COURT OF APPEALS
DECISION
DATED AND FILED

April 20, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1407 **Cir. Ct. No. 2015SC1266**

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

DALIYAH JOHNSON,

PLAINTIFF-RESPONDENT,

V.

AFFORDABLE AUTO SALES OF AMERICA, INC.,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Kenosha County: DAVID M. BASTIANELLI, Judge. *Affirmed*.

¶1 GUNDRUM, J.[1] Affordable Auto Sales of America, Inc. (Affordable) appeals a trial court order rescinding its sale of a 2002 Volkswagen

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

Beetle to Daliyah Johnson and requiring it to pay to Johnson the amount she paid Affordable for the car in exchange for Johnson's return of the car. For the following reasons, we affirm.

¶2 In May 2015, Johnson filed this small claims action against Affordable seeking $3000 related to her April 2015 purchase of the car, for $3000, from Affordable. On June 25, 2015, a trial to the court was held where Johnson and the owner of Affordable were the only two witnesses to testify. The following facts are from that trial.

¶3 Johnson testified she test drove and then purchased the car, with the owner giving her a thirty-day warranty she believed applied to the entire car. Shortly after she took possession of the car, she contacted Affordable regarding an oil light that was coming on, "jerking" of the car, and transmission concerns, and was told by the owner to bring the car in, which she did on April 14. The owner did not dispute he told Johnson to bring in the car. Johnson testified the issues continued after she got the car back on April 15.

¶4 Johnson testified to getting estimates for repairs, including repairs to the car's transmission, and providing Affordable with the estimates and an opportunity to repair the car, including leaving it at Affordable from April 24 to 27. She stated, and it was not disputed by the owner, that when she came to get the car on April 27, no repairs of any type had been made to the car, including repairs related to a hubcap, door handle and plastic guard, specific repairs that had been written into the contract at the time of purchase.

¶5 In his testimony, the owner acknowledged he had drafted the purchase contract and asserted Affordable had sold the car "as is" and the thirty-day warranty was only for the hubcap, door handle and plastic guard. He further

testified Johnson did not provide Affordable with sufficient notice when she brought in the car for repair and she left it only over a weekend when the business was closed.

¶6 The trial court read the contract[2] as affording Johnson a thirty-day warranty on the entire car, not just the three items written into the contract. The court concluded that, at a minimum, the language of the contract was ambiguous on the warranty issue; so it read the contract against the drafter of it, Affordable. The court then rescinded the contract between the parties, stating Johnson was to return the car to Affordable within thirty days (including signing over the title) and Affordable was to accept the car and return to Johnson the $3000 she paid for it, or timely ask the court for a stay of the judgment.[3] Affordable appeals.

¶7 On appeal, Affordable claims Johnson did not meet her burden of proof, arguing "[t]here was no evidence." It argues this is so because Johnson did not produce in court various text messages or a repair estimate she referred to in her testimony, and a second estimate she did produce was insufficient to support her testimony regarding the car's condition.

¶8 We will not set aside a trial court's findings of fact unless they are clearly erroneous. WIS. STAT. § 805.17(2). This case was tried to the court:

> "It is well settled that the weight of the testimony and the credibility of the witnesses are matters peculiarly within the province of the trial court acting as the trier of fact" because the trial court has a superior opportunity "to

[2] After noting that its copy was difficult to read, the court inquired if either party had a more legible copy and Affordable's owner provided the original contract for the court to use.

[3] There is nothing in the record showing Affordable has sought a stay.

> observe the demeanor of witnesses and to gauge the persuasiveness of their testimony."

Tang v. C.A.R.S. Prot. Plus, Inc., 2007 WI App 134, ¶19, 301 Wis. 2d 752, 734 N.W.2d 169 (citations omitted). It is also for the trial court, not this court, "to resolve conflicts in the testimony, and we review the evidence in the light most favorable to the findings made by the trial court." ***Id.*** (citation omitted). When more than one reasonable inference can be drawn from the credible evidence, we must accept the inference drawn by the trial court. ***Id.***

¶9 We note that Affordable's brief is replete with factual statements for which it provides no citations to the record, many of which statements we are unable to find any support for in the record. As a general matter, this court does not consider "facts" that are unsupported by citation to the record. *See* ***Nelson v. Schreiner***, 161 Wis. 2d 798, 804, 469 N.W.2d 214 (Ct. App. 1991) (assertions of fact not found in the record are prohibited and will not be considered by the court). Affordable seeks to use these unsupported statements as a basis to show Johnson provided false testimony at the trial.[4] It cannot do so.

¶10 Affordable asserts the trial court erred in concluding the contract for purchase of the car was ambiguous with regard to whether it provided a warranty for only certain items on the car or for the entire car and in then interpreting the contract against the drafter, i.e., Affordable. We conclude the court did not err.

[4] For example, Affordable claims in its appellate brief, again, without support in the record, that Johnson never mentioned anything to the owner about the "jerking" of the car after having taken it for a test drive and that the owner never mentioned anything to Johnson to the effect that the jerking was due to the new brakes "catching."

¶11 "The interpretation of a written contract, including the determination of whether its terms are ambiguous, is a legal matter that we decide independently" of the trial court. ***Neenah Sanitary Dist. No. 2 v. City of Neenah***, 2002 WI App 155, ¶9, 256 Wis. 2d 296, 647 N.W.2d 913. If a contract is ambiguous, we construe the language against the drafter of the document. *See* ***Goebel v. First Fed. Savings & Loan Assoc.***, 83 Wis. 2d 668, 675, 266 N.W.2d 352 (1978). Further, extrinsic evidence may be considered to determine the intended meaning of ambiguous language. ***Kernz v. J.L. French Corp.***, 2003 WI App 140, ¶¶10, 27, 266 Wis. 2d 124, 667 N.W.2d 751 (In considering the trial testimony of the negotiators of an employment contract, the court noted in a parenthetical that the "intention of the parties to any particular transaction may be gathered from their acts and deeds, in connection with surrounding circumstances, as well as from their words." (citations omitted)).

¶12 Contract language is ambiguous if it is "reasonably or fairly susceptible of more than one construction." ***Neenah***, 256 Wis. 2d 296, ¶9 (quoting ***Borchardt v. Wilk***, 156 Wis. 2d 420, 427, 456 N.W.2d 653 (Ct. App. 1990)). That is what we have here. The contract does state in the form language: "AS IS-NO WARRANTY, DEALER DISCLAIMS ALL WARRANTIES INCLUDING IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE." Below that language, however, as "Other conditions Of Sale," is handwritten in: "Sold as is no warranty Affordable

Auto Sales will fix inside door car [sic] - and hubcap and seat plastic guard - *30 day warranty*."[5] (Emphasis added.)

¶13 Affordable asserted to the trial court and asserts on appeal that the "30-day warranty" only applies to the door, hubcap and seat items specifically written on the contract. The court concluded the contract was ambiguous and, in light of the ambiguity, considered the testimony of Johnson and Affordable's owner in determining the intent of the parties with regard to the contract. The trial court did not believe the owner's testimony that the warranty was intended to be limited to just the three specific items written on the contract. Considering the language of the contract and the owner's testimony, the court stated:

> If I'm looking at a 30-day warranty, in this particular type of instance what it would have to mean to me is if there's some problem with the car, I got 30 days to bring it back to you, either fix maybe or give my money back in relation to this. You know, I wouldn't read it as 30-day warranty that my hubcap's going to stay on … or a door guard. It just doesn't make sense.

¶14 We agree with the trial court that Affordable's handwritten addition to the contract of "30-day warranty" created an ambiguity. Even if the warranty did relate, as Affordable asserts, only to the three items written on the contract, this in itself would create an ambiguity due to the direct conflict with the other, unstricken language in the contract stating, "AS IS-NO WARRANTY, DEALER DISCLAIMS ALL WARRANTIES INCLUDING IMPLIED WARRANTIES OF

[5] The record contains a photocopy of the contract. At trial, the trial court read off of the original contract. While the photocopy in the record is not a model of clarity, it appears to be consistent in all material respects with what the court read from the original during the trial.

MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE." We conclude, however, as the trial court did, that the addition of the "30-day warranty" language created an ambiguity because it could be interpreted as providing a warranty only with regard to the three items listed or with regard to the entire car.

¶15 Because the contract is ambiguous, we may consider extrinsic evidence in our efforts to divine the intent of the parties. *See* ***Kernz***, 266 Wis. 2d 124, ¶¶10, 27. Doing so, we note that Johnson testified that as part of the purchase, the owner told her he would "give [her] a 30-day warranty just because [he had] that much confidence in [the] vehicle. And if [she had] any problems within that 30 days then, you know, give me a call." The trial court found Johnson's testimony credible and we largely defer to credibility determinations of the fact finder. *See* ***Tang***, 301 Wis. 2d 752, ¶19.

¶16 Additionally, Affordable's actions in the thirty-day period following the purchase support the conclusion Affordable intended a thirty-day warranty on the entire car. *See* ***Kernz***, 266 Wis. 2d 124, ¶10 ("Admissible extrinsic evidence might include 'the surrounding circumstances including factors occurring before and after the signing of an agreement.'" (citation omitted)). Between Johnson and the owner, the testimony at trial was that within the thirty-day period following the purchase, the owner told Johnson to bring the car back in to Affordable for the owner to look into problems Johnson identified with the "oil light," "the jerking," and the transmission, with the owner even testifying he had ordered a new sensor to fix the oil light problem and "did test the transmission." None of these alleged problems with the car were related to the three items the owner handwrote on the contract. In short, within the thirty days following Johnson's purchase of the car,

Affordable acted in a manner consistent with having provided Johnson a thirty-day warranty on the entire car.

¶17 The owner testified Johnson acted unreasonably because she "would drop [the car] off for us but she wouldn't give us any time with" it. Affordable reiterates that complaint on appeal, claiming Johnson "fail[ed] to cooperate." Johnson, however, testified to leaving the car with Affordable on April 14, 2015, and picking it up again on April 15, and leaving the car at Affordable on April 24 and picking it up on April 27, but that "nothing had been done."[6] Ultimately, the trial court considered the testimony of both Johnson and Affordable and concluded Johnson "acted reasonably within the time period and the language" of the contract. Affordable has not convinced us the court erred in this determination.[7]

¶18 Affordable has failed to convince us the trial court erred in concluding Affordable provided Johnson with a thirty-day warranty on the entire car and failed to reasonably honor that warranty. The trial court ordered rescission of the contract and directed that Johnson return the car to Affordable and Affordable pay her back the $3000 she paid for the car. In that Affordable in no way challenges on appeal the remedy ordered by the court, we affirm it.

By the Court.—Order affirmed.

[6] Affordable testified April 14, 2015, was a Friday, but we take judicial notice of the fact it was a Tuesday. April 24, 2015, was a Friday and April 27 was a Monday.

[7] Affordable additionally complains that the trial court misread the purchase date on the contract to be April 13, 2015, instead of April 3, 2015. Even though this was in part due to the testimony of Affordable's owner telling the court at trial that the purchase date was April 13, any error regarding the date discrepancy is harmless and immaterial in that all issues related to the car occurred within thirty days of both April 3 and April 13, 2015, and it is the thirty-day warranty that is at issue.

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