COURT OF APPEALS
DECISION
DATED AND FILED

January 30, 2018

Diane M. Fremgen
Acting Clerk of Court of Appeals

Appeal No. 2016AP1591 **Cir. Ct. No. 2015CV63**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

RUNAMUK RIDES, LLC,

PLAINTIFF-APPELLANT,

V.

TERRY NEVILLE, TAMARA PFAFFLE, MORGANNE PFAFFLE, BROOKANNE PFAFFLE AND KAITLYN PFAFFLE,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Sawyer County: JOHN M. YACKEL, Judge. *Affirmed*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Runamuk Rides, LLC, asserts that Terry Neville, Tamara Pfaffle, Morganne Pfaffle, Brookanne Pfaffle, and Kaitlyn Pfaffle (collectively, the Neville Party) damaged a snowmobile they had rented from Runamuk.[1] The circuit court rejected Runamuk's claim for damages, following a bench trial, concluding Runamuk had failed to prove that the Neville Party caused any damage to the snowmobile. On appeal, Runamuk has not demonstrated that any of the circuit court's factual findings were clearly erroneous. We therefore affirm the judgment dismissing Runamuk's claim.[2]

BACKGROUND

¶2 On December 4, 2014, Terry, on behalf of the Neville Party, made a reservation to rent two two-person snowmobiles from Runamuk for the time period from December 29 to December 31, 2014. When the Neville Party arrived at Runamuk's premises on December 29, each party member signed an equipment rental and use agreement regarding the snowmobiles. The agreement required the Neville Party to return the snowmobiles to Runamuk "in the exact shape and condition under which they received [them], except for normal wear and tear." The agreement further provided that Runamuk would inspect the snowmobiles after the Neville Party returned them, and if Runamuk found any damage, the Neville Party would be responsible for the cost to repair the damage, along with certain administrative costs set forth in the agreement. The agreement contained

[1] Where necessary, we refer to individual members of the Neville Party by their first names.

[2] Judge John Yackel presided over the bench trial in this case and issued an oral ruling dismissing Runamuk's claim. A written judgment to that effect was subsequently signed by Judge Michael Lucci.

an addendum entitled "Participant Equipment Inspection & Receipt Form," which directed the Neville Party to make note of any damage to the snowmobiles prior to using them. No member of the Neville Party noted any damage to either snowmobile on that addendum.

¶3 The Neville Party did not immediately take possession of the snowmobiles after signing the rental agreement. Instead, Runamuk delivered the snowmobiles later that day to the resort where the Neville Party was staying. Members of the Neville Party rode the rented snowmobiles on multiple occasions between December 29 and 31. Terry and Brookanne testified at trial that they were not aware of either snowmobile being involved in an accident or otherwise being damaged during that time period. Troy Neville and Colton Carstensen, who were snowmobiling with the Neville Party on the relevant dates, similarly testified they were not aware of any accidents or damage to the rented snowmobiles.

¶4 Terry testified he and Brookanne drove the rented snowmobiles back to Runamuk after lunch on December 31. They parked the snowmobiles outside Runamuk's office building, and Terry then went inside and spoke with James Taylor, one of Runamuk's owners. Taylor instructed Terry to fill the snowmobiles with gas using a gas pump on the premises. After doing so, Terry and Brookanne went back inside Runamuk's office, where Terry paid for the gas and had a brief conversation with Taylor. Terry testified Taylor, who was looking out a window at the snowmobiles during this conversation, "told Brook and I we were good to go. The snowmobiles were good." Brookanne similarly testified Taylor told them "You guys are good to go," after which she and Terry left Runamuk and drove back to the resort with other members of the Neville Party.

¶5 Taylor confirmed at trial that Terry and Brookanne returned the snowmobiles to Runamuk at around 1:00 p.m. on December 31. He further confirmed that, although he was inside Runamuk's office, he could see the snowmobiles through a window. However, Taylor testified that, immediately after Terry and Brookanne finished checking in the snowmobiles, Taylor's business partner, Justin Hollmann, came inside and informed Taylor that one of the snowmobiles the Neville Party had rented was damaged. Taylor then went outside with Hollmann and observed the damage, at which point he saw members of the Neville Party driving away in an SUV. He tried to run after the SUV but could not catch up to it. Taylor testified he went back inside and attempted to call the Neville Party, but he could not reach them. Notably, while Taylor testified during the June 2016 bench trial that all of these events occurred on December 31, he had previously averred in a November 2015 affidavit that the Neville Party returned the snowmobiles on December 29, and he averred in a January 2016 affidavit that the snowmobiles were returned on December 30.

¶6 Hollmann testified that, on December 31, he left Runamuk's office building to return to its shop and saw two snowmobiles parked outside. He noticed "from quite a ways away" that one of them—a 2010 Ski Doo—was damaged. This testimony was somewhat inconsistent with Hollmann's pretrial affidavits, in which he averred that he noticed the damaged snowmobile after exiting Runamuk's shop building "in the afternoon and approaching dusk" on December 30. Hollmann testified at trial that, after notifying Taylor of the damage, he took the snowmobile into Runamuk's shop, photographed the damaged areas, and began to prepare an estimate of the repair cost. Hollmann's photographs of the damage were introduced into evidence at trial.

¶7 The circuit court issued an oral ruling dismissing Runamuk's claim that the Neville Party breached its rental agreement with Runamuk by refusing to pay for the damage to the 2010 Ski Doo. The court began by explaining that its decision "[came] down to credibility." The court then listed a number of factors that led it to conclude Runamuk's witnesses were less credible than the Neville Party's witnesses. First, the court observed that Runamuk had failed to keep detailed business records regarding which snowmobiles it rented, which had created a factual dispute about whether the damaged snowmobile was, in fact, the same snowmobile that was rented by and delivered to the Neville Party. Second, the court observed the rental agreement the Neville Party signed did not include "any identifying features" specific to the snowmobile that was damaged, such as a license plate number or VIN number.

¶8 Third, the circuit court expressed concern that Runamuk did not have procedures in place for inspecting snowmobiles immediately after they were returned by renters. The court indicated that, if Taylor had immediately inspected the snowmobile in question when the Neville Party returned it, his observations "would have been vital evidence" regarding whether the snowmobile was, in fact, damaged at that time.

¶9 Fourth, the circuit court stressed that there was conflicting evidence about whether Taylor attempted to call the Neville Party on December 31 after discovering damage to the snowmobile. The court noted Taylor had not been able to produce phone records corroborating his testimony that he called the Neville Party that afternoon, and Terry's cellphone records did not show any incoming calls from Runamuk. The court further observed there was no evidence Taylor attempted to contact the resort where he knew the Neville Party was staying.

¶10 Fifth, the circuit court emphasized the discrepancies between Taylor and Hollmann's trial testimony, on one hand, and their pretrial affidavits, on the other. The court explained:

> I would assume that when Mr. Hollmann and Mr. Taylor gave that information to [Runamuk's attorney] at the time they made these affidavits their memories were better of this event than they are now. I have never met one person in any kind of testimony that their memory improves with time as opposed to getting worse. Obviously our memories become faultier as time goes by. And this Court is left with statements in affidavit form and in testimony form of different dates and different times throughout the day related to I think what are fairly important facts. So that calls into [question] the credibility of the testimony.

¶11 Sixth, the circuit court observed that the photographs Runamuk provided did not identify the damaged snowmobile by its VIN number. The court further noted the late date at which these pictures "were found and … given and provided to" the Neville Party's attorney.

¶12 Seventh, the circuit court noted Runamuk had a video surveillance system, footage from which may have shown whether the snowmobile in question was, in fact, already damaged when the Neville Party returned it. The court emphasized that Runamuk had failed to preserve the surveillance footage, despite knowing within two weeks that the Neville Party was refusing to pay for any repair costs.

¶13 After noting all of these factors that called into question the credibility of Runamuk's witnesses, the circuit court expressly found credible Terry and Brookanne's testimony regarding the "timeline" of events on December 31, 2014. The court further stated:

> It is the finding of this Court that at the time that Mr. Neville left the building at Runamuk and went to the

> vehicle, that there was no damage [to the snowmobile]. At least not the damage that has been represented on the photographs. That was not in place at that time.

The court found the evidence showed that the Neville Party had returned the snowmobiles to Runamuk "right around 1 o'clock," and the photographs indicated Runamuk was aware of the damage "at least … at 1:53." The court therefore found there was an over-forty-five-minute time period after the Neville Party returned the snowmobiles during which the damage could have occurred. Based on that temporal gap, as well as the court's assessment of the witnesses' credibility, the court concluded Runamuk had not met its burden to prove the Neville Party caused any damage to the snowmobiles it rented. The court subsequently entered a written judgment dismissing Runamuk's breach of contract claim, and Runamuk now appeals.

DISCUSSION

¶14 Runamuk's sole argument on appeal is that the circuit court erred by refusing to enforce the parties' rental agreement. Runamuk contends: (1) the agreement is a valid contract; (2) the agreement made the Neville Party liable for any damage to the snowmobiles they rented; and (3) the agreement governed the calculation of Runamuk's damages.

¶15 Runamuk's argument in this regard misses the point. There is no question that the parties entered into a valid agreement for the Neville Party to rent two snowmobiles from Runamuk. There is also no question that the rental agreement: (1) required the Neville Party to return the snowmobiles in the same condition in which it received them; (2) permitted Runamuk to inspect the snowmobiles after the Neville Party returned them; (3) made the Neville Party liable for the cost to repair any damage; and (4) governed the calculation of

Runamuk's damages. What Runamuk fails to appreciate is that the circuit court concluded Runamuk did not meet its burden to prove the Neville Party *caused* any damage to the snowmobiles it rented. Absent that proof, Runamuk cannot recover under its agreement with the Neville Party.

¶16 Following a bench trial, we will not set aside the circuit court's factual findings unless they are clearly erroneous. WIS. STAT. § 805.17(2) (2015-16).[3] A finding of fact is clearly erroneous when it is against the great weight and clear preponderance of the evidence. ***Phelps v. Physicians Ins. Co.***, 2009 WI 74, ¶39, 319 Wis. 2d 1, 768 N.W.2d 615. We search the record for evidence that supports the circuit court's findings, rather than looking for evidence to support findings the court could have, but did not, make. ***Dickman v. Vollmer***, 2007 WI App 141, ¶14, 303 Wis. 2d 241, 736 N.W.2d 202. Moreover, because it is the circuit court's responsibility to resolve conflicts in the testimony, we will uphold its determinations as to witness credibility unless they are inherently or patently incredible, and we will not second-guess the court's reasonable factual inferences. ***Id.***

¶17 Here, the circuit court expressly found that the snowmobile in question was not damaged when the Neville Party returned it to Runamuk. That finding is supported by ample evidence and is therefore not clearly erroneous. Four witnesses testified on behalf of the Neville Party that they were not aware of any damage to or accidents involving the snowmobile while it was in the Neville Party's possession. Evidence was also introduced at trial indicating that Taylor

[3] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

saw the snowmobile through a window when Terry and Brookanne returned it, but he did not say anything to suggest he had observed any damage.

¶18 Furthermore, as the circuit court noted, there was evidence indicating that approximately forty-five minutes elapsed between the time the Neville Party returned the snowmobile and the time Runamuk first documented any damage to it. The court reasonably inferred the damage could have occurred during that time period, while the snowmobile was in Runamuk's exclusive possession.[4] Although Taylor and Hollmann testified they observed damage to the snowmobile immediately after the Neville Party returned it, the court expressly found that their testimony was not credible. The court explained in great detail why it did not consider Taylor and Hollmann to be credible witnesses, and its credibility determination was reasonable and supported by the record.

¶19 Based on its finding that the snowmobile was not damaged when the Neville Party returned it to Runamuk, the circuit court appropriately concluded Runamuk had failed to prove that the Neville Party damaged the snowmobile. Runamuk challenges that conclusion on the basis that there was "no evidence to indicate anything at all happened to the 2010 Ski Doo in the very brief window between [its return] to [Runamuk's] empty parking lot and its inspection by the mechanic." Runamuk further observes that the Neville Party did not present the

[4] Runamuk argues in its reply brief that, contrary to the circuit court's findings, Runamuk became aware of the damage to the snowmobile "at most 25 minutes" after the Neville Party returned it. Assuming without deciding Runamuk is correct that the temporal gap was only twenty-five minutes, rather than forty-five minutes, that fact makes no difference to our analysis. The damage to the snowmobile could just as easily have occurred during a twenty-five-minute time period as in a forty-five-minute time period.

circuit court with "an alternate theory of how the damage occurred in that brief window of time."

¶20 Again, this argument misses the point. As the plaintiff in this breach of contract action, Runamuk had the burden to prove that the Neville Party breached the rental agreement by damaging the snowmobile and subsequently refusing to pay for its repair. *See* ***Acuity Mut. Ins. Co. v. Olivas***, 2006 WI App 45, ¶14, 289 Wis. 2d 582, 712 N.W.2d 374. The Neville Party was not required to prove—and the circuit court was not required to determine—precisely how and when the damage actually happened. It was sufficient for the court to find that the damage did not occur while the snowmobile was in the Neville Party's possession.

¶21 Runamuk further observes the rental agreement expressly states that, when rented equipment is returned, Runamuk "may conduct a cursory look at it," but Runamuk "will not inspect the equipment until it has appropriate staff on hand; the equipment is clean and free of visual obstructions; [and] the ambient light and weather are suitable." Runamuk appears to contend that, when there is a delay between the time equipment is returned to Runamuk and the time Runamuk performs its inspection, the rental agreement makes the renter liable for any damage that occurs in the interim. However, accepting this argument would lead to absurd results, in that it would make renters liable for damage to rented equipment caused by third-parties—or by Runamuk itself—at a time when the equipment is no longer in the renters' possession. We interpret contracts so as to avoid absurd results. ***Chapman v. B.C. Ziegler & Co.***, 2013 WI App 127, ¶2, 351 Wis. 2d 123, 839 N.W.2d 425. We therefore reject Runamuk's claim that the rental agreement made the Neville Party liable for any damage to the snowmobile that occurred after the Neville Party returned it to Runamuk but before Runamuk performed its inspection.

¶22 For all of the reasons stated above, we affirm the judgment dismissing Runamuk's breach of contract claim. The Neville Party asserts this appeal is frivolous and therefore asks us to remand this matter to the circuit court for an award of attorney fees and costs under WIS. STAT. RULE 809.25(3). However, the Neville Party does not develop any argument that Runamuk pursued this appeal "in bad faith, solely for purposes of harassing or maliciously injuring another." *See* RULE 809.25(3)(c)1. Moreover, although we have rejected Runamuk's argument that the circuit court erred by denying its breach of contract claim, we cannot conclude that argument was so devoid of merit that Runamuk or its attorney "knew, or should have known, that the appeal … was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law." *See* RULE 809.25(3)(c)2. We therefore decline the Neville Party's request that we remand for an award of attorney fees and costs under RULE 809.25(3).

By the Court.—Judgment affirmed.

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