COURT OF APPEALS
DECISION
DATED AND FILED

April 27, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-1489

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

CINDY A. BOELTER, AND LEONA BOELTER,

PLAINTIFFS-RESPONDENTS,

V.

KAY C. BAGSTAD,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Rock County: JAMES WELKER, Judge. *Affirmed.*

¶1 DEININGER, J.[1] Kay Bagstad appeals an order directing her to return personal property to Cindy Boelter, and an order finding her in contempt for failing to do so. On appeal, Bagstad contends that: (1) the trial court was not

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

competent to entertain Boelter's small claims action because the value of the property in question exceeded five thousand dollars; (2) the trial judge was prejudiced against Bagstad and should have recused himself from further participation in the matter; and (3) the trial court's contempt order was unlawful because it failed to establish feasible purge conditions. We find no merit in any of these contentions, and we therefore affirm the orders of the trial court.

BACKGROUND

¶2 Cindy Boelter moved into Kay Bagstad's home in February 1998. Although there was no written rental agreement between them, Boelter contributed substantially to the household expenses.[2] In January 1999, Boelter and Bagstad were involved in a disagreement which resulted in Boelter leaving Bagstad's home. When Boelter returned two weeks later to retrieve her belongings, Bagstad refused to turn over the majority of Boelter's personal property. Boelter then filed a small claims action against Bagstad to recover this property.[3] After a bench trial, the court determined that Bagstad had "wrongfully withheld" Boelter's property and directed Bagstad to allow Boelter to enter her home and retrieve this property.

¶3 When Boelter returned to Bagstad's home, however, Bagstad again refused to turn over certain items. Boelter moved the court to enter an order of

[2] At trial, the two parties disputed the terms of their informal financial agreement. Bagstad claimed that Boelter had agreed to pay half of the rent and half of the household bills. Boelter admitted that she had initially paid $250 per month toward rent but that a month or two later the financial arrangement "changed" and she instead began paying the household bills in their entirety. Bagstad had counterclaimed for almost $2,000 in unpaid rent and "utilities," but the trial court found that she had failed to satisfy her burden of proof and denied her counterclaim.

[3] Boelter's cause of action was first heard by a Rock County court commissioner. The court commissioner ordered Bagstad to return certain specific items of property to Boelter. Bagstad then requested a trial de novo in the circuit court. *See* WIS. STAT. § 799.207(3).

contempt against Bagstad, and the court conducted a hearing to consider Boelter's motion. At the close of this hearing, the court granted the motion and entered an order of contempt against Bagstad. The order committed Bagstad to jail unless she returned Boelter's property and paid $375 towards Boelter's attorney fees. Bagstad appeals both the contempt order and the initial order instructing her to return Boelter's property.

ANALYSIS

¶4 Bagstad first contends that the trial court was not competent to entertain Boelter's cause of action because the value of the disputed property exceeds five thousand dollars. Her contention is based on the fact that Boelter's suit was brought as a "small claims action" and is therefore subject to the procedures set forth in WIS. STAT. ch. 799. Under WIS. STAT. § 799.01(1)(c), small claims procedures apply to "[a]ctions for replevin … where the value of the property claimed does not exceed $5,000."

¶5 The value of the withheld property is not entirely clear from the record. In its written order, the trial court stated that Bagstad's personal property was worth "approximately $5,000." At the close of the trial, however, the court had stated that "the value of that property was something *clearly in excess of $5,000*, which is the small claims limit" (emphasis added). Bagstad points to the trial court's oral pronouncement that the value of Boelter's property exceeded the limit set forth in WIS. STAT. § 799.01(1)(c), and she asserts that the trial court was thus not competent to entertain the action before it. *See* ***Bank of Spring Valley v. Wolske***, 144 Wis. 2d 762, 765, 424 N.W.2d 744 (Ct. App. 1988) (holding that "where a court has power to deal with an action, but for no more than a designated amount, the court lacks competency for excess sums"). We conclude that even if

Bagstad is correct that the trial court lacked competence to enter the instant replevin order, her objection comes too late.

¶6 First, we are not convinced that the issue is properly characterized as a competence issue. Whether a court is competent to determine the result of a particular action depends upon whether the legislature has conferred upon the court the power to entertain that type of action. *See* ***Mueller v. Brunn***, 105 Wis. 2d 171, 177, 313 N.W.2d 790 (1982); *see also* RESTATEMENT OF JUDGMENTS, § 7 cmt. a (1942). The legislature has clearly authorized circuit courts to decide actions for replevin. *See*, *e.g.*, WIS. STAT. ch. 810. And, ch. 799 does *not* create a "small claims court" separate from the circuit court; rather, it specifies "the exclusive procedure to be used in circuit court" for certain actions. *See* WIS. STAT. § 799.01(1). The issue before us, then, appears to be whether the circuit court erred by allowing Boelter to obtain her replevin judgment by employing small claims procedures.

¶7 We conclude that Bagstad failed to raise the procedural objection in a timely fashion, and thus forfeited the opportunity to object to the use of small claims procedures. Bagstad first raised the issue after not only the replevin judgment had been entered, but after she had been found in contempt for failing to return the property. Even if the issue before us is one of competence, however, we similarly conclude that Bagstad forfeited her right to object to the competence of the trial court when she failed to timely object to the court's competence to proceed. *See* ***Wall v. DOR***, 157 Wis. 2d 1, 7, 458 N.W.2d 814 (Ct. App. 1990). If Bagstad was concerned about the trial court's competence to entertain Boelter's replevin action, she should have objected at the time Boelter filed her small claims complaint or, at the very latest, at the close of trial when the court addressed the

valuation issue. Boelter failed to timely raise the issue of the trial court's competence, and we therefore decline to address it further. *See* ***id.***

¶8 Bagstad next contends that the trial judge was prejudiced against her and should have recused himself from further participation in the matter. Specifically, Bagstad argues that Judge Welker inappropriately commented on her "financial situation" and that the judge expressed a "desire" to send her to jail.[4] Bagstad contends that these comments suggest that Judge Welker was biased and therefore unable to preside impartially at trial. Bagstad, however, did not ask the judge to recuse himself at the time the comments were made, and she did not raise the issue of bias during any subsequent trial court proceedings. It is well established that "[a] challenge to a judge's right to adjudicate a matter must be made as soon as the alleged infirmity is known and prior to the judge's decision on a contested matter." ***State v. Marhal***, 172 Wis. 2d 491, 505, 493 N.W.2d 758 (Ct. App. 1992). Accordingly, Bagstad's belated attempt to disqualify Judge Welker fails.

¶9 Finally, Bagstad contends that the trial court erred when it found her in contempt of court and refused to create a purge condition which would allow her to pay for the value of Boelter's property instead of returning the property itself. After finding Bagstad in contempt of court, the trial court issued an order

---

[4] During the contempt hearing, Judge Welker stated:

> [I]t's very clear [that Bagstad] didn't do what she was supposed to do…. I'm going to put her in jail, and I'm going to keep her in jail until she turns these items over to the plaintiff….

We disagree with Bagstad's assertion that the comment demonstrates judicial bias. Rather, the judge was expressing his frustration with Bagstad's apparently wilful refusal to comply with a court order.

which stated that Bagstad would be sentenced to jail unless she "turn[ed] over all of the circled items listed on Exhibit #1" and "return[ed] the items to [Boelter] by … putting them in good condition, on the porch or in the garage…." Bagstad, however, insists that she no longer possesses some of these items and is therefore unable to comply with the trial court's purge conditions. Bagstad contends that the trial court was required to issue an "alternative" purge condition which would allow her to pay for the value of the missing property and thereby avoid a jail sentence.

¶10 A trial court has the authority to impose up to six months of imprisonment as a remedial sanction for contempt of court. *See* WIS. STAT. § 785.02 and .04(1)(b). The contemnor, however, must be able to purge the sanction by complying with the trial court's orders. *See* ***Larson v. Larson***, 159 Wis. 2d 672, 675-76, 465 N.W.2d 225 (Ct. App. 1990). Additionally, the purge conditions imposed by the court must be feasible and must reasonably relate to the cause or nature of the contempt. *See* ***id.*** at 676.

¶11 In its written contempt order, the trial court determined as a factual matter that Bagstad had the ability to return the disputed property to Boelter. This court gives great deference to a trial court's factual findings, and we will only overturn the findings if we conclude they are clearly erroneous, that is, if they are contrary to the great weight and clear preponderance of the evidence. *See* WIS. STAT. § 805.17(2); *see also* ***Siker v. Siker***, 225 Wis. 2d 522, 527-28, 593 N.W.2d 803 (Ct. App. 1999). After reviewing the record, we conclude that it contains ample evidence to support the trial court's determination that Bagstad had access to the disputed property and was therefore capable of returning this property to Boelter. The trial court's purge conditions were therefore feasible and Bagstad's challenge to these purge conditions is without merit.

CONCLUSION

¶12 For the reasons discussed above, we affirm the orders of the trial court.

By the Court.—Orders affirmed.

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