COURT OF APPEALS
DECISION
DATED AND FILED

March 31, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP2088 **Cir. Ct. No. 2005CV8782**

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

BUCYRUS INTERNATIONAL, INC.,

PLAINTIFF-APPELLANT,

V.

PRICE ERECTING COMPANY, A/K/A PRICE VIKING COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Milwaukee County: ELSA C. LAMELAS, Judge. *Affirmed*.

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

¶1 FINE, J. Bucyrus International, Inc., appeals a judgment entered on a jury verdict after the trial court changed the answer to one of the questions. *See* WIS. STAT. § 805.14(5)(c) ("Any party may move the court to change an answer in the verdict on the ground of insufficiency of the evidence to sustain the answer.").

Bucyrus claims that the trial court erred because the verdict answer was supported by sufficient evidence. We affirm.

I.

¶2 Price Erecting Company, also known as Price Viking Company, was hired to move a 69,000 pound vertical column that was part of a mill bar machine that was being moved from Bucyrus's South Milwaukee plant to a factory in Ohio for retrofitting. While the column was being rigged for movement, it fell to the ground and cracked. After investigating whether the column could be repaired or replaced, Bucyrus ultimately determined the best option was to purchase a used mill bar machine.

¶3 Bucyrus sued Price for negligently damaging the column. At the trial, Bucyrus presented evidence that from October 15, 2004, to July 15, 2005, the date the retrofit was to be complete through the date the used machine became operational, it incurred outsourcing expenses of $734,964, that is, what it cost to have made what the mill bar machine would have made had it not been damaged so Bucyrus could not use it. According to Bucyrus, its outsourcing expenses included $533,983 to subcontract for the parts that would have been produced by the mill bar machine, $5,222 to hire a third-party inspector to ensure the quality of the parts, and $195,758 to ship the parts to and from Bucyrus. Bucyrus also presented evidence that, among other things, it cost $582,949 to assemble and modify the used machine, and $38,450 for the tools needed to operate it.

¶4 The jury found Price seventy-five percent negligent and Bucyrus twenty-five percent negligent. It then awarded damages to Bucyrus in the three categories on the special verdict form:

a. Cost to repair or replace the physical item (column and/or components) $968,040

b. Reasonable cost of repairs to the building $111,317

c. Loss of use of the Mill Bar $1,354,964

¶5 Price moved to change the loss-of-use award, claiming that the only evidence Bucyrus presented at trial showed $734,964 in loss-of-use damages as that component of the special verdict was defined by the jury instructions. *See* WIS. STAT. § 805.14(5)(c). The trial court agreed and changed the jury's award from $1,354,964 to $734,964. Bucyrus claims that the trial court erred because, it contends, there was sufficient credible evidence to support the jury's loss-of-use award.

II.

¶6 We will sustain a jury's verdict on damages if there is any credible evidence to support it. ***D.L. Anderson's Lakeside Leisure Co. v. Anderson***, 2008 WI 126, ¶¶22, 26, ___ Wis. 2d ___, ___, 757 N.W.2d 803, 810, 811; *see also* WIS. STAT. § 805.14(1).[1]

> [A]ppellate courts search the record for credible evidence that sustains the jury's verdict, not for evidence to support a verdict that the jury could have reached but did not. If we

[1] WISCONSIN STAT. § 805.14(1) provides:

> TEST OF SUFFICIENCY OF EVIDENCE. No motion challenging the sufficiency of the evidence as a matter of law to support a verdict, or an answer in a verdict, shall be granted unless the court is satisfied that, considering all credible evidence and reasonable inferences therefrom 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 party.

> find that there is "any credible evidence in the record on which the jury could have based its decision," we will affirm that verdict. Similarly, if the evidence gives rise to more than one reasonable inference, we accept the particular inference reached by the jury.

Morden v. Continental AG, 2000 WI 51, ¶39, 235 Wis. 2d 325, 352, 611 N.W.2d 659, 672 (citations and quoted source omitted). We cannot, however, uphold a judgment based on "conjecture, unproved assumptions, or mere possibilities." ***Szalacinski v. Campbell***, 2008 WI App 150, ¶23, ___ Wis. 2d ___, ___, 760 N.W.2d 420, 428 (quoted source and internal quotation marks omitted).

> ¶7 When we review an order changing the jury's answers, we begin with considerable respect for the trial court's better ability to assess the evidence. However, an appellate court may overturn the trial court's decision to change the jury's answers if the record reveals that the trial court was "clearly wrong."

Richards v. Mendivil, 200 Wis. 2d 665, 671–672, 548 N.W.2d 85, 88 (Ct. App. 1996) (citations omitted). "When a circuit court overturns a verdict supported by 'any credible evidence,' then the circuit court is 'clearly wrong' in doing so." ***Weiss v. United Fire & Cas. Co.***, 197 Wis. 2d 365, 389, 541 N.W.2d 753, 761 (1995).

¶8 Since a challenge to the sufficiency of the evidence must be evaluated in light of jury instructions, *see* ***D.L. Anderson's***, 2008 WI 126, ¶22, ___ Wis. 2d at ___, 757 N.W.2d at 810, we begin with the jury instruction defining loss-of-use damages. The jury was instructed:

> [I]f you find that Plaintiff Bucyrus could not use its mill bar because of the accident, insert the amount that will reasonably compensate plaintiff for the loss of its use.
>
> You may consider the reasonable cost to outsource the mill bar's production for the period of time beyond October 15, 2004 to July 15, 2005, but this cost may not

> exceed the amount plaintiff expended to outsource production temporarily.

None of the parties, including Bucyrus, objected to this instruction at the trial. *See* WIS. STAT. § 805.13(3) ("Failure to object at the conference constitutes a waiver of any error in the proposed jury instructions or verdict.").

¶9 On appeal, Bucyrus claims that this instruction did not limit loss-of-use damages to its $734,964 outsourcing expenses. It argues that under the broad definition given to loss-of-use damages in some of the case law, *see* ***Kim v. American Family Mut. Ins. Co.***, 176 Wis. 2d 890, 897, 501 N.W.2d 24, 27 (1993) ("claimants should receive the sum that reasonably compensates them for their losses"), the jury could have reasonably included the assembly and modification costs, and the tooling-procurement expenses in its damage award. We disagree.

¶10 The clear language in the jury instruction specifically limits loss-of-use damages to "the amount [Bucyrus] expended to outsource production temporarily." It does not include assembly and modification costs or tooling-procurement expenses. Accordingly, under the jury instructions here, loss-of-use damages are limited to Bucyrus's outsourcing damages. We thus examine the Record to determine whether Bucyrus presented any credible evidence on which the jury could find that its outsourcing costs were $1,354,964. *See* ***Morden***, 2000 WI 51, ¶39, 235 Wis. 2d at 352, 611 N.W.2d at 672 (reviewing court searches the record for credible evidence to support the jury's verdict).

¶11 Bucyrus presented evidence that it cost $734,964 to outsource the mill bar machine's production. Peter J. Dahms, a manager of manufacturing technical services for Bucyrus at the time of the accident to the mill bar machine, testified that he was "responsible for, for tracking out-sourcing activity that was

necessary to continue producing product that would have been produced on this boring bar had the accident not occurred." According to Dahms, Bucyrus's outsourcing expenses came to "a total of nearly $735,000":

> Q Let me show you Exhibit Number 20, Plaintiff's Exhibit 20. Have you seen this document before?
>
> A Yes, I have.
>
> Q Okay. Just generally tell me what this is.
>
> A This document indicates that our boring expenses, that would have been for subcontract machining of the weldments, was just under $534,000; inspection expenses, as I described, were a little over $5,200; and the freight expenses were just under $196,000, for a total of nearly $735,000.
>
> ….
>
> Q Okay. And the boring expenses, does that relate to the out-sourcing expenses that you say were incurred because the machine was down?
>
> A Yes.
>
> Q And inspection expenses, those are the ones that you've talked about already?
>
> A Yes.
>
> Q And the freight expenses, that's the freight costs for out-sourcing work that could have been done at Bucyrus?
>
> A That's correct.

Consistent with Dahms's testimony, Exhibit 20, titled "Summary of Increased Cost of Outsourcing Damage," lists boring expenses of $533,983, inspection expenses of $5,222, and freight expenses of $195,758, for total outsourcing

damages of $734,964.[2] In his closing argument, Bucyrus's lawyer asked the jury to rely on these amounts to determine Bucyrus's outsourcing expenses:

> Exhibit 20[].
>
> This is another loss. This machine was supposed to be, after retrofit[ing], back on line by October 15th and producing parts. Between October 15th and July 15th of '05 it wasn't operating; okay? So they had to outsource the work that they could have done in-house to other third parties. And this is the total expense relating to that outsourcing between October 15, '04 and July of '05.

There is no evidence that Bucyrus's outsourcing expenses included machine assembly-and-modification or tooling-procurement costs. Indeed, the assembly-and-modification and tooling-procurement expenses that Bucyrus points to were presented at trial as machine-replacement damages. Bucyrus may not recharacterize them on appeal as outsourcing expenses to meet the jury instruction's definition of loss-of-use damages. In sum, Bucyrus did not present any credible evidence that it sustained $1,354,964 in loss-of-use damages. Accordingly, the trial court was not clearly wrong when it reduced Bucyrus's loss-of-use damages from $1,354,964 to $734,964.

By the Court.—Judgment affirmed.

Publication in the official reports is not recommended.

[2] The numbers actually add up to $734,963. The Record does not explain the discrepancy.