

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 10, 2009

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. 2008AP2806

Cir. Ct. No. 2008SC1936

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

SUZANNE LEE,

PLAINTIFF-APPELLANT,

V.

JAMES M. EMERSON,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Rock County:
JAMES WELKER, Judge. *Affirmed.*

¶1 HIGGINBOTHAM, J.¹ Suzanne Lee appeals an order denying her motions for a new trial and judgment notwithstanding the verdict after the circuit

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(d) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

court dismissed her small claims action. Lee argues that the court erroneously exercised its discretion in denying her request to allow two witnesses to testify by telephone. Assuming for the sake of argument that the court's denial of Lee's request was a misuse of its discretion, we affirm because Lee's substantial rights were not affected by the court's erroneous exercise of its discretion.

BACKGROUND

¶2 The following facts are taken from the pleadings and trial testimony. Suzanne Lee, a resident of Connecticut, and James Emerson, a Wisconsin resident, met in Alaska in September 2007 and began an intimate relationship soon thereafter. It appears that their relationship was tumultuous and ended after a February 2008 meeting in a North Carolina hotel room.

¶3 Following the relationship's demise, Lee sued Emerson in small claims court in Rock County for misrepresentation, breach of contract and assault and battery. The allegations in Lee's complaint stem from the February 2008 rendezvous. Lee claimed that Emerson agreed to pay for all expenses she incurred for her trip to North Carolina, and that Emerson physically assaulted her in the hotel room.

¶4 The case was heard and subsequently dismissed by a court commissioner, and Lee requested a trial de novo before the circuit court. Nine days prior to trial, Lee notified the court that she intended to call two witnesses living in Connecticut who would appear by telephone. She stated that the witnesses would provide testimony relating to "pain and suffering, out of pocket expenses, loss of reputation and humiliation damages directly resulting from the assault and battery and other abusive conduct caused and performed by the

defendant against the plaintiff.” At the start of the trial, the circuit court denied Lee’s request to allow the Connecticut witnesses to testify by telephone.

¶5 After hearing testimony from Lee, Emerson and a witness for Emerson, the circuit court dismissed the misrepresentation and breach of contract claims, concluding that the purported agreements were not legally enforceable. The court also dismissed Lee’s assault and battery claim upon a determination that Emerson was a more credible witness than Lee. The court denied Lee’s motions for a new trial and judgment notwithstanding the verdict. Additional facts are provided as necessary.

DISCUSSION

¶6 Lee’s sole argument on appeal is that the trial court erroneously exercised its discretion in denying her request to allow the Connecticut witnesses to testify by telephone. For purposes of this decision only, we assume that she is correct that the denial of this request was a misuse of discretion. We nonetheless affirm the trial court’s dismissal of her action because we conclude, under the analysis set forth below, that the court’s error did not affect her substantial rights.

¶7 “An erroneous exercise of discretion in admitting or excluding evidence does not necessarily lead to a new trial.” *Martindale v. Ripp*, 2001 WI 113, ¶30, 246 Wis. 2d 67, 629 N.W.2d 698; *see also* WIS. STAT. § 805.18(2). To determine if a new trial is warranted, we must conduct a harmless error analysis. *See id.*; *see also* WIS. STAT. § 805.18(2). “If the error did not affect the substantial rights of the party, the error is considered harmless.” *Id.* An error affects the substantial rights of the party if there is a reasonable probability that the outcome would have been different but for the error. *See State v. Dyess*, 124 Wis. 2d 525, 544-45, 370 N.W.2d 222 (1985).

¶8 As noted, Lee’s notice regarding her intent to present testimony by telephone stated that the Connecticut witnesses would testify about her “damages directly resulting from the assault and battery.” Thus, the witnesses’ testimony would have had no bearing on the misrepresentation and breach of contract claims, and, with regard to the assault and battery claim, would have related to damages only.

¶9 Lee’s problem is that the trial court believed Emerson’s testimony about what transpired in the North Carolina hotel room, and there is no reasonable probability that the Connecticut witnesses’ testimony about damages would have altered this important determination. Lee testified that Emerson assaulted her; Emerson denied doing so. The trial court explicitly stated that it believed Emerson’s testimony, and that it disbelieved Lee’s. Lee does not contend that this finding was clearly erroneous. *See State v. Ndina*, 2009 WI 21, ¶45, 315 Wis. 2d 653, 761 N.W.2d 612 (appellate court must uphold trial court’s factual findings unless those findings are clearly erroneous).²

¶10 Because the court rejected Lee’s claim that Emerson assaulted her, the Connecticut witnesses’ evidence relating only to damages would have been irrelevant. Thus, there is no reasonable probability that the Connecticut witnesses’ testimony would have changed the outcome of the case. Accordingly, we conclude that the trial court’s denial of Lee’s request to present telephonic

² Lee’s difficulty proving the alleged assault was compounded by the court’s refusal to hear testimony about her alleged injuries. This ruling followed Lee’s refusal to provide medical records to substantiate her alleged injuries. Lee does not challenge the court’s decision not to allow testimony about her injuries.

testimony did not affect Lee's substantial rights and was thus harmless error. We therefore affirm.

By the Court.—Order affirmed.

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

