COURT OF APPEALS
DECISION
DATED AND FILED

March 29, 2007

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2006AP1971 **Cir. Ct. No. 2005CV1828**

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

UNIVERSITY OF WISCONSIN CREDIT UNION,

PLAINTIFF-APPELLANT,

V.

MIDDLETON MOTORS, INC.,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Dane County: RICHARD G. NIESS, Judge. *Affirmed*.

Before Dykman, Vergeront and Higginbotham, JJ.

¶1 VERGERONT, J. The primary issue on appeal is the date on which the University of Wisconsin Credit Union's security interest in a vehicle was perfected by Middleton Motors, Inc. The circuit court concluded that the security

interest was perfected in accordance with WIS. STAT. § 342.19(2) (2005-06)[1] on June 25, 2004, and granted summary judgment in favor of Middleton Motors. The Credit Union appeals. We agree with the circuit court that, based on the undisputed facts, Middleton Motors perfected the security interest in accordance with § 342.19(2) on June 25, 2004. We further agree that, as a result, the Credit Union is not entitled to damages under WIS. STAT. § 342.16(1)(a) and Middleton Motors did not breach its contract with the Credit Union and is entitled to dismissal of all claims. Accordingly, we affirm.

BACKGROUND

¶2 The following facts are not disputed. On June 14, 2004, Rachelle Schutt entered into a contract with Middleton Motors for the installment sale of a pickup truck. Pursuant to the contract, Schutt agreed to apply for and obtain purchase-money financing in the amount of $24,162.71. The contract granted any holder of the contract a security interest in Schutt's vehicle, a right to repossess the vehicle if Schutt defaulted on monthly payments, and, in the event of bankruptcy, the contract holder would become a secured creditor for purposes of distribution of the bankruptcy estate, all provided the security interest was properly perfected.

¶3 At the time of the sale, Middleton Motors had in place a "consumer paper purchase agreement" with the Credit Union (the Credit Union contract) pursuant to which Schutt's contract was assigned to the Credit Union. The Credit Union contract obligated Middleton Motors to "file and perfect all liens" and provided that in the event Middleton Motors "fails to perfect the lien associated

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

with any Consumer Paper within ninety (90) days from the payment of such Consumer Paper by UWCU, [Middleton Motors] agrees to repurchase such Consumer Paper from UWCU at the then current payoff amount of such Consumer Paper."

¶4 With respect to Schutt's vehicle, Middleton Motors submitted a "Wisconsin [T]itle & License Plate Application" on a Department of Transportation (DOT) form to DOT together with a check for $125.50, which corresponded to the total amount on the completed application listed for the title fee, loan filing fee, and license plate fee. The completed application itemized the fees as follows: title fee, $35; loan filing fee, $4; license plate fee, $86.50. Under "loan information," the completed application listed the Credit Union as the secured party, along with its address. DOT received the completed application on June 25, 2004.[2] A copy of the canceled check shows that the check was dated

[2] In its "Statement of Facts" section of its main brief on appeal, the Credit Union asserts that "[i]t is unknown when the application and check were received by [DOT]." However, the affidavit submitted in the circuit court by a Credit Union employee avers that "on or about June 25, 2004, Middleton Motors submitted to the Department" the application and a check for $125.50. In addition, Middleton Motors' proposed undisputed facts stated that "On June 25, 2004, the DOT received a completed Wisconsin [T]itle & License Plate Application for the Schutt vehicle … as evidenced by the date stamp in the upper left hand corner," and the Credit Union's reply to this proposed undisputed fact was "Not disputed." The circuit court therefore accepted Middleton Motors' proposal as an undisputed fact.

Generally, a party may not take a position on appeal contrary to one it has previously taken when the court has adopted that position. *See* ***State v. Gove***, 148 Wis. 2d 936, 943, 437 N.W.2d 218 (1989). If the Credit Union believed there was a genuine factual dispute as to when DOT received the completed application with the check, it was incumbent upon the Credit Union to make that argument and submit any supporting factual material in the circuit court, thus giving Middleton Motors a chance to argue and submit factual materials in response. *See* ***Gruber v. Village of N. Fond du Lac***, 2003 WI App 217, ¶27, 267 Wis. 2d 368, 671 N.W.2d 692. Finally, our review of the record reveals that although smudged, the stamp on the copy of the application that the owner of Middleton Motors submitted with his affidavit shows the date received as June 25, 2004. For all these reasons, we conclude it is undisputed that the completed application was received by DOT on June 25, 2004.

June 23, 2004, and the back shows it was cashed on July 1, 2004, and cleared on July 2, 2004.

¶5 DOT sent a letter to Schutt dated July 29, 2004, stating that an additional fee of $15 was due in order to "process your application" and asking her to send the amount. Fifteen dollars was listed in the letter as the amount for the "Special Plate Issuance Fee." The letter stated that "[e]arlier, we contacted Middleton Motors Inc. asking for the additional fees." By check dated August 4, 2004, Schutt paid the balance of $15. On August 7, 2004, DOT issued a "Confirmation of Security Interest (Lien) Perfection" listing the Credit Union as the secured party.

¶6 On October 1, 2004, Schutt filed for bankruptcy in ***In re Schutt***, No. 04-17031-7 (Bankr. W.D. Wis. Oct. 1 2004). In the related adversary proceeding, the complaint alleged: "[The Credit Union] failed to timely perfect its security interest in [Schutt's] Vehicle pursuant to WIS. STAT. § 342.19." The Credit Union subsequently filed a joint stipulation in which it agreed that "the [Credit Union] perfected its security interest in the Vehicle … on or about August 4, 2004 … within the ninety day preference period," and that the bankruptcy court could enter an order avoiding the security interest. Based on the stipulation, the bankruptcy court entered an order avoiding the security interest in Schutt's vehicle.[3] Pursuant to the stipulation, the bankruptcy trustee was permitted to sell Schutt's vehicle for

[3] Under 11 U.S.C. § 547(b)(4)(a) (2000) of the Bankruptcy Code, the trustee may avoid any transfer of interest of the debtor in property made on or within ninety days of the filing of the petition; however, under § 547(c)(3)(B), the trustee may not avoid a transfer that creates a security interest in property acquired by the debtor that is perfected on or before twenty days after the debtor receives possession of the property.

$12,700 and the Credit Union received $4,903.04 of the proceeds, with other creditors receiving the remainder.

¶7 The Credit Union filed a complaint alleging that Middleton Motors negligently and in violation of its contract with the Credit Union and WIS. STAT. § 342.19 failed to perfect the Credit Union's security interest in Schutt's vehicle by failing to remit the proper fees to DOT. This failure, the Credit Union alleged, caused the security interest to be a voidable preference under the U.S. Bankruptcy Code and thereby resulted in substantial financial loss to the Credit Union. The complaint asserted that Middleton Motors was liable under WIS. STAT. § 342.16 for the damages resulting in its failure to timely perfect the security interest.

¶8 The Credit Union moved for summary judgment and Middleton Motors opposed the motion, asserting that it was entitled to summary judgment. The circuit court concluded the material facts were undisputed and granted summary judgment in favor of Middleton Motors. The court decided that under WIS. STAT. § 342.19 the security interest was perfected once the application with the $4 fee was received by DOT. Based on the undisputed facts, the court concluded that this occurred no later than June 25, 2004. What DOT subsequently did with the application did not deprive the Credit Union of its secured status, the court stated, and the bankruptcy court's decision was not binding on Middleton Motors, which was not a party. Accordingly, the court held that Middleton Motors had neither violated WIS. STAT. § 342.16 nor breached its contract with the Credit Union.

DISCUSSION

¶9 On appeal the Credit Union challenges the court's construction and application of WIS. STAT. §§ 342.19(2) and 342.16(1)(a) and also contends the court erred in concluding there was no breach of contract and no negligence.

¶10 We review de novo the grant and denial of summary judgment, employing the same methodology as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 314-15, 401 N.W.2d 816 (1987). Summary judgment is proper when there are no issues of material fact and one party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).

¶11 We address first the question of the proper construction and application of WIS. STAT. §§ 342.19(2) and 346.16(1)(a). When we construe a statute, we begin with the language of the statute and give it its common, ordinary, and accepted meaning, except that technical or specially defined words are given their technical or special definitions. ***State ex rel. Kalal v. Circuit Court for Dane County***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. We interpret statutory language in the context in which it is used, not in isolation but as part of a whole, in relation to the language of surrounding or closely related statutes, and we interpret it reasonably to avoid absurd or unreasonable results. ***Id.***, ¶46. We also consider the scope, context, and purpose of the statute insofar as they are ascertainable from the text and structure of the statute itself. ***Id.***, ¶48. If, employing these principles, we conclude the statutory language has a plain meaning, we apply the statute according to that plain meaning. ***Id.***, ¶47. If, on the other hand, the statutory language is ambiguous—that is, capable of being understood by reasonably well-informed persons in two or more senses—then we

may employ sources extrinsic to the statutory text to resolve the ambiguity. ***Id.***, ¶¶47, 50.

¶12 WISCONSIN STAT. § 342.19 governs the perfection of security interests in motor vehicles. Section 342.19(2) provides that, with an exception not applicable here, a security interest is perfected

> by the delivery to [DOT] of the existing certificate of title, if any, an application for a certificate of title containing the name and address of the secured party, and the required fee. It is perfected as of the later of the time of its delivery or the time of the attachment of the security interest.

This procedure is the exclusive method for perfecting security interests subject to WIS. STAT. ch. 342, with certain exceptions not applicable in this case. WIS. STAT § 342.24. *See also* ***Milwaukee Mack Sales, Inc. v. First Wis. Nat'l Bank***, 93 Wis. 2d 589, 595, 287 N.W.2d 708 (1980). The fee that must be paid DOT for "the original notation of … each security interest noted upon a certificate of title …" is $4. WIS. STAT. § 342.14(2).

¶13 Because in this case the security interest attached on June 14, 2004,[4] the Credit Union's security interest was perfected at "the time of … delivery" to DOT of the items specified in WIS. STAT. § 342.19(2).

¶14 The Credit Union mixes two arguments in challenging the court's construction and application of this statute to the undisputed facts. Its primary

[4] Under WIS. STAT. § 409.203(1), the security interest "attaches" to the collateral when it is "enforceable against the debtor." It is enforceable when: (1) value has been given; (2) the debtor has rights in the collateral; and (3) the debtor has authenticated a security agreement that provides a description of the collateral. *See* § 409.203(2); ***National Exchange Bank of Fond du Lac v. Mann***, 81 Wis. 2d 352, 357-58, 260 N.W.2d 716 (1978). The security interest in Schutt's vehicle attached on June 14, 2004, when the transaction took place and the sales and security agreement was signed by Schutt and a dealer representative.

argument appears to be that we cannot assume that the $125.50 included the $4 fee for the security interest, and the $15 amount still due could just as well have included the $4 loan fee. However, this position is as odds with the undisputed facts.

¶15 The completed application plainly listed "loan filing fee: $4.00" as included in the $125.50 "fee total." Middleton Motors' proposed undisputed facts included these two: "[o]n or about June 14, 2004, Middleton Motors submitted paperwork to the DOT together with check for $125.50 for title, loan and registration of [Schutt's vehicle]…"; and "[t]he Wisconsin [T]itle & License Plate Application submitted to the DOT by Middleton Motors itemized fees included with such submission to include a $35 title fee and a $4 Loan File Fee." In reply, the Credit Union disputed the June 14 date, but not the rest of that proposed fact; and it stated that it did not dispute the second proposed fact. Therefore, the circuit court concluded that it was undisputed that the $125.50 check was "for title, loan and registration…."

¶16 If the Credit Union intends now to argue that, in spite of the Credit Union's designation of what the $125.50 was for, DOT could properly apply the $4 for the loan fee to another fee that remained unpaid, there are no factual submissions from which one could infer that DOT did so, and no developed legal argument that it had the authority to do so. For the same reasons we have identified *supra* in footnote 2, we will not consider an argument that is at odds with facts the Credit Union has already conceded are undisputed or that relies on facts the Credit Union did not support with proper submissions in the circuit court. *See* WIS. STAT. § 802.08(2).

¶17 The Credit Union also makes a cursory argument that "the required fee" in WIS. STAT. § 342.19(2) refers to all required fees, not just the $4 fee to have the security interest noted. We understand the Credit Union to be contending that "the required fee" therefore includes the $15 even if it was for the "Special Plate Issuance Fee." Thus, according to the Credit Union, the security interest was not perfected until after DOT received that fee, which was not until at least August 4, 2004, the date on Schutt's check for the $15. The August 4 date, we observe, is later than July 3, 2004, which began the ninety-day voidable preference period under bankruptcy law for Schutt's bankruptcy petition filed on October 1 and more than twenty days after Schutt took possession of the vehicle. *See supra* at footnote 3.

¶18 We begin with the language of WIS. STAT. § 342.19(2). We conclude that, at a minimum, the phrase "the required fee" plainly includes the $4 fee required for security interests, because that is the subject of § 342.19 in general and § 342.19(2) in particular. We next observe, although neither party argues this, the term might also be reasonably interpreted to include, in addition to the security interest fee, the fee required for an application for a certificate of title. This may be a reasonable interpretation because that application is required by § 342.19(2) and the $4 fee is for a security interest "noted upon a certificate of title." WIS. STAT. § 342.14(2). However, we need not resolve in this case whether this construction is reasonable, or the most reasonable, because it is undisputed that Middleton Motors included in its $125.50 check a title fee of $35, which is the amount required for a certificate of title. *See* § 342.14(1) and (3m). Instead, we move on to the Credit Union's proposed construction—that "the required fee" in § 342.19(2) includes the $15 for a special plate issuance fee.

¶19 The Credit Union does not provide a developed argument in support of its proposed construction. The various fees listed in WIS. STAT. § 342.14 relate to certificates of title and security interests. They do not include registration fees, which are covered in WIS. STAT. ch. 341, subchapter II.[5] The Credit Union does not explain why it is reasonable to read "the required fee" in WIS. STAT. § 342.19(2) to include a fee required in another chapter that has no apparent connection with either the certificate of title or the security interest. The Credit Union points out that WIS. STAT. § 342.11 permits DOT to "refuse issuance of a certificate of title if any required fee has not been paid…." However, the Credit Union provides no explanation for why "any required fee" in this section reasonably includes registration fees in another chapter or how, whatever the meaning of § 342.11, it bears on the meaning of "the required fee" under § 342.19(2). Finally, the Credit Union relies on the fact that DOT did not process the application until it received the $15. However, the Credit Union does not explain, using principles of statutory construction, why this is relevant to the meaning of "the required fee" in § 342.19(2).

¶20 Based on the Credit Union's arguments, we conclude it is not reasonable to read "the required fee" in WIS. STAT. § 342.19(2) to include the special plate issuance fee. Therefore, we need not decide whether the term means only the security interest fee or, in addition, the certificate of title application fee. It is undisputed that the application for a certificate of title containing the name and address of the secured party, along with the fee for the application and the fee for the security interest was received by DOT on June 25, 2004. Therefore, under

[5] The special plate issuance fee of $15 is required by WIS. STAT. § 341.14(6r)(b)2.

either reasonable construction of the term, based on the undisputed facts the Credit Union's security interest was perfected on that date.

¶21 Because the security interest was perfected on June 25, 2004, the Credit Union is not entitled to damages under WIS. STAT. § 342.16(1)(a). This subsection imposes certain obligations upon a dealer who transfers title to another person, including:

> The dealer shall promptly execute the assignment and warranty of title, showing the name and address of the transferee and of any secured party holding a security interest created or reserved at the time of the resale or sale on consignment, in the spaces provided therefor on the certificate or as the department prescribes. Within 7 business days following the sale or transfer, the dealer shall process the application for certificate of title, and within the next business day after processing the application, the dealer shall mail or deliver the original application for certificate and all associated materials required by the department to the department.

The subsection further provides: "The dealer is liable for any damages incurred by the department or any secured party for the dealer's failure to perfect a security interest which the dealer had knowledge of at the time of sale." ***Id.*** Not only was the security interest perfected in this case, it was perfected on June 25, 2004, well before the ninety-day voidable preference period and within twenty days of the sale. *See supra* at note 3. Therefore, based on the undisputed facts, any loss the Credit Union suffered because of the stipulated order avoiding its security interest

was not caused by Middleton Motors' failure to perfect a security interest within those timeframes.[6]

¶22 We next turn to the Credit Union's argument that the circuit court erroneously dismissed its contract and negligence claims. On appeal the Credit Union does not present a developed argument on its breach of contract claim. The contract requires Middleton Motors to perfect the security interest and it did. The Credit Union points to no provision in the contract that requires Middleton Motors to perfect the security interest sooner than it did.

¶23 The Credit Union's argument on its negligence claim is similarly undeveloped. The Credit Union made no separate argument on this claim in the circuit court. We assume this is why the court did not separately address this issue in its decision. On appeal the Credit Union appears to argue that, even if the security interest was perfected on June 25, 2004, Middleton Motors was negligent in not sending in the $15 and this delayed the application for registration and issuance of a certificate of title. The Credit Union does not provide an analysis based on the elements of a negligence claim: (1) duty of care; (2) breach of that

[6] In its reply brief, the Credit Union argues that Middleton Motors violated WIS. STAT. § 342.16(1)(a) because it failed to submit the application to DOT within seven business days of the transaction. (We note that the "seven business days from the sale or transfer" applies to the requirement that "the dealer process the application for certificate of title" and that "within the next business day after processing the application, the dealer shall mail or deliver the original application for certificate and all associated materials required by the department to the department." Section 342.16(1)(a).) The Credit Union did not make this argument in the circuit court or in its main brief. We do not generally address issues raised for the first time in the reply brief. ***Schaeffer v. State Personnel Comm'n***, 150 Wis. 2d 132, 144, 441 N.W.2d 292 (Ct. App. 1989). We decline to do so here, particularly because this argument was not raised in the circuit court and there might well have been additional factual submissions from Middleton Motors in response to this argument. *See* ***Gruber***, 267 Wis. 2d 368, ¶27. We add that, in any event, the Credit Union does not explain how any violation of any time period in the statute caused the Credit Union damages.

duty; (3) causal connection between the breach and the plaintiff's injury; and (4) actual loss or damages resulting from the injury. *See* ***Gritzner v. Michael R.***, 2000 WI 68, ¶19, 235 Wis. 2d 781, 611 N.W.2d 906.

CONCLUSION

¶24 We conclude that, based on the undisputed facts, Middleton Motors perfected the security interest in accordance with WIS. STAT. § 342.19(2) on June 25, 2004. Therefore, the Credit Union is not entitled to damages under WIS. STAT. § 342.16(1)(a). We also conclude that Middleton Motors did not breach its contract with the Credit Union and it is entitled to dismissal of all claims. Accordingly we affirm.

By the Court.—Judgment affirmed.

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