MEMORANDUM DECISION

IN THE

Court of Appeals of Indiana

Lynn Mattern,

Appellant-Plaintiff/Cross-Appellee

v.

Courtney Ward,

Appellee-Defendant/Cross-Appellant

July 18, 2024

Court of Appeals Case No.
22A-PL-2493

Appeal from the Allen Circuit Court

The Honorable Wendy W. Davis, Judge

Trial Court Cause No.
02C01-2007-PL-271

Memorandum Decision by Judge Pyle
Judges Tavitas and Foley concur.

Pyle, Judge.

Statement of the Case

[1] This case concerns a land contract ("the contract") entered into by Lynn Mattern ("Mattern") and Courtney Ward ("Ward"), Mattern's step-granddaughter. The contract governed the sale of real estate ("the real estate") from Mattern to Ward. After a bench trial, Mattern appeals the trial court's denial of his motion to correct error challenging some of the trial court's findings and conclusions. Mattern specifically argues that the trial court erred when it: (1) found that foreclosure, not forfeiture, was the proper remedy; and (2) denied Mattern's request for attorney's fees. On cross-appeal, Ward argues that: (1) the trial court abused its discretion when it awarded $38,372.37 in damages to Mattern for Ward's breach of the contract; and (2) she is entitled to appellate attorney's fees under Indiana Appellate Rule 66(E) because Mattern filed his appeal in bad faith. Concluding that the trial court clearly erred when it found that Ward had not abandoned the real estate, we reverse the trial court's judgment and hold that forfeiture was the proper remedy in this case. Additionally, we hold that the trial court abused its discretion when it denied Mattern's request for attorney's fees because the text of the contract allowed for Mattern's reasonable attorney's fees. We also partially reverse the trial court's award of damages in favor of Mattern for Ward's breach of the contract.

[2] We affirm in part, reverse in part, and remand with instructions.

Issues and Cross-Appeal Issues

1. Whether the trial court erred when it found that foreclosure, not forfeiture, was the proper remedy.

2. Whether the trial court abused its discretion when it denied Mattern's request for attorney's fees.

3. Whether the trial court erred when it ordered $38,372.37 in damages to Mattern.

4. Whether Ward is entitled to appellate attorney's fees because Mattern filed his appeal in bad faith.

Facts

[3] Sometime in 2014, Mattern purchased the real estate, which is located in Allen County. Mattern purchased the real estate with the intent to sell the real estate to Ward. In October 2014, Ward, who is Mattern's adult granddaughter, began living in the real estate. Ward had agreed, as a term of living in the real estate, to pay Mattern $450 a month. Additionally, Ward was responsible for property taxes, homeowner's insurance, and utilities.

[4] In July 2016, Cynthia Garriott ("Cynthia"), who is Mattern's daughter and who is married to Ward's father, Alan Garriott ("Alan"), drafted the contract. Cynthia is not an attorney and had drafted similar land contracts between Mattern and some of his other grandchildren. Ward signed the contract, and Cynthia filed the contract with the Allen County Recorder's Office.

[5] The contract provided that Ward would purchase the real estate from Mattern for the price of $75,000. The contract further provided that Ward would pay

$450 a month starting on August 1, 2016 and that each $450 payment would be due on the first of each month. The contract provided that the remaining balance would accrue interest at the rate of five (5) percent. The contract also provided that Ward would be responsible for: (1) paying property taxes on the real estate; (2) paying any assessment fees; (3) maintaining and paying home insurance premiums for the real estate; and (4) paying utilities for the real estate. The contract defined default as Ward being thirty (30) days late on: (1) any monthly payment; (2) any property tax payment or public assessment; and (3) any home insurance premium payment. The contract also provided that the real estate "shall not be rented, leased, or occupied by persons other than purchaser, and the [r]eal [e]state shall be solely [used] as [Ward]'s principal residence, and for no other purpose." (Appellant's App. Vol. 2 at 60).

[6] The contract, in relevant part, also provided:

> In the event [Ward] deserts, or abandons the [r]eal [e]state or commits any other willful breach of this [c]ontract which materially diminishes the security intended to be given to [Mattern] under and by virtue of this [c]ontract, then, it is expressly agreed by [Ward] that, unless [Ward] shall have paid more than $50,000 of the [p]urchase [p]rice, [Mattern] may, at [Mattern]'s option, cancel this [c]ontract and take possession of the [r]eal [e]state and remove [Ward] therefrom[.] . . . Such retention shall not bar [Mattern]'s right to recover damages for unlawful detention of the [r]eal [e]state after default, for any failure to pay taxes or insurance, for failure to maintain the [r]eal [e]state at any time, for waste committed thereon or for any other damages suffered by [Mattern], including reasonable attorneys' fees incurred by [Mattern] in enforcing any right hereunder[.]

(Appellant's App. Vol. 2 at 62) (emphasis in original).

[7] Between 2014 and 2019, Ward made payments pursuant to the contract. However, these payments were sporadic, and the amount paid varied. In September 2019, Ward stopped making her monthly payments. At this point, Ward had made payments totaling $21,400.00. In 2018, 2019, and 2020, Ward made multiple attempts to discuss a payoff amount for the real estate. She discussed the payoff matter with her father, Alan, and Mattern, but they never gave a payoff amount to Ward. Sometime in the fall of 2019, Mattern, while at a family gathering, heard that Ward was planning to move to Georgia. At the end of 2019, communication between Ward and Alan, who did the majority of the communicating with Ward on Mattern's behalf, broke down. Ward allegedly began putting her monthly payments into an escrow account.

[8] In December 2019, Ward left the real estate and moved to Georgia, where her husband, Ronald Ward ("Ronald") was working. Ward also enrolled her children in school in Georgia in January 2020.

[9] In July 2020, Mattern filed with the trial court his complaint for breach of contract and for possession or forfeiture of the real estate. In January 2021, Mattern entered the real estate and changed the locks. In February 2021, Mattern filed with the trial court a verified petition for a preliminary recovery of possession of real estate pursuant to INDIANA CODE § 32-30-3-5. In March 2021, the trial court granted Mattern's motion after a hearing.

[10] In May 2022, the trial court held a bench trial, where it heard the facts as set forth above and additional facts as well. Mattern testified that he had purchased the real estate at an auction. When Mattern's attorney asked Mattern if the real estate had been "move-in ready" when he had purchased it at auction, Mattern responded, "No." (Tr. Vol. 2 at 57). Mattern testified that he had put in new doors, windows, furnace, carpet, and had re-arranged the cabinets. Mattern testified that all of Ward's payments prior to entering into the contract counted towards the contract price. When Mattern's attorney asked Mattern if his "primary goal [wa]s to simply get possession of the [real estate]," Mattern responded, "Yes." (Tr. Vol. 2 at 82).

[11] Mattern also testified that in 2021, after he had retaken possession of the real estate, he had to "bring the house up to code." (Tr. Vol. 2 at 76). Mattern's counsel asked Mattern about the kinds of "improvements and repairs" that he had made to the property, and Mattern responded, "Extensive." (Tr. Vol. 2 at 75). Mattern moved to admit the list of renovations and their costs, and the trial court admitted them without objection as Plaintiff's Exhibit 9. The list of improvements and repairs totaled $29,740. The list of improvements and repairs admitted as Plaintiff's Exhibit 9 included, amongst many other items, cabinets and cabinet trim, installation of city water, a garage door, multiple interior doors, countertops, flooring, clay farm sink, carpets, a gold kitchen faucet, a water heater, refrigerator, stove, oven, microwave, dishwasher, and a washer and dryer. Mattern testified that he had no knowledge of an escrow account owned by Ward.

[12] Alan also testified at the bench trial. Alan testified that he had had multiple conversations with Ward about the contract on behalf of Mattern. Alan testified that there had been a dispute about payments starting in late 2019. Alan also testified that, in 2020, he had driven by the real estate multiple times, and it looked like "nobody [was] there." (Tr. Vol. 2 at 117). Alan also testified that Ward had left Indiana to live in Georgia in December 2019. Alan also testified that when he had entered the real estate in January 2021, the real estate appeared abandoned. Alan also testified that he was not aware of Ward having an escrow account.

[13] Ward also testified at the bench trial. Ward testified that her husband was "working on a property" in Georgia in 2019, so she went to Georgia to visit. (Tr. Vol. 2 at 139). Ward further testified that she had "definitely" planned on coming back to Indiana. (Tr. Vol. 2 at 139). Ward testified that she was staying at a friend's house in Georgia, and Ronald traveled back to Indiana multiple times in 2020 to check on the real estate. Ward also testified that she had returned to the real estate in August 2020, but she did not stay there because of the litigation. When Ward's counsel asked Ward if it was her intent to return to and live in the real estate, Ward responded, "[o]f course[.]" (Tr. Vol. 2 at 146). Ward also testified that she had not been able to travel due to COVID-19. Specifically, Ward testified that she had not wanted to drive back to Indiana with four children during COVID travel restrictions and that it had been a "scary time." (Tr. Vol. 2 at 169).

[14] In July 2022, the trial court issued an extensive sixteen-page order containing its findings of fact and conclusions of law. The trial court's order stated, in relevant part, the following:

> 15. Ward testified that her last payment to Mattern was in September of 2019.
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> 16. Pl.'s Ex. 3 shows payments made by Mattern including real estate taxes in 2015, 2018, 2019, 2020, and 2021.
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> 17. Ward testified that she paid the real estate taxes on the Real Estate. She provided Def.'s Ex. C showing payments she alleged to have made toward taxes. Ward conceded that these amounts may not have been for the full amount of the real estate taxes due and could not explain why Mattern would have paid the real estate taxes unless she had not paid them in full.
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> 18. Additionally, Def.'s Ex. D presented by Ward allegedly shows utility payments. The itemization shows no payments by Ward on the utilities in December of 2019, January of 2020, or February of 2020.
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> 19. Mattern testified that he heard at a family gathering in the fall of 2019 that Ward intended to move out of the Real Estate. Ward's husband, Ronald Ward, was living in Georgia, and Mattern understood that Ward was moving to be with him. Cynthia testified to the same.
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> 20. However, testimony and evidence show that Mattern's assumption of abandonment by Ward was based on verbal information that Mattern received from a family member, as well as a surface check of the Real Estate by Mattern.

21. Ward's father, Alan, testified that Ward told him she was moving to Georgia. Alan testified that he had several conversations with Ward about her moving out of the Real Estate by in-person communication and text message.

22. Pl.'s Ex. 8 shows that Ward withdrew her son, Isaiah Johnson, from Holland Elementary School on November 6, 2019. Ward testified that she took her children to Georgia in December of 2019. She enrolled all three of her children in school at Murray Educational Center, Douglasville, Georgia on January 10, 2020.

23. Mattern testified that no one was regularly using the Real Estate after December of 2019.

* * * * *

26. In January of 2021, Mattern and another son, Edward Mattern, went to the Real Estate for the purpose of securing the Real Estate for the winter. Photographs of the Real Estate were taken at that time showing the level of disrepair. Pl.'s Ex. 6 is a collection of photographs taken in January of 2021 and March of 2021.

27. Mattern testified that the Real Estate appeared abandoned to him. Edward testified that the Real Estate appeared abandoned. However, Ward asserts that no abandonment took place, and that while there were periods of time where she left the state for various reasons, she never did so with the intent either to permanently leave the Real Estate or primarily reside in another location.

28. On January 5, 2021, police arrived at the Real Estate. A report was prepared and admitted as Pl.'s Ex. 4. In the report,

the police officer stated that the home was not much warmer than it was outside, and it appeared that the home had been used more for storage than a residence.

* * * * *

31. Ward and her husband were also operating a business out of the Real Estate. Ward conceded that the business, Worldwide Property Management LLC, operated out of the Real Estate. Ward admitted that the business received a PPP loan using the address in 2021.

32. At trial, Ward claimed that she was unable to return to the Real Estate due to COVID-19 traveling restrictions, which is shown in Def.'s Ex. J. Ward had driven to Georgia in December of 2019.

33. Alan testified that he took over primary contact with Ward after she left the Real Estate. Alan explained to the Court that the conversations with Ward did not happen all the time. There were long periods between communications about the Real Estate. Alan explained that the bulk of conversations about the Real Estate and the Contract took place by text.

* * * * *

35. Alan conceded that Ward asked for a payoff. Alan also testified Ward thought the payoff would be based on the Purchase Price less the gross amounts she paid. Allen testified that he told Ward that she knew better than this and that the Contract Balance was much higher than just subtracting the payments she made. Alan testified that Ward never said that she could pay off the Contract. Ward usually said that she would make two or three payments to pay off the balance.

> 36. Alan believed that the Contract Balance, after applying payments made by Mattern for taxes, insurance, and utilities, and applying accrued interest, still exceeded $73,000.00.
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> 37. Other than the testimony of Alan, no testimony or evidence of the application of the payments nor the value of the Real Estate was provided, as were no interest calculations.

(Appellant's App. Vol. 2 at 27-31).

[15] Further, the trial court ordered, in relevant part, the following:

> 1. The Court finds that [Ward] was in breach of the Contract for non-payment, [Mattern] is entitled to a monetary judgment against [Ward] in the amount of $38,372.37 for repairs made after taking possession and prior payments made.
>
> 2. The Court finds that both parties are responsible for their own reasonably incurred attorney fees.
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> 3. The Court finds that [Ward] has not deserted or abandoned the Real Estate in December of 2019 pursuant to the Contract due to COVID-19 traveling restrictions.
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> 4. [Mattern] has utilized an improper action to seek remedies for [Ward]'s breach. Foreclosure is an appropriate remedy under the Contract. The evidence shows that [Ward] has made sufficient payments to be considered having substantial equity in the Real Estate based on the Contract.
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> 5. [Ward] shall be afforded the opportunity of redemption of the Real Estate in the event the parties file a foreclosure complaint.

(Appellant's App. Vol. 2 at 40).[1]

[16] In August 2022, Mattern filed a motion to correct error. Mattern argued that the trial court had erred when it had: (1) determined that Ward had not abandoned the real estate; (2) determined that Ward had substantial equity in the real estate; and (3) denied Mattern's request for attorney's fees.[2] Ward also filed a motion to correct error arguing that the trial court had erred when it had awarded $38,372.37 in damages to Mattern. In September 2022, the trial court denied Mattern's motion to correct error on these arguments and denied Ward's motion to correct error on her argument related to Mattern's damages award.[3]

[17] Mattern now appeals, and Ward cross-appeals.

Decision

[18] Mattern argues that the trial court abused its discretion when it denied in part his motion to correct error. Specifically, Mattern argues that the trial court erred when it: (1) determined that foreclosure, not forfeiture, was the proper remedy; and (2) denied Mattern's request for attorneys' fees. On cross-appeal,

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[1] Paragraph 5 read differently on the initial order, but the trial court amended it after partially granting Mattern's motion to correct error. We quote the language as it would be after the trial court's correction.

[2] Mattern also argued that the trial court had erred in two other respects, and the trial court granted those portions of Mattern's motion to correct error. One correction was an entry of judgment against Ward for her eleven counterclaims against Mattern.

[3] Neither party provided a transcript of the September 2022 motion to correct error hearing.

Ward argues that the trial court abused its discretion when it denied in part her motion to correct error. Specifically, Ward argues that the trial court abused its discretion when it awarded $38,372.37 in damages to Mattern. Ward also contends that Mattern filed his appeal in bad faith. We address each of the contentions in turn.

[19] Both Mattern and Ward appeal the denial of their motions to correct error. We review the trial court's decision on a motion to correct error for an abuse of discretion. *Bruder v. Seneca Mortgage Services, LLC*, 188 N.E.3d 469, 471 (Ind. 2022). An abuse of discretion occurs when the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court or if the court has misinterpreted the law. *Berg v. Berg*, 170 N.E.3d 224, 227 (Ind. 2021). We review questions of law de novo. *Community Health Network, Inc. v. McKenzie*, 185 N.E.3d 368, 375 (Ind. 2022). Here, following a bench trial, the trial court entered findings of fact and conclusions thereon pursuant to Trial Rule 52. "In the appellate review of claims tried without a jury, the findings and judgment are not to be set aside unless clearly erroneous, and due regard is to be given to the trial court's ability to assess the credibility of the witnesses." *Fraley v. Minger*, 829 N.E.2d 476, 482 (Ind. 2005) (citing Ind. Trial Rule 52). "A judgment will be clearly erroneous when there is no evidence supporting the findings or the findings fail to support the judgment, and when the trial court applies the wrong legal standard to properly found facts." *Fraley*, 829 N.E.2d at 482 (internal citations and quotation marks omitted). "While findings of fact are reviewed under the clearly erroneous standard, appellate courts do not defer

to conclusions of law, which are reviewed de novo." *Id.* We will not reverse the trial court's judgment unless it is clearly erroneous, that is, when our review of the record leaves us with a firm conviction that a mistake has been made. *Id.*

1. Forfeiture

[20] Mattern's overarching argument is that the trial court erred by ordering foreclosure instead of forfeiture. We pause briefly to discuss the topic of foreclosure and forfeiture in land contracts. This Court has explained the differences between foreclosure and forfeiture as follows:

> In *Skendzel v. Marshall*, 261 Ind. 226, 301 N.E.2d 641 (1973), *cert. denied*, . . . our Supreme Court held that in all but a few specific instances, the proper relief to be granted a vendor upon the vendee's material breach of a land sale contract is a judgment of foreclosure pursuant to Indiana Trial Rule 69(C). Upon foreclosure, the vendee retains a vendee's lien upon the sale, and once the balance owed under the contract has been paid to the vendor, the vendee may retain the proceeds from the sale. If the foreclosure does not net a sufficient amount to satisfy the vendor's remaining security interest in the property, a damage judgment for waste caused by the vendee equivalent to the amount recoverable by a mortgagee as a deficiency judgment would be appropriate. Forfeiture divests property without compensation; in other words, forfeiture terminates an existing contract without restitution. A vendor who has obtained the remedy of forfeiture may cancel the contract, retain the payments made, retain the real estate, and recoup actual damages sustained as a result of the transaction. Forfeiture may be considered an appropriate remedy in limited circumstances, that is, (1) an abandoning or absconding vendee or (2) where the vendee has paid a minimal amount and the vendor's security interest in the

> property has been jeopardized by the acts or omissions of the vendee.

Deason v. Bill R. McWhorter & Heather McWhorter Revocable Living Tr., Dated Jan. 24, 2003, 112 N.E.3d 1082, 1085-86 (Ind. Ct. App. 2018) (cleaned up).

[21] Forfeiture provisions in a land sales contract are not per se to be deemed unenforceable. *Morris v. Weigle*, 383 N.E.2d 341, 344 (Ind. 1978). But, under certain circumstances, they may become unenforceable because of the equity underlying the contract at issue. *Id.* "The court, in the exercise of its equitable powers, does not infringe upon the rights of citizens to freely contract, but the court does refuse, upon equitable grounds, to enforce the contract because of the actual circumstances at the time the court is called upon to enforce it." *Id.*

[22] More than fifty years ago, the Indiana Supreme Court addressed the equity of forfeiture as a remedy in land contracts in *Skendzel*. The *Skendzel* Court initially observed that forfeitures are generally disfavored by law because a significant injustice results where the vendee has a substantial interest in the property. *Skendzel*, 301 N.E.2d at 645–46. The *Skendzel* Court determined that a land sales contract is akin to a mortgage and, therefore, the remedy of foreclosure is more consonant with notions of fairness and justice:

> [J]udicial foreclosure of a land sale contract is in consonance with the notions of equity developed in American jurisprudence. A forfeiture—like a strict foreclosure at common law—is often offensive to our concepts of justice and inimical to the principles of equity. . . . [A] court of equity must always approach forfeitures with great caution, being forever aware of the

> possibility of inequitable dispossession of property and exorbitant monetary loss. We are persuaded that forfeiture may only be appropriate under circumstances in which it is found to be consonant with notions of fairness and justice under the law.

McLemore v. McLemore, 827 N.E.2d 1135, 1140 (Ind. Ct. App. 2005) *(*quoting *Skendzel,* 301 N.E.2d at 650). Again, forfeiture may be considered an appropriate remedy only in the limited circumstances of: (1) an abandoning or absconding vendee; or (2) where the vendee has paid a minimal amount and the vendor's security interest in the property has been jeopardized by the acts or omissions of the vendee. *McLemore*, 827 N.E.2d at 1140.

[23] We now turn to Mattern's argument that the trial court erred by concluding that Ward had not abandoned the real estate due to the COVID-19 travel restrictions. "For there to be an abandonment of a conditional land sales contract[,] one must actually and intentionally relinquish possession of the land and act in a manner which is unequivocally inconsistent with the existence of a contract." *McLemore*, 827 N.E.2d at 1141.

[24] Here, our review of the record reveals that Ward stopped making her contract payments to Mattern in September 2019. Further, in December 2019, Ward left Indiana with her children and started living in Georgia with her husband. Alan also testified that Ward had told him that she was moving to Georgia. In January 2020, Ward enrolled all of her children in school in Georgia. The record also shows that Ward made no utility payments in December 2019, January 2020, and February 2020. Further, Mattern had paid some or all of the

property taxes on the real estate in 2019 and 2020. Aside from Mattern's property tax payment in 2020, all of these facts occurred before the COVID-19 pandemic began in March 2020. These facts show that Ward had actually and intentionally relinquished possession of the land and acted in a manner which was unequivocally inconsistent with the existence of a contract. *Id.* Therefore, we hold that the trial court clearly erred when it found that Ward had not abandon the contract due to the COVID-19 pandemic.[4]

[25] Further, in January 2021, Mattern and his son entered the real estate. They both testified that the real estate looked like it had been abandoned. Further, a police officer filed a report around the same time and noted that the real estate temperature was not much warmer than outside and that the real estate looked like it had been used more for storage than a residence.

[26] Given that Ward had: (1) not made a payment to Mattern under the contract since September 2019; (2) left the real estate in December 2019; (3) enrolled her children in school in Georgia in January 2020; and (4) stopped making regular payments towards utilities in December 2019, we hold that Ward had abandoned the real estate and, therefore, forfeiture was appropriate under these circumstances.

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[4] Both parties also made arguments under the second *Skendzel* exception regarding minimal payments and jeopardized security interests. However, because we have held that Ward had abandoned the property, we need not address these arguments. *See McLemore*, 827 N.E.2d at 1140.

2. Attorney Fees

[27] Mattern argues that the trial court abused its discretion when it denied his request for attorney's fees. "When reviewing an award or denial of attorney fees, we note that the trial court is empowered to exercise its sound discretion, and any successful challenge to its determination must demonstrate an abuse thereof." *Delgado v. Boyles*, 922 N.E.2d 1267, 1270 (Ind. Ct. App. 2010), *reh'g denied*, *trans. denied*. We will find an abuse of discretion if "the trial court's decision is clearly against the logic and effect of the facts and circumstances before it." *Id.*

[28] Parties to litigation generally pay their own attorney's fees but may agree by contract to do otherwise. *Reuille v. E.E. Brandenberger Const., Inc.*, 888 N.E.2d 770, 771 (Ind. 2008). Where, as here, parties have executed a contractual provision agreeing to pay attorney's fees, such agreement is enforceable according to its terms unless the contract conflicts with law or public policy. *Id.*

[29] In this case, the contract provides:

> Such retention shall not bar [Mattern]'s right to recover damages for unlawful detention of the [r]eal [e]state after default, for any failure to pay taxes or insurance, for failure to maintain the [r]eal [e]state at any time, for waste committed thereon or for any other damages suffered by [Mattern], including reasonable attorneys' fees incurred by [Mattern] in enforcing any right hereunder[.]

(Appellant's App. Vol. 2 at 62).

[30] The issue before our court is one of contract interpretation. "The goal of contract interpretation is to ascertain and give effect to the parties' intent as by the language of the agreement." *Delgado*, 922 N.E.2d at 1270. Clear and unambiguous language "must be given its plain and ordinary meaning." *Reuille*, 888 N.E.2d at 771.

[31] Here, the text of the contract clearly provides that Mattern is not barred from his right "to recover damages . . . including reasonable attorneys' fees incurred by [Mattern] in enforcing any right hereunder[.]" The trial court specifically found that Ward had breached the terms of the contract. Seeking to recover damages, Mattern exercised that right when he requested that the trial court award him his attorney's fees. However, the trial court denied Mattern's request. The text of the contract unambiguously allows for Mattern to recover his reasonable attorney's fees. Therefore, we hold that the trial court abused its discretion when it denied Mattern's request. Accordingly, we reverse the trial court's judgment and remand with instructions for the trial court to hold a hearing in order to determine Mattern's reasonable attorney's fees.[5]

3. Cross-appeal - Damages

[32] Ward argues on cross-appeal that the trial court abused its discretion when it determined that Ward owed $38,372.37 in damages to Mattern for breaching

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[5] Both Mattern and Ward argue about whether Mattern was the prevailing party in the litigation. Because we hold that Mattern is entitled to forfeiture due to Ward's breach of the contract, Mattern is the prevailing party.

the contract. The computation of damages for a breach of contract is a matter within the sound discretion of the trial court. *City of Jeffersonville v. Env't Mgmt. Corp.*, 954 N.E.2d 1000, 1015 (Ind. Ct. App. 2011). We will not reverse a damage award upon appeal unless it is based on insufficient evidence or is contrary to law. *Id.* In determining whether an award is within the scope of the evidence, we may not reweigh the evidence or judge the credibility of witnesses. *Id.*

[33] The measure of damages for breach of contract is limited by what is reasonably foreseeable at the time the parties entered into the contract. *Rogier v. Am. Testing & Eng'g Corp.*, 734 N.E.2d 606, 614 (Ind. Ct. App. 2000), *reh'g denied*, *trans. denied*. "The test for measuring damages is foreseeability at the time of entry into the contract, not facts existing and known to the parties at the time of the breach[.]" *Indiana & Mich. Elec. Co. v. Terre Haute Indus., Inc.*, 507 N.E.2d 588, 601 (Ind. Ct. App. 1987), *reh'g denied*, *trans. denied*; *Rogier*, 734 N.E.2d at 614. "Foreseeability means that which it is objectively reasonable to expect, not merely what might conceivably occur." *Greives v. Greenwood*, 550 N.E.2d 334, 338 (Ind. Ct. App. 1990). "An injured party may recover for breach of contract damages that are the natural, foreseeable and proximate consequence of the breach, but 'may not be placed in a better position than he would have enjoyed if the breach had not occurred.'" *Crider & Crider, Inc. v. Downen*, 873 N.E.2d 1115, 1119 (Ind. Ct. App. 2007) (quoting *Fowler v. Campbell*, 612 N.E.2d 596, 603 (Ind. Ct. App. 1993)).

[34] Ward challenges the $8,631.71 that the trial court awarded to Mattern in damages related to real estate taxes, association fees, home insurance, and utilities that Mattern paid from 2015 to 2021. The contract provided that Ward would be responsible for: (1) paying property taxes on the real estate; (2) paying any assessment fees; (3) maintaining and paying home insurance premiums for the real estate; and (4) paying utilities for the real estate. Our review of the record suggests that these damages are the natural, foreseeable and proximate consequence of Ward's breach. *See Crider*, 873 N.E.2d at 1119. Therefore, we hold that the trial court did not abuse its discretion when it awarded $8,631.71 in damages in favor of Mattern.[6]

[35] However, Ward also challenges portions of the $29,740 damages for renovations. Specifically, she argues that portions of this damage award were not foreseeable. We agree.

[36] Here, our review of the record reveals that, at the bench trial, Mattern testified that he had made "extensive" improvements and repairs to the real estate after he had temporary possession given to him by the trial court in March 2021. (Tr. Vol. 2 at 75). These improvements and repairs reached a total cost of $29,740. The list of improvements and repairs admitted as Plaintiff's Exhibit 9 included, amongst many other items, cabinets and cabinet trim, installation of

[6] Ward also argues that the contract states that she would be responsible for property taxes starting in November 2016, and therefore, should not have to pay for the 2015 property tax cost of $1,150 listed in Mattern's exhibit. (Ex. at 46). However, Ward testified that she had been responsible for the property taxes from the time she moved into the real estate in October 2014.

city water, a garage door, multiple interior doors, countertops, flooring, clay farm sink, carpets, a gold kitchen faucet, a water heater, refrigerator, stove, oven, microwave, dishwasher, and a washer and dryer. It strains credulity to believe that all of these specifically listed damages are the natural, foreseeable and proximate consequence of Ward's breach. Further, based on the admitted evidence, it is highly likely that Mattern has been placed in a better position than he would have enjoyed if the breach had not occurred. *Id.* However, Mattern's list of improvements and repairs also contains items that may have been the natural, foreseeable and proximate consequence of Ward's breach. These repairs would have, therefore, been properly included in the damages award. We remand the $29,740 damage award to the trial court with instructions to determine which improvements and repairs were a natural, foreseeable and proximate consequence of Ward's breach.

4. Cross-appeal - Bad Faith

[37] Finally, Ward argues that she is entitled to her appellate attorney's fees under Indiana Appellate Rule 66(E) due to Mattern's substantive and procedural bad faith. While Indiana Appellate Rule 66(E) provides this Court with discretionary authority to award damages on appeal, we must use extreme restraint when exercising this power because of the potential chilling effect upon the exercise of the right to appeal. *Thacker v. Wentzel*, 797 N.E.2d 342, 346 (Ind. Ct. App. 2003).

[38] Indiana appellate courts have formally categorized claims for appellate attorney fees into substantive and procedural bad faith claims. *Boczar v. Meridian Street Found.*, 749 N.E.2d 87, 95 (Ind. Ct. App. 2001). To prevail on a substantive bad faith claim, the party must show that the appellant's contentions and arguments are utterly devoid of all plausibility. *Id.* Procedural bad faith, on the other hand, occurs when a party flagrantly disregards the form and content requirements of the rules of appellate procedure, omits and misstates relevant fact appearing in the record, and files briefs written in a manner calculated to require the maximum expenditure of time both by the opposing party and the reviewing court. *Id.* Even if the appellant's conduct falls short of that which is "deliberate by design," procedural bad faith can still be found. *Id.*

[39] Here, after careful review of the record before us, we cannot say that any of Mattern's arguments on appeal constitute substantive or procedural bad faith. Having concluded that Mattern's arguments regarding abandonment have merit, they cannot be "utterly devoid of all plausibility." *Boczar*, 749 N.E.2d at 95. Therefore, we decline Ward's request to award appellate attorney's fees in her favor.

[40] Affirmed in part, reversed in part, and remanded with instructions.

Tavitas, J., and Foley, J., concur.

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