COURT OF APPEALS
DECISION
DATED AND FILED

March 23, 2016

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. 2015AP928

Cir. Ct. Nos. 2013CV88
2013CV134

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

PLAINTIFF-RESPONDENT,

V.

CAMERON J. MONTROY, MITCHELL L. HOLDEN AND NELSON REED STEWART,

DEFENDANTS,

JENNA D. MELSTROM AND BENJAMIN L. ROSS,

DEFENDANTS-APPELLANTS.

JENNA D. MELSTROM,

PLAINTIFF-APPELLANT,

BENJAMIN L. ROSS, BY HIS GUARDIAN AD LITEM AND LORI LIEN,

INTERVENING-PLAINTIFFS-APPELLANTS,

STATE OF WISCONSIN - DEPARTMENT OF HEALTH SERVICES AND WESTERN WISCONSIN CARES,

INVOLUNTARY-PLAINTIFFS,

V.

CAMERON J. MONTROY AND AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

DEFENDANTS,

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

INTERVENING-DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Dunn County: ROD W. SMELTZER, Judge. *Affirmed*.

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

¶1 REILLY, P.J. This appeal involves Illinois' "initial permission" rule for insurance liability as it relates to an accident occurring in the State of Wisconsin.[1] A fourteen-year-old, without permission, took his grandfather's vehicle and crashed it, injuring a number of teenagers who were in the vehicle. The grandfather had a liability policy issued in the State of Illinois with State Farm. State Farm moved for summary judgment arguing that the policy did not provide coverage for the accident as the grandson committed a "tortious conversion" when he took the van. The circuit court agreed and dismissed all

[1] The parties agree that Illinois law is controlling as to the terms of the insurance policy.

claims against State Farm. Jenna Melstrom and Benjamin Ross (Plaintiffs) argue that material questions of fact exist as to whether a tortious conversion occurred. We affirm as the undisputed material facts show a tortious conversion.

BACKGROUND

¶2 State Farm issued an automobile insurance policy to Illinois resident James Montroy, Sr., Cameron Montroy's grandfather, for a 2002 Chrysler Town and Country van.[2] In 2012, James allowed Ike and Sherry Montroy, his son and daughter in law, to use his van. Ike and Sherry live in Durand, Wisconsin. Sherry later explained that she understood that no one else was to drive the van. Under Illinois law, "if the named insured has initially given permission to another to use the insured vehicle," called the "initial permission" rule, "a deviation from the authorized use does not serve to terminate the permission." ***Maryland Cas. Co. v. Iowa Nat'l Mut. Ins. Co.***, 297 N.E.2d 163, 167-68 (Ill. 1973). Two exceptions to the "initial permission" rule exist: theft and tortious conversion. ***Founders Ins. Co. v. Contreras***, 842 N.E.2d 177, 178 (Ill. App. Ct. 2005).

¶3 On October 15, 2012, Sherry and Ike left their home in Durand and spent the day in Menomonie, Wisconsin. Ike and Sherry left the van at their home with the keys in a lock box.[3] Their son, Cameron, was at home and was soon joined by his friends Melstrom, Ross, Mitchell Holden, and Nelson Stewart.

[2] The parties do not dispute the terms of the liability policy nor do they argue that the terms of the policy control the current dispute.

[3] The circumstances surrounding where and how the keys to the van were stored are in dispute. Sherry said the keys were taken from a lock box that had been broken into. An investigation conducted by the Durand Police Department later revealed that the actual lock box did not show any signs of forced entry.

Being a fourteen-year-old, Cameron was not licensed to operate a motor vehicle in Wisconsin. *See* WIS. STAT. § 343.07(1g) (2013-14).[4]

¶4 Melstrom, Holden, and Stewart were looking for transportation to Menomonie, which is approximately twenty miles from Durand, to purchase marijuana. They asked Cameron to use the van. Cameron, knowing he did not have permission to use the van, refused. Cameron eventually agreed after Stewart said they would give Cameron some of the marijuana in exchange for use of the van. It is disputed who obtained the keys to the van from the lock box.

¶5 Stewart drove the van from Durand to Menomonie to pick up the marijuana. On the return trip, Stewart stopped the vehicle on the outskirts of Menomonie and told Cameron to drive the remaining distance. It is disputed whether Cameron willingly took the wheel or was coerced by Stewart. Cameron proceeded to crash the van, injuring his fellow passengers. Following the accident, Ike reported the van stolen and informed the investigating officer that no one had permission to operate the van.

¶6 State Farm moved for summary judgment on the issue of liability coverage. The circuit court granted State Farm's motion, finding that Cameron tortiously converted the van, which precluded coverage under Illinois' "initial permission" rule.

[4] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

DISCUSSION

¶7 We review an award of summary judgment de novo, applying the same methodology as the circuit court. ***Young v. West Bend Mut. Ins. Co.***, 2008 WI App 147, ¶6, 314 Wis. 2d 246, 758 N.W.2d 196. Summary judgment is appropriate where the pleadings and evidentiary submissions of the parties demonstrate that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." WIS. STAT. § 802.08(2).

¶8 Under Illinois' "initial permission" rule, once James gave Ike and Sherry "permission to use the vehicle (the initial permittee[s]), any person subsequently given permission to drive the vehicle by the initial permittee[s] is also covered under the policy, barring theft or tortious conversion." ***Founders***, 842 N.E.2d at 178 (citation omitted). Setting aside that Ike and Sherry did not give permission to Cameron to use the van, tortious conversion serves as an exception to the "initial permission" rule.

¶9 The question presented by the parties is whether the undisputed facts reflect a tortious conversion.[5] The Illinois Supreme Court described the parameters of a tortious conversion specifically as it applies to the "initial permission" rule: "Any unauthorized act by which an owner is deprived of his property permanently or indefinitely, or the exercise of dominion over property inconsistent with the rights of the owner, is a conversion." ***Western States Mut. Ins. Co. v. Verucchi***, 363 N.E.2d 826, 828 (Ill. 1977) (citation omitted). The court explained that where the term "tortious conversion" is used in the context of the

[5] The parties agree that Cameron's conduct does not constitute theft as he lacked the requisite intent to permanently deprive James of the van.

"initial permission" rule, it "referred to a substantial interference with or deprivation of an owner's rights in his vehicle." ***Id.*** "In considering a tortious conversion of one's property, the converter's malice, culpability, or conscious wrongdoing is irrelevant." ***Harry W. Kuhn, Inc. v. State Farm Mut. Auto. Ins. Co.***, 559 N.E.2d 45, 50 (Ill. App. Ct. 1990).

¶10 Two cases educate our analysis: ***Verucchi***, 363 N.E.2d at 827 and ***Woodall v. Booras***, 538 N.E.2d 1263 (Ill. App. Ct. 1989). In ***Verucchi***, the owner gave his son permission to use the insured vehicle. ***Verucchi***, 363 N.E.2d at 827. The son took two of his friends, one being Verucchi, to a drive-in restaurant and parked across the street. ***Id.*** When it was time to leave, the son lingered while Verucchi retrieved the vehicle without permission. ***Id.*** While attempting to navigate heavy traffic and cross the street to the drive-in, Verucchi was forced to circle the block and was involved in an accident. ***Id.***

¶11 The court concluded that while Verucchi's actions may have constituted a *technical* conversion, it was not the type of *substantial* conversion contemplated by the exception to the "initial permission" rule. ***Id.*** at 828. The court found no intent to deprive the owner or the initial permittee of the vehicle, citing Verucchi's plan to only drive fifty to one hundred feet and wait for the owner's son. ***Id.*** The court also found it significant that Verucchi used the vehicle for the benefit of the initial permittee as he was attempting to bring the car to him. ***Id.*** The court concluded that the "initial permission" rule applied to provide liability coverage to Verucchi. ***Id.***

¶12 In ***Booras***, the court reached the opposite conclusion. Again, the owner had given his son permission to use the insured vehicle. ***Booras***, 538 N.E.2d at 1263. Booras, the son's friend, took the vehicle without permission,

intending to drive to a local McDonald's to pick up a girl. ***Id.*** at 1264. On the way, he was involved in an accident. ***Id.***

¶13 The court distinguished ***Booras*** from ***Verucchi***, concluding that the facts demonstrated a more substantial conversion. ***Booras***, 538 N.E.2d at 1267. The court reasoned that a substantial tortious conversion occurred because Booras was told not to drive the vehicle, he planned to deprive both the owner and the initial permittee of the vehicle for a greater period of time and a longer distance than was the case in ***Verucchi***, and his actions were not for the benefit of the owner or the initial permittee. ***Booras***, 538 N.E.2d at 1267.

¶14 We are persuaded by the reasoning in ***Verucchi*** and ***Booras***. Setting aside that Cameron was not given permission by Ike or Sherry, the issue was whether Cameron's intended use of the van was a "substantial interference with or deprivation of an owner's rights in his vehicle" sufficient to constitute a tortious conversion. We answer in the affirmative as the undisputed facts are on point with those of ***Booras***. Cameron, knowing he did not have permission, willingly allowed the van to be used to drive to Menomonie to obtain marijuana. Cameron's unauthorized act of taking the vehicle deprived the owner, James, and the initial permittees, Ike and Sherry, of their rights in the van for an indefinite period of time.

¶15 The specific facts of this case indicate that Cameron's actions were more than a technical tortious conversion. The drive to Menomonie was twenty miles each way and would have taken about an hour to complete. This distance and time is significantly more than was the case in ***Verucchi***. Further, Cameron did not use the vehicle for the benefit of James, Ike, or Sherry. The trip was solely for the benefit of Cameron and his passengers to obtain marijuana. As such, we

conclude that it is undisputed that Cameron's use of the van was an unauthorized act that substantially interfered with or deprived his parents and grandfather of their rights in the vehicle. The "initial permission" rule is not applicable on grounds of tortious conversion.

¶16 Plaintiffs argue that material disputed facts exist as to the "initial permission" rule: (1) Cameron may not have exercised dominion or control since he did not initially drive the van; (2) Cameron may not have personally obtained the keys to the van; (3) Cameron may have driven the van before, suggesting implied permission; and (4) Cameron may have been pressured to drive the van by Stewart. We disagree.

¶17 Plaintiffs argue that Cameron did not exercise dominion or control over the vehicle as he was initially a passenger and not the driver. According to Plaintiffs, the tortious conversion analysis only applies once Cameron was behind the wheel, and at that point Cameron did not have the requisite intent to deprive the owner or initial permittees of their right to the van because he was on his way to return the vehicle home. Further, Plaintiffs argue that Cameron could not have committed a tortious conversion merely by failing to stop Stewart from taking the van.

¶18 We disagree. Whether Cameron was the driver or passenger is irrelevant. The elements of a tortious conversion for the purpose of the "initial permission" rule only require "[a]ny unauthorized act by which an owner is deprived of his property permanently or indefinitely" or, in the alternative, "the exercise of dominion over property inconsistent with the rights of the owner." ***Verucchi***, 363 N.E.2d at 828. Cameron acted and he acted purposefully to take the van for his own personal use, knowing he lacked permission. Cameron

initially refused to let his friends use the van and only agreed after his friends said they would share the marijuana with him. He took the van knowing he had no permission to do so. Cameron's initial status as a passenger rather than the driver does not cure his lack of permission to "use" the van.

¶19 Plaintiffs next argue that there are disputed questions of fact as to whether Cameron personally obtained the keys to the van and whether the keys were located in a locked container. Sherry explained that she had a "silverish tin box" that she locked the keys in at the time of the accident. She stated that there were signs that the lock box had been "jimmied" or the lock had been broken. She also said that Cameron told her that Stewart got the keys from the box. In contrast, Melstrom and Ross insist that Cameron retrieved the keys from his house.

¶20 It is immaterial whether it was Cameron or Stewart who actually got the keys. Both had the intent required to commit a tortious conversion. The pertinent fact for the purposes of a tortious conversion is that Cameron knew that neither he nor any of the occupants of the vehicle had permission to use the van. Thus, the only facts relevant to this court are (1) that someone took the keys from Ike and Sherry's house and (2) they did so without permission, which resulted in a substantial interference with the owner's or initial permittees' rights in the vehicle.

¶21 Plaintiffs next posit that Cameron had driven the van before, suggesting implied permission. According to the Plaintiffs, Cameron was seen driving Sherry's other vehicle around town with his parents in the car and once driving the van alone. Plaintiffs suggest that although Cameron testified that he knew he did not have permission *to drive* the van, this is not the same as knowing he did not have permission to *use* the van as a passenger.

¶22 We do not agree that the fact of "implied" permission is disputed. Cameron's own deposition testimony reflects that he knew he did not have permission to drive the van. James, Ike, and Sherry also stated that no one had permission to use the van. As a fourteen-year-old, Cameron did not have a license nor was he legally entitled to drive in Wisconsin. *See* WIS. STAT. § 343.07(1g). We will not entertain an argument of implied permission in the face of explicit evidence to the contrary. We agree with the circuit court's assessment that others' mere perception of whether Cameron had consent is not relevant to the question of whether a tortious conversion occurred. Further, we will not leap, as the Plaintiffs request, to the conclusion that despite Cameron's knowledge that he did not have permission to *drive* the van, he believed he had permission to be a *passenger* in the van driven by one of his friends. If he knew he was not allowed to drive the van, then he knew taking the van on a joy ride with his friends over an hour away from his home to obtain marijuana was not an authorized use of the vehicle.

¶23 Finally, Plaintiffs argue that Cameron did not agree to drive voluntarily, but, rather, was threatened by Stewart. According to Plaintiffs, a jury could reasonably infer that Stewart was a bully and Cameron consented to driving because he was intimidated by Stewart. This argument is without merit as Cameron's state of mind as to "malice, culpability, or conscious wrongdoing is irrelevant" as it relates to tortious conversion. ***Kuhn***, 559 N.E.2d at 50. Cameron's conversion of the van was not dependent on whether he was threatened by Stewart. As previously addressed, the tortious conversion of the vehicle began when it was initially taken by Cameron and his friends, not when Cameron subsequently got behind the wheel on the way home from Menomonie. The undisputed evidence demonstrates that he had the intent required to establish a tortious conversion.

¶24 For these reasons, we affirm the circuit court's order granting summary judgment and dismissing all claims against State Farm.

By the Court.—Judgment affirmed.

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