**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

January 13, 1998

**Marilyn L. Graves**
**Clerk, Court of Appeals**
**of Wisconsin**



**No. 96-2297**

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

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**CONSTANCE WOLFGRAM,**

**PLAINTIFF-RESPONDENT,**

**V.**

**LEWIS E. OLSON,**

**DEFENDANT-APPELLANT,**

**ALBERT DOBIASH, D/B/A DOBIASH AND ASSOCIATES, LTD.,**

**DEFENDANT.**

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APPEAL from a judgment of the circuit court for Milwaukee County: WILLIAM D. GARDNER, Judge. *Affirmed.*

Before Wedemeyer, Schudson and Curley, JJ.

PER CURIAM. Lewis E. Olson appeals from the judgment, following a jury trial, awarding Constance Wolf, f/k/a Constance Wolfgram,

damages in the amount of $46,000 and finding him forty percent causally negligent. Olson argues that the trial court: (1) should have granted his motion to dismiss after the plaintiff had rested; (2) should have granted his motion to change the answers in the special verdict; and (3) should have granted his motion for judgment notwithstanding the verdict.[1] He also argues that because Wolf owned the house in tenancy-in-common with her ex-husband, who was not joined in the action, any damage award should be reduced by one-half because Mr. Wolfgram could still initiate his own claim. We reject Olson's arguments and affirm.

## I. BACKGROUND

Olson and Albert Dobiash were building inspectors who provided Wolf and her then-husband, Michael Wolfgram, with condition reports on the basement and foundation of a home they were planning to purchase in the Village of Shorewood. In Olson's September 1990 report, he stated that the "[b]asement walls appear to be sound …. I believe the house to be reasonably sound …." The Wolfgrams then purchased the home only to discover, based on subsequent reports, that the foundation was at risk of collapsing and causing substantial damage to the house. As a result, the value of the home plummeted from $90,000,

[1] Olson contends that the trial court did "not ma[k]e a ruling on motions before and after verdict[.]" The trial court docket indicates that defense counsel's motions after verdict were heard on April 29, 1996, that the court took the motions under advisement, and that the court stated that it would issue a written decision. The next docket entry, dated May 31, 1996, states, however: "Post-verdict motions not having been decided, judgment to be entered on the verdict." A motion is considered denied if within 90 days after the verdict is rendered the court does not decide the motion and allows the verdict to be entered. *See* § 805.16(3), STATS.

the purchase price the Wolfgrams paid, to $35,000, the only offer they received before trial.

On December 23, 1994, Wolf filed a complaint against Olson and Dobiash, alleging, among other things, that they were negligent in their inspections of the foundation and basement walls. During the three-day trial, Wolf presented testimony establishing the standard of care of the American Society of Home Inspectors, as well as the means by which an inspector evaluates the stability of a foundation. The jury found that Olson and Dobiash were negligent in their inspections and apportioned sixty percent of the causal negligence to Dobiash[2] and forty percent of the causal negligence to Olson. Damages were found to be $46,000.

## II. ANALYSIS

Olson argues that the trial court should have granted his motion to dismiss for insufficient evidence after Wolf rested her case. We disagree. A motion challenging the sufficiency of the evidence as a matter of law should not be granted "unless the court is satisfied that, considering all credible evidence and reasonable inferences therefrom in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a finding in favor of such party." Section 805.14 (1), STATS.;[3] *see also* ***Richards v. Mendivil***,

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[2] After judgment was entered, Dobiash settled the matter with Wolf and then withdrew his appeal.

[3] Section 805.14, STATS., provides in relevant part:

> **Motions challenging sufficiency of evidence; motions after verdict. (1)** TEST OF SUFFICIENCY OF EVIDENCE. No motion challenging the sufficiency of the evidence as a matter of law to support a verdict, or an answer in a verdict, shall be granted unless the court is satisfied that, considering all credible

(continued)

200 Wis.2d 665, 670, 548 N.W.2d 85, 88 (Ct. App. 1996). When ruling on a motion to dismiss for insufficient evidence at the close of a plaintiff's case, the trial court may not grant the motion unless, considering all credible evidence in the light most favorable to the plaintiff, no credible evidence supports a verdict for the plaintiff. *See* ***Weiss v. United Fire & Cas. Co.***, 197 Wis.2d 365, 388, 541 N.W.2d 753, 761 (1995). The trial court may not grant a motion unless it finds, as a matter of law, that no jury could disagree on the proper facts or the inferences therefrom and no credible evidence supports a verdict for the plaintiff. ***Id.*** This standard also applies to our review of the trial court's decision. ***Id.*** However, in reviewing

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> evidence and reasonable inferences therefrom in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a finding in favor of such party.
>
> ....
>
> **(3)** MOTION AT CLOSE OF PLAINTIFF'S EVIDENCE. At the close of plaintiff's evidence in trials to the jury, any defendant may move for dismissal on the ground of insufficiency of evidence. If the court determines that the defendant is entitled to dismissal, the court shall state with particularity on the record or in its order of dismissal the grounds upon which the dismissal was granted and shall render judgment against the plaintiff.
>
> ….
>
> **(5)** MOTIONS AFTER VERDICT....
>
> (b) *Motion for judgment notwithstanding the verdict.* A party against whom a verdict has been rendered may move the court for judgment notwithstanding the verdict in the event that the verdict is proper but, for reasons evident in the record which bear upon matters not included in the verdict, the movant should have judgment.
>
> (c) *Motion to change answer.* Any party may move the court to change an answer in the verdict on the ground of insufficiency of the evidence to sustain the answer.

the trial court's decision, we must give substantial deference to the trial court's superior ability to assess the evidence. ***Id.*** at 388-89, 541 N.W.2d at 761.

Wolf claimed that Olson was negligent in his inspection of the house. In an action for negligence, the plaintiff must prove:

> a) facts which give rise to a legal duty on the part of the defendant to conform to the standard of conduct established by law for the protection of the plaintiff,
>
> b) failure of the defendant to conform to the standard of conduct,
>
> c) that such failure is a legal cause of the harm suffered by the plaintiff, and
>
> d) that the plaintiff has in fact suffered harm of a kind legally compensable by damages.

***Samson v. Riesing***, 62 Wis.2d 698, 706, 215 N.W.2d 662, 666 (1974) (internal quotation marks and quoted source omitted). We conclude that the trial court correctly denied Olson's motion to dismiss.

Wolf presented ample evidence to support her claim that Olson was negligent in his inspection of the basement and foundation. James Lee, a certified home inspector, testified that Wolf's house was not structurally sound, and that, based on his review of the foundation walls and Olson's report, he believed that Olson had failed to exercise the degree of care required by the profession. Lee added that Olson's report erroneously stated that the basement walls were sound. Lee stated that he could not agree with Olson's assessment because "there isn't any way of determining exactly when [the settlement] occurred … and [furthermore that] settlement to basement walls would indicate that they are not sound." Lee also testified that neither a home inspector nor an engineer could look at a crack in a wall and determine how long it had been there. Wolf also called Tony Zidar, a

basement contractor with over thirty-five years of experience, to testify about the condition of the foundation. Zidar testified that, based on his visual inspection of the foundation, Wolf's basement was one of the worst five he had ever seen. He also estimated that it would cost well over $40,000 just to repair the foundation.

Wolf also presented testimony regarding the diminished value of the house and the cost of repairs. *See* ***Laska v. Steinpreis***, 69 Wis.2d 307, 313, 231 N.W.2d 196, 200 (1975) (cost of repairs to damaged property is an acceptable measure of damages); *see also* ***Johnson v. Seipel,*** 152 Wis.2d 636, 651, 449 N.W.2d 66, 71 (Ct. App. 1989) (diminished value of property is an acceptable measure of damages). Wolf testified that she and her husband paid $90,000 for the house in 1991, but that given the discovery of the faulty foundation, she could never sell the house for that price. She testified that it was her belief that because of the severity of her house's structural problems, the fair market value of the house was $35,000. *See* ***Perpignani v. Vonasek***, 139 Wis.2d 695, 737, 408 N.W.2d 1, 18 (1987) (non-expert owner may testify concerning the value of his or her property). Sharon Owsley, Wolf's real estate agent, supported Wolf's estimate. Owsley, a realtor with Homestead Realty, testified that when she first listed the house, she believed it had a listing price of $157,900. After learning about the defective foundation and receiving an offer of $35,000, which was the value of the land only, her opinion changed. Owsley testified that given the offer she received and the extensive structural defects, she believed that the house's fair market value was approximately $35,000. Given this testimony, the trial court properly denied Olson's motion to dismiss.

Olson next claims that the trial court erred in not granting his motion to change the answers in the special verdict.[4] A motion to change a jury's verdict answer challenges the sufficiency of the evidence to sustain the answer. *See* § 805.14(5)(c), STATS. A reviewing court will not upset a verdict, including the jury's apportionment of negligence, if any credible evidence supports it. ***Ferraro v. Koelsch***, 119 Wis.2d 407, 410, 350 N.W.2d 735, 737 (Ct. App. 1984), *aff'd,* 124 Wis.2d 154, 368 N.W.2d 666 (1985). This evidence must "under any reasonable view support[ ] the verdict and remove[ ] the question from the realm of conjecture." ***Gonzalez v. City of Franklin***, 128 Wis.2d 485, 494, 383 N.W.2d 907, 911 (Ct. App.1986), *aff'd*, 137 Wis.2d 109, 403 N.W.2d 747 (1987). We look for credible evidence to sustain a jury's verdict, ***Ferraro***, 119 Wis.2d at 410-11, 350 N.W.2d at 737, and the credibility of witnesses and the weight afforded their individual testimony is left to the jury. *See* ***Radford v. J.J.B. Enters, Ltd.***, 163 Wis.2d 534, 543, 472 N.W.2d 790, 794 (Ct. App. 1991). Further, even if more than one reasonable inference may be drawn from the evidence, we must accept the jury's choice. *See* ***Ferraro***, 119 Wis.2d at 410-11, 350 N.W.2d at 737.

The trial court did not err by failing to grant Olson's motion to change the answers in the special verdict. Again, ample evidence supported the jury's finding regarding Olson's negligence and Wolf's damages. Wolf's witnesses supported her negligence claim and established her damages. Moreover, even Olson's defense witnesses assisted in establishing Wolf's claim. Defense expert Daniel McCoy, a foundation repair expert, testified that Wolf's basement was "bad." He explained that the basement had "two of the worst case scenarios you

[4] In his post-verdict motion, Olson moved to change each special verdict question relating to his causal negligence. He also moved to change the money damages from $46,000 to $0.

can have in a house," and that it was only "a matter of time" before the walls caved in. After reading Olson's report stating that the house appeared structurally sound, McCoy reached a different opinion, testifying that he believed the house had serious problems. Defense expert, Melody Stell, a foundation repair company employee, testified that the condition of the foundation was serious and recommended that the land around the house be excavated and that the foundation repaired.

Trial evidence also established that the house was listed unsuccessfully at $157,900. The value of the land without the home was $35,000. Repair costs were estimated between $40,000 and $45,000. Looking at the evidence in the light most favorable to the jury's verdict, we conclude that sufficient credible evidence supported the jury's verdict. The evidence and the inferences fairly drawn from the evidence supported the jury's verdict apportioning forty percent of the causal negligence to Olson and finding $46,000 in damages. *See* ***Bauer v. Piper Indus., Inc.***, 154 Wis.2d 758, 763, 454 N.W.2d 28, 30 (Ct. App. 1990) (noting that if credible evidence exists to support damage verdict, it must be sustained). Accordingly, we conclude that the trial court properly entered judgment on the verdict.

Next, Olson contends that the trial court erred by not ruling on his motion for judgment notwithstanding the verdict. In his brief to this court, however, Olson, does little more than rewrap the previous arguments we have rejected. Finally, Olson claims that the trial court erred by not reducing the damage award by one-half. He argues:

> At the time of commencement of the action, Constance Wolfgram was a joint tenant with her husband in the ownership of the property …. On January 5, 1995 by virtue of a judgment of divorce in Milwaukee County … of

> which the court took judicial notice, the ownership of the property was changed to Constance Wolfgram and Michael Wolfgram as tenant in common, each owning a one-half interest in the property.
>
> Michael Wolfgram did not join in the action nor was he named as a party Plaintiff, hence the interest in any award of damages would be only one-half…. Michael Wolfgram's claim had not been extinguished at the time of the verdict, hence, he would have been entitled to commence an action in his own behalf.

Olson provides neither legal authority nor argument in support of this proposition. Accordingly, we will not consider it. *See* ***Village of Egg Harbor v. Sarkis***, 166 Wis.2d 5, 17, 479 N.W.2d 536, 541 (Ct. App. 1991).

*By the Court.*—Judgment affirmed.

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