

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

NOTICE

July 23, 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, STATS.

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

No. 96-2500

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

MILENKO PAVLOVIC, A/K/A MIKE PAVLOVIC,

**PLAINTIFF-RESPONDENT-
CROSS APPELLANT,**

V.

MLADENA TERZIC, A/K/A MARILYN TERZIC,

**DEFENDANT-APPELLANT-
CROSS RESPONDENT.**

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Kenosha County: ROBERT V. BAKER, Judge. *Reversed and cause remanded.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

PER CURIAM. Mladena Terzic appeals from a judgment entered in favor of Milenko Pavlovic for \$9000. Pavlovic cross-appeals from the same

judgment. On appeal, each challenges, among other things, the trial court's apparent amendment of the pleadings without the consent of the parties. We conclude that the trial court's decision is sufficiently at variance from the pleadings so as to require a new trial in the interests of justice. We therefore reverse the judgment of the circuit court and remand the cause for a new trial.

This case centers upon four checks which Pavlovic wrote to Terzic between November 1992 and August 1993. Pavlovic's pleadings claimed that the checks were loans that Terzic had never repaid or, alternatively, that Terzic had wrongfully converted the money. Terzic's answer asserted that the checks were gifts. The evidence at the bench trial followed these theories. The trial court's decision ostensibly cast the issue as "whether the four checks were gifts as the Defendant contends, or loans as the Plaintiff contends." However, later in the decision, in disposing of the third check, the court held that Terzic "was not forthcoming enough to the Plaintiff re her August 19, 1993 marriage" and ordered her to return \$4000 of the \$10,000 as an apparent setoff against some expenses she incurred. Regarding the fourth check, the court held that it "was received under false pretenses by the Defendant" Terzic appealed and Pavlovic cross-appealed.

Section 802.09(2), STATS., provides that "[i]f issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." Terzic primarily argues that the trial court disposed of at least part of the case on the basis of issues neither pleaded nor tried nor consented to. We agree. By conditioning its decision regarding the fourth check upon the concept of false pretenses, the court decided the

case as if fraud or misrepresentation had been pleaded.¹ *Cf., e.g., State v. Burke*, 189 Wis. 641, 646, 207 N.W. 406, 407-08 (1926) (addressing criminal fraud).

In defending the trial court’s determination regarding the fourth check, Pavlovic argues that the court’s findings are consonant with a wrongful conversion in that a gift can be conditioned upon some act by the donee. *See Zirngibl v. Zirngibl*, 165 Wis.2d 130, 137, 477 N.W.2d 637, 640 (Ct. App. 1991). He argues that “even if the money was a gift it was clearly given with the intent that the relationship was in existence and would continue.” We are unconvinced, however, that the case was tried on that basis or that Terzic was on notice of a conditional gift claim.

Pavlovic also argues from § 805.17(3) and (4), STATS., that this court ought to deem Terzic’s arguments waived for her failure to raise them in the trial court in a postjudgment motion. We cannot agree. This court discussed the operation of that statute in *Schinner v. Schinner*, 143 Wis.2d 81, 420 N.W.2d 381 (Ct. App. 1988). There, we held that the statute envisions waiver only for failure to bring a motion to correct manifest errors—those of oversight, omission or miscalculation. *See id.* at 92-93, 420 N.W.2d at 385-86. While we note that it is a better practice to bring such a motion for any trial court error, we cannot say that the statute here required Terzic to make a postjudgment motion.

We conclude that by casting part of its decision in terms of false pretenses, the trial court functionally amended the pleadings without the implied

¹ Pavlovic makes an analogous argument concerning the court’s use of a setoff in the fourth check.

or express consent of the parties.² As our supreme court has noted, “Parties in a legal proceeding have a right to be apprised of the issues involved, and to be heard on such issues.” *General Elec. Co. v. WERB*, 3 Wis.2d 227, 241, 88 N.W.2d 691, 700 (1958). While we have considerable sympathy for the trial court’s attempt to do justice in this case, we are ultimately unconvinced that the real controversy was tried here. We therefore exercise our discretionary reversal power under § 752.35, STATS., and remand the cause for a new trial.

While the appeal and cross-appeal speak only to the trial court’s findings regarding the third and fourth checks, we cannot be sure from the court’s decision whether its findings concerning the first and second checks depended at all upon the concepts of false pretenses or setoff. We therefore reverse the entire judgment. We need not, therefore, address any other of the issues raised in the appeal and cross-appeal.

We grant no costs to either party.

By the Court.—Judgment reversed and cause remanded.

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

² In response to Pavlovic’s cross-appeal, we conclude that the trial court’s reliance upon setoff was similarly erroneous.

