COURT OF APPEALS
DECISION
DATED AND RELEASED

April 9, 1997

NOTICE

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.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-0295

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

WILLIAM T. PAINTER,

Plaintiff-Appellant-
Cross Respondent,

v.

RALPH L. ZAUN,

Defendant-Respondent-
Cross Appellant.

APPEAL and CROSS-APPEAL from an order of the circuit court for Ozaukee County: JOSEPH D. MC CORMACK, Judge. *Reversed and cause remanded with directions.*

Before Brown, Nettesheim and Anderson, JJ.

PER CURIAM. William T. Painter appeals from an order vacating a jury verdict and ordering a new trial.[1] Ralph L. Zaun cross-appeals challenging the jury

[1] By an order of February 29, 1996, we granted leave to appeal the nonfinal order.

verdict. The issues are whether the trial court lost competency to order a new trial because applicable time limits for doing so expired, whether the verdict was ambiguous as to damages, whether the verdict was supported by the evidence, and whether impermissible hearsay evidence was admitted. On Painter's appeal, we reverse the order granting a new trial because the verdict was not ambiguous. We affirm the verdict on the cross-appeal and remand with directions that judgment be entered in favor of Painter.

Painter and Zaun agreed to combine businesses they each owned to engage in the business of making shoreline erosion repairs. They agreed to use Zaun's preexisting corporation, Grounds Maintenance Corporation, as the operating entity. Painter was to contribute heavy machinery, existing contracts to perform shoreline erosion control work, and his engineering skills. Painter was named president of the corporation and received a salary. Zaun arranged for a line of credit and loans to the corporation. After three months, the business relationship broke down. Zaun retained the equipment Painter brought to the business.

Painter commenced this action alleging both misrepresentation and breach of contract. He claimed that Zaun misrepresented the extent of Painter's participation in the corporation, Zaun's ability to obtain bonding required to obtain restoration contracts, and Zaun's ability to contribute capital to the business. Zaun counterclaimed for alleged negligent misrepresentations made by Painter with respect to his ability to bring business into the corporation and operate the business profitably.

The jury found that Zaun made negligent misrepresentations to Painter. It assigned 70% negligence to Zaun and 30% contributory negligence to Painter. The jury also found that Zaun had breached his contract with Painter. Damages were set at $38,250.

Zaun filed a timely motion after verdict. The trial court denied the motion and ordered entry of judgment on the verdict. Painter submitted a judgment for $38,250 plus costs. Zaun objected to the form of the judgment because it did not offset Painter's contributory negligence. Upon consideration of Zaun's objection, the trial court concluded that the verdict was ambiguous because there was only one damage determination but two theories of liability. The trial court vacated the jury verdict and ordered a new trial.

It is undisputed that Zaun's objection to the form of the judgment was filed 73 days after the verdict and the trial court's order granting a new trial was entered 102 days after the verdict. Section 805.16, STATS., requires a motion after verdict to be filed within 20 days and that such a motion is deemed denied if not decided within 90 days after the verdict. Painter correctly points out that the trial court loses its competency to decide postverdict motions after the expiration of the 90 days. *See* ***Watts v. Watts***, 152 Wis.2d 370, 378, 448 N.W.2d 292, 295 (Ct. App. 1989). However, we need not concern ourselves with the trial court's competency to address the objection to the form of the judgment because we reverse the trial court's order on other grounds.[2]

Although the case was submitted to the jury on two theories of liability and only one damage question, the verdict was not ambiguous. The jury found that Zaun had breached the contract and awarded damages. The finding on negligent misrepresentation is rendered superfluous by the finding on the contract claim. *Cf.* ***Luke v. Northwestern Nat. Cas. Co.***, 31 Wis.2d 530, 536, 143 N.W.2d 482, 485 (1966) (when

[2] Section 805.16, STATS., applies to trial-related motions rather than verdict-related motions. *See* ***Gorton v. American Cyanamid Co.***, 194 Wis.2d 203, 230, 533 N.W.2d 746, 757 (1995), *cert. denied*, 116 S. Ct. 753 (1996). Here, it was not until Painter, as the prevailing party, submitted the judgment that the issue arose about offsetting the contributory negligence. The objection to the judgment was a verdict-related motion because it required an interpretation of the verdict.

either one of two theories is sufficient to sustain the verdict, it is immaterial that it cannot be determined which theory the jury accepted). The contributory negligence determination falls out of the case when the breach of contract claim is supported by the evidence. The trial court erred in ordering a new trial.[3]

We turn to Zaun's challenge to the jury's verdict. Zaun sought and was denied a new trial in the interests of justice and because the verdict was contrary to the manifest weight of the evidence. *See §* 805.15(1), STATS. The standard of review that we apply to a claim that a new trial must be granted because the verdict was against the weight of the evidence requires us to sustain the verdict if there is any credible evidence which supports it. *See* ***Giese v. Montgomery Ward, Inc.***, 111 Wis.2d 392, 408, 331 N.W.2d 585, 593 (1983). Thus, the issue is one more of the sufficiency of the evidence rather than whether the trial court erroneously exercised its discretion in denying the appellant's motion for a new trial.[4] *See* ***id.*** at 408-09, 331 N.W.2d at 593-94.

[3] We reject Zaun's claim that a new trial is warranted because there has been a miscarriage of justice. *See* § 752.35, STATS. Painter's damages resulted from one course of conduct by Zaun, albeit that conduct gave rise to two causes of action. We are not persuaded that the award of damages would be different in a new trial.

[4] Zaun suggests that we review for a misuse of discretion and that the trial court did not exercise discretion when it concluded that the verdict rested on the jury's determination of credibility. Our standard of review here can be contrasted with that applied to a motion for a new trial in the interests of justice because the jury's findings are contrary to the great weight and clear preponderance of the evidence. *See* ***Giese v. Montgomery Ward, Inc.***, 111 Wis.2d 392, 408, 331 N.W.2d 585, 593 (1983). A new trial may be granted in the interest of justice when the jury findings are contrary to the great weight and clear preponderance of the evidence, even though the findings are supported by credible evidence. *See* ***Sievert v. American Family Mut. Ins. Co.***, 180 Wis.2d 426, 431, 509 N.W.2d 75, 78 (Ct. App. 1993), *aff'd*, 190 Wis.2d 623, 528 N.W.2d 413 (1995). Such a motion is within the discretion of the trial court and will not be reversed on appeal unless the trial court clearly exercised its discretion erroneously. *See* ***id.*** Our role is not to seek to sustain the jury's verdict but to look for reasons to sustain the trial court. *See* ***id.***

Zaun argues that the jury's finding that Painter had not breached the contract is contrary to the evidence.[5] In his reply brief, Zaun suggests that Painter's breach was of the obligation to exercise good faith in performance of the contract. Specifically, he points to the evidence that after Painter's association with the corporation was terminated, Painter continued to work on a corporate contract at the Calvin Akin property, retained payments on the contract due to the corporation, and signed a lien waiver on behalf of the corporation.

The evidence was conflicting as to Painter's conduct with respect to the Akin job. Painter testified that he performed the work after his termination from the corporation based on his personal contact with Mr. Akin. Zaun indicated that the contract belonged to the corporation. The jury is the ultimate arbiter of credibility. *See* ***O'Connell v. Schrader***, 145 Wis.2d 554, 557, 427 N.W.2d 152, 153 (Ct. App. 1988). The credibility of the witnesses and the weight afforded their individual testimony are left to the province of the jury. *See* ***Fehring v. Republic Ins. Co.***, 118 Wis.2d 299, 305, 347 N.W.2d 595, 598 (1984), *overruled on other grounds by* ***DeChant v. Monarch Life Ins. Co.***, 200 Wis.2d 559, 547 N.W.2d 592 (1996). The jury chose to believe Painter in concluding that Painter did not breach the contract. We must accept the jury's determination based on credibility.

The final issue is whether hearsay evidence was improperly admitted. Painter testified that he was not awarded a contract on the Big Bay Buckley Park project because he was unable to get the required bonding. Zaun made a hearsay objection during

[5] The jury found that Painter negligently made an untrue representation of fact but that Zaun did not "believe such representation to be true and rely on it to his pecuniary damage." Zaun contends that the finding that he did not suffer any pecuniary damage as a result of Painter's misrepresentation is contrary to the evidence. We need not address Zaun's claims with respect to the negligent misrepresentation finding because the verdict can be sustained on the breach of contract claim. For this reason it is also not necessary to address Zaun's claim that the trial court should not have sua sponte amended Painter's misrepresentation claim from strict and intentional to negligent misrepresentation.

Painter's direct examination. However, Painter did not give hearsay evidence because he did not repeat what another person said. *See* § 908.01(3), STATS. Painter was merely explaining why he did not get the project despite being the low bidder.

On cross-examination, Painter was asked how he knew he was the low bidder on the job. At that point Painter testified that the engineer in charge of the project told him so. Zaun himself elicited the testimony which he complains is hearsay. Any objection is waived. *See* ***State v. Gove***, 148 Wis.2d 936, 944, 437 N.W.2d 218, 221 (1989) (party may not affirmatively contribute to court error and then obtain reversal because of the error).

We reverse the order granting a new trial. On remand, the trial court is directed to enter judgment for Painter on the jury's verdict without an offset for contributory negligence.

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

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