

2018 IL App (1st) 163279-U

No. 1-16-3279

Order filed March 30, 2018

Fifth Division

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

HENRIETTA TURNER,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee and Cross-Appellant,)	Cook County.
)	
v.)	No. 14 M1 147101
)	
THE VILLAGE OF SAUK VILLAGE, an Illinois)	Honorable
Municipal Corporation,)	Jessica A. O'Brien,
)	Judge, presiding.
Defendant-Appellant and Cross-Appellee.		

JUSTICE LAMPKIN delivered the judgment of the court.
Justices Hall and Rochford concurred in the judgment.

ORDER

- ¶ 1 *Held:* Based on the terms of the village's personnel manual and the parties' settlement agreement, which resolved their dispute about the village board of trustees' authority over the village manager, the village manager was not entitled to reimbursement for attorney fees she incurred when she refused to comply with the village board of trustees' directive placing her on paid administrative leave for 14 days.
- ¶ 2 Defendant, the Village of Sauk Village (the Village), appeals the trial court's decision that granted summary judgment in favor of plaintiff Henrietta Turner on her breach of contract

claim. The trial court awarded Turner attorney fees and costs that she had incurred both in her current case that alleged a breach of contract and in underlying litigation when she unsuccessfully challenged the Village's motion to enforce the terms of the parties' settlement agreement regarding Turner's employment as Village manager. In her cross-appeal, Turner argues that the trial court erred by not awarding her the full reimbursement amount that she sought.

¶ 3 For the reasons that follow, we reverse the judgment of the trial court that awarded Turner fees and costs and deny the relief that Turner sought in her cross-appeal.

¶ 4 I. BACKGROUND

¶ 5 This cause, which comes before this court again on the issue of Turner's attorney fees and costs, arose from an employment contract dispute between the Village and Turner. Specifically, in June 2011, the Village Board of Trustees (the Board), by a majority vote, approved ordinance No. 11-023, which created the position of Village manager. The ordinance provided that the Village manager "shall be hired by the [Board]," and two-thirds of the members of the Board "shall have the power to remove" the Village manager. The manager would be the chief administrative employee of the Village and was responsible to the mayor and Board for the proper administration of all Village affairs, departments and offices.

¶ 6 Ordinance No. 11-023 provided that the power and duties of the Village manager included recommending the appointment and removal of department heads and officers; acting as the Village's business manager and coordinating and supervising administrative work, including securing annual audits, coordinating the payment of approved salaries, preparing authorized forms, budgets, and tax levy ordinances and scheduling hearings related thereto,

reviewing bonds and insurance, and preparing releases to inform the public about its Village government; acting *ex officio* as purchasing agent; managing the Village hall and other buildings; administering the employees' participation in the retirement fund and medical care plans; making monthly and annual reports to the mayor and Board; and performing other duties, consistent with the Village's charter and ordinances and Illinois law, as the mayor and Board may direct or delegate from time to time.

¶ 7 In November 2011, the Village entered into an employment contract with Turner, hiring her as the Village manager through April 2013. The contract provided that the Village could terminate the contract for any reason by giving Turner 30 days notice with no separation compensation.

¶ 8 In February 2012, the Board voted to terminate the contract for financial reasons and notified Turner that her last day of employment would be March 16, 2012. However, the mayor, who unsuccessfully had attempted to veto the Board's vote, told Turner to ignore the Board's decision and report to work. Turner continued to report to work.

¶ 9 In March 2012, the Village filed a lawsuit seeking a declaratory judgment that Turner's employment was terminated. The Village also sought a temporary restraining order and preliminary injunction to, *inter alia*, require Turner to leave her position and cease trespassing on Village property.

¶ 10 In April 2012, the Village, the Board, the mayor, and Turner resolved their dispute by entering into a settlement agreement. The agreement provided that the parties were settling all claims and counterclaims asserted in the litigation. The Village agreed to dismiss all claims against Turner, and the Village and Board agreed to cease all attempts to remove her from her

position as Village manager and agreed not to pass an ordinance eliminating her position before the end of the fiscal year on October 31, 2012. Furthermore, Turner and the mayor acknowledged that the Village or Board had the lawful right to eliminate the Village manager position in the next year's budget and agreed not to file any lawsuit challenging the elimination of that position. Finally, the Village agreed to pay the attorney fees and costs incurred by Turner and the mayor with the law firm of Langhenry, Gillen, Lundquist and Johnson, LLC, not to exceed \$14,500 in total. As of April 8, 2012, Turner and the mayor had incurred \$13,436 in attorney fees. The trial court dismissed the declaratory judgment action with prejudice but retained jurisdiction to enforce the terms of the settlement agreement.

¶ 11 In September 2012, the Board approved an ordinance that eliminated the Village manager position for the 2013 fiscal year. Also, on September 4, 2012, the Board placed Turner on paid administrative leave, effective from September 5 through 19, 2012, to investigate alleged misconduct by Turner. However, in a telephone call between the mayor and Turner, the mayor either told or asked Turner to continue to report to work. When Turner continued to report to work, the Village filed an emergency motion in the trial court to, *inter alia*, enforce the settlement agreement and order Turner to comply with the Board's directive placing her on paid administrative leave. According to the Village, Turner's actions were a challenge to ordinance No. 11-023, which clearly provided that the Village manager was a Village employee and the Board had the authority to manage its employees. The Village argued that Turner's challenge to ordinance No. 11-023 was a violation of the settlement agreement.

¶ 12 On September 14, 2012, the trial court granted the Village's motion as to Turner and ordered her to comply with the Board's directive placing her on administrative leave. The trial

court rejected Turner's arguments that (1) the Board had violated the terms of the settlement agreement by acting in 2012 to eliminate the Village manager position for the 2013 fiscal year, and (2) the Board's action placing her on administrative leave constituted a removal from office and, thus, a violation of the settlement agreement. The court found that the Board, not the mayor, had the authority to control the employee the Board had hired as the Village manager, and it was a proper exercise of the Board's authority to place Turner on paid administrative leave. The court found that because the Board had the power and authority "to deal with" the Village manager, neither the mayor nor the chief of police had the authority to order Turner to continue to report to work in contravention of the Board's decision to place her on paid administrative leave. After September 14, 2012, Turner did not return to work or perform any official duties on behalf of the Village. She received her salary and benefits through October 31, 2012, and her position was eliminated effective November 1, 2012. Turner appealed the trial court's judgment, and this court affirmed the trial court's judgment on March 15, 2013. *Village of Sauk Village v. Turner*, 2013 IL App (1st) 122720-U.

¶ 13 The instant appeal arises from Turner's October 2014 three count complaint against the Village. Turner alleged that the Village's March 2012 action for declaratory relief had sued her in her capacity as Village manager. After the parties settled that dispute in April 2012, she incurred \$39,036.21 in attorney fees when she defended herself against the Village's September 2012 emergency motion to enforce the parties' settlement agreement and when she appealed the trial court's judgment that granted the Village's motion. Turner sought a judgment of \$39,036.21 against the Village, plus interest, attorney fees, and costs associated with the instant action. Specifically, Turner argued that (1) the Village breached its contractual obligation under the

Village's personnel manual to provide her with legal representation and protect her from personal financial responsibility for the legal action taken against her; (2) under an equitable estoppel theory, the Village could not challenge her claim for attorney fees because it had agreed to pay her legal fees in the settlement agreement; and (3) under an unjust enrichment theory, the Village should not keep the benefit it had received when its conflict of interest relieved it of its obligation to provide her with a defense.

¶ 14 After Turner and the Village filed cross-motions for summary judgment, the trial court granted summary judgment in favor of the Village on Turner's equitable estoppel and unjust enrichment claims. However, the trial court granted summary judgment in favor of Turner on her breach of contract claim. Specifically, the court found that article 6, section 11 of the Village's personnel manual required the Village to pay the attorney fees and costs Turner incurred in (1) challenging in the trial court the Village's emergency motion to enforce the April 2012 settlement agreement; (2) appealing, unsuccessfully, the trial court's September 2012 judgment granting that motion; and (3) pursuing her 2014 breach of contract claim.

¶ 15 According to the transcript of the summary judgment hearing, the trial court noted that Turner was responsible to both the mayor and the Board for the proper administration of all Village affairs, departments, and offices. However, there was a history of a power struggle between the mayor and the Board, and they had given Turner contradictory directives about reporting to work. The trial court stated that even though the Board's action of placing Turner on paid administrative leave for 14 days technically did not constitute a removal from her position as Village manager, Turner reasonably believed that the Village was violating the settlement agreement provision about not taking any steps to remove her from her position during the 2012

fiscal year. When the Village moved the court to enforce the settlement agreement and order Turner to comply with the Board's administrative leave directive, Turner defended her position as Village manager by challenging the Village's interpretation of the removal provision of the settlement agreement. The trial court also held that when the Village moved to enforce the settlement agreement, Turner did not need the Village's approval to retain the same counsel that had represented her in the Village's declaratory judgment action.

¶ 16 Thereafter, Turner submitted her petition for fees, seeking \$88,136.09 and statutory prejudgment interest. The Village filed a motion to reconsider and a response to Turner's fee petition. The trial court denied the Village's motion to reconsider and awarded Turner \$67,483.37 in attorney fees. The trial court's order, however, did not explain the manner by which the court had calculated that figure or indicate whether it included prejudgment interest. Also, the order did not give any breakdown about the particular amount of attorney fees awarded for the Village's settlement enforcement action, Turner's appeal, or Turner's attorney fee case.

¶ 17 The Village timely appealed, and Turner timely cross-appealed.

¶ 18 **II. ANALYSIS**

¶ 19 **A. Motion to Strike Portions of Appellant's Reply Brief**

¶ 20 Turner moved this court to strike portions of the Village's August 2017 appellant-reply brief, arguing that the Village improperly asserted arguments in that brief in violation of Illinois Supreme Court Rule 341(h) (eff. July 1, 2017), which sets forth the requirements for appellants' briefs and provides that "[p]oints not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing." Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2017). Specifically, Turner asserts that the Village failed to raise the following arguments in its opening

brief: (1) Turner’s breach of contract claim can only arise from the settlement agreement, (2) Turner cannot recover attorney fees because her defense against the Village’s attempt to remove her from office did not benefit the Village in any way, (3) the Village’s personnel handbook prohibits defense and indemnity when the employee’s actions are in violation of Village policies and directives, and (4) municipalities are not liable to pay interest. This court took Turner’s motion with the case.

¶ 21 The Illinois Supreme Court “has repeatedly held that the failure to argue a point in the appellant’s opening brief results in forfeiture of the issue.” *Vancura v. Katis*, 238 Ill. 2d 352, 369 (2010). We deny Turner’s motion to strike the Village’s reply brief. Our review of the parties’ appellate briefs establishes that the Village has complied with Rule 341(h) because there were no new issues or improper arguments raised in the reply brief.

¶ 22 **B. Attorney Fee Award**

¶ 23 The Village argues that the trial court erred by granting summary judgment in favor of Turner on her breach of contract claim and ruling that she was entitled to her attorney fees under article 6, section 11 of the Village’s personnel manual. The Village contends that Turner is not entitled to an award of attorney fees because (1) she did not incur her claimed attorney fees while conducting her “official duties” but, rather, by trying to avoid the Board’s valid personnel instruction and pursuing what she viewed as the Board’s breach of the settlement agreement, (2) Turner could not have been performing “official duties” after she left her position in September 2012 and was no longer a Village employee, (3) the settlement agreement did not provide for attorney fees and costs incurred in enforcing it, (4) Turner was not the prevailing party in the Village’s motion to enforce the settlement agreement, and (5) the Village’s personnel

manual clearly provided that the Village will not pay an employee's attorney fees for actions like Turner's refusal to comply with the Board's valid directive to go on paid leave.

¶ 24 Furthermore, the Village challenges the fee award because (6) when the trial court determined in September 2012 that the Board, not the mayor, had the authority to control the Village manager and it was a valid exercise of the Board's authority to place Turner on paid administrative leave, and then this court in 2013 affirmed the trial court's decision, *res judicata* prevented the trial court in 2016 from finding, as one basis supporting an attorney fee award to Turner, that Turner was conducting her official duties when she ignored the Board's directive to go on leave and followed the mayor's request to continue to report to work, (7) when the trial court determined in September 2012 that the Board did not violate the settlement agreement because placing Turner on paid leave was not tantamount to removing her from her position, and then this court in 2013 affirmed the trial court's decision, collateral estoppel prevented the trial court in 2016 from finding, as a second basis supporting the attorney fee award, that Turner reasonably believed the Board had violated the settlement agreement by placing her on paid leave, (8) Turner did not seek the Board's approval to retain counsel, in violation of the Village's code and Illinois' municipal code, and (9) Turner did not meet the statutory requirements for prejudgment interest.

¶ 25 Turner responds that she was entitled to the award of attorney fees under article 6, section 11 of the manual because she was acting within the scope of her job description and the Village sued her for performing her "official duties" as instructed by the mayor. Turner argues that the entire purpose of the Village's emergency motion to enforce the settlement agreement was to stop her from performing her official duties as Village manager and stop the mayor from telling

her to continue to work. She argues that she incurred her claimed attorney fees because she was caught in the middle of the power struggle between the Board and the mayor and was justified in following the mayor's instruction to continue to report to work. Also, Turner was entitled to retain her own counsel because the Village attorney could not represent her and that conflict of interest relieved the Village of its obligation to provide her with counsel. Turner contends that she was entitled to an award for the attorney fees incurred after the trial court's September 14, 2012 judgment because she had the right to appeal that judgment and was compelled to sue the Village for breach of contract when the Village refused to reimburse her for those fees.

¶ 26 Furthermore, Turner argues that article 6, section 11 of the manual did not limit the Village's obligation to provide its sued employees with legal representation to only those instances where the employees prevailed in those legal actions. Turner asserts that the doctrine of *res judicata* did not apply because the trial court in 2016 did not issue a ruling that was contrary to the 2012 judgment of the trial court. Furthermore, collateral estoppel was not applicable because the issue the trial court decided in 2016 was whether the Village was obligated to reimburse Turner the costs of defending the legal action the Village had brought against her. Consequently, no issue decided in the Village's 2012 action to enforce the settlement agreement was a controlling or material fact in Turner's 2014 attorney fee case. Finally, Turner asserts that she was entitled to statutory prejudgment interest because article 6, section 11 of the manual was a written instrument for counsel's representation of Turner and the Village withheld money by an unreasonable and vexatious delay in payment.

¶ 27 We review a trial court's grant of summary judgment *de novo*. *Joyce v. Mastri*, 371 Ill. App. 3d 64, 73 (2007). Furthermore, the interpretation of a contract is a question of law, which

we review *de novo* in accordance with the general rules applicable to contract interpretation. *Richard W. McCarthy Trust Dated Sept. 2, 2004 v. Illinois Casualty Co.*, 408 Ill. App. 3d 526, 534-35 (2011); see also *Powers v. Rockford Stop-N-Go, Inc.*, 326 Ill. App. 3d 511, 516 (2001) (when the facts are not in dispute, the trial court's application of the law is a matter that we review *de novo*). If the ultimate question before the court involves an application of the facts to a principle of law, the matter is committed to the discretion of the trial court and its decision will not be reversed absent an abuse of discretion. *Powers*, 326 Ill. App. 3d at 516. When the parties challenge the reasonableness of the trial court's decision concerning the amount of attorney fees awarded, the trial court's decision will not be reversed absent an abuse of discretion. *Peleton, Inc. v. McGivern's Inc.*, 375 Ill. App. 3d 222, 225 (2007). A trial court abuses its discretion where its ruling is arbitrary, fanciful, or unreasonable or where no reasonable person would take the view adopted by the trial court, or where its ruling rests on an error of law. *Alm v. Loyola University Medical Center*, 373 Ill. App. 3d 1, 4 (2007).

¶ 28 “Attorney fees are recoverable when specifically authorized by statute or contract.” *Mirar Development, Inc. v. Kroner*, 308 Ill. App. 3d 483, 486 (1999). “There is no common law principle allowing attorney's fees either as costs or damages.” *Qazi v. Ismail*, 50 Ill. App. 3d 271, 273 (1977). “Contract provisions regarding attorney fees are to be strictly construed and enforced at the discretion of the circuit court.” *Mirar Development, Inc.*, 308 Ill. App. 3d at 488. “In construing the contract, ‘the court must determine the intention of the parties with respect to the payment of attorney fees. [Citation.]’ ” *Id.* (quoting *Jackson v. Hammer*, 274 Ill. App. 3d 59, 70 (1995)).

¶ 29 We review *de novo* whether Turner was entitled to attorney fees under the terms of article 6, section 11 of the Village's personnel manual. Article 6 of the manual was entitled "Compensation Plan." Section 11 of article 6 provided:

"Section 11. Legal Liability

While conducting her/his official duties, an employee shall be legally represented and protected from personal financial responsibility, in the event legal action is taken against the employee. This policy shall not apply if the employee's actions are in violation of Village policies, directives, or rules; Village ordinance; State or federal laws; or if the employee's actions are not within the scope of her/his job description."

¶ 30 We disagree with the trial court's interpretation that this provision required the Village to pay the attorney fees and costs Turner incurred by (1) challenging in the trial court the Village's emergency motion to enforce the parties' settlement agreement and order Turner to comply with the Board's valid paid administrative leave directive; (2) appealing, unsuccessfully, the trial court's September 2012 judgment granting that motion; and (3) pursuing her 2014 breach of contract claim.

¶ 31 The trial court broadly construed article 6, section 11 of the personnel manual to entitle Turner to attorney fees incurred in any legal action arising from her employment as Village manager. However, the plain language of article 6, section 11 does not support the trial court's broad interpretation. Rather, this narrowly written provision excludes the type of personnel management dispute at issue here, and courts must honor the Village's intent to prevent taxpayer

funds from being used to subsidize the personal litigation of Village employees in their individual capacities.

¶ 32 Article 6, section 11 clearly limits an employee's entitlement to paid legal representation to when she was performing her "official duties" and legal action was taken against her. According to the terms of her employment contract and Village ordinance No. 11-023, Turner's official duties as Village manager included acting as the Village's business manager and coordinating all supervisory work, managing the Village's buildings, administering the employees' participation in the retirement fund and medical care plans, and making monthly and annual reports to the mayor and Board. Her job description did not include challenging the Board's personnel management decision to place her on paid administrative leave or pursuing perceived breaches of a settlement agreement concerning the continuation of her employment contract.

¶ 33 Furthermore, Turner seeks an award for attorney fees that she incurred after she left her position as Village manager on September 14, 2012, when the trial court ruled that the Village did not breach the settlement agreement by placing her on paid administrative leave. Consequently, any fees incurred after September 14, 2012, were not recoverable under the plain terms of article 6, section 11. Even assuming that Turner was entitled under article 6, section 11 to paid representation when the Board filed the March 2012 lawsuit against her, seeking a declaratory judgment that her employment was terminated, Turner waived any entitlement to additional attorney fees when she agreed to settle that litigation and accept compensation for attorney fees capped at \$14,500. The settlement agreement did not provide for the recovery of attorney fees and costs incurred in enforcing that agreement.

¶ 34 Turner argues that she was justified when she disobeyed the Board's directive placing her on paid leave because she was caught in the middle of the power struggle between the Board and the mayor and had received conflicting directives from them about reporting to work. However, this court previously affirmed the trial court's judgment that the Board, not the mayor, had the authority to control the employee the Board had hired as the Village manager and it was a proper exercise of the Board's authority to place Turner on paid leave. *Turner*, 2013 IL App (1st) 122720-U, ¶¶ 15, 31. Consequently, Turner is barred by collateral estoppel from challenging the validity of the Board's administrative leave directive and, thus, the mayor's contrary request or order that she should report to work is not relevant to her breach of contract claim of entitlement to attorney fees. Again, article 6, section 11 expressly provided that employees were not entitled to attorney fees if the employees' actions were in violation of Village directives or ordinances.

¶ 35 Turner cites *Wayne Township Board of Auditors, DuPage County v. Ludwig*, 154 Ill. App. 3d 899 (1987), and *Griffith v. Pembroke Township*, 314 Ill. App. 3d 262 (2000), to support her claim that she was entitled to attorney fees. Those cases, however, are distinguishable from the instant case.

¶ 36 In *Ludwig*, the township's board of auditors pursued a *mandamus* action against Roy Paeth, in his official capacities as the supervisor, treasurer and township trustee, seeking access to township public records relating to the expenditure of public funds. *Id.* at 902. The documents were subpoenaed and, after multiple requests, Paeth eventually produced boxes of records, but it was alleged that he had refused to surrender certain documents. *Id.* at 903. A hearing was conducted against him on the rule to show cause why he should not be held in contempt for failure to comply with the subpoena. *Id.* Eventually, the court entered an order that discharged

the rule to show cause and discharged Paeth. *Id.* Thereafter, Paeth filed a petition for attorney fees pursuant to an Illinois statute. *Id.* The board, however, argued that he was not entitled to fees because his refusal to provide documents was contrary to fundamental principles of Illinois law and was, therefore, outside his official duties. *Id.* at 907.

¶ 37 On review, this court held that Paeth was entitled to reasonable attorney fees incurred in the defense of the action the Board brought against him in his official capacities as supervisor, treasurer, and township trustee. *Id.* (if a plaintiff intends to bind the defendant's office, the suit must be brought against the officer in his official, not individual, capacity). Contrary to the circumstances in *Ludwig*, the Board here did not move to enforce the settlement agreement against Turner in her official capacity as Village manager. Rather, the Board took that action against her in her individual capacity as an employee who was challenging the Board's authority to place her on administrative leave. Consequently, Turner did not incur her attorney fees in her official capacity. Furthermore, *Ludwig* did not involve the interpretation of contract provisions.

¶ 38 In *Griffith*, 314 Ill. App. 3d at 266, the township assessor, who was a township official, was entitled to attorney fees when she, in her official capacity, successfully defended the assessor's office against the township's *mandamus* action that sought to relocate the assessor's office to the town hall. Here, in contrast, Turner's conduct in ignoring the Board's directive to place her on paid administrative leave while it investigated an allegation of misconduct did not constitute an official duty. It was a purely personal act by an employee and cannot be construed as part of Turner's Village manager job description. See *City of Elmhurst ex rel. Mastrino v. City of Elmhurst*, 272 Ill. App. 3d 168, 174, 176 (1994) (the actions of city aldermen, who were defendants in a libel action, in forming a purely private association to oppose a referendum

proposed by other aldermen on a public policy question constituted private activity and did not relate to the duties of their office for purposes of the city's ordinance that authorized the city to defend and indemnify employees acting within the scope of their employment).

¶ 39 We conclude, based on the terms of article 6, section 11 of the Village's personnel manual and the parties' settlement agreement, which resolved their dispute about the Board's authority over the village manager position, that Turner was not entitled to reimbursement for the attorney fees she incurred when she refused to comply with the Board's directive placing her on paid administrative leave for 14 days. Specifically, she was not entitled to her claimed attorney fees that she incurred when she challenged the Village's emergency motion to enforce the settlement agreement, unsuccessfully appealed the trial court's judgment granting that motion, and pursued her breach of contract claim against the Village for attorney fees.

¶ 40 C. Amount of the Award

¶ 41 Based on our decision that Turner was not entitled to recover attorney fees, we do not address whether the amount of the attorney fee award was an abuse of discretion or Turner's cross-appeal claim that the trial court abused its discretion by not awarding her the full reimbursement amount that she sought.

¶ 42 III. CONCLUSION

¶ 43 For the foregoing reasons, we reverse the judgment of the trial court that granted summary judgment in favor of Turner on her breach of contract claim and awarded her \$88,136.09 in attorney fees.

¶ 44 Reversed.