

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

JANUARY 22, 1997

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(1), STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-1662

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**DAIRY FARM LEASING COMPANY, INC.,
a Delaware Corporation,**

Plaintiff-Appellant,

v.

DEAN WINK,

Defendant-Respondent.

APPEAL from a judgment of the circuit court for St. Croix County:
SCOTT R. NEEDHAM, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Dairy Farm Leasing Company, Inc., appeals a judgment dismissing its complaint against Dean Wink alleging conversion of dairy cows and tortious interference with a contract. Dairy Farm argues that the trial court erroneously dismissed its complaint at the close of its evidence. It also argues that the trial court erroneously denied its motion for reconsideration and a new trial. We reject these arguments and affirm the judgment.

On December 3, 1988, Dairy Farm leased fifty dairy cows to Mark and Sharon Wink. These cows generally had a market value between \$800 and \$1,000 each. To secure performance of the lease, Mark and Sharon provided Dairy Farm a security interest in all livestock they owned or thereafter acquired. On June 18, 1990, Dairy leased eight more dairy cows to Mark and Sharon.

On February 5, 1991, Mark and Sharon defaulted on the leases. On February 14, 1991, Mark and Sharon filed bankruptcy. A memo, attached to answers to interrogatories filed in an adversary proceeding in Mark and Sharon's bankruptcy, stated that pursuant to a verbal lease, they had leased eight cows from Dean Wink, Mark's brother, and one had died. It also stated that they had returned the seven cows to Dean two days before filing bankruptcy.¹

Throughout the lease period, Dairy Farm periodically visited Sharon and Mark's farm to audit the herd. At the time of three of the audits, fifteen cows were missing. On November 7, 1990, Mark signed an affidavit that he culled fifteen cows and replaced them with five cows he purchased with the proceeds from the culled cows. He also listed ten heifers as offspring from Dairy Farm leased cattle. The lease required Mark and Sharon to replace culled cows. Dairy Farm's auditor testified that a 20% cull rate per year was common. When he audited the herd on December 24, 1990, he would put a tag on a cow that was not tagged and list her as a replacement cow for one missing.

Dairy Farm eventually recovered forty-seven adult cows and four head of young stock. Dairy Farm sought return of its missing cows from Dean and filed this action alleging conversion of leased property, conversion of collateral and tortious interference with contract.

¹ The memo described the cows as follows:

#376 Red ear tag
#373 Red ear tag
#27 White brand middle of back
#43 stall Big head & body 9019 Blue ear tag
#2 yellow ear tag 1st calf
#1 stall ... all black except bag and feet #3805 blue ear
#38 yellow ear tag 3rd calf # 9020 blue ear tag
#37 yellow ear tag Died shortly after with twin calves

The case was tried to the court. To demonstrate that the cattle transferred to Dean belonged to Dairy Farm, it relied principally on a February 5, 1991, audit showing seven cows missing, a handwritten list from its auditor dated December 24, 1990, as well as Mark's November 7 affidavit. It also relied on Mark's memo indicating that he returned seven cows to his brother Dean pursuant to the terms of an oral lease. Mark, Dean nor Sharon testified at the trial.

At the close of Dairy Farm's evidence, the trial court granted Dean's motion to dismiss. It concluded that Dairy Farm had not met its burden to show conversion of leased property or conversion of collateral because it failed to demonstrate that the cows returned to Dean could be identified as Dairy Farm's missing cows.² Consequently, the court further concluded that the record failed to support Dairy's claim that Dean tortiously interfered Dairy Farm's contractual relationship with Mark and Sharon that existed under the two leases. Dairy Farm appeals the judgment of dismissal.

After Dairy Farm completed the presentation of its evidence, Dean moved for dismissal. Since this was a trial by the court without a jury, § 805.17, STATS., applies. This section states:

(1) Motion at close of plaintiff's evidence. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his or her evidence, the defendant, without waiving his or her right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff on that ground or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in sub. (2). Unless the court in its order for dismissal

² Because all three of Dairy Farm's claims hinge on this critical determination, it is the dispositive issue on appeal. We need not address other nondispositive issues.

otherwise specifies, a dismissal under this section operates as an adjudication upon the merits.

In a trial to the court without a jury, after the plaintiff has presented its case, the defendant may move for dismissal on the ground that upon the facts and law the plaintiff has shown no right to relief. Section 805.17(1), STATS. "The court as trier of the facts may then determine them and render judgment against the plaintiff on that ground or may decline to render any judgment until the close of all the evidence." *Id.* In determining the motion to dismiss, the trial court, as trier of fact, is not required to view the evidence in the light most favorable to the plaintiff. *Household Util., Inc. v. Andrews Co.*, 71 Wis.2d 17, 28, 236 N.W.2d 663, 669 (1976). "If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in [§ 805.17(2)]." Section 805.17(1), STATS.

In actions tried without a jury, findings of fact shall not be set aside on appeal unless clearly erroneous. Section 805.17(2), STATS. Trial courts, not appellate courts, judge the weight and credibility of the evidence. *Estate of Wolff v. Weston Town Bd.*, 156 Wis.2d 588, 597-98, 457 N.W.2d 510, 513-14 (Ct. App. 1990).

Conversion has been defined as the act of dominion wrongfully exerted over another's goods, depriving him of possession permanently or for an indefinite time. *Production Credit Ass'n v. Equity Coop. Livestock Sales Ass'n*, 82 Wis.2d 5, 10 n.8, 261 N.W.2d 127, 129 n.8 (1978). The principal dispute is whether the cattle Mark and Sharon transferred to Dean belonged to Dean. Unless the court was satisfied that Dairy Farm was entitled to the cattle, no action for conversion of collateral or leased property, and no action for tortious interference of contract is shown.

On this record, the trial court was not required to find that the transferred cattle belonged to Dairy Farm. The circumstantial evidence offered to support such a finding were Mark's and Sharon's answers to interrogatories, which stated that one cow bearing "#376 red ear tag" was surrendered to Dean. Also, Mark's November 7 affidavit stated that "35LBU3044, 376 or" was purchased with cow cull money from Dairy Farm cows. The trial court could conclude that the answer to the interrogatory was insufficient to demonstrate

that the cow bearing the a red ear tag #376 was the same cow purchased with cow cull money bearing a tag "35LBU3044, 376 or."

Also, the answers to interrogatories indicate that cows with blue tags #9019, #3805, #9020 and red tag #373 were surrendered to Dean. The auditor's December 24 handwritten list contains cows with identically numbered ear tags, which the auditor recorded, in Mark's presence, as replacements for culled Dairy Farm cows.³ However, the auditor testified that he put a replacement tag on any cow in the herd that did not have an ear tag. The court was not required to accept the auditor's inference that every tagless cow was necessarily a replacement cow for Dairy Farm.

Dairy Farm argues that it presented sufficient circumstantial evidence to permit the trial court to find in its favor. It argues that the trial court erroneously denied its motion for reconsideration. However, our role on appeal is not to search the record for findings the trial court could have but did not make. *In re Estate of Becker*, 76 Wis.2d 336, 347, 251 N.W.2d 431, 435 (1977). If more than one reasonable inference may be drawn from the evidence, we must accept the inference drawn by the trial court. *See Hennekens v. Hoerl*, 160 Wis.2d 144, 162, 465 N.W.2d 812, 819-20 (1991). Our standard of review constrains us to accept the trial court's determinations as to weight and credibility of the evidence. Section 805.17(2), STATS. We conclude that on this record the trial court could reasonably determine that Dairy Farm did not establish a leasehold or security interest in the cattle Dean accepted from Mark and Sharon.

By the Court. – Judgment affirmed.

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

³ The trial court sustained Dean's hearsay objection to Mark's statements to the auditor during the audit. Dairy Farm does not challenge this ruling on appeal.