

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 30, 2011

A. John Voelker
Acting 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. 2010AP1474

Cir. Ct. No. 2008CV2581

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

BEST PRICE PLUMBING, INC.,

PLAINTIFF-RESPONDENT,

V.

ERIE INSURANCE EXCHANGE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County:
MICHAEL O. BOHREN, Judge. *Order reversed and cause remanded with
directions.*

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

¶1 PER CURIAM. The jury found that Erie Insurance Exchange did not breach its contract with Best Price Plumbing, Inc. for Best Price's work on a property loss insured by Erie. Postverdict, the circuit court changed the jury's

answer to this question and granted judgment to Best Price for its invoice amount. We conclude that the circuit court erred. Therefore, we reverse the circuit court's order and remand with directions to enter judgment on the jury's verdict.

¶2 Erie's insured, Willtrim Group LLC, suffered a loss due to frozen pipes. Best Price provided plumbing services at Willtrim's property. Erie paid Best Price's invoice via a two-party check payable to Willtrim and Best Price; Erie sent the check to Willtrim. The check bore endorsements by Willtrim and Best Price, but Best Price never received any of the funds. Best Price sued Erie for the amount due on its invoice claiming that it had a contract with Erie for the work. The jury found that Erie entered into a contract for plumbing services with Best Price,¹ but Erie did not breach the contract. On postverdict motions, the circuit court determined that Erie breached the contract, changed the jury's answer, and granted Best Price judgment in the amount due on its invoice. Erie appeals.

¶3 When "considering a motion to change the jury's answers to the questions on the verdict, a 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." *Richards v. Mendivil*, 200 Wis. 2d 665, 671, 548 N.W.2d 85 (Ct. App. 1996).

In reviewing the evidence, the trial court is guided by the proposition that "[t]he credibility of witnesses and the weight given to their testimony are matters left to the jury's judgment, and where more than one inference can be drawn from the evidence," the trial court must accept the inference drawn by the jury.

¹ The evidence at trial is that Best Price submitted a proposal for the work, but Erie never signed the document. The jury was asked to determine whether Best Price and Erie had a contract for plumbing services. The jury found that they did, and neither party has challenged the jury's determination that there was a contract.

Id. (citation omitted).

¶4 We may overturn the circuit court’s decision to change the jury’s answer if the record reveals that the court was “clearly wrong.” *Id.* at 671-72. “When a circuit court overturns a verdict supported by ‘any credible evidence,’ then the circuit court is ‘clearly wrong’ in doing so.” *Id.* (citation omitted). We look for credible evidence to sustain the jury’s verdict; we do not search for evidence to sustain a verdict that the jury could have reached, but did not. *Meurer v. ITT Gen. Controls*, 90 Wis. 2d 438, 450-51, 280 N.W.2d 156 (1979).

¶5 In changing the jury’s answer to the breach of contract question, the circuit court employed the following analysis. The court concluded that there were two contracts: one between Best Price and Erie and one between Erie and its insured, Willtrim. Erie issued a two-party check as a result of its contract with its insured, not its contract with Best Price. Because evidence about the two-party payment protocol was offered in relation to its contract with Erie’s insured, there was no evidence about the terms of payment under the Best Price-Erie contract. The court then relied upon cases holding that because the Best Price-Erie contract was silent as to the place of payment, payment was to be made at the payee’s principal place of business. Because Erie did not pay Best Price at its principal place of business, there was no credible evidence from which the jury could find that Erie did not breach the contract. The court changed the jury’s answer.

¶6 On review, we look for credible evidence that supports the jury’s verdict. *Id.* The question is whether there is credible evidence that Erie did not

breach its contract when it issued a check payable to Willtrim and Best Price and delivered the check to Willtrim.²

¶7 The Erie check contained a handwritten endorsement for Best Price. Trevor Trimble, a Willtrim employee, testified that the check was endorsed by a Best Price employee at the work site. Deborah Michlig, Best Price's general manager, testified that Best Price endorses checks by a stamp, not a signature. Paul Price, Best Price's president, testified that the check was not endorsed by Best Price, and he never discussed payment terms with Erie's adjuster, Wayne Sovinski. Darryl Michlig, Best Price's service manager, testified that he did not discuss direct payment with Sovinski.

¶8 Sovinski testified that Erie paid Best Price via a two-party check, two-party checks are Erie's usual course of business, and two-party checks are the usual course of business in the insurance industry. In order to pay a contractor directly, Erie must be directed to do so by its insured. Sovinski testified that he did not receive such a direction.

¶9 The jury was charged with resolving the conflict in the testimony about how Best Price was to be paid and how Best Price's endorsement came to be on the check. *See Richards*, 200 Wis. 2d at 671. Sovinski testified about the two-party payment convention in the insurance industry; Best Price conceded that it did not make a direct pay request. Trimble testified that the check was endorsed by a Best Price employee; Best Price's employees testified that the check was not endorsed by Best Price. The jury had to resolve the conflicts in the testimony to

² We note that the jury found that a contract existed, but the jury was not asked to find the terms of the contract.

determine that Erie did not breach its contract with Best Price to pay for plumbing services.

¶10 Because there was credible evidence to support the jury's verdict that Erie did not breach its contract with Best Price, the circuit court was clearly wrong when it changed the jury's answer. We therefore reverse the circuit court's order changing the jury's verdict and remand with instructions to enter a judgment on the jury's verdict.

By the Court.—Order reversed and cause remanded with directions.

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

