COURT OF APPEALS DECISION DATED AND FILED

November 5, 2002

Cornelia G. Clark
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. 02-0752

Cir. Ct. No. 99CV9050

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

DEBORAH A. CONDON AND JOHN W. CONDON,

PLAINTIFFS-RESPONDENTS,

V.

HERITAGE MUTUAL INSURANCE COMPANY,

DEFENDANT-APPELLANT,

BLUE CROSS & BLUE SHIELD UNITED OF WISCONSIN,

DEFENDANT.

APPEAL from a judgment of the circuit court for Milwaukee County: THOMAS R. COOPER, Judge. *Affirmed*.

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

¶1 PER CURIAM. Heritage Mutual Insurance Company (Heritage) appeals from the judgment entered after a jury awarded Deborah and John Condon $262,714.18 for the wrongful death of their daughter, Ashley Condon, who was

struck and killed by an automobile operated by Kyle Fueger. Heritage contends: (1) no credible evidence supported the jury's finding that Fueger's negligence was a substantial factor in Ashley's death; (2) expert testimony was necessary to establish that Fueger's negligence was a substantial factor in Ashley's death; (3) the trial court erroneously admitted testimony of Officer Riederer regarding the statistical relationship between impact speed and the severity of injury; and (4) the trial court erroneously admitted the deposition testimony of a defense expert witness, contrary to WIS. STAT. § 804.07 (1999-2000).[1]

¶2 We conclude that sufficient evidence established that Fueger's negligence as to speed and lookout was a substantial factor in causing Ashley's death. Additionally, expert testimony was not necessary to establish this causal connection, because the presence of Fueger's negligence was reasonably comprehensible to the jury, even though it may have involved the drawing of inferences. Further, although the trial court erroneously admitted the statistical testimony of Officer Riederer, because Heritage has failed to establish that the outcome would have been different absent this testimony, we conclude that the error was harmless. Finally, we conclude that the trial court did not err in admitting the deposition testimony of the defense expert. Accordingly, the trial court is affirmed.

I. BACKGROUND.

¶3 On July 19, 1998, at 1:00 p.m., Ashley, an eight-year-old girl, was riding her bicycle down her neighbor's driveway. Her neighbor's house was

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

located on Spring Drive in Brookfield, Wisconsin. As Ashley rode down the driveway heading from east to west, Fueger, a seventeen-year-old boy, was driving his parents' automobile northbound on Spring Drive. As Ashley emerged from the driveway and entered the intersection, she was struck and killed by Fueger's vehicle.

¶4 The speed limit on Spring Drive in the neighborhood of the accident was twenty-five miles per hour. Fueger told police who were investigating the accident that he was traveling at approximately thirty miles per hour. He also told police that he never saw Ashley on her bicycle prior to the collision, and that he did not apply his brakes until immediately after impact.

¶5 One of the investigating officers, Frank Riederer, conducted an accident investigation reconstruction. Initially, Officer Riederer inspected Fueger's vehicle and Ashley's bicycle. He determined that the point of impact between the automobile and the bicycle was approximately two feet from the left corner of the front bumper – meaning that Ashley had nearly cleared the northbound lane of Spring Drive before being struck. As part of his inspection, he also turned the key in the ignition of the vehicle and discovered that the "[a]ir conditioning was up and the radio was on loud."

¶6 Officer Riederer later determined and testified that Fueger was likely traveling between 31.5 and 37.7 miles per hour at the point of impact. While noting that there was a sight obstruction from trees and bushes in Fueger's sightline, Officer Riederer was able to calculate that the distance between the point at which Ashley became visible to Fueger from behind the last obstruction to the point of impact was 14.58 feet. Based on this calculation and the speed of the

vehicle, Officer Riederer computed that Ashley would have been visible to Fueger for approximately 1.4 to 2.9 seconds.[2]

¶7 Officer Riederer also testified about stopping distances for automobiles traveling at various speeds. He testified that a vehicle traveling between twenty and thirty miles per hour would have a stopping distance of forty-three to seventy-nine feet, but that a vehicle traveling between thirty and forty miles per hour would have a stopping distance of seventy-nine to one-hundred and twenty-six feet. He also testified that a vehicle traveling between thirty-one and thirty-seven miles per hour would have been between 65.8 and 78.6 feet away from the collision point at 1.4 seconds prior to impact, and that a vehicle traveling at the same speed would have been between 131.7 and 157.2 feet from the collision point at 2.9 seconds prior to impact. Finally, in his accident report, Officer Riederer concluded that Fueger's speed was a significant factor in causing the accident.

¶8 The jury apportioned liability between Fueger and Ashley at 75% and 25%, respectively. The jury awarded Ashley's parents the statutory wrongful death limit of $350,000, which was reduced to $262,714.18 due to Ashley's contributory negligence. This award was further reduced to Heritage's policy limit of $250,000.[3]

---

[2] Officer Riederer testified that if Ashley were traveling at a bicycle speed of ten feet per second, she would have been visible to Fueger for 1.4 seconds. However, based on a five feet per second average pedaling speed for ten-to-twenty-year-old riders, Officer Riederer also testified that if Ashley were only traveling at five feet per second, she would have been visible to Fueger for 2.9 seconds.

[3] Because Heritage was the only named defendant, the jury award was reduced to the policy limit of $250,000 plus costs and interest.

¶9 In motions after the verdict, Heritage argued: (1) no credible evidence supported the jury's finding that Fueger's negligence was a substantial factor in Ashley's death; (2) expert testimony was necessary to establish that Fueger's negligence was a substantial factor in Ashley's death; (3) the trial court erroneously admitted testimony of Officer Riederer regarding the statistical relationship between impact speed and the severity of injury; and (4) the trial court erroneously admitted the deposition testimony of Robert Krenz, a defense expert witness, after he had been excused from the stand. The trial court denied Heritage's post-verdict motions and entered judgment in favor of the Condons in the amount of $250,000.

II. ANALYSIS.

A. Credible evidence supported the jury's finding that Fueger's negligence was a substantial factor in Ashley's death.

¶10 Question two of the special verdict form submitted to the jury read: "Was the negligence of Kyle Fueger a cause of Ashley Condon's death." In response, the jury answered, "Yes." Heritage contends that the trial court should have changed the jury's answer because no credible evidence supported the jury's finding. We disagree and conclude that the Condons presented sufficient evidence such that a reasonable juror could have concluded that Fueger's negligence was a substantial factor in causing Ashley's death.

¶11 We review a jury's finding under the "any credible evidence" standard. *See* ***Foseid v. State Bank of Cross Plains***, 197 Wis. 2d 772, 783, 541 N.W.2d 203 (Ct. App. 1995). Under this standard, we will uphold the jury's determination if there is any credible evidence to sustain the verdict. ***Id.*** at 782. This is a highly deferential standard of review:

> In considering a motion to change the jury's answers to the questions on the verdict, a trial court must view the evidence in the light most favorable to the verdict and affirm the verdict if it is supported by any credible evidence. The trial court is not justified in changing the jury's answers if there is any credible evidence to support the jury's findings. In reviewing the evidence, the trial court is guided by the proposition that "[t]he credibility of witnesses and the weight given to their testimony are matters left to the jury's judgment, and where more than one inference can be drawn from the evidence," the trial court must accept the inference drawn by the jury. On appeal this court is guided by these same rules.

Richards v. Mendivil, 200 Wis. 2d 665, 671, 548 N.W.2d 85 (Ct. App. 1996) (citations omitted). Thus, even though the jury's verdict could be challenged by contradictory evidence, it is this court's obligation to search for credible evidence that will sustain the verdict, not for evidence to sustain a verdict the jury could have, but did not reach. *See* ***Meurer v. ITT Gen. Controls***, 90 Wis. 2d 438, 450-51, 280 N.W.2d 156 (1979). "These standards apply not only as to the presence of negligence but also as to the existence of causation." ***City of Cedarburg Light & Water Comm'n v. Allis-Chalmers Mfg. Co.***, 33 Wis. 2d 560, 564, 148 N.W.2d 13 (1967). In the instant case, credible evidence fairly supports the jury's finding.

¶12 "Excessive speed certainly is causal when it prevents or retards the operator, after seeing danger, from slowing down or stopping in time to avoid a collision." ***Heagney v. Sellen***, 272 Wis. 107, 112, 74 N.W.2d 745 (1956). Here, Officer Riederer testified that Fueger was traveling at approximately thirty-one to thirty-seven miles per hour at the time of the accident in an area where the speed limit was twenty-five miles per hour. Officer Riederer further testified that a vehicle traveling at twenty-five miles per hour (the speed limit) has a stopping distance of sixty-one feet, but that a vehicle traveling between thirty and forty

miles per hour (Fueger's speed) has a stopping distance of seventy-nine to one-hundred and twenty-six feet. Finally Officer Riederer testified that a vehicle traveling between thirty-one and thirty-seven miles per hour would have been between 65.8 and 78.6 feet away from the collision point at 1.4 seconds prior to impact, and that a vehicle traveling at the same speed would have been between 131.7 and 157.2 feet from the collision point at 2.9 seconds prior to impact.

¶13 We conclude that, based on this testimony, a reasonable juror could have concluded: (1) Ashley was riding her bicycle at ten miles per hour down the driveway; (2) Ashley was visible to Fueger for 1.4 seconds; (3) Fueger was traveling at thirty-one miles per hour at the time of the accident; (4) Fueger was 65.8 feet away from the accident at 1.4 seconds prior to impact; (5) the stopping distance at Fueger's speed was seventy-nine feet; but that (6) the stopping distance for a vehicle traveling at the speed limit is sixty-one feet. Thus, under this scenario, a reasonable juror could have concluded that, had Fueger been traveling at the speed limit, he would have been able to stop his vehicle in time to avoid the accident.

¶14 Additionally, Fueger's speed could have had a direct effect on other types of negligence, including improper lookout:

> Excessive speed has a direct effect upon other types of negligence. For instance, speed may limit the lookout of the operator or his ability to slow down or stop in time to avoid a collision. It is erroneous to state that excessive speed may not be causal because other items of negligence may or may not also be present. The causality of speed does not drop out of a case because there may also exist negligence in other respects, nor does it cease to exist necessarily because other items of negligence do not exist.

Rodenkirch v. Johnson, 9 Wis. 2d 245, 252, 101 N.W.2d 83 (1960).

¶15 Based on the testimony of Officer Riederer, a reasonable juror could have also drawn the following conclusions regarding the accident: (1) Ashley was traveling down the driveway at a speed of five miles per hour; (2) Ashley was visible to Fueger for 2.9 seconds; (3) Fueger was traveling at thirty-one miles per hour; (4) Fueger was 131.7 feet from the collision point at 2.9 seconds prior to impact; (5) the stopping distance for a vehicle traveling at Fueger's speed was seventy-nine feet; but that (6) Fueger's speed, in combination with the distraction of the loud radio, limited his ability to maintain a proper lookout. Thus, a reasonable juror could have also concluded that had Fueger been keeping a proper lookout, he could have seen Ashley in time to safely stop his vehicle and avoid the accident.

¶16 Under either scenario, we conclude that sufficient credible evidence allowed the jury to reasonably infer that Fueger was causally negligent as to speed and lookout.

B. Expert testimony was not necessary to establish causation.

¶17 Heritage also contends that the Condons were required to produce an independent expert witness on the issues of causation. Generally, however, it is not essential to have expert testimony on the issue of causation unless the issue involves technical, scientific, or medical matters beyond the common knowledge and experience of jurors. ***City of Cedarburg Light & Water Comm'n v. Allis-Chalmers Mfg. Co.***, 33 Wis. 2d 560, 568a, 149 N.W.2d 661 (1967). Whether expert testimony is required must be determined on a case-by-case basis. ***Netzel v. State Sand & Gravel Co.***, 51 Wis. 2d 1, 6, 186 N.W.2d 258 (1971).

¶18 Here, we conclude that the issues involved – speed and lookout – do not involve scientific matters beyond the common knowledge and experience of

jurors. As illustrated above, the jury could have readily based its finding of causation on the testimony of Officer Riederer regarding speed and stopping distance, as well as Fueger's testimony that he never saw Ashley before impact. Because the jury was able to draw its own conclusions without assistance of expert opinion, admission of such testimony would not only have been unnecessary, but also improper. *See* ***Valiga v. Nat'l Food Co.***, 58 Wis. 2d 232, 251, 206 N.W.2d 377 (1973) ("If the court or jury is able to draw its own conclusions without assistance of expert opinion, admission of such testimony is not only unnecessary but improper."). Further, requiring expert testimony in cases involving such relatively simple automobile accidents would present an unnecessary financial hurdle to plaintiff's seeking access to our legal system. *See* ***Martindale v. Ripp***, 2001 WI 113, ¶65, 246 Wis. 2d 67, 629 N.W.2d 698 ("Requiring specialized expert testimony … in relatively simple automobile accident situations would escalate the cost of presenting personal injury cases without adequate justification. In short, it would present a serious issue in the administration of the legal system.").

C. Any error in admitting the testimony of Officer Riederer regarding the statistical relationship between impact speed and the severity of injury was harmless.

¶19 At trial, Officer Riederer also testified regarding the statistical relationship between impact speed and the severity of injury:

> [PLAINTIFF'S COUNSEL]: Officer, are you familiar with authoritative sources that indicate what the relationship of speed is to fatalities in accidents?
>
> ….
>
> [OFFICER RIEDERER]: Yes, I read a number of books that state the statistics.
>
> ….

> [PLAINTIFF'S COUNSEL]: And what is your recollection did those studies show, Officer?
>
> ….
>
> [OFFICER RIEDERER]: According to the book, most fatal accidents occur between 26 and 30 miles an hour….
>
> [PLAINTIFF'S COUNSEL]: And what is the percentage of fatalities for accidents between 26 and 30 miles an hour?
>
> [OFFICER RIEDERER]: 56 percent.
>
> [PLAINTIFF'S COUNSEL]: And what is the percentage of fatalities for accidents occurring at a speed of under 25?
>
> [OFFICER RIEDERER]: 13 percent.

On cross-examination, Officer Riederer acknowledged that he never performed any type of calculation regarding the impact speed and severity of injury in the instant case. Officer Riederer also acknowledged that his testimony in this area was merely a recitation of statistics from a book he had reviewed a week prior to the trial.

¶20 Heritage contends that Officer Riederer lacked the sufficient background and requisite knowledge to testify about the relationship between impact speed and severity of injury. While we agree that the Condons failed to establish a proper foundation for Officer Riederer to offer expert testimony in this area, we conclude that the admission of his testimony was harmless error.

¶21 "The admissibility of evidence is directed to the sound discretion of the trial court, and we will not reverse the trial court's decision to allow the admission of evidence if there is a reasonable basis for the decision and it was made in accordance with accepted legal standards and in accordance with the facts of record." ***State v. Brewer***, 195 Wis. 2d 295, 305, 536 N.W.2d 406 (Ct. App. 1995) (citation omitted). The admissibility of expert opinion testimony is assessed

in light of WIS. STAT. § 907.02. *See **id.*** WISCONSIN STAT. § 907.02 states: "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."

¶22 Whether expert testimony assists the fact finder is a discretionary decision of the trial court. *See* ***Brewer***, 195 Wis. 2d at 305. Further, the expert witness's area of competency, i.e., whether a witness possesses sufficient knowledge to qualify as an expert, is generally within the discretion of the trial court. *See* ***Potter v. Schleck***, 9 Wis. 2d 12, 19, 100 N.W.2d 559 (1960). Here, we conclude that Officer Riederer lacked the specific knowledge to give statistical testimony relating impact speed and the severity of injury.

¶23 "The qualifications of a witness should relate to his or her background, education, and experience rather than a label as to a profession or trade." ***Leahy by Heft v. Kenosha Mem'l Hosp.***, 118 Wis. 2d 441, 453, 348 N.W.2d 607 (Ct. App. 1984). Therefore, "[w]hether a witness 'is qualified to give an opinion depends upon whether he or she has superior knowledge in the area in which the precise question lies.'" ***State v. St. George***, 2002 WI 50, ¶40, 252 Wis. 2d 499, 643 N.W.2d 777 (citation omitted).

¶24 Officer Riederer was only qualified as an expert witness in the field of accident reconstruction. This would allow him to offer expert testimony regarding point of impact, vehicle speed, braking distance, and other physical aspects of the accident. However, nothing in the record establishes Officer Riederer was ever trained in the field of statistical analysis. Rather, Officer Riederer testified that he gained his knowledge regarding the statistical

relationship in question from a book that he read the week before the trial. Because the Condons failed to either establish that this book was part of some type of formal statistical training or provide the book to the court and Heritage for its review, we conclude that they failed to establish a proper foundation for the statistical testimony.

¶25 However, "[a]n erroneous exercise of discretion in admitting or excluding evidence does not necessarily lead to a new trial." ***Martindale***, 2001 WI 113 at ¶30. In ***Martindale***, our supreme court explained the interplay of WIS. STAT. §§ 805.18 and 901.03 in a harmless error analysis:[4]

> The appellate court must conduct a harmless error analysis to determine whether the error "affected the substantial rights of the party." If the error did not affect the substantial rights of the party, the error is considered harmless.
>
> Two statutes govern this situation, WIS. STAT. § 901.03 (Rulings on evidence) and WIS. STAT. § 805.18(2) (Mistakes and Omissions; Harmless Error). Section 901.03

---

[4] WISCONSIN STAT. § 805.18(2) (1999-2000) provides:

> **805.18 Mistakes and omissions; harmless error.** ....
>
> **(2)** No judgment shall be reversed or set aside or new trial granted in any action or proceeding on the ground of selection or misdirection of the jury, or the improper admission of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court to which the application is made, after an examination of the entire action or proceeding, it shall appear that the error complained of has affected the substantial rights of the party seeking to reverse or set aside the judgment, or to secure a new trial.

WISCONSIN STAT. § 901.03 (1999-2000) provides:

> **901.03 Rulings on evidence. (1)** EFFECT OF ERRONEOUS RULING. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected.

> provides that error may not be predicated on a ruling that admits or excludes evidence "unless a substantial right of the party is affected." This statute must be read together with § 805.18(2), which provides that a new trial shall not be granted for an error unless the error has affected the substantial rights of the party. This latter provision, which dates back to the early years of Wisconsin statehood, applies to both civil and criminal cases....
>
> For an error "to affect the substantial rights" of a party, there must be a reasonable possibility that the error contributed to the outcome of the action or proceeding at issue. A reasonable possibility of a different outcome is a possibility sufficient to "undermine confidence in the outcome."

Id. at ¶¶ 30-32 (footnotes and citations omitted); *see also* ***State v. Dyess***, 124 Wis. 2d 525, 543-47, 370 N.W.2d 222 (1985); ***Town of Geneva v. Tills***, 129 Wis. 2d 167, 184-85, 384 N.W.2d 701 (1986) (holding that the harmless error analysis set forth in ***Dyess*** applies in both civil as well as criminal cases).

¶26 In the instant case, Heritage has failed to establish a reasonable possibility that the error contributed to the outcome of the trial. Heritage contends that "the officer's statistical recitation was the only time plaintiffs[] came close to addressing the causation issue." We disagree. First, as illustrated above, a reasonable juror could have found Fueger causally negligent as to speed from the testimony of Officer Riederer concerning the vehicle's speed, the point of impact, the vehicle's braking distance, and the visibility time – testimony that Heritage concedes Officer Riederer was qualified to offer. Second, a reasonable juror also could have found Fueger causally negligent as to lookout based on Officer Riederer's and Fueger's testimony.

¶27 Additionally, Officer Riederer's testimony about the relationship between impact speed and the severity of injury is nothing more than common sense – the faster a vehicle is going, the more likely it is that someone will be

seriously hurt if he or she is struck by that vehicle. Thus, because this testimony was within the realm of common experience, and independent testimony was offered to establish causation, we conclude that any error was harmless.

D. The trial court did not err in admitting the deposition testimony of Krenz.

¶28 Finally, Heritage contends that the trial court erred in allowing the Condons to read portions of the deposition of Robert Krenz, the defense's expert witness on accident reconstruction, into evidence after he had been excused from the stand. The Condons argue, pursuant to WIS. STAT. § 804.07(1)(a), that they merely read-in portions of Krenz's deposition testimony for the purpose of impeaching his testimony offered at trial.[5] They claim that an adverse party's use of deposition testimony pursuant to WIS. STAT. § 804.07(1)(a) is not restricted solely to cross-examination of the witness while he is on the witness stand.

¶29 Although the use of deposition testimony for purposes of impeachment is not limited exclusively to situations where the witness is on the stand, a party offering deposition testimony for impeachment purposes must also

---

[5] WISCONSIN STAT. § 804.07(1)(a) (1999-2000) states:

> **804.07 Use of depositions in court proceedings.**
>
> **(1)** USE OF DEPOSITIONS. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:
>
> (a) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

comply with WIS. STAT. § 906.13, which governs the use of prior inconsistent statements of witnesses at trial. Because the Condons satisfied both §§ 804.07(1)(a) and 906.13(2)(a)2, we conclude that the trial court properly admitted the deposition testimony.

¶30 WISCONSIN STAT. § 804.07 provides a limited hearsay exception for deposition testimony, which obviates the need to also qualify the statements under the enumerated exceptions in ch. 908. *See* 7 DANIEL D. BLINKA, WISCONSIN PRACTICE: WISCONSIN EVIDENCE § 802.4, at 583 (2d ed. 2001). However, where the deposition of a witness other than a medical expert is offered in an action as substantive testimony pursuant to WIS. STAT. § 804.07(1)(c)1, the unavailability of the witness must be established as a condition to admitting the deposition as testimony. *See* WIS. STAT. § 804.07(1)(c)1.a-e; *see also* ***Feldstein v. Harrington***, 4 Wis. 2d 380, 388, 90 N.W.2d 566 (1958). Alternatively, where a deposition is offered in an action for impeachment purposes pursuant to WIS. STAT. § 804.07(1)(a), the party offering the testimony must not only comply with the requirements of that section but also with WIS. STAT. § 906.13, which governs the admission of prior statements of witnesses. *See* ***Feldstein***, 4 Wis. 2d at 385 ("[Because] the power to take depositions rests entirely upon statute[,] such power did not exist at common law [and] the conditions under which they may be used depend upon the general rules of evidence. Even when there are statutes which enumerate the conditions under which depositions may be used … these should not be deemed to be exclusive.").

¶31 Thus, to use Krenz's deposition for impeachment purposes, the Condons were required to comply with WIS. STAT. §§ 804.07 and 906.13. First, the deposition testimony was admissible under WIS. STAT. § 804.07(1)(a), because a party may use any part of a deposition at trial "for the purpose of contradicting

or impeaching the testimony of [the] deponent as a witness." Second, the testimony was also admissible under § 906.13(2). Section 906.13(2) states, in relevant part:

> **906.13 Prior statements of witnesses.**
>
> **(2)** EXTRINSIC EVIDENCE OF PRIOR INCONSISTENT STATEMENT OF A WITNESS. (a) Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless any of the following is applicable:
>
> 1. The witness was so examined while testifying as to give the witness an opportunity to explain or to deny the statement.
>
> 2. The witness has not been excused from giving further testimony in the action.
>
> 3. The interests of justice otherwise require.

Therefore, the deposition testimony of Krenz was admissible under § 906.13(2)(a)2, because he was subject to recall. *See* 7 DANIEL D. BLINKA, WISCONSIN PRACTICE: WISCONSIN EVIDENCE § 613.3, at 583 (2d ed. 2001) ("[E]xtrinsic evidence may be offered where the witness is still under subpoena or subject to recall."); *cf.* ***State v. Smith***, 2002 WI App 118, ¶13, 254 Wis.2d 654, 48 N.W.2d 15 ("[B]ecause Smith intended to introduce extrinsic evidence of alleged prior inconsistent statements of the victim – inconsistent with testimony that the victim had previously given – who was under subpoena, and, therefore, not excused from giving further testimony in the action, we conclude that such evidence is admissible pursuant to § 906.13(2)(a)2."). Because the Condons satisfied both §§ 804.07 and 906.13, we conclude that the trial court properly admitted the deposition testimony.[6]

[6] We note Krenz was the last witness. Had Heritage wanted to rebut this impeachment testimony, it could have recalled Krenz. We reach this conclusion because nothing in the record supports the conclusion that the witness had been excused from giving additional testimony.

¶32 Based on the foregoing, the trial court is affirmed.

By the Court.—Judgment affirmed.

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