IN THE SUPREME COURT OF IOWA
No. 20-0972
Linn County Nos. EQCV091488 and LACV091167

BORST BROTHERS CONSTRUCTION, INC.,
Plaintiff-Appellee,
v.
FINANCE OF AMERICA COMMERCIAL, INC.,
Defendant-Appellant.

FINANCE OF AMERICA COMMERCIAL, INC.,
Plaintiff-Appellant/Cross-Appellee,
v.
THOMAS DOSTAL DEVELOPERS, INC. and RANDY T. DOSTAL,
Appellees/Cross-Appellants,

and

KELLY CONCRETE COMPANY, INC., AFFORDABLE HEATING AND COOLING, INC.,
5 STAR PLUMBING, INC. and BORST BROTHERS, CONSTRUCTION, INC.,
Defendants-Appellees.

BORST BROTHERS CONSTRUCTION, INC.,
Plaintiff-Appellee,
v.
FINANCE OF AMERICA COMMERCIAL, LLC,
Defendant-Appellant.

FINANCE OF AMERICA COMMERCIAL, LLC,
Plaintiff-Appellee,
v.
THOMAS DOSTAL DEVELOPERS, INC. and RANDY T. DOSTAL,
Defendants-Appellants,

and

KELLY CONCRETE COMPANY, INC., DARNELL HOLDINGS, LLC d/b/a DARNELL CONSTRUCTION, AFFORDABLE HEATING AND COOLING,

INC., 5 STAR PLUMBING, INC., BORST BROTHERS CONSTRUCTION, INC., and KEN-WAY EXCAVATING SERVICE, INC.,
Defendants-Appellees.

ON APPEAL FROM THE IOWA DISTRICT COURT FOR LINN COUNTY, HONORABLE MARY E. CHICCHELLY, PRESIDING

COMBINED BRIEF OF THE APPELLEES/CROSS-APPELLANTS THOMAS DOSTAL DEVELOPERS, INC. and RANDY T. DOSTAL

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ROUTING STATEMENT

As it respects this aspect of the appeal (involving FAC's claims against the Dostal Parties), the issues involve claims sounding in mortgage foreclosure and personal guaranty (deficiency judgment) as well as an attorney's fee award; because these issues present the application of existing legal principles to the facts this action should be transferred to the Iowa court of appeals under the criteria set forth in Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case. As it respects the appellees/cross appellants Thomas Dostal Developers, Inc. (Developers) and Randy T. Dostal (Dostal)—which parties shall be collectively referred to as the Dostal Parties—the plaintiff in case number EQCV0914888 (Finance of America Commercial, LLC (FAC)) sued Developers for foreclosure of five residential subdivision lots, and sought on top of that a deficiency judgment against Developers as well as such a judgment against the purported personal guarantor Dostal; in addition, FAC ultimately sought an attorney's fee award against the Dostal Parties as well. (Petition of 11-16-2018; App. 153-184.) The Dostal Parties contested the claims—including foreclosure, deficiency, amount of any such deficiency and attorney's fees. (Answer of 01-28-2019; App. 230-233.)

Course of the Proceedings. The mortgage foreclosure case was consolidated with an action brought by a mechanic's lienholder—Borst Brothers

Construction, Inc.—to establish priorities between several filed mechanic's liens and the mortgages (that is case number LACV091167). (Consolidation Order of 02-04-2019; App. 234-237.)

Bench trial on the consolidated cases was held on February 3, 2020. (Trial Trans. at p. 1.) During the trial, the district ruled on all objections, including objections made by the Dostal Parties to certain of the exhibits offered by FAC (Trial Trans. at, e.g. 23:22-24:11, 29:04-29:11, 32:12-32:20, 38:25-39:16, 46:05-46:09, 47:23-47:25, 49:09-49:11, 50:24-51:02, 68:02-68:06, and etc.)—this importantly included the exhibits FAC submitted to attempt to prove not only loan note defaults but the purported amount owing on the notes (for ultimate deficiency judgment purposes); FAC did not present summaries (backed-up by the underlying supporting records) to establish the amounts for the five notes but instead obtained admission, under the business records exception to the hearsay rule, of five letter documents prepared by another company (that does loan servicing) and which documents were prepared for the purposes of this litigation—to establish the purported deficiency amount as of the very date of trial. (Exhibits F.35.1 through F.35.5; App. 678-688.)

In addition, FAC attempted to obtain a personal judgment against Dostal individually and based on his purported personal guaranty of the five loan notes—but one of those guaranties expressly was signed only in Dostal's capacity as an officer of Developers and Dostal himself testified that all the actions he undertook

and as it respects all aspects of the development project—including execution of the notes, mortgages and guarantees—were done in his capacity as an officer of Developers and not in his personal capacity; Developers alone was the borrower and ultimate developer (general contractor) of the residential subdivision project that included the five lots in question. (Exhibit F.29.23; App. 664-668; Trial Trans. at 199:11-201:02.)

Finally, FAC filed a post-ruling application against Developers for an award of attorney fees and after the district court ruled that the mortgages be foreclosed; the Dostal Parties resisted that motion. (Resistance of 05-08-2020; App. 903-906.)

Disposition of the Case. Again, as relevant to this aspect of the overall appeal (the mortgage foreclosure-based claims brought by FAC against the Dostal Parties), the district court entered its ruling on March 18, 2020 that granted FAC foreclosure and judgment relief against Developers but denied FAC's request for a deficiency judgment against Dostal. (Ruling and Judgment of 03-18-2020; App. 804-827.) FAC then filed a post-judgment rule 1.904(2) motion (respecting the district court's denial of an individual deficiency judgment) and also a motion for an award of attorney's fees; the Dostal Parties resisted each motion, and as it respected the attorney's fee motion on the grounds that FAC should not have prevailed to begin with but, in any case, its request for a full attorney fee and expense award should be significantly discounted as FAC only prevailed on a partial aspect of the claims that

were subject to an attorney fee award. (Resistances of 04-13-2020 and 05-08-2020; App. 845-855 and 903-906.) Ultimately, the court denied the post-trial rule 1.904 motion by order entered on June 24, 2020 but granted FAC's fee motion in the entirety (by order entered on August 24, 2020). (Rulings of Indicated Dates; App. 907-912; 974-980.)

FAC filed its notice of appeal within thirty days after the district court's post-judgment order had issued (i.e., on July 21, 2020) and the Dostal Parties filed their notice of cross appeal three days later. (Notice of Cross-Appeal of 07-24-2020; App. 920-922.) The Dostal Parties also timely appealed, on September 3, 2020, from the district court's attorney's fee and expense award order. (Notice of Appeal of 09-03-2020; App. 985-986.) (The Iowa supreme court subsequently combined that appeal into the instant appeal and for the purposes of single briefing of all the issues raised between FAC and the Dostal Parties).

STATEMENT OF THE FACTS

The defendant Thomas Dostal Developers, Inc. (Developers) as relevant to this appeal is the owner of five lots located within a residential subdivision improvement project known as Hawks Point. (Exhibits F.29.2, F.29.7, F.29.12, F.29.17 and F.29.22; App. 507-523; 542-558; 577-593; 612-628; 647-663; Trial Trans. 18:17-19:19.) The lots in question are legally described as "LOTS 5, 6, 7, 8 AND 10, HAWKS POINT SEVENTH ADDITION IN THE CITY OF CEDAR

RAPIDS, LINN COUNTY, IOWA" and are locally known as 5221 Dostal Drive SE, 5126 Dostal Drive SW, 5130 Dostal Drive SW, 5118 Dostal Drive SW, and 5124 Dostal Drive SW, all in Cedar Rapids, Iowa 52404. (Id.)

The plaintiff Finance of America (FAC) is the purchase money lender for each of the five lots, and it obtained separate mortgages on each of the five lots from Developers; Developers was the sole borrower and it alone signed the loan notes secured by the mortgages. (Id.; Trial Trans. at 55:17-56:01.) In addition, FAC claims that the individual Dostal defendant, Randy T. Dostal, executed a personal guaranty of at least some, if not all, of the five loan notes issued to Developers and backed by the mortgages; Dostal disputes the guarantees were executed, or intended to be executed, in his personal capacity. (Exhibits F.29.3, F.29.8, F.29.13, F.29.18 and F.29.23; App. 524-528; 559-563; 594-598; 629-633; 664-668; Trial Trans. at 56:02-56:09, 199:11-201:02.)

At trial and as it respects the mortgage foreclosure claim, the Dostal Parties presented evidence that FAC's notices of default and acceleration—sent only to Developers—were insufficient. (Trial Trans. at 56:25-62:11.) The Dostal Parties further objected on hearsay grounds to FAC's sole evidence—five two-page letters prepared by another corporation (that is, one other than FAC) addressed to Developers but never sent to it—that purportedly itemized the amounts owing on each of the five loans (and to set the amount of any deficiency judgment against both

Developers and Dostal). (Trial Trans. at 38:25-39:16, 43:25-46:09, 47:23-47:25, 49:09-49:11, 50:24-51:02, 62:12-66:11.)

The remaining salient facts already have been set forth in the Statement of the Case division of this brief or will be set forth in greater detail below.

ARGUMENT ON APPEAL ISSUE RAISED BY FAC

I. The District Court Correctly Found For Dostal On The Guaranty Claim.

A. The Standard of Review.

FAC asserts the standard of review for its personal guaranty claim must be de novo because the overarching claim sounds in mortgage foreclosure, and the associated deficiency claims based on the notes and guaranties, are the types of claims typically filed and tried in equity. But there is a two-fold issue here concerning how the case was actually tried and what relief was requested by FAC. First, as the trial record demonstrates, the district court ruled on every objection made on behalf of every party at the trial—and these included the district court's ruling on the objections relevant to FAC's mortgage foreclosure-based claims. (Trial Trans. at, e.g. 23:22-24:11, 29:04-29:11, 32:12-32:20, 38:25-39:16, 46:05-46:09, 47:23-47:25, 49:09-49:11, 50:24-51:02, 68:02-68:06, and etc.) Second, the claims pressed by FAC were not purely for equitable relief (such as the simple in rem foreclosure of the mortgages); to the contrary, FAC sought monetary damages against both Developers and Dostal and on the basis of a purported deficiency

amount in the notes and following deduction of the net foreclosure proceeds, if any, to be obtained—and monetary damages are a legal remedy. (Petition; App. 153-184.) *In re Coe College,* 935 N.W.2d 581, 586 (Iowa 2019) (whether the action is tried in equity or law, and for standard of review purposes, hinges in important part on whether the trial court ruled on evidentiary objections and whether the claimant sought monetary relief or a ruling that such damages were or were not due); *see also Clark Cty, Reservoir Comm'n v. Robins Revocable Trust,* 862 N.W.2d 166, 171 (Iowa 2015) (Standard of review on appeal "is determined by how the case was tried in district court.") And the pleadings themselves—that is, how the case was filed and the pretrial submissions—are not determinative; it is how the case was actually tried and what forms of relief were requested and ruled upon are what govern. *Passebl Estate v. Passebl,* 712 N.W.2d 408, 413-14 (Iowa 2006). And where the action involves contract-based claims (as here—loan notes and mortgages), when the plaintiff requests both equitable and legal relief then "the action [equitable or legal] is ordinarily classified according to what appears to be its primary purpose or its controlling issue." *Van Sloan v. Agans Bros., Inc.,* 778 N.W.2d 174, 178-79 (Iowa 2010) (quoting *Mosebach v. Blythe,* 282 N.W.2d 755, 758 (Iowa Ct. App. 1979).

A significant part of the relief requested by FAC against the Dostal Parties was monetary relief; this fact combined with how the case actually was tried in the

district court— with that court ruling on all evidentiary objections made at the trial (not taking all the proffered evidence subject to the objections)—strongly tips this case to the conclusion that it was actually tried in law. Accordingly, the standard of review is for the correction of errors at law. *Iowa Mortgage Center, L.L.C. v. Baccam*, 841 N.W.2d 107, 110 (Iowa 2013); *see also NevadaCare, Inc. v. Iowa Dep't of Human Servs*., 783 N.W.2d 459, 465 (Iowa 2010); *Ernst v. Johnson Cnty*., 522 N.W.2d 599, 602 (Iowa 1994) ("Where there is uncertainty about the nature of a case, a litmus test we use in making this determination is whether the trial court ruled on evidentiary objections."). The district court's findings of fact in an action at law tried to the bench are binding on appeal if supported by substantial evidence; however, the appellate court is not bound by the district court's conclusions of law or its application of legal principles to the facts. *Id*.; *see also EnviroGas, L.P. v. Cedar Rapids/Linn County Solid Waste Agency*, 641 N.W.2d 776, 780-81 (Iowa 2002). Evidence is considered substantial if a reasonable mind would accept it as adequate to reach the same factual conclusion as the district court. *Smith v. State*, 845 N.W.2d 51, 54 (Iowa 2014); *Fisher v. City of Sioux City*, 695 N.W.2d 31, 34 (Iowa 2005). This determination is made in the light most favorable to the district court's judgment. *Chrysler Fin. Co. v. Bergstrom*, 703 N.W.2d 414, 418 (Iowa 2005).

Nonetheless, if the appellate court concludes this case was tried in equity,

while de novo review would then apply the appeals court is to accord weight to the district court's factual findings (particularly pertaining to witness credibility) and the court's interpretation of the facts applied to the law remain subject to review for the correction of errors at law. *In re Estate of Myers*, 825 N.W.2d 1, 3-4 (Iowa 2012); *In re Estate of Roethler*, 801 N.W.2d 833, 837 (Iowa 2011).

B. The Merits of the Personal Guaranty Claim.

In general, there are two types of guaranty agreements: absolute guaranties and conditional guaranties. A guaranty is considered to be absolute "unless its terms import some condition precedent to the liability of the guarantor." *Preferred Investment Co. v. Westbrook*, 174 N.W.2d 391, 395 (Iowa 1970). In an absolute guaranty, liability is imposed upon the guarantor upon default of the principal debtor; not so for a conditional guaranty (the precondition must be satisfied). *Schaffer v. Acklin*, 205 Iowa 567, 570, 218 N.W. 286, 287 (1928). Guaranty contracts are to be construed according to the intention of the parties. *Miller v. Geerlings*, 256 Iowa 569, 576, 128 N.W.2d 207, 211 (1964). This intention may be ascertained by examining the language employed and the circumstances under which the guaranty is given. *Buser v. Grande Avenue Land Co.*, 211 Iowa 659, 664, 234 N.W. 241, 244 (1931). The plaintiff bears the burden to prove by the preponderance of the evidence the breach of the condition(s) that triggers the guaranty, the breach of the guaranty, the provision of appropriate notice, and as well as damages and the

amount. *Susan Kizer & Serenity Salon & Spa, Inc. v. Sievers*, 859 N.W.2d 658, 664-65 (Iowa Ct. App. 2015).

FAC, after a lengthy citation of general Delaware contract law (which was not argued as applying at the district court level of the proceedings), conclusory states that there was "no evidence" presented that Dostal executed any of the guaranty documents in other than his individual capacity. But that conclusory assertion is not supported by the evidence actually presented and on which the district court made a finding supported by substantial evidence (or otherwise witness credibility) that the guaranty documents were not intended to subject Dostal to individual liability in the event Developer's defaulted on any of the loan notes. (Exhibit F.29.3; App. 524-528; Trial Trans. 56:02-56:09, 199:11-201:02.)

First, right after FAC in its brief claims there is "no evidence" Dostal signed any of the guaranty's in his capacity as an officer of Developers, FAC turns around and acknowledges—as it must under the record—that Dostal in fact expressly signed one of the notes singularly in that capacity (and not in his individual capacity); and the note was made out by FAC for this to occur. (Exhibit F.29.23; App. 664-668; Trial Trans. at 56:02-56:09, 199:11-201:02). And as for the other four guaranty documents (exhibits F.29.3, F.29.8, F.29.13, and F.29.18; App. 524-528, 559-563, 594-598, 629-633), Dostal indicated the intention was that those documents were to be treated the same way and that at all times—and executing all of the mortgage-

based documents—he acted solely in his capacity as an officer of Developers. (Trial Trans. 199:11-201;02.) In contrast, FAC's only witness admitted that all he knew about the transactional documents was what he gleaned from his review of FAC's file (as this witness was not even employed with FAC at the time the transactional documents were prepared and executed); and this witness accordingly agreed that he otherwise had no personal knowledge as to the parties' intention at the time in question. (Trial Trans. at 54:17-55:16.)

And in that regard, the cases on which FAC relies are easily distinguishable—the cases in fact support Dostal's position—as well as the district court's ultimate findings and conclusions; because those cases focus on the intention of the parties at the time the documents were executed. For instance, in *Builders Kitchen & Supply Co. v. Moyer*, 2009 WL 295129 (Iowa Ct. App. 2009), the body of the guaranty expressly referred to the individual signor and in his personal capacity as the guarantor; such language does not appear in the FAC guarantees (no individual or personal language is used in the definition of the term guarantor). Likewise, in *City of Davenport v. Shewry Corp.*, 674 N.W.2d 79 (Iowa 2004), a corporation and its officer each signed a separate guaranty that covered the same singular loan note (or debt), one note signed in the corporate capacity and the other in an express individual capacity with matching terms for the same in the body of the guaranty—in the case at bar, a single note was executed to cover each of the five separate loan notes and

the intent as set forth above was not to bind Dostal individually. And *Bayless v. Pearson*, 15 Iowa 279 (Iowa 1863) and *Kuehl v. Freedman Bros. Agency*, 521 N.W.2d 714 (Iowa 1994) are not different because the signatory parties for the singular debt involved in those cases expressly executed the document at issue in his individual capacity with the terms of the document indicating such personal responsibility as well.

Under these circumstances, at best a dispute of fact existed over the meaning of the guaranties and under the intent of the parties—and there was substantial evidence to support the district court's factual resolution of this dispute (or otherwise the district court's determination of Dostal's credibility over the admitted lack of personal knowledge of the FAC witness should control). The district court's findings and conclusions on this subject—and under either standard of review (law or equity)—are fully supported. Its decision should not be disturbed.

ARGUMENT ON THE CROSS-APPEAL ISSUES RAISED BY THE DOSTAL PARTIES

II. The District Court Erred In Admitting Into Evidence FAC's Singular Evidence Of Deficiency Amount (Loan Default Amount) And In Ruling FAC Proved The Elements Of Its Mortgage Foreclosure Claim.

A. Error Preservation.

The Dostal Parties preserved error. First, they objected on hearsay grounds to FAC's submission of the singular evidence it presented to prove the amount of deficiencies on the five notes (and hence the amount of the deficiency judgments

that should be entered against Developers as the borrower (signer of the notes) and Dostal as the purported personal guarantor). (Trial Trans. at 38:25-39:16, 43:25-46:09, 47:23-47:25, 49:09-49:11, 50:24-51:02, 62:12-66:11.) This evidence was comprised of five two-page letters, purportedly addressed to Developers (but admittedly never sent to it) that claimed to itemize the deficiencies. (Id.; Exhibits F.35.1, F.35.2, F.35.3, F.35.4 and F.35.5; App. 678-679; 680-682; 683-684; 685-686; 687-688.) These letters were not prepared by FAC but rather were prepared by a servicing company called BSI Financial Services—and the letters were prepared singularly to calculate the purported deficiencies owing as of the exact date the trial was held (February 3, 2020). (Id.) FAC argued, and against the Dostal Parties' hearsay objection, singularly that the letters were admissible under the business records exception to the hearsay rule (and that is what the district court ruled in admitting the letters). (Id.) This ruling was error; the business records exception was not shown to apply. The Dostal Parties preserved error as they obtained a ruling from the district court on the objection. (Id.) *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) (error is preserved where the issues raised on appeal were first raised before the district court and ruled upon by that court); *see also Metz v. Amoco Oil Co.*, 581 N.W.2d 597, 600 (Iowa 1998) ("issues must be presented and passed upon by the district court" in order for appellate error to be preserved); *Peters v. Burlington N. R.R.*, 492 N.W.2d 399, 401 (Iowa 1992) (same).

Second, the Dostal Parties submitted their post-trial brief that set forth the argument that FAC failed to prove its right to mortgage foreclosure in the first instance (and hence did not establish the other claims, including for deficiencies)—that FAC did not meet the notice provisions set forth in the transactional documents (both respecting default and acceleration). (Brief and Final Argument of 02-14-2020; App. 793-803.) The Dostal Parties obtained a ruling from the district court on this issue as well when that court ruled FAC proved its elements of the mortgage foreclosure action and rejected the notice contentions of the Dostal Parties. (Ruling and Judgment of 03-18-2020; App. 804-827.)

B. The Standard of Review.

For the reasons stated and authorities cited by the Dostal Parties in division I.A. of this brief, the standard of review on the merits of FAC's mortgage foreclosure claim hinge on whether this case was tried at the district court level in law or in equity. *In re Coe College*, 935 N.W.2d at 586. But as for the challenged evidentiary ruling—the overruled hearsay objections to the deficiency documents—as we have seen the district court actually ruled on these objections (as well as on all of the other evidentiary objections made on behalf of the parties); the district court did not employ the equity rule of not ruling on objections—that is, admitting the evidence subject to the objection; instead, it ruled on the merits of the evidentiary objections. Generally, a district court's evidentiary rulings (at least those not based on hearsay)

are reviewed for abuse of discretion. *Hall v. Jennie Edmundson Mem'l Hosp.*, 812 N.W.2d 681, 685 (Iowa 2012). An abuse of discretion occurs when the trial court exercises its discretion "on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *State v. Maghee*, 573 N.W.2d 1, 5 (Iowa 1997). "A ground or reason is untenable when it is not supported by substantial evidence or when it is based on an erroneous application of law." *Graber v. City of Ankeny*, 616 N.W.2d 633, 638 (Iowa 2000). But where, as here, the objection is grounded in hearsay, then the appellate court reviews the correctness of the ruling for the correction of errors at law. *Karth v. Iowa Dep't of Transp.,* 628 N.W.2d 1, 5 (Iowa 2011); *State v. Paredes*, 775 N.W.2d 554, 560 (Iowa 2009). And unlike for non-hearsay based objections, prejudice to the objecting party is presumed when evidence is admitted that should have been excluded from the fact-finder's consideration by the hearsay rule. *State v. Reitenbaugh*, 392 N.W.2d 486, 489-90 (Iowa 1986).

C. The District Court Improperly Admitted And Relied On Hearsay Evidence For The Amount Of Deficiency Owing On The Notes.

It must first be noted—and emphasized—that FAC bore the burden of proof by a preponderance of the evidence to establish that the business records exception to the hearsay rule applied to the BSI deficiency letters and given the Dostal Parties' hearsay objection. *State v. Long*, 628 N.W.2d 440, 442-43 (Iowa 2001) (proponent of the evidence bears the burden to prove that an exception to the hearsay rule

permits that evidence's admission); *State v. Miller*, 204 N.W.2d 834, 840 (Iowa 1973) (same).

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Iowa R. Evid. 5.801(c). A "declarant" is defined as "a person who makes a statement." Id. at 5.801(b). "Hearsay is normally inadmissible." *State v. Buelow*, ___ N.W.2d ___, No. 18-0733 at *6 (Iowa 2020) (citing evidence rule 5.802). Where the statement is hearsay, the proponent of the statement must show that one or more of the enumerated exceptions to the hearsay rule apply, and the exception at issue in this appeal is known as the business records exception. *Id*. at 5.803(6).

For evidence to be admissible under this exception to the hearsay rule, the proponent of the evidence must show each and all of the following: (1) the documents in question, and each of them, are business records; (2) the documents were made at or near the time of the act (i.e., the documents were not created for purposes of litigation or in contemplation of possible future litigation but rather in the regular course of the business's mundane and routine affairs); (3) the documents were made by, or from information transmitted by, a person with actual personal knowledge and authorized by his or her employment position to make that record or transmit that information; (4) the documents were kept in the course of a regularly conducted business activity; and (5) it was a regular practice of that business activity

to make such a business record. Iowa R. Evid. 5.803(6); *State v. Reynolds,* 746 N.W.2d 837, 841 (Iowa 2008); *Beachel v. Long,* 420 N.W.2d 482, 484 (Iowa Ct. App. 1988). Moreover, the person who provides the testimony to establish that the documents are indeed business records, and as such exempted from the hearsay rule, must himself or herself have personal knowledge of the record keeping system, have access to it, and have personal knowledge to establish each of the five elements to prove the records are admissible under the business records exception to the hearsay rule. *Beachel,* 420 N.W.2d at 484 (quoting 5A Iowa Rules of Civil Procedure 581 (1984)).

In *Beachel,* the Iowa court of appeals ruled that the district court properly excluded clinic records directly involving treatment of the plaintiff (in a personal injury lawsuit) and sought to be admitted into evidence by the defendant tortfeasor party as business records; the *Beachel* court ruled in *id.* at 484-85:

> The defendant first contend[s] that the trial court erred in not admitting into evidence the records from a clinic where Beachel received treatment (the Gundersen Clinic records). The court ruled that the records were inadmissible hearsay. The defendant argues that the records are admissible under the business records exception to the hearsay rule. See Iowa R. Evid. [5.]803(6). We hold that the Gundersen Clinic records were properly excluded by the trial court. The foundation elements which must be proved prior to admission of the evidence under the business records exception are as follows:
>
> (1) That it is a business record;

> (2) That it was made at or near the time of an act;
>
> (3) That it was made by, or from information transmitted by, a person with knowledge;
>
> (4) That it was kept in the course of a regularly conducted business activity;
>
> (5) That it was the regular practice of that business activity to make such a business record.

> 5A Iowa Rules of Civil Procedure Annotated 581 (1984). The records in this case were introduced through Kathy Callan, the assistant director of medical records at the Gundersen Clinic. She testified by deposition taken over the telephone. Having reviewed the relevant portions of the deposition, we hold that the defendant did not lay a complete and proper foundation for admission of the clinic records. Specifically, there is insufficient foundation to prove that the clinic records were made by, or from information transmitted by, a person with knowledge of the events recorded. Kathy Callan was never asked any question pertaining to whether the record entries were made by health care practitioners who had dealt with Mary Beachel and would, therefore, have had sufficient knowledge to transmit information about her. Furthermore, the foundation was insufficient to establish that the record was kept in the course of a regularly conducted business activity. Callan was asked whether the entries in the record had "been made in the ordinary course of business." This question only inquiries into whether the Gundersen Clinic has a regular practice of making such records. The question does not address the issue of whether the medical evaluations, of the type involving Mary Beachel, are a regularly conducted business activity at the Gundersen Clinic.

A real indica that a record does not qualify for admission into evidence under the business records exception to the hearsay rule is where that record was created

for litigation purposes—that is, to prove some fact (or element) involving a party's claim or defense. *State v. Musser*, 721 N.W.2d 734, 754 (Iowa 2006); *see also United States v. Norwood*, ___ F.3d ___, No. 19-2178 at *15 (7th Cir. 2020) (business records typically are nontestimonial—that is, such records are not created for litigation purposes); *United States v. Miller*, ___ F.3d ___, No. 18-5578 at 28 (6th Cir. 2020) (bracket in original) ("On the other hand, a report written for a purpose unrelated to creating evidence or proving past events is generally nontestimonial. Business records are the best examples of these reports. Those records are generally admissible without cross-examination of their authors because they are 'created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial[.]'") (quoting *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 309-11 (2009)).[1]

Here, FAC through its singular witness did not establish any of the five foundational elements and in order for FAC to meet its proof burden of showing the documents were admissible under the business records exception to the hearsay rule; in addition, rather than being a business record the documents were created for

[1] It also needs to be noted that FAC did not even go through the motions of attempting to establish the business records exception by submitting a Certificate of Authenticity signed by a BSI officer or employee whom may have been able to establish by self-authentication that the letters were business records. Iowa R. Evid. 5.902(11) (method to self-authenticate a business record); *see also State v. Boothby*, ___ N.W.2d ___, No. 19-0454 at *9-10 (Iowa 2020) (process of how to do so).

testimonial (that is, litigation) purposes—to establish the amounts owing on each of the five loan notes (and in order to establish the deficiency amounts for both the individual deficiency claims against Developers (as the borrower and note signer) and Dostal (as the purported guarantor of the notes). First, FAC's sole witness testified that, despite the form of the documents—purported letters addressed to Developers to notify it of the deficiency (loan arrearage) amounts and right to cure—the documents were not intended to be sent to Developers and in fact were never so sent; to the contrary, the documents were prepared singularly to establish the arrearage amounts as of the date of the trial and to be submitted at trial to establish (and as FAC's only evidence) of the arrearage amounts (and to establish the deficiency amount on both the note (borrower) and guaranty claims). (Trial Trans. at 62:12-66:11.) Moreover, the documents were created on the cusp of the scheduled trial to do just that. (Exhibits F.35.1, F.35.2, F.35.3, F.35.4 and F.35.5—each dated January 23rd, less than two weeks before the start of trial; App. 678-679; 680-682; 683-684; 685-686; 687-688.) And there was no information presented as to who actually made and transmitted the information contained in the documents (just a generalized statement it had to have been done by someone with BSI Financial). (Trial Trans. 65:07-65:09.) Likewise, such documents could not have been kept in the "regular course of business activity" because the documents were not created for notice purposes (to be sent to the borrower, in this case Developers) but rather were

created to be used testimonially to establish facts (and elements of claims) for which FAC bore the burden of proof in this litigation. (Trial Trans. at 62:12-66:11.)

While prejudice is presumed, the Dostal Parties in fact were prejudiced here. The barren admission of the documents left them no way to determine the accuracy of the numbers set forth therein—unlike had a summary been used, where the underlying documents would have had to have been produced for inspection—and FAC's singular witness himself testified he had no personal knowledge concerning the arrearage numbers appearing on the documents (he could only take—that is assume—the numbers were correct). (Trial Trans. at 62:12-66:11.) And without this erroneously admitted evidence, FAC would have failed to prove the amount of note arrearage and the corresponding deficiency judgment for both its claims of loan note breach and recovery on the guarantees. (Id.)

As a result, FAC failed in its proof on these claims. Developers is entitled to judgment on the note breach claim and Dostal likewise is entitled to judgment on the personal guaranty claim.

D. The District Court Erred in Granting FAC A Judgment On The Foreclosure Claim.

A mortgage foreclosure is a contractual claim—that is, the foreclosing party must prove the elements of a breach of contract claim (here, breach of the note secured by the mortgage and ultimately breach of the mortgage itself). *Golden Sun Feeds, Inc. v. Clark,* 258 Iowa 678, 682 140 N.W.2d 158, 161 (1966). To prove a

breach of contract, a party must show: "(1) the existence of a contract; (2) the terms and conditions of the contract; (3) that it has performed all the terms and conditions required under the contract; (4) the defendant's breach of the contract in some particular way; and (5) that plaintiff has suffered damages as a result of the breach." *Molo Oil Co. v. River City Ford Truck Sales, Inc.*, 578 N.W.2d 222, 224 (Iowa 1998). "A party breaches a contract when, without legal excuse, it fails to perform any promise which forms a whole or a part of the contract." *Id*. Contract interpretation, that is the meaning of contractual language, is a legal issue for the court to decide unless the interpretation is dependent on extrinsic evidence. *Id*. "The cardinal rule of contract interpretation is to determine what the intent of the parties was at the time they entered into the contract." *Pillsbury Co. v. Wells Dairy, Inc*., 752 N.W.2d 430, 436 (Iowa 2008). The words of the contract are "the most important evidence" in this determination. *Id*. "When there are ambiguities in the contract, they are strictly construed against the drafter." *Dickson v. Hubbell Realty Co*., 567 N.W.2d 427, 430 (Iowa 1997).

As it respects damages and the amount, the courts have said the following. An injured party is "generally entitled to be placed in as good a position as he or she would have occupied had the contract been performed." *Midland Mut. Life Ins. Co. v. Mercy Clinics, Inc.,* 579 N.W.2d 823, 831 (Iowa 1998). Any damages awarded must relate to the nature and purpose of the contract itself. *Id.* Damages cannot be

speculative:

> [D]amages based on breach of a contract must have been foreseeable or have been contemplated by the parties when the parties entered into the agreement. Whether the damages were reasonably anticipated by the parties when the contract was formed may be discerned from "the language of the contract in the light of the facts, including the nature and purpose of the contract and circumstances attending its execution."

Kuehl, 521 N.W.2d at 718 (citations omitted) (quoting 22 Am.Jur.2d *Damages* § 460, at 541 (1988)). Damages may also be considered foreseeable if they arise from "the ordinary cause of events" or "as a result of special circumstances ... that the party in breach had reason to know." *Royal Indem. Co. v. Factory Mut. Ins. Co.,* 786 N.W.2d 839, 847 (Iowa 2010) (quoting Restatement (Second) of Contracts § 351, at 135 (1981).).

The evidence showed that in November 2017, Developers executed separate promissory notes with FAC as it respected each of the five lots in question (exhibits F.29.1, F.29.6, F.29.11, F.29.16 and F.29.14; App. 500-506; 535-541; 570-576; 605-611; 599-601); contemporaneously, Developers executed five separate mortgages to secure the notes (exhibits F29.2, F 29.7, F 29.12, F 29.17 and F 29.22; App. 507-523; 542-558; 577-593; 612-628; 647-663). Nine months later, FAC (purporting to act through the Posinelli Firm) sent to Developers a separate letter for each note and mortgage, and dated August 16, 2018, that purported to notify Developers that the

respective note was in default and that if Developers did not pay a specified amount (under $10,000.00 for each note) "on or before August 23, 2018," then FAC would exercise its rights under the notes and mortgages (i.e., it would institute foreclosure or other legal proceedings) (exhibits F29.4, F29.9, F29.14, 29.19 and F 29.24; App. 529-531; 564-566; 599-601; 634-636; 669-671). Thus, even assuming these notices were delivered to Developers as rapidly as but one day after the August 16th letter notice date (the absolute soonest possible), Developers was accorded but six days (including non-business days) to make good on the purported default for non-payment of the respective notes.[2] And given the testimony of FAC's witness (see note 2), the record does not establish that Developers was accorded any prior notice time to cure. (Trial Trans. at 56:25-62:11.) This in hindsight is hardly surprising—apparently FAC through the Posinelli Firm was not kidding on providing Developers little-to-no-time to cure any of the notices of defaults; just eleven days after the date of the August 16th first-notices-of-default letters, FAC (again purporting to act through the Posinelli Firm) dated notices to Developers that FAC was immediately accelerating each of the five notes and further that FAC intended to immediately

[2] And it must be emphasized that this is an assumption—FAC's sole witness on this subject (Mark Thomas) testified that the soonest Developers could have received the default notices was the next business day; however, he went on to concede this was speculation on his part and the letters could have been received many days after August 16th and may not have been delivered until after the actual default date. (Trial Trans. at 56:25-62:11.)

exercise its remedy rights on the notes and mortgages without according Developers any time to cure the accelerated amounts purportedly owing (and whatever those amounts may have been) (exhibits F29.5, F29.10, F29.15, F29.20 and F29.26; App. 532-534; 567-569; 602-604; 637-639; 675-677). Indeed, at the last paragraph of page 2 of the acceleration notices, FAC through Posinelli curtly noted (id.):

> "Nothing set forth in this letter, no delay on the part of the Lender in enforcing its rights with respect to the default, and no discussions between Lender and Borrower, or Lender and Guarantor regarding the matters addressed in this letter, the Loan Documents, or any other subject matter, are intended (and none shall be deemed) to modify, limit, release, reduce or waive any of Lender's rights, remedies or privileges under the Loan Documents, or at law or in equity, all of which are hereby specifically reserved."

The manner in which FAC proceeded—providing Developers with in essence no time to cure any purported default (let alone to even respond to the claim of default) and proceeding immediately to accelerate each of the notes (so no default, if any, could actually be cured)—may have comported with FAC's business purposes but it constitutes a facial and material breach of its obligations under the notes and mortgages to Developers. Specifically, paragraph 14 of the notes (identified in the above note exhibits) contains the notice provision that governs defaults; it provides that: "All notices required or permitted to be given hereunder shall be given in the manner and to the place as provided in the Mortgage/Deed of Trust for notices to the party to whom each notice is given." As it respects the

mortgages (identified in the mortgage exhibits above), paragraph 19 defines "events of default" (capitalization omitted) which includes at subparagraph A Developers failure to pay a note installment within the grace period (five days after due date, and as set forth in the notes) and then the paragraph at subpart D further defines how long after notice from FAC to Developers does Developers have to cure such a default: "If default shall continue for 15 days after notice thereof by Mortgagee to Mortgagor in the due and punctual performance or observance of any other agreement or condition herein or in the Note contained; [remainder of the provision extends the cure period to 30-days after notice is delivered in the event the default is not otherwise susceptible of cure within the 15-days after notice period]."

FAC failed to accord Developers with adequate—and contractually required—notice of the default (as well as the subsequent acceleration) and let alone accord Developers the required post-notice period to either contest or cure the default; to the contrary, FAC breached the terms of the notes and mortgages by significantly constraining the notice of cure period for the purported default of payment and then providing no notice period at all for the subsequent acceleration. FAC purposefully acted in such a manner as to preclude Developers from even addressing any purported default, let alone actually according Developers the time set forth in the contracts (the cure period in the notes and the default periods in the mortgages) to remedy any such default.

FAC breached the terms of the notes and mortgages in the material manners specified above. It did so knowingly and of its own accord, and its breaches had the intended effect—they caused Developers to be placed into an uncurable default position on the notes and mortgages (and as the result of the abrupt accelerations). Under these established facts, FAC failed to prove its entitlement to a judgment on its mortgage foreclosure claim because it failed to meet the third element of proof of breach—that it performed all the terms and conditions required under the contract.

And FAC's failure impacts its other claims, all based on the foreclosure action (claim). Here, we already have seen that the notes never matured in the required manner—in this case, FAC apparently claims maturity occurred when (through its apparent agent Posinelli) it accelerated each of the five notes on August 27, 2018; yet we have seen that this acceleration was improper and based on a breach of the default and notice to cure provisions imposed on FAC by the notes and mortgages. FAC under the terms of the guaranty documents cannot self-excuse its breaches by claiming the guarantor(s) nevertheless are personally liable even when the borrower Developers is not—the guarantors' respective liability flows through the liability of the borrower Developers (that is, the guarantors' liability is preconditioned on the liability of the borrower). And in that regard, Developers' showing that FAC has failed to prove damages and the amount to support a deficiency judgment equally applies to FAC's effort to impose a deficiency judgment on the guarantees.

ARGUMENT ON THE APPEAL OF THE DOSTAL PARTIES TO FAC'S ATTORNEY FEE AND EXPENSE AWARD

III. The District Court Erred In Ruling That FAC Was Entitled To An Attorney Fee And Expense Award And In Awarding The Full Amount FAC Requested.

A. Error Preservation.

The Dostal Parties, and including Developers (whom the fee and expense award was assessed against), preserved error by submitting their written resistance and oral argument that no such award should be made, and that in any case if such an award should be made it should be substantially reduced (by upwards of 75% of the amount requested) because FAC only partially prevailed on its fee and expense eligible claims. (Resistance of 05-08-2020; App. 903-906; Fee Trans. at 19:25-21:10.) The district court specifically ruled on the Dostal Parties' positions and rejected them (ordering a full fee and expense award). (Ruling of 08-24-2020; App. 974-980.) Error was preserved. *Meier*, 641 N.W.2d at 537.

B. The Standard of Review.

The standard of review of an attorney's fee and expense award authorized by contract (and hence statute) hinges on how the underlying action giving rise to such an award was tried—was it tried in law or equity?; if the former, the correction of errors at law standard applies; if the latter, the equity de novo standard applies. *City of Riverdale v. Diercks*, 806 N.W.2d 643, 651-52 (Iowa 2011). This issue is discussed in division I.A. of this brief.

C. The District Court Erred In Granting FAC A Judgment On Its Attorney Fee And Expense Request And In The Full Amount Of That Request.

The contractual provision governing FAC's right to an attorney fee and expense award appears at paragraph 20 of the mortgages in question (see, e.g., FAC exh. 29.17, at page 10 para. 20; App. 621). The district court granted FAC's fee request in the full amount requested—and this is error for two reasons.

First, to prevail under the statute and based on a contract, FAC must be the prevailing party on some claim subject to a fee award; and for the reasons stated and authorities cited in this brief FAC should not have prevailed on its mortgage foreclosure claim (and hence is not entitled to a fee award under the referenced paragraph 20).

Second, even if the foreclosure ruling holds up on appeal, for the reasons stated and authorities cited in this brief FAC should not prevail on the arrearage claims (loan default/deficiency and guaranty claims). Indeed, even at the district court level FAC failed on the guaranty claim. Yet FAC was awarded its full fee and expense request. And this is error—the district court should have proportionately reduced that fee and expense request as FAC only partially prevailed. And should FAC only partially prevail on this appeal the same principle applies.

A recent case that summarized this rule is *Ferguson v. Exide Techs., Inc.*, 936 N.W.2d 429 (Iowa 2019). There, the Iowa supreme court reiterated the rule it announced in *Smith v. Iowa State Univ. of Sci. & Tech.*, 885 N.W.2d 620 (Iowa 2016)

that a party claiming a contractual or statutory right to an attorney's fee award is not entitled to recover its full fees incurred when either of two circumstances exist: (a) the party recovers on all of its claims but some of those claims do not qualify for an attorney's fee award; or (b) that party only partially recovers on attorney fee award allowable claims but also loses on some of those attorney fee permitted claims. In citing to its *Smith* decision, the *Ferguson* court in 936 N.W.2d at 435 summarized this two-pronged rule as follows:

> We explained that the district court should follow a two-step process in evaluating how to award fees in such hybrid cases.
>
> First, while fees can be awarded for time devoted generally to the litigation as a whole, the district court should make an appropriate reduction for ... unrelated time spent on claims for which fees are not recoverable. Then [i.e., second], ... if the plaintiff only obtained partial or limited success on the claim for which the legislature has authorized fees, the court must consider the reasonableness of the hours expended in light of this ultimate result.

The applicant FAC's request for attorney's fees is limited by the second part of the rule that is applicable if FAC only partially succeeds on its claims against the Dostal Parties. In their resistance, the Dostal Parties suggested in the event of partial success that FAC's fee claim should be reduced by at least 50% (if not up to 75%). And that would be a reasonable percentage reduction amount to be applied (and on remand to the district court to reduce that fee award).

CONCLUSION

For the reasons stated and authorities cited in this brief, the appeals court should accord the Dostal Parties the following relief: (1) affirm the ruling in favor of Dostal on the guaranty claim (either by affirming the district court's original ruling on this claim or otherwise on appeal ruling in favor of the Dostal Parties on this claim through the issues they have raised on cross-appeal); (2) reverse the district court's ruling on FAC's mortgage foreclosure claim and entering judgment on that claim in favor of the Dostal Parties; and (3) reverse the ruling awarding FAC attorney fee's and expenses or otherwise ordering the amount of fees and expenses that were awarded be substantially reduced and remanded to the district court for a determination in the first instance of the percentage of that reduction.

REQUEST FOR ORAL ARGUMENT

The Dostal Parties, through counsel, requests to be heard in oral argument upon the submission of this cause.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION AND TYPE AND TYPE-STYLE REQUIREMENTS

1. This combined brief complies with the type-volume limitations of Iowa R. App. P. 6.903(1)(g)(1) or (2) because this brief contains 7,855 words, excluding parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This combined brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word format 2010 in Times New Roman 14-point style.

/s/ S.P. DeVolder
S.P. DeVolder

February 24, 2021
Date

CERTIFICATE OF FILING AND SERVICE

The undersigned certifies that on February 24, 2021, a copy of this Combined Brief of the Appellees/Cross-Appellants was filed electronically with the Clerk of the Iowa Supreme Court through the EDMS system, and which system further will provide access to and service of the Brief on that same date to:

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