COURT OF APPEALS
DECISION
DATED AND FILED

March 1, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP2313 **Cir. Ct. No. 2014SC219**

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

SHANE KURTZ AND KARROL THOMAS,

PLAINTIFFS-APPELLANTS,

V.

GARY L. MAREK AND RURAL MUTUAL INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Burnett County: KENNETH L. KUTZ, Judge. *Affirmed*.

¶1 SEIDL, J.[1] Shane Kurtz and Karrol Thomas (collectively, Kurtz), pro se, appeal an order dismissing a small claims complaint against Gary Marek

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

and his insurer, Rural Mutual Insurance Company (collectively, Marek).[2] Kurtz argues the circuit court erroneously determined Marek was not statutorily liable for damages Kurtz's truck sustained when it collided with Marek's cattle in a roadway. We reject Kurtz's argument and affirm.

BACKGROUND

¶2 Kurtz testified as follows at a hearing before a court commissioner. Kurtz was returning from a landscaping job at approximately 10:30 p.m. in July. He was driving his 1985 Chevrolet pickup truck and towing a 6,500-pound skidsteer on a trailer. It was dark and clear, and Kurtz was traveling thirty to forty miles per hour. He encountered a slight "pitch" in the road that limited the range of his headlights. When Kurtz suddenly saw livestock in the road, he braked and down shifted the truck into low gear. However, he was unable to stop and struck the cattle, damaging his truck. Kurtz presented receipts showing $11,000 in truck repairs, as well as photos of his damaged truck.

¶3 Marek also testified before the court commissioner. When Marek arrived at the accident scene he observed one of his cows limping and a calf that was injured and had to be put down. Marek and his son discovered a broken chain on one of the tubular steel gates on his livestock enclosure, and they concluded the cattle escaped from that location.

¶4 Marek further testified the chain he used to secure the gate through which the animals escaped is commonly used by farmers, and, in fact, came welded to the gate. He checked his gates, fences, and chains every day, including

[2] Kurtz was represented by counsel before the court commissioner and circuit court.

the day of the accident. He never had any prior issues with animals escaping, and he explained that the cattle were typically inactive at night.

¶5 Following the evidentiary hearing, the court commissioner issued a written decision. First, the commissioner determined Marek violated the provision of WIS. STAT. § 172.015 that states: "No livestock shall run at large on a highway at any time except to go from one farm parcel to another." Next, the commissioner held:

> In addition, the Court finds that [Marek] was negligent. The evidence showed [Marek's] cattle apparently pushed the gate until the chain broke. I feel that it is not credible to believe that this was the first time the cattle pushed the gate or even so that the first time pushing the gate would break the chain. There must have been wear on the chain that should have been apparent to an even casual inspection. [Marek] testified that he thinks he checked. He did not observe any issues with the gate. I feel that either there was no inspection or the inspection itself was negligent.

¶6 The commissioner further concluded Kurtz was not contributorily negligent,[3] found Kurtz proved $11,000 in damages, and awarded the maximum small-claims award of $10,000. Marek subsequently demanded a trial de novo in the circuit court.

¶7 Instead, at Marek's prompting, the parties agreed to forego a trial and submit the case on briefs. A dispute then arose regarding whether the circuit court would be required to defer to the commissioner's fact findings. The parties nonetheless agreed to proceed with a review without trial, with Marek asserting there were no credibility issues and were only issues of law. Consequently, the

[3] There was conflicting evidence presented regarding whether Kurtz had operational trailer brakes.

circuit court reviewed the transcript of the evidentiary hearing, the exhibits introduced at that hearing,[4] and the parties' briefs.

¶8 The circuit court issued a written decision in Marek's favor, dismissing Kurtz's complaint. First, the court determined Kurtz's common-law negligence claim failed because Marek did not breach any duty. The court reasoned:

> [T]he question is whether Marek failed to take reasonable measures to prevent his cattle from going onto the highway.
>
> Marek testified about the steps he takes to keep his cattle on his property by chaining the gate to their pen. He further testified that he's never had a problem with his cattle running at large off his property before the accident …, which would indicate to a reasonable person that the steps he'd taken to restrain his animals were effective. With no evidence in the record to contradict this, the court finds that Marek was not negligent under common law.

¶9 Additionally, the court rejected Kurtz's argument that Marek was negligent per se under WIS. STAT. § 172.015. The court explained that, despite the statute's prohibition of cattle on highways, an owner is not subject to a fine under that statute unless he or she knowingly permits the animals to remain on a highway after notification from a peace officer. Because Marek had neither knowledge nor officer notification that his cattle were loose, the court concluded there was no violation and, therefore, no per se negligence under the statute.

[4] We observe that Marek's trial exhibit 102, which is a labeled aerial image of his farm, shows the cattle would still have been within a fenced enclosure upon exiting the gate with the broken chain. However, the outer enclosure had a gate across the driveway entrance to the farm, and the exhibit notes that gate was left open the night of the accident. As the parties have not addressed this fact, we do not consider it further.

Because the court concluded there was no negligence, it did not address contributory negligence or damages. Kurtz now appeals.

DISCUSSION

¶10 Kurtz does not argue Marek was liable under a theory of common-law negligence.[5] Rather, he argues only that Marek was liable under WIS. STAT. § 172.015 and/or WIS. STAT. § 172.01. However, this approximately one-page argument is inadequately developed. ***State v. Flynn***, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994) (appellate court may decline to consider issue that is undeveloped in the briefs or that is not supported by citation to legal authority). Kurtz attempts to apply certain provisions of both statutes in isolation, and does not cite or apply the legal standard for determining whether a safety statute gives rise to civil liability.

¶11 WISCONSIN STAT. § 172.015 provides:

> No livestock shall run at large on a highway at any time except to go from one farm parcel to another. If the owner or keeper of livestock knowingly permits livestock to run at large on a highway, except when going from one farm parcel to another, and after notice by any peace officer fails to remove the livestock from the highway, the owner or keeper may be fined not more than $200.

[5] Issues not briefed are deemed abandoned. *See* ***Reiman Assocs. v. R/A Adver., Inc.***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981). We are given pause by the procedure utilized in the circuit court, and the court's apparent rejection of the court commissioner's factual determinations regarding negligence, based on only a paper review of the record. Nonetheless, we will not abandon our neutrality to develop arguments for the parties. *See* ***Industrial Risk Insurers v. American Eng'g Testing, Inc.***, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82.

Kurtz does not address the circuit court's rationale that no civil liability could arise unless Marek was subject to a fine under the statute. Therefore, we deem Kurtz to have conceded the validity of that holding. *See* ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994). Further, citing ***Antwaun A. v. Heritage Mutual Insurance Company***, 228 Wis. 2d 44, 66-67, 596 N.W.2d 456 (1999), Marek responds with a developed argument applying the standard for determining whether a safety statute gives rise to per se negligence. Kurtz failed to file a reply brief and address this argument. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded).

¶12 Kurtz argues Marek was also liable under WIS. STAT. § 172.01. He forfeited this issue by not raising it in the circuit court. *See* ***State v. Huebner***, 2000 WI 59, ¶¶10-12, 235 Wis. 2d 486, 611 N.W.2d 727 ("It is a fundamental principle of appellate review that issues must be preserved at the circuit court."). In any event, Kurtz ignores much of the statute's language, and the statute is inapplicable on its face. Section 172.01 applies only to certain male animals above a particular age. As Marek asserts, "Kurtz's argument fails at the onset because none of Marek's cows were bulls over six months old." Again, Kurtz concedes this argument by failing to reply. *See* ***Charolais Breeding Ranches***, 90 Wis. 2d at 109.

¶13 Because we affirm the circuit court's order dismissing the action based on a determination Marek was not negligent, we need not address Kurtz's additional arguments concerning contributory negligence and damages. *See* ***State v. Castillo***, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) (appellate courts not required to address every issue raised when one issue is dispositive).

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.