COURT OF APPEALS DECISION DATED AND FILED

December 23, 2003

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. 03-1023

Cir. Ct. No. 02-SC-657

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

AMIR MAHMOUD,

PLAINTIFF-RESPONDENT,

V.

MICHAEL ORTIZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Ozaukee County: PAUL V. MALLOY, Judge. *Affirmed*.

¶1 BROWN, J.[1] This appeal is basically a sufficiency of evidence review of a small claims court judgment awarding damages to Amir Mahmoud for Michael Ortiz's breach of contract based on the trial court's finding that Ortiz

[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.

failed to rebuild two car engines as promised. We conclude that the trial court's factual findings are supported by the record and are not clearly erroneous. We also reject Ortiz's assertion that the trial court judge was biased and his claim that newly discovered evidence should have afforded him a new trial. We affirm.

¶2 Ortiz states that the correct standard of review for insufficiency of evidence is de novo. This is not entirely correct. De novo review is proper when the appellate court is asked to review if there is enough evidence to meet the burden of proof for establishing a prima facie case. *See* ***Brandt v. Brandt***, 145 Wis. 2d 394, 409, 427 N.W.2d 126 (Ct. App. 1988). However, in situations where the appellate court is asked to assess the credibility and weight that the trial court afforded each witness, the appropriate standard of review is whether the findings of fact made by the trial court are clearly erroneous. *See* ***Tourtillott v. Ormson Corp.***, 190 Wis. 2d 291, 294-95, 526 N.W.2d 515 (Ct. App. 1994).

¶3 In the postjudgment motions, it is true that Ortiz couched his sufficiency of evidence argument in terms of whether Mahmoud had provided sufficient evidence to meet his prima facie burden of proof. This is evidenced by the fact that Ortiz's counsel explained how the crux of the issue was whether a specialized engine had been repaired and argued that whether an engine was repaired required an expert opinion. Because Mahmoud did not provide an expert, Ortiz asserted that Mahmoud had failed to meet his burden of proof. Had that been the issue on appeal, our standard of review would have been de novo.

¶4 In his appellate brief-in-chief, however, Ortiz has apparently abandoned the "lack of an expert" argument because that argument is not mentioned at all. Rather, Ortiz takes issue with the trial court's choice of Mahmoud's version of the events rather than his. Thus, this court reads Ortiz's

brief to be making an argument focusing on the trial court's credibility determinations. Therefore, the standard of review is whether the trial court's credibility call is clearly erroneous.

¶5 Bearing this standard of review in mind, our analysis will focus upon the credibility determinations of the trial court. The trial court first concluded that Mahmoud contracted with Ortiz for the repair of more than one engine. The trial court then found that for a long and unreasonable period of time, Ortiz completed little to no actual work on the vehicles. Specifically, the court determined that "when somebody holds themself out as a mechanic to rebuild an engine, albeit this looks like a specialized engine, there should be a reasonable period of time to get that done, and it wasn't done here." The court also found that, when Ortiz claimed to be working on the vehicles, Mahmoud paid Ortiz and paid for parts for repair of the vehicles. As to this, the court stated:

> And then just to dump the parts and the vehicle and say get it out [of] here, to me strains the credibility of the whole case. And to charge storage fees and pickup fees for parts and things of that nature, I basically find that there was a breach of the contract to repair the vehicle.

Finally, the court concluded that the work completed by Ortiz had no value. Based on these findings, the court found Ortiz in breach and awarded Mahmoud $4655.41, which included the amounts Mahmoud had paid Ortiz as a down payment and for the parts.

¶6 Ortiz argues that these factual findings of the court and the damages based on these findings are not supported by the record. Ortiz asserts that he and Mahmoud only contracted to rebuild one engine despite Mahmoud's assertion that the contract was for two engines. He contends that the testimony presented at the hearing on the breach of contract issue supports his assertion. He further argues

that the work he had done on the engines had value and, consequently, the damages award cannot be sustained. Finally, he faults the trial court for preferring Mahmoud's account over his and claims that Mahmoud's testimony "was at times clearly evasive, internally contradictory, or contradicted by his own witnesses."

¶7 We have read the record before us in its entirety and are confident that it supports the facts found and the inferences drawn by the trial court. It is well established that the weight of evidence and credibility of witnesses are matters for the trial court and where more than one inference can be drawn from the evidence, we are obliged on review to accept the one drawn by the trier of fact. ***Holbrook v. Holbrook***, 103 Wis. 2d 327, 334, 309 N.W.2d 343 (Ct. App. 1981). Simply put, the trial court believed Mahmoud's version of the events and disbelieved Ortiz. That is a credibility call by the trial court that we are not in a position to disturb.

¶8 Correlatively, Ortiz argues that the small claims court was biased against him and, as a result, a new trial is warranted. The problem with this argument is that it is raised for the first time on appeal. Ortiz had an obligation to first ask the trial court to vacate the judgment on the basis that its decision was the result of bias. *See* WIS. STAT. § 757.19(2)(g). While Ortiz did bring a postjudgment motion alleging newly discovered evidence, he never accused the judge of bias. This is important because the question of bias he has raised has a subjective component. The subjective element in para. (2)(g) is based purely on the judge's own belief in his or her ability to act impartially. *See* ***State v. Am. TV & Appliance***, 151 Wis. 2d 175, 182, 443 N.W.2d 662 (1989). If the trial judge subjectively believes he or she is unable to act impartially then the judge must disqualify himself or herself. *See* ***id.*** Because there was no motion to vacate, the

trial judge never had a chance to address the claim of bias. Therefore, we have no record concerning the subjective component. We hold that the issue is waived.

¶9 Alternatively, even addressing the subject, Ortiz complains about the way the court interjected itself into the proceedings and, at one point, even took over questioning for Ortiz. But this was a small claims trial where both parties were pro se and it is evident from reading the record that the trial court was concerned about keeping order and decorum in the courtroom. This is borne out by the comments of the trial court at the postjudgment proceeding, where Ortiz had counsel representing him. The trial court stated:

> This was a mess of a trial. People talking over each other, people yelling at each other, people essentially misbehaving in court. I might as well had a black and white referee shirt and whistle.

¶10 The court has not only the right, but also the responsibility to maintain control of the courtroom. We have reviewed the record and can find nothing that shows bias on the part of the trial court. If anything, it shows that the court was even-handed in its admonitions. It admonished both parties. That the trial court finally came down on Mahmoud's side when making the credibility call does not mean that the trial court was biased against Ortiz.

¶11 Ortiz's final claim is that there was newly discovered evidence which would have materially affected the result of the trial and the trial court erroneously exercised its discretion when it failed to order a new trial on the basis of this evidence. During the postjudgment motion, Ortiz submitted postings that were reportedly made by Mahmoud on the Internet at Rxclub.com. Ortiz claimed that the postings showed how Mahmoud was attempting to sell the same used motor and parts that Mahmoud claimed during the small claims trial were not

useable. Ortiz asserted that, in the postings, Mahmoud claimed that the motor had been rebuilt and was in "fine, functioning shape or nearly completely functioning shape." Ortiz further alerted the court to postings showing how Mahmoud was trying to sell the same gasket and seals that, in Ortiz's view, corresponded with the gasket and seals that Mahmoud claimed at trial were not useable. Ortiz argued that this new evidence damages Mahmoud's credibility to such an extent that, if presented at a new trial, it would materially affect the result.

¶12 The trial court requested a response from Mahmoud who said that the parts referred to in the Internet postings were "actually a friend's parts; they're not mine. I still have the parts in the garage to this day, sir."

¶13 After hearing from both parties, the trial court denied the motion. The trial court specifically referred to Mahmoud's response that the items listed on the Internet were not the parts at issue and ruled that, in the court's view, there was no fraud on the court.

¶14 Newly discovered evidence which serves only to impeach the credibility of a witness who testified at trial is insufficient to warrant a new trial. *See*, e.g., ***Simos v. State***, 53 Wis. 2d 493, 499, 192 N.W.2d 877 (1972); ***State v. Kimpel***, 153 Wis. 2d 697, 700-01, 451 N.W.2d 790 (Ct. App. 1989). This is exactly what Ortiz is trying to do. The law does not allow it.

By the Court. —Judgment and order affirmed.

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