

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 16, 2010

David R. Schanker
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. 2009AP20

Cir. Ct. No. 2007CV6398

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

CLAY WOSKOSKI,

PLAINTIFF-APPELLANT,

FEDERAL INSURANCE COMPANY,

INVOLUNTARY-PLAINTIFF,

v.

JOSEPH TRUE AND FEDERAL INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Milwaukee County: MICHAEL B. BRENNAN, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 KESSLER, J. Clay Woskoski appeals from a judgment, entered after a jury trial, awarding him damages related to injuries he sustained in a car accident.¹ At issue on appeal are the litigation costs awarded to each party. Woskoski argues that he is entitled to fees and expenses pursuant to WIS. STAT. § 804.12(3) (2007-08),² and that the defendants, Joseph True and Federal Insurance Company (collectively, “True”), should not have been allowed costs pursuant to WIS. STAT. § 814.04(7). We reject Woskoski’s arguments and affirm the judgment.

BACKGROUND

¶2 On September 9, 2004, Woskoski was the front-seat passenger in a van being driven by True, who was Woskoski’s boss.³ True’s van entered the intersection after the light had already turned red and collided with another vehicle that was proceeding on a green light. According to True, he was driving at a safe speed and otherwise operating the vehicle safely up until the moment that a glare interfered with his ability to see the traffic signal, which caused him to enter the intersection after the light had turned red.

¶3 According to Woskoski’s trial testimony, he exited the van after the accident and “had a lot of pain” in his leg. Woskoski said he told True and the

¹ After the notice of appeal was filed, Woskoski successfully moved to amend the judgment to allow for additional costs and interest. The amendments to the judgment that occurred after the notice of appeal was filed are not relevant to this appeal and will not be considered.

² All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

³ These facts are taken from the trial testimony and the parties’ briefs. They are offered to provide background; we do not attempt to reconcile conflicting testimony.

investigating police officer that his leg was injured, but he declined medical assistance when the officer offered to get him an ambulance. Woskoski did not seek treatment for his injuries in the days and weeks following the accident. Woskoski said that over the next several months he had constant pain in his ankle. Woskoski testified that he mentioned the problems with his ankle to a doctor he saw on November 10, 2004, but the doctor's notes for that day do not reflect that. The first doctor who actually noted anything in the medical notes about Woskoski's ankle saw Woskoski on January 27, 2005, over four months after the accident.

¶4 While Woskoski was dealing with ankle pain, he did not miss work due to the injuries. Rather, he continued working until he injured his shoulder in November 2004.

¶5 In June 2007, Woskoski filed suit against True. On June 10, 2008, True filed an offer of judgment pursuant to WIS. STAT. § 807.01, offering Woskoski \$18,000 to settle the case. Woskoski did not accept the offer and the case proceeded to trial.⁴

¶6 The jury found that True had negligently operated his van and caused the accident. With respect to injuries that Woskoski "sustained as a result of the accident," the jury found that Woskoski should be compensated for \$3882 in past medical expenses;⁵ \$3000 for past pain, suffering and disability; and \$2300

⁴ The pretrial litigation included a motion for summary judgment made by True that was based on the exclusivity provisions of the Worker's Compensation Act. That motion, as well as other pretrial motions that are not relevant to the issues raised on appeal, will not be discussed.

⁵ This was approximately one half of the \$7762.75 in medical bills that were submitted to the jury.

for future pain, suffering and disability. The jury declined to award any damages for past or future wage loss.

¶7 True moved for judgment on the verdict and sought an order granting him taxable costs and disbursements pursuant to WIS. STAT. § 814.04(7), on grounds that the damages awarded did not exceed those in the pretrial offer of judgment. True sought a total of \$2839.53, which included \$500 in attorney fees, *see* § 814.04(1), and \$2339.53 in disbursements.

¶8 Woskoski filed a motion for judgment notwithstanding the verdict, a motion to change the jury's answers and a motion for a new trial.⁶ He also asked for expenses and costs pursuant to WIS. STAT. § 804.12(3), based on what Woskoski termed the "unreasonable denial of his requests for admissions" that dealt with whether True's negligence caused Woskoski's injuries and the amount of past medical bills. (Capitalization omitted.) Woskoski's brief in support of his motions stated that he was opposing True's motion for judgment on the verdict, although he did not offer argument or objections concerning any specific costs sought in True's motion.

¶9 The trial court ultimately granted True's motion and denied Woskoski's motion for reasons noted below. This appeal follows.

⁶ Woskoski has not appealed the denial of any post-trial motions except those involving costs. The denial of those motions is not at issue on appeal and will not be discussed.

DISCUSSION

¶10 Woskoski argues that the trial court erroneously exercised its discretion when it: (1) denied his motion for WIS. STAT. § 804.12(3) costs; and (2) granted True's motion for costs. We consider each issue in turn.

I. Woskoski's motion for a WIS. STAT. § 804.12(3) sanction.

¶11 Woskoski's post-trial motion asked the trial court to sanction True for denying unspecified pretrial requests for admission. Woskoski's motion was based on WIS. STAT. § 804.12(3), which provides in relevant part:

EXPENSES ON FAILURE TO ADMIT. If a party fails to admit ... the truth of any matter as requested under s. 804.11, and if the party requesting the admissions thereafter proves ... the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the requesting party the reasonable expenses incurred in the making of that proof, including reasonable attorney fees. The court shall make the order unless it finds that (a) the request was held objectionable pursuant to sub. (1), or (b) the admission sought was of no substantial importance, or (c) the party failing to admit had reasonable ground to believe that he or she might prevail on the matter, or (d) there was other good reason for the failure to admit.

If a trial court applying this statute finds that the prerequisites of § 804.12(3) are satisfied and that none of the four exceptions listed in the statute are present, the trial court is required “to award expenses upon the motion of the party requesting the admissions.” *Michael A.P. v. Solsrud*, 178 Wis. 2d 137, 148, 502 N.W.2d 918 (Ct. App. 1993). On appeal, the applicable standard of review requires us to “uphold the trial court’s factual findings unless they are clearly erroneous” and then determine as a matter of law whether fees and costs should have been awarded. *Id.* (reviewing trial court’s decision to award a party costs and fees pursuant to WIS. STAT. § 804.12(3)).

¶12 Woskoski's post-trial motion argued that he "served defendants with requests to admit that Joseph True's negligence was a cause of injuries to Mr. Woskoski, and that the past medical bills were reasonable and necessary to treat injuries Mr. Woskoski sustained in the accident." We consider Woskoski's motion for costs and attorney fees related to proving: (1) negligence and cause of injuries; and (2) the necessity and reasonableness of the medical expenses.

A. Negligence and cause of injuries.

¶13 At the trial court, Woskoski argued that he was entitled to "expenses for proving causal negligence" because True "denied without explanation the requests to admit that 'Joseph True was negligent at or immediately before the accident' and that 'Joseph True's negligence was a cause of injuries to Mr. Woskoski.'" (Some capitalization omitted.) The trial court found that Woskoski was not entitled to costs because exception (c) of WIS. STAT. § 804.12(3) applied: "the party failing to admit had reasonable ground to believe that he or she might prevail on the matter." The trial court noted that there was evidence True had exercised due care, such that it was reasonable for him to deny the request that he admit negligence in causing the accident. The trial court also found that causation of injuries was in dispute because there was evidence presented from which a jury could conclude that Woskoski's injuries were not fully caused by the accident.

¶14 We conclude that the trial court properly denied Woskoski's motion, based on the arguments he presented. As noted above, Woskoski characterized the issue for the trial court as whether True should have admitted that his negligence

caused Woskoski's injuries.⁷ We agree with the trial court's conclusion that True had a "reasonable ground to believe that he ... might prevail" on the issue of whether Woskoski's injuries were caused by the accident. *See id.* It was undisputed that Woskoski did not see a doctor for at least two months and that he continued to work despite his alleged injuries. Contrary to Woskoski's continued suggestion that "[i]t could not be disputed that Mr. Woskoski was injured in the accident," we agree with the trial court that whether Woskoski was injured in the accident and the extent of his injuries were debatable issues that True was entitled to contest.

¶15 Whether True should have admitted that he drove negligently and thereby caused the accident is an issue not so easily decided. On appeal, Woskoski provides extensive argument and citations to cases discussing whether an alleged glare can form the basis for a refusal to admit negligent operation of a vehicle, and whether True's failure to request a jury instruction on emergencies affects that analysis. The problem with these particular arguments is that they were not included in Woskoski's brief to the trial court, and they were raised only briefly, without citation to authority, at the motion hearing before the trial court.

¶16 Another problem with Woskoski's trial-level brief was that it did not present separate arguments concerning each individual request to admit.⁸ Instead,

⁷ On appeal, Woskoski once again uses that same blurred characterization, arguing that "there was no reasonable basis for the defense to believe it could prevail on causal negligence," because "there was no reasonable or legal basis to deny ... requests" to admit that True was negligent and that True's negligence caused Woskoski's injuries. (Capitalization omitted.)

⁸ Woskoski's motion did not even identify by number the specific requests for admission at issue, such that to determine precisely which requests were denied, one had to compare language quoted in Woskoski's brief with the entire list of requests for admission that were attached as an exhibit to Woskoski's brief.

it characterized the requests for admissions in numerous ways that combined the issues of negligence causing the accident and the accident causing the injuries. Requesting “expenses for proving causal negligence” rather than expenses associated solely with True’s failure to admit negligent operation of the vehicle is an example of this obfuscation. We have carefully reviewed the parties’ trial briefs, the oral argument and the trial court’s decision. It is clear that the issues of negligent driving, causation of the accident and causation of the injuries were presented as intertwined arguments. In light of this presentation of the issues, we cannot fault the trial court for not *sua sponte* addressing individually the issue of True’s failure to admit negligence for the accident—an issue that it appears was dealt with in a single request for admission—and whether that single failure would satisfy WIS. STAT. § 804.12(3). *See Rossow Oil Co., Inc. v. Heiman*, 72 Wis. 2d 696, 707, 242 N.W.2d 176 (1976) (trial court “cannot be faulted for declining to assume both the role of advocate and arbiter” in deciding legal issues); *Chen v. Warner*, 2004 WI App 112, ¶21, 274 Wis. 2d 443, 683 N.W.2d 468 (appellate court “cannot fault” trial court for failing to address an argument that was not made).

¶17 Woskoski’s argument on appeal continues to obfuscate the request by combining the issues of whether True drove negligently and whether that negligence caused Woskoski’s injuries. In addition, he relies on reasoning and case law concerning liability for negligence that were not presented to the trial court. We decline to further consider his argument because it is inadequately briefed and is raised for the first time on appeal. *See State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (stating that this court will not address issues on appeal that are inadequately briefed); *State v. Van Camp*, 213 Wis. 2d 131, 144, 569 N.W.2d 577 (1997) (arguments raised for the first time on

appeal are generally deemed waived). For the foregoing reasons, we affirm the trial court's decision to deny Woskoski's motion for costs and fees related to proving negligence and cause of injuries.

B. Necessity and reasonableness of medical care.

¶18 We also affirm the trial court's decision to deny Woskoski's motion for costs and fees related to proving the necessity and reasonableness of medical care. At the trial court, Woskoski argued that there was unrefuted testimony that "all of the medical bills were reasonable in amount and necessary to treat the injuries Mr. Woskoski sustained in this accident." He noted that the defense did not present any expert testimony to contradict the necessity and reasonableness of the bills. The trial court denied Woskoski's motion, concluding that exception (c) of § 804.12(3) applied because True had a reasonable ground to believe that he might prevail. The trial court found that there was "evidence for a jury to conclude potentially that [Woskoski's] injuries were not fully caused by [True's] negligence." The trial court's decision referenced True's argument that Woskoski's failure to seek medical treatment for months after the accident raised issues concerning causation.

¶19 The trial court's factual findings concerning the evidence in the case are not clearly erroneous, and we agree that Woskoski was not entitled to fees pursuant to WIS. STAT. § 804.12(3). Based on Woskoski's failure to seek immediate medical attention and the resulting lack of immediate documentation of the details of his injuries, True had a basis to contest whether the medical expenses were reasonable and necessary to treat any injuries that may have been sustained in the accident. Indeed, the jury awarded Woskoski only one-half of the medical expenses he sought, which shows not only that there was a basis to contest the

medical expenses, but also that the evidence was compelling.⁹ For these reasons, we affirm the trial court's decision denying Woskoski's motion for § 804.12(3) costs associated with proving medical expenses.

II. True's motion for costs.

¶20 Next, we consider True's motion for costs filed pursuant to WIS. STAT. § 814.04(7), which provides in relevant part: "If the offer of judgment pursuant to [WIS. STAT. §] 807.01 is not accepted and the plaintiff fails to recover a more favorable judgment the plaintiff shall not recover costs but the defendant shall have full costs to be computed on the demand of the complaint." True sought a total of \$2839.53 and provided receipts with his motion. Woskoski opposed True's motion for judgment on the verdict, but he offered no written argument concerning the propriety of the costs True sought. However, at the motion hearing Woskoski did object to the assessment of certain costs, arguing that True had "listed items on the bill of costs that aren't recoverable." Woskoski noted particular concerns about copying costs and attorney fees.

¶21 In its oral decision, the trial court found that True was entitled to costs based on True's pretrial offer of judgment. The trial court recognized that Woskoski "has disputed a couple of the taxable cost items." The trial court then stated:

[T]he defense can submit [an] order for judgment with regard to the taxable costs, and if [trial counsel for Woskoski] wants to dispute any of the various line items,

⁹ Based on the jury's rejection of one-half of the medical costs, True questions whether the prerequisites of WIS. STAT. § 804.12(3) have even been established. *See id.* (party must prove the truth of the matter). Because we affirm the trial court's conclusion that exception (c) of § 804.12(3) applies, we do not consider that alternative basis to affirm the trial court's order.

she can do so. The Court will make its ruling and the Court will do the math and enter that final order. And, [True's trial counsel], you can prepare that order for judgment, submit it to the Court under the five-day rule.

When Woskoski's trial counsel asked for clarification, she and the trial court had the following exchange:

THE COURT: ... [Y]ou'll have the opportunity to object to the line items. Because I think you still believe the attorney's fees should be 300, not 500, and you still dispute the taxing of costs with regard to the expert witness; is that correct?"

[TRIAL COUNSEL]: Right. There's other things I dispute. So you're saying that the judgment clerk will fill in what she fills in and then if we disagree with that, then we come back to you?

THE COURT: Right. There will be a motion to review those costs....

....

[TRIAL COUNSEL]: Right. If we don't agree with the judgment clerk.

THE COURT: That's correct.

¶22 True filed his proposed order for judgment. There is nothing in the record indicating that Woskoski filed an objection to the costs. The trial court subsequently entered judgment consistent with True's proposed order for judgment.

¶23 On appeal, Woskoski asks this court to increase the judgment by \$749.95 because True should not have been allowed certain costs, such as an expert witness fee. In response, True argues that Woskoski waived that issue when he failed to timely object to True's proposed order in the trial court.

¶24 Woskoski's reply to True's waiver argument is that he "specifically preserved" his objections at the motion hearing. Woskoski contends that because the clerk of court entered judgment in the amount the trial court ordered, rather than itemizing costs, Woskoski "could not object any further." We are not persuaded and we conclude that Woskoski waived this issue when he failed to object to True's proposed order for judgment.

¶25 We acknowledge that Woskoski raised concerns about certain costs at the motion hearing. In response, the trial court explicitly told Woskoski's trial counsel that it would consider Woskoski's objections to costs if Woskoski filed an objection to True's proposed order of judgment. No objection was filed. Therefore, Woskoski forfeited his right to raise this issue on appeal. *See Savina v. Milwaukee Gas Co.*, 36 Wis. 2d 694, 707, 154 N.W.2d 237 (1967) (party's objection to costs assessed was barred where party failed to file written objection to taxation of costs pursuant to Wis. STAT. § 271.10(3) and (4) (1965-66), the predecessor to Wis. STAT. § 814.10(3)¹⁰); *see also State v. Ndina*, 2009 WI 21, ¶29, 315 Wis. 2d 653, 761 N.W.2d 612 ("forfeiture is the failure to make the timely assertion of a right") (citation omitted).

¶26 The fact that the proposed order for judgment did not detail each cost is irrelevant; trial counsel was aware of what costs were being sought, and

¹⁰ WISCONSIN STAT. § 814.10(3), related to taxation of costs, provides:

(3) OBJECTIONS, PROOFS, ADJOURNMENT. The party opposing such taxation, or the taxation of any particular item shall file with the clerk a particular statement of the party's objections, and the party may produce proof in support thereof and the clerk may adjourn such taxation, upon cause shown, a reasonable time to enable either party to produce such proof.

what True was receiving as costs, as evidenced by Woskoski's argument on appeal concerning individual costs. Woskoski needed to raise these issues with the trial court—as the trial court instructed him to do—and in failing to do so he forfeited his right to contest the costs imposed. *See Savina*, 36 Wis. 2d at 707 (rejecting argument that “it would have been useless” to file an objection to costs where the trial court had already heard the party’s objection, because “trial judges have been known to change their minds and even if objections pursuant to sec. 271.10 might not have been successful, we think the failure to properly make objections and to seek a review … precludes the raising of the objections on appeal”).

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

