COURT OF APPEALS
DECISION
DATED AND FILED

January 28, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1184 **Cir. Ct. No. 01 CV 205**

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

ALAN D. EISENBERG,

PLAINTIFF-APPELLANT,

V.

ADRIENNE SEIDER,

DEFENDANT,

SAFECO INSURANCE COMPANY OF AMERICA,

INTERVENOR-(IN T.CT.),

FOUNDERS INSURANCE COMPANY,

INTERVENOR-RESPONDENT.

APPEAL from a judgment of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. *Affirmed and cause remanded with directions.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

¶1 PER CURIAM. Alan D. Eisenberg appeals from the trial court judgment, following a bench trial, declaring that Founders Insurance Company had no duty to defend or indemnify him on a counterclaim resulting from a car accident. Eisenberg argues that the court erred in finding that Founders had proven that Eisenberg had failed to notify his insurance agent of his acquisition of a new car within thirty days of the car's delivery to him and in concluding, therefore, that Eisenberg's Founders automobile liability insurance policy provided no coverage for the accident. We affirm. Further, because Eisenberg's appeal is frivolous, we remand for the determination and assessment of costs and attorney's fees Eisenberg must pay for pursuing this appeal.

I. BACKGROUND

¶2 According to the trial evidence, for many years Eisenberg insured cars through his independent insurance agent, Harry "Bud" Brown of B & J Insurance Agency. Brown's wife, son, and daughter also worked for B & J, a business Brown and his wife had owned and operated since 1959. On July 26, 2000, Eisenberg purchased a Founders auto insurance policy through B & J for his 1996 Cadillac. In relevant part, the policy provided:

> D. "**Your insured car**" means:
>
> ….
>
> 2. Your newly owned *private passenger car* … on the date it is delivered to you, subject to the following:
>
> a. You must inform us of all such acquisitions within the policy period or within 30 days of the *car*[']*s* delivery to you, whichever is shorter.

> b. If a *car* replaces a car described in the Declarations, it will have the same coverage as the replaced car.

¶3 On September 28, 2000, Eisenberg traded in his 1996 Cadillac for a 1999 Cadillac. On December 18, 2000, Eisenberg was driving the '99 Cadillac when he was involved in a car accident. Eisenberg sued the driver of the other car; when that driver counterclaimed, Eisenberg tendered the defense to Founders. Founders, however, declined to accept the defense and intervened, seeking a judgment declaring that it had no duty to defend because it had not received timely notice of Eisenberg's replacement vehicle and, therefore, that Eisenberg's policy provided no coverage for the accident.

¶4 At the two-day bench trial, the issue was whether Eisenberg had timely notified B & J that he had traded in his '96 Cadillac for the '99 Cadillac. Eisenberg and his wife testified that they promptly notified B & J of the new car by fax; they were unclear, however, regarding which of them actually faxed the notice. Mrs. Eisenberg also testified that within one week of the delivery of the new car, she spoke with Brown's son, confirming that they had advised B & J of the purchase. Brown testified, however, that B & J never received any such communication until February 13, 2001, when Mrs. Eisenberg called and, for the first time, asked that the '99 Cadillac be added to the policy.

¶5 Brown also testified that Eisenberg called him on about January 8, 2001, informing him of the December 18, 2000 accident and advising him that the accident was the fault of the other driver whom he would be suing; in that call, however, Eisenberg said nothing about having obtained the '99 Cadillac. Further, Brown testified, when Eisenberg got on the phone during his wife's February 13, 2001 call, he informed Eisenberg that the '99 Cadillac was not covered due to lack

of notice, and that Eisenberg (who had no collision coverage and, at that point, was unaware of any counterclaim) did not dispute that.

¶6 Brown testified that when Eisenberg notified B & J of his acquisition of the '99 Cadillac, the annual premium for the auto insurance increased from $306 to $569. He also mentioned that Eisenberg had been less than candid on other occasions—when, upon first applying for insurance from Founders, he failed to disclose an accident, the discovery of which led to a retroactive premium increase; and when he attempted to make a claim on a vehicle that was not insured.

¶7 The court found that Brown was credible; that Mrs. Eisenberg, while credible in some respects, was "not credible in describing the notice to Mr. Brown"; and that Eisenberg was not credible. The court observed that Eisenberg and his wife had presented contradictory testimony about their claimed notice to Brown and his son, and that they had failed to produce a fax transmittal confirmation sheet, which could have confirmed a notice guaranteeing continuing insurance coverage. The court also stated that defense exhibit 23 (which the Eisenbergs claimed to be a photocopy of the front of their file folder), on which was written, among other things, "10-2-00 Notified Bud to change insurance," "Alan faxed," and "JAN-10th FAXED & called Bud – again HIS SON," appeared to have been "modified at various points with different handwriting, [with] information being added after the fact to support the testimony that was given in court."

¶8 The court also based its credibility findings on Brown's reference to B & J's standard operating procedures and the obvious business incentives B & J had for promptly issuing updated policy endorsements producing higher

premiums. Thus, the court concluded that the Eisenbergs' testimony simply did not "make sense," and that the evidence offered "no proof of any documents … regarding any mistakes by Mr. Brown."

II. DISCUSSION

¶9 Eisenberg acknowledges that "[t]he facts necessary for a determination of this appeal appear to be clear and are not in contention," and that resolution of this appeal "requires the application of accepted law to the facts." Founders agrees. Following a bench trial, the trial court's "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." WIS. STAT. § 805.17(2). Where testimony conflicts, the fact finder is the ultimate arbiter of witness credibility. ***Bank of Sun Prairie v. Opstein***, 86 Wis. 2d 669, 676, 273 N.W.2d 279 (1979).

¶10 Generally, "where the 'automatic insurance' clause requires that notice of the acquisition of a different automobile be given to the insurer within a specified time after delivery, the failure to give such notice operates to preclude coverage for the new vehicle when the accident occurs after the expiration of the designated period." ***Thompson v. Dairyland Mut. Ins. Co.***, 30 Wis. 2d 187, 192, 140 N.W.2d 200 (1966). In this trial, the parties stipulated that Founders had the burden to prove that it had not received timely notice that Eisenberg had bought a new car. *See* ***Just v. Land Reclamation, Ltd.***, 151 Wis. 2d 593, 605, 445 N.W.2d 683 (Ct. App. 1989) (generally, the insurer bears the burden of proving the applicability of a coverage exclusion), *rev'd on other grounds*, 155 Wis. 2d 737, 456 N.W.2d 570 (1990).

¶11 Eisenberg argues only that Founders "did not meet its burden of proof in showing that there was no notice of a replacement vehicle given to its agent." He does not, however, challenge the court's credibility calls. Instead, Eisenberg suggests that the trial court could have weighed the testimony differently. He contends:

> A substantial factual issue then exists as a result of the credible testimony of both Mr. Brown and Mrs. Eisenberg, though not because their testimony regarding their personal experience[s] is in conflict or contradictory. While both were deemed credible by the trial court, Mr. Brown's testimony was found more credible than Mrs. Eisenberg's, presumably where that of the two would diverge. However, Founders Insurance presented no direct evidence which would affirmatively show that no one at the insurance agency, other than Mr. Brown, did not receive a fax within the 30 days providing notice of the replacement vehicle, as testified to by Mr. and Mrs. Eisenberg. Perhaps more significantly, there was no direct testimony to contradict … Mrs. Eisenberg's testimony that she had spoken with Mr. Brown's son within the 30[-]day period regarding adding the replacement vehicle to the policy.… Therefore, there would be the "more" credible testimony of Mr. Brown that he had not received any notice of a replacement vehicle within 30 days of its purchase, and the merely credible testimony of Mrs. Eisenberg that she had faxed notice to the agency and subsequently spoken with Mr. Brown's son regarding that notice. Where credible testimonial evidence in the record supports notice, and no direct contradictory evidence exists in the record, including the possibility of rebuttal testimony, then not only has Founders … failed to meet its burden of proving no notice, but the existence of that credible evidence requires a finding that there was, in fact, actual notice to the agency and, by extension and act of law, the principal of the agency, Founders Insurance Company.

¶12 Eisenberg's argument is without merit. For several reasons, solidly anchored in the evidence, the trial court logically found that Eisenberg's testimony was not credible and, where the testimony of Brown and Mrs. Eisenberg diverged on the critical subject of communication with Brown and his son, Mrs. Eisenberg's

testimony was not credible. These credibility calls, together with all the other evidence, provided an ample basis on which the trial court correctly concluded that Founders had carried its burden.

¶13 Founders argues that Eisenberg's appeal is frivolous and asks for costs and reasonable attorney fees under WIS. STAT. § 809.25(3). "We decide as a matter of law whether an appeal is frivolous." ***Lessor v. Wangelin***, 221 Wis. 2d 659, 666, 586 N.W.2d 1 (Ct. App. 1998). Eisenberg, offering no reply to Founders' argument that his appeal is frivolous, concedes it. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments deemed admitted).

¶14 Moreover, the frivolousness of this appeal is clear. The evidence established that Eisenberg attempted to mislead his insurance agent and insurer in order to gain coverage. The evidence also established that Eisenberg maintained his misleading ways by attempting to deceive the trial court. On appeal, he offers no challenge to the trial court's findings that he was not credible and that a critical document was "modified … to support" his position.

¶15 The circumstances here are similar to those we considered in ***Lessor***, where we concluded that the appeal was frivolous because the appellant or his attorney "should have known that an appeal to reverse the trial court's credibility determinations could not be successful under the long-standing law of this state." ***Lessor***, 221 Wis. 2d at 669. While some subtle differences distinguish the legal theories offered by the appellants in the two cases, and while Eisenberg casts his appeal more as a legal-standard/burden-of-proof challenge, here, as in ***Lessor***, the appellant's essential argument "asks this court to reweigh the testimony of

witnesses and to reach a conclusion regarding credibility contrary to that reached by the trial judge" while "not contest[ing] the trial judge's rationale." ***Id.***

¶16 Accordingly, we conclude that Eisenberg's appeal is frivolous. Therefore, we remand for the trial court's determination and assessment of costs and reasonable attorney's fees.

By the Court.—Judgment affirmed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.