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United States Court of Appeals
Tenth Circuit

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Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

REED AUTO OF OVERLAND PARK, LLC,

Plaintiff - Appellant/Cross-Appellee,

and

REED AUTOMOTIVE GROUP, INC.,

Plaintiff - Cross-Appellee,

v.

LANDERS MCLARTY OLATHE KS, LLC,

Defendant - Appellee/Cross-Appellant.

Nos. 21-3225 & 22-3043
(D.C. No. 2:19-CV-02510-HLT)
(D. Kan.)

ORDER AND JUDGMENT*

Before **BACHARACH**, **PHILLIPS**, and **EID**, Circuit Judges.

Reed Auto of Overland Park, LLC sued fellow vehicle dealer Landers McLarty Olathe KS, LLC for allegedly breaching a contract to which Reed Auto was not a party. Reed Auto alleged it was either a third-party beneficiary of the contract or a

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

successor to an original signatory of the contract. The district court granted summary judgment to Landers McLarty on the third-party beneficiary claims. Following a bench trial, it resolved the remaining claim in favor of Landers McLarty. It then denied Landers McLarty's motion for attorneys' fees. Reed Auto appeals the grant of summary judgment and the trial judgment, and Landers McLarty appeals the denial of its motion for attorneys' fees. We have subject matter jurisdiction under 28 U.S.C. § 1332(a)[1] and appellate jurisdiction under 28 U.S.C. § 1291. For the reasons stated below, we affirm on all counts.

I.

The parties here are competing Kansas Jeep Chrysler Dodge Ram ("JCDR") vehicle dealers and their owners. Kansas law and their contracts with JCDR manufacturer Fiat Chrysler Automotive ("FCA")[2] control where and how the dealers

[1] Reed Automotive Group, Inc., is the sole member of Reed Auto of Overland Park, LLC. Reed Automotive Group is incorporated in Missouri, has its principal place of business in Missouri, and is therefore domiciled in Missouri. Aplt. Br. at 4. Therefore, Reed Auto of Overland Park is also domiciled in Missouri. *See Siloam Springs Hotel, L.L.C. v. Century Sur. Co.*, 781 F.3d 1233, 1237–38 (10th Cir. 2015) (the citizenship of a limited liability company is determined by the citizenship of all its members). Landers McLarty, LLC is domiciled in Kansas and Arkansas where its members are citizens. Aplt. Br. at 4. Therefore, there is complete diversity between the parties, and as the amount in controversy was over $75,000, we have subject matter jurisdiction.

[2] At the time the suit was filed, FCA manufactured the Jeep, Chrysler, Dodge, and Ram vehicle lines. The Chrysler, Dodge, and Jeep vehicle lines had previously been manufactured by DaimlerChrysler Motor Company, LLC, which changed its name to ChryslerMotors, LLC in mid-2007. FCA, purchased the Jeep Chrysler Dodge vehicle lines from DaimlerChrysler in 2009 following DaimlerChrysler's bankruptcy. As discussed more below, we assume for the purposes of this appeal that the DaimlerChrysler-manufactured vehicle lines are the same as the FCA vehicle

can locate and relocate their dealerships. As relevant here, FCA assigns each franchisee a geographic sales area. The franchisee has exclusive rights to sell vehicles and perform warranty work in that sales area. The franchisee is free to open a dealership anywhere in the sales area, to relocate anywhere in the sales area, and to consolidate its dealerships within the sales area. However, if the dealer wants to open a new dealership or move or consolidate existing dealerships, the change is subject to Kansas law. The dealer must file a petition with the Kansas Department of Revenue director of vehicles "giv[ing] written notice of its intention [to add, relocate, or consolidate dealerships]" and "establish[ing] good cause for adding or relocating [the dealership]." Kan. Stat. § 8-2430(a). The director of vehicles publishes a notice of the petition in the Kansas Register. Then any new vehicle dealer that "has a franchise agreement for the same line-make vehicle as that which is to be sold . . . by the proposed additional or relocated new vehicle dealer" and is physically located within a specified distance (here, ten miles) of the proposed new location may file a protest to block the proposed move. *Id.* § 8-2430(b), (c), (e)(2)(A).

Overland Park Jeep ("OPJ")[3] and Landers McLarty were two DaimlerChrysler dealers in the Kansas City area. OPJ sold vehicles out of the Overland Park sales area, and Landers McLarty sold vehicles out of the Olathe sales area. Around 2007, Landers McLarty sought to move its dealership to a more desirable location within

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lines. Therefore, where relevant, we will refer to the manufacturer as either DaimlerChrysler or FCA.

[3] In 2012, OPJ changed its name to Overland Park Ventures, Inc. We will continue to refer to it as OPJ.

the Olathe sales area. The new location was within ten miles of an OPJ dealership. Worse from OPJ's perspective, Landers McLarty's new proposed location was within ten miles of almost the entire OPJ Overland Park sales area. Thus, if it relocated, Landers McLarty would have been able to file a protest and prevent OPJ from relocating or consolidating its dealerships almost anywhere within OPJ's own sales area. Accordingly, OPJ filed a protest to prevent the move.

The two dealers reached a compromise. In a 2007 Settlement Agreement and Release (the "Settlement Agreement"), OPJ promised to dismiss its protest against Landers McLarty, allowing it to move to the new location. In return, Landers McLarty "agree[d] not to protest or otherwise challenge any relocation or establishment of any DaimlerChrysler vehicle lines into the Overland Park sales area . . . for a period of 15 years from the date of the execution of the agreement." App'x Vol. I at 160 (the "No Future Protest" provision). It thus freed OPJ to establish or relocate dealerships within its sales area. The promise extended to the parties' successors and assigns:

> This Agreement shall inure to the benefit of and be binding on the successors, assigns, heirs, and legal representatives of the Parties to this Agreement. In the event Landers McLarty enters into any agreement to sell or transfer all or any portion of its stock or assets, then Landers McLarty is required to include in the terms of any such agreement the terms of this Agreement and that the buyer is bound by the terms of this agreement.

Id. at 163 (the "Successors and Assigns" provision). OPJ and Landers McLarty agreed that, if there was a dispute about the Settlement Agreement which required

litigation, the prevailing party would be entitled to recover reasonable attorneys' fees from the non-prevailing party. Then-manufacturer DaimlerChrysler was also a party to the Settlement Agreement. Other than OPJ, Landers McLarty, and DaimlerChrysler, no one else was a party to the Settlement Agreement, and the Settlement Agreement did not specifically provide for any third-party beneficiaries.

Several years later, the owner of OPJ sold his business to Reed Auto of Overland Park, LLC[4] and its owner, the Reed Automotive Group, Inc. (together, "Reed Auto"). The Asset Purchase Agreement (the "Purchase Agreement") between OPJ and Reed Auto spelled out the terms of the sale. Reed Auto purchased specified assets from OPJ, including products, inventory, equipment, fixtures, customer lists, websites, retail orders, and instructional material. The Purchase Agreement also stated Reed Auto would assume OPJ's rights and liabilities under specified contracts (the "Assumed Contracts"). The Assumed Contracts included those with service, parts, and equipment providers, and the dealership's building lease. Reed Auto only assumed liability for "those liabilities, obligations, and duties of [OPJ] arising on and after the Closing Date with respect to the Assumed Contracts and the liabilities and obligations under unfilled retail orders being purchased by [Reed Auto]." App'x Vol. III at 408–09. The Purchase Agreement also included a list of contracts for which Reed Auto explicitly did not assume liability (the "Excluded Liabilities"). In addition to the contracts specifically included on the list of Excluded Liabilities,

[4] Reed Auto is sometimes referred to as "Reed Jeep," but here we will refer to it as Reed Auto.

OPJ's "[l]iabilities under all agreements other than 'Assumed Contracts' [were] considered Excluded Liabilities." *Id.* The Settlement Agreement was not included in either Assumed Contracts or on the list of Excluded Liabilities and was never mentioned in the Purchase Agreement.

Finally—and most importantly—Reed Auto purchased the ability to become the JCDR franchisee in the Overland Park sales area. While the franchise rights were "by far the largest asset of the agreement," App'x Vol. IV at 725, they did not come directly from OPJ. FCA conditionally approved the purchase before the Purchase Agreement was signed, but Reed Auto was later required to execute a separate franchise agreement with FCA. In addition to securing its own franchise rights from FCA, Reed Auto also separately obtained permission from the state to operate the dealership, including securing state licenses and bonds, and obtained its own financing, contracts with utility providers, and employee benefit and insurance plans. After the sale, most OPJ employees stayed on and continued working for Reed Auto. A few months after signing the Purchase Agreement, OPJ dissolved.

Reed Auto entered into the Purchase Agreement with the intention of relocating the dealership once the current lease expired and began looking for a new location right away. It found and purchased a property just off the I-35 corridor, within ten miles of Landers McLarty's Olathe dealership. FCA approved the new location and filed a notice of intent to relocate on behalf of Reed Auto. At the time it filed the notice, FCA did not expect Landers McLarty to file a protest. However, Landers McLarty did intend to protest and so informed FCA before doing so in April

2019. At the time it filed the protest, both Landers McLarty and FCA were aware of the Settlement Agreement, but neither mentioned it to Reed Auto. Reed Auto fought the protest at considerable expense until July 2019, when the former owner of OPJ brought the Settlement Agreement to Reed Auto's attention and assigned Reed Auto his rights under it (the "July 2019 Assignment"). Reed Auto informed Landers McLarty of the assignment, and Landers McLarty dismissed the protest. Reed Auto moved to the new location.

Reed Auto then sued Landers McLarty for, among other things, breaching the Settlement Agreement by filing a protest. Because Reed Auto had not yet been assigned the Settlement Agreement at the time Landers McLarty filed its protest, it argued (1) it was a third-party beneficiary to the Settlement Agreement, and therefore Landers McLarty owed it a duty not to protest the relocation; and (2) it was a "successor" to OPJ, and therefore the Settlement Agreement applied to Reed Auto in the same way it applied to OPJ even before it was assigned. Landers McLarty argued Reed Auto was neither a successor nor a third-party beneficiary and there was never any valid enforceable contract between them. Applying Michigan law as called for in the Settlement Agreement, the district court granted summary judgment in favor of Landers McLarty on the third-party beneficiary theory. It then held a bench trial on the successor theory. At the conclusion of the trial, the district court found Reed Auto was not a successor to OPJ, and therefore Reed Auto did not have standing to enforce the Settlement Agreement.

Shortly after the trial, Landers McLarty filed a motion for attorneys' fees pursuant to the same Settlement Agreement it had just spent years arguing was not enforceable. The district court denied the motion because Landers McLarty had not preserved its claim.

Now, Reed Auto appeals the district court's judgment that it is neither a third-party beneficiary under the Settlement Agreement nor a successor to OPJ. Landers McLarty cross-appeals the denial of attorneys' fees.

II.

a.

Reed Auto first argues the district court erred in concluding it was not a "successor" to Overland Park Jeep and therefore had no standing to enforce the Settlement Agreement. The Settlement Agreement specified that any disputes arising from the agreement would be subject to Michigan law. Both parties briefed Michigan law, and we see no reason not to apply it.

We review de novo both the district court's interpretation of Michigan law and its interpretation of the contract term. *United States v. McCall*, 235 F.3d 1211, 1215 (10th Cir. 2000); *Meemic Ins. Co. v. Jones*, 984 N.W.2d 57, 63 (Mich. 2022). Our task is to interpret this contract in the same way a court in Michigan would. *See Corneveaux v. CUNA Mut. Ins. Group*, 76 F.3d 1498, 1506 (10th Cir. 1996). Neither party argues the term "successor" is ambiguous, and we agree. "Absent an ambiguity or internal inconsistency, contractual interpretation begins and ends with the actual words of a written agreement." *Zantel Mktg. Agency v. Whitesell Corp.*, 696 N.W.2d

735, 741 (Mich. App. 2005); *Moore v. Campbell, Wyant & Cannon Foundry*, 369 N.W.2d 904, 906 (Mich. App. 1985).

With this in mind, we begin (and end) our interpretation of the term "successor." The parties direct us to unpublished Michigan cases defining "successor" as someone who "succeeds to the office, rights, responsibilities, or place of another, [or] who replaces or follows a predecessor" or "someone or something that follows and takes the job, place, or position that was held by another," *Redding v. Blodgett*, No. 349573, 2021 WL 1236110, at *5 (Mich. App. Apr. 1, 2021) (unpublished),[5] or "a person or thing that succeeds or follows or a person who succeeds another in an office, position, or the like," *Walnut Brook Dev. Co. v. DeFlorio*, 314554, 2014 WL 5066091, at *2 (Mich. App. Oct. 9, 2014) (unpublished). We agree with these definitions, bearing in mind that when the words "successor" and "succeed" are used in the context of a corporate contract, their meanings may be more formal than when the words are used colloquially. *See Willits v. Peabody Coal Co.*, Nos. 98-5458, 98-5527, 1999 WL 701916, at *6 (6th Cir. 1999) (unpublished) ("'[S]uccessor,' with reference to corporations, ordinarily means 'another corporation which, through amalgamation, consolidation, or other legal succession, becomes invested with rights and assumes burdens of the first corporation.'" (quoting *Black's Law Dictionary* (6th ed. 1990))); *see also Dawson v.*

[5] Unpublished cases are not precedential, but we may cite them for their persuasive value. *See* 10th Cir. R. 32.1 (federal cases); Mich. Ct. R. 7.215(C)(1) (state cases).

Rent-A-Ctr. Inc., 490 Fed. App'x 727, 730 (6th Cir. 2012) (unpublished) (same); *Sturgis Nat'l Bank v. Maryland Cas. Co.*, 233 N.W. 367, 431 (Mich. 1930).

Reed Auto first claims it is a successor under the Settlement Agreement because it "succeeded" OPJ as the FCA-approved dealer in the Overland Park sales area. But rights under the Settlement Agreement passed to the "successors, assigns, heirs, and legal representatives *of the Parties*," App'x Vol. I at 163 (emphasis added), not the successor to the *sales area*. The language of the Settlement Agreement demonstrates that the parties did not intend for it to be enforceable by any dealer to whom FCA subsequently granted the Overland Park sales area franchise. Thus, Reed Auto must prove it was OPJ's successor, not merely that it took over the Overland Park sales area.

The record does not support the conclusion that Reed Auto succeeded OPJ for the purposes of the Settlement Agreement. OPJ sold some, but not all, of its assets to Reed Auto. Reed Auto assumed some, but not all, of OPJ's contractual rights and liabilities. Notably, the Settlement Agreement was not one of those contracts, and therefore OPJ retained any rights it had under the Settlement Agreement. Before and after the transfer, OPJ and Reed Auto were separate business entities. Reed Auto never owned any part of OPJ. OPJ did not immediately dissolve when the Purchase Agreement took effect; that happened months later. Reed Auto did not automatically assume the right to continue selling FCA vehicles in the Overland Park sales area after signing the Purchase Agreement; it acquired those rights separately from FCA. It also separately acquired its state licenses, employee insurance plan, financing, and

utilities, all in its own name. In short, what we have here is one business purchasing assets from another business; Reed Auto did not follow or replace OPJ as a matter of law by merging with, taking over ownership of, or acquiring all the rights to an existing business.

Reed Auto argues two Michigan cases support its conclusion that the asset transfer was sufficient to make it OPJ's successor. First, it points us to *Leonard v. All-Pro Equities, Inc.*, where the court said one franchisee was the successor of another franchisee "[i]n light of the purchase of assets by and later transfer of interest in the franchise agreement." 386 N.W.2d 159, 161 (Mich. App. 1986). However, we note whether one party was the successor of the other was not at issue in *Leonard*. Further, it is unclear whether the first franchisee directly transferred its franchise rights or, as here, the second franchisee was required to obtain them separately.

Reed Auto's larger argument centers on *Walnut Brook Dev. Co. v. DeFlorio*, 314554, 2014 WL 5066091 (Mich. App. Oct. 9, 2014) (unpublished). The *Walnut Brook* court found a condominium developer was a "successor" for the purposes of a right of first refusal, notwithstanding the fact that the plaintiff had not merged with the first developer, acquired its stock, or assumed its liabilities. *Id.* at *2. However, *Walnut Brook* is not binding and is distinguishable.

In *Walnut Brook*, the first developer had "transferred *all* of its assets to plaintiff," and the plaintiff had "acted as the successor to [the first developer] as developer of the Condominium project and ha[d] exercised *all* rights which formerly belonged to [the first developer] under the condominium documents." *Id.* (emphases

added). Additionally, the plaintiff had interacted with the defendants as the successor, and, except on one occasion, the defendant had not challenged the plaintiff's successor status. *Id.* In this case, OPJ transferred some, not all, of its assets to Reed Auto, and Reed Auto did not act as OPJ's successor by exercising *all* of OPJ's rights, it acquired many of its rights separately. Landers McLarty had not previously interacted with Reed Auto as if Reed Auto was OPJ's successor. Therefore, while Reed Auto may very well be correct that in some circumstances a party may succeed another without merging or acquiring stock, it has not shown that Michigan case law supports the conclusion that one party automatically succeeds another by purchasing some of its assets and taking on some of its contracts.

Finally, Reed Auto points to Landers McLarty's duty to notify any entity that purchased "any portion of [Landers McLarty's] stock or assets" of the duty not to protest OPJ's relocation. This, Reed Auto argues, signifies the parties intended anyone who purchased even a portion of a parties' assets to be a "successor." However, we do not read the clause as defining "successor" but as ensuring notice of the liability. "Generally, when one corporation sells its assets to another, the purchaser is not responsible for the debts and liabilities of the selling corporation. But the Michigan courts have recognized a number of exceptions to this rule. One exception is where there is an express or implied assumption of liability by the purchasing corporation." *Epazz, Inc. v. Nat'l Quality Assurance USA, Inc.*, 20-1552, 2021 WL 3808946, at *7 (6th Cir. Aug. 26, 2021) (unpublished) (internal citations and quotation marks omitted) (citing *Antiphon, Inc. v. LEP Transp., Inc.*, 454 N.W.2d

222, 224 (Mich. App. 1990) and *Foster v. Cone-Blanchard Mach. Co.*, 597 N.W.2d 506, 509 (Mich. 1999)). A purchaser could not expressly or impliedly assume Landers McLarty's obligation not to protest unless it had notice of the obligation. This provision ensures any potential purchaser of Landers McLarty's assets would have notice of the liability so, for example, Landers McLarty could not escape the contract by selling off its business piecemeal. It does not mean the parties intended the benefit to run to anyone who purchased some of OPJ's assets.

For these reasons, we affirm the judgment of the district court that Reed Auto is not a successor to OPJ for the purposes of the Settlement Agreement.

b.

Reed Auto next argues the district court erred in concluding it was not a third-party beneficiary to the Settlement Agreement. We review grants of summary judgment de novo, applying the same standard as the district court. *Ortiz v. Norton*, 254 F.3d 889, 893 (10th Cir. 2001). Summary judgment is proper where the moving party "shows that there is no genuine dispute as to any material fact and [it] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). We review the record and draw all reasonable inferences in the light most favorable to the nonmoving party. *Rocky Mt. Wild, Inc. v. U.S. Forest Serv.*, 56 F.4th 913, 921 (10th Cir. 2022). As discussed above, we review de novo a federal district court's interpretation of state law. *Woolard v. JLG Indus., Inc.*, 210 F.3d 1158, 1168 (10th Cir. 2000).

Michigan provides for the rights of third-party beneficiaries by statute. Michigan Compiled Laws § 600.1405(1)(a) states, in pertinent part, "[a] promise

shall be construed to have been made for the benefit of a person whenever the promisor of said promise had undertaken to give or to do or refrain from doing something directly to or for said person." The contract may refer to the claimant specifically or as a member of an ascertainable class. *Id.* § 600.1405(b). Michigan courts have interpreted § 600.1405(1) to mean a third party may enforce a contract if the contract "expressly contain[s] a promise to act to the benefit of the third party." *White v. Taylor Distrib. Co., Inc.*, 798 N.W.2d 354, 356 (Mich. App. 2010).

It has been noted that Michigan law "is not particularly generous to would-be third-party beneficiaries." *VDV Props., LLC v. State Farm Fire & Cas. Co.*, No. 2:18-CV-12501, 2019 WL 4261136, at *3 (E.D. Mich. Sept. 9, 2019) (unpublished). Michigan courts sharply distinguish "between intended third-party beneficiaries who may sue for a breach of a contractual promise in their favor, and incidental third-party beneficiaries who may not." *Brunsell v. City of Zeeland*, 651 N.W.2d 388, 390 (Mich. 2002). Michigan courts take an objective approach to determine whether a party is an intended or incidental third-party beneficiary. *Id.* at 428. They look to the language of the contract to see if the "contracting party knowingly undert[ook] an obligation directly for the benefit of [the third party]." *Id.* at 391 (quoting *Koenig v. City of S. Haven*, 597 N.W.2d 99, 106 (Mich. 1999) (Opinion of Taylor, J.)); *see also Johnson v. Doodson Ins. Brokerage, LLC*, 793 F.3d 674, 679 (6th Cir. 2015).

Reed Auto does not claim the Settlement Agreement refers to it directly. Instead, it argues it is a member of an identified class comprised of "any entity relocating DaimlerChrysler vehicles lines into the Overland Park Sales Area" to

whom Landers McLarty made a direct promise not to protest. Reed First Br. at 33–34. It arrives at this conclusion by first assuming the parties intended the Settlement Agreement to be enforceable. And in that case, the only entities who could enforce it after OPJ dissolved are DaimlerChrysler vehicle line dealers in the Overland Park sales area.[6] Thus, the argument concludes, the other dealers must be intended third-party beneficiaries. We disagree.

First, we cannot conclude that just because one party to a contract dissolved and can no longer enforce the contract, there necessarily must be someone else who can enforce it. Second, there is no class of "other" vehicle dealers expressly benefited by the Settlement Agreement. In the No Future Protest provision, Landers McLarty promised OPJ "not to protest or otherwise challenge any relocation or establishment of any DaimlerChrysler vehicle lines into the Overland Park Sale Area." App'x Vol. I at 160. The promise was made directly to OPJ and no one else. The word "dealer" is not in the provision, and so Landers McLarty could not have made a promise directly to other dealers. Thus, a plain reading is enough to tell us

[6] Reed Auto presented documents attempting to trace FCA, with whom it did have a contract, to DaimlerChrysler, with whom it acknowledged it did not have a contract. In denying summary judgment on the third-party beneficiary claim, the district court found Reed Auto had been "somewhat unsuccessful" in showing it was a DaimlerChrysler vehicle line dealer. App'x Vol. I at 82–83 ("The Court has reviewed these purported facts and the supporting documents. Some of the cited materials do not support Plaintiffs' claims, and at other times, Plaintiffs only cite voluminous exhibits generally without reference to a particular page."). Later, before the bench trial, Landers McLarty acknowledged for the purposes of the remaining claims that Reed Auto was a DaimlerChrysler dealer. App'x Vol. III at 685. For the purposes of this section, we will assume without deciding Reed Auto is a DaimlerChrysler vehicle line dealer.

Landers McLarty did not promise any other DaimlerChrysler dealer it would not protest if that dealer relocated or established a dealership in the Overland Park sales area. Further, in the Successors and Assigns provision, Landers McLarty also directly promised not to protest if "successors, assigns, heirs, and legal representatives of the Parties to this Agreement" relocated or established a DaimlerChrysler vehicle line in the Overland Park sales area. *Id.* at 163. This group specifically included successors, assigns, heirs, and legal representatives of OPJ. Notably absent from this list is a promise not to protest the relocation of any other DaimlerChrysler dealership in the sales area if that dealership is *not* a successor, assign, heir, or legal representative of OPJ. Therefore, Landers McLarty's No Future Protest promise does not extend to "other" dealers. *See Bodnar v. St. John Providence, Inc.*, 933 N.W.2d 363, 373 (Mich. App. 2019) ("When a contract is clear and unambiguous, the provisions reflect the parties' intent as a matter of law and courts are to construe and enforce the language as written.").

Lastly, Reed Auto argues the use of a lowercase "p" in "party" in other provisions of the Settlement Agreement means that parties other than OPJ, DaimlerChrysler/FCA, and Landers McLarty—who are referred to elsewhere in the Settlement Agreement with a capital "P" "Party"—must have some standing to enforce it. Reed Auto does not present any evidence that the use of the lowercase is anything other than a typographical error, and so we will not read into it an express intent to benefit third parties.

An objective reading of the Settlement Agreement produces no promise by Landers McLarty not to protest the establishment or relocation of a dealership other than that made to OPJ and its successors, assigns, heirs, or legal representatives. There is no promise not to protest made to anyone else. Therefore, the district court did not err in concluding Reed Auto is not an intended third-party beneficiary to the Settlement Agreement with standing to enforce it.

c.

Finally, Landers McLarty, in a cross-appeal, challenges the district court's denial of its post-trial motion for attorneys' fees pursuant to the Settlement Agreement. "We generally review a denial of attorney's fees for an abuse of discretion." *Johnson v. Heath*, 56 F.4th 851, 863 (10th Cir. 2022). A district court abuses its discretion when it bases "its decision on an erroneous conclusion of law or where there is no rational basis in evidence for the ruling." *Mann v. Reynolds*, 46 F.3d 1055, 1062 (10th Cir. 1995). "We review de novo the legal analysis providing the basis for the award or denial of attorney fees." *ClearOne Commc'n, Inc. v. Bowers*, 643 F.3d 735, 777 (10th Cir. 2011).

The district court rejected Landers McLarty's claim for attorneys' fees on two alternate grounds. First, under Michigan law, Landers McLarty had not timely asserted a claim for attorneys' fees. *Reed Auto of Overland Park, LLC v. Landers McLarty Olathe KS, LLC*, 2:19-CV-02510-HLT, 2022 WL 392302, at *5 (D. Kan. Feb. 9, 2022). Second, Landers McLarty was not entitled to attorneys' fees because there had been no judgment that the Settlement Agreement was enforceable as

between Landers McLarty and Reed Auto at the time Reed Auto filed its lawsuit. *Id.* It is unnecessary to decide whether Landers McLarty asserted a timely claim because we affirm on the latter ground.

In its Memorandum and Order denying Landers McLarty's motion for attorneys' fees, the district court concluded the claim was predicated on the theory that after OPJ assigned the Settlement Agreement to Reed Auto in July 2019, there was a valid contract between Reed Auto and Landers McLarty. At that point, Reed Auto would have assumed liability for the fees. Thus, Landers McLarty could recover damages only if the July 2019 Assignment was valid. However, the district court found it had "not been asked to decide [whether it was valid] in the first place." *Id.* "Landers McLarty never moved for summary judgment on this issue, never asked for any findings of fact or conclusions of law on this issue, and the issue was not addressed at trial." *Id.* (internal citations omitted).

On appeal, Landers McLarty disputes the idea that there was no finding that OPJ assigned the Settlement Agreement to Reed Auto in July 2019. It directs us to the Pretrial Order where the parties stipulated to the admissibility of the July 2019 Assignment as evidence. But the parties never stipulated that the assignment was valid. In fact, later in the same order, Landers McLarty contended "[t]he Settlement Agreement *is* not a valid or enforceable contract," App'x Vol. I at 56 (emphasis added), or in other words, the Settlement Agreement was not valid or enforceable at the time of the trial. A few lines later, it doubled down, questioning whether OPJ had even had a valid interest to assign: "On July 9, 2019, [OPJ], a dissolved entity that

could no longer conduct any business in the state of Kansas, assigned its *alleged* interest under the Settlement Agreement to Plaintiff [Reed Auto]." *Id.* (emphasis added). Therefore, Landers McLarty's citation to the Pretrial Order does not show us the district court erred by concluding the validity of the July 2019 Assignment was undetermined. Failure to point to any contradictory fact in the record means Landers McLarty has waived any argument that the district court erred in finding (a) it was required to find the July 2019 Assignment was valid and (b) it did not find the assignment was valid. *See Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 679 (10th Cir. 1998) ("Arguments inadequately briefed in the opening brief are waived.").

Landers McLarty's entire case was premised on there being no valid contract between it and Reed Auto. It does not adequately contest the district court's finding that it never argued the July 2019 Assignment created a valid contract between it and Reed Auto before Reed Auto filed suit. Therefore, we cannot say the district court erred in finding Landers McLarty did not show it was entitled to attorneys' fees. The district court did not abuse its discretion by denying them.

III.

For the reasons stated above, we AFFIRM the judgment of the district court.

Entered for the Court

Allison H. Eid
Circuit Judge

Reed Auto of Overland Park, LLC et al. v. Landers McLarty Olathe KS, LLC, Nos. 21-3225, 22-3043
BACHARACH, J., concurring in part and dissenting in part.

This case involves competition among vehicle dealers for desirable locations. Under state law, a vehicle dealer could sometimes protest another dealer's move. In this case, a protest led to a settlement between two vehicle dealers: Overland Park Jeep and Landers McLarty Olathe KS, LLC. The settlement contained a promise by Landers McLarty to forgo future protests over relocations within a particular area.

After the parties settled, Overland Park Jeep sold its assets to Reed Auto; and Reed Auto wanted to relocate its dealership over Landers McLarty's protest. The resulting issue at the summary judgment stage is whether Landers McLarty's promise to forgo protests could protect a different vehicle dealer (Reed Auto) as a third-party beneficiary.[1] The majority answers *no*. In my view, this answer disregards the presence of factual issues that should have prevented summary judgment.

The settlement agreement expressly prohibited Landers McLarty from protesting or otherwise challenging "any relocation or establishment of any DaimlerChrysler vehlcle [sic] lines into" a particular sales area. Appellant's App'x vol. 1, at 160. On its face, this language prohibited

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[1] The majority concludes that the district court did not clearly err in determining that Reed Auto is not Overland Park Jeep's legal successor . I agree with this conclusion.

Landers McLarty from challenging a relocation into the area not only by Overland Park Jeep but by any dealer of the DaimlerChrysler vehicle line. But Landers McLarty and the majority conclude that this contractual language couldn't possibly mean what it says.

To assess this conclusion, we must apply the standard for summary judgment. This standard requires us to view the evidence in the light most favorable to the non-moving party (Reed Auto). Maj. Op. at 13.[2] Viewing the evidence favorably to Reed Auto, we consider whether a reasonable factfinder could ascertain a factual foundation for status as a third-party beneficiary. *See Yellowbear v. Lampert*, 741 F.3d 48, 56 (10th Cir. 2014) (Gorsuch, J.) (stating that to defeat summary judgment, the nonmovant "is obliged to show merely that a reasonable fact finder could rule his way when viewing the evidence in the record in the light most favorable to him").

The settlement agreement states that disputes about its "validity, construction, and performance . . . shall be governed by the laws of the State of Michigan." Appellant's App'x vol. 1, at 162. Given this language, we apply Michigan law to assess Reed Auto's potential status as a third-

[2] In district court, Landers McLarty and Reed Auto moved for summary judgment. The district court granted Landers McLarty's motion and denied Reed Auto's. This appeal challenges the grant of Landers McLarty's motion, but not the denial of Reed Auto's motion. *See* Appellant's Opening Br at 5 (stating the issue as whether "Landers McLarty was entitled to judgment as a matter of law").

party beneficiary. Maj. Op. at 8. A Michigan statute requires us to consider whether the contract was made to benefit a non-party. Mich. Comp. Laws Ann. § 600.1405 (West 2023). Under Michigan law, we liberally construe this statute to allow third-party beneficiaries to sue as promisees. *Guardian Depositors Corp. of Detroit v. Brown*, 287 N.W. 798, 800 (Mich. 1939).

In liberally construing status as a third-party beneficiary, we "look no further than the form and meaning" of the language in the settlement agreement. *Schmalfeldt v. N. Pointe Ins. Co.*, 670 N.W.2d 651, 654 (Mich. 2003); *see also Shay v. Aldrich*, 790 N.W.2d 629, 665 (Mich. 2010) ("[T]his Court has long held that the standard for determining whether a person is a third-party beneficiary is an objective standard and must be determined from the language of the contract only.").[3] "Therefore the parties' motives and subjective intentions are not relevant in determining whether plaintiff is a third-party beneficiary." *Rieth-Riley Constr. Co. v. Dep't of Transp.*, 357 N.W.2d 62, 65 (Mich. App. 1984).

Even without the liberal construction required under Michigan law, the contract language is expansive, extending beyond the contracting parties to cover "*any* relocation" within the area "of any DaimlerChrysler vehlcle [sic] lines." Appellant's App'x vol. 1, at 160 (emphasis added).

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[3] Landers McLarty agrees, stating that "[w]hether a promise has been made to benefit a person not a party to a contract is determined using an objective standard to discern the contracting parties' intentions from the contract itself." Appellee's Resp. Br. at 39.

Perhaps the factfinder might decide to discount this expansive contract language in the face of other language supporting a narrower interpretation. But that decision would be for the factfinder, not us: Our job is simply to determine whether a reasonable factfinder could interpret the contract to prevent protests against purchasers of Overland Park Jeep's assets. *See* p. 2, above.

Landers McLarty points out that we're to examine the entirety of the settlement agreement. But the agreement doesn't cloud the expansive language extending the protection to any DaimlerChrysler vehicle lines. For example, Landers McLarty points to a narrow contractual definition of *successors* to the contracting parties. But the inquiries are distinct for status as a successor and third-party beneficiary. *See Safeco Ins. Co. v. Pontiac Plastics & Supply Co.*, No. 214079, 2000 WL 33538535, at *1 (Mich. App. Jan. 21, 2000) (unpublished) (per curiam) (stating that a claim of "successor liability . . . does not implicate third-party beneficiary rules");[4] *see also Woolard v. JLG Indus., Inc.*, 210 F.3d 1158, 1170 (10th Cir. 2000) (stating that a clause to protect successors didn't affect status as

[4] We can consider *Safeco* even though it is unpublished. *See Taransky v. Sec'y of the U.S. Dep't of Health & Human Servs.*, 760 F.3d 307, 317 n.9 (3d Cir. 2014) (stating that we can refer to unpublished opinions when predicting state law); *Puckett v. Tenn. Eastman Co.*, 889 F.2d 1481, 1485 (6th Cir. 1989) (stating that absent a decision by the state's highest court, the federal appeals court considers decisions by the state's intermediate appellate court regardless of whether they had been published).

a third-party beneficiary). A *successor* takes the place of a contracting party; a *third-party beneficiary* exists independently of a contracting party. *See Third-Party Beneficiary*, *Black's Law Dictionary* (11th ed. 2014); *Successor*, *Black's Law Dictionary* (11th ed. 2019). Given the different standards, the district court couldn't reject status as a third-party beneficiary based on the standard for successorship.[5]

Landers McLarty also argues that the agreement did not use the "words 'third-party beneficiary'" or refer to Reed Auto by name. Appellee's Resp. Br. at 40. But third-party status doesn't turn on whether an entity is named in the contract. *See Guardian Depositors Corp. of Detroit v. Brown*, 287 N.W. 798, 800 (Mich. 1939) (stating that the name of the third-party beneficiary need not be stated if the class is sufficiently described or designated); *see also* 5A Glenda K. Harnad, et al., *Mich. Civ. Jur. Contracts* § 17 (Apr. 2023 update) ("[A] purported third party beneficiary of a contract need not be specifically named in the contract, so long as this nonparty can show that he or she is a member of a class for whose benefit the contract was made."). And courts elsewhere haven't determined status as a third-party beneficiary based on the contract's use

[5] Given this conclusion, I would not decide the issue of attorney fees until the district court determines who has prevailed on the contract claim. But I agree with the majority's conclusion that Reed Auto was not Overland Park's successor.

of the legal terminology. *See City of Houston v. Williams*, 353 S.W.3d 128, 145 (Tex. 2011) (stating that "the agreement need not state 'third-party beneficiary' or any similar magic words"); *Bissette v. Univ. of Miss. Med. Ctr.*, 282 So. 3d 507, 513–15 (Miss. Ct. App. 2019) (rejecting the defendant's reliance on the absence of the term *third-party beneficiary* in the contract).[6]

The district court also reasoned that the settlement agreement omits the word *dealer* in the no-protest clause. But this omission doesn't remove a genuine dispute of material fact. Under Kansas statutes, protests are available only to vehicle dealers. *See* Kan. Stat. Ann. § 8-2430(a)–(c) (West 2023) (addressing notices and protests of "the relocation of an existing new vehicle dealer in new motor vehicles."). Given the statutory limitation to dealers, the contractual prohibition against protests would have applied only to dealers; no one else would have otherwise had a right to protest the relocation. So a factfinder could reasonably interpret the contract language to address relocation by dealers despite the omission of the term *dealer*.

* * *

In my view, a factfinder could reasonably find a factual foundation for Reed Auto's status as a third-party beneficiary. The controlling clause

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[6] Michigan appellate courts have not addressed this issue.

of the settlement agreement is expansive and covers relocation by dealers in the DaimlerChrysler vehicle line, such as Reed Auto.

Perhaps a factfinder could draw other inferences based on other parts of the contract. But we must view the evidence favorably to Reed Auto, not Landers McLarty. When the factfinder views the evidence favorably to Reed Auto, the factual foundation for Reed Auto's status as a third-party beneficiary is not only possible but reasonable.

Given the reasonableness of that factual foundation, the district court should have denied Landers McLarty's argument for summary judgment on Reed Auto's status as a third-party beneficiary.