COURT OF APPEALS
DECISION
DATED AND FILED

December 13, 2000

Cornelia G. Clark
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*** **WIS. STAT. § 808.10 and RULE 809.62.**

No. 00-0419

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

JOHN HUSENICA AND KRISTI HUSENICA,

PLAINTIFFS-RESPONDENTS,

V.

MICHAEL HUSENICA,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Kenosha County: BRUCE E. SCHROEDER, Judge. *Affirmed.*

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

¶1 PER CURIAM. Michael Husenica appeals from a judgment awarding John and Kristi Husenica (the Husenicas) $27,015 for the cost of storing Michael's vehicles on their property and the expenses they incurred due to the presence of Michael's vehicles. Michael argues that his brother, John, and John's

wife, Kristi, did not make a reasonable effort to mitigate their damages. We disagree and affirm.

¶2 In September 1996, Michael left a salt spreader, a Ford Bronco, a truck and a semi-trailer on the Husenicas' property.[1] Although Michael had agreed to remove the vehicles in June 1997, he failed to do so. Although the Husenicas asked Michael on numerous occasions to remove the vehicles, he did not do so. As of July 1, 1997, the Husenicas began charging Michael rent. The Husenicas were preparing to construct a home on their property and needed Michael's vehicles removed to make way for the construction project. The Husenicas were denied building permits in January 1998 because the presence of Michael's vehicles constituted a zoning violation. The Husenicas commenced an eviction action in April 1998. Michael did not appear in the eviction action, and the court entered a default judgment. The salt spreader, Bronco and truck were removed on April 18, 1998. The semi-trailer was removed on May 15, 1998.

¶3 At the damages phase of the eviction action, the Husenicas sought rent for the period from July 1, 1997, until the vehicles were removed. Kristi Husenica contacted a local towing and storage company to determine what to charge Michael. The Husenicas also sought to recover the additional plumbing, concrete and housing rental costs they incurred because their permitting and construction schedule was pushed back due to the presence of Michael's vehicles.

¶4 The court rejected Michael's argument that the Husenicas should have mitigated their damages by having the vehicles towed away earlier than they

[1] Although he was represented by counsel, Michael did not appear at the damages trial. Therefore, the facts are taken from the testimony and other evidence offered by the Husenicas.

did. The court found that the Husenicas acted reasonably and proved their reasonable storage charges and construction-related costs. The court awarded the Husenicas the $27,015 in damages they requested.

¶5 On appeal, Michael argues that the Husenicas did not mitigate their damages.[2] "An injured party has a duty to use reasonable means under the circumstances to avoid or minimize his or her damages." ***Langreck v. Wis. Lawyers Mut. Ins. Co.***, 226 Wis. 2d 520, 524, 594 N.W.2d 818 (Ct. App. 1999). Normally, whether facts satisfy the legal standard of reasonableness presents a question of law which we decide independently. *See* ***id.*** However, "whether a course of action is reasonable can be intertwined with factual findings surrounding the conclusion, and in that case we give weight to the fact finder's decision, but not controlling weight." ***Id.***

¶6 Michael argues that the Husenicas should have had the vehicles towed and allowed the storage charges to accrue at the towing site, not on their property. Michael claims that if this had been done, his storage charges would have been less. We fail to see the logic in this since Michael declined to retrieve his vehicles from the Husenicas' property, and there is no evidence in the record that he would have retrieved his vehicles more promptly from the towing and storage site. As the circuit court pointed out, Michael would have been liable for storage charges regardless of the location of the vehicles.

¶7 The court deemed the Husenicas' actions reasonable and in line with their duty to mitigate their damages. The court observed that the Husenicas "could

[2] Michael does not dispute the calculation of the $27,015 judgment other than to contend that the Husenicas did not mitigate their damages.

reasonably fear misuse of the legal system by [Michael]" and reasonably opted to employ legal process. We give weight to the facts and law intertwined in this statement. *See* ***id.*** We agree that the Husenicas' choice to employ the legal process of eviction in lieu of self-help was reasonable, which is all the law of mitigation requires. *See* ***id.***

¶8 Michael argues that he was not in a landlord/tenant relationship with the Husenicas, and they could have engaged in self-help methods to remove the vehicles before sizeable storage charges accrued. This argument is raised for the first time in Michael's reply brief. We do not consider arguments raised for the first time in a reply brief. *See* ***Northwest Wholesale Lumber, Inc. v. Anderson***, 191 Wis. 2d 278, 294 n.11, 528 N.W.2d 502 (Ct. App. 1994).

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1997-98).