**COURT OF APPEALS DECISION DATED AND FILED**

February 23, 1999

Marilyn L. Graves
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* § 808.10 and RULE 809.62, STATS.**

**No. 98-2346-FT**

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

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**WILLIAM C. ANDERSON,**

**PLAINTIFF-APPELLANT,**

**V.**

**JOHN MOGENSON,**

**DEFENDANT-RESPONDENT.**

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APPEAL from a judgment of the circuit court for Eau Claire County: GREGORY A. PETERSON, Judge. *Reversed and cause remanded for further proceedings.*

CANE, C.J. William Anderson appeals a small claims judgment denying his request for replevin of two Corvair automobiles from John Mogenson.[1] Anderson stored the cars at a brewery, and Mogenson, the receiver in

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[1] This is an expedited appeal under RULE 809.17, STATS.

the brewery's foreclosure action, gave the cars to a third party in exchange for services. On appeal, Anderson argues that he was entitled to the protections of the unclaimed property statute, § 171.06, STATS., and was deprived of his Corvairs without due process of law. Additionally, Anderson contends that the trial court erred when it dismissed the complaint for his failure to: (1) name the corporation as a defendant; (2) join an indispensable party; and (3) timely pursue his claim under the doctrine of laches. Anderson also disputes the trial court's conclusion that Mogenson had qualified immunity because he disposed of the unclaimed personal property with specific judicial authorization. Mogenson insists that Anderson's appeal is frivolous and that he is therefore entitled to costs. Because this court concludes that the trial court erred by dismissing his complaint, the judgment is reversed and the matter remanded for further proceedings. In addition, this court rejects Mogenson's frivolousness argument.[2]

## I. BACKGROUND

Following a trial, the court made the following findings of fact. William Anderson purchased two Chevrolet Corvair automobiles, one in 1967 and another in 1991. Over the last several years, he stored those vehicles on the Walter Brewery property. Anderson had done some architectural work for the brewery's previous owners in exchange for storing the Corvairs in the brewery. In April 1997, the property went into foreclosure, and Mogenson was appointed receiver. In September, judgment of foreclosure was granted. By a December 11 order, the sale was confirmed, Mogenson was terminated as receiver and was

[2] Mogensen's brief fails to conform to the appellate briefing requirements of § 809.19, STATS. It contains no table of contents or record cites and only one citation to authority. For these reasons alone, this court could decline to address any of his arguments. *See* ***State v. Pettit***, 171 Wis.2d 627, 642, 492 N.W.2d 633, 646-47 (Ct. App. 1992).

authorized to dispose of any unclaimed personal property on the premises. The trial court concluded that Mogenson had "transferred ownership" of the Corvairs to Allen Sopiarz in exchange for cleaning garbage and other debris from the brewery. The cars remained on the brewery premises.

Anderson knew in June or July that Mogenson had been appointed receiver and that the property was in foreclosure. However, the first time Anderson contacted Mogenson to seek return of his vehicles was at some point after December 11. Thus, the first notice Mogenson had of Anderson's claim was after the date the sale of the brewery was confirmed. Mogenson has not returned the vehicles to Anderson. Anderson filed a complaint against Mogenson in small claims court seeking replevin of the Corvairs. Mogenson filed a counterclaim for storage fees if the court ordered replevin. The trial court dismissed both actions. Anderson appeals.

## II. ANALYSIS

The issues present mixed questions of fact and law. This court defers to the circuit court's findings of fact unless they are unsupported by the record and are therefore clearly erroneous. *See* § 805.17(2), STATS.; ***Clarmar Realty Co. v. Milwaukee Redevelop. Auth.***, 129 Wis.2d 81, 94, 383 N.W.2d 890, 895-96 (1986). However, the application of those facts to the pertinent law is a question of law which this court reviews de novo. ***Miller v. Thomack***, 210 Wis.2d 650, 658, 563 N.W.2d 891, 894 (1997).

Citing ***Sutton v. City of Milwaukee***, 672 F.2d 644 (7th Cir. 1982), Anderson argues that he was deprived of his Corvairs without due process because Mogenson took his vehicles while acting as receiver and promised them to Sopiarz without notice and opportunity to be heard. Additionally, he claims that

application of § 171.06, STATS., would have avoided this due process violation. The trial court concluded that § 171.06 did not apply because Mogenson is neither a bailee nor consignee. First, this court declines to address Anderson's due process argument under ***Sutton*** because he never made that argument to the trial court. *See* ***Doe v. Ellis***, 103 Wis.2d 581, 592, 309 N.W.2d 375, 379 (Ct. App. 1981). Rather, his argument focused on § 171.06, and this court therefore confines its analysis to Anderson's due process argument under the statute.

Section 171.06, STATS., entitled "**Unclaimed property, how disposed of**" provides, in part:

> When any property is not perishable or subject to decay and is not claimed and taken away within one year after it was received, it may be sold as follows: The person in whose custody the property is, or the person's agent or attorney, may make an affidavit of the facts and present the same to a judge or court commissioner of the county in which the property is located and such judge or court commissioner shall immediately issue an order requiring the sheriff or any constable of the county to sell the property at public auction, giving 60 days' notice of the time and place of the sale to the consignor, the consignee and the custodian of the property. This notice shall be in writing and served personally or by mail upon the persons whose names and residences are known.

Anderson argues that § 171.06, STATS., applies here because the brewery's owners, for whom Mogenson was acting as a receiver, are warehouse keepers. Under ch. 171, a consignee or bailee includes a warehouse keeper. Section 171.01, STATS. A warehouse keeper under § 407.102(1)(h), STATS., is "a person engaged in the business of storing goods for hire." Anderson acknowledges that the owners were not regularly engaged in the business of storing goods for hire, but he claims that the definition does not require it. The trial court found that the owners allowed Anderson to store his Corvairs in the

brewery in exchange for the architectural work, and the parties do not dispute that finding.

This court agrees with Anderson that the brewery acted as a warehouse keeper when it stored his Corvairs in consideration for his architectural services. Like the furrier in ***Insurance Co. of North America v. Krieck Furriers, Inc.***, 36 Wis.2d 563, 567, 153 N.W.2d 532, 535 (1967), which was a "warehouseman" in connection with the storage of a customer's coat, the brewery was a warehouse keeper in connection with its storage of Anderson's Corvairs. Thus, this court agrees with Anderson that he was entitled to the protections of § 171.06, STATS.

Even if § 171.06, STATS., does not apply, it does not follow that Anderson's replevin action should be dismissed. Replevin is a possessory action to obtain actual possession of the subject matter. ***Confidential Loan & Mtg. Co. v. Hardgrove***, 259 Wis. 346, 350, 48 N.W.2d 466, 468 (1951). The plaintiff must have the right to possession when the replevin action is commenced. Section 810.02(1), STATS.; ***Schweitzer v. Hanna***, 91 Wis. 318, 319, 64 N.W. 997, 997 (1895). "[W]hich party is entitled to possession of the disputed property becomes the ultimate fact question in a replevin action." ***Ford Motor Co. v. Lyons***, 137 Wis.2d 397, 468, 405 N.W.2d 354, 382-83 (Ct. App. 1987). Prior possession and a wrongful taking are sufficient to maintain replevin. ***Kellogg v. Adams***, 51 Wis. 138, 146, 8 N.W. 115, 116 (1881).

The trial court concluded that Sopiarz owns the vehicles, but the record reflects that Anderson has the titles to both Corvairs.[3] Wisconsin places great emphasis on certificates of title as evidence of ownership of a motor vehicle. *See* ***National Exch. Bank v. Mann***, 81 Wis.2d 352, 357, 260 N.W.2d 716, 718 (1978). Section 340.01(42), STATS., defines an "owner" of a vehicle as "a person who holds the legal title of a vehicle." The record contains no evidence of any transfer of title from Anderson to Mogenson or Sopiarz. Indeed, the trial court's discussion of ownership does not address who has title to the Corvairs, but focuses on physical possession. Moreover, Mogenson acknowledged that he has not yet given Sopiarz the vehicles, and the trial court found that the vehicles are still on the premises. Thus, its finding that Sopiarz owns the Corvairs is clearly erroneous because there is no evidence that Sopiarz has possession of, or more significantly, legal title to, the Corvairs.

Next, Anderson argues that the trial court erred when it dismissed his complaint for failure to join an indispensable party. Under § 803.03(1), STATS., a person "shall" be joined as a party if: (1) in that person's absence, complete relief cannot be accorded to those already parties; (2) the person claims an interest relating to the subject matter of the action and is so situated that disposition in his or her absence may as a practical matter impair or impede the person's ability to protect that interest or leave any of the persons already parties subject to a substantial risk of incurring multiple obligations.

[3] Anderson testified that neither vehicle has ever been registered in Wisconsin. One of the Corvairs is titled in Anderson's name in Minnesota, though the registration expired in 1976. The other Corvair is titled in California in a third party's name. Anderson testified that he purchased the car from the third party in California and towed it back to the Midwest. He further testified that he has not operated the vehicles on the highway since 1991. In any event, the invalidity of the plaintiff's title is immaterial when the defendant's title is no better. *See* ***Dresser v. Lemma***, 122 Wis. 387, 390-92, 100 N.W. 844, 846 (1904).

Failure to join a party is not a jurisdictional defect; a court may proceed even if an indispensable party has not been made a party to the suit. *See* ***Hoppmann v. Reid***, 86 Wis.2d 531, 535, 273 N.W.2d 298, 300 (1979). Rather, before the action must be dismissed for failure to the join the absent party, the trial court must order joinder, and if the absent party cannot be joined, the court must determine whether the absent party is indispensable by applying the factors in § 803.03(3), STATS. Here, the court based its decision to dismiss for failure to join an indispensable party on its belief that Sopiarz "owns" the Corvairs, a finding this court has held is clearly erroneous. If the trial court determines on remand that Sopiarz is an indispensable party, it should order joinder, and if Sopiarz cannot be joined, it should consider then whether dismissal is appropriate under § 803.03(3).

The trial court concluded that the brewery, not Mogenson, was the proper defendant because the corporation "has possession" of the Corvairs as they are currently stored on corporation property. Anderson argues that if the corporation had an interest, it should have made a third-party claim under § 810.11, STATS., and that Mogenson never indicated that "he perceived the corporation as possessing the property in question." The full extent of Mogenson's reply, without citation to authority, is that "[t]here certainly was [a] legitimate basis for the Court to find that the corporation, not the Defendant, should be the proper Defendant." Mogenson's conclusory statement offers no argument countering Anderson's contention. Arguments not refuted are deemed admitted. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis.2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979). Further, it is not this court's job to supply legal research and argument to support and develop Mogenson's conclusory statement. *See* ***State v. Waste Mgmt. Inc.***, 81 Wis.2d 555, 564, 261 N.W.2d 147, 151 (1978).

Anderson also contends that the trial court erred by dismissing his claim based on the equitable doctrine of laches. This court agrees. The trial court stated that Anderson failed to "pursue his claim in a timely fashion" because he knew in June or July that Mogenson had been appointed receiver and that the property was being foreclosed, yet he failed to contact Mogenson until December. Thus, the trial court concluded, Anderson's failure to diligently look out for his own rights contributed to his present dilemma.

Laches is an equitable defense to an action based on the plaintiff's unreasonable delay in bringing suit under circumstances in which such delay is prejudicial to the defendant. *See* ***Schafer v. Wegner***, 78 Wis.2d 127, 132, 254 N.W.2d 193, 196 (1977). The elements of the equitable doctrine of laches are: (1) unreasonable delay, (2) knowledge of and acquiescence in the course of events, and (3) prejudice to the party asserting laches. ***Batchelor v. Batchelor***, 213 Wis.2d 251, 257, 570 N.W.2d 568, 571 (Ct. App. 1997). If any element is missing, laches will not be applied. *See* ***Schafer***, 78 Wis.2d at 132, 254 N.W.2d at 196. Here, the trial court made no finding that the delay prejudiced Mogenson.

Next, Anderson argues that the trial court erred by basing its decision on immunity because Mogenson did not raise it as an affirmative defense. In its decision, the trial court stated:

> Finally, Mogenson is connected with this case only because he was the receiver in the foreclosure proceedings. He was discharged as receiver on December 11, 1997. The discharge order specifically authorized him to dispose of any unclaimed personal property on the premises. The attorneys have not argued and I have not had the time to research, but it seems to me that Mogenson must have at least a qualified immunity since he was given specific judicial authorization to dispose of unclaimed personal property. He did nothing more than comply with the court order.

Anderson argues that Mogenson waived an immunity defense because he failed to raise it as an affirmative defense. This court disagrees. Section 802.02(3), STATS., provides that a party must raise immunity as an affirmative defense in its pleadings. Affirmative defenses are deemed waived if not raised in the pleadings.[4] ***Oetzman v. Ahrens***, 145 Wis.2d 560, 571, 427 N.W.2d 421, 426 (Ct. App. 1988). Mogenson's answer, however, does state: "I was also authorized by the court and Judge Barland to dispose of any unclaimed property." "Notice-giving is the primary purpose of pleading under the rules of civil procedure adopted by the supreme court in 1976." ***Hertlein v. Huchthausen***, 133 Wis.2d 67, 72, 393 N.W.2d 299, 301 (Ct. App. 1986). An allegation that a court order authorized Mogenson to dispose of the property was sufficient to raise immunity as an affirmative defense under § 802.02(3). This allegation put Anderson on fair notice of the defense. *See* ***Hertlein***, 133 Wis.2d at 72-73, 393 N.W.2d at 301.

This notwithstanding, the trial court acknowledged that the parties did not argue qualified immunity and that it had not researched the issue. Because the trial court's conclusion was made without the benefit of the attorney's arguments and because the trial court admittedly did not research the issue, this court is without the benefit of its reasoned analysis. Further, as Anderson points out, the trial court never made a specific finding that Mogenson had qualified immunity. Because this case is remanded, the trial court will have an opportunity,

[4] "Affirmative defenses. In pleading to a preceding pleading, a party shall set forth affirmatively any matter constituting an avoidance or affirmative defense including but not limited to the following: … immunity." Section 802.02(3), STATS.

if it so chooses, to consider the issue and give us the benefit of its reasoned analysis.

A trial was held, but because the trial court dismissed the complaint primarily on procedural grounds, the judgment is reversed and remanded for further proceedings. On remand, the trial court may, in its discretion, receive additional evidence on the issue of whether Anderson is entitled to replevin of the two Corvair automobiles and, if so, whether he should be required to pay storage fees.

Finally, this court rejects Mogenson's contention that this appeal is frivolous. As is apparent from our analysis, the appeal is not without a reasonable basis in law or equity. Section 809.25(3), STATS. Thus, Mogenson is not entitled to costs.

*By the Court.*—Judgment reversed and cause remanded for further proceedings.

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