COURT OF APPEALS
DECISION
DATED AND FILED

February 14, 2013

Diane M. Fremgen
Clerk of Court of Appeals

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Appeal No. 2012AP435 **Cir. Ct. No. 2009CV1679**

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

FRANK RITTER AND NICOLE RITTER,

PLAINTIFFS-APPELLANTS,

GENERAL CASUALTY INSURANCE COMPANY,

INVOLUNTARY-PLAINTIFF-RESPONDENT,

V.

PENSKE TRUCKING LEASING COMPANY, L.P.,

DEFENDANT-RESPONDENT,

UNITED HEALTHCARE INSURANCE COMPANY,

INTERVENOR.

APPEAL from a judgment of the circuit court for Rock County: DANIEL T. DILLON, Judge. *Affirmed*.

Before Lundsten, P.J., Higginbotham and Sherman, JJ.

¶1 LUNDSTEN, P.J. Frank Ritter appeals an order granting summary judgment in favor of Penske Trucking Leasing Company. Ritter argues that the circuit court erred by concluding, in effect, that Ritter's negligence exceeded that of Penske as a matter of law. We agree with the circuit court that, based on undisputed facts, Ritter was more negligent than Penske as a matter of law. We therefore affirm the judgment.

Background

¶2 Frank Ritter was employed as a delivery driver with Chambers & Owens. Ritter's duties included driving delivery trucks loaded with goods to convenience stores during nighttime hours. Ritter's truck would typically be loaded with containers, such as boxes and plastic totes, each of which could weigh up to 50 pounds or more. These containers were held in place by two load bars. A nightly loading crew would load these containers into the truck, but Ritter would also load a freezer bunker and cooler items himself into the truck at the beginning of his delivery shift. The truck that Ritter drove was leased to Chambers & Owens by Penske Trucking Leasing Company.

¶3 During his tenure at Chambers & Owens, Ritter had submitted numerous daily inspection sheets stating that the switch for the light in the cargo area of his truck was malfunctioning. The light would get hot to the touch and then cool, repeatedly, over a period of days, and then it would stop working. The switch for the light was replaced on October 10, 2008.

¶4 On October 22, 2008, Ritter began his shift at a Chambers & Owens warehouse about 2:30 in the morning. Before leaving the warehouse, Ritter

himself loaded the freezer bunker and cooler items into the cargo area of the truck. At the warehouse, the switch for the light and the light in the cargo area of the truck were working. When Ritter arrived at his first delivery stop, he became aware that the switch for the light and the light in the cargo area were no longer working. In the days preceding October 22, Ritter had noticed the light switch getting hot, and reported it on his daily inspection sheets.

¶5 In the pre-dawn hours of October 22, despite the fact that there was no light in the cargo area, Ritter unloaded the freezer and cooler items from the cargo area of the truck, brought them into the store, and then returned to the truck with a flashlight. Ritter has no recollection of what occurred after he returned to the truck. His next recollection is being in an ambulance. Although he cannot recall the specifics that led to his accident, it is uncontested that Ritter was injured when several of the totes from the cargo area of the truck fell on him. Among Ritter's injuries were a head injury, an injury to his right eye, and injuries to his neck, shoulder, and lower back.

¶6 Ritter sued Penske, alleging that Penske was negligent in failing to maintain a functioning lighting system in the truck. Penske moved for summary judgment. The circuit court granted Penske's motion for summary judgment, and Ritter appeals.

Discussion

¶7 The most reasonable reading of the circuit court's analysis is that it concluded that no reasonable jury could find that Penske was more negligent than

Ritter.[1] Thus, the issue before us is the comparative negligence of Penske and Ritter. Ritter contends that a reasonable jury could have found that Penske was more negligent than Ritter based on Penske's knowledge of the faulty light switch for the truck's cargo area and Penske's failure to properly maintain the lighting system. We disagree, and conclude that Ritter's negligence exceeded that of Penske as a matter of law and, thus, summary judgment is appropriate.

Presumption Of Care

¶8 As an initial matter, Ritter argues that he deserves a presumption of due care because his injuries resulted in his failure to remember the accident. We disagree.

¶9 In some circumstances, a person with memory loss due to retrograde amnesia is entitled to a presumption that he or she acted with due care "unless, of course, there is credible evidence to overcome the presumption." ***Walter v. Shemon***, 267 Wis. 424, 427, 66 N.W.2d 160 (1954). This presumption, however, "is a *limited* presumption and is eliminated upon the receipt of evidence from

[1] The circuit court stated that, assuming Penske was somewhat negligent, the issue was "whether reasonable people could reach different conclusions here as to whether there's an unbroken sequence of events" that caused Ritter's injuries. Despite its use of the unbroken sequence of events language, the circuit court appears to have based its decision on its conclusion that Ritter was more negligent than Penske by continuing to unload his vehicle in the dark. This is the correct way to analyze the situation before us.

We disagree with Penske's assertion that the circuit court decided summary judgment based on an analysis of public policy factors. This is an incorrect reading of the circuit court's decision. The circuit court correctly stated that "after and only after the determination of the cause-in-fact of the injury the court may still deny recovery after addressing public policy ... considerations." Although the circuit court mentioned the public policy considerations, it did not rely on them to decide the case before us, and neither do we.

which negligence on the part of [the person with amnesia] may be inferred." ***Brunette v. Dade***, 25 Wis. 2d 617, 622-23, 131 N.W.2d 340 (1964).

¶10 Here, neither we nor the circuit court is speculating that Ritter was additionally negligent beyond negligence that can be discerned from the undisputed facts. We are assuming in Ritter's favor that he in fact suffered an inability to remember,[2] and further assuming in his favor that he engaged in no additional negligent behavior beyond the undisputed fact that he chose to attempt to retrieve merchandise from the cargo area without the assistance of a working light. As we shall see, regardless how carefully Ritter attempted to unload in the darkened cargo area, no reasonable jury could have concluded that Penske was more negligent than Ritter.

Comparative Negligence

¶11 We independently review a grant of summary judgment, using the same methodology as the circuit court. ***Daughtry v. MPC Sys., Inc.***, 2004 WI App 70, ¶22, 272 Wis. 2d 260, 679 N.W.2d 808. Where the plaintiff's negligence "clearly exceeds the defendant's, we may so hold as a matter of law" and grant summary judgment. ***Kloes v. Eau Claire Cavalier Baseball Ass'n***, 170 Wis. 2d 77, 88, 487 N.W.2d 77 (Ct. App. 1992); *see also* ***Johnson v. Grzadzielewski***, 159 Wis. 2d 601, 608, 465 N.W.2d 503 (Ct. App. 1990); WIS. STAT. § 895.045(1) (2011-12). However, the apportionment of negligence is generally a question left for the jury. ***Kloes***, 170 Wis. 2d at 88. Thus, "[s]ummary judgment should only

[2] Courts are hesitant to give a plaintiff a presumption of due care "in the absence of some evidence" from a medical professional that his or her failure of memory is due to retrograde amnesia. *See* ***Ernst v. Greenwald***, 35 Wis. 2d 763, 775, 151 N.W.2d 706 (1967).

be used in the exceptional case where it is clear and uncontroverted that one party is substantially more negligent than the other and that no reasonable jury could reach a conclusion to the contrary." ***Hansen v. New Holland N. Am., Inc.***, 215 Wis. 2d 655, 669, 574 N.W.2d 250 (Ct. App. 1997); *see also* ***Huss v. Yale Materials Handling Corp.***, 196 Wis. 2d 515, 534, 538 N.W.2d 630 (Ct. App. 1995).

¶12 Ritter argues that whether he was more negligent than Penske should have been a question for a jury. That is, Ritter contends that a reasonable jury could have found that he was not more negligent in unloading the truck in the dark than Penske was in not properly maintaining the switch for the light in the truck's cargo area. Ritter analogizes his situation to a number of cases in which we have declined to conclude that the plaintiff was more negligent than the defendant as a matter of law, and thus summary judgment was not warranted. *See, e.g.*, ***Kloes***, 170 Wis. 2d at 81-82, 88 (baseball player was not more negligent as a matter of law for playing under inadequate lighting than the baseball association and city who maintained the lighting of the field); ***Huss***, 196 Wis. 2d at 524-25, 533, 534-35 (forklift operator was not more negligent as a matter of law than forklift manufacturer for using a forklift without the overhead guard attached amongst high stacks of pallets); ***Hansen***, 215 Wis. 2d at 659-61, 669-70 (hay baler operator was not more negligent as a matter of law than hay baler manufacturer when he dislodged trapped hay while the machine was turned on).

¶13 Penske, on the other hand, points to examples in which this court and the supreme court have granted summary judgment or directed verdicts where the evidence shows the plaintiff to be substantially more negligent than the defendant such that no reasonable jury could conclude otherwise. *See, e.g.*, ***Schuh v. Fox River Tractor Co.***, 63 Wis. 2d 728, 731-32, 744, 218 N.W.2d 279 (1974)

(farmer who stood near a blower's fan to repair the machine was more negligent as a matter of law than manufacturer of the blower); ***Hertelendy v. Agway Ins. Co.***, 177 Wis. 2d 329, 331-32, 340, 501 N.W.2d 903 (Ct. App. 1993) (helper of landowner who attempted to pull a fallen tree off of an electrical wire was more negligent as a matter of law than landowner); ***Johnson***, 159 Wis. 2d at 605-07, 608-09 (university student who sustained injuries climbing out of incapacitated dormitory elevator car was more negligent as a matter of law than university officials or elevator manufacturer).

¶14 What we glean from the cases the parties discuss is simply that each case turns on its particular facts. Thus, in order to determine whether the situation before us is appropriate for summary judgment, we must compare the negligence of Penske with the negligence of Ritter. *See* ***Huss***, 196 Wis. 2d at 532. This comparison illustrates that Ritter's negligence exceeded that of Penske as a matter of law.

¶15 Ritter argues that Penske was negligent in maintaining the light switch for the light in the cargo area of Ritter's truck. On his daily inspection sheets, Ritter reported a number of times that the switch would become hot and then cool, repeatedly, and then fail to work. Penske replaced the switch twelve days before the accident and, thereafter, Ritter reported that the switch was again becoming hot. There is no evidence in the record that Penske took any action regarding the switch after it was replaced on October 10, 2008. So far as the submissions disclose, the switch and light were working when Ritter left the Chambers & Owens warehouse to begin his delivery route.

¶16 Based on these facts, a jury might find that Penske was negligent in failing to fix the reoccurring problem of the switch becoming hot and then

eventually failing. However, it is not reasonable to conclude that Penske's negligence exceeded Ritter's.

¶17 At Ritter's first stop, he began unloading his truck during nighttime hours after he became aware that the light had failed and that he would have to unload in a darkened cargo area. It is undisputed that Ritter was aware of how cargo was stacked and secured. The only reasonable inference from the submissions is that Ritter regularly engaged in the same delivery routine, with the same types of products, and, on this day, he himself loaded some items and was in the cargo area of the truck before he left the warehouse area.[3] There is no evidence in the record suggesting any urgency that would have required Ritter to continue to unload his truck rather than obtaining additional lighting himself or waiting for the morning light.[4] Instead, Ritter engaged in obviously dangerous behavior by unloading his cargo in the dark, with only a flashlight to provide light.

[3] If Ritter was unaware of the way cargo was stacked and secured, his negligence in attempting to unload the cargo is arguably greater. Attempting to unload cargo in the dark while not knowing how it is stacked or secured is clearly a dangerous endeavor. Further, Ritter has not alleged that his employer, Chambers & Owens, or any of his co-employees negligently stacked or secured the cargo. In any event, if the cargo was not properly stacked and secured, that would not be weighed against Penske.

[4] Ritter mentions in his circuit court brief in opposition to the motion for summary judgment that there are Department of Transportation rules that regulate the number of hours a day a delivery driver may be on the road, "meaning that Mr. Ritter only had so much time to complete his route." Besides this fleeting reference, we see no evidence in the record of what these rules are or how they would have applied to Ritter on the night of the accident. Similarly, Ritter asserts that, "[b]ecause of how Defendant Penske was staffed, they would have been in no position to respond" if Ritter had called to have the light switch fixed. We will assume in Ritter's favor that Penske would not have responded that night to repair the light. However, that provides no basis for a finding that Ritter was under some sort of undue pressure to continue deliveries in the dark, rather than obtaining additional lighting himself or waiting until after dawn. If there is more evidence on this topic, Ritter failed to produce it.

If the lack of a working light was a causal factor, then it is apparent that the flashlight was no substitute for the truck's own lighting.

¶18 The circuit court provided a helpful bicycle-rider injury analogy. With some modifications, the analogy goes like this. Suppose a person uses a bicycle to commute to work and has been having problems with a front tire that goes flat. Suppose further that the bike owner has repeatedly taken his bicycle in to a bike shop to have the front tire repaired, explaining that he needs the bicycle for his commute to work, and the bike shop negligently repairs the tire. If the tire thereafter blows and causes an accident, the bike shop is likely liable. But what if the tire blows, but does not immediately cause an accident. Suppose, instead, that after the tire goes flat the rider chooses to continue riding in an effort to get to work on time and has an accident when he loses control riding down a hill. The bike shop is undoubtedly negligent, but it cannot reasonably be said that the bike shop is more negligent than the rider who chose to continue riding the unsafe bicycle. We agree with the circuit court that we have a comparable situation here.

¶19 In sum, we conclude that no reasonable jury could find that Penske was more negligent than Ritter and, therefore, summary judgment was appropriate.

Conclusion

¶20 For the reasons above, we affirm the circuit court's grant of summary judgment.

By the Court.—Judgment affirmed.

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