In the Missouri Court of Appeals
Eastern District

DIVISION TWO

MISSISSIPPI VALLEY EQUIPMENT COMPANY, Respondent, vs. DAVID KILLIAN, d/b/a ELITE SEAWALL & EXCAVATING, LLC, Appellant.	)	No. ED113156 Appeal from the Circuit Court of St. Louis County Cause No. 21SL-CC03110 Honorable David L. Vincent III FILED: October 21, 2025

Introduction

David Killian (Killian) appeals the trial court's judgment which found Killian personally liable for Mississippi Valley Equipment Company's (MVE) claim for breach of contract. Killian argues in three points on appeal that the trial court erred in entering judgment in favor of MVE because (1) there was insufficient evidence MVE entered into any contracts with Killian in his individual capacity; (2) there was insufficient evidence Killian signed or otherwise assented to two of the three contracts at issue; and (3) the trial court erred in awarding MVE attorney's fees because MVE failed to present any evidence regarding the amount of time its attorneys worked on the case. We affirm.

As a preliminary matter, both parties have pending motions in this appeal. MVE has moved to strike Killian's Exhibit B because it was not admitted into evidence at trial. Appellate courts

only consider evidence which has been properly admitted, and ignore evidence which was not. *Powell v. State Farm Mut. Auto. Ins. Co.*, 173 S.W.3d 685, 689 (Mo. App. W.D. 2005). We grant MVE's motion to strike Exhibit B.

Killian, in his reply brief, moved to strike MVE's brief for Rule 84.04[1] violations. While his complaints are well taken, it is our preference to decide matters on the merits, and we can exercise our discretion to review a deficient brief *ex gratia* when those deficiencies do not impede review. *Deere v. Deere*, 627 S.W.3d 604, 609 (Mo. App. W.D. 2021). Although MVE's brief is deficient, it is not to such a degree that it impedes our review. We deny Killian's motion to strike MVE's brief.

Factual and Procedural Background

Killian is a Michigan resident in the business of performing work on boat lifts, boat covers, and seawalls. In January of 2020, Killian contacted MVE, a Missouri company, to inquire about renting equipment for his work. Killian submitted a commercial credit application, on which he listed only "Elite" as the company name, provided a street address, an email address at The Nautical Needle, marked his "Type of Business" as "Proprietorship," and listed himself under the "Corporate Officers" section with the title of "Owner." Killian signed the credit application as owner. Based on the address provided, MVE found the company to which it was registered and affixed a note at the bottom of the application which read "Elite Lifts & Automated Covers LLC." The note continued, "Co. too new – No Info Holland, MI No Info on report."

After discussing Killian's needs, MVE prepared a rental agreement (V-2 lease) for a piece of equipment, a V-2. On January 29, 2020, MVE emailed a quote and rental purchase option to the email address Killian provided with instructions to sign and return. Killian's mother replied

[1] All rule references are to the Missouri Supreme Court Rules (2025).

and clarified The Nautical Needle was her company, but that she did the paperwork for her son. The V-2 lease was signed that day. The V-2 lease was addressed to "Elite" at the attention of Killian, and named "The Nautical Needle" as the lessee. At the bottom, the V-2 lease listed "Elite" as lessee, with Killian's signature on the "Authorized Signature" line.

Killian testified that after having difficulties getting the V-2 to work, MVE sent a technician to install a rotary unit on the V-2, called a V-2 ESC. MVE prepared a second rental agreement (V-2ESC lease), which was now addressed to "Elite Seawall and Excavating" and to the attention of Killian. The first paragraph listed "Elite Seawall and Excavating" as the lessee, however, contained "Elite" at the bottom as lessee. Killian's electronic signature was affixed as the "Authorized Signature," and it was dated June 2, 2020.

Killian accepted the equipment and used it, but after continuing difficulties with the V-2, MVE sent a new piece of equipment, a V-5. MVE prepared a third rental agreement (V-5 lease), which was again addressed to "Elite Seawall and Excavating" and to the attention of Killian. The first paragraph of the lease contained "Elite Excavating and Seawall" as the lessee, while "Elite Excavating and Seawall" was listed as lessee at the bottom with Killian's electronic signature affixed as the "Authorized Signature," and dated June 24, 2020.

Although Killian was having success with the V-5, the parties began having billing disputes so MVE salesman Bob Clapsaddle traveled to Michigan in November of 2020 to disable the V-2. Killian also returned the V-5 at that point. MVE repossessed the V-2 in January of 2021.

MVE ultimately sued Killian for breach of contract, suit on account, and account stated. The case proceeded to bench trial on July 23, 2024. Killian's attorney objected to the proceeding on the basis that MVE had improperly brought claims against Killian personally, rather than his LLC. The trial court overruled the objection but allowed it as a continuing objection. MVE's

executive vice president, Kenneth Sifford and Clapsaddle testified for MVE as to the merits of the breach of contract claim. MVE's attorney testified about their legal fees, explaining her firm charges thirty percent of what it collects, and that it had already incurred about $20,000 of collection agency debt, bringing the total cost for attorney's fees and collection costs to $55,190.74. Killian testified as his case-in-chief. The trial court entered judgment the following day in favor of MVE on the breach of contract claim and dismissed the other two claims. The court ordered Killian to pay the principal balance of $106,386.20, interest amounting to $60,858.46, attorney's fees and collection costs of $55,190.74, totaling $222,435.40, plus court costs. Killian filed his motion to vacate, amend, or modify judgment or for a new trial, which the trial court denied. This appeal follows.

Standard of Review

We will affirm the trial court's judgment "unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law." *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). "Substantial evidence is that which, if true, has probative force upon the issues, and from which the trier of fact can reasonably decide the case." *Houston v. Crider*, 317 S.W.3d 178, 186 (Mo. App. S.D. 2010). We view the evidence and reasonable inferences drawn therefrom "in the light most favorable to the judgment, disregard all evidence and inferences contrary to the judgment, and defer to the trial court's superior position to make credibility determinations." *Id.* The trial court "is free to believe or disbelieve all, part, or none of the testimony of any witness." *Id.*

Discussion

A claim of breach of contract requires four essential elements: "(1) the existence and terms of a contract; (2) that plaintiff performed or tendered performance pursuant to the contract; (3)

breach of the contract by the defendant; and (4) damages suffered by the plaintiff." *Bell v. Shelter Gen. Ins. Co.*, 701 S.W.3d 614, 618 (Mo. banc 2024). The primary issue here is whether a contract existed between Killian and MVE. A contract exists if there is an "offer, acceptance, and bargained for consideration." *EM Med., LLC v. Stimwave LLC*, 626 S.W.3d 899, 907 (Mo. App. E.D. 2021) (internal quotation omitted).

Point I – Personal Liability[2]

In Point I, Killian argues MVE did not present evidence to support a breach of contract claim because MVE failed to present any evidence it had entered into any contracts with Killian in his individual capacity. We disagree because Killian failed to meet his burden to demonstrate the trial court's judgment is incorrect.

The trial court's judgment is presumed valid and it is Killian's burden to demonstrate its incorrectness. *Houston*, 317 S.W.3d at 186. "[A]ny citation to or reliance upon evidence and inferences contrary to the judgment is irrelevant and immaterial to an appellant's point and argument challenging a factual proposition necessary to sustain the judgment as being not supported by substantial evidence." *Id*. Accordingly, "[s]uch contrary facts and inferences provide no assistance to this Court in determining whether the evidence and inferences favorable to the challenged proposition have probative force upon it, and are, therefore, evidence from which the trier of fact can reasonably decide that the proposition is true." *Id.*

An appellant challenging the trial court's judgment as not supported by substantial evidence must complete three steps:

[2] Killian included in this point a challenge to the trial court's reliance on section 417.200, which criminally penalizes the use of fictitious names while conducting business, in finding him personally liable. MVE agreed at oral argument that section 417.200 was irrelevant. Because we will affirm a judgment based on any ground supported by the record, we will not further address this argument. *See Welcome v. Welcome*, 497 S.W.3d 842, 845 (Mo. App. W.D. 2016).

> (1) identify a challenged factual proposition, the existence of which is necessary to sustain the judgment;
> (2) identify all of the favorable evidence in the record supporting the existence of that proposition; and,
> (3) demonstrate why that favorable evidence, when considered along with the reasonable inferences drawn from that evidence, does not have probative force upon the proposition such that the trier of fact could not reasonably decide the existence of the proposition.

Id. at 187.

Killian challenges the proposition that a contract existed between himself and MVE as not supported by substantial evidence. The identification of this proposition satisfies the first step of the challenge. However, Killian fails at the second step and "doom[s] [his] ability to satisfy the last step of [the] challenge." *Id.* at 188. Killian did not identify any facts favorable to the trial court's finding he contracted as an individual. Rather, Killian's argument rests on the assumption that he was doing business as an agent of Elite Lifts & Automated Covers, LLC.

There is ample evidence favorable to the trial court's judgment. Killian listed on the credit application the company name as "Elite," and marked the company as a proprietorship. Elite Seawall and Excavating was the lessee in the V-2ESC lease, while Elite Excavating and Seawall was listed as lessee in the V-5 lease. Of the three Request for Job Information forms, two contained Elite as the billing name, while the third listed Elite Seawall and Excavating. In his response to MVE's petition, Killian admitted "Elite Seawall & Excavating, LLC, entered into the Commercial Credit Application." MVE's executive vice president testified Elite Lifts & Automated Covers, LLC, was not listed as MVE's customer. Furthermore, Clapsaddle testified as to the existence of a certificate of liability insurance made out to Killian and asserted MVE never had a contract specifically with Elite Lifts & Automated Covers, LLC. Killian testified "Elite" was shorthand for Elite Seawall and Excavation, which was not incorporated when he signed the contracts. Killian points to the lack of indication in the contracts of his intent to be personally bound, and to

the note at the bottom of the credit application, but these are facts contrary to the trial court's judgment which we must disregard. *See id.* at 186.

Killian's "exclusion of material favorable evidence renders [his] attempted demonstration analytically useless and provides no support for sustaining [his] challenge." *Id*. at 188. "To support a favorable decision for [Killian] on [these points] would require this Court to devise and articulate its own demonstration of how the omitted favorable evidence . . . is not substantial evidence[.]" *Id.* at 189. This would force us to advocate on Killian's behalf, "a role we are prohibited from assuming." *Id.* Point denied.

Point II – Signing or Assenting to the Contracts

In Point II, Killian alleges MVE failed to present any evidence Killian himself signed or otherwise assented to the V-2ESC and V-5 leases. We disagree because Killian again failed to meet his burden of showing the trial court's judgment is incorrect.

Like in his first point, Killian satisfies the first step of a challenge to a judgment as not supported by substantial evidence by identifying a challenged factual proposition—that he signed or assented to the V-2ESC and V-5 leases–the existence of which is necessary to sustain the judgment. However, Killian's second point similarly falls at the second step of the analysis by failing to identify all favorable evidence in the record supporting the existence of that proposition.

Even if Killian did not personally sign or assent to the contract, there is substantial evidence supporting the trial court's judgment in that even if Killian's mother did not have authority to enter into the leases, Killian ratified the agreements by accepting and using the equipment. "Ratification in the context of agency is the express or implied adoption or confirmation, with knowledge of all material matters, by one person of an act performed in his behalf by another who at that time

assumed to act as his agent but lacked the authority to do so." *Peoples Nat'l Bank, N.A., v. Fish*, 600 S.W.3d 273, 279 (Mo. App. E.D. 2020).

On the credit application, Killian listed as a point of contact his mother's email address at The Nautical Needle. Killian told Clapsaddle his mother works for The Nautical Needle but that she occasionally does work for him as well. Understandably, MVE sent paperwork to Killian's mother, who signed and returned the documents. Although Killian was having success with the V-2, MVE installed the V-2ESC after further discussions. However, after three weeks of use, Killian was unable to complete jobs with the combined equipment. Consequently, MVE recommended the V-5, with which Killian had better success. The evidence and inferences viewed in the light most favorable to the judgment show that Killian's mother, acting as his agent, signed the latter two contracts and Killian ratified his mother's actions by accepting and using the equipment. Killian claimed he did not sign the V-2ESC or V-5 leases and did not expect to be charged for the equipment, but the trial court was free to disbelieve that evidence, and our standard of review requires us to disregard it as contrary to the judgment. *Houston*, 317 S.W.3d at 188.

Killian's second point suffers the same fatal flaw as his first point in that his "exclusion of material favorable evidence renders [his] attempted demonstration analytically useless and provides no support for sustaining [his] challenge." *Id.* at 188. We cannot devise and articulate our own demonstration of how the omitted favorable evidence is not substantial, as doing so would force us to become Killian's advocate. *Id.* at 189. Point denied.

Point III – Attorney's Fees

Lastly, in Point III, Killian alleges the trial court erred in awarding MVE attorney's fees because MVE failed to present any evidence about the amount of time its attorneys worked on the

matter to support the award. We disagree because Killian agreed to pay all costs of collection, which included collection agency's and attorney's fees.

Although litigants are generally responsible for paying their own legal fees, "an exception exists when a contract between the litigating parties provides for payment of attorney's fees." *Martha's Hands, LLC v. Rothman*, 328 S.W.3d 474, 482 (Mo. App. E.D. 2010). "When a party requests attorney fees under a provision of a contract, the trial court must comply with the terms set forth in that contract." *Id.* at 483 (internal quotation omitted). Although the court has discretion in determining the amount to award in attorney's fees, "where a party is found to have breached the contract, the contractual provision for attorney fee requires the award of attorney fees." *Id.* (internal quotation omitted). "An award in some amount is required by the contract as a matter of law and is not a matter within the trial court's discretion." *Id.* (internal quotation omitted).

Here, each lease referenced and incorporated MVE's "TERMS AND CONDITIONS," which provided, "Customer agrees to pay *all costs of collection*, including but not limited to collection agency's and attorney's fees, court costs and other expenses incurred as a result of Customer's failure to pay all invoices when due." (emphasis added). The trial court was required by this language to award "some amount," and the total amount was discretionary. *See id.* Killian does not allege the trial court abused its discretion in awarding $55,190.74 in attorney's fees and collection costs, and instead argues that there was insufficient evidence supporting the award because MVE did not present any evidence regarding the amount of time its attorneys worked on the case. Presentation of the amount of time spent working on the case was unnecessary, however, because the contract simply required Killian "to pay all costs of collection[.]" *See id.* ("Thus, according to the express provisions of the Agreement, [plaintiff] is owed 'all collection and attorney fees.").

Although Killian does not challenge the award of attorney's fees as an abuse of discretion, we note MVE's attorney testified as to attorney's fees and collections costs:[3]

> And, Your Honor, as you know, Vogler & Associates are a collection law firm, and we charge a percentage of what we collect, and in this case, we charge 30 percent, and we had already received a collection agency debt of about $20,000 additional, and so we have added our charges to theirs to make the total of $55,190.74. So that's the total collection debt as well as attorneys' fees for both.[4]

Accordingly, we cannot say the trial court's award of attorney's fees was unsupported by substantial evidence. Point denied.

Conclusion

For the reasons set forth above, we affirm the judgment of the trial court.

Virginia W. Lay, J.

Michael S. Wright, P.J., concurs.
Philip M. Hess, J., concurs.

[3] *See Hazelcrest III Condo Ass'n v. Bent*, 495 S.W.3d 200, (Mo App. E.D. 2016) (recognizing the trial court is an expert at determining attorney's fees and may set the amount without the aid of evidence).
[4] *See Anderson v. Anderson*, 437 S.W.2d 704, 712 (Mo. App. 1969) (noting statement by counsel as officer of the court regarding fees was "not required to be under oath"); *but see Marriage of Vanet*, 544 S.W.2d 236, 244 (Mo. App. 1976) (noting the court's disapproval of the lax manner in which counsel presented evidence related to attorney's fees).