COURT OF APPEALS
DECISION
DATED AND FILED

June 12, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 00-1031

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

JAY E. ZUROWSKI,

PLAINTIFF-APPELLANT,

V.

HOBART CORPORATION,

DEFENDANT-RESPONDENT,

OVERNITE TRANSPORTATION COMPANY,

DEFENDANT.

APPEAL from a judgment of the circuit court for Milwaukee County: CHARLES F. KAHN, JR., Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Jay E. Zurowski appeals from a judgment entered after a bench trial wherein the trial court dismissed his personal injury claim alleging negligence and a violation of Wisconsin's Safe Place Statute against Hobart Corporation (Hobart). Zurowski claims the trial court erred in two respects: (1) when it concluded that Hobart was not negligent; and (2) when it determined that a safe place violation was not a cause of his injuries and damages. Because the trial court's findings of fact are not clearly erroneous and support its conclusions of law, we affirm.

I. BACKGROUND

¶2 Overnite Transportation Company (Overnite) hired Zurowski as a full-time truck driver in 1986. His duties included assisting with the loading and unloading of freight if requested by the customer. On August 9, 1994, Zurowski was dispatched to deliver a commercial dishwasher to Hobart's service center. While at the Hobart loading dock, two Hobart employees asked Zurowski to assist in unloading the crate containing the dishwasher. This procedure was accomplished by using a Johnson Bar[1] on the front of the crate, with the two employees of Hobart pushing the crate out of the trailer onto a portable loading plate that spanned the area between the back of the trailer and the loading dock. Zurowski was holding onto the Johnson Bar at the front of the crate, trying to guide it off the truck.

¶3 Zurowski alleged that the portable dock plate used to span the gap between the loading dock and the back of the trailer spun when contacted by the

[1] A Johnson Bar is a device with two wheels on an approximate ten-inch axle connected to and supporting a steel lip at the end of an approximately five-foot-long tapered handle.

wheels of the Johnson Bar, causing him to lose his balance and fall. His left leg dropped through a gap between the dock and the trailer, and his right wrist slipped down the side of the trailer in a hyper-flexed position resulting in a torn scaphoid lunate ligament in his right wrist. Zurowski sued Hobart alleging claims for common law negligence and violation of Wisconsin's Safe Place Statute. After a bench trial, the trial court ruled that Hobart was not negligent and that a violation of the safe place statute was not a cause of Zurowski's injuries. He now appeals.

II. DISCUSSION

¶4 Zurowski claims that there are no record facts to support the trial court's conclusion that Hobart was not negligent. In addition, Zurowski contends that this conclusion cannot be reconciled with the trial court's conclusion that there was a violation of the safe place statute. He argues that Wisconsin law provides that such a violation is negligence in any event. We are not convinced.

1. Standard of Review

¶5 The trial court's findings of fact are reviewed under the clearly erroneous standard. WIS. STAT. § 805.17(2) (1997-98).[2] Under this standard, even though the evidence would permit a contrary finding, findings of fact will be affirmed on appeal as long as the evidence would permit a reasonable person to make the same finding. ***Noll v. Dimiceli's Inc.***, 115 Wis. 2d 641, 643, 340 N.W.2d 575 (Ct. App. 1983). To justify reversal of a trial court's finding, the evidence for a contrary finding must itself constitute the great weight and clear preponderance of the evidence. ***Cogswell v. Robertshaw Controls Co.***, 87 Wis. 2d

[2] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

243, 249-50, 274 N.W.2d 647 (1979). Although a trial court's findings of fact are reviewed under the clearly erroneous standard, whether a party has met its burden of proof is a question of law that we review independently. ***Plesko v. Figgie Int'l***, 190 Wis. 2d 764, 776, 528 N.W.2d 446 (Ct. App. 1994).

¶6 When the trial court acts as the finder of fact, it is the ultimate arbiter of the credibility of the witnesses, ***Gehr v. City of Sheboygan***, 81 Wis. 2d 117, 122, 260 N.W.2d 30 (1977), and of the weight to be given to each witness's testimony, ***Milbauer v. Transport Employes' Mut. Benefit Soc'y***, 56 Wis. 2d 860, 865, 203 N.W.2d 135 (1973). This is especially true because the trier of fact has the opportunity to observe the witnesses and their demeanor on the witness stand. ***Syvock v. State***, 61 Wis. 2d 411, 414, 213 N.W.2d 11 (1973).

¶7 Drawing an inference on undisputed facts when more than one inference is possible is a finding of fact, which is binding upon a reviewing court. ***State v. Friday***, 147 Wis. 2d 359, 370, 434 N.W.2d 85 (1989). "It is not within the province of this court … to choose not to accept an inference drawn by a factfinder when the inference drawn is a reasonable one." ***Id.*** at 370-71.

¶8 Where the trial court has had the opportunity to weigh the credibility of the witnesses, but has failed to make an express finding necessary to support its legal conclusion, an appellate court can assume the trial court made the finding in the way that supports the trial court's decision. ***State v. Wilks***, 117 Wis. 2d 495, 503, 345 N.W.2d 498 (Ct. App.), *aff'd*, 121 Wis. 2d 93, 358 N.W.2d 273 (1984).

2. Analysis

¶9 We initiate this review by noting that the parties were unable to agree on a memorialized set of findings of fact to support the conclusions of law

determined by the trial court. Thus, judgment was entered based on the findings of fact that appear in the oral decision of the trial court on November 8, 1999, and as clarified at a motion hearing on March 3, 2000, to confirm findings of fact and to reconsider.[3] From our review, we deem the following to be the relevant findings of fact rendered by the trial court.

¶10 On August 9, 1994, Zurowski suffered a fall while performing his duties for Overnite at the Hobart service terminal. Something happened while he and two employees from Hobart were moving a commercial dishwasher that was strapped to a skid from a trailer onto the loading dock of Hobart, which resulted in Zurowski losing his balance and placing his weight upon his right hand. A portable dock plate was used to bridge the gap between the trailer and the loading dock. Zurowski was using a Johnson Bar at the time he lost his balance. He sustained a torn ligament to his right wrist. Dr. Lewis Chamoy, a medical expert witness, opined that injury to the wrist was caused by the fall on August 9th. The court found that it was impossible to determine exactly what happened when Zurowski fell. The court further found that the manner in which Zurowski described and demonstrated his fall during the trial was inconsistent with natural physics and the science of biometrics. What Zurowski demonstrated in court as to how the fall occurred was impossible.

¶11 As an ultimate fact, the court determined that Zurowski failed to establish by the greater weight of the credible evidence that the method used to unload the dishwasher at the Hobart dock constituted negligence.

[3] The orders denying these two motions were signed by the trial court on March 15, 2000.

¶12 The court further found that the dock-board used that day did not meet the standard of WIS. ADM. CODE OSHA § 1910.30(a)(2), which requires that "Portable dock-boards shall be secured in position, either by being anchored or equipped with devices which will prevent their slipping." Specifically, it found that the portable dock was not properly anchored. But, the court further found that the evidence failed to support by the greater weight of credible evidence that the dock-board slipped during the unloading, causing the injury.[4]

A. Negligence Claim.

¶13 Zurowski first contends that the trial court's findings of fact are clearly erroneous. He bases his contention on the failure of the court to consider such material evidence as the amount of training Hobart dock personnel had in materials handling, their knowledge of the risks and hazards attendant to the manual removal procedure, whether this procedure exposed frequenters to an unreasonable risk of injury, and whether alternative methods or devices were reasonably available that would have reduced or eliminated known risks and hazards. Hobart replies that each finding made by the trial court is supported by substantial and credible evidence and is not clearly erroneous.

¶14 The first part of Zurowski's negligence claim relates to the quality of the unloading procedure that was used on August 9, 1994. He contends it was unsafe and therefore constituted negligence on the part of Hobart. Stated

[4] The trial court further determined that even if it found Hobart negligent, Zurowski's negligence exceeded Hobart's. On appeal, Zurowski challenges the trial court's findings in this regard. Because of our disposition of the first two issues, however, we need not reach the contributory negligence finding. ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issues need to be addressed).

otherwise, he claims that the use of manpower and the Johnson Bar to unload the dishwasher did not meet the "ordinary care" standard.

¶15 Zurowski contends that the underlying material facts relevant to negligence are undisputed. We disagree. The material facts relating to negligence were strongly contested. Zurowski presented engineer Joseph Driear as his liability expert. Driear testified that the Johnson Bar used by Hobart was not an appropriate tool to transport the crate containing the dishwasher up the portable dock plate to the Hobart dock, and that a Johnson Bar should only be used to *elevate* heavy items. Driear further opined that using the Johnson Bar to horizontally transport the crate containing the dishwasher was a dangerous and unsafe procedure.

¶16 His testimony was countered by witnesses James Mather and Peter Crisp who testified that using the Johnson Bar was a simpler, easier method to move the crate from a trailer to the dock "with one shot." Furthermore, Hobart also called liability experts Dr. John Wiechel, who opined that the Johnson Bar procedure was "very safe," and Ivan Russell, who rendered an opinion to a reasonable degree of probability that "the Johnson Bar and the pushers, with the guys pushing the crate was a satisfactory method of handling the crate."

¶17 Zurowski further posits that the manual method of unloading using the Johnson Bar was not as safe as possible because an alternative procedure was available by use of a forklift. This approach was challenged by both Dr. Wiechel and Russell. The former did not think that the use of a forklift would be "a better operation … and it probably has more risk involved," while the latter concluded "that the forklift or pallet jack were not viable methods."

¶18 The evidence presented directed the trial court to assess whether or not the method employed for moving the crate containing the dishwasher from the trailer to the dock under the existing circumstances constituted negligence. The trial court heard the testimony of Hobart employees and the procedures they followed, as well as the contrary opinions of Zurowski's liability experts. The trial court could have reasonably accepted the position advanced by either party because the record contains substantial credible evidence supporting both positions. After assessing the credibility and demeanor of the witnesses presented, the trial court chose to accept the reasonableness of Hobart's method of unloading.

¶19 There is substantial credible evidence to support the trial court's finding that Hobart was not negligent with respect to its procedure utilized on the loading dock for unloading the dishwasher. Hobart's witnesses testified that the Johnson Bar method was appropriate and that alternative methods were of equal or greater danger than the method used. Accordingly, the trial court's conclusion that Zurowski failed to meet his burden of proving that Hobart's unloading procedure constituted negligence is sufficiently supported in the record.

B. Safe Place.

¶20 The second part of Zurowski's claim of negligence is based upon a violation of a duty imposed by the safe place statute. He argues that the trial court's findings that there was a safe place violation, yet insufficient credible evidence to establish Hobart's negligence, are irreconcilable. Zurowski reasons that it is inconsistent to find that a dock plate which is capable of slipping, thereby rendering the place of employment not as safe as the nature of the place would reasonably permit, while an activity that forced a frequenter to traverse the same dock plate under circumstances which Hobart knew had been causing the dock

plate to slip, was not tantamount to negligence. He maintains that the activity or method of unloading cannot be divorced and analyzed separately from the condition; i.e., the violation of the safe place statute under the circumstances of this case. He bases this proposition upon the premise that a violation of the safe place statute equates with a finding of negligence. ***Lealiou v. Quatsoe***, 15 Wis. 2d 128, 136, 112 N.W.2d 193 (1961); ***Krause v. Veterans of Foreign Wars Post No. 6498***, 9 Wis. 2d 547, 552, 101 N.W.2d 645 (1960). We are not convinced.

¶21 To create liability under the safe place statute, three basic elements must be established: (1) the existence of a hazardous condition; (2) the condition caused the injury; and (3) the employer or owner knew or should have known of the condition. ***Topp v. Continental Ins. Co.***, 83 Wis. 2d 780, 787, 266 N.W.2d 397 (1978). It is well established under our negligence law that the safe place statute does not create a cause of action. It merely establishes another standard of care for determining negligence, albeit stricter than ordinary care. ***Zehren v. F.W. Woolworth Co.***, 11 Wis. 2d 539, 543, 105 N.W.2d 563 (1960). Although Zurowski set forth two causes of action in his complaint, it was not inappropriate for the trial court, acting as the fact finder and arbiter of the law, to analyze his complaint as embodying one cause of action for negligence applying alternative standards of care.

¶22 Zurowski next contends that the trial court's conclusion that there was insufficient credible evidence to establish causation is based upon an erroneous view of the law. The alleged error of law was the failure to accord him a presumption of causation because the defect existed at the place where the accident occurred. He argues that his position is supported by the undisputed fact that he lost his balance while on the dock plate. Zurowski's logic is faulty for two reasons.

¶23 In respect to Zurowski's claim of negligence because of a safe place violation, an unsecured dock plate is a condition of the premises subject to the safe place statute. ***Presti v. O'Donahue***, 25 Wis. 2d 594, 598, 131 N.W.2d 273 (1964). The trial court concluded that the portable dock located on the Hobart terminal dock violated the safe place statute. No one has questioned that conclusion. It is not a subject for this appeal.

¶24 When a failure to fulfill a duty under the safe place statute exists and an accident occurs which the performance of the duty was intended to prevent, the law presumes that the damage was caused by the failure. This presumption, if not rebutted, is sufficient to meet the burden of proof of a prima facie case. Thus, some evidence is required to show the failure to perform the duty or defect was not causal if the presumption is applicable. ***Baker v. Bracker***, 39 Wis. 2d 142, 146, 158 N.W.2d 285 (1968).

¶25 However, "there is no such presumption when the accident does not occur at the spot or place where the defect exists or when the presence of safeguards or the elimination of the defect would have … no effect in preventing the accident." ***Carr v. Amusement, Inc.***, 47 Wis. 2d 368, 372, 177 N.W.2d 388 (1970). Any argument that "proof of an accident in the general area of a defect is sufficient to [invoke] the presumption is without merit and must be rejected." ***Baker***, 39 Wis. 2d at 147.

¶26 It is obvious from the record that the trial court was not oblivious to this important distinction and, although it held that the dock board did not comply with the standard of WIS. ADM. CODE OSHA § 1910.30, it further held "that the evidence … fails to support Mr. Zurowski's claim … that the dock board … in violation … slipped which is what caused his injury.… [T]here[] [has] been no

causal connection between that violation and Mr. Zurowski's injury …." In making this determination, the trial court made two significant findings: (1) Zurowski failed to prove that slippage of the dock board caused the fall; and (2) Zurowski failed to convince the trial court that he was standing on the dock plate when he lost his balance.

¶27 In regard to the first finding of fact, we have searched the record and can find no evidence to support any slippage. Thus, the absence of a finding of slippage is not clearly erroneous. As for the second finding, as we indicated earlier in this opinion, because the parties could not agree on a proposed submitted finding of fact, a motion hearing was conducted to confirm findings of fact. On four separate occasions during the hearing, Zurowski's counsel attempted to convince the trial court that his client was standing on the dock plate when he lost his balance. The trial court refused to find where Zurowski was standing because there was inadequate proof. Zurowski's claim that he was standing on the dock plate at the time of his fall is based upon two components: his own testimony and inferences drawn from the circumstances of the accident.

¶28 We cannot conclude that this proposed inference of location is unreasonable. Nevertheless, when a finder of fact is faced with the question of whether there are sufficient grounds to draw a favorable inference or inadequate grounds to draw any inferences at all, the fact finder having assessed the credibility of the witnesses and assigned the relative probative values to the evidence before it, is in the best position, through a process of reasoning, to find facts that either sustain the burden of proof or not. We conclude that the trial court's findings of fact are clearly not erroneous and its conclusions of law that Zurowski had not met his burden of proof because of these findings was not an error of law.

By the Court.—Judgment affirmed.

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