

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 27, 2001

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.

Nos. 00-2588 & 00-2589

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

BRENDA MOORE,

PLAINTIFF-APPELLANT,

v.

M.J. KORTSCH,

DEFENDANT-RESPONDENT.

APPEAL from orders of the circuit court for Milwaukee County: THOMAS R. COOPER and TIMOTHY G. DUGAN, Judges. *Affirmed in part; reversed in part and cause remanded with directions.*

¶1 CURLEY, J.¹ Brenda Moore appeals from two court orders dismissing her two separate small claims actions brought against M.J. Kortsch

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

(Kortsch).² Moore, acting *pro se*, does not actually dispute the trial court's dismissal order in the first action, and it is affirmed. She does, however, argue that the second action was improperly dismissed when the trial court mistakenly believed that the second case was identical to the first action, and that the first action had been dismissed on the merits. She also appeals the trial court's order assessing costs of \$100 against her for bringing a motion to reopen the dismissal order in the second action. Kortsch seeks appellate costs of \$750, claiming that Moore's appeal is "groundless and without merit." Because the trial court erred in dismissing the second action when it mistakenly believed that Moore's earlier action was identical to the second action and that the first action was dismissed on the merits, this court reverses. Further, this court overturns the trial court's assessment of \$100 costs because Moore properly attempted to prove, by providing the court with a transcript of the first hearing, that the trial court was mistaken in thinking the earlier action was identical and had been dismissed on the merits. Kortsch's request for appellate costs is also denied as Moore's appeal was not frivolous.

I. BACKGROUND.

¶2 This case emanates out of an eviction action that is not part of this appeal. From what can be gleaned from the record, Moore's landlord apparently successfully evicted her, resulting in the sheriff removing her property from the rented premises some time in early January 2000 and taking it to Kortsch's warehouse for storage. After Moore learned that her property had been taken to the Kortsch warehouse for storage, Moore contacted Kortsch seeking the return of

² These two actions, separately appealed, were consolidated by this court.

her belongings. A Kortsch employee told her that her property had been sold. As a result, Moore brought a small claims action in which she claimed that Kortsch unlawfully sold her property. She claimed that she was involved in litigation with the landlord over the eviction action, and that Kortsch “was asked not to sale [sic] my lifelong belongings until the case is heard. But they have.”³ The trial court, without addressing the merits of Moore’s complaint, learned that Kortsch had not yet sold Moore’s belongings and dismissed the action since the property had not been sold.

¶3 Several months later, Moore brought another small claims action against Kortsch. This time she alleged that Kortsch had her possessions, but the company was wrongfully giving her conflicting information about securing the return of her belongings, making it impossible for her to arrange for their return, resulting in accrued additional storage charges. The record indicates that the court commissioner apparently mistakenly believed this action was identical to Moore’s earlier dismissed action and that the earlier case had been dismissed with prejudice after a trial on the merits. This mistaken impression was communicated to the trial court. The trial court then called the case and listened to the Kortsch representative explain that Kortsch could lawfully dispose of Moore’s goods because it became the owner of Moore’s goods by operation of WIS. STAT. § 407.210.⁴ However, the trial court made no findings of fact. Instead, the trial

³ No documentation was provided to the trial court or this court confirming that such a court order was ever made.

⁴ WISCONSIN STAT. § 407.210 provides:

Enforcement of warehouse keeper’s lien.

(1) Except as provided in sub. (2), a warehouse keeper’s lien may be enforced by public or private sale of the goods in bloc or in parcels, at any time or place and on any terms which are

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commercially reasonable, after notifying all persons known to claim an interest in the goods. Such notification must include a statement of the amount due, the nature of the proposed sale and the time and place of any public sale. The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the warehouse keeper is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. If the warehouse keeper either sells the goods in the usual manner in any recognized market therefor, or at the price current in such market at the time of the sale, or if the warehouse keeper has otherwise sold in conformity with commercially reasonable practices among dealers in the type of goods sold, the warehouse keeper has sold in a commercially reasonable manner. A sale of more goods than apparently necessary to be offered to insure satisfaction of the obligation is not commercially reasonable except in cases covered by the preceding sentence.

(2) A warehouse keeper's lien on goods, other than goods stored by a merchant in the course of his or her business, may be enforced as provided in sub. (1) if all of the following are satisfied:

(a) The warehouse keeper notifies all persons known to claim an interest in the goods by delivering in person or sending by registered or certified mail to the last-known address of persons known to claim an interest in the goods the notice specified in par. (b).

(b) The notice includes an itemized statement of the claim, a description of the goods subject to the lien, a demand for payment within a specified time not less than 30 days after receipt of the notification, and a conspicuous statement that unless the claim is paid within that time the goods will be sold by public or private sale.

(3) Before any sale pursuant to this section any person claiming a right in the goods may pay the amount necessary to satisfy the lien and the reasonable expenses incurred under this section. In that event the goods must not be sold, but must be retained by the warehouse keeper subject to the terms of the receipt and this chapter.

(4) The warehouse keeper may buy at any public sale pursuant to this section.

(5) A purchaser in good faith of goods sold to enforce a warehouse keeper's lien takes the goods free of any rights of persons against whom the lien was valid, despite noncompliance by the warehouse keeper with the requirements of this section.

(continued)

court said: “Brenda, you can’t keep filing lawsuits over and over again. This case is dismissed, and if you file another one I am going to impose terms against you of \$100.” When Moore asked to be allowed to give her side of the story, the trial court refused to permit it, stating she had been given a chance to give her side of the story at the earlier hearing. The trial court then instructed her to work out a payment plan with the company.

¶4 Approximately a month later, Moore, armed with a transcript of the first hearing, brought a motion to reopen, seeking to revive her action against Kortsch. When the matter was called, the following exchange took place:

THE COURT: Ms. Moore, we argued this case about a month ago and I told you if you come back again I am going to impose a hundred dollar terms, and you filed another motion to reopen.

MS. MOORE: I have the transcript from the judge’s decision and that’s what –

THE COURT: You now owe Mr. Kortsch a hundred dollars and the case is still dismissed. Next case. It’s over. It’s done. Don’t come back again. Next time I will impose \$500. Now don’t leave. You got another one at 9:30.

(6) The warehouse keeper may satisfy the warehouse keeper’s lien from the proceeds of any sale pursuant to this section but must hold the balance, if any, for delivery on demand to any person to whom the warehouse keeper would have been bound to deliver the goods.

(7) The rights provided by this section shall be in addition to all other rights allowed by law to a creditor against the creditor’s debtor.

(8) Where a lien is on goods stored by a merchant in the course of the merchant’s business the lien may be enforced in accordance with either sub. (1) or (2).

(9) The warehouse keeper is liable for damages caused by failure to comply with the requirements for sale under this section and in case of wilful violation is liable for conversion.

Moore appeals from both dismissal orders.

II. ANALYSIS.

¶5 Moore's arguments are less than clear. She writes that she "feels let down by the court system in both cases, my rights have been taking [sic] from me," and she submits that in the second action, "Judge Cooper refused to allow me to state my case on August 7, 2000. But he did allow [Kortsch's employee] to speak for thirty minutes." Further, Moore complains that at the motion to reopen, "Judge Cooper refused to allow me to speak as he had did [sic] before at the earlier hearing. And he would not even look at the transcript," and "Judge Cooper charged me a \$100 fine payable to [Kortsch's] because I had the case back in court." Kortsch's brief does not respond to Moore's complaints that the trial court erred. When a party fails to respond to an argument, this court interprets this as a concession. *State v. Peterson*, 222 Wis. 2d 449, 459, 588 N.W.2d 84 (Ct. App. 1998).

¶6 A review of the transcripts confirms that the trial court did refuse to permit Moore to present her case, believing that a trial had occurred in the earlier action. The trial court's refusal, premised as it was on a mistake, was error. Further, the trial court's decision to deny Moore's motion to reopen and to assess costs against her was clearly erroneous. Moore brought the motion to reopen after obtaining a transcript of the earlier hearing. She wanted to prove to the trial court that a trial had not been conducted in the first action. She was correct—no trial took place in the first action and the dismissal occurred because her belongings had not been sold. Thus, the trial court's refusal to hear her argument and assessing costs against her was an erroneous exercise of discretion.

¶7 However, this does not end the matter. Both parties have asked this court to decide the legal questions raised in the suit. Moore devotes much of her brief to the merits of her claim against Kortsch and she asks this court to resolve the dispute she has with Kortsch. Kortsch, too, requests this court to decide the merits of Moore's action. Kortsch contends that it was lawfully able to keep Moore's property and to sell it because it followed the procedure in the warehouse keeper lien law found at WIS. STAT. § 407.206(1). In fact, Kortsch's brief contains exhibits touching on the dispute between the parties that were never admitted into evidence at the trial court level.⁵

¶8 This court declines, as it must, the invitation of the parties to decide their underlying dispute. Whether Kortsch acted improperly in holding Moore's belongings and the company is obligated to return them to Moore as Moore argues, or whether Kortsch had the legal right to dispose of Moore's property by operation of the lien law are questions that can only properly be answered by the trial court. This court is limited by the Constitution to appellate jurisdiction only. Article VII, § 5(3), WIS. CONST. This precludes it from making any factual determinations where the evidence is in dispute. Making findings of fact is a power reserved to trial courts. While the court of appeals has constitutional jurisdiction in respect to its supervisory authority over actions and proceedings in the trial court, this grant of jurisdiction does not confer the right to make findings of fact where the evidence is controverted. *Wurtz v. Fleischman*, 97 Wis. 2d 100, 107 & n.3, 293 N.W.2d 155 (1980). As a result, this court affirms the trial court's dismissal of the first action as the matter was not then ripe for decision. This court reverses the trial court's dismissal order in the second action because the trial

⁵ If they were ever admitted, the exhibits are not in the record on appeal.

court erred in its belief that the dispute had been resolved in the earlier action. As a result, the costs assessed against Moore for bringing a motion to reopen are also overturned. This matter is remanded to the trial court for a trial on the merits. Inasmuch as Moore has prevailed on appeal, her appeal was not frivolous and Kortsch's request for appellate costs is denied.

By the Court.—Orders affirmed in part; reversed in part and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

