

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 12, 2001

Cornelia G. Clark
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 WIS. STAT. § 808.10 and RULE 809.62.

No. 00-2289

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

CLARENCE E. TALBERT,

PLAINTIFF-APPELLANT,

DANE COUNTY DEPARTMENT OF HUMAN SERVICES,

**INVOLUNTARY-PLAINTIFF-
(IN T.CT.),**

V.

**AFFILIATED CARRIAGE SYSTEMS, INC., A/K/A
AFFILIATED TAXI COMPANY D/B/A MADISON TAXI, AND
AMERICAN SOUTHERN INSURANCE COMPANY,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Dane County:
STEVEN D. EBERT, Judge. *Affirmed.*

Before Roggensack, Deininger and Lundsten, JJ.

¶1 PER CURIAM. Clarence Talbert appeals a summary judgment which dismissed his negligence action against Affiliated Carriage Systems (d/b/a Madison Taxi) and its insurer, American Southern Insurance Company, with costs. We affirm for the reasons discussed below.

BACKGROUND

¶2 Talbert drove a cab for Madison Taxi. Coming from Tennessee, Talbert had only limited experience driving in winter conditions. His training at Madison Taxi consisted of a three-hour in-house training session on road safety and operational procedures and a single ride-along shift with an experienced driver. The ride along shift was conducted in winter conditions and included directions on how to use the anti-lock brakes and how to stop a skid.

¶3 On the morning of February 8, 1998, following an all-night shift, Talbert requested a ride home. He filled out a direct bill slip, authorizing a payroll deduction for the fare at the twenty-five percent discount rate Madison Taxi gave its employees for trips to and from work. Madison Taxi did not generally permit passengers or off-duty workers to drive its cabs. However, because the driver who was assigned to drive Talbert home needed to return her mother's car, Talbert's dispatcher authorized Talbert to drive his co-worker's cab to her mother's house, so that she could drive him home from there.

¶4 Conditions were foggy that day. En route to the co-worker's mother's house, Talbert changed lanes and accelerated to avoid a semi-truck that was veering into his lane, hit a patch of black ice and skidded into a light pole. Talbert was knocked unconscious and claimed to have hurt his head, neck, back and hip in the collision. Madison Taxi deducted the fare for the uncompleted trip from Talbert's paycheck.

¶5 Talbert filed a worker's compensation claim, but LIRC determined that the accident had occurred outside the scope of Talbert's employment because he was doing a favor for the co-worker, and the circuit court affirmed that determination on certiorari review.¹ Talbert also filed a personal injury action, claiming that Madison Taxi had been negligent in allowing Talbert to drive the cab when he was a paying passenger and should have known he was fatigued from a long shift, and that Madison Taxi had also been negligent in training and supervising its employees. The trial court dismissed the action on summary judgment, and that decision is the subject of this appeal.

STANDARD OF REVIEW

¶6 We apply the same summary judgment methodology as that employed by the trial court. WIS. STAT. § 802.08 (1999-2000);² *State v. Dunn*, 213 Wis. 2d 363, 368, 570 N.W.2d 614 (Ct. App. 1997). We first examine the complaint to determine whether it states a claim, and then review the answer to determine whether it joins issue. *Id.* If we conclude that the pleadings are sufficient to join an issue of law or fact, we examine the moving party's affidavits to determine whether they establish a *prima facie* case for summary judgment. *Id.* If they do, we look to the opposing party's affidavits to determine whether there are any material facts in dispute which require a trial. *Id.*

¹ Talbert did not appeal that decision to this court.

² All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

ANALYSIS

¶7 In order to prevail on a negligence claim, Talbert would need to establish that Madison Taxi owed him a duty of care, that it breached that duty, that the breach caused an injury, and that Talbert suffered damages as a result. *Miller v. Wal-Mart Stores, Inc.*, 219 Wis. 2d 250, 260, 580 N.W.2d 233 (1998). To the extent that the alleged duty relates to training and supervision, Talbert would need to show that the employer's failure caused a wrongful act by an employee which in turn resulted in the injury. *Id.* at 262-63.

¶8 Talbert offers several theories as to what duty of care Madison Taxi owed him, which vary depending on whether their relationship at the time of the accident was that of common carrier and passenger, employer and employee, or both. We need not resolve the question of Talbert's status, however, because we conclude that the materials he presented were insufficient to create a material dispute on the element of causation under any of his theories of breached duty.

¶9 First, Talbert alleges that Madison Taxi should not have allowed him to operate the cab following his shift because he had paid a fare.³ There is nothing in the record, however, to indicate that the accident would not have occurred if Talbert had not paid the fare but had instead been driving the same route within the scope of his employment. Therefore, the payment of the fare was not itself a cause of Talbert's injuries.

³ We are not persuaded by this contention. Madison General Ordinance 11.06 provides, "No public passenger vehicle shall be operated except by the owner thereof, or his/her employee" We see nothing in the language of the ordinance which would prohibit employees who are off-duty from driving their cabs to or from work, regardless of whether fares are paid.

¶10 Next, Talbert alleges that Madison Taxi should not have allowed him to operate the cab following his shift because it should have known that he was exhausted and inadequately trained for driving in winter conditions. However, Talbert does not identify any actions which a well-rested and properly trained driver would have been expected to take that could have avoided the accident. To the contrary, Talbert claims that he “was confronted with a sudden hazard not of his making” and that his “actions did avoid the collision with the semi-trailer.” Because the materials presented are insufficient to show that the accident would not have occurred if someone other than Talbert had been driving, Madison Taxi’s decision to allow Talbert to operate the cab cannot be considered a cause of the accident. Talbert’s allegation that Madison Taxi failed to properly train him fails on the question of causation for the same reason.

¶11 Finally, another driver informed Talbert that the tires on the vehicle involved in the accident had been over inflated to increase the speed at which the fare meter ran, thereby resulting in more money for the driver. Talbert speculated that this might have increased the speed at which the vehicle slid. He also produced an affidavit from a tire specialist stating that over-inflation of tires could affect the handling characteristics of the vehicle. Rather than increasing his injuries, however, it was Talbert’s stated and undisputed belief that the faster skidding may have saved his life, presumably by helping him avoid the semi-trailer and other traffic. Therefore, the summary judgment materials failed to show that the allegedly improper condition of the tires caused Talbert’s injuries. Because Talbert failed to show a causal link between the condition of the tires and his injuries, we also conclude that he can not establish prejudice from any of the alleged discovery violations dealing with the maintenance of the tires, and we do not address that issue further.

By the Court.—Judgment affirmed.

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

