COURT OF APPEALS
DECISION
DATED AND FILED

May 29, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2984 **Cir. Ct. No. 2007SC434**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

KEM KUCHEMBECKER,

PLAINTIFF-RESPONDENT,

V.

DOUG TESAR,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Crawford County: MICHAEL KIRCHMAN, Judge. *Affirmed.*

¶1 VERGERONT, J.[1] This is a small claims action in which Kuchembecker seeks damages from Doug Tesar resulting from an automobile accident. The circuit court determined that Tesar was negligent and awarded

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

$4,695 in compensatory damages, the amount requested by Kuchembecker. Tesar appeals, contending that the circuit court's failure to attribute any negligence to Kuchembecker was clearly erroneous and its resulting failure to reduce the damages proportionately, as required by WIS. STAT. § 895.045(1), constitutes an error of law. We reject these contentions and affirm the circuit court's judgment.

¶2 At the trial to the court, Kuchembecker and Tesar both appeared unrepresented. Each testified to the circumstances of the accident, which occurred on April 25, 2007. There were no other witnesses.

¶3 According to Kuchembecker, there was a dark rain storm, at dusk, and the front of his vehicle struck the back end of Tesar's vehicle when Tesar stopped suddenly in the left lane without using his signals and with no lights. There was another car in front of Tesar. As a result of the accident, Kuchembecker had x-rays and there was damage to his truck in the amount of $4,695. He did not get a citation.

¶4 Tesar acknowledged that for this incident he got a ticket for driving while under the influence, second offense. He testified that he had his brake lights on. He disputed that there was a storm and said it was drizzly and it was right around 6:00 p.m. so it was daylight. The police were called and that is when they learned he was driving while under the influence of alcohol. At the scene the preliminary breath test showed .13 and when he was tested later at the police station, the test showed .19. Tesar testified that he had his turn signal on. He denied there was a car in front of him.

¶5 Kuchembecker gave the circuit court the police report and the court read from it that Kuchembecker stated that Tesar, "stopped suddenly for a vehicle ahead and he could not—he, that would be Mr. Kuchembecker, couldn't get

stopped on the rain-slicked roadway."[2] Kuchembecker acknowledged that he said that. The court also read from the police report that Tesar stated "he was stopping and got hit. He panicked because of alcohol consumption and left" and Tesar acknowledged that that is what he told the police. Kuchembecker pointed out to the court that the police report has a diagram showing a car in front of Tesar's vehicle.

¶6 The circuit court referred to the rules of the road and noted that Kuchembecker had a duty to control his vehicle so as to avoid colliding with vehicles in front of him and, if it was raining, to operate more carefully because of that condition. The court also observed that the rules of the road required that Tesar not stop suddenly to make a turn, have working break lights and turn signals on, and do this enough in advance to give the car behind him adequate notice.

¶7 The court noted the factual disputes between the parties as to what had occurred and concluded that he believed Kuchembecker rather than Tesar because Tesar had been drinking. The court observed that the alcohol level in Tesar's blood indicated that his judgment and memory could be affected—the judgment he exercised at the time and the memory of what he thought happened. Because the court believed Kuchembecker rather than Tesar regarding how fast

[2] The police report was not submitted into evidence but Tesar has included it in the appendix. It is evident from the transcript that the court and the parties all referred to it and Kuchembecker does not object to the inclusion of the police report in the appendix. In fact, he refers to the police report in his brief. Therefore we treat the police report as part of the record before the circuit court.

Tesar's car stopped and how soon he put the turn signals on, the court found in favor of Kuchembecker and awarded him the amount of damages he sought.[3]

¶8 On appeal, Tesar argues that the circuit court found that Kuchembecker was negligent but did not apportion any negligence to him. According to Tesar, this violates WIS. STAT. § 895.045(1), which requires that if there is contributory negligence, the damages must be reduced proportionate to the level of negligence assigned to the recovering party.

¶9 Tesar's argument that the circuit court found Kuchembecker negligent but did not assign any negligence to him is based on statements of the court that Tesar reads out of context. When the court stated "Mr. Kuchembecker has got two things against him," and then discussed the duty to control his car to avoid colliding with vehicles in front of him and to drive more carefully because of the conditions, the court was describing the duties Kuchembecker had according to the rules of the road. Read in the context of all of the court's comments, the phrase that "Mr. Kuchembecker has got two things against him …" did not mean the court found that Kuchembecker failed in these duties. Rather, the court meant these were his duties.

¶10 Similarly, when the court stated "I am slightly persuaded in favor of Mr. Kuchembecker over what Mr. Tesar said for the reasons that I stated [Mr. Tesar's alcohol consumption]," the court was not suggesting that Tesar was slightly more negligent than Kuchembecker. Rather, the court was explaining that

[3] Tesar did not dispute that Kuchembecker incurred damages as a result of the accident nor did he dispute the amount of the damages.

he was "slightly persuaded" to believe Kuchembecker over Tesar because of Tesar's alcohol consumption.

¶11 We are satisfied that a fair reading of the transcript is that the court did not find Kuchembecker negligent and found Tesar negligent.

¶12 Generally, the existence of negligence is a question of fact that is to be decided by the trier of fact. *See* ***Ceplina v. South Milwaukee Sch. Bd.***, 73 Wis. 2d 338, 243 N.W.2d 183, 342-43 (1976). This court does not disturb the circuit court's findings of fact unless they are clearly erroneous. WIS. STAT. § 805.17(2). The circuit court is the ultimate arbitrator of the witness's credibility and, when more than one reasonable inference can be drawn from the evidence, this court affirms the circuit court's findings. ***Onalaska Elec. Heating, Inc. v. Schaller***, 94 Wis. 2d 493, 501, 288 N.W.2d 829 (1980).

¶13 In this case there was a sharp conflict between the accounts of the two witness. There were also inconsistencies or apparent inconsistencies between each witness's testimony at trial and the police report. The court questioned Kuchembecker on the inconsistencies or apparent inconsistencies between his trial testimony and the police report. It was the role of the circuit court to resolve those inconsistencies and to decide which witness to believe. The fact-finder may choose to believe some portions of a witness's testimony but not others. ***Nabbefeld v. State***, 83 Wis. 2d 515, 529, 266 N.W.2d 292 (1978); ***State v. Kimbrough***, 2001 WI App 138, ¶29, 246 Wis. 2d 648, 630 N.W.2d 752. Given that the circuit court chose to believe Kuchembecker's testimony that Tesar stopped suddenly without first putting on his turn signal—a decision that was for the circuit court to make—we are not persuaded that the court's finding that Kuchembecker was not negligent was clearly erroneous.

¶14 In his brief Kuchembecker asks that we award attorney fees for a frivolous appeal pursuant to WIS. STAT. § 809.25(3). Tesar is correct that the matter of a frivolous appeal must be raised by motion; it is not adequate to raise it in a brief. ***Howell v. Denomie***, 2005 WI 81, ¶19, 282 Wis. 2d 130, 698 N.W.2d 621. However, even if Kuchembecker had filed a motion, we would conclude the appeal was not frivolous.

¶15 In conclusion, for the reasons stated above, we reject Tesar's arguments and affirm the judgment of the circuit court.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.