

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 6, 2002

Cornelia G. Clark
Clerk of Court of Appeals

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.

**Appeal No. 02-1238
STATE OF WISCONSIN**

Cir. Ct. No. 02-SC-810

**IN COURT OF APPEALS
DISTRICT II**

JAMES R. GEHR,

PLAINTIFF-APPELLANT,

v.

COLLEEN LAMMERS,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Sheboygan County:
L. EDWARD STENGEL, Judge. *Reversed.*

¶1 SNYDER, J.¹ James R. Gehr, a Wisconsin prisoner incarcerated at North Fork Correctional Facility in Sayre, Oklahoma, appeals an order dismissing his small claims action against his sister, Colleen Lammers. Gehr argues that the

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

trial court erroneously dismissed his action for failure to appear. We agree and reverse the order of the trial court.

FACTS

¶2 On March 14, 2002, Gehr filed this small claims action in replevin against Lammers, “seeking return of all property or fair market value thereof at time of adverse possession.” Gehr alleged that, upon his request, Lammers had retrieved some of his property from the Ozaukee County Sheriff’s Department and had not returned his property to him or compensated him for said property. On April 2, 2002, Gehr filed a “Letter of Appearance,” waiving his personal appearance and requesting judgment on his behalf. Gehr’s pleadings and submissions make clear that he is currently incarcerated.

¶3 On April 8, 2002, Lammers filed an answer and a replevin hearing was scheduled for April 15, 2002. A letter from Gehr, dated April 12, 2002, and received by the clerk of court’s office on April 22, 2002, indicates that Gehr was not permitted to appear by telephone. The clerk’s minutes from the April 15, 2002 hearing indicated that the action was dismissed for Gehr’s nonappearance. Gehr appeals.

DISCUSSION

¶4 Gehr argues that the trial court erred in ruling he could not appear by telephone and then dismissing his small claims action for his failure to appear. We agree.

¶5 When a court manages a civil action in which one party is incarcerated, the court must exercise its discretion and determine whether the incarcerated party should make an appearance and, if so, whether alternative

means of providing the prisoner access, other than a personal appearance, will suffice. *See Schmidt v. Schmidt*, 212 Wis. 2d 405, 410-12, 569 N.W.2d 74 (Ct. App. 1997).

¶6 A trial court has the power to order production of a prisoner. *State ex rel. Rilla v. Circuit Court of Dodge County*, 76 Wis. 2d 429, 434, 251 N.W.2d 476 (1977). In making the decision as to whether a prisoner should be produced or not, the trial court must weigh the interest of the prisoner in presenting his or her testimony in person against the interest of the State in maintaining his or her confinement. *Id.* In reaching its determination, the trial court should consider the costs, inconvenience and danger involved in bringing the prisoner to court and other factors relating to the substance and merits of the case. *Id.*

¶7 In the present case, the trial court neither issued an order for Gehr's appearance nor concluded that his appearance was unnecessary under *Rilla's* balancing test. The trial court required Gehr's appearance at the hearing, did nothing to allow Gehr to appear and then dismissed the action when Gehr failed to appear. Gehr's ability to appear at the proceeding was not within his control and was within the control of the trial court. Under these circumstances, we conclude that the trial court erred in dismissing the action for failure to appear. We therefore reverse the order of the trial court.

By the Court.—Order reversed.

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

