

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 6, 2005

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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

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. 2004AP2960

Cir. Ct. No. 2002CV755

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

**DELMAR F. RENAK, MARJORIE E. RENAK, AND
THE RACINE COUNTY HISTORICAL SOCIETY AND
MUSEUM, INC., A/K/A THE RACINE HERITAGE MUSEUM,**

PLAINTIFFS-RESPONDENTS,

v.

RAYMOND G. FEEST AND JANET M. FEEST,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Racine County:
CHARLES H. CONSTANTINE, Judge. *Affirmed.*

Before Brown, Nettesheim and Snyder, JJ.

¶1 PER CURIAM. Raymond and Janet Feest appeal from a judgment declaring that an antique Pierce Engine is personal property owned by Delmar

Renak and that Renak, his wife Marjorie Renak, and the Racine County Historical Society and Museum, Inc., are entitled to immediate possession of the Pierce Engine. The issue is whether the Pierce Engine is personal property or a fixture to real property owned by the Feests. We affirm the circuit court's summary judgment ruling that the Pierce Engine is personal property solely owned by Renak.

¶2 In 1973, the Feests purchased real property from Renak and several co-owners. Included on the property was a building, "the shop," in which three generations of the Renak family operated a blacksmith, wagon repair, and machine repair business. The real estate purchase agreement gave Renak the right to exclusive use and occupancy of the shop for the rest of his life. The agreement also provided:

Included in the purchase price is all tangible personalty now on the property, except the following:

....

B. Any item of personalty owned by Delmar Renak alone as distinguished from personalty which is owned by him and the other sellers in common. The statement of Delmar Renak that he owns alone any item of personalty shall be binding upon all parties to this agreement.

¶3 After the sale of the property to the Feests, Renak continued to use the shop until sometime in 2000. Various equipment in the shop was powered by a gasoline Pierce Engine which had been installed in the shop by Renak's grandfather and father. The Pierce Engine, approximately six and one-half feet long, three and one-half feet tall, and weighing more than a ton, was attached to a

brick foundation within the shop’s “engine room” by four large bolts. It had been in the shop for nearly one hundred years.¹

¶4 In November 2000, Renak agreed to donate the Pierce Engine to the Racine County Historical Society and Museum, Inc. The Feests claimed ownership of the Pierce Engine and refused to permit its removal from their property. Consequently, this action for replevin was filed.² The parties filed cross-motions for summary judgment. The circuit court concluded that there was no dispute concerning the characteristics of the Pierce Engine, its location in the shop, or its history. It granted summary judgment declaring the Pierce Engine to be the personal property of Renak because there was no intent to make it a permanent fixture to the land.

¶5 We review decisions on summary judgment de novo, applying the same methodology as the circuit court. *M & I First Nat’l Bank v. Episcopal Homes Mgmt., Inc.*, 195 Wis. 2d 485, 496-97, 536 N.W.2d 175 (Ct. App. 1995). That methodology has been recited often and we need not repeat it here except to observe that summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See id.*; WIS. STAT. § 802.08(2) (2003-04).³ When both parties move by cross-motions for summary judgment, it is the equivalent of a stipulation of facts permitting the

¹ In the fall of 2000, the Feests removed the Pierce Engine from the shop and stored it elsewhere on their property.

² Renak also sought the return of other items of personal property located in the shop. The circuit court’s decision granting a writ of restitution for recovery of those items is not challenged on appeal.

³ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

circuit court to decide the case on the legal issues. *Millen v. Thomas*, 201 Wis. 2d 675, 682-83, 550 N.W.2d 134 (Ct. App. 1996).

¶6 The issue is whether the Pierce Engine is personal property or a fixture.

The rule which has developed in Wisconsin as to what constitutes a fixture is not really a comprehensive definition, but rather a statement of the factors which are to be applied to the facts and circumstances of a particular case to determine whether or not the property in question does constitute a fixture:

“ . . . Whether articles of personal property are fixtures, *i.e.*, real estate, is determined in this state, if not generally, by the following rules or tests: (1) Actual physical annexation to the real estate; (2) application or adaptation to the use or purpose to which the realty is devoted; and (3) an intention on the part of the person making the annexation to make a permanent accession to the freehold.”

Premonstratensian Fathers v. Badger Mut. Ins. Co., 46 Wis. 2d 362, 367, 175 N.W.2d 237 (1970) (citation omitted).

¶7 The Feests characterize the circuit court’s decision as concluding that the Pierce Engine is a trade fixture. They argue that rules for determining if an item is a trade fixture apply only when the parties are landlord and tenant because “[a] much stricter rule is applied as against a landlord in a contest between the landlord and tenant.” *Thomsen v. Cullen*, 196 Wis. 581, 599, 219 N.W. 439 (1928). *See also DOR v. A. O. Smith Harvestore Prods., Inc.*, 72 Wis. 2d 60, 73, 240 N.W.2d 357 (1976) (recognizing the “fallacy of carrying over fixtures cases in one classification to another classification, where the status and relations of the parties are different”). The Feests contend the circuit court’s ruling that the Pierce Engine is a trade fixture is error since there is no landlord-tenant relationship

between the Feests and Renak, or between any persons ever owning the property and those utilizing the shop.

¶8 We do not view the circuit court's ruling to be that the Pierce Engine is a trade fixture. Although the circuit court commented that "there is nothing to suggest that prior to 1973 it was viewed as anything other than a trade fixture," it was not making a final ruling that the Pierce Engine is a trade fixture. It was merely using the term "trade fixture" to describe the parties' intent toward the use of the Pierce Engine as an item used in the Renak family business or trade. We set forth the pertinent part of the circuit court's written decision in its entirety:

The case at hand can be decided by analyzing the third factor of the fixture test. In placing the Pierce Engine in the "Shop", was there the intent to make it a permanent accessory to the freehold?

The Court can only conclude based on the record before it that the answer is "no".

The engine has been in the Renak Family for 100 years. It was part of the operation of a family business. But there is nothing to suggest that prior to 1973 it was viewed as anything other than a trade fixture to be passed from generation to generation.

The probate records while not conclusive seem to infer that.

In 1973 when the real estate was sold, neither the buyer nor the sellers viewed the transaction as one involving the purchase of an ongoing business. It was primarily a transaction to purchase real estate. Delmar Renak was allowed to lease the shop after sale. So in determining whether the engine was a fixture, one must analyze not only the issue in terms of landlord/tenant relationship, but also vendor/vendee.

But under either standard the Feests' position is untenable. Had the Feests negotiated the purchase of the ongoing business (shop) an argument could be made that the engine was an integral part of the real estate and the business operation. But the Feests never were interested in

operating the business and, in fact, have torn the shop down. (See affidavit of Daniel Feest.)

In negotiating the transaction, the Feests allow Mr. Renak to designate what property was his. Mr. Renak was the only individual who could operate a business out of the shop. (See paragraph 4 of addendum.)

The expectation was that he would take with him his personalty or could do with the personalty as he saw fit.

The Pierce Engine was detachable. The pulleys could be changed and removed. The engine, with a hoist, was easily movable. Its only owner has been the Renak Family. The only reasonable expectation would have been that it would remain within the Renak Family.

The Court finds that the Pierce Engine is personalty (i.e. a trade fixture) and subject to Delmar Renak's rights under the addendum to the offer to purchase. Therefore, Delmar Renak is entitled to the engine and had an absolute right to transfer his interest in this engine to the Racine Historical Society.

¶9 As the first quoted paragraph demonstrates, the circuit court's ruling was based on the third element of the three-part test for determining whether an item is personal property or part of the real property—the intent to make the item a permanent accession to real property. Our de novo review also focuses on the third element of the test.⁴ “[I]ntent is the primary determinant of whether a certain piece of property has become a fixture.” *Premonstratensian Fathers*, 46 Wis. 2d at 371.

¶10 We agree with the circuit court's assessment of the undisputed facts that the Pierce Engine was not intended to be a permanent fixture to the real estate. The Pierce Engine was used solely in the business operated on the property. A

⁴ Therefore, it is not necessary to address Renak's explanation that in substance there was a landlord-tenant relationship between his grandfather as owner of the property and the business partnership of his grandfather and father utilizing the shop.

1925 probate record included an interest in the Pierce Engine as an item of personal property in the estate of Renak's grandfather. It also included as personal property the related line shafts and pulleys by which power generated by the Pierce Engine was distributed. That document is most near in time to the installation of the Pierce Engine and exhibits the parties' original intent. There is also the partial itemization of personal property that Renak created in the early 1970's which includes the Pierce Engine. Although the itemization was never given to anyone, it demonstrates Renak's continued treatment of the Pierce Engine as business and personal property.

¶11 We also conclude that the second part of the fixtures test is in Renak's favor. "Adaptation refers to the relationship between the chattel and the use which is made of the realty to which the chattel is annexed." *Premonstratensian Fathers*, 46 Wis. 2d at 370. Although the Pierce Engine was adapted for use in the shop as a power source, the use of the real estate was not dependent on the presence of the Pierce Engine or even the shop. The circuit court made this point when it recognized that the Feests did not purchase the realty for the purpose of utilizing the shop or continuing the machine repair business. They gave Renak lifetime use of the shop and then proceeded to dismantle the shop when he ceased to use it. So while it could be said that the Pierce Engine was adapted solely for use in the shop, it was not adapted to the real estate itself. The Pierce Engine is Renak's personal property.

By the Court.—Judgment affirmed.

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

