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IN THE COURT OF APPEALS OF IOWA

LeROY MUELLER,	)	
Appellee,	)	Filed March 29, 1978
vs.	)	
LARRY MENKE,	)	<u>404</u>
Appellant.	)	2-60006

Appeal from Lee District Court - Joseph L. Phelan, Judge.

Defendant repairman appeals trial court's award of damages to plaintiff for equipment allegedly stolen from defendant's premises while left for repair. -
Reversed and remanded for new trial.

T. A. Lawse, Fort Madison, for Appellant.

George E. Wright, of Napier, Napier & Wright, Fort Madison, for Appellee.

Submitted to Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

PER CURIAM

Defendant repairman Larry Menke appeals the trial court's judgment for plaintiff Leroy Mueller for the value of a snowmobile and trailer allegedly stolen from Menke's premises while left with Menke for repairs. We reverse for new trial.

Plaintiff Mueller claims that this is a small claims action and that appeal should have been taken to the district court within 10 days of the judicial magistrate's ruling. During the pendency of this appeal the supreme court construed sections 602.32 and 602.60, The Code 1975, in *State v. Wehde*, 258 N.W.2d 347 (Iowa 1977). Section 602.60 is involved in the instant case. *Wehde* held appeal from a ruling by district associate judge exercising jurisdiction over indictable misdemeanors under § 602.32 is governed by rules for appeal from the district court. Under § 602.32 the district associate judge has the jurisdiction provided in § 602.60, that is, of a judicial magistrate. Under § 602.60 a full-time magistrate, such as in the instant action, has jurisdiction in civil matters involving less than \$3000. In exercising such jurisdiction judicial magistrates employ district judges' practice and procedure. Section 602.60. The *Wehde* decision requires an overruling of Mueller's motion to dismiss this appeal. A judicial magistrate's ruling in a civil matter involving less than \$3000 must be appealed to the supreme court; it is not a small claims action appealable to district court. Small claims matters are limited to claims of \$1000 or less. This claim is for \$2849.

Mueller's petition alleged Menke became his bailee upon acceptance of the equipment for repairs, that Menke promised to deliver the same and had converted it to his own use and that if the proof should show theft, Menke was negligent in failing to secure his premises, to provide a suitable warning system or to provide safe-keeping for the entrusted equipment. At trial, Mueller's proof focused, over Menke's strenuous and continuing objection, upon a theft insurance policy maintained by Menke and an alleged promise by Menke to make good on any deficiency the insurance company did not pay.

Notably the petition did not set out any allegations of insurance coverage or the gratuitous promise after the theft of payment of whatever loss was not covered. The petition and answer framed the issue as that of a bailment and

negligence on the part of the bailee Menke. The trial court granted Mueller recovery stating:

Plaintiff also alleged that the defendant has an insurance policy purportedly to cover theft and that the defendant was liable under the theory of bailments. The Court is concerned herein only with the evidence of defendant's liability to the plaintiff and will not discuss the effect of the insurance policy or give any credence to the law of bailments.

The evidence clearly shows that the defendant guaranteed the repairs and the return of plaintiff's property, but failed to carry out his responsibility to this effect.

The action was based upon Menke's alleged negligence in performance of duties imposed upon him by the parties' bailment agreement. No special contract was pled or introduced at trial to impose a higher duty than ordinary care upon Menke. See Farmer's Butter & Dairy Coop. v. Farm Bureau Mutual Insurance Company, 196 N.W.2d 533, 537 (Iowa 1972). The decision of the trial court should have turned on what constituted ordinary care in this bailment and whether the proof established conduct by Menke which was negligent under this standard of ordinary care.

Without consideration of the bailment agreement, as the source of Menke's liability, there is no explanation for the trial court's ruling other than that it was based upon the alleged gratuitous promise to make up any deficiency in insurance coverage. Menke strenuously and repeatedly objected to all questions relating to insurance coverage. He claimed insurance bore no relation to the question of his liability. The record at trial cannot be characterized, as Mueller urges, as a trial of the issue of the insurance deficiency by consent. Wilson v. Corbin, 241 Iowa 593, 41 N.W.2d 202 (1950)

Plaintiff Mueller prevailed upon a promise neither pled in the original petition nor by any subsequent amendment. Further, he prevailed to the full extent of damages stated in his bailment claim, under a trial court ruling disclaiming any consideration of bailment, rather than to the extent of damages suffered because of any insurance deficiency. We find the trial court made an erroneous ruling of law in refusing to decide the case under the law of bailment. Such error requires a new trial. Hamilton v. Town of Palo, 244 N.W.2d 329, 331 (Iowa 1976).

Reversed and remanded for new trial.