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**IN THE  
COURT OF APPEALS OF INDIANA**

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THE KROGER COMPANY, )

Appellant-Petitioner, )

vs. )

PATRICIA K. HAMMOND, )

Appellee-Respondant. )

No. 30A01-0705-CV-209

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APPEAL FROM THE HANCOCK SUPERIOR COURT  
The Honorable Larry Amick, Commissioner  
Cause No. 30D02-0702-SC-79

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**November 29, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**ROBB, Judge**

### Case Summary and Issue

The Kroger Company (“Kroger”) appeals a small claims judgment against it and in favor of Patricia Hammond in the amount of \$570.00. For our review, Kroger raises two issues, which we consolidate and restate as one: whether the small claims court’s judgment was contrary to law. Concluding that the small claims court’s determination that a bailment existed between Hammond and Kroger and that Kroger breached its standard of care as bailee is not clearly erroneous, we affirm.

### Facts and Procedural History

Hammond was hired by an in-home health care service to do the shopping for its elderly or disabled clients. On December 26, 2006, Hammond was shopping at a Kroger store. She put her purse, which contained an organizer in which she kept client shopping lists and money, in the front of her cart. After she checked out, the bag clerk brought another cart to the lane and put Hammond’s purchases in that cart. He then moved her original cart to the other side of the lane behind some boxes. Hammond “thought he had put everything in the other cart.” Tr. at 12. Hammond realized as she was leaving the store that she did not have her purse. She returned to the lane where she had just checked out and told the cashier that she had left her purse. Kroger employees looked for the purse. The bag clerk testified that employees “went to the parking lot and looked at all the carts and couldn’t find it.” Tr. at 31. Someone later turned the purse into the customer service desk, but the \$570 Hammond claimed she had in the purse was missing.

Hammond filed a Notice of Claim in small claims court alleging that

Defendant's employee took shopping cart containing Plaintiff's groceries and wallet. A Kroger employee transferred the groceries to another cart. When Plaintiff discovered wallet was missing she reported it to the store office. They returned her wallet, but not the money. Only Kroger employees had access to the cart and the wallet during this time.

Appellant's Appendix at 27. Hammond testified at the bench trial that one other customer and two Kroger employees were in the checkout area when she was there. She also testified that she saw the bag clerk move her original cart behind some boxes on the other side of her checkout lane, but she did not see anyone remove money from her purse. At the conclusion of the bench trial, the small claims court made the following statement:

. . . I don't believe she is claiming that she can necessarily prove that any individual person at Kroger stole the money. I[ ] think what she is saying is that Kroger, by taking charge of the cart with the item in it and placing it where it was in an area that couldn't be easily seen should be held liable in a theory of what we could call under law "constructive bailment[,]" that is, they have authority and jurisdiction over the property and she did not at a time when the property came up missing and because of their [role] in doing, taking positive action to put it where it was and then the money coming up missing whoever took it Kroger should be held responsible or liable under legal theory because they took it away from where she could supervise it and keep control and authority over it and at the time it was at that situation the money was taken by whom she does not know. . . . [O]n the theory of constructive bailment I think there is sufficient evidence in the record to enter judgment for the plaintiff . . . .

Tr. at 42-44. The small claims court entered judgment of \$570.00 with no costs against Kroger. Kroger now appeals.

## Discussion and Decision

### I. Standard of Review

Indiana Small Claims Rule 8(A) provides:

The trial shall be informal, with the sole objective of dispensing speedy justice between the parties according to the rules of substantive law, and shall not be

bound by the statutory provisions or rules of practice, procedure, pleadings or evidence except provisions relating to privileged communications and offers of compromise.

Our standard of review is particularly deferential in small claims actions; however, the parties in a small claims case bear the same burdens of proof as they would in a regular civil action on the same issues. Ind. Small Claims Rule 4(A); Mayflower Transit, Inc. v. Davenport, 714 N.E.2d 794, 797 (Ind. Ct. App. 1999). A judgment in favor of a party having the burden of proof will be affirmed if the evidence was such that from it a reasonable trier of fact could conclude that the elements of the party's claim were established by a preponderance of the evidence. Wehry v. Daniels, 784 N.E.2d 532, 534 (Ind. Ct. App. 2003).

Judgments in small claims actions are "subject to review as prescribed by relevant Indiana rules and statutes." S.C.R. 11(A). When reviewing claims tried to the bench without a jury, we apply the clearly erroneous standard to review of facts determined at the trial. Ind. Trial Rule 52(A); Trinity Homes v. Fang, 848 N.E.2d 1065, 1067 (Ind. 2006). In determining whether a judgment is clearly erroneous, we do not reweigh the evidence or determine the credibility of witnesses. Rather, we consider only the evidence that supports the judgment and the reasonable inferences to be drawn therefrom. Counciller v. Ecenbarger, Inc., 834 N.E.2d 1018, 1021 (Ind. Ct. App. 2005). However, this deferential standard is not applied to substantive rules of law, which we consider de novo. Trinity Homes, 848 N.E.2d at 1067.

## II. Bailment

The small claims court determined that a bailment existed and accordingly entered

judgment in favor of Hammond. Kroger contends that the small claims court's conclusion was erroneous, because no bailment was created or, if a bailment existed, because Kroger did not breach its standard of care arising out of the bailment.

#### A. Existence of a Bailment

A bailment is an agreement, either express or implied, that one person will entrust personal property to another for a specific purpose and that when the purpose is accomplished, the bailee will return the property to the bailor. Pitman v. Pitman, 717 N.E.2d 627, 631 (Ind. Ct. App. 1999). A bailment arises when personal property belonging to a bailor is delivered into the exclusive possession of the bailee and the property is accepted by the bailee. Kottlowski v. Bridgestone/Firestone, Inc., 670 N.E.2d 78, 82 (Ind. Ct. App. 1996), trans. denied. To constitute delivery, there generally must be such a full transfer, either actual or constructive, of the property to the bailee as to exclude the possession of the owner and all other persons and give to the bailee, for the time being, the sole custody and control of the property. Cox v. Stoughton Trailers, Inc., 837 N.E.2d 1075, 1083 (Ind. Ct. App. 2005). Acceptance requires either an express contract to take the property and later redeliver it, or circumstances from which such a contract can be implied. Kottlowski, 670 N.E.2d at 82. Whether or not there was delivery and acceptance of the property is a question for the trier of fact. Id.

There is little doubt that there was no express contract between Hammond and Kroger regarding her purse. The trial court found a "constructive bailment." "Involuntary or constructive bailments arise in situations in which one person receives lawful possession of another's property, other than by virtue of a bailment contract. This bailment arrangement

arises when personal property passes to another by mistake [or] accident . . . .” 8A Am.Jur.2d Bailments § 12 (2000). No Indiana case has specifically addressed constructive bailments. We find the case of Shamrock Hilton Hotel v. Caranas, 488 S.W.2d 151 (Tex. Civ. App. 1972), remarkably similar to this case, however. In that case, a paying guest of the hotel left her purse under the table in the hotel dining room. The busboy found the purse and turned it over to the restaurant cashier per established protocol. A short time later, the cashier gave the purse to a man who was not married or related to the owner, or authorized by the owner to claim it. The plaintiff realized the purse was missing the next morning and notified the hotel. Upon being told that the purse had already been claimed, the plaintiff sued to recover the value of the purse and its contents. On appeal, the court concluded that the circumstances supported a constructive bailment of the purse.

The delivery and acceptance were evidenced in the acts of [the plaintiff] unintentionally leaving her purse behind . . . [and] a hotel employee picking it up . . . . The delivery need not be a knowingly intended act on the part of [the plaintiff] if it is apparent that were she . . . aware of the circumstances (here the chattel being misplaced) she would have desired the person finding the article to have kept it safely for its subsequent return to her.

Id. at 153. The result in Shamrock Hilton is consistent with our law of bailments, in that in Indiana a bailment may be implied, delivery may be constructive, and acceptance may be made other than by express contract.

In this case, Hammond did not intend to leave her purse in the cart. A Kroger employee took possession of the cart containing her purse and moved it out of the way in the

course of facilitating the checkout process.<sup>1</sup> Kroger argues that it did not have exclusive possession of the purse because there were other people in the store and there was no evidence that the cart was moved into an employee-only area. Kroger also argues that it did not accept the purse. This is not a situation where, for instance, the plaintiff takes her cart out of the store, unloads her purchases, and inadvertently leaves her purse in the cart in the parking lot. In that case, we might agree that there was no exclusive possession and no acceptance of the purse. In this case, however, a Kroger employee took Hammond's cart from her on his own initiative and moved it behind "stacks of boxes that looked like it needed . . . going through" in the store. Tr. at 12. A reasonable inference from this evidence is that Kroger had exclusive possession of the cart and therefore the purse. A further reasonable inference from this evidence is that when the Kroger employee took the cart from Hammond, he did so under circumstances implying acceptance of whatever was in the cart. Although Kroger contends that there was no evidence that the bag clerk knew or was aware that Hammond had left her purse in her cart and therefore could not have accepted it, it would have been a fairly simple matter to look in an otherwise empty cart and see that a personal item had been left behind. Delivery and acceptance are matters for the trier of fact to determine, see Kottlowski, 670 N.E.2d at 82, and we cannot say that the small claims court's determination that there was a bailment under the circumstances of this case is clearly erroneous.

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<sup>1</sup> Hammond testified that she was not accusing the bag clerk of stealing the money because she did not actually see him take anything from her purse. Although it seems odd that the bag clerk switched the carts and moved Hammond's original cart away from other carts, we have no way of knowing whether the bag clerk did so for some nefarious purpose. As Hammond did not proceed on the theory that the bag clerk was necessarily the one to take the money, we will assume he acted merely to keep traffic in the checkout lanes

## B. Standard of Care

The bailee must exercise a degree of care with regard to the property commensurate with the benefit he derives from the arrangement. United Farm Family Ins. Co. v. Riverside Auto Sales, 753 N.E.2d 681, 685 (Ind. Ct. App. 2001). A bailee is required to use only “slight care” when a bailment is for the sole benefit of the bailor, “great care” when the bailment is for the sole benefit of the bailee, and “ordinary care” when the bailment is for the parties’ mutual benefit. Pitman, 717 N.E.2d at 631. When the evidence shows that the bailee received the property in good condition but it was returned damaged or not returned at all, an inference is raised that the bailee failed to exercise the appropriate degree of care. United Farm Family Ins. Co., 753 N.E.2d at 685. Once this inference of negligence is created, the burden of production shifts to the bailee to produce evidence tending to prove the loss, damage, or theft occurred without his fault or neglect. Id. The determination of a bailee’s compliance with the applicable standard of care is a matter for the trier of fact. Id.

Kroger contends that the bailment was solely for Hammond’s benefit and it therefore had only a duty of slight care. We disagree with this contention. When the Kroger bag clerk moved Hammond’s cart away from the checkout lane, he presumably did so to keep store traffic flowing smoothly. Kroger clearly derives a benefit from helping customers enjoy a quick and easy shopping experience in that it encourages customers to continue patronizing the store. Cf. Shamrock Hilton, 488 S.W.2d at 154-55 (holding that the bailment was one for the mutual benefit of the parties; there was a benefit to the patron in being able to claim lost personal property and an incidental business benefit to the hotel “in the continued patronage

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flowing smoothly.



of the hotel by customers who have lost chattels and who have been able to claim them from the management.”). Thus, we hold that the bailment was for the mutual benefit of the parties, and Kroger was required to use ordinary care in holding Hammond’s purse and its contents.

Regarding whether Kroger breached this standard of care, the evidence indicates that a Kroger employee took possession of the cart containing the purse and when Hammond returned to the checkout lane a few minutes later, the purse was missing. Kroger presented testimony from the cashier that there were several people in the vicinity when Hammond checked out and from the bag clerk that he did not take the money from Hammond’s purse. However, this testimony does not tend to show that the loss occurred without fault or neglect on the part of Kroger. In taking the cart from Hammond and moving it out of the way, Kroger failed to use ordinary care to protect Hammond’s personal property still in the cart. The record supports the small claims court’s conclusion that Kroger breached its standard of care.

### Conclusion

The trial court’s judgment in favor of Hammond and against Kroger was not clearly erroneous and is, therefore, affirmed.

Affirmed.

KIRSCH, J., and BARNES, J., concur.