FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

SILVAN GOESER,	)	
Plaintiff-Appellant,	)	Filed February 26, 1986
vs	)	**109**
CRAMPTON-COLLINS CHEVROLET-BUICK, INC., and **GENERAL MOTORS ACCEPTANCE CORPORATION,**	)	5-583 85-11
Defendants-Appellees.	)	

Appeal from the Iowa District Court for Crawford County (No. 26030) - Michael S. Walsh, Judge.

Plaintiff appeals the district court's denial of replevin relief asserting that the court erred in finding the evidence did not establish that he had purchased and paid for a car. **REVERSED AND REMANDED FOR ENTRY OF JUDGMENT.**

Michael R. Mundt of Franck, Mundt, Nepper & Franck, Denison, for plaintiff-appellant.

Stephen M. Engelhardt of Engelhardt Law Office, Denison, for defendants-appellees.

Considered by Oxberger, C.J., and Snell and Hayden, JJ.

In October of 1978, plaintiff Silvan Goeser purchased a new Chevrolet Nova from Eddie Duncan, a salesman at Hawk-Crampton Chevrolet-Buick, Inc. in Denison, Iowa. Goeser paid $4,845 in cash and traded in another vehicle for the Nova. His automobile insurance reflected a $5,200 value for the Nova. In early 1979, Goeser moved from Denison to Independence, Missouri.

In April of 1979, Goeser returned to Denison to purchase a new car. Goeser decided to trade in the Nova because his wife was not satisfied. Goeser again dealt with Duncan to negotiate a sale. These men testified by interrogatory or deposition that an agreement was reached for the purchase of a new 1979 Malibu. Goeser testified the Malibu was in the possession of Hawk-Crampton Chevrolet at this time, but Duncan testified that the vehicle was ordered after the deal was made. The General Motors vehicle invoice states that the Malibu had a suggested retail price of $7,196. Duncan and Goeser testified that a written purchase agreement was submitted by Duncan to Mark Crampton, the owner of the Chevrolet dealership, and Crampton okayed the agreement. Crampton did not testify at trial. The terms allegedly agreed upon were that Goeser would trade in his Nova and upon delivery of the Malibu to him in Independence, he would pay $2,400. Duncan and Goeser claim that after the agreement was approved, Goeser turned over his Nova to the dealership. Goeser left the Nova on the lot and drove a pickup which he had left in Denison back to Independence. The Nova was sold by the dealer on April 12, 1979, for just over $4,000 and a used Buick Electra as a trade. Duncan testified that about the same time Goeser wanted to trade in his old pickup for a new one, but the pickup and the car deals were two separate negotiations altogether.

On July 31, 1979, Goeser was involved in a serious automobile accident while driving his old pickup truck. On August 16, 1979, Goeser purchased a

new pickup truck from Hawk-Crampton Chevrolet. Duncan testified that there was no trade-in for the new truck, but he could not remember what Goeser paid for it because Crampton handled the cash sale. A personal check from Goeser to Hawk-Crampton Chevrolet for $2,906 was dated August 16, 1979. Additionally, a check for $2,675 from Farmers Casualty Company was endorsed by Goeser to the dealership on August 16, 1979. On August 17, 1979, Hawk-Crampton Chevrolet transferred title to the new pickup to Goeser. Goeser presented evidence that the pickup was valued at approximately $5,500 at the time of his purchase. Duncan testified that Goeser had someone drive the new pickup to Independence for him since he could not drive after the accident.

At the end of 1979 Hawk-Crampton Chevrolet sold the dealership to defendant Crampton-Collins Chevrolet-Buick, Inc. Mark Crampton remained an officer and director of the new corporation; however, the new owner was Ron Collins.

Goeser never received delivery of the 1979 Malibu nor its certificate of title. Several of Goeser's tools were stored in the trunk of the Malibu from 1979 until 1982 when the dealership returned them to Goeser. In 1981, he tendered the $2,400 balance due on the purchase agreement to the dealership. This replevin action followed Crampton Chevrolet's refusal to accept the tender and assertion of ownership of the Malibu. No written agreements were introduced documenting either the sale of the 1979 Malibu or the sale of the new pickup.

According to Collins, the 1979 Malibu was offered for sale on the dealership lot as a new car from the time of its delivery until 1982. Apparently the Malibu did not sell because of its color and the market's economic slowdown. In February of 1982, General Motors Acceptance Corporation (GMAC) repossessed the 1979 Malibu along with all of Crampton Chevrolet's inventory pursuant to GMAC's security agreement covering the new car inventory.

The district court found that Goeser failed to establish his right to possession of the 1979 Malibu because no written purchase agreement was ever finalized. The court recognized that it was:

> [P]robable and likely that as a result of the plaintiff wrecking his old pickup and being unable to trade it in, that the 1978 Nova was traded in, in part, for the new pickup that was purchased for the plaintiff. The Court has reached this conclusion based on the fact that at all times the 1979 Malibu was treated as a new car and retained on the dealership's lot for sale .... The Court concludes, however, that it is unlikely that the plaintiff would have traded in his 1978 Nova for the 1979 Malibu *without obtaining* delivery of the 1979 Malibu ... [plaintiff's] demand for possession was presented more than two and one-half years after the alleged purchase of the 1979 Malibu.

On appeal, Goeser contends that the district court erred by finding the evidence did not establish that he had purchased and paid for the Malibu in 1979. He also contends the district court erred by excluding from evidence two documents. One document was a computer-generated record from GMAC headquarters allegedly showing that the Malibu was listed as sold in April of 1979; the other document was a service record on the pickup truck purchased by Goeser allegedly showing that the truck had few options and could not have been worth as much as the total amount paid by Goeser to the dealership.

A replevin action is an action at law. Iowa Code § 643.2 (1983). Therefore, the trial court's findings of fact are binding upon us if supported by substantial evidence. Iowa R. App. P. 14(f)(1). Our review, then, is upon assigned errors of law. "We are not precluded from inquiry as to whether trial court applied erroneous rules of law which materially affected the decision." Sandhorst v. Mauk's Transfer, Inc., 252 N.W.2d 393, 395 (Iowa 1977).

"Replevin is an action to recover specific personal property that has been wrongfully taken or wrongfully detained, with an incidental right to damages caused by reason of such detention." Flickinger v. Mark IV Apartments, Ass'n,

315 N.W.2d 794, 796 (Iowa 1982). Iowa Code chapter 643 sets forth the procedural requirements for a replevin action. "The gist of a replevin action is enforcement of the plaintiff's right to immediate possession of the property wrongfully taken or detained . . . . A wrongful detention occurs when the defendant wrongfully withholds or retains possession of the property sought to be recovered." Id. The plaintiff has the burden to prove by a preponderance of the evidence that he is entitled to possession of the personal property involved. Marx Truck Line, Inc. v. Fredricksen, 150 N.W.2d 102, 105 (Iowa 1967).

Goeser's claimed right to possession of the Malibu is based upon its allegation of unqualified ownership by oral agreement. Goeser does not have a certificate of title for the Malibu. The Chevrolet dealership and GMAC have at all times been listed as the undisputed owners on the certificate of title for the Malibu. Goeser has no interest reflected on that certificate. Ordinarily, the certificate of title of a vehicle is dispositive of the question of ownership. In Iowa, the assignment of the certificate of title is the only method approved by the legislature for transferring title between buyer and seller. However, Iowa Code section 321.45(2) recognizes certain exceptions to this general rule, one of which is pertinent for purposes of this case:

> No person shall acquire any right, title, claim or interest in or to any vehicle subject to registration under this chapter from the owner thereof except by virtue of a certificate of title issued or assigned to the person for such vehicle or by virtue of a manufacturer's or importer's certificate delivered to the person for such vehicle; nor shall any waiver or estoppel operate in favor of any person claiming title to or interest in any vehicle against a person having possession of the certificate of title or manufacturer's or importer's certificate for such vehicle for a valuable consideration except in case of:
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> * * *
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> c. A dispute between a buyer and the selling dealer who has failed to deliver or procure the certificate of title as promised. . . . (emphasis added)

Thus, we find that in this case the certificate of title is not conclusive on the issue of ownership of the Malibu.

In this case there is absolutely no evidence in the record to support the trial court's judgment. In fact, the evidence is to the contrary and undisputed. Goeser testified that he traded in his 1978 Nova for a 1979 Malibu. The salesman, Duncan, also testified that such a trade occurred. Goeser and Duncan both testified that the sale was approved by Crampton, the owner of the Denison Chevrolet dealership at that time. The dealership offered Goeser's Nova for sale on its lot and sold it shortly thereafter. No evidence was presented to contradict these facts. While the trial court determined that Goeser likely traded in his Nova in part for the new pickup which he purchased four months later, this finding is wholly unsupported by the record. In fact, Duncan explicitly testified that this was not the case. He stated that Goeser's negotiations for the Malibu and for the pickup were two totally separate transactions. Another factor which indicates that someone from the Chevrolet dealership believed the Malibu to be Goeser's is that his tools were placed in the Malibu's trunk after being removed from Goeser's Nova.

Our decision is further bolstered by plaintiff's exhibit 14 which the trial court erroneously excluded from evidence. Iowa Rule of Evidence 803(6) (1985) enunciates the business records exception to the hearsay rule:

> **Records of regularly conducted activity.** A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and the regular practice of that business activity was to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession,

> occupation, and calling of every kind, whether or not conducted for profit.

This relatively new Iowa rule 803(6) is identical to Federal Rule of Evidence 803(6). While the Iowa appellate courts have not had much opportunity to apply rule 803(6), several federal courts have interpreted the rule and serve as persuasive authority for our application of the rule in the present situation. "The issue of admissibility under Rule 803(6) is chiefly a matter of trustworthiness. In this inquiry the trial court is given great latitude." Mississippi River Grain Elev. v. Bartlett & Co., Grain, 659 F.2d 1314, 1319 (5th Cir. 1981).

In order for evidence to be admissible under the business records exception, the trial court must find that five elements are satisfied. The record must be proven:

1) by its custodian or other qualified witness to have been

2) made at or near the time the events occurred which are the subject of the record;

3) made from information transmitted by a person with knowledge;

4) kept in the course of a regularly-conducted business activity; and

5) made as the regular practice of that business activity.

It is well established under federal law that a "qualified witness" is not required to have personal knowledge of the preparation of the particular record in issue. United States v. Mendel, 746 F.2d 155, 166 (2d Cir. 1984); Mississippi, 659 F.2d at 1319; United States v. Grossman, 614 F.2d 295, 297 (1st Cir. 1980); Rosenburg v. Collins, 624 F.2d 659, 665 (5th Cir. 1980); United States v. Bowers, 593 F.2d 376, 380 (10th Cir. 1979); United States v. Reese, 568 F.2d 1246, 1252 (6th Cir. 1977); United States v. Pfeiffer, 539 F.2d 668, 671 (8th Cir. 1976). Moreover, "the business records exception does not require that the records

be prepared by the business which has custody of them." Mississippi, 659 F.2d at 1319; see also Mendel, 746 F.2d at 166; United States v. Ulrich, 580 F.2d 765, 771-72 (5th Cir. 1978).

In this case, exhibit 14 consists of a computer-generated vehicle history on the 1979 Malibu in question. This computer printout came from the Chevrolet Motors Division of General Motors in Omaha. The document lists the date of sale of the Malibu as April 7, 1979. The printout was offered into evidence through the testimony of Bob Mathers, a former employee of defendant GMAC and a General Motors dealer for about twenty-two years. Mathers testified that General Motors maintained vehicle histories on all of its cars which would reflect when vehicles were sold. Mathers stated that he requested the vehicle history for the Malibu in question from the Omaha office by providing them with the Malibu's identification number. The computer printout was mailed to him from the Omaha office. He testified that as a dealer he had requested such information for numerous vehicles throughout his employment. He did so in the ordinary course of business and relied on the computer printouts as trustworthy sources of vehicle information.

We conclude that Mathers was a qualified witness and this computer printout is admissible as a business record under Iowa R. Evid. 803(6). It is a record transmitted by persons with knowledge and relied upon in the regular course of car dealership business. The printout has all of the indicia of trustworthiness that our rules of evidence require for the admission of hearsay evidence.

We can only conclude that a sale of the Malibu occurred in April of 1979 and that Goeser has a right to immediate possession of that vehicle which defendants have wrongfully detained.

In February of 1982, GMAC repossessed the inventory of Crampton Chevrolet including the 1979 Malibu. GMAC now contends that its perfected

security interest in new car inventory should prevail over any interest Goeser claims in the Malibu. GMAC's argument fails because Goeser qualifies as a buyer in the ordinary course of business pursuant to Iowa Code sections 554.9307 and 554.1201(9) (1983). As such, Goeser takes free of any security interests created by his seller. Therefore, GMAC's claim to the Malibu is clearly not superior to Goeser's.

Iowa Code section 643.19 (1985) provides:

> If the party found to be entitled to the property be not already in possession thereof by delivery under the provisions of this chapter or otherwise, the party may at the party's option have an execution for the delivery of the specific property, or for the value thereof as determined by the jury, and if any article of the property cannot be obtained on execution, the party may take the remainder, with the value of the missing articles.

Goeser is entitled to possession of the 1979 Malibu if it is in the possession of defendants. If it cannot be found, Goeser is entitled to damages of $5400 less the $2400 balance due on the sale plus interest at 10% per annum from the date plaintiff tendered the balance due on the contract. Defendants shall be jointly and severally liable for the amount of this judgment. Costs are assessed to defendants.

REVERSED AND REMANDED FOR ENTRY OF JUDGMENT.