[Cite as *Green v. Germain Ford of Columbus, L.L.C.*, 2009-Ohio-5020.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Keelie Green,	:	
Plaintiff-Appellee,	:	No. 08AP-920 (C.P.C. No. 05CVH05-5234)
v.	:	(REGULAR CALENDAR)
Germain Ford of Columbus, LLC,	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on September 24, 2009

Shayne Nichols, *LLC*, and *Thomas J. Rocco*, for appellant.

Ronald L. Burdge, *Elizabeth Ahern Wells*, and *John B.P. Wakefield*, for appellee.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶1} Defendant-appellant, Germain Ford of Columbus, LLC ("appellant"), appeals the judgment of the Franklin County Court of Common Pleas granting the post-verdict motion for treble damages of plaintiff-appellee, Keelie Green ("appellee"). Because the judgment from which appellant appeals is not a final appealable order, we must dismiss this matter for lack of jurisdiction.

{¶2} Appellee purchased a 2000 Volkswagen Beetle from appellant in June 2004. Shortly after the purchase, appellee's vehicle began experiencing problems. In

December 2004, it was discovered that the vehicle's prior owner had been involved in a collision that had caused severe frame damage. After nearly a year of attempted repairs, a body shop completed the requisite repairs to the vehicle's frame. As a result of these circumstances, appellee filed suit against appellant and alleged violations of the Ohio Consumer Sales Practices Act ("CSPA").[1]

{¶3} On August 10, 2007, appellee filed a motion asking the trial court to bifurcate the attorney fees issue from the liability portion of the alleged CSPA violations. In this motion, appellee noted that the CSPA permits a prevailing party to request reimbursement of its attorney fees. Additionally, appellee argued, "[n]o determination [on attorney fees] can be made until after [a] hearing on the merits has taken place; thus, a subsequent hearing is required for this issue." Appellee's motion to bifurcate, Aug. 10, 2007, at 1. On August 15, 2007, the trial court granted appellee's unopposed motion and provided, "the issue of any award of attorney fees or costs shall be bifurcated from the litigation of the merits herein and come on for a separate hearing before the Court only after the merits have been determined." Trial court entry granting motion to bifurcate attorney fee issue, at 1.

{¶4} The merits of this matter proceeded to a jury trial on June 17, 2008. On June 23, 2008, the jury returned a verdict partly in favor of appellee and partly in favor of appellant. Importantly, however, the jury's verdict found in favor of appellee on the alleged CSPA violations.

[1] Although appellee raised other claims and originally included another named defendant, this appeal only regards appellant's alleged violations of the CSPA.

{¶5} As a result, on July 11, 2008, appellee filed a motion for treble damages which appellant opposed. On September 2, 2008, the trial court issued a decision granting in part and denying in part appellee's motion. In the decision, the trial court requested that counsel present the appropriate judgment entry within 20 days of the date of the decision. The trial court signed and filed such an entry on September 18, 2008.

{¶6} However, two days earlier, on September 16, 2008, appellee had filed a motion for attorney fees and costs. In this motion, appellee expressed its intent to file a separate, supplemental memorandum with detailed support regarding the time spent and cost data of appellee's counsel. On September 25, 2008, appellant opposed the motion and argued that it was devoid of evidentiary support and entirely deficient. Appellant asked the trial court to deny the motion on this basis. Additionally, appellant argued that it could not formulate a proper response to the merits of appellee's deficient motion.

{¶7} On October 7, 2008, the trial court issued a decision that provided:

> [I]t is no secret that this case was brought under the Consumer Sales Practices Act, R.C. 1345.01 et seq., and that R.C. 1345.09(F)(2) provides that a trial court may award attorneys fees where a supplier knowingly committed an act or practice that violated the Act. * * * The defendant is not prejudiced by the failure to identify the statutory basis for plaintiff's motion for attorney's fees. Therefore, the court elects not to summarily deny the motion on that procedural basis.
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> * * *
>
> Therefore, the court will conduct an evidentiary hearing on plaintiff's motion for an award of attorney's fees and costs.

Trial court decision setting evidentiary hearing on plaintiff's motion for attorney's fees and costs, at 2-3. The trial court set the evidentiary hearing for October 24, 2008. Additionally, the trial court ordered appellee to submit copies of any and all supporting documentation regarding fees and costs to appellant no later than seven days prior to the hearing.

{¶8} Also on October 7, 2008, appellee filed a notice of withdrawal of its motion for attorney fees and costs. The notice demonstrated appellee's intent to compile the necessary supportive data and refile the motion. Specifically, appellee provided, "we will withdraw the motion and finish compiling the data and then refile the motion. Plaintiff hereby withdraws her motion for attorney fees and costs without prejudice to refiling (which will be done shortly)." Appellee's notice of withdrawal of plaintiff's motion for attorney fees and costs, at 1.

{¶9} Also on October 7, 2008, appellee's counsel contacted the court to request that the evidentiary hearing be rescheduled. Rescheduled Evidentiary Hearing Notice, filed Oct. 15, 2008. In the entry granting this request, the trial court noted that counsel had agreed to continue the hearing to November 10, 2008. Rescheduled Evidentiary Hearing Notice, filed Oct. 15, 2008. Notably, the trial court's notice was filed over one week after appellee had withdrawn its motion. Therefore even after the withdrawal of appellee's motion, the trial court and both sets of counsel were fully aware that the attorney fees issue remained unresolved. This notice confirmed the consistent contemplation of counsel and the trial court that a post-verdict, evidentiary hearing on the issue of attorney fees was necessary. Only two days after the trial court's notice was

filed, however, appellant filed its notice of appeal, which solely regards the trial court's decision to grant treble damages.

{¶10} On November 18, 2008, appellee filed a motion to dismiss, which presents the argument that the September 18, 2008 entry is not a final appealable order because the attorney fees issue remains unresolved. Appellant opposes the motion and argues that the unilateral withdrawal of appellee's motion resolved the attorney fees issue. The threshold issue therefore regards whether there is a final appealable order in this matter. For the reasons that follow, we find that there is not.

{¶11} "It is well-established that an order must be final before it can be reviewed by an appellate court. If an order is not final then an appellate court has no jurisdiction." *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.* (1989), 44 Ohio St.3d 17, 20. A final order resolves a case or an issue, thereby obviating the need for future determinations or proceedings regarding the matter resolved. *Savage v. Cody-Zeigler, Inc.*, 4th Dist. No. 06CA5, 2006-Ohio-2760, ¶9, citing *Catlin v. United States* (1945), 324 U.S. 299, 65 S.Ct. 631. To determine whether a judgment is final, an appellate court must employ a two-step analysis. *Gen. Acc. Ins. Co.* at 21.

> First, it must determine if the order is final within the requirements of R.C. 2505.02. If the court finds that the order complies with R.C. 2505.02 and is in fact final, then the court must take a second step to decide if Civ. R. 54(B) language is required.

Gen. Acc. Ins. Co.; see also *Walburn v. Dunlap*, 121 Ohio St.3d 373, 2009-Ohio-1221, ¶13.

{¶12} Appellant fails to specify which portion of R.C. 2505.02 supports the finding of a final appealable order. Instead, appellant generally argues that no issues are left to be resolved.

{¶13} It is well established that "[t]he [CSPA] is a remedial law which is designed to compensate for traditional consumer remedies and so must be liberally construed pursuant to R.C. 1.11." *Einhorn v. Ford Motor Co.* (1990), 48 Ohio St.3d 27, 29, citing *Roberts & Martz, Consumerism Comes of Age: Treble Damages and Attorney Fees in Consumer Transactions – the Ohio Consumer Sales Practices Act* (1981), 42 Ohio St.L.J. 927, 928-29. Under the CSPA, a prevailing party may recover attorney fees in limited circumstances. Specifically, R.C. 1345.09 provides:

> (F) The court may award to the prevailing party a reasonable attorney's fee limited to the work reasonably performed, if either of the following apply:
>
> (1) The consumer complaining of the act or practice that violated this chapter has brought or maintained an action that is groundless, and the consumer filed or maintained the action in bad faith;
>
> (2) The supplier has knowingly committed an act or practice that violates this chapter.

{¶14} The Supreme Court of Ohio has outlined the rationale for permitting the recovery of attorney fees under the CSPA. See *Einhorn* at 30. Specifically:

> Since recoveries pursuant to [the CSPA] are often small and generally insufficient to cover attorney fees, many consumers would be persuaded not to sue under the [CSPA]. This is inapposite to the General Assembly's intention as expressed in Am. Sub. H.B. No. 681, the 1978 amendment to the [CSPA], which provided for the enactment of R.C. 1345.09(F). The amendment's purpose was "* * * to provide strong and effective remedies, both public and private, to assure that consumers will recover any damages caused by such acts

> and practices, and to eliminate any monetary incentives for suppliers to engage in such acts and practices."

Id. citing 137 Ohio Laws, Part II, 3219.

{¶15} This court has previously held that a judgment entry is not a final appealable order when the issue of attorney fees remains unresolved. *Bushman v. Blackwell*, 10th Dist. No. 02AP-419, 2002-Ohio-6753, ¶16, citing *Harris v. Conrad*, 12th Dist. No. CA2001-12-108, 2002-Ohio-3885, ¶10-12. Appellate courts routinely adhere to this principle when a trial court either defers adjudication of the award of attorney fees or defers the determination of the specific amount of the award. See *Ft. Frye Teachers Assn. v. Ft. Frye Loc. School Dist. Bd. of Edn.* (1993), 87 Ohio App.3d 840, 843; see also *Republic Bank v. Flynn Properties, LLC*, 8th Dist. No. 90941, 2009-Ohio-1875, ¶12. Appellate courts dismiss such appeals because they lack final appealable orders. Id.

{¶16} Indeed, the Fifth District Court of Appeals dismissed an appeal when presented with circumstances similar to the instant matter. See *Std. Plumbing & Heating Co. v. Hartman*, 5th Dist. No. 2003CA0091, 2004-Ohio-3964. In *Std. Plumbing & Heating Co.*, a magistrate found a violation of the CSPA and determined that attorney fees were recoverable. Id. at ¶107. The magistrate's decision also indicated that the attorney fees issue was to be scheduled for a full, evidentiary hearing. Id. at ¶115. The trial court adopted the magistrate's decision and included Civ.R. 54(B) certification. Id. Upon appeal, the Fifth District dismissed the appeal because the hearing had not yet occurred and the matter was unresolved. Id., citing *Kimble Mixer Co. v. St. Vincent* (June 9, 2004), 5th Dist. No. 2003AP020014.

{¶17} Further, the Supreme Court of Ohio has addressed the issue by holding:

> When attorney fees are requested in the original pleadings, an order that does not dispose of the attorney-fee claim and does not include, pursuant to Civ.R. 54(B), an express determination that there is no just reason for delay, is not a final, appealable order.

Internatl. Bhd. Of Electrical Workers, Loc. Union No. 8 v. Vaughn Industries, LLC, 116 Ohio St.3d 335, 2007-Ohio-6439, paragraph two of the syllabus.

{¶18} In interpreting *Internatl. Bhd.*, the Fourth District Court of Appeals has noted that most pleadings set forth general requests for attorney fees. *Jones v. McAlarney Pools, Spas & Billiards, Inc*., 4th Dist. No. 07CA34, 2008-Ohio-1365, ¶11. Therefore, the Fourth District has distinguished a series of cases from the broad language of the *Internatl. Bhd*. syllabus because otherwise, "it will result in the dismissal of practically every appellate case on jurisdictional grounds, even when the attorney fee issue is truly irrelevant to the action." *McAlarney* at ¶11. Accordingly, the Fourth District has distinguished cases in which the prayer for relief sets forth a general, pro forma request for attorney fees from those cases in which attorney fees may be recoverable under a specific statute. See *Jones v. Burgess*, 4th Dist. No. 07CA37, 2008-Ohio-6698; see also *Huspen v. Cooper*, 4th Dist. No. 07CA2987, 2008-Ohio-4590; see also *McAlarney*. Specifically, the Fourth District has held, "[a]bsent an attorney fee request under specific authority, appellate courts should 'treat the fee request as having been overruled *sub silento*' when not specifically disposed of in the trial court's order." *Burgess* at ¶12 quoting *McAlarney*. The Ninth District Court of Appeals has adopted this analysis. See *Knight v. Colazzo*, 9th Dist. C.A. No. 24110, 2008-Ohio-6613, ¶9.

{¶19} This distinction has no significance in the instant matter because appellee undoubtedly seeks relief under R.C. 1345.09(F), such that its request for attorney fees is

not a general, pro forma request. Consequently, we find that the trial court's judgment did not overrule the attorney fees request sub silento. This finding is further supported by the fact that trial court specifically bifurcated the attorney fees issue in order to determine its substantive merit. For these reasons, we distinguish the instant matter from the cases of *Burgess*, *Huspen*, *McAlarney*, and *Knight*.

{¶20} As for the positions of the parties, appellee asserts that there is no final appealable order because the attorney fees issue has not yet been resolved by the trial court. On the other side, appellant concedes that the trebling entry would not have been a final appealable order if appellee had not filed the motion for attorney fees. Indeed, appellant acknowledges the fact that the issue would have been unresolved absent such a motion. Additionally, appellant concedes that the trebling entry would not have been a final appealable order if appellee had not withdrawn its motion. Again, appellant acknowledges the fact that the issue would have been unresolved if the motion remained pending. Therefore, appellant's sole contention is that by filing and subsequently withdrawing the motion, the attorney fees issue has been resolved. Appellant argues that it is immaterial that appellee attempted to reserve the right to refile the motion because appellee had no authority to make such a reservation. Appellant cites two Florida cases in support of its position.

{¶21} The two Florida cases, however, are distinguishable from the instant matter. See *Rehman v. ECC Internatl. Corp*. (Fla.App.1997), 698 So.2d 921; see also *Rehman v. Estate of Frye* (Fla.App.1998), 704 So.2d 754. These cases regard Florida's Whistle-blower Act and equate a withdrawal of a motion for attorney fees to a complete abandonment of the right to recover such fees. *ECC Internatl*. at 921; *Frye* at 754. The

cases are unclear regarding whether the party seeking attorney fees expressed its intent to file a subsequent motion. Therefore, both of these Florida cases are distinguishable from the instant matter. Indeed, in this matter, appellee made perfectly clear its intent to file a subsequent motion. In fact, the entire basis for the withdrawal was appellant's objection to the evidentiary support of appellee's original motion. In these circumstances, we cannot possibly find that appellee's withdrawal amounts to a complete abandonment of the request.

{¶22} Furthermore, we are unpersuaded by appellant's argument that appellee lacked the authority to reserve the right to refile the motion. Such an argument should have been presented to the trial court, rather than raising it for the first time upon appeal. Additionally, appellee cites case law that provides a prevailing party with "reasonable time" to file a motion for attorney fees. *Sprovch v. Bob Ross Buick, Inc*. (1993), 90 Ohio App.3d 117, 123-24; see also *Bd. of Trustees of Deerfield Twp. v. Hoskins*, 12th Dist. No. CA2002-04-039, 2003-Ohio-816, ¶10. These issues, among others, must first be determined by the trial court. After these determinations are made, a subsequent appeal may properly be raised on both the trebling and attorney fees issues.

{¶23} It is well settled that a trial court's decision on a request for attorney fees is subject to an abuse of discretion standard of review. *Bittner v. Tri-County Toyota, Inc*. (1991), 58 Ohio St.3d 143, 146. In the instant matter, however, we have no decision upon which we may implement this standard.

{¶24} If this court accepted appellant's arguments, we would effectively elevate form and gamesmanship over substance. Indeed, the parties and the trial court clearly evidenced their intent to conduct a post-verdict, evidentiary hearing on the issue of

attorney fees. This intent was confirmed even after appellee withdrew its motion. Therefore, even after the withdrawal, appellee, appellant, and the trial court all believed the issue remained unresolved. Although the trial court has not yet determined whether attorney fees are recoverable, this situation is nevertheless similar to the *Hartman* case, in which the trial court scheduled an evidentiary hearing that never occurred.

{¶25} We also reject appellant's argument in favor of the general need for the finality of judgments. Such an argument would have been more persuasive had appellant obtained Civ.R. 54(B) certification from the trial court. Indeed, this court has distinguished entries with Civ.R. 54(B) certification from the confines of *Internatl. Bhd.* See *Niehaus v. The Columbus Maennerchor*, 10th Dist. No. 07AP-1024, 2008-Ohio-4067, ¶14. The analysis in *Niehaus*, however, is inapplicable to the instant matter because there is no Civ.R. 54(B) certification in the judgment entry.

{¶26} Without the Civ.R. 54(B) certification, this matter falls squarely within the purview of *Internatl. Bhd.* Specifically, the trial court's order does not dispose of appellee's CSPA attorney fee claim, and it lacks Civ.R. 54(B) language. Therefore, it is not a final appealable order. *Internatl. Bhd.* at paragraph two of syllabus.

{¶27} Accordingly, we lack jurisdiction over this matter and therefore grant appellee's motion to dismiss.

Appeal dismissed.

KLATT and TYACK, JJ., concur.