

BECAUSE BOTH PARTIES SOUGHT A MONEY JUDGMENT
AGAINST THE OTHER, BUT NEITHER PREVAILED IN THAT
EFFORT, THE ARKANSAS COURT OF APPEALS HELD THAT AN
AWARD OF ATTORNEY'S FEES OR COSTS TO EITHER PARTY
WOULD AMOUNT TO AN ABUSE OF DISCRETION.

In *Brackelsberg v. Heflin*¹, the Arkansas Court of Appeals held that because neither party successfully obtained a money judgment against the other party, neither party was the “prevailing party” for purposes of awarding attorney’s fees under Arkansas Code Annotated, Seciton 16-22-308.²

Phil and Crystal Brackelsberg (the “Brackelsbergs”) and Marc and Billie Heflin (the “Heflins”) executed a real estate contract in August of 2005.³ Pursuant to the real estate contract, the parties settled on a price of \$450,000.00, and the Heflins paid \$5,000.00 in earnest money.⁴ However, after this agreement, the Heflins reneged on the contract because the appraisal of the house was actually \$420,000.00, and their bank would not loan them an excess of the appraisal value.⁵ Once it was clear that the Heflins were not going to purchase the house, the Brackelsbergs sought other buyers for their house, and they ultimately sold it for \$422,500.00.⁶ However, upon the sale of their house, the Brackelsbergs did not return the \$5,000.00 of earnest money to the Heflins.⁷

After more than a year from when the Heflins breached the contract, they sued the Brackelsbergs for the earnest money of \$5,000.00, and the Heflins amended the complaint in order to exclude the seeking of any actual damages.⁸ In their answer and counterclaim, the Brackelsbergs argued that because the Heflins did not act in good faith when they sought to secure financing for the loan, they breached the real estate contract, which was completed in August of 2005.⁹ Therefore, the Brackelsbergs requested the court to dismiss the Heflins’ suit, and additionally, they requested damages of at least \$60,105.74, which they increased to \$72, 621.57 in an amended counterclaim.¹⁰

-
1. 2011 Ark. App. 678, ___ S.W.3d ___.
 2. *Id.*, at 9, ___ S.W.3d at ___.
 3. *Id.* at 2, ___ S.W.3d at ___.
 4. *Id.*, ___ S.W.3d at ___.
 5. *Id.*, ___ S.W.3d at ___.
 6. *Id.*, ___ S.W.3d at ___.
 7. *Brackelsberg*, 2011 Ark. App. 678, at 2, ___ S.W.3d ___.
 8. *Id.*, ___ S.W.3d at ___.
 9. *Id.*, ___ S.W.3d at ___.
 10. *Id.*, ___ S.W.3d at ___.

The Heflins also argued that the Brackelsbergs retained the earnest money as liquidated damages.¹¹ The Brackelsbergs provided in their amended complaint that they had returned the \$5,000.00 to the Heflins, and had given up their right to liquidated damages under the contract and only requested actual damages.¹² However, the Heflins did not accept the Brackelsbergs' refund of the earnest money.¹³ The Brackelsbergs attempted another route to refund the money by filing an interpleader petition, in which they requested to deposit money with the clerk, but the trial court denied that petition.¹⁴

After both parties filed cross-motions for summary judgment, on April 20, 2009, the trial court granted only the Brackelsbergs' motion for summary judgment.¹⁵ Because the court found that the Heflins materially breached the real estate contract by not fulfilling a requirement of that contract, which was completing a loan application, the court granted the Brackelsbergs \$22,500.00 in damages.¹⁶ Because Arkansas Code Annotated, Section 16-22-308 allows a court the discretion to award a reasonable attorney's fee to the prevailing party in a breach-of-contract action, the Brackelsbergs also received an award of attorney's fees. At the same time, the court did not award any pre or postjudgment interest.¹⁷

Once the trial court's entered its order of the summary judgment, the Heflins appealed and the Brackelsbergs cross-appealed it.¹⁸ In *Heflin I*, the Arkansas Court of Appeals "affirmed in part, reversed and remanded in part, and vacated the attorney's fee award."¹⁹ It affirmed the trial court's holding that the Heflins' materially breached the real estate contract by not completing an application for a loan within the acceptable time period of five days, as provided by the contract.²⁰

Although the appeals court agreed with the trial court in finding that the Heflins breached the real estate contract, it reversed and remanded for

11. *Id.*, ___ S.W.3d at ___.

12. *Id.* at 3, ___ S.W.3d at ___.

13. *Brackelsburg*, 2011 Ark. App. 678, at 3, ___ S.W.3d at ___.

14. *Id.*, ___ S.W.3d at ___.

15. *Id.*, ___ S.W.3d at ___ (dismissing the Heflins' case with prejudice).

16. *Id.*, ___ S.W.3d at ___ (concluding that \$22,500.00 was the appropriate amount of damages because that amount was the difference between \$450,000.00, the agreed sales price by the Heflins, and \$422,500.00, the sale price paid by the eventual buyer of the Brackelsbergs' house).

17. *Id.*, ___ S.W.3d at ___.

18. *Id.* at 3, ___ S.W.3d at ___. The Arkansas Court of Appeals first heard a case from these parties pertaining to the same undisputed facts in 2010. *Heflin v. Brackelsberg*, 2010 Ark. App. 261, ___ S.W.3d ___ (*Heflin I*).

19. *Brackelsburg*, 2011 Ark. App. 678, at 3, ___ S.W.3d at ___.

20. *Id.* at 3-4, ___ S.W.3d at ___.

new trial based on the trial courts award of damages to the Brackelsbergs.²¹ The court's decision to reverse and remand was based on a choice the contract gave the Brackelsbergs in the event the Heflins breached:²² to either retain the earnest money as liquidated damages or to return the earnest money and file a lawsuit that "asserts all legal and equitable rights which exists as a result" of the breach.²³

Lastly in *Heflin I*, when the appeals court vacated the award of attorney's fee to the Brackelsberg, it relied on the holding in *Marcum v. Wengert*,²⁴ which provides "[t]he prevailing party is determined by who comes out 'on top' at the end of the case," in order to interpret Arkansas Code Annotated, Section 16-22-308, which provides that "the prevailing party in a breach of contract action may be entitled to a reasonable attorney's fee."²⁵ Because the decision of which party will come out 'on top' is not appropriate until the end of the case, the appeals court concluded that the trial court should only use its discretion regarding attorney's fee award when the case is "all said and done."²⁶ Therefore, the appeals court remanded *Heflin I*, and on December 16, 2010, the jury trial occurred with the sole purpose of focusing on the issue of damages.²⁷ On remand, the jury found that the Brackelsbergs exercised their power under the real estate contract of choosing to retain as liquidated damages the earnest money of \$5,000.00, thus, on January 6, 2011, the trial court dismissed the action on its merits.²⁸

Following the trial court's order, both parties requested attorney's fees, because pursuant to Arkansas Code Annotated, Section 16-22-308, they were the prevailing party.²⁹ However, on February 8, 2011, the trial court denied both parties' requests, which in turn, made each party liable for their own attorney's fees and costs.³⁰ As a consequence to the trial courts holding, the Brackelsbergs filed a motion for reconsideration regarding the attorney's fees, and they argued that this constituted an award of attorney's fees not only pursuant to Arkansas Code Annotated, Section 16-22-308, but also to Paragraph 28 in the real estate contract, which was signed by both parties.³¹

21. *Id.*, at 4, ___ S.W.3d at ___.

22. *Id.*, ___ S.W.3d at ___.

23. *Id.*, ___ S.W.3d at ___.

24. 344 Ark. 153, 40 S.W.3d 230, (2001).

25. *Brackelsburg*, 2011 Ark. App. 678, at 5, ___ S.W.3d at ___ (quoting *Marcum v. Wengert*, 344 Ark. 153, 162, 40 S.W.3d 230, 236 (2001); *Heflin I*, 2010 Ark. App. 261, at 8-9, ___ S.W.3d at ___).

26. *Id.*, ___ S.W.3d at ___ (quoting *Heflin I*, 2010 Ark. App. 261, at 8-9 ___ S.W.3d at ___).

27. *Brackelsburg*, 2011 Ark. App. 678, at 5, ___ S.W.3d at ___.

28. *Id.*, ___ S.W.3d at ___.

29. *Id.*, ___ S.W.3d at ___.

30. *Id.*, ___ S.W.3d at ___.

31. *Id.* at 6, ___ S.W.3d at ___.

After considering the Brackelsbergs argument, the trial court agreed with them that the prevailing party should be awarded attorney's fees, however, the court did not agree with them that they were the prevailing party.³² Instead, the trial court found that the Heflins prevailed in the litigation, and it relied on *Gill v. Transcriptions, Inc.*,³³ which provides that "the prevailing party is the party that receives judgment in their favor," as it entered an "order on defendant's motion for reconsideration," which made the Brackelsbergs responsible for the Heflins' attorney's fees and costs.³⁴

After the trial court entered its decision regarding the Heflins as the prevailing party in the litigation, on March 11, 2011, the Brackelsbergs filed an appeal in which they alleged that they were the "prevailing party for purposes of awarding attorney's fees pursuant to Ark. Code Ann. § 16-22-308," as well as the purposes of Paragraph 28 in the real estate contract. Thus, it should follow that they should be awarded attorney's fees and costs.³⁵ The court agreed with the Brackelsbergs "that the trial court abused its discretion in finding the Heflins to be the prevailing party."³⁶ The court reviewed the holding in *Gill*, and it found that in order to be deemed the prevailing party, "the litigant must be granted some relief on the merits of his claim,"³⁷ and the court must analyze each case in the entirety of the litigation in order to "determine who was the prevailing party."³⁸

In overturning the trial court's holding by reviewing the entirety of the case, the appeals court explained that the Heflins' initially requested that the Brackelsbergs return the \$5,000.00 earnest money, and "the Heflins ultimately lost on that claim pursuant to a summary-judgment order, affirmed in part by [the appeals court], which determined that the Heflins breached the real estate contract as a matter of law."³⁹

The Brackelsbergs counterclaim requested actual damages well over the \$5,000.00 requested by the Heflins.⁴⁰ Because "[t]he fact that a party does not recover all of the damages it sought is not determinative of whether that party prevailed at trial,"⁴¹ the appeals court found that the Brackelsbergs should be deemed the non-prevailing party. However, because "both parties

32. *Id.*, ___ S.W.3d at ___.

33. 319 Ark. 485, 486, 892 S.W.2d 258, 259 (1995).

34. *Brackelsberg*, 2011 Ark. App. 678, at 6, ___ S.W.3d at ___.

35. *Id.* at 7, ___ S.W.3d at ___.

36. *Id.*, ___ S.W.3d at ___.

37. *Id.* at 7, ___ S.W.3d at ___ (citing *BKD, LLP v. Yates*, 367 Ark. 391, 394, 240 S.W.3d 588, 591 (2006)).

38. *Brackelsberg*, 2011 Ark. App. 678, at 8, ___ S.W.3d at ___ (citing *Perry v. Baptist Health*, 368 Ark. 114, 117, 243 S.W.3d 310, 313 (2006)).

39. *Brackelsberg*, 2011 Ark. App. 678, at 8, ___ S.W.3d at ___.

40. *Id.*, ___ S.W.3d at ___.

41. *Id.* at 8-9 (citing *Marcum v. Wengert*, 344 Ark. 153, 162, 40 S.W.3d 230, 236 (2001)).

sought a money judgment against the other, but neither prevailed in that effort,” the appeals court held that regarding the entirety of the case, neither party prevailed, “thereby leaving each party to bear their own fees and costs expended in this litigation.”⁴²

This case presented a subtle issue that was very important to the overall outcome of this case: whether it is necessarily implied that if one party prevails in an earlier court decision it is necessarily implied that it prevailed in the totality of the litigation. According to the Arkansas Court of Appeals, in order to be the prevailing party, the party must prevail in all claims against the other party. Additionally, based on the facts and holdings of the lower courts, it must be clear that one party prevailed over the other throughout the totality of the lawsuit.

* *Andrew Ritchie*

42. *Brackelsberg*, 2011 Ark. App. 678, at 9, ___ S.W.3d at ___.