COURT OF APPEALS DECISION DATED AND FILED

November 30, 2012

Diane M. Fremgen
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. 2011AP2064 **Cir. Ct. No. 2007CV730**

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

MIDWEST OIL OF SHAWANO, LLC,

PLAINTIFF-APPELLANT,

V.

GARROW OIL CORPORATION,

DEFENDANT-THIRD-PARTY
PLAINTIFF-RESPONDENT,

CHARLES PLUGER AND DANIEL BESCH,

DEFENDANTS-RESPONDENTS,

V.

NAOMI ISAACSON,

THIRD-PARTY DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Outagamie County: JOHN A. DES JARDINS, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 PER CURIAM. Midwest Oil of Shawano, LLC, and Naomi Isaacson, Midwest's managing member, appeal a judgment awarding Garrow Oil Corporation damages on Garrow's counterclaim for unpaid fuel invoices. Following a four-day trial, the circuit court also determined that Midwest failed to prove it was damaged by Garrow's tortious interference with Midwest's contracts. On appeal, Midwest's principal argument is that the circuit court erred in its credibility determinations when evaluating evidence of Midwest's damages. Midwest also challenges the circuit court's determinations that Garrow is entitled to prejudgment interest and certain fees, that Isaacson is jointly and severally liable as a guarantor, and that Midwest is not entitled to setoff for alleged overcharges. We affirm.

BACKGROUND

¶2 Midwest operates three gas stations in Shawano, Wisconsin. Garrow orally agreed to sell Midwest gasoline, subject to certain credit requirements outlined in a credit application. Garrow agreed to provide gasoline at one cent over the lowest available rack rate.[1] Between April 23, 2005 and May 8, 2006, Midwest failed to abide by the credit terms, and Garrow charged three cents over

[1] Rack rate refers to the price at which gasoline is sold to wholesalers like Garrow. The supplier will usually draft the wholesaler's account ten days after the wholesaler "pulls" a load of gasoline regardless of receipt of payment from the wholesaler's customer.

the lowest available rack rate. When Midwest became current in its payments, Garrow resumed charging one cent over the lowest available rack rate.

¶3 Garrow made gasoline deliveries to Midwest on March 26, 29, and 31, and April 2 and 4, 2007. Midwest did not pay for these deliveries. On April 6, Garrow notified Midwest that it would be altering the parties' payment schedule. In response, Isaacson terminated Garrow's supply contract. Midwest was without fuel between April 6 and April 13 as it searched for a new supplier. It ultimately obtained fuel from Merwin Oil. Shortly thereafter, Merwin received a letter and a telephone call from Garrow representatives advising Merwin not to do business with Midwest. Merwin did not refuse to sell to Midwest, nor did it increase its prices.

¶4 Midwest then contacted Klemm Tank Lines, its longstanding fuel hauler, to deliver the fuel from Merwin. Garrow contacted Klemm on April 17, asserting it had a supply agreement with Midwest and would sue Klemm if it continued to deliver gasoline to Midwest. However, Klemm did not stop hauling for Midwest until weeks later, when it had problems receiving payment from Midwest. Nonetheless, the circuit court concluded the call from Garrow was the "straw that broke the camel's back." Midwest then retained Advantage Transport to haul its gasoline.

¶5 Midwest commenced the present action on May 7, 2007, alleging tortious inference with prospective contractual relations. Garrow counterclaimed against Midwest for payment of the past due fuel invoices plus interest. It also sought to hold Issacson liable under a personal guaranty signed in 2005. Midwest disputed the amounts due and asserted it was entitled to setoff for overcharges.

¶6 A four-day bench trial was held beginning on October 7, 2008 and continuing the following day and on January 9, 2009. Midwest filed for bankruptcy protection on March 16, 2009. This action was stayed while the bankruptcy was pending. The automatic stay under federal law was lifted on May 24, 2010. The final day of trial was held on August 24, 2010.

¶7 The trial court issued an oral decision on February 18, 2011. It determined that Midwest had proved many of the elements of tortious interference as to Merwin and Klemm, but "the bottom line comes down to … establishing an actual damage for what occurred to Midwest." The court found Midwest's records unreliable because they were plagued with problems and focused mostly on lost revenue as opposed to lost profit. It determined that Midwest was liable for the unpaid fuel invoices with prejudgment interest and "Not Sufficient Funds" (NSF) fees, and that Midwest was not entitled to a setoff because it failed to abide by the terms of its credit agreement with Garrow. Isaacson was held jointly and severally liable for these obligations because the court determined she failed to revoke her personal guaranty. The court subsequently determined Garrow was entitled to limited attorney fees. Midwest filed a motion for reconsideration, which was denied.

DISCUSSION

¶8 Midwest first raises a number of issues relating to the trial court's damages determination. Specifically, Midwest challenges the trial court's conclusion that Midwest failed to meet its burden of proof concerning compensatory damages. The court's findings of facts will not be set aside unless

clearly erroneous. WIS. STAT. § 805.17(2).[2] We give due regard to the trial court's opportunity to judge the credibility of the witnesses. ***Id.*** The weight and sufficiency of the evidence are within the province of the trier of fact. ***Cutler Cranberry Co. v. Oakdale Elec. Co-op.***, 78 Wis. 2d 222, 231, 254 N.W.2d 234 (1977).

¶9 There is no dispute that Garrow intentionally interfered with Midwest's current and prospective business arrangements.[3] *See* **Cudd v. Crownhart**, 122 Wis. 2d 656, 659-60, 364 N.W.2d 158 (Ct. App. 1985). However, Garrow is liable only for the harm caused by the interference. *See* ***id.*** at 659. In general, damages for tortious interference consist of the "pecuniary loss of the benefits of the contract or prospective contract." ***Id.*** at 659-60; *see also* **Musa v. Jefferson Cnty. Bank**, 2001 WI 2, ¶29, 240 Wis. 2d 327, 620 N.W.2d 797.

¶10 "To warrant damages, the evidence must demonstrate that the injured party has sustained some injury and must establish sufficient data from which the trial court … could properly estimate the amount." ***Plywood Oshkosh, Inc. v. Van's Realty & Const. of Appleton, Inc.***, 80 Wis. 2d 26, 31, 257 N.W.2d 847 (1977). The claimant generally has the burden of proving damages by credible evidence to a reasonable certainty. ***Id.*** This requirement extends both to the existence and the amount of damages, though mathematical precision is not required. ***Id.***

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[2] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[3] The circuit court's only specific interference finding relates to Garrow's contact with Klemm. Although Garrow disagrees that it interfered, it acknowledges that it does not challenge the circuit court's finding.

¶11 Midwest first asserts that it is entitled to recover lost profits for the seven days it was without fuel.[4] However, at trial Midwest only submitted evidence of lost revenue. This was insufficient. *See* ***Magestro v. North Star Envtl. Const.***, 2002 WI App 182, ¶15, 256 Wis. 2d 744, 649 N.W.2d 722. "To establish lost profits, claimants must produce evidence of the business's revenue as well as its expenses because assertions as to the amount of lost profits have no evidentiary value unless supported by figures showing both profits and losses." ***Id.*** A claimant cannot establish lost profits by producing only gross receipts. ***Id.***

¶12 Midwest contends its records, when coupled with Isaacson's testimony, sufficiently establish lost profits. Although its records show revenue, Midwest asserts it should be entitled to extrapolate an estimate of lost profits "based upon a conservative average of the profit margin of ten percent from actual sales."

¶13 However, the circuit court had little faith in Midwest's records or Isaacson's testimony. The court specifically found that Midwest's records were "plagued with problems," "not credible, not reliable," and "not trustworthy as far as establishing the required proofs." The unreliability of Midwest's evidence left the circuit court without credible proof of lost profits. The circuit court's credibility findings "will not be overturned on appeal unless they are inherently or patently incredible or in conflict with the uniform course of nature or with fully established or conceded facts." ***Yates v. Holt-Smith***, 2009 WI App 79, ¶25, 319

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[4] There must be a causal connection between the interference and damages. ***Finch v. Southside Lincoln-Mercury, Inc.***, 2004 WI App 100, ¶18 n.8, 274 Wis. 2d 719, 685 N.W.2d 154. We note that Midwest voluntarily terminated its supply agreement with Garrow, and Garrow did not contact Merwin until after the seven-day period.

Wis. 2d 756, 768 N.W.2d 213. Midwest concedes there were errors in its records; it simply argues the errors were insufficient to undermine the court's confidence in them. However, the weight and sufficiency of the evidence are within the province of the trier of fact. ***Cutler Cranberry Co.***, 78 Wis. 2d at 231.

¶14 Next, Midwest claims damages arising from what it calls the "Merwin restrictions." At trial, Isaacson testified that Merwin can deliver only Marathon branded product, which is sometimes more expensive than the fuel that Garrow provided. However, the circuit court plainly refused to give credit to this testimony. A court need not adopt uncontradicted testimony it finds inherently incredible. ***Ashraf v. Ashraf***, 134 Wis. 2d 336, 345, 397 N.W.2d 128 (Ct. App. 1986). The court noted Midwest never asked Merwin's representative at trial about its arrangements with Midwest, the type of product it provided, or if it could provide only branded product.

¶15 Midwest also asserts it adequately proved damages arising from Garrow's interference with Klemm. Midwest argues it had to find a new hauler, Advantage, who charged higher freight and hauling rates. However, the circuit court determined that no credible evidence was presented as to the difference between Klemm's and Advantage's charges. In its oral ruling, the court noted the differing freight charges were based entirely on Exhibit 27, a document prepared by Midwest that presumably suffered from the same deficiencies as its other records. At trial, Isaacson conceded that the document was based on the assumption that Klemm would not have increased its rates.[5] However, Klemm's

[5] Isaacson asserted that the rate was set by contract, but stated that she could not produce a copy.

vice president testified that the rate would change monthly. Midwest does not dispute Garrow's assertion that no witness from Advantage was called to testify, and no Klemm or Advantage freight bills were introduced into evidence.[6]

¶16 Midwest also claims damages due to late fuel deliveries because Advantage is a small company with only four trucks. Two trial exhibits, 28 and 29, set forth lost revenue without separately describing Midwest's expenses. Midwest again argues that it is entitled to "an average profit margin of ten percent for the applicable time periods." However, documents establishing lost revenue without expenses are inadequate. ***Magestro***, 256 Wis. 2d 744, ¶15. In its oral ruling, the circuit court refused to credit trial documents purporting to establish only lost revenue:

> The damage has to relate to the exact profit that Midwest made, not the revenue. The revenue is irrelevant to the Court in determining damages. [If t]he business is losing money and doesn't get product, there would be no damages. If they're breaking even, there would be no damages. They have to show that there's a profit. Revenue is really pretty much irrelevant except for the fact that it can be used to show what the profit would be less the expenses. And, you know, like I say, Midwest records are unreliable. Midwest showed that they had lost revenue on several instances, but it doesn't help the Court because I don't know what their profit would have been ….

Again, the weight and sufficiency of the evidence are within the province of the trier of fact. ***Cutler Cranberry Co.***, 78 Wis. 2d at 231.

[6] The closest Midwest comes to refuting this assertion is Midwest's statement that "[t]he freight invoices were available for inspection all through the trial." However, Midwest does not direct us to any evidence in the record.

¶17 Citing ***Cutler Cranberry Co.***, 78 Wis. 2d at 234-35, Midwest argues the circuit court should have fixed a reasonable amount of damages even in the face of uncertainty regarding the actual amount. To the extent Midwest reads ***Cutler Cranberry Co.*** as disposing of the need for proof of damages to a reasonable certainty, this reading is inconsistent with more recent supreme court precedent. Indeed, our supreme court limited ***Cutler Cranberry Co.***'s holding a mere four months after that decision was issued. *See* ***Plywood Oshkosh, Inc.***, 80 Wis. 2d at 32 (permitting recovery under ***Cutler Cranberry Co.*** only when, from the nature of the case, the extent of injury and the amount of damages are not capable of exact and accurate proof). In ***Cutler Cranberry Co.***, 78 Wis. 2d at 224, the salient issue was how to determine the value of a partial cranberry crop damaged by frost during a power outage. The supreme court recognized the speculation inherent in this determination, as numerous factors can affect the size and value of a crop. ***Id.*** at 232-33. By contrast, this case required that Midwest establish only the amount it expected to profit—revenue minus expenses—absent the interference with its current and prospective contracts.

¶18 Midwest next argues it is entitled to setoff for overcharges. Specifically, it contends it is entitled to credit for an extra two cents per gallon over an unspecified period of time. However, the circuit court determined that Midwest had failed to abide by the credit terms of its agreement with Garrow. Testimony at trial established that a mark-up of one to three cents per gallon over rack is usual and normal in the industry. A customer that does not comply with payment terms is charged more than one cent over rack. The circuit court did not erroneously exercise its discretion when it concluded that Midwest was not entitled to a setoff for overcharges. *See* ***State v. Walters***, 224 Wis. 2d 897, 901,

591 N.W.2d 874 (Ct. App. 1999) (reviewing setoff determination under erroneous exercise of discretion standard).[7]

¶19 Midwest also asserts the circuit court erred by awarding Garrow prejudgment interest during certain periods. "Prejudgment interest is awarded where the amount of damages is determinable, either because the damages are liquidated or because there is a reasonably certain standard of measurement." ***City of Merrill v. Wenzel Bros.***, 88 Wis. 2d 676, 697, 277 N.W.2d 799 (1979). Although Garrow was not permitted to charge prejudgment interest during Midwest's bankruptcy proceeding, Midwest contends Garrow should not be permitted to charge it at all. It reasons that, given the alleged overcharges and business interference, the amount owed to Garrow was not determinable until after resolution of this lawsuit.

¶20 We conclude the circuit court properly awarded Garrow prejudgment interest for the periods in which this matter was not stayed by federal bankruptcy law. Midwest does not dispute it ordered and received the gasoline set forth in the invoices. The parties' credit agreement unequivocally provides for an interest rate of one and one-half percent per month. "[W]hen the parties explicitly agree, either in their principal contract or in a supplementary stipulation or agreement, that damages will ... include prejudgment interest, the parties will be held to that agreement[.]" ***Klug & Smith Co. v. Sommer***, 83 Wis. 2d 378, 382, 265 N.W.2d 269 (1978).

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[7] The circuit court did not specifically address Midwest's claim for a setoff of two cents per gallon, instead focusing on another of Midwest's arguments—since abandoned on appeal—that Garrow had not charged Midwest the lowest rack price. However, we will search the record for reasons to sustain the court's exercise of discretion. *See* ***Olivarez v. Unitrin Prop. & Cas. Ins. Co.***, 2006 WI App 189, ¶17, 296 Wis. 2d 337, 723 N.W.2d 131.

¶21 In a one-paragraph argument, Midwest also seeks to overturn the NSF fees. It acknowledges that NSF fees are standard in the industry, but contends "no determination was made as to whether $3,793.65 is a standard and allowable NSF fee." Further, it asserts, without citation to authority, that the NSF fees are "an excessive penalty" that "was not agreed to under the terms of the parties' contractual arrangements." However, the parties' contract consisted of only a bare oral commitment and a credit application. In other words, it was a simple contract entered into in the context of the trade practice.[8] *See* ***Schaefer v. Dudarenke***, 89 Wis. 2d 483, 494, 278 N.W.2d 844 (1979). The circuit court did not erroneously exercise its discretion when it awarded the NSF fees.

¶22 Midwest asserts that, as a matter of law, Isaacson is not liable as a guarantor of Midwest's debt.[9] Written notice of revocation relieves the guarantor of liability as to any obligations incurred after the giving of the notice. ***Home Sav. Bank v. Gertenbach***, 270 Wis. 2d 386, 393, 71 N.W.2d 347 (1955). Midwest argues Isaacson's liability ended on April 28, 2006, when she notified Garrow that she was withdrawing her personal guaranty.

¶23 The problem with Midwest's assertion is that it contradicts the circuit court's findings of fact. We acknowledge a Garrow representative gave conflicting statements, years apart, at trial as to whether he received Isaacson's written revocation. However, it is for the trier of fact to accept or reject inconsistent testimony. ***State v. Curiel***, 227 Wis. 2d 389, 421, 597 N.W.2d 697

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[8] Accordingly, we reject Midwest's assertion that "[t]he absence of NSF fees in Garrow's credit application is clear and cogent evidence that they [sic] should be disallowed."

[9] Midwest and Isaacson filed joint briefs.

(1999). The circuit court specifically found that, although Isaacson signed a revocation document, she failed to send it to Garrow:

> Now, there's a pattern of sloppy business activity on the part of Midwest. It's very clear to the Court that that was the case. They weren't good at keeping track of things. For example, Naomi Isaacson, you know, signed this personal guarantee and then apparently rescinded it but never sent it to Garrow Oil. So they didn't know she rescinded it. I'm quite convinced that Naomi Isaacson believes that she signed a letter or document rescinding her personal guarantee, but it was never sent. There are other people in the organization that [were responsible for] send[ing] it to Garrow Oil. They never received it. So her rescinding of the personal guarantee is of no value if she doesn't send it out. And it should have been documented clearly. When she is dealing with what she believes is a hostile entity, Garrow Oil, you'd send that certified with a return receipt to document it. It was not done. That's the kind of proof that she had to have. It wasn't before the Court. So I don't believe it was ever sent. I do believe that she testified honestly that she signed one, but it wasn't sent.

"[I]t is the trier of fact's task, not this court's, to sift and winnow the credibility of the witnesses." ***Id.***

¶24 Midwest's final arguments concern the attorney fees awarded by the circuit court. We review the circuit court's decision to award attorney fees de novo. ***Reid v. Benz***, 2001 WI 106, ¶12, 245 Wis. 2d 658, 629 N.W.2d 262.

¶25 Midwest first asserts the court lacked authority to award attorney fees. "Under the ... American Rule, parties to litigation are generally responsible for their own attorney fees incurred with respect to the litigation." ***Id.***, ¶2. Attorney fees are generally not awarded to the prevailing party in the absence of a statute or enforceable contract providing for such an award. ***Id.*** Midwest acknowledges that "[t]he only contractual support for Garrow's [attorney fees] request is a one-page credit application containing reference to Garrow's right to

reimbursement for 'costs and fees' of collection." We agree with the circuit court; attorney fees are unambiguously included in the term "fees."

¶26 Midwest also challenges the amount of attorney fees awarded by the circuit court. However, it does so for the first time in its reply brief. We have no obligation to address arguments raised for the first time in a reply brief. ***Roy v. St. Lukes Med. Ctr.***, 2007 WI App 218, ¶30 n.6, 305 Wis. 2d 658, 741 N.W.2d 256. In addition, Garrow notes Midwest failed to include in the record a transcript of the April 26 and May 2 hearings regarding the attorney fees. It is the appellant's obligation to ensure that the record before us is complete.[10] ***State v. Marks***, 2010 WI App 172, ¶20, 330 Wis. 2d 693, 794 N.W.2d 547. "Given an incomplete record, we will assume that it supports every fact essential to sustain the trial court's exercise of discretion." ***State Bank of Hartland v. Arndt***, 129 Wis. 2d 411, 423, 385 N.W.2d 219 (Ct. App. 1986).

¶27 Even so, we would conclude the circuit court properly exercised its discretion when setting the amount of recoverable attorney fees. *See* ***Roehl Transp., Inc. v. Liberty Mut. Ins. Co.***, 2010 WI 49, ¶169, 325 Wis. 2d 56, 784 N.W.2d 542. We give deference to the circuit court's determination, as its expertise and ability to observe the amount and quality of work place it in a preferential position to evaluate the reasonableness of attorney fees. ***Id.***, ¶179. The court properly limited the award to only those fees attributable to collection of amounts due from Midwest. Although the court noted some difficulty in allocating the fees to the various aspects of the litigation, it ultimately determined

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[10] Thus, we are unimpressed by Midwest's assertion that "Garrow's counsel never voiced any concerns about the record" during its assembly.

that twenty percent of the fees were attributable to collection. Midwest has not explained why the court's twenty percent calculation was unreasonable. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) ("We may decline to review issues inadequately briefed.").

By the Court.—Judgment affirmed.

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