

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 24, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 2006AP1898

Cir. Ct. No. 2005SC30322

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

ANTHONY HARRIS,

PLAINTIFF-RESPONDENT,

v.

EARL E. GRUNWALD,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JEAN W. DIMOTTO, Judge. *Affirmed.*

¶1 CURLEY, J.¹ Earl E. Grunwald appeals *pro se* the judgment in a small claims action awarding Anthony Harris \$3000 for Harris's car that was destroyed in a fire while in Grunwald's auto mechanic shop. Grunwald first

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2005-06).

argues that the form signed by Harris contained a disclaimer waiving any liability Grunwald may have had for damage caused by fire. Second, he submits that the trial court's legal conclusions are clearly erroneous because they were based on a "misinterpretation of plaintiff's testimony." Finally, Grunwald argues that the car was not worth \$3000. Because the trial court's findings are not clearly erroneous, this court affirms.

I. BACKGROUND.

¶2 Harris sued Grunwald, seeking damages for his car which was destroyed while at Grunwald's shop, Richards Street Service. Harris testified that on February 8, 2005, he brought his 1992 Mitsubishi Diamonte to Grunwald's auto mechanic shop for an assessment of mechanical problems. Grunwald called him back the same day and told him what was wrong with the car and how much it would cost to have it fixed. Harris claims he approved the repairs suggested by Grunwald. The next day Harris received a phone call from a friend who told him that his car was on fire.² As a result, Harris called Grunwald and learned that, indeed, his car had started on fire and he should come down to the shop. When Harris arrived, he saw his "totally burnt [sic] up" car sitting on the other side of the street across from Grunwald's shop.

¶3 Harris claimed that Grunwald told him he would exchange his destroyed car for another one. Harris explained to the court that he told Grunwald his car was worth \$3200. After some time had passed, Harris had another

² Harris actually testified "as the day went past ...," suggesting that the fire occurred the same day he took the car in. The fire department report that was admitted into evidence lists February 9, 2005 as the day the fire occurred. The parties do not dispute the date that the fire occurred.

conversation with Grunwald, at which time Grunwald told him he was not going to pay for the car because Grunwald said Harris should have had auto insurance to pay for it.

¶4 At trial, Grunwald disputed the reasons given by Harris for bringing his car into the shop, claiming that Harris said that the car had a “miss.” Grunwald also contended that Harris agreed to pay for only part of the needed repairs. As to the fire, he related that his shop was closed the morning of February 9th, and when he arrived at the shop, he saw the fire trucks. He insisted that the fire started in Harris’s car, and by inference suggested that no repairs had been started on the car, so neither he nor his employees were negligent. He also told the court he looked up the Kelly Blue Book value on Harris’s car and it was worth only \$525. He also explained to the court that a completely burned up car has a greater salvage value because there is “less junk on it,” and he submitted that Harris should have picked up his car and sold it for scrap instead of having it towed away by the city.

¶5 Grunwald also claimed that Harris came to his office after the fire and “trashed” it, and in doing so, Harris destroyed his notes concerning the condition of the car and the recommended repairs. Harris later denied “trashing” the office.

¶6 Grunwald also pointed out to the court that Exhibit 3, a Richards Street Service authorization form bearing Harris’s signature authorizing the repairs, included a statement that read: “It is understood that this company assumes no responsibility for loss or damage by theft or fire to vehicles placed with them for storage, sale, repair or while road testing.” Grunwald claimed that as a result of the disclaimer, he was not responsible for Harris’s car. Harris countered that he received no paperwork on the car when he dropped it off and

explained the authorization form with his signature by noting that he has been to Grunwald's shop on other occasions and the paperwork may have been for a different repair on the car.

¶7 The trial court found that Harris had “put the car within the care, custody, and control of Mr. Grunwald’s shop.” The trial court found the authorization form unpersuasive because it was not dated and contained no amount for repairs. The trial court also found that “[a] rather reasonable inference is that the car was being repaired, or in some way being acted upon by someone associated with Richard’s Street Service,” and therefore, Grunwald was liable for the car. The court reasoned that Grunwald’s earlier proposal to Harris to give him another car was inconsistent with Grunwald’s trial posture that he had no responsibility for the car, but was consistent with one who believed he was responsible because he was in a bailment relationship with Harris. Further, the court accepted the testimony that the value of the car was approximately \$3000. Consequently, the court found Grunwald liable for damages in the amount of \$3000 plus costs.

II. ANALYSIS.

¶8 “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 both.” *Yao v. Chapman*, 2005 WI App 200, ¶19, 287 Wis. 2d 445, 705 N.W.2d 272. There are several types of bailments. One type is a bailment for mutual benefit, an example of which occurs between one who delivers an automobile to one who, for consideration, undertakes to repair it. *See* BLACKS LAW DICTIONARY 152 (8th ed. 2004). 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.

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 ordinary prudent person would exercise in the protection of his or her property from loss, damage, or destruction.

WIS JI—CIVIL 1025.7. Further, “the risk of fire is not an assumed risk of the bailment unless caused by the negligence of” the bailee. *Dahl v. St. Paul Fire & Marine Ins. Co.*, 36 Wis. 2d 420, 424, 153 N.W.2d 624 (1967).

¶9 Grunwald challenges the trial court’s findings that: (1) no form containing the disclaimer for fire damage was given to Harris the day before the fire; (2) that the car had been worked on by either Grunwald or an employee; and (3) the car was worth \$3000.

¶10 Following a bench trial, the trial court’s “[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.” WIS. STAT. § 805.17(2) (2005-06).³ Where testimony conflicts, the fact finder is the ultimate arbiter of witness credibility. *Bank of Sun Prairie v. Opstein*, 86 Wis. 2d 669, 676, 273 N.W.2d 279 (1979).

¶11 A trial court’s findings of fact “will not be upset unless contrary to the great weight and clear preponderance of the evidence.” *Amoco Oil Co. v. Capital Indem. Corp.*, 95 Wis. 2d 530, 542, 291 N.W.2d 883 (Ct. App. 1980).

³ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

Further, 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. South Milwaukee Sch. Bd.*, 73 Wis. 2d 338, 342, 243 N.W.2d 183 (1976).

¶12 This court is satisfied that the trial court's findings are not clearly erroneous. First, Harris testified that he never received any paperwork from Grunwald for the car repairs. He told the court that he dropped the car off and Grunwald called him later. Moreover, the authorization form admitted into evidence as Exhibit 3 contains no date, nor does it list an amount to be paid for the repairs. Thus, the trial court could properly conclude that the document may have been signed by Harris, but on a different occasion. Consequently, the trial court's conclusion that the disclaimer for fire damage, written on the form, was irrelevant to this dispute, is not clearly erroneous.

¶13 Next, Grunwald argues that the trial court erred in its belief that Harris testified that he saw his car on fire, and this led to the trial court's assumption that the repairs had begun on the car. This court could not find any statement by the trial court that suggested the trial court thought Harris actually saw his car burning with the hood up. Rather, the trial court refused to accept Grunwald's testimony that the car fire started spontaneously and that no work had been done on the car. The trial court did not rest its finding that Grunwald was liable on Harris's seeing his car burning with the hood up, but rather, the trial court inferred that work had been started on the car because Grunwald originally took responsibility for the damaged car and offered a replacement car.

¶14 Finally, with regard to the value of the car, according to the transcript, it would appear that the trial court was presented with a document listing several of the Kelly Blue Book values of the car because the trial court

made reference to the fact that the Kelly Blue Book value for the car in excellent condition was \$4890, and the trial court elected, instead, to value the car at \$3000, \$200 less than a different listing for the car's value. The trial court resolved the disputed value of the car by accepting Harris's estimate bolstered by the Kelly Blue Book information and reduced it slightly to reflect its scrap value. This finding is supported by the evidence.

¶15 None of the trial court's findings were clearly erroneous, and this court is obligated to accept them. For the reasons stated, the judgment is affirmed.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

