

MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision is not binding precedent for any court and may be cited only for persuasive value or to establish res judicata, collateral estoppel, or law of the case.



IN THE
Court of Appeals of Indiana

Terry's Discount Windows & More, LLC,
Appellant / Defendant / Counter-Plaintiff

v.

Timothy Clancy,
Appellee / Plaintiff / Counter-Defendant

February 19, 2024

Court of Appeals Case No.
23A-PL-1438

Appeal from the Porter Superior Court
The Honorable Jeffrey W. Clymer, Judge

Trial Court Cause No.
64D02-2103-PL-2383

Memorandum Decision by Judge Vaidik
Judges Bradford and Brown concur.

Vaidik, Judge.

Case Summary

- [1] Terry’s Discount Windows & More, LLC (“Terry’s”) and Timothy Clancy contracted for Terry’s to perform various projects on Clancy’s house. After a dispute arose about the quality of the work, Clancy sued Terry’s for breach of contract, fraud, and negligence, and Terry’s counter-sued for breach of contract and abuse of process. Terry’s prevailed on all claims at a jury trial and then filed a motion for attorney’s fees, prejudgment interest, and post-judgment interest. The trial court denied the motion. Terry’s now appeals, arguing that the trial court erred in denying the motion and that it is entitled to attorney’s fees and prejudgment interest under the parties’ contracts and to post-judgment interest by statute. We affirm in part and reverse in part, finding that Terry’s is entitled to attorney’s fees for its breach-of-contract claim but not its abuse-of-process claim, to prejudgment interest on its breach-of-contract claim, and to post-judgment interest on the entire judgment.

Facts and Procedural History

- [2] In June 2020, Terry’s entered into five home-improvement contracts with Clancy for various projects on Clancy’s house. Each contract contained the following provision on default and collection:

If Customer shall fail to make payment to Terry’s as provided in this Purchase Contract, and shall fail to cure that non-payment

within five (5) business days after issuance of written notice thereof by Terry's, Customer shall be in default under this Purchase Contract, and Terry's shall be entitled to initial [sic] legal proceedings for the collection of the balance then outstanding and unpaid under this Purchase Contract. In the event that Terry's is required to so initiate legal proceedings, **Terry's shall additionally be entitled to recover all costs and attorney fees incurred in connection with such collection proceedings**, as well as interest on the contract balance outstanding and unpaid at the rate of 1½% per month.

Appellant's App. Vol. II pp. 55, 57, 60, 63, 65 (emphasis added).

[3] After Terry's completed some of the projects, Clancy raised issues with the quality of the work and refused to pay the balance due. The parties tried to resolve the dispute but failed. Clancy ultimately filed suit against Terry's in March 2021, alleging breach of contract, fraud, and negligence.¹ Terry's counter-sued Clancy for breach of contract and abuse of process.

[4] Just before trial, the parties entered a joint pretrial order. As part of the order, they agreed attorney's fees for Terry's would be one of the issues of law to be determined by the court. The order specifically stated: "Defendant/Counter-Plaintiff TDW has claimed it is entitled to attorney fees, expenses, and interest **pursuant to the contractual language of the contracts**. If Defendant/Counter-Plaintiff obtains a favorable verdict which would be determined by the Court

¹ Clancy also alleged breaches of the Home Improvement Fraud Act, Home Improvement Contract Act, and Indiana Consumer Protection Act, but the parties stipulated to dismissal of these counts before trial.

after judgement is rendered [sic].” *Id.* at 33 (emphasis added). The parties also jointly submitted an issue instruction setting forth \$13,530 as the balance due for the work completed. *See id.* at 44; Appellant’s Reply Br. p. 16 n.4 (explaining the instruction mistakenly listed the balance as \$11,530 instead of \$13,530).

[5] A jury trial was held in April 2023. At the close of evidence, the trial court granted a directed verdict for Terry’s on Clancy’s negligence claim. The jury rejected Clancy’s breach-of-contract and fraud claims and returned a verdict in favor of Terry’s for \$13,530 on its breach-of-contract claim and \$35,000 on its abuse-of-process claim. The trial court entered judgment for Terry’s for \$48,530.

[6] Terry’s filed a post-trial motion for attorney’s fees, prejudgment interest, and post-judgment interest. At the end of the hearing on the motion, the trial court said it was denying the motion based on the following:

If [Terry’s] had submitted to the jury at that point, the attorney’s fees that . . . Terry’s Discount Windows & More had incurred, which is in fact exactly what they’re asking for, then they could have determined what was reasonable on a counterclaim There was no evidence for the jury to determine what reasonable attorney’s fees were [Terry’s] could have said, my company spent this much money defending this frivolous lawsuit. That evidence wasn’t in front of the jury [T]he motion for attorney’s fees is [] denied.

Tr. pp. 11-12. In addressing the motion, the court didn’t get into Terry’s’ specific arguments for prejudgment or post-judgment interest, but it concluded the hearing by noting that “[t]he judgment that was entered accrues interest at

the statutory rate at the date of its entry.” *Id.* at 13. But the court didn’t amend the judgment to reflect the accrual of post-judgment interest or enter a separate order awarding post-judgment interest. To the contrary, the court issued a written order ruling that “Defendant/Counter-Plaintiff’s Motion for Award of Attorney Fees, Pre-Judgment Interest, and Post-Judgment Interest is DENIED.” Appellant’s App. Vol. II p. 24.

[7] Terry’s now appeals.

Discussion and Decision

[8] This case involves whether the prevailing party in a breach-of-contract action is entitled to attorney’s fees, prejudgment interest, and post-judgment interest. Parties to litigation generally pay their own attorney’s fees but may agree by contract to do otherwise. *Reuille v. E.E. Brandenberger Constr., Inc.*, 888 N.E.2d 770, 771 (Ind. 2008). Where, as here, parties have included a contractual provision agreeing to pay attorney’s fees, that agreement is enforceable according to its terms unless the contract conflicts with law or public policy. *Id.* Even under a contract, an award of attorney’s fees must be reasonable. *Corvee, Inc. v. French*, 943 N.E.2d 844, 847 (Ind. Ct. App. 2011). The amount recoverable for an award of attorney’s fees is left to the sound discretion of the trial court. *Fischer v. Heymann*, 12 N.E.3d 867, 874 (Ind. 2014), *reh’g denied*.

[9] A contract may also provide for an award of prejudgment interest. A party’s right to prejudgment interest according to a contract is not discretionary. *PNC*

Bank, Nat'l Ass'n v. Page, 186 N.E.3d 633, 638 (Ind. Ct. App. 2022).

Prejudgment interest is warranted in a breach-of-contract action when “the amount of the claim rests upon a simple calculation and the terms of the contract make such a claim ascertainable.” *Song v. Iatarola*, 76 N.E.3d 926, 939 (Ind. Ct. App. 2017), *aff'd on reh'g*, 83 N.E.3d 80 (Ind. Ct. App. 2017), *trans. denied*. The test for determining whether an award of prejudgment interest is appropriate is whether the damages are complete and may be ascertained as of a particular time. *Id.* An award is proper when the trier of fact does not have to exercise judgment to assess the amount of damages. *Id.*

[10] Once judgment is entered, the prevailing party is entitled to post-judgment interest. *See* Ind. Code § 24-4.6-1-101. The language of Section 24-4.6-1-101 is mandatory: interest “shall be” rendered from the date of judgment. *Denman v. St. Vincent Med. Grp., Inc.*, 176 N.E.3d 480, 503 (Ind. Ct. App. 2021), *reh'g denied, trans. denied*. “[T]rial courts have no discretion over whether post-judgment interest will be awarded; prevailing plaintiffs are automatically entitled to it.” *Id.*

[11] Terry’s contends it is entitled to attorney’s fees and prejudgment interest under the contracts and to post-judgment interest under Section 24-4.6-1-101. We address each argument in turn.

I. Terry's is entitled to reasonable attorney's fees incurred in connection with its breach-of-contract claim only

A. Breach-of-Contract Claim

[12] Terry's first argues the trial court erred in denying its request for attorney's fees. The parties agreed in their contracts that Terry's was "entitled to recover all costs and attorney fees incurred in connection with" legal proceedings to collect any outstanding balance. Yet the trial court denied the request for attorney's fees because there was no evidence from which the jury could determine a reasonable amount of fees. Terry's contends "the trial court arrived at an improper legal conclusion" in denying its motion on this basis. Appellant's Reply Br. p. 8. As to attorney's fees for the breach-of-contract claim, we agree.

[13] A request for attorney's fees is generally not ripe for consideration until a judgment has been reached. *Song*, 76 N.E.3d at 938; *see also Storch v. Provision Living, LLC*, 47 N.E.3d 1270, 1275 (Ind. Ct. App. 2015) ("[I]n petitioning the trial court for attorney fees after the jury had reached its decision in this case, *Storch* was following standard procedure."). In some cases, the jury may decide whether an amount of attorney's fees is reasonable, such as where the parties have stipulated to that effect or the contract calls for it. *Storch*, 47 N.E.3d at 1275. But without such an agreement, there is no right to have a jury determine a reasonable amount of fees. *Id.* at 1275-76. Rather, the trial court is considered an expert on the question of attorney's fees and "may judicially know what constitutes a reasonable attorney's fee." *Id.* at 1276.

[14] The parties here didn't agree to have the jury determine attorney's fees; to the contrary, they agreed in the pretrial order that attorney's fees under the contract were an issue of law "which would be determined by the Court after judgement is rendered." Based on this agreement, the court was the appropriate trier of fact for the issue of attorney's fees under the contract, so there was no reason for Terry's to present any evidence of those fees to the jury. *See Song*, 76 N.E.3d at 938-39. The trial court erred in denying attorney's fees based on the lack of evidence for the jury to determine reasonable fees because this was not for the jury to determine.

[15] The parties differ in their interpretations of the following portion of the pretrial order: "Defendant/Counter-Plaintiff TDW has claimed it is entitled to attorney fees, expenses, and interest pursuant to the contractual language of the contracts. If Defendant/Counter-Plaintiff obtains a favorable verdict which would be determined by the Court after judgement is rendered [sic]." Terry's contends the phrase "determined by the Court" meant the trial court would determine a reasonable amount of attorney's fees to award. Clancy suggests the phrase gave the court discretion to determine Terry's wasn't entitled to attorney's fees at all. To support his interpretation, Clancy cites cases where the issue was whether the amount of attorney's fees was reasonable and this Court explained that trial courts have broad discretion in determining what constitutes reasonable attorney's fees. *See Appellee's Br.* p. 12. In light of our case law that an award of attorney's fees pursuant to a contract must be reasonable, *see, e.g., Corvee*, 943 N.E.2d at 847, and that the trial court is in the best position to

determine attorney's fees, *see, e.g., Song*, 76 N.E.3d at 938, we take the pretrial order to mean that the trial court was required to award Terry's attorney's fees incurred in the collection proceedings but had the discretion to determine a reasonable amount of fees. Terry's' breach-of-contract claim is a collection proceeding because it brought the claim to collect the outstanding balance of \$13,530. On remand, the court must calculate reasonable attorney's fees for Terry's on its breach-of-contract claim as provided for in the parties' contracts.

B. Abuse-of-Process Claim

[16] Terry's also claims it is entitled to attorney's fees for abuse of process because it is entitled under the terms of the contract to recover all attorney's fees incurred in connection with the collection proceedings. *See* Appellant's Br. p. 11. And per the pretrial order, the trial court was to decide any contractual attorney's fees as a matter of law. *Id.* at 11. Terry's likens this case to *Storch*. There, the parties' agreement provided that "[i]n the event of any controversy, claim, or dispute between the parties hereto, arising out of or relating to this Agreement or the breach thereof," the prevailing party would be entitled to recover attorney's fees from the other. *Storch*, 47 N.E.3d at 1271. After *Storch* prevailed on a negligence claim, the trial court ruled that because the only matter submitted to the jury was negligence, not breach of the agreement, *Storch* was "not the prevailing party regarding 'any controversy, claim or dispute between the parties hereto, arising out of or relating to this Agreement or the breach thereof'" and thus was not entitled to attorney's fees under the agreement. *Id.* at 1273. This Court reversed, holding that the negligence claim related to the

parties' agreement because it had the same underlying subject matter, and the events leading to the claim would not have occurred but for the agreement.

[17] Terry's argues that like the negligence claim in *Storch*, its abuse-of-process claim is related to the contracts and wouldn't have been brought but for the contracts. But unlike the agreement in *Storch*, the parties didn't agree Terry's was entitled to attorney's fees in "any" proceeding "relating to" the contracts. The contracts provided only for recovery of "attorney fees incurred in connection with" "legal proceedings for the collection of the balance then outstanding," and only the breach-of-contract claim involved such collection. The contract provision does not entitle Terry's to attorney's fees for its abuse-of-process claim.²

² Abuse of process is a tort claim that can be filed against a party who has allegedly engaged in wrongful use of the judicial process. *Crosson v. Berry*, 829 N.E.2d 184, 196 (Ind. Ct. App. 2005), *trans. denied*. A party may bring an abuse-of-process claim after successfully defending against a wrongful action, *see* I.C. § 34-52-1-1(c), or as a counterclaim to the wrongful action, *see* *Burke v. Elkin*, 51 N.E.3d 1287 (Ind. Ct. App. 2016). This is a distinct tort from a claim for attorney's fees under Indiana Code section 34-52-1-1(b), which requires a showing that litigation was frivolous, unreasonable, groundless, or in bad faith. *See* *Crosson*, 829 N.E.2d at 194; I.C. § 34-52-1-1(c). A party who prevails on an abuse-of-process claim can recover the attorney's fees spent defending against the wrongful action, so long as they haven't already recovered the fees under Section 34-52-1-1(b). *Lindsay v. Jenkins*, 574 N.E.2d 324, 327 (Ind. Ct. App. 1991), *trans. denied*; *see also* *Burke*, 51 N.E.3d at 1288. But the fees are limited to those spent in defending against the wrongful action; the prevailing party is not entitled to recover fees incurred in prosecuting the abuse-of-process claim itself. *Tech. Comput. Servs., Inc. v. Buckley*, 844 P.2d 1249, 1256 (Colo. App. 1992). Here, Terry's only claims it is entitled to attorney's fees under the terms of the contract, so we do not reach the issue of whether it would have otherwise been entitled to fees as a result of its favorable verdict on the abuse-of-process claim. Terry's also asked the trial court for fees permitted under Indiana Code section 34-52-1-1, but the trial court denied the request. Terry's does not appeal that denial. *See* Appellant's Reply Br. p. 9 n.2.

II. Terry’s is entitled to prejudgment interest on the award for its breach-of-contract claim

[18] Terry’s also contends the trial court erred in denying its request for prejudgment interest. Clancy argues prejudgment interest is inappropriate here because the damages for Terry’s’ breach-of-contract and abuse-of-process claims “could not possibly have rested on a simple calculation by the jury.” Appellee’s Br. p. 15. But Terry’s requested prejudgment interest only on the \$13,530 award for its breach-of-contract claim. This amount is based on a simple calculation of the total prices designated in the contracts less the portions Clancy paid, which was readily ascertainable before trial. The parties’ issue instruction informed the jury that Terry’s sought to recover the outstanding amount of \$13,530, so the jury didn’t have to exercise judgment to assess the amount of damages for the breach-of-contract claim. An award of prejudgment interest to Terry’s on its damages for breach of contract is proper.

[19] As to the appropriate rate of interest, Terry’s cites Indiana Code section 34-51-4-9, which permits a court to set a prejudgment interest rate of no less than 6% and no more than 10% per year. But this statute applies to actions arising out of tortious conduct. I.C. § 34-51-4-1. The relevant statute is Section 24-4.6-1-102, which designates an interest rate of 8% per year when parties to a contract haven’t agreed on a rate. *PNC Bank*, 186 N.E.3d at 638. But the parties here did agree on a rate—the contracts specified that, in the event that Terry’s had to initiate legal proceedings to collect any unpaid balance, Terry’s would be entitled to recover “interest on the contract balance outstanding and unpaid” at

a rate of 1.5% per month. “When the parties have contractually agreed to a rate of interest, that rate is used to compute the amount of prejudgment interest.” *Id.* And the prejudgment interest is computed from the time the principal amount was demanded or due. *Song*, 76 N.E.3d at 939; *see also Fackler v. Powell*, 923 N.E.2d 973, 978 (Ind. Ct. App. 2010) (holding Fackler was entitled to prejudgment interest at the rate in the parties’ agreement from the date of default until the date of judgment). We reverse the trial court’s denial of prejudgment interest and remand with instructions for the court to calculate the prejudgment interest due on the \$13,530 breach-of-contract award at the parties’ agreed-upon rate of 1.5% per month.

III. Terry’s is entitled to post-judgment interest on the entire judgment

[20] Finally, Terry’s argues the trial court erred in failing to award it post-judgment interest. Despite ultimately issuing an order denying the motion for attorney’s fees, prejudgment interest, and post-judgment interest, the trial court ruled at the hearing on the motion that “[t]he judgment that was entered accrues interest at the statutory rate at the date of its entry.” This “statutory rate” comes from Indiana Code section 24-4.6-1-101(2), which provides, in relevant part, that “interest on judgments for money whenever rendered shall be from the date of the return of the verdict or finding of the court until satisfaction at . . . an annual rate of eight percent (8%) [.]” Under this statute, Terry’s is entitled to post-judgment interest on the \$48,530 judgment at the rate of 8% beginning on April 6, 2023, the date the judgment was entered. While the trial court

acknowledged this at the hearing, it didn't enter an order awarding post-judgment interest or amend the judgment to reflect the accrual of interest. We instruct the court to do so on remand.

[21] Terry's also contends it is entitled to post-judgment interest at the statutory rate of 8% on the prejudgment interest and attorney's fees it is owed. Awards of prejudgment interest and attorney's fees also accrue post-judgment interest under Section 24-4.6-1-101(2) beginning on the date the trial court enters the awards. *Denman*, 176 N.E.3d at 501-02; *Pac-Van, Inc. v. Wekiva Falls Resort*, 975 N.E.2d 831, 832-33 (Ind. Ct. App. 2012). On remand, after the trial court calculates reasonable attorney's fees and prejudgment interest, it must also award post-judgment interest on those amounts at the statutory rate of 8%. The post-judgment interest on the awards of prejudgment interest and attorney's fees will begin accruing on the date the court enters the awards.

[22] Affirmed in part, reversed in part, and remanded.

Bradford, J., and Brown, J., concur.

ATTORNEY FOR APPELLANT

Daniel J. Calhoun
Calhoun Law LLC
Crown Point, Indiana

ATTORNEYS FOR APPELLEE

Christopher L. Wartman
Todd A. Uzelac
Uzelac Law, LLC
Merrillville, Indiana