

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 27, 2011

A. John Voelker
Acting 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. 2010AP2704-FT
STATE OF WISCONSIN**

Cir. Ct. No. 2009SC2931

**IN COURT OF APPEALS
DISTRICT II**

2671 LLC,

PLAINTIFF-RESPONDENT,

V.

PLYMOUTH GLASS Co., LLC,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Sheboygan County: TIMOTHY M. VAN AKKEREN, Judge. *Affirmed.*

¶1 REILLY, J.¹ Plymouth Glass Co., LLC appeals from a small claims judgment. The circuit court entered a replevin judgment in favor of 2671 LLC

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

after it found that Plymouth Glass failed to return a set of glass panels to 2671 LLC. When the glass panels could not be returned, the court granted 2671 LLC a monetary judgment. Plymouth Glass argues that the judgment should be vacated for three reasons: (1) Plymouth Glass and 2671 LLC were not in privity; (2) the replevin judgment was not supported by a bailment theory; and (3) 2671 LLC's claim is barred by the statute of limitations. We affirm the judgment.

FACTS

¶2 In January 2002, David and Kelly Kastelic purchased a property located at 427 East Mill Street. 2671 LLC purchased the East Mill Street property from the Kastelics in November 2003. 2671 LLC states that a provision in its contract to purchase the East Mill Street property provided that 2671 LLC would also obtain ownership of a set of glass panels that had been removed from the storefront. At issue in this appeal is the ownership status of the glass panels.

¶3 2671 LLC alleges that after it purchased the property, David Kastelic told 2671 LLC that he turned over the glass panels to Plymouth Glass for repair. Additionally, 2671 LLC states that it was told by Kastelic to contact Plymouth Glass to get the panels back. 2671 LLC claims that it contacted Plymouth Glass "at least six or seven times personally" over the course of three years and asked about the status of the glass panels. After Plymouth Glass failed to turn over the glass panels, 2671 LLC wrote two letters to Plymouth Glass in 2007, the second letter stating that 2671 LLC would take legal action if Plymouth Glass did not return the panels. When 2671 LLC did not receive the glass panels, it filed a replevin action against Plymouth Glass in September 2009.

¶4 Plymouth Glass tells a different story. It concedes that in the spring of 2002 Kastelic contacted Plymouth Glass about renovating and repairing some

of the glass panels, and that Plymouth Glass picked up the panels and provided Kastelic with a repair estimate. Plymouth Glass, however, states that after Kastelic decided the repair estimate was too expensive, Plymouth Glass returned the glass panels to Kastelic in the fall or winter of 2002.

¶5 Kastelic did not testify at the trial. Instead, a written statement by Kastelic was read into the record:

In approximately early spring of 2003, I asked the Plymouth Glass Co. to help me load up the sheet of glass. I ha[d] no idea what condition the glass was in, as it was sandwiched between two pieces of plywood. My idea was to get it out of my way so it would not be damaged and to have it repaired, at some point, for future use.

After this statement was read, the circuit court asked an employee of Plymouth Glass what happened to the glass. The employee replied, “[t]hat’s the stuff I’m telling you went into our rack and we stored it for [Kastelic].... After about two years of laying in the rack ... we dumped it.... In other words, that whole thing got junked.”

¶6 The circuit court granted a judgment of replevin in favor of 2671 LLC for the glass panels. When the glass panels could not be located, 2671 LLC asked for a damages hearing.² Three days before the scheduled damages hearing, Plymouth Glass filed a supplemental answer and alleged that it was not in privity with 2671 LLC and that 2671 LLC’s claim was barred by the six-year statute of limitations imposed by WIS. STAT. §§ 893.43 and 893.51(1). A court

² WISCONSIN STAT. § 810.14 provides that when a plaintiff is granted a replevin judgment, he is entitled to either possession of the property, or the value of the property if the property cannot be recovered. In either case, the plaintiff is also entitled to damages for the unlawful detention of the property. *See id.*

commissioner dismissed 2671 LLC's action after she found that 2671 LLC did not have a contractual relationship with Plymouth Glass. 2671 LLC subsequently demanded a trial before a circuit court judge. The circuit court ruled that 2671 LLC's claim was not time-barred by §§ 893.43 and 893.51(1), and awarded a \$1,620 judgment plus costs against Plymouth Glass.

¶7 Plymouth Glass appeals and argues that the circuit court's decision was erroneous for three reasons: (1) there was no privity between Plymouth Glass and 2671 LLC; (2) the replevin judgment was not supported by a bailment theory; and (3) 2671 LLC's claim is barred by the statute of limitations. We affirm the circuit court's replevin judgment and damages award.

STANDARD OF REVIEW

¶8 We will not set aside the circuit court's factual findings unless they are clearly erroneous. WIS. STAT. § 805.17(2). It is for the circuit court, and not this court, to resolve conflicts in testimony and to determine the credibility of witnesses. *Global Steel Prods. Corp. v. Ecklund*, 2002 WI App 91, ¶10, 253 Wis. 2d 588, 644 N.W.2d 269. We will search the record for evidence to support the findings that the circuit court made, not for findings that the circuit court could have made but did not make. *Id.*

¶9 Whether two parties are in privity is a question of law that we review de novo. *Paige K.B. ex rel. Peterson v. Steven G.B.*, 226 Wis. 2d 210, 223, 594 N.W.2d 370 (1999). Whether 2671 LLC's claim is time-barred requires us to interpret WIS. STAT. §§ 893.43 and 893.51(1). The interpretation of a statute is also a question of law that we review de novo. *West v. Dep't of Commerce*, 230 Wis. 2d 71, 74, 601 N.W.2d 307 (Ct. App. 1999). We note, however, that when a circuit court's legal conclusions are so intertwined with the facts of a case, we give

weight—though not total deference—to the circuit court’s decision. *Yao v. Chapman*, 2005 WI App 200, ¶21, 287 Wis. 2d 445, 705 N.W.2d 272.

DISCUSSION

¶10 A bailment is created by the delivery of personal property from one person to another to be held temporarily for the benefit of the bailee (the person receiving the property), the bailor (the person giving the property), or both. *Id.*, ¶19. A bailment may be created by an express or implied contract. *Id.* No meeting of the minds is necessary to create a bailment. *Id.* All that is required to establish a bailment relationship is a delivery of property by the bailor to the bailee, the bailee’s acceptance of the property, and an agreement that the bailee will return the property either upon request or at a specified time.³ 8A AM. JUR. 2D *Bailments* § 28 (2011). When the bailee receives no compensation for holding the property, a gratuitous bailment is created. *Yao*, 287 Wis. 2d 445, ¶19.

¶11 We hold that a gratuitous bailment relationship existed between 2671 LLC and Plymouth Glass. The circuit court found that the Kastelics gave the glass panels to Plymouth Glass and that Plymouth Glass had the responsibility of either taking care of the panels or disposing of them according to statutory

³ At the replevin hearing, the circuit court noted that the bailment issue was not before the court. 2671 LLC did, however, raise the issue of bailment in its brief opposing Plymouth Glass’s motion for summary judgment (although this was *after* the replevin judgment). Both parties have also briefed the issue on appeal. Additionally, we determine that the bailment issue is inseparable from the replevin issue. We will therefore address whether 2671 LLC and Plymouth Glass had a bailment relationship. See *Harvest Sav. Bank v. ROI Invs.*, 209 Wis. 2d 586, 596, 563 N.W.2d 579 (Ct. App. 1997) (the court of appeals may consider issues not raised below when the parties have fully briefed the issue and when the issue is an important question of law that merits discussion).

guidelines. We defer to the circuit court's factual findings. See WIS. STAT. § 805.17(2).

¶12 Furthermore, we hold that 2671 LLC and Plymouth Glass are in privity. While we cannot verify that the glass panels were part of 2671 LLC's purchase of the East Mill Street property (as the offer to purchase is not included in the record), the circuit court found that 2671 LLC was entitled to a replevin judgment for the panels, presumably because the glass panels were included in 2671 LLC's purchase of the property. Plymouth Glass argues that it returned the glass panels to the East Mill Street property before 2671 LLC purchased the property, but the circuit court found otherwise. Indeed, one of Plymouth Glass's own employees testified that his company "dumped" the glass panels after holding them for two years. As Plymouth Glass has not demonstrated that the circuit court's factual findings were erroneous, we affirm the circuit court's finding that 2671 LLC is entitled to a replevin judgment for the glass panels.

¶13 Finally, we conclude that 2671 LLC's claim is not barred by a statute of limitations. WISCONSIN STAT. § 893.43 provides that "[a]n action upon any contract, obligation or liability, express or implied ... shall be commenced within 6 years after the cause of action accrues or be barred." Similarly, WIS. STAT. § 893.51(1) states that "an action to recover damages for the wrongful taking, conversion or detention of personal property shall be commenced within 6 years after the cause of action accrues or be barred. The cause of action accrues at the time the wrongful taking or conversion occurs, or the wrongful detention begins." The Wisconsin Supreme Court has held that the clock on the statute of limitations for a bailment violation does not begin to tick until the bailor asks for his property back and the bailee refuses to turn the property over. *Smith v. Poor Hand Maids of Jesus Christ*, 193 Wis. 63, 66, 213 N.W. 667 (1927). It is not

clear from the record when 2671 LLC first asked Plymouth Glass to return the glass panels. 2671 LLC, however, purchased the property in November 2003 and filed this lawsuit in September 2009. Regardless of when Plymouth Glass first asked for the return of the glass panels, it would have been within the six-year window. 2671 LLC's claim is therefore not barred by a statute of limitations.

CONCLUSION

¶14 We affirm the circuit court's replevin judgment in favor of 2671 LLC.

By the Court.—Judgment affirmed.

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

