COURT OF APPEALS
DECISION
DATED AND FILED

March 19, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-2050 **Cir. Ct. No. 00SC32175**

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

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

PLAINTIFF-RESPONDENT,

V.

WILLIAM MCELWEE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: THOMAS R. COOPER, Judge. *Affirmed.*

¶1 CURLEY, J.[1] William McElwee appeals the small claims judgment, entered after a bench trial, for damages incurred by State Farm Mutual Auto Insurance Company's (State Farm) insured, Candice Ortiz, as the result of a

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2).

car/motorcycle accident, in which he was the driver of the motorcycle. McElwee contends that the trial court erred in finding him more negligent than Ortiz. Because the trial court's findings are not clearly erroneous, this court affirms.

I. BACKGROUND.

¶2 State Farm sued McElwee on its own behalf, as well as on behalf of its insured, Ortiz, following an accident on October 11, 1999, in which Ortiz was driving a car and McElwee was operating a motorcycle. State Farm contended that McElwee's negligence caused the accident and requested reimbursement of the $3,829.27 in damages it paid to Ortiz. State Farm was also seeking Ortiz's deductible amount. McElwee cross-claimed, contending that Ortiz was negligent and seeking $5,000 in damages. Ultimately, a bench trial was held and the trial court found McElwee 70% negligent and entered judgment against him totaling $3,029.90.[2]

¶3 McElwee contends that the trial court erred when finding him more negligent than Ortiz because Ortiz violated a number of traffic statutes, including two that the trial court specifically found she violated – failing to signal her left turn into her driveway and failing to keep a proper lookout. Thus, he argues, Ortiz was 100% negligent and the judgment should be reversed.

¶4 The trial court heard the testimony and arguments and made the following findings:

[2] McElwee repeatedly refers to the trial judge as Judge Thomas Cooper. The transcript reflects that Reserve Judge William Gardner presided over the trial.

> So I find that [Ortiz] was negligent as to look-out and failing to signal. At the same time I am satisfied that Mr. McElwee's passing in that circumstance was a negligent act particularly as to – as to management control because he saw the vehicle there, mistook its intent.
>
> And I don't believe that her vehicle stopped and that his stopped or the accident would not have occurred at the speed or with the impact that it did. So I find on that basis that Ms. Ortiz's version is more credible. I find the negligence on the part of Mr. McElwee to be at seventy percent, and the negligence on Ms. Ortiz to be thirty percent for failing to signal and failing to keep a look-out to the rear. And so Mr. McElwee will be responsible to the plaintiff for seventy percent of [$]3,829.89, and the counterclaim is dismissed. So ordered.

¶5 McElwee argues on appeal that, in addition to failing to signal and failing to keep a proper lookout, Ortiz also violated several other vehicular statutes and the trial court incorrectly found to the contrary.

II. ANALYSIS.

¶6 Following a court trial, this court must accept the trial court's findings unless they are clearly erroneous. *See* WIS. STAT. § 805.17(2) (1999-2000).[3] "[I]t is the burden of the appellant to demonstrate that the trial court erred." *See* ***Seltrecht v. Bremer***, 214 Wis. 2d 110, 125, 571 N.W.2d 686 (Ct. App. 1997) McElwee does not meet his burden. Here, the trial court had a clear choice of two versions of the cause of the accident. The trial court chose Ortiz's version.

¶7 The determination of credibility is the sole province of a trial court sitting as trier of fact and will not be upset unless there is abuse of discretion or

[3] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

error of law. ***Sensenbrenner v. Sensenbrenner***, 89 Wis. 2d 677, 700-01, 278 N.W.2d 887 (1979). The weight of the testimony and the credibility of the witnesses are tasks given primarily to the trial court, and where more than one reasonable inference can be drawn from the credible evidence, the reviewing court must accept the one drawn by the trier of fact. ***Hanz Trucking, Inc. v. Harris Bros. Co.***, 29 Wis. 2d 254, 262, 138 N.W.2d 238 (1965).

¶8 In his brief, McElwee has simply relied on his testimony and discounted Ortiz's recollection of how the accident occurred. There is nothing in the record to suggest that the trial court erroneously exercised its discretion when it accepted Ortiz's version of the events over McElwee's. Nor is this a suggestion that the trial court committed a legal error. Thus, this court affirms the trial court's decision.

By the Court.—Judgment affirmed.

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