COURT OF APPEALS
DECISION
DATED AND FILED

May 30, 2012

Diane M. Fremgen
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. 2011AP2129 **Cir. Ct. No. 2008CV293**

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

COMPLETE PLUMBING, INC.,

PLAINTIFF,

V.

BRIAN FOLLETT,

DEFENDANT-THIRD-PARTY PLAINTIFF-APPELLANT,

BIGGAR DEVELOPMENT, LTD.,

DEFENDANT-RESPONDENT,

V.

CURT BIGGAR,

THIRD-PARTY DEFENDANT-RESPONDENT,

MARK BIGGAR, U.S. OIL, INC. D/B/A DESIGN AIR, INC. AND CHRISTENSEN HEATING & AIR CONDITIONING, INC.,

THIRD-PARTY DEFENDANTS.

APPEAL from a judgment of the circuit court for Outagamie County: NANCY J. KRUEGER, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 PER CURIAM. Brian Follett appeals a money judgment entered after a jury trial. Follett argues the trial court erroneously denied his postverdict motions to change a verdict answer or grant remittitur and to hold one of the third-party defendants personally liable. We reject Follett's arguments and affirm.

BACKGROUND

¶2 Follett hired Biggar Development, Ltd. (BDL) to renovate a home he purchased on the Fox River in Appleton. BDL, which essentially consisted of Mark and Curt Biggar, was to serve as the architect and construction manager. Follett and BDL executed an "Architect-Owner Agreement" in December 2006. BDL drafted some initial plans, and Follett approved a preliminary budget of approximately $1,314,400 in February 2007. The budget was inclusive of architectural and construction management fees, labor, and materials.

¶3 As the project progressed, Follett requested multiple changes. Because Follett's primary residence was in Texas, the parties communicated by email, fax, and telephone. Starting in February 2007, Mark put together a monthly "draw." The draw document included an itemized preliminary budget and indicated the work subcontractors had performed and what they had billed. Mark would send the draw to Follett and follow up with a phone call to discuss it. Follett would then send a check to BDL, which would distribute it to pay for the labor and materials.

¶4 Follett expressed concern with the project cost in August 2007 and sent BDL an email in September stressing that he had not received the revised budget he had requested five to six weeks earlier and that the cost overruns to date were "simply unacceptable." BDL delivered a letter in late October agreeing that the project total would not exceed $2,933,142, and that "if the project exceeds this amount [BDL] will participate."[1] That agreement also set forth BDL's fees paid to date, the remaining fee amount to be paid, and the payment schedule for the fees.[2] Within a few days, Mark realized he had made a "tabulation error" and notified Follett that an additional $75,000 had to be added to the final project cost. This addition would bring the final cost to $3,008,142. Follett did not respond to this notice, and work continued for several months. Follett stopped payment after making nine monthly draw payments totaling $2,609,173.[3]

¶5 At some point, the project became the subject of a DNR enforcement action because BDL constructed a pond and graded the river bank without obtaining necessary permits. This resulted in increased permit costs and the filling of a pond for which Follett had already paid BDL over $60,000. BDL also invoiced Follett an additional $37,500 for work on the pond.

¶6 Follett hired another construction company in December 2007 to review BDL's invoices and facilitate BDL's completion of the project. BDL continued work until Follett terminated it on February 8, 2008. By that time, BDL

[1] Both of the parties' agreements in this case were prepared in all capital letters. We omit that capitalization throughout the decision.

[2] Specifically, the agreement indicated Follett would pay BDL $20,000 in fees the following day, and a final $35,000 payment at completion of the project.

[3] We have rounded some of the figures in the decision to the nearest dollar.

had submitted its tenth and eleventh draws, which BDL did not pay. In addition to the nearly $257,000 billed for those two draws, BDL's January 18, 2008 invoice itemized approximately $205,000 in uncompleted work, for a project total of $3,106,238. However, BDL asserted on February 7, 2008 that Follett would owe a total of $3,148,462 for the completed project.

¶7 A plumbing subcontractor later sued BDL and Follett for nonpayment. Follett cross-claimed against BDL, Mark, and Curt, alleging breach of contract and asserting claims under WIS. ADMIN. CODE § ATCP 110 (Oct. 2004). BDL counterclaimed against Follett for breach of contract. The case between Follett and BDL, Mark, and Curt proceeded to a jury trial. The jury found that BDL failed to obtain necessary permits and awarded § ATCP 110 damages totaling $118,517. The jury also held that BDL had breached the "Architect-Owner Agreement and/or the 'Cost Not to Exceed' agreement." The jury awarded Follett $140,320 in damages for the breach. The jury determined that Follett sustained no damages as a result of BDL's failure to put all changes to the agreements in writing. Finally, the jury determined that Follett breached the Architect-Owner Agreement, and awarded $398,969 in damages to BDL.

¶8 Follett filed two postverdict motions. The first sought to change the jury's answer as to whether Follett breached the Architect-Owner Agreement from yes to no, or, alternatively, to remit the amount of damages. The court denied this motion. Follett's second motion requested double damages plus costs and attorney fees on the § ATCP 110 claim, and further sought to hold Mark and Curt individually responsible for that portion of the judgment. The court granted the motion for double damages, plus costs and fees of just over $19,000. Further, it held that Mark was personally liable, but that Curt was not. Thus, the final

judgment awards approximately $396,365 to Follett and $398,969 to BDL, for a net of $2,604 to BDL. Follett now appeals.

DISCUSSION

¶9 Follett first argues the court erroneously denied his postverdict motion to change the jury's answer whether he breached the Architect-Owner Agreement. A motion to change an answer in a jury verdict challenges the sufficiency of the evidence to support the verdict. WIS. STAT. § 805.14(5)(c);[4] ***State v. Michael J.W.***, 210 Wis. 2d 132, 143, 565 N.W.2d 179 (Ct. App. 1997). In considering a motion to change a jury's answer, we must view the evidence in the light most favorable to the verdict and affirm if the verdict is supported by any credible evidence. WIS. STAT. § 805.14(1); ***Richards v. Mendivil***, 200 Wis. 2d 665, 671, 548 N.W.2d 85 (Ct. App. 1996).

¶10 Follett argues he could not have breached the Architect-Owner Agreement because the jury found that BDL also breached it. He further asserts that BDL breached the agreement first. This argument is a nonstarter. The jury was not asked only whether BDL breached the Architect-Owner Agreement. Rather, verdict question 15 asked: "Did [BDL] breach the Architect-Owner Agreement *and/or* the 'Cost Not to Exceed' agreement dated October 22, 2007?" (Emphasis added.) Thus, Follett cannot demonstrate which agreement the jury found BDL breached.

¶11 The undisputed evidence at trial, however, was that BDL performed its obligations under the Architect-Owner Agreement and continued to do so until

[4] All references to the Wisconsin Statutes are to the 2009-10 version.

Follett terminated it in February 2008, despite Follett's failure to pay BDL for the completed work covered by draws ten and eleven, dated in November and December 2007, respectively. In any event, Follett fails to identify how BDL breached the parties' initial Architect-Owner Agreement.

¶12 In his reply brief, Follett asserts for the first time that, regardless of whether BDL breached it, he did not breach the Architect-Owner Agreement because:[5]

> There is nothing in the Contract which states that draws will be given to Follett by BDL which need to be paid within a specified amount of time. Presumably, Follett could have waited until the Project was completed before being obligated to pay BDL for its services and not have violated the Contract.
>
> ....
>
> Follett never agreed to make periodic payments to BDL ....

Follett is mistaken. The Architect-Owner Agreement provides, as relevant:

> **Construction Management**: (As owner's agent).
>
> Provide itemized spreadsheet of construction costs, allowances and fees; authorize purchase of building materials & labor; negotiate subcontracts; expedite and supervise project; prepare progress payments to be made by owner *as due on a periodic basis*.

(Emphasis added; typographical errors corrected.) Further, under the "**Fee**" section, the agreement indicates Follett would be charged a percentage "of monthly construction payments." Finally, the agreement concludes with the

[5] Although we choose to reject Follett's arguments on the merits, we may disregard arguments raised for the first time in a reply brief. *See* ***Swartwout v. Bilsie***, 100 Wis. 2d 342, 346 n.2, 302 N.W.2d 508 (Ct. App. 1981).

following statement: "Owner understands that [BDL] acts as their agent for all labor and materials and that owner is responsible for payment of such items."[6] Moreover, Follett received and paid nine monthly periodic work invoices before he stopped payment. This further evidences the parties' agreement that Follett would make monthly progress payments for work performed.

¶13 Therefore, given the evidence that Follett failed to pay BDL the amount due for the labor and materials covered by draws ten and eleven, we must defer to the jury's determination that Follett breached the Architect-Owner Agreement and reject his request to change the verdict answer.

¶14 Follett next contends the court erroneously denied his alternative motion for remittitur requesting that the damages award be reduced from $398,969 to zero or, alternatively, to $35,000 to correspond to the amount of unpaid construction management fees. Remittitur is properly applied when the amount of damages is not supported by the evidence adduced at trial. *See* WIS. STAT. § 805.15(6); ***Urban v. Anderson***, 234 Wis. 280, 285, 291 N.W. 520 (1940). We will not reverse a decision on remittitur unless the trial court erroneously exercised its discretion. ***Boodry v. Byrne***, 22 Wis. 2d 585, 588-89, 126 N.W.2d 503 (1964). "A damage verdict which has been approved by the trial court will not be disturbed if 'there exists a reasonable basis for the trial court's determination after [viewing the evidence] in favor of plaintiff.'" ***Ballard v. Lumbermens Mut. Cas.***

[6] Follett also appears to argue that the Cost Not to Exceed Agreement modified the parties' initial Architect-Owner Agreement. Regardless, the Cost Not to Exceed Agreement does not modify the parties' periodic billing and payment obligations. The only reference to the topic indicates that the outstanding payment for draw nine was due the following day, in October 2007.

Co., 33 Wis. 2d 601, 605-06, 148 N.W.2d 65 (1967) (quoting ***Kablitz v. Hoeft***, 25 Wis. 2d 518, 525, 131 N.W.2d 346 (1964)); *see also* ***Boodry***, 22 Wis. 2d at 589.

¶15 Follett argued that BDL failed to provide evidence of its damages and that the award was therefore speculative. He asserted in his postverdict motion, and the trial court agreed, that the jury arrived at its damages award as follows. It began with the cost not to exceed amount of $2,933,142 and added the $75,000 tabulation error BDL asserted days later. From that sum, the jury subtracted the $2,609,173 that Follett had already paid BDL. The court, however, observed that Follett did not provide any explanation as to why this was not at least one credible method of determining damages.

¶16 Follett contends that BDL did not owe the subcontractors any money because he negotiated reduced bills with them and then paid them directly. However, the court indicated it reviewed the evidence presented at trial and that there "was no testimony presented by any subcontractors that they released [BDL] or Follett from amounts still owing." The court concluded, "the jury could have reasonably inferred that [BDL], as general contractor, was responsible for paying the subcontractors. They could have reasonably calculated the amount remaining due on the project to be $398,969 ...."

¶17 Follett renews his argument that the subcontractors have all been paid, and directs us to his testimony to that effect. The jury, however, could have reasonably rejected that self-serving testimony. Follett was asked at trial if he knew what subcontractors had been paid and, if so, how much he paid them. He responded that he did not know the answer to either question. Follett also failed to introduce any approved settlements from the numerous subcontractors or any receipts or check stubs indicating he had paid them directly. Moreover, any

agreements solely between Follett and a subcontractor would not necessarily absolve BDL, a nonparty, from liability for any invoiced amounts not paid.[7]

¶18 Further, it was reasonable for the jury to conclude that BDL still owed hundreds of thousands of dollars to the various subcontractors. Follett concedes he failed to pay BDL for draws ten and eleven, which represented labor and materials incurred through November 2007 totaling $256,691. The spreadsheet BDL provided Follett indicates that the remaining work from that point forward would cost $205,374. Thus, it would be reasonable to conclude that BDL incurred labor and material costs of at least $142,278 (398,969 – 256,691) for the work performed from December 2007 through February 8, 2008, when Follett terminated BDL. In any event, aside from arguing that the subcontractors were owed nothing, Follett fails to put forth his own figures as to what labor and material costs were incurred but not paid.

¶19 Follett also asserts that some portion of the jury's award was necessarily attributed to "work never actually performed by BDL or the subcontractors. Rather, a portion of the award would have been for work that was actually performed by [subsequent contractors] such as .... [listing items]." This unsupported assertion fails to account for two factors. First, the jury award resulted in BDL receiving $63,096 less than its projected completion cost of $3,106,238. Second, these figures do not account for the offset in damages to Follett based on the jury's awards to him for BDL's breach ($140,320) and failure

[7] Follett asserts that the settlement payments would have released BDL from all liability to the subcontractors. He fails, however, to develop an argument in support of this assertion or cite any legal authority. Thus, we need not consider the argument further. *See* ***State v. Flynn***, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994).

to obtain DNR permits ($118,517). Thus, the jury's awards resulted in BDL receiving $321,933 less than the anticipated cost of completion. Follett therefore fails to demonstrate that the jury improperly granted a windfall to BDL for work that was never performed. The trial court properly rejected his request for remittitur.

¶20 Finally, Follett argues the court erroneously ruled that Curt was not individually liable under WIS. ADMIN. CODE § ATCP 110 for failing to obtain the DNR permits. Section ATCP 110.03(1) provides: "Before a buyer enters into a home improvement contract, the seller shall inform the buyer of all building or construction permits that are required for the home improvement. No seller may start work under a home improvement contract until all required state and local permits have been issued."

¶21 WISCONSIN ADMIN. CODE § ATCP 110 allows for piercing of the corporate veil to impose liability on individual wrongdoers when the individual, rather than the entity, is responsible for the violation. ***Rayner v. Reeves Custom Builders, Inc.***, 2004 WI App 231, ¶¶1, 11, 277 Wis. 2d 535, 691 N.W.2d 705. We held in ***Rayner***, "To the extent individuals have the power to prevent unfair dealings with consumers, individuals will incur liability for noncompliance." ***Id.***, ¶14. We further explained that the plaintiff must demonstrate the individual "either perpetrated [the] violations or had the power to prevent or rectify them." ***Id.***, ¶20. Individual liability may not be premised merely on a person's status as an officer or employee of the business entity. ***Id.***

¶22 Here, the court reasoned:

> The evidence in this case, as introduced at trial, is that Mark Biggar was in charge of obtaining the correct permits. .... However, Curt Biggar was not shown to have any

> involvement with the permitting process and had minimal ongoing involvement with the project itself. Both Mark and Curt Biggar qualify as "officers, representatives, agents [or] employees" under [WIS. ADMIN. CODE § ATCP 110.] However, evidence was not offered at trial to link Curt Biggar with the failure to obtain proper permits. Mark Biggar acknowledged a failure to obtain the proper permits, and the sanctions that resulted.
>
> ....
>
> ... There was no evidence presented at trial that Curt Biggar was involved with obtaining the requisite permits and as such Follett's personal liability claim against him fails.

¶23 In ***Rayner***, we held that the corporation president's wife, who was an officer and employee, was not individually liable because her duties did not implicate the WIS. ADMIN. CODE § ATCP 110 violations. ***Rayner***, 277 Wis. 2d 535, ¶¶5, 20. Here, consistent with the trial court's evaluation of the evidence, Curt testified about his role on the project:

> I did basically the architectural work, the drawing work, preparing framing plans, floor plans, foundations plans. I dealt with Brian Follett on what his needs were and prepared colored drawings for him that he approved. As he went through different changes, he would come up with suggestions and I would draw pictures of it, and then Mark would give a budget on them and we would make those changes.

This testimony is also consistent with the letterhead used in both of the parties' agreements. Both documents identify Curt's title as "architect," and Mark as "construction manager."

¶24 Countering this evidence and the trial court's observations, Follett proffers the following exchange at trial:

> Q: It is true you failed to obtain all the necessary permits on this job, correct?

> [Curt]: I guess — there was one issue that came up with the DNR that a permit — we didn't feel we needed one; other than that, we got all permits, subcontractors got their own permits.
>
> Q: But you failed to get the permit per the DNR, correct?
>
> [Curt]: Correct.

Follett argues this testimony "clearly evidences the fact that both Curt and Mark were equally responsible for failing to obtain permits from the DNR. It is further evident from the language above that there was a conscious decision made between Curt and Mark to not obtain permits from the DNR."

¶25 We disagree with Follett's assessment of Curt's generalized testimony. The questions and answers do not address precisely whose responsibility it was to obtain permits or when Curt became aware that a necessary permit had not been obtained. The references to "we" and "you" could just as easily have referred generally to BDL as an entity. In any event, this testimony, combined with other general statements that Curt and Mark were the only people responsible for the project, does not come close to convincing us that the court erred in its assessment of the evidence and conclusion that Curt's duties did not implicate day to day management of the project, generally, or acquisition of DNR permits, specifically.

By the Court.—Judgment affirmed.

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