COURT OF APPEALS
DECISION
DATED AND FILED

July 22, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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* § 808.10 and RULE 809.62, STATS.

No. 99-0280-FT

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

JANESVILLE PRODUCTS, A UNIT OF JASON INCORPORATION,

PLAINTIFF,

V.

CAP ELECTRIC, INC., AND ABC INSURANCE COMPANY,

DEFENDANTS,

A&A SHEET METAL WORKS, INC., AND FEDERATED MUTUAL INSURANCE COMPANY,

DEFENDANTS-THIRD-PARTY PLAINTIFFS-RESPONDENTS,

V.

MH EQUIPMENT SERVICE CORP., AND CONTINENTAL WESTERN INSURANCE COMPANY,

THIRD-PARTY DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Rock County: RICHARD T. WERNER, Judge. *Affirmed.*

Before Eich, Vergeront and Deininger, JJ.

PER CURIAM. MH Equipment Service Corporation appeals from a judgment in a tort action brought by Janesville Products. The judgment, entered after trial to the court, assigned 75% of the liability to MH, and 25% to A&A Sheet Metal Works, Inc., for a fire that damaged Janesville's property. On appeal, MH contends that the trial court erred in its apportionment of liability because the court based its decision on incredible testimony. We reject that contention, and affirm.[1]

A&A owned a machine serviced by MH. A&A reported a malfunction, and called MH to repair it. MH's employee inspected the machine, disconnected the batteries and placed an out-of-service sign on it, and then left the premises. Tom Arndt of A&A subsequently spoke with someone from MH. He testified that he was told that he could use the machine without safety concerns until it was repaired. He also testified that he did not know the MH employee had disconnected the batteries and tagged the machine out-of-service. Witnesses for MH denied that anyone ever told Arndt that he could continue using the machine. Its subsequent operation caused the fire that damaged Janesville's property.

The trial court held MH 75% liable based on its finding that MH failed to warn A&A of the safety risks in operating the machine. The court held A&A 25% responsible based on its finding that A&A reconnected the batteries

[1] This appeal was expedited pursuant to RULE 809.17, STATS.

and used the machine after MH had tagged it. The trial court's decision rested on its determination that Arndt told the truth about his conversation with an MH employee, and that MH did, in fact, place and label the machine out-of-service.

According to MH, the trial court was obligated to disbelieve all of Arndt's testimony because it did not believe him about restarting and operating the tagged machine. However, as the trial court explained in its decision on MH's motion for reconsideration, the court's apportionment of 25% liability to A&A did not depend on a finding that Arndt testified untruthfully about restarting the disabled machine. The court pointed out that Arndt testified that he was not personally aware that the machine was tagged out-of-service. "The determination that the [machine] was disconnected does not logically lead to a finding that Tom Arndt personally knew it had been disconnected. The [machine] could be disconnected without Tom Arndt knowing that fact."

Even if MH's contention rested on an accurate description of the trial court's credibility findings, MH could not prevail on appeal. When the trial court acts as the finder of fact, it is the ultimate arbiter of the witness's credibility. ***Lessor v. Wangelin***, 221 Wis.2d 659, 665, 586 N.W.2d 1, 3 (Ct. App. 1998). This court will not reweigh the testimony of the witnesses and reach a conclusion regarding credibility contrary to the trial court's, and it is frivolous to seek that result on appeal. ***Id***. at 669, 586 N.W.2d at 5. Furthermore, the finder of fact may find some of a witness's testimony credible while rejecting another portion of it. ***State v. Toy***, 125 Wis.2d 216, 222, 371 N.W.2d 386, 389 (Ct. App. 1985).

By the Court.—Judgment affirmed.

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