COURT OF APPEALS
DECISION
DATED AND FILED

September 19, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP121 **Cir. Ct. No. 2011CV265**

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

GRACE SHAW-KENNEDY AND KASSANDRA LADD,

PLAINTIFFS-RESPONDENTS,

V.

AMY S. HUNTER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Vernon County: MICHAEL J. ROSBOROUGH, Judge. *Affirmed*.

Before Blanchard, P.J., Higginbotham and Sherman, JJ.

¶1 PER CURIAM. Amy Hunter appeals a judgment that granted Grace Shaw-Kennedy a writ of replevin to regain possession of a horse that Shaw-Kennedy had placed with Hunter primarily for breeding purposes, and dismissed Hunter's counterclaims for breach of contract, a lien on the horse, and unjust

enrichment for the added value she claimed to have provided to Shaw-Kennedy by training and competing with the horse. The issues on appeal are whether the circuit court improperly considered extraneous evidence, and whether the court erred in refusing to grant Hunter compensation on her unjust enrichment claim. We affirm the circuit court for the reasons discussed below.

BACKGROUND

¶2 Shaw-Kennedy purchased an Irish Draught horse named Cradilo in 1996 for *IR*£22,000, and arranged for her business partner Kassandra Ladd to manage the horse—including allowing Ladd to represent herself as the owner when expedient so that Shaw-Kennedy would not have to deal with any of the business aspects of horse ownership. Cradilo competed successfully in dressage events for several years, before he developed some health issues that led him to be retired from competition for several years.

¶3 In 2006, Ladd arranged to have Cradilo placed with Hunter primarily for breeding, with the understanding that Hunter could attempt to train and compete the horse again if she chose. Ladd produced a copy of a lease agreement dated July 19, 2006, that appeared to have been signed by Shaw-Kennedy and Hunter, wherein Hunter was to have the use of Cradilo without any payments to Shaw-Kennedy, but would assume all expenses incurred by the horse for the duration of the lease, whose term was not specified. Shaw-Kennedy wrote Hunter a letter at about the same time, thanking Hunter for agreeing to take Cradilo for training and breeding, and granting express permission to ship the horse to Hunter's home. Ladd testified that it was her understanding that Hunter was permitted to breed Cradilo to her own mares and to keep any stud fees under the

agreement, although Ladd anticipated only live breeding because Cradilo's frozen semen had been tested by two veterinary clinics and was found to be nonviable.

¶4 Hunter denied having signed, or even having seen, the first lease until 2008, but she acknowledged that there was no other formal agreement for any periodic payments when she initially took the horse. Rather, Hunter contended that Ladd had made a series of comments, both orally and in emails, that led Hunter to believe that she was helping Ladd avoid having her ex-husband claim an ownership interest in Cradilo in the Ladds' divorce; that Ladd and/or Shaw-Kennedy would help her as their finances permitted; and that they would all share in any success Hunter was able to achieve with Cradilo.

¶5 Hunter herself produced a nearly identical lease, which was dated two years later, that Hunter had filled out at Ladd's request while Ladd was attempting to document the ownership and whereabouts of a number of horses for her divorce. The second lease specified that the backdated term of the lease was from August 18, 2006 to August 18, 2011, again stating that Hunter could have the use of Cradilo for free, but was required to pay all of Cradilo's expenses. The second lease specified that Hunter would primarily use Cradilo for breeding and competing.

¶6 Cradilo's heath improved under Hunter's care and he began competing again. By 2009, Cradilo was having considerable success on the equestrian Gran Prix circuit due to Hunter's efforts. However, Hunter no longer had sufficient funds to take him to shows. Shaw-Kennedy began making payments to Hunter, averaging about $13,000 a month and totaling $217,000. Both Shaw-Kennedy and Hunter testified that that money was a sponsorship gift, intended to allow Hunter to continue competing with Cradilo. Hunter also

testified that Shaw-Kennedy subsequently made an oral promise to Hunter that Cradilo could stay with Hunter for the rest of his life and that Shaw-Kennedy would continue to make payments for his care.

¶7 In the fall of 2011, after the expiration of the second lease, Shaw-Kennedy informed Hunter that she wished to take possession of Cradilo. Hunter then provided Shaw-Kennedy with an itemization of additional expenses that Hunter had incurred for Cradilo between 2006 and 2011, and refused to return the horse until she had been compensated. This lawsuit followed.

¶8 At trial, expert appraiser and horse insurer Steven Wall, who had judged some of the biggest equestrian events in the country and the world, testified that Cradilo's value as a stud horse had increased from about $40,000-50,000 in 2006 to a conservative estimate of $750,000 in 2011, due not only to Cradilo's own subsequent success on the Grand Prix circuit, but also the success of some of his young progeny, who were nearing the Grand Prix level themselves. If the progeny continued to do well and the horse could be successfully bred, Cradilo's value would increase to over a million dollars.

¶9 Hunter herself also testified that horses that competed at the Grand Prix level were typically worth something in the high six figure or low seven figure range, and that most of the value came from their breeding potential. She said that she had taken Cradilo to a top clinic that was able to successfully freeze fourteen straws of his semen, but she did not invest much effort or money into advertising breeding while Cradilo was still competing. Rather, it had been her intention to recoup the money she had invested in the horse by following a breeding program after he retired. She explained how up to 1,000 straws of frozen

semen from a Grand Prix level horse could be collected in a year and sold in Europe at $2000 a straw.

¶10 The circuit court made factual findings that: (1) Shaw-Kennedy was the lawful owner of the horse and Ladd was her agent; (2) whether either of the written leases had been validly executed or not, they accurately reflected an agreement between the parties that Hunter would have both the full use of Cradilo for breeding, training, and showing purposes, and the full responsibility for his maintenance, training, and showing costs while the horse was in her care; (3) the five-year term of the lease had expired; (4) Hunter's testimony as to Cradilo's value was emotional, self-serving, and conclusory; and (5) Wall's testimony was not sufficient to establish the actual value of the horse because it was not backed up by any other facts in the record. Based on those findings, the circuit court granted Shaw-Kennedy replevin and dismissed Hunter's counterclaims.

¶11 On the appeal before us, Hunter does not dispute the circuit court's ruling on replevin or renew her counterclaims for breach of a written contract or a lien on the horse. She challenges only the circuit court's dismissal of her claim for compensation under a quasi-contract theory of unjust enrichment.

STANDARD OF REVIEW

¶12 Hunter attempts to characterize the circuit court's entire decision on "compensation" as a discretionary determination. That is not entirely accurate. The appellant's counterclaims were tried to the court pursuant to WIS. STAT. § 805.17 (2011-12).[1] Whenever a case is tried without a jury, the circuit court

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

"shall find the ultimate facts and state separately its conclusions of law thereon," and this court shall not set aside such finding of facts unless they are "clearly erroneous." Section 805.17(2). A factual finding is not clearly erroneous unless—after accepting all credibility determinations made and reasonable inferences drawn by the fact-finder—the great weight and clear preponderance of the evidence support a contrary finding. ***Noll v. Dimiceli's, Inc.***, 115 Wis. 2d 641, 643-44, 340 N.W.2d 575 (Ct. App. 1983).

¶13 Thus, the circuit court's decisions on the question of "compensation" presented mixed questions of law and fact. Any determinations as to Cradilo's value and the interactions between the parties were factual findings, subject to the clearly erroneous test, while the ultimate determinations as to whether the facts found were sufficient to establish the elements of Hunter's counterclaims for breach of contract or a lien were questions of law subject to de novo review. Only the circuit court's decision whether to grant equitable relief for unjust enrichment based upon its factual findings was discretionary in nature. ***Abbott v. Marker***, 2006 WI App 174, ¶20, 295 Wis. 2d 636, 722 N.W.2d 162.

DISCUSSION

¶14 As a threshold matter, Hunter complains that the circuit court committed "plain error" by looking online to see what an Irish Draught horse was and what the conversion rate for 22,000 Irish pounds would be in the current market. The respondents contend that Hunter forfeited any complaint about the circuit court's Internet searches by failing to object at the time the circuit court sua sponte disclosed them. We agree. If the respondents had raised a contemporaneous objection, the circuit court judge could have made a more specific record about the materials he had accessed, or explained what, if any

reliance he placed upon them. Contrary to Hunter's assertions, making a record for appeal does not constitute "testifying" in the underlying matter.

¶15 We turn next to the substance of Hunter's unjust enrichment claim. "A plaintiff may recover through quasi-contract unjust enrichment when the plaintiff confers a benefit on the defendant, the defendant is aware of the benefit, and the retention of the benefit would be inequitable." ***Id.***, ¶20.

¶16 By refusing to accept the expert testimony of Wall and Hunter regarding Cradilo's current value, the circuit court essentially determined that Hunter had failed to establish what benefit she had conferred on Shaw-Kennedy. Hunter challenges the circuit court's finding on the grounds that Shaw-Kennedy offered no other evidence of Cradilo's value. However, a circuit court can properly reject even uncontroverted testimony if it finds the facts underpinning the testimony to be untrue. ***State v. Kimbrough***, 2001 WI App 138, ¶29, 246 Wis. 2d 648, 630 N.W.2d 752. This includes opinions proffered by an expert. ***Bray v. Gateway Ins. Co.***, 2010 WI App 22, ¶24, 323 Wis. 2d 421, 779 N.W.2d 695.

¶17 Wall and Hunter testified that much of Cradilo's value was dependent upon his breeding potential, which in turn depended in large part upon whether his semen could be successfully frozen. Although Hunter testified that Cradilo's semen had been successfully frozen on one occasion, Ladd testified that two different veterinary hospitals had advised her that Cradilo's frozen semen would not be viable. Given the conflicting testimony regarding whether or how well Cradilo's semen could be frozen, the circuit court's determination that there was insufficient evidence to establish the value of the horse was not clearly erroneous.

¶18 Additionally, the circuit court made a point of noting that Hunter owned offspring of Cradilo as a result of the lease. The fact that Hunter had already reaped the benefit of owning at least two more horses who were showing signs of being able to compete at the Grand Prix level suggests that, even if Cradilo's value had exponentially increased due to Hunter's efforts, it was not inequitable for Shaw-Kennedy to keep that value when Hunter's efforts also benefited herself.

By the Court.—Judgment affirmed.

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