COURT OF APPEALS
DECISION
DATED AND RELEASED

MARCH 26, 1997

No. 96-1043

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

WISCONSIN PLATING WORKS OF RACINE, INC.,

Plaintiff-Respondent,

v.

BECKART ENVIRONMENTAL, INC.,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Racine County: DENNIS J. FLYNN, Judge. *Affirmed*.

Before Snyder, P.J., Brown and Anderson, JJ.

ANDERSON, J. Beckart Environmental, Inc. (Beckart) appeals from a judgment denying its motions after verdict and affirming the jury's verdict for breach of its performance warranty and awarding damages in favor of Wisconsin Plating Works of Racine, Inc. (WPW). Beckart argues that the purchase contract included a limitation of remedies which should have been

enforced; WPW failed to mitigate its damages; WPW's lost profits were not foreseeable and should not have been recoverable; and WPW should have been compelled to elect its remedy before trial. Beckart also questions several evidentiary rulings made by the trial court. We conclude that once a performance guaranty is given, the limitation of remedies fails for its essential purpose because it does not make a party whole if the guaranteed product or service does not meet the requisite standards. We further conclude that the mitigation of damages and foreseeability of lost profits are questions for the jury and will not be disturbed; Beckart waived the election of remedies argument; the rulings on the two plants are moot; and Beckart's issues with the expert testimony all go to the weight of the testimony and not its admissibility. Accordingly, we affirm.

BACKGROUND

WPW operated an electroplating plant in Racine, Wisconsin.[1] In 1988, due to federal, state and local mandates, WPW was required to install a system that would treat the effluent from its plating production line prior to discharge to the city sewer system. Between October and December 1988, WPW and Beckart negotiated a contract whereby Beckart agreed to design a system, purchase equipment and supervise the installation of a pretreatment system at WPW's Hamilton Street plant. Beckart selected an air flotation system

[1] WPW has two plants: Plant 1 on Carroll Street and Plant 2 on Hamilton Street. The Carroll Street plant specializes in electroplating and metal finishing. The Carroll Street plant was in compliance with federal, state and local standards until 1991, at which time a bottom-method wastewater treatment system was installed by a different company. The Carroll Street plant is not at issue on appeal.

for WPW and agreed to provide certain warranties and guarantees as to the capabilities of the system.

By April 1989, the system was installed and operational. From the beginning of operation, the system did not function properly. WPW outlined several of the problems in a letter dated August 28, 1989. Beckart made numerous modifications to the system; however, WPW continued to have system failures through August 1993. In October 1993, the City of Racine issued an order requiring WPW to stop production at the Hamilton Street plant because of its continuous noncompliance with its pretreatment permit.

Consequently, in July 1994, WPW filed suit against Beckart for negligence, misrepresentation, breach of contract and breach of warranty and sought damages for loss of goods, loss of past and future profits, and loss of goodwill. Beckart filed a motion for partial summary judgment to dismiss all claims for damages and to limit WPW's claim to the cost of replacement. The trial court denied the motion.[2]

Beckart filed motions in limine to preclude expert testimony and evidence on the issue of profit loss as incidental and consequential damages. The trial court denied both motions. Specifically, the trial court determined that under § 402.715, STATS., "it's clear under both 1 and 2 as well as the prior section 714(3) that these type [sic] of damages, lost profits, can in fact be addressed in

[2] In November 1995, Heritage Mutual Insurance Company, Beckart's insurer, filed a motion to intervene to seek declaratory judgment regarding coverage issues. This motion was also denied.

proper cases." The trial court noted that given the relationship between the parties:

> [I]t's asserted that the defendants were involved in the design, manufacture and installation of the pretreatment system, that they had an awareness of the governmental regulations that had to be adhered to, and that they would particularly and uniquely be aware of the implications that would inure to a plaintiff in purchasing such a system if the system in fact did not work as represented.

It therefore concluded that "this is a proper case for the jury to consider the issue of damages, including the element of loss of profits."

After a six-day trial, the jury rendered a verdict in favor of WPW on its claim for breach of warranty and awarded WPW $1,101,200 in out-of-pocket loss, past and future profits and fines. Beckart filed motions after verdict and WPW filed motions for attorney's fees and judgment on the verdict. The trial court granted WPW's motions for judgment on the verdict and attorney's fees for a total judgment of $1,130,798.84. Beckart appeals. Additional facts will be included in the body of the decision as they apply to the issues.

DISCUSSION

Limitation of Remedies

Beckart first argues that the purchase contract included a limitation of remedies which should have been enforced. Beckart provided WPW with its original quotation on November 14, 1988, which outlined the pretreatment process and the type and cost of the equipment required, all

subject to an attached set of terms and conditions. The attached terms and conditions of sale contained an express warranty that provided:

> Beckart Environmental, Inc. warrants that the goods, services, or equipment furnished pursuant hereto will (1) conform to the approved or record drawings if any, (2) be of good workmanship, provided it has had normal use and used in accordance with manufacturer's instruction, for a period of 12 months from date of start-up or 18 months from date of shipment, whichever occurs first.
>
> In the event that any defects in material and/or workmanship are detected within the specified period, Beckart Environmental, Inc.'s obligation under this warranty is limited to furnishing a replacement part F.O.B. factory. Labor of installation shall be done by others, Beckart shall be given the opportunity to inspect such alleged defects prior to taking any action. Components purchased by Beckart from others and incorporated into the equipment furnished by Beckart from others and incorporated into the equipment furnished by Beckart shall be limited to the usual guarantee or warranty extended by the manufacturer or supplier of such components.
>
> BECKART MAKES NO WARRANTY OF MERCHANTABILITY NOR ANY OTHER WARRANTY, EXPRESS OR IMPLIED, EXCEPT AS STATED ABOVE. IT IS ALSO UNDERSTOOD AND AGREED THAT BUYER WILL MAKE NO CLAIM AGAINST BECKART FOR SPECIAL, INDIRECT, INCIDENTAL OR CONSEQUENTIAL DAMAGES ARISING OUT OF OR RELATED TO THE USE AND OPERATION OF EQUIPMENT FURNISHED HEREUNDER.

In response to concerns raised by WPW, Beckart submitted an addendum, dated December 9, 1988, that included a performance guarantee on

the treated water and sludge, added another transfer pump, explained the other systems, i.e., alarm, control panel and lime feeding system and requested a 30% down payment with the purchase order to "seal the deal." A December 13, 1988, letter reiterated Beckart's performance guarantee as follows:

> Beckart Environmental Incorporated will guarantee to meet the sewer standards as follows:
>
> A. The Federal Register 40 C.F.R. 413.14, and subpart A, as of January 28, 1981.
>
> B. Racine Sewer District permit number 1028.1-N.
>
> * The guarantee is in effect under the following conditions only:
>
> (1) The flow is not to exceed 50 gpm.
>
> (2) All treating programs done as directed by Beckart Environmental, Inc.
>
> (3) Equipment be properly maintained and a continuous supply of proper chemicals be in adequate supply at all times.
>
> (4) Polymer be purchased from Beckart Environmental, Inc. for which they will provide free Engineering services.
>
> (5) Clarifier to be cleaned as needed to prevent sludge bypass to sewer.

On December 14, 1988, WPW submitted its purchase order and down payment for the treatment system "as per [Beckert's] Quotation dated 11/14/88, with Addendums dated 12/9/88, and guarantees dated 12/13/88 and 12/9/88." The "[p]urchase order is contingent upon the guarantees by Beckart Environmental to meet Local, State, and Federal Wastewater Standards. Also

the sludge will be able to pass E.P.A., TCLP tests." Installation began in early 1989 in conformance with the contract.

At the outset, we note that the contract between Beckart and WPW consisted of more than Beckart's original quotation. It is hornbook law that "offer," "acceptance" and "consideration" are elements of an enforceable contract. *See* ***NBZ, Inc. v. Pilarski***, 185 Wis.2d 827, 837, 520 N.W.2d 93, 96 (Ct. App. 1994). The existence of an offer and acceptance are mutual expressions of assent, and consideration is evidence of the intent to be bound to the contract. *See* ***id.*** And when a party sends a written offer that makes acceptance of the agreement subject to its terms, and the offeree responds with a form making its acceptance expressly conditional on assent to its new or different terms, no contract is formed *unless* the offeror accepts the offeree's terms. *See* ***Dresser Indus. Inc. v. Gradall Co.***, 965 F.2d 1442, 1449 (7th Cir. 1992). Here, WPW's purchase order was contingent on Beckart's guarantees. Beckart agreed to those terms when it began drawing up plans and constructing WPW's system. We conclude that all documents, including the original quotation, the addendum, guarantees and the purchase order, constitute the contract between the parties.

Nevertheless, Beckart submits that "while [the] … performance guarantees may well … have supplanted the initial limited warranty against defects, what those additional warranties did not address was the contract's specific limitations on remedies." Under the Uniform Commercial Code (UCC) a seller of goods may limit his contractual liability through a disclaimer of warranties or a limitation of remedies. *See* ***Murray v. Holiday Rambler, Inc.***, 83

Wis.2d 406, 414, 265 N.W.2d 513, 517 (1978).[3] A disclaimer of warranties reduces the number of circumstances in which the seller will be in breach of the contract, thereby limiting the seller's liability. *See* ***id.*** at 414, 265 N.W.2d at 517-18. A limitation of remedies restricts the remedies available to the buyer once a breach is established. *See* ***id.*** at 414, 265 N.W.2d at 518. Here, the contract included both. Beckart's original quotation contained a warranty that the product was free of defects in material and workmanship and the addendum and performance guarantee[4] ensured compliance with federal, state and local standards. The quotation also purported to disclaim all warranties and limited WPW's remedies to replacement parts only.[5]

When the express warranty conflicts with the disclaimer of all warranties, the language of the express warranty must control. *See* § 402.316(1), STATS.; *see also* ***Murray***, 83 Wis.2d at 417, 265 N.W.2d at 519. In fact, § 402.316 is designed principally to deal with those frequent clauses in sales

> contracts which seek to exclude 'all warranties, express or implied.' It seeks to protect a buyer from unexpected and unbargained language of disclaimer by denying effect to such language when inconsistent with language of express warranty ….

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[3] Although *Murray v. Holiday Rambler, Inc.*, 83 Wis.2d 406, 265 N.W.2d 513 (1978), involved the revocation of acceptance of a motor home, the principles enunciated therein are substantially analogous to the case at bar and therefore control our analysis as well.

[4] That the performance guarantee constitutes an express warranty under § 402.313, STATS., is not in dispute.

[5] Because the contract specifically precluded WPW from making a claim for damages, we conclude that WPW's exclusive remedy was replacement parts. Presumably WPW agreed to this exclusive remedy based upon Beckart's performance guarantee.

Uniform Commercial Code Comment 1, WIS. STAT. ANN. § 402.316 (West 1995). In this case, the contract contained an express warranty that the pretreatment system would be free of defects for up to one year and would comply with the requisite effluent standards, subject to the limitation of remedies language.

The contract also limited WPW's remedies to "furnishing a replacement part F.O.B. factory." Such a limitation is permissible under § 402.719, STATS. "However, the UCC disfavors limitations on remedies and provides for their deletion where they would effectively deprive a party of reasonable protection against breach." ***Murray***, 83 Wis.2d at 418, 265 N.W.2d at 520. Section 402.719(2) specifically provides: "Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in chs. 401 to 411." The purpose of an exclusive remedy of repair or replacement, from the buyer's standpoint, is to give him or her goods which conform to the contract—in this case, a pretreatment system that complies with the requisite effluent standards and WPW's discharge permit—within a reasonable time after a defect is discovered. *See* ***Murray***, 83 Wis.2d at 420, 265 N.W.2d at 520. As noted by the supreme court in ***Murray***:

> [E]very buyer has the right to assume his new car, with the exception of minor adjustments, will be 'mechanically new and factory furnished, operate perfectly, and be free of substantial defects' …
>
> … [T]he seller *does not have an unlimited time* for the performance of the obligation to replace and repair parts. The buyer of an automobile is not bound to permit the seller to tinker with the article indefinitely in the hope that it may ultimately be made to comply with the warranty. At some point in time, if major problems continue to plague the automobile, it must

> become obvious to all people that a particular vehicle simply cannot be repaired or parts replaced so that the same is made free of defect ….

Id. at 420-21, 265 N.W.2d at 520-21 (citations omitted) (quoted sources omitted) (emphasis added). Where the seller is given a reasonable opportunity to correct the defect or defects, and the system nevertheless fails to operate free of defects, the exclusive remedy fails of its essential purpose. *See* ***id.*** at 421, 265 N.W.2d at 521. If the exclusive limited remedy of the contract fails of its essential purpose, then the buyer is entitled to invoke any of the remedies available under the UCC. *See* ***id.*** at 430, 265 N.W.2d at 525. This includes the right to recover incidental and consequential damages under § 402.715, STATS. *See* ***Murray***, 83 Wis.2d at 430, 265 N.W.2d at 525.

The jury determined that Beckart breached its performance warranties. The verdict of a jury will not be disturbed by this court if, viewing the evidence in the light most favorable to the verdict, any credible evidence fairly admits of an inference supporting the verdict. *See* ***id.***, at 421-22, 265 N.W.2d at 521. Here, the evidence was sufficient to support the jury's implicit finding that Beckart failed to provide WPW with a pretreatment system substantially free of defects and that Beckart failed to get the system to comply with the requisite effluent standards within a reasonable time.

Jeff Toeppe, vice-president of WPW, maintained daily journals of the different problems with the system, self-monitoring violations, city violations and visits or consultations with Beckart employees. According to his testimony, some of the problems included: adjustments to the system at the

outset; a carry-over problem—the metal hydroxides failing to float—in May 1989 that continued until the system was shut down in October 1993; the equalization tanks failed to operate properly and constantly overflowed; the chain on the clarifier kept breaking; difficulty with the lime feed; and ultimately, continuous violations of the effluent limits. J.Toeppe also documented the visits, adjustments and modifications made to the system by Beckart. However, the problems persisted, leading WPW to restrict the water flow, cut down on production and cease certain types of line work. J.Toeppe also testified that "[t]he city was very, very concerned about our facility there and we were in threat of losing our discharge permit." After losing a significant number of customers and goodwill, WPW "decided that at this time [1993] we couldn't afford to put the proper equipment in at the Hamilton Street Plant."

There was also testimony from WPW's system operators who were present during the installation by Beckart until the eventual closure. All recounted the continuous problems with the system as designed, from the mixing tanks to the sludge settling in the clarifier tank instead of floating to the top, despite the adjustments and modifications made by Beckart.

In addition, Frank Altmayer, a consultant in the metal finishing industry, was hired by WPW to evaluate and provide recommendations to correct the problems with the system. Altmayer reported four problems with the Beckart system: (1) the small retention time in the chromium reduction tank; (2) the size of the pH adjustment tank; (3) insufficient chemicals to induce flocculents; and (4) the air flotation was misapplied in this plant and should be

changed to a gravity system. His conclusion and advice "was that the dissolved air flotation system was inadequate to achieve the standards that they were attempting to achieve and that they ought to abandon the air flotation system and replace it with … a gravity system." Altmayer questioned the viability of the air flotation system because of the difficulty to control or maintain the air particles at 100 microns or less and the inability to consistently sustain the .05 to .03 mass ratio of air to solids.

Altmayer's testimony was confirmed by another consultant, Mark Zielbeck, president of J.Mark Systems. He stated that in his opinion the probability of an air flotation system adequately separating WPW's waste as to "meet[] their discharge limits is very low, and low … is less than ten percent." Even after modifications, for example, the additional settling tank would not solve the problem because "you've removed the material that's heavy that wants to sink first and now you're still using … an inefficient means of taking the rest of these solids, the other 50 percent of them that are floating and you still do not have a high removal rate or separation rate from the water." For Zielbeck, the tri-weekly cleanings of the clarifier also exemplified that the "liquid solid technique, be it floating or sinking, is not working, what's on the bottom of a flotation unit solids that were supposed to float but did not."

Finally, Beckart's own employee, Tom Dougherty, made numerous recommendations in a memo dated August 27, 1993, to improve the operation of WPW's wastewater treatment system. Similar to WPW's experts, Dougherty advocated replacing the floating clarifier with a settling clarifier.

We conclude that this evidence supports the jury's conclusion that, despite reasonable opportunity for repair, Beckart failed to provide WPW with a system that conformed to the contract—a pretreatment system that complied with the requisite effluent standards—within a reasonable time. Despite continuous adjustments and modifications, Beckart's "limited remedy of repair or replacement of defective parts fail[ed] of its essential purpose when[], despite reasonable opportunity for repair, the goods [were] not restored to a non-defective condition …." ***Murray***, 83 Wis.2d at 424, 265 N.W.2d at 522. The remedy therefore failed of its essential purpose and the remedy of consequential damages became available.

Nonetheless, Beckart maintains that whether the separate limitation on consequential damages would have made the remedy fail of its essential purpose was never addressed by the trial court. In fact, Beckart submits that the jury's award of $45,000 for WPW's loss of benefit of the bargain/out- of-pocket loss provided WPW with "a 'fair quantum of remedy' for what the jury determined was a breach of the performance guarantee."

We disagree. First, Beckart seems to ignore the fact that under the contract the only remedy available to WPW was replacement parts. Under the contract, consequential damages were not available as a remedy. Only if the exclusive remedy—repair or replacement—failed of its essential purpose did damages become available. As noted by the ***Murray*** court, even though "an express warranty excludes consequential damages, when the exclusive contractual remedy fails, the buyer may recover consequential damages under

sec. 402.715, Stats., as though the limitation had never existed." ***Murray***, 83 Wis.2d at 432, 265 N.W.2d at 526.

Here, the jury implicitly determined that even though Beckart replaced or modified defective parts, the system still failed to comply with the performance guarantee. Section 402.719(2), STATS., provides that once a limited remedy fails of its essential purpose, "remedy may be had as provided in chs. 401 to 411." "In such a case the exclusive contractual remedy '… must give way to the general remedy provision of this Article [ch. 402, STATS.].'" ***Murray***, 83 Wis.2d at 432, 265 N.W.2d at 526 (quoted source omitted). Accordingly, WPW was entitled to recover consequential damages, including reasonable damages incurred as a result of the loss of use of the pretreatment system. *See* ***id.***

Mitigation of Damages

The law is well established in this state that a plaintiff must do all that is reasonable to minimize damages after a breach of contract has occurred. *See* ***Sprecher v. Weston's Bar, Inc.***, 78 Wis.2d 26, 42, 253 N.W.2d 493, 500 (1977). "'Damages are not recoverable for harm that the plaintiff should have foreseen and could have avoided by reasonable effort without undue risk, expense, or humiliation.'" ***Id.*** at 44, 253 N.W.2d at 501 (quoted source omitted). However, "'[i]t is not reasonable to expect the plaintiff to avoid harm if at the time for action it appears that the attempt may cause other serious harm. He need not enter into other risky contracts, incur unreasonable inconvenience or expense, disorganize his business, or put himself in a humiliating position or in one involving loss of honor and respect.'" ***Id.*** (quoted source omitted). While the

"duty" to mitigate damages rests with the aggrieved party, the burden of proof is upon the defaulting party to establish that the former failed to do all that was reasonable to minimize his or her damages subsequent to the breach. *See* ***id.*** at 42, 253 N.W.2d at 500.

Beckart does not contest either the trial court's jury instructions on the duty to mitigate damages or the way the special verdict question was phrased. Rather, Beckart argues that WPW "could have replaced the Beckart system for as little as $20,000 - $30,000," but instead elected the "unreasonable" option of closing its Hamilton Street plant, thereby failing to mitigate its damages as a matter of law.

We disagree. Beckart concedes, but nevertheless ignores, the fact that whether WPW exercised ordinary care to mitigate its damages is a question of fact for the jury. *See* ***Kuhlman, Inc. v. G. Heileman Brewing Co.***, 83 Wis.2d 749, 755, 266 N.W.2d 382, 385 (1978). We must affirm the jury's verdict if there is any credible evidence to support it. *See* ***Richards v. Mendivil***, 200 Wis.2d 665, 671, 548 N.W.2d 85, 88 (Ct. App. 1996). When the verdict has the trial court's approval, this is even more true. *See* ***Kuklinski v. Rodriguez***, 203 Wis.2d 324, 331, 552 N.W.2d 869, 872 (Ct. App. 1996). The verdict may not be overturned unless "there is such a complete failure of proof that the verdict must be based on speculation." ***Id.*** There was sufficient evidence in this case to support the jury's determination.

Robert Toeppe, president of WPW, explained the substantial decline in WPW's annual sales from installation of the Beckart system to the

closure of the Hamilton Street plant. The gross sales of the plant declined from $812,042 in 1988 to $65,536 in 1994.[6] According to WPW's expert, Donald Becker, "[i]n 93 they were coming off of three significant loss years of about $400,000, so that cash may not have been available" for WPW to invest a minimum of $20,000 to $30,000 to fix the system.

Experts for both sides also testified that even if WPW returned to operation at the Hamilton Street plant, the business would not immediately return to 1988 levels. WPW's expert, Becker, estimated that it would take approximately five years for WPW to recapture the lost business, whereas Beckart's expert, Robert Berkley, determined that it would take three years for WPW to recover lost sales.

Following a breach, it is sometimes possible for the nondefaulting party to minimize his damages by spending a sum of money. If the courts were to require this expenditure in every case in which it turns out, as a matter of hindsight, that such expenditure would have minimized the loss, courts would effectively be requiring the innocent party to incur risks beyond those in the contract in the hope that damages could be recovered from the breacher. … Damages will not be decreased through showing that a substantial expenditure would have minimized the total loss or that the suggested expenditure may or may not have decreased damages. The defaulter is in no position to cast this risk of substantial expenditures on the plaintiff.

As the supreme court pointed out in ***Sprecher***:

[6] The exact figures provided to the jury were: 1988, $812,042; 1989, $642,650; 1990, $590,000; 1991, $389,812; 1992, $329,341; 1993, $262,369; and 1994, $65,536.

> Since such risks arose because of the breach, they are to be borne by the defaulting party.

Sprecher, 78 Wis.2d at 45, 253 N.W.2d at 501-02. The record is clear that WPW attempted to minimize its damages. For four years WPW allowed Beckart to adjust and modify the system in order to comply with the guarantee. In addition, WPW made additional modifications in response to Dougherty's recommendations. WPW "purchased some of the recommended equipment from Beckart that they gave us in the list, did the maintenance that they requested and recycled or reran the water through the system to try to clean it to the point where we could discharge this water into the city sewer." However, the Toeppes ultimately decided that they "couldn't afford to put the proper equipment in at the Hamilton Street Plant." The jury determined that this was reasonable and we will not, based on this record, upset that determination.

Lost Profits

Beckart further argues that WPW's lost profits were not foreseeable and should not have been recoverable. Damages must flow directly and necessarily from the breach of contract, and must be reasonably foreseeable at the time the contract was made as a probable result of the breach. *See* ***Reiman Assocs., Inc. v. R/A Advertising, Inc.***, 102 Wis.2d 305, 320, 306 N.W.2d 292, 300 (Ct. App. 1981). As noted in ***Fidelity & Deposit Co. v. Krebs Eng'rs***, 859 F.2d 501, 507 (7th Cir. 1988), "the test is whether the seller, knowing or having reason to know the buyer's needs, could have reasonably foreseen the loss as a probable consequence of a breach." The jury answered this question in the

affirmative and awarded damages of $700,000 in loss of past profits and $350,000 in loss of future profits. On appeal, this court is to search for credible evidence to sustain the verdict, not for evidence to sustain a verdict the jury could have reached, but did not. *See* ***Reiman***, 102 Wis.2d at 322, 306 N.W.2d at 301.

We conclude that there is sufficient evidence before the jury from which it could determine that Beckart could foresee damages such as those awarded. In particular, the guaranty specifically warranted compliance with the sewer standards under 40 C.F.R. 413.14, and subpart A, as well as the City of Racine discharge limits, permit number 1028.1-N. Without question, if the discharge limits were not met, then WPW either would not be able to continue plating or could go out of business. The result of either scenario would be or could be lost profits.

In fact, J.Toeppe stated that although WPW agreed with the "basic nuts and bolts of the quote," it was concerned that "there was no guarantee or performance guarantee that they would stand behind their equipment." J.Toeppe expressed his concerns to Tom Fedrigon, and the two negotiated a guarantee promising compliance with federal, state and local discharge limits. Clearly, the parties, in particular Beckart, could reasonably have foreseen the loss as a probable consequence of a breach.

Similar to ***Krebs***,[7] Beckart knew when it sold the pretreatment system to WPW that WPW was using it to comply with mandated discharge

[7] In ***Fidelity & Deposit Co. v. Krebs Eng'rs***, 859 F.2d 501, 502 (7th Cir. 1988), two Wisconsin

limits to the municipal sewer system. "It should have been reasonably foreseeable to [Beckart] that if the [system] did not work as it should, and the [system] could not meet applicable [discharge] standards, litigation would likely result." ***Krebs***, 859 F.2d at 507. At the time Beckart contracted with WPW, Beckart could also have reasonably foreseen that breaching that warranty, by supplying an inadequate pretreatment system, would result in loss of business and profits to WPW. We affirm the jury's verdict as to this claim.

Election of Remedies

Beckart next argues that WPW should have been compelled to elect its remedy prior to trial. In footnote 6 of its brief, Beckart maintains that it did not waive this issue. We disagree; Beckart did not raise this argument until its motions after verdict—a month after return of the jury's verdict. Such failure to timely object constitutes a waiver. *See* ***Miles v. Ace Van Lines & Movers, Inc.***, 78 Wis.2d 538, 545, 241 N.W.2d 186, 189 (1976).

Evidentiary Rulings

Finally, Beckart questions several evidentiary rulings made by the trial court. According to Beckart, the trial court precluded testimony that WPW's Carroll Street plant "was awash with compliance and maintenance

(..continued)
towns hired a construction company to build an incinerator to burn their garbage. The construction company hired a subcontractor to handle the incinerator's pollution-control system. The subcontractor purchased the scrubber from Krebs Engineers, but unfortunately the scrubber did not scrub as it was supposed to and the emissions exceeded the limits. *See* ***id.*** at 502-03. Despite a damage disclaimer in Krebs' contract, the court determined that the consequential damages were foreseeable and affirmed the damage award. *See* ***id.*** at 507.

problems";2 allowed testimony relating to Shephard Plating's dissatisfaction with its Beckart wastewater system; and allowed WPW's accounting expert's "speculative projections," but restricted Beckart's accounting expert from commenting on the veracity of WPW's expert. We will address each seriatim.

In reviewing a trial court's decision concerning the admission or exclusion of evidence, we apply the discretionary standard of review. *See* ***State v. Oberlander***, 149 Wis.2d 132, 140-41, 438 N.W.2d 580, 583 (1989). We will uphold the trial court's ruling unless it erroneously exercised its discretion. *See* ***id.*** A trial court properly exercises its discretion if it applied the proper law to the relevant facts and reached a rational conclusion. *See* ***id.*** Our inquiry is not whether this court would have admitted the evidence, but is limited to whether the trial court acted in accordance with accepted legal standards and the facts of record. *See* ***State v. Sohn***, 193 Wis.2d 346, 352, 535 N.W.2d 1, 3 (Ct. App. 1995). Even if the trial court erroneously exercised its discretion, we will not reverse if the error was harmless. *See* ***State v. Dyess***, 124 Wis.2d 525, 543, 370 N.W.2d 222, 231-32 (1985).

Beckart's first contention is that "evidence of noncompliance and maintenance problems with [WPW's] Carroll Street system would have been highly probative" on whether maintenance failures not only caused the compliance problems at the Hamilton Street system, but voided the warranty. Beckart also believes this information would have undermined R.Toeppe's credibility.

The trial court concluded that "[w]hat occurred in the other plant with the other system has absolutely no relevance to this case whatsoever"; that "the danger of unfair prejudice far exceeds the probative value of such evidence"; and that "information relative to the Carroll Street plant would be something other than the established proposition in the case." The evidence supports this conclusion.

Bias evidence which is only marginally relevant or which may confuse the issues is excludable. *See* ***State v. Lindh***, 161 Wis.2d 324, 362, 468 N.W.2d 168, 182 (1991). Such is the case here. There is no duplication of finishes at the Carroll Street and Hamilton Street plants. J.Toeppe testified that at "[o]ne plant we do electroplating of zinc, zinc cobalt, nickel, copper, chrome and chromating. At the other plant we have—which is the Hamilton Street plant—we have a very small amount of electropolishing." In addition, the pretreatment systems at the two plants were two different designs by two different companies. Carroll Street utilized a gravity clarification system designed by J.Mark Systems and Hamilton Street used the air clarification system designed by Beckart. The trial court was concerned that "the Carroll Street matter would have the trial divert itself." Such evidence may have directed the jury's attention away from the case and is therefore prejudicial. *See* ***id.*** at 363, 468 N.W.2d at 182.

Beckart further argues that the trial court erroneously exercised its discretion by allowing evidence of Shephard Plating's experience with its Beckart pretreatment system. We disagree.

The trial court concluded that testimony about Shephard Plating "relating to whether the system (a) functioned or didn't function and (b) whether a manual was provided or not provided is a matter that can be gone into." The trial court decided this because the "link involving the defendant and plaintiff was Shephard Plating and … that the plaintiff relied directly on statements as to the installation of that type of defendant system in Shephard Plating."

Edward Raymond, the former general manager of Shephard Plating, testified that Fedrigon made certain representations about what the Beckart system could do. The testimony was relevant to the misrepresentation claim. The trial court set forth a reasoned decision for admission and properly exercised its discretion.

Even if the trial court had erroneously exercised its discretion, Beckart prevailed on the misrepresentation claims. Such an error would be harmless. *See* ***Dyess***, 124 Wis.2d at 543, 370 N.W.2d at 231-32.

Finally, Beckart maintains that the trial court erred when it allowed Becker, WPW's accountant, to render opinions which "amounted to a mere repetition of speculative projections made by plaintiff's principals." Beckart continues "[t]2he court then refused to permit defendant's C.P.A. to comment on the assumption and methodology that underlay the opinions of plaintiff's expert." Again, we disagree.

Expert testimony is admissible only if it is relevant. *See* ***State v. Ross***, 203 Wis.2d 66, 80, 552 N.W.2d 428, 433 (Ct. App. 1996). Section 907.02, STATS., allows expert testimony if it "assist[s] the trier of fact to understand the evidence or to determine a fact in issue." However, "expert testimony does not assist the fact finder if it conveys to the jury the expert's own beliefs about the veracity of another witness because such testimony usurps the jury's role." ***State v. Richardson***, 189 Wis.2d 418, 423, 525 N.W.2d 378, 380 (Ct. App. 1994). Both the trial court's determination of whether expert evidence is relevant and whether the evidence will assist the trier of fact are discretionary decisions. *See* ***Ross***, 203 Wis.2d at 80, 552 N.W.2d at 434.

Here, the trial court decided at the motion in limine hearing to allow Becker to testify, concluding that "this expert states he accepted certain data that would otherwise be hearsay data and that based on that as well as other matters he formulated an opinion; that opinion is something the jury can consider. … It then becomes a matter of how much weight the jury would want to give to the opinion that's stated." In short, the trial court ruled that the issue went to weight and not admissibility.[8] Becker recited his opinion on the lost profits that WPW suffered because of Beckart's pretreatment system. This testimony was relevant and could assist the jury to determine a fact at issue—lost profits, if any. Accordingly, we conclude that the trial court did not erroneously exercise its discretion in admitting Becker's opinion testimony.

[8] We also note that Beckart does not contest at trial, or on appeal, Becker's expertise in calculating lost profits. Accordingly, we conclude that it has waived that issue on appeal. *See* ***Wingad v. John Deere & Co.***, 187 Wis.2d 441, 457, 523 N.W.2d 274, 281 (Ct. App. 1994).

Furthermore, the trial court properly refused to admit Exhibit 67 or to permit Beckart's C.P.A., Robert Berkeley, to comment on the assumptions and methodology that underlay the opinions of WPW's expert. Berkeley strongly disagreed with Becker's calculation of lost profits and his letter, Exhibit 67, reflected this disagreement with language such as "highly speculative," "looks ridiculous," and "lack of reasonableness." This is precisely the type of attack on the character and veracity of another expert that ***Richardson*** does not allow. We affirm the trial court's conclusion.

Moreover, the trial court did not preclude Berkeley from providing the jury with his opinions as to WPW's total profit loss. Berkeley explained to the jury how he calculated lost profits. In contrast to Becker's opinion of $2,500,000 in lost profits, Berkeley computed $344,934 in lost profits due to a wastewater treatment facility that did not work.

It is for the jury, not this court, to resolve conflicts in testimony and determine the credibility of witnesses. *See* ***State v. David J.K.***, 190 Wis.2d 726, 741, 528 N.W.2d 434, 440 (Ct. App. 1994). The jury apparently chose not to rely too heavily on either expert and calculated WPW's lost profits to be somewhere in between their figures. We will not overturn the jury's credibility determinations.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.