

IN THE SUPREME COURT OF THE STATE OF NEVADA

PERCY LAVAE BACON,  
Appellant,  
vs.  
UNITED ROAD SERVICE, INC.,  
D/B/A QUALITY TOWINGS; AND  
MIKE BROOKS,  
Respondents.

No. 49938

**FILED**

NOV 03 2008

TRACIE L. LINDEMAN  
CLERK OF SUPREME COURT  
BY: *[Signature]*  
CHIEF DEPUTY CLERK

ORDER GRANTING REHEARING, VACATING  
PREVIOUS ORDER, AND REVERSING AND REMANDING

This is a proper person appeal from a district court order dismissing a complaint in a tort action.

On May 8, 2008, this court affirmed the district court's order dismissing appellant Percy Bacon's complaint. Subsequently, on May 21, 2008, Bacon filed a petition for rehearing. On June 16 and August 18, 2008, Bacon filed supplemental documentation in support of his rehearing petition.

Under NRAP 40(c)(2)(i), this court will grant a rehearing petition in a civil matter if the appellant shows that a material fact or material question of law was overlooked or misapprehended. Having considered the petition for rehearing, we have determined that rehearing of this matter is warranted because the district court improperly dismissed Bacon's complaint.<sup>1</sup> Accordingly, we grant the petition for

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<sup>1</sup>We note that because the district court withheld issuance of the summons in the underlying action, there are no respondents who are parties to this appeal and thus no answer was ordered by this court. See NRAP 2 (providing that this court may suspend its appellate rules).

rehearing and submit this matter for decision on rehearing without further briefing or oral argument.<sup>2</sup>

Appellant Percy Bacon filed a complaint in district court alleging that respondents failed to inventory, secure, and protect Bacon's personal property that was inside a rental car that he had been driving at the time of his arrest, which was subsequently towed and stored at respondents' places of business. It appears that Bacon's complaint also alleged that the rental car company's manager failed to timely close the rental contract. After reviewing Bacon's complaint, however, the district court issued a show cause order that required Bacon to explain why his complaint should not be dismissed, as the statute of limitations for his action had expired. Bacon responded to the show cause order. After determining that Bacon failed to show cause as to why his complaint should not be dismissed, the district court dismissed Bacon's complaint. This appeal followed. Bacon asserts that the district court improperly dismissed his complaint.

Generally, a determination as to when the applicable statute of limitations begins is a question of fact unless there is uncontroverted evidence upon which the district court may determine the issue as a matter of law.<sup>3</sup> Because, here, the district court concluded that the statute of limitations had expired, its decision is a question of law that is subject to de novo review.<sup>4</sup> Under NRS 11.190(3)(c), "[a]n action for taking [or] detaining . . . personal property, including actions for specific

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<sup>2</sup>See NRAP 40(e).

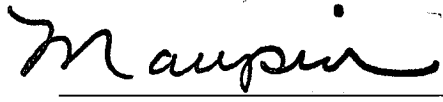
<sup>3</sup>Day v. Zubel, 112 Nev. 972, 977, 922 P.2d 536, 539 (1996).

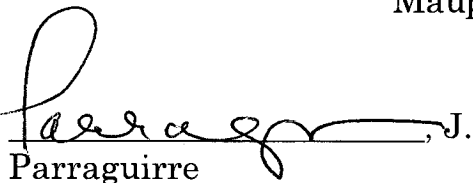
<sup>4</sup>See id.

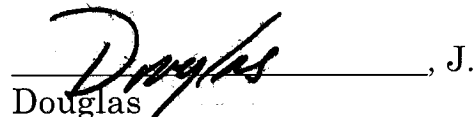
recovery thereof" must be filed within three years of the action taken against the personal property. The statute of limitations, however, is an affirmative defense that must be asserted in the pleadings or it is deemed waived.<sup>5</sup> An affirmative defense is set forth by a party in a pleading, in a 12(b) motion, or tried by consent.<sup>6</sup>

Having reviewed the record and Bacon's civil proper person appeal statements in light of those principles, we conclude that the district court improperly dismissed Bacon's complaint. In particular, the district court may not sua sponte raise affirmative defenses that are required to be raised by the parties. Moreover, because the defendants have not appeared in the matter, as the district court withheld issuance of the summons, there does not appear to be an adequate record to resolve the statute of limitations concern at this time. Accordingly, we vacate our prior order of affirmance, reverse the district court's order dismissing Bacon's complaint and remand this matter to the district court for proceedings consistent with this order.

It is so ORDERED.

  
\_\_\_\_\_, J.  
Maupin

  
\_\_\_\_\_, J.  
Parraguirre

  
\_\_\_\_\_, J.  
Douglas

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<sup>5</sup>NRCP 8(c); NRCP 12(b); see also Second Baptist Ch. v. First Nat'l Bank, 89 Nev. 217, 220, 510 P.2d 630, 631-32 (1973) (stating that affirmative defenses not specifically pleaded are waived).

<sup>6</sup>See NRCP 12(b).

cc: Hon. Kathy A. Hardcastle, District Judge  
Percy Lavae Bacon  
Eighth District Court Clerk