COURT OF APPEALS
DECISION
DATED AND FILED

December 5, 2002

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 00-3428 Cir. Ct. No. 97-CV-1693

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

MADISON CRUSHING & EXCAVATING CO., INC.,

PLAINTIFF-CROSS-RESPONDENT-CROSS-APPELLANT,

WERNER BROTHERS, INC.,

PLAINTIFF-CROSS-RESPONDENT,

V.

VOLKMANN RAILROAD BUILDERS, INC.,

DEFENDANT-THIRD-PARTY PLAINTIFF-RESPONDENT-CROSS-APPELLANT-CROSS-RESPONDENT,

V.

WISCONSIN RIVER RAIL TRANSIT,

THIRD-PARTY DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Dane County: DAVID T. FLANAGAN, Judge. *Affirmed in part; reversed in part and cause remanded with directions*.

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

¶1 DYKMAN, J. This is an appeal in a case which involves three separate lawsuits. The suits all involve, directly or indirectly, a contract between the Wisconsin River Rail Transit Commission (River Rail) and Volkmann Railroad Builders, Inc. (Volkmann), pertaining to the rehabilitation of a railroad track extending through parts of Madison and Middleton, Wisconsin. The suits began when Madison Crushing & Excavating Co., Inc. (Madison Crushing) sued Volkmann demanding payment for subcontracting work it did for Volkmann on the project. Volkmann impleaded the owner of the railroad, River Rail. Another subcontractor of Volkmann's, Werner Brothers, Inc. (Werner Brothers), intervened in the action, asserting that it was owed money on its subcontract with Volkmann. Although these are separate lawsuits, they are all tied to the Volkmann/River Rail dispute in one way or another. That dispute is over how much of Volkmann's work on the project was required by the contract between Volkmann and River Rail, and how much was extra-contractual work, or "extras" required by River Rail.

¶2 The trial court concluded that the contract between Volkmann and River Rail was unambiguous and awarded Volkmann damages of over $800,000. It awarded damages of $224,309 to Madison Crushing against Volkmann, and $39,793 to Werner against Volkmann. It also awarded interest to Werner and Madison Crushing.

¶3 River Rail appeals from the judgment in favor of Volkmann. Volkmann appeals from the judgments in favor of Madison Crushing and Werner. Madison Crushing cross-appeals from the trial court's denial of its claim for 18% interest against Volkmann.

¶4 As to Volkmann and River Rail: We conclude that the contract between River Rail and Volkmann is unambiguous, and we accept Volkmann's view as to its meaning. Accordingly, we affirm the trial court's judgment in this respect. We affirm the trial court's method of calculating damages for River Rail's breach of the contract. But we also conclude that Volkmann's evidence was insufficient to show that River Rail interfered with Volkmann's performance of the contract. We therefore reverse the trial court's award of damages for the interference. We affirm the trial court's award of interest and attorney fees pursuant to statute, and we also affirm the trial court's award of prejudgment interest on "extra work" that Volkmann performed.

¶5 As to Volkmann's cross-appeal: We modify the trial court's award of prejudgment interest to Werner Brothers by changing the rate to 5%. We remand with directions to award prejudgment interest at that rate. We reverse the trial court's award of 12% prejudgment interest to Madison Crushing.

¶6 As to Madison Crushing's cross-appeal: We affirm the trial court's denial of 18% or 5% prejudgment interest on Madison Crushing's claim.

I. CONTRACT AMBIGUITY

¶7 After an extensive bidding process, which included views of the railroad track to be rehabilitated, River Rail awarded the railroad rehabilitation contract to Volkmann. Soon after work began, two of Volkmann's subcontractors,

Madison Crushing and Werner Brothers, began complaining that River Rail's construction superintendent, Ted Schnepf, was requiring them to do work they believed was outside of their subcontract requirements. Schnepf told them that they would be paid for everything they did that was required by the contract, and they continued with the project, billing Volkmann for the work they were doing. When the project was completed, Volkmann billed River Rail for the work it and Volkmann's subcontractors did, in an amount that substantially exceeded the contract price. River Rail refused to pay. Madison Crushing sued Volkmann, Volkmann impleaded River Rail, and Werner Brothers intervened in the lawsuit.

¶8 River Rail's first claim is that its contract with Volkmann is unambiguous. The result of this, it argues, is that all the work Volkmann did on the project was required by the contract. Thus, the trial court erred by concluding that Volkmann was entitled to compensation for "extras" it did. River Rail claims that its contract unambiguously required Volkmann to construct ditches adjacent to the railroad track, the outer edges of which would have a two-to-one (2:1) slope.[1] The parties agree that Volkmann was to construct a ditch on either side of the track, varying in width from two to eight feet, to prevent water from accumulating on the tracks. They disagree on the distance to which the ditching was required to extend laterally. River Rail asserts that where the track ran through a "cut" or valley where some soil had been removed when the railroad was originally built, the 2:1 required slope might have to extend as far from the

[1] A 2:1 slope extends horizontally two feet for each one foot it rises.

track as to the edge of the right-of-way. This distance could be as much as fifty feet on each side of the centerline of the track.[2]

¶9 River Rail bases its interpretation of the contract on Exhibit or Diagram 12, which was appended to the contract. We have made Diagram 12 an appendix to this opinion to clarify River Rail's assertion. Diagram 12 notes in three places: "All new slopes 2:1," and in two places: "All slopes steeper than 2:1 will require approval of the Engineer and will require placement of erosion control blanket."

¶10 Volkmann also asserts that the contract is unambiguous, but concludes that it required Volkmann to reestablish ditches only within an area no wider than twenty-two feet from the centerline of the railroad tracks. It bases its interpretation on the contract's requirement that Volkmann "reestablishes ditches" "adjacent to the track," that amended Diagram 12 shows a width of 20' +-, in a typical ditching section, and that Volkmann was required to cut brush and trees, spray stumps and chip or remove trimmings within an area extending twenty-two feet on each side of the centerline of the tracks. From this, Volkmann infers that the contract did not require ditching to extend beyond twenty-two feet from the track's centerline.

¶11 A contract is ambiguous if a reasonable person could understand it differently, ***Jensen v. Janesville Sand & Gravel Co.***, 141 Wis. 2d 521, 530, 415 N.W.2d 559 (Ct. App. 1987), or if a contract provision is reasonably susceptible to more than one construction. ***Kohler Co. v. Wixen***, 204 Wis. 2d 327, 335, 555

[2] A railroad right-of-way is a strip of land, usually one hundred feet in width, and of varying length, designed for railroad tracks.

N.W.2d 640 (Ct. App. 1996). The key to this rule is "reasonableness." When we consider whether a contract provision is ambiguous, we must "canvass the entire agreement. A provision that seems ambiguous might be disambiguated elsewhere in the agreement." ***Rossetto v. Pabst Brewing Co., Inc.***, 217 F.3d 539, 545 (7th Cir. 2000); *see also* ***Crown Life Ins. Co. v. LaBonte***, 111 Wis. 2d 26, 36, 330 N.W.2d 201 (1983) ("It is a cardinal rule of contract construction that the meaning of a particular provision in a contract is to be ascertained with reference to the contract as a whole.").

¶12 Because Judge Vergeront's concurrence in this case is joined by two members of the court, it becomes the majority for this section of the opinion. I agree with the majority that the contract between River Rail and Volkmann is unambiguous and that Volkmann's view is the only reasonable interpretation of the contract, but for the reasons stated by the trial court: (1) the contract is to "reestablish" ditching; (2) the competing bids all assumed that ditching would not extend beyond twenty or twenty-two feet from the centerline of the track; (3) brush cutting, required by the contract, does not require removal of vegetation down to the bare ground, which ditching requires; (4) clearing and grubbing requires removal of vegetation down to the bare ground, and the contract does not mention clearing and grubbing; and, (5) a part of the contract pertaining to crossings requires brushing to the right-of-way, while the rest of the contract does not.

¶13 Further, I independently conclude that if River Rail is correct as to the meaning of Diagram 12, a prospective bidder could only guess as to which slopes would be greater than 2:1. The bidder could only speculate as to whether the engineer would approve that slope. Bidding a project of the magnitude of the Madison-Middleton rail rehabilitation cannot be done by guesswork. River Rail

suggests that Volkmann could have determined what amount of dirt would have to be removed or added by walking or riding on the track and taking measurements. That would be true only if Volkmann assumed that all ditches would extend to the existing ground line, even if that meant going out to the edge of the right-of-way. But the contract provision that slopes in excess of 2:1 would have to be approved by the engineer belies River Rail's suggestion.

II. DAMAGES CALCULATION

¶14 River Rail challenges what it terms the trial court's determination that the contract was the proper measure of damages for Volkmann's extra work. River Rail refers us to the following part of the trial court's decision: "I find also that the elements of quantum meruit and/or unjust enrichment have been proven in each instance, but I look to the contract terms to find the appropriate damages." While this appears to support River Rail's theory, in fact the trial court adopted Volkmann's calculations as to damages, and those calculations were mostly determined by what Volkmann believed was a fair price for the extra work it did.

¶15 In his testimony, Richard Volkmann discussed Exhibit 283A, a summary of Volkmann's damages in its dispute with River Rail. The damages were an additional 10,695 linear feet of ditching done at the contract price of $5.40 per linear foot for a total additional cost of $57,753. Thus, for this item of damage, the trial court used the unit prices of the contract. But the next item of damages, "additional material excavated from the site" could not have been calculated from the contract, because the contract was priced on a linear-foot basis, not on volume measurement. Therefore, Volkmann's testimony that "16,897 cubic yards is everything outside of the 20 foot zone" makes it obvious that the cost of the additional material excavated, $219,661, was not derived from

the contract, because, as we have previously concluded, the contract pertained to material within that zone.

¶16 Similarly, Richard Volkmann testified that there was additional brush cutting beyond the project's specifications and additional cost for hauling trees and brush from beyond the twenty-foot zone. With a credit for additional ditching pursuant to a change order, Richard Volkmann testified that total ditching related damages were $345,261.55. To this, he added $20,134.34 for additional seeding, bringing Volkmann's damages to $365,395.89. Added to this was the $45,554.27 retainage held by River Rail, for a total of $410,950.16.

¶17 From this evidence, River Rail concludes that the trial court awarded damages under a theory of quantum meruit. We agree, with the exception of the 10,695 linear feet of additional ditching. River Rail asserts that this is an improper method of calculating damages, and argues that the only proper measure of damages was unjust enrichment.

¶18 River Rail's only authority for this argument is ***Puttkammer v. Minth***, 83 Wis. 2d 686, 688-89, 266 N.W.2d 361 (1978). ***Puttkammer***, however, was a suit by a subcontractor against an owner, and it is undisputed that Volkmann is not a subcontractor but a contractor. River Rail argues that it is not bound by Volkmann's contracts with its subcontractors, Madison Crushing and Werner. We agree, but fail to see the relevance of this. Volkmann was entitled to fulfill its contract in any way it wished, including hiring subcontractors. The fact that it calculated its damages by what it was charged by the subcontractors is irrelevant.

¶19 As River Rail notes, the trial court used Volkmann as a pass-through for amounts the subcontractors were entitled to receive. But that is always true in any contract where subcontractors are involved. River Rail might have disputed

the quantity or quality of the work done by the subcontractors and forced Volkmann to defend their work, but it did not, other than to argue that this work was required by its contract with Volkmann. We have examined and rejected that argument. We therefore reject River Rail's argument that Volkmann's hiring of subcontractors required the trial court to calculate damages under a theory of unjust enrichment.

¶20 River Rail next argues that work performed for a political corporation under an invalid contract is compensable only in unjust enrichment. It relies on ***Blum v. Hillsboro***, 49 Wis. 2d 667, 183 N.W.2d 47 (1971). In ***Blum***, the court concluded that because the city failed to comply with the public bidding law by orally contracting with the contractor for additional work, the contractor was not permitted to recover in quantum meruit, but only in unjust enrichment, which the court noted was the actual cost to the plaintiff without profit or overhead. ***Id.*** at 673-74.

¶21 Volkmann's written contract with River Rail contemplated that Volkmann might be required to do additional work. This was a part of the specifications on which bids were made and received. Section 4.4 of the parties' contract provides that River Rail had "the right to increase or decrease the quantities of any items of work as may be considered necessary or desirable during the work." That is what River Rail did, and what all bidders on the project expected. Volkmann performed no additional, illegal work for River Rail. ***Blum*** is therefore inapplicable. The trial court was not required to calculate damages under a theory of unjust enrichment.

III. CONTRACTOR INTERFERENCE

¶22 Next, River Rail argues that the trial court erred in awarding damages to Volkmann on its "contractor interference" claim because the claim was untimely, withdrawn during trial and unsupported by the evidence. We agree that the claim was unsupported by evidence, and therefore need not address River Rail's other arguments.

¶23 In its trial brief, citing ***Edward E. Gillen Co. v. John H. Parker Co.***, 170 Wis. 264, 280, 174 N.W. 546 (1919), Volkmann claimed that River Rail had an obligation to "refrain from doing that which will interfere or impede the contractor in the performance of his part" of the work. We will assume without deciding that "contractor interference" is a claim separate from Volkmann's claim for extra work performed at River Rail's direction.

¶24 The evidence supporting Volkmann's interference claim is thin, perhaps because Volkmann told the trial court that it was withdrawing its interference claim "to allow this matter to be completed today." River Rail challenges the trial court's finding that River Rail interfered with Volkmann's contract and claims that no evidence supports that finding or the court's determination that Volkmann was damaged in the amount of $128,196.62.

¶25 Volkmann cites an exhibit it prepared as the basis for the trial court's calculation of its damages. This exhibit was neither offered or admitted, as Volkmann concedes, and therefore cannot be used as a basis for the trial court's findings or award. Volkmann suggests that the award could have been based on testimony that it would have bid the project at $15 or $16 per cubic yard if it had known the extent of the project. But that explains little of contractor interference. The trial court had already awarded Volkmann $57,753 for additional ditching

adjacent to the track and $219,661 for 16,897 cubic yards excavated from outside the twenty-foot ditching corridor billed at $13.00 per cubic yard. In a footnote, Volkmann asserts that 35,400 cubic yards of material was removed from the project and that if its damages were calculated at $3 per cubic yard, that would support an award of $106,200. But that suggests only that if the "extra" material was 16,897 cubic yards, and the total material removed was 35,400 cubic yards, then 18,503 cubic yards was the amount of material Volkmann anticipated would have to be removed when it bid the project.

¶26 Richard Volkmann's testimony does not support this theory, either. He testified that had he known the extent of the work, he would have bid the project higher. "There would be more time involved in doing the excavation so the price per cubic yard from my experience would go up to maybe $15 or $16 per cubic yard." But more time spent in excavation can as easily result from being asked to do more excavation as from being interfered with in doing the excavation required by the contract. And we know that Volkmann did 16,897 cubic yards of additional excavation.

¶27 Volkmann points to testimony by Dennis Jones, an employee of Madison Crushing & Excavating:

> Q. Based on your experience in working on these other projects did you find Mr. Schnepf's behavior in directing work on this project to be different than what you normally encounter?
>
> A. Yes.
>
> Q. What do you normally encounter?
>
> A. Normally an inspector inspects. He does not try to direct.

Accepting that River Rail's inspector directed, how did that interfere with Volkmann? How many hours of Volkmann's time was wasted? What were the inspector's contractual duties? Volkmann does not explain this. We cannot infer that the inspector interfered with Volkmann, and that this interference caused $128,196.62 of damage from the explanation Volkmann gives us.

¶28 The trial court reached this figure by noting that the additional ditching and seeding increased the total contract price by $365,395.89, a 12.3% increase. That figure is the total of extra costs for ditching and seeding, and the trial court permitted Volkmann to recover that sum. One cannot infer from the fact that Volkmann did additional work at River Rail's request that River Rail interfered with Volkmann. Additional work is commonly called an "extra." An owner who asks a contractor to do additional work outside of a contract does not thereby "interfere" in the contract, subjecting the owner to additional damages for "contract interference."

¶29 Volkmann points to Richard Volkmann's testimony about Schnepf's "interference:"

> Q. And what directions did Mr. Schnepf give you?
>
> A. It could vary from day to day.
>
> Q. But you were told you had to do it his way basically?
>
> A. Yes. What I mean by it varying from day to day is one day something was fine with him and the next day the same thing wasn't fine with him. So it was hard to schedule work and have an efficient flow of an operation when we didn't know what he was going to accept or reject on a day-to-day basis.

¶30 While we can sympathize with Volkmann's frustration, we cannot tell from this testimony, or from anything to which Volkmann refers us in its brief,

the extent of the problem, and specifically, the cost of wasted time or whatever other costs were incurred. Did the "accept one day and reject the next" result in ten hours of wasted time or five hundred hours of wasted time? Did it require more trucks or earth moving machines? What was the cost of the labor or machinery? If the evidence to which Volkmann refers us can support an award of $128,196.62, why cannot it support an award of 45% of Volkmann's claim of a $1,042,249 cost over budget for the project, or $469,012?

¶31 We have examined the examples of "contract interference" which Volkmann has pointed to in its brief. These examples show nothing more than a project experiencing some difficulty. There is no evidence of the costs incurred as a result of these examples. We cannot use the trial court's analysis and award to support Volkmann's "contract interference" claim because the court's reasoning is based on the faulty premise that the project's 12.3% cost increase for ditching and seeding was 45% caused by contract interference. The percentage was derived from a document neither offered or received in evidence, and not discussed by Richard Volkmann when he discussed other claimed damages. The cost increase is as easily explained by an expansion of the work as by contract interference. We cannot use the testimony upon which Volkmann relies to support the court's award. We therefore conclude that the evidence is insufficient to support that award, and reverse the award of $128,196.62 for contract interference.

IV. INTEREST AND ATTORNEY FEES

INTEREST

¶32 Next, River Rail argues that the trial court erred by determining that Volkmann was entitled to interest and attorney fees on its judgment against River Rail.[3] This is a question of statutory interpretation, which we decide de novo. ***State v. Szulczewski***, 216 Wis. 2d 495, 499, 574 N.W.2d 660 (1998). The statute applicable to interest is WIS. STAT. § 66.0135.[4] Subsection (2) provides:

> Interest payable to principal contractors.
>
> (a) Except as provided in sub. (4) or as otherwise specifically provided, an agency that does not pay timely the amount due on an order or contract shall pay interest on the balance due from the 31st day after receipt of a properly completed invoice or receipt and acceptance of the property or service under the order or contract, whichever is later, or, if the agency does not comply with sub. (7), from the 31st day after receipt of an improperly completed invoice or receipt and acceptance of the property or service under the order or contract, whichever is later, at the rate specified in s. 71.82 (1) (a) compounded monthly.
>
> (b) For the purposes of par. (a), a payment is timely if the payment is mailed, delivered or transferred by the later of the following:
>
> 1. The date specified on a properly completed invoice for the amount specified in the order or contract.

[3] The trial court's second-amended judgment divided Volkmann's claim into several parts, including $341,618 for Volkmann's January 29, 1996 claim plus retainage, for which the trial court awarded WIS. STAT. § 66.0135 (1999-2000) interest of 12%. The court also awarded $69,332 for "additional work" for which it awarded prejudgment interest at 5%. We address the latter interest claim in Part V., of this opinion. All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

[4] After the trial court's decision in this case, the legislature renumbered WIS. STAT. § 66.285 as § 66.0135. The wording of the statute was unchanged.

> 2. Within 30 days after receipt of a properly completed invoice or receipt and acceptance of the property or service under the order or contract, or, if the agency does not comply with sub. (7), within 30 days after receipt of an improperly completed invoice or receipt and acceptance of the property or service under the order or contract, whichever is later.

¶33 River Rail asserts that WIS. STAT. § 66.0135(2) applies only to "agencies," and that it is not an agency. "Agency" is defined by § 66.0135(1)(a) as "any office, department, board, commission or other body under the control of the governing body of a local governmental unit which expends moneys or incurs obligations on behalf of the local governmental unit." Instead, River Rail claims that it is a local governmental unit, which is defined in § 66.0135(1)(c) as "a political subdivision of this state, a special purpose district in this state, an agency or corporation of a political subdivision or special purpose district, or a combination or subunit of any of the foregoing."

¶34 Whether River Rail is a "local governmental unit" is not relevant to this discussion. WISCONSIN STAT. § 66.0135(2) applies only to "agencies." River Rail may or may not be a "local governmental unit." The question is whether it is an "agency." River Rail admitted in its answer to Volkmann's complaint that it was a local or cooperative governmental commission …." The statutory definition of "agency" includes a commission. Section 66.0135(1)(a).

¶35 River Rail argues in its brief that it is an entity created pursuant to the authority given to municipalities and counties under WIS. STAT. §§ 66.0301 and 59.58(3)(h). Once created, asserts River Rail, it is no longer under the control of the municipalities and counties that formed it.

¶36 WISCONSIN STAT. § 66.0301 permits a city to contract for the formation of a joint transit commission. WISCONSIN STAT. § 59.58(3)(h) permits a

county to establish by contract a joint transit commission. River Rail points to no statute or other authority which prevents cities and counties, who have contracted for a joint transit commission, from agreeing to amend or terminate their contracts. While River Rail would like to be a local governmental unit beholden to no-one, and with eternal life, in reality it exists at the pleasure of the parties who have contracted for its existence.

¶37 We conclude that River Rail is an "agency," required to pay interest to principal contractors under WIS. STAT. § 66.0135(2).[5] We agree with the trial court's conclusion that it must do so.

¶38 River Rail next argues that the trial court erred by determining that the interest it must pay accrued upon acceptance of Volkmann's work. It relies on the part of WIS. STAT. § 66.0135(2), which requires it to pay interest from:

> [T]he "31st day after receipt of a properly completed invoice or receipt and acceptance of the property or service under the order or contract, whichever is later, or, if the agency does not comply with sub. (7), from the 31st day after receipt of an improperly completed invoice or receipt and acceptance of the property or service under the order or contract, whichever is later ….

¶39 River Rail asserts that Volkmann did not submit a "proper invoice" and therefore interest did not begin to run on January 29, 1996, the date of Volkmann's invoice.

¶40 First, we note that the question is not whether Volkmann submitted a "proper invoice," but whether River Rail received a "properly completed invoice."

[5] River Rail nowhere contends that it does not expend money or incur obligations on behalf of a local governmental unit, a second factor in the definition of "agency." We therefore need not consider whether it does so.

The trial court found that Volkmann submitted a claim on January 29, 1996, and that River Rail denied the claim on February 15, 1996.[6] River Rail does not contest these dates.[7] River Rail therefore denied Volkmann's claim twelve working days after Volkmann made its claim. WISCONSIN STAT. § 66.0135(7) therefore becomes relevant. It provides:

> (7) Improper invoices. If an agency receives an improperly completed invoice, the agency shall notify the sender of the invoice within 10 working days after it receives the invoice of the reason that it is improperly completed.

¶41 Even if River Rail is correct that Volkmann's January 29, 1996 letter was an improperly completed invoice, River Rail waited for twelve days to notify Volkmann of this fact. That is two days too late. WISCONSIN STAT.§ 66.0135(2) required River Rail to pay the invoice within thirty-one days of January 29, 1996, or July 1, 1996, whichever was later. Interest therefore began to run on July 31, 1996.

¶42 River Rail next contends that a statutory exception to WIS. STAT. § 66.0135(2) denied interest to Volkmann. Section 66.0135(4)(e) provides in pertinent part:

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[6] River Rail's February 15, 1996 letter was neither offered or received in evidence. While this might be an alternative reason to conclude that River Rail's claim based on this letter fails, we need not address this issue because, in any event, the letter was not timely.

[7] River Rail asserts that after February 15, Volkmann provided additional information which prompted River Rail to again deny the claim. It concludes that this somehow voids Volkmann's January 29 letter. We fail to see how subsequent negotiations between the parties are relevant when, after ten working days, River Rail had failed to respond to Volkmann's claim. WISCONSIN STAT. § 66.0135(2) had already determined River Rail's obligation to pay interest when it sent its letter of denial on February 15.

> Interest on late payments …. (4)(e):
>
> (4) Exceptions. Subsection [66.0135](2) does not apply to any of the following:
>
> ….
>
> (e) An order or contract under which the amount due is subject to a good faith dispute if, before the date on which payment is not timely, notice of the dispute is sent by 1st class mail, personally delivered or sent in accordance with the procedure specified in the order or contract.

¶43 River Rail argues that its February 15, 1996 letter set out a good-faith dispute, and it therefore came within the exception to an agency's liability for interest.[8] It notes that WIS. STAT.§ 66.0135(1)(b) provides a definition of "good faith dispute." The definition provided in § 66.0135(1)(b)2 is applicable here: "Good faith dispute means any of the following: …. 2. Any other reason giving cause for the withholding of payment by an agency … until the dispute is settled."

¶44 The February 15, 1996 letter gives River Rail's reason for its refusal to pay Volkmann's claim. That reason is the same reason River Rail has asserted here—that Volkmann was required to do everything it did under the terms of the contract. River Rail does not argue that any cause, no matter how speculative or irrational, is adequate to prevent interest from accruing. Were that the meaning of "cause" in WIS. STAT. § 66.0135(1)(b)2, an agency could avoid paying interest by asserting that it had failed to plan for enough funds for the project, or that it had recently concluded that the project wasn't worth what it was going to cost.

[8] We assume without deciding that River Rail meets the requirements of WIS. STAT. § 66.0135(4)(e) in that the letter was sent by first-class mail or in accordance with the procedure specified in the parties' contract, and was sent before the date on which payment would not be timely.

¶45 We conclude that when a party asserts as a reason for nonpayment its interpretation of the contract, that interpretation must be a reasonable one. It need not be the only reasonable interpretation. It need not, of course, be the interpretation the court decides is correct, but it must be reasonable. We have already concluded that River Rail's interpretation of the contract was not reasonable. Therefore, River Rail's refusal to pay on that ground was not "cause for the withholding of payment" within the meaning of WIS. STAT. § 66.0135(1)(b)2.

¶46 The trial court found that River Rail knew of Volkmann's claim for $296,064 for brush cutting, tree cutting, excavation and grading, hauling of trees and brush, and seeding and matting, about January 30, 1996. It recognized that the parties had ongoing disputes about the amount of work done, but that by July 1, 1996, when the project was complete, there was no reasonable basis for River Rail to continue to deny Volkmann's claim. River Rail's defense to WIS. STAT. § 66.0135 interest is therefore based only on its unreasonable interpretation of the contract. It does not dispute that Volkmann did the work outlined in its letter of January 29, 1996. River Rail does not take issue with the various costs, totaling $296,064, which are noted in the letter. Nor has River Rail disputed the facts underlying these figures, such as the number of cubic yards of material Volkmann removed during excavation and grading, or the labor and machinery cost of hauling off trees and brush. Its defense, one that the trial court and this court have concluded is unreasonable, was and is that Volkmann was required to do all the work it did because that is what the parties' contract required. We conclude that reliance on this defense was not "cause," as that word is used in § 66.0135(1)(b)2, once the project was complete, and River Rail knew that Volkmann expected

payment of $296,064 for the extra-contractual work outlined in its January 29, 1996 letter.

ATTORNEY FEES

¶47 River Rail argues that the trial court erred in awarding attorney fees pursuant to WIS. STAT. § 66.0135(6), which provides: "Attorney fees. Notwithstanding s. 814.04(1), in an action to recover interest due under this section, the court shall award the prevailing party reasonable attorney fees."

¶48 This issue arose post-trial, when the parties were exchanging briefs on various post-trial issues. On October 4, 2000, Volkmann filed an affidavit containing a twenty-seven page exhibit of its attorney fees, together with a request that River Rail be ordered to pay 63% of the $119,604 in fees that Volkmann had incurred in this lawsuit. The affidavit based the request on WIS. STAT. § 66.0135(6).

¶49 Though River Rail had previously filed briefs responding to requests for WIS. STAT. § 814.025 attorney fees, costs and other expenses, it did not respond to Volkmann's request for WIS. STAT. § 66.0135(6) attorney fees.

¶50 On October 18, the trial court sent an order for judgment and judgment to the attorney for River Rail. The judgment included:

> $34,685.16 as attorneys fees pursuant to sec. 66.285(6), Wis. Stats., such amount representing 29% of the total attorney fee billed which is the proportion of the interest recovered as a percentage of the total recovery, not including this award of attorneys fees…

¶51 River Rail did not respond to the judgment.

¶52 On October 24, 2000, the trial court sent an amended order for judgment and judgment to the attorney for River Rail, including the same language we have quoted.

¶53 River Rail did not respond to the amended judgment.

¶54 On October 30, 2000, the trial court sent a second-amended order for judgment and judgment to the attorney for River Rail, again including the language we have quoted.

¶55 Again, River Rail did not respond.

¶56 On November 3, 2000, Volkmann sent a notice of entry of judgment to River Rail's attorney, which included a copy of the trial court's second-amended order for judgment and judgment. River Rail responded by filing a notice of appeal on December 13.

¶57 We have often said that we will not consider an issue raised for the first time on appeal. ***Segall v. Hurwitz***, 114 Wis. 2d 471, 489, 339 N.W.2d 333 (Ct. App. 1983). While this is a rule of judicial administration from which we may depart, ***id.***, we see no reason to do so here. River Rail had multiple opportunities to present the arguments it now makes to the trial court. It failed to do so. We conclude that River Rail has waived its right to appeal the trial court's award of attorney fees under WIS. STAT. § 66.0135(6).

V. PREJUDGMENT INTEREST

¶58 River Rail next argues that Volkmann is not entitled to prejudgment interest on its entire damage award.[9] River Rail terms this "statutory prejudgment interest." Since the trial court awarded interest pursuant to common law principles, we will address this issue as contesting the use of these principles. Whether Volkmann is entitled to prejudgment interest is a question of law, which we determine de novo. ***United Capitol Ins. v. Bartolotta's Fireworks***, 200 Wis. 2d 284, 299, 546 N.W.2d 198 (Ct. App. 1996).

¶59 The trial court initially concluded that Volkmann was entitled to a total of $410,950.16 as damages for ditching, seeding, and retainage. Included in this amount, however, was the $296,064 referenced in Volkmann's January 29, 1996 letter. The court had previously concluded that the $296,064 would accrue interest pursuant to WIS. STAT. § 66.0135(2). The court therefore subtracted $296,064 from the $410,950.16, a difference of $114,886.16, which represented work done not pursuant to the parties' contract, for which Volkmann demanded 5% prejudgment interest pursuant to WIS. STAT.§ 138.04. The trial court called this "extra work," or work that was done at River Rail's request, but outside of the scope of the contract. It concluded that River Rail sufficiently knew the amount owing for the "extra work," at least when the project was completed, July 1, 1996.

¶60 Wisconsin has no dearth of authority on the issue of when prejudgment interest may be awarded. The seminal case is ***Laycock v. Parker***,

[9] The trial court did not do this. It awarded prejudgment interest on $114,886.16 of "additional amounts."

103 Wis. 161, 79 N.W. 327 (1899). The court examined the history of interest on indebtedness, and concluded that:

> [H]e who retains money which he ought to pay to another should be charged interest upon it. The difficulty is that it cannot well be said one ought to pay money, unless he can ascertain how much he ought to pay with reasonable exactness. Mere difference of opinion as to amount is, however, no more a reason to excuse him from interest than difference of opinion whether he legally ought to pay at all, which has never been held an excuse…. So, if there be a reasonably certain standard of measurement by the correct application of which one can ascertain the amount he owes, he should equally be held responsible for making such application correctly and liable for interest if he does not.

Laycock, 103 Wis. at 186.

¶61 ***Wyandotte Chemicals Corp. v. Royal Electric Manufacturing***, 66 Wis. 2d 577, 225 N.W.2d 648 (1975), traced the cases from ***Laycock*** to 1975, and concluded that the rule of ***Laycock*** was still valid. The court noted that ***Laycock***'s rule was a compromise between the view of interest as compensation and the view of interest as punishment for wrongful behavior. It observed that the general rule was that interest would be awarded, but that there were exceptions where "some other factor," such as a dispute as to a statute's constitutionality or where a pretrial damage claim greatly exceeded the amount recovered at trial. ***Id.*** at 582-84.

¶62 ***Beacon Bowl v. Wisconsin Electric Power Co.***, 176 Wis. 2d 740, 776-77, 501 N.W.2d 788 (1993), repeated the rule that a party can recover preverdict interest only on damages that are either liquidated or determinable by a reasonably certain standard of measurement. In ***Bartolotta's Fireworks***, 200 Wis. 2d at 300, the court noted that the existence of legal issues which may affect actual liability for damages has no role in the prejudgment interest calculus.

¶63 River Rail relies upon ***Dahl v. Housing Authority of the City of Madison***, 54 Wis. 2d 22, 194 N.W.2d 618 (1972), and in particular, the court's comment that on one of the plaintiff's claims, "even full recovery would not erase the fact of genuine dispute on a close enough issue of fact and law." ***Id.*** at 32. River Rail contends that Volkmann's damages were not liquidated or determinable by a reasonably certain standard of measurement.

¶64 ***Dahl*** does not support River Rail's argument. The court in ***Dahl*** noted that a variance between claim and award can be a factor in determining whether a plaintiff is entitled to prejudgment interest. But this was explained in ***Wyandotte Chemicals Corp.***, 66 Wis. 2d at 585-86, as a rule "that prejudgment interest would be denied in a case where the damage claim was substantially inflated and a genuine dispute existed between the parties as to the amount due." The court noted that this rule was designed to discourage grossly inflated or overstated claims. ***Id.*** Volkmann hardly made a grossly inflated or overstated claim. Indeed, its recovery substantially exceeded its original claim.

¶65 River Rail knew of Volkmann's claim for $114,886.16 of "extra work" on July 1, 1996. It knew that Volkmann had done the extra work (though it does not agree that the work was "extra"), and its briefs do not challenge the amount or quality of the extra work. Instead, it has argued that the proper measure of these damages was unjust enrichment, and that the public bid law precluded recovery. We have already rejected these arguments. Quantum meruit claims would not usually involve damages that are either liquidated or determinable by a reasonably certain standard of measurement. *But see* ***Noll v. Dimiceli's Inc.***, 115 Wis. 2d 641, 644, 340 N.W.2d 575 (Ct. App. 1983). Here, however, River Rail was intimately familiar with the work being done by Volkmann and its subcontractors. Its project manger, Ted Schnepf, inspected the work on a weekly,

if not daily, basis. Complaints to the effect that the work required by River Rail exceeded the requirements of the contract surfaced soon after the project began. On February 15, 1996, Schnepf wrote to Volkmann noting that Volkmann had raised the issue of the extent of the work required by the contract at a November 16, 1995 construction meeting, and that Schnepf had denied the claim on December 7, 1995. Schnepf wrote: "Remember, our bid was by the linear foot. I am working with Dennis Jones to identify the ditching locations, and try to resolve almost 5,000 foot difference between our records …. As the letter of January 29 provides no reasons to accept this claim, the claim continues to be denied."

¶66 The damages claimed by Volkmann were easily determinable by a reasonably certain standard of measurement—cubic yards of material removed, number of truckloads of brush cut and hauled from beyond the twenty-two-foot corridor and number of linear feet of ditching. Indeed, Volkmann explained what extra work it had done in its January 29, 1996 letter, and Schnepf knew Volkmann's position as to the extra work as well as Volkmann did. Schnepf did not deny Volkmann's claim for $296,064 because of a dispute as to the number of cubic yards of material removed, or the truckloads of trees and brush removed. He denied the claim because he believed that Volkmann was required by the parties' contract to do, for a set sum, all work within the right-of-way that Schnepf determined should be done. The question was one of contract interpretation, not of the extent or quality of work done. It is well settled that a difference of opinion as to whether money is owed does not prevent prejudgment interest from accruing. *See* ***Laycock***, 103 Wis. at 186; ***City of Merrill v. Wenzel Bros., Inc.***, 88 Wis. 2d 676, 698, 277 N.W.2d 799 (1979); and ***Bartolotta's Fireworks***, 200 Wis. 2d at 300. We conclude that Volkmann's claim was determinable by a reasonably

certain standard of measurement. River Rail knew of that measurement and of the items in Volkmann's claim and did not challenge them. It failed to pay retainage which it concedes is owing. Under these circumstances, Volkmann was entitled to prejudgment interest from July 1, 1996, until the date of judgment.[10]

VI. VOLKMANN'S CROSS-APPEAL

¶67 The trial court rendered judgment against Volkmann and in favor of Werner Brothers for $39,793, and against Volkmann and in favor of Madison Crushing for $224,309. It then imposed a constructive trust on a portion of the interest it had previously awarded to Volkmann and against River Rail, the effect of which was to award prejudgment interest to Werner Brothers and Madison Crushing at 12%, the same rate as it awarded interest to Volkmann against River Rail. Volkmann appeals, arguing that the trial court erred when it awarded interest at 12% on a portion of the judgments in favor of Madison Crushing and Werner Brothers.

¶68 Volkmann first contends that we must consistently apply our decision in River Rail's appeal to the claims by Madison Crushing and Werner Brothers. What Volkmann wishes to avoid is a decision in which we conclude that it was required to ditch and seed beyond the twenty-two-foot corridor without extra compensation, but that it was required to pay Madison Crushing and Werner

[10] River Rail asserts that it has already paid a portion of the damages awarded for seeding and ditching. The record citations it gives for this assertion are unclear. The trial court's damage award is for a net amount, and its oral decision relies upon Volkmann's Exhibit 283A, which for the most part shows damages for extra work. It is probable that River Rail has paid Volkmann the amounts it conceded were owing under its interpretation of the parties' contract, with the exception of $45,554.57 retainage. If River Rail can show that it has not been credited with payments it can prove that it made, it may apply to the trial court for relief from Volkmann's judgment.

Brothers additional sums for work they performed beyond the twenty-two-foot corridor. We need not address this contention, however, because we have already concluded that Volkmann was entitled to be compensated for work done beyond the twenty-two-foot corridor. We therefore move to Volkmann's claim that Werner Brothers and Madison Crushing were not entitled to interest at 12% pursuant to a constructive trust based on Volkmann's receipt of 12% interest on part of its judgment against River Rail.

WERNER BROTHERS

¶69 The trial court concluded that it would be inequitable for Volkmann to receive 12% interest on part if its claim, but only be required to pay Werner Brothers 5% interest on the part of its claim that was included in Volkmann's 12% award.[11] It concluded that Volkmann must pay 12% interest to Werner Brothers on $18,202.00, beginning thirty-one days after July 1, 1996.

¶70 There are two problems with the trial court's analysis. First, WIS. STAT. § 66.0135(2) pertains only to amounts not timely paid by an owner to certain contractors.[12] Exhibit 79 shows that Werner Brothers did not consider Volkmann as delinquent in payment until after January 16, 1996, when Volkmann paid Werner Brothers $20,000, leaving a balance of $22,492.70. Volkmann paid an additional $18,550.34 to Werner Brothers on March 8, 1996, leaving a principal

[11] The trial court awarded Volkmann 12% interest pursuant to WIS. STAT. § 66.0135(2) on the part of its claim represented by Exhibit 437, its January 29, 1996 invoice, plus retainage held by River Rail. The court considered these amounts as due under the Volkmann/River Rail contract. Using the same reasoning, the trial court awarded Werner Brothers 12% interest for that part of its claim on which Volkmann received 12% interest.

[12] WISCONSIN STAT. § 66.0135(3) pertains to interest paid to subcontractors, and generally follows the requirements in § 66.0135(2).

balance of $3,942.36. Thus, as of March 8, Volkmann was within $4,000 of having satisfied the requirements of the statute requiring 12% interest to be paid on delinquent accounts. Requiring Volkmann to pay 12% interest on $18,550.34 from August 1, 1996, when $3,942.36 was all it owed on that date on the amount for which Volkmann received 12% interest is not an equitable solution to the problem the trial court considered.

¶71 More basically, Werner Brothers has failed to show that the trial court correctly awarded it 12% interest on equitable principles. Werner Brothers asks us to review the trial court's decision deferentially, citing ***Estreen v. Bluhm***, 79 Wis. 2d 142, 156-158, 255 N.W.2d 473 (1977), for the proposition that the trial court's decision was within its discretion, thus requiring this standard of review. ***Estreen*** was an action for specific performance of a land contract, an equitable action. ***Id.*** at 156. Thus, when the court noted: "The allowance of interest, in cases in equity, is a matter within the discretion of the [trial] court," ***id.***, the court was not speaking to actions at law such as the Werner Brothers's claim against Volkmann.

¶72 Whether Werner Brothers is entitled to 12% interest from Volkmann involves the interpretation of WIS. STAT. § 66.0135(2), and Wisconsin authority regarding the obligation of a debtor for prejudgment interest. Both are questions of law which we review de novo. *See* ***Murray v. Holiday Rambler, Inc.***, 83 Wis. 2d 406, 438, 265 N.W.2d 513 (1978). Werner Brothers cites only ***Morden v. Continental AG***, 2000 WI 51, 235 Wis. 2d 325, 611 N.W.2d 659, as authority for its assertion that the trial court did not erroneously exercise its discretion by requiring 12% interest on $18,202 of Werner Brothers's judgment against Volkmann. ***Morden*** involves several issues in a products liability action, but nowhere does ***Morden*** discuss prejudgment interest, or interest of any sort. We

agree with the only other case Werner Brothers cites, ***Upthegrove v. Pennsylvania Lumbermans Insurance Co.***, 152 Wis. 2d 7, 13, 447 N.W.2d 367 (Ct. App. 1989), that a damage award is not a penalty, but a part of a plaintiff's compensatory damages. However, that does not answer the question whether the trial court erred by awarding 12% interest to Werner Brothers on part of its claim.

¶73 The only authority Werner Brothers has provided to sustain its contention that we should affirm the trial court's judgment regarding 12% interest paid to Werner Brothers is inapplicable. It offers no alternative way to sustain the trial court's judgment. It has failed to rebut Volkmann's argument that a court may not exercise its equitable authority if such exercise would ignore a clear statutory mandate. ***GMAC Mortgage Corp. v. Gisvold***, 215 Wis. 2d 459, 480, 572 N.W.2d 466 (1998).

¶74 WISCONSIN STAT. § 138.04 provides that the rate of interest on the forbearance of money is 5% per annum. *See* ***IGL-Wisc. Awning, Tent and Trailer Co., Inc. v. Greater Milwaukee Air and Water Show,*** 185 Wis. 2d 864, 878, 520 N.W.2d 279 (Ct. App. 1994); ***Murray***, 83 Wis. 2d at 438-439. In its reply brief, Volkmann concedes that it is not challenging Werner Brothers's award of interest under WIS. STAT. § 138.04. We therefore modify the trial court's award of 12% interest to Werner Brothers, and remand with directions to award Werner Brothers prejudgment interest on its unpaid balance at the rate of 5% per annum.

MADISON CRUSHING

¶75 The trial court found that Volkmann did not fail to make payment as required by its subcontract with Madison Crushing. It based this on Madison Crushing's bid, which noted that payment was due "As Volkmann RR is paid."

Richard Volkmann's testimony supports this finding. He explained that the term "Net 30" on Volkmann's purchase order to Madison Crushing meant that payment was due thirty days after Volkmann was paid by River Rail. Since Volkmann had not been paid by River Rail, the amounts Volkmann owed Madison Crushing were not yet due. The court concluded that Madison Crushing had no contractual right to prejudgment interest from Madison Crushing.

¶76 Madison Crushing does not dispute the trial court's conclusion, based on the Volkmann/Madison Crushing contract and Richard Volkmann's testimony, that the parties agreed that Madison Crushing would be paid only after Volkmann was paid by River Rail. Instead, it defends the trial court's award of 12% prejudgment interest on its claim. The trial court awarded that interest to Madison Crushing by impressing Volkmann's recovery from River Rail with a constructive trust for the interest Volkmann recovered on work done by Madison Crushing.

¶77 Volkmann, citing ***GMAC Mortgage Corp.***, 215 Wis. 2d at 480, argues that a court may not exercise its equitable authority if doing so would ignore a statutory mandate. It points out that WIS. STAT. § 66.0135(3) requires contractors to pay subcontractors 12% interest "in a timely fashion." "Timely fashion" is then defined: "A payment is timely if it is mailed, delivered or transferred to the subcontractor no later than 7 days after the principal contractor's receipt of any payment from the agency." ***Id.***

¶78 Madison Crushing does not discuss ***GMAC Mortgage***. It argues, however, that the trial court's imposition of a constructive trust does not interfere with the statutory right of Volkmann to recover prejudgment interest from River Rail. It concludes: "However, the fact that the constructive trust results in MCE

receiving interest, via Volkmann, based on WIS. STAT. § 66.285 does not mean that the statute has been contravened."

¶79 Madison Crushing does not distinguish between WIS. STAT. §§ 66.0135(2) and 66.0135(3), for it cites only WIS. STAT. § 66.285, now § 66.0135. Section 66.0135(2) applies to contractors, and is not relevant to Volkmann's assertion that imposing a constructive trust contravenes a statutory mandate. Section § 66.0135(3) applies to subcontractors, and it is undisputed that Madison Crushing is a subcontractor to Volkmann.

¶80 The trial court found that there was no evidence that Volkmann received money from River Rail but thereafter failed to pay Madison Crushing. That is the problem with Madison Crushing's claim for 12% interest. WISCONSIN STAT. § 66.0135(3) specifically provides that Madison Crushing can receive 12% interest only if Volkmann received money from River Rail, and did not pay Madison Crushing. The legislature has determined that only then can Madison Crushing receive 12% interest. Madison Crushing cannot meet the requirements of the statute.

¶81 ***GMAC Mortgage*** holds that a court cannot ignore a statutory mandate by using an equitable doctrine, here a constructive trust, to provide equitable relief when a statute, here WIS. STAT. § 66.0135(3), provides that 12% interest cannot be awarded. We therefore reverse the trial court's award of 12% interest.

VII. MADISON CRUSHING'S CROSS-APPEAL

¶82 Madison Crushing argues that it is entitled to 18% interest on its unpaid balance with Volkmann, and failing that, 5% interest. It claims that

because its invoices carried the notation "Interest charge of 1.5% per month will be charged for past due amounts—Annual rate 18%," Volkmann is liable for that rate on Madison Crushing's invoices. Its fall-back position is that Volkmann owes interest pursuant to WIS. STAT. § 138.04 at 5% per annum.

¶83 Madison Crushing admits that its contract with Volkmann provided for payment "As Volkmann RR is paid." However, it claims that because Volkmann's purchase order contained the term "Net 30," this amended the contract to provide "that MCE would be paid within 30 days of the date of invoicing." But Madison Crushing only *assumes* that the parties intended that "Net 30" had that meaning. In fact, as we have noted earlier, Richard Volkmann testified to something very different. He testified that "Net 30," a writing on his company's purchase order, meant that Volkmann would pay Madison Crushing within thirty days of being paid by River Rail. Of course, River Rail has not paid Volkmann's total billings to this day.

¶84 Madison Crushing has failed to give a record citation for its assertion that the parties intended the term "Net 30" to mean that Volkmann was required to pay Madison Crushing's invoices within thirty days of their receipt. Even if we were to search the voluminous record to determine whether that evidence existed, we would only have a dispute as to facts. The trial court found for Volkmann in this possible dispute by noting that the evidence was insufficient to show an agreement between the parties as to an interest charge. The testimony supporting this finding is Richard Volkmann's explanation as to the meaning of the phrase found on Volkmann's purchase order. The trial court did not err by concluding that Volkmann had not failed to make payment as required by the Volkmann-Madison Crushing subcontract.

¶85 Next, Madison Crushing argues that the invoices it sent to Volkmann required Volkmann to pay interest on payments not made in thirty days. Each invoice had printed at the bottom: "An interest charge of 1.5% per month will be charged for past due amounts—Annual rate 18%." The answer to this argument is short.[13] As the trial court found, and we have affirmed, Volkmann was not past due on amounts shown on its invoices. The invoices were due only "As Volkmann RR is paid." Madison Crushing asserts, "Even though Volkmann received regular payments from WRRT for work MCE performed, it did not pay MCE." This assertion is a misrepresentation of the facts. Exhibit 55, a stipulation between Volkmann and Madison Crushing, shows that Volkmann paid Madison Crushing seven payments totaling $236,007.84 between June 13, 1995, and February 12, 1996. Madison Crushing's interest will begin to run, if it does, when River Rail pays the balance of what it owes to Volkmann.

¶86 Madison Crushing next contends that Volkmann failed to pay invoices when due:

> Further, the evidence establishes that Volkmann did receive payments from the Commission every two weeks and the payments included full payment for the crossing and undercut work performed by MCE. (See R. 99, p. 158) Despite receiving these payments, Volkmann did not pay MCE for all of its crossing and undercutting services.

¶87 Again, Madison Crushing has not provided a record citation for its assertion that Volkmann did not pay for all of Madison Crushing's crossing and undercutting services. And again, we will not search this record for that evidence.

[13] Because we have concluded that Madison Crushing's invoices were not past due, we need not address the cases it cites to support its contention that it is entitled to 18% interest on the invoices not yet paid.

The record citations Madison Crushing provided show only that Volkmann was paid for these services, not that Volkmann did not pay Madison Crushing for all of the services. Madison Crushing does not explain how it is, when Exhibit 55 shows that the value of the services was a total of $61,521.42, and Volkmann paid Madison Crushing $226,007.84, the crossing and undercutting services were not totally paid.[14] The trial court found that Volkmann did not wrongfully withhold payment to Madison Crushing. We agree, and conclude that Madison Crushing's assertions to the contrary are meritless.[15]

¶88 As its final argument, Madison Crushing asserts that it is entitled to interest at 5% per year irrespective of the terms of its contract with Volkmann. This argument, too, founders because the amounts billed in the invoices were not yet due. The cases it cites, ***E.D. Wesley Co. v. City of New Berlin***, 62 Wis. 2d 668, 215 N.W.2d 657 (1974), ***Kilgust Heating v. Kemp***, 70 Wis. 2d 544, 235 N.W.2d 292 (1975), and ***DeToro v. DI-LA-CH, Inc.***, 31 Wis. 2d 29, 142 N.W.2d 192 (1966), all provide similar rules: "Wesley is entitled to interest from the date of breach of the contract if his claim is liquidated at that time." ***E.D. Wesley***, 62 Wis. 2d at 676. "We have already concluded that the trial court, based on the evidence, properly found that $1,325.72 was in fact owed to the plaintiff for delivered materials." ***Kilgust***, 70 Wis. 2d at 549. In ***DeToro***, an arbitrator found that certain amounts were owing to a contractor. The court concluded that interest

[14] It may be that Volkmann did not pay Madison Crushing's share of the retainage that River Rail has not paid. Even if that is true, it is still money that has not been paid to Volkmann.

[15] Because we have concluded that Madison Crushing's invoices are not yet payable, we need not address the parties arguments as to the applicability of the Uniform Commercial Code to their contract, nor whether Madison Crushing's inclusion in its invoice of the phrase purporting to obligate Volkmann to pay interest at 18% per year accomplished its desired result. Nor need we address Volkmann's claim that Madison Crushing waived the claims it now makes.

was due on those amounts. ***DeToro***, 31 Wis.2d at 34-35. In all three cases, the money claimed was found to be owing. We have no quarrel with the holdings or language in any of these cases. They simply do not pertain to a case, such as the present one, where money is due on a contract only on a contingency that has not yet occurred. We conclude that the trial court correctly denied interest to Madison Crushing at either 18% per year or 5% per year.

VIII. CONCLUSION

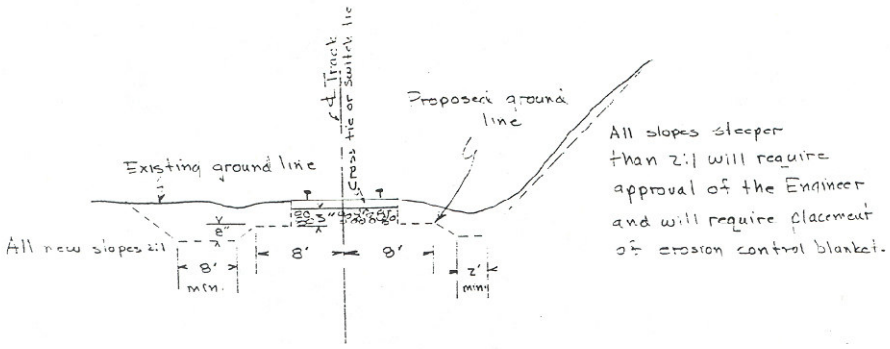
¶89 We therefore affirm in part and reverse in part the trial court's judgment in favor of Volkmann and against River Rail. The judgment in favor of Werner Brothers is reversed in part. The judgment in favor of Madison Crushing is reversed. We reverse the trial court's award of 12% prejudgment interest to Madison Crushing. We affirm Madison Crushing's cross-appeal.

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

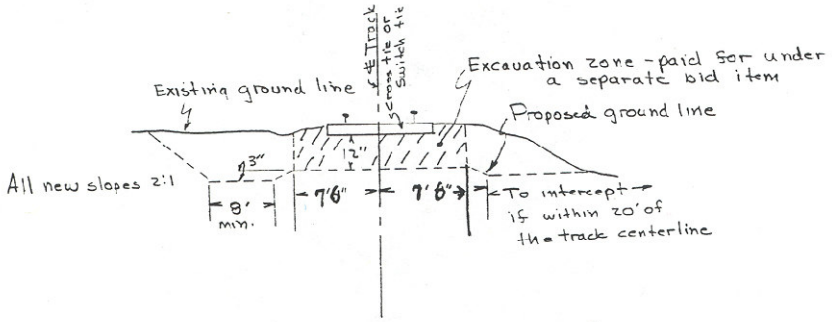
Not recommended for publication in the official reports.

¶90 VERGERONT, P.J. (*concurring*). I join in the lead opinion's conclusion that the contract is unambiguous in that it does not require Volkmann to perform ditching outside an area extending twenty-two feet from each side of the centerline of the tracks. However, I reach this conclusion by a somewhat different analysis. For the reasons the lead opinion explains in ¶13, I conclude that River Rail's construction of the contract is unreasonable. I further conclude that Volkmann's construction is reasonable. Since River Rail does not offer an alternative reasonable construction of the contract, I would on that basis adopt Volkmann's construction of the contract as the only reasonable construction. I do not agree with the lead opinion's analysis in ¶12. In my view, the second, third, and fourth reasons in that paragraph are not properly part of determining whether the contract is unambiguous as a matter of law, because they rely on facts outside the contract; and the first and fifth reasons do not persuade me that Volkman's construction is the only reasonable construction. Accordingly, I respectfully concur.

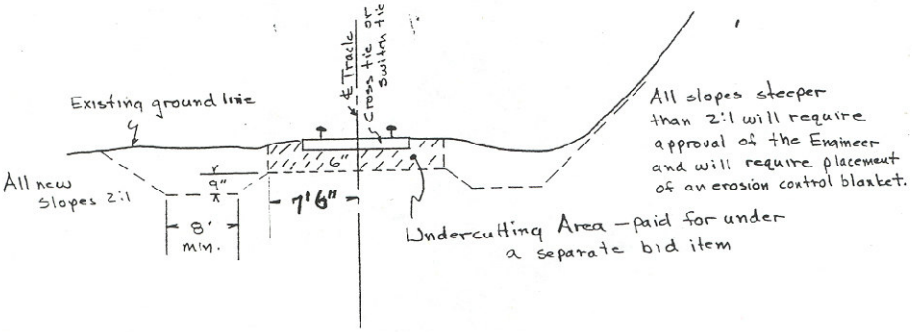
¶91 I am authorized to state that Judge Lundsten joins in this concurrence.



TYPICAL DITCHING SECTION



DITCHING THRU EXCAVATION ZONE OF CROSSINGS



DITCHING ADJACENT TO UNDERCUT ZONE

EXHIBIT

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EXHIBIT 12