COURT OF APPEALS
DECISION
DATED AND FILED

June 1, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP198 **Cir. Ct. No. 2014CV13**

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

ROBERT J. DANIELS, SR.,

PLAINTIFF-APPELLANT,

V.

PAULA B. MCGESHICK,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Forest County: LEON D. STENZ, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Robert Daniels, Sr., appeals a judgment, following a trial to the court, dismissing his complaint alleging entitlement to a 1971 Chevrolet El Camino. We affirm the circuit court's judgment.

¶2 Daniels claimed that his former girlfriend, Paula McGeshick, obtained title to the vehicle by fraud.[1] However, the circuit court found credible McGeshick's testimony that she purchased the vehicle from Jerry Marko. McGeshick produced at trial an original sales receipt for $1,500 signed by Marko as seller, McGeshick as purchaser, and Daniels as witness. The court specifically noted Daniels' acknowledgement at trial that the signatures on McGeshick's sales receipt "are all true and accurate."

¶3 Daniels claimed he borrowed the money to purchase the vehicle, and at trial he produced a receipt in the amount of $8,495.36 for a deposit to his CoVantage Credit Union checking account, from which Daniels claimed he obtained cash for the payment to Marko. However, the court questioned how the deposit receipt supported Daniels' allegation that he paid $5,600 for the vehicle. The court stated:

> I find that it does not. If it was deposited into his account, it certainly wasn't a withdrawal. … If, in fact, that was the situation, I would have expect[ed] to see a withdrawal of $5,600, not a deposit to his checking account of $8,495.36. So, it doesn't match up.

¶4 Despite being subpoenaed to appear, Marko testified at trial telephonically. He stated he initially purchased the vehicle "off a guy out of

[1] Daniels testified he purchased the vehicle from Jerry Marko for $5,600 cash. Daniels stated the vehicle "needed more work," and he did not intend to register the vehicle "until I got it fixed up and roadability where it would pass an inspection." Daniels claimed he "just got through setting the timing on the vehicle," when McGeshick asked if she could "take a ride." When she returned, Daniels noticed "there was a license plate on the truck." When Daniels inquired, McGeshick allegedly told him, "The truck belongs to me now, and there is nothing that you can do about it."

Michigan" several years earlier. Marko stated he was "going to fix it up to use for like off road or truck pulls," but then "got busy with work here, and … just decided to sell it." Marko testified the person who sold him the vehicle signed the title, and that when Marko himself transferred the title it had the prior owner's name on it. However, the newly issued title to McGeshick showed the vehicle was previously titled in Colorado.

¶5 Marko also testified that he prepared a receipt for the sale and gave Daniels a copy of the receipt when he gave him the title. Marko also testified that Daniels later came back and told him McGeshick "took off with the car and took the title … and he asked me if I had another copy of the [receipt.]" Marko claimed he "had another copy made" of the receipt. Marko stated the original sales receipt was never given to Daniels. He insisted he had the original receipt in his records, but only a purported copy was introduced into evidence.

¶6 The circuit court found Marko's testimony "completely not credible." The court also stated, "I do not believe it was $5,600 paid. And it appears that the receipt was generated afterwards." The court noted the receipt was not dated. The court stated, "And also where is the original of this receipt? If, in fact, Mr. [Marko] had it why isn't it here?"

¶7 There was a reasonable basis for the circuit court to find the original sales receipt produced by McGeshick more credible and persuasive than the purported copy of a receipt produced by Daniels. The evidence presented did not support the testimony of Daniels and Marko. The record supports the circuit court's factual findings, and we will not disturb the court's credibility determinations. *See* WIS. STAT. § 805.17(2) (2013-14).

¶8 Daniels also argues a continuance was required to prevent unfair surprise at the trial as to the vehicle's fair market value. Daniels contends he was unfairly surprised at trial by the defense strategy, which was to claim McGeshick purchased the vehicle for $1,500 rather than receiving it as a gift from Daniels. He claims additional evidence as to the vehicle's fair market value would have influenced the court's decision on whether it was reasonable to conclude Marko would accept $1,500 for the vehicle purchase, and argues the court denied his continuance motion without explanation.

¶9 First, the record belies Daniels' contention that he raised the issue of unfair surprise at trial. When asked by the court if he had any rebuttal witnesses, Daniels' attorney simply stated, "I guess, that I would ask for a postponement." The court denied the request for a postponement and asked, "Do you have any rebuttal witnesses today?" Daniels' attorney answered, "No." After commencing his closing argument, Daniels' attorney then again stated, "I guess I would ask for a postponement so we could get some official estimate as to what a vehicle like that would be worth." The court responded, "Today is the day for trial. All witnesses and evidence should have been here. Proceed with your closing argument." Quite simply, there was no mention of unfair surprise, and we will therefore not further address it. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443, 287 N.W.2d 140 (1980).

¶10 In any event, even if Daniels may have been surprised at trial by the defense strategy, it was not unfair. The issue at trial was ownership, not the fair market value of the vehicle. Although additional evidence concerning the vehicle's fair market value may have supported Daniels' position, it was by no means determinative of ownership. Furthermore, Daniels was not precluded from pretrial discovery to determine McGeshick's defenses to his claim that she

obtained the vehicle by fraud. The circuit court properly exercised its discretion by denying the request for a continuance.

¶11 Finally, we also reject Daniels' argument that the circuit court erroneously denied his posttrial motion requesting the court take judicial notice of a photograph purporting to show an advertisement in the vehicle's windshield. Daniels submitted an affidavit stating: "The significance of the photograph is the message on the windshield. The windshield message reads as follows: FOR SALE 71 El Camino 4x4 396 Big Block Auto $6300.00 OBO."

¶12 On appeal, Daniels argues the $6,300 advertised price "is a quotation to the general public," and therefore "relevant as part of the history behind the sale." Daniels suggests that the photograph requires reversal of the determination that the vehicle sold for $1,500. However, the circuit court properly noted that a judicially noticed fact must be one that is not subject to reasonable dispute. *See* WIS. STAT. § 902.01(2). The court observed:

> Judicial notice is for things that I can—that is subject without dispute.
>
> Now, maybe, certainly, you could have used it during the trial. Ms. McGeshick could have testified to it. All kind of things could have happened, but you didn't present it during the trial.
>
> So, I don't think this is the type of fact that I can take judicial notice of, evidentiary issues. It is, basically, an attempt to supplement the record. I am not going to do that.
>
> ….
>
> No. I am not going to accept that at this point. I have your affidavit. I don't think it sets forth facts sufficient for the Court to take judicial notice of an exhibit which is subject to dispute, which would have been subject to cross-examination and testimony. It is not the type of fact that the Court can take judicial notice of that is undisputed. It is

> a picture, okay. But I don't know what, when, where, none of that.
>
> ….
>
> I don't know if this is the vehicle. I don't know when the message was put on there. I don't know who took the picture. I don't know why it wasn't present at the time of trial. All of those issues are something that would require the Court to resolve.
>
> ….
>
> But, the message is subject to [different] interpretations and should have been presented for cross-examination and consideration of the trial and it is too late now. The trial is over. So, I will not give you an opportunity to take judicial notice of that issue.

¶13 The circuit court properly exercised its discretion in denying Daniels' posttrial motion to take judicial notice of the photograph. Evidence purportedly contained in the photograph was subject to dispute. In addition, the court found that the photograph was available for presentation at trial, where its use would be subject to cross-examination. Daniels may disagree with the court's finding in this regard, but he was not denied the opportunity to air the issue at trial. The failure to present Marko in person rather than telephonically, in order to authenticate the photograph, and also to better provide the court an opportunity to evaluate his credibility, was Daniels' responsibility. We conclude the circuit court did not err in determining on this record that Daniels failed in his burden of proof. Accordingly, we affirm the court's judgment.

By the Court.—Judgment affirmed.

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