COURT OF APPEALS
DECISION
DATED AND RELEASED

October 17, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

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No. 95-1822

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

CHUCK BELKE,

Plaintiff-Appellant,

v.

M & I FIRST NATIONAL BANK OF STEVENS POINT,

Defendant-Respondent.

APPEAL from a summary judgment of the circuit court for Portage County: LEWIS MURACH, Judge. *Affirmed*.

Before Eich, C.J., Vergeront, J., and Paul C. Gartzke, Reserve Judge.

EICH, C.J. Chuck Belke appeals from a summary judgment dismissing his action against M & I First National Bank of Stevens Point.

Belke sued M & I, alleging that it had converted to its own use two certificates of deposit in which he claimed a security interest. The trial court

granted M & I's motion for summary judgment dismissing the action, concluding, alternatively, that (1) M & I had a prior security interest in the certificates, and (2) language on the certificates prohibiting transfer or assignment without M & I's consent barred Belke's claim.

The facts, lengthy in the recitation, are not in dispute. In 1989, M & I issued two $10,000 certificates of deposit to Irene M. Tepp. Each certificate contained a notation that it was "non-negotiable," that it would be paid to the named depositor upon presentation and delivery on the maturity date, and that the depositor "cannot transfer or assign this certificate or any rights under it without [the bank's] written consent." At the time, Tepp owed substantial sums of money to M & I and had executed security documents in 1988 giving M & I a security interest in, among other things, "all debtor[']s ... general intangibles, contract rights, chattel paper & instruments, whether now owned or hereafter acquired ... to secure all debts, obligations & liabilities of ... debtor to bank ...."

In August 1990, Tepp borrowed money from Belke, pledging the certificates as security for the loan and executing a security agreement in Belke's favor covering, among other things, "instruments and general intangibles." Belke took possession of the two certificates and filed the required financing statement with the secretary of state. M & I was never asked to give its consent to assignment or transfer of the certificates.

When Tepp defaulted on her obligations to M & I, the Bank set off the debt against the certificates of deposit. Tepp then filed for bankruptcy, discharging both her debt to Belke and her debt to M & I. Later, when M & I refused to honor Belke's demand for payment of the certificates, he sued, claiming that he had an interest in the certificates as a perfected secured creditor under the Uniform Commercial Code, § 409.304, STATS. [U.C.C. §9-304], by reason of his possession of them. Under the statute, a security interest in "money or *instruments*" may be perfected by possession alone, without the need for filing or other action.

The trial court held that the certificates were instruments within the meaning of the Code,[1] but that the restrictions on their transfer or assignment prevented Belke's security interest from defeating M & I's setoff. Belke appealed, and we reversed. ***Belke v. Stevens Point M & I First Nat'l Bank***, 189 Wis.2d 385, 525 N.W.2d 737 (Ct. App. 1994). Because M & I did not question the trial court's determination that the certificates were instruments under § 409.105(1)(i), STATS. [U.C.C. §9-105(1)(i)], we said in ***Belke I*** that we were "not decid[ing] whether they are properly classified as such." ***Id***. at 388, 525 N.W.2d at 738. We went on to conclude that, despite the restrictions against transfer or assignment, Belke had "acquired an enforceable security interest" in them. ***Id***. at 388, 391, 525 N.W.2d at 738, 739. We remanded to the circuit court with directions to ascertain "[t]he priority of Belke's security interest as against [M & I]'s right to setoff ...." ***Id***. at 391 n.5, 525 N.W.2d at 739.

On remand, a different trial court judge held that M & I's setoff rights in the certificates had priority over Belke's interest in them. In so ruling, the court interpreted § 409.105(1)(i), STATS., as requiring that a document must be negotiable in order to qualify as an "instrument" under § 409.304, and went on to conclude that, because of the certificates' nontransferability language, they were not negotiable and thus could not be considered "instruments" within the meaning of § 409.105(1)(i), STATS. Alternatively, the court held that even if Belke had acquired a security interest in the certificates, it would be subject to the nontransferability language and thus second in priority to M & I's setoff rights.[2]

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[1] The term "instrument" is defined in the Code as

> a negotiable instrument as defined in s. 403.104 ... or any other writing which evidences a right to the payment of money and is not itself a security agreement or lease and is of a type which is in ordinary course of business transferred by delivery with any necessary endorsement or assignment.

Section 409.105(1)(i), STATS. [U.C.C. §9-105(1)(i)].

[2] In so ruling, the court relied on ***Bank of Winter Park v. Resolution Trust Corp.***, 633 So.2d 53 (Fla. Dist. Ct. App. 1994), where, under similar circumstances, the Florida Court of Appeals held that the lack of the bank's written consent to assignment, in the face of similar language on the certificate, gave the bank "priority" to exercise its right to set off the certificate's proceeds against the borrower's debt despite the assignee's rights as a

The first portion of the court's decision need not detain us long. As indicated above, we did not pass upon the trial court's initial ruling that the certificates were "instruments" under the code in ***Belke***. We concluded instead that Belke had a security interest in the certificates under § 409.203(1), STATS. [U.C.C. § 9-203(1)],[3] and that "[his] security interest attached to the certificates, notwithstanding the provision in [them] that they may not be transferred or assigned without the bank's consent ...." ***Belke***, 189 Wis.2d at 388-89, 390-91, 525 N.W.2d at 738, 739.

The law of the case, therefore, is that whether or not the certificates are "instruments" under § 409.105(1)(i), STATS., Belke obtained a security interest in them.[4] Thus, as in ***Belke I***, we need not address the (second) trial court's decision that the certificates were "instruments" under § 409.105, or M & I's argument that they were not. The only issue before us is the one we remanded the case to the trial court to consider: whether Belke's interest in the certificates takes precedence over M & I's setoff rights. We conclude that it does not.

Relying primarily on ***First Wisconsin Nat'l Bank v. Midland Nat'l Bank***, 76 Wis.2d 662, 251 N.W.2d 829 (1977), Belke argues that because his security interest in the certificates attached prior to M & I's attempted offset—and thus prior to Tepp's default—it should take precedence over M & I's rights.

(..continued)
secured creditor under the Code. ***Id***. at 53, 56.

[3] The statute provides that security interests do not attach unless:

(a) The collateral is in the possession of the secured party pursuant to agreement, or the debtor has signed a security agreement which contains a description of the collateral ...

(b) Value has been given; and

(c) The debtor has rights in the collateral.

Belke, 189 Wis.2d at 388-89, 525 N.W.2d at 738. We concluded that all three criteria were met in Belke's case. ***Id***. at 389-91, 525 N.W.2d at 738-39.

[4] A decision on a legal issue by an appellate court establishes the law of the case, which "must be followed in all subsequent proceedings in the trial court or on later appeal." ***Univest Corp. v. General Split Corp.***, 148 Wis.2d 29, 38, 435 N.W.2d 234, 238 (1989).

He refers specifically to the following statement of the ***First Wisconsin*** court: "As long as the security interest is perfected and attached prior to an attempted setoff, priority is to be given to the perfected security interest over a subsequently attempted setoff by the depositary bank." ***Id***. at 670, 251 N.W.2d at 833.

In ***First Wisconsin***, the Midland Bank issued two certificates of deposit to Walter Kassuba, who in turn pledged them to First Wisconsin as security for a loan. The pledging documents transferred the certificate, together with any renewals or extensions, as security for payment of any and all of Kassuba's present and future liabilities to First Wisconsin. First Wisconsin also held an existing collateral pledge agreement signed by Kassuba giving it a security interest in "all [of his] property ... of any kind" then or thereafter in First Wisconsin's possession. ***Id***. at 666, 251 N.W.2d at 831. When Kassuba subsequently filed for bankruptcy, First Wisconsin informed Midland of its security interest in the renewal certificates. Several weeks later—on the day before the certificates were to mature—Midland set off the amount of the certificates against a large debt Kassuba owed to Midland. The following day, First Wisconsin presented the certificates to Midland for payment and Midland refused to honor them.

Likening the certificates to certified checks drawn on a bank and to a promissory note "in that [they constitute] a promise to pay when due," the supreme court held that First Wisconsin's security interest took priority over Midland's, stating that "what determines the priority of the security interest is that it had attached at the time of offset ... by Midland." ***First Wisconsin***, 76 Wis.2d at 670, 251 N.W.2d at 833. While the language of ***First Wisconsin*** is broad in scope, we agree with M & I that the case is distinguishable and not controlling here. The supreme court has recognized that the application of language in an opinion "must be limited to the facts of the ... case," and that "language [that is] broader than necessary to determine the issue before the court ... [is] dicta." ***Sunnyslope Grading v. Miller, Bradford***, 148 Wis.2d 910, 917, 437 N.W.2d 213, 216 (1989). The certificates at issue in ***First Wisconsin*** were, as the court recognized, fully negotiable. ***First Wisconsin***, 76 Wis.2d at 669, 251 N.W.2d at 832. There were no restrictions on their transfer or assignment. Here, of course, the certificates were expressly made nontransferable and nonassignable without the Bank's written consent, and that consent was neither sought nor given. No such issue was under consideration in ***First Wisconsin***,

and we decline to extend and apply the court's broadly stated comments to a case where transferability of the certificates is at the heart of the dispute.

We think ***Bank of Winter Park v. Resolution Trust Corp.***, 633 So.2d 53 (Fla. Dist. Ct. App. 1994), a case relied on by the trial court, is more to the point. In ***Winter Park***, the bank required Swann, one of its debtors, to maintain a $100,000 certificate of deposit at the bank in lieu of "outside" security for a $300,000 loan. The certificate stated that it was not transferable by Swann without the bank's written consent. Shortly after acquiring it, Swann pledged the certificate to American Pioneer, a savings and loan organization, without the bank's consent. When American Pioneer attempted to redeem the certificate at its maturity, the bank refused, stating that it was exercising its contractual right of setoff against the certificate's proceeds to partially satisfy Swann's loan.

The Florida court concluded that the bank's right of setoff prevailed, grounding its decision on two alternative analyses—either one of which, said the court, "mandates reversal" of the trial court's decision awarding the proceeds of the certificate to American Pioneer: (1) the bank's right of setoff takes priority because it accrued (upon Swann's default on the $300,000 loan) prior to the time it was notified of the assignment of the certificate to American Pioneer; and (2) even if that analysis "is incorrect ... the Bank still should have prevailed ... because the CD prohibited Swann from transferring or assigning [it] without first obtaining the Bank's written consent." ***Winter Park***, 633 So.2d at 55-56. It is the court's second analysis we find persuasive here: that "the bank's promise to pay [is] conditioned upon its consent to the assignment." ***Id***. at 56.

Belke does not discuss ***Winter Park*** in his briefs to this court. He argues only that M & I's setoff rights to the certificates could not arise until Tepp (the debtor) was in default, and by the time that occurred, his own security interest in them had attached by reason of the assignment from Tepp.[5] As in ***Winter Park***, however, the certificates in this case were nonnegotiable, and while Belke had a security interest in the certificates as a result of Tepp's assignment, his right to the funds represented by them were conditioned upon

[5] Belke offers no authority for his assertion—which we consider to be one of law—that M & I had no rights or security interest in the certificates until Tepp's default.

M & I's consent to that assignment. Belke was on notice from the language on the face of the certificates that they were not assignable except on M & I's books, and there is no evidence in this case that Belke obtained M & I's consent to the assignment—or even notified M & I of his receipt of, or interest in, them.[6]

While Belke may be considered a secured party with respect to the certificates, the protection afforded him under the law is not absolute. ***Bank of Waunakee v. Rochester Cheese Sales, Inc.***, 906 F.2d 1185, 1190 (7th Cir. 1990). Given the plain language of the certificates restricting their transfer, whatever security interest he may be said to have in them cannot take precedence over M & I's setoff rights resulting from its earlier loans to Tepp. We agree with the *amicus curiae*, the Wisconsin Bankers Association, that the rationale of ***Winter Park*** is persuasive on the question of priority between M & I's and Belke's interests in the certificates.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

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[6] Belke states in his brief, "Whether ... the Bank had [such] knowledge is disputed." He also states, however, that the question is irrelevant, citing ***First Wisconsin Bank***, 76 Wis.2d at 665, 251 N.W.2d at 830, for the proposition that "`knowledge or lack of it does not determine the right of a Bank to set off against the account of a depositor which contains funds to which a third party has a valid prior claim'" (quoted source omitted). While Belke correctly points out that notice is not relevant to when his security interest attached, ***id.***, it is relevant to determining whether M & I gave its consent to the assignment.

GARTZKE, Reserve Judge (*dissenting*). We should reverse the trial court. We held in ***Belke I*** that Belke's security interest attached to the certificates, notwithstanding the restrictions against transfer or assignment without the Bank's consent and the lack of that consent. We remanded to the trial court to decide whether Belke's security interest had priority as against M & I's right to setoff. ***Belke I***, 189 Wis.2d 385, 391 n.5, 525 N.W.2d 737, 739 (1994).

Because Belke has been in possession of the certificates since he acquired a security interest and his security interest in the certificates has attached, it was not necessary for him to file a financing statement. § 409.302(a), STATS. His security interest, having attached before M & I attempted to assert its setoff, has priority over the setoff. ***First Wisconsin Nat'l Bank v. Midland Nat'l Bank***, 76 Wis.2d 662, 670, 251 N.W.2d 829, 833 (1977). We therefore should reverse and remand with directions to enter judgment for Belke.