COURT OF APPEALS DECISION DATED AND FILED

November 24, 2004

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 03-3332

Cir. Ct. No. 01CV000169

STATE OF WISCONSIN

IN COURT OF APPEALS DISTRICT IV

M&I BANK OF SOUTHERN WISCONSIN N/K/A M&I MARSHALL & ILLSLEY BANK,

PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

V.

JOHN J. POEHLING AND DIXIE R. POEHLING,

DEFENDANTS-THIRD PARTY PLAINTIFFS-APPELLANTS-CROSS-RESPONDENTS,

V.

LAWYERS TITLE INSURANCE CORP., FINE LINE CONSTRUCTION, INC. AND RONALD BINTER,

THIRD-PARTY DEFENDANTS,

M&I MORTGAGE CORPORATION,

RESPONDENT.

APPEAL and CROSS-APPEAL from an order of the circuit court for Dane County: JOHN C. ALBERT, Judge. *Affirmed; cross-appeal reversed.*

Before Dykman, Vergeront and Lundsten, JJ.

¶1 VERGERONT, J. John and Dixie Poehling appeal the circuit court order granting summary judgment in favor of M&I Bank of Southern Wisconsin for the amount due on a note under a construction loan agreement with the Poehlings. The circuit court also granted summary judgment in the Bank's favor on the Poehlings' counterclaims for breach of contract and negligence. The Poehlings contend the circuit court erred in concluding that the Bank was entitled to judgment as a matter of law on their counterclaims for breach of contract and negligence. They also contend the circuit court erred in failing to grant their motions to add M&I Mortgage Corporation (M&I Mortgage) as a third party and to add counterclaims against the Bank for vicarious liability for M&I Mortgage and breach of fiduciary duty by the Bank. We conclude the circuit court properly granted summary judgment in favor of the Bank and denied the motions to amend the pleadings. Accordingly, we affirm on the appeal.

¶2 The Bank cross-appeals the court's award of reasonable attorney fees under the provisions of the note and mortgage. We agree with the Bank that the court erroneously exercised its discretion in reducing the requested fees by 25% for the reason it did, and we therefore reverse the order for reasonable attorney fees insofar as it reduces the amount requested. For the reason we explain in the decision, we do not remand for further consideration of the amount of fees that are reasonable, but instead direct the circuit court to enter an order awarding the Bank 100% of the fees requested.

BACKGROUND

¶3 In February 2000, the Poehlings entered into a contract with Fine Line Construction, Inc., owned by Ronald Binter, for the construction of a house, and construction began that month. There is a dispute between the Poehlings and Fine Line over the terms of the agreement. The Poehlings take the position that they agreed to a total cost of approximately $485,000, as reflected in the estimated job cost Fine Line prepared. Fine Line takes the position that the parties understood the estimate was not a complete estimate and the agreement was for construction on a time and materials basis.

¶4 In order to obtain funds for the construction, the Poehlings entered into a residential construction loan agreement with the Bank, signing the following documents in addition to the loan agreement: a note in the principal amount of $477,200, a mortgage on the property, and a disbursement agreement with the Bank as lender and Lawyers Title as disbursing agent.

¶5 The loan agreement provided that all funds disbursed by the Bank "shall be disbursed to a Title Insurance Company pursuant to that Disbursement Agreement executed herewith." Paragraph 8(d).

¶6 The disbursement agreement specified the items that had to be presented to Lawyers Title for draw requests by the general contractor and the owner; one of these was an authorization of draw signed by the owner. The agreement also established the following procedure for disbursements:

> Within three days of receipt of each Draw Request from General Contractor, Owner shall execute an Authorization of Draw for work completed in accordance with the terms of the Construction Documents…. Within seven days after General Contractor's submittal of Draw Requirements for a

> requested draw to Disbursing Agent, Disbursing Agent will convey to Lender:
>
> a) A copy of items which are provided by General Contractor for the Draw Request
>
> b) Disbursing Agent's Inspection Report and Recommendation for Payment
>
> c) Request for Funding
>
> d) Endorsement Updating Title
>
> Lender will either transfer funds to Disbursing Agent, or provide written objection, stating the basis for Lender's denial to transfer funds, to Disbursing Agent, General Contractor and Owner within seven days after receipt of the above items from Disbursing Agent. However, the Disbursement Agreement is not a commitment by Lender to transfer funds to Disbursing Agent, General Contractor or Owner. Funds shall not be deemed to be Disbursement Funds for purposes of disbursement under this Agreement until received by Disbursing Agent. Upon receipt of Disbursement Funds from Lender, and completion of any remaining draw requirements, Disbursing Agent will disburse payment within seven days for General Contractor, Subcontractors and suppliers indicated in the Draw Request, for all work completed at the time the Draw Request is submitted, provided that General Contractor, Subcontractors and Suppliers provide signed lien waivers satisfactory to Disbursing Agent in exchange for payment(s).

¶7 With respect to the sufficiency of the loan proceeds, the disbursement agreement provided that neither the disbursing agent nor the lender was responsible "for assuring, that Disbursement Funds will be sufficient to complete construction.… Owner has determined that the Disbursement Funds will be sufficient to complete all construction, including Separate Owner Contracts."[1] Paragraph 5.

[1] The disbursement agreement states that: "[T]he total construction cost" is $485,000.

¶8 There were four disbursements of the loan proceeds. The first occurred at the loan closing, which took place in March 2000. The Poehlings there executed a HUD-1 settlement statement providing for a $104,485 disbursement to Fine Line as an "Advance Draw at Closing," in payment for an invoice submitted at closing.

¶9 The second disbursement occurred in April 2000 when M&I Mortgage, which provided loan disbursement services to the Bank, disbursed $111,000 after receiving the following documents from Lawyers Title: an Owner's Authorization of Draw in that amount signed by John Poehling; a General Contractor's Draw Request in that amount signed by Binter; and an inspection certificate from Madison Survey Associates, Inc.

¶10 The third disbursement occurred in June 2000 and was for $115,000. M&I Mortgage had the following documents from Lawyers Title before making this draw: an Owner's Authorization of Draw for $129,000 signed by John Poehling;[2] General Contractor's Draw Request for $129,000 signed by Binter; and an Inspection Certificate from Madison Survey Associates, Inc. for $115,000, indicating that $14,000 should be deducted because "no materials on site."

¶11 Although there was a request for a fourth disbursement of $107,500 in July 2000, the Bank declined to make it. M&I Mortgage received an Owner's Authorization of Draw for $107,500 signed by John Poehling; a General

[2] The Poehlings point out in their statement of facts that John Poehling testified at his deposition that he signed blank draw requests for Binter to submit, but Binter was not to use them unless he, John, was unavailable to sign and they had discussed it first. Poehling did not know, he testified, that Binter was using this draw request. Assuming this to be true for purposes of this appeal, the Poehlings do not explain in the argument section how this is relevant to their claims against the Bank or their proposed claim against M&I Mortgage. We therefore conclude this factual dispute is not relevant to this appeal.

Contractor's Draw Request for that amount signed by Binter; and an Inspection Certificate from Madison Survey Associates, Inc. for that amount. The reasons given by the Bank for not disbursing the requested funds were: (1) the disparity between the percentage of the completion of the house and the percentage of the funds already disbursed; and (2) information about a dispute between the Poehlings and Fine Line over the proper application of the funds already disbursed. The Bank eventually approved a disbursement in August 2000 for $31,860.74 to pay subcontractors' invoices, and that amount was disbursed after the receipt of an Owner's Authorization of Draw in that amount signed by John Poehling.

¶12 The Poehlings and Fine Line were not able to resolve their dispute, construction on the house ceased, and the Poehlings ceased making payments on the note. When the Bank filed this action alleging a default on the note, the Poehlings responded with two counterclaims: a breach of contract claim and a negligence claim, both based on the allegations that the Bank disbursed funds on unsubstantiated draw requests. The Poehlings also filed a third-party complaint against Lawyers Title and against Fine Line, later amending it with the court's permission to add Binter.

¶13 The Bank moved for summary judgment, asserting that it was entitled to judgment as a matter of law that it had no obligation under the agreements with the Poehlings or otherwise not to fund draw requests that the Poehlings expressly authorized. The Poehlings opposed the motion, contending that the agreements and testimony of the Bank's employees and agents and its own practices showed that it did have such an obligation. The Poehlings also moved to amend their counterclaim to add M&I Mortgage as a party and assert a negligence claim against it; and they sought to amend their counterclaim against the Bank to

add a breach of fiduciary duty claim and allegations that the Bank was vicariously liable for the conduct of M&I Mortgage and Lawyers Title, as well as additional factual allegations on the breach of contract and negligence claims.

¶14 The circuit court initially denied the Bank's motion for summary judgment, concluding that there were factual disputes concerning what a Bank employee and a Lawyers Title employee told the Poehlings at the closing about the inspections that their respective employers would make to assure the disbursements were used for work already completed; the court also stated that there was a possibility there was a principal/agency relationship between the Bank and the Poehlings. However, on a motion for reconsideration, the court concluded that the agreements plainly placed the duty to inspect before disbursing funds on Lawyers Title, not on the Bank, and it therefore concluded that the contract claim and negligence claim against the Bank should be dismissed.

¶15 Based on similar reasoning, the court denied the Poehlings' motion to add a claim against the Bank for breach of fiduciary duty. The court also denied the motion to add M&I Mortgage as a party, reasoning that M&I Mortgage was an agent of the Bank and therefore did not have an obligation greater than that of the Bank.

¶16 The court entered judgment in favor of the Bank for $80,054.48 plus interest, the amount of the deficiency after the sale of the property, which had occurred during the proceedings. The court also awarded the Bank $180,267.35 as reasonable attorney fees for collection of the payments due under the note, for a total judgment of $309,473.49. The claims of negligence and breach of fiduciary duty against Lawyers Title, as well as the claims of breach of contract and fraud

against Fine Line, were to proceed to trial.[3] The resolution of these claims does not affect our decision on this appeal, which concerns the dispute between the Bank and the Poehlings.

DISCUSSION

I. Summary Judgment In Favor of M&I Bank

¶17 A party is entitled to summary judgment if there are no genuine issues of material fact and that party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). We apply the same methodology as the circuit court and review de novo the grant or denial of summary judgment. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987).

A. *Breach of Contract*

¶18 The Poehlings argue on appeal, as they did in the circuit court, that the agreements they signed imposed a duty on the Bank to disburse funds only for completed construction, and the Bank breached this duty by dispersing funds out of proportion to the degree of completion of the project. We agree with the circuit court that neither the loan agreement nor the disbursement agreement imposed this obligation on the Bank. We also conclude that, because the contract language was

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[3] The court denied Lawyers Title's motion for summary judgment; granted Binter's motion for summary judgment, dismissing him; and partially granted Fine Line's motion for summary judgment. The court determined, based on the undisputed facts, that the contract between the Poehlings and Fine Line was a time and materials contract; it also determined there was no evidence to support the theft by contractor claim against Fine Line, stating that Fine Line paid at least the amount it received from the Poehlings, if not more, in labor and materials.

The Poehlings do not appear to be arguing on appeal that the Bank was vicariously liable for the conduct of Lawyers Title.

plain on these points, the other evidence the Poehlings point to does not constitute material issues of fact that entitle them to a trial.

¶19 In construing a contract, we begin with the language of the contract and, if that is plain, we enforce those terms as written. ***Teff v. Unity Health Plans Ins. Corp.***, 2003 WI App 115, ¶21, 265 Wis. 2d 703, 666 N.W.2d 38. It is only when the contract on its face is ambiguous that we may look outside the contract to extrinsic evidence to determine the intent of the parties. ***Id.*** Whether a contract is ambiguous is a question of law, which we review de novo. ***Id.***

¶20 The loan agreement provides that the "Owner shall be responsible for completion of construction in accordance with the plans and specifications, …" and the Bank "is acting solely as a mortgage lender[,] [and] shall not be responsible for: i) any aspect of construction; including without limitation: supervision; inspections…." With respect to inspection of the property, the loan agreement specifically states:

> M&I is hereby given the right to inspect the "Property" at any time during construction, but is in no way obligated to do so[;] [a]ny appraisals or inspections of the "Property" made, by or on behalf of M&I shall be solely for its benefit in determining the adequacy of its security and the Owner shall not (and hereby waives any right to) rely upon such appraisals, inspections or determinations of M&I in any way.

Paragraph 6(b) and (c). Thus, the plain language of the loan agreement imposes no obligation on the Bank to make inspections, but permits it to do so to protect its own interests.

¶21 Regarding disbursements of the loan proceeds, paragraph 8(c) provides:

> [A]ll funds for construction shall be disbursed only upon the Owner's order and/or satisfaction of the requirements of M&I, if applicable. M&I shall have the right to determine the time and other requirements under which disbursements shall be made and shall have the right to take any action which it deems necessary to complete construction to its satisfaction. M&I may, in its discretion, withhold disbursement of funds until improvements, repairs, and work to be performed by Owner in the form of work credits have been fully completed to M&I's satisfaction; provided that M&I may disburse funds on the Owner's order upon partial completion of work credit improvements. M&I may, at its option, withhold disbursement of funds until it is satisfied that the balance in the Loans-in-Process Account is sufficient to complete construction in accordance with the plans and specifications and/or any additions thereto; provided, the Owner shall not rely on any disbursement or other arrangement as a representation that the balance of such account will be so sufficient. M&I may also withhold disbursement of funds if, in its discretion, such action seems warranted for any reason.

Under this plain language, although the Bank has the right to determine the time and other requirements under which disbursements shall be made, and to withhold the disbursement of funds for specific reasons as well as when "in its discretion such action seems warranted for any reason," the Bank has no obligation to do so.

¶22 The disbursement agreement also does not obligate the Bank to make any inspections before transferring funds to the disbursing agent in response to a draw request or to withhold funds based on the degree of completion of the construction. The procedure established for the disbursement of funds, which we have quoted in paragraph 6 above, is consistent with the loan agreement: it gives the Bank wide discretion in deciding whether to transfer funds to the disbursing agent in response to a draw request but does not impose obligations on the Bank before doing so.

¶23 The Poehlings rely primarily on paragraph 10 of the disbursement agreement, which provides:

> **INSPECTIONS**. Owner hereby authorizes Disbursing Agent's inspector to enter the Property to conduct inspections on the sole behalf of Lender for the purposes of determining completion of work represented in the Draw Requests. Lender may, at its option, require additional inspections for purposes of appraisal of the Property and Owner hereby authorizes entrance to the Property for such inspections. Inspections for Contracts by Owner will coincide with those for General Contractor.
>
> IT IS NOT DISBURSING AGENT'S OR LENDER'S RESPONSIBILITY TO MAKE ANY ASSURANCES TO OWNER AS TO QUALITY OF WORK OF CONFORMITY TO THE CONSTRUCTION DOCUMENTS. DETERMINATION OF ACCEPTABILITY TO OWNER IS THE RESPONSIBILITY OF OWNER. DISBURSING AGENT IS RESPONSIBLE FOR THE GENUINENESS OF THE LIEN WAIVERS AND OWNER PAYMENT AUTHORIZATIONS IT ACCEPTS.

The Poehlings argue as follows. Because this paragraph authorizes the disbursing agent to make inspections on behalf of the Bank to determine the completion of the work represented in the draw requests, but exempts the Bank from responsibility for assuring conformity only as to the quality of the work, it is reasonable to read this paragraph as making the Bank responsible for assuring the owner that the degree of completion "was keeping pace with the funds disbursed."

¶24 We disagree. Under paragraph 8 of the disbursement agreement, it is plain that the disbursing agent has an obligation to provide the Bank with an inspection report and its recommendation for payment; but nothing in either paragraphs 8 or 10 or elsewhere in this agreement obligates the Bank to conduct its own inspection or to assure completion of work before disbursement. We conclude it is unreasonable to interpret the absence of language exempting the Bank from assuring an appropriate degree of completion as a requirement that it do so.

¶25 Because we conclude the agreements are not ambiguous, the extrinsic materials the Poehlings rely on may not be considered in construing them.[4]

¶26 The Poehlings also argue that the Bank breached the disbursement agreement by disbursing $115,000 instead of the $129,000 they requested in June 2000 without providing "written objection, stating the basis for the Lender's denial to transfer funds, to Disbursing Agent, General Contractor and Owner within seven days after receipt of the above items from Disbursing Agent," as provided in paragraph 8 of the disbursement agreement. The Poehlings do not appear to argue that the Bank did not have the authority to decline to disburse the full amount if it had provided a written objection. They also do not explain how they were damaged by the lack of a written objection, given that, in general, their contention is that the Bank should not have disbursed the money it did.

¶27 The Poehlings did not allege this lack of written objection in the breach of contract counterclaim they initially filed against the Bank, but did add it in the amended counterclaim they sought permission to file. As far as we can tell from the record, the court did not grant any part of the motion to amend and no amended counterclaim was filed. Nor, as far as we can tell from the record, did the Poehlings ever argue this lack of written objection in opposition to the Bank's motion for summary judgment. Presumably for this reason, the court never ruled on this issue. Because this issue was not argued in the circuit court and is inadequately developed on appeal, we decline to address it.

[4] The Poehlings argue that the informational material the Bank sent them, the M&I Mortgage Procedures Manual, and the testimony of employees on the Bank's practices show that the Bank was obligated to assure the appropriate degree of completion before releasing funds.

¶28 The Poehlings make a brief argument that the comments of John Burger, a Bank employee at the closing, modify the terms of the written agreements. The evidence on which the Poehlings rely for this argument is primarily based on John Poehling's deposition testimony. He testified that at the closing he asked to be the disbursing agent and was told both by Burger and the representative of Lawyers Title that he was the homeowner, he did not understand all the paperwork that had to be done, and

> between the title company and the bank, that they're experts in construction and they're experts in the disbursal of funds…. [T]hey track the budget amount against the disbursements to make sure everything was in line, that they wouldn't release another draw unless they had all the lien waivers from the previous draws and that they sent an inspector out to see that physically the work that was being requested to be paid for in fact was done to the point that would be reasonable to pay that.

¶29 In response to questions attempting to clarify who Poehling meant by "they" and what Burger as opposed to Lawyers Title's representative said, Poehling answered:

> I believe John Burger was describing to me what would happen and why we had to have the title company to be the disbursing. I believe he was indicating the title company, but I believe it was John Burger gave me the steps that had to be taken in order for … a disbursement to be made.

¶30 Accepting this testimony as true and drawing all reasonable inferences in the Poehlings' favor, we conclude it is insufficient as a matter of law to constitute an oral modification of the written agreements with the Bank. First, the discussion took place at the same meeting at which the written documents were signed, making it indistinguishable from the type of extrinsic evidence that is not admissible to show the parties' intent when contract language is unambiguous. The Poehlings do not develop an argument that would explain why the concept of

oral modification of a written contract would apply to the facts of this case. But even if we overlook this point, there is nothing in John Poehling's testimony that reasonably suggests that the Bank, through Burger, promised to do anything beyond that required of it by the written agreements.

¶31 We are satisfied that the circuit court correctly concluded that the Bank was entitled to judgment as a matter of law on the breach of contract claim.

B. *Negligence*

¶32 The Poehlings contend that the comments of Burger at the closing establish an agency relationship between them and the Bank, and the Bank therefore had a duty to act reasonably in disbursing the loan proceeds on their behalf. They assert that there are disputed issues of fact as to whether the Bank was an agent of the Poehlings and, if so, whether it breached its duty to them, and they are thus entitled to a trial on their negligence claim.

¶33 As we have previously explained, Burger's comments do not indicate that the Bank was promising to do anything beyond that required of it by the written agreements. And we have already held that that the written agreements plainly did not obligate the Bank to assure an appropriate degree of completion before authorizing the disbursement of the loan proceeds. The cases on which the Poehlings rely do not support their position that the Bank had such a duty regardless of the terms of the written agreements.

¶34 The Poehlings first distinguish ***First National Bank v. Wernhart***, 204 Wis. 2d 361, 555 N.W.2d 819 (1996), on which the circuit court relied. In that case, this court concluded that

> a mortgage lender who consents to disburse loan proceeds and personal funds of the borrower, without further participation by the borrower, is an agent of the borrower and therefore owes a duty of due care to assure the funds are paid for work actually done and to assure that the contractor has obtained lien waivers from the subcontractors.

Id. at 364. The circuit court reasoned that the Bank had no such duty to the Poehlings because a requirement for a disbursement under the disbursement agreement was the owner's approval of it, in the form of the owner's request for the draw.

¶35 The Poehlings correctly point out that we did not expressly hold in ***Wernhart*** that the lender had no duty as an agent when a condition of disbursement is the borrower's request; but it is also true that the reasoning in ***Wernhart*** does not support the imposition of such a duty on the Bank, given the terms of the written agreements in this case. The Poehlings do not bring to our attention any Wisconsin case that does impose such a duty,[5] but instead refer us to cases from other jurisdictions. However the facts in these cases, particularly regarding the terms of the agreement between the lenders and the borrowers, are so dissimilar from this case that the rationales are not persuasive here. *See* ***Falls Lumber Co. v. Heman***, 181 N.E.2d 713, 714, (Ohio Ct. App. 1961) (bank orally agreed to "take care of things" but failed to comply with the statutes regarding construction mortgages and mechanic's liens); ***M.S.M. Corp. v. Knutson Co.***, 167 N.W.2d 66, 67 (Minn. 1969) (written agreement authorizing lender to make "progressive and final disbursements" to contractor upon presentation of lien

[5] The Poehlings cite to ***Merten v. Nathan***, 108 Wis. 2d 205, 211, 321 N.W.2d 173 (1982), for the proposition that the law protects the justifiable expectations of the contracting parties. This statement was made in the context of the court weighing the tension between the principles of contract law and tort law in deciding whether to enforce an exculpatory contract. We do not see how this statement aids in resolving the issues in this case.

waivers showing satisfactory compliance; lender used some of the funds to satisfy unrelated obligations of contractor to the lender); ***Kalbes v. California Fed. Sav. and Loan Ass'n***, 497 So. 2d 1256, 1258 (Fla. Dist. Ct. App. 1986) (under agreement lender had sole authority on behalf of owner to pay contractors and therefore had duty to see that payments were made in compliance with mechanic's lien law); ***Prudential Ins. Co. of America v. Executive Estates, Inc.***, 369 N.E.2d 1117, 1120-21 (Ind. Ct. App. 1977) (oral agreement that lender would secure releases before disbursing loan proceeds).

¶36 In short, the Poehlings have provided no authority for the proposition that, when written agreements between the lender and owner require the owner's request as a condition of each disbursement and limit the lender's obligations as the agreements here do, the lender nonetheless has a duty beyond its contractual obligations to assure an appropriate degree of completion before authorizing disbursement of the loan proceeds. We therefore conclude that the circuit court properly granted summary judgment in the Bank's favor on the negligence claim.

II. Motion to Amend Third-Party Complaint and Counterclaims

¶37 The Poehlings contend the circuit court erred in denying their motion to amend their third-party complaint to add M&I Mortgage as a party and assert a negligence claim against it. The allegations of the proposed amended third-party complaint were that M&I Mortgage had a duty to approve draw requests and disbursements only as normal practices and procedures required; and it breached this duty by disbursing funds or approving draw requests on inadequately substantiated claims and in disregard of the actual work completed on the project. The circuit court denied the motion, reasoning that M&I Mortgage

was acting as the Bank's agent and did not have a duty to the Poehlings unless the Bank did; since the Bank did not have a duty to the Poehlings beyond that imposed by the written agreements, neither did M&I Mortgage.

¶38 Whether to allow an amendment to a pleading after the time limit prescribed in WIS. STAT. § 802.09(1)[6] is committed to the discretion of the circuit court. ***Mach v. Allison***, 2003 WI App 11, ¶22, 259 Wis. 2d 686, 656 N.W.2d 766. Denying a motion to amend a complaint because the new claim is futile and cannot succeed as a matter of law is a proper exercise of discretion. *See* ***Habermehl Elec., Inc. v. State Dep't of Transp.***, 2003 WI App 39, ¶31, 260 Wis. 2d 466, 659 N.W.2d 463; *see also* ***Vargas–Harrision v. Racine United School Dist.***, 272 F.3d 964, 974 (7th Cir. 2001) (futility is appropriate basis on which to deny motion for leave to amend a complaint under analogous federal rule). Because the circuit court's decision to deny permission to amend was based on its conclusion of law that, given the undisputed facts, the negligence claim against M&I Mortgage could not succeed, we review this decision de novo. *See* ***Clark v. Mudge***, 229 Wis. 2d 44, 50 599 N.W.2d 67 (Ct. App. 1999) (when discretionary decision is based on a question of law, we review that question de novo).

¶39 There is no dispute that M&I Mortgage acted as the agent of the Bank in servicing the loan. The Poehlings assert that this is immaterial because

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[6] WISCONSIN STAT. § 802.09(1) provides:

> **(1)** AMENDMENTS. A party may amend the party's pleading once as a matter of course at any time within 6 months after the summons and complaint are filed or within the time set in a scheduling order under s. 802.10. Otherwise a party may amend the pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given at any stage of the action when justice so requires.

M&I Mortgage is liable for its own torts to third parties and is not insulated from liability simply because it was acting on behalf of its principal.

¶40 The complete statement of the principle on which the Poehlings rely is "that an agent who does an act that would be a tort if he were not then acting as an agent for another is not relieved from liability to an injured third party, simply because he was acting as an agent when he caused the injury." ***Ramsden v. Farm Credit Servs.***, 223 Wis. 2d 704, 715, 590 N.W.2d 1 (Ct. App. 1998) (citations omitted). Thus, for example, when an agent acting on behalf of a principal makes factual statements that are untrue to a third party, the agent is liable to that third party just as the principal would be if the principal made those misrepresentations. ***Id.*** at 719. This principle does not create a duty on the part of an agent to third persons that the principal does not have; it simply provides that acting as an agent does not insulate an agent from liability for tortious conduct toward third persons.

¶41 In this case, the conduct of M&I Mortgage that the Poehlings assert was negligent is the same conduct we have already concluded did not make the principal, the Bank, liable to the Poehlings—either for breach of contract or negligence. Nothing in ***Ramsden*** suggests that in these circumstances the Poehlings have a negligence claim against M&I Mortgage for that same conduct.

¶42 We also conclude that ***A.E. Inv. Corp. v. Link Builders, Inc.***, 62 Wis. 2d 479, 214 N.W.2d 764 (1974), does not support the Poehlings' position. There the court held that an architect may be liable to third parties for negligent performance of work under a contract, even though there is no privity of contract with those third parties. ***Id.*** at 488. That holding has no application to the facts of this case. The Poehlings are not third parties; they have a contract with the Bank under which M&I Mortgage performed as the Bank's servicing agent; and we

have already concluded that the agent's conduct the Poehlings assert was negligent did not breach the contract and the Bank did not have a duty to the Poehlings beyond the terms of the contract to assure an appropriate degree of completion before authorizing disbursement of the loan proceeds. The circuit court correctly concluded that in these circumstances the Bank's agent did not have such a duty to the Poehlings.

¶43 Because the circuit court was correct in concluding that the Poehling's negligence claim against M&I Mortgage could not succeed as a matter of law, it properly denied permission to amend the third-party complaint.

¶44 The two counterclaims the Poehlings sought to add against the Bank were (1) vicarious liability for the negligent acts of its agent, M&I Mortgage and (2) breach of the Bank's fiduciary duty to the Poehlings. The circuit court's reasons for denying permission to add these were implicitly or explicitly based on the court's conclusions of law, and thus we review the denial of this motion de novo. *See* ***Clark***, 229 Wis. 2d at 51.

¶45 The vicarious liability counterclaim against the Bank is premised on the negligence claim against M&I Mortgage. For the same reasons that the circuit court correctly denied permission to add the negligence claim against M&I Mortgage, it correctly denied permission to add the vicarious liability counterclaim against the Bank.

¶46 As we understand the Poehlings' argument on the breach of fiduciary duty counterclaim, this counterclaim is based on essentially the same duty that is the premise for their negligence counterclaim against the Bank. The Poehlings do not appear to distinguish between the two types of duties in their discussion of the case law. Therefore, for the reasons we have explained in the

negligence section, we conclude the circuit court properly denied permission to add a breach of fiduciary duty counterclaim.

III. Cross-Appeal—Attorney Fees for M&I Bank

¶47 The note executed by the Poehlings contained the following provision regarding attorney fees:

> Payment of Note Holder's Cost and Expenses:
>
> If the Note Holder has required me to pay immediately in full as described above [notice of default], the Note Holder will have the right to be paid back by me for all of its cost and expenses in enforcing this Note to the extent not prohibited by applicable law. Those expenses include, for example, reasonable attorney' fees.[7]

(Footnote added.)

¶48 After the circuit court dismissed the Poehlings' counterclaims, the Bank moved for a judgment on the balance due under the note together with prejudgment interest and the cost of collection, including reasonable attorney fees. The Bank accompanied the motion with a detailed billing statement, which showed that its attorneys had billed for a total of $227,536.25 in fees and $12,759.16 in costs for work between January 4, 2001 and June 30, 2003.

¶49 The Poehlings objected to paying the attorney fees and costs on two grounds: (1) some of the time charged was to participate in depositions relating to the third-party claims and this work is not covered under the terms of the note, and (2) the billing statements were insufficient to determine reasonable attorney fees

[7] The mortgage contained similar language: "Lender shall be entitled to collect all **expenses incurred in pursuing the remedies provided in this paragraph 21, including, but not limited to, reasonable attorneys' fees and costs of title evidence**."

because many entries were vague or "bundled" different tasks—that is, had only one total of hours for the day for a number of specified tasks.

¶50 At the hearing on the motion, the Bank presented as a witness an attorney who testified as an expert, opining that the fees charged and costs for disbursements were reasonable given the issues in the case. In particular, this witness stated that the fees incurred in defending against the counterclaims were related to efforts to collect on the note, because the counterclaims were directed at avoiding paying on the note. The expert also stated that it was reasonable for the Bank to incur attorney fees and costs to defend against the third-party complaint for two reasons: (1) as to Fine Line, if the Poehlings could not prevail on their claims against it, there were no damages on the counterclaims against the Bank; and (2) as to Lawyers Title, the proposed amended counterclaim alleged that the Bank was vicariously liable for the conduct of Lawyers Title. Finally, the expert opined that the amount of detail in the billing statements conformed to the usual and customary practice, he was able to link the entries to the activities occurring in the case at the time, and in his opinion all the entries described services that were reasonably and necessarily incurred in collecting on the note.

¶51 In addition, the Bank's counsel testified to explain some of the entries to which the Poehlings had objected in their brief.

¶52 In the circuit court's written opinion it concluded that the Bank was entitled to fees in defending against the counterclaims and participating in the litigation on the third-party claims. It explained that the Poehlings had not presented any evidence in opposition to the Bank's expert's opinion that this work was inextricably linked to the Bank's claim against the Poehlings, and the court

found the expert's opinion to be sound, given the facts in this case. However, the court reduced the fees requested by 25%, providing the following explanation:

> This court's previous rulings confirmed that the bank has no duty of the lender/liability nature to protect the borrower from a loan gone sour. Here, the record demonstrates that Mr. Poehling knew of the first draw request, authorized the second draw request and okayed, in blank, the third draw request of $129,000.00.
>
> However, this court is terribly troubled by the actions of the bank employees when they did not follow their own internal protocol and analyze the amount of the draws vis-à-vis the percentage completion of the project. To this court, that is an appropriate and unavoidable factor that must be considered in the exercise of this court's discretion as to how much the bank is permitted in its claim for attorney's fees.
>
> Had the bank followed its own written, in-house procedures, it is highly likely that the second or third draw would not have been approved. If the bank had done that then it follows that less money would have been due the bank on its deficiency. That presumes, however, that less money loaned meant less money due on the sale of the partially completed home. Further, this court must factor into that somewhat speculative analogy the aggressiveness of the Poehlings in their continued pursuit of the litigation after the deficiency had been determined.
>
> What is fair? For this court, a 50 percent reduction in the bank's claim for attorney's fees is too onerous. Remember that counsel for the Poehlings contends that the bank is entitled to nothing by way of attorney's fees. This court concludes that a 25 percent reduction in the attorney's fees claimed by the bank can be related to the bank's inadequate adherence to its own in-house policies and procedures and, hence, the bank's entitlement should be limited to 75 percent of its fees claimed.[8]

(Footnote added.)

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[8] For purposes of this appeal, we assume the Bank did not follow its internal procedures.

¶53 On its cross-appeal, the Bank contends the circuit court erroneously exercised its discretion in reducing the fees for the reason it did. The Bank points out that in granting summary judgment to the Bank, the court rejected the Poehlings' arguments that the Bank breached its agreements with the Poehlings and breached a duty to them by authorizing the disbursements and not following its internal procedures. It is inconsistent, the Bank asserts, and therefore unreasonable to reduce its attorney fees for that very reason.

¶54 The Poehlings respond that the circuit court could properly take into account the Bank's failure to "mitigate" the damages to the Poehlings, even if, in the court's view, the Bank did not owe a duty based on its contract or otherwise to do so.

¶55 Both parties agree that we review the circuit court's ruling to determine whether it was a proper exercise of discretion. This deferential standard of review is used to review challenges to the reasonableness of attorney fees that are awarded under statutes that authorize reasonable attorney fees. ***Kolupar v. Wilde Pontiac Cadillac, Inc.***, 2004 WI 112, ¶22, ___ Wis. 2d __, 683 N.W.2d 58. The circuit court properly exercises its discretion when it employs a logical rationale based on correct legal principles and the facts of record. ***Id.*** The rationale for this deferential standard of review of a determination of reasonable attorney fees is that the circuit court will likely have witnessed the amount and quality of the attorney's work firsthand. ***Id.*** Without expressly addressing the distinction between reasonable attorney fees under a statute and reasonable attorney fees under a contract, this court has used the deferential standard of review in the latter as well as the former. *See, e.g.,* ***Stan's Lumber, Inc. v. Fleming***, 196 Wis. 2d 554, 571-72, 538 N.W.2d 849 (Ct. App. 1995); ***State Bank of Hartland v. Arndt***, 129 Wis. 2d 411, 422-23, 385 N.W.2d 219 (Ct. App. 1986).

We agree with the parties that when contracting parties agree that one party is entitled to "reasonable attorney fees" under particular circumstances, whether the fees awarded are reasonable should be reviewed on appeal under the deferential standard of review we use for discretionary decisions.

¶56 We conclude the circuit court erroneously exercised its discretion in reducing the fees by 25% based on the reasoning that the Bank did not follow its internal procedures in authorizing the disbursement of funds. There is nothing in the court's comments or in the record that supports a logical connection between the Bank's failure to follow its internal procedures and the attorney fees incurred in attempting to collect on the note. Significantly, the court concluded (and we have affirmed) that, notwithstanding the Bank's internal procedures, it did not breach its agreements with the Poehlings by authorizing the disbursement of funds and did not breach a duty it otherwise owed to the Poehlings. It is therefore not rational to reduce the attorney fees the Bank is otherwise entitled to under the note because the Bank did not do something it had no obligation to the Poehlings to do.

¶57 The circuit court was of the view that it had the authority to make this reduction based on the reference to "fundamental concepts of justice and fair play" in ***Borchardt v. Wilk***, 156 Wis. 2d 420, 428, 456 N.W.2d 653, but we conclude this is not a correct reading of that case. In ***Borchardt*** we addressed the issue whether the same language contained in the Poehlings' note allowed the mortgagee to recover all the attorney fees incurred in her suit on the note and mortgage, even though she recovered only a small portion of the amount due under the note because the mortgagors succeeded on one of their counterclaims growing out of the underlying transaction. We concluded that this provision was "ambiguous on the question whether full attorney fees recovery [to the mortgagee] was intended by the parties if [the mortgagors] should prevail in establishing

misrepresentation on the underlying transaction." ***Id.*** at 427. We resolved the ambiguity by adopting the rule that in that situation the recovery of attorney fees should be reduced in proportion to the amount recovered on the note less the amount recovered on the counterclaim. ***Id.*** at 428. We reasoned:

> To hold otherwise would obligate a party who, in whole or in part, has successfully prosecuted a claim against another to pay the latter's attorney's fees; in short, the winner pays the loser. This is contrary to fundamental concepts of justice and fair play. Moreover, to hold otherwise suggests that the parties intended such a role reversal -- a result which we conclude borders on the unreasonable. In interpreting an ambiguous contract provision, we must reject a construction resulting in unfair or unreasonable results.

Id.

¶58 Our reference to "fundamental concepts of justice and fair play" was thus made in the context of resolving a specific ambiguity in the contract language; it did not purport to add to or alter the standard a court is to employ in determining what fees are reasonable. The ambiguity in the contract language presented by the facts in ***Borchardt*** does not exist here: the Poehlings were not successful on their counterclaims and there was therefore no reduction in the amount the Bank recovered under the note. In this case, the circuit court's task was to determine what amount of attorney fees the Bank reasonably incurred in enforcing the note. ***Borchardt*** does not authorize a different standard.

¶59 The Poehlings make two additional arguments in support of the 25% reduction, which they made in the circuit court and which the circuit court rejected: (1) the court erred in awarding fees for work relating to their third-party claims; and (2) the billing statements were insufficient to determine reasonable attorney fees because many entries were vague or "bundled" different tasks. The

Poehlings state that for these reasons the court could have reasonably reduced the amount of attorney fees below 25%, but they do not specify the amounts of reduction if each argument were successful nor point us to anywhere in the record that this information is available.[9]

¶60 With respect to their argument regarding the third-party claims, the Poehlings rely on ***Borchardt*** to argue that the attorney fee provision is ambiguous and it should therefore be construed against the drafter, the Bank. However, as we have already explained, the ambiguity in ***Borchardt*** arose from a set of facts that does not exist in this case. Therefore, our conclusion of ambiguity there does not control the issue of the work on the third-party claims here.

¶61 In this case, the court accepted the expert's testimony that the work the Bank's attorneys performed on the third-party claims "was inextricably tied" to the Bank's liability on the counterclaim. This testimony, in turn, is supported by the record. Therefore, the question of contract construction presented here is whether, based on the testimony and evidence accepted by the circuit court, reasonable attorney fees incurred "in enforcing the note" include fees for participating in discovery on third-party claims filed by the debtor that relate to the same underlying transaction and that may affect the lender's liability on the counterclaims. The intent of the parties as plainly expressed in the language of the attorney fee provision is that the lender's recovery under the note should not be reduced by the expenditure of attorney fees reasonably necessary for that recovery. The Poehlings do not argue that this provision does not include work on the debtor's unsuccessful counterclaims, and we conclude it does. Because a

[9] A respondent (which the Poehlings are on the cross-appeal) may, without filing a cross-appeal, present arguments to support the order or judgment appealed from even though the circuit court rejected those arguments and based its decision on another. *See* WIS. STAT. § 809.10(2)(b).

successful counterclaim relating to the underlying transaction will reduce or perhaps eliminate the actual recovery under the note, time spent in a successful defense to the counterclaims is reasonably necessary to recover the full amount due under the note. We see no rational basis for distinguishing between the work reasonably necessary to defend on the counterclaims and the work reasonably necessary to participate on the third-party claims so as to minimize liability on the counterclaims.

¶62 Turning next to the argument on the insufficiency of many entries, the Poehlings' argument on appeal appears to be that the circuit court should have awarded no fees because of the insufficiency of so many entries. The circuit court implicitly if not explicitly rejected this argument, and it reasonably exercised its discretion in doing so. The billing statements and the testimony provided a sufficient basis on which the court could decide what amount of fees was reasonable. Because the Poehlings do not develop this argument with sufficient specificity to inform us what amount of fees awarded by the court were unreasonable and why, we do not address this argument further.

¶63 In summary, we conclude the circuit court erroneously exercised its discretion in reducing the Bank's attorney fees on the ground that the Bank made the disbursements without following its internal procedures. We therefore reverse the court's order awarding 75% of the fees requested. We have considered whether we should direct the court on remand to further consider what amount of attorney fees is reasonable. However, as we understand the circuit court's decision, based on its view of the evidence it did not see a reason for reducing the requested fees other than the one that it explained and that we have rejected. Accordingly, we conclude no purpose would be served by further consideration in

the circuit court, and we direct the circuit court to enter an order awarding 100% of the fees requested.

By the Court.—Order affirmed; cross-appeal reversed.

Not recommended for publication in the official reports.