

No. SC 91523

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IN THE MISSOURI SUPREME COURT

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JAS APARTMENTS, INC.,

Appellant,

v.

MOHAMAD ALI NAJI, et al.,

Respondents.

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Appeal from the Circuit Court of Jackson County, Missouri  
The Honorable Robert M. Schieber

Transferred after opinion from the Missouri Court of Appeals, Western District  
No. WD 71403

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SUBSTITUTE BRIEF OF RESPONDENTS

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## SUMMARY OF ARGUMENT

The crux of JAS Apartments' claims of error center on interpretation of the rulings found in *JAS Apts., Inc. v. Naji*, 230 S.W.3d 354 (Mo.App. W.D. 2007) ("Naji I").<sup>1</sup>

It is well-established that 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. E.D. 2000).

In Naji I, the appellate court made the following findings pertinent to this appeal:

- "Naji agreed to sell the building, situated in the 500 block of East Armour Blvd. and known as The Newbern, to JAS Apartments for \$3.5 million." 230 S.W.3d at 357.
- "On November 20, 2002, the parties executed a standard form contract prepared by the Kansas City Metropolitan Board of Realtors." *Id.*
- "The contract obligated Naji to deliver a general warranty deed that conveyed 'marketable fee simple title to the Property, free and clear of all liens and encumbrances, other than Permitted Exceptions.'" *Id.*
- "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

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<sup>1</sup> As will be discussed below, JAS Apartments' interpretation of the appellate court findings as reflected in its "Statement of Facts" virtually mirrors the Najis' interpretation of the court's rulings in Naji I. *See* Substitute Brief of Appellant, pp. 14-18.

Apartments did not object to in writing within 10 days after receiving the title insurance commitment.” *Id.*

- “The contract provided, concerning objections raised by JAS Apartments, ‘If [Naji] does not cure the objections by closing, this contract shall automatically be terminated unless [JAS Apartments] waives the objections on or before closing.’” *Id.*

- “The contract declared that time and ‘exact performance’ were ‘of the essence.’” *Id.*

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

- “Chicago Title’s commitment included a schedule, entitled Schedule B, which purported to contain exceptions to Chicago Title’s insurance coverage.” *Id.*

- “Among the schedule’s provisions was one that said, ‘The spouse, if any, of Mohamad Ali Naji must join in the proposed agreement.’” *Id.*

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

- “Because JAS Apartments anticipated that Naji would be unable to deliver marketable title without his wife’s consent, it refused to close the transaction and filed this lawsuit.” *Id.* at 358.

- JAS Apartments never made a written objection concerning the issue of Naji's wife joining in the sales agreement. *Id.*

The court of appeals in Naji I decided several other legal questions as well:

- “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. *Id.* at 358.
- “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 conveyances of separate property of a spouse without the other spouse joining.’”*Id.* at 361.
- “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.*
- “In other words, JAS Apartments was willing to take what title Naji had, provided it had the opportunity to raise objections.” *Id.*
- “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.*

- “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.*
- “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. *See* Note 3, *supra.*” *Id.*
- “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.” Note 3, *Id.* at 358.
- If Chicago Title intended Naji’s wife joining in the agreement to be a requirement for issuance of its insurance policy, “the circuit court may have a basis for finding that Naji anticipatorily repudiated the contract when he declared that Hala Naji would not join in the sale because that would have thwarted him from fulfilling his obligation to provide title insurance.” *Id.* at 362.
- “If on the other hand, the circuit court determines that the provision was an exception, it may have the basis for finding that Naji did not anticipatorily breach the contract because Hala Naji’s signature was not required and JAS Apartments did not object in writing to the exception. In the latter case, perhaps, the circuit court could conclude that JAS Apartments breached the real estate contract by refusing to close.” *Id.*

Therefore, according to the “law of the case” set forth in *Naji I*: (1) the real estate sale contract only obligated Mr. Naji to deliver a general warranty deed that conveyed “marketable fee simple title to the Property, free and clear of all liens and encumbrance, other than Permitted Exceptions.” (2) the real estate 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 Apartments did not object to in writing within 10 days after receiving the title insurance commitment;” (3) JAS Apartments never objected in writing to Item 15 set forth in the title insurance commitment which stated, “The spouse, if any, of Mohamad Ali Naji must join in the proposed agreement;” (4) “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;” (5) the court of appeals concluded, “JAS Apartments was willing to take what title Naji had, provided it had the opportunity to raise objections;” (7) the court ruled that there was no contractual obligation that Mr. Naji obtain his wife’s signature on the contract;<sup>2</sup> (6) however, the appellate court found that Mr. Naji was obligated to “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

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<sup>2</sup> The linchpin of JAS Apartments’ arguments that “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,” flies in the face of the court’s rulings in *Naji I*. *See* Substitute Brief of Appellant, p. 4.

object;” and (8) thus, the question of fact that remained to be resolved by the trial court was whether Chicago Title “intended to condition its issuance of insurance on Hala Naji’s joining in the sales agreement.”

The court of appeals remanded the case concluding that if the trial court made the factual finding that Chicago Title intended for Mr. Naji’s wife joining in the agreement to be a requirement for issuance of its insurance policy, “the circuit court may have a basis for finding that Naji anticipatorily repudiated the contract when he declared that Hala Naji would not join in the sale because that would have thwarted him from fulfilling his obligation to provide title insurance.” *Id.* at 362.

Following a one-day trial, the Honorable Robert M. Schieber ruled in part as follows: “The Court finds that based upon the evidence and the undisputed testimony at trial, Mrs. Naji’s joining in the agreement was not a requirement imposed by Chicago Title for issuance of a title insurance policy. Therefore, Mr. Naji did not anticipatorily repudiate the contract because Hala Naji’s refusal did not ‘thwart him from fulfilling his obligation to provide title insurance.’” (L.F. 121).

Reviewing the evidence and all reasonable inferences there from in the light most favorable the Judge Schieber’s decision, and disregarding all evidence to the contrary, the judgment is supported by substantial evidence and is not against the weight of the evidence. Furthermore, Judge Schieber did not erroneously declare or apply the law.

In addition, Judge Schieber’s award of attorney’s fees, costs and expenses was not arbitrarily arrived at or so unreasonable as to indicate indifference or a lack of careful consideration. Also, Mr. Naji’s demand for payment on September 19, 2009, of a

liquidated claim for fees, costs, and expenses clearly supports an award of prejudgment interest pursuant to Section 408.020, RSMo 2000.<sup>3</sup>

### **STATEMENT OF FACTS**

Rule 84.04(c) directs that “the statement of facts shall be a fair and concise statement of the facts relevant to questions presented for determination without argument.” The Najis object to JAS’s “Statement of Facts” because the alleged “fair and concise statement of the facts relevant to questions presented for determination” in is impermissibly one-sided.

The purpose of the statement of facts is to provide the appellate court with an immediate, accurate, complete, and unbiased understanding of the facts.” *Low v. State Dept. of Corrections*, 164 S.W.3d 566, 569 (Mo.App. S.D. 2005).

In accordance with Rule 84.04(f), respondents Mr. and Mrs. Naji correct and supplement JAS Apartments’ “Statement of Facts.”

#### **Factual Background: The Contract and Unconsummated Transaction to Sell the Newbern Apartments.**

In November of 2002, Steve Frenz was planning a trip to Kansas City and wanted to look at as many properties as possible. (Appendix to Substitute Brief of Appellant, hereinafter “App. to Appellant’s Sub. Brief,” p. A193). Mr. Jorgensen, the broker

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<sup>3</sup> JAS Apartment’s “haphazard” comment directed at Judge Schieber is disingenuous in view of the fact that it did not even realize such error occurred until pointed out by the Najis’ in their respondents’ brief.

representing Mr. Frenz, contacted Ed Stewart because he had listings, which did not include The Newbern, “that generally fit the parameters.” *Id.* Mr. Stewart happened to mention that The Newbern was property that he thought could potentially be acquired. *Id.*

The real estate sale contract used by JAS Apartments and Mr. Naji was provided by Mr. Jorgensen. (App. to Appellant’s Sub. Brief, p. A194). Mr. Jorgensen did not discuss the form with Mr. Stewart, but instead “[b]ecause we had used it previously, I defaulted to that form.” *Id.*

Mr. Frenz testified that he did not appear at closing because “[n]o closing was set.” (App. to Appellant’s Sub. Brief, p. A209). “We were told that [Naji] would not be delivering a deed.” *Id.* On the other hand, Bonnie Vestal testified that she did not tell JAS Apartments’ representative or anyone connected with JAS Apartments not to show up to closing. (Appendix to Respondents’ Substitute Brief, hereinafter “Appendix,” A-19). Moreover, Ms. Vestal testified that she did not intend her statements to Brian McCool on February 7, 2003, “to be don’t come to closing Chicago Title is not going to issue a policy.” (App. to Appellant’s Sub. Brief, p. A138).

### **The 2007 Court of Appeals Opinion**

As discussed in later in the argument portion of this brief, the Najis vehemently disagree with JAS Apartment’s purported “statement of fact” that “[t]he Najis prevailed on only one of nine issues considered on appeal, and JAS prevailed on the other eight.”

### **Remand Proceedings**

The appellant must define the scope of the controversy by stating the relevant facts fairly and concisely in order that the appellate court can adjudicate an appeal without

becoming an advocate for the appellant. *Carden v. Missouri Intergovernmental Risk Management Ass'n*, 258 S.W.3d 547, 555 (Mo.App. S.D. 2008). Omission of facts unfavorable to the appellant's position is a violation of Rule 84.04(c). *Vodicka v. Upjohn Company*, 869 S.W.2d 258, 263 (Mo.App. S.D. 1994). The "facts" describing the "Remand Proceedings" found in Appellant's Substitute Brief fall considerably short of fulfilling this purpose. (Appellant's Substitute Brief, pp. 19-20). Additional facts relevant to the issues raised on appeal omitted by JAS Apartments will be set forth in the discussion pertaining to Point I.

Judge Schieber entered a Judgment setting forth the following "Findings of Fact and Conclusions of Law:"

This matter having come before the Court for hearing, the Court considers the evidence presented and arguments of counsel, and makes the following Findings of Fact and Conclusions of Law.

The Court has been instructed to decide the issue whether Mr. Naji anticipatorily breached the real estate sale contract thereby excusing JAS Apartment's obligation to perform in accordance with such contract. According to the court of appeals, this decision is dependent upon the factual finding whether following closing of the sale, Mr. Naji could have obtained from Chicago Title and provided to JAS Apartments an ATLA policy of title insurance that would insure the title conveyed to JAS Apartments with an exception for the marital interest of Hala Naji.

The evidence presented and testimony of the witnesses at trial on this point was undisputed. Regardless of whether Item 15 found in Schedule B of the title commitment is characterized as an “exception” or “requirement,” 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. As confirmed by both Mr. Stephen Todd, the plaintiff’s expert witness who was formerly employed as underwriting counsel by Chicago Title, and Ms. Kellee Dunn-Walters, the Najis’ expert witness who has been employed by Chicago Title as underwriting counsel since 2000, Item 15 can be converted by Chicago Title into an exception that would carry over to the title policy.

The Court finds that based upon the evidence and the undisputed testimony at trial, Mrs. Naji’s joining in the agreement was not a requirement imposed by Chicago Title for issuance of a title insurance policy. Therefore, Mr. Naji did not anticipatorily repudiate the contract because Hala Naji’s refusal did not “thwart him from fulfilling his obligation to provide title insurance.”

JAS Apartments contends that if the Court finds that Item 15 is a requirement, then the Court must find that Mr. Naji anticipatorily repudiated the real estate sale contract by informing its representatives before closing that his wife would not sign the real estate contract, thus excusing JAS

Apartments' obligation to tender performance and close the purchase. This argument misses the mark.

As pointed out previously, the court of appeals has already ruled as a matter of law that, "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.* at 361.

Moreover, in response to JAS Apartments' contention at trial that Mr. Naji was required to convey and then insure "fee simple marketable title," we must again look to the court of appeals opinion. According to the appellate court, "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.* "In other words, JAS Apartments was willing to take what title Naji had, provided it had the opportunity to raise objections." *Id.* Therefore, unless and until a written objection was made by JAS Apartments to Item 15, there was no requirement under the terms of the real estate sale contract on the part of Mr. Naji to provide it with "fee simple marketable title."

WHEREFORE IT IS HERBY ORDERED AND ADJUGDGED that judgment is rendered on behalf of defendant Mohamad Ali Naji and against plaintiff JAS Apartments, Inc. on plaintiff's claim asserting breach of the real estate sale contract.

(L.F. 120-122).

**POINTS RELIED ON**

**I. THE TRIAL COURT DID NOT ERR IN ENTERING JUDGMENT IN FAVOR OF THE NAJIS ON JAS’S BREACH OF CONTRACT CLAIM BECAUSE SUBSTANTIAL EVIDENCE SUPPORTED THE FINDING THAT CHICAGO TITLE INTENDED ITEM 15 TO BE AN “EXCEPTION” NOT A “REQUIREMENT” IN THAT CHICAGO TITLE WOULD HAVE ISSUED A POLICY OF TITLE INSURANCE LISTING MRS. NAJI’S MARITAL INTEREST AS AN EXCEPTION TO COVERAGE.**

- *JAS Apartments, Inc. v. Naji*, 230 S.W.3d 354 (Mo. App. 2007).
- *Murphy v. Carron*, 536 S.W.2d 30 (Mo. banc 1976)
- *Langdon v. United Restaurants, Inc.*, 105 S.W.3d 882 (Mo. App. W.D. 2003).
- *Matthews v. Moore*, 911 S.W.2d 664 (Mo. App. S.D. 1995).

**II. THE TRIAL COURT’S AWARD OF ATTORNEY’S FEES, COSTS AND EXPENSES WAS NOT AN ABUSE OF THE COURT’S DISCRETION BECAUSE THE REAL ESTATE CONTRACT SPECIFICALLY PROVIDES FOR PAYMENT OF SUCH AMOUNTS BY THE DEFAULTING PARTY TO THE PARTY SEEKING TO ENFORCE CONTRACT TERMS AND, IN THIS CASE, JAS WAS**

**FOUND TO BE A DEFAULTING PARTY AND MR. NAJI SOUGHT TO ENFORCE THE CONTRACT'S TERMS.**

- *Fleetwood/Edwards Chevrolet, Inc. v. Fleetwood Chevrolet*, 9 S.W.3d 62 (Mo.App. W.D. 2000).
- *Scott v. Blue Springs Ford Sales, Inc.*, 215 S.W.3d 145 (Mo.App. W.D.2006).
- *State ex rel. Ford Motor Co. v. Messina*, 71 S.W.3d 602(Mo. banc 2002).
- *Nail Boutique, Inc. v. Church*, 758 S.W.2d 206 (Mo.App. S.D. 1988).

**III. THE TRIAL COURT'S AWARD OF ATTORNEY'S FEES, COSTS AND EXPENSES IN THE AMOUNT OF \$299,507.92 WAS NOT AN ABUSE OF THE COURT'S DISCRETION BECAUSE SUCH AMOUNT WAS "REASONABLE" IN THAT JUDGMENT WAS ENTERED IN THIS CASE IN FAVOR OF THE NAJIS.**

- *Klinkerfuss v. Cronin*, 289 S.W.3d 607 (Mo.App. E.D.2009).
- *Evans v. Werle*, 31 S.W.3d 489, 493 (Mo.App. W.D. 2000)
- *Fleetwood/Edwards Chevrolet, Inc. v. Fleetwood Chevrolet*, 9 S.W.3d 62 (Mo.App. W.D. 2000).
- *Smith v. Welch*, 611 S.W.2d 398(Mo.App. S.D. 1981).

**IV. THE TRIAL COURT DID NOT ERR IN GRANTING THE NAJIS' MOTION TO AMEND THE JUDGMENT TO AWARD PREJUDGMENT INTEREST UNDER §408.020, RSMO 2000 BECAUSE IT IS UNDISPUTED THAT ON SEPTEMBER 19, 2005, MR. NAJI MADE A DEMAND FOR PAYMENT OF A LIQUIDATED CLAIM FOR ATTORNEYS FEES, COSTS AND EXPENSES; HOWEVER, THE AMOUNT AWARDED MUST BE REDUCED.**

- *Midwest Division-OPRMC, LLC v. Department of Social Services, Div. of Medical Services*, 241 S.W.3d 371 (Mo.App. W.D. 2007).
- *Children Int'l v. Ammon Painting Co.*, 215 S.W.3d 194 (Mo. App. 2006).
- *Chouteau Auto Mart, Inc. v. First Bank of Mo.*, 148 S.W.3d 17(Mo.App. W.D. 2004).
- Section 408.020, RSMo 2000.

## ARGUMENT

**I. The Trial Court Did Not Err In Entering Judgment In Favor Of The Najis On JAS's Breach Of Contract Claim Because Substantial Evidence Supported The Finding That Chicago Title Intended Item 15 To Be An "Exception" Not A "Requirement" In That Chicago Title Would Have Issued A Policy Of Title Insurance Listing Mrs. Naji's Marital Interest As An Exception to Coverage.**

**A. Standard of Review**

The standard of review in a court-tried case is governed by the principles enunciated in *Murphy v. Carron*, 536 S.W.2d 30 (Mo. banc 1976); *Gilmartin Bros., Inc. v. Kern*, 916 S.W.2d 324, 328 (Mo. App. E.D. 1995). The judgment of the trial court will be affirmed unless it is not supported by substantial evidence, unless it is against the weight of the evidence, or unless it erroneously declares or applies the law. *Id.* "In reviewing court-tried matters, the appellate courts give due deference to the trial court and its unique ability to judge the credibility of the witnesses." *Id.* The appellate court will uphold the trial court's judgment if the result was correct on any tenable basis. *Id.*

In addition, the appellate court will presume that the trial court's decision is correct and the appellant bears the burden of demonstrating that the trial court's judgment is erroneous. *Kerr v. Jennings*, 886 S.W.2d 117, 123 (Mo. App. W.D. 1994).

**B. The *De Novo* Standard of Review Does Not Apply – Resolution Of An Ambiguity Is For The Trier of Fact And Is Not A Question Of Law.**

As mentioned earlier, the court of appeals in *Naji I* decided several questions of law including that the title commitment was ambiguous:

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.

\* \* \*

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.

*JAS Apartments, Inc. v. Naji*, 230 S.W.3d 354, 357-358 (Mo. App. W.D. 2007).

The appellate court then specifically directed:

Resolution of the issue depends on the *circuit court's factual finding* of whether or not 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.

Upon remand, the circuit court will resolve this issue.

*Id.* at 362. (emphasis added).

After consideration of the evidence and the testimony presented at trial, Judge Schieber entered his finding of fact that “Mrs. Naji’s joining in the agreement was not a requirement imposed by Chicago Title for issuance of a title insurance policy.” (L.F. 121). And, as pointed out by JAS, “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; consequently, the Judgment must be deemed to include a finding that Chicago Title intended Item 15 to be an exception.” *See Nail Boutique, Inc. v. Church*, 758 S.W.2d 206, 208 (Mo. App. S.D. 1988)(all fact issues upon which the trial court makes no specific findings shall be considered as having been found in accordance with the result reached).

Whether the terms of a contract are ambiguous is a question of law. *See Edgewater Health Care, Inc. v. Health Systems Management, Inc.*, 752 S.W.2d 860, 865 (Mo. App. E.D. 1988). However, the case law is also clear that “[i]f a court determines that a contract is ambiguous, the resolution of the ambiguity becomes a factual determination entitled to deference by the appellate court.” *Langdon v. United Restaurants, Inc.*, 105 S.W.3d 882, 887 (Mo. App. W.D. 2003).

One final matter must be addressed before leaving this discussion. It comes as no surprise that JAS asserts that this case should be reviewed *de novo*.

According to JAS, “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.’<sup>4</sup> (Substitute Brief of Appellant, p. 26). Later on JAS further contends that because the parties “disagree as to the legal effect of [undisputed facts], ... the trial court’s holding presents a question of law concerning the interpretation of an ambiguous contract term, and this Court’s review of the trial court’s interpretation is *de novo*.” (Substitute Brief of Appellant, p.29). Such arguments fail on several fronts.

First off, JAS’s premise is faulty – Judge Schieber did not undertake contract interpretation. Instead, in accordance with the directive found in *Naji I*, Judge Schieber resolved an ambiguity. What’s more, as mentioned previously, resolution of an ambiguity is a factual determination entitled to deference by the appellate court. *See Langdon v. United Restaurants, Inc.*, 105 S.W.3d at 887.

In addition, neither the judgment entered by Judge Schieber nor the record supports JAS’s assertion that *all* material facts in this case are undisputed. There was no dispute only as to the fact that regardless of whether Item 15 was found to be an

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<sup>4</sup> The court in *Crossman*, reviewing entry of summary judgment, stated, “Where the parties do not dispute the underlying facts, disputes arising from the interpretation and application of insurance contracts are matters of law for the court.” *Id.* at 778. The court found as a matter of law that contract was ambiguous and remanded the case for further proceedings. In *Muilenburg*, the court ruled that “matters of contract interpretation – including whether or not a contract is ambiguous – are questions of law to be reviewed *de novo* on appeal. *Id.* at 778

exception or a requirement, Chicago Title would reword Item 15 so that Mrs. Naji's marital interest could be listed as an exception to the coverage provided under the title insurance policy.

**C. Reviewing The Evidence And All Reasonable Inferences Therefrom In The Light Most Favorable To The Trial Court's Judgment, And Disregarding All Evidence To The Contrary, The Judgment Should Be Sustained.**

Because this appeal involves a court-tried matter, the appellate court will accept as true the evidence and reasonable inferences therefrom in favor of the prevailing party and disregards the contrary evidence. *Evans v. Werle*, 31 S.W.3d 489, 491 (Mo. App. W.D. 2000). The court will set aside the decision of the trial court only when firmly convinced that the judgment is wrong. *Id.*

In addition, the appellate court “defers to the trial court as the finder of fact in determinations as to whether there is substantial evidence to support the judgment and whether that judgment is against the weight of the evidence, even where those facts are derived from pleadings, stipulations, exhibits and depositions.” *Business Men's Assur. Co. of America v. Graham*, 984 S.W.2d 501, 506 (Mo. banc 1999). The trial court is accorded wide discretion even if there is evidence in the record which would support another conclusion. *Engelage v. Director of Revenue*, 197 S.W.3d 197, 198 (Mo. App. W.D. 2006).

**1. Introduction**

JAS contends on appeal that Item 15 was a “requirement” because Chicago Title would not have closed and issued a title insurance policy listing Mrs. Naji’s marital interest as an exception unless Item 15 was expressly waived by JAS at closing. According to JAS, because it never provided such written consent, the trial court’s holding that Item 15 was an exception must be reversed.

This argument incorrectly frames the issue the court of appeals in Naji I directed the trial court to address on remand:

“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.” Note 3, *Id.* at 358.

*JAS Apartments, Inc. v. Naji*, 230 S.W. 3d at 358.

Resolution of the issue [whether or not Chicago Title’s provision concerning Hala Naji’s joining in the agreement was an exception or a requirement] depends on *the circuit court’s factual finding of whether or not 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*. Upon remand, the circuit court will resolve this issue.

230 S.W. 3d at 362.(emphasis added).

The trial court was instructed to determine the *intent of Chicago Title*. Nowhere does the court of appeals refer to the *intent of JAS* or whether the title insurance policy containing an exception would be acceptable to JAS as determinative of the question which party breached the real estate sale contract.<sup>5</sup>

In addition, although Mr. Naji was ready to close, JAS did not show up to closing opting instead to file this lawsuit thus breaching the real estate sale contract. In fact, as discussed later in this brief, JAS had not taken any of the actions necessary to proceed to closing. Any stance that JAS takes at this juncture with regard to what would have transpired had the closing occurred is sheer speculation.

## **2. The Judgment Is Supported By Substantial Evidence.**

By agreement of the parties, this case was to be tried in two phases. Phase One was to address the initial question – whether JAS Apartments’ failure to perform in accordance with the terms of the real estate sale contract was excused by Mr. Naji anticipatorily repudiating the contract. If the court found against JAS Apartments on this issue and in favor of Mr. Naji, the award of “reasonable attorney’s fees, court costs and other legal expenses” would be the only issue that remained to be decided. (L.F. 117). On

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<sup>5</sup> In fact, JAS’s counsel stated, “The parties’ intent is irrelevant in this case. ... It is, you know, the Court of Appeals has already ruled. It’s not the question of the intent of the parties.” (Depo. John Coghlan, p.78; Appendix, p. A-29).

the other hand, if the court should find that Mr. Naji anticipatorily breached the real estate sale contract, then the case would proceed to the Phase Two trial wherein JAS Apartments' various claims, including its action for specific performance, and the Najis' counterclaim for unjust enrichment would be decided. (L.F. 117).

Keeping in mind the principles announced at the outset of this point, the Najis present this Court with a different account of the evidence and testimony presented to the trial court regarding the "exception versus requirement" issue.

The trial court heard testimony from Kellee Dunn Walters, the only witness currently employed by the Kansas City office of Chicago Title that appeared at trial. (Tr. 21-22, 58, 88). Ms. Dunn-Walters worked for Chicago Title in its Kansas City office as underwriting counsel at the time it issued the title commitment in this case. (Tr. 88). She became familiar with the lawsuit arising between Mr. Naji and JAS, Inc., in 2004 or 2005. (Tr. 94).

Ms. Dunn Walters received her law degree from University of Kansas. (Tr. 89). She was first employed by Chicago Title as underwriting counsel in 2000. (Tr. 88-89). From 2002 to 2005, her position with Chicago Title became Assistant Vice-President and Underwriting Counsel. (Tr. 88). After 2005, Ms. Dunn-Walters' title was Vice President, Underwriting Counsel and Commercial Manager. ( Tr. 88).

After graduating from law school and prior to her employment at Chicago Title, Ms. Dunn-Walters worked for two other large title insurance agencies, American Land Title and Security Land Title Company. (Tr. 89). Both agencies have since been acquired

by First American Title. (Tr. 89). In addition, Ms. Dunn-Walters was employed for approximately four years by Insured Titles, a title underwriter. (Tr. 89).

Ms. Dunn-Walters has taught a number of seminars for attorneys through the Kansas City Bar Association, the Missouri Bar, and some proprietary companies (Tr. 90). In addition, she taught title matters to title agents through the Missouri Land Title and Kansas Land Title Associations. (Tr. 90).

Ms. Dunn-Walters is a member of the Real Property and Trust section of the American Bar Association and Kansas Bar Association, and served as chair of the Kansas Bar Association committee for title standards for six years. (Tr. 90). Ms. Dunn-Walters is also a member and past-president of the Association of Commercial Real Estate Brokers, which is known as the Commercial Brokers Association. (Tr. 90). Furthermore, she is the immediate past-president and a member of the board of directors of Kansas City Commercial Real Estate Women. (Tr. 91).

Ms. Dunn-Walters' job duties for Chicago Title in Kansas City include managing the commercial escrow department consisting of a staff of about ten people. (Tr. 92). Her department performs closings on property in the Kansas City area as well as in the states of Kansas, Nebraska, and Missouri. (Tr. 92). In addition, Ms. Dunn-Walters serves as underwriting counsel responding to inquiries posed by examiners, commercial closers, residential closers, and agents. (Tr. 92-93). Ms. Dunn-Walters explained that she is considered an underwriter for Chicago Title in that she examines the proposed risk from a legal perspective and decides whether Chicago Title is willing to issue an insurance policy. (Tr. 93).

Ms. Dunn-Walters testified that a title commitment is the company's statement that incorporates terms and provisions of the policy that will be issued – it's a bridge between a binder for insurance and a disclosure of matters that affect the property. (Tr. 94). Discussing the difference between "requirements" and "exceptions," Ms. Dunn-Walters stated that a requirement is something that must be done in order for the policy to issue, while an exception is something that may remain in the final policy. (Tr. 96).

Ms. Dunn-Walters confirmed her familiarity with Schedule B of the title commitment issued in connection with the sale of The Newbern. (Tr. 95). Noting that Schedule B is clearly prefaced with the term "exceptions," she further testified, "If there were a page here titled Schedule B-1 requirements, at the top it would say that these matters must be addressed before the company is required to issue its policy, before the company is obligated to issue its policy." (Tr. 96).

Ms. Dunn-Walters explained to Judge Schieber that it's been her "understanding from talking to Mr. Todd and others in [Chicago Title's] underwriting department that the reason [Chicago Title's] title commitment is set up this way is specifically because [Chicago Title] is not ... taking on the obligation of figuring out what the parties want to take title subject to or not, what they want to have happen, that [Chicago Title] set(s) out those things that are there and they can tell us." (Tr. 97). When asked, "What's in it for Chicago Title for calling this an exception as opposed to a requirement?," Ms. Dunn-Walters replied, "As I mentioned, by having it being an exception, it takes the decision-making away from [Chicago Title] to say that this is a requirement before [Chicago Title

is] obligated to issue a policy. If a party didn't satisfy that, it could be an exception in the policy." (Tr. 98-99).

With regard to Item 15 in the title commitment, Ms. Dunn-Waters testified unequivocally that "it is an exception ... we don't title it as a requirement because we're not saying it's a requirement." (Tr. 98). Ms. Dunn-Walters added that she had been involved in transactions where the spouse's interest was listed as an exception to the title insurance policy. (Tr. 99). On redirect examination, Ms. Dunn-Walters reiterated that Item 15 is an exception. (Tr. 108).

In support of its claim that Judge Schieber's ruling is against the weight of the evidence and is unsupported by substantial evidence, JAS relies on what it refers to as "the unequivocal testimony of both Mr. Todd and Mr. Coghlan ... that Item 15 constituted a 'requirement' by Chicago Title Insurance Company as a matter of local practice, and as a matter of law, form, and substance." (Substitute Brief of Appellant, p. 30). Judge Schieber apparently found Ms. Dunn-Walters' unequivocal testimony that Item 15 constituted an "exception" by Chicago Title more persuasive than the testimony of Mr. Todd and Mr. Coghlan, and "[t]hat was the trial court's prerogative." *Matthews v. Moore*, 911 S.W.2d 664, 668 (Mo. App. S.D. 1995). In a case tried to the court, "credibility of witnesses and the weight to be given their testimony was a matter for the trial court, which was free to believe none, part or all of the testimony of any witness" *Id.*

In addition to the testimony of Ms. Dunn-Walters, other evidence was presented by the parties upon which the trial court based its decision.

According to Stephen Todd, Item 15 could in fact carry over to the title insurance policy issued by Chicago Title. (Tr. 77). Mr. Todd further testified that exceptions may appear in the title insurance policy that the buyer receives. (Tr. 63).

As testified to by Ms. Dunn-Walters, Mr. Todd stated that it was the local practice of Chicago Title to combine exceptions and requirements into a single Schedule B. (Tr. 71). “This is not the typical industry standard and is a local deviation from the ALPA 1966 Form Commitment.” (Tr. 69). “It was decided by Chicago Title that it would be a better practice just to have one Schedule B and put exceptions and requirements both in the same schedule. Our practice tended to be to list exceptions first and requirements last, but there were a lot of departures from that practice.” (Tr. 71).

Also, Mr. Todd admitted that nowhere in Schedule B is the word “requirement” used by Chicago Title in reference to Item 15. (Tr. 78-79). He further stated that “the plain language” of Schedule B states that ““The following are exceptions and [Item] 15 is included under that.” (Tr. 80). Mr. Todd confirmed that Item 15 on Schedule B of the title commitment was labeled an “exception” by Chicago Title. (Tr. 81). Mr. Todd agreed that if Chicago Title wanted to make sure that anyone who looked at Schedule B had no doubt as to whether Item 15 is a requirement or an exception, Chicago Title could have easily delineated it as a requirement but Schedule B does not do that. (Tr. 80).

Similarly, John Coghlan testified that Chicago Title clearly knows the difference between the word “exception” and “requirement” and could have used the word “requirement” or “exception where they wanted to.” (Appendix, pp. A27-A28). Going to

Schedule B of Chicago Title's title commitment, there is no section for requirements. (Appendix, p. A28).

The deposition of Bonnie Vestal, who worked for Chicago Title during the time relevant to this lawsuit as a Commercial Closer, was read to Judge Schieber at trial. (Appendix, A12-A13).

All the forms and documents needed to close the transaction to be supplied by Mr. Naji were prepared and ready for closing. (Appendix, A-15). On the other hand, Ms. Vestal did not receive from JAS any forms or documents necessary to close the transaction. (Appendix, A-14-15). Ms. Vestal emphatically stated that she never told JAS's representative or anyone connected with JAS not to show up to closing. (Appendix, A-19).

With regard to providing coverage, Chicago Title did not care one way or the other whether Mrs. Naji joined in the agreement. (Appendix, A-17). Chicago Title would just alter the policy language if Mrs. Naji did not join in the contract and her marital interest would be listed on the title insurance policy as an exception to coverage. (Appendix A-17-18).

Ms. Vestal further testified that if the buyer JAS Apartments made no objection to Item 15 referred in Schedule B of the Title Commitment at or before closing and then proceeded to close, JAS would be purchasing the property subject to Item 15 set out in Schedule B of the Title Commitment. (App. to Appellant's Sub. Brief, p. A137). And, Chicago Title would have issued a policy showing an exception for the marital interest of Mrs. Naji. (App. to Appellant's Sub. Brief, p. A137). Assuming again that Mr. Naji

agreed to sell his interest in the property and JAS agreed to purchase Mr. Naji's interest in the property and there was no objection to Item 15 at closing and the transaction went ahead and closed and Mrs. Naji did not join in the agreement, Ms. Vestal confirmed that Chicago Title would have issued a title policy listing Mrs. Naji's interest as an exception to coverage. (App. to Appellant's Sub. Brief, p. A138).

The deference extended to the trier of fact is not limited to credibility of witnesses, but also the trial court's conclusions and all facts deemed to have been found in accordance with the result reached by the court. *Webster v. Jenkins*, 779 S.W.2d 340, 342 (Mo. App. W.D. 1989).

The court of appeals' primary concern is the correctness of the trial court's judgment not the route it took to get to that result and, therefore, the judgment will be affirmed if it is supported by any reasonable theory even if different from that expressed by the trial court. *O'Dell v. Mefford*, 211 S.W.3d 136, 138 (Mo. App. W.D. 2007).

As long as the record contains credible evidence upon which the trial court could have formulated its beliefs, the appellate court will not substitute its judgment for that of the trial court. *Patton v. Patton*, 973 S.W.2d 139, 146 (Mo. App. W.D. 1998). The court also presumes that the trial court believed the testimony and evidence consistent with the judgment. *Id.*

"Substantial evidence" is competent evidence from which the trier of fact could reasonably decide the case. *Leaverton v. Lasica*, 101 S.W.3d 908 (Mo. App. S.D. 2003). In assessing if there is substantial evidence, the reviewing court must defer to the trial

court on factual issues and cannot substitute its judgment for that of the trial judge. *Chapman v. Lavy*, 20 S.W.3d 610 (Mo. App. E.D. 2000).

There can be no doubt that the judgment entered by Judge Schieber is supported by substantial evidence.

### **3. The Judgment Is Not Against The Weight Of The Evidence.**

JAS argues that “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 of 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.” (Substitute Brief of Appellant, pp. 31-32). In support of this argument, JAS spends page after page detailing certain evidence and testimony presented at trial, albeit in the light most favorable to its position and disregarding any evidence that supports Judge Schieber’s judgment. Clearly, JAS impermissibly invites this Court to reweigh the evidence and substitute its judgment for that of Judge Schieber.<sup>6</sup>

By focusing on evidence and testimony unfavorable to the Judge Schieber’s findings, JAS ignores the well-established law that the appellate court is obligated to view evidence and inferences therefrom in the light most favorable to the trial court’s

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<sup>6</sup> The appellate court cannot reweigh the evidence or to substitute its fact findings for those of the trial court. *Walker v. First Home Savings Bank*, 274 S.W.3d 609, 611 (Mo. App. S.D. 2009).

judgment. *See Patton v. Patton*, 973 S.W.2d 139, 145 (Mo. App. W.D. 1998). The appellate court does not pass on the credibility of witnesses at trial and, thus, arguments by the appellant as to “who presented the most credible testimony are inappropriate and ineffective.” *Id.* The trial court is in the best position to judge the credibility of the witness before it and those elusive, intangible factors not readily discernable in the record, such as the character and sincerity of those witnesses. *Id.*

In addition, as the trier of fact, it is the function and duty of the trial court to assess the weight and value of the testimony of each witness. *Legacy Homes Partnership v. General Elec. Capital Corp.*, 50 S.W.3d 346, 356 (Mo. App. E.D. 2001).

With regard to the weight of the evidence, the appellate court does not reweigh the evidence but determines if there is sufficient evidence to support the findings after considering the evidence in the light most favorable to the party prevailing below, giving that party the benefit of all reasonable inferences and disregarding the other party’s evidence except as it may support the judgment. *Neal v. Sparks*, 773 S.W.2d 481, 486 (Mo. App. W.D. 1989).

An appellate court is admonished to exercise the power to set aside a judgment on the ground that it is against the weight of the evidence with caution and with the firm belief that the judgment is wrong. *Mullenix-St. Charles Properties, L.P. v. City of St. Charles*, 983 S.W.2d 550, 555 (Mo. App. E.D. 1998). The appellate court does not review *de novo* or reweigh the evidence. *Id.* Rather, the court accepts the evidence and inference is favorable to the prevailing party and disregards all contrary evidence. *Id.*

Furthermore, the appellate court “defers to the trial court as the finder of fact in determinations as to whether there is substantial evidence to support the judgment and whether that judgment is against the weight of the evidence, even where those facts are derived from pleadings, stipulations, exhibits and depositions.” *Business Men's Assur. Co. of America v. Graham*, 984 S.W.2d 501, 506 (Mo. banc 1999).

The Court’s attention is also directed to the fact that there is no basis for an argument that the trial court erroneously declared or misapplied the law. The scope of the issue for determination on appeal is framed by the point relied on. *Rea v. Moore*, 74 S.W.3d 795, 799 (Mo. App. S.D. 2002). Boiled down to its basics, JAS’s point relied on states, “The Trial Court Erred ... In Holding That The Title Commitment Item 15 Was An Exception ... In That Evidence At Trial Established Only That Item 15 Could Be Converted Into An Exception ... .” Thus, any contention by JAS in the argument portion of its brief that Judge Schieber somehow erroneously declared or applied the law falls outside the scope of the point relied on.

The arguments asserted in support of this point have already been addressed by the Najis and evidence that JAS’s relies upon to support its position that Judge Schieber erred in entering judgment in favor other Najis has been discussed. To rehash the arguments and evidence would serve no purpose at this juncture.

Based on the evidence presented at trial, there clearly is substantial evidence in the record to support Judge Schieber’s decision and such findings are not against the weight of the evidence, nor has Judge Schieber erroneously applied or declared the law. For

these reasons, Judge Schieber's judgment finding Item 15 to be an "exception" should be affirmed.

**D. Mr. Naji Did Not Anticipatorily Repudiate the Contract.**

Judge Schieber's ruling that "Mrs. Naji's joining in the agreement was not a requirement imposed by Chicago Title for issuance of a title insurance policy. It was an exception to coverage and, therefore, Mr. Naji did not anticipatorily repudiate the contract" is supported by the evidence, is not against the weight of the evidence, and is not an erroneous declaration or application of the law.

Also, JAS once again advances the argument presented at trial that:

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 repudiated the Contract.

(Substitute Brief of Appellant, p. 40).

Judge Schieber considered these very same assertions and dismissed them outright stating:

JAS Apartments contends that if the Court finds that Item 15 is a requirement, then the Court must find that Mr. Naji anticipatorily repudiated the real estate sale contract by informing its representatives before closing that his wife would not sign the real estate contract, thus

excusing JAS Apartments' obligation to tender performance and close the purchase. This argument misses the mark.

As pointed out previously, the court of appeals has already ruled as a matter of law that, "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.* at 361.

Moreover, in response to JAS Apartments' contention at trial that Mr. Naji was required to convey and then insure "fee simple marketable title," we must again look to the court of appeals opinion. According to the appellate court, "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.* "In other words, JAS Apartments was willing to take what title Naji had, provided it had the opportunity to raise objections." *Id.* Therefore, unless and until a written objection was made by JAS Apartments to Item 15, there was no requirement under the terms of the real estate sale contract on the part of Mr. Naji to provide it with "fee simple marketable title."

(L.F. 214).

In other words, according to the court's very specific rulings in Naji I, Mr. Naji cannot be found to have anticipatorily repudiated the contract for his failure to obtain Mrs. Naji's signature:

- 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.” *JAS, Inc.*, 230 S.W.3d at 357.
- 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 Apartments did not object to in writing within 10 days after receiving the title insurance commitment. Id.* (emphasis added).
- Naji was the only person to sign the contract to sell the property to JAS Apartments. *Id.*
- “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 conveyances of separate property of a spouse without the other spouse joining.’” *Id.* at 361.
- “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.*
- “In other words, JAS Apartments was willing to take what title Naji had, provided it had the opportunity to raise objections.” *Id.*

- JAS Apartments never made a written objection as required by the real estate contract concerning the issue of Naji's wife joining in the sale agreement. *Id.* at 358.
- "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.* at 361.

In light of the prior rulings set forth in Naji I and Judge Schieber's finding that Item 15 was an exception to coverage, there is no merit to JAS's claim that Mr. Naji anticipatorily breached the real estate sale contract.

**E. Should This Court Reverse, JAS's Claims For Specific Performance, Declaratory Judgment, Attorneys Fees and Costs Must Be Remanded To The Trial Court.**

Assuming for argument purposes only that the trial court's judgment is reversed, this case must once again be remanded to the trial court for determination of the remaining issues.

It is a fundamental rule that contentions not put before the trial court will not be considered on appeal. *Matter of Conservatorship Estate of Moehlenpah*, 763 S.W.2d 249, 256 (Mo. App. E.D. 1988). "Furthermore, as an appellate court, we deem it the better course of action to refrain from non-essential decision of a question that is properly addressable to the trial court in the first instance." *Tryon v. Case*, 416 S.W.2d 252, 259 (Mo. App. 1967). An appellate court's decision should be limited to those questions

essential to proper disposition of the appeal. *Community Title Co. v. Roosevelt Federal Sav. & Loan Ass'n*, 670 S.W.2d 895, 899 (Mo. App. E.D. 1984).

In addition, “specific performance of a realty purchase contract is not a matter of strict right, but rests in the trial court's discretion.” *Best v. Culhane*, 677 S.W.2d 390, 394 (Mo. App. E.D. 1984). “It has frequently been said that the equitable relief of specific performance does not issue as a matter of course, but only as a matter of grace, and that the grant of this relief rests in the sound discretion of the court in light of the conduct of the party seeking relief.” *Id.*

Moreover, Judge Messina refused to consider JAS Apartments’ action for declaratory judgment because she concluded that the issue of Mrs. Naji’s marital interest was not ripe for adjudication until after completion of the conveyance and after either her husband had predeceased her or the couple divorced. 230 S.W.3d at 359. And, as mentioned previously, the issue of Mrs. Naji’s marital interest did not arise in the second trial nor has such been briefed on appeal.

For the Court to rule as a matter of law at this stage of the proceedings would deprive Mrs. Naji of her right to fully present evidence to a finder of fact who is in a position to observe the demeanor and assess the credibility of the witnesses, and weigh the evidence presented, before extinguishing her interest in The Newbern.

Simply put, the Court should decline JAS’s invitation to assume the role of the trial court. Should the judgment be reversed, unfortunately this case must once again be remanded to the trial court for determination the remaining claims.

One final matter before leaving this point, JAS Apartments has omitted its request for specific performance contending that such relief “may no longer be the appropriate remedy.” Rule 83.07(b) states that “the substitute brief shall not altar the basis of any claim raised in the court of appeals.”

**II. The Trial Court’s Award of Attorney’s Fees, Costs And Expenses Was Not An Abuse Of The Court’s Discretion Because The Real Estate Contract Specifically Provides For Payment Of Such Amounts By The Defaulting Party To The Party Seeking To Enforce Contract Terms And, In This Case, JAS Was Found To Be A Defaulting Party And Mr. Naji Sought To Enforce The Contract’s Terms.**

**A. Standard of Review.**

The granting or refusal to grant attorney's fees is reviewable in the appellate court for an abuse of discretion. *Scott v. Blue Springs Ford Sales, Inc.*, 215 S.W.3d 145, 170 (Mo.App. W.D.2006). “The trial court abuses discretion if its order is clearly against the logic of the circumstances, is arbitrary and unreasonable, and indicates a lack of careful consideration.” *State ex rel. Ford Motor Co. v. Messina*, 71 S.W.3d 602, 607 (Mo. banc 2002). A trial court's award of attorney’s fees is presumed correct, and the appellant bears the burden to overcome this presumption. *Scott*, 215 S.W.3d at 170.

**B. The Trial Court’s Granting Of Attorney’s Fees Is Not Clearly Against the Logic of the Circumstances, Arbitrary And Unreasonable, Nor Does Such Ruling Indicate A Lack Of Careful Consideration.**

Paragraph 16 of the real estate sale contract provides:

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.

(Appendix, p. A16).

### **1. JAS Was The “Defaulting Party.”**

JAS asserts that the trial court made no finding that JAS defaulted under the real estate sale contract. This claim is untrue in light of the fact that Judge Schieber granted the Najis’ motion to amend the judgment to award fees, court costs and other expenses. All fact issues upon which no specific findings were made by the trial court shall be considered as having been found in accordance with the result reached. *Nail Boutique, Inc. v. Church*, 758 S.W.2d 206, 208 (Mo.App. S.D. 1988).

In addition, JAS’s reliance on *Turner v. Shalberg*, 70 S.W.3d 653, 660 (Mo.App. S.D. 2002) is also misplaced. We are unable to locate that part of the opinion in *Turner* where the appellate court held that “an explicit finding” of a default is required to trigger the opposing party’s entitlement to fees, costs and expenses under the contract.

Furthermore, Judge Schieber ruled that Mr. Naji did not anticipatorily repudiate the real estate sale contract. Thus, JAS’s failure to perform its contractual duties was not excused thereby making JAS the “defaulting party.” And because Mr. Naji did not breach

the real estate sale contract, he is the “nondefaulting party” entitled to be reimbursed “for all reasonable attorney’s fees, court costs and legal expenses.”

Finally, JAS’s assertion that a default did not occur “because no written contract remained at the time of closing” is spurious. The court in *Naji I* specifically held, “The contract remained in force and, the parties were obligated to perform their duties under it.” *JAS Apartments, Inc.*, 230 S.W.3d at 358. The appellate court also ruled that JAS failed to perform in accordance with the contract when it “never made a written objection concerning the issue of Naji’s wife joining in the sales agreement” while at the same time refusing to proceed with the transaction, choosing instead to file this lawsuit. *Id.* Further findings in *Naji I* included that “JAS Apartments’ obligation to perform” would be excused if “Naji anticipatorily repudiated the contract.” *Id.* at 362.

**2. Because Suit Was Brought to Enforce Rights Under the Contract, Mr. Naji Is Entitled to Recover his Attorney’s Fees, Costs and Expenses.**

JAS also contends that since Mr. Naji never sought to enforce rights under the contract, the Najis cannot recover attorney’s fees. In *Fleetwood/Edwards Chevrolet, Inc. v. Fleetwood Chevrolet*, 9 S.W.3d 62 (Mo.App. W.D. 2000), the court of appeals rejected this same argument in the context of facts and contract language analogous to those in the present case.

The dispute in *Fleetwood* arose from a contract to sell an automobile dealership, Fleetwood Chevrolet Company. As was the case here with regard to the sale of The Newbern apartment building, “[t]he sale of the dealership’s assets never came to

fruition.” *Id.* The purchaser filed suit asserting breach of contract and other claims. The seller responded with multiple counterclaims.

After dismissal of the purchasers’ claims, the court in the *Fleetwood* case sustained the sellers’ motion for partial summary judgment declaring them to be the prevailing parties entitled to attorney’s fees. *Id.* at 65. The court entered judgment for \$210,000.00, the full amount of attorney’s fees sought by the purchasers. *Id.* An appeal from the judgment was filed by a purchaser.

Among the issues raised on appeal, the purchaser contended that the attorney’s fees clause was “inapplicable by its language.” *Id.* at 66. The provision at issue in *Fleetwood* stated:

In the event either party shall employ an attorney for enforcement of all of this agreement or any provision hereof, then in such event the prevailing parties shall be entitled to recover all costs incurred, including reasonable attorneys’ fees.

*Id.* at 67.

Disagreeing with the purchaser’s contention, the appellate court concluded that the facts in the case before it fit squarely within such language. *Id.* According to Judge Lowenstein:

“Either party” employed an attorney “for enforcement” of the contract. Here the party seeking enforcement was the [purchaser] Appellant and the Plaintiffs below. However, that does not take away Respondents’ [sellers’] right to fees. The language does not read that only a party seeking

enforcement who *then wins* is entitled to their fees. The language reads that when either party brings suit to enforce the agreement, the prevailing party, no matter if they were the party bringing suit or not, is entitled to their fees.

*Id.* (emphasis by the court).

The court in *Fleetwood* held that because the appellant brought suit to enforce the Sales Agreement and the sellers prevailed, the sellers were entitled to their attorney's fees. *Id.*

*Fleetwood* is directly on point in the present case. Returning once again to the real estate sale contract, the provision at issue states:

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.

Here, as in *Fleetwood*, the "Buyer" employed an attorney "to enforce its rights" under the contract. Applying the holding in *Fleetwood* to the facts in this case, although JAS was the party seeking to enforce its rights, "that does not take away [Mr. Naji's] right to fees [because] [t]he language does not read that only a party seeking enforcement who *then wins* is entitled to their fees." Thus, the real estate sale contract provision at issue must be read as providing that if as the result of a "default," *i.e.*, non-performance of a contractual duty, either the seller or buyer brings suit to enforce its rights, the

nondefaulting party is entitled to be reimbursed for fees, costs and expenses, whether or not they were the party that filed the suit.

JAS has failed to provide the Court with any authority that directly supports its position that the “fees, costs, and expenses” provision does not apply. On the other hand, the court’s decision in *Fleetwood* provides clear precedent to affirm Judge Schieber’s ruling amending the judgment to grant attorney’s fees, court costs and other legal expenses incurred to the Najis.

**III. The Trial Court’s Award of Attorney’s Fees, Costs And Expenses In The Amount Of \$299,507.92 Was Not An Abuse Of The Court’s Discretion Because Such Amount was “Reasonable” In That Judgment Was Entered In This Case In Favor of The Najis.**

**A. Standard of Review.**

The trial court is considered an expert on attorney’s fees, including fees for services on appeal, and the court has discretion in determining the fee award. *Klinkerfuss v. Cronin*, 289 S.W.3d 607, 613 (Mo.App. E.D.2009). The court of appeals “shall reverse the trial court’s award only where we find an abuse of discretion.” *Id.* “A court abuses its discretion when it awards an amount so arbitrarily arrived at, or so unreasonable, as to indicate indifference and a lack of proper consideration.” *Id.* The complaining party must shoulder the burden of establishing that the trial court abuses such discretion. *Id.*

**B. Trial Court’s Award Of Attorney’s Fees Was Not Arbitrarily Arrived At Or So Unreasonable To Indicate Indifference And Lack Of Proper Consideration.**

**1. The Najis Ultimately Prevailed On All Issues.**

There is no question that the pivotal issue in this case was JAS’s breach of contract claim, and that resolution of all other issues raised by the parties was driven by the determination whether Mr. Naji anticipatorily breached the real estate sale contract.

At the conclusion of the first trial in 2005, Judge Messina ruled against JAS on its claim that Mr. Naji breached the real estate sale contract. However, because Judge Messina also found that the real estate sale contract had terminated, she held that JAS was not obligated to pay Mr. Naji’s attorney’s fees, court costs, and legal expenses.

Four years later, following an appeal and another bench trial, JAS has once again lost its claim for breach of contract. In addition, JAS *must now pay attorney’s fees, court costs, and legal expenses to Mr. Naji.* Therefore, JAS’s assertion that the Najis “prevailed on a fraction of the issues litigated” is an inaccurate description of the record.

**2. Cases Relied Upon By JAS For Apportionment Are Distinguishable.**

JAS has provided this Court with a laundry list of cases that allegedly support apportioning the fees incurred by Mr. Naji.<sup>7</sup> However, each case is factually

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<sup>7</sup>As pointed out previously, the Najis object to and do not agree with JAS’s assessment, “The Najis prevailed on only one of the nine issues considered by this Court.”

distinguishable on its face because apportionment was applied to issues affirmatively plead by the *plaintiff*, as opposed to a defendant which has no choice other than to defend claims that have been asserted against it. *See Hoag v. McBride & Son Inv., Co., Inc.*, 967 S.W.2d 157 (Mo.App. E.D. 1998) (plaintiffs prevailed on their claim asserting creation of a covenant but were unsuccessful on their remaining five claims); *Kaplan v. U.S. Bank, N.A.*, 166 S.W.3d 60 (Mo.App. E.D. 2003) (plaintiff prevailed on some but not all counts in a multiple count petition); *Brewer v. Trimble*, 926 S.W.2d 686 (Mo.App. S.D. 1996)(award of attorney fees made to plaintiff in civil rights action was reduced by one-half because the plaintiff was successful against only one of two defendants); *Chesterfield Financial Corp. v. North County General Surgery, Inc.*, 917 S.W.2d 603 (Mo.App. E.D. 1996) (plaintiff is not entitled to additional fees on appeal having lost more than half of the judgment it recovered in the trial court); *Miller v. Gammon & Sons, Inc.* 67 S.W.3d 613 (Mo.App. W.D. 2001) (although the plaintiffs were successful in their attempt to enforce the rent provisions of the lease, they could not recover attorney's fees with respect to their seeking costs associated with the repairs to the parking lot since they were not the prevailing party on this issue).

*Wooten v. DeMean*, 788 S.W.2d 522 (Mo.App. S.D. 1990), is also distinguishable in that the plaintiff in that case did not prevail on his claim but successfully defended the defendants' counterclaim. *Id.* at 529. In the present case, the Najjis have prevailed on both JAS's claim for breach of contract and the counterclaim for fees, costs, and expenses pursuant to the real estate sale contract.

**C. There Is Competent Evidence To Support The Award And The Amount Awarded Was Reasonable. Furthermore, This Argument Is Not Raised In The Point Relied On.**

JAS does not assert error in its “point relied on” because the award “lacks a competent evidentiary base.” Review is limited to the issues presented in the “points relied on” and they alone need be and are considered by the appellate court. *Smith v. Welch*, 611 S.W.2d 398, 399 (Mo.App. S.D. 1981).

Should the Court choose to review the argument presented in this point, the following discussion is provided in response to JAS’s assertions.

Contrary to JAS’s claims, proof of attorney’s fees incurred by Mr. Naji was sufficient because the billings submitted to the trial court and included in the court’s file were not redacted. (TLF 887; L.F. 150). Therefore, there was in fact competent evidence presented from which Judge Schieber could determine the amount to be awarded.

As to the question of reasonableness of the award, the Court’s attention is directed once again to *Fleetwood/Edwards Chevrolet, Inc. v. Fleetwood Chevrolet*, 9 S.W.3d 62 (Mo.App. W.D. 2000).

In his final point on appeal, the purchaser in *Fleetwood* contended that the attorney’s fee award of \$210,000.00, the entire amount requested by the seller, was unreasonable. This Court rejected the argument noting that the setting of attorney’s fees is within the sound discretion of the trial court. *Id.* at 67. “Although the amount of the fee award is large, the judge deciding the point is presumed to know the value of the legal

services, so here, there is no room for a determination that the trial court erred on this award.” *Id.* at 68.

The facts and issues in *Fleetwood* are virtually the same as those in the present case with one glaring exception – in this case, Mr. Naji was also forced to incur the expenses of an appeal and additional trial. In light of the \$210,000.00 award in *Fleetwood*, an award of \$299,507.92 in the present case is more than reasonable.

Generally, a trial judge is considered an expert on the reasonableness of attorney’s fees, and his or her decision on whether to award fees will not be disturbed unless an abuse of discretion has been found. *Evans v. Werle*, 31 S.W.3d 489, 493 (Mo.App. W.D. 2000). Since the Najis were the successful parties and JAS has not shown that Judge Schieber has abused his discretion in awarding \$299,507.92, the award should be affirmed.

**IV. The Trial Court Did Not Err In Granting The Najis’ Motion To Amend The Judgment To Award Prejudgment Interest Under §408.020, RSMo 2000 Because It Is Undisputed That On September 19, 2005, Mr. Naji Made A Demand For Payment Of A Liquidated Claim For Attorneys Fees, Costs and Expenses. However, The Amount Awarded Must Be Reduced.**

**A. Standard of Review**

The determination of the right to prejudgment interest pursuant to §408.020, RSMo 2000 is reviewed *de novo* because it is primarily a question of statutory

interpretation and its application to undisputed facts. *See Children Intern. v. Ammon Painting Co.*, 215 S.W.3d 194, 202 (Mo.App. W.D. 2006).

**B. The Trial Court’s Award Should Be Affirmed Because Statutory Prejudgment Interest Is Allowed From the Time Of Demand For Payment of A Liquidated Claim.**

“ ‘Interest’ is the measure of damages for failure to pay money when payment is due even though the obligor refuses payment because the obligor questions legal liability for all or portions of the claim.” *J.R. Waymire Co. v. Antares Corp.*, 975 S.W.2d 243, 248 (Mo.App. W.D.1998). When parties have not previously agreed on a specific interest rate, § 408.020 applies. *Id.*

Section 408.020 directs that “[c]reditors shall be allowed to receive interest at the rate of nine percent per annum, when no other rate is agreed upon, for all moneys after they become due and payable, on written contracts, and on accounts after they become due and demand of payment is made.”

The purpose of statutory prejudgment interest is to promote settlement of lawsuits and fully compensate parties by accounting for the time-value of money. *Children Intern.*, 215 S.W.3d at 203. The courts are allowed to consider equitable principles of fairness and justice when awarding prejudgment interest. *Id.*

Prejudgment interest will be awarded when a claim is liquidated. *Midwest Division-OPRMC, LLC v. Department of Social Services, Div. of Medical Services*, 241 S.W.3d 371, 384 (Mo.App. W.D. 2007). A claim is liquidated when the amount is “ ‘fixed and determined or readily ascertainable by computation or a recognized standard.’

” *Id.* Moreover, interest will be allowed from the time of demand. *Chouteau Auto Mart, Inc. v. First Bank of Mo.*, 148 S.W.3d 17, 27 (Mo.App. W.D. 2004).

In the instant case, JAS clearly questions whether fees, costs, and expenses are recoverable by the Najis under the terms of the real estate sale contract. However, JAS has never disputed that on September 19, 2005, Mr. Naji made a demand pursuant to the terms of such contract for payment of \$150,058.50 in fees, costs, and expenses he incurred in connection with the first trial. Nor has JAS ever challenged Mr. Naji’s claim for payment of \$150,058.50 in fees, costs, and expenses as being unliquidated or incapable of being determined.

Where the damages involved are liquidated, “[a]wards of prejudgment interest are not discretionary; if the statute applies, the court must award prejudgment interest.” *Children Intern.*, 215 S.W.3d at 203.

Therefore, as a matter of law, the trial court properly awarded Mr. Naji prejudgment interest under § 408.020 at the statutory rate of nine percent per annum commencing September 19, 2005, through the date of the Judgment, April 17, 2009.

### **C. JAS’s Arguments Are Unpersuasive.**

In response to the request for prejudgment interest pursuant to §408.020 JAS argues: (1) Mr. Naji is not entitled to an award of attorneys fees under the terms of the real estate sale contract and (2) the billings submitted to the trial court were redacted and, thus, failed to provide the requisite support for such an award. As discussed at length in the two points immediately preceding this point, there is no merit to either argument.

JAS further contends that attorney's fees have never become "due and payable" as provided for in §408.020. Apparently, it is JAS's contention that since Judge Messina found that the contract had terminated and because this Court remanded the case to the trial court for further proceedings, recovery of prejudgment interest is precluded. This argument also fails.

The court in *Naji I* determined that Judge Messina erred in finding that the real estate sale contract terminated. *JAS Apartments, Inc. v. Naji*, 230 S.W.3d 354, 369 (Mo.App. W.D. 2007). With regard to recovery of attorney fees, the court also found that because the contract did not terminate by its own terms, the circuit court also erred in not considering an award of attorney fees to the parties." *Id.* at 363 "Upon remand, in resolving the issues in this case, [the trial court] shall consider ordering attorney fees in accord with this provision. *Id.* at 363-364.

On remand, the trial court determined that (1) Mr. Naji did not breach the real estate sale contract and that (2) Mr. Naji was entitled to recover from JAS under the terms of the real estate sale contract the entire amount of fees, costs, and expenses he expended. Clearly, upon Mr. Naji's demand after the first trial on September 19, 2005, for payment of liquidated damages, i.e., fees, costs, and expenses totaling \$150,058.50 expended to date, such amount became "due and payable." Neither Judge Messina's ruling nor the fact that this case was remanded to the trial court preclude the recovery of prejudgment interest

**D. The Trial Court's Award Of Statutory Prejudgment Interest  
Must Be Reduced To A Sum Equal To Nine Percent Per Annum**

**On \$150,058.50 Commencing September 19, 2005, Through  
April 17, 2009, Or \$48,285.00.**

The Najis agree with JAS Apartments that amount of prejudgment interest awarded by the trial court in this case is excessive. Section 408.020 mandates that the Najis are entitled to recover nine percent per annum interest on \$150,058.50, not \$150,058.50.

When the error is a matter of mathematical calculation only, the appellate court can amend the judgment accordingly. *State ex rel. City of Desloge v. St. Francois County*, 245 S.W.3d 855, 862 (Mo.App. E.D. 2007). In the *State ex rel. City of Desloge* case, the court of appeals recalculated the proper amount of prejudgment interest and entered judgment accordingly.

The following formula was used by the appellate court in *State ex rel. City of Desloge* to calculate the correct amount of prejudgment interest: “We take the amount the trial court determined was due ..., determine the annual interest (amount due times .09), determine the daily interest (annual interest divided by 365), and calculate the interest ...(daily interest times the number of days ...)” *Id.* at 363. Applying this same formula to the facts in the present case, the amount of prejudgment interest allowed pursuant to §408.020 is calculated as equaling \$150,058.50 times .09 [\$13,505.27] divided by 365 [\$37.00] times 1305 days, or \$48,285.00.

Therefore, the trial court’s judgment should be modified to award \$48,285.00 in prejudgment interest to the Najis.

**CONCLUSION**

For the foregoing reasons, respondents Ali and Hala K. Naji request that the trial court's judgment be affirmed as modified, i.e., the award of prejudgment interest be reduced to \$48,285.00, and for such further relief as this Court deems proper.

Respectfully submitted,

MANZ SWANSON & MULHERN, P.C.

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**CERTIFICATE OF SERVICE**

I hereby certify that two copies of the foregoing brief, along with a floppy disk containing the brief, were mailed on this 16<sup>th</sup> day of June, 2011, to:

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**CERTIFICATE OF COMPLIANCE WITH RULE 84.06(c)**

The undersigned hereby certifies, pursuant to Rule 84.06(c), that:

1. This certificate includes below the information required by Rule 55.03, including the undersigned's addresses, Missouri Bar numbers, telephone numbers, facsimile numbers, and electronic mail addresses.
2. This brief complies with the limitations contained in Rule 84.06(b).
3. This brief contains 13,549 words, according to the word-processing system used to prepare the brief.
4. Microsoft Word 2003 was used to prepare this Substitute Brief of Respondents.
5. The floppy disk provided with this brief has been scanned for viruses and is virus free.

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**APPENDIX**

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