RECEIVED
10-05-2015
CLERK OF COURT OF APPEALS
OF WISCONSIN

COURT OF APPEALS
STATE OF WISCONSIN
DISTRICT III

CITY OF RHINELANDER,
Plaintiff-Respondent,

Case No.: 2015AP302

vs.

THOMAS V. WAKELY,
Defendant-Appellant

PLAINTIFF-RESPONDENT CIT OF RHINELANDER'S REPLY TO BRIEF OF DEFENDANT-APPEALLANT

ON THE APPEAL OF A JURY VERDICT
IN FAVOR OF THE PLAINTIFF-RESPONDENT
ENTERED BY THE ONEIDA COUNTY CIRCUIT COURT,
THE HONORABLE PATRICK F. O'MELIA, PRESIDING

Carrie S. Miljevich
Attorney for Plaintiff-Respondent
State Bar No. 1038842
City Attorney for the
City of Rhinelander
33 W. Davenport Street
P.O. Box 733
Rhinelander, WI 54501
(715)-362-8489

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES CITED

STATUTES CITED

WISCONSIN ADMINISTRATIVE CODE

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Plaintiff-Respondent, the City of Rhinelander, does not request oral argument. The law requiring the operator of a vehicle to report an accident is a straightforward application of law and, therefore, oral argument is not merited. Additionally, given the restrictive standard of review for a jury verdict, oral argument is not warranted.

Publication of the opinion is not warranted as this matter as the Court does not publish opinions in one-judge appeals such as this case. Furthermore, as this matter involves reporting requirements for an accident is well-established in case law, administrative rules and administrative law, publication of the opinion is not needed.

STATEMENT OF ISSUE

1. Does Wis. Stat. § 346.70(1) require a minimum monetary threshold of $200 of personal injury costs before requiring an accident to become "reportable?"

The Trial Court Answered: No.

STATEMENT OF THE CASE[1]

I. Statement of Facts

On August 16, 2014, the defendant-appellant, Thomas V. Wakely, struck a bicyclist within the city limits of the City of Rhinelander, Oneida County, Wisconsin while operating his motor vehicle. The bicyclist suffered injuries at the scene of the accident including a bruise on his left shin, a bruise on his left elbow and a gash on his left hand that was "gashed open and bleeding." Jury Trial Tr., 12/22/14 at 92:8-13, 155:12-17. The bicyclist also had damage to his bike. Jury Trial Tr., 12/22/14 at 87:18-25, 96:9-19. Although Wakely exited his vehicle to speak briefly with the victim and observe the situation, he left the accident scene prior to police arriving despite being told by the bicyclist that his vehicle had struck him and despite being specifically requested by a witness to stay as police had been called. Jury Trial Tr., 12/22/14 at 88-91. Witnesses to the collision immediately attempted to contact 911 and also flagged down a passing police officer after Wakely had already left the scene. Jury Trial Tr., 12/22/14 at 115:1-25, 151-155.

[1] The City of Rhinelander notes Wakely's failure follow the Court's order of April 22, 2015 in regards to serving the City of Rhinelander with any documents filed with the Court prior to August 21, 2015 when a Notice of Retainer was submitted by Attorney Alanna Feddick-Goodwin. The City of Rhinelander has yet to receive any documents filed by Wakely prior to that time and willfully ignored the Court order dated April 22, 2015. Based on Wakely's failure to follow these requirements, the Court should dismiss the appeal pursuant to Wis. Stat. 809.83.

After law enforcement investigated the accident, Wakely was issued a municipal citation for failing to notify police of an accident pursuant to Wis. Stat. § 346.70(1). Jury Trial Tr. 12/24/15 at 115-123.

At the request of Wakely, a jury trial was held on December 22, 2014 in Oneida County Circuit Court presided by the Honorable Patrick F. O'Melia. A unanimous jury found Wakely guilty of failing to notify police of an accident pursuant to Wis. Stat. § 346.70(1). Jury Trial Tr. 12/24/15 at 272:1-24. Thomas V. Wakely appeals.

ARGUMENT

I. DEFENDANT-APPELLANT, THOMAS WAKELY, ERRONEOUSLY APPLIES AN EXTRA ELEMENT TO WIS. STAT. § 346.70(1).

Wakely states in his brief that "[i]n order for an individual to be statutorily required to report an accident, the "apparent extent" of the personal injury must be $200 or more at the time of the accident, or the "apparent extent" of the property damage must be $1000 or more at the time of the accident." (Defendant-Appellant's Brief, Page 8.) Wakely further states "[a]t the time of the accident, the apparent cost of the injury or damage must meet the statutory minimum amount in order for the accident to be reportable under the statute." (Defendant-Appellant's Brief, Page 8.) These statements and implications as they relate to a minimum monetary amount for sustained injuries are an entirely erroneous application of Wis. Stat. Wis. Stat. § 346.70(1).

Wis. Stat. §346.70(1) requires the operator of a vehicle to immediately give notice of an accident to a local law enforcement agency if said accident results in injury or death to any person or if said accident results in damage to any state or government-owned property (except state or government owned vehicles) to the apparent extent of $200.00 or more or if total damage to property owned by any one person or to a state or other government-owned vehicle to an apparent extent of $1,000 or more. Wis. Stat. § 346.70(1) (emphasis added.) Subsection 1 of Wis. Stat. 346.70 goes on further to define "injury" as "injury to a person of a physical nature resulting in death or the need of first aid or attention by a physician or surgeon, whether or not first aid or medical or surgical treatment was actually received." *Id*. There is nothing in the plain language of the statute itself or in the definition of "injury" that requires minimum monetary damages for a sustained injury.

The plain language of Wis. Stat. § 346.70(1) in no way requires the injury of a victim to suffer a minimum monetary threshold before an accident is reportable. Rather, the minimum monetary threshold of $200 (to government property) or $1000 (to personal property, personal vehicles or government vehicles) applies to property or vehicle damage *only*. Wisconsin case law, the Wisconsin Administrative Code, similar statutes and the Wisconsin Department of Transportation Driver Report of Accident (Form MV4002) affirm this.

A minimum threshold amount of property or vehicle damage prior to making an accident reportable is well-established in Wisconsin case law. *See*

State v. Nolan 359 Wis.2d 677, 859 N.W.2d 629, 2015 WI App 13 (Wis. App., 2014) at ¶14. However, no case in Wisconsin requires a minimum dollar amount for injuries before an accident is deemed reportable. The definition of injury is plain on its face: injury to a person of a physical nature resulting in death or the need of first aid or attention by a physician or surgeon, whether or not first aid or medical or surgical treatment was actually received." Wis. Stat. § 346.70(1).

The Wisconsin Administrative Code further confirms that a minimum monetary damage amount pursuant to Wis. Stat. § 346.70(1) is for vehicle or property damage only. *See* Trans 100.03 (Wisconsin Administrative Code). Trans 100.03(1) states "'[R]eportable' refers to an accident in which the minimum damage requirements of s. 346.70, Stats., are met or exceeded, and for which reporting the accident is mandatory under that section, or an accident to which the safety responsibility law applies under s. 344.12, Stats." Id.

Additionally, Wis. Stat. § 344.12 entitled *Applicability of provisions relating to deposit of security for past accidents* has similar requirements to that of Wis. Stat. 346.70(1). That statutes reads:

> Subject to the exceptions contained in s. 344.14, the provisions of this chapter requiring deposit of security and requiring suspension for failure to deposit security apply to the operator and owner of every motor vehicle which is in any manner involved in an accident in this state which has resulted in bodily injury to or death of any person or damage to property of any other person of $1,000 or more.

Wis. Stat. § 344.12 (emphasis added). There is no dispute that this statute, very similar in nature to Wis. Stat. § 346.70(1), differentiates injury or death to an

individual and damage to property as separate elements. Like Wis. Stat. § 346.70(1), there is no requirement in Wis. Stat. § 344.12 that injury costs must exceed either $200 or $1,000.00 as Wakely states in his brief before an accident becomes reportable. To suggest so would lead to an absurd result: A police officer or individual (if no Motor Vehicle Accident form is completed by law enforcement) would find themselves assessing or calculating costs of an injury rather than focusing on the accident (or injuries) at hand. The law is clear when to report an accident and when it needs not to be reported.

Finally, it is clear in the State of Wisconsin that any crash must be reported when it results in 1.) Injury or death of a person 2.) $1,000 or more total damage to property owned by any one person or 3.) Damage of $200 or more to government property (except motor vehicles). If a law enforcement officer does not file a Wisconsin Motor Vehicle Accident Report, a driver is required to complete a Driver Report of Accident pursuant to Wis. Stat. 346.70(2). Form MV4002 is printed by the Wisconsin Department of Transportation.[2]

In short, drivers or occupants are required to notify law enforcement for any accident where a person is injured or deceased or there is apparent extent of damage to personal vehicles or personal property of $1,000 or more or when there

[2] Form MV4002 is printed by the Wisconsin Department of Transportation, Division of Motor Vehicles and is available at http://wisconsindot.gov/Documents/formdocs/mv4002.pdf. The face of that form clearly states that the form is required to be completed if "there was $1000 or more damage to any one person's property — OR — Anyone was injured — OR —There was $200 or more damage to government property, other than vehicles. There is no requirement for a minimum monetary threshold for injuries.

is damage to the apparent extent of $200 or more to government property. However, there is no minimum monetary amount of injury needed as Wakely erroneously relies on in his brief. The defendant had injuries sustained at the time of being struck that were noticeable and required first aid. Although he declined medical attention at the time, he went the following day to the emergency department of the local hospital in Rhinelander, Wisconsin. There is no dispute that Wakely left the scene of the accident instead of failing to report it pursuant to Wis. Stat. 346.70(1).

II. WAKELY FAILED TO ADDRESS A MINIMUM MONETARY INJURY REQUIREMENT DURING TRIAL THEREBY FORFEITING HIS RIGHT TO DO SO FOR THE FIRST TIME ON APPEAL.

The City of Rhinelander maintains its argument that Wakely is grossly inaccurate when stating that Wis. Stat. 346.70(1) requires a minimum threshold amount for injuries before making an accident reportable. However, that aside, Wakely failed to object to or address this topic during the jury trial, thus constituting forfeiture.

In Wisconsin case law, forfeiture is the failure to make a timely assertion of a right. *State v. Pinno,* 2014 WI 74, ¶29, 356 Wis. 2d 106, 850 N.W.2d 207 (Wis. 2014). The forfeiture rule facilitates fair and orderly administration of justice and encourages parties to be vigilant lest they lose a right by failing to object to its denial. *Id.,* ¶ 30. Contemporaneous objections give judges the opportunity to remedy an error so that it does not fester beneath the proceedings and infect the judgment of the court. *Id.*

Generally, a party who wishes to raise an issue on appeal needs to first raise the issue before the circuit court. *State v. Dowdy*, 2012 WI 12, ¶ 5, 338 Wis.2d 565, 808 N.W.2d 691 (Wis. 2012) ("As a general rule, issues not raised in the circuit court will not be considered for the first time on appeal."). "It is a fundamental principle of appellate review that issues must be preserved at the circuit court. Issues that are not preserved at the circuit court, even alleged constitutional errors, generally will not be considered on appeal." *State v. Huebner*, 2000 WI 59, ¶ 10, 235 Wis. 2d 486, 611 N.W.2d 727 (Wis. 2000) (holding that a defendant forfeited his right to challenge the six-person jury in his misdemeanor trial by failing to object at the circuit court level); *State v. Caban*, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (Wis. 1997) (holding that a defendant had forfeited his right to challenge the admissibility of evidence against him by failing to object at the circuit court level). "Raising issues at the trial court level allows the trial court to correct or avoid the alleged error in the first place, eliminating the need for appeal. It also gives both parties and the trial judge notice of the issue and a fair opportunity to address the objection." *Huebner*, 235 Wis. 2d 486, ¶ 12, 611 N.W.2d 727; *Caban*, 210 Wis. 2d at 609, 563 N.W.2d 501.

Here, Wakely failed to raise his objection about a minimum monetary threshold for injuries with the circuit court or at any time during the jury trial, and so the forfeiture rule applies.

III. THE TRIAL COURT'S JURY INSTRUCTIONS WERE NOT REQUIRED TO INCLUDE AN EXTRA (ERRORNEOUS) ELEMENT OF THE ACCIDENT REPORT STATUTE AND, THERFORE, DID NOT MISSTATE THE LAW OR MISLEAD THE JURY.

For the reasons set forth above, it is clear that Wakely mischaracterizes the law when he states that injuries must be at least $200 (i.e., a minimum monetary threshold) before being reportable. *See Wis. Stat. § 346.70(1).* In his brief, Wakely states "[i]n this case, the jury instruction regarding the statutory requirements of Wis. Stat. § 346.70(1) failed to include an essential element of the offense, thereby constituting an incorrect statement of the law as applied to this particular case." (Defendant-Appellant's Brief, Page 11.) The City of Rhinelander disagrees that an "essential element" of the offense was missing.

A circuit court has broad discretion to instruct a jury. *Nommensen v. Am. Cont'l Ins. Co.*, 2001 WI 112, ¶ 50, 246 Wis. 2d 132, 629 N.W.2d 301. This does not mean, however, that a jury instruction is insulated from review. Facts of record must support the instruction and the instruction must correctly state the law. *Id*.

The correctness of the jury instruction affects the validity of a jury's verdict. *State v. Dodson*, 219 Wis. 2d 65, 87, 580 N.W.2d 181 (1998). However, an "erroneous jury instruction warrants reversal and a new trial only if the error was prejudicial." *Fischer v. Ganju*, 168 Wis. 2d 834, 849, 485 N.W.2d 10 (1992). An error is prejudicial when it probably misled the jury. *Id.* at 850, 485 N.W.2d 10. Put another way, "an error relating to the giving or refusing to give an instruction

is not prejudicial if it appears that the result would not be different had the error not occurred." *Lutz v. Shelby Mut. Ins. Co.*, 70 Wis. 2d 743, 751, 235 N.W.2d 426 (1975).

Jurors were presented with approximately fourteen jury instructions, including, but not limited to the burden of proof in forfeiture actions, evidence defined, circumstantial evidence, exhibits and jurors knowledge. The jury instruction at issue is "Failure to Notify Police of Accident -- § 346.70" was discussed after the parties rested. The jury instructions were read to Wakely at his request (R: 238:20). (R-App., p. 21).

Although Wakely objected to this jury instruction at the time it was to the parties, he objected to the definition of "accident" and not because an "essential element" of the statute was missing (i.e., minimum monetary threshold for injuries.) As is set forth in Argument II of this brief, Wakely forfeits an argument regarding jury instructions for failing to object to missing language at the time and bringing it up for the first time on appeal.

IV. THE STANDARD OF REVIEW OF JURY VERDICT'S MUST BE NARROW.

An appellate court's review of a jury verdict must be narrow. Appellate courts in Wisconsin will sustain a jury verdict if there is any credible evidence to support it. *Meurer v. ITT Gen. Controls*, 90 Wis. 2d 438, 450, 280 N.W.2d 156 (1979). Moreover, if there is any credible evidence, under any reasonable view, that leads to an inference supporting the jury's finding, an appellate court will not

overturn that finding. *Ferraro v. Koelsch*, 119 Wis. 2d 407, 410-11, 350 N.W.2d 735 (Ct. App. 1984), *aff'd*, 124 Wis. 2d 154, 368 N.W.2d 666 (1985); Wis. Stat. § 805.14(1)

In applying this narrow standard of review, this court considers the evidence in a light most favorable to the jury's determination. *Meurer*, 90 Wis. 2d at 450; *Stunkel v. Price Elec. Coop.*, 229 Wis. 2d 664, 668, 599 N.W.2d 919 (Ct. App. 1999). An appellate court does so because it is the role of the jury, not an appellate court, to balance the credibility of witnesses and the weight given to the testimony of those witnesses. *Meurer*, 90 Wis. 2d at 450. To that end, appellate courts search the record for credible evidence that sustains the jury's verdict, not for evidence to support a verdict that the jury could have reached but did not. *Wheeler v. General Tire & Rubber Co.*, 142 Wis. 2d 798, 809, 419 N.W.2d 331 (Ct. App. 1987) (citing *Gonzales v. City of Franklin*, 137 Wis. 2d 109, 134, 403 N.W.2d 747 (1987)). If an appellate court finds that there is "any credible evidence in the record on which the jury could have based its decision," an appellate court will affirm that verdict. *Lundin v. Shimanski*, 124 Wis. 2d 175, 184, 368 N.W.2d 676 (1985). Similarly, if the evidence gives rise to more than one reasonable inference, an appellate court will accept the particular inference reached by the jury. *Meurer*, 90 Wis. 2d at 450; *Ferraro*, 119 Wis. 2d at 410-11. "[An appellate] court will uphold the jury verdict "even though [the evidence] be contradicted and the contradictory evidence be stronger and more convincing."" *Weiss v. United Fire & Cas. Co.*, 197 Wis. 2d 365, 390, 541 N.W.2d 753 (1995).

In this case, the Honorable Patrick F. O'Melia accepted the jury verdict at the conclusion of the trial. Jury Trial Tr., 12/22/14 at 272:22-24. (R-App., p. 22). As a result, he imposed a forfeiture in the amount of $389.50 which was the uniform deposit amount listed on the original citation. The standard of review becomes even more stringent when a Court approves a jury verdict. *Modern v. Continental AG,* 2000 WI 51, ¶ 40, 235 Wis. 2d 325, 611 N.W.2d 659 (Wis., 2000). An appellate court affords special deference to a jury determination in those situations in which the trial court approves the finding of a jury. *Kuklinski v. Rodriguez*, 203 Wis. 2d 324, 331, 552 N.W.2d 869 (1996). In such cases, this court will not overturn the jury's verdict unless "there is such a complete failure of proof that the verdict must be based on speculation." *Coryell v. Conn*, 88 Wis. 2d 310, 315, 276 N.W.2d 723 (1979).

The City's two lay witnesses and two police officers provided similar testimony, as well as exhibits were offered and admitted, during an all-day jury trial: than a bicyclist was struck on August 16th, 2015, injuries were sustained by the bicyclist that met the definition of "injury" as set forth in Wis. Stat. § 346.70(1) and that Wakely failed to report said accident. As such, there is more than enough credible evidence to support the jury's determination that Wakely was guilty of failing to report an accident pursuant to Wis. Stat. §346.70(1).

CONCLUSION[3]

This Court should affirm the verdict of the jury, which is consistent with the clear language of the statute and consistent with other similar State of Wisconsin statutes and case law that does not require any minimum amount of injuries sustained by a part before an accident becomes reportable. Wis. Stat. § 346.70(1) is so plain on its face – with the definition of "injury" defined within the same paragraph -- that it is unclear how the legislature could more plainly articulate its intent to relating to accident reporting.

Dated this 5th day of October, 2015.

BY: _____

Carrie S. Miljevich
Attorney for Plaintiff-Respondent
State Bar No. 1038842
Attorney for the City of Rhinelander
33 W. Davenport Street
P.O. Box 733
Rhinelander, WI 54501
(715)-362-8489

[3] The Court may consider summarily disposing of this appeal pursuant to Wis. Stat. § 809.21. Summary disposition is appropriate in this case as there is no arguable basis for an appeal of the jury verdict due to the factors and arguments as set forth above. Wakely misstates the law in his contention that there is an extra element in 346.70(1).

CERTIFICATION OF FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8) (b) and (c) for a brief and appendix produced with a Times New Roman, 13 point font. The length of this brief is 18 pages.

Dated this 5th day of October, 2015.

BY: _____

Carrie S. Miljevich
State Bar No.: 1038842

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of October 5, 2015.

A copy of this certificate is being filed with the court and served on all opposing parties as of this date.

Dated this 5th day of October, 2015.

BY: _____

Carrie S. Miljevich
Attorney for Plaintiff-Respondent
State Bar No. 1038842
33 W. Davenport Street
P.O. Box 733
Rhinelander, WI 54501
(715)-362-8489