

**COURT OF APPEALS
DECISION
DATED AND FILED**

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Cornelia G. Clark
Acting 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. 99-2619

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

DC TRANSPORT OF WISCONSIN, INC.,

PLAINTIFF-APPELLANT,

v.

KENNETH HASS,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Monroe County:
JAMES W. RICE, Judge. *Reversed and cause remanded with directions.*

¶1 VERGERONT, J.¹ This is a small claims dispute between a trucking company, DC Transport of Wisconsin, Inc., and a contract driver, Kenneth Hass. In January 1999, the parties entered into a relationship whereby Hass would pick up and deliver loads for DC Transport. In May 1999, Hass

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (1997-98).

terminated his employment² with DC Transport. DC Transport brought suit against Hass alleging: (1) at the termination of employment, Hass failed to return a semitrailer and a telephone card that belonged to DC Transport; (2) the unlawful retention of the corporation's semitrailer resulted in lost profits totaling approximately \$5,000. The trial court determined that Hass had no authority to keep the semitrailer beyond the termination of his employment, and, therefore, was liable for any damages. However, the court awarded no damages because, it held, DC Transport failed to meet its burden of proof on damages.

¶2 DC Transport appeals the judgment, claiming the trial court erred in deciding that it did not meet its burden of proof on damages. We affirm the trial court's determination that DC Transport did not meet its burden of proof on lost profits, but we conclude the trial court did err in failing to award DC Transport consequential damages in the amount of \$200 for expenses in recovering the trailer. We therefore reverse and remand for the consequential damages to be awarded.

BACKGROUND

¶3 The rules in effect during Hass's employment provided that upon termination by either employer or employee, all money owed the employee would be held for a period of two weeks in order to ensure that all bills are turned in and all equipment is accounted for and returned.

² We use the term "employment" because it is used by the parties and in the company's handout for contract drivers. Whether Hass is an employee of DC Transport or an independent contractor is inconsequential to this appeal.

¶4 Mark Ludeking, vice president of DC Transport, testified as follows. After Hass terminated his employment, Ludeking told Hass the company was going to stop payment on his last check because he had not returned the trailer. Hass told Ludeking the trailer was parked outside of a theater located in Sparta, Wisconsin, and also said that Ludeking “better not stop payment on that check.” Ludeking went to retrieve the trailer at the theater but it was not there. After this incident, Ludeking repeatedly tried to get in contact with Hass in order to recover the trailer. Hass waited thirteen to fourteen days after he quit to return the trailer to a weigh station in West Salem. Ludeking was subsequently notified by the Wisconsin State Patrol that his trailer had been dropped off at the weigh station. Ludeking hired a driver to go to West Salem to pick up the trailer. However, when the driver got there, he was told that the trailer would not be released that day because it did not pass inspection due to a broken spring. Once the spring was repaired, Ludeking had to rehire the same driver to drive back to West Salem to retrieve the semitrailer, paying the driver a total of \$200 for his services.

¶5 With respect to lost profits, Ludeking testified as follows:

Q Now, you mentioned you have seven trailers?

A Yes.

Q And you use these trailers to haul freight?

A Constantly.

Q And are they all of the same type of trailer or do you have different types of trailers?

A No. They are all refrigerated unit trailers.

Q And how long – you said that Mr. Hass told you he was going to quit on May 7th?

A I do believe that was the day, yes.

Q And on what day did you pick up the trailer?

A I do believe it was either picked up the 19th or the 20th.

Q Have you calculated how many days that was?

A It's like 13 or 14.

....

Q And if the trailer had been brought back to you on May 7th, would you have used it?

A Yes, definitely.

Q And how would you have used that trailer?

A I would have been loading it with products that we haul out of Wisconsin immediately.

Q And did you have any loads to haul with that trailer?

A Yes, I did.

Q And what kind of loads would you have hauled?

A Probably french fries out of Plover or cheese out of Rochester, Minnesota, or cheese out of Plymouth, Wisconsin, or it's multiple different varieties of loads.

Q Did you have to forego any loads because this trailer was unavailable?

A Yes, I did. I refused freight because I didn't have a trailer to my access.

¶6 To establish a dollar amount for DC Transport's claim of lost profits, Ludeking presented records from two loads hauled in the past as examples. Ludeking testified that the first load was hauled by a trailer similar to one driven by Hass. The records showed DC Transport charged \$3,025 for this load. Ludeking testified that from this amount, \$963.53 was paid to the driver for wages and fuel, leaving a profit of \$2,061.47, or \$412.29 per day for each of the five days the trailer was on the road. For the second load DC Transport was paid \$2,200 for three days on the road. Ludeking testified that the company's profit was \$1,774.

¶7 On cross-examination of Ludeking, opposing counsel demonstrated that, in the second example, \$600 worth of expenses for such things as gas, oil and repairs were not included in Ludeking's calculations. Ludeking acknowledged that, in order to accurately determine the company's profits for that load, those expenses needed to be subtracted. When asked whether the accurate amount of his

daily profit for the load hauled by Hass was not substantially lower than the \$500 per day Ludeking had earlier testified to, Ludeking stated: “That’s two examples. Sometimes I make a lot more than that on a load. So if you take the two, it probably still averages out probably close to \$500.00 a day.”

¶8 The trial court found that although Ludeking said he lost the use of the trailer for thirteen days, the court did not know how many of those days would have been “workdays” or whether DC Transport had other trailers available at the time, and therefore did not award damages.

DISCUSSION

¶9 DC Transport contends the trial court erred because the standard it applied to their proof of damages for lost profits was too strict, and the evidence was sufficient to support an award for damages.

¶10 On appeal, we do not set aside findings of fact made by the trial court unless they are clearly erroneous. *See* WIS. STAT. § 805.17(2). The credibility of a witness and the weight to be accorded a witness’s testimony is for the trial court to decide, not this court. *Lessor v. Wangelin*, 221 Wis. 2d 659, 665, 586 N.W.2d 1 (Ct. App. 1998). When more than one reasonable inference can be drawn from the credible evidence, we must accept the inference drawn by the trial court. *See Siker v. Siker*, 225 Wis. 2d 522, 528, 593 N.W.2d 830 (Ct. App. 1999).

¶11 A claimant has the burden to prove by credible evidence to a reasonable degree of certainty both the fact of damages and the amount. *Naden v. Johnson*, 61 Wis. 2d 375, 387, 212 N.W.2d 585, 591 (1973). Although whether a party has sustained its burden of proof is a question of law, we must accept the trial court’s assessment of the credibility of the witnesses. *Burg v. Miniature*

Precision Components, 107 Wis. 2d 277, 287, 319 N.W.2d 921, 927. While damages for lost profits need not be proved with absolute certainty, a claimant must produce sufficient evidence so that a reasonable inference can be made as to the amount of damages. See *Lindevig v. Dairy Equip. Co.*, 150 Wis. 2d 731, 740, 442 N.W.2d 504 (Ct. App. 1989).

¶12 We conclude the trial court applied the correct standard and the trial court's determination that DC Transport did not present enough evidence on the amount of damages was reasonable. A plaintiff is not entitled to damages for loss of use of property absent a showing that the plaintiff's property would have been used had it not been detained. *Korb v. Schroedel*, 93 Wis. 2d 207, 212, 286 N.W.2d 589 (1980). DC Transport did not present any evidence of specific jobs that it had refused because it did not have access to the trailer. The trial court found that Ludeking's general statement that he had to refuse freight hauls and could have used the trailer for certain purposes, without any records or specific dates or details of the lost jobs, was insufficient evidence on which to make an inference as to how many of the thirteen to fourteen days the trailer would have been used. We conclude it was reasonable for the court to be uncertain based on its assessment of Ludeking's testimony and, therefore, the court did not err in deciding that DC Transport had not proved lost profits.³

¶13 However, we conclude the trial court did err by not awarding consequential damages to DC Transport in the amount of \$200. The record

³ In addition, the evidence Ludeking presented on the company's profits on two prior hauls, as examples of profits, did not take all the expenses into account. The court therefore could reasonably determine that Ludeking's testimony on the profits per trip was not sufficiently reliable. But the fundamental deficiency was the lack of evidence on what specific jobs the company would have used the trailer for.

supports the trial court's determination that Hass unlawfully retained the trailer and failed to return the trailer. There is undisputed evidence that DC Transport incurred \$200 in recovering the trailer. Although DC Transport makes these points in its initial brief, Hass does not dispute them in his response. We take this as a concession that the trial court erred in not awarding DC Transport \$200. *See Schlieper v. DNR*, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994). We therefore reverse the judgment on this point and remand to the trial court with directions to award \$200 in damages in DC Transport's favor.

By the Court.—Judgment reversed and cause remanded with directions.

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

