

WALLER CORPORATION,

Appellee

v.

WARREN PLAZA, INC.,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 380 WDA 2013

Appeal from the Judgment Entered February 1, 2013
In the Court of Common Pleas of Washington County
Civil Division at No(s): 2007-1585

BEFORE: BENDER, P.J.E., LAZARUS, J., and MUNDY, J.

CONCURRING AND DISSENTING OPINION BY BENDER, P.J.E. **FILED JUNE 30, 2014**

Respectfully, I dissent. I agree with the learned Majority that Appellant, Warren Plaza, Inc. is liable to Waller Corporation (Waller) for compensatory damages and interest based upon its breach of contract. However, in my view, the Majority errs in affirming the trial court's award of attorney fees.

First, the Majority disregards the binding precedential value of ***Zimmerman v. Harrisburg Fudd I, L.P.***, 984 A.2d 497 (Pa. Super. 2009), opting instead to re-interpret the merely persuasive, federal authority upon which the ***Zimmerman*** panel based its decision. ***See Commonwealth v. Hull***, 705 A.2d 911, 912 (Pa. Super. 1998) ("It is beyond the power of a panel of the Superior Court to overrule a prior decision of the Superior Court"). In so doing, the Majority rejects the ***Zimmerman*** panel's

determination that a “*substantially* prevailing party” must prove that a defendant withheld prompt payment without a good faith reason. **See Zimmerman**, 984 A.2d at 503 (relying upon the “good faith” requirement legislated in 73 P.S. § 512(a) to interpret a “substantially prevailing party,” as provided in 73 P.S. § 512(b)).

Here, the trial court found expressly that Appellant “had a good faith basis, although mistaken, to withhold payment.” Trial Court Opinion, 03/01/2012, at 4; **see also** Trial Court Post-Trial Opinion, 10/17/2012, at 3 (reiterating the trial court’s determination that Appellant withheld payment in good faith); Trial Court 1925(a) Opinion, 04/09/2013, at 4 (same). The record supports these findings, and we are bound by them. **Piston v. Hughes**, 62 A.3d 440, 443 (Pa. Super. 2013). In my view, the trial court’s finding is dispositive of this issue, and, therefore, the trial court erred in concluding that Waller was the *substantially* prevailing party. **Zimmerman**, 984 A.2d at 503.

Moreover, the Majority does not suggest a new interpretation of the modifier “substantially,” indeed declining to impart it with any particular significance. **See Bridges PBT v. Chatta**, 821 A.2d 590, 593 (“We presume that the legislature intended that the entire statute be effective and disfavors surplusage.”). This is particularly troubling in light of the trial court’s initial determination that Waller was the substantially prevailing party *merely* because the court found against Appellant. **See** Post-Trial Opinion,

at 4; **Chatta**, 821 A.2d at 593 (rejecting the appellant's efforts to eliminate the modifier "substantially").

Finally, I disagree with the Majority's affirmance of the trial court's post-trial decision to increase its award of attorney fees to Waller. In granting Waller's post-trial motion for additional attorney fees, the court determined to increase its award in order to reflect accurately the bills submitted, concluding that the "large and disproportionate fee" was "largely due to the actions of [Appellant]." **See** Trial Court 1925(a) Opinion at 8. Section 512(b) directs a trial court to award a "reasonable attorney fee." It does not empower a trial court to award a disproportionate fee. Moreover, the trial court did not cite evidence in the record to support its finding that Appellant was responsible for any delay in the proceedings. In my view, there is no support in the record for this finding. **See Piston**, 62 A.3d at 443.