

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

April 17, 2001

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. 00-1890**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**NORTH CENTRAL COMPANIES, INC., A MINNESOTA  
CORPORATION,**

**PLAINTIFF-APPELLANT,**

**V.**

**D & D PROPERTIES, A WISCONSIN GENERAL  
PARTNERSHIP, AND DENNIS JANSEN, A GENERAL  
PARTNER OF D & D PROPERTIES,**

**DEFENDANTS-RESPONDENTS,**

**DUANE GURTNER, A GENERAL PARTNER OF D & D  
PROPERTIES, AND DONNICK ENTERPRISES, A  
MINNESOTA CORPORATION,**

**DEFENDANTS.**

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APPEAL from a judgment of the circuit court for Polk County:  
JAMES R. ERICKSON, Judge. *Affirmed and cause remanded with directions.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. North Central Companies, Inc., appeals a judgment dismissing its claim against D & D Properties, and one of D & D's general partners, Dennis Jansen.<sup>1</sup> North Central sought damages against D & D, alternatively as a bailee or as a negligent landlord, after North Central learned that a significant amount of its hardwood lumber was missing from storage at D & D's warehouse. North Central argues that the trial court erred when it concluded that D & D did not create a bailment relationship when it refused to release North Central's lumber. Alternatively, North Central argues that D & D was negligent with respect to its duties as landlord. Because the record supports the trial court's decision, we affirm the judgment. Because we grant D & D's motion for reasonable attorney fees, we remand for a determination of the amount.

¶2 In its written decision following a bench trial, the court made the following findings. North Central, a lumber wholesaler located in Minnetonka, Minnesota, shipped wood for short-term storage to Donnicks Enterprises, a lumber company located in Milltown, Wisconsin. Donnicks performed the tasks of having North Central's lumber milled to order and delivered to customers. The trial court explained:

North Central would ship lumber to Donnicks for short-term storage. North Central would then fax or telephone a specific order to Donnicks to, for example, mill and size 500 board feet of oak and have Donnicks deliver the wood to North Central's customer. Donnicks would earn its income by charging North Central for the milling and for the transportation. At times, North Central would retrieve its milled lumber from Donnicks and deliver the load to its own customer.

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<sup>1</sup> We refer to D & D and Jansen as D & D for purposes of this opinion.

¶3 At some point, North Central suggested moving its lumber supply from its Minnesota location to Milltown. This required a large storage facility and, because Donnicks was not financially capable of building one, Donnicks's sole owner, Duane Gurtner, established a partnership with Dennis Jansen that they named D & D Properties. D & D purchased land from Gurtner, obtained financing and built what was referred to at trial as building No. 2.

¶4 North Central moved its lumber supply to building No. 2 as soon as it was completed in the fall of 1997, under an oral month-to-month lease. On July 1, 1998, D & D and North Central entered into a six-month written lease. In the fall, however, North Central advised D & D that North Central would be leaving building No. 2. Its relationship with Donnicks had soured and Donnicks had filed for bankruptcy.

¶5 D & D would not release North Central's lumber until North Central paid its November and not yet due December rent. It also insisted that North Central pay a fee to D & D to load and remove North Central's lumber from building No. 2. North Central commenced this action after it discovered some of its lumber inventory was allegedly missing.

¶6 The trial court bifurcated the issues of liability and damages. It first determined that North Central had failed to prove that D & D was liable as either a bailee or a landlord. North Central appeals the judgment of dismissal.

¶7 A bailment is created by delivery of personal property from one person to another, to be held temporarily for the benefit of the bailee, the bailor, or both under an express or implied contract. *Bushweiler v. Polk County Bank*, 129 Wis. 2d 357, 359, 384 N.W.2d 717 (Ct. App. 1986). Implicit in the bailment

relationship is that the titleholder be out of possession and the bailee be in a position to exercise all possessory rights. *Manor Enter. v. Vivid, Inc.*, 228 Wis. 2d 382, 398, 596 N.W.2d 828 (Ct. App. 1999). In certain circumstances, the dual status of landlord and bailee may be imposed. See *Barclay, Inc. v. Maxfield*, 48 A.2d 768, 769 (D.C. Cir. 1946).

¶8 North Central argues that D & D created a bailment by asserting control and possession over North Central's lumber when it refused to release it on demand. We conclude that the trial court was correct in concluding that the evidence was insufficient to prove that D & D accepted North Central's lumber for storage. Rather, North Central proved only that it simply rented building No. 2 from D & D, which undertook no duty to safeguarding the lumber. Therefore, no bailment was created.

¶9 The trial court was entitled to reject North Central's claim that D & D held dual status as bailee and landlord. The lease agreements, oral and written, provided that North Central pay rent for the building, not that it pay for storage. Under the leases, North Central was entitled to exclusive possession of building No. 2, and D & D, as the landlord, had no occasion to do anything with the lumber until termination of the lease. Although the written lease indicates that North Central would use the building to store lumber, there is no evidence that D & D assumed the duty to safeguard the lumber. Further, the record demonstrates that Donnicks, not D & D, received the lumber for storage and removed it for milling and delivery at North Central's direction. This evidence undercuts North Central's claim that it delivered lumber to D & D's control and possession.

¶10 North Central argues, nonetheless, that the trial court should have given more weight to D & D's refusal to allow North Central access to its lumber in November 1998, when North Central terminated its lease. Additionally, North Central had to arrange a time and date to gain access to building No. 2 to perform an inventory because the building was locked and North Central had no key. Also, other parties stored lumber in building No. 2. North Central relies on the fact that D & D refused to load the lumber until North Central paid an additional loading fee. North Central contends that the lease does not permit an acceleration of monthly payments or provide for a loading fee. Because these facts are inconsistent with the lease, North Central reasons that they point to a bailment relationship.

¶11 The assessment of the weight of evidence is a trial, not appellate, court function. WIS. STAT. § 805.17(2).<sup>2</sup> Here, the trial court considered the facts upon which North Central relies, and explained that they failed to support a bailment claim:

Donnick ... was permitted by [North Central] to use some of the rented premises for storage of Donnick lumber. On at least one occasion, Donnick sold some of its lumber to one Lon Scheele. Lon Scheele thus owned some lumber that was located in the rented building. Donnick also allowed a high school Future Farmers of America club to keep some material in the rental building, but no club member ever had a key to the building.

¶12 The trial court implicitly gave little weight to the parties' activities at the termination of the lease, apparently because it believed they were not indicative of their relationship. This is reasonable in light of testimony that

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<sup>2</sup> All references to the Wisconsin Statutes are to the 1999-2000 version.

Donnick, not D & D, had previously exercised the responsibility of transporting North Central's lumber. Also, the court apparently gave little weight to the fact that North Central did not have a key to the building, given undisputed evidence that North Central was located in Minnesota, had not requested a key and would have been given one had it asked.

¶13 North Central complains, however, that it “did not itself move lumber into the warehouse. It paid D&D to do so.” It further contends that D & D, and not Donnick, was paid for moving North Central's lumber. This argument, unaccompanied by record citation, *see* WIS. STAT. § 809.09(1)(e), challenges the factual findings of the court. Our review of record satisfies us that the testimony supports the court's findings of fact. To the extent that the testimony conflicts, it is the trial court's function to resolve the conflicts. Appellate courts search the record for evidence to support findings reached by the trial court, not for evidence to support findings the trial court could have but did not reach. *In re Estate of Dejmal*, 95 Wis. 2d 141, 154, 289 N.W.2d 813 (1980). Appellate court deference considers that the trial court has the only opportunity to observe the demeanor of witnesses and gauge the persuasiveness of their testimony. Because testimony supports the trial court's findings, we do not overturn them on appeal.

¶14 Next, North Central alternatively argues that D & D was negligent in carrying out its duties as a landlord when it failed to exercise ordinary care by allowing third-parties to store lumber in North Central's exclusive warehouse. We reject this argument. The court apparently believed Jansen's testimony that Donnick stored other parties' lumber in building No. 2 with North Central's

knowledge and permission.<sup>3</sup> Because credibility is a trial court, not appellate court function, we do not reverse the trial court's determination. WIS. STAT. § 805.17(2).

¶15 North Central also complains that D & D was negligent when it allowed Donnicks' employees to remove lumber that belonged to North Central, without North Central's express permission. This issue is also resolved by reference to the record. Jason Loehr, a Donnicks employee, testified that he removed lumber located in building No. 2 at North Central's direction. The court apparently disbelieved testimony that D & D had knowledge that Donnicks removed lumber without North Central's permission. As a result, there is no basis for holding D & D liable on a theory of negligence.<sup>4</sup>

¶16 Finally, we address D & D's motion for appellate attorney fees. D & D claims that its lease provides for an award to the prevailing party of "reasonable attorneys fees" in the event suit is brought "because of any act which may arise out of the possession of the premises, by either party." North Central has not responded to the motion. Accordingly, we grant D & D's motion for reasonable attorneys fees pursuant to the lease and remand to the trial court for a determination of the amount. See *Lucareli v. Vilas County*, 2000 WI App 157, ¶8, 238 Wis. 2d 84, 616 N.W.2d 153.

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<sup>3</sup> Two North Central employees corroborated Jansen's statement that others stored wood in building No. 2 with North Central's permission.

<sup>4</sup> North Central also argues that the trial court erred by upholding as valid the lease's exculpatory clause. Because we resolve the appeal on alternative grounds, we do not reach this argument. *Norwest Bank Wisconsin Eau Claire, N.A., v. Plourde*, 185 Wis. 2d 377, 383 n.1, 518 N.W.2d 265 (Ct. App. 1994).

*By the Court.*—Judgment affirmed and cause remanded with directions.

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



