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**IN THE  
COURT OF APPEALS OF INDIANA**

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BARKER INDUSTRIAL PARK, INC., )  
CLARA BARKER and CHARLES E. BARKER, )  
 )  
Appellants-Plaintiffs, )

vs. )

No. 49A05-1104-PL-201

KEN CUT LAWN SERVICE, INC., )  
 )  
Appellee-Defendant. )

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Patrick L. McCarty, Judge  
Cause No. 49D03-0905-PL-24583

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**October 19, 2011**

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**BARNES, Judge**

## **Case Summary**

Barker Industrial Park, Inc., Clara Barker, and Charles Barker (collectively, the “Barkers”) appeal the trial court’s judgment against Ken Cut Lawn Service, Inc., (“Ken Cut”). We reverse and remand.

### **Issue**

The Barkers raise one issue, which we restate as whether the trial court properly calculated the Barkers’ damages for Ken Cut’s breach of a lease agreement.

### **Facts**

Ken Cut entered into a lease agreement with the Barkers, but Ken Cut vacated the premises before the lease expired. Ken Cut also stopped paying rent to the Barkers. In June 2009, the Barkers filed a small claims complaint against Ken Cut, but the case was refiled in the Marion County Superior Court. Ken Cut then filed an answer and a counterclaim against the Barkers.

The Barkers filed a motion for summary judgment, and on April 1, 2010, the trial court entered summary judgment in favor of the Barkers and against Ken Cut for \$3,900 in unpaid rent and \$81 in costs. The trial court set the issues of “damage repair costs, attorney fees, the amount of prejudgment interest, and the Defendant’s counterclaim” for trial. Appellant’s App. p. 11. After a bench trial, the trial court found: (1) Ken Cut had failed to meet its burden on its counterclaim; (2) the Barkers had “additional damages” of \$2,000 reduced by Ken Cut’s damage deposit of \$1,100; (3) cumulative damages were \$4,881; (4) the Barkers were entitled to “judgment interest of \$357.94 (11 months at \$32.54/month) since April 1, 2010” on the \$4,881; and (5) the total judgment was

\$4,513.54. Id. at 9. The Barkers filed a motion to correct error, which the trial court denied. The Barkers now appeal.

### **Analysis**

The Barkers argue that the trial court's damages award is improper because it failed to include their attorney fees, failed to include prejudgment interest, and contained a calculation error. The trial court entered sua sponte findings of fact and conclusions thereon. Sua sponte findings control only as to the issues they cover, and a general judgment will control as to the issues upon which there are no findings. Yanoff v. Muncy, 688 N.E.2d 1259, 1262 (Ind. 1997). We will affirm a general judgment entered with findings if it can be sustained on any legal theory supported by the evidence. Id. When a court has made special findings of fact, we review sufficiency of the evidence using a two-step process. Id. First, we must determine whether the evidence supports the trial court's findings of fact. Id. Second, we must determine whether those findings of fact support the trial court's conclusions of law. Id.

Findings will only be set aside if they are clearly erroneous. Id. "Findings are clearly erroneous only when the record contains no facts to support them either directly or by inference." Id. A judgment is clearly erroneous if it applies the wrong legal standard to properly found facts. Id. In order to determine that a finding or conclusion is clearly erroneous, an appellate court's review of the evidence must leave it with the firm conviction that a mistake has been made. Id.

Our scope of review when considering a damages award in a breach of contract case is limited. Coffman v. Olson & Co., P.C., 906 N.E.2d 201, 210 (Ind. Ct. App.

2009), trans. denied. We do not reweigh evidence or judge witness credibility, and will consider only the evidence favorable to the award. Id. The damages award cannot be based on speculation, conjecture, or surmise, and must be supported by probative evidence. Id. When injured by a breach of contract, a party's recovery is limited to the loss actually suffered. Id. Such party may not be placed in a better position than he or she would have enjoyed if the breach had not occurred. Id. Accordingly, a damages award must reference some fairly defined standard, such as cost of repair, market value, established experience, rental value, loss of use, loss of profits, or direct inference from known circumstances. Id. We will reverse the trial court's award only when it is not within the scope of the evidence of record. Id. at 210-11.

The damages at issue in the trial here were attorney fees, prejudgment interest, and damage repairs. The trial court acknowledged that these were the issues for trial and apparently combined the three issues to award \$2,000 in "additional damages." Appellant's App. p. 9. The trial court's findings do not specifically address how it reached its additional damages calculation. As noted, a general judgment will control as to the issues upon which there are no findings. Yanoff, 688 N.E.2d at 1262. We will affirm the general judgment entered with findings if it can be sustained on any legal theory supported by the evidence. Id.

### ***I. Attorney Fees***

Generally, Indiana follows the American Rule, which requires each party to pay his or her own attorney fees. Stewart v. TT Commercial One, LLC, 911 N.E.2d 51, 58 (Ind. Ct. App. 2009), trans. denied. However, parties may shift the obligation to pay such

fees through contract or agreement, and courts will enforce the agreements as long as they are not contrary to law or public policy. Id. The lease agreement here provided: “Each party shall pay the other party’s reasonable legal costs and attorney’s fees incurred in successfully enforcing against the other party any covenant, term, or condition of this lease.” Appellant’s App. p. 22. Even under a contract, an award of attorney fees must be reasonable. Stewart, 911 N.E.2d at 58.

The Barkers requested an attorney fee award of \$5,661. Ken Cut stipulated to the admissibility of the Barkers’ itemized attorney fee bills, and Ken Cut also stipulated that the Barkers’ attorney’s hours were reasonable and customary. In fact, Ken Branam of Ken Cut testified that Ken Cut also had incurred attorney fees of \$5,000 to \$6,000. Ken Cut did not prevail on its counterclaim against the Barkers, but the Barkers prevailed on their claim against Ken Cut. Even if the entire \$2,000 additional damages award was for the Barkers’ attorney fees, it was not within the scope of the evidence presented.

Ken Cut argues that the award is proper and was reduced because the Barkers failed to prevail on all of the issues in its complaint. In particular, Ken Cut argues that the Barkers failed to be awarded all of its requested damages for repairs. We noted in Delgado v. Boyles, 922 N.E.2d 1267 (Ind. Ct. App. 2010), trans. denied, that, in the context of attorney fees, a prevailing party is one ““who successfully prosecutes the action or unsuccessfully defends against it, prevailing on the main issue, even though not necessarily to the extent of his original contention.”” Delgado, 922 N.E.2d at 1270 (quoting BLACK’S LAW DICTIONARY 1188 (6th ed. 1990)). Although the Barkers were not awarded the entire amount of repair costs that they requested, they were awarded a

substantial amount of the total damages requested and prevailed on Ken Cut's counterclaim. We conclude that the substantial reduction in their requested attorney fees was an abuse of discretion.

The attorney fee award is clearly not within the scope of the evidence. Given the contractual provision and Ken Cut's stipulation that the amount of requested attorney fees was reasonable, we conclude that the trial court abused its discretion. We remand for the trial court to recalculate the attorney fee award to the Barkers.

### ***II. Prejudgment Interest***

The Barkers also argue that the trial court failed to award prejudgment interest. The lease provided: "All sums as to which Tenant is in default of payment shall bear interest at the rate of eight percent (8%) per annum until paid." Appellant's App. p. 22. Because the trial court did not enter specific findings detailing its \$2000 additional damages award, we cannot determine how much, if any, prejudgment interest the trial court awarded the Barkers. Because we are already remanding for recalculation of the attorney fee award, we direct the trial court to also explain its prejudgment interest calculation on remand.

### ***III. Calculation Error***

Finally, the Barkers argue that the trial court made a calculation error in its judgment. The trial court entered a total judgment of \$4,513.54. However, the judgment was comprised of the following: (1) \$3,900 rent awarded on summary judgment; (2) plus \$81 in costs awarded on summary judgment; (3) plus \$2,000 in additional damages; (4) minus \$1,100 for the damage deposit; (5) plus \$357.94 in interest since April 1, 2010.

This calculation should have resulted in a damages award of \$5,238.94 rather than \$4,513.54. Ken Cut concedes that the trial court's calculation was erroneous. Of course, this calculation will change on remand due to our determination that the attorney fee award was inadequate. Regardless, we direct the trial court to recalculate the damages in accordance with this opinion.

### **Conclusion**

The trial court's attorney fee award was not within the scope of the evidence and was inadequate. We reverse and remand for recalculation of the attorney fee award. On remand, the trial court should explain its prejudgment interest calculation and correct its total judgment calculation.

Reversed and remanded.

ROBB, C.J., and BRADFORD, J., concur.