COURT OF APPEALS
DECISION
DATED AND FILED

April 27, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-3582

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

PAUL PELTONEN,

PLAINTIFF-RESPONDENT,

V.

BRIAN RICHTIG AND ALLAN J. RITTENHOUSE,

DEFENDANTS,

LAURIE A. RITTENHOUSE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Florence County: ROBERT A. KENNEDY, Judge. *Affirmed.*

CANE, C.J. Laurie Rittenhouse appeals from a small claims judgment requiring her to pay for repairs to Paul Peltonen's 1984 BMW which was damaged in an accident. She contends the evidence is insufficient to support the court's finding that her son, while driving her older Lincoln, caused damage to

Peltonen's parked vehicle. She also contends the trial court improperly conducted the examination of the witnesses, reinstated Rittenhouse in the case after previously dismissing her, and used her son's failure to testify as circumstantial evidence that he was the driver of the car that damaged Peltonen's vehicle. This court rejects Rittenhouse's arguments and affirms the judgment.

This case involves a motor vehicle accident in a private driveway where Peltonen had parked his car while visiting a friend, Raymond Owens. It is undisputed that the damage to Peltonen's BMW totaled $1,848.89 when another auto backed into the left side of his parked car. The only dispute at the bench trial was whether Rittenhouse's son, Brian Richtig, backed into Peltonen's car and damaged it. Richtig was visiting Owens' son and had parked his mother's older Lincoln along the same driveway. The trial court found that while leaving the driveway, Richtig accidentally backed his mother's Lincoln into the BMW. Because Rittenhouse sponsored her son's driver's license, the trial court found her liable for the son's negligent driving.

Because both parties appeared pro se at trial and again on appeal, it is helpful to observe this court's standard of review when deciding a case on appeal. When reviewing on appeal a trial court's factual findings, those findings shall not be set aside unless clearly erroneous. Section 805.17(2), STATS. It is for the trial court, not the appellate court, to resolve conflicts in the testimony. *See* ***Fuller v. Riedel***, 159 Wis.2d 323, 332, 464 N.W.2d 97, 101 (Ct. App. 1990). It is not within the appellate court's province to reject an inference a factfinder draws when the inference drawn is reasonable. *See* ***Onalaska Elec. Heating, Inc. v. Schaller***, 94 Wis.2d 493, 501, 288 N.W.2d 829, 833 (1980). Appellate courts search the record for evidence to support the findings that the trial court made, not for findings that the trial court could have but did not make. ***In re Estate of***

Becker, 76 Wis.2d 336, 347, 251 N.W.2d 431, 435 (1977). Also, the trial court is the final arbiter of the credibility of witnesses, and its findings will not be overturned on appeal unless they are inherently or patently incredible, or in conflict with the uniform course of nature or with fully established or conceded facts. ***Chapman v. State***, 69 Wis.2d 581, 583, 230 N.W.2d 824, 825 (1975).

With this standard of review in mind, this court has reviewed the transcript of the trial and concludes that the evidence is sufficient to support the court's findings. Admittedly, the evidence is circumstantial because no witnesses testified that they saw Richtig cause the damage. However, circumstantial evidence may be stronger and more convincing than direct evidence. ***State v. Syed Tagi Shah***, 134 Wis.2d 246, 249, 397 N.W.2d 492, 494 (1986).

Here, the undisputed evidence shows that Peltonen had parked his BMW in Owens' driveway at 6:05 p.m. and that there was no damage to the vehicle before entering the residence. When Peltonen returned to his vehicle at approximately 7 p.m., he discovered extensive damage to the left side of his BMW where somebody had apparently backed a car into it. Richtig, who had been visiting with Owens' son and had also parked the Lincoln in the same driveway, left the home at approximately 6:40 p.m. Richtig had parked the Lincoln ahead of and to the left of Peltonen's car. Nobody else left the home between the time Peltonen parked his car and the time the damage to his car was discovered.

Owens, who is a deputy for the Florence County Sheriff's department, testified that he investigated the accident and observed tire tracks leading from where the Lincoln had been parked to the BMW. Additionally, he checked the Lincoln the same evening after the accident and observed that its rear bumper was covered with grime except for a shiny spot on the right side. He

testified that this shiny spot showed evidence of an impact. Owens' undisputed testimony was that the only tracks in the muddy driveway leading to Peltonen's car were those from the parked Lincoln. Thus, this court is satisfied that the evidence is sufficient to support the trial court's finding that Richtig had negligently driven the Lincoln into Peltonen's car and caused the damage.

Next, Rittenhouse argues the trial court erred by conducting the examination of the parties. She cites as an example the court's limiting her cross-examination of Peltonen when it suggested that Owens be called as a witness. This court has reviewed that part of the transcript and is satisfied that the trial court did not limit her cross-examination of Peltonen. Instead, the court suggested that Owens be called as a witness when Peltonen started to testify about what Owens saw and did. Obviously the court was attempting to limit any improper hearsay and instead have Owens testify as to his observations.

Section 906.11(1), STATS., gives the trial court authority to exercise reasonable control over the mode and order of interrogating and presenting evidence to make the interrogation and presentation effective for ascertainment of the truth and to avoid needless consumption of time. Additionally, a trial judge's authority to interrogate a witness is not open to question, § 906.11(1), although such examination may not be excessive. ***Breunig v. American Fam. Ins. Co.***, 45 Wis.2d 536, 546-48, 173 N.W.2d 619, 626 (1970). The legislature has also specifically provided that in small claims actions, the trial court may conduct questioning of the witnesses. Section 799.209(3), STATS.

Although the trial court examined some of the witnesses, it was done to expedite the proceeding because both parties appeared without counsel and had difficulty asking questions relevant to the case. Nor was the court's questioning

excessive. Its questions were relevant and directed in such a manner in order to get directly to the truth of the matter and avoid needless consumption of time. Also, the record shows that each party was permitted to ask questions of the witnesses. Thus, this court sees no error because the trial court questioned some of the witnesses.

Rittenhouse also contends that the trial court improperly reinstated her as a defendant after previously dismissing her from the case earlier in the hearing. The trial court, in attempting to sort out the proper parties at the beginning of the trial, was first informed that Rittenhouse was not driving the car; therefore, it concluded that she was not a proper defendant. It did not reinstate Rittenhouse because her son had filed for bankruptcy as she suggests in her brief. Instead, when informed that Richtig was her son and that she had sponsored his driver's license, the trial court properly concluded that she should remain a defendant. Thus, this court sees no error when the trial court concluded that she should remain a defendant in the case.

Finally, Rittenhouse claims the trial court erred by using Richtig's failure to testify as circumstantial evidence that he was the driver of the Lincoln. This court is not persuaded. When making its decision, the trial court stated, "Brian didn't testify which is a circumstance pointing to the fact that he was the driver." The law is well settled in Wisconsin and succinctly stated in WIS J I—CIVIL 410, which provides:

> If a party fails to call a material witness within its control, of whom it would be more natural for that party to call than the opposing party, and the party fails to give a satisfactory explanation for not calling the witness, you may infer that the evidence which the witness would give would be unfavorable to the party who failed to call the witness.

Because Richtig was a material witness whom Rittenhouse could have called as a witness, but did not without giving a satisfactory explanation, the trial court could reasonably consider this as circumstantial evidence that he was the driver. Additionally, there is no error in referring to his failure to testify because the trial court simply inferred from this fact that he was the driver of the Lincoln, a fact not disputed at trial.

In summary, this court concludes that the evidence is sufficient to support the trial court's finding that Richtig negligently drove his mother's Lincoln into Peltonen's car. Further, the trial court did not err by conducting an examination of the witnesses, reinstating Rittenhouse as a defendant and using Richtig's failure to testify as a circumstance suggesting that Richtig was the driver of the Lincoln.

By the Court.—Judgment affirmed.

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