WD80840

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

G&G MECHANICAL CONTRACTORS, INC.,
Respondent,

vs.

JEFF CITY INDUSTRY, INC. a/k/a JC INDUSTRIES INC.
and LIBERTY MUTUAL INSURANCE COMPANY,
Appellants.

On Appeal from the Circuit Court of Boone County
Honorable Jodie C. Asel, Circuit Judge
Case No. 14BA-CV01158

BRIEF OF THE RESPONDENT

JONATHAN STERNBERG,
Mo. #59533
Jonathan Sternberg, Attorney, P.C.
2323 Grand Boulevard, Suite 1100
Kansas City, Missouri 64108
Telephone: (816) 292-7000
Facsimile: (816) 292-7050
jonathan@sternberg-law.com

JOHN L. HAYOB,
MO Bar #24518
G. STEPHEN RUPRECHT,
MO Bar #23494
Brown & Ruprecht, PC
2323 Grand Boulevard, Ste. 1100
Kansas City, Missouri 64108
T: (816) 292-7000
F: (816) 292-7077
jhayob@brlawkc.com
sruprecht@brlawkc.com

COUNSEL FOR RESPONDENT

Preliminary Statement

Subcontractor sued Contractor for a balance due under the subcontract. A jury found for Subcontractor, and the trial court awarded Subcontractor a further nine percent prejudgment interest under § 408.020, R.S.Mo.

Contractor now appeals, bringing one point relied on, which challenges only the prejudgment interest award. Contractor argues that while the subcontract itself contained no provision stating any interest rate, language in Subcontractor's original proposal contained a higher interest rate, and its representative testified he crossed it out and he and Subcontractor's representative initialed the cross-out intending to forego any interest. It argues the interest award therefore should be reversed because "the unrebutted evidence at trial establishes that the parties … intent[ded] that no interest would be charged on past due amounts."

Contractor's point is not preserved for appeal. This was a jury-tried case, so it had to state its argument in a post-judgment motion. But it did not file any post-judgment motion. Therefore, its appeal must be dismissed.

If the point is preserved, the trial court's judgment must be affirmed. Language stricken from a proposed agreement is extrinsic to the ultimate agreement, must be ignored, and cannot be used to create an ambiguity. Here, the subcontract unambiguously did not provide a rate of interest, so § 408.020 controls and entitles Subcontractor to the trial court's award.

And if there somehow was an ambiguity, Contractor had the burden to prove its contested proposition that no interest was intended. The trial court must be presumed to have disbelieved Contractor's witness who testified so.

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Jurisdictional Statement

This is an appeal from a judgment of the Circuit Court of Boone County in the plaintiff's favor in an action for breach of contract.

This case does not involve the validity of a Missouri statute or constitutional provision or of a federal statute or treaty, the construction of Missouri's revenue laws, the title to statewide office, or the death penalty. So, under Mo. Const. art. V, § 3, this case does not fall within the Supreme Court's exclusive appellate jurisdiction, and jurisdiction of this appeal lies in the Missouri Court of Appeals. This case arose in Boone County. Under § 477.070, R.S.Mo., venue lies in the Western District.

Statement of Facts

A. Background to the proceedings below

1. JCI, G&G, and the Project

Appellant Jeff City Industry, Inc. ("JCI") is a Missouri corporation based in Jefferson City (L.F. 164). In fall 2011, JCI, as general contractor, entered into an agreement with the City of Columbia, Missouri for a sewer project named the Hominy Water & Sewer Project ("the Project") (L.F. 165). Appellant Liberty Mutual Insurance Company is a Massachusetts insurance company authorized to issue surety bonds in Missouri, and issued one to JCI for the work on the Project that named Columbia as obligee (L.F. 125-27, 167, 275-76). This brief generally refers to both appellants as "JCI."

JCI's agreement with Columbia required JCI to perform certain underground boring work (L.F. 166-67). In November 2011, Respondent G&G Mechanical Contractors, Inc. ("G&G"), a Missouri corporation based in Oak Grove, submitted a written proposal to JCI ("the Proposal") to perform that boring work for a total subcontract price of $996,500 (L.F. 167-68).

At the time, William Dooley was G&G's estimator, project manager, and business developer (Tr. 86). As part of his position, he bid on projects for G&G, and it was he who bid on the Project for G&G (Tr. 86). On the other side, Douglas Adrian was JCI's project manager during the Project, and it was he who negotiated G&G's bid with Mr. Dooley (Tr. 105, 131, 746, 754-55).

2. G&G's Proposal and the Contract

G&G's Proposal included an "Attachment A", which detailed the responsibilities of each side of the proposed agreement (Tr. 102-04, 130, 754;

L.F. 160; Appx. A16). "Attachment A" was unsigned, but contained a signature line for JCI to accept it (L.F. 160; Appx. A16). G&G's standard is to have its proposal signed when its bid is accepted (Tr. 105).

"Attachment A" included a proposed provision that JCI or Columbia would provide and maintain dewatering along the bore line to a certain level ("Paragraph 3") (L.F. 160. 168-69; Appx. A16). It also contained a proposed provision stating, "Any pay estimate overdue by 60 days shall bear interest at the annual rate of 18% or the highest rate allowed by law; if lower, Retainage shall not be held out of payments" ("Paragraph 11") (L.F. 160).

After receiving a fax copy of the Proposal, including "Attachment A", Mr. Adrian called Mr. Dooley to ask whether G&G's price was good, and Mr. Dooley said it was (Tr. 104-05). In December, G&G then sent JCI a cover letter asking for JCI to return its form contract signed along with G&G's Proposal, which already bore G&G's principal's signature (Tr. 105).

When the proposal came back to Mr. Dooley from Mr. Adrian, it had Mr. Adrian's signature on it, but with some changes (Tr. 107-08, 131, 624-25; 755-56; L.F. 160). Mr. Adrian had drawn a line drawn through all of Paragraph 11 (Tr. 108, 625, 755; L.F. 160; Appx. A16). He also had written "5% Retianage [*sic*]" next to Paragraph 11 (Tr. 108, 625, 756, 1296; L.F. 160; Appx. A16). He then initialed the strikethrough and new language, "D.A." (Tr. 108, 755-56; L.F. 160; Appx. A16).

At one point in its brief, JCI claims Mr. Dooley and Mr. Adrian discussed this change to Paragraph 11 by telephone beforehand (Brief of the Appellant ("Aplt.Br.") 11) (citing Tr. 106). Nothing on page 106 of the

transcript – or anywhere else – says this. In fact, Mr. Dooley testified that he and Mr. Adrian *had not* discussed this by telephone (Tr. 109-10). Rather, on page 106, Mr. Dooley merely testified he "believed" Mr. Adrian had called him by telephone after receiving the December copy of the Proposal and "*wanted* to go over a portion of our proposal where it stated no retention, which is understandable because there was 5 percent retention on the project, and 18 percent interest occurred on late payment" (Tr. 106) (emphasis added). Mr. Dooley never testified that he and Mr. Adrian actually discussed this or what they discussed about it, merely that he "believed" Mr. Adrian "wanted" to discuss it (Tr. 106).

At trial, Mr. Adrian testified that he crossed out Paragraph 11 and initialed the changes "[b]ecause it states that they want to charge us interest and then the retainage. And the City was going to hold retainage on us. So I marked through that line" (Tr. 756).

In its brief, JCI states Mr. Adrian also testified "that G&G and JCI agreed to remove the interest provision" so that "no interest was to be charged on the contract" (Aplt.Br. 8) (citing Tr. 789). Mr. Adrian never actually testified that G&G agreed that this was intended to bar all interest on the contract. Instead, what he actually testified on page 789 of the transcript was that this was *his* understanding (Tr. 789). When JCI's counsel asked him whether Mr. Dooley also agreed to no interest, G&G's counsel objected, and JCI's counsel rephrased the question whether Mr. Dooley *signed* the writing, which Mr. Dooley said he did (Tr. 789). And this is what

Mr. Dooley did: he initialed, signed, and dated the returned Proposal "1-9-12" (Tr. 108-09, 132, 625, 789-90, 1296, 1301-03; L.F. 160; Appx. A16).

In both the statement of facts and argument portions of its brief, JCI states several times that Mr. Dooley *also* testified he intended crossing out Paragraph 11 of the Proposal to agree to no interest or zero percent interest on any sums due:

- "Mr. Dooley testified it was his intent to agree to the changes made by Mr. Adrian in regard to eliminating prejudgment interest" (Aplt.Br. 7) (citing Tr. 109, lines 5-7);
- "At trial, Mr. Dooley testified that by initialing below the cross-out he was accepting JCI's position that no interest be charged" (Aplt.Br. 12) (citing Tr. 108, line 20, through 109, line 4);
- "G&G's sole witness proffered on the interest issue was Bill Dooley. He testified that by writing his name and initials next to Mr. Adrian's cross-out of Paragraph 11 he, on G&G's behalf, accepted and agreed with JCI that no interest would be paid on past due amounts" (Aplt.Br. 13) (citing Tr. 109, lines 5-7).

This is not a fair statement of the record. Mr. Dooley never testified he agreed or intended that crossing out Paragraph 11 would mean no interest would be paid on past-due amounts. Instead, all he testified in the portion of the transcript to which JCI cites was he agreed to JCI's crossing out Paragraph 11 and inserting the retainage language, *not* what that intended.

Here are pages 108, line 20, through 109, line 4, of the transcript in their entirety:

Q. Okay. All right. Under that – it's blurred when you get too big -- but it looks like a "W.O.D." And I'm just guessing that that is a signature too. Is that a William O. Dooley signature there?

A. Yes, it is.

Q. And in parentheses, is that "W.O.D.," is that supposed to be your initials?

A. Yes.

Q. And who put "1-9-12"? Dated it?

A. I did.

Q. Okay. And was that your intent then to agree with the changes made by Mr. Adrian at that time?

A. Yes.

(Tr. 108:20 through 109:7).

So, Mr. Dooley testified it was his intent to agree with the physical changes Mr. Adrian had made. Indeed, on cross-examination, Mr. Dooley was asked whether by adding his initials to the changes he "agreed to strike out paragraph 11, correct?" to which he replied, "yes" (Tr. 132). He then was asked whether it also meat he "agreed to 5 percent retainage as well; is that correct?" to which he also replied "yes" (Tr. 132).

But Mr. Dooley plainly did not testify "it was his intent to agree to … eliminating prejudgment interest" (Aplt.Br. 7), "that by initialing below the cross-out he was accepting JCI's position that no interest be charged" (Aplt.Br. 12), or "that by writing his name and initials next to Mr. Adrian's cross-out of Paragraph 11 he, on G&G's behalf, accepted and agreed with JCI that no interest would be paid on past due amounts" (Aplt.Br. 13).

Mr. Dooley then returned the signed documents to JCI (Tr. 109). This constituted an agreement between JCI and G&G to perform the boring work on the Project ("the Contract") (L.F. 169). A copy of the final Contract is in the legal file (pages 145-60) and the appendix to this brief (pages 1-16) (L.F. 169). The Contract contained the same price as the Proposal, and the Proposal's Paragraph 3 dewatering provision (L.F. 160, 169; Appx. A16).

Mr. Dooley and Mr. Adrian then had no further contact about the Proposal, and instead G&G's work began on the Project (Tr. 109-10). G&G alleged JCI scheduled it to commence its boring work on the Project on February 6, 2012, and complete that work by July 20, 2012 (L.F. 128).

3. G&G's work and the parties' dispute

G&G alleged that, in March and April 2012, it encountered excess unexpected water, which JCI had not dewatered, and which slowed and eventually halted the progress of the sewer boring (L.F. 128). It said it did not complete all the boring work until March 2013, and this was due to JCI's failure to timely and effectively dewater the Project in compliance with the Contract (L.F. 132).

G&G invoiced JCI for $530,731.42 remaining due on the completion of its work, but JCI denied G&G was entitled to that amount and refused to pay (L.F. 177-79).

B. Proceedings Below

In April 2014, G&G filed an action against JCI and Liberty Mutual in the Circuit Court of Boone County (L.F. 5, 33).

G&G's second amended petition alleged a breach of contract claim against JCI, a breach of surety bond claim against JCI and Liberty Mutual, a claim for *quantum meruit* or unjust enrichment against JCI, and a Missouri Prompt Payment Act claim against JCI (L.F. 135-37). Each substantive count sought a total of $1,631,449.80 in damages "together with interest, costs and attorney's fees", and the Prompt Payment Act count sought a per diem from the date payment was due until paid (L.F. 135-37).

JCI counterclaimed against G&G for breach of the Contract, alleging G&G was responsible for its own delay, which had damaged JCI as a result (L.F. 189-92).

The case was tried to a jury over six days in March 2017 (Tr. 1). The jury found for G&G and awarded it $445,408.94, which was G&G's contract balance of $530,731.42 minus an amount to which the jury found JCI was entitled as back-charges (L.F. 537, 540). The jury also found that JCI withheld payment of the contract balance of $530,731.42 without reasonable cause and found it liable for an additional penalty to be determined by the court (L.F. 539-40).

G&G also argued it was entitled to prejudgment interest at the statutory rate of nine percent per year under § 408.020, R.S.Mo. (L.F. 375). JCI countered that this was not so, as the statutory prejudgment interest rate only applied to amounts contractually due and the crossing out of Paragraph 11 meant the parties had agreed to a zero percent interest rate (L.F. 393-95).

The parties agreed to submit the issue of G&G's entitlement to prejudgment interest to the trial court, rather than the jury (Tr. 624-34, 856-59, 1290-91, 1294-1309). Ultimately, in its final judgment in May 2017 the trial court awarded G&G prejudgment interest, stating:

> The Court has further considered the arguments and authorities of counsel on the issue of Plaintiff's claim for pre-judgment interest against Defendants JCI and Liberty Mutual under R.S.Mo. Section 408.020. The Court finds that Plaintiff is entitled to recover pre-judgment interest on the amount awarded on Verdict A at the rate of 9% per annum against both Defendants JCI and Liberty Mutual from August 1, 2013 to the date of judgment. The Court further finds Plaintiff is entitled to recover from Defendant, JCI only, additional interest at the rate of 9% per annum from August 1, 2013 to the date on this Judgment on the amount awarded in Verdict A, pursuant to the jury's finding in Verdict B.

(L.F. 460-61).

The Court then awarded G&G $445,408.94, plus prejudgment interest of $149,803.84 (L.F. 461). For the additional penalty under § 34.057, R.S.Mo. for JCI's lack of reasonable cause in failing to pay G&G, it awarded G&G additional prejudgment interest of another $149,803.84 against JCI alone, rather than with Liberty Mutual (L.F. 461).

JCI did not file any post-judgment motion. Instead, it timely appealed to this Court (L.F. 515).

Argument

A. Summary

JCI's sole point relied on is not preserved for appeal. It challenges the trial court's post-verdict decision to award G&G nine percent prejudgment interest under § 408.020, R.S.Mo. It is well-established that, to be preserved for appeal, such a challenge must have been specifically stated in an authorized post-judgment motion. *See Edgewater Health Care, Inc. v. Health Sys. Mgmt., Inc.*, 752 S.W.2d 860, 869 (Mo. App. 1988); *Chi. & Erie R.R. Co. v. Lightfoot*, 232 S.W. 176, 178 (Mo. App. 1921). But JCI did not file any post-judgment motion at all. Its appeal therefore must be dismissed.

If JCI's point somehow is preserved, the trial court's judgment must be affirmed. First, the Contract's plain language unambiguously does not contain any provision agreeing to an interest rate, thereby entitling G&G to nine percent prejudgment interest per year under § 408.020. Only where a contract expressly states a different rate of interest does § 408.020 not apply. And language stricken from a proposed agreement is extrinsic to the ultimate agreement, must be ignored, and cannot be used to create an ambiguity. *See Maddick v. DeShon*, 296 S.W.3d 519, 526 (Mo. App. 2009); *Gateway Frontier Props., Inc. v. Selner, Glaser, Komen, Berger & Galanski, P.C.*, 974 S.W.2d 566, 570-71 (Mo. App. 1998). Here, as the Contract did not expressly provide a different rate of interest besides nine percent, § 408.020 controls.

Second, if there somehow was an ambiguity, JCI had the burden to prove its contested proposition that no interest was intended. But the trial court disbelieved JCI's witness who testified so, requiring affirmance.

B. JCI's sole point relied on is not preserved for appellate review, because JCI did not file a post-judgment motion at all, let alone one that presented the claim of error it now seeks to have reviewed, so the Court must dismiss its appeal.

Citing no authority, JCI argues its sole point relied on is preserved for appeal because "On May 18, 2017, the trial court granted G&G's Motion for prejudgment interest" and "On June 19, 2017, Appellants timely filed their Notice of Appeal pursuant to 81.04(a) and thus the issue of prejudgment interest was preserved for appeal" (Aplt.Br. 9-10) (citing L.F. 460-61, 515-21).

This is without merit. Filing a timely notice of appeal does not *ipso facto* preserve claims of error for review. Rather, the law of Missouri is that, as this was a jury-tried case, JCI additionally had to file an authorized post-judgment motion stating its claim of error. Rule 78.07(a). As it did not, its sole point is not preserved for appeal. The Court must dismiss its appeal.

Rule 78.07(a) provides that, "In jury tried cases, except as otherwise provided in this Rule 78.07, allegations of error must be included in a motion for a new trial in order to be preserved for appellate review." The "otherwise provided" allegations are only those concerning questions: (1) of subject-matter jurisdiction; (2) presented in JNOV motions; or (3) "relating to motions for directed verdict that are granted at trial." *Id.* And if an allegation is "based on matters occurring or becoming known after final submission to the court or jury", it must "be stated specifically." *Id.*

This case was a "jury tried case" under Rule 78.07(a). It was tried to a jury over six days in March 2017 (Tr. 1-7). Therefore, JCI had to include any "allegations of error" besides subject-matter jurisdiction or questions related to JNOV motions or granted directed verdicts "in a motion for new trial in

order to be preserved for appellate review." *Id.* This was especially true of any "matters occurring or becoming known after final submission to the … jury", which JCI had to "stat[e] specifically" in that motion. *Id.*

So, to be preserved, JCI had to include and specifically state the point it now presents in a motion for new trial. JCI's point alleges error "in awarding prejudgment interest to G&G" under § 484.020, R.S.Mo. This does not concern subject-matter jurisdiction, JNOV, or a directed verdict. And the award it challenges occurred "after final submission to the … jury …." *Id.*

But JCI did not file any post-judgment motion of any kind, let alone one that included and specifically stated this challenge to the decision to award G&G prejudgment interest (L.F. 29-30). The trial court entered its judgment on May 18, 2017 (L.F. 29, 460). JCI would have had 30 days – until June 18, 2017 (the actual 30th day, June 17, was a Sunday) – in which to file a post-judgment motion. Rules 72.01(b) and 78.04. But it did not (L.F. 29-30). Instead, the next day, June 19, it simply appealed to this Court (L.F. 515).

Accordingly, JCI's point is not preserved for appeal. It is well-established that a party must include a challenge to a trial court's post-verdict interest determination in a jury-tried case in an authorized post-judgment motion to preserve that challenge for appeal. *See Edgewater Health Care, Inc. v. Health Sys. Mgmt., Inc.*, 752 S.W.2d 860, 869 (Mo. App. 1988); *Chi. & Erie R.R. Co. v. Lightfoot*, 232 S.W. 176, 178 (Mo. App. 1921).

In *Edgewater*, Landlord sued Tenant for past-due rent payments and reimbursement of real property taxes, and Tenant counterclaimed for breach of contract, seeking reimbursement of maintenance expenditures. 752

S.W.2d at 862-65. The trial court directed a verdict for Landlord for past-due rent, and the jury awarded Landlord damages for reimbursement of property taxes. *Id.* Then, the trial court awarded Landlord prejudgment interest. *Id.* The jury also awarded Tenant damages on its counterclaim, which exceeded those it was ordered to pay by more than $10,000. *Id.* But the trial court did not grant Tenant's request for prejudgment interest. *Id.* at 865.

On appeal, Tenant argued the trial court had erred in not granting it prejudgment interest on its claim for expenditures. *Id.* at 869. But it had failed to raise this point in its motion for new trial. *Id.* For this reason, this Court held the point was not preserved and so refused to reach it:

> Complaints as to the allowance of interest, not raised in the motion for new trial, are not reviewable on appeal. It is fundamental that a trial court must be given an opportunity to review and correct an error before we are called upon to review it. [Tenant]'s final point has not been preserved and we shall not review the contention.

Id. (internal citations omitted) (citing Rule 78.07; *Modine Mfg. Co. v. Carlock*, 510 S.W.2d 462, 472 n.15 (Mo. 1974); *Filmakers Releasing Org. v. Realart Pictures of St. Louis, Inc.*, 374 S.W.2d 535, 546 n.12 (Mo. App. 1964)).[1] The Court affirmed the trial court's judgment. *Id.*

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[1] *Modine* and *Filmakers*, which also held challenges to a trial court's interest determination not preserved because the appellant had not included them in an authorized post-judgment motion, were court-tried cases, not jury-tried cases. Both decisions predate the 1974 amendment to Rule 78.07 (previously Rule 79.03), that relieved parties in court-tried cases from having to file post-judgment motions to preserve most allegations of error. *See State ex rel. Ciaramitaro v. City of Charlack*, 679 S.W.2d 405, 408 (Mo. App. 1984) (discussing the amendment). After the amendment, a party in a court-tried case does not have to include a challenge to an interest determination in a

Likewise, in *Lightfoot*, Carrier sued Consignee for a balance due for freight, and the jury found for Carrier and awarded it damages. 232 S.W. at 176-77. The trial court then awarded Carrier 6% of prejudgment interest. *Id.* at 178. On appeal, Consignee argued this was error because there was no proof of a demand to activate Carrier's statutory right to prejudgment interest. *Id.* But this claim appeared "nowhere in the motion for new trial which was filed", and so the "question was not preserved in the record … for consideration." *Id.* at 178. The Court affirmed the trial court's judgment. *Id.*

Similarly, this Court has reviewed post-judgment motions in jury-tried cases to ensure an allegation of error as to the trial court's post-verdict interest determination was specifically included and held the allegation preserved because it was. *See, e.g.*, *Sanders v. Hartville Mill Co.*, 14 S.W.3d 188, 215 (Mo. App. 2000) (appellant preserved challenge to trial court's post-verdict prejudgment interest award by stating it in post-judgment motion); *Nangle v. Brockman*, 972 S.W.2d 545, 549-50 (Mo. App. 1998) (same).

Collectively, these authorities show that Missouri's rule of preservation for this issue is simple. In a jury-tried case, if the appellant does not include in a post-judgment motion a specific allegation that the trial court's post-

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post-judgment motion to preserve it for appeal. *Green Acres Enters. v. Freeman*, 876 S.W.2d 636, 641 n.2 (Mo. App. 1994). But before the amendment the same standards applicable to this jury-tried case applied to court-tried cases, and just as in *Modine* and *Filmakers* it was universally held that when a party in a court-tried case had failed to include that argument in a post-judgment motion, it was not preserved. *See, e.g.*, *Flint v. Sebastian*, 300 S.W. 798, 806 (Mo. 1927); *Taylor Inv. Co. v. Dye*, 198 S.W. 440, 441 (Mo. App. 1917); *Red Diamond Clothing Co. v. Steidemann*, 152 S.W. 609, 615 (Mo. App. 1912); *Elley v. Caldwell*, 59 S.W. 111, 113 (Mo. App. 1900).

verdict award of prejudgment interest was error, that claim is not preserved for appeal. If the appellant does specifically include it, it is preserved.

JCI violated this rule. It did not file a motion for new trial or any other authorized post-judgment motion at all, let alone one specifically stating its allegation that the trial court had erred in awarding G&G prejudgment interest under § 484.020 for the reason it alleged. Instead, it forewent the requirement of a post-judgment motion and merely filed a notice of appeal.

JCI's sole point relied on therefore is not preserved for appeal. And JCI does not request plain error review of this issue under Rule 84.13(c),[2] which is "discretionary and rarely granted in civil cases," *City of Greenwood v. Martin Marietta Materials, Inc.*, 299 S.W.3d 606, 617 (Mo. App. 2009), "should be used sparingly", *MB Town Ctr., LP v. Clayton Forsyth Foods, Inc.*, 364 S.W.3d 595, 602 (Mo. App. 2012) (citation omitted), "and may not be invoked to cure the mere failure to make proper and timely objections." *Guess v. Escobar*, 26 S.W.3d 235, 241 (Mo. App. 2000).

When an appellant's only point is not preserved, the appropriate disposition is to dismiss the appeal. *See, e.g.*, *Jarvis v. State*, 472 S.W.3d 238, 242 (Mo. App. 2015) ("Because Mr. Jarvis's point on appeal is not preserved for our review, his appeal is dismissed").

Accordingly, JCI's appeal must be dismissed.

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[2] At one point, JCI argues the trial court's "decision to find no agreement of the parties on interest and thus award 9% recovery, constitutes plain error" (Aplt.Br. 11). This seems to be using "plain" as an adjective – i.e., arguing that the trial court's decision plainly was error – rather than the legal term of art "plain error." JCI clearly argues its point *is* preserved for appeal, and it does not state any argument under the standards for plain error review.

C. To the extent the trial court resolved any disputed facts in awarding G&G prejudgment interest, this Court must view the evidence in the light most favorable to its judgment, taking as true all evidence in its favor and disregarding all contrary evidence.

JCI also claims that G&G's "statutory right to prejudgment interest pursuant to" § 408.020 "is reviewed *de novo*" (Aplt.Br. 9). This is untrue. Where, as here, the trial court may have resolved disputed facts in determining that right, this Court views the evidence and inferences in a light most favorable to that determination, taking all evidence and inferences in its favor as true and disregarding all contrary evidence and inferences.

To support its argued standard of review, JCI cites only *Mitchell v. Residential Funding Corp.*, 334 S.W.3d 477, 508 (Mo. App. 2010). But *Mitchell* held the standard is *de novo* when § 408.020 is applied to undisputed facts: "Determination of the right to prejudgment interest is reviewed de novo because it is primarily a question of statutory interpretation and its application to undisputed facts." *Id.* (citation omitted) (undisputed contract language entitled plaintiff to prejudgment interest under statute). This makes sense, because "[w]hen the facts relevant to an issue are uncontested, then the issue is legal" and presents a question of law reviewed *de novo*. *Cortner v. Dir. of Revenue*, 408 S.W.3d 789, 792 (Mo. App. 2013).

Here, unlike in *Mitchell*, the facts surrounding JCI's challenge to the applicability of the prejudgment interest statute were not "undisputed". Evidence only is undisputed "when the issue before the trial court involves only stipulated facts and does not involve resolution … of contested testimony …." *White v. Dir. of Revenue*, 321 S.W.3d 298, 308 (Mo. banc 2010).

While the parties did not dispute that the interest provision in G&G's Proposal was crossed out or that alteration was signed, they disputed what the parties intended by it. JCI argued that the strikethrough's intent only could be discerned through testimony. And after hearing that testimony, the trial court held in G&G's favor.

Therefore, whether the contract was ambiguous is a question of law reviewed *de novo*, but if it was not and the trial court resolved the parties' intent using extrinsic evidence, that intent was a factual question, and this Court must defer to the trial court's resolution of that evidence:

> The primary rule of contract construction is to ascertain the intent of the parties and give effect to that intention. If a contract is unambiguous, the intent of the parties is to be discerned from the contract alone based on the plain and ordinary meaning of the language used. However, a contract may be ambiguous if it is susceptible to more than one interpretation, which is a legal issue determined by the court. If the ambiguity cannot be resolved within the four corners of the contract, the parties' intent can be determined by use of parol evidence. Resolution of the ambiguity may then be a factual issue to be resolved by the finder of fact.

Whelan Sec. Co. v. Kennebrew, 379 S.W.3d 835, 846 (Mo. banc 2012) (internal citations and quotation marks omitted).

This Court defers to the trial court's resolution of disputed facts. *Ivie v. Smith*, 439 S.W.3d 189, 205-06 (Mo. banc 2014). A trial court "is in a better position" than an appellate court "not only to judge the credibility of witnesses and the persons directly, but also their sincerity and character and other trial intangibles which may not be completely revealed by the record." *White*, 321 S.W.3d at 308-09. And this equally applies to credibility

determinations a court makes in resolving a post-verdict motion after a jury trial. *See, e.g., March v. Midwest St. Louis, LLC*, 417 S.W.3d 248, 253-54 (Mo. banc 2014) (re: granting new trial because witness committed perjury).

Accordingly, this Court "will accept as true the evidence and inferences from the evidence that are favorable to the trial court's [judgment] and disregard all contrary evidence." *Watson v. Mense*, 298 S.W.3d 521, 526 (Mo. banc 2009). "A trial court is free to disbelieve any, all, or none of th[e] evidence," and "this Court defers to [its] determination of credibility." *White*, 321 S.W.3d at 308. And this is not as simple as the trial court merely believing the plaintiff and disbelieving the defendant. Rather, the trial court "is free to believe none, part, or all of the testimony of any witness." *Wennihan v. Wennihan*, 452 S.W.3d 723, 729 (Mo. App. 2015). It also may "assess the weight to be given to any evidence found to be credible." *Id.*

So, boiled down, here is the applicable standard of review:

- Whether the Contract's treatment of prejudgment interest is ambiguous is a question of law reviewed *de novo*;
- If the Contract's treatment of prejudgment interest is unambiguous, then its meaning is a question of law reviewed *de novo*;
- If the Contract's treatment of prejudgment interest is ambiguous, then this Court reviews the evidence as to its intent in a light most favorable to the trial court's decision to award G&G interest, taking all evidence and inferences in favor of that decision as true and disregarding all contrary evidence and inferences.

D. The Contract's plain language unambiguously does not include any provision agreeing to a rate of interest, so G&G is entitled to nine percent prejudgment interest per year under § 408.020; the previous, rejected language of Paragraph 11 does not create an ambiguity, because language stricken from a proposed agreement is extrinsic to the ultimate agreement, must be ignored, and cannot be used to create an ambiguity.

1. Where a contract does not expressly agree to a rate of interest under it, § 408.020 entitles a prevailing plaintiff in a breach of contract action awarded damages of a liquidated sum to prejudgment interest at nine percent per year.

JCI's sole point relied on alleges the "trial court erred in awarding prejudgment interest to G&G" under § 408.020 (Aplt.Br. 9). Section 408.020 provides in relevant part, "Creditors shall be allowed to receive interest at the rate of nine percent per annum, when no other rate is agreed upon, for all moneys after they become due and payable, on written contracts, and on accounts after they become due and demand of payment is made …."

So, where a party's damages for breach of a contract are "readily determinable and ascertainable by computation" – i.e., are "liquidated" – and the party made a demand for payment, it generally "is entitled to prejudgment interest" of nine percent under § 408.020 running "from the date of the breach or the time when payment was due under the contract." *Doe Run Resources Corp. v. Certain Underwriters and Lloyd's London*, 400 S.W.3d 463, 477 (Mo. App. 2013). "The award of prejudgment interest in" such "a case … is not a matter of court discretion; it is compelled." *Id.*

G&G's contract balance of $530,731.42 was a liquidated claim because it was fixed, determined, and readily ascertainable (L.F. 537, 540). Therefore, under § 408.020, G&G is entitled to nine percent of prejudgment

interest per year from the date of its demand for payment, which the trial court found was August 1, 2013, through the date of judgment (L.F. 460-61).

JCI does not contest that the $530,731.42 contract balance was a liquidated amount. It also does not contest the propriety of using August 1, 2013 as the date from which prejudgment interest should run.

Instead, JCI seizes on § 408.020's language "when no other rate is agreed upon" (Aplt.Br. 10). It claims the parties had agreed that no interest would be paid, completely obviating § 408.020's application (Aplt.Br. 10-13).

The language "when no other rate is agreed upon" in § 408.020 provides the only exception to the statute's otherwise general entitlement to prejudgment interest for a liquidated amount due under a contract. *Manfield v. Auditorium Bar & Grill, Inc.*, 965 S.W.2d 262, 269 (Mo. App. 1998). It means that "[p]arties may also agree on a specific rate of interest which will control if it is not otherwise excessive under the law." *Doe Run*, 400 S.W.3d at 477. But "[i]f no other rate is agreed upon, the rate in Section 408.020" – nine percent per year – always "is applicable." *Id.*

It is true that the "other rate agreed upon" *can* be "zero", in which case the prevailing party loses its entitlement to prejudgment interest under § 408.020. *Manfield*, 965 S.W.2d at 269. This is because "[t]he 'no' found in the phrase in the statute, 'when no other rate is agreed upon,' obviously refers to the lack of an agreement as to interest, not to an agreement to pay no or zero interest." *Id.* So, "where the parties … have agreed upon interest at any rate, including a rate of zero, they are bound by their agreement and an award at the statutory rate is not implicated." *Id.* at 270. Accordingly, where

"there is no dispute that the parties agreed to interest … at the rate of zero percent", "§ 408.020 does not apply …." *Id.*

But all Missouri authorities holding a different rate of interest than the statutory nine percent applied because "another rate was agreed upon" always have required that the different rate be *expressly* agreed. *See, e.g.*:

- *Manfield*, 965 S.W.2d at 269-70 (where promissory notes expressly agreed to "0%" interest rate, the plaintiff was not entitled to any statutory interest under § 408.020);
- *Bank of Kirksville v. Small*, 766 S.W.2d 770, 771 (Mo. App. 1989) (where rate of interest in note was blank space, the parties did not agree on a rate of interest and so the plaintiff was entitled to nine percent under § 408.020);
- *Prange v. Prange*, 755 S.W.2d 581, 591 (Mo. App. 1987) (under UCC provision of § 400.3-118(d), where rate of interest and due date in note were blank spaces, statutory interest rate of § 408.020 applied).

2. Here, the Contract unambiguously did not state any rate of interest, so G&G was entitled to § 408.020's standard nine percent interest on its contract balance.

Here, the Contract did not expressly agree to any rate of interest at all, nor does JCI argue it did. Instead, JCI points to language in Paragraph 11 of G&G's Proposal, which Mr. Adrian crossed out and replaced with the language "5% Retianage [*sic*]" and then he and Mr. Dooley initialed (Aplt.Br. 11-13). It argues that because the language in the Proposal called for interest, but the ultimate Contract did not, this means "the unrebutted evidence at trial establishes that the parties eliminated from the contract a

written provision for interest and thereby indicated their intent that no interest would be charged on part due [*sic*] amounts" (Aplt.Br. 9). It then recounts that evidence as being the testimony of Mr. Adrian and Mr. Dooley (Aplt.Br. 11-13), though as pointed out *supra* at pp. 12-14, JCI entirely misstates Mr. Dooley's actual testimony.

But JCI's argument is not really about the meaning of the Contract's plain language. Instead, by pointing to extrinsic testimonial evidence, JCI argument that *this*, *rather than* the Contract's plain language, shows the parties' intent necessarily depends on the language of the Contract as to interest being ambiguous. For, "If a contract is unambiguous, the intent of the parties is to be discerned from the contract alone based on the plain and ordinary meaning of the language used." *Whelan*, 379 S.W.3d at 846. Only if a contract is (a) ambiguous and (b) "the ambiguity cannot be resolved within the four corners of the contract" may "the parties' intent … be determined by use of parol evidence." *Id.*

There is no ambiguity here, nor does JCI identify any. "The rule is well established that where the printed portions of a written contract conflict with handwritten provisions or interlineations, the latter prevail." *Century 21-Andrews Realty, Inc. v. Adams*, 691 S.W.2d 511, 512 (Mo. App. 1985). So, "Words in a contract that have been erased or crossed out ordinarily should not be considered." 17A C.J.S. *Contracts* § 419.

Accordingly, crossing out a paragraph in a printed contract proposal does not mean that the parties agreed to the opposite of that paragraph and this is what the Court should consider in determining the contract's meaning.

Missouri courts firmly have firmly held that "stricken language" does not create a "negative inference" agreeing to the converse of what was stricken. *Maddick v. DeShon*, 296 S.W.3d 519, 526 (Mo. App. 2009) (striking of language which would have expressly terminated Wife's right to maintenance upon remarriage did not show that parties "agreed in writing to the converse" of Husband's maintenance obligation extending beyond her remarriage and terminating only on her death).

In *Gateway Frontier Props., Inc. v. Selner, Glaser, Komen, Berger & Galanski, P.C.*, the Court explored the treatment of stricken language from contract proposals and held that they are extrinsic evidence that cannot be used to create an ambiguity:

> Whether or not language stricken from an unambiguous, integrated contract constitutes extrinsic evidence which may not be considered in its interpretation apparently has not been addressed in Missouri …. However, the majority of other jurisdictions considering the issue have held that stricken language is extrinsic and may not be resorted to in construing an integrated, unambiguous contract. The rationale underlying the rule is that the writing excised from the agreement, whether by way of striking, erasing, or simply transferring the agreement to a new piece of paper without the stricken language, is not part of the agreement between the parties. Here, the trial court and the parties agreed that the guaranty was not ambiguous, therefore the trial court erred in resorting to the stricken language.

974 S.W.2d 566, 570-71 (Mo. App. 1998) (internal citations omitted).

So, "stricken language is not part of the parties'" agreement, "and cannot be used to create an ambiguity in the remaining language of the" agreement, "(even assuming both parties agreed to the strikeout)." *Maddick*, 296 S.W.3d at 526. "Before [this Court] could turn to the stricken language

to assist in construing the parties' [agreement], [it] would first have to find that the surviving text of the [agreement] was ambiguous." *Id.* Simply put, stricken language must be ignored in determining whether a contract is ambiguous. *See, e.g.*, *id.*; *Gateway Frontier*, 974 S.W.2d at 570-71; *Hastings & Chivetta Architects v. Burch*, 794 S.W.2d 294, 295 (Mo. App. 1990) (crossed-out deletions in printed contract section disregarded in determining its meaning; provision was not ambiguous).

Here, the Contract is unambiguous as to interest: it simply contains no interest provision at all. Paragraph 11 in G&G's Proposal *would* have stated both (a) a rate of 18% interest and (b) that if by a law the rate had to be lower than that, retainage was not to be held out of payments. But the parties struck all that language, wrote "5% Retianage [*sic*]" instead, and initialed those interlineations. Accordingly, the interlineations control over what they replaced, and all Paragraph 11 says as a matter of law is "5% Retianage".

"[T]here is nothing ambiguous" as to a rate of interest "about the language the parties employed in paragraph [11] (ignoring the stricken language) …." *Maddick*, 296 S.W.3d at 526. The Contract simply does not agree on any interest rate at all. "[T]herefore no resort to extrinsic evidence is appropriate." *Id.*

Accordingly, the law of Missouri is that as there was no express agreement on any interest rate, "the rate in Section 408.020" – nine percent per year – applied. *Doe Run*, 400 S.W.3d at 477. There was no provision on any interest rate in the final Contract at all, and certainly not one, as in *Manfield*, that expressly stated a rate "0%" or "no interest". 965 S.W.2d at

269. So, § 408.020's ordinary nine percent applies. *Doe Run*, 400 S.W.3d at 477.

The trial court picked up on exactly this. It told JCI's counsel the parties "didn't agree on zero. They disagreed on 18 percent. And therefore, the provision was struck in total, which means you have the exact statutory situation where there's no other rate agreed upon" (Tr. 627). It went on,

> So there was no agreement as to interest. You can't say they agreed to the part, the -- you know, 'the highest rate allowed by law,' that is scratched out. It doesn't say, 'We forego the highest interest allowed by law.' It doesn't -- there's no provision regarding interest because your client scratched it out.

(Tr. 630).

The trial court's point was that there was no ambiguity in the Contract as to whether it stated an agreed rate of interest. The Contract simply did not state one at all, so § 408.020's standard nine-percent rate controls.

Ultimately, the trial court did not make any findings *why* it held G&G was entitled to nine percent interest under § 408.020 (L.F. 460-61). This means "the trial court is presumed to have made findings in accordance with the decree entered and judgment will be affirmed under any reasonably theory supported by the evidence." *Green Acres Enters.*, 876 S.W.2d at 639.

Here, it plainly is a reasonable theory supported by the evidence that G&G was entitled to nine percent prejudgment interest under § 408.020 because the Contract unambiguously did not state any other rate of interest. The trial court correctly awarded G&G prejudgment interest of nine percent under § 408.020.

3. JCI has waived any argument that the trial court erred in holding the contract unambiguously does not state any rate of interest.

Notably, despite the trial court's lengthy comments on this, in its brief JCI never once addresses the notion that the trial court simply may have held the Contract was unambiguous in this manner. It never addresses ambiguity at all, nor does it even mention the word "ambiguity" or any permutation of it. It certainly does not allege that such a finding was error.

Instead, JCI's sole point relied on seems to make a sort of weight-of-the-evidence argument,[3] arguing "that the unrebutted evidence at trial establishes that the parties eliminated from the contract a written provision for interest and thereby indicated their intent that no interest would be charged on part due [*sic*] amounts" (Aplt.Br. 9). But assessing the weight or sufficiency of extrinsic evidence as to a contract's intent *ipso facto* depends on the trial court first having found an ambiguity. *Whelan*, 379 S.W.3d at 846.

Accordingly, JCI has waived any argument that the trial court erred in holding the Contract unambiguously did not agree to a rate of interest. "Arguments not encompassed by the point relied on are not preserved for review." *DeWalt v. Davidson Service/Air Inc.*, 398 S.W.3d 491, 502 (Mo. App. 2013). And JCI cannot make that argument for the first time in its reply brief, either. This Court "will not address issues raised for the first time in a reply brief." *Salvation Army, Kan. v. Bank of Am.*, 435 S.W.3d 661, 670 (Mo. App. 2014).

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[3] If so, JCI's argument is impermissible. In a jury-tried case, "[Q]uestions as to the weight of the evidence are not the subject of appellate review." *Burbridge v. Union Pac. R.R. Co.*, 413 S.W.3d 649, 656 (Mo. App. 2013).

4. The federal *Trinity Products* decisions are not binding on this Court, they conflict with this Court's decisions in *Maddick* and *Gateway Frontier*, and the Court should disregard them; regardless, they are inapposite and do not support JCI's argument.

Regardless, JCI presents no authority that crossing out a paragraph of a proposal automatically means the parties affirmatively agreed to the opposite of what they struck through. This is because none exists. It would run afoul of the rule that deleted provisions of contracts simply are ignored. *Supra* at pp. 30-32. No offeree could feel safe deleting a paragraph of a printed contract proposal, because even if the offeror accepted that amendment, rather than ascribing no meaning to the deleted paragraph the offeree would be risking construing some meaning against it.

Instead, JCI relies almost entirely on two federal decisions that do not hold this either: *Trinity Prods., Inc. v. Burgess Steel, LLC*, No. 4:03CV01808, 2006 WL 903240[4] (E.D.Mo. Apr. 7, 2006), and the Eighth Circuit's decision affirming it in part and reversing it in part, 486 F.3d 325 (8th Cir. 2007).

JCI initially incorrectly says the federal district court's decision was by "the Missouri Court of Appeals for the Eastern District" (Aplt.Br. 14), rather than the *U.S. District Court* for the Eastern District of Missouri. This is an important distinction, because while there is one Missouri Court of Appeals, *Akins v. Dir. of Revenue*, 303 S.W.3d 563, 567 n.4 (Mo. banc 2010), and decisions from its Eastern District in St. Louis generally bind panels of its Western District in Kansas City, *see* Supreme Court Operating Rule 22.01,

[4] JCI cites the federal district court's decision incorrectly (200*0* WL instead of 200*6* WL) (Aplt.Br. 14).

federal district court decisions are not binding. "Though meriting [this Court's] respect, decisions of the federal district and intermediate appellate courts … are not binding on" this Court. *Doe v. Roman Catholic Diocese of St. Louis*, 311 S.W.3d 818, 823 (Mo. App. 2010).

The *Trinity Products* decisions consider language stricken from a contract proposal in determining the final contract's intent, which this Court's decisions in *Maddick* and *Gateway Frontier* expressly hold the law of Missouri does not allow. *Supra* at pp. 30-32. So, as the federal *Trinity Products* decisions attempting to construe Missouri law conflict with these actual Missouri decisions, the Court should disregard them. *Smith v. Callaway Bank*, 359 S.W.3d 545, 548 (Mo. App. 2012) (disregarding Eighth Circuit decision on Missouri law that conflicted with decision from this Court).

Even if they somehow correctly state the law of Missouri, the *Trinity Products* decisions are inapposite. They do not hold that crossing out a paragraph that states an interest rate in a contract proposal and replacing it with nothing else in the final contract means the parties agreed to zero percent interest and § 408.020 does not apply, which is what JCI argues here. Instead, they hold that replacing such a provision with a different method of paying on amounts due – there, by means of a letter of credit not further detailed in the decisions – can render § 408.020 inapplicable. That did not occur here.

In *Trinity Products*, the original proposal

> provided for a "monthly late payment charge equal to 1.5% per month (18% per year), on all amounts past due and owing to

> Seller will be charged to Purchaser." In negotiating the contract, however, this sentence, including the entire paragraph in which it was contained, was crossed out. It was handwritten underneath the paragraph and partially in the margin "As per L/C (Letter of Credit)" and initialed, to indicate the parties would forgo any charge for late payment.

2006 WL 903240 at *3.

The district court's decision does not state what the letter of credit's terms were. *Id.* After trial and a decision for the plaintiff, the defendant argued the parties agreed to forego interest by replacing the interest rate with "as per letter of credit", disentitling the plaintiff to prejudgment interest under § 408.020. *Id.* The district court agreed. *Id.*

Both parties then appealed to the Eighth Circuit, with the plaintiff appealing this decision as to the denial of prejudgment interest. 486 F.3d at 335. The Eighth Circuit affirmed *specifically because* the interest rate paragraph was not merely crossed out, but was replaced with *a different method* of recouping amounts lost from nonpayment, i.e. the letter of credit:

> In this case, Trinity's pre-printed contract form provided for 1.5% interest per month on amounts past due, but that provision was crossed out and replaced with a handwritten notation: "as per L/C (Letter of Credit)." The district court concluded that this substitution reflected an intent that no interest would be owed on amounts past due, including amounts due for extra work. Therefore, the court ruled, § 408.020 did not apply, and no prejudgment interest was owing. A letter of credit ensures that the buyer's bank will promptly pay contract demands that conform to the letter of credit's requirements. Thus, **we agree with the district court *that replacing a contractual rate of interest for amounts past due with a provision that payment will be made under a letter of credit reflects an agreement that no interest will be owing on amounts past***

> ***due, since any amounts not promptly paid would not have been demanded in accordance with the letter of credit.***

Id. (internal citation omitted) (emphasis added).

Tellingly, JCI does not mention the replacement of the interest provision with the letter of credit's terms (Aplt.Br. 14-15). Its recounting of the district court's decision in *Trinity Products* stops after the words "crossed out" and neglects to mention the replacement with the letter of credit's terms (Aplt.Br. 14-15). And it insists that the Eighth Circuit's decision somehow is "inapplicable" because it "did not … squarely address this issue on appeal" (Aplt.Br. 15-16). But this is because JCI equally omits the Eighth Circuit's actual holding: that replacing a contractual rate of interest with a provision that payment will be made under a letter of credit foregoes interest under § 408.020 (Aplt.Br. 16).

Plainly, *Trinity Products* does not present "the identical scenario in this case" (Aplt.Br. 14). Here, the entirety of Paragraph 11 was crossed out and replaced with language only bearing on retainage, not interest or other means of recouping amounts lost from nonpayment. Even if *Trinity Products* somehow is a correct statement of the law of Missouri, unlike in *Trinity Products* there unambiguously is no statement of any rate or method of interest payment in the Contract here. Therefore, § 408.020 applies.

The Court should affirm the trial court's judgment.

E. If the Contract somehow is ambiguous as to whether the parties intended to forego interest, then viewing the evidence in a light most favorable to the trial court's judgment its decision to award G&G interest under § 408.020 still must be affirmed.

If JCI somehow is correct that there was some ambiguity in the Contract as to whether it stated a rate of interest to be paid, and so the testimony as to the parties' intent can be reviewed, then its argument is equally meritless.

Essentially, JCI's argument is that the trial court *had* to conclude the parties intended crossing out Paragraph 11 of G&G's Proposal and replacing it with "5% Retianage" in the Contract to mean no prejudgment interest would be paid (Aplt.Br. 10-13). It says this is because "the unrebutted evidence at trial establishes that the parties eliminated from the contract a written provision for interest and thereby indicated their intent that no interest would be charged on part due [*sic*] amounts" (Aplt.Br. 9). It says its evidence – Mr. Adrian's testimony – was that the intent was for no interest to be paid, and because G&G's evidence – Mr. Dooley's testimony (that JCI misrepresents, *supra* at pp. 12-14) – did not rebut this, the trial court had to find for JCI.

If JCI were correct that there was an ambiguity and any of this evidence even mattered, its argument fundamentally misunderstands and misapplies the standard of review. Correctly viewing the evidence in a light most favorable to the trial court's judgment awarding G&G nine percent prejudgment interest under § 408.020, taking all evidence and inferences in

the judgment's favor as true and disregarding all contrary evidence and inferences, the trial court did not err.

In short, all this would mean is that JCI had the burden of proof that the parties' intent was what JCI said it was, but the trial court found Mr. Adrian was not credible and disbelieved his testimony. If parol evidence somehow comes into play, the Court still must affirm the trial court's judgment.

As explained *supra* at pp. 25-26, the trial court is in a better position than this Court to judge witness credibility, so this Court confines its review to the sufficiency of the evidence, viewing all evidence in a light most favorable to the trial court's judgment. This means accepting as true all evidence and inferences in the judgment's favor and disregarding all contrary evidence and inferences.

So, it is virtually impossible for a losing party who had the burden of proof on an issue, as JCI did on its contested proposition that the parties intended the replacement of Paragraph 11 of G&G's Proposal with the language "5% Retianage" to mean they agreed on a rate of zero percent interest, to prevail on a sufficiency or weight of the evidence argument on appeal. *England v. England*, 454 S.W.3d 912, 919 (Mo. App. 2015).

In *England*, this Court held JCI's argument is impermissible:

> [I]t is clear that [JCI] misunderstands both the trial court's role in receiving and weighing evidence and our standard of review on appeal. [JCI] repeatedly asserts that [it] has proved a "prima facie case" and argues that [G&G] must then provide evidence to rebut [its] evidence. [JCI] argues that, where [it] has provided evidence, such as testimony or written evidence, and [G&G]

> failed to offer [its] own direct evidence, the trial court was bound to hold in [JCI]'s favor. This misstates settled Missouri law.

Id.

This is because "[w]hen the burden of proof is placed on a party for a claim that is denied, the trier of fact has the right to believe or disbelieve that party's uncontradicted or uncontroverted evidence." *White*, 321 S.W.3d at 305. "If the trier of fact does not believe the evidence of the party bearing the burden, it properly can find for the other party." *Id.* "Generally, the party not having the burden of proof on an issue need not offer any evidence concerning it." *Id.* (citation omitted).

JCI's first point fails this standard. All the evidence was contested. The trial court had the right to believe or disbelieve any, all, some, part, or none of any of the evidence or testimony introduced in JCI's support, including Mr. Adrian's testimony on which JCI principally relies. This Court must take all evidence and inferences in favor of the judgment as true and disregard all contrary evidence and inferences, which means disregarding Mr. Adrian's testimony in its entirety.

And disregarding Mr. Adrian's testimony about what JCI's intent in crossing through Paragraph 11 of G&G's Proposal and replacing it with "5% Retianage" was, which the trial court must be presumed not to have believed, no evidence supports JCI's contested proposition of what the parties intended. As always when a party had the burden of proof on an issue and the trial court disbelieved its evidence, the trial court here properly found against JCI. *White*, 321 S.W.3d at 305.

The Court should affirm the trial court's judgment.

Conclusion

The Court should dismiss the appellants' appeal. Alternatively, the Court should affirm the trial court's judgment.

Respectfully submitted,

Jonathan Sternberg, Attorney, P.C.

by /s/Jonathan Sternberg
Jonathan Sternberg, Mo. #59533
2323 Grand Boulevard, Suite 1100
Kansas City, Missouri 64108
Telephone: (816) 292-7000 (x7020)
Facsimile: (816) 292-7050
jonathan@sternberg-law.com

BROWN & RUPRECHT, PC

By: /s/*John L. Hayob*
John L. Hayob, MO Bar #24518
G. Stephen Ruprecht, MO Bar #23494
2323 Grand Blvd., Suite 1100
Kansas City, MO 64108
T: (816) 292-7000 / F: (816) 292-7077
jhayob@brlawkc.com
sruprecht@brlawkc.com

COUNSEL FOR RESPONDENT

Certificate of Compliance

I certify that I prepared this brief using Microsoft Word 2016 in Century Schoolbook, size-13 font, which is not smaller than Times New Roman, size-13 font. I further certify that this brief complies with the word limitations of Supreme Court Rule 84.06(b) and this Court's Rule XLI, as this brief contains 9,385 words.

/s/Jonathan Sternberg
Attorney

Certificate of Service

I certify that, on January 10, 2018, I filed a true and accurate Adobe PDF copy of this brief of the respondent and its appendix via the Court's electronic filing system, which notified the following of that filing:

Mr. James S. Kreamer — Counsel for Appellants
Baker Sterchi Cowden & Rice, L.L.C.
2400 Pershing Road, Suite 500
Kansas City, Missouri 64108
Telephone: (816) 471-2121
Facsimile: (816) 472-0288
kreamer@bscr-law.com

/s/Jonathan Sternberg
Attorney