

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 5, 2012

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. 2012AP304

Cir. Ct. No. 2010SC31083

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

GURJAPBIR KAHLON,

PLAINTIFF-RESPONDENT,

v.

JOE SANFELIPPO CABS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JOHN SIEFERT, Judge. *Affirmed.*

¶1 CURLEY, P.J.¹ Joe Sanfelippo Cabs, Inc. (“Sanfelippo”) appeals the judgment awarding Gurjapbir Kahlon, an independent contractor who leased

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2009-10).

All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

one of its cabs, \$1934.69 (\$1500 from a security deposit that Kahlon paid for use of the cab, and \$434.69 from Kahlon's earnings from his final week of driving the cab). Sanfelippo argues that the trial court erred in awarding Kahlon the \$1500 security deposit because Kahlon broke the terms of the lease agreement he had with the company. Sanfelippo additionally argues that the trial court erred in awarding Kahlon \$434.69 because the evidence adduced at trial was insufficient to prove that Kahlon earned this amount during his final week driving its cab. This court disagrees and affirms.

BACKGROUND

¶2 Kahlon entered into a written lease agreement with Sanfelippo in October 2007. Under the terms of the agreement, Kahlon rented a taxicab from Sanfelippo as an independent contractor. Kahlon paid Sanfelippo a security deposit of \$1500 as well as a weekly rental fee, and in exchange Sanfelippo granted him the right to operate the cab and collect fares at any time of day.

¶3 The lease provided that Kahlon's right to operate the cab was exclusive. In other words, he could not assign or transfer the cab to anyone else. Specifically, the lease provided:

The lessee's rights and obligations under this agreement shall not be transferred by assignment or otherwise, nor shall the lessee's rights be subject to encumbrance or subject to the claims of his/her creditors. This agreement constitutes the entire agreement and understanding between [the] parties as to the subject matter hereto, and merges all prior discussions between them. None of the parties shall be bound by any conditions, definitions, warranties, understandings or representations other than as expressly provided herein.

(Some formatting omitted.)

¶4 The lease also had an addendum providing that all drivers leasing cabs were required to follow the company's policies and rules, and that failure to do so could result in termination of the lease and forfeiture of any security deposit or other funds:

Any driver leasing a vehicle from Joe Sanfelippo Cabs Inc. [is] required to follow policies and rules of the company. Failure to adhere to these policies and rules[] may result in the termination of your lease and or forfeit[ure] of any/all security deposit or other funds.

(Some formatting omitted.)

¶5 About two years after Kahlon entered into the lease with Sanfelippo, Sanfelippo terminated his lease, took the cab, and withheld his \$1500 security deposit. According to Sanfelippo, this was because Kahlon allowed his cousin and roommate, Jasdeep Nat, to drive the cab and collect fares the morning of October 3, 2009.² Mike Sanfelippo, president and owner of the company, had received a tip that someone besides Kahlon was driving the taxi and, with the aid of a GPS device, had gone to the cab's location and found Nat, an unauthorized driver, inside. Sanfelippo also withheld Kahlon's pay earned from his final week of cab driving. According to Kahlon, the amount came to \$434.69.

¶6 Kahlon consequently sued Sanfelippo in small claims court, requesting \$1934.69 in damages. Kahlon claimed that he did not break the terms of the lease, and that Sanfelippo wrongfully withheld his \$1500 security deposit and the \$434.69 constituting his final week's pay. After the small claims

² The parties agree and much of the trial testimony reflects that the events giving rise to this action took place in October 2009. Therefore, this court will use the 2009 dates even though some portions of the trial transcript indicate that the events took place in 2010.

commissioner dismissed the case, Kahlon appealed to the trial court, who held a bench trial.

¶7 At trial, Kahlon testified that he did not know that Nat had taken the cab because he had previously worked the night shift and was sleeping the morning it was taken. According to Kahlon, Nat took his keys and drove the cab without his permission. Kahlon explained that Nat knew how to operate the cab because he had been training Nat on its computer system the previous weeks. Kahlon had been training Nat on the cab because Nat was scheduled to begin driving his own taxi with Sanfelippo the following Monday.

¶8 Kahlon further testified that after Sanfelippo terminated the lease and took the cab from him, he went to pick up his final week's pay and his security deposit, and was told that the company did not have either. According to Kahlon, his final week's pay should have been \$434.69. Kahlon explained that the reason the company owed him money was because much of his pay derived from "vouchers," or contracts that clients held with the company. Under the voucher system, Kahlon received approximately seventy-eight percent of client fares and the company kept twenty-two percent for itself. Kahlon estimated that during the time he drove a Sanfelippo cab, he earned between \$700-900 a week from vouchers. Kahlon knew that he was owed \$434.69 for his final days with the company because he had seen a printout from the company computer.

¶9 Sanfelippo stipulated that the security deposit it withheld from Kahlon amounted to \$1500, but did not stipulate to the \$434.69 in withheld pay. There was no testimony or further evidence provided by the company, however, showing that Kahlon was *not* owed anything for his final week's work, and there was no evidence showing that the amount owed was anything other than \$434.69.

When asked whether there was a dispute as to whether Kahlon was paid this amount for his final week of work, Richard Christiansen, Sanfelippo's general manager, answered, "I can't say it was paid or not [t]hat would be [Kahlon's] responsibility."

¶10 The trial court found that Kahlon did not have knowledge of Nat's activities, and found that Kahlon did not give Nat permission to operate the cab. Consequently, the trial court determined that Kahlon did not violate the terms of the lease and that Sanfelippo owed Kahlon \$1934.69. Sanfelippo now appeals.

ANALYSIS

¶11 Sanfelippo makes two arguments on appeal. The company first argues that the trial court erred in awarding Kahlon the \$1500 security deposit because Kahlon broke the terms of the lease agreement he had with the company. Sanfelippo additionally argues that the trial court erred in awarding Kahlon \$434.69 because the evidence adduced at trial was insufficient to prove that Kahlon earned this amount during his final week of cab driving. This court will discuss each argument in turn.

- (1) *The trial court did not err in determining that Kahlon did not break the lease terms because Kahlon did not "transfer" the cab within the meaning of the lease.*

¶12 Sanfelippo argues that trial court erred in determining that Kahlon did not breach the terms of the lease. Whether the facts as found by the trial court constitute a breach of the lease is a question of law that this court reviews *de novo*. See *Prent Corp. v. Martek Holdings, Inc.*, 2000 WI App 194, ¶9, 238 Wis. 2d 777, 618 N.W.2d 201. The trial court's factual findings, on the other hand, will be upheld unless they are clearly erroneous. *Id.*; see also WIS. STAT. § 805.17(2).

¶13 Specifically, Sanfelippo argues that Kahlon “transferred” his cab within the meaning of the lease when Nat took it and drove it without his permission. According to Sanfelippo, because the definition of “transfer” involves “every” mode of disposing of or parting with an asset—see BLACK’S LAW DICTIONARY 1535 (eighth ed. 2004) (“transfer” includes “[a]ny mode of disposing of or parting with an asset”); see also WIS. STAT. 242.01(12) (under Uniform Fraudulent Transfer Act, “[t]ransfer’ means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease and creation of a lien or other encumbrance”)—it does not matter whether Kahlon ever intended for Nat to drive his cab.

¶14 This court disagrees. Contrary to what Sanfelippo argues, intent is required to transfer property. See *Potts on Behalf of Estate of Gavcus v. Garionis*, 127 Wis. 2d 47, 51, 377 N.W.2d 204 (Ct. App. 1985) (essential elements of gratuitous transfer are “(1) intention to give; (2) delivery; (3) end of dominion of donor; [and] (4) creation of dominion of donee”); see also *Northwestern Mut. Life Ins. v. Wright*, 153 Wis. 252, 255, 140 N.W. 1078 (1913) (“In every transfer ... there must be an actual or constructive delivery of the thing or paper title ... with intention to pass title, and an actual or constructive acceptance ... so as to end dominion on the one side and create it on the other.”). Additionally, transfer involves a change in dominion from one entity to another. See *Garionis*, 127 Wis. 2d at 51; *Wright*, 153 Wis. at 255. Neither element was present in this case. As Kahlon testified, he did not intend for Nat to drive his cab; indeed, Kahlon had no knowledge that Nat took the cab until Nat called him and told him he had been caught driving it. Moreover, under the facts as found by the trial court, it would defy common sense to conclude that there was a change in

dominion. There is no evidence that Nat intended to take Kahlon's cab as his own; rather, he was scheduled to begin leasing his own cab in just a couple of days.

¶15 Furthermore, this court notes that Nat's actions could have constituted operating a vehicle without the owner's consent, contrary to WIS. STAT. § 943.23(3) or (3m), which prohibit the intentional driving or operation of any vehicle without the consent of the owner. Adopting Sanfelippo's exceptionally broad definition of "transfer" would necessarily result in a crime constituting a valid transfer. This court will not adopt such a definition. *Cf. State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110 (statutes are to be read in context so as to avoid absurd results).

¶16 In sum, this court agrees with the trial court that Kahlon did not "transfer" the cab to Nat within the meaning of the lease. Therefore, the trial court did not err in requiring Sanfelippo to return Kahlon's \$1500 security deposit.

(2) *The trial court did not err in awarding Kahlon \$434.69 for his final week's pay.*

¶17 Sanfelippo next challenges the sufficiency of the evidence to support the trial court's finding that Kahlon was entitled to \$434.69 for his final week of driving for the company. When reviewing the sufficiency of the evidence, this court uses a highly deferential standard of review. *Jacobson v. American Tool Cos.*, 222 Wis. 2d 384, 389, 588 N.W.2d 67 (Ct. App. 1998). The court will not set aside the trial court's findings of fact unless they are clearly erroneous. WIS. STAT. § 805.17(2). Determinations as to the credibility of a witness and the weight to be accorded a witness's testimony are left to the trial court. *Lessor v. Wangelin*, 221 Wis. 2d 659, 665, 586 N.W.2d 1 (Ct. App. 1998). Deference is appropriate since

the trial court has the unique opportunity to observe the demeanor and persuasiveness of a witness. *Jacobson*, 222 Wis. 2d at 390. In addition, because this is a small claims action, the trial court has wider discretion on the type of evidence to admit and to consider in reaching its decision. See WIS. STAT. § 799.209(2).

¶18 While Sanfelippo correctly states that Kahlon had the burden of establishing his damages to a reasonable degree of certainty at trial, see *Plywood Oshkosh, Inc. v. Van's Realty & Constr.*, 80 Wis. 2d 26, 31, 257 N.W.2d 847 (1977); *Pleasure Time, Inc. v. Kuss*, 78 Wis. 2d 373, 387, 254 N.W.2d 463 (1977), this court disagrees with the company's contention that Kahlon's testimony that he was owed \$434.69 in back pay was insufficient to support the damage award. First, Sanfelippo's allegation that there ought to be documentary evidence to support the damage award ignores the relaxed evidentiary procedures of small claims actions. Small claims procedure gives the trial court wide discretion in the admissibility of evidence. WIS. STAT. § 799.209(2). Second, Sanfelippo's argument ignores the fact that Kahlon's testimony was not only corroborated by other evidence, but was also uncontradicted at trial. While "a claimant's mere statement or assumption that he has been damaged to a certain extent without stating any facts on which the estimate is made" is not enough to substantiate damages, *Plywood Oshkosh*, 80 Wis. 2d at 32, the record shows that Kahlon's testimony on damages was more than a "mere statement or assumption," see *id.* Kahlon testified to the exact amount that the company owed him. He further explained the basis for this knowledge; he saw the amount on a printout from the company computer. Kahlon also gave testimony describing voucher system from which he derived much of his pay. Additionally, the amount of \$434.69 was well within the realm of his usual weekly pay; in fact, it was far less,

which strongly suggests that Kahlon testified truthfully, and that perhaps his lease was terminated before the official end of a pay cycle. Furthermore, Sanfelippo did not dispute the \$434.69 figure at trial, either through the testimony of its witnesses, documentary evidence, or closing argument. Indeed, as noted, Sanfelippo's general manager essentially refused to testify as to whether Kahlon was paid upon termination of the lease. Under these circumstances, Kahlon did not need to introduce documentary evidence in order to establish his damages. His testimony was sufficient, and the trial court's award will stand.

By the court.—Judgment affirmed.

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

