COURT OF APPEALS
DECISION
DATED AND FILED

August 17, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1468 **Cir. Ct. No. 2008CV3739**

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

ANDREW S. FALK, D/B/A LAKE COUNTRY AUTO CARE,

PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

V.

DROEGKAMP SALES & SERVICE, INC.,

DEFENDANT-APPELLANT-CROSS-RESPONDENT.

APPEAL and CROSS-APPEAL from an order of the circuit court for Waukesha County: DONALD J. HASSIN, Judge. *Affirmed*.

Before Neubauer, P.J., Reilly and Brunner, JJ.

¶1 PER CURIAM. This case began with a dispute over a withheld security deposit and snowballed into a three-day, fifteen-witness jury trial. Andrew S. Falk, d/b/a Lake Country Auto Care, filed suit against Droegkamp

Sales & Service, Inc., for recovery of his $6,000 security deposit on the parties' commercial lease. Droegkamp counterclaimed for breach of contract, theft, criminal damage to property and waste. The jury decided that Falk was not entitled to the return of his security deposit and rejected Droegkamp's counterclaims. The trial court determined that, while both sides "sort of won," neither party prevailed, and that each had to shoulder its own costs and fees. Droegkamp appeals from the order denying its attorney fees and costs; Falk cross-appeals on grounds that the written order did not dismiss the counterclaims. Neither party's arguments persuade us. We affirm the order in its entirety.

¶2 In 2003, Falk began leasing space from Droegkamp to operate his vehicle repair business. When the parties terminated the lease in 2008, Droegkamp retained Falk's $6,000 security deposit, claiming that Falk left the property in poor condition and repair and removed fixtures and alterations belonging to Droegkamp. Falk filed suit for return of the security deposit, contending that, except for normal wear and tear, the property was surrendered in better condition than when the lease commenced. Falk demanded the $6,000 plus interest, and taxable costs and reasonable attorney fees under the lease.

¶3 In its answer, Droegkamp alleged that it was entitled to an offset of the security deposit. Three months later, it counterclaimed for breach of contract, theft, criminal damage to property and waste, and sought actual damages, triple exemplary damages and costs and attorney fees. In addition to unquantified costs, Droegkamp alleged damages in the neighborhood of $100,000, later modified to about $32,000.

¶4 The jury decided that Falk was not entitled to recover the security deposit. The jury also decided that Droegkamp was not entitled to any additional

damages for theft and criminal damage to property, the only two counterclaim questions on the verdict.[1]

¶5 On motions after verdict, the trial court found that neither party prevailed on its respective claims. The court ordered that, "in accordance with the jury verdict," judgment be entered in favor of Droegkamp for $6,000, which "has already been paid to [Droegkamp] by [Falk]." Noting that Droegkamp's counterclaims "amplified considerably" the lawsuit Falk had commenced, the court also ordered that each party bear its own attorney fees and costs under the lease and its statutory costs. This appeal and cross-appeal follow.

¶6 The first issue on appeal involves the trial court's construction of the attorney fees provision in the parties' lease, which provided:

> COSTS OF ENFORCEMENT. Lessee and Lessor covenant and agree to pay and discharge all reasonable costs, attorney fees and expenses which shall be made and incurred by the other *if the other party shall prevail in an action commenced to enforce the covenants and conditions of this lease*. (Emphasis added.)

Droegkamp contends that the trial court erred in finding that it was not the prevailing party and therefore wrongly concluded that it was not entitled to fees and costs under the lease.

[1] The court did not use Droegkamp's proposed jury instructions for breach of contract, theft or waste and Droegkamp did not propose one for criminal damage to property. Droegkamp's counsel affirmatively stated at the instructions and verdict conference that he had no objections to either the court's proposed instructions or verdict. *See* WIS. STAT. § 805.13(3) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless noted.

¶7 Our task is to determine who, if anyone, "prevails" where each party brings unsuccessful claims against the other. Whether Droegkamp is a "prevailing" party is a question of law that we review de novo. *See* ***Shadley v. Lloyds of London***, 2009 WI App 165, ¶12, 322 Wis. 2d 189, 776 N.W.2d 838. Where a contract's terms are plain and unambiguous, we will construe it as it stands. ***Borchardt v. Wilk***, 156 Wis. 2d 420, 427, 456 N.W.2d 653 (Ct. App. 1990). A contract is ambiguous, however, where its terms are fairly susceptible of more than one construction. ***Id.*** Whether a contract is ambiguous itself is a question of law. ***Id.***

¶8 Wisconsin adheres to the American Rule, under which parties generally are responsible for their own attorney fees unless recovery is expressly allowed by contract or statute. ***Kremers-Urban Co. v. American Employers Ins. Co.***, 119 Wis. 2d 722, 744-45, 351 N.W.2d 156 (1984). We will enforce a fee-shifting provision only if it clearly and unambiguously provides for the recovery of fees. ***Hunzinger Constr. Co. v. Granite Res. Corp.***, 196 Wis. 2d 327, 340, 538 N.W.2d 804 (Ct. App. 1995).

¶9 In the context of what transpired at trial, the parties each press for alternate constructions of the word "prevail" under the lease. Droegkamp asserts that "prevail" must apply to the party who succeeds on the complaint because it reflects their intent that, before commencing litigation, a party pauses to evaluate the risk of incurring the winning party's attorney fees and litigation costs. Falk responds that neither party prevails where, as here, both parties advance claims against the other and neither recovers on its claim.

¶10 These differing, not unreasonable, interpretations render the lease provision ambiguous as to what "prevail" means. We thus must construe the

provision so far as reasonably practicable to "make it a rational business instrument" and resolve what appears to have been the parties' intent. *See* ***Borchardt***, 156 Wis. 2d at 427.

¶11 ***Borchardt*** is instructive. There, we deemed a promissory note's similar attorney fee provision ambiguous because the agreement was silent as to what the parties contemplated in the event one prevailed on the complaint and the other on the counterclaim and because reasonable persons could differ as to whether defense of the counterclaim constituted enforcement of the note under the language of the note. ***Id.*** We concluded that, generally speaking, when a contract provides for attorney fees and the plaintiff recovers on a claim and the defendant recovers on a counterclaim, the attorney fees should be reduced in proportion to the amount the plaintiff recovered less the amount the defendant recovered. *See* ***Borchardt***, 156 Wis. 2d 428.

¶12 We reject Droegkamp's steadfast insistence that "prevailing party" applies only to the victor on the complaint when its counterclaims, too, were "commenced to enforce the covenants and conditions of this lease." We also reject its assertion that it was *required* to assert counterclaims. (Emphasis theirs.) The counterclaims went beyond the dispute over the security deposit, alleged as an offset in Droegkamp's answer, to affirmatively state over $100,000 in new claims. The trial court considered the claims and counterclaims "in the totality of the trial itself and the lease agreement and the cases in Wisconsin that discuss the award of the fees under such an arrangement … in terms of prevailing parties," and concluded that, while both "sort of won," ultimately neither party prevailed.

¶13 We agree. Falk recovered nothing on his complaint. Droegkamp recovered nothing on its counterclaims. Thus, applying ***Borchardt,*** neither party

recovers its costs and fees under the lease. Furthermore, the trial court found that the counterclaims ramped up the initially "simple" dispute. The jury rebuffed Droegkamp's counterclaims, answering "no" to both questions. The trial court, too, questioned their merit and opined that "the evidence in support of those counterclaims was nil." Awarding Droegkamp its attorney fees would encourage others to bring excessive and unsubstantiated claims. We must avoid unreasonable or unjust results. *See* ***Shadley***, 322 Wis. 2d 189, ¶21.

¶14 Droegkamp next claims trial court error in not awarding it statutory costs. It relies on WIS. STAT. § 814.03(1), which provides: "If the plaintiff is not entitled to costs under s. 814.01 (1) or (3), the defendant shall be allowed costs to be computed on the basis of the demands of the complaint." We recognize that § 814.03(1) is mandatory, not discretionary. *See* ***Strong v. Brushafer***, 185 Wis. 2d 812, 818, 519 N.W.2d 668 (Ct. App. 1994). Section 814.03(1) contemplates the awarding of costs only to the "successful party" in the action, however. *See* ***DeGroff v. Schmude***, 71 Wis. 2d 554, 568, 238 N.W.2d 730 (1976). Here, that describes neither Falk nor Droegkamp.

¶15 Moreover, Droegkamp's counterclaim brings the case under WIS. STAT. § 814.035(2). Section 814.035(2) provides that "[w]hen the causes of action stated in the complaint and counterclaim … arose out of the same transaction or occurrence, costs in favor of the successful party upon the complaint and counterclaim … so arising shall be in the discretion of the court." Falk sued unsuccessfully to recover the security deposit. Had Droegkamp not brought counterclaims, there would have been no dispute that, as the "prevailing party," it would have been entitled under the lease to reasonable attorney's fees. On the counterclaims, however, which likewise served to drive up litigation fees and costs, Falk was the prevailing party. The trial court concluded that there was no

successful party and that each appreciated the risk of incurring the other's costs. Under such circumstances, a court can deny statutory attorney fees and costs. *See* ***Witt v. Realist, Inc.***, 18 Wis. 2d 282, 303, 118 N.W.2d 85 (1962). The denial of costs to both parties was a proper exercise of discretion.

¶16 On the cross-appeal, Falk contends that the final order does not state that Droegkamp's counterclaims are dismissed and so does not comport with the jury verdict and the court's own statement. This exchange occurred at the postverdict motion hearing:

> THE COURT: …. In light of [the risks Falk took in his effort to recover the security deposit and that Droegkamp took in pursuing his counterclaims], each side shall bear the costs of this action [on] their own. Each side shall bear the costs of their attorney fees and the matter is dismissed pursuant—
>
> MR. LOVE [Falk's attorney]: May I prepare the order, Your Honor?
>
> THE COURT: You may.
>
> MR. LOVE: So the order will recite that both the entire case, all claims and counterclaims is dismissed and the order will provide there will be no costs awarded to either party.
>
> THE COURT: Or attorney fees.
>
> MR. LOVE: Thank you. I'll prepare and mail it to the Court under the five[-]day rule today.
>
> THE COURT: Thank you. Mr. Carter [Droegkamp's attorney]?
>
> MR. CARTER: Judge, does this mean as far as statutory costs as well that the Court is not inclined to award statutory costs?
>
> THE COURT: That is correct.
>
> MR. LOVE: I'll insert both.

> THE COURT: Neither to Mr. Falk nor to Mr. Droegkamp….

¶17 Falk represents that the final order actually was drafted by Droegkamp.[2] Regardless of whether the order specifically states that the counterclaims are dismissed, the court plainly conveyed its intent to dismiss the matter.[3] When a judge's oral and written decisions conflict, the intent of the trial judge governs which decision controls. *See* ***State v. Lipke***, 186 Wis. 2d 358, 364-65, 521 N.W.2d 444 (Ct. App. 1994). An unambiguous oral pronouncement controls a conflicting written judgment, *see* ***State v. Perry***, 136 Wis. 2d 92, 113-15, 401 N.W.2d 748 (1987), whether the case is civil or criminal, *see* ***Jackson v. Gray***, 212 Wis. 2d 436, 444, 569 N.W.2d 467 (Ct. App. 1997). Because the trial court plainly intended to dismiss the counterclaims, we conclude that it did.

¶18 No costs to either party.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[2] Letters to the court from the parties' attorneys indicate that Droegkamp's attorney objected to the order Falk's attorney drafted and submitted one of his own, to which Falk's attorney objected. The objected-to orders are not included with the letters in the record.

[3] Droegkamp's brief states that the trial court "did not dismiss the claims" and "refus[ed] to dismiss all claims." This does not accurately reflect the record.