COURT OF APPEALS
DECISION
DATED AND RELEASED

September 11, 1997

NOTICE

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.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-1815

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

GARY L. ADDISON, HEIDI A. ADDISON, GARY L. HAMMOND, JOANNE HAMMOND, JEANNE BUTLER AND RUBEN AND FLORENCE HEBERLEIN, AND ADOLPH AND IRENE VESPERMAN, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVES OF THE ESTATE OF ADOLPH HEBERLEIN, DECEASED, CAROLE JOHNSON AND IVAN JOHNSON,

PLAINTIFFS-APPELLANTS-CROSS RESPONDENTS,

V.

GRANT COUNTY,

DEFENDANT-RESPONDENT-CROSS APPELLANT,

VINCENT M. ADAMS AND JEAN F. ADAMS,

DEFENDANT-RESPONDENT.

APPEAL and CROSS-APPEAL[1] from a judgment of the circuit court for Grant County JOHN R. WAGNER, Judge. *Affirmed.*

Before Eich, C.J., Dykman, P.J., and Vergeront, J.

VERGERONT, J. This appeal arises out of a dispute over rights to an abandoned railroad property. The plaintiffs, Gary L. Addison and other owners[2] of property adjoining the railroad property, appeal from the order granting summary judgment in favor of defendants, Grant County and Vincent and Jean Adams. The Adamses purchased the abandoned property from the County. The trial court determined that the plaintiffs had failed to file a notice of claim with Grant County as required by § 893.80(1), STATS.,[3] and dismissed their action

[1] Our decision makes it unnecessary for us to decide the issues raised on Grant County's cross-appeal.

[2] The names of the other property owners are: Heidi A. Addison, Gary L. Hammond, Joanne Hammond, Jeanne Butler, Ruben Heberlein, Florence Heberlein, Adolph Vesperman, Irene Vesperman, Carole Johnson and Ivan Johnson. It appears from the transcript of a hearing conducted on October 5, 1994, that the Herberleins and the Vespermans withdrew from the case. However, neither the caption nor the briefs on appeal reflect that. Whether they are still plaintiffs does not reflect the outcome of this appeal.

[3] Section 893.80(1), STATS., provides:

> Except as provided in subs. (1g), (1m), (1p) and (8), no action may be brought or maintained against any volunteer fire company organized under ch. 213, political corporation, governmental subdivision or agency thereof nor against any officer, official, agent or employe of the corporation, subdivision or agency for acts done in their official capacity or in the course of their agency or employment upon a claim or cause of action unless:
>
> (a) Within 120 days after the happening of the event giving rise to the claim, written notice of the circumstances of the claim signed by the party, agent or attorney is served on the volunteer fire company, political corporation, governmental subdivision or agency and on the officer, official, agent or employe under s. 801.11. Failure to give the requisite notice shall not bar action on the claim if the fire company, corporation, subdivision or agency had actual notice of the claim and the claimant shows to the

(continued)

against all defendants. We conclude that the trial court properly dismissed all defendants and therefore we affirm.

BACKGROUND

The County gave the Adamses a quit claim deed for the disputed property, which was recorded on June 2, 1988. The plaintiffs filed their complaint on January 18, 1991. The complaint alleged that the County's sale of the abandoned railroad property to the Adamses was void because notice was not given to the plaintiffs before the sale as required by § 75.12, STATS. The complaint sought an order declaring the plaintiffs owners of half of the abandoned property, ordering the County and the Adamses to remove a fence and manure the Adamses had placed on the property, and granting attorney fees against the County and the Adamses. The Adamses asserted counterclaims against the plaintiffs for unjust enrichment, attorney fees for a frivolous action and slander of

---

> satisfaction of the court that the delay or failure to give the requisite notice has not been prejudicial to the defendant fire company, corporation, subdivision or agency or to the defendant officer, official, agent or employe; and
>
> (b) A claim containing the address of the claimant and an itemized statement of the relief sought is presented to the appropriate clerk or person who performs the duties of a clerk or secretary for the defendant fire company, corporation, subdivision or agency and the claim is disallowed.
>
> (1g) Notice of disallowance of the claim submitted under sub. (1) shall be served on the claimant by registered or certified mail and the receipt therefor, signed by the claimant, or the returned registered letter, shall be proof of service. Failure of the appropriate body to disallow a claim within 120 days after presentation of the written notice of the claim is a disallowance. No action on a claim under this section against any defendant fire company, corporation, subdivision or agency nor against any defendant officer, official, agent or employe, may be brought after 6 months from the date of service of the notice of disallowance, and the notice of disallowance shall contain a statement to that effect.

title, and cross-claims against the County for unjust enrichment, and strict liability misrepresentation of title.[4]

Grant County filed a motion to dismiss both the plaintiffs' claims against it and the Adamses' cross-claims on the grounds, among others, that those parties failed to comply with the notice requirements of § 893.80(1), STATS. The court held a hearing on the motion on March 29, 1991, at which Grant County Treasurer Beverly Harnett testified that the County issued a quit claim deed to the Adamses for the property in dispute, which was recorded on June 2, 1988. Harnett also testified that she did not receive written notice that there was any problem in connection with the transaction until a letter from Heidi Addison to the chairman of the County Board of Supervisors dated November 29, 1990, pointed out problems the Addisons had with the deed from the County to the Adamses. Vincent Adams testified that he first learned in 1989 that the Addisons claimed ownership of some of the property conveyed to him by the County after he cleared the land and started to put manure on it. He testified that he first cleared the land in April 1988 before he received the deed from the County.[5]

After hearing the testimony, the court found that a timely notice of claim had not been filed with the County and there was no evidence of actual

[4] The trial court denied the plaintiffs' motion and renewed motion for partial summary judgment. The court denied the renewed motion because it determined that there were disputed issues of material fact as to whether the original conveyance to the railroad was that of a fee or an easement. On appeal, the plaintiffs contend they were entitled to partial summary judgment that they had rights to one-half of the disputed property, and the County and the Adamses contend summary judgment should have been granted determining that the plaintiffs had no rights to the disputed property. Because we decide the action was properly dismissed on other grounds, we need not address this issue.

[5] The other testimony of Harnett and Adams at this hearing concerned the propriety of the conveyance to the Adamses and is not pertinent to the notice of claim issue.

notice. The court also noted that in addition to proving actual notice, if no notice of claim was filed, the plaintiffs had the burden of showing lack of prejudice. The court stated that as to the plaintiffs' claims, the County's motion to dismiss for lack of compliance with § 893.80, STATS., should be granted. However, it stated that might be a "nullity" because if damages were awarded against the Adamses in favor of the plaintiffs, the Adamses "then would have a cause of action arising out of contribution or indemnification" against the County:

> [I]t would seem to me it would be a rather foolish exercise of legalistic maneuver to then have [the Adamses] serve a 120-day notice on the county and allow the county to make an investigation into what is already known to the county and have the county board then make a determination as to whether or not damages should be awarded and then if they deny it, allow [the Adamses] to reinstitute the lawsuit which would be an additional cost to Mr. Adams and his wife, additional fees, additional paper work to accomplish the very thing I am discussing now. That in my mind would just be a waste of everybody's time, effort and money. And for that reason as to the Adams [sic], I am going to deny the motion to remove the county as a party.

No order was issued as a result of the May 29, 1991 hearing.

On March 23, 1994, the County moved for summary judgment.[6] One of the grounds for the motion was the plaintiffs' and the Adamses' failure to comply with § 893.80(1), STATS. In support of the motion, the County submitted the affidavit of Dorothy Eck, County Clerk, which averred that she attends the county board meetings, that neither the plaintiffs nor the Adamses filed a notice of claim or circumstances with her office at any time and the Grant County Board

[6] The handwritten date on the motion for summary judgment is June 20, 1994, but the clerk's stamp on the affidavits, which are referred to in the undated brief in support of the motion, is March 23, 1994. This is the date for the motion that the plaintiffs used in their brief, and we do the same.

had no actual notice of the plaintiffs' or the Adamses' claims, as no employee brought the matter before the county board. Neither the plaintiffs nor the Adamses submitted any materials disputing these affidavits.

At the hearing on this motion, held on October 5, 1994, the County brought to the court's attention the case of ***DNR v. Waukesha***, 184 Wis.2d 178, 515 N.W.2d 888 (1994), which held that § 893.80(1), STATS., applies to all actions, not just to tort actions.[7] The court decided that ***DNR*** required that it grant the County's motion. The plaintiffs' counsel contended that he should have the opportunity to present evdience that Treasurer Harnett had actual notice of the Addisons' claims because she was contacted by Gary Addison within the 120-day period and to present other evidence going to actual notice.[8] The court permitted the plaintiffs' counsel to present an offer of proof. However, it then concluded that there had already been an evidentiary hearing on the issue of compliance with § 893.80(1), that Harnett had testified and was cross-examined by the plaintiffs'

[7] The question of the retroactivity of the court's decision in ***DNR v. Waukesha***, 184 Wis.2d 178, 515 N.W.2d 888 (1994), was raised at the October 5, 1994 hearing. The County argued that because ***DNR*** interpreted an amended version of the statute, which was effective before the County conveyed the disputed property to the Adamses, the holding of ***DNR*** applies in this case. The other parties did not dispute that proposition at the hearing, and no party contends otherwise on appeal.

[8] The plaintiffs' counsel explained that he had not come prepared to do that because there was a stipulation that the County would not pursue a defense based on noncompliance with § 893.80(1), STATS., and he argued that the County was estopped from asserting lack of compliance with § 893.80(1) as a defense because of that stipulation. According to plaintiffs, the stipulation was that they would not seek any affirmative relief from the County and therefore the County would not pursue a defense based on § 893.80. We assume that, whatever occurred that the plaintiffs' counsel described as a stipulation, occurred after the May 29, 1991 hearing. Counsel for the County at the October 5, 1994 hearing, who was not the same attorney as the one who appeared for the County on May 29, 1991, and apparently did not appear for the County until sometime in 1994, argued that the stipulation was not in writing, was not made on the record, and she had no knowledge of it. The court decided that without any evidence of such a stipulation or any agreement on its terms, it could not enforce the stipulation or determine that the County was estopped based upon it.

counsel, and that the court had found there was no notice, actual or otherwise. The court explained that it had kept the County in the case in order to have one rather than two lawsuits, but it was now of the view, based on ***DNR***, that it could not do that.

The court dismissed the plaintiffs' actions against both defendants, and dismissed the cross-claims and counterclaims of the Adamses without prejudice.

DISCUSSION

On appeal, the plaintiffs contend that the trial court correctly ruled on May 29, 1991, that the County should be dismissed from the "plaintiffs' suit" but that the plaintiffs could pursue their claims against the Adamses. The trial court later erred, according to the plaintiffs, in dismissing the Adamses as well as the County. They advance these reasons in support of their position: (1) the County waived the defense of noncompliance with § 893.80(1), STATS., by its inaction; (2) the trial court did not give the plaintiffs the opportunity to oppose the County's motion to dismiss the Adamses at the October 25, 1994 hearing; (3) the plaintiffs were not required to comply with § 893.80(1) as to the Adamses because the Adamses are not governmental bodies or officers, agents or employees thereof; (4) the Adamses never moved for dismissal of the plaintiffs' claims against them; and (5) the plaintiffs should be permitted to pursue their claims against the Adamses and, if they prevail against the Adamses, the Adamses can at that time file a notice of claim and, if that is rejected, they can then file suit on their claims against the County.

At the outset, we emphasize the distinction between the County as a defendant of the plaintiffs' claims and the County as a cross-defendant of the

Adamses' claims, because that distinction appears to be overlooked in some of the briefing. We understand the plaintiffs to concede that the court correctly determined that the plaintiffs could not pursue any claims against the County because they failed to comply with § 893.80(1), STATS. We do not understand why the plaintiffs are objecting to the County's effort to seek dismissal of the Adamses' cross-claims against the County, but apparently they are. The first two arguments we have listed above go to the County's motion for summary judgment in its favor as to the cross-claims against the County. We can easily dispose of those two contentions.

The plaintiffs contend that the County waved noncompliance with § 893.80(1), STATS., because, after the court's ruling on May 29, 1991, which permitted the plaintiffs to pursue their claims against the Adamses (but not the County), the County did not again raise the issue of noncompliance with § 893.80(1) until its motion for summary judgment, filed on or about March 23, 1994, even though there were hearings held on other matters in the interim. There is no merit to this contention. In its motion to dismiss, filed approximately two months after the complaint was filed, the County asks for dismissal of the plaintiffs' claims and the Adamses' cross-claims against it. Although the court in its May 29, 1991 ruling agreed with the County that the plaintiffs could not pursue any claims against the County because of noncompliance with § 893.80(1), it did not agree that the Adamses' cross-claims against the County should be dismissed because of their noncompliance with § 893.80(1). That is why it did not dismiss the County from the action (although it could have, consistent with its decision, entered an order dismissing the plaintiffs' claims against the County).

The County was obliged to continue to participate in the lawsuit after May 29, 1991, because the court had not dismissed the Adamses' cross-

claims. The County's motion for summary judgment on the same ground was, in effect, a renewal of the motion to dismiss, with affidavits containing testimony supplementing that provided by Harnett at the evidentiary hearing on the motion to dismiss. The County was not obligated to renew the motion, at this time or earlier, but it certainly was free to do so. There is no evidence in the record that the County ever made any statement or took any position indicating that it was not going to pursue dismissal of the Adamses' cross-claims against it after the May 29, 1991 hearing.

The plaintiffs' contention that they were not given any opportunity to defend against the County's motion for summary judgment on the notice of claim is also without merit. The County's brief and affidavit in support of their motion, filed well before the hearing on October 5, 1994, clearly stated that they were seeking dismissal of the Adamses' cross-claims against the County for failure to file a notice of claim and because of the lack of actual notice. The plaintiffs do not explain why they could not prepare to defend on this issue, if they wished to, prior to the hearing. The court did permit the plaintiffs' counsel to make an offer of proof. However, the court then concluded that the plaintiffs simply wished to present additional testimony from a witness they had already had the opportunity to question at the May 29, 1991 hearing, when essentially the same issue—compliance by the plaintiffs and the Adamses with § 893.80(1), STATS.,—was before the court and on which issue the court had already made factual findings. Whether to take more testimony under these circumstances was a decision within the trial court's discretion, *see* ***State v. Hanson***, 85 Wis.2d 233, 237, 270 N.W.2d 212, 215 (1978). We conclude that the trial court properly exercised its discretion.

We agree with the plaintiffs' third contention—that they did not have to file a notice of claim regarding their claim against the Adamses. However, while the trial court may not have explained why it concluded that ***DNR*** required it to dismiss the plaintiffs' claims against the Adamses, we are confident the reason was *not* that it believed that the plaintiffs had to comply with § 893.80(1), STATS., with respect to their claims against the Adamses. The plaintiffs point to nothing in the record indicating this might have been a basis for the trial court's decision, and we have found none.

We now address the plaintiffs' argument that the trial court erred in dismissing their claims against the Adamses because the Adamses did not move for dismissal of the plaintiffs' claims. We interpret this contention to be, at bottom, a claim of lack of notice and an opportunity to be heard on the issue of whether their claims against the Adamses should be dismissed if the County was dismissed. The Adamses do not respond to this argument but the County contends that under § 802.08(6), STATS., a court may grant summary judgment to the party against whom a motion for summary judgment asserted, even though that party has not made a motion.[9] While this is true, it does not fit the situation here. The plaintiffs were not moving for summary against the Adamses; the County was. Section 802.08(6) permits the court to grant summary judgment against the County in the Adamses' favor on the County's motion for summary judgment against the Adamses. But it does not authorize summary judgment against a party

[9] Section 802.08(6), STATS., provides:

> JUDGMENT FOR OPPONENT. If it shall appear to the court that the party against whom a motion for summary judgment is asserted is entitled to a summary judgment, the summary judgment may be awarded to such party even though the party has not moved therefor.

who did not bring a motion for summary judgment in favor of another party who did not bring a motion for summary judgment. The person who brings a summary judgment motion has notice and the opportunity to show the court why judgment should be entered in its favor rather than against it, but that does not apply to the plaintiffs here.

Based on the County's motion for summary judgment and its brief, it is unclear whether the County was seeking dismissal of the plaintiffs' claims against the Adamses, as well as all the claims against the County.[10] The discussion on this issue at the October 5, 1994 hearing was not focused and the record is somewhat ambiguous. Counsel for the County did request that "the case be dismissed" because the County had no notice from the Adamses, but never expressly addressed why noncompliance with § 893.80(1), STATS., required dismissal of the plaintiffs' claims against the Adamses. Some of the Adamses' counsel's arguments did indicate that their position was that it would be unfair to leave them in the case with no recourse against the County and that the result of ***DNR*** is that "they should all go home." Other comments by the Adamses' counsel made before that at the hearing indicated that he believed the Adamses would not have a claim against the County unless and until the plaintiffs had a judgment against them and therefore the Adamses could file a notice of claim against the

[10] The motion requests "the entry of summary judgment in its favor in the above lawsuit and counterclaim[sic]." The brief in support of the motion states that "since the plaintiffs and defendant Adams failed to file a [timely] notice of claims prior to filing their actions against Grant County, the lawsuit of plaintiffs and the cross claim of defendant Adams … must be dismissed." The brief does not argue that dismissal of the Adamses' cross-claims requires dismissal of the plaintiffs' claims against the Adamses. After addressing the merit of the plaintiffs' claim to the disputed property and the merits of the Adamses' cross-claims against the County, the brief concludes with the County's request "that the above action be dismissed pursuant to Wisconsin Statutes Section 802.08(6) as it is evident from the above arguments that Grant County is entitled to judgment on plaintiffs' and Defendant Adams' claims."

County at that time. The court's oral ruling was that, "the motion on the part of the county is granted based on [***DNR***]," without clarifying what claims were being dismissed. However, the order entered the following day dismissed "the case" with prejudice because "plaintiffs failed to file a notice of claim within the statutory 120-day deadline; [and] previously failed to prove that there was actual or constructive notice to the county of their claim in this matter." At least on October 6, 1994, then, the plaintiffs knew the court had decided that their claims against the Adamses had to be dismissed because of their noncompliance with § 893.80(1).

Assuming without deciding that the plaintiffs did not know until the entry of the October 6, 1994 order that either the County or the Adamses sought dismissal of the plaintiffs' claims against the Adamses, the plaintiffs do not explain what evidence they would have presented at the October 5, 1994 hearing had they known this.[11] To the extent they are contending they did not have an opportunity to present argument on the issue, we consider that argument now. Whether the court properly dismissed their claims against the Adamses, based on the facts as found by the trial court, presents a question of law, which we decided de novo. *See* ***DNR***, 184 Wis.2d at 189, 515 N.W.2d at 892 (application of a statute to a given set of facts is question of law, which we review de novo).

[11] As we noted above, the only evidence the plaintiffs claim they were prevented from presenting at the October 5, 1994 hearing, on which the court heard an offer of proof, related to whether the County had actual and timely notice of their claim that they had an interest in the land conveyed to the Adamses. This does not go to whether the plaintiffs' claims against the Adamses should be dismissed. If the plaintiffs did have additional evidence pertinent to this issue, they should have brought it to the court's attention after the October 6, 1994 order was entered through a motion for reconsideration.

Drawing on all the court's comments at the May 29, 1991 hearing and the October 5, 1994 hearing, we understand the court to have decided that the Adamses would not be able to obtain relief from the County on its cross-claims, should the plaintiffs prevail against them, because no notice of claim had been filed with the County and there was no actual notice, and therefore it would be unfair to the Adamses to permit the plaintiffs to proceed against them. The plaintiffs contend that this unfairness need not result because, if they prevail against the Adamses, the Adamses can at that time file a timely notice of claim with the County and, if it is denied, file suit against the County. This contention, as stated above, was made by the Adamses' counsel at one point in the October 5, 1994 hearing. In addition, the court at the May 29, 1991 hearing and again at the October 5, 1994 hearing, indicated it saw merit in this view. In particular, the court suggested an analogy to claims for indemnification and contribution. *See* ***State Farm Mut. Auto. Ins. Co. v. Schara***, 56 Wis.2d 262, 265, 201 N.W.2d 758, 759 (1972) (claim for contribution accrues when one joint tortfeasor pays more than proportionate share of damages). However, the court did not ultimately adopt this view: had it done so, it would not have ordered dismissal of the plaintiffs' claims against the Adamses.

The plaintiffs cite no authority in support of their position that the Adamses may file a timely notice of claim with the County if and when they are found liable to the plaintiffs. Their argument on this point is one sentence. Section 893.80(1)(a), STATS., requires notice "within 120 days after the happening of the event giving rise to the claim.…" The court's suggested analogy to contribution and indemnification claims does not help the plaintiffs' arguments because the Adamses' claims against the County are not for contribution or

indemnification[12] but for unjust enrichment based on taxes they paid for the property in the spring of 1988, and alleged misrepresentations made by the County in conveying the property to them in the spring of 1988. As the County points out, accepting the plaintiffs' argument means that, years after the events of 1988, it will have to respond to a notice of claim, and suit, even if the County has been prejudiced by the delay. This is not consistent with the purpose of § 893.80(1), STATS., which is to allow municipalities the opportunity to compromise and settle claims and avoid time-consuming litigation. ***DNR***, 184 Wis.2d at 195, 515 N.W.2d at 894.

We generally do not develop a party's arguments for them or consider issues that are inadequately briefed. *See* ***State v. Pettit***, 171 Wis.2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992). We decline to do so here. We are not persuaded that if the plaintiffs were to prevail against the Adamses, the Adamses could file a timely notice of claim against the County at that time, years after the events giving rise to the claims occurred. This means that if the plaintiffs' claims against the Adamses were permitted to proceed and the plaintiffs prevailed, the Adamses would have no recourse against the County. The plaintiffs do not argue that this is a correct result. They do not contend that the Adamses should have filed a notice of claim with the County at some earlier time, nor do they argue that the Adamses need not file a notice of claim at all in order to pursue their cross-claims against the County.

[12] Contribution is the process by which one person obtains reimbursement from another for a proportionate share of an obligation paid by the first person for which they are jointly liable. ***Jasmine J.E. v. John E.P.***, 198 Wis.2d 114, 120, 542 N.W.2d 171, 174 (Ct. App. 1995). A claim for indemnification is based on the principle that shifts the loss from one who has been compelled to pay to one who, on the basis of equitable principles, should bear the loss. ***Id.*** at 118, 542 N.W.2d at 173.

Although the plaintiffs contend in their reply brief that the County was not a necessary part for the declaration of rights with respect to title of the disputed property, perhaps suggesting that they did not have to give the County notice after all because they did not have a claim against the County, they argued just the opposite to the trial court. At the October 5, 1994 hearing they contended that it was mandatory that they join the County for the quiet title action and that is why they did so. If their legal position has changed, and if that affects the correctness of the court's dismissal of their claims against the Adamses, they have not developed that argument.

The County was a necessary party in order to afford complete relief to other parties, that is, to the Adamses on their cross-claim. *See* § 803.03(1)(a), STATS. When a party is a necessary party but cannot be made a party, the trial court may dismiss the entire action after considering certain factors, including whether judgment rendered in the person's absence might be prejudicial to the person or those already parties, the extent to which prejudice can be avoided or lessened, whether judgment in the person's absence will be adequate and whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder. *See* § 803.03(3)[13] The trial court here considered the fact that the

[13] Section 803.03(3), STATS., provides:

> DETERMINATION BY COURT WHENEVER JOINDER NOT FEASIBLE. If any such person has not been so joined, the judge to whom the case has been assigned shall order that the person be made a party. If the party should join as a plaintiff but refuses to do so, the party may be made a defendant, or, in a proper case, an involuntary plaintiff. If a person as described in subs. (1) and (2) cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include:

(continued)

plaintiffs had not complied with § 893.80(1), STATS., and therefore either the County would not have the notice it was statutorily entitled to or the Adamses would not have recourse against the County for any damages they might be entitled to if the plaintiffs prevailed against them. The plaintiffs have not persuaded us that the trial court made any legal error in its analysis, and we cannot say this is an unreasonable result. *See* ***Rodak v. Rodak***, 150 Wis.2d 624, 631, 442 N.W.2d 489, 492 (Ct. App. 1989) (we affirm discretionary determinations if the trial court applies the correct law to the facts of record and reaches a reasonable result). We therefore affirm.

We conclude that the trial court properly exercised its discretion in dismissing all of the plaintiffs' claims, including those against the Adamses, since

---

> (a) To what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties;
>
> (b) The extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided;
>
> (c) Whether a judgment rendered in the person's absence will be adequate; and
>
> (d) Whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

the County had to be dismissed as a party both as to the plaintiffs' claims against the County and the Adamses' cross-claims against the County.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

No. 96-1815(D)

DYKMAN, P.J. *(dissenting).* Once in a while a litigant loses a case without knowing why. This is one of those cases. I cannot agree with the majority's conclusion that Gary and Heidi Addison are prevented from litigating a common, mine-run boundary dispute with Vincent and Jean Adams because the Adamses might not be able to obtain relief from their predecessor in title should the Addisons prevail on their claim.

Once the irrelevancies in this case are excised, the case becomes easy to understand. A railroad right of way separates the Addisons' and Adamses' back yards. When the railroad abandoned the right of way, both parties claimed the land. Each has interesting legal arguments as to why the land is theirs, but we need not examine those theories now. The only question before us is whether the trial court properly dismissed the case.

I am mystified as to why the Addisons sued Grant County. But that is where all the trouble started, and I would end it by concluding that the trial court correctly dismissed Grant County from this lawsuit. That would leave this lawsuit like almost every other quiet title or trespass action, where the question is: "Who owns the land?" A recent example is ***Klinefelter v. Dutch***, 161 Wis.2d 28, 467 N.W.2d 192 (Ct. App. 1991). In that case, neighbors owning adjacent forty-acre parcels disputed about who owned a two-acre strip located between their parcels. No one thought it necessary to join the predecessors in title to the forty-acre parcels, and we decided the case without even discussing that fact. And ***Klinefelter*** is typical of the myriad of quiet title and trespass actions that have occupied Wisconsin's courts since the Civil War. *See, e.g.,* ***Gamble v. Loop***, 14 Wis. 505 [*465] (1861).

The probable reason that quiet title complaints have not been dismissed for failure to join predecessors in title is that this would require the predecessor in title to join his or her predecessor in title. If it is "unfair" to take land from its owner without permitting the owner to cross-complain against the person who deeded the land to him or her, it would be no less unfair to require the predecessor in title to stand the loss when the problem began with someone who earlier held title to the land. The result of this reasoning is that unless a plaintiff in a quiet title action joins all persons who ever owned the land and contributed to the problem, the action would be dismissed. This is an interesting theory which would result in most quiet title actions being dismissed, but it is not the law.

The majority adopts this theory by concluding that Grant County was a necessary party to the Addisons' quiet title action. Section 803.03(1)(a), STATS., provides that a person who is subject to service of process shall be joined in an action if in the person's absence, complete relief cannot be accorded among those already parties. But the majority cites no authority for its conclusion that Grant County was a necessary party requiring the dismissal of the Addisons' complaint against the Adamses. However, there *is* authority on this issue, and it has been a part of Wisconsin jurisprudence for a long time. And that authority contradicts the majority's holding.

In ***Grossback v. Brown***, 72 Wis. 458, 40 N.W. 494 (1888), John Nagele owned several contiguous parcels of land in La Crosse County. He sold one of the parcels to Fred Coelln. Because the parcel was landlocked, Nagele gave Coelln a right of way over some of Nagele's other land. Coelln sold the land together with the right of way to Grossbach. Nagele then sold the land burdened by the right of way to Brown. Brown refused to permit Grossbach to use the right of way. Grossbach sued and won in both the circuit court and supreme court. The

supreme court addressed the question of whether Nagele, the predecessor in title to both Grossbach and Brown, was a necessary party to the action:

> We do not think Nagele is a necessary party to this action. He had conveyed the lands over which the plaintiff had acquired such right of way to the defendant. This action is merely to perfect and quiet such right of way in the plaintiff and as against the defendant. Nagele is not a necessary party to such a controversy.

Id. at 463, 40 N.W. at 497.

Ten years after ***Grossbach***, the supreme court revisited the issue. The court concluded that a predecessor in title was not a necessary party to an action to set aside a judgment and various deeds because of fraud. The court concluded that the predecessor in title claimed no interest in the real estate, and was therefore not a necessary party in the suit between the persons claiming to have been defrauded and those alleged to have perpetrated the fraud. ***Kruczinski v. Neuendorf***, 99 Wis. 264, 269, 74 N.W. 974, 975 (1898).

After the turn of the century, the issue arose again. James Mitchell and Henry Mitchell owned land in Langlade County as tenants in common. In September 1912, James gave a mortgage and a deed of his interest in the land to J. Wirig. In October 1912, an execution sale transferred James's interest in the land to Henry Mitchell. In Henry Mitchell's action to set aside the deed from James Mitchell to J. Wirig, Wirig asserted that a predecessor in title was a necessary party to the action. The court responded:

> The defendant Wirig claims that James Mitchell should have been made a party to the action, since he was the grantor of the deed and the maker of the mortgage—two instruments declared void by the judgment. Since the plaintiff Henry R. Mitchell under the execution sale succeeded to all the interest that James Mitchell had in the lands, the latter was not a necessary nor a proper party.

> Both the defendant Wirig and the plaintiff Henry R. Mitchell deny any title in James Mitchell and he claims none, so he had no interest in the litigation.

Mitchell v. Lyons, 163 Wis. 399, 402, 158 N.W. 70, 71 (1916).

I agree that these cases are older, and perhaps that is why the majority has not discussed them. But we are bound by prior decisions of the supreme court. *See* ***State v. Lossman***, 118 Wis.2d 526, 533, 348 N.W.2d 159, 163 (1984). That court has not made an exception for its older cases.

More recently, a federal court has explained why a predecessor in title is not a necessary party to a quiet title action. *See* ***Ford v. Adkins***, 39 F. Supp. 472 (E.D. Ill. 1941). I recognize that federal decisions are not binding on state courts on issues of state law. *See* ***West Bend Mut. Ins. Co. v. Berger***, 192 Wis.2d 743, 755, 531 N.W.2d 636, 641 (Ct. App. 1995). However, the court's reasoning applies to the Addisons and Adamses as well as to Ford and Adkins:

> Under these frequently enunciated principles Williams is not an indispensable party. He is no longer the owner of any of the property involved. More than twenty years ago, by deed of record, he conveyed all interest therein and it is a matter of no moment to him whether plaintiffs or defendants win upon the issues presented by the bill of complaint. The fact that Williams may have executed a warranty deed and thereby become liable to his grantee for breach of warranty if plaintiffs succeed, as suggested by plaintiffs, does not change the situation. Plaintiffs are not interested in whether any defendant has a cause of action against any other. Rather they are endeavoring to establish title to property now claimed entirely by defendants other than Williams. His presence is wholly unnecessary; it can add nothing to plaintiffs' claim and is of no avail in the establishment of that claim. Clearly he is to be ignored in determining whether the cause is properly removed.

Ford, 39 F. Supp. at 474 (citation omitted).

There is another reason why I cannot join in the majority opinion. Whether a party is a necessary party under § 803.03(1), STATS., is within the trial court's discretion. *See, e.g.,* ***Wisconsin State Journal v. University of Wisconsin-Platteville***, 160 Wis.2d 31, 44, 465 N.W.2d 266, 271 (Ct. App. 1990). We are prohibited from exercising the trial court's discretion. ***Wisconsin Ass'n. of Food Dealers v. City of Madison***, 97 Wis.2d 426, 434-35, 293 N.W.2d 540, 545 (1980). Thus, we must look to see what the trial court decided to determine whether it appropriately exercised its discretion. I have done so, and I conclude that the person most surprised to learn that the trial judge dismissed the Addisons' complaint because the action was unfair to the Adamses will be the trial judge himself. The majority opinion cannot find any direct evidence that this was the trial court's reasoning, for it notes: "[W]e understand the court to have decided …." The majority does not tell us which words the trial judge uttered to enable it to understand the trial court's reasoning.

My examination of the May 29, 1991 hearing and the October 5, 1994 hearing shows me that the trial court was concerned with dismissing Grant County because it believed that doing so would be futile if the Addisons prevailed. It reasoned that if the Addisons proved that the right of way was theirs, the Adamses would then have a claim against Grant County, which had sold them the land. If the Adamses lost the Addisons' lawsuit against them, they would give proper notice to Grant County. Then, if they failed to receive a refund of the money for the land the county sold them, they could sue Grant County. I draw my conclusion from the trial court's explanations in the October 5 transcript:

> So as to the plaintiffs themselves, I believe that the county's action and motion [to dismiss] should be granted. Now, that may very well be, in and of itself be a nullity, however, because if the defendant Adams, as a result of this action, suffered a judgment resulting in an award of

> damages to the plaintiffs, then they would have a cause of action arising out of contribution or indemnification if it can be properly proven and the cause of action would then occur when damages were awarded to the plaintiffs payable by the Adams[es] and it would seem to me it would be a rather foolish exercise of legalistic maneuver to then have Mr. McNamara serve a 120-day notice on the county and allow the county to make an investigation into what is already known to the county and have the county board then make a determination as to whether or not damages should be awarded and then if they deny it, allow Mr. McNamara's client to reinstitute the lawsuit which would be an additional cost to Mr. Adams and his wife, additional fees, additional paperwork to accomplish the very thing I am discussing right now. That, in my mind, would just be a waste of everybody's time, effort and money. And for that reason as to the Adams[es], I am going to deny the motion to remove the county as a party.
>
> ….
>
> … Now everybody's wondering why the county is kept in there. Well, that was because I didn't want to have two lawsuits. If the county had been dismissed earlier and then an action somehow resulted in damages against Mr. Adams and his wife, then to have Mr. McNamara start a second action coming back in for contribution or indemnification against the county, we got two actions. I felt we could proceed in this with one action, get it over, if that was the case. But it apparently isn't the case and we've been talking since about 9:30 on the effects of ***DNR v. Waukesha*** and you can't change it, I can't. I have yet to hear a trial court overrule the Supreme Court of the State of Wisconsin successfully. They say no notice, no case. If you want to take an expedited appeal, Mr. Scott, on the record, I'll authorize the approval of that. I don't know how anybody could object to that. My ruling stands.

I do not believe that we should hypothesize a rationale contrary to what the trial court did, and then conclude that this constitutes an appropriate exercise of discretion. Discretion contemplates a decision based on applicable law and a process of reasoning from the facts to a conclusion. *See* ***Bahr v. Bahr***, 107 Wis.2d 72, 77-78, 318 N.W.2d 391, 395 (1982). Neither the trial court nor the majority opinion discusses the applicable law, and only this court reasons that

complete relief would not be available to the Adamses if they lost to the Addisons. The trial court concluded differently. It reasoned that if the Adamses lost the lawsuit, they would then have a claim against Grant County. The majority does not explain why it rejects this conclusion.

I conclude as I began. This is not a difficult case. Grant County does not belong in this lawsuit. The trial court properly dismissed the county. This is then a suit between adjoining landowners to quiet title to an abandoned railroad right of way. I do not know who owns the land, but there is no evidence that it is anyone but the Addisons or the Adamses. Were I writing a majority opinion, I would remand this case so that they could present whatever evidence they have as to who owns the right of way. If the trial court determines that the property belongs to the Adamses, they can continue to plant their garden there. If the Addisons prevail, the Adamses can decide whether they should give the proper notice to Grant County to recover their damages for buying land which Grant County had no right to sell. Either way, justice is done. As this case now stands, that has not happened.