

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 21, 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. 99-1703

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

WISCONSIN OVEN CORPORATION,

PLAINTIFF-RESPONDENT,

V.

**MESA INDUSTRIES, INC., GERALD ANDINO AND
FRANK NISENBOIM,**

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Walworth County:
JAMES L. CARLSON, Judge. *Affirmed.*

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

¶1 PER CURIAM. Mesa Industries, Inc. and its principals, Gerald Andino and Frank Nisenboim (collectively, Mesa), appeal from a judgment dismissing Mesa's counterclaim against Wisconsin Oven Corporation (WOC),

denying Mesa costs after a mistrial and dismissal of two claims, and awarding WOC attorney's fees and costs for that period of the litigation during which Mesa lacked a valid certificate to conduct business in Wisconsin. The issues are whether Mesa lacked the ability to bring suit because it surrendered its assets to creditors and whether the trial court erroneously exercised its discretion with respect to attorney's fees and costs. We affirm the judgment.

¶2 Mesa purchased from WOC an industrial paint finishing system which included a drying oven, curing oven, conveyor system, washer, and environmental powder booth. WOC commenced this action to collect remaining amounts due under the purchase contract.¹ Mesa answered that the paint system never worked correctly. Mesa's counterclaim was to recover damages caused by WOC's failure to timely install the paint system and defective performance of the system.

¶3 To finance its operations, Mesa had a line of credit with Norwest Business Credit, Inc. The security agreement with Norwest gave Norwest a first security interest in collateral, including all of Mesa's general intangibles. By a corporate resolution passed on February 23, 1996, Mesa assigned to Andino and Nisenboim "any claim it may have against Wisconsin Oven and others for alleged defects and delays caused by Wisconsin Oven's installation of a paint system at Mesa Industries, Inc." Soon thereafter because of financial difficulties and the cessation of business operations, Mesa surrendered all collateral, including general intangibles, to its junior creditors. In turn, the junior creditors sold all collateral and general intangibles to Palmer/Snyder Furniture Company. Norwest was paid

¹ WOC's amended complaint sought judgment against Gerald Andino and Frank Nisenboim personally based on alleged misrepresentations and fraudulent transfers.

and released its security interest.² Surrender and sale of the assets was made on March 14, 1996, prior to WOC filing its complaint on March 18, 1996.

¶4 At trial, two of WOC's claims were dismissed at the close of WOC's presentation of evidence. The trial court dismissed Mesa's counterclaim on the ground that Mesa had relinquished to its creditors all of its rights to its collateral, including any cause of action to recover money for a breach of warranty. The trial court determined that the purported assignment to Andino and Nisenboim of the cause of action against WOC was a violation of the security agreement. WOC voluntarily dismissed its remaining two claims and the jury was excused.

¶5 Mesa first argues that it has "standing" to pursue claims against WOC because it was aggrieved by WOC's negligence. It contends that WOC failed to raise a lack of standing as an affirmative defense. We assume without deciding that Mesa has "standing" in the traditional sense of being a person aggrieved by alleged negligence. However, a person with standing to commence an action can assign the right to sue to another. See *D'Angelo v. Cornell Paperboard Prods. Co.* 19 Wis. 2d 390, 401, 120 N.W.2d 70 (1963) (assignment stripped away the right to bring a suit); *Witt v. Realist, Inc.*, 18 Wis. 2d 282, 289, 118 N.W.2d 85 (1962) (substantive and not merely procedural question presented as to the right of a particular plaintiff to sue in the face of an assignment). The real issue is the effect of the surrender of Mesa's general intangibles. That issue

² The surrender and sale of assets did not include leased equipment. Mesa had financed the purchase of the conveyor system through a lease arrangement with AT&T Capital Leasing Services, Inc. Palmer/Snyder did not assume the conveyor lease.

was raised at the start of this litigation and was tried by implication. *See* Wis. STAT. § 802.09(2) (1997-98).³

¶6 The security agreement with Norwest uses the term “general intangibles” as defined by the Uniform Commercial Code (UCC). The UCC definition is codified at WIS. STAT. § 409.106: “‘General intangibles’ means any personal property (including things in action) other than goods, accounts, chattel paper, documents, instruments, investment property and money.” Mesa’s cause of action against WOC for breach of contract or breach of warranties is a “thing in action.” *See Corcoran v. Land O’Lakes, Inc.*, 39 F. Supp. 2d 1139, 1147 (N.D. Iowa 1999). Mesa grafts to the definition of general intangibles the requirement that the contractual rights are customarily used as commercial security. *See* Official Comment, 3 UNIFORM COMMERCIAL CODE (ULA) § 9-106 at 236 (West 1992) (“The term ‘general intangibles’ brings under this Article miscellaneous types of contractual rights and other personal property which are used or may become customarily used as commercial security.”). However, we deem reliance on the commentary as only necessary when the intangible in question does not squarely fall under the code definition. Further, *Corcoran* demonstrates that a lawsuit or claims therein have long been recognized as general intangibles used as commercial security.

¶7 Thus, the cause of action against WOC was a general intangible in which Norwest held a security interest and which was surrendered, without limitation, to creditors. Mesa argues that because the conveyor system was financed through a lease arrangement with AT&T, and leased assets were not

³ All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

surrendered, Mesa retained a sufficient interest in the conveyor system to support its action against WOC. “In a lease situation when the property is leased to a third party the lessor relinquishes physical possession of the property to the lessee, but he nevertheless, retains a legal interest in the property as the holder of legal title.” *Voluntary Assign. of Watertown Tractor & Equip. Co.*, 94 Wis. 2d 622, 632, 289 N.W.2d 288 (1980). AT&T, not Mesa, holds legal rights with respect to the conveyor system.

¶8 The purported assignment to Andino and Nisenboim of the cause of action Mesa had against WOC for alleged defects and delays did not divest Norwest of its superior interest in that cause of action as a general intangible. *See* WIS. STAT. § 409.306(2).⁴ The surrender of Mesa’s general intangibles included the cause of action against WOC regardless of the assignment to Andino and Nisenboim. The trial court correctly determined that Mesa no longer possessed the right to sue WOC.

¶9 The first time the parties went to trial, a mistrial was declared after jury selection because WOC had used its peremptory strikes in a discriminatory manner. As a sanction, WOC was required to pay jury fees. Mesa contends that it should have been awarded costs and attorney’s fees incurred in the duplication of trial preparation. Under WIS. STAT. § 814.036, the imposition of costs occasioned by a mistrial is a matter within the trial court’s discretion. *See Schultz v. Darlington Mut. Ins. Co.*, 181 Wis. 2d 646, 656, 511 N.W.2d 879 (1994). The

⁴ WISCONSIN STAT. § 409.306(2) provides: “Except where this chapter otherwise provides, a security interest continues in collateral notwithstanding sale, exchange or other disposition thereof unless the disposition was authorized by the secured party in the security agreement or otherwise, and also continues in any identifiable proceeds including collections received by the debtor.”

trial court found that the activity that occurred in the three-week period between the mistrial and second trial was not duplicative but addressed new matters. It found that Mesa was not prejudiced by the mistrial but that the extra time enhanced overall preparation for trial by clarifying matters. These findings are not clearly erroneous and support the trial court's exercise of discretion in determining the appropriate sanction for the mistrial.

¶10 Mesa also claims that it is absolutely entitled to taxable costs because of the dismissal of two of WOC's claims at the close of WOC's case. It relies on WIS. STAT. § 814.03(1), which provides: "If the plaintiff is not entitled to costs under s. 814.01(1) or (3), the defendant shall be allowed costs to be computed on the basis of the demands of the complaint." We recognize that § 814.03(1) is mandatory, not discretionary. See *Strong v. Brushafer*, 185 Wis.2d 812, 818, 519 N.W.2d 668 (Ct. App. 1994). However, Mesa's counterclaim brings the case under WIS. STAT. § 814.035(2), which provides: "When the causes of action stated in the complaint and counterclaim and cross complaint arose out of the same transaction or occurrence, costs in favor of the successful party upon the complaint and counterclaim and cross complaint so arising shall be in the discretion of the court." In the face of the dismissal of two of WOC's claims and the dismissal of the counterclaims, the award of costs was a matter of discretion for the trial court. The trial court concluded that WOC was really the only successful party in this litigation despite that WOC voluntarily dismissed its two remaining claims. We agree. The denial of costs to Mesa was a proper exercise of discretion.

¶11 Mesa was ordered to pay WOC \$4,000 for attorney's fees incurred during the period of the litigation in which Mesa lacked a valid certificate of authority from the state of Wisconsin. Mesa is an Illinois corporation. Under

WIS. STAT. § 180.1502(1), “[a] foreign corporation transacting business in this state without a certificate of authority, if a certificate of authority is required under s. 180.1501, may not maintain a proceeding in any court in this state until it obtains a certificate of authority.” Mesa concedes that its certificate of authority was revoked on October 31, 1996, and not reinstated until October 1997.

¶12 Mesa claims that there was no evidence that during the time it was without a certificate of authority that it transacted any business in the state other than maintaining and defending against this action. Mesa contends that a threshold determination must be made whether it was required to have a certificate of authority during that time.

¶13 The trial court did not assess attorney’s fees for the simple lack of the certificate of authority. The court looked to the misleading affidavits filed by Andino and Nisenboim on December 13, 1996. Those affidavits indicated that Mesa “is still a viable corporation which remains in good standing with the State of Wisconsin Secretary of State’s office.” Contrary to Mesa’s present assertion that it was not conducting business which required a certificate of good standing, the affidavits indicated that Mesa “is currently pursuing other business endeavors.” The court found that the affidavits included representations that kept the case going when there was no right to keep it going. It assessed attorney’s fees under WIS. STAT. § 802.05(1)(a), which vests the trial court with discretion to determine an appropriate sanction for a party’s inaccurate pleading. The sanction may include an order to pay to the other party the amount of reasonable expenses incurred by that party because of the inaccurate pleading, including reasonable attorney fees. *See id.* The trial court found that \$4,000 was the cost incurred by WOC to determine if Mesa had the appropriate certificate of authority. The trial court properly exercised its discretion.

By the Court.—Judgment affirmed.

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

