COURT OF APPEALS
DECISION
DATED AND RELEASED

May 8, 1997

NOTICE

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. 96-2872

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

LEANN STODDARD,

PLAINTIFF-APPELLANT,

V.

RICHARD BERG,

DEFENDANT-RESPONDENT.

LEANN STODDARD,

PLAINTIFF-APPELLANT,

V.

JUNE BERG,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Monroe County: MICHAEL J. MCALPINE, Judge. *Affirmed.*

EICH, C.J.[1] Leann Stoddard appeals from a small-claims judgment awarding her $151.75 in damages from the defendants Richard and June Berg. She claims she proved damages between $4000 and $6000.

Stoddard, who was renting a house from Richard Berg, vacated the premises in November 1994 and moved to another city, claiming that the house was inadequately heated.[2] She left various items of personal property behind. In April 1995, Berg sold the house to a "Ms. Town," whom we assume to be the "June Berg" identified in the pleadings. We refer to her as "Town." Apparently, Town either disposed of or destroyed the personal property Stoddard left in the home, and that formed the basis of Stoddard's action. She sued Berg and Town, claiming that they "willfully and maliciously" refused to return the property to her, selling some of it, using some of it themselves, and destroying the rest.

The trial court found that Berg and Town had a duty to retain the property for Stoddard's benefit, but concluded that Stoddard failed to establish the $4000 damages she sought. The court found that Stoddard was entitled to recover $150 for fuel oil left in a tank and $1.75 for two pair of pants, which a witness stated she purchased at Town's garage sale.

[1] This appeal is decided by one judge pursuant to § 752.31(2)(a), STATS.

[2] The basic facts are taken from the trial court's transcribed decision. They are not disputed by the parties, although at times they are difficult to follow because it appears that at least two of the parties changed their names at some point during the proceedings.

On appeal Stoddard argues that the court erred in concluding that she failed to prove greater damages. Pointing to cases indicating that when the fact of damage is proved but proof of the amount is uncertain, the trial court has "discretion to fix a reasonable amount," *see* ***Cutler Cranberry Co. v. Oakdale Elec. Coop.***, 78 Wis.2d 222, 233-35, 254 N.W.2d 234, 240-41 (1977), she claims that the telephone testimony of an auctioneer, Dan Elliott, supplied an adequate basis for a damage award between $4000 and $6000.

Elliott never observed Stoddard's property. He testified that he looked at a notebook in which Stoddard listed the items she left in the house (to the best she could recall) and talked to her on the telephone, "kinda asking her some questions on the quality of the items and such." His direct testimony on the value of Stoddard's property follows in its entirety. When asked how he "estimat[ed]" the value of the property, Elliott replied:

> A. Okay. What I did was I went and I reviewed the pages, and it looked like pretty much a standard household sale that I conduct. Household sales can vary substantially. In fact, I had one a few weeks ago that was $6,000, and then I had one a few weeks prior to that that was around $3,000, so I kinda took a happy medium. I did the best—it's awful hard to appraise something you can't see, but I try to do the best of my standards.
>
> Q. So would it be correct to state that what you did is you compared it to a standard estate house sale that you would handle?
>
> A. Correct.
>
> Q. And given that, what's your best estimate as to what the valuation would be?
>
> A. I believe I wrote down—I didn't bring my paperwork with me here today, Dan but I think I wrote down about $4,000. Was that correct?
>
> Q. That's correct.

On cross-examination, Elliott repeated that he never saw Stoddard's property and he acknowledged that many of the items on Stoddard's list were pieces of clothing which "fetch[] little or nothing at a sale." He acknowledged that "some household sales go 3,000 and some 6,000" and some "under a thousand," and he concluded by conceding that his estimate of $4000 was "purely speculation on [his] part."

Reviewing Elliott's testimony—emphasizing the fact that he did not view the property, that clothing has little if any value and, especially, Elliott's acknowledgment that his $4000 estimate was "pure speculation"—the trial court concluded:

> I am not able by the record to establish that the value of the personal property was $4000, $3000, $2000 or $1000. For the reason that Mr. Elliott also said that sales of this nature could generate between … $1000 and 4000.

It is true, as Stoddard points out, that absolute certainty is not required, but even in the case she cites, ***Cutler***, the supreme court recognized that there must be, at a minimum, evidence that, "with such certainty as the nature of the particular case may permit, lay[s] a foundation which will enable the trier of fact to make a fair and reasonable estimate" of actual damage. ***Cutler***, 78 Wis.2d at 234, 254 N.W.2d at 240 (quotations and quoted sources omitted). And in ***Plywood Oshkosh, Inc. v. Van's Realty & Construction***, 80 Wis.2d 26, 31-32, 257 N.W.2d 847, 849 (1977), the supreme court stated:

> To warrant damages, the evidence must demonstrate that the injured party has sustained some injury and must establish sufficient data from which the trial court … could properly estimate the amount. The claimant generally has the burden of proving by credible evidence to a reasonable certainty his damage, and the amount thereof must be established at least to a reasonable certainty. Compliance with the rule of reasonable certainty

> does not make it necessary for the claimant to prove ... damages with mathematical accuracy. It is sufficient if they can be estimated by the trier of facts with a reasonable degree of certainty.
>
> Nevertheless, damages should be proven by statements of facts rather than by mere conclusions of the witnesses, and a claimant's mere statement or assumption that he has been damaged to a certain extent without stating any facts on which the estimate is made is too uncertain.

(Quoted sources omitted.)

In this case, Stoddard's $4000 damage claim—the amount for which she sued—was based on Elliott's testimony, and, as indicated above, Elliott could do no more than offer figures ranging from something under $1000 to something over $6000, which he garnered from various estate sales. That inconclusive range was rendered even less probative—if that is possible—by Elliott's acknowledgment that his estimate was nothing more than "pure speculation." The evidence was not only inadequate to permit an damage estimation "with a reasonable degree of certainty," ***id.*** at 31, 257 N.W.2d at 849; it was insufficient to lay even the barest foundation that would permit the trial court to make a "fair and reasonable estimate" of Stoddard's damages.[3] ***Cutler***, 78 Wis.2d at 234, 254 N.W.2d at 240.

By the Court.–Judgment affirmed.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.

[3] Given this conclusion, the parties' arguments on Stoddard's duty to mitigate her damages need not be addressed.