COURT OF APPEALS
DECISION
DATED AND FILED

September 25, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 01-1224-FT

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

MARVIN TOMLIN,

PLAINTIFF-RESPONDENT,

V.

LANGLADE COUNTY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Langlade County: JAMES P. JANSEN, Judge. *Affirmed.*

¶1 HOOVER, P.J.[1] This is an appeal of a small claims judgment awarding Marvin Tomlin compensation for damages to his motor vehicle that the

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

trial court found were caused by the County's negligent snowplow operation.[2] The County contends that the trial court erred by concluding that its snowplow driver was negligent based upon the court's factual findings. This court disagrees, and therefore affirms the judgment.

BACKGROUND

¶2 While Tomlin was operating his motor vehicle on a highway in Langlade County, he encountered a County snowplow that was propelling slush into Tomlin's lane of traffic. Tomlin was approximately 200' to 300' from the plow when he first observed it. The plow's blade was "right at the center line …." Tomlin pulled off onto the shoulder of the road[3] and attempted to stop so he "wouldn't be hit so hard." As the snowplow passed Tomlin, it threw slush, gravel and "little rocks" onto his vehicle, breaking a windshield wiper and cracking his windshield.

¶3 Tomlin had thirty years' experience driving municipal snowplows. He estimated that the County plow was going "about 30 or 35" miles per hour in an area where the posted limit was thirty miles per hour.[4] The snowplow driver, Michael Kielcheski, conceded, in essence, that if he is plowing an area where debris is built up and is therefore likely to be propelled into oncoming traffic, he

[2] This is an expedited appeal under WIS. STAT. RULE 809.17.

[3] Tomlin testified that about one half of his vehicle was on the paved portion of the road.

[4] Tomlin testified that the snowplow's blade was angled in such a way as to promote propelling materials into his lane of travel. However, Kielcheski testified that he "recalled" having the blade at a proper angle and the trial court so found.

should slow down.[5] Kielcheski, however, did not recall this incident and therefore did not know if he slowed down as the snowplow passed Tomlin's vehicle. He did speculate that given the vehicles passed in an area where the road curves, "I'm probably only running 20, 25 miles an hour …." He also testified that he knew that if the materials in question were propelled onto passing cars, they could cause damage.

¶4 Tomlin filed a small claims action against the County. The matter was tried to the court, which entered a judgment in favor of Tomlin in the amount of $457.25. The County appealed, and this court remanded the case to the trial court with directions that it make explicit findings of fact and then apply those facts to its conclusions of law. Upon remand, the trial court found in pertinent part that as the two vehicles met, Tomlin pulled to the right and stopped to let the snowplow go past and, as it did so, "snow/slush/sand hit the plaintiff's window, causing damage." It further found that, while the blade was angled properly, the

[5] Kielcheski testified that if you come upon spots of built up material "you slow down, yeah." It is implicit in Kielcheski's testimony that slowing down serves to prevent (or minimize) material from flying into oncoming traffic:

> Q But if you see oncoming traffic and you see your plow throwing—
>
> A I'll slow down.
>
> Q —material—
>
> A Yeah.
>
> Q —you'll slow down, won't you.
>
> A Oh yes.

snowplow "did not slow down enough to keep the slush from splashing the plaintiff," and therefore the operator was causally negligent.[6]

LEGAL STANDARDS

¶5 "As a general rule ... the existence of negligence is a question of fact which is to be decided by the [trier of fact]." ***Ceplina v. South Milw. Sch. Dist.***, 73 Wis. 2d 338, 342-43, 243 N.W.2d 183 (1976).[7] This court will not disturb the trial court's findings unless they are clearly erroneous. *See* WIS. STAT. 805.17(2). The trial court is the ultimate arbiter of the witnesses' credibility and, when more than one reasonable inference can be drawn from the evidence, this court is obliged to affirm the trial court's findings. ***Onalaska Elec. Htg. v. Schaller***, 94 Wis. 2d 493, 501, 288 N.W.2d 829 (1980). The standard for review is heavily weighted on the side of sustaining trial court findings of fact in cases tried without a jury. ***Leimert v. McCann***, 79 Wis. 2d 289, 296, 255 N.W.2d 526 (1977).

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[6] At the conclusion of the trial, the court correctly observed that Kielcheski did not, under these facts, have a duty to stop the snowplow. *See* ***Jacobson v. Greyhound Corp.***, 29 Wis. 2d 55, 65-66, 138 N.W.2d 133 (1965).

[7] The County relies upon ***Millonig v. Bakken***, 112 Wis. 2d 445, 450, 334 N.W.2d 80 (1983), for the proposition that negligence involves a mixed question of fact and law. This is correct, but only "because the [trier of fact] is confronted with a dual problem: What did the person, alleged to be negligent, do or fail to do in a particular situation, and what would a reasonable or prudent person have done in the same circumstance." ***Id.*** The existence of negligence is a mixed question of law and fact which is generally left to the trier of fact. ***Smith v. Dodgeville Mut. Ins. Co.***, 212 Wis. 2d 226, 233, 568 N.W.2d 31 (Ct. App. 1997).

The existence of negligence as a mixed question of law and fact has been viewed in yet another way. In ***Ceplina v. South Milw. Sch. Bd.***, 73 Wis. 2d 338, 342, 243 N.W.2d 183 (1976), the supreme court stated that, generally, whether an individual is negligent is a question of fact to be decided by the jury. However, in ***Olson v. Ratzel***, 89 Wis. 2d 227, 251, 278 N.W.2d 238 (Ct. App. 1979), this court described the existence and scope of a duty of care—one element of a negligence claim—as a question of law for the court.

¶6 The law imposes upon drivers the duty to drive a vehicle at a speed that is reasonable and prudent under existing conditions. *See* WIS. STAT. § 346.57(2); *see generally* WIS JI—CIVIL 1285. A driver must drive at an appropriate reduced speed when special hazards exist with regard to other traffic or by reason of highway conditions. *See* WIS. STAT. § 346.57(3). In discussing the reduced speed statute, the supreme court said:

> What reduced speed is appropriate depends upon the particular facts in light of the speed a person of ordinary intelligence and prudence would drive under the circumstances, so as not to subject himself or others or his or their property to an unreasonable risk of injury or damage.

McGee v. Kuchenbaker, 32 Wis. 2d 668, 671-72, 146 N.W.2d 387 (1966). Thus, an "appropriate reduced speed" is a relative term and means less than the otherwise lawful speed. *See* ***Millonig v. Bakken***, 112 Wis. 2d 445, 463 n.1, 334 N.W.2d 80 (1983).

DISCUSSION

¶7 The County's general contention is that the trial court erred as a matter of law by concluding that the facts it found constituted negligence. It argues that the findings that the materials were propelled by the snowplow onto Tomlin's vehicle as the plow passed and that they caused damage "have nothing to do with negligence." Rather, the County asserts, these findings relate to causation and injury. It further contends that Kielcheski's negligence turns upon his conduct, or fault. In this regard, the County notes that the trial court found that the plow blade was properly angled and that Kielcheski did not slow sufficiently to prevent the materials from being propelled onto Tomlin's vehicle. In the latter regard, the County further notes that the trial court made no explicit finding as to

the snowplow's speed. From this, it reasons that the trial court's conclusion that the snowplow was traveling too fast was based solely upon the fact that damage occurred. This court is unpersuaded.

¶8 The County is correct that negligence is based upon fault and that harm occurred is irrelevant to whether a standard of care was breached. The County is similarly correct that the negligence issue focuses on Kielcheski's conduct. But this court disagrees with the premise that the County's analysis rests upon, that is, that the trial court "failed to make any finding as to the speed of the snowplow." The trial court found that it was traveling too fast for the existing conditions, which were the presence of both materials that could cause damage if propelled onto passing vehicles, and a passing vehicle. These findings are not contrary to the great weight and clear preponderance of the evidence.

¶9 Tomlin testified that the snowplow was traveling between thirty and thirty-five miles per hour. Kielcheski did not know how fast he was going because he did not remember the incident. He did, however, acknowledge that to prevent material from being propelled onto and damaging passing vehicles, it was necessary to slow down, although he could not remember if he did slow as he passed Tomlin. The trial court could infer that Kielcheski was operating too fast for the conditions from Kielcheski's testimony that slowing prevents or minimizes flying material into oncoming traffic, and from Tomlin's testimony that material was in fact propelled onto his vehicle. This inference is strengthen by Tomlin's perception that material was being propelled into his lane with sufficient force that he should take to the side of the road and try to stop his vehicle.

¶10 The County also argues that:

> Apparently, the trial court concluded that the exercise of ordinary care required the snowplow driver to slow down enough to avoid splashing … oncoming vehicles, even if that meant stopping completely. Implicitly, the trial court concluded that it would be a breach of the standard of care to allow [materials] to be projected at oncoming traffic. If the snowplow had to stop in order to prevent the splashing … then apparently that [is] what the trial court would require.

The County relies on ***Jacobson v. Greyhound Corp.***, 29 Wis. 2d 55, 138 N.W.2d 133 (1965), for the proposition that requiring a snowplow to stop to prevent "splashing" is unreasonable.

¶11 In ***Jacobson***, a car collided with a Greyhound bus. ***Id.*** at 58. There were strong winds blowing snow across the highway, so that intermittent drifts formed on the shoulder and the road. A County snowplow was traveling in a northerly direction plowing the snowdrifts, while the car was southbound. As the snowplow moved the drifts, the wind would blow a part of the snow across the highway, occasionally restricting visibility for a short time. ***Id.*** at 59. The bus was traveling behind the snowplow, and its driver could see the occasional clouds of snow as the snowplow struck the drifts. As the bus and the car approached the snowplow, a large cloud of snow was thrown into the air. Both drivers claimed they were momentarily unable to see anything. The head-on collision occurred just south of the snowplow. The snowplow operator testified as to his speed and that he knew his plowing caused snow to be thrown into the air. ***Id.***

¶12 Greyhound contended that these facts were sufficient to permit a finding that the snowplow driver was negligent, in relevant part, as to speed. ***Id.*** at 65. The supreme court noted that all three drivers were aware that the plowing was causing snow to blow across the highway. ***Id.*** at 64. It concluded that if the snowplow driver

> knew or should have known that his activity was causing snow to blow across the highway in such a manner as to momentarily restrict the vision of other users of the highway under the conditions as they existed here, he could assume that fact was readily apparent to the other users of the highway. To say that he was required to stop before plowing each drift on the busy state highway would be such an unreasonable restriction as to practically prevent any efficient snowplowing.
>
> In the absence of testimony as to the length, width, or depth of the drifts, or the size or height of the plow blade, coupled with his position on the highway, it would be only speculation to find that a speed of 20 miles per hour would appreciably affect the blowing snow hazard, or that his speed was negligence.

Id. at 65-66.

¶13 This case is distinguished from ***Jacobson*** because the trial court held that the damage occurred because the snowplow was being operated too fast. The trial court expressly did not hold the county to a standard that required a plow to stop every time a vehicle approached. Moreover, contrary to the County's implicit contention, it does not follow that stopping the plow was the only alternative available to Kielcheski. In this case, Kielcheski's testimony itself described the logical course of action under the circumstances: slow down.[8] Again, under the applicable standard of review and the reasonable inferences, the trial court could draw from Kielcheski's testimony that had the snowplow momentarily slowed enough to prevent material from being propelled into the oncoming lane, Tomlin's vehicle would not have been damaged. While, as in ***Jacobson***, it was apparent that the plow blade was throwing material into Tomlin's lane, unlike in ***Jacobson***,

[8] Indeed, just as Kielcheski was not required to come to a stop to exercise reasonable care, nor should Tomlin have been forced to stop at the side of the road so he "wouldn't be hit so hard" with the propelled slush.

Kielcheski could have taken a reasonable precaution to prevent the injury to Tomlin's vehicle. This court therefore affirms the trial court's finding of negligence.

By the Court.—Judgment affirmed.

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