COURT OF APPEALS
DECISION
DATED AND FILED

October 5, 2005

Cornelia G. Clark
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. 2004AP3253

Cir. Ct. No. 2004CV155

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

LIND EXCAVATING & LANDSCAPING, LLC,

PLAINTIFF-RESPONDENT,

V.

DAVID CIHLAR,

DEFENDANT-THIRD-PARTY
PLAINTIFF-APPELLANT,

BRADLEY A. LIND,

THIRD-PARTY DEFENDANT.

APPEAL from a judgment of the circuit court for Winnebago County: WILLIAM H. CARVER, Judge. *Affirmed*.

Before Brown, Nettesheim and Anderson, JJ.

¶1 PER CURIAM. David Cihlar appeals from a judgment in favor of Lind Excavating & Landscaping, LLC, for payment due for work performed at Cihlar's home. Cihlar contends that no money was due because Lind failed to disclose it operated as a limited liability corporation and not as a sole proprietorship and because Lind negligently performed the work. We affirm the judgment.

¶2 In December 2001, Lind dug the basement to a new home Cihlar was building. Lind was paid in full for that work. Cihlar then hired Lind to grade and landscape around the completed home. Lind performed work at the property from April to July 2002. His bill for work performed went unpaid and this collection action was commenced. Cihlar filed a counterclaim and a third-party complaint against Bradley Lind alleging that Lind negligently graded the property causing the repeated intrusion of water in a basement egress window during construction and requiring great amounts of fill to be brought to the property to bring the grade up so that the concrete driveway, sidewalk and patio could be completed. The matter was tried to the court.

¶3 We observe that the trial court did not make specific findings of fact. "We have repeatedly held that, for convenience on review—to the parties as well as to the appellate courts—it is preferable that findings be expressly and separately set forth. The failure to do so, however, is not fatal, and findings can be gleaned from a trial judge's decision." ***State v. Walstad***, 119 Wis. 2d 483, 515, 351 N.W.2d 469 (1984). When faced with inadequate findings, an appellate court may review the record and affirm if the evidence supports the judgment. ***Minguey v. Brookens***, 100 Wis. 2d 681, 688, 303 N.W.2d 581 (1981).

¶4 Cihlar argues that the trial court ignored the testimony of the expert witnesses that Lind did not properly grade the property. He reiterates the evidence he believes supports his claims. Cihlar essentially challenges the sufficiency of the evidence to support the judgment.

¶5 The trial court's findings of fact will not be set aside unless clearly erroneous. WIS. STAT. § 805.17(2) (2003-04).[1] For purposes of appellate review, the evidence supporting the court's findings need not constitute the great weight and clear preponderance of the evidence; reversal is not required if there is evidence to support a contrary finding. ***Bank of Sun Prairie v. Opstein***, 86 Wis. 2d 669, 676, 273 N.W.2d 279 (1979). Rather, the evidence in support of a contrary finding must itself constitute the great weight and clear preponderance of the evidence. ***Id.*** In addition, the trial court is the ultimate arbiter of the witnesses' credibility when it acts as the fact finder and there is conflicting testimony. ***Id.*** We accept the inference drawn by the trier of fact when more than one reasonable inference can be drawn from the evidence. ***Id.***

¶6 The trial court found that as a landscaper, Lind was not responsible for the water intrusion in the basement egress window during construction. Cihlar argues that as an excavator, Lind was responsible for properly backfilling around the foundation and that he failed to do so around the egress window.[2] Bradley Lind testified that the retaining wall by the egress window was supposed to be in

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[2] The trial court did not specifically address Lind's potential responsibility as an excavator for the water intrusion since Lind had been fully paid for his work as an excavator and it was not clear that Lind's performance as an excavator was at issue.

place before the foundation was backfilled, that Cihlar was going to do the wall himself, and that Lind did not backfill around the egress window so that the wall could be built. Although Cihlar testified that he expected Lind to build the retaining wall and told Lind to do so, he indicated that the wall would be part of the landscaping responsibility. Lind was hired to do landscaping after the excavation was completed. There was no contract for Lind to construct the retaining wall before Cihlar requested the foundation to be backfilled. The trial court's finding that Lind was not responsible for water intrusion during construction is not clearly erroneous.

¶7 Cihlar complains that Lind removed too much of the excavated material. The trial court found that there was not a clear direction on what should be done with the excavated material. Lind indicated that Cihlar asked that the material be removed so there would be room for construction vehicles on the lot. Lind observed that the lot was not very large and that if the material had not been removed, there would be dirt piles up to the windows. Lind indicated that enough material was left so that the grade could be pitched away from the house. Although Cihlar presented a picture and his own opinion that there was sufficient room on the lot to leave the excavated material, that evidence does not constitute the great weight of the evidence at trial. The trial court's implicit finding that Lind had not removed too much material and was not responsible for the cost of fill that had to be brought to the property later is not clearly erroneous.

¶8 Cihlar argues that the evidence establishes that Lind's "final grade" of the property was not high enough and that he was forced to have another contractor haul in large amounts of fill to bring the grade to a higher level to support the gravel base for concrete work to be done on the driveway, sidewalk and patio. The trial court found that Lind was not finished grading the property.

That finding is supported by Lind's testimony that he could not finish grading the property because the concrete work was not completed. Lind explained that the property was graded to within five and six feet of the driveway and places needing concrete work which allowed Cihlar to seed his lawn. Lind told Cihlar to call him back when the concrete work was finished. He intended to return to the property to "feather" in the edges, but Cihlar never called him back.

¶9 Not until December 2002 did Cihlar attempt to have the concrete driveway, sidewalk and patio poured. Cihlar testified that his concrete contractor indicated the grade was too low to allow the concrete work to be done. Cihlar then contacted other landscapers to get bids on how to fix the grade so the driveway could be put in. Two landscape architects testified about what they would do to improve the grade. However, contrary to Cihlar's description of their testimony, neither expert witness gave an opinion that Lind's work did not meet industry standards.[3] One expert explained that typically the driveway and other concrete work is in place before the property is graded. He recognized that at Cihlar's property the grade where concrete work would be done was not high enough to support the gravel base and hold the concrete in, but he indicated that fill could be brought in after the concrete work was completed to give the necessary support. He acknowledged that areas could be "feathered" in to the existing grade. The other expert explained that if the concrete work is not completed, it is proper to grade by staying away from those areas and going back

---

[3] Even if the experts testified as Cihlar describes, "[n]o factfinder is bound by the opinion of an expert, even if the opinion is uncontroverted." ***Davis v. Psychology Examining Bd.***, 146 Wis. 2d 595, 602, 431 N.W.2d 730 (Ct. App. 1988).

and "feathering" in the edges. He, too, acknowledged that it would be proper to come back and finish the job after the concrete work was completed.

¶10 The trial court found that neither expert gave a definite opinion about whether the grading was wrong. That finding is not clearly erroneous. Further, as the trial court concluded, the expert evidence merely established that the grading could have been more aesthetically pleasing. There was no evidence of negligence.

¶11 We do not address Cihlar's argument that he was not informed that Lind was doing business as a limited liability corporation. Whether or not that is true has no bearing on the judgment in favor of Lind. There is no link between the form of business operation and the work performed at Cihlar's property.[4]

¶12 Lind argues that each of Cihlar's appellate arguments is frivolous and seeks an award of actual attorney fees and costs. *See* WIS. STAT. RULE 809.25(3)(c)2. Whether an appeal is frivolous is a question of law. ***NBZ, Inc. v. Pilarski***, 185 Wis. 2d 827, 841, 520 N.W.2d 93 (Ct. App. 1994). "The standard to be applied is an objective one: what should a reasonable person in the position of this pro se litigant know or have known about the facts and the law relating to the arguments presented." ***Holz v. Busy Bees Contracting, Inc.***, 223 Wis. 2d 598, 608, 589 N.W.2d 633 (Ct. App. 1998). We cannot award fees under

[4] Cihlar argues for the first time in his reply brief, and for the first time on appeal, that Lind violated the consumer protection code by not presenting a written contract required from home improvement contractors by WIS. ADMIN. CODE § ATCP 110.05. We do not address an issue which is raised for the first time on appeal or for the first time in the reply brief. *See* ***Evjen v. Evjen***, 171 Wis. 2d 677, 688, 492 N.W.2d 361 (Ct. App. 1992); ***Schaeffer v. State Pers. Comm'n***, 150 Wis. 2d 132, 144, 441 N.W.2d 292 (Ct. App. 1989).

RULE 809.25(3) unless "the entire appeal is frivolous." ***Lenhardt v. Lenhardt***, 2000 WI App 201, ¶16, 238 Wis. 2d 535, 618 N.W.2d 218.

¶13 We are not convinced that there was no reasonable basis for challenging the sufficiency of the evidence in this matter. Although the determination rests primarily on the credibility determination made by the trial court, there was conflicting testimony suggesting arguable merit to the appeal. The trial court's failure to make specific findings also contributed to Cihlar's belief that the evidence had been misapplied. We deny the motion to have the appeal declared frivolous.

By the Court.—Judgment affirmed.

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