COURT OF APPEALS
DECISION
DATED AND FILED

June 13, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 98-3169

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

JIM SIELAFF,

PETITIONER-APPELLANT,

v.

MATCO TOOLS CORPORATION,
ROBERT MUELLER AND
JEFFREY WAGNER,

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County: DIANE S. SYKES, Judge. *Affirmed.*

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

¶1 PER CURIAM. James Sielaff appeals from an order dismissing his misrepresentation claim filed against Matco Tools Corporation, Robert Mueller, and Jeffrey Wagner (collectively, "Matco"). Sielaff claims that the trial court

erred when it granted Matco's motion to dismiss during the trial on the grounds that Sielaff failed to produce any witnesses qualified to testify as to damages. Sielaff also contends that the trial court erroneously exercised its discretion when it denied his motion to strike Matco's answer as a sanction for discovery violations. Because Sielaff failed to produce any witness qualified to testify as to the fair market value of the property at issue, and because he failed to make any sufficient offer of proof with regard to the same, we affirm the trial court's decision to dismiss the case. Further, because the trial court did not erroneously exercise its discretion when it denied Sielaff's motion to strike Matco's answer, we affirm that decision as well.

I. BACKGROUND

¶2 In 1989, Sielaff purchased a Matco dealership from the previous owner, Mueller. After three years, the dealership folded. Sielaff contends that Mueller intentionally and negligently misrepresented various facts in order to induce the purchase. Sielaff filed the instant lawsuit, seeking damages for the allegedly fraudulent misrepresentations.

¶3 A scheduling order was issued, requiring Sielaff to name both lay and expert witnesses. In December 1997, he named two expert witnesses, Dr. Ralph Scott, an economist, and Clifford Diviney, a liability expert. In April 1998, Sielaff's counsel moved to withdraw. After various hearings on the motion, the trial court eventually granted the motion on June 8, 1998. Sielaff was directed to obtain new counsel by July 27, 1998. On that date, his new attorney, James E. Starnes, was admitted *pro hac vice*. The trial court also addressed Matco's motion regarding Sielaff's failure to provide expert-witness reports as required by the

scheduling order. The trial court ordered Sielaff to produce these reports by July 31, 1998, at 9:00 a.m., or the case would be dismissed.

¶4 A report from Diviney was timely filed. The report discussed liability issues and listed Sielaff's damages in the form of loans incurred when Sielaff purchased the dealership. No report from the economist was ever filed. On August 10, 1998, Sielaff filed an emergency motion to strike Matco's answer, affirmative defenses and counterclaims as a sanction for various discovery violations. The trial court denied the motion, ruling it was untimely, and that any discovery violations that occurred did not justify such a drastic sanction.

¶5 A jury trial commenced on August 31, 1998. During the second day of trial, the trial court learned that Diviney did not intend to testify as to the fair market value of the dealership at the time it was purchased. Further, Sielaff conceded that he did not have an accountant, economist, or other witness who could qualify as an expert to offer testimony on the fair market value issues. Instead, Sielaff contended that an expert witness was not required to address these issues, because fair market value could be determined by Sielaff, himself, or by his former accountant, Roxanne Otto, who was listed as a witness for the defense. Sielaff's counsel advised the court that he did not know what Otto's testimony would be, and no offer of proof as to Sielaff's testimony was recorded. Matco moved to dismiss the case with prejudice.

¶6 The trial court ruled:

> [I]t is very clear to me there is no way the case was ready to be tried, not through any fault or failure of effort for the last few weeks, but because it wasn't prepared properly previously, and orders were not complied with previously.
>
> But to address the merits of the dismissal motion, in order to sustain its claim that … the plaintiff has to present,

> among other things, some evidence as to this benefit of the bargain fair market value measure of damages, whether this is an intentional misrepresentation case if the jury were to so find or a negligent misrepresentation case if the jury were to so find, it has to be that measure of damages which is applied.…
>
> And there is no witness to testify about that, expert or lay. If it's going to be a lay witness, a lay opinion, it has to be at least somebody who has a basis to state an opinion about the fair market value, and I'm not even sure it can be done with a lay witness, but assuming a lay witness will be permitted, qualified and permitted to testify as to the fair market value difference, the benefit of the bargain measure of damages here, there isn't a witness who can so testify here. You can't use one of the defense witnesses because there is no representation that that witness would render an opinion that is favorable to the plaintiff in that regard. There is no offer of proof on that. I have no offer of proof that any witness is going to be able to offer a benefit of the bargain opinion about the damages in this case or a fair market value opinion about the damages in this case.
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> That being the case, the plaintiff cannot prove its claim for intentional or negligent misrepresentation, and the case must be dismissed.

Sielaff appeals from the trial court's order dismissing the case.

II. DISCUSSION

A. Dismissal.

¶7 Sielaff contends that the trial court erred when it dismissed his case, arguing that he was not required to present evidence as to the fair market value of the dealership, and that he did not need an expert witness in order to establish his damages. We are not persuaded.

¶8 In ***Weiss v. United Fire & Casualty Co.***, 197 Wis. 2d 365, 541 N.W.2d 753 (1995), the supreme court set out the standard of review we are to

apply when reviewing the trial court's decision to dismiss a claim based on evidence insufficiency:

> A motion challenging the sufficiency of the evidence may not be granted "unless the court is satisfied that, considering all credible evidence in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a finding in favor of such a party." This standard applies both to a motion to dismiss at the close of a plaintiff's case and to a motion for a directed verdict or dismissal at the close of all the evidence when the motion challenges the sufficiency of the evidence. It also applies both to the circuit court and to "an appellate court on review of the trial court's determination" of the motion.
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> ....
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> Because a circuit court is better positioned to decide the weight and relevancy of the testimony, an appellate court "must also give substantial deference to the trial court's better ability to assess the evidence." An appellate court should not overturn a circuit court's decision to dismiss for insufficient evidence unless the record reveals that the circuit court was "clearly wrong."

Id. at 388-89 (citations omitted).

¶9 Sielaff's claims against Matco involved causes of action alleging intentional and negligent misrepresentation. In intentional misrepresentation cases, damages are calculated according to the "benefit of the bargain" rule. *See* ***Ollerman v. O'Rourke Co., Inc.***, 94 Wis. 2d 17, 52, 288 N.W.2d 95 (1980). Under this rule, the measure of the purchaser's damages is the difference between the value of the property as represented, and its actual value as purchased. *See* ***id.*** at 52-53. In negligent misrepresentation cases, damages are measured by the difference between the fair market value of the property at the time of sale and the amount actually paid, otherwise known as the "out-of-pocket" rule. *See* ***Gyldenvand v. Schroeder***, 90 Wis. 2d 690, 697-98, 280 N.W.2d 235 (1979).

Thus, Sielaff needed a qualified witness who could attest to either the value of the property as represented, or the fair market value of the property at the time of the purchase.

¶10 Although Sielaff argues that the trial court prematurely dismissed his case when informed that his expert witness would not provide the required testimony, we disagree. As Sielaff points out, expert testimony is not always required in order to determine damages. When the matters to be proven are within the area of common knowledge and lay comprehension, expert testimony is not required. *See* ***Suburban State Bank v. Squires***, 145 Wis. 2d 445, 452, 427 N.W.2d 393 (Ct. App. 1988). However, the fair market value of a tool dealership, which had been successfully operated at a profit by the previous owner, is not an area within the common knowledge of the average lay person. Under the circumstances presented here, determining the true fair market value of an ongoing business concern requires expert testimony.

¶11 Sielaff contends that either he or Diviney would have testified to the amount of money Sielaff invested in the business, in order to demonstrate the damages that resulted. This testimony, however, does not reflect the true fair market value of the dealership at the time it was purchased. Sielaff's damages are the difference between the two values. *See, e.g.,* ***D'Huyvetter v. A.O. Smith Harvestore Prods.***, 164 Wis. 2d 306, 322-24, 475 N.W.2d 587 (Ct. App. 1991). Sielaff argues that he himself could have testified to the fair market value of the dealership, as did the owner of the silo in ***D'Huyvetter***, who testified that the silo was worthless. *See* ***id.*** at 323-24. This argument fails for two reasons. First, Sielaff failed to make any offer of proof at the time the trial court requested it. *See, e.g.,* ***Frankard v. Amoco Oil Co.***, 116 Wis. 2d 254, 267, 342 N.W.2d 247 (Ct. App. 1983) (absent offer of proof, appellate court is precluded from reviewing

alleged error). Second, Sielaff's dealership is distinguishable from the silo in ***D'Huyvetter***, because the dealership was clearly not worthless. Arguably, the dealership may have been worth less than Sielaff paid for it; nevertheless, Sielaff failed to produce any witnesses who could establish the fair market value of the property.

¶12 Sielaff also contends that his former accountant, Otto, could have attested to the fair market value of the dealership. However, Sielaff did not name Otto as a witness and, although she was named as a witness for the defense, Sielaff did not reserve the right to call the defense witnesses. Further, Sielaff failed to make an offer of proof as to what Otto's testimony would be. Instead, Sielaff's counsel told the court that he had no idea what Otto might attest to. Accordingly, Sielaff's reliance on Otto as his damage witness fails. *See* ***Findorff v. Findorff***, 3 Wis. 2d 215, 226, 88 N.W.2d 327 (1958); WIS. STAT. § 901.03(1)(b) (1997-98) (counsel must "make an offer of proof as to the rejected testimony as a condition precedent to this court passing on this alleged erroneous ruling on evidence," otherwise "this court cannot determine whether the exclusion of the offered evidence was prejudicial.").

¶13 Based on the foregoing, we conclude that the trial court's dismissal of Sielaff's case was not clearly wrong.

B. Motion to Strike.

¶14 Sielaff also claims that the trial court erred when it denied his motion seeking to strike Matco's answer as a sanction for discovery violations. Discovery sanctions involve the exercise of the circuit court's discretion and will not be disturbed absent an erroneous exercise of discretion. *See* ***Johnson v. Allis Chalmers Corp.***, 162 Wis. 2d 261, 273, 470 N.W.2d 859 (1991). However,

dismissal of an action for failure to comply with discovery and scheduling orders is permissible only when bad faith or egregious conduct can be shown on the part of a noncomplying party. *See* ***id.*** at 275. We cannot conclude that the trial court erroneously exercised its discretion when it denied Sielaff's motion seeking to strike Matco's answer as a sanction for discovery violations.

¶15 The trial court denied the motion for two reasons. First, it denied the motion on the basis that the motion was dispositive in nature and the deadline for filing dispositive motions had long since passed. Second, the trial court determined that any discovery violations were not of such a magnitude that justified the drastic sanction of striking the answer. The trial court also noted that striking the answer was an extremely drastic and disfavored remedy since it had nothing to do with the merits of the action. The trial court then indicated that, with the trial only two weeks away, it was anxious to get to the merits of the matter. The trial court's decision reflects a proper exercise of discretion. Accordingly, we must affirm the trial court's decision to deny Sielaff's motion.

By the Court.—Order affirmed.

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