COURT OF APPEALS
DECISION
DATED AND FILED

July 13, 2017

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. 2016AP1140 **Cir. Ct. No. 2014CV2226**

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

DR. CARA WESTMARK,

PLAINTIFF-RESPONDENT,

V.

GARDENS AT SWAN CREEK CONDOMINIUM OWNERS ASSOCIATION, INC.,

DEFENDANT-APPELLANT,

MATT OLESEN,

DEFENDANT.

APPEAL from a judgment of the circuit court for Dane County: JAMES R. TROUPIS, Judge. *Affirmed*.

Before Kloppenburg, P.J., Lundsten and Sherman, JJ.

¶1 PER CURIAM. Gardens at Swan Creek Condominium Owners Association, Inc., appeals a judgment entered on a jury verdict in favor of Cara Westmark, a condominium unit owner. The Association argues that the circuit court erroneously admitted expert testimony from Westmark's real estate appraiser contrary to the ***Daubert*** reliability standard codified in WIS. STAT. § 907.02.[1] We reject this argument. The Association also argues that the court provided the jury with an erroneous damages instruction. However, by failing to lodge a particularized objection to the damages instruction, the Association "waive[d] ... any error in the proposed instructions" pursuant to WIS. STAT. § 805.13(3) and, on that basis, we decline to address whether the instruction was erroneous. We affirm.

Background

¶2 This dispute arises out of water damage to Westmark's condominium unit and the Association's alleged failure to adequately investigate and repair the source or sources of the damage. Westmark sued the Association alleging, among other claims, that the Association breached its contractual duties by failing to maintain and repair certain common elements, such as roofing and other exterior surfaces, resulting in severe and ongoing water damage to her unit.

[1] *See* ***Daubert v. Merrell Dow Pharm., Inc.***, 509 U.S. 579 (1993). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

¶3 According to Westmark, her unit and associated common elements required $42,152 in repairs to restore her unit to its pre-damaged condition. Westmark claimed that the Association failed to make most of these needed repairs.

¶4 Westmark retained a real estate appraiser who formed opinions as to the value of Westmark's unit with and without the $42,152 in repairs to the unit and common elements. Specifically, the appraiser valued Westmark's unit with the repairs at $178,500 and without the repairs at approximately $77,000, a difference of $101,500.

¶5 To derive the $77,000-without-repairs valuation, the appraiser relied on a formula provided by a local real estate investor who was in the business of purchasing distressed properties. The formula involved starting with the value of the property in a fully repaired condition, applying discount factors, and, finally, subtracting repair costs.

¶6 The Association argued that the appraiser's $77,000-without-repairs valuation should be excluded because it failed to meet the ***Daubert*** reliability standard for expert testimony codified in WIS. STAT. § 907.02. The circuit court disagreed, and permitted the appraiser to provide this opinion in testimony at trial.

¶7 During the jury instructions conference, the parties disputed how the jury should be instructed on damages. We address below the content of the instruction that the court adopted. The jury returned a verdict finding that Westmark suffered $100,000 in damages, apparently an approximation of the $101,500 lost value that Westmark's appraiser advanced.

Discussion

A. Appraiser's Expert Testimony

¶8 We turn first to the Association's argument that the circuit court erred in admitting Westmark's appraiser's testimony contrary to the ***Daubert*** reliability standard codified in WIS. STAT. § 907.02.[2] As we understand it, the Association's challenge to this testimony is limited to the appraiser's $77,000-without-repairs valuation that was based on the investor's formula.

¶9 "Appellate courts review a circuit court's decision to admit or exclude expert testimony under an erroneous exercise of discretion standard." ***State v. Giese***, 2014 WI App 92, ¶16, 356 Wis. 2d 796, 854 N.W.2d 687. "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." ***Id.*** For the reasons that follow, we reject the Association's argument that the circuit court erroneously exercised its discretion.

¶10 We first summarize the ***Daubert*** standard. We then address the Association's more specific arguments.

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[2] WISCONSIN STAT. § 907.02 provides, in pertinent part:

> **(1)** If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case.

¶11 "Under the ***Daubert*** standard, the circuit court serves as a 'gate-keeper' to 'ensure that the expert's opinion is based on a reliable foundation and is relevant to the material issues.'" ***Bayer v. Dobbins***, 2016 WI App 65, ¶21, 371 Wis. 2d 428, 885 N.W.2d 173 (quoting ***Giese***, 356 Wis. 2d 796, ¶18). "When assessing reliability, '[t]he court is to focus on the principles and methodology the expert relies upon, not on the conclusion generated.'" ***Id.*** (quoting ***Giese***, 356 Wis. 2d 796, ¶18). The goal is "to prevent the jury from hearing conjecture dressed up in the guise of expert opinion." ***Giese***, 356 Wis. 2d 796, ¶19.

¶12 In ***Kumho Tire Co. v. Carmichael***, 526 U.S. 137 (1999), the United States Supreme Court made clear that ***Daubert*** applies not just to "scientific" testimony, but to all expert testimony. *See* ***Kumho Tire***, 526 U.S. at 147. At the same time, the Court also reiterated that the ***Daubert*** standard is "flexible." *See* ***Kumho Tire***, 526 U.S. at 141 (citing ***Daubert v. Merrell Dow Pharm., Inc.***, 509 U.S. 579, 594 (1993) ("The inquiry envisioned by Rule 702 is, we emphasize, a flexible one.")).

¶13 In a proper case, expert testimony may be deemed reliable based on the expert's "personal knowledge or experience," without reference to the factors listed in ***Daubert***.[3] *See* ***Kumho Tire***, 526 U.S. at 150. The Court in ***Kumho Tire*** explained more fully as follows:

[3] The ***Daubert*** factors include:

> —Whether a "theory or technique ... can be (and has been) tested";
>
> —Whether it "has been subjected to peer review and publication";

(continued)

> In other cases, the relevant reliability concerns may focus upon personal knowledge or experience. As the Solicitor General points out, there are many different kinds of experts, and many different kinds of expertise. Our emphasis on the word "may" [in ***Daubert***, in discussing factors a court may consider] thus reflects ***Daubert***'s description of the Rule 702 inquiry as "a flexible one." ***Daubert*** makes clear that the factors it mentions do *not* constitute a "definitive checklist or test." And ***Daubert*** adds that the gatekeeping inquiry must be "'tied to the facts'" of a particular "case." We agree with the Solicitor General that "[t]he factors identified in ***Daubert*** may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of his testimony." The conclusion, in our view, is that we can neither rule out, nor rule in, for all cases and for all time the applicability of the factors mentioned in ***Daubert***, nor can we now do so for subsets of cases categorized by category of expert or by kind of evidence. Too much depends upon the particular circumstances of the particular case at issue.

Id. (citations omitted). ***Kumho Tire*** explains that, boiled down, the question is whether the expert "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *See* ***id.*** at 152.

¶14 In effect, ***Kumho Tire*** is the seminal case addressing the sort of non-scientific expert witness testimony at issue here, and the Association might have focused more attention on it. However, so far as we can tell, it matters not. It seems to us that with or without a more developed and express ***Kumho Tire***

> —Whether, in respect to a particular technique, there is a high "known or potential rate of error" and whether there are "standards controlling the technique's operation"; and
>
> —Whether the theory or technique enjoys "'general acceptance'" within a "'relevant scientific community.'"

Kumho Tire Co. v. Carmichael, 526 U.S. 137, 149-50 (1999) (quoting ***Daubert***, 509 U.S. at 593-94).

argument, the Association has made the strongest arguments available in light of ***Kumho Tire***. Specifically, the Association argues that the appraiser's use of the investor's formula to arrive at the $77,000-without-repairs valuation lacked demonstrable reliability because the appraiser admitted that he had not encountered or used the formula before, and further admitted that he did not know if the investor used the formula for condominium properties.

¶15 Were these the only pertinent facts, we would likely agree with the Association that admitting the $77,000-without-repairs testimony was not reasonable. However, the Association largely ignores other facts supporting the circuit court's conclusion that the appraiser's use of the formula was sufficiently reliable. The appraiser explained that, given the degree of damage to Westmark's unit and the extent of needed repairs, the only type of buyer likely to purchase the unit was an "investor-purchaser" who "flips" property, can pay in cash, and does not need to obtain conventional financing. Therefore, the appraiser explained, he could not value Westmark's property in its unrepaired state using comparable sales or other, alternative methods. The appraiser believed that the most reliable method to determine value under the circumstances was to rely on the formula used by the investor, who knew the local market and purchased local distressed properties. The appraiser stated that, in his professional opinion, relying on the formula was reasonable, and he could think of no more reliable method. The appraiser further stated that, although he had not used the formula before and did not know whether the investor had applied it to condominiums before, the appraiser would consider using the formula again now that he was aware of it.

¶16 Further, the appraiser indicated that appraisers routinely rely, in part, on other types of experts, including experts who estimate the amount of damage to property, just as the appraiser did here in relying, in part, on the $42,152 repair

costs estimate provided by another witness. To this we add that, in applying the formula, the appraiser relied, in part, on his own independent opinion as to the value of Westmark's unit with all repairs completed.

¶17 We conclude that these facts are enough to uphold the circuit court's exercise of discretion, especially given ***Kumho Tire***'s statement that trial-level courts may find reliability based on an expert's personal knowledge or experience. *See* ***Kumho Tire***, 526 U.S. at 150; *see also* ***Seifert v. Balink***, 2017 WI 2, ¶78, 372 Wis. 2d 525, 888 N.W.2d 816 (lead op.) ("When evaluating specialized or technical expert opinion testimony, 'the relevant reliability concerns may focus upon personal knowledge or experience.' ***Kumho Tire***, 526 U.S. at 150.").

¶18 Relying on ***Dura Automotive Systems of Indiana, Inc. v. CTS Corp.***, 285 F.3d 609 (7th Cir. 2002), the Association argues that the appraiser's reliance on the formula was impermissible "parroting" of another expert's opinion. *See* ***id.*** at 613. Our review of the record tells us that this is a new argument that is raised for the first time on appeal. We deem the argument forfeited and, on that basis, we reject it. *See* ***Schill v. Wisconsin Rapids Sch. Dist.***, 2010 WI 86, ¶45 & n.21, 327 Wis. 2d 572, 786 N.W.2d 177 (explaining that issues not raised in the circuit court are forfeited, and supporting proposition that appellate courts generally do not address forfeited issues).

¶19 Moreover, we observe that, even if we ignored forfeiture with respect to the "parroting" argument, we would likely reject the argument. In particular, ***Dura***'s isolated reference to an example of "parroting" involving medical experts does not persuade us that there might be a "parroting" problem here. *See* ***Dura***, 285 F.3d at 613. As the Association acknowledges, ***Dura*** states that "it is common in technical fields for an expert to base an opinion in part on

what a different expert believes on the basis of expert knowledge not possessed by the first expert." *See* ***id.***

¶20 Other arguments and assertions that the Association makes go to the weight of the appraiser's expert testimony, not to whether the circuit court reasonably admitted that testimony in the first place. For example, the Association complains that the appraiser's $77,000-without-repairs valuation "completely ignored the fact that Westmark accepted an offer from an uninterested third party … to purchase the Unit for $148,000" in its unrepaired state. However, this offer fell through, and the Association points to nothing showing that reliable appraisal practices require an appraiser to consider an unconsummated deal.

B. Damages Instruction

¶21 We turn to the Association's argument that the circuit court provided the jury with an erroneous damages instruction. For the reasons that follow, we conclude that the Association failed to preserve its challenge to the instruction with a particularized objection and, therefore, we decline to address whether the instruction was erroneous.

¶22 WISCONSIN STAT. § 805.13(3) provides that, during the instructions conference, "[c]ounsel may object to the proposed instructions …, *stating the grounds for objection with particularity on the record*" (emphasis added). "Failure to object at the conference constitutes a waiver of any error in the proposed instructions ...." ***Id.*** Thus, "'in the absence of a specific objection which brings into focus the nature of the alleged error, a party has not preserved its objections for review.'" ***State v. Gomaz***, 141 Wis. 2d 302, 318, 414 N.W.2d 626 (1987) (quoting ***Air Wisconsin, Inc. v. North Cent. Airlines, Inc.***, 98 Wis. 2d 301, 311, 296 N.W.2d 749 (1980)).

¶23 During the instructions conference, Westmark requested that the circuit court modify the pattern jury instruction on property damages in two ways to reflect Westmark's two different theories supporting her requested damages. We need not spend time on the details of these damages theories. It is enough to know that, under either theory, Westmark's minimum property damages equaled her condominium unit's lost value, rather than the cost of repairs. The Association opposed these modifications. The circuit court granted one of the requested modifications and rejected the other. As noted, the jury awarded damages nearly equal to Westmark's claimed lost value.

¶24 On appeal, the Association argues that the modified instruction was inconsistent with settled property damages law. However, when we look to the Association's objection and arguments during the instructions conference, we see that the Association's arguments were directed at the requested modification *rejected* by the circuit court. We see no particularized objection or argument as to the requested modification that the court *adopted*. The Association's challenge to the modified instruction, accordingly, was not preserved.

Conclusion

¶25 For the reasons above, we affirm the circuit court's judgment in favor of Westmark.

By the Court.—Judgment affirmed.

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