ATTORNEYS FOR APPELLANT

Shane C. Mulholland
Jared P. Baker
Matthew A. Senko
Burt, Blee, Dixon, Sutton & Bloom, LLP
Fort Wayne, Indiana

ATTORNEYS FOR APPELLEE

L. Charles Lukmann, III
Connor H. Nolan
Harris Welsh & Lukmann
Chesterton, Indiana

# IN THE COURT OF APPEALS OF INDIANA

Five Star Roofing Systems, Inc. D/B/A Five Star Commercial Roofing Systems Inc.,

*Appellant-Defendant*,

v.

Armored Guard Window & Door Group, Inc. D/B/A Pendleton Enterprises, Inc.,

*Appellee-Plaintiff*.

June 9, 2022

Court of Appeals Case No. 21A-PL-1964

Appeal from the Porter Superior Court

The Honorable Michael A. Fish, Special Judge

Trial Court Cause No. 64D01-1609-PL-8432

**Brown, Judge.**

[1] Five Star Roofing Systems, Inc. ("Five Star") appeals the trial court's entry of summary judgment in favor of Armored Guard Window & Door Group, Inc., doing business as Pendleton Enterprises, Inc., ("Pendleton Enterprises") and award of prejudgment interest and attorney fees. We affirm in part, reverse in part, and remand.

## *Facts and Procedural History*

[2] On April 20, 2015, Five Star signed a subcontractor agreement ("Subcontractor Agreement") with Pendleton Enterprises for roofing work as part of a construction project for Flint Hill Resources ("FHR"). The total subcontract price of $176,000 included an up front, initial payment of $88,000, with the remaining balance of $88,000 to be paid upon completion of the project. On August 24, 2015, Pendleton Enterprises sent an email to Five Star stating that it had twice shown up with the incorrect insulation material, not complied with safety rules and regulations regarding permits and documentation of training, and this had led "to FHR requiring more stipulations," and it outlined expectations for future work on the roof. Appellant's Appendix Volume II at 157. On August 31, 2015, Pendleton Enterprises sent an email to Five Star claiming that Five Star was in breach of the Subcontractor Agreement, setting forth the basis for the claimed breach, and stating, "[a]s a result of the aforementioned breach of contract, it is determined that [Five Star] will be terminated as the subcontractor with the following terms to be met . . . ." *Id.* at 161. The letter further provided: "[Five Star] has 48 hours within receipt of this to acknowledge via certified letter to Pendleton Enterprises and follow all

guidelines set forth in this document. If terms and conditions are not met, Pendleton Enterprises will pursue legal action in a Porter County, Indiana court as the [Subcontractor Agreement] states." *Id.* at 162.

[3] Pendleton Enterprises sought three new estimates for completion of the roofing project, and on October 19, 2015, it signed a new contract with Sterling Commercial Roofing, Inc. ("Sterling") to complete the project for $210,085. On February 9, 2016, Sterling had completed the roofing project and sent an invoice for $209,992 to Pendleton Enterprises.

[4] On January 7, 2016, Kevin Baird, on behalf of Five Star, sent the owner and president of Pendleton Enterprises, David Pendleton, ("Pendleton") and Pendleton Enterprises' counsel a letter alleging costs of $88,766 and loss of the "final payment not received due to not being allowed to complete the job" and stating "[w]e will accept the deposit as final payment for the costs incurred." Appellant's Appendix Volume III at 119.

[5] On September 9, 2016, Pendleton Enterprises filed a complaint against Five Star alleging "conduct or circumstances that would be a default of the [Subcontractor Agreement]," that it had the right to terminate the contract, and that it was "entitled to reimbursement from Five Star for all of the [breaches] pursuant to the express terms of the Subcontract" and for "its cost of completing the Work, and . . . all losses, damages, costs, and expenses." Appellant's Appendix Volume II at 196, 198.

[6] On August 31, 2020, Pendleton Enterprises filed a motion for summary judgment together with: designated evidence which included an affidavit of Pendleton; the Subcontractor Agreement; the contract between FHR and Pendleton Enterprises; email messages between the parties' representatives; a deposition of Herbert Mains, a roofing estimator employed by Five Star; and Five Star's answers to interrogatories. In his affidavit, Pendleton stated:

> 5. In 2015, Pendleton Enterprises put in a bid to serve as the general contractor on a commercial roof replacement for the Administration Building at [FHR] in Peru, Illinois.
>
> 6. [FHR] awarded the contract to Pendleton Enterprises for a price of $285,000 . . . .
>
> * * * * *
>
> 8. Pendleton Enterprises had experience as a general contractor, but did not have specialized experience in commercial roofing replacements, and was relying on the subcontractors for their experience and expertise.
>
> * * * * *
>
> 13. The proposal [submitted by Five Star] did not meet all of the requirements of [FHR], so I asked Herb Mains to revise it to meet the owner's specifications. (See Exhibit A-3).
>
> * * * * *
>
> 19. On April 20, 2015, Pendleton Enterprises and Five Star signed the Subcontractor Agreement for the job. (See Exhibit A-6). I signed the Subcontractor Agreement for Pendleton Enterprises, and Chris Spegal signed it for Five Star (See Exhibit A-6, page 19).
>
> * * * * *
>
> 22. There were several important requirements for the work on the [FHR] commercial roof replacement, including but not limited to the following:

A. All workers on the job, including myself, had to pass a background check and complete an on-line site specific training course before arriving at the job site in order to receive an entry pass for the gate to the [FHR] facility. (See Exhibit A-8 for a description of the on-line training).

B. Anyone on the roof had to properly utilize a fall protection harness by wearing the fall protection harness and securing it to a safety anchor on the roof.

C. Whenever workers were cutting into the roof or there was a risk of creating sparks or flames, a person needed to be stationed inside the building on fire watch . . . .

D. All chemicals and solvents had to be properly disposed of and handled in accordance with Occupational Health and Safety Act (OSHA) requirements.

E. Workers needed to wear respirators.

F. The components of the replacement roof were specified in the Subcontractor Agreement with their Material Safety and Data Sheets (MSDS) for each component. (See Exhibit A-5, pages 20-45).

* * * * *

24. The first day of work was scheduled for June 2, 2015, and there were several immediate problems with Five Star, including but limited to [sic] the following:

A. Five Star's work crew began cutting into the roof without having a person stationed on fire watch.

B. The workers from Five Star were not properly handling chemicals and solvents, as they were washing their hands with gasoline and letting the gasoline spill directly onto the ground.

C. Five Star's workers were not wearing personal protective equipment (respirators and rubber gloves) as required and directed.

D. Five Star's workers were not appropriately using the fall protection harnesses while they were on the roof because they were not securing their harnesses to a safety anchor.

> E. Five Star ordered and caused the wrong foam insulation to be delivered . . . . Instead of insulation from ACH Technologies . . . the material ordered and delivered was from Firestone, a competitor of [FHR] . . . .
>
> * * * * *

31. On August 10, 2015 Five Star sent a work crew with different workers than the ones who arrived on June 2 without notifying me. Some of the new members of the Five Star work crew had not completed background checks or the on-line site specific training to receive their entry passes. These workers had to leave the job site on August 10 and complete the on-line training and background checks before they came back . . . .

32. Work was delayed from August 10 to August 11 due to the new workers not having the background checks and on-line training complete.

33. Five Star's new crew also had fewer workers than the prior one. With less [sic] workers on the job, the Five Star crew did not have enough people to work on the roof, supervise the job site form [sic] the ground, and to post on fire watch.

34. On August 11, in order to avoid further delay, I agreed to temporarily serve as the person on fire watch.

35. While I was responding to Five Star's unannounced delivery of the wrong insulation, the Five Star crew started cutting into the roof, without giving any notice to me or to [FHR], and without a fire watch in place. The Five Star crew also failed to wear their PPE and failed to properly clip their fail [sic] protection harnesses to the roof.

36. [FHR] stopped the work and ordered Five Star off the site, and began an investigation.

37. That same day, after being ordered off the site, the Five Star workers returned to the site without checking in at the gate, contacting me, or giving any notice, and climbed back on the roof to take tools and equipment off of the job site.

* * * * *

41. [FHR] scheduled another mandatory safety meeting for August 14, 2015 . . . .

* * * * *

43. I attended the meeting on August 14, and only Herb Mains from Five Star attended. No one from the work crew showed up.

* * * * *

45. [FHR] gave direction on the remedies for these concerns, as follows:

> A. Five Star workers would need to provide OSHA-10 cards to document the proper hazard training.
>
> B. A trained fall protection person on site at all time, with the implementation of a fall protection plan. [FHR] offered to pay for the costs of having a person trained in fall protection supervision on site, but would not pay for a Five Star employee to receive training.
>
> C. All workers were now required to submit to a full background check to ensure proper work permits were in place.
>
> D. Five Star must have a representative on site at all times who was not a working member of the crew to be able to document changes and communicate by e-mail during the day.

* * * * *

46. After our safety meeting on August 14, and despite my request for Five Star to notify me of any further deliveries, an unscheduled delivery arrived on August 14, containing the proper insulation manufactured by [FHR] and ordered from ACH Technologies.

47. On August 19, 2015, Five Star demanded an additional deposit for what they called "change orders", for [FHR] to pay for additional training of Five Star employees, and for [FHR] to pay Five Star $500 per hour for a competent fall protection person to be on the site. (See Exhibit A-26).

* * * * *

51. On August 31, 2015, I sent a letter to Five Star by e-mail and certified mail notifying them that they were in breach of the Subcontractor Agreement, and due to their refusal to follow instructions Five Star was being terminated from the job. (See Exhibit A-28).

> 52. Pendleton Enterprises terminated the Subcontractor Agreement and sought out another subcontractor.
>
> * * * * *
>
> 58. Pendleton Enterprises paid Sterling [the new subcontractor] $209,992 in addition to the $88,000 already paid to Five Star.

*Id.* at 56-64.

[7] The Subcontractor Agreement provides in relevant part:

> 1.1 The Subcontract Documents consist of this Subcontractor Agreement . . . including the [contract between Pendleton Enterprises and FHR] . . . .
>
> * * * * *
>
> 1.2.1 The Scope of Work includes . . . the following specifications:
>
> > Tear off all old foam roofing material as determined and (1) Install new insulation and fiber board layers w. FHR insulation mechanically fastened to the decking; (2) Apply first layer of Starbond modified cold applied asphalt mastic to roof surface; (3) Install layer of base sheet over Starbond; (4) Apply second layer of Starbond modified cold applied asphalt mastic; (5) Install first layer of Poly-Flex fiver membrane, staggering seams; (6) Apply third layer of Starbond modified cold applied asphalt mastic; (7) Install second layer of Poly- Flex [sic] membrane, staggering seams; (8) Flash all protrusions through rood [sic] (i.e. vents, drains, HVAC units, etc); (9) Apply fourth layer of Starbond modified cold applied asphalt mastic; (10) Apply cover layer of Starfire aluminum chips.
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> * * * * *
>
> 6.2 The Subcontractor shall promptly provide the Contractor with scheduling information, as requested . . . . Subcontractor shall comply with instructions given by Contractor, including any to suspend, delay or accelerate the Work. Subcontractor shall furnish to Contractor periodic progress reports on the Work, including information on the status of

materials and equipment which may be in the course of preparation, manufacture or transit.

* * * * *

6.10 Subcontract[or] shall perform the Work in compliance with all applicable federal, state, municipal and local laws, codes, ordinances, rules, regulations and requirements, including without limitation, those relating to OSHA, MSHA, discrimination in employment, fair employment practices and equal employment opportunity, without additional expense to Contractor, and shall correct at its own cost and expense, any violations resulting from performance of the Work. Subcontractor shall comply with federal, state and local tax laws, social security acts, unemployment compensation acts and workers compensation acts insofar as applicable to the performance of the Work.

6.11 Subcontractor shall at all times provide personal superintendence to the Work, or have at the site a competent foreman or superintendent satisfactory to Contractor and with the authority to bind Subcontractor.

* * * * *

6.13 Subcontractor shall comply with all applicable safety laws and with any other standards established by Contractor and/or Owner . . . . When so ordered, Subcontractor shall stop any part of the Work that Contractor deems unsafe until corrective measures satisfactory to Contractor have been taken.

* * * * *

17.1 Should Subcontractor at any time fail to . . . supply sufficient skilled workers, equipment or materials of proper quality and quantity . . . fail to take any measure to prevent injury to any person as required by this Subcontract, or cause by any act or omission the stoppage or delay of or interference with or damage to the work of Contractor and Owner . . . or fail in the performance of the terms and provisions of the Subcontract or any of the Subcontract Documents . . . Contractor or Owner shall have the right . . . after 48 hours' notice to Subcontractor and failure of Subcontractor to cure such default, . . . (b) to terminate the employment of Subcontractor for all or any portion of the Work, enter upon the premises and take possession of, for the purpose of completing the Work, all materials, equipment, scaffolds, tools, appliances and other items required, all of which Subcontractor hereby transfers, assigns and sets over to Contractor for such purpose, and to employ any person or

> persons to complete the Work and provide all the labor, services, materials, equipment, and other items required therefor. In case of such termination of employment of Subcontractor, Subcontractor shall not be entitled to receive any further payment under this Subcontract until the Work shall be wholly completed to the satisfaction of Contractor, Owner and Architect and shall have been accepted by them, at which time, if the unpaid balance of the amount to be paid under this Subcontract shall exceed the cost and expense incurred by Contractor and/or Owner in completing the Work, such excess shall be paid by Contractor to Subcontractor, but if such cost and expense shall exceed such unpaid balance, the Subcontractor shall pay the difference to Contractor. Such cost and expense shall include not only the cost of completing the Work to the satisfaction of Contractor, Owner and Architect, buy [sic] also all losses, damages, costs and expenses, including legal fees and disbursements sustained, incurred or suffered by reason of or resulting from Subcontractor's default.

*Id.* at 83, 88-90, 98 (italics omitted). Further, the contract between FHR and Pendleton Enterprises provided: "Contractor Group [including Subcontractors] shall at all times strictly follow all requests and instructions given by [FHR] regarding safety and health matters in or at such premises." *Id.* at 67.

[8] On December 29, 2020, Five Star filed a memorandum in opposition to Pendleton Enterprises' motion for summary judgment together with designated evidence. Five Star's designated evidence included excerpts of Pendleton's and Mains's deposition, the affidavits of Chris Spegal and Mains, emails sent by Pendleton, and the January 7, 2016 letter itemizing the alleged costs incurred during the job.

[9] On June 28, 2021, the court granted Pendleton Enterprises' motion for summary judgment and found Pendleton Enterprises was entitled to damages of $121,992 plus prejudgment interest of $56,902.72 and reasonable attorney

fees. It noted that "Five Star concedes it was in breach of the contract but contends it cured its breach," "the Court can determine from the undisputed facts that Five Star's not following the safety rules would result in it being disallowed from continuing to work on owner's site," "the breach was material," not complying with the safety provisions of the contract and then "demanding additional compensation to come into compliance constitute[d] the ongoing breach," Five Star could not claim that Pendleton Enterprises' notice to cure was defective because they were already in material breach, and regardless, that "notice of termination was correct under the contract." Appellant's Appendix Volume II at 15-16.

[10] On August 10, 2021, the court held a hearing on the award of attorney fees, at which Pendleton Enterprises sought to admit its December 29, 2015 offer to settle ("Settlement Letter"), Five Star objected to its admission, and the court admitted the letter, stating that although "it is not normally admissible," "I do have, because there isn't a jury here, a duty to make sure I give it any proper weight that it should be given and not consider it at all if I feel like I shouldn't consider it." Transcript Volume II at 57. On August 12, 2021, the court directed final judgment and "fees and expenses of $66,233.78 plus costs of $156.00 for a total judgment of $245,284.50." Appellant's Appendix Volume II at 19.

## *Discussion*

[11] Five Star argues the trial court erred in: (A) improperly admitting evidence; (B) granting summary judgment to Pendleton Enterprises; (C) concluding that Five Star had neither a contractual nor common law right to set-off for its costs; and (D) granting and calculating prejudgment interest.

A. *Admission of Evidence*

[12] Five Star argues the trial court erred in denying its Motion to Strike and in considering designated evidence that was otherwise inadmissible. Five Star claims, regarding paragraphs thirty-three and thirty-five of Pendleton's affidavit, that the court "failed to strike opinion testimony from a lay person that would otherwise require an expert in roofing," "in no situation would David Pendleton's opinion as to commercial roofing standards be admissible," and that it failed to strike exhibits A-9 and exhibit A-19. Appellant's Brief at 33-34. Further, Five Star claims the court abused its discretion in admitting and considering the December 29, 2015 Settlement Letter in awarding attorney fees in violation of Ind. Evidence Rule 408.

[13] Generally, we review a trial court's decision to admit or exclude evidence for an abuse of discretion. *Lanni v. Nat'l Collegiate Athletic Ass'n*, 989 N.E.2d 791, 797-798 (Ind. Ct. App. 2013). This discretion extends to rulings on motions to strike affidavits on the grounds that they fail to comply with the summary judgment rules. *Ford v. Jawaid*, 52 N.E.3d 874, 877 (Ind. Ct. App. 2016). We reverse a trial court's decision to admit or exclude evidence only if that decision

is clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom. *Lanni*, 989 N.E.2d at 798. Further, the trial court's decision will not be reversed unless prejudicial error is shown. *Id.*

[14] In ruling on a motion for summary judgment, the trial court will consider only properly designated evidence. *Ford*, 52 N.E.3d at 877. "Unsworn statements and unverified exhibits do not qualify as proper Rule 56 evidence." *Stafford v. Szymanowski*, 31 N.E.3d 959, 964 (Ind. 2015) (quotation omitted). Trial Rule 56(E) provides that an affidavit "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Ind. Evidence Rule 701 allows for the admission of opinion testimony by lay witnesses. The opinion must be "rationally based on the witness's perception and helpful to a clear understanding of the witness's testimony or to a determination of a fact in issue." Ind. Evidence Rule 701. The requirement that the opinion be "rationally based" on perception "simply means that the opinion must be one that a reasonable person could normally form from the perceived facts." *A House Mechanics, Inc. v. Massey*, 124 N.E.3d 1257, 1265 (Ind. Ct. App. 2019) (quoting *Davis v. State*, 791 N.E.2d 266, 268 (Ind. Ct. App. 2003)).

[15] Here, the affidavit establishes that Pendleton based his opinions on personal knowledge, and he is competent to testify. Paragraphs thirty-three and thirty-five of his affidavit state:

> 33. Five Star's new crew also had fewer workers than the prior one. With less [sic] workers on the job, the Five Star crew did not have enough people to work on the roof, supervise the job site form [sic] the ground, and to post on fire watch.
>
> * * * * *
>
> 35. While I was responding to Five Star's unannounced delivery of the wrong insulation, the Five Star crew started cutting into the roof, without giving any notice to me or to Flint Hills Resources, and without a fire watch in place. The Five Star crew also failed to wear their PPE and failed to properly clip their fail [sic] protection harnesses to the roof.

Appellant's Appendix Volume II at 61. To the extent Five Star insists these statements are inadmissible because the testimony would ordinarily require an expert in roofing, we note that the affidavit also states that Pendleton Enterprises had experience "as a general contractor, but did not have specialized experience in commercial roofing replacements, and was relying on the subcontractors for their experience and expertise." *Id.* at 57. Nevertheless, Pendleton was able to observe the number of Five Star's workers and determine whether they complied with Pendleton Enterprises' and FHR's safety requirements. The Subcontractor Agreement established that Five Star would "comply with all applicable safety laws and with any other standards established by Contractor and/or Owner." *Id.* at 90. Exhibit A-9 includes Pendleton's opinion concerning the scope of fire watch responsibilities and is attached to his sworn and verified affidavit. The document containing the notes of the industrial hygienist Jennifer Holliday, Exhibit A-19, is unsworn and unverified. Even if Holliday's notes were improperly considered, Five Star does not demonstrate prejudice. With regard to the safety violations, the trial court

stated, "[t]hese Violations ranged from Five Star not completing required training to not following OSHA rules for fall prevention, fire safety, vapor inhalation protection, and fuel spill prevention." *Id.* at 13. It is not apparent the court relied on the hygienist's notes in its order, and other uncontroverted designated evidence supports the court's findings. We cannot say the admission of the industrial hygienist's notes requires reversal.

[16] To the extent Five Star claims that the trial court abused its discretion by admitting and considering Pendleton Enterprises' Settlement Letter in awarding attorney fees, we note that Ind. Evidence Rule 408 provides:

> (a) Prohibited Uses. Evidence of the following is not admissible on behalf of any party either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:
>
> > (1) furnishing, promising, or offering, or accepting, promising to accept, or offering to accept a valuable consideration in order to compromise the claim; and
> >
> > (2) conduct or a statement made during compromise negotiations about the claim. Compromise negotiations include alternative dispute resolution.
>
> (b) Exceptions. The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

[17] At the August 10, 2021 hearing about attorney fees and expenses, Pendleton Enterprises moved to admit the Settlement Letter "not as evidence of what the value of the case is, but as proof of what [it was] willing to settle the case for before it went to suit and before that first mediation." Transcript Volume II at

52. The court stated the Settlement Letter was "an offer of compromise and inadmissible," and that "it is not normally admissible," but ultimately overruled Five Star's objection and admitted it into evidence, stating: "I do have, because there isn't a jury here, a duty to make sure I give it any proper weight that it should be given and not consider it at all if I feel like I shouldn't consider it." *Id.* at 57. The Settlement Letter, dated December 29, 2015, described itself as a "settlement demand" and "offer," outlined Five Star's breaches of the Settlement Agreement, referenced attorney fees and litigation costs totaling $1,500, and described the amounts it believed Five Star would ultimately be responsible for if the matter were litigated. Appellant's Appendix Volume III at 197.

[18] Even if the Settlement Letter were inadmissible as evidence of settlement negotiations, Five Star has not demonstrated prejudice. The 2015 Settlement Letter referred to an amount of $1,500 for attorney fees and litigation costs. Pendleton Enterprises later submitted much more detailed documentation of its attorney fees and expenses, and the court awarded $66,233.78 on August 12, 2021. The court had determined Pendleton Enterprises was entitled to attorney fees prior to the hearing at which it determined the exact amount, and the court's final order did not indicate that the court relied on the Settlement Letter in determining the amount of Pendleton Enterprises' attorney fees. We cannot say the admission of the Settlement Letter prejudiced Five Star or requires reversal.

B. *Summary Judgment*

[19] We review an order for summary judgment de novo, applying the same standard as the trial court. *Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014). The moving party bears the initial burden of making a *prima facie* showing that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. *Manley v. Sherer*, 992 N.E.2d 670, 673 (Ind. 2013). Summary judgment is improper if the moving party fails to carry its burden, but if it succeeds, then the nonmoving party must come forward with evidence establishing the existence of a genuine issue of material fact. *Id.* "A genuine issue of material fact exists where facts concerning an issue that would dispose of the issue are in dispute or where the undisputed material facts are capable of supporting conflicting inferences on such an issue." *Robbins v. Trustees of Ind. Univ.*, 45 N.E.3d 1, 6 (Ind. Ct. App. 2015) (citing *Doe v. Lafayette Sch. Corp.*, 846 N.E.2d 691, 695 (Ind. Ct. App. 2006), *reh'g denied*, *abrogated on other grounds*). We construe all factual inferences in favor of the nonmoving party and resolve all doubts as to the existence of a material issue against the moving party. *Manley*, 992 N.E.2d at 673. Our review of a summary judgment motion is limited to those materials designated to the trial court. *Mangold ex rel. Mangold v. Ind. Dep't of Natural Res.*, 756 N.E.2d 970, 973 (Ind. 2001).

[20] Five Star claims that the trial court erred in granting summary judgment in favor of Pendleton Enterprises because questions of fact exist as to whether Five Star materially breached the contract, the court did not construe all facts and inferences in its favor, and the court incorrectly found that it conceded breach

of the Subcontractor Agreement. Pendleton Enterprises responds that Five Star defaulted under the contract, it was entitled to terminate the contract, and there is no dispute of material fact regarding Five Star's breach.

[21] Interpretation and construction of contract provisions are questions of law. *Fischer v. Heymann*, 943 N.E.2d 896, 900 (Ind. Ct. App. 2011), *trans. denied*. As such, cases involving contract interpretation are particularly appropriate for summary judgment. *Westfield Cos. v. Knapp*, 804 N.E.2d 1270, 1274 (Ind. Ct. App. 2004), *trans. denied*. Our goal in contract interpretation is to determine the intent of the parties at the time they entered into the agreement. *Hartman v. BigInch Fabricators & Constr. Holding Co. Inc.*, 161 N.E.3d 1218, 1223 (Ind. 2021). We start by determining whether the contract's language is ambiguous—and when it is not, we apply its plain and ordinary meaning in light of the whole agreement, "without substitution or addition." *Id.* (citing *Care Grp. Heart Hosp., LLC v. Sawyer*, 93 N.E.3d 745, 752 (Ind. 2018)). Importantly, the parties' disagreement over a term's plain meaning doesn't itself create ambiguity. *Id.* It is true that we determine the meaning of a contract by considering all of its provisions, not individual words, phrases, or paragraphs read alone. *Sawyer*, 93 N.E.3d at 756. But when the contract terms are unambiguous, we do not go beyond the four corners of the contract to investigate meaning. *Id.* The four corners rule states that where the language of a contract is unambiguous, the parties' intent is to be determined by reviewing the language contained within the "four corners" of the contract, and "parol or extrinsic evidence is inadmissible to expand, vary, or explain the

instrument unless there has been a showing of fraud, mistake, ambiguity, illegality, duress or undue influence." *Ryan v. TCI Architects/Engineers/Contractors, Inc.*, 72 N.E.3d 908, 917 (Ind. 2017). Extrinsic evidence cannot be used to create an ambiguity. *Id*.

[22] The Indiana Supreme Court has held that "[w]hether a breach is material is generally a question of fact to be decided by the trier of fact." *State v. Int'l Bus. Machines Corp.*, 51 N.E.3d 150, 158 (Ind. 2016) (quoting *Collins v. McKinney*, 871 N.E.2d 363, 375 (Ind. Ct. App. 2007) (citing *Goff v. Graham*, 159 Ind. App. 324, 306 N.E.2d 758, 765 (1974))). The Court held that "[a] material breach is often described as one that goes to the 'heart of the contract.'" *Id.* at 158-159 (citing *Collins*, 871 N.E.2d at 370). This Court has previously affirmed the entry of summary judgment where the designated evidence established a breach was material. *See A House Mechanics, Inc.*, 124 N.E.3d at 1263 (affirming the entry of summary judgment and holding that noncompliance with applicable building codes, failing to cure, and the breakdown of the business relationship constituted material breaches as a matter of law).

[23] Generally, this Court has held that the resolution of whether a party has committed a material breach is dependent on several factors. *Titus v. Rheitone, Inc.*, 758 N.E.2d 85, 94 (Ind. Ct. App. 2001), *trans. denied*; *Goff*, 159 Ind. App. at 335, 306 N.E.2d at 765. Under the Restatement (Second) of Contracts, an injured party is not discharged from his or her duty to perform unless (1) the breach is material, and (2) it is too late for performance or an offer to perform to

occur. *Frazier v. Mellowitz*, 804 N.E.2d 796, 803 (Ind. Ct. App. 2004). In particular, the Restatement (Second) of Contracts (1981) provides:

> § 241. Circumstances Significant in Determining Whether a Failure Is Material
>
> In determining whether a failure to render or to offer performance is material, the following circumstances are significant:
>
> (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;
>
> (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
>
> (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
>
> (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;
>
> (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

*See also Int'l Bus. Machines Corp.*, 51 N.E.3d at 159-160 ("Under the common law, when determining whether a breach is material, Indiana courts generally apply the factors articulated in the Restatement (Second) of Contracts § 241 (1981)."). "When one party to a contract commits the first material breach of that contract, it cannot seek to enforce the provisions of the contract against the other party if that other party breaches the contract at a later date." *Coates v. Heat Wagons, Inc.*, 942 N.E.2d 905, 917 (Ind. Ct. App. 2011).

[24] The Indiana Supreme Court has stated that, "where a contract itself provides the standard for what constitutes a material breach, this is the standard that governs." *Int'l Bus. Machines Corp.*, 51 N.E.3d at 161. Here, while Section 17.1 of the Subcontractor Agreement does not use the term "material," the section provides for acts and omissions which the parties agreed constituted a breach of the agreement for purposes of terminating the contract.

[25] The record reveals that Five Star did not designate evidence to contest many of Pendleton Enterprises' claims, including that it ordered the wrong insulation on two occasions, it did not provide lead time when requested for the third order of insulation, its workers cut into the roof when Pendleton left to check an insulation delivery, it did not have enough workers on August 11, 2015, its workers cleaned up with kerosene and failed to use protective gloves, its workers failed to attend a safety meeting, it did not ultimately hire a fall-protection-competent person at a reasonable rate pursuant to Pendleton Enterprises' request, it failed to comply with safety requirements prior to August 14, 2015, and it did not respond to or comply with the allegations in the August 24th email. It is undisputed that the Subcontractor Agreement required Five Star to use FHR insulation, to "provide the Contractor with scheduling information, as requested," to "comply with all applicable safety laws and with any other standards established by Contractor and/or Owner . . . until corrective measures satisfactory to Contractor have been taken," and to "perform the Work in compliance with all applicable federal, state, municipal and local laws, codes, ordinances, rules, regulations and requirements,

including without limitation, those relating to OSHA, MSHA, . . . without additional expense to Contractor, and shall correct at its own cost and expense, any violations . . . ." Appellant's Appendix Volume II at 88-90. Under these circumstances, we conclude as a matter of law that Five Star's breaches were material and permitted Pendleton Enterprises to terminate the Subcontractor Agreement. *See A House Mechanics, Inc.*, 124 N.E.3d at 1263 (concluding that breaches were material as a matter of law). Based on the designated evidence, we find the trial court did not err in granting Pendleton Enterprises' motion for summary judgment.[1]

C. *Right to Set-off*

[26] Five Star claims the trial court erred in concluding it had no contractual right to set-off for its costs. Five Star further alleges that it has a common law right to set-off.

[27] The Subcontractor Agreement provides in relevant part:

> 5.2 . . . The Subcontract [sic] shall have the benefit of the rights and remedies against the Contractor which Contractor, by the Subcontract Documents, has against the Owner, except as may be provided otherwise herein.

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[1] To the extent Five Star claims that Pendleton Enterprises' August 31, 2015 letter did not adhere to Section 17.1 of the Subcontractor Agreement to properly terminate the Subcontractor Agreement, we note that the designated evidence shows that Pendleton Enterprises sent email messages to Five Star on August 14, 2015, and August 24, 2015, outlining the violations of the Subcontractor Agreement and that these messages were sent before forty-eight hours prior to Pendleton Enterprises sending its letter on August 31, 2015, terminating the Subcontractor Agreement.

* * * * *

> 17.1 . . . Contractor or Owner shall have the right, in addition to any other rights and remedies provided under the Subcontractor or the Subcontract Documents, or that Contractor may have at law or at equity, after 48 hours' notice to Subcontractor and failure of Subcontractor to cure such default, (a) to perform and furnish through itself or through others any such labor or materials for the Work and to deduct the cost thereof from any monies due or to become due to Subcontractor under this Subcontract, and/or, (b) to terminate the employment of Subcontractor for all or any portion of the Work, enter upon the premises and take possession of, for the purpose of completing the Work, all materials, equipment, scaffolds, tools, appliances and other items required, all of which Subcontractor hereby transfers, assigns and sets over to Contractor for such purpose, and to employ any person or persons to complete the Work and provide all the labor, services, materials, equipment, and other items required therefor. In case of such termination of employment of Subcontractor, Subcontractor shall not be entitled to receive any further payment under this Subcontract until the Work shall be wholly completed to the satisfaction of Contractor, Owner and Architect and shall have been accepted by them, at which time, if the unpaid balance of the amount to be paid under this Subcontract shall exceed the cost and expense incurred by Contractor and/or Owner in completing the Work, such excess shall be paid by Contractor to Subcontractor, but if such cost and expense shall exceed such unpaid balance, the Subcontractor shall pay the difference to Contractor.

Appellant's Appendix Volume II at 87, 98. The contract between FHR and Pendleton Enterprises provides: "Company may terminate any particular project at any time subject to payment of compensation (as detailed herein) for Work properly completed." *Id.* at 68. Five Star sent the January 7, 2016 letter to Pendleton Enterprises alleging costs totaling $88,766, which included expenditures for materials, trainings, and equipment, and Spegal's affidavit stated Five Star incurred costs of $88,766. Pendleton Enterprises hired Sterling

to complete the roofing project and paid them $209,992.[2] The January 7, 2016 letter to which Five Star cites on appeal also stated: "We will accept the deposit as final payment for the costs incurred." Appellant's Appendix Volume III at 119. In his deposition, Baird, the man "designated as the point person for the company," agreed that Five Star received $88,000 "up front" from Pendleton Enterprises. Appellant's Appendix Volume II at 241, 244. Under these circumstances, we cannot say the trial court erred in denying a contractual right to set-off.

[28] To the extent Five Star asserts it has a right to set-off for its costs according to equity and Indiana's common law, we hold that Five Star has waived this issue. Generally, "an argument or issue raised for the first time on appeal is waived for appellate review." *First Chi. Ins. Co. v. Collins*, 141 N.E.3d 54, 61 (Ind. Ct. App. 2020). Even though Five Star has waived this claim, where a right to set-off is not granted by statute, such relief may be granted by a court of equity if "necessary to effect clear equity and prevent irremedial injustice," *McKinney v. Pure Oil Co.*, 154 N.E.2d 53, 56 (Ind. Ct. App. 1958) (quoting *Anderson v.*

[2] Pendleton Enterprises paid Five Star $88,000 as a down payment on April 23, 2015, half of the Subcontract Agreement's total contract price of $176,000. After Five Star's termination, and at the time Pendleton Enterprises paid Sterling to complete the roofing project, Pendleton Enterprises had not paid Five Star the remaining $88,000 of the total contract price. As stated above, Section 17.1 of the Subcontractor Agreement provides that, if the Contractor's costs and expenses to finish the roofing project exceed the unpaid balance to the Subcontractor, then "the Subcontractor shall pay the difference to Contractor." Appellant's Appendix Volume II at 98. The cost of $209,992 to hire Sterling exceeded the unpaid balance to Five Star by $121,992.

*Biggs*, 77 N.E.2d 909, 912 (Ind. Ct. App. 1948)); however, here we cannot say that clear equity requires a right to set-off for Five Star's alleged costs.

D. *Prejudgment Interest*

[29] Five Star claims that Pendleton Enterprises should not recover prejudgment interest from August 31, 2015, the date of the notice of termination, because the damages were not fully accrued until February 9, 2016, and it argues the damages do not rest on a simple calculation and are not ascertainable. Pendleton Enterprises claims that prejudgment interest is due from August 31, 2015, and it contends the amount of its claim rests on a simple calculation and is readily ascertainable.

[30] The test for allowing prejudgment interest is whether "the injury and consequent damages are complete and must be ascertained as of a particular time and in accordance with fixed rules of evidence and known standards of value." *Wash. Cnty. Mem'l Hosp. v. Hattabaugh*, 717 N.E.2d 929, 933 (Ind. Ct. App. 1999) (quoting *Harlan Sprague Dawley, Inc. v. S.E. Lab Grp., Inc.*, 644 N.E.2d 615, 617 (Ind. Ct. App. 1995), (citing *N.Y., Chi. & St. L. Ry. Co. v. Roper*, 176 Ind. 497, 96 N.E. 468 (Ind. 1911)), *trans. denied*). "When the plaintiff's loss is complete and ascertainable as of a time certain, plaintiff's damages can be computed with reasonable precision, and prejudgment interest must be awarded to fully compensate the plaintiff." *Stephens v. Parkview Hosp., Inc.*, 745 N.E.2d 262, 266 (Ind. Ct. App. 2001). Prejudgment interest is computed from the time the principal amount was demanded or due and is

allowable at the permissible statutory rate when no contractual provision specifies the interest rate. *J.S. Sweet Co., Inc. v. White Cnty. Bridge Comm'n*, 714 N.E.2d 219, 225 n.5 (Ind. Ct. App. 1999). An award of prejudgment interest in a contract action is appropriate purely as a matter of law when the breach did not arise from tortious conduct, the amount of the claim rests on a simple calculation, and the trier of fact does not need to exercise its judgment to assess the amount of damages. *Sawyer*, 93 N.E.3d at 757. Where parties have not agreed on an interest rate, Ind. Code § 24-4.6-1-102 supplies a rate of eight percent. *Id.*

[31] With respect to whether Pendleton Enterprises' damages were ascertainable, the ascertainable standard is in reference to the amount of damages as distinguished from the liability for those damages. *Ind. Indus., Inc. v. Wedge Prods., Inc.*, 430 N.E.2d 419, 427 (Ind. Ct. App. 1982) (quotations omitted). The trier of fact must always exercise its judgment to determine the liability for damages, but prejudgment interest is proper where the trier of fact need not exercise its judgment to assess the amount of damages. *Id.* The trial court determined that Five Star was liable for costs equaling the difference between the unpaid portion of the Subcontractor Agreement and the cost to complete the work, but was not responsible "for the expenses related to the Industrial Hygienist, HSE Solutions or fall protection harnesses." Appellant's Appendix Volume II at 16. The court adhered to the method described in Section 17.1 of the Subcontractor Agreement to determine damages and used the statutorily prescribed interest rate of eight percent to calculate prejudgment interest.

Because damages were a simple calculation after a finding of liability, this was a proper case for the allowance of pre-judgment interest. *See J.S. Sweet Co., Inc.*, 714 N.E.2d at 225 ("[T]he trial court found either that the items were uncontested by the parties or made a mere determination that the amounts were recoverable under the contract. As the trial court was not required to make an evaluation of the amount due for these items, Sweet was entitled to prejudgment interest with respect to those amounts.").

[32] The record reveals that, after Pendleton Enterprises terminated Five Star, it sought "[t]hree estimates again" and "references from local areas that had track records" before selecting Sterling's proposal and signing a contract for $210,085 on October 19, 2015. Appellant's Appendix Volume III at 100. Sterling completed the roofing project by February 9, 2016, at which time it submitted an invoice for $209,992. Once Sterling completed the roofing project to FHR and Pendleton Enterprises' satisfaction, submitted its invoice on February 9, 2016, and the cost expended to complete the roofing project could be determined, Pendleton Enterprises' damages were due according to the Subcontractor Agreement.

[33] For the foregoing reasons, we affirm the grant of summary judgment, damages, and attorney fees, reverse the award of prejudgment interest with respect to the date the prejudgment interest began to accrue, and remand with instructions for

the court to determine the appropriate amount of interest from February 9, 2016.[3]

[34] Affirmed in part, reversed in part, and remanded.

May, J., and Pyle, J., concur.

[3] In the conclusion section of its brief and without citation to authority or a developed argument, Pendleton Enterprises requests that this Court award appellate attorney fees. We decline to do so.