

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 14, 2002

Cornelia G. Clark
Clerk of Court of Appeals

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.

**Appeal No. 02-0913-FT
STATE OF WISCONSIN**

Cir. Ct. No. 01-SC-559

**IN COURT OF APPEALS
DISTRICT II**

NATIONAL EXCHANGE BANK AND TRUST,

PLAINTIFF-RESPONDENT,

v.

SOUTHSIDE TIRE CO., INC.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Fond du Lac County: HENRY B. BUSLEE, Judge. *Affirmed.*

¶1 SNYDER, J.¹ Southside Tire Co., Inc. appeals from a small claims judgment entered in favor of National Exchange Bank and Trust (NEBT). Southside argues that NEBT failed to prove that Southside caused any damages to NEBT's collateral, or that NEBT suffered any damages due to the loss of a sale of

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

its collateral. We disagree with these contentions and affirm the judgment of the trial court.

FACTS

¶2 In March 2000, Southside installed \$1,854 worth of tires on Jeffrey Jewett's truck. NEBT had a security interest in the truck. In November 2000, the truck was towed to Southside's store after its engine blew. Southside claims that Jewett gave it permission to remove the truck's tires. In the meantime, Leonard Hughes expressed interest to NEBT in buying the truck for \$4,000. Hughes changed his mind when he saw that the truck's tires had been removed and its brakes had been damaged due to Southside's storage of the vehicle. NEBT complained to Southside about the truck's condition, and as a result, Southside reinstalled tires on the truck and repaired its brakes.

¶3 NEBT then sold the repaired truck to a third party for \$2,500 and sued Southside for \$5,000 in damages for "reduced collateral," alleging that Southside did not have permission to remove the tires. Both parties stipulated that the only issue for the trial court to determine was damages caused to NEBT by Southside in removing the tires. The trial court granted NEBT \$1,500 in damages, plus statutory costs and disbursements. Southside appeals.

DISCUSSION

¶4 Southside argues that NEBT failed to prove its damages to a reasonable degree of certainty and that it failed to prove that Southside even caused any actual damage.

¶5 This court "must sustain a damage award if there is any credible evidence that under any reasonable view supports it and removes the issue from

the realm of conjecture.... The evidence is sufficient if it enables the fact-finder to make a fair and reasonable approximation.” *Kersten v. H.C. Prange Co.*, 186 Wis. 2d 49, 59-60, 520 N.W.2d 99 (Ct. App. 1994). If the trial court’s findings are not against the great weight and clear preponderance of the evidence, then the findings must be affirmed. *City of Milwaukee v. Thompson*, 24 Wis. 2d 621, 623, 130 N.W.2d 241 (1964).

¶6 Southside claims that NEBT bears the burden of proving its damages to a reasonable degree of certainty and that NEBT failed to meet this burden by not providing relevant information on the amount of damages suffered from the sale of the truck and by never explaining why the semi-truck was not reoffered to Hughes after being repaired and reinstalled with tires. In examining the record in the present case, this court is unpersuaded. Not only is it clear that the trial court’s determination is not against the great weight and clear preponderance of the evidence, but it is clear that the evidence supports the trial court’s determination. The trial court used credible evidence to find that NEBT had a valid offer from Hughes to purchase the semi-truck for \$4,000. Hughes testified that he withdrew the offer because the truck’s tires had been removed and the brakes had been broken. The trial court found that NEBT mitigated its damages by selling the truck to a third party for \$2,500. Based on evidence that removed its finding from the realm of conjecture, the trial court made a fair and reasonable approximation of damages by subtracting the valid \$4,000 Hughes offer from the \$2,500 ultimately paid for the truck to decide that NEBT sustained \$1,500 in damages. The trial court’s finding is not clearly erroneous.

¶7 Southside also contends that NEBT must prove that Southside did something to cause actual damage before being entitled to a damages judgment. We disagree. Whether Southside caused damages would usually be a matter for

trial on the merits, except in this case the parties stipulated that the only issue before the court was damages. By conceding everything but damages, Southside essentially agreed that NEBT had suffered damages. The only issue for the trial court to decide was the damages amount.

By the Court.—Judgment affirmed.

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