

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 30, 1998

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. 97-2714

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

MICHAEL R. OTT AND NEIL OTT,

PLAINTIFFS-APPELLANTS,

v.

**WISCONSIN AMERICAN MUTUAL INSURANCE COMPANY,
F/K/A WISCONSIN FARMERS MUTUAL INSURANCE
COMPANY,**

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Calumet County:
DONALD A. POPPY, Judge. *Affirmed.*

Before Brown, Nettesheim and Anderson, JJ.

PER CURIAM. Michael and Neil Ott appeal from a judgment dismissing their action to recover damages to their barn under a policy issued by Wisconsin American Mutual Insurance Company. The Otts challenge the trial

court's decision to change the jury's answer on the verdict. We affirm the judgment.

The barn roof on the Otts' dairy farm was found damaged on March 7, 1995. The Otts made a claim under the Wisconsin American policy for alleged wind damage. The claim was denied on the grounds that the damage was "due to the weight of ice and snow with deterioration of the structure being a contributing factor."

The jury determined that the damage to the barn was caused by the force of the wind. On motions after verdict, the trial court changed the jury's answer. The trial court found that the Otts' theory as to how winds damaged the roof was "in conflict with the uniform course of nature" and with the "fully established facts" as to wind direction and speed.

In considering a motion to change the jury's answer to a question on the verdict, the 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. *See Richards v. Mendivil*, 200 Wis.2d 665, 671, 548 N.W.2d 85, 88 (Ct. App. 1996). What is necessary is that there is sufficient evidence to remove the question from the realm of conjecture. *See Nieuwendorp v. American Family Ins. Co.*, 191 Wis.2d 462, 472, 529 N.W.2d 594, 598 (1995). "When we review an order changing the jury's answers, we begin with considerable respect for the trial court's better ability to assess the evidence." *Richards*, 200 Wis.2d at 671, 548 N.W.2d at 88.

We acknowledge that there is evidence favorable to the Otts, including lay testimony that the winds were strong during the evening of March 6,

1995, and that the barn was in good condition.¹ The Otts' expert architect concluded that the damage was caused by "high winds against the west side of the structure, causing the east side to bow out and sheer along the laminations of the rafters." He believed that the force of the wind must have been very strong to push debris out 150 feet east of the barn.

However, a meteorologist's testimony that the winds were blowing northeast between 8 and 12 miles per hour and, at the most, gustiness of 20 miles per hour was not contradicted. Thus, the trial court could conclude that the testimony that there were strong winds was inherently incredible. *See Day v. State*, 92 Wis.2d 392, 400, 284 N.W.2d 666, 671 (1979) (inherently or patently incredible evidence is that type of evidence which is in conflict with nature or fully established facts).

Moreover, the meteorologist explained the Beaufort Wind Scale which indicates that winds between 8 to 12 miles per hour cause leaves and small twigs to be in constant motion and will extend a light flag. Even winds of 24 miles per hour result only in the swaying of small trees in leaf and crested wavelets on inland water. Under the Beaufort scale, slight structural damage occurs when winds are between 47 to 54 miles per hour. Any inference by the jury that the winds on March 6, 1995, at the Ott farm were strong enough to cause the structural damage to the barn was unreasonable.

¹ Neil Ott testified that during the evening of March 6, 1995, he was awakened by a "severe windstorm" and that trees were bending and crashing against his house. A barn builder testified that the materials and rafter system utilized in the Ott barn were in good shape and the roof could not have collapsed due to excess weight from ice and snow. An architect did not find any water damage or rot in either the remaining structure or the damaged portion and thought that the barn was well maintained over the years. He explained that the balloon type of roof on the barn did not lend itself to ice and snow build up.

To support the jury's verdict, the Otts rely on the deposition testimony of a meteorologist they consulted but did not call as a witness.² The testimony the Otts point out alluded to the possible increase in wind velocity that would be caused by the meteorological phenomena known as the "eddy effect."³ Although the meteorologist theorized that the eddy effect could occur between the one silo on the east side of the barn and the three silos on the west side of the barn, he did not give an opinion to the requisite degree of scientific probability that the low winds could have produced the eddy effect, thus causing the structural damage. The meteorologist's singular reference to the possibility that the winds could have gone backwards does not remove the jury's verdict from the realm of

² The deposition of meteorologist John Chandik was taken with only questions from counsel for Wisconsin American. During trial, Wisconsin American read some of the deposition. The Otts read a few additional portions during rebuttal.

³ The portions of Chandik's deposition utilized at trial did not explain the phenomena. The only explanation of the eddy effect was given by Wisconsin American's meteorologist and he explained that the effect would only increase wind velocity slightly.

speculation.⁴ There was simply no evidence that the eddy effect would have increased the wind velocity to a sufficient level to damage the barn.

By the Court.—Judgment affirmed.⁵

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

⁴ The Otts' architect indicated that as the wind came around three silos on the property, the wind pressure could become great enough to cause the flatter side of the building to shift and shear the rafters inside. However, this opinion was based on Neil Ott's description of the force and direction of the wind, a premise rendered incredible.

⁵ We praise court reporter Steven J. Platkowski for the detailed index provided with the trial transcripts in this case.

