No. 22-

IN THE
SUPREME COURT OF THE UNITED STATES

RICHARD E. GARDINER,
Petitioner,

v.

NELS ANDERSON,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UTAH SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Utah Supreme Court denied Petitioner his Fourteenth Amendment right to due process when it failed to reverse a decision of the Utah Court of Appeals awarding contractual attorney fees to Respondent based on a legal theory which Respondent did not argue, and thus waived, and which Petitioner therefore had no opportunity to address.

Directly Related Proceedings

Gardiner v. *Anderson*, Case Number 190700031 (Fourth Judicial District, State of Utah, County of Millard)

Gardiner, as Assignee of Liqua-Dry, Inc. v. *Anderson*, Case Number 190700012 (Fourth Judicial District, State of Utah, County of Millard)

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CITATION TO THE OPINION BELOW

The opinion of the Utah Supreme Court is published at 2022 UT 42 (2022).

JURISDICTION OF THIS COURT

The judgment of the Utah Supreme Court sought to be reviewed was entered on December 15, 2022. This Court has jurisdiction pursuant to 28 U.S.C.A. § 1257 to review the final judgment rendered by the highest court of a State where any right is claimed under the Constitution of the United States.

CONSTITUTIONAL PROVISION

> No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

U.S. Constitution, Amendment XIV, Section 1.

STATEMENT OF THE CASE

This appeal arises out of a dispute between a landlord and tenant. Tenant, Nels Anderson, leased a warehouse from Landlord, Richard Gardiner. The lease prohibited Tenant from subleasing the warehouse without Landlord's prior written consent, but Tenant did so anyway. Tenant received $5,000 per month from his sub-tenant—five times more than the

$1,000 he paid to Landlord.

The issue on appeal concerns the attorney fees provision in the lease. The provision allowed a non-defaulting party to recover attorney fees in an enforcement action. The district court (the Utah trial court) found that Tenant defaulted by leasing the premises without Landlord's prior written consent and thus denied Tenant's request for fees. App. 65a. But, as to attorney fees, the Utah Court of Appeals reversed and directed the district court to award attorney fees *to the defaulting Tenant*, based on a "flexible and reasoned approach" (App. 19a) that applies only in situations where (unlike here) there is a dispute as to which party prevailed. Worse, the Utah Court of Appeals adopted the "flexible and reasoned approach" *sua sponte* and without allowing Landlord an opportunity to explain that the "flexible and reasoned approach" did not apply.

In what follows, Landlord provides the background necessary to understand the issue.

The Lawsuit

When Landlord learned of Tenant's breach, he gave Tenant ten days to cure by paying Landlord the monies Tenant received from the subtenant. App. 65a. Tenant did not cure the breach and instead vacated the warehouse. *Id.* Landlord then filed this lawsuit. The district court granted summary judgment in favor

of Tenant, ruling that Tenant breached the lease, but that neither the lease nor the Utah Code provided Landlord a remedy in damages. App. 65a. Tenant then filed a motion requesting fees under the lease's attorney fees provision, which allows fees to be awarded to a non-defaulting party:

> Should either party default in the performance of any covenants or agreements contained herein, **such defaulting party shall pay to the other party all costs and expenses**, including but not limited to, a reasonable attorney's fee, including such fees on appeal, which the prevailing party may incur in enforcing this Agreement or in pursing any remedy allowed by law for breach hereof. (emphasis added).

The district court denied Tenant's motion. App. 60a. The court ruled that, because Tenant was in default, the provision did not apply. *Id.* Specifically, the court ruled that Tenant:

> is the defaulting party, and the lease agreement does not provide a basis for an award of attorney fees to . . . the party in default. Further, the fact that [Landlord] pursued damages against [Tenant] that were ultimately unsuccessful does not translate into a default by [Landlord].

App. 62a.

The First Appeal

Both parties appealed. Landlord appealed the summary judgment ruling on damages, and Tenant appealed the attorney fees ruling. 2018 UT App 167 (App. 19a). The Utah Court of Appeals affirmed the summary judgment ruling, agreeing that, although Tenant breached, there was no remedy in damages available to Landlord. But the court reversed the attorney fees ruling, holding that the attorney fee provision did allow Tenant potentially to recover fees because Tenant successfully defended against the complaint. The court thus remanded for the district court to determine whether Tenant was, in fact, entitled to fees.

In reaching the conclusion regarding attorney fees, however, the court relied on a legal theory that Tenant had not raised in his opposition brief: "a common sense flexible and reasoned approach to the interpretation of contractual 'prevailing party' language" as set forth in *Express Recovery Services Inc.* v. *Olson*, 2017 UT App 71 (App. 41a-42a) (internal quotation marks omitted). Indeed, Tenant had declined to argue -- and thus waived -- application of the "common sense flexible and reasoned approach" as evidenced by the page of Tenant's opposition brief where he quoted in part from *Express Recovery Services Inc.* -- but intentionally omitted (by the use of

ellipses)[1] the discussion of the "common sense flexible and reasoned approach" of the decision.[2]

Because Tenant did not rely on the "common

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[1] Pages 27-28 of *Tenant's Resp. Br.* in Case No. 20170551-CA are reproduced in the Appendix at 77a.

[2] The omitted portion of *Express Recovery Services Inc.* read:

> ¶ 10 Utah courts generally apply a "common sense 'flexible and reasoned' approach ... to the interpretation of contractual 'prevailing party' language." *A.K. & R. Whipple Plumbing & Heating* v. *Guy*, 2004 UT 47, ¶ 14, 94 P.3d 270 (quoting *Mountain States Broad. Co.* v. *Neale*, 783 P.2d 551, 556–57 & n.7 (Utah Ct. App.1989)). This approach begins with the "net judgment rule," which provides that "the party in whose favor the 'net' judgment is entered must be considered the 'prevailing party' and is entitled to an award of its fees." *See Mountain States*, 783 P.2d at 557–58. While the "net judgment rule" is a starting point, the court should also consider "common sense factors in addition to the net judgment." *A.K. & R. Whipple*, 2004 UT 47, ¶¶ 26–28, 94 P.3d 270; *see also R.T. Nielson Co.* v. *Cook*, 2002 UT 11, ¶ 25, 40 P.3d 1119 (enumerating relevant factors). "'This approach requires not only consideration of the significance of the net judgment in the case, but also looking at the amounts actually sought and then balancing them proportionally with what was recovered.'" *Olsen* v. *Lund*, 2010 UT App 353, ¶ 7, 246 P.3d 521 (quoting *A.K. & R. Whipple*, 2004 UT 47, ¶ 26, 94 P.3d 270).

2017 UT App 71, ¶ 10.

sense flexible and reasoned approach" -- by omitting it from his brief -- Landlord had no notice that such an approach would be considered and thus did not have an opportunity to explain that the "common sense flexible and reasoned approach" did not apply.[3] The application of that approach was thus *sua sponte*.

On remand, the district court awarded Tenant (the defaulting party) attorney fees of $25,998.75 and costs of $413.83. App. 48a. Supplemental attorney fees were subsequently awarded in the amount of $14,052.50.

The Second Appeal

Landlord appealed the award of attorney fees and costs, arguing that the "common sense flexible and reasoned approach" did not apply, and thus that Tenant was not entitled to attorney fees. But the Utah Court of Appeals rejected his argument based on the law of the case doctrine. App. 11a. On remand, the district court awarded Tenant additional fees and costs of $9,162 in the court's judgment on January 13, 2022. App. 48a.

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[3] Although this Court need not address Landlord's argument that the "common sense flexible and reasoned approach" does not apply -- as the only issue before the Court is whether landlord should have been provided an opportunity to address that argument -- a summary of that argument is set forth, *infra*, so that the Court can see that the argument would have changed the outcome of the ruling of the Utah Court of Appeals.

The Third Appeal

Landlord filed another notice of appeal -- of the judgment of January 13, 2022, leading to the appeal at issue here. In the Utah Supreme Court -- to which all appeals are initially taken (*see* Utah Code § 78A-3-102(j)) -- Landlord sought retention of the appeal by the Utah Supreme Court. In his retention letter, he requested the Utah Supreme Court to review whether the Utah Court of Appeals deprived Landlord of his Fourteenth Amendment right to due process when, in the first appeal, the Utah Court of Appeals reversed the district court's ruling on an unargued legal theory. In Petitioner's *Principal Memorandum* filed in the Utah Supreme Court on May 26, 2022, Petitioner argued:

> Unlike affirming on an unargued ground, reversing on an unargued ground violates the appellant's due process rights under Article I, Section 7 of the Utah Constitution and the Fourteenth Amendment to the United States Constitution. Indeed, it is well-established that "all parties are entitled to notice that a particular issue is being considered by a court and to *an opportunity to present evidence and argument on that issue before decision*." *Plumb* v. *State*, 809 P.2d 734, 743 (Utah

> 1990) (emphasis added). This court has held that, "at a minimum, due process requires timely and adequate notice and an opportunity to be heard in a meaningful way." *Salt Lake City Corp.* v. *Jordan River Restoration Network*, 2012 UT 84, ¶ 50 (alteration and internal quotation marks omitted).
>
> Important here, this court also has held that a judgment is void if it violates due process. *Garcia* v. *Garcia*, 712 P.2d 288, 291, n.5 (Utah 1986) ("A judgment is void only if the court that rendered it lacked jurisdiction of the subject matter, or the parties, or if it acted in a manner inconsistent with due process of law." (emphasis added)). And "there is no time limit on an attack on a judgment as void," *Garcia* v. *Garcia*, 712 P.2d 288, 291 (Utah 1986).

Petitioner's *Principal Memorandum* at 4-5.

The Utah Supreme Court retained the appeal but, in its decision (App. 1a), did not address the federal question now sought to be reviewed -- even though the judgment of the Utah Court of Appeals was void and "there is no time limit on an attack on a judgment as void," *Garcia* v. *Garcia*, 712 P.2d 288, 291 and n.5 (Utah 1986). *See also United Student Aid*

Funds, Inc. v. *Espinosa*, 559 U.S. 260, 271 (2010) (judgment is void where "premised . . . on a violation of due process that deprives a party of notice or the opportunity to be heard.").

REASONS FOR GRANTING THE WRIT

I.

The Utah Supreme Court Denied Petitioner His Fourteenth Amendment Right To Due Process When It Failed To Reverse A Decision Of The Utah Court of Appeals Awarding Contractual Attorney Fees To Respondent Based On A Legal Theory Which Respondent Did Not Argue, And Thus Waived, And Which Petitioner Therefore Had No Opportunity To Address

In not reversing the Utah Court of Appeals, the Utah Supreme Court has endorsed and ratified a decision of the Utah Court of Appeals involving an important federal question in a way which conflicts with relevant decisions of this Court and with decisions of the United States Courts of Appeals for the Second, Ninth, Tenth, and Federal Circuits.

A.
The Fourteenth Amendment Right To Due Process Applies To the Courts

In *Galpin* v. *Page*, 85 U.S. 350 (1873), this Court explained:

> It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant, **until he** has been duly cited to appear, and **has been afforded an opportunity to be heard**. Judgment without such citation and opportunity wants all the attributes of a judicial determination; **it is judicial usurpation and oppression**, and never can be upheld where justice is justly administered.

85 U.S. at 368–69 (emphasis added).

More recently, in *Day* v. *McDonough*, 547 U.S. 198 (2006), this Court unequivocally held with regard to *sua sponte* actions of a court:

> Of course, before acting on its own initiative, a court must accord the parties fair notice and an opportunity to present their positions.

547 U.S. at 210.

In the same vein, this Court has observed that "injustice was more likely to be caused than avoided by deciding the issue without petitioner's having had an **opportunity to be heard**." *Singleton* v. *Wulff*, 428 U.S. 106, 121 (1976) (emphasis added).

The principle enunciated in *Galpin*, *Day*, and *Singleton* is closely related to that expressed in *United States* v. *Sineneng-Smith*, 140 S. Ct. 1575 (2020), in which the Court reprimanded the Ninth Circuit for departing "so drastically from the principle of party presentation as to constitute an abuse of discretion," and vacated and remanded the case for:

> an adjudication of the appeal attuned to the case shaped by the parties rather than the case designed by the appeals panel.

140 S. Ct. at 1578.

Similarly, in *Hydro Res., Inc.* v. *U.S. E.P.A.*, 608 F.3d 1131 (10th Cir. 2010), the Tenth Circuit concluded:

> [W]hen a party chooses not to pursue a legal theory potentially available to it, we generally take the view that it is "inappropriate" to pursue that theory in

> our opinions. . . . Our caution in this respect flows from a recognition of our dependence on the adversarial process to test the issues for our decision and from concern for the affected parties to whom we traditionally extend **notice and an opportunity to be heard** on issues that affect them.

608 F.3d at 1146, n.10 (emphasis added).

The Tenth Circuit had earlier noted:

> This court should neither raise *sua sponte* an argument not advanced by a party either before the district court or on appeal, nor then advocate a particular position and resolve the appeal based on that advocacy.

United States v. *Abdenbi*, 361 F.3d 1282, 1290 (10th Cir. 2004).

And the Second Circuit held in *Catzin* v. *Thank You & Good Luck Corp.*, 899 F.3d 77 (2d Cir. 2018):

> "No principle is more fundamental to our system of judicial administration than that a person is entitled to notice before adverse judicial action is taken against him." *Lugo* v. *Keane*, 15 F.3d 29, 30 (2d

> Cir. 1994) (*per curiam*). This is because "providing the adversely affected party with **notice and an opportunity to be heard** plays an important role in establishing the fairness and reliability of" the court's decision and "avoids the risk that the court may overlook valid answers to its perception of defects in the plaintiff's case." *Snider* v. *Melindez*, 199 F.3d 108, 113 (2d Cir. 1999).

899 F.3d at 82 (emphasis added).

Two other circuits have expressed the same view (albeit not expressly alluding to the elements of due process: notice and an opportunity to be heard): *Baude* v. *United States*, 955 F.3d 1290, 1303 (Fed. Cir. 2020) ("It is not the job of the court, the 'neutral arbiter,' to raise questions that are not presented by the parties") and *Nuelsen* v. *Sorensen*, 293 F.2d 454, 462 (9th Cir. 1961) ("the general rule that an appellate court will not consider *sua sponte* arguments not presented or urged by the litigants.").

See also Steiner v. *Markel*, 968 A.2d 1253, 1260, 600 Pa. 515 (2009) ("[W]hen a court decides issues *sua sponte*, it exceeds its proper appellate function and unnecessarily disturbs the processes of orderly judicial decisionmaking.").

B.

The Utah Supreme Court Denied Petitioner His Fourteenth Amendment Right To Due Process

As the right to due process applies to the courts, the *sua sponte* adoption by the Utah Court of Appeals of the "common sense flexible and reasoned approach" -- which the Utah Supreme Court endorsed and ratified -- was a denial of Petitioner's Fourteenth Amendment right to due process as he was denied an opportunity to present argument on a legal theory which Tenant had not raised. And, in not reversing the Utah Court of Appeals, the Utah Supreme Court has decided an important federal question in a way that conflicts with relevant decisions of this Court and with decisions of the United States Courts of Appeals for the Second, Ninth, Tenth, and Federal Circuits.

Because Landlord was denied due process, the judgment of the Utah Court of Appeals as to attorney fees is void. *See e.g.*, *United Student Aid Funds, Inc.* v. *Espinosa*, 559 U.S. 260, 271 (2010) (judgment is void where "premised . . . on a violation of due process that deprives a party of notice or the opportunity to be heard."). *See also Garcia* v. *Garcia*, 712 P.2d 288, 291, n.5 (Utah 1986) ("judgment is void only if the court that rendered it . . . acted in a manner inconsistent with due process of law.").

Moreover, as a void judgment, it may be attacked at any time. *See United Student Aid Funds,*

Inc., supra, 559 U.S. at 270 ("**void judgment** is one so affected by a fundamental infirmity that the infirmity **may be raised even after the judgment becomes final**." (emphasis added). *See also Garcia, supra*, 712 P.2d at 291 ("there is no time limit on an attack on a judgment as void"). Thus, this issue may be raised even after the decision of the Utah Court of Appeals became final.

II.
The "Common Sense Flexible and Reasoned Approach" Does Not Apply

Had the Utah Court of Appeals provided Landlord an opportunity to brief and argue whether the "common sense flexible and reasoned approach" applied to this case, he would have shown that it does not.

The "common sense flexible and reasoned approach" applies only where the prevailing party is entitled to attorney fees but the parties dispute which of them prevailed. The approach originated in a footnote in *Mountain States Broadcasting Co.* v. *Neale*, 783 P.2d 551, 556 n.7 (Utah 1989). There, the Court reviewed cases where "the determination of a 'prevailing party'" became "complicated." *Id.* The Court concluded that:

> [t]hese cases demonstrate the need for a flexible and reasoned approach to

> deciding in particular cases who actually is **the** "prevailing party."

Id. (emphasis in original).

Since *Mountain States* was issued, Utah courts have applied the "flexible and reasoned approach" **only** to resolve disputes concerning which party prevailed. *E.g.*, *Wihongi* v. *Catania SFH LLC*, 2020 UT App 109, ¶ 25; *Express Recovery Servs. Inc.* v. *Olson*, 2017 UT App 71, ¶ 17; *Giles* v. *Min. Res. Int'l, Inc.*, 2014 UT App 37, ¶ 10; *Neff* v. *Neff*, 2011 UT 6, ¶ 59; *Olsen* v. *Lund*, 2010 UT App 353, ¶ 7; *J. Pochynok Co.* v. *Smedsrud*, 2005 UT 39, ¶¶ 12-13; *A.K. & R. Whipple Plumbing & Heating* v. *Guy*, 2004 UT 47, ¶¶ 31-32.

The "flexible and reasoned approach" has never been applied where the prevailing party was undisputed. Until now. Here, the Utah Court of Appeals used the "flexible and reasoned approach" even though it was undisputed that Tenant prevailed in the lawsuit as no damages were awarded against him.

But that was not the question. The question was whether the plain language of the attorney fees provision in the lease allowed an award of fees to Tenant even though Tenant was the defaulting party. The "flexible and reasoned approach" had no bearing on that question.

Instead, under Utah law, attorney fees "provided for by contract . . . are allowed only in **strict accordance** with the terms of the contract. . . ." *Foote* v. *Clark*, 962 P.2d 52, 54 (Utah 1998) (emphasis added). Indeed, "[i]f the legal right to attorney fees is established by contract, Utah law clearly requires the court to apply the contractual attorney fee provision and to do so **strictly in accordance with the contract's terms**." *Express Recovery Servs.*, 2017 UT App 71, ¶ 8 (citation and internal quotation marks omitted) (emphasis added). Notably, this holding emphasizes that *Express Recovery Services Inc.* was only establishing a standard to determine who was the prevailing party when that was in dispute and was not construing "defaulting party" language. Indeed, the "flexible and reasoned approach" adopted by the Utah Court of Appeals, by its very nature, does not require "strict accordance with the terms of the contract."

And, where the contractual language allows only a non-defaulting party to recover fees, Utah courts strictly construe that language as well. For example, in *Foote* v. *Clark*, *supra*, the attorney fee provision "provide[d] that 'the defaulting party shall pay . . . a reasonable attorney's fee, which may arise or accrue in pursuing any remedy provided by applicable law." 962 P.2d at 54 (alteration and internal quotation marks omitted). The Court strictly construed the language and held that only the non-defaulting party could recover fees, **regardless of who prevailed**. *Id.* at 54-55.

Similarly, in *Faulkner* v. *Farnsworth*, 714 P.2d 1149 (Utah 1986), the contract provided that, if either party defaulted, "the defaulting party shall pay all costs and expenses, including a reasonable attorney's fee, which may arise or accrue from enforcing this agreement." 714 P.2d at 1150. The Court held that, even though the defendants (as here) were the prevailing party, the plaintiffs did not have to pay defendants' attorney fees because the award of attorney fees was triggered by a party's default. *Id.* at 1151. As the Court explained:

> The contractual language does not award attorney fees to the prevailing party who succeeds in enforcing the agreement, but against the defaulting party whose default necessitates enforcement.

Id.

The law is therefore well-settled in Utah that, where a contract contemplates fees only for a non-defaulting party, only a non-defaulting party can recover fees. *B. Inv. LC* v. *Anderson*, 2012 UT App 24, ¶¶ 33-34 (relying on *Faulkner* to hold that only a defaulting party can be required to pay fees under the contract language); *Guisti* v. *Sterling Wentworth Corp.*, 2009 UT 2, ¶ 77 (only "non-defaulting party shall be entitled to recover" fees); *Jones* v. *Riche*, 2009 UT App 196, ¶ 3 ("[w]hen a contract requires, as this one does, that the defaulting party pay attorney fees, 'the sole

criterion for [a party] to obtain attorney fees . . . is to show default by the other contract party.'").

The Utah Supreme Court has emphasized that, when the attorney fee provision is based upon default, the amount of a plaintiff's recovery "is irrelevant" because the defaulting party language "does not require any evaluation of the parties' respective success in an action brought to remedy a default." *Foote* v. *Clark*, *supra*, 962 P.2d at 54–55. Here, the attorney fees provision allowed an award of attorney fees only to the non-defaulting party (Landlord):

> Should either party default in the performance of any covenants or agreements contained herein, **such defaulting party** shall pay to the other party all costs and expenses, including but not limited to, a reasonable attorney's fee, including such fees on appeal, which the prevailing party may incur in enforcing this Agreement or in pursing any remedy allowed by law for breach hereof. (emphasis added).

The provision -- when interpreted in "strict accordance" with the contract terms -- does not entitle a defaulting party (Tenant) to fees. When there is a default, the "defaulting party shall pay to the other party all costs and expenses."

Those "costs and expenses" are defined as "including but not limited to, a reasonable attorney's fee," which "the prevailing party may incur in enforcing this Agreement or in pursuing any remedy allowed by law for breach hereof." Thus, the "prevailing party" language is merely a part of the clause defining what "costs and expenses" are recoverable. Viewed in that proper context, "prevailing party" is simply a different way of referring to the non-defaulting party, not a reference to the party who prevailed on damages since prevailing on damages does not determine who defaulted.

The interpretation of the Utah Court of Appeals turns the provision on its head. Indeed, if "prevailing party" is interpreted to mean the party who defaults, but who successfully defends against an award of damages for defaulting, then all the triggering "defaulting party" language is rendered completely without effect. The only way to give effect, function, and meaning to the triggering "default" language and to the "prevailing party" language is to construe "prevailing party" to refer to the party who was not in default (Landlord) and not to the party who prevailed on damages (Tenant).

The remaining language in the provision reinforces this conclusion. Tenant did not "enforc[e]" the Lease nor did he "pursu[e] any remedy allowed by law for breach" of the lease. Instead, he only successfully defended against an award of damages.

In sum, had the Utah Court of Appeals given Landlord an opportunity to brief the issue, he would have shown that the "flexible and reasoned approach" did not apply and that Tenant is not entitled to a fee award under the lease.

CONCLUSION

The Court should grant this Petition to address the important question of federal law that has been decided in a way that conflicts with relevant decisions of this Court and with decisions of the United States Courts of Appeals for the Second, Ninth, Tenth, and Federal Circuits.

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March 14, 2023

APPENDIX

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2022 UT 42

IN THE
SUPREME COURT OF THE STATE OF UTAH

RICHARD E. GARDINER,
Appellant,
v.
NELS ANDERSON,
Appellee.

No. 20220146
Filed December 15, 2022

On Direct Appeal

Fourth District, Millard
The Honorable Anthony Howell
No. 160700010

Attorneys:
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JUSTICE PETERSEN authored the opinion of the Court, in which CHIEF JUSTICE DURRANT, ASSOCIATE CHIEF JUSTICE PEARCE, JUSTICE POHLMAN, and JUDGE TENNEY joined.

Having recused herself, JUSTICE HAGEN does not

participate herein; COURT OF APPEALS JUDGE RYAN D. TENNEY sat.

JUSTICE PETERSEN, opinion of the Court:

INTRODUCTION

¶1 We retained this appeal to address only one issue: the reasonableness of the district court's attorney fee award to the appellee. However, the appellant has not addressed this issue. Instead, he has attempted to reargue a contention that the court of appeals rejected in a prior appeal—that the appellee is not entitled to an attorney fee award. The court of appeals decided that question in the appellee's favor, and we denied the appellant's petition for certiorari. It is therefore the law of the case that the appellee is entitled to his attorney fees. The only question properly before us in this subsequent appeal is whether the amount of the attorney fees awarded to the appellee is reasonable.

¶2 By declining to address that issue, the appellant has waived it. Accordingly, we do not disturb the district court's award of attorney fees. We further conclude that the appellee is entitled to recover the reasonable attorney fees he has incurred defending against this appeal. And we remand to the district court for the sole purpose of calculating those fees.

BACKGROUND

¶3 In 2013, Nels Anderson leased a warehouse from Richard Gardiner. The lease prohibited Anderson from subletting the warehouse without Gardiner's prior written consent. But Anderson did just that and made a healthy profit.

¶4 Two years later, Gardiner discovered Anderson's arrangement. He sent Anderson written notice of his breach, giving him ten days to cure it. Anderson chose not to cure and vacated the warehouse. So Gardiner terminated the lease.

¶5 Gardiner then sued for unlawful detainer, breach of lease, and unjust enrichment. He sought damages in the amount of the profits that Anderson had earned from subletting the warehouse.

¶6 Anderson moved for summary judgment, arguing that Gardiner's claim for damages was "nonexistent." The district court agreed and granted Anderson's motion, finding no "support for these damages in the unlawful detainer statute or the lease agreement." Anderson then moved to recoup his attorney fees, arguing that he was the "prevailing party" because he had successfully defended against Gardiner's claims. He asserted that the language of the lease agreement was sufficiently broad to warrant an award of fees to the prevailing party when read in conjunction with Utah's reciprocal attorney fee statute.

The district court ultimately disagreed and denied Anderson's request for attorney fees.

First Appeal - Gardiner I

¶7 Both parties appealed the district court's decision—with Gardiner arguing that the court erred in granting summary judgment to Anderson, and Anderson arguing that the court should have granted his request for attorney fees. And in August 2018, the court of appeals issued its first decision in this case (Gardiner I). The court of appeals affirmed the district court's summary judgment ruling, but it reversed the court's ruling on attorney fees. *Gardiner* v. *Anderson*, 2018 UT App 167, ¶ 1, 436 P.3d 237. The court of appeals held that the lease triggered Utah's reciprocal attorney fee statute, *id.* ¶ 27, which permits a district court to award costs and attorney fees to the prevailing party in a civil action based upon a written contract that "allow[s] at least one party to recover attorney fees," *id.* ¶ 24 (alteration in original) (quoting UTAH CODE § 78B-5-826). And it determined that Anderson "was the prevailing party in enforcing the Lease and defending against [Gardiner's] claims." *Id.* ¶ 27. The court of appeals then remanded for the district court "to determine whether [Anderson] should be awarded attorney fees for successfully defending against [Gardiner's] complaint." *Id.*; see also *id.* ¶ 29. Additionally, it held that Anderson was "entitled to attorney fees incurred on appeal for substantially prevailing on appeal." *Id.* ¶ 28.

¶8 Gardiner petitioned for certiorari, but we denied his petition. On remand, the district court awarded Anderson attorney fees and costs against Gardiner totaling $26,412.58—including $7,143.75 for time spent on the initial case and summary judgment and $18,855 for time spent on appeal, among other costs.

Second Appeal - Gardiner II

¶9 Gardiner appealed the district court's attorney fee order. But instead of attacking the order itself, he largely repeated the arguments he made in *Gardiner I* as to why Anderson was not entitled to attorney fees under the lease agreement. As the court of appeals had already rejected this argument in *Gardiner I*, it issued an order of affirmance (*Gardiner II*), concluding that "the district court correctly followed [its] guidance on remand and there [was] no basis for disturbing [its] prior holding that [Anderson] was eligible for an award of attorney fees."

¶10 The court of appeals also concluded that Gardiner's continued arguments against *Gardiner I* were barred by the law of the case doctrine. More specifically, the court explained that the mandate rule "dictates that pronouncements of an appellate court on legal issues in a case become the law of the case and must be followed in subsequent proceedings of that case." (Quoting *Thurston* v. *Box Elder Cnty*., 892 P.2d 1034, 1037 (Utah 1995).) And it concluded that

"[a]pplication of the mandate rule effectively disposes of [Gardiner's] claims."

¶11 Following the court of appeals' decision in *Gardiner II*, Gardiner once again petitioned for certiorari. We denied the petition. In doing so, we granted Anderson's request for attorney fees incurred in responding to the petition. And we remanded to the district court "for the limited purpose of ascertaining the amount of those fees."

¶12 On remand, Anderson sought attorney fees for 33.75 hours spent preparing the opposition brief filed in the court of appeals and 6.25 hours spent responding to Gardiner's petition for certiorari. Gardiner did not oppose the fees associated with the petition at that time, but he did oppose the 33.75 hours of work associated with the proceeding in the court of appeals. He argued that since the court of appeals' order of affirmance did not explicitly award Anderson any attorney fees, the district court could not award any fees for time spent on that appeal. Gardiner also argued that "[t]he hours purportedly incurred in preparing the opposition brief filed in the Court of Appeals" were "grossly exaggerated and unreasonable."

¶13 The district court rejected Gardiner's arguments. And on January 13, 2022, it awarded Anderson $9,000 in attorney fees and $162 in costs.

Third Appeal

¶14 This brings us to the present appeal, which is Gardiner's third in this case. Gardiner appealed the district court's January 2022 order awarding attorney fees. He then requested that we retain the case and overturn the court of appeals' decision in *Gardiner I* because, according to Gardiner, "the Court of Appeals got the law wrong." We retained Gardiner's appeal, but we made it clear in a scheduling order that the only issue properly before us was the amount of fees the district court calculated on remand.

STANDARD OF REVIEW

¶15 "Calculation of reasonable attorney fees is in the sound discretion of the trial court ...." *Dixie State Bank* v. *Bracken*, 764 P.2d 985, 988 (Utah 1988) (citation omitted). We will not disturb the trial court's fee calculation absent a showing that the court abused its discretion. Id. (citation omitted).

ANALYSIS

¶16 The only issue before us in this appeal is the reasonableness of the district court's January 2022 award of attorney fees. We begin by discussing Gardiner's failure to address this issue, and we conclude that this results in Gardiner waiving any challenge to the amount of the district court's fee award. We then address Anderson's request for

attorney fees incurred on this appeal, and we conclude that such an award is appropriate.

I. WAIVER

¶17 In this case, we issued a narrow scheduling order, which instructed the parties that the "sole issue that will be considered on appeal is whether the district court erred in setting the amount of the fees specified in its January 13, 2022 order." Gardiner has interpreted this scheduling order to allow him to relitigate his arguments about why Anderson is not entitled to fees under the lease agreement. His interpretation of our order is incorrect. As the court of appeals made clear in *Gardiner II*, its decision in *Gardiner I*—that Anderson is eligible for attorney fees under the reciprocal fee statute—is the law of the case. That means the issue is not up for reconsideration or relitigation. So our review is confined to the reasonableness of the district court's $9,162 attorney fee award in January 2022.

¶18 However, Gardiner fails to address the amount of the district court's fee award. At the district court level, Gardiner did make several arguments against the $9,162 figure. See *supra* ¶ 12. Yet on appeal, Gardiner abandons these arguments. Instead, he attempts to persuade us to overturn *Gardiner I*.

¶19 By failing to address the fees calculated in the January 13, 2022 order, Gardiner has waived his

right to challenge their reasonableness. *State* v. *Johnson*, 2017 UT 76, ¶ 16, 416 P.3d 443 ("When a party fails to raise and argue an issue on appeal ... that issue is waived and will typically not be addressed by the appellate court." (citing *Allen* v. *Friel*, 2008 UT 56, ¶¶ 7–8, 194 P.3d 903)). Accordingly, we will not disturb the district court's award of attorney fees.

II. ATTORNEY FEES

¶20 Anderson argues that he should be granted the attorney fees that he has incurred on this appeal. Where a "party entitled to attorney fees below prevails on appeal, [an] award of attorney fees on appeal is proper." *Meadowbrook, LLC* v. *Flower*, 959 P.2d 115, 120 (Utah 1998) (citing *R & R Energies* v. *Mother Earth Indus.*, 936 P.2d 1068, 1081 (Utah 1997)). As discussed, the law of the case establishes that Anderson was properly awarded his attorney fees in the district court. And Anderson has now prevailed in the instant appeal. Accordingly, we grant Anderson's request for the reasonable attorney fees that he has incurred in defending against this appeal.

CONCLUSION

¶21 After *Gardiner I*, Gardiner owed Anderson $26,412.58 in attorney fees and costs. On remand after *Gardiner II*, the district court awarded Anderson an additional $9,000 in attorney fees and $162 in costs. This is the award before us here, and we affirm the

district court's order.

¶22 We now grant Anderson's request for attorney fees incurred on this appeal. And we remand to the district court for the limited purpose of ascertaining the amount of those fees.

IN THE UTAH COURT OF APPEALS

RICHARD E. GARDINER,
Appellee,
v.
NELS ANDERSON,
Appellant.

ORDER OF AFFIRMANCE
Case No. 20200312-CA

Before Judges Appleby, Orme, and Hagen.

This dispute is before this court for the second time. Richard E. Gardiner (Landlord) challenges the district court's award of attorney fees to Nels Anderson (Tenant) following remand from this court. We have determined, on our own motion, that this matter is appropriate for disposition without an opinion. *See* Utah R. App. P. 31(a) ("The court may dispose of any qualified case under this rule upon its own motion . . . ."); *id.* R. 31(b)(1), (5). We conclude the district court correctly followed our guidance on remand and there is no basis for disturbing our prior holding that Tenant was eligible for an award of attorney fees. We therefore affirm.

The facts giving rise to this dispute are detailed in our prior opinion, *Gardiner v. Anderson* (*Gardiner I*), 2018 UT App 167, 436 P.3d 237. In summary, Landlord and Tenant entered into a commercial lease

for a warehouse. *Id.* ¶ 2. Although the lease prohibited Tenant from subleasing the warehouse without Landlord's prior written consent, Tenant entered into an oral agreement to sublet the warehouse to a subtenant without obtaining Landlord's consent. *Id.* ¶¶ 2–3. Approximately thirty-three months later, Landlord became aware of the sublease and gave Tenant written notice of default and an opportunity to cure. *Id.* ¶¶ 3–4. When Tenant declined to cure the breach, Landlord terminated the lease pursuant to the default provisions, and Tenant promptly vacated the warehouse. *Id.* ¶ 4.

Landlord later sued Tenant for breach of contract or, alternatively, for unjust enrichment, seeking damages based upon the amount Tenant received from the sublease. *Id.* ¶ 5. On summary judgment, the district court concluded that nothing in the unlawful detainer statute or the lease supported Landlord's claim for damages in the amount of the rent obtained from the sublease. *Id.* ¶ 9. Rather, "the only remedy [Landlord] appears to be entitled to is a declaration under [the unlawful detainer statute] that the [Lease] is forfeited due to [Tenant's] failure to perform a condition or covenant therein." *Id.*

Following the summary judgment ruling in his favor, Tenant requested attorney fees, contending he was the prevailing party in the lawsuit because he had successfully defended against Landlord's claim. *Id.* ¶ 10. Landlord objected, arguing the lease's enforcement

provision provided for attorney fees only to the non-defaulting party. *Id.* The district court denied Tenant's request, concluding Tenant was the defaulting party and that the lease "does not provide a basis for an award of attorney fees to . . . the party in default." *Id.* ¶ 11.

In *Gardiner I*, Landlord appealed the district court's grant of summary judgment in Tenant's favor on the damages issue and Tenant cross-appealed the denial of his request for attorney fees. *Id.* ¶ 12. We affirmed the summary judgment in Tenant's favor on damages, agreeing with the district court that the lease does not provide for the damages Landlord requested. *Id.* ¶ 16. But we held the district court erred in concluding there was no basis for awarding attorney fees to Tenant as the prevailing party. *Id.* ¶ 22.

We observed the enforcement provision of the lease provides that the "defaulting party shall pay to the other party all costs and expenses, including but not limited to, a reasonable attorney's fee including such fees on appeal, which the *prevailing party* may incur in enforcing [the Lease] or in pursuing any remedy allowed by law for breach hereof." *Id.* ¶ 25. Although this language provides that the defaulting party must pay the prevailing party, we recognized that "Utah courts generally apply a common sense flexible and reasoned approach to the interpretation of contractual 'prevailing party' language" when

considering requests for attorney fees. *Id.* (quotation simplified). And we also held the contractual language triggered the application of Utah's reciprocal attorney fee statute, *see* Utah Code Ann. § 78B-5-826 (LexisNexis 2012), under which "courts may award attorney fees to the prevailing party of a contract dispute so long as the contract provided for the award of attorney fees to at least one of the parties," *Gardiner I*, 2018 UT App 167, ¶ 24 (quotation simplified). In accordance with these holdings, we remanded the case to the district court "to determine whether Tenant should be awarded attorney fees for successfully defending against Landlord's complaint." *Id.* ¶ 29.

On remand to the district court following *Gardiner I*, Tenant requested an award of attorney fees and Landlord objected. While recognizing this court had left to the district court "the ultimate decision of whether [Tenant] should be awarded attorney fees for successfully defending against [Landlord's] complaint," the district court stated it found this court's analysis "instructive." It observed this court had "concluded that the Lease did trigger the reciprocal attorney fee statute" and that this court had also concluded that although Tenant had defaulted under the lease, Tenant had cured his default by the time Landlord commenced suit and that Tenant "was the prevailing party in enforcing the Lease and defending against [Landlord's] claims under the unlawful detainer statute and [for] breach of contract." Agreeing that the reciprocal attorney fee

statute did in fact apply, the district court granted Tenant's request for an award of attorney fees as the prevailing party and subsequently entered a Final Judgment consistent with that ruling.

Landlord subsequently filed a Motion to Alter or Amend the Judgment. The district court denied the motion, ruling that "the award of attorney fees to [Tenant] is proper and follows the provisions of the Lease and the remand order of the Court of Appeals." This second appeal followed.

Landlord argues the district court erred in awarding attorney fees to Tenant on remand. Specifically, Landlord maintains that the reciprocal attorney fee statute does not apply, and strict construction of the lease as a matter of law precludes an award of attorney fees to Tenant. In essence, Landlord argues this court erred in deciding *Gardiner I* when it held the reciprocal attorney fee statute applies and when it remanded the matter to the district court to consider Tenant's request for attorney fees.

Tenant responds that Landlord's arguments are barred by the "law of the case doctrine." Tenant reasons that Landlord is now asking this court to revisit its holding in *Gardiner I* without making the showing required to disturb the law of the case. We agree.

Under the law of the case doctrine, a decision made in one stage of a case is binding in successive stages of the same litigation. "The doctrine was developed in the interest of economy and efficiency to avoid the delays and difficulties involved in repetitious contentions and reconsideration of rulings on matters previously decided in the same case." *Thurston v. Box Elder County*, 892 P.2d 1034, 1037 (Utah 1995). The mandate rule, a particular branch of the doctrine, "dictates that pronouncements of an appellate court on legal issues in a case become the law of the case and must be followed in subsequent proceedings of that case." *Id.* at 1037–38. Importantly, the rule must be followed even though a lower court addressing the case on remand disagrees with the mandate. *Id.* at 1038.

Application of the mandate rule effectively disposes of Landlord's claims on this appeal. In *Gardiner I*, we observed that Utah courts apply a common sense flexible and reasoned approach to the interpretation of contractual "prevailing party" language when considering requests for attorney fees. *Gardiner I*, 2018 UT App 167, ¶ 25. And after considering the attorney fee provision in the lease, we held it triggered the application of Utah's reciprocal attorney fee statute. *Id.* ¶¶ 24–25. Having concluded that Tenant was potentially eligible for an award of attorney fees under the lease and statute, we remanded the case to the district court to determine whether Tenant should be awarded attorney fees for successfully defending against Landlord's complaint.

Id. ¶ 27.

On appeal, Landlord argues the district court erred in awarding fees to Tenant because Tenant was not eligible for an award of fees under the lease and because Utah's reciprocal attorney fee statute does not apply. But each of these arguments is in direct conflict with this court's holding in *Gardiner I*. If Landlord disagreed with these holdings, he could have sought rehearing pursuant to rule 35 of the Utah Rules of Appellate Procedure, which provides an avenue for those "seeking to alter a decision in a manner that affects the substantive rights of the parties or any mandate or rule of law established by the decision." Utah R. App. P. 35(a)(1). But Landlord did not do that. As a result, this court's holding that Tenant was eligible for an award of attorney fees became the law of the case. It therefore was binding on the district court on remand. As a result, Landlord cannot meet his burden of showing the district court erred in awarding attorney fees to Tenant.[4]

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[4] Although under limited circumstances a court may elect to reconsider its own prior decision, none of those circumstances are present here. "The exceptional circumstances under which courts have reopened issues previously decided are narrowly defined: (1) when there has been an intervening change of controlling authority; (2) when new evidence has become available; or (3) when the court is convinced that its prior decision was clearly erroneous and would work a manifest injustice." *Thurston v. Box Elder County,* 892 P.2d 1034, 1039 (Utah 1995). Landlord has not demonstrated the existence of any such circumstances. He does not contend there has been an intervening

Dated this 6th day of January, 2021.

FOR THE COURT:

/s/Kate Appleby
Kate Appleby, Judge

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change of controlling authority or that new evidence has become available. And he has not convinced us that our prior decision was clearly erroneous and would work a manifest injustice. The arguments Landlord raised on this appeal were carefully considered and rejected by this court in *Gardiner I*, and we are not persuaded either that our decision was clearly erroneous or that it would work a manifest injustice.

2018 UT App 167

THE UTAH COURT OF APPEALS

RICHARD E. GARDINER,
Appellant and Cross-appellee,
v.
NELS ANDERSON,
Appellee and Cross-appellant.

Opinion
No. 20170551-CA
Filed August 30, 2018

Fourth District Court, Fillmore Department
The Honorable Jennifer A. Brown
No. 160700010

Todd F. Anderson, Attorney for Appellant
and Cross-appellee

Marlin J. Grant, Attorney for Appellee
and Cross-appellant

JUDGE KATE A. TOOMEY authored this Opinion,
in which JUDGES DAVID N. MORTENSEN and
DIANA HAGEN concurred.

TOOMEY, Judge:

¶1 Richard E. Gardiner (Landlord) appeals the district

court's grant of summary judgment in favor of Nels Anderson (Tenant). Tenant cross-appeals the court's decision to award Landlord attorney fees with respect to Landlord's motions to strike and the court's denial of Tenant's request for attorney fees as the prevailing party. We affirm the district court's grant of summary judgment in favor of Tenant because Landlord's claim fails as a matter of law. We remand to the district court to provide findings of fact and conclusions of law to support its decision to award attorney fees to Landlord for the motions *240 to strike. We reverse the district court's conclusion that the Lease did not trigger the reciprocal attorney fees statute and remand for the court to determine whether Tenant should be awarded attorney fees as the prevailing party. We further conclude Tenant is entitled to attorney fees on appeal and remand to determine the reasonable amount of fees incurred on appeal and cross-appeal.

BACKGROUND

¶2 On November 1, 2013, Landlord and Tenant entered into a lease agreement (the Lease) for a warehouse building (the Warehouse) to last for two years until October 31, 2015. The Lease provided that Tenant was to "repair" the Warehouse "at [Tenant's] sole cost and expense, including, but not limited to, electrical fixtures, interior painting and decorating, and glass replacement." The agreed rent escalated gradually over time from $600 per month to $1,000 per

month. The Lease prohibited Tenant from subleasing the Warehouse without Landlord's prior written consent. The sublease provision states:

> [Tenant] shall not ... sublet or permit the leased premises or any part thereof to be used by others for any purpose, without prior written consent of [Landlord] being first obtained in each instance; provided, however, that regardless of any such assignment or sublease, [Tenant] shall remain primarily liable for the payment of the rent herein reserved and for the performance of all the other terms of this lease required to be performed by [Tenant].

¶3 Despite this provision, Tenant entered into an oral agreement to sublet the Warehouse to a subtenant (Subtenant), beginning November 1, 2013—the same day the Lease went into effect—without Landlord's written consent. Tenant and Subtenant orally agreed that Subtenant would pay $2,250 per month in rent from November 1, 2013, through October 31, 2014; and $3,000 per month from November 1, 2014, through March 31, 2015. They later signed a written agreement to sublet[1] the Warehouse for $5,000 per month from April 1, 2015, to September 30, 2015.

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[1] We refer to the oral and written agreements, collectively, as the Sublease.

¶4 In July 2015, Landlord discovered that Tenant was subletting the Warehouse and sent Tenant a letter in September 2015, giving Tenant written notice of his default of the sublease provision and giving him ten days to cure by paying Landlord $30,000. Because Tenant chose not to cure the breach, Landlord terminated the Lease pursuant to its default provisions. Tenant promptly vacated the Warehouse.

¶5 A few months later, Landlord filed a complaint, alleging that Tenant unlawfully detained the Warehouse, breached the Lease, and was unjustly enriched by the Sublease. Landlord claimed he had been damaged by the Sublease in the amount of $53,100, arguing that he "would have agreed to the Sublease if Tenant had paid Landlord the difference between Tenant's rent and what Tenant received from [Subtenant]." Landlord sought treble damages in the amount of $159,300 and reasonable attorney fees, arguing that the Sublease amounted to an unlawful detainer under Utah Code section 78B-6-802(1)(d). Alternatively, he sought $53,100 in damages for either breach of contract or unjust enrichment, stating that "it would be unjust for the Tenant to retain the benefit from the sublet rent that he received."

¶6 Tenant filed an answer and later a Motion to Dismiss or in the Alternative for Summary Judgment (Tenant's Motion for Summary Judgment). He attached a Verified Memorandum of Points and Authorities (the Verified Memorandum) in which he

swore "under oath to tell the whole truth." In the Verified Memorandum, Tenant articulated material facts that were substantially similar to Landlord's complaint, including that Tenant breached the Lease, entered into a Sublease, chose not to cure the breach, and vacated in a timely fashion pursuant to the Lease's default provision. He referred to Landlord's complaint and the exhibits attached to it to support these facts. Tenant also argued that Landlord's unlawful detainer claim failed because Tenant returned possession of the Warehouse to Landlord before the term of the notice expired. He further argued that Landlord had no remedy for *241 breach of contract because the Lease allowed Landlord to terminate the Lease and collect the $1,000 rent due each month through the end of the Lease, which included lost rents from Tenant between September 14, 2015, and October 31, 2015, but, according to Tenant, nothing in the Lease entitled Landlord to the rent from the Sublease. Finally, he argued that without evidence of an unlawful detainer or a provision in the Lease that would entitle Landlord to such damages, Landlord could not claim that Tenant was unjustly enriched from the rent collected under the Sublease.

¶7 Landlord opposed Tenant's Motion for Summary Judgment, arguing that the Verified Memorandum did not comply with rule 56 of the Utah Rules of Civil Procedure because it did "not state that the facts set forth in the pleading were true and correct to the

personal knowledge of the signer," and instead "attempt[ed] to verify the entire contents of the pleading, not just the factual assertions, and some of the facts sworn were ... mere assumptions or conclusions."[2] Landlord also "[d]isputed" many of the facts in the Verified Memorandum, essentially claiming that the facts were not relevant to the complaint or re-characterizing the way Tenant had articulated them.[3]

¶8 Landlord then filed his own motion for summary judgment (Landlord's Motion for Summary Judgment), asserting that there was no dispute as to any material fact and arguing that subletting the Warehouse without Landlord's written consent was an unlawful detainer and a breach of contract, which "entitled

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[2] We note that Landlord's complaint and motion for summary judgment also included "mere assumptions or conclusions," the most notable being that his statement of facts asserted that Landlord "would have agreed to the sublease if [Tenant] had paid [Landlord] the difference between [Tenant's] rent and what [Tenant] received from [Subtenant]."

[3] For example, Tenant's Verified Memorandum stated that he did not hear from Landlord after Tenant vacated until he was served with a summons in May 2016. Landlord "[d]isputed" this fact and referred to his own affidavit stating that there was an email thread between Landlord and Tenant about an event unrelated to the dispute regarding the Lease, the Sublease, or the Warehouse. It would not be unreasonable to infer that Tenant's stated fact meant that he had not heard from Landlord with respect to the breach of the Lease or Landlord's request for the excess rent as damages as a consequence of that breach until he was served with a summons.

[him] to judgment" for $153,600[4] plus reasonable attorney fees and post-judgment interest. Shortly thereafter, Tenant filed a reply memorandum in support of his own motion for summary judgment and then a memorandum in opposition to Landlord's Motion for Summary Judgment. Landlord filed motions to strike both of these replies (the Motions to Strike), claiming they were untimely filed and failed to comply with the Utah Rules of Civil Procedure. The district court heard argument on the Motions to Strike and ultimately struck Tenant's two reply memoranda for being untimely and ordered Tenant to pay Landlord attorney fees and costs related to the Motions to Strike. But the court determined that, because Tenant filed a motion for summary judgment, Landlord's Motion for Summary Judgment was opposed and the court would therefore "consider arguments and material" from the Verified Memorandum.[5]

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[4] Landlord's calculation of damages in his motion for summary judgment differs from the amount articulated in his complaint. Because we conclude Landlord was not entitled to any of his claimed damages, we do not address this discrepancy.

[5] Even in situations where a motion for summary judgment is unopposed, the moving party bears the burden of showing that it is entitled to summary judgment as a matter of law by demonstrating it is entitled to the remedy it seeks either under a contract or law. Utah R. Civ. P. 56(a). Summary judgment may be granted to a nonmoving party even if the nonmoving party did not file a memorandum in opposition to the moving party's motion for summary judgment. See id. R. 56(f)(1) (explaining that a court may enter judgment "independent of the motion" and may

¶9 The district court considered both parties' motions for summary judgment. It concluded that nothing in the unlawful detainer statute or the Lease supported Landlord's claim for damages of $53,100 in rent Tenant obtained from the Subtenant. The court determined that "the only remedy [Landlord] appears to be entitled to is a declaration under [the unlawful detainer statute] that the [Lease] is forfeited due to [Tenant's] failure to perform a condition or covenant therein." Tenant complied with Landlord's notice to vacate when he elected to promptly vacate the Warehouse rather than cure the breach and therefore did not unlawfully possess it. The court further concluded that even if Tenant was in "unlawful detainer" of the Warehouse under Utah Code section

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"grant summary judgment for a nonmoving party" "[a]fter giving [the nonmoving party] notice and a reasonable time to respond"). In addition, with respect to cross-motions for summary judgment, as is relevant here, each party "must establish its own entitlement to summary judgment rather than simply rely on the other party's failure on its own motion." *Martin* v. *Lauder*, 2010 UT App 216, ¶ 7, 239 P.3d 519. Further, this court has determined that "[c]ross-motions for summary judgment do not ipso facto dissipate factual issues, even though both parties contend that they are entitled to prevail because there are no material issues of fact." *Id.* ¶ 8 (quotation simplified). "Rather, cross-motions may be viewed as involving a contention by each movant that no genuine issue of fact exists under the theory it advances, but not as a concession that no dispute remains under the theory advanced by its adversary." Id. (quotation simplified). "In effect, each cross-movant implicitly contends that it is entitled to judgment as a matter of law, but that if the court determines otherwise, factual disputes exist which preclude judgment as a matter of law in favor of the other side." *Id.* (quotation simplified).

78B-6-802(1)(d) for unauthorized subletting, that section "does not specifically provide for damages for unauthorized subletting" and neither did the Lease. As a result, the court granted summary judgment in favor of Tenant and denied Landlord's cross-motion.

¶10 In light of judgment in his favor, Tenant requested attorney fees, contending that he was the prevailing party in the lawsuit because he successfully defended against Landlord's complaint. He also argued that he was entitled to attorney fees under the unlawful detainer statute because he successfully defended against the claim of unlawful detainer. Landlord challenged the request, arguing that the Lease's enforcement provision provided for attorney fees only to the party not in breach of the Lease. The enforcement provision states:

> Should either party default in the performance of any covenants or agreements contained herein, such defaulting party shall pay to the other party all costs and expenses, including but not limited to, ... reasonable attorney's fee[s], including such fees on appeal, which the prevailing party may incur in enforcing [the Lease] or in pursuing any remedy allowed by law for breach hereof.

¶11 The district court denied Tenant's request,

concluding that Tenant was the defaulting party and that the Lease "does not provide a basis for an award of attorney fees to ... the party in default." The court further concluded that Landlord did not become the party in default by virtue of losing the lawsuit. The court also concluded that Tenant was not entitled to attorney fees under the unlawful detainer statute, because the provision that would have allowed for such an award was not in effect until May 2017,[6] after the complaint had been filed. Because the statute did not state that it could be applied retroactively and because the statute was not amended to clarify its meaning in response to judicial action, the court concluded Tenant was not entitled to attorney fees under that statute. (Citing Utah Code Ann. § 86-3-3 (LexisNexis 2016); *Wasatch County* v. *Okelberry*, 2015 UT App 192, ¶ 17, 357 P.3d 586.)

¶12 Landlord appeals the court's grant of summary judgment in favor of Tenant. Tenant cross-appeals the court's order requiring him to pay attorney fees for the Motions to Strike and for the denial of his request for

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[6] Effective May 9, 2017, the unlawful detainer statute was amended to add a subsection that states: "In an action under this chapter, the court may award costs and reasonable attorney fees to the prevailing party." Utah Code Ann. § 78B-6-811(5) (LexisNexis Supp. 2017). Prior to the amendment, only one subsection of the statute included attorney fees language: "The judgment shall be entered against the defendant for the rent, for three times the amount of the damages assessed under Subsections (2)(a) through (2)(e), and for reasonable attorney fees." *Id. § 78B*-6-811(3) (2012).

attorney fees as the prevailing party.

ISSUES AND STANDARDS OF REVIEW

¶13 Landlord contends the district court erred in granting summary judgment in favor of Tenant in three respects. He first argues that the court should have denied Tenant's Motion for Summary Judgment "on its face" because the Verified Memorandum did not include citations to "particular parts of materials in the record" in violation of rule 56(a) of the Utah Rules of Civil Procedure. Second, he argues that Landlord's Motion for Summary Judgment should have been granted because the court should have dismissed the Verified Memorandum in its entirety based on its failure to conform with rule 56 and therefore the court could not have relied on it as a replacement for Tenant's opposition to Landlord's Motion for Summary Judgment.[7] Third, Landlord argues that the court

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[7] Landlord further contends the district court erred in denying his motion for summary judgment because it was unopposed. We note, however, that in Landlord's Motion for Summary Judgment he cited the Verified Memorandum in his statement of facts to support the factual assertion of the amount of rent Tenant collected from Subtenant under the Sublease. He therefore relied on a document, the Verified Memorandum, that he asserts the court should not have considered in determining whether there was a dispute as to any material fact. We decline to address this claim for two reasons. First, as discussed infra ¶¶16–20, Landlord's claim fails as a matter of law, because the remedy he seeks is not available under the Lease or case law from any jurisdiction. Second, the district court has discretion in requiring compliance with briefing requirements under rule 56 of

erred in determining that the Lease did not afford him the damages he sought.[8]

¶14 Summary judgment is appropriate where "there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Utah R. Civ. P. 56(a). "We review the district court's grant of summary judgment for correctness and accord no deference to its conclusions of law."[9] *Dillon*

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the Utah Rules of Civil Procedure, see Bluffdale City v. Smith, 2007 UT App 25, ¶ 5, 156 P.3d 175, and could therefore review the Verified Memorandum because it complied with the purpose of that rule and was beneficial to the court's determination.

[8] On appeal, Landlord has abandoned his unlawful detainer claim and elected to proceed on the court's ruling only with respect to his claim for damages under the breach of the Lease.

[9] We take this opportunity to address some confusion raised by Landlord as to the applicable standard of review. Use of the terms "for correctness," "de novo," and "correction of error" under the Issues and Standards of Review sections of our opinions mean that we afford "no deference" to the district courts' rulings with respect to their legal conclusions. *See Salt Lake County* v. *Holliday Water Co.*, 2010 UT 45, ¶ 14, 234 P.3d 1105 ("We review a summary judgment determination for correctness, granting no deference to the district court's legal conclusions." (quotation simplified)); *Innerlight, Inc.* v. *Matrix Group, LLC*, 2009 UT 31, ¶ 8, 214 P.3d 854 ("We review a district court's grant of summary judgment de novo, considering the record as a whole, with no deference afforded to the legal conclusions of the district court."); *Raile Family Trust ex. rel. Raile* v. *Promax Dev. Corp.*, 2001 UT 40, ¶ 8, 24 P.3d 980 ("On appeal from the district court's ruling on summary judgment, we apply a correction of error standard, affording the [district] court's ruling no deference.").

v. *Southern Mgmt. Corp. Ret. Trust*, 2014 UT 14, ¶ 21, 326 P.3d 656 (quotation simplified). "We may affirm the result reached by the [district] court if it is sustainable on any legal ground or theory apparent on the record, even though that ground or theory was not identified by the lower court as the basis of its ruling." Id. (quotation simplified).

¶15 Tenant cross-appeals and contends the district court erred in awarding attorney fees to Landlord for the Motions to Strike.[10] Tenant further contends the

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[10] Landlord filed a motion to dismiss Tenant's cross-appeal with respect to this issue. Landlord contends the issue is "moot" because Tenant has already paid the attorney fees related to the Motions to Strike. In support, Landlord cites rule 58B(c) of the Utah Rules of Civil Procedure and *Richards* v. *Brown*, 2012 UT 14, 274 P.3d 911, abrogated on other grounds by *Utah Res. Int'l, Inc.* v. *Mark Techs. Corp.*, 2014 UT 59, 342 P.3d 761. But his reliance on these sources is misplaced. Under rule 58B(c), "[s]atisfaction of a judgment, whether by acknowledgment or order, discharges the judgment, and the judgment ceases to be a lien as to the debtors named and to the extent of the amount paid." Utah R. Civ. P. 58B(c). This means that the party who was paid the judgment cannot seek more damages for the same judgment from the same debtor (that is, the person who paid the judgment) after accepting the payment. As applied to this case, Landlord could not appeal any claimed error in the amount of attorney fees awarded for preparing the Motions to Strike, because Tenant paid the attorney fees he was ordered to pay to satisfy the judgment and Landlord has accepted those fees. The rule does not, on its face, prohibit Tenant, as the debtor, from appealing the amount or the order.

Similarly, Landlord's use of *Richards* is misplaced. Landlord selectively quoted a "general rule" that did not apply in

court erred in denying his request for attorney fees as the prevailing party and for "defend[ing] against this unnecessary litigation" where Tenant timely vacated the Warehouse in accordance with the terms of the Lease. "Whether attorney fees are recoverable in an action is a question of law, which we review for correctness." Express Recovery Services Inc. v. Olson,

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Richards and does not apply in this case. The *Richards* court explained, "The general rule is that if a judgment is voluntarily paid, and is accepted, and a judgment is thereby satisfied, the controversy has become moot and the right to appeal is waived." 2012 UT 14, ¶ 13, 274 P.3d 911 (emphasis added) (quotation simplified). But the Richards court determined that, although the appellant had accepted payment as satisfaction of the judgment of one of his claims, he did not waive his right to appeal because "the appeal is waived only for the specific claims upon which payment is accepted." *Id.* ¶¶ 13–16. The *Richards* court did not discuss whether a party who pays a judgment under protest is precluded from appealing whether the court properly ordered the payment. To the contrary, the Utah Supreme Court has clarified that, "although the general rule that voluntary payment of a judgment waives one's right to appeal is still valid, where a judgment debtor's intention of preserving his right to appeal is made to appear clearly on the record, he does not waive his right to appeal." *Mark Techs. Corp.*, 2014 UT 59, ¶ 33, 342 P.3d 761 (quotation simplified).

Here, although Tenant paid the fees, he did so under protest and is therefore not precluded from appealing the district court's order with respect to the propriety of those fees. *See id.* Tenant objected to the award of attorney fees to Landlord, requested the court stay the order awarding attorney fees until after a decision on appeal, and then filed a notice of cross-appeal with the intent to challenge that award, as well as the court's failure to award Tenant attorney fees for successfully defending the case. We conclude Landlord's argument is without merit and address both of Tenant's attorney fees issues.

2017 UT App 71, ¶ 5, 397 P.3d 792 (quotation simplified). "We review the [district] court's determination as to who was the prevailing party under an abuse of discretion standard." Id. (quotation simplified).[11]

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[11] Landlord also contends he "should have been awarded reasonable attorney's fee and costs and expenses where [Tenant] was found to have breached [the Lease] and thus was in default in the performance of [the Lease]." (Quotation simplified.) He asserts the issue was preserved because he requested reasonable attorney fees in Landlord's Motion for Summary Judgment, but that the court "did not address the issues, however, in its [ruling], presumably because, having held that [the Lease] does not provide for damages as requested by [Landlord], [Landlord] was also not eligible for a reasonable attorney's fee." This argument is unpreserved. "An issue is preserved for appeal when it has been presented to the district court in such a way that the court has an opportunity to rule on it." Patterson v. Patterson, 2011 UT 68, ¶ 12, 266 P.3d 828 (quotation simplified). We will not address an unpreserved issue on appeal unless the appellant argues that an exception to the preservation rule applies. *Id.* ¶¶ 12–13. Although Landlord vaguely requested reasonable attorney fees in his motion for summary judgment—stating that his damages included "reasonably incurred attorney fees (provided for by contract)"—he did not argue below that the court improperly failed to rule on his request for attorney fees, and he failed to provide any argument below for why the Lease afforded him attorney fees even in the event summary judgment was granted in favor of Tenant as the defaulting party. He has also failed to argue an exception to the preservation rule. We therefore do not address the issue on appeal.

ANALYSIS

I. Motion for Summary Judgment

¶16 Landlord contends the district court erred in granting summary judgment in favor of Tenant for three reasons. But because we can affirm summary judgment on any ground or theory apparent on the record, regardless of whether it was identified by the district court as the basis of its ruling, *see Dillon*, 2014 UT 14, ¶ 21, 326 P.3d 656, we do not address each of his arguments and instead affirm on the basis that Landlord's claim fails as a matter of law. We agree with the district court that the Lease "does not provide for damages as requested by [Landlord]."

¶17 Landlord argues that "the law must provide a remedy in damages" and that " 'damages are properly measured by the amount necessary to place the nonbreaching party in as good a position as if the contract had been performed.' "[12] (Quoting *Alexander* v. *Brown*, 646 P.2d 692, 695 (Utah 1982).). He asserts that "it is an undisputed material fact that [he] would have agreed to the sublease if [Tenant] had paid [him]

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[12] We are perplexed by Landlord's argument that the remedy he pursued under the Lease—either that Tenant pay $30,000 and evict Subtenant to cure the breach or vacate the premises and pay the rent due for the remainder of the Lease, which Tenant did—has not placed Landlord in the same position as Landlord would have been in if Tenant never breached the Lease.

the difference *245 between [Tenant's] rent and what [Tenant] received from [Subtenant].” For example, Landlord claims he deserves $4,000 per month for the months when Tenant was required to pay $1,000 per month for rent under the Lease and Subtenant was required to pay $5,000 per month for rent under the Sublease. Landlord argues that, had the parties entered into that agreement, he would have been paid the excess rent he now seeks. Though this might be true, we do not see how this legally entitles Landlord to the excess rent from the Sublease without a provision in the Lease providing for those damages. Instead, it appears Landlord is requesting the court to enforce “an alternative benefit to the bargain” than the agreement he reached with Tenant in the Lease based on “something he might have contracted for under different circumstances.” *See Toll* v. *Tannenbaum*, 982 F.Supp.2d 541, 559 (E.D. Pa. 2013). As in *Toll*, this argument fails because it is a request for equitable relief that “hinges on the existence of an agreement.” *See id.* (quotation simplified). There was no agreement to pay the difference between Tenant and Subtenant's rent and there is nothing in the record to suggest that Tenant would have agreed to Landlord's conditions for consenting to the Sublease.

¶18 Because there is no Utah case law that has addressed whether a landlord can recover excess rents obtained by a tenant through a nonconforming sublease without a provision allowing for such recovery, we requested supplemental briefing from the

parties to explain how other jurisdictions have addressed this issue. Landlord has failed to provide case law from any jurisdiction that has addressed the issue with facts similar to this case that would support his request for damages. He cites *Long Building* v. *Buffalo Anthracite Coal Co.*, 190 Misc. 97, 74 N.Y.S.2d 281 (N.Y. Special Term 1947),[13] in which

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[13] Landlord also cites *Theatre Row Phase II Associates* v. *National Recording Studios, Inc.*, 291 A.D.2d 172, 739 N.Y.S.2d 671 (2002). In that case, the court stated, "We perceive no logical support for the absolute rule relied upon by [the tenant] that damages for breach of a covenant against unauthorized subletting may under no circumstances include any of the rental fees collected by the tenant from its subtenant." *Id.* at 175, 739 N.Y.S.2d 671. The court concluded that, in that "particular instance[,] it [was] especially inappropriate" to determine that excess rent was not a consequential damage of an illegal sublease, "because the terms of the lease tend[ed] to support [the landlord's] right to claim entitlement to the excess rents collected by the tenant from its subtenant beyond the amount payable to the landlord." *Id.* at 176, 739 N.Y.S.2d 671. This was because "the contract [gave] the landlord the option to sublease any space the tenant propose[d] to sublease," and it was therefore "possible to infer that the parties intended to give the landlord the right to any expected profits that could be derived from a sublet." *Id.*

Landlord's supplemental brief uses this case to support a new argument under a different provision of the Lease—paragraph 22(C)(4)—for his ability to collect the excess rent obtained under the Sublease. Landlord never argued in his opening brief on appeal, let alone to the district court in Landlord's Motion for Summary Judgment, that paragraph 22(C)(4) governs whether he is entitled to the damages he seeks. It would be unfair to entertain this new argument because Tenant did not have an opportunity to respond. *Cf. Allen* v. *Friel*, 2008 UT 56, ¶ 8, 194 P.3d 903 (explaining that the requirement that "an appellant's reply brief shall be limited to answering any new

a landlord sued a tenant for breach of lease for subletting a portion of the property without the landlord's consent. *Id.* at 282. The landlord claimed he had "no adequate remedy at law, and, therefore, demand[ed] judgment for an accounting for the sums of money received by the [tenant] from the subtenant." Id. But the court explained that "[i]t is well settled that where an adequate remedy at law is provided, the reason for granting equitable relief disappears[,] and if an equitable action does not lie, for the reason that the plaintiff has an adequate remedy at law, the defendant may, before answer, move to dismiss the complaint upon that ground." *Id.* (quotation

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matter set forth in the opposing brief" is "rooted in considerations of fairness" because "if new issues could be raised in a reply brief, the appellee would have no opportunity to respond to those arguments" (quotation simplified)). We conclude this requirement applies equally to new arguments raised in a supplemental brief that responds to the court's request for case law that supports the arguments already made by the appellant. *Cf. id.* ("It is well settled that issues raised by an appellant in the reply brief that were not presented in the opening brief are considered waived and will not be considered by the appellate court." (quotation simplified)); *see also* 4 C.J.S. *Appeal & Error* § 737 (2018) ("Ordinarily only such points as are made and relied on in the original briefs will be considered by the reviewing court in disposing of the case, and supplemental, additional, or amended briefs setting up errors not specified in the original briefs cannot be filed without leave of court or consent of the opposite party, except to the extent that the assignments of error suggest fundamental error." (quotation simplified)). We also note, with some irony, that Landlord filed a motion to strike Tenant's supplemental brief for this exact reason, requiring Tenant to respond to the motion.

simplified).

¶19 Here, Landlord not only had an adequate remedy at law explicitly provided for under the Lease, he also pursued that remedy, and Tenant complied. Landlord first sent a notice to Tenant to cure the default by paying $30,000 and evicting Subtenant. When Tenant did not comply, Landlord sent another notice stating: "Because you did not cure the default ... I hereby exercise my right, pursuant to ¶ 22(C)(1) of the Lease, to terminate the Lease and hereby notify you that the Lease is terminated. Pursuant to ¶ 22(C)(1) of the Lease, you must 'surrender possession of the premises immediately.' "

¶20 Because Landlord pursued an adequate remedy at law for Tenant's breach, because the Lease did not provide for excess rent as damages for a nonconforming sublease, and because Landlord has not articulated any means by which he was actually damaged or injured by the Sublease, we conclude that Landlord's claim fails as a matter of law. We therefore affirm the district court's grant of summary judgment in favor of Tenant and the denial of Landlord's motion for summary judgment.[14]

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[14]Landlord argues that, although Tenant never claimed to have cured the breach by paying Landlord the excess rent obtained under the Sublease, the "district court erred as a matter of law" when it "nonetheless concluded, without citing any authority, that because the 'lease agreement does not provide for damages,' [Tenant] was entitled to summary judgment."

II. Attorney Fees

A. Motions to Strike

¶21 Tenant asserts on cross-appeal that the district court erred in ordering Tenant to pay attorney fees for the Motions to Strike. "Whether attorney fees are recoverable in an action is a question of law, which we review for correctness." *Federated Capital Corp.* v. *Haner*, 2015 UT App 132, ¶ 9, 351 P.3d 816 (quotation

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Landlord's entire argument below with respect to damages resulting from the breach of the Lease amounted to three paragraphs in which he (1) restated the sublease provision and the notice to cure provision of the Lease; (2) included his own statement that he would have given consent to a sublease based on the condition that he receive the excess rent from the sublease; and (3) provided two quotes from cases that stated that "[i]t is axiomatic in the law that for every wrong there is a remedy," *Kramer* v. *Pixton*, 72 Utah 1, 268 P. 1029, 1032 (1928), and "[d]amages are properly measured by the amount necessary to place the nonbreaching party in as good a position as if the contract had been performed," *Alexander* v. *Brown*, 646 P.2d 692, 695 (Utah 1982). First, the court was not required to support its decision with legal authority that the Lease did not provide for the damages Landlord sought, because Landlord did not direct the court to any language in the Lease that provided for such damages. Second, it was Landlord's burden to provide an argument and supporting legal authority to show that he was entitled to summary judgment as a matter of law. *See* Utah R. Civ. P. 56(a); id. R. 7(d)(1)(B). Similar to our requirements on appeal that an appellant's arguments must be adequately briefed so as not to "dump the burden of argument and research" on the court, it is not the district court's burden to research and develop arguments for a moving party and then rebut them. *Cf. Johnson* v. *Johnson*, 2014 UT 21, ¶ 20, 330 P.3d 704.

simplified). To the extent that the district court exercised its discretion to award attorney fees under either statute or one of the Utah Rules of Civil Procedure, we review its decision for an abuse of discretion. *See id.* ¶¶ 9–10. Here, the court failed to provide any findings of fact or conclusions of law to support the award. It is unclear whether the fees were awarded under a provision of the Lease, a statute, or one of the Utah Rules of Civil Procedure. This is concerning, because Landlord never requested attorney fees in either of his Motions to Strike. We therefore remand to the district court to revisit whether attorney fees for the Motions to Strike are appropriate and, if so, to supplement the order with findings of fact and conclusions of law to support its decision.

B. Reciprocal Attorney Fees

¶22 Tenant further contends on cross-appeal that the district court erred in denying attorney fees to Tenant as the prevailing party.[15] We agree.

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[15] Tenant also contends the district court erred in denying his request for attorney fees as the prevailing party in an unlawful detainer action, see Utah Code Ann. § 78B-6-811(5) (LexisNexis Supp. 2017), and for filing the complaint and corresponding motions in bad faith, *see id.* § 78B-5-825 (2012). Because we conclude the court erred in determining that the reciprocal attorney fee statute did not apply and remand for consideration of whether Tenant should be awarded attorney fees for successfully defending against the complaint and prevailing on summary judgment, we decline to address the merits of these

¶23 Although we review whether an award of attorney fees is appropriate for correctness, "we review certain related issues for an abuse of discretion," such as "the determination of which party prevailed in a civil action." *Id.* (quotation simplified).

¶24 Utah Code section 78B-5-826 provides that a court may award costs and attorney fees to the prevailing party in a civil action that is based upon a written contract and that written contract "allow[s] at least one party to recover attorney fees." Utah Code Ann. § 78B-5-826 (LexisNexis 2012); see also *Haner*, 2015 UT App 132, ¶ 11, 351 P.3d 816 ("Under Utah's reciprocal attorney fee statute, courts may award attorney fees to the prevailing party of a contract dispute so long as the contract provided for the award of attorney fees to at least one of the parties[.]"). But see *Blackmore* v. *L & D Dev. Inc.*, 2016 UT App 198, ¶¶ 39–43, 382 P.3d 655 (explaining that a district court erred when relying on a "prevailing party" standard where the contract included only "defaulting party" language).

¶25 Here, the enforcement provision of the Lease provides that the "defaulting party shall pay to the other party all costs and expenses, including but not limited to, a reasonable attorney's fee including such fees on appeal, which the prevailing party may incur in enforcing [the Lease] or in pursuing any remedy allowed by law for breach hereof." (Emphasis added.)

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arguments.

Although this language provides that the defaulting party must pay the prevailing party, "Utah courts generally apply a common sense flexible and reasoned approach to the interpretation of contractual 'prevailing party' language." *See Express Recovery Services Inc.* v. *Olson*, 2017 UT App 71, ¶ 10, 397 P.3d 792 (quotation simplified) (quoting *A.K. & R. Whipple Plumbing & Heating* v. *Guy*, 2004 UT 47, ¶ 14, 94 P.3d 270).

¶26 The district court determined that "the fact that [Landlord] pursued damages against [Tenant] that were ultimately unsuccessful" does not translate into an award of attorney fees to Tenant because, "[a]s in *Blackmore*, 'this provision clearly provides that the party who defaults is liable for attorney fees' and it would be error for this Court to award attorney fees by deeming [Tenant] as the prevailing party under the reciprocal attorney fee statute." (Quotation simplified.) We disagree. In *Blackmore*, the contract provided only "defaulting party" language and not "prevailing party" language. Here, the Lease included both. And, under the circumstances of this case, when "apply[ing] a common sense flexible and reasoned approach to the interpretation of contractual 'prevailing party' language" of the Lease, Tenant could have received costs and attorney fees as the prevailing party. *See Express Recovery Services Inc.*, 2017 UT App 71, ¶ 10, 397 P.3d 792; see also *Hooban* v. *Unicity Int'l Inc.*, 2012 UT 40, ¶ 12, 285 P.3d 766 (explaining that the reciprocal attorney fees statute "consists of a

conditional if/then statement: (a) If the provisions of a written contract allow at least one party to recover attorney fees in a civil action based upon the contract, (b) then a court may award attorney fees to either party that prevails"). Tenant successfully defended against the complaint and prevailed on summary judgment because Landlord was not entitled to judgment either under the Lease or Utah law.

¶27 We conclude that the district court erred in determining that the Lease did not trigger the reciprocal attorney fee statute, because the enforcement provision of the Lease awarded attorney fees to the prevailing party and Tenant prevailed against Landlord's complaint. See *Hooban*, 2012 UT 40, ¶ 12, 285 P.3d 766. Although Tenant was the defaulting party, he had already cured the default pursuant to the explicit requirements of the Lease by the time Landlord filed the complaint, and Tenant was the prevailing party in enforcing the Lease and defending against Landlord's claims under the unlawful detainer statute and breach of contract.[16]

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[16] We also take this opportunity to note that Landlord engaged in a pattern of filing motions below and on appeal that appear to be for purposes of delay or increasing the costs of litigation, further supporting our conclusion that Tenant likely should have been awarded attorney fees under the Lease as the prevailing party. Landlord's responses to Tenant's motions, the Motions to Strike below and on appeal, and Landlord's motion to dismiss the cross-appeal all claimed to be based on strict compliance with the Utah Rules of Civil Procedure and the Utah Rules of Appellate Procedure. We agree that compliance with the

rules is important, but the extent to which Landlord has attempted to enforce them is not well taken. We agree with Tenant that on numerous occasions, Landlord, through his attorney, has "belittled" Tenant and filed "needless motions to strike" in an attempt to "avoid ... full briefing on the merits of the case."

Indeed, our review of the record shows that many of these filings appeared to "harass [Tenant] or to cause unnecessary delay or needless[ly] increase the cost of litigation." See Utah R. Civ. P. 11(b)(1); Utah R. App. P. 40(b)(1). For example, Tenant filed a notice of supplemental authority with the district court, informing the court of a recent opinion issued by this court, *Express Recovery Services Inc.* v. *Olson*, 2017 UT App 71, 397 P.3d 792. In this notice, Tenant explained how Express Recovery supported his claim for attorney fees as the prevailing party in a contract case where the contract awards attorney fees to the prevailing party. *See id.* ¶¶ 17–19 (concluding that a party was the prevailing party below, vacating the district court's order denying that party's request for attorney fees, and remanding to the district court to determine reasonable attorney fees). Tenant also attached to the notice a printed copy of the case. Landlord filed a response, arguing that the court should not consider the notice, because it did not comply with rule 7(i) of the Utah Rules of Civil Procedure. Specifically, he argued:

> Rule 7(i) provides in pertinent part that, when a party files a notice of citation to supplemental authority, that notice must state "the citation to the authority the page of the motion or memorandum or the point orally argued to which the authority applies, and the reason the authority is relevant." *[Tenant's] notice does not state "the page of the motion or memorandum to which the authority applies.*" The court should thus not consider [his] notice.

(Emphasis added.) (Quotation simplified.) It is obvious from the language of the notice that Tenant was referring to his motion

requesting attorney fees as the prevailing party on summary judgment. Therefore, the notice was sufficient for the purpose of rule 7(i). Landlord's response to the notice resulted in Tenant filing a reply to the notice to rebut this argument. Landlord then filed a motion to strike this reply, arguing that only the notice and a response by the opposing party is permitted under rule 7(i) and "no other memorandum is permitted." Landlord also requested time at an upcoming hearing to address the issue. Although the district court agreed with Landlord, we are perplexed as to the reasoning because nothing in rule 7(i) prohibits a reply under these circumstances. See Utah R. Civ. P. 7(i). We are unaware of any Utah case law that has addressed this issue.

On appeal, Landlord filed a motion to dismiss Tenant's cross-appeal, arguing that Tenant's docketing statement included argument in violation of rule 9 of the Utah Rules of Appellate Procedure. This court denied this motion to dismiss because "[t]he docketing statement [was] sufficient to meet the purposes stated in rule 9(a)." Landlord then filed a motion to dismiss Tenant's cross-appeal with respect to whether the court erred in awarding attorney fees to Landlord on the Motions to Strike, arguing the issue was moot because Tenant had already paid those fees. We rejected that argument above, explaining that Landlord failed to cite relevant case law in support of his argument and that Utah case law specifically states that this type of issue is not moot when the party objected on the record to the award and paid the fees under protest. See *supra* note 10. Landlord also filed a motion to strike Tenant's supplemental brief, yet, as we noted previously, Landlord's supplemental brief included the same errors that he claimed Tenant's brief included. See *supra* ¶18 & note 13. And in his reply brief on appeal, Landlord argued that one of the facts Tenant had stated in his response brief about an email from October 27, 2014, in which he informed Landlord about a neighbor (Subtenant) who had suffered a fire and needed to use the Warehouse, "not only [was] not before the district court, but [was] an erroneous characterization of the [email]." This fact was before the district court, not only because it was supported in an exhibit to the Verified Memorandum, but also because Landlord referred to it in his own affidavit in support of his opposition to Tenant's

We therefore remand to the district court to determine whether Tenant should be awarded attorney fees for successfully defending against Landlord's complaint.

¶28 Tenant has also requested attorney fees on appeal. Generally, "when a party who received attorney fees below prevails on appeal, the party is also entitled to fees reasonably incurred on appeal." *Golden Meadows Props., Inc.* v. *Strand*, 2010 UT App 258, ¶ 13, 241 P.3d 371 (quotation simplified). Although Tenant was not awarded attorney fees below, "we have held that such fees may have been warranted and remand for further consideration of the issue." See *Kimball* v. *Kimball*, 2009 UT App 233, ¶¶ 50–52, 217 P.3d 733 (holding that attorney fees may have been warranted below and remanding to the district court for factual findings to support an award of attorney fees to the husband, but also concluding that the husband was not entitled to attorney fees incurred on appeal because he did "not substantially prevail on appeal").

Motion for Summary Judgment. And our review of that email supports Tenant's explanation that a neighbor suffered a fire and would be using the Warehouse to "house supplies until he has time to get his facility rebuilt" and that Tenant "just wanted to let [Landlord] know of [his] intentions and use of the building in order to maintain transparency."

The record is replete with examples such as these and many appear to have served to delay the proceedings, distract the court from the merits of the issues, mislead this court on appeal, and increase the costs of litigation. See Utah R. Civ. P. 11(b)(1); Utah R. App. P. 40(b)(1).

We therefore conclude Tenant is entitled to attorney fees incurred on appeal for substantially prevailing on appeal. *See id.*

CONCLUSION

¶29 We affirm the district court's grant of summary judgment in favor of Tenant because Landlord's claim fails as a matter of law. We reverse the district court's conclusion that the Lease did not trigger the reciprocal attorney fee statute and remand for the court to determine whether Tenant should be awarded attorney fees for successfully defending against Landlord's complaint and successfully enforcing the Lease. We further conclude that Tenant is entitled to attorney fees on appeal, as well as on cross-appeal, because he has substantially prevailed on appeal and "we have held that such fees may have been warranted" below. See *Kimball*, 2009 UT App 233, ¶¶ 50–52, 217 P.3d 733. We also remand for the court to revisit its decision regarding the award of attorney fees to Landlord for the Motions to Strike. If the court determines that the award is appropriate, it must provide findings of fact and conclusions of law to support its decision.

The Order of the Court is stated below:
Dated: January 13, 2022 05:48:29 AM **/s/** ANTHONY HOWELL
District Court Judge

IN THE DISTRICT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF UTAH, IN AND FOR THE COUTY OF MILLARD

RICHARD E. GARDINER
Plaintiff
v.

NELS ANDERSON
Defendant

Proposed Amended Judgment on Attorney Fees

Civil No. 160700010
Judge Howell

Comes now Defendant, through counsel, and at the courts request, and submits the Proposed Order on Attorney Fees incurred. Defendant has filed a motion for said fees, the Plaintiff filed and objection, and the court, having reviewed the pleadings and law regarding attorney fees, especially the Supreme Courts denial of Certiorari where they stated:

"IT IS HEREBY ORDERED that the Petition for Writ of Certiorari is denied. Respondent's request for

attorney fees incurred in responding to the Petition for Writ of Certiorari is granted. This matter was remanded to the district court for the limited purpose of ascertaining the amount of those fees." The district court finds all fees and cost incurred are awardable:

1. The Defendant has incurred the following specific attorney fees on the dates shown: [Table omitted].

2. Defendant's attorney fees requested are reasonable and all fees are to be awarded per the above list. The court has awarded attorney fees to Defendant in this case for every defense Defendant has asserted, and the prior awards total $14,052.50, $26,412.58, and $3,285. The fees incurred on *Gardiner II are $9,000.00 plus costs of $162, which this court finds as reasonable.*

3. Defendant filed 29 pages on Appellate Briefing and 25 pages on Writ of Certiorari at $3.00 a page, or $162.00 per Rule 34(c) of Utah rules on costs.

4. The court awards Defendant costs on appeal the sum of $162 and $9,000 in attorney fees.

SIGNED AND DATED BY THE COURT AS INDICATED AT THE TOP OF THIS PROPOSED ORDER.

The Order of the Court is stated below:
Dated: September 26, 2019 /s/ ANTHONY HOWELL
06:47:23 AM District Court Judge

IN THE DISTRICT COURT
OF THE FOURTH JUDICIAL DISTRICT,
OF THE STATE OF UTAH
IN AND FOR THE COUNTY OF MILLARD

RICHARD E. GARDINER
Plaintiff
v.

NELS ANDERSON
Defendant

FINAL JUDGMENT

Civil No. 160700010
Judge Howell

Pursuant to Utah R. Civ. Pro. 54, for the reasons set forth in the court's *Ruling Re: Pending Motions* of May 7, 2019, judgment is entered in favor of Defendant and against Plaintiff as follows:

1) Plaintiff's motion for summary judgment for unjust enrichment is DENIED.

2) Defendant's Motion to Strike is well taken, but moot since Plaintiff's motion for summary judgment was denied sua sponte.

3) Attorney fees: Time spent in lower court on

initial case and summary judgment, $7,143.75; Time spent on appeal, $18,855.00.

4) Costs: $225 filing fee and $188.83 for printing, binding, postage, and delivery of appellate briefs.

5) Refund of attorney fees paid to Plaintiff: $2,598.75.

6) The Clerk is hereby ORDERED to deliver the cash bonds deposited with the court, totaling $600.00, to Defendant, with Plaintiff being given credit of $300 towards the forgoing judgment amounts.

7) Accordingly, the total judgment in favor of Defendant, against Plaintiff is $26,412.58 ($25,998.75 + $413.83).

8) This judgment earns interest at post judgment rate of 4.59% per annum.

9) Defendant is entitled to an award of after-accruing costs and attorney fees to collect on this judgment pursuant to Rule 73, as needed.

****Execution of this document is evidenced by the Court's signature affixed hereto.****

**IN THE FOURTH JUDICIAL DISTRICT COURT,
MILLARD COUNTY, STATE OF UTAH**

RICHARD E. GARDINER
Plaintiff
v.

NELS ANDERSON
Defendant

**RULING RE:
Pending Motions**

Civil No. 160700010
Judge Anthony L. Howell

This matter came before the Court for oral argument on pending motions on March 13. 2019. Plaintiff was represented by Todd F. Anderson and Defendant was represented by Marlin J. Grant. At the conclusion of the hearing the Court took the matter under advisement. Having reviewed the pleadings submitted by the parties and hearing the arguments of counsel. and being fully advised in the premises. the Court now enters the following Ruling:

BACKGROUND

Plaintiff (Landlord) and Defendant (Tenant) entered into a Lease. on or about October 30. 2013. for the lease of a warehouse located in the County of Millard. State of Utah. The term of the Lease was a period of two (2) years commencing on November I.

2013. and extending to midnight on October 31. 2015. Defendant contends he moved out before the 10 day Notice to Quit required it (thus. defendant was not in unlawful detainer): Defendant had paid all rents due; and left the premises better than when Defendant first rented it.

On December 27. 2016 this Court issued a Ruling and Order Re: Dispositive Motions (the "Ruling") granting Defendant's Motion for Summary Judgment and denying Plaintiff's Motion for Summary Judgment.[1] On June 19. 2017. this Court entered a Ruling and Order Re: Attorney Fees. and an Order of Hearing Held June 9. 2017 was signed on July 7. 2017. The parties filed cross-appeals and on August 30. 2018 the Utah Court of Appeal's Decision was entered herein.

Defendant filed a Motion for and Memorandum of Costs and Fees along with supporting affidavit on September 19. 2018 and again on November 30. 2018. On December 10. 2018. Plaintiff filed a Motion for Summary Judgment for Unjust Enrichment. Plaintiff filed an Opposition to Defendant's Motion for Attorney Fees and Costs on December 19. 2018. That same day. Defendant filed a Motion to Strike and Objection to Plaintiff's Summary Judgment Pleadings. On December 27. 2018. Defendant filed an Opposition to Dele.ndant's Motion to Strike. Defendant filed reply memoranda supporting his motions on January 8. 2019.

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[1] The Honorable Judge Jennifer A. Brown presided over all pre-appeal proceedings herein.

DISCUSSION

I. Plaintiff's Motion for Summary Judgment for Unjust Enrichment

In Plaintiff's Memorandum In Opposition To Defendant's Motion to Dismiss Or In the Alternative For Summary Judgment filed on June 24. 2016. Plaintiff consented to dismissal of his Third Claim For Relief (Unjust Enrichment). Because the Ruling did not acknowledge Plaintiff's stipulation to the dismissal of his Third Claim for Relief. Plaintiff now claims to withdraw his consent to dismissal and seeks summary judgment in his favor on this claim. This is inappropriate. Plaintiff's stipulation to the dismissal of his unjust enrichment claim constituted a waiver thereof. *Slate v. Johnson.* 2017 UT 76. ¶ 16 n. 4. 416 P.3d 443 (stating that waiver may be express. such as through a stipulation of' the parties, or implied. such as by failing to raise an issue or argument at the required time). Not only did Plaintiff expressly consent to the dismissal of his unjust enrichment claim. he also impliedly waived the claim by Ibiling to raise an argument in opposition. The Ruling clearly granted Defendant's Motion for Summary Judgment which disposed of the entire action before the Court—including Plaintiff's claim for unjust enrichment.

Furthermore. the Court notes that Plaintiff filed a Notice of Appeal (Not Interlocutory) on July 10, 2017. and acknowledged therein that he was "appealing the final judgment of the District Court of

the Fourth Judicial District dated December 27. 2016.[2] Additionally. Defendant filed a cross-appeal. which is not permitted from an interlocutory order. *See* Utah R. App. 5(i). It is clear that both parties and the appellate court interpreted the Ruling as the final order that this Court intended it to be. If Plaintiff indeed felt his unjust enrichment claim was not properly disposed of. Plaintiff's appeal should have been styled as an interlocutory appeal and not an appeal as of right pursuant to Rule 3 of the Utah Rules or Appellate Procedure. Furthermore. Plaintiff's petition for permission to appeal from the interlocutory order would have needed to be filed no later than 20 days after the entry of the Ruling. *See* Utah R. App. 5(a).

Plaintiff's claim for equitable relief was expressly and impliedly waived. Accordingly. Plaintiff's Motion for Summary Judgment for Unjust Enrichment is hereby DENIED. Given Plaintiff's waiver. Defendant's Motion to Strike Summary Judgment Pleadings is well-taken but moot given the Court's decision herein.

II. Defendant's Motion for Attorney Fees and Costs

The Court of Appeals reversed this Court's conclusion that the Lease did not trigger the reciprocal

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[2] Plaintiff-now argues that no judgment was entered pursuant to Utah R. Civ. P. 58A. Subsection (c)(1) provides the procedure for preparation of the proposed judgment. including a provision whereby Plaintiff could have prepared the proposed judgment upon Defendant's failure to timely do so.

attorney fee statute and remanded for a determination whether Defendant should be awarded attorney fees for successfully defending against Plaintiffs complaint and successfully enforcing the Lease. *See Gardiner v. Anderson*. 2018 UT App 167. ¶ 29. 436 P.3d 237. The Court of Appeals further concluded that Defendant is entitled to attorney fees on appeal. as well as on cross-appeal. because he substantially prevailed on appeal. *See id.* The appellate court also remanded regarding the award of attorney fees to Plaintiff for the Motions to Strike. *Id.*

Defendant now seeks an award for all of his attorney fees and costs under the Lease. While the Court of Appeals left the ultimate decision of whether Defendant should be awarded attorney fees for successfully defending against Plaintiff's complaint to this Court. its analysis is instructive. The appellate court concluded that the Lease did trigger the reciprocal attorney fee statute "because the enforcement provision of the Lease awarded attorney fees to the prevailing party...." *Id. at* ¶ 27. Paragraph 23 of the Lease Agreement states as follows:

> Should either party default in the performance of any covenants or agreements contained herein, such defaulting party shall pay to the other party all costs and expenses. including but not limited to, a reasonable attorney's fee. including such fees on appeal. which the prevailing party may incur in enforcing this Agreement or in pursuing any remedy allowed by law for

breach hereof.

The Court of Appeals also concluded that "[a]lthough [Defendant] was the defaulting party. he had already cured the default pursuant to the explicit requirements of the Lease by the time [Plaintiff] filed the complaint, and [Defendant] was the prevailing party in enforcing the Lease and defending against [Plaintiff's] claims under the unlawful detainer statute and breach of contract." *Gardiner v. Anderson.* 2018 UT App at ¶ 27.

"Utah Code section 78B-5-826 provides that a court may award costs and attorney fees to the prevailing party in a civil action that is based upon a written contract and that written contract "allow[s] at least one party to recover attorney fees.'" *Id. at* ¶ 24 (quoting Utah Code Ann. § 78B-5-826). Here. the enforcement provision of the Lease allows the prevailing party to recover attorney fees. As the Court of Appeals has made clear. Defendant was the prevailing party in enforcing the Lease and defending against Plaintiff's claims under the unlawful detainer statute and breach of contract. Accordingly. this Court finds that Defendant is entitled to his attorney 112.es and costs incurred under the Lease.

Plaintiff argues that Defendant is not entitled to attorney lees because he did not seek to enforce the Lease or pursue any remedy allowed by law for breach thereof. However, the statute "requires only that a party to the litigation assert the contract's enforceability as basis for recovery." *Hooban Unicity Int'l Inc.*. 2012 UT 40. ¶ 10. 285 P.3d 766 (internal

citations omitted) (holding that the reciprocal attorney fee statute does not require that the parties to the litigation be the parties to the contract). Plaintiff's second claim for relief clearly asserts that the Lease was an enforceable agreement that Defendant breached entitling Plaintiff to damages. This is sufficient to trigger damages pursuant to the Lease and the statute. If Plaintiff had prevailed herein, he would have been entitled to fees under the Lease. *Id.* at ¶ 29. The reciprocal attorney fee statute thus affords a basis for an award of fees to Defendant as the prevailing party.

Turning to the reasonableness of Defendant's requested attorney fees. Plaintiff objects to certain of the fees claimed by Defendant. First. without reference to any authority. Plaintiff objects to defense counsel's practice of billing by the quarter hour and argues the time claimed should be arbitrarily reduced by a third. This argument is not properly supported and the Court finds that 31.75 hours is not unreasonable for time spent in this court. Plaintiff next objects to all but 12.25 hours of defense counsel's trial court time arguing that they were not "specifically incurred on Summary Judgment." Plaintiff's position is untenable because all fees to enforce the Lease and/or pursue any legal remedy against Landlord's attack are awardable. Likewise. as the prevailing party. Defendant is entitled to all of the attorney fees and costs incurred on appeal. The Court finds that the requested fees and costs are reasonable. Defendant's Motion for Attorney Fees and Costs is hereby GRANTED.

III. Award of attorney fees to Plaintiff for Motions to Strike

The Court of Appeals held that remand was warranted for this court to revisit whether the award of attorney fees to Plaintiff was appropriate with respect to his motions to strike Defendant's reply memorandum in support of his own motion for summary judgment and memorandum in opposition to Plaintiff's motion for summary judgment for being untimely.

The Court of Appeals was concerned that Plaintiff never requested fees in his motions. this court failed to provide any findings of fact or conclusions of law to support award. and it was unclear whether fees were awarded under a provision of lease. statute, or rules of civil procedure. Upon review of the record. it appears that the Honorable Judge Jennifer A. Brown did sua sponte award Plaintiff attorney fees in connection with the motions to strike. On the record. Judge Brown only expressed a concern for Defendant's disregard for the Rules of Civil Procedure.

"Our supreme court has explained that 'courts of general jurisdiction,' such as the district court here, 'possess certain inherent power [sic] to impose monetary sanctions on attorneys who by their conduct thwart the court's scheduling and movement of cases through the court." *Maxwell v. Woodall.* 2014 UT App 125, ¶ 6. 328 P.3d 869 (citing *Barnard v. Wasserman.* 855 P.2d 243. 249 (Utah 1993). This inherent power is:

> continuing, and plenary. and exists

> independently of statutes or rules of equity. and ought to be assumed and exercised as the exigencies and necessity of the case require. not only to maintain and protect the integrity and dignity of the court, to secure obedience to its rules and process. and to rebuke interference with the conduct of its business. but also to control and protect its officers. including attorneys.

Id. (quoting *In re Evans.* 42 Utah 282. 130 P. 217. 225 (1913)). The Court of Appeals recently acknowledged that trial courts have "inherent power to control the conduct of attorneys and litigants whose actions interfered with the administration of justice and resulted in wasted time and effort by opposing counsel." *Ross v. Short,* 2018 UT App 78. ¶ 26. 436 P.3d 318 (quoting *Id.* at ¶ 16).

While the court acknowledges that Judge Brown had sufficient power and authority to award Plaintiff attorney fees for bringing the motions to strike, the court disagrees that such fees were necessary and appropriate in this case. Defendant's pleadings were only six (6) days late. While Defendant's filings were certainly untimely and failed to comply with Rule 7 of the Utah Rules of Civil Procedure, they hardly "interfered with the administration of justice" or "thwart[ed] the court's scheduling and movement of cases through the court." Defendant's late filings did not impact the scheduling of or subsequent hearing on the motions. These were the first late filings of their kind and striking the filings was a sufficient sanction

for Defendant's failure to comply with the rules. Plaintiff did not request the additional remedy of attorney fees for bringing the motions to strike. Accordingly. this Court finds that Plaintiff shall refund Defendant the $2.598.75 paid as a result of the Order entered on July 7. 2017.

CONCLUSION

Plaintiff's Motion for Summary Judgment for Unjust Enrichment is DENIED. Defendant's Motion to Strike Summary Judgment Pleadings is MOOT. Defendant's Motion for Attorney Fees and Costs is GRANTED. Plaintiff shall refund Defendant the $2.598.75 erroneously awarded in attorney fees for Plaintiff's Motions to Strike. Defendant shall prepare an appropriate order and judgment consistent with this Ruling for the Court's signature.

DATED this 7 day of May. 2019.

/s/ Anthony L. Howell
Anthony L. Howell
District Court Judge

**IN THE FOURTH JUDICIAL DISTRICT COURT,
MILLARD COUNTY, STATE OF UTAH**

RICHARD E. GARDINER
Plaintiff
v.

NELS ANDERSON
Defendant

**RULING AND ORDER RE:
Attorney Fees**

Civil No. 160700010
Judge Jennifer A. Brown

The parties' several motions, stemming from their respective requests for an order awarding attorney fees, were before the Court for oral argument on Friday, June 9, 2017. The Court made its findings and rulings on the record as to all pending issues, with the exception of whether Defendant was entitled to an award of attorney fees as a result of the Court's order entered on December 27, 2016.

In the Court's prior ruling, the Court found that Defendant breached the lease agreement (and was therefore a defaulting party) because he admittedly entered into a sublease without Plaintiffs consent. Nevertheless, Defendant contends that he is the prevailing party, and thus entitled to his attorney fees, because the Court declined to award damages as requested under the breach of contract or unlawful

detainer causes of action pursued by Plaintiff. Plaintiff argues that Defendant is not entitled to attorney fees because such fees are available only if provided by contract or statute. Plaintiff further argues that the lease agreement only provides for an award of attorney fees to a non-defaulting party. Specifically, Paragraph 23 of the Lease Agreement states as follows:

> Should either party default in the performance of any covenants or agreements contained herein, such defaulting party shall pay to the other party all costs and expenses, including but not limited to, a reasonable attorney's fee, including such fees on appeal, which the prevailing party may incur in enforcing this Agreement or in pursuing any remedy allowed by law for breach hereof.

Plaintiff argues that this provision would only allow for an award of attorney fees to Defendant if the Court had made a finding that Plaintiff defaulted in the performance of any covenants or agreements contained herein, and that here the only defaulting party was Defendant. Defendant counters that the language of this provision is sufficiently broad to warrant an award of fees when read in conjunction with the reciprocal fee statute found at U.C.A. 78B-5-826. However, *Blackmore v. L&D Dev. Inc.,* 283 P.3d 655, 666 (Utah Ct. App. 2016), cited by Plaintiff, clarifies that language similar to the attorney fee provision included in the lease agreement between the parties does not implicate the reciprocal fee statute.

Here, Defendant is the defaulting party, and the lease agreement does not provide a basis for an award of attorney fees to Defendant as the party in default. Further, the fact that Plaintiff pursued damages against Defendant that were ultimately unsuccessful does not translate into a default by Plaintiff. As in *Blackmore,* "this provision clearly provides that the party who 'defaults' is liable for attorney fees" and it would be error for this Court to award attorney fees by deeming Defendant as the "prevailing party" under the reciprocal attorney fee statute.

Defendant also argues that he should receive an award of attorney fees as the prevailing party under the unlawful detainer statute. It should be noted that, if this matter had been pursued by Plaintiff after May 9, 2017, this argument would be correct. U.C.A. 78B-6-811(5) currently provides that: "In an action under this chapter, the court may award costs and reasonable attorney fees to the prevailing party."[1]

However, that language did not exist in the pre-May 9, 2017 version of the statute—it was added as a result of the passage of S.B. 52. Prior to that date, the statute provided that a *judgment against the tenant* would include reasonable attorney fees, but made no mention of a prevailing party award. Defendant cannot avail himself of the language of the new statute

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[1] The amendment to the unlawful detainer statute demonstrates that the prior version did not include an award of fees to a prevailing tenant, an issue that the legislature chose to address.

because the change is not applied retroactively.[2] The general rule is that statutes are not retroactive unless they state that they are. U.C.A. § 68-3-3. However, if a statute is amended to clarify the statute's meaning in response to judicial action, it will apply to pending cases. *Wasatch County v. Okelberry,* 2015 UT App 192, ¶ 17. This only applies to situations where the legislature disagrees with judicial interpretation of a statute and amends it. *Id.* That circumstance does not apply here.

The final situation where a statute may apply retroactively is when the statute is purely procedural. *Brown & Root Indust. Service v. Indust. Comm'n of Utah,* 947 P.2d 671, 675 (Utah 1997). Or perhaps more accurately, the court applies the law that is in place at the time of the action, which in procedural cases is when the motion is filed. *State v. Clark,* 2011 UT 23, ¶ 13 . "[Olnly procedural changes 'which do not enlarge, eliminate, or destroy vested or contractual rights' may be applied retroactively." *Brown & Root,* 947 P.2d at 675. A retroactive application of the amendment to the unlawful detainer statute would enlarge a right (or create a new one) that did not exist when this action was filed. Accordingly, the unlawful detainer statute does not provide a basis for an award of attorney fees to Defendant.

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[2] Further, the reciprocal statute is not applicable to this basis for attorney fees. U.C.A. 78B-5-825.5 allows for a reciprocal award if a party prevails in a civil action "based upon any promissory note, written contract, or other writing executed after April 28, 1986". There is no mention of a statute being the basis for a reciprocal award.

Based upon the foregoing reasons, the Court finds that Defendant is not entitled to an award of attorney fees, pursuant to either contract or statute. Accordingly, Defendant's Motion and Memorandum of Costs and Fees is denied. This is the final ruling of the Court and no further order is required as to this discrete issue. However, Mr. Anderson is instructed to prepare an order consistent with the rulings made by the Court on the record.

DATED this 19th day of June, 2017.

/s/ Jennifer A. Brown
Jennifer A. Brown
District Court Judge

IN THE DISTRICT COURT
OF THE
FOURTH JUDICIAL DISTRICT
OF THE
STATE OF UTAH,
IN AND FOR
THE COUNTY OF MILLARD

RICHARD E. GARDINER,
Plaintiff,
v.
NELS ANDERSON,
Defendant.

RULING AND ORDER RE:
Dispositive Motions

Civil No. 160700010
Judge Jennifer A. Brown

The matters before the Court are Defendant's Motion to Dismiss or in the Alternative for Summary Judgment filed June 1, 2016, and Plaintiffs Motion for Summary Judgment filed July 6, 2016. Plaintiff filed his Memorandum in Opposition on June 24,2016 and Defendant's Memorandum in Opposition was stricken by this Court. Defendant filed a Reply Memorandum in Support of his motion on July 7, 2016. Oral arguments were heard on October 24, 2016, at which time the Court took the matter under advisement. Having reviewed the pleadings submitted by the parties and hearing the arguments of counsel, and being fully advised in the premises, the Court now enters the following Ruling:

BACKGROUND

Plaintiff and Defendant entered into a Lease, on or about October 30,2013, for the lease of a warehouse located in the County of Millard, State of Utah. The term of the Lease was a period of two (2) years commencing on November 1, 2013, and extending to midnight on October 31,2015, For the months of November and December, 2013, the agreed rent was $600 per month. For the months of January through April 2014, the agreed rent was $700 per month. For May 2014, the agreed rent was $800 per month. For the months of June 2014 through October 2015, the agreed rent was $1,000 per month.

Defendant contends he moved out before the 10 day Notice to Quit required it (thus, defendant was not in unlawful detainer); Defendant had paid all rents due; and left the premises better than when Defendant first rented it.

Paragraph 4 of the Lease provided that Tenant could not "sublet... the leased premises . . . , without the prior written consent of LESSOR being first obtained in each instance . . . . " Defendant sublet part of the premises to Liqua-Dry, Inc. orally, month to month from November 1, 2013 for $2,250, then for $3,000 a month on November 1, 2014 to March 31 2015, then signed a 6 month written lease from April 1, 2015 to September 30, 2015 for $5,000 a month. Defendant sublet the leased premises to Liqui-Dry, Inc. without the prior written consent of Plaintiff. Plaintiff claims he would have agreed to the sublease if Defendant had paid Plaintiff the difference between

Defendant's rent and what Defendant received from Liqua-Dry Inc. Plaintiff argues he suffered a loss of the difference between Defendant's rent and what Defendant received from Liqua-Dry Inc.

Plaintiff claims his losses from Defendant's violation of the Lease are the difference between Defendant's rent and what Defendant received from Liqua-Dry Inc totaling $51,200. Plaintiff claims he was not made aware that Defendant was subletting the warehouse to Liqui-Dry, Inc. until in or about late July, 2015. Paragraph 22(B)(3) of the Lease provides:

> (3) Failure by LESSEE to perform any other provision of this Lease required of LESSEE, if the failure to perform the same is *not cured within ten days after written notice* has been given to LESSEE .... (emphasis added).

Plaintiff sent a letter to Defendant on September 3, 2015 (by certified mail) giving Defendant written notice of his default and giving him ten days to cure the default by paying Plaintiff the monies Defendant received from Liqui-Dry, Inc. and by removing the property of Liqui-Dry, Inc. from the premises. Pursuant to ¶ 25 of the Lease, Plaintiff sent the letter to Defendant at 4370 West 2500 North, Delta, UT 84624. By certified mail of September 14, 2015, Plaintiff notified Defendant that he had not cured the default and notified Defendant that Plaintiff was exercising his right, pursuant to ¶ 22(C)(1) of the Lease, to terminate the Lease and notified Defendant that the Lease was terminated, and notified

Defendant, pursuant to ¶ 22(C)(1) of the Lease, that he must "surrender possession of the premises immediately." Pursuant to ¶ 25 of the Lease, Plaintiff sent the letter to Defendant at 4370 West 2500 North, Delta, UT 84624.

Defendant did not pay Plaintiff the difference between Defendant's rent and what Defendant received from Liqua-Dry Inc. Defendant vacated and surrendered the premises by the end of September, 2015. Plaintiff argues that to date, Defendant has not paid to Plaintiff the difference between Defendant's rent and what Defendant received from Liqua-Dry, Inc.

DISCUSSION

Rule 56 of the Utah Rules of Civil Procedure governs motions for summary judgment and states that the court shall grant summary judgment if the moving party shows "that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Utah R. Civ. P. 56(c). In addition, "[t]he party moving for summary judgment has the burden of presenting evidence that no genuine issue of material fact exists." *Uintah Basin Med. Ctr. v. Hardy,* 2008 UT 15, ¶ 16, 179 P.3d 786 (citing Rule 56(e)). The Utah appellate courts have made clear that "the nonmoving party is entitled to all inferences arising from the facts of record." *Id.* at ¶ 18 (citing *Hermansen* v. *Tasulis,* 2002 UT 52, ¶ 10, 48 P.3d 235).

Pursuant to this standard, the Court finds that there are no genuine issues of material fact precluding

the court from granting summary judgment in this case. It is undisputed that Defendant sublet the premises to Liqui-Dry without prior written authorization as required by the lease agreement. It is also undisputed that Plaintiff served Defendant with a 10-day notice to quit or cure required by f 22(B)(3) of the Lease and Defendant vacated the premises promptly thereafter.

Unlawful Detainer

Utah Code Ann. §78B-6-801(9) defines "unlawful detainer" to "mean[] unlawfully remaining in possession of property after receiving a notice to quit, served as required by this chapter, and failing to comply with that notice." According to Utah Code Ann. § 78B-6-802(1)(d), a tenant is guilty of an unlawful detainer if the tenant "assigns or sublets the leased premises contrary to the covenants of the lease, or commits or permits waste on the premises after service of a three calendar days' notice to quit."[1]

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[1] Plaintiff argues that in Utah Code Ann. § 78B-6-802(l)(d), the comma separating the phrase "assigns or sublets the leased premises contrary to the covenants of the lease" from the following phrase indicates that the phrase "after service of a three calendar days' notice to quit" modifies only the phrase "commits or permits waste on the premises." Accordingly, Plaintiff contends that no notice is required by the unlawful detainer statute for an action for subletting the leased premises contrary to the covenants of the lease.

The Court is not persuaded by Plaintiffs argument. Courts are "to interpret the provisions of a statute in harmony with other statutes in the same chapter and related chapters." *Slate v. J.M.S.* 2011 UT 75, ¶ 22, 280 P.3d 410 (internal quotation marks

Paragraph 4 of the Lease provided that Tenant could not "sublet.., the leased premises ..., without the prior written consent of LESSOR being first obtained in each instance ...." Defendant does not dispute that he sublet the premises to Liqui-Dry, Inc. and that he charged Liqui-Dry, Inc. greater rent than he was paying Plaintiff, Further, Defendant did not obtain Plaintiff's prior written consent to sublet the warehouse. Accordingly, Defendant breached the lease. However, Defendant complied with the 10-day notice to quit and did not "unlawfully remain in possession of the property." UCA §78B-6-801(9).

Plaintiff argues that under Code § 78B-6-811(1)(b), the court may enter "an order for the restitution of the premises," and, under Code § 78B-6-81 l(2)(b), the court"*shall also* assess the damages resulting to the plaintiff from" an "unlawful detainer." Thus, it is apparent that the Utah State Legislature contemplated that damages would be recoverable for "subletting] the leased premises contrary to the

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omitted). Additionally, courts should seek to avoid interpretations "which render some part of a provision nonsensical or absurd." *O'Dea v, Olea,* 2009 UT 46, ¶ 32, 217 P.3d 704 (internal quotation marks omitted). Here, aside from a comma, the Court does not find anything within the unlawful detainer statute which would indicate that unauthorized subletting somehow supersedes the notice provisions contained therein or that the legislature intended for a party to be in unlawful detainer (and subject to the punitive nature of treble damages such as those requested by Plaintiff in this matter) without notice. Such an interpretation would render the notice requirements for all other unlawful detainer actions nonsensical or absurd. Accordingly, the Court declines to find Defendant in unlawful detainer prior to notice having been given by Plaintiff.

covenants of the lease...." Plaintiff argues its losses are "directly traceable to Defendant's breach of the lease and Plaintiff may recover those losses as damages. However, Utah Code Ann § 78B-6-811(2) does not specifically provide for damages for subletting contrary to the lease agreement. It provides:

> (2) The jury or the court, if the proceeding is tried without a jury or upon the defendant's default, shall also assess the damages resulting to the plaintiff from any of the following:
>
> > (a) forcible entry;
> > (b) forcible or unlawful detainer;
> > (c) waste of the premises during the defendant's tenancy, if waste is alleged in the complaint and proved at trial;
> > (d) the amounts due under the contract, if the alleged unlawful detainer is after default in the payment of amounts due under the contract; and
> > (e) the abatement of the nuisance by eviction as provided in Sections 78B-6-1107 through 78B-6-1114.

Additionally, the lease agreement does not

specifically provide for damages. It only states that "regardless of any such assignment or sublease, LESSEE shall remain primarily liable for the payment of the rent herein reserved and for the performance of all the other terms of this lease required to be performed by LESSEE."

It is undisputed that Defendant was current on rent and was only evicted for defaulting under the lease agreement by subletting without prior written consent. Also, there is some evidence that Defendant notified Plaintiffs agent of the subletting via email almost a year prior to Plaintiff enforcing that provision of the lease. Accordingly, the Court finds the requested $51,200 in damages to be excessive. There is nothing in the statute or the lease agreement to support such damages. Furthermore, according to the definition of unlawful detainer found in UCA §78B-6-801(9), Defendant was not in unlawful detainer. Therefore, the only remedy Plaintiff appears to be entitled to is a declaration under UCA §78B-6-811(c) that the lease agreement is forfeited due to Defendant's failure to perform a condition or convent therein.

Breach of Contract

In the Second Claim for Relief, Plaintiff seeks damages for breach of the Lease, in particular for breach of paragraph 4 of the Lease, which provides that Defendant could not "sublet... the leased premises ..., without the prior written consent of LESSOR being first obtained in each instance ...." Defendant does not dispute that he sublet the premises to Liqui-Dry, Inc. and that he charged Liqui-Dry, Inc. greater rent than

he was paying Plaintiff. Further, Defendant did not obtain Plaintiff's prior written consent to sublet the warehouse. Accordingly, Defendant breached the lease. Finally, Plaintiff gave Defendant the notice to cure required by ¶ 22(B)(3) of the Lease.

Plaintiff argues that Defendant did not cure the breach by paying to Plaintiff the difference between Defendant's rent and what Defendant received from Liqua-Dry Inc. and has not done so to date. Defendant contends that he vacated possession and turned it over to Plaintiff landlord immediately upon notice. As a result, Defendant cannot, as a matter of law, be in unlawful detainer. Moreover, the fact he may have defaulted the lease by subletting without written permission only creates a default, but that default never ripened to unlawful detainer because tenant returned possession to Landlord. The parties dispute whether Utah Code Ann. §78B-6-802(d) requires the continued subletting "after service of a 3 day calendar notice to quit." Plaintiff contends the 3 day notice is only required for the provision "or commits or permits waste on the premises." Plaintiff argues to interpret it otherwise would nullify the entire provision. However, the definition of unlawful detainer found in UCA §78B-6-801(9) seems to support Defendant's interpretation of the statute that the unauthorized subletting must continue after service of the notice to quit.

CONCLUSION

Plaintiff seeks damages in the amount of $51,200, representing the difference between what Defendant paid in rent to Plaintiff and what

Defendant collected from Liqua-Dry for the unauthorized subletting. The Court does not find support for these damages in the unlawful detainer statute or the lease agreement. Utah Code §78B-6-80I(9) defines "unlawful detainer" as "unlawfully remaining in possession of property after receiving a notice to quit. ..and failing to comply with that notice." The Court finds that Defendant complied with Plaintiff's 10 day notice and did not remain in unlawful possession of the property. Furthermore, even if Defendant were in unlawful detainer pursuant to 78B-6-802(l)(d) for the unauthorized subletting of the property, Section 78B-6-811(2) does not specifically provide for damages for unauthorized subletting. Furthermore, the lease agreement does not provide for damages as requested by Plaintiff. Accordingly, Plaintiffs Motion for Summary Judgment is hereby DENIED and Defendant's Motion for Summary Judgment is GRANTED.

This ruling constitutes the final order of the Court on this issue. No further order is necessary to effectuate the Court's decision.

DATED this 27th day of December, 2016.

/s/Jennifer A. Brown
Jennifer A. Brown
District Court Judge

Excerpt From *Tenant's Resp. Br.* in Case No. 20170551-CA (at pages 27-28)

The recent case of *Express Recovery Services Inc.* v. *Olson*, 2017 UT App 71 (April 17, 2017) is on point and makes (*sic*) the holding that:

> "If the legal right to attorney fees is established by contract, Utah law clearly requires the court to apply the contractual attorney fee provision and to do so strictly in accordance with the contract's terms . . . . Since the right is contractual, the court does not possess the same [equitable] discretion to deny attorney's fees that it has when fashioning equitable remedies, or applying a statute which allows the discretionary award of such fees" *Id.,* ¶ 8 . . . .[2] Ultimately, "[t]he focus should be on 'which party had attained a comparative victory,

[2] These ellipses are where the portion of *Express Recovery Services Inc.* which Tenant omitted (and which is quoted in the body of the Petition) was found.

considering what a total victory would have meant for each party and what a true draw would look like . . . Comparative victory—not necessarily a shutout—is all that is required." *Id.* ¶ 12.