

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 8, 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. 98-2780

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

RICHARD D. PRICE, JR., AND DAVID NELSON,

PLAINTIFFS-JOINT-APPELLANTS,

V.

ZIMBRICK, INC.,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Walworth County:
MICHAEL S. GIBBS, Judge. *Reversed and cause remanded.*

Before Brown, P.J., Nettesheim and Snyder, JJ.

PER CURIAM. Richard D. Price, Jr., and David Nelson appeal pro se from a summary judgment dismissing their complaint against Zimbrick, Inc., for conversion of a 1994 Cadillac Seville. We conclude that there are material issues of fact as to whether Nelson had a sufficient ownership interest in the

vehicle to support a claim against Zimbrick. We reverse the judgment and remand for further proceedings.

The controversy between the parties arises from the fraudulent conduct of Joel Wiesneski while acting as the general manager of Whitewater Motors, Inc., a car dealership in which Nelson and Price were investors. In July 1995, a 1994 Cadillac Seville was purchased in Nelson's name. Wiesneski converted funds that were supposed to pay for the vehicle but later had the newly formed Whitewater Motors issue a check to pay for the vehicle. Ultimately, Wiesneski sold the Cadillac to Zimbrick, forging Nelson's signature on the title. Zimbrick's payment was made directly to Wiesneski. A few months later, the unauthorized sale of the Cadillac and other business discrepancies were discovered. Wiesneski fled before he could be held accountable for his fraudulent conduct.

Nelson and Price commenced this action to recover from Wiesneski and Whitewater Motors monies invested in the car dealership but converted by Wiesneski. Nelson and Price also sought to recover the retail value of the Cadillac from Zimbrick as a result of Zimbrick's alleged "wrongful conduct" and negligence in issuing payment to "a non-title holder ... in violation of commonly accepted business sales practices."

Whitewater Motors consented to entry of a default judgment and admitted that all the allegations in the complaint were true. Thus, Whitewater Motors admitted that Nelson was the owner of the Cadillac. At the hearing, Nelson testified that he was the titleholder of the Cadillac and he had paid money for it. Judgment was entered against Whitewater Motors and Wiesneski for

\$135,000, which included \$35,000 for the value of the Cadillac.¹ After entry of the judgment, Nelson and Price submitted an “agreement to vacate judgment” which recited that in consideration of vacating the \$135,000 judgment, Whitewater Motors assigned to Nelson and Price any and all its assets, including “all choses in action and in particular the right to recover any and all damages and moneys related to the sale” of the Cadillac.

Nelson and Price then filed an amended complaint against Zimbrick for conversion of the Cadillac, negligence and unjust enrichment. The complaint alleges that Whitewater Motors paid for the Cadillac but that the automobile was titled in Nelson’s name. Nelson and Price allege that as a result of Zimbrick’s conduct “Plaintiffs have suffered and continue to suffer injuries to their property in that a Cadillac Seville ... paid for by Plaintiffs’ assignor WHITEWATER MOTORS, INC. and titled in the name of Plaintiff DAVID NELSON has been permanently and wrongfully converted and removed without permission from Plaintiffs’ possession.”

Zimbrick moved for summary judgment on the ground that Nelson and Price could not recover from Whitewater Motors on Nelson’s false testimony that he paid for the Cadillac and then recover from Zimbrick based on the truth that Whitewater Motors paid for the Cadillac.² The trial court found that judicial estoppel applied and that Price and Nelson could not make contradictory

¹ A default judgment was taken against Wiesneski as well on the allegations that Price and Nelson had each advanced \$50,000 to Wiesneski to get the car dealership started.

² Nelson and Price filed a cross-motion for summary judgment and a supporting brief but those documents were not considered by the trial court because they were not timely filed. We summarily conclude that it was a proper exercise of discretion to disregard the untimely motion papers under the local court rule which required responsive papers to be filed at least five business days before the hearing.

allegations about who owned the Cadillac. Summary judgment was granted in favor of Zimbrick.

When reviewing a trial court's grant of summary judgment, we apply the standards set forth in § 802.08, STATS., in the same manner as the trial court. *See Williams v. State Farm Fire & Cas. Co.*, 180 Wis.2d 221, 226, 509 N.W.2d 294, 296 (Ct. App. 1993). The first step requires us to examine the pleadings to determine whether a claim for relief has been stated. *See Crowbridge v. Village of Egg Harbor*, 179 Wis.2d 565, 568, 508 N.W.2d 15, 17 (Ct. App. 1993). If so, the inquiry shifts to whether any factual issues exist. *See id.*

Here, whether or not the complaint states a cause of action in either conversion or negligence is dependent on ownership of the Cadillac. *See Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.*, 206 Wis.2d 158, 188, 557 N.W.2d 67, 79 (1996) (owner of converted property may recover for the wrongful exercise of control over it). It is correct that as a matter of judicial estoppel, Whitewater Motors, having admitted that Nelson owned the vehicle, can not subsequently make an ownership claim so as to have any cause of action against Zimbrick. "Judicial estoppel 'precludes a party from asserting a position in a legal proceeding and then subsequently asserting an inconsistent position.'" *Davis v. American Family Mut. Ins. Co.*, 212 Wis.2d 382, 390, 569 N.W.2d 64, 67 (Ct. App. 1997) (quoted source omitted). By virtue of the assignment from Whitewater Motors, Price and Nelson only stepped into the empty shoes of Whitewater Motors and really acquired no additional cause of action against Zimbrick. *See D'Angelo v. Cornell Paperboard Prods. Co.*, 19 Wis.2d 390, 401, 120 N.W.2d 70, 76 (1963).

Zimbrick argues that Price and Nelson have no cause of action in their individual capacity because “it is undisputed that they had no ownership interest in the Cadillac.”³ Zimbrick characterizes the amended complaint as alleging that Whitewater Motors “owned the vehicle all along.” However, the amended complaint does not make any allegations regarding ownership. It simply alleges that Whitewater Motors issued the check in payment for the Cadillac but that the vehicle was titled in Nelson’s name.

Ownership is not a matter simply decided by payment for the vehicle or the certificate of title. *See Friendship Village, Inc. v. City of Milwaukee*, 181 Wis.2d 207, 221, 511 N.W.2d 345, 351 (Ct. App. 1993) (“[O]wnership is a question which must be determined in each case in the context of the purpose of the determination.”) (quoted source omitted). Ownership in property passes according to the intent and conduct of the parties. *See Tesky v. Tesky*, 110 Wis.2d 205, 212-13, 327 N.W.2d 706, 709 (1983). “Ownership means ‘something substantially more in the way of enjoyment or the possession of other indicia of ownership than bare or paper title.’” *Wall v. DOR*, 157 Wis.2d 1, 8, 458 N.W.2d 814, 817 (Ct. App. 1990) (quoted source omitted).

We turn to consider whether the facts that bear on ownership are undisputed. Zimbrick contends that Nelson admitted in his interrogatory responses that Whitewater Motors had paid for the car. Nelson did acknowledge that Whitewater Motors had issued a check for full payment of the car. He also

³ Apparently Price remains a party to the litigation by virtue of an “oral assignment” of Nelson’s interest. We do not decide whether this is a sufficient basis for Price to be a party to the action.

explained the circumstances of how Whitewater Motors came to pay for the car. Nelson indicated that:

[O]wnership was conveyed from Mysore Sundara to me for moneys due me from a land deal that we lost money on in South Barrington, Illinois in September 1991. I never paid cash for the Cadillac. Mysore Sundara gave a check to Joel Wiesneski for \$29,000 to buy the Cadillac from Stark Motors in Merrill, Wisconsin in June or July 1995. Joel pocketed the money but as Finance Manager at Stark Motors gave Mysore and I possession of the Cadillac in July 1995 (before Whitewater Motors, Inc. was formed, let alone even contemplated). Joel gave various excuses to Stark Motors as to why payment had not been made until finally on October 16, 1995 a check was issued by Whitewater Motors, Inc. from its business account to Stark G.M. for \$29,016.50 for full payment of the Cadillac.

Nelson also admitted that the title to the vehicle was kept locked in the business office of Whitewater Motors and that while he was employed by Whitewater Motors the vehicle was kept on the premises. He stated that he did not give Wiesneski permission to sell the car, although he knew of the plan to exhibit the car on the Zimbrick lot. There is no information about who insured the car and whether it was ever licensed or driven.

Zimbrick asserts that Nelson never had possession of the Cadillac. That cannot be said with certainty given Nelson's interrogatory answer that Wiesneski gave him possession. The same is true with Zimbrick's assertion that Nelson did not pay for the vehicle or have access to the title bearing his name. In his view, Nelson did pay for the Cadillac by accepting title of the vehicle in payment of a previous debt. If Nelson worked at Whitewater Motors, where title to the vehicle was kept, he may have had access to the title. We conclude that the facts bearing on ownership are in conflict and cannot be determined on the summary judgment record. *See Bacheller v. Employers Mut. Liab. Ins. Co.*, 93

Wis.2d 564, 573d, 290 N.W.2d 872, 874-75 (1980) (a material issue of fact as to ownership makes summary judgment inappropriate).

Zimbrick contends that Price and Nelson are guilty of attempting to manipulate the judicial system and therefore are judicially estopped from seeking recovery. Before judicial estoppel can be applied it must first be determined that a litigant's later position is clearly inconsistent with the earlier position. *See Davis*, 212 Wis.2d at 390, 569 N.W.2d at 67. Zimbrick believes Nelson's testimony⁴ that he paid money for the car is inconsistent with the later admission that Whitewater Motors paid for the car. However, Nelson's interrogatory answer gives an explanation for how he "paid money" for the car, or at least has a financial interest in the car. That explanation, if found to be credible, is not clearly inconsistent with Nelson's testimony. By his admission that Whitewater Motors issued a check in payment for the Cadillac, Nelson has not taken a position inconsistent with his position that he had a financial interest in the vehicle. Judicial estoppel

⁴ During the hearing on Price and Nelson's motion for a default judgment against Whitewater Motors and Wiesneski, the following exchange took place:

THE COURT: Now, this Cadillac, did either of you have any money invested in that vehicle?

....

MR. PRICE: I didn't.

THE COURT: Do you have any money invested in this Cadillac?

MR. NELSON: Yes.

THE COURT: How were you involved in the Cadillac?

MR. NELSON: I was the title holder.

....

THE COURT: And have you paid money for that vehicle?

MR. NELSON: Yes, I paid money for it, yes.

does not bar Nelson's attempt to establish a sufficient ownership interest to support a cause of action against Zimbrick.

Because we conclude that ownership of the Cadillac involves disputed issues of fact, we cannot hold that Price and Nelson have failed to state a claim for relief. We reverse the judgment and remand for further proceedings.⁵ It may be that Zimbrick has other defenses to the action, but those were not litigated on the record before us.

By the Court.—Judgment reversed and cause remanded.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

⁵ The judgment is reversed and we need not decide Price and Nelson's claim that the trial court was improperly influenced by a note the trial court clerk left on the motion for summary judgment that the case was "not a good case." Additionally, this claim is raised for the first time on appeal. *See Evjen v. Evjen*, 171 Wis.2d 677, 688, 492 N.W.2d 361, 365 (Ct. App. 1992).

