

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 9, 2006

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. 2005AP1392

Cir. Ct. No. 2003CV1423

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

MEHRAN HEYDARPOUR,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

V.

STONE DIMENSIONS, INC.,

DEFENDANT-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Waukesha County: PATRICK C. HAUGHNEY, Judge. *Affirmed in part; reversed in part and cause remanded with instructions.*

Before Brown, Nettesheim and Anderson, JJ.

¶1 PER CURIAM. In this breach of contract case, Mehran Heydarpour appeals from a judgment against him and Stone Dimensions, Inc., cross-appeals from the circuit court's denial of its request for attorney's fees, costs and interest

pursuant to the parties' contract for granite countertops. We affirm the judgment as to Heydarpour because the circuit court properly refused to change the jury's verdict, and we decline to order a new trial. However, we conclude the circuit court erroneously refused to consider Stone's claims for attorney's fees, costs and interest, and we reverse and remand for further proceedings on these claims.

¶2 Heydarpour ordered granite countertops from Stone for his residence. Thereafter, Heydarpour had many complaints about the workmanship and the granite, including the presence of a seam in the bar countertop. The jury found that Stone did not breach its contract to provide and install granite materials and did not violate any provision of WIS. ADMIN. CODE § ATCP 110.02 et seq. (Oct. 2004) relating to home improvement practices. The jury determined that Heydarpour breached the contract with Stone and awarded Stone \$9450 in damages for work performed and for which Heydarpour did not pay. The jury did not award any damages to Heydarpour.

¶3 Postverdict, Heydarpour sought to change the jury's answers to the breach of contract, home improvement practices and damages questions. The circuit court denied the motion. The court also denied Stone's motion for attorney's fees, costs and interest under the contract because those claims had to be pursued in a separate lawsuit.

¶4 On appeal, Heydarpour argues that the circuit court erred when it declined to change the jury's verdict that Stone did not breach the contract. In support of this claim, Heydarpour cites Stone's delivery and installation of a seamed granite bar countertop. Heydarpour contends that the contract required the bar countertop to be seamless and that the evidence at trial on this point was undisputed.

¶5 When asked to change an answer in the jury verdict, we view “the evidence . . . in the light most favorable to the verdict and the verdict will be affirmed if supported by any credible evidence.” *Lagerstrom v. Myrtle Werth Hosp.-Mayo Health Sys.*, 2005 WI 124, ¶93, 285 Wis. 2d 1, 700 N.W.2d 201 (citation omitted). We will sustain the verdict even if “there is evidence to support a different verdict. In addition, the credibility of witnesses and the weight given to their testimony is for the judgment of the jury, not an appellate court. Moreover, special deference is afforded to a jury determination that has been upheld by the circuit court.” *Hoffmann v. Wisconsin Elec. Power Co.*, 2003 WI 64, ¶9, 262 Wis. 2d 264, 664 N.W.2d 55 (citations omitted).

¶6 On appeal, Heydarpour relies upon his testimony and that of Stone’s Michael Kohl to establish that he informed Kohl that the bar countertop had to be seamless and that the drawing for the bar countertop did not show a seam. Stone responds by focusing on testimony from Kohl and other evidence that the contract did not have a no-seam provision. Stone further states that the drawing relied upon by Heydarpour as evidence of a no-seam provision was made to size the bar countertop for a quote, not to confirm the absence of a seam on the finished countertop. The drawing was not produced at trial because Heydarpour disposed of it when he received later drawings from Stone.

¶7 It was for the jury to assess the credibility of the witnesses and resolve the conflicts in their testimony and the other evidence. *See id.* The jury had to resolve evidence of a contract that did not discuss seams or incorporate by its terms any drawings of the countertops and contradictory testimony from Heydarpour and Kohl on the question of whether the bar countertop was to be seamless. We conclude that there is credible evidence to support the jury’s

finding that Stone did not breach the contract because the contract did not require that Stone provide a seamless bar countertop.¹

¶8 Heydarpour next argues that the circuit court erred when it declined to change the jury's verdict that Stone did not violate one or more of the provisions of WIS. ADMIN. CODE § ATCP 110.02 et seq. relating to home improvement practices. To the extent that Heydarpour bases this argument on his claim that Stone made representations or that the parties had a contract for a seamless bar countertop, the claim is rejected for the reasons stated above.

¶9 Heydarpour contends that Stone violated the WIS. ADMIN. CODE § ATCP 110.02 et seq. by not providing him with a copy of the contract before receiving payment or beginning work. We agree with Stone that this claim is waived. Heydarpour did not cite this ground as a basis for changing the jury's verdict when he made his postverdict motion. *See Ford Motor Co. v. Lyons*, 137 Wis. 2d 397, 417, 405 N.W.2d 354 (Ct. App. 1987).

¶10 Heydarpour argues that the circuit court erred when it declined to change the jury verdict to award him damages for a replacement, seamless bar countertop. The jury was asked to determine what sum of money would fairly and reasonably compensate Heydarpour for correction and completion of work to be

¹ The contract has an integration clause providing that no prior verbal or written representations exist outside of the agreement and requiring all changes to be in writing. Heydarpour's argument that the drawings were part of the contract fails in the face of this clause.

In his reply brief, Heydarpour argues that the integration clause cannot be enforced when a party is fraudulently induced to enter into a contract. Heydarpour's fraud claim is premised on his contention that Stone agreed the bar countertop would be seamless. The jury rejected that claim, and we have affirmed. In addition, Heydarpour's fraud contention was not placed before the jury. For these reasons, we do not consider this argument further.

performed by Stone. The jury awarded no damages, and Heydarpour contends this is perverse because the evidence at trial showed that Stone did not provide and install a seamless bar countertop as required by the contract. We have already upheld the jury's verdict that Stone did not breach the contract. Therefore, Heydarpour was not damaged, and the jury's verdict is not perverse.

¶11 Finally, Heydarpour contends that a new trial is required in the interest of justice because he was prejudiced when the circuit court placed an armed bailiff in the courtroom on the last day of trial. After calling a recess and sending the jury from the courtroom, the judge stated that when he glanced at Heydarpour, Heydarpour "engage[d] in a stare-down" with him. The court deemed such conduct inappropriate and a breach of security. Heydarpour denied staring at the judge. The judge warned Heydarpour that he would be held in contempt if he engaged in such behavior again. The judge then instructed Heydarpour and his counsel to discuss the rules of courtroom decorum and declined to let Heydarpour address the court before he spoke with his counsel. When court resumed, Heydarpour did not renew his request to address the court. An armed bailiff attended the rest of the trial.

¶12 At the postverdict motion hearing, the circuit court addressed Heydarpour's complaint about the bailiff. The court found that Heydarpour stared him down, and that Heydarpour lied when he denied doing so. The court found that the bailiff was necessary and that the presence of a bailiff was not an unusual practice in civil cases where tensions were running high. The court expressed little sympathy for Heydarpour's complaint that the presence of the bailiff "painted him in a bad light," and suggested that the next time Heydarpour appears in court, he should conduct himself properly, and that the need to have a bailiff present was a result of Heydarpour's own conduct. The court observed that at the

end of civil cases, jurors often inquire about security and the absence of a bailiff in the courtroom. The court observed that jurors seem to prefer the presence of a bailiff.

¶13 Heydarpour argues that the court imposed punitive and prejudicial conditions upon him without sufficient grounds. We disagree with Heydarpour's characterization of the circuit court's action. The court did not find Heydarpour in contempt and did not reprimand Heydarpour in front of the jury. Heydarpour has not convinced us that the presence of the bailiff affected the outcome of the trial. Furthermore, Heydarpour did not renew his request to address the court after he met with counsel or ask the court to explain the bailiff's presence to the jury. The presence of the bailiff does not require a new trial in the interest of justice.

¶14 As his final issue on appeal, Heydarpour argues that the circuit court erred when it denied his postverdict motion to dismiss Stone's counterclaim for enforcement of a WIS. STAT. ch. 779 (2001-02) construction lien. Heydarpour contends that Stone did not comply with the statutes governing pursuit of a lien claim.

¶15 The judgment entered in this case does not refer to a construction lien or grant foreclosure of such a lien. At the postverdict motion hearing, the circuit court declined to grant foreclosure of the construction lien, and the judgment from which this appeal is taken does not refer to the construction lien. Therefore, we do not address this issue further.

¶16 Having affirmed the circuit court on Heydarpour's appeal, we turn to Stone's cross-appeal. In its cross-appeal, Stone argues that its postverdict motion seeking contract-based attorney's fees, costs and interest should have been heard by the circuit court as part of postverdict proceedings in the Heydarpour suit, and

that the court erred when it ruled that Stone had to commence a separate action to recover under the contract. The court also observed that Heydarpour might be entitled to a determination as to whether the contract imposed liability for attorney's fees and costs. Stone also seeks reasonable attorney's fees relating to Heydarpour's claims for loss of use of the house and loss of income; Stone prevailed on these claims pretrial. The circuit court declined to award these attorney's fees as well.

¶17 The contract's terms and conditions state:

Delinquency: In the event Stone Dimensions is required to hire an attorney in order to collect money due under this Agreement, Buyer agrees to be responsible for all costs of collection, including, but not limited to, all reasonable attorneys fees or costs incurred by Stone Dimension.

Interest: A one and one-half percent (1½ %) interest charged per month (18% annual percentage rate) from the time of installation shall be charged on all accounts not paid when due.

¶18 A posttrial award of attorney fees and costs is recognized in Wisconsin law. First, such a request "is verdict-related as it is predicated on a party's prevailing party status. Second, case law indicates that an award of attorney fees may be considered after entry of a judgment or order. *Gorton v. American Cyanamid Co.*, 194 Wis. 2d 203, 230, 533 N.W.2d 746 (1995). Wisconsin permits the recovery of attorney fees pursuant to a contract when that request is made before the court that entered judgment. *Purdy v. Cap Gemini Am., Inc.*, 2001 WI App 270, ¶19, 248 Wis. 2d 804, 637 N.W.2d 763. We conclude that the circuit court was empowered to address the verdict-related request, and it erred when it declined to do so.

¶19 We further observe that having presided over the case, the circuit court is the most logical and informed forum in which to address the request for attorney's fees and costs. *Cf. Sheboygan County v. D.T.*, 167 Wis. 2d 276, 282, 481 N.W.2d 493 (Ct. App. 1992) (we defer to lower court determinations when that court is, for whatever reason, in a better position to make a particular determination); *Purdy*, 248 Wis. 2d 804, ¶¶18-19. Additionally, the presiding court would have the best grasp of the issues relating to the reasonableness of the attorney's fees and costs and other issues. Therefore, we decline Stone's invitation to address the attorney's fee issue *de novo*.

¶20 The circuit court did not decide whether interest could be awarded pursuant to the contract. To the extent that the parties dispute whether the attorney's fees, costs and interest provisions are enforceable, the parties may litigate these issues on remand.

¶21 Finally, Stone argues that it is entitled to reasonable attorney's fees arising out of Heydarpour's claims for loss of use of the house and loss of income which Stone had to prepare to try. Stone argues that it prevailed pretrial on these claims and therefore is entitled to an award of attorney's fees and costs. However, Stone does not inform us of the circuit court's reasons for rejecting this claim, and Heydarpour similarly does not enlighten us in his cross-respondent's brief.

¶22 Where a party fails to advise us of the circuit court's ruling or reasoning we may, in our discretion, decline to consider the issue on the merits. *See Karl M. Elbinger Co. v. George J. Meyer Mfg. Co.*, 3 Wis. 2d 202, 208, 87 N.W.2d 807 (1958). Furthermore, the Rules of Appellate Procedure require the

appellant to provide “a statement of the issues presented for review and how the trial court decided them.” WIS. STAT. RULE 809.19(1)(b).² We will not address this claim because it is inadequately briefed. *See Vesely v. Security First Nat’l Bank of Sheboygan Trust Dep’t*, 128 Wis. 2d 246, 255 n.5, 381 N.W.2d 593 (Ct. App. 1985) (we will not independently develop a litigant’s argument).

¶23 Heydarpour argues that Stone is not entitled to recover its expert witness fee. Stone does not argue for recovery of this fee in its cross-appellant’s brief. We do not consider this issue further.

¶24 In conclusion, we affirm the judgment against Heydarpour, and we reverse and remand for further proceedings relating to Stone’s request for attorney’s fees, costs and interest under the parties’ contract. Because Stone has prevailed on the appeal and the cross-appeal, Stone is entitled to WIS. STAT. RULE 809.25(1) costs on the appeal and the cross-appeal.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

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

² All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

