

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

April 18, 1996

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.

NOTICE

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

No. 95-0671

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**TIM LAWRENCE, d/b/a
LAWRENCE & LAWRENCE CONSTRUCTION,**

Plaintiff-Respondent,

v.

**RONALD BRIESKE and
BARB BRIESKE,**

Defendants-Appellants.

APPEAL from a judgment of the circuit court for Monroe County:
MICHAEL J. McALPINE, Judge. *Affirmed.*

Before Dykman, Sundby and Vergeront, JJ.

PER CURIAM. Ronald and Barb Brieske appeal from a money judgment in favor of Tim Lawrence. We affirm.

This case began as a small claims action by Lawrence, doing business as Lawrence & Lawrence Construction, seeking damages for the Brieskes' alleged failure to pay him as provided in a home remodeling contract. Lawrence later filed an amended complaint seeking damages of over \$2,000, and the case was transferred out of small claims court.

The case was tried to the trial court. Although both parties' pleadings alleged the existence of a contract, the court concluded there was not a contract. Relying on the testimony of the contractor who finished the remodeling, the court found that Lawrence had completed twenty-five percent of the project before being terminated by the Brieskes. The court set Lawrence's damages by concluding that the replacement contractor's bill represented a reasonable charge for his seventy-five percent of the work, and then extrapolating from that bill to set the value for the twenty-five percent of the job completed by Lawrence. The court further found that Lawrence's father, Durward Lawrence, was an electrical subcontractor entitled to payment for labor and materials.

The Brieskes argue the trial court erred by deciding whether the parties had a contract. They argue the parties' pleadings alleging the existence of a contract were a "judicial admission" which precluded the court from deciding the issue. However, to be binding, an admission must be one of fact, rather than a conclusion of law. *Fletcher v. Eagle River Memorial Hosp.*, 156 Wis.2d 165, 178, 456 N.W.2d 788, 794 (1990). The existence of a contract is a question of law. See *Peters v. Peters Auto Sales, Inc.*, 37 Wis.2d 346, 350, 155 N.W.2d 85, 87 (1967) (allegation in complaint that contract was entered into is only legal conclusion, not fact). Therefore, the trial court could properly decide the issue.

Except for one sentence in passing, the Brieskes do not attack the merits of the trial court's conclusion that there was no contract. We do not address that issue.

The Brieskes also argue the trial court erred in calculating damages. The parties agree quantum meruit is the appropriate theory to set damages in the absence of a contract. Damages in quantum meruit are measured by the reasonable value of the plaintiff's services. *Ramsey v. Ellis*,

168 Wis.2d 779, 785, 484 N.W.2d 331, 333-34 (1992). The Brieskes appear to be arguing the court should have considered the price they believed they had contracted for and the amount they spent to complete the job. However, neither of these amounts is necessary to a determination of the reasonable value of Lawrence's services. That is the test required by *Ramsey*. The method the court used was sufficient.

The Brieskes argue the trial court erred in finding that Durward Lawrence was a subcontractor. They argue the finding is contrary to Tim Lawrence's testimony that his father did not work for him and that he did not owe his father money. However, Durward Lawrence testified that he was asked to do the job by Tim Lawrence. Both Durward Lawrence and Ronald Brieske testified there was no direct contact between them about hiring Durward Lawrence for the job. The trial court, therefore, was forced to choose between the conflicting testimony of Tim Lawrence and the other witnesses. We are to give due regard to the trial court's opportunity to judge the credibility of witnesses. Section 805.17(2), STATS. The court's finding was not clearly erroneous.

By the Court. – Judgment affirmed.

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