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DISTRICT IV

May 21, 2020

To:

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You are hereby notified that the Court has entered the following opinion and order:

2019AP305 Alonzo Davis v. American Family Insurance
(L.C. # 2017CV2847)

Before Fitzpatrick, P.J., Graham and Nashold, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Alonzo Davis appeals from a judgment that dismissed his negligence claim against Xavier Bandera and Bandera's insurer, American Family Insurance, and granted judgment in American Family's favor on a counterclaim. After reviewing the record, we conclude at conference that this case is appropriate for summary disposition. See WIS. STAT. RULE 809.21 (2017-18).[1] We affirm.

[1] All reference to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

This case arises from a traffic accident in which a vehicle driven by Davis collided with a vehicle driven by Bandera in an intersection controlled by a traffic light. Both vehicles were damaged in the accident and two of Bandera's passengers suffered injuries for which American Family made payments because Davis was uninsured. The parties dispute which driver had a green light. Davis was convicted of operating a motor vehicle while intoxicated (OWI) and with a prohibited alcohol concentration (PAC) in connection to the accident; however, a municipal citation against Davis for running a red light was dismissed, and he was acquitted of OWI-causing injury. Davis filed a negligence action seeking compensation for the damage to his vehicle, and American Family filed a counterclaim against Davis to recover for the insurance payments it had made.

American Family served Davis with requests to admit a number of key facts—including that Davis ran a red light while his blood alcohol level was 0.23%, that he was 100% causally negligent with respect to the accident and uninsured, and that American Family had made $46,696.17 in payments to Bandera and his passengers pursuant to Bandera's uninsured motorist policy insurance with American Family. After Davis failed to timely respond, American Family moved to have all of these facts deemed admitted. Davis then filed a belated response admitting that he had been intoxicated at the time of the accident and that American Family had made the claimed payments, but denying that he had run a red light or caused the accident. Davis also moved to suppress a document related to his actual blood alcohol level.

The circuit court construed Davis's belated response as a request to withdraw some of his admissions, pursuant to WIS. STAT. § 804.11(2). Under that statute, a court may permit the withdrawal of an admission "when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that

withdrawal … will prejudice the party in maintaining … [a] defense on the merits." The court concluded that the presentation of the merits of the case would not be served by allowing Davis to withdraw his admissions because Davis had no admissible evidence to present that would show he had not run a red light while intoxicated. The court further concluded that American Family would be prejudiced if Davis were allowed to withdraw his admissions on the eve of trial because, in reliance on the admissions, American Family had not subpoenaed an expert witness on intoxication. After the court refused to allow Davis to withdraw his admissions, American Family immediately moved for summary judgment, which the circuit court granted.

On this appeal, Davis complains that the circuit court entered judgment against him "with no actual evidence submitted by the defense," despite the dismissal of his citation for running a red light and his acquittal on the OWI-causing injury charge, what Davis views as inconclusive evidence as to his level of intoxication, and photos that Davis believes show Bandera's vehicle struck his vehicle. We will liberally construe Davis's disorganized evidentiary contentions as an argument that the circuit court erroneously exercised its discretion when it denied Davis's request to withdraw his admissions. However, we are not persuaded that any of the evidence to which Davis points would have served the presentation of the merits.

First, there is no indication that the traffic citation was dismissed on its merits rather than as a procedural matter once Davis had been convicted of the OWI and PAC offenses and acquitted of OWI-causing injury. And even if Davis were acquitted on the merits of a charge of running a red light, such an acquittal would mean little because the burden of proof is lower in a civil case. *See* ***Crowell v. Heritage Mut. Ins. Co.***, 118 Wis. 2d 120, 346 N.W.2d 327 (Ct. App. 1984). Similarly, Davis's acquittal on the OWI-causing injury charge could signify that the jury believed it more likely than not that Davis caused the accident, without being persuaded beyond

a reasonable doubt—or even that the accident was the result of Davis running a red light rather than his being intoxicated. Therefore, the dismissal of the traffic citation and acquittal on the OWI-causing injury charge would have had little evidentiary value.

Second, Davis's attempts to challenge his actual blood alcohol level, how many drinks he had, or whether he knew he was intoxicated also miss the point. Due to the OWI and PAC convictions, the jury would have been informed that Davis was intoxicated at the time of the accident and that his blood alcohol level was beyond the legal limit. While Davis's exact level of intoxication may have some relevance, the difference between two prohibited levels is less significant than the fact that he was driving at the time of the accident with a blood alcohol concentration that is not allowed under Wisconsin law.

Third, the photos that Davis contends would show that the other vehicle struck his car would have no relevance as to which vehicle had the red light. In other words, Davis could have been found liable for causing the accident by running a red light regardless which vehicle entered the intersection first, and regardless whether his intoxication was what caused him to run the red light.

In sum, given the low probative value of the evidence Davis would have sought to introduce at trial, we are satisfied that the circuit court properly exercised its discretion when it refused to allow Davis to withdraw his admissions.

Davis also faults both American Family and the circuit court for failing to raise the issue of admissions at a status conference prior to trial. However, Davis cites no authority that would have required either of them to do so, or shown that the failure to do so would somehow preclude the challenged facts from being deemed admitted.

Finally, to the extent that Davis makes any additional arguments that we have not explicitly addressed in this opinion, they are deemed denied. *See* ***Libertarian Party of Wis. v. State***, 199 Wis. 2d 790, 801, 546 N.W.2d 424 (1996) (an appellate court need not discuss arguments that lack "sufficient merit to warrant individual attention").

IT IS ORDERED that the judgment is summarily affirmed under WIS. STAT. RULE 809.21(1).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals