COURT OF APPEALS
DECISION
DATED AND RELEASED

February 6, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-1569

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

STATE FARM MUTUAL AUTO INSURANCE COMPANY,

Plaintiff-Respondent,

v.

JOHN McCLELLAN,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Milwaukee County: WILLIS J. ZICK, Reserve Judge. *Affirmed*.

SULLIVAN, J. John McClellan appeals *pro se* from a small claims judgment awarding State Farm Mutual Automobile Insurance Co. $506.36 in damages and costs arising from an automobile accident between McClellan and State Farm's insured, Greg Olson. McClellan raises the following issues for review: (1) whether the trial court erred when it denied his request to compel production of documents; (2) whether the trial court erroneously exercised its discretion "when it refused to order [American Family] to produce the names of the witness, that [McClellan] might call for his witnesses;" (3) whether the trial court "failed to consider [American Family] continually changing his story;"

and (4) whether the trial court's finding that McClellan was negligent is contrary to the evidence. This court rejects all of the defendant's arguments and affirms.[1]

The following facts were adduced at trial. Olson testified that he was pulling into the parking space next to McClellan's car, and that when he was approximately three-fourths of the way into the space, McClellan backed his car into Olson's car. McClellan testified that he was attempting to back out of his parking space when he stopped to let a vehicle pass. He testified that while his car was still stopped, Olson's car struck his. He further testified that a van was in the parking space next to his vehicle. A State Farm estimator testified that he viewed the damage to Olson's car, and that he estimated the damage to the left rear quarter panel would cost $463.73 to repair. The trial court found McClellan ninety percent negligent and Olson ten percent negligent. The trial court then assessed costs and entered judgment for American Family.

If a discovering party receives an answer to an interrogatory that it believes is evasive or incomplete, or fails to receive any answer at all, the discovering party may move the trial court for an order compelling discovery. *See* § 804.12(1)(a) & (b), STATS. Further, the burden is "on the frustrated party to seek a court order compelling compliance." 3 JAY E. GRENIG & WALTER L. HARVEY, CIVIL PROCEDURE § 412.2 at 580 (2d ed., Wis. Prac. Series) (1994).

> A motion for an order compelling discovery should be filed with the court and served on all the parties within a reasonable time after the moving party is served with the allegedly insufficient response to the discovery request or, if no response has been received, after the deadline for the response. The motion should be made in sufficient time so that it can be decided and the moving party can obtain the requested material before the trial and the discovery deadline.

[1] This appeal is decided by one judge pursuant to § 752.31(2), STATS.

Id. at 581 (footnotes omitted); *see* ***Hertlein v. Huchthausen,*** 133 Wis.2d 67, 71, 393 N.W.2d 299, 300 (Ct. App. 1986) (stating that § 804.12, STATS., provides various remedies to which party can avail itself if party is concerned about not receiving discovery materials). Whether to grant a motion compelling discovery is a matter within the discretion of the trial court and we will not reverse the trial court absent an erroneous exercise of that discretion. ***Earl v. Gulf & Western Mfg. Co.,*** 123 Wis.2d 200, 204-05, 366 N.W.2d 160, 163 (Ct. App. 1985).

McClellan argues that the trial court erroneously exercised its discretion by denying his *pro se* motion to compel discovery. The record belies this argument. The trial court ordered American Family to give McClellan copies of the insurance policy, a photograph of the damages, and an itemized estimate of the damages to Olson's car. The transcript shows that American Family complied with this order. There was no erroneous exercise of discretion.

McClellan next argues that the trial court erroneously exercised its discretion by failing to order American Family "to produce the names of the witness, that [he] might call for his witnesses." This argument is specious. The trial court cannot compel a plaintiff to the produce the names of witnesses a defendant may call for his witnesses. The defendant is free to call any relevant witness he chooses, and only the defendant knows who he or she intends to call.

McClellan argues that the trial court erred when it failed to consider what he alleged was American Family's "continually changing" the story of how the accident occurred. The trial court acted as finder of fact in this case, and, as such, it is the ultimate arbiter of credibility of witnesses. ***Cogswell v. Robertshaw Controls Co.,*** 87 Wis.2d 243, 250, 274 N.W.2d 647, 650 (1979). McClellan provides this court with no basis to dispute the trial court's credibility determinations in this case.

Finally, McClellan argues that the trial court erred when it found him negligent because he alleges that this finding is contrary to the evidence. We will sustain a verdict "if there is any credible evidence to support the verdict." ***Fehring v. Republic Ins. Co.,*** 118 Wis.2d 299, 305, 347 N.W.2d 595, 598 (1984). Further, it is this court's duty to search for credible evidence to sustain the trial court's verdict. ***Id.***

McClellan bases his argument on the scientific principles of Newton's first and second laws of thermodynamics. He argues that these principles show that if Olson's version of the accident was accurate, "the force of [McClellan's] vehicle moving rearward striking the lighter rear panel of [Olson's] vehicle would cause two thing to happen. First the damage would be through the point of impact to the end of the vehicle and [Olson's] car would be moved by the impact."

The trial court believed Olson's version of events, and the evidence presented supported this version. Thus, this court must sustain the verdict. ***Id***.

In short, this court rejects McClellan's arguments and the judgment of the trial court is affirmed.

By the Court.—Judgment affirmed.

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