

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

Billy Cook

Court of Appeals No. E-09-028

Appellee

Trial Court No. 2006-CV-361

v.

Newman Motor Sales, et al.

DECISION AND JUDGMENT

Appellants

Decided: May 7, 2010

* * * * *

Leslie O. Murray and John T. Murray, for appellee.

Loretta A. Riddle, for appellant.

* * * * *

COSME, J.

{¶ 1} This appeal arises from a transaction between appellee, Billy Cook ("Cook"), and appellants Newman Motor Sales, Timothy Newman, and William Newman, involving the purchase of a used car. The Erie County Court of Common Pleas found in favor of Cook on his claims for violation of the Certificate of Motor Vehicle

Title Law ("MVTL"), R.C. 4504.181, Ohio's Consumer Sales Practices Act ("CSPA"), R.C. 1345, et seq., and the federal Truth-in-Lending Act ("TILA"), Section 1601, Title 5, U.S.Code, et seq.

{¶ 2} For the reasons set forth below, we affirm the judgment of the trial court.

I. BACKGROUND

{¶ 3} The parties executed a sales contract for the purchase of a 1999 Cougar. Pursuant to their agreement, Cook transferred title and ownership of a 1997 Ford Aspire and a 1993 Ford Thunderbird to Newman Motor Sales. Cook also paid \$331.75 in cash to be applied to the sales tax. After the cash and trade-in value of the two vehicles was applied to the agreed upon sale price of the Cougar, the balance allegedly remaining was \$3,995.

{¶ 4} However, Cook claims that Timothy Newman consciously, deliberately, and fraudulently increased the unpaid balance and the amount to be financed to \$5,777.50. This total included a \$1,000 dealer processing fee. Although Newman Motor Sales gave the Cougar to Cook, it refused to convey the title to him. Cook then allegedly refused to pay for the vehicle, so Newman Motor Sales repossessed the Cougar and sold it to a third party. When the Cougar was repossessed, it contained over \$1,000 of Cook's personal tools and other property. These items were never returned. Newman Motor Sales also sold the Aspire and Thunderbird to third parties.

{¶ 5} Cook filed his complaint on April 21, 2006.¹ Following discovery, the deposition of Timothy Newman, and the refusal of William Newman to be deposed, Cook moved for summary judgment asserting that no genuine issues of material fact existed, that Newman Motor Sales, Timothy Newman and William Newman engaged in fraud and deception, intentionally misleading Cook as to the terms of the sales contract, and that their conduct was a proximate cause of Cook's damages. Several common law and statutory theories of recovery were asserted.

{¶ 6} Upon consideration of the briefs, sworn deposition testimony and the affidavits filed, the trial court granted summary judgment on the issues of liability in Cook's favor, finding that: (1) title had not been provided for the Cougar in breach of the sales agreement; (2) a lien not contained in the vehicle title had been executed; (3) the Cougar was wrongfully repossessed, and personal property within it was lost; (4) there were violations of the CSPA and violations of the TILA.

{¶ 7} Following Cook's withdrawal of his demand for a jury trial, a damages hearing was held. The trial court awarded Cook the following damages under the CSPA:

¹R.C. 1345.09 was amended by 2006 S.B. 117 (effective October 31, 2007). In *Whitaker v. M.T. Automotive, Inc.*, 111 Ohio St.3d 177, 2006-Ohio-5481, the Ohio Supreme Court held CSPA damages include all forms of compensatory relief, including non-economic damages such as those for physical and mental pain and suffering. Amended R.C. 1345.09 caps the amount of non-economic damages recoverable at \$5,000. Although it did not address the substance of the CSPA in its decision, the Ohio Supreme Court in *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, subsequently found R.C. 2315.18, limiting noneconomic damages in most tort actions, constitutional. The amendments, however, are not applicable to this case. See *Osai v. A&D Furniture Co.* (1981), 68 Ohio St.2d 99.

\$1,350 for the two trade-in vehicles; \$1,300 for the loss of personal property due to repossession of the Cougar; \$8,000 in consequential damage arising from the wrongful repossession including transportation and work related expenses, pain and suffering, aggravation and stress; \$8,000 for humiliation due to appellants' conveyance of the license plates from Cook's vehicle to a trafficker of illicit drugs; \$5,000 for anxiety resulting from appellants' threats on Cook's life; and \$331.75 reimbursement for payment of the sales tax. The aggregate damage under the CSPA claim was \$23,981.75, which was trebled to \$71,945.25.

{¶ 8} Cook also alleged that appellants' conduct was malicious and requested punitive damages. Specifically, Cook asserted appellants maliciously withheld the title to the Cougar, refused to accept payment tendered in order to extort additional funds, and added extra costs in the form of a \$1,000 dealer processing fee. The trial court agreed, finding appellants' specific conduct, some of which was uncontested at hearing, demonstrated the existence of malice. The court awarded \$12,500 as punitive damages.

{¶ 9} The trial court next considered appellants' liability under the TILA. It held that strict compliance with the TILA is required and appellants failed to make the required disclosures, including the amount financed, the amount of payments, and the annual percentage rate. As a result, the trial court awarded the statutory maximum, \$1,000 for each occurrence, for a total of \$4,000.

{¶ 10} Finally, Cook requested his attorney's fees. The trial court concluded that in addition to independent violations of the CSPA, the violations of the MVTL and TILA

were also violations of the CSPA. It determined that Cook was entitled to an award of attorneys fees in the amount of \$29,899.52.

{¶ 11} Appellants, Newman Motor Sales, Timothy Newman, and William Newman assert that genuine issues of material fact preclude summary judgment against them, raising five assignments of error.

II. STANDARD OF REVIEW

{¶ 12} A trial court's grant of summary judgment is reviewed de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105. Appellate courts apply the same criteria as the trial court, which is the standard contained in Civ.R. 56. *Lorain Natl. Bank v. Saratoga Apts.* (1989), 61 Ohio App.3d 127, 129. Under Civ.R. 56(C), summary judgment is proper if no genuine issue as to any material fact remains to be litigated, and the moving party is entitled to judgment as a matter of law. See *Grafton*, 77 Ohio St.3d at 105.

{¶ 13} The moving party has the initial burden of informing the court of those portions of the record that demonstrate the absence of an issue of material fact. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. To meet its burden, the moving party must specifically refer to the "pleadings, depositions, answers to interrogatories, * * * written stipulations of fact, if any," which affirmatively demonstrate that the nonmoving party has no evidence to support the nonmoving party's claims. Civ.R. 56(C); *Dresher*, 75 Ohio St.3d at 293.

{¶ 14} Upon this initial showing, the burden shifts then to the nonmoving party to offer specific facts demonstrating a genuine issue for trial. Civ.R. 56(E); *Dresher*, 75 Ohio St.3d at 293. The nonmoving party must come forward with evidence, rather than resting on unsupported allegations in the pleadings. *Kascak v. Diemer* (1996), 112 Ohio App.3d 635, 638. A trial court may grant a properly supported motion for summary judgment if the nonmoving party does not respond, by affidavit or as otherwise provided in Civ.R. 56, with specific facts showing the existence of a genuine issue for trial. *State ex rel. Mayes v. Holman* (1996), 76 Ohio St.3d 147.

{¶ 15} In considering appellant's claims regarding damages and attorney's fees, we are guided by the following standard of review: "Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279. An appellate court generally must presume that the findings of the trier of fact are correct. *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 79-80. The trier of fact is in the best position to make factual findings, since it has had the opportunity to observe the witnesses' demeanor, gestures, and voice inflections which cannot be conveyed on appeal through the written record. *Seasons Coal Co.*, 10 Ohio St.3d at 79-80; *Miller v. Miller* (1988), 37 Ohio St.3d 71. "A finding of an error in law is a legitimate ground for reversal, but a difference of opinion on credibility of witnesses and evidence is not." *Seasons Coal Co.*,

10 Ohio St.3d at 81. See, also, *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus.

III. SUMMARY JUDGMENT

{¶ 16} In his first assignment of error, William Newman maintains that:

{¶ 17} "The trial court erred by granting Plaintiff's motion for summary judgment when there was a genuine issue of material fact as to Defendant William Newman."

{¶ 18} William Newman asserts that Cook failed to provide evidence sufficient to support the grant of summary judgment. William Newman argues a genuine issue of material fact exists as to whether he is liable for his participation in the transaction. Appellants insist that William Newman's conduct was not a proximate cause of Cook's damages and assert that "there is no liability for the notary public."

{¶ 19} We disagree. Cook satisfied his initial burden and William Newman failed to come forward with any evidence demonstrating the existence of a genuine issue for trial.

{¶ 20} In its March 11, 2008 opinion, the trial court held that "defendants have committed numerous violations of statutory and common law." It based this holding on the affidavits, William Newman's failure to respond to interrogatories, to be deposed, the damages hearing transcript, and the pleadings.

{¶ 21} The trial court also determined William Newman's participation in the transaction was a proximate cause of the alleged harm to Cook and that he is liable.

{¶ 22} Appellants raise no genuine issues of material fact regarding William Newman's liability for his participation in the transaction. The trial court reasonably found William Newman's participation was a proximate cause of Cook's damage even though the wrongful acts of Newman Motor Sales and Timothy Newman were also necessary to produce the harm. Therefore, appellants' first assignment of error is not well-taken.

IV. EXISTENCE OF A CONTRACT DOES NOT TURN ON THE PARTIES' CREDIBILITY

{¶ 23} In the second assignment of error, Newman Motor Sales and Timothy Newman maintain:

{¶ 24} "The trial court erred and abused its discretion by deciding what evidence was 'credible' and granting Plaintiff's motion for summary judgment when there was a genuine issue of material fact as to Defendants Tim Newman and Newman Motors."

{¶ 25} Appellants assert that the trial court erred in making credibility determinations and complain that Cook failed to provide evidence sufficient to support the grant of summary judgment. They also argue that a genuine issue of material fact exists as to whether there was a loan transaction as defined by the CSPA or the TILA.

{¶ 26} We disagree. Resolution of whether or not the parties entered into a contract for the purchase of the Cougar does not turn on the parties' credibility. Cook's testimony concerning the transaction was based upon the documents prepared by Timothy Newman. Because Cook discharged his initial Civ.R. 56 burden, it was

Timothy Newman's burden to demonstrate that a genuine issue of material fact existed with respect to whether there was a loan or other financial transaction involving the sale of the Cougar. Timothy Newman's affidavit does not dispute the existence of the transaction. Rather, the affidavit reflects only that "Cook was going to pay cash * * * he had money coming in." Credibility was not critical to the resolution of this issue of fact and thus, the trial court did not err in granting summary judgment. See, e.g., *Mitchell v. Woodbridge*, 7th Dist. No. 98CA-255, 2001-Ohio-3253 (credibility not manifestly critical to determine no genuine issue of material fact).

V. WAIVER OF THE RIGHT TO A JURY TRIAL

{¶ 27} In the third assignment of error, appellants maintain that:

{¶ 28} "The trial court erred by conducting a trial on the issue of damages without a jury."

{¶ 29} We disagree.

{¶ 30} Appellants never asked for a jury trial. Appellants waived their right to a jury trial on the issue of damages when they failed to object to the proceeding.

Specifically, after Cook withdrew his jury demand in writing with the court, appellants did not object to going forward with the hearing on damages. They also did not object at the hearing. Litigating the claims to the court without objection to the withdrawal of the jury demand constitutes a waiver. Civ.R. 38(D). See *Wray v. Allied Indus. Dev. Corp.* (2000), 138 Ohio App.3d 362, 365 ("Generally, where there is a right to trial by jury, a party must file a timely demand for a jury or that party waives its right to have the case

heard by a jury."); *Lucas, Prendergast, Albright, Gibson, & Newman v. Zschach* (Sept. 12, 1996), 10th Dist. No. 95APE12-1663 ("The failure of a party to timely serve his demand for a jury trial as required by the Civil Rules constitutes a waiver by him of a trial by jury.").

{¶ 31} Thus, we find that the trial court did not err in proceeding with the hearing on damages to the court instead of a jury. Appellants' third assignment of error is not well-taken.

VI. DAMAGES AND ATTORNEY FEES

{¶ 32} In their fourth assignment of error, appellants assert that:

{¶ 33} "The trial court erred and abused its discretion by awarding punitive damages, attorney fees and awarding punitive damages when there was no finding of the worth of Defendant Newman Motors, Tim Newman or William Newman."

{¶ 34} Specifically, appellants challenge the trial court's finding that they committed an act of egregious fraud and assert the trial court's decision to award punitive damages was against the weight of the evidence. We disagree.

{¶ 35} Appellants complain that what the trial court designated as treble damages under the CSPA were punitive damages and should not have been awarded in the absence of a finding of actual malice. But appellants confuse the standard for an award of treble damages under the CSPA as being the same as the standard for an award of punitive damages.

{¶ 36} R.C. 1345.09(B) provides that a consumer is entitled to "rescind the transaction * * * or recover three times the amount of his actual damages." Cook did not seek to rescind the transaction. The only remedy sought by Cook was for damages. The Aspire and Thunderbird he had traded in had been sold by appellants and could no longer be recovered. Rescission was impossible.

{¶ 37} Appellants also argue the awarding of \$12,500 in additional punitive damages was error. In *Borror v. MarineMax of Ohio, Inc.*, 6th Dist. No. OT-06-010, 2007-Ohio-562, this court held that an award of punitive damages in addition to the treble damages provided for under the CSPA constitutes error as a matter of law. See, also, *Brenner Marine, Inc. v. Goudreau* (Jan. 13, 1995), 6th Dist. No. L-93-077, discretionary appeal not allowed (1995), 72 Ohio St.3d 1530; and *Hamlin Steel Prod., Inc. v. Bur. of Emp. Serv.* (1977), 54 Ohio App.2d 173.

{¶ 38} But here, the trial court found three additional tortious acts, separate from those acts complained of under the CSPA, MVTL or TILA. Specifically, the court found appellants acted with actual malice when they: (1) withheld the title to the Cougar; (2) refused to accept payment tendered in order to extort additional funds; and (3) added extra costs in the form of a \$1,000 dealer processing fee.

{¶ 39} While the underlying conduct itself may violate the CSPA, the finding of malice adds an element over and above that necessary to set forth a violation of the statute. In other words, the CSPA does not require malice to trigger a violation. Therefore, malice does not completely overlap with the factual predicate supporting the

CSPA claim. Thus, the trial court's judgment of punitive damages in the amount of \$12,500 was supported by competent, credible evidence.

{¶ 40} Characterizing appellants' conduct as intentional and deliberate conduct from which malice may be inferred, the trial court meant that appellants' conduct was elevated to the level contemplated by the Supreme Court of Ohio in *Charles R. Combs Trucking, Inc. v. Internatl. Harvester Co.* (1984), 12 Ohio St.3d 241. In that case, the court held, "In each case of alleged fraud the plaintiff, in order to be awarded punitive damages, must establish not only the elements of the tort itself but, in addition, must either show that the fraud is aggravated by the existence of malice or ill will, or must demonstrate that the wrongdoing is particularly gross or egregious."

{¶ 41} The United States Supreme Court has stated that it should be presumed a plaintiff has been made whole by compensatory damages, and punitive damages should be awarded only if the defendant's culpability is so reprehensible to warrant the imposition of further sanctions to achieve punishment or deterrence. *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003), 538 U.S. 408. Here, the trial court found competent, credible evidence of actual malice to support its judgment of punitive damages.

{¶ 42} As to the trial court's award of attorney's fees, appellants assert that "[i]f there is no finding of punitive damages then there can be no recovery of attorney fees." They argue that "[s]ince the award of punitive damages was unwarranted, the award of attorney fees must also be reversed." But appellants misconstrue the law as it applies to CSPA and TILA claims.

{¶ 43} Appellants do not challenge the amount of the trial court's award of attorney fees totaling \$29,899.52 to Cook. They challenge only the fact that an award of attorney fees was made.

{¶ 44} The trial court awarded Cook attorney fees pursuant to the CSPA. R.C. 1345.09(F)(2) provides that in an action brought pursuant to the CSPA, "[t]he court may award to the prevailing party a reasonable attorney's fee limited to the work reasonably performed, if * * * [t]he supplier has knowingly committed an act or practice that violates this chapter." Additionally, Section 1640(a)(3) of the TILA also provides that a successful plaintiff is entitled to "reasonable attorney fees, as determined by the Court." Section 1640(a)(3), Title 15, U.S.Code.

{¶ 45} In *Bittner v. Tri-County Toyota, Inc.* (1991), 58 Ohio St.3d 143, 146, the Supreme Court of Ohio held, "Under [R.C. 1345.09(F)] a trial court, in its discretion, may award a consumer reasonable attorney fees when the supplier in a consumer transaction intentionally commits an act or practice which is deceptive, unfair or unconscionable. *Einhorn v. Ford Motor Co.* (1990), 48 Ohio St.3d 27. The CSPA, R.C. Chapter 1345, is a remedial law designed to compensate for traditional consumer remedies and must be liberally construed pursuant to R.C. 1.11. *Einhorn v. Ford Motor Co.* (1990), 48 Ohio St.3d 27, 29. Since recoveries under this Act are often small and generally insufficient to cover attorney fees, without an award of attorney fees many consumers would be persuaded not to sue. *Einhorn v. Ford Motor Co.* (1990), 48 Ohio St.3d 27, 30."

{¶ 46} "The legislative purpose of the section allowing an award of attorney fees was 'to prevent unfair, deceptive, and unconscionable acts and practices, 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.' R.C. 1345.09(A). Am.Sub. H.B. No. 681, 137 Ohio Laws, Part II, 3219. Awarding attorney fees under the Act allows private redress of individual wrongs, but also may benefit the community generally because a judgment for the consumer may discourage violations of the Act by others. *Bittner v. Tri-County Toyota, Inc.* (1991), 58 Ohio St.3d 143. 'Prohibiting private attorneys from recovering for the time they expend on a consumer protection case undermines both the purpose and deterrent effect of the Act.'" *Bittner*, 58 Ohio St.3d at 144.

{¶ 47} An award of attorney fees pursuant to R.C. 1345.09(F)(2) should not be reversed absent a showing of an abuse of discretion. *Bittner*, 58 Ohio St.3d at 146. An abuse of discretion is "more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. When applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621. The court in *Bittner* stressed reviewing courts should not interfere with a fee award unless the amount of fees determined is so high or so low as to

shock the conscience. *Bittner*, 58 Ohio St.3d at 146, quoting *Brooks v. Hurst Buick-Pontiac-Olds-GMC, Inc.* (1985), 23 Ohio App.3d 85, 91.

{¶ 48} In the present case, the trial court awarded Cook the full amount of attorney fees requested, explaining that it had considered the factors set forth in *Bittner*. We find the trial court did not err in awarding Cook attorney fees for his CSPA claims. Accordingly, appellants' fourth assignment of error is not well-taken.

VII. CIVIL RULE 15(B) AMENDMENTS TO CONFORM TO THE EVIDENCE

{¶ 49} In the fifth assignment of error, appellants maintain:

{¶ 50} "The trial court erred by finding liability under sections of the revised code that were not pleaded in the complaint and finding liability under sections of the Ohio Revised Code that had been repealed."

{¶ 51} Appellants contend that the trial court erred in finding them liable for violations of the CSPA and the TILA that were not specifically pled in the complaint as well as finding liability under sections of the Revised Code that had not been pleaded. Further, appellants insist they should not be held liable for the repossession of the Cougar since the section of the Revised Code relied upon by Cook had been repealed. We hold that when issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.

{¶ 52} At the outset, Civ.R. 15(B), "Amendments to conform to the evidence," provides: "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the

pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment. Failure to amend as provided herein does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence."

{¶ 53} In construing the requirements of Civ.R. 15(B), the court in *Murphy v. Koepke Motors* (Mar. 29, 1984), 8th Dist. No. 47257, observed: "The rule clearly contemplates the granting of relief other than specifically requested in the complaint, and although the pleadings may be amended at any time to conform with the evidence or relief sought, the failure to formally amend pleadings will not jeopardize a judgment based upon competent evidence. See *Decker v. Korth* (1955), 219 F. 2d 732, cert. denied, 350 U.S. 830 (1955). If evidence is introduced outside of the pleadings, but the opposing party does not object, the evidence is treated as if it had been raised by the pleadings whether the pleadings are amended or not." *Id.*, citing *Smith v. Smith* (Nov. 6, 1975), 8th Dist. No. 34234.

{¶ 54} Appellants did not object to the allegations contained within Cook's motion for summary judgment. At the hearing on damages, appellants again did not object to

Cook's references to violations of the MVTL, CSPA, and TILA. Absent objections from appellants, the issues raised during the damages hearing must be treated as if they were raised in the pleadings.

{¶ 55} Additionally, it is clear that under the provisions of Civ.R. 15(B), Cook would have been permitted to include these violations since testimony was elicited without objection touching upon other additional applicable regulations. It would have been error to preclude Cook from formally asserting these violations. See *Koepke Motors*, 8th Dist. No. 47257.

{¶ 56} In *City of Akron v. The Tractor Place, Inc.*, 9th Dist. No. 21379, 2003-Ohio-4531, the court held that "[t]he trial court determines whether an unpleaded issue is tried by implied consent, and that determination will not be disturbed on appeal absent an abuse of discretion." *Id.* at ¶ 7, citing *State ex rel. Evans*, 5 Ohio St.3d at 46. In light of appellants' awareness of the unpleaded issue and both parties' ability to introduce evidence or cross-examine the witnesses regarding the issues raised during the motion for summary judgment and the damages hearing, we find that the trial court did not abuse its discretion. Accordingly, we find appellants' fifth assignment of error not well-taken.

VIII. CONCLUSION

{¶ 57} We conclude appellants have not established that genuine issues of material fact exist to support their claims. We further find the trial court properly awarded punitive damages and attorney fees. Accordingly, appellants' first, second, third, fourth, and fifth assignments of error are not well-taken.

{¶ 58} On consideration whereof, we find substantial justice has been done the parties complaining and the judgment of the Erie County Court of Common Pleas is affirmed. Appellants are ordered to pay costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Arlene Singer, J.

JUDGE

Keila D. Cosme, J.
CONCUR.

JUDGE

<p>This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.</p>
