[Cite as *Stevens v. S.W.L.H.S. Invest. Partners*, 2017-Ohio-415.]

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

Lloyd A. Stevens	Court of Appeals No. L-15-1129
Appellee	Trial Court No. CI0201105308
v.	
S.W.L.H.S. Investment Partners, et al.	**DECISION AND JUDGMENT**
Appellants	Decided: February 3, 2017

* * * * *

John J. McHugh, III, Matthew M. McHugh, and Nader O. Sarsour, for appellee.

Marvin A. Robon and Zachary J. Murry, for appellants.

* * * * *

YARBROUGH, J.

I. Introduction

{¶ 1} Appellants, S.W.L.H.S. Investment Partners ("SWLHS"), Chi Fu Sun, Chung Chien Lin, Shan Teh Sun, Lili Hsu and Juniper Holding, LP, appeals the judgment of the Lucas County Court of Common Pleas, finding for appellee, Lloyd Stevens, for

breach of contract and awarding him compensatory damages in the amount of $535,263.00 plus court costs and attorney fees.

A. Facts and Procedural Background

{¶ 2} Appellee, Lloyd Stevens ("Stevens") was a prominent commodities trader before becoming housebound due to multiple sclerosis. At that point, Stevens stayed active through online commodities trading. Appellant, Chifu Sun, ("Jim Sun") and Lloyd Stevens became acquainted through Jim Sun's occupation as a local restaurant owner. The two became close, to the point that Jim Sun would run errands for Stevens and would make visits to Stevens' home. During the course of this relationship, Jim Sun became aware of Stevens' dealings in commodities trading, and asked if Stevens would trade on his behalf. Stevens informed Jim Sun that he was already trading on behalf of someone else, but if Jim Sun could get a group of investors together, he would trade on their behalf for the group.

{¶ 3} In 2007, Jim Sun created SWLHS. Each initial stood for the name of a group member. The 'W' stood for Dr. Wiley, who was the person Stevens was originally trading on behalf of. Before any activity commenced, Dr. Wiley decided to leave the group. Each remaining initial stood for a member of Jim Sun's family.

{¶ 4} On June 15, 2007, Jim Sun, through his own private counsel, created a partnership agreement for SWLHS. The agreement included a clause regarding compensation of the investment manager. That provision provided that the investment manager was to be paid 40 percent of the profits and that the compensation would be on

the resulting net gain, if any, for the year. If there was no net gain, the investment manager was to receive no compensation. Stevens was not a signatory to this agreement. However, a separate, undated agreement, signed by both Stevens and Jim Sun, contained an identical compensation clause, and a clause naming Stevens the investment manager.

{¶ 5} On July 16, 2007, Stevens began trading on behalf of SWLHS, after an initial deposit of $500,000 with TradeStation, an online brokerage. At the close of 2007, SWLHS recognized a net loss of $493,108. Both parties agree that since there was no profit, Stevens had not earned compensation for 2007. In 2008, SWLHS realized profits of $1,916,632. Stevens argues that his 40 percent compensation should have been $766,652. In 2009, SWLHS realized profits of $143,421, until the account was closed by Jim Sun in February, 2009. Stevens's 40 percent compensation share would total $57,368.40.

{¶ 6} Documentation of payments totaling $288,757 was given to Stevens, from Jim Sun, in compensation for his work for this period of time. Jim Sun argues that additional money was paid to Stevens, an amount totaling no less than $580,521. The additional money was paid, "here and there" through cash payments, for which he was not provided a receipt. Jim Sun also argues that the parties orally modified their agreement at the end of 2007 to the effect that Stevens would not be paid any compensation until he recouped all losses from 2007. Stevens denies any such modifications and argues that he is owed the balance of $535,264.20, for his 40 percent compensation from 2008 and 2009.

{¶ 7} Stevens filed his breach of contract claim for monetary damages on September 7, 2011, naming SWLHS, Jim Sun, Shan The Sun, Lin Chung Chien, Lili Hsu, and Juniper Holding LP as defendants. Defendants filed an answer on October 11, 2011, asserting several counterclaims sounding in both tort and breach of contract. After pretrial negotiations, and several motion hearings, trial commenced on September 22, 2014. On the first day of trial, Stevens did not appear for medical reasons. In his place, Donald Beadle sat at counsel table while a jury was empaneled. On the next day, it became clear that Stevens could not attend due to a stroke he had suffered immediately prior to trial. The court declared a mistrial.

{¶ 8} A second trial commenced on January 20, 2015 and consisted of four days of testimony. Stevens was the first witness called to testify. He testified that he has multiple ailments, stemming from his multiple sclerosis, which necessitates him placing his trust in others to handle his day to day activities. He is homebound and spends all of his waking time in front of a computer trading commodities. His most trusted confidant was Donald Beadle. Mr. Beadle would help him with several aspects of his life, from running errands, to reviewing documents and making deposits. Stevens testified that he trusted Mr. Beadle with his life.

{¶ 9} Stevens testified that he traded for SWLHS for the period mentioned in 2007-2009. He stated that he never agreed to take less compensation to offset any losses in 2007. He testified that Jim Sun had total control over the money in the account and that, although he had a good idea if he was losing or making money, he had no way to

determine the exact amount. He denied receiving any cash payments from Jim Sun as compensation for trading on behalf of SWLHS, stating that if anyone ever gave him sums of money that large, he would make sure to give them a receipt.

{¶ 10} Stevens next called John Turin. Mr. Turin prepared the partnership agreement for SWLHS. Notably, he testified that there was no carryover agreement in the contract. Each year was determinative of itself and there was no duty by Stevens to recoup any prior year's losses before earning compensation for the next year.

{¶ 11} Daniel Park was next to offer testimony. Mr. Park was Jim Sun's accountant. He testified that he prepared tax related documents for Stevens regarding SWLHS and had Stevens sign them. When questioned what documentation he had received for payments made to Stevens, Mr. Park testified that the only documentation that he had was what Jim Sun told him he paid to Stevens.

{¶ 12} Later in trial, Donald Beadle took the stand. He testified that he was a former IRS agent and had previously been employed as an independent investigator. He helped Stevens with various endeavors, and Stevens compensated him. He testified that he had power of attorney for Stevens and was involved in checking bank records to see if there were any large cash payments that were deposited by Stevens during the time Jim Sun claimed to be paying him. He could not find any evidence of under the table cash payments.

{¶ 13} Jim Sun testified that he had orally modified his agreement with Stevens and that Stevens agreed to offset losses from 2007. He also testified that Stevens had

agreed to take a smaller compensation percentage going forward into 2008. He testified that he would often bring large sums of cash to Stevens' home in brown paper bags and would give them to Stevens as compensation. He testified that he had falsified documents to TradeStation relating his prior personal experience so that he could be listed as managing partner of SWLHS. He also stated that when he presented a check to Stevens on March 22, 2010, in the amount of $94,857 with the word "final" in the memo, and had Stevens sign a receipt of the money, that is was to be for the full amount owed.

{¶ 14} Jim Sun attempted to call two witnesses to testify to prior incidents where police were called to Stevens's residence, but the court denied them due to potential prejudice to Stevens. Jim Sun also attempted to call a rebuttal witness and the court again rejected the witness on similar grounds.

{¶ 15} On January 23, 2015, the jury returned verdicts in favor of Stevens in the amount of $535,263, plus court costs and attorney fees. Motions for remittitur and for a new trial were filed and denied by the trial court. On April 30, 2015, the trial court issued its final judgment awarding Stevens the amount of $535,263 on his breach of contract claim, plus an additional award of $122,724.17 for his court costs and attorney fees.

{¶ 16} It is from this order that appellants have filed this timely appeal.

B. Assignments of Error

{¶ 17} On appeal, appellants present the following assignments of error for our review:

Assignment of Error No. 1

The Trial Court erred by awarding Plaintiff his attorney fees and costs following the return of a verdict in his favor on a breach of contract claim where there was no contractual entitlement to such award.

Assignment of Error No. 2

The Trial Court erred by failing to grant summary judgment, or to enter judgment notwithstanding the verdict in favor of Defendants on the basis that Plaintiff Lloyd Stevens provided investment advice for a fee and was not licensed as an Investment Advisor as required by Ohio Law.

Assignment of Error No. 3

The Trial Court erred by failing to grant summary judgment, or to enter judgment notwithstanding the verdict in favor of Defendants on the basis that Plaintiff Lloyd Stevens was not licensed as a Commodities Pool Operator as required by Federal Law.

Assignment of Error No. 4

The Trial Court erred by failing to direct a verdict in favor of the Defendants upon the basis of "Accord and Satisfaction" as the check clearly indicated that it was a final payment and Plaintiff testified that he knowingly compromised his disputed claim.

Assignment of Error No. 5

The Trial Court erred by arbitrarily limiting defense counsel's cross-examination of Plaintiff and by excluding Defendants' exhibits M, N, O, & P as rebuttal and impeachment evidence.

Assignment of Error No. 6

The Trial Court erred by excluding testimony of two witnesses and Exhibits Q, R, S, T, and U during Defendants' case-in-chief to rebut testimony of Plaintiff Lloyd Stevens and Plaintiff's witness and power-of-attorney Donald Beadle.

Assignment of Error No. 7

The Trial Court erred by allowing Donald Beadle, power of attorney for Plaintiff, to testify as to an "audit" and "investigation" the he allegedly conducted when Mr. Beadle was not designated as an expert witness and by allowing Mr. Beadle to sit at the trial table as a substitute for Plaintiff.

Assignment of Error No. 8

The Trial Court erred by denying Defendants' Motion for Judgment Notwithstanding the Verdict as the decision of the jury was against the manifest weight of the evidence.

II. Analysis

{¶ 18} For his first assignment of error, Jim Sun argues that the trial court committed reversible error by awarding appellee attorney fees and costs when there is no basis in the law for such an award on a breach of contract case. We review this issue

under an abuse of discretion standard. "The decision to award attorney fees and the amount thereof are within the discretion of the trial court." *Technical Constr. Specialties, Inc. v. New Era Builders, Inc*., 9th Dist. Summit No. 25776, 2012-Ohio-1328, ¶ 26, citing *Cassaro v. Cassaro*, 50 Ohio App.2d 368, 373-374, 363 N.E.2d 753 (8th Dist.1976). *Raymond J. Schaefer, Inc. v. Pytlik*, 6th Dist. Ottawa No. OT-09-026, 2010-Ohio-4714, ¶ 34, citing *Bittner v. Tri-County Toyota, Inc.*, 58 Ohio St. 3d 143, 146, 569 N.E.2d 464 (1991). ("The trial court's decision to award attorney fees should not be reversed absent an abuse of discretion").

A. Attorney Fees

{¶ 19} Appellant argues that, as a matter of law, attorney fees cannot be awarded on a breach of contract claim absent an enforceable term providing therefor in the contract, or a statutory right to fees. With regard to attorney fees, appellant correctly contends that the state of Ohio adheres to the "American Rule." Simply stated, the American Rule provides that "each party to a lawsuit must pay its own attorney fees." *Clean Wood Recycling, Inc. v. Tony's Landscaping, Inc.*, 6th Dist. Lucas No. L-14-1047, 2014-Ohio-5280, ¶ 11. The Ohio Supreme Court has found three exceptions to the American Rule. "Attorney fees may be awarded if (1) there has been a finding of bad faith; (2) if a statute expressly provides that the prevailing party may recover fees; or (3) if the parties' enforceable contract provides for fee-shifting." *Id.*, citing *Nottingdale Homeowners' Ass'n. Inc. v. Darby*, 33 Ohio St.3d 32, 33 514 N.E.2d 702 (1987).

{¶ 20} In the present case, it is undisputed that no exception to the American Rule exists. The court did not make a finding that appellee was acting in bad faith, the agreement of the parties does not contain a provision for the award of attorney fees, and there is no statutory authority that would allow for Stevens to recover attorney fees for the breach of contract.

{¶ 21} Appellee argues that although no exception to the American Rule is present, the award of attorney fees was proper because the invited error doctrine prevents appellant from complaining of an error which he invited. Under the doctrine, "a party is not permitted to take advantage of an error that he himself invited or induced the trial court to make." *Davis v. Wolfe*, 92 Ohio St.3d 549, 552, 751 N.E.2d 1051 (2001).

{¶ 22} Appellee identifies two ways in which appellant was actively involved in creating the error: 1) by agreeing to the verdict forms which failed to clarify which claims would support an award of attorney fees, and 2) by refusing to identify the claims after the jury specifically questioned whether it was permitted to award fees.

{¶ 23} In support of his argument, appellee claims that the facts of this case are remarkably analogous to our recent decision in *Ohio Vestibular& Balance Ctrs., Inc. v. Wheeler*, 2013-Ohio-4417, 999 N.E.2d 241 (6th Dist.). The applicable portion of *Ohio Vestibular* involved an award of attorney fees in a tort claim to the prevailing party where the jury did not first award punitive damages.

{¶ 24} In *Ohio Vestibular*, the parties created jury instructions that did not clarify that punitive damages must be awarded on a claim in order for the jury to award attorney

fees. The parties then learned that the jury had, in fact, awarded attorney fees on tort claims for which they did not award punitive damages. At that point, appellee requested that the court instruct the jury that punitive damages must be awarded in order to award attorney fees. The court refused to so instruct the jury, and on appeal, appellee argued that such a refusal constituted an abuse of discretion.

{¶ 25} We noted that punitive damages are a prerequisite to awarding attorney fees in a tort action. *Id.* at ¶ 56, citing *Columbus Fin., Inc. v. Howard*, 42 Ohio St.2d 178, 183, 327 N.E.2d 654 (1975). In spite of this, we held that appellee and appellant, together, had created the jury instructions that did not clarify that punitive damages must be awarded before attorney fees could be awarded. *Id.* at ¶ 57. In *Ohio Vestibular*, this court applied the invited error doctrine to award attorney fees to the prevailing party, holding that because appellee was actively involved in creating the error, he waived the argument on appeal. *Id.* at ¶ 57.

{¶ 26} Although we note that several similarities exist, *Ohio Vestibular* is distinguishable from the present case. *Ohio Vestibular* revolves around the award of attorney fees in a tort action. While an award of attorney fees is proper in a tort action subsequent to an award of punitive damages, the same is not true for a breach of contract action. Such an award requires additional evidence to be presented at trial showing bad faith, and specific findings to be made by the court, which were not present in this case.

{¶ 27} Appellee acknowledged this fact in response to a jury question during deliberations:

THE COURT: The first question I am marking a single number one reads, we would like to know how to include attorney fees. Can it be written as pay attorney costs, end quote.

[APPELLEE'S COUNSEL]: No, Your Honor. And [co-counsel] just looked at the matter for me, and my recollection was inaccurate. It appears that on a breach of contract action as such that a party is not – a prevailing party is not entitled to collect attorney fees. We are not entitled to recover attorney fees in our contract action.

{¶ 28} Given this acknowledgement, along with the fact that some of appellant's claims sounded in tort and could potentially result in attorney fees being awarded, the solution was to answer the jury's question, "yes, the court will determine the amount." The record indicates that the parties agreed that the amount of attorney fees to be awarded would be a question of law, decided by the court, with the understanding that if attorney fees were inappropriate for a certain complaint, that amount would be $0.

[APPELLEE'S COUNSEL]: And that's why I think if you just – I agree with these gentlemen if you say you award compensatory damages attorney fees may be awarded as determined by the Court. I think that – then that answers the jury's question. It makes the record that we need, and then the legal issue is presented to you, because I do agree it is not a factual question for them.

{¶ 29} While appellant is correct that appellee played a significant role in creating the jury instructions, we cannot say that the award of attorney fees resulting from the jury instructions is attributable to appellants, and constitute invited error.

{¶ 30} We hold that the invited error doctrine does not apply to this case, and both parties agree that there has been no exception to the "American Rule" that each party is responsible for paying its own costs. Because neither party can identify any statute that authorizes attorney fees, there is no contract provision providing for attorney fees, and there were no findings made that either party acted in bad faith, the trial court erred by imposing attorney fees. *Wright v. Fleming*, 1st Dist. Hamilton No. C-070121, 2008-Ohio-1435, ¶ 5.

{¶ 31} Therefore, appellants' first assignment of error is well-taken.

B. Futures Commodities

{¶ 32} In assignments of error 2 and 3, Appellant argues that the trial court erred by failing to grant summary judgment, or enter a directed verdict or judgment notwithstanding the verdict in favor of appellant. Specifically, he argues that appellee lacked either a commodities pool operator license or an investment advisor license, which precluded him from charging a fee for the investment management services provided to appellant.

{¶ 33} When reviewing a trial court's decision regarding a motion for summary judgment, an appellate court conducts a de novo review. *Village of Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996). Summary judgment is only appropriate

when the following have been established: 1) 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, that party being entitled to have the evidence construed most strongly in its favor. Civ.R. 56(C). Further, the standard of review for a motion for directed verdict [or one for judgment notwithstanding the verdict] is analogous to that of a motion for summary judgment. *Ohio Cas. Ins. Co. v. D&J Distrib. & Mfg., Inc.*, 6th Dist. Lucas No. L-08-1104, 2009-Ohio-3806, ¶ 29.

{¶ 34} To resolve these issues, we must first determine whether appellee was acting as a commodities pool operator ("CPO"), governed by the Federal Code of Regulations, or an investment advisor, governed by the Ohio Revised Code.

{¶ 35} An investment advisor is defined by R.C. 1707.01(X)(1):

> (X) (1) "Investment adviser" means any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as a part of regular business, issues or promulgates analyses or reports concerning securities.

{¶ 36} At all times during the parties' relationship, appellee's dealings were strictly limited to futures commodities. A key determination is whether a futures commodity fits the definition of a security.

{¶ 37} The term security is defined by R.C. 1707.01(B) as:

(B) "Security" means any certificate or instrument, or any oral, written, or electronic agreement, understanding, or opportunity, that represents title to or interest in, or is secured by any lien or charge upon, the capital, assets, profits, property, or credit of any person or of any public or governmental body, subdivision, or agency. It includes shares of stock, certificates for shares of stock, an uncertificated security, membership interests in limited liability companies, voting-trust certificates, warrants and options to purchase securities, subscription rights, interim receipts, interim certificates, promissory notes, all forms of commercial paper, evidences of indebtedness, bonds, debentures, land trust certificates, fee certificates, leasehold certificates, syndicate certificates, endowment certificates, interests in or under profit-sharing or participation agreements, interests in or under oil, gas, or mining leases, preorganization or reorganization subscriptions, preorganization certificates, reorganization certificates, interests in any trust or pretended trust, any investment contract, any life settlement interest, any instrument evidencing a promise or an agreement to pay money, warehouse receipts for intoxicating liquor, and the currency of any government other than those of the United States and Canada, but sections 1707.01 to 1707.45 of the Revised Code do not apply to the sale of real estate.

{¶ 38} Although this is not an exhaustive list, the term futures contract is not specifically listed as a security. To find any specific regulation of futures commodities, we turn to federal law. Overwhelmingly, federal courts have determined that futures commodities are not securities. *Consolo v. Hornblower & Weeks-Hemphill, Noyes, Inc.*, 436 F.Supp. 447 (N.D.Ohio 1976); *Berman v. Bache, Stuart, Shields, Inc.*, 467 F.Supp. 311, 315 (S.D. Ohio 1979) ("An understanding of the true nature of a commodities futures contract, however, demonstrates why virtually all courts agree that the simple commodities futures contract is not a security.").

{¶ 39} We have found no controlling case law to the contrary, and we agree that simple futures contracts do not fit within the purview of the definition of security. Because of this, and because of the fact that he dealt strictly with futures commodities contracts, Stevens was not bound by registration requirements of an investment advisor under R.C. 1707.141(A). The court thereby did not err by failing to grant summary judgment based on the fact that Stevens was not properly licensed as an investment advisor.

{¶ 40} Appellant also argues that summary judgment should have been granted in his favor because appellee failed to register as a CPO. A CPO is defined as:

> (cc) Commodity pool operator. This term means any person engaged in a business which is of the nature of a commodity pool, investment trust, syndicate, or similar form of enterprise, and who, in connection therewith, solicits, accepts, or receives from others, funds, securities, or property,

> either directly or through capital contributions, the sale of stock or other forms of securities, or otherwise, for the purpose of trading in commodity interests, including any commodity for future delivery, security futures product, or swap; any agreement, contract or transaction described in section 2(c)(2)(C)(i) or section 2(c)(2)(D)(i) of the Act; any commodity option authorized under section 4c of the Act; any leverage transaction authorized under section 19 of the Act; or any person who is registered with the Commission as a commodity pool operator, but does not include such persons not within the intent of this definition as the Commission may specify by rule or regulation or by order.
>
> 17 C.F.R. 1.3 (cc)

{¶ 41} Federal law requires registration by CPOs, however there is a registration exemption for small CPOs. A small pool is defined as one with less than 15 participants and total gross capital contributions not exceeding $400,000. 17 C.F.R. 4.13(a)(2). The amount of gross capital contributions is further limited to exclude amounts considered to be principal contributions.

{¶ 42} The court, in its decision to deny appellants' motion for summary judgment, decided that there were issues of material fact as to whether Stevens had solicited, accepted or received funds and whether the overall operation could be considered a small pool.

{¶ 43} We find that, viewed in a light most favorable to Stevens, material issues of fact did exist, and the court did not err by denying appellant's motion for summary judgment.

{¶ 44} Accordingly, appellants' second and third assignments of error are not well-taken.

C. Accord and Satisfaction

{¶ 45} Appellant next argues that the court erred by failing to enter a directed verdict or a judgment notwithstanding the verdict in his favor upon the basis of an accord and satisfaction. As we previously noted, we review motions for directed verdict or a judgment notwithstanding the verdict de novo. *Ohio Cas. Ins. Co.*, 6th Dist. Lucas No. L-08-1104, at ¶ 29.

{¶ 46} Our analysis of this claim must be divided into three distinct inquiries: 1) the defendant must prove the process of an offer and acceptance – an accord, 2) the accord must have been carried out – a satisfaction, and 3) the accord and satisfaction must have been supported by consideration. *Allen v. R.G. Indus. Supply*, 66 Ohio St.3d 229, 231, 611 N.E.2d 794 (1993).

{¶ 47} Appellant's argument is based on a meeting at appellee's home on March 22, 2010, in which appellant gave appellee a check in the amount of $94,857. In the memo of the check, appellant wrote, "33% + 8% Final". Appellant also drafted a receipt, which appellee signed, stating, "I Lloyd Stevens agree, I received proper payment & compensation from the partnership. $94,857". Appellant further points to the testimony

of appellee stating he received the check, signed the receipt, and deposited the check. Appellant claims that this is a textbook case of accord and satisfaction. We disagree.

{¶ 48} In order to have an effective accord and satisfaction, there must be a meeting of the minds. *Kirk Williams Co. v. Six Indus., Inc.*, 11 Ohio App.3d 152, 153, 463 N.E.2d 1266 (2d Dist.1983), quoting *Commonwealth Petroleum Co. v. Beck L.P. Gas, Inc.*, 3d Dist. Wyandot No. 16-85-19, 1987 Ohio App. LEXIS 10080, *7 (Dec. 9, 1987). Although appellant argues that it was clear that the check for $94,857 was for the full amount owed to appellee, the record would indicate otherwise.

{¶ 49} Appellee testified that he did not know that "proper payment" meant that he was accepting the full amount owed. He testified that he took the check, but made it clear to appellant that he was owed more. When asked if there was any conversation after the check was presented to him, appellee testified that, "He didn't say anything, he didn't say anything. I said that's not what you owe me. But I took the check. It is better taking 94 than getting nothing, so I took the check, but I said that's not what you owe me."

{¶ 50} In denying appellant's motion for summary judgment the trial court noted that many questions of material fact existed regarding the issue of accord and satisfaction. The parties disagree on whether there was a meeting of the minds, they disagree on what was meant by the words "proper payment," and they disagree that the check made clear that it was meant to be payment in full. These are questions of fact that were properly decided by the jury.

{¶ 51} Construing the evidence most favorably for appellee, we find that reasonable minds could reach different conclusions regarding whether or not there was an accord and satisfaction reached between the parties. Accordingly, the court did not err by denying summary judgment to appellant.

{¶ 52} Therefore, appellants' fourth assignment of error is not well taken.

D. Exclusion of Evidence

{¶ 53} In assignments of error five and six, appellant argues that the trial court erred by excluding certain exhibits, and testimony of two witnesses. Specifically, appellant wished to introduce evidence of previous lawsuits involving appellee, to contradict testimony that appellee had previously never been sued. Also, appellant claims the trial court erred by excluding testimony of Officer Schaetzke of the Ottawa Hills Police Department regarding police reports for which appellee was listed as a victim. Finally, appellant argues that the court erred in excluding testimony of Albert Teow regarding the presence of certain items in appellee's home.

{¶ 54} The admission or exclusion of evidence by a trial court will not be reversed absent a clear and prejudicial abuse of discretion. *O'Brien v. Angley,* 63 Ohio St.2d 159, 163, 407 N.E.2d 490 (1980). An abuse of discretion connotes that a court's attitude in reaching its decision was arbitrary, unreasonable or unconscionable. *Blakemore v. Blakemore,* 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 55} At trial, the court specifically addressed these issues, giving its reasoning for the exclusions. Regarding the exclusion of evidence of prior lawsuits, the record reflects the following:

> [THE COURT]: What's the relevancy to this case?
>
> [APPELLANT'S COUNSEL]: He testified at his deposition that there were none, and it goes to his memory which is a big issue in this case. There are two lawsuits filed by Dr. Wiley in 2013 and '14, and there's two other lawsuits prior to that.
>
> [THE COURT]: What's the relevance to this case?
>
> [APPELLANT'S COUNSEL]: The relevance is to his memory.
>
> [THE COURT]: Other than memory what's the relevance? There are other ways of testing --
>
> [APPELLANT'S COUNSEL]: The –
>
> [THE COURT]: Let me finish my sentences, please.
>
> [APPELLANT'S COUNSEL]: Sure.
>
> [THE COURT]: Other than potential prejudice of mentioning other lawsuits, which is apparent, how can you not test his memory other ways? What does it have to do with overriding the potential prejudice by mentioning other lawsuits which are not part of this litigation?

{¶ 56} Cross-examination of a witness is a matter of right, but the "extent of cross-examination with respect to an appropriate subject of inquiry is within the sound

discretion of the trial court." *State v. Green*, 66 Ohio St.3d 141, 147, 609 N.E.2d 1253 (1993), quoting *Alford v. United States*, 282 U.S. 687, 691, 51 S.Ct. 218 (1931).

{¶ 57} We cannot say that the trial court's decision to exclude evidence of prior lawsuits due to potential prejudice to the jury is unreasonable, arbitrary, or unconscionable. Therefore, the exclusion of this evidence does not constitute an abuse of discretion.

{¶ 58} Neither can we say that excluding testimony from Officer Schaetzke was an abuse of discretion. Appellant proffered his testimony to show that, on calls to appellee's home, the officer noticed large sums of cash and precious metals in appellee's residence. The theory behind this evidence was that since the parties had participated in previous cash dealings, appellee may have forgotten that he was paid by appellant, and that the money was subsequently stolen.

{¶ 59} The trial court rejected this argument, reasoning that it is far too speculative in nature to assume that since appellee kept cash in his home that it is possible that appellant paid appellee sums of money that were subsequently stolen. Also, the court noted that the police reports were created after any transactions were made between the two parties. Ohio has rejected the notion that subsequent conduct is admissible to show action by a party in conformity therewith. *Cappara v. Schibley*, 85 Ohio St.3d 403, 407, 709 N.E.2d 117 (1999).

{¶ 60} Appellants have not shown that exclusion of this evidence is unreasonable, arbitrary, or unconscionable. Therefore we find that the court did not abuse its discretion by excluding this evidence.

{¶ 61} Appellants also attempted to call Albert Teow as a rebuttal witness. The stated purpose of this testimony was to rebut the testimony of appellee, that he was not a bookie. In excluding this testimony, the court reasoned that allowing the testimony would be too prejudicial. The court refused to allow the jury to make the connection that somehow, bookmaking is related to illegal activity, therefore everything about Stevens is not trustworthy.

{¶ 62} Appellants rely on several cases holding that rebuttal witnesses need not be disclosed prior to trial and enumerating his unconditional right to present rebuttal testimony. *Phung v. Waste Mgmt.*, 71 Ohio St.3d 408, 410, 644 N.E.2d 286 (1994). However, the trial court's determination was made based on more than simply the name not being on the witness list. The trial court pointed out the negative connotation of introducing this evidence, the fact that the issue had not previously been testified to, and there was no pretrial discovery done with reference to this issue. The record reflects that a combination of these issues led to the exclusion of the rebuttal witness. Appellant has not shown that this determination was an abuse of discretion.

{¶ 63} Accordingly, assignments of error five and six are not well-taken.

E. Testimony of Donald Beadle

{¶ 64} For his seventh assignment of error, appellants contend that the trial court erred by allowing Mr. Donald Beadle to use the terms "audit" and "investigation" in his trial testimony, and by allowing him to sit at counsel table as "substitute plaintiff."

{¶ 65} At the outset, we would note that appellants have failed to present any law, or show any prejudice as to the result of Mr. Beadle sitting at trial table. That argument has no merit. Appellants also argue that "audit" and "investigation" are terms of art, and their use by a lay witness could confuse a jury and potentially bolster his credibility.

{¶ 66} Appellants cite to *Slayton v. Ohio Dept. of Youth Services*, 206 F.3d 669 (6th Cir. 2000) in support of this argument. In *Slayton*, the court held that a court may use its discretion to exclude lay opinion testimony when "terms used by the witness have a separate, distinct, and specialized meaning in the law different from that of present vernacular." *Id.* at 676-77. Here, there is no showing that the terms "audit" and "investigation" have a *separate* meaning in the law and in common vernacular.

{¶ 67} The record reflects that Mr. Beadle used the term "audit," only to describe the work he had previously performed while working for the IRS. The term "investigation" can only be found sparingly, to describe his previous work as a private investigator. This case is also distinguishable from *Slayton* because the terms for which appellant complains of were never used while giving any lay opinion testimony, only to describe his background. Appellants are unable to show any prejudice from Mr. Beadle's

use of the terms “audit” and “investigation”. Therefore, the court did not err by allowing this testimony.

{¶ 68} Accordingly, appellants’ seventh assignment of error is not well-taken.

F. Manifest Weight

{¶ 69} For his final assignment of error, appellants argue that the court erred by not granting the motion notwithstanding the verdict because the verdict was against the manifest weight of the evidence.

{¶ 70} The civil manifest weight of the evidence standard has been explained in *C.E. Morris Co. v. Foley Constr. Co*., 54 Ohio St.2d 279, 376 N.E.2d 578 (1978), syllabus (“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”). The Ohio Supreme Court has also recognized when reviewing a judgment under a manifest weight of the evidence standard, a court has an obligation to presume that the findings of the trier of fact are correct. *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 80-81, 461 N.E.2d 1273 (1984).

{¶ 71} The crux of appellants’ manifest weight argument is that there was an accord and satisfaction, that appellee was not properly licensed to charge a fee for his services, and that there were irregularities with appellee’s tax returns. As we have already determined the first two issues, the only new issue is that appellee declared funds on his tax returns that he now claims were not paid to him.

{¶ 72} This new argument is not persuasive. The record indicates that the tax returns were prepared by Jim Sun's personal accountant and were signed by appellee without his review. Further, the returns were not based on any documentation, but rather what Jim Sun told his accountant he paid Stevens. The jury had the opportunity to weigh all of this evidence and still found in favor of the appellee. We cannot say that this determination was against the manifest weight of the evidence.

{¶ 73} Appellants' eighth assignment of error is not well taken.

III. Conclusion

{¶ 74} Based on the foregoing, the judgment of the Lucas County Court of Common Pleas is affirmed, in part, and reversed, in part. The stay of execution of judgment entered September 30, 2015, is hereby withdrawn. This matter is remanded for further proceedings consistent with this opinion. Costs are hereby ordered to be shared between appellee and appellants, in accordance with App.R. 24.

Judgment affirmed, in part
and reversed, in part.

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

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
JUDGE

James D. Jensen, P. J. _____
CONCUR.
JUDGE