IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

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| THE VILLAGE OF LAKE IN THE HILLS, | ) | Appeal from the Circuit Court |
| | ) | McHenry County. |
| Plaintiff-Appellant, | ) | |
| | ) | |
| v. | ) | No. 07--TR--9585 |
| | ) | |
| JOHN J. JOHANDES, | ) | Honorable |
| | ) | Thomas A. Meyer, |
| Defendant-Appellee. | ) | Judge, Presiding. |

**RULE 23 ORDER**

Plaintiff, the Village of Lake in the Hills, prosecuted defendant, John J. Johandes, for violating a truck-weight ordinance that was based on section 15--111(f) of the Illinois Vehicle Code (625 ILCS 5/15--111(f) (West 2006)). After a bench trial, the trial court held that (1) defendant had exceeded the ordinance's weight limit; but (2) there was no credible evidence of the vehicle's weight, and thus no basis to impose a proper fine under the ordinance. The trial court therefore ruled for defendant. The trial court denied plaintiff's motion to reconsider, and plaintiff timely appealed.

On appeal, plaintiff argues that the trial court's judgment for defendant is against the manifest weight of the evidence. We reverse and remand with directions.

Plaintiff's complaint alleged that, on February 1, 2007, defendant violated plaintiff's ordinance by driving an overweight Grove GMK 5275 crane west on Algonquin Road, east of Crystal Lake Road. The ordinance adopts section 15--111(f) of the Illinois Vehicle Code, which reads:

"On designated Class I, II or III highways and the National System of Interstate and Defense Highways, no vehicle or combination of vehicles with pneumatic tires may be operated, unladen or with load, when the total weight on the road surface exceeds the following: 20,000 pounds on a single axle; 34,000 pounds on a tandem axle with no axle within the tandem exceeding 20,000 pounds; 80,000 pounds gross weight for vehicle combinations of 5 or more axles[.]" (Emphasis added.) 625 ILCS 5/15--111(f) (West 2006).

The statutory fines, and those under the ordinance, vary depending on the amount of excess weight. If a vehicle is no more than 2,000 pounds overweight, the fine is $50, but, if it is 5,001 or more pounds overweight, the fine is $750 for the first 5,000 pounds overweight and $75 for each additional increment of 500 pounds or fraction thereof. 625 ILCS 5/15--113(a) (West 2006).

At defendant's bench trial, plaintiff's sole witness, police officer Jason Lira, testified on direct examination as follows. Lira was plaintiff's "truck enforcement officer," and, as of July 17, 2007, he had stopped 150 to 200 trucks for weight violations. Algonquin Road is a Class II highway. West of Crystal Lake Road, Algonquin Road is a "county designated highway," which means that, in order to drive a vehicle heavier than 80,000 pounds, one needs a county permit.

On February 1, 2007, at about 7:57 a.m., Lira was "stationary on Algonquin Road just east of Crystal Lake Road" when he saw an eight-axle crane traveling west within plaintiff's boundaries. The crane, which had pneumatic tires, appeared grossly overweight, so Lira stopped it. Defendant was driving. Defendant produced a state permit and a permit from the Village of Algonquin. However, neither permit applied to where Lira first observed the crane or to any portion of Algonquin Road west of Route 31. Defendant lacked a valid McHenry County permit, so he was not allowed to drive the vehicle within plaintiff's limits unless it weighed 80,000 pounds or less.

Lira had defendant pull off the roadway. As Lira waited for portable scales to arrive, he measured the crane's axles in order to ascertain the length of the vehicle and where "the weight was at in relation to the vehicle." After measuring the crane, he weighed it on dry, level pavement. Lira used four portable scales, each of which was approximately 3½ feet long, 2 feet wide, and 2½ inches tall and had a weight capacity of 20,000 pounds. Lira first ascertained that the scales had stickers showing that they were currently certified by the Department of Agriculture; that they were operating properly; and that they had been "zeroed." Lira tested the scales before he used them. They were functioning properly. Lira had used portable scales to weigh trucks on about ten previous occasions.

Lira described the standard weighing process that he used for defendant's crane. Employing portable scales, an officer must "weigh an axle or a series of axles together so [as to] have an evenly planed weight between a single axle or a series of axles." To keep the vehicle level to ensure a proper reading, Lira used "dummy pads" that were the same size as the scales. After weighing each of the eight axles separately, Lira calculated that the truck's gross weight (the sum of the axle weights) was 179,280 pounds, exceeding the maximum by 99,280 pounds. Using the mandatory "state statutory formula" (see 625 ILCS 5/15--113 (West 2006)), Lira calculated defendant's "total bond" at $18,745.

Lira testified on cross-examination as follows. Defendant's exhibit No. 4, a Department of Transportation certification slip, stated that defendant's crane weighed 160,000 pounds, about 20,000 pounds less than what Lira had obtained. (The exhibit is not in the record on appeal. In successfully moving for its admission, defendant's attorney described it as an "IDOT load application faxed.") Asked what would explain the difference, Lira replied, "Could be equipment on the vehicle, could be counterweights, could be more fuel, could be anything." Lira stated that, had it come from Hodgkins, 40 miles away, it would not have burned 20,000 pounds of fuel.

Lira testified that defendant's crane had a hydraulic suspension system. Once the brakes were released, the weighing of the crane would not be affected by whether the crane was in drive or in neutral. The dummy pads were made of wood, to the exact specifications of the scales.

Plaintiff rested. Defendant's first witness, Ken Martineck, testified on direct examination as follows. He was employed by Walter Payton Power Equipment and had sold 100 or 150 Grove cranes over 21 years, including approximately six Grove GMK 5275 models. According to Martineck, GMK 5275 cranes weigh between 153,000 and 154,000 pounds. Thus, defendant's crane's gross weight did not approach 179,280 pounds; that weight was "virtually impossible," as the GMK 5275 was designed to weigh less than 160,000 pounds. Martineck was shown photographs of defendant's crane as it appeared at the time of the weighing. He testified that, in the photographs, there were no counterweights on the crane. Also, the capacity of the gas tank was 136 gallons, and, at seven pounds per gallon, the consumption of half a tank (or less) of fuel would not explain the discrepancy between 154,000 pounds and 179,280 pounds.

Martineck testified that the GMK 5275 has a unique suspension system, called "Megatrak," that provides "fully independent suspension on every wheel *** so each wheel acts independently, and it's controlled by a large hydraulic cylinder that we call a Megastrut." The hydraulic cylinder keeps all the wheels in contact with the ground at all times, "so that when a wheel comes up, the hydraulic cylinder pushes it back down." According to Martineck, the GMK 5275 can be weighed accurately only in a single draft. Using four portable scales, as Lira did, will fail, because, when the crane is in an "out-of-level configuration," the cylinder will exert pressure downward on wheels that are not down, and, as a result, "what you're really weighing is not the vehicle weight, but the force that's generated by the hydraulic cylinder." The latter figure differs from the former and "[h]opefully"

is greater. Martineck reiterated that a GMK 5275 crane cannot possibly weigh 179,280 pounds but does weigh about 153,000 or 154,000 pounds. He added that counterweights cannot increase the weight to 179,280 pounds without making the crane impossible to drive.

Martineck testified as follows on cross-examination. He was a salesman and had never weighed a crane with portable scales. Although it was physically possible for the GMK 5275 crane to carry enough load to make its total weight 179,280 pounds, doing so would damage the crane.

Defendant testified that, shortly after his company bought the crane, he had it weighed in a single draft, on a scale on I-55. The crane's gross weight came to 153,560 pounds. Defendant identified Defendant's group exhibit No. 9 as documents stating that, on March 13, 2007, this weight was certified by the State of Illinois. Defendant did not weigh the crane on February 1, 2007. When Lira informed him that the crane weighed 179,280 pounds, defendant was surprised, because it was "not possible for that crane to weigh that much." If it did weigh 179,280 pounds, he "absolutely [could] not" have driven it from Hodgkins to Algonquin.

Plaintiff objected on foundational grounds to Defendant's group exhibit No. 9, and the trial court refused to admit it. After arguments, the judge explained his decision as follows. According to Martineck's testimony, the crane could not have weighed 179,280 pounds on February 1, 2007. However, there was a fatal problem of proof:

> "And while generally the testimony supported that [sic] it did violate the 80,000-pound weight restriction, the only numbers the Court had were best estimates of the two witnesses of somewhere between 153 and 154,000 pounds. While probably reasonable estimates, they remained really nothing more than their best estimates, *** which prevented

the Court from being able to assess any type of a fine. In the absence of an absolute or reliable number on which to base the fine, the Court must find in favor of the defendant." The judge added, "I will further find that *** a violation was established."

Plaintiff moved to reconsider. Plaintiff argued that, because there was no evidence that defendant's crane weighed 80,000 pounds or less on February 1, 2007, the judgment for defendant was against the manifest weight of the evidence. At the hearing on the motion, the trial judge reiterated that plaintiff had proved that defendant had violated plaintiff's ordinance, but that plaintiff's evidence of the crane's weight had been discredited and the only other evidence of weight consisted of estimates or guesses. After its motion was denied, plaintiff timely appealed.

On appeal, plaintiff contends that the trial court's judgment for defendant is against the manifest weight of the evidence. Plaintiff contends that the trial court erred in finding that the axle-by-axle weighing that Lira used was unreliable. Plaintiff also contends that, even without Lira's testimony, the evidence proved a violation, requiring the trial court to fine defendant.

Because plaintiff prosecuted defendant for an ordinance violation and sought only a fine, it had to prove its case by a preponderance of the evidence. See Village of Kildeer v. LaRocco, 237 Ill. App. 3d 208, 211 (1992). We shall not reverse the judgment unless it is against the manifest weight of the evidence. See County of Kankakee v. Anthony, 304 Ill. App. 3d 1040, 1048 (1999).

Plaintiff contends first that the trial court erred in rejecting its evidence that defendant's crane weighed 179,280 pounds on February 1, 2007. Plaintiff asserts specifically that Lira's measurement was credible because (1) the statute on which the ordinance is based allows axle-by-axle weighing (see 625 ILCS 15/5--112(a) (West 2006)); (2) LaRocco, and People v. Fair, 61 Ill. App. 2d 360

(1965), uphold the use of axle-by-axle weighing; and (3) Martineck's testimony that axle-by-axle weighing was improper in this case was unworthy of belief.

We find no merit in these contentions. First, the mere fact that the statute allows axle-by-axle weighing does not establish that the use of this method produced an accurate result in this case. We fail to see how the statute can create an irrebuttable presumption that axle-by-axle weighing provides an accurate result regardless of the circumstances. Moreover, we are sure that the legislature did not intend such an absurd result. Thus, the trial court could not assume that Lira's results were accurate merely because his method of obtaining them is, in general, legally permissible.

Second, LaRocco and Fair cannot reasonably be read to create a per se rule or irrebuttable presumption that the use of axle-by-axle weighing produces an accurate result in a given case. Aside from the obvious illogic of attempting to impose such a scientific conclusion by judicial fiat, the opinions simply do not support plaintiff's reading of them.

In LaRocco, we held that evidence obtained through axle-by-axle weighing was presumptively proper in that case, which was based on a prosecution for "an excessive weight per axle type of violation, not a gross vehicle weight violation." (Emphasis in original.) LaRocco, 237 Ill. App. 3d at 212. Although the defendant contended that axle-by-axle weighing was unreliable, we disagreed, pointing out that "[t]here was no objective evidence or (expert) testimony presented by defendant" to support his argument. (Emphasis added.) LaRocco, 237 Ill. App. 3d at 212. It is true that we noted that Fair and other opinions had rejected attacks on axle-by-axle weighing "even in gross weight violation cases." LaRocco, 237 Ill. App. 3d at 212. However, we recognized that those opinions did not state a per se rule against challenging axle-by-axle weighing. We stated, "In the

absence of any competent evidence that axle-by-axle weighing is grossly inaccurate, these cases have continuing vitality." (Emphasis added.) La Rocco, 237 Ill. App. 3d at 212.

In Fair, the defendants contended on appeal that their truck should have been weighed in a single draft because the axle-by-axle method that the arresting officer had used would have shifted some of the truck's load toward the axle being weighed. The appellate court rejected this argument, noting that the officer had testified that no such shifting occurred and the defendants had produced "[n]o expert witnesses *** to testify to the proper method of weighing a motor vehicle too large to be weighed in a single draft." Fair, 65 Ill. App. 2d at 367. Thus, as in LaRocco, the court held only that the challenge to axle-by-axle weighing was insufficiently supported by evidence at trial.

The situation here is entirely different. Martineck testified at length that, because of the GMK 5275's unique suspension system, axle-by-axle weighing seriously overstated the weight of defendant's vehicle, producing an unreliable result. The trial court credited this testimony and thus discredited Lira's conclusion that the crane weighed 179,280 pounds. The court simply exercised its fact-finding prerogative.

Plaintiff contends, however, that, even if the trial court had such a prerogative, its rejection of Lira's testimony was improper because Martineck was not credible. Plaintiff asserts that, because Martineck was a mere "salesman" who admittedly had never weighed a vehicle with portable scales, the trial court should have rejected his testimony that axle-by-axle weighing of the GMK 5275 is inherently unreliable. We disagree. Deciding the credibility of the witnesses is the province of the fact finder, not the appellate court. Chicago Transparent Products, Inc. v. American National Bank & Trust Co. of Chicago, 337 Ill. App. 3d 931, 941 (2002). We follow that basic rule here. As a long-time salesman who was presumably familiar in detail with the workings of various cranes,

including the GMK 5275, Martineck would appear to have been eminently qualified to discuss the GMK 5275's unique features and how they affect such matters as weighing the crane. The court accepted Martineck's testimony, and we shall not disturb that decision.

We hold that the trial court's conclusion that plaintiff did not prove that defendant's crane weighed 179,280 pounds is not against the manifest weight of the evidence. However, that does not end the matter. Plaintiff notes that the trial court's finding that the crane weighed more than the 80,000-pound limit is inconsistent with its judgment in favor of defendant. Plaintiff argues that, even if the trial court need not have accepted plaintiff's figure, the court erred in concluding that there was no credible evidence of how much the crane weighed on February 1, 2007. We agree.

Defendant testified that, shortly after the crane was purchased, he weighed it in a single draft, obtaining a gross weight of 153,560 pounds. Although the trial court did not accept the documentary evidence of this result, owing to a lack of foundation, that did not affect the credibility of defendant's straightforward statement that the crane was weighed by a method that neither party has questioned, thereby producing a specific figure. Moreover, defendant's testimony was corroborated by Martineck's testimony that a GMK 5275 crane will weigh between 153,000 and 154,000 pounds. The range of variation--1,000 pounds--is not large in relation to the figures involved, and those figures are wholly consistent with defendant's testimony that the crane weighed 153,560 pounds.

Although the trial court found that defendant offered only "reasonable estimates" of the crane's weight, we cannot agree with this characterization of the evidence. The trial court's conclusion that there was no reliable evidence of the crane's weight is against the manifest weight of the evidence. Therefore, we reverse the judgment in favor of defendant, enter judgment in favor of

plaintiff and find the vehicle weighed 153,560 lbs. at the time of the violation. We remand this cause with instructions to the trial court to impose a fine based on a vehicle weight of 153,560 pounds.

Reversed and remanded with directions.

McLAREN, J., with GROMETER and ZENOFF, JJ., concurring.