COURT OF APPEALS
DECISION
DATED AND FILED

May 11, 2006

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 Nos. 2005AP307
2005AP1025

Cir. Ct. Nos. 2001CV3446

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

WELTON VENTURES LIMITED PARTNERSHIP,

PLAINTIFF-APPELLANT,

V.

PROJECT COORDINATORS, INC., AND BRUCE STROEBE,

DEFENDANTS-THIRD-PARTY
PLAINTIFFS-RESPONDENTS,

V.

WELTON ENTERPRISES, INC., KURTIS D. WELTON, KEVIN D. WELTON AND DAVID J. MCCUNE,

THIRD-PARTY DEFENDANTS.

APPEAL from a judgment and an order of the circuit court for Dane County: C. WILLIAM FOUST, Judge. *Affirmed*.

Before Lundsten, P.J., Dykman and Deininger, JJ.

¶1 DEININGER, J. Welton Ventures Limited Partnership appeals a judgment awarding damages to Project Coordinators, Inc. (PCI), a construction company Welton hired to construct an office and warehouse building. Welton asks us to exercise our discretionary power of reversal under WIS. STAT. § 752.35 (2003-04)[1] because the real controversy was not fully tried and because the trial produced a miscarriage of justice. Welton also claims the trial court erred in permitting PCI's unjust enrichment claim to be submitted to the jury along with a breach of contract claim and in upholding the unjust enrichment damages the jury awarded to PCI. Finally, Welton appeals a separate order that awarded PCI a portion of its attorneys fees, challenging both the enforceability of the attorney fees provision in the parties' contract and the amount of fees the circuit court awarded thereunder.

¶2 We reject Welton's claim that certain allegedly defective questions on the special verdict form prevented the real controversy from being fully tried or that the evidence adduced at trial shows that justice probably miscarried. Accordingly, we do not exercise our discretionary reversal authority. We further conclude the trial court did not err in either submitting PCI's unjust enrichment claim to the jury or in upholding the damages jurors awarded on that claim. Finally, we conclude that the parties' contract authorized the circuit court to award PCI the attorneys fees it incurred in collecting from Welton what it was owed for the construction project, and, further, that the court did not erroneously exercise its discretion in awarding the amount that it did under that authority. We thus affirm both the judgment awarding damages and the order awarding attorneys fees.

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

BACKGROUND

¶3 Project Coordinators, Inc., a construction company, contracted with Welton Ventures Limited Partnership to construct an 80,000 square foot office and warehouse building in Middleton for the price of $2,060,495, with possible additions totaling $221,000. PCI had worked with Welton since 1997 on thirty different projects. The parties had changed the scope of the work on virtually all of the prior construction projects while they were in progress. Although the parties' contracts specified certain procedures for documenting modifications with contemporaneous change orders, PCI would often make changes requested by Kevin Welton without first documenting them via change orders. On these prior occasions, PCI submitted written change orders for the oral modifications in a group at the end of the project and Welton invariably paid the amounts PCI billed for the change orders.

¶4 Consistent with this past practice, Welton requested several modifications during construction of the current project. However, as the project progressed, Welton became dissatisfied with the quality of PCI's work, and on October 26, 2001, with the project about ninety percent complete, Welton banned PCI from the construction site. Prior to that date, PCI had prepared three change orders that had been signed by Welton. After its termination from the project, PCI prepared thirty-four additional change orders and presented them to Welton for payment, which was refused. Welton hired another contractor to finish the project and filed this action against PCI and its owner, Bruce Stroebe, alleging multiple causes of action, including breach of contract and breach of warranty. PCI counterclaimed for, among other things, breach of contract, unjust enrichment and defamation.

¶5 The parties' competing claims were tried to a jury, which returned a verdict favorable to PCI on all but one claim. Jurors found that Welton had breached the contract and awarded $111,070 in damages to PCI on its contract claim. They further concluded that Welton had been unjustly enriched in the amount of $203,287 by PCI's completion of additional work requested by Welton during the course of the project. Finally, Welton prevailed on its breach of express warranty claim, for which the jury awarded Welton $42,404 in damages against PCI.[2]

¶6 The circuit court denied Welton's post-verdict motion for a new trial and entered judgments reflecting the jury's verdicts. The court also awarded PCI $92,780.88 in attorneys fees based on a contract provision entitling it to "attorney fees resulting from collection." Welton appeals the judgment entered against it in favor of PCI for breach of contract and unjust enrichment damages and the separate order awarding PCI attorneys fees.

ANALYSIS

I. Discretionary Reversal under WIS. STAT. § 752.35

¶7 Welton first raised the verdict errors it claims on appeal in its post-verdict motion. The failure to timely object to the proposed verdict at the instructions conference deprives Welton of the right to challenge the verdict on appeal. *See* WIS. STAT. § 805.13; ***Vollmer v. Luety***, 156 Wis. 2d 1, 9, 456 N.W.2d 797 (1990). Apparently recognizing this fact, Welton asks that we exercise our

[2] The jury also awarded PCI $75,000 in compensatory damages and $325,000 in punitive damages on its defamation claim. The parties have settled the defamation claim and it is not a part of this appeal.

discretionary power of reversal under WIS. STAT. § 752.35 on the grounds that the real controversy was not fully tried and justice has probably miscarried.[3]

¶8 At the outset, we note that our power of discretionary reversal under WIS. STAT. § 752.35 should not be viewed as a substitute for a particularized, on-the-record objection to a special verdict question. Furthermore, we exercise our discretionary reversal authority sparingly and only in exceptional cases. *See* ***Vollmer***, 156 Wis. 2d at 10-11. Nonetheless, we have the power to order a new trial under § 752.35 if we are persuaded that "the real controversy has not been fully tried or … it is probable that justice has for any reason miscarried." ***Id.*** at 16. In order for us to find a probable miscarriage of justice, an appellant must first convince us of "a substantial probability of a different result on retrial," but that showing is not required if we are asked to reverse because the real controversy was not fully tried. ***Id.*** at 16. Welton contends the real controversy was not fully tried because of defects in the special verdict form submitted to the jury.

¶9 When an appellant asserts the real controversy was not fully tried because of alleged but unobjected-to errors in a special verdict, we will exercise our discretionary reversal authority only if we conclude the errors are such that

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3 WISCONSIN STAT. § 752.35 reads as follows:

> In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.

they "obfuscate[d] the real issue or arguably caused the real issue not to be tried." ***Id.*** at 22. Thus, a discretionary reversal may be appropriate when, as in ***Vollmer***, errors in a special verdict form led jurors to focus their attention on a peripheral issue and miss the crux of the case. *See* ***id.*** Welton asserts the special verdict form was defective in three regards: (1) the trial court erroneously submitted questions of law to the jury; (2) a question regarding PCI's conduct should have been framed as "whether PCI's performance was deficient"; and (3) the question regarding Welton's breach of contract should have been subdivided into parts that elucidated whether the jury believed Welton terminated the contract for cause, or for its convenience, or whether simply PCI quit its performance. We review these asserted errors in light of the guidance provided in ***Vollmer***.

¶10 Welton first claims the trial court erred by submitting questions of law to the jury. The verdict questions it challenges on this basis, and the jury's answers to them, are as follows:

> 1. Did Welton … and PCI have a valid contract? Yes
>
> 2. Did PCI breach the contract? No
>
> ….
>
> 5. Did PCI breach an express warranty? Yes
>
> ….
>
> 8. Did PCI breach an implied warranty of fitness for a particular purpose? NO
>
> ….
>
> 11. Did [Welton] breach the contract? Yes

Welton relies on numerous precedents allegedly supporting the proposition that questions involving the validity and breach of a contract are questions of law that should not be submitted to a jury. *See*, *e.g.,* ***Elliott v. Donahue***, 169 Wis. 2d 310,

316, 485 N.W.2d 403 (1992) (whether a party has breached a contractual provision is a question of law); ***Wassenaar v. Panos***, 111 Wis. 2d 518, 523-24, 331 N.W.2d 357 (1983) (whether a stipulated damages clause is valid is a question of law for the trial judge, not a question of fact and law for the jury). Welton argues that, instead of phrasing the questions in terms of the validity and breach of the parties' contract, the verdict should instead have asked jurors to determine specific facts underlying the parties' claims.

¶11 For example, Welton contends that, instead of asking the jury whether PCI breached the contract or an express warranty (questions 2 and 5), the verdict should have asked whether PCI's work was defective. Welton also maintains that question 11 should not have asked if Welton breached the contract, but whether PCI quit the project or whether Welton terminated PCI's work, and if the latter, did Welton do so for cause or for its convenience.[4] Welton contends jurors might have overlooked the fact that it had a contractual privilege to terminate the contract for its convenience and speculates they might have concluded that Welton breached the contract only because they (mistakenly) thought that termination for convenience constituted a breach on Welton's part.

¶12 We begin by noting that Welton has little grounds to complain about the wording of questions 1 and 8, the jury's answers to which established that the parties had a valid contract and that PCI breached an express warranty. The existence of a contract between the parties was virtually undisputed, and Welton's recovery of $42,404 in damages rests on the jury's determination that PCI

[4] Welton adds that, in conjunction with this multi-part question, the jury should have been instructed on the contract's definition of "cause" and what the contract provided regarding damages in the event of a termination for convenience or for cause.

breached an express warranty. As to the remaining questions Welton cites (numbers 2, 5 and 11, which the jury answered in PCI's favor), we note that a trial court exercises discretion when it fashions a special verdict, and, even when a claim of error has been properly preserved by a timely objection or request at the instruction conference, we will not reverse "'as long as all material issues of fact are covered by appropriate questions." *See* ***Fischer v. Wisconsin Patients Comp. Fund***, 2002 WI App 192, ¶7, 256 Wis. 2d 848, 650 N.W.2d 75 (citation omitted).

¶13 Special verdict questions much like those at issue here were challenged in ***Naden v. Johnson***, 61 Wis. 2d 375, 212 N.W.2d 585 (1973), where jurors were asked "Did the defendant … breach the contract that existed between he and the plaintiff," to which they answered "Yes." ***Id***. at 380. The defendant argued on appeal, as Welton does here, "that the court erred in submitting the special verdict questions in terms of issues of ultimate fact rather than separating these issues into specific questions comprising these ultimate facts." ***Id***. at 381. Although the rule in effect governing the use of special verdicts differed from the present WIS. STAT. § 805.12, the supreme court rejected the argument, concluding:

> A special verdict making more specific inquiries as to contract provisions and breaches thereof could well have been used in this case. However, it does not necessarily follow that it was an abuse of discretion to submit the factual issues in form of ultimate-fact questions.
>
> The instructions given to the jury by the trial court … sufficiently informed the jury as to the legal requirements of an oral agreement and the effect of a breach. The trial court also gave all of the instructions … that would excuse performance or minimize the damages of a breach. The instructions were sufficient to cover the issues.

Naden, 61 Wis. 2d at 383.

¶14 The rule in effect at the time the supreme court decided ***Naden v. Johnson*** provided that special verdict questions were to relate "only to material issues of fact," as opposed to "material issues of ultimate fact," as presently specified in WIS. STAT. § 805.12(1).[5] *See* ***id***. at 381. The older version of the rule also stated that it was "discretionary with the court whether to submit such questions in terms of issues of ultimate fact, or to submit separate questions with respect to the component issues which comprise such issues of ultimate fact." The court upheld the trial court's use of "ultimate fact" questions in ***Naden*** as a proper exercise of discretion. ***Id***. at 383. The result in ***Naden*** would seem to be virtually compelled under the present wording of § 805.12(1). *See* ***Fischer***, 256 Wis. 2d 848, ¶7 ("'A special verdict must cover material issues of ultimate fact'" (citation omitted).).

¶15 Having reviewed the trial record, we are satisfied that the verdict questions did not lead "jurors to focus their attention" on improper matters or cause them to miss "the crux of [the] case." *See* ***Vollmer***, 156 Wis. 2d at 22. The court gave extensive instructions regarding pertinent aspects of contract law, covering such topics as modification by mutual agreement, integration of separate writings, the duty to perform, substantial performance, breach, waiver, express and

[5] WISCONSIN STAT. § 805.12(1) provides as follows:

> Unless it orders otherwise, the court shall direct the jury to return a special verdict. The verdict shall be prepared by the court in the form of written questions relating only to material issues of *ultimate* fact and admitting a direct answer. The jury shall answer in writing. In cases founded upon negligence, the court need not submit separately any particular respect in which the party was allegedly negligent. The court may also direct the jury to find upon particular questions of fact.

(Emphasis added.)

implied warranties, and the measure of damages for breach of contract. As in ***Naden***, the court's "instructions were sufficient to cover the issues" addressed by the ultimate-fact questions submitted to jurors, ***Naden***, 61 Wis. 2d at 383, and we cannot conclude the wording of the verdict questions Welton cites caused the real controversy to not be fully tried.

¶16 Welton next argues that "the jury's verdict was a miscarriage of justice in light of the overwhelming evidence of PCI's defective and deficient work and [Welton]'s substantial payments for the project." Welton supports its miscarriage of justice contention by claiming jurors came to intensely dislike the Weltons during the course of the trial, a fact allegedly evidenced by the jury's awarding $400,000 in compensatory and punitive damages on the defamation claim (see footnote 2), and an additional $314,357 on PCI's contract and unjust enrichment claims. Welton then devotes six pages of its opening brief pointing to evidence in the record that allegedly supports the conclusions that (1) Welton suffered damages on account of PCI's deficient performance far exceeding the $42,404 the jury awarded, and (2) PCI had simply underbid the contract and had been paid for its acceptable work, including the three signed change orders. Welton concludes by asserting that "a new trial before a different jury would almost certainly yield a different outcome."

¶17 Welton's argument basically reduces to this: there was evidence in the record to support an outcome other than the verdict the jury returned, and Welton should be allowed to re-try the case because the next jury could find its witnesses more credible than the first jury apparently found them. More simply, Welton maintains that the jury got it wrong. We do not, however, overturn jury verdicts because evidence was presented that could have produced different answers to verdict questions. As we have noted, an appellant who contends that

justice has miscarried must demonstrate "a substantial probability of a different result on retrial." *See* ***Vollmer***, 156 Wis. 2d at 16. Put another way, a "probable miscarriage of justice exists only if the evidence and law are such that [Welton] probably should have won and therefore deserve[s] another chance." *See* ***Ford Motor Co. v. Lyons***, 137 Wis. 2d 397, 422, 405 N.W.2d 354 (Ct. App. 1987) (citations omitted). We conclude Welton has not made such a showing.

¶18 We note that when we review a trial court's refusal to direct a verdict or its denial of a motion to change verdict answers, we must affirm if "there is any credible evidence to support a jury's verdict, 'even though it be contradicted and the contradictory evidence be stronger and more convincing, nevertheless the verdict ... must stand.'" *See* ***Weiss v. United Fire & Cas. Co.***, 197 Wis. 2d 365, 389-90, 541 N.W.2d 753 (1995) (citation omitted). In deference to the jury's paramount role in judging the weight and credibility of the evidence presented at trial, we may not substitute our view of the evidence for the jury's, especially when the verdict is upheld by the trial court over a party's post-verdict challenges. *See, e.g.*, ***Morden v. Continental AG***, 2000 WI 51, ¶¶38-40, 235 Wis. 2d 325, 611 N.W.2d 659 ("We afford special deference to a jury determination in those situations in which the trial court approves the finding of a jury."). We see no reason why an appellant should obtain a less deferential review of the jury's verdict simply by requesting us to exercise our discretionary reversal authority under WIS. STAT. § 752.35.

¶19 Like the trial court, we conclude the record contains evidence which, if believed by the jury, would allow it to reach the conclusions it did. All of Welton's arguments relate to witness credibility and the weight it argues jurors should have accorded certain evidence. We are simply not persuaded that something extraordinary occurred during the trial that would lead us to believe

Welton should be given the chance to re-try the case before a different jury. If jurors indeed "disliked" and disbelieved the Welton principals, it was not only because of the evidence of their conduct relating to PCI's defamation claim, but also because the Weltons provided inconsistent testimony.[6] As we did in ***Ford Motor Co. v. Lyons***, we "see no miscarriage of justice in leaving this credibility issue in the posture in which the jury has resolved it." *See* ***Ford Motor Co.***, 137 Wis. 2d at 445.

II. Trial Court's Denial of New Trial Motion

¶20 Welton moved post-verdict for a new trial "on all issues" on the grounds that "the jury's verdict was not supported by the great weight and clear preponderance of the evidence." *See* WIS. STAT. § 805.15(1). As Welton recognizes, unlike with respect to its request that we exercise our discretion under WIS. STAT. § 752.35 to order a new trial, our role on Welton's second claim is to review the trial court's exercise of its discretion in denying the motion. *See* ***Priske v. General Motors Corp.***, 89 Wis. 2d 642, 663, 279 N.W.2d 227 (1979) ("The function of this court is not to exercise discretion in the first instance but to review the exercise of discretion by the trial court."). Welton contends the trial court erroneously exercised its discretion in failing to order a new trial.

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[6] At the hearing on Welton's post-verdict motion for a new trial, the trial court remarked: "I have to say that I have never before seen a witness so visibly deflated as Kurtis Welton did during his direct examination on what occurred following the October 26th meeting. That was a defining moment in the course of trial." The court also said this in its ruling:

> I don't think that the wrong lawsuit got tried. I mean, to tell you the truth, the bottom line for me in the lawsuit is I think everybody got a full … trial in the case. It was a fair trial. And you got a jury's decision. You may not like it, but that happens.

We concur in the trial court's assessment.

¶21 A trial court may grant a new trial when the jury's findings are contrary to the great weight and clear preponderance of the evidence, even though the findings are supported by credible evidence. *See* ***id***. at 662. Thus, unlike the motion to change verdict answers or to direct a verdict, which are governed by the "any credible evidence" standard, *see* WIS. STAT. § 805.14, a new trial motion under WIS. STAT. § 805.15(1) invites (and permits) the trial court to weigh, at least to a limited extent, the evidence presented at trial. That court is better positioned than we "to observe and evaluate the evidence," and, thus, when we review a trial court's decision to grant or deny a new trial motion under § 805.15(1) grounded on the claim that the verdict is "contrary to the great weight and clear preponderance of the evidence," we accord "great deference" to the trial court's exercise of discretion. ***Sievert v. American Family Mut. Ins. Co.***, 180 Wis. 2d 426, 431, 509 N.W.2d 75 (Ct. App. 1993). The reason for our deference is the trial court's superior opportunity to evaluate the evidence by observing the demeanor of witnesses and gauging the persuasiveness of their testimony. *See* ***Krolikowski v. Chicago & Nw. Transp. Co.***, 89 Wis. 2d 573, 580-81, 278 N.W.2d 865 (1979).

¶22 In support of its claim that the trial court erred in denying its motion for a new trial, Welton basically re-states the arguments it made in attempting to persuade us that justice miscarried. It claims the trial court "ignored the overwhelming evidence of PCI's defective work." Welton also points to evidence it presented at trial that it had paid PCI, its subcontractors and the contractors Welton hired to complete the project, in aggregate, well in excess of the price it had agreed to pay PCI for the construction project. It summarizes by asserting that "[t]he jury's verdict is impossible to understand."

¶23 In denying the new trial motion, the trial court said this:

> You [Welton] argue that the verdict was contrary to [the] great weight and clear preponderance of the evidence. You spent a lot of time talking about defects and delays admitted by [PCI's principal] and other information regarding defects. Well, the jury found that yes, there were defects, and they awarded money to the Weltons. And I can't say… that their findings are contrary to the great weight and clear preponderance of the evidence.
>
> I think it is fair to say that a lot of this case did boil down to a credibility determination for the jury. And I … have to say that I have never before seen a witness so visibly deflated as Kurtis Welton did during his direct examination on what occurred following the October 26th meeting. That was a defining moment in the course of trial.
>
> You argue … that the evidence shows that the Weltons had good cause for terminating or that PCI quit. The third option was … that Kurtis Welton lost his temper during the October 26th meeting and simply fired PCI without contractual notice.
>
> And that boiled down, I think, to a credibility fight for the jury to decide. And they obviously decided that the way they did that, it was Kurtis Welton [who] blew up and ended the relationship improperly according to the written contract.

¶24 We are satisfied the trial court did not erroneously exercise its discretion in denying Welton's new trial motion. Properly exercised discretion involves "a statement on the record of the trial court's reasoned application of the appropriate legal standard to the relevant facts of the case." *See* ***Earl v. Gulf & W. Mfg. Co.***, 123 Wis. 2d 200, 204-05, 366 N.W.2d 160 (Ct. App. 1985). The trial court's decision on Welton's motion amply meets this standard. Having reviewed the record, and according the trial court's evaluation of the evidence presented before it the deference to which it is entitled, we affirm the court's denial of the motion for a new trial.

III. PCI's Recovery for Both Breach of Contract and Unjust Enrichment

¶25 The jury awarded PCI damages of $111,070 for Welton's breach of contract and an additional $203,287 on its unjust enrichment claim. Welton claims the unjust enrichment award must be set aside because (1) the unjust enrichment claim should not have been decided by the jury; (2) the existence of a written contract between the parties was undisputed and precludes any additional recovery for unjust enrichment; and (3) PCI failed to produce evidence of the benefit to Welton resulting from PCI's work in completing requested modifications to the project.

¶26 Before addressing the specific challenges Welton makes to the unjust enrichment award, we dispose of a claim it does not make. Welton does *not* argue that there is a duplication of damages in the judgment for $314,357 in PCI's favor on its contract and unjust enrichment claims. That is, Welton does not claim PCI obtained a "double recovery" for the same work or items of damages. The unjust enrichment question on the verdict read as follows: "Did PCI confer a benefit upon [Welton] by making requested changes and modifications to the building?" During closing argument, PCI's counsel explained to jurors that the unjust enrichment claim was based on PCI's completion of additions and modifications that went beyond the contract work.[7] Taking into account the verdict's wording and PCI's argument at trial, together with the evidence we discuss below regarding PCI's unjust enrichment claim and the absence of a contention from Welton that PCI obtained a double recovery, we are satisfied that

[7] PCI's counsel argued as follows: "And the unjust enrichment here is … the Weltons … want to get all of the changes, all of the additions, all of [the] improvements that were done, that they asked for all along during the building process, and they want to get them for free."

the amounts the jury awarded as unjust enrichment damages did not duplicate any compensation it awarded PCI for breach of contract damages.

¶27 As with its challenges to other aspects of the special verdict, Welton cannot claim error in the submission of PCI's unjust enrichment claim to the jury because it did not timely object at the instruction conference to the inclusion of questions on that claim in the verdict form. *See* WIS. STAT. § 805.13(3). Even had the issue been properly preserved, however, Welton relies solely on ***Sulzer v. Diedrich***, 2002 WI App 278, ¶9, 258 Wis. 2d 684, 654 N.W.2d 67, to support its contention that jurors should not have been asked to decide whether Welton had been unjustly enriched. We did not address the question at hand (whether an unjust enrichment claim may be tried to a jury) in ***Sulzer***, however, explaining only that whether to grant equitable relief in an unjust enrichment action is committed to the discretion of the trial court. *See* ***id***. Several Wisconsin precedents support the conclusion that an unjust enrichment claim may be submitted to a jury. *See* ***Lawlis v. Thompson***, 137 Wis. 2d 490, 499, 405 N.W.2d 317 (1987) ("[T]he jury was properly instructed on the question of unjust enrichment."); ***Dahlke v. Dahlke***, 2002 WI App 282, ¶20, 258 Wis. 2d 764, 654 N.W.2d 73 ("[A]n unjust enrichment action can be tried to a jury.").

¶28 We thus move on to Welton's second challenge to the award of unjust enrichment damages. Welton argues that PCI was awarded damages under two mutually exclusive theories—breach of contract and unjust enrichment. It argues, citing ***Continental Casualty Co. v. Wisconsin Patients Comp. Fund***, 164 Wis. 2d 110, 473 N.W.2d 584 (Ct. App. 1991), that the existence of a written contract forecloses the possibility of any claim for unjust enrichment. *See* ***id***. at 118 ("The doctrine of unjust enrichment does not apply where the parties have entered into a contract."). We agree that a claimant cannot obtain multiple

recoveries for the same items of damages under multiple theories of liability. As we have noted above, however, PCI did not seek to recover twice for the same work under its contract and unjust enrichment claims. The amount PCI recovered in unjust enrichment was for work it performed as a result of the modifications requested by Welton that were in addition to the work PCI had contracted with Welton to perform.[8]

¶29 Welton asserts, however, that PCI's right to obtain payment from Welton for work it performed, both pursuant to the original contract and for change orders, was limited to the remedies specified in the parties' contract. It argues that PCI could not recover for the additional work under any theory other than contract, and that permitting jurors to award damages for unjust enrichment prevented them from determining whether PCI "was entitled to recover compensation for extra or changed work." We disagree.

¶30 Welton relies on ***Gorton v. Hostak, Henzl & Bichler, S.C.***, 217 Wis. 2d 493, 577 N.W.2d 617 (1998), but the case is not dispositive on the present question. ***Gorton*** expressly acknowledges that payment for services performed in addition to contracted work may be sought under theories other than breach of contract. *See* ***id.*** at 509 n.13 ("An attorney may have a claim in quantum meruit or implied contract where 'he renders services in addition to those contemplated by

[8] PCI's owner testified at trial that Kevin Welton, the Vice-President of Welton Enterprises, directed him and his crew to perform certain tasks in addition to the work specified in the original contract. A certified public accountant retained by PCI's attorney prepared a report that summarized cost data regarding PCI's performance of the written contract and the costs for changes requested by Welton. According to the accountant, the total value of PCI's services performed in addition to the work specified in the contract was $621,696, as documented by thirty-seven change orders PCI had prepared. Welton had made payments of $48,485 for three change orders it had previously signed off on.

the contingent fee arrangement'" (citation omitted).). One such noncontractual theory is unjust enrichment, which is typically invoked where a party cannot prove the existence of a contract and the circumstances do not suggest that there was an implied promise to pay. *See, e.g.,* ***Dunnebacke Co. v. Pittman***, 216 Wis. 305, 257 N.W. 30 (1934) (builder erected a structure on owner's property without her permission while she was out of town). It requires proof of the following elements: (1) a benefit conferred upon the defendant by the plaintiff, (2) appreciation by the defendant of the fact of such benefit, and (3) acceptance and retention by the defendant of the benefit, under circumstances such that it would be inequitable to retain the benefit without payment of the value thereof. *See* ***Seegers v. Sprague***, 70 Wis. 2d 997, 1004, 236 N.W.2d 227 (1975).

¶31 Welton does not contend the record lacks credible evidence to support any of the unjust enrichment elements, only that PCI should have been limited to seeking payment for its work on contract additions and modifications as additional items of contract damages.[9] As we have noted, however, Welton did

[9] We acknowledge that PCI could have, and perhaps should have, pressed its claim for compensation for the additional work by arguing that the parties' longstanding course of conduct (whereby PCI would apparently complete informally requested additions and modifications to a project during construction and be compensated for them at the completion of the work) effected a modification to the contract's written change order provisions. Alternatively, PCI might have sought compensation for the additions and modifications on the theory that, with respect to this additional work, the parties had a contract implied in fact, under which PCI could recover the reasonable value of its services, i.e., quantum meruit. *See* ***W.H. Fuller Co. v. Seater***, 226 Wis. 2d 381, 386 n.2, 595 N.W.2d 96 (Ct. App. 1999). We are not persuaded, however, that, had PCI sought payment for all of its work under a purely contractual theory or in quantum meruit, PCI would have recovered less in damages. The jury awarded damages to Welton because it concluded PCI had breached an express warranty, but it also concluded: (1) Welton had breached the parties' contract and PCI had not; (2) PCI was due additional compensation from Welton under the contract; and (3) PCI performed additional work that benefited Welton for which it should be compensated. In short, Welton has not persuaded us that if PCI had presented its claim for compensation for additional work as a contractual claim, or as a claim in quantum meruit, the result would have been either no damage award, or a lesser award, for the additional work.

not object to submission of the unjust enrichment questions to the jury, and it has not persuaded us that a claimant may never recover payment for contracted work under a contractual theory, while, at the same time, obtaining compensation for performing work in addition to that contracted for under a noncontractual theory. Finally, because we are satisfied there was no double recovery, we affirm the trial court's rejection of Welton's challenge to PCI's entitlement to both contract and unjust enrichment damages.

¶32 Welton's final challenge to the unjust enrichment award is that PCI failed to prove that the building's value was enhanced by the additions and modifications it requested and PCI performed. In Welton's view, PCI's evidence demonstrated only the cost or reasonable value of the services PCI performed, instead of the value of any benefit conferred on Welton, which is the proper measure of restitution damages flowing from the unjust enrichment of another. *See* ***Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.***, 206 Wis. 2d 158, 188, 557 N.W.2d 67 (1996). We agree with Welton that, in order to recover on an unjust enrichment theory, a contractor who provides services to an owner must demonstrate the owner benefited from those services, and, further, the measure of damages the contractor may recover is the value of the benefit conferred on the owner. *See* ***W.H. Fuller Co. v. Seater***, 226 Wis. 2d 381, 388, 595 N.W.2d 96 (Ct. App. 1999).

¶33 The jury was correctly instructed regarding the measure of damages for unjust enrichment. Jurors were told that PCI must show that it conferred a benefit on Welton, and that a loss to PCI "without an actual benefit to Welton is not recoverable as an unjust enrichment." *See* ***Lawlis v. Thompson***, 137 Wis. 2d 490, 499 n.1. The court also instructed that "a person, unjustly enriched by the conduct or efforts of the other, must pay for the benefit conferred." We thus turn

to the evidence PCI presented regarding the extra work it performed for Welton in completing additions or modifications to the project and the value of this work to Welton. Some of PCI's additional work or services on the construction project clearly conferred no benefit on Welton. As Welton's counsel elucidated at trial, PCI's post-contract change orders included costs resulting from weather-related delays ($32,885), costs associated with delays in obtaining financing and problems with soil ($100,246), and costs of changes requested by a prospective tenant of the constructed building, who Welton maintained was not authorized to request such modifications ($70,252).

¶34 Thus, jurors were made aware that not all of PCI's work over and above that associated with performance of the contract necessarily translated into a benefit to Welton, and they did not award PCI all of the costs it claimed. The total PCI requested for additional services in the change orders PCI produced at trial, less the amount Welton had paid, was $573,211 ($621,696 minus $48,485, see footnote 8), but jurors awarded only $203,287 in damages for unjust enrichment.

¶35 In denying Welton's post-verdict challenge to the unjust enrichment award, the trial court said, "I don't see how … PCI's cost is not a fair measure of the value of the benefit conferred." We agree. The supreme court noted in ***Nelson v. Preston***, 262 Wis. 547, 55 N.W.2d 918 (1952), that the owner of several newly constructed homes had benefited from a plumber's "furnishing labor and material which entered into the construction of the buildings." ***Id***. at 552. There is no indication in the court's opinion that the plumber produced any evidence of the specific increase in the value of the owner's property attributable to services and materials he provided, or that the amounts he claimed due him were for other than his unpaid invoices for the services and materials he provided. The court nonetheless concluded the plumber was "entitled to a judgment awarding the

damages claimed by him." ***Id***. at 553. Here, we conclude that jurors were entitled to conclude that, because Welton specifically requested additions and modifications to the project, it derived a benefit from the services and materials PCI provided to complete the requested modifications, and that PCI provided sufficient evidence for jurors to evaluate the extent of the benefit conferred on Welton by PCI's additional work.[10]

IV. Attorney Fees Award

¶36 Welton's final contention is that the trial court erred in awarding PCI attorney fees in the amount of $92,780.88. It argues that: (1) the attorney fee provision in the parties' contract is ambiguous and therefore should not be enforced; (2) the amount of the award should be reduced because PCI's recovery was based in part on a non-contractual theory and because Welton prevailed on one of its claims against PCI; and (3) the trial court arbitrarily determined the amount of reasonable attorney fees to award PCI. We reject Welton's contentions and affirm the award.

¶37 Wisconsin follows the "American Rule," whereby "attorney's fees are not recoverable unless such fees are expressly allowed by contract or statute." ***Borchardt v. Wilk***, 156 Wis. 2d 420, 426, 456 N.W.2d 653 (Ct. App. 1990). The parties' contract contained the following provision, adjacent to Welton's signature:

> **ACCEPTANCE OF PROPOSAL** The above price, specifications and conditions are satisfactory and are

[10] *Cf*. RESTATEMENT (SECOND) OF CONTRACTS § 371 (1981) (When a party is entitled to restitution damages for a benefit conferred, the sum "may as justice requires be measured by either: (a) the reasonable value to the other party of what he received in terms of what it would have cost him to obtain it from a person in the claimant's position, or (b) the extent to which the other party's property has been increased in value or his other interests advanced.)

> hereby accepted. You are authorized to proceed with the work as specified. *Attorney fees resulting from collection will be charged to the owner.* **PAYMENT TERMS:** Net 30 days.

(Emphasis added.) We will enforce a contractual provision that shifts attorney fees contrary to the American Rule only if the contract provision clearly and unambiguously provides for the recovery of fees. ***Hunzinger Constr. Co. v. Granite Res. Corp***., 196 Wis. 2d 327, 340, 538 N.W.2d 804 (Ct. App. 1995).

¶38 Welton claims the attorney fees provision quoted above is ambiguous and, therefore, unenforceable. Whether a contract provision is ambiguous is a question we decide de novo. *See* ***Kernz v. J.L. French Corp.***, 2003 WI App 140, ¶8, 266 Wis. 2d 124, 667 N.W.2d 751. "'Contract language is considered ambiguous if it is susceptible to more than one reasonable interpretation.'" ***Id.***, ¶10 (citation omitted). Welton asserts that ambiguity arises from the lack of contract definitions for the terms "collection" and "charged" and from the provision's failure to specify whether the term "collection" may apply to disputed amounts or is limited to only undisputed amounts. Welton also argues that agreeing to be "charged" for attorney fees is not the same thing as agreeing to pay them. We reject Welton's claim of ambiguity. We read the provision as plainly stating that PCI may charge Welton under the contract, and thus recover from Welton, any attorney fees it incurs resulting from its efforts to collect payment for construction services performed pursuant to the parties' contract.

¶39 Alternatively, Welton maintains that, even if the contract provision is not ambiguous, the trial court nonetheless erred by not properly taking into account the outcome at trial. Specifically, Welton contends the trial court should not have awarded PCI any attorney fees because Welton prevailed on its breach of express warranty claim against PCI. Welton relies on out-of-state authority for the

proposition that, where both parties prevail on certain claims, an attorney fees award "would not be appropriate or required."[11] The cases cited by Welton, however, involve different contract language than that before us. The Oregon case, for example, involves a provision specifying that attorney fees would be awarded to the "prevailing party."[12] The California case, moreover, deals primarily with the interaction between the provision for attorneys fees in the parties' contract and applicable statutes that impacted or modified that provision.[13] Here, where the contract permits PCI to recover attorneys fees incurred for the collection of amounts due it, so long as PCI in fact collected amounts it was due, the fact that Welton also obtained damages partially offsetting what it owed PCI does not defeat PCI's contractual right to recover attorney fees.

¶40 Similarly, we reject Welton's argument based on ***Borchardt***, 156 Wis. 2d 420, that the trial court should have reduced the attorneys fees award by 38.2%, which is the ratio of its breach of warranty damages compared to the amount PCI was awarded for breach of contract damages. First, we note that our conclusion in ***Borchardt*** that the attorneys fees award should be reduced in proportion to the parties' respective recoveries rested in large part on our conclusion that the attorneys fees provision in the parties' contract was ambiguous on the question of the amount of fees recoverable in the event both parties were to prevail in part. ***Id***. at 427-28. More important, however, is the fact that, in ***Borchardt***, the trial court had awarded the plaintiff attorneys fees "for prosecuting

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[11] ***Lawrence v. Peel***, 607 P.2d 1386, 1392 (Or. Ct. App. 1980); ***Scott Co. of Cal. v. Blount, Inc.***, 979 P.2d 974, 977 (Cal. 1999).

[12] *See* ***Lawrence***, 607 P.2d. at 1391.

[13] *See* ***Scott Co.***, 979 P.2d at 977.

her claim on the note *and* defending against the … counterclaim." ***Id***. at 423. Here, as we explain below, the amount the trial court awarded to PCI did *not* include fees the court attributed to PCI's defense against Welton's claims. Thus, the apportionment we ordered in ***Borchardt*** would not appear to be necessary in order to account for the fact that each party prevailed in part on their respective claims against one another.

¶41 Welton also questions the method the trial court used in calculating the amount of the attorney fee award. The amount of attorneys fees to be awarded is committed to the discretion of the trial court. *See* ***Kolupar v. Wilde Pontiac Cadillac, Inc.***, 2004 WI 112, ¶22, 275 Wis. 2d 1, 683 N.W.2d 58. We defer to the trial court's discretionary determination because that court is more familiar with local billing norms and will likely have witnessed first-hand the quantity and quality of the service rendered by counsel. ***Id.*** We will uphold the trial court's award as long as it employed a "'logical rationale based on the appropriate legal principles and facts of record.'" ***Id.*** (citation omitted).

¶42 The supreme court explained in ***Kolupar*** that the lodestar approach has become "'the guiding light of [our] fee-shifting jurisprudence.'" ***Id.***, ¶29 (citation omitted). The court further directed that the "lodestar" figure (i.e., the reasonable number of hours expended multiplied by a reasonable hourly rate) should be the starting point for a trial court's computation. This amount may then be adjusted by considering the factors first announced in ***Johnson v. Ga. Highway Express, Inc.***, 488 F.2d 714, 717-19 (5th Cir. 1974), and adopted by the Wisconsin supreme court in ***Kolupar***. *See* ***Kolupar***, 275 Wis. 2d 1, ¶29.

¶43 The trial court properly began its determination with a review of the affidavit of fees submitted by PCI's counsel. PCI's attorney averred that his firm

spent 1628.5 hours of attorney and paralegal time working on the case. The court determined that, up to the point that PCI filed its defamation claim, its attorneys had spent equal amounts of time on the collection of amounts due PCI and in defending against Welton's warranty claims. The court further determined that, after filing the defamation claim, the attorneys devoted half of their time to that claim, and continued to divide the remaining half equally between offensive and defensive litigation of the competing contract claims. The result was that the court awarded PCI a fee recovery of 50% of the fees incurred prior to the defamation claim, and 25% thereafter. The court noted that it had reviewed PCI's attorneys' billing statements and found "the hourly rates quoted for the participants in this case [attorneys, $125 to $225 per hour; paralegals, $75 per hour] are reasonable within this community." The court also explained that it had reviewed the statements to determine the number of hours billed for out-of-court time compared to in-court and deposition time, and that it found the seven-to-one ratio reasonable for a case of this complexity.

¶44 We conclude the trial court employed a "logical rationale" in determining an appropriate amount of attorney fees attributable to PCI's collection efforts. *See* ***Kolupar***, 275 Wis. 2d 1, ¶22. As in ***Kolupar***, the trial court might have explained its rationale in more depth, but the present record nonetheless contains a "'concise but clear explanation of its reasons for the fee award.'" *See* ***id***., ¶52 (citation omitted). Accordingly, we affirm the award in the amount of $92,780.88.[14]

[14] The billing statements PCI's attorneys filed with the court show a total of $281,818 billed for 1628.50 hours of attorney and paralegal time for their work on the entire case. The award of $92,780.88 thus represents less than one-third of the total fees incurred in the litigation.

CONCLUSION

¶45 For the reasons discussed above, we affirm the appealed judgment and order.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.