

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 7, 2010

David R. Schanker
Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 2009AP193

Cir. Ct. No. 2003CV553

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

**MCDONALD ENTERPRISES/FOND DU LAC LIMITED PARTNERSHIP BY
MCDONALD FAMILY ENTERPRISES/FDL, LLC GENERAL PARTNER,**

PLAINTIFF-APPELLANT,

V.

**EXCEL ENGINEERING, INC. AND SIGNATURE HOMES BY ADASHUN
JONES, INC.,**

DEFENDANTS-RESPONDENTS,

TOWN OF FOND DU LAC,

DEFENDANT.

APPEAL from judgments of the circuit court for Fond du Lac
County: STEVEN W. WEINKE, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J., and Anderson, J.

¶1 PER CURIAM. McDonald Enterprises/Fond du Lac Limited Partnership, by its general partner, appeals from judgments dismissing its claims against Excel Engineering, Inc. and Signature Homes by Adashun Jones, Inc.¹ after a jury trial. We affirm the judgments.

¶2 McDonald owns a parcel adjoining a subdivision developed by Signature Homes. McDonald alleged “that the actions of Signature Homes and Excel Engineering, the developer and engineering firm associated with [the] subdivision, caused contaminated water to drain from the subdivision to McDonald’s property causing crop damage, long-term, adverse changes to the property, and a nuisance, among other claims.” McDonald also alleged negligent design and construction of the subdivision. *McDonald Enters. v. Excel Eng’g, Inc.*, No. 2006AP1412, unpublished slip op. at ¶2 (Wis. Ct. App. Mar. 14, 2007) (reversing grant of summary judgment due to the presence of factual disputes).

¶3 After a jury trial, the jury found that Excel Engineering acted unreasonably in designing the subdivision, but that such unreasonable action did not interfere with McDonald’s use and enjoyment of its property. The jury also found that Excel had a duty to use ordinary care yet failed to do so in designing the subdivision, and Excel inflicted harm, but not significant harm, on McDonald’s property. The jury found that Signature Homes did not act unreasonably and used ordinary care in developing the subdivision. The jury also found that McDonald contributed to the harm to its property and apportioned

¹ The caption of McDonald’s January 22, 2009 notice of appeal designates Signature Homes as a respondent, but the text of the notice of appeal identifies neither Signature Homes nor the January 16, 2009 judgment in favor of Signature as the subject of the appeal. Signature did not move to dismiss this appeal due to a defective notice of appeal. We need not decide this issue as Signature has appeared in this appeal via motions and a respondent’s brief.

liability eighty percent to Excel and twenty percent to McDonald. After unsuccessful postverdict motions, McDonald appeals.

¶4 On appeal, McDonald argues that the jury instructions and special verdict form did not accurately state or reflect the law of negligence, the jury's verdict was inconsistent, there was no credible evidence to support the jury's findings that Excel did not cause significant harm to McDonald and absolving Signature of all liability, and the jury view was prejudicial.

¶5 McDonald's challenges to the jury instructions and special verdict are waived because McDonald neither objected at the time of trial nor raised these challenges in its postverdict motions. During the jury instruction conference, the circuit court declined to submit a separate negligence instruction to the jury and combined the instructions for negligence and nuisance. The court determined that WIS JI—CIVIL 1920 includes negligent conduct. McDonald's counsel specifically stated that she had no problem with giving WIS JI—CIVIL 1920. The circuit court also reviewed the special verdict with counsel; McDonald did not object. Now, on appeal, McDonald contends that the jury instructions and verdict were erroneous.

¶6 WISCONSIN STAT. § 805.13(3) (2007-08)² states that if counsel does not object to the proposed jury instructions or verdict form on the grounds of error, the alleged error is waived. Counsel did not object; rather, she approved the use of WIS JI—CIVIL 1920. In addition, counsel failed to raise the jury instruction

² All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

problem in postverdict motions, again waiving the issue on appeal.³ *Suchomel v. University of Wis. Hosp. & Clinics*, 2005 WI App 234, ¶10, 288 Wis. 2d 188, 708 N.W.2d 13.

¶7 We reject McDonald's argument that waiver does not apply. McDonald undoubtedly waived any objection to the jury instructions and verdict form. We do not review waived claims. *LaCombe v. Aurora Med. Group, Inc.*, 2004 WI App 119, ¶5, 274 Wis. 2d 771, 683 N.W.2d 532. To do otherwise would render the objection requirement of WIS. STAT. § 805.13(3) a nullity. *LaCombe*, 274 Wis. 2d 771, ¶15.

¶8 McDonald argues that the verdict was inconsistent and that the inconsistency did not result from McDonald's failure to object to the verdict form. Specifically, McDonald argues that the jury should not have apportioned liability (eighty percent on Excel and twenty percent on McDonald) without first finding negligence.

¶9 The verdict asked the jury whether Excel's failure to use ordinary care caused any harm to McDonald's property; the jury answered "yes" although such harm was not significant. The jury was then asked if McDonald contributed to the harm to its property; the jury answered "yes." The jury was then told that if it answered "yes" to this question, it was to apportion liability, which it did. Given how the jury was instructed and the verdict form was constructed, *see LaCombe*, 274 Wis. 2d 771, ¶11, the jury returned a verdict that was consistent and supported

³ McDonald filed three postverdict motions: motion for judgment notwithstanding the verdict due to juror conduct during the jury view, motion to change the jury's answer on the question of whether Excel significantly harmed McDonald's property, and motion for a new trial due to an inconsistent verdict. None of these motions addressed the jury instructions.

by the evidence. We distinguish those cases in which the jury did not follow the circuit court's instructions and, as a result, produced an inconsistent verdict. *See id.*, ¶9.

¶10 McDonald challenges the sufficiency of the evidence and argues that the jury should have found that Signature failed to use ordinary care. We will sustain a jury's verdict if there is any credible evidence to support it. ***D.L. Anderson's Lakeside Leisure Co. v. Anderson***, 2008 WI 126, ¶22, 314 Wis. 2d 560, 757 N.W.2d 803. "[I]f the evidence gives rise to more than one reasonable inference, we accept the particular inference reached by the jury." ***Morden v. Cont'l AG***, 2000 WI 51, ¶39, 235 Wis. 2d 325, 352, 611 N.W.2d 659 (citations omitted).

¶11 On appeal, McDonald essentially asks us to reweigh the evidence and independently assess the witnesses' credibility. This we cannot do. "Matters of weight and credibility are left to the jury." ***Frayner v. Lovell***, 190 Wis. 2d 794, 810, 529 N.W.2d 236 (Ct. App. 1995). McDonald concedes that there was testimony in support of the verdict but argues that such testimony was not credible.⁴ We conclude that the evidence was sufficient.

¶12 McDonald argues that the jury view was prejudicial. However, McDonald's appellate briefs do not set out how or why the view was prejudicial. We will not develop this argument for McDonald. *See Vesely v. Security First Nat'l Bank*, 128 Wis. 2d 246, 255 n.5, 381 N.W.2d 593 (Ct. App. 1985).

⁴ For this reason, we do not discuss the evidence adduced at trial.

¶13 Signature moves the court to deem this appeal frivolous; McDonald objects. We cannot award fees under WIS. STAT. RULE 809.25(3) “unless the entire appeal is frivolous.” *Lenhardt v. Lenhardt*, 2000 WI App 201, ¶16, 238 Wis. 2d 535, 618 N.W.2d 218. McDonald’s argument regarding the allegedly inconsistent verdict was not frivolous.

By the Court.—Judgments affirmed.

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

