

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 24, 2008

David R. Schanker
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. 2007AP2043

Cir. Ct. No. 2006CV58

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STEVE BALCSIK AND CARLA BALCSIK, D/B/A BALCSIK FARMS, INC.,

PLAINTIFFS-RESPONDENTS,

V.

**FIL-MOR EXPRESS, INC., GEORGE H. BRUCE AND LIBERTY MUTUAL
INSURANCE COMPANY,**

DEFENDANTS-APPELLANTS,

**GREATER INSURANCE SERVICE, CURT VINJE AND WESTPORT
INSURANCE CORPORATION,**

DEFENDANTS.

APPEAL from a judgment of the circuit court for Douglas County:
GEORGE L. GLONEK, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Fil-mor Express, Inc., George Bruce, and Liberty Mutual Insurance Company appeal a judgment awarding damages to Steve and Carla Balcsik, d/b/a Balcsik Farms, Inc. Liberty challenges the jury's determination of damages, arguing the damages exceed what is permissible by law. Liberty also contends the court erroneously admitted hearsay evidence. We reject Liberty's arguments and affirm the judgment.

BACKGROUND

¶2 The Balcsiks own and operate an excavating and hauling business. On June 7, 2005, a dump truck owned by the Balcsiks was involved in an accident with a semi-truck insured by Liberty. A jury allocated liability for the accident ninety percent to Liberty's insured and ten percent to the Balcsiks.

¶3 The largest component of the Balcsiks' claimed damages was for loss of the dump truck's use. After the accident, the Balcsiks' dump truck was towed to a repair facility.

¶4 While the dump truck was being repaired, the Balcsiks initially attempted to rent substitute dump trucks. However, the Balcsiks testified that rental dump trucks were not always available. When rental trucks were available, they came with their own drivers, who were less efficient than the Balcsiks' drivers. The rental trucks also could not haul the Balcsiks' heavy equipment trailers, sometimes requiring equipment to be driven directly to job sites at low speeds.

¶5 The rental situation resulted in extra labor costs and forced the Balcsiks to turn down or cancel jobs because they could not meet deadlines. The financial strain on the Balcsiks' business also caused them to fall behind on

payments to a key gravel distributor, forcing them to use a geographically inconvenient alternative. The Balcsiks attempted to make up for days when rental trucks were unavailable by renting multiple trucks when they were available. However, because of the difficulties associated with renting trucks, the Balcsiks purchased a new dump truck in August 2005, trading in the truck that was being repaired.

¶6 Another part of the Balcsiks' claim was for property damage to their truck. The Balcsiks received \$55,156 for trading in the damaged truck. An appraisal of the truck conducted shortly before the accident estimated its value at \$65,000.

¶7 Altogether, the Balcsiks calculated their total damages at about \$300,000. The Balcsiks' expert, accountant Randall Paschal, calculated the damages were \$113,844.94. Liberty's expert, accountant John Peters, testified the damages were nominal.

¶8 The jury was not asked to render special verdicts for the different components of damages. Instead, it was simply asked, "What sum of money will fairly and reasonably compensate Plaintiffs for their damages over and above the amounts already paid by Liberty Mutual Insurance?" The jury found this amount was \$125,000.

DISCUSSION

¶9 Liberty's first argument challenges the amount of damages awarded. We review a jury's award of damages for whether there is any credible evidence to support it. *Ford Motor Co. v. Lyons*, 137 Wis. 2d 397, 446, 405 N.W.2d 354 (Ct. App. 1987). For property damage to a vehicle, a plaintiff may recover the lesser

of the diminished market value of the vehicle or, if the vehicle can be restored to its prior condition, the costs of repair. *Krueger v. Steffan*, 30 Wis. 2d 445, 449, 141 N.W.2d 200 (1966). For loss of use, a plaintiff may recover damages that are reasonable under all of the circumstances. *Nashban Barrel & Container Co. v. G.G. Parsons Trucking Co.*, 49 Wis. 2d 591, 601, 182 N.W.2d 448 (1971). Thus,

damages should be allowed for loss of use (1) during a time period reasonably required for replacement, including a reasonable time to determine whether the vehicle is in fact repairable, and (2) in an amount equal to that which was actually expended (absent a showing that a temporary replacement was unavailable), provided such amount was not unreasonable.

Id. at 601-02. A plaintiff may recover lost profits if the plaintiff can show the anticipation of a profit with reasonable certainty. *Krueger*, 30 Wis. 2d at 450.

¶10 Liberty relies on *Nashban*, arguing the Balcsiks' damages for loss of use were limited to the cost of renting a dump truck from the time of the accident until the time they purchased a replacement truck. *See id.* at 601-02. Liberty contends these rental costs are the sole measure of damages for loss of use, precluding any recovery for actual losses, including lost profits. We reject this argument.¹

¶11 The *Nashban* court's discussion of the measure of damages does not narrow its holding that damages for loss of use are recoverable where reasonable

¹ Liberty also expends an inordinate amount of energy dissecting and criticizing the calculations in Pachal's report. However, Liberty does not claim Pachal's report was erroneously admitted into evidence. Further, Pachal's report is not the jury's verdict. The jury's verdict of \$125,000 differed from the amount in Pachal's report, indicating the jury relied on other evidence. Because the jury rendered a single, lump-sum damages verdict, it is impossible to determine what, if any, calculations from Pachal's report the jury might have relied on.

under all of the circumstances. *Kim v. American Family Mut. Ins. Co.*, 176 Wis. 2d 890, 896, 501 N.W.2d 24 (1993). Further, rental costs are only an appropriate measure of damages when a temporary replacement is available. *See Nashban*, 49 Wis. 2d at 601-02. Here, the Balcsiks testified that rentals were not always available and, when they were available, they were not functionally equivalent to the truck that was lost. Nothing in *Nashban* required the jury to ignore these facts, which were clearly relevant to what damages were reasonable under the circumstances. *See id.* at 601. In short, we disagree with Liberty's interpretation of *Nashban*, and we conclude the Balcsiks' damages for loss of use were not limited to the rental costs.

¶12 Liberty's incorrect reading of *Nashban* is the foundation of its challenge to the damages award. Liberty does not argue, based on a correct application of the law, that there was no credible evidence to support the jury's verdict. Therefore, we are presented with no basis for concluding the jury's damages award excessive. *See Ford Motor Co.*, 137 Wis. 2d at 446.

¶13 Liberty's second argument is that the court erroneously admitted hearsay evidence. Specifically, Liberty challenges the admission of an appraisal of the Balcsiks' dump truck created shortly before the accident. The Balcsiks concede the appraisal was inadmissible hearsay, but contend the error was harmless.

¶14 An error only requires reversal if it affects the substantial rights of an adverse party. WIS. STAT. § 805.18(2).² An error is harmless if it appears,

² All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

beyond a reasonable doubt, that the claimed error did not affect the verdict obtained. *Neder v. United States*, 527 U.S. 1, 15-16 (1999).

¶15 We conclude the court's erroneous admission of the appraisal into evidence was harmless. The appraisal merely gave the jury information it already had from other evidence not challenged by Liberty. *See State v. Doney*, 114 Wis. 2d 309, 313, 338 N.W.2d 852 (Ct. App. 1983). Pachal's report referenced the appraisal and stated the appraised value. Steve Balcsik also mentioned the appraised value in his testimony. Further, Liberty's expert, Peters, incorporated the appraisal into his theory that the Balcsiks were in financial trouble before the accident. Viewed in context, admitting the appraisal into evidence did not affect the jury's verdict. *See id.*

By the Court.—Judgment affirmed.

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

