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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0712**

Ismail Ibrahim,
Appellant,

vs.

APCO Systems, et al.,
Respondents.

**Filed March 4, 2019
Affirmed
Hooten, Judge**

Hennepin County District Court
File No. 27-CV-17-15899

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

Matthew C. Kopp, Kelly R. Rodieck & Associates, St. Paul, Minnesota (for respondent)

Considered and decided by Hooten, Presiding Judge; Rodenberg, Judge; and Cochran, Judge.

UNPUBLISHED OPINION

HOOTEN, Judge

Appealing from the district court's grant of summary judgment in favor of respondents, appellant-lessee argues that he is entitled to loss-of-use damages because he had exclusive control of the taxicab that respondents damaged. We affirm.

FACTS

Appellant Ismail Ibrahim is the CEO of Target Taxi LLC. On March 16, 2016, respondent Terrence Floyd was driving a vehicle owned by respondent APCO Systems when he crashed into a taxicab owned by Target Taxi. At the time of the accident, the taxicab was being driven by a non-party to this action. Target Taxi brought a claim against respondents for damage to property, towing costs, and lost business. Target Taxi recovered \$8,706.86 in damages in conciliation court in May 2017.

Ibrahim then brought an action against respondents for his loss of use of the taxi in his capacity as a taxicab driver. The conciliation court found that Ibrahim was not entitled to relief. He then removed the case to district court. Respondents moved for summary judgment in February 2018. Ibrahim did not oppose the motion, and the district court granted the motion in March 2018, reasoning, *inter alia*, that the agreement produced by Ibrahim did not show that he had exclusive control and possession of the taxicab. This appeal follows.

DECISION

We first address respondents' argument that Ibrahim forfeited his arguments because he did not oppose their summary judgment motion. As a general rule, we "will not consider an issue raised for the first time on appeal." *Fahrendorff ex rel. Fahrendorff v. N. Homes, Inc.*, 597 N.W.2d 905, 909 (Minn. 1999); *see also Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) ("A reviewing court must generally consider only those issues that the record shows were presented and considered by the trial court in deciding the matter before it." (quotation omitted)). To the extent that Ibrahim raises new issues on appeal,

they are forfeited. But the core issue in this case—whether Ibrahim is entitled to loss-of-use damages—was raised in his initial Statement of Claim and Summons filed with the Conciliation Court, and the issue was squarely addressed by the district court in its summary judgment order. Based upon this record, we conclude that the question of loss-of-use damages was not forfeited.

Ibrahim asserts that the district court erred in granting summary judgment in favor of respondents. We review a grant of summary judgment de novo to determine if there are genuine issues of material fact and if the district court erred in its application of the law. *Montemayor v. Sebright Prods., Inc.*, 898 N.W.2d 623, 628 (Minn. 2017); *see also* Minn. R. Civ. P. 56.01. We view the evidence in the light most favorable to the party against whom summary judgment was granted, and resolve any doubts about the existence of a material fact in favor of the losing party. *Senogles v. Carlson*, 902 N.W.2d 38, 42 (Minn. 2017).

The crux of Ibrahim’s position is that, as a taxicab driver, he is entitled to loss-of-use damages for the period of time that the taxicab damaged by Floyd was being repaired. There are two relevant cases on this issue. The first is *Williams v. Boswell*, in which we first held that a lessee taxicab driver could recover loss-of-use damages. 444 N.W.2d 887, 888 (Minn. App. 1989). In that case, we held “that appellants had *exclusive control and possession* of the taxicab and therefore may recover damages arising from the loss of use.” *Id.* (emphasis added). The second is *Herzig v. Larson-Sawchak*, 464 N.W.2d 754 (Minn. App. 1991). In *Herzig*, we built upon our *Williams* holding and explained that “[i]n deciding the issue of exclusive control, this court must look to the terms of the lease

agreement.” 464 N.W.2d at 755. And we found that unlike in *Williams* where “the lease gave drivers much control over the leased taxicabs,” the provisions in Herzig’s lease did not give him exclusive control and possession of the taxicab. *Id.* We focused on two points. First, that “[t]he owner had the right to assign the taxicab to other drivers as long as Herzig was given a car to drive during his shift.” *Id.* at 755–56. And second, that Herzig “was subject to a variety of different requirements and regulations under the lease.” *Id.* at 756.

We turn to the agreement’s terms in this case. It states in relevant part:

I AGREE AND UNDERSTAND THAT AS A
LESSEE/BAILEE:

. . . .

5. That I 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;

. . . .

8. I am at all times free from right of control and direction of Lessor/Bailor and operations 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;

. . . .

14. If the vehicle is damaged, the owner is bound to make reasonable effort to repair, and I will be responsible for damage caused by any negligence;

. . . .

16. I agree to check fluid levels at the end of each shift and return the vehicle with a full tank of gasoline;

. . . .

18. The vehicle shall be used and operated only for use as a taxicab . . . ;

. . . .

23. 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 agreement with d/b/a Target Taxi LLC or by the coupons.

The terms of the agreement do not show that Ibrahim had exclusive control and possession of the taxicab damaged by respondents. While paragraph eight of the agreement purports to keep Ibrahim free from the control of Target Taxi, other parts of the agreement establish important limitations on his control of any taxicab he might lease from Target Taxi. Paragraph 14 makes Target Taxi—not Ibrahim—responsible for repairing the taxicab. Paragraph 16 requires Ibrahim to check fluid levels and return the taxicab with a full tank of gas at the end of a shift. Paragraph 18 limits Ibrahim to using the vehicle as a taxicab. Paragraph 23 requires that he accept orders dispatched by Target Taxi. Most significantly though, where the agreement in *Williams* gave the appellants control over a specific and identifiable taxicab, 444 N.W.2d at 887, the agreement in this case does not give Ibrahim access to a specific taxicab. Rather, paragraph five of the agreement plainly

says that he could acquire a taxicab from any of the taxicab owners associated with Target Taxi and that those owners had a right to refuse to lease him a vehicle.

The arrangement between Ibrahim and Target Taxi differs from the agreement described in *Williams*. 444 N.W.2d at 888. But it resembles the agreement in *Herzig* where “[t]he owner had the right to assign the taxicab to other drivers . . . [and Herzig] was subject to a variety of different requirements and regulations under the lease.” 464 N.W.2d at 755–56. We conclude that Ibrahim did not have exclusive control and possession of the taxicab. He therefore does not qualify for loss-of-use damages, and the district court was correct in awarding summary judgment to respondents.

Affirmed.