COURT OF APPEALS
DECISION
DATED AND FILED

January 28, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2418

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

JAMES FREER,

PLAINTIFF-APPELLANT-
CROSS-RESPONDENT,

v.

ZIMBRICK, INC.,

DEFENDANT-RESPONDENT-
CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Dane County: RICHARD J. CALLAWAY, Judge. *Affirmed.*

Before Dykman, P.J., Roggensack and Deininger, JJ.

PER CURIAM. James Freer appeals a judgment dismissing his complaint against Zimbrick, Inc., after trial. We affirm.

Freer brought this action on a variety of theories, but all relate to his purchase of a used car from Zimbrick. The case was tried to the court. The facts were substantially in dispute, but the court ultimately found in favor of Zimbrick.

Freer first argues that the trial court erred by considering the reputation in the community of two businesses whose employees were witnesses in this case. As to one business, the court stated:

> Holmes has been around for many, many years. They're reliable. They have a good reputation in the area. I think it was George Holmes' father that started the thing back on Syene Road. They couldn't stay in business that long if they had been dishonest. I find the testimony of Mr. Zimpel to be clear and convincing.

As to Zimbrick, the court stated:

> I find the testimony of the Zimbrick people to be credible. John Zimbrick was a salesman for Cage Buick before he bought and became Zimbrick Buick. He has enjoyed a good reputation in this city for 25 or 30 years and so has Zimbrick. They have enjoyed a good reputation in the community.

We conclude that these remarks were offhand comments and were not actually determinants in the judge's decision. The court's other remarks show that it did consider the evidence presented and that it concluded that Freer had not made his case.

Freer also argues that the trial judge should have been disqualified because the above comments indicate bias and partiality in favor of Zimbrick. This issue was not raised in the trial court. Freer could have raised it orally after the judge's decision, or by motion for reconsideration. We ordinarily do not address issues raised for the first time on appeal. *See* ***Wirth v. Ehly***, 93 Wis.2d

433, 443-44, 287 N.W.2d 140, 145-46 (1980). We see no grounds to depart from that practice in this case.

Freer next argues that he was improperly deprived of his right to a jury trial when the trial court denied his motion to voluntarily dismiss his case without prejudice. The relevant facts are as follows. Freer originally commenced this action pro se in small claims court. After losing before the court commissioner, Freer sought a trial de novo and retained counsel. Counsel concluded that Freer's available claims exceeded the jurisdictional limit for small claims court, and Freer filed an amended complaint seeking higher damages on November 8, 1996. A scheduling conference for the trial de novo was held on November 11, 1996, and pursuant to the scheduling order Freer was to file a jury demand and pay jury fees by November 15, 1996.

On November 14, the day before the jury fees were due, Freer's attorney wrote to the trial judge and advised him that the judge's clerk had told him that, in order to proceed with a large claim, he must dismiss the small claim action without prejudice and refile in circuit court. The letter stated that counsel had submitted a stipulation for dismissal without prejudice to Zimbrick's counsel; that Freer would ask that the refiled case be assigned to the same judge so the scheduling order could remain in effect; and that, "to avoid unnecessary confusion," Freer would not be filing the jury request and fee by the next day, but would do so during the following week when he refiled as a large claim. The letter concluded: "If the court should disagree with this proposed plan, I would appreciate it if it would advise me at once."

Several months later, apparently after failed settlement negotiations, Freer moved the court for an order dismissing his small claims action without

prejudice so he could refile in circuit court. The transcript of the hearing on this motion indicates some uncertainty by the parties and the court as to the appropriate procedure Freer should follow. However, the court ultimately denied the motion and concluded that Freer would be allowed to proceed with this case as a large claim, but the trial would be to the court because the jury fee was not timely paid.

The relief Freer seeks on appeal is a new trial before a jury, or to be allowed to dismiss without prejudice and refile in circuit court for a jury trial. He argues that the court erroneously exercised its discretion by failing to state the reason for its decision "with particularity or any degree of comprehensibility." However, even if the court's expression of its reasons for its decision was incomplete, we will search the record to see if it supports the court's decision. *See* ***Loomans v. Milwaukee Mut. Ins. Co.***, 38 Wis.2d 656, 662, 158 N.W.2d 318, 320 (1968). Freer argues that the decision here is not supported because it was inequitable. Freer argues that he reasonably relied on the trial court's silence in response to his November 14, 1996 letter as indicating the court's approval for his proposed procedure, and as a result Freer decided not to pay the jury fee in the small claims case, which would not have been refundable if he had later dismissed the case. Therefore, he argues, the trial court should be "estopped" from denying his motion to dismiss without prejudice.

We reject the argument. Freer's reliance on the court's silence was not reasonable. A court is under no obligation to issue an immediate response to such a letter. Nor can a trial court be "estopped" from rejecting a party's proposal in a letter simply because the court does not respond. If uncertain of the proper procedure, Freer could have moved to amend the scheduling order or clarify the procedure, or could have paid the small claims jury fee even though it might not

be refundable. Ultimately, Freer's loss of a jury trial was caused as much by his own failure to file in the correct court to begin with, and by his own decision not to pay the jury fee. The result was not inequitable.

Finally, Freer argues that the trial court erred by granting Zimbrick's motion to prevent him from introducing the testimony of David Love. We assume, for purposes of this opinion, that the court erred. We turn to whether the error was harmless. We will reverse the trial court's decision only if there is a reasonable possibility that the error contributed to the result. *See* ***Nischke v. Farmers & Merchants Bank & Trust***, 187 Wis.2d 96, 108, 522 N.W.2d 542, 547 (Ct. App. 1994).

Although Freer focuses on the substance of Love's proposed testimony, as described by his attorney in an affidavit, we note that it is questionable whether Love would have testified at all, regardless of the court's ruling. During oral argument on the motion on the day of trial, Freer's counsel stated: "The motion … is regarding one of [Freer's] potential witnesses that we would like to call by telephone, if possible, and quite frankly, I don't know if he is going to be able -- it's very -- been very problematic to get to this witness." Love was obviously not in the courtroom, and it does not appear that Freer subpoenaed this witness that he now argues was crucial to his case. It is also not clear that telephone testimony would have occurred in this case under § 807.13, STATS., even if Love had been reachable by telephone. Under these circumstances, we conclude that the error, if any, was harmless.

Because we have affirmed the judgment, we need not address Zimbrick's cross-appeal.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)(5), STATS.