

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 19, 2004

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 04-0107
STATE OF WISCONSIN**

Cir. Ct. No. 03SC000180

**IN COURT OF APPEALS
DISTRICT III**

ANTIGO HOMES, INC.,

**PLAINTIFF-RESPONDENT-CROSS-
APPELLANT,**

v.

JOHN K. RAIMER AND KATIE M. RAIMER,

**DEFENDANTS-APPELLANTS-CROSS-
RESPONDENTS.**

CROSS-APPEAL from a judgment of the circuit court for Langlade County: JAMES P. JANSEN, Judge. *Affirmed.*

¶1 CANE, C.J.¹ Antigo Homes, Inc., cross-appeals² a judgment that John and Katie Raimer are responsible only for statutory attorney fees resulting

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

² The Raimers voluntarily dismissed their appeal of the judgment.

from a breach of contract action Antigo Homes brought against them in small claims court. Antigo Homes argues that it is entitled to actual attorney fees pursuant to a clause in the contract between it and the Raimers. It also argues that it is entitled to actual attorney fees associated with this cross-appeal. We affirm the judgment.

BACKGROUND

¶2 On December 20, 2002, the Raimers contracted with Antigo Homes for the purchase and installation of a manufactured home. The contract price was \$60,000. The Raimers paid \$55,100 at the time they signed the contract, with the balance of \$4,900 to be paid upon completion. The contract contained a provision that stated:

If the purchaser defaults in the performance of any of its duties in this Contract, Retailer may terminate its obligation to perform the Work, and shall be paid for Retailer's Work that was performed, in addition to all other amounts due under this Contract, (including the purchase price of the Home), and shall have all other remedies available at law or equity. Purchaser shall pay Retailer's cost of collection, including attorney's fees, whether before or after bankruptcy.

¶3 After Antigo Homes began installation, disputes arose regarding the construction of a concrete slab beneath the home, an Antigo Homes employee who was allegedly intoxicated on the job, and whether Antigo Homes failed to perform its responsibilities under the contract. For these reasons, the Raimers did not pay Antigo Homes the balance of the contract and prevented Antigo Homes' employees from entering the property to finish the installation.

¶4 Antigo Homes filed a claim in small claims court for the \$4,900 balance the Raimers owed. The Raimers did not dispute that they owed Antigo

Homes \$4,900. However, they filed a counterclaim, arguing that Antigo Homes failed to perform under the contract and caused the emission of hazardous substances on their property. The Raimers alleged they had suffered damages “in an amount to be determined, but in excess of [\$5,000].”³ They argued that they had to do some work themselves that Antigo Homes should have done.

¶5 The court concluded that Antigo Homes was entitled to the \$4,900 balance owed to them under the contract. However, it also concluded that the Raimers are entitled to a setoff for work they did that Antigo Homes should have done. The court determined that the value of the work the Raimers performed was \$2,000 and, therefore, awarded Antigo Homes \$2,900. The court also awarded Antigo Homes interest and statutory attorney fees totaling \$445.20.

¶6 Antigo Homes drew up the judgment for the court to sign. In it, Antigo Homes included actual attorney fees of \$2,500. The Raimers objected to this figure, arguing that because it was a small claims case, Antigo Homes was only entitled to statutory attorney fees of \$100. The court therefore changed the amount on the judgment to reflect the statutory amount of \$100. Antigo Homes appeals that portion of the judgment.

DISCUSSION

¶7 Appellate review of an award of attorney fees is confined to whether the trial court erroneously exercised its discretion. *Carl v. Spickler Enters., Ltd.*, 165 Wis. 2d 611, 627, 478 N.W.2d 48 (Ct. App. 1991). In small claims cases, an award of attorney fees is governed by statute, WIS. STAT. § 799.25(10). The

³ The Raimers’ counterclaim states the damages are “in excess of \$5,00.00.” The record makes clear that the Raimers meant to state that the damages are in excess of \$5,000.

application of the statute to the facts of this case is a question of law we review independently. *See DeMars v. LaPour*, 123 Wis. 2d 366, 370, 366 N.W.2d 891 (1985).

¶8 WISCONSIN STAT. ch. 799 governs small claims actions. WISCONSIN STAT. § 799.25(10)(a) states that a small claims court is to award attorney fees “as provided in s. 814.04(1) ... except if the amount of attorney fees is otherwise specified by statute.” WISCONSIN STAT. § 814.04(1)(a) states that “when the amount recovered or the value of the property involved is \$1,000 or over, attorney fees shall be \$100.” Thus, the Raimers maintain Antigo Homes is only entitled to \$100 in attorney fees.

¶9 In Antigo Homes’ brief in chief, it acknowledged that only statutory attorney fees are available in small claims actions. However, it argued that the contract supersedes the statute and therefore it is entitled to actual attorney fees. Antigo Homes’ entire argument in its brief in chief involved the validity of the contract, and that the Raimers agreed to the attorney fee provision when they signed the contract. However, when a contract conflicts with a statute, the statute controls. *See Drivers, etc., Local No. 695 v. WERC*, 121 Wis. 2d 291, 298, 359 N.W.2d 174 (Ct. App. 1984). Thus, Antigo Homes is incorrect in its assertion that the contract supercedes the statute.

¶10 We note that, in its reply brief, Antigo Homes for the first time argues that because the Raimers’ counterclaim was in excess of \$5,000, the case should have been tried in the upper branch of the circuit court. Pursuant to WIS. STAT. § 799.02(1):

If a counterclaim or cross complaint is filed, which arises out of the transaction or occurrence that is the subject matter of the plaintiff’s claim and which is beyond the

limitations of s. 799.01, [providing for the \$5,000 limit on small claims actions] the person filing the same shall pay the fee prescribed in s. 814.62(3)(b), and the entire matter shall be tried under chs. 801 to 847 procedure

Antigo Homes argues that upper branch procedures recognize contract language governing attorney fees, and therefore the contract should govern here. It is a well-established rule of appellate practice, however, that this court will not consider arguments raised for the first time in a reply brief. *Northwest Wholesale Lumber v. Anderson*, 191 Wis. 2d 278, 294 n.11, 528 N.W.2d 502 (Ct. App. 1995).⁴

¶11 Antigo Homes also argued that if we determine it is entitled to actual attorney fees in the trial court, it should also be entitled to attorney fees associated with this cross-appeal. Because we have determined it was not entitled to attorney fees in the trial court, we need not address the issue of attorney fees on cross-appeal.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

⁴ When the Raimers filed their counterclaim, they also filed a motion for change of venue. The clerk's minutes state, "Per Judge Jansen, motion for change of venue to be set, file not to go to upper branch yet." Subsequently, the court denied the venue motion. However, the file was apparently never transferred to the upper branch as the proceedings continued in small claims court.

