COURT OF APPEALS
DECISION
DATED AND FILED

August 18, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP2728

Cir. Ct. Nos. 2013CV20
2013SC231

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

STUART SORENSON,

PLAINTIFF-RESPONDENT,

V.

THOMAS ZASTROW,

DEFENDANT-APPELLANT,

MARY ANN MAST AND PAUL V. MAST,

DEFENDANTS.

KERRY HIGGINS,

PLAINTIFF,

THOMAS ZASTROW,

PLAINTIFF-APPELLANT,

V.

MARY ANN MAST AND PAUL V. MAST,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Shawano County: JAMES. R HABECK, Judge. *Affirmed*.

Before Stark, P.J., Hruz, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Thomas Zastrow appeals a money judgment for the value of baled corn stalks he removed from farm land. Zastrow argues Stuart Sorenson failed to mitigate his damages. We affirm.

¶2 Zastrow operates a dairy farm in Shawano County together with his children. On April 12, 2012, his daughter, Kerry Higgins, executed an offer to purchase approximately forty-six acres of adjacent farm land from Paul and Mary Mast. On the back of the offer to purchase was the following unsigned handwritten notation: "Tom Zastrow can farm the 46A for the year 2012 providing cutting and making our hay for us.—If the loan does not go thru—The Zastrows owe the Masts 150 an A rent for the year 2012."[1]

¶3 The offer to purchase contained a sixty-day financing contingency. Financing was not timely obtained, and the offer to purchase was not extended in

[1] Paul Mast averred in an affidavit, "The alleged agreement written on the back page of the offer was never made because Tom Zastrow refused to sign it when I asked him to sign it right after I wrote those words. He said, 'I'm not signing anything.' Kerry Higgins never acknowledged the hand written agreement in writing."

writing. On September 11, 2012, the farm land was sold to Kerry Higgins and her brothers Kevin and Keith Zastrow, as tenants in common.

¶4 At the time of the offer to purchase, Stuart Sorenson had a written lease executed by Paul Mast in early 2011, to rent the farm land during the years 2011-2013.[2] Sorenson planted corn on forty-nine acres in 2011 and 2012, including the forty-six acres purchased by Higgins and her brothers.

¶5 Sorenson harvested corn from the farm land in October 2012. When he went to bale the chopped corn stalks approximately a month later, he found Thomas Zastrow had already baled the corn stalks without Sorenson's consent. On December 15, 2012, Paul Mast advised Sorenson in writing that "we had the closing on the land with the Zastows and we don't ow[n] the land anymore there[fore] the land rent agreement is void for the year 2013."

¶6 On January 28, 2013, Zastrow and Kerry Higgins commenced a lawsuit against the Masts seeking money damages for allegedly depriving them of profits for the 2012 growing season. On May 7, 2013, Sorenson commenced a small claims action against the Masts and Zastrow, seeking money damages for the value of the corn stalks. These actions were consolidated.

¶7 The circuit court dismissed all claims by Sorenson against the Masts. The court also found there was no definite and certain agreement for Zastrow to lease the land, and the handwritten note on the back side of the offer to purchase was not subscribed or approved by the parties to the offer to purchase, or by

[2] The lease indicated forty-eight acres, but Sorenson testified at trial: "Well, I paid rent on 48 acres. There's one corner that Paul added after the fact that added it up to 49."

Sorenson. The court further found that Zastrow baled the corn stalks with actual knowledge that Sorenson had written lease rights for 2012. The court determined that Zastrow wrongfully harvested and converted the corn stalks to Sorenson's detriment. The court concluded Sorenson was entitled to the value of the corn stalks harvested on forty-six acres and found damages in the amount of $6,716. Zastrow now appeals.

¶8 Zastrow argues that Sorenson failed to mitigate his damages by making no effort to remove from the field the corn stalks Zastrow baled. In the alternative, Zastrow also contends he did not bale the entire forty-six acres, and any loss to Sorenson should have been no greater than the number of acres Zastrow baled, which he claimed at trial was twenty to twenty-two acres. According to Zastrow, "the actual damages should be no more than 22/46 … of $6716.00 or $3,212.00."

¶9 In matters involving mitigation of damages tried without a jury, the circuit court shall find the ultimate facts and its findings shall not be set aside unless clearly erroneous. *See* WIS. STAT. § 805.17(2) (2013-14). Moreover, we pay proper deference to the circuit court's assessment of the weight and credibility of the evidence. *See* ***Chapman v. State***, 69 Wis. 2d 581, 583, 230 N.W.2d 824 (1975). We search the record for evidence to support the findings reached by the circuit court. *See* ***Estate of Dejmal***, 95 Wis. 2d 141, 154, 289 N.W.2d 813 (1980).

¶10 In its oral decision, the court relied upon aerial maps introduced into evidence, showing the farmland as a long parcel with a road along the north edge. Zastrow testified at trial that when baling the corn stalks, "we went about three quarters of the way to the other end of the field. Took off more towards the road."

The court observed the aerial maps demonstrated "some of the land is more visible [from] the road than others is the upshot of it." The court also stated:

> Now Mr. Zastrow comes up and he says, well, actually we did not even do all of our 46 acres. And there is land essentially to the south we didn't do. Well, if you think about that, I don't—that could very well be true, but I don't know how Mr. Sorenson is going to recognize that when he is driving through the road.
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> ….
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> … You would have to be really watching carefully to figure out that not all of the land was baled.

¶11 We conclude there is an adequate basis in the record to support the circuit court's finding that Sorenson was entitled to damages for forty-six acres of chopped corn stalks. Under the circumstances of this case, it was reasonable for Sorenson to assume all forty-six acres had been baled because the acres visible from the road had been baled.

¶12 The record also supports the implicit finding that it was reasonable for Sorenson to believe that conversations with Zastrow about the bales would prove futile. Sorenson testified regarding a "conflict with Mr. Zastrow in the spring that he was totally unreasonable about that land situation, and I can't talk to him." It is apparent the court found this testimony credible. Given the nature of their relationship, Sorenson reasonably declined to attempt to approach Zastrow to demand to remove the corn stalks Zastrow baled, or check on whether any acres were unbaled. As a result, the court properly determined Sorenson's loss encompassed the value of forty-six acres of baled corn stalks.

¶13 The reasons for the circuit court's determinations were not exhaustive. However, the court's decision, as a whole, was supported by the record, incorporated appropriate considerations, and was not clearly erroneous.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2013-14).