

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 23, 2010

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

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Appeal No. 2010AP132

Cir. Ct. No. 2007CV3383

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

JANE FRANCES LOW,

PLAINTIFF-APPELLANT,

V.

PENN SELF STORAGE,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Dane County:
RICHARD G. NIESS, Judge. *Affirmed.*

Before Vergeront, P.J., Higginbotham and Blanchard, JJ.

¶1 VERGERONT, P.J. This action arises out of a rental agreement for self-service storage space between Penn Self Storage and Jane Low. After a jury

trial on Low's claim that Penn violated provisions of WIS. STAT. § 704.90 (2007-08),¹ which governs self-service storage facilities, the court entered judgment in favor of Low for \$15,000 in compensatory damages, plus costs and interest. Low presents two issues on appeal.

¶2 First, Low contends the circuit court erred in reducing the jury's award of \$22,000 to \$15,000 based on a provision in the rental agreement. She asserts this provision is contrary to WIS. STAT. § 704.90 and is therefore unenforceable. We conclude that § 704.90 does not prohibit a restriction in the rental agreement on the value of the property that may be stored in the leased space and that a corresponding limitation on the compensatory damages a lessee may recover for loss of the stored property is enforceable. We emphasize that we decide this issue under § 704.90 (2007-08) and do not consider the amendments to this statute effective June 2, 2010, which we refer to in paragraph 24.

¶3 Second, Low contends the circuit court erred in precluding her from presenting the issue of punitive damages to the jury. For the reasons we explain in this opinion, we conclude the circuit court properly exercised its discretion in not allowing an amendment to Low's pleading to add punitive damages after the close of evidence and not allowing her to present the issue of punitive damages to the jury. Accordingly, we affirm the judgment.²

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

² Low contends that, if she prevails on appeal, she is entitled to attorney fees under WIS. STAT. § 704.90(12) for the appeal, and she has filed a motion requesting fees. We deny the motion because she does not prevail on appeal.

BACKGROUND

¶4 Low signed an agreement in May 2005 to lease a ten-by-ten-foot storage space from Penn at the rate of \$65 per month. She fell behind on the rent and Penn sold the contents of her storage space at an auction for \$20. When Penn filed a small claims action to recover the balance of what Low owed under the rental agreement, Low answered and filed a counterclaim alleging violations of WIS. STAT. § 704.90, which governs self-service storage facilities. Specifically, Low alleged statutory violations concerning the procedure for selling her property.

¶5 Low's claim was tried to a jury. The court determined that, as a matter of law, Penn had committed four violations of WIS. STAT. § 704.90: (1) failure to include in the rental agreement a provision allowing Low to specify the name and last known address of a person whom Penn was required to notify, in addition to Low, if Low was in default, in violation of § 704.90(2m); (2) failure to include in the rental agreement a statement in bold-faced type that Penn has a lien on Low's personal property in the leased space and may satisfy the lien if Low defaults by selling the personal property in accordance with the statute, in violation of § 704.90(3)(b); (3) failure to place an advertisement containing Low's name, in violation of § 704.90(6)(a)4.; and (4) selling Low's property sooner than fifteen days after the first newspaper advertisement of the sale, in violation of § 704.90(6)(a)6. The jury was asked to decide causation and compensatory damages. For reasons that will be discussed later in the opinion, the court did not allow the issue of punitive damages to go to the jury.

¶6 The jury determined that the statutory violations had caused Low injury and awarded \$22,000 to compensate her for the injury.

¶7 Penn filed a post-verdict motion to reduce the damages from \$22,000 to \$15,000 because of a provision in the rental agreement whereby Low agreed not to store property in the leased space that had a total value in excess of \$15,000 without the prior written permission of Penn. The provision also limited Penn's liability to this amount. The court granted Penn's motion.

¶8 Low filed a motion for reconsideration asking the court to reverse its ruling on punitive damages and grant a new trial on punitive damages. The court denied Low's motion.

DISCUSSION

¶9 On appeal Low contends that the circuit court erred in reducing the award of compensatory damages from \$22,000 to \$15,000 because, she asserts, the lease agreement provision on which the court relied is contrary to WIS. STAT. § 704.90 and is not enforceable. She contends the court also erred in its ruling on punitive damages. We address each issue and affirm both rulings.

I. Limitation on Value of Stored Property and Accompanying Limit on Liability

¶10 The contract provision on which the circuit court relied in reducing the damage award to \$15,000 provides:

4. Use of Premises and Prohibited Storage. ... **Lessee agrees not to store property with a total value in excess of \$15,000.00 without the prior written permission of the Lessor. If such written permission is not obtained, the value of the property shall be deemed not to exceed \$15,000.00.** The premises is not appropriate for the storage of irreplaceable property such as books, writings, objects which have an unknown immediate resale market value, or objects which have a special or emotional value to Lessee. By this agreement, Lessor is generally not liable for the loss of Lessee's property. *In the event any competent court of law adjudicates Lessor liable for any loss, for any*

reason, Lessee agrees that Lessor's liability shall not exceed \$15,000.00.... [Bold in original, italics added.]

¶11 Low contends that the \$15,000 limitation is the same type of limitation on liability we held impermissible under WIS. STAT. § 704.90 in *Cook v. Public Storage, Inc.*, 2008 WI App 155, 314 Wis. 2d 426, 761 N.W.2d 645. Penn responds that *Cook* is not dispositive because *Cook* did not address a provision like the one quoted above: one that regulates the use of the storage unit based on the maximum value of property allowed to be stored and stipulates the value of stored property to be no more than that value. According to Penn, enforcing such a use restriction with an accompanying maximum value on the compensatory damages for the loss of stored property does not negate the protections the legislature intended to provide in § 704.90.

¶12 A resolution of this issue requires that we construe and apply WIS. STAT. § 704.90 to undisputed contract language. This presents a question of law, which we review de novo. See *Wisconsin Cent. Farms v. Heartland Agric. Mktg., Inc.*, 2006 WI App 199, ¶18, 296 Wis. 2d 779, 724 N.W.2d 364.

¶13 We begin with *Cook*, in which the storage facility sought reduction of the jury's compensatory damage award based on a provision in the rental agreement. The provision stated: "Lessee agrees that Operator's and Operator's Agents' total responsibility for any Loss from any cause whatsoever will not exceed a total of \$5,000." *Cook*, 314 Wis. 2d 426, ¶79. We concluded that this provision was unenforceable with respect to the compensatory damages for the following reason:

The legislature has chosen to establish a comprehensive scheme protecting persons who store their personal property in self-service storage under a rental agreement. The legislature has provided that persons injured by a violation of the statute may bring "a civil action to recover

damages” “[i]n addition to the remedies otherwise provided by law.” WIS. STAT. § 704.90(12).³ This expresses the legislature’s intent that operators comply with the statute and compensate persons injured when operators do not. Regardless of whether this limitation of liability for compensatory damages may be permissible in a breach of contract action—an issue we do not decide—enforcing such a limitation in an action under § 704.90(12) negates protections the legislature intended to provide in § 704.90 generally and in § 704.90(12) particularly.

Id., ¶86 (footnote added).

¶14 We do not agree with Low that the provision we addressed in *Cook* is essentially the same as the provision at issue here. The provision we addressed in *Cook* did not contain a limitation on the value of property that could be stored in the leased space.⁴ Therefore, we did not decide whether WIS. STAT. § 704.90 permits an operator to enforce a limitation on liability for loss of stored property

³ WISCONSIN STAT. § 704.90(12) provides:

Right to action for violation. In addition to the remedies otherwise provided by law, any person injured by a violation of this section or any rule promulgated under sub. (9) may bring a civil action to recover damages together with costs, disbursements and reasonable attorney fees, notwithstanding s. 814.04(1), and any equitable relief as may be determined by the court.

⁴ Low points out in a footnote in her reply brief that the rental agreement in *Cook v. Public Storage, Inc.*, 2008 WI App 155, 314 Wis. 2d 426, 761 N.W.2d 645, did contain a provision in the section titled “Use of Premises” stating: “Because the value of the personal property may be difficult or impossible to ascertain, **Lessee agrees that under no circumstances will the aggregate value of all personal property stored in the Premises exceed, or be deemed to exceed, \$5,000 and may be worth substantially less than \$5,000.**” (Bold in original.) Low refers us to a copy of the rental agreement included in an appendix to one of the appellate briefs in *Cook*. However, the operator of the storage facility in *Cook* did not refer to this provision in arguing that the jury’s verdict should be reduced. Instead the operator relied on a provision in the section titled “Limitation of Operator’s Liability; Indemnity,” which provided: “Lessee agrees that Operator’s and Operator’s Agents’ total responsibility for any Loss from any cause whatsoever will not exceed a total of \$5,000.” *Cook*, 314 Wis. 2d 426, ¶79. The provision from the “Use of Premises” section was not addressed in *Cook*.

when the limitation is based on an agreed maximum value of the property that may be stored in the leased space.

¶15 Low argues that *Wisconsin Central Farms*, 296 Wis. 2d 779, which we discussed in *Cook*, supports her position that *Cook* precludes enforcement of the \$15,000 limitation on the amount of compensatory damages she may recover. In *Wisconsin Central Farms* we held that a contract provision that precluded double damages under a statute regulating the sale of produce was not enforceable because the double damages provision was the “sole incentive to private parties to initiate actions to enforce the statute.” *Wisconsin Cent. Farms*, 296 Wis. 2d 779, ¶24. We concluded in *Cook* that, “like the double damages provision in [*Wisconsin*] *Central Farms*, the attorney fees provision in [WIS. STAT.] § 704.90(12) is the incentive for private parties to bring actions to enforce the statute.” *Cook*, 314 Wis. 2d 426, ¶85. However, in *Cook* we did not rely on this reasoning in our discussion of the \$5,000 limitation on liability as applied to compensatory damages. Our reasoning on this point in *Cook* is set forth in paragraph 13 above. As we have already stated, that reasoning does not address a limitation on liability for loss of stored property when the limitation is based on an agreed maximum value of the property that may be stored in the leased space. *Wisconsin Central Farms* does not assist us in resolving whether this provision is enforceable under § 704.90.

¶16 We recognize that the last sentence of the disputed provision here might appear to be a limit on *any* liability of Penn because it provides that its liability shall not exceed \$15,000 “for any loss, for any reason.” However, we do not understand Penn to be construing it in this way. In any case, such a construction would be unenforceable under *Cook*. In *Cook* we concluded that the \$5,000 limitation on liability was unenforceable with respect to the compensatory

damages, attorney fees, and punitive damages. *Cook*, 314 Wis. 426, ¶¶82-89. Therefore, regardless of what the principles of contract construction might yield, the only potentially enforceable aspect of the \$15,000 limitation here is a limitation on the compensatory damages resulting from the loss of the personal property stored in the leased space.

¶17 In the following paragraphs we first consider whether the contract term on the maximum value of property that can be stored in the leased space is prohibited by WIS. STAT. § 704.90. We conclude it is not prohibited.⁵ We then address whether the accompanying limitation on compensatory damages for the loss of that property based on the agreed maximum value is enforceable under § 704.90, and, in particular, § 704.90(12). We conclude it is enforceable.

¶18 In construing WIS. STAT. § 704.90, we interpret the language in the context in which it is used, not in isolation but as part of a whole, in relation to the language of surrounding or closely related statutes. *State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110. We interpret it reasonably to avoid absurd or unreasonable results. *Id.* We also consider the

⁵ Low suggests in a footnote that the limitation on the value of the property that may be stored in the leased space may not be enforceable as a matter of contract law “[g]iven the inherent uncertainty as to the ‘value’ of used personal property.” She cites by way of example *Vohs v. Donovan*, 2009 WI App 181, ¶¶8-10, 322 Wis. 2d 721, 777 N.W.2d 915. *Vohs* addresses the unenforceability of a contract on the ground that an essential term of the contract was indefinite and on the alternative ground that the promise was illusory. It is not apparent why the “inherent uncertainty” of the value of used personal property—assuming this is an accurate characterization—makes the limitation on the value of the property that may be stored either an indefinite essential term of the contract or makes the promise of either Low or Penn illusory. Low does not explain this and does not develop an argument that, as a matter of contract law, the limitation on the value of property that may be stored in the leased space is unenforceable. Accordingly, we do not address this issue. We address only whether such a limitation—and the related limitation on the amount that may be recovered to compensate for the loss of the stored property—is enforceable under WIS. STAT. § 704.90.

scope, context, and purpose of the statute insofar as they are ascertainable from the text and structure of the statute itself. *Id.*, ¶48.

¶19 Examining the language of WIS. STAT. § 704.90, we see that few provisions address the use or restrictions on use of the leased storage space. Subsection 704.90(1) defines “leased space” as a space “located within a self-service storage facility that a lessee is entitled to use for the storage of personal property on a self-service basis pursuant to a rental agreement....” § 704.90(1)(b). Besides the definition of “personal property,”⁶ no statutory provision addresses restrictions on the use of the leased space except the prohibition on use for residential purposes. *See* § 704.90(2). “Rental agreement” means “a lease or agreement between a lessee and an operator that establishes or modifies any provisions concerning the use of a leased space, including who is entitled to use the leased space.” § 704.90(1)(f). This definition indicates that the parties are free to negotiate on the use of the leased space, subject to the definition of “personal property” and the prohibition against residency. In short, we see nothing in the language of § 704.90 that suggests an operator may not restrict use to personal property having no more than a specified value.

¶20 The purpose of WIS. STAT. § 704.90 as expressed in its text does not suggest otherwise. The evident purpose is to provide certain protections to persons who store their personal property in self-service storage facilities. *See Cook*, 314 Wis. 2d 426, ¶86. The protections include written rental agreements, § 704.90(2m); notice of the lien the operator has on the stored personal property,

⁶ “Personal property” is defined as “movable property not affixed to land, including goods, wares, merchandise, motor vehicles, watercraft, household items and furnishings.” WIS. STAT. § 704.90(1)(e).

§ 704.90(3); limitations on late fees, § 704.90(4b); and procedures the operator must follow when the lessee fails to pay the rental fee and before the operator may sell the property, § 704.90(4g), (4r), (5), (6). The limitation on the value of the personal property Low may store in the leased space is not inconsistent with and does not undermine the protections afforded by the statute.

¶21 In summary, the legislature has not made the policy choice to prohibit rental agreements under WIS. STAT. § 704.90 from restricting use of the leased space to personal property below a specified value. Rather, this type of a provision is within the ambit of restrictions on use of the leased space that the parties may agree to in the rental agreement.

¶22 Given that a restriction on the value of the stored property is a permissible provision in a rental agreement under WIS. STAT. § 704.90, the inquiry is: does § 704.90 permit an accompanying limitation on the compensatory damages a lessee may recover for loss of the stored property? We do not agree with Low that § 704.90(12) entitles her to recover the full value of her stored property notwithstanding the contractual limitation on the value of the property that may be stored in the space she leased. As Low appears to acknowledge, without the accompanying limit on the compensatory damages for loss of the stored property, the limitation on the value that may be stored in the leased space is unenforceable as a practical matter.⁷ Had the legislature desired to prohibit a limitation on the value of property that could be stored in a leased space, it would

⁷ While Low asserts that Penn could have counterclaimed for a breach of contract and sought damages for the breach, she also states that the “only relevant ‘remedy’ for the breach is ... a limitation on the operator’s liability ...” (which, she contends, is a violation of WIS. STAT. § 704.90).

have done so directly. It is not reasonable to construe § 704.90(12) to indirectly accomplish what the legislature chose not to do directly.

¶23 Construing WIS. STAT. § 704.90(12) to enforce a contract limitation on compensatory damages for the loss of personal property that is the same as a contract limitation on the value of property that may be stored in the leased space does not undermine the protections of § 704.90. Penn violated the statute by not affording Low the procedural protections to which she was entitled before Penn could sell her property. Penn did not violate the statute by limiting the value of the property Low could store in the leased space without Penn's permission to \$15,000. An award of \$15,000 compensates Low for the property she lost that was stored in the leased space consistent with her agreement. It does not compensate her for the value of property she stored in excess of the agreed upon amount, but we see nothing in § 704.90 in general or § 704.90(12) in particular that requires this result. Low chose not to seek permission from Penn to store property at a higher value and therefore took the risk that, if her property exceeded \$15,000 in value, she would not be able to recover its full value.

¶24 The parties debate the significance of a recent amendment to WIS. STAT. § 704.90. Effective June 2, 2010, § 704.90(2m)(a) was amended to add that “[i]f a rental agreement contains a provision that places a limit on the value of property that is stored in the leased space, that provision shall be typed in bold type or underlined type of the same size as the remainder of the agreement.” 2009 Wis. Act 380, § 4. In addition, § 704.90(3)(c) was created to read: “If the rental agreement contains a limit on the value of property stored in the lessee's storage space, the limit shall be presumed to be the maximum value of the property stored in the space.” 2009 Wis. Act 380, § 6. Penn argues that these changes show that, prior to the amendment, the legislature intended to permit a provision limiting the

value of property that could be stored in a leased space, while Low argues they show that such a provision was not previously permitted. Because we have resolved the issue before us based on the plain language of the statute in effect at the time relevant to this appeal, we do not discuss the recent amendment.

II. Punitive Damages

¶25 Low's pleading, drafted by an attorney representing Low at the time, did not request punitive damages. The record does not disclose any reference to punitive damages until Low, proceeding pro se, filed proposed jury instructions a week before trial with her trial brief. The proposed jury instructions included a copy of the standard jury instruction for punitive damages in non-products liability cases, WIS JI—CIVIL 1701.1, as well as plainly inapplicable standard jury instructions on punitive damages and certain other topics. The record contains no transcript of the jury instruction conference, which took place on the first day of the two-day trial.

¶26 On the second day of trial, during Low's closing argument, she stated, "My life's worth more than \$20. I ask you to have them pay much more than that in punitive damages." The court immediately interrupted Low and instructed the jury that no issue of punitive damages was being submitted to the jury and the jurors were to disregard Low's argument. Outside the jury's presence, Low told the court she had submitted jury instructions regarding punitive damages. The court stated that they had gone over the jury instructions and verdict form the day before and Low had said these were fine and did not request anything more, despite being given the opportunity to do so. Low responded that she had assumed once she submitted the jury instructions on punitive damages, "that was clear." Penn objected to inclusion of an instruction

on punitive damages because it had not been on notice there was a claim for punitive damages and because there had been no evidence on punitive damages.

¶27 The circuit court denied Low’s request for a punitive damages instruction. The court explained that there was no request for punitive damages in her pleading and no request to amend her pleading over the two years the case had been pending. The court also stated that Low made no request for punitive damages or a punitive damages instruction during “a very meticulous, detailed questioning” on the appropriateness of the jury instructions and verdict form. The court viewed it as unfair to Penn to have to defend against punitive damages without having had the opportunity to do discovery and prepare a defense.⁸ In denying Low’s motion for reconsideration of this ruling, the court described what occurred at the instruction conference in this way:

I did go over [the jury instructions] specifically word for word. And we went through every single one of these instructions and the verdict form, and Ms. Low agreed to the content of the jury instructions and the content and form of the verdict form. The Court of Appeals will note that I specifically asked her, you know, speak now or forever hold your peace. What else do you want here? And there was nothing said about punitive damages.

¶28 On appeal Low questions whether a complaint or counterclaim must plead punitive damages, but she assumes for the sake of argument that a plaintiff or counterclaimant must provide specific notice of the intent to seek punitive

⁸ In denying the request, the court also stated that there was no evidence Penn had acted maliciously toward Low or in an intentional disregard for Low’s rights. *See* WIS. STAT. § 895.043 (setting forth the standard on punitive damages). However, in denying Low’s motion for reconsideration of its ruling, the court stated that it was no longer relying on the insufficiency of the evidence, explaining that it did not know if the evidence was sufficient or not. We therefore do not take this reason into account in our analysis.

damages. She contends that the court and Penn had actual notice that Low was seeking punitive damages when she filed her proposed instructions and, given her pro se status, the circuit court erroneously exercised its discretion in not allowing her to amend her complaint at that time.

¶29 For purposes of this appeal, we accept Low’s assumption that a complaint must plead punitive damages and we do not decide that issue. WISCONSIN STAT. § 802.09(1) provides that, after the time period has run for an amendment as of right, the court may grant permission to amend and “leave shall be freely given at any stage of the action when justice so requires.” Under § 802.09(2), when there is an objection at trial that certain evidence or a matter is not within the issues raised in the pleading, a circuit court “may allow the pleadings to be amended [to conform to the evidence at trial] and shall do so freely when the presentation of the merits of the action will be subserved thereby....”

¶30 As Low correctly recognizes, the decision whether to grant leave to amend a complaint, after the time for amending as of right has run, is committed to the discretion of the circuit court. WIS. STAT. § 802.09(1); *Hess v. Fernandez*, 2005 WI 19, ¶12, 278 Wis. 2d 283, 692 N.W.2d 655. On review, we do not reverse a discretionary decision if the circuit court properly exercised its discretion. *Id.* A circuit court properly exercises its discretion when it has examined the relevant facts, applied a proper legal standard, and, using a demonstrated rational process, reached a reasonable conclusion. *Id.*

¶31 We conclude the circuit court properly exercised its discretion. Because we do not have a transcript of the instruction conference, we must assume it supports the circuit court’s ruling. See *Fiumefreddo v. McLean*, 174 Wis. 2d 10, 26-27, 496 N.W.2d 226 (Ct. App. 1993) (An appellant has an obligation to

include in the record on appeal all items from the record in the circuit court essential to decide the issues raised, and when an appellant fails to do so, we assume the missing portion supports the circuit court's ruling.). We therefore assume that the transcript of the instruction conference would support the circuit court's ruling and its description of that conference. Specifically, as the court described the conference, given the manner in which the court went over the instructions and verdict questions with Low and questioned her, the court could reasonably expect that Low—taking into account her pro se status—would understand that, if she wanted punitive damages, she needed to say something at that time.⁹ Because Low did not do so, and because nothing during the trial signaled that she was seeking punitive damages, the circuit court and Penn could reasonably conclude that punitive damages were not an issue, regardless of what she had filed the week before. The court could reasonably decide that, under these

⁹ In denying the motion for reconsideration, the court referred to WIS. STAT. § 805.13(3), which provides:

Instruction and verdict conference. At the close of the evidence and before arguments to the jury, the court shall conduct a conference with counsel outside the presence of the jury. At the conference, or at such earlier time as the court reasonably directs, counsel may file written motions that the court instruct the jury on the law, and submit verdict questions, as set forth in the motions. The court shall inform counsel on the record of its proposed action on the motions and of the instructions and verdict it proposes to submit. Counsel may object to the proposed instructions or verdict on the grounds of incompleteness or other error, stating the grounds for objection with particularity on the record. Failure to object at the conference constitutes a waiver of any error in the proposed instructions or verdict.

Low argues that this applies only to counsel, not to a pro se litigant. We need not decide the correct construction of this statute because we are satisfied that, even if this statute does not apply to a pro se litigant, the circuit court's ruling was reasonable for the reasons we explain in the text.

circumstances and in light of the fact that Low had not given notice of seeking punitive damages in the two years before submitting her proposed instructions, it would be unfair to Penn to allow an amendment to include punitive damages. In these circumstances, the court properly exercised its discretion in concluding that the interests of justice would not be served by an amendment after the close of evidence. Accordingly, the court acted properly in not permitting the jury to consider punitive damages.

CONCLUSION

¶32 The circuit court correctly reduced the compensatory damages awarded by the jury to \$15,000, and properly exercised its discretion in not allowing an amendment to the complaint on punitive damages and not allowing the jury to consider punitive damages. Accordingly, we affirm the judgment.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

