

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 23, 1997

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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. 97-1192

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

SYBIL DRABEK,

PLAINTIFF-APPELLANT,

V.

FLOYD RASMUSSEN,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Forest County:
ROBERT E. KINNEY, Judge. *Reversed and cause remanded.*

MYSE, J. Sybil Drabek appeals a judgment dismissing her complaint and assessing frivolous sanctions. Drabek contends that the dismissal was improper because the trial court erroneously excluded evidence under the dead man's statute, § 885.16, STATS. Drabek further contends that because sufficient evidence existed to support her claim, it was not frivolous. Because this court concludes that the trial court excluded important evidence preventing trial of

the real controversy, and that the assessment of frivolous costs was improperly granted, the judgment is reversed and remanded for a new trial.

Drabek brought a small claims action after Floyd Rasmussen obtained title to, and possession of, a car she claims she bought. Drabek contends that she purchased the car from Floyd's late father, William, through her agent and brother, Edward Monnot. Drabek claims to have paid \$1,000 in cash for the car, but lacks a title or any other written evidence of such a transaction.

At trial, Drabek intended to pursue her claim through offering the following direct testimony by her and Monnot: the actual sale between Monnot and William; a telephone call made to Floyd before William's death informing him of the sale; William's bringing of the title over to Monnot's place of business; and William's apparent knowledge of Drabek's possession of the car during the final weeks of his life. In addition, Drabek intended to introduce a repair bill with her name on it, issued while William was still alive, to show evidence of ownership. Floyd routinely objected.

The trial court decided that the dead man's statute, § 885.16, STATS., prevented the admission of virtually all of Drabek's evidence. Because the trial court concluded that Drabek could not introduce any evidence to corroborate her claim, frivolous costs were also imposed as a sanction. Drabek appeals.

I. The Trial Court Erred by Dismissing Drabek's Case

Drabek argues that dismissal was improper because the trial court erroneously excluded material evidence. When important evidence is erroneously excluded causing the real controversy not to be fully tried, this court has the discretionary power to reverse a judgment of the trial court and remand for a new

trial. *Vollmer v. Luety*, 156 Wis.2d 1, 17, 456 N.W.2d 797, 805-06 (1990); § 752.35, STATS. This court concludes that the trial court did exclude important evidence, and therefore remands for new trial.

The trial court excluded the material evidence based on its interpretation of the dead man's statute, § 885.16, STATS. In reviewing this decision, our interpretation of the statute is a question of law that we review de novo. See *Hunzinger Constr. Co. v. Granite Resources Corp.*, 196 Wis.2d 327, 332, 538 N.W.2d 804, 806 (Ct. App. 1995). This court concludes that the trial court's interpretation was erroneous, and therefore the evidence should not have been excluded on that basis.

The Dead Man's Statute

The trial court found that Drabek could not overcome the effect of § 885.16, STATS., and concluded that there was virtually no evidence she could introduce that would not contravene the statute. Although § 799.209, STATS., grants much discretion to the trial court in making evidentiary determinations, and although § 885.16, STATS., is a rule of evidence, see § 906.01, STATS., this court cannot agree with the trial court's conclusion.

This court begins by noting the long-standing rule that § 885.16 is to be construed as narrowly as possible. See *Hunzinger*, 196 Wis.2d at 333-34, 538 N.W.2d at 807, and cases cited therein. A review of the case law in this area demonstrates that the trial court improperly excluded several important pieces of evidence.

First, the trial court should not have excluded the testimony of Monnot, who is both Drabek's brother and her agent for the alleged sale. Under

either relationship to Drabek, the dead man's statute does not apply to him. Section 885.16, STATS., "only excludes the testimony of a party to the action. ... It does not exclude the testimony of the agent ... to prove the whole cause of action." *Hunzinger*, 196 Wis.2d at 335, 538 N.W.2d at 807 (quoting *Hanf v. Northwestern Masonic Aid Ass'n*, 76 Wis. 450, 452-53, 45 N.W. 315, 315 (1890) emphasis deleted). Further, Monnot's relationship to Drabek is insufficient to bring him within the statute. Wisconsin courts have repeatedly held that close relatives of the claimant, such as spouses or children, do not fall under the dead man's statute because their interests are too remote and contingent. *See Havlicek/Fleisher Enters., Inc. v. Bridgeman*, 788 F. Supp. 389, 397 (E.D. Wis. 1992), and cases cited therein. The trial court therefore erred by excluding Monnot's testimony based on the dead man's statute.

Second, the trial court erroneously excluded testimony regarding William dropping off the title at the bar, which William apparently did in satisfaction of the car sale. At the new trial, the dead man's statute would not prevent testimony by the bartender or anyone else that William dropped off the title. The trial court would also be permitted to admit Drabek's own testimony on this, depending on its discretionary application of § 885.16, STATS. The interests of such witnesses, if indeed they can even be considered interested, would be too remote and contingent. *Bridgeman*, 788 F. Supp. at 397.

Third, introduction of the repair bill does not violate the dead man's statute. It is evidence of a transaction between Drabek and the repair shop, so therefore § 885.16, STATS., does not apply. The trial court appeared concerned that this evidence amounted to "a course of conduct between [Drabek] and the deceased which may constitute a transaction." Although Drabek offered this evidence to prove the sale, the dead man's statute is not so broad-reaching as to

exclude this documentary evidence of her dealings with the repair shop. At the new trial, witnesses from the repair shop would also be permitted to testify to this transaction. Depending on the strictness of the trial court's application of the dead man's statute, Drabek might also be permitted to so testify.

Thus, the trial court erroneously excluded evidence under the dead man's statute and prevented the real controversy from being tried. This court wishes to stress that the application of § 885.16, STATS., provided in this opinion is the strictest permissible one; it does not intend to suggest that the trial court lacks discretion to provide a more liberal reading and permit other evidence as well. *See* § 799.209, STATS. (the rules of evidence shall not govern a small claims trial in order to permit an informal proceeding, one allowing each party to present evidence to the extent reasonably necessary for full and true disclosure of the facts); *Hunzinger*, 196 Wis.2d at 333-34, 538 N.W.2d at 807 (recognizing Wisconsin's long-standing policy of construing the dead man's statute as narrowly as possible). Ultimately, however, the trial court's application of § 885.16 like the credibility and weight to be given to such evidence, is left to its proper use of discretion.

II. The Trial Court Erred by Awarding Frivolous Sanctions

The trial court also erred by imposing frivolous costs against Drabek and her attorney. While this court will not upset the trial court's findings of facts supporting the frivolous claim unless they are against the great weight of the evidence, the ultimate question of whether those facts fulfill the legal standard of frivolousness is a question of law that is reviewed de novo. *Stern v. Thomspson & Coates, Ltd.*, 185 Wis.2d 220, 236, 517 N.W.2d 658, 664 (1994).

The trial court assessed frivolous sanctions under § 814.025(3)(b), STATS., essentially finding that the action was without any reasonable basis in law and could not be supported by a good faith modification argument. The trial court based its ruling on Drabek's imputed knowledge of § 885.16, STATS., and the constraints placed upon the evidence to prove the purchase of the auto.

This court disagrees that the filing of this action was frivolous. As noted in part one of this opinion, a small claims trial court is empowered to relax the rules of evidence. In addition, appeals courts have long encouraged trial courts to construe the dead man's statute as narrowly as possible. These factors alone are sufficient to counter the argument that Drabek's claim was without a reasonable basis in law. When this court further considers that the trial court based the sanction in part on an erroneous exclusion of important evidence, it is convinced that Drabek's claim was not frivolous.

This court therefore concludes that the trial court erred by excluding material evidence under an erroneous interpretation of the dead man's statute, preventing trial of the real controversy. Further, the imposition of costs for the prosecution of a frivolous claim was in error. The judgment is therefore reversed, and the matter is remanded for a new trial.

By the Court.—Judgment reversed and cause remanded.

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

