COURT OF APPEALS
DECISION
DATED AND FILED

October 24, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 01-0236

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

BERNHARD TRIVALOS,

PLAINTIFF-APPELLANT,

V.

F.H. RESORT LIMITED PARTNERSHIP,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Manitowoc County: PATRICK L. WILLIS, Judge. *Affirmed*.

Before Nettesheim, P.J., Brown and Anderson, JJ.

¶1 ANDERSON, J. Bernhard Trivalos appeals from a judgment of the trial court dismissing his claim of negligent bailment and conversion. Because we agree with the trial court that F.H. Resort Limited Partnership (Fox Hills) did not breach its bailment obligation with regard to Trivalos's trailer and because no

evidence was provided to show that Fox Hills converted Trivalos's trailer or his two deep-fat fryers, we affirm.

¶2 The role of an appellate court in reviewing the evidence presented in a bench trial is limited by statute. WISCONSIN STAT. § 805.17(2) (1999-2000)[1] provides that in all actions tried without a jury, "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." A trial court's findings of fact are not clearly erroneous unless contrary to the great weight and clear preponderance of the evidence. ***State v. Knight***, 168 Wis. 2d 509, 514 n.2, 484 N.W.2d 540 (1992). Also, as a general rule, the existence of negligence is a question of fact that is to be decided by the trier of fact. ***Ceplina v. S. Milwaukee Sch. Bd.***, 73 Wis. 2d 338, 342, 243 N.W.2d 183 (1976).

¶3 We review the facts presented to the trial court to make the determination in question. Trivalos was hired by Fox Hills in 1997 as its food and beverage director. In October 1997, Trivalos agreed to sell a restaurant-equipped trailer to Fox Hills for the purchase price of $16,009.10. Trivalos and several Fox Hills employees then brought the trailer to Fox Hills. The trailer remained at Fox Hills for the duration of Trivalos's employment with Fox Hills. In March 1998, Trivalos left his employment with Fox Hills; at that time, Trivalos had not yet received payment from Fox Hills for the trailer.

¶4 Four months later, Trivalos filed a complaint claiming that Fox Hills did not pay for the trailer and seeking relief in the amount of the original sale price

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

of $16,009.10. Eventually, the parties reached an agreement in which Fox Hills would return the trailer to Trivalos and issue him a payment of $3250 (assumedly to compensate Trivalos for its use). Fox Hills issued a check to Trivalos in the amount of $3250 with the understanding that Trivalos would remove the trailer. Trivalos did not pick up the trailer because before doing so, he had it inspected and discovered that two deep-fat fryers, which he thought were in the trailer at the time of the agreement, were missing.

¶5 From the record, we gather that the information regarding the missing deep-fat fryers and the settlement agreement were presented to the trial court at pretrial on October 25, 1999. The trial court then ordered a partial dismissal of Trivalos's claim. The only part of the claim that remained was the claim that two deep-fat fryers from the trailer were wrongfully converted by Fox Hills.

¶6 However, Trivalos was allowed to amend his claim after being informed by Fox Hills on December 29, 1999, that the trailer was missing and that Fox Hills did not have knowledge as to its whereabouts. In Trivalos's amended complaint, he again claimed that Fox Hills did not pay for the trailer but, unlike in his original claim, he did not ask for relief in the amount of $16,009.10, the original sale price. Instead, he asked for judgment in "an amount equal to the fair market value of the trailer effective October 25, 1999 [the day of the pretrial] together with the fair market value of the deep fat fryers." This request for relief was based on his additional allegation that Fox Hills breached a bailment obligation with regard to the trailer left on its property and claims of conversion with regard to the deep-fat fryers and the trailer.

¶7 A bench trial took place on December 5, 2000, and the trial court made the following findings of fact: Trivalos owned a trailer and consented to the use of it by Fox Hills. Fox Hills accepted use of the trailer. The parties settled the dispute with regard to whether Fox Hills agreed to purchase the trailer. Trivalos proceeded on the theory of bailment claiming that he was the bailor and Fox Hills was the bailee of the trailer and its contents including two deep-fat fryers. The trailer was located on the property of Fox Hills with an unlocked hitch and remained on its property until the time it disappeared. The opinion of Trivalos is that the trailer was stored in an ordinary and reasonable fashion. No evidence was provided as to the disappearance of the trailer and whether it was stolen.

¶8 From these findings, the trial court made the following conclusions of law: A bailment existed with Trivalos as the bailor and Fox Hills as the bailee. The bailment relationship existed since 1997 when the trailer was first put on the property of Fox Hills. The bailment was for the mutual benefit of Trivalos and Fox Hills. Fox Hills owed a duty of ordinary care with regard to the bailment of the trailer. There is no evidence that the deep-fat fryers or the trailer were wrongfully converted. There is no evidence to suggest that Fox Hills was negligent with regard to bailment of the deep-fat fryers or the trailer. The responsibility for loss of the trailer and deep-fat fryers falls on the bailor, Trivalos, rather than on the bailee. The trial court then dismissed Trivalos's complaint on its merits with prejudice.

¶9 A bailment is created by the delivery of personal property from one person to another to be held temporarily for the benefit of the bailee, the bailor, or for their mutual benefit under a contract, express or implied. ***The Manor Enters., Inc. v. Vivid, Inc.***, 228 Wis. 2d 382, 398, 596 N.W.2d 828 (Ct. App. 1999). The possession of the personal property is temporarily transferred, but the general title

remains in the hands of the original owner. ***Id.*** Implicit in the bailment relationship is that the general titleholder (bailor) be out of possession of the chattel and the bailee be in a position to exercise all possessory rights. ***Id.*** A bailment depends upon the voluntary assumption of possession and control of the bailed property. ***Id.*** at 399.

¶10 In a bailment for mutual benefit, a bailee owes a duty to exercise ordinary care with respect to the property which is the subject of the bailment. WIS JI—CIVIL 1025.7; ***Smith v. Poor Hand Maids of Jesus Christ***, 193 Wis. 63, 67, 213 N.W. 667 (1927). While a bailee is in no sense an insurer of the bailed property against loss, damage, or destruction, a bailee has the same duty to exercise ordinary care with respect to such property which an ordinarily prudent person would exercise in the protection of his or her property from loss, damage, or destruction. WIS JI—CIVIL 1025.7.

¶11 We agree with the trial court that a mutual bailment relationship existed between Fox Hills and Trivalos. The possession of the trailer was temporarily transferred to Fox Hills, but the general title remained in the hands of Trivalos. Therefore, Fox Hills owed a duty to exercise ordinary care with respect to the trailer and its contents. The trial court found sufficient evidence to show that the trailer and deep-fat fryers had disappeared. This finding placed the presumption of negligence on Fox Hills. This is so because a presumption of negligence on the part of the bailee arises when the bailor establishes that the bailed property was damaged while in the possession of the bailee. ***Nat'l Fire Ins. Co. v. City of Green Bay***, 247 F. Supp. 346, 348 (E.D. Wis. 1965).

¶12 In ***Afflerbaugh v. Geo. Grede & Bro.***, 182 Wis. 217, 219, 196 N.W. 224 (1923), our supreme court held that it is sufficient for the plaintiff as bailor to

establish a prima facie case to show that an unexplained occurrence damaged its property.[2] But the court also held that even if the plaintiff makes this prima facie showing, it will not change the burden proof. ***Id.*** It amounts to no more than the requirement that the bailee shall affirmatively overcome the presumption of negligence in the care of the property. ***Id.*** This presumption is founded in the fact that the evidence is generally in the possession of the bailee and that he or she should be required to produce it. ***Id.*** When such evidence is produced and no negligence is shown, the presumption is overcome. ***Id.***

¶13 Fox Hills did overcome this presumption during its cross-examination of Trivalos. During cross-examination, Fox Hills elicited testimony from Trivalos to show that it was not negligent in its duty as a bailee. Trivalos acknowledged that the trailer was stored and kept in a fashion similar to the way Fox Hills stored and kept other property. Trivalos testified that the trailer was anchored on the property and padlocked with a Fox Hills padlock. Finally, Trivalos testified that Fox Hills's conduct as bailee was appropriate:

> [Defense Attorney] Okay. So you felt pretty comfortable leaving it where it was on the property, correct?
>
> [Trivalos] Yes.
>
> [Defense Attorney] You felt it was safe there?

[2] In ***Afflerbaugh***, the plaintiff took his car to the defendant's place of business to have it repainted. ***Afflerbaugh v. Geo. Grede & Bro.***, 182 Wis. 217, 218, 196 N.W. 224 (1923). Several days later, a fire broke out on a Cadillac car which was stationed next to the plaintiff's car on the third floor of the establishment; and, the plaintiff's car, together with the building and its contents, was damaged. ***Id.*** The plaintiff brought an action for recovery of the damage to the car, alleging negligence on the part of the defendant in the method used to repaint the Cadillac car, which negligence resulted in the fire and the destruction of the plaintiff's car. ***Id.*** The supreme court held that the evidence was insufficient to show negligence because the cause of the accident was left in conjecture. ***Id.*** at 223.

> [Trivalos] Yes.
>
> [Defense Attorney] Okay. And you're not critical of Fox Hills for not ensuring this thing's safety in a better fashion, correct?
>
> [Trivalos] Yes.

¶14 Upon review of the record, we conclude that the trial court's findings are not clearly erroneous. We agree that the record lacks evidence of conversion and/or negligent bailment. We further conclude that the trial court's conclusions of law are accurate. Based on the lack of evidence to support Trivalos's claims and based on the affirmative evidence to show that Fox Hills was not negligent in its duty as bailee, we affirm.[3]

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

[3] Fox Hills asks that we declare Trivalos's appeal frivolous. We decline. While this case ultimately turns on the sufficiency of the evidence, Trivalos's argument on that point rests on his contention that "Wisconsin law is and/or should be that in a bailment for mutual benefit, upon proven breach of the duty to return the property, the bailee has a duty to offer evidentiary explanation. Failing that duty, constructive conversion must be presumed by the trial court." While we reject that approach, we do not deem Trivalos's argument frivolous.