[Cite as *R.W. Earhart Co. v. Dick Lavy Trucking, Inc.*, 2015-Ohio-2970.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MIAMI COUNTY

R.W. EARHART COMPANY	:	
	:	
Plaintiff-Appellee	:	C.A. CASE NO. 2014-CA-35
	:	
v.	:	T.C. NO. 14-CV-129
	:	
DICK LAVY TRUCKING, INC.	:	(Civil appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 24th day of July, 2015.

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DONOVAN, J.

{¶ 1} Defendant-appellant Dick Lavy Trucking, Inc. (hereinafter "Lavy") appeals from a decision of the Miami Court of Common Pleas, Civil Division, granting the motion for summary judgment of plaintiff-appellee R.W. Earhart Company (hereinafter "Earhart") with respect to its claim for breach of contract. Earhart's claim for breach of contract derived from Lavy's failure to remit payment for a 7,500 gallon shipment of diesel fuel delivered by Earhart to Lavy on November 19, 2011. The trial court filed its decision granting Earhart's motion for summary judgment on November 10, 2014. Lavy filed a timely notice of appeal with this Court on December 8, 2014.

{¶ 2} Earhart is a business that supplies fuel and propane to residential and commercial customers. Lavy is a trucking company who periodically purchases "on-road" diesel fuel from Earhart and other fuel suppliers in order to run its fleet of trucks. Evidence was adduced by both parties which established that the price of diesel fuel fluctuated daily, thereby requiring one-time contracts between distributors and buyers depending on the current price.

{¶ 3} On November 18, 2011, Richard Lavy, the president of the company, contacted Earhart by telephone and agreed to purchase 7,500 gallons of on-road diesel fuel. According to the agreement, delivery was to occur the next day on Saturday, November 19, 2011. On that date, Earhart driver, Steven Charles Drapp, traveled to Lavy's business headquarters, and arrived at approximately 3:45 p.m. In his deposition, Drapp testified that there were some Lavy employees still on the premises, but he did not speak to anyone. Drapp testified that he filled Lavy's underground tank with 7,500 gallons of diesel fuel, per the parties' mutual agreement. Although the fuel tank was

purportedly locked, Drapp testified that he was able to open it and fill the tank. By the time that Drapp finished filling the tank at approximately 4:47 p.m., all Lavy employees had left the premises. Drapp testified that he left an invoice for the amount of fuel delivered and the payment due at Lavy's office. The amount due for 7,500 gallons of on road diesel fuel was $27,659.25. The invoice was left unsigned, however, because there were no employees remaining on the premises when Drapp completed his delivery. Lavy denied that it ever received the invoice left by Drapp.

{¶ 4} More importantly, Lavy denied that it received a shipment of diesel fuel from Earhart on November 19, 2011, and refused to pay. Accordingly, on March 14, 2014, Earhart filed a complaint for money damages in which it set forth three claims for relief, to wit: breach of contract, unjust enrichment, and quantum meruit.[1] Lavy filed an answer to Earhart's complaint on March 21, 2014. On September 29, 2014, Earhart filed a motion for summary judgment. Lavy filed a memorandum in opposition on October 9, 2014. In a decision issued on November 10, 2014, the trial court granted Earhart's motion for summary judgment. On November 14, 2014, an entry was filed granting Earhart judgment against Lavy in the amount of $27,659.25 plus statutory interest at the rate of three percent, as well as recovery of all court costs.

{¶ 5} It is from this judgment that Lavy now appeals.

{¶ 6} Standard of Review

{¶ 7} When reviewing a summary judgment, an appellate court conducts a de novo review. *Village of Grafton v. Ohio Edison Co.,* 77 Ohio St. 3d 102, 105, 671 N.E.2d

[1]Earhart originally filed a complaint involving the same claims against Lavy on January 13, 2012. In a written decision issued on August 22, 2013, the Miami County Court of Common Pleas overruled Earhart's motion for summary judgment filed in that case. Thereafter, Earhart voluntarily dismissed its complaint pursuant to Civil Rule 41(A).

241 (1996). "De Novo review means that this court uses the same standard that the trial court should have used, and we examine the evidence to determine whether as a matter of law no genuine issues exist for trial." *Harris v. Dayton Power & Light Co.*, 2d Dist. Montgomery No. 25636, 2013-Ohio-5234, ¶ 11 (quoting *Brewer v. Cleveland City Schools Bd. Of Edn*., 122 Ohio App. 3d 378, 383, 701 N.E.2d 1023 (8th Dist.1997), citing *Dupler v. Mansfield Journal Co.*, 64 Ohio St. 2d 116, 413 N.E.2d 1187 (1980)). Therefore, the trial court's decision is not granted any deference by the reviewing appellate court. *Brown v. Scioto Cty. Bd. Of Commrs*., 87 Ohio App. 3d 704, 711, 622 N.E.2d 1153 (4th Dist.1993).

{¶ 8} Civ. R. 56 defines the standard to be applied when determining whether a summary judgment should be granted. *Todd Dev. Co., Inc. v. Morgan*, 116 Ohio St. 3d 461, 2008-Ohio-87, 880 N.E.2d 88, ¶ 11. Summary judgment is proper when the trial court finds: "(1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the Motion for Summary Judgment is made, who is entitled to have the evidence construed most strongly in his favor." *Fortune v. Fortune*, 2d Dist. Greene No. 90-CA-96, 1991 WL 70721, *1 (May 3, 1991) (quoting *Harless v. Willis Day Warehousing Co.*, 54 Ohio St. 2d 64, 67, 375 N.E.2d 45 (1978)). The initial burden is on the moving party to show that there is no genuine issue of material fact. *Dresher v. Burt,* 75 Ohio St. 3d 280, 292-93, 662 N.E.2d 264 (1996). Once a moving party satisfies its burden, the nonmoving party may not rest upon the mere allegations or denials of the party's pleadings. *Dotson v. Freight Rite, Inc.,* 2d Dist. Montgomery No. 25495, 2013-Ohio-3272, ¶ 41 (citation omitted).

{¶ 9} Lavy's first assignment of error is as follows:

{¶ 10} "THE TRIAL COURT ERRED IN GRANTING EARHART SUMMARY JUDGMENT WHEN GENUINE ISSUES OF MATERIAL FACT EXIST REGARDING THE ALLEGED DELIVERY OF FUEL."

{¶ 11} In its first assignment, Lavy initially contends that the trial court erred in granting Earhart summary judgment because questions of fact exist regarding 1) whether an order for fuel was actually placed by Lavy; and 2) whether a delivery of fuel was actually made by Earhart to Lavy on November 19, 2011. Lavy, however, proceeds to assert that "it does not matter whether or not a fuel order was placed." Instead, Lavy argues that "the key issue on summary judgment was whether a genuine issue of material fact exists as to whether fuel was actually delivered."

{¶ 12} In his deposition, Senior Sales Executive for Earhart, Bryan A. Ross testified that on the morning of November 18, 2011, he received a telephone call from Richard Lavy who inquired about the current price of on-road diesel fuel. Ross testified that he and Mr. Lavy agreed on a price per gallon of fuel. Ross further testified that Mr. Lavy stated that he would accept delivery of the fuel the following day, which was Saturday, November 19, 2011. Ross noted that Lavy does not typically accept Saturday deliveries.

{¶ 13} Earhart produced a list created by Ross which contained a notation establishing that Lavy placed an order for delivery of on-road diesel fuel on November 18, 2011, for delivery on the following day. Def. Ex. I. Ross testified that he always creates a list of fuel orders containing the name of the customer, price per gallon of fuel agreed to by the parties, and the time and date for delivery. Additionally, Earhart submitted phone

records for the morning of November 18, 2011, which Ross identified as containing an incoming call from Lavy shortly after 8:00 a.m. that lasted approximately one minute and twenty-two seconds. Def. Ex. J.

{¶ 14} As previously discussed, Drapp testified that he was the Earhart driver who delivered the order for 7,500 gallons of on-road diesel fuel to Lavy on November 19, 2011. Drapp testified that he specifically recalled arriving at Lavy headquarters late in the afternoon that day to deliver the fuel. Drapp testified that although there was a lock on the lid of the underground fuel storage tank, he was able to remove the lid in order to deliver the fuel from his tanker truck. Prior to pumping the fuel into the tank, Drapp testified that he, per routine procedure, measured the tank for depth. Drapp recorded the measurements on Earhart's confirmation sheet. Plaintiff's Ex. E, Drapp Depo. As recorded in the confirmation sheet, the measurements were twenty-nine inches pre-delivery. After delivering the fuel, Drapp recorded the post-delivery depth as sixty-five and one-half inches. Once delivery was complete, Drapp testified that he attempted to locate a Lavy employee to sign for the delivery, but everyone had left for the day.

{¶ 15} In support of Drapp's testimony, Earhart submitted documentation which established that it delivered fuel to Lavy on November 19, 2011. Pl. Exs. 7, 8, and 9. In his deposition, Scott Earhart testified that the documents are records kept in the ordinary course of business Plaintiff's Ex. 7 was identified as a GPS report for the Earhart delivery truck driven by Drapp on November 19, 2011. According to the GPS report, Drapp drove the truck to a location on Brandt Street in Dayton, Ohio, arriving at approximately 2:15 p.m. and departing at 3:02 p.m. on November 19, 2011. While at the

Brandt Street location, Drapp purchased 7,500 gallons of on-road diesel. The purchase is reflected in Pl. Ex. 8, which is a bill of lading signed by Drapp on behalf of Earhart for 7,500 gallons of diesel fuel. Drapp testified that he purchased the fuel for delivery to Lavy. With the exception of a five-minute stop at an address on Webster Street in Dayton, Ohio, the GPS report establishes that Drapp drove the truck directly to Lavy headquarters in order to deliver the fuel.

{¶ 16} Thereafter, the GPS report confirms that from approximately 4:12 p.m. until 4:47 p.m., Drapp was stopped in the delivery truck at Lavy headquarters, ostensibly delivering the 7,500 gallons of fuel ordered by Richard Lavy on November 18, 2011. After delivery of the fuel was complete, the GPS report establishes that Drapp drove the truck back to Earhart headquarters located in Troy, Ohio, and parked the truck for the evening. Drapp testified that he arrived at work early the next morning on November 20, 2011, and drove the empty fuel truck to Sunoco Gas Station located on Farr Drive in Dayton, Ohio, for the purposes of refueling the truck for a delivery to another customer. The GPS report confirms that Drapp's truck was stopped at the Sunoco on Farr Drive on November 20, 2011, from 5:01 a.m. until 5:22 a.m. Pl.'s Ex. 9 is a bill of lading from the morning of November 20, 2011, confirming that Drapp purchased 7,507 gallons of diesel fuel on behalf of Earhart. The bill of lading is signed by Drapp and indicates that he had to replace the fuel he delivered to Lavy on November 19, 2011. The GPS report establishes where Drapp's delivery truck was located on November 20, 2011, from 12:40 a.m. until later that morning at 7:06 a.m.

{¶ 17} On appeal, Lavy advances the following arguments in order to create a genuine issue of material fact, to wit: 1) the lid to the underground tank at Lavy was

locked; 2) the bill of lading was not signed by a Lavy employee; and 3) an invoice was never sent by email to Lavy from Earhart.

{¶ 18} Initially, we note that Lavy argues that Drapp could not have delivered any fuel because the lid to the underground tank was locked. At his deposition, however, Lavy testified that he had never tried to remove the lid without taking off the lock. Drapp and Earhart director of operations, Tim Anderson, both testified that the lock on the lid was only meant to deter theft, not prevent it. Before Anderson became the director of operations, he was a fuel delivery driver who testified that he had made deliveries to Lavy in the past. Specifically, Drapp and Anderson testified that "after hours" deliveries are routinely made to "locked" tanks by spinning or lifting the cap off and connecting the hose to deliver the fuel. Simply put, the lock was just for show, and Earhart's drivers were aware of that fact when they made after hours deliveries.

{¶ 19} Lavy next argues that Drapp could not have made the fuel delivery on November 19, 2011, because no bill of lading was signed. A bill of lading signed by a Lavy employee would be prima facie evidence that a fuel delivery had occurred. Nevertheless, the absence of a Lavy employee signature on the bill of lading is not fatal to Earhart's motion for summary judgment. Anderson testified that it is not uncommon to have an unsigned delivery confirmation, especially when the delivery occurs after hours when no employees are present. Drapp testified that when he arrived at Lavy at approximately 3:45 p.m., several employees were present on the premises. However, the GPS records establish that Drapp did not complete the fuel delivery until 4:47 p.m. on November 19, 2011. Lavy employee timesheets reveal that all of the remaining employees "clocked out" between 4:32 p.m. and 4:36 p.m. on November 19, 2011.

Thus, by the time that Drapp completed the fuel delivery, no employees were present to sign the bill of lading.

{¶ 20} Finally, Lavy argues that it never received an email invoice from Earhart regarding the delivery. Lavy's argument, however, fails to create a genuine issue of material fact as to whether Drapp made the requested delivery of fuel on November 19, 2011. Scott Earhart testified that any record of an email sent to Lavy containing an invoice for the fuel delivery would not have been archived in the course of Earhart's normal business procedures. Secondly, and more importantly, Earhart sent Lavy an invoice for the delivery in question which is attached to the complaint which initiated the instant lawsuit. Earhart's failure to recover an email invoice regarding the delivery is insufficient to create a genuine issue of material fact in the instant case.

{¶ 21} Contrary to the assertions made by Lavy, the undisputed GPS report clearly establishes that Drapp traveled directly to Lavy headquarters with a full load of diesel fuel and remained on the premises for a sufficient length of time in which to unload the fuel. In his deposition, Richard Lavy acknowledged that the route taken by Drapp from Dayton to Lavy headquarters was reasonable and made within a reasonable time. Richard Lavy also acknowledged that the route taken by Drapp after leaving Lavy headquarters and traveling back to Earhart Trucking was reasonable and made within a reasonable time. Lavy finally acknowledged that a fuel tanker truck can only hold 7,500 gallons of fuel due to a tanker's weight limit restrictions. Most significantly, however, Lavy failed to produce any evidence which disputed the validity of the GPS report confirming the various locations of the truck driven by Drapp on the day of the fuel delivery. Upon review, we conclude that the evidence submitted by Lavy does not create

a genuine issue of material fact regarding whether an order was made by Richard Lavy for 7,500 gallons of diesel fuel on November 18, 2011, and that Earhart delivered the fuel on the afternoon of November 19, 2011, per said order.

{¶ 22} Thus, even construing the evidence most strongly in Lavy's favor, Earhart was entitled to judgment as a matter of law, and the trial court did not err when it granted summary judgment in its favor.

{¶ 23} Lavy's first assignment of error is overruled.

{¶ 24} Because they are interrelated we will discuss Lavy's second and third assignments of error together as follows:

{¶ 25} "THE TRIAL COURT ERRED BY INAPPROPRIATELY WEIGHING WITNESS CREDIBILITY IN GRANTING EARHART SUMMARY JUDGMENT."

{¶ 26} "THE TRIAL COURT ERRED BY IGNORING EVIDENCE AND MISAPPLYING OHIO LAW."

{¶ 27} In its second assignment, Lavy argues that the trial court erred by "inappropriately weighing" the credibility of Earhart's main witness, Drapp. Conversely, in its third assignment, Lavy asserts that the trial court unfairly discounted the affidavit and deposition testimony of Richard Lavy. Specifically, Lavy argues that the trial court misapplied existing Ohio law when it found that Richard Lavy's affidavit was inconsistent with his deposition testimony, and no effort was made to explain the inconsistencies.

{¶ 28} Initially, we note that the trial court addressed Lavy's argument regarding witness credibility in its decision granting Earhart summary judgment, stating as follows:

> The Defendant has argued the Court cannot weigh credibility on a motion for summary judgment and the Lavy deposition creates issues of

fact which necessitate a trial.

The Court agrees that credibility is not to be weighed when deciding a motion for summary judgment.

{¶ 29} Clearly, the trial court understood its role when it determined that Earhart was entitled to summary judgment. It is apparent from the decision that the trial court did not put undue weight on Drapp's or any other Earhart employee's deposition testimony.

{¶ 30} Specifically, the trial court found that Ross' testimony regarding the fuel order made by Richard Lavy was supported by the daily log created by Ross listing all the fuel orders made on November 18, 2011. Furthermore, the trial court found that Drapp's testimony that he delivered the fuel to Lavy on November 19, 2011, was supported by the GPS report and the bills of lading establishing that Drapp purchased fuel for delivery immediately prior to traveling to Lavy and then on the next morning for a separate delivery. The undisputed documentary evidence submitted by Earhart, supported by the testimony of Drapp and Ross, was sufficient to establish the lack of a genuine issue regarding whether the diesel fuel was ordered and subsequently delivered to Lavy. Accordingly, we find that the trial court did not reach its decision to award summary judgment to Earhart by improperly weighing the credibility of Drapp and Ross.

{¶ 31} Lavy also argues that the trial court misapplied Ohio law by ignoring the affidavit of Richard Lavy in which he asserts that the delivery did not occur. Initially, we note that Richard Lavy testified that he was not on the premises when the fuel delivery was made by Drapp. Additionally, Richard Lavy testified in his deposition that he could not recall whether he placed an order for fuel from Earhart on November 18, 2011. In his affidavit, however, Lavy unequivocally asserts that he did not place the order, without

providing any explanation regarding the inconsistency with his earlier deposition testimony. The trial court also noted that Richard Lavy averred that the fuel tank was locked at the time the delivery was made, but in his deposition, Lavy testified that he had never tried to remove the lid of the tank without taking off the lock. Therefore, based on the unexplained inconsistencies between Richard Lavy's deposition testimony and his affidavit, the trial court found that Lavy failed to create a genuine issue of material fact sufficient to avoid summary judgment.

{¶ 32} In *Gessner v. Schroeder*, 2d Dist. Montgomery No. 21498, 2007-Ohio-570, we stated that an "affidavit of a party opposing summary judgment that contradicts former deposition testimony of that party may not, *without sufficient explanation*, create a genuine issue of material fact to defeat the motion for summary judgment." *Id*. at ¶ 53, citing *Byrd v. Smith*, 110 Ohio St.3d 24, 24-25, 2006-Ohio-3455, 850 N.E.2d 47, ¶ 3 of the syllabus. We have further held that:

> A contradictory affidavit of a party witness should be disregarded. The party witness generally has the benefit of counsel to protect him from inadvertent misstatements. Therefore, when a party witness has given certain detrimental answers in a deposition, but subsequently, upon advice of counsel, sets forth averments in an affidavit in order to "clarify" or "correct" what was said in the deposition, the subsequent affidavit should be disregarded. The affidavit is being used as a self-serving device to avoid damaging admissions made by the party witness during his deposition.

Gessner, at ¶ 55, citing *Clemmons v. Yaezell*, 2d Dist. Montgomery No. 11132, 1998 WL 142397, at *5-6 (Dec. 29, 1998).

{¶ 33} Upon review, we conclude that the trial court did not err when chose to disregard the conclusory and inconsistent statements in Richard Lavy's affidavit. Because Richard Lavy offered no explanation for the inconsistencies in his deposition testimony, the assertions in his affidavit could not create a genuine issue of material fact regarding whether Drapp delivered the fuel to Lavy headquarters on November 19, 2011. Thus, the trial court did not err when it granted Earhart's motion for summary judgment with respect to its claim for breach of contract.

{¶ 34} Lavy's second and third assignments of error are overruled.

{¶ 35} All of Lavy's assignments of error having been overruled, the judgment of the trial court is affirmed.

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HALL, J. and WELBAUM, J., concur.

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