COURT OF APPEALS
DECISION
DATED AND FILED

June 9, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

No. 98-0385

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

JOHN J. CALLANAN,

PLAINTIFF-APPELLANT-
CROSS-RESPONDENT,

v.

BRADLEY KIMMEL PROPERTIES, INC.

DEFENDANT-RESPONDENT-
CROSS-APPELLANT,

KENNETH KEMPEN, D/B/A
KEMPEN BROS. MASONRY, INC.,

DEFENDANT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Ozaukee County: JOSEPH D. McCORMACK, Judge. *Affirmed*.

Before Snyder, P.J., Brown and Nettesheim, JJ.

PER CURIAM. Bradley Kimmel Properties, Inc. appeals from a judgment in favor of John J. Callanan for damages relating to the negligent construction of Callanan's home. Callanan cross-appeals from the circuit court's reduction of the jury verdict from $75,000 to $5998. We affirm the appeal and cross-appeal.

Callanan purchased a recently-built home on which Bradley Kimmel Properties had been the general contractor.[1] When Callanan purchased the home, he was aware of a water problem in the basement and at the back of the house. Due to the continuing water problem, Callanan sued Kimmel Properties for negligent construction of the house and alleged that Kimmel Properties "owed a duty to supervise its employees to make sure they used the correct materials, to hire competent subcontractors, and to insure that proper procedures were taken in the construction of the basement."[2] Callanan alleged that defective materials were used to construct the basement and that Kimmel Properties negligently hired subcontractors who negligently failed to perform their services such that Kimmel Properties was liable under the doctrine of respondeat superior. Callanan sought damages for the financial loss on the property at its sale[3] due to the water problem and the cost of repairs to the house.

Kimmel Properties denied the allegations of Callanan's amended complaint and raised numerous affirmative defenses. However, it was not until trial that Kimmel Properties alleged that the mason who worked on the basement

[1] The home was built by the party who sold it to Callanan.

[2] Callanan also sued the mason who worked on the basement. Callanan's claim against the mason was dismissed on summary judgment.

[3] Callanan was transferred out of state by his employer and had to sell the house.

was an independent contractor and that the mason's liability could not be imputed to Kimmel Properties, the general contractor.

The jury found Kimmel Properties negligent in the construction of Callanan's house and that such negligence caused Callanan's injuries. The jury awarded Callanan $75,000 for his out-of-pocket loss. Kimmel Properties filed postverdict motions seeking a new trial, judgment notwithstanding the verdict and a change in the jury's damages award because it was not based on the evidence.

At the postverdict motion hearing, the circuit court found that there was sufficient evidence to support a verdict in favor of Callanan. However, the court found that the $75,000 damages award was unsupported by the evidence. The circuit court found that Callanan proved the following for damages: $2000 for landscaping and drainage work, $875 for basement repair work, and $3123 for additional basement repair work, for a total of $5998 in repair costs. However, the court did not find Callanan's testimony regarding the sale price of houses in his neighborhood sufficiently credible to support his claim of an $18,000 loss on the house at sale due to the water problem. The court reduced the jury verdict from $75,000 to the $5998 in repair costs incurred by Callanan.

Callanan appeals from the reduction in the verdict and Kimmel Properties cross-appeals claiming that there was insufficient evidence of its negligence. We address the cross-appeal first.

A jury verdict will be sustained if there is any credible evidence to support it. *See* ***Nieuwendorp v. American Family Ins. Co.***, 191 Wis.2d 462, 472, 529 N.W.2d 594, 598 (1995). We consider the evidence in the light most favorable to the verdict, and when more than one inference may be drawn from the evidence, we are bound to accept the inference drawn by the jury. *See* ***id.*** The

weight and credibility of the evidence are matters for the jury to determine. *See* ***Meurer v. ITT Gen. Controls***, 90 Wis.2d 438, 450, 280 N.W.2d 156, 162 (1979).

The foundation of the cross-appeal is the contention that the mason was an independent contractor. Generally, the liability of an independent contractor may not be imputed to a general contractor. *See* ***Jacob v. West Bend Mut. Ins. Co.***, 203 Wis.2d 524, 543, 553 N.W.2d 800, 807 (Ct. App. 1996). A contractor is independent when the principal or general contractor does not control the details of the work. *See* ***id.*** at 544, 553 N.W.2d at 808; *see also* ***Madix v. Hochgreve Brewing Co.***, 154 Wis. 448, 450-51, 143 N.W. 189, 190 (1913) (an independent contractor is "one who, exercising an independent employment, contracts to do a piece of work according to his own methods and without being subject to control of his employer, except as to the result of his work.").

Bradley Kimmel testified on adverse examination[4] that he has never worked as a mason. Kimmel, as general contractor, hired subcontractors based on referrals, not based on an evaluation of their workmanship. He coordinated the presence of the various subcontractors on the property in the order in which they were needed as construction progressed but he did not tell "the worker specifically what to do." In response to a question as to whether Kimmel visits the site to see if the subcontractor is doing the work properly, Kimmel testified that it was not his "responsibility to see if the mason is, in other words, doing things right. That's the mason contractor himself." Kimmel also relied upon the inspections of the supervisor or foreman of the masonry crew and the building inspector to evaluate

[4] Kimmel did not testify on direct examination in the defendant's case. Kimmel Properties determined that it would not present any evidence other than that which had been presented during Callanan's case-in-chief.

the quality of the work. He reiterated that it was not his responsibility to check to see whether the work is done properly although he visits the site almost daily to check on the project's progress.

On appeal, Kimmel Properties argues that the mason was an independent contractor over whom Kimmel Properties did not exercise control as to the details of the mason's work. Therefore, Kimmel Properties argues, any liability of the mason should not be imputed to Kimmel Properties. Therefore, we turn to the record for evidence that the mason was an independent contractor.

The sole evidence in the record on this point is Bradley Kimmel's testimony that the mason was an independent contractor. However, whether a party is an independent contractor is a question of law. *See* ***Rehse v. Industrial Comm'n,*** 1 Wis.2d 621, 626, 85 N.W.2d 378, 381 (1957). There must be a factual basis for the conclusion. Here, Bradley Kimmel offered a legal conclusion but not a factual basis regarding his right or lack of right to control the mason's work to sustain the defense theory. Kimmel Properties did not put into evidence any construction contract which would have been evidence of Kimmel Properties' relationship with the mason to evaluate whether the independent contractor liability rule would apply.

We further note that Bradley Kimmel's testimony that he expected others, such as the workers themselves and the building inspector, to supervise the work presents a jury question as to Kimmel Properties' negligence. The jury was instructed that a general contractor is generally not liable to a third person for the negligence of an independent contractor, such as the mason in this case. "Nevertheless, such principal contractor is bound to exercise ordinary care to prevent injury to third persons ... when, in the natural course of things, injurious

consequences must be expected to arise from the work, unless such means are adapted by which such consequences may be prevented."[5] WIS J I—CIVIL 1022.6.

From the evidence and based upon this instruction, the jury could have found that even if the mason was an independent contractor, Kimmel Properties did not exercise ordinary care to prevent the problems which arose in the construction of Callanan's house. *See* ***Nieuwendorp***, 191 Wis.2d at 472, 529 N.W.2d at 598. Furthermore, the jury was free to assess the credibility of Bradley Kimmel's testimony on the question of Kimmel Properties' role as the general contractor, the status of the mason as an independent contractor, and Kimmel Properties' approach to the manner in which work was performed at the site. *See* ***Meurer***, 90 Wis.2d at 450, 280 N.W.2d at 162.

We now turn to Callanan's appeal from the circuit court's reduction of the jury verdict.[6]

> In considering a motion to change the jury's answers to the questions on the verdict, a trial court must view the evidence in the light most favorable to the verdict and affirm the verdict if it is supported by any credible evidence. ***Nelson v. Travelers Ins. Co.***, 80 Wis.2d 272, 282-83, 259 N.W.2d 48, 52-53 (1977). The trial court is not justified in changing the jury's answers if there is any credible evidence to support the jury's findings. *See* ***Bennett v. Larsen Co.***, 118 Wis.2d 681, 705-06, 348

[5] The jury instruction is not objected to on appeal.

[6] In its ruling on postverdict motions, the circuit court ordered that "all but $5598 be remitted." While the circuit court employed the remittitur concept, we conclude that the circuit court actually granted Kimmel Properties' motion to change the jury's damages verdict. True remittitur requires that when a damages award must be reduced, the prevailing party is allowed to choose between remittitur to an amount of damages supported by the evidence or a new trial. *See* ***Carlson & Erickson Builders, Inc. v. Lampert Yards, Inc.***, 190 Wis.2d 650, 668, 529 N.W.2d 905, 912 (1995). In this case, Callanan was not given the choice; the circuit court ordered the jury's damages verdict changed. Therefore, we apply the standard of review for a change in the jury's verdict rather than the standard of review for remittitur.

> N.W.2d 540, 554 (1984). In reviewing the evidence, the trial court is guided by the proposition that "[t]he credibility of witnesses and the weight given to their testimony are matters left to the jury's judgment, and where more than one inference can be drawn from the evidence," the trial court must accept the inference drawn by the jury. ***Id.*** at 706, 348 N.W.2d at 554. On appeal this court is guided by these same rules. *See* ***Nelson***, 80 Wis.2d at 282, 259 N.W.2d at 52.

Richards v. Mendivil, 200 Wis.2d 665, 671, 548 N.W.2d 85, 88 (Ct. App. 1996).

On appeal, Callanan argues that there was credible evidence to support the $75,000 verdict. He argues that this figure included the $5598 repair component actually awarded by the court, the $18,000[7] in lost value of the house due to the defects, an estimate for additional basement repairs of $2643, and $49,357 for his loss of use, time, aggravation and inconvenience.

In changing the jury's damages award, the court did not find Callanan's testimony regarding lost value to be credible. Callanan testified that when he was transferred by his employer, he listed the house with a broker for $229,900. The price was set based on comparable sales in the area compiled by the broker. However, Callanan's testimony regarding a specific prior sale as a basis for his familiarity with home prices in the neighborhood was objected to and stricken on hearsay grounds.[8]

Callanan was unable to accept an offer of $225,000 because the offer had contingencies which violated the rules of the relocation service which was

[7] At trial, Callanan testified that the lost value was $18,000. In his appellant's brief, Callanan calculates the lost value to have been $17,000. We will use the $18,000 figure offered at trial.

[8] This evidentiary ruling is not challenged on appeal.

coordinating his relocation.[9] Because Callanan was unable to sell the house in sixty days, he sold it to the relocation service for $212,000,[10] which was $18,000 less than the listing contract price. Consequently, Callanan claims $18,000 in lost value which he attributes to the water problem.

While Callanan's testimony regarding the setting of the listing contract price was competent, *see* ***Trible v. Tower Insurance Co.***, 43 Wis.2d 172, 187, 168 N.W.2d 148, 156 (1969) (homeowner is competent to testify as to the value of property), there is no credible evidence in the record that the ultimate sale price of $212,000 was due to the water problem. The record reflects that Callanan sold the house to the relocation service because he did not receive an offer which would be approved by the relocation service, to facilitate the purchase of a house in his new community, and to preserve the benefits of the relocation program (moving expenses, buy-out arrangement, relocation assistance, etc.). These are all factors which could have influenced the $212,000 price. Callanan did not testify regarding the relocation service agreement which might have contained information as to how the $212,000 sale price was reached. On the issue of fair market value, there is no evidence that the transaction between Callanan and the relocation service was "an arm's-length transaction on the open market between a

[9] If Callanan was unable to sell his house in sixty days, the relocation service would purchase the house from him.

[10] Callanan testified that broker with whom he listed the house would have received at least a six percent commission on a sale of the house for $225,000, or approximately $12,000 to $15,000. Callanan agreed that if the house had sold in this manner, he would have netted approximately $210,000. Callanan conceded that the $212,000 he received from the relocation service was equivalent to the amount he would have realized in a broker sale. However, on redirect, Callanan testified that the relocation service would have paid the broker's commission if Callanan had sold the house himself through a broker. In light of this testimony, we are not persuaded by the contention that Callanan's commission savings precludes a possible loss on the sale of the house. However, as we later hold, there was no credible evidence that the $18,000 "loss" on the sale of the house to the relocation service was due to the water problem.

willing seller not obliged to sell the property and a willing buyer not obliged to purchase it." ***Waste Management, Inc. v. Kenosha County Bd. of Review***, 184 Wis.2d 541, 556, 516 N.W.2d 695, 701 (1994). Additionally, we note that Callanan received an offer of $225,000 which was $4999 less than the listing price. On this record, this offer is arguably better evidence of an arm's-length transaction valuation of the house than the ultimate $212,000 sale price to the relocation service.

Callanan assumes that the $18,000 "loss" relates solely to the water problem, but there was no evidence to that effect. However, there was evidence that the arrangement with the relocation service was a factor in the $212,000 sale price. We conclude that there was no credible evidence from which the jury could determine how the relocation service determined the price it would pay for the house and whether it paid less for the house due to the water problem.

In closing argument, Callanan briefly argued that he should be compensated for aggravation and grief. However, there was no testimony as to the amount of time Callanan spent addressing the water problem.[11] The circuit court properly concluded that there was no credible evidence to sustain an award for grief and aggravation.

Finally, the additional estimated repairs of $2643 were never performed because the house was sold. Therefore, this cannot be an element of Callanan's out-of-pocket damages. *See* ***Hawes v. Germantown Mut. Ins. Co.***, 103 Wis.2d 524, 533, 309 N.W.2d 356, 361 (Ct. App. 1981).

[11] While Callanan testified that he painted the basement walls with a sealant, he did not indicate how much time he spent doing this.

The circuit court properly limited damages to that for which there was credible evidence. In this case, there was credible evidence only of actual repair costs in the amount of $5598. *See* ***id.***

By the Court.—Judgment affirmed.

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