COURT OF APPEALS
DECISION
DATED AND FILED

August 31, 2016

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. 2015AP1473 **Cir. Ct. No. 2011CV1224**

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

VILLAGE OF SLINGER,

PLAINTIFF,

V.

POLK PROPERTIES, LLC AND DONALD J. THOMA,

DEFENDANTS-THIRD-PARTY PLAINTIFFS-APPELLANTS,

STEVEN M. KEARNS,

DEFENDANT,

V.

RUSSELL BRANDT, RICK GUNDRUM, JEFF BEHREND, LEE FREDERICKS, JOHN DUKELOW, RICHARD KOHL, DEAN OTTE AND JESSI BALCOM,

THIRD-PARTY DEFENDANTS,

SCHLOEMER LAW FIRM, S.C. AND ABC INSURANCE COMPANY,

THIRD-PARTY DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Washington County: SANDY A. WILLIAMS, Judge. *Affirmed*.

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

¶1 REILLY, P.J. This appeal addresses whether a witness is qualified to give an expert opinion. Polk Properties, LLC and Donald J. Thoma (collectively "Polk") sued their former law firm, Schloemer Law Firm, S.C. (Schloemer), for legal malpractice, alleging that Schloemer negligently drafted/negotiated their developer's agreement.[1] Polk named Attorney Richard Jacobson as its expert witness on Schloemer's legal malpractice. Schloemer moved to strike Jacobson as not being qualified to offer an expert opinion as to the drafting/negotiating of a developer's agreement. The circuit court determined that Jacobson lacked the expertise required to offer such an opinion, struck Jacobson as a witness, and granted summary judgment to Schloemer as Polk had no proof that Schloemer committed legal malpractice. We affirm.

STANDARD OF REVIEW

¶2 We review de novo a court's grant of summary judgment. ***Paskiewicz v. American Family Mut. Ins. Co.***, 2013 WI App 92, ¶4, 349 Wis. 2d 515, 834 N.W.2d 866. The summary judgment decision here turned entirely on

[1] This is a "case within a case" regarding the development of Pleasant Farm Estates, a subdivision in Washington County. The Village of Slinger (the Village) filed suit against Polk over disagreements about restrictions on the use of unsold subdivision lots. This appeal involves the third-party complaint filed by Polk against Schloemer.

the court's conclusion that Jacobson's expert testimony under WIS. STAT. § 907.02 (2013-14)[2] was inadmissible. "Whether the [court] applied the appropriate legal framework for evaluating expert testimony is reviewed de novo, but the court's choice of relevant factors within that framework and its ultimate conclusion as to admissibility are reviewed for [an erroneous exercise of discretion]." ***Lees v. Carthage Coll.***, 714 F.3d 516, 520 (7th Cir. 2013). "A circuit court's discretionary decision will not be reversed if it has a rational basis and was made in accordance with accepted legal standards in view of the facts in the record." ***State v. Giese***, 2014 WI App 92, ¶16, 356 Wis. 2d 796, 854 N.W.2d 687.

BACKGROUND

¶3 Polk purchased farmland with a desire to transform it into a residential subdivision. Polk retained Schloemer as its legal counsel. Pertinent to this appeal is Polk's allegation that Schloemer was negligent in the negotiation and drafting of the developer's agreement.[3] The adopted developer's agreement included a restrictive covenant that prohibited Polk from using any subdivision lot for anything other than a single family residence. Due to difficulty in selling the residential lots, Polk kept the property in agricultural use. [4]

[2] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[3] The document at issue in this case is titled Declaration of Covenants, Conditions and Restrictions of Pleasant Farm Estates. We will refer to it and the related subdivision development documents collectively as the developer's agreement.

[4] Polk's real estate taxes would be substantially less if taxed as agricultural land than if taxed as residential lots. The issue of whether the property was in agricultural use for tax purposes is currently pending before this court in a companion case, case No. 2015AP1970.

¶4 The Village commenced the underlying lawsuit against Polk, claiming that Polk was using the residentially zoned property for agricultural purposes, including tilling the soil and planting and harvesting crops. The Village sought an injunction against the agricultural use and a money judgment for the costs of litigation. Polk responded, in part, by filing a third-party complaint against Schloemer, claiming Schloemer "negligently failed to draft and prepare" the developer's agreement so as to allow Polk to utilize the unsold portions of the subdivision for agricultural purposes. Polk retained Jacobson as its expert witness to testify that Schloemer failed to meet the standard of care that Schloemer owed Polk in the drafting and negotiating of the developer's agreement and also committed malpractice by engaging in the dual representation of Polk and the Village.

¶5 Jacobson provided an affidavit listing five credentials "to help show that my testimony as an expert witness in the case … is competent": (1) he is a lawyer "admitted to practice in the State of Wisconsin, the Eastern and Western federal District Courts in Wisconsin, the United States Court of Appeals for the Seventh Circuit, and the Supreme Court of the United States"; (2) he holds a Ph.D. from the University of California in Literature; (3) he has taught Professional Responsibilities at the University of Wisconsin Law School for approximately six semesters; (4) he has served on the Dane County Committee for the Wisconsin Office of Law Regulation from 2003 through 2008; and (5) he has lectured on Ethics and Professional Responsibility. Notably absent from Jacobson's affidavit is any mention of expertise in the field of real estate transactions. Schloemer thereafter took Jacobson's deposition.

¶6 Jacobson testified at his deposition that his principal criticism of Schloemer's representation was that the developer's agreement did not reserve the

right to use the undeveloped portion of the property for agricultural use. Jacobson's deposition revealed, however, that he had not prepared or reviewed a developer's agreement for more than ten years (possibly fifteen years) and that when he did do so (more than ten years ago), he personally drafted two or three declarations of restrictions in real estate developer's agreements and only reviewed six or seven developer's agreements that were drafted by others. Jacobson admitted that he had never seen the language that he suggested should have been in the Polk development agreement and that he never saw a declaration after 2009 that reserved farm use. As to his opinion that Schloemer committed malpractice by his dual representation, Jacobson admitted that he was speculating that Schloemer's work for Polk was affected by Schloemer's long-term representation of the Village. Jacobson admitted that an ethical violation is not a basis for civil liability.

¶7 Schloemer filed a motion to strike Jacobson as an expert on the grounds that Jacobson was not qualified to render an expert opinion in the field of drafting/negotiating developer's agreements and that Jacobson's opinion that Schloemer committed legal malpractice by its dual representation was based on speculation and, thus, inadmissible. The court granted Schloemer's motion to strike, finding that Jacobson did not have the specialized knowledge to testify as to the standard of care for the drafting of developer's agreements and that Jacobson's opinion as to Schloemer's conflict of interest would not assist the jury as it was based on speculation.

DISCUSSION

¶8 "The admissibility of expert testimony is governed by WIS. STAT. § 907.02." ***Giese***, 356 Wis. 2d 796, ¶17. A circuit court's decision to admit or

exclude expert testimony begins with the threshold question of whether the witness is qualified to give an expert opinion, i.e., is the witness competent in the special skill or knowledge about which he or she is to testify. ***Carney-Hayes v. Northwest Wis. Home Care, Inc.***, 2005 WI 118, ¶43, 284 Wis. 2d 56, 699 N.W.2d 524. "The goal is to prevent the jury from hearing conjecture dressed up in the guise of expert opinion." ***Giese***, 356 Wis. 2d 796, ¶19; ***Tamraz v. Lincoln Elec. Co.***, 620 F.3d 665, 671 (6th Cir. 2010) ("'[N]o matter how good' experts' 'credentials' may be, they are 'not permitted to speculate.'" (alteration in original; citation omitted)); *see also* Daniel D. Blinka, *The Daubert Standard in Wisconsin: A Primer*, WISCONSIN LAWYER, Mar. 2011, at 60 ("Coursing through ***Daubert***[5] lore is a palpable fear of ipse dixit ('because I said so') testimony."). The circuit court must focus on the principles and methodology the expert relied upon, not merely on the conclusion generated. ***Giese***, 356 Wis. 2d 796, ¶18. Polk does not contest that the drafting/negotiation of a developer's agreement calls for specialized knowledge.

¶9 The circuit court was presented with two issues regarding Jacobson's proffered opinions: (1) was Jacobson's opinion that Schloemer committed malpractice by its dual representation inadmissible on the grounds of speculation and (2) did Jacobson have the qualifications (the specialized knowledge) to offer an opinion that Schloemer was negligent in drafting Polk's developer's agreement? We address each issue separately.

[5] ***Daubert v. Merrell Dow Pharms., Inc.***, 509 U.S. 579 (1993).

Opinion Testimony Rooted in Speculation is Inadmissible

¶10 Jacobson was prepared to offer the opinion that "[i]t is likely that [Schloemer's] loyalty to their continuing, long-term client, could reasonably affect their representation of a (presumably) short-term client such as Polk." Jacobson admitted that in offering this opinion he was simply "speculating" that Schloemer's work was affected by its long-term representation of the Village and admitted that an ethical violation standing alone is not a basis for civil liability. No matter how impressive an expert may be, they are not permitted to speculate. ***Giese***, 356 Wis. 2d 796, ¶19 (citing ***Tamraz***, 620 F.3d at 671). The court properly exercised its discretion in dismissing as speculative Jacobson's opinion that Schloemer's dual representation amounted to actionable malpractice.

Jacobson Was Not Qualified to Opine as to the Drafting of a Developer's Agreement

¶11 The goal of a court's gatekeeper role "is to ensure that the expert's opinion is based on a reliable foundation and is relevant to the material issues." ***Giese***, 356 Wis. 2d 796, ¶18. A witness who offers an opinion in an area requiring special knowledge when that witness does not have a sufficient foundation to give such an opinion falls into the type of testimony referred to as ipse dixit ("because I said so") testimony. See ***id.***, ¶¶19-20. The circuit court, in this case, engaged in the proper preliminary analysis to determine if Jacobson's testimony fell into the "because I said so" improper testimony. The circuit court reviewed Jacobson's "real world" experience as well as his academic background, and found both insufficient to establish his expertise in the drafting/negotiating of developer's agreements. The court distinguished Jacobson's academic credentials, which while impressive, were not germane to drafting developer's agreements: "Teaching ethics doesn't necessarily correlate to a person being able to say it is

malpractice." The circuit court recognized that Jacobson was a legal ethics instructor and perhaps had expertise in the area of ethics, but Jacobson lacked the requisite expertise to opine about the drafting of developer's agreements. The circuit court determined that Jacobson's "real world" experience consisted of personally drafting two or three declarations of covenants, conditions, and restrictions, and those few declarations were drafted ten to fifteen years ago.

¶12 Polk argues that the circuit court erred by applying the ***Daubert*** reliability standard to test Jacobson's qualifications, rather than reviewing Jacobson's methodology. We disagree with Polk's characterization as the circuit court's oral decision contains a proper analysis under WIS. STAT. § 907.02(1). The court focused on the threshold question of whether Jacobson is qualified to even offer an opinion that Schloemer negligently drafted the developer's agreement. Neither the reliability of or methodology used by Jacobson is at issue. The court's role is to make sure that "because I said so" evidence does not come before the jury from someone who does not have the qualification to give such an opinion.

¶13 Attorney Jacobson is certainly an impressive witness: admitted to practice before the United States Supreme Court; a Ph.D. in Literature from the University of California; an academic who has taught ethics at the University of Wisconsin Law School; and a committee member for the Office of Law Regulation. But that does not make Jacobson an expert in drafting developer's agreements. The fact that Albert Einstein may have once bought a home does not make Einstein qualified to give an expert opinion as to the drafting of an offer to purchase. A jury may love to see and hear Einstein, but the court as gatekeeper must ensure that Einstein only offers opinions in areas that Einstein is in fact an expert. Likewise, Jacobson, while having a brilliant resume, has little foundation in the specialized area of drafting developer's agreements and what foundation he

does have is neither recent nor extensive. The circuit court did not err in its discretionary decision to exclude Jacobson's testimony based on Jacobson's insufficient qualifications.

CONCLUSION

¶14 The circuit court's reasonable discretionary decision to exclude Jacobson as an expert witness had "a rational basis and was made in accordance with accepted legal standards in view of the facts in the record." ***Giese***, 356 Wis. 2d 796, ¶16. The court properly granted summary judgment.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.