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STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2328

Daniel Pawelk,
Appellant,

vs.

R & B Pit Pumping, Inc.,
Respondent.

Filed November 18, 2008
Affirmed
Harten, Judge*

Wright County District Court
File No. 86-CV-06-646

James B. Fleming, Fleming Law Offices, P.A., 113 Locust Street, P.O. Box 1569, Monticello, MN 55362 (for appellant)

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Considered and decided by Kalitowski, Presiding Judge; Halbrooks, Judge; and Harten, Judge.

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* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D   O P I N I O N

HARTEN, Judge

Appellant Daniel Pawelk challenges the judgment for respondent R & B Pit Pumping, Inc., arguing that the district court erred in concluding that no bailment existed between the parties. Because the findings of fact support this conclusion, we affirm.

FACTS

In September 2005, appellant, a dairy farmer, arranged with respondent to pump out the manure pit on appellant's farm. Respondent normally used his customers' tractors in the process of pumping out their manure pits; the tractors were attached to metal agitators that were backed into the pit and powered by the tractors. Ron Boogaard, respondent's principal, asked appellant to use two of appellant's tractors. Appellant agreed, but he and Boogaard disagreed over the placement of appellant's John Deere tractor. Appellant wanted it put on a cement ramp east of the manure pit, while Boogaard wanted to put it on an earthen embankment southwest of the pit.

Appellant's son used the John Deere tractor for farm chores every afternoon. The day of the pumping, appellant told his son that, when he finished, he should park the tractor near respondent's equipment. One of respondent's employees, seeing it parked there, moved it to the earthen embankment.

Appellant's son saw the tractor on the embankment and told appellant. Appellant then directed his son to go to the pit and tell respondent to get the tractor off the embankment. Appellant's son testified that he went to the pit and walked toward the

tractor, intending to move it himself. As he approached the tractor, he saw it slide backwards into the pit.

Appellant and Boogaard disagreed as to what should be done. Boogaard wanted to let the tractor continue running, but appellant insisted it be turned off. Boogaard entered the pit and turned off the tractor. Efforts to remove the tractor were unsuccessful until about 4:00 a.m., when much of the pit had been pumped out. Later that morning, Boogaard called a John Deere mechanic to inspect the tractor, at respondent's expense. Boogaard also offered either to have respondent's employees clean the tractor or to have it cleaned professionally. Appellant rejected both offers, saying he wanted a new tractor. Boogaard also proposed to test the tractor's parking brake, but appellant refused.

Appellant brought this action and narrowed it to seek relief solely on the basis of a bailment relationship. Following a bench trial, the district court determined that the transaction involving the tractor had not been a bailment and that appellant was not entitled to recover damages. Appellant challenges that determination.

D E C I S I O N

> In an appeal from a bench trial, we do not reconcile conflicting evidence. We give the district court's factual findings great deference and do not set them aside unless clearly erroneous. However, we are not bound by and need not give deference to the district court's decision on a purely legal issue. When reviewing mixed questions of law and fact, we correct erroneous applications of law, but accord the [district] court discretion in its ultimate conclusions and review such conclusions under an abuse of discretion standard.

Porch v. Gen. Motors Acceptance Corp., 642 N.W.2d 473, 477 (Minn. App. 2002) (quotations and citations omitted), *review denied* (Minn. June 26, 2002).

A bailment requires: (1) delivery without transfer of ownership; (2) express or implied acceptance; and (3) express or implied agreement that the item be returned. *Kampsen v. Kandiyohi County*, 426 N.W.2d 917, 920 (Minn. App. 1988), *aff'd*, 441 N.W.2d 103 (Minn. 1989).

> As applied to automobiles, the difference between a mere bailment relation and that of master and servant is the distinction between a mere permissive use and a use which is subject to the control of the master and connected with his affairs. A bailment entails such a complete surrender of control by the owner that he may thereafter become a mere guest in his own automobile.

Frankle v. Twedt, 234 Minn. 42, 47, 47 N.W.2d 482, 487 (1951) (citations omitted); *see also Tschida v. Dorle*, 235 Minn. 461, 469, 51 N.W.2d 561, 566 (1952) (person who borrowed brother's motorcycle was in bailor-bailee relationship with brother, who relinquished control over motorcycle, whereas passenger whom person permitted to drive the motorcycle and rode behind him, was in a master-servant or a principal-agent relationship with person, who had not relinquished control); *Prod. Credit Ass'n v. Fitzpatrick*, 385 N.W.2d 410, 412 (Minn. App. 1986) (bailment relationship found between owner of grain storage bin and owner of grain because bin owner "maintained exclusive control of the grain bin, and absent a court order, he excluded [grain owner and his assignee] from taking the [grain] prior to their paying storage costs").

Relying on these cases, the district court concluded that appellant and respondent were not in a bailment relationship because appellant was available and able to control the tractor and told respondent when and how the tractor was to be used, both before and after it went into the pit. The evidence supports the district court's conclusion. Appellant

never ceded exclusive control of the tractor to respondent; the tractor was "subject to the control of [appellant] and connected with his affairs." *Frankle*, 234 Minn. at 47, 47 N.W.2d at 487. Appellant orally directed that the tractor was to be positioned on the concrete ramp at the east end of the pit; appellant said that it was to be turned off when it was in the pit; appellant provided chains with which to extract it; appellant agreed with respondent that the pumping would need to be almost complete before the tractor could be safely extracted; appellant refused to have the tractor cleaned by respondent or by a professional; and appellant refused to have the tractor's parking brake tested.

Appellant argues that, because he said that the tractor was to be placed on the cement ramp and it was placed on the embankment, he did not have control over it. The district court noted that "there was conflicting testimony regarding whether or not [appellant] ultimately agreed to [having respondent] park the . . . tractor on the earthen embankment[.]" But appellant's son testified that, when the tractor slid into the pit, he was approaching the tractor with the intent to move it himself from the embankment where respondent had put it. Clearly, appellant had not given respondent exclusive control of the tractor.

The district court did not err in concluding that no bailment existed between the parties and in ordering judgment for respondent.

Affirmed.