COURT OF APPEALS
DECISION
DATED AND FILED

July 31, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 00-2574

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

CAROLYN A. BENSON,

PLAINTIFF-APPELLANT,

V.

CITY OF ASHLAND, RAE BUCKWHEAT, C&S DESIGN & ENGINEERING, INC., JESSE SAMARZIYA, AND RICHARD WIIK,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Ashland County: EUGENE D. HARRINGTON, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Carolyn Benson appeals a judgment entered upon a jury's verdict awarding her the sum of $20,000 for damages in this negligence action. Benson argues that the verdict was inadequate. She also claims that the trial court erroneously (1) refused to change the verdict; (2) instructed the jury;

(3) rejected her claim for attorney fees and costs incurred prior to the trial; (4) ruled that the jury array was proper; and (5) failed to change venue. We reject Benson's arguments and affirm the judgment.

¶2 This action arises out of a home construction dispute. Benson commenced this suit alleging negligence on the part of the City, its building inspector, the engineering firm it hired, and two city employees who conducted inspections. Benson alleged that they failed to use reasonable care in carrying out the performance of the Uniform Dwelling Code building inspections and issuing building permits.[1]

¶3 After filing the suit in Ashland County, Benson moved to change venue in the interest of justice. She accompanied her motion with a brief in which she stated that all the defendants were affiliated with or employed by the City of Ashland. At the evidentiary hearing on the motion, Benson offered the testimony of Isabelle Moe, who stated that Benson was treated unfairly at a Sons of Norway meeting.[2] Moe acknowledged on cross-examination that the meeting was held in Bayfield County, although a portion of the members are from Ashland County. Other witnesses agreed with Moe's testimony, and one opined that there was "no way" Benson could be treated fairly in Ashland County because everyone knows each other.

¶4 Benson called another witness adversely, who testified that she had expressed to the Sons of Norway members that Benson was dishonest. The

[1] In a separate action, Benson sued her general contractor.

[2] Without objection, Benson relies on a transcript, made part of this record, of a change of venue hearing from a different lawsuit over which the same trial judge presided.

witness also testified, however, that she believed Benson could get a fair trial in Ashland County.

¶5 Benson testified on her own behalf that in December 1998, she had been involved in a lawsuit brought against her by Tim Brown, a builder, and as a result had to pay him nearly $40,000. She claimed that she had difficulty hiring attorneys and contractors. She did not believe she could get a fair trial in Ashland County. She further offered an exhibit showing that many of the prospective jurors on the jury list lived near the defendants and many were employed by the City.

¶6 The trial court withheld ruling on the motion pending the results of voir dire. After voir dire, the court found that a fair and impartial jury had been selected and that no members had any personal knowledge of the case or litigants. The court denied Benson's motion for change of venue.

¶7 After a three-day trial, the jury found the engineering firm and the City negligent and returned a verdict awarding Benson $20,000. The trial court denied Benson's post-verdict motions, and Benson filed this appeal.

¶8 Benson argues that the verdict is inadequate and that the trial court erroneously denied her motion to change the verdict's answers. Interwoven with this argument is her claim that the court erroneously instructed the jury on mitigation of damages. In addition, she contends that there is insufficient credible evidence to support the jury's award of $20,000. She points to evidence she presented showing that she suffered a loss of either $129,579.31 or $75,350.15. We address each argument in turn.

¶9 First, we conclude that credible evidence supports the verdict. Appellate courts will sustain a jury's verdict if there is any credible evidence to support it. ***Morden v. Continental AG***, 2000 WI 51, ¶38, 235 Wis. 2d 325, 351, 611 N.W.2d 659. The credibility of witnesses and the weight given to their testimony are matters left to the jury's judgment. ***Bennett v. Larsen Co.***, 118 Wis. 2d 681, 706, 348 N.W.2d 540 (1984). "When the jury hears conflicting testimony about unliquidated damages, its verdict should not be disturbed on review when it is clear that the award arrived at is well within the range of figures placed in evidence, and that there is credible evidence to sustain the jury's finding." ***Carlson & Erickson Bldrs. v. Lampert Yards***, 190 Wis. 2d 650, 674, 529 N.W.2d 905 (1995).

¶10 Steven Schraufnagel, an architectural expert, testified that $12,825 in repair work would rectify the problems. It is apparent that the jury did not accept Benson's and her witnesses' version of the facts but, instead, believed Schraufnagel. In addition to the $12,825 in damages to which Schraufnagel testified, Benson claimed that she lost a $7,000 deposit on cabinetry. This evidence permitted the jury to make a reasonable approximation of damages in the sum of $20,000.

¶11 Benson argues, nonetheless, that the court erroneously instructed the jury on mitigation of damages and, if not for the erroneous jury instruction, the damage award would have been greater. We disagree. A trial court has broad discretion when instructing a jury. ***White v. Leeder***, 149 Wis. 2d 948, 954, 440 N.W.2d 557 (1989). However, it is error for the court to instruct on an issue that finds no support in the evidence. ***Lutz v. Shelby Mutual Ins. Co.***, 70 Wis. 2d 743, 750, 235 N.W.2d 426 (1975).

¶12 Here, the record supports the instruction. A plaintiff is required to use reasonable means to minimize or avoid damages. ***Kuhlman, Inc. v. G. Heileman Brewing Co.***, 83 Wis. 2d 749, 752, 266 N.W.2d 382 (1978). Shraufnagel testified to the effect that the expenditure of $12,825 would alleviate the damages claimed. Because this testimony supports the instructions, the court did not erroneously exercise its discretion.

¶13 Next, Benson argues that the trial court erroneously rejected evidence of $28,617.22 attorney fees and costs incurred in previous litigation with the builder, subcontractors and suppliers. She claims that had the City and C & S not been negligent, the attorney fees would not have been incurred. Consequently, she contends that the attorney fees were proper items of damages.

¶14 The City asserts that the trial court correctly ruled that the attorney fees were recoverable in Benson's legal malpractice action against her former attorney. It argues that the trial court correctly held that it was not appropriate to "double dip" by attempting to recover the fees in a second lawsuit. Because Benson does not reply to this argument, it is conceded for purposes of this appeal. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (arguments not refuted deemed admitted).

¶15 Next, Benson argues that the trial court erroneously denied her challenge to the jury array. She claims that the array was invalid because a judicial assistant, rather than a clerk of court, compiled the jury list. *See* WIS. STAT. § 756.04(4).[3] We reject this argument. Benson claims no prejudice as a

[3] WISCONSIN STAT. § 756.04(4) states that the clerk of court shall compile the list of prospective jurors.

result of the alleged irregularity. In ***State v. Coble***, 100 Wis. 2d 179, 211, 301 N.W.2d 221 (1981), our supreme court held: "The rule in this State is that irregularities in the selection of jurymen are to be disregarded unless it appears probable that the person seeking to take advantage thereof has been prejudiced thereby." (Citation omitted.) Accordingly, Benson fails to demonstrate reversible error. *See* WIS. STAT. § 805.18.

¶16 Finally, Benson argues that the trial court erroneously denied her motion for change of venue. She claims that the inadequate damage award demonstrates the existence of jury bias. We reject her arguments.[4]

¶17 Change of venue in civil cases is governed by statute. ***Central Auto Co. v. Reichert***, 87 Wis. 2d 9, 15, 273 N.W.2d 360 (Ct. App. 1978).[5] The granting

[4] Benson relies on ***Nyberg v. State***, 75 Wis. 2d 400, 404, 249 N.W.2d 524 (1977), *overruled by* ***State v. Ferron***, 219 Wis. 2d 481, 496, 579 N.W.2d 654 (1998), stating: "A trial court must honor challenges for cause whenever it may reasonably suspect that circumstances outside the evidence create bias or appearance of bias." Benson's reliance is misplaced. The quoted language was overruled in ***Ferron***. In any event, the quoted language applies not to changes of venue, but to juror challenges for cause.

[5] WISCONSIN STAT. § 801.50 reads in part:

> Venue in civil actions or special proceedings. (1) A defect in venue shall not affect the validity of any order or judgment.
>
> (2) Except as otherwise provided by statute, venue in civil actions or special proceedings shall be as follows;
>
> (a) In the county where the claim arose;
>
> (b) In the county where the real or tangible personal property, or some part thereof, which is the subject of the claim, is situated;
>
> (c) In the county where a defendant resides or does substantial business; or

(continued)

of a venue change on community prejudice grounds is discretionary with the trial court. ***Id.***[6] The denial of a change of venue motion should not be disturbed on appeal unless it appears that the trial court erroneously exercised its discretion. ***Id.*** In reviewing the trial court's discretion, deference must be paid by the reviewing court. ***Id.*** at 16. However, the reviewing court is obliged to review the evidence de novo to determine whether discretion was properly exercised. ***Id.***

¶18 A court must consider the following factors in determining whether a change of venue should be granted because of community prejudice:

> (a) the inflammatory nature of the publicity,
>
> (b) the degree to which the adverse publicity permeated the area from which the jury panel would be drawn,
>
> (c) the timing and specificity of the publicity,
>
> (d) the degree of care exercised, and the amount of difficulty encountered, in selecting the jury,
>
> (e) the extent to which the jurors were familiar with the publicity, and
>
> (f) the defendant's utilization of challenges, both peremptory and for cause, available to him on voir dire.

> (d) If the provisions under par. (a) to (c) do not apply, then venue shall be in any county designated by the plaintiff.
>
> ….
>
> (6) Venue under this section may be changed under s. 801.52.

[6] WISCONSIN STAT. § 801.52 provides:

> Discretionary change of venue. The court may at any time, upon its own motion, the motion of a party or the stipulation of the parties, change the venue to any county in the interest of justice or for the convenience of the parties or witnesses.

Id.

¶19 After reviewing the evidence of prejudice in light of these criteria, if there is a reasonable likelihood that the moving party will not receive a fair trial, the trial court has no discretion and is required to grant a change of venue. ***Id.*** at 16-17. "Actual community prejudice need not be shown, and any doubts about community prejudice should be resolved in favor of the moving party." ***Id.*** (footnote omitted).

¶20 Here, the record supports the trial court's decision. There is nothing in the record from which we can conclude that there was any publicity about the case. No news accounts were shown. It cannot be argued that adverse publicity affected the jury members. The trial court permitted a lengthy voir dire and ensured that the jury members were free of any prejudice or knowledge about the case. The amount awarded in damages is supported by credible evidence. We conclude that the interest of justice did not require a change of venue.

By the Court.—Judgment affirmed.

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