

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 31, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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.

No. 99-1910

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

BADGER HOME BUILDERS, INC.,

PLAINTIFF-RESPONDENT,

v.

PAUL J. KAMINSKI AND SHEILA KAMINSKI,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Waukesha County:
JAMES R. KIEFFER, Judge. *Affirmed.*

Before Brown, P.J., Nettesheim and Anderson, JJ.

¶1 PER CURIAM. Paul and Sheila Kaminski appeal from a judgment on a promissory note they gave Badger Home Builders, Inc. for outstanding construction costs. They argue that the trial court erred in granting Badger Home's motion for judgment notwithstanding the verdict. We conclude that the

evidence was insufficient to support the Kaminskis' duress defense and that changing the jury's answer was proper. We affirm the judgment.

¶2 The Kaminskis contracted with Badger Home for construction of a new home. After the contract was signed, the Kaminskis decided to have Badger Home finish the last two rooms in the basement. The Kaminskis were assured they could be in their new home by the end of May 1998. They gave notice to their landlord that they were vacating their duplex.

¶3 The closing took place on May 26, 1998. By Badger Home's accounting, the Kaminskis owed it \$8293.56. Badger Home offered to take a promissory note for the balance remaining after the application of certain allowances. The Kaminskis believed they had paid all the amounts due under the contract but felt pressured into signing the note because they had to move out of their duplex and into their new home. The Kaminskis gave a promissory note for \$6343.56. When they failed to pay on the note, Badger Home brought this action.

¶4 At trial, the Kaminskis' defense was that the note was invalid because it was obtained by duress. The jury was asked to answer the following verdict question: "By signing a promissory note, did Paul Kaminski and Sheila Kaminski agree to pay Badger Home Builders, Incorporated, for all outstanding construction charges related to the construction of their home?" The jury answered, "No." The jury further determined that Badger Home was not entitled to any sum of money for the Kaminskis' breach of the terms of the promissory note and that Badger Home had not breached the contract by failing to return to the Kaminskis allowances for certain items.

¶5 Badger Home moved for judgment notwithstanding the verdict. The trial court concluded that the proof adduced by the Kamiskis was not sufficient to establish the defense of duress. It changed the jury's verdict answer to "yes" and entered judgment for the amount of the note.

¶6 The Kaminskis first argue that a motion for judgment notwithstanding the verdict does not allow a trial court to change the jury's verdict answer because such a motion does not challenge the sufficiency of the evidence to support the verdict but alleges that the facts found are insufficient to permit recovery as a matter of law. See *Logterman v. Dawson*, 190 Wis. 2d 90, 101, 526 N.W.2d 768 (Ct. App. 1994). We acknowledge the difference between a motion to change the verdict answers, which is premised on the absence of any credible evidence to support the verdict, see *Richards v. Mendivil*, 200 Wis. 2d 665, 671, 548 N.W.2d 85 (Ct. App. 1996), and a motion for judgment notwithstanding the verdict. Affixing a label to the motion before the trial court is not necessary because what is really at issue was whether the facts establish the duress defense. Whether the facts fulfill a legal conclusion presents a question of law. See *Popp v. Popp*, 146 Wis. 2d 778, 787, 432 N.W.2d 600 (Ct. App. 1988). Similarly, whether a party has met the burden of proof is a question of law. See *id.* Either type of postverdict motion may raise this question of law. The trial court focused on the legal question. The jury's answer was changed only to execute its ruling. Since a question of law is involved, our review is de novo. See *id.*

¶7 We turn to consider whether the Kaminskis met their burden of proof on their duress defense. That determination turns on whether Badger Home engaged in unlawful or illegal conduct by demanding payment of the excess construction costs. See *Wurtz v. Fleischman*, 97 Wis. 2d 100, 109, 293 N.W.2d

155 (1980) (one of the elements of a claim of duress is a wrongful or unlawful threat). We conclude it did not.

¶8 At the closing, the parties were engaged in a legitimate dispute over the sum due pursuant to the construction contract. The jury's finding that the Kaminskis were not entitled to return of certain allowances was a rejection of the Kaminskis' claim that they had paid the agreed-upon amount for the cost of the finished basement. Implicit is the finding that some additional sums were due for the basement construction. In light of a bona fide dispute over additional sums due, Badger Home was entitled to demand payment and withhold occupancy until payment was made. The Kaminskis' complaint that Badger Home did not keep them informed of the excess costs and that they learned of the amount for the first time at the closing does not detract from Badger Home's right to demand payment under the contract. "A threat to do what the person making the threat has a legal right to do does not constitute duress; nor does driving a hard bargain or taking advantage of another's financial difficulty." *Pope v. Ziegler*, 127 Wis. 2d 56, 60, 377 N.W.2d 201 (Ct. App. 1985).

¶9 Badger Home's right to demand payment (or even compel future discussion over sums due) is not converted to wrongful or threatening conduct simply because the Kaminskis had nowhere else to live. It was the fact that the Kaminskis had to move from their duplex and had nowhere else to live that brought about their belief that they had no other choice but to execute the promissory note. As the trial court noted, that circumstance was not a result of Badger Home's legitimate demand for payment. In the absence of an unlawful act which deprives the Kaminskis of their unfettered will, the duress defense fails as a

matter of law. *See Wurtz*, 97 Wis. 2d at 109 (second element of duress is that the conduct deprived the alleged victims of duress of their “unfettered will”).

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1997-98).

