COURT OF APPEALS
DECISION
DATED AND RELEASED

March 25, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

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No. 96-0975

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

Jef G. Spalding,

Plaintiff-Appellant,

West Bend Mutual Insurance Co.,

Plaintiff,

v.

Ammco Tools, Inc.,

Defendant-Respondent,

ABC Insurance Co., Coats-Hennessey, Inc., DEF Insurance Co., Auto Parts & Service, Inc. and American States Insurance Co.,

Defendants.

APPEAL from a judgment of the circuit court for Milwaukee County: THOMAS P. DOHERTY, Judge. *Reversed and cause remanded.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. Jef G. Spalding appeals from the trial court's judgment dismissing his action against Ammco Tools, Inc. He argues that the trial court erred in disqualifying his expert witness from testifying, and denying his request for a continuance to obtain other expert testimony. Because we conclude that the trial court erred in disqualifying Spalding's expert witness, we reverse.[1]

Spalding sued Ammco and others claiming that he was injured while using an Ammco tire changing machine to change a tire at the service station where he worked. In his complaint, Spalding alleged that Ammco was "negligent in the design, testing, manufacturing and sale" of the tire changing machine and that such negligence "was a substantial factor causing the injuries." He also claimed strict liability, alleging that the Ammco machine "was defective and unreasonably dangerous."

Ammco filed a motion *in limine* asking the trial court "to preclude [Spalding] from calling William Max Nonnamaker as an expert witness." Evaluating Spalding's offer of proof in response to the motion, the trial court considered extensive testimony from Nonnamaker.

Nonnamaker described his substantial experience and expertise regarding auto tires. He also explained, however, that although he had considerable experience with tire changing machines, he never had been involved in the design or manufacture of such machines. This gap in Nonnamaker's background led the trial court to conclude that he was not qualified to testify as an expert. Commenting on Nonnamaker's testimony at the offer of proof, the trial court granted Ammco's motion explaining, in relevant part:

[1] Accordingly, we do not address the argument regarding the trial court's denial of a continuance. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed).

[Nonnamaker] has voiced opinions ... to the effect that indeed [the Ammco tire changer] was defective basically for three reasons, as I understand them: That there were no restraints that presumably would catch the tire and rim ... if, in fact, there was an explosion by reason of ... the beads not being ... properly seated. There is a view that the platform upon which the tire and the rim set ... should have been smaller. And, lastly, that the inflation hose,... an extension of the machine, did not have a governor on it, in effect....

....

Now in viewing ... his qualifications, I have to view them in the context of what relevant testimony ... would be offered ... in the context of those [three] ... aspects.

... It is clear ... that the witness is not an expert by reason of educational background in the context of what we are talking about. He is not an engineer....

....

... [H]e has no special training ... in the design of this type of equipment, nor does he have any experience in the designing of this equipment, nor does he have any demonstrable skill....

But it does leave open the aspect of knowledge. There is no question ... that this proffered witness is an expert in the manufacture of tires and on the subject matter of tires. *He, himself, indicates he is an expert on the problems with the beading, of leaks in tires, which he offered a great deal of opinions and that ... is one of the aspects of this case.* It is apparently going to be uncontested there was some type of beading that caused this explosion, that ... was a cause of the unfortunate injuries to ... Mr. Spalding.

... My judgment, and it is really a discretionary judgment I have to make, is based upon do I find his knowledge such that he can testify as an expert in this case on the relevant aspects of it, and specifically those being with regard to the design and alleged design defects in this machine.

His knowledge is based upon observing, having made an observation of this machine, fairly limited, but made an observation of it, not in a functioning capacity, but as it stands here in court apparently today, and making observations....

....

But the critical flaw, even though he has some observational knowledge,... is he does not have that foundational background of being an engineer or design engineer ... in order to really make an intelligent evaluation of the various pieces of equipment that he's testified to.

....

... And I'm just very uncomfortable with his ... *background, and insofar as his ability to really give integrity to – and credibility to his opinions.*

....

I guess as I sit here and I think as the jury would sit here they would say to themselves, why don't we have somebody in here who manufactures these pieces of equipment? Or is an engineer in designing these or ... has worked with these machines? Rather than somebody who is an expert in tires.

It may be that Mr. Nonnamaker's testimony would be very compatible and very supportive and relevant to, in conjunction with an expert on design, but standing

> alone he does not substitute for it in his lack of expertise in design.

(Emphases added.)

Section 907.02, STATS., in part provides that "a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise." "Opinion evidence is admissible if it can help the jury decide a contested issue of fact." ***James v. Heintz***, 165 Wis.2d 572, 578, 478 N.W.2d 31, 34 (Ct. App. 1991).

Under § 901.04(1), STATS., "[p]reliminary questions concerning the qualifications of a person to be a witness ... or the admissibility of evidence shall be determined by the judge." The trial court's decision to allow testimony from a proposed expert is discretionary. ***State v. Blair***, 164 Wis.2d 64, 74, 473 N.W.2d 566, 571 (Ct. App. 1991). The trial court's decision, however, must have "a reasonable basis" and be ""in accordance with accepted legal standards and in accordance with the facts of record."" ***Id.*** (quoting ***State v. Pharr***, 115 Wis.2d 334, 342, 340 N.W.2d 498, 501 (1983) (citation omitted)). In this case, we conclude that the trial court's conclusions were inconsistent with Nonnamaker's testimony and, therefore, were not "in accordance with the facts of record."

The trial court premised its conclusion, in part, on what it said was Nonnamaker's failure to do anything more than observe the tire changing machine involved in this case. Nonnamaker, however, testified that he did more than observe. He stated that he "inspected" the machine, its turntable, inflation hose and nozzle, and that he also saw that the machine lacked a tire restraint device. Under cross-examination, he also described his testing of the machine.

> Q:Okay. And you can't tell us today whether you tested that tire changer in any respect, right?
>
> A:Oh, yes. My deposition again speaks to the inflator unit, and checking that, and I note it's almost a full circle, on literature, inflator 6 to 8 inches long, inflator takes two hands and you have to be over machine. Air chuck hold down valve can

be pulled off—and/or blown off, very flimsy, set for 16 inch,....

Q:Okay. You didn't test that day whether the air chuck could, in fact, be blown off during operation, correct?

A:Not blown off. I had a valve and I put it in and pulled on it and it pulled off very easily.

Q:You didn't measure the force necessary to allow you to pull the grip chuck off the valve that day, right?

A:No, sir, I did not.

Q:You didn't have an inflated tire with a valve on it, did you?

A:No, I did not.

Q:So you had a little valve in one hand and the grip chuck in your other hand, you put them on and pulled them around?

A:That is correct, sir.

Q:And you didn't measure how much force it took?

A:Other than it took very little force as far as I was concerned but I did not measure precisely the force.[2]

The trial court also based its conclusion on the premise that Nonnamaker was an expert on tires and tire breaks, but not on factors relating to tire mounting machines and their possible relationship to tire breaks. Once again, however, the record refutes the trial court's conclusion; Nonnamaker's testimony establishes that he was qualified in both areas.

[2] We do not mean to imply that mere observation necessarily would be insufficient to establish a witness's qualifications. That would depend on the issues of the case and the nature of the observations. Thus, in this regard, we also note that Nonnamaker testified that although he had not conducted tests "designed to break the beads of tires during the mounting process" involving other tire changing machines, he had observed such tests.

Unquestionably, Nonnamaker's primary experience and expertise related to tires, not changing machines. He also testified, however, that his tire consulting company, Nonnamaker & Associates, has expertise covering "tires, wheels, inner tubes, valves, flaps, anything that is part of the assembly *and also the tire mounting machine, if it's involved in a bead break case*." (Emphasis added.) In the course of his work in this latter area, Nonnamaker testified:

> I came to realize and recognize that the tire mounting machine, if it were designed so that there was no platform in which to launch the assembly upward once the bead of the tire went over the flange on the rim, that in essence, there would be little if any movement of the assembly, that the bead would just go out into space.

Nonnamaker went on to relate that he had been involved in the examination and preparation of reports and had studied tire failures and explosions occurring "during the mounting or demounting process."

Nonnamaker testified that he is an expert "in the facet of bead breaks on mounting machines," and "on tire mounting machines that involve the breakage of the bead." He offered numerous opinions on what he viewed as the design deficiencies of the Ammco machine and their causation of Spalding's alleged injuries. In his opinion, "the bead of the tire broke on the bottom and went over the flange, and because of the platform being present, hurled the assembly upward and injured Mr. Spalding."

In sum, Nonnamaker described many years of experience that, he said, had provided him with expertise on the subjects surrounding the anticipated issues of this case. As this court has explained:

> A witness called to give expert testimony may, like any other witness, establish a proper testimonial foundation by his or her own testimony. *Cf.* Rule 906.02, STATS. (A witness' requisite personal knowledge may be proven by his or her own testimony.). *This testimony must be accepted by the trial court in making its determination under Rule 901.04(1), STATS., unless it finds the testimony not credible or there*

> *is contrary credible evidence that undercuts the proffered foundation.*

James, 165 Wis.2d at 579, 478 N.W.2d at 34 (emphasis added).

Despite commenting "that experts who are experts by reason of their profession tend to be somewhat suspect, tend to ... fall into that cliche designation, many times, of the hired gun," the trial court never found that Nonnamaker's testimony was not credible. Commenting on the "credibility" and "integrity" of Nonnamaker's views, the trial court clearly was offering its assessment of the potential weight of his testimony, given his professional background. No contrary evidence undercut Nonnamaker's professed experience and expertise and, therefore, under ***James***, the trial court was required to accept Nonnamaker's assessment that he had expertise in the area of bead breakage and its relationship to tire changing machines during the mounting and demounting process.

This court recently reiterated:

> [T]he rule remains in Wisconsin that *the admissibility of scientific evidence is not conditioned upon its reliability*. Rather, scientific evidence is admissible if: (1) it is relevant, § 904.01, STATS.; (2) the witness is qualified as an expert, § 907.02, STATS.; and (3) the evidence will assist the trier of fact in determining an issue of fact, § 907.02. If these requirements are satisfied, the evidence will be admitted.

State v. Peters, 192 Wis.2d 674, 687-88, 534 N.W.2d 867, 872 (Ct. App. 1995) (emphasis added; footnotes and citation omitted).

Nonnamaker's testimony was relevant. Indeed, while doubting the value of Nonnamaker's testimony, standing alone, the trial court acknowledged its relevance. Nonnamaker was qualified to testify as an expert, for the reasons we have explained. His opinions, addressing the very subjects surrounding the issues in this case, may very well assist the jury. Thus, although ultimately a jury might come to share the trial court's concerns about

the "integrity" and "credibility" of Nonnamaker's opinions, such concerns relate to the reliability, not the admissibility, of his testimony.

By the Court. – Judgment reversed and cause remanded.

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