COURT OF APPEALS
DECISION
DATED AND FILED

November 18, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1166

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

LILLIAN MCKEE,

PLAINTIFF-APPELLANT,

V.

PRICE COUNTY AND WISCONSIN COUNTY MUTUAL INSURANCE CORP.,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Price County: GARY L. CARLSON, Judge. *Affirmed.*

Before Cane, P.J., Myse and Hoover, JJ.

PER CURIAM. Lillian McKee appeals a judgment dismissing her negligence action against Price County and its insurer, Wisconsin County Mutual Insurance Corp. McKee argues that a jury question was presented whether the County breached its duty of ordinary care. We affirm the judgment.

The action arises out of a collision resulting in the death of McKee's son, Timothy McKee. On February 15, 1995, on State Highway 8, Patrick Potter attempted to pass a line of cars following a County snowplow. Timothy was driving a vehicle in that line of cars. The snowplow, plowing the westbound shoulder of the highway, created a cloud of snow extending the width of the highway. The snowplow driver estimated his speed between thirty and thirty-five miles per hour; another witness estimated the plow's speed at forty to forty-five miles per hour.

The accident occurred four to five miles outside town limits. It had snowed the night before, but was not snowing at the time of the collision. When Potter came up behind the line of cars, he pulled into the eastbound lane to pass. He saw what looked like snow blowing across the highway and then collided with an oncoming logging truck. The logging truck driver lost control and crossed the center line, colliding with Timothy's vehicle. The logging truck driver testified that as he came out of the blinding snow cloud, he saw Potter's pickup a split second before the collision. He testified that the snow cloud created by the plow completely concealed the objects behind it. He swerved to miss but there was no time.

The snowplow operator testified that he knew he was creating a snow cloud, and that he was able to reduce the size of the cloud by slowing down. He testified that he maintained a consistent speed. There is no evidence that he deviated from his course of travel. The traveled portion of the roadway was salt covered and not slippery. He was aware of the hazard created by the snow cloud.

After McKee rested, the trial court concluded that the issue of the snowplow operator's negligence was controlled by ***Jacobson v. Greyhound Corp.,***

29 Wis.2d 55, 138 N.W.2d 133 (1965), and concluded that McKee failed to demonstrate a breach of ordinary care on the part of the County. It granted the County's motion for directed verdict and entered a judgment of dismissal. McKee appeals.

McKee argues that the trial court erroneously dismissed because she presented a jury question with respect to the County's negligence. Before we turn to McKee's contention, we note that, contrary to RULE 809.19(1)(d) and (e), STATS., McKee fails to provide any citations to the record, risking sanctions that include striking the brief. *See* RULE 809.83(2), STATS. A reviewing court need not sift the record for facts to support counsel's contentions. ***Keplin v. Hardware Mut. Cas.,*** 24 Wis. 2d 319, 324, 129 N.W.2d 321, 323 (1964). This court cannot continue to function at its current capacity without requiring compliance with the rules of appellate procedure, the purpose of which are to facilitate review. ***Cascade Mt. v. Capitol Indemn. Corp.,*** No. 96-2562 slip op. at 5 n.3 (Wis. Ct. App. July 3, 1997, ordered published Aug. 26, 1997) (569 N.W.2d 45).[1] In the future, counsel must be aware that strict compliance will be expected.

Because the circumstances of this case resemble those of ***Jacobson,*** we recount that case in some detail. A collision between a passenger car and a Greyhound bus occurred in mid-afternoon on a straight stretch of Highway 12 running north and south. ***Id.*** at 58, 138 N.W.2d at 134. It was cold and windy but

[1] When this court was created in 1978 as a 12-judge court, it was anticipated that within five years it would reach its capacity of 1,200 appeals annually, or 100 cases per judge. ***Cascade Mt. v. Capitol Indemn. Corp.,*** No. 96-2562 slip op. at 5 n.3 (Wis. Ct. App. July 3, 1997, ordered published Aug. 26, 1997). That capacity was exceeded its first full year of operation and, in 1996, 3,628 cases were filed in our 16-judge court, amounting to 227 opinions per judge. ***Id.*** This figure does not include petitions, motions and miscellaneous matters, each requiring disposition by order. (In 1996, 324 petitions for leave to appeal, 5,643 motions and 931 miscellaneous matters were filed.) ***Id.***

not snowing. The snow was blowing and drifting across the highway. A Clark County snowplow was proceeding north plowing intermittent drifts on the east shoulder and the roadway. ***Id.*** The truck's lights were on and properly working. As the snowplow encountered drifts, it would create a large cloud of snow that restricted visibility for short intervals. ***Id.*** at 59, 138 N.W.2d at 134-35. The operator was aware of the hazard the snow was creating. ***Id***.

The car was traveling in a southerly direction and the bus in a northerly direction. ***Id.*** at 58, 138 N.W.2d at 134. The Greyhound bus driver decreased his speed as he came up behind the snowplow. "As the bus and the car approached the snowplow a large cloud of snow was thrown into the air. Both drivers claimed they were momentarily unable to see anything." ***Id.*** at 59, 138 N.W.2d at 135. The bus driver described it as a solid wall of snow and testified that he did not know where he was on the highway. ***Id.*** A head-on collision occurred just south of the snowplow on the west part of the roadway in the southbound lane. ***Id.***

The survivors of the passenger car initiated an action against Greyhound, which interpled the County, alleging negligence on the part of the snowplow operator. ***Id.*** at 57-58, 138 N.W.2d at 134. The court received testimony that "the faster you plow snow the higher it will be thrown in a strong wind" and it would impair visibility. ***Id***. at 61, 138 N.W.2d at 136. The hazardous weather conditions were known to all three drivers. ***Id.*** at 64, 138 N.W.2d at 138. The drivers saw the snow blowing across the highway when the plow hit drifts. ***Id.***

In rejecting contentions of negligence based upon improper speed and lookout, our supreme court held that "a driver ordinarily has no duty of

maintaining a lookout to the rear unless a deviation from his course of travel or his position on the highway could reasonably create or constitute a hazard to drivers approaching from the rear." ***Id.*** at 65, 138 N.W.2d at 138. "To say that he was required to stop before plowing each drift on the busy state highway would be such an unreasonable restriction as to practically prevent any efficient snowplowing." ***Id.***

Jacobson also held that absent any "testimony as to the length, width or depth of the drifts, or the size or height of the plow blade, coupled with his position on the highway, it would be only speculation to find that a speed of 20 miles per hour would appreciably affect the blowing snow hazard, or that his speed was negligence." ***Id.*** at 65-66, 138 N.W.2d at 138.

Applying ***Jacobson***'s analysis to the present case, we conclude that the trial court correctly entered judgment of dismissal. The trial court does not grant a motion for directed verdict unless it is satisfied that, considering all credible evidence and reasonable inferences in the light most favorable to the opposing party, there is no credible evidence to sustain a finding in favor of that party. Section 805.14(1), STATS. Cases should be taken from the jury only when plaintiff's evidence, given the most favorable construction it will reasonably bear, is insufficient to sustain a verdict in plaintiff's favor. ***Murawski v. Brown,*** 51 Wis.2d 306, 311, 187 N.W.2d 194, 196 (1971).

Here, the evidence was undisputed that the snowplow operator did not deviate from his course of travel on the highway. Although a snow cloud was created, this obstacle was evident to all the drivers on the road. There is no suggestion that the operator was not complying with rules of the road. Any suggestion that the operator's speed was a factor would be mere speculation absent

testimony showing the relationship between the snow cloud and miles per hour, the length, width, or depth of the snow, the size of the blade and the plow's position on the highway. ***Jacobson,*** 29 Wis.2d at 65-66, 138 N.W.2d at 138. Because the case before us cannot be meaningfully distinguished from ***Jacobson,*** we conclude that the court correctly relied upon it when concluding that McKee failed to raise a jury issue with respect to the snowplow operator's negligence.

McKee argues that ***Jacobson*** is inapplicable in light of more recent cases establishing a driver's duty to maintain a lookout to the rear, ***Bentzler v. Braun,*** 34 Wis.2d 362, 149 N.W.2d 626 (1967), and ***Krainz v. Strle,*** 81 Wis.2d 26, 259 N.W.2d 707 (1977). We disagree. ***Bentzler*** involved a motorist who reduced his speed on the highway to five miles an hour. The court held that if the driver "intended to stop or slow down appreciably, he had the duty of making an observation to the rear to see that it could be done with safety." ***Id***. at 371, 149 N.W.2d at 631. ***Bentzler*** is consistent with ***Jacobson.***

Krainz reaffirmed ***Jacobson,*** stating that controlling Wisconsin law provides that

> the driver of the front car owes no duty to the driver of the car behind him, except to use the road in the usual way …. However, if the driver of the front car intends to deviate from his course of travel or suddenly stop or decrease his speed in such a manner that would create a hazard to a car following in a lawful manner, he must then exercise ordinary care to make a lookout to the rear before making such movement.

Krainz, 81 Wis.2d at 29, 259 N.W.2d at 708. ***Bentzler*** and ***Krainz*** are consistent with ***Jacobson,*** and McKee's argument therefore fails.

Next, McKee contends that the trial court erred because it failed to consider ***Frostman v. State Farm Mut. Ins. Co.,*** 171 Wis.2d 138, 491 N.W.2d 100 (Ct. App. 1992). We disagree. In ***Frostman,*** we rejected the County's argument that it was entitled to summary judgment because it was immune from liability based upon public policy and § 893.80(4), STATS., granting immunity to municipalities for discretionary acts. In so holding, we stated, "Rather, we are merely willing to impose liability when the county fails to exercise its duty of ordinary care when engaging in snowplowing." ***Id.*** at 143, 491 N.W.2d at 102. That is no different from what ***Jacobson*** holds and what the trial court held here. *Cf.* ***id***. at 64, 138 N.W.2d at 138 ("The county does not contend that it could not be held liable under any circumstances nor that the snowplow driver could not have been negligent regardless of how he drove the vehicle."). Here, the issue is whether, considering all credible evidence and inferences in the light most favorable to McKee, a reasonable jury could have found that the snowplow operator failed to exercise its duty of ordinary care. Because the issue in ***Frostman*** was different from the issue presented here, the trial court did not err by failing to apply ***Frostman.***

Finally, McKee argues that the trial court erred by failing to consider the snowplow operator's duty to the oncoming logging truck driver. There is, however, no evidence that the snowplow operator breached his duty of care to the oncoming driver by plowing snow near the shoulder of the opposite lane while maintaining consistent speed.

Without citation to the record, McKee asserts that the operator failed to maintain proper lookout, because the operator testified that he had no specific recollection of passing a logging truck. The operator testified that he did not see the accident because it happened behind him, and he had no idea that it occurred

until some twenty minutes later when he was on his return trip and came upon the accident scene. We conclude that the operator's lack of specific recollection is insufficient to show improper lookout.

Again without record citation, McKee argues that the operator's "supervisors advised him to slow down to reduce the size of a cloud upon becoming aware of other vehicles. Clear and compelling evidence was offered that established that the snowplow operator failed to follow these instructions." We disagree that there was any evidence to support a finding that the operator breached instructions from supervisors. The trial transcript fails to indicate that any supervisor's testimony was offered. In her brief, McKee relies on the following testimony of the operator:

> Q. You were instructed before that day to do your best to keep the snow cloud down so that vehicles could pass safely; is that right?
>
> A. Yes.
>
> ….
>
> Q In any event, you would plow creating a cloud that would impair visibility, and you would keep notice of vehicles behind you, and when you saw vehicles approaching, you would reduce your speed, that would reduce the size of the cloud; is that right?
>
> A. Yes.

This testimony fails to support a finding that the operator breached any instructions from his supervisors relative to oncoming vehicles. First, it refers to vehicles behind him. Second, although the operator testified that he was instructed to "do his best" to control speed in order to control the size of the snow cloud, there is no evidence as to what size snow cloud was permissible or that the

size of the snow cloud he created at the time in question violated instructions. There is no evidence that, short of stopping altogether, the operator would have been able to avoid impairing visibility. "To say that he was required to stop before plowing each drift on the busy state highway would be such an unreasonable restriction as to practically prevent any efficient snowplowing." ***Jacobson,*** 29 Wis.2d at 65, 138 N.W.2d at 138. Because there is no evidence that the creation of the snow cloud violated instructions, McKee's argument fails. Any verdict finding a breach of ordinary care on the part of the snowplow operator would necessarily be based upon speculation. Accordingly, the trial court's judgment of dismissal was appropriate.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.