

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 2, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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

Appeal No. 2014AP488

Cir. Ct. No. 2012CV226

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**NATIONWIDE AGRIBUSINESS INSURANCE COMPANY AS SUBROGEE OF
PREMIER COOPERATIVE,**

PLAINTIFF-APPELLANT,

v.

AUGUST WINTER & SONS, INC.,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Iowa County:
WILLIAM D. DYKE, Judge. *Affirmed.*

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

¶1 PER CURIAM. This case involves litigation over a boiler that exploded during installation and adjustment of the boiler at Premier Cooperative. The plaintiff, Nationwide Agribusiness Insurance Company, as subrogee of its

policyholder, Premier Cooperative, sued the installer, August Winter & Sons, Inc. Prior to trial, August Winter asked the circuit court to exclude the only expert witness Nationwide planned to present on the topic of the cause of the explosion. The court excluded the expert witness. The question on appeal is whether the circuit court properly excluded the witness under WIS. STAT. § 907.02(1),¹ Wisconsin's *Daubert* statute.² We agree with the circuit court that the witness was properly excluded and, therefore, affirm.

Background

¶2 The complaint alleges the following. Premier Cooperative contracted with August Winter to have August Winter install and place into service a steam boiler. During January 2009, the boiler exploded as it was being put into service. Just before the explosion, August Winter employee Joe Molenda was making “adjustments on the burner for the boiler.” Molenda negligently made adjustments, resulting in “excessive natural gas accumulated within the combustion chamber,” which caused a “massive explosion” when ignited by the pilot flame. These allegations form the factual basis for both of the complaint’s claims: negligence and breach of contract.

¶3 Pursuant to an insurance agreement, Nationwide made payments to Premier Cooperative for property damage and business interruption expenses caused by the explosion. Accordingly, Nationwide has subrogation rights to “remedies and claims against” August Winter.

¹ All references to the Wisconsin Statutes are to the 2011-12 version, the version in effect during the pertinent time period.

² *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

¶4 For purposes of proving the cause of the explosion, Nationwide planned to call a single expert witness, Duane Wolf. Wolf prepared a report that gave the opinion that Molenda failed to sufficiently tighten a “set screw,” which resulted in the accumulation of excessive gas. According to the report, the failure to sufficiently tighten the set screw resulted in slippage which, in turn, caused the explosion. In addition, Wolf was deposed on July 2, 2013, and at that time further explained his opinion on the cause of the explosion.

¶5 On December 16, 2013, August Winter filed a pretrial motion to exclude the testimony of Wolf. Among other arguments, August Winter contended that Wolf’s deposition showed that Wolf’s opinion as to the cause of the explosion depended on “an ‘assumed fact’ that has no basis.” The assumed fact was that the “set screw” was too loose at a particular point in time, which Wolf assumed to be true because of scratch marks on “linkage” that controls the flow of gas into the combustion chamber. August Winter argued that Wolf’s theory of a too-loose set screw, which slipped to allow too much gas to flow, depended on the premise that the set screw left the scratch marks on the linkage just before the explosion, but without Wolf explaining why the scratch marks could not have occurred at another time.

¶6 After considering the briefs and oral argument held on January 3, 2014, the circuit court agreed with August Winter that the probative value of Wolf’s opinion hinged on Wolf’s factual assumption that the scratch marks showed that the set screw was too loose, a factual assumption without support.³

³ We state here as fact that the circuit court agreed with August Winter’s factual basis argument because that is how we read the record. Nationwide disputes this reading of the record. Nationwide contends that the circuit court provided no cogent analysis at all. As explained in the
(continued)

Accordingly, the circuit court ruled that Wolf's causation opinion was not admissible.

¶7 On January 16, 2014, pursuant to a stipulation, the circuit court entered a final order dismissing claims against August Winter. The parties agreed to dismissal because there was no dispute over damages (\$100,000) and the only issue to be tried was causation, and Nationwide could not prove causation without Wolf's testimony. Nationwide appeals, challenging the circuit court's decision to exclude Wolf's testimony.

Discussion

¶8 Nationwide argues that the circuit court erroneously excluded the testimony of Nationwide's expert witness, Duane Wolf, under WIS. STAT. § 907.02(1) because the court did not engage in a proper analysis under that statute. Nationwide acknowledges that such decisions are discretionary. *See State v. Shomberg*, 2006 WI 9, ¶10, 288 Wis. 2d 1, 709 N.W.2d 370 (decision whether to admit expert testimony is discretionary). Nationwide argues, however, that, because the circuit court failed to engage in a proper analysis under § 907.02(1), we should *not* defer to the court's exercise of discretion, but should instead review the matter de novo.

¶9 We could explain why the circuit court's oral decision, though sometimes difficult to track, does in fact contain a sufficient analysis under WIS. STAT. § 907.02(1). However, that discussion is unnecessary because, even

Discussion section, this disagreement does not affect our resolution of the appeal because we engage in a de novo review of the issue, as requested by Nationwide.

reviewing the matter de novo, as Nationwide asks us to do, we conclude that the circuit court correctly excluded Wolf's testimony.

¶10 We begin our de novo review by honing in on the dispositive dispute. Nationwide lists five factors that it finds in WIS. STAT. § 907.02(1). According to Nationwide:

Wisconsin Statute § 907.02(1) now provides that expert testimony is admissible if:

1. Scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue;
2. The witness is qualified as an expert by knowledge, skill, experience, training, or education;
3. The testimony is based upon sufficient facts or data;
4. The testimony is the product of reliable principles and methods; and
5. The witness has applied the principles and methods reliably to the facts of the case.

Nationwide then addresses all five factors, pointing to evidence that Nationwide contends supports a ruling that all five are satisfied.⁴

⁴ WISCONSIN STAT. § 907.02(1) provides:

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

¶11 August Winter tells us we need not address all five factors. August Winter argues that this dispute can be resolved by addressing just the third factor above, whether the testimony is based upon sufficient facts or data. We agree. We first explain why we perceive there to be no dispute that, *if* expert Wolf’s causation testimony is based on an unsupported factual assumption, *then* his testimony is properly excluded. Next, we address the parties’ dispute about what the record shows on this topic.

¶12 As noted, August Winter asserts that a court is not required to address all five factors if it concludes that an expert’s opinion is not based on “sufficient facts.” August Winter supplies legal authority for that assertion, but we need not examine that authority because Nationwide does not dispute the point. Instead, Nationwide states that August Winter’s “argument is irrelevant here” because the circuit court made no findings with respect to any of the WIS. STAT. § 907.02(1) factors. In light of Nationwide’s contention that we should review the circuit court’s decision *de novo*, this response is insufficient. Under *de novo* review, why would it matter even if the circuit court had failed to address all of the § 907.02(1) factors? Regardless, we are left with August Winter’s undisputed and seemingly reasonable proposition that, if Wolf’s opinion is not based on “sufficient facts,” that alone would support excluding Wolf’s testimony. Accordingly, for purposes of this opinion, we will treat this proposition as true and proceed to examine the merits of August Winter’s argument that Wolf’s causation opinion hinges on an unsupported assumed fact.

¶13 As the background section above explains, a boiler explosion occurred at Premier Cooperative while Joe Molenda, an employee of August Winter, was making adjustments during boiler installation. Nationwide, Premier’s insurer, brought a subrogation action against August Winter to recover amounts

Nationwide paid to Premier as a result of the explosion. In broad strokes, Nationwide sought to prove that the boiler explosion was caused by the failure of Molenda to adequately tighten a “set screw” which was part of the “linkage” mechanism that controlled the flow of gas into a combustion chamber of the boiler. Nationwide sought to prove that a set screw slipped during a particular “cycle” because the set screw was too loose, allowing too much gas into the chamber and resulting in the explosion. Although Wolf’s testimony and his report regarding the boiler, the setup process, and the various steps involved in the setup and testing of the boiler are often complicated and confusing, it is unnecessary to understand the precise mechanics of the boiler’s operation and the adjustment process in order to resolve this case. The dispute focuses on just a few parts of the boiler, a limited sequence of events, and Wolf’s opinion about those parts and events.

¶14 It was Wolf’s opinion that the explosion occurred because Molenda was adjusting linkage, including making adjustments using set screws, in order to regulate the flow of gas into the boiler’s combustion chamber. In Wolf’s opinion, during that process Molenda failed to sufficiently tighten one of the set screws, allowing the screw to slip and let too much gas into the combustion chamber. Wolf’s opinion regarding the tightness of the set screw was an assumption that was solely based on scratch marks.

¶15 To clarify, Nationwide does not dispute that Wolf’s causation theory hinges on Wolf’s opinion that Molenda failed to sufficiently tighten the set screw between two specific boiler cycles. A monitoring device determined that the boiler had cycled 97 times prior to the explosion and that the explosion occurred

during the 98th cycle.⁵ Wolf gave the opinion that the set screw slipped between the 97th and 98th cycles, permitting excessive gas build-up in the combustion chamber which, in turn, caused the explosion during the 98th cycle. We perceive no dispute that Wolf's factual assumption that the set screw slipped at this particular point in time was based on his observation of scratch marks on the linkage.

¶16 August Winter's insufficient-factual-basis argument proceeds as follows. Wolf's causation opinion depends on the proposition that the set screw slipped between the 97th and 98th cycles and that the only evidence that the set screw slipped at this point in time is the existence of the scratch marks. However, when Wolf was questioned about why the scratch marks supply evidence that the set screw both was too loose and slipped between the 97th and 98th cycles, Wolf provided no explanation. Rather than explain why he concluded that the scratch marks were made between the 97th and 98th cycles, Wolf admitted that he did not know whether the scratch marks were present prior to the 97th cycle. When Wolf was specifically asked whether he knew *when* the scratch marks were made, Wolf responded that they were made before the explosion but that he did not know when. Wolf responded that he did not know "how much of that slippage occurred between 97 and 98 or at the onset of 98," and, when pressed further, admitted he knew only that the slippage occurred "before 98," but "how much between 97 and 98 versus prior cycles, I don't know. I can't say."

⁵ In a pleading before the circuit court, August Winter states that there is a dispute regarding whether the explosion occurred during the 98th cycle or after that cycle. Nationwide does not suggest that any dispute regarding this topic favors Nationwide. So far as we can tell, Nationwide's expert witness, Wolf, assumed that the explosion occurred during the 98th cycle. We make the same assumption.

¶17 In sum, we understand August Winter to argue on appeal, as it did before the circuit court, that Wolf's causation opinion was incomplete in that it depended on an unsupported factual assumption. We agree.

¶18 Wolf was clear that he believed that Molenda failed to assure that the set screw was sufficiently tight between the 97th and 98th cycles and that this too-loose set screw (and the mechanism it was supposed to hold in place) slid, allowing too much gas into the combustion chamber, resulting in the explosion. What is missing is a factual basis for Wolf's assumption that the set screw was *in fact* too loose between the 97th and 98th cycles. Like the circuit court, so far as we can tell this assumption depends on when the scratch marks were made. And, like the circuit court, we find no explanation as to why the evidence supports a finding that the scratch marks were made between the 97th and 98th cycles.⁶

¶19 For example, Wolf does not explain or opine that there is something about the nature of the scratch marks that shows that they must have been made, or even that they were likely made, between the 97th and 98th cycles. Similarly, Wolf does not explain why it is unlikely that the scratch marks were made at some point in time prior to the 97th cycle. Instead of supplying a factual basis for his assumption about when the pertinent scratch marks were made, Wolf repeatedly acknowledged that he did not know when they were made.

⁶ Before the circuit court and on appeal, August Winter points to evidence from other witnesses indicating that the set screw was sufficiently tight. The point of August Winter's argument seems to be that August Winter was prepared to present evidence, contrary to Wolf's testimony, that the set screw was sufficiently tight during the explosion cycle. We do not rely on such contrary evidence. For purposes of this appeal, we conclude only that Nationwide's argument fails, not because there is stronger contrary evidence, but because there is no evidence supporting a necessary factual component of Wolf's causation opinion.

¶20 We have scoured Nationwide’s oral and written arguments before the circuit court and this court for a cogent response to August Winter’s argument. We find none. Indeed, we find no detailed discussion of the set screw issue at all. In its brief-in-chief, Nationwide argues:

Third, Mr. Wolf had sufficient factual basis to support his opinion. Mr. Wolf investigated the boiler on three different occasions in 2009, during which he took 267 photographs. His report detailed exactly what his photographs show, and his observations in them. He also described in detail the burner cycle process he observed, and the results of each burner cycle. In addition, Duane Wolf obtained and analyzed information from the burner management system. He also analyzed and relied upon the reports of [August Winter’s] expert, Dean Yourchuck.

[August Winter] does not argue that Mr. Wolf did not sufficiently investigate and develop facts. [August Winter’s] sole criticism of Mr. Wolf’s factual basis for his opinion that [August Winter] negligently set up the boiler is that, in opining that the screws were not properly tightened, Mr. Wolf did not rule out all possibility that the scratches he observed were caused by the accident. This argument goes to the credibility of Mr. Wolf’s conclusions, not his methodology. Also, it is impossible for Mr. Wolf to rule this out as he could not have gone back in time and inspected the boiler prior to the accident. Furthermore, an expert is not required to rule out all other possibilities in order to have a reliable opinion.

(Record citations omitted.) Obviously, nothing above addresses the factual basis for Wolf’s assumption that the scratch marks were made between the 97th and 98th cycles.⁷

⁷ In its reply brief, Nationwide does no better. There, Nationwide’s pertinent factual argument is as follows:

Contrary to what [August Winter] would have this Court believe, Mr. Wolf did not simply pull his opinion as to causation out of thin air. Instead, Mr. Wolf inspected the boiler on three occasions, took more than 200 photographs, and authored a

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¶21 Additionally, the excerpt from Nationwide’s appellate brief above mischaracterizes the pertinent part of August Winter’s argument. The place in the record cited by Nationwide to support its assertion—that the “sole criticism” lodged by August Winter is that Wolf failed to “rule out” other scenarios as to when the scratch marks were made—does not contain that argument. Instead, looking there, we find the argument we address on appeal:

The “lynchpin” to [Wolf’s] theory remains an assumption that the set screw was loose enough so as to allow the linkage to slip during the cycle when the explosion occurred. [Wolf’s] only support for this conclusion is scratch marks on the linkage that he believes demonstrates slippage. However and importantly, those scratch marks are only relevant to [Wolf’s] analysis and ultimately his opinion regarding [Molenda’s] tightening of the set screw if [Wolf] can establish factually that the scratch marks were made during the cycle when the explosion occurred. As demonstrated by his deposition testimony, [Wolf] cannot [do so].

¶22 Before concluding, we make two more observations.

¶23 First, although Nationwide does not discuss the issue, it appears that Wolf, in his deposition testimony, might have been attempting to explain that the set screw may have begun slipping before the 97th cycle and that there was additional slippage between the 97th and 98th cycles that was significant: the straw that broke the camel’s back. This refinement of Wolf’s theory, if correct,

report to document his observations and his methodology. Further Mr. Wolf’s conclusion as to the cause of the explosion is not simply his “personal belief”—instead, it is based on his analysis of the data and evidence, including the scratch marks and the statement by [August Winter] representative Joe Molenda that a fuel arm was also loose.

(Record citation omitted.)

does not help Nationwide. Taking this view of slippage into account, it remains true that Wolf provides no basis for his assumption that the set screw was *in fact* too loose between the 97th and 98th cycles.

¶24 Second, we, like the circuit court before us, are bound by the record at it stands. It may be that Wolf was prepared to give an explanation as to why the *most likely* scenario was scratch-causing slippage between the 97th and 98th cycles because of a too-loose set screw. Perhaps Nationwide’s counsel planned to present such evidence at a trial. But that is just speculation; such evidence is lacking as the record stands now. We are obligated to apply law to the existing record.

Conclusion

¶25 For the reasons above, we affirm the circuit court.

By the Court.—Order affirmed.

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

