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WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

September 13, 2023

To:

Hon. Sandy A. Williams
Circuit Court Judge
Electronic Notice

Amy Hetzner
Electronic Notice

Connie Mueller
Clerk of Circuit Court
Ozaukee County Justice Center
Electronic Notice

Henry E. Koltz
Electronic Notice

You are hereby notified that the Court has entered the following opinion and order:

2022AP1165

Property Prep, LLC d/b/a LaBonte Construction v. Van Wyks, Inc.
(L.C. #2021CV94)

Before Neubauer, Grogan and Lazar, 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).

Property Prep, LLC d/b/a LaBonte Construction (“LaBonte”) appeals an order, excluding its expert from testifying and then, due to the lack of expert testimony, dismissing its claim for negligent construction. LaBonte argues the circuit court erred by excluding its expert and by determining expert testimony was needed for its negligent construction claim. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).¹ We conclude the circuit court

¹ All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

erred by excluding LaBonte's expert from testifying. We therefore reverse and remand for further proceedings.²

LaBonte, as general contractor, brought suit against subcontractor Van Wyks, Inc. ("Van Wyks") alleging, in part that Van Wyks was negligent in the performance of its contract with LaBonte to construct foundation walls for a residential addition. According to LaBonte, Van Wyks' negligent construction resulted in a foundation wall that was not plumb or vertically accurate. This, in turn, resulted in a basement stairway that was narrower than called for in the plan specifications and prevented the homeowners from storing personal property in the basement as intended because the property would not fit down the too-narrow stairway. LaBonte compensated the homeowners for the loss of use of personal property.

Prior to trial, LaBonte disclosed general contractor Daniel Merline as an expert witness. Merline is licensed in Wisconsin as a general contractor and a dwelling contractor qualifier. His report provided:

After evaluating plans, photos of work performed and the job contracts. Van Wyks Inc. did not meet the minimal standard of performing in a workmanlike manner. The Masonry done by them was not plumb, square or true. The framing abutting the masonry was installed plumb, as is standard practice, despite the irregularities in the concrete work. It would have been prohibitively time consuming and costly to demolish and redo the errant masonry work. The framers did the best they could given what they were left with. However, this resulted in a stair that is smaller than the plan called for. As such, given the critical function of the stairway for this client, it would require removal

² Because we determine the circuit court erred by excluding LaBonte's expert from testifying, we do not need to determine whether LaBonte needed expert testimony to prove up his negligent construction claim. See *State v. Blalock*, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) ("[C]ases should be decided on the narrowest possible ground.").

and reinstallation of drywall to afford him full use of the stairway. No one could reasonably accept the cost, time, mess and inconvenience of this. In conclusion, the errors in the masonry work resulted in a stairway that did not meet the needs of this client.

During Merline's deposition, the following exchange took place:

Q In your employment history, have you ever performed concrete work?

A Yes.

Q Okay. Tell me when.

A In the course of 20 years, I -- I -- I cannot give you specific time frames and instances.

Q Well, tell me which employers did you perform concrete work for?

A For my own company.

Q And what's the name of your company?

A Currently Hands On, LLC.

Q How about prior companies that you've operated or been involved with?

A Ke[n]ne, K-e-n-n-e, & Associates.

Q And that was your company?

A Yes.

Van Wyks moved to exclude Merline's expert testimony, pursuant to WIS. STAT. § 907.02. A court's decision to admit or exclude expert testimony is governed by

§ 907.02(1).³ That subsection adopts the federal “reliability” standard developed in *Daubert*.⁴ *State v. Giese*, 2014 WI App 92, ¶17, 356 Wis. 2d 796, 854 N.W.2d 687. Under § 907.02(1), there are three “threshold requirements” for the admission of expert testimony:

the witness must be *qualified* (“a witness qualified as an expert by knowledge, skill, experience, training, or education”); the witness’s testimony must be *relevant* (“[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue”); and ... the witness’s testimony must be *reliable* (“if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case”).

State v. Hogan, 2021 WI App 24, ¶19, 397 Wis. 2d 171, 959 N.W.2d 658 (quoting § 907.02(1); first alteration in original).

Van Wyks’ motion focused on the qualification and reliability requirements. It argued Merline was not qualified because he held no licenses related to concrete work, did not belong to any concrete-work trade groups, and had not published articles on concrete. Van Wyks also argued that Merline’s opinion was not reliable because it was only based on photographs—Merline did not physically inspect or take measurements of the basement wall, and Merline did not identify a published or controlling standard that supported his plumb-and-square opinion.

³ WISCONSIN STAT. § 907.02(1) provides:

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, if the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case.

⁴ *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

Separately, Van Wyks argued Merline should be excluded from testifying because he may have some financial ties to an individual who has an interest in LaBonte and because Merline has some domestic abuse convictions that he did not report to the Wisconsin Department of Safety and Professional Services (“DSPS”), which is the entity that administers his contractor licenses.

At the motion hearing, the court observed LaBonte intended to qualify Merline as an expert through his twenty-year career as a general contractor who has done concrete work. The court continued:

[Merline] might be in construction for 20 years, but he’s a general contractor and he has done some concrete foundational work, but how much? We have no idea. He couldn’t even cite it. He said in his deposition[:] I cannot give you specific timeframes and instances that he performed concrete work. And that’s pretty much what we are left with. He’s had employment history for 20 years in this general field, but to be an expert you have to have more than that. And I can’t find that based on what’s been presented that he would qualify as an expert.

The court granted Van Wyks’ motion to exclude Merline from testifying. LaBonte appeals.

An appellate court’s review of a circuit court’s admission or exclusion of expert witness testimony is guided by a two-part test: first, whether the circuit court applied the proper legal standard; and second, whether the circuit court “properly exercised its discretion in determining which factors should be considered in assessing reliability, and in applying the reliability standard to determine whether to admit or exclude evidence under WIS. STAT. § 907.02(1).” *Seifert v. Balink*, 2017 WI 2, ¶¶89-90, 372 Wis. 2d 525, 888 N.W.2d 816 (footnote omitted).

Here, the circuit court excluded Merline from testifying on the basis that Merline did not have enough experience in concrete work to offer an opinion as to whether the basement wall was “plumb, square, or true” and whether the space required for the basement stairs as specified

in the building plans was met. We conclude the circuit court erred by excluding Merline from testifying based on his qualifications. Merline testified that during his twenty-year career he had both overseen subcontractors' concrete work as well as self-performed such concrete work. A general contractor with twenty years' experience is qualified to opine from experience about whether a foundation wall is "plumb, square, or true" and whether the space required for the basement stairs as called for in the building plans was satisfied. While Van Wyks raises many factual issues associated with Merline's qualifications, such as, for example, the fact that he is a general contractor instead of someone who only performs concrete work and that he did not quantify how many times he has performed concrete work, these issues go to the weight to be given to Merline's testimony, not its admissibility.

Alternatively, Van Wyks argues Merline should be excluded from testifying because Merline has a financial conflict of interest and because Merline failed to report domestic abuse convictions to the DSPS. However, there has been no showing that Merline's compensation is contingent on the outcome in this case. *See* WIS. STAT. § 907.02(2). Whether there are financial ties between Merline and LaBonte⁵ goes to Merline's credibility and is subject to cross-examination. Moreover, the failure to report domestic abuse convictions, to the extent they are relevant, go to Merline's credibility and is also subject to cross-examination. Neither of these circumstances establish Merline should be excluded from testifying.

⁵ Van Wyks argues that someone involved in LaBonte also has a financial interest in a company called Blackbrook Capital. Blackbrook Capital, in turn, has a financial interest in litigation involving Merline's company and could foreclose on one of Merline's projects.

IT IS ORDERED that the order of the circuit court is summarily 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.

Samuel A. Christensen
Clerk of Court of Appeals