COURT OF APPEALS
DECISION
DATED AND FILED

June 9, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2215

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

HERSHEL E. HOOVEN,

PLAINTIFF-APPELLANT,

V.

TRUCK COUNTRY OF WISCONSIN,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Outagamie County: DEE R. DYER, Judge. *Affirmed in part; reversed in part and cause remanded for further proceedings.*

Before Cane, P.J., Myse and Hoover, JJ.

PER CURIAM. Hershel Hooven appeals a summary judgment that dismissed his multiclaim lawsuit against Truck Country of Wisconsin, a truck repair business. Truck Country attempted to repair Hooven's Peterbilt 359 truck two times without success and may have failed again the third time; the record is

not clear. Hooven refused to pay the third $2,757.50 repair bill, having paid two prior bills totalling $752.11, and Truck Country refused to return the truck. Fifteen months later, Hooven paid the bill and retrieved his truck. He also brought suit against Truck Country. After a mistrial, the trial court granted Truck Country summary judgment dismissing all five of Hooven's claims: (1) wrongful detainer, or what Wisconsin calls conversion; (2) wrongful bailment, seeking damages for a stolen radio; (3) Wisconsin Consumer Act violation for credit finance charges; (4) common-law negligence; and (5) punitive damages. The trial court correctly granted summary judgment if there was no dispute of material fact and Truck Country deserved judgment as a matter of law. *See* ***Powalka v. State Life Mut. Assur. Co.***, 53 Wis.2d 513, 518, 192 N.W.2d 852, 854 (1972). We affirm the judgment in part, reverse it in part, and remand the matter for further proceedings.

This case has an unusual posture. Hooven's suit originally went to trial. At the close of Hooven's case-in-chief, a member of his lawyer's family became ill, and the trial court granted a mistrial on Hooven's five claims. Hooven's wrongful detainer, or conversion, claim attacked Truck Country's decision to retain the truck's possession until he paid his bill. Hooven's wrongful bailment claim sought to hold Truck Country liable as bailee for a radio stolen from the truck during the bailment. Hooven's Wisconsin Consumer Act claim attacked Truck Country's 18% interest levy on his overdue bill. His common-law negligence claim sought damages for negligent repair. His punitive damage claim labeled Truck Country's conduct a "reckless disregard" of his rights under Wisconsin's former common-law standard for punitive damages. Before the new trial, Truck Country moved for summary judgment on all five of Hooven's claims. It maintained that the combined trial and summary judgment records produced no disputed issues of material fact on any of Hooven's five claims. The trial court

agreed and dismissed all five claims, reviewing not only the summary judgment record for disputes of material fact, but also the record of the aborted trial. We review the trial court's summary judgment ruling de novo. *See* ***Green Spring Farms v. Kersten***, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987).

We initially uphold three of the trial court's rulings. First, Hooven had no claim for conversion. Truck Country had a statutory right to keep possession of the vehicle until payment. *See* § 779.41(1), STATS. There was no conversion unless Truck Country exceeded the scope of the bailment. *See* ***Donovan v. Barkhausen Oil Co.***, 200 Wis. 194, 198-200, 227 N.W. 940, 941-42 (1929). Truck Country's statutory right to possession kept it within the scope of its bailment and shielded it from a conversion claim. Second, Hooven had no claim for punitive damages. His complaint alleged Truck Country's "reckless disregard" of his rights—the former common-law standard. The legislature has increased the standard to maliciousness and intentional disregard of someone's rights. *See* § 895.85(3), STATS. Hooven's claim fell short of the new standards, and the trial court having once provided an opportunity to amend had no duty to allow a second opportunity to amend. Third, Hooven had no claim under the Wisconsin Consumer Act. In general, the Act applies to consumer credit transactions, defining "credit" as a right to defer payment that a creditor "grants" a customer. *See* § 421.301(14), STATS. Truck Country did not "grant" Hooven credit; it expected Hooven's payment in full when it finished its services. The invoiced 18% "finance charge" on thirty-day overdue accounts did not change this. This was just interest set by contract on past-due amounts. *See, e.g.,* ***Estate of Burgess***, 214 Wis.2d 180, 189, 571 N.W.2d 432, 437 (Ct. App. 1997).

The Consumer Act is inapplicable for the following additional reasons. The Consumer Act covers "consumer credit transactions." *See*

§ 422.102, STATS. It defines these as transactions "payable in installments" or having a "finance charge." *See* § 421.301(10), STATS. "Payable in installments" means at least two installments. *See* § 421.301(30)(a), STATS. Truck Country permitted no installments; it demanded payment in full. Its invoiced 18% interest, though termed "finance charge," was not a finance charge under the Act. Courts have long recognized the difference between finance charges and late-payment charges; late-payment charges fall outside consumer credit laws. *See* ***Hahn v. Hank's Ambulance Service, Inc.***, 787 F.2d 543, 544 (11th Cir. 1986); ***Bright v. Ball Memorial Hospital Ass'n, Inc.***, 616 F.2d 328, 336-39 (7th Cir. 1980); ***Garland v. Mobil Oil Corp.***, 340 F. Supp. 1095, 1098 (N.D. Ill. 1972); ***Rogers Mortuary, Inc. v. White***, 594 P.2d 351, 352-53 (N.M. 1979); ***Porter v. Hill***, 838 P.2d 45, 50-52 (Or. 1992); ***Iberlin v. TCI Cablevision***, 855 P.2d 716, 725-26 (Wyo. 1993). Finance charges give debtors the option to defer payment with interest; late-payment charges bar deferral, assessing interest on default. *See* ***Hahn***, 787 F.2d at 544; ***Bright***, 616 F.2d at 336-39; ***Garland***, 340 F. Supp. at 1098; ***Rogers***, 594 P.2d at 352-53; ***Porter***, 838 P.2d at 50-52; ***Iberlin***, 855 P.2d at 725-26. Truck Country levied a late-payment charge; it demanded payment in full and charged 18% interest on default after a thirty-day grace period. This was thus not a consumer credit transaction under the Act.

Nonetheless, we reverse the trial court's dismissal of the wrongful bailment claim. This claim sought damages for a radio stolen from the truck on the theory that Truck Country had failed to safeguard the truck as bailee. The trial court used the following line of reasoning: (1) Hooven had not proven the value of the radio at the first trial and had provided nothing more on summary judgment; and (2) the undisputed facts showed ordinary care. This ruling was error. The first trial had no preclusive effect or collateral consequences; the mistrial made the

original trial a legal nullity. The mistrial inherently gave Hooven a new trial and a new chance to prove damages. As a result, his failure to prove a damage issue in the first trial did not encumber him at summary judgment in any preclusive way. As far as Hooven's summary judgment deposition, Hooven's stolen radio claim inherently showed a compensatory loss, and he had no duty to quantify it further at the summary judgment stage. We also believe that the theft itself gave rise to a disputed material fact as to whether Truck Country used proper care as bailee.

We also reverse the trial court's ruling on expert testimony. The trial court ruled that Hooven needed such testimony to raise a dispute of material fact on the negligent repair issue. This ruling was error. As the moving party, Truck Country had the primary burden; it needed to show that ordinary care on its part was the only reasonable inference. *See* ***Hennekens v. Hoerl***, 160 Wis.2d 144, 162, 465 N.W.2d 812, 819-20 (1991). On his part, Hooven needed only to raise disputed material facts on negligence; he did not need to furnish proof at a level sufficient to defeat a directed verdict. Here, Truck Country's repairs allegedly did not fix the truck, and Hooven took it back three times. Two or three failures were enough *ipso facto* to raise a reasonable inference of negligent repair, at least on summary judgment, even if not enough to bar a directed verdict. These two or three failed attempts inherently gave rise to a reasonable inference that Truck Country had not exercised ordinary care. This is consistent with the principle that negligence questions are seldom suited for summary judgment. *See* ***Hunter of Wisconsin, Inc. v. Hamilton***, 101 Wis.2d 460, 471, 304 N.W.2d 752, 757 (1981). In short, Truck Country's ordinary care was not the only reasonable inference, and Truck Country had no right to summary judgment. We express no opinion, however, on what evidence Hooven must introduce at trial to bar a directed verdict on the issue of ordinary care.

By the Court.—Judgment affirmed in part and reversed in part; cause remanded for proceedings consistent with this opinion; no costs to either party.

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