COURT OF APPEALS
DECISION
DATED AND FILED

March 21, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 00-3539 **Cir. Ct. No. 98-CV-96**

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

PHOENIX CONTROLS, INC. AND EMERGENT FINANCIAL CORP.,

PLAINTIFFS-APPELLANTS-CROSS-RESPONDENTS,

V.

EISENMANN CORPORATION,

DEFENDANT-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Rock County: JAMES P. DALEY, Judge. *Affirmed*.

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

¶1 DEININGER, J. Phoenix Controls, Inc. and Emergent Financial Corp.[1] appeal a judgment entered on Phoenix's claims against Eisenmann Corporation, which cross-appeals the judgment. A jury awarded Phoenix $946,825 in damages for Eisenmann's intentional misrepresentation regarding payment for work Phoenix performed on a construction project for which Eisenmann served as the prime contractor. Eisenmann contends that the trial court erred in denying its motions for judgment notwithstanding the verdict, for dismissal of certain claims, for changed answers or directed verdicts on certain questions, or for a new trial. Eisenmann also cites portions of the court's award of costs and fees as erroneous. Phoenix challenges the trial court's rulings regarding the parties' entitlements to contractual attorneys' fees and the court's denial of additional damages on its claim of promissory estoppel.

¶2 We conclude that, with one exception, the trial court did not err in denying Eisenmann's post-verdict motions. In light of the jury's finding that the parties had entered into a modified agreement, the court should have dismissed Phoenix's promissory estoppel claim, but the dismissal of that claim does not affect the appealed and cross-appealed judgment. We also affirm the trial court's rulings regarding attorneys' fees and costs.

BACKGROUND

¶3 The present litigation encompassed several claims and a counter-claim that were tried to a jury over five days. The litigation arises out of a

[1] Phoenix Controls, Inc., which is apparently no longer in business, assigned its claim against Eisenmann to its creditor, Emergent Financial Corp. We will refer to the plaintiffs-appellants-cross-respondents, collectively, as Phoenix.

construction project undertaken by General Motors Corporation (GM) in Janesville. GM retained Eisenmann as its prime contractor to design and construct a large assembly line paint application facility. Eisenmann, in turn, retained Phoenix as a subcontractor to produce control panels and install software to operate automated materials handling systems in the new facility. This contract, which the parties refer to as the "base contract," required Phoenix to perform certain specified work for a fixed price of $800,000.

¶4 As is often the case with large and complicated construction projects, the GM project encountered delays and difficulties, which ultimately led to change orders under which Phoenix performed different or additional tasks beyond those specified in the "base contract." The events leading directly to this litigation began in May and June of 1997, when Eisenmann requested Phoenix to supply additional personnel in order to expedite start-up testing for portions of the assembly line. Discussions between representatives of the two companies led to Eisenmann's issuance of the following "Field Order" on June 18, 1997:

> [Heading]
>
> The Contractor is hereby authorized and directed to proceed with the work described below in accordance with the terms and conditions of the contract. The Contractor shall promptly submit a statement of impact, including price quotation, for all work described below to Eisenmann Purchasing no later than: ASAP
>
> 1. Please provide additional de-bug man-power to satisfy accelerated schedule requirements as of 6/23/97, per Eisenmann direction.
>
>   Each instance of this work must be clearly identified in the applicable time sheets.
>
>   This work to be done on a time and material basis.

> Completed daily time and material sheets are to be submitted within 24 hours of completion of work performed for verification and signature by an authorized Eisenmann representative.
>
> Signed time sheets along with complete backup are to be submitted to Eisenmann to processing within (5) five working days after completion of work.
>
> All future documentation regarding this work must reference Eisenmann's Field Order Number as designated above.
>
> NOTE: Failure to comply with this request will lead to delays in processing and payment.
>
> [Signatures]
>
> Notice to Contractor. This Field Order does not authorize you to invoice for this work. Billing must be withheld until a purchase order alteration is received incorporating this work in the purchase order.

¶5 In the months following the issuance of the field order, Phoenix supplied personnel and performed work on the GM project for which it sent Eisenmann invoices for several hundred thousand dollars. Eisenmann refused to pay for most of the invoiced work. Phoenix was ultimately terminated from the project in November 1997, and this litigation ensued. Phoenix's claim against Eisenmann was tried to a jury on three separate theories—breach of contract, misrepresentation, and promissory estoppel. The trial court permitted all three causes of action to go to the jury over Eisenmann's objection. Phoenix sought a total of $1.4 million in damages, while Eisenmann pursued a counter-claim seeking $465,000 for Phoenix's alleged breach of the parties' contract.

¶6 The jury returned a verdict with the following findings. The jury found that the "base contract" was in fact modified, but that Eisenmann did *not*

breach the modified agreement. It also found that Phoenix did not breach the parties' contract as Eisenmann alleged in its counter-claim. The jury determined, however, that when Eisenmann issued the June 18th field order, it did not intend to pay for the additional work, and the jury awarded damages to Phoenix for intentional misrepresentation in the amount of $946,825. The jury also concluded that Phoenix had established the elements of promissory estoppel based on Eisenmann's promise to pay for work performed pursuant to the "Field Order." The jury was not asked to award any separate or additional damages for this claim, however, because the parties had stipulated that the court would consider the issue post-verdict, if necessary.

¶7 The trial court denied all of Eisenmann's post-verdict motions seeking relief from the jury's adverse findings. The court also declined to award additional damages to Phoenix on its promissory estoppel claim, concluding that the jury's award for intentional misrepresentation encompassed all damages that might be recoverable under the alternate theory. Phoenix also sought to recover its actual attorneys' fees, citing a provision in the parties' contract. The court concluded, however, that because the jury found no breach of contract but awarded damages only on the non-contractual claim of misrepresentation, Phoenix was not entitled to recover its attorneys' fees. Instead, because Eisenmann had prevailed on a relatively minor contractual issue involving $80,000 worth of material and equipment, to which Phoenix had stipulated, the court awarded Eisenmann some $18,706.50 in attorneys' fees and costs. The court also approved an award of costs in favor of Phoenix, as the overall prevailing party, which included $3,700 in express charges.

¶8 Phoenix appeals the judgment for $957,196.73 entered in its favor, challenging the court's rulings on attorneys' fees and the denial of additional

promissory estoppel damages. Eisenmann cross-appeals, seeking relief on numerous grounds from the judgment entered against it. Additional facts will be presented as necessary in the analysis which follows.

ANALYSIS

I.

¶9 We begin by addressing Eisenmann's cross-appeal because some contentions in Phoenix's appeal will be moot if Eisenmann prevails in setting aside the judgment. Eisenmann requested virtually every form of relief from the jury's verdict available by way of post-verdict motions under WIS. STAT. §§ 805.14(5) and 805.15(1). At the heart of Eisenmann's many challenges to the verdict is its contention that, because the underlying relationship between Phoenix and Eisenmann was contractual, Phoenix could not, as a matter of law, recover on either its claims of intentional misrepresentation or promissory estoppel. We thus first consider whether the trial court erred in denying Eisenmann's motion for judgment notwithstanding the verdict grounded on this contention.

¶10 We review a trial court's denial of a motion for judgment notwithstanding the verdict de novo, applying the same standards as the trial court. ***Lisa R.P. v. Michael J.W.***, 210 Wis. 2d 132, 140, 565 N.W.2d 179 (Ct. App. 1997). A motion for judgment notwithstanding the verdict accepts the findings of the verdict as true but contends that the moving party should have judgment for reasons evident in the record other than those decided by the jury. WIS. STAT. § 805.14(5)(b); ***Greenlee v. Rainbow Auction/Realty Co.***, 202 Wis. 2d 653, 661, 553 N.W.2d 257 (Ct. App. 1996). The motion does not challenge the sufficiency of the evidence to support the verdict, but rather whether the facts found are

sufficient to permit recovery as a matter of law. ***Logterman v. Dawson***, 190 Wis. 2d 90, 101, 526 N.W.2d 768 (Ct. App. 1994) (citations omitted).

¶11 Relying on the supreme court's recent holdings in ***Mackenzie v. Miller Brewing Co.***, 2001 WI 23, 241 Wis. 2d 700, 623 N.W.2d 739, and ***Tatge v. Chambers & Own***, 219 Wis. 2d 99, 579 N.W.2d 217 (1998), Eisenmann asserts that Phoenix cannot recover on its misrepresentation claim because "no duty to refrain from misrepresentation existed independently" of the contractual relationship between the parties.

¶12 We conclude, however, that ***Mackenzie*** and ***Tatge*** are not controlling on the present facts. In both cases, the supreme court emphasized that the contracts at issue were "at-will employment contracts." ***Tatge***, 219 Wis. 2d at ¶19; ***Mackenzie***, 2001 WI 23 at ¶13. In the later case, the court discussed at considerable length why permitting at-will employees and their employers to sue each other for misrepresentations made during the course of employment would contravene long-standing public policy in Wisconsin upholding the concept of at-will employment. ***Mackenzie*** at ¶¶12-20. More importantly, however, although it acknowledged in both cases the traditional common law prohibition against permitting parties to a contract from seeking tort remedies for what are essentially breaches of the contract,[2] the court also recognized in each case the viability of a tort claim for misrepresentation which arises at or before the inception of the contractual relationship:

> We note … that there is a distinction between actions involving fraudulent inducements to commence

[2] *See* ***Mackenzie v. Miller Brewing Co.***, 2001 WI 23, ¶¶ 23-29, 241 Wis. 2d 700, 623 N.W.2d 739, and ***Tatge v. Chambers & Own***, 219 Wis. 2d 99, ¶¶17-20, 579 N.W.2d 217 (1998).

> employment and fraudulent inducements to continue employment.… The essential difference is that fraudulent inducement to commence employment occurs prior to the formation of the at-will contract. Of course, both employees and employers may be subjected to a fraud action based on conduct that occurred prior to the formation of an at-will contract.

Mackenzie, 2001 WI 23 at ¶18 n.15 (citation omitted). The court explained in ***Tatge*** that when "no employment relationship existed at the time of the misrepresentations, any duty to refrain from misrepresentation must have existed independently from the performance of an employment contract," and thus, an employee who is fraudulently induced into entering an employment contract may sue in tort. ***Tatge***, 219 Wis. 2d at ¶¶21-23 (citing ***Hartwig v. Bitter***, 29 Wis. 2d 653, 139 N.W.2d 644 (1966)).

¶13 This court has explained why, notwithstanding the "economic loss doctrine,"[3] fraud which induces a contract is actionable by a party to a contract:

> An intentional misrepresentation that fraudulently induces a party to enter into a contract … presents a special situation where the parties to the contract appear to negotiate freely, but, in fact, one party's ability to negotiate fair terms and make an informed decision is undermined by the other party's fraudulent conduct….
>
> Furthermore, under Wisconsin law, a material misrepresentation of fact may render a contract void or voidable.… The economic loss doctrine does not apply to fraudulently induced contracts because the person fraudulently induced to enter the contract can affirm or avoid the contract, and in so electing, has the option of selecting tort or contract damages.

[3] "The economic loss doctrine provides that a commercial purchaser of a product cannot recover from a manufacturer, under tort theories, damages that are solely economic losses." ***Douglas-Hanson Co., Inc. v. BF Goodrich Co.***, 229 Wis. 2d 132, 142, 598 N.W.2d 262 (Ct. App. 1999) (citing ***Daanen & Janssen, Inc. v. Cedarapids, Inc.***, 216 Wis. 2d 395, 400, 573 N.W.2d 842 (1998)).

Douglas-Hanson Co., Inc. v. BF Goodrich Co., 229 Wis. 2d 132, 144-45, 598 N.W.2d 262 (Ct. App. 1999) (citations omitted). We conclude that the ***Douglas-Hanson*** rationale applies here and governs our disposition.

¶14 There is no dispute that Eisenmann and Phoenix were parties to an existing "base contract" at the time of the alleged misrepresentations in June 1997. There can also be little dispute, however, that the parties then entered into a new or modified contract to account for the following facts: (1) the completion and testing schedules for the assembly line control panels had changed drastically; (2) Phoenix had already performed services for which Eisenmann had approved payment of approximately 95% of Phoenix's total compensation specified in the base contract; and (3) additional services from Phoenix personnel would be required to complete the remaining work on the GM project. A verdict question asked, "Did Phoenix and Eisenmann modify [their "base contract"] to provide that Phoenix would be paid an additional sum for the work it performed?" The jury answered this question "Yes," and neither party challenges this finding. The jury also found that "on or about June 18, 1997," Eisenmann represented "to Phoenix through a field order that Eisenmann would pay for time and materials used by Phoenix on the project site."[4]

¶15 Thus, the representation at issue was made at a time when the parties were discussing how to proceed in light of circumstances which had changed from those envisioned in the original "base contract." The representation dealt not with

[4] The jury further found that at the time it made the representation, Eisenmann intended "not to pay for time and materials used by Phoenix"; that the representation was untrue; and that it was made with the requisite knowledge or recklessness and with intent to "deceive and induce Phoenix to act upon it."

how to implement the terms of the existing contract, but on how to depart from it and form a new or modified contract. If Eisenmann intentionally misled Phoenix into believing it would be compensated in a certain way for work to be performed after June 18, 1997, thus inducing Phoenix to perform work under a new or modified contract, Phoenix's "ability to negotiate fair terms and make an informed decision [was] undermined by [Eisenmann's] fraudulent conduct," and Phoenix was thus permitted to "affirm or avoid the contract, and in so electing, has the option of selecting tort or contract damages." ***Id***.

¶16 We discuss below the impact of the jury's finding that Eisenmann did *not* breach the "modified agreement." For present purposes, however, we note that although Eisenmann objected to having the misrepresentation claim put to the jury, it did not object at the instructions conference to having jurors answer the misrepresentation questions regardless of how they answered preceding questions regarding the existence of a "modified agreement" and whether Eisenmann had breached it. Phoenix could not ultimately both "affirm" and "avoid" a modified contract and thus obtain damages both under it and in spite of it. *See* ***id***. But, given that the existence of both a "modified agreement" and an actionable misrepresentation inducing it were in dispute, it was not improper to ask the jury to make findings in both regards, especially since Eisenmann lodged no objection to the form of the verdict.[5]

[5] Had the jury found no "modified agreement," any misrepresentation on Eisenmann's part could not be said to have induced a new or modified contract. In that circumstance, the misrepresentation could be characterized as inducing Phoenix's continued performance under a pre-existing contract. *Cf.* ***Mackenzie***, 2001 WI 23 at ¶10 ("Wisconsin does not recognize a cause of action for the tort for intentional misrepresentation to induce continued employment in the at-will employment context."). The absence of a new or modified contract, however, might also lend support to Phoenix's promissory estoppel claim. *See* ***id***. at ¶25. We discuss in section II of this opinion the viability of that claim in light of the jury's finding of a modified contract.

¶17 Eisenmann also argues that, as a matter of law, it cannot be liable for any misrepresentation which may have induced Phoenix to enter into the modified agreement because the jury found that Eisenmann did not breach the modified agreement. The misrepresentation involved a promise of future action on Eisenmann's part (payment to Phoenix for additional work on a time and materials basis), and Phoenix had to prove that, at the time Eisenmann issued the June 18th field order, it had no intention to pay on that basis. *See* ***Hartwig v. Bitter***, 29 Wis. 2d 653, 659, 139 N.W.2d 644 (1966). According to Eisenmann, even if it had no intention to pay Phoenix on a time and materials basis when it issued the field order, the fact that it did not subsequently breach the parties' modified agreement essentially "cures" the misrepresentation. We disagree that the jury's finding that Eisenmann did not breach the modified agreement nullifies Phoenix's ability to recover on its misrepresentation claim.

¶18 In support of the proposition that the lack of a breach of a fraudulently induced contract relieves a party of liability for misrepresentations at the inception of the contract, Eisenmann cites our opinion in ***Wausau Medical Center v. Asplund***, 182 Wis. 2d 274, 514 N.W.2d 34 (Ct. App. 1994). We concluded in ***Wausau Medical Center*** that a former employee's statement that he "wanted to return" to employment with the medical center was an opinion, not a statement of fact. ***Id***. at 291. We then "[a]dditionally" said that because the employee did in fact return, albeit for a brief period, "the statement that he wanted to return was not false." ***Id***. Finally, we noted that the employee's "return also renders the exception to the 'preexisting fact' fact rule—where the promisor at the time the promise was made, had a present intention not to perform—inapplicable." ***Id***. (citation omitted). It is on this tertiary comment that Eisenmann relies.

¶19 The flaw in Eisenmann's argument is that the jury's finding that Eisenmann did not breach the modified agreement is *not* the equivalent of a finding that Eisenmann made good on its representation that it would pay Phoenix for additional work on a time and materials basis. In fact, it is undisputed that Eisenmann never paid Phoenix on that basis, and that as of November 1997 when Eisenmann terminated Phoenix from the GM project, Phoenix had presented Eisenmann with invoices for hundreds of thousands of dollars which went unpaid. Eisenmann's defense at trial was not that it had in fact paid Phoenix according to the June 18th field order, but that it was not obligated to do so for a number of reasons, including that its purchasing department had not "accepted" the "Field Order," that Phoenix had failed to properly document its claims for additional compensation, and that Phoenix had breached its obligations under the parties' contract.[6]

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[6] The question remains, of course, if Eisenmann never paid Phoenix in accordance with the terms of the June 18th field order, on what basis could the jury conclude that it had not breached the parties' "modified agreement"? There are several possibilities. Phoenix argued in the trial court that the jury concluded that there was no breach by Eisenmann because the revised work schedule cited in the field order "fell by the wayside." The trial court, on the other hand, concluded the following:

> The jury could have concluded … that in fact there was a contract and it was modified and that the contract which is a meeting of the minds modified by the parties and paid for by Eisenmann was in fact the modified contract. And they didn't [b]reach that modified contract. That doesn't cover the June 18th purchase [sic] order, the subsequent meeting and the subsequent work by Phoenix on the job … which Eisenmann didn't pay for. The jury could have concluded from that evidence that in fact, yes, there was a misrepresentation. There was inducement to do work with no intent to pay.

We note as well that the jury may have accepted Eisenmann's argument that it did not breach the modified agreement because Phoenix did not submit proper documentation. Eisenmann's counsel argued in closing as follows:

(continued)

II.

¶20 We next address Eisenmann's claim that, as a matter of law, the fact that the parties entered into a modified agreement regarding payment for additional work precludes Phoenix from recovering payment for that work on a promissory estoppel theory. We agree that the existence of the modified agreement, confirmed by the jury, precludes the alternate, quasi-contractual theory of recovery. Unlike the tort claim for a misrepresentation that induces one to enter a contract, which the victim of a fraud may then avoid, a promissory estoppel claim presupposes the non-existence of a contract. *See* ***Spensley Feeds v. Livingston Feed***, 128 Wis. 2d 279, 291-92 n.8, 381 N.W.2d 601 (Ct. App. 1985) ("[T]he promissory estoppel theory applies only when no contract exists, oral or

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> [M]y position isn't hey, they didn't do the work; hey, we didn't sign that field order; hey, we shouldn't be paying you. Our position is how can we pay you when you haven't shown us the documentation to support your very claim?
>
> ….
>
> …[Y]ou'll have a series of questions, and one of the questions will be was there a modification to the contract? And there was a modification to the contract. We issued this field order and we asked them to do work.
>
> Now, second question is did Phoenix perform that work. That's not the question here, but the thing you have to consider is did they perform what was requested here to acceptable level, and I think the evidence there is probably not completely. And did they do what they were required to do under this to get paid? The answer to that is absolutely not. So you have a tough time of saying did Eisenmann breach the agreement when what we need to perform we've never received ….

Thus, the jury could have concluded that Eisenmann had not technically breached the modified agreement because of Phoenix's failure to submit documentation it called for, but that Eisenmann was nonetheless guilty of misrepresenting that it would pay Phoenix for work performed, when it had no intention of ever doing so, and in fact never did.

otherwise, or the contract fails to address the essential elements of the parties' total business relationship.") (citing ***Kramer v. Alpine Valley Resort***, 108 Wis. 2d 417, 425, 321 N.W.2d 293 (1982)).

¶21 Phoenix maintains, however, that the "exception" the supreme court noted in ***Kramer*** applies here. That is, if a contract exists between the parties, but it "represents a minor aspect of a larger business relationship," and thus "fails to embody essential elements of the total business relationship of the parties … the existence of a contract does not bar recovery under promissory estoppel." ***Kramer***, 108 Wis. 2d at 421-22. Unlike the lease in ***Kramer***, which the court concluded represented only "one minor aspect of a larger business relationship," ***id***. at 424, the "base contract" and the subsequent "modified agreement" in this case governed virtually all aspects of the parties' business relationship, specifically including the terms and conditions of payment to Phoenix for work it performed on the GM project. Accordingly, Phoenix must look to its contract and prove a breach, or, as we have discussed, Phoenix could avoid the contract altogether because of Eisenmann's misrepresentation, in order to recover damages. We agree with Eisenmann that a third opportunity for recovery via promissory estoppel is not open to Phoenix on the facts as found by the jury.

¶22 Because the jury found that the parties entered into a modified contract regarding payment for Phoenix's additional work on the GM project, we conclude the trial court erred in denying Eisenmann's post-verdict motion to dismiss the promissory estoppel claim. This error, however, had no impact on the judgment inasmuch as the judgment awarded Phoenix damages solely on the basis of its misrepresentation claim.

III.

¶23 Eisenmann next claims the trial court erred in denying its pretrial motions challenging Phoenix's misrepresentation claim. Specifically, Eisenmann moved for dismissal or for partial summary judgment on this claim, asserting Phoenix's failure to plead fraud with the specificity required under WIS. STAT. § 802.03(2); its failure to allege or show anything other than an "unfulfilled promise"; and its failure to establish the element of reasonable reliance. We review a trial court's rulings on motions to dismiss and for summary judgment de novo. *See* ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). We reject Eisenmann's claim of error in the pretrial rulings.

¶24 WISCONSIN STAT. § 802.03(2) provides that when a party sues for fraud, "the circumstances constituting fraud … shall be stated with particularity." The rule, like its counterpart in the Federal Rules, requires that "the time, place, and content of an alleged false representation" be specified, such that the defendant may be put on notice in order to prepare a meaningful response to the claim. ***Rendler v. Markos***, 154 Wis. 2d 420, 428, 453 N.W.2d 202 (Ct. App. 1990). We are satisfied that Phoenix's Second Amended Complaint meets this requirement.

¶25 Phoenix's allegations include the following:

> 26. Eisenmann further represented and promised to Phoenix Controls that if Phoenix Controls would commence work under the two original Purchase Orders issued by Eisenmann which total $800,000.00, the labor and materials furnished by Phoenix Controls which exceeded that amount would be paid by Eisenmann.
>
> 27. Throughout the Project, Eisenmann made further promises and representations to Phoenix Controls that if Phoenix Controls provided certain labor and

> materials for the Project, the cost of that labor and materials would be paid by Eisenmann.
>
> ….
>
> 33. Prior to entering of the agreement, Eisenmann made representations to Phoenix Controls as set forth above.
>
> ….
>
> 36. Upon information and belief, the representations and statements were, in fact, not true and were misleading.
>
> ….
>
> 40. Upon information and belief, Eisenmann made the afore-described misrepresentations intentionally or with reckless disregard of Phoenix Controls' rights.
>
> 41. Phoenix Controls reasonably relied upon the representations to its detriment.

¶26 We conclude that the foregoing allegations were sufficient to put Eisenmann on notice that the alleged misrepresentation occurred during the course of Phoenix's work on the GM project, and consisted of Eisenmann's statements that it would pay for Phoenix's additional work on a time and materials basis. We also note that in response to Eisenmann's motion, Phoenix filed affidavits and discovery excerpts which provided further specificity regarding the "who, what and when" of Eisenmann's allegedly false representations regarding the terms of compensation for Phoenix's additional work on the project. In short, we agree with Phoenix that Eisenmann had ample notice from the pleadings and supplementary filings of the basis of Phoenix's misrepresentation claim so as to permit a "meaningful response" to the claim.

¶27 We also reject Eisenmann's contention that the record on summary judgment entitled it to a dismissal of the misrepresentation claim. We have

reviewed the submissions and agree with Phoenix that they were sufficient to create a factual issue regarding whether Eisenmann, at the time it issued the field order, intended to compensate Phoenix on a time and materials basis for work Phoenix thereafter performed on the project. As the trial court noted when ruling on post-verdict motions, a party's intent is rarely provable by a "smoking gun," such as an outright admission that it did not intend to perform a promise. (See footnote 9, below.) Rather, intent is generally inferred from "facts and circumstances," *see* ***State v. Schleusner***, 154 Wis. 2d 821, 829, 454 N.W.2d 51 (Ct. App. 1990), and it is "seldom determinable on summary judgment." ***Muchow v. Goding***, 198 Wis. 2d 609, 629, 544 N.W.2d 218 (Ct. App. 1995). Phoenix's submissions, which included statements from an Eisenmann site representative of having doubts regarding whether Phoenix would actually be paid for the additional work, which doubts were not communicated to Phoenix, and from another Eisenmann manager that Phoenix was "naïve" in doing the additional work based on the field order, were sufficient to avoid summary judgment.

¶28 The same is true regarding the issue of Phoenix's reasonable or justifiable reliance on the representations in the "Field Order" regarding payment for additional work. An Eisenmann witness testified in a deposition that it was "reasonable" for Phoenix to assume that the Eisenmann purchasing department received a copy of the field order, and that absent objections, had approved it. An Eisenmann site manager acknowledged that subcontractors were expected to perform work authorized by field orders. In short, the evidence in the record on summary judgment, viewed in the light most favorable to Phoenix, did not entitle Eisenmann to summary dismissal of the misrepresentation claim. *See* ***State Bank of La Crosse v. Elsen***, 128 Wis. 2d 508, 512, 383 N.W.2d 916 (Ct. App. 1986).

IV.

¶29 Eisenmann next argues that the evidence at trial was insufficient to support the jury's answers regarding the misrepresentation claim, and thus, the trial court should have granted its motion to dismiss the claim or change the jury's answers regarding it.[7] A motion for a directed verdict and one to change the jury's answer to a verdict question both challenge the sufficiency of the evidence, and neither may be granted "unless the court is satisfied that, considering all credible evidence and reasonable inferences therefrom in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a finding in favor of such party." WIS. STAT. § 805.14(1). This standard applies to both the trial court's consideration of the motion and to our review on appeal.

¶30 Thus, Eisenmann faces the heavy burden of convincing us that there is "no credible evidence" to support the jury's finding. ***Weiss v. United Fire and Cas. Co.,*** 197 Wis. 2d 365, 388, 541 N.W.2d 753 (1995). Our duty is to search the record to find precisely such evidence, accepting all reasonable inferences drawn by the jury. ***Heideman v. American Family Ins. Group***, 163 Wis. 2d 847, 863-64, 473 N.W.2d 14 (Ct. App. 1991). And, if we find credible evidence to support the verdict, the fact that it may arguably be "'contradicted and the contradictory evidence be stronger and more convincing, nevertheless the verdict ... must stand.'" ***Weiss***, 197 Wis. 2d at 390 (citation omitted).

[7] Eisenmann makes the same arguments regarding the promissory estoppel claim, which we have concluded should have been dismissed as a matter of law. We will therefore not address Eisenmann's arguments challenging the evidentiary basis for Phoenix's promissory estoppel claim.

¶31 The evidence at trial regarding the disputed issues of lack of intent to perform and reasonable reliance is similar to what is contained in the summary judgment submissions.[8] We have reviewed the portions of the record cited by both parties as containing the testimony and other evidence tending to show what Eisenmann did or did not intend when it issued the field order, and why Phoenix continued to perform services on the project following the June 18th order. We are satisfied that there was credible evidence, similar to that produced on summary judgment, which supports the jury's answers regarding these issues. As the supreme court has explained:

> [A] reviewing court's consideration of the evidence (a) must be done in a light most favorable to the verdict … and (b) "when more than one inference may be drawn from the evidence presented at trial, this court is nevertheless bound to accept the inference drawn by the jury." …This standard of review becomes even more appropriate when the jury's verdict has the approval of the circuit court.

Nieuwendorp v. American Family Ins. Co., 191 Wis. 2d 462, 472, 529 N.W.2d 594 (1995) (footnote and citations omitted).

¶32 Eisenmann also cites the alleged paucity of evidence of its "present intent" not to perform, and of Phoenix's reliance on the field order, to argue that, at the very least, the jury's answers on these questions were against the weight of the evidence, entitling Eisenmann to a new trial. Put another way, Eisenmann asserts that, even if there was "credible evidence" to support the jury's answers on the questions, the answers were still contrary to the great weight and clear

[8] Eisenmann begins his argument for changed answers or a directed verdict as follows: "For much the same reasons stated above [regarding the denial of summary judgment], the evidence [Phoenix] produced at trial was insufficient to support a claim for misrepresentation …."

preponderance of the evidence. This argument thus involves the same evidence (or lack of it) as the motion to direct a verdict or change answers, but requires a different balance point for our review.

¶33 When we review a trial court's decision to grant or deny a new trial motion under WIS. STAT. § 805.15(1), grounded on the claim that the verdict is "contrary to the great weight and clear preponderance of the evidence," we accord "great deference" to the trial court's exercise of discretion. ***Sievert v. American Family Mut. Ins. Co.***, 180 Wis. 2d 426, 431, 509 N.W.2d 75 (Ct. App. 1993). The reason for our deference is the trial court's superior opportunity to evaluate the evidence by observing the demeanor of witnesses and gauge the persuasiveness of their testimony. *See* ***Krolikowski v. Chicago & N.W. Transp. Co.***, 89 Wis. 2d 573, 580-81, 278 N.W.2d 865 (1979) (citing ***Bartell v. Luedtke***, 52 Wis. 2d 372, 377, 190 N.W.2d 145 (1971)). We are satisfied that the trial court did not erroneously exercise its discretion in denying Eisenmann's new trial request.[9]

[9] In addressing Eisenmann's motions challenging the evidence to support the jury's answers on the misrepresentation claim, the trial court said in part:

(continued)

¶34 Eisenmann also cites as grounds for a new trial the court's failure to give an instruction it requested regarding its "present intent" at the time of its alleged misrepresentation. Eisenmann requested the court to include the following language in an instruction on the elements of misrepresentation:

> First, that Eisenmann made a representation of fact that it would do something in the future and at the time it made the representation or promise Eisenmann[] did not intend to perform that promise. The fact that Eisenmann did not perform its promise is not by itself sufficient evidence that Eisenmann never intended to perform its promise. In order for you to determine that Eisenmann did not intend to perform its promise, there must be additional evidence of Eisenmann's intentions at the time it made the promise.

> [W]e have to take a look at the relationship of the parties before, at the time that field order was issued and after the field order was issued … to infer what in fact the intent was at the time the field order was issued…. In this case, like every other case I have ever tried dealing with these issues, there is not a smoking gun. There isn't somebody that comes forward and says, you know, jury, I didn't intend to pay that. That just doesn't happen…. We have in this case the whole factual scenario…. That was within the factual authority of the jury to make that determination. I think there was enough to infer that at the time the purchase [sic] order was issued with knowledge that [an Eisenmann employee] had, and subsequent conduct between the parties, [the Eisenmann employee] made the statement he didn't think … Phoenix was going to get paid on that purchase [sic] order that they'd have to deal with the … purchasing department, is just an indication of what was going on between these parties at that site. I think a jury could have concluded that in fact there was not present intent to pay. Based on what occurred before, which is 98-95 percent … of the … base contract was already paid off by that time, the conduct during that period of time, push to get more people on the job by Eisenmann, get more Phoenix people on the job and the subsequent issuance of the purchase [sic] order and subsequent conduct between the parties I think would leave them enough upon which to base their verdict.

The trial court declined to add the requested language, electing instead to give the pattern instructions on misrepresentation. *See* WIS JI—CIVIL 2401, 2402.

¶35 Our review of the trial court's jury instructions is deferential; we inquire only whether the trial court misused its broad discretion to give jury instructions. *See* ***Young v. Professionals Ins. Co.***, 154 Wis. 2d 742, 746, 454 N.W.2d 24 (Ct. App. 1990). We will reverse the trial court and order a new trial only if the jury instructions, taken as a whole, misled the jury or communicated an incorrect statement of the law. *See* ***Miller v. Kim***, 191 Wis. 2d 187, 194, 528 N.W.2d 72 (Ct. App. 1995). Eisenmann does not argue that the instruction which the court gave erroneously stated the law, but that it was incomplete in not spelling out in more detail for the jury the necessity for Phoenix to prove Eisenmann's present intent not to perform its promise of payment. Eisenmann argues that the "jury must have been confused and misled by the failure to include Eisenmann's requested instruction because, as discussed above, there is no evidence to support a finding of the requisite 'present intent.'"[10] We disagree.

¶36 The instruction the court gave on the elements of misrepresentation plainly communicated the need for Phoenix to prove that Eisenmann made a "representation of fact" that was "untrue," knowing it to be untrue or "recklessly without caring if it was true or false." The instruction included an admonition that an "expression of opinion which either indicates some doubt as to the speaker's belief in the existence of a state of fact, or merely expresses the speaker's judgment on some matter" was not actionable. Most importantly, however, the

[10] As Eisenmann's argument challenging the misrepresentation instruction indicates, it is in large measure a renewal of its challenge to the sufficiency of the evidence to support the misrepresentation claim.

specific question asked of the jury on the verdict emphasized the "present intent" requirement: "At the time Eisenmann made the representation [that it "would pay for time and materials used by Phoenix on the project site"], did Eisenmann intend not to pay for time and materials used by Phoenix on the project site?"

¶37 We are satisfied that the instructions and verdict, taken as a whole, properly focused the jury's attention on the factual issues it needed to decide, including whether Eisenmann had a "present intent" to perform its promise of payment in the June 18th field order." Accordingly, we conclude the trial court did not erroneously exercise its discretion in declining to include the additional language requested by Eisenmann.

V.

¶38 Next, Eisenmann, again asserting insufficiency of evidence, seeks relief from the damages the jury awarded in the form of either a directed verdict, a changed answer, or a new trial. We have set forth above the relevant standards for our review of these claims. Eisenmann contends that the documentation for Phoenix's claim was inadequate. Specifically, Eisenmann asserts that "time records on which it bases its claim are too unreliable to have allowed the jury to establish Phoenix's alleged damages to a reasonable degree of certainty." Eisenmann also argues that Phoenix failed to adequately "distinguish between work to complete base contract items and any 'additional manpower to satisfy the accelerated schedule' under the June 18th field order," and it challenges Phoenix's claim of $1500 per week in "expenses" on the GM project. Finally, Eisenmann argues that the damage award is "excessive" because Phoenix "did not add any manpower" after the issuance of the field order, having maintained the same level, or even a reduced level, of staffing at the GM site after June 18th.

¶39 We are not persuaded that the trial court erred in sustaining the jury's damage award. We agree with Eisenmann's assertion that it was Phoenix's burden to establish its damages and that juries are not permitted to arrive at damages awards on pure speculation. *See* ***Reyes v. Greatway Ins. Co.***, 220 Wis. 2d 285, 301, 582 N.W.2d 480 (Ct. App. 1998). Nonetheless, "[t]he amount of damages awarded is a matter resting largely in the jury's discretion." ***Zintek v. Perchik***, 163 Wis. 2d 439, 480, 471 N.W.2d 522 (Ct. App. 1991), *overruled on other grounds by* ***Steinburg v. Jensen***, 194 Wis. 2d 439, 534 N.W.2d 361 (1995). Moreover, as with other jury findings, when a jury's damage award "has the approval of the trial court, the scope of review is even more limited." ***T&HW Enters. v. Kenosha Assocs.***, 206 Wis. 2d 591, 602, 557 N.W.2d 480 (Ct. App. 1996).

¶40 We agree with Phoenix that Eisenmann's arguments challenging the damages award are essentially the same arguments it made to the jury, without success, and we conclude that Phoenix presented sufficient evidence from which the jury could award the damages it did. Phoenix based its claim against Eisenmann on the number of "manweeks" Phoenix personnel spent working at the GM site. It submitted spreadsheets and related documents showing the weeks Phoenix personnel, identified by name, worked on the GM project. From the total manweeks it documented, Phoenix deducted some 142 manweeks, which witnesses testified the parties had agreed should be allocated to "start-up" services covered by the "base contract."

¶41 The jury awarded several hundred thousand dollars less in damages than Phoenix claimed,[11] perhaps in recognition of some of the "inadequacies" in documentation of which Eisenmann complained. We cannot say, however, that the damages awarded were based on pure speculation, given that the amounts sought by Phoenix for work it performed pursuant to the field order were supported by the testimony it presented and the exhibits it produced. Eisenmann's challenge goes more to the weight and credibility of the evidence supporting Phoenix's claim, and these were matters for the jury to determine. *See* ***Mullen v. Braatz***, 179 Wis. 2d 749, 756, 508 N.W.2d 446 (Ct. App. 1993) (weight and credibility are matters within the province of the trier of fact).

VI.

¶42 For the reasons discussed in the preceding sections of this opinion, we affirm the trial court's entry of judgment in favor of Phoenix on the jury's verdict. We turn now to the issue of attorneys' fees. The parties' contract included the following provision:

> Should it become necessary for any party to this Contract to seek the assistance of legal counsel to enforce any part of this Subcontract or to maintain or defend any cause of action or arbitration arising out of this Contract … the prevailing party shall be entitled to recover from the losing party all costs and expenses reasonably incurred, including, but not limited to attorneys' fees.

The trial court awarded Eisenmann $15,750 in attorneys' fees, and $2,956.50 in costs, in view of the fact that, by stipulation, it recovered $80,000 from Phoenix for materials and equipment Eisenmann furnished to Phoenix under the parties'

[11] Phoenix asked the jury to award it a total of $1.4 million, which included interest and "retainage" for base contract work. The jury awarded $946,825.

contract. The court denied Eisenmann's request for additional fees and costs, and it also denied Phoenix's request for attorneys' fees under the contract as the overall "prevailing party," granting Phoenix only its taxable costs. Both parties claim error in the trial court's rulings on their respective attorneys' fees requests.

¶43 Phoenix argues that its recovery of $946,825 from Eisenmann in a "cause of action arising out of" the contract entitles it to an award of attorneys' fees. We disagree. Phoenix is in the awkward position of arguing that its recovery of misrepresentation damages "arose out of" the contract, while at the same time, as we have discussed, it argued (successfully) both here and in the trial court that it was entitled to recover tort damages *notwithstanding* the parties' contract. Although it is true that Phoenix also "prevailed" by defeating, except to the extent of the stipulated sum, Eisenmann's counter-claim for breach of the contract, it did not prevail on its own contractual claim against Eisenmann.

¶44 In short, the claims each party brought against the other which clearly "arose out of" their contract were fought to a virtual draw. Phoenix argues that the phrase "arising out of" may be construed broadly, and we agree that in some contexts, that is the case.[12] Here, however, the context in which the phrase is used narrows its meaning: recoverable fees are those incurred by a party "to enforce any part of this Subcontract or to maintain or defend any cause of action or arbitration arising out of this Contract." We conclude that the provision cannot be read to extend to fees incurred by a party to obtain damages from the other on a

[12] *See* ***Thompson v. State Farm Mut. Auto. Ins. Co.***, 161 Wis. 2d 450, 456, 568 N.W.2d 432 (1991) (holding that the accidental shooting of a passing motorist by a hunter sitting in the bed of a pickup truck "arose out of" the use of the truck for purposes of underinsured motorist coverage).

non-contractual theory. Although Phoenix recovered over $900,000 in damages from Eisenmann, it did so only because it succeeded in convincing jurors that Eisenmann had committed a tort. We therefore conclude that the trial court did not err in determining that Phoenix was not the prevailing party in "any cause of action … arising out of" the parties' contract.

¶45 We next consider whether the court's award to Eisenmann of partial fees and costs was improper, as Phoenix claims, or inadequate, as Eisenmann maintains. We conclude it was neither.

¶46 Phoenix argues that because Eisenmann lost on its breach of contract claim before the jury, and only obtained an offset for $80,000 pursuant to a stipulation, Eisenmann did not "gain victory" or "prevail" in its contract claim against Phoenix. Phoenix maintains that Eisenmann was clearly the "losing party" in this litigation, and that the conceded offset, amounting to less than ten percent of the jury's award in Phoenix's favor, does not alter the overall outcome. Finally, Phoenix attacks the award of fees and costs to Eisenmann as being "excessive." We reject Phoenix's arguments.

¶47 The amount of reasonable attorneys' fees awarded at the conclusion of litigation to a party claiming them under a contract or statute is a matter committed to the discretion of the trial court. This is so because the trial court has the expertise and best opportunity to fully consider the matter of attorneys' fees requested by a prevailing party. ***First Wisconsin Nat'l Bank v. Nicolaou***, 113 Wis. 2d 524, 537, 335 N.W.2d 390 (1983). The trial court is keenly aware of the amount of time consumed by an action and of the nature and complexity of the issues raised. ***Tesch v. Tesch***, 63 Wis. 2d 320, 334-35, 217 N.W.2d 647 (1974). In addition, the court has the opportunity to observe all of the work which has

gone into an action from its commencement, as well as to assess the quality of the services rendered by counsel. ***Id***. We conclude that a like measure of deference is owed to a trial court's allocation of partial fees to a partially successful party because it is in a better position than we to evaluate what portion of an attorney's time and expertise was devoted to one among several litigated issues. *Cf*. ***Footville State Bank v. Harvell***, 146 Wis. 2d 524, 539-40, 432 N.W.2d 122 (Ct. App. 1988).

¶48 The trial court awarded Eisenmann attorneys' fees at $175 per hour for ninety hours and allowed it some of its costs for travel, transcripts and copies. Eisenmann reported incurring a total of $484,028.24 in attorneys' fees.[13] The $15,750 in fees the court awarded to Eisenmann thus amounted to about three percent of the total. We cannot say that the trial court erroneously exercised its discretion in awarding Eisenmann a minimal portion of its fees for recovering on a contractual claim that was, similarly, a very small part of the amounts in controversy in this litigation. Accordingly, we affirm the award, rejecting both Phoenix's assertion that the award was too high and Eisenmann's that it should have received all or a greater part of its fees and costs for being the only party to "prevail" on a contractual issue.

VII.

¶49 Two issues remain. Eisenmann argues that the trial court erred when it permitted Phoenix to tax "express charges" totaling $3,705.10 as an allowable cost. We disagree. The trial court concluded that Phoenix had "established that

[13] Phoenix's claim for attorneys' fees totaled $343,834.50.

the express charges resulted from the costs of both preparing witnesses for trial and shipping deposition exhibits from Milwaukee to Atlanta for purposes of depositions which were to [be] held in Atlanta at the request of [Eisenmann]." Disbursements for "express" are specifically allowable under WIS. STAT. § 814.04(2), and Eisenmann has not persuaded us that the trial court erred in concluding that the express charges were "necessary disbursements." *See* ***Rhiel v. Wisconsin County Mut. Ins. Corp.***, 212 Wis. 2d 46, 57, 568 N.W.2d 4 (Ct. App. 1997).

¶50 Finally, in addition to challenging the trial court's rulings regarding attorneys' fees, Phoenix argues in its appeal that the trial court erred in not awarding additional damages on the promissory estoppel claim. As we have discussed, the existence of a "modified agreement" between the parties precludes Phoenix from recovering on a promissory estoppel theory. Thus, we need not address whether the court erred in not awarding additional damages.

CONCLUSION

¶51 An appeal of a final order or judgment brings before this court "all prior nonfinal judgments, orders and rulings adverse to the appellant." WIS. STAT. Rule 809.10(4). Accordingly, we reverse the "Order Regarding Post-Trial Motions," entered May 3, 2000, insofar as it denied Eisenmann's motion for judgment notwithstanding the verdict seeking dismissal of Phoenix's promissory estoppel claim. We affirm the order in all other respects. Because our dismissal of the promissory estoppel claim does not affect the appealed and cross-appealed judgment, we affirm the judgment entered in favor of Phoenix for $957,196.73.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.