COURT OF APPEALS
DECISION
DATED AND FILED

February 8, 2007

A. John Voelker
Acting 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. 2005AP2537
2005AP2777

Cir. Ct. No. 2002CV2965

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

2005AP2537
THERMAL DESIGN, INC.,

PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

V.

PROJECT COORDINATORS, INC.,

DEFENDANT-CROSS-RESPONDENT,

SHANNON SYFTESTAD AND WELTON ENTERPRISES, INC.,

DEFENDANTS,

WELTON VENTURES LIMITED PARTNERSHIP,

DEFENDANT-APPELLANT.

2005AP2777
THERMAL DESIGN, INC.,

PLAINTIFF-RESPONDENT,

V.

PROJECT COORDINATORS, INC.,

DEFENDANT-APPELLANT,

SHANNON SYFTESTAD, WELTON ENTERPRISES, INC. AND WELTON VENTURES LIMITED PARTNERSHIP,

DEFENDANTS.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Dane County: ROBERT DeCHAMBEAU, Judge. *Affirmed in part; reversed in part and cause remanded with directions*.

Before Lundsten, P.J., Vergeront and Higginbotham, JJ.

¶1 VERGERONT, J. This appeal arises out of a dispute over the payment of the insulation subcontractor on a construction project. The circuit court determined that the general contractor, Project Coordinators, Inc. (PCI), had breached its contract with the subcontractor, Thermal Design, Inc., and was liable to Thermal Design for $37,200.68 in damages, 18% interest, and the costs of collection, including reasonable attorney fees. The court also determined that the owner of the building, Welton Ventures Limited Partnership (Welton), was unjustly enriched by using the insulation in its building for which it had not paid and was liable to the subcontractor, Thermal Design, for $37,200.68 in damages plus 5% interest. Welton and PCI each appeal the circuit court's judgment against them on a number of grounds, and we have consolidated the appeals. Thermal Design cross-appeals, challenging the circuit court's ruling that Thermal Design was not entitled to attorney fees from Welton and its decision on when the 18% interest that PCI must pay begins to run.

¶2 On Welton's appeal, we affirm the circuit court's determination that Welton was unjustly enriched. On PCI's appeal, we conclude the circuit court: (1) did not err in determining that PCI was liable under its contract with Thermal Design for the invoice amount; (2) correctly construed PCI's contract with Thermal Design to entitle Thermal Design to attorney fees from PCI; (3) properly exercised its discretion in determining the amount of fees; and (4) did not err in determining that PCI was liable under that contract for interest at the rate of 18%. We further conclude that neither Welton nor PCI are entitled to relief on appeal based on the contentions of both that the court's judgment allows for a double recovery by Thermal Design.

¶3 On Thermal Design's cross-appeal, we conclude: (1) the circuit court correctly construed the contract between Thermal Design and PCI not to entitle Thermal Design to attorney fees against Welton; and (2) the circuit court erred in not ordering interest from the date specified in the contract.

¶4 Accordingly, we affirm in part, reverse in part and remand for proceedings consistent with this decision.

BACKGROUND

¶5 The following background facts are not disputed for purposes of this appeal. PCI entered into a contract with Welton[1] to serve as general contractor for the construction of a building and entered into a contract with Thermal Design under which Thermal Design was to supply some of the insulation for the

[1] The amended complaint named Welton Ventures Limited Partnership and Welton Enterprises, Inc., but Welton Enterprises, Inc. was dismissed in the circuit court's final order. We use "Welton" to refer to the limited partnership.

building. After a dispute arose between Welton and PCI, PCI ceased serving as general contractor. When Thermal Design did not receive payment from PCI for a second shipment of insulation, Thermal Design filed this action against PCI and Welton. Thermal Design's amended complaint alleged that PCI had breached its contract with Thermal Design by not paying an invoice for $37,200.68 for the second shipment of the insulation. The amended complaint also alleged that the second shipment of insulation had been used by Welton on the project, but Welton had paid neither PCI nor Thermal Design and thus had been unjustly enriched.

¶6 Another lawsuit was filed by Welton concerning its dispute with PCI (the Welton suit). The Welton suit was assigned to a different judge and Welton was represented by different counsel in that case. PCI filed counterclaims against Welton in the Welton suit; Thermal Design was not a party. Welton's counsel in this case moved to adjourn the scheduled trial until after the trial in the Welton suit on the ground that the Welton suit would resolve the issue of whether PCI or Welton had the responsibility of paying various subcontractors, including Thermal Design. The circuit court granted the motion and the Welton suit was tried first. As relevant to this appeal, the judgment in the Welton suit, based on the jury verdict, awarded PCI $111,070 for Welton's breach of contract and $203,287 for the amount Welton was unjustly enriched by PCI.

¶7 Thereafter, this case was tried to the court. The court made the following findings of fact. PCI did not pay Thermal Design for the second shipment of insulation that Thermal Design delivered to the construction site, for which it invoiced PCI for $37,200.68 on September 4, 2001. All the insulation purchased from Thermal Design was installed in Welton's building and Welton benefited from that. When Welton terminated its contract with PCI on October 26, 2001, Welton told PCI that it would take over the construction project

and pay outstanding balances due subcontractors and material suppliers, and it was aware of the outstanding balance due to Thermal Design. Thermal Design was entitled to obtain a construction lien on the property, but it did not do so because of Welton's promises that it would pay the outstanding bill. The jury in the Welton suit determined that all payments made by Welton to PCI were used to pay for claims and expenses related to the project. Welton did not pay PCI for the materials relating to Thermal Design's invoice of $37,200.68. The value of the materials supplied by Thermal Design and not paid for by either Welton or PCI was $37,200.68.

¶8 The court concluded that PCI breached its contract with Thermal Design and that Thermal Design was damaged in the amount of $37,200.68. The court also concluded that under the contract Thermal Design was entitled to its costs of collections, including attorney fees, for pursuing judgment against PCI but not against Welton; and it awarded Thermal Design $22,060.75 for attorney fees. Finally, the court concluded that under the contract Thermal Design was entitled to interest at 18%. The court subsequently determined that interest should begin on November 2, 2003, which the court apparently believed was the approximate date on which PCI learned of this action.

¶9 With respect to Welton, the court concluded that Welton was unjustly enriched by using Thermal Design's insulation in the amount of $37,200.68. The court also concluded that Thermal Design was entitled to interest of 5% on this amount from the date of the first notice of the debt, which the court found to be January 9, 2002.

DISCUSSION

I. Welton's Appeal

A. Unjust Enrichment

¶10 Welton contends the court erred in determining that it was unjustly enriched on two alternative grounds: (1) Welton had already paid PCI for Thermal Design's installation by October 26, 2001, when PCI ceased working as a general contractor; or (2) Welton is obligated to pay PCI for the invoice amount under the judgment in the Welton suit, and it has now paid that judgment.

¶11 The elements of a claim of unjust enrichment are:

> (1) a benefit conferred upon the defendant by the plaintiff; (2) an appreciation or knowledge by the defendant of the benefit; and (3) acceptance or retention by the defendant of the benefit under circumstances making it inequitable for the defendant to retain the benefit without payment of its value.

Puttkammer v. Minth, 83 Wis. 2d 686, 689, 266 N.W.2d 361 (1978). If an owner either has paid or is obligated to pay a general contractor for a subcontractor's work or supplies, then the subcontractor does not have a claim for unjust enrichment against the owner; the third element is not met because in such circumstances it is not inequitable for the owner to retain the benefit without payment to the subcontractor. *See* ***Superior Plumbing Co. v. Tefs***, 27 Wis. 2d 434, 438, 134 N.W.2d 430 (1965).

¶12 The decision to grant relief for a claim of unjust enrichment involves the exercise of the court's discretion insofar as the court must decide what is equitable. *See* ***Tri-State Mechanical, Inc. v. Northland College***, 2004 WI App 100, ¶13; 273 Wis. 2d 471, 681 N.W.2d 302. However, whether the court applied

the correct legal standards is a question of law, which we review de novo. ***Id.*** As for findings of fact the court makes in deciding whether to grant the relief, we accept those if they are not clearly erroneous. ***Ulrich v. Zemke***, 2002 WI App 246, ¶8, 258 Wis. 2d 180, 654 N.W.2d 458.

1. Payment by Welton before October 26, 2001

¶13 Welton contends that the evidence it presented in this case shows that it paid PCI for the second shipment of insulation before October 26, 2001, when PCI ceased working as the general contractor. This argument is a challenge to the circuit court's factual finding. As already noted, we affirm the court's factual findings unless they are clearly erroneous. ***Id.***; WIS. STAT. § 805.17(2).[2] This means that we review the record to determine whether there is any credible evidence to support the circuit court's finding. *See* ***State v. Peppertree Resort Villas, Inc.***, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345. The circuit court is the ultimate arbiter of the witnesses and the weight to be given to the witnesses' testimony. ***Id.*** When more than one reasonable inference can be drawn from the credible evidence, the reviewing court must accept the inferences drawn by the circuit court. ***Id.*** In addition, when the circuit court does not make an express finding on a particular point, including a witness's credibility, we assume on appeal that a credibility determination was made in favor of the court's decision. ***State v. Hubanks***, 173 Wis. 2d 1, 27, 496 N.W.2d 96 (Ct. App. 1992).

¶14 We conclude the court's finding that Welton had not paid PCI for the second shipment of insulation is not clearly erroneous because it is supported

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

by credible evidence. Bruce Strobe, the president of PCI, testified that the last pay request he submitted to Welton was for August and did not include the second shipment of insulation, which occurred in September; the check PCI received from Welton on October 9 or 10 was payment through the third week or the last Saturday in August.

¶15 Welton points to the testimony of Robert Newcomb, Welton's expert, to support its argument that Welton had paid PCI for the second shipment of insulation before PCI ceased working as the general contractor. Newcomb testified based on his review of the contract and PCI's last payment request. He opined that, although the payment request did not have a line item for insulation, the insulation was most likely included in line items that showed a high percentage of completion—90%, 80% and 75%; this meant that all the product had been delivered and paid for and the small percentages remaining were attributable to installation of the materials.

¶16 Newcomb based his interpretation of the payment request on his view that the initial contract budget amount, which was on the pay request and was used to determine the percentage of completion, was an accurate reflection of the total amount that Welton owed PCI. However, Strobe testified that there were verbal change orders from Welton that increased the initial contract budget amount. Strobe said he did not alter the percentages of completion to reflect these, but instead recorded them separately at the bottom of the pay requests.

¶17 The circuit court evidently credited Strobe's testimony on these and other material points when his testimony conflicted with the testimony of Newcomb and of Kurt Welton. This credibility determination is not clearly erroneous, *see* ***id.*** at 27. Accepting the testimony that the court determined

credible, we conclude that its finding that Welton did not pay PCI for the insulation relating to Thermal Design's invoice of $37,200.68 is not clearly erroneous.

¶18 Welton argues that it is not required to prove that it made a payment to PCI specifically designated for Thermal Design in order to show that it paid for the benefit, relying on ***Tri-State Mechanical***, 273 Wis. 2d 471, ¶16. In ***Tri-State Mechanical***, "it [was] unrefuted that [the owner] paid [the general contractor] the contract price plus excess costs [and] [t]hus … [the owner] fully paid for the benefits it received." ***Id.*** In that context we rejected the subcontractor's argument that, in order to defeat an unjust enrichment claim, the owner had to show it issued a check to the general contractor specifically for the subcontractor's work. ***Id.*** In this case, in contrast, there is a dispute over whether Welton paid PCI for the benefit Welton received in the form of Thermal Design's insulation, and the court resolved that dispute against Welton.

B. Judgment in the Welton Suit

¶19 Welton argues that, even if it had not paid PCI for the second shipment of insulation before PCI ceased working as a general contractor, the judgment against it in the Welton suit obligates it to pay PCI for that. In its reply brief, Welton points out that this court has now affirmed the judgment against it in the Welton suit. *See* ***Welton Ventures Ltd. v. Project Coordinators, Inc.***, Nos. 2005AP307, 2005AP1025, unpublished slip op. (Wis. Ct. App. May 11, 2006).

Welton asks us to take judicial notice pursuant to WIS. STAT. § 902.01 that it has filed a satisfaction of judgment in the circuit court.[3]

¶20 We observe initially that, because the case law provides that a subcontractor does not have an unjust enrichment claim against the owner if the owner "has paid the general contractor for the benefit furnished *or is obligated to do so*," ***Superior Plumbing Co.***, 27 Wis. 2d at 438 (emphasis added), the issue on this appeal is the same whether or not Welton has paid to PCI the amount ordered in the Welton suit. The relevant issue is: does the judgment obligate Welton to pay PCI for the second shipment of the insulation? Nonetheless, we will assume that Welton has satisfied the judgment in the Welton suit on PCI's breach of contract and unjust enrichment claims.

¶21 Welton asserts that the evidence presented at the trial in this action shows that the judgment in the Welton suit obligates it to pay PCI for the second shipment of the insulation. Strobe testified in this trial that he prepared a binder of all the changes PCI made on Welton's building, which included the invoice for the second shipment of the insulation, and presented it as part of his testimony in the Welton suit. The notebook was admitted into evidence at this trial, as well as transcripts from the Welton suit. According to the transcripts, Strobe testified in the Welton suit that the binder contained all the individual change orders PCI submitted to Welton and totaled approximately $600,000; the binder was admitted

[3] Welton also contends the circuit court erred in not giving it a credit against the invoice for $4,325.77. In response, Thermal Design explains why the court did not err and Welton does not address this issue in its reply brief. We consider this an implicit concession by Welton and do not address this issue further. *See* ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994) (we may take as a concession the failure in a reply brief to refute propositions in a responsive brief).

into evidence; and it was among the exhibits that the parties agreed could go to the jury. The special verdict questions and answers and the judgment from the Welton suit were also in evidence in this trial.

¶22 The Welton suit special verdict questions relevant to this appeal and the answers are:

> Did [Welton] breach [its] contract [with PCI]? Answer: Yes….
>
> [W]hat amount of money will compensate PCI for the damage [for the breach]? Answer: $111, 070.
>
> Did PCI confer a benefit upon [Welton] by making requested changes and modifications to the building? Answer: Yes.
>
> [D]id Welton know or appreciate the benefit? Answer: Yes.
>
> [D]id [Welton] accept and retain the benefit under such circumstances that it would be inequitable to retain it without paying for it? Answer: Yes.
>
> What amount will reasonably compensate PCI for the benefit conferred upon [Welton]? Answer: $203,287.

¶23 Welton argues that the only reasonable inference from the evidence in this trial is that the jury in the Welton suit considered Thermal Design's invoice for the second shipment of insulation and either concluded that Welton had already included that amount in its payments before PCI ceased working for Welton, or included it in the breach of contract damages or the unjust enrichment damages. The circuit court in this case did not make an express ruling on whether the judgment in the Welton suit obligated Welton to pay PCI for the second shipment of the insulation, but its conclusion that Welton was unjustly enriched by Thermal Design by the amount of the invoice implicitly rejects that argument. The court's comments during the trial in this case indicate its view that it is

impossible to tell whether the invoice amount was included in the damages the jury awarded in the Welton suit.

¶24 To the extent Welton's position is that the jury in the Welton suit may have decided, or did decide, that Welton paid PCI for the second shipment of the insulation before PCI ceased working as the general contractor, we conclude Welton has waived the right to raise that argument on appeal. If Welton was of the view that the jury in the Welton suit had decided that issue in its favor, it should have argued in the circuit court here that the prior litigation of that issue precluded relitigation of that issue in this case. Although Welton did make an argument in the circuit court that it identified as "issue preclusion," which we discuss below, Welton did *not* contend that the court should not hear evidence and decide whether Welton had paid PCI for the second shipment of insulation before PCI ceased working as a general contractor. Instead, as we have already discussed, both Welton and PCI presented evidence on this very issue; the circuit court resolved it against Welton; and we have concluded the court's finding is supported by the evidence.

¶25 As for Welton's argument that the record in this case shows that the jury in the Welton suit must have included the invoice amount in damages for either the breach of contract or the unjust enrichment claim, Welton does not indicate what our standard of review is on this issue. Welton seems to treat this as a question of fact, but also appears to invite our independent review of what the record in this case shows about the judgment in the Welton suit. We will assume without deciding that our standard of review is de novo, as that is the most favorable standard for Welton. We conclude, as the circuit court implicitly did, that based on the record in this case one can only speculate on whether the invoice amount is included in the damages the jury awarded PCI in the Welton suit. First,

because the invoice was included in the binder of change orders, it appears unlikely that the jury included it in the damages for the breach of contract, and Welton does not explain why the jury might have done so. Second, because the change orders in the binder totaled far more than the jury awarded PCI for damages for unjust enrichment, it is not possible to draw any inferences from the record before us on what change orders the jury did and did not include. Third, we take into account that the jury was asked whether "*PCI* confer[red] a benefit upon [Welton] by making requested changes and modifications to the building?" (Emphasis added.) Since Strobe testified in this action that PCI did not pay Thermal Design for the invoice, and presumably did not testify to the contrary in the Welton suit, it is not apparent how *PCI* conferred a benefit on Welton by supplying Welton with insulation that PCI had not paid for. It may be that jury instructions or rulings or arguments from the Welton suit would explain this, but the record in this case does not contain them.

¶26 Welton contends that under the doctrine of issue preclusion, Thermal Design is precluded from arguing that Welton is not obligated by the jury's verdict in the Welton suit to pay for the second shipment of insulation.[4] Issue preclusion addresses the effect of a prior judgment on the ability to relitigate an identical issue of law or fact in a subsequent action. ***Mrozek v. Intra Fin. Corp.***, 2005 WI 73, 281 Wis. 2d 448, ¶17, 699 N.W.2d 54. In order for this doctrine to apply, the question of fact or law sought to be litigated in the present action must have been actually litigated in the prior action and be necessary to the prior judgment, ***id.***;

[4] Welton also argues that the doctrine of claim preclusion applies, but it did not make this argument in the circuit court and we therefore do not address it. *See* ***Evjen v. Evjen***, 171 Wis. 2d 677, 688, 492 N.W.2d 361 (Ct. App. 1992) (we generally do not consider arguments raised for the first time on appeal).

and the party against whom issue preclusion is asserted must have been a party in the prior action or in privity or have sufficient identity of interests with a party in the prior action. ***Paige K.B. v. Steven G.B.***, 226 Wis. 2d 210, 226, 594 N.W.2d 370 (1999). If those predicate elements are present, then the circuit court decides whether the application of issue preclusion comports with principles of fundamental fairness. ***Mrozek***, 281 Wis. 2d 463, ¶17. The party asserting issue preclusion has the burden of demonstrating that it applies. ***Paige K.B.***, 226 Wis. 2d at 219.

¶27 Except for certain of the factors underlying the fundamental fairness analysis that involve the circuit court's discretion, the predicate elements for application of the doctrine present a question of law when the facts are undisputed. *See* ***id.*** at 224-25. We review issues of law de novo. ***Id.*** at 223.

¶28 We conclude the doctrine of issue preclusion is inapplicable because Welton has not shown that Thermal Design is relitigating in this case an identical issue of fact or law that was actually litigated in the Welton suit. The relevant issue in this case, as Welton has framed it, is whether the Welton suit judgment obligates Welton to pay PCI for the second shipment of the insulation—in other words, whether the jury *did* include this item in the damages it awarded. As we have already discussed, it is not possible to tell from this record whether the jury did. Thermal Design is not attempting to litigate in this case whether PCI *should* be awarded this item in damages from Welton.

¶29 Welton emphasizes that unjust enrichment is an equitable claim, *see* ***CleanSoils Wis., Inc. v. DOT***, 229 Wis. 2d 600, 612, 599 N.W.2d 903 (Ct. App. 1999), and argues that the circuit court's decision was unfair to it because it will be paying twice for the second shipment of insulation—once to PCI because it

paid the judgment in the Welton suit and again to Thermal Design. However, as we have already concluded, our independent review persuades us that the circuit court correctly concluded that it is not possible to tell whether the judgment in the Welton suit includes this amount. Given that the circuit court postponed this trial because of Welton's representation that the Welton suit would resolve the issue of its obligations to PCI, and given Welton's failure in the Welton suit to obtain a special verdict answer specifically addressing its liability to PCI for the second shipment of insulation, we cannot conclude it was unfair for the court to decide that Thermal Design should be able to recover this amount from Welton. Thus, to the extent Welton is challenging the circuit court's exercise of discretion in granting Thermal Design equitable relief, we conclude the circuit court properly exercised its discretion. *See* ***Ulrich***, 258 Wis. 2d at 187 (circuit court properly exercises its discretion when it examines the relevant facts, applies the correct law, and reaches a reasonable conclusion).

C. Potential Double Recovery by Thermal Design

¶30 Welton argues that the court erred because its judgment permits Thermal Design to recover from both Welton and PCI on the invoice and this is unfair. We observe that the court made clear at the hearing on motions after the court had entered findings of fact and conclusions of law, but before it entered the order for judgment, that it did not intend that Thermal Design recover the full amount from both PCI and Welton; rather it wanted Thermal Design to be able to collect from either. Welton and PCI had the opportunity to ask for a provision in the judgment to make this explicit, but apparently neither did so. We therefore cannot conclude that the circuit court erred. Nothing in this conclusion prevents Welton from seeking relief in the circuit court to prevent a double recovery by Thermal Design.

II. PCI's Appeal

A. Liability for Invoice Amount

¶31 PCI contends that the court erred in concluding that it owed Thermal Design for the $37,200.68 due on the invoice because: (1) the court found that Welton terminated its contract with PCI and assumed the obligation to pay Thermal Design, and (2) Thermal Design failed to mitigate its damages because it did not file a construction lien on Welton's property. We reject these arguments for the following reasons.

¶32 PCI provides no authority for the proposition that Welton's statement that it would pay the subcontractors absolved PCI of its contractual obligation to pay Thermal Design. We therefore do not discuss this issue further.

¶33 As for PCI's failure-to-mitigate argument, PCI made this argument below only in the context of the attorney fees and interest it should have to pay. It did not argue that it should have no liability to Thermal Design for the invoice amount because it failed to mitigate its damages. We therefore do not address this issue. *See* ***Evjen v. Evjen***, 171 Wis. 2d 677, 688, 492 N.W.2d 361 (Ct. App. 1992) (we generally do not consider arguments raised for the first time on appeal).

B. Contractual Entitlement to Attorney Fees

¶34 PCI contends that the circuit court erred in construing its contract with Thermal Design as entitling Thermal Design to its reasonable attorney fees incurred in pursuing this action against PCI. According to PCI, the contract language on attorney fees is ambiguous and thus must be construed against the drafter, Thermal Design.

¶35 The agreement between PCI and Thermal Design consists of a purchase order and a credit application; Thermal Design accepted the credit application. The purchase order provides that all the terms and conditions of Thermal Design's quote to PCI are part of the purchase order, and those terms include "[c]ash due upon shipping or net due 30 days after shipment with approved credit. A daily finance charge will be computed at an annual 18% rate or the maximum legal rate allowed and is due on all accounts not paid when due." The credit application identifies PCI as the "business" at the beginning of the document and directs that the application be "signed by a company officer or authorized person." The stated terms for credit are "net 30 days from invoice date" and, "on all accounts not paid when due, a daily finance charge will be computed at an annual 18% rate (or legal percentage rate)." ***Id.*** The credit application also provides:

> The terms and conditions of this credit contract will prevail over any other contradictory terms stated on purchase orders or other documents from the Buyer. In accordance with the usage of the trade, the acknowledgement of this contract will be construed as a counter offer to any terms and conditions of the buyer's documentation and will be construed as accepted by the Buyer for all purchases for which credit is used until full payment is made and this contract is specifically revoked in writing. *The undersigned(s) hereby personally and corporately guarantee(s) payment for all purchases, finance charges and collection costs, including attorneys fees, of Thermal Design, Inc. on behalf of the Business named above, its owners and agents*.

(Emphasis added.) The "Buyer's Signature" line contains the signature of Shannon Syftestad who, Strobe testified, is PCI's office manager and in the normal course of business signs credit applications on behalf of PCI.

¶36 When we construe contract language, we aim to ascertain the intent of the parties and we presume the parties' intent is evidenced by the contract language they chose, if that language is unambiguous. ***Kernz v. J.L. French Corp.***, 2003 WI App 140, ¶9, 266 Wis. 2d 124, 667 N.W.2d 751. Contract language is ambiguous if it is susceptible to more than one reasonable construction. ***Id.***, ¶10. Whether language in a contract is ambiguous is a question of law. ***Lynch v. Crossroads Counseling Center, Inc.***, 2004 WI App 114, ¶19, 275 Wis. 2d 171, 684 N.W.2d 141. Because Wisconsin follows the American Rule under which parties are generally responsible for their own attorney fees unless a statute or contract provides otherwise, a contract must plainly provide for attorney fees in order for the obligation to be imposed on a party. ***Hunzinger Constr. Co. v. Granite Res. Corp.***, 196 Wis. 2d 327, 338-40, 538 N.W.2d 804 (Ct. App. 1995).

¶37 PCI's argument that the attorney fees language is ambiguous is based on the use of the term "guarantee." According to PCI, that term makes this sentence "a guarantee provision and not a collection term" and, as a guarantee provision, "it is ambiguous as to how it relates to attorney fees."

¶38 The common meaning of the verb "guarantee" is "to assume responsibility for the debt, default or miscarriage of." AMERICAN HERITAGE COLLEGE DICTIONARY 603 (3d ed. 1995). *See also* BLACK'S LAW DICTIONARY 723 (8th ed. 2004) ("… to agree to answer for a debt or default"). Generally, a guarantee clause in a contract is one in which a "person promises to pay the obligation of another." ***Id.*** at 723-24. It follows that the debtor and the guarantor are generally two different people. However, we do not agree with PCI that the use of the term "guarantee" here makes it unclear whether PCI has an obligation for payment of "collection costs, including attorney fees," of Thermal Design.

However awkwardly phrased this sentence is, in the context of the credit application the only reasonable construction is that Shannon Syftestad is agreeing personally, and on behalf of PCI, to pay for those collection costs.[5] Indeed, beyond stating that the sentence is ambiguous, PCI has not suggested a reasonable construction of this sentence whereby PCI is not obligated to pay Thermal Design's collection costs, including attorney fees. We therefore concluded the court correctly decided that PCI was obligated to pay Thermal Design its reasonable attorney fees for pursuing its claim against PCI.

C. Reasonableness of Attorney Fees

¶39 PCI contends that, even if it is contractually obligated to pay Thermal Design's attorney fees, the amount the court awarded—$22,060.75—was unreasonable.

¶40 The determination of what amount of attorney fees is reasonable is committed to the circuit court's discretion. ***Kolupar v. Wilde Pontiac Cadillac Inc.***, 2004 WI 112, 275 Wis. 2d 1, ¶22, 683 N.W.2d 58. We give deference to the circuit court's decision because the circuit court is familiar with the local billing norms and will likely have witnessed firsthand the quality of the services rendered by counsel. ***Id.*** When we review a challenge to the reasonableness of attorney fees, we affirm if the circuit court employed a logical rationale based on the appropriate legal principles and facts of record. ***Id.*** If the circuit court does not explain its reasoning when exercising its discretion on attorney fees, we may search the record and sustain the circuit court's decision if there is a reasonable

[5] Shannon Syftestad was named as a defendant, but was dismissed. There is no issue on this appeal of Syftestad's personal liability for Thermal Design's attorney fees.

basis for it. ***Siegel v. Leer, Inc.***, 156 Wis. 2d 621, 631, 457 N.W.2d 533 (Ct. App. 1990).

¶41 In determining reasonable attorney fees, circuit courts are to employ the "lodestar" methodology. ***Kolupar***, 275 Wis. 2d 1, ¶22. Under this methodology, the circuit court begins with the number of hours reasonably expended, multiplied by a reasonable hourly rate, and then may make upward or downward adjustments to that figure based on the factors in SCR 20:1.5. ***Id.***[6]

¶42 In this case, Thermal Design submitted the affidavits of the two attorneys who successively prosecuted the action, Kendall Harrison and Thaddeus Stankowski. Each affidavit was accompanied by time records detailing date,

[6] The factors in SCR 20:1.5 are:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
>
> (8) whether the fee is fixed or contingent.

activity, and amount of time spent on this case. Because the court had ruled that the contract between PCI and Thermal Design did not entitle Thermal Design to attorney fees for its efforts against Welton, these affidavits identified the number of hours that each expended in pursuing PCI only. Attorney Harrison, who initially represented Thermal Design, averred that amount was $5,508.75, and explained how he arrived at this figure with reference to the time records and the activities in the case. Attorney Stankowski, who tried the case, averred that amount was $16,802. This was supported by his notation for each entry on the time record showing what amount of the recorded time on that date was for PCI.

¶43 In addition, Thermal Design submitted the affidavit of Attorney Werner Scherr, who was not involved in the litigation but evaluated the work of the two attorneys who were. Attorney Scherr averred that he has more than forty years experience as a trial attorney and that he reviewed the entire file of Attorney Stankowski, as well as the billings of both attorneys and all the exhibits. He opined that services rendered and time charged for representing Thermal Design against PCI were reasonable, necessary, and appropriate, and explained this conclusion with reference to particular aspects of the proceedings.[7] He also opined that the rate of each attorney ($210 for Attorney Harrison and $200 for Attorney Stankowski) was reasonable.

¶44 In opposition to Thermal Design's request, PCI's attorney submitted an affidavit averring that this case was a simple collection matter on a written

[7] In his affidavit, Attorney Scherr identified one entry that in his view should not be charged and Thermal Design's brief in the circuit court stated this entry had been removed from the total amount sought.

document, and at his law firm these matters are routinely assigned to the newest associates whose hourly rates are $125 and $150 per hour.

¶45 Both parties filed briefs on the issue of attorney fees. Thermal Design's brief set forth the methodology established in ***Kolupar***, 275 Wis. 2d, 1, *see supra* paragraph 41, and PCI agreed that was the proper methodology. Therefore, although the court did not explain how it arrived at its conclusion, we presume it applied the correct legal standard.

¶46 We conclude the record provides a reasonable basis for the court's award of attorney fees. While PCI's affidavit disputed the reasonableness of the hourly rate, the court was entitled to rely on Scherr's affidavit instead and its own knowledge of customary rates in the community. *See* ***Crawford County v. Masel***, 2000 WI App 172, ¶16, 238 Wis. 2d 380, 617 N.W.2d 188 (circuit court's expertise in evaluating prevailing rate is relevant, although that cannot be the sole basis when there is substantial factual and opinion evidence to the contrary). The court could also consider it relevant, as Thermal Design argued below, that, notwithstanding PCI counsel's affidavit, PCI was not represented by an associate but by an experienced attorney: this attorney's affidavit averred he had practiced for twenty-nine years and the focus has been on state and federal litigation including complex civil litigation. The other arguments that PCI makes on appeal concerning the simplicity of the issues, the unnecessary expenditure of attorney time because of Thermal Design's actions, and the amount recovered are all arguments that were made to the circuit court and implicitly rejected by that court.

¶47 Although the amount at issue was fixed and PCI did not dispute it had not paid the invoice, PCI *did* dispute that it, rather than Welton, should pay Thermal Design. PCI also disputed its contractual obligation to pay Thermal

Design *any* costs, interest, or attorney fees. In this regard, PCI advanced a number of theories, some of which we have not mentioned because PCI did not pursue them on appeal, and did not prevail on any. Thus, the court could reasonably reject PCI's characterization of this as a simple collection action and conclude the amount of time expended was reasonable given PCI's responses and positions. The court could also reasonably conclude that fees should not be reduced because the amount of the invoice was not larger: Thermal Design was entitled under the contract to that amount and to reasonable attorney fees to collect it. Finally, the circuit court is in the best position to judge the skill of the attorneys and their efficiency in pursuing PCI, and we will not second guess its implicit judgment that these factors did not warrant downward adjustments.

D. Eighteen Percent Interest

¶48 PCI contends the circuit court erred in awarding 18% interest on the invoice amount for several reasons.[8] First, PCI asserts the contract is ambiguous on this point for the same reason that it argues that the attorney fee provision is ambiguous—"it is a guarantee provision not a collection term." For the reasons we have already discussed, we conclude that the contract language has only one reasonable meaning—that PCI is obligated to pay "the finance charges." The

[8] PCI includes another reason in this section of its argument—that Thermal Design should not be permitted to recover more than 18% interest by recovering interest from both PCI and Welton. We address this argument in the next section. We do not address PCI's argument that there is ambiguity in the contract language concerning the rate of interest. Thermal Design asserts that PCI did not make this argument in the circuit court; PCI does not dispute this assertion in its reply brief; and we do not find a specific developed argument on this point in either PCI's pretrial or post-trial brief. We generally do not address issues raised for the first time on appeal. *See* ***Evjen***, 171 Wis. 2d at 688.

terms of credit plainly include a "finance charge … at an annual 18% rate (or legal percentage rate)."

¶49 Second, PCI argues that if any interest is awarded against it, it should start on October 4, 2001, (thirty days after the invoice) and end on October 26, 2001, the date on which Welton stated that it would assume responsibility for paying the subcontractors. As with the same argument made in the context of PCI's liability for the invoice amount, PCI provides no authority for the proposition that Welton's statement absolved PCI of its contractual obligations to Thermal Design. Accordingly, we reject the argument.

¶50 Third, and related to the second argument, is PCI's assertion that Thermal Design failed to "mitigate its damages" because Thermal Design could have filed a construction lien against Welton and acted unreasonably in failing to do so. We reject this contention because PCI does not support it with any legal authority for the proposition that its contractual obligation to pay interest to Thermal Design is affected by Thermal Design's failure to file a construction lien against Welton.

¶51 Fourth, PCI contends that the 18% interest rate is punitive and the court therefore erred in applying it. The court found that 18% interest is standard in the construction industry. This finding is supported by Strobe's own testimony that PCI's contracts include an 18% interest rate and "that's what everybody puts on theirs."

¶52 We conclude that the court did not err in determining that Thermal Design was entitled to 18% interest on the unpaid invoice amount under the terms of its contract with PCI.

E. Potential Double Recovery by Thermal Design

¶53 PCI makes essentially the same double recovery argument made by Welton: that the court's judgment improperly permits a double recovery by Thermal Design—both as to the invoice amount and as to interest.[9] For the reasons we have already discussed, we cannot conclude this was circuit court error. Nothing in this conclusion prevents PCI from seeking relief in the circuit court to prevent double recovery by Thermal Design.

III. Thermal Design's Cross-Appeal

A. Attorney Fees Against Welton

¶54 Thermal Design contends the circuit court erred in concluding that the terms of its contract with PCI do not permit it to recover the attorney fees it incurred in pursuing its unjust enrichment claim against Welton. There is no merit to this argument. As we have already stated, *see supra* paragraph 36, in order to be entitled to attorney fees based on a contract, the contract language must be clear. *See* ***Hunzinger***, 196 Wis. 2d at 338-40. The terms of the credit agreement plainly apply only to PCI, and there is no reasonable way to read the sentence on collection costs to include attorney fees Thermal Design incurred in asserting a claim against another party.

[9] We observe that PCI sought permission to file a cross-claim against Welton in this action, but the circuit court denied the motion, apparently because it was not timely filed under the scheduling order.

B. Date Eighteen Percent Interest Begins

¶55 Thermal Design challenges the circuit court's decision that the interest against PCI began to run on November 2, 2003. The court's initial conclusion, contained in the findings of fact and conclusions of law, was that, pursuant to the credit agreement between PCI and Thermal Design, PCI was responsible for 18% interest on the invoice amount to be "calculated [beginning] thirty (30) days after the amount was due." However, at the hearing before the order for judgment was entered, the court was persuaded by PCI's argument that it was unfair to calculate the interest from October 4, 2001, because, according to PCI, Thermal Design did not immediately pursue PCI for the invoice amount and, even after Thermal Design filed this action, it did not promptly serve PCI. The court decided that PCI should not have to pay interest at 18% until it had notice of this action. Based on the statements of Welton's counsel at the hearing, who related a conversation with PCI's current counsel, the court determined that date to be November 2003. Thermal Design moved for reconsideration of this decision and the court implicitly denied the motion when it subsequently entered an order for judgment with November 2, 2003 as the date on which interest begins to accrue.

¶56 Thermal Design argues that, because the contract plainly prescribes interest and the date on which it begins to accrue, that is the date that governs and the court erred in deciding otherwise.[10] PCI responds that Thermal Design's claim

[10] In the alternative, Thermal Design argues, even if the court could properly calculate interest from the date PCI was served in this action, the record shows that it served PCI, by service on its first attorney in this case as agreed with that attorney, on November 26, 2002, and that attorney confirmed this by letter dated December 2, 2002. PCI responds that PCI subsequently obtained new counsel, who did not know about this service, and it attributes this confusion to Thermal Design. Because of our conclusion that the correct date for interest to (continued)

against it was not liquidated because Thermal Design also sought the same amount from Welton and because Thermal Design also sought attorney fees and interest, which are disputed. Therefore, Welton asserts, under ***Estreen v. Bluhm***, 79 Wis. 2d 142, 158-59, 255 N.W.2d 473 (1977), Thermal Design is not entitled to interest until PCI learned of this action.

¶57 Whether a party is entitled to pre-verdict interest and, if so, when it begins to accrue based on a given set of facts are questions of law, which we review de novo. *See* ***R.S. Deering Mech. Contractors v. Livesey Co.***, 161 Wis. 2d 727, 729, 468 N.W.2d 758 (Ct. App. 1991).

¶58 When a contract entitles a party to impose interest in a specified amount after a specified period has elapsed since payment under the contract was due, that is the date on which interest begins to accrue. ***DeWitt Ross & Stevens S.C. v. Galaxy Gaming & Racing Ltd. P'ship***, 2004 WI 92, ¶¶48-51, 273 Wis. 2d 577, 682 N.W.2d 839. In ***DeWitt***, the court rejected the argument that in such circumstances interest did not begin to accrue until the party entitled to interest notified the other that it intended to exercise its right to interest. ***Id.*** The ***DeWitt*** court cited with approval and applied the general rule, as stated in ***Estreen***, that

> "the time at which interest begins to run on a liquidated claim is … the time payment was due under the terms of the contract and, if no such time is specified, then from the time a demand was made and, if no demand was made prior to the time of commencement from the action, then, from that time."

Id., ¶50 (citing ***Estreen***, 79 Wis. 2d at 158).

---

begin under the contract is October 4, 2001, we do not address Thermal Design's alternative argument.

¶59 In this case, the credit agreement between Thermal Design and PCI, as well as the terms of the purchase order, plainly provide that Thermal Design is entitled to interest at 18% on amounts "not paid when due." Under the credit agreement the invoice amount was due October 4, 2001, thirty days after the invoice. There is no dispute that PCI did not pay the invoice amount. Therefore interest began to run on October 4, 2001.

¶60 There is no merit to PCI's argument that Thermal Design's claim against it is not liquidated. The invoice amount for the second shipment is "a fixed and determined amount" and is therefore liquidated. *See* ***Bigley v. Brandau***, 57 Wis. 2d 198, 208, 203 N.W.2d 735 (1973) (citation omitted). It is irrelevant that PCI questioned its liability for this amount because Thermal Design filed a claim of unjust enrichment against Welton seeking this same amount. A dispute over liability does not render the amount claimed unliquidated. *See* ***Kernz***, 266 Wis. 2d 124, ¶¶47-48. And, since Thermal Design seeks interest only on the invoice amount, the disputes over attorney fees and the rate of interest do not affect the liquidated nature of the invoice amount.

¶61 We agree with Thermal Design that the court erred in not awarding it interest against PCI on the invoice amount beginning on October 4, 2001.

CONCLUSION

¶62 We affirm the circuit court on all issues raised in the appeals of Welton and PCI. On Thermal Design's cross-appeal, we affirm the circuit court's conclusion that Thermal Design is not entitled under its contract with PCI to attorney fees incurred in pursuing it's claim against Welton. However, because we conclude the circuit court erred in determining the date on which the interest PCI owes Thermal Design began to accrue, we reverse the court's award of

interest against PCI and remand for a recalculation of interest that begins with the date of October 4, 2001.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

Not recommended for publication in the official reports.