COURT OF APPEALS
DECISION
DATED AND FILED

March 19, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP90 **Cir. Ct. No. 2009CV730**

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

PAUL M. WHITEAKER AND KAREN WHITEAKER,

PLAINTIFFS-APPELLANTS,

V.

SCOTT A. BLACK,

DEFENDANT,

TRINITY TRUCKING, INC. AND INTEGRITY MUTUAL INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Polk County: EUGENE D. HARRINGTON, Judge. *Affirmed.*

Before Hoover, P.J., Mangerson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Paul Whiteaker[1] appeals a directed verdict dismissing his negligence action against Trinity Trucking, Inc., and its insurer, Integrity Mutual Insurance Company. Whiteaker contends he presented sufficient evidence of special circumstances to abrogate the general rule of immunity in favor of owners when their vehicle is stolen and the thief subsequently injures another. We conclude the circumstances in this case do not permit a jury to conclude Trinity and its employee, David Hunter, were causally negligent for Whiteaker's injuries. Accordingly, we affirm.

BACKGROUND

¶2 On July 25, 2009, Whiteaker was injured in an accident with one of Trinity's dump trucks. The truck was driven by Scott Black, an acquaintance of Trinity employee David Hunter. Hunter left the truck parked at his residence on Grey Cloud Island the previous day. Hunter's stepfather, Sam Perna, owns the property, and several other family members also live there.

¶3 On July 24, Hunter arrived at his residence around 6:00 p.m. and remained for approximately ninety minutes before leaving with a friend. Hunter parked the truck in the driveway, facing the road. He left the doors unlocked and placed the keys above the driver's-side visor. Hunter was filling in for a sick employee the following day, and intended to leave the truck overnight.

[1] Karen Whiteaker's claims were settled and dismissed with prejudice by stipulation. Consequently, she has waived her right to appeal. *See* ***RecycleWorlds Consulting Corp. v. Wisconsin Bell***, 224 Wis. 2d 586, 592-93, 592 N.W.2d 637 (Ct. App. 1999) (party waives right to appeal if it has consented or stipulated to the entry of judgment). This opinion will therefore refer to Paul Whiteaker, individually, as the sole appellant.

¶4 Unbeknownst to Hunter, he and Black arrived at the Perna property at approximately the same time. Black had spent decades around the Pernas; he considered Sam something of a stepfather because Sam was engaged to Black's mother for a time in the 1970s. Black occasionally and unexpectedly visited the residence and had stayed there for a few months in the 1990s. However, the Perna family considered Black a transient and a drunk.

¶5 Black had been drinking heavily before he arrived at the Perna residence on July 24. Rick Perna, Hunter's brother, visited with Black behind the garage for an hour or two, where Black consumed more alcohol. Black then went into the woods and stayed at a makeshift camping site until he passed out. The next morning, Black decided he would surprise a friend in Balsam Lake, Wisconsin. He intended to borrow Hunter's truck for a short time, and then have Hunter pick it up. Black took the truck and the accident involving Whiteaker followed.

¶6 Whiteaker sued Trinity and the case proceeded to trial. At the close of Whiteaker's case, the circuit court made several findings of what it deemed "uncontested fact." The court found Black was homeless and transient, an infrequent visitor at the Perna residence, and came and went in an unpredictable pattern. Black had a thirty-year relationship with Hunter and the Pernas, and had never stolen anything from them, nor committed a crime against any of them. Hunter did not know that Black had a prior conviction for theft, but did know Black had been convicted of driving while intoxicated. Hunter also knew that a bicycle was Black's usual means of transportation. Hunter did not know that Black was at the Perna residence on July 24, or that Black had consumed alcohol on that day.

¶7 The court also made findings of "uncontested fact" regarding Grey Cloud Island and events leading up to the theft. Grey Cloud Island is a residential community located in the southeastern section of the Twin Cities metropolitan area. There are no bars or other commercial buildings on Grey Cloud Island, and the island attracts little nonresidential traffic. July 24, 2009 was the first and only instance that Hunter had taken the Trinity truck to his home on Grey Cloud Island. Hunter did not tell anyone the truck was parked in the driveway, though it would have been prominent.

¶8 Based on these findings, the court concluded there were insufficient facts to support a jury verdict for Whiteaker, as there were no special circumstances supporting abrogation of the general rule of immunity. Specifically, the court determined it was not reasonably foreseeable to Hunter that someone might steal the truck. Thus, the jury could not reasonably find that "the negligent act of leaving the keys in [Hunter's] vehicle directly caused [Whiteaker's] injury."

DISCUSSION

¶9 The parties agree Minnesota law controls this case. In Minnesota, a motor vehicle owner is generally immune from liability for damages caused by the negligent acts of a thief. ***Whaley v. Anderson***, 461 N.W.2d 913, 914 (Minn. 1990). However, in ***State Farm Mutual Automobile Insurance Co. v. Grain Belt Breweries, Inc.***, 245 N.W.2d 186 (Minn. 1976), the supreme court adopted a "special circumstances" exception to this rule. Under this exception, "[s]pecial circumstances which impose a greater potentiality of foreseeable risk or more serious injury, or require a lesser burden of preventative action, may be deemed to

impose an unreasonable risk on, and legal duty to, third persons." ***Id.*** at 189 (citing ***Hergenrether v. East***, 393 P.2d 164 (Cal. 1964)).

¶10 In ***Grain Belt***, a beer truck was stolen by two intoxicated thieves who caused a collision shortly thereafter. ***Id.*** at 187. The insurer of an individual injured in the crash sued the brewery that owned the truck. ***Id.*** at 187-88. A jury determined the brewery employees' negligence proximately caused the insured's injury. ***Id.*** at 188. On appeal, the court determined there was sufficient evidence of special circumstances to permit the jury to decide the negligence issue. ***Id.*** at 189. The employees left their truck unsupervised with the keys in it in a "high crime" area of Minneapolis populated by bars and frequented by hard drinkers. ***Id.***

¶11 A few years later, the court clarified that foreseeability is the lynchpin of the "special circumstances" analysis. The special circumstances rule shifts the emphasis of the liability inquiry to "whether the negligence of the thief was reasonably foreseeable by the owner." ***Illinois Farmers Ins. Co. v. Tapemark Co.***, 273 N.W.2d 630, 635 (Minn. 1978). If the defendant is aware or should be aware of circumstances that increase the probability that the car will be stolen, that a thief is likely to operate the car negligently, and that injury or damage to a third party will result, the defendant is under a duty to act so as to prevent the theft and, consequently, the injury or damage. ***Id.*** at 635-36. The ***Tapemark*** court reversed a summary judgment dismissing the plaintiff's claims, holding that material disputes of fact existed as to the character of the neighborhood, the car owner's knowledge of that character, and the availability of the keys. ***Id.*** at 636.

¶12 Whiteaker asserts that, as a matter of public policy, this court should "take into account the actual serious risks to third-parties [sic] arising from thief-driven vehicles." He cites numerous national studies finding an elevated risk of collision among stolen vehicles. Whiteaker fails, however, to cite any legal authority holding that such data are relevant to the negligence inquiry. Minnesota's foreseeability analysis is highly fact specific. ***Grain Belt***, 245 N.W.2d at 189. Factors to consider include the nature and reputation of the immediate area, the character of its occupants, preventative measures taken by the vehicle's operator, and the temporal proximity of the accident to the theft. ***Id.*** National studies, while informative, are not helpful to answer whether special circumstances exist in a given case.

¶13 Because the special circumstances analysis is so fact-driven, the circuit court serves a significant gatekeeping function. Not all cases involving the negligent driving of a thief must be submitted to the jury. ***Id.*** The trial court "must consider the facts of each case and determine whether, in its judgment, those facts constitute such special circumstances that a jury could reasonably find that the negligent act of leaving keys in the vehicle directly caused the injury." ***Id.*** at 189-90. Thus, while the jury must answer the ultimate questions of negligence and causation, it is for the circuit court to decide, on the undisputed facts or at the conclusion of the plaintiff's case, whether special circumstances exist to permit the jury to reach these issues.

¶14 The standard of review ordinarily applicable to directed verdicts does not mesh well with Minnesota's method of determining special circumstances. Ordinarily, a motion for a directed verdict based on the sufficiency of the evidence is granted only if the court is satisfied that, considering all credible evidence and reasonable inferences in the light most favorable to the opposing

party, there is no credible evidence to sustain a finding in favor of the opposing party. ***Weiss v. United Fire & Cas. Co.***, 197 Wis. 2d 365, 388, 541 N.W.2d 753 (1995).

¶15 However, the special circumstances inquiry requires a court to do much more than simply determine whether the nonmoving party has presented any credible evidence in support of its claim. Instead, the court must consider the facts as developed during the trial and determine whether those facts constitute special circumstances such that the jury could reasonably conclude that the vehicle owner's negligence caused the plaintiff's injury. ***Grain Belt***, 245 N.W.2d at 189-90. This inquiry essentially asks whether the defendant owed a duty to the plaintiff, which is a question of law in Minnesota. *See* ***Canada By & Through Landy v. McCarthy***, 567 N.W.2d 496, 504 (Minn. 1997). We review questions of law de novo. ***Awve v. Physicians Ins. Co.***, 181 Wis. 2d 815, 821, 512 N.W.2d 216 (Ct. App. 1994).

¶16 We conclude, as did the circuit court, that no special circumstances are present in this case. No reasonable jury could conclude, on these facts, that Hunter's alleged negligence caused Whiteaker's subsequent injury at the hands of Black.

¶17 Quite simply, there are no facts about the nature and reputation of the immediate area in which the theft occurred that would have led Hunter to believe the truck was at risk. Grey Cloud Island is an island in the middle of the Mississippi River with large residential lots. Hunter described Grey Cloud Island as "in the middle of nowhere." According to Black, it is quiet, isolated, and rural. Aerial photographs admitted at trial show no visible commercial activity. In the ten years prior to July 24, 2009, there has been only one vehicle theft from the

Grey Cloud Island Township. These facts are among the most important, as the character of the neighborhood and defendant's knowledge of that character are the major factors to consider in assessing whether special circumstances exist. *See* ***Tapemark***, 273 N.W.2d at 635.

¶18 Rather than the character of the neighborhood, Whiteaker focuses on the character of one individual—Black. Whiteaker reminds us that Black was a homeless alcoholic with a criminal record.[2] However, the extent of that criminal record was unknown to Hunter, who had very little contact with Black in the years preceding the theft. Black had never stolen from the Pernas or their neighbors in the decades he had been visiting the property. And, in any event, there is no evidence that Hunter knew of Black's presence on Perna property on July 24, 2009.

¶19 Whiteaker correctly notes that, along with the nature of the neighborhood and character of its occupants, ***Grain Belt*** and ***Tapemark*** require consideration of the "defendant's burden of preventative action." This argument appears to be based on the nature of the stolen vehicle. Because Hunter was operating a large commercial dump truck requiring a special license, Whiteaker argues Hunter was under an enhanced duty to take precautions against theft.

¶20 However, this factor is of relatively small importance compared to the risk of theft. Although the accident could have been prevented by removing

[2] On appeal, Whiteaker notes Black has been convicted of four crimes of theft. He concedes, however, that most of Black's criminal record was excluded at trial. Whiteaker does not challenge this ruling on appeal.

the keys from the vehicle, the same is true in virtually all theft-accident cases.[3] The key question is whether the defendant acted unreasonably in not taking greater efforts to prevent the theft. As we have noted, the risk of theft on the island was minimal. Indeed, Hunter had left a previous employer's truck parked on the Perna property daily for two years without incident. Hunter usually left that truck unlocked and sometimes even running, with the keys readily accessible. If a vehicle is not likely to be stolen, then the likelihood that a thief would operate the car negligently is diminished accordingly.

¶21 We are also unpersuaded by Whiteaker's assertion that the circuit court ignored a plethora of undisputed facts in reaching its conclusion. Whiteaker cites Trinity's practice of securing its vehicles on company property, its failure to conduct a background check on Hunter or investigate his alleged "propensity for dishonesty," an alcohol abuse issue involving Rick Perna, and lay opinion concerning whether it is advisable to lock, and remove the keys from, a commercial vehicle. None of these factors are circumstances that increased the probability that the truck would be stolen. Hunter reasonably believed the risk of theft to be negligible given the nature of Grey Cloud Island and Hunter's knowledge of Black's character.

¶22 Whiteaker also takes issue with the circuit court's finding that Hunter had no knowledge of Black's theft convictions, asserting the court's "most important finding is just plain wrong," and emphasizing that "there is no support for this finding in the record." However, the very first substantive page of

[3] As it is, Hunter did not leave the keys in the ignition, but placed them above the driver's visor.

Whiteaker's appendix is an excerpt from Hunter's deposition in which he clearly states that he was not aware of Black's criminal convictions. Whiteaker's own appellate submission refutes his argument.

¶23 Whiteaker next asserts the circuit court ignored testimony from the investigating police officer that Hunter told him Black "frequently shows up at the house unannounced." The circuit court determined Black was an infrequent visitor to the Perna property, apparently based on Hunter's trial testimony that Black would stay at the residence approximately once every two years. Although the court perhaps overstated the matter by labeling the frequency of Black's visits an "uncontested fact," any factual dispute is immaterial. Regardless of how often Black visited the property, what is truly important is the undisputed fact that he had never before stolen from the Pernas.[4]

¶24 Whiteaker attempts, unpersuasively, to undermine this fact, arguing the circuit court neglected "the fact that Black did not intend to steal the truck or commit a crime against the Pernas."[5] Whiteaker points to Black's testimony that he intended only to borrow the truck for a short time, then have Hunter pick it up. Whiteaker fails to explain, though, how Hunter could have been aware of Black's innocent intent, or why this intent should negate Black's decades of theft-free history with the Pernas. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430

[4] Black had also never operated any of the Pernas' vehicles, nor had he slept inside one.

[5] Contrary to Whiteaker's assertion, the circuit court recognized that the theft was a "spur-of-the-moment action" that resulted from Black's "spontaneous urge to drive to Balsam Lake, Wisconsin, and visit a friend." Whiteaker concedes this was the correct finding, but argues that it "ignores the credible evidence that Black's entire life appears to have been on a spur-of-the-moment basis without any due regard for society or the rights of others." Because Whiteaker concedes this was an appropriate finding, we will not address his argument.

N.W.2d 366 (Ct. App. 1988) (court of appeals will not address undeveloped arguments).

¶25 Next, Whiteaker suggests the court erred when it concluded there were no bars or other commercial buildings on Grey Cloud Island. Whiteaker contends there was nothing in the record to support this finding. We disagree. The court's finding was reasonable based on the evidence presented, including testimonial descriptions of the island and aerial photographs.

¶26 Moreover, as the plaintiff, Whiteaker bore the burden of producing evidence supporting his claim. Whiteaker has not cited any evidence establishing that there are, in fact, bars or commercial property on the island. Instead, he relies on a double negative: "There is no evidence in the record that the island does not have any bars or commercial areas." The absence of evidence does not establish the contrary as fact.

¶27 Finally, Whiteaker suggests the court erred by refusing to admit crime statistics for the larger area of St. Paul Park, which apparently includes Grey Cloud Island. We reject this assertion. First, Whiteaker's argument is undeveloped because he does not provide any standard for reviewing evidentiary decisions, does not direct us to an offer of proof,[6] and does not address whether the exclusion affected his substantial rights. *See* WIS. STAT. § 901.03(1).[7] Second, Whiteaker conceded at trial that the St. Paul Park statistics did not include

[6] Whiteaker's appendix apparently includes the disputed trial exhibit, which consists of spreadsheets, crime statistics, and court records, without explication.

[7] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

"just Grey Cloud Township." As the circuit court recognized, presentation of the larger area's crime statistics was likely to overstate the risk of theft in a prejudicial way.

¶28 In sum, because there were no special circumstances abrogating the general rule of immunity, the trial court correctly dismissed Whiteaker's negligence action against Trinity and its insurer.

By the Court.—Order affirmed.

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