

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 12, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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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. 2011AP1669

Cir. Ct. No. 2008CV2920

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

BICKFORD FARMS, INC., PAUL BICKFORD, AND CYD BICKFORD,

PLAINTIFFS-APPELLANTS,

V.

WISCONSIN POWER AND LIGHT COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Dane County:
JULIE GENOVESE, Judge. *Affirmed.*

Before Vergeront, Higginbotham and Blanchard, JJ.

¶1 PER CURIAM. In this stray voltage case, Bickford Farms and Paul and Cyd Bickford (collectively, the Bickfords) appeal a judgment following a jury verdict that found negligence by Wisconsin Power and Light Company (WPL) did not cause damage to the Bickfords. The Bickfords contend that they are entitled to

a new trial because the circuit court erred by: (1) excluding expert witness evidence the Bickfords offered after the deadline set by the court; (2) allowing WPL to present testimony by a WPL engineer as to his recent observations of the electrical power lines in the area; and (3) dismissing individual nuisance claims by Paul and Cyd Bickford. We conclude that the court properly exercised its discretion as to the evidentiary issues, and that the jury verdict on causation moots the issue of whether Paul and Cyd Bickford had standing to pursue individual nuisance claims. Accordingly, we affirm.

Background

¶2 In July 2008, the Bickfords filed this action against WPL claiming damages from stray electricity and earth current at the Bickfords' dairy farm. The circuit court required the Bickfords to disclose their expert witnesses and provide expert witness reports by July 1, 2010, and set a discovery deadline of January 1, 2011. On June 29, 2010, the Bickfords disclosed their expert witnesses and provided the experts' reports or deposition transcripts to WPL.

¶3 On December 1, 2010, the Bickfords moved for permission to name an additional expert witness. The proposed expert witness had analyzed data as to stray voltage at the Bickfords' "summer [milking] parlor," located several miles from their main milking parlor, in the summer and fall of 2010. WPL opposed the motion, arguing that the time for naming experts had passed and allowing the new expert would result in a lengthy delay of trial, which was scheduled to begin February 7, 2011. The circuit court denied the Bickfords' request, explaining that it was too late in the trial process to add a new expert witness, particularly because the Bickfords offered the proposed expert witness to testify concerning data collected after the time for naming expert witnesses had passed.

¶4 On January 21, 2011, after the discovery deadline had passed, the Bickfords moved for permission to introduce recently discovered evidence of unraveling wires on a neighboring farm near the Bickfords' summer milking parlor, claiming that the wires were a cause of damages at the summer milking parlor beginning in summer 2010. WPL opposed the motion, arguing that admission of the new evidence at that point, which was within two weeks of the trial date, did not allow WPL sufficient time to respond. WPL also moved to strike updated expert reports the Bickfords provided on January 31, 2011, in response to a supplemental discovery request by WPL. WPL argued that the updated expert reports presented new information to which WPL did not have adequate time to respond.

¶5 At a motions hearing, the circuit court expressed its unwillingness to allow the Bickfords to introduce new information or new expert analyses within the final weeks before trial. The court denied the Bickfords' request to introduce evidence of the unraveling wires on the nearby farm, explaining that it was not going to allow a new theory of damages beginning in the summer of 2010 to be litigated in this case. The court stated that the Bickfords had been required to disclose their expert reports by July 1, 2010, and that the court was not going to allow the parties to litigate new injuries and new theories discovered in the summer and fall of 2010. The court allowed the Bickfords' experts to update their reports with figures to show damages through trial, but disallowed the experts from introducing the information in a new format that was not previously provided to WPL or including any evidence regarding testing performed subsequent to the expert disclosure deadline. Finally, the court prohibited the Bickfords from introducing a supplemental report by one of its experts as to observations he made in 2009 because the expert did not provide the report until January 2011.

¶6 The circuit court held a two-week jury trial in February 2011. WPL introduced testimony by its electrical distribution engineer to rebut testimony by one of the Bickfords' experts that contact between electrical power lines and trees near the summer milking parlor caused electrical transient current to run into the ground. WPL's engineer testified that, within the past two days, he had personally observed the power lines in the area of the Bickfords' dairy farm. Over the Bickfords' objection, WPL's engineer testified that his recent observation indicated that the contact between the power lines and trees did not pose any hazard because the trees were in contact with neutral conductors.

¶7 After the Bickfords presented their case, the circuit court dismissed the individual nuisance actions by Paul and Cyd Bickford. The court explained that the nuisance claim belonged to the corporation, not the individual shareholders or employees.

¶8 The jury returned a special verdict finding that WPL was negligent in providing electrical service to the Bickfords, but that the negligence did not cause damage to the Bickfords. The special verdict directed the jury not to answer any further questions based on its answer on causation.

¶9 The Bickfords moved for a new trial on the issues of causation and damages. They asserted that the circuit court's evidentiary rulings were erroneous and prejudiced the Bickfords, and that a new trial was required in the interest of justice. They also argued that the court erred by dismissing the individual nuisance claims of Paul and Cyd Bickford. The court denied the motion and dismissed the claims against WPL. The Bickfords appeal.

Standard of Review

¶10 We review a circuit court's evidentiary rulings for an erroneous exercise of discretion. *Martindale v. Ripp*, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698. Decisions concerning scheduling orders are also within the circuit court's discretion. *Alexander v. Riegert*, 141 Wis. 2d 294, 298, 414 N.W.2d 636 (1987). We uphold a circuit court's exercise of discretion if the court relied on the facts in the record and applied the proper legal standard to reach a reasonable decision. *Martindale*, 246 Wis. 2d 67, ¶28.

Discussion

¶11 The Bickfords contend that the circuit court erroneously exercised its discretion by excluding evidence that was highly relevant to their claims. They contend that the court rigidly enforced its July 1, 2010, expert witness disclosure deadline without considering the ongoing nature of the Bickfords' damages claim. *See Alexander*, 141 Wis. 2d at 299 (holding that a scheduling order should yield to allow a trial of the true controversy between the parties). Specifically, the Bickfords contend that the court erred by denying the Bickfords' requests, made after the deadlines established in the scheduling order, to add an expert witness, present updated reports by named witnesses, and present evidence of the unraveling wires on a farm near the Bickfords' summer milking parlor. We address each decision in turn.

¶12 First, the Bickfords contend that the circuit court erroneously exercised its discretion by denying their request to add an expert witness after the deadline had passed. The Bickfords assert that the information their new expert witness would present was not yet in existence at the time of the July 1, 2010, deadline because problems with the cows at the summer milking parlor began in

the summer and fall of 2010. They assert that their new expert witness was necessary to explain the source of those problems. The Bickfords contend that the court failed to properly exercise its discretion in deciding whether to allow the expert, despite the late disclosure, because the court did not weigh the probative nature of the evidence against the danger of unfair surprise. See *Magyar v. Wisconsin Health Care Liability Ins. Plan*, 211 Wis. 2d 296, 303-06, 564 N.W.2d 766 (1997) (holding that the circuit court erroneously exercised its discretion by excluding an expert witness based on surprise to the opposing party, where the court did not weigh the probative value of the evidence against the danger of unfair surprise). The Bickfords contend that, rather than weighing the probative value of the expert's testimony against the danger of unfair surprise, the court based its decision solely on WPL's claim of hardship if the additional expert were allowed. The Bickfords point out that, when they moved to add an expert witness, trial was still eight weeks away, and the expert's testimony was highly relevant to their damages claim. Thus, the Bickfords assert, the court erroneously exercised its discretion by excluding their additional expert witness. See *id.* at 303-04 (“[T]he drastic measure of excluding a witness should be avoided by giving the surprised party more time to prepare, if possible.”); see also *Fredrickson v. Louisville Ladder Co.*, 52 Wis. 2d 776, 784, 191 N.W.2d 193 (1971) (“Forbidding a party to call a witness is a drastic measure in a trial, where truth is sought.”).

¶13 WPL responds that the Bickfords' additional expert witness used methods significantly different than the Bickfords' named experts, and it would have prejudiced WPL to have required it to respond to a new method of analysis in the weeks before trial. It asserts that this case is analogous to *260 North 12th Street, LLC v. DOT*, 2011 WI 103, ¶¶56-64, 338 Wis. 2d 34, 808 N.W.2d 372, where the supreme court upheld the circuit court's decision to exclude untimely

named expert witnesses as a sanction for failing to comply with the court's scheduling order.

¶14 We discern no erroneous exercise of the circuit court's discretion. After the July 1, 2010, deadline for naming experts had passed and about two months before trial, the Bickfords asked permission to name a new expert to analyze data collected at the summer milking parlor from September to November of 2010. At the motion hearing, the Bickfords confirmed that they intended for their expert to testify as to data collected after the time for naming expert witnesses had passed. The Bickfords explained that the problems at the summer milking parlor developed in the summer of 2010, necessitating the additional testing and analysis. WPL asserted that the new testing and analysis opened up new issues that it did not have time to address, and that it did not want to delay the trial. The court noted the late date of disclosure—December 2010, with a trial date in February 2011—and explained that it would not allow a new expert for purposes of analyzing data collected after the time for naming experts had passed.

¶15 In essence, then, the circuit court limited the scope of trial to the stray voltage claims that existed at the time of pleading and up to the disclosure of expert witnesses. See *City of Sun Prairie v. Davis*, 226 Wis. 2d 738, 749-50, 595 N.W.2d 635 (1999) (holding that a circuit court has inherent authority to act in “ensuring that the court functions efficiently and effectively to provide the fair administration of justice”); *Puchner v. Hepperla*, 2001 WI App 50, ¶7, 241 Wis. 2d 545, 625 N.W.2d 609 (holding that “[a] court may exercise its inherent power ... to control its docket with economy of time and effort”). The court disallowed a new expert witness to analyze a new claim of stray voltage that had developed after the time for disclosing witnesses and within several months of the trial date. We do not agree with the Bickfords' assertion that the court failed to

weigh unfair surprise to WPL against the probative value of the proffered evidence; rather, the court reasonably limited the scope of the trial, and the new expert's testimony was not probative of the issues within the scope of trial. In sum, the Bickfords have not established that the court erroneously exercised its discretion in limiting the scope of trial to the issues that were developed within the deadlines set by the court or that it otherwise misused its discretion in excluding the new expert witness.

¶16 Next, the Bickfords contend that the circuit court erred by excluding their named experts' updated reports. The Bickfords assert that problems at the summer milking parlor developed in the summer and fall of 2010, after the time for disclosing expert reports had passed. They assert that the evidence in the updated reports was all newly in existence or newly discovered after the July 1, 2010, deadline for expert reports. The Bickfords assert the court erred by disallowing the updated reports rather than considering a continuance to allow WPL adequate time to respond to those reports. WPL responds that the court properly exercised its discretion by excluding new evidence and new theories in the weeks before trial, which would have unfairly prejudiced WPL.

¶17 Again, we discern no erroneous exercise of the circuit court's discretion in excluding the evidence. As explained above, the court reasonably exercised its inherent authority to limit the trial evidence to issues developed and disclosed according to the court's scheduling order. The Bickfords have not established that the court was required to modify its schedule to allow them to present new theories and new evidence in the weeks before trial, or that the court acted unreasonably in denying their request to do so.

¶18 The Bickfords also contend that the circuit court erred by excluding their proffered evidence of the unraveling wires on a farm near the summer milking parlor. They contend that they first learned of the unraveling wires in January 2011, although the owner of the property had reported the problem to WPL in the winter of 2010, and thus any delay in revealing the evidence was the fault of WPL. They contend that the court's decision that the unraveling-wire evidence would have to be presented in a new lawsuit, rather than adjourning trial to allow the evidence in this case, was unreasonable because it would be costly and cause more delay. WPL responds that there is no evidentiary support for the assertion that WPL was previously informed of the unraveling wires; that the Bickfords controlled their own investigation and could have previously investigated for unraveling wires on nearby properties; that the Bickfords cannot complain that they were not granted an adjournment when they never requested one; and that the evidence would have unfairly prejudiced WPL because it did not have time to prepare a response.

¶19 We conclude that the circuit court properly exercised its discretion by excluding the evidence. The court explained that the Bickfords were required to be ready to disclose its expert reports by July 1, 2010, and that the court was not going to allow new theories of damages to be introduced so close to trial. The court also explained that it was not clear why the Bickfords had not discovered the wire evidence previously. The court determined that, if the Bickfords had a new claim of damages in the summer milking parlor arising in the summer of 2010, they would have to litigate that in a different case. As we have explained, the court's decision to limit admissible evidence and theories to what was disclosed within the timeframe of the court's scheduling order was a reasonable exercise of the court's discretion.

¶20 Next, the Bickfords argue that the circuit court erred by allowing WPL to present testimony of its engineer as to his recent observation of the area. The engineer testified that he had observed the power lines in the area of the Bickfords' dairy farm in the previous two days, and that the trees were in contact with the power lines in a non-hazardous manner. The Bickfords argue that the engineer's testimony was unfairly prejudicial and unrebuttable. The Bickfords point out that their expert had testified that photographs of the area taken in the summer of 2010 showed burn marks on the power cables and the trees which, the expert explained, would cause electrical transient current to run into the ground. The Bickfords contend that the engineer's testimony as to what he observed within the two previous days, during the course of trial, did not allow the Bickfords an opportunity to visit the site to verify or rebut that testimony. The Bickfords assert that the engineer's rebuttal testimony was self-serving, unsupported by photographs, and unfairly prejudicial because it attacked the credibility of their expert witness. WPL responds that its engineer's testimony was appropriate as directly responsive to testimony by the Bickfords' expert, and that the credibility of that testimony was for the jury to determine. WPL also disputes the Bickfords' contention that the engineer's observations were unrebuttable. WPL contends that, to the contrary, there is no reason the Bickfords could not have had a witness personally observe the area and testify to those observations in rebuttal.

¶21 We discern no error in the circuit court allowing WPL's engineer to testify as to his recent observations. As WPL asserts, the engineer testified in direct response to the testimony of the Bickfords' expert. Their expert testified that contact between trees and power lines in the area of the Bickfords' dairy farm produced burn marks and allowed electricity to run into the ground. WPL's engineer testified that he recently observed the power lines in the area and noted

that the contact between the trees and the power lines was non-hazardous based on the point of contact. The Bickfords have not established that the court erroneously exercised its discretion in allowing testimony as to the engineer's factual observations, or that the Bickfords were unable to present a rebuttal witness to testify as to personal observations of the area.

¶22 Finally, the Bickfords contend that the circuit court erred by dismissing Paul and Cyd Bickford's individual nuisance claims against WPL. The Bickfords contend that Paul and Cyd had possessory interests in the land sufficient to warrant individual nuisance claims. The problem with the Bickfords' argument, however, is that the jury determined that WPL's negligence did not cause the Bickfords' damages; thus, even if Paul and Cyd's individual claims were submitted to the jury, the claims would have failed for lack of causation. The Bickfords do not explain why they believe the individual nuisance claims would have survived the jury's finding of no causal negligence, or what additional evidence would have been admissible on causation if those claims had survived.

¶23 In sum, we discern no error by the circuit court requiring reversal. Accordingly, we affirm.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5 (2009-10).

