COURT OF APPEALS
DECISION
DATED AND FILED

March 15, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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No. 99-2017
99-2288

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

NO. 99-2017

GRAIN DRYER SYSTEMS, A DIVISION OF GDS, INC.,

PLAINTIFF-RESPONDENT,

V.

KEVIN ADAMS, D/B/A ADAMS BROS. GRAIN BIN SERVICE,

DEFENDANTS-THIRD-PARTY PLAINTIFFS,

V.

CHIEF INDUSTRIES, INC.,

THIRD-PARTY DEFENDANT-APPELLANT,

NAMIC INSURANCE COMPANY, INC., A/K/A NAMICO,

**THIRD-PARTY DEFENDANT-
RESPONDENT.**

NO. 99-2288

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PLAINTIFF,

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KEVIN ADAMS, D/B/A ADAMS BROS. GRAIN BIN SERVICE,

**DEFENDANTS-THIRD-
PARTY PLAINTIFFS-RESPONDENTS,**

V.

CHIEF INDUSTRIES, INC.,

**THIRD-PARTY DEFENDANT-
APPELLANT,**

NAMIC INSURANCE COMPANY, INC., A/K/A NAMICO,

THIRD-PARTY DEFENDANT.

APPEALS from judgments of the circuit court for Rock County: JAMES P. DALEY, Judge. *Affirmed.*

Before Dykman, P.J., Roggensack and Johnston, JJ.[1]

¶1 DYKMAN, P.J. Chief Industries, Inc., appeals from judgments entered on a jury verdict awarding damages to Grain Dryer Systems (GDS) and Kevin Adams.[2] The jury found that Chief was negligent in the failure of a grain storage bin that GDS had hired Adams to erect. Chief makes several arguments in this appeal. It argues that: (1) there was insufficient evidence to support several of the jury's findings, including a damage award to Adams, (2) the jury verdict was perverse, (3) the trial court erred in excluding opinion testimony of three witnesses, (4) the trial court erred in admitting photographs of wind damage to the grain bin, (5) the judgment should be reversed because the real controversy was not fully tried, and (6) the trial court erred in allowing Adams to tax certain costs. We disagree with Chief on each point and therefore affirm the judgments.

I. Background

¶2 GDS contracted with Adams to erect a grain storage bin made by Chief. The bin consists primarily of a roof and sidewall metal sheets shaped into a cylinder. During the erection process, the bin must be supported on a series of linked jacks and then incrementally raised as additional rings of sidewall sheets are added from the bottom. While Adams was erecting the bin, it fell from his jacking system twice. After the second fall, GDS had to completely pull down the bin. Most of the bin and Adams' jacks were damaged beyond use. GDS then

[1] Circuit Judge William D. Johnston is sitting by special assignment pursuant to the Judicial Exchange Program.

[2] Chief initially filed two appeals in this matter, and then we ordered the appeals consolidated upon Chief's motion.

hired George Abell to erect an identical bin at the same location. Using more jacks than Adams, Abell successfully erected an identical bin.

¶3 The procedural history of this case is complex. For purposes of this appeal, it is enough to know that GDS sued Adams, Adams brought a third-party claim against Chief, and Chief cross-claimed against Adams. After a trial, the jury found that: (1) the contract between GDS and Adams was impossible to perform, (2) Chief was negligent in the "design, manufacture, engineering, or instructions provided relating to the grain bin," (3) Adams was not negligent in his erection of the bin or the manufacture of his jacks, and (4) $42,694.20 would fairly and reasonably compensate Adams for the damages caused by the bin.[3] Chief appeals.

II. Analysis

A. Jury Verdict

¶4 Chief first argues that the record contains no credible evidence to support the jury's finding that Chief was negligent in the failure of the grain bin. We disagree.

¶5 In reviewing a claim that a verdict is contrary to the evidence, we are required to construe all evidence and inferences to be drawn from the evidence in favor of the jury verdict. ***Anderson v. Alfa-Laval Agri, Inc.***, 209 Wis. 2d 337, 352, 564 N.W.2d 788 (Ct. App. 1997). If there is any credible evidence that will support the jury's verdict, the verdict must be affirmed. ***Id.*** We review a jury's verdict with great deference and indulge in every presumption in support of the verdict. ***Id.***

[3] The jury made other findings not at issue on this appeal.

¶6 John Johnson testified as an expert for Adams. He was a consulting engineer and University of Wisconsin emeritus professor specializing in material science as well as structure design and failure. Johnson reviewed Chief's instruction manual for erecting the bins, examined the bin, and inspected Adams' jacking system, including the links used in the system.

¶7 Johnson testified that the bin did not have enough "wind rings" to support it during the erection process, and that if there would have been enough wind rings, the bin would have been unlikely to have buckled during erection. Johnson also testified that the bin's design was based on "Jansen's equation" which "when we're talking about certain types of silage … doesn't predict the behavior worth a darn." Johnson explained that Jansen's equation applies when there is grain in the bin, but not when the bin is empty. Johnson concluded, "I'm of the opinion that [Chief] simply pushed the envelope too far and they didn't do enough analysis or investigation to see what the effect of building such a large bin would be." Johnson's testimony is credible evidence that supports the jury's findings that Chief's negligence caused the failure of the bin.

¶8 Chief also argues that the record contains no credible evidence to support the jury's finding that Adams was not negligent in erecting the bin. Again, we disagree.

¶9 Adams testified that at the time he worked on the bin, he had experience in erecting over one hundred grain bins made by various companies. La-Mon Klingaman of GDS testified that Adams followed the procedures in Chief's instruction manual. Ronald Nall, a civil engineer employed by Chief, and Klingaman both testified that the instruction manual stated that there should be one jack per sidewall sheet. Adams and Klingaman testified that Adams used one

jack per sheet, as the manual required, for a total of thirty jacks. In addition, Johnson testified that the links Adams used in his jacks during his first erection attempt were twice as strong as should have been necessary. He also testified that the larger links Adams used in his second attempt were about seven-and-one-half times stronger than necessary.

¶10 This testimony supports the jury's determination that Adams was not negligent. While it may be true, as Chief points out, that other evidence in the record could support a contrary conclusion, our role in reviewing a jury verdict is not to reweigh the evidence and substitute our judgment for that of the jury. We determine only whether the record contains any credible evidence that supports the jury's verdict, and the record here does.

¶11 Chief next argues that the evidence does not support the jury's finding that the contract between GDS and Adams was impossible to perform because Abell subsequently erected an identical bin successfully. Chief's argument misconstrues both our standard of review and the doctrine of impossibility in contract law. Abell's success with his bin does not necessarily mean that there is "no credible evidence" supporting the jury's determination.

¶12 A conclusion that a contract was impossible to perform does not require that the task to be performed is impossible under any hypothetical circumstances. An illustration from the RESTATEMENT OF CONTRACTS § 456 (1932),[4] cited with approval in ***Scherrer Constr. Co. v. Burlington Mem'l Hosp.***, 64 Wis. 2d 720, 734-35, 221 N.W.2d 855 (1974), is instructive:

[4] The analogous section in the more recent RESTATEMENT retains a somewhat similar example. *See* RESTATEMENT (SECOND) OF CONTRACTS § 266 illus. 10 (1979).

> A, a general contractor, contracts with B to build a bridge according to plans that have been prepared by C, a bridge engineer, employed by B. The determination of the sufficiency of the plans demands expert knowledge. They are so defective that a structure built according to them must inevitably fall before it is half finished. It does so when A has partially completed it. A is under no duty, since performance was from the outset impossible.

¶13 Not every negligently designed product fails in every instance. Abell testified that he used thirty-eight jacks to erect the bin. This was eight more jacks than Adams used and eight more jacks than the Chief instruction manual required. The jury found that Chief negligently designed or manufactured the bin. As we have already suggested, there was ample evidence from which the jury could infer that the bin was poorly designed. Given the applicable legal standard we conclude that this evidence, along with the fact that Abell deviated from Chief's own procedures, was enough for the jury to conclude that Adams' contract with GDS was impossible to perform.

¶14 Chief's next argument is that the evidence does not support the jury's award of $42,694.20 to Adams for damage to his jacks. Chief makes a number of assertions as to why this amount is not correct, but we are not convinced that any of these arguments are pertinent to our standard of review. The question before us is limited to whether any credible evidence supports the jury's finding that $42,694.20 was a reasonable and fair amount of damages for Adams' jacks. Adams testified that all thirty of his jacks were destroyed and that it was his understanding that it would cost about $1,420 to replace each of them. Thirty jacks times $1,420 equals $42,600. Adams testimony was credible evidence that supports the jury's finding on damages.

¶15 Chief's final argument with regard to the verdict is that the entire verdict must be set aside because it is perverse. "A verdict is perverse when a jury

clearly refuses to follow the instruction of the trial court on a point of law, or where the verdict reflects highly emotional, inflammatory or immaterial considerations, or an obvious prejudgment with no attempt to be fair." ***Frayer v. Lovell***, 190 Wis. 2d 794, 811-12, 529 N.W.2d 236 (Ct. App. 1995). Chief does not explain how the jury refused to follow the law or engaged in obvious prejudgment, nor does Chief identify any emotional, inflammatory, or immaterial considerations on which the jury relied. Instead, Chief reiterates its argument that the jury's verdict is not supported by credible evidence, an assertion we have rejected.

B. Trial Court's Evidentiary Rulings

¶16 Chief next argues that the trial court erroneously exercised its discretion in several evidentiary decisions. We review a challenge to the admissibility of evidence deferentially under the erroneous exercise of discretion standard. ***State v. Peters***, 192 Wis. 2d 674, 685, 534 N.W.2d 867 (Ct. App. 1995). If we can discern a reasonable basis for the trial court's evidentiary decision, then we uphold that decision as a proper exercise of discretion. ***State v. Huntington***, 216 Wis. 2d 671, 681, 575 N.W.2d 268 (1998).

1. Expert Testimony

¶17 Chief argues that the trial court erred in excluding from evidence certain expert opinion testimony of each of three witnesses, one of whom was Abell. The other two witnesses, also called by Chief, were Ray Bucklin, an agricultural engineer and University of Florida professor, and Allan Anderson, a manufacturer of grain bin jacking systems. We conclude that the court had a reasonable basis for excluding the opinion testimony in each instance.

¶18 With regard to Abell's testimony, the trial court allowed Abell to testify about the procedures he used to erect the bin. However, the trial court determined that Abell could not give an opinion as to whether his methods were "proper erection technique." At a hearing on motions in limine, the trial court also ruled that Abell could not testify that the links in Adams' jacks failed because they were overloaded. The trial court noted that Abell was not an engineer and then determined that he did not have the background to testify about the load it would take to break the links.

¶19 Chief argues that the trial court improperly based its rulings on Abell's lack of academic qualifications. As Chief correctly points out, the qualifications of an expert may depend not only on formal attributes such as professional licensure, but also on experience. *See* ***Brain v. Mann***, 129 Wis. 2d 447, 454, 385 N.W.2d 227 (Ct. App. 1986). Nevertheless, a witness may testify as an expert only within areas in which he or she is qualified, ***id.***, and the question of an expert witness's qualifications is a matter resting in the sound discretion of the trial court, ***State v. Donner***, 192 Wis. 2d 305, 317, 531 N.W.2d 369 (Ct. App. 1995).

¶20 We conclude that the trial court properly exercised its discretion in limiting Abell's testimony. While it may be true under ***Brain*** that a witness need not always hold a professional degree or other credential to testify as an expert, that does not mean that the trial court can never consider the lack of such credentials. Moreover, Abell's lack of credentials was not the court's only basis for its rulings on Abell's testimony. At the motion hearing, the trial court also

considered Abell's deposition responses.[5] These responses, along with Abell's lack of credentials, were reasonable bases for exclusion of the testimony.

¶21 With regard to Bucklin's testimony, Chief complains of two rulings by the trial court. First, at the motion hearing the trial court ruled that, while Bucklin could testify regarding the design of the bin, he could not testify as to erection procedures nor that the bin fell because of the way it was erected or supported. We do not agree that the trial court erred in this ruling. The trial court noted that at Bucklin's deposition, he admitted that he was not an expert in grain bin erection. The court determined, and Chief agreed, that erection was outside Bucklin's particular knowledge. Bucklin's lack of expertise in erection procedures was a reasonable basis for the trial court's exclusion of his testimony on that topic.

¶22 At trial, the court sustained Adams' objection to testimony by Bucklin in response to a question about the "design of [the] stiffeners … for purposes of erecting the bin." This is the second ruling of which Chief complains. Because this question to Bucklin went not just to design, but was specifically "for purposes of erecting the bin," we conclude that the trial court was simply ruling in accord with its previous decision at the motion hearing.

¶23 With regard to Anderson's testimony, Chief argues that, as with Abell, the trial court relied on Anderson's lack of formal engineering credentials in limiting Anderson's testimony. We have already explained that the lack of

[5] In ruling on Abell's testimony, the trial court quoted Abell's deposition, in which he stated that he did not know whether Adams' choice not to "anchor" his jacks would have contributed to the failure of the bin during the erection process if there had been wind or other factors causing the bin to move around on its base.

professional credentials is a proper consideration when the trial court is determining the range of an expert witness's expertise. Therefore, the trial court did not err in limiting Anderson's testimony.

¶24 In short, we conclude that the trial court properly exercised its discretion in excluding and limiting opinion testimony by Abell, Bucklin, and Anderson because in each instance, it had a reasonable basis for doing so.

2. Wind Damage Photographs

¶25 Chief next argues that the trial court erred in admitting photographs of wind damage that the bin sustained after Abell successfully erected it. Chief asserts that the photos were not relevant because there was testimony that the collapse of the bin from wind damage resulted from different types of forces than the forces associated with the bin's fall when Adams was attempting to erect it. Even assuming the testimony was clear on this point, we conclude that the trial court properly admitted the photographs because they served as foundation for testimony by Johnson. Johnson testified that he took the photographs, and that they showed how the bin had buckled. Johnson then used the photographs to illustrate the buckling phenomenon that he opined led to the damage of Adams' jacks and to explain why the bin buckled when Adams was attempting to erect it.

¶26 Chief argues that even if the photographs were otherwise admissible, the trial court should have excluded them because their probative value was substantially outweighed by a risk of unfair prejudice, confusion of the issues, or misleading of the jury. We cannot agree. In a more sensitive context—a homicide trial where the admissibility of photographs of the victim's body was at issue—we explained that we would uphold the trial court's decision to admit the photographs "unless it is wholly unreasonable or the only purpose of the photographs is to

inflame and prejudice the jury." ***State v. Thompson***, 142 Wis. 2d 821, 841, 419 N.W.2d 564 (Ct. App. 1987). Chief does not specifically explain how the wind damage photographs were particularly confusing, prejudicial, or inflammatory. We conclude that the risk of confusion or prejudice was so minimal that the trial court did not err in allowing the photographs into evidence.

C. Discretionary Reversal

¶27 Chief next argues that we should reverse the judgments against it using our discretionary power to do so under WIS. STAT. § 752.35 (1999-2000).[6] Under § 752.35, we may reverse a trial court's judgment if we conclude that (1) the real controversy has not been fully tried or (2) it is probable that justice has miscarried. ***State v. Shea***, 221 Wis. 2d 418, 433, 585 N.W.2d 662 (Ct. App. 1998). Chief argues that the real controversy has not been fully tried because of erroneous evidentiary rulings. However, we have concluded that those rulings were not erroneous. In addition, we note that many witnesses gave testimony in support of both Chief's and Adams' positions. The jury trial spanned over five days and produced a transcript in excess of one thousand pages. We disagree with

[6] WISCONSIN STAT. § 752.35 states:

> **Discretionary reversal.** In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.

Chief's assertion that the real controversy has not been fully tried, and therefore we decline to reverse under § 752.35.

D. Costs

¶28 Chief next argues that trial court erred in allowing Adams to tax costs, including $100 in statutory attorney fees, for each of Adams' two attorneys. Adams used one attorney for his defense and another attorney for his third-party claim.[7]

¶29 We will not overturn a trial court's award of costs unless the court erroneously exercised its discretion. ***Grube v. Daun***, 213 Wis. 2d 533, 553-54, 570 N.W.2d 851 (1997). WISCONSIN STAT. ch. 814 (1997-98)[8] sets forth a variety of litigation scenarios under which the trial court may award costs. WIS. STAT. §§ 814.01, 814.03, and 814.035; ***Kleinke v. Farmers Coop. Supply & Shipping***, 202 Wis. 2d 138, 149 n.4, 549 N.W.2d 714 (1996). In addition, an omnibus costs provision embodied in WIS. STAT. § 814.036 states, "[i]f a situation arises in which the allowance of costs is not covered by ss. 814.01 to 814.035, the allowance shall be in the discretion of the court."

¶30 Chief cites no case law in support of its position that the trial court improperly awarded Adams costs for two attorneys, whereas Adams cites ***Gospodar v. Milwaukee Auto Ins. Co.***, 249 Wis. 332, 339, 24 N.W.2d 676 (1946),

[7] The trial court determined that Adams could tax costs for two attorneys because he may have had different interests in his individual capacity and in his business capacity. Chief asserts that Adams' business was a sole proprietorship and that costs for two attorneys were therefore improper. We need not resolve this question because we affirm the trial court's decision on other grounds.

[8] All subsequent references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

for the proposition that when more than one claim is joined, costs should be allowed as if each claim were brought separately. To be exact, the supreme court in ***Gospodar*** explained:

> In ***Hansberry v. Dunn***, this court held that where several causes of action were consolidated for trial each plaintiff could recover costs, and in ***DeKeyser v. Milwaukee Automobile Ins. Co.***, it was held that where separate causes of action were consolidated for trial and a defendant was successful it could recover costs from each plaintiff. The only difference between the foregoing cases and this case is that in the foregoing cases separate causes of action were commenced by each plaintiff and were consolidated for trial, while in this case all plaintiffs joined in the same complaint. It is the rule at this time that if each of the plaintiffs had commenced a separate action they could have recovered the costs which they have now taxed. To hold that they cannot do so by joining in the same complaint would necessarily mean that in the future separate causes of action would be commenced, which as the trial court has well said would be "in direct conflict with modern court procedure to reduce multiplicity of suits …."

Id. (citations omitted). ***Gospodar*** and subsequent cases citing it with approval have not addressed facts identical to those here.[9] Nevertheless, Adams' used each of his attorneys for a separate claim. We conclude that the trial court properly exercised its discretion when it allowed Adams to tax costs for both attorneys.

[9] *See, e.g.*, ***B.F. Goodrich Co. v. Wisconsin Auto Sales, Inc.***, 256 Wis. 11, 17-18, 39 N.W.2d 678 (1949) (holding that defendant was entitled to recover costs against each of multiple plaintiffs although one firm represented all plaintiffs); ***Zintek v. Perchik***, 163 Wis. 2d 439, 470-72, 471 N.W.2d 522 (Ct. App. 1991) (affirming award of costs to each of six joined plaintiffs), *overruled on other grounds*, ***Steinberg v. Jensen***, 194 Wis. 2d 439, 462, 464, 534 N.W.2d 361 (1995); *cf.* ***Gorton v. Hostak, Henzl & Bichler, S.C.***, 217 Wis. 2d 493, 513-14, 577 N.W.2d 617 (1998) (holding that multiple plaintiffs were not entitled to multiple costs where they joined in only one cause of action).

¶31 Chief also argues that Adams' expenses for several depositions were not taxable to Chief because those depositions were not necessary to the part of Adams' case involving Chief. We disagree.

¶32 Deposition expenses are specifically enumerated under "disbursements" as allowable costs pursuant to WIS. STAT. § 814.04(2). Chief again cites no case law in support of its position, although we have noted that before a disbursement may be taxed, the successful party must show that it was an expenditure "relating to" the losing party's case. ***Gorman v. Wausau Ins. Cos.***, 175 Wis. 2d 320, 328, 499 N.W.2d 245 (Ct. App. 1993).

¶33 In an affidavit, Adams' defense counsel averred that the depositions were related to Adams' case against Chief because there was a reasonable likelihood at the time of the depositions that the deponents would "have knowledge of, or information leading to witnesses with knowledge of" underlying facts in the Adams-Chief case. In correspondence to the trial court, Chief objected that the depositions were taken only for insurance coverage issues. However, Chief has not specifically refuted Adams' counsel's sworn statement that they were also reasonably likely to assist Adams in his defense against Chief. Therefore, we conclude that the trial court properly allowed costs to be taxed against Chief for the depositions.

By the Court.—Judgments affirmed.

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