COURT OF APPEALS
DECISION
DATED AND FILED

March 21, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

No. 98-2104

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

PATRICK MCDONOUGH,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

V.

ALAN J. MUETZELBURG,

DEFENDANT-RESPONDENT,

DAVID HEUER AND THE BUILDING INSPECTORS OF WISCONSIN, INC.,

DEFENDANTS-RESPONDENTS-CROSS-APPELLANTS.

APPEAL and CROSS-APPEAL from an order of the circuit court for Milwaukee County: VICTOR MANIAN, Judge. *Reversed and cause remanded with directions; cross-appeal dismissed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

¶1 PER CURIAM. Patrick McDonough appeals from the trial court order, following a jury trial, setting aside the jury's verdict, which included an award of damages, and dismissing his action against the defendants, Alan J. Muetzelburg, David Heuer, and The Building Inspectors of Wisconsin, Inc. McDonough argues that because the trial court failed to decide the postverdict motions within ninety days after the verdict was rendered, as required by WIS. STAT. § 805.16(3) (1997-98),[1] the court had no authority to set aside the jury's verdict and, therefore, the verdict must be affirmed. McDonough is correct and, therefore, we reverse.

¶2 McDonough purchased a house from Muetzelburg. Prior to the purchase, Muetzelburg provided a "Real Estate Condition Report," representing that he was unaware of any "defects in the … foundation (including cracks, seepage and bulges)." Also prior to the purchase, McDonough hired Heuer and his company, The Building Inspectors of Wisconsin, Inc., to inspect the house. Heuer inspected the house, including the foundation, and reported that he had found no major defects.[2]

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[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

[2] The defendants-respondents state that "the basement inspection was excluded from the inspection under the pre[-]inspection agreement." They do not, however, base any argument on this assertion. We note that the pre-inspection agreement says that the purpose of the inspection is to "alert[] the customer to major deficiencies in the condition of the property." The agreement specifies that the written report will include the basement. It does, however, contain additional language, including:

> It is understood and agreed that this inspection will be [of] readily accessible areas of the building and is limited to visual observations of apparent conditions existing at the time of the inspection only. Latent and concealed defects and deficiencies are excluded from the inspection; equipment, items and systems will not be dismantled.

¶3 After purchasing the house, McDonough hired a carpenter to do some floor repair. According to McDonough's trial testimony, the carpenter, in the course of that work, pointed out a section of the foundation that appeared to be in bad shape. McDonough testified, "There were bricks, cinder blocks that were overlapping, and they appeared to be bulging toward the outside of the house, and also some of them coming toward the inside of the house." McDonough hired a foundation consultant who discovered that the house had substantial foundation problems. McDonough sued, claiming, among other things, that the defendants negligently misrepresented the condition of the house's foundation.

¶4 During the trial, the jury viewed the house. The jury also heard testimony from McDonough's consultant who estimated the cost of replacing the foundation. The consultant also offered his opinion that Heuer had not "exercised that degree of skill and care normally exercised with home inspection with respect to the inspection of the basement." The jury apparently agreed and returned a verdict awarding McDonough $30,000.

¶5 The defendants filed timely motions after verdict. They contended (as they had earlier maintained in a motion to dismiss, which the trial court had taken under advisement) that McDonough had attempted to prove damages under a theory of strict liability rather than negligent misrepresentation and, in any event, that he had failed to prove damages under either theory.

¶6 The trial court deferred its decision on the postverdict motions, commenting that it thought it could adjourn a decision on the motions "for purposes of having a transcript." After more than ninety days following the verdict, McDonough filed a motion asking the trial court to enter judgment on the verdict, contending that "[a] trial court loses its competency to decide motions

after verdict ninety (90) days from the date of the verdict," pursuant to WIS. STAT. § 805.16(3). The trial court denied McDonough's request and, about seven months after the verdict, rendered its written decision on the postverdict motions. In its decision, the trial court stated, "The delay in scheduling arguments, briefs and decision is because plaintiff's counsel wished to have a copy of the trial transcript in order to reply to defendants' motions to dismiss at the close of plaintiff's case and at the conclusion of all of the testimony."

¶7 As McDonough argues, however, the record refutes the trial court's assertion. Indeed, the defendants-respondents, on appeal, do not dispute McDonough's assertion that the trial court decision "simply mischaracterized the record." As McDonough explains:

> In motions after verdict …, the attorney for David Heuer and [The] Building Inspectors of Wisconsin, Marjorie Wendt, indicates that she ordered a transcript … right after the trial. Further on, [the record reflects that] Ms. Wendt states she was prepared to argue to the court today and possibly defer briefs if the court wanted them, once the transcript was done. The court tells Ms. Wendt that it was prepared to hear her oral argument and asked that any assertions she wanted to make be supported by references to the transcript. Ms. Wendt further acknowledged that is why she asked for the transcript.

(Record references omitted.) McDonough is correct. The record confirms that defense counsel and the trial court, not McDonough, initiated the request resulting in preparation of the transcript and postponement of the decision.

¶8 The record also reveals that both defense counsel and the trial court had some misunderstanding of WIS. STAT. § 805.16(3). Ms. Wendt initially stated, "I know that these motions are required to be filed and heard within 60 days." Shortly thereafter, she asked the court, "[I]s it filed and heard, or is it filed and decided?" She commented: "My concern is that I don't want to have an

appellate issue as to whether this was heard. So if the Court wants to hear us today, literally, and to defer its decision, or unless you—it's the Court's discretion, I guess." The trial court also mistakenly stated that the deadline was sixty days, not ninety, and expressed its understanding that the statute required that the postverdict motions be "filed and heard," not decided, by the statutory deadline.

¶9 WISCONSIN STAT. § 805.16(3) states:

> If within 90 days after the verdict is rendered the court does not decide a motion after verdict on the record or the judge, or the clerk at the judge's written direction, does not sign an order deciding the motion, the motion is considered denied and judgment shall be entered on the verdict.

The statute "is plain in its terms and in its effect." ***Gegan v. Backwinkel***, 141 Wis. 2d 893, 898, 417 N.W.2d 44 (Ct. App. 1987). After the passage of ninety days, the trial court "has jurisdiction only to enter judgment on the verdict, and that is a ministerial act." ***Id.*** at 899. "[A] trial court loses its competency to decide post-verdict motions after the expiration of ninety days from the date of the jury verdict" and, therefore, a trial court's order entered after that deadline "must be vacated." *See* ***Watts v. Watts***, 152 Wis. 2d 370, 378, 448 N.W.2d 292 (Ct. App. 1989).

¶10 Nevertheless, the defendants-respondents argue that we should affirm the trial court's postverdict order, under the authority of WIS. STAT. § 752.35,[3] the statute providing this court the power to order discretionary

[3] WISCONSIN STAT. § 752.35 provides:

> **Discretionary reversal.** In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper

(continued)

reversal. But their argument misses the point. Although this statute does indeed provide us the authority to direct the entry of what we deem the proper judgment, the statute does not authorize a *trial court* to decide postverdict motions after ninety days, in violation of WIS. STAT. § 805.16(3).

¶11 It is undisputed that the trial court decided the postverdict motions after ninety days had passed. Thus, the trial court then only had authority to enter judgment on the verdict. *See* ***Gegan***, 141 Wis. 2d at 899. We have no choice but to vacate the trial court's order. *See* ***Watts***, 152 Wis. 2d at 378.

¶12 Perhaps anticipating the likelihood of reversal on the appeal, the defendants-respondents "cross appeal," contending that the evidence was insufficient to support the jury's verdict. Essentially, they present the same arguments, regarding damages and McDonough's foundation consultant, which they presented in their postverdict motions. They ask that this court exercise its discretionary authority to set aside the verdict as a "manifest injustice."

¶13 In its postverdict decision, the trial court essentially agreed with the defendants' arguments. Therefore, the defendants-respondents actually are not really cross-appealing from an adverse trial court order or judgment. Accordingly, we will consider their "cross-appeal" simply as a request that this court exercise discretionary authority to reverse the jury's verdict and award. We, however, see no basis for doing so.

> judgment or remit the case to the trial court for entry of the proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.

¶14 The defendants-respondents contend that McDonough failed to prove damages because: (1) he did not offer evidence to establish the fair market value of the property at the time of the purchase; (2) his consultant who testified about the foundation problems was "named as an expert to 'evaluate the need for repairs, how long problem existed,'" and not as an expert on damages; and (3) the consultant's "ballpark" estimate that the cost of the foundation restoration would be $40,000-$50,000 was not sufficient or reliable evidence of damages. The defendants-respondents elaborate that although McDonough's consultant testified about the cost for replacement of the foundation, such replacement "would create a new home with a better foundation" than the "condition [in which the house] was represented to be" at the time of McDonough's purchase. Thus, they contend, the jury was left without evidence specifically tying McDonough's alleged damages to the condition of the house when he bought it. Further, the defendants-respondents challenge McDonough's consultant's experience, expertise, currency of knowledge, and reliance on information from others in estimating the foundation replacement costs.

¶15 The measure of damages in a negligent misrepresentation case involving a sale of property is "the difference, if any, between the market value of the property at the time of purchase and the amount of money that (plaintiff) paid for the property." WIS JI—CIVIL 2406 (applying "out-of-pocket" rule). Damages—in this case, the reduced value of the house due to the faulty foundation—need not be proven with absolute or mathematical certainty. *See* ***Town of Fifield v. State Farm Mut. Auto. Ins. Co.***, 119 Wis. 2d 220, 227-36, 349 N.W.2d 684 (1984). "[I]t is always the value to the owner, to the injured party, that is the measure of damages," and "market value is … one way to measure such damages." ***Id.*** at 229. Here, the value of the house was reduced by the cost of

restoring or replacing the foundation so that it would be in sound condition, as the defendants had represented.

¶16 The defendants-respondents have offered nothing to counter McDonough's summary of his consultant's extensive professional experience. That summary is substantiated by the trial record, which includes evidence of the consultant's ample credentials giving him the expertise to offer his opinion on the condition of the foundation, and on the cost of restoring or replacing it.

¶17 Based on the undisputed evidence that McDonough purchased the house at a price premised on the defendants' representation that the foundation was sound, and based on the testimony of his consultant regarding the foundation defects and the $40,000-$50,000 cost of repair, the jury reasonably could have awarded $30,000 damages. Therefore, the defendants-respondents have not provided any basis on which we could conclude that "the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried." *See* WIS. STAT. § 752.35; *see also* ***Vollmer v. Luety***, 150 Wis. 2d 891, 895-906, 443 N.W.2d 32 (Ct. App. 1989) (comparing functions of court of appeals and supreme court and concluding that "[b]ecause [WIS. STAT. §§] 751.06 and 752.35 … are almost identical, that longstanding interpretation of [§] 751.06 and its predecessors has become a part of [§] 752.35"), *aff'd*, 156 Wis. 2d 1, 11, 456 N.W.2d 797 (1990) (emphasizing that supreme court will exercise power of discretionary reversal only in exceptional cases). Thus we vacate the circuit court order and remand this case for entry of judgment on the verdict.

By the Court.—Order reversed and cause remanded with directions; cross-appeal dismissed.

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