A: It's not ambiguous to me, no. Q: What is [Item 15]? A: It's a requirement. Q: It's not an exception? A: No, it's not.”
(Coghlan Tr. 44:13-25; A130).

In conjunction with this testimony, the trial court heard consistent testimony from both parties: (1) that Schedule B, the Title Commitment provision which contained Item 15, encompassed both exceptions and requirements, (2) that Chicago Title would not close the Newbern transaction or issue its title insurance policy without Hala Naji's signature or JAS's waiver thereof, and (3) that Hala Naji would not sign transaction papers and that JAS would not waive her signature thereupon. *See* Part I.C.2, 3, *infra*.

In light of this evidence, and in light of the admission of the Najis' lone witness that Stephen Todd “would have [the] prerogative to make the final underwriting decision on matters” at Chicago Title, (Tr. 89:22-90:3; A120), the trial court's tortured holding that Item 15 “is” an exception because all agreed that it could be “reworded to *become*” an exception is nothing short of baffling. Indeed, it is erroneous as a matter of law.

The trial court's Judgment, while it is silent as to whether Chicago Title “intended” Item 15 to be a requirement, is deemed to have found all facts in a manner consistent with the Judgment;⁵ consequently, the Judgment must be deemed to include a finding that Chicago Title intended Item 15 to be an exception. But such a finding is squarely inconsistent with, and therefore necessarily disregards, the uncontradicted evidence that Chicago Title would not close the transaction without Hala Naji's signature or JAS's express written waiver thereof. While Missouri law provides that trial courts may *disbelieve*

⁵ *O'Dell v. Mefford*, 211 S.W.3d 136, 141 (Mo. App. 2007).

uncontradicted evidence, Missouri law does *not* permit trial courts to *disregard* uncontested evidence and facts without an “*express* finding of incredibility.” *Martin v. Dir. of Rev.*, 248 S.W.3d 685, 689 (Mo. App. 2008) (emphasis added). The trial court made no such credibility findings here with respect to either JAS’s or the Najis’ witnesses; since *all* witnesses from both parties proffered such testimony, then, the trial court erred as a matter of law in implicitly finding that Chicago Title intended Item 15 to be an exception, because such a finding necessarily disregards the uncontradicted testimony of all parties.

For these reasons, as set forth in additional detail below, the trial court’s Judgment must be reversed because it is against the manifest weight of the evidence and, as a matter of contract interpretation, erroneously declares the law. *See Grand Inv. Corp. v. Connaughton, Boyd & Kenter, P.C.*, 119 S.W.3d 101, 112 (Mo. App. 2003) (“Contract interpretation is a question of law.”)

C. Chicago Title Intended Item 15 to Constitute, and the Parties Understood Item 15 to Be, A Requirement to Chicago Title’s Issuance of Title Insurance on the Newbern Property.

“The cardinal rule of contract interpretation is to ascertain the parties’ intention and to give effect to that intention. *Grand Inv. Corp.*, 119 S.W.3d at 112 (internal citations omitted). Where a contract provision is ambiguous, the parties’ intentions may be determined by reference to parol evidence, including “the subject matter of the contract . . . the practical construction the parties themselves have placed on the contract by their acts and deeds, and other external circumstances that cast light on intent of the parties.” *N. Cent. County Fire Alarm Sys., Inc. v. Maryland Heights Fire Protection Dist.*, 945 S.W.2d 17, 20

(Mo. App. 1997); *see also Wilson v. Bob Wood & Assocs., Inc.*, 633 S.W.2d 738, 747-48 (Mo. App. 1981) (holding that real estate industry custom and practice evidence was admissible to show intent where a real estate contract provision was ambiguous).

Here, the respective forms of Schedule B and Item 15, examined in light of Chicago Title's practice and relevant industry practice, as well as the practical construction the parties placed on Item 15, as evidenced by the pre-closing conduct of JAS, the Najis, and Chicago Title, clearly demonstrate that Item 15 was and was intended to be a requirement.

**1. The Respective Forms of Schedule B and Item 15
Conclusively Demonstrate that Item 15 Is a Requirement.**

A title commitment constitutes a "title insurance company's agreement to issue title insurance in favor of the proposed insured upon delivery of the documents necessary to convey title as listed in the policy, and agrees thereunder "to insure marketable fee simple title." 18, Mo. Prac. §§ 5.7, 5.9 (3d ed. 2006). A commitment usually contains "schedules" that set forth "requirements," which are a "title company's prerequisites to issuing its insurance," and "exceptions," which will be matters excepted from coverage of the policy or policies to be issued. *Id.* at §§ 5.9, 5.10.

Here, the first court of appeals panel held that whether the subject Title Commitment's Item 15, providing that "[t]he spouse, if any of Mohamad Ali Naji must join in the proposed agreement," was an "exception" or a "requirement" was "a matter of ambiguity." *JAS Apartments, Inc.*, 230 S.W.2d at n.3. The Title Commitment's ambiguity is the result of its "Schedule B" that includes both "requirements" and "exceptions" in a single schedule, rather than in separate schedules as is more common. *See Mo. Real Estate Prac.*

§ 2.40, *Exceptions* (4th ed. 2000) (LF 113-14; A63-64). The Missouri title insurance legal community indeed formally recognizes that “[s]ome forms of commitment do not distinguish between exceptions and requirements, and they are intermixed in a one-part Schedule B.” *Id.* Such is the case with the Newbern Title Commitment,⁶ as witnesses for both parties testified at trial. (*See, e.g.*, Tr. 69:4-8; A116) (JAS expert witness Todd testified that the Commitment’s Schedule B contains both exceptions and requirements); (Tr. 105:17-19; A122) (Naji expert witness Dunn-Walters testified that it is “true” that Schedule B “contains exceptions and requirements”).

Because Schedule B intermixes requirements and exceptions, it is necessary to look at sentence structure and language form distinctions between Schedule B’s various provisions and to consider the respective purposes of requirements and exceptions to determine which Schedule B provisions are the former and which are the latter. (*See* Tr. 78:22-79:5; A118) (Stephen Todd testifying that Schedule B’s provisions are “not delineated as either exceptions or requirements” and that such distinction “has to be ascertained from the way they’re worded.”) Relative to this inquiry, testimony by JAS’s expert witnesses Stephen Todd and John Coghlan was admitted in the Phase I trial below.

Mr. Todd, testifying in light of his three-plus decades of title insurance practice with Chicago Title, explained that “[r]equirements are matters that *have to be* disposed of in order to create the state of title that the buyer and the insured is [sic] expecting to receive,” and that requirements are “disposed of going up to the closing and aren’t thereafter mentioned in the title insurance.” (Tr. 65:24-66:3; A115) (emphasis added). Testifying as to the formal and

⁶ (A23-28).

substantive differences between exceptions and requirements, Mr. Coghlan affirmed that “a requirement is a matter that must be fulfilled before the title policy will issue,” whereas an exception is simply a matter that is “not going to be covered by the policy when issued.” (Coghlan Tr. 27:5-6; 68:8-25; A128; A133).

Item 15’s wording, when contrasted with Schedule B provisions that are undisputedly “standard exceptions,” clearly demonstrates that Chicago Title, as Item 15’s drafter, intended the provision to be a requirement. Illustratively, Item 15 reads “The spouse, if any, of Mohamad Ali Naji *must join* in the proposed agreement.” (See A27) (emphasis added). The imperative, active character of this language is exclusively indicative of a requirement. Bonnie Vestal, the Newbern transaction’s would-be closer and a Chicago Title employee for 25 years affirmed that, if Item 15 were an exception, it would “simply be stated passively.” (Vestal Tr. 19:5-10; A136).

In contrast, Schedule B’s Items 3 and 5, for example, which passively enumerate “[r]ights or claims of parties in possession not shown by the public records,” and “[e]asements or claims of easements not shown by the public records,” respectively, (see A26), track word-for-word with “standard exceptions” identified in the Real Estate Transactions volume of the Missouri Practice treatise. See 18 Mo. Prac. § 5.10.

Chicago Title’s use of the imperative “must join” verb form, in light of the purpose of commitment requirements—*i.e.*, to set forth matters that “*must be fulfilled* before the policy will issue”—thus demonstrates that Item 15 was *intended to be* a requirement for coverage. Additionally, Item 15 *is* a requirement as a matter of Missouri law. See R.S. Mo. § 474.150, (A10) (creating a presumption of fraud where spousal consent is not obtained in a

conveyance of real estate by a married person). Mr. Coghlan explained that, given the statutory presumption, title companies routinely require spousal consent, and elaborated as follows:

Mr. Sinclair: What about paragraph 15, is that an exception or requirement?

Mr. Coghlan: I would say that it is a requirement.

Mr. Sinclair: And why do you say that it's a requirement?

Mr. Coghlan: In my title insurance experience this is a standard type of . . . a requirement that is put in a commitment if in fact the title is held in an individual's name. And in this case Schedule A reflects that title is held in Mr. Naji's name alone, so not knowing whether or not he's married is a general requirement that is put in a commitment for her to sign because of the marital rights waiver that's required in Missouri. So when I was an examiner based on my experience as an examiner you had to put that in to cover – as a requirement to cover the title company.

(Coghlan Tr. 40:4-41:19; A129).

Even the Judgment implicitly concedes that Item 15 *must* be a requirement. Specifically, the trial court's holding that Item 15 "is" an exception, in light of its undisputed factual findings that Item 15 "could be converted" or "reworded into" an exception, violates those findings' logical imperative. That is, if Item 15 had to be "converted" or "reworded" to *become* an exception, it could not possibly have been an exception in the first instance. Item 15 must necessarily, then, be a requirement. The trial court's holding to the contrary is

erroneous as a matter of law, and is unsupported by the evidence and the compulsory logic of the trial court's own findings of fact.

2. Item 15 Never Became a Permitted Exception.

The trial court's Judgment thus commits an improper logical leap: it assumes that because Item 15 *could become* an exception, it *is* an exception. (*See* LF 120-21; A6-7). This conclusion runs contrary to the undisputed evidence at trial that Item 15 could not have become a "permitted exception," as that term is contemplated by the Contract, absent JAS's express written waiver. All four expert witnesses in this case—even the Naji's expert Kellee Dunn-Walters—unanimously testified to this effect. Illustratively:

- Stephen Todd testified that, to convert Item 15 into an exception, Chicago Title would require "an expressed waiver signed by the buyer [JAS]" prior to closing. (Tr. 74:22-23; A117).

- John Coghlan, when asked whether Item 15 could become a permitted exception, stated "I don't think so because they are requiring that she join in," but then agreed that it could be possible if a buyer signed "an express written waiver of that condition at closing." (Coghlan Tr. 47:4-48:13; A131).

- Bonnie Vestal, testifying as to Chicago Title's prerequisites to closing, agreed that in order for closing to occur for JAS, either Mrs. Naji would have to have signed, or JAS would have to have signed a waiver that it would close without her signature. (*See* Vestal Tr. 18:2-10; A136).

- Even the Najis' expert Kellee Dunn-Walters admitted that in order for Item 15 "to become a permitted exception . . . [t]here would need to be instruction from Mr. Naji and

we would typically want it to be written,” and affirmed that if the transaction were going to close, Chicago Title would “require an express written waiver by JAS of condition 15.” (Tr. 105:1-5, 106:5-11; A122).

The evidence thus conclusively demonstrates that Item 15 could not become a “permitted exception” merely by the parties’ inaction. It mandated an affirmative signature by Hala Naji or JAS. This is the essence of a requirement. It is undisputed that Hala Naji and JAS never gave such consent. Consequently, the trial court’s Judgment, concluding that Item 15 is an exception, must be reversed.

**3. The Conduct of JAS, the Najis, and Chicago Title
Demonstrate the Parties’ Understanding that Item 15 Was,
and Chicago Title’s Intent that Item 15 Be, A Requirement.**

The most telling evidence of Chicago Title’s intent that Item 15 be a requirement—other than Item 15’s form and imperative language—is the fact that, as of February 7, 2003, Chicago Title refused to close the Newbern transaction for the explicit reason that Hala Naji’s signature or JAS’s express written waiver thereof had not been procured. As attested to by the transaction’s would-be closer, Bonnie Vestal, formerly of Chicago Title:

Mr. Sinclair: And it had been made perfectly clear to you that Mr. Naji had made every attempt in the world to get her to sign, and she wasn’t going to; correct?

Ms. Vestal: That was my understanding, yes.

Mr. Sinclair: And isn’t it true that at that point on February 7th, you told Brian McCool that Chicago Title couldn’t close this without Hala Naji’s signature?

Ms. Vestal: I believe so, yes.

(Vestal Tr. 28:3-11; A137).

The conduct of the parties, like the conduct of Chicago Title, is indicative of the construction the parties collectively gave Item 15 throughout the pre-closing term, and such conduct is a significant consideration in the construction of an ambiguous contract term. *See Muilenberg, Inc.*, 250 S.W.3d at 854 (holding that the issues of “what terms are included in” an ambiguous contract “depend on what the parties *actually said and did* and not upon one party’s own understanding”) (emphasis added). Steve Frenz, the president of JAS, testified that he did not object to Item 15’s inclusion in the Title Commitment’s Schedule B because, as a frequent purchaser of real estate, he sees “standard title requirement[s]” like Item 15 “all the time,” and that in “any transaction” involving a “non-entity, noncorporation . . . it’s always required that the spouse joins [sic] in the agreement.” (Tr. 45:15-24; A111). Mr. Frenz further testified that JAS did not close the Newbern transaction because he had been told that “Mrs. Naji would not enter into the sale [and] that Chicago Title was not going to provide title insurance without her entering into the deed.” (Tr. 49:2-6; A112).

Even the conduct of Mr. Naji, as he continuously attempted to obtain his wife’s consent leading up to the date of closing, and repeatedly updated Chicago Title and JAS as to the status of his efforts, supports the conclusion that the Najis understood Item 15 to be a requirement to Chicago Title’s issuance of title insurance.

For all these reasons, the trial court’s Judgment, holding Item 15 to be an “exception,” must be reversed.

D. Mohamad Ali Naji Anticipatorily Repudiated the Contract.

The trial court's ruling that Ali Naji did not anticipatorily breach the Contract should likewise be reversed. (*See* LF 121; A7). Because Item 15 is a requirement, and because at no time did Item 15 become a Permitted Exception, Mr. Naji's inability to procure his wife's signature on the Contract rendered him incapable of providing title insurance of fee simple marketable title. Because insurance of fee simple marketable title was a prerequisite of the Contract, under this Court's opinion as the law of the case, (*JAS Apartments, Inc.*, 230 S.W.3d at 362), Ali Naji necessarily anticipatorily repudiated the Contract.

As discussed above, the evidence admitted at the Phase I remand trial conclusively demonstrated that, in order for Item 15 to have become a Permitted Exception, the express written consent of JAS was necessary. *See* Part I.B.2., *supra*. Further, JAS never agreed to take title subject to Hala Naji's marital interest, either orally or in writing. Ali Naji consequently could not tender a contractual prerequisite—insurance of fee simple marketable title. *JAS Apartments, Inc.*, 230 S.W.3d at 362 (“[w]e do find a requirement that [Naji] obtain a policy insuring marketable fee simple title to the property subject to any exception in the title insurance to which JAS Apartments did not object.”).

Given that “Naji undisputedly declared that his wife would not join in the sale,” (LF 119, ¶ 6; A5), in the event that this Court holds that Item 15 is a requirement, the ruling of the trial court that Ali Naji did not anticipatorily repudiate the Contract must be reversed. *See Inauen Packaging Equip. Corp. v. Integrated Indus. Servs., Inc.*, 970 S.W.2d 360, 367 (Mo. App. 1998) (“[a] party to a contract repudiates that contract by manifesting, by words or conduct, a positive intention not to perform.”) Such a reversal would be consistent with

the court of appeals' original opinion and mandate, holding that "[i]f Chicago Title intended Naji's wife joining in the agreement 'to be a requirement for issuance of a policy insuring the property's title,'" the trial court may well deem Naji to have anticipatorily repudiated the contract because Hala Naji's refusal "would have thwarted him from fulfilling his obligation to provide title insurance." *JAS Apartments, Inc.*, 230 S.W.3d at 362. Mr. Naji's inability to deliver a title policy insuring marketable fee simple title constitutes a default under the Contract, which defines "default" as a failure "to comply with any material covenant, agreement, or obligation . . . required by this Contract." (A15, ¶16); *see also Bobst v. Sons*, 252 S.W.2d 303, 305 (Mo. 1952) (holding that "[a] vendor who alone has contracted to sell land and who is unable to convey a good title because of the refusal of a spouse to join in a conveyance" may be "held liable in damages for breach of contract.")

As a result of Mr. Naji's anticipatory breach, JAS had no further obligation to tender performance under the Contract at closing on February 11, 2003 and cannot be found a "defaulting party." *Inauen Packaging Equip. Corp.*, 970 S.W.2d at 367 (a defendant's anticipatory breach of contract "obviates the need to prove plaintiff's performance.")

Because the undisputed evidence and testimony of the witnesses at trial showed only that Item 15 *could be converted into* an exception, and because Chicago Title refused to close the intended Newbern sale transaction absent Hala Naji's signature or JAS's waiver thereof, the trial court erred as a matter of law in finding Item 15 to be an "exception" and not a "requirement." The trial court's dependent ruling that Ali Naji did not anticipatorily repudiate the Contract is likewise erroneous. Consequently, the Judgment of the trial court must be reversed in all respects.

E. Judgment in JAS’s Favor Should Be Entered On JAS’s Claims, and the Cause Should Be Remanded Only for a Determination of Proper Remedy.

This litigation, which has now been ongoing for over eight years, should be brought to an end. After two trials, pre-trial proceedings assigned to six circuit court judges, and two prior appeals, copious judicial resources and resources of the parties have been expended. Even the Najis moved below for this matter’s expeditious and final resolution. (*See* Defendants’ Motion to Expedite Appeal, A30-34). JAS therefore respectfully requests that, if this Court reverses the holdings of the trial court, rather than remanding for proceedings consistent with this Court’s opinion, the Court enter Judgment in JAS’s favor on its breach of contract and declaratory judgment claims, and remand only to the extent necessary for a determination of an appropriate remedy.

Missouri Rule of Civil Procedure 84.14 provides that, “[t]he appellate court shall . . . give such judgment as the court ought to give,” and, “[u]nless justice otherwise requires, the court *shall dispose finally* of the case.” (emphasis added). As set forth above, the trial court erred in holding Item 15 to be an exception, and consequently erred in finding that Ali Naji had not anticipatorily repudiated the Contract. Because the trial court should have found Item 15 to be a requirement and Ali Naji to have anticipatorily breached, JAS respectfully requests that this Court enter its Judgment so holding, rather than remanding this matter yet again to the trial court for further proceedings on this issue. *See Grate v. Richards*, 689 S.W.2d 635, 639 (Mo. App. 1984) (holding that court of appeals, upon reversing trial court’s judgment in real estate quiet title action, “has authority to enter the judgment that should

have been entered by the trial court,” and entering judgment after determining that “neither the pleadings *nor the evidence* established” that certain statutory notice had been given to judgment debtors before levy against and execution sale of real estate (emphasis added)).

Also, the factual record on the marital fraud issue has already been fully developed in the trials in this matter. Because no further “factual adjudication” on this point is necessary, under Rule 84.14, JAS respectfully requests that this Court render Judgment on this issue “as ought to be given” and “dispose finally of the case.” *Marks v. Marks*, 625 S.W.2d 700, 702 (Mo. App. 1981) (holding that “where no further factual adjudication is necessary, a court of appeals may give such judgment as ought to be given pursuant to Rule 84.14”).

Under Missouri law, a transfer may only be deemed “fraudulent” where “all the facts and circumstances in evidence” show that the transfer was “executed with the *intent and purpose* to defeat” the non-transferring spouse’s marital rights. *McDonald v. McDonald*, 814 S.W.2d 939, 945 (Mo. App. 1991) (citing *Potter v. Winter*, 280 S.W.2d 27, 35-36 (Mo. 1955)); *see also Kempton v. Dugan*, 224 S.W.3d 83, 88 (Mo. App. 2007) (holding that fraud must be proved with “clear and convincing” evidence). In the 2005 trial, both Ali Naji and Hala Naji unequivocally testified that the transfer of the Newbern to JAS was not intended to defraud Hala Naji’s marital rights. Specifically, Ali Naji repeatedly testified that, despite the fact that the Contract Price was a good deal and a fair price⁷ for the property, Hala Naji

⁷ Ed Stewart, Ali Naji’s broker, reported that, prior to the JAS negotiations, the Newbern had at times been listed for sale at prices between \$1.8 and \$2.6 million. (TTr. 151:9-18; A200).

would nevertheless not join in the Contract. (TTr. 434:4-13; 473:12-474:5; A217; A220). Hala Naji explained that her refusal to join in the Contract was not based on a lack of value for the transfer, but because she loved the building architecturally and had a desire to maintain the monthly income generated by the apartments. (TTr. 504:18-505:5; 507:17-24; A223-24). Hala Naji admitted that the \$3.5 million was a great deal of money and that her husband was very excited about the deal. (TTr. 511:20-22; A225). When asked if she felt that her husband was trying to defraud her by selling the building, Mrs. Naji testified: “He would never do something like that, no. He honestly believed he had a good deal.” (TTr. 512:7-14; A225). And in response to the question “when you signed that contract and faxed it back to Ed Stewart, you weren’t trying to defraud your wife, were you?,” Ali Naji answered, “No, I wasn’t.” (TTr. 434:14-16; A217).

These testimonial statements of the Naji Defendants constitute “judicial admissions” that cannot be contradicted in this Court or on remand, and in fact “concede for the purpose of the litigation” that the propositions stated are true, and obviate the need for any additional production of evidence as to those propositions. *Peace v. Peace*, 31 S.W.3d 467, 471 (Mo. App. 2000); *see also Pennington v. Kansas City Rys. Co.*, 223 S.W.428, 431 (Mo. 1920) (holding that an admission of record is binding, even where made for purposes of a former trial). Thus, no further facts need to be developed in order for this Court to declare that, as a matter of law, the intended transfer of the Newbern was not made with “intent or purpose to defraud” Hala Naji’s marital interest.

In light of this matter’s protracted litigation history, the desire of all parties to obtain a final resolution to this matter, and in accord with this Court’s policy that it “shall dispose

finally of the case” unless justice otherwise requires, JAS respectfully requests that the Court reverse the Judgment of the trial court, and enter Judgment on JAS’s breach of contract claim in its favor and against Defendant Ali Naji, enter a declaratory judgment concerning Hala Naji’s marital rights, and awarding attorney’s fees and costs in favor of JAS for its protracted attempts to enforce the Contract.

JAS further suggests that, given the passage of time since this matter’s inception and the character of the parties’ dispute, the equitable remedy originally sought, *i.e.*, specific performance, may no longer be the appropriate remedy. *See, e.g.*, 25 Williston on Contracts § 66:82 (4th ed.) (observing that “any rule that the purchaser cannot recover for the loss of the bargain due to the vendor’s inability to convey marketable title where the vendor acted in good faith in entering into the contract has been regarded as inapplicable where the reason for the vendor’s breach is the refusal of his or her spouse to join in the conveyance, on the theory that a breach of this sort constitutes such fraud on the part of the vendor as to entitle the purchaser to compensation for the loss of the bargain”); *see also Bobst*, 252 S.W.2d at 305-06 (noting that “[t]he rule generally followed in specific performance cases is that if specific performance cannot be ordered because of a disability due to a defect in the vendor’s title existing at the time of entering into the contract, or other similar reason, . . . then, although the Court cannot grant a specific performance, it will retain the cause, assess the plaintiff’s damages, and decree a pecuniary judgment in place of the purely equitable relief originally demanded.”) JAS thus requests remand only to the extent necessary to determine a just and appropriate remedy.

II. The Trial Court Erred In Granting The Naji Defendants' Motion To Amend The Judgment To Award Attorney's Fees, Costs And Expenses Because The Real Estate Contract Between The Parties Contains No Provision That, As Applied, Creates An Exception To The Missouri Rule That Litigants Must Bear the Expense Of Their Own Attorney's Fees In That The Contract Only Provides For Payment Of Attorney's Fees By Defaulting Parties To Parties Seeking To Enforce Contract Terms, JAS Was Not Found To Be A Defaulting Party, And The Najis Have Never Sought To Enforce The Contract's Terms.

Standard of Review.

This Court reviews the trial court's ruling on a motion to amend the judgment for abuse of discretion. *Gill Constr. Co. v. 18th & Vine Auth.*, 157 S.W.3d 699, 712 (Mo. App. 2004). Similarly, this Court reviews an award of attorney's fees for abuse of discretion, but where attorney's fees are awarded "under a provision of a contract, the trial court must comply with the terms set forth in that contract," and has no discretion to act outside of its terms. *In re Marriage of Thomas*, 199 S.W.3d 847, 862 (Mo. App. 2006).

A. The Trial Court's Award of Attorney's Fees Was An Abuse of Discretion in Light of Its Erroneous Substantive Holding.

Because the trial court erred as a matter of law in entering Judgment in favor of the Najis on JAS's breach of contract claim, as set forth in Point I, *supra*, the trial court abused its discretion in entering its dependent amended Judgment awarding attorney's fees to the

Najis. Even if this Court affirms the trial court’s substantive rulings on Point I, however—which JAS strongly urges is unwarranted—it should still reverse the trial court’s award of attorney’s fees to the Najis as an abuse of discretion because the Contract’s mandatory prerequisites for a fee award were not met.

B. The Trial Court’s Attorney’s Fee Award Is An Abuse of Discretion Because It Is Not Encompassed by One of the Narrowly Construed Exceptions to the American Rule.

Generally, Missouri follows the American Rule which provides that litigants must bear the expense of their own attorney’s fees. *First State Bank of St. Charles, Mo. v. Frankel*, 86 S.W.3d 161, 175 (Mo. App. 2002). An exception to this general rule applies, however, where “a contract provides for the payment of attorney’s fees and expenses incurred in the enforcement of a contract provision.” *Id.* at 175-76. The Contract between the parties here provides for attorney’s fees in certain limited circumstances, as follows:

If, as a result of a default under this Contract, either Seller or Buyer employs an attorney to enforce its rights, the defaulting party shall, unless prohibited by law, reimburse the nondefaulting party for all reasonable attorney’s fees, court costs and other legal expenses incurred by the nondefaulting party in connection with the default.

(A16, ¶16).

The mere presence of this clause in the Contract does not end the inquiry as to the propriety of an attorney’s fee award. In Missouri, “[w]here a party’s claim to attorney fees is based upon a contract the court must adhere to the terms of the contract and may not go

beyond it.” *Trimble v. Pracna*, 167 S.W.3d 706, 714 (Mo. 2005); *see also In re Marriage of Thomas*, 199 S.W.3d at 862. The attorney’s fee provision here contains three triggering preconditions to an attorney’s fee award; namely: (1) there must be a default which causes attorney’s fees to be incurred, (2) the party from whom attorney’s fee are sought must have defaulted, and (3) the party seeking the attorney’s fees must have employed its attorney(s) to enforce the contract. (*See* A15-16, ¶16).

Because the evidence showed that not one of the three mandatory contractual preconditions for a fee award to the Najis was met, the trial court abused its discretion by awarding the Najis fees in this matter.

1. There Has Been No Default.

Under the introductory phrase of the contractual fee provision, “If, as a result of a default under this Contract,” a default under the Contract that has resulted in the incursion of attorney’s fees must first occur before an award covering those fees may be granted. (*See* A16, ¶16). The trial court here made no finding that either JAS or Naji defaulted under the Contract. (*See generally* LF 115-22; A1-8). Furthermore, the provision’s phrase “as a result” requires that any attorney’s fees to be charged to a party must be proximately *caused* by a default. From a review of the trial court’s Judgment, what appears to have occurred, *at best*, is that neither party had a duty to perform: (1) Naji did not have to cure potential exceptions, and (2) JAS did not have to take title to property that was not a marketable title due to the marital interest. There are no facts upon which to base a proximate cause finding that any of the attorney’s fees incurred here by the Najis were proximately caused by any

default. Therefore, the first mandatory condition of the attorney’s fees clause has not been met.

2. JAS is Not a Defaulting Party.

Under the contractual language that “the *defaulting* party shall . . . reimburse the nondefaulting party,” it is not enough to give rise to a proper fee award that the Naji Defendants were deemed non-defaulting parties; rather, JAS would also have to have been found in default. (A16, ¶16) (emphasis added). Although the trial court found against JAS on its breach of contract claim, it did not issue a finding in either its original or amended Judgment that JAS was in default. As a matter of law, the trial court’s Judgment, initially and as amended, is insufficient to support an award of attorney’s fees, and the trial court abused its discretion in awarding the Najis fees. *See Shirley’s Realty Inc. v. Hunt*, 160 S.W.3d 804, 809 (Mo. App. 2005) (where contractual attorney’s fee provision contained identical “defaulting/non-defaulting party” language as is at issue here, it was held that absent a default determination, the “court has no basis on which to award attorney’s fees”).

Turner v. Shalberg, 70 S.W.3d 653 (Mo. App. 2002), is instructive. Shalberg, the would-be buyer in a business purchase transaction, informed the seller Turner, a few days before the parties were to close, that Shalberg had no intention of closing the deal. *Id.* at 657. In fact, Shalberg had failed to even fill out a loan application as a prerequisite to purchasing the subject business. *Id.* at 656-57. The court found Shalberg in breach, and awarded Turner attorney’s fees pursuant to a contract provision with identical “defaulting/nondefaulting party” language as is in the disputed fee provision here. *Id.* at 660.

The *Turner* court, however, awarded those fees only after an explicit finding that Shalberg had defaulted on the contract. *Id.*

Similar to the *Turner* defendant, Mr. Naji informed JAS prior to closing that he could not obtain his wife's signature. At the remand trial, all witnesses unanimously testified that Chicago Title would not close the transaction absent Hala Naji's signature or JAS's express written waiver thereof. *See* Point I.C.2., *supra*. Thus, on similar facts, and under a materially identical attorney's fee provision, the *Turner* principle, requiring a finding of default before attorney's fees may be awarded, applies.

Thus, because of the "defaulting party" language of the fee provision here, it is not enough that the Najis were the "prevailing party" on remand. Again, as a matter of Missouri law, courts may only enter fee awards under a contractual fee provision in a manner consistent with that provision's terms. *Trimble*, 167 S.W.3d at 714. A provision granting fees to a non-defaulting party from a defaulting party, like that at issue here, is materially different from a generic "prevailing party" provision. *See, e.g., Shirley's Realty, Inc.*, 160 S.W.3d at 809 (holding, where real estate contract contained materially identical attorney's fee provision to that at issue here, that "[a] prerequisite to awarding legal fees . . . under this provision is that the party from whom the attorney's fees are sought . . . defaulted on the contract," and denying a request for attorney's fees where the trial court made no determination of default).

3. A Properly Supported “Exception” Holding Would Not Necessitate a Finding of Default.

Further, although the trial court expressly held that Item 15 is an “exception,” the conclusion that JAS defaulted does not necessarily follow, for two reasons. First, the “exception” holding is not supported by the trial court’s factual findings, analysis or the evidence, as set forth in Point I, *supra*, and thereby provides insufficient foundation for a finding of default. Second, even if the “exception” finding were proper—which is not conceded—several facts beyond the purview of the first court of appeals’ prior holding that the Contract did not terminate on its own terms support the conclusion that the Contract terminated prior to JAS’s refusal to close, and it was therefore impossible for JAS subsequently to default.

Specifically: (1) the Title Commitment was not furnished by Mr. Naji until 50 days after the Contract date, not 15 days as called for in the Contract, (TLF 1103, ¶ 34; A170) (TTr. 204:12-205:2; A205-07); (2) the Title Commitment furnished by Mr. Naji was not a standard ALTA form as called for in the Contract, by not separating exceptions and requirements into a Schedule B-1 and B-2 as ALTA requires, (TTr. 394:15-23; 397:21-24; A212-13); and (3) Chicago Title would not have closed the transaction without Hala Naji’s signature or a written waiver thereof from JAS. (Vestal Tr. 18:2-10; A136). Item 15 could not, then, have become a “Permitted Exception” under the Contract terms. Consequently,

the Contract as written could not have closed, so no Contract remained at the time of closing upon which JAS could have defaulted.⁸

For these reasons, even if the trial court’s Judgment could somehow be read to contain an *implicit* finding that JAS is a defaulting party—and it does not—that finding would constitute an abuse of discretion, and the trial court’s award of attorney’s fees should be reversed.

4. The Najis Never Sought to Enforce Contract Rights.

The trial court abused its discretion in awarding the Najis attorney’s fees for the additional and independent reason that the Najis never sought to enforce rights under the Contract. Again, the Contract only provides for a fee award to the Najis if “Seller . . . employs an attorney to enforce its rights.” (A15-16, ¶16); *see also Schnucks Carrollton Corp. v. Bridgeton Health and Fitness, Inc.*, 884 S.W.2d 733, 739-40 (Mo. App. 1994) (where contract provided for attorney’s fees incurred “in the enforcement” of a contract provision, it was only proper to award the portion of attorney’s fees attributable to “that part

⁸ This conclusion is not repugnant to the first appellate panel’s prior holding that the Contract did not terminate on its own terms, *i.e.*, the law of the case. *JAS Apartments, Inc.*, 230 S.W.3d at 358-59. That court’s analysis and holding on the prior “terminated contract” argument were predicated on wholly separate facts urged as bases for termination. *See id.* This Court is free, then, to consider these additional and distinct bases for a finding of pre-closing contract termination, as argued to the remand trial court in JAS’s Response to Defendants’ Motion to Amend the Judgment. (*See* LF 134-35; A76-77).

of the action which seeks to enforce [an opposing party's contractual] obligations"). And Missouri courts strictly construe contractual provisions awarding attorney's fees or costs. *Architectural Res., Inc. v. Rakey*, 912 S.W.2d 676, 679 (Mo. App. 1995); *In re Thomasson*, 159 S.W.2d 626, 628 (Mo. 1942).

Under the language of the Contract, then, the Najis could only be entitled to attorney's fees if they had specifically sought to enforce contractual rights. Black's Law Dictionary defines "enforce" as "1. To give force or effect to (a law, etc.); to compel obedience to. 2. Loosely, to compel a person to pay damages for not complying with (a contract)." Black's Law Dictionary 8th ed. 2005, p. 569. The Najis have not sought to compel JAS to comply with the Contract or to perform thereunder. Rather, Ali Naji has consistently sought only to *avoid* his obligations under the Contract, and has proceeded at all times under the theory that "[t]here is no valid contract between Plaintiff and Defendants." (LF 31, ¶ 45; A41). Indeed, the only Contract provision the Najis have ever sought to enforce is the attorney's fee provision pursuant to their post-remand trial Motion to Amend and Ali Naji's first Counterclaim. Because, however, the Contract's fee provision is only triggered by some enforcement action *preceding* an action to obtain attorney's fees, post-dispositive motions and counterclaims limited in substance to attorney's fees cannot alone support a contractual award.

Strictly construing the fee provision as Missouri law requires, then, the trial court abused its discretion in granting the Najis fees where the Najis never acted to enforce substantive rights under the Contract. For this reason, and because there was no default

under the Contract and JAS was not found to be a defaulting party, the trial court's amended Judgment, awarding the Najis attorney's fees, costs and expenses, must be reversed.

III. The Trial Court Erred In Granting The Naji Defendants' Motion To Amend The Judgment To Award Attorney's Fees, Costs And Expenses In The Total Amount Of \$299,507.92 Because The Award Violates The Contractual Attorney's Fee Provision Requiring Any Fee Award To Be "Reasonable" In That The Award Grants Attorney's Fees In An Amount Grossly Disproportionate To The Najis' Litigation Success.

Standard of Review.

This Court reviews the trial court's ruling on a motion to amend the judgment for abuse of discretion. *Gill Constr. Co. v. 18th & Vine Auth.*, 157 S.W.3d 699, 712 (Mo. App. 2004). Similarly, this Court reviews an award of attorney's fees for abuse of discretion, but where attorney's fees are awarded "under a provision of a contract, the trial court must comply with the terms set forth in that contract," and has no discretion to act outside of its terms. *In re Marriage of Thomas*, 199 S.W.3d 847, 862 (Mo. App. 2006). Additionally, the trial court's award may be reversed if it "is determined arbitrarily or is so unreasonable as to indicate indifference and the lack of proper judicial consideration." *Bacon v. Uhl*, 173 S.W.3d 390, 399 (Mo. App. 2005).

A. Because the Najis Prevailed On a Fraction of Issues Litigated, the Trial Court's Award of All Attorney's Fees Incurred Was an Abuse of Discretion.

In Missouri, "[w]here a party's claim to attorney fees is based upon a contract the court must adhere to the terms of the contract and may not go beyond it." *Trimble*, 167

S.W.3d at 714. The fee provision here only grants an award of “all *reasonable* attorney’s fees, court costs and other legal expenses incurred.” (A16, ¶16). Because the trial court’s \$299,507.92 award included *all* attorney’s fees incurred by the Najis throughout this litigation, the award is unreasonable as a matter of law because it does not account for the Najis’ poor litigation success record. The trial court’s amended Judgment, awarding fees, therefore should be reversed.

The Najis prevailed on only one of the nine issues previously considered by this Court. According to the court of appeals’ 2007 opinion, the Najis lost the following arguments:

- The Contract terminated because JAS objected to the marital interest and Ali Naji had no duty to cure this objection. *JAS Apartments, Inc.*, 230 S.W.3d at 358-59.
- JAS waived its duty to object in writing to trigger the termination language. *Id.* at 359.
- JAS could not obtain specific performance because Hala Naji was not a party to the Contract. *Id.* at 361-62.
- JAS failed to perform under the Contract. *Id.* at 362.
- JAS could not challenge the marital interest because the issue was not ripe for adjudication. *Id.* at 359-61.
- JAS had no legal standing to challenge the marital interest. *Id.* at 360-61.

- JAS could not challenge the marital interest because the Contract had not closed. *Id.* at 361.
- JAS could not obtain specific performance because it had “unclean hands.” *Id.* at 363.

Below, the Najis proffered more than 135 pages of attorney billing statements with their motion to amend seeking fees but, in light of the first court of appeals’ decision rejecting eight out of the nine appellate arguments asserted by the Najis, only a small fraction of those bills can possibly relate to an issue or proceeding in which the Naji’s prevailed. At the very least, the trial court abused its discretion by failing to account for the prior appellate losses in the Naji’s fee award because the United States Supreme Court has declared, that “the most critical factor” in assessing the “reasonableness” of an attorney’s fee award “is the degree of success obtained” by the party seeking fees. *Farrar v. Hobby*, 506 U.S. 103, 114 (1992).

Missouri law is soundly in accord with the Supreme Court on this point. *See Brewer v. Trimble*, 926 S.W.2d 686, 689 (Mo. App. 1996) (finding that the trial court abused its discretion in awarding all incurred attorney’s fees to prevailing party that was successful on only one of its two claim, and reducing the fee award by half); *Chesterfield Fin. Corp. v. N. County Gen. Surgery, Inc.*, 917 S.W.2d 603, 606 (Mo. App. 1996) (prevailing party was not entitled, under contract provision permitting “reasonable attorney’s fees,” to attorney’s fees incurred on appeal where that party prevailed at trial but “lost more than half of the judgment it recovered in the trial court” on appeal); *Miller v. Gammon & Sons, Inc.*, 67 S.W.3d 613, 626 (Mo. App. 2001) (holding that otherwise successful plaintiffs were not entitled to

recover certain attorney's fees "since they were not the prevailing party on [that] issue"); *Hoag v. McBride & Son Inv. Co., Inc.*, 967 S.W.2d 157, 175 (Mo. App. 1998) (where contract provided for attorney's fees to prevailing party, but plaintiff only prevailed on one out of six issues, "trial court did not err in concluding that the plaintiffs were not entitled to their attorney's fees"); *Kaplan v. U.S. Bank, N.A.*, 166 S.W.3d 60, 75-76 (Mo. App. 2003) (holding that it was not an abuse of discretion for trial court to apportion fees among several issues in multi-claim case and that an attorney's fee award of \$1000 was not unreasonable where the prevailing party lost on all claims but one).

The trial court's award of *all* fees incurred by the Najis throughout this litigation was grossly disproportionate to the Najis limited litigation success and thus was "unreasonable" as a matter of Missouri law and, additionally, violative of the Contract's provision granting recovery of "reasonable" fees. *See Wooten v. DeMean*, 788 S.W.2d 522, 529 (Mo. App. 1990) (court of appeals refused to award full amount of attorney's fee requested, concluding that "a reasonable allowance" must "different[iate] between time spent in prosecution of [an] unsuccessful appeal and time spent in defending [an] unsuccessful appeal"). Under *Trimble*, the trial court abused its discretion in entering its amended Judgment awarding fees in the amount of \$299,507.92, in violation of the Contract's "reasonable" fee term.

B. The Trial Court's Award Lacks a Competent Evidentiary Basis and Was Arbitrary.

While the trial court is generally considered an expert on attorney's fees, Missouri law only provides that a trial court may "fix the amount of fees without the aid of evidence" where that court has tried the case and is fully acquainted with the issues. *Bacon*, 173

S.W.3d at 399. Here, the remand judge who awarded fees was not the first, second, third, fourth, or even *fifth* trial judge to have been assigned to this matter. (TLF 12, 467, 1115, 1117; A147, A165, A182, A184); (LF 48, 78, 79; A58, A61-62). Judge Schieber was the sixth trial judge assigned to this case and, at the time of his assignment in October 2008, this litigation had been ongoing for nearly six years. (LF 79; A62). Consequently, Judge Schieber lacked familiarity with “the nature of the work the presentation of the cause” had entailed, “the quality of the professional labor,”⁹ the expenditure of time and thus, its value assessed according to custom, place and circumstances.” *Bacon*, 173 S.W.3d at 399.

Accordingly, under *Bacon*, the trial court should have heard evidence to properly apportion a fee award, if any was appropriate at all. *See also Sheppard v. East*, 192 S.W.3d 518, 525 (Mo. App. 2006) (“in exercising th[e] discretion . . . to determine what constitutes a reasonable award . . . the court should hear from the parties”). Not only did the trial court here *not* hold a hearing to receive evidence as to an appropriate fee award, however, the limited evidence the trial court *must* have considered, *i.e.*, the billing statements submitted by the Naji’s, constitutes a failure of proof by competent evidence.

⁹ The Najis’ present counsel has only represented them since March 2008. (LF 52-53; A59-60). Consequently, the “quality of the professional labor” presented before Judge Schieber from the time he was assigned the case in October 2008 is not necessarily indicative of the “quality of professional labor” presented before the judges who preceded him.

Specifically, all of the Armstrong Teasdale billings, as provided to JAS, which amount to \$226,938.64—or 76% of the amount the Najis’ requested—were substantively redacted. As a consequence, it appears that the trial court had no reasonable basis on the record submitted to determine which litigation tasks or points of argument the attorneys were working on when the fees reflected in the billing statements were incurred, or whether the points for which time was billed were ultimately ruled in the Najis’ favor.¹⁰ *See Am. Nat’l Ins. Co. v. Noble Comm’ns Co., Inc.*, 936 S.W.2d 124, 134 (Mo. App. 1996) (where neither the motion for fees “nor the itemization of expenses attached to it, differentiates between time expended” on successfully and unsuccessfully litigated points, court could not award full amount of attorneys fees requested because movant was only entitled to fees with respect to points on which it was successful); *compare First State Bank of St. Charles, Mo.*, 86 S.W.3d at 176 (fee award not arbitrarily determined where billing invoices submitted for considered set “forth the services performed”).

The trial court’s failure to hear evidence, in light of its relatively brief exposure to the case, and its assumptions based on substantively redacted attorney’s billing invoices, indicate that the Najis’ fee award was granted arbitrarily, and with indifference and a lack of proper judicial consideration. For this reason, and because the award amount is grossly disproportionate to the relative degree of the Najis’ litigation success in these proceedings,

¹⁰ In the Najis’ respondents’ brief below, it was suggested that the billing records provided to the trial court were unredacted, but the unredacted records have not since been provided to JAS.

the trial court abused its discretion in awarding the Najis \$299,507.92 in fees, costs and expenses, and its amended Judgment should be reversed.

IV. The Trial Court Erred In Granting The Naji Defendants' Motion To Amend The Judgment To Award Prejudgment Interest In The Total Amount Of \$150,058.50 Because Under R.S. Mo. § 408.020 Prejudgment Interest Cannot Have Begun To Accrue Until The Trial Court's August 2009 Judgment Awarding Attorney's Fees Was Entered In That No Moneys Were Due The Najis On The Contract Until The Remand Trial Court Awarded Them Attorney's Fees.

Standard of Review

This Court's review of a trial court's award of prejudgment interest involves the interpretation of R.S. Mo. § 408.040. *McCormack v. Capital Elec. Constr. Co., Inc.*, 159 S.W.3d 387, 402 (Mo. App. 2004). "Whether a statute applies to a given set of facts is a question of law" that is "reviewed *de novo*, without deference to the trial court's judgment." *Id.*

The Najis' request for prejudgment interest below was purportedly predicated on a demand for attorney's fees and costs made subsequent to the 2005 trial in which they initially prevailed. (*See* LF 127; A69). Because, however, the Najis (1) are not entitled to attorney's fees under the Contract, as set forth in Point II, *supra*, and (2) the redacted affidavits fail to provide competent evidentiary support for the trial court's award, the Najis necessarily cannot recover prejudgment interest on the improperly awarded fees.

The trial court's prejudgment interest award is additionally erroneous because it awards interest from September 19, 2005, when Ali Naji alleges he made a demand for fees under the Contract. *Id.* Prejudgment interest, however, is not provided under the Contract.

(See A15-16, ¶16). Where prejudgment interest is not provided for by contract, it is strictly a matter of statute. *Children Int'l v. Ammon Painting Co.*, 215 S.W.3d 194, 203 (Mo. App. 2006). Missouri Revised Statute § 408.020 thus governs, and provides that prejudgment interest on written contracts is calculated from the time “moneys . . . become due and payable,” and not from the date of demand as the Naji’s urged below. See R.S. Mo. § 408.020; (A11) (prejudgment interest is calculated from date of demand only “on accounts due”).

Because the trial court’s amended Judgment contained no factual findings or legal conclusions on this issue, JAS assumes that the trial court awarded prejudgment interest on the terms urged in the Najis’ motion to amend, and thus calculated interest as due from the date of the original Judgment in their favor. (See LF 127; A69). But again, as set forth in Point II, *supra*, attorney’s fees were only due the Najis if JAS had been found to have defaulted and if the Najis had sued to enforce rights under the Contract. In the original Judgment—the Judgment entered on the date from which the Najis argue they demanded fees—the Contract was deemed to have terminated, and neither party was held in default. Since, therefore, the “default” precondition of the contractual attorney’s fee provision was not met, (*see* Point II.B.1., *supra*), such attorney’s fees were not, at the time of the original Judgment, “moneys due and payable.”

And neither did an attorney’s fee sum become “due and payable” after the Court of Appeals issued its original opinion, because the issue of attorney’s fees—*i.e.*, the only “moneys” the Najis sought under the Contract—was remanded for determination and therefore not yet reduced to Judgment. Even the trial court’s April 17, 2009 Judgment was

ineffective to have begun a prejudgment interest clock running, because that Judgment set forth no ruling on attorney's fees, and specifically lacked findings that the Najis had ever sought to enforce Contract rights or that any party—much less JAS—was in default. Since, again, both conditions are necessary to support an attorney's fee award under the Contract, prejudgment interest could only be even *colorably* argued to have begun accruing on August 12th or 13th, 2009, the date the trial court entered its amended Judgment fee award. (LF 195; A9).¹¹

Accordingly, the trial court erred as a matter of law in awarding prejudgment interest in the amount of \$150,058.50, as calculated from the date of the original Judgment. And, as the Najis' respondents' brief acknowledged below, the trial court awarded prejudgment interest *of* \$150,058.50, (the attorney's fees demanded by Mr. Naji in 2005), rather than prejudgment interest *on* \$150,058.50 which, at nine percent per annum, would total \$48,285.00.¹² Consequently, the trial court's prejudgment interest was over three times the amount permitted by R.S. Mo. § 408.020. Assuming *arguendo* that prejudgment interest

¹¹ Of course, because JAS argues in Point II that the trial court's amended Judgment awarding fees was entered erroneously, JAS contends that even *now* prejudgment interest should not be accruing under R.S. Mo. § 408.020.

¹² The calculation is as follows: \$150,058.50 multiplied by .09 [\$13,505.27], divided by 365 [\$37.00], multiplied by 1305 days [\$48,285.00]. *See State ex rel. City of Deslog v. St. Francois County*, 245 S.W.3d 855, 862 (Mo. App. 2007) (calculating appropriate prejudgment interest and amending the judgment accordingly).

should have been awarded at all (and it should not have been, for the reasons set forth above), the trial court's Judgment must *at least* be modified to award only \$48,285.00, rather than \$150,058.50, to the Najis.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing and the Appendix to Appellant's Substitute Brief were mailed, US postage prepaid, this 15th day of May, 2011 to:

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