COURT OF APPEALS
DECISION
DATED AND FILED

September 27, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP2151 **Cir. Ct. No. 2012CV5741**

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

SHENICQUA S. NAPPER,

PLAINTIFF-APPELLANT,

V.

SMART DOLLAR AUTO AND GEORGE KUSSMAN,
DEFENDANTS-RESPONDENTS,

AUTO-OWNERS INSURANCE COMPANY,
INTERVENOR-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: DANIEL A. NOONAN, Judge. *Affirmed*.

Before Brennan and Brash, JJ., and Daniel L. LaRocque, Reserve Judge.

¶1 PER CURIAM. Shenicqua S. Napper appeals from an order of the circuit court that granted summary judgment to Smart Dollar Auto, George

Kussman, and Auto-Owners Insurance Company (collectively, "Smart Dollar") and dismissed Napper's claims. Napper asserts a factual dispute precludes summary judgment on her statutory misrepresentation claim. We disagree, so we affirm the circuit court's order.

Background

¶2 The underlying facts of this case are simple, if unfortunate. On or about September 19, 2008, the Wisconsin Department of Transportation (DOT) issued a clear certificate of title for a 2001 Kia Optima to Sylvia Johnson. On October 6, 2008, Johnson reported the vehicle had been taken, possibly by her roommate, sometime during the overnight hours of October 5-6, 2008. The Milwaukee Police Department generated a stolen vehicle report that, by all accounts, should have been entered into the National Crime Information Center (NCIC) database that day.

¶3 However, despite having reported the vehicle stolen, Johnson also assigned the title for the Kia to Becky and Leonardo Hernandez, on October 6, 2008. The DOT issued a clear certificate of title for the Kia to the Hernandezes on October 7, 2008. The title was issued even though the DOT's computers are supposed to automatically check the National Motor Vehicle Title Information System, which is meant to pull information from the NCIC, and delay issuance of a title for any vehicle that has been reported stolen.

¶4 On September 30, 2011, the Hernandezes sold the Kia to Kunes Ford, a dealership, as part of a trade and assigned the title. On October 27, 2011, Smart Dollar purchased the vehicle from Kunes through Evansville Auto Auction, and Kunes Ford assigned title to Smart Dollar.

¶5 On March 2, 2012, Napper purchased the Kia with cash from Smart Dollar. A purchase contract and bill of sale were generated and executed, and Napper left with the Kia. She was informed that the certificate of title would follow by mail from the DOT, which eventually issued the title to Napper on May 4, 2012. The title erroneously indicated that Smart Dollar was a lienholder, but the title was otherwise unencumbered.[1]

¶6 On April 21, 2012, while driving the Kia, Napper was stopped in River Hills for speeding. When the officer ran the vehicle identification number, the stolen vehicle report returned. The officer requested confirmation, and the Milwaukee Police Department verified that it was a "valid steal" with that department. Napper insisted she was the owner of the Kia, but she could not produce documentation. The vehicle was impounded, and Napper was transported to the River Hills Police Department. The department delayed booking so Napper could call home and try to have someone retrieve her sales paperwork and bring it to the police department. Napper was unable to obtain the correct paperwork that day, so she was booked into jail on suspicion of auto theft. On April 24, 2012, Napper was able to obtain the sales paperwork, so no formal charges were filed against her and she was released from custody.

[1] The listing of Smart Dollar—which also does business as A Able Auto, Inc., and was so listed on the title—as a lienholder is not an issue on appeal, although we may refer to Napper's title as unencumbered despite this erroneous designation.

¶7 Napper subsequently filed suit against Smart Dollar. She alleged a violation of WIS. STAT. § 100.18 (2011-12),[2] WIS. STAT. § 895.446,[3] and breach of contract. Specifically with regard to the § 100.18 claim, Napper alleged that Smart Dollar falsely represented it owned the Kia free and clear.

¶8 Smart Dollar moved for summary judgment on the claims, noting among other things that the unencumbered titles were *prima facie* evidence of Smart Dollar's ownership and Napper had no evidence to the contrary. Smart Dollar presented the clear title issued to Johnson, her transfer to the Hernandezes and their clear title, the transfers from the Hernandezes to Kunes to Smart Dollar by way of the auction house,[4] and the unencumbered title eventually issued to Napper. The circuit court agreed with Smart Dollar's assessment and granted the motion for summary judgment.[5] Napper appeals, challenging only the dismissal of her WIS. STAT. § 100.18 misrepresentation claim.

Discussion

¶9 We review a grant of summary judgment *de novo*, using the same methodology as the circuit court. *See* ***Westphal v. Farmers Ins. Exch.***, 2003 WI

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

[3] The complaint cites WIS. STAT. § 865.446. Smart Dollar noted there was no such statute, and assumed Napper meant to cite WIS. STAT. § 895.446. However, Napper does not appeal the dismissal of this claim, so we need not discuss this typographical error further.

[4] Evidently, licensed motor vehicle retailers are not required to apply for title in their own names, so Kunes, Evansville Auto, and Smart Dollar did not obtain certificates of title for themselves when they took possession of the Kia.

[5] Smart Dollar had also asked the circuit court for certain declaratory relief. However, the order for summary judgment dismissing the claims is dispositive, obviating the need for the requested declarations.

App 170, ¶9, 266 Wis. 2d 569, 669 N.W.2d 166. Summary judgment is appropriate when there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. *See* WIS. STAT. § 802.08(2). Inferences from the underlying facts should be viewed in the light most favorable to the non-moving party. *See* ***Novell v. Migliaccio***, 2008 WI 44, ¶23, 309 Wis. 2d 132, 749 N.W.2d 544. If there is a genuine dispute over a material fact, or if the evidence presented is subject to conflicting inferences, summary judgment should be denied. *See* ***Westphal***, 266 Wis. 2d 569, ¶9.

¶10 A person or business offering an item for sale may not, "with intent to induce the public in any manner to enter into any contract or obligation relating to the" sale, make "an advertisement, announcement, statement or representation of any kind" regarding the sale that "contains any assertion, representation or statement of fact which is untrue, deceptive or misleading." *See* WIS. STAT. § 100.18(1). Thus, "there are three elements in a § 100.18 cause of action: (1) the defendant made a representation to the public with the intent to induce an obligation, (2) the representation was 'untrue, deceptive or misleading,' and (3) the representation materially induced (caused) a pecuniary loss to the plaintiff." ***Novell***, 309 Wis. 2d 132, ¶49 (citations omitted).

¶11 A certificate of title issued by the DOT "shall contain" the name and address of the owner, the names of secured parties, the title number assigned to the vehicle, a description of the vehicle, any required mileage disclosure, and "[a]ny other data which the department deems pertinent and desirable." *See* WIS. STAT. § 342.10(1)(a)-(e). "A certificate of title issued by the department is prima facie evidence of the facts appearing on it." WIS. STAT. § 342.10(5).

¶12 The crux of Napper's WIS. STAT. § 100.18 claim is her belief that Smart Dollar made an untrue representation that it owned the Kia free and clear in order to induce her purchase. The circuit court, in granting summary judgment, explained:

> The Court is persuaded that there is no genuine issue of material fact here because a state statute has been complied with.… And that Statute is section 342.10. And we've gone over that in detail earlier.… But most importantly sub paragraph 5, parenthetical 5 of 342.10. And it states as follows: A certificate of Title issued by the Department is prima facie evidence of the facts appearing on it.
>
> Here there is no dispute that Smart Dollar acquired legal Title and certificate of Title pursuant to the terms of 342.10 from Kunes all the way going back to Hernandez and Johnson.
>
> Now, that being the case all of these transfers were legal and legitimate despite a highly inaccurate NCIC report that was not followed up on. And that is not determinative of the certificate of Title or transfer of ownership in this state. It cannot trump the statute that I just indicated, 342.10. That statute was indeed complied with. Therefore, there can be nothing deceptive under 100.18. There can be nothing under that statute. At least and clearly as to the second component of it which states that there must be something that the representation was untrue, deceitful or misleading. There is no genuine issue of material fact.

¶13 Napper acknowledges the presumption created by WIS. STAT. § 342.10(5), but asserts that the certificate of title is not conclusive proof of ownership and that lawful ownership still presents a question of fact for a jury under ***Westphal***, 266 Wis. 2d 569, ¶14. Napper argues that she rebutted the WIS. STAT. § 342.10(5) presumption of ownership with public law enforcement records and deposition testimony from a Milwaukee Police Department lieutenant, who

explained that the Kia was indeed listed as stolen in their records and the NCIC.[6] But this case is not like ***Westphal***.

¶14 In ***Westphal***, insurance coverage depended in part on who owned a truck at the time it was involved in an accident. *See* ***id.***, 266 Wis. 2d 569, ¶12. On March 31, 1999, Eric Meadows had entered into an agreement to purchase the truck from his employer, Bruce Fall. *See* ***id.***, ¶4. According to Meadows, he purchased the vehicle for $1000, Fall was going to deduct $50 per month from his paychecks, and the title would be transferred upon the final payment. *See* ***id.*** According to Fall, he turned the truck over to Meadows entirely on March 31 and had intended to transfer the title then, but did not have it in his possession, so he applied for a replacement tile on April 5, 1999. *See* ***id.***, ¶5. Meadows and the truck were involved in an accident on April 8, 1999. *See* ***id.***, ¶2.

¶15 In concluding that there was a factual dispute regarding ownership, we first noted a "settled princip[le] that 'where title has been endorsed and delivered, a conclusive presumption arises … that ownership was transferred; where it has not been endorsed and delivered, the intent and conduct of the parties govern.'" *See* ***id.***, ¶13 (citation and one set of quotation marks omitted; ellipses in ***Westphal***). We further acknowledged that under WIS. STAT. § 342.10(5), the existing title was *prima facie* evidence that Fall still owned the truck, but stated that "this finding is not inevitable" because the title had not been delivered *and* the

[6] The lieutenant also testified about the unusually poor job that had been done handling the report. For example, while the report identified a suspect, it also said an unknown person was responsible for the theft; this inconsistency should have resulted in rejection of the report. Further, there were no follow-up reports filed, suggesting nothing had been done with the case other than taking Johnson's report, not even contacting the roommate she suspected of the theft.

parties' intent was disputed. *See* ***id.***, ¶14. This case, however, is not at all like ***Westphal***: title to the Kia has been endorsed and delivered multiple times.

¶16 Ultimately, the problem with Napper's position is two-fold. First, the only even remotely disputed transfer is the one from Johnson to the Hernandezes. While Napper implies that whoever stole the Kia is the one who fraudulently executed the title transfer, she presented no evidence of a fraudulent transfer on summary judgment. The stolen vehicle report proves only that Johnson reported the vehicle stolen; it does not prove that she did not subsequently execute the title transfer. Second, Napper's misrepresentation claim is premised on an assumption that a stolen vehicle report acts as a title encumbrance. It does not, and Napper cites no authority to show otherwise.

¶17 We do not know why the systems in place failed to flag this vehicle as reported stolen when the Hernandezes titled it in 2008, but that question is not before us. We are further not unsympathetic to Napper's experience here; we are in fact disconcerted by it. Nevertheless, the undisputed evidence presented for summary judgment shows that the title to the Kia has been transferred, multiple times, since at least 2008, without encumbrance: Johnson transferred the Kia to the Hernandezes, who took it free and clear; the Hernandezes assigned the title to Kunes, who transferred title to Smart Dollar after Evansville Auction sold the Kia; and Smart Dollar transferred the title to Napper, still unencumbered. There is no evidence that Smart Dollar made an untrue representation about owning the vehicle free and clear when it offered the Kia for sale. Summary judgment dismissing the WIS. STAT. § 100.18 misrepresentation claim was appropriate.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2013-14).