Appendix A

Panel Opinion of the U.S. Court of Appeals
for the Eighth Circuit (Aug. 19, 2021)

United States Court of Appeals
For the Eighth Circuit

No. 19-3458

Designworks Homes, Inc., a Missouri corporation; Charles Lawrence James

Plaintiffs - Appellants

v.

Thomson Sailors Homes, L.L.C., a Kansas L.L.C.; Thomson Homes, L.L.C.; Donald Sailors; Edward B. Thomson, III; Team 3 Architects, Inc.; Bruce H. Beatty; Bobby Sailors; Eric Bradley Thomson; Elswood Smith Carlson, P.A.

Defendants - Appellees

Appeal from United States District Court
for the Western District of Missouri - Kansas City

Submitted: June 15, 2021
Filed: August 19, 2021

Before GRUENDER, ARNOLD, and STRAS, Circuit Judges.

STRAS, Circuit Judge.

Designworks Homes, Inc., thinks that a group of architects and other builders copied one of its home designs. It also believes that, even if there was no copyright

violation, it should not have to reimburse the alleged infringers for their attorney fees and costs. The district court[1] disagreed on both points, and so do we.

I.

Charles James built a house on Melrose Drive in Columbia, Missouri. The house, just like two others built in the area, has a two-story "triangular atrium design with stairs as part of the main room." Many years later, Designworks registered the design as a copyrighted architectural work.

Another firm, Thomson Sailors Homes, L.L.C., also used a triangular-atrium design in what it called the Newbury Model. Designworks believes that everyone involved in the design and promotion of the Newbury Model, including those who displayed it in brochures, infringed on its copyright. *See* 17 U.S.C. § 102(a)(8) (extending copyright protection to "architectural works").

At summary judgment, the district court did not see things the same way. It concluded that the Newbury Model was not a copy of the original Melrose home. It also decided to award over $400,000 in attorney fees and costs to Thomson Sailors and the other defendants. *See id.* § 505. The reason: Designworks' "litigating position was unreasonable and . . . [its] pursuit of the case was, at best, frivolous in nature and, at worst, done in bad faith."

II.

We review the district court's decision to grant summary judgment de novo. *See Warner Bros. Ent., Inc. v. X One X Prods.*, 644 F.3d 584, 591 (8th Cir. 2011). Summary judgment was appropriate "if the evidence, viewed in the light most

[1]The Honorable Stephen R. Bough, United States District Judge for the Western District of Missouri.

favorable to [Designworks], demonstrates that there is no genuine issue of material fact and that [Thomson Sailors was] entitled to judgment as a matter of law." *Id.* (internal quotation marks omitted).

To prevail on its copyright claims, Designworks had to prove that Thomson Sailors copied its design. *See Taylor Corp. v. Four Seasons Greetings, LLC*, 403 F.3d 958, 964 (8th Cir. 2005). It had no direct evidence, so it attempted to make its case indirectly by showing that Thomson Sailors had access to the Melrose house and then designed and built "substantially similar" homes. *Id.* at 966–67.

Substantial similarity incorporates two concepts. First, there must be similarity of ideas, which must be "evaluated extrinsically, focusing on [the] objective similarities . . . of the works." *Rottlund Co. v. Pinnacle Corp.*, 452 F.3d 726, 731 (8th Cir. 2006). Second, if the ideas are similar, they must be similarly expressed, meaning that an "ordinary, reasonable person" would think that "the total concept and feel of the [designs] in question are substantially similar."[2] *Hartman v. Hallmark Cards, Inc.*, 833 F.2d 117, 120–21 (8th Cir. 1987) (referring to this as "the intrinsic test"). Without similarity in ideas *and* expression, there is no infringement. *See id.* at 120.

After "compar[ing] [the] works," *id.* (second alteration in original) (quoting *O'Neill v. Dell Publ'g Co.*, 630 F.2d 685, 690 (1st Cir. 1980)), we agree with the district court that substantial similarity in expression is missing here. The Melrose house, which was built first, has a roughly rectangular floorplan, except for a large diamond-shaped great room. *See Appendix*. The corners of the great room intersect the rear wall and, as the floor plan of the home shows, half of the diamond extends

[2]Even if the district court misstated the standard for evaluating similarity, as Designworks argues, "[we] may [still] affirm." *Wierman v. Casey's Gen. Stores*, 638 F.3d 984, 1002 (8th Cir. 2011). The reason, of course, is that our review of a grant of summary judgment is de novo.

from the back of the house in the form of an isosceles right triangle with 20-foot legs. *Id.* Along the wall forming the far-left side of the diamond is a stairway leading down to a similarly shaped room on the lower level. *Id.* The stairway, which is open and has large windows above it, is what creates the "triangular atrium." *Id.*

The Newbury Model also has a two-story "triangular atrium" consisting of large windows and stairs, but the similarities end there. *Id.* The walls forming the legs of the triangle on the Newbury Model, for example, are roughly 10 feet long, not 20. *Id.* It has two flights of stairs, not just one, with a landing at the triangle's point, rather than having the stairs run along a single wall like they do in the Melrose house. *Id.* The adjoining room is also rectangular and oriented in line with the other rooms, not a diamond with sides at a 45° angle to them. *Id.* So even if one feature of both designs is a triangular atrium, there are plenty of differences, from the size of the atriums themselves to how they are integrated with the rest of the house, with each having rooms and stairways of differing shapes, sizes, and orientations.

To an "ordinary, reasonable person" viewing both designs, "the total concept and feel of the" homes would not appear "substantially similar." *Hartman*, 833 F.2d at 120–21; *see also Taylor Corp.*, 403 F.3d at 966 (explaining that the focus should be on "the work[] taken as a whole"). In summary-judgment terms, our conclusion is the same as the district court's: "the works are so *dissimilar* that 'reasonable minds could not differ as to the absence of substantial similarity in expression.'" *Hartman*, 833 F.2d at 120 (emphasis added) (quoting *Litchfield v. Spielberg*, 736 F.2d 1352, 1355–56 (9th Cir. 1984)).

III.

After granting summary judgment, the district court had the discretion to order Designworks to pay Thomson Sailors's "full costs," including "a reasonable attorney's fee." 17 U.S.C. § 505. In deciding whether to make an award, the court had to "giv[e] substantial weight to the reasonableness of [Designworks'] litigating

position [and] . . . tak[e] into account all other relevant factors," *Kirtsaeng v. John Wiley & Sons, Inc.*, 136 S. Ct. 1979, 1989 (2016), including "frivolousness, motivation, . . . compensation[,] and deterrence," *Pinkham v. Camex, Inc.*, 84 F.3d 292, 294 (8th Cir. 1996) (quoting *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 n.19 (1994)).

Many of these factors played a prominent role in the district court's decision to award fees and costs to Thomson Sailors and the other defendants. The court's order emphasized how unreasonable Designworks' litigating position had been, from completely failing to address the "significant objective differences" between the designs to producing nothing more than speculative evidence that anyone associated with Thomson Sailors had accessed the Melrose house. The court even wondered whether Designworks' goal all along was to run up Thomson Sailors's costs and then extract a large settlement. Designworks may well disagree with these inferences and how the court weighed the relevant factors, but we cannot say that its decision to award fees and costs was an abuse of discretion.[3] *See Killer Joe Nev., LLC v. Doe*, 807 F.3d 908, 912–13 (8th Cir. 2015).

To be sure, the district court was wrong to say that attorney fees "are the rule rather than the exception and *should* be awarded routinely" in cases like this one. (Emphasis added) (quoting *Little Mole Music v. Spike Inv., Inc.*, 720 F. Supp. 751, 757 (W.D. Mo. 1989)). The Copyright Act itself makes clear that the decision lies within the court's discretion, and an approach that awarded fees "automatic[ally]" or by default "would pretermit the exercise of that discretion." *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 533 (1994).

[3]Designworks may not challenge the size of the award for the first time on appeal. It did not object to *any* of the specific items in Thomson Sailors's request before, so it cannot do so now. *See Great Plains Real Estate Dev., L.L.C. v. Union Cent. Life Ins.*, 536 F.3d 939, 947 (8th Cir. 2008).

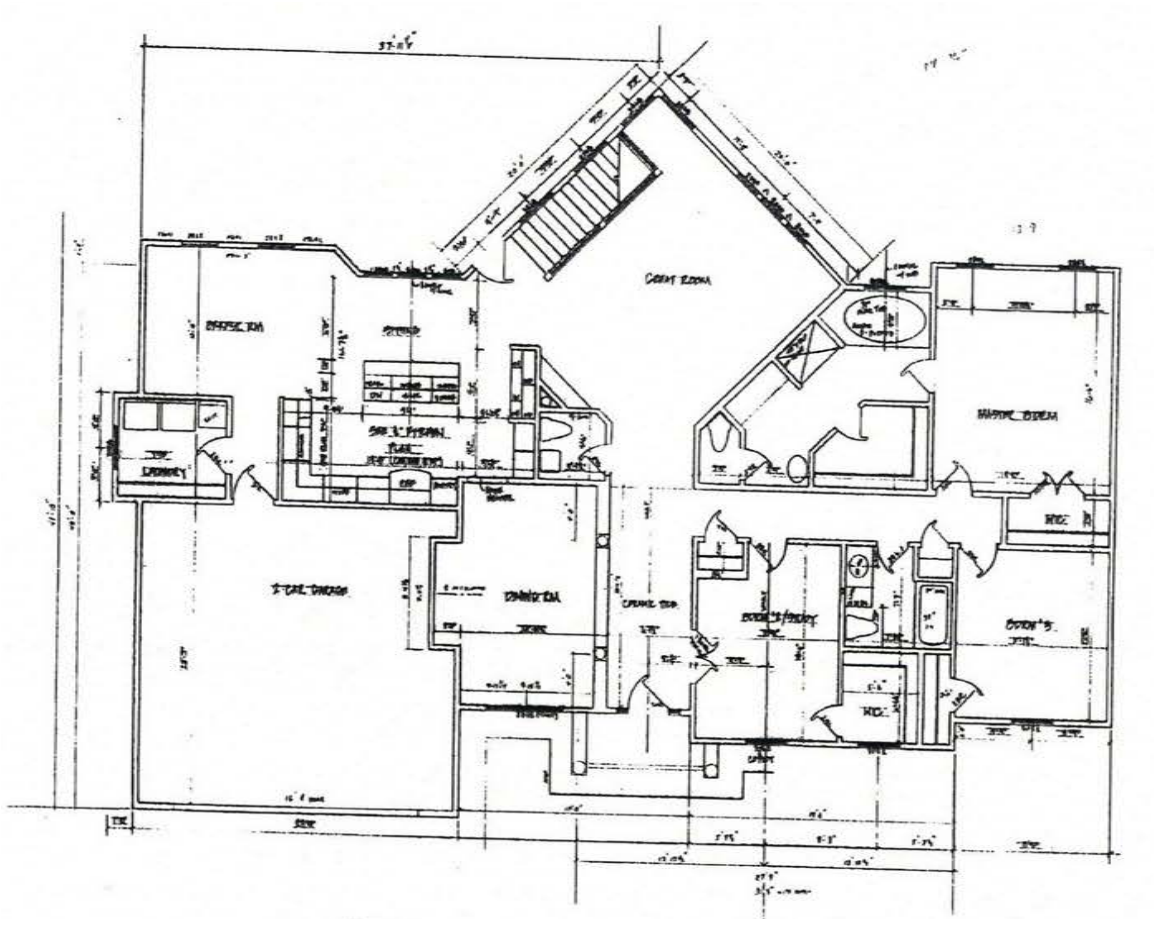
Despite the misstatement, we are convinced that the district court knew it had discretion and exercised it properly. After all, it identified the relevant factors and then explained why they weighed in favor of an award. There is nothing to suggest, in other words, that it gave "significant weight" to an "improper factor." *Killer Joe*, 807 F.3d at 911 (quotation marks omitted).

IV.

We accordingly affirm the judgment of the district court.

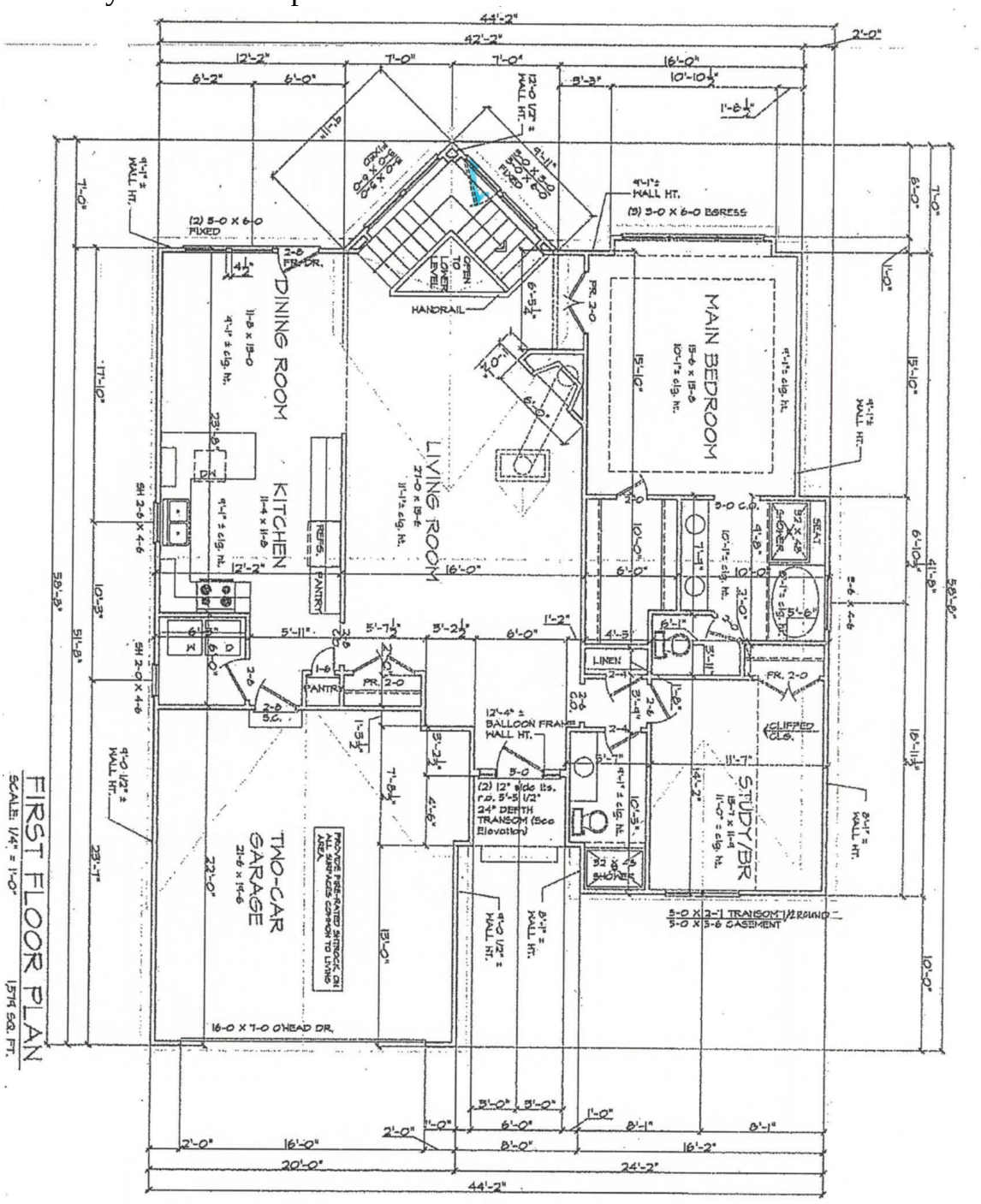
APPENDIX.

Melrose house floor plan:



R. Doc. 133-15, at 8 (cropped and rotated).

Newbury Model floor plan:



R. Doc. 133-9, at 4 (cropped and rotated).

Appendix B

Summary-Judgment Order of U.S. District Court
for the Western District of Missouri (Oct. 10, 2019)

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

DESIGNWORKS HOMES, INC., et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 18-0189-CV-W-SRB
	)	
THOMSON SAILORS HOMES, LLC., et al.,	)	
	)	
Defendants.	)	

ORDER

Before the Court is Defendants' Motion for Summary Judgment. (Doc. #131). For the reasons discussed below, the Motion is GRANTED.

I. Legal Standard

Federal Rule of Civil Procedure 56(a) requires a court to grant a motion for summary judgment if 1) the moving party "shows that there is no genuine dispute of material fact" and 2) the moving party is "entitled to judgment as a matter of law." A nonmoving party survives a summary judgment motion if the evidence, viewed in the light most favorable to the nonmoving party, is "such that a reasonable jury could return a verdict for the nonmoving party." *Stuart C. Irby Co. v. Tipton*, 796 F.3d 918, 922 (8th Cir. 2015) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). The purpose of summary judgment "is not to cut litigants off from their right of trial by jury if they really have issues to try." *Hughes v. Am. Jawa, Ltd.*, 529 F.2d 21, 23 (8th Cir. 1976) (internal quotation marks omitted) (quoting *Poller v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464, 467 (1962)).

II. Background

Considering the parties' statements of facts and supporting evidence in the light most favorable to Plaintiffs as the non-moving party, the Court finds the relevant facts to be as follows:

Plaintiff Charles Lawrence James is the sole shareholder and home designer for Plaintiff Designworks Homes, Inc., a design-build company. In 1996, Plaintiff James designed and built a home that had a "unique triangular atrium design with stairs as part of the main room" at 4306 Melrose in Columbia, Missouri. (Doc. #51, p. 4). In 1999, Plaintiff James built a second home that incorporated the triangular atrium design at 1713 Kenilworth in Columbia, Missouri. Between 1999 and 2001, Plaintiff James built a third house featuring the triangular atrium design at 4804 Chilton in Columbia, Missouri. On May 10, 2004, Plaintiffs registered the triangular atrium design as a copyrighted architectural work titled "Atrium ranch on walk-out; Angular atrium ranch" with respect to the home constructed at 4804 Chilton Court. (Doc. #51, p. 4). On June 6, 2013, Plaintiffs registered the design as a copyrighted architectural work for a house not yet constructed. On April 22, 2018, Plaintiff James registered the design as a copyrighted technical drawing with respect to the home at 4306 Melrose Drive. Also, on April 22, 2018, Plaintiff James registered the design as a copyrighted technical drawing with respect to the home at 1713 Kenilworth in Columbia, Missouri.

On September 8, 1998, Defendant Elswood Smith Carlson Architects, P.A. created an architectural design that included a triangular atrium feature with stairs adjacent to a living room, known as the Newbury Model. Plaintiffs allege the Newbury Model infringes their copyrights. Plaintiffs allege Defendant Thomson Sailors Homes, LLC ("Thomson Sailors Homes")[1]

[1] Defendants Donald Sailors, Bobby F. Sailors, and Edward B. Thomson, III are former members of Thomson Sailors Homes. Defendant Eric Bradley Thomson was a superintendent for Thomson Sailors Homes.

subsequently built thirty-five Newbury Model homes in a development in Kansas City, Missouri, that also infringed on Plaintiffs' copyrights. Plaintiffs allege Thomson Homes, LLC ("Thomson Homes")[2] is the successor-in-interest of Thomson Sailors Homes and thus liable as a successor, and also independently liable for the copying and distribution of a brochure that depicted the allegedly infringing Newbury Model homes. Plaintiffs allege Defendant Team 3 Architects, Inc. ("Team 3 Architects")[3] created and distributed the allegedly infringing Newbury Model house plan to Thomson Sailors Homes and/or Thomson Homes. Plaintiffs allege Thomson Sailors Homes, Team 3 Architects, and Elswood Smith Carlson all put copyright notices on the Newbury Model in violation of U.S. copyright laws.

Plaintiffs' First Amended Complaint sets forth five claims: (1) copyright infringement, Count I; (2) contributory infringement, Count II; (3) vicarious infringement, Count III; (4) accounting against Defendants Thomson Homes and Thomson Sailors Homes only, Count IV; and (5) declaratory and/or injunctive relief, Count V. All claims relate to the copyrighted triangular atrium design with stairs as part of the main room. Defendants move for summary judgment on all counts, arguing: (1) Defendants could not have infringed three of the four copyrighted works asserted by Plaintiffs because such works were created after the Newbury Model was created; (2) Plaintiffs cannot prove copying of the remaining copyrighted work; and (3) Plaintiffs are not entitled to damages.

III. Discussion

Defendants argue initially they could not have infringed the copyrighted works corresponding with 1713 Kenilworth, 4804 Chilton, or the house not yet constructed, because

[2] Defendant Edward B. Thomson, III was the sole member and founder of Thomson Homes. Defendant Eric Bradley Thomson was a superintendent for Thomson Homes.
[3] Defendant Bruce H. Beatty is the sole shareholder of and an architect for Team 3 Architects.

Defendants created the Newbury Model before those works were constructed. Plaintiffs argue that Defendants constructed houses that infringed on Plaintiffs' design after substantial completion of construction of the houses at 1713 Kenilworth and 4804 Chilton, which incorporated the same triangular atrium design and were derivative of the original design as constructed at 4306 Melrose. The Court finds it unnecessary to engage in such analysis because all parties agree that all claims in this case hinge on whether Defendants infringed on Plaintiffs' copyrighted triangular atrium design with stairs as part of the main room. The Court will focus its discussion on whether Plaintiffs can prove Defendants infringed on that design.

To establish their claim of copyright infringement, Plaintiffs are "required to prove ownership of a valid copyright and copying of original elements." *Rottlund Co. v. Pinnacle Corp.*, 452 F.3d 726, 731 (8th Cir. 2006) (internal citation and quotation marks omitted). "Copying may be established . . . by showing that the defendants had access to the copyrighted materials and showing that substantial similarity of ideas and expression existed between the alleged infringing materials and the copyrighted materials." *Id.* (internal citation omitted). "Determination of substantial similarity involves a two-step analysis[.]" *Id.* (citing *Hartman v. Hallmark Cards, Inc.*, 833 F.2d 117, 120 (8th Cir. 1987)). "Similarity of ideas is evaluated extrinsically, focusing on objective similarities in the details of the works." *Id.* "If the ideas are substantially similar, then similarity of expression is evaluated using an intrinsic test depending on the response of the ordinary, reasonable person to the forms of expression." *Id.* (internal citation and quotation marks omitted).

The parties do not dispute the validity of Plaintiffs' copyrights. The parties dispute whether Defendants copied Plaintiffs' design.[4]

[4] Plaintiffs argue that Defendants' multiple copyright notices on the Newbury Model are unlawful because "[i]t is a legal impossibility that [Thomson Sailors Homes] and [Team 3 Architects] had the legal right to put copyright

A. Access

Access can be established "by showing that the defendants had an opportunity to view or to copy" Plaintiffs' work. *Moore v. Columbia Pictures Indus., Inc*., 972 F.2d 939, 942 (8th Cir. 1992) (internal citation and quotation marks omitted). "Establishing a 'bare possibility' of access is not enough; rather, [Plaintiffs] must prove that [Defendants] had a 'reasonable possibility' of viewing [their] work." *Id.* (internal citation omitted). "There must be some evidence from which the jury could determine that [Defendants were] able to view [the copyrighted work]." *Infogroup, Inc. v. DatabaseUSA.com LLC*, No. 8:14-CV-49, 2018 WL 6624217, at *10 (D. Neb. Dec. 18, 2018) (applying *Moore* standard).

Plaintiffs' speculation that Defendants "had possible access to the Plaintiffs' architectural work" simply because the property was "easily accessible from the public-right-away [sic]" and because Plaintiffs advertised the homes during construction amounts to no more than a bare possibility of access, which is not enough. (Doc. #134, pp. 50–51). Plaintiffs offer no evidence that any of the Defendants viewed Plaintiffs' homes. Plaintiffs also assert that their copyrighted design won awards in Columbia, Missouri, but offer no evidence that any of the Defendants knew of the awards or learned of Plaintiffs' design based on the awards. Plaintiffs argue that Defendants could have viewed Plaintiffs' design at an open house, but Plaintiff James admits he does not know whether any of the Defendants attended any open houses, could not recall seeing them there, and did not produce the sign-in sheets he claimed to have kept from the open houses.

The cases in which a plaintiff has demonstrated a defendant had access to copyrighted work involve some circumstantial evidence of a reasonable possibility of viewing the plaintiff's

notices on the plans if the copyright was owned by [Elswood Smith Carlson Architects]." (Doc. #134, p. 47) (footnote omitted). This argument has no bearing on whether Defendants infringed on Plaintiffs' copyrighted works.

work. *See, e.g., Kootenia Homes, Inc. v. Reliable Homes, Inc.*, No. CIV. 00-1117ADMAJB, 2002 WL 15594, at *5 (D. Minn. Jan. 3, 2002) (finding reasonable possibility of access where defendant toured plaintiff's home that was subject to copyright); *Moore*, 972 F.2d at 943 (finding reasonable possibility of access where an ongoing relationship between individuals associated with plaintiff and defendant existed); *Sullivan v. Prince*, No. 3:09CV0009 JMM, 2010 WL 330351, at *3 (E.D. Ark. Jan. 20, 2010) (finding reasonable possibility of access where Defendant possessed a "sketch" of copyrighted house plan). Here, Plaintiffs have no circumstantial evidence showing a reasonable possibility that Plaintiffs viewed Defendants' copyrighted work; therefore, Plaintiffs cannot prove Defendants had access to Plaintiffs' triangular atrium design.

B. Similarity

Plaintiffs argue that even if they cannot prove access, access can be inferred if Plaintiffs can prove the "similarity between the original and the copy is so striking as to preclude any possibility of independent creation." *Moore*, 972 F.2d at 941 n.1. Courts find striking similarity in cases in which two designs are nearly identical. *See, e.g., Thimbleberries, Inc. v. C & F Enters., Inc.*, 142 F. Supp. 2d 1132, 1140 (D. Minn. 2001) (finding striking similarity between wreath-shaped quilt patterns that were "for all practical purposes, identical"); *Midway Mfg. Co. v. Dirkschneider*, 543 F. Supp. 466, 482–83 (D. Neb. 1981) (finding striking similarity between video games that were "virtually identical," "in virtually every detail").

An "architectural work," subject to copyright protection is defined as "the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings." 17 U.S.C. § 101. The protected work "includes the overall form as well as the arrangement and composition of spaces and elements in the design, but does not include

individual standard features." *Id.*; *see also* 17 U.S.C. § 102(b) ("In no case does copyright protection for an original work of authorship extend to any idea . . . regardless of the form in which it is described, explained, illustrated, or embodied in such work.").

Plaintiffs are unable to prove substantial similarity, let alone striking similarity. There are objective differences in the details of Plaintiffs' and Defendants' works. Plaintiffs describe their copyrighted design as a triangular atrium design with stairs as part of the main room. Plaintiffs' design includes a diamond-shaped great room with a straight staircase to the basement. The great room is positioned at a forty-five-degree angle to the rest of the house. The stairs are integrated as part of the great room, or parallel to the wall in the great room that is opposite the staircase. In contrast, Defendants' design includes an offset triangular atrium that is adjacent to, not part of, a rectangular living room, and an angled staircase to the basement. The staircase forms the triangular shape and protrudes out from the living room. Further, Plaintiffs' diamond-shaped great room is significantly larger than Defendants' triangular atrium design at the end of living room. Accordingly, the arrangement of spaces and elements in the design is not substantially, let alone strikingly, similar. § 101; *see also Howard v. Sterchi*, 974 F.2d 1272, 1276 (11th Cir. 1992) ("In architectural plans . . . , modest dissimilarities are more significant than they may be in other types of art works."). Plaintiffs' copyright does not extend to the idea of a triangular-shaped atrium, but to the particular arrangement and composition of the great room and stairwell designed by Plaintiff. § 102(b). Plaintiffs have failed to demonstrate striking similarity between Defendants' and Plaintiffs' works.

IV. Conclusion

Accordingly, Defendants' Motion for Summary Judgment (Doc. #131) is GRANTED. Because Plaintiffs cannot prove Defendants infringed on their copyrighted design, summary judgment is granted on all claims. Defendants also filed a Joint Motion to Strike Plaintiff's Declaration (Doc. #136). The Court did not reach the damage-related issues contemplated in the Motion to Strike. Accordingly, Defendants' Joint Motion to Strike Plaintiff's Declaration (Doc. #136) is DENIED as moot.

IT IS SO ORDERED.

/s/ Stephen R. Bough
STEPHEN R. BOUGH, JUDGE
UNITED STATES DISTRICT COURT

DATE: October 10, 2019

Appendix C

Fees Order of U.S. District Court
for the Western District of Missouri (Dec. 13, 2019)

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

DESIGNWORKS HOMES, INC., et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 18-0189-CV-W-SRB
	)	
THOMSON SAILORS HOMES, LLC., et al.,	)	
	)	
Defendants.	)	

ORDER

Before the Court is Defendants' Motion for Attorneys' Fees and Full Costs (Doc. #148) and Defendants' Motion for Attorneys' Fees and Full Costs (Doc. #154). For reasons discussed below the Motions are GRANTED.

I. Background

Plaintiff Charles Lawrence James is the sole shareholder and home designer for Plaintiff Designworks Homes, Inc., a design-build company. Plaintiff James designed and built homes that had a "unique triangular atrium design with stairs as part of the main room" in Columbia, Missouri. (Doc. #51, p. 4). Plaintiffs registered the triangular atrium design as a copyrighted work. Defendants created an architectural design that included a triangular atrium feature with stairs adjacent to a living room, built houses incorporating the design, and distributed a brochure depicting the design. Plaintiffs filed the underlying action against Defendants for allegedly infringing on their copyright. The Court granted summary judgment in favor of Defendants, finding Plaintiffs presented no evidence that Defendants had access to Plaintiffs' copyrighted design and that Plaintiffs could not prove substantial, let alone striking, similarity between the two designs. Plaintiffs now move for an award of attorneys' fees and costs.

II. Discussion

In an action for copyright infringement, "the court in its discretion may allow the recovery of full costs" and "a reasonable attorney's fee to the prevailing party." 17 U.S.C. § 505. "Factors that courts may consider in awarding attorney's fees include frivolousness, motivation, objective reasonableness (both in the factual and in the legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence." *Pinkham v. Camex, Inc.*, 84 F.3d 292, 294 (8th Cir. 1996) (internal quotation marks omitted) (quoting *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 n.19 (1994)). A district court must "give 'substantial weight' to the reasonableness of a losing party's litigating positions while also considering other relevant circumstances." *Kirtsaeng v. John Wiley & Sons, Inc.*, 136 S. Ct. 1979, 1989 (2016) (internal citation omitted). "Although attorney's fees are awarded in the trial court's discretion, they are the rule rather than the exception and should be awarded routinely." *Little Mole Music v. Spike Inv., Inc.*, 720 F. Supp. 751, 757 (W.D. Mo. 1989) (quoting *Micromanipulator Co. v. Bough*, 779 F.2d 255, 259 (5th Cir. 1985)); *Broadcast Music, Inc. v. MWS, LLC*, No. 4:11CV1481 TIA, 2014 WL 2804396, at *4 (E.D. Mo. June 20, 2014).

Defendants argue they are entitled to attorneys' fees because Plaintiffs' claims were objectively unreasonable considering Plaintiffs produced no evidence showing that Defendants had access to Plaintiffs' copyrighted design and considering the objective differences between the parties' designs. Defendants argue Plaintiffs' counsel's attempt to withdraw early in the disposition of the case is indicative of the weakness of Plaintiffs' claims. Defendants argue Plaintiffs' case was frivolous and pursued in bad faith, as evidenced by Plaintiffs' failure to retain a single expert or take a single deposition in the case and by the fact that Plaintiffs ignored settlement offers. Defendants argue Plaintiffs were motivated by greed and sued Defendants

"with the intent to force a large monetary settlement from Defendants who would wish to avoid financially ruinous attorneys' fees." (Doc. #148, p. 9). Defendants argue an award of attorneys' fees and costs would deter Plaintiffs from filing frivolous claims in the future and encourage defendants in copyright actions to confidently litigate and advance meritorious defenses.

Plaintiffs do not respond to Defendants' arguments or analyze a majority of the factors relevant to the Court's analysis. Plaintiffs argue their litigating position was objectively reasonable because "access can be . . . fleeting [and] hard to detect and prove," so "just because Plaintiffs didn't find [access], doesn't necessarily mean it didn't exist." (Doc. #161, p. 2). Plaintiffs argue Defendants are unworthy of an award of attorneys' fees because several Defendants allegedly violated copyright law by placing separate copyright notices on their own triangular atrium design at different points in time.[1]

The Court finds the relevant factors weigh in favor of awarding Defendants full costs and reasonable attorneys' fees. Plaintiffs produced no direct or circumstantial evidence that Defendants had access to Plaintiffs' copyrighted design. As described in the Court's order on summary judgment, significant objective differences existed between the parties' designs, which Plaintiffs failed to address. The Court also considers that Plaintiffs' attorney sought to withdraw as counsel during litigation, stating that Plaintiffs had rendered representation unreasonably difficult. (Doc. #75, ¶ 3). These realities, when considered in conjunction with the facts that Plaintiff ignored settlement offers,[2] failed to develop their claims through discovery, and failed to prosecute their case, demonstrate Plaintiffs' litigating position was unreasonable and that Plaintiffs' pursuit of the case was, at best, frivolous in nature and, at worst, done in bad faith.

[1] The Court reiterates that any alleged issue involving the validity or legality of Defendants' own copyright notices placed on their own work is irrelevant to this action concerning whether Defendants infringed on Plaintiffs' copyright. (See Doc. #137, pp. 4–5, n.4).
[2] Plaintiffs do not dispute this allegation.

Defendants request a total of $430,057 in attorneys' fees and $8,355.00 in costs. Plaintiffs do not dispute the amount of attorneys' fees and costs Defendants request. A reasonable fee is "based on a lodestar figure represented by the reasonable hourly rate multiplied by the hours expended in the litigation." *Pinkham*, 84 F.3d at 294. "[T]he actual fee arrangement between the client and the attorney is immaterial." *Id.* The Court has examined the billing records and hourly rates submitted by Defendants. The Court has considered the time and labor expended by counsel for Defendants, customary fees, and other relevant factors. *See St. Paul Stamp Works, Inc. v. Allen Marking Prod., Inc.*, No. 05-349-CV-W-FJG, 2006 WL 3937093, at *1 (W.D. Mo. Dec. 7, 2006) (listing numerous factors the court may use to assess a reasonable attorneys' fee); *Zoll v. E. Allamakee Cmty. Sch. Dist.*, 588 F.2d 246, 252 n.11 (8th Cir. 1978) (same). The Court finds the hours billed to be reasonable. The Court finds the hourly rates submitted by Defendants to be reasonable, except that a reasonable hourly rate is no greater than $400 an hour. The Court approves all hourly rates below $400 as requested and reduces all hourly rates above $400 to $400. The Court also declines to include in its calculation hours billed by law students.

Accordingly, the Court finds Defendant Elswood Smith Carlson is entitled to an award of $121,157.50 in attorneys' fees and $2,107.99 in costs. Defendant Thomson Sailors Homes and related individual Defendants are entitled to an award of $181,492.00 in attorneys' fees and $3,017.29 in costs. Defendants Team 3 Architects and Bruce H. Beatty are entitled to an award of $43,885.00 in attorneys' fees and $1,553.38 in costs. Defendant Thomson Homes and related individual Defendants are entitled to an award of $49,750.50 in attorneys' fees and $1,676.34 in costs. In total, Defendants are entitled to $396,285 in attorneys' fees and $8,355.00 in costs.

III. Conclusion

Accordingly, Defendants' Motion for Attorneys' Fees and Full Costs (Doc. #148) and Defendants' Motion for Attorneys' Fees and Full Costs (Doc. #154) are GRANTED. Further, and for good cause stated, Plaintiffs' counsel's Motion for Leave to Withdraw (Doc. #164) is GRANTED. Counsel Kenneth Caldwell is removed as counsel of record for Plaintiffs and DIRECTED to provide Plaintiffs with a copy of this Order.

IT IS SO ORDERED.

/s/ Stephen R. Bough
STEPHEN R. BOUGH, JUDGE
UNITED STATES DISTRICT COURT

DATE: December 13, 2019

Appendix D

Order of the U.S. Court of Appeals for the Eighth Circuit
Denying Rehearing (Oct. 19, 2021)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 19-3458

Designworks Homes, Inc., a Missouri corporation and Charles Lawrence James

Appellants

v.

Thomson Sailors Homes, L.L.C., a Kansas L.L.C., et al.

Appellees

Appeal from U.S. District Court for the Western District of Missouri - Kansas City
(4:18-cv-00189-SRB)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Grasz did not participate in the consideration or decision of this matter.

October 19, 2021

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans