



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215

P.O. BOX 1688

MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880

TTY: (800) 947-3529

Facsimile (608) 267-0640

Web Site: www.wicourts.gov

DISTRICT II

February 26, 2020

To:

Hon. William Domina
Circuit Court Judge
Waukesha County Courthouse
521 W. Riverview, Rm. JC 103
Waukesha, WI 53188-3636

Gina Colletti
Clerk of Circuit Court
Waukesha County Courthouse
515 W. Moreland Blvd.
Waukesha, WI 53188

Jesse Jonas Bair
Perkins Coie, LLP
33 E. Main St., Ste. 201
Madison, WI 53703

Paul D. Bauer
Quarles & Brady LLP
411 E. Wisconsin Ave., Ste. 2400
Milwaukee, WI 53202

Leonard A. Gail
Matthew J. Reedy
Constance Grieves
Massy & Gail, LLP
50 E. Washington St., Ste. 400
Chicago, IL 60602

Christopher Wilson
Perkins Coie, LLP
131 S. Dearborn St., Ste. 1700
Chicago, IL 60603

You are hereby notified that the Court has entered the following opinion and order:

2019AP122

Severstal Columbus Holdings, LLC v. Willis of Wisconsin, Inc.
(L.C. #2015CV1629)

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

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Severstal Columbus Holdings, LLC, appeals from a judgment dismissing its claims against and awarding costs in favor of Willis of Wisconsin, Inc. Based upon our review of the briefs and

record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).¹ We affirm.

In 2004, Severstal, a Russian steel company, retained Willis as its actuary, to provide an annual estimate of the Other Post-Employment Benefits (OPEB) liabilities² of its Dearborn, Michigan subsidiary. When Severstal decided to sell the Dearborn plant, it provided Willis' OPEB estimate to interested buyers. In 2014, Severstal entered into an agreement to sell Dearborn to AK Steel Corporation for \$700 million. In reviewing Willis' OPEB estimates, AK Steel's actuary came up with a higher number. Willis soon realized that due to a single keystroke error in 2004, its software had been reading an incorrect column and underestimating Dearborn's OPEB liabilities. Willis' 2013 estimate had understated Dearborn's OPEB liability by \$19.2 million. Willis immediately shared this discovery with Severstal and with AK Steel's actuary. To address the increased liability of the Dearborn plant, Severstal agreed to reduce the purchase price by \$6.5 million.

Severstal brought a negligent misrepresentation claim against Willis, asserting that Willis had breached the standard of care for actuarial services. Willis' theory of defense was that its conduct did not fall below the expectations of reasonable actuaries under the same or similar circumstances. In support, Willis presented the expert testimony of Larry Sher, a former member of the Actuarial Standards Board, the body responsible for promulgating the rules and regulations applicable to all actuaries in the United States. Sher testified about his review of the records in the case and his interviews of the Willis personnel involved in the Dearborn OPEB work, and

¹ All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

² There are anticipated future expenses for retirees pursuant to an employee benefit plan.

concluded that in his expert opinion, Willis' conduct was reasonable and satisfied the applicable duty of care. Severstal's expert, Dr. Ethan Kra, also well-credentialed, testified that various quality-control procedures were part of the standard of care and should have been used by Willis. Kra concluded that Willis breached its duty of care.

The jury was instructed that Willis was negligent if it failed to "use the degree of care, skill, and judgment which reasonably prudent actuaries practicing in this state would exercise under like or similar circumstances" and that it "must attempt to determine [the negligence standard] from the expert testimony" because the standard of care for actuaries is "not a matter within the common knowledge of lay persons." After a five-day trial, the jury returned a verdict finding Willis not negligent. Severstal filed post-verdict motions seeking to change the jury's answer on the question of negligence, *see* WIS. STAT. § 805.14(1), or, in the alternative, requesting a new trial, *see* WIS. STAT. § 805.15(1). After briefing, the circuit court denied Severstal's motions.

On appeal, Severstal maintains that it is entitled to a new trial under WIS. STAT. § 805.15(1) because the jury's verdict is "contrary to the great weight and clear preponderance of the evidence." *Krolkowski v. Chicago & Northwestern Transp. Co.*, 89 Wis. 2d 573, 580, 278 N.W.2d 865 (1979). In assessing a new trial motion, the circuit court "may not simply substitute its judgment for that of the jury nor order a new trial on the basis that another jury might reach another result." *Burch v. American Family Mut. Inc. Co.*, 198 Wis. 2d 465, 477, 543 N.W.2d 277 (1996). Our review of the decision to deny a new trial is deferential "because of the [circuit] court's opportunity to observe the trial and evaluate the evidence." *Krolkowski*, 89 Wis. 2d at 581 (citation omitted).

The circuit court properly exercised its discretion in denying Severstal's motion for a new trial. As the court explained, the jury was specifically instructed to determine the standard of care from the experts' testimony and "the jury apparently accepted Mr. Larry Sher's testimony over Severstal's expert, Ethan Kra." The experts in this heavily-litigated case were vigorously cross-examined and the jury was properly instructed. "In cases where there is conflicting expert testimony, it is up to the jury, as the trier of fact, to determine weight and credibility." *Hoffman v. Wisconsin Elec. Power Co.*, 2003 WI 64, ¶16, 262 Wis. 2d 264, 664 N.W.2d 55. Given the circuit court's opportunity to observe the trial and evaluate the evidence, there is no basis for disturbing the verdict.

Other ample evidence supports Sher's conclusion and the jury's verdict. Whereas Kra testified about the necessity of various quality-control procedures, Sher explained that the governing Actuarial Standards do not require the check-lists, peer reviews, or test-lives deemed by Kra to be components of the standard of care. Though Kra suggested that Willis needed multiple additional employees entering and checking its work, Sher opined that, given the small size of Willis, this was neither practical nor required. Sher opined that it was reasonable for Willis' actuary to enter the data herself and have her supervisor review the final product. Sher considered that Willis used a highly-recognized software program, that the actuary who made the keystroke mistake had extensive relevant experience prior to working at Severstal, and that the actuary's supervisor had health insurance experience that made him well-suited to review the actuary's report for reasonableness. Sher testified that this collaborative approach meets the industry standard for small firms like Willis. Given the facts relied on by Sher and his considerable experience in the actuarial field, it cannot be said the jury's verdict is against the great weight and clear preponderance of the evidence.

In light of the above decision, we necessarily affirm the denial of Severstal's WIS. STAT. § 805.14 motion, to which we apply a more stringent standard. Simply put, the circuit court cannot change a jury's verdict under § 805.14 if it is supported by *any* credible evidence (or, stated differently, unless there is *no* credible supporting evidence). *See* § 805.14(1); *Nelson v. Travelers Ins. Co.*, 80 Wis. 2d 272, 282-83, 259 N.W.2d 48 (1977); *see also Sievert v. American Family Mut. Ins. Co.*, 180 Wis. 2d 426, 433-34, 509 N.W.2d 75 (Ct. App. 1993), *aff'd*, 190 Wis. 2d 623, 528 N.W.2d 413 (1995) (recognizing that the § 805.14 standard is more stringent than the standard for granting a new trial). To affirm a verdict as not against the great weight and clear preponderance of the evidence presumes that the verdict is supported by at least some credible evidence sufficient to defeat a challenge under § 805.14. Therefore,

IT IS ORDERED that the judgment is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals