

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 18, 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. 01-1978
STATE OF WISCONSIN**

Cir. Ct. No. 99CV8683

**IN COURT OF APPEALS
DISTRICT I**

**ECLIPSE MEDIA, INC., A WISCONSIN CORPORATION,
FRED EISENHAUER AND MARK BOSLEY,**

PLAINTIFFS-RESPONDENTS-CROSS-APPELLANTS,

v.

**QUAD/CREATIVE, INC., A WISCONSIN CORPORATION, AND
QUAD/MERGER, INC., A FOREIGN CORPORATION,**

DEFENDANTS,

QUAD/CREATIVE, LLC, A FOREIGN COMPANY,

DEFENDANT-APPELLANT-CROSS-RESPONDENT.

APPEAL and CROSS-APPEAL from a judgment and an order of the circuit court for Milwaukee County: DAVID HANSHER, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Quad Creative, Inc., Quad Creative, LLC, and Quad Merger, Inc. (collectively, Quad), appeal from the judgment entered after a jury found them liable to Eclipse Media, Inc. (Eclipse) under the theories of breach of contract, quantum meruit, and promissory estoppel, and found Quad liable to Fred Eisenhauer and Mark Bosley on their claims of quantum meruit and promissory estoppel. Quad contends that it was entitled to judgment notwithstanding the verdict because, as a matter of law, there was no binding oral contract between Quad and Eclipse. Quad also alleges that the evidence is insufficient to support the jury's verdict that Quad and Eclipse entered into an oral agreement. Finally, Quad claims that the trial court erred in allowing Eclipse contract damages that made it better off than it would have been had the parties performed under the contract.

¶2 Eclipse, Eisenhauer, and Bosley cross-appeal from the trial court's order dismissing their intentional and statutory misrepresentation claims, and that part of the judgment wherein the trial court reversed the jury's award of attorneys' fees and denied recovery of prejudgment interest, non-taxable costs and other taxable costs.¹ Eclipse contends that the trial court erred in granting Quad's motion for summary judgment with respect to Eclipse's misrepresentation claims, and further erred in denying Eclipse's request for leave to amend its pleadings. Eclipse also alleges that the trial court erred in reversing the jury's verdict on the issue of its attorneys' fees. We affirm the trial court with respect to all issues except contract damages. With respect to contract damages, the award is reversed

¹ Hereinafter, Eclipse Media, Inc., Fred Eisenhauer, and Mark Bosley are collectively referred to as Eclipse.

and the matter remanded for the trial court to enter judgment in the amount of \$126,268.00.

I. BACKGROUND.

¶3 Quad Graphics, Inc., printed catalogs for nearly twenty years for Nasco, Inc., a company that sells educational products. When Quad Graphics learned that Nasco intended to hire a company to build an e-commerce website, Quad Graphics, through its subsidiaries, Quad Creative, Inc., Quad Creative, LLC, and Quad Merger, Inc., solicited the business.

¶4 Nasco first hired Quad to develop an internet business strategy (IBS), which Nasco would then use to solicit bids for the website project from a number of vendors, including Quad. Quad, through Chris DeSantis, an internet business strategist whom it hired, sought the advice of Eclipse to develop the technical recommendations for the IBS. In turn, Eclipse hired Fred Eisenhower, a technology specialist, to research and develop the technological recommendations for the IBS and the proposed bid. Eisenhower asked Mark Bosley, another independent technical specialist, to join the team. Meanwhile, Quad also worked on drafting a bid proposal to win the website project.

¶5 On April 14, 1999, while the parties were completing the IBS, Quad and Eclipse submitted a bid for the website project which identified Quad's role in the design and marketing of the website and Eclipse's role as the technical partner. On April 20, 1999, Quad and Eclipse presented the completed IBS to Nasco. Quad presented the business strategy and Eclipse presented the technological aspects. Nasco informed the parties that it would use the IBS to solicit bids from a number of vendors. Subsequently, Nasco received bids from two additional companies offering e-commerce website services.

¶6 In April and May of 1999, in anticipation of winning the website project, Quad and Eclipse began mapping out their business relationship and their plan for developing the website. On June 21, 1999, Nasco advised Quad that it had accepted its bid. On June 22, 1999, Mary Ellen Aspenson, a sales representative at Quad, notified Michael Eglash, one of Eclipse's owners, that Quad and Eclipse had won the job. Aspenson testified that she called Eglash because "it was [her] understanding that Eclipse was going to be [the] technology partner," based on the fact that the proposal that was accepted by Nasco listed Eclipse as the "technology partner." After Nasco's acceptance, another Quad employee, Jacci Mohr, called Joe Krisberg, also a part owner of Eclipse, and asked if Eclipse was accepting any other projects. Mohr expressed concern that additional work outside of the Nasco project may prevent Eclipse from completing the Nasco project on time. Krisberg assured Mohr that Eclipse would not accept any new work and would devote its full attention to the Nasco project.

¶7 On June 24, 1999, Krisberg sent Quad three interrelated contract proposals. Each was unsigned and related to different aspects of the project. The first proposed agreement outlined the consulting and programming services. Eclipse agreed to perform these services, including ordering hardware and software, installation of hardware and software, system testing, and training development. On June 24, 1999, Eclipse sent Quad two versions of the first proposal – one indicating an equipment, hardware and software cost of \$68,524, and the other indicating a cost of \$78,524. The second proposed agreement detailed Eclipse's duties in registering certain Uniform Resource Locators

(URLs)² and promoting the Nasco website. The third proposed agreement dealt with Eclipse's responsibilities concerning the image conversion process, *i.e.*, converting the images from Nasco's print catalogs, which are in a high-resolution format, to a low-resolution format that can be loaded into an image database and accessed on the website. Each of the proposed agreements provided a section for the signatures of Krisberg, as the president of Eclipse, and a representative of Quad. The first and third contracts also contained the following provision:

Upon signing of this agreement, [Quad] shall pay Eclipse Media a deposit of 50% of Phase I as a precondition for Eclipse Media's performance ... 100% of equipment and hardware costs prior to purchase of equipment and software ... [and] 33% of Phase II and Phase III prior to start of each phase.

....

[Quad] agrees that no work shall commence until deposits and Eclipse Media receives payments.

None of the proposed agreements were signed by Krisberg when Eclipse sent them to Quad, and no representative of Quad ever signed them.

¶8 On June 24, 1999, representatives from Quad met with representatives from Eclipse, including Eisenhauer and Bosley, to outline and assign tasks for the project. The minutes of this meeting, which were recorded and later sent to members of the team via e-mail, stated, "It is expected that client [Nasco] will provide cash-in-hand no later than July 14, 1999, at which time Eclipse will order equipment and begin Phase I." This e-mail message specifically listed Eglash, Krisberg and Bosley as part of the "team member list." On June 25,

² A Uniform Resource Locator is a network designation used to locate information on the World Wide Web, such as <http://www.courts.state.wi.us>.

1999, Eclipse sent Quad two invoices – one for the equipment totaling \$78,524, and the other for 50% of the Phase I costs totaling \$48,750.

¶9 On July 8, 1999, Aspenson sent an e-mail message to Eglash stating, “We have returned the proposal changing the name of signature to the president. He will sign and we can move ahead.” Quad then scheduled a “kickoff meeting” for July 15, 1999, with Eclipse and Nasco to officially begin the project. Eglash, Krisberg, Eisenhauer and Bosley attended the “kickoff meeting” as representatives of Eclipse. At this meeting, Quad brought up the issue of image conversion, informing Nasco that the process would be more costly than originally anticipated, while insinuating that Eclipse was responsible for the conversion. At the conclusion of the meeting, Eclipse expressed its displeasure with Quad’s suggestion that the image conversion was Eclipse’s responsibility. In response, Quad informed Eclipse that it would come up with a new proposal that would incorporate image conversion. Bosley and Eisenhauer then informed Quad that they would still begin working on the project as scheduled at Nasco the next day. Quad did not object.

¶10 However, Quad soon formed a plan to replace Eclipse. On July 19, 1999, Quad met with Berbee Information Network Group, another technology consulting company, to replace Eclipse. Unaware of this development, Eclipse, Eisenhauer and Bosley continued their work on the project. Additionally, Eclipse revised the third proposed agreement concerning image conversion, reducing its costs for this part of the process from \$118,800 to \$54,600.³ Eclipse sent this

³ Eglash later testified that Eclipse decided to “bite the bullet” because this project meant a great deal to his company.

modified proposal to Quad on July 16, 1999. In response, Quad asked to meet with Eclipse on July 23, 1999, at which time Quad informed Eclipse that it was too small of a company to complete the project and that it had been replaced.

¶11 On October 25, 1999, Eclipse Media, Inc., sued Quad for breach of contract, misrepresentation, and promissory estoppel. On March 28, 2000, Eclipse Media, Inc., filed an amended complaint adding a claim for quantum meruit and adding Eisenhower and Bosley as plaintiffs.⁴ On July 7, 2000, Quad moved for summary judgment on all claims. The trial court denied the motion for summary judgment as to the breach of contract, quantum meruit and promissory estoppel claims. However, the trial court granted summary judgment on the remaining claims, concluding that Eclipse failed to plead their intentional fraud claim with particularity, and that Eclipse failed to establish statutory fraudulent representation pursuant to WIS. STAT. § 100.18(1).

¶12 On March 12, 2000, the jury found that Quad had breached its contract with Eclipse Media causing damages in the amount of \$329,338. The jury also found that Eclipse Media was entitled to its attorneys' fees pursuant to the terms of the agreement. Finally, the jury found in favor of Eclipse on its quantum meruit and promissory estoppel claims. Following the trial, the parties filed various and numerous post-verdict motions. Eclipse sought an award of attorneys' fees, prejudgment interest and all costs relating to the litigation. Relevant to this appeal, Quad sought to change the jury's answer on the special verdict form as to the contract claim, asserting that the jury's finding that there

⁴ Eisenhower and Bosley only joined in the misrepresentation, promissory estoppel and quantum meruit claims.

was a contract was contrary to the law as well as the evidence. Quad also argued that the breach of contract damages were contrary to the law and evidence, and that the jury's finding regarding Eclipse's attorneys' fees was improper as a matter of law. The trial court granted Quad's motion as to the attorneys' fees, but denied the remainder of the motions.

II. ANALYSIS.

A. *A valid contract was formed.*

¶13 Quad first contends that no contract existed because the proposed agreements required acceptance to be made by signing and making the necessary down payments, which never occurred. In response, Eclipse argues: (1) Quad waived the argument by never raising it in the trial court; and (2) alternatively, Eclipse and Quad entered into a binding contract because Eclipse waived the signature and down payment requirements and Quad orally accepted the contract.

¶14 First, “as a matter of judicial policy, we decline to consider legal arguments that are posed for the first time on appeal and which were not raised in the trial court.” *Department of Taxation v. Scherffius*, 62 Wis. 2d 687, 696-97, 215 N.W.2d 547 (1974). “It is the practice of this court not to consider issues raised for the first time on appeal since the trial court has had no opportunity to pass upon them.” *Hopper v. Madison*, 79 Wis. 2d 120, 137, 256 N.W.2d 139 (1977). As explained by the supreme court in *Cappon v. O’Day*, 165 Wis. 486, 162 N.W. 655 (1917), this rule is one of administration:

The reason for the rule is plain. If the question had been raised below, the situation might have been met by the opposite party by way of amendment or of additional proof. In such circumstances, therefore, for the appellate court to take up and decide on an incomplete record questions raised before it for the first time would, in many instances

at least, result in great injustice, and for that reason appellate courts ordinarily decline to review questions raised for the first time in the appellate court.

Id. at 490-91.

¶15 However, new arguments are permitted on an issue that was properly raised in the trial court. See *State v. Holland Plastics Co.*, 111 Wis. 2d 497, 505, 331 N.W.2d 320 (1983) (holding that an additional argument on issues already raised in the trial court does not violate the general rule against raising issues for the first time on appeal). An “issue” is defined as “a point in question of law or fact,” including “a single material point of law or fact depending in a suit that is affirmed by one side and denied by the other and that is presented for determination at the conclusion of the pleadings.” *State v. Weber*, 164 Wis. 2d 788, 789 n.2, 476 N.W.2d 867 (1991). In contrast, an “argument” is defined as “a reason given for or against a matter under discussion,” or, alternatively, “a coherent series of reasons, statements, or facts intended to support or establish a point.” *Id.* Therefore, “[a]lthough we will not generally review an issue raised for the first time on appeal, we will permit a new argument to be raised on an issue which was raised below.” *L.L.N. v. Clauder*, 203 Wis. 2d 570, 590 n.14, 552 N.W.2d 879 (Ct. App. 1996) (citation omitted), *rev’d in part on other grounds*, 209 Wis. 2d 674, 563 N.W.2d 434 (1997).

¶16 In the instant case, we conclude that Quad did not waive this issue. In its brief in support of its motions after the verdict, Quad argued: “The Verdict Cannot Stand Because There Can Be No Verbal Contract If Both Parties Intended That There Would Be No Agreement In The Absence Of A Signed Document.” Additionally, in its reply brief in support of its motion after the verdict, Quad again argued: “In Wisconsin, Oral Agreements Are Not Binding On Parties If The

Parties Did Not Intend To Be Bound Until A Later Formalized Written Agreement Was Entered Into.” Thus, our review of the record indicates that Quad addressed the same issue with nearly identical arguments at the trial court level as on appeal.⁵ Accordingly, Quad did not waive the issue.

¶17 Consequently, we address Quad’s argument that that no contract existed because the proposed agreements required acceptance to be made by signing and making the necessary down payments. First, Quad claims that it is entitled to judgment notwithstanding the verdict because, as a matter of law, it could not have accepted the proposed agreements without satisfying these requirements. Second, Quad argues that even if it could have orally accepted Eclipse’s proposals without satisfying these requirements, it is entitled to judgment notwithstanding the verdict because an objective view of the parties’ conduct demonstrates that the parties did not intend to enter into an oral contract. We disagree with both of these contentions.

¶18 WISCONSIN STAT. § 805.14(5)(b) (1999-2000)⁶ establishes the grounds for a motion for judgment notwithstanding the verdict:

Motion for judgment notwithstanding verdict. A party against whom a verdict has been rendered may move the court for judgment notwithstanding the verdict in the event that the verdict is proper but, for reasons evident in the record which bear upon matters not included in the verdict, the movant should have judgment.

⁵ We also note that Quad has cited a majority of the same case law for nearly identical propositions in the trial court and on appeal.

⁶ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

In contrast, § 805.14(1) establishes the test for challenging the sufficiency of the evidence:

TEST OF SUFFICIENCY OF EVIDENCE. No motion challenging the sufficiency of the evidence as a matter of law to support a verdict, or an answer in a verdict, shall 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.

The distinction between these two statutory sections was highlighted in *Greenlee v. Rainbow Auction/Realty Co.*, 202 Wis. 2d 653, 553 N.W.2d 257 (Ct. App. 1996):

A motion for judgment notwithstanding the verdict concedes that the findings of the verdict are true but contends that the moving party should have judgment for reasons evident in the record other than those decided by the jury. In contrast, a motion to change an answer in the verdict challenges the sufficiency of the evidence to sustain the answer. A motion challenging the sufficiency of the evidence may not be granted unless the court is satisfied that, considering all credible evidence in the light most favorable to the nonmoving party, there is no credible evidence to sustain the verdict.

Id. at 661-62 (citations omitted).

¶19 First, with respect to whether a party may waive a signature requirement, Quad is not disputing the pertinent facts. Instead, Quad argues that it should have judgment as a matter of law because it could not have legally accepted the proposed agreements absent satisfaction of the signature requirements – an issue not decided by the jury. Where the evidence concerning the creation of a contract between the parties is undisputed, issues concerning the contract formation are questions of law. *See Consolidated Papers, Inc. v. Dorr-Oliver, Inc.*, 153 Wis. 2d 589, 595, 598, 451 N.W.2d 456 (Ct. App. 1989). We

review such issues without deference to the decision of the trial court. *See id.* at 598.

¶20 We previously addressed a similar issue in *Consolidated Papers*. In that case, Consolidated solicited a bid from Dorr-Oliver for a mechanism used for manufacturing paper. *See id.* at 595. Dorr-Oliver then sent Consolidated a revised sales proposal. *See id.* Attached to the proposal was a form entitled “General Terms and Conditions.” *See id.* In part, the terms and conditions stated that the proposal became a binding contract only upon approval in writing by a Dorr-Oliver officer. *See id.* at 597. Although the proposal was never signed by Consolidated or approved in writing by Dorr-Oliver, Consolidated placed an oral order with the Dorr-Oliver home office approximately three weeks after receiving the revised proposal. *See id.* In concluding that Consolidated orally accepted Dorr-Oliver’s offer, we explained:

A written agreement need not be signed by both parties to be effective. Consolidated argues, however, that it could not have accepted the written terms and conditions in Dorr-Oliver’s proposal unless both Consolidated and Dorr-Oliver’s home office had signed the proposal in the spaces provided. We disagree.

The provision in its proposal requiring the signature of an officer at its home-office was for Dorr-Oliver’s protection. By failing to contest Consolidated’s May 14 oral acceptance (confirmed by written purchase order on May 18), Dorr-Oliver waived that protection. Consolidated cannot invoke that provision to deny that it had accepted the offer, namely the April 25 proposal, and so entered a binding contract.

Id. at 599 (citations omitted).

¶21 Similarly, in *Albright v. Stegeman Motor Car Co.*, 168 Wis. 557, 170 N.W. 951 (1919), Albright ordered a motor truck to be built by the Stegeman Motor Car Company, a manufacturer of motorcars and trucks. *See id.* at 557. The

written order contained the following clause: “This proposal, if accepted, constitutes a contract, subject to the approval of the *Stegeman Motor Car Company*, at its offices in Milwaukee, and must be countersigned by an officer of the company to be valid and in force.” *Id.* at 558. Despite this language, the proposal was never signed by a representative of the Stegeman Motor Car Company. *Id.* at 560. Absent satisfaction of the signature requirement, the supreme court concluded that the parties otherwise demonstrated their intention to be bound by the terms of the contract because, among other facts, Albright had paid \$450 at the time of signing the order which was accepted by the company and the company had begun building the truck. *Id.* at 559-61. In concluding that a contract existed, the supreme court noted:

It is quite fundamental that parties may become bound by the terms of a contract, even though they do not sign it, where their intention to do so is otherwise indicated. Manifestly the provision requiring the order in question to be countersigned by an officer of the company was inserted for the benefit of the company, and to prevent its liability thereon until ratified by some one occupying a position of responsibility with the company. If a contracting party may be bound on a contract by acts evidencing an intent to that end, we see no reason why the provision here under consideration could not be waived, nor why the company could not by its acts accept the order, or become estopped to deny its binding force.

Id. at 560.

¶22 Additionally, we have specifically held that the doctrine of waiver, as applied to a contractual condition of performance, applies equally to contractual conditions of acceptance. See *C.G. Schmidt, Inc. v. Tiedke*, 181 Wis. 2d 316, 321, 510 N.W.2d 756 (Ct. App. 1993). Therefore, although parties cannot, generally, form a contract if acceptance does not occur in the manner required, any party to a contract may waive a provision that is for its benefit. See *id.*; see also

Nelson, Inc. v. Sewerage Comm'n of Milwaukee, 72 Wis. 2d 400, 419, 241 N.W.2d 390 (1976) (“[A] contract was formed even though the formal written notice of award had not been sent or the contract executed.”). Here, the provisions requiring both parties’ signatures and a down payment were inserted into the proposals by Eclipse for its own benefit. Accordingly, we conclude that Eclipse had the authority to waive these provisions and allow Quad to orally accept the proposals.

¶23 Second, Quad contends that the parties’ objective intent demonstrates that they planned only to enter into a written agreement. In support of this contention, Quad makes the following points: (1) “Here, the parties’ actions and words show that they intended all along that any formal agreement between them relating to development and creation of the Nasco e-commerce website should be made in writing.”; (2) “Moreover, the actions of Eclipse representatives ... show that Eclipse representatives did not believe that there was ... a contract between the parties.”; and (3) “Furthermore, Eclipse’s representatives admitted that they intended that there be a written and signed contract....” Based on these factors, Quad argues that it is entitled to judgment notwithstanding the verdict.

¶24 In a case such as this, the intent of the parties must necessarily be derived from a consideration of their words, both written and oral, and their actions. *Household Utils., Inc. v. Andrews Co.*, 71 Wis. 2d 17, 29, 236 N.W.2d 663 (1976); *see also Jungdorf v. Little Rice*, 156 Wis. 466, 470, 145 N.W. 1092 (1914) (“[T]here was evidence from which the jury as triers of fact might infer that the oral agreement was complete in its terms and that performance on the part of the plaintiff should commence at once without waiting for the execution of the written contract and bond.”). Whether there is intent to make a contract is a

question of fact. *See National Steel Serv. Ctr., Inc. v. Wollin Silos & Equip., Inc.*, 92 Wis. 2d 133, 138, 284 N.W.2d 606 (1979).

¶25 We conclude that the trial court properly denied Quad’s motion for judgment notwithstanding the verdict. Question one of the special verdict form asked, “Did Eclipse Media have an agreement with [Quad] to provide technical services for the Nasco website project?” Eleven of the twelve jurors answered, “YES.” Quad’s arguments directly challenge this question of fact considered by the jury. Therefore, judgment notwithstanding the verdict would be improper. *See Kolpin v. Pioneer Power & Light Co.*, 162 Wis. 2d 1, 28-29, 469 N.W.2d 595 (1991) (“A motion for judgment notwithstanding the verdict admits for the purposes of the motion that the findings of the verdict are true, but asserts that judgment should be granted the moving party on grounds other than those decided by the jury.”).

B. The evidence is sufficient to support the jury’s verdict.

¶26 Quad also contends that there is no credible evidence to sustain the jury’s verdict that Eclipse had an agreement with Quad to provide technical services for the Nasco website project. Quad argues: (1) there is no evidence that the parties had a meeting of the minds on all of the essential terms of the proposal; and (2) there is no evidence that the parties intended to be bound by the agreement. Specifically, Quad claims that the parties failed to agree on the costs for equipment, hardware and software, and the allocation of responsibility for the image conversion. Thus, Quad concludes that the parties merely had an “agreement to agree,” which was the subject of continued negotiation, and that the answer on the special verdict form should be changed to, “NO,” or alternatively, a

new trial should be granted.⁷ We disagree and conclude that the evidence supports the jury's finding that the parties entered into an oral contract.

¶27 “[C]ontracts require the element of mutual meeting of the minds and of intention to contract.” *Garvey v. Buhler*, 146 Wis. 2d 281, 289, 430 N.W.2d 616 (Ct. App. 1988). “Meeting of the minds” or “mutual assent” does not mean that the parties must subjectively agree to the same interpretation at the time of contracting. *See Nauga, Inc. v. Westel Milwaukee Co.*, 216 Wis. 2d 306, 313, 576 N.W.2d 573 (Ct. App. 1998). Instead, mutual assent is judged by an objective standard. *See id.* Therefore, we look to the parties' words, written and oral, as well as their conduct, to determine if they intended to enter into a contract and agreed on the essential terms of the contract. *See id.*

¶28 In denying Quad's motion challenging the sufficiency of the evidence, the trial court stated:

The Court also refuses to set aside a verdict or grant a new trial because I find ... that there was sufficient evidence for the jury to find a binding verbal or oral agreement between Quad and Eclipse, the terms of which the parties had agreed to prior to work commencing.

The Court also finds there was sufficient evidence to support the jury's basic finding, and obviously finding that there was a meeting of the minds on the essential terms and conditions of the work to be performed by Eclipse....

There's no question in my mind and obviously the jury's mind that both parties believed they would be bound by the essential terms of the contract ... even though the final signatures were not affixed.

⁷ As noted above, question one of the special verdict form asked, “Did Eclipse Media have an agreement with [Quad] to provide technical services for the Nasco website project?”

I think that was the reason for the so-called [“]kick-off lunch[”] which was to have begun the project. They were beginning the project because the essential terms were agreed to.

¶29 In reviewing a trial court’s ruling on a motion challenging the sufficiency of evidence to support the verdict, appellate courts apply a highly deferential standard of review:

In considering a motion to change the jury’s answers to the questions on the verdict, a trial court must view the evidence in the light most favorable to the verdict and affirm the verdict if it is supported by any credible evidence. The trial court is not justified in changing the jury’s answers if there is any credible evidence to support the jury’s findings. In reviewing the evidence, the trial court is guided by the proposition that “[t]he credibility of witnesses and the weight given to their testimony are matters left to the jury’s judgment, and where more than one inference can be drawn from the evidence,” the trial court must accept the inference drawn by the jury. On appeal this court is guided by these same rules.

Richards v. Mendivil, 200 Wis. 2d 665, 671, 548 N.W.2d 85 (Ct. App. 1996) (citations omitted). “On appeal the obligation of this court is to search for credible evidence that will sustain the verdict, not for evidence to sustain a verdict the jury could have but did not reach.” *Meurer v. ITT Gen. Controls*, 90 Wis. 2d 438, 450-51, 280 N.W.2d 156 (1979).

¶30 Further, a new trial may be granted in the interest of justice only when the jury findings are contrary to the great weight and clear preponderance of the evidence. *Krolkowski v. Chicago & Northwestern Transp. Co.*, 89 Wis. 2d 573, 580, 278 N.W.2d 865 (1979). The trial court’s decision of whether or not to grant a new trial will not be disturbed on appeal in the absence of a clear showing of an erroneous exercise of discretion. *Larry v. Commercial Union Ins. Co.*, 88 Wis. 2d 728, 733, 277 N.W.2d 821 (1979). Taking Quad’s arguments

individually, we conclude that the credible evidence supports the jury's finding that Eclipse and Quad entered into an oral contract.

¶31 First, an oral contract, which may be proven by extrinsic evidence, *see Goossen v. Estate of Standaert*, 189 Wis. 2d 237, 247, 525 N.W.2d 314 (Ct. App. 1994), is complete in itself and will take effect even though it is anticipated that a written contract embodying its terms will subsequently be signed. *See Cohn v. Plumer*, 88 Wis. 622, 626, 60 N.W. 1000 (1894) (“The fact that it was expected that a written contract would afterwards be signed, embodying the terms of the oral contract, does not prevent the oral contract from taking effect.”). In the instant case, the jury heard the following testimony indicating that Quad had entered into an oral contract: (1) on April 14, 1999, Quad and Eclipse submitted a joint bid for the project which identified Quad's role in the design and marketing of the website and Eclipse's role as the technical partner; (2) on June 22, 1999, Aspenson notified Eglash that Quad and Eclipse had won the job to develop Nasco's website; (3) it was Aspenson's understanding that Eclipse was going to be Quad's technology partner based on the fact that the proposal accepted by Nasco listed Eclipse as the technology partner; (4) Mohr called Krisberg expressing concern that additional work outside of the Nasco project may prevent Eclipse from completing the Nasco project and seeking assurance that Eclipse would not accept any other projects and devote its full attention to the Nasco project; (5) the minutes of the June 24, 1999 meeting, which specifically listed Eglash, Krisberg and Bosley as part of the “team member list,” stated that Eclipse could order equipment and begin Phase I as soon as Nasco provided cash-in-hand; (6) although the first of the proposed agreements listed two alternative quotes of \$68,524 and \$78,524 for the costs of equipment, hardware and software, Eclipse later sent Quad an invoice for the costs of equipment, hardware and software

totaling \$78,524, which was not disputed by Quad; (7) on July 8, 1999, Aspenson sent an e-mail message to Eglash stating, “We have returned the proposal changing the name of signature to the president. He will sign and we can move ahead”; and (8) Quad scheduled a “kickoff meeting” for July 15, 1999, with Eclipse and Nasco to officially begin the project.

¶32 The jury also heard extensive testimony regarding the issue of image conversion.⁸ Eclipse presented credible testimony establishing that Quad was responsible for the image conversion process. Eglash testified that Quad had told Eclipse that “[Quad] had a solution for [the image conversion process]” and that “it was their responsibility and they would do it.” Eglash also gave the following testimony concerning the third contract, which outlined the parties’ relative responsibilities with respect to image conversion:

[ECLIPSE’S ATTORNEY]: Then, Mr. Eglash, could you take a look at Page 2 of that document? And direct your attention to the heading that says ... data base population.... Who had responsibility for that task?

[EGLASH]: That was Eclipse Media’s responsibility.

[ECLIPSE’S ATTORNEY]: And can you describe for me what that task is?

[EGLASH]: We receive the images in low res from [Quad] ... and then we load them into the data base which is referred to as populating the data base.

[ECLIPSE’S ATTORNEY]: Based on your discussions with [Quad] about the [con]version of the high res images to the low res images, how was [Quad] going to handle that?

⁸ Eclipse admitted at trial that it was responsible for populating the website database by loading the low-resolution images, but asserted that the parties agreed that Quad was responsible for converting the high-resolution print catalog images to low-resolution images.

[EGLASH]: That we discussed – they [told] us that it was their imaging department which deals with their – with their printing issues.

Thus, Eclipse presented credible evidence establishing that Quad was responsible for the image conversion.

¶33 Quad was apparently unable to refute this testimony. Quad’s own witness, Mohr, testified that in an e-mail message dated June 9, 1999, she wrote, “I was speaking with Joe Krisberg, who is one of the partners; he agreed that they would be fine with [Quad] taking on the data extraction/data conversion component.” She also testified that Quad had already developed a software package for its print and e-commerce applications called Quad Compress that was being used by Quad to convert high-resolution images to low-resolution images. Finally, on April 7, 1999, Mohr testified that Quad had made a presentation to Nasco involving the Quad Compress software. Accordingly, based on our review of the record, despite the fact that Quad never signed the proposed agreements, we cannot conclude, as a matter of law, that the jury’s findings are contrary to the great weight and clear preponderance of the evidence.

C. The parties have stipulated to the amount of contract damages.

¶34 After finding that Quad breached its oral contract with Eclipse, the jury awarded Eclipse \$329,338 in damages. We will sustain a damage award as long as the award is within reasonable limits and there is any credible evidence in the record to support it. See *Gerth v. American Star Ins. Co.*, 166 Wis. 2d 1000, 1009, 480 N.W.2d 836 (Ct. App. 1992).

¶35 “[T]he award of damages for a breach of contract should compensate an injured party for losses that necessarily flow from the breach.” *Thorp Sales*

Corp. v. Gyuro Grading Co., 111 Wis. 2d 431, 438, 331 N.W.2d 342 (1983). Wisconsin applies the “benefit of the bargain” measure of damages to a breach of contract claim. See *Eklund v. Koenig & Assoc., Inc.*, 153 Wis. 2d 374, 379, 451 N.W.2d 150 (Ct. App. 1989). This means that “[a]n injured party is entitled to the benefit of his agreement, which is the net gain he would have realized from the contract but for the failure of the other party to perform.” *Thorp*, 111 Wis. 2d at 438-39.

¶36 In other words, the “benefit of the bargain” measure of damages is designed “to give the injured party the benefit of the bargain by putting it in as good a position as it would have been in had the contract been performed.” *Id.* at 439. “If, however, the agent would have incurred expenses and the breach saves those expenses, then the agent is entitled only to the agreed compensation less the expenses he has saved.” *Id.* Therefore, “when a party is prevented from fully performing a contract, it is entitled to recover the profits it would have realized by performing, that is, the difference between the contract price and what it would have cost the party to perform.” *Id.* at 440.

¶37 Here, the agreement between Eclipse and Quad provided that Eclipse was to be compensated \$351,620 for its services.⁹ Quad and Eclipse agree that, under the contract, \$203,070 of that amount would have been paid to Eisenhower for subcontractor fees. Eclipse’s contract with Quad provides, in relevant part:

⁹ Eclipse admitted expenses in closing argument totaling \$22,282, resulting in its request for \$329,338 in damages.

INDEMNITY:

Client shall hold Eclipse Media harmless in and from all claims, liabilities, damages, and detriments not arising from Eclipse Media's actual negligence or malfeasance.

¶38 At trial, Eclipse argued that, pursuant to this provision, Quad was obliged to indemnify Eclipse for Eisenhower's subcontractor fees. In its reply brief, for the first time, Quad argues that this indemnity language applies only to Nasco, because the agreements state that Quad was acting as an agent for Nasco, the ultimate "client" of Eclipse's services.

¶39 Generally, we decline to address an issue raised for the first time in a reply brief. *See Swartwout v. Bilsie*, 100 Wis.2d 342, 346 n. 2, 302 N.W.2d 508 (1981). However, in the instant case, the parties have filed supplemental briefs in which Eclipse states:

Eclipse believed the indemnity provision applied to Quad/Creative and Quad/Creative was obligated to indemnify Eclipse for its liabilities to its subcontractor.

....

Quad/Creative now asserts in its Reply Brief ... that the indemnity language ... actually applies to Nasco, not Quad/Creative. After reviewing the argument and documents, Eclipse agrees. For that reason ... Eclipse will stipulate that the contract damages due Eclipse, should there be an affirmation of liability, is \$126,268.00.

Because contract damages in the amount of \$126,268.00 are within reasonable limits and supported by credible evidence, we direct the trial court to enter judgment in that amount.

D. Eclipse was not contractually entitled to the recovery of attorneys' fees.

¶40 The special verdict asked, “Did the agreement between the parties provide for the recovery of attorney[']s fees if [Quad] breached the agreement?” All twelve jurors answered, “YES.” In response to Quad’s post-verdict motion seeking to set aside this finding, the trial court stated:

I find as a matter of law that there was no evidence in this record that the recovery of attorneys['] fees was discussed by the parties.

This was not surprising since [Quad]’s attorneys had not even signed off on the project. There was ample evidence of the discussion of what was to be done by whom and what was to be paid to Eclipse but nothing indicating any agreement regarding attorneys['] fees.

[T]he American rule was applicable in this case and the provision in the contract really did not cover attorneys['] fees for a lawsuit of this type....

....

So I find as to the attorneys['] fees, even though everything else was agreed to, and these [were] sufficient facts for the jury to find liability under any of the three theories sought [] by the plaintiff, there was no meeting of the minds as to attorneys['] fees.

¶41 Pursuant to WIS. STAT. § 805.14(1), as outlined above, a motion to change an answer in the verdict challenges the sufficiency of the evidence and shall not be granted unless the trial 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. See *Bastman v. Stettin Mut. Ins. Co.*, 92 Wis. 2d 542, 546-48, 285 N.W.2d 626 (1979). If there is credible evidence which supports a jury verdict, the action of a trial court in changing a jury verdict will be set aside on appeal. See *id.* at 548. Where, as in the instant case, a trial court decides a

question of law on a motion challenging the verdict, we review its decision *de novo*. See *Greenlee*, 202 Wis. 2d at 662-63; see also *Hunzinger Constr. Co. v. Granite Res. Corp.*, 196 Wis. 2d 327, 338, 538 N.W.2d 804 (Ct. App. 1995).

¶42 “Wisconsin follows the ‘American Rule,’ under which parties are generally responsible for their own attorney fees.” *Hunzinger*, 196 Wis. 2d at 338. “Under the well-established American Rule, parties to litigation are generally responsible for their own attorney’s fees unless recovery is expressly allowed by either contract or statute, or when recovery results from third-party litigation.” *DeChant v. Monarch Life Ins. Co.*, 200 Wis. 2d 559, 571, 547 N.W.2d 592 (1996). Eclipse claims that it is entitled to its attorneys’ fees by way of its contract with Quad. Each proposed agreement in question provides, in relevant part:

PAYMENTS:

[Quad] shall pay Eclipse Media the Charges plus expenses due for reimbursement within fourteen (14) days of billing. Overdue payments shall bear a 2% per month late charge. If Eclipse Media undertakes collection or enforcement efforts, [Quad] shall be liable for all costs thereof, including attorney fees.

¶43 We agree with the trial court that there is no credible evidence to support the jury’s conclusion that Eclipse and Quad ever had a meeting of the minds concerning this provision contained in the proposed agreements. Moreover, there is no credible evidence that Eclipse and Quad ever contemplated, negotiated, or discussed the issue of attorneys’ fees. Because the proposed agreements were never signed by either of the parties, Eclipse was required to prove that Quad orally accepted this fee shifting agreement. We conclude that, although the evidence supports the conclusion that Quad and Eclipse created an oral contract regarding Eclipse’s work on the Nasco project, no credible evidence supports the

conclusion that this agreement included a provision providing for payment of attorneys' fees.

E. Eclipse is not entitled to prejudgment interest, non-taxable costs or other taxable costs.

¶44 Eclipse contends that “the same contractual provision requiring [Quad] to pay Eclipse’s reasonable attorney’s fees [] also requires [Quad] to pay all the costs Eclipse incurred in bringing this action.” Eclipse also argues that it is “entitled to an award of prejudgment interest,” because “[t]he agreement between Eclipse and [Quad] specifically provides for the recovery of 2% per month on unpaid amounts.” Because we have concluded that the parties did not have a meeting of the minds on this provision of the proposed agreements, and, further, because Eclipse has failed to otherwise establish that Quad agreed to pay these expenses, we conclude that Eclipse is not entitled to recover any of these costs related to its breach of contract action.

F. The trial court properly dismissed Eclipse’s misrepresentation claims.

¶45 The trial court granted Quad’s summary judgment motion seeking dismissal of Eclipse’s misrepresentation claims. The trial court ruled that Eclipse did not plead these claims with the specificity required by WIS. STAT. RULE 802.03(2), which provides: “In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.” We agree with the trial court that Eclipse’s pleadings lack the requisite specificity.

¶46 Our review of a trial court’s grant of summary judgment is *de novo*. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315-16, 401 N.W.2d 816

(1987). Summary judgment is appropriate if the evidence demonstrates “that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” WIS. STAT. RULE 802.08(2).

¶47 “[T]he party alleging fraud has the burden of proving it by clear and convincing evidence.” *Williams v. Rank & Son Buick, Inc.*, 44 Wis. 2d 239, 242, 170 N.W.2d 807 (1969). “In order to establish that a representation was fraudulent, one must establish, first, that the statement of fact is untrue; second, that it was made with intent to defraud and for the purpose of inducing the other party to act upon it; and third, that he did in fact rely upon it and was thereby induced to act, to his injury or damage.” *Id.* The rule requiring specificity in pleading claims of fraud and mistake also “requires specification of the time, place and content of an alleged false misrepresentation.” *Friends of Kenwood v. Green*, 2000 WI App 217, ¶14, 239 Wis. 2d 78, 619 N.W.2d 271 (citation omitted). “[T]he particularity requirement affords notice to a defendant for the purposes of a response,” and “is designed to protect defendants whose reputation could be harmed by lightly made charges of wrongdoing involving moral turpitude.” *Id.* (citations omitted).

¶48 Eclipse’s fraud claims assert:

44. Both affirmatively and by its silence, [Quad] represented to [Eclipse] that [Eclipse] would be building the e-commerce web site for Nasco pursuant to the terms of the agreement sent to Nasco.

45. [Quad]’s foregoing representations to [Eclipse] were untrue when made and [Quad] made the representations with knowledge of their falsity or recklessly without caring whether they were true or false.

46. [Quad] made the foregoing representations with an intent to deceive and induce [Eclipse] to act upon the representations, all to the pecuniary damage of [Eclipse].

47. [Eclipse] believed [Quad]’s representations to be true and relied upon them.

....

49. [Quad]’s foregoing representations to [Eclipse] constituted an untrue, deceptive, and/or misleading representation within the meaning of Wis. Stat. § 100.18(1).

These allegations wholly ignore the “who, what, when, where and how” of the alleged false representations. *See Friends of Kenwood*, 2000 WI App 217 at ¶14. Without providing specification as to the time, place and content of the alleged incidents, Eclipse failed to satisfy the requirements of WIS. STAT. RULE 809.03(2). Accordingly, the trial court properly dismissed Eclipse’s misrepresentation claims.

¶49 Finally, Eclipse argues that the trial court erred in denying its motion to amend its pleadings to allow it to satisfy WIS. STAT. RULE 809.03(2). “A trial court’s decision to grant leave to amend a complaint is discretionary.” *Finley v. Culligan*, 201 Wis. 2d 611, 626, 548 N.W.2d 854 (Ct. App. 1996). This court will not reverse a discretionary decision unless the record demonstrates that the trial court failed to exercise its discretion, the facts do not support the trial court’s decision or the trial court applied the wrong legal standard. *See id.* at 626-27.

¶50 After our examination of the record, we conclude that the trial court correctly concluded that the facts were insufficient to support a cause for misrepresentation. Therefore, a ruling allowing Eclipse to amend its pleadings would only promote the filing of suits in the hope of turning up relevant information during discovery, which is clearly discouraged by WIS. STAT. RULE 809.03(2).

¶51 Based on the foregoing reasons, the matter is remanded for the trial court to enter judgment in favor of Eclipse in the amount of \$126,268.00.

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

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

