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IN THE
COURT OF APPEALS OF INDIANA

Thomas M. Shoaff,
Appellant / Cross-Appellee-Defendant,

v.

First Merchants Bank,
Appellee / Cross-Appellant-Plaintiff.

December 12, 2022

Court of Appeals Case No.
22A-PL-514

Appeal from the
Allen Superior Court

The Honorable
Jennifer L. DeGroote, Judge

Trial Court Cause No.
02D03-1905-PL-176

Foley, Judge.

[1] Thomas Shoaff ("Shoaff") is a guarantor of a loan upon which an insurance company ("Borrower") defaulted. First Merchants Bank ("First Merchants"), the lender, filed an action seeking to hold Shoaff to his responsibilities under the signed guaranty agreement ("Agreement"). The trial court granted summary judgment in favor of First Merchants. Shoaff argues that the Agreement does

not apply because Borrower's underlying obligation was materially altered, and thus, Shoaff is absolved of liability for the defaulted balance. For the reasons set forth below, we disagree. Moreover, First Merchants filed a cross-appeal, contending that the trial court abused its discretion with respect to the damages award. We find that the trial court abused its discretion with respect to its calculation of interest, late fees, and attorney's fees. Accordingly, we affirm in part, reverse in part, and remand for further proceedings.

Issues[1]

[2] We address three issues on appeal:

I. Whether the trial court erred in granting summary judgment to First Merchants;

II. Whether the trial court abused its discretion in calculating First Merchants's damages;

III. Whether the trial court abused its discretion in determining its award of attorney's fees.

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[1] The parties devote briefing to the threshold question of whether we have jurisdiction over this appeal. First Merchants contends that Shoaff's notice of appeal was not timely filed, a mistake which is ordinarily fatal to an appeal in Indiana. *See, e.g.*, *Montgomery, Zukerman, Davis, Inc. v. Chubb Grp. of Ins. Cos.*, 698 N.E.2d 1251, 1253 (Ind. Ct. App. 1998). Our motions panel has already denied First Merchants's motion to dismiss on these grounds, and we decline to revisit that decision. "Although we may reconsider our previous rulings on motions, we decline to do so in the absence of clear authority establishing that our earlier ruling was erroneous as a matter of law." *Pittman v. State*, 9 N.E.3d 179, 182 (Ind. Ct. App. 2014) (citing *State v. Sagalovsky*, 836 N.E.2d 260, 264 (Ind. Ct. App. 2005)). First Merchants provides no such authority.

Facts and Procedural History

[3] Borrower secured a loan of $600,000.00 from IAB Financial Bank on August 12, 2014.[2] Two parties—Shoaff and Andrea Baumer ("Baumer")—signed guaranties in order to secure the loan. Baumer was involved with Borrower and had previous dealings with Shoaff, a former attorney. Pertinent passages of the Agreement signed by Shoaff are reproduced here:

> 2. SPECIFIC AND FUTURE DEBT GUARANTY. For good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, and to induce you at your option, to make loans or engage in any other transactions with the Borrower from time to time, I absolutely and unconditionally agree to all terms of and guaranty to you the payment and performance of each and every Debt, of every type, purpose and description that the Borrower either individually, among all or a portion at themselves, or with others, may now or at any time in the future owe you, including, but not limited to the following described Debt(s) including without limitation, all principal, accrued Interest, attorneys' fees and collection costs, when allowed by law, that may become due from the Borrower to you in collecting and enforcing the Debt and all other agreements with respect to the Borrower.
>
> . . . .
>
> In addition, Debt refers to debts, Liabilities, and obligations of the Borrower including, but not limited to, amounts agreed to be paid under the terms of any notes or agreements securing the payment of any debt, loan, liability or obligation, overdrafts,

[2] IAB merged with First Merchants on July 13, 2017. Appellant's App. Vol. III p. 69.

letters of credit, guaranties, advances for taxes, insurance, repairs and storage, and all extensions, renewals, refinancings and modifications at these debt(s) whether now existing or created or incurred in the future, due or to become due, or absolute or contingent, including obligations and duties arising from the terms of all documents prepared or submitted for the transaction such as applications, security agreements, disclosures, and the Note.

My liability will not exceed $450,000.00 of the principal amount outstanding at default, plus accrued interest, attorneys' fees and collection costs, when allowed by law, and all other costs, fees and expenses agreed to be paid under all agreements evidencing the Debt and securing the payment of the Debt. You may, without notice, apply this Guaranty to such Debt of the Borrower as you may select from time to time.

3. EXTENSIONS. I consent to all renewals, extensions, modifications and substitutions of the Debt which may be made by you upon such terms and conditions as you may see fit from time to time without further notice to me and without limitation as to the number of renewals, extensions, modifications or substitutions.

> A. Future Advances. I waive notice of and consent to any and all future advances made to the Borrower by you.

. . . .

6. REVOCATION. I agree that this is an absolute and unconditional Guaranty. I agree that this Guaranty will remain binding on me, whether or not there are any Debts outstanding, until you have actually received written notice of my revocation or written notice of my death or incompetence. Notice of revocation or notice of my death or incompetence will not affect

any obligations under this Guaranty with respect to any Debts incurred by or for which you have made a commitment to Borrower before you actually receive such notice, and all renewals, extensions, refinancings, and modifications of such Debts. I agree that if any other person signing this Guaranty provides a notice of revocation to you, I will still be obligated under this Guaranty until I provide such a notice of revocation to you. If any other person signing this Guaranty dies or is declared incompetent, such fact will not affect my obligations under this Guaranty.

. . . .

9. WAIVERS AND CONSENT. To the extent not prohibited by law, I waive protest, presentment for payment, demand, notice of acceleration, notice of intent to accelerate and notice of dishonor.

A. Additional Waivers. In addition, to the extent permitted by law, I consent to certain actions you may take, and generally waive defenses that may be available based on these actions or based on the status of a party to the Debt or this Guaranty.

(1) You may renew or extend payments on the Debt, regardless of the number of such renewals or extensions.

(2) You may release any Borrower, endorser, guarantor, surety, accommodation maker or any other co-signer.

(3) You may release, substitute or impair any Property.

(4) You, or any institution participating in the Debt, may invoke your right of set-off.

(5) You may enter into any sales, repurchases or participation of the Debt to any person in any amounts and I waive notice of such sales, repurchases or participations.

(6) I agree that the Borrower is authorized to modify the terms of the Debt or any instrument securing, guarantying or relating to the Debt.

(7) You may undertake a valuation of any Property in connection with any proceedings under the United States Bankruptcy Code concerning the Borrower or me, regardless of any such valuation, or actual amounts received by you arising from the sale of such Property.

(8) I agree to consent to any waiver granted the Borrower, and agree that any delay or lack of diligence in the enforcement of the Debt, or any failure to file a claim or otherwise protect any of the Debt, in no way affects or impairs my liability.

(9) I give up any rights I may have under any valuation and appraisement laws which apply to me.

(10) I agree to waive reliance on any anti-deficiency statutes, through subrogation or otherwise, and such statutes in no way alter or impair my liability. In addition, until the obligations at the Borrower to Lender have been paid in full, I waive any right at

> subrogation, contribution, reimbursement, indemnification, Exoneration, and any other right I may have to enforce any remedy which you now have or in the future may have against the Borrower or another guarantor or as to any Property.

Appellant's App. Vol. III pp. 51–52.

[4] Over the course of five years, Borrower's obligation was modified multiple times. The parties devote a substantial amount of briefing to the details of the modifications, but for our purposes those modifications can be described as: (1) a series of new notes being issued for the debt; (2) a new loan number being provided; (3) Baumer signing a new guaranty; (4) the alteration of the payment of the debt from a revolving line of credit to a term note; (5) a change in the manner in which the debt was to be repaid (altered to required monthly payments); and (6) multiple changes in the form and amount of the interest rate. Despite Shoaff waiving notice, the record reflects that First Merchants and/or its predecessor contacted Shoaff about many of the modifications "as a courtesy." Appellant's App. Vol. V p. 24.

[5] On March 15, 2019, the note (in its final form) matured and became payable in full. Borrower failed to pay and was therefore in default. On May 19, 2019, First Merchants filed its Complaint on Note and Guaranties.[3] On September 10, 2019, First Merchants filed a motion for summary judgment which the trial

[3] Innovative Insurance Partners LLC and Baumer were originally named defendants in this action but have since been dismissed from the case and are not parties to this appeal.

court granted on July 15, 2021 and directed First Merchants to provide a proposed order containing calculation of damages through the date of its grant of summary judgment, including the requested attorney's fees. The trial court entered a damages award in the amount of $859,927.49.

[6] On August 13, 2021, Shoaff filed a motion to correct error and contended that the trial court erred in granting summary judgment as well as in failing to give Shoaff the opportunity to respond to First Merchants's claims regarding damages. The trial court agreed as to the latter and vacated its damages order. On February 8, 2022, the trial court entered a new damages order, finding as follows:

> As of July 15 [ ] 2021, there is a balance due and owing to First Merchants from . . . Thomas M. Shoaff [ ] on the Shoaff Guaranty in the following amounts: principal in the amount of $450,000.00, accrued interest in the amount of $111,133.42 (based on the interest rate set out in the Complaint), accrued interest and unpaid late charges in the amount of $28,601.95 (calculated at 5% of the unpaid portion of the regularly scheduled payment of $572,039.06 due on March 15, 2019), for a total amount of $589,735.37 plus accruing interest at the rate of $117.4005 per day through the date of entry of this Amended Judgment.
>
> There is due and owing to the First Merchants from . . . Thomas M. Shoaff, the sum of $125,166.41 for attorney fees and out-of pocket expenses incurred by First Merchants in foreclosing the Note and Shoaff Guaranty and related services required by the default under said Note and Shoaff Guaranty plus court costs.

Appellant's App. Vol. VI pp. 34–35. This appeal followed.

Discussion and Decision

[7] Shoaff contends that the trial court erred when it granted summary judgment in favor of First Merchants. "'When this Court reviews a grant or denial of a motion for summary judgment, we stand in the shoes of the trial court.'" *Minser v. DeKalb Cnty. Plan Comm'n*, 170 N.E.3d 1093, 1098 (Ind. Ct. App. 2021) (quoting *Burton v. Benner*, 140 N.E.3d 848, 851 (Ind. 2020)). "Summary judgment is appropriate if the designated evidentiary matter shows 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." *Id*. (internal quotations omitted); *see also* Ind. Trial Rule 56(C). "The party moving for summary judgment bears the burden of making a prima facie showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law." *Id*. "The burden then shifts to the non-moving party to show the existence of a genuine issue of material fact." *Id*.

[8] "On appellate review, we resolve any doubt as to any facts or inferences to be drawn therefrom in favor of the non-moving party." *Id*. (cleaned up). "We review the trial court's ruling on a motion for summary judgment de novo, and we take 'care to ensure that no party is denied his day in court.'" *Id*. (quoting *Schoettmer v. Wright*, 992 N.E.2d 702, 706 (Ind. 2013). "'We limit our review to the materials designated at the trial level.'" *Id*. (quoting *Gunderson v. State, Ind. Dep't of Nat. Res.*, 90 N.E.3d 1171, 1175 (Ind. 2018), *cert. denied*). "Findings of fact and conclusions of law entered by the trial court aid our review, but they do not bind us." *Id*. (citing *Supervised Est. of Kent*, 99 N.E.3d 634, 637 (Ind. 2018)).

I. Guaranty

[9] Shoaff first contends that he was discharged of liability under the guaranty when the original obligation was materially altered. Accordingly, he asserts that the trial court erred in granting summary judgment to First Merchants. "A guaranty is a conditional promise to answer for a debt or default of another person, such that the guarantor promises to pay only if the debtor/borrower fails to pay." *Broadbent v. Fifth Third Bank*, 59 N.E.3d 305, 311 (Ind. Ct. App. 2016) (citing *TW Gen. Contracting Servs., Inc. v. First Farmers Bank & Tr.*, 904 N.E.2d 1285, 1288 (Ind. Ct. App. 2009)). "The interpretation of a guaranty is governed by the same rules applicable to other contracts." *Id*. "We must give effect to the intentions of the parties, which are to be ascertained from the language of the contract in light of the surrounding circumstances." *Id*. (citing *Noble Roman's, Inc. v. Ward*, 760 N.E.2d 1132, 1138 (Ind. Ct. App. 2002)).

> Generally, the nature and extent of a guarantor's liability depends upon the terms of the contract, and a guarantor cannot be made liable beyond the terms of the guaranty. Nevertheless, the terms of a guaranty should neither be so narrowly interpreted as to frustrate the obvious intent of the parties, nor so loosely interpreted as to relieve the guarantor of a liability fairly within their terms.

Id. (quoting *TW Gen. Contracting Servs., Inc.*, 904 N.E.2d at 1288).

[10] "If the court finds that any term is ambiguous, then the parties may introduce extrinsic evidence of its meaning, and the interpretation of that term becomes a question of fact." *Id*. (citing *Beradi v. Hardware Wholesalers, Inc.*, 625 N.E.2d

1259, 1261 (Ind. Ct. App. 1993), *trans. denied).* "A word or a phrase is ambiguous if reasonable people could differ as to its meaning." *Id*. "However, a contract term is not ambiguous merely because the parties disagree about the term's meaning." *Id*. (citing *Simon Prop. Grp., L.P. v. Mich. Sporting Goods Distribs., Inc.*, 837 N.E.2d 1058, 1070 (Ind. Ct. App. 2005), *trans. denied*).

[11] > Contracts of guaranty are divided into two kinds. One is absolute or unconditional and the other is conditional. An absolute guaranty is an unconditional undertaking on the part of the guarantor that the person primarily obligated will make payment or will perform, and such a guarantor is liable immediately upon default of the principal without notice. A conditional guaranty is an undertaking to pay or perform if payment of performance cannot be obtained from the principal obligor by reasonable diligence . . . . An absolute guaranty, unlike a conditional one, casts no duty upon the creditor or holder of the obligation to attempt collection from the principal debtor before looking to the guarantor . . . . Both presuppose default by the principal.

McEntire v. Ind. Nat. Bank, 471 N.E.2d 1216, 1225 (Ind. Ct. App. 1984) (citing *Pavlantos v. Garoufalis*, 89 F.2d 203, 206 (10th Cir. 1937); *United States v. Willis*, 593 F.2d 247 (6th Cir. 1979); *Joe Heaston Tractor & Implement Co. v. Sec. Acceptance Corp.*, 243 F.2d 196 (10th Cir. 1957); *U.S.A., Etc. v. Chatlin's Dep't Store, Inc.*, 506 F. Supp. 108 (E.D. Pa. 1980)).

[12] The Agreement is an absolute, unconditional guaranty, limited only in the sense that Shoaff's liability for the principal (but not including interest or other fees or costs) is capped at $450,000.00. We do not find any of its terms to be

ambiguous. Shoaff's argument hinges on the proposition that the original obligation that he guaranteed was "materially" altered, and such material alterations relieve him of responsibility under the Agreement.[4] We are unpersuaded.

[13] It is true that "'[u]nder Indiana common-law principles, when parties cause a material alteration of an underlying obligation without the consent of the guarantor, the guarantor is discharged from further liability whether the change is to his or her injury or benefit.'" *Keesling v. T.E.K. Partners, LLC*, 861 N.E.2d 1246, 1251 (Ind. Ct. App. 2007) (quoting *S-Mart, Inc. v. Sweetwater Coffee Co.*, 744 N.E.2d 580, 585-86 (Ind. Ct. App. 2001). Thus, even an unconditional, absolute guaranty such as Shoaff's may be unenforceable if the debt being guaranteed has been "materially" altered. "'A material alteration which will effect a discharge of the guarantor must be a change which alters the legal identity of the principal's contract, substantially increases the risk of loss to the guarantor, or places the guarantor in a different position. The change must be binding.'" *Id*.

[14] Shoaff relies primarily on *S-Mart, Inc. v. Sweetwater Coffee Co.*. In *S-Mart*, a coffee company ("Sweetwater") signed a lease for purposes of setting up a kiosk

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[4] Shoaff argues that "[t]here was no dispute that the debt in question was materially altered, something that First Merchants admitted." Appellant's Br. p. 22. Shoaff's authority for this proposition is the transcript of a hearing during which First Merchants's counsel orally argued that Shoaff had prospectively consented to "material alteration[s]." Tr. Vol. II pp. 6-7. We think Shoaff's reading of First Merchants's position in this regard is strained. Regardless, our standard of review here is de novo, and we must consider whether the alterations were, in fact, material.

inside a gas station. The lease was secured with a guaranty that "unconditionally and continuously" guaranteed monthly rent payments. 744 N.E.2d at 582. At first blush, that language might suggest a similarity to the guaranty in the instant matter. We find the case readily distinguishable, however.

[15] Several months after the parties signed a lease, the gas station began to expand its business to include an outdoor grill:

> Because the outdoor grill served food, and would utilize the kitchen area leased to Sweetwater, both of which would potentially interfere with Sweetwater's bakery and sandwich business, the parties subsequently negotiated an Amendment to the Lease Agreement (the "Lease Amendment"). The Lease Amendment allowed S-Mart to operate the outside grill and use the kitchen area in exchange for which it agreed to reduce Sweetwater's rent by $750.00 per month.

Id. at 583.

[16] The following year, Sweetwater "stopped operations, abandoned the premises, and ceased paying rent." *Id*. The trial court found that the lease amendment was a material alteration of the lease, and that, therefore, the guarantor was discharged from liability. We agreed and noted that:

> Notwithstanding the all-inclusive liability contained in the continuing guaranty, the guaranty *merely contemplates a series of debts with respect to the accrual of rental payments*. The parties contemplated that the Wilsons, as guarantors, would guarantee the payment of rent as it accrued. At the time the guaranty was executed however *the parties did not contemplate that within a matter*

> *of months they would become business competitors*. As a result, the terms of the Lease Agreement as originally contemplated and guaranteed by the Wilsons expanded beyond their original liability.

Id. at 587 (citing *Farmers Loan & Tr. Co. v. Letsinger*, 652 N.E.2d 63, 67 (Ind. 1995)) (emphasis added). The relationship between the parties in S-Mart changed in a legally significant manner. That is the key difference. The guaranty in *S-Mart* contemplated a debt and the repayment thereof, and nothing more.

[17] On the other hand, the legal relationship between the parties here was never altered. Their business relationship was not altered. The only changes were to the structure of the loan, the dates associated with its repayment, and the manner in which it was to be repaid. Those changes do not fit any of the three categories of materiality, and clearly fall within the language of the Agreement, demonstrating that Shoaff contemplated their possibility and prospectively consented to them.

[18] We find *Kruse v. National Bank of Indianapolis* to be more instructive. 815 N.E.2d 137 (Ind. Ct. App. 2004). Kruse, the guarantor, argued that the bank materially altered the underlying obligations by allowing the obligor to borrow amounts in excess of the "Borrowing Base." *Id*. at 149. The bank argued that Kruse "prospectively consented to alterations of [the] obligation" when Kruse agreed:

> absolutely and unconditionally: (i) to pay the obligations of [obligor] created by the Loan Agreement and any extensions, renewals or replacements thereof; (ii) that his liability would be "UNLIMITED"; (iii) that Indebtedness might be "created and continued in any amount"; and (iv) [that] his guaranty [would] continue "in spite of any modification of . . . maturities or other contractual terms applicable to the Indebtedness," without notice to him.

Id. at 150 (cleaned up).

[19] Given the language of the contract, we agreed with the bank. Shoaff attempts to distinguish *Kruse* by arguing that we concluded that Kruse failed to designate sufficient evidence to establish a genuine issue of material fact, and that our opinion did nothing more. We disagree. "We are inclined to agree with NBI that Kruse prospectively agreed to unlimited liability . . . ." *Id*.; *see also* Appellant's Br. p. 13. The implication in *Kruse* is that the parties *can* contract to allow unlimited liability, regardless of future material changes. That implication is not altered by the fact that the *Kruse* court did not have occasion to examine whether a material alteration had occurred in that case.

[20] We recognize that our jurisprudence in this area exhibits an internal tension. We have previously held, for example, that a change from monthly mortgage payments to semi-annual payments—without notice to the guarantor—was enough to discharge the guarantor from liability. *Brooks v. Bank of Geneva*, 97 N.E.3d 647, 653 (Ind. Ct. App. 2018) ("The change in the [obligor's] payment terms was a material alteration to the original contract between them and the Bank. Because the [guarantors] did not consent to that change, they were

discharged from liability as sureties and their mortgage should have been released."). In part, this tension is due to a fine distinction being drawn inconsistently. There is a difference between the question of whether an alteration is material, and whether it is contemplated and consented to by a contract. It is unclear whether the parties believe that a material alteration in the underlying obligation supplants the terms of the guaranty, whether it only does so under certain circumstances, or whether parties can contract to prospectively consent to all alterations, material or otherwise. Contracts are, by their nature, a way of parties mutually assenting to depart from common law rules. But here the common law rule might be cast as one of interpretation of the contract itself, and thus, could be interpreted to belie the terms of the contract. We need not determine such delicate doctrinal questions, however, in order to dispose of the case before us.

[21] On balance, we find that the specific factors of this case must lead us to the conclusion that Shoaff's liability remains intact for both reasons of immateriality *and* simple interpretation of contract. First, the language of the Agreement is exceptionally broad and appears to admit of no condition pursuant to which it could be compromised. We acknowledge that the Agreement sweeps broadly, though we disagree with Shoaff's characterization of the Agreement as "contemplat[ing] every single material alteration conceivable." Appellant's Reply Br. p. 7. Contracts are not invalidated merely because they cast so wide a net. Furthermore, Shoaff is a veteran attorney and—as with any litigant—is "presumed to understand the documents which

he signs and cannot be released from the terms of a contract due to his failure to read it." *Clanton v. United Skates of Am.*, 686 N.E.2d 896, 899–900 (Ind. Ct. App. 1997) (citing *Fultz v. Cox*, 574 N.E.2d 956, 958 (Ind. Ct. App. 1991)).

[22] Second, the underlying debt was modified repeatedly over the course of many years. The record includes communications from First Merchants and its predecessor to Shoaff for many of those changes, despite the fact that Shoaff waived all notice as part of the Agreement. We find it unlikely that Shoaff was completely unaware of every modification made to the underlying obligation. And yet he did not raise an objection until First Merchants complained of the default. Shoaff, in turn, complains that there is a genuine issue of material fact with respect to "whether Mr. Shoaff would have revoked his Guaranty if he had not been left in the dark by First Merchants." Appellant's Reply Br. p. 20. But, given that he was not entitled to notice of any changes, the issue is not one of *material* fact.

[23] Finally:

> There is also authority that even without an express term in a guaranty allowing it, a modification of the underlying obligation generally does not revoke a continuing guaranty; the guarantor is only discharged if the modification, other than an extension of time, creates a substituted contract or imposes risks on the secondary obligor fundamentally different from those imposed pursuant to the original one.

38 Am. Jur. 2d Guaranty § 70. We do not think that any of the modifications to the terms of the debt and its repayment imposed fundamentally different risks

on Shoaff. He may end up paying more than he would have otherwise, or more than he expected to pay when he signed the Agreement. But those are changes in degree, not in kind. Shoaff contemplated interest, late fees, and future debts in the Agreement. He assumed those risks.

[24] We have previously found that the key to the question of alteration of the legal identity of the principal's contract is that the requirement is best understood to mean whether the obligation itself—rather than the instrument which records it—has meaningfully changed. *See Mod. Photo Offset Supply v. Woodfield Grp.*, 663 N.E.2d 547, 551 (Ind. Ct. App. 1996) ("However, as *Cunningham* makes explicit, the change in legal identity of a contract is an alteration in the 'obligation,' or 'underlying contract.' Thus, the merger of one bank into another and the renaming of the survivor corporation did not materially alter the underlying contract between the creditor and the obligor, and the liability of the personal guarantors continued. Here, the Agreement does not materially alter the obligation of MacGill to guarantee payment of the Woodfield debt to Modern Photo." (quoting *Cunningham v. Mid State Bank*, 544 N.E.2d 530, 534 (Ind. Ct. App. 1989))). First Merchants is merely seeking the principal loaned, as well as interest and late fees associated therewith. That is precisely the obligation Shoaff guaranteed.

[25] We conclude that the underlying obligation—guaranteed by Shoaff—was not materially altered. Regardless, any alterations were contemplated by the parties to the Agreement, and prospectively consented to by Shoaff. Accordingly, the

trial court did not err in granting summary judgment to First Merchants with respect to Shoaff's liability for the debt.

II. Damages

[26] On cross-appeal, First Merchants contends that the trial court abused its discretion when it calculated the damages First Merchants is entitled to. "Generally, the computation of damages is a matter within the sound discretion of the trial court." *Fitzpatrick v. Kenneth J. Allen & Assocs., P.C.*, 913 N.E.2d 255, 264 (Ind. Ct. App. 2009) (citing *Berkel & Co. Contractors, Inc. v. Palm & Assoc., Inc.*, 814 N.E.2d 649, 658 (Ind. Ct. App. 2004)). Indiana Appellate Rule 66(C)(4), however, provides that one remedy available on appeal is "if damages are excessive or inadequate, [the Court may] order entry of judgment of damages in the amount supported by the evidence[.]" "On appeal, we will not reverse a damages award unless it is based on insufficient evidence or is contrary to law." *Fitzpatrick*, 913 N.E.2d at 256. Shoaff argues that First Merchants failed to submit sufficient evidence of its damages and that, therefore, we cannot conclude that the trial court abused its discretion. First Merchants argues that it supplied sufficient evidence but that the trial court did not calculate the damages correctly.

[27] The damages in question are contractual in nature. And, "[t]he rules governing the interpretation and construction of contracts generally apply to the interpretation and construction of a guaranty contract." *Keesling v. T.E.K. Partners, LLC*, 861 N.E.2d 1246, 1251 (Ind. Ct. App. 2007). "In a case brought by a creditor against guarantor, a damage award must be supported by the

evidence." 38A C.J.S. Guaranty § 146 (*citing Ferguson v. Cadle Co.*, 816 So. 2d 473 (Ala. 2001)). "Damages are readily ascertainable where the trier of fact need not exercise its judgment to assess the amount of damages." *Hooker Builders, Inc. v. Smalley*, 691 N.E.2d 1256, 1258 (Ind. Ct. App. 1998) (citing *City of Indianapolis v. Twin Lakes Enters., Inc.*, 568 N.E.2d 1073, 1087 (Ind. Ct. App. 1991), *trans. denied*). "Where the breach of contract consists of a failure to pay the debt of another, the measure of damages has usually been considered to be the amount lost in consequence of the breach." *Ind. Univ. v. Ind. Bonding & Sur. Co.*, 416 N.E.2d 1275, 1288 (Ind. Ct. App. 1981) (citing *Devol v. McIntosh*, (1864) 23 Ind. 529; *Weddle v. Stone*, (1859) 12 Ind. 625).

[28] The record suggests that the amount of damages comprised of accrued interest and assessed late fees is calculable and readily ascertainable in a manner that means the trial court's discretion should not be implicated. This is unlike, for example, a case in which a trial court must determine what a reasonable measure of damages would be.[5] The record also suggests that the trial court did not take account of all of the variables necessary to correctly calculate the loss suffered by First Merchants. The trial court's interest calculation, for example, employed a flat 5% rate. But, as we have noted, the interest rate for the loan

[5] We reject Shoaff's argument that First Merchants failed to provide sufficient evidence on this score. To the contrary, the affidavits and exhibits submitted make quite clear which variables should have been accounted for when calculating interest and late fees, including the particularly helpful summary of the changing interest rates found in Appellee's Appendix Volume II at page 31.

fluctuated multiple times. First Merchants provided the trial court with the following table:

[29]

Effective Date	Rate	# days	Calculated Interest	Interest Paid	Total Interest Due	Principal Payment	Remaining Balance	Per Diem
10/31/2017	5.25%						$ 599,300.00	$ 87.3979
12/13/2017	5.25%	43	$ 3,758.11	$ 2,621.91	$ 1,136.20	$ 2,446.25	$ 596,853.75	$ 87.0412
12/14/2017	5.50%	1	$ 87.04		$ 1,223.24		$ 596,853.75	$ 91.1860
1/10/2018	5.50%	27	$ 2,462.02	$ 2,682.19	$ 1,003.07	$ 2,385.97	$ 594,467.78	$ 90.8215
2/7/2018	5.50%	28	$ 2,543.00	$ 2,819.47	$ 726.60	$ 2,248.69	$ 592,219.09	$ 90.4779
3/9/2018	5.50%	30	$ 2,714.34	$ 2,626.61	$ 814.33	$ 2,441.55	$ 589,777.54	$ 90.1049
3/22/2018	5.75%	13	$ 1,171.36		$ 1,985.70		$ 589,777.54	$ 94.2006
4/9/2018	5.75%	18	$ 1,695.61	$ 2,706.51	$ 974.80	$ 2,361.65	$ 587,415.89	$ 93.8234
5/7/2018	5.75%	28	$ 2,627.05	$ 2,945.06	$ 656.79	$ 2,123.10	$ 585,292.79	$ 93.4843
6/8/2018	5.75%	32	$ 2,991.50		$ 3,648.29		$ 585,292.79	$ 93.4843
6/12/2018	5.75%	4	$ 373.94	$ 2,900.38	$ 1,121.84	$ 2,167.78	$ 583,125.01	$ 93.1380
6/22/2018	6.00%	10	$ 931.38		$ 2,053.22		$ 583,125.01	$ 97.1875
7/10/2018	6.00%	18	$ 1,749.38	$ 2,863.09	$ 939.51	$ 2,205.07	$ 580,919.94	$ 96.8200
8/13/2018	6.00%	34	$ 3,291.88	$ 2,972.70	$ 1,258.69	$ 2,095.46	$ 578,824.48	$ 96.4707
9/18/2018	6.00%	36	$ 3,472.95		$ 4,731.64	$ 5,068.16	$ 573,756.32	$ 95.6261
9/27/2018	6.25%	9	$ 860.63		$ 5,592.27		$ 573,756.32	$ 99.6105
10/2/2018	7.25%	5	$ 498.05	$ 6,090.29	$ 0.03		$ 573,756.32	$ 115.5481
11/28/2018	7.25%	57	$ 6,586.24	$ 3,350.90	$ 3,235.38	$ 1,717.26	$ 572,039.06	$ 115.2023
12/20/2018	7.50%	22	$ 2,534.45		$ 5,769.83		$ 572,039.06	$ 119.1748
12/21/2018	7.50%	1	$ 119.17	$ 5,885.00	$ 4.00		$ 572,039.06	$ 119.1748
2/7/2019	7.50%	48	$ 5,720.39	$ 2,983.34	$ 2,741.05	$ 8,516.66	$ 563,522.40	$ 117.4005
2/15/2019	12.50%	8	$ 939.20		$ 3,680.26		$ 563,522.40	$ 195.6675
12/12/2019	12.50%	300	$ 58,700.25		$ 62,380.51	10000	$ 553,522.40	$ 192.1953
2/18/2020	12.50%	68	$ 13,069.28		$ 75,449.79	$ 10,000.00	$ 543,522.40	$ 188.7231
4/28/2020	12.50%	70	$ 13,210.61		$ 88,660.40	$ 10,000.00	$ 533,522.40	$ 185.2508
6/4/2020	12.50%	37	$ 6,854.28		$ 95,514.68	$ 15,000.00	$ 518,522.40	$ 180.0425
1/22/2021	12.50%	232	$ 41,769.86		$ 137,284.54	$ 6,785.38	$ 511,737.02	$ 177.6865
7/15/2021	12.50%	174	$ 30,917.44		$ 168,201.99		$ 511,737.02	$ 177.6865

Appellee's App. Vol. II p. 31. This purports to mirror the correct calculations for the interest Shoaff owes. The trial court did not explain its approach to the interest calculation, or why it did not take into account the fluctuating interest rates. We hold that the effective date of each interest rate, as well as the number of days each rate was in effect, must factor into the interest calculation.

[30] Neither does the trial court's calculation of late fees appear to have considered the necessary complexities. Under the Agreement and subsequent modifications, a late payment by the debtor triggers a late charge equal to 5% of the unpaid portion of the regularly scheduled payment. But the amount of the payments and their due dates varied throughout the life of the debt. There were

also several defaults, in which event the scheduled payment is the full amount due. First Merchants's designated evidence below evidences at least six instances in which fees for missed payments were due. And yet the trial court does not seem to have accounted for those instances in its calculation of the late fees, concluding merely that Shoaff owes "accrued interest[6] and unpaid late charges in the amount of $28,601.95 (calculated at 5% of the unpaid portion of the regularly scheduled payment of $572,039.06 due on March 15, 2019) . . . ." Appellant's App. Vol. VI p. 35. It is unclear why the trial court determined that only one late fee payment was due, but we hold that it must do so on remand.

[31] Thus, the trial court did exercise some discretion here *with respect to the methodology for calculating interest and late fees*. We hold that it abused that discretion by adopting an approach that did not comply with the unambiguous terms of the Agreement. *See Bruno v. Wells Fargo Bank, N.A.*, 850 N.E.2d 940, 950 (Ind. Ct. App. 2006) (remanding where trial court failed to explain its methods for calculating interest and not accounting for variable interest rate).

[32] We reverse the trial court's damages award with respect to interest and late fees and remand for further proceedings. We note that the trial court may need to hold additional hearings or hear additional testimony and/or argument in order

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[6] The trial court did not clarify how this referenced "accrued interest" is different or separate from its pronouncement on owed interest.

to determine which factors must properly be accounted for, and precisely how the correct measure of damages should be calculated.

III. Attorney's Fees

[33] Our analysis of the trial court's conclusion with respect to attorney's fees is somewhat different, however. "'We review a trial court's award of attorney's fees for an abuse of discretion.'" *Minser*, 170 N.E.3d at 1102 (quoting *River Ridge Dev. Auth. v. Outfront Media, LLC*, 146 N.E.3d 906, 912 (Ind. 2020)). "'An abuse of discretion occurs when the court's decision either clearly contravenes the logic and effect of the facts and circumstances or misinterprets the law.'" *Id*. "'To make this determination, we review any findings of fact for clear error and any legal conclusions de novo.'" *Id*.

[34] The gravamen of First Merchants's position on the award of attorney's fees is that the trial court only awarded fees up through the date of the initial entry of summary judgment, and not for the subsequent litigation involving the motion to correct error and re-determination of the damages award. Unlike the calculations of interest and late fees, the trial court's discretion with respect to attorney's fees is, generally speaking, unfettered by everything except for reasonableness. *See, e.g., Walton v. Claybridge Homeowners Ass'n, Inc.*, 825 N.E.2d 818, 826 (Ind. Ct. App. 2005). "The determination of reasonableness of an attorney's fee necessitates consideration of all relevant circumstances." *Bruno*, 850 N.E.2d at 950 (citing *Boonville Convalescent Ctr., Inc. v. Cloverleaf Healthcare Servs., Inc.*, 834 N.E.2d 1116, 1127–28 (Ind. Ct. App. 2005), *reh'g denied, trans. denied*).

[35] When determining the amount of reasonable attorney's fees the trial court may—but is not required to—consider "'such factors as the hourly rate, the result achieved . . . and the difficulty of the issues.'" *Fischer v. Heymann*, 12 N.E.3d 867, 874 (Ind. 2014) (quoting *Heiligenstein v. Matney*, 691 N.E.2d 1297, 1304 (Ind. Ct. App. 1998)).

[36] Here, however, reasonable attorney's fees are guaranteed by the Agreement. The trial court's unexplained decision to award fees up until a certain date and then no fees thereafter appears to be arbitrary and renders its award of attorney's fees unreasonable. The trial court is free to evaluate First Merchants's submissions for the fee amount and assess whether that amount itself is reasonable, and the trial court may, in its discretion, conclude that the amount either is or is not reasonable. But to award partial fees, reasonable or not, is to ignore the plain meaning of the Agreement, and therefore constitutes an abuse of discretion. On remand, the trial court should assess a reasonable amount of attorney's fees for *all* services rendered in pursuit of the debt owed by Shoaff up until the date of the order granting such fees.

Conclusion

[37] The trial court did not err when it granted summary judgment to First Merchants. It did err, however, with respect to its awards of interest, late fees, and attorney's fees.

[38] Affirmed in part, reversed in part, and remanded for further proceedings.

Robb, J., and Mathias, J. concur.