

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 24, 2015

Diane M. Fremgen
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. 2014AP733

Cir. Ct. No. 2013SC026508

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

JEFFERY BORDERS, D/B/A BORDERS TRUCKING, LLC,

PLAINTIFF-RESPONDENT,

V.

MARK BEHRMAN, D/B/A JP AND ASSOCIATES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: PEDRO COLON, Judge. *Affirmed.*

¶1 BRENNAN, J.¹ Mark Behrman, d/b/a JP & Associates, appeals from a judgment ordering him to pay \$6000 in damages to Jeffery Borders,

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

d/b/a Borders Trucking, LLC, for erroneously notifying C.H. Robinson that Borders' insurance had expired, thereby preventing Borders from working for several days; Behrman also appeals from the trial court's order denying his motion for reconsideration. Behrman claims the damages ordered by the trial court are unsupported by the record. We disagree and affirm.

BACKGROUND

¶2 In August 2013, Borders owned a small trucking business. He obtained jobs through C.H. Robinson, a brokerage company, and hauled loads within a four to 500 mile radius from Wisconsin. From August 5, 2013, through August 15, 2013, C.H. Robinson was very busy, with approximately 4500 loads available per day.

¶3 Mid-day on August 5, 2013, after Borders had delivered a load, C.H. Robinson informed Borders that it would not give him any more loads because it had been informed that Borders' insurance had been cancelled. Behrman, Borders' insurance agent, had sent C.H. Robinson a letter, informing the brokerage company that Borders' insurance had been cancelled. Borders remained out of business until August 15, 2013, at which time he was finally able to show C.H. Robinson that he was insured.

¶4 Borders filed a small claims complaint against Behrman, claiming that Behrman erroneously notified C.H. Robinson that Borders' insurance had been cancelled, causing Borders damages. Behrman conceded that the letter to C.H. Robinson had been sent in error and that Borders in fact was insured during the relevant time period. Consequently, the only issue at the court trial was damages.

¶5 Both Borders and Behrman testified at trial. Following their testimony, the trial court found that Borders missed eight days of work due to Behrman's mistake, and that Borders could have made up to \$1500 a day. As such, the trial court found the maximum amount Borders could have made during the eight-day period he was out of business was \$12,000. However, the trial court then took into account evidence demonstrating that Borders' daily income fluctuates, and, based on that evidence, the trial court awarded Borders \$6000, that is, half of the maximum amount Borders could have made during the eight days he was out of work.

¶6 Behrman filed a motion for reconsideration on the grounds that the trial court miscalculated damages. Behrman believed the trial court overestimated the number of days that Borders could have worked and the amount that he could have made per day. The trial court denied the motion,² and Behrman appeals.

DISCUSSION

¶7 Behrman argues on appeal that the trial court erroneously exercised its discretion when calculating damages because Behrman believes the record conclusively shows that: (1) Borders missed four work days due to Behrman's error, rather than the eight days found by the trial court; and (2) Borders' daily income was only 19% of his gross receipts according to his tax records for the previous year. "Determining damages is within the trial court's discretion."

² According to the electronic online docket, the trial court denied Behrman's postconviction motion on the record during a hearing. While the trial court's reasoning for upholding its damages decision would have been useful to this court, no written order was entered by the trial court, and the parties have not included a copy of the hearing transcript in the record. *See* WIS. STAT. § 805.17(3) (permitting an appeal to be taken from an order on the record denying a motion for reconsideration).

J.K. v. Peters, 2011 WI App 149, ¶32, 337 Wis. 2d 504, 808 N.W.2d 141. “We will not reverse the trial court’s findings of fact on damages unless they are clearly erroneous.” *Id.* We must affirm if the discretion is exercised in accordance with the relevant law and facts, and we will “search the record for reasons to sustain” that discretion. *State v. Thiel*, 2004 WI App 225, ¶26, 277 Wis. 2d 698, 691 N.W.2d 388. Because the record supports the trial court’s damage calculations here, we affirm.

Missed Work Days

¶8 Behrman first argues that the record conclusively establishes that Borders only missed four work days and that the trial court erred in finding that Borders missed eight days of work. According to Behrman, the trial court found that damages started on August 9 (rather than August 5) and that Borders’ insurance problems had been rectified with C.H. Robinson by August 15, leaving Borders unable to work for six days. Because two of those days fell on the weekend, and because Borders testified that he only “occasionally” worked on Saturdays, Behrman argues that the record conclusively shows that only four of those six days were work days that can be used to calculate Borders’ lost income. The record belies his assertions.

¶9 Behrman correctly notes that at one point during the trial Borders testified that he thought C.H. Robinson stopped giving him loads mid-day on August 8. However, Borders later repeatedly testified that C.H. Robinson informed him that it had been told that Borders’ insurance had been cancelled mid-day on August 5. Borders then testified to exactly which days he would have worked had the brokerage company been properly informed of his insurance status:

Q. All right. And from 8/10 to 8/15, were you gonna work every day? Were you gonna work some days? How many days were you gonna work between that time period?

A. Monday through Friday, occasionally Saturday.

Q. Occasionally. So if I look on the calendar, you were already working on the 5th [when the brokerage company notified Borders that it believed his insurance had been cancelled]?

A. Yes.

Q. Which was a Monday. And if I look on the calendar, 8/5 is a Monday, 8/15 is a Thursday; were you back in operation on Thursday?

A. The 15th?

Q. Yes.

A. Yes.

Q. Okay. So I have five days. Were you gonna work the Saturday the 10th?

A. I'm not sure if I was or not because it was so far long ago. Sometimes I do --

Q. All right.

A. -- you know.

Q. Were you gonna work Monday through Wednesday, the 12th [and] the 14th?

A. Yes.

Q. Okay. So that would be eight working days.

A. Okay.

¶10 On cross-examination, Borders clarified that C.H. Robinson notified him on August 5 that it would not give him any more loads until it received notification that Borders was insured. But Borders admitted that he could be mistaken. Behrman's counsel engaged in the following exchange with Borders:

Q. Now, you claim that when you were estimating how many days you were off, you said you were off from August 5th to August 15th; is that right?

A. That's correct.

Q. And that was eight working days; is that right?

A. Yes.

Q. But as a matter of fact, you first learned that you didn't have insurance and you were first denied a job on August 8th; isn't that correct?

A. No.

Q. No?

A. Not that I can --

Q. When did you learn that you didn't have insurance?

A. The 5th.

....

Q. So when did you get to Beaver Dam?

A. I thought that load was delivered on the 5th on that Monday. It's been a while back. It's been a while, so I'm not 100 percent.

Q. Isn't it correct that the load was delivered on August 8th, which is a Thursday?

A. It's a possibility, okay, if you say so. I thought it was the 5th, but okay.

Q. You mean, it's possible it was the 8th?

A. Everything's possible but --

Q. Okay.

¶11 The trial court implicitly credited Borders' testimony that C.H. Robinson first denied him work in the afternoon of August 5 when finding that Borders missed eight days of work. While the trial court did state that

Borders testified that he learned he could no longer work “on 8/8” and that the clock “begins to tick” on “the 9th,” the remainder of the court’s findings show that the court merely misspoke.³ The trial court’s ultimate finding that Borders missed eight days of work is well supported by Borders’ repeated testimony that C.H. Robinson stopped giving him loads in the afternoon of August 5. *See Thiel*, 277 Wis. 2d 698, ¶26 (we will “search the record for reasons to sustain” the trial court’s discretionary decision).

¶12 In determining that Borders missed eight work days, the trial court credited Borders with working Saturday, August 10. Behrman argues that the trial court could not credit Borders for missing a Saturday of work because Borders testified that he only worked on Saturdays “occasionally.” However, in so testifying, Borders did not eliminate the possibility that he could have worked on Saturday, August 10. As such, the trial court did not erroneously exercise its discretion in counting that Saturday as a missed work day for purposes of calculating damages, and the trial court’s finding that Borders missed eight days of work due to Behrman’s error is supported by the record. *See Peters*, 337 Wis. 2d 504, ¶32.

Daily Income

¶13 Next, Behrman argues that the trial court erroneously calculated Borders’ daily income because “Borders’ 2012 income tax return showed that to bring in \$38,834.00, Borders had to spend \$31,511.00, for a profit of \$7,323.00. Borders’ profit is 19% of his gross receipts.” As such, Behrman argues that even

³ Our conclusion that the trial court merely misspoke is supported by the fact that the trial court denied Behrman’s motion for reconsideration; although, again, we note that we do not have a transcript from the evidentiary hearing to confirm the trial court’s reasoning.

if we were to assume that Borders missed eight days of work at \$1500 a day, Borders' gross profit would only have been \$2280, that is, 19% of \$12,000.⁴

¶14 When calculating Borders' daily income, the trial court found that "[a]ll I have is ... -- Mr. Borders' testimony that he could potentially on any given day make \$1500 and so the maximum he would make under this eight-day period would be about \$12,000."⁵ However, the court noted that it had also reviewed Borders' "tax income, tax filing, filed on -- in 2012" and considered "the random nature of the work" and the fact that "Borders admitted that it does fluctuate. He can make between a thousand and \$1500, optimal days about a \$1500 a day." Based on those considerations, the court awarded Borders \$6000 for the eight missed days of work.

¶15 The trial court did not erroneously exercise its discretion in calculating Borders' daily income. Behrman's complaint amounts to little more than an assertion that the trial court should have exercised that discretion differently. Furthermore, even if Borders' profit margin for 2012 was 19%, there is no evidence in this record that the profit margin would be the same in August 2013. Additionally, the premise for Behrman's argument is that Borders should only be awarded his taxable net income for damages in this case. But Behrman fails to develop this argument. There is nothing in this record explaining what the

⁴ Behrman's brief actually assumes that Borders only missed four days of work and calculates Borders' alleged damages thusly. However, because we conclude that the trial court did not err in finding that Borders missed eight days of work, we have explained Behrman's argument that Borders is entitled to only 19% of his gross receipts based upon an eight-day calculation for clarity.

⁵ Borders testified that he made "[b]etween 12 and \$1500 a day" as "[n]et profit."

tax treatment of a damage award is and whether it equates with the tax treatment of gross income.

¶16 The trial court noted that Borders' daily income fluctuated due to the nature of the work, and Behrman did not counter Borders' testimony that he can potentially net \$1500 a day. The trial court credited him with only half that amount. As such, the trial court's damages award is squarely founded on the record.

By the Court.—Judgment and order affirmed.

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

