COURT OF APPEALS
DECISION
DATED AND RELEASED

May 28, 1997

NOTICE

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.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-3528-FT

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

MILWAUKEE INSURANCE COMPANY,

PLAINTIFF-APPELLANT,

V.

RANDY KRUEGER, D/B/A KRUEGER AUTOBODY, AND STATE FARM FIRE AND CASUALTY COMPANY,

DEFENDANTS,

PLACH CHEVROLET-BUICK-OLDS, INC., AND GENERAL CASUALTY COMPANY OF WISCONSIN,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Outagamie County: JOHN A. DES JARDINS, Judge. *Affirmed.*

Before LaRocque, Myse and Fox, JJ.

PER CURIAM. Milwaukee Insurance Company appeals a summary judgment dismissing its subrogation claim against Plach Chevrolet-Buick-Olds, Inc.[1] Milwaukee argues that the record demonstrates disputes of material fact with respect to Plach's negligence as bailee of a vehicle being repaired. Because the record discloses no dispute of material fact, and because the trial court correctly decided that absent a showing of negligence Plach is not liable as a matter of law, we affirm the summary judgment.

Frank Harmison, Milwaukee's insured, took his 1992 Buick Regal to Plach to repair damage caused by backing into a mailbox. Because the damage required body work, Plach subcontracted with Randy Krueger, d/b/a Krueger AutoBody, to perform the work. Krueger picked up the car from Plach and took it to his place of business. While the car was at Krueger Autobody, a fire of undetermined origin destroyed the car. Milwaukee paid $19,171 to its insured in settlement for the loss of the car.

Milwaukee initially pursued its subrogation claim solely against Krueger. Krueger, however, was uninsured and Milwaukee amended its pleadings to join Plach and its insurer under a bailment theory. The trial court granted Plach's motion for summary judgment and Milwaukee appeals.

When reviewing a summary judgment, this court applies the same standards set forth in § 802.08, STATS., as the trial court. ***Griebler v. Doughboy Recreational, Inc.,*** 160 Wis.2d 547, 559, 559, 466 N.W.2d 897, 902 (1991). Our review is de novo. *See* ***id.*** Summary judgment is granted when there is no dispute

[1] This is an expedited appeal under RULE 809.17, STATS.

of material fact, and the moving party is entitled to judgment as a matter of law. ***Id.***

"A bailment is the delivery of personal property by one person to another for a specific purpose under a contract with the understanding that the property so delivered will be returned or duly accounted for when the purpose of the bailment has been fulfilled." *See* WIS J I-CIVIL 1025.5. The one who temporarily transfers possession is the "bailor." The one who receives possession is the "bailee." ***Id.*** Because Plach took temporary possession of the car for the specific purpose of repairs with the understanding it would be returned when the repairs were complete, Plach is the bailee and bailment principles apply.

"[T]he risk of fire is not an assumed risk of the bailment unless caused by the negligence" of the bailee. ***Dahl v. St. Paul Fire & Marine Ins. Co.,*** 36 Wis.2d 420, 424, 153 N.W.2d 624, 626 (1967). In Wisconsin, "a bailee is not an insurer." ***Fireman's Fund Ins. Co. v. Schreiber,*** 150 Wis. 42, 48, 135 N.W. 507, 509 (1912). In absence of special provisions, a bailee only owes a duty to exercise ordinary care as to the property entrusted to its care. ***Id.***

> [O]rdinary care at all points, no more and no less, is the standard contracted for in the ordinary bailment for compensation as in this case. No exceptions are found in the law. It is stated in the books, old and new, that the bailee can only be held responsible for such care.

Id. Ordinary care does not require a bailee to insure the property of the owner. *See* ***INA v. Krieck Furriers, Inc.,*** 36 Wis.2d 563, 570, 153 N.W.2d 532, 536 (1967).

Milwaukee argues that disputed issues of material fact regarding Plach's negligence preclude summary judgment of dismissal. Milwaukee relies on the following jury instruction:

> WIS J I-CIVIL 1026 provides:
>
> BAILMENT: NEGLIGENCE OF BAILEE MAY BE INFERRED
>
> The burden of proof is upon the owner of the property, in this instance the plaintiff, to show that the property of the plaintiff which the defendant had in his possession was damaged as a result of the negligence of the defendant. This means that the plaintiff must prove (to a reasonable certainty by the greater weight of the credible evidence) that the plaintiff's property was received by the defendant in an undamaged condition and that, during the period of time that the defendant had the property in his care, the defendant had exclusive possession of the same, and also that the damage to the property would not ordinarily occur without someone's negligence.

Proof of these facts is sufficient to infer that the bailee was negligent as to the care of the bailee's property. ***Id.*** "You will not make such an inference, of course, if the defendant has offered an explanation, satisfactory to you, of how the damage occurred without his fault." ***Id.***

Milwaukee argues that although Plach turned the vehicle over to Krueger for repairs, Plach should be considered to be in "exclusive possession" of the car because at no time did the owner take control. In any event, Milwaukee argues, what constitutes exclusive possession presents a question of fact for the jury. We conclude that the resolution of this issue is unnecessary because it is undisputed that Plach established that the damage occurred without its fault.

Milwaukee does not dispute that the car was damaged while at Krueger's AutoBody by a fire that was investigated and determined to be of unknown origin. Milwaukee argues that a question of fact is presented by the issue whether damage to the insured's car would ordinarily occur without someone's negligence. We disagree. Under the most favorable construction of the evidence, there is no showing that the fire in question was one that would not have occurred in the absence of negligence. The doctrine of res ipsa loquitur does not apply. ***Arledge v. Scherer***, 269 Wis.2d 142, 150, 68 N.W.2d 821, 826 (1955). The undisputed evidence reveals a fire of unknown origin. "Fires frequently occur without negligence." ***Id***.

Nonetheless, Milwaukee argues that ***National Fire Ins. Co. v. City of Green Bay,*** 247 F.Supp. 346, 348 (E.D. Wis. 1965), holds that a presumption of negligence is appropriate in case of fire. Milwaukee reads ***National Fire*** too broadly. In that case, the district court stated: "A presumption of negligence on the part of the bailee arises when the bailor establishes that the bailed property was damaged while in the possession of the bailee. These facts have been stipulated. The bailee then has the burden of coming forward with evidence to exonerate himself from any causal negligence." ***Id.*** at 347. The court held: "The evidence in this case shows, and the Court finds, that the defendant was causally negligent in using fuel oil with the volatile additive." ***Id.*** (Citations omitted.) As a result, the court concluded that the defendant bailee failed to meet its burden to overcome the presumption of negligence on its part. ***Id.*** at 348.

Here, Plach met its burden of coming forward with evidence to exonerate itself. It established the undisputed fact that a fire occurred of undetermined origin. Because Milwaukee failed to rebut this fact with any

evidence of causal negligence, the trial court was entitled to enter judgment for Plach as a matter of law.

Milwaukee also argues, however, that Plach was negligent because it failed to ascertain whether Krueger carried insurance to cover the loss of the car. We disagree. A bailee is not required to insure the subject of the bailment. *See* ***INA,*** 36 Wis.2d at 570, 153 N.W.2d at 536.

Here, the record discloses no instructions, special contracts, trade usage or habitual dealings that created a duty to insure. Annotation, *Bailee's Duty to Insure Bailed Property,* 28 A.L.R.3D 513, 520 (1969). Milwaukee relies on the affidavit of its expert witness, Thomas Dix, stating that Plach was negligent by failing to guarantee the safety of the vehicle while in Krueger's possession and that it is a "good business practice" to insure the vehicle. Evidence of "good practice" falls short of demonstrating a material factual issue with respect to a duty to insure.

Plach's duty was one of ordinary care; it was not required to guarantee the safety of the vehicle. ***INA,*** 36 Wis.2d at 570, 153 N.W.2d at 536. Evidentiary facts, not legal conclusions, are necessary to create a genuine issue. Section 802.08(3), STATS. Because the record fails to disclose any issue of material fact with respect to Plach's negligence, Plach is entitled to summary judgment of dismissal.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.