COURT OF APPEALS
DECISION
DATED AND FILED

November 6, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP729 **Cir. Ct. No. 2012SC5132**

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

DONNA PETERS AND LARRY PETERS,

PLAINTIFFS-RESPONDENTS,

V.

UNION CAB OF MADISON COOPERATIVE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: MARYANN SUMI, Judge. *Affirmed*.

¶1 SHERMAN, J.[1] Union Cab of Madison Cooperative appeals a judgment awarding Donna and Larry Peters damages they incurred when forced to

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

reschedule travel plans after Union Cab failed to pick them up as previously scheduled. For the reasons discussed below, I affirm.

BACKGROUND

¶2 In June 2012, the Peters brought suit against Union Cab to recover expenses they incurred when they were forced to reschedule travel plans after Union Cab failed to pick them up as previously scheduled. The Peters alleged that they had arranged for Union Cab to pick them up on Saturday, June 11, 2011, and that Donna confirmed their pick-up date and time with Union Cab on Friday, June 10. The Peters alleged that Union Cab failed to pick them up as scheduled, which resulted in them missing their flight and necessitated them purchasing new airline tickets with a later departure date. The Peters sought damages in the amount of $6,140.68, which included $5,225 for new airline tickets, $300 for ticket exchange fees, and $615.68 for prepaid hotel fees for the days they missed due to the change in their departure date.

¶3 Following a hearing, the small claims court entered judgment in favor of the Peters in the amount of $5,933.02. The court rejected Union Cab's defense that there was a mutual mistake of fact as to the pick-up date, concluding that there was not a mutual mistake of fact but instead "a mistake of fact by Union Cab" as to the pick-up date. On appeal, Union Cab challenges this determination, as well as the award of damages. Additional facts will be discussed below as necessary.

DISCUSSION

¶4 Union Cab challenges the circuit court's determination that a mutual mistake of fact did not occur as to the Peters' pick-up date. Union Cab asserts that

whether the parties were mutually mistaken is a question of law. However, the law is clear that the question of whether a mutual mistake occurred is one of fact. *See* ***State Bank of La Crosse v. Elsen***, 128 Wis. 2d 508, 517, 383 N.W.2d 916 (Ct. App. 1986). A circuit court's findings of fact will be affirmed unless clearly erroneous. WIS. STAT. § 805.17(2).

¶5 Union Cab does not argue that the circuit court's finding that a mutual mistake did not occur in this case is clearly erroneous. Rather, Union Cab argues that the court "gave insufficient weight to the fact that Donna [] simultaneously made the same mistake" of "confusing or conflating June 11, June 12, and Saturday." However, the court effectively found that Donna had not made a mistake as to the pick-up date, a finding not challenged by Union Cab as clearly erroneous. However, even if Union Cab had challenged the court's finding as clearly erroneous, Union Cab would not prevail.

¶6 At trial, a transcript of the telephone call between Donna and a Union Cab representative on Tuesday, June 7, 2011, was admitted into evidence. It read, in relevant part:

> [Donna]: … Saturday—do you have handicapped vans?
>
> UNION CAB: Yes, we do.
>
> [Donna]: Oh, you do…. We need a real early pickup to go to the airport.
>
> UNION CAB: Tomorrow?
>
> [Donna]: No, Saturday morning.
>
> UNION CAB: Saturday.
>
> [Donna]: Do you have the back end loaded vans?
>
> UNION CAB: Yes.
>
> ….

> UNION CAB: Saturday, the 12th, what time?
>
> [Donna]: Probably around 10 to five ….
>
> UNION CAB: Okay.
>
> ....
>
> UNION CAB: All right. We've got you down.
>
> [Donna]: Make sure they get here on time.…
>
> UNION CAB: That's great. We got it. We'll see you at 4:50 on Saturday.

It is evident from the transcript that Donna was requesting a pick-up on Saturday, June 11. At no point does she indicate that she desires a pick-up on Sunday, June 12. Furthermore, Donna testified at the hearing that on Friday, June 11, she called Union Cab to confirm their pick-up time for Saturday. The circuit court clearly found Donna's testimony to be credible, a finding not challenged by Union Cab. *See* ***State v. Peppertree Resort Villas, Inc.***, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345 (the circuit court is the ultimate arbiter of the credibility of the witnesses). Accordingly, I conclude that Union Cab's argument as to mutual mistake is without merit.

¶7 Union Cab also challenges the damages awarded to the Peters. Union Cab does not challenge the evidence supporting the damages, but instead argues that the damages are too "remote, unforeseeable" and disproportionate to the cost of the cab ride to be sustainable.

¶8 When reviewing an award of damages, an appellate court applies a highly deferential standard of review. ***Selmer Co. v. Rinn***, 2010 WI App 106, ¶28, 328 Wis. 2d 263, 789 N.W.2d 621. If sufficient evidence supports the court's finding of damages, we must uphold the court's finding unless that finding is

clearly erroneous. ***Cianciola, LLP v. Milwaukee Metro. Sewerage Dist.***, 2011 WI App 35, ¶21, 331 Wis. 2d 740, 796 N.W.2d 806.

¶9 To be recoverable in a contract claim, damages must flow from the breach and "'be reasonably foreseeable at the time the contract was made as a probable result of the breach.'" ***United Concrete & Const., Inc. v. Red-D-Mix Concrete, Inc.***, 2013 WI 72, ¶54, 349 Wis. 2d 587, 836 N.W.2d 807 (quoted source omitted). Union Cab asserts that it could not "remotely have contemplated the prospect of [the Peters'] claims" in light of the uncertainty of the costs that might arise from the Peters' missed flight, the details of which Union Cab was unaware. However, it is that uncertainty, as well as the knowledge that flights are expensive, especially when purchased on short notice that makes the Peters' damages foreseeable. Furthermore, as pointed out by the Peters, our supreme court has stated that the question of foreseeability is not whether "a particular injury is foreseeable … [instead] it is sufficient to show that 'some injury could reasonably have been foreseen.'" ***Morden v. Continental AG***, 2000 WI 51, ¶47, 235 Wis. 2d 325, 611 N.W.2d 659 (quoted source omitted). Although the supreme court made this statement in the context of a duty of care analysis, I conclude that it is equally applicable here. Union Cab has not argued that an injury was not foreseeable in this case, but instead argues that the Peters' particular injury was not foreseeable.

¶10 I also read Union Cab's brief as arguing that the damages sustained by the Peters were not foreseeable because the amount of the award is not proportionate to an ordinary cab fare. Union Cab cites this court to ***General Star Indem. Co. v. Bankruptcy Estate of Lake Geneva Sugar Shack, Inc.***, 215 Wis. 2d 104, 119-120, 572 N.W.2d 881 (Ct. App. 1997), as best as I can discern, for the proposition that damages that are disproportionate to the contract amount are not

foreseeable. To the extent that this is what Union Cab intends to argue, I conclude that Union Cab's reliance on ***General Star*** is misplaced.

¶11 In ***General Star***, this court concluded that an insured could not recover damages for "unrelated and collateral investment dealings" because those damages were not contemplated by the parties. ***Id.*** at 120-21. We stated that the insured's damages for the insurer's breach of contract were limited to those damages that were "the natural and probable consequences of the breach and were within contemplation of the parties when the contract was made." ***Id.*** at 120. We further stated that a premium of $10,000 in exchange for potential liability in excess of $3 million "strongly suggest[ed]" the parties had not intended to cover such losses in the event of a breach. ***Id.*** at 120-21.

¶12 Unlike ***General Star***, the damages sustained in the present case were a natural and direct consequence of Union Cab's breach. Moreover, I conclude as a matter of law that the difference between the potential cab fare (which Union Cab does not inform this court of) and the Peters' damages, is not so substantial as to indicate that the damages were not foreseeable. Accordingly, I conclude Union Cab's assertion that the Peters' damages were not foreseeable to be without merit.

¶13 The Peters move for an award of costs and attorney fees on the grounds that the appeal is frivolous under WIS. STAT. RULE 809.25(3)(c). Whether an appeal is frivolous is a matter of law. ***Stern v. Thompson & Coates, Ltd.***, 185 Wis. 2d 220, 253, 517 N.W.2d 658 (1994).

¶14 An appeal is frivolous when:

> 1. The appeal … was filed, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another.

> 2. The party or the party's 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.

WIS. STAT. § 809.25(3)(c). The Peters allege that Union Cab should have known that its appeal was without merit, misstated the standard of review on appeal, raised new arguments on appeal, failed to cite to evidence supporting some of its arguments, and brought this appeal "arguably" in bad faith. I agree that Union Cab did not present its arguments in light of the correct standard of review and failed to include citations to the record in support of some of its arguments, contrary to WIS. STAT. RULE 809.19(1)(d), which requires "appropriate references to the record." Nevertheless, I conclude that Union Cab made reasonable, good faith arguments. I therefore conclude that Union Cab's appeal was not frivolous and deny the Peters' motion for attorney fees and costs.

CONCLUSION

¶15 For the reasons discussed above, I affirm.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.