

NOT DESIGNATED FOR PUBLICATION

No. 110,461

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of

ROBERT M. GERLEMAN,  
*Appellee/Cross-appellant,*

and

JEANNETTE M. GERLEMAN,  
*Appellant/Cross-appellee.*

MEMORANDUM OPINION

Appeal from Douglas District Court; BARBARA KAY HUFF, judge. Opinion filed March 27, 2015.  
Reversed.

*Joan Hawkins*, of J. Hawk Law Ltd., of Lawrence, for appellant/cross-appellee.

*Suzanne Valdez*, of Smith Legal LC, of Lawrence, for appellee/cross-appellant.

Before LEBEN, P.J., ARNOLD-BURGER, J., and BUKATY, S.J.

BUKATY, J.: Robert Gerleman filed a petition for divorce from Jeanette Gerleman. The case became very contentious in many respects. Suzanne Valdez in association with cocounsel Branden Smith represented Robert. Joan Hawkins represented Jeanette. Despite the animosity between the parties and between the attorneys, a settlement of all substantive issues in the case was reached through mediation. Prior to their reaching the settlement, the parties engaged in numerous disputes through their attorneys over discovery matters. Prior to finalizing the settlement agreement, Robert's attorneys filed a request for attorney fees which they alleged Robert had incurred due to Hawkins' failure

to turn over, as ordered by the district court, certain documents pertaining to the adoption of two children of the parties. After the settlement became final and a decree of divorce had been entered, the court granted the request for attorney fees and ordered that Hawkins pay the amount of \$1,575 representing 9 hours of work by Robert's attorneys in obtaining the documents in question. Hawkins appeals that order. In response, Robert makes a summary request for attorney fees on appeal. Because the record fails to establish that Hawkins did anything or failed to do anything that violated an order of the court, we reverse the award of attorney fees and deny Robert's request for attorney fees on appeal.

### *Facts*

This appeal centers around the attempt by Robert's attorneys to compel compliance by Jeanette and Hawkins with a court order to produce discovery. The parties' briefs cite many facts which are not directly related to this rather limited issue. We will first provide a brief background to the disputes giving rise to the issue and then recite the facts relevant to our disposition of it.

As the trial date neared, Robert's attorneys attempted to compel Jeanette's compliance with what he alleged were court orders that granted his discovery requests under K.S.A. 2014 Supp. 60-237. During the course of the case, Robert had challenged through various motions: (1) Jeanette's initial failure to respond and Hawkins' subsequent failure to produce documents related to the parties' adoption of two of their children, (2) Hawkins' directions to Jeanette to not answer questions concerning her settlement proposals during her deposition, (3) Hawkins' sending of an expert report to the judge's chambers, (4) and Hawkins' failure to comply with the district court's order to send a "succinct" settlement proposal to opposing counsel. Jeanette, in turn, challenged Robert and his attorneys' failure to produce financial records of the parties. Back and forth they went.

Robert's attorneys thereafter attempted to obtain the adoption documents requested in discovery from Hawkins, who had indicated via e-mail that they were available for production at her office. A stalemate occurred when Smith arrived at Hawkins' office to view them. Hawkins refused to turn the voluminous records over to him to scan but offered to send them to Kinkos to be copied. Smith refused to share in the expense of those copies.

Consequently, on May 3, 2013, Smith filed a motion for emergency relief and for sanctions against Jeannette and Hawkins under K.S.A. 2014 Supp. 60-237 for failure to comply with the district court's order to provide a succinct settlement proposal and the adoption documents. In support, Smith noted in his motion that Hawkins had delivered what appear to be adoption documents to his office that morning but Smith believed that that production, which consisted only of 64 single-sided pages and 45 blank pages, failed to comply with his request.

On May 6, 2013, Smith also moved the district court for an order directing Hawkins to appear before the court and show cause why she should not be held in indirect contempt for those same failures.

In a show cause order filed on May 7, 2013—just 2 days before the case was scheduled to go to trial—the district court ordered Hawkins to appear before the court on May 23, 2013 at 2 p.m. and show cause why she should not be held in indirect contempt under K.S.A. 2014 Supp. 20-1204a. In particular, the court ordered Hawkins to show cause why she had "failed to produce all of the documents requested in [*Robert's*] *Second Request for Production of Documents* and to forward a 'succinct' settlement proposal to [Robert] within 24 hours of April 29, 2013, despite being directed to do so by previous order of the court."

Two days later on the day of the scheduled trial the parties apparently appeared in court and announced they had reached a settlement of the substantive issues in the case. This occurred through mediation sessions while the discovery disputes were ongoing. As we will point out later in this opinion, a dispute subsequently arose before the decree of divorce had been filed as to whether all the substantive issues actually had been settled.

On May 23, 2013, the district court conducted a hearing on the May 7 show cause order. Just 2 hours prior to that hearing, Hawkins delivered to Smith's office a proposed divorce decree and settlement documents, which were signed by Hawkins or Jeannette.

At the outset of the May 23, 2013, hearing the parties argued at length over whether a final and complete settlement agreement had actually been reached at the May 9 hearing and whether the contempt issue was moot based on the settlement documents. Hawkins contended a settlement had been reached, and Robert's attorneys argued otherwise. Eventually the district court ordered Smith to draft a divorce decree attaching either a transcript or an outline of what the parties' agreement was as attested to at the May 9 hearing, including the property, child support, and parenting plan agreements. The court rejected Hawkins' repeated insistence that the court instead accept the original version of the decree that she had prepared with Robert's counsel's objections.

Once the district court had resolved the dispute over whether a settlement had actually been reached, Smith inquired about whether the court would be taking up the show cause order. Notably, he agreed with the court that most of it was now a moot issue. Nonetheless, he asked the court to order Hawkins to pay his attorney fees related to his preparation and filing of the motions to force her compliance with his discovery requests and the court's orders. After chastising Smith for unrelated matters, the court responded that it would certainly consider attorney fees, noting in particular its concerns with Hawkins' not producing the requested adoption-related documents. The court directed Smith to file an affidavit detailing his time. A heated debate ensued between Hawkins

and Smith concerning who, if anyone, was to blame for any delays and the complained-of failures to produce the documents.

Because we deem it significant to the particular issue before us, we will set out a portion of the transcript that contains that debate .

"[MS. HAWKINS:] Now these accusations, the first one in the order to appeal and show cause is regarding adoption papers. And there was a request for documents served on me, and initially there was conversation between Ms. Valdez and I about seeing adoption papers. There was never any specificity as to what adoption papers. There was never any idea of what was being sought in any adoption papers. I didn't even know what they were. My client brought me in a folder like this, and this is where she maintains all of the records that the parties have ever had regarding the two children's adoptions. These are her originals. She's still in the process of doing home studies. She's still in the process of applying for Social Security cards for the kids.

"The very first request I said, you know, you're welcome to come look at these, Ms. Valdez, but the concern my client has is right now she had requested a whole bunch of financial information that she still hasn't seen in order to move forward and settle the negotiations. And the agreement was if he would just get us what we needed for financial stuff, then let's just do a friendly exchange. So that didn't happen.

"So then we were served with formal discovery, which then I informed Ms. Valdez, I said, I've got this folder in my office. You're welcome to come over and look at it. Mark what you want copies of or whatnot. I told her that and we had the pretrial conference on that Monday, and she said, well, I'm leaving to go out of town but Mr. Smith is going to be handling this while I'm gone. So I didn't hear anything from Mr. Smith after the pretrial conference on Monday.

"So they were also supposed to provide us with certain financial documents within 48 hours. So I sent him an e-mail the day before those were due and said how about we just meet at my office and exchange the information. So then he agreed that that was fine. And then I then realized all I had was originals and my client didn't want me letting those go. So I said, I'm not going to be able to send the original with you.

"So when he came into my office, he just blustered at me, and I said they're here, you can look at, mark whatever you want. I can make copies. No, I insist on taking these to my office. . . .

....

"THE COURT: —[W]hen I had my client's originals, I made a copy for the other party. What is the problem with that?

"MS. HAWKINS: Well, the problem is I didn't have copies made because I didn't know what needed to be made, and it's very voluminous.

"MR. SMITH: All of it.

"MS. HAWKINS: So I made it available for inspection . . . .

"THE COURT: What is the problem with making it all available?

"MS. HAWKINS: Well, I did make it all available for inspection and that was the original agreement with Ms. Valdez. I've got it in my office, you guys can let me know what you want copies of. She never said we want all of it. And then . . . Smith said that I want all of it. . . . I said, well, I can run it over to Kinko's and have them make the copies and you can pick them up there tomorrow. And he said no, that's not satisfactory. I want to take them tonight and I want to be able to scan them. And he said . . . I'm not going to pay the cost at Kinko's. Well, I mean, it's pretty standard in discovery cases if there's a cost involved, we share it. So he refused to do that.

....

"THE COURT: Ms. Hawkins, one moment. Mr. Smith, did she offer to take them to Kinko's and make a copy and refused to pay?

"MR. SMITH: She did. She said that she could take them to Kinko's, she could drop them off. She didn't know when it would be done. And I said that's fine but I'm not paying for them. You should have them today. I said if you're not going to let me take them and scan them like we had—

"THE COURT: All right. One moment. Have a seat. Ms. Valdez, Mr. Smith was working with you. It is customary. Don't you agree that somebody pay for copies and getting copies?

....

"THE COURT: All right. Ms. Hawkins, if I may say this, one reason that you think that I am picking on you, these problems arise in cases with you more than with other lawyers. I believe that if you look at the rules—I mean at the pretrial conference Ms. Valdez said that you instructed your client not to answer questions about

what she wanted. That was improper. How is a case going to be settled, Ms. Hawkins, without someone knowing what your client wants. All right. That's a problem. And it was improper to tell your client not the answer those questions.

"When someone comes to your office and they want a copy of all of it, you are entitled to say you have to pay for it. All right. But you're not entitled to say no, you can't have it. All right.

"MS. HAWKINS: I never said that.

"THE COURT: It does sound like you did say that. It is proper. I mean I often took thinks to Kinko's because I didn't always want to give it to someone else to copy. And they paid for it. Similarly when they took it [to Kinko's], I paid for it. I assumed in some ways that this is motion to get these thinks at the last minute."

Apparently, neither side presented any sworn oral testimony at the hearing. After hearing the above arguments of counsel, the district court took the matter of attorney fees under advisement. The court informed Smith that she would leave it up to him to further pursue the matter by filing an attorney fee affidavit. The court also noted it would "have a hearing on that . . . if [counsel did] choose to go forward."

Before adjourning, the district court discussed with Hawkins her concerns that "these problems arise in cases with [her] more than with other lawyers." The judge then reminded Hawkins of the rules and her obligations in responding to discovery and participating in settlement negotiations. Hawkins persisted in her position that she had done nothing wrong.

On July 10, 2013, Robert's counsel filed an affidavit for attorney fees. In that affidavit, he stated he had expended a total of 15.6 billable hours "related to discovery issues and motions regarding the same." Smith further stated he had billed his client for this time at the discounted rate of \$175 per hour, resulting in a total attorney fee request of \$2,730.

On July 24, 2013, the district court signed and filed the decree of divorce and journal entry of final settlement of all issues pertaining to the status of the marriage, property, and debt division and issues concerning the parties' minor children, including child custody, parenting time, and support.

On August 14, 2013, the district court issued its decision on Robert's request for attorney fees as filed by Smith. Based on the statements of counsel at the May 23 hearing, the district court found an attorney fee award proper under K.S.A. 2014 Supp. 60-237(b)(2)(C) because Hawkins had not offered "substantial justification for [the] delay" in producing the adoption documents. The court assessed the fees against Hawkins personally because Jeannette had turned the documents over to Hawkins and Hawkins had failed to timely provide them to opposing counsel.

We note at this point that Hawkins originally filed a notice of appeal on behalf of Jeannette from the attorney fee award and several of the district court's orders in the divorce decree. Robert's attorneys filed a timely cross-appeal. Considerable prebriefing proceedings pertaining to show cause orders then ensued in this court. After the appeal was docketed, the parties apparently returned to mediation, which resulted in them settling the substantive disputes between themselves and abandoning their appeals. However, that did not resolve the issue of the propriety of the attorney fee award entered personally against Hawkins. This court has since ruled that issue remains the only substantive issue before this court on appeal.

### *Analysis*

The district court cited K.S.A. 2014 Supp. 60-237(b)(2)(C) as the authority for its attorney fee award. That statute provides, in pertinent part, *that in the case of noncompliance with a discovery order*, "the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's

fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust." So in entering the attorney fee award, the district court necessarily had to find: (1) Hawkins had failed to obey an order to provide or permit discovery of the adoption documents; and (2) Hawkins had failed to show that failure was substantially justified.

As a general rule, we review such factual findings to determine whether they are supported by substantial competent evidence and are sufficient to support the district court's legal conclusions. "Substantial competent evidence is such legal and relevant evidence as a reasonable person might regard as sufficient to support a conclusion." *Hodges v. Johnson*, 288 Kan. 56, 65, 199 P.3d 1251 (2009).

We will first review the issues raised by Hawkins. Most of them can be disposed of somewhat summarily as lacking any merit. Hawkins raises six issues in her brief: (1) she was denied due process; (2) the settlement of substantive issues rendered the discovery issues and attorney fee request moot which then deprived the court of jurisdiction over the issues; (3) the doctrine of laches precluded Robert from seeking attorney fees; (4) the award was unreasonable; (5) the district court was biased against Hawkins; (6) and the district court's findings of fact are not supported by substantial competent evidence. Robert's attorneys respond simply that the district court was well within its discretion in ordering Hawkins to pay his attorney fees as a discovery sanction. They also summarily request attorney fees for this appeal pursuant to Supreme Court Rule 5.01 (2014 Kan. Ct. R. Annot. 34) and Supreme Court Rule 7.07(b) (2014 Kan. Ct. R. Annot. 70).

As to due process, Hawkins alleges that the district court declined to hold an evidentiary hearing or provide her with a copy of Robert's attorney's itemized time sheet that the court reviewed in camera. Neither allegation is "keyed to the to the record on appeal by volume and page number" as required by Supreme Court Rule 6.02 (a)(4)

(2014 Kan. Ct. R. Annot. 40-41). Further, Hawkins has failed to cite any specific legal authority for her position. She merely cites to general statements about due process law. To the contrary, the record certainly reflects that Hawkins had an opportunity to and, in fact, did argue to the district court that she had not violated any order to provide discovery.

As to the matter of attorney fees being moot in light of the parties' settlement of substantive issues which then deprived the district court of jurisdiction to hear the matter, she also fails to cite any authority for the argument. As to her contention that the doctrine of laches precludes the award of attorney fees against her, she claims that had Robert wanted to pursue the fees, he should have done so during the negotiations that led to the settlement. This issue is actually just an extension of her argument that the settlement rendered the attorney fee question moot.

Because Hawkins has presented her issues of due process, mootness, and laches without supporting them with reference to specific facts or legal authority that would entitle her to relief, she has waived and abandoned them. "[A]n argument that is not supported with pertinent authority is deemed waived and abandoned." *Friedman v. Kansas State Bd. of Healing Arts*, 296 Kan. 636, 645, 294 P.3d 287 (2013). Likewise, "an argument raised incidentally in a brief and not argued therein is also deemed abandoned." 296 Kan. at 645 (citing *Manhattan Ice & Cold Storage v. City of Manhattan*, 294 Kan. 60, 71, 274 P.3d 609 [2012]); see also *Village Villa v. Kansas Health Policy Authority*, 296 Kan. 315, 335, 291 P.3d 1056 (2013) (deeming argument "[w]ithout any substance behind it" abandoned); *State v. Holmes*, 278 Kan. 603, 622, 102 P.3d 406 (2004) (holding that where appellant cites no authority to support a position on appeal and only makes conclusory legal allegations, the issue has not been adequately briefed and is deemed abandoned).

As to the reasonableness of the amount of attorney fees awarded, Hawkins claims the district court considered an itemization of the time spent by Robert's attorneys that is not part of the record on appeal and that renders the award unsupportable. However, if she desired this court to review the itemization, as the appellant, it was her obligation to see to it that it was included in the record on appeal by motion filed under either Supreme Court Rule 3.02 (2014 Kan. Ct. R. Annot. 20) or Supreme Court Rule 5.01 (2014 Kan. Ct. R. Annot. 34.) She apparently has never filed such a motion.

As to the alleged bias of the district judge towards her, Hawkins launches into what appears to be a laundry list of particular incidents that she believes demonstrate the judge was biased toward her. What she fails to mention in her brief are the several instances contained in the record where the judge criticized Robert's attorneys for their conduct in the case. The court became obviously frustrated with both attorneys and their continued bickering over discovery matters and even over the issue of whether a settlement had been reached. Hawkins' brief fails to set out any specific remarks that indicate any more bias on the part of the trial judge against her let alone how any remarks contributed to the court's decision to order fees against her.

This brings us to Hawkins's final issue—that the district court's findings of fact lack the support of substantial competent evidence. While Hawkins' argument on the issue is cursory at best, we cannot ignore some significant facts in the record that bear on the attorney fee award.

As we stated before, the district court relied on K.S.A. 2014 Supp. 60-137 (b)(2)(C) for its authority to award attorney fees as a sanction against Hawkins. That statute essentially requires that two conditions exist in order to create that authority. There first must be a court order that required a party to provide discovery. Secondly, there must be noncompliance by that party with the terms of that order.

The first thing that strikes us is that the district court appeared to specifically order the sanctions solely because of Hawkins failure to provide the adoption documents. In her brief, Jeannette agrees with this characterization of the court's order. In the memorandum decision, the court does mention other actions by Hawkins that thwarted discovery efforts by the other side, such as instructing Jeannette not to state what she wanted to settle the case. However, the only order that the court's decision mentions that Hawkins failed to comply with is the one the court entered at the time of the pretrial conference that required Jeannette to provide the adoption records. That conference occurred on April 29, 2013, about 3 weeks before the hearing on the request for attorney fees. Yet, our review of the transcript of that conference does not reveal any statement by the court which we could view as an order to Hawkins to provide the adoption documents. Nor does the record contain any written order that provides for such. Hawkins does not seem to contest the existence of such an order, but we are puzzled by its absence from the record. At the pretrial conference, Robert's attorney did argue for a motion to compel Jeannette to divulge her proposals to settle the case and the court ordered it. Obviously, Hawkins and Jeanette later stated their position on the merits of the case since it did, in fact, settle. But there is no mention by the court that it was ordering sanctions for Hawkins violation of an order to state her client's position about settlement.

More importantly, however, even if such an order had been issued requiring that Jeannette and Hawkins produce adoption records, the record lacks any evidence that either one of them failed to provide them. We have previously set forth several pages of the transcript from the hearing on the show cause motion and request for attorney fees. It reflects that counsel for both sides agreed that Smith would pick up the records he was seeking at Hawkins's office. Then, when he arrived, Hawkins apparently refused to turn them over since they contained originals. However, she agreed that she would make copies for him of anything he desired. When Smith indicated he wanted all of the records (apparently they were voluminous) Hawkins stated that she would take them to Kinkos for copying and Smith could pick up the copies the next day after paying for them. When

asked by the district court if this was true, Smith admitted this was accurate and that he could have had copies of what he was seeking if he paid for them. Following this, the court indicated to Hawkins that she was entitled to require a party to pay for any records it wanted that were in her possession, but she was not entitled to say "no you can't have it." Hawkins then denied she ever said such a thing.

The award of attorney fees against her then followed. Our review of the record reveals that the district court had obviously become very frustrated (and perhaps justifiably so) from what appeared to be the constant bickering between the attorneys in this case over what at sometimes appeared to be trivial discovery matters. We venture no opinion on which side bears the most responsibility for this. However, we do conclude that at least one of the conditions required for the authority to award attorney fees under the statute cited by the district court here was lacking. There simply was insufficient evidence that Hawkins had failed to comply with a specific order to provide the adoption documents to Robert and his attorneys. Hawkins provided the documents with a legitimate request that Smith pay copying expenses. Smith refused to pay those expenses. Under these facts, we are unable to conclude that Hawkins failed to comply with any order to provide the adoption documents. Without support in the record that Hawkins violated a specific order of the court, we reverse the order that she pay attorney fees.

Turning to Robert's request for his attorney fees on appeal, we first note that he makes the request under Rule 5.01 and Rule 7.071(b). In light of our ruling on the merits of this appeal, we summarily deny the request noting also that Robert has failed to timely file a motion for such fees as required under Supreme Court Rule 7.07(b)(2) (2014 Kan. Ct. R. Annot. 70); see *In re Estate of Strader*, 301 Kan. 50, 62-63, 339 P.3d 769 (2014) (holding party failed to preserve right to attorney fees incurred on appeal to Court of Appeals by failing to file a motion in compliance with Rule 7.07[b]).

Reversed.