COURT OF APPEALS
DECISION
DATED AND FILED

May 3, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP1855 **Cir. Ct. No. 2004CV123**

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

MICHAEL BAXTER,

PLAINTIFF-APPELLANT,

V.

WILLIAM LYNCH,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Green Lake County: WILLIAM M. McMONIGAL, Judge. *Affirmed*.

Before Brown, Nettesheim and Anderson, JJ.

¶1 PER CURIAM. Michael Baxter appeals from a judgment in favor of William Lynch for services Lynch performed in restoration of a vehicle owned

by Baxter. Baxter argues that he should have recovered damages, including double damages under WIS. STAT. § 100.20(5) (2003-04),[1] caused by Lynch's violation of WIS. ADMIN. CODE ch. ATCP 132 (Jan. 1994),[2] failure to complete the restoration, and poor workmanship. We conclude that the evidence supports the trial court's finding that Baxter terminated Lynch's services and that this was not an arrangement within the scope of ch. ATCP 132. We affirm the judgment.

¶2 Baxter's complaint alleged that Lynch, doing business as "Precision Collision," agreed to do body work and paint Baxter's 1969 Plymouth Roadrunner for $4000. It alleged that after initial work was commenced, the parties agreed to expand the scope of the work to include a full and complete restoration of the vehicle for which Baxter would pay Lynch an additional $1000 and transfer title to a camper to Lynch. Baxter claimed that Lynch ceased work on the vehicle before completing the restoration and that Lynch was wrongfully retaining possession of the car. The complaint also alleged that Lynch was in the auto repair business and failed to provide a written estimate of repairs as required by WIS. ADMIN. CODE §§ ATCP 132.02 and 132.03(1). Baxter sought possession of the vehicle, damages, and attorney fees under WIS. STAT. § 100.20(5). Lynch counterclaimed for the value of work performed and costs of storing the vehicle in his garage.

¶3 The matter was tried to the court. Baxter and Lynch gave conflicting testimony about their arrangement. They both agreed that the initial plan was to replace the fenders with fenders Baxter had acquired elsewhere and to repaint the

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[2] All references to the Wisconsin Administrative Code are to the January 1994 version unless otherwise noted.

outer body of the vehicle. Baxter testified that the agreement was capped at $4000 for that work. Lynch testified that he was allowing Baxter to utilize his garage to perform work on the vehicle. Lynch expected to be paid $25 per hour for labor in helping Baxter paint the vehicle. Lynch acknowledged that the parties later agreed to expand the project to a complete restoration with Baxter promising to transfer title to a camper and pay an additional sum of money.

¶4 The vehicle was delivered to Lynch's garage on July 1, 2004. Baxter moved his camper to Lynch's property so that he had a place to stay while helping Lynch work on the vehicle. The parties had a falling-out which prompted Lynch to require Baxter to remove his camper and all belongings from the property. Lynch locked the vehicle in his garage.

¶5 The trial court concluded that the administrative code provisions did not apply because Baxter worked on the car alongside Lynch and Baxter was not a "customer" within the meaning of the code. It found that the parties agreed Lynch would be paid $25 per hour for work performed on Baxter's car. It found that Lynch had been paid $1400. It awarded Lynch $6237.50 in quantum meruit.

¶6 Except for the determination of whether the administrative code applies, the issues in this appeal challenge the sufficiency of the evidence to support the trial court's factual findings. The trial court's factual findings will not be reversed unless they are clearly erroneous. *See* WIS. STAT. § 805.17(2). We review the record in the light most favorable to the trial court's findings to determine whether the findings are clearly erroneous. ***Rohde-Giovanni v. Baumgart***, 2003 WI App 136, ¶18, 266 Wis. 2d 339, 667 N.W.2d 718. "When we undertake to determine whether a finding is clearly erroneous, rejection is not warranted merely because there is evidence in the record to support a contrary

finding. The contrary evidence, rather, must constitute the great weight and clear preponderance of the evidence." ***Id.*** (citation omitted). The credibility of witnesses and the weight to be attached to that evidence are matters uniquely within the province of the trial court when it acts as the finder of fact. *See* ***Global Steel Prods. Corp. v. Ecklund Carriers, Inc.***, 2002 WI App 91, ¶10, 253 Wis. 2d 588, 644 N.W.2d 269.

¶7 Baxter first argues that the trial court erred in not finding that there was an initial agreement to complete the work for $4000.[3] However, whether or not there was a cap of $4000 is of no consequence because the trial court found that the scope of that project expanded beyond that originally contemplated.

¶8 The trial court's finding that the project expanded beyond the scope of the parties' initial agreement is not clearly erroneous. Baxter acknowledged that he was present ninety-five percent of the time that the vehicle was being worked on. Lynch testified that from the first day that Baxter brought the vehicle to his shop, the scope of the project changed. Baxter had already removed the glass from the vehicle and they began doing repairs on the inside. Lynch indicated

[3] Baxter also suggests, and more vigorously asserts in his reply brief, that the subsequent agreement to expand the project to a complete restoration and pay Lynch with title to the camper and an additional $1000 was a novation. *See* ***State Med. Soc'y v. Associated Hosp. Serv. Inc.***, 23 Wis. 2d 482, 490, 128 N.W.2d 43 (1964) ("A novation contemplates a substitution of a new contract for a previous one."). The claim that a novation occurred is raised for the first time on appeal and we do not address it. *See* ***Evjen v. Evjen***, 171 Wis. 2d 677, 688, 492 N.W.2d 361 (Ct. App. 1992). Moreover, Baxter testified that Lynch proposed doing a complete restoration in exchange for title to the camper and an additional $1000, but "[t]here was no actual agreement for him to go ahead and do that, and so there was no actual agreement for him to restore my car." Baxter's position on appeal that a novation occurred is inconsistent with his testimony that he did not agree to a complete restoration of the vehicle. He cannot assert inconsistent positions. *See* ***Coconate v. Schwanz***, 165 Wis. 2d 226, 231, 477 N.W.2d 74 (Ct. App. 1991) (judicial estoppel prevents a party from asserting a position in a legal proceeding which is inconsistent with a position previously asserted).

that it was Baxter directing more and more work and that Baxter disassembled the vehicle to the point where a full restoration was underway. Lynch's mother indicated that Baxter kept wanting to do more and more to the vehicle and kept taking parts off to be refinished. Since the project did not adhere to the scope of the initial agreement, the $4000 cap, even if initially agreed to, fell out of the picture.

¶9 We turn then to the trial court's finding that the parties agreed that Lynch would be compensated for his labor on the car at $25 per hour. Baxter's appellate position is that Lynch would be compensated at $25 per hour.[4] Lynch testified that he and Baxter were friends and he agreed to give him a discounted labor charge. He also indicated that he and Baxter used the same arrangement when he worked on Baxter's "dually" pickup truck. Lynch's mother confirmed that the deal was that Baxter would pay Lynch $25 per hour. We recognize that Baxter adamantly denied that he agreed to pay $25 per hour, but the trial court rejected Baxter's credibility on that point. The trial court's finding that Lynch was to be compensated at $25 per hour is not clearly erroneous.

¶10 Baxter also argues that the trial court's finding that Baxter terminated the agreement by removing the vehicle from the property in August 2004 is clearly erroneous because in fact Lynch retained possession of the vehicle until after this lawsuit was filed and a surety bond was substituted as security for Lynch's counterclaim.[5] Lynch concedes that the trial court's finding that Baxter

[4] In his reply brief Baxter states: "Baxter's position at trial was that the parties had entered into an oral agreement for work on Baxter's vehicle at the rate of $25.00 per hour with a cap of $4,000.00."

[5] Again, Baxter's own trial testimony misled the trial court. Baxter indicated that the vehicle had been sitting on his car hauler trailer in his enclosed garage since August of 2004.

retrieved his vehicle at the end of August is error. That, however, does not require reversal of the judgment in Lynch's favor. Contrary to Baxter's assertion, Lynch was not contractually obligated to provide a certain amount of work on the vehicle before expecting payment in full and releasing the vehicle.

¶11 It is sufficient that the evidence supports the trial court's finding that Baxter told Lynch not to do any more work on the vehicle. Baxter testified that on the day he removed his trailer from the property, he told Lynch not to do any further work on the vehicle. Why Baxter left the property and terminated the work in progress on the vehicle is not legally relevant. Again, Lynch had no contractual obligation to complete a certain amount of work. Lynch quit work when Baxter directed him to do so. Baxter's contention that Lynch is responsible for rust that occurred up to the date of trial because Lynch wrongfully terminated the contract or wrongfully impounded the vehicle is misplaced.

¶12 Baxter contends that Lynch is not entitled to recover in quantum meruit because Lynch failed to substantially complete the contract. However, we have already upheld the trial court's finding that Baxter told Lynch not to do any more work on the vehicle. Baxter cannot be heard to argue against Lynch's entitlement to recovery under quantum meruit where he, himself, caused the cessation in Lynch's performance.

¶13 Baxter next argues that Lynch's work on the vehicle was of such poor quality that it was of no value, thereby precluding Lynch from recovering in quantum meruit. *See* ***W.H. Fuller Co. v. Seater***, 226 Wis. 2d 381, 386 n.2, 595 N.W.2d 96 (Ct. App. 1999) (quantum meruit is allowed where there is a request to perform services, services are provided, and the services were valuable to the person requesting them). Again, because the project quickly became open-ended,

the trial court looked at the condition of the vehicle when Lynch was told to cease work. The trial court found that extensive prep work in anticipation of the paint job had been completed. The photo exhibits at trial confirm that. The trial court implicitly rejected the testimony of Baxter's expert witness that the body panels were damaged by Lynch's sandblasting of the panels. Lynch testified that he did not sandblast the body panels. Thus, the trial court's findings that Lynch did not damage the vehicle and performed service of value are not clearly erroneous. The award in quantum meruit is supported by the evidence.

¶14 The final issue on appeal is whether the consumer protection provisions of WIS. ADMIN. CODE ch. ATCP 132 apply. By requiring a vehicle repair shop to provide the customer with a copy of a dated written repair order legibly describing the repairs to be performed, the code seeks to prevent uncommissioned vehicle repairs. *See* ***Huff & Morse, Inc. v. Riordon***, 118 Wis. 2d 1, 9, 345 N.W.2d 504 (Ct. App. 1984), *abrogated on other grounds*, ***Baierl v. McTaggart***, 2001 WI 107, ¶¶16-17, 19, 245 Wis. 2d 632, 629 N.W.2d 277. Section ATCP 132.01(2) defines "customer" as "a natural person, corporation or business entity that owns, operates or controls a motor vehicle that is the subject of a repair transaction." Baxter asserts he was a customer entitled to a written repair estimate and is not obligated to pay for any work on the vehicle that was not authorized by a written repair estimate.

¶15 We agree with the trial court that the administrative code does not apply in this unique factual situation. Baxter was not merely a customer. Baxter performed work on the car alongside Lynch. Baxter directed the work to be done. He moved his camper to Lynch's property so he could be involved in work on the

vehicle. The restoration of the vehicle was a joint effort. This was not a consumer transaction to which the code applies.[6]

¶16 Even if the code applies, Baxter must still pay for the repairs he authorized. *See* ***Huff & Morse***, 118 Wis. 2d at 8-11 (repair shop may recover for authorized repairs even if code not complied with). By his own admission, Baxter was present ninety-five percent of the time his vehicle was worked on and he authorized all the work up until the day he told Lynch to stop work. Baxter may not use noncompliance with the code as negating his liability to pay for the work he authorized.

By the Court.—Judgment affirmed.

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

[6] We emphasize that this is an unusual factual situation. Our holding that Baxter is not a customer does not offend the consumer protection goal of the administrative code.