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DISTRICT II

January 12, 2022

To:

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Circuit Court Judge
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Marylou Mueller
Clerk of Circuit Court
Ozaukee County
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You are hereby notified that the Court has entered the following opinion and order:

2021AP1349-FT

DK Enterprises, Inc. v. Andrew G. Bultman (L.C. #2019CV238)

Before Gundrum, P.J., Neubauer and Grogan, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

DK Enterprises, Inc. appeals from an order granting summary judgment to Andrew G. Bultman and his insurer, Chubb Indemnity Insurance Co. (Chubb). Pursuant to a presubmission conference and this court's order of September 7, 2021, the parties submitted memorandum briefs. *See* WIS. STAT. RULE 809.17(1) (2019-20).¹ Upon our review of those memoranda and the record, we reverse the order granting summary judgment and remand the case for further proceedings consistent with this decision.

¹ All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

In June 2016, Bultman lost control of his vehicle and collided with a large concrete planter, which was propelled into a building where DK Enterprises' pizza restaurant was located. The collision caused substantial damage to items inside the restaurant. Bultman carried auto liability insurance with Chubb. DK Enterprises had a commercial general liability insurance policy with Society Insurance (Society). Daryl M. Kranich² is the sole shareholder of DK Enterprises, which owns and operates the pizza restaurant.

Society and DK Enterprises were unable to reach an agreement on what amount should be paid for the replacement value of the damaged items in the restaurant.³ Ultimately, Society paid DK Enterprises \$22,805.96 based on its assessment of costs to repair and replace items damaged in the accident, and Chubb reimbursed Society for that amount. DK Enterprises, however, believed its damages to be \$30,937.23 more than what was paid. Accordingly, DK Enterprises filed suit to recover the additional damage amount.

Bultman filed a motion seeking summary judgment asserting that DK Enterprises needed an expert witness in order to establish its damage claim. The circuit court agreed and granted summary judgment in favor of Bultman: "I will grant their request for the summary judgment because you have no expert." The circuit court entered an order to that effect and dismissed DK Enterprises' suit without prejudice.

DK Enterprises appeals. It contends that no expert witness is required here because Wisconsin law clearly states that "a non-expert owner may testify concerning the value of their

² Because Kranich is the sole owner of DK Enterprises, we refer to Kranich as the "owner" of DK Enterprises' property for purposes of this appeal.

³ It is undisputed that Society's policy provided for replacement value.

property” and “[t]he weight to be attached to a non-expert owner’s testimony is for the trier of fact.” See *Mayberry v. Volkswagen of Am., Inc.*, 2005 WI 13, ¶42, 278 Wis. 2d 39, 692 N.W.2d 226 (citation omitted). Accordingly, DK Enterprises contends the circuit court erred in granting summary judgment on the basis that it did not have an expert witness.

In reviewing a grant of summary judgment, we use the same methodology as the circuit court; our review is de novo. *Estate of Sheppard ex rel. McMorrow v. Schleis*, 2010 WI 32, ¶15, 324 Wis. 2d 41, 782 N.W.2d 85. Summary judgment is proper if there are no genuine issues of material fact and one party is entitled to judgment as a matter of law. *Id.*; WIS. STAT. § 802.08(2).

The issue in this case involves whether expert testimony is required on the question of damages and whether the absence of an expert witness precludes DK Enterprises from presenting the disputed damages question to the factfinder. We conclude that no expert witness is required and therefore the circuit court erred in granting summary judgment in this case. We reverse the summary judgment order and remand to the circuit court for further proceedings consistent with our decision.

Bultman’s summary judgment motion in the circuit court began with his contention that DK Enterprises could not present its case to the factfinder because, as a matter of law, DK Enterprises could not satisfy its burden of proof because it did not have an “expert[] qualified to opine as to the fair market value of the damaged property.” In the alternative, “even if the court were to determine [DK Enterprises] need not submit expert evidence ... [DK Enterprises] does not have any lay evidence concerning fair market value as to any of the damaged property.” Bultman’s argument shifted a bit during the circuit court oral argument.

Bultman said that because of the uniqueness of the property involved, there is *no* fair market value and that *before* Kranich could testify as to his own property's value, he would first be required to present an expert witness who would say "it has no fair market value."

Bultman presents the same argument to this court. He concedes that the law allows Kranich to testify as to the value of his damaged property but insists an expert witness's testimony that the property has no fair market value is a prerequisite. Bultman does not cite any case or other law to this court that stands for this proposition. In fact, our case law refutes Bultman's expert witness requirement.

Our supreme court has explained there is no "per se" requirement that an expert testify. *See Robinson v. City of West Allis*, 2000 WI 126, ¶¶33-34, 239 Wis. 2d 595, 619 N.W.2d 692. Rather, "[w]hether expert testimony is required in a given situation must be answered on a case-by-case basis." *Netzel v. State Sand & Gravel Co.*, 51 Wis. 2d 1, 6, 186 N.W.2d 258 (1971). "In Wisconsin, the general rule is that a non-expert owner may testify concerning the value of their property, regardless of whether it is realty or personalty.... The weight to be attached to a non-expert owner's testimony is for the trier of fact." *Mayberry*, 278 Wis. 2d 39, ¶42 (omission in original; citation omitted); *Trible v. Tower Ins. Co.*, 43 Wis. 2d 172, 187, 168 N.W.2d 148 (1969). "Wisconsin case law is clear that an owner of property may testify as to its value and that such testimony may properly support a jury verdict for damages, even though the opinion is not corroborated or based on independent factual data." *Mayberry*, 278 Wis. 2d 39, ¶42.

Bultman relies on *Payne v. Milwaukee Sanitarium Foundation, Inc.*, 81 Wis. 2d 264, 260 N.W.2d 386 (1977) and *Cedarburg Light & Water Commission v. Allis-Chalmers Manufacturing Co.*, 33 Wis. 2d 560, 148 N.W.2d 13 (1967), to support his contention that

expert testimony is required. Neither case supports that contention. *Payne* required expert testimony for a medical negligence suit “brought against the attending psychiatrist or the hospital and its staff[.]” *Payne*, 81 Wis. 2d at 276. Clearly, DK Enterprises’ case is not a medical negligence suit. *Cedarburg Light* was a negligence case where the supreme court reviewed a jury’s verdict to determine whether “credible evidence [existed] to show that the appellant was causally negligent.” *Cedarburg Light*, 33 Wis. 2d at 564. Although the *Cedarburg Light* court discussed generally when experts are necessary to establish negligence and causation, *id.* at 565-68, and it noted that “expert testimony is essential to establish an injured person’s future medical expenses as well as his future pain and suffering[.]” *id.* at 568, DK Enterprises’ case does not involve any of those issues. Nothing in *Cedarburg Light* refutes DK Enterprises’ position that an owner’s opinion as to the value of the owner’s property is sufficient “to survive summary judgment[.]” See *Mayberry*, 278 Wis. 2d 39, ¶43.

Bultman’s reliance on *Bunde v. Badger Carpet Dyers, Inc.*, 262 Wis. 621, 55 N.W.2d 869 (1952), is also not convincing. In *Bunde*, an expert witness testified about the value of an “Austrian hand-tufted rug imported from Czechoslovakia[.]” but the *Bunde* court did not establish an expert witness requirement or prohibit owners from testifying as to the value of their own property. *Id.* at 622-24.

In this case, Bultman damaged DK Enterprises’ property by allegedly “driving the vehicle at an excessive speed, failing to maintain control of the vehicle and operating the vehicle while under the influence of an intoxicant that impaired his ability to operate his vehicle in a safe manner.” The property included custom restaurant equipment that the owner—Kranich—built from scratch. He personally built both the buffet table and the cash register station. Because Kranich is the owner of the property involved here, his testimony as to its value is sufficient

under Wisconsin law to survive summary judgment. See *Mayberry*, 278 Wis. 2d 39, ¶42 (“non-expert owner may testify concerning the value of their property” (citation omitted)); *D’Huyvetter v. A.O. Smith Harvestore Prods.*, 164 Wis. 2d 306, 323, 475 N.W.2d 587 (Ct. App. 1991) (same); *Town of Fifield v. State Farm Mut. Auto. Ins. Co.*, 119 Wis. 2d 220, 233, 349 N.W.2d 684 (1984) (“The trial judge correctly held that the town chairman could testify as an owner, but that the weight given to the testimony was for the jury.”).

In *Town of Fifield*, our supreme court explained why an owner is allowed to testify as to the value of property “irrespective of the depreciation or obsolescence of the property[.]” *Id.*, 119 Wis. 2d at 234. The property involved—that the negligent party damaged—may have “great value to the owner” and “mere uncertainty as to the amount will not preclude the right of recovery.” *Id.* at 235-36 (citation omitted). The “value to the owner” is “the proper measure of damages” and “the tortfeasor ought not to be heard to complain that, because of his wrong, the [owner] has no substantial redress because the property destroyed, though of great value to the owner, did not have a value that could be neatly and exactly determined by the market or by routine accounting methods.” *Id.* at 236.

Wisconsin law does not require expert testimony in this case. As the owner, Kranich is able to testify to the value of his own property to which Bultman's negligence caused damage. The weight to be given to Kranich's testimony is for the factfinder.⁴

Accordingly, the circuit court erred in granting summary judgment to Bultman. We reverse the grant of summary judgment and remand to the circuit court for further proceedings consistent with this decision.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is reversed and remanded for further proceedings. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals

⁴ Bultman argues in the alternative that Kranich has been fully compensated by the amounts Society already paid to him and which the parties agree Chubb has reimbursed Society. DK Enterprises objects to Bultman's alternative argument as it is raised for the first time on appeal. According to the record, Bultman argued to the circuit court that it should be afforded a credit for the amount it has already paid should the factfinder return a damage award greater than that amount. Because of our disposition, it is unnecessary for us to address this argument, as it is unknown what amount the factfinder will award. *State v. Lickes*, 2021 WI 60, ¶33 n.10, 397 Wis. 2d 586, 960 N.W.2d 855 ("Issues that are not dispositive need not be addressed.").

