COURT OF APPEALS
DECISION
DATED AND FILED

April 10, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP1796 **Cir. Ct. No. 2005CV8235**

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

SHEILA WARREN,

PLAINTIFF-APPELLANT,

V.

FARMERS INSURANCE EXCHANGE,

DEFENDANT-RESPONDENT,

CHAUNCEY O. ERBY,

DEFENDANT.

APPEAL from a judgment of the circuit court for Milwaukee County: MICHAEL GUOLEE, Judge. *Affirmed.*

Before Wedemeyer, P.J., Curley and Kessler, JJ.

¶1 CURLEY, J. Sheila Warren appeals the grant of summary judgment to Farmers Insurance Exchange (Farmers). Warren was injured in an

automobile accident caused by Chauncey O. Erby (Chauncey), and this appeal arises out of Warren's subsequent lawsuit, alleging that Chauncey was covered by his mother's insurance policy from Farmers. Warren contends that summary judgment should not have been granted because a jury could infer that Chauncey was not the owner of the vehicle he was driving or that Chauncey did not have "regular" use of the vehicle, and was thus covered by the policy. We are satisfied that the record establishes that Chauncey was an owner of the vehicle, precluding coverage under the policy and eliminating any genuine issues of material fact. We therefore need not address whether Chauncey had regular use of the vehicle and affirm.

I. BACKGROUND.

¶2 On or about January 25, 2005, Chauncey and his cousin, Wayne Erby (Wayne), both aged eighteen, were standing on a street corner when Derek Treadwell drove up in a 1989 Chevrolet Celebrity, and offered to sell them the car for $125. Wayne knew Treadwell because he and Treadwell had previously lived in the same neighborhood and Wayne was aware that Treadwell had had the car for sale for some time. Chauncey and Wayne decided to purchase the car. According to both Chauncey and Wayne, Wayne contributed $75 and Chauncey contributed $50. Chauncey later testified that Treadwell gave him and Wayne the keys and title to the car, but that Treadwell did not fill out or sign the title certificate. Chauncey and Wayne provided different accounts as to what happened next. According to Chauncey, the three then entered the car and he and Wayne dropped Treadwell off at an unknown location. According to Wayne, he and Treadwell drove to pick up the title certificate, Treadwell entered his (Wayne's) name on the title, and they then drove back to where Chauncey was, picked him up and then dropped Treadwell off.

¶3 At the time of the incident, Chauncey resided with his mother, Jacqueline Erby (Jacqueline). According to Chauncey, after he and Wayne purchased the car, they stored it in his mother's garage until approximately January 28, 2005, because the car's brakes needed to be repaired. During this time, Chauncey maintained possession of the title. Chauncey later testified that his mother did not know that he had purchased a car, and that he lied to her and told her the car was Wayne's. He also testified that his mother likely did not know the car was in the garage. On approximately January 28, Wayne's father, Wayne Erby, Sr., repaired the car's brakes. Chauncey paid for the new parts. Following the repair, Chauncey and Wayne each drove the car a few times.

¶4 On January 31, 2005, Chauncey was driving the car on West Center Street near the intersection of North 9th Street in Milwaukee. At the same time, Warren was crossing West Center Street on foot. Chauncey struck Warren and Warren was seriously injured. It is undisputed that Chauncey's negligence was the cause of the accident.[1]

¶5 Following the accident, Chauncey ripped up and threw away the title to the car. He later testified that he did so because he felt the document was worthless as he knew he would not get the car back after the accident due to the extensive damage it had sustained. He also testified that at no time after the transaction did he take steps to officially change title of the car into his name, that he realized for purposes of the State's records the car was still in Treadwell's name, and that he was not surprised that the State contacted Treadwell following

[1] Chauncey fled the scene after the accident and criminal charges were filed by the State in an unrelated case.

the accident. He also testified that he and Wayne considered the car theirs because they had both the title and the keys to the car.

¶6 On February 8, 2005, upon learning of the accident, Treadwell applied for a replacement title to the car. On August 4, 2005, Treadwell filed an affidavit that in some respects is inconsistent with Chauncey's and Wayne's versions of the events. Treadwell stated that he sold the car to Chauncey and Wayne on December 24, 2004, rather than at the end of January, that only Wayne was present during the transaction, but that both Chauncey and Wayne contributed money to the car. He also stated that he sold the car for $150, not $125, and that he entered Wayne's name on the title.

¶7 At the time of the accident, Jacqueline had an automobile insurance policy through Farmers. As relevant, the policy provides coverage for Jacqueline, and for family members who are residents in her household, when driving "any **private passenger car**, **utility car**, or **utility trailer**" owned by someone else, as long as the vehicle is used with "sufficient reason to believe that the use is with the permission of the owner" (bolding in original). Exclusion 10 of the policy, however, excludes coverage for "**Bodily injury** or **property damage** arising out of the ownership, maintenance or use of any vehicle … which is owned by or furnished or available for regular use by you or a **family member**" (bolding in original).

¶8 On September 14, 2005, Warren sued Chauncey and Farmers, alleging that Chauncey was covered under Jacqueline's insurance policy because at the time of the accident he was operating a non-owned vehicle and was a resident of his mother's household. Farmers eventually moved for summary judgment, and the trial court heard the motion on June 5, 2006. Warren argued

that there were enough inferences to show that the vehicle was neither owned by Chauncey nor available to him, and thus, was covered by the policy. The trial court disagreed, finding instead that:

> [The car] was at his residence, he had the keys, he was experiencing domain over that car. There were questions about purchasing things for repairing the vehicle. He kept the title. The sale occurred before the accident. Possession was transferred. It is clear under these facts that Chancy [sic] was I think without doubt an owner under the facts. And if he wasn't technically an owner, this vehicle was furnished and available for his regular use, and, therefore, it is not covered by his mother's policy.

The trial court therefore concluded that there was no coverage as a matter of law and granted summary judgment to Farmers. This appeal follows.

II. ANALYSIS.

¶9 We review a summary judgment *de novo*, using the same methodology as the trial court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Summary judgment is appropriate if the "depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08(2) (2003-04).[2]

¶10 We must first determine if the pleadings set forth a claim for relief. ***Trinity Evangelical Lutheran Church & School-Freistadt v. Tower Ins. Co.***, 2003 WI 46, ¶32, 261 Wis. 2d 333, 661 N.W.2d 789. If such a claim is set forth,

[2] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

and the moving party has established a *prima facie* case for summary judgment, "we examine the record to determine whether there 'exist[s] disputed material facts, or undisputed material facts from which reasonable alternative inferences may be drawn, sufficient to entitle the opposing party to a trial.'" ***Id.*** (quoting ***Grams v. Boss***, 97 Wis. 2d 332, 338, 294 N.W.2d 473 (1980)). All reasonable inferences must be viewed in the light most favorable to the non-moving party. ***Grams***, 97 Wis. 2d at 339.

¶11 The burden is on the moving party to prove that there are no genuine issues of material fact. ***Strasser v. Transtech Mobil Fleet Serv., Inc.***, 2000 WI 87, ¶31, 236 Wis. 2d 435, 613 N.W.2d 142. "An issue of fact is genuine if a reasonable jury could find for the nonmoving party." ***Marine Bank v. Taz's Trucking, Inc.***, 2005 WI 65, ¶12, 281 Wis. 2d 275, 697 N.W.2d 90. A fact is material if it would influence the outcome of the controversy. ***Id.***

¶12 The issue before us is whether a genuine issue of material fact exists as to whether Chauncey was the owner of the car. Warren contends that one does exist because "a jury could infer that Chauncey Erby was not an owner of the automobile," and thus was covered by the policy. We disagree.

¶13 Warren first points to factual inconsistencies between Chauncey's version of the events and the versions recounted by Treadwell and Wayne in their affidavits in an effort to undermine the credibility of all three. She claims Chauncey's testimony that he and Wayne dropped Treadwell off somewhere but could not remember whether the location was on the north or south side of the city "detracts from his credibility as to whether Chauncey was in fact involved in this transaction." She contends that "[t]he discrepancy in the alleged date of purchase is very material," claiming that because Chauncey stated that the transaction

occurred around January 25, while Treadwell stated that it occurred on December 24, a jury could infer that the sale took place on December 24, that only Wayne was present, that only Wayne gave Treadwell money, and that only Wayne's name was placed on the title. According to Warren, "[t]here would be a serious question of just where the vehicle was between December 24th and January 25th," and a jury could infer that for thirty days the vehicle was in the possession of Wayne only. She also refers to Chauncey's deposition testimony in which he admitted that he had lied to his mother and told her that the car he was driving was Wayne's and maintains that "[t]hat testimony standing alone would be enough to create a jury question as to who was the true owner of the vehicle at the time of the accident."

¶14 Even though the versions told by Chauncey, Wayne and Treadwell differ somewhat, none of the differences amount to material disparities for purposes of whether a sale took place. Despite the inconsistencies in how much money exchanged hands—Chauncey and Wayne remembering the purchase price as $125, Treadwell remembering it as $150—all three agreed that Treadwell sold the car to Chauncey and Wayne. In fact, Treadwell specifically stated in his affidavit that despite his recollection that only Wayne was present, both Chauncey and Wayne contributed money toward the purchase of the car. Likewise, despite disputes about the exact moment Treadwell handed over the title, and inconsistent versions of whose name, if anyone's, was entered on the title—Wayne remembering that he and Treadwell drove to get the title, Chauncey testifying that Treadwell gave them the title on the street corner, and Wayne and Treadwell saying Wayne's name was written on the title and Chauncey saying no one's was—all three stated under oath that when Chauncey and Wayne received the keys to the car, they also received the car's title certificate. There appears to be no

dispute about the fact that Chauncey maintained possession of the title after the purchase and ripped it up and threw it away after the accident. It also appears clear that Chauncey paid for the parts used to repair the car and the car was stored in Chauncey's mother's garage.[3] These facts further support the notion that Chauncey indeed became the owner of the car after he and Wayne bought it from Treadwell. Based on the foregoing, it is clear that the fact that Chauncey admitted that he had lied to his mother and told her that the car was Wayne's does not create a jury question. Similarly, Chauncey's failure to recall where he and Wayne dropped Treadwell off does not present a genuine issue of material fact. Where Treadwell was dropped off and whether Chauncey could recall the location are of no significance in assessing whether Treadwell sold Chauncey and Wayne the car and thus do not influence the outcome of the controversy.

¶15 The discrepancy in the date is also hardly material. Warren's speculation about where the car was for thirty days is irrelevant because it does not detract from the core fact, agreed upon by all three parties involved, that Chauncey and Wayne *together* purchased the car. No reasonable jury could infer, as Warren would have us believe, that Wayne purchased the car without Chauncey's knowledge and had possession of the car thirty days before Chauncey had access to it. The discrepancy in the date reflects only that someone incorrectly recalled a

[3] Warren also points to Chauncey's testimony that the car was kept in his mother's garage between the purchase and the accident because the brakes required repair and because the car was not registered, and that his mother probably was unaware that the car was in the garage. Warren then questions Jacqueline's unawareness of the vehicle, insisting that "a jury could certainly conclude that it was highly unlikely that his mother would not notice a strange automobile in her garage during that entire period of time." Warren, however, ignores the affidavit submitted by Jacqueline, in which she stated that, for convenience and safety reasons, she does not park her car in the garage, which is located in an alley, but prefers to park it on the street. In light of Jacqueline's affidavit, it is perfectly reasonable to conclude that the car was in her garage and she was unaware of this fact.

date, and does not influence the resolution of the case. It is, however, significant that all three, including Wayne, who remembered only that the transaction took place during the winter, agreed that it took place prior to the accident.

¶16 Moreover, it is hardly surprising that, more than eight months after the accident, the three versions of how the transaction took place were not identical. Regardless, all three versions undoubtedly establish that Treadwell sold the car to Chauncey and Wayne.

¶17 Warren nevertheless still challenges the conclusion that Chauncey ever actually had the title to the car and points to Chauncey's testimony that he was in no rush to get the title transferred to his name, and that, after the accident, "for some reason, he 'just ripped up title up and threw it away, because I know they (the police) wouldn't give me my car back.'" Warren insists that Chauncey's failure to transfer title of the vehicle to his name or obtain license plates violates WIS. STAT. § 342.15,[4] the transfer of title statute. She concedes that under ***Bacheller v. Employers Mutual Insurance Co.***, 93 Wis. 2d 564, 573, 290 N.W.2d 872 (1980), "endorsement and delivery of the title certificate are not essential

[4] WISCONSIN STAT. § 342.15(2) provides in part:

> **(2)** … the transferee shall, promptly after delivery to him or her of the vehicle, execute the application for a new certificate of title in the space provided on the certificate or as the department prescribes, and deliver or mail the certificate and application to the department. A salvage vehicle purchaser shall comply with s. 342.065(1)(a).
>
> **(3)** … a transfer by an owner is not effective until the provisions of this section have been complied with. An owner who has delivered possession of the vehicle to the transferee and has complied with the provisions of this section is not liable as owner for any damages thereafter resulting from operation of the vehicle.

conditions for a transfer of a motor vehicle to occur," but maintains that because the fee for obtaining vehicle license plates is $55 and the vehicle title fee for new or transferred title is $45, "[a] jury could infer that Chauncey never intended at any time to comply with the law and obtain a title and license plates for a vehicle that he supposedly paid $50 for." According to Warren, because Treadwell applied for a replacement title and license plates on February 8, 2005, a jury could also infer "that Treadwell always considered himself the owner of the vehicle, since it was returned to him and there is no proof that he ever returned any money to either Chauncey or Wayne, or made any attempt to return the vehicle to them."[5]

¶18 Warren's conclusion regarding Chauncey's alleged intent not to obtain title and license plates for the vehicle, based on the price he and Wayne paid for the car, relative to the cost of registering the car, are purely speculative—particularly given that the car needed repairs and they had, according to Chauncey, had the car for less than a week at the time the accident took place. Chauncey himself also testified that and he and Wayne had indeed intended to register the car. However, as Warren candidly acknowledges, whether Chauncey ever intended to register the car does not imply that title had not already been transferred to him. ***Bacheller*** makes clear that "[t]he title certificate is only evidentiary," ***id.*** at 573b-73c, and "[w]here it has been endorsed and delivered, a conclusive presumption arises, as provided in sec. 342.15(3), that ownership was

[5] Warren also faults the trial court for allegedly "ma[king] no detailed analysis of any of the facts in this case, or inferences to be drawn therefrom, and cites no Wisconsin appellate decision," and for "ma[king] no reference whatsoever in its decision concerning the many material discrepancies in the evidence, not even commenting on the fact that Chauncey Erby admitted that he lied to his mother about who was allegedly the owner of the vehicle in question." As noted, our review of summary judgment is *de novo*, ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987), and we therefore need not address the trial court's reasoning.

transferred," ***id.*** at 573c; however, "where it has not been endorsed and delivered, *the intent and conduct of the parties govern*," ***id.*** (emphasis added).

¶19 Here, although it is unclear whether Treadwell actually endorsed the title certificate by filling in a name and signing it himself, even assuming that he did not, all three parties to the transaction intended for a sale to take place and agreed that one in fact took place: they agreed upon a sale price, Chauncey and Wayne paid Treadwell that sum and received the car, the keys and the car's title. The conclusions that the parties intended to transfer title is further supported by the fact that neither Chauncey nor Wayne had ever purchased a car before, and Chauncey testified that he was concerned about only receiving the title and did not know it had to be signed.

¶20 This conclusion is not altered by Warren's suggestion that Treadwell still considered himself the owner of the car because he applied for a replacement title after the accident. Warren's argument begs the question why Treadwell would need to apply for a replacement title if he was still the owner of the car. The logical answer is because he did give Chauncey and Wayne the title when he sold them the car. As discussed at Chauncey's deposition, the only reason Treadwell applied for a replacement title was that after the accident the police contacted him and advised him that he was still listed as the car's registered owner. The record is unclear as to why he felt the need to apply for a replacement title or what he intended to do with it, but such speculation is irrelevant because we agree with Farmers that the application confirms that Treadwell did not have title to the car at the time of the accident. No reasonable jury could infer that Treadwell thought he still owned the car, in light of the transaction that all three agreed took place. However, even assuming that Treadwell had, by applying for a replacement title, somehow thought he was the owner of the car, his sworn

affidavit, submitted seven months after the replacement title application, detailing his recollection of the transaction, unequivocally states that he sold the car outright to Chauncey and Wayne. Treadwell's affidavit directly refutes any argument that he thought he owned the car at the time of the accident.

¶21 Therefore, we are satisfied that no reasonable jury could conclude that Chauncey was not the owner of the car at the time of the accident. As a result, coverage under Jacqueline's insurance policy was precluded as a matter of law.

¶22 Finally, Warren also submits that the alternative grounds for the trial court's conclusion, that even if Chauncey was not an owner of the vehicle, he would still be excluded from coverage because he had "regular use" of the vehicle, also fails because the jury could infer that Chauncey did not have "regular" use of the vehicle. Because we have already concluded that Chauncey was an owner of the vehicle, and he is therefore precluded from coverage by his mother's policy, we need not address the trial court's alternative reason. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W.2d 663 (1938) (unnecessary to decide non-dispositive issues).

¶23 Accordingly, we are satisfied that the trial court properly granted summary judgment in favor of Farmers. Consequently, we affirm.

By the Court.—Judgment affirmed.

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