

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 3, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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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. 2012AP628

Cir. Ct. No. 2008CV1010

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

TOWN & COUNTRY BANK,

PLAINTIFF-RESPONDENT,

V.

**PHILLIP C. BUSS, NANCY M. BUSS AND WATERTOWN AUTO MART,
LLC,**

**DEFENDANTS-THIRD-PARTY
PLAINTIFFS-APPELLANTS,**

CITIMORTGAGE, INC. AND CITIBANK, N.A.,

DEFENDANTS,

V.

FEDERAL INSURANCE COMPANY,

THIRD-PARTY DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Jefferson County:
WILLIAM F. HUE, Judge.¹ *Affirmed.*

Before Blanchard, P.J., Lundsten and Higginbotham, JJ.

¶1 HIGGINBOTHAM, J. The issue presented on appeal is whether the circuit court erred in granting summary judgment in favor of Town & Country Bank, dismissing a counterclaim for civil theft by bailee made by Phillip Buss, Nancy Buss, and the Watertown Auto Mart, pursuant to WIS. STAT. §§ 943.20(1)(b), 895.446(1) (2011-12).² We conclude that, viewing the evidence in the light most favorable to the Busses and Auto Mart by assuming that the jury accepted Buss's averment that he never authorized the transfer of funds from Auto Mart's line of credit, no reasonable jury could find that the bank had intent to transfer funds from the line of credit without the consent of Buss/Auto Mart. Accordingly, we affirm.

BACKGROUND

¶2 Phillip Buss was the principal owner of Watertown Auto Mart, a used car dealership. Town & Country Bank provided four loans to Auto Mart, including a revolving loan, extending a line of credit in the amount of \$40,000. At some point, the Busses and Auto Mart defaulted on the four loans and the bank filed a foreclosure action against them. In response, the Busses and Auto Mart

¹ The Honorable Jacqueline R. Erwin presided over the issue presented in this appeal. The Honorable William F. Hue was assigned this case as a result of judicial rotation. Judge Hue presided over this action after the issue presented in this appeal was decided by Judge Erwin.

² All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

filed a counterclaim against the bank, alleging, among other things, that the bank committed theft by bailee, in violation of WIS. STAT. §§ 943.20(1)(b), 895.446. The Busses and Auto Mart were permitted to join the former president of the bank, Thomas Hahn, as a third-party defendant and filed a third-party action against Hahn and the bank's insurer, Federal Insurance Company, alleging that Hahn had committed theft by bailee.

¶3 The theft by bailee claims against the bank are based on the following facts. Hahn's employment with the bank entitled him to use a leased vehicle. That is, the bank would cover lease payments for a vehicle for Hahn to use as a fringe benefit. Hahn sought to lease a particular Toyota through Auto Mart as part of this fringe benefit. Buss informed Hahn that Buss/Auto Mart only sold cars and did not lease them. However, Buss told Hahn that Buss/Auto Mart would be willing to sell the Toyota to a third party, which could then lease the Toyota to the bank for Hahn's use. Hahn contacted TLC Leasing of Wisconsin, Inc. (TLC), and TLC agreed to purchase the Toyota for \$24,000. The bank entered into a two-year lease agreement with TLC for the Toyota. Auto Mart and TLC entered into a vendor buyback agreement, providing that, upon expiration of the lease, Auto Mart would "purchase the leased vehicle for the agreed upon residual value of \$16,000 or take possession of [the] vehicle into [its] inventory until such sale occurs." If Auto Mart chose the latter option, and a cash buyer was not found within thirty days after the lease expired, the agreement stated that the

Bank would “then issue an ‘interest only’ note” to Auto Mart to pay off the balance due on the Toyota.³

¶4 According to Buss’s deposition testimony, shortly before the bank’s lease with TLC on the Toyota expired, Hahn asked Buss whether he planned to purchase the car upon expiration of the lease, and Buss responded that “at this time I don’t think I can buy the car. I’m not in [a] position [to buy back the car].” A former Auto Mart mechanic, Mike Ramspeck, averred in an affidavit that he was present during that conversation between Hahn and Buss, and that Buss informed Hahn that he would not purchase the vehicle at the end of the lease.

¶5 According to Hahn, after the lease for the Toyota expired, Buss told him to “charge [Auto Mart’s] line.” Hahn averred that he understood Buss to mean that the bank should pay TLC the money owed on the Toyota under the vendor buyback agreement by drawing on Auto Mart’s \$40,000 line of credit with the bank. In contrast, Buss averred that he “never authorized [the bank] or Thomas Hahn to draw on [Auto Mart’s] \$40,000 line of credit to pay for the Toyota.” It is undisputed that Hahn instructed a bank employee to transfer the amount owed under the vendor buyback agreement, \$16,064.47, from Auto Mart’s line of credit to TLC’s lender, American National Bank Fox Cities.

¶6 The bank and Hahn moved for summary judgment seeking, among other things, dismissal of the theft by bailee claims. The circuit court granted the motion on the ground that Buss and Auto Mart had not “met their burden to show

³ The vendor buyback agreement states: “If a cash buyer is not found within thirty (30) calendar days, said Bank will then issue an ‘interest only’ note to [Auto Mart] sufficient to pay[]off the ‘net to close’ balance at the bank in accordance with the debt amortization schedule.”

the required intent to convert Auto Mart property or use it without consent as contemplated in” WIS. STAT. § 943.20(1)(b). Buss appeals the court’s grant of summary judgment to Town & County Bank.⁴

DISCUSSION

¶7 We review a grant of summary judgment de novo, applying the same methodology as the circuit court. *State v. Bobby G.*, 2007 WI 77, ¶36, 301 Wis. 2d 531, 734 N.W.2d 81. Summary judgment is appropriate when the affidavits and other submissions show that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). It is improper to grant summary judgment where “the material presented on the motion is subject to conflicting interpretations or reasonable people might differ as to its significance.” *Grams v. Boss*, 97 Wis. 2d 332, 339, 294 N.W.2d 473 (1980), *overruled on other grounds by Beidel v. Sideline Software, Inc.*, 2013 WI 56, 348 Wis. 2d 360, 842 N.W.2d 240. However, the “mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.” *Baxter v. DNR*, 165 Wis. 2d 298, 312, 477 N.W.2d 648 (Ct. App. 1991) (quoting another source). “In evaluating the evidence, we draw all reasonable inferences from the evidence in the light most favorable to the non-moving party.” *Burbank Grease Servs., LLC v. Sokolowski*, 2006 WI 103, ¶40, 294 Wis. 2d 274, 717 N.W.2d 781. The purpose of summary judgment is “to avoid trials where there is nothing to try.”

⁴ This appeal does not concern Hahn.

Transportation Ins. Co. v. Hunzinger Const. Co., 179 Wis. 2d 281, 289, 507 N.W.2d 136 (Ct. App. 1993) (quoting another source).

¶8 Under the criminal theft by bailee statute, a person is guilty of theft if:

[b]y virtue of his or her office, business or employment, or as trustee or bailee, having possession or custody of money or of a negotiable security, instrument, paper or other negotiable writing of another, intentionally uses, transfers, conceals, or retains possession of such money, security, instrument, paper or writing without the owner's consent, contrary to his or her authority, and with intent to convert to his or her own use or to the use of any other person except the owner....

WIS. STAT. § 943.20(1)(b). A civil cause of action may be brought against a person whose intentional conduct in violation of the criminal theft by bailee statute has caused another to suffer loss or damages. *See* WIS. STAT. § 895.446(1).

¶9 Thus, to prevail on a civil theft by bailee claim, the Busses and Auto Mart must prove that:

- (1) The bank had possession of money belonging to Buss/Auto Mart because of the bank's business or employment or as bailee;
- (2) The bank intentionally used the money without the consent of Buss/Auto Mart and contrary to the bank's authority;
- (3) The bank knew that the use of the money was without the consent of Buss/Auto Mart and contrary to the bank's authority; and
- (4) The bank intended to convert the money to its own use or the use of any other person except Buss/Auto Mart.

See WIS JI—CRIMINAL 1444. “Knowledge and intent must be found, if found at all, from the [bank’s] acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge and intent.” *Id.*

¶10 Significant in this case is the definition of the intent element. “Intent” requires not only that Hahn, acting on behalf of the bank, ordered the funds to be transferred, but also that he had “the mental purpose to use the money without the owner’s consent and contrary to the [bank’s] authority.” *Id.*

¶11 The primary question presented here is whether there is a genuine issue of material fact regarding whether the bank intentionally and knowingly transferred the funds from Auto Mart’s line of credit to TLC’s lender without consent from Buss/Auto Mart and contrary to the bank’s authority.

¶12 The Busses and Auto Mart contend that Buss’s averment in his affidavit that he did not authorize Hahn or the bank to transfer funds from Auto Mart’s \$40,000 line of credit to TLC’s lender creates a genuine factual dispute about whether the bank knowingly and intentionally transferred the funds without Buss’s consent and without the bank’s authority. The bank responds that there are no facts from which a reasonable jury could infer the requisite intent because the bank and Hahn “gained absolutely nothing from the wire transfer to TLC’s lender.” The bank also contends that no reasonable jury could find that the bank intended to convert the money to the use of another other than Buss/Auto Mart because it converted the money for the *benefit* of Buss and Auto Mart, “which received a car in exchange for funds [the bank] provided to it.”

¶13 We conclude that, viewing the evidence in the light most favorable to the Busses and Auto Mart, no reasonable jury could find in favor of the Busses and Auto Mart because there is no genuine dispute that the bank did not

intentionally transfer the funds without the consent of Buss/Auto Mart. There is no reasonable inference from which a finding could be made that the bank had any motivation to transfer the funds without the consent of Buss/Auto Mart and therefore at most the jury could find that a miscommunication occurred between Hahn and Buss. We therefore conclude that the bank is entitled to summary judgment as a matter of law.

¶14 We note that, in his affidavit, Buss averred that he “never authorized [the bank] or Thomas Hahn to draw on [Auto Mart’s] \$40,000 line of credit to pay for the Toyota.” However, according to Buss’s own deposition testimony, Buss told Hahn after the bank transferred the funds that, “I don’t remember ever telling you to pay for the car.” This latter statement suggests that Buss did not recall authorizing the transfer, and not that he did not actually authorize it.

¶15 However, assuming that a reasonable jury accepted Buss’s averment that he never authorized the transfer as true, the Busses and Auto Mart fail to explain what motive Hahn had to transfer the funds without the consent of Buss/Auto Mart. As best we can tell, the Busses and Auto Mart appear to suggest that Hahn gained an advantage by transferring the funds to TLC out of the line of credit, rather than affording Buss an opportunity to take possession of the Toyota and obtain an interest-only note from the bank, as provided for in the vendor buyback agreement. However, the Busses and Auto Mart do not explain what advantage Hahn or the bank would receive from paying \$16,000 from Auto Mart’s line of credit to TLC, and not issuing an interest-only note to Buss. Thus, on the record before us, it is undisputed that Hahn had no motive to transfer the funds other than a belief that Buss/Auto Mart authorized it, and thus no reasonable jury could infer an intent to transfer funds without consent.

¶16 Given the complete lack of evidence regarding a motivation by Hahn or the bank to transfer the funds without consent, at best, from the point of view of the Busses and Auto Mart, and considering the evidence in the light most favorable to them, they might have been able to persuade a jury that there had been a miscommunication between Buss and Hahn. That is, viewing this evidence in a light most favorable to the Busses and Auto Mart, they might have been able to persuade a jury that Hahn misinterpreted something Buss said. But that scenario does not help the Busses and Auto Mart because it would fall short of demonstrating intent on the part of Hahn or the bank.

¶17 To the extent that the Busses and Auto Mart are arguing that a reasonable jury could find intent based on the averment in Ramspeck's affidavit that Buss told Hahn that he would not purchase the vehicle at the end of lease, we reject that argument. Again, even if a reasonable fact-finder accepted that averment as true, it does not suggest any motivation for Hahn to act without consent. Ramspeck avers only that, before the lease expired, Buss stated that he would not buy back the Toyota.

¶18 We also disagree with the Busses' and Auto Mart's contention that a reasonable jury could find intent based on Buss's testimony at his deposition that Hahn stated during a conversation after the transfer that he had "nothing to do with" the transfer. The Busses and Auto Mart assert that, because it is undisputed that Hahn authorized the funds to be transferred, his alleged statement that he had "nothing to do with" the transfer raises an inference that he was lying about his involvement in the transfer after the fact "to cover guilty knowledge." However, as the bank points out, the deposition testimony is taken out of context. Buss testified at his deposition as follows:

[Buss:] I said, [to Hahn], what is going on? I don't remember ever telling you to pay for the car. I don't remember – I mean, you're driving around with license plates. And he goes, well, don't worry about it. And I said, you know I'm \$4,000 overdrawn.... If I recollect he said, you still have \$4,000 in your account. He said, [Buss], *I have nothing to do with this*. This banking is changed. I'm not – I mean, I just don't know what's going on.

(Emphasis added.) Even viewing this testimony in the light most favorable to the Busses and Auto Mart, nothing about this testimony suggests that Hahn intended to transfer the funds without the consent of Buss/Auto Mart.

¶19 We acknowledge that intent is ordinarily a question of fact for a jury to decide. *See Tri-Tech Corp. of America v. Americomp Servs., Inc.*, 2002 WI 88, ¶30 n.5, 254 Wis. 2d 418, 646 N.W.2d 822 (“[T]he issue of intent is generally not readily susceptible of determination on summary judgment.”). However, as we have explained, no reasonable jury could infer that the bank intentionally authorized the transfer without the consent of Buss/Auto Mart based on the summary judgment record before us.

CONCLUSION

¶20 Based on the above, we conclude that there is no genuine issue of material fact precluding summary judgment. Accordingly, we affirm.

By the Court.—Judgment affirmed.

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