COURT OF APPEALS
DECISION
DATED AND FILED

August 24, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP234 **Cir. Ct. No. 2009SC186**

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

RICHARD SPRAGUE, D/B/A RETRIEVAL TOWING SERV, LLC,

PLAINTIFF-RESPONDENT,

V.

KEVIN ANDREWS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Langlade County: FRED W. KAWALSKI, Judge. *Reversed.*

¶1 HOOVER, P.J.[1] Kevin Andrews appeals a small claims judgment awarding $3,500 plus court costs to Richard Sprague. Andrews argues the court's award was without any basis in law. We agree and reverse.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

BACKGROUND

¶2 On August 10, 2008, Andrews crashed his motorcycle in an accident involving one other motorcycle. Andrews' bike, which was off the road beyond the shoulder, was totaled. Menominee County Sheriff's Deputy Jamie Ninham responded to the scene. She informed Andrews his bike would be towed and instructed dispatch to contact Retrieval Towing to haul both bikes away. Retrieval Towing brought the bikes back to its business location.

¶3 After the driver of the other motorcycle died the following day, Ninham instructed Retrieval Towing to hold the bikes securely as evidence. Andrews' bike was stored indoors and nobody was permitted to have any contact with it. On approximately January 21, 2009, after the accident investigation was completed and Andrews was cleared of any wrongdoing, Retrieval Towing was instructed it could release the vehicle.

¶4 Sprague, Retrieval Towing's owner, testified he left a voicemail for Andrews in August 2008, informing him his bike had been towed there. Sprague and Andrews never spoke, however, until January 2009 when the sheriff's department authorized release of the motorcycle. At that time, Sprague demanded payment for a $200 towing fee plus $25 per day in storage fees. After Andrews refused to pay for the release of his totaled motorcycle, Sprague brought a small claims action to recover $5,000.

¶5 The court stated Sprague had no right to enforcement of a statutory lien for towing and storage because he never provided Andrews the requisite written notice. However, the court observed, "I don't know that I need to address that issue, because this is not an enforcement of a lien action. This is an action for straight money damages. So what it seems to be obvious, is that both parties, I

think, were sort of sucked into this situation, where neither one of them can move or do anything ….” The court continued, “[I]f anybody would be liable for it I would think[,] at least from a common sense perspective[,] could be the county, because neither one of you could have done anything.” Ultimately, the court concluded:

> If [the] lawsuit were dismissed[,] Mr. Sprague ... would in effect be paying all the storage charges, would in effect be paying all the towing charges that were none of his responsibility[.] [B]etween the two of them, … the act that precipitated all of this, the thing that started this ball rolling, was the accident that Mr. Andrews was in. And he did not have insurance, if he had insurance that would have pa[id] for it between the two parties should pay Mr. Andrews [sic]. Now the suit is for five thousand dollars. Even though Mr. Sprague[’s] … storage charge is 25 dollars per day, I think in view of the hold on the vehicle, I don’t know that Mr. Andrews should be held to that severe amount, bike doesn’t take up that much room. There should be some payment to Mr. Sprague, I’ll award him thirty-five hundred dollars and costs of this action.

DISCUSSION

¶6 Andrews argues he had no contractual relationship with Sprague, he derived no benefit from Sprague’s services, and Sprague failed to establish a WIS. STAT. § 779.415 towing and storage lien. Additionally, Andrews observes the court failed to identify any legal theory on which it relied.

¶7 Sprague responds that it is “widely understood that circuit courts have broad discretion in deciding small claims cases,” and that “[p]rincipals of fairness, present in small claims actions, support the trial court’s ruling.” We are aware of no such unfettered judicial discretion in small claims actions, and Sprague fails to support his assertions with any citation.

¶8 Sprague also contends the court's ruling was supported by principals of agency law, quantum meruit, and unjust enrichment. We will address each of these legal theories in turn. We also address the application of WIS. STAT. § 779.415, the towing and storage lien statute.

¶9 Sprague argues there was an apparent agency, asserting "Ninham, acting as Andrews' agent, called Sprague to tow Andrews' motorcycle. This created a contract between Andrews and Sprague." When a third party reasonably believes, based on the principal's actions, that an agent has authority to act in a particular transaction, the principal is bound by the agent's acts within the scope of his or her apparent authority. ***McDonald v. Century 21 Real Estate Corp.***, 111 Wis. 2d 600, 606, 331 N.W.2d 606 (Ct. App. 1983). The three elements of apparent agency, outlined in ***Hansche v. A.J. Conroy, Inc.***, 222 Wis. 553, 560, 269 N.W. 309 (1936), are: (1) acts by the agent or principal justifying belief in the agency; (2) knowledge thereof by the party sought to be held; (3) reliance thereon by the plaintiff, consistent with ordinary care and prudence.

¶10 Sprague argues the first element was satisfied because Andrews acquiesced when Ninham told him she was having his motorcycle towed. We disagree. Ninham neither gave Andrews an option to remove the motorcycle himself nor requested his permission for towing. Further, there is no evidence in the record that Ninham told Sprague she was requesting the tow on Andrews' behalf. Indeed, Sprague testified his company did not even know who the motorcycle belonged to when it was towed. Under these facts, Sprague could assume Ninham had authority *as a law enforcement officer* to have the vehicle towed, but he had no basis to believe the authority to tow was given by the motorcycle's owner. Likewise, it would be unreasonable under the third element for Sprague to rely solely on Ninham's towing request as demonstrating she was

the owner's authorized agent. Of course, as we discuss below, none of this likely would have mattered to Sprague, because, regardless, WIS. STAT. § 779.415(1)(a) authorized him to recover from the motorcycle's owner "when such towing or storage is performed at the direction of a traffic officer …."

¶11 Furthermore, Ninham and Sprague both testified that Ninham converted the possession of Andrews' motorcycle to an impoundment the next day after it was towed. From that point forward, Ninham knew the bike was being stored without regard to Andrews' consent.

¶12 Sprague next argues he was entitled to recovery under a theory of quantum meruit. This requires, in part, that the defendant requested the plaintiff to perform services. ***W.H. Fuller Co. v. Seater***, 226 Wis. 2d 381, 386 n.2, 595 N.W.2d 96 (1999). That did not occur here.

¶13 We also reject Sprague's unjust enrichment claim, which requires: (1) a benefit conferred upon the defendant by the plaintiff; (2) knowledge or appreciation of the benefit by the defendant; and (3) acceptance and retention by the defendant of such benefit under such circumstances that it would be inequitable for him or her to retain it without paying the value thereof. ***Id.*** at 385-86. Andrews testified he received no benefit from the towing or storage because, given a choice in the matter, he would have simply hauled the worthless motorcycle back to Appleton and stored it for free in his parents' garage, rather than have it be towed to, and stored far away in, Antigo. This testimony was unchallenged. Also, as noted at the outset, the motorcycle was not obstructing the roadway so as to require its immediate removal.

¶14 Further, we agree with Andrews that any storage beyond the first day accrued instead to the benefit of the Menominee County Sheriff's Department,

which ordered impoundment of the motorcycle to preserve evidence. Ninham testified Menominee County does not have its own impound lot, but that, "It was impounded[, Andrews] wouldn't be able to touch it." After it was impounded, the bike was in the actual or constructive custody of the Department. *See* WIS. STAT. §§ 961.18, 968.19, 968.20;[2] *cf.* WIS. STAT. §§ 961.55(3), (4). Because the record

[2] WISCONSIN STAT. § 968.18 provides, in part:

> **Receipt for seized property.** Any law enforcement officer seizing any items without a search warrant shall give a receipt as soon as practicable to the person from whose possession they are taken.

WISCONSIN STAT. § 968.19 provides:

> **Custody of property seized.** Property ... validly seized without a warrant shall be safely kept by the officer, who may leave it in the custody of the sheriff and take a receipt therefor, so long as necessary for the purpose of being produced as evidence on any trial.

WISCONSIN STAT. § 968.20 provides:

> **Return of property seized.** (1) Any person claiming the right to possession of property seized ... without a search warrant may apply for its return to the circuit court for the county in which the property was seized .... If the right to possession is proved to the court's satisfaction, it shall order the property ... returned if:
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> (a) The property is not needed as evidence or, if needed, satisfactory arrangements can be made for its return for subsequent use as evidence; or
>
> (b) All proceedings in which it might be required have been completed.
>
> ….
>
> (2) Property not required for evidence or use in further investigation ... may be returned by the officer to the person from whom it was seized without the requirement of a hearing.

demonstrates Sprague conferred no benefit on Andrews, we do not address the remaining unjust enrichment elements.

¶15 Finally, we address WIS. STAT. § 779.415,[3] which provides in part:

> (1)(a) Every [authorized entity] who performs vehicle towing services or stores a motor vehicle, when such towing or storage is performed at the direction of a traffic officer ..., shall ... have a lien on the motor vehicle for reasonable towing and storage charges, and may retain possession of the vehicle until such charges are paid. ...
>
> ….
>
> (1m) Within 30 days after taking possession of a motor vehicle, every [authorized entity] under sub. (1) shall send written notice to the owner of the vehicle and the holder of the senior lien on the vehicle informing them that they must take steps to obtain the release of the motor vehicle. To reclaim the vehicle, the owner or the senior lienholder must pay all towing and storage charges that have a priority under sub. (1)(a) and all reasonable storage charges that have accrued after 60 days .... Failure to make a reasonable effort to so notify the owner and the senior lienholder renders void any lien to which the [authorized entity] would otherwise be entitled under sub. (1).

This statute would have provided Sprague an opportunity to recover his towing and storage charges from Andrews (at least those incurred prior to the impoundment). As Sprague concedes, however, he failed to send Andrews the written notice required by subsec. (1m), thus voiding his lien.

By the Court.—Judgment reversed.

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

[3] WISCONSIN STAT. § 779.415 was substantially modified by 2009 Wis. Act 201, effective August 1, 2010. We apply the earlier version.