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**DISTRICT IV**

November 30, 2016

To:

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Circuit Court Judge  
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You are hereby notified that the Court has entered the following opinion and order:

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2015AP2564

Deborah Burke v. Tiffany Burke (L.C. # 2014CV84)

Before Lundsten, Sherman and Blanchard, JJ.

Tiffany Burke appeals an order granting summary judgment in favor of Deborah Burke. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2013-14).<sup>1</sup> We affirm.

Tiffany argues that the court's summary judgment decision granting replevin to Deborah should be reversed. That decision is properly before us in this appeal as a prior nonfinal order that precedes the summary judgment order awarding money damages. *See* WIS. STAT. RULE 809.10(4).

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

As we understand it, Tiffany argues that the parties' oral contract covering use of and payment for the vehicle they leased together is invalid because it is, in effect, a modification of the vehicle lease, and any such modifications must be in writing. More specifically, Tiffany argues that if their oral contract somehow gives Deborah a claim for sole possession of the vehicle after Tiffany breached it, that contract would be a modification of the lease, because the lease gives *both* of them the right to possession. And, because the lease provides that all modifications to it must be in writing, their oral agreement cannot modify their joint right under the lease to possession of the vehicle.

Whatever the legal merits of that argument might be in the abstract, we need not address it, because the circuit court did not grant replevin based on a contract theory. Deborah's complaint alleged that the parties reached an agreement, and that Tiffany "is in breach under the terms of her agreement with the plaintiff." However, Deborah abandoned that theory by the time of her motion for summary judgment. Her brief in support of that motion did not use terms like "contract," "agreement," or "breach."

Instead, Deborah argued that the "defendant has received all of the benefits of the plaintiff's payments [on the lease] and would be unjustly enriched if she were allowed to retain possession of the vehicle and was not required to repay the plaintiff for funds advanced in the fulfillment of the Lease while the plaintiff was not in possession of the vehicle." It appears that Deborah was making only an equitable claim of unjust enrichment, not a contract claim. The circuit court's oral and written decisions did not specify a legal theory, but the oral ruling appears to track closely with the content of the summary judgment brief. Accordingly, we understand Deborah's claim, and the court's decision, to be based on unjust enrichment.

With that background, it is apparent that Tiffany's argument on appeal is irrelevant. It does not matter whether an oral agreement of the parties attempted to modify the lease, because replevin was not based on any agreement between the parties. If the result of Deborah's claim can properly be described as a modification of the lease, that modification was instead ordered by *the court*, as an equitable remedy to end unjust enrichment.

To prevail on appeal, Tiffany would have to argue that something in the lease, or some other legal concept, prevents *the court* from ordering such a modification. However, she has not developed any such argument, and we have not attempted to develop one for her. Therefore, Tiffany has not persuaded us that the circuit court erred by granting replevin.

Tiffany also argues that the court erred by denying her motion to reopen the replevin decision under WIS. STAT. § 806.07. It does not appear necessary for us to discuss that argument in detail. As we understand her position, her purpose in seeking that reopening was to make the argument that we have rejected above. She was not attempting to reopen the replevin decision on a theory that requires additional discussion, such as newly discovered evidence.

IT IS ORDERED that the order appealed from is summarily affirmed under WIS. STAT. RULE 809.21.

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*