

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 11, 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. 03-2416
STATE OF WISCONSIN**

Cir. Ct. No. 02CV001324

**IN COURT OF APPEALS
DISTRICT II**

OLGA RICO,

PLAINTIFF-APPELLANT,

v.

**MIDWEST SECURITY INSURANCE COMPANY AND THOMAS
T. BENNER,**

DEFENDANTS-RESPONDENTS,

**TOMMY G. THOMPSON, SECRETARY, UNITED STATES
DEPARTMENT OF HEALTH AND HUMAN SERVICES,**

DEFENDANT.

APPEAL from a judgment of the circuit court for Racine County:
GERALD P. PTACEK, Judge. *Affirmed.*

Before Deininger, P.J., Vergeront and Higginbotham, JJ.

¶1 PER CURIAM. Olga Rico appeals from a judgment dismissing her personal injury action against Thomas Benner and Midwest Security Insurance Company. We affirm.

¶2 Rico and Benner agreed during their trial testimony on the basic facts of the accident. Each testified that Rico was driving north on a four lane Racine street, in the left lane, and Benner was behind her; that a tractor-trailer attempting to make a right turn from the right lane moved at least partly into the left lane; that Rico came to a complete stop; and that Benner collided with her from the rear. The parties further agreed that Rico's car then moved forward to strike the trailer portion of the truck, causing damage to her vehicle. However, they disagreed as to whether that movement was caused by the impact from Benner's vehicle. Benner testified that he was almost stopped when he struck Rico's vehicle; that the impact was minor; and that after the impact Rico's car "took off like a rocket" and "there wasn't a skidding sound. More of an acceleration sound going to the semi." He said the distance Rico's car traveled to the truck was approximately twenty feet. Rico, in contrast, testified that she did not step on the accelerator and that the force of the impact from Benner caused her car to move forward into the truck.

¶3 The jury attributed the negligence 80% to Rico and 20% to Benner. Rico argues that the trial court erred by declining, at the close of evidence, to find Benner causally negligent as a matter of law and by allowing the jury to consider the issue of Rico's comparative negligence. In reviewing the sufficiency of the evidence, the trial court is to consider all credible evidence and reasonable inferences therefrom in the light most favorable to the party against whom the

motion is made and may grant the motion only if there is no credible evidence to sustain a finding in favor of such party. WIS. STAT. § 805.14(1) (2001-02).¹ Rico discounts Benner's testimony about the forward movement of her vehicle because it was not consistent with his earlier statements. However, such inconsistency does not make his testimony incredible; it merely creates a credibility issue for impeachment of his testimony to be decided by the fact finder.

¶4 We conclude that the trial court properly declined to find Benner negligent and allowed the jury to decide the issue of comparative negligence. The record contains photographs of Rico's vehicle. One photograph is of the rear of Rico's vehicle. Although the parties did not testify as to when this photograph was taken, both testified that it accurately shows the condition of Rico's vehicle after the accident. The photograph shows no visible damage of the type typically caused by collision, other than possibly a few paint scratches. Other photographs show Rico's vehicle from the front. Rico testified that these photographs accurately depict the damage from the accident. The photographs show impact damage and structural deformity from a fairly narrow object pushing what appears to be 6 to 12 inches into the bumper and other parts. These photographs alone constitute credible evidence that (1) the impact from the rear was not sufficient to cause Rico's injuries and (2) the impact from the rear was not sufficient by itself to cause Rico's car to move forward twenty feet and sustain the degree of frontal damage shown by the photographs. In other words, there is a basis to find that, regardless of whether Benner was 100% negligent in causing the *initial* impact,

¹ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

that impact did not cause Rico to suffer injuries and did not cause the later impact with the truck in front of her.

¶5 There is also other evidence beyond the photographs that supports these conclusions. Benner was driving a 1987 Sierra pickup truck. The jury could reasonably infer that this is a larger vehicle than Rico's Pontiac Grand Am and that it would therefore be capable of inflicting visible damage on the Pontiac even at low speeds, but apparently did not. Benner testified that Rico's vehicle accelerated without skidding after the impact, leading to a reasonable inference that Rico applied the accelerator, rather than the brake. Furthermore, Rico testified that before the impact she was holding the brake with her *left* foot, giving rise to a reasonable inference that her right foot was available to apply to the accelerator in response to an unexpected stimulus.

¶6 Rico next argues that the trial court erred by admitting evidence of her criminal conviction for a second offense of operating while intoxicated (OWI). She argues that the evidence was not admitted for credibility purposes as required by WIS. STAT. § 906.09. She argues that the evidence does not, by itself, impeach her credibility. This argument is contrary to long-standing Wisconsin law holding that convictions are probative as to credibility. *See State v. Smith*, 203 Wis. 2d 288, 294-99, 553 N.W.2d 824 (Ct. App. 1996). She also argues that the evidence should have been excluded under § 906.09(2) because of its minimal probative value and the unfairly prejudicial nature of the intoxication offense. We note, first, that the jury was informed of the specific nature of the crime only because Rico first answered "no" when asked if she had been convicted of a crime. The trial court's pretrial ruling properly allowed only the general fact of a criminal conviction, not the specific crime. Second, Rico's argument on this point is mainly a dispute with the policy decision that underlies the admission of this type

of evidence. That policy decision has already been made and we see nothing that makes the prior conviction in this case unless probative or more prejudicial than usual.

¶7 Rico also argues that the trial court erred by allowing the “emergency” and “duty of preceding driver” instructions to be given to the jury. She argues that the facts of this case did not present the required legal foundation for giving these instructions. She argues that the giving of these instructions improperly directed the jury’s focus to her own actions and away from “the real issues” of the case, which relate to Benner’s actions. We conclude that any error in the giving of these instructions was harmless. *See Nommensen v. American Cont’l Ins. Co.*, 2001 WI 112, ¶¶51-52, 246 Wis. 2d 132, 629 N.W.2d 301 (there must be a reasonable possibility that the instruction error contributed to the outcome of the action). As we discussed above, the jury was properly allowed to consider comparative negligence. Therefore, it was proper for the jury to focus on Rico’s conduct in the incident, regardless of whether the objected-to instructions were given.

¶8 Furthermore, we are satisfied that the disputed instructions played little role in the jury’s apportionment of the negligence. It is unlikely, as Rico appears to assume, that the jury’s apportionment was based on a conclusion that Benner was only 20% negligent in causing the initial impact. It appears more likely that the jury’s apportionment arose more from the evidence that gave substantial reason to doubt that Benner’s collision was a major factor in causing either Rico’s injuries or the forward movement of her vehicle. We note that during deliberation the jury specifically asked to view the photographs of the front and rear of Rico’s vehicle.

¶9 Finally, Rico asks for discretionary reversal under WIS. STAT. § 752.35, based on the alleged errors we discussed above. For the same reasons we rejected those arguments, we conclude that discretionary reversal is not appropriate.

By the Court.—Judgment affirmed.

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

