COURT OF APPEALS
DECISION
DATED AND RELEASED

February 20, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

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No. 96-1371

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

EUGENE HENRY WILLIAMSON and ELAINE A. WILLIAMSON,

Plaintiffs-Respondents,

v.

STECO SALES, INC., a Pennsylvania corporation, ABC INSURANCE COMPANY,

Defendants,

PACCAR, INC., d/b/a PETERBILT MOTORS, INC., a Delaware corporation qualified to do business in Tennessee, XYZ INSURANCE COMPANY, RONALD L. HAKA, NATIONAL GENERAL INSURANCE COMPANY,

Defendants-Respondents,

FIREMAN'S FUND INSURANCE COMPANY,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Wood County: DENNIS D. CONWAY, Judge. *Affirmed*.

Before Eich, C.J., Dykman, P.J., and Vergeront, J.

EICH, C.J. This appeal concerns the responsibility of various parties and their insurers for personal injuries suffered by Eugene Williamson in 1991 when a tractor-trailer truck operated by Ronald Haka backed into him.

Williamson sued Haka and his insurer, National General Insurance Company, and several other parties. Also named as a defendant in the action was Fireman's Fund Insurance Company, the insurer of the Jerzak Trucking Company, to whom, Williamson alleged, Haka's truck was leased at the time of the accident.[1] The jury found that Haka's truck was "under lease" to Jerzak at the time, and the trial court, after denying Fireman's Fund's postverdict motions, entered judgment declaring that its policy provided coverage. Fireman's Fund appeals, challenging the sufficiency of the evidence and various jury instructions given by the court. We reject the challenges and affirm the judgment. Other facts will be discussed in succeeding sections of this opinion.

I. The Jury Instructions

A. Introduction: Scope of Appellate Review

In the first instance, the trial court has "wide discretion" in instructing the jury on the facts and circumstances of the case, and we will not reverse on an instructional issue absent an erroneous exercise of that discretion. ***Northwestern Nat'l Ins. Co. v. Nemetz***, 135 Wis.2d 245, 263-64, 400 N.W.2d 33, 41 (Ct. App. 1986). If the trial court's instructions "`adequately cover the law'" and "`fairly inform the jury of the law applicable to the particular case,'" the trial court properly exercises its discretion. ***Peplinski v. Fobe's Roofing, Inc.***, 193 Wis.2d 6, 24, 531 N.W.2d 597, 604 (1995); ***State v. McCoy,*** 143 Wis.2d 274, 289, 421 N.W.2d 107, 112 (1988) (quoted sources omitted).

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[1] On an earlier appeal, we reversed a decision of the trial court determining that Jerzak had leased Haka's truck, concluding that disputed issues of material fact existed for trial. *See* ***Williamson v. Steco Sales, Inc.***, 191 Wis.2d 608, 530 N.W.2d 412 (Ct. App. 1995). The case is back before us after trial of the factual issues to a jury.

Whether there are sufficient facts to warrant giving a particular instruction, however, is a question of law which we review *de novo*. ***State v. Mayhall***, 195 Wis.2d 53, 57, 535 N.W.2d 473, 475 (Ct. App. 1995). Finally, even when an instructional error occurs, we will not order a new trial unless the error is prejudicial—there is a probability, not just a possibility, "that the jury was misled thereby." ***Betchkal v. Willis***, 127 Wis.2d 177, 188, 378 N.W.2d 684, 689 (1985).

B. Continuation of a Former Lease

Haka had hauled for Jerzak off and on for several years and purchased his own truck in 1989. In 1990, Jerzak entered into a written agreement with Haka to lease the truck for a ten-month term ending on February 1, 1991. As indicated, Williamson claimed that Haka and Jerzak, by their actions, had agreed to extend the lease beyond its expiration date and that it was in effect on May 8, 1991, when he was injured.[2] Williamson requested the following instruction, which was given by the trial court:

> Even where an agreement, such as a lease, expires by its terms, if the parties continue to perform as they had in the past, a presumption arises that they had mutually assented to a new lease agreement continuing on the same terms as the old one.

Fireman's Fund argues that neither the law nor the evidence supports the instruction.

Considering the legal challenge first, we begin by noting our agreement with National General that much of Fireman's Fund's argument is based on a mischaracterization of the instruction. According to Fireman's Fund, the instruction tells jurors they must presume that the Haka/Jerzak lease continued beyond its expiration date.[3] Such a characterization ignores the

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[2] Haka and Jerzak executed another written lease commencing July 15, 1991, and expiring January 31, 1992.

[3] Fireman's Fund captions its argument as follows: "**The Court Erred in Instructing the**

instruction's plainly stated major premise: that the presumption of a continuing agreement arises only "if the parties continue to perform [the agreement] as they had in the past." So read, the instruction does not in any way "presume," *ipso facto*, that the lease continued—as Fireman's Fund posits. It simply tells the jurors that, if they find the predicate—that the parties continued to perform the agreement after its expiration date—it is presumed to continue on the same terms as before. If they do not find the predicate, no presumption arises.

We also believe the instruction accurately reflects applicable Wisconsin law. A lease is a contract, much as a contract of employment. In ***Borg-Warner Corp. v. Ostertag***, 18 Wis.2d 484, 489, 118 N.W.2d 900, 903 (1963), the supreme court held that when an employee is "hired by the year and continues in employment after the end of a particular year, there is a presumption that he is again employed for the new year on the same terms as before."[4] Fireman's Fund attempts to diminish the precedential value of ***Borg-Warner*** by emphasizing the factual situation in which the case arose and apparently asserting, without elaboration, that the court's holding should be strictly limited to the facts before it. There is nothing in the language of the ***Borg-Warner*** opinion, however, to support such a limitation. The quoted statement simply sets forth the general legal proposition against which the court was judging the facts of the case—much as the trial court did in this case in its instruction to the jury.

What Fireman's Fund's argument boils down to is that the evidence did not warrant the instruction. It states, for example, that there was no evidence that Haka did any hauling or other work for Jerzak "between leases."

There was, however, evidence that, when Haka purchased the truck, Jerzak told him that he had "a lot of work" for him and could "keep [Haka] running and ... take a percentage," and that Jerzak prepared a title application for the truck identifying Jerzak Trucking as the lessee. Jerzak completed all of the paperwork relating to the truck, including filing the many

(..continued)

Jury that a `Presumption' Existed that the Parties had Mutually Assented to Continuation of the Expired Lease," and repeats the assertion in the text of its brief.

[4] We note in this regard that the 1990-91 Haka/Jerzak lease designated the driver of the truck—in this case, Haka—as Jerzak's "employee."

required government forms and obtaining insurance. Jerzak listed Haka's truck as one under lease to Jerzak Trucking in documents filed with the Motor Vehicles Department and placed its name and certificate of authority numbers on the truck.

Significantly, we think, at the time of the accident, Haka's truck was displaying Jerzak Trucking's name, its "LC," "IC" and "ICC-MC" numbers, and its 1991 International Fuel License.[5] And when Jerzak applied for fuel tax stamps in February 1991—after expiration of the written lease—Haka's truck was listed as one of the trucks operating under Jerzak's authority. Beyond that, after the 1990-91 lease expired, Haka continued to park his truck in Jerzak's employee lot and considered that his truck had been under lease to Jerzak "from the time [he] bought it." He testified that he believed he was still "under lease" to Jerzak. And Jerzak's wife, who did the company's paperwork, acknowledged that "basically from the very first day ... Haka sought title to his truck, [she] understood ... he was under some sort of lease arrangement with Jerzak Trucking."

Fireman's Fund stresses that Haka did occasional work for others during the "interim" period and contends that this is evidence that their relationship did not continue after expiration of the written contract. But Haka testified that because 1991 was a "very slow year," Jerzak gave him permission to take on occasional work for other carriers. Understanding that even after expiration of the contract, Jerzak had first call on his truck, Haka "checked in" with Jerzak every morning to see whether Jerzak needed his truck that day. And he always sought—and received—specific permission from Jerzak before taking work from third parties, including the work in which he was engaged at the time of the accident.

As in any case, evidence also existed that would support a conclusion that the parties' prior relationship did not continue on the same terms as before. The evidence, however, is not balanced and weighed by the trial court in determining whether a particular instruction is justified—nor by this court in reviewing the trial court's action in that regard. Our task is to determine whether there is evidence to support the instruction, not to weigh

[5] Jerzak testified that he did not allow trucks not leased to his company to display the company's numbers.

conflicting evidence on the point. ***Finley v. Culligan***, 201 Wis.2d 611, 630-31, 548 N.W.2d 854, 862 (Ct. App. 1996). We are satisfied that the evidence warranted the instruction.

C. Instruction on Haka's Personal Use of the Truck

The trial court also instructed the jury: "A truck owner may reserve the right to use his truck for his own purposes when the motor carrier has no use for the truck and still be under lease with the motor carrier." Fireman's Fund claims that this instruction, too, is contrary to law. Again, we disagree.

The instruction derives from ***Kreider Truck Service, Inc. v. Augustine***, 394 N.E.2d 1179 (Ill. 1979). While the ***Kreider*** court's discussion of the subject is admittedly *dictum*, in the course of its opinion, the court took pains to "point out" and quote at length from an Interstate Commerce Commission ruling that an operator may use the leased vehicle for its own purposes on an "intermittent" basis without terminating the underlying lease arrangement. ***Id***. at 1182.[6]

In the former appeal of this case, we held that, in the context of a summary judgment motion, National General had established a *prima facie* case that the lease arrangement between Haka and Jerzak (1) continued to exist at

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[6] The issue in ***Kreider Truck Service v. Augustine***, 394 N.E.2d 1179 (Ill. 1979), was whether the carrier-lessee was liable for injuries caused by the operator-lessor while engaged in work for a third party. The court held—relying on Interstate Commerce Commission rules no longer in effect—that because the lease had not been formally terminated and because the operator's trucks still carried the carrier's identification and licensing numbers, the carrier was liable despite the fact that the operator was doing work for another party.

In ***Kreider***, it was claimed that an oral agreement existed between the parties under which the operator reserved the right to use the trucks for her own purposes whenever the carrier had no use for them. The court, stating that, given its interpretation of the ICC rules, it did not need to consider the validity and effect of such an "arrangement," nonetheless elected to "point out" and quote from an ICC ruling that a subagreement whereby the operator/lessor could take on occasional work of its own was "permissible." ***Kreider***, 394 N.E.2d at 1182.

the time of the accident and (2) was not affected by the fact that, on that date, Haka was doing work for a third party. ***Williamson***, 191 Wis.2d at 616-618, 530 N.W.2d at 416-17. In so ruling, we expressly adopted what we described as the "majority rule" that "during the lease term, the ICC carrier is liable for the lessor's negligence, even if the lessor is not engaged in a job for the lessee at the time of the accident." ***Id***. at 616, 617-18, 530 N.W.2d at 416, 417. Among those cases, we referred to ***Kreider*** for the rationale underlying the rule and also for the proposition that "[t]he carrier is responsible even if the lessor is performing an intrastate operation for a third party." ***Williamson***, 191 Wis.2d at 617, 530 N.W.2d at 417.

We see no legal error in the instruction.

II. Sufficiency of the Evidence

Fireman's Fund argues that the evidence was insufficient to permit the jury to find that the lessor-lessee relationship between Haka and Jerzak continued to exist at the time of the accident. The argument is based on a section of the Uniform Commercial Code, § 411.103(1)(j), STATS., which provides, so far as may be relevant here, that "`[l]ease' means a transfer of the right to possession and use of goods for a term in return for consideration ...." Fireman's Fund says there is no evidence to establish the three elements of the statute: "(a) a transfer of the right to possession and use of Haka's truck to Jerzak; (b) for a term; and (c) in return for consideration."

Williamson argues first that we should not even consider the argument because §411.103(1)(j), STATS., was enacted by the legislature and became effective on July 1, 1992, more than a year after the accident and several years after Haka and Jerzak began their relationship. It appears, however, that the trial court instructed the jury—however briefly—on the statute,[7] so we consider ourselves bound to consider Fireman's Fund's contentions.

[7] At one point during its lengthy instructions, the court stated: "You are instructed that the Wisconsin Statutes provides [sic] that a lease means the transfer of right to possession and use of goods for a term in return for consideration."

We pay great deference to jury verdicts. If there is any credible evidence in the record that, under any reasonable view, fairly admits of an inference that supports a jury's finding, that finding may not be overturned. ***Ferraro v. Koelsch***, 119 Wis.2d 407, 410, 350 N.W.2d 735, 737 (Ct. App. 1984), *aff'd*, 124 Wis.2d 154, 368 N.W.2d 666 (1985); § 805.14(1), STATS. Our task is to search for credible evidence that, under any reasonable view, supports the verdict, not for evidence that might sustain a verdict the jury could have reached but did not. ***Finley***, 201 Wis.2d at 631, 548 N.W.2d at 862; ***Stan's Lumber, Inc. v. Fleming***, 196 Wis.2d 554, 565, 538 N.W.2d 849, 853 (Ct. App. 1995). And we give special weight to jury findings that have been approved by the trial court—as were the jury's findings in this case. ***Nieuwendorp v. American Family Ins. Co.***, 191 Wis.2d 462, 472, 529 N.W.2d 594, 598 (1995).

As before, Fireman's Fund argues that, during the interregnum between the written leases—the time when the accident occurred—Haka did no work for Jerzak, but was brokering his own work for third parties; it asserts that there is no evidence that Jerzak had any right to possession or use of Haka's truck after expiration of the 1990-91 lease agreement.

In Section I(B) of this opinion, considering Fireman's Fund's challenge to the evidence supporting the trial court's "continuing lease" instruction, we set forth at some length the evidence relating to Jerzak's involvement with Haka and his truck both before and after expiration of the 1990-91 lease. We also noted that, as a matter of law, Haka's work for third parties during the period does not negate the existence of a continuing lessor-lessee relationship. As for the evidence, we emphasized, in addition to the continued display of Jerzak's name and all state and federal licensing numbers on the truck, Haka's understanding that he was still under lease to Jerzak during the contract interregnum. We also noted his daily "first call" contacts with Jerzak and his routine receipt of permission from Jerzak to take on occasional work for others—including the work he was doing at the time of the accident. Without repeating our earlier discussion, we are satisfied the record contains adequate evidence that fairly admits of inferences supporting a finding that Jerzak's right to control the use of Haka's truck continued after expiration of the 1990-91 lease.

Fireman's Fund also argues briefly that because Haka acknowledged that he expected to retain the entire fee for his third-party work on the day of the accident, there is no evidence of the existence of the statutory

requirement of "consideration." As noted above, Haka understood that Jerzak continued to have something akin to a "right of first refusal" with respect to the use of his truck and he acted on that understanding by checking in with Jerzak every day and seeking and obtaining his permission before undertaking any work for another principal.[8] All during this time, as we also noted, Haka's truck continued, with Jerzak's acquiescence, to display Jerzak's placards, registration and licensing numbers.

We said in ***Wagner v. Dissing***, 141 Wis.2d 931, 416 N.W.2d 655 (Ct. App. 1987), that

> "it is hornbook law that mutual promises are sufficient consideration" for a contract. We note, too that consideration may take the form of a detriment incurred by the promisee; and that "detriment" has been defined as the performance of "any act which occasioned [the promisee] the slightest trouble or inconvenience, and which he was not obliged to perform."

Id. at 944, 416 N.W.2d at 659-60 (citations and quoted sources omitted). Haka remained "on call" for Jerzak during the contract interregnum and Jerzak received the benefit of having a truck readily available on a daily basis during this period. The jury could fairly infer from this evidence that consideration existed.

Finally, Fireman's Fund argues that there was no evidence that the purported oral lease extension was "for a term," as specified in § 411.103(1)(j), STATS., and that the jury could only speculate that the lease extension "w[as] subject to any time limitations whatever." The argument is not elaborated beyond those statements.

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[8] Fireman's Fund asserts that Jerzak testified that Haka did not talk with him on the morning of the accident, contrary to Haka's testimony that he did. The weight and credibility of the evidence are, of course, solely within the province of the jury. ***Hauer v. Union State Bank,*** 192 Wis.2d 576, 589, 532 N.W.2d 456, 461 (Ct. App. 1995).

The expired 1990-91 lease, which ran for ten months, permitted either party to terminate it on ten days' written notice, and Haka testified that he understood the lease would continue on a year-to-year basis. We note also that Fireman's Fund has offered no authority for the proposition that the lease "term" under § 411.103(1)(j), STATS.—in this case the "ten-day-notice" provisions, or even a general year-to-year "term"—could not continue in a carry-over oral extension of a written contract. Indeed, the supreme court recognized in ***California Wine Ass'n v. Wisconsin Liquor Co.***, 20 Wis.2d 110, 124-25, 121 N.W.2d 308, 316 (1963), that when a contract is silent as to its duration it may be terminated by either party upon reasonable notice. We reject Fireman's Fund's argument that the jury's verdict must be overturned for a failure of proof of the "term" of the continued lease.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.