COURT OF APPEALS
DECISION
DATED AND FILED

October 23, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1482 **Cir. Ct. No. 2011CV796**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

BURLINGTON PAVERS LEASING, LLC,

PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

V.

DAVID MONTOYA CONSTRUCTION, INC.,

DEFENDANT-APPELLANT-CROSS-RESPONDENT,

THE TRAVELERS INDEMNITY CO.,

DEFENDANT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Racine County: JOHN S. JUDE, Judge.[1] *Affirmed in part; reversed in part and cause remanded with directions.*

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[1] The Honorable Michael E. Nieskes presided over this case from December 2011 to June 2012, including addressing pretrial proceedings referred to in this appeal. Thereafter, the Honorable John S. Jude presided, including throughout the trial and post-trial proceedings.

Before Blanchard, P.J., Lundsten and Sherman, JJ.

¶1 BLANCHARD, P.J. Burlington Pavers Leasing, LLC, of Racine, leased to David Montoya Construction, Inc., of New Mexico, a mobile plant used to produce concrete. In 2011, after five years of plant use by Montoya, Burlington initiated this action for replevin of the plant and damages against Montoya. Burlington alleged that Montoya was unjustly enriched and had breached a series of written and oral or implied leasing agreements between the parties, including by failing to: pay Burlington all rent due on the plant; properly repair and maintain the plant; and return the plant to Burlington.

¶2 Montoya counterclaimed, alleging that Burlington had breached agreements to deliver an operational plant to Montoya in the first place, or to pay for needed repairs to the plant, and had failed to notify Montoya that Burlington intended to bill Montoya based on a monthly volume usage basis for those months in which the volume of concrete that Montoya produced would generate a larger rent payment than under a base or minimum monthly fee of $15,000.

¶3 At trial, the jury made findings that included the following: during the final phase of the parties' contractual relationship, after the second of two written contracts between the parties had expired, Montoya breached an oral or implied agreement regarding rent payments, resulting in damages to Burlington of $329,825. This involved a dispute over the volume usage versus base rate methods of calculating monthly rent payments, with the jury finding that Burlington was entitled to the higher payments.

¶4 In its appeal, Montoya argues that the circuit court erred in failing to grant judgment notwithstanding the verdict (JNOV) in its favor regarding the rent payment damages against Montoya found by the jury, based on the legal theory of

account stated. We reject this argument based on forfeiture, because Montoya failed to present to the circuit court the account stated legal theory that it pursues on appeal and has now abandoned other legal theories it did present to the circuit court.

¶5 Burlington cross-appeals regarding a separate jury finding regarding repair and maintenance of the plant. The jury answered "no" when asked if Montoya breached either of the two written leases or the oral or implied agreement by failing to properly repair and maintain components of the plant. Burlington argues that the circuit court should have changed the answer to this question to "yes," because the evidence was insufficient to sustain a verdict of no breach regarding proper repair or maintenance. We reject this argument on the grounds that the jury was presented with sufficient evidence to conclude that Montoya followed a mode of plant repair and maintenance called for in the agreements of the parties in light of the condition of the plant when Montoya received it from Burlington and its condition when Burlington took it back.

¶6 Separately, we reverse a circuit court decision denying Burlington's attorney's fees arising from a separate action filed by Montoya in New Mexico, but we affirm a decision denying Burlington's attorney's fees arising from this action.

BACKGROUND

¶7 Burlington and Montoya entered into two written leases regarding Montoya's use of the plant, one dating from October 2006 and the second from August 2008.

¶8 On the topic of lease payments, the 2006 lease provided in pertinent part the following, under the heading "Lease payment and Minimum Sum":

> A. $15,000 per month for 9 months for a total of $135,000.00 or $2.00 per cubic yard, whichever is greater. With a deposit of $33,500.00 minus $15,000.00 original deposit equals $18,500.00 which may be deducted at a rate of $3,350.00 per month. Additional months of September and October and half of November, 2007 will be at a rate of $15,000.00 per month. The remainder of November & December at no charge providing total quantity is not over 67,500 cubic yards, otherwise to be paid at a rate of $2.00 per cubic yard.

¶9 The 2006 lease expired in January 2008, and the parties executed a second written lease in August 2008 that bound the parties until June 2009. The parties agreed to the following regarding lease payments: "[Montoya] shall pay [Burlington] … the Contract Sum of $2.00 per cubic yard for each cubic yard of concrete or a minimum of $15,000.00 per month."

¶10 After the second lease expired in June 2009, for a period of approximately twenty months, Burlington allowed Montoya to continue to use the plant under some set of agreements, disputed below and on appeal by the parties, while the parties negotiated and exchanged proposed written lease terms, without signing a third agreement. We will refer to this as the period of the oral or implied agreement.

¶11 Turning to the repair and maintenance issue, the 2006 lease contained a provision that provided in pertinent part:

> [Burlington] is responsible that the … Plant after final assembly by [Montoya] will be in working order. Also [Burlington] warrants that all components of the machine have been serviced. [Montoya] shall provide all maintenance and repair the following[:] all wear parts and components of the plant, all manufacturer recommended service. [Montoya] agrees during the period covered by

> this lease to use said … Plant in a careful and prudent manner, [and] to make, at [Montoya's] expense, any and all repairs thereon which may be necessary to keep said property in as good condition as it is now, reasonable use and wear there excepted, and to pay all operating and maintenance expenses until … the … property is returned and actually received by [Burlington], and upon the termination of this lease return said property to [Burlington] in as good condition as received, normal wear and tear excepted….

The 2008 lease contained similar language.

¶12 Burlington presented evidence at trial that Montoya repeatedly failed to perform maintenance on the plant, such as cleaning it, unclogging its air filtration system, and replacing sticking or flattened rollers. There was testimony that, as a result, Burlington's actual and estimated repairs and associated costs totaled between $443,675 and $535,274, after deductions for normal wear and tear.

¶13 Montoya countered with evidence that the plant had an unusual design, was sometimes inoperable from the start of Montoya's attempts to use it and broke down frequently, required an unexpectedly high amount of repair and maintenance, and in the course of normal operation essentially "[ate] itself up."

¶14 The trial lasted over two weeks. There were twenty-two questions presented to the jury on the special verdict form.

¶15 Regarding the rent due issue raised in Montoya's appeal, the jury found that Montoya did not breach either the 2006 lease or the 2008 lease, but that, following expiration of the 2008 lease, the parties had an oral or implied agreement regarding rental amounts. The jury further found that Montoya breached this later agreement by paying too little to Burlington, and that this resulted in damages to Burlington of $329,825. Both parties now make arguments

based on the premise, which we accept, that this answer could only be interpreted as a finding that Montoya had breached agreements to pay Burlington the cubic yard usage rate for those months when volumes of concrete passing through the plant should have resulted in payments greater than $15,000.

¶16 Regarding the repair and maintenance issue raised in Burlington's cross-appeal, the jury found that Montoya did not breach any pertinent agreement.

¶17 We provide additional background regarding jury answers and the attorney's fees issues in the Discussion section below.

DISCUSSION

¶18 We first address Montoya's argument on appeal that the circuit court should have entered a JNOV regarding the rent due to Burlington because the parties created a new contract on the rate issue that Burlington is bound to honor under the account stated doctrine. Then we turn to Burlington's cross-appeal argument that there was insufficient evidence to support the jury's verdict regarding Montoya's alleged breach in not properly repairing and maintaining the plant. Finally, we address Burlington's further cross-appeal arguments that it is entitled to attorney's fees arising from both a separate New Mexico action between the parties and this action.

I. MONTOYA'S ACCOUNT STATED ARGUMENT

¶19 In its post-trial JNOV motion, Montoya challenged the jury verdict answer that Montoya breached agreements to pay Burlington at the cubic yard usage rate during months in which that rate could apply. Montoya argued that this verdict could not stand as a matter of law, based on any of three legal theories. However, on appeal Montoya abandons all three of these theories, and relies on a

theory never presented to the circuit court. In the sections below, we make clear that the three theories Montoya pursued before the circuit court are different than the theory Montoya now advances on appeal. And, without reaching the merits, we apply the forfeiture doctrine to reject the new argument.

A. Forfeiture Doctrine

¶20 Appellate courts strive to avoid reversals that "blindside trial courts … based on theories which did not originate in their forum." ***State v. Rogers***, 196 Wis. 2d 817, 827, 539 N.W.2d 897 (1995). This court will typically reject arguments raised for the first time on appeal. ***State v. Moran***, 2005 WI 115, ¶31, 284 Wis. 2d 24, 700 N.W.2d 884. We discuss the forfeiture doctrine further in an analysis section below.

B. Montoya's Arguments in the Circuit Court: Waiver; Equitable Estoppel; Accord and Satisfaction

¶21 In advance of trial, Montoya moved for partial summary judgment. After briefing by the parties, the circuit court apparently took this motion under advisement. Subsequently, Montoya made the same substantive arguments again in a JNOV motion, which the court denied in a written decision. In each context, Montoya's substantive arguments rested on the following three legal theories, offered in the alternative, to support its argument that Burlington could not recover rent based on the cubic yardage rate.

1. *Waiver*. Montoya argued that the Burlington voluntarily and intentionally relinquished its right to charge Montoya based on cubic yard usage by consistently billing Montoya at the flat $15,000 per month rate, waiving the right to collect higher cubic yard rates. Citing general waiver principles from case law and provisions of Wisconsin's Uniform Commercial Code, Montoya argued

that Burlington, through its conduct, demonstrated an intent to waive its contractual right to the higher rent payments because it "continuously and repeatedly" "intentionally failed to exercise this contractual right."

2. *Equitable estoppel*. Montoya argued that Burlington's billing practices constituted action or inaction on which Montoya reasonably relied to its detriment, citing case law setting forth the elements of equitable estoppel.

3. *Accord and satisfaction*. Montoya argued that each time Burlington accepted and cashed a check tendered to it by Montoya based on a Burlington $15,000 invoice, Burlington agreed to discharge an existing disputed claim. Montoya cited legal authority for the proposition that accord and satisfaction is a complete defense and occurs where there is an agreement to discharge an existing, disputed claim.

C. Montoya's Current Argument: Account Stated

¶22 On appeal Montoya abandons these theories and instead advances the new theory of account stated. Under this doctrine, Montoya contends, Burlington and Montoya agreed to an account of Montoya's debts to Burlington, and Montoya promised to pay debts listed on that account, which created a new contract that Burlington is bound to honor.

¶23 This court has explained the account stated doctrine as follows:

> An account stated is an agreement between a debtor and creditor that the items of a transaction between them are correctly stated in a statement rendered, that the balance shown is owed by one party to the other and that the party has promised to pay that balance to the other. The promise to pay the balance may be express or implied from the conduct of the parties.

> In an action on an account stated, the retention of a statement of an account by a party without making an objection within a reasonable time is evidence of acquiescence in or assent to the correctness of the account. An implied agreement to pay may be presumed from such retention. Furthermore, an account stated may arise where a debtor makes partial payment on an account or accompanies partial payment with an agreement to pay the balance.

Stan's Lumber, Inc. v. Fleming, 196 Wis. 2d 554, 565-66, 538 N.W.2d 849 (Ct. App. 1995) (citations omitted).

D. Analysis

¶24 Montoya makes no effort to compare the account stated doctrine with the equitable estoppel doctrine that it argued below. As to accord and satisfaction, Montoya suggests that it has abandoned this theory because accord and satisfaction requires proof, which Montoya lacks, of a prior dispute about an original contract between the parties. However, as to the waiver argument Montoya made before the circuit court, Montoya now contends that its account stated argument is "simply additional legal authority or legal shorthand" for this prior argument. For the following reasons, we conclude that Montoya forfeited the only legal theory it now advances.

¶25 If, as Montoya now argues, the waiver theory that it advanced below were merely "legal shorthand" for the legal theory of account stated, then Montoya would rest its current argument on the waiver theory. There would be no need for Montoya to mention the account stated theory. In a puzzling approach, Montoya does not clearly explain what advantage it sees in solely advancing the account stated theory on appeal, as opposed to a waiver theory. However, one thing that is clear is that Montoya's approach is premised on the notion that there *must be* at least one meaningful difference between the account stated theory and

the waiver theory. And, there is no question that account stated is a distinct legal doctrine with features not identified to the circuit court.

¶26 We do not attempt to solve the puzzle of why Montoya now places all of its appellate chips on a new legal theory that it believes creates a more forgiving standard for its arguments.[2]

¶27 Montoya argues that the forfeiture doctrine applies to new issues only, and that on appeal Montoya is merely "raising new arguments or employing new legal terminology." For the difference between new issues and new arguments in the forfeiture context Montoya cites authority that includes ***State v. Holland Plastics Co.***, 111 Wis. 2d 497, 331 N.W.2d 320 (1983). In ***Holland Plastics***, the court deemed an argument on appeal to be "merely an additional argument on issues already raised by the defendants," and explained that "the

[2] Without attempting to solve the puzzle, we note one possibility in order to provide context for our forfeiture decision. Montoya may believe, rightly or wrongly, that Montoya cannot show that Burlington at any pertinent time voluntarily and intentionally relinquished its known right to the higher rent payments, as required under the waiver doctrine. *See* ***Brunton v. Nuvell Credit Corp.***, 2010 WI 50, ¶37 & n.11, 325 Wis. 2d 135, 785 N.W.2d 302 (Waiver "requires the intentional relinquishment of a known right."). While intentional relinquishment may be demonstrated by conduct, such conduct must be "'so inconsistent with a purpose to stand upon one's rights as to *leave no room* for a reasonable inference to the contrary.'" ***Id.***, ¶38 (quoted source omitted) (emphasis added). That is, the conduct must "unambiguously demonstrat[e]" an intent to give up the right. ***Id.*** On this issue below, the circuit court concluded, "Under these circumstances, I do not agree that [Burlington] knowingly relinquished its claim to rent based on usage." Perhaps Montoya has concluded that the "leave no room" standard is less forgiving than what Montoya sees as a corresponding standard under the account stated doctrine, under which a court may identify an implied promise by a debtor to pay a particular amount through "a progression of events." *See* ***Stan's Lumber, Inc. v. Fleming***, 196 Wis. 2d 554, 569, 538 N.W.2d 849 (Ct. App. 1995) ("[T]he evidence demonstrates a progression of events after the initial agreement by which Fleming impliedly promised to pay the billings which Stan's provided."). But this is just one possibility that could explain Montoya's approach, and we express no conclusion regarding the merits of such a potential view.

general rule against raising issues for the first time on appeal does not prevent the state from making its argument in this court." ***Id.*** at 505.

¶28 However, as this court has explained, to say that a party is not prevented from making an argument is not the same thing as saying that an appellate court must entertain a new argument. ***Townsend v. Massey***, 2011 WI App 160, ¶¶24-25, 338 Wis. 2d 114, 808 N.W.2d 155; *see also* ***State v. Kaczmarski***, 2009 WI App 117, ¶7, 320 Wis. 2d 811, 772 N.W.2d 702 (forfeiture is a rule of judicial administration and we may exercise discretion to address issues raised for the first time on appeal). Moreover, we went on to explain the following in ***Townsend***, regarding the passage in ***Holland Plastics***:

> In ***Schonscheck v. Paccar, Inc.***, 2003 WI App 79, 261 Wis. 2d 769, 661 N.W.2d 476, we noted ***Holland Plastics***, and went on to explain that the "fundamental" forfeiture inquiry is whether a legal argument or theory was raised before the circuit court, as opposed to being raised for the first time on appeal in a way that would "blindside" the circuit court. *See* ***Schonscheck***, 261 Wis. 2d 769, ¶¶10–11, 661 N.W.2d 476. That case and countless others after ***Holland Plastics*** have reaffirmed that the forfeiture rule focuses on whether particular arguments have been preserved, not on whether general issues were raised before the circuit court. *See, e.g.*, ***State v. Rogers***, 196 Wis. 2d 817, 827, 539 N.W.2d 897 (Ct. App. 1995) (explaining that the forfeiture rule requires that, to preserve its arguments, a party must "make all of their arguments to the trial court").

Townsend, 338 Wis. 2d 114, ¶25. As we further explained in ***Townsend***, a rule that appellate courts must address the merits of new legal arguments so long as the arguments relate to an issue raised before the circuit court "would seriously undermine the incentives parties now have to apprise circuit courts of specific arguments in a timely fashion so that judicial resources are used efficiently and the process is fair to the opposing party." ***Id.***, ¶26 (citing ***State v. Ndina***, 2009 WI 21, 315 Wis. 2d 653, 761 N.W.2d 612).

¶29 Taking these concerns into account, we conclude that reversal based on an account stated theory here would blindside the circuit court. If we were to now review the evidence presented at trial through the lens of the account stated doctrine, we would be engaging in a different task than any that Montoya asked the circuit court to undertake, or that the circuit court could have been expected to undertake on its own. It would be different if Montoya had based its current appellate argument on waiver, and then referred to account stated as a closely related or complementary theory. In that situation, we would address Montoya's waiver theory on its merits as a preserved argument. However, in its principal brief on appeal, Montoya relies on the account stated doctrine alone. Then, after Burlington argues in its brief that Montoya "waived" (by which Burlington means forfeited) any argument based on the account stated theory, Montoya in its reply brief doubles down, relying entirely on the account stated doctrine. Thus, at least so far as Montoya has presented its arguments on appeal, it has forfeited its account stated argument.

¶30 For these reasons, we affirm the circuit court's decision not to upset the jury verdict on rent damages and move to issues raised by Burlington on cross-appeal.

II. SUFFICIENCY OF EVIDENCE SUPPORTING VERDICT REGARDING MONTOYA'S ALLEGED BREACH IN NOT PROPERLY REPAIRING AND MAINTAINING PLANT

¶31 Burlington argues that there was "no credible evidence to support" the jury's verdict that Montoya did not breach either of two written leases or an oral or implied agreement by failing to properly repair and maintain components of the plant under obligations that Burlington argued were required by all agreements between the parties. We reject this argument, based on: (1) our

standard of review in light of the pertinent question presented to the jury; (2) evidence that could have been credited by the jury; and (3) the arguments of counsel at trial.[3]

¶32 We "will sustain a jury verdict if there is any credible evidence to support it," including evidence that "under any reasonable view" supports "an inference supporting the jury's finding." ***Morden v. Continental AG***, 2000 WI 51, ¶38, 235 Wis. 2d 325, 611 N.W.2d 659 (citing authority that includes WIS. STAT. § 805.14(1) (2011-12)). "[I]t is the role of the jury, not an appellate court, to balance the credibility of witnesses and the weight given to the testimony of those witnesses." ***Id.***, ¶39. For this reason, we "search the record for credible evidence that sustains the jury's verdict, not for evidence to support a verdict that the jury could have reached but did not." ***Id.***

¶33 The standard of review becomes "even more stringent" in cases, such as this one, in which the circuit court approves the jury's verdict. *See* ***id.***, ¶40. In such cases, a verdict is not overturned unless "'there is such a complete failure of proof that the verdict must be based on speculation.'" ***Id.*** (quoted source omitted).

¶34 The question that Burlington seeks to have changed asked the jury:

> Did [Montoya] breach the 2006 Lease, 2008 Lease or the oral or implied agreement, if you so found [that these agreements existed], with [Burlington] by not properly maintaining or repairing all wear parts and components of the plant?

[3] Given this conclusion, we do not reach Burlington's additional argument that Burlington is entitled to additur for Montoya's breach of its obligations of repair and maintenance.

The jury answered this question "no."

¶35 This was one of only two questions posed to the jury on the topic of Montoya's obligation to repair and maintain, with the second question limited to the damages due to Burlington if the answer to the first question was "yes." We note that the substantive (as opposed to the damages) repair and maintain question did not ask the jury to differentiate between breaches of repair obligations and breaches of maintenance obligations, did not break out major or significant types of repair or maintenance, and did not isolate time periods within the course of the five-year commercial relationship at issue. Thus, the jury was essentially asked to make a global finding about whether, over the course of the five years, Montoya's mode of repair and maintenance was not "proper" under one or both of the written leases, or under the oral or implied agreement if the jury found that this last agreement existed.

¶36 Montoya argued that the jury was entitled to credit testimony that the plant was defectively designed and in very poor condition when Montoya received it, that it operated in a manner that created unexpected wear and tear, and that Montoya more than met its contractual repair and maintenance obligations through significant, ongoing repair and maintenance, which Burlington understood Montoya needed to perform simply to keep the plant in operation. This included testimony that "this machine just eats itself up" when in operation, causing Montoya to allegedly spend "over $400,000 in repairs and maintenance."

¶37 As the circuit court noted in concluding that there was "ample, credible evidence for the jury to find that" Montoya returned the plant to Burlington "in the condition it was received," the jury heard testimony that included the following: when Montoya "first opened the communication trailer, it

was discovered that a rat had built a nest in the wiring and destroyed some wiring."

¶38 On appeal, Burlington argues that, regardless of trial testimony that the plant required "almost constant maintenance" and was "susceptible to higher maintenance and more wear" than would ordinarily be expected, this testimony is "irrelevant" to its cross-appeal, because the agreements between the parties required Montoya to repair and maintain this particular plant, not the "typical" concrete producing plant that might require less repair and maintenance.

¶39 However, Burlington took a different approach at trial. It argued to the jury that Montoya's position on this issue was defeated by facts that the jury should find about the condition of the plant that Burlington delivered to Montoya and whether Montoya in fact subjected the plant to improper wear and tear that it failed to repair:

> Now one of the things you will hear from Montoya Construction is that this plant wasn't in good condition when they got it. That all of this maintenance failure [was] sort of beside[] the point. But that's just not true. Compare the pictures [taken when the plant was first shipped to Montoya with pictures taken after it was returned to Burlington].
>
> … Don't believe this. [Montoya argues, "]It was in bad shape when [Montoya] got it.["] It's just not true….
>
> ….
>
> This plant was not debilitated when Montoya Construction got it. The extraordinary wear and tear that you heard about for [the] two weeks [of trial], it isn't ordinary wear and tear.

This was an explicit invitation by Burlington for the jury to resolve this issue based on factual propositions for which there was conflicting testimony.

¶40 In sum, we conclude that there was not a complete failure of proof to support Montoya's argument to the jury that there were no breaches in repair and maintenance, and that Burlington invited the jury to resolve this issue based on a view of the facts that the jury had a basis to reject.

III. ATTORNEY'S FEES.

¶41 The balance of the issues raised by Burlington on cross-appeal require additional background. We first briefly summarize applicable law, then turn to the attorney's fees arising from a lawsuit filed by Montoya in New Mexico separate from this action, and finally address the attorney's fees arising from this action.

A. Legal Standards

¶42 In an exception to the American Rule against shifting attorney's fees, fees may be awarded based on clear, specific contractual agreements. ***Gorton v. Hostak, Henzl & Bichler, S.C.***, 217 Wis. 2d 493, 508, 510-11, 577 N.W.2d 617 (1998); *see also* ***State Bank of Hartland v. Arndt***, 129 Wis. 2d 411, 422, 385 N.W.2d 219 (Ct. App. 1986) (contractual provisions for reimbursement of attorney's fees and costs are enforceable).

¶43 When we interpret a contract and apply undisputed facts, our review is independent from that of the circuit court. ***Maryland Arms Ltd. P'ship v. Connell***, 2010 WI 64, ¶21, 326 Wis. 2d 300, 786 N.W.2d 15.

¶44 "[U]nambiguous contract language controls contract interpretation." ***Kernz v. J.L. French Corp.***, 2003 WI App 140, ¶9, 266 Wis. 2d 124, 667 N.W.2d 751. Thus, when contract terms "'are clear and unambiguous, we construe the

contract according to its literal terms.'" ***Maryland Arms Ltd. P'ship***, 326 Wis. 2d 300, ¶23 (quoted source omitted).

B. Fees Arising From the New Mexico Action

1. Background Regarding New Mexico Action and Fee Dispute

¶45 The 2006 and 2008 written leases each included a forum selection provision and two attorney fee shifting provisions. The forum selection provision in each lease provided that "[v]enue for any … court action shall be in the State of Wisconsin, Racine County." There is no dispute between the parties about the meaning of this provision.

¶46 The fee shifting provision at issue here stated, in pertinent part:

> Attorney's fees. In the event either party employs the services of an attorney to enforce the provisions of this Contract and if the dispute results in the filing of a legal … complaint …, the prevailing party shall be entitled to reasonable attorney's fees, cost of expert witnesses, court … fees, and other expenses of the proceedings, for money damages, ….[4]

¶47 In December 2010, shortly before Burlington filed this Wisconsin action, Montoya sued Burlington in New Mexico state court for breach of contract

[4] This is the second of the two fee shifting provisions contained in each written lease. The first shifting provision in each lease is not pertinent to our analysis of Burlington's entitlement to its legal fees for the New Mexico litigation, because we conclude that the second provision applies here. However, we address the other fee shifting provision in discussion below regarding legal fees arising from this case, because Burlington refers to it in one argument.

Separately, both fee shifting provisions refer to legal expenses beyond fees paid to attorneys, such as costs for experts, but there is no dispute in this appeal about additional expenses, and therefore we consistently use the phrase attorney's fees as shorthand for the broader set of expenses at issue.

and seeking declaratory judgment, making essentially the same arguments that could constitute its later counterclaims in this action. Montoya's claims in the New Mexico action alleged conduct occurring during periods covered by both the 2006 and 2008 leases and also conduct thereafter, under the oral or implied agreement.

¶48 Burlington successfully removed Montoya's New Mexico action to federal district court in New Mexico and then moved for dismissal of the case, on the basis of the forum selection provision in the 2006 and 2008 leases. After Montoya stated that it would not oppose the motion to dismiss, the federal court granted Burlington's motion, concluding that the case "should be dismissed for improper venue."

¶49 After Burlington filed this Wisconsin action in January 2011, but before trial, Burlington moved the Wisconsin circuit court for partial summary judgment and an award of $23,010.32 for Burlington's attorney's fees and expenses generated as a result of the New Mexico litigation, based on the forum selection and attorney fee-shifting provisions in the 2006 and 2008 leases. Burlington argued that Montoya's filing and unsuccessful pursuit of the New Mexico action breached the forum selection provision, and that Burlington had prevailed under the fee-shifting provisions. The court granted Burlington's motion for partial summary judgment, finding and awarding damages of $23,010.32.

¶50 In post-trial briefing in this action, Montoya asked the court to reverse this decision of a judge formerly assigned to the case to grant partial summary judgment. Montoya argued that the earlier decision was in error, because there was no meeting of the minds of the parties regarding a fee shifting

agreement during the period covered by the oral or implied agreement. The court agreed with Montoya, explaining in a written decision its view that Burlington was not entitled to the New Mexico-suit related fees, and reversing the earlier summary judgment.

¶51 Burlington moved for reconsideration of this decision on multiple grounds, which were rejected by the circuit court. Burlington now cross-appeals on the issue of the fees for the New Mexico litigation expenses, making a series of arguments that it was entitled to summary judgment on this issue.

2. Discussion of New Mexico Action and Fee Dispute

¶52 We begin by clarifying that Montoya does not challenge the size of the fee award initially made to Burlington for its attorney's fees in the New Mexico litigation, but instead solely argues that Burlington is not entitled to an award of any size for Burlington's legal expenses in defending against the New Mexico action.

¶53 Our next point of clarification is that the parties present us with purely legal arguments for and against the fees initially awarded. Neither side argues that either of the two circuit court judges made any pertinent findings of fact or exercised discretion in a manner that requires deference on appeal. We follow the lead of the parties.

¶54 With those clarifications, we employ a plain language interpretation of the fee shifting provision to conclude that Burlington is entitled to the attorney's fees in connection with the New Mexico litigation: Burlington was a "party" that "employ[ed] the services of an attorney to enforce the provisions" of the 2006 and 2008 leases, namely the forum selection provision, in a dispute that

"result[ed] in the filing of a legal … complaint," namely the New Mexico action, and Burlington was "the prevailing party" in litigating the New Mexico action.

¶55 Montoya does not dispute that its New Mexico complaint contained claims based in part on alleged breaches of each of the two written leases. Instead, Montoya makes two arguments. First, Montoya briefly asserts that the venue issue was not part of a dispute that "resulted in the filing" of the New Mexico complaint, and therefore under the terms of the fee shifting provision, there was no "dispute result[ing] in the filing of" a complaint. This is not a well-developed argument, but to the extent we understand it, we are not persuaded. It appears that Montoya asks us to read the fee shifting provision to exclude as a prevailing party any party that does not prevail on a specific issue raised by the party filing the complaint at issue. We reject this as a contorted reading of the provision, which contemplates only that the prevailing party hired an attorney to enforce a contract term (here the forum selection provision) as part of a dispute that has resulted in the filing of a complaint.

¶56 Second, as its primary argument, Montoya focuses on the "prevailing party" term, and on the fact that its New Mexico complaint contained claims based in part on conduct occurring during the period of the oral or implied agreement. Montoya primarily argues from the premise that the parties did not agree to forum selection in their oral or implied agreement. If that is the case, Montoya contends, Burlington could not be entitled to the fee award because *not all* of Montoya's claims in the New Mexico suit were subject to dismissal under the forum selection provision.

¶57 In a separate section below, we address the issue and decide that Montoya's premise is correct. That is, we conclude that there was not an

agreement between the parties to have a fee shifting agreement after June 2009. However, that does not matter on this issue, because Montoya filed a complaint that covered the entire course of the relationship. This included the periods covered by the two written leases. Montoya filed its action and pursued it at least briefly, with full knowledge of the forum selection provisions and the fee shifting provisions in the written leases. And, *all* of Montoya's claims were dismissed in the only complaint at issue in connection with Burlington's attorney's fees in the New Mexico action. As pertinent here, the fee shifting provision contemplates litigation arising from an action initiated by a civil complaint in which one party prevails. As to the New Mexico action, Burlington was the unqualified victor. The single, dispositive issue in the New Mexico action ended up being the applicability of the forum selection provision and on this issue Montoya conceded defeat.

¶58 For these reasons, we conclude that the circuit court's initial decision granting summary judgment to Burlington on the issue of attorney's fees arising out of the New Mexico action was proper.[5]

C. Fees Arising From This Action

¶59 Turning from the attorney's fees arising from the dismissed New Mexico action to those arising from the litigation in this case, the circuit court

[5] Given this result, we need not and do not reach Burlington's additional argument that its legal expenses in the New Mexico case may be awarded for breach of contract damages under common law.

concluded that neither party was entitled to attorney's fees under any contract between the parties.[6] We agree.

¶60 We begin by observing that the analysis here is starkly different from that used to determine whether attorney's fees in the New Mexico action should be awarded. As discussed above, Burlington was the only winner in connection with the New Mexico litigation; there was no successful result for Montoya weighing against Burlington's successful result. In this Wisconsin action, however, each party made multiple claims, which met with mixed results.

¶61 Summarizing, the following jury determinations were successes for Montoya and failures for Burlington: Montoya did not breach the 2006 lease with respect to rent owed; Montoya did not breach the 2008 lease with respect to rent owed; Montoya did not breach any agreement with respect to proper repair and maintenance of the plant; Burlington breached the 2006 lease by failing to provide Montoya with a plant in working order, but Montoya was awarded no compensation beyond $18,019.41 that was credited to Montoya on 2007 invoices.

¶62 The following were successes for Burlington and failures for Montoya: Montoya breached the oral or implied agreement with respect to rent, resulting in an award of $329,825; Montoya was obligated to pay for transport costs to return the plant to Burlington, in the amount of $31,077.44; Burlington did not breach any of the agreements for failing to reimburse Montoya for repair and replacement expenses incurred by Montoya; Burlington and Montoya did not have an oral or implied contract to lease the plant until the completion of Montoya's

[6] The court stated that "both parties are prevailing parties," but the court made clear that this meant that neither party was entitled to attorney's fees as a prevailing party.

work on a highway near Des Moines, New Mexico, or a separate project requiring use of the plant at an airport at Clovis, New Mexico.

¶63 Highly significant to the circuit court's decision against awarding attorney's fees to either party was the court's conclusion that the parties did not form an oral or implied agreement regarding fee shifting following expiration of the 2008 lease. This is highly significant, because as reflected in the summary above, the jury's monetary damages awards to Burlington arose under the oral or implied agreement. We conclude that the circuit court was correct in finding no agreement to potentially shift fees in the oral or implied agreement, contrary to the American Rule.

¶64 Burlington fails to direct us to proof before the circuit court of an agreement of the parties on the essential terms of a fee shifting agreement covering the period after June 2009. Burlington points only to evidence of exchanges between the parties of proposed contracts that contained the same fee shifting language as was contained in the 2006 and 2008 leases, but which, by Burlington's own admission, contained other terms that differed and were never executed. Absent proof of additional pertinent exchanges or discussions on this topic, Burlington describes classic *pre*-contract negotiation, with the parties exchanging offers and counteroffers, asking each other to sign particular written agreements, but where no agreements are in fact executed. *See* ***American Nat'l Prop. & Cas. Co. v. Nersesian***, 2004 WI App 215, ¶16, 277 Wis. 2d 430, 689 N.W.2d 922 ("Until accepted in the mode and manner expressly provided by the terms of [an] offer, there remains an unaccepted offer, which cannot, in itself, be considered a binding contract."). The parties here unsuccessfully attempted to negotiate a third written lease. Since Burlington points only to unexecuted, proposed contracts, its argument goes nowhere, not least in this particular context.

See ***Hunzinger Const. Co. v. Granite Res. Corp.***, 196 Wis. 2d 327, 340, 538 N.W.2d 804 (Ct. App. 1995) ("As a general rule," courts "will not construe an obligation to pay attorney's fees contrary to the American Rule unless the contract provision clearly and unambiguously so provides.").

¶65 This conclusion leaves Burlington with little of substance to argue in support of its contention that it was the prevailing party at trial. As Montoya points out, Montoya defeated each of the Burlington claims related to the 2006 and 2008 leases.

¶66 Burlington argues that Montoya's "only 'wins' under the 2006 and 2008 leases were against [Burlington] for small unpaid rent claims during these lease periods." This is not accurate. With one jury answer alone, finding no breach by Montoya of any of the alleged agreements to repair and maintain the plant, the jury gave Montoya a victory on an issue that could have cost Montoya more than $500,000 under the arguments advanced strenuously by Burlington.

¶67 Burlington makes a broad argument based on the first of the two fee shifting provisions in the 2006 and 2008 leases, which provided, under the "Termination" section:

> In the event [Montoya] breaches any covenant herein, [Montoya] agrees to pay [Burlington] all of its costs incurred to enforce this agreement, including but not limited to[:] attorney's fees, court costs, deposition and transcript costs, special process server fees, and bond costs and expert witness fees.

Burlington points to the fact that the jury found a breach by Montoya of at least one of the agreements between the parties, under which Montoya was to pay for transportation costs to return the plant to Burlington. Based on this finding, Burlington argues that it is entitled to attorney's fees because "the plain language

of … this provision does not provide for reduction" in the attorney's fees owed to Burlington in proportion to Burlington's failures to prevail.

¶68 This argument is based on an unreasonable interpretation of the two written leases. The two different fee shifting provisions in each of the leases must be read together. When the two provisions are read together, what is plainly contemplated in disputes such as this one, involving claims and cross-claims raising issues that are resolved based on a common nucleus of facts through litigation, is an assessment of whether there was a prevailing party, not an isolated assessment of breaches by lessees alone.

¶69 Similarly unavailing is Burlington's citation to ***Cook v. Public Storage, Inc.***, 2008 WI App 155, ¶95-98, 314 Wis. 2d 426, 761 N.W.2d 645, which addresses the rule that courts "should focus on the significance of the overall relief obtained" by a party when the party achieved substantial success and particular unsuccessful claims were brought and pursued in good faith. Here, Burlington fails to show that the "overall relief" it obtained was significant compared to "overall relief" obtained by Montoya.

CONCLUSION

¶70 For these reasons, we affirm the decisions of the circuit court to: deny Montoya's JNOV motion to change the jury's answers regarding Montoya's breach of an oral and implied agreement following the 2008 lease period regarding the amount of rent owed, based on the doctrine of account stated; deny Burlington's motion to change the verdict regarding an obligation to repair and maintain the plant; and deny Burlington's motion to award it attorney's fees arising from litigation of this action. We reverse the decision of the circuit court to reverse the initial award to Burlington of attorney's fees arising from litigation

of the New Mexico action, and direct that the court enter judgment in favor of Burlington for the amount of those legal expenses, which Montoya does not dispute.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

Not recommended for publication in the official reports.