

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 8, 2004

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. 03-0965
STATE OF WISCONSIN**

Cir. Ct. No. 02SC010666

**IN COURT OF APPEALS
DISTRICT IV**

BRANDON HILL

PLAINTIFF-APPELLANT,

v.

PATRICIA A. BUTLER AND TEMIKA D. BUTLER,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Dane County:
DAVID T. FLANAGAN, Judge. *Affirmed.*

¶1 DYKMAN, J.¹ Brandon Hill appeals from a judgment awarding him \$524.00. He seeks to recover a total of \$2,636.70 in damages from Patricia

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

and Temika Butler. Because we lack a transcript to review the trial court's findings of fact, we affirm.

¶2 The only portion of the record that explains the facts of this case is the sparse pleadings filed in small claims court. Hill pled that, "my vehicle was struck by defendant while waiting in line at a Taco Bell drive thru. I am seeking repair costs, rental costs, and court costs." In her answer, Patricia Butler admitted that her car damaged Hill's car and offered him \$450 to settle the case. The small claims court commissioner dismissed the case against Patricia Butler because she was the owner, not the driver, of the car. It awarded Hill a judgment of \$4,311 against Temika Butler. Hill then demanded a trial de novo in circuit court. The trial court awarded him a judgment for \$450 plus costs against Temika. Hill appeals.

¶3 Hill raises only one issue on appeal: how much money should Temika Butler have to pay him for car repair and rental costs? We consider appeals with different standards of review. The standard of review controls how much we defer to the trial court's decision. We review matters of law without any deference to the trial court's conclusions. However, we will affirm the trial court's findings of fact unless clearly erroneous:

When the circuit court acts as the finder of fact, it is the ultimate arbiter of the credibility of the witnesses and the weight to be given to each witness's testimony. The reason for this rule is that the trier of fact had the opportunity to observe the witnesses and their demeanor. When more than one reasonable inference can be drawn from the credible evidence, the reviewing court must accept the inference drawn by the trier of fact.

State v. Peppertree Resort Villas, Inc., 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345 (citations omitted); WIS. STAT. § 805.17(2). Even if evidence

permits a different finding, we affirm the trial court's findings of fact "as long as the evidence would permit a reasonable person to make the finding." *Sellers v. Sellers*, 201 Wis. 2d 578, 586, 549 N.W.2d 481 (Ct. App. 1996).

¶4 This appeal requires us to review the trial court's findings of fact. We presume that the trial court found facts when it entered a judgment against Butler. *See* WIS. STAT. § 805.17(2). Those facts would be stated "orally on the record following the close of evidence or set ... forth in an opinion or memorandum of decision filed by the court." *Id.* Obviously, we have no way of knowing what facts the trial court found. While the trial court did not accept a body shop estimate of the cost to repair Hill's car, without a transcript we cannot tell whether the trial court's reasons for doing so were correct.

¶5 The rule is well established that appellate review "is limited to the record; we are powerless to review a question of fact which is based upon testimony or other acceptable information not preserved on appeal." *Schimke v. Milwaukee & Suburban Trans. Co.*, 34 Wis. 2d 317, 320, 149 N.W.2d 659 (1967) (citations omitted).

¶6 Appellate courts do not re-try cases. We review cases which have been tried. An appeal to the court of appeals is not a trial de novo of the sort Hill received when he demanded a trial before a judge under WIS. STAT. § 799.207. By failing to provide this court with a transcript of the trial in circuit court, Hill has effectively prevented us from reviewing his case.

¶7 Because the record does not contain a transcript of the trial court's decision, Hill has failed to meet his burden of proving that the trial court's findings of fact were clearly erroneous. We will not reverse findings of fact when the party who has the burden to show error fails to submit an adequate transcript.

See Herlitzke v. Herlitzke, 102 Wis. 2d 490, 495, 307 N.W.2d 307 (Ct. App. 1981).

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.

