

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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STANWOOD MOTOR SPORTS ACQUISITION,  
L.L.C.,

Plaintiff/Counter-Defendant-  
Appellee,

v

JOSEPH F. ARNOLD and VERDA SUE  
ARNOLD,

Defendants/Counter-Plaintiffs-  
Appellants,

and

TIMOTHY CRAWFORD and PAUL ROSE,

Counter-Defendants-Appellees.

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UNPUBLISHED  
April 17, 2014

No. 313994  
Kent Circuit Court  
LC No. 11-005999-GC

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No. 314018  
Kent Circuit Court  
LC No. 11-005999-GC

Before: GLEICHER, P.J., and HOEKSTRA and O'CONNELL, JJ.

PER CURIAM.

Joe and Sue Arnold own commercial property in Kentwood that they leased to Stanwood Motor Sports Acquisition, L.L.C. to operate a recreational vehicle store and service center. Stanwood terminated the lease early and the parties each filed suit, the Arnolds seeking full payment for the lease term and Stanwood seeking reimbursement for the months paid. The trial court ruled in the Arnolds' favor but abated the damages by one-third. That judgment is factually and legally supported and we affirm. However, the trial court denied the Arnolds attorney fees due to the prevailing party under the lease. We reverse that portion of the court's judgment and remand for consideration and calculation of a reasonable attorney fee award.

## I. BACKGROUND

In late 2010, the Arnolds negotiated a lease with Paul Rose and Tim Crawford, the owners of Stanwood. Stanwood sold recreational vehicles such as snowmobiles, four-wheelers and boats from existing locations in Stanwood, Michigan and Colorado. They intended to open a third location in Kentwood. The lease ran from February 1, 2011, through February 1, 2013. Stanwood accepted responsibility for most maintenance and repairs at the site, but the Arnolds remained responsible for "the roof, exterior walls, [and] structural foundation." Stanwood was required to permit the Arnolds entry "upon the premises at reasonable times and upon reasonable notice, for the purpose of inspecting the same." Paragraph 9 of the lease, governed possession of the property as follows:

If Lessor is unable to deliver possession of the premises at the commencement hereof, Lessor shall not be liable for any damages caused thereby, nor shall this lease be void or voidable, but Lessee shall not be liable for any rent until possession is delivered. Lessee may terminate this lease if possession is not delivered within 30 days of the commencement of the term hereof.

Paragraph 19 allowed the prevailing party attorney fees in case a suit should be filed regarding the property between the parties:

In case suit should be brought for recovery of the premises, or for any sum due hereunder, or because of any act which may arise out of the possession of the premises, by either party, the prevailing party shall be entitled to all costs incurred in connection with such action, including reasonable attorney fees.

The parties agreed that when Stanwood began its tenancy a significant amount of the Arnold's personal property was still on the premises. The Arnolds asserted that they had a verbal agreement with Crawford, allowing them time to remove these items. Crawford and Rose denied any verbal agreement and claimed they repeatedly asked the Arnolds to remove their belongings. An outdoor storage area was unusable by Stanwood due to the bulk the Arnolds' tractors and tractor parts stored there. An "old service area" was one-third filled with the Arnolds' property. Further, the Arnolds placed a lock on the facility's attic, claiming the area was dangerous and unusable. However, Crawford and Rose asserted that the Arnolds had

showed them the attic during the lease negotiations and the area was filled with the Arnolds' belongings as well.

After executing the lease, Rose and Crawford contended that Joe Arnold repeatedly appeared at the property unannounced and outside of business hours. They claimed that Joe Arnold retained a key to the building and entered on his own accord on at least two occasions. Rose and Crawford accused the Arnolds of failing to maintain the building's roof, which allegedly leaked, and the exterior walls, one of which was allegedly covered in mold. Rose and Crawford further alleged that Joe Arnold physically threatened them on two separate occasions, fueling their decision to terminate the lease early. Ultimately, Stanwood terminated its lease effective July 6, 2011.

The Arnolds, on the other hand, claimed that they remedied the problem causing the roof leak and denied the existence of mold. Joe Arnold further denied wrongfully entering the premises or threatening Stanwood's owners. Arnold believed Rose and Crawford decided to terminate the lease prematurely because they sold their assets to a competitor and entered an agreement precluding them from operating a store in Kentwood. The Arnolds presented evidence that Stanwood terminated its employees and moved the remainder of its inventory in June, before it notified the Arnolds of their decision to terminate.

The parties filed competing suits, each claiming the other breached the lease agreement. The matter proceeded to a bench trial, after which the court ruled that the Arnolds had breached the lease, but that this breach was "not sufficient to allow" Stanwood "to rescind the lease." The court later clarified its ruling, stating its belief that Stanwood terminated its lease because it sold out to a competitor and not because of the Arnolds' breaches. The court therefore awarded the Arnolds all payments due under the lease for the entire two-year period. Based on the Arnolds' failure to remove the remainder of their personal property from the premises, the trial court abated the rent and property tax award by one-third.

The trial court also determined that the Arnolds were entitled to recovery of their attorney fees pursuant to the lease agreement. Stanwood thereafter filed an objection to the attorney fee award, arguing that the Arnolds could not be deemed the prevailing party because they committed the first breach. Stanwood also contended that it presented an offer of judgment to the Arnolds on November 22, 2011, and that the Arnolds failed to respond, negating their entitlement to attorney fees under the offer of judgment rule, MCR 2.405(D)(2). The court agreed and eliminated the element of attorney fees and costs.

Following this judgment, the parties filed competing appeals in this Court; Stanwood challenging the judgment in the Arnolds' favor and the Arnolds challenging the denial of its request for attorney fees. This Court consolidated the appeals.

## II. SUBJECT MATTER JURISDICTION

The parties initially filed their complaints in district court. Before trial, the Arnolds moved to transfer its complaint to the circuit court because its damages could exceed the district court's jurisdictional limit. The district court granted the motion and the chief judge of the circuit court ordered the district court to sit in judgment of the parties' cross-complaints on

assignment. Stanwood complains on appeal that the Arnolds never paid the transfer fee required by MCR 4.002(C), which is a condition precedent of the circuit court exerting jurisdiction. This claim completely lacks merit. The Arnolds have presented the cancelled check to this Court. The fact that the district court clerk erroneously failed to docket the payment does not deprive the circuit court of jurisdiction.

### III. JUDGMENT REGARDING LEASE BREACHES

Stanwood challenges the trial court's judgment in the Arnolds' favor. We review a trial court's factual findings following a bench trial for clear error and its conclusions of law de novo. *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003). "A finding is clearly erroneous where, after reviewing the entire record, this Court is left with a definite and firm conviction that a mistake has been made." *Id.* "In the application of this principle, regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." MCR 2.613(C). We review underlying issues of contract interpretation de novo. *Bandit Indus, Inc v Hobbs Int'l, Inc*, 463 Mich 504, 511; 620 NW2d 531 (2001). We must give effect to a contract's plain and unambiguous language. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 61; 664 NW2d 776 (2003).

The trial court did not clearly err in finding that both parties had breached the lease agreement or in awarding the Arnolds two-thirds of the rent owed on the property. While the Arnolds breached the lease first, the evidence supports the trial court's conclusion that Stanwood terminated the lease because it sold its business assets. Stanwood was not entitled to a complete abatement of its rent based on the Arnolds' failure to completely quit the property because the record supports that Stanwood waived this remedy to some extent. The trial court reached an equitable and legally justified resolution under the circumstances.

The trial court determined that the Arnolds breached the lease agreement first but ruled that those breaches were not substantial and were not the actual cause of Stanwood's termination of the lease. "The rule in Michigan is that one who first breaches a contract cannot maintain an action against the other contracting party for his subsequent breach or failure to perform." *Flamm v Scherer*, 40 Mich App 1, 8-9; 198 NW2d 702 (1972). "However, that rule only applies when the initial breach is substantial," i.e., material. *Michaels v Amway Corp*, 206 Mich App 644, 650; 522 NW2d 703 (1994).

"A breach not causally related to the claimed damages is not actionable and is not material." *Paul v Lee*, 455 Mich 204, 216; 568 NW2d 510 (1997), overruled on other grounds *Smith v Globe Life Ins Co*, 460 Mich 446, 455 n 2; 597 NW2d 28 (1999). "To determine whether a substantial breach occurred, a trial court considers 'whether the nonbreaching party obtained the benefit which he or she reasonably expected to receive.'" *Able Demolition, Inc v City of Pontiac*, 275 Mich App 577, 585; 739 NW2d 696 (2007), quoting *Holtzlander v Brownell*, 182 Mich App 716, 722; 453 NW2d 295 (1990). In *Walker & Co v Harrison*, 347 Mich 630, 635; 81 NW2d 352 (1957), our Supreme Court recited a list of factors deemed "influential" in deciding whether a contractual breach was substantial or material, including "[t]he extent to which the injured party will obtain the substantial benefit which he could have reasonably anticipated," and "[t]he extent to which the party failing to perform has already partly performed or made preparations for performance."

The party arguing that the other's breach was material has the burden of proof. *Livingston Shirt Corp v Great Lakes Garment Mfg Co*, 351 Mich 123, 129; 88 NW2d 614 (1958). If that party fails, its subsequent breach could result in liability to itself.

But the injured party's determination that there has been a material breach, justifying his own repudiation, is fraught with peril, for should such determination, as viewed by a later court in the clam of its contemplation, be unwarranted, the repudiator himself will have been guilty of material breach and himself have become the aggressor, not an innocent victim. [*Walker & Co*, 347 Mich at 635.]

The trial court determined that Stanwood did not terminate the lease because of the Arnolds' breach. As the breaches were not the cause of Stanwood's damages, the breaches were not material or substantial. See *Paul*, 455 Mich at 216. Further, despite the Arnolds' breaches, Stanwood received the benefit of its bargain by conducting business at the premises for four to five months. See *Walker & Co*, 347 Mich at 635; *Able Demolition*, 275 Mich App at 722. The trial court did not clearly err in this regard.

On June 29, 2011, Stanwood entered a non-compete agreement with Fox Motor Sports. That contract indicated that Stanwood sold certain assets to Fox and agreed to refrain from competing in the Kentwood area. Stanwood specifically promised to stop "engag[ing] in the sale, lease or service of new or used ATVs, MUVs and snowmobiles . . . and/or parts. . . ." Under the plain language of that agreement, Stanwood could continue to sell and service boats.

Rose and Crawford provided unconvincing testimony that their decision to abandon the Kentwood lease was based on the Arnolds' breaches rather than the non-compete agreement. Crawford testified that Stanwood needed the inaccessible outdoor storage area to display boats for sale. Yet, Stanwood never approached the city of Kentwood for the requisite licenses to show boats outside the building. And the Arnolds impeached Rose's trial testimony with his deposition admission that Stanwood "opted not to sell anything" at the Kentwood location to ensure compliance with the non-compete agreement.

Moreover, in June 2011, Stanwood transferred all employees from the Kentwood store. By July 2011, Stanwood had not moved any boats to Kentwood to sell to potential customers. Without staff and inventory, it was impossible for Stanwood to operate its business. And Crawford accepted employment with Fox Motor Sports only six months later.

Ultimately, it was the trial court's duty to determine Stanwood's reason for terminating the lease based on the witness testimony and the evidence before it. The court found that the termination was based on the Fox Motor Sports sale and not any breach by the Arnolds. In addition, Crawford, Rose, and their employees all testified that Stanwood sold and serviced snowmobiles and other land-based recreational vehicles, and even sold two boats, from the Kentwood site between February and June 2011. Stanwood operated its business as planned until it decided to sell most of its inventory to a competitor and not bring an inventory of boats to the site. Accordingly, the Arnolds' breaches were not substantial or material and they could seek recovery under the lease.

The trial court also did not clearly err in awarding the Arnolds two-thirds of the rent and property tax payments due under the lease. Paragraph 9 of the lease promised Stanwood possession of the premises within 30 days of February 1, 2011. This provision required delivery of “full” possession. “A lease gives the tenant possession of the property leased and exclusive use or occupation of it for all purposes not prohibited by the terms of the lease.” *Macke Laundry Svc Co v Overgaard*, 173 Mich App 250, 253; 433 NW2d 813 (1988). Nothing in the lease prohibited use of the attic, the outdoor storage area, portions of the “old service area” or several locked cabinets throughout the facility. Generally, the failure to give full possession of the premises amounts to a “partial eviction.” When there is a partial eviction from the property, the tenant is not liable and the landlord has no right to pursue rent. *Ravet v Garelick*, 221 Mich 70, 72; 190 NW 637 (1922); *Dunton v Sweet*, 210 Mich 525, 529; 177 NW 962 (1920); *Kuschinsky v Flanigan*, 170 Mich 245, 247-248; 136 NW 362 (1912); *Pridgeon v Excelsior Boat Club*, 66 Mich 326, 327-328; 33 NW 502 (1887).

However, a party may waive a remedy or ratify a contract after a breach. The Arnolds testified that they had a verbal agreement with Crawford giving them up to a year to remove the remainder of their belongings. Crawford admitted that he never demanded the Arnolds remove the personal property and that their conversations on the topic “were somewhat laid-back.” Crawford also conceded that he allowed the Arnolds to leave items that were useful to Stanwood. Crawford claimed, “I would have ultimately liked it all out of there,” but he never shared that message with Arnold.

A party may waive the other’s breach, i.e., overlook it and continue performing under the contract. “A waiver implies an intention to overlook a deficiency, or to forego a right to have the defect remedied or to have compensation therefor, and necessarily implies knowledge of the defect that is waived, or acquiescence under circumstances reasonably implying unconditional acceptance of the work as a full performance.” *Eaton v Gladwell*, 108 Mich 678, 680-681; 66 NW 678 (1896). “[A] waiver of a breach of contract must be a ‘voluntary intentional relinquishment of a known right.’” *Grand Rapids Asphalt Paving Co v Wyoming*, 29 Mich App 474, 483; 185 NW2d 591 (1971), quoting *Bissell v L W Edison Co*, 9 Mich App 276, 287; 156 NW2d 623 (1967). Waiver can be shown by an express agreement between the parties or may be inferred by the parties’ acts or conduct. *Kuschinsky*, 170 Mich at 248-249; *Grand Rapids Asphalt*, 29 Mich App at 483. Stanwood’s continued occupancy in spite of the lease breaches standing alone would be insufficient to amount to a waiver, however. *Ravet*, 221 Mich at 72; *Dunton*, 210 Mich at 530; *Kuschinsky*, 170 Mich at 248. And there is no waiver when the landlord continues to promise to remedy a deficiency, lulling the tenant into a false sense of security, and yet never makes good on his promise. *Lynder v S S Kresge Co*, 329 Mich 359, 365-367; 45 NW2d 319 (1951).

There was evidence that the parties agreed to the Arnolds having additional time to remove their personal property from the leased premises. There was also evidence that the remaining personal property did not actually interfere with Stanwood’s ability to conduct its business and that Crawford permitted its presence. Given the record evidence and competing testimony of the witnesses, the trial court was within its right to judge the credibility contest and determine that Stanwood waived the Arnolds’ breaches, thereby allowing the Arnolds to pursue their remedies under the lease.

The other alleged breaches committed by the Arnolds were not material and were also insufficient to be deemed a constructive or partial eviction to preclude the Arnolds from pursuing rent. Crawford and Rose decided based on personal observation that the back wall in the parts room was covered in mold. They sought no testing and provided no proof. They notified the Arnolds of the problem and they remediated the area. Stanwood also notified the Arnolds of the roof leaks, which they remedied. Moreover, Joe Arnold's entries onto the property outside of business hours were minor.

#### IV. ATTORNEY FEES

The Arnolds challenge the denial of their request for attorney fees under the lease agreement. Stanwood, in turn, challenges the trial court's determination that the Arnolds were the prevailing party despite that their request for damages was reduced. We agree with the trial court's assessment that the Arnolds were the prevailing parties. The trial court improperly denied attorney fees, however, based on the offer of judgment court rule.

We generally review a trial court's decision to award attorney fees for an abuse of discretion. *Mitchell v Dahlberg*, 215 Mich App 718, 729; 547 NW2d 74 (1996). This case also involves issues of contract and court rule interpretation, both of which we review de novo. *Pellegrino v Ampco Sys Parking*, 486 Mich 330, 338; 785 NW2d 45 (2010); *Bandit Indus*, 463 Mich at 511.

Both parties rely on *Mitchell* in their argument regarding the award of attorney fees to a "partially" prevailing party. In that case, the parties' land contract provided for attorney fees as follows: "In any action to enforce any rights under this Purchase Contract, the prevailing party may recover all costs and expenses incurred in connection with the action, including reasonable attorney fees." *Mitchell*, 215 Mich App at 729. The plaintiffs in that case argued that they should have received attorney fees under the contract because they prevailed on their counterclaim for judgment on an arbitration award while the defendants were denied foreclosure and acceleration of the land contract balance. The trial court in that case found that neither party prevailed in full so neither was entitled to fees. *Id.* This Court reached the following conclusion:

Whether to award attorney fees is within the trial court's discretion, and we will not find an abuse of that discretion unless the "result so violates fact and logic that it constitutes perversity of will, defiance of judgment or the exercise of passion or bias." It is clear that neither party prevailed in full. Plaintiffs have been ordered to pay interest on their unpaid payments, and therefore did not prevail on that issue. We therefore find that the trial court's decision denying plaintiffs' request for attorney fees was not an abuse of discretion. [*Id.* (citations omitted).]

Similarly here, neither party prevailed in full. Stanwood was ordered to pay outstanding rent to the Arnolds; however, the Arnolds' entitlement to rent was reduced. But *Mitchell* does not require any particular result. *Mitchell* does not preclude a trial court from exercising its discretion to award attorney fees to a party that would be considered "prevailing" under normal legal parlance.

In Michigan, a party need not prevail in full to be considered a “prevailing party.” As discussed in *Forest City Enterprises v Leemon Oil Co*, 228 Mich App 57, 81; 577 NW2d 150 (1998):

The fact that Forest City recovered less than the full amount of damages sought is not dispositive of whether it was the prevailing party. On the other hand, mere recovery of some damages is not enough; in order to be considered a prevailing party, that party must show, at the very least, that its position was improved by the litigation. [Citations omitted.]

This Court has repeatedly held that a party may be a prevailing party despite that it does not receive the full amount of damages sought. *Pontiac Country Club v Waterford Twp*, 299 Mich App 427, 438; 830 NW2d 785 (2013); *Van Zanten v H Vander Laan Co*, 200 Mich App 139, 141; 503 NW2d 713 (1993).

This Court has only required a prevailing party to “fully” prevail for purposes of collecting attorney fees when the statute underlying the award requires such resounding success. In *Peters v Gunnell, Inc*, 253 Mich app 211, 222-223; 655 NW2d 582 (2002), for example, this Court denied the plaintiff attorney fees under the sales representative commissions act because the act defined a “prevailing party” as one “who wins all the allegations of the complaint or on all of the responses to the complaint.”

The Arnolds were the prevailing party because their request for recovery of outstanding rent was granted, although abated. Stanwood asks this Court to read additional language into the contract in order to define “prevailing party” differently than the common understanding of that term. Such interpretation is not permitted.

Stanwood convinced the trial court that the Arnolds’ failure to respond to their November 2011 offer of judgment, which was less favorable to the Arnolds than the court’s judgment, precluded the Arnolds from collecting attorney fees. Pursuant to MCR 2.405(C)(2)(b), a party is deemed to have rejected an offer of judgment if the party does not respond. Under MCR 2.405(D)(2), “[i]f an offer is rejected, costs are payable,” in relevant part, as follows:

If the adjusted verdict is more favorable to the offeree than the average offer, the offeror must pay to the offeree the offeree’s actual costs incurred in the prosecution or defense of the action. However, an offeree who has not made a counteroffer may not recover actual costs unless the offer was made less than 42 days before trial.

Costs under the court rule include a reasonable attorney fee. MCR 2.405(A)(6).

Under the circumstances of this case, if MCR 2.405(D) alone were applied, the Arnolds would have no entitlement to attorney fees. However, MCR 2.405 is not the only mechanism to award or deny attorney fees to a party. It does not ban attorney fees from all sources and under all agreements. Parties are free to contract for attorney fees in the event of a lawsuit. And a party such as the Arnolds that has contracted for attorney fees could perceive that it had no need to reply to another party’s offer of judgment because it would be entitled to attorney fees from another source.

The plain language of the parties' lease provides that "the prevailing party shall be entitled to all costs incurred in connection with such action, including reasonable attorney fees." The parties agreed to this contractual provision, presumably with the assistance of counsel. And counsel would understand that there are several court rules awarding or denying attorney fees in certain situations, such as the offer of judgment rule and the mediation sanctions rule. Yet, the contract provides no exceptions. There is no precedent allowing the court to nullify this contractual provision based on an unrelated court rule.

Accordingly, the trial court abused its discretion in denying the Arnolds' request for attorney fees. When the court initially granted the attorney fees, however, the court erred in accepting the numeric value provided by the Arnolds with no support. The lease agreement provides for reasonable attorney fees. At a minimum, the Arnolds were required to present their attorney bills to the court for consideration. On remand, the trial court should be ordered to accept evidence and hear Stanwood's objections before valuing the attorney fee recovery.

We affirm in part and reverse in part and remand for further proceedings consistent with this opinion. As neither party prevailed in full as required for recovery of appellate costs, neither may tax costs pursuant to MCR 7.219. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher

/s/ Joel P. Hoekstra