

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 22, 1998

Marilyn L. Graves
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 § 808.10 and RULE 809.62, STATS.

No. 98-1023

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

DA VANG,

PLAINTIFF-APPELLANT,

PA VANG,

PLAINTIFF,

V.

EMMERICH & ASSOCIATES, INC.,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Marathon County:
THOMAS G. GROVER, Judge. *Affirmed.*

MYSE, P.J. Da Vang appeals an order dismissing his negligence complaint against Emmerich & Associates, Inc., the owners and managers of an apartment house where Vang rented an apartment. The complaint contended that Emmerich's negligence caused a loss of personal property Vang alleged as

missing. It is unclear whether the trial court granted summary judgment dismissing the complaint or determined after a telephonic trial that the evidence was insufficient to demonstrate Emmerich's negligence. Nevertheless, the court ordered the complaint dismissed. Because no transcript was filed, this court must construe all evidentiary matters as consistent with the trial court's decision. Accordingly, the order dismissing Vang's complaint is affirmed.

Da Vang rented an apartment in a complex managed by Emmerich & Associates. As a result of a criminal investigation, the Wausau Police Department obtained a search warrant for these premises. Emmerich gave a set of keys to the police who conducted a search and videotaped the apartment's interior. Vang contends, and Emmerich does not dispute, that the videotape reflects the existence of a television, VCR and certain power tools in the apartment at the time of the police search. The police retained the keys for a period of time and ultimately returned them to the apartment manager. Before returning the keys, Emmerich's staff entered the apartment to verify that the utilities were working properly and noticed the television and VCR. The police requested that Emmerich's staff return to the apartment sometime later to remove decaying food and garbage at which time the staff identified power tools in a kitchen closet.

After the keys were returned, the apartment manager entered the apartment to prepare it for re-renting. At that time, Emmerich's staff reported items missing from the apartment. The missing items were reported to the police. Vang's personal property was then removed to a storage unit where it was held for him to claim. Vang's relatives paid Vang's account on the apartment and were given possession of the storage unit. Vang contends it was at this time his relatives discovered that the television, VCR and power tools were missing.

Vang commenced a small claims action seeking to recover the value of the missing property from Emmerich claiming that Emmerich failed to exercise ordinary care to protect his property from loss. The matter was ultimately assigned to Judge Grover from Shawano County, who indicated that a telephone trial would be held on March 31, 1998.

Vang submitted a proposed stipulation detailing the circumstances leading up to his discovery of his alleged missing property. On the day of trial, Emmerich faxed a reply disputing some of the statements in the stipulation and attached cover letter. In the same fax, Emmerich asked that the trial be continued because of the absence of one of the principals, asserted an objection to the trial by telephone, and suggested that the court consider summary judgment dismissing the complaint. The court denied the motion to continue the trial and a telephone hearing proceeded as originally scheduled. No transcript of those proceedings has been filed and, accordingly, this court has no way of reviewing the nature of the proceedings or the court's findings as a result of those proceedings. The only document in the record is an order dismissing Vang's complaint. It is unclear whether that order was the result of a trial or was the result of summary judgment.

When an appellant fails to file a transcript a reviewing court is limited to those portions of the record available to the court. *Ryde v. Dane County Dep't. of Social Servs.*, 76 Wis.2d 558, 563, 251 N.W.2d 791, 793 (1977). In addition, this court is required to assume that every fact essential to sustain the factfinder's exercise of discretion is supported by the record. *Austin v. Ford Motor Co.*, 86 Wis.2d 628, 641, 273 N.W.2d 233, 239 (1979).

In this case, Vang first contends that the trial court improperly received an ex parte communication from a party stating its position and opinions

about the case and objecting to Vang's proposed stipulation. Vang contends he was not given notice or a copy of the facts forwarded to the court immediately before trial and therefore did not have the opportunity to respond. Such a contention may reflect improper ex parte communications, but presents no basis for reversing the judgment unless the result of the communication was prejudicial to Vang's rights. See *State ex rel. DeLuca v. Common Council*, 72 Wis.2d 672, 695, 242 N.W.2d 689, 701 (1976). Vang also contends that the trial court erred by refusing to accept the testimony subject to his stipulation. It is not clear that the court did not accept the facts contained in the stipulation and nonetheless determined that the evidence presented was insufficient to demonstrate Emmerich's negligence. Because this determination cannot be made in the absence of a transcript, this court is required to construe the circuit court's determination in a manner consistent with its order of dismissal.

This court acknowledges Vang's contention that it would be improper to grant summary judgment based upon this record. Vang, however, has not demonstrated that the court granted summary judgment, nor can this determination be made in the absence of a transcript. Accordingly, this court construes the judgment dismissing the complaint to be a judgment based upon the merits considering the facts proposed by Vang's stipulation, together with Vang's assertion that he gave the key to no other person and he himself was absent at the time his personal property was removed from his apartment. Even though the court may have accepted these facts as undisputed, the court could properly reach the conclusion that these facts are insufficient to demonstrate that the loss of the property was the result of Emmerich's negligence. Vang bears the burden of proving Emmerich's negligence. Merely asserting that Emmerich employees had access to the apartment and could have removed the property does not demonstrate

that is in fact how the property was lost. If a third party unknown to Emmerich gained access to the apartment, the loss would not be caused by any negligent conduct by Emmerich because it has no duty to monitor access to each of the rental units it manages. This court must assume that the trial court reached a conclusion on the merits and that this appeal attacks the court's conclusions that there was insufficient evidence to support Vang's claim of negligence. This court believes an impartial factfinder could conclude that the evidence is insufficient to demonstrate that the loss was occasioned by Emmerich and, accordingly, affirms the order.

By the Court.—Order affirmed.

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

