MEMORANDUM DECISION

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IN THE
COURT OF APPEALS OF INDIANA

Brownsburg Kimberley, LLC,
Appellant/Plaintiff

v.

Indy Metal Finishing, Inc.,
Appellee/Defendant

September 7, 2021

Court of Appeals Case No. 20A-PL-2049

Appeal from the Hendricks Superior Court

The Honorable Daniel F. Zielinski, Judge

The Honorable Rhett M. Stuard, Special Judge

Trial Court Cause No. 32D02-1910-PL-120

Altice, Judge.

Case Summary

[1] This is a dispute regarding attorneys' fees that the trial court declined to award to either party. Because liability of the tenant, Indy Metal Finishing (IM), to its landlord, Brownsburg Kimberly, LLC (BK), for breaching the terms of a commercial lease was not at issue, the parties stipulated that the matter should proceed directly to a damages hearing. Following that hearing, the trial court balanced the relative successes of the parties on each claim that BK lodged against IM, awarded damages to BK on some of the claims but denied damages on others, and determined that neither party was entitled to an award of attorneys' fees because the litigation ended in a "tie." *Appellant's Appendix* at 30.

[2] BK now appeals the denial of its request for attorneys' fees from IM, and IM cross appeals the denial of *its* request for attorneys' fees. Both parties claim entitlement to their respective attorneys' fees pursuant to the lease and contend that the trial court abused its discretion in denying recovery of those fees.

[3] We affirm.

Facts and Procedural History

[4] IM, an Indiana Corporation that was formed in 2009, engages in a commercial chemical process that coats metal pieces with a protective layer. The process uses chemicals rather than electroplating that oxidizes aluminum pieces for its

customers in approximately one hour.[1] In October 2009, IM entered into a lease agreement with Lewis Properties, LLC (Lewis Properties), for the rental of office and warehouse space in Lewis Properties's building. The lease ran from October 12, 2009, through June 1, 2014.

[5] On June 1, 2014, the parties extended the lease to May 31, 2017, subject to IM's option to renew the lease for an additional twenty-four months. Under the 2014 lease, IM's monthly base rent was $3,400 per month for the first two years, $3,500 for months 25-36, and $3,600 for months 37-60. IM also agreed to pay an additional $275 per month for estimated water usage.

[6] The lease acknowledged the receipt of IM's $3,000 security deposit, along with a performance bond obligation of at least $50,000. The lease contained a clause regarding "environmental compliance" that stated:

> Tenant expressly agrees to be responsible for all environmental building improvements that may be necessary in order to operate its business upon the Leased Premises. Tenant guarantees to Landlord that Tenant will meet all environmental regulations mandated by all appropriate government and regulatory agencies, and will obtain all environmental approvals that may be required by such agencies for the operation of Tenant's business.
>
> Tenant agrees to make available to Landlord copies of any and all reports of environmental inspections previously performed by

[1] Testimony at trial revealed that it takes approximately thirty years for aluminum to naturally oxidize "in the field." *Transcript Vol. III* at 10.

> state, local and federal governmental agencies. In addition, Tenant agrees to provide copies of such reports for all future inspections to the Landlord's agent, within 7 business days after Tenant receives those reports from the applicable agencies.

Id. at 232.

[7] The lease further provided that IM, at the end of the lease, would surrender the premises "in the same order and condition in which Tenant received them, the effects of ordinary wear, acts of God, casualty, insurrection, riot or public disorder excepted." *Id.* at 232.

[8] Paragraph 7 of the lease contained a "holdover tenant" provision that stated:

> In event Tenant shall hold over after this Lease has been terminated, no recognition of a continuing tenancy by Landlord, by accepting rent or otherwise, shall be construed as creating a tenancy by year to year, but the same shall be construed as constituting a tenancy for one month only, and if recognized by Landlord after the end of the first month shall be deemed to create successive tenancies for one month only, governed at all times by the terms of this Lease. In case Tenant shall hold over after the termination of this Lease, Landlord shall, despite acceptance of rent from or on behalf of Tenant, be entitled as a separate remedy to evict Tenant pursuant to any remedy of common or statutory law or in equity which is available, and further be entitled to charge against Tenant the reasonable costs, expenses, charges, attorneys' fees and rental or other business losses which may accrue to Landlord because of such holding over by Tenant, and recover the same from Tenant as of the date upon which Tenant was obligated to surrender possession of the Leased Premises.

Id. at 233.

[9] The lease also set forth the following regarding IM's duty to repair the roof on the premises:

> Tenant shall replace existing damaged roofing located above the Leased Premises. The parties acknowledge that Tenant has obtained a proposal and cost estimate for this repair, which is approved by Landlord. Tenant acknowledges that he will cause the roof to be repaired consistent with this proposal. The parties further acknowledge that funds have been received from Tenant's insurance provider, which are currently being held in escrow by Dan Moore Real Estate Services, Inc. The costs for the repair shall first be made using those escrowed funds. Tenant shall be solely responsible for any additional costs of this repair.

Id. at 233-34.

[10] The lease allowed for the landlord's inspection of the premises, coupled with the duty to make repairs that it deemed necessary. An attorney fee provision of the lease states that "[e]ach 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." *Id.* at 41.

[11] In May 2015, BK sought to purchase the building from Lewis Properties. A portion of that agreement allowed for BK to conduct environmental inspections on the property. Thus, on July 6, 2015, BK hired Giles Engineering Associates, Inc. (Giles) to conduct an environmental assessment on the premises that IM was leasing. The report stated that Giles:

> identified the material threat of a release from the use of metal finishing products on the subject property, within the IM Finishing tenant space, as a recognized environmental condition. *However, further environmental assessment of the subject property was not considered warranted*.

Transcript Vol. V at 21 (emphasis added).

[12] In light of Giles's findings, BK expressed no concern that IM may have caused any dangerous environmental conditions on the premises during its operations between 2009 and 2015. Thus, BK moved forward with the purchase of the property. Among the closing documents dated September 10, 2015, it was provided that

> Dan Moore Real Estate Services, Inc., as Property Manager, is holding the sum of $19,529.00 in insurance proceeds to repair roof damage caused by the Tenant [IM] of Unit 400 and said sum shall be paid to title agent prior to closing and title agent shall disburse proportionately to Buyers as closing POC. By way of this agreement, Lewis has hereby assigned its rights of Landlord to the insurance proceeds to [BK]. With such assignment, [BK] accepts the disclosed condition of the roof in Unit 400, and fully releases and indemnifies [Lewis Properties] from any claim, damage or such concerning said roof condition and/or repair as long as all correspondence between Landlord and the insurance company handling the issue and the one that paid the aforementioned amount, and all related material have been provided to [BK] within 10 days of closing.

Transcript Vol. IV at 245.

[13] An assignment and assumption of lease was also executed at closing, which provided that Lewis Property's rights as the landlord under the amended lease were assigned to BK, along with the security deposit and the funds for roof repairs.

[14] On September 22, 2015, an IM representative emailed BK's agent, inquiring about what had happened to the roof repair funds that had been held in escrow and when "the new buyer" would "get someone out to address the roof knowing that weather is coming is causing concern." *Transcript Vol. V* at 15-16. BK responded that it had been working to finalize the repair arrangement. At some point, BK used a portion of the escrowed funds to make a few of the roof repairs; however, the roof continued to leak during rainstorms. IM complained to BK from time-to-time regarding the continuing leaks, but no further repairs were made.

[15] In November 2016, IM exercised its option to extend the lease from May 31, 2017, through May 31, 2019. In May 2018, BK retained Giles to re-evaluate the premises and verify that the conditions had not changed since the 2015 report. Following the inspection, Giles sent a report to BK summarizing its findings:

> No environmental concerns were identified within the IM Finishing tenant space at the time of the May 24, 2018 site visit. No need for changes in storage and handling practices were noted. The facility appeared to be well-maintained, with good housekeeping practices, and proper spill controls in place. Based

> on our observations, no changes to the current practices of IM Finishing are considered warranted at this time.

Transcript Vol. IV at 169-71.

[16] On June 12, 2019, IM and BK executed an additional amendment to the lease that extended the term through July 31, 2019. The base rent remained at $3,600 per month and provided that IM would "return the leased premises in very good condition." *Transcript Vol. V* at 37. The amendment further stated that all damages to the premises were to be immediately and completely repaired at IM's cost before it vacated the premises.

[17] The amendment went on to provide that

> No later than June 21, 2019, Tenant shall provide Landlord with a written proposal for the removal of Tenant's trade fixtures and all required repairs to restore the Leased Premises into very good condition that Tenant shall undertake at the time of move out to restore the Leased Premises into very good condition. Said written proposal shall be provided by a State licensed and insured general contractor who has been in business for at least 10 years and shall include detailed specifications and cost estimates for said fixtures removal and all repair work required to put the Leased Premises back into very good condition. Tenant shall not undertake said work until Landlord has expressly approved said plan in writing, which shall be Landlord's sole and absolute discretion to accept or deny. If denied, the plan shall be revised so it is acceptable to Landlord.

Id. at 38. The amendment required IM to deposit $20,000 in escrow funds with the designated agent, which it did on June 18, 2019.

[18] IM continued negotiating with BK regarding a third amendment to the 2014 lease; however, the parties were unable to agree upon the terms. Thus, as of August 1, 2019, IM occupied the premises as a holdover tenant under the lease. IM paid, and BK accepted, base rent and an estimated $4,000 water usage payment for August 2019. Because BK accepted the rent for August 2019, IM became a month-to-month tenant, commencing September 2019. And because the 2014 lease had expired, IM was unable to renew the performance bond.

[19] On August 26, 2019, BK mailed a notice of lease termination to IM by certified mail that provided the required thirty-day written notice of the month-to-month tenancy. Thereafter, on October 4, 2019, BK filed a motion for ejectment. And on November 14, 2019, IM sent $1,500 in attorney's fees to BK's prior counsel.

[20] On January 2, 2020, IM sent a payment to BK for rent and water usage for October, November, and December 2019. Two weeks later, the trial court conducted a status/eviction hearing and took the matter under advisement. At that time, IM paid $8,000 to the Hendricks County Clerk that represented its rent and estimated water usage obligation for January and February 2020. At that time, IM was uncertain whether it would be occupying the leased premises in February.

[21] On January 17, 2020, the trial court granted the eviction and ordered IM to vacate the premises by midnight on January 31, 2020. IM removed its equipment and personal belongings from the building sometime on January 31, 2020, and surrendered the keys to a BK representative on February 3, 2020. IM

subsequently confirmed to BK that it wished to inspect the premises for floor, pipe, and ceiling damages that BK had alleged. Prior to surrendering the premises, IM had reinstalled a window in the building and had made certain repairs to the roof where an air scrubber and exhaust system had penetrated the roof. IM also refinished the concrete floor and painted the interior of the rented area. IM spent nearly $20,000 in contractors' fees and materials for that work.

[22] BK determined that some discoloration and staining were on the floor, likely caused by water spillage and normal color variation. Although IM was not required to have independent testing performed by an environmental contractor, it nonetheless paid a company $4,100 to perform a baseline assessment of the premises at the end of January 2020. That company also reviewed the 2018 Giles Report and issued its own report after reviewing all safety data sheets as to the chemicals that IM had used in the building. It concluded that IM had not committed any environmental violations. BK received this report in February 2020 and did not pursue immediate action against IM.

[23] Seven days before the damages hearing, BK hired Patriot Engineering and Environmental (Patriot) to review all environmental documents regarding the rented premises. On August 3, 2020, Patriot provided an estimated cost of $9,000 for further investigation of suspected environmental violations. Patriot recommended that soil testing be performed on the premises. BK also hired Skyline Roofing (Skyline) in August, which determined that a leak in the roof

was the result of faulty workmanship by IM and its contractors and estimated the cost of repair to be $1,750. BK stated that IM had never provided any notice of leaks in the roof prior to vacating the premises. IM disputed this and claimed that while nothing was presented in writing, it verbally reported the leaks to BK's associates on many occasions.

[24] BK's ledger showed that IM owed a balance of $26,044.74 in rent as of July 2020. This amount was based on monthly rent in the amount of $3,600, utilities fees totaling $273.33 per month, and miscellaneous charges in the amount of $19.83, for the months of March 2020 through July 2020. BK did not receive any rental income from February 2020 through August 2020 while the case was pending. BK also claimed that it incurred attorneys' fees in the amount of $32,200 in this action, and IM claimed that it had expended $28,600 in attorneys' fees.

[25] Prior to the hearing, the parties agreed to—and the trial court approved—the following: (1) IM owes BK $10,800 for painting work; (2) BK's agent is holding escrowed funds in the amount of $20,000; (3) BK is holding the security deposit in the amount of $3,000; (4) The Hendricks County Clerk is holding funds in the amount of $8,000; and (5) IM previously paid attorneys' fees in the amount of $1,500.

[26] Following the two-day damages hearing that concluded on August 12, 2020, the trial court entered a thirty-two-page order that contained nearly 250 findings of fact and conclusions of law, determining that BK was entitled to damages

from IM in the amount of $23,025. It also concluded that neither party was entitled to recover its attorneys' fees from the other. In reaching this result, the trial court found as follows:

> 240. The Attorney's Fee Provision in the Lease states, '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.'
>
> 241. Pursuant to the plain language of this section, either party may recover reasonable fees incurred in enforcing the Lease. By implication then, either party required to defend its rights under the Lease is also entitled to fees for defending against claims relating to the Lease.
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> 242. Therefore, the Court finds that *the terms of the Second Amended Lease allow either party to recover attorney fees for prosecuting, or defending, an action in court.*
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> 243. Turning to the case before the Court, BK successfully has been awarded damages for:
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> a. unpaid rent/IM'S holdover in the amount of $11,075;
> b. necessary repairs to the floor in the amount of $1,150; and
> c. the stipulated painting repair in the amount of $10,800.
>
> 244. *IM successfully defended against the following claims asserted by BK*:
>
> a. a claim for $9,000 for further environmental testing;
> b. a claim for $1,750 for roof repair; and
> c. a claim for $11,700 to epoxy the floor.

245. *Each party prevailed on three basic claims.*

246. Thus, there is no prevailing party. In the vernacular, the case is a tie.

247. Supporting this conclusion is the fact that after two days of trial, each side expending more than $28,000 on attorney's fees, and the court writing thirty-two pages of findings and conclusions to address the claims made, the Court is ordering a grand total of $1,475 to change hands.

248. *Since the case is a tie, the Court finds that neither party shall be required to pay any of the other party's attorney fees.*

JUDGMENT AND RECONCILIATION

249. Judgment is entered in favor of Plaintiff, BK, and against Defendant, IM, in the amount of $23,025.00 ("BK Judgment"). The BK Judgment represents: (a) $10,800 for painting; (b) $1,150 in damages to remove paint spots from the floor; and (c) January rent and holdover rent in the total amount of $11,075.

250. Currently, BK is in possession of the following funds:

a. IM's $3,000 Security Deposit;
b. IM's Prior Attorney's Fee Payment, in the amount of $1,500; and
e. IM's escrowed funds of $20,000 held at Greenspoon Marder LLP.

Additionally, the Clerk of the Court for Hendricks County is holding $8,000 in funds deposited by IM under this cause number.

> 252. Because IM previously paid $1,500 to BK for attorney's fees, and this Court has found no Attorney's Fees are owed, the $1,500 is applied as a credit in BK's column.
>
> 253. Therefore, BK (or BK's agents) is currently in possession of a total of $24,500 in funds.
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> 254. This is $1,475 more than the judgment rendered in this case in favor of BK.
>
> 255. Therefore, this Court orders that a check, in the amount of $1,475 shall be disbursed [from BK] . . . to IM. . . .
>
> 256. The Clerk of this Court is ordered to disburse the Clerk-Held Funds in the amount of $8,000.00, payable to [IM], and mailed to [IM's legal counsel] . . . .

Appellant's Appendix Vol. II at 29-45 (emphasis added).

[27] BK now appeals, and IM cross-appeals.

Discussion and Decision

[28] We initially observe that neither party challenges the trial court's findings or conclusions regarding the nature or amount of damages that were awarded. Rather, BK argues that the trial court abused its discretion in denying its request for attorneys' fees under the lease because the evidence established that IM was a holdover tenant, and BK successfully prevailed on other claims that it brought against IM. BK further maintains that the trial court erred in "balancing the relative successes" of the parties, i.e., prevailing on some of its claims versus

IM's success in defending—and thus prevailing—on other claims, in deciding to reject its claim for attorneys' fees. *Appellant's Reply Brief* at 7.

[29] IM cross-appeals, claiming that the trial court erred in denying its request for attorneys' fees in light of BK's failure to prevail on some of the claims, and IM's success in defending and prevailing on various issues.

[30] Indiana generally follows the "American Rule" as to attorneys' fees, which provides that a party must pay his or her own attorneys' fees, absent an agreement between the parties, a statute, or other rule to the contrary. *R.L. Turner Corp. v. Town of Brownsburg,* 963 N.E.2d 453, 458 (Ind. 2012). Relevant here is the provision in the lease between IM and BK that provides for the recovery of attorneys' fees in favor of the party that successfully enforces the terms of the lease.

[31] A lease is interpreted in the same way as is any other contract. *Indiana Port Comm'n v. Consol. Grain & Barge Co.,* 701 N.E.2d 882, 887 (Ind. Ct. App. 1998), *trans. denied*. The primary goal of contract interpretation is to give effect to the parties' intent. *Id.* When a contract's terms are clear and unambiguous, they are conclusive, and the court will not construe the contract or look to extrinsic evidence. *Id.* This court can only enforce the terms of the contract as agreed upon and we have no authority to make a new and different contract. *Workman v. Douglas*, 419 N.E.2d 1340, 1346 (Ind. Ct. App. 1981).

[32] We review a trial court's decision regarding an award of attorneys' fees for an abuse of discretion. *R.L. Turner,* 963 N.E.2d at 457. An abuse of discretion

occurs when the trial court's decision clearly contravenes the logic and effect of the facts and circumstances or if the court has misinterpreted the law. *Id.*

[33] In this case, the relevant provision in the lease states that "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]." *Transcript Vol. IV* at 241. In construing similar terms, a panel of this court has determined that "successfully" enforcing the terms of an agreement means that the party has prevailed with respect to a particular covenant or term set forth in the contract. *See Delgado v. Boyles,* 922 N.E.2d 1267, 1271 (Ind. Ct. App. 2010), *trans. denied*. Also, in *Reuille v. E.E. Brandenberger Constr., Inc.,* 888 N.E.2d 770 (Ind. 2008), our Supreme Court relied on the definition in Black's Law Dictionary regarding the meaning of "prevailing party," since the contract at issue did not define that term:

> Black's Law Dictionary defines 'prevailing party' as: The party to a suit who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not necessarily to the extent of his original contention. The one in whose favor the decision or verdict is rendered and judgment entered.

Id. at 771.

[34] Here, the contractual rights and duties of the parties are set forth in the lease, and the trial court was called upon to determine their obligations with regard to the enforcement of the various covenants, terms, and conditions. As the trial court's order indicated, BK prevailed on some of its claims against IM, while

IM successfully defended against others. In determining whether it was proper for the trial court to "balance" the various successes that the parties had in making competing claims for an award of attorneys' fees, we initially turn to this court's opinion in *Rauch v. Circle Theatre,* 374 N.E.2d 546 (Ind. Ct. App. 1978), for guidance. In *Rauch*, the trial court held that the lessors were not entitled to recover attorneys' fees because they did not recover on the merits of their actions against the lessee. *Id*. at 553. On appeal, a panel of this court observed that

> *Taylor v. Lehman* (1897), 17 Ind. App. 585, 46 N.E. 84, 47 N.E. 230, does support, to some extent, a denial of attorney's fees. In *Taylor*, a lessor had sued her lessee for unpaid rent and lessee pleaded a setoff against that rental for damages resulting from the lessor's failure to make certain repairs to the leased premises. The Appellate Court stated that because the lessee's setoff for damages exceeded the lessor's claim, she could not recover any attorney's fees:
>
> > Construing the finding as a whole, its effect is, that when appellant [the lessor] filed her complaint there was nothing due her from the appellee [lessee]. There being nothing due for rent which appellant could recover in an action against the appellee, no attorney fee could be allowed. The same would be true of interest.
>
> [T]he policy evinced in *Taylor* that a lessor may recover his attorney's fees under a provision in the lease only where he makes a successful recovery on the merits of his complaint is a sound one. While a contractual provision allowing a recovery of attorney's fees by a party is not of itself violative of public policy, a construction of such a provision allowing a recovery in unsuccessful actions would create an unnecessary likelihood of

> frivolous or oppressive lawsuits. The purpose of allowing an award of attorney's fees in a civil action is to more fully compensate a party who has successfully enforced his legal rights in court rather than to merely provide that person with free access to the courts at the expense of his opponent. The allowance of attorney's fees to a party who has no enforceable claim for relief would not further this purpose. The trial court did not err in denying an award of attorney's fees to Lessors.

Id. at 553-54 (internal citations omitted).

[35] On the other hand, in *Burras v. Canal Constr. & Design Co.*, 470 N.E.2d 1362 (Ind. Ct. App. 1984), this court observed that

> where a party prevails on a contract under which fees are provided but the opposing party prevails on certain counterclaims, *the recoverable attorney fees should be reduced 'in proportion 'to the amount recovered on the [contract] less the amount recovered on the counterclaim.*'

Id. at 1370 (citing and quoting *Pioneer Constructors v. Symes*, 267 P.2d 740, 744 (Ariz. 1954)) (emphasis added). The *Burras* court noted that "[t]his formula enables the trial judge to determine the amount of success obtained by each party entitled to attorney fees." *Id.* at 1370 n.4.

[36] This court embraced the *Burras* and *Rauch* holdings in *Willie's Constr. Co. v. Baker*, 596 N.E.2d 958 (Ind. Ct. App. 1992), *trans. denied,* where the defendant —like IM in this case—placed disputed funds in escrow prior to trial. *Id.* at 963-64. In applying the *Burras* and *Rauch* rationales, we determined that

> To allow the recovery of attorney's fees to a party whose claim was completely diminished by a counterclaim would not further the purpose of compensating the successful party. Enforcing the contract provision here would provide Willie's attorney's fees and interest on an award that was more than set off by the Baker's counterclaim. We find that such an award, particularly in this case where the Bakers felt that they were wronged, put the disputed amount in escrow, and then proved in court that Willie's had wronged them, would be contrary to public policy.

Id. at 964.

[37] The holdings of the cases discussed above demonstrate that there is support for the trial court's balancing of IM and BK's relative "successes" when evaluating their requests for attorneys' fees. To be sure, the trial court noted in its order that each party had prevailed on three basic claims. Although IM may not have advanced counterclaims against BK, the trial court awarded damages to BK on three of its claims against IM, while IM successfully defended, i.e., prevailed, on three additional claims that BK had asserted against it.

[38] More specifically, as for the requirement that IM was to return the premises in "very good condition" at the time it surrendered the premises, BK was awarded $1,150 for necessary repairs to the floor and $10,800 regarding IM's painting commitment. On the other hand, IM prevailed in part as to BK's request for damages relating to roof repairs in the amount of $1,750, as well as on BK's request for the epoxy floor coating in the amount of $11,700. In comparing these amounts, it was reasonable for the trial court to conclude that BK succeeded in recovering $11,950 on its claims, and IM succeeded as to $13,450

in claims. On balance, IM "succeeded" more than BK by $1,500. The trial court also determined that IM owed nothing to BK on the claim for an environmental compliance violation because there was no breach of that lease provision. Hence, IM successfully defended against that claim.

[39] It was further established that IM paid BK all rent that was due through December 31, 2019, and the trial court concluded that IM owed BK only $11,075 for uncollected rent. Even though BK had not succeeded as to *all* of its request for unpaid rent after January 1, 2020, it *did* prevail in collecting more rent than the $8,000 that IM had paid into escrow. In short, BK prevailed on its unpaid rent claim in the amount of $3,075.

[40] Upon reconciling and balancing the outcomes for BK and IM, the trial court pointed out that there was only a $1,475 difference in the amounts. The relative results were so close, and we decline to conclude that the trial court abused its discretion in referring to the matter as a "tie" and in refusing to award either side the attorneys' fees they expended in this litigation. Under these circumstances, we conclude that the trial court properly denied the parties' respective requests for attorneys' fees.

[41] Judgment affirmed.

Bradford, C.J. and Robb, J., concur.