

**COURT OF APPEALS
DECISION
DATED AND FILED**

OCTOBER 21, 1998

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. 98-1205

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STEPHEN J. GRUBER,

PLAINTIFF-APPELLANT,

V.

DALE SWART,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Racine County:
STEPHEN A. SIMANEK, Judge. *Affirmed.*

ANDERSON, J. We reject Stephen J. Gruber's challenge to the circuit court's determination that he failed to establish his ownership interest in certain items of personal property and its dismissal of his replevin action seeking the return of those items. Because the circuit court's decision is supported by credible evidence, we affirm.

Replevin is a possessory action and the ultimate fact question is which party is entitled to possession of the disputed property. See *Ford Motor Co.*

v. Lyons, 137 Wis.2d 397, 468, 405 N.W.2d 354, 382-83 (Ct. App. 1987). Therefore, we will make use of a well-known formula when addressing Gruber's challenge to the sufficiency of the evidence. We will not set aside the trial court's findings of fact unless clearly erroneous. See § 805.17(2), STATS. It is for the trial court, not the appellate court, to resolve conflicts in the testimony. See *Fuller v. Riedel*, 159 Wis.2d 323, 332, 464 N.W.2d 97, 101 (Ct. App. 1990). It is not within our province to reject an inference drawn by a fact finder when the inference drawn is reasonable. See *Onalaska Elec. Heating, Inc. v. Schaller*, 94 Wis.2d 493, 501, 288 N.W.2d 829, 833 (1980). We will search the record for evidence to support the findings that the trial court made, not for findings that the trial court could have made but did not make. See *Becker v. Zoschke*, 76 Wis.2d 336, 347, 251 N.W.2d 431, 435 (1977). The trial court is the arbiter of the credibility of witnesses, and its findings will not be overturned on appeal unless they are inherently or patently incredible, or in conflict with the uniform course of nature or with fully established or conceded facts. See *Chapman v. State*, 69 Wis.2d 581, 583, 230 N.W.2d 824, 825 (1975).

Gruber started a replevin action against Dale Swart seeking the return of personal property being held by Swart. He also sought damages for the period of time that Swart retained the personal property without having a possessory interest. The replevin action arose from a business relationship between the two. In March 1997, an ongoing divorce action forced Gruber to close his transmission repair shop in Kansasville. Gruber had been doing repairs for Swart on a contract basis and moved all of his tools and equipment to Swart's Burlington shop where he began to work full time. Gruber and Swart ended their relationship in August, 1997. A short time later Gruber told Swart he was coming to the shop to retrieve his tools and equipment. Swart refused to permit Gruber on

the premises, claiming that Gruber had sold him the tools and equipment. Gruber commenced this replevin action claiming a possessory interest in the tools and equipment.

After a bench trial, the court dismissed the action:

I think on balance the credible evidence showed that through this period of time [Gruber] was going through a divorce, he sold off items for cash so his soon-to-be ex-wife wouldn't know about it, that Mr. Swart actually purchased these items

I will, therefore, rule in favor of the defense, dismiss the complaint for failure to prove the claim. It boils down simply – I don't think – it boils down to – simply a lack of proof.

When you make a claim in court, you've got to back it up with proof that is credible. I just think the plaintiff's claim here is not supported by proof. And when it's he said/he said, I got to draw the line somewhere. And I've drawn it based on what I've just reiterated.

The record supports the trial court's findings. The trial court found Swart was a more credible witness, partially because there was documentary evidence that supported Swart's testimony, and we will not meddle in that resolution of credibility. *See Chapman*, 69 Wis.2d at 583, 230 N.W.2d at 825. Swart testified that before Gruber moved to his Burlington shop he offered to sell some tools and equipment because he was going through a messy divorce and needed cash for attorney's fees and rent. Swart stated that most of the transactions were in cash because Gruber did not want his estranged wife to find out that he was selling his tools and equipment and the amount he received because she would be entitled to one-half of the proceeds. This evidence is sufficient to support the trial court's finding that Swart, not Gruber, held the possessory interest in the tools and equipment.

Gruber also challenges the trial court's dismissal of his claim for damages for Swart's wrongful detention of the tools and equipment. Gruber states that after this action was commenced, but before trial, Swart returned some tools and equipment. He asserts that he is entitled to damages for the period of time Swart retained the personal property. Gruber relies upon § 810.13(1)(d), STATS., requiring the court to find "damages sustained by the successful party from any ... unjust detention of the property to the time of trial." The statutory requirement that the court award damages for unlawful detention subsumes that there is credible evidence to support such a finding. *See* § 805.17(2), STATS. The trial court concluded that Gruber failed to present credible evidence to support his claim and our review of the record finds sufficient support for this conclusion.

This case presented a credibility call for the trial court. "It is the trial court's responsibility to weigh the evidence and to determine credibility, and its findings in these areas will not be disturbed on appeal unless they are clearly erroneous." *Johnson v. Miller*, 157 Wis.2d 482, 487, 459 N.W.2d 886, 888 (Ct. App. 1990). We conclude that the trial court's determination and findings were not clearly erroneous.

By the Court.—Judgment affirmed.

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

