COURT OF APPEALS
DECISION
DATED AND FILED

May 7, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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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.

No. 97-0391

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

ROGER MAAHS, AN INCOMPETENT, BY HIS GUARDIAN AD LITEM, CHRIS M. CLEMENS, CHRISTOPHER MAAHS, A MINOR, BY HIS GUARDIAN AD LITEM, CHRIS M. CLEMENS, AND LAURIE MAAHS,

PLAINTIFFS-APPELLANTS,

GRANT COUNTY,

INVOLUNTARY-PLAINTIFF-RESPONDENT,

V.

LOUIS B. LIEBFRIED, JR., JOSEPH A. BREITSPRECKER, RONALD B. DRESSLER, ECONOMY FIRE & CASUALTY COMPANY, A FOREIGN CORPORATION, WISCONSIN MUTUAL INSURANCE COMPANY, AND CONTINENTAL CASUALTY INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Grant County: GEORGE S. CURRY, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Vergeront, Deininger and Jones,[1] JJ.

JONES, J. Roger Maahs, his son, Christopher Maahs, and his wife, Laurie Maahs, (collectively Maahs) appeal a judgment dismissing their personal injury action and denying post-trial motions. They seek a change in the answer to the comparative negligence question or a new trial in the interests of justice. Maahs also appeals the trial judge's decision not to impose costs on Grant County, an involuntary plaintiff. We conclude that the jury's answer to the comparative negligence question is supported by credible evidence and affirm the judgment entered on the verdict. We also affirm the trial judge's denial of a new trial in the interests of justice. However, we reverse the trial court's ruling denying the taxation of costs against Grant County.

BACKGROUND

On May 11, 1991, Roger Maahs sustained severe personal injuries when he drove his motorcycle into the pick-up truck owned by Joseph Breitsprecker and operated by Louis Liebfried, Jr. on County Highway U in Grant County, Wisconsin. At the time of the accident Maahs was heavily intoxicated, with a blood alcohol concentration of .26 percent. Prior to the accident, he and a friend, James Fishnick, had been drinking at the Burton Bar where Maahs had consumed at least sixteen, and perhaps as many as thirty, twelve-ounce beers.

[1] Circuit Judge P. Charles Jones is sitting by special assignment pursuant to the Judicial Exchange Program.

On the day of the accident Louis Liebfried, Jr. and Ronald Dressler had volunteered to help Joseph Breitsprecker move his cattle herd to an unused barn on County Highway U because of a barn fire earlier that day. Both Liebfried and Dressler had pulled their cattle trailers to the Breitsprecker farm to help transport the cattle. At the time of the accident, both trailers were parked on opposite sides of County Highway U with their flashers activated. A short time before the accident, Liebfried, driving Breitsprecker's pick-up truck, pulled out of the farm driveway onto County Highway U and called to Dressler who had just parked his truck and was walking to the farm. At the time of the accident, the pick-up truck was stopped in the middle of the roadway and Liebfried was talking to Dressler.

Dressler heard a motorcycle engine, saw a motorcycle approaching, and then watched as Maahs drove the motorcycle straight headlong into the pick-up truck. Maahs made no apparent effort to slow down, brake, swerve or deviate from his path. There were no skid marks. The impact moved the stationary pick-up three to four feet.

The investigating police officer testified that after the accident she could find no evidence that Maahs was wearing eye protection. A defense reconstruction expert opined that Maahs was traveling between 51 and 66 mph. It appeared to Dressler that Maahs was "throttling all the way" and was "flying low as if he had his eyes closed." The roadway was unobstructed for 1200 feet in the direction of the approaching motorcycle, from the crest of a hill and curve to the point of impact.

The investigating officer testified as follows regarding the cause of the accident:

> I felt there were three contributing factors. On the side of Mr. Liebfried I felt he was stopped illegally parked or stopped on the roadway. I felt, you know, he was issued a traffic citation for that. I felt that's what it was deserving of. As far as the motorcycle operator Mr. Maahs, is concerned, I felt he was heavily intoxicated, and his judgment was severely impaired at the time of this accident and that he was going too fast. First of all, it was my professional opinion he should not have been operating a motorcycle, and that was a factor in the accident and that he was operating the vehicle too fast.

Maahs has been rendered incompetent as a result of the injuries sustained in the accident. He appeared by a guardian ad litem. He did not testify at trial.

Following the accident, Grant County expended over $136,000 for medical expenses on Maahs' behalf. Maahs impleaded Grant County as an involuntary plaintiff because of its subrogation lien.

Prior to trial, all parties entered into a stipulation, approved by the court, that dismissed Joseph Breitsprecker, and provided that the matter would be tried on liability issues only. The parties stipulated that if Liebfried was found at least as causally negligent as Maahs, two insurance carriers, Economy Fire & Casualty Company and Wisconsin Mutual Insurance Company, would pay their policy limits to Maahs and Maahs would satisfy Grant County's lien solely out of those proceeds. The matter was tried to a jury from August 12 through August 16, 1996. Grant County did not participate in the trial.

The trial judge found both Liebfried and Maahs negligent as a matter of law. The jury found both causally negligent and apportioned negligence at twelve percent to Liebfried and eighty-eight percent to Maahs. The jury also found Dressler negligent, but found that his negligence was not a cause of the accident. The trial judge denied Maahs' post-verdict motions and affirmed the

verdict in all respects. Each defendant and his insurance carrier obtained a judgment dismissing Maahs' action with prejudice and with costs. Each judgment dismissed Grant County's claim with prejudice but without costs, based on the trial judge's ruling that Grant County was only a nominal plaintiff and "not a substantially litigating party."

1. MOTION TO CHANGE ANSWERS

(a) Standard of Review.

A motion to change a jury verdict answer challenges the sufficiency of the evidence to sustain the answer. Section 805.14(5)(c), STATS.; ***Richards v. Mendivil***, 200 Wis.2d 665, 671, 548 N.W.2d 85, 88 (Ct. App. 1996). We review the evidence de novo but we apply the same methodology as the trial court applies when considering motions after verdict. ***Weiss v. United Fire and Cas. Co.***, 197 Wis.2d 365, 388, 541 N.W.2d 753, 761 (1995). No answer will be changed unless "the court is satisfied that, considering all credible evidence and reasonable inferences therefrom in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a finding in favor of such party." Section 805.14(1). "When there is *any* credible evidence to support a jury's verdict, `even though it be contradicted and the contradictory evidence be stronger and more convincing, nevertheless the verdict ... must stand.'" ***Weiss,*** 197 Wis.2d at 389-90, 541 N.W.2d at 761-62 (emphasis in original) (quoted source omitted).

(b) Discussion.

Maahs' primary argument is that the jury's finding of comparative negligence is unfairly disproportionate. Maahs asks this court to change the

comparative negligence answer to a 50-50 apportionment. He claims that the jury's apportionment of twelve percent to Liebfried and eighty-eight percent to him is "unfairly disproportionate" as a matter of law. We disagree.

Although both Liebfried and Maahs were found negligent as a matter of law, credible evidence in the record supports a jury finding that Maahs' state of intoxication significantly contributed to his negligent lookout. In addition, credible evidence supports a finding that Maahs was negligent for operating his motorcycle without eye protection and at a rate of speed, which if not over the limit, was in excess of what the conditions warranted. There was evidence that if Maahs had not been intoxicated, had been wearing eye protection and looking efficiently during the clear view 1200 feet prior to impact, he would have seen flashing lights from two cattle trailers parked on the shoulders of the highway and a pick-up truck straddling the center line of the roadway, primarily in his lane of traffic. Absent a heavily intoxicated condition, he would have been able to process a situation requiring caution, a slowing down of speed and a deviation in his path.[2]

Maahs argues that he had the right-of-way and Liebfried had an on-going duty to yield the right-of-way. For this argument he relies on ***Ogle v. Avina***, 33 Wis.2d 125, 146 N.W.2d 422 (1966). His reliance is misplaced.

Ogle involved a four car accident. The issue at trial was the comparison of negligence of three of the drivers: the driver who entered onto the arterial highway and failed to judge the excessive speed of two on-coming

[2] Maahs' companion, James Fishnick, was trailing Maahs. He testified that he observed the Liebfried vehicle in the roadway and was able to safely stop before reaching it.

vehicles racing each other, and the two drivers involved in the race. When the vehicle entering the roadway blocked the lead driver's lane of travel, the driver swerved his vehicle into the on-coming lane, spun 180 degrees and smashed tail-first into an on-coming vehicle, killing the guest passenger. The trailing driver also swerved to avoid the entering vehicle and made minor impact with the on-coming vehicle. The matter was tried to the court without a jury. The trial judge found the entering driver free of negligence and apportioned causal negligence equally between the two speeding drivers.[3]

The majority of the supreme court affirmed the trial judge's finding of no negligence on the driver of the vehicle entering the highway, holding that the trial judge's finding was "not against the great weight and clear preponderance of the evidence." ***Id***. at 130, 146 N.W.2d at 425. The majority concluded that the lead driver was 1000 feet from the entering vehicle when sighted and, at that distance, was not "approaching" the entering vehicle as that term is used in § 346.18(4), STATS.[4] ***Id.*** at 131, 146 N.W.2d at 425.

The minority of the court would have found the driver of the vehicle entering the highway negligent as a matter of law for improper lookout and failure to yield the right-of-way. Maahs relies on the minority's citation to the rule that excessive speed does not forfeit the right-of-way in the situation where another

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[3] Illegal racing was not pleaded by the plaintiff, so equal culpability and responsibility for damages could not obtain as a matter of law. *See* ***Ogle v. Avina,*** 33 Wis.2d 125, 134, 146 N.W.2d 422, 426 (1966).

[4] Section 346.18(4), STATS., provides:

> The operator of a vehicle entering a highway from an alley or from a point of access other than another highway shall yield the right-of-way to all vehicles *approaching* on the highway which the operator is entering. (Emphasis added.)

vehicle is entering an arterial highway, and that proper lookout requires the driver to reasonably estimate the speed of on-coming vehicles and anticipate excessive speed. This minority view, although a correct statement of the law, is not relevant to our case. First, we do not have a vehicle entering a roadway in the path of an approaching vehicle. Second, our case was not tried as a right-of-way case.[5]

Any argument on appeal by Maahs that Liebfried failed to yield the right-of-way was waived. In fact, the investigating officer who testified on behalf of Maahs, when asked by Maahs' attorney which vehicle had the right-of-way, testified without objection or contradiction as follows:

> Neither. As an intoxicated driver, he loses his right of way. As an intoxicated driver Mr. Maahs relinquishes his right of way. He had no legal right being in the roadway in that condition.[6]

Maahs did not submit or request any pattern or special jury instruction on right-of-way. He did not object to the instructions as given by the court. The only instructions given by the court that related to Liebfried's negligence were WIS J I—CIVIL 1030, Right To Assume Due Care By Highway Users; WIS J I—CIVIL 1055, Lookout; and WIS J I—CIVIL 1065, Lookout: Entering Or Crossing Through Highway.

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[5] What is relevant to our case in ***Ogle*** is the majority's holding that the trial judge, as fact-finder, should be affirmed on appeal because his findings of fact were not against the great weight or clear preponderance of the evidence. This states the "clearly erroneous" test for the sufficiency of the evidence in a bench trial. ***Cogswell v. Robertshaw Controls Co.***, 87 Wis.2d 243, 249-50, 274 N.W.2d 647, 650 (1979). *Cf.,* ***Hibner v. Lindauer***, 18 Wis.2d 451, 453-54, 118 N.W.2d 873, 875 (1963) (Jury trial test for sufficiency of the evidence: viewing the evidence in the light most favorable to the verdict, are the jury's findings of fact supported by any credible evidence? This test is very deferential to the jury's verdict especially where the verdict has the trial court's approval.).

[6] We have found no authority supporting this witness' opinion on forfeiture of right-of-way under these circumstances. Maahs' attorney, however, allowed her answer to stand and never challenged the officer's opinion during the trial.

Section 805.13(3), STATS., dealing with the instruction and verdict conference between the trial judge and counsel provides in relevant part:

> Counsel may object to the proposed instructions or verdict on the grounds of incompleteness or other error, stating the grounds for objection with particularity on the record. Failure to object at the conference constitutes a waiver of any error in the proposed instructions or verdict.

Maahs waived any objection to the absence of an instruction on right-of-way, and cannot argue right-of-way on appeal. *See* ***State v. Schumacher***, 144 Wis.2d 388, 402, 424 N.W.2d 672, 677 (1988). ("Thus, sec. 805.13(3), makes clear that there is waiver if counsel fail to object to a proposed verdict or instruction at the jury trial.")

Maahs relies on ***Leckwee v. Gibson***, 90 Wis.2d 275, 280 N.W.2d 186 (1979), for his argument that the jury's answer to the comparative negligence question was unfairly disproportionate. Again, this reliance is misplaced.

Leckwee was also a right-of-way case. It involved an intersection accident between a motorcycle operated by the plaintiff on an arterial highway and an automobile entering the roadway from a stop sign. The jury found both parties causally negligent and apportioned the negligence at seventy-five percent to the plaintiff and twenty-five percent to the defendant. The trial judge affirmed the verdict and the supreme court reversed. The court concluded that the defendant's negligence was at least equal to the plaintiff's as a matter of law, and set aside the jury's comparison of negligence and ordered a new trial. The court stated:

> Clearly the defendant Gibson was negligent as to lookout and failure to yield the right-of-way. These acts of negligence were the *dominant causes of the accident*. The jury could have properly found the plaintiff Leckwee negligent both as to lookout and as to management and control. On the facts of this case and in view of the rule that some preference must be accorded users of an arterial

> highway, it must be concluded that as a matter of law the defendant's negligence was at least equal to the plaintiff's.

Id. at 292, 280 N.W.2d at 193 (emphasis added) (citation omitted).

Comparing the facts of ***Leckwee*** to our case is instructive. In ***Leckwee***, the motorcyclist testified that he saw the defendant's automobile at the stop sign, glanced down at the tachometer preparing to shift, and looked up to find the automobile in his path. He did not apply his brakes or attempt to avoid the defendant's vehicle. The court found that there was credible evidence in the record to support a finding that the plaintiff was negligent as to lookout and management and control.

The defendant testified that he stopped at the intersection, looked but did not see any on-coming traffic and proceeded slowly into the intersection. He saw the motorcyclist a split second before impact. The court held that the jury could find the defendant negligent as to lookout and failure to yield right-of-way. As noted above, the supreme court found the defendant's acts of negligence were the "dominant causes of the accident." ***Id.***

Any similarities between the facts of ***Leckwee*** and our case are overcome by overwhelming differences. First, ***Leckwee*** is a right-of-way case. As we have discussed, this case was not presented as a right-of-way case. Second, intoxication was not involved in ***Leckwee***. Although the plaintiff was negligent as to lookout and management and control, his lookout and management and control were not impaired by a high degree of intoxication. The Maahs jury reasonably could have found that Maahs' intoxication significantly impaired his judgment, observation, perception and motor skills. Third, there is no evidence in ***Leckwee*** that the motorcyclist was not wearing eye protection. The Maahs jury could have found that Maahs' lack of eye protection further contributed to his inefficient

lookout. Fourth, in ***Leckwee***, the motorcyclist saw the defendant's vehicle stopped at the stop sign and had the right to assume that the driver would yield to his right-of-way. He glanced down briefly and when he looked up the automobile had entered his lane of travel. In our case, credible evidence suggests that Maahs never saw the pick-up truck at any time as he traveled the 1200 feet of clear roadway ahead of him. He never changed speed, never applied his brakes, never altered his path during that entire stretch. Fifth, in ***Leckwee***, the offending vehicle moved into the path of the motorcycle moments before impact. In our case, the pick-up, albeit parked illegally in the roadway, was in plain view for the entire 1200 feet of Maahs' approach. Sixth, in ***Leckwee***, no eyewitness testimony is referenced in the decision other than from the participants. In our case, Ronald Dressler testified as an eyewitness to the accident and James Fishnick testified as to his observations while traveling a minute or two behind Maahs. In addition, the investigating officer testified as to the factors which she felt contributed to the accident and clearly placed the greater blame on Maahs. ("Mr. Liebfried was also in the wrong, but I feel to a much lesser degree.")

In sum, a comparison of this case with ***Leckwee*** underscores the jury's apportionment of negligence and supports the verdict. Therefore, viewing the evidence in the light most favorable to the verdict, the jury's answer to the comparative negligence question is clearly supported by credible evidence in the record and its answer is not unfairly disproportionate.

2. NEW TRIAL IN THE INTERESTS OF JUSTICE

(a) Standard of Review.

A motion for a new trial in the interests of justice also tests the sufficiency of the evidence. Section 805.15(1), STATS. It may be granted "when

the jury findings are contrary to the great weight and clear preponderance of the evidence, even though the findings are supported by credible evidence." ***Sievert v. American Family Mut. Ins. Co.***, 180 Wis.2d 426, 431, 509 N.W.2d 75, 78 (Ct. App. 1993), *aff'd*, 190 Wis.2d 623, 528 N.W.2d 413 (1995). Great deference is given to the trial court in the exercise of its discretion denying a motion for a new trial in the interests of justice because it is in the best position to observe and evaluate the evidence. ***Id***.

(b) Discussion.

Maahs raises no new arguments in support of his motion for a new trial in the interests of justice. Rather, he relies on the legal principle that the motion can be granted where the verdict is against the great weight of the evidence even though there is sufficient credible evidence in the record to support the verdict. He cites ***Pruss v. Strube***, 37 Wis.2d 539, 544-45, 155 N.W.2d 650, 653 (1968), for this principle. ***Pruss*** provides little, if any, assistance.

Pruss is another right-of-way case. In ***Pruss***, the plaintiff entered an uncontrolled intersection on defendant's right at approximately the same time as the defendant entered the intersection. The plaintiff did not see the defendant until impact; the defendant saw the plaintiff about five feet before impact. Both drivers had reduced their speed as they approached the intersection, so speed was not an issue.

The jury found both drivers causally negligent with respect to lookout and apportioned the negligence at ninety percent to the defendant and ten percent to the plaintiff. The trial judge affirmed the verdict and refused to grant a new trial in the interest of justice.

Although Chief Justice Hallows, writing the court's opinion, expressed his individual opinion that the jury's apportionment of negligence was "grossly disproportionate" and that he would disapprove the verdict, ***id***. at 546, 155 N.W.2d at 653, the majority of the court affirmed the trial court. ***Id***. at 545, 155 N.W.2d at 653. The majority found that the defendant's added duty to yield the right-of-way to plaintiff because she entered the intersection on his right, justified the apportionment found by the jury. *See* WIS J I—CIVIL 1157.

Once again, failure to yield the right-of-way was a critical issue in ***Pruss.*** It was waived in our case as noted above, and no jury instructions on right-of-way were submitted to the jury.

Irrespective of the waiver of right-of-way, we conclude that the verdict in this case and the apportionment of negligence was not only supported by credible evidence, it was supported by the great weight and clear preponderance of the evidence, as discussed above.

3. COSTS AGAINST GRANT COUNTY

(a) Standard of review.

Interpretation and application of a statute, such as the statute allowing costs to a defendant, § 814.03, STATS., is a question of law that we review de novo. *See* ***Franzen v. Children's Hosp.***, 169 Wis.2d 366, 376, 485 N.W.2d 603, 606 (Ct. App. 1992) ("When a trial court construes a statute in order to determine the correct legal principles governing the matter at hand, the construction is a question of law which this court reviews without deference to the trial court's decision."). This standard of review was applied to § 814.03 in ***Sampson v. Logue***, 184 Wis.2d 20, 27, 515 N.W.2d 917, 920 (Ct. App. 1994).

(b) Discussion.

Maahs named Grant County as an involuntary plaintiff in the amended complaint because of the County's subrogation lien. In his order for judgment dated November 14, 1996, the trial judge ordered that judgments be entered on behalf of Ronald A. Dressler, Louis B. Liebfried, Jr. and their insurers dismissing the complaint of the plaintiffs "upon the merits, with prejudice, and with taxable costs against plaintiffs, but **not** the involuntary plaintiff, Grant County, since participation was nominal: It was not a substantial litigating plaintiff." (Emphasis in original.) The trial judge cited no authority for this ruling.

Maahs appealed the trial judge's ruling denying costs against Grant County. He relies on ***Sampson***, as authority for taxing costs on the County.

Grant County raises a series of arguments in opposition to Maahs' appeal of the trial judge's ruling denying the taxation of costs against Grant County. Each argument will be discussed briefly in the order advanced.

First, Grant County argues that the taxation of costs issue was waived by Maahs because he did not seek to have costs taxed against Grant County in the trial court. We disagree.

The defendants sought costs against Grant County. The trial judge ruled in his order for judgment that costs should not be taxed against Grant County because its "participation was nominal: It was not a substantial litigating plaintiff." The defendants, therefore, submitted judgments without costs taxed against Grant County. Maahs has appealed these judgments timely which incorporate the trial court's ruling. In our opinion, Maahs was not required to

move the trial court for taxation of costs against the County or move for reconsideration of the trial court's order in that regard to preserve the issue on appeal.

Second, Grant County argues that it was not served with the amended summons and complaint, and therefore, "costs cannot be entered against Grant County since they were never served with the amended summons and complaint and did not execute same as a plaintiff." Grant County offers as authority for the argument, an 1855 case, ***Abrams v. Jones***, 4 Wis. 841 (1855).

Lack of service was not raised by Grant County in the trial court and, therefore, was waived. Section 802.06(8)(a), STATS. In addition, Grant County had actual notice that Maahs had joined it as an involuntary plaintiff. Once joined, Grant County had to elect one of three options: (1) participate in the prosecution of the action; (2) agree to have its interest represented by Maahs, the party who caused the joinder; or (3) move for dismissal with or without prejudice. Section 803.03(2)(b), STATS. It participated in the action by signing the pretrial stipulation approved by the court which protected its subrogation interest if Maahs prevailed against Liebfried at trial. It agreed to have its interest represented by Maahs at the trial. It elected not to participate during the trial, but it did not seek to have its subrogation interest dismissed without prejudice. It bound itself to the pretrial stipulation and order, and it is clearly bound by the judgments entered dismissing its subrogation claim on its merits and with prejudice. It does not claim otherwise.

Third, Grant County argues that "none of the parties filed a claim against Grant County pursuant to Wisconsin Statutes Section 893.80.... [t]herefore, Grant County cannot be ordered to pay any monies in this matter." Grant County

offers no authority on point for the contention that a notice of claim is required before a prevailing defendant can tax costs against a governmental body. Grant County asserted its subrogation interest in this litigation. It sought recovery in this litigation. No party made a claim against Grant County. The purpose of the notice of claim statute is to allow the governmental body to promptly investigate and evaluate a claim made against it or its officers and employees. ***Markweise v. Peck Foods Corp***., 205 Wis.2d 208, 219-20, 556 N.W.2d 326, 331 (Ct. App. 1996). We conclude that taxation of costs following trial is not a claim that must be preceded by notice under § 893.80, STATS.

Fourth, Grant County argues that "the costs demanded by the defendants in this matter are excessive." The taxation of costs is a clerk of court function; objections to items of costs must be made to the clerk and, then, are subject to review by the trial court. Section 814.10, STATS.

Fifth, Grant County argues that the taxation of costs against Grant County would violate the pretrial stipulation and order entered into by the parties. The stipulation and order is silent as to costs. The issue was not addressed. However, the agreement was designed in part to protect the County's subrogation interest by having it satisfied out of insurance proceeds if Maahs prevailed. Maahs did not prevail. Grant County was a plaintiff, and, we conclude, is subject to costs to the prevailing defendants under ***Sampson***.

Sixth, Grant County argues that this court should withhold its decision on the taxation of costs until pending legislation is passed by the legislature which will prohibit taxation of costs against the Department of Health and Family Services or a county joined as a plaintiff under § 803.03, STATS., because of a subrogation lien based on benefits paid under subchapter IV of ch.

49, STATS. This legislation was passed as part of 1997 Wis. Act 27, effective October 14, 1997, (the 1997-99 Budget Bill). Section 5184 of the Act created § 814.03(3), STATS.[7]

The Act, however, made the initial applicability of the new subsection to § 814.03, STATS., the commencement date of any action or claim made on or after the effective date of the Act. Section 9309 of the Act reads as follows:

> **Initial applicability; circuit courts.**
>
> (1) LIABILITY OF CERTAIN SUBROGATED PLAINTIFFS. The treatment of section 814.03(3) of the statutes first applies to actions or claims commenced on the effective date of this subsection.

The new subsection, therefore, is not retroactive and does not apply to this action and the taxation of costs against Grant County.

Seventh, Grant County argues that this appeal is untimely. There are two appealable judgments in this case: the judgment of Ronald Dressler and Economy Fire & Casualty Company entered December 18, 1996; and the

[7] Section 814.03(3), STATS., reads as follows:

> **(3)** Notwithstanding subs. (1) and (2), where the department of health and family services or a county is joined as a plaintiff pursuant to ss. 49.89(2) and 803.03(2)(a) because of the provision of benefits under subch. IV of ch. 49, and where the interests of the department of health and family services or of the county are represented under s. 803.03(2)(b) by the party who caused the joinder, the department of health and family services or the county shall not be liable for costs to any prevailing defendant.

judgment of Louis B. Liebfried, Jr. and Wisconsin Mutual Insurance Company entered December 20, 1996. In our opinion, this appeal is timely as to each.[8]

The Dressler/Economy judgment was signed on December 16, 1996. However, it was not entered until December 18, 1996. ("A judgment is entered when it is filed in the office of the clerk of court." Section 806.06(1)(b), STATS.) The notice of entry of judgment contains December 16, 1996, as the date of entry of the judgment. This is an incorrect date. Although notice of entry of judgment reduces the time for appeal from ninety days to forty-five days if given within twenty-one days after entry, § 806.06(5), the notice *must* contain an accurate date of the entry of judgment to be effective. ***Weina v. Atlantic Mut. Ins. Co***., 177 Wis.2d 341, 344-45, 501 N.W.2d 465, 466-67 (Ct. App. 1993). It did not. Therefore, the Dressler/Economy judgment could be appealed at any time within ninety days after entry, § 808.04(1), STATS.

The Liebfried/Wisconsin Mutual judgment was signed on December 20, 1996 and entered the same date. The notice of entry of judgment was dated December 27, 1996. This notice, when mailed, reduced the time to appeal the Liebfried/Wisconsin Mutual judgment to forty-five days from entry of judgment. Section 808.04(1), STATS. The appeal from this judgment was initiated within this forty-five day limitation.

[8] Grant County argues that the trial judge's order for judgment dated November 14, 1996, was an appealable order. We do not agree. It was not a final order, and was not stamped as such. It clearly directed that final judgments should be prepared and entered on behalf of Ronald Dressler and his insurer and Louis Liebfried, Jr. and his insurer. Even if we assume that it was an appealable order, however, the appeal was filed on February 3, 1997, well within the ninety days allowed for appeal when notice of entry of the order was not given. Section 808.04(1), STATS.

In addition to these arguments, Grant County makes two assertions with respect to the ***Sampson*** decision that are plainly wrong. First, Grant County argues that the ***Sampson*** decision "was not entered by this Court of Appeals district and has no legal effect as far as creating a precedent." Where an issue has been decided by the court of appeals in a published decision, it has statewide precedential effect. Section 752.41(2), STATS. Only the supreme court has the power to overrule, modify or withdraw language from a published decision of the court of appeals. ***Cook v. Cook***, 208 Wis.2d 166, 189-90, 560 N.W.2d 246, 256 (1997).

Second, Grant County argues that the ***Sampson*** court "ruled that Milwaukee County waived their right to be relieved from the judgment imposing costs since they did not raise this issue before the trial court." This is a misstatement of the ***Sampson*** decision.

The ***Sampson*** court held that Milwaukee County had waived any appellate relief under § 806.07(1)(a), STATS., because that subsection had not been raised in the trial court. ***Sampson,*** 184 Wis.2d at 26, 515 N.W.2d at 920. However, the court addressed the other two subsections raised below and on appeal, § 806.07(1)(d) and (h). The dissent by Judge Fine, concurring in part and dissenting in part, raised waiver by the County, and indicated that he would have decided the case on that narrow basis. The majority disagreed, however, and reached the merits.

The ***Sampson*** court affirmed the trial court's order awarding costs against Milwaukee County as a subrogated party in a personal injury lawsuit in which the defendants prevailed. The plaintiff named the County as a defendant. The County filed a notice of appearance but did not participate in the trial. In the

defendants' motion for judgment on the verdict, they moved the trial court to amend the case caption to name Milwaukee County as a plaintiff pursuant to § 803.03, STATS., and to tax costs against it pursuant to § 814.03, STATS. The trial court granted the motion amending the caption naming the County as a plaintiff and ordered judgment for the defendants with costs.

The County filed a motion for relief from the judgment pursuant to § 806.07(1)(d) and (h), STATS. The trial court denied the motion. The County appealed, claiming that costs could not be taxed against a subrogated party. The ***Sampson*** court rejected the County's argument. It held that the costs-to-defendant statute, § 814.03, STATS., "is plain on its face and clearly applies to *all* plaintiffs, not just to non-subrogated plaintiffs." ***Sampson,*** 184 Wis.2d at 27, 515 N.W.2d at 920 (emphasis in original).

In addition, the ***Sampson*** court held that the joinder statute, § 803.03, STATS., requires a joined subrogated party to elect one of the three options set out in § 803.03(2)(b), or risk dismissal of its subrogation claim with prejudice. It determined that Milwaukee County had "exercised the first and, in a sense, the second options under § 803.03(2)(b)." ***Id***. at 28, 515 N.W.2d at 920-21. "Thus, the County, despite its lack of active participation, was a `litigating plaintiff' and had its interest represented to an extent by Sampson." ***Id.*** at 28, 515 N.W.2d at 921.

Similarly, in this case, Grant County exercised the first and the second options. It entered into a pretrial stipulation, approved by the court, to protect its subrogation interest out of insurance proceeds payable to Maahs if he prevailed against Liebfried; and it turned over its interest to Maahs to represent during the trial. Like Milwaukee County, Grant County was a "litigating plaintiff"

albeit denominated an involuntary plaintiff by Maahs, and electing not to participate at trial.

The ***Sampson*** case controls and costs are taxable against Grant County. The trial judge's order denying costs against Grant County must be reversed and the matter remanded for further proceedings with respect to taxation of costs.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded.

Not recommended for publication in the official reports.