STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0241

Dale M. Rieppel, et al.,
Respondents,

vs.

Lakota, Inc. d/b/a Badboyscustom Cycles,
Appellant,

Patrick F. Kelly,
Defendant.

Filed July 30, 2018
Affirmed in part, reversed in part, and remanded
Connolly, Judge

Wright County District Court
File No. 86-CV-16-4508

William H. Henney, Minnetonka, Minnesota (for respondents)

Boe M. Piras, Willenbring, Dahl, Wocken & Zimmermann, PLLC, Cold Spring, Minnesota (for appellant)

Considered and decided by Bratvold, Presiding Judge; Connolly, Judge; and Smith, Tracy M., Judge.

U N P U B L I S H E D O P I N I O N

CONNOLLY, Judge

Appellant-business challenges a judgment awarding damages to respondents-customers, arguing that the district court abused its discretion in setting the amount of the award because it did not consider respondents' failure to mitigate damages and because it based the award in part on hearsay evidence and in part on an oral addendum to a written contract. Because we see no abuse of discretion in the determinations that respondents did not fail to mitigate damages and that one witness's testimony on rental cost was admissible, we affirm those determinations; because the evidence does not support the determination that respondents are entitled to damages based on an oral addendum to their written contract, we reverse that determination and remand to the district court for the purpose of deducting these damages from the judgment against appellant.

FACTS

Appellant Lakota, Inc., d/b/a Badboyscustom Cycles, in the business of selling, maintaining, repairing, and altering motorcycles, is owned by Natasha Kelly. Her husband Patrick Kelly (Kelly) owns the property and the equipment, does some of the work on the motorcycles, and offers advice, but is not an employee or an owner of appellant. Kelly was the only witness appellant called at trial. Respondents Dale Rieppel (Rieppel) and his wife Kathy Rieppel were customers of appellant.

Respondents contracted with appellant to buy a used 2007 motorcycle that would be converted into a trike (the 2007 trike), for which they paid with the trade-in of their 2006 trike (the 2006 trike) ($19,500), a credit card payment ($1,700), and a check ($6,111.75),

totaling $27,311.75 (the transaction). The written contract did not mention the parts that appellant would remove from the motorcycle in order to convert it into the 2007 trike (the take-off parts). The contract explicitly excluded any other agreement between the parties: "The front and back of this CONTRACT comprise the *entire* CONTRACT affecting this purchase. The DEALER will not recognize any verbal agreement, or any other agreement or understanding of any nature." (Emphasis added.) Both parties' signatures appear under this language. The words "Pd in full" and the check number are handwritten on the contract. In late June, 2016, respondents received the 2007 trike.

On August 23, 2016, respondents, having noticed severe wear on a rear tire, took the 2007 trike back to appellant. At 2:34 p.m. that day, respondents received a phone message from appellant that "we got your trike finished for you . . . [We] reset the alignment, the tow was way out . . . [and] replaced the tires for you . . . . [I]t does work properly, um and it's ready for pick up when you're available. There is no charge on it . . . ."

But when Rieppel went to pick up the 2007 trike on August 25, 2016, appellant would not release it. Instead, appellant gave Rieppel a letter saying that: (1) appellant could not recover the $2,000 it would cost to bring the 2007 trike up to the standard needed for it to be released to a customer; (2) appellant's policy on take-off parts was that customers who brought their own motorcycles in to be converted were given the take-off parts but customers who had appellant convert its motorcycles were not given the take-off parts; (3) appellant would indemnify respondents for everything they paid in the June 2016 transaction; and (4) appellant was going to "produce the paper work and unwind the sale"

and re-register the 2006 trike to respondents and the 2007 trike back to appellant. The letter did not offer to provide respondents with any vehicle other than the 2006 trike, on a temporary or permanent basis.

A second letter from appellant, dated August 26, 2016, informed respondents that: (1) when respondents returned the 2007 trike to appellant, appellant's mechanics inaccurately determined that the only problem was a tow adjustment; (2) Kelly himself had determined that the 2007 trike would not be safe to ride until he personally disassembled the entire rear suspension and drive system; (3) Kelly would not release the 2007 trike until it was "in perfect working condition"; (4) the 2006 trike respondents had traded in was in appellant's shop, where it had received maintenance and repair work; and (5) appellant would return the 2006 trike and the amount respondents had paid in exchange for the damaged 2007 trike. The letter did not refer to any other arrangement and said appellant would do no further business with respondents after returning the 2006 trike and the payment.

Respondents brought an action to recover the 2007 trike and for replevin damages. Following a hearing, the district court granted partial summary judgment and ordered appellant to return the 2007 trike to respondents and to refrain "from taking any action concerning the [2007 trike,] including, without limitation, it being disassembled or made otherwise inoperable" before doing so. The district court also noted that respondents "provided sufficient evidence demonstrating ownership" of the 2007 trike and that appellant did not claim an interest in the 2007 trike or present any argument for retaining

it except a concern about its own liability if respondents were injured. Final judgment was not entered pending resolution of outstanding issues.

A court trial was held on damages. Rieppel and appellant's former general manager, T.W., who had managed the June 2016 transaction, testified for respondents; Kelly testified for appellant. Written closing arguments were submitted after trial; appellant's argument raised for the first time the issue of parol evidence concerning the take-off parts.

Judgment of $19,230, based on a $300 daily rental cost of a trike for 57 days ($17,100),[1] plus $780 for take-off parts, plus $1,350 in court costs, was entered for respondents against appellant. Appellant challenges the judgment, arguing that the district court abused its discretion by ignoring respondents' failure to mitigate their damages and by basing the award in part on hearsay evidence and in part on an addendum to the written contract.[2]

D E C I S I O N

"We review a district court's decision to award or not award damages for an abuse of discretion." *In re Minnwest Bank Litigation Concerning Real Property*, 873 N.W.2d 135, 141 (Minn. App. 2015). "An abuse of discretion occurs when the district court's decision is not supported by the evidence." *Id.* at 149.

[1] The parties do not dispute that, because of rain, respondents would have ridden the trike for only 57 of the 77 days they were without it.

[2] Appellant also argues that the district court abused its discretion by not permitting appellant to disassemble and examine the 2007 trike before returning it to respondents. But there is no indication that appellant asked either the district court or respondents for permission to examine the 2007 trike, it does not appear that this issue was ever presented to the district court, and appellant does not specify what relief, if any, it seeks. We therefore decline to address the issue.

1. Failure to Mitigate

Appellant contends that the trial court abused its discretion by not finding that respondents did not mitigate "by failing to accept a free loaner trike" and decreasing the damage award. But respondents were never offered a free loaner trike: they were told that they would not be able to recover their own 2007 trike and that the 2006 trike they had traded in on the 2007 trike would be returned to them. The testimony of Kelly, who had a phone conversation with Rieppel, reflects this.

> Q: [I]n that conversation, are you saying you offered a loaner trike?
> A: Yes.
> Q: You're not talking about unwinding the transaction and giving him back his 2006 [trike] now, are you?
> A: At a point the conversation went to we'll give you the [2006 trike] back.
> Q: Is that the [2006 trike] you're referring to, or are you talking about a separate loaner trike?
> A: Well, we assumed that he'd want his own [2006 trike] because it was familiar and had been cleaned up and was drivable.
> Q: So what you're saying is you offered him his old bike back?
> A: Precisely.
> Q: You didn't offer him a loaner bike?
> A: Well, his [2006 trike] was now mine.
> Q: Okay, so you were offering to unwind the transaction and give him his 2006 [trike] back. Is that what you're saying?
> A: Yes.

Respondents were not offered the 2006 trike or any other trike to use temporarily until the 2007 trike was returned. They did not fail to mitigate, and the district court did not abuse its discretion by not reducing the damage award on that basis.

2. Hearsay Evidence

The district court awarded damages based on $300 as the daily rental cost of a trike, finding that T.W., the former general manager of appellant, "credibly testified to admissible evidence that, based upon his prior experience in the business of renting this type of property, the average daily rental for a 2007 Honda 3-wheel motorcycle (or something similar) was $300 per day."

Appellant argues that the district court abused its discretion by basing the award on T.W.'s testimony that: (1) he had worked in the motorcycle industry for 30 years; (2) he had worked in the rental aspect of the industry for 14 years; (3) he had rented trikes to customers for $300 per day in 2014; (4) he could testify to current, i.e., 2016, rental rates because he had talked to a rental-company owner the previous week; and (5) the owner told him the price had not changed. Rieppel also testified about the rental cost: he said he had checked it on the internet and found that trikes were rented for $850 per week plus $21 per day for insurance and an additional amount for weekends.

"If . . . specialized knowledge will assist the trier of fact to . . . determine a fact in issue, a witness qualified as an expert by knowledge . . . [and] experience may testify thereto in the form of an opinion . . . ." Minn. R. Evid. 702. Whether a lay witness is competent to give opinion evidence is the decision of the district court, whose ruling will not be reversed unless it is based on an erroneous view of the law or is clearly not justified by the evidence. *Muehlhauser v. Erickson*, 621 N.W.2d 24, 29 (Minn. App. 2000).

Appellant argues that "because [T.W.] could not establish current rental rates without relying upon what [another person] had told him . . . the district c]ourt should have

awarded no rental value damages as there was no non-hearsay evidence in the record on that issue." But the district court differentiated between the foundation of T.W.'s opinion on the rental cost, which was admissible evidence, and the foundation of Rieppel's opinion on the cost, which "[could not] be considered because the foundation [for them] was inadmissible hearsay." The district court's ruling on T.W.'s testimony was not based on an erroneous view of the law or unjustified by the evidence; there is no basis to overturn it. *See id.*

3. The Oral Contract

The district court granted respondents $780 in damages because they had not received the take-off parts from the conversion of appellant's 2007 motorcycle into a trike. Rieppel testified that the take-off parts' value was "approximately $780" and was questioned about them.

> Q: And you were promised that [you could have the take-off parts] by whom and when?
> A: Natasha Kelly promised me the take-off parts. I asked her who gets the take-off parts from the [2007] bike. She said, they are yours if you want them. I said, I want them. When we . . . actually signed the deal and put down the down payment, I asked again who gets the take-off parts. She says, They are yours. You can do whatever you want with them.
> Q: And those are the parts that were taken off the 2007 Honda?
> A: . . . [Y]es, yes.
> Q: Okay. So you were promised those take-off parts two different times?
> A: Yes.
> Q: By Ms. Kelly?
> A: Yes.
> Q: And did you get those parts?
> A: No.

> Q: Was anything said to you about why you weren't getting them?
> A: They . . . told me two things. One, whenever they convert a bike, the parts become theirs. That was their policy. The other thing they told me was they lost money on this transaction. Therefore, they needed to keep the parts to make up the difference.

Based exclusively on this testimony, the district court found: "[Respondents] established through testimony that the parts taken off the [2007] Honda they purchased as part of the conversion to a trike were not returned to them and have a total value of $780 as additional damages."

But the take-off parts could not have been "returned" to respondents because respondents had never owned or possessed them: the take-off parts were on the 2007 motorcycle that belonged to appellant and were removed when appellant converted it to a trike to be sold to respondents.

In its August 25 letter to respondents, appellant explained its take-off part policy.

> [W]hen we convert an owner[']s] bike we always offer the [take-off] parts. In a case where we own the bike and [do] the conversion we offer the trike at a reduced cost and we make an effort to resell the part[s] to recover that loss. In this case we dropped the cost to a minimum . . . .

Here, respondents were not the owners of the bike being converted. Appellant owned the bike, did the conversion, and priced it accordingly; respondents agreed to that price. The letter indicates that, contrary to Rieppel's testimony, respondents would not have been offered the take-off parts because they did not bring in their own motorcycle for appellant to convert but rather had appellant convert one of its own motorcycles.

The district court does not address the contract's omission of any mention of take-off parts and exclusion of any other agreement between the parties; nor does it address the take-off parts policy set out in appellant's letter; nor does it address appellant's failure to raise the take-off parts issue before or during trial, when respondents would have been able to refute it. "An abuse of discretion occurs when the district court's decision is not supported by the evidence." *Minnwest Bank*, 873 N.W.2d at 149. We conclude that the district court's decision that respondents were entitled to $780 for take-off parts was an abuse of discretion.

We affirm the decision that respondents were entitled to $17,100 for damages and $1,350 for court costs, reverse the decision that they were entitled to $780 for take-off parts, and remand this case to the district court for the sole purpose of reducing the judgment for respondents to the amount of $18,450 ($17,100 + $1,350).

Affirmed in part, reversed in part, and remanded.