[Cite as *Russi v. Brentlinger Ents.*, 2011-Ohio-4764.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Steven R. Russi,	:	
Plaintiff-Appellee,	:	
		No. 10AP-1143
v.	:	(C.P.C. No. 08CVH-10-14932)
Brentlinger Enterprises,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on September 20, 2011

Janet George Blocher, for appellee.

Stockamp & Brown, LLC., David A. Brown, Deanna L. Stockamp, and *John C. Camillus,* for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, P.J.

{¶1} Defendant-appellant, Brentlinger Enterprises d/b/a Midwestern Auto Group ("MAG"), appeals from a judgment of the Franklin County Court of Common Pleas directing a verdict in favor of plaintiff-appellee, Steven R. Russi. Because the trial court erred in granting the directed verdict when substantial, competent evidence was presented at trial from which reasonable minds could draw different conclusions, we reverse.

I. Facts and Procedural History

{¶2} Plaintiff filed a complaint against MAG pursuant to the Ohio Consumer Sales Practices Act ("CSPA"). Plaintiff alleged MAG acted deceptively and violated the CSPA when it (1) accepted plaintiff's cash deposit but did not provide plaintiff a receipt stating the cash selling price of the Audi R8 at issue, (2) failed to integrate into the written agreement MAG's verbal promise to sell plaintiff the car at the manufacturer's suggested retail price ("MSRP"), (3) attempted to raise the actual purchase price of the vehicle, and (4) reneged on its agreement to sell plaintiff MAG's second allocated Audi R8.

{¶3} According to plaintiff's trial evidence, the events giving rise to the complaint began in the fall of 2006 when plaintiff decided to buy an Audi R8, a limited production luxury sports car that was not yet in production. Plaintiff went to MAG's salesroom where he spoke with Bryan Huff, MAG's Audi sales manager, about purchasing an Audi R8. Plaintiff and Huff agreed plaintiff would be entitled to buy at MSRP the second Audi R8 that MAG received from Audi. Plaintiff gave Huff a $2,000 deposit, and both he and Huff signed a "Retail Buyer's Order." The buyer's order confirmed that plaintiff was to receive the second Audi R8, but it did not mention price. MAG placed plaintiff's Audi R8 order on March 21, 2007. Plaintiff received a letter from Audi on April 7, 2007 confirming Audi received plaintiff's order and stating plaintiff's commission number was #Z03730. Plaintiff remained in contact with Huff through electronic mail while waiting for his Audi R8.

{¶4} At the time plaintiff placed his deposit with MAG, Audi did not have a VIP program but subsequently started it, allowing Audi to designate certain high profile or wealthy individuals who were to receive an Audi R8 at MSRP. In October of 2007, Audi

received a request that a local individual be placed on the Audi R8 VIP list, and by January 2008 it was accomplished. Although MAG placed its first retail order in the name of the owner of MAG, MAG sold its first retail order Audi R8 in November 2007 to the local individual as a VIP vehicle. On February 6, 2008, Huff so informed plaintiff, but noted the vehicle was a VIP vehicle allocated to the local individual and did not come out of MAG's general retail allocation.

{¶5} Because MAG sold a retail unit as a VIP unit, Huff changed the local individual's name to "Ben Dover" on the computerized Audi VIP list, causing Audi to change the VIP Audi R8 allocated for the local individual to a regular retail allocation. Huff assured plaintiff he would see his Audi R8 in the summer of 2008. After selling its first Audi R8 to the local individual and its second to another person in April 2008, MAG sold its third to a third individual in August 2008 as a VIP allocation.

{¶6} By May 2008, plaintiff became aware that Greg Marks replaced Huff as the MAG Audi sales manager. Plaintiff sent Marks an e-mail on July 8, 2008, attempting to confirm, in light of Huff's departure, that MAG would be selling plaintiff the Audi R8 at MSRP. Marks informed plaintiff the price for the Audi R8 was $20,000 over MSRP. Believing MAG failed to honor its agreement to sell plaintiff, at MSRP, the second Audi R8 MAG received, plaintiff filed his complaint against MAG on October 17, 2008. MAG received the Audi R8 with plaintiff's commission number on October 27, 2008; at that time, the market price of the vehicle was MSRP.

{¶7} In addition to answering plaintiff's complaint, MAG had filed a third-party complaint against Huff alleging tortious interference with contractual relations and with

business relations. MAG dismissed its third-party complaint against Huff the day after Huff testified at trial.

{¶8} At the conclusion of the trial, plaintiff moved for a directed verdict pursuant to the motor vehicle sales rule embodied in Ohio Adm.Code 109:4-3-16(B)(17), alleging the trial evidence conclusively demonstrated that MAG knowingly raised the purchase price of plaintiff's motor vehicle. The court granted the motion stating, "On the issue of raising the price, I am going to direct the verdict totally in favor of the plaintiff and make a determination of damages of $20,000." (Tr. 620.)

{¶9} The parties agreed plaintiff would drop his remaining claims and, if the trial court's decision were reversed on appeal, MAG would not object to plaintiff's re-asserting his claims relevant to switching the allocated cars and violating the deposit rule. Plaintiff filed motions for treble damages and attorney fees, both of which the trial court granted. The court entered final judgment for plaintiff on November 9, 2010 in the amount of $150,000, plus court costs and interest at a rate of four percent from the date of filing.

II. Assignments of Error

{¶10} MAG appeals, assigning the following errors:

> 1. The trial court erred in granting a directed verdict on liability by invading the province of the jury when it credited certain witness testimony and weighed that evidence against contrary, competing evidence.
>
> 2. The trial court erred in granting a directed verdict that Plaintiff's damages were $20,000 based upon the Uniform Commercial Code when no contract existed, and the only claim pleaded was for a Consumer Sales Practices Act violation.

III. First Assignment of Error - Directed Verdict

{¶11} A motion for directed verdict should be granted when, "after construing the evidence most strongly in favor of the party against whom the motion is directed, 'reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party.' " *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St.3d 512, 2002-Ohio-2842, ¶3, quoting Civ.R. 50(A)(4). By contrast, a motion for directed verdict must be denied when substantial, competent evidence has been presented from which reasonable minds could draw different conclusions. *Kroh v. Continental Gen. Tire, Inc.*, 92 Ohio St.3d 30, 31, 2001-Ohio-59.

{¶12} As a result, if the evidence is conflicting on a particular issue or a "combination of circumstances exists requiring a determination as to the credibility of witnesses in order to deduce the true facts" relative to a particular issue, the ultimate resolution of the issue is solely within the province of the jury and the motion must be denied. *Posin v. A.B.C. Motor Court Hotel, Inc.* (1976), 45 Ohio St.2d 271, 276, citing *Rothfuss v. Hamilton Masonic Temple Co.* (1973), 34 Ohio St.2d 176; *Chardon Lakes Inn Co. v. MacBride* (1937), 56 Ohio App. 40. See also *Carseta v. Holland Ladder & Mfg. Co.* (June 30, 2000), 10th Dist. No. 99AP-338 (when deciding a motion for directed verdict, "the trial court is not permitted to weigh the evidence or the credibility of witnesses"). Appellate review of a trial court's decision to grant a motion for a directed verdict is de novo. *Abbott v. Jarrett Reclamation Serv., Inc.* (1999), 132 Ohio App.3d 729, 738, discretionary appeal not allowed, 86 Ohio St.3d 1455; *Goodyear* at ¶4.

{¶13} Plaintiff brought his action pursuant to the CSPA, which states that "[n]o supplier shall commit an unfair or deceptive act or practice in connection with a consumer transaction." R.C. 1345.02(A). "Such an unfair or deceptive act or practice violates this section whether it occurs before, during, or after the transaction." Id. The CSPA further provides that the attorney general of Ohio may adopt, amend and repeal substantive rules defining with reasonable specificity acts or practices that violate R.C. 1345.02(A). R.C. 1345.05(B)(2). Pursuant to that authority, the attorney general adopted Ohio Adm.Code 109:4-3-16 to define various deceptive acts and trade practices. *Renner v. Derin Acquisition Corp.* (1996), 111 Ohio App.3d 326, 335, discretionary appeal not allowed, 77 Ohio St.3d 1480.

{¶14} Plaintiff moved for a directed verdict under Ohio Adm.Code 109:4-3-16(B)(17), which states a dealer's raising or attempting to raise the actual purchase price of any motor vehicle to a specific consumer in connection with a sale of a motor vehicle is an unfair act or practice for a dealer. "Purchase price" is defined as "the total amount the consumer is required to pay the dealer pursuant to the contract." Ohio Adm.Code 109:4-3-16(A)(5). See *Renner* (concluding trial court improperly granted dealer summary judgment on the plaintiff's CSPA claim under Ohio Adm.Code 109:4-3-16(B)(17) where the dealer refused to deliver to plaintiff the vehicle's certificate of title unless the plaintiff paid $737, the amount of a GM employee discount GM refused to honor); *Frey v. Vin Devers, Inc.* (1992), 80 Ohio App.3d 1 (determining dealership incorrectly computed pay-out on plaintiffs' trade-in vehicle and violated Ohio Adm.Code 109:4-3-16(B)(17)

when it demanded, after plaintiffs took possession of the vehicle, that plaintiffs pay $984.87, the amount by which the dealership miscalculated the pay-out).

{¶15} Typically, a claim under the CSPA " 'does not require either intent or knowledge of the alleged perpetrator; rather it is sufficient that the conduct complained of "has the likelihood of inducing in the mind of the consumer a belief which is not in accord with the facts." ' " *Renner* at 334-35, quoting *Funk v. Montgomery AMC/Jeep/Renault* (1990), 66 Ohio App.3d 815, 823; *Frey* at 6. The court, however, may award the prevailing consumer attorney fees if a supplier acted knowingly. R.C. 1345.09(F)(2). When a supplier commits an act or practice the attorney general has declared deceptive pursuant to R.C. 1345.05(B)(2), the consumer may recover treble damages. R.C. 1345.09(B).

{¶16} Within those parameters and construing the evidence in a light most favorable to MAG, the issue is whether reasonable minds could come to but one conclusion: MAG raised or attempted to raise the actual purchase price of plaintiff's Audi R8 from the price to which plaintiff and Huff agreed in violation of the CSPA. The evidence on that point is disputed.

{¶17} Plaintiff's evidence on the price issue was presented primarily through plaintiff and Huff, both of whom testified MAG's contract with plaintiff was to sell plaintiff, at MSRP, the second Audi R8 that MAG received. Huff stated he did not write a price on the buyer's order because he "said, well, it's MSRP, so, you know – and there's no price to write there." (Tr. 230.) Plaintiff felt his conversation with Huff was such that the price was a non-issue: "The sticker price was the price." (Tr. 152.)

{¶18} Explaining his testimony, Huff stated none of his superiors at MAG ever gave him instructions on how to handle the Audi R8 sales and orders. Nor had anyone before told him to speak with his superiors before taking Audi R8 orders or about a policy for selling them over MSRP. According to Huff, even Mr. Pryor, the Executive Vice President and General Manager of MAG, was not really upset when he discovered Huff had taken Audi R8 orders at MSRP, but MAG's owner was very upset and told him he was to speak with Pryor or Mr. Galli, MAG's Chief Financial Officer, before taking such orders.

{¶19} Plaintiff testified he learned MAG expected him to pay $20,000 over MSRP in his July 8, 2008 e-mail conversation with Marks. Plaintiff tried to find another Audi R8 but was unsuccessful. According to plaintiff, his "breaking point" was "really when it became clear that they had dug their heels in. They were going to require the extra $20,000, and they weren't going to honor that commitment to sell it at sticker." (Tr. 183.)

{¶20} MAG presented contrary evidence through Pryor, who testified MAG's policy was to sell the Audi R8 at market price. Pryor said that, consistent with MAG's policy, Pryor attempted to ensure, after Huff took plaintiff's deposit, that Huff knew the price of the Audi R8 was market price. Pryor stated Huff in response said he never told plaintiff he had a deal at MSRP; instead, Huff said he and plaintiff "didn't discuss price." (Tr. 520.) Pryor did not believe plaintiff's deal was for MSRP but for $20,000 over MSRP.

{¶21} With that testimony, two reasons in combination render the trial court's decision to grant plaintiff's motion for directed verdict improper: the testimony is disputed, and Pryor's testimony does not involve a binding admission.

A. Disputed Testimony

{¶22} Apparently recognizing Pryor's testimony conflicts with the testimony of plaintiff and Huff, plaintiff contends that "[t]o the extent Mr. Pryor's testimony is being offered for the purpose of proving the truth of the matter asserted, i.e., to prove that there was no agreement regarding the price of the vehicle, that testimony is plainly hearsay and does not serve as probative evidence." (Appellee's brief, 25.) Plaintiff, however, did not object at trial to Pryor's testimony about what Huff said to Pryor. "It is well settled that a litigant's failure to raise an issue before the trial court waives the litigant's right to raise that issue on appeal." *Gentile v. Ristas,* 160 Ohio App.3d 765, 2005-Ohio-2197, ¶74, citing *Estate of Hood v. Rose,* 153 Ohio App.3d 199, 2003-Ohio-3268, ¶10.

{¶23} While the "waiver," or forfeiture, rule "is tempered somewhat by the doctrine of plain error," the plain error doctrine is nonetheless disfavored in civil cases. *S & P Lebos, Inc. v. Ohio Liquor Control Comm.,* 163 Ohio App.3d 827, 2005-Ohio-5424, ¶12; *Lias v. Beekman,* 10th Dist. No. 06AP-1134, 2007-Ohio-5737, ¶30, discretionary appeal not allowed, 117 Ohio St.3d 1459, 2008-Ohio-1635, citing *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 1997-Ohio-401, syllabus. A court should apply the doctrine of plain error "only in the extremely rare case involving exceptional circumstances" where error, "to which no objection was made at the trial court, seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself." *Goldfuss* at 122-23.

{¶24} Plaintiff's case does not present such exceptional circumstances, but rather a typical failure to object to typically disputed evidentiary material. As a result,

plaintiff's failure to object to the alleged hearsay at trial forfeited any argument pertinent to that issue on appeal. *White v. Snyder* (June 20, 1997), 6th Dist. No. F-96-024 (concluding failure to object to the admission of a document based on hearsay waives the right to raise such argument for the first time on appeal).

{¶25} Viewing all the evidence in the light most favorable to MAG, a reasonable juror could conclude, based on Pryor's testimony, that Huff and plaintiff did not discuss price, MAG never contracted to sell plaintiff an Audi R8 at a specific price, and MAG thus could not have raised or attempted to raise the price of plaintiff's AUDI R8 from the agreed price.

B. No Binding Admission

{¶26} In the midst of the conflicting testimony, plaintiff, in cross-examining Pryor, read into the record a portion of defendant's third-party complaint against Huff alleging that "Russi agreed to purchase the Audi R8 at the car's MSRP." (Tr. 117.) Plaintiff then asked Pryor if he was "telling the jury that the deal was MSRP plus $20,000, but * * * telling Mr. Huff he's at fault because the deal was MSRP, correct?" (Tr. 117.) Pryor responded, "Correct." (Tr. 118.) Although the question and response are not entirely clear, Pryor's affirmative response to the question suggests MAG was claiming at trial that plaintiff's deal was MSRP plus $20,000 but Huff, MAG's agent, agreed with plaintiff to sell the Audi R8 at MSRP.

{¶27} "Pleadings shall not be read or submitted to the jury, except insofar as a pleading or portion thereof is used in evidence." Civ.R. 8(G). Even so, "if a party unequivocally concedes a fact, that concession constitutes a judicial admission for the

purposes of trial." *Haney v Law*, 1st Dist. No. C-070313, 2008-Ohio-1843, ¶7. As a result, "[p]leadings containing admissions against interest are admissible as evidence against the pleader as long as the admissions involve material and competent facts." Id. Apparently attempting to invoke the exception, plaintiff appears to have used the pleading as an admission that the agreement between plaintiff and Huff, MAG's agent, was for a sale at MSRP, since " '[a] party who has alleged and has the burden of proving a material fact need not offer any evidence to prove that fact if it is judicially admitted by the pleadings of the adverse party.' " Id. at ¶8, quoting *Gerrick v. Gorsuch* (1961), 172 Ohio St. 417; *Reed v. Toledo Edison Co.* (July 10, 1992), 6th Dist. No. L-91-259 (stating "parties are bound by their [w]ritten admissions made in the progress of a cause as a substitute for proof of any material fact, and cannot repudiate them at pleasure).

{¶28} At the same time, Civ.R. 8(E) provides that parties may plead in the alternative, stating "[a] party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses." The rule further provides "[a] party may also state as many separate claims or defenses as he has regardless of consistency."

{¶29} Two reasons prompt us to conclude the statement read out of MAG's third-party complaint is not a binding admission from the pleading. Initially, MAG could plead inconsistently and did so: it denied it was liable to plaintiff, but stated it entered into the contract at MSRP. Were this the only circumstance, we might reach a different conclusion, but, secondly, the evidence on that very point is contested. Pryor testified Huff told him Huff did not discuss price with plaintiff and thus could not have entered into a

contract with plaintiff at MSRP. When the evidence in the record conflicts with the pleaded facts, courts are less likely to deem the pleaded fact is a binding admission. See *Donofrio v. Vaughn* (Sept. 1, 1977), 8th Dist. No. 36174.

{¶30} In the end, "[t]he determination whether a pleaded fact constitutes a judicial admission should be made on a case-by-case basis." *Haney* at ¶14. Because here the statement from the third-party complaint was an attempt to plead in the alternative and was rebutted at trial, the pleading does not constitute a binding admission.

{¶31} In order to conclude both that MAG contracted to sell plaintiff an Audi R8 for MSRP and MAG attempted to raise the price in violation of Ohio Adm.Code 109:4-3-16(B)(17), the trial court had to weigh Huff and plaintiff's testimony against Pryor's, resolve the inconsistency in Pryor's testimony and assess the credibility of plaintiff, Huff, and Pryor. As the trial court may not weigh the evidence or assess witness credibility when ruling on a Civ.R. 50 motion for directed verdict, the trial court erred.

IV. Disposition

{¶32} For the reasons stated, MAG's first assignment of error is sustained, rendering its remaining assignment of error moot. The judgment of the Franklin County Court of Common Pleas directing a verdict in favor of plaintiff is reversed, and the case remanded for further proceedings consistent with this decision.

Judgment reversed and
case remanded.

BROWN and DORRIAN, JJ., concur.

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