

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

NOVEMBER 18, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 97-1134-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

MICHELLE FRANK,

PLAINTIFF-APPELLANT,

V.

DR. JAMES FRITZ AND MRS. SALLY FRITZ,

DEFENDANTS-RESPONDENTS,

**JAMES A. FRITZ, ABC INSURANCE COMPANY AND XYZ
INSURANCE COMPANY,**

DEFENDANTS.

APPEAL from an order of the circuit court for Milwaukee County:
ARLENE D. CONNORS, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

PER CURIAM. Michelle Frank appeals from the trial court's order granting summary judgment in favor of Dr. James and Mrs. Sally Fritz. The issue is whether the Fritzes were negligent in entrusting their car to their son, James Fritz. Pursuant to this court's order dated May 13, 1997, this case was submitted to the court on the expedited appeals calendar. See RULE 809.17, STATS. We affirm.

James Fritz sexually assaulted Michelle Frank in a car owned by his parents. Fritz was convicted of two counts of second-degree sexual assault and is now serving a prison term. Frank commenced this civil action against Fritz, his parents, and the insurance company that had issued a homeowner's insurance policy to Fritz's parents. Frank claimed that Fritz's parents were negligent in entrusting their vehicle to him.¹

Fritz's parents filed a motion for summary judgment, arguing that there were no genuine issues of material fact and that they did not know or have reason to know that their son was likely to use their car in a way that would create an unreasonable risk of harm to Frank. The trial court denied the motion, ruling that it was premature because discovery was not yet complete and the facts had not been sufficiently developed. The trial court suggested that Frank depose the Fritzes and conduct further discovery.

When the period for completing discovery was nearing an end, the Fritzes again moved for summary judgment. The court granted summary judgment in favor of the Fritzes, concluding that there was no evidence that the

¹ Frank also argued that the Fritzes were negligent in failing to control their son. Because Fritz was an adult when the assault occurred, this claim was not properly brought. This claim is not at issue in this appeal.

Fritzes knew or should have known that their son would use the auto in a way that would create an unreasonable risk of harm to Frank.

Summary judgment allows controversies to be settled without trial where there are no disputed material facts and only legal issues are presented. *In re Cherokee Park Plat*, 113 Wis.2d 112, 115-16, 334 N.W.2d 580, 582-83 (Ct. App. 1983). On review of the summary judgment order, we employ the same methodology as the trial court. *Green Spring Farms v. Kersten*, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987). We first examine the pleadings and affidavits to determine whether a claim for relief has been stated. *Id.* If a claim for relief has been stated, we then determine whether any factual issues exist. *Id.* If there is no genuine issue as to any material fact, and if the moving party is entitled to judgment as a matter of law, we will affirm the trial court order granting summary judgment. *Id.*

In support of her claim that the Fritzes were negligent in entrusting their vehicle to their son, Frank presented three facts: (1) Fritz had been convicted of operating under the influence of an intoxicant within two years of the assault; (2) Fritz had been convicted of misdemeanor entry into a locked building and receiving stolen property within two years of the assault;² and (3) Fritz's father stated at the sentencing on the sexual assault that he had "some trouble" with his son, but believed his son had recently turned himself around. In opposition, the Fritzes submitted an affidavit stating that they "were aware of no incidents in

² It appears that Frank's brief and affidavit in opposition to the renewed motion were not timely filed. Evidence of the two convictions was presented with those documents. The trial court did, however, consider the documents when deciding the summary judgment motion, without deciding whether they were timely submitted. We, too, consider the documents in deciding whether summary judgment was properly granted.

which [their son] was involved that included any allegations of sexual assault against him.”

The Fritzes were entitled to summary judgment. Frank needed to show that the Fritzes knew or had reason to know that their son intended or was likely to use their car in a way that would create an unreasonable risk of harm to her. Based on the facts presented, the Fritzes were aware of only one incident in which their son had used a car in a way that presented a threat of harm to others; he had been convicted within the previous two years of operating while intoxicated. Although the Fritzes had problems with their son, and were aware that he had a misdemeanor conviction for a property crime, these facts do not establish that they knew or should have known that their son was capable of committing a violent sexual assault or that entrustment of their car would enable him to do so. The Fritzes stated in their affidavit that they were not aware of any allegations of sexual assault against their son. At best, Frank established that Fritz’s parents were aware that their son was having problems, and were aware that he had two non-violent convictions. Those facts are insufficient, as a matter of law, to establish that the Fritzes were negligent in entrusting their car to their son.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

