

NOT DESIGNATED FOR PUBLICATION

No. 124,809

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

ONG LAW FIRM, P.A.,
Appellee,

v.

KAREN DEMSTER,
Appellant.

MEMORANDUM OPINION

Appeal from Johnson District Court; PAUL C. GURNEY, judge. Opinion filed May 5, 2023.

Affirmed.

Allison G. Kort, of Kort Law Firm LLC, of Kansas City, Missouri, for appellant.

Michael R. Ong, of Ong Law Firm, P.A., of Overland Park, for appellee.

Before HURST, P.J., MALONE and BRUNS, JJ.

PER CURIAM: This case concerns a dispute over attorney fees arising from an underlying familial conflict. In 2017, Karen Demster hired Ong Law Firm (the Firm) to represent her in an action to recover money her daughter had inherited from Demster's mother. As part of that representation, Demster signed a written attorney representation and fee agreement in which she agreed to pay the Firm fixed hourly billing rates plus all costs and expenses incurred through the representation. However, after some period of time, Demster could no longer make regular payments to the Firm for her attorney fees and costs. Thereafter, Demster and the Firm orally agreed that the Firm would delay its

receipt of regular payments from Demster and take its fees and costs from the judgment it recovered on her behalf.

After recovering a judgment on Demster's behalf, the Firm sought to retain its outstanding attorney fees from that judgment, but Demster objected. The Firm sought a declaratory judgment regarding its ability to retain the outstanding fees and costs from the judgment, and after denying Demster's summary judgment motion and conducting a bench trial, the district court found for the Firm and ordered that the Firm was entitled to recover its outstanding attorney fees of \$98,057.32 and \$764.74 in costs from the judgment. Demster appeals, claiming the district court lacked subject matter jurisdiction to declare the Firm's rights to the unpaid attorney fees and costs and order recovery from the judgment proceeds.

FACTUAL AND PROCEDURAL HISTORY

In February 2012, Demster's mother, Mary Margaret Bridges, died. Upon Bridges' death, certain assets passed to her granddaughter, Natalie Nelson. In July 2017, Demster and her husband hired the Firm to represent them in an action against Nelson, Demster's daughter—captioned *Demster v. Nelson*, Case No. 17CV06351—to recover money Nelson had received from Bridges. Demster signed a written attorney representation and fee agreement in which she agreed to pay fixed hourly billing rates and all costs and expenses incurred by the Firm on their behalf. The agreement required a \$1,500 retainer and provided that billing statements would be due and payable upon receipt. The Demsters paid the \$1,500 retainer and made further payments upon receipt of statements which totaled \$6,730 by the end of 2017.

Eventually, however, the Demsters could not continue to pay the attorney fees and expenses as they were incurred during the litigation. Thereafter, Demster orally agreed to

pay any further-incurred attorney fees and expenses out of any judgment the Firm secured against Nelson on Demster's behalf.

Demster ultimately prevailed in her action against Nelson and was awarded \$226,719.91. The money judgment was deposited in the Firm's trust account. The Firm attempted to disburse the awarded funds to Demster, less its remaining unpaid attorney fees and expenses, but Demster disputed the Firm's claimed fees and expenses.

The Firm subsequently filed a petition for declaratory judgment, seeking a determination of its contractual right to recover the disputed unpaid attorney fees and expenses and the proper disposition of the disputed funds retained in the Firm's trust account. Demster filed a motion for summary judgment, arguing that the district court lacked subject matter jurisdiction to order Demster to pay the Firm's unpaid attorney fees and expenses out of the judgment awarded to her in the underlying litigation because her oral agreement to do so was never reduced to writing. After a hearing at which both sides presented argument, the district court denied Demster's motion for summary judgment, finding that it had subject matter jurisdiction to hear and decide the Firm's petition for declaratory judgment.

In August 2021, the district court conducted a bench trial on the Firm's petition for declaratory judgment. Following conclusion of the trial, the court issued a comprehensive order and judgment, awarding the Firm \$98,057.32 in attorney fees and expenses and \$764.74 in costs. The court ordered that the Firm could recover its awarded fees and costs from Demster's funds obtained in the judgment secured against Nelson and held in the Firm's trust account and that the remaining funds be disbursed to Demster. Demster now appeals.

DISCUSSION

Demster appeals the district court's declaratory judgment and order, arguing that the district court lacked subject matter jurisdiction to order Demster to pay the Firm's unpaid attorney fees and expenses out of the judgment it received on her behalf.

Before reaching the merits of the parties' dispute, this court must address two disputed ancillary issues. First, the Firm contends that volumes seven and eight of the record on appeal should not be considered because Demster did not timely request the addition of these volumes. But Demster responds that she requested these additions to the record on appeal in accordance with the governing Kansas Supreme Court Rules. Demster is correct.

Supreme Court Rule 3.02(d) (2023 Kan. S. Ct. R. at 21) provides that "[a] party may request adding to the record on appeal any part of the entire record under Rule 3.01(a)." Supreme Court Rule 3.01(a) (2023 Kan. S. Ct. R. at 20) in turn provides:

"The entire record consists of:

- (1) all original papers and exhibits filed in the district court;
- (2) the court reporter's notes and transcripts of all proceedings;
- (3) any other court authorized record of the proceedings, including an electronic recording; and
- (4) the entries on the appearance docket in the district court clerk's office."

Finally, Supreme Court Rule 3.02(d)(3)(B) (2023 Kan. S. Ct. R. at 22) provides that, if the record on appeal has not yet been transmitted to the clerk of the appellate courts, "[t]he clerk must add the requested addition to the record on appeal. No court order is required."

Demster filed her request to add volumes seven and eight to the record on appeal on September 12, 2022, before the record on appeal was transmitted to the clerk of the appellate courts on October 6, 2022. Moreover, the contents of both volumes—documents and exhibits filed in the district court—are within the definition of the entire record as provided in Rule 3.01(a). The Firm cites no contrary authority to support its argument that the added volumes should not be considered by this court. Demster complied with the governing Supreme Court Rules in requesting to add volumes seven and eight to the record on appeal, and it is therefore appropriate for this court to consider the contents of those records.

Second, the Firm argues this court may not consider the contents of the exhibits Demster attached to her motion for summary judgment (upon which she sometimes relies in her appellate brief) because the district court refused to do so. At the hearing on Demster's summary judgment motion, the district court explained that the exhibits were "unverified documents . . . lacking in evidentiary value" and, therefore, it would "not consider such documents or arguments based on any specific content of such documents." In its subsequent journal entry denying the motion, the court reiterated that the documents "are not part of the case record." This court need not decide this issue because the contested exhibits are immaterial to its analysis governing the sole issue presented in this appeal. So, this court will consider volumes seven and eight but need not consider the summary judgment exhibits.

On appeal, this court reviews "issues of subject matter jurisdiction and statutory interpretation de novo," as they are both questions of law subject to unlimited review. *Chalmers v. Burrough*, 314 Kan. 1, 7, 494 P.3d 128 (2021); *Kingsley v. Kansas Dept. of Revenue*, 288 Kan. 390, 395, 204 P.3d 562 (2009) ("The question as to whether subject matter jurisdiction exists is a question of law over which this court's scope of review is unlimited.").

I. *The District Court Had Subject Matter Jurisdiction*

Demster claims that "[b]ecause any oral contingency fee agreement was never reduced to writing, no valid agreement existed between these parties" and therefore, the district court lacked subject matter jurisdiction over the Firm's petition for declaratory judgment concerning that agreement. Demster argues that "[t]he trial Court lacked jurisdiction under the Declaratory Judgments Act to concoct never-written terms of an employment contract and then bind the parties to those terms." Subject matter jurisdiction is a prerequisite for a court to enter a valid judgment. *In re Estate of Heiman*, 44 Kan. App. 2d 764, 766, 241 P.3d 161 (2010) ("If a court lacks subject matter jurisdiction, its actions have no legal force or effect and cannot bind the parties."). "Subject matter jurisdiction is the power of the court to hear and decide a particular type of action," which is conferred by the Kansas Constitution and statutes. *Chalmers*, 314 Kan. at 7; *In re Marriage of Williams*, 307 Kan. 960, 967, 417 P.3d 1033 (2018) ("Sources of Kansas courts' subject-matter jurisdiction include the Kansas Constitution and Kansas statutes.").

This court exercises unlimited review over the interpretation of the statutes governing subject matter jurisdiction in this case. *Kingsley*, 288 Kan. at 395. And when interpreting these statutes, this court must give effect to the Legislature's intent, which should be ascertained, when possible, from the plain language of the statute. *In re M.M.*, 312 Kan. 872, 874, 482 P.3d 583 (2021). "When a statute is plain and unambiguous, an appellate court should not speculate about the legislative intent behind that clear language, and it should refrain from reading something into the statute that is not readily found in its words." 312 Kan. at 874.

K.S.A. 60-1701 provides, in pertinent part, that "[c]ourts of record within their respective jurisdictions shall have power to declare the rights, status, and other legal relations whether or not further relief is, or could be sought." Additionally, K.S.A. 60-1703 provides that "[f]urther relief based on a declaratory judgment may be granted

whenever necessary or proper. The application shall be by petition to a court having jurisdiction to grant the relief." Those who may seek a declaratory judgment and further relief are described as "[a]ny person having an interest under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise." K.S.A. 60-1704. And those persons seeking a declaratory judgment "may seek determination of any question of construction or validity arising under that enactment, document or agreement and may obtain a declaration of rights, status or other legal relations thereunder." K.S.A. 60-1704.

Moreover, "[a]ny court proceeding under this act may construe a contract in the event of an actual or threatened breach thereof." K.S.A. 60-1705. Finally, the purpose of the district court's authority in a declaratory judgment action is to "provide relief from uncertainty and insecurity with respect to disputed rights, status and other legal relations," and it is a remedial measure which should be "liberally construed and administered to achieve that purpose." K.S.A. 60-1713; see also *Prairie Land Elec. Co-op v. Kansas Elec. Power Co-op*, 299 Kan. 360, 366, 323 P.3d 1270 (2014).

K.S.A. 60-1701 conferred subject matter jurisdiction upon the district court to "declare the rights, status, and other legal relations" of parties within its jurisdiction. This includes the Firm's rights to the remaining unpaid attorney fees and expenses pursuant to the parties' written fee agreement. Additionally, K.S.A. 60-1704 unambiguously conferred upon the district court the subject matter jurisdiction to declare the validity of the fee agreement and the Firm's rights thereunder. The Firm had "an interest under a . . . written contract" as well as "rights, status or other legal relations . . . affected by a . . . contract" and, therefore, the Firm could "seek determination of any question of construction or validity arising under that . . . agreement and may obtain a declaration of rights, status or other legal relations thereunder." K.S.A. 60-1704.

Additionally, in any proceeding under the Declaratory Judgments Act, the district court "may construe a contract in the event of an actual or threatened breach." K.S.A. 60-1705. Here, it is clear that there was an actual or threatened breach. Moreover, the Act vests the district court with authority beyond just declaring a party's rights—it permits the district court to grant further relief based upon a declaratory judgment "whenever necessary or proper." K.S.A. 60-1703. These statutes clearly confer subject matter jurisdiction on the district court to declare the Firm's right to the remaining unpaid attorney fees and expenses *and* to provide the further relief necessary to secure that right.

The purpose of a declaratory judgment is to "terminate the uncertainty or controversy giving rise to the proceeding." *Waste Connections of Kansas, Inc. v. Ritchie Corp.*, 296 Kan. 943, Syl. ¶ 2, 298 P.3d 250 (2013). In finding for the Firm in its declaratory judgment action, the district court granted the Firm monetary relief as a form of "further relief" pursuant to K.S.A. 60-1703. This is consistent with the interpretation of a panel of this court that has found that district courts have authority to award monetary relief as a form of further relief in a declaratory judgment action. See *Raspberry v. Midwest Tower Systems, Inc.*, No. 88,105, 2002 WL 35658060, at *1 (Kan. App. 2002) (unpublished opinion) ("[K.S.A. 60-1703] allows for monetary relief as a form of further relief."). A declaratory judgment may be the first step to establish a party's rights, preceding a separate enforcement action, but two separate actions are not required. See *Phoenix Indemnity Co. v. Zinn*, 177 Kan. 689, 694, 281 P.2d 1065 (1955) ("There can be no question concerning the fact that [K.S.A. 60-1703] prescribes a method by which further relief than mere interpretation may be obtained."); see also *Condon National Bank of Coffeyville v. Krigel*, 179 Kan. 274, 279-80, 294 P.2d 241 (1956) ("[T]here can be no doubt that, under our declaratory judgment statute and decisions construing its force and effect, appellee had the right to maintain such action and recover relief as therein sought in a proceeding for further relief in the original suit. [Citations omitted.]"); *Rutland Savings Bank v. Steele*, 155 Kan. 667, 673, 127 P.2d 471 (1942) (In affirming the district court's money judgment for the plaintiff, the Kansas Supreme Court stated that "[t]here

can be no question concerning the fact that [K.S.A. 60-1703] prescribes a method by which further relief, [rather] than mere interpretation, may be obtained.").

The Kansas Supreme Court has articulated this principle:

"Where remedial and further relief is prayed for in a declaratory judgment action, the trial court in determining the question of law has the right to adjudicate the whole controversy at one trial and grant all relief that might flow therefrom when necessary in order to make its judgment complete and effective on the question of law presented." *Simmons v. Reynolds*, 179 Kan. 785, 788, 298 P.2d 345 (1956).

The predecessor declaratory judgment statutes, which are interpreted in the earlier cases cited, were textually identical to the current statute at issue in this case. See, e.g., *Zinn*, 177 Kan. at 694.

The district court "settle[d] and provide[d] relief from uncertainty and insecurity with respect to disputed rights" when it ordered that the Firm could recover its awarded attorney fees and expenses from the money judgment the Firm secured against Nelson and held in its trust account. K.S.A. 60-1713. And that order finally "terminate[d] the uncertainty or controversy giving rise to the proceeding." *Waste Connections of Kansas, Inc.*, 296 Kan. 943, Syl. ¶ 2. A mere determination of the Firm's right to recover would have provided far less conclusive relief and would not have served the "remedial" purpose for which the Legislature adopted the statutes providing for declaratory judgments. K.S.A. 60-1713.

Demster's lone argument that the district court lacked subject matter jurisdiction to enter a declaratory judgment against her because her agreement to pay the Firm from the judgment proceeds was oral, not written, is unpersuasive. The district court's declaratory judgment was, in fact, based upon the written fee agreement, although this court makes no finding that the district court would not have had subject matter jurisdiction to enter a

declaratory judgment concerning an oral agreement. Demster entered into a written contract in which she agreed to pay fixed hourly billing rates and all costs and expenses incurred by the Firm on her behalf. Demster's contractual obligation to pay the Firm was set forth in writing, and that contract was never rescinded. Rather, when Demster could no longer afford to pay the regular billing statements, she orally agreed to satisfy her *preexisting* contractual obligation to pay the Firm's further-incurred attorney fees and expenses out of any judgment secured against Nelson. In other words, the terms of the *oral* agreement only related to the *further relief* granted by the district court pursuant to K.S.A. 60-1703. And K.S.A. 60-1703 provided the district court with broad discretion in granting further relief so long as it was "necessary or proper."

II. *The District Court Did Not Enforce an Unwritten Contingency Fee Agreement*

Demster also argues that by permitting the Firm to recover its unpaid attorney fees and expenses from the judgment, the district court effectively enforced an unwritten contingency fee agreement. The Kansas Rules of Professional Conduct require a contingency fee agreement to be in writing. KRPC 1.5(d) (2023 Kan. S. Ct. R. at 334); see *Progressive Cas. Ins. Co. v. Freeman*, No. 89,926, 2003 WL 22283156, at *3 (Kan. App. 2003) (unpublished opinion).

However, contrary to Demster's assertion, the district court did not enforce a contingency fee agreement. In a contingency fee agreement, the attorney agrees to be paid in the form of a fixed amount or percentage of the potential recovery—but in the event there is no recovery, the lawyer forgoes compensation. See, e.g., *Consolver v. Hotze*, 306 Kan. 561, 562, 395 P.3d 405 (2017) (describing a "standard contingency fee agreement"). That is not what happened here. Rather, the district court determined that the Firm was entitled to \$98,057.32 in unpaid attorney fees and expenses and \$764.74 in costs based upon the parties' written attorney representation and fee agreement in which Demster agreed to fixed hourly billing rates. The fee award was calculated by multiplying

the applicable hourly rate by the number of hours worked, regardless of whether the Firm recovered on Demster's behalf. That is not a contingency fee.

The parties' written fee agreement did not transform into a contingency fee agreement by virtue of the Firm's willingness to delay receiving payment. Neither did the Firm agree to forgo payment if its efforts were not victorious. Rather, the Firm agreed to delay receiving payment after it determined that Demster was having trouble making regular payments and that it was likely to recover on her behalf. So, rather than continuing to regularly invoice Demster for the legal fees and expenses as they were incurred when she could not afford the payments, the Firm decided to agree to delay receiving payment from the judgment. Demster argues that because the Firm stopped regularly sending her invoices, the Firm agreed to accept a contingency fee arrangement. While it is clear the Firm's position would have been strengthened if it had continued to send Demster invoices and somehow indicate that the Firm agreed to accept delayed payment of those invoices, that failure did not somehow terminate the preexisting representation contract or create a contingency fee agreement. The parties simply changed the payment due date of the hourly fees, not the basis or amount of the payment.

Moreover, even if Demster had not agreed to fulfill her contractual obligation under the written fee agreement using the judgment obtained in her favor by the Firm, the district court still would have had the authority to order her to do so as a form of further relief pursuant to K.S.A. 60-1703. Accordingly, affirming the district court's judgment and order does not require this court, explicitly or implicitly, to enforce an unwritten contingency fee agreement.

Demster's real grievance appears to be with the district court's factual finding that, when Demster ran out of money, she agreed to pay the Firm's further-incurred fees and expenses out of the judgment, and not with the district court's exercise of subject matter jurisdiction over the petition. However, Demster does not challenge that factual finding

on appeal; nor does she pursue any theory attacking the validity of the oral agreement, such as a statute-of-frauds challenge. Rather, Demster *only* challenges the district court's exercise of subject matter jurisdiction. That challenge fails.

CONCLUSION

Demster agreed to pay the Firm fixed hourly billing rates and expenses for its representation, and when she was unable to continue regularly paying, she agreed to pay any further-incurred attorney fees and expenses out of the judgment secured in the underlying litigation. The district court had subject matter jurisdiction to declare the Firm's rights pursuant to the written fee agreement and grant the further relief necessary to secure those rights.

Affirmed.