COURT OF APPEALS
DECISION
DATED AND FILED

January 31, 2007

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2005AP3190 **Cir. Ct. No. 2003CV389**

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

ACCUWEB, INC.,

PLAINTIFF-APPELLANT,

RAYMOND BUISKER,

PLAINTIFF,

V.

FOLEY & LARDNER, HARRY C. ENGSTROM, QUARLES & BRADY LLP AND NICHOLAS SEAY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Dane County: JOHN C. ALBERT, Judge. *Affirmed*.

Before Dykman, Deininger and Higginbotham, JJ.

¶1 HIGGINBOTHAM, J. AccuWeb, Inc. appeals a summary judgment entered in favor of Foley & Lardner and one of its attorneys, Harry C. Engstrom; and Quarles & Brady, LLP and one of its attorneys, Nicholas Seay (collectively, "the defendant attorneys"). The issues on appeal are whether AccuWeb provided sufficient evidence that raises a genuine issue of a material fact that the alleged failure of the defendant attorneys to prevent the premature expiration of AccuWeb's 5,072,414 Patent ("the 414 patent") was a substantial factor in causing actionable damages to AccuWeb, and, if so, whether AccuWeb has established with reasonable certainty the amount of those damages. AccuWeb alleges that the defendant attorneys negligently permitted the premature expiration of the 414 patent by failing to remind AccuWeb in a timely manner of its responsibility to pay the required patent maintenance fees. AccuWeb sued the defendant attorneys on the theories of legal malpractice and breach of contract.[1]

¶2 We conclude that AccuWeb has not presented sufficient evidence that raises a genuine issue of a material fact that the defendant attorneys' alleged negligence was a substantial factor in causing actionable damages to AccuWeb. We also conclude that AccuWeb has not established a prima facie case with reasonable certainty that it suffered actual damages caused by the lapse of the 414 patent. We therefore affirm the circuit court's summary judgment against AccuWeb.

[1] AccuWeb does not appeal the dismissal of its breach of contract claims.

BACKGROUND

¶3 AccuWeb is a manufacturer of web guide control systems, which assist the movement of materials in conversion operations performed by companies such as 3M and Kodak involving applications such as plastic film, paper and foil converting. One of the technologies AccuWeb developed and patented is a compensated detection system used in the conversion industry to maintain web guide points. The system detects and eliminates sensor vulnerability to errors caused by environmental variables like humidity and ambient temperature by automatically compensating for changes caused by such variables. We will refer to the device, known as the "Ultrasonic Web Edge Detection Method and Apparatus," as "the invention."

¶4 In 1989, AccuWeb and its president Raymond Buisker retained Harry Engstrom as AccuWeb's patent attorney. Shortly thereafter, Engstrom notified AccuWeb of a conflict of interest regarding the 414 patent AccuWeb was seeking for the invention. AccuWeb consequently retained Nicholas Seay of the Quarles & Brady law firm to complete the 414 patent application. In 1990, Engstrom joined the law firm of Foley & Lardner. AccuWeb continued to keep Engstrom on retainer as its patent attorney. However, AccuWeb continued to use the services of Seay and Quarles & Brady to obtain two patents related to its invention, including the 414 patent at issue in this appeal. The 414 patent was issued in 1991.

¶5 To prevent the 414 patent from expiring, AccuWeb was required to pay a maintenance fee by June 10, 1995; a grace period extended the date to December 10, 1995. The maintenance fee was not timely paid, causing the 414 patent to expire. Had the 414 patent not lapsed, it would have naturally expired in

2008. Four years after the 414 patent's premature expiration, Buisker received a letter from a paralegal at Quarles & Brady notifying him of the maintenance fee deadline. Engstrom subsequently confirmed that the maintenance fee had not been paid and that the 414 patent had expired.

¶6 AccuWeb and Buisker sued the defendant attorneys alleging legal malpractice and breach of contract related to the lapse of the 414 patent. Both law firms moved for partial summary judgment: the Foley & Lardner firm moved to dismiss Buisker's personal claim and AccuWeb's economic loss and business valuation claims; Quarles & Brady moved to dismiss Buisker's claim and AccuWeb's diminished business valuation claim. The trial court granted partial summary judgment to the defendant attorneys. The court dismissed the claims made by Buisker on the ground that he lacked standing to sue; the court also dismissed AccuWeb's diminished business valuation claim because AccuWeb failed to provide sufficient evidence demonstrating a genuine issue of a material fact that the defendant attorneys' alleged negligence caused AccuWeb damages and because AccuWeb failed to establish to a degree of reasonable certainty its alleged damages.

¶7 AccuWeb moved for reconsideration; the trial court denied the motion. The parties subsequently entered into a stipulation and release agreement, in which AccuWeb agreed to release all claims against the defendant attorneys other than the diminution in value business claim. On November 23, 2005, the trial court issued a written order denying AccuWeb's motion for reconsideration and entered final judgment dismissing the case. AccuWeb appeals.

DISCUSSION

Standard of Review

¶8 We review summary judgment de novo, applying the same methodology as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987). We first determine whether the complaint states a claim. ***Id.*** at 317. We then determine whether there is a material factual dispute and whether the moving party is entitled to judgment as a matter of law. *See* WIS. STAT. § 802.08(2); ***Germanotta v. National Indem. Co.***, 119 Wis. 2d 293, 296, 349 N.W.2d 733 (Ct. App 1984). We view the facts, and the reasonable inferences drawn from those facts, contained in the moving party's supporting papers in the light most favorable to the party opposing the motion. *See* ***Grams v. Boss***, 97 Wis. 2d 332, 339, 294 N.W.2d 473 (1980).

Analysis

¶9 The issues are whether AccuWeb has provided sufficient evidence to establish that the expiration of the 414 patent caused actionable damages, and, if so, whether AccuWeb has established both the existence and amount of those damages to a reasonable degree of certainty. AccuWeb contends that the lapse of the 414 patent caused it to suffer damages in three ways: (1) the loss of a potential sale of AccuWeb to one of its largest competitors, Fi-Tech; (2) the loss of the fair market value of the 414 patent itself; and (3) the diminution in the future resale value of its business.[2] We address each argument in turn.

[2] AccuWeb also argues that the trial court should not have weighed the evidence. Because our review is de novo, we do not address this argument.

A. Actionable Damages from Loss of Sale to Fi-Tech: Causation of Injury

¶10 AccuWeb argues that the defendant attorneys are liable for damages sustained as a result of their alleged negligence. AccuWeb alleges that the defendant attorneys were negligent in allowing the 414 patent to lapse, thereby causing AccuWeb to suffer actionable damages in two respects: AccuWeb lost the opportunity to sell its business at the asking price; and it has lost a valuable right in the 414 patent itself.[3] We conclude, for the reasons that follow, that AccuWeb has failed to offer any evidence that raises a genuine issue of a material fact that the defendant attorneys' negligence was a substantial factor in causing Fi-Tech to withdraw its original offer to purchase AccuWeb.

¶11 A plaintiff must prove four elements to succeed in a claim for legal malpractice: (1) the existence of a lawyer-client relationship; (2) the commission of negligent acts or omissions by the defendant attorney; (3) that the attorney's negligence caused the plaintiff to suffer an injury; and (4) the nature and the extent of the injury. ***Hicks v. Nunnery***, 2002 WI App 87, ¶33, 253 Wis. 2d 721, 643 N.W.2d 809 (citation omitted). We assume first for purposes of this discussion that the defendant attorneys' alleged failure to prevent the 414 patent's lapse constituted a breach of their common law and contractual duties. We therefore next examine whether AccuWeb has sufficiently established that the 414 patent's lapse was a substantial factor in AccuWeb's failure to sell its company to Fi-Tech.

[3] It is unclear what valuable right AccuWeb claims it has lost. AccuWeb seems to argue at one point that it has lost the right to exclude its competitors from exploiting the 414 patent technologies. It also appears to contend that it lost the commercial or fair market value of the 414 patent. Regardless of which right AccuWeb means to reference here, it does not affect the conclusions we reach in this opinion.

¶12 AccuWeb submitted affidavit and deposition testimony from Raymond Buisker that, during 1997 and 1998, AccuWeb engaged in negotiations with Fi-Tech, one of AccuWeb's largest competitors, to sell its web guide business. On July 30, 1998, Fi-Tech submitted a letter of intent to purchase AccuWeb for $9 million and the assumption of its accounts payable; the offer also allowed AccuWeb to retain its cash and accounts receivable, which would net a benefit of approximately $12.2 million. Pursuant to the offer, Fi-Tech deposited $100,000 as security, to be applied to the purchase price. After the due diligence period had expired, Fi-Tech lowered its offer to $5.5 million, which AccuWeb rejected. Consequently, Fi-Tech forfeited $85,000 of its $100,000 deposit.

¶13 Buisker testified that the only reason Fi-Tech gave for reducing its offer was "due to economic conditions." He further testified that he did not believe that was the real reason Fi-Tech lowered its offer. In his affidavit, Buisker similarly averred that he believed Fi-Tech's withdrawal of the first offer was actually due to finding out about the lapsed patent, rather than the "economic" concerns it mentioned. Buisker further averred that AccuWeb later decided not to pursue further potential sales of its company in part because it did not want to disclose to potential purchasers that the 414 patent was no longer protected. He testified that AccuWeb has not responded to the many letters it has received from people interested in buying the company.

¶14 We conclude that AccuWeb has failed to establish that the lapse of the 414 patent was a substantial factor in causing Fi-Tech to withdraw its original offer to purchase AccuWeb. The extent of AccuWeb's evidence regarding Fi-Tech's motives for withdrawing its letter of intent to purchase AccuWeb is limited to the subjective beliefs of Raymond Buisker and his son, Brian, who is AccuWeb's vice-president in charge of sales. The Buiskers' subjective beliefs of

Fi-Tech's motive for withdrawing its original offer to purchase is simply insufficient to establish that the defendant attorneys' alleged negligence was a substantial factor in causing the deal to fall through.

¶15 There is no dispute that the only reason Fi-Tech gave for reducing its offer to buy AccuWeb was "due to economic conditions." Buisker speculates when he says that he "belie[ved]" that Fi-Tech withdrew its first offer because it discovered that the 414 patent had lapsed. He offered no corroborating evidence supporting his "belief" other than his own testimony. Brian Buisker conceded that his opinion on why Fi-Tech withdrew its offer to purchase the business were merely "intuitive." Raymond Buisker testified that it was his "assumption" that economics were not the true reason for Fi-Tech's withdrawal because "I mean, everybody would" withdraw an offer to buy AccuWeb after finding out the 414 patent had lapsed, while conceding that the only reason Fi-Tech gave for reducing its offer was "due to economic conditions." Raymond also conceded that no one at Fi-Tech mentioned the 414 patent when it withdrew its original offer. In short, none of the evidence presented by either Raymond or Brian Buisker on why Fi-Tech withdrew its offer to purchase AccuWeb rests on anything but speculation.

¶16 In summary judgment, "the party asserting a claim on which it bears the burden of proof at trial [must] 'make a showing sufficient to establish the existence of [all] element[s] essential to that party's case.'" ***Transportation Ins. Co., Inc. v. Hunzinger Const. Co.***, 179 Wis. 2d 281, 292, 507 N.W.2d 136 (Ct. App. 1993). The Buiskers' lack of personal knowledge of why Fi-Tech withdrew its letter of intent would render their testimony inadmissible at trial and therefore is insufficient to establish a genuine issue of material fact. *See* WIS. STAT. § 802.08(3) ("Supporting and opposing affidavits shall be made on personal knowledge and shall set forth such evidentiary facts as would be admissible in

evidence [and shall] set forth specific facts [beyond mere allegation] showing that there is a genuine issue for trial.").

¶17 AccuWeb asserts that the Buiskers' beliefs regarding Fi-Tech's motive in withdrawing its original offer is sufficient evidence to raise a genuine issue of material fact on this aspect of AccuWeb's damages claim. AccuWeb argues that there were underlying reasons for their beliefs: "Raymond Buisker considered Fi-Tech's 'economic' explanation as 'hogwash' because AccuWeb was having a record year … and [his] thirty years' experience in the industry enables him to make valid judgments on these matters." Reliance on this statement is misplaced. Buisker's unsupported subjective opinions as to why Fi-Tech withdrew its original offer are inadmissible speculation. *See* WIS. STAT. § 802.08(3); ***Sadler v. Western Moulding Co.***, 6 Wis. 2d 278, 283, 94 N.W.2d 602 (1959) ("An affidavit on information and belief is not alone sufficient to create an issue of fact and thereby prevent a summary judgment."). There must be something more than unsupported subjective beliefs to survive summary judgment.

B. Fair Market Value of the 414 Patent

¶18 AccuWeb argues that the lapse of the 414 patent constitutes lost personal property, for which it is entitled to the "uncontroverted" "fair market value." In support of this proposition, AccuWeb relies on a passage from ***Boehm v. Wheeler***, where our supreme court said that "[t]he right to exclude others is a valuable right and the loss of it would be an injury…." ***Boehm v. Wheeler***, 65 Wis. 2d 668, 678, 223 N.W.2d 536 (1974), *overruled on different grounds*, ***Hansen v. A.H. Robins Co., Inc.***, 113 Wis. 2d 550, 560, 335 N.W.2d 578 (1983),

as recognized by ***Hennekens v. Hoerl***, 160 Wis. 2d 144, 154 n.8, 465 N.W.2d 812 (1991),[4] AccuWeb's reliance on ***Boehm*** is misplaced.

¶19 We do not disagree with the fundamental notion that the right of a patent owner is to "exclude others from making, using, offering for sale, or selling the invention throughout the United States." 35 U.S.C. § 154(a)(1). But ***Boehm*** does not stand for the proposition that the loss of a patent, standing alone, creates some value to the patent for which a plaintiff may recover damages. In other words, there is no inherent value to a patent. The value of a patent is derived from the particular invention it protects. As AccuWeb contends, a patent owner may exploit its virtues in a number of ways including, "[s]ale of the patent or of the entity that owns the patent, licensing for royalties, or maintaining the monopoly afforded by the patent …." However, AccuWeb's argument here is merely another version of its diminution of value argument, that the 414 patent's loss caused the market value of the business to diminish, stemming from the company's inability to protect its exclusive right to control the exploitation of the 414 patent.

¶20 AccuWeb has not presented any evidence supporting its view that it has suffered damages by the mere loss of the 414 patent.[5] It claims to have lost

[4] The Foley & Lardner firm contends that the "suit within a suit" theory of proving damages in a legal malpractice action applies to this legal malpractice action. The Quarles & Brady firm argues that the value of a patent is related to a right to bring an impingement of patent claim under the federal statutes. Because we dispose of this case on other grounds, we do not address these arguments.

[5] To the extent that AccuWeb relies on its failure to sell the business to Fi-Tech as the measure of damages for losing the 414 patent, we have concluded that the lapse of the 414 patent was not a substantial factor in causing Fi-Tech to withdraw its letter of intent to purchase AccuWeb. Thus, for the same reasons we rejected AccuWeb's argument that the lapsed patent was the reason for why Fi-Tech did not purchase the business, we reject this argument as well.

what it describes as the "uncontroverted" fair market value of the 414 patent, but does not explain what that fair market value is, or how it could be determined by a trier of fact. More fundamentally, AccuWeb has not by way of testimony or affidavit demonstrated it has suffered any damages simply because the 414 patent had lapsed.[6]

C. Expert Evaluation of AccuWeb's Diminished Value

¶21 AccuWeb argues that the premature expiration of the 414 patent diminished the fair market value of its business. It relies on a document prepared by its expert, Jay Goldfarb, called the Mesirow Report, as evidence of diminished value of its company resulting from the 414 patent's lapse. We conclude, for the reasons that follow, that AccuWeb has failed to prove by reasonably certain evidence its alleged diminution in value damages caused by the premature expiration of the 414 patent.

¶22 Damages must be proven with reasonable certainty. *See* ***Plywood Oshkosh, Inc. v. Van's Realty Constr., Inc.***, 80 Wis. 2d 26, 31, 257 N.W.2d 847 (1977). The supreme court in ***Plywood*** explained the reasonable certainty standard in proving damages this way:

> The claimant generally has the burden of proving by credible evidence to a reasonable certainty his damage, and the amount thereof must be established at least to a reasonable certainty. Compliance with the rule of reasonable certainty does not make it necessary for the claimant to prove his damages with mathematical accuracy. It is sufficient if they can be estimated by the trier of facts with a reasonable degree of certainty.

[6] AccuWeb does not make a claim for lost profits.

Id. (citations omitted). However, "damages should be proven by statements of facts rather than by mere conclusions of the witnesses, and a claimant's mere statement or assumption that he has been damaged to a certain extent without stating any facts on which the estimate is made is too uncertain." ***Id.*** at 31-32. Such facts are required because a trier of fact can not "'determine damages by speculation or guesswork.'" ***Pleasure Time, Inc. v. Kuss***, 78 Wis. 2d 373, 387, 254 N.W.2d 463 (1977) (citation omitted).

¶23 We begin this discussion by observing that the defendant attorneys do not dispute whether diminution in value can generally be an appropriate basis for calculating damages, and we do not decide that issue here. Rather, they argue that AccuWeb has failed to prove the assumptions that serve as the underlying premise for Goldfarb's conclusions rendered in the Mesirow Report. They also argue that the conclusions in the Mesirow Report, in light of the undisputed facts, are insufficient to meet AccuWeb's burden of proving damages with reasonable certainty. We agree.

¶24 The Mesirow Report is the sole basis supporting AccuWeb's claim that the premature expiration of the 414 patent has diminished the business's future market value. Goldfarb based his opinions on the future fair market value of AccuWeb on a number of factors and assumptions. We focus our attention on the assumptions because if those assumptions are not reasonably based on facts of record or on events reasonably certain to occur, then the conclusions of the Mesirow Report are fatally flawed. The extent of AccuWeb's actual damages must be based upon something more than a mere possibility of future harm. *See* ***Hennekens***, 160 Wis. 2d at 153. "Actual damage is harm that has already occurred or is reasonably certain to occur in the future." ***Id.*** at 152.

¶25 Goldfarb relies on two flawed assumptions in calculating AccuWeb's future fair market value:

1. That the date on which AccuWeb suffered actual damages was November 15, 2002.[7]

2. That one or more competitors will have obtained the 414 patent technology and would introduce products containing that technology into the market.

We address each assumption in turn.

¶26 We begin with two concepts Goldfarb employs in his analysis: the "base case" (the pre-damage value of AccuWeb) and the "damaged case" (the post-damage value). Goldfarb explains in the Mesirow Report that the "base case" is "an estimate of the current fair market value of AccuWeb *made under the assumption that the 414 Patent remains in force until its natural expiration date in 2008*"; he also explains that the "damaged case" is calculated by "the use of financial modeling to examine the potential consequences of *one or more competitors introducing products* with the compensation features disclosed in the 414 Patent." (Emphasis added.) In other words, the Mesirow Report calculates the base case value under the assumption that the 414 patent was still in force at the time of the Mesirow Report. The Mesirow Report then calculates the damaged

[7] We note that Goldfarb observed that AccuWeb's "performance may already be impacted since the patent expiration fundamentally altered the risk characteristics associated with investing in the company and as such decreased the owners' willingness to commit additional capital." However, Goldfarb went on to say that AccuWeb's historical financial performance had not been impacted by the 414 patent's expiration. As such, two of AccuWeb's characterizations of the Mesirow Report are misleading: (1) its description of the Mesirow Report as proving that the fair market value of its business has already diminished by millions of dollars due to the loss of the 414 patent; and (2) AccuWeb's representation that the Mesirow Report proves that "the loss of the 414 patent has *destroyed* AccuWeb's ability to sell the company." (Emphasis added.) We do not rely on this observation in reaching our conclusion, but it is important to recognize the inconsistencies between AccuWeb's descriptions of the Mesirow Report and its actual contents.

case value based on the assumption of competitors introducing products using the invention's technology. However, the record contains no facts supporting these assumptions.

1. First Assumption: Pre-Lapse Value As The Base Case

¶27 To determine AccuWeb's damages, Goldfarb calculated AccuWeb's damages as "the difference between the value of AccuWeb's assets with the patent and the value without [the patent] at the same point in time." That point in time was November 15, 2002. This approach is flawed. First, it is undisputed that the 414 patent did not exist on November 15, 2002; the 414 patent lapsed on December 10, 1995. Second, damages for the destruction of property are measured from the time the actual damage occurred. *See* WIS JI—CIVIL 1803. Here, AccuWeb's damages, if any, accrued when the 414 patent prematurely expired on December 10, 1995. Therefore, the proper date on which the diminished value of AccuWeb should have been based was December 10, 1995. The date on which the base value of AccuWeb was measured is incorrect. Consequently, the calculations of AccuWeb's base value used by Goldfarb to determine AccuWeb's future fair market value cannot be accurate.

2. Second Assumption: Future Competition As The Damaged Case Premise

¶28 In calculating the damaged case values, Goldfarb assumed that "one or more competitors [will introduce into the market] ultrasonic sensors with the compensation feature disclosed in the 414 patent." Goldfarb testified that this assumption is based on a hypothetical competitor who would begin competing in 2003 and continue competing until 2008, the year when the 414 patent was scheduled to expire. He also testified that he had no information that such a competitor actually existed. Indeed, the Mesirow Report itself affirms that "[a]s of

the writing of this report, the Company is not aware of any competitor marketing products that use the compensation technology disclosed in the 414 Patent." Such evidence is required to establish "harm that has already occurred or is *reasonably certain* to occur. Actual damage is not the mere possibility of future harm." ***Hennekens***, 160 Wis. 2d at 152-53 (emphasis added). It is apparent that Goldfarb's damaged case assessment rests in substantial part on speculation that AccuWeb has a competitor who has obtained and is selling the 414 patent technology, or will have such a competitor before the 414 patent's natural expiration date.

¶29 We conclude that AccuWeb has failed to present evidence that establishes with reasonable certainty its actual damages arising from the premature expiration of the 414 patent. AccuWeb has failed to offer any evidence establishing the likelihood of competing products entering the market to any degree of reasonable certainty. In other words, the primary assumption upon which the Mesirow Report's damaged case value assessment is based relies on speculation and conjecture that a particular event may or may not occur now or in the future.

¶30 AccuWeb contends that evidence of competing products entering the market is unnecessary. It argues that "there is no authority which requires proof of post-expiration use of the invention as a prerequisite to proving the value of a patent." AccuWeb misses the point. Since the Mesirow Report's damage valuation is explicitly based on the assumption of such competition, in order for the Mesirow Report's conclusions to be relevant, AccuWeb must establish with reasonable certainty that such competition has or is likely to occur. *See* ***Plywood Oshkosh, Inc.,*** 80 Wis. 2d at 31. However, AccuWeb has produced no evidence indicating that a single rival, including any of those mentioned in the Mesirow

Report, has attempted to exploit the invention since its patent expired in 1995 or is reasonably certain to do so in the future. To the contrary, it is undisputed that Fi-Tech has not exploited the unpatented technology of the invention since its due diligence, and AccuWeb has not identified any competitor who has. Consequently, without any evidence that the assumption of competition upon which the Mesirow Report's damaged case assessment is based has occurred or is likely to occur, AccuWeb has failed to show how the Mesirow Report establishes the amount of damages with reasonable certainty.

¶31 AccuWeb relies on ***Independence Tube Corp. v. Copperweld Corp.***, 691 F.2d 310, 329 (7th Cir. 1982), *rev'd on other grounds*, ***Copperweld Corp. v. Independence Tube Corp.***, 467 U.S. 752 (1984), for the proposition that the plaintiff's estimate of damages need only have a "reasonable basis of computation" to submit the damage question to the jury. AccuWeb's reliance is misplaced. ***Independence Tube Corp.*** is a federal circuit court case and is therefore not controlling. In any event, the court in ***Independence Tube Corp.*** was addressing a scenario where the defendants' actions affected plaintiff's ability to prove damages to a reasonable degree of certainty. ***Id.*** Moreover, here, AccuWeb has failed to even meet this low standard of proof.

¶32 We observe that AccuWeb's own evidence conflicts with other evidence it presented regarding the reliability of the valuations made in the Mesirow Report. A 1997 valuation report AccuWeb had performed two years after the 414 patent prematurely expired evaluated AccuWeb's worth at between $8.25 million and $11.5 million, with a strategic value between $17 million and $22.8 million. Notably, this estimation fits within the range of the base case value ($5.4 million to $10.3 million, under the market approach, or $6.4 million to $18.4 million, under the income approach), not the damaged case value ($1.7 million to

$3.0 million) as provided in the Mesirow Report. The 1997 valuation report appears to indicate that the 414 patent's lapse did not cause damage to AccuWeb's value. AccuWeb has not explained how the damaged case value in the Mesirow Report reflects the actual post-patent-lapse financial status of AccuWeb, in light of the 1997 valuation.

CONCLUSION

¶33 In conclusion, AccuWeb has failed to show that the attorney defendants' alleged negligence was a substantial factor in causing Fi-Tech to withdraw its original letter of intent to purchase AccuWeb. We also conclude that AccuWeb has not produced any evidence that establishes to a degree of reasonable certainty the actual damages it has suffered as a result of the premature expiration of the 414 patent. We therefore affirm.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

¶34 DYKMAN, J. (*dissenting*). When lawyers and judges want to discredit testimony, they call it "speculation"; when they want to stress its persuasive value, they call it "opinion." That, in a nutshell, describes the majority's reasons for terminating this case on summary judgment.

¶35 We see this first in the majority's conclusion that "Buisker's unsupported subjective opinions as to why Fi-Tech withdrew its original offer are inadmissible speculation." Majority, ¶17. The problem with this is that AccuWeb is owned by Raymond Buisker, his wife, and his two sons, Randy and Brian. Raymond Buisker is the inventor of the device which is the subject of the disputed patent. The majority apparently assumes that despite the Buiskers' knowledge of AccuWeb's business, its failed sale and the actions of the proposed purchaser, they can only guess at why Fi-Tech withdrew its original offer. Raymond Buisker's affidavit reads: "It is my belief that Fi-Tech discovered that the '414 patent had lapsed as part of its due diligence, and that Fi-Tech withdrew from the transaction for this reason alone." At his deposition, Brian Buisker, AccuWeb's vice president in charge of sales since the company's inception, testified that it was his opinion that Fi-Tech discovered the loss of the 414 patent during its due diligence inspection and then withdrew its offer as a result. He explained that forming his opinion was a mental process.

¶36 An opinion is described as "belief stronger than impression and less strong than positive knowledge." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1582 (1993). "That [an] affidavit contains opinions does not make it nonevidentiary." ***Preloznik v. City of Madison***, 113 Wis. 2d 112, 122, 334

N.W.2d 580 (Ct. App. 1983). I do not accept the majority's rejection of opinion testimony. *See* WIS. STAT. § 907.01 (2003-04)[1] (allowing opinion testimony at trial, if it is "rationally based on the perception of the witness and helpful to a clear understanding of the witness's testimony or the determination of a fact in issue"). A jury might accept or reject Buisker's opinion after drawing inferences from his testimony and the facts of the case. The fact that AccuWeb relies on an opinion to resist summary judgment is no reason to prevent this case from reaching a jury.

¶37 The same reasoning applies to the majority's conclusion that AccuWeb submitted nothing showing that it had suffered any damages as a result of the loss of its 414 patent. There are two reasons for the majority's conclusion. First, it believes that because the Mesirow report was dated November 15, 2002, long after the 414 patent lapsed in 1995, the report cannot be accurate. Majority, ¶27. This is a significant holding, certain to have an effect on litigation. But the Mesirow report is dated November 15, 2002, because that is the date its authors finished it. Presumably, the report would be updated by its authors to show AccuWeb's damages on the date of trial. There is nothing absurd or sinister about showing damages as of a trial date. Indeed, that is how cases are tried, and we review only for reasonableness. *See* ***Hatleberg v. Norwest Bank Wisconsin***, 2005 WI 109, ¶16, 283 Wis. 2d 234, 700 N.W.2d 15 (We review an award of damages "simply [to] determine whether the award falls within reasonable limits, viewing the evidence in the light most favorable to the award"). The majority's notion that damages must be calculated as of the date the 414 patent was lost conflicts with the fact that AccuWeb's damages were ongoing, or if defendants' assertions were

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

believed, nonexistent. A jury could conclude that as of the date of a trial, the value of AccuWeb was diminished as a result of the loss of the 414 patent. Or that because no competitor used or would use the patent's process, AccuWeb was not damaged at all. A jury has the right to award damages based on economic conditions existing at the time it renders a verdict. ***Zeinemann v. Gasser***, 251 Wis. 238, 247, 29 N.W.2d 49 (1947).

¶38 I cannot agree with the majority's second reason for its conclusion either. Paragraph 32 reads in pertinent part: "We observe that AccuWeb's own evidence conflicts with other evidence it presented regarding the reliability of the valuations made in the Mesirow report." I agree. But conflicting facts and inferences are what make cases ineligible for summary judgment treatment.

> We have often stated summary judgment is a drastic remedy and should not be granted unless the material facts are not in dispute, no competing inferences can arise, and the law that resolves the issue is clear. Summary judgment is not to be a trial on affidavits and depositions.

Lecus v. American Mut. Ins. Co. of Boston, 81 Wis. 2d 183, 189, 260 N.W.2d 241 (1977). This admonition is especially pertinent here, where the affidavits and depositions are voluminous and subject to competing interpretations. A party's conflicting evidence or testimony is no reason to jettison the evidence in its entirety. ***State ex rel. Brajdic v. Seber***, 53 Wis. 2d 446, 450, 193 N.W.2d 43 (1972). The trial court and the majority may have determined that AccuWeb's chances of success are slim and that a jury will likely find for the defendants. That may well be true. But that is not a reason to prevent a trial. WISCONSIN STAT. § 802.08(2) permits summary judgments only if there is no genuine issue as to any material fact. Inferences as well as direct evidence may give rise to a genuine issue of material fact. *See* ***Lecus***, 81 Wis. 2d at 189-90.

¶39 The majority also asserts that AccuWeb has failed to meet its burden to prove damages with reasonable certainty, citing to ***Plywood Oshkosh, Inc. v. Van's Realty Constr., Inc.***, 80 Wis. 2d 26, 257 N.W.2d 847 (1977). Majority, ¶¶21-22. In ***Plywood***, the supreme court concluded that testimony as to damages was insufficient in the absence of proof of the known labor costs for replacing defective plywood. ***Id.*** at 30-33. The court also said, however, that "recovery is permitted" despite uncertain proof of damages "when, from the nature of the case, the extent of injury and the amount of damage are not capable of exact and accurate proof." ***Id.*** at 32. We recognized this distinction in ***Lindevig v. Dairy Equipment Co.***, 150 Wis. 2d 731, 739-40, 442 N.W.2d 504 (Ct. App. 1989), explaining the significant aspect of ***Plywood*** as the fact that "defendant kept no record of the expenses of the labor involved."

¶40 Time sheets are easily kept. In contrast, no one, AccuWeb included, routinely keeps specific records of damages suffered by a business when its attorneys fail to prevent a patent from lapsing. The Mesirow report does not, and could not conclude that, for instance, AccuWeb's damages were $6,945,341.66. Instead, the report assesses AccuWeb's fair market value assuming the patent was valid and its value without the patent. The value with a valid patent was between $5.9 and $14.3 million. The value without the patent was between $1.7 and $3 million. Assessing a company's value with and without a valid patent is a far cry from keeping track of the number of hours workers spent replacing defective plywood. Further, loss of a patent is an injury recoverable in a legal malpractice suit. ***Boehm v. Wheeler***, 65 Wis. 2d 668, 678, 223 N.W.2d 536 (1974), *overruled on different grounds*, ***Hansen v. A.H. Robins Co., Inc.***, 113 Wis. 2d 550, 560, 335 N.W.2d 578 (1983), *as recognized by* ***Hennekens v. Hoerl***, 160 Wis. 2d 144, 154 n.8, 465 N.W.2d 812 (1991). If the Mesirow report is inadequate to support a

damage award, then no business will ever be able to show its damages when the value of the business is in question. Because I conclude that there are facts and inferences from which a jury could conclude that Foley & Lardner and Quarles & Brady were negligent and that their negligence caused AccuWeb damage, I would reverse and remand for a trial.