STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0262

Ahmed Said,
Appellant,

vs.

Davin Branwall,
Respondent.

Filed August 6, 2018
Affirmed; motion granted in part
Hooten, Judge

Ramsey County District Court
File No. 62-CV-16-5115

Peter J. Nickitas, Peter J. Nickitas Law Office, L.L.C., Minneapolis, Minnesota (for appellant)

Tony L. Douvier, David M. Werwie & Associates, St. Paul, Minnesota (for respondent)

Considered and decided by Schellhas, Presiding Judge; Ross, Judge; and Hooten, Judge.

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

HOOTEN, Judge

Appellant taxicab lessee challenges the district court's summary judgment determination that he is not entitled to recover loss-of-use damages from respondent driver, who collided with the leased taxicab while it was driven by a different lessee. Appellant

argues that he is entitled to loss-of-use damages because he had exclusive control of the taxicab during the lease period. We affirm.

FACTS

Target Taxi, LLC leased a taxicab to three separate drivers, O.S., I.I., and appellant Ahmed Said. I.I. is also the owner of Target Taxi, and Target Taxi owns the taxicab at issue in this case. On December 3, 2014, Respondent Davin Branwall struck the rear of the taxicab while it was being driven by O.S. Branwall admits liability in causing the collision.

Said and Target Taxi have a written agreement, which was signed on July 30, 2014, that details the rights and obligations of each party. According to Said, "Target Taxi, L.L.C. leased the vehicle to [him] on an exclusive weekend basis, to [O.S.] on an exclusive, twelve-hour weekday basis, and to [I.I.], on an exclusive twelve-hour weekday basis." As a result of the collision, the taxicab was unavailable to be driven by Said for twelve of his shifts.

Said brought a claim for loss-of-use damages in conciliation court, and the conciliation court found in favor of Branwall because Said "did not have requisite 'exclusive control' of the cab to recover." Said removed the case to the district court, and the district court granted summary judgment in favor of Branwall for the same reason.

D E C I S I O N

Appellate courts "review a district court's grant of summary judgment to determine whether there are any genuine issues of material fact and whether the court erred in its application of the law." *Louis v. Louis*, 636 N.W.2d 314, 318 (Minn. 2001). Evidence is

viewed "in the light most favorable to the party against whom summary judgment was granted." *Senogles v. Carlson*, 902 N.W.2d 38, 42 (Minn. 2017). Appellate courts "do not weigh facts or determine the credibility of affidavits and other evidence." *Stringer v. Minnesota Vikings Football Club, LLC*, 705 N.W.2d 746, 754 (Minn. 2005). But we are "not required to ignore [our] conclusion that a particular piece of evidence may have no probative value, such that reasonable persons could not draw different conclusions from the evidence presented." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997). Summary judgment decisions are reviewed de novo. *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010).

The law is well settled that an owner of a commercial vehicle may recover loss-of-use damages for a vehicle while it is being repaired. *Williams v. Boswell*, 444 N.W.2d 887, 888 (Minn. App. 1989). Minnesota has extended the ability to recover loss-of-use damages to taxicab lessees if the lessee has exclusive control and possession of the taxicab. *Id.*; *see also Herzig v. Larson-Sawchak*, 464 N.W.2d 754, 754 (Minn. App. 1991) ("A lessee's right to recover damages for lost use depends upon whether he was entitled to the exclusive control and possession of the leased vehicle."). "In deciding the issue of exclusive control, this court must look to the terms of the lease agreement." *Herzig*, 464 N.W.2d at 755.

The district court did not err in its conclusion that Said did not have exclusive control and possession of the taxicab. The written agreement between Said and Target Taxi was not an agreement for the lease of a specific taxicab, but instead provides that Said "may lease/bail a vehicle from any of the various taxicab owners associated with the d/b/Target Taxi LLC and it is understood that one or more of those owners may or may not

lease a vehicle to [Said]." *Compare Herzig*, 464 N.W.2d at 755–56 (holding that evidence did not support a finding that taxicab lessee had the right to exclusive control and possession of leased taxicab where "[t]he owner had the right to assign the taxicab to other drivers as long as [appellant] was given a car to drive during his shift" and the lessee "was subject to a variety of different requirements and regulations under the lease"), *with Williams*, 444 N.W.2d at 888 (holding that taxicab lessees had exclusive control and possession of taxicab where lease was for a specific taxicab, "Rainbow Taxi ### 172," and lease provided that "Lessee is at all times free from the right of control and direction of Lessor in the operation of the taxicab during the term of this lease and Lessor shall not exercise or attempt to exercise any supervision over the service performed by Lessee").

While the written agreement between Said and Target Taxi contains a provision very similar to the lease agreement in *Williams* stating that Said is free from the control and direction of Target Taxi in his operation of the taxicab, other more specific provisions in the written agreement contradict that provision. The written agreement provides that Said is

> at all times free from right of control and direction of Lessor/Bailor and operation of taxicab during the term of this lease and the Lessor/Bailor shall not exercise or attempt to exercise any supervision over the services performed by the Lessee/Bailee, which may include operation of the taxicab while crossing state lines, operating on interstate or U.S. highways, or transporting passengers to airports, railroad stations, bus depots, or other interstate transportation nodes.

However, the written agreement also provides that: "Bailee agrees to accept orders dispatched by d/b/Target Taxi LLC, through its dispatching service including the

acceptance of passengers & packages which are paid for pursuant to a charge account arrangement with d/b/a Target Taxi LLC or by the coupons." Said is also required to "check fluid levels at the end of each shift and return the vehicle with a full tank of gasoline." He also can only use the vehicle "as a taxicab in a careful manner and in compliance with all City, State, and Federal governmental requirements including those pertaining to the age and licensing of drivers and the disclosure of Lessor interest in the vehicle." Finally, if "the vehicle is damaged, *the owner* is bound to make reasonable effort to repair." (Emphasis added.)

Other than the written agreement, the only other evidence in the record that could support that Said had exclusive possession and control over the taxicab is the affidavit of I.I. I.I. stated that:

> 3. Target Taxi, LLC leased this vehicle to three separate drivers, each of whom had total control of the vehicle during the time of his lease.
> . . . .
> 5. Target Taxi, LLC had a written lease and bailment agreement with Mr. Said at the time of the collision, which I attach and incorporate as Exhibit 1.
> . . . .
> b. Mr. Said had exclusive control over the vehicle during the shift in which he drove it.

I.I.'s statements that Said had total and exclusive control of the taxicab are conclusory and do not supply any facts to support that conclusion—other than the written agreement—and multiple other provisions in the written agreement show that Said was not free from the control of the lessor. *See Nowicki v. Benson Properties*, 402 N.W.2d 205, 208 (Minn. App.

1987) (pointing out that conclusory statements in an affidavit are "insufficient to defeat a summary judgment motion").

Said's arguments to the contrary are unavailing. First, Said argues that a lease and a bailment are not mutually exclusive. But whether to characterize the written agreement as a lease, a bailment, or both, begs the question because the underlying legal issue is the same—whether Said had exclusive control and possession of the taxicab. *See Frankle v. Twedt*, 234 Minn. 42, 47, 47 N.W.2d 482, 487 (1951) ("As applied to automobiles, the difference between a mere bailment relation and that of master and servant is the distinction between a mere permissive use and a use which is subject to the control of the master and connected with his affairs.").

Second, Said argues that the written agreement does not control the analysis because the facts on the ground are the final word.[1] Even if that was the law, which is not supported by our caselaw in loss-of-use cases for taxicab lessees,[2] Said has not put in the record any

[1] Said filed a purported citation to supplemental authority on this point, Branwall filed a motion to strike, and Said filed a response. Parties are authorized to provide the court with "pertinent and significant authorities" if those authorities "come to a party's attention after the party's brief has been filed or after oral argument," and can do so by filing a letter stating, "*without argument*[,] the reasons for the supplemental citations." Minn. R. Civ. App. P. 128.05 (emphasis added); *see also Scheffler v. City of Anoka*, 890 N.W.2d 437, 452 (Minn. App. 2017), *review denied* (Apr. 26, 2017). The initial submission by Said included arguments and selectively highlighted advisory opinions, and the response contained arguments and citations to the record, none of which are authorized by the rule. Said's attorney is reminded that rule 128 letters must be limited to citation of "pertinent and significant authorities" and cannot be used to submit additional argument to the court. Accordingly, we accept the case citations and strike the remainder of his supplemental filings.

[2] Both of our published opinions on the availability of loss-of-use damages for a taxicab lessee analyzed the terms of the leases, *see Herzig*, 464 N.W.2d at 755–56; *Williams*, 444 N.W.2d at 888, and the cases Said cites are employment cases, not loss-of-use cases.

evidence that is sufficient to defeat a summary judgment motion. I.I.'s affidavit recites what one provision in the written agreement states, that Said was free from the control of Target Taxi, but does not provide any facts supporting that conclusion—other than the agreement. And the agreement shows that Said was not free from the control of Target Taxi and did not have control equivalent to an owner when he was leasing the taxicab. Said also attempts to recharacterize the plaintiff in *Herzig* as being an employee and not a lessee or bailee. But *Herzig* never characterizes the plaintiff as an employee, nor does the opinion discuss whether the plaintiff was an employee or a lessee in explaining why loss-of-use damages were unavailable—the court's analysis was that the plaintiff did not have "the right to exclusive control and possession of the leased taxicab." 464 N.W.2d at 756.

Third, Said argues that *Williams* is the controlling case and that *Williams* compels the conclusion that Said is entitled to loss-of-use damages. But there are two key differences between this case and *Williams*. The lease in *Williams* was for a specific taxicab, 444 N.W.2d at 888, while the written agreement here was that Said "may lease/bail a vehicle from any of the various taxicab owners associated with the d/b/Target Taxi LLC and it is understood that one or more of those owners *may or may not lease a vehicle to me*." (Emphasis added.) And while both the lease in *Williams* and the written agreement here contain similar language about the lessee being free from the control of the lessor, as argued by Branwall, the written agreement here contradicts that statement in several ways and shows that Said was not free from the control of Target Taxi. This case is much closer to *Herzig* than *Williams* and leads to the conclusion that Said is not entitled to loss-of-use damages.

Said also claims that because I.I. recovered loss-of-use damages, even though I.I. was not driving the taxicab at the time of the accident, he should also recover. But I.I. owns Target Taxi and Target Taxi owns the taxicab, and owners of commercial vehicles are entitled to loss-of-use damages. *See Williams*, 444 N.W.2d at 888. And I.I. signed the release with Branwall's insurance company as CEO of Target Taxi. While Said is correct that a LLC has a separate legal existence from its owners, *see generally* Minn. Stat. § 322B.20 (2016), I.I.'s decision to disregard that separate legal existence and accept payment directly for loss-of-use damages owed to Target Taxi is not evidence that I.I. was compensated as a lessee. And even if we assume that I.I. was compensated as a lessee, Said does not explain why that legally requires Branwall to compensate him for his loss-of-use damages.

Affirmed; motion granted in part.