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Supreme Court of Texas.
Christopher N. Epps and Laura L. Epps
v.
Bruce Fowler, Jr. and Stephanie L. Fowler.
No. 10-0283.

February 3, 2011.

Appearances:

N. West Short of West Short & Associates, P.C., for Petitioners.

Frank B. Lyon, for Respondents.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Dale Wainwright, David M. Medina, Paul W. Green, Phil Johnson, Don R. Willett, Eva M. Guzman, and Debra H. Lehrmann, Justices.

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is now ready to hear argument in 10-0283 Epps v. Fowler.

MARSHAL: May it please the court, Mr. Short will present argument for the Petitioners. The Petitioners have reserved five minutes for rebuttal.

ORAL ARGUMENT OF N. WEST SHORT ON BEHALF OF THE PETITIONER

ATTORNEY N. WEST SHORT: Good morning. I'm Michael Short and this is my client Laura Epps and we're grateful to be here today. May it please the court, we are here today on the issue of whether the parties to a standard form real estate contract intended that the plaintiff in a legal proceeding arising out of that contract would be able to prevent the defendant from recovering attorneys' fees by non-suing in order to avoid a ruling on the merits. Clearly not. The job of a court is to determine the intention of the parties from the face of a contract and to give the words that are used their plain grammatical meaning. [Inaudible]--

JUSTICE DAVID M. MEDINA: Why is it clearly not and how is your client the prevailing party?

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ATTORNEY N. WEST SHORT: Well the intentions in this contract are clear and they're twofold with regard to attorneys' fees. One, that in any legal proceeding there would be a prevailing party. It uses the term the prevailing party in any legal proceeding. Not if there is one, what if there is a prevailing party it says--

JUSTICE EVA M. GUZMAN: What if you though non-suit without prejudice and then re-file the suit, take it to trial on the merits and then there would be a different prevailing party. So how would you reconcile that scenario with your argument?

ATTORNEY N. WEST SHORT: Under the plain meaning of the contract, it uses the term any legal proceeding so in that instance there would be two different legal proceedings where one party could prevail in one, another in the other. Because, again, the expectation of the parties to this contract is that there would be a prevailing party in any legal proceeding because it uses the term the prevailing party in any legal proceeding.

JUSTICE EVA M. GUZMAN: Even though there hasn't been an adjudication on the merits on the dispute?

ATTORNEY N. WEST SHORT: I think that's the expectations of the parties if you look at the contract is that in any legal proceeding there would be prevailing party. There wouldn't be a situation where there would be no prevailing party, such as the court indicated in this case in the 3rd Court. And the other expectation of the parties that's clear from the contract is that the prevailing party would be entitled to recover their attorney's fee.

CHIEF JUSTICE WALLACE B. JEFFERSON: Would we just ignore Intercontinental Group that says for a party to prevail, the court must award it something either monetary or equitable or is that distinguishable because or on what ground is it distinguishable?

ATTORNEY N. WEST SHORT: Well, in that case, I think the court recognized that there were two different standards that should be applied, one for plaintiff and one for defendant because one size does not fit all when it comes to a prevailing party when you're looking at the plaintiff and the defendant and that's for two reasons. Those two reasons are that there are, there are two different methods by which it's accepted that a defendant just as a participant at a sports proceeding, just as defenders say in a military exercise can prevail. One of those methods is to prevail in the substance, on the merits and the 3rd Court recognized that. But the other method that is an accepted method of prevailing is when the other side gives up, when they walk away, when they surrender. The best example of this that I can think of is World War II, for example. There's no question but the United States prevailed in World War II in two different theaters, but they were very different. In the European theater, we prevailed in substance. The aggressor was defeated. In the Pacific theater, however, it was quite different. In the Pacific theater, the Japanese seeing imminent defeat surrendered yet we declared victory, we prevailed. Same issue can occur in a court proceeding where the plaintiff seeing that defeat is imminent decides to give up.

JUSTICE EVA M. GUZMAN: That is not always the reason for a non-suit. There are other strategic reasons that could support a non-suit and would certainly not indicate a victory, if you will. What about those scenarios if we adopt the rule that you want us to adopt?

ATTORNEY N. WEST SHORT: Well, again, I think you have to look at the intention of the parties. I think the intention of the parties is that there would be a prevailing party even when the plaintiff decides to non-suit for an accepted reason. They get halfway into a lawsuit and just simply change their mind, but they force the defense to incur tens of thousands of dollars in expenses.

CHIEF JUSTICE WALLACE B. JEFFERSON: Right, but they also, there's also an incentive for, under your reading of this contract, for them to continue even if for strategic reasons or for reasons of merit it makes more sense to give up. I mean you might as well throw your dice if you're going to have to pay the fees anyway.

ATTORNEY N. WEST SHORT: And that's true and some courts have recognized that possibility and have adopted a standard that is not so liberal as just if you give up then you have to pay the fees. For example, the 5th

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Circuit in the Dean case set out a standard for if you're a defendant, you can be a prevailing party when the plaintiff gives up if you can show that they gave up to avoid a ruling on the merits. And although I think that that's more than what the parties expected in the contract, I think it's a fairly straightforward standard in the contract just there is a prevailing party in every legal proceeding. So if one side gives up, the other side is obviously the prevailing party under the contract.

JUSTICE DEBRA H. LEHRMANN: Isn't this position that your advocating in all ways that you're going right now discourage non-suits and isn't that something that we want to avoid?

ATTORNEY N. WEST SHORT: Well I think what it does is it discourages the filing of a weak case to begin with because the parties to a contract like this recognize--

CHIEF JUSTICE WALLACE B. JEFFERSON: Well the Civil Practice and Remedies Code discourages the filing of the weak case. You can get sanctions if there's a frivolous pleading, which you didn't seek here.

ATTORNEY N. WEST SHORT: We actually did file that claim.

CHIEF JUSTICE WALLACE B. JEFFERSON: Or gave up on.

ATTORNEY N. WEST SHORT: But we proceeded forward merely under the contract for the prevailing party. And that's true; however, the standard for proving a frivolous case is quite different from simply prevailing on the case whether it's on the merits or because the other side has given up.

JUSTICE DEBRA H. LEHRMANN: Could you please?

ATTORNEY N. WEST SHORT: And that's a pretty high burden.

JUSTICE DEBRA H. LEHRMANN: Excuse me, could you please answer my question specifically about dis couraging non-suits?

ATTORNEY N. WEST SHORT: Well I, my interpretation of this is that it would discourage the filing of a weak case not the filing of a non-suit because the parties to this contract have to expect when they initiate a legal proceeding that there's a possibility they're going to be assessed the attorneys' fees of the other side. So they have to decide in advance whether this is a good case to file.

JUSTICE DEBRA H. LEHRMANN: But let's say that the plaintiff is going forth on a good-faith basis and as they get into a lawsuit they see that the lawsuit does not have merit. Don't we want to encourage them to non-suit at that point to avoid all the expense associated not only financially, but also emotionally in litigating that suit?

ATTORNEY N. WEST SHORT: I would agree with that. I would agree that you do want in that case the plaintiff would decide, gosh, this isn't worth going forward. We're going to lose this case. We shouldn't proceed forward. I believe in the contract though the parties expected that under those instances that the plaintiff would be paying the expenses that they forced the defendant to incur unnecessarily. Now again, though, the courts have recognized that that could lead to an inequitable result in some situations and that's why some courts have adopted the view of, well, in those instances, we're only going to say that the defendant is a prevailing party and, therefore, entitled to collect their attorneys' fees if they can show that this was a strategic dismissal in order to avoid an adverse ruling on the merits.

JUSTICE DEBRA H. LEHRMANN: Well that, this suit was actually non-suited without prejudice. So how can you say that they prevailed when they can come and re-file?

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ATTORNEY N. WEST SHORT: Well because in this instance what they did was they were certain to lose this case. They had failed to show up at two different depositions. They had failed to respond to discovery. They had done everything wrong they could in the case. As a result, we were going to prevail and had filed a motion for summary judgment and after, I mean just days before that hearing on the merits, they non-suited. And so in that instance even under the highest standards that we have found for a defense to be considered a prevailing party, we fulfilled that standard because we were able to show that they did this just to avoid an adverse ruling on the merits. And that's only fair because if you look at it that way, you can't allow the plaintiff to decide when the defendant is allowed to recover attorneys' fees and if we hold the defendant to a on-the-merit standard, then what you're saying is the defendant has to prevail on the plaintiff's case, but the plaintiff has 100% control over that case. So we're giving the power to the plaintiff to decide when the defendant can recover their attorneys' fees by saying that the plaintiff can decide when to dismiss the case and if they dismiss the case, then it's impossible for the defendant to be a prevailing party and that gives way too much power to the plaintiff and allows the plaintiff to decide when the defense can recover their attorneys' fees instead of the court.

JUSTICE DALE WAINWRIGHT: Under the Dean standard where the defendant can obtain attorney's fees if it shows that there was a strategic decision by the plaintiff to non-suit, you have a non-suit then you have a trial on the merits. Doesn't sound too efficient does it? Think of what's going to happen, discovery, huge fight over work product, and then a trial, bad questions, a jury even.

ATTORNEY N. WEST SHORT: And I agree in that case I recognize that as well that if you have to show that you, in fact, were going to prevail on the merits, then you could have that kind of difficulty. But another way to read that is that what you would have to show is more like a TRO or temporary injunction standard just a likelihood that if, that you would have succeeded on the merits. So it's not a trial on the merits. You're going to have the trial anyway, but if you can show the court and that the burden is on the defense in that case. If you can show the court that there was a likelihood that had it proceeded, you would have succeeded on the merits then and this dismissal was to avoid that, then it only makes sense that as a defendant you should be a prevailing party. Because again, when it comes to the plaintiff's case and the plaintiff's ability to recover attorneys' fees, it's up to the court to decide whether the plaintiff prevails on their case. But if we hold that same standard to the defendant, then it's up to the plaintiff to decide when the defendant prevails.

JUSTICE DON R. WILLETT: I thought I heard you tell the Chief Justice earlier that you thought KB Home created a different rule for plaintiff and defendants. Did I mishear you?

ATTORNEY N. WEST SHORT: It didn't create it. It recognized that there, it's inequitable to apply the same standard to the plaintiff and the defendants.

JUSTICE DON R. WILLETT: Because my recollection is that we, as to defendants, we just didn't reach the issue one way or the other.

ATTORNEY N. WEST SHORT: That's correct and the question was actually asked in the primary opinion if one party loses does the other party prevail? And that's a valid question to ask, particularly in a situation like this where the plaintiff gives up on their case does the defendant prevail?

JUSTICE DON R. WILLETT: I'd agree. We didn't answer that question.

ATTORNEY N. WEST SHORT: That question was not answered.

JUSTICE PHIL JOHNSON: Counsel, you said that in response to Justice Wainwright that there may be some way to avoid a trial by showing simply the likelihood that you would prevail, but in this case would the opposing party not be entitled to a jury trial on the amount of the attorneys' fees if they, even if we set a standard of likely the defendant showed likelihood of prevailing, what do we do about the amount of attorneys' fees?

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ATTORNEY N. WEST SHORT: That's an excellent question. If there had been a jury requested in the case that was going to hear the merits of the case and the merits of the case were dismissed, then all that would remain for the jury to decide would be the amount of the attorneys' fees.

JUSTICE PHIL JOHNSON: And in this case you did not request a jury, the defendant did not?

ATTORNEY N. WEST SHORT: In this case, I don't believe either party requested a jury. Correct. It was going to be a trial by the court either way.

JUSTICE PHIL JOHNSON: Okay, but if either party had requested a jury then, would the amount of attorneys' fees under your scenario where the likelihood is all that you're going to show, would the amount of the attorneys' fees then be a jury question unless both parties waived?

ATTORNEY N. WEST SHORT: I think it would be a jury question just in the same way it would be had the case been tried on the merits. Because again it's not a sanctions, it's not a sanctions motion that is before the court. It's simply an issue of as the defendant as a prevailing party, what is the amount of the attorneys' fees that should be awarded?

CHIEF JUSTICE WALLACE B. JEFFERSON: In general, under your construction of this, if there's a non-suit and that non-suit becomes, let's say, becomes final 30 days past there's no appeal or no attempt to get the, but could you then still under some kind of contract action seek to get your fees or is it over at that point? Do you have to act within 30 days or not?

ATTORNEY N. WEST SHORT: I think if, under the rule 162, the non-suit applies to any case, any part of the case except for a request for attorneys' fees. The only thing that would remain is a request for attorneys' fees. And so that's the only way that survives.

CHIEF JUSTICE WALLACE B. JEFFERSON: And you would have act within 30 days.

ATTORNEY N. WEST SHORT: If you've already requested it. There's not, under rule 162, you don't have the ability to go back after the fact and ask for attorneys' fees. So I think that that has to be part of the main case under rule 162 and it survives merely because of rule 162 that there is a pending motion for attorneys' fees. I am out of time and I will see you on rebuttal.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Counsel. The court is ready to hear argument from the Respondents.

MARSHAL: May it please the court, Mr. Lyon will present argument for the Respondents?

ORAL ARGUMENT OF FRANK B. LYON ON BEHALF OF THE RESPONDENT

ATTORNEY FRANK B. LYON: May it please the court, good morning, thank you for the opportunity to be here. In this case, the contract provision I think was very clear about what the intent of the parties was. The definition--

JUSTICE NATHAN L. HECHT: Everybody thinks it's very clear and I'm thinking the opposite.

ATTORNEY FRANK B. LYON: The definition, the contract speaks twice about a legal proceeding and about prevailing party, which to me indicates that there had to be a determination in a legal proceeding. I think in a, if you ask a layman, someone on the street, what do you think, who prevails in a legal proceeding, they're going to tell you whoever the judge or the jury says is the winner. It's not just the person who decides to go away and

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dismiss his claims without prejudice.

JUSTICE DAVID M. MEDINA: We don't ask people on the street unless they're part of the jury what the law should be. That's analysis we have to make here and [inaudible] in a sense. They gave up the claim so you say I surrender, you've lost.

ATTORNEY FRANK B. LYON: We, the non-suit was a dismissal without prejudice so we did have the right to come back and re-file the case if we'd chosen to do that.

JUSTICE DAVID M. MEDINA: What if it's a dismissal with prejudice?

ATTORNEY FRANK B. LYON: If it was a dismissal with prejudice, I think it would be slightly different, but there's still no adjudication, no determination by the court of who's the prevailing party. Actually, that's different from what happened here because we dismissed without prejudice.

JUSTICE PAUL W. GREEN: But in the abstract, parties can agree that in the termination of litigation that one party or the other can obtain attorneys' fees. I mean you don't dispute that do you?

ATTORNEY FRANK B. LYON: Oh no, absolutely not. They can settle and as part of the settlement--

JUSTICE PAUL W. GREEN: Right, you just say in this case that the contract doesn't provide for that.

ATTORNEY FRANK B. LYON: Well I think that in this case if there had been a settlement and if part of that settlement had been one side was going to pay some or all of the other sides attorneys' fees, I think that would be a situation where you kind of disregard what the contract says and you settle on whatever economic terms that the parties can accept.

JUSTICE PAUL W. GREEN: Sure, when you reach a settlement everybody, presumably all those issues are resolved.

ATTORNEY FRANK B. LYON: Yes.

JUSTICE PAUL W. GREEN: But my point is in this particular case, you don't think that the contract provides in the event of a non-suit that the non movant, the remaining party, I guess, would be entitled to attorney fees. So it's just a contract interpretation issue.

ATTORNEY FRANK B. LYON: That's correct.

JUSTICE PAUL W. GREEN: Now there are a lot of cases that have to deal with dealing with the prevailing parties in the statutory context, but that may or may not apply in this situation, would you agree?

ATTORNEY FRANK B. LYON: I agree, I agree although some of the cases that get to the interpretation of the phrase prevailing party in a contract situation draw from analogies in statutory cases and such like that use similar logic in getting to an analysis of what does it mean to be a prevailing party.

JUSTICE PAUL W. GREEN: So we just have to decide what the parties meant in this contract.

ATTORNEY FRANK B. LYON: I think, I think that's correct.

JUSTICE PHIL JOHNSON: Counsel, there have been questions about if the prevailing party means, in your situation a non-suit without prejudice will that discourage non-suits without prejudice? But as a practical matter, can't the parties agree if the defendant has a concern about the merits of the plaintiff's case and the plaintiff for

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whatever reason they just get, they don't want to go through it anymore, but they're not concerned so much about the merits. As a practical matter, can't you negotiate out and say, look, my client wants to just be done with this litigation and non-suit, let's wash it out; you pay your attorneys' fees and costs. We'll pay ours and we'll just dismiss. Isn't that the way that when there's a real question about the merits that it can be handled.

ATTORNEY FRANK B. LYON: I think so.

JUSTICE PHIL JOHNSON: And isn't that typically the way it's handled if there's a question about something on a matter like this in your experience or not?

ATTORNEY FRANK B. LYON: Well I think it is. Any time you sign a settlement agreement with somebody, there's usually--

JUSTICE PHIL JOHNSON: No, not a settlement agreement; you're just going to dismiss. A lot of times there's no money changes hands. You say, look, we'll go away, we're just tired of this lawsuit, but we don't want to pay any attorneys' fees and we don't argue anymore if you'll agree that we're not going to argue about attorneys' fees. We'll agree to go away, just dismiss, dismiss.

ATTORNEY FRANK B. LYON: That could have happened here if the defendants would have agreed to let that happen.

JUSTICE PHIL JOHNSON: But that certainly is a possibility?

ATTORNEY FRANK B. LYON: Yes.

JUSTICE PHIL JOHNSON: Which indicates if, in fact, not going into this case, but if that negotiation takes place, it would seem as though then if the defendant's unwilling to do that, that there's a real concern on the plaintiff's, there would have to be a real concern on the plaintiff's part about the merits of their case and if the merits, and if the plaintiff dismisses anyway, seems like there's going to have to be a concern about whether the defendant, in fact, prevails because of the, a lack of merits.

ATTORNEY FRANK B. LYON: Well I think that certainly that that could be the case, but people dismiss lawsuits for all kinds of reasons. They just get, as was alluded to earlier, just tired of it. It's an emotional, it's stressful to be involved in a lawsuit. It's not fun like it is on TV when you're the party in the lawsuit. I would like to address the point--

JUSTICE DALE WAINWRIGHT: Counsel, let me follow up on that. If that's the approach though, don't you put defendants in a corner in a catch-22? Because if defendants say no I just want you to non-suit and I don't want to pay attorneys' fees and you don't want to pay attorneys' fees and there's a discussion about that, then the fact that defendants brought it up, won't plaintiff's say that's a recognition that the contract doesn't say what you think it says? And the fact that you brought it up means that you think the opposite might be the case under the contract.

ATTORNEY FRANK B. LYON: That could be one way to look at it.

JUSTICE DALE WAINWRIGHT: So it's not a riskless proposition for defendants?

ATTORNEY FRANK B. LYON: It's certainly not riskless when you have a clause like this for an entitlement of attorneys' fees and you're locked in litigation and one side, whether it's the plaintiff or the defendant, decides for whatever reason if I don't want to go forward, you've got this, as you said a catch-22, do I go forward and risk winning or losing and paying the other side's attorneys' fees or do I just walk away?

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JUSTICE EVA M. GUZMAN: The policy argument seems to be that allowing for the recovery of attorneys' fees would somehow discourage the frivolous lawsuits, but in practicality, you get a frivolous lawsuit filed against you, your client, you file the motion for sanctions, etc., that survives any non-suit.

ATTORNEY FRANK B. LYON: That's correct.

JUSTICE EVA M. GUZMAN: And so can you comment then on the policy argument of it then?

ATTORNEY FRANK B. LYON: Well I think that if you adopt the Petitioner's position, we are discouraging non-suits because you are putting a party in a lawsuit in the catch-22 of what do I do? I could be stuck with attorneys' fees win, lose or draw.

JUSTICE EVA M. GUZMAN: And we could deal with the frivolous suits by attorneys for the defendant preserving their right to make those claims by motions pleadings that survive non-suits.

ATTORNEY FRANK B. LYON: Oh yes, I think there are other ways to get rid of frivolous lawsuits too, motions for summary judgment as well as the motion for sanctions.

JUSTICE NATHAN L. HECHT: But regardless of the policy, you still agree with Justice Green that the parties could agree to it if they wanted to.

ATTORNEY FRANK B. LYON: Absolutely. The issue has been raised that or alluded to that the plaintiffs dropped this lawsuit because defeat was imminent. They were going to lose. And I would like to emphasize that there's really not any evidence in the record of that. The defendants did file a no evidence motion for summary judgment, which the plaintiff's responded to pointing out that the Fowlers, I'm sorry I'm getting the parties mixed up, that the Fowlers did, in fact, believe that they had been wrong, that there was a problem to the foundation in this house, that the Epps had known about it. The response to the, the Fowlers' response to the motion for no evidence summary judgment also contains a report by an engineering firm that indicated that there were problems with the foundation and that there were sufficient problems in evidence of cover up of cosmetic repairs that the prior owners knew that there should have been problems with the foundation. There are also allegations that discovery was not responded to, but there's no evidence in the record about what that discovery was. The request for admissions are not in there. There was no motion for summary judgment filed saying that we should be entitled to judgment as a matter of law because such requests are deemed admitted because no response was made. In this case, there was no evidence that the plaintiff's dropped the lawsuit because defeat was imminent.

JUSTICE NATHAN L. HECHT: Under this agreement, do you think the defendant would be a prevailing party within the contemplation of the parties if the case had been dismissed for want of prosecution?

ATTORNEY FRANK B. LYON: If the cause had been dismissed for want of prosecution, I would say that that's a gray area, to be honest. That's not really an adjudication; it's not thumbs up or thumbs down somebody wins or loses. It's simply that the case has sat idle and that nothing has happened.

JUSTICE NATHAN L. HECHT: Do you think it was within the contemplation of the parties that the defendant would be a prevailing party if the plaintiff's case was dismissed as a discovery sanction?

ATTORNEY FRANK B. LYON: I think in that case it could have been, yes the prevailing party because that would have. If the case was dismissed as a result of discovery sanctions that, in effect, would have been a dis missal with prejudice.

JUSTICE NATHAN L. HECHT: Well it might be or might not be. What's the difference between dismissal for

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discovery sanction and dismissal for want of prosecution in your view?

ATTORNEY FRANK B. LYON: A dismissal for discovery sanctions indicates that there was bad faith on the part of the party that was sanctioned, that was not doing what they were supposed to do under the rules. Dismissal for want of prosecution to me is a more innocuous situation where the party simply just let something sit idle and don't do anything about it one way or the other.

JUSTICE DON R. WILLETT: What do you think are the biggest just practical complications that might arise from having a different rule for plaintiffs and defendants?

ATTORNEY FRANK B. LYON: You mean as far as who's the prevailing party? Well from a practical standpoint, typically the plaintiff is the person seeking relief and what you may run into is the situation where the defendant hasn't filed the counterclaim, but the defendant prevails. I think that in a situation like that where there is no counterclaim, but the court finds in favor of the defendant then the defendant has prevailed and would be entitled to attorneys' fees if the defendant sought those attorneys' fees.

JUSTICE PHIL JOHNSON: But if you try the case and the defendant simply had a general denial and submitted it to the jury and the jury said no, plaintiff has the burden of proof. Jury just says no, no, no, then the plaintiff has not prevailed because they've not had affirmative relief in any way, but all the defendant has done is said the same thing that they've said all along, we didn't do it. You can't prove we did it, which is really what a general denial is. So it seems as though there's a fair similarity here between a dismissal and a jury finding that the defendant didn't do anything. Plaintiff did not fulfill their burden of proof.

ATTORNEY FRANK B. LYON: I think in that situation, there would be a take nothing judgment so the defendant would end up prevailing because the judgment it would have to be entered based upon the jury's verdict. I think it would have to be that the plaintiff takes nothing.

CHIEF JUSTICE WALLACE B. JEFFERSON: Doesn't that mean you say if the non-suit is with prejudice then the defendant is a prevailing party?

ATTORNEY FRANK B. LYON: If a non-suit had been with prejudice then I think that is a judicial determination that the other party prevailed.

JUSTICE PHIL JOHNSON: What if the non-suit is without prejudice but it's after the limitations has run so it can't be re-filed?

ATTORNEY FRANK B. LYON: Well that's a different issue about limitations because limitations is an affirmative defense that would have to be raised at a subsequent point. Dismissal without prejudice after limitations has run is not res judicata on the issues.

JUSTICE PAUL W. GREEN: Ok you don't have, you're not disputing that this is a legal proceeding related to the contract.

ATTORNEY FRANK B. LYON: Do not dispute that.

JUSTICE PAUL W. GREEN: So prevailing all that means is who wins, right?

ATTORNEY FRANK B. LYON: I think it means the court determines who wins.

JUSTICE PAUL W. GREEN: Okay so having filed a lawsuit and the case is now over by non-suit you didn't win, the plaintiff didn't win so that would have to mean that the defendant won, does that make logical sense?

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ATTORNEY FRANK B. LYON: I don't think so because the cases that talk about what a non-suit does talk about that a non-suit just puts the parties back in a situation that there were in before the case was filed.

JUSTICE PAUL W. GREEN: Right, but I mean in terms of the context of what an ordinary person reading a contract provision like this would think, I mean what the intent of the parties was is that if somebody sues me and I hire a great lawyer and the intimidating factor of this lawyer and the other side says okay, we're not going to get involved, we're gone, non-suit. So as a defendant I think well I just won the case. Why wouldn't that mean what the parties intended?

ATTORNEY FRANK B. LYON: I think that there is a difference between what your perception as a defendant might be and the legal definition of who was actually the prevailing party in that case.

JUSTICE PAUL W. GREEN: So you don't think what the parties may have thought. You think the parties need to be thinking in a legal context rather than in terms of what they, what an ordinary person would think.

ATTORNEY FRANK B. LYON: I think based upon the way that this clause is written that it talks about the prevailing party in a legal proceeding. I think that that requires a determination by a court of who wins and who loses.

JUSTICE DON R. WILLETT: So you view it more like a boxing match. These guys sort of pummel each other, they end up bloodied and bruised, but it's a draw. 15 rounds later, it's a draw, nobody wins and that's how you see it.

ATTORNEY FRANK B. LYON: On the non-suit you mean, yes. And I'll also go back and look at this court's decision in the KB Homes case because the way I understand that case is both the majority said there hasn't been a sufficient determination, a sufficient victory on the part of the plaintiff to warrant the recovery of attorneys' fees because zero damages were awarded. And the defense, I mean the descent said well there was, the defendant was the prevailing party, I'm sorry, the plaintiff was the prevailing party because there was a finding in their favor although zero damages were awarded. So the difference was what is the something that has to be given to resolve in a prevailing party. But I believe that both the majority and the descent in that case recognized that for there to be a prevailing party that there had to be a judicial determination of who wins and who loses.

JUSTICE DEBRA H. LEHRMANN: And with regard to that case, do you think it matters whether it's the plaintiff or the defendant that we're talking about.

ATTORNEY FRANK B. LYON: I think that there is the possibility that there could be a different standard for plaintiffs and defendants especially in the situation where the defendant hasn't raised a counterclaim. Where the defendant has just said I didn't do it, it's not my fault or whatever. So there is the possibility that you could have a defendant who's the prevailing party, but nothing is awarded to the defendant because the defendant did not seek any affirmative relief, but nonetheless the defendant would still be the prevailing party in that situation.

JUSTICE PHIL JOHNSON: And that would because it's a determination on the merits or is there any other reason.

ATTORNEY FRANK B. LYON: That would be because of the determination on the merits. Here I believe that the Petitioner, they talk about that the 3rd Court got confused about the rule 162 rights. There's a difference between the right to bring the claim for attorneys' fees which rule 162 certainly allows, and the right to recover on the merits on that claim for attorneys' fees. We don't dispute that the Epps had the right to bring their claim for attorneys' fees. Our dispute is that they did not, they were not entitled to attorneys' fees because there was no determination on the merits of the case as to who was the prevailing party. It's the Respondent's position that the 3rd Court got it right when they looked at the definition of prevailing party that the 3rd Court properly applied

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the standards of contract interpretation by looking to the meaning, I'm sorry by looking to the intent of the parties and interpreting and construing the unambiguous terms as a matter of law.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Counsel.

ATTORNEY FRANK B. LYON: Thank you.

REBUTTAL ARGUMENT OF N. WEST SHORT ON BEHALF OF PETITIONER

JUSTICE EVA M. GUZMAN: You had a Section 10 claim for attorneys' fees and you elected not to pursue that. Pretty heavy burden there. You had to show it was a frivolous claim, etc., etc., and I guess in light of the expert's report and some of the other responsive pleadings to the summary judgment that had been filed, you chose instead to rely on the contract language.

ATTORNEY N. WEST SHORT: Under Chapter 10, you have to show that the case was baseless in law and in fact from the inception and that's a heavy burden to establish. In the response to the motion for summary judgment, though, I'd contest whether that was any evidence at all because it contained conclusory affidavit about what they believed and it contained a letter from an engineer that didn't establish anything either and was inadmissible because they hadn't disclosed this engineer and there was no ability on our part, for example, to make any discovery on that issue.

JUSTICE EVA M. GUZMAN: It sounds like that would have facilitated then your ability to prove your Section 10 claims.

ATTORNEY N. WEST SHORT: It might have, but I don't know that I could have. It would have been a much more difficult burden to establish that it was baseless in law and in fact.

JUSTICE EVA M. GUZMAN: So, I'm sorry.

ATTORNEY N. WEST SHORT: I mean I would characterize their case as at best a weak case, but I think if we had been forced to prove that it was baseless in law in fact that would have been a much higher burden than I think the parties intended in the contract.

JUSTICE EVA M. GUZMAN: So to be a prevailing party because there was a non-suit here, your argument presumes that the suit had no merit and because it was non-suited, you won because if it had merit, they would not have non-suited. It's a little problematic when you view it in light of the fact that you chose not to pursue sanctions.

ATTORNEY N. WEST SHORT: Well I don't think we presumed that it had no merit. We presumed that defeat was imminent and that defeat was because they simply either had no evidence that could have been admitted or because of the, they had failed to respond to any discovery, they weren't going to be able to actually admit any of that evidence. And so we would have prevailed on the merits of the case even if the case had some merit of some kind somewhere, we still, we were still going to prevail on the merits.

CHIEF JUSTICE WALLACE B. JEFFERSON: But if a plaintiff with a weak damages case, let's say discovery goes on for a while and they, what they thought was going to be a million dollar case turns out to be $10,000. But your, the defendant has already sunk $20,000 in attorneys' fees and so their incentive is to go forward because they want to get that small amount of damages to avoid a large attorneys' fee recovery. I mean that's kind of what plays out in these cases.

ATTORNEY N. WEST SHORT: I would say that in that scenario, yeah the incentive is to either go forward or

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to settle that case at that point if you figured out that you have a very weak case and in fact as a matter of practicality--

CHIEF JUSTICE WALLACE B. JEFFERSON: But what you're going for is to prevail even in the weak case. So you don't care what amount of damages at this point, you just want to get at least a dollar so that you don't have pay $100,000 to your defendant's attorneys. So you win the case, but I mean you lose the war.

ATTORNEY N. WEST SHORT: I think that's essentially true and that's what the parties contemplated when they signed the contract is that if you're going to file a case, there's a chance that you're going to pay the defendant's attorney's fees. And I want to make a quick point here.

CHIEF JUSTICE WALLACE B. JEFFERSON: Well I'm just trying to understand incentives because the typical, the courts, the system benefits when a plaintiff non-suits a case that makes, where it is inefficient to go forward. And the scenario that I just articulated is that wouldn't happen. It's inefficient to go forward, yes, because the damages are too low, but I have to do it on behalf of my client or I'm going to face this crippling attorneys' fee recovery. Now isn't that, maybe the contract requires that, but isn't there a problem with that?

ATTORNEY N. WEST SHORT: That's a hard call because in the case where they've signed a contract that provides that the prevailing party recovers their attorneys' fees and they discover that they really don't have much of a case, then you're in a dilemma as to whether to go forward and actually go ahead and try to prevail so that you don't have to pay the attorneys' fees or to settle in some fashion. I agree that that is a dilemma, but that's a situation that they put themselves in when they sign a contract that said the prevailing party in any of the proceedings.

JUSTICE DON R. WILLETT: In litigation today it can get pretty complex. You can have you know multiple plaintiffs, multiple defendants, you can have third party, responsible third parties, multiple claims, some non-suited, some proceed, you win on some, lose on others. I mean getting to the bottom of all that in terms of prevailing party, I mean it just seems really complex and it seems to smack more of accounting than judging. Do you disagree with that?

ATTORNEY N. WEST SHORT: It is a complex area, but I think there's an emerging trend in the courts to see both ways in which a defendant can prevail. One being on the substance of the case and also when the plaintiff gives up after, when defeat is imminent or seems likely because you look at the cases and you'll see that, that that's starting to become a trend that in the contracts like this, a defendant is considered a prevailing party when it seems as though defeat is likely for the plaintiff's case and the plaintiff just gives up and walks away, which I think is what the parties expect as in any other situation such as a sporting event or a boxing match where one of the boxers steps out of the ring before the case is over. I don't think anybody would question that the other boxer is the prevailing boxer.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Counsel. The cause is submitted and the Court will take a brief recess.

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