



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT IV

November 6, 2015

To:

Hon. Barbara W. McCrory
Circuit Court Judge
Courthouse
51 S Main St - 5th Fl
Janesville, WI 53545-3978

Jacki Gackstatter
Clerk of Circuit Court
Rock Co. Courthouse
51 S. Main Street
Janesville, WI 53545

Gary W. Thompson
Thompson Law Offices, S.C.
808 N. Third St., Ste. 406
Milwaukee, WI 53203

Margery M. Tibbetts
Murphy Desmond S.C.
101 East Milwaukee St. #301
Janesville, WI 53545-3004

You are hereby notified that the Court has entered the following opinion and order:

2014AP1680

William J. Jass v. Newell Enterprises, LLC and Allan Newell
(L.C. # 2011CV1294)

Before Kloppenburg, P.J., Higginbotham and Sherman, JJ.

William Jass appeals from a judgment that denied four of his five claims against Newell Enterprises, LLC and Allan Newell (collectively, Newell) for alleged unfair trade practices and violations of the Wisconsin Consumer Act relating to the sale and subsequent repossession of an automobile, and that awarded Newell an offset on its counterclaim for breach of contract. After reviewing the record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2013-14).¹ We affirm for the reasons explained below.

¹ All reference to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

As a threshold matter, Newell asks that we strike Jass's statement of facts because Jass failed to provide a transcript of the bench trial for the appellate record and also cites from summary judgment materials that were not submitted into evidence. We are not persuaded that striking the entire statement of facts is warranted because Jass does provide citations to other items in the record such as trial exhibits and the court's written decision. However, we do agree with Newell that it is an appellant's responsibility to provide this court with an adequate record for review. Our standard approach in these circumstances is simply to assume that the missing material would support the circuit court, and we will do so here. See *Fiumefreddo v. McLean*, 174 Wis. 2d 10, 27, 496 N.W.2d 226 (Ct. App. 1993).

The circuit court made the following factual findings, none of which we could determine to be clearly erroneous in the absence of a transcript. Jass purchased a used car from an auto dealership owned by Newell. At the time of the sale, the parties discussed three issues with the car: a weak-sounding starter; a clunking noise when the steering wheel was turned; and a messy interior. Jass made a down payment and financed the rest of the purchase price with a loan from Newell. The purchase contract, loan documents, and title and license plate applications all provided an address on Elizabeth Street in Janesville as Jass's residence.

A few months after the sale, having been evicted from the Elizabeth Street residence and having made only two installment payments on the car loan, Jass moved to Illinois with his family. He took the car with him, but did not provide Newell with his Illinois address, and did not make any further payments on his loan. Jass still had a post office box in Janesville that he would periodically return to check, but he did not give that address to Newell either.

Newell sent a Notice of Right to Cure Default to Jass at the Elizabeth Street Address, which was returned as undeliverable. After using Facebook to find Jass in Illinois, Newell took possession of the car at the high school of Jass's stepdaughter, accompanied by the chief of the local police department. When Newell called Jass from the school to inform him of the repossession, Jass asked how Newell found him and stated that he did not believe Newell had the right to take the vehicle. Aside from making a single obscene statement—for which the circuit court found a violation of WIS. STAT. § 427.104(1)(i) and imposed the statutory penalty—Newell remained respectful and cordial throughout the repossession process at the school.

Jass's first argument on appeal is that the Notice of Right to Cure Default was defective under provisions in the Wisconsin Consumer Act because it was not sent to his last known address and overstated the amount necessary to cure the default by \$43.71.² *See generally*, WIS. STAT. § 425.104(2) and 425.105(1). Although Newell attempts to present this as an issue of law, his argument is foreclosed by the circuit court's findings of fact. Specifically, the circuit court stated in a memorandum opinion that, based upon its credibility determinations relating to multiple discrepancies in Jass's testimony and exhibits, "I find that Newell did not have the P.O. Box. He sent the notice to the only address he had for Jass" and stated in a subsequent order for judgment that Newell's calculation of the amount of default set forth in Exhibit 7 and "arrived at...using a computer program, was the accurate amount in default."

² Jass makes an additional argument that the circuit court should have allowed him to amend the pleadings to raise an additional claim that the notice was defective with respect to the amount of default, but that issue is moot given the court's factual finding that the notice accurately stated the amount in default.

Jass's second, related, argument on appeal is that the circuit court erroneously exercised its discretion by failing to take judicial notice of his arithmetic calculations as to the amount in default. The Wisconsin Rules of Evidence authorize a court to take judicial notice of adjudicative facts that are "generally known within the territorial jurisdiction" of the court or are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." WIS. STAT. § 902.01(2)(b). The amount of Jass's default was a factual matter in dispute and the subject of competing exhibits from the parties. Because the court was required to weigh conflicting evidence in order to reach its determination of the amount of default, Jass's calculation sheet was not a proper subject for judicial notice.

Jass's third argument on appeal is that Newell committed an unfair trade practice by providing him with an incomplete Wisconsin Buyer's Guide disclosure form at the time of sale, and by subsequently refusing to repair an undisclosed defect. Administrative regulations require the disclosure form for selling a used car to include, among other things, "all significant existing mechanical, electrical and electronic defects and damage." WIS. ADMIN. CODE § Trans 139.04(4) (through Nov. 2015). Fair trade practices require a dealer to "remedy an item improperly reported on the guide that the dealer could have found using reasonable care if the buyer has notified the dealer within a reasonable time after the buyer discovered or should have discovered the improperly reported item and the vehicle is made available to the dealership." WIS. ADMIN. CODE § Trans 139.04(6)(a)5. (through Nov. 2015).

Jass contends that the knocking sound the steering wheel made when it was being turned should have been reported under the "Drive Train" section of the disclosure form, and that Newell should have repaired the problem when Jass complained about it after the sale. However, the circuit court found credible Newell's testimony that the knocking sound did not

affect the safety of the vehicle; that repair was not made a condition of the sale when the issue was orally discussed after Jass test drove the vehicle; and that Jass never actually brought the vehicle in for repair. Newell's testimony supports determinations that the knocking sound was not a sufficiently "significant" mechanical defect to require disclosure on the form, and that Jass did not meet the preconditions for having Newell repair the problem.

Jass's fourth argument is that Newell violated the Wisconsin Consumer Act by breaching the peace during the repossession. *See* WIS. STAT. § 425.206(2)(a). He relies upon *Hollibush v. Ford Motor Credit Co.*, 179 Wis. 2d 799, 508 N.W.2d 449 (Ct. App. 1993), for the proposition that a breach of the peace occurs when the merchant takes a vehicle after the debtor tells him not to. We note, however, that the reason for the holding in that case was that a verbal objection to repossession could be seen as a precursor to violence during an emotional confrontation. There was no such imminent potential for violence here, where Jass made a verbal objection over the phone but was not in the same location as Newell.

Jass's fifth argument is that Newell violated the Wisconsin Consumer Act by entering a dwelling "used by the customer as a residence." *See* WIS. STAT. § 425.206(2)(b). This argument borders on the frivolous. Neither Jass nor his stepdaughter was residing at the school. Any argument that the statute should be expanded to include school property as well as residences should be directed to the legislature.

Finally, Jass contends that the circuit court improperly granted judgment on Newell's counterclaim. This argument rests on the premise that Newell violated the Wisconsin Consumer Act, and thus, the consumer contract under which Newell recovered damages should have been voided under WIS. STAT. § 425.305. We do not address this argument because Jass raises it for

the first time on appeal. See *Schonscheck v. Paccar, Inc.*, 2003 WI App 79, ¶¶10-11, 261 Wis. 2d 769, 661 N.W.2d 476 (This court will generally not consider issues raised for the first time on appeal, so that we don't "blindsided [circuit] courts with reversals based on theories which did not originate in their forum.").

IT IS ORDERED that the judgment is summarily affirmed under WIS. STAT. RULE 809.21.(1).

Diane M. Fremgen
Clerk of Court of Appeals