

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**July 31, 2003**

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. 02-3351  
STATE OF WISCONSIN**

**Cir. Ct. No. 02-SC-2408**

**IN COURT OF APPEALS  
DISTRICT IV**

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**SAMMY J. GATES,**

**PLAINTIFF-APPELLANT,**

**V.**

**GARY R. MCCAUGHTRY,**

**DEFENDANT-RESPONDENT.**

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APPEAL from orders of the circuit court for Dane County:  
DAVID T. FLANAGAN, Judge. *Affirmed.*

¶1 DEININGER, J.<sup>1</sup> Sammy Gates appeals an order that dismissed his small claims replevin action on summary judgment. He also appeals an order that denied reconsideration of the dismissal order. He claims the trial court erred in

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

dismissing his complaint because defendant Gary McCaughtry failed to comply with the circuit court's briefing schedule, and because the court ignored Gates's assertion that McCaughtry was responsible for the loss of Gates's property because McCaughtry failed to follow administrative rules. We reject these claims and affirm the appealed orders.

### **BACKGROUND**

¶2 The circuit court dismissed Gates's replevin action on summary judgment. The following background summary is taken from McCaughtry's affidavit in support of the defense motion for summary judgment.

¶3 McCaughtry is the warden of the Waupun Correctional Institution (WCI) and acknowledges that he has "responsibility for implementing Department of Corrections administrative codes, policies and procedures involving inmate property for the inmates who reside at WCI." Gates was transferred to Waupun on July 8, 1999. A correctional officer inventoried the property Gates brought with him and identified several items as contraband, including some publications and photographs. The officer also identified as unallowable thirteen cassette tapes and other personal items. Gates indicated that he would send the contraband items out of the institution, but did not do so within the thirty days allowed by rule to do so, and accordingly, the items were destroyed.

¶4 In August 1999, Gates was placed in segregation and another property inventory was conducted. Several additional items were identified as contraband, including a television set because it had two broken knobs. Gates filed an inmate complaint regarding the television, and the complaint was resolved informally by allowing Gates to purchase new knobs for the television. The knobs

were never purchased, however, and the television set was subsequently destroyed.

¶5 Gates was transferred to the Wisconsin Secure Program Facility (WSPF) at Boscobel on December 9, 1999. His property was again inventoried at Waupun in preparation for the transfer. In a notice of claim filed with the Attorney General on April 12, 2001, Gates averred that a property inventory conducted after his arrival at the WSPF in December 1999 revealed that “properties in an approximate \$390 amount are missing.”

¶6 Warden McCaughtry averred that “at no time did I have any direct custody or control over any property of the plaintiff, Sammy Gates, while he was residing at WCI,” and that “at the present time, WCI is not holding any property belonging to plaintiff/inmate Gates.”

¶7 Both parties moved for summary judgment. The circuit court granted McCaughtry’s motion and denied Gates’s. The court noted that McCaughtry averred that he had no control or custody of the plaintiff’s property, and Gates had submitted no evidence to the contrary. Accordingly, the court concluded that McCaughtry was entitled to dismissal of the complaint as a matter of law. Gates moved for reconsideration, which the court denied.

### ANALYSIS

¶8 We review the granting and denial of motions for summary judgment de novo, applying the same methodology and standards as the trial court. *See Green Spring Farms v. Kersten*, 136 Wis.2d 304, 315, 401 N.W.2d 816 (1987). If there are no disputed issues of material fact, summary judgment is proper where the moving party is entitled to judgment as a matter of law. *See id.*

When both parties move for summary judgment and neither argues that factual disputes bar the other's motion, the "practical effect is that the facts are stipulated and only issues of law are before us." See *Lucas v. Godfrey*, 161 Wis. 2d 51, 57, 467 N.W.2d 180 (Ct. App. 1991) (citation omitted).

¶9 Gates first complains that the trial court failed to enforce its scheduling order and erred in denying his motion to strike McCaughtry's reply brief.<sup>2</sup> The trial court had established a briefing schedule which called for reply briefs to be filed by October 23, 2002. McCaughtry faxed his reply brief to the circuit court on October 23, 2002, at 4:45 p.m. The clerk of court stamped it as "filed" on October 24, 2002.

¶10 Gates has not demonstrated that he was in any way prejudiced by the arguable one-day delinquency in the filing of McCaughtry's reply brief in the trial court. First, there is no indication that the trial court's decision on summary judgment relied on McCaughtry's two-page letter reply. More importantly, however, because we review the summary judgment record de novo, Gates has suffered no prejudice whatsoever from McCaughtry's asserted noncompliance with the trial court's briefing schedule. In our de novo review, we consider the arguments made in the parties' briefs to this court, not those filed in the trial court.

¶11 As to the merits, Gates asserts that his complaint should not have been dismissed because he has asserted "from the beginning" that McCaughtry

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<sup>2</sup> Gates also appears to challenge other submissions McCaughtry filed in response to Gates's motion for summary judgment and in support McCaughtry's motion. As near as we can tell from his pro se brief, Gates is complaining that McCaughtry should not have filed his own summary judgment motion before responding to Gates's motion. Our review of the various submissions and their dates of filing, however, do not reveal any irregularities or missed deadlines on McCaughtry's part, save for the arguably late reply brief.

“failed to follow [the] Wisconsin Administrative Code ... and it was [his] responsibility ... to see that [Gates’s] property made it from WCI to WSPF.” It may be true that McCaughtry, due to his position as warden at WCI, shoulders the overall responsibility for the loss or destruction of Gates’s property. Gates filed no evidentiary submissions on summary judgment, however, that place in dispute McCaughtry’s averment that, at the time of the replevin action in 2002, neither he nor WCI were “holding any property belonging to plaintiff/inmate Gates.” This undisputed fact is fatal to Gates’s replevin action.

¶12 A replevin action seeks the return of property wrongfully held by another. *See* BLACK’S LAW DICTIONARY 1302 (7th ed. 1999). Because it is undisputed that McCaughtry held no property belonging to Gates at the time of the action, McCaughtry is entitled to a judgment dismissing the replevin claim. Although Gates’s small claims complaint may encompass an alternate claim for money damages,<sup>3</sup> that relief is unavailable to Gates because he failed to comply with the notice of claim requirement under WIS. STAT. § 893.82(3). *See Lewis v. Sullivan*, 188 Wis. 2d 157, 169, 524 N.W.2d 630 (1994) (concluding that “because the plaintiff did not comply with sec. 893.82(3), his claim under the replevin statute for damages for detention of the property fails”). The record reflects that Gates knew the property in question was missing as of his transfer to WSPF in December 1999, but he did not file a notice of claim until April 2001, well beyond the statutory deadline for doing so. *See* § 893.82(3) (requiring notice of claim to be filed “within 120 days of the event causing the injury [or] damage”).

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<sup>3</sup> *See* WIS. STAT. § 810.14 (“In any action of replevin[,] judgment for the plaintiff may be for the possession or for the recovery of possession of the property, or the value thereof in case a delivery cannot be had....”).

## CONCLUSION

¶13 For the reasons discussed above, we affirm the appealed orders.

*By the Court.*—Orders affirmed.

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

