MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

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IN THE
COURT OF APPEALS OF INDIANA

Kris Reibel,
Appellant-Respondent,

v.

Kara Kavensky,
Appellee-Petitioner.

February 14, 2022

Court of Appeals Case No. 21A-DR-1648

Appeal from the Hamilton Superior Court

The Honorable Michael A. Casati, Judge

Trial Court Cause No. 29D01-1602-DR-1465

Bailey, Judge.

Case Summary

[1] Kris Reibel ("Reibel") appeals the order finding him in contempt of the parties' court-approved dissolution settlement agreement ("the Settlement Agreement"), assessing damages, and imposing attorney fees.

[2] We affirm in part, reverse in part, and remand with instructions.

Issues

[3] Reibel raises six issues which we consolidate and restate as the following four issues:

I. Whether the trial court's order that Reibel transfer to Kara Kavensky ("Kavensky"), within fourteen days, one half of the funds from his simplified employee pension ("SEP account") was an impermissible modification of the Settlement Agreement.

II. Whether the amounts Reibel was ordered to pay for the Lowe's credit card debt and health care expenses were supported by sufficient evidence.

III. Whether the trial court's orders that Reibel pay Kavensky interest on assessed damages and refrain from claiming the children as tax exemptions for the next four years are abuses of the court's discretion.

IV. Whether the trial court's order awarding Kavensky $3,000 in attorney fees is an abuse of discretion.

Facts and Procedural History

[4] The parties were married on November 23, 1996, and three children were born of the marriage. In their subsequent dissolution action, the parties—proceeding pro se—filed the Settlement Agreement, which the trial court approved and incorporated into its final dissolution decree on April 20, 2016. The relevant portions of the Settlement Agreement state:

> **2.04 Investment Accounts** … Husband's SEP retirement account shall be used by Husband for needed maintenance to the marital residence, and the remaining amount shall be divided equally into SEP or IRA accounts for Husband and Wife.
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> * * *
>
> **3.02 Debts and Obligations of Husband** … The Lowes credit card is to be paid by Husband within 6 months from [the] proceeds of [the] SEP account. Husband will assume minimum payments on [the] Lowes card once Wife vacates [the] marital residence.
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> * * *
>
> **ARTICLE V**
> **CHILD SUPPORT**
>
> * * *

> **5.03** **<u>Health Care Expenses</u>** … [Beginning on April 1, 2016,[1]] Wife shall pay the first $1,744 of uninsured medical expenses annually, with any additional expenses to be divided by percentage of income, currently Husband [at] 77% and Wife [at] 23%.
>
> **5.04** **<u>Tax Exemptions</u>** Exemption[s] and deduction[s] for the minor children shall be equally divided by Husband and Wife on their state and federal tax returns.
>
> * * *

App. at 46-49 (emphasis in original).

[5] On May 17, 2021, Kavensky filed her Verified Motion for Rule to Show Cause why Reibel should not be held in contempt for violating the Settlement Agreement. Following a hearing on Kavensky's motion, the trial court issued an order dated July 6, 2021, in which the court held Reibel in contempt. The facts most favorable to the court's order are as follows.

[6] By the time of the hearing on Kavensky's contempt motion ("show cause hearing"), over five years had passed since the date of the order approving and adopting the Settlement Agreement, but Reibel still had not completed "needed maintenance" to the marital residence or distributed to Kavensky her portion of the SEP account. *Id.* at 4. At the show cause hearing, Reibel testified that he

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[1] The Settlement Agreement provided separately for the payment of health care expenses that were due prior to April 1, 2016, and those amounts are not at issue on appeal.

had not "done the work" on the repairs to the marital residence because he "wasn't required to" do so, as there was no "time frame" stated in the Settlement Agreement. Tr. at 33-34. The value of the SEP account at the time of the dissolution was approximately $80,000, and the value had increased to approximately $150,000 by the time of the show cause hearing.

[7] On September 21, 2012, the parties charged "$14,898.00" to a Lowe's credit card. Ex. at 10. The remaining balance due on that charge was "$2,048.59" as of October 26, 2016. *Id.* As of May 3, 2021, the balance due on the Lowe's card was "$2,031.78." *Id*. at 4. Kavensky had vacated the marital residence by the time the dissolution was finalized, i.e., April 20, 2016, but Reibel failed to assume minimum payments on the Lowes credit card at that point. Kavensky made the April and May 2016 payments—each totaling $384—on the Lowes account. Kavensky filed for bankruptcy and the remaining Lowes credit card debt was included as a debt in her bankruptcy proceedings. Reibel made a $4,000 payment on the parties' Lowes credit card account on October 5, 2016—i.e., approximately six months following the dissolution decree—but failed to pay the remaining balance, upon which interest continued to accrue.

[8] Kavensky paid all of the children's health care expenses from April 2016 through 2020, with no contribution from Reibel—despite Kavensky's repeated requests that Reibel pay his portion of such expenses per the Settlement Agreement. Kavensky sent Reibel copies of medical bills, annual itemizations of the health care expenses, and communications regarding the amount Reibel owed Kavensky for the same. Kavensky was forced by financial circumstances

to pay portions of the children's health care expenses with a credit card. At the time of the show cause hearing, the total amount of Reibel's portion of health care expenses that Kavensky had paid since April 1, 2016, was $6,564.40.

[9] Despite his failure to pay his portion of the children's health care expenses per the Settlement Agreement, Reibel claimed the children as tax exemptions on his tax returns each year from 2016 through 2020.

[10] At the show cause hearing, Kavensky testified that she had incurred "about 3,000" dollars in attorney fees in pursuing her contempt motion. Tr. at 13.

[11] In its July 1, 2021, order, the trial court ordered, in relevant part, that:

* Reibel must divide the SEP account within fourteen days of the order and effectuate a transfer to Kavensky of her portion (i.e., one half) of the funds from that account;

* Reibel must pay Kavensky's bankruptcy trustee $2,816.59 for the Lowes credit card balance Reibel had failed to pay, plus $1,130.96 in interest, for a total of $3,947.55.

* Reibel must pay Kavensky $6,564.40 for Reibel's portion of health care expenses that he had failed to pay for the years 2016 through 2020, plus $1,374.93, which is interest on such health care expenses at the rate of eight percent (8%) per annum.

* Kavensky alone shall claim the parties' children as tax exemptions for the years 2021 through 2024, "due to [Reibel's] failure to pay [Kavensky] his portion of the children's medical expenses which is a component of child support" while still having claimed the children as tax

exemptions on his tax returns from 2016 through 2020. Appealed Order at 9.

* Reibel must pay $3,000 of Kavensky's attorney fees to Kavensky's attorney, with interest accruing at eight percent (8%) beginning August 1, 2021.

[12] This appeal ensued.

Discussion and Decision

Standard of Review

[13] Reibel challenges the court order finding him in contempt of the Settlement Agreement.

> Whether a party is in contempt of court is a matter within the trial court's discretion, and its decision will be reversed only for an abuse of that discretion. A court abuses its discretion when its decision is against the logic and effect of the facts and circumstances before the court or is contrary to law. When reviewing a contempt determination, we will not reweigh evidence or judge witness credibility. We will affirm unless, after a review of the entire record, we have a firm and definite belief the trial court made a mistake.

Copple v. Swindle, 112 N.E.3d 205, 213 (Ind. Ct. App. 2018) (citations omitted); *see also City of Gary v. Major*, 822 N.E.2d 165,172 (Ind. 2005) ("The determination of damages in a contempt proceeding is within the trial court's discretion, and we will reverse an award of damages only if there is no evidence to support the award.").

Interpretation and Enforcement of Provision Regarding SEP Account

[14] Reibel contends that the trial court abused its discretion by modifying the terms of the Settlement Agreement without authority to do so. Specifically, he asserts that the court modified provision 2.04 of the Settlement Agreement by ordering him to pay half the SEP account to Kavensky even though he had not yet used SEP funds to complete work on the marital residence. However, we conclude that the trial court did not modify the Settlement Agreement but interpreted it as requiring Reibel to act within a reasonable time. And, because Reibel did not act within a reasonable time, he waived his contractual right to use the SEP funds for home repairs.

[15] When parties to a dissolution agree in writing to the disposition of property and the trial court subsequently approves and adopts that agreement as a decree of the court, the trial court may not subsequently modify the terms of the agreement "except as the agreement prescribes or the parties subsequently consent." Ind. Code § 31-15-2-17(c). However, it is well-settled that the trial court retains jurisdiction to interpret and enforce the terms of its property settlement agreements. *E.g.*, *Robinson v. Robinson*, 858 N.E.2d 203, 206 (Ind. Ct. App. 2006) ("Courts of this State have long had power, both inherent and statutory, to entertain actions to determine whether a judgment has been carried out and satisfied." (internal quotations and citation excluded)); *see also* I.C. § 31-15-7-10 (allowing enforcement of a dissolution decree by contempt and "any other remedies available for the enforcement of a court order").

[16] Settlement agreements regarding property are contractual in nature; therefore, they are subject to the general rules of contract construction. *Niccum v. Niccum*, 734 N.E.2d 637, 639 (Ind. Ct. App. 2000). Under those rules, "[w]here the parties fix no time for the performance or discharge of obligations created by the contract[,] they are assumed to have had in mind a reasonable time." *City of E. Chicago, Ind. v. E. Chicago Second Century, Inc.*, 908 N.E.2d 611, 623 (Ind. 2009); *see also Elrod v. Bauman*, 136 N.E.3d 232, 242 (Ind. Ct. App. 2019), ("Where no time for performance is specified in the contract the law will imply that it must be performed within a reasonable time." (quotations and citation omitted)), *trans. denied*. The question of what constitutes a reasonable time within which to perform an act in a contract, in the absence of a fixed date, is generally one for the trier of fact and "depends on the particular facts of each case, including the subject matter of the contract, the situation of the parties, and the circumstances attending performance." *Rogier v. Am. Testing and Eng'g Corp.*, 734 N.E.2d 606, 617 (Ind. Ct. App. 2000), *trans. denied*.

[17] Moreover, as a matter of equity, courts may "decline to assist a person who has slept upon his rights" by failing to act within a reasonable time without showing an excuse for such failure. *SMDFund, Inc. v. Ft. Wayne-Allen Cnty. Airport Auth.*, 831 N.E.2d 725, 729 (Ind. 2005). Waiver of a right under a contract provision is an intentional relinquishment of a known right. *McGraw v. Marchioli*, 812 N.E.2d 1154, 1157 (Ind. Ct. App. 2004). But "[w]aiver may be implied from the acts, omissions, or conduct of one of the parties to the contract." *L.H. Controls, Inc. v. Custom Conveyor, Inc.*, 974 N.E.2d 1031, 1051 (Ind. Ct. App.

2012). Thus, a condition in a contract made for the benefit of a party may be waived by that party if he fails to act in a timely manner. *Id.*; *see also SMDFund*, 831 N.E.2d at 729.

[18] Here, the provision of the Settlement Agreement regarding the SEP account did not specify a time by which Reibel was required to use SEP funds to complete needed maintenance on the marital residence and transfer half of the remaining SEP funds to Kavensky. Because that provision was silent regarding a time frame, the trial court interpreted it as requiring that Reibel act within a reasonable time. *See Elrod*, 136 N.E.3d at 242. And the trial court found that giving Reibel more than five years to act would be unreasonable. The court noted that Reibel's proffered interpretation—that the lack of time frame meant he was not required to ever complete needed maintenance and divide the SEP funds—was "preposterous." Appealed Order at 2. Instead, the trial court concluded, in effect, that Reibel had breached the terms of the contract by failing to give Kavensky her portion of the SEP funds within a reasonable time. In addition, the court concluded that Reibel's failure to use SEP funds for needed home repair within a reasonable time resulted in waiver of that contractual right. *See, e.g.*, *SMDFund*, 831 N.E.2d at 729. The trial court was well within its discretion to interpret the SEP provision in that manner, whereas Reibel's proffered interpretation would render the provision essentially meaningless. We see no error in the trial court's interpretation of the provision.

[19] In sum, the trial court did not modify the settlement agreement but engaged in permissible interpretation and enforcement of it. The trial court's interpretation

of provision 2.04 as requiring that Reibel complete needed repairs to the marital residence and distribute Kavensky's portion of the SEP account to her within a reasonable time was consistent with applicable contract law. And the court's conclusions that (1) more than five years was not a reasonable time within which to complete home repairs, and (2) by failing to finish home repairs within five years' time, Reibel waived his right to do so, were not erroneous.

Sufficiency of the Evidence of Outstanding Debts

[20] Reibel asserts that there was "insufficient evidence" to support the amounts the trial court awarded for his contempt of the orders to pay the Lowe's credit card debt and the children's health care expenses. Appellant's Br. at 17. We disagree.

[21] Kavensky's testimony and her exhibits—including Exhibit 2, a copy of the Lowe's credit card bill dated October 26, 2016—support the trial court's contempt finding regarding the Lowe's debt. Exhibit 2 shows the only charge on the card was a $14,898.00 charge made on Sept. 21, 2012—i.e., prior to the date of the parties' dissolution of marriage.[2] The Exhibit also shows that the remaining balance on that charge as of Oct. 26, 2016, was $2,048.59. Exhibit 1, an email from Kavensky's attorney to Reibel's attorney, shows that the balance due on the Lowes card was $2,031.78 as of May 3, 2021. And Kavensky's

[2] Thus, Reibel's contention that "there is no means to accurately determine when the charges were made on the Lowe's account" is without merit. Appellant's Br. at 19.

testimony showed that she paid a total of $768.00 on the credit card in the months of April and May of 2016. Together, the evidence supports the trial court's order that Reibel pay $3,947.55 for the past due Lowes debt, which includes an interest rate of eight percent (8%) per annum.

[22] In addition, Kavensky's testimony and multiple exhibits—including copies of medical bills, correspondence between Kavensky and Reibel regarding past due medical bills, and correspondence between the parties' attorneys detailing Reibel's portion of the total outstanding medical bills for years 2016 through 2020—support the trial court's finding that Reibel was in contempt of court for failure to pay his portion of health care expenses. That same evidence also supports the amount of damages the trial court awarded regarding the medical expenses. Reibel's contentions to the contrary are merely requests that we reweigh the evidence and judge witness credibility, which we may not do. *See Copple*, 112 N.E.3d at 213; *City of Gary*, 822 N.E.2d at 172.

Award of Interest on Damages and Order Regarding Tax Exemptions

[23] Reibel maintains that the trial court lacked "a legal basis" for awarding Kavensky eight percent (8%) interest on the damages that were awarded for his failure to pay the Lowe's debt and the children's medical expenses as ordered. Appellant Br. at 19. He asserts that the award of interest was an impermissible punishment for his contempt, rather than the compensatory remedy appropriate for indirect civil contempt. Similarly, Reibel maintains that the order regarding tax exemptions is not a permissible compensatory remedy for his contempt, but

an impermissible modification of the Settlement Agreement designed to "punish" him for his contempt. *Id.* at 21. We address each contention in turn.

Award of Interest

[24] "It is well-settled that an award of prejudgment interest in a breach of contract action is warranted if the amount of the claim rests upon a simple calculation and the terms of the agreement make such a claim ascertainable." *Song v. Iatarola*, 76 N.E.3d 926, 939 (Ind. Ct. App. 2017) (quotation and citation omitted), *trans. denied*; *see also* I.C. § 24-4.6-1-101 (providing for "interest on judgments for money whenever rendered").

> The test for determining whether an award of prejudgment interest is appropriate is whether the damages are complete and may be ascertained as of a particular time. *Song*, 76 N.E.3d at 939 []. The amount is computed from the time the principal amount was demanded or due and is allowable at the permissible statutory rate when no contractual provision specifies the interest rate. *Id.* … The current interest rate is eight percent when there is no contract by the parties specifying a different interest rate. Ind. Code § 24-4.6-1-101."

DeGood Dimensional Concepts, Inc. v. Wilder, 135 N.E.3d 625, 637 (Ind. Ct. App. 2019).

[25] While punitive damages are not properly imposed in a civil contempt proceeding, *see, e.g.*, *Matter of Paternity of B.Y.*, 159 N.E.3d 575, 579 (Ind. 2020), the award of interest in this case is not punitive but compensatory; that is, it is designed to fully compensate the injured party for the lost use of money, *see*

DeGood, 135 N.E.3d at 637. "Put another way, prejudgment interest is recoverable not as interest but as additional damages to accomplish full compensation." *DeGood*, 135 N.E.3d at 637 (quotation and citation omitted). And it is a permissible goal of civil contempt to compensate a party when a court order is violated. *Madden v. Phelps*, 152 N.E.3d 602, 615 (Ind. Ct. App. 2020) ("[T]he trial court has the inherent authority to compensate the aggrieved party for losses and damages resulting from another's contemptuous actions.").

[26] Here, the amount of the damages resulting from Reibel's failure to pay the Lowes debt and health care expenses as ordered was complete and ascertainable as of the date of the show cause hearing and the court's order on that hearing. And, because the settlement agreement did not state otherwise, interest at an amount of eight percent (8%) per annum was appropriate. *See* I.C. § 24-4.6-1-101. The trial court did not abuse its discretion when it awarded Kavensky interest on her damages.

Order Regarding Tax Exemptions

[27] As noted above, the trial court determined that Reibel had violated section 5.03 of the Settlement Agreement, which required him to pay a portion of the children's health care expenses. The court noted that, despite his failure to support the children by paying for their health care as ordered, Reibel nevertheless claimed the parties' children as tax exemptions in years 2016 through 2020, per section 5.04. Therefore, the court ordered that only

Kavensky would be permitted to claim the children as tax exemptions in the years 2021 through 2024.

[28] Reibel asserts that order was an impermissible modification of section 5.04, which called for the parties to "equally divide" the tax exemptions and deductions they claimed for their children. App. at 49. He further contends that the order was impermissibly punitive rather than compensatory.[3] Reibel is wrong on both fronts.

[29] First, the order was not a modification of the Settlement Agreement but a permissible interpretation and enforcement of the same. Again, a property settlement agreement is contractual in nature and is, therefore, subject to the general rules of contract construction. *Niccum*, 734 N.E.2d at 639. It is a general rule of contract construction that "a court should read all of the provisions [of a contract] as a whole to accept an interpretation that harmonizes the contract's words and phrases and gives effect to the parties' intentions as established at the time they entered [into] the contract." *Haggarty v. Haggarty*, 176 N.E.3d 234, 246 (Ind. Ct. App. 2021) (internal quotations and citation omitted); *see also Rieth-Riley Const. Co., Inc. v. Auto-Owners Mut. Ins. Co.*, 408 N.E.2d 640, 645 (Ind. Ct. App. 1980) ("In construing a contract, we must adopt

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[3] Reibel claimed, for the first time and in passing, in his Reply Brief that there is no support in the record for the finding that he claimed the children as tax exemptions in 2016 through 2020. Reply Br. at 9. However, he has waived that argument by raising it for the first time in a reply brief. *See* Ind. Appellate Rule 46(C) ("No new issues shall be raised in the reply brief."); *see also, e.g.*, *Ross v. State*, 429 N.E.2d 942, 945 (Ind. 1982) ("If we were to permit . . . changes of theory through reply briefs, appellees would be entitled to respond by an additional answer brief, and the briefing could continue ad infinitum.").

a construction which appears to be in accord with justice, common sense, and the probable intention of the parties in light of honest and fair dealing."). Thus, as previously noted, where one construction of a contract would make it unusual and extraordinary, but another construction—equally consistent with the language of the contract—would make it reasonable, just, and fair, the latter construction must prevail. *Assoc. Aviation Underwriters*, 712 N.E.2d at 1076.

[30] It is clear from the court's order that it considered the Settlement Agreement as a whole, including sections 5.03 and 5.04. The court reasonably determined that an "equal division" of the tax exemptions, per section 5.04, assumed that the parties were each fulfilling their obligations to support the children, per section 5.03. That is a fair interpretation of provision 5.04, given the division of responsibility for the children's health care needs contained in provision 5.03. However, Reibel sought to take advantage of a benefit conferred by the contract—i.e., annual tax exemptions for the children—without fulfilling a predicate contractual duty—i.e., paying his portion of the children's health care during those years. Reibel claimed tax exemptions for the children during years that Kavensky, not Reibel, was supporting the children by paying their health care expenses. Therefore, to enforce the agreement to make the division of the tax exemptions "equal" per section 5.04, the trial court acted within its discretion by ordering that Kavensky, not Reibel, would be entitled to the tax exemptions for the next four years. *See Robinson*, 858 N.E.2d at 206. (noting a court has inherent power to determine whether a judgment has been "carried out and satisfied," and issue enforcement orders accordingly); I.C. § 31-15-7-10

(permitting enforcement of a dissolution decree by contempt or "any other remedies available for the enforcement of a court order").

[31] Second, the trial court's order regarding future tax exemptions is compensatory rather than punitive. During the years 2016 through 2020, Kavensky was supporting the children by paying for their health care expenses but Reibel was not. Therefore, Kavensky alone should have been entitled to claim the children as tax exemptions in those years. By allowing Kavensky alone to claim such tax exemptions in the next four years, the trial court is attempting to compensate Kavensky for not being able to solely claim such exemptions in years 2016 through 2020. Such compensatory relief for Reibel's violation of the Settlement Agreement is permissible and appropriate. *See Madden*, 152 N.E.3d at 615; I.C. § 31-15-7-10.

Award of Attorney Fees

[32] Reibel does not challenge the trial court's authority to order him to pay Kavensky's attorney fees, as such an order is clearly authorized by statute and as part of the court's inherent authority to enforce compliance with its orders. *See* I.C. § 31-15-10-1 (allowing award of attorney fees in dissolution matters); *Madden*, 152 N.E.3d at 615 ("Regardless of consideration of economic resources, once a party is found in contempt, the trial court has the inherent authority to compensate the aggrieved party for losses and damages resulting from another's contemptuous actions, including an award of attorney's fees." (citation omitted)).

[33] Rather than challenge Kavensky's entitlement to attorney fees, Reibel asserts that there was insufficient evidentiary support for the amount of those fees. We agree. The only evidence related to the amount of attorney fees Kavensky incurred in the contempt motion is her testimony that those fees were "about 3,000" dollars. Tr. at 13. Kavensky presented no evidence to support that amount, such as an attorney's fee affidavit and documentation of her attorney's hourly rate and hours billed. She did not even present testimony as to the exact amount she was billed for attorney fees. Therefore, we reverse the order that Reibel pay $3,000 in attorney fees and remand to the trial court for a determination of the amount of reasonable attorney fees Kavensky incurred in pursing her contempt motion.

Conclusion

[34] The trial court did not impermissibly modify the parties' Settlement Agreement when it ordered Reibel to pay Kavensky her half of the SEP funds; rather, the court reasonably construed the Settlement Agreement as requiring that Reibel make needed repairs to the marital residence from the SEP funds and transfer to Kavensky her portion of the remaining SEP funds within a reasonable time. The trial court did not err in determining that it was unreasonable for Reibel to fail for over five years to take such actions and that such unreasonable failure resulted in a waiver of Reibel's contractual right to use the SEP funds to pay for the remaining needed home repairs. The order that Reibel pay Kavensky her portion of the SEP funds was not erroneous.

[35] There was sufficient evidence to support the orders finding Reibel in contempt for failure to pay the Lowes credit card debt and the children's health care expenses and ordering him to pay those past due amounts. And the court did not abuse its discretion by ordering Reibel to pay eight percent interest per annum on those past due amounts and refrain from claiming the children as tax exemptions for the next four years.

[36] Finally, the trial court did not abuse its discretion in ordering that Reibel must pay Kavensky's reasonable attorney fees incurred in pursuing her contempt motion. However, there was insufficient evidence of the amount of those attorney fees. Therefore, we reverse the order that Reibel pay $3,000 in Kavensky's attorney fees, and we remand this matter for a determination of the amount of the reasonable attorney fees Kavensky incurred in the contempt proceedings.

[37] Affirmed in part, reversed in part, and remanded with instructions.

Mathias, J., and Altice, J., concur.