COURT OF APPEALS
DECISION
DATED AND FILED

July 1, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2149 **Cir. Ct. No. 01 CV 1227**

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

JOSE-MANUEL RANEDA,

PLAINTIFF-APPELLANT,

JULIA E. RANEDA SITZLER,

PLAINTIFF,

V.

BANK OF AMERICA, N.A.,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Milwaukee County: DOMINIC S. AMATO, Judge. *Affirmed and remanded with directions*.

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

¶1 PER CURIAM. Jose-Manuel Raneda appeals from the circuit court judgment, following a jury trial, dismissing his action against Bank of America,

N.A., and ordering him to pay $126,632.62 in costs and attorney's fees for pursuing a frivolous action. Raneda argues: (1) the circuit court engaged in misconduct, which caused bias against him; (2) the circuit court "should have granted [his] motion for judgment notwithstanding the verdict because the Bank did not meet its burden of production as to the basic facts of the case"; and (3) "the [Wisconsin Consumer Act] and its consumer protection provisions apply to the lease between the Bank and [him]." We reject his arguments and affirm. Further, because Raneda's appeal is frivolous, we remand for the determination and assessment of costs and attorney's fees Raneda must pay for pursuing this appeal.

I. BACKGROUND

¶2 Raneda was out of the country when, at approximately 3:00 a.m. on December 18, 2000, his 1999 Toyota Land Cruiser was repossessed by Badgerland Auto Recovery, Inc. When he returned home, on December 30, he realized that his SUV had been repossessed because he had failed to make the required lease payments to Bank of America for four consecutive months. On January 9, 2001, the Bank advised him that the SUV would be sold at auction. Raneda then paid the lease deficiency and the SUV was returned to him.

¶3 On February 9, 2001, Raneda, then a law student, filed the underlying action, alleging that the Bank broke into his garage to retrieve the SUV and that some personal property inside it, including a videotape of his deceased father, was not returned to him. His complaint claimed trespass to land, conversion of property, violation of the Uniform Commercial Code, and punitive damages.

¶4 At trial, Raneda conceded, in his opening statement and closing argument, that he had failed to make four consecutive payments and, therefore, the

Bank was entitled to repossess the SUV. Nevertheless, he argued that the Bank was liable because Badgerland, which was under contract with the Bank, had broken into his garage to take the SUV. Because Badgerland maintained that the SUV, when repossessed, had been located on Raneda's driveway, Raneda contended that the critical question for the jury was the location of the SUV on December 18—in the driveway or in the garage.

¶5 Raneda testified that he parked the SUV inside his garage when he left the country and took the keys with him. He acknowledged, however, that he left an extra set of keys inside the house and that his friend, Seth Kiefer, and his twelve-year-old daughter had access to the house and garage while he was gone.

¶6 Kurt Schwebe, a repossession agent for Badgerland, testified that he drove by Raneda's residence several times prior to December 18, with the intention of repossessing the SUV. He said that on several occasions he did not see the SUV in the driveway and, therefore, did nothing. At 3:00 a.m. on December 18, however, he saw it in the driveway, loaded it on a dolly, and took it away. He also explained that he advised the police that he was repossessing the SUV, that in his fifteen years of repossession experience he had never broken into a garage to retrieve a vehicle, and that if the SUV had been in the garage, he would simply have obtained a writ of replevin, as was his customary practice when unable to gain access to a vehicle. Schwebe and Pablo Reyes, who assisted in the repossession, both testified that they did not enter Raneda's garage. Moreover, trial evidence established that their dolly was too big to enter the garage; thus, repossession with use of the dolly could only have been accomplished if the vehicle was outside.

¶7 Raneda offered no evidence to counter Badgerland's account. Instead, with no witnesses to or evidence of forcible entry, Raneda offered his view, which he conceded was merely speculative. He suggested that Badgerland must have entered his garage to get the SUV by either "hot wiring" the key pad to his garage door or breaking in through a small window at the back of the garage.

¶8 The jury returned a verdict in favor of the Bank on all counts; Raneda moved for a judgment notwithstanding the verdict. Opposing Raneda's motion, the Bank moved for sanctions, costs and attorney's fees.[1] Raneda did not file a response to the Bank's motion for sanctions or offer an oral response at the hearing. The court denied Raneda's motion, granted the Bank's motion for fees and costs, and entered judgment in accordance with the jury's verdict. The circuit court held a hearing on the reasonableness of the Bank's legal fees. Raneda did not contest the amount of fees sought by the Bank or appear at the hearing; thus, judgment was entered in favor of the Bank for $126,632.62.

II. DISCUSSION

A. Alleged Judicial Misconduct

¶9 While somewhat difficult to follow, Raneda's brief to this court seems to contend that he was denied a fair trial because of judicial bias. Specifically, he argues that the circuit court engaged in an ex parte communication that caused judicial and jury bias against him. His argument has no merit.

[1] *See* WIS. STAT. §§ 802.05 and 814.025 (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

¶10 According to SCR 60.04(1)(g), "A judge may not initiate, permit, engage in or consider ex parte communications concerning a pending or impending action or proceeding…." A judge may, however, "consult with other judges or with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities." SCR 60.04(1)(g)(3). The party alleging that an ex parte communication occurred bears the burden of showing that the communication caused prejudice to a material degree. ***Seebach v. Public Serv. Comm'n***, 97 Wis. 2d 712, 721, 295 N.W.2d 753 (Ct. App. 1980) ("material error occurs when a party not notified of an ex parte communication is prejudiced by [an] inability to rebut facts presented in the communication and where improper influence upon the decision making appears with reasonable certainty").

¶11 As he did with his claims in the underlying action, Raneda, on appeal, resorts to speculation. Arguing that an ex parte communication between the circuit court judge and a law clerk caused bias, he points to an instance at voir dire when the judge said that he (Raneda) was a second-year law student. Raneda argues: "There is no evidence any where [sic] on the record from which [the judge] could have concluded that [he] was a second-year law student. Therefore, it is reasonable to conclude that by this point [the judge] had already engaged in the ex parte communication…."

¶12 In his reply brief, Raneda concedes that, at a pre-trial motion hearing, he informed the court that he was a law student. He argues, however, that because he never specified he was a *second-year* law student, the judge's statement proves the judge inappropriately engaged in an ex parte communication. We disagree. Countless other explanations exist and, absent evidence to support it, Raneda's accusation is pure speculation.

¶13 Moreover, in his appellate brief, Raneda misrepresents the record by omitting relevant portions of a quotation, from the court's decision on his motion after the verdict, in his effort to prove the court engaged in an ex parte communication that caused bias. The portions he omitted are in bold type:

> I was told by the law clerk who brought the jury up and down that apparently you applied for one of the judicial law clerk positions here, **and I did not say anything to him and I would not say anything. I would not make any determination as to what your future is.** But that's almost adverse to your testimony where you said you had a patent job coming up at $120,000 a year. So I don't perceive you as being as lying—intentionally lying, I just perceive the way you tried the case and the things you say, that you [speak] without making certain that what you are saying is accurate and complete. **I'm not finding you to be a bad guy, a finding that the action was malicious, but** you just can't start lawsuits and continue them without a factual underpinning without a basis to proceed, and that's what you did in this case. And you knew it and you continued and you acknowledged it.

We caution Raneda that at all times, and certainly when alleging judicial misconduct, he must meticulously present the record.

¶14 The record does not establish that the circuit court judge did anything to "initiate, permit, engage in, or consider" the law clerk's information in rendering its decision. After pointing out that its finding of frivolousness was based on Raneda's lack of evidence, the court specifically told Raneda about the law clerk's comment and emphasized that it had no bearing on its decision. The court clarified that it "did not say anything to [the law clerk]" and that it "would not say anything" or "make any determination as to what [Raneda's] future is." Thus, it is clear that Raneda was not prejudiced to any material degree by the court's knowledge of the law clerk's comment.

B. Evidentiary Rulings and Court Conduct

¶15 Raneda also argues that some of the court's evidentiary rulings, its questions to him, and its one "sarcastic" remark biased the jury. He does not, however, offer anything to support his argument. *See* ***Barakat v. DHSS***, 191 Wis. 2d 769, 786, 530 N.W.2d 392 (Ct. App. 1995). Further, with one exception,[2] Raneda never objected to any of the court's rulings or conduct; hence, he waived this argument. *See* ***Sprangers v. Greatway Ins. Co.***, 182 Wis. 2d 521, 545, 514 N.W.2d 1 (1994) (generally, an appellate court will not review an issue raised for the first time on appeal).

C. Motion after Judgment

¶16 Raneda argues that the circuit court should have granted his motion notwithstanding the verdict because, he contends, at trial the "Bank did not introduce any credible evidence to prove that anyone that [he] authorized drove the vehicle out of [his] garage between December 12, 2000 and December 18, 2000." He argues that it was not his burden to "prove that a burglary took place," but that it was his burden to prove that "he left the car in the garage, that he did not authorize anyone to drive the vehicle out of the garage, and that no one known to him has suggested that they drove the vehicle out of the garage." Raneda is incorrect. He filed the action against the Bank alleging that, among other things, it broke into his garage; thus, he had the burden of presenting facts to support his allegations. *See* ***Jandrt ex rel. Brueggeman v. Jerome Foods, Inc.***, 227 Wis. 2d

[2] Raneda objected to the circuit court's ruling that a question he posed to one of the Bank's witnesses on cross-examination was argumentative. On appeal, he does not argue that the court's ruling was incorrect; he simply refers to it in an attempt to prove that the court's conduct biased the jury.

531, 550, 597 N.W.2d 744 (1999) (the law requires that a claim be well grounded in both fact and law); *see also* WIS. STAT. § 802.05(1)(a) (a "pleading, motion or other paper [must be] well[]grounded in fact"). The circuit court correctly denied Raneda's motion and found his claims to be frivolous because he failed to produce any evidence to support them.

¶17 Raneda also argues that the jury instructions "[i]ncorrectly [s]tated the [l]aw and [a]sked the [w]rong [q]uestions." He contends that the circuit court should have based the jury instructions on WIS. STAT. § 903.01.[3] His argument fails, however, because, as the Bank points out, Raneda never requested an instruction based on this statute, never objected to the instructions and, at the hearing on his motion after the verdict, never argued that § 903.01 instructions should have been given; instead he argued that the court should have given a *res ipsa loquitur* jury instruction. Thus, the Bank argues waiver. Raneda offers no reply. *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).

[3] WISCONSIN STAT. § 903.01 provides:

> **Presumptions in general.** Except as provided by statute, a presumption recognized at common law or created by statute, including statutory provisions that certain basic facts are prima facie evidence of other facts, imposes on the party relying on the presumption the burden of proving the basic facts, but once the basic facts are found to exist the presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence.

D. Wisconsin Consumer Act

¶18 Raneda also argues that certain provisions of the Wisconsin Consumer Act (WCA), WIS. STAT. ch. 421, preclude the repossession of his SUV because, according to his interpretation of the statute, his "total lease obligation," *see* WIS. STAT. §§ 421.202(6); 429.104(26), was less than $25,000. We disagree.

¶19 The WCA limits a secured party's right to repossess vehicles if the lease amount is less than $25,000. *See* WIS. STAT. § 421.202(6) (the WCA does not apply to "…motor vehicle consumer leases in which the total lease obligation exceeds $25,000…."). According to WIS. STAT. § 421.301(25m), "'[m]otor vehicle consumer lease' has the meaning given for 'consumer lease' in s. 429.104(9)." WISCONSIN STAT. § 429.104(9) provides: "'Consumer lease' … [is one where] the total lease obligation, excluding any option to purchase or otherwise become owner of the motor vehicle at the expiration of the consumer lease, does not exceed $25,000." Raneda contends that, under § 429.104(9), his "total lease obligation" is the value of the vehicle at the beginning of the lease, $52,163.30, minus the option to purchase at the end of the lease, $36,333.76, which equals $15,829.54. He is incorrect.

¶20 WISCONSIN STAT. § 429.104(9) simply defines "consumer lease." It does not provide a formula to determine whether a specific lease falls under the WCA.[4] According to the WCA, "total lease obligation" for a motor vehicle consumer lease is defined as the sum of all scheduled periodic payments under the

[4] Even if WIS. STAT. § 429.104(9) did apply, as Raneda contends, his interpretation would be inaccurate. The statute directs that the option to purchase be excluded, not subtracted, from the "total lease obligation" to determine whether the lease is below $25,000 and can be considered a "consumer lease."

lease plus the down payment. WIS. STAT. §§ 421.301(43m); 429.104(26). As the Bank calculates: Raneda's lease required thirty-nine payments of $733.91; he made no down payment; therefore, his "total lease obligation, " as defined by WIS. STAT. §§ 421.301(43m); 429.104(26), was $28,622.49. Raneda offers no reply to the Bank's argument. *See* ***Charolais Breeding Ranches, Ltd.***, 90 Wis. 2d at 109 (unrefuted arguments deemed admitted).

E. Frivolous Appeal

¶21 The Bank argues that Raneda's appeal is frivolous because his arguments are based on speculation and conjecture and, in the words of WIS. STAT. § 809.25(3)(c)(2), he "knew, or should have known, that the appeal … was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law." Thus, the Bank asks for costs and reasonable attorney's fees under WIS. STAT. § 809.25(3). Raneda does not even respond to the Bank's request.

¶22 "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). Generally, a conclusion that the circuit court "correctly adjudged the matter frivolous renders the appeal frivolous per se." ***Belich v. Szymaszek***, 224 Wis. 2d 419, 435, 592 N.W.2d 254 (Ct. App. 1999).

¶23 The circuit court concluded that Raneda's claims were frivolous:

> …[T]hrough [his] own acknowledgment, everything was based upon speculation and conjecture. [He] even argued that to the jury. [The court] kept patiently waiting for some type of evidence that went beyond speculation and conjecture other than what [Raneda] hypothesized or attempted to surmise. Really it was based upon pure opinion without any underlying factual basis. There [was]

> never any evidence that [Raneda] offered that went beyond speculation and conjecture.

We have thoroughly reviewed the record and agree with the circuit court's determination.

¶24 The frivolousness of Raneda's appeal is clear. Given the lack of evidence presented at trial, the wild speculations made at trial and on appeal, and the incomplete and/or misleading references to the record and law, Raneda "knew, or should have known, that the appeal … was without any reasonable basis in law or equity." WIS. STAT. § 809.25(3)(c)(2). Accordingly, we conclude that Raneda's appeal is frivolous. Therefore, we remand for the circuit court's determination and assessment of costs and reasonable attorney's fees.

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

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