COURT OF APPEALS
DECISION
DATED AND FILED

January 28, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-2401

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

SHAWN MADDEN AND KARI MADDEN,

PLAINTIFFS-RESPONDENTS,

V.

MIKE HANSON AND MARIANNE HANSON,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for La Crosse County: MICHAEL J. MULROY, Judge. *Affirmed.*

EICH, J.[1] Mike and Maryanne Hanson appeal from a small claims judgment entered against them, and in favor of Shawn and Kari Madden, for $2,938.27. They argue: (1) that the evidence does not support the trial court's

[1] This appeal is decided by a single judge pursuant to § 752.31(2)(c), STATS.

finding of liability; and (2) that the trial court erred in calculating damages. We reject their arguments and affirm the judgment.

The Maddens purchased a home with an outdoor swimming pool from the Hansons in September 1997, and moved in the following month. Mr. Hanson and his brother-in-law had installed the pool themselves a few months earlier. Prior to moving in, Hanson showed Mr. Madden how to close out the pool for winter, and at that time neither noticed any tears in the pool liner. A home inspector retained by Madden prior to the purchase noted that, at that time, the ground in the pool area was damp. Madden testified that he asked Hanson several times whether the pool leaked, and Hanson said no.

The following spring, Madden discovered that the pool liner was damaged and two professionals who inspected it at his request declared it a total loss. The Maddens sued, claiming that the pool was damaged when they purchased the house. They sought $4,000 in damages.

Robert Paisley, a pool installer, testified on behalf of the Maddens. He said that when he inspected the pool in May 1998 he observed that the whole liner was torn up and the pool wall and pool bottom was "accordioned." This condition, he said, is caused by a leak in the pool during the winter season, and may not be detectable during the summer. During wintertime, the water freezes up, and when the ice drops to the pool bottom, it rips the liner "beyond repair." Paisley stated that rocks found in the sand under the pool are a common cause of such damage. He said that, in his eleven years in the business, he has seen many pools destroyed in such a manner. He testified that he observed small and large rocks in the sand underneath the Maddens' pool, and that any rock can cause a pool liner to spring a leak—most likely during the winter. He testified that

"Mr. Madden's pool is a prime example of what happens with an improperly installed swimming pool."

Richard Ristow, another pool installer who testified for the Maddens, said that he, too, observed rocks in the sand underneath the liner. It was his opinion that the rocks caused the tear in the liner, and that the pool couldn't be saved.

The court found that, although the rocks were the "culprit" in this matter, it was Hanson's responsibility to ensure that the sand was rock free prior to installing the pool, and entered judgment in favor of the Maddens for the replacement cost of the pool plus associated costs, totaling $2,938.27.

As indicated, the Hansons first argue that the evidence does not support the trial court's finding of liability. Whether Hanson improperly installed the swimming pool is a factual finding that we will not disturb unless it is clearly erroneous—that is, unless the finding is contrary to the great weight and clear preponderance of the evidence. *See* § 805.17(2), STATS.; ***Noll v. Dimiceli's, Inc***., 115 Wis.2d 641, 643, 340 N.W.2d 575, 577 (Ct. App. 1983). It is the role of the trial court, not this court, to weigh the evidence—including the testimony of experts—and to resolve any conflicts in the evidence. ***Brandt v. Witzling***, 98 Wis.2d 613, 619, 297 N.W.2d 833, 836 (1980). And in doing so, the court may accept certain positions of any expert's testimony while rejecting others. ***State v. Owen***, 202 Wis.2d 620, 634, 551 N.W.2d 50, 56 (Ct. App. 1996).

According to the trial court, Hanson improperly installed the pool by placing it on top of a rocky terrain:

> And it seems without question that the leak was caused because of the fact that the pool was set up on sand that

> contained rocks and that those rocks were the -- basically the culprit in this matter. Obviously that was something that was within ... not only [the] responsibility but also the exclusive province of Mr. Hanson to ensure that they were -- that the sand was rock free.
>
> It seemed fairly obvious to both Mr. Ristow and to Mr. Paisley that the rocks were not only present and obvious but also that they were the cause of the damage.

Paisley's and Ristow's testimony, which we have summarized above, supports the court's finding in this regard. And while their testimony might also support an inference that the tear in the liner could have occurred after the Maddens moved into the home, and not as a result of the installation (no one observed any tear in the liner prior to closing out the pool in September 1997, and there was testimony that a tear in the liner above the water level could also cause similar damage), it is for the trial court, not this court, to assess the credibility of the witnesses and the weight to be given their testimony—and to draw inferences from the evidence. ***Cogswell v. Robertshaw Controls Co***., 87 Wis.2d 243, 250, 274 N.W.2d 647, 650 (1979). As we have noted, when the testimony conflicts, the trial court decides reliability and resolves any inconsistencies in expert testimony. ***Schultz v. State***, 87 Wis.2d 167, 173, 274 N.W.2d 614, 617 (1979). We are satisfied that the trial court's finding of liability in this case is supported by the evidence and is not clearly erroneous.

The Hansons also argue that the court erred in calculating the Maddens' damages. Madden testified that he spent a total of $3,417.13 to replace the pool. He subtracted various amounts from that total representing some "upgrades," and he also credited Hanson with the value of some re-useable parts, arriving at a net claim of $2,938.27. Hanson testified only that he purchased the pool for $995, and that he installed it himself. He offered no other testimony as to the pool's value. As indicated, the trial court entered judgment for $2,938.27 "for

the cost of the replacement and associated costs." Hanson says that amount represents a "windfall" to the Maddens which is not justified by the "benefit-of-the-bargain" rule of damages in breach-of-contract actions. We agree, as Hanson points out, that damages in cases such as this are not to serve as "punishment" to the defendant. *See* ***Pleasure Time, Inc. v. Kuss***, 78 Wis.2d 373, 385-86, 254 N.W.2d 463, 469 (1977). We also agree with Hanson that benefit-of-the-bargain damages "can be calculated as the difference between the value of the property as represented and its actual value when purchased or by showing out-of-pocket expenses."

The only evidence on damages in this case is: (1) Madden's testimony that he paid a net of $2,938.27 to replace a swimming pool that was ruined as a result of Hanson's negligence in installing it a few months earlier; and (2) Hanson's testimony that he paid $995 for the pool and did all of the installation work himself. Hanson offered no evidence of the value of his work of the finished project. The trial court stated as follows in determining damages:

> I guess it could be argued that because Mr. Hanson only spent $900 for the pool initially that that's all the Maddens should be responsible for, but I think that that would overlook the fact that they then would have to take on the responsibility of doing the installation themselves which I don't believe is necessary or required under the circumstances, and particularly when it was done improperly by Mr. Hanson in the first ... place.
>
> So the Court is going to enter judgment against the defendant in favor of the plaintiffs for the cost of the replacement and associated costs. Those have been documented as $2,938.27.

On this record, we see no error in the court's determination.

By the Court.—Judgment affirmed.