

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 12, 2006

Cornelia G. Clark
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. 2006AP1533

Cir. Ct. No. 2005TR13338
2005TR14103

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

CITY OF EAU CLAIRE,

PLAINTIFF-APPELLANT,

V.

KENNETH R. VAN DE HEI,

DEFENDANT-RESPONDENT.

APPEAL from a judgment and an order of the circuit court for Eau Claire County: WILLIAM M. GABLER, Judge. *Affirmed.*

¶1 PETERSON, J.¹ Kenneth Van De Hei was acquitted by a jury of operating a motor vehicle while intoxicated and operating with a prohibited

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

alcohol concentration, first offenses. The City of Eau Claire appeals the judgment of acquittal and an order denying its motion for judgment notwithstanding the verdict. The City argues that, based on undisputed facts, Van De Hei was on a highway when he operated a motor vehicle. We disagree and affirm the judgment and order.

BACKGROUND

¶2 At approximately 2:30 a.m. on October 22, 2005, Eau Claire City Police Officers Kyle Jentsch and Kyle Anderson responded to an anonymous complaint that a person, later identified as Van De Hei, had driven a piece of construction equipment in the 1500 block of Frederick Street. At the time, the block was under road construction and was barricaded.

¶3 When the officers arrived at the scene, they determined a skid-steer had been moved from one side of the street to the other. Jentsch then searched the area for an individual matching the description provided by the anonymous caller and found Van De Hei. Van De Hei admitted driving the skid-steer.

¶4 The City charged Van De Hei with operating while under the influence and operating with a prohibited blood alcohol concentration, both first offenses. At a jury trial, the parties stipulated Van De Hei operated the skid-steer during the early morning hours of October 22. The parties also stipulated a blood draw taken less than three hours from when Van De Hei drove the skid-steer revealed a blood alcohol content of more than .08%.

¶5 During the course of the trial, many witnesses testified regarding the status of Frederick Street. Jentsch testified he observed barricades on Frederick Street and the space between the barricades was approximately one and a half car

widths. Anderson testified he saw “at least two cars parked on the street” in the 1500 block of Frederick Street.

¶6 Douglas Derks, who worked for the Eau Claire Public Works Department, testified the street was under construction and residents were notified there would be times during which automobile access to their property would not be possible. He confirmed barricades had been placed, “gapped so the residents could get through,” but it was “not for through traffic, but it is allowed to allow the residents access to the property” Derks also stated that when the barricades are put up, there are signs posted which read “road closed, local traffic only.” He confirmed that “from the moment that those barricades are first put up to the point in time when they are removed, it is intended that the freedom to use the street is restricted or limited to both residents and to the general public, depending on the state of the work.” Derks also confirmed that the general public was not authorized to travel on Frederick Street until after October 27, 2005.

¶7 Derek Knopps, a local resident, stated there was only space for one car to get through the barricades and the signs on the barricades read “road closed, local traffic only.” Cheryl Riess, another local resident, testified that on October 22 she could not access her driveway, there were large barricades in place, and there was only a single lane for people to access the neighborhood behind hers. Brandon Smith testified that on October 22 he went to the 1500 block of Frederick Street with Van De Hei and saw barricades with “road closed signs.” He stated the vehicle he was traveling in had to park “around the corner couple blocks, because it was closed off.” Marcus Burns also testified he traveled with Van De Hei to the 1500 block of Frederick Street and there were barricades “blocking ... access into Frederick Street.” He acknowledged there was possibly enough room for a car to squeeze through.

¶8 Van De Hei requested a jury instruction regarding the definition of “highway” because the 1500 block of Frederick Street had been under construction and was barricaded at the time of the incident. The jury instruction provided to the jury stated:

“Highway” means all public ways and thoroughfares. It includes the entire width between the boundary lines of every way open to the use of the public as a matter of right for the purposes of vehicular travel. It includes those roads in the state, county or city which are opened to the use of the public for the purpose of vehicular travel. In determining whether Frederick Street was opened to the use of the public for the purpose of vehicular travel on October 22, 2005, the City must establish the street was to be used by the public. Even if Frederick Street was temporarily restricted to use by its residents, it still was open to the use of the public if potentially any licensed automobile driver could drive on the street in an authorized manner.

The City did not object to the instruction.

DISCUSSION

¶9 In reviewing a judgment based on a jury’s verdict, we will uphold the verdict if we find “any credible evidence in the record on which the jury could have based its decision.” *Morden v. Continental AG*, 2000 WI 51, ¶39, 235 Wis. 2d 325, 611 N.W.2d 659 (quoting *Lundin v. Shimanski*, 124 Wis. 2d 175, 184, 368 N.W.2d 676 (1985)). A motion for judgment notwithstanding the verdict should only be granted when the evidence gives rise to no dispute regarding material issues or when the evidence is so clear and convincing unbiased minds can reach only one conclusion. *Wozniak v. Local No. 1111*, 57 Wis. 2d 725, 733, 205 N.W.2d 369 (1973). We review a trial court’s denial of a motion for judgment notwithstanding the verdict without deference. *Logterman v. Dawson*, 190 Wis. 2d 90, 101, 526 N.W.2d 768 (Ct. App. 1994). In our review of the

motion, we view the facts in the light most favorable to the nonmoving party. *See id.* at 102; *see also Winger v. Winger*, 82 F.3d 140, 143 (7th Cir. 1996) (noting that under Wisconsin law “we consider all credible evidence and reasonable inferences in the light most favorable to the non-moving party.”).

¶10 The City contends the undisputed facts establish that the 1500 block of Frederick Street was a highway when Van De Hei drove the skid-steer. We disagree. The trial court’s definition of highway included: “Even if Frederick Street was temporarily restricted to use by its residents, it still was open to the use of the public if potentially any licensed automobile driver could drive on the street *in an authorized manner.*” (Emphasis added.) The jury could well have focused on whether persons other than local residents were authorized to drive on the street. Numerous witnesses testified the street was barricaded at either end. One witness testified the signs on the barricades stated “road closed” while other witnesses stated the signs read “road closed, local traffic only.” Derks, a city worker, stated the signs were intended to restrict the general public’s access, and the first time the general public was authorized to travel on the street was October 27, five days after the incident. Although there was other evidence, we must look at the evidence most favorable to Van De Hei. *See Logterman*, 190 Wis. 2d at 101-02. In this light, the evidence allowed the jury to conclude that nonresidents were not authorized to drive on the street. Therefore, the street would not fit the definition of a highway.²

² Van De Hei states there were other issues that could have led to the jury’s verdict. For example, Van De Hei states the City failed to address whether he had any alcoholic beverages to drink after operating the skid-steer and before the blood test. However, because we find the highway issue dispositive, we need not address the other issues. *See State v. Castillo*, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) (court should decide cases on the narrowest possible grounds).

(continued)

¶11 The City also contends the trial court’s jury instruction defining highways was erroneous. However, the City concedes it did not timely object to the instruction. WISCONSIN STAT. § 805.13(3) states: “Failure to object [to a proposed jury instruction] at the conference constitutes a waiver of any error in the proposed instructions or verdict.”

¶12 Despite having waived the argument, the City asks this court, in the interest of justice, to use its discretionary power to review the claimed error. *See In re C.E.W.*, 124 Wis. 2d 47, 57, 368 N.W.2d 47 (1985). However, the City points to nothing that distinguishes this case from any other where a party fails to object to an instruction. We see no compelling reason to address the claimed error.

By the Court.—Judgment and order affirmed.

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

