COURT OF APPEALS
DECISION
DATED AND FILED

May 24, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1110 **Cir. Ct. No. 2011CV1069**

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

GE PROPERTIES, LLC, NATIONAL AVENUE 15710, LLC AND ELIESHA R. EVANS, D.C., S.C.,

PLAINTIFFS-APPELLANTS,

V.

MICHELLE DRAGGOO,

DEFENDANT-RESPONDENT.

APPEAL from a judgment and orders of the circuit court for Waukesha County: PATRICK C. HAUGHNEY, Judge. *Affirmed*.

Before Curley, P.J., Kessler and Brash, JJ.

¶1 CURLEY, P.J. GE Properties, LLC, National Avenue 15710, LLC, and Eliesha R. Evans, D.C., S.C. (collectively "GE Properties" unless context requires otherwise) appeal from the judgment on the verdict and orders denying

GE Properties' postverdict and attorney's fees motions. On appeal, GE Properties argues that: (1) the evidence is insufficient to establish that the parties agreed to modify the lease termination date; (2) the evidence is insufficient to establish that Dr. Michelle Draggoo did not take property that she was not entitled to take when she vacated the premises; (3) GE Properties is entitled to judgment notwithstanding the verdict; and (4) GE Properties is entitled to actual or reasonable attorney's fees as provided in the lease. For the reasons set forth below, we affirm.

BACKGROUND

¶2 This appeal arises from a dispute concerning the terms of a commercial lease and a related Asset Purchase Agreement. In 2005, Dr. Eliesha Evans owned a chiropractic business that leased office space located at 15720 West National Avenue in New Berlin, Wisconsin (the "premises").[1] That building was owned by GE Properties, LLC, and Dr. Evans and her husband, Attorney James Gatzke, are the members of GE Properties, LLC. GE Properties, LLC, eventually transferred ownership of the premises to National Avenue 15710, LLC, a related entity.

¶3 Dr. Draggoo purchased Dr. Evans's chiropractic clinic in October 2005.[2] Pursuant to the terms of the sale, Dr. Draggoo was required to continue leasing space from GE Properties. At some point during the lease term, Dr.

[1] Eliesha Gatzke is known professionally as Dr. Eliesha Evans, which is how we refer to her in this opinion.

[2] Dr. Draggoo now goes by the name Dr. Stamm; however, we refer to her as Dr. Draggoo in this opinion.

Draggoo increased the amount of space leased at that location, and all leases had the same September 30, 2010 termination date.

¶4 At trial, Dr. Draggoo testified that she became concerned about the amount of rent she was paying after learning it exceeded the rent being charged at similar locations nearby. She further testified that she engaged in numerous conversations with Attorney Gatzke, her primary landlord contact, in early 2010 regarding the amount of her rent and sought to have the amount reduced. In emails in February and March 2010, Attorney Gatzke reminded Dr. Draggoo that her lease ran until October 2010.

¶5 Dr. Draggoo ultimately moved her business and entered a lease at a new location effective October 1, 2010. However, prior to entering the lease at the new location, Dr. Draggoo and Attorney Gatzke engaged in conversations, both orally and in writing, regarding the termination of Dr. Draggoo's lease. Dr. Draggoo testified at trial that she had a phone conversation with Attorney Gatzke on September 24, 2010, during which they discussed Dr. Draggoo's lease going to a month-to-month lease and that they agreed that Dr. Draggoo could stay through October 2010. Dr. Draggoo took notes memorializing that conversation. Those notes included the phrases "month to month," "end of October," and "pay October," and Dr. Draggoo explained that those notes referenced options that Dr. Draggoo and Attorney Gatzke discussed during that conversation.

¶6 Attorney Gatzke disputed that the September 24 conversation ever occurred and denied that there was ever an agreement to amend the lease allowing Dr. Draggoo to stay beyond September 30, 2010. However, he did confirm that during the term of the lease, he and Dr. Draggoo had conversations regarding a reduction in rent and extending or renewing Dr. Draggoo's lease, and he also

acknowledged that at some point they may have discussed Dr. Draggoo moving to a month-to-month lease.

¶7 On September 29, 2010, Dr. Draggoo sent an email to Attorney Gatzke proposing that she leave the premises by October 8, 2010, and that she pay the prorated rent for those eight days, totaling $2762.97. Attorney Gatzke did not respond, and a check in the amount of $2762.97 was thereafter delivered to Attorney Gatzke's office on October 1, 2010. The "memo" line of the check stated "Oct. 8 days." Although the September 29 email, entered as an exhibit at trial, clearly listed "Jim Gatzke" in the "to" line, Attorney Gatzke testified that he never received the email prior to the end of the lease period. After receiving the October 1 check, Attorney Gatzke replied to Dr. Draggoo via letter dated October 2, 2010, stating that the remainder of the October 2010 rent remained due and that GE Properties was electing to extend Dr. Draggoo's lease for one year as a holdover tenant pursuant to WIS. STAT. § 704.25(2) (2013-14).[3] Dr. Draggoo responded via email on October 6, 2010, stating that she had emailed him prior to October 1, 2010, that she had been fully prepared to move out prior to October 1, and that she did not do so because she assumed her proposal to stay through October 8 was acceptable to him since he had not objected.

¶8 Dr. Evans also testified at trial. In addition to testifying about the terms of the sale of her practice to Dr. Draggoo, she testified that Dr. Draggoo took property that did not belong to her when she vacated the premises and moved her chiropractic business to its new location. Some of the items Dr. Evans

[3] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

testified were missing include medical equipment, a radio, shelving units, magazine racks, a garbage can, and hand sanitizers. Dr. Draggoo testified that she believed that such items, although not explicitly identified in the Asset Purchase Agreement, were nevertheless included in the terms of the sale because Dr. Evans left those items behind when she sold the business.

¶9 At trial, GE Properties sought $96,042.35—the amount of rent it alleged Dr. Draggoo owed in rent as a holdover tenant—as well as $6611.28 for property it alleged was not sold to Dr. Draggoo under the terms of the Asset Purchase Agreement and $5190 for the cost of repairs required for damage exceeding normal wear and tear.[4]

¶10 As relevant here, the jury found that: (1) Dr. Draggoo had permission from GE Properties to remain in the premises after September 30, 2010; (2) the parties had agreed to an "End of October 2010" termination date; (3) Dr. Draggoo was required to pay the remainder of the October 2010 rent; and (4) Dr. Draggoo had not improperly removed property when she vacated the premises. The jury also found that Dr. Draggoo had caused excessive wear and tear and awarded $3542 on that claim. GE Properties thereafter filed a motion seeking postverdict relief, arguing that: (1) it was entitled to judgment notwithstanding the verdict; (2) the evidence was insufficient to support the jury's finding that the parties agreed to an "End of October 2010" termination date; and (3) the evidence was insufficient to support the jury's finding that Dr. Draggoo had not improperly removed property when she vacated the premises. GE

[4] GE Properties does not appeal the jury's verdict as to its claim for damages for excessive wear and tear.

Properties also filed a motion seeking attorney's fees in the amount of $29,902.60, arguing that it was entitled to those fees under the terms of the lease.

¶11 The trial court held a motion hearing concerning GE Properties' postverdict motions on June 17, 2014, and a motion hearing concerning GE Properties' motion for attorney's fees on October 23, 2014. The trial court denied the postverdict motions and the request for attorney's fees under the terms of the lease, although it did award GE Properties $500 in statutory attorney's fees and additional costs totaling $1716.75.

¶12 GE Properties now appeals the judgment on the verdict and the orders denying the postverdict and attorney's fees motions.[5]

ANALYSIS

¶13 On appeal, GE Properties raises the issues it raised before the trial court: (1) the evidence is insufficient to establish that the parties agreed to modify the termination date; (2) the evidence is insufficient to establish that Dr. Draggoo did not take property that she was not entitled to take when she vacated the premises; (3) GE Properties is entitled to judgment notwithstanding the verdict; and (4) GE Properties is entitled to actual or reasonable attorney's fees as provided in the lease. We address each argument in turn, beginning with GE Properties' argument seeking judgment notwithstanding the verdict.

[5] GE Properties filed an earlier Notice of Appeal; however, we remanded the matter back to the trial court for lack of jurisdiction, as no final judgment had been entered for the purpose of appeal at that time. The trial court entered a judgment on the verdict on April 16, 2015, and GE Properties thereafter filed a Notice of Appeal on June 1, 2015.

I. The trial court properly denied the motion for judgment notwithstanding the verdict.

¶14 GE Properties argues that it should prevail despite the jury's verdict because it is undisputed that the lease at issue required modifications to be made in writing and that no written modification extending the termination date was introduced at trial, nor can one be found anywhere in the record. According to GE Properties, because there was no written modification of the lease, the jury could not conclude that the parties agreed to a valid termination date other than the September 30, 2010 date stated in the lease, therefore resulting in Dr. Draggoo becoming a holdover tenant under WIS. STAT. § 704.25. We disagree.

¶15 Judgment notwithstanding the verdict is appropriate when a jury verdict "is proper but, for reasons evident in the record which bear upon matters not included in the verdict, the movant should have judgment" as a matter of law. WIS. STAT. § 805.14(5)(b). A motion for judgment notwithstanding the verdict thus does not challenge the sufficiency of the evidence to support a verdict; rather, it "'admits for purposes of the motion that the findings of the verdict are true, but asserts that judgment should be granted [to] the moving party on grounds other than those decided by the jury.'" ***Management Comput. Servs. v. Hawkins Ash, Baptie & Co.***, 206 Wis. 2d 158, 176, 557 N.W.2d 67 (1996) (citation omitted).

¶16 Judgment notwithstanding the verdict should be granted only in those cases where the moving party has shown that the facts in the record are sufficient to permit the court to enter judgment as a matter of law. *See* ***Herro v. DNR***, 67 Wis. 2d 407, 412-13, 227 N.W.2d 456 (1975); *see also* ***Johnson v. Neuville***, 226 Wis. 2d 365, 373, 595 N.W.2d 100 (Ct. App. 1999). Whether a trial court properly denied a motion notwithstanding the verdict is a question of law we review *de novo*. ***Management Comput. Servs.***, 206 Wis. 2d at 177.

¶17 The lease between GE Properties and Dr. Draggoo contains provisions pertaining to amendments and modifications of the lease. Specifically, the lease includes the following:

> 20.1 This Lease may not be amended, modified, or terminated, nor may any obligation under it be waived orally. No amendment, modification, termination, or waiver shall be effective for any purpose unless it is in writing and signed by the party against whom enforcement thereof is sought.
>
> ….
>
> 21.11 *Modification*. No changes, additions, or interlineations made to this Lease shall be binding unless initialed by both parties.

GE Properties argues that based upon these provisions, the parties could only agree to modify the termination date in writing and that any conclusion that the parties modified the termination orally, by their conduct, or in some other manner other than in writing, is contrary to law.

¶18 Parties to a written contract may amend the contract orally or by their conduct, even where the contract requires written modifications. *See* ***S&M Rotogravure Serv., Inc. v. Baer***, 77 Wis. 2d 454, 468-69, 252 N.W.2d 913 (1977). Waiver of a provision in a written contract, such as a provision requiring that all amendments or modifications be in writing, may be shown by submitting evidence of oral agreements between the parties or by the parties' conduct. *See* ***Royster-Clark, Inc. v. Olsen's Mill, Inc.***, 2006 WI 46, ¶¶21-32, 290 Wis. 2d 264, 714 N.W.2d 530. This principle also applies to contracts subject to the statute of frauds. *See* ***Hilkert v. Zimmer***, 90 Wis. 2d 340, 343, 280 N.W.2d 116 (1979) (oral modification of a written contract subject to the statute of frauds is enforceable in equity under Wisconsin law).

¶19 Here, the jury was presented with evidence from which it could adduce that the parties agreed to waive the written amendment requirement in the lease. For example, the jury heard testimony that Dr. Draggoo and Attorney Gatzke spoke on September 24, 2010, and that Dr. Draggoo's notes memorializing that conversation indicated that they had discussed going to a month-to-month lease and that Dr. Draggoo was to pay rent for October 2010. The jury also heard testimony that the parties had engaged in numerous conversations beginning early in 2010 regarding Dr. Draggoo's displeasure with the rental amount and the termination of her lease. Such conduct can reasonably be interpreted as establishing an oral modification and therefore a waiver of the written modification requirement.

¶20 To the extent that GE Properties suggests that an oral modification of the lease was contrary to law because the statute of frauds requires a written modification of the lease, we reject that argument. It has been established that even where the statute of frauds may otherwise require a modification to a contract be in writing, there are exceptions to that requirement, such as where the parties have waived the writing requirement or the parties have performed at least some of the terms of the modified contract. *See, e.g.*, ***Royster-Clark, Inc.***, 290 Wis. 2d 264, ¶¶19-23, 37-43. As previously noted, the jury heard testimony from the parties regarding the oral modification, and it was entitled to find Dr. Draggoo's testimony most credible.

¶21 As we have explained, where a party seeks judgment notwithstanding the verdict, we accept, for the purpose of the motion, that the jury's factual findings are correct. *See* ***Management Comput. Servs.***, 206 Wis. 2d at 176-77. Thus, we assume here that the parties agreed to amend the lease's termination date from September 30, 2010, to the end of October 2010, as the jury

found. Because we reject GE Properties' argument that a modification of the lease's termination date could only be shown by the existence of a *written* modification or amendment, GE Properties is not entitled to judgment notwithstanding the verdict.

¶22 Additionally, GE Properties' argument that the jury's verdict, and the trial court's affirmation of that verdict, "stands for the proposition that written agreements between sophisticated parties can be *unilaterally* modified, without the existence of any writing, despite an express agreement between the parties to the contrary," is a mischaracterization of the verdict. The jury's findings do not conclude that only *one* party desired an amendment; rather, the jury's findings provide that *both* parties, through their words or conduct, agreed to an amendment of the termination date in the lease and thereby waived any written requirement. Accordingly, the trial court did not err in denying the motion.

II. The trial court properly denied GE Properties' motion to amend the jury's verdict answers relating to the amendment of the lease termination date and to the claim that Dr. Draggoo wrongfully took property she was not entitled to take.

¶23 Having concluded that GE Properties is not entitled to judgment notwithstanding the verdict, we turn next to its challenge of the trial court's denial of its postverdict motions relating to the sufficiency of the evidence. Specifically, GE Properties argues on appeal that there was insufficient evidence to support the jury's findings as to questions two, five, six, ten, and eleven. Question two asked whether Dr. Draggoo "ha[d] permission from [GE Properties] to remain in possession of subject property beyond September 30, 2010," to which the jury responded "Yes." Question five asked "[w]hat was the termination date?" and the jury responded "End of October 2010." Question six asked "[w]hat sum of money, if any, will fairly and reasonably compensate [GE Properties] as a result of

Defendant continuing to occupy the leased premises after September 30, 2010," to which the jury responded "7943.54." Question ten asked whether Dr. Draggoo "remove[d] any items from the premises that she was not entitled to under the terms of the lease or any other contract," and the jury said "No." Finally, question eleven asked the jury to determine the value of the items improperly removed; however, the jury was only required to answer question eleven if it answered "yes" to question ten, and because the jury answered "no" to that question, the jury did not answer question eleven.[6]

¶24 WISCONSIN STAT. § 805.14(5)(c) allows a party to challenge the sufficiency of the evidence to sustain an answer in a jury's verdict. The court may only grant a motion challenging the sufficiency of the evidence if it "is satisfied that, considering all credible evidence and reasonable inferences therefrom in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a finding in favor of such party." *See* WIS. STAT. § 805.14(1).

¶25 As a general rule, we will affirm a jury verdict if there is any credible evidence to support it. *See* ***Meurer v. ITT Gen. Controls***, 90 Wis. 2d 438, 450, 280 N.W.2d 156 (1979). "[I]f there is any credible evidence which, under any reasonable view, fairly admits an inference that supports a jury's finding, that finding may not be overturned. This is particularly true when the trial

[6] Because the jury did not answer question eleven due to its having found that Dr. Draggoo did not remove property that she was not entitled to take, it appears that Dr. Evans requests that we conclude that the value of the allegedly missing property is $6611.28 and that we award her that amount. We decline to do so. Also, although the verdict form contained thirteen questions, we discuss only those questions and responses specifically identified and challenged on appeal.

court upholds the verdict after denying postverdict motions." ***City of Milwaukee v. NL Indus.***, 2008 WI App 181, ¶21, 315 Wis. 2d 443, 762 N.W.2d 757 (internal quotation marks and citations omitted). To that end, appellate courts search the record for any credible evidence to sustain the jury's verdict, not for evidence to contradict it. *See* ***Wheeler v. General Tire & Rubber Co.***, 142 Wis. 2d 798, 809, 419 N.W.2d 331 (Ct. App. 1987). Where more than one inference can be drawn from the evidence adduced at trial, the court must accept the inference drawn by the jury. ***Best Price Plumbing, Inc. v. Erie Ins. Exch.***, 2012 WI 44, ¶43, 340 Wis. 2d 307, 814 N.W.2d 419.

A. There is credible evidence in the record to support the jury's finding that the parties agreed to a termination date of October 31, 2010.[7]

¶26 GE Properties complains that the jury lacked credible evidence to support its finding that the parties agreed to an October 31, 2010 termination date, thereby also effectively finding that Dr. Draggoo was not a holdover tenant under Wisconsin law. Contrary to GE Properties' position, the record does contain such evidence.

¶27 By its written terms, the lease terminated on September 30, 2010, and it is undisputed that Dr. Draggoo did not vacate the premises until October 8, 2010. At trial, the parties disputed whether Dr. Draggoo became a holdover tenant subject to WIS. STAT. § 704.25(2)(a), as GE Properties argues, or rather, whether the parties had modified or amended the lease thereby allowing Dr. Draggoo to remain in the premises beyond September 30, 2010.

[7] The jury verdict states that the agreed-upon termination date was the "End of October 2010." We refer to that date as October 31, 2010.

¶28 Here, both Dr. Draggoo and Attorney Gatzke testified regarding conversations they had prior to September 30, 2010. As previously explained, Dr. Draggoo testified that she spoke with Attorney Gatzke on September 24, 2010, and that they discussed going to a month-to-month lease or that Dr. Draggoo could remain through October 2010, whereas Attorney Gatzke denied that that conversation occurred. Dr. Draggoo further testified about the notes she took during the September 24, 2010 phone call between Dr. Draggoo and Attorney Gatzke and those notes include the phrases "month to month," "end of October," and "pay October." Attorney Gatzke did confirm, however, that they may have discussed a month-to-month arrangement at some point in time. Thus, in light of the conflicting testimony between Dr. Draggoo and Attorney Gatzke, the issue became primarily one of credibility for the jury.

¶29 Additional evidence presented at trial also supports the jury's finding. For example, an email from Attorney Gatzke to Dr. Draggoo illustrating that GE Properties knew as early as February 2010 that Dr. Draggoo was unhappy with the lease was admitted as an exhibit. Another email between Dr. Draggoo and Attorney Gatzke introduced at trial revealed that prior to September 30, 2010, Dr. Draggoo had sought to negotiate a shorter extension, through October 8, 2010. Dr. Draggoo also testified that prior to vacating the subject property, she received mail addressed to Dr. Evans from the IRS and that the address listed—15720 West National Avenue—was the address that Dr. Draggoo would soon be vacating. The date of the IRS letter was September 30, 2010. Based on the IRS communication, the jury could reasonably infer that GE Properties was aware that Dr. Draggoo would be vacating the premises in the near future. Because there is credible evidence upon which the jury could have reached its conclusion, we will not disturb the jury's finding.

¶30 Although such evidence admittedly may be construed in different ways, particularly in light of the contradicting testimony, the jury, as trier of fact, was entitled to make a credibility determination and infer that the evidence, as a whole, showed an agreed-upon termination date of October 31, 2010.[8] For this court to find that there was insufficient evidence to support the jury's finding as to the termination date, we would have to conclude that there had been such a complete failure of proof that the only reasonable conclusion left to draw is that the verdict was based on pure speculation. *See* ***Kubichek v. Kotecki***, 2011 WI App 32, ¶14, 332 Wis. 2d 522, 796 N.W.2d 858. The evidence in the record does not demonstrate such a failure. Because we conclude that sufficient evidence supporting the jury's verdict on this issue was introduced at trial, the trial court did not err in denying GE Properties' post-verdict motion.

B. There is credible evidence in the record that supports the jury's finding that Dr. Draggoo did not improperly remove certain items from the property.

¶31 The parties also disputed at trial whether certain items that Dr. Evans alleged were missing after Dr. Draggoo vacated the premises—such as posters, magazine racks, hand sanitizers, file holders, medical equipment, and a paper towel holder, among others—were items that were included in the terms of the sale and Asset Purchase Agreement when Dr. Draggoo purchased Dr. Evans's chiropractic business. Dr. Evans argued that Dr. Draggoo was not entitled to take

[8] Throughout its brief, GE Properties refers to the jury as having improperly found that the parties agreed to a month-to-month lease. This is incorrect. The jury specifically found that the parties had agreed to an "End of October 2010" termination date and rejected the conclusion that the parties had agreed to a month-to-month lease after September 2010. This is evident from the jury's response to verdict question five, as it selected the "End of October 2010" option and *not* any of the other options presented, which included "Month to Month."

the items identified because those items were not specifically listed in the Asset Purchase Agreement. The jury determined that Dr. Draggoo did not improperly remove property she was not entitled to take, and Dr. Evans now argues that there was no credible evidence to justify the jury's finding. Dr. Evans is wrong.

¶32 The Asset Purchase Agreement declared that the sale included "all equipment of that division (see addendum A)." Although the Asset Purchase Agreement contains an attachment that includes a list of "Purchased Equipment," the copy of the Asset Purchase Agreement admitted into evidence at trial does not include a specifically identified "addendum A." When questioned about the absence of an attachment specifically titled "addendum A," Attorney Gatzke testified that he did not know if a specific document identified as "addendum A" was attached to the Asset Purchase Agreement; however, he believed that it was "logical" that the attachment listing "purchased equipment" "may very well be" the referenced "addendum A."

¶33 Dr. Evans also testified regarding the Asset Purchase Agreement, and she stated that only the specific items listed were included in Dr. Draggoo's purchase of Dr. Evans's business. Dr. Draggoo, to the contrary, testified that the parties intended the sale to include items in addition to those specifically identified. Dr. Draggoo explained her belief that those items were part of the business and that they had not been specifically excluded in the terms of her purchase of the business, as well as that an asset list generally only includes the more expensive items belonging to the business. Moreover, Dr. Draggoo disputed that she had taken certain items identified in the complaint, although she did admit to having taken some of the identified items based on her belief they were included in the purchase. Dr. Draggoo also testified that the list of items identified as being improperly removed did *not* include other items that Dr. Draggoo had

taken with her that were not specifically identified in the Asset Purchase Agreement. Moreover, Dr. Draggoo explained that five years had passed since she purchased the business from Dr. Evans and that at no point in time had Dr. Evans ever requested that Dr. Draggoo return the items identified in the complaint.

¶34 In light of the apparent lack of clarity in regard to the specific items actually sold in accordance with the Asset Purchase Agreement, as well as Dr. Draggoo's testimony that she did not take certain items and that those she did take, were included in her purchase of the business, the jury was entitled to weigh the credibility of the evidence and determine that Dr. Draggoo did not improperly take any items when she vacated the premises. Moreover, the Asset Purchase Agreement states that the sale of the business included "miscellaneous supplies and inventory on hand on date of closing." Thus, the evidence in the record is sufficient to support the jury's verdict, and the trial court did not err in denying the postverdict motion challenging the jury's verdict.

III. The trial court did not err in denying GE Properties' motion for actual or reasonable attorney's fees.

¶35 An award of attorney's fees is generally committed to the trial court's discretion and is entitled to deferential treatment on review. *See* ***Cook v. Public Storage, Inc.***, 2008 WI App 155, ¶91, 314 Wis. 2d 426, 761 N.W.2d 645. We will affirm the trial court if it "'employed a logical rationale based on the appropriate legal principals of facts of record.'" ***Id.*** (citation omitted). A trial court properly exercises its discretion if it "'employs a logical rationale based on the appropriate legal principles and facts of record.'" ***Village of Shorewood v. Steinberg***, 174 Wis. 2d 191, 204, 496 N.W.2d 57 (1993) (citation omitted). The interpretation of a contract, however, is a question of law we review *de novo*.

Borchardt v. Wilk, 156 Wis. 2d 420, 427, 456 N.W.2d 653 (Ct. App. 1990). Whether the contract is ambiguous, meaning that the "terms are reasonably or fairly susceptible to more than one construction," is also a question of law we review *de novo*. *See* ***id.***

¶36 Under the "American Rule," each party is responsible for its own attorney's fees unless a statute or enforceable contract provides otherwise. ***Klemm v. American Transmission Co., LLC***, 2011 WI 37, ¶42, 333 Wis. 2d 580, 798 N.W.2d 223. In Wisconsin, a party is not entitled to attorney's fees based on a contractual provision unless the contractual language "clearly and unambiguously so provides." ***Hunzinger Constr. Co. v. Granite Res. Corp.***, 196 Wis. 2d 327, 340, 538 N.W.2d 804 (Ct. App. 1995). GE Properties argues on appeal that it is entitled to $29,902.60 in attorney's fees based on the terms of the lease.

¶37 We note at the outset that the trial court did not specifically address whether the attorney's fees provision at issue "clearly and unambiguously" provides for attorney's fees. Instead, it reached its decision after specifically finding that GE Properties not only did "not prevail," it was the "losing party" in this matter based on the amount of damages sought (approximately $107,000) compared to the amount of damages awarded (approximately $11,000), and noting that the attorney's fees provision is one-sided, does not contain the term "reasonable," and that a requirement that GE Properties succeeds in order to recover attorney's fees must be read into the provision.

¶38 On appeal, the parties generally appear to assume that the attorney's fees provision is enforceable, as GE Properties relies upon Section 11.2 and Section 7.1 of the lease and Dr. Draggoo argues primarily that the trial court has discretion in awarding attorney's fees even where a contractual provision for

attorney's fees is at issue.[9] However, because a contract must *clearly and unambiguously* provide for attorney's fees, we begin by first determining whether the attorney's fees provision in the lease clearly and unambiguously entitles GE Properties to recover its attorney's fees.

¶39 In support of its argument, GE Properties points first to Article 11, titled "Right to Cure Defaults," and specifically, Section 11.2, which states:

> *Lessee defaults.* If Lessee fails to make or perform any required payment or act, Lessor may do so for Lessee's account. Lessee shall pay to Lessor on Demand all amounts *so paid by Lessor and all incidental costs and expenses (including attorney's fees and expenses) incurred in connection with the payment or performance*, including interest thereon at the maximum legal rate, or, if no such rate is established, at 15 percent per annum from the date the payment is made or the costs and expenses are incurred.

(Second emphasis added.) GE Properties next points to Section 7.1 of the lease, which provides that Dr. Draggoo was required to keep the premises "in good order and condition (except for ordinary wear and tear or damage caused by casualty or Taking) and shall make all repairs and take all other action necessary or appropriate to keep and maintain the Property in good order or condition." Thus, according to GE Properties, because the jury found that Dr. Draggoo caused damage to the premises beyond normal wear and tear—the jury awarded $3542 of the $5190 claimed in damages on that question—it is clear that Dr. Draggoo violated Section 7.1 of the lease and GE Properties is therefore entitled to attorney's fees pursuant to Section 11.2.

[9] Dr. Draggoo did briefly argue before the trial court that the attorney's fees provision is ambiguous because it does not contain the word "actual" or "reasonable."

¶40 We first point out that the attorney's fees provision that GE Properties relies upon is part of Article 11, "Right to Cure Defaults." The lease defines a "default" as "an event or condition that occurrence of which would, with the lapse of time or the giving of notice or both, become an Event of Default." The lease in turn defines "Event of default" as "defined in Article 24." The lease, however, does not contain an Article 24, and the lease's "Table of Contents" identifies only Articles 1-22. The parties also do not point to any version of the lease in the record containing "Article 24." Thus, it is not clear what actually constitutes a "default" or "Event of default" under the lease, or whether excessive wear and tear itself is a default that would entitle GE Properties to recover attorney's fees. Because the terms and specially defined words used in the attorney's fees provision that GE Properties relies upon are unclear, we conclude that this provision does not clearly and unambiguously identify the exact circumstances in which GE Properties may recover attorney's fees.

¶41 Second, it is unclear whether GE Properties' claim for owed rent even falls within the attorney's fees provision. The provision at issue states, "If Lessee fails to make or perform any required act, *Lessor may do so for Lessee's account*." (Emphasis added.) Dr. Draggoo's failure to pay the total rent owed for October 2010 is arguably a failure "to make or perform *any* required act." (Emphasis added). However, the second clause of that sentence states that in the event Dr. Draggoo fails to perform a required act (*e.g.*, paying rent), "[GE Properties] may do so for [Dr. Draggoo's] account." It is not clear, however, that GE Properties would pay rent, effectively to itself, on Dr. Draggoo's behalf, or even why it would do so, and thus it is unclear whether the attorney's fees provision in Section 11.2 would apply to a failure to pay rent.

¶42 Third, to the extent attorney's fees may be recoverable pursuant to Article 11.2 in certain circumstances, it remains unclear whether recovery of attorney's fees is limited only to those attorney's fees accruing in relation to that specific default, particularly where, as here, certain claims asserted in litigation arguably would *not* fall under the terms of Section 11.2. For example, assuming for the sake of argument that Section 11.2 does allow recovery of attorney's fees for the claim related to excessive wear and tear, may GE Properties only recover attorney's fees related to prosecuting that specific claim? Or, because GE Properties asserted its excessive wear and tear claim in conjunction with other claims, does Article 11.2 allow GE Properties to recover attorney's fees related to *all* claims, even if those claims that would not otherwise fall within the ambit of Article 11.2? The attorney's fees provision does not adequately resolve these questions.

¶43 Fourth, to the extent that GE Properties' request for attorney's fees includes fees incurred in relation to the claim that Dr. Draggoo improperly removed property when she vacated the premises, it does not appear that there is any basis for granting attorney's fees under the lease in regard to that claim. This is particularly so given Dr. Evans's testimony that the items Dr. Draggoo allegedly took contrary to the terms of the Asset Purchase Agreement belonged to Dr. Evans and *not* GE Properties. Neither GE Properties nor Dr. Evans can reasonably argue, and the lease cannot be reasonably read to suggest, that attorney's fees related to the missing property claim—which is entirely unrelated to the lease—are somehow recoverable under the lease, and GE Properties points to no other document under which it claims attorney's fees are allowed.

¶44 In light of ambiguities highlighted above, we find ***Borchardt*** instructive as to our resolution of the attorney's fees issue. In ***Borchardt***, we

considered whether a party who prevailed under a contract allowing for attorney's fees could also collect attorney's fees when the opposing party prevails on a counterclaim related to the underlying transaction. ***Id.***, 156 Wis. 2d 422. There, we concluded that the contract was ambiguous and that the amount of attorney's fees awarded must be "reduced in proportion to the amount recovered on the note less the amount recovered on the counterclaim." *See* ***id***. at 428. In reaching that conclusion, we stated that "[t]o hold otherwise would obligate a party who, in whole or in part, has successfully prosecuted a claim against another to pay the latter's attorney's fees; in short, the winner pays the loser. This is contrary to fundamental concepts of justice and fair play." *See* ***id.*** We also went on to say that "to hold otherwise suggests that the parties intended such a role reversal-a result which we conclude borders on the unreasonable. *In interpreting an ambiguous contract provision, we must reject a construction resulting in unfair or unreasonable results.*" *See* ***id.*** (emphasis added).

¶45 Unlike in ***Borchardt***, here there is no counterclaim to consider in regard to the attorney's fees provision.[10] However, as the trial court noted, GE Properties seeks almost $30,000 in attorney's fees under the lease despite having been awarded only approximately $11,000 out of the approximately $107,000 it sought at trial. Because GE Properties' recovery was so small compared to what it sought, the trial court found that GE Properties was the "losing party," and the trial court did not err in exercising its discretion in reaching that conclusion. Consequently, as in ***Borchardt***, to award GE Properties attorney's fees under these

[10] Dr. Draggoo did file a counterclaim; however, GE Properties indicated in its motion that it removed attorney's fees accruing from defense of Dr. Draggoo's counterclaim in determining the amount of attorney's fees sought.

circumstances would obligate Dr. Draggoo—arguably the "winner"—to pay attorney's fees to GE Properties—arguably the "loser." Such a result is simply not reasonable, particularly where, as here, the contractual provision is unclear and ambiguous, as even contractual provisions for attorney's fees must abide by the concepts of justice and fair play to avoid an unreasonable result where the winner pays the loser. *See* ***id.***, 156 Wis. 2d at 428.

¶46 Accordingly, we conclude that GE Properties is not entitled to attorney's fees because the contractual clause relied upon is unclear and ambiguous, and the trial court did not err in concluding that attorney's fees were not warranted because GE Parties was the "losing party" in light of the nominal amount it recovered on its claims. We therefore will not disturb the trial court's decision relative to attorney's fees under the lease.

By the Court.—Judgment and orders affirmed.

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