COURT OF APPEALS DECISION DATED AND FILED

January 25, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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.**

No. 99-2805

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

DALE PHILLIPPI AND JANA PHILLIPPI,

PLAINTIFFS-APPELLANTS,

V.

DUANE BECKER, TODD DROSTE, CITY OF PITTSVILLE, PITTSVILLE FIRE DEPARTMENT, INC., RURAL MUTUAL INSURANCE COMPANY, WAUSAU INSURANCE, MIDWEST SECURITY INSURANCE COMPANY, WISCONSIN MUTUAL INSURANCE COMPANY, AND MILWAUKEE MUTUAL INSURANCE COMPANY,

DEFENDANTS,

TOWN OF ROCK, VOLUNTEER FIRE DEPARTMENT OF TOWN OF ROCK, TOWN OF CAMERON, VOLUNTEER FIRE DEPARTMENT OF THE TOWN OF CAMERON, MARSHFIELD RURAL FIRE ASSOCIATION, AND VOLUNTEER FIREMAN'S INSURANCE SERVICES,

DEFENDANTS-RESPONDENTS.

APPEAL from orders of the circuit court for Wood County: DENNIS D. CONWAY, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Roggensack, JJ.

¶1 PER CURIAM. Dale Phillippi and Jana Phillippi appeal from pretrial orders on several issues in this personal injury action. We affirm.

¶2 This is a personal injury action by the Phillippis against various defendants. They alleged that Dale Phillippi was injured in a traffic accident. One of the drivers allegedly involved was defendant Duane Becker, who was a volunteer firefighter with the Town of Rock fire department. The issues argued in this appeal were raised in pretrial motions. To the extent those orders were nonfinal, we have granted leave to appeal under WIS. STAT. § 808.03(2) (1997-98).[1]

¶3 Wisconsin statutes provide for a damage limit of $50,000 per person in actions founded on tort against certain volunteer fire companies, their agents, and their employees. WIS. STAT. § 893.80(3). The Phillippis first argue that the trial court erred by rejecting their argument that the defendant Towns waived this damage limit. The Phillippis' argument relies on ***Stanhope v. Brown County***, 90 Wis. 2d 823, 280 N.W.2d 711 (1979). In that case, the supreme court held that the county waived the statutory damage limit by purchasing insurance in an amount greater than the limit *and* by expressly waiving, in the insurance policy itself, the damage-limit defense. ***Id.*** at 851-52. The Phillippis appear to concede that there is no such express waiver in their case. Nonetheless, they argue that the

[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

Towns' actions went far beyond those of the defendant in ***Stanhope***, and therefore the trial court should have allowed a jury to determine whether the Towns intended to waive the statutory limit. Specifically, the argument is that the Towns waived the limit by agreeing among themselves to obtain $1,000,000 worth of automobile insurance coverage, by promising their firefighters that they would do so, and then by actually purchasing the insurance. There is no factual dispute on appeal as to whether the Towns did these things.

¶4 We reject this argument for two reasons. First, the Phillippis have not provided us with any legal authority showing that, in the absence of an express waiver in the insurance policy, the Towns can be held to have waived the damage limit because they demonstrated their "intent" in some other way. In other words, we are aware of no law which provides that something less than an express waiver is sufficient to establish that a waiver occurred.

¶5 We also reject this argument because, even if the Towns' intent is relevant, we see no basis upon which a reasonable fact finder could conclude that the Towns intended to waive the statutory limit. The supreme court has already decided that the purchase of a policy above the statutory limit does not, by itself, waive the damage limit. ***Id.*** at 846-47. Furthermore, even if the question were an open one, the higher policy limit does not lead to a reasonable inference that the Towns intended to waive the statutory limit. The statutory damage limit is per *person*, while the insurance policy limit in this case is $1,000,000 per *occurrence*. Therefore, the purchase of the higher policy limit is readily seen as a response to the potential for a multi-person occurrence, rather than as an intent to waive the per-person damage limit. Nor do we see how the promise to insure the firefighters has any bearing on this issue. There is no suggestion that the Towns told the

firefighters that the Towns would waive the statutory limit or that the firefighters would be covered for an amount greater than the statutory limit per person.

¶6 The Phillippis' second argument is that the trial court erred by rejecting their argument that the damage limit for the Town of Rock was raised to $250,000 by operation of WIS. STAT. § 345.05. That statute raises the liability limit for motor vehicles "owned and operated" by a municipality. Subsection (2) of that statute provides, in relevant part, that a vehicle is "deemed owned and operated by a municipality if the vehicle is either being rented or leased." The argument in this case is that Becker's vehicle was being rented by the Town. The Phillippis rely on ***Manor v. Hanson***, 123 Wis. 2d 524, 368 N.W.2d 41 (1985). That case holds that to determine whether a vehicle is being "rented," the question is whether at the time of the accident the municipality provided "compensation or a fee" for the "use" of the motor vehicle. ***Id.*** at 533-34. The court held that the vehicle in ***Manor*** was indeed rented, because the volunteer operator of the vehicle was paid a specified fee per mile driven while providing transportation services for elderly and handicapped riders under a program administered by the county. ***Id.*** at 526, 534-35.

¶7 The Phillippis' argument is based on the fact that in this case the Town paid Becker $7.50 per hour from the time he was dispatched to the time he was released from an incident scene. Because Becker generally used his own vehicle to take himself and his equipment to incidents, and was paid for that time, the Phillippis argue that the Town was renting his vehicle for that period of time. They argue that the trial court should not have granted summary judgment on this issue because the existence of a "rental" was a fact in dispute, and therefore not appropriate for summary judgment.

¶8 We question whether the existence of a "rental" is actually a question of fact when the historical facts are undisputed, as the parties agree they are here. However, even if it is a question of fact, we agree that no reasonable fact finder could find a rental of Becker's vehicle here. The Town points out, and the Phillippis do not dispute, that Becker was not *required* to own a vehicle or to transport himself to incidents in that fashion. The payments to him were not based in any manner on whether he used his vehicle to arrive at the scene. If Becker walked to the scene, his payment would be the same.

¶9 The Phillippis' third argument is that the trial court erroneously dismissed the Town of Cameron and its volunteer fire department. The incident Becker was returning from at the time of Phillippi's injury was in the Town of Cameron. Becker had been called there pursuant to a mutual aid agreement among several towns, including the Towns of Rock and Cameron. The Phillippis' argument is based on language in the mutual aid agreement which provides that the fire department requesting aid is in command of the operation. The Phillippis' theory of liability against the Town of Cameron is that this language establishes a master-servant relation between that town and Becker, thereby making the town vicariously liable for his acts in the scope of his employment.

¶10 A reasonable fact finder could not find for the Phillippis on this issue. The aid agreement contains a provision stating that when responding on mutual aid, "such aid is not intended to create an employer-employee relationship as between the requesting and responding fire departments or their members." In addition, whatever control the requesting town has over the firefighter is limited to the firefighter's actions while at the incident scene. Becker had already left the fire scene and was no longer under the control of the Town of Cameron.

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1999-2000).