COURT OF APPEALS
DECISION
DATED AND RELEASED

OCTOBER 29, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62(1), STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-3466

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

DALE L. LARSON AND
BARBARA A. LARSON,

Plaintiffs-Respondents,

v.

CINCINNATI CASUALTY COMPANY,
D/B/A THE CINCINNATI COMPANIES
AND INDIANHEAD GOLF AND
RECREATION, INC., D/B/A
INDIANHEAD GOLF COURSE,

Defendants-Appellants,

THE UNITED STATES LIFE
INSURANCE COMPANY,

Defendant.

APPEAL from a judgment of the circuit court for Marathon County: VINCENT K. HOWARD, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Indianhead Golf and Recreation, Inc., and Cincinnati Casualty Company (collectively, "Indianhead") appeal a judgment determining that Indianhead was 51% liable for the injuries Dale Larson suffered in a fall. Indianhead argues that the apportionment of negligence is clearly erroneous and that the trial court improperly relied upon facts not in evidence. We reject Indianhead's arguments and affirm the judgment.

The case was tried to the court without a jury. The record reveals that Larson arrived at Indianhead to play golf at approximately 2:30 in the afternoon. He teed off at 3:54 p.m. and concluded his round about 6 p.m. He retreated to the clubhouse bar until almost 10 p.m. Larson acknowledged that during this interval at Indianhead, he consumed approximately eight beers and five mixed drinks. After his fall, his blood alcohol level tested at .28%.

An inclined ramp from the clubhouse leads to the parking lot. When Indianhead renovated its premises in 1976, its plans for the ramp called for a four-inch-thick concrete slab. Indianhead eliminated the concrete ramp at a savings of $1,440. The former golf course manager testified that in place of the proposed concrete ramp, the "members" constructed a terra-lock ramp over a sand base that would shift every winter. Each spring the manager and his crew would pick up terra-lock sections, pour new sand, and lay the bricks on top.

An engineer testified that considering the freeze-thaw cycles in Wisconsin, and that golf spikes would be worn on the ramp, it was unsafe to use terra-lock because the joints would wash out, leaving gaps that would readily catch golf spikes. He testified that there is a natural inclination to pick up speed going down a ramp. If one foot is caught, tripping is a natural consequence regardless of alcohol consumption. A landscaper testified that the terra-lock installation was sloppy, because the installers did not use a saw to cut the blocks exactly and left broad spaces between the bricks. As a result of the loose installation, the bricks would slide, leaving gaps far exceeding the 1/16" recommended by manufacturer's specifications.

Jeffrey Brandt was Larson's partner on the day in question. He testified that he observed nothing unusual with respect to Larson's demeanor or balance. He observed no impairment of coordination, judgment or speech. Brandt, as former golf league president, testified that wearing spikes is customary in the clubhouse and that the ramp was unsafe, poorly maintained

and had an irregular surface. Brandt testified that after Larson fell, Larson spontaneously told him that he tripped on the ramp, put his left arm out to recover but could not reach the railing, and fell on his face and mouth. In a statement made to an insurance investigator, Larson said: "I believe this accident happened due to jogging down [the] ramp, having too many drinks and getting my cleat caught in the tile walk way or surface."

There was a great deal of conflicting testimony with respect to the level that Larson was impaired by alcohol. Larson, his wife and Brandt testified that Larson was not significantly affected. Indianhead's medical expert and other lay witnesses testified that Larson was substantially motor impaired and had difficulty walking.

The trial court found that the gaps in the bricks were an "initiating factor" in causing the fall and that even a sober individual could have fallen. It also found that Larson had a "significant amount of intoxication." The trial court apportioned negligence 51% on the part of Indianhead and 49% on the part of Larson.[1]

Indianhead argues that the apportionment of negligence is clearly erroneous.[2] We disagree. Appellate courts do not reverse trial court findings of fact unless they are clearly erroneous. ***Fryer v. Conant,*** 159 Wis.2d 739, 744, 465 N.W.2d 517, 520 (Ct. App. 1990). Appellate courts search the record for evidence to support findings the trial court made, not for findings the trial court could have but did not. ***In re Estate of Becker,*** 76 Wis.2d 336, 347, 251 N.W.2d 431, 435 (1977). When there is conflicting testimony, the trial court is the ultimate arbiter of the credibility of the witnesses. ***Noll v. Dimiceli's, Inc.***, 115 Wis.2d 641, 644, 340 N.W.2d 575, 577 (Ct. App. 1983). Appellate courts defer to the trial court's superior opportunity to observe witness demeanor. ***In re Estate of Dejmal,*** 95 Wis.2d 141, 151-52, 289 N.W.2d 813, 818 (1980). We do not substitute our judgment for that of the trial court on issues of weight and credibility of the evidence unless the evidence is inherently incredible. ***In re***

---

[1] The trial court initially attributed 55% negligence to Indianhead, but reduced it to 51% on motions after trial.

[2] The "great weight and clear preponderance" language has been supplanted with the term "clearly erroneous" under § 805.17(2), STATS. However, the two tests are essentially the same. ***Noll v. Dimiceli's, Inc.***, 115 Wis.2d 641, 643, 340 N.W.2d 575, 577 (Ct. App. 1983).

Estate of Jones, 74 Wis.2d 607 613 n.10, 247 N.W.2d 168, 171 n.10 (1976). Inherently incredible means to be "in conflict with the uniform course of nature or with fully established or conceded facts." ***Chapman v. State,*** 69 Wis.2d 581, 583, 230 N.W.2d 824, 825 (1975).

The trial court found that the terra-lock was installed in such a way as to cause a person wearing golf cleats to become stuck momentarily. The record discloses ample evidence to support the finding that Indianhead's negligent installation and maintenance of the ramp was a substantial factor in causing Larson to fall. The court concluded that the use of terra-lock was not negligent, but the manner of installation was.

There was also ample evidence of Larson's intoxication, and this evidence was not disregarded by the trial court. The court rhetorically asked whether the negligent installation was causal in view of the "high level of intoxication." The trial court weighed the evidence and determined that Indianhead's causal negligence was slightly greater than Larson's under the facts and circumstances presented. This it was entitled to do. The apportionment of negligence is a matter for the trier of fact, and when more than one reasonable inference may be drawn from the evidence, we accept the inference drawn by the trier of fact. ***Voigt v. Riesterer,*** 187 Wis.2d 459, 467, 523 N.W.2d 133, 136 (Ct. App. 1994).

It is reasonable for the trial court to conclude that the level of Larson's negligence did not exonerate Indianhead from all liability. Evidence of intoxication is a proper consideration in determining negligence only if it is found that the amount of alcohol consumed so affected the person as to appreciably lessen or impair his ability to exercise ordinary care for his own safety. ***Klinzing v. Huck,*** 45 Wis.2d 458, 466 n.4, 173 N.W.2d 159, 163 n.4 (1970). The record discloses conflicting testimony to the degree that Larson's intoxication impaired his abilities. Larson conceded some contributory negligence. The trial court was entitled to weigh this testimony and attribute weight and credibility as it saw fit. *See* ***State v. Doyle,*** 96 Wis.2d 272, 289, 291 N.W.2d 545, 553 (1980) (lay witnesses are competent to testify to intoxication based upon their observations of the subject).

The trial court found that the "negligence is closer to equal between the parties." The finding of 49% negligence on the part of Larson

recognizes that Larson's alcohol consumption affected his ability. Nonetheless, based upon the testimony of Larson's engineer and other witnesses, the trial court was also entitled to attribute a substantial degree of negligence to Indianhead for constructing an unsafe walkway.

Next, Indianhead argues that the trial court committed reversible error when it considered facts not in evidence. Larson contends that the trial court erroneously stated that intoxication "is an individual thing" and that Larson might have tolerated a .30% blood alcohol level "quite well."[3] Indianhead argues that the trial court substituted its own opinion for unchallenged medical expert opinion that a blood alcohol concentration of .30% is stuporous. We disagree. Taken in context, the court's observations reflected its weighing of the conflicting testimony concerning the degree to which Larson's abilities were impaired. The trial court compared the medical testimony with the testimony of lay witnesses. It noted that after the fall, although injured and bleeding, Larson picked himself up, walked into the building, walked to the car, and from the car to the hospital. The record shows evidence that Larson behaved rationally, rebutting the evidence that medically he should have been in a stupor. We are unpersuaded that the trial court erroneously relied on evidence not of record. However, we conclude that to the extent that its comments could be interpreted to have done so, any such error would be harmless in view of the sufficient evidence to support its judgment.

By the Court.—Judgment affirmed.

This opinion will not be published. RULE 809.23(1)(b)5, STATS.

[3] For future reference, it would be helpful for appellants' counsel to cite record references for materials quoted from the record. *See* § 809.19(1)(e), STATS.; *see also* ***Tam v. Luk,*** 154 Wis.2d 282, 291 n.5, 453 N.W.2d 158, 162 n.5 (Ct. App. 1990).